



DEPARTMENT OF THE ATTORNEY GENERAL

News Release

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STATE OF HAWAII FILES LAWSUIT AGAINST SEVEN MAJOR CREDIT CARD COMPANIES

HONOLULU – Today the Attorney General of the State of Hawaii filed lawsuits in First Circuit Court against seven major credit card companies, alleging that these companies improperly charged their Hawaii customers for products not requested or for products that did not provide the benefits claimed.

The suits are being brought by the State of Hawaii by Attorney General David M. Louie, with the State of Hawaii being represented by local attorney Rick Fried in association with two mainland firms, Golomb & Honik of Philadelphia, and Baron & Budd of Dallas.

An example of an alleged improper charge is where a credit card company bills a consumer for something called “payment protection” or something similar, which supposedly pays the cardholder’s required minimum monthly payments in certain circumstances. The consumer is not told of the numerous restrictions, and often the consumer doesn’t qualify for the product in the first place. Solicitations for these products are often telemarketing calls using predatory tactics to sign up customers for services they either don’t want or don’t qualify for. The suits point out that, unlike other telemarketers, these credit card companies already have their customers’ credit card information and therefore are able to charge their customers for products without their knowledge or consent.

The seven credit card companies that have been named as defendants are Bank of America, Barclays, Capital One, Chase, Citi, Discover, HSBC, and their subsidiaries.

The State has requested injunctive relief to stop the alleged illegal practices, full restitution for all affected consumers, and penalties, which could subject the credit card companies to up to \$10,000 per violation. If awarded, restitution funds would go directly to consumers and penalties would go to the state’s general fund.

Please call Rick Fried at (808) 524-1433, if you believe you have been a victim of such conduct. When you call, please mention that your call relates to possible payment protection fraud.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, *EX. REL.* DAVID M.
 LOUIE, ATTORNEY GENERAL,

Plaintiff,

vs.

BANK OF AMERICA CORPORATION,
 and FIA CARD SERVICES, N.A., and DOE
 DEFENDANTS 1-20,

Defendants.

CIVIL NO. 12-1-0982-04 .• K K S
 (Other Civil Action)

COMPLAINT; SUMMONS

No trial date has been set.

COMPLAINT

Plaintiff, the State of Hawaii, by David M. Louie, Attorney General (“the State”) brings this Complaint against the Defendants Bank of America Corporation, FIA Card Services, N.A. and Doe Defendants 1-20 (collectively “Defendants” or “BofA”) and alleges, upon information and belief, as follows:

INTRODUCTION

1. This action stems from the Defendants’ marketing, selling, and administering to Hawaii consumers fee-based products, which are ancillary to their credit cards.

2. Defendants market such ancillary products as protection for consumers against improper or unauthorized charges on their credit cards, identity theft, and lost or stolen credit cards and/or as providing benefits in the event of unemployment or disability. Each ancillary product is marketed only to the Defendants’ current card holders, and the products themselves are attached to the cardholders’ specific account at issue.

3. Upon information and belief, when consumers apply for and receive Defendants’ credit cards, a process is triggered whereby a consumer can unknowingly and unintentionally sign up to receive ancillary products.

4. Additionally, Defendants often enroll consumers in these products even though the consumers did not assent to pay for them. This process is referred to as “slamming.” Enrollment may be based on highly deceptive and misleading telemarketing calls, forged or non-existent mailers or online applications, or nothing at all. In each instance, unknowing consumers are hit with monthly fees without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in a position to do this because, unlike a

typical marketer or seller, they are already the consumer's credit card company and already have their credit card number.

5. Further, for certain types of ancillary products, including but not limited to "Cardholder Security Plan," "Credit Protection" and Credit Protection Plus," and other monikers that all offer similar coverage (hereinafter collectively referred to as "Payment Protection Plans" or "Plans"), that purport to pay the consumer's required minimum monthly payment for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent, Defendants make no effort to determine whether consumers are even eligible for the benefits at the time of sale. As a consequence, Defendants bill ineligible Hawaii citizens for this coverage, even though their status at the time of enrollment prevents them from receiving benefits under the terms of these Payment Protection Plans.

6. The Defendants commit unfair and deceptive business practices and violate statutory law by charging consumers for ancillary products, including Payment Protection Plans, who either did not want them or were not entitled to benefits from them, and by the unfair and deceptive manner in which Defendants offer and administer claims for benefits by consumers.

7. Upon information and belief, as a result of these unfair and deceptive practices, Defendants have amassed substantial sums of money with virtually no benefits to Hawaii citizens who are nevertheless charged for these products month in and month out.

PARTIES

8. This action, brought by the State of Hawaii in its sovereign capacity by and through David M. Louie, the Attorney General of the State of Hawaii, is authorized under Hawaii law on Unfair or Deceptive Acts or Practices ("UDAP"), Haw. Rev. Stat. § 480-2(d), and

under *parens patriae* authority, on behalf of the State and its citizens to enforce Hawaii law. The Attorney General has the power to bring these claims on behalf of the State under the provisions of Haw. Rev. Stat. § 661-10.

9. The State asserts no claims arising out of, under or in any way preempted by the laws (common, statutory or administrative) of the United States, nor does it bring this action on behalf of a class or any group of persons that can be construed as a class. The State specifically disclaims any such claims that would support removal of this action to a United States District Court on the basis of diversity, jurisdictional mandates under the Class Action Fairness Act of 2005 (28 U.S.C. §§ 1332(d), 1453, 1711-1715), federal question jurisdiction, or any other basis.

10. Upon information and belief, Defendant Bank of America Corporation (“BOA Corp.”) is a Delaware Corporation and under Delaware law it has the capacity to sue and be sued.

11. Upon information and belief, Defendant FIA Card Services, N.A. (“FIA”) is a national banking association formerly known as MBNA America, N.A. (“MBNA”), and is a subsidiary of Defendant Bank of America. In 2006, Bank of America acquired MBNA, making it a wholly-owned subsidiary, and renamed it FIA. FIA Card Services is a trade name of FIA Card Services, N.A. As such, FIA markets, administers and finances credit card services for Bank of America. FIA’s principal place of business is located in Wilmington, Delaware.

12. At all times material herein, Defendants BOA Corp. and FIA have been doing business, and continue to do business, within the City & County of Honolulu, State of Hawaii.

13. DOE DEFENDANTS 1-20 are sued herein under fictitious names for the reason that after diligent and good faith efforts to ascertain their names and identities through review of applicable records and through interviews, their true names and identities are presently unknown

to Plaintiff except that they are connected in some manner with the named Defendants and/or were the agents, servants, employees, employers, representatives, co-venturers, associates, sub-contractors or contractors of the named Defendants and/or were in some manner presently unknown to the Plaintiff engaged in the activities alleged herein and/or were in some manner responsible for the injuries or damages to Plaintiff and/or designed and/or placed on the market a product which was defective; which defect was proximate and/or legal cause of injuries or damages to Plaintiff and/or inspected and/or maintained and/or controlled some object or product in a negligent manner, which negligence was a proximate and/or legal cause of such injuries or damages to Plaintiff and/or conducted some activity in a negligent or dangerous manner; which negligent or dangerous conduct was a proximate and/or legal cause of injuries or damages to Plaintiff and/or were in some manner related to the named Defendants and Plaintiff pray for leave to insert herein their true names, identities, capacities, activities and/or responsibilities when the same are ascertained.

FACTUAL BACKGROUND

I. Defendants' Ancillary Products Are Marketed and Sold to Hawaii Consumers in an Unfair and Deceptive Manner

A. Defendants Market and Sell Ancillary Products to Cardholding Consumers Which Generate Substantial Revenue for Them.

14. Upon information and belief, Defendants market and sell ancillary products to all of their credit card customers, but most aggressively market these products to vulnerable Hawaii consumers who fall into the subprime credit category, who have low credit limits because of impaired credit ratings, or who are looking to establish or re-establish their credit.

15. Defendants' ancillary products share common characteristics in that each are: (a) marketed as ways for consumers to protect themselves from fraud or unauthorized charges, or to increase their financial security, (b) considered an optional product that is not required to have a

credit card account, (c) tethered to consumers' specific credit card accounts, and (d) billed directly to the account monthly, with no separate bill provided.

16. Defendants' ancillary products are in fact a dense maze of limitations, exclusions and restrictions, making it impossible for consumers to knowingly determine what these products cover and whether they provide a worthwhile financial benefit.

17. Examples of Defendants' ancillary products include:

a. **Payment Protection** – this product allegedly safeguards subscribers' credit card accounts by canceling or temporarily suspending the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts in other circumstances.

b. **Identity Theft Protection** – In exchange for a fixed-rate monthly fee, this plan (called Privacy Assist) purports to monitor consumers' credit scores for indicia of identity theft and will alert the enrollee if something suspicious happens to their credit score.

18. Defendants have enrolled large numbers of Hawaii residents and charged them substantial sums of money for enrollment in these product plans.

19. Defendants have devised a scheme to increase the profits they receive from their ancillary products exponentially. Upon information and belief, by limiting the amount of credit given to Hawaii consumers, but issuing multiple cards to them, Defendants are able to impose separate monthly fees for these products on each of the consumers' cards. This scheme doubles, triples or more, the monthly fees charged without any analogous increased risk to Defendants.

B. Defendants Sign Up Unsuspecting Cardholding Consumers for Ancillary Products Without Their Meaningful, Knowing Authorization or Consent

20. Defendants often enroll consumers in these products based on highly deceptive and misleading telemarketing calls, charging some consumers without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in the unique position to do this because, unlike a typical seller or marketer, they are the consumer's credit card company and already have their credit card numbers. The State of Hawaii brings this

parens patriae consumer protection lawsuit against Defendants to address their unfair and deceptive business practices.

1. The Way Ancillary Products Are Marketed is Unfair and Deceptive

21. Defendants sell ancillary products to consumers through a number of different channels, including online and direct mail marketing, in which they may ask that consumers “check the box” to initiate the plan, and through telemarketing, where consumers may be asked to press a button on the telephone or verbally agree in order to approve initiation of the plan. The former channels require an affirmative action by the consumer to enroll, such as checking a box or initializing a monthly statement or other mailer or online form in a designated space to authorize enrollment. For a consumer that “checked the box” or initialized a document, confirming consumers’ assent to be billed for an ancillary product is easily traceable. On the other hand, for those whose assent was allegedly obtained through telemarketing (upon information and belief, the majority of ancillary product customers), confirmation of affirmative assent requires a review of the telephone call itself.

22. In addition to Defendants’ financial motive to enroll as many Hawaii customers as possible into these highly lucrative ancillary product schemes, upon information and belief, individual telemarketers are incentivized to enroll as many cardholders as possible, either because their compensation is commission-based or because their performance is otherwise evaluated and they are subsequently compensated based on the number of cardholders they enroll.

23. Unfair and deceptive practices are rife in telemarketing these products.

24. Defendants' telemarketers employ an array of unfair and deceptive sales tactics to elicit cardholders into communicating some affirmative response, knowing that the cardholders do not actually understand that they are supposedly agreeing to purchase an ancillary product.

25. Defendants' telemarketers characterize the call as a courtesy to thank cardholders and remind them of benefits they already get through their credit card agreement (like cash back, airline miles, rewards, etc.), when in fact they are calling to sell ancillary products.

26. Telemarketers may speed through, skip altogether or alter the text of the information they are required to provide to cardholders (the "disclosure"), in an effort to make the disclosure sound like confusing legalese, then say "OK?" or ask if the person heard them or understood, knowing that such a question will almost always elicit an affirmative response such as "ok" or "yes." The cardholder believes they have just listened to a courtesy call, but the Defendants treat the affirmative response as the cardholder's agreement to enroll in the plan. These cardholders may say "ok" or "yes" at the conclusion of the call, but no reasonable person listening to the recordings of these calls would conclude the cardholder was giving their knowing, meaningful assent to be charged a monthly fee for enrollment in the plan.

27. Another tactic Defendants' telemarketers use is to ask cardholders if they may simply send out a "packet of information" about the plan. Defendants treat an affirmative response to this inquiry as authorization for paid enrollment, even though consumers do not understand or believe that they have agreed to purchase anything.

28. Each Defendant has such a "packet of information" for each of the plans offered and Defendants are required to provide enrollees with this information. For example, Defendants use a document entitled "*Credit Protection Addendum*" for this purpose for its Payment Protection Plan. Many Hawaii customers never receive the packets allegedly sent out.

Others who receive the packet ignore or disregard it because they do not understand that they had already been enrolled. They may reasonably assume it is just another piece of junk mail from a credit card company. While those cardholders that told the telemarketer they could send information about the plan may recognize what the packet relates to, they reasonably assume further steps must be taken by them before they will become enrolled in the plan. If the slammed consumer simply throws out the packet, without reading it, signing it or conferring with the credit card company about it, they are nevertheless still enrolled in the plan.

29. Defendants utilize the card activation process as another way to wrongfully enroll consumers. Consumers are told they must call Defendants from their home phone number to activate their card. Defendants take this opportunity to sell ancillary products. Cardholders who are calling to activate a credit card are particularly susceptible to believing that the “disclosure” is some legal text that must be read to the cardholder, rather than an alleged contractual agreement to purchase an optional, ancillary product of little or no value to them. Many Hawaii cardholders, accustomed to all the legal language and fine print received when they open a new credit card account, become immune to the terms and conditions communicated to them. They reflexively reply “ok,” and have no idea that they have supposedly purchased some ancillary product.

30. In addition to deceptively inducing cardholders to say “yes” or “ok” during the call, Defendants enroll some cardholders who did not provide any affirmative response. In such instances, Defendants have no proof of affirmative assent, either because there is no affirmative response on the recording, there is a clear rejection of the offer, or a record of the call does not exist. The cardholder has been “slammed,” that is, involuntarily enrolled in the plan without their knowledge or consent.

31. And unlike in a typical telemarketing call, this telemarketer does not need the consumer to provide them with their credit card number and information to purchase the product because the telemarketer *is* the credit card company. As a result, Defendants can charge consumers' accounts when there has been no clear and knowing consent given.

2. Hawaii Consumers "Slammed" with Ancillary Products Receive Little to No Relief from the Defendants

32. Defendants know that slamming occurs frequently. In fact, the "refund" process itself is set up on the assumption that consumers have been deceived and do not understand that they have been enrolled. When a consumer calls within thirty (30) days of being enrolled, they are supposed to get their money back no questions asked, and Defendants make no effort to then determine how it came to be that the cardholder was enrolled without their authorization.

33. However, many Cardholders have no idea they are enrolled in an ancillary product plan and do not notice or appreciate the meaning of the line-item charge for the plan on their credit card bills. The charge appears among the other purchases on the cardholder's monthly statement.

34. Some cardholders have accounts that do not require close inspection of monthly statements. This may be because they are not making new purchases on the account (they may be simply seeking to pay off the balance, or took advantage of a balance transfer offer, or utilized the account to make a single purchase). Others do not receive monthly bills at all.

35. Consumers may pay this hidden charge month after month for many months before they become aware of it. For online accounts, add-on plans are often posted to a cardholder's account on the last day of each statement period, and that statement is then archived on the website. A cardholder may review current activity on their account regularly and yet

never see the charge billed to their account on the last day of the previous billing cycle's statement.

36. In addition to the obvious unfairness of enrolling cardholders without their valid authorization, Defendants reap an extra windfall because these enrollees will never invoke the supposed benefits of the plans for which they were charged because they do not even know they may do so.

37. If cardholders do not discover the deceit until more than 30 days after being enrolled, Defendants will not automatically refund the overpayments to the cardholder.

38. Cancellation of plans and disputes about enrollment are so widespread in this industry that Defendants use template form letters to send to slammed consumers who complain. Instead of "coming clean" to these aggrieved consumers, Defendants make it exceedingly difficult for them to get relief, such that many Hawaii consumers give up hope of ever getting their money back after paying for a product they did not request and did not use.

II. Defendants Sell Payment Protection, a Specific Ancillary Product, to Hawaii Consumers Who Can Receive No Benefit from the Coverage Offered

39. Payment Protection has come under increased scrutiny recently from both the federal government and private plaintiffs.¹

¹ See, e.g., Credit Cards: Consumer Costs for Debt Protection Products Can be Substantial Relative to Benefits but are Not a Focus of Regulatory Oversight, U.S. Government Accountability Office, GAO-11-311, March 25, 2011 ("GAO Report"), attached as Ex. 1 to the Complaint.

Lawsuits are pending, including cases brought by Attorneys General. See *State of Minn. v. Discover Fin. Servs. et al.*, 27-CV-10-27510 (D. Minn. Dec. 6, 2010), (Ex. 2); *State of West Virginia v. Capital One Bank (USA), N.A., et al.*, 10-C-7-N (Cir. Mason, WV Jan. 20, 2010) (Ex. 3). At least two cases brought by consumer classes have settled. See Order Granting Final Approval of Class Action Settlement, *Spinelli et al. v. Capital One Bank and Capital One Servs.*, 08-cv-132-T-33EAJ, Dkt. 231 (M.D. Fla. Nov. 23, 2010), [Proposed] Order (Ex. 4), and *Kardonick et al. v. JP Morgan Chase & Co. and Chase Bank USA N.A.*, 10-cv-23235, Dkt. 23 (S.D. Fla. Feb. 3, 2011) (Ex. 5).

40. The ancillary products at issue in this Complaint, including but not limited to Payment Protection, are not deemed insurance products under Hawaii law, and the Defendants are not insurance companies.

41. Defendants do not consider Payment Protection an insurance product. Payment Protection Plans are not registered or identified as insurance products with the Department of Commerce & Consumer Affairs for the State of Hawaii, which is tasked with the responsibility of overseeing the insurance industry in Hawaii, or other appropriate authorities.

42. Defendants do not designate Payment Protection an “insurance product.” This way, they can avoid state regulation and charge higher fees. Payment Protection Plans are unregulated as to terms, conditions and fees, making them highly profitable for Defendants.

43. These types of plans offer little to no benefit to consumers for several reasons and have been subject to criticism from consumer advocates on several fronts. For example, it may not be disclosed to consumers that under the terms and conditions of the plan, the cardholder may not be permitted to use their credit card while they have invoked Payment Protection benefits, and in the periods of time when consumers actually invoke the benefits, such as in the case of unemployment, the cardholder often needs their credit the most.

44. Defendants market specifically to elderly consumers, for whom benefits may be of little or no value. Defendants know that their conduct is directed towards elderly consumers (defined as sixty-two years of age or older by HRS § 480-13.5(c)), because they have the consumer’s date of birth on file. The main benefit of Defendants’ Payment Protection plans is that they suspend payment obligations when the borrower’s income stream is lost due to unemployment, disability, or natural disaster. But for those on a fixed income, any such

“protection” may be illusory because the “qualifying events” will not disrupt the income stream coming from a fixed income.

45. Defendants market Payment Protection through direct mail and solicit Payment Protection customers over the phone. They represent Payment Protection as a product that pays the required minimum monthly payment due on the subscriber’s credit card account and the Payment Protection plan fee for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent. Defendants’ marketing for this product claims that “You’ve got help to stay on track when life gets expensive” and “Life is unpredictable. Be prepared with Credit Protection Plus.” See <https://www9.bankofamerica.com/insurance/protection/credit-protection/overview.go> (last viewed on 11/12/10). Among other things, Defendants promise that Payment Protection “. . . delivers . . . Peace of Mind and World Class Benefits . . .”. *Id.*

46. However, Defendants misrepresent and/or fail to disclose the real nature of Payment Protection. While representing to consumers that “Now Your Future Is More Secure”, among other representations, in fact, Defendants impose Payment Protection on customers who did not authorize the charges. Because these customers do not know this “coverage” has been imposed on them and that they were enrolled without their consent, they do not know they can avail themselves of it and do not have the necessary information to determine what Payment Protection covers and whether it would be a sound financial choice to continue paying for the Plan.

47. Defendants market their Payment Protection Plans to individuals who do not qualify for the alleged benefits of the Plans. The numerous qualifications and restrictions set forth in Defendants’ fine print expose the advertised “peace of mind” as an illusion, at best,

because the Defendants do not determine consumers' eligibility for various options under the Payment Protection Plan before marketing and selling Payment Protection to them.

48. Defendants market Payment Protection as a product that will safeguard subscribers' credit card accounts by suspending or crediting the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts in other circumstances. When minimum monthly payments are credited, the monthly interest charges and the Payment Protection fee (and any other ancillary fees) continue to accrue without adequate disclosure to consumers.

49. The terms offered for the Payment Protection scheme are varied, complicated and always changing. However, all of the various plans provide for some form of payment suspension upon the occurrence of the following events, as it defines the terms: *Hospitalization & Disability, Involuntary Job Loss, Leave of Absence or Loss of Life*. The restrictions, limitations and exclusions associated with these events that trigger supposed Payment Protection benefits are expansive and constantly evolving.

50. Defendants make no reasonable effort and undertake no investigation, including review of information in their possession regarding the cardholder, to determine if Payment Protection coverage would apply to the cardholder. Such information may include health status, name of last employer and date of birth, which would assist Defendants in knowing whether a particular cardholder is eligible for Payment Protection benefits.

51. Accordingly, Defendants engage in aggressively marketing to enroll Hawaii cardholders in Payment Protection even when they have information in their possession indicating that the product may have limited or no value to the particular consumer.

52. Telephone marketing scripts and written materials provided by Defendants to consumers are incomplete, indecipherable, misleading and obfuscatory.

53. One example of the misleading and obfuscatory language is Defendants' failure to disclose that Payment Protection is actually akin to an insurance product. Despite this fact, marketing materials carefully avoid any use of the word "insurance." The materials may, however, refer to "premiums," "claims" or "benefits," which indicates that Defendants internally regard and acknowledge this as an insurance product.

54. Defendants do not adequately describe or explain the exclusions to prospective subscribers so they can determine whether they have certain characteristics or meet certain factors that would bar them from being eligible for benefits under Credit Protection, even though Defendants have a common practice of imposing limitations on full coverage based on exclusions.

- a. For instance, upon information and belief, a retired person is charged for Credit Protection even though they are categorically excluded from receiving most or all of the benefits under the plan. This most often affects "elder" consumers aged sixty-two or over.
- b. Similarly, upon information and belief, the benefits for unemployment are limited to those receiving unemployment insurance benefits (although not all unemployed people are eligible for benefits) or, for self-employed individuals, under certain specific circumstances.
- c. Further, benefits for involuntary unemployment are limited to circumstances in which unemployment begins 60 days or more after the effective date of enrollment.
- d. Additionally, part-time or seasonal workers are also limited or categorically excluded from receiving benefits for loss of employment. To qualify for benefits, one needs to work at least 1,000 hours per year.
- e. As another example, benefits for disability are limited to circumstances in which disability begins 60 days or more after the effective date of enrollment.
- f. For other protected events, such as hospitalization, family leave of absence, or loss of life, paid and enrolled customers are likewise not even eligible for benefits unless they have been enrolled for 60 days or more

after the effective date of enrollment in Credit Protection. Thus, as with benefits for involuntary unemployment or disability, paying customers are not even eligible for coverage unless they have already been paying Defendants for the program for two billing cycles.

55. For instance, retired persons in Hawaii, many of whom are “elder” senior citizens aged sixty-two or older, are charged for this product even though they are categorically excluded from receiving many of the benefits under the plan. Defendants do not ask customers whether they are retired.

56. Further, part-time workers, seasonal workers and workers concluding an employment contract (including ending a military tour of duty) are also limited or categorically excluded from receiving benefits. To qualify for benefits, one needs to work a set number of hours a week in employment considered to be permanent. However, Defendants make no effort to investigate whether any of the Hawaii consumers they charge for Payment Protection are part-time, seasonal or military workers. These terms are not adequately communicated or defined in written materials.

57. Finally, benefits are limited for disabled persons, but Defendants nevertheless fail to affirmatively inform these individuals of the limitations in benefits when they are enrolled. In fact, Defendants do not even ask customers whether they are disabled.

58. Defendants have no process to keep updated on consumers’ status, either. Accordingly, when consumers’ statuses change, they will continue to pay for Payment Protection even though they may no longer be eligible for its benefits.

59. If consumers are eventually provided with written materials, the materials themselves are confusing, and do not require the consumers’ signature or affirmative assent before they can be billed for the plan. It is virtually impossible for the subscriber to determine

all of the exclusions and limitations of Payment Protection, or the value of the product, based on what is provided.

60. The cost of Payment Protection is set forth in a confusing and misleading manner. The premium for Payment Protection is set at a dollar amount per \$100.00 of the ending statement balance for each particular month. For example, the cost of Credit Protection is \$0.95 per \$100 of the previous billing period's New Balance. Thus a cardholder who charges \$1000 a month and carries the balance one month forward pays \$114.00 per annum for Credit Protection. Defendants add these amounts directly to the credit card account statement each month.

61. Payment Protection also provides the added benefit to Defendants of lowering available credit to its subscribers because the imposition of this additional fee brings consumers closer to their maximum credit limit without their knowledge. This operates in some instances to cause consumers to exceed their credit limits, thereby incurring over-the-limit fees. Further, the imposition of the Payment Protection fee creates a cycle of profitability, in that the fee itself increases subscribers' monthly credit balances, which in turn increases Payment Protection fees in subsequent months.

62. Defendants' "customer service" support is set up in such a way that Hawaii consumers cannot easily cancel ancillary products or receive answers to benefit questions, nor can they easily file claims or receive benefits for filed claims.

63. Upon information and belief, employees at Defendants' Payment Protection call centers are given authority to deny claims immediately over the phone, but do not have authority to approve payment of benefits to claimants in the same manner.

64. Moreover, upon information and belief, when subscribers call Defendants attempting to cancel Payment Protection, employees at Defendants' call center are trained to

attempt to talk the subscriber out of canceling by “selling” the supposed benefits of Payment Protection.

65. Further, when claims for Payment Protection benefits are denied, Defendants have not implemented a process through which subscribers’ Payment Protection premiums are refunded, even if the subscribers are deemed to be *per se* ineligible for Payment Protection benefits. In fact, if Hawaii subscribers are denied Payment Protection benefits, Defendants neither affirmatively remove subscribers from Payment Protection enrollment going forward, nor do they inform subscribers of their continued obligations to pay for Payment Protection, even though they have been deemed to be ineligible for benefits.

66. Payment Protection is so confusing as to when coverage is triggered, so restricted in terms of the benefits it provides to subscribers, and processing claims is made so difficult by Defendants, that it is essentially worthless.

67. Although heralded as coverage designed for a subscriber’s peace of mind and for use when times get tough, the Payment Protection device is designed to prey on the financially insecure and is virtually worthless because of the numerous restrictions that are imposed, because of the exclusions of benefits, and because of the administrative and bureaucratic hurdles that are placed in the way of Hawaii consumers who attempt to secure payments from Defendants under Payment Protection coverage.

68. Bank of America is one of the three largest general purpose credit card issuers in the United States, and in 2010 was second in the country in outstanding balances for general purchase credit cards. In 2010, Bank of America had 17% of the market share by credit card issuer. FIA Card Services is a wholly-owned subsidiary of Bank of America Corporation and upon information and belief is the issuer of Bank of America’s credit cards. Upon information

and belief, Payment Protection is a profit center for Defendants and serves the Companies' interests in generating fee income, to the detriment of their most vulnerable customers.

69. As a result of their unfair and deceptive marketing practices in connection with sales of Payment Protection, Defendants have increased profits by substantial sums, all thanks to products which provide virtually no benefit to the Hawaii residents who are nevertheless charged for these products month in and month out.

COUNT I
VIOLATION OF HAWAII LAW ON UNFAIR OR DECEPTIVE ACTS OR PRACTICES, HAW. REV. STAT. §§ 480-1 ET SEQ. ("UDAP")

70. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

71. The UDAP sets forth that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." Haw. Rev. Stat. § 480-2(a).

72. Among other things, Haw. Rev. Stat. § 481A-3(a) defines actions that constitute a "deceptive trade practice" as including, but not limited to, the following:

(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

* * * *

(5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;

* * * *

(9) Advertises goods or services with intent not to sell them as advertised;

* * * *

(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Id. § 481A-3(a)(2), (5), (9), (12).

73. As set forth herein, the Defendants' actions of marketing, selling and administering the ancillary products at issue in this Complaint, including Payment Protection, fit within the definitions and scope of the UDAP.

74. The Attorney General of the State of Hawaii "may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section." *Id.* at § 480-2(d). The Attorney General is specifically charged with the administration of the UDAP, and may act *sua sponte* as the agent and legal representative of the State in civil proceedings to enforce the statute.

75. Defendants' conduct described above constitutes multiple, separate violations of the UDAP.

76. Each violation of the statute by the Defendants is an unfair or deceptive act or practice in the conduct of the trade or commerce in violation of the UDAP. For example, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product without his or her assent constituted a separate violation of the UDAP. Likewise, each enrollment by Defendants of a Hawaii consumer who is ineligible for the plan's benefits (due to age, work status, disability or for any other reason) constituted a separate violation of the UDAP. Similarly, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product but failed to disclose all material restrictions, limitations, and

exclusions constituted a separate violation of the UDAP. Each time Defendants failed to refund premiums paid also constituted a separate violation of the UDAP.

77. The Defendants' violations were and are likely to mislead Hawaii consumers. The Defendants are aware of the violations, including the widespread slamming practices engaged in and the enrollment of cardholders who are ineligible for benefits offered under Payment Protection, yet Defendants fail to adequately and affirmatively take steps to cure the violations or refund monies owed.

78. As a result of the Defendants' unfair or deceptive practices, the purported contracts between Hawaii consumers and the Defendants for purchase of the aforementioned ancillary products are "void and [] not enforceable at law or in equity." Haw. Rev. Stat. § 480-12.

79. Defendants' violations justify penalties of up to \$10,000 for each violation of the UDAP (*id.* at § 480-3.1) and injunctive relief (*id.* at 480-15).

COUNT II
VIOLATION OF THE UDAP, CONSUMER FRAUDS AGAINST ELDERS
HAW. REV. STAT. § 480-13.5

80. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

81. The UDAP sets forth that "[i]f a person commits a violation under section 480-2 which is directed toward, targets, or injures an elder, a court, in addition to any other civil penalty, may impose a civil penalty not to exceed \$10,000 for each violation." Haw. Rev. Stat. § 480-13.5(a).

82. Defendants knowingly market specifically to elderly consumers, many of whom are retired, and for whom benefits may be of little or no value.

83. As a result of the Defendants' unfair or deceptive practices directed specifically towards elders, Defendants' violations justify assessing additional penalties of up to \$10,000 for each violation of the UDAP committed against elders. *Id.*

COUNT III
UNJUST ENRICHMENT

84. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

85. By unknowingly paying unauthorized or otherwise improper charges to Defendants, as stated above, Hawaii consumers conferred a benefit on Defendants.

86. Defendants knowingly accepted such benefit, to which they are not entitled.

87. Defendants' acceptance and retention of such benefit under these circumstances is unjust and inequitable.

88. As a matter of equity, consumers within the State should be made whole by application of the doctrine of unjust enrichment.

RELIEF

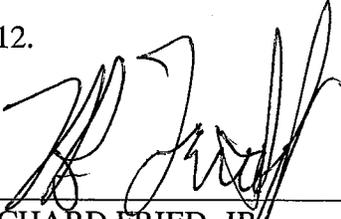
WHEREFORE, the State of Hawaii, by and through its Attorney General, respectfully prays that this Court grant the following relief:

1. Entering Judgment in favor of the State in a final order against each of the Defendants;
2. Enjoining the Defendants and their employees, officers, directors, agents, successors, assignees, merged or acquired predecessors, parent or controlling entities, subsidiaries, and all other persons acting in concert or participation with it, from engaging in unfair or deceptive practices in violation of Hawaii law and ordering temporary, preliminary or permanent injunction;
3. Awarding judgment against the Defendants for restitution and disgorgement of monies under the *parens patriae* doctrine, the general equitable powers of this Court, the doctrine of unjust enrichment and any other authority, for all Hawaii consumers injured by Defendants' acts described in this Complaint;

4. Declaring that each act of each of the Defendants described in this Complaint constitute multiple, separate violations of Hawaii law;
5. Imposing civil penalties for each repeated violation of the UDAP;
6. Imposing additional civil penalties of up to \$10,000 for each repeated and willful violation of the UDAP committed against elders;
7. Awarding equitable relief, including but not limited to restitution and disgorgement of monies obtained as a result of the UDAP violations;
8. Granting the State:
 - a. The cost of investigation and reasonable attorneys' fees, as authorized by the UDAP,
 - b. Pre-judgment and post-judgment interest, and,
 - c. All other relief as provided by law and/or as the Court deems appropriate and just.

Plaintiff asserts claims herein in excess of the minimum jurisdictional requirements of this Court.

DATED: Honolulu, Hawai'i, April 12, 2012.



L. RICHARD FRIED, JR.
PATRICK F. MCTERNAN
Attorneys for Plaintiff

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, <i>EX. REL.</i> DAVID M.)	CIVIL NO. <u>12-1-0981-04</u> · R A N
LOUIE, ATTORNEY GENERAL,	)	(Other Civil Action)
)	
Plaintiff,	)	COMPLAINT; SUMMONS
)	
vs.)	
)	
BARCLAYS BANK DELAWARE, JUNIPER)	
BANK DELAWARE, and DOE DEFENDANTS)	
1-20,	)	No trial date has been set.
)	
Defendants.)	
)	
)	

COMPLAINT

Plaintiff, the State of Hawaii, by David M. Louie, Attorney General (“the State”) brings this Complaint against the Defendants Barclays Bank Delaware, Juniper Bank Delaware, and Doe Defendants 1-20 (collectively “Defendants” or “Barclays”) and alleges, upon information and belief, as follows:

INTRODUCTION

1. This action stems from the Defendants’ marketing, selling, and administering to Hawaii consumers fee-based products, which are ancillary to their credit cards.
2. Defendants market such ancillary products as protection for consumers against improper or unauthorized charges on their credit cards, identity theft, and lost or stolen credit cards and/or as providing benefits in the event of unemployment or disability. Each ancillary product is marketed only to the Defendants’ current card holders, and the products themselves are attached to the cardholders’ specific account at issue.
3. Upon information and belief, when consumers apply for and receive Defendants’ credit cards, a process is triggered whereby a consumer can unknowingly and unintentionally sign up to receive ancillary products.
4. Additionally, Defendants often enroll consumers in these products even though the consumers did not assent to pay for them. This process is referred to as “slamming.” Enrollment may be based on highly deceptive and misleading telemarketing calls, forged or non-existent mailers or online applications, or nothing at all. In each instance, unknowing consumers are hit with monthly fees without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in a position to do this because, unlike a

typical marketer or seller, they are already the consumer's credit card company and already have their credit card number.

5. Further, for certain types of ancillary products, including but not limited to "Account Protector," "Account Protector Ultra," "Account Protector Plus," and other monikers that all offer similar coverage (hereinafter collectively referred to as "Payment Protection Plans" or "Plans"), that purport to pay the consumer's required minimum monthly payment for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent, Defendants make no effort to determine whether consumers are even eligible for the benefits at the time of sale. As a consequence, Defendants bill ineligible Hawaii citizens for this coverage, even though their status at the time of enrollment prevents them from receiving benefits under the terms of these Payment Protection Plans.

6. The Defendants commit unfair and deceptive business practices and violate statutory law by charging consumers for ancillary products, including Payment Protection Plans, who either did not want them or were not entitled to benefits from them, and by the unfair and deceptive manner in which Defendants offer and administer claims for benefits by consumers.

7. Upon information and belief, as a result of these unfair and deceptive practices, Defendants have amassed substantial sums of money with virtually no benefits to Hawaii citizens who are nevertheless charged for these products month in and month out.

PARTIES

8. This action, brought by the State of Hawaii in its sovereign capacity by and through David M. Louie, the Attorney General of the State of Hawaii, is authorized under Hawaii law on Unfair or Deceptive Acts or Practices Act ("UDAP"), Haw. Rev. Stat. § 480-2(d),

and under *parens patriae* authority, on behalf of the State and its citizens to enforce Hawaii law. The Attorney General has the power to bring these claims on behalf of the State under the provisions of Haw. Rev. Stat. § 661-10.

9. The State asserts no claims arising out of, under or in any way preempted by the laws (common, statutory or administrative) of the United States, nor does it bring this action on behalf of a class or any group of persons that can be construed as a class. The State specifically disclaims any such claims that would support removal of this action to a United States District Court on the basis of diversity, jurisdictional mandates under the Class Action Fairness Act of 2005 (28 U.S.C. §§ 1332(d), 1453, 1711-1715), federal question jurisdiction, or any other basis.

10. Upon information and belief, Defendant Barclays Bank Delaware (“Barclays Bank”) is a Delaware Corporation and under Delaware law it has the capacity to sue and be sued.

11. Upon information and belief, Defendant Juniper Bank Delaware (“Juniper”) is a Delaware Corporation with a principal place of business in Wilmington, Delaware.

12. At all times material herein, Defendants Barclays Bank and Juniper have been doing business, and continue to do business, within the City & County of Honolulu, State of Hawaii.

13. DOE DEFENDANTS 1-20 are sued herein under fictitious names for the reason that after diligent and good faith efforts to ascertain their names and identities through review of applicable records and through interviews, their true names and identities are presently unknown to Plaintiff except that they are connected in some manner with the named Defendants and/or were the agents, servants, employees, employers, representatives, co-venturers, associates, sub-contractors or contractors of the named Defendants and/or were in some manner presently unknown to the Plaintiff engaged in the activities alleged herein and/or were in some manner

responsible for the injuries or damages to Plaintiff and/or designed and/or placed on the market a product which was defective; which defect was proximate and/or legal cause of injuries or damages to Plaintiff and/or inspected and/or maintained and/or controlled some object or product in a negligent manner, which negligence was a proximate and/or legal cause of such injuries or damages to Plaintiff and/or conducted some activity in a negligent or dangerous manner; which negligent or dangerous conduct was a proximate and/or legal cause of injuries or damages to Plaintiff and/or were in some manner related to the named Defendants and Plaintiff pray for leave to insert herein their true names, identities, capacities, activities and/or responsibilities when the same are ascertained.

FACTUAL BACKGROUND

I. Defendants' Ancillary Products Are Marketed and Sold to Hawaii Consumers in an Unfair and Deceptive Manner

A. Defendants Market and Sell Ancillary Products to Cardholding Consumers Which Generate Substantial Revenue for Them.

14. Upon information and belief, Defendants market and sell ancillary products to all of their credit card customers, but most aggressively market these products to vulnerable Hawaii consumers who fall into the subprime credit category, who have low credit limits because of impaired credit ratings, or who are looking to establish or re-establish their credit.

15. Defendants' ancillary products share common characteristics in that each are: (a) marketed as ways for consumers to protect themselves from fraud or unauthorized charges, or to increase their financial security, (b) considered an optional product that is not required to have a credit card account, (c) tethered to consumers' specific credit card accounts, and (d) billed directly to the account monthly, with no separate bill provided.

16. Defendants' ancillary products are in fact a dense maze of limitations, exclusions and restrictions, making it impossible for consumers to knowingly determine what these products cover and whether they provide a worthwhile financial benefit.

17. Examples of Defendants' ancillary products include:

a. **Payment Protection** – this product allegedly safeguards subscribers' credit card accounts by canceling or temporarily suspending the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts in other circumstances.

b. **Wallet Protection** – In exchange for a fixed-rate monthly fee this product (called "Fraud Protection") provides that if the consumers' wallet is lost or stolen, Defendant will contact the issuers of the consumers' credit cards to cancel the cards lost or stolen.

18. Defendants have enrolled large numbers of Hawaii residents and charged them substantial sums of money for enrollment in these product plans.

19. Defendants have devised a scheme to increase the profits they receive from their ancillary products exponentially. Upon information and belief, by limiting the amount of credit given to Hawaii consumers, but issuing multiple cards to them, Defendants are able to impose separate monthly fees for these products on each of the consumers' cards. This scheme doubles, triples or more, the monthly fees charged without any analogous increased risk to Defendants.

B. Defendants Sign Up Unsuspecting Cardholding Consumers for Ancillary Products Without Their Meaningful, Knowing Authorization or Consent

20. Defendants often enroll consumers in these products based on highly deceptive and misleading telemarketing calls, charging some consumers without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in the unique position to do this because, unlike a typical seller or marketer, they are the consumer's credit card company and already have their credit card numbers. The State of Hawaii brings this *parens patriae* consumer protection lawsuit against Defendants to address their unfair and deceptive business practices.

1. The Way Ancillary Products Are Marketed is Unfair and Deceptive

21. Defendants sell ancillary products to consumers through a number of different channels, including online and direct mail marketing, in which they may ask that consumers “check the box” to initiate the plan, and through telemarketing, where consumers may be asked to press a button on the telephone or verbally agree in order to approve initiation of the plan. The former channels require an affirmative action by the consumer to enroll, such as checking a box or initializing a monthly statement or other mailer or online form in a designated space to authorize enrollment. For a consumer that “checked the box” or initialized a document, confirming consumers’ assent to be billed for an ancillary product is easily traceable. On the other hand, for those whose assent was allegedly obtained through telemarketing (upon information and belief, the majority of ancillary product customers), confirmation of affirmative assent requires a review of the telephone call itself.

22. In addition to Defendants’ financial motive to enroll as many Hawaii customers as possible into these highly lucrative ancillary product schemes, upon information and belief, individual telemarketers are incentivized to enroll as many cardholders as possible, either because their compensation is commission-based or because their performance is otherwise evaluated and they are subsequently compensated based on the number of cardholders they enroll.

23. Unfair and deceptive practices are rife in telemarketing these products.

24. Defendants’ telemarketers employ an array of deceptive sales tactics to elicit cardholders into communicating some affirmative response, knowing that the cardholders do not actually understand that they are supposedly agreeing to purchase an ancillary product.

25. Defendants' telemarketers characterize the call as a courtesy to thank cardholders and remind them of benefits they already get through their credit card agreement (like cash back, airline miles, rewards, etc.), when in fact they are calling to sell ancillary products.

26. Telemarketers may speed through, skip altogether or alter the text of the information they are required to provide to cardholders (the "disclosure"), in an effort to make the disclosure sound like confusing legalese, then say "OK?" or ask if the person heard them or understood, knowing that such a question will almost always elicit an affirmative response such as "ok" or "yes." The cardholder believes they have just listened to a courtesy call, but the Defendants treat the affirmative response as the cardholder's agreement to enroll in the plan. These cardholders may say "ok" or "yes" at the conclusion of the call, but no reasonable person listening to the recordings of these calls would conclude the cardholder was giving their knowing, meaningful assent to be charged a monthly fee for enrollment in the plan.

27. Another tactic Defendants' telemarketers use is to ask cardholders if they may simply send out a "packet of information" about the plan. Defendants treat an affirmative response to this inquiry as authorization for paid enrollment, even though consumers do not understand or believe that they have agreed to purchase anything.

28. Each Defendant has such a "packet of information" for each of the plans offered and Defendants are required to provide enrollees with this information. Many Hawaii customers never receive the packets allegedly sent out. Others who receive the packet ignore or disregard it because they do not understand that they had already been enrolled. They may reasonably assume it is just another piece of junk mail from a credit card company. While those cardholders that told the telemarketer they could send information about the plan may recognize what the packet relates to, they reasonably assume further steps must be taken by them before they will

become enrolled in the plan. If the slammed consumer simply throws out the packet, without reading it, signing it or conferring with the credit card company about it, they are nevertheless still enrolled in the plan.

29. Defendants utilize the card activation process as another way to wrongfully enroll consumers. Consumers are told they must call Defendants from their home phone number to activate their card. Defendants take this opportunity to sell ancillary products. Cardholders who are calling to activate a credit card are particularly susceptible to believing that the “disclosure” is some legal text that must be read to the cardholder, rather than an alleged contractual agreement to purchase an optional, ancillary product of little or no value to them. Many Hawaii cardholders, accustomed to all the legal language and fine print received when they open a new credit card account, become immune to the terms and conditions communicated to them. They reflexively reply “ok,” and have no idea that they have supposedly purchased some ancillary product.

30. In addition to deceptively inducing cardholders to say “yes” or “ok” during the call, Defendants enroll some cardholders who did not provide any affirmative response. In such instances, Defendants have no proof of affirmative assent, either because there is no affirmative response on the recording, there is a clear rejection of the offer, or a record of the call does not exist. The cardholder has been “slammed,” that is, involuntarily enrolled in the plan without their knowledge or consent.

31. And unlike in a typical telemarketing call, this telemarketer does not need the consumer to provide them with their credit card number and information to purchase the product because the telemarketer *is* the credit card company. As a result, Defendants can charge consumers’ accounts when there has been no clear and knowing consent given.

2. Hawaii Consumers “Slammed” with Ancillary Products Receive Little to No Relief from the Defendants

32. Defendants know that slamming occurs frequently. In fact, the “refund” process itself is set up on the assumption that consumers have been deceived and do not understand that they have been enrolled. When a consumer calls within thirty (30) days of being enrolled, they are supposed to get their money back no questions asked, and Defendants make no effort to then determine how it came to be that the cardholder was enrolled without their authorization.

33. However, many Cardholders have no idea they are enrolled in an ancillary product plan and do not notice or appreciate the meaning of the line-item charge for the plan on their credit card bills. The charge appears among the other purchases on the cardholder’s monthly statement.

34. Some cardholders have accounts that do not require close inspection of monthly statements. This may be because they are not making new purchases on the account (they may be simply seeking to pay off the balance, or took advantage of a balance transfer offer, or utilized the account to make a single purchase). Others do not receive monthly bills at all.

35. Consumers may pay this hidden charge month after month for many months before they become aware of it. For online accounts, add-on plans are often posted to a cardholder’s account on the last day of each statement period, and that statement is then archived on the website. A cardholder may review current activity on their account regularly and yet never see the charge billed to their account on the last day of the previous billing cycle’s statement.

36. In addition to the obvious unfairness of enrolling cardholders without their valid authorization, Defendants reap an extra windfall because these enrollees will never invoke the

supposed benefits of the plans for which they were charged because they do not even know they may do so.

37. If cardholders do not discover the deceit until more than 30 days after being enrolled, Defendants will not automatically refund the overpayments to the cardholder.

38. Cancellation of plans and disputes about enrollment are so widespread in this industry that Defendants use template form letters to send to slammed consumers who complain. Instead of “coming clean” to these aggrieved consumers, Defendants make it exceedingly difficult for them to get relief, such that many Hawaii consumers give up hope of ever getting their money back after paying for a product they did not request and did not use.

II. Defendants Sell Payment Protection, a Specific Ancillary Product, to Hawaii Consumers Who Can Receive No Benefit from the Coverage Offered

39. Payment Protection has come under increased scrutiny recently from both the federal government and private plaintiffs.¹

40. The ancillary products at issue in this Complaint, including but not limited to Payment Protection, are not deemed insurance products under Hawaii law, and the Defendants are not insurance companies.

41. Defendants do not consider Payment Protection an insurance product. Payment

¹ See, e.g., Credit Cards: Consumer Costs for Debt Protection Products Can be Substantial Relative to Benefits but are Not a Focus of Regulatory Oversight, U.S. Government Accountability Office, GAO-11-311, March 25, 2011 (“GAO Report”), attached as Ex. 1 to the Complaint.

Lawsuits are pending, including cases brought by Attorneys General. See *State of Minn. v. Discover Fin. Servs. et al.*, 27-CV-10-27510 (D. Minn. Dec. 6, 2010), (Ex. 2); *State of West Virginia v. Capital One Bank (USA), N.A.; et al.*, 10-C-7-N (Cir. Mason, WV Jan. 20, 2010) (Ex. 3). At least two cases brought by consumer classes have settled. See Order Granting Final Approval of Class Action Settlement, *Spinelli et al. v. Capital One Bank and Capital One Servs.*, 08-cv-132-T-33EAJ, Dkt. 231 (M.D. Fla. Nov. 23, 2010), [Proposed] Order (Ex. 4), and *Kardonick et al. v. JP Morgan Chase & Co. and Chase Bank USA N.A.*, 10-cv-23235, Dkt. 23 (S.D. Fla. Feb. 3, 2011) (Ex. 5).

Protection Plans are not registered or identified as insurance products with the Department of Commerce & Consumer Affairs for the State of Hawaii, which is tasked with the responsibility of overseeing the insurance industry in Hawaii, or other appropriate authorities.

42. Defendants do not designate Payment Protection an “insurance product.” This way, they can avoid state regulation and charge higher fees. Payment Protection Plans are unregulated as to terms, conditions and fees, making them highly profitable for Defendants.

43. These types of plans offer little to no benefit to consumers for several reasons and have been subject to criticism from consumer advocates on several fronts. For example, it may not be disclosed to consumers that under the terms and conditions of the plan, the cardholder may not be permitted to use their credit card while they have invoked Payment Protection benefits, and in the periods of time when consumers actually invoke the benefits, such as in the case of unemployment, the cardholder often needs their credit the most.

44. Defendants market specifically to elderly consumers, for whom benefits may be of little or no value. Defendants know that their conduct is directed towards elderly consumers (defined as sixty-two years of age or older by HRS § 480-13.5(c)), because they have the consumer’s date of birth on file. The main benefit of Defendants’ Payment Protection plans is that they suspend payment obligations when the borrower’s income stream is lost due to unemployment, disability, or natural disaster. But for those on a fixed income, any such “protection” may be illusory because the “qualifying events” will not disrupt the income stream coming from a fixed income.

45. Defendants market Payment Protection through direct mail and solicit Payment Protection customers over the phone. They represent Payment Protection as a product that pays the required minimum monthly payment due on the subscriber’s credit card account and the

Payment Protection plan fee for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent.

46. However, Defendants misrepresent and/or fail to disclose the real nature of Payment Protection. While representing to consumers that Payment Protection provides peace of mind, among other representations, in fact, Defendants impose Payment Protection on customers who did not authorize the charges. Because these customers do not know this “coverage” has been imposed on them and that they were enrolled without their consent, they do not know they can avail themselves of it and do not have the necessary information to determine what Payment Protection covers and whether it would be a sound financial choice to continue paying for the Plan.

47. Defendants market their Payment Protection Plans to individuals who do not qualify for the alleged benefits of the Plans. The numerous qualifications and restrictions set forth in Defendants’ fine print expose the advertised “peace of mind” as an illusion, at best, because the Defendants do not determine consumers’ eligibility for various options under the Payment Protection Plan before marketing and selling Payment Protection to them.

48. Defendants market Payment Protection as a product that will safeguard subscribers’ credit card accounts by suspending or crediting the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts in other circumstances. When minimum monthly payments are credited, the monthly interest charges and the Payment Protection fee (and any other ancillary fees) continue to accrue without adequate disclosure to consumers.

49. The terms offered for the Payment Protection scheme are varied, complicated and always changing. However, all of the various plans provide for some form of payment suspension upon the occurrence of the following events, as it defines the terms: *Death, Disability and Involuntary Unemployment*. The restrictions, limitations and exclusions associated with these events that trigger supposed Payment Protection benefits are expansive and constantly evolving.

50. Defendants make no reasonable effort and undertake no investigation, including review of information in their possession regarding the cardholder, to determine if Payment Protection coverage would apply to the cardholder. Such information may include health status, name of last employer and date of birth, which would assist Defendants in knowing whether a particular cardholder is eligible for Payment Protection benefits.

51. Accordingly, Defendants engage in aggressively marketing to enroll Hawaii cardholders in Payment Protection even when they have information in their possession indicating that the product may have limited or no value to the particular consumer.

52. Telephone marketing scripts and written materials provided by Defendants to consumers are incomplete, indecipherable, misleading and obfuscatory.

53. One example of the misleading and obfuscatory language is Defendants' failure to disclose that Payment Protection is actually akin to an insurance product. Despite this fact, marketing materials carefully avoid any use of the word "insurance." The materials may, however, refer to "premiums," "claims" or "benefits," which indicates that Defendants internally regard and acknowledge this as an insurance product.

54. Defendants do not adequately describe or explain the exclusions to prospective subscribers so they can determine whether they have certain characteristics or meet certain factors

that would bar them from being eligible for benefits under Credit Protection, even though Defendants have a common practice of imposing limitations on full coverage based on exclusions.

- a. Account Protector benefits do not apply to persons employed by family members;
- b. Account Protector benefits do not apply to persons employed part time or seasonally;
- c. Account Protector benefits do not apply to retired persons, which most often affects “elder” consumers aged sixty-two or over;
- d. Account Protector benefits do not apply for the first 30 days of unemployment or disability;
- e. Account Protector benefits do not apply to persons who have not held their job for at least 90 days;
- f. Account Protector benefits do not apply if you qualify for state or federal unemployment benefits;
- g. Account Protector benefits do not apply unless you remain “registered at a recognized employment agency”;
- h. Account Protector coverage is limited to 12 months;
- i. Account Protector coverage is limited to one benefit approval per calendar year;
- j. Account Protector benefits require proof of continuous physician’s care for the entire period of benefits; and
- k. Account Protector benefits require the continued payment of all required monthly payments on the card, even while a person has to wait through the 90 days of unemployment, leave of absence, or disability before applying for benefits, as well as during the entire application for benefits process, and all the way up through approval.

55. For instance, retired persons in Hawaii, many of whom are “elder” senior citizens aged sixty-two or older, are charged for this product even though they are categorically excluded from receiving many of the benefits under the plan. Defendants do not ask customers whether they are retired.

56. Further, part-time workers, seasonal workers and workers concluding an employment contract (including ending a military tour of duty) are also limited or categorically excluded from receiving benefits. To qualify for benefits, one needs to work a set number of hours a week in employment considered to be permanent. However, Defendants make no effort to investigate whether any of the Hawaii consumers they charge for Payment Protection are part-time, seasonal or military workers. These terms are not adequately communicated or defined in written materials.

57. Finally, benefits are limited for disabled persons, but Defendants nevertheless fail to affirmatively inform these individuals of the limitations in benefits when they are enrolled. In fact, Defendants do not even ask customers whether they are disabled.

58. Defendants have no process to keep updated on consumers' status, either. Accordingly, when consumers' statuses change, they will continue to pay for Payment Protection even though they may no longer be eligible for its benefits.

59. If consumers are eventually provided with written materials, the materials themselves are confusing, and do not require the consumers' signature or affirmative assent before they can be billed for the plan. It is virtually impossible for the subscriber to determine all of the exclusions and limitations of Payment Protection, or the value of the product, based on what is provided.

60. The cost of Payment Protection is set forth in a confusing and misleading manner. The premium for Account Protector is set at a dollar amount per \$100.00 of the ending statement balance for each particular month. The cost of Account Protector is monthly charges ranging from \$0.83 to \$0.99 per \$100.00 of a subscriber's month-ending credit card balance. Thus, a cardholder who carries a \$1,000 balance for a year pays anywhere from \$99.60 to \$118.80 per

annum for Account Protector. Defendants add these amounts directly to the credit card account statement each month.

61. Payment Protection also provides the added benefit to Defendants of lowering available credit to its subscribers because the imposition of this additional fee brings consumers closer to their maximum credit limit without their knowledge. This operates in some instances to cause consumers to exceed their credit limits, thereby incurring over-the-limit fees. Further, the imposition of the Payment Protection fee creates a cycle of profitability, in that the fee itself increases subscribers' monthly credit balances, which in turn increases Payment Protection fees in subsequent months.

62. Defendants' "customer service" support is set up in such a way that Hawaii consumers cannot easily cancel ancillary products or receive answers to benefit questions, nor can they easily file claims or receive benefits for filed claims.

63. Upon information and belief, employees at Defendants' Payment Protection call centers are given authority to deny claims immediately over the phone, but do not have authority to approve payment of benefits to claimants in the same manner.

64. Moreover, upon information and belief, when subscribers call Defendants attempting to cancel Payment Protection, employees at Defendants' call center are trained to attempt to talk the subscriber out of canceling by "selling" the supposed benefits of Payment Protection.

65. Further, when claims for Payment Protection benefits are denied, Defendants have not implemented a process through which subscribers' Payment Protection premiums are refunded, even if the subscribers are deemed to be *per se* ineligible for Payment Protection benefits. In fact, if Hawaii subscribers are denied Payment Protection benefits, Defendants

neither affirmatively remove subscribers from Payment Protection enrollment going forward, nor do they inform subscribers of their continued obligations to pay for Payment Protection, even though they have been deemed to be ineligible for benefits.

66. Payment Protection is so confusing as to when coverage is triggered, so restricted in terms of the benefits it provides to subscribers, and processing claims is made so difficult by Defendants, that it is essentially worthless.

67. Although heralded as coverage designed for a subscriber's peace of mind and for use when times get tough, the Payment Protection device is designed to prey on the financially insecure and is virtually worthless because of the numerous restrictions that are imposed, because of the exclusions of benefits, and because of the administrative and bureaucratic hurdles that are placed in the way of Hawaii consumers who attempt to secure payments from Defendants under Payment Protection coverage.

68. As a result of their unfair and deceptive marketing practices in connection with sales of Payment Protection, Defendants have increased profits by substantial sums, all thanks to products which provide virtually no benefit to the Hawaii residents who are nevertheless charged for these products month in and month out.

COUNT I
VIOLATION OF HAWAII LAW ON UNFAIR OR DECEPTIVE ACTS OR
PRACTICES, HAW. REV. STAT. §§ 480-1 ET SEQ. ("UDAP")

69. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

70. The UDAP sets forth that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." Haw. Rev. Stat. § 480-2(a).

71. Among other things, Haw. Rev. Stat. § 481A-3(a) defines actions that constitute a “deceptive trade practice” as including, but not limited to, the following:

(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

* * * *

(5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;

* * * *

(9) Advertises goods or services with intent not to sell them as advertised;

* * * *

(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Id. § 481A-3(a)(2), (5), (9), (12).

72. As set forth herein, the Defendants’ actions of marketing, selling and administering the ancillary products at issue in this Complaint, including Payment Protection, fit within the definitions and scope of the UDAP.

73. The Attorney General of the State of Hawaii “may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section.” *Id.* at § 480-2(d). The Attorney General is specifically charged with the administration of the UDAP, and may act *sua sponte* as the agent and legal representative of the State in civil proceedings to enforce the statute.

74. Defendants' conduct described above constitutes multiple, separate violations of the UDAP.

75. Each violation of the statute by the Defendants is an unfair or deceptive act or practice in the conduct of the trade or commerce in violation of the UDAP. For example, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product without his or her assent constituted a separate violation of the UDAP. Likewise, each enrollment by Defendants of a Hawaii consumer who is ineligible for the plan's benefits (due to age, work status, disability or for any other reason) constituted a separate violation of the UDAP. Similarly, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product but failed to disclose all material restrictions, limitations, and exclusions constituted a separate violation of the UDAP. Each time Defendants failed to refund premiums paid also constituted a separate violation of the UDAP.

76. The Defendants' violations were and are likely to mislead Hawaii consumers. The Defendants are aware of the violations, including the widespread slamming practices engaged in and the enrollment of cardholders who are ineligible for benefits offered under Payment Protection, yet Defendants fail to adequately and affirmatively take steps to cure the violations or refund monies owed.

77. As a result of the Defendants' unfair or deceptive practices, the purported contracts between Hawaii consumers and the Defendants for purchase of the aforementioned ancillary products are "void and [] not enforceable at law or in equity." Haw. Rev. Stat. § 480-12.

78. Defendants' violations justify penalties of up to \$10,000 for each violation of the UDAP (*id.* at § 480-3.1) and injunctive relief (*id.* at 480-15).

COUNT II
VIOLATION OF THE UDAP, CONSUMER FRAUDS AGAINST ELDERS
HAW. REV. STAT. § 480-13.5

79. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

80. The UDAP sets forth that “[i]f a person commits a violation under section 480-2 which is directed toward, targets, or injures an elder, a court, in addition to any other civil penalty, may impose a civil penalty not to exceed \$10,000 for each violation.” Haw. Rev. Stat. § 480-13.5(a).

81. Defendants knowingly market specifically to elderly consumers, many of whom are retired, and for whom benefits may be of little or no value.

82. As a result of the Defendants’ unfair or deceptive practices directed specifically towards elders, Defendants’ violations justify assessing additional penalties of up to \$10,000 for each violation of the UDAP committed against elders. *Id.*

COUNT III
UNJUST ENRICHMENT

83. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

84. By unknowingly paying unauthorized or otherwise improper charges to Defendants, as stated above, Hawaii consumers conferred a benefit on Defendants.

85. Defendants knowingly accepted such benefit, to which they are not entitled.

86. Defendants’ acceptance and retention of such benefit under these circumstances is unjust and inequitable.

87. As a matter of equity, consumers within the State should be made whole by application of the doctrine of unjust enrichment.

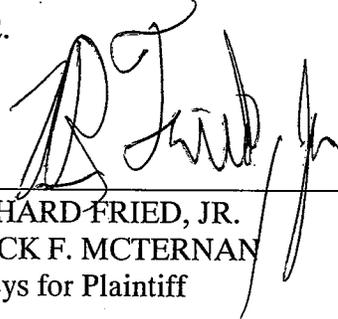
RELIEF

WHEREFORE, the State of Hawaii, by and through its Attorney General, respectfully prays that this Court grant the following relief:

1. Entering Judgment in favor of the State in a final order against each of the Defendants;
2. Enjoining the Defendants and their employees, officers, directors, agents, successors, assignees, merged or acquired predecessors, parent or controlling entities, subsidiaries, and all other persons acting in concert or participation with it, from engaging in unfair or deceptive practices in violation of Hawaii law and ordering temporary, preliminary or permanent injunction;
3. Awarding judgment against the Defendants for restitution and disgorgement of monies under the *parens patriae* doctrine, the general equitable powers of this Court, the doctrine of unjust enrichment and any other authority, for all Hawaii consumers injured by Defendants' acts described in this Complaint;
4. Declaring that each act of each of the Defendants described in this Complaint constitute multiple, separate violations of Hawaii law;
5. Imposing civil penalties for each repeated and willful violation of the UDAP;
6. Imposing additional civil penalties of up to \$10,000 for each repeated and willful violation of the UDAP committed against elders;
7. Awarding equitable relief, including but not limited to restitution and disgorgement of monies obtained as a result of the UDAP violations;
8. Granting the State:
 - a. The cost of investigation and reasonable attorneys' fees, as authorized by the UDAP,
 - b. Pre-judgment and post-judgment interest, and,
 - c. All other relief as provided by law and/or as the Court deems appropriate and just.

Plaintiff asserts claims herein in excess of the minimum jurisdictional requirements of this Court.

DATED: Honolulu, Hawai'i, April 12, 2012.

A handwritten signature in black ink, appearing to read "L. Richard Fried, Jr.", written over a horizontal line.

L. RICHARD FRIED, JR.
PATRICK F. MCTERNAN
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, <i>EX. REL.</i> DAVID M. LOUIE, ATTORNEY GENERAL,	)	CIVIL NO. <u>12-1-0981-04</u>
	)	(Other Civil Action)
)	
Plaintiff,	)	SUMMONS
)	
vs.)	
)	
BARCLAYS BANK DELAWARE, JUNIPER BANK DELAWARE, and DOE DEFENDANTS 1-20,	)	No trial date has been set.
)	
Defendants.)	
)	
)	
)	

SUMMONS TO ANSWER CIVIL COMPLAINT

TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby summoned and required to file with the court and serve upon L. Richard Fried, Jr., Esq. and Patrick F. McTernan, Esq., plaintiff's attorneys, whose address is 600 Davies Pacific Center, 841 Bishop Street, Honolulu, Hawaii, 96813, an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled court permits, in writing to this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATE ISSUED: APR 12 2012

A. MARPLE

CLERK



1ST CIRCUIT COURT
STATE OF HAWAII
FILED

2012 APR 12 AM 8:08

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Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, *EX. REL.* DAVID M.
LOUIE, ATTORNEY GENERAL,

Plaintiff,

vs.

CAPITAL ONE BANK (USA) N.A.,
CAPITAL ONE SERVICES, LLC,
and DOE DEFENDANTS 1-20,

Defendants.

) CIVIL NO. 12-1-0980-04 GWBC
) (Other Civil Action)

) COMPLAINT; SUMMONS

) No trial date has been set.

COMPLAINT

Plaintiff, the State of Hawaii, by David M. Louie, Attorney General (“the State”) brings this Complaint against the Defendants Capital One Bank (USA) N.A., Capital One Services, LLC, and Doe Defendants 1-20 (collectively “Defendants” or “Capital One”) and alleges, upon information and belief, as follows:

INTRODUCTION

1. This action stems from the Defendants’ marketing, selling, and administering to Hawaii consumers fee-based products, which are ancillary to their credit cards.

2. Defendants market such ancillary products as protection for consumers against improper or unauthorized charges on their credit cards, identity theft, and lost or stolen credit cards and/or as providing benefits in the event of unemployment or disability. Each ancillary product is marketed only to the Defendants’ current card holders, and the products themselves are attached to the cardholders’ specific account at issue.

3. Upon information and belief, when consumers apply for and receive Defendants’ credit cards, a process is triggered whereby a consumer can unknowingly and unintentionally sign up to receive ancillary products.

4. Additionally, Defendants often enroll consumers in these products even though the consumers did not assent to pay for them. This process is referred to as “slamming.” Enrollment may be based on highly deceptive and misleading telemarketing calls, forged or non-existent mailers or online applications, or nothing at all. In each instance, unknowing consumers are hit with monthly fees without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in a position to do this because, unlike a

typical marketer or seller, they are already the consumer's credit card company and already have their credit card number.

5. Further, for certain types of ancillary products, including but not limited to "Payment Protection," "Emergency Payment," "Credit Inform," "Credit Inform Premier" and other monikers that all offer similar coverage (hereinafter collectively referred to as "Payment Protection Plans" or "Plans"), that purport to pay the consumer's required minimum monthly payment for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent, Defendants make no effort to determine whether consumers are even eligible for the benefits at the time of sale. As a consequence, Defendants bill ineligible Hawaii citizens for this coverage, even though their status at the time of enrollment prevents them from receiving benefits under the terms of these Payment Protection Plans.

6. The Defendants commit unfair and deceptive business practices and violate statutory law by charging consumers for ancillary products, including Payment Protection Plans, who either did not want them or were not entitled to benefits from them, and by the unfair and deceptive manner in which Defendants offer and administer claims for benefits by consumers.

7. Upon information and belief, as a result of these unfair and deceptive practices, Defendants have amassed substantial sums of money with virtually no benefits to Hawaii citizens who are nevertheless charged for these products month in and month out.

PARTIES

8. This action, brought by the State of Hawaii in its sovereign capacity by and through David M. Louie, the Attorney General of the State of Hawaii, is authorized under Hawaii law on Unfair or Deceptive Acts or Practices ("UDAP"), Haw. Rev. Stat. § 480-2(d), and

under *parens patriae* authority, on behalf of the State and its citizens to enforce Hawaii law. The Attorney General has the power to bring these claims on behalf of the State under the provisions of Haw. Rev. Stat. § 661-10.

9. The State asserts no claims arising out of, under or in any way preempted by the laws (common, statutory or administrative) of the United States, nor does it bring this action on behalf of a class or any group of persons that can be construed as a class. The State specifically disclaims any such claims that would support removal of this action to a United States District Court on the basis of diversity, jurisdictional mandates under the Class Action Fairness Act of 2005 (28 U.S.C. §§ 1332(d), 1453, 1711-1715), federal question jurisdiction, or any other basis.

10. Upon information and belief, Defendant Capital One Bank (USA) N.A. is a Delaware Corporation and under Delaware law it has the capacity to sue and be sued.

11. Upon information and belief, Defendant Capital One Services, LLC is a Delaware Corporation headquartered at 1680 Capital One Drive, McLean, Virginia. Upon information and belief, Capital One Services, LLC is the sales and marketing arm of Capital One Bank (USA) N.A. and it is also a subsidiary of Capital One Bank (USA) N.A.

12. At all times material herein, Defendants Capital One Bank (USA) N.A. and Capital One Services LLC have been doing business, and continue to do business, within the City & County of Honolulu, State of Hawaii.

13. DOE DEFENDANTS 1-20 are sued herein under fictitious names for the reason that after diligent and good faith efforts to ascertain their names and identities through review of applicable records and through interviews, their true names and identities are presently unknown to Plaintiff except that they are connected in some manner with the named Defendants and/or were the agents, servants, employees, employers, representatives, co-venturers, associates, sub-

contractors or contractors of the named Defendants and/or were in some manner presently unknown to the Plaintiff engaged in the activities alleged herein and/or were in some manner responsible for the injuries or damages to Plaintiff and/or designed and/or placed on the market a product which was defective; which defect was proximate and/or legal cause of injuries or damages to Plaintiff and/or inspected and/or maintained and/or controlled some object or product in a negligent manner, which negligence was a proximate and/or legal cause of such injuries or damages to Plaintiff and/or conducted some activity in a negligent or dangerous manner; which negligent or dangerous conduct was a proximate and/or legal cause of injuries or damages to Plaintiff and/or were in some manner related to the named Defendants and Plaintiff pray for leave to insert herein their true names, identities, capacities, activities and/or responsibilities when the same are ascertained.

FACTUAL BACKGROUND

I. Defendants' Ancillary Products Are Marketed and Sold to Hawaii Consumers in an Unfair and Deceptive Manner

A. Defendants Market and Sell Ancillary Products to Cardholding Consumers Which Generate Substantial Revenue for Them.

14. Upon information and belief, Defendants market and sell ancillary products to all of their credit card customers, but most aggressively market these products to vulnerable Hawaii consumers who fall into the subprime credit category, who have low credit limits because of impaired credit ratings, or who are looking to establish or re-establish their credit.

15. Defendants' ancillary products share common characteristics in that each are: (a) marketed as ways for consumers to protect themselves from fraud or unauthorized charges, or to increase their financial security, (b) considered an optional product that is not required to have a credit card account, (c) tethered to consumers' specific credit card accounts, and (d) billed directly to the account monthly, with no separate bill provided.

16. Defendants' ancillary products are in fact a dense maze of limitations, exclusions and restrictions, making it impossible for consumers to knowingly determine what these products cover and whether they provide a worthwhile financial benefit.

17. Examples of Defendants' ancillary products include:

a. **Payment Protection** – this product allegedly safeguards subscribers' credit card accounts by canceling or temporarily suspending the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts in other circumstances.

b. **Identity Theft Protection** – In exchange for a fixed-rate monthly fee, this plan (called Credit Inform) purports to monitor consumers' credit scores for indicia of identity theft and will alert the enrollee if something suspicious happens to their credit score.

18. Defendants have enrolled large numbers of Hawaii residents and charged them substantial sums of money for enrollment in these product plans.

19. Defendants have devised a scheme to increase the profits they receive from their ancillary products exponentially. Upon information and belief, by limiting the amount of credit given to Hawaii consumers, but issuing multiple cards to them, Defendants are able to impose separate monthly fees for these products on each of the consumers' cards. This scheme doubles, triples or more, the monthly fees charged without any analogous increased risk to Defendants.

B. Defendants Sign Up Unsuspecting Cardholding Consumers for Ancillary Products Without Their Meaningful, Knowing Authorization or Consent

20. Defendants often enroll consumers in these products based on highly deceptive and misleading telemarketing calls, charging some consumers without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in the unique position to do this because, unlike a typical seller or marketer, they are the consumer's credit card company and already have their credit card numbers. The State of Hawaii brings this *parens patriae* consumer protection lawsuit against Defendants to address their unfair and deceptive business practices.

1. The Way Ancillary Products Are Marketed is Unfair and Deceptive

21. Defendants sell ancillary products to consumers through a number of different channels, including online and direct mail marketing, in which they may ask that consumers “check the box” to initiate the plan, and through telemarketing, where consumers may be asked to press a button on the telephone or verbally agree in order to approve initiation of the plan. The former channels require an affirmative action by the consumer to enroll, such as checking a box or initializing a monthly statement or other mailer or online form in a designated space to authorize enrollment. For a consumer that “checked the box” or initialized a document, confirming consumers’ assent to be billed for an ancillary product is easily traceable. On the other hand, for those whose assent was allegedly obtained through telemarketing (upon information and belief, the majority of ancillary product customers), confirmation of affirmative assent requires a review of the telephone call itself.

22. In addition to Defendants’ financial motive to enroll as many Hawaii customers as possible into these highly lucrative ancillary product schemes, upon information and belief, individual telemarketers are incentivized to enroll as many cardholders as possible, either because their compensation is commission-based or because their performance is otherwise evaluated and they are subsequently compensated based on the number of cardholders they enroll.

23. Unfair and deceptive practices are rife in telemarketing these products.

24. Defendants’ telemarketers employ an array of unfair and deceptive sales tactics to elicit cardholders into communicating some affirmative response, knowing that the cardholders do not actually understand that they are supposedly agreeing to purchase an ancillary product.

25. Defendants' telemarketers characterize the call as a courtesy to thank cardholders and remind them of benefits they already get through their credit card agreement (like cash back, airline miles, rewards, etc.), when in fact they are calling to sell ancillary products.

26. Telemarketers may speed through, skip altogether or alter the text of the information they are required to provide to cardholders (the "disclosure"), in an effort to make the disclosure sound like confusing legalese, then say "OK?" or ask if the person heard them or understood, knowing that such a question will almost always elicit an affirmative response such as "ok" or "yes." The cardholder believes they have just listened to a courtesy call, but the Defendants treat the affirmative response as the cardholder's agreement to enroll in the plan. These cardholders may say "ok" or "yes" at the conclusion of the call, but no reasonable person listening to the recordings of these calls would conclude the cardholder was giving their knowing, meaningful assent to be charged a monthly fee for enrollment in the plan.

27. Another tactic Defendants' telemarketers use is to ask cardholders if they may simply send out a "packet of information" about the plan. Defendants treat an affirmative response to this inquiry as authorization for paid enrollment, even though consumers do not understand or believe that they have agreed to purchase anything.

28. Each Defendant has such a "packet of information" for each of the plans offered and Defendants are required to provide enrollees with this information. For example, Defendants use a welcome kit for this purpose for its Payment Protection Plan. Many Hawaii customers never receive the packets allegedly sent out. Others who receive the packet ignore or disregard it because they do not understand that they had already been enrolled. They may reasonably assume it is just another piece of junk mail from a credit card company. While those cardholders that told the telemarketer they could send information about the plan may recognize

what the packet relates to, they reasonably assume further steps must be taken by them before they will become enrolled in the plan. If the slammed consumer simply throws out the packet, without reading it, signing it or conferring with the credit card company about it, they are nevertheless still enrolled in the plan.

29. Defendants utilize the card activation process as another way to wrongfully enroll consumers. Consumers are told they must call Defendants from their home phone number to activate their card. Defendants take this opportunity to sell ancillary products. Cardholders who are calling to activate a credit card are particularly susceptible to believing that the “disclosure” is some legal text that must be read to the cardholder, rather than an alleged contractual agreement to purchase an optional, ancillary product of little or no value to them. Many Hawaii cardholders, accustomed to all the legal language and fine print received when they open a new credit card account, become immune to the terms and conditions communicated to them. They reflexively reply “ok,” and have no idea that they have supposedly purchased some ancillary product.

30. In addition to deceptively inducing cardholders to say “yes” or “ok” during the call, Defendants enroll some cardholders who did not provide any affirmative response. In such instances, Defendants have no proof of affirmative assent, either because there is no affirmative response on the recording, there is a clear rejection of the offer, or a record of the call does not exist. The cardholder has been “slammed,” that is, involuntarily enrolled in the plan without their knowledge or consent.

31. And unlike in a typical telemarketing call, this telemarketer does not need the consumer to provide them with their credit card number and information to purchase the product

because the telemarketer *is* the credit card company. As a result, Defendants can charge consumers' accounts when there has been no clear and knowing consent given.

2. Hawaii Consumers "Slammed" with Ancillary Products Receive Little to No Relief from the Defendants

32. Defendants know that slamming occurs frequently. In fact, the "refund" process itself is set up on the assumption that consumers have been deceived and do not understand that they have been enrolled. When a consumer calls within thirty (30) days of being enrolled, they are supposed to get their money back no questions asked, and Defendants make no effort to then determine how it came to be that the cardholder was enrolled without their authorization.

33. However, many Cardholders have no idea they are enrolled in an ancillary product plan and do not notice or appreciate the meaning of the line-item charge for the plan on their credit card bills. The charge appears among the other purchases on the cardholder's monthly statement.

34. Some cardholders have accounts that do not require close inspection of monthly statements. This may be because they are not making new purchases on the account (they may be simply seeking to pay off the balance, or took advantage of a balance transfer offer, or utilized the account to make a single purchase). Others do not receive monthly bills at all.

35. Consumers may pay this hidden charge month after month for many months before they become aware of it. For online accounts, add-on plans are often posted to a cardholder's account on the last day of each statement period, and that statement is then archived on the website. A cardholder may review current activity on their account regularly and yet never see the charge billed to their account on the last day of the previous billing cycle's statement.

36. In addition to the obvious unfairness of enrolling cardholders without their valid authorization, Defendants reap an extra windfall because these enrollees will never invoke the supposed benefits of the plans for which they were charged because they do not even know they may do so.

37. If cardholders do not discover the deceit until more than 30 days after being enrolled, Defendants will not automatically refund the overpayments to the cardholder.

38. Cancellation of plans and disputes about enrollment are so widespread in this industry that Defendants use template form letters to send to slammed consumers who complain. Instead of “coming clean” to these aggrieved consumers, Defendants make it exceedingly difficult for them to get relief, such that many Hawaii consumers give up hope of ever getting their money back after paying for a product they did not request and did not use.

II. Defendants Sell Payment Protection, a Specific Ancillary Product, to Hawaii Consumers Who Can Receive No Benefit from the Coverage Offered

39. Payment Protection has come under increased scrutiny recently from both the federal government and private plaintiffs.¹

¹ See, e.g., Credit Cards: Consumer Costs for Debt Protection Products Can be Substantial Relative to Benefits but are Not a Focus of Regulatory Oversight, U.S. Government Accountability Office, GAO-11-311, March 25, 2011 (“GAO Report”), attached as Ex. 1 to the Complaint.

Lawsuits are pending, including cases brought by Attorneys General. See *State of Minn. v. Discover Fin. Servs. et al.*, 27-CV-10-27510 (D. Minn. Dec. 6, 2010), (Ex. 2); *State of West Virginia v. Capital One Bank (USA), N.A., et al.*, 10-C-7-N (Cir. Mason, WV Jan. 20, 2010) (Ex. 3). At least two cases brought by consumer classes have settled. See Order Granting Final Approval of Class Action Settlement, *Spinelli et al. v. Capital One Bank and Capital One Servs.*, 08-cv-132-T-33EAJ, Dkt. 231 (M.D. Fla. Nov. 23, 2010), [Proposed] Order (Ex. 4), and *Kardonick et al. v. JP Morgan Chase & Co. and Chase Bank USA N.A.*, 10-cv-23235, Dkt. 23 (S.D. Fla. Feb. 3, 2011) (Ex. 5).

40. The ancillary products at issue in this Complaint, including but not limited to Payment Protection, are not deemed insurance products under Hawaii law, and the Defendants are not insurance companies.

41. Defendants do not consider Payment Protection an insurance product. Payment Protection Plans are not registered or identified as insurance products with the Department of Commerce & Consumer Affairs for the State of Hawaii, which is tasked with the responsibility of overseeing the insurance industry in Hawaii, or other appropriate authorities.

42. Defendants do not designate Payment Protection an “insurance product.” This way, they can avoid state regulation and charge higher fees. Payment Protection Plans are unregulated as to terms, conditions and fees, making them highly profitable for Defendants.

43. These types of plans offer little to no benefit to consumers for several reasons and have been subject to criticism from consumer advocates on several fronts. For example, it may not be disclosed to consumers that under the terms and conditions of the plan, the cardholder may not be permitted to use their credit card while they have invoked Payment Protection benefits, and in the periods of time when consumers actually invoke the benefits, such as in the case of unemployment, the cardholder often needs their credit the most.

44. Defendants market specifically to elderly consumers, for whom benefits may be of little or no value. Defendants know that their conduct is directed towards elderly consumers (defined as sixty-two years of age or older by HRS § 480-13.5(c)), because they have the consumer’s date of birth on file. The main benefit of Defendants’ Payment Protection plans is that they suspend payment obligations when the borrower’s income stream is lost due to unemployment, disability, or natural disaster. But for those on a fixed income, any such

“protection” may be illusory because the “qualifying events” will not disrupt the income stream coming from a fixed income.

45. Defendants market Payment Protection through direct mail and solicit Payment Protection customers over the phone. They represent Payment Protection as a product that pays the required minimum monthly payment due on the subscriber’s credit card account and the Payment Protection plan fee for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent. Defendants’ marketing for this product claims that Payment Protection “gives you peace of mind.” See, http://www.capitalone.com/onlinebanking/faq.php#65_pg_sl (last visited Feb. 15, 2012).

46. However, Defendants misrepresent and/or fail to disclose the real nature of Payment Protection. While representing to consumers that Payment Protection provides “peace of mind”, among other representations, in fact, Defendants impose Payment Protection on customers who did not authorize the charges. Because these customers do not know this “coverage” has been imposed on them and that they were enrolled without their consent, they do not know they can avail themselves of it and do not have the necessary information to determine what Payment Protection covers and whether it would be a sound financial choice to continue paying for the Plan.

47. Defendants market their Payment Protection Plans to individuals who do not qualify for the alleged benefits of the Plans. The numerous qualifications and restrictions set forth in Defendants’ fine print expose the advertised “peace of mind” as an illusion, at best, because the Defendants do not determine consumers’ eligibility for various options under the Payment Protection Plan before marketing and selling Payment Protection to them.

48. Defendants market Payment Protection as a product that will safeguard subscribers' credit card accounts by suspending or crediting the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts in other circumstances. When minimum monthly payments are credited, the monthly interest charges and the Payment Protection fee (and any other ancillary fees) continue to accrue without adequate disclosure to consumers.

49. The terms offered for the Payment Protection scheme are varied, complicated and always changing. However, all of the various plans provide for some form of payment suspension upon the occurrence of the following events, as it defines the terms: *Total and Permanent Disability, Inability to Work Due to Involuntary Termination, Inability to Work Due to Temporary Disability, or Loss of Life*. The restrictions, limitations and exclusions associated with these events that trigger supposed Payment Protection benefits are expansive and constantly evolving.

50. Defendants make no reasonable effort and undertake no investigation, including review of information in their possession regarding the cardholder, to determine if Payment Protection coverage would apply to the cardholder. Such information may include health status, name of last employer and date of birth, which would assist Defendants in knowing whether a particular cardholder is eligible for Payment Protection benefits.

51. Accordingly, Defendants engage in aggressively marketing to enroll Hawaii cardholders in Payment Protection even when they have information in their possession indicating that the product may have limited or no value to the particular consumer.

52. Telephone marketing scripts and written materials provided by Defendants to consumers are incomplete, indecipherable, misleading and obfuscatory.

53. One example of the misleading and obfuscatory language is Defendants' failure to disclose that Payment Protection is actually akin to an insurance product. Despite this fact, marketing materials carefully avoid any use of the word "insurance." The materials may, however, refer to "premiums," "claims" or "benefits," which indicates that Defendants internally regard and acknowledge this as an insurance product.

54. Defendants do not adequately describe or explain the exclusions to prospective subscribers so they can determine whether they have certain characteristics or meet certain factors that would bar them from being eligible for benefits under Credit Protection, even though Defendants have a common practice of imposing limitations on full coverage based on exclusions.

- a. For instance, upon information and belief, a retired person is charged for Payment Protection even though they are categorically excluded from receiving most or all of the benefits under the plan. This most often affects "elder" consumers aged sixty-two or over.
- b. Additionally, part-time, self-employed and seasonal workers are limited or categorically excluded from receiving benefits for the inability to work benefits. However, Capital One makes no effort to investigate whether any consumers that pay for Payment Protection are part-time, seasonal or self-employed. Further, these terms are never adequately defined in any Capital One materials.

55. For instance, retired persons in Hawaii, many of whom are "elder" senior citizens aged sixty-two or older, are charged for this product even though they are categorically excluded from receiving many of the benefits under the plan. Defendants do not ask customers whether they are retired.

56. Further, part-time workers, seasonal workers and workers concluding an employment contract (including ending a military tour of duty) are also limited or categorically excluded from receiving benefits. To qualify for benefits, one needs to work a set number of hours a week in employment considered to be permanent. However, Defendants make no effort to investigate whether any of the Hawaii consumers they charge for Payment Protection are part-

time, seasonal or military workers. These terms are not adequately communicated or defined in written materials.

57. Finally, benefits are limited for disabled persons, but Defendants nevertheless fail to affirmatively inform these individuals of the limitations in benefits when they are enrolled. In fact, Defendants do not even ask customers whether they are disabled.

58. Defendants have no process to keep updated on consumers' status, either. Accordingly, when consumers' statuses change, they will continue to pay for Payment Protection even though they may no longer be eligible for its benefits.

59. If consumers are eventually provided with written materials, the materials themselves are confusing, and do not require the consumers' signature or affirmative assent before they can be billed for the plan. It is virtually impossible for the subscriber to determine all of the exclusions and limitations of Payment Protection, or the value of the product, based on what is provided.

60. The cost of Payment Protection is set forth in a confusing and misleading manner. The premium for Payment Protection is set at a dollar amount per \$100.00 of the ending statement balance for each particular month. For example, the cost of Payment Protection is \$0.99 per \$100 of the previous billing period's New Balance. Thus a cardholder who charges \$1000 a month and carries the balance one month forward pays \$118.80 per annum for Credit Protection. Defendants add these amounts directly to the credit card account statement each month.

61. Payment Protection also provides the added benefit to Defendants of lowering available credit to its subscribers because the imposition of this additional fee brings consumers closer to their maximum credit limit without their knowledge. This operates in some instances to cause consumers to exceed their credit limits, thereby incurring over-the-limit fees. Further, the

imposition of the Payment Protection fee creates a cycle of profitability, in that the fee itself increases subscribers' monthly credit balances, which in turn increases Payment Protection fees in subsequent months.

62. Defendants' "customer service" support is set up in such a way that Hawaii consumers cannot easily cancel ancillary products or receive answers to benefit questions, nor can they easily file claims or receive benefits for filed claims.

63. Upon information and belief, employees at Defendants' Payment Protection call centers are given authority to deny claims immediately over the phone, but do not have authority to approve payment of benefits to claimants in the same manner.

64. Moreover, upon information and belief, when subscribers call Defendants attempting to cancel Payment Protection, employees at Defendants' call center are trained to attempt to talk the subscriber out of canceling by "selling" the supposed benefits of Payment Protection.

65. Further, when claims for Payment Protection benefits are denied, Defendants have not implemented a process through which subscribers' Payment Protection premiums are refunded, even if the subscribers are deemed to be *per se* ineligible for Payment Protection benefits. In fact, if Hawaii subscribers are denied Payment Protection benefits, Defendants neither affirmatively remove subscribers from Payment Protection enrollment going forward, nor do they inform subscribers of their continued obligations to pay for Payment Protection, even though they have been deemed to be ineligible for benefits.

66. Payment Protection is so confusing as to when coverage is triggered, so restricted in terms of the benefits it provides to subscribers, and processing claims is made so difficult by Defendants, that it is essentially worthless.

67. Although heralded as coverage designed for a subscriber's peace of mind and for use when times get tough, the Payment Protection device is designed to prey on the financially insecure and is virtually worthless because of the numerous restrictions that are imposed, because of the exclusions of benefits, and because of the administrative and bureaucratic hurdles that are placed in the way of Hawaii consumers who attempt to secure payments from Defendants under Payment Protection coverage.

68. Upon information and belief, Payment Protection is a profit center for Defendants and serves the Companies' interests in generating fee income, to the detriment of their most vulnerable customers.

69. As a result of their unfair and deceptive marketing practices in connection with sales of Payment Protection, Defendants have increased profits by substantial sums, all thanks to products which provide virtually no benefit to the Hawaii residents who are nevertheless charged for these products month in and month out.

COUNT I
VIOLATION OF HAWAII LAW ON UNFAIR OR DECEPTIVE ACTS OR PRACTICES, HAW. REV. STAT. §§ 480-1 ET SEQ. ("UDAP")

70. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

71. The UDAP sets forth that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." Haw. Rev. Stat. § 480-2(a).

72. Among other things, Haw. Rev. Stat. § 481A-3(a) defines actions that constitute a "deceptive trade practice" as including, but not limited to, the following:

(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

* * * *

(5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;

* * * *

(9) Advertises goods or services with intent not to sell them as advertised;

* * * *

(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Id. § 481A-3(a)(2), (5), (9), (12).

73. As set forth herein, the Defendants' actions of marketing, selling and administering the ancillary products at issue in this Complaint, including Payment Protection, fit within the definitions and scope of the UDAP.

74. The Attorney General of the State of Hawaii "may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section." *Id.* at § 480-2(d). The Attorney General is specifically charged with the administration of the UDAP, and may act *sua sponte* as the agent and legal representative of the State in civil proceedings to enforce the statute.

75. Defendants' conduct described above constitutes multiple, separate violations of the UDAP.

76. Each violation of the statute by the Defendants is an unfair or deceptive act or practice in the conduct of the trade or commerce in violation of the UDAP. For example, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product without his or her assent constituted a separate violation of the UDAP. Likewise, each enrollment by Defendants of a Hawaii consumer who is ineligible for the plan's benefits (due to age, work status, disability or for any other reason) constituted a separate violation of the UDAP. Similarly, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product but failed to disclose all material restrictions, limitations, and exclusions constituted a separate violation of the UDAP. Each time Defendants failed to refund premiums paid also constituted a separate violation of the UDAP.

77. The Defendants' violations were and are likely to mislead Hawaii consumers. The Defendants are aware of the violations, including the widespread slamming practices engaged in and the enrollment of cardholders who are ineligible for benefits offered under Payment Protection, yet Defendants fail to adequately and affirmatively take steps to cure the violations or refund monies owed.

78. As a result of the Defendants' unfair or deceptive practices, the purported contracts between Hawaii consumers and the Defendants for purchase of the aforementioned ancillary products are "void and [] not enforceable at law or in equity." Haw. Rev. Stat. § 480-12.

79. Defendants' violations justify penalties of up to \$10,000 for each violation of the UDAP (*id.* at § 480-3.1) and injunctive relief (*id.* at 480-15).

COUNT II
VIOLATION OF THE UDAP, CONSUMER FRAUDS AGAINST ELDERS
HAW. REV. STAT. § 480-13.5

80. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

81. The UDAP sets forth that “[i]f a person commits a violation under section 480-2 which is directed toward, targets, or injures an elder, a court, in addition to any other civil penalty, may impose a civil penalty not to exceed \$10,000 for each violation.” Haw. Rev. Stat. § 480-13.5(a).

82. Defendants knowingly market specifically to elderly consumers, many of whom are retired, and for whom benefits may be of little or no value.

83. As a result of the Defendants’ unfair or deceptive practices directed specifically towards elders, Defendants’ violations justify assessing additional penalties of up to \$10,000 for each violation of the UDAP committed against elders. *Id.*

COUNT III
UNJUST ENRICHMENT

84. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

85. By unknowingly paying unauthorized or otherwise improper charges to Defendants, as stated above, Hawaii consumers conferred a benefit on Defendants.

86. Defendants knowingly accepted such benefit, to which they are not entitled.

87. Defendants’ acceptance and retention of such benefit under these circumstances is unjust and inequitable.

88. As a matter of equity, consumers within the State should be made whole by application of the doctrine of unjust enrichment.

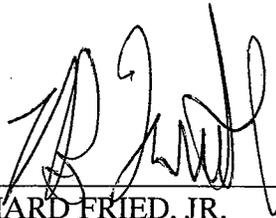
RELIEF

WHEREFORE, the State of Hawaii, by and through its Attorney General, respectfully prays that this Court grant the following relief:

1. Entering Judgment in favor of the State in a final order against each of the Defendants;
2. Enjoining the Defendants and their employees, officers, directors, agents, successors, assignees, merged or acquired predecessors, parent or controlling entities, subsidiaries, and all other persons acting in concert or participation with it, from engaging in unfair or deceptive practices in violation of Hawaii law and ordering temporary, preliminary or permanent injunction;
3. Awarding judgment against the Defendants for restitution and disgorgement of monies under the *parens patriae* doctrine, the general equitable powers of this Court, the doctrine of unjust enrichment and any other authority, for all Hawaii consumers injured by Defendants' acts described in this Complaint;
4. Declaring that each act of each of the Defendants described in this Complaint constitute multiple, separate violations of Hawaii law;
5. Imposing civil penalties for each repeated and willful violation of the UDAP;
6. Imposing additional civil penalties of up to \$10,000 for each repeated and willful violation of the UDAP committed against elders;
7. Awarding equitable relief, including but not limited to restitution and disgorgement of monies obtained as a result of the UDAP violations;
8. Granting the State:
 - a. The cost of investigation and reasonable attorneys' fees, as authorized by the UDAP,
 - b. Pre-judgment and post-judgment interest, and,
 - c. All other relief as provided by law and/or as the Court deems appropriate and just.

Plaintiff asserts claims herein in excess of the minimum jurisdictional requirements of
this Court.

DATED: Honolulu, Hawai'i, April 12, 2012.

A handwritten signature in black ink, appearing to read "L. Richard Fried, Jr.", written over a horizontal line.

L. RICHARD FRIED, JR.
PATRICK F. MCTERNAN
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, <i>EX. REL.</i> DAVID M. LOUIE, ATTORNEY GENERAL,	)	CIVIL NO. <u>12-1-0980-04</u>
	)	(Other Civil Action)
)	
Plaintiff,	)	SUMMONS
)	
vs.)	
)	
CAPITAL ONE BANK (USA) N.A.,)	
CAPITAL ONE SERVICES, LLC,)	
and DOE DEFENDANTS 1-20,	)	No trial date has been set.
)	
Defendants.)	
)	
)	
)	

SUMMONS TO ANSWER CIVIL COMPLAINT

TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby summoned and required to file with the court and serve upon L. Richard Fried, Jr., Esq. and Patrick F. McTernan, Esq., plaintiff's attorneys, whose address is 600 Davies Pacific Center, 841 Bishop Street, Honolulu, Hawaii, 96813, an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled court permits, in writing to this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATE ISSUED: APR 12 2012

A. MARPLE
CLERK



1ST CIRCUIT COURT
STATE OF HAWAII
FILED

2012 APR 12 AM 8:14

J. KUBO
CLERK

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, *EX. REL.* DAVID M.
LOUIE, ATTORNEY GENERAL,

Plaintiff,

vs.

JPMORGAN CHASE & CO., CHASE BANK
USA, N.A., and DOE DEFENDANTS 1-20,

Defendants.

CIVIL NO. 12-1-0985-04 G W B C
(Other Civil Action)

COMPLAINT; SUMMONS

No trial date has been set.

COMPLAINT

Plaintiff, the State of Hawaii, by David M. Louie, Attorney General (“the State”) brings this Complaint against the Defendants JPMorgan Chase & Co., Chase Bank USA, N.A., and Doe Defendants 1-20 (collectively “Defendants” or “Chase”) and alleges, upon information and belief, as follows:

INTRODUCTION

1. This action stems from the Defendants’ marketing, selling, and administering to Hawaii consumers fee-based products, which are ancillary to their credit cards.

2. Defendants market such ancillary products as protection for consumers against improper or unauthorized charges on their credit cards, identity theft, and lost or stolen credit cards and/or as providing benefits in the event of unemployment or disability. Each ancillary product is marketed only to the Defendants’ current card holders, and the products themselves are attached to the cardholders’ specific account at issue.

3. Upon information and belief, when consumers apply for and receive Defendants’ credit cards, a process is triggered whereby a consumer can unknowingly and unintentionally sign up to receive ancillary products.

4. Additionally, Defendants often enroll consumers in these products even though the consumers did not assent to pay for them. This process is referred to as “slamming.” Enrollment may be based on highly deceptive and misleading telemarketing calls, forged or non-existent mailers or online applications, or nothing at all. In each instance, unknowing consumers are hit with monthly fees without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in a position to do this because, unlike a

typical marketer or seller, they are already the consumer's credit card company and already have their credit card number.

5. Further, for certain types of ancillary products, including but not limited to "Chase Payment Protector," "Account Protection Plan," "Chase Payment Advantage," "Account Security Plan," "Total Protection Plan," "Account Ease" and other monikers that all offer similar coverage (hereinafter collectively referred to as "Payment Protection Plans" or "Plans"), that purport to pay the consumer's required minimum monthly payment for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent, Defendants make no effort to determine whether consumers are even eligible for the benefits at the time of sale. As a consequence, Defendants bill ineligible Hawaii citizens for this coverage, even though their status at the time of enrollment prevents them from receiving benefits under the terms of these Payment Protection Plans.

6. The Defendants commit unfair and deceptive business practices and violate statutory law by charging consumers for ancillary products, including Payment Protection Plans, who either did not want them or were not entitled to benefits from them, and by the unfair and deceptive manner in which Defendants offer and administer claims for benefits by consumers.

7. Upon information and belief, as a result of these unfair and deceptive practices, Defendants have amassed substantial sums of money with virtually no benefits to Hawaii citizens who are nevertheless charged for these products month in and month out.

PARTIES

8. This action, brought by the State of Hawaii in its sovereign capacity by and through David M. Louie, the Attorney General of the State of Hawaii, is authorized under

Hawaii law on Unfair or Deceptive Acts or Practices (“UDAP”), Haw. Rev. Stat. § 480-2(d), and under *parens patriae* authority, on behalf of the State and its citizens to enforce Hawaii law. The Attorney General has the power to bring these claims on behalf of the State under the provisions of Haw. Rev. Stat. § 661-10.

9. The State asserts no claims arising out of, under or in any way preempted by the laws (common, statutory or administrative) of the United States, nor does it bring this action on behalf of a class or any group of persons that can be construed as a class. The State specifically disclaims any such claims that would support removal of this action to a United States District Court on the basis of diversity, jurisdictional mandates under the Class Action Fairness Act of 2005 (28 U.S.C. §§ 1332(d), 1453, 1711-1715), federal question jurisdiction, or any other basis.

10. Upon information and belief, Defendant JP Morgan Chase & Co. is a Delaware Corporation and under Delaware law it has the capacity to sue and be sued. Upon information and belief, Defendant JP Morgan Chase & Co. is a publicly traded financial services company with a principal place of business in New York City, New York.

11. Upon information and belief, Defendant Chase Bank USA, N.A. operates a nationally chartered bank incorporated in Delaware with a principal place of business in New York City, New York.

12. At all times material herein, Defendants JP Morgan Chase & Co. and Chase Bank USA, N.A. have been doing business, and continue to do business, within the City & County of Honolulu, State of Hawaii.

13. DOE DEFENDANTS 1-20 are sued herein under fictitious names for the reason that after diligent and good faith efforts to ascertain their names and identities through review of applicable records and through interviews, their true names and identities are presently unknown

to Plaintiff except that they are connected in some manner with the named Defendants and/or were the agents, servants, employees, employers, representatives, co-venturers, associates, sub-contractors or contractors of the named Defendants and/or were in some manner presently unknown to the Plaintiff engaged in the activities alleged herein and/or were in some manner responsible for the injuries or damages to Plaintiff and/or designed and/or placed on the market a product which was defective; which defect was proximate and/or legal cause of injuries or damages to Plaintiff and/or inspected and/or maintained and/or controlled some object or product in a negligent manner, which negligence was a proximate and/or legal cause of such injuries or damages to Plaintiff and/or conducted some activity in a negligent or dangerous manner; which negligent or dangerous conduct was a proximate and/or legal cause of injuries or damages to Plaintiff and/or were in some manner related to the named Defendants and Plaintiff pray for leave to insert herein their true names, identities, capacities, activities and/or responsibilities when the same are ascertained.

FACTUAL BACKGROUND

I. Defendants' Ancillary Products Are Marketed and Sold to Hawaii Consumers in an Unfair and Deceptive Manner

A. Defendants Market and Sell Ancillary Products to Cardholding Consumers Which Generate Substantial Revenue for Them.

14. Upon information and belief, Defendants market and sell ancillary products to all of their credit card customers, but most aggressively market these products to vulnerable Hawaii consumers who fall into the subprime credit category, who have low credit limits because of impaired credit ratings, or who are looking to establish or re-establish their credit.

15. Defendants' ancillary products share common characteristics in that each are: (a) marketed as ways for consumers to protect themselves from fraud or unauthorized charges, or to increase their financial security, (b) considered an optional product that is not required to have a

credit card account, (c) tethered to consumers' specific credit card accounts, and (d) billed directly to the account monthly, with no separate bill provided.

16. Defendants' ancillary products are in fact a dense maze of limitations, exclusions and restrictions, making it impossible for consumers to knowingly determine what these products cover and whether they provide a worthwhile financial benefit.

17. Examples of Defendants' ancillary products include:

(a) **Payment Protection** – this product allegedly safeguards subscribers' credit card accounts by canceling or temporarily suspending the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts in other circumstances.

(b) **Identity Theft Protection** – In exchange for a fixed-rate monthly fee, this product purports to monitor consumers' credit score for indicia of identity theft and will alert the enrollee if something suspicious happens to their credit score.

(c) **Extended Warranty** – This product, formerly referred to as "Purchase Security and Warranty Manager," may no longer be available to current cardholders. It provides extended warranty coverage for items as well as organizing pre-existing warranties for items.

18. Defendants have enrolled large numbers of Hawaii residents and charged them substantial sums of money for enrollment in these product plans.

19. Defendants have devised a scheme to increase the profits they receive from their ancillary products exponentially. Upon information and belief, by limiting the amount of credit given to Hawaii consumers, but issuing multiple cards to them, Defendants are able to impose separate monthly fees for these products on each of the consumers' cards. This scheme doubles, triples or more, the monthly fees charged without any analogous increased risk to Defendants.

B. Defendants Sign Up Unsuspecting Cardholding Consumers for Ancillary Products Without Their Meaningful, Knowing Authorization or Consent

20. Defendants often enroll consumers in these products based on highly deceptive and misleading telemarketing calls, charging some consumers without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in the

unique position to do this because, unlike a typical seller or marketer, they are the consumer's credit card company and already have their credit card numbers. The State of Hawaii brings this *parens patriae* consumer protection lawsuit against Defendants to address their unfair and deceptive business practices.

1. The Way Ancillary Products Are Marketed is Unfair and Deceptive

21. Defendants sell ancillary products to consumers through a number of different channels, including online and direct mail marketing, in which they may ask that consumers "check the box" to initiate the plan, and through telemarketing, where consumers may be asked to press a button on the telephone or verbally agree in order to approve initiation of the plan. The former channels require an affirmative action by the consumer to enroll, such as checking a box or initializing a monthly statement or other mailer or online form in a designated space to authorize enrollment. For a consumer that "checked the box" or initialized a document, confirming consumers' assent to be billed for an ancillary product is easily traceable. On the other hand, for those whose assent was allegedly obtained through telemarketing (upon information and belief, the majority of ancillary product customers), confirmation of affirmative assent requires a review of the telephone call itself.

22. In addition to Defendants' financial motive to enroll as many Hawaii customers as possible into these highly lucrative ancillary product schemes, upon information and belief, individual telemarketers are incentivized to enroll as many cardholders as possible, either because their compensation is commission-based or because their performance is otherwise evaluated and they are subsequently compensated based on the number of cardholders they enroll.

23. Unfair and deceptive practices are rife in telemarketing these products.

24. Defendants' telemarketers employ an array of deceptive sales tactics to elicit cardholders into communicating some affirmative response, knowing that the cardholders do not actually understand that they are supposedly agreeing to purchase an ancillary product.

25. Defendants' telemarketers characterize the call as a courtesy to thank cardholders and remind them of benefits they already get through their credit card agreement (like cash back, airline miles, rewards, etc.), when in fact they are calling to sell ancillary products.

26. Telemarketers may speed through, skip altogether or alter the text of the information they are required to provide to cardholders (the "disclosure"), in an effort to make the disclosure sound like confusing legalese, then say "OK?" or ask if the person heard them or understood, knowing that such a question will almost always elicit an affirmative response such as "ok" or "yes." The cardholder believes they have just listened to a courtesy call, but the Defendants treat the affirmative response as the cardholder's agreement to enroll in the plan. These cardholders may say "ok" or "yes" at the conclusion of the call, but no reasonable person listening to the recordings of these calls would conclude the cardholder was giving their knowing, meaningful assent to be charged a monthly fee for enrollment in the plan.

27. Another tactic Defendants' telemarketers use is to ask cardholders if they may simply send out a "packet of information" about the plan. Defendants treat an affirmative response to this inquiry as authorization for paid enrollment, even though consumers do not understand or believe that they have agreed to purchase anything.

28. Each Defendant has such a "packet of information" for each of the plans offered and Defendants are required to provide enrollees with this information. Many Hawaii customers never receive the packets allegedly sent out. Others who receive the packet ignore or disregard it because they do not understand that they had already been enrolled. They may reasonably

assume it is just another piece of junk mail from a credit card company. While those cardholders that told the telemarketer they could send information about the plan may recognize what the packet relates to, they reasonably assume further steps must be taken by them before they will become enrolled in the plan. If the slammed consumer simply throws out the packet, without reading it, signing it or conferring with the credit card company about it, they are nevertheless still enrolled in the plan.

29. Defendants utilize the card activation process as another way to wrongfully enroll consumers. Consumers are told they must call Defendants from their home phone number to activate their card. Defendants take this opportunity to sell ancillary products. Cardholders who are calling to activate a credit card are particularly susceptible to believing that the “disclosure” is some legal text that must be read to the cardholder, rather than an alleged contractual agreement to purchase an optional, ancillary product of little or no value to them. Many Hawaii cardholders, accustomed to all the legal language and fine print received when they open a new credit card account, become immune to the terms and conditions communicated to them. They reflexively reply “ok,” and have no idea that they have supposedly purchased some ancillary product.

30. In addition to deceptively inducing cardholders to say “yes” or “ok” during the call, Defendants enroll some cardholders who did not provide any affirmative response. In such instances, Defendants have no proof of affirmative assent, either because there is no affirmative response on the recording, there is a clear rejection of the offer, or a record of the call does not exist. The cardholder has been “slammed,” that is, involuntarily enrolled in the plan without their knowledge or consent.

31. And unlike in a typical telemarketing call, this telemarketer does not need the consumer to provide them with their credit card number and information to purchase the product because the telemarketer *is* the credit card company. As a result, Defendants can charge consumers' accounts when there has been no clear and knowing consent given.

2. Hawaii Consumers "Slammed" with Ancillary Products Receive Little to No Relief from the Defendants

32. Defendants know that slamming occurs frequently. In fact, the "refund" process itself is set up on the assumption that consumers have been deceived and do not understand that they have been enrolled. When a consumer calls within thirty (30) days of being enrolled, they are supposed to get their money back no questions asked, and Defendants make no effort to then determine how it came to be that the cardholder was enrolled without their authorization.

33. However, many Cardholders have no idea they are enrolled in an ancillary product plan and do not notice or appreciate the meaning of the line-item charge for the plan on their credit card bills. The charge appears among the other purchases on the cardholder's monthly statement.

34. Some cardholders have accounts that do not require close inspection of monthly statements. This may be because they are not making new purchases on the account (they may be simply seeking to pay off the balance, or took advantage of a balance transfer offer, or utilized the account to make a single purchase). Others do not receive monthly bills at all.

35. Consumers may pay this hidden charge month after month for many months before they become aware of it. For online accounts, add-on plans are often posted to a cardholder's account on the last day of each statement period, and that statement is then archived on the website. A cardholder may review current activity on their account regularly and yet

never see the charge billed to their account on the last day of the previous billing cycle's statement.

36. In addition to the obvious unfairness of enrolling cardholders without their valid authorization, Defendants reap an extra windfall because these enrollees will never invoke the supposed benefits of the plans for which they were charged because they do not even know they may do so.

37. If cardholders do not discover the deceit until more than 30 days after being enrolled, Defendants will not automatically refund the overpayments to the cardholder.

38. Cancellation of plans and disputes about enrollment are so widespread in this industry that Defendants use template form letters to send to slammed consumers who complain. Instead of "coming clean" to these aggrieved consumers, Defendants make it exceedingly difficult for them to get relief, such that many Hawaii consumers give up hope of ever getting their money back after paying for a product they did not request and did not use.

II. Defendants Sell Payment Protection, a Specific Ancillary Product, to Hawaii Consumers Who Can Receive No Benefit from the Coverage Offered

39. Payment Protection has come under increased scrutiny recently from both the federal government and private plaintiffs.¹

¹ See, e.g., Credit Cards: Consumer Costs for Debt Protection Products Can be Substantial Relative to Benefits but are Not a Focus of Regulatory Oversight, U.S. Government Accountability Office, GAO-11-311, March 25, 2011 ("GAO Report"), attached as Ex. 1 to the Complaint.

Lawsuits are pending, including cases brought by Attorneys General. See *State of Minn. v. Discover Fin. Servs. et al.*, 27-CV-10-27510 (D. Minn. Dec. 6, 2010), (Ex. 2); *State of West Virginia v. Capital One Bank (USA), N.A., et al.*, 10-C-7-N (Cir. Mason, WV Jan. 20, 2010) (Ex. 3). At least two cases brought by consumer classes have settled. See Order Granting Final Approval of Class Action Settlement, *Spinelli et al. v. Capital One Bank and Capital One Servs.*, 08-cv-132-T-33EAJ, Dkt. 231 (M.D. Fla. Nov. 23, 2010), [Proposed] Order (Ex. 4), and *Kardonick et al. v. JP Morgan Chase & Co. and Chase Bank USA N.A.*, 10-cv-23235, Dkt. 23 (S.D. Fla. Feb. 3, 2011) (Ex. 5).

40. The ancillary products at issue in this Complaint, including but not limited to Payment Protection, are not deemed insurance products under Hawaii law, and the Defendants are not insurance companies.

41. Defendants do not consider Payment Protection an insurance product. Payment Protection Plans are not registered or identified as insurance products with the Department of Commerce & Consumer Affairs for the State of Hawaii, which is tasked with the responsibility of overseeing the insurance industry in Hawaii, or other appropriate authorities.

42. Defendants do not designate Payment Protection an “insurance product.” This way, they can avoid state regulation and charge higher fees. Payment Protection Plans are unregulated as to terms, conditions and fees, making them highly profitable for Defendants.

43. These types of plans offer little to no benefit to consumers for several reasons and have been subject to criticism from consumer advocates on several fronts. For example, it may not be disclosed to consumers that under the terms and conditions of the plan, the cardholder may not be permitted to use their credit card while they have invoked Payment Protection benefits, and in the periods of time when consumers actually invoke the benefits, such as in the case of unemployment, the cardholder often needs their credit the most.

44. Defendants market specifically to elderly consumers, for whom benefits may be of little or no value. Defendants know that their conduct is directed towards elderly consumers (defined as sixty-two years of age or older by HRS § 480-13.5(c)), because they have the consumer’s date of birth on file. The main benefit of Defendants’ Payment Protection plans is that they suspend payment obligations when the borrower’s income stream is lost due to unemployment, disability, or natural disaster. But for those on a fixed income, any such

“protection” may be illusory because the “qualifying events” will not disrupt the income stream coming from a fixed income.

45. Defendants market Payment Protection through direct mail and solicit Payment Protection customers over the phone. They represent Payment Protection as a product that pays the required minimum monthly payment due on the subscriber’s credit card account and the Payment Protection plan fee for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent. Defendants’ marketing for this product claims that “Life Brings Change. Be Prepared. Plan for the unexpected with Chase Payment Protector.” See <https://www.chasepaymentprotector.com/index.cfm> (last viewed on February 6, 2012).

46. However, Defendants misrepresent and/or fail to disclose the real nature of Payment Protection. While representing to consumers that Payment Protection allows consumers to plan for the unexpected, in fact, Defendants impose Payment Protection on customers who did not authorize the charges. Because these customers do not know this “coverage” has been imposed on them and that they were enrolled without their consent, they do not know they can avail themselves of it and do not have the necessary information to determine what Payment Protection covers and whether it would be a sound financial choice to continue paying for the Plan.

47. Defendants market their Payment Protection Plans to individuals who do not qualify for the alleged benefits of the Plans. The numerous qualifications and restrictions set forth in Defendants’ fine print expose the advertised “protection” as an illusion, at best, because the Defendants do not determine consumers’ eligibility for various options under the Payment Protection Plan before marketing and selling Payment Protection to them.

48. Defendants market Payment Protection as a product that will safeguard subscribers' credit card accounts by suspending or crediting the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts in other circumstances. When minimum monthly payments are credited, the monthly interest charges and the Payment Protection fee (and any other ancillary fees) continue to accrue without adequate disclosure to consumers.

49. The terms offered for the Payment Protection scheme are varied, complicated and always changing. However, all of the various plans provide for some form of payment suspension upon the occurrence of the following events, as it defines the terms: *Involuntary Unemployment, Hospitalization or Disability, Leave of Absence*, the occurrence of some *Life Event* or *Personal Milestone*, including things like birth or adoption, marriage, divorce, a disaster, being called to active military duty, and other closely defined events, and *Accidental Death*. The restrictions, limitations and exclusions associated with these events that trigger supposed Payment Protection benefits are expansive and constantly evolving.

50. Defendants make no reasonable effort and undertake no investigation, including review of information in their possession regarding the cardholder, to determine if Payment Protection coverage would apply to the cardholder. Such information may include health status, name of last employer and date of birth, which would assist Defendants in knowing whether a particular cardholder is eligible for Payment Protection benefits.

51. Accordingly, Defendants engage in aggressively marketing to enroll Hawaii cardholders in Payment Protection even when they have information in their possession indicating that the product may have limited or no value to the particular consumer.

52. Telephone marketing scripts and written materials provided by Defendants to consumers are incomplete, indecipherable, misleading and obfuscatory.

53. One example of the misleading and obfuscatory language is Defendants' failure to disclose that Payment Protection is actually akin to an insurance product. Despite this fact, marketing materials carefully avoid any use of the word "insurance." The materials may, however, refer to "premiums," "claims" or "benefits," which indicates that Defendants internally regard and acknowledge this as an insurance product.

54. Defendants do not adequately describe or explain the exclusions to prospective subscribers so they can determine whether they have certain characteristics or meet certain factors that would bar them from being eligible for benefits under Credit Protection, even though Defendants have a common practice of imposing limitations on full coverage based on exclusions.

- a. Payment Protection benefits do not apply to retired persons. This most often affects "elder" consumers aged sixty-two or over;
- b. Payment Protection benefits do not apply to persons self-employed, employed part time or seasonally;
- c. Payment Protection benefits do not apply immediately or for some period directly after unemployment or disability;
- d. Payment Protection benefits do not apply unless you qualify for state unemployment benefits and continue to meet qualifications;
- e. Payment Protection benefits do not apply unless you notify the company and provide verification within a set period of time;
- f. Subscribers may not be able to use their credit card for new purchases while Payment Protection benefits are being provided;
- g. Payment Protection coverage is limited to per calendar year maximums; and
- h. Payment Protection benefits require continued treatment and verification by a physician for the duration of the disability.

55. For instance, retired persons in Hawaii, many of whom are “elder” senior citizens aged sixty-two or older, are charged for this product even though they are categorically excluded from receiving many of the benefits under the plan. Defendants do not ask customers whether they are retired.

56. Further, part-time workers, seasonal workers and workers concluding an employment contract (including ending a military tour of duty) are also limited or categorically excluded from receiving benefits. To qualify for benefits, one needs to work a set number of hours a week in employment considered to be permanent. However, Defendants make no effort to investigate whether any of the Hawaii consumers they charge for Payment Protection are part-time, seasonal or military workers. These terms are not adequately communicated or defined in written materials.

57. Finally, benefits are limited for disabled persons, but Defendants nevertheless fail to affirmatively inform these individuals of the limitations in benefits when they are enrolled. In fact, Defendants do not even ask customers whether they are disabled.

58. Defendants have no process to keep updated on consumers’ status, either. Accordingly, when consumers’ statuses change, they will continue to pay for Payment Protection even though they may no longer be eligible for its benefits.

59. If consumers are eventually provided with written materials, the materials themselves are confusing, and do not require the consumers’ signature or affirmative assent before they can be billed for the plan. It is virtually impossible for the subscriber to determine all of the exclusions and limitations of Payment Protection, or the value of the product, based on what is provided.

60. The cost of Payment Protection is set forth in a confusing and misleading manner. The premium for Payment Protection is set at a dollar amount per \$100.00 of the ending statement balance for each particular month. For example, upon information and belief, the plans charge every month anywhere from \$0.79 to \$0.89 for every \$100 of the previous billing period's New Balance. Thus, a customer who charges \$1000 a month, and even pays off his balance every month, pays between \$94.80 and \$106.80 per year for Payment Protection. Defendants add these amounts directly to the credit card account statement each month.

61. Payment Protection also provides the added benefit to Defendants of lowering available credit to its subscribers because the imposition of this additional fee brings consumers closer to their maximum credit limit without their knowledge. This operates in some instances to cause consumers to exceed their credit limits, thereby incurring over-the-limit fees. Further, the imposition of the Payment Protection fee creates a cycle of profitability, in that the fee itself increases subscribers' monthly credit balances, which in turn increases Payment Protection fees in subsequent months.

62. Defendants' "customer service" support is set up in such a way that Hawaii consumers cannot easily cancel ancillary products or receive answers to benefit questions, nor can they easily file claims or receive benefits for filed claims.

63. Upon information and belief, employees at Defendants' Payment Protection call centers are given authority to deny claims immediately over the phone, but do not have authority to approve payment of benefits to claimants in the same manner.

64. Moreover, upon information and belief, when subscribers call Defendants attempting to cancel Payment Protection, employees at Defendants' call center are trained to

attempt to talk the subscriber out of canceling by “selling” the supposed benefits of Payment Protection.

65. Further, when claims for Payment Protection benefits are denied, Defendants have not implemented a process through which subscribers’ Payment Protection premiums are refunded, even if the subscribers are deemed to be *per se* ineligible for Payment Protection benefits. In fact, if Hawaii subscribers are denied Payment Protection benefits, Defendants neither affirmatively remove subscribers from Payment Protection enrollment going forward, nor do they inform subscribers of their continued obligations to pay for Payment Protection, even though they have been deemed to be ineligible for benefits.

66. Payment Protection is so confusing as to when coverage is triggered, so restricted in terms of the benefits it provides to subscribers, and processing claims is made so difficult by Defendants, that it is essentially worthless.

67. Although heralded as coverage designed for a subscriber’s peace of mind and for use when times get tough, the Payment Protection device is designed to prey on the financially insecure and is virtually worthless because of the numerous restrictions that are imposed, because of the exclusions of benefits, and because of the administrative and bureaucratic hurdles that are placed in the way of Hawaii consumers who attempt to secure payments from Defendants under Payment Protection coverage.

68. Chase operates a financial services empire and, with over \$2 trillion in assets, \$1 trillion in deposits, \$115.6 billion in annual revenue in 2010, and \$11.7 billion in profit.

69. As a result of their unfair and deceptive marketing practices in connection with sales of Payment Protection, Defendants have increased profits by substantial sums, all thanks to

products which provide virtually no benefit to the Hawaii residents who are nevertheless charged for these products month in and month out.

COUNT I
VIOLATION OF HAWAII LAW ON UNFAIR OR DECEPTIVE ACTS OR PRACTICES, HAW. REV. STAT. §§ 480-1 ET SEQ. (“UDAP”)

70. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

71. The UDAP sets forth that “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.” Haw. Rev. Stat. § 480-2(a).

72. Among other things, Haw. Rev. Stat. § 481A-3(a) defines actions that constitute a “deceptive trade practice” as including, but not limited to, the following:

(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

* * * *

(5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;

* * * *

(9) Advertises goods or services with intent not to sell them as advertised;

* * * *

(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Id. § 481A-3(a)(2), (5), (9), (12).

73. As set forth herein, the Defendants' actions of marketing, selling and administering the ancillary products at issue in this Complaint, including Payment Protection, fit within the definitions and scope of the UDAP.

74. The Attorney General of the State of Hawaii "may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section." *Id.* at § 480-2(d). The Attorney General is specifically charged with the administration of the UDAP, and may act *sua sponte* as the agent and legal representative of the State in civil proceedings to enforce the statute.

75. Defendants' conduct described above constitutes multiple, separate violations of the UDAP.

76. Each violation of the statute by the Defendants is an unfair or deceptive act or practice in the conduct of the trade or commerce in violation of the UDAP. For example, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product without his or her assent constituted a separate violation of the UDAP. Likewise, each enrollment by Defendants of a Hawaii consumer who is ineligible for the plan's benefits (due to age, work status, disability or for any other reason) constituted a separate violation of the UDAP. Similarly, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product but failed to disclose all material restrictions, limitations, and exclusions constituted a separate violation of the UDAP. Each time Defendants failed to refund premiums paid also constituted a separate violation of the UDAP.

77. The Defendants' violations were and are likely to mislead Hawaii consumers. The Defendants are aware of the violations, including the widespread slamming practices engaged in and the enrollment of cardholders who are ineligible for benefits offered under

Payment Protection, yet Defendants fail to adequately and affirmatively take steps to cure the violations or refund monies owed.

78. As a result of the Defendants' unfair or deceptive practices, the purported contracts between Hawaii consumers and the Defendants for purchase of the aforementioned ancillary products are "void and [] not enforceable at law or in equity." Haw. Rev. Stat. § 480-12.

79. Defendants' violations penalties of up to \$10,000 for each violation of the UDAP (*id.* at § 480-3.1) and injunctive relief (*id.* at 480-15).

COUNT II
VIOLATION OF THE UDAP, CONSUMER FRAUDS AGAINST ELDERS
HAW. REV. STAT. § 480-13.5

80. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

81. The UDAP sets forth that "[i]f a person commits a violation under section 480-2 which is directed toward, targets, or injures an elder, a court, in addition to any other civil penalty, may impose a civil penalty not to exceed \$10,000 for each violation." Haw. Rev. Stat. § 480-13.5(a).

82. Defendants knowingly market specifically to elderly consumers, many of whom are retired, and for whom benefits may be of little or no value.

83. As a result of the Defendants' unfair or deceptive practices directed specifically towards elders, Defendants' violations justify assessing additional penalties of up to \$10,000 for each violation of the UDAP committed against elders. *Id.*

COUNT III
UNJUST ENRICHMENT

84. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

85. By unknowingly paying unauthorized or otherwise improper charges to Defendants, as stated above, Hawaii consumers conferred a benefit on Defendants.

86. Defendants knowingly accepted such benefit, to which they are not entitled.

87. Defendants' acceptance and retention of such benefit under these circumstances is unjust and inequitable.

88. As a matter of equity, consumers within the State should be made whole by application of the doctrine of unjust enrichment.

RELIEF

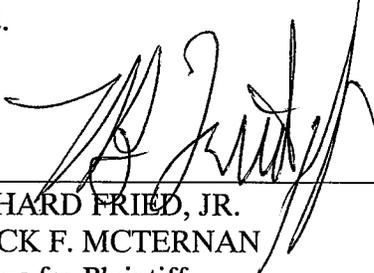
WHEREFORE, the State of Hawaii, by and through its Attorney General, respectfully prays that this Court grant the following relief:

1. Entering Judgment in favor of the State in a final order against each of the Defendants;
2. Enjoining the Defendants and their employees, officers, directors, agents, successors, assignees, merged or acquired predecessors, parent or controlling entities, subsidiaries, and all other persons acting in concert or participation with it, from engaging in unfair or deceptive practices in violation of Hawaii law and ordering temporary, preliminary or permanent injunction;
3. Awarding judgment against the Defendants for restitution and disgorgement of monies under the *parens patriae* doctrine, the general equitable powers of this Court, the doctrine of unjust enrichment and any other authority, for all Hawaii consumers injured by Defendants' acts described in this Complaint;
4. Declaring that each act of each of the Defendants described in this Complaint constitute multiple, separate violations of Hawaii law;
5. Imposing civil penalties for each repeated and willful violation of the UDAP;

6. Imposing additional civil penalties of up to \$10,000 for each repeated and willful violation of the UDAP committed against elders;
7. Awarding equitable relief, including but not limited to restitution and disgorgement of monies obtained as a result of the UDAP violations;
8. Granting the State:
 - a. The cost of investigation and reasonable attorneys' fees, as authorized by the UDAP,
 - b. Pre-judgment and post-judgment interest, and,
 - c. All other relief as provided by law and/or as the Court deems appropriate and just.

Plaintiff asserts claims herein in excess of the minimum jurisdictional requirements of this Court.

DATED: Honolulu, Hawai'i, April 12, 2012.



L. RICHARD FRIED, JR.
PATRICK F. MCTERNAN
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, <i>EX. REL.</i> DAVID M. LOUIE, ATTORNEY GENERAL,	)	CIVIL NO. <u>12-1-0985-04</u>
	)	(Other Civil Action)
)	
Plaintiff,	)	SUMMONS
)	
vs.)	
)	
JPMORGAN CHASE & CO., CHASE BANK USA, N.A., and DOE DEFENDANTS 1-20,)	
	)	No trial date has been set.
Defendants.)	
)	
)	

SUMMONS TO ANSWER CIVIL COMPLAINT

TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby summoned and required to file with the court and serve upon L. Richard Fried, Jr., Esq. and Patrick F. McTernan, Esq., plaintiff's attorneys, whose address is 600 Davies Pacific Center, 841 Bishop Street, Honolulu, Hawaii, 96813, an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled court permits, in writing to this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATE ISSUED: APR 12 2012

J. KUBO

CLERK



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1ST CIRCUIT COURT
 STATE OF HAWAII
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2012 APR 12 AM 8:28

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, <i>EX. REL.</i> DAVID M.)	CIVIL NO. <u>12-1-0986-04</u>	V L C
LOUIE, ATTORNEY GENERAL,	)	(Other Civil Action)	
)		
Plaintiff,	)	COMPLAINT; SUMMONS	
)		
vs.)		
)		
CITIGROUP INC., CITIBANK, N.A.,)		
DEPARTMENT STORES NATIONAL BANK,)		
and DOE DEFENDANTS 1-20,	)	No trial date has been set.	
)		
Defendants.)		
)		
)		

COMPLAINT

Plaintiff, the State of Hawaii, by David M. Louie, Attorney General (“the State”) brings this Complaint against the Defendants Citigroup Inc., Citibank, N.A., Department Stores National Bank, and Doe Defendants 1-20 (collectively “Defendants” or “Citi”) and alleges, upon information and belief, as follows:

INTRODUCTION

1. This action stems from the Defendants’ marketing, selling, and administering to Hawaii consumers fee-based products, which are ancillary to their credit cards.
2. Defendants market such ancillary products as protection for consumers against improper or unauthorized charges on their credit cards, identity theft, and lost or stolen credit cards and/or as providing benefits in the event of unemployment or disability. Each ancillary product is marketed only to the Defendants’ current card holders, and the products themselves are attached to the cardholders’ specific account at issue.
3. Upon information and belief, when consumers apply for and receive Defendants’ credit cards, a process is triggered whereby a consumer can unknowingly and unintentionally sign up to receive ancillary products.
4. Additionally, Defendants often enroll consumers in these products even though the consumers did not assent to pay for them. This process is referred to as “slamming.” Enrollment may be based on highly deceptive and misleading telemarketing calls, forged or non-existent mailers or online applications, or nothing at all. In each instance, unknowing consumers are hit with monthly fees without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in a position to do this because, unlike a

typical marketer or seller, they are already the consumer's credit card company and already have their credit card number.

5. Further, for certain types of ancillary products, including but not limited to "Credit Protect," "Credit Protector," "Payment Protector," "PaymentAid," "PaymentAid Plus," and other monikers that all offer similar coverage (hereinafter collectively referred to as "Payment Protection Plans" or "Plans"), that purport to pay the consumer's required minimum monthly payment for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent, Defendants make no effort to determine whether consumers are even eligible for the benefits at the time of sale. As a consequence, Defendants bill ineligible Hawaii citizens for this coverage, even though their status at the time of enrollment prevents them from receiving benefits under the terms of these Payment Protection Plans.

6. The Defendants commit unfair and deceptive business practices and violate statutory law by charging consumers for ancillary products, including Payment Protection Plans, who either did not want them or were not entitled to benefits from them, and by the unfair and deceptive manner in which Defendants offer and administer claims for benefits by consumers.

7. Upon information and belief, as a result of these unfair and deceptive practices, Defendants have amassed substantial sums of money with virtually no benefits to Hawaii citizens who are nevertheless charged for these products month in and month out.

PARTIES

8. This action, brought by the State of Hawaii in its sovereign capacity by and through David M. Louie, the Attorney General of the State of Hawaii, is authorized under Hawaii law on Unfair or Deceptive Acts or Practices ("UDAP"), Haw. Rev. Stat. §§ 480-2(d).

and 480-14(a), and under *parens patriae* authority, on behalf of the State and its citizens to enforce Hawaii law. The Attorney General has the power to bring these claims on behalf of the State under the provisions of Haw. Rev. Stat. §§ 480-14(a) and 661-10.

9. The State asserts no claims arising out of, under or in any way preempted by the laws (common, statutory or administrative) of the United States, nor does it bring this action on behalf of a class or any group of persons that can be construed as a class. The State specifically disclaims any such claims that would support removal of this action to a United States District Court on the basis of diversity, jurisdictional mandates under the Class Action Fairness Act of 2005 (28 U.S.C. §§ 1332(d), 1453, 1711-1715), federal question jurisdiction, or any other basis.

10. Upon information and belief, Defendant Citigroup Inc. is a Delaware Corporation and under Delaware law it has the capacity to sue and be sued. Upon information and belief, Defendant Citigroup Inc. is a publicly traded company with a principal place of business in New York, New York.

11. Upon information and belief, Defendant Citibank, N.A. operates a nationally chartered bank. Citibank, N.A. is a subsidiary of Citicorp, which in turn is a subsidiary of Citigroup Inc.

12. At all times material herein, Defendants Citigroup Inc. and Citibank, N.A. have been doing business, and continue to do business, within the City & County of Honolulu, State of Hawaii.

13. DOE DEFENDANTS 1-20 are sued herein under fictitious names for the reason that after diligent and good faith efforts to ascertain their names and identities through review of applicable records and through interviews, their true names and identities are presently unknown to Plaintiff except that they are connected in some manner with the named Defendants and/or

were the agents, servants, employees, employers, representatives, co-venturers, associates, sub-contractors or contractors of the named Defendants and/or were in some manner presently unknown to the Plaintiff engaged in the activities alleged herein and/or were in some manner responsible for the injuries or damages to Plaintiff and/or designed and/or placed on the market a product which was defective; which defect was proximate and/or legal cause of injuries or damages to Plaintiff and/or inspected and/or maintained and/or controlled some object or product in a negligent manner, which negligence was a proximate and/or legal cause of such injuries or damages to Plaintiff and/or conducted some activity in a negligent or dangerous manner; which negligent or dangerous conduct was a proximate and/or legal cause of injuries or damages to Plaintiff and/or were in some manner related to the named Defendants and Plaintiff pray for leave to insert herein their true names, identities, capacities, activities and/or responsibilities when the same are ascertained.

FACTUAL BACKGROUND

I. Defendants' Ancillary Products Are Marketed and Sold to Hawaii Consumers in an Unfair and Deceptive Manner

A. Defendants Market and Sell Ancillary Products to Cardholding Consumers Which Generate Substantial Revenue for Them.

14. Upon information and belief, Defendants market and sell ancillary products to all of their credit card customers, but most aggressively market these products to vulnerable Hawaii consumers who fall into the subprime credit category, who have low credit limits because of impaired credit ratings, or who are looking to establish or re-establish their credit.

15. Defendants' ancillary products share common characteristics in that each are: (a) marketed as ways for consumers to protect themselves from fraud or unauthorized charges, or to increase their financial security, (b) considered an optional product that is not required to have a

credit card account, (c) tethered to consumers' specific credit card accounts, and (d) billed directly to the account monthly, with no separate bill provided.

16. Defendants' ancillary products are in fact a dense maze of limitations, exclusions and restrictions, making it impossible for consumers to knowingly determine what these products cover and whether they provide a worthwhile financial benefit.

17. Examples of Defendants' ancillary products include:

(a) **Payment Protection** – this product allegedly safeguards subscribers' credit card accounts by crediting the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts (up to \$10,000 maximum) in other circumstances.

(b) **Identity Theft Protection** – In exchange for a fixed-rate monthly fee, this product (called IdentityMonitor by Citi) purports to monitor consumers' credit score for indicia of identity theft and will alert the enrollee if something suspicious happens to their credit score.

18. Defendants have enrolled large numbers of Hawaii residents and charged them substantial sums of money for enrollment in these product plans.

19. Defendants have devised a scheme to increase the profits they receive from their ancillary products exponentially. Upon information and belief, by limiting the amount of credit given to Hawaii consumers, but issuing multiple cards to them, Defendants are able to impose separate monthly fees for these products on each of the consumers' cards. This scheme doubles, triples or more, the monthly fees charged without any analogous increased risk to Defendants.

B. Defendants Sign Up Unsuspecting Cardholding Consumers for Ancillary Products Without Their Meaningful, Knowing Authorization or Consent

20. Defendants often enroll consumers in these products based on highly deceptive and misleading telemarketing calls, charging some consumers without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in the unique position to do this because, unlike a typical seller or marketer, they are the consumer's credit card company and already have their credit card numbers. The State of Hawaii brings this

parens patriae consumer protection lawsuit against Defendants to address their unfair and deceptive business practices.

1. The Way Ancillary Products Are Marketed is Unfair and Deceptive

21. Defendants sell ancillary products to consumers through a number of different channels, including online and direct mail marketing, in which they may ask that consumers “check the box” to initiate the plan, and through telemarketing, where consumers may be asked to press a button on the telephone or verbally agree in order to approve initiation of the plan. The former channels require an affirmative action by the consumer to enroll, such as checking a box or initializing a monthly statement or other mailer or online form in a designated space to authorize enrollment. For a consumer that “checked the box” or initialized a document, confirming consumers’ assent to be billed for an ancillary product is easily traceable. On the other hand, for those whose assent was allegedly obtained through telemarketing (upon information and belief, the majority of ancillary product customers), confirmation of affirmative assent requires a review of the telephone call itself.

22. In addition to Defendants’ financial motive to enroll as many Hawaii customers as possible into these highly lucrative ancillary product schemes, upon information and belief, individual telemarketers are incentivized to enroll as many cardholders as possible, either because their compensation is commission-based or because their performance is otherwise evaluated and they are subsequently compensated based on the number of cardholders they enroll.

23. Unfair and deceptive practices are rife in telemarketing these products.

24. Defendants' telemarketers employ an array of deceptive sales tactics to elicit cardholders into communicating some affirmative response, knowing that the cardholders do not actually understand that they are supposedly agreeing to purchase an ancillary product.

25. Defendants' telemarketers characterize the call as a courtesy to thank cardholders and remind them of benefits they already get through their credit card agreement (like cash back, airline miles, rewards, etc.), when in fact they are calling to sell ancillary products.

26. Telemarketers may speed through, skip altogether or alter the text of the information they are required to provide to cardholders (the "disclosure"), in an effort to make the disclosure sound like confusing legalese, then say "OK?" or ask if the person heard them or understood, knowing that such a question will almost always elicit an affirmative response such as "ok" or "yes." The cardholder believes they have just listened to a courtesy call, but the Defendants treat the affirmative response as the cardholder's agreement to enroll in the plan. These cardholders may say "ok" or "yes" at the conclusion of the call, but no reasonable person listening to the recordings of these calls would conclude the cardholder was giving their knowing, meaningful assent to be charged a monthly fee for enrollment in the plan.

27. Another tactic Defendants' telemarketers use is to ask cardholders if they may simply send out a "packet of information" about the plan. Defendants treat an affirmative response to this inquiry as authorization for paid enrollment, even though consumers do not understand or believe that they have agreed to purchase anything.

28. Each Defendant has such a "packet of information" for each of the plans offered and Defendants are required to provide enrollees with this information. For example, Defendants use a document entitled "*PaymentAid Terms and Conditions in Plain Language*" for this purpose for its Payment Protection Plan. Many Hawaii customers never receive the packets

allegedly sent out. Others who receive the packet ignore or disregard it because they do not understand that they had already been enrolled. They may reasonably assume it is just another piece of junk mail from a credit card company. While those cardholders that told the telemarketer they could send information about the plan may recognize what the packet relates to, they reasonably assume further steps must be taken by them before they will become enrolled in the plan. If the slammed consumer simply throws out the packet, without reading it, signing it or conferring with the credit card company about it, they are nevertheless still enrolled in the plan.

29. Defendants utilize the card activation process as another way to wrongfully enroll consumers. Consumers are told they must call Defendants from their home phone number to activate their card. Defendants take this opportunity to sell ancillary products. Cardholders who are calling to activate a credit card are particularly susceptible to believing that the “disclosure” is some legal text that must be read to the cardholder, rather than an alleged contractual agreement to purchase an optional, ancillary product of little or no value to them. Many Hawaii cardholders, accustomed to all the legal language and fine print received when they open a new credit card account, become immune to the terms and conditions communicated to them. They reflexively reply “ok,” and have no idea that they have supposedly purchased some ancillary product.

30. In addition to deceptively inducing cardholders to say “yes” or “ok” during the call, Defendants enroll some cardholders who did not provide any affirmative response. In such instances, Defendants have no proof of affirmative assent, either because there is no affirmative response on the recording, there is a clear rejection of the offer, or a record of the call does not

exist. The cardholder has been “slammed,” that is, involuntarily enrolled in the plan without their knowledge or consent.

31. And unlike in a typical telemarketing call, this telemarketer does not need the consumer to provide them with their credit card number and information to purchase the product because the telemarketer *is* the credit card company. As a result, Defendants can charge consumers’ accounts when there has been no clear and knowing consent given.

2. Hawaii Consumers “Slammed” with Ancillary Products Receive Little to No Relief from the Defendants

32. Defendants know that slamming occurs frequently. In fact, the “refund” process itself is set up on the assumption that consumers have been deceived and do not understand that they have been enrolled. When a consumer calls within thirty (30) days of being enrolled, they are supposed to get their money back no questions asked, and Defendants make no effort to then determine how it came to be that the cardholder was enrolled without their authorization.

33. However, many Cardholders have no idea they are enrolled in an ancillary product plan and do not notice or appreciate the meaning of the line-item charge for the plan on their credit card bills. The charge appears among the other purchases on the cardholder’s monthly statement.

34. Some cardholders have accounts that do not require close inspection of monthly statements. This may be because they are not making new purchases on the account (they may be simply seeking to pay off the balance, or took advantage of a balance transfer offer, or utilized the account to make a single purchase). Others do not receive monthly bills at all.

35. Consumers may pay this hidden charge month after month for many months before they become aware of it. For online accounts, add-on plans are often posted to a cardholder’s account on the last day of each statement period, and that statement is then archived

on the website. A cardholder may review current activity on their account regularly and yet never see the charge billed to their account on the last day of the previous billing cycle's statement.

36. In addition to the obvious unfairness of enrolling cardholders without their valid authorization, Defendants reap an extra windfall because these enrollees will never invoke the supposed benefits of the plans for which they were charged because they do not even know they may do so.

37. If cardholders do not discover the deceit until more than 30 days after being enrolled, Defendants will not automatically refund the overpayments to the cardholder.

38. Cancellation of plans and disputes about enrollment are so widespread in this industry that Defendants use template form letters to send to slammed consumers who complain. Instead of "coming clean" to these aggrieved consumers, Defendants make it exceedingly difficult for them to get relief, such that many Hawaii consumers give up hope of ever getting their money back after paying for a product they did not request and did not use.

II. Defendants Sell Payment Protection, a Specific Ancillary Product, to Hawaii Consumers Who Can Receive No Benefit from the Coverage Offered

39. Payment Protection has come under increased scrutiny recently from both the federal government and private plaintiffs.¹

¹ See, e.g., Credit Cards: Consumer Costs for Debt Protection Products Can be Substantial Relative to Benefits but are Not a Focus of Regulatory Oversight, U.S. Government Accountability Office, GAO-11-311, March 25, 2011 ("GAO Report"), attached as Ex. 1 to the Complaint.

Lawsuits are pending, including cases brought by Attorneys General. See *State of Minn. v. Discover Fin. Servs. et al.*, 27-CV-10-27510 (D. Minn. Dec. 6, 2010), (Ex. 2); *State of West Virginia v. Capital One Bank (USA), N.A., et al.*, 10-C-7-N (Cir. Mason, WV Jan. 20, 2010) (Ex. 3). At least two cases brought by consumer classes have settled. See Order Granting Final Approval of Class Action Settlement, *Spinelli et al. v. Capital One Bank and Capital One Servs.*, 08-cv-132-T-33EAJ, Dkt. 231 (M.D. Fla. Nov. 23, 2010), [Proposed] Order (Ex. 4), and *Kardonick et al. v. JP Morgan Chase & Co. and Chase Bank USA N.A.*, 10-cv-23235, Dkt. 23 (S.D. Fla. Feb. 3, 2011) (Ex. 5).

40. The ancillary products at issue in this Complaint, including but not limited to Payment Protection, are not deemed insurance products under Hawaii law, and the Defendants are not insurance companies.

41. Defendants do not consider Payment Protection an insurance product. Payment Protection Plans are not registered or identified as insurance products with the Department of Commerce & Consumer Affairs for the State of Hawaii, which is tasked with the responsibility of overseeing the insurance industry in Hawaii, or other appropriate authorities.

42. Defendants do not designate Payment Protection an “insurance product.” This way, they can avoid state regulation and charge higher fees. Payment Protection Plans are unregulated as to terms, conditions and fees, making them highly profitable for Defendants.

43. These types of plans offer little to no benefit to consumers for several reasons and have been subject to criticism from consumer advocates on several fronts. For example, it may not be disclosed to consumers that under the terms and conditions of the plan, the cardholder may not be permitted to use their credit card while they have invoked Payment Protection benefits, and in the periods of time when consumers actually invoke the benefits, such as in the case of unemployment, the cardholder often needs their credit the most.

44. Defendants market specifically to elderly consumers, for whom benefits may be of little or no value. Defendants know that their conduct is directed towards elderly consumers (defined as sixty-two years of age or older by HRS § 480-13.5(c)), because they have the consumer’s date of birth on file. The main benefit of Defendants’ Payment Protection plans is that they suspend payment obligations when the borrower’s income stream is lost due to unemployment, disability, or natural disaster. But for those on a fixed income, any such

“protection” may be illusory because the “qualifying events” will not disrupt the income stream coming from a fixed income.

45. Defendants market Payment Protection through direct mail and solicit Payment Protection customers over the phone. They represent Payment Protection as a product that pays the required minimum monthly payment due on the subscriber’s credit card account and the Payment Protection plan fee for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent. In the past, Defendants claimed that this product provides “[s]o much protection and peace of mind for so little!” See <https://www.paymentaidplus.citi.com/details.aspx?ordsrc=D1083> (last viewed on June 14, 2010). Defendants continue to market PaymentAid as providing protection “against unexpected loss of income.” See <https://creditcards.citi.com/services/paymentaid> (last viewed on February 6, 2012).

46. However, Defendants misrepresent and/or fail to disclose the real nature of Payment Protection. While representing to consumers that Payment Protection protects against unexpected loss of income, among other representations, in fact, Defendants impose Payment Protection on customers who did not authorize the charges. Because these customers do not know this “coverage” has been imposed on them and that they were enrolled without their consent, they do not know they can avail themselves of it and do not have the necessary information to determine what Payment Protection covers and whether it would be a sound financial choice to continue paying for the Plan.

47. Defendants market their Payment Protection Plans to individuals who do not qualify for the alleged benefits of the Plans. The numerous qualifications and restrictions set

forth in Defendants' fine print expose the advertised "protection" as an illusion, at best, because the Defendants do not determine consumers' eligibility for various options under the Payment Protection Plan before marketing and selling Payment Protection to them.

48. Defendants market Payment Protection as a product that will safeguard subscribers' credit card accounts by suspending or crediting the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts in other circumstances. When minimum monthly payments are credited, the monthly interest charges and the Payment Protection fee (and any other ancillary fees) continue to accrue without adequate disclosure to consumers.

49. The terms offered for the Payment Protection scheme are varied, complicated and always changing. However, all of the various plans provide for some form of payment suspension upon the occurrence of the following events, as it defines the terms: *Job Loss*, *Short-term* or *Long-term Disability*, the occurrence of some *Life Event*, including marriage, child birth, adoption, first-time college entrance, a home move, and other closely defined events, and *Death*. The restrictions, limitations and exclusions associated with these events that trigger supposed Payment Protection benefits are expansive and constantly evolving.

50. Defendants make no reasonable effort and undertake no investigation, including review of information in their possession regarding the cardholder, to determine if Payment Protection coverage would apply to the cardholder. Such information may include health status, name of last employer and date of birth, which would assist Defendants in knowing whether a particular cardholder is eligible for Payment Protection benefits.

51. Accordingly, Defendants engage in aggressively marketing to enroll Hawaii cardholders in Payment Protection even when they have information in their possession indicating that the product may have limited or no value to the particular consumer.

52. Telephone marketing scripts and written materials provided by Defendants to consumers are incomplete, indecipherable, misleading and obfuscatory.

53. One example of the misleading and obfuscatory language is Defendants' failure to disclose that Payment Protection is actually akin to an insurance product. Despite this fact, marketing materials carefully avoid any use of the word "insurance." The materials may, however, refer to "premiums," "claims" or "benefits," which indicates that Defendants internally regard and acknowledge this as an insurance product.

54. Defendants do not adequately describe or explain the exclusions to prospective subscribers so they can determine whether they have certain characteristics or meet certain factors that would bar them from being eligible for benefits under Credit Protection, even though Defendants have a common practice of imposing limitations on full coverage based on exclusions.

- a. Certain Payment Protection benefits (e.g., for job loss, short term disability, long term disability and family leave) do not apply to retired persons. This most often affects "elder" consumers aged sixty-two or over;
- b. Certain Payment Protection benefits (e.g., for job loss, short term disability, long term disability and family leave) do not apply to persons employed part time or seasonally;
- c. Certain Payment Protection benefits (e.g., for job loss, short term disability, long term disability and family leave) do not apply to persons employed by family members, or to those not employed;
- d. Payment Protection benefits do not apply for the first 30 days of unemployment or disability;
- e. With limited exceptions, Payment Protection job loss benefits do not apply unless you initially qualify for state or federal unemployment benefits;

- f. Payment Protection job loss benefits do not apply to persons who have not held their job for at least 90 days;
- g. Payment Protection job loss benefits do not apply unless a person registers and remains registered for work at a recognized employment agency;
- h. Payment Protection benefits do not apply unless you notify the company and provide Verification within a set period of time;
- i. Payment Protection coverage is limited to per calendar year maximums;
- j. Payment Protection disability benefits require continued certification by a physician for the duration of the injury or illness;
- k. Finance charges, monthly fees (including for PaymentAid and other ancillary products), past due and over credit line/limit amount charges will continue to accrue during the period of Payment Protection; and
- l. Cash advances are not allowed during the Payment Protection period

55. For instance, retired persons in Hawaii, many of whom are “elder” senior citizens aged sixty-two or older, are charged for this product even though they are categorically excluded from receiving many of the benefits under the plan. Defendants do not ask customers whether they are retired.

56. Further, part-time workers, seasonal workers and workers concluding an employment contract (including ending a military tour of duty) are also limited or categorically excluded from receiving benefits. To qualify for benefits, one needs to work a set number of hours a week in employment considered to be permanent. However, Defendants make no effort to investigate whether any of the Hawaii consumers they charge for Payment Protection are part-time, seasonal or military workers. These terms are not adequately communicated or defined in written materials.

57. Finally, benefits are limited for disabled persons, but Defendants nevertheless fail to affirmatively inform these individuals of the limitations in benefits when they are enrolled. In fact, Defendants do not even ask customers whether they are disabled.

58. Defendants have no process to keep updated on consumers' status, either. Accordingly, when consumers' statuses change, they will continue to pay for Payment Protection even though they may no longer be eligible for its benefits.

59. If consumers are eventually provided with written materials, the materials themselves are confusing, and do not require the consumers' signature or affirmative assent before they can be billed for the plan. It is virtually impossible for the subscriber to determine all of the exclusions and limitations of Payment Protection, or the value of the product, based on what is provided.

60. The cost of Payment Protection is set forth in a confusing and misleading manner. The premium for Payment Protection is set at a dollar amount per \$100.00 of the ending statement balance for each particular month. For example, the cost of PaymentAid is \$.89 per \$100 of the previous billing period's New Balance, and IdentityMonitor costs an additional \$12.95 per month. Thus, a customer who charges \$1000 a month, and even pays off his balance every month, pays \$106.80 per year for Payment Protection and \$155.40 annually for IdentityMonitor. Defendants add these amounts directly to the credit card account statement each month.

61. Payment Protection also provides the added benefit to Defendants of lowering available credit to its subscribers because the imposition of this additional fee brings consumers closer to their maximum credit limit without their knowledge. This operates in some instances to cause consumers to exceed their credit limits, thereby incurring over-the-limit fees. Further, the imposition of the Payment Protection fee creates a cycle of profitability, in that the fee itself increases subscribers' monthly credit balances, which in turn increases Payment Protection fees in subsequent months.

62. Defendants' "customer service" support is set up in such a way that Hawaii consumers cannot easily cancel ancillary products or receive answers to benefit questions, nor can they easily file claims or receive benefits for filed claims.

63. Upon information and belief, employees at Defendants' Payment Protection call centers are given authority to deny claims immediately over the phone, but do not have authority to approve payment of benefits to claimants in the same manner.

64. Moreover, upon information and belief, when subscribers call Defendants attempting to cancel Payment Protection, employees at Defendants' call center are trained to attempt to talk the subscriber out of canceling by "selling" the supposed benefits of Payment Protection.

65. Further, when claims for Payment Protection benefits are denied, Defendants have not implemented a process through which subscribers' Payment Protection premiums are refunded, even if the subscribers are deemed to be *per se* ineligible for Payment Protection benefits. In fact, if Hawaii subscribers are denied Payment Protection benefits, Defendants neither affirmatively remove subscribers from Payment Protection enrollment going forward, nor do they inform subscribers of their continued obligations to pay for Payment Protection, even though they have been deemed to be ineligible for benefits.

66. Payment Protection is so confusing as to when coverage is triggered, so restricted in terms of the benefits it provides to subscribers, and processing claims is made so difficult by Defendants, that it is essentially worthless.

67. Although heralded as coverage designed for a subscriber's peace of mind and for use when times get tough, the Payment Protection device is designed to prey on the financially insecure and is virtually worthless because of the numerous restrictions that are imposed,

because of the exclusions of benefits, and because of the administrative and bureaucratic hurdles that are placed in the way of Hawaii consumers who attempt to secure payments from Defendants under Payment Protection coverage.

68. Citi is one of the largest banks in the United States and in the world, with consolidated assets of over 2 trillion dollars. Citi's credit card division is run by its brand, "Citi Cards." Citi Cards is the one of the world's largest providers of credit cards with more than 21 million customer accounts. See <http://www.citigroup.com/citi/business/brands.htm> (last viewed on February 6, 2012).

69. As a result of their unfair and deceptive marketing practices in connection with sales of Payment Protection, Defendants have increased profits by substantial sums, all thanks to products which provide virtually no benefit to the Hawaii residents who are nevertheless charged for these products month in and month out.

COUNT I
VIOLATION OF HAWAII LAW ON UNFAIR OR DECEPTIVE ACTS OR PRACTICES, HAW. REV. STAT. §§ 480-1 ET SEQ. ("UDAP")

70. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

71. The UDAP sets forth that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." Haw. Rev. Stat. § 480-2(a).

72. Among other things, Haw. Rev. Stat. § 481A-3(a) defines actions that constitute a "deceptive trade practice" as including, but not limited to, the following:

(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

* * * *

(5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;

* * * *

(9) Advertises goods or services with intent not to sell them as advertised;

* * * *

(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Id. § 481A-3(a)(2), (5), (9), (12).

73. As set forth herein, the Defendants' actions of marketing, selling and administering the ancillary products at issue in this Complaint, including Payment Protection, fit within the definitions and scope of the UDAP.

74. The Attorney General of the State of Hawaii "may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section." *Id.* at § 480-2(d). The Attorney General is specifically charged with the administration of the UDAP, and may act *sua sponte* as the agent and legal representative of the State in civil proceedings to enforce the statute.

75. Defendants' conduct described above constitutes multiple, separate violations of the UDAP.

76. Each violation of the statute by the Defendants is an unfair or deceptive act or practice in the conduct of the trade or commerce in violation of the UDAP. For example, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product without his or her assent constituted a separate violation of the UDAP. Likewise, each

enrollment by Defendants of a Hawaii consumer who is ineligible for the plan's benefits (due to age, work status, disability or for any other reason) constituted a separate violation of the UDAP. Similarly, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product but failed to disclose all material restrictions, limitations, and exclusions constituted a separate violation of the UDAP. Each time Defendants failed to refund premiums paid also constituted a separate violation of the UDAP.

77. The Defendants' violations were and are likely to mislead Hawaii consumers. The Defendants are aware of the violations, including the widespread slamming practices engaged in and the enrollment of cardholders who are ineligible for benefits offered under Payment Protection, yet Defendants fail to adequately and affirmatively take steps to cure the violations or refund monies owed.

78. As a result of the Defendants' unfair or deceptive practices, the purported contracts between Hawaii consumers and the Defendants for purchase of the aforementioned ancillary products are "void and [] not enforceable at law or in equity." Haw. Rev. Stat. § 480-12.

79. Defendants' violations justify penalties of up to \$10,000 for each violation of the UDAP (*id.* at § 480-3.1) and injunctive relief (*id.* at 480-15).

COUNT II
VIOLATION OF THE UDAP, CONSUMER FRAUDS AGAINST ELDERS
HAW. REV. STAT. § 480-13.5

80. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

81. The UDAP sets forth that "[i]f a person commits a violation under section 480-2 which is directed toward, targets, or injures an elder, a court, in addition to any other civil

penalty, may impose a civil penalty not to exceed \$10,000 for each violation.” Haw. Rev. Stat. § 480-13.5(a).

82. Defendants knowingly market specifically to elderly consumers, many of whom are retired, and for whom benefits may be of little or no value.

83. As a result of the Defendants’ unfair or deceptive practices directed specifically towards elders, Defendants’ violations justify assessing additional penalties of up to \$10,000 for each violation of the UDAP committed against elders. *Id.*

COUNT III
UNJUST ENRICHMENT

84. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

85. By unknowingly paying unauthorized or otherwise improper charges to Defendants, as stated above, Hawaii consumers conferred a benefit on Defendants.

86. Defendants knowingly accepted such benefit, to which they are not entitled.

87. Defendants’ acceptance and retention of such benefit under these circumstances is unjust and inequitable.

88. As a matter of equity, consumers within the State should be made whole by application of the doctrine of unjust enrichment.

RELIEF

WHEREFORE, the State of Hawaii, by and through its Attorney General, respectfully prays that this Court grant the following relief:

1. Entering Judgment in favor of the State in a final order against each of the Defendants;
2. Enjoining the Defendants and their employees, officers, directors, agents, successors, assignees, merged or acquired predecessors, parent or controlling entities, subsidiaries, and all other persons acting in concert or participation with

it, from engaging in unfair or deceptive practices in violation of Hawaii law and ordering temporary, preliminary or permanent injunction;

3. Awarding judgment against the Defendants for restitution and disgorgement of monies under the *parens patriae* doctrine, the general equitable powers of this Court, the doctrine of unjust enrichment and any other authority, for all Hawaii consumers injured by Defendants' acts described in this Complaint;
4. Declaring that each act of each of the Defendants described in this Complaint constitute multiple, separate violations of Hawaii law;
5. Imposing civil penalties for each repeated and willful violation of the UDAP;
6. Imposing additional civil penalties of up to \$10,000 for each repeated and willful violation of the UDAP committed against elders;
7. Awarding equitable relief, including but not limited to restitution and disgorgement of monies obtained as a result of the UDAP violations;
8. Granting the State:
 - a. The cost of investigation and reasonable attorneys' fees, as authorized by the UDAP,
 - b. Pre-judgment and post-judgment interest, and,
 - c. All other relief as provided by law and/or as the Court deems appropriate and just.

Plaintiff asserts claims herein in excess of the minimum jurisdictional requirements of this Court.

DATED: Honolulu, Hawai'i, April 12, 2012.



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FIRST CIRCUIT COURT
 STATE OF HAWAII
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, <i>EX. REL.</i> DAVID M. LOUIE, ATTORNEY GENERAL,)	CIVIL NO. <u>12-1-0984-04 ECN</u>
	)	(Other Civil Action)
Plaintiff,	)	COMPLAINT; SUMMONS
)	
vs.)	
)	
DISCOVER FINANCIAL SERVICES, INC., DISCOVER BANK, DFS SERVICES, L.L.C., ASSURANT, INC., and DOE DEFENDANTS 1-20,	)	No trial date has been set.
)	
Defendants.)	
)	

COMPLAINT

Plaintiff, the State of Hawaii, by David M. Louie, Attorney General (“the State”) brings this Complaint against the Defendants Discover Financial Services, Inc., Discover Bank, DFS Services, L.L.C., Assurant, Inc., and Doe Defendants 1-20 (collectively “Defendants” or “Discover”) and alleges, upon information and belief, as follows:

INTRODUCTION

1. This action stems from the Defendants’ marketing, selling, and administering to Hawaii consumers fee-based products, which are ancillary to their credit cards.

2. Defendants market such ancillary products as protection for consumers against improper or unauthorized charges on their credit cards, identity theft, and lost or stolen credit cards and/or as providing benefits in the event of unemployment or disability. Each ancillary product is marketed only to the Defendants’ current card holders, and the products themselves are attached to the cardholders’ specific account at issue.

3. Upon information and belief, when consumers apply for and receive Defendants’ credit cards, a process is triggered whereby a consumer can unknowingly and unintentionally sign up to receive ancillary products.

4. Additionally, Defendants often enroll consumers in these products even though the consumers did not assent to pay for them. This process is referred to as “slamming.” Enrollment may be based on highly deceptive and misleading telemarketing calls, forged or non-existent mailers or online applications, or nothing at all. In each instance, unknowing consumers are hit with monthly fees without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in a position to do this because, unlike a

typical marketer or seller, they are already the consumer's credit card company and already have their credit card number.

5. Further, for certain types of ancillary products, including but not limited to Discover Payment Protection and other monikers that all offer similar coverage (hereinafter collectively referred to as "Payment Protection Plans" or "Plans"), that purport to pay the consumer's required minimum monthly payment for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent, Defendants make no effort to determine whether consumers are even eligible for the benefits at the time of sale. As a consequence, Defendants bill ineligible Hawaii citizens for this coverage, even though their status at the time of enrollment prevents them from receiving benefits under the terms of these Payment Protection Plans.

6. The Defendants commit unfair and deceptive business practices and violate statutory law by charging consumers for ancillary products, including Payment Protection Plans, who either did not want them or were not entitled to benefits from them, and by the unfair and deceptive manner in which Defendants offer and administer claims for benefits by consumers.

7. Upon information and belief, as a result of these unfair and deceptive practices, Defendants have amassed substantial sums of money with virtually no benefits to Hawaii citizens who are nevertheless charged for these products month in and month out.

PARTIES

8. This action, brought by the State of Hawaii in its sovereign capacity by and through David M. Louie, the Attorney General of the State of Hawaii, is authorized under Hawaii law on Unfair or Deceptive Acts or Practices ("UDAP"), Haw. Rev. Stat. § 480-2(d), and

under *parens patriae* authority, on behalf of the State and its citizens to enforce Hawaii law. The Attorney General has the power to bring these claims on behalf of the State under the provisions of Haw. Rev. Stat. § 661-10.

9. The State asserts no claims arising out of, under or in any way preempted by the laws (common, statutory or administrative) of the United States, nor does it bring this action on behalf of a class or any group of persons that can be construed as a class. The State specifically disclaims any such claims that would support removal of this action to a United States District Court on the basis of diversity, jurisdictional mandates under the Class Action Fairness Act of 2005 (28 U.S.C. §§ 1332(d), 1453, 1711-1715), federal question jurisdiction, or any other basis.

10. Upon information and belief, Defendant Discover Financial Services, Inc. (“DFS Inc.”) is a Delaware Corporation and under Delaware law it has the capacity to sue and be sued. Upon information and belief, DFS Inc. is organized as a bank holding company and financial holding company. Upon information and belief, DFS Inc. wholly owns Discover Bank and DFS Services, L.L.C. DFS Inc.’s 2009 Annual Report indicates that it is involved in the marketing and sale of ancillary products discussed in this Complaint.

11. Upon information and belief, Defendant Discover Bank is a Delaware state-chartered bank and a leading credit card issuer. Upon information and belief, Defendant Discover Bank is a wholly owned subsidiary of DFS Inc. with a principal place of business in Greenwood, Delaware.

12. Upon information and belief, Defendant DFS Services, L.L.C. (DFS LLC), formerly known as Discover Financial Services, L.L.C., is a limited liability company duly organized and existing under the laws of the State of Delaware, having a principal place of business in the State of Illinois. Upon information and belief, the sole member of the limited

liability company DFS LLC is DFS Inc. Upon information and belief, DFS LLC is Discover Bank's service affiliate and, as such, provides various services for Discover Bank such as marketing, application approval, transaction approval, customer service, security, billing and the collection of delinquent accounts.

13. Upon information and belief, Defendant Assurant, Inc. (Assurant) is a Delaware Corporation with a principal place of business in the State of New York. Upon information and belief, Assurant assisted Discover with its ancillary products, including Payment Protection, by managing and administering enrollment, activation of benefits, communications with customers (including sending Welcome Kits and claim responses) and plan cancellations, as well as providing administrative and sales support.

14. At all times material herein, Defendants DFS Inc., Discover Bank, DFS LLC, and Assurant have been doing business, and continue to do business, within the City & County of Honolulu, State of Hawaii.

15. DOE DEFENDANTS 1-20 are sued herein under fictitious names for the reason that after diligent and good faith efforts to ascertain their names and identities through review of applicable records and through interviews, their true names and identities are presently unknown to Plaintiff except that they are connected in some manner with the named Defendants and/or were the agents, servants, employees, employers, representatives, co-venturers, associates, sub-contractors or contractors of the named Defendants and/or were in some manner presently unknown to the Plaintiff engaged in the activities alleged herein and/or were in some manner responsible for the injuries or damages to Plaintiff and/or designed and/or placed on the market a product which was defective; which defect was proximate and/or legal cause of injuries or damages to Plaintiff and/or inspected and/or maintained and/or controlled some object or product

in a negligent manner, which negligence was a proximate and/or legal cause of such injuries or damages to Plaintiff and/or conducted some activity in a negligent or dangerous manner; which negligent or dangerous conduct was a proximate and/or legal cause of injuries or damages to Plaintiff and/or were in some manner related to the named Defendants and Plaintiff pray for leave to insert herein their true names, identities, capacities, activities and/or responsibilities when the same are ascertained.

FACTUAL BACKGROUND

I. Defendants' Ancillary Products Are Marketed and Sold to Hawaii Consumers in an Unfair and Deceptive Manner

A. Defendants Market and Sell Ancillary Products to Cardholding Consumers Which Generate Substantial Revenue for Them.

16. Upon information and belief, Defendants market and sell ancillary products to all of their credit card customers, but most aggressively market these products to vulnerable Hawaii consumers who fall into the subprime credit category, who have low credit limits because of impaired credit ratings, or who are looking to establish or re-establish their credit.

17. Defendants' ancillary products share common characteristics in that each are: (a) marketed as ways for consumers to protect themselves from fraud or unauthorized charges, or to increase their financial security, (b) considered an optional product that is not required to have a credit card account, (c) tethered to consumers' specific credit card accounts, and (d) billed directly to the account monthly, with no separate bill provided.

18. Defendants' ancillary products are in fact a dense maze of limitations, exclusions and restrictions, making it impossible for consumers to knowingly determine what these products cover and whether they provide a worthwhile financial benefit.

19. Examples of Defendants' ancillary products include:

a. **Payment Protection** – this product allegedly safeguards subscribers' credit card accounts by canceling or temporarily suspending the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts in other circumstances.

b. **Identity Theft Protection** – In exchange for a fixed-rate monthly fee, this product purports to monitor consumers' credit score for indicia of identity theft and will alert the enrollee if something suspicious happens to their credit score.

c. **Wallet Protection** – In exchange for a fixed-rate monthly fee, if the consumers' wallet is lost or stolen, Defendants will contact the issuers of the consumers' credit cards to cancel the cards lost or stolen.

d. **Credit Score Tracker** – In exchange for a fixed-rate monthly fee, this product provides consumers with copies of their credit report(s) and tools that allow them to track their credit score on a daily basis. However, the three major credit reporting agencies are required by federal law to provide consumers with one free credit report each year.

e. **Extended Warranty** – also known as "SquareTrade Care Plan," this product provides extended warranty coverage for items broken after purchased, regardless of whether purchased with the Discover card.

20. Defendants have enrolled large numbers of Hawaii residents and charged them substantial sums of money for enrollment in these product plans.

21. Defendants have devised a scheme to increase the profits they receive from their ancillary products exponentially. Upon information and belief, by limiting the amount of credit given to Hawaii consumers, but issuing multiple cards to them, Defendants are able to impose separate monthly fees for these products on each of the consumers' cards. This scheme doubles, triples or more, the monthly fees charged without any analogous increased risk to Defendants.

B. Defendants Sign Up Unsuspecting Cardholding Consumers for Ancillary Products Without Their Meaningful, Knowing Authorization or Consent

22. Defendants often enroll consumers in these products based on highly deceptive and misleading telemarketing calls, charging some consumers without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in the unique position to do this because, unlike a typical seller or marketer, they are the consumer's

credit card company and already have their credit card numbers. The State of Hawaii brings this *parens patriae* consumer protection lawsuit against Defendants to address their unfair and deceptive business practices.

1. The Way Ancillary Products Are Marketed is Unfair and Deceptive

23. Defendants sell ancillary products to consumers through a number of different channels, including online and direct mail marketing, in which they may ask that consumers “check the box” to initiate the plan, and through telemarketing, where consumers may be asked to press a button on the telephone or verbally agree in order to approve initiation of the plan. The former channels require an affirmative action by the consumer to enroll, such as checking a box or initializing a monthly statement or other mailer or online form in a designated space to authorize enrollment. For a consumer that “checked the box” or initialized a document, confirming consumers’ assent to be billed for an ancillary product is easily traceable. On the other hand, for those whose assent was allegedly obtained through telemarketing (upon information and belief, the majority of ancillary product customers), confirmation of affirmative assent requires a review of the telephone call itself.

24. In addition to Defendants’ financial motive to enroll as many Hawaii customers as possible into these highly lucrative ancillary product schemes, upon information and belief, individual telemarketers are incentivized to enroll as many cardholders as possible, either because their compensation is commission-based or because their performance is otherwise evaluated and they are subsequently compensated based on the number of cardholders they enroll.

25. Unfair and deceptive practices are rife in telemarketing these products.

26. Defendants' telemarketers employ an array of unfair and deceptive sales tactics to elicit cardholders into communicating some affirmative response, knowing that the cardholders do not actually understand that they are supposedly agreeing to purchase an ancillary product.

27. Defendants' telemarketers characterize the call as a courtesy to thank cardholders and remind them of benefits they already get through their credit card agreement (like cash back, airline miles, rewards, etc.), when in fact they are calling to sell ancillary products.

28. Telemarketers may speed through, skip altogether or alter the text of the information they are required to provide to cardholders (the "disclosure"), in an effort to make the disclosure sound like confusing legalese, then say "OK?" or ask if the person heard them or understood, knowing that such a question will almost always elicit an affirmative response such as "ok" or "yes." The cardholder believes they have just listened to a courtesy call, but the Defendants treat the affirmative response as the cardholder's agreement to enroll in the plan. These cardholders may say "ok" or "yes" at the conclusion of the call, but no reasonable person listening to the recordings of these calls would conclude the cardholder was giving their knowing, meaningful assent to be charged a monthly fee for enrollment in the plan.

29. Another tactic Defendants' telemarketers use is to ask cardholders if they may simply send out a "packet of information" about the plan. Defendants treat an affirmative response to this inquiry as authorization for paid enrollment, even though consumers do not understand or believe that they have agreed to purchase anything.

30. Each Defendant has such a "packet of information" for each of the plans offered and Defendants are required to provide enrollees with this information. For example, Defendants use a document entitled "*Discover Payment Protection Benefit Guide*" for this purpose for its Payment Protection Plan. Many Hawaii customers never receive the packets

allegedly sent out. Others who receive the packet ignore or disregard it because they do not understand that they had already been enrolled. They may reasonably assume it is just another piece of junk mail from a credit card company. While those cardholders that told the telemarketer they could send information about the plan may recognize what the packet relates to, they reasonably assume further steps must be taken by them before they will become enrolled in the plan. If the slammed consumer simply throws out the packet, without reading it, signing it or conferring with the credit card company about it, they are nevertheless still enrolled in the plan.

31. Defendants utilize the card activation process as another way to wrongfully enroll consumers. Consumers are told they must call Defendants from their home phone number to activate their card. Defendants take this opportunity to sell ancillary products. Cardholders who are calling to activate a credit card are particularly susceptible to believing that the “disclosure” is some legal text that must be read to the cardholder, rather than an alleged contractual agreement to purchase an optional, ancillary product of little or no value to them. Many Hawaii cardholders, accustomed to all the legal language and fine print received when they open a new credit card account, become immune to the terms and conditions communicated to them. They reflexively reply “ok,” and have no idea that they have supposedly purchased some ancillary product.

32. In addition to deceptively inducing cardholders to say “yes” or “ok” during the call, Defendants enroll some cardholders who did not provide any affirmative response. In such instances, Defendants have no proof of affirmative assent, either because there is no affirmative response on the recording, there is a clear rejection of the offer, or a record of the call does not

exist. The cardholder has been “slammed,” that is, involuntarily enrolled in the plan without their knowledge or consent.

33. And unlike in a typical telemarketing call, this telemarketer does not need the consumer to provide them with their credit card number and information to purchase the product because the telemarketer *is* the credit card company. As a result, Defendants can charge consumers’ accounts when there has been no clear and knowing consent given.

2. Hawaii Consumers “Slammed” with Ancillary Products Receive Little to No Relief from the Defendants

34. Defendants know that slamming occurs frequently. In fact, the “refund” process itself is set up on the assumption that consumers have been deceived and do not understand that they have been enrolled. When a consumer calls within thirty (30) days of being enrolled, they are supposed to get their money back no questions asked, and Defendants make no effort to then determine how it came to be that the cardholder was enrolled without their authorization.

35. However, many Cardholders have no idea they are enrolled in an ancillary product plan and do not notice or appreciate the meaning of the line-item charge for the plan on their credit card bills. The charge appears among the other purchases on the cardholder’s monthly statement.

36. Some cardholders have accounts that do not require close inspection of monthly statements. This may be because they are not making new purchases on the account (they may be simply seeking to pay off the balance, or took advantage of a balance transfer offer, or utilized the account to make a single purchase). Others do not receive monthly bills at all.

37. Consumers may pay this hidden charge month after month for many months before they become aware of it. For online accounts, add-on plans are often posted to a cardholder’s account on the last day of each statement period, and that statement is then archived

on the website. A cardholder may review current activity on their account regularly and yet never see the charge billed to their account on the last day of the previous billing cycle's statement.

38. In addition to the obvious unfairness of enrolling cardholders without their valid authorization, Defendants reap an extra windfall because these enrollees will never invoke the supposed benefits of the plans for which they were charged because they do not even know they may do so.

39. If cardholders do not discover the deceit until more than 30 days after being enrolled, Defendants will not automatically refund the overpayments to the cardholder.

40. Cancellation of plans and disputes about enrollment are so widespread in this industry that Defendants use template form letters to send to slammed consumers who complain. Instead of "coming clean" to these aggrieved consumers, Defendants make it exceedingly difficult for them to get relief, such that many Hawaii consumers give up hope of ever getting their money back after paying for a product they did not request and did not use.

II. Defendants Sell Payment Protection, a Specific Ancillary Product, to Hawaii Consumers Who Can Receive No Benefit from the Coverage Offered

41. Payment Protection has come under increased scrutiny recently from both the federal government and private plaintiffs.¹

¹ See, e.g., Credit Cards: Consumer Costs for Debt Protection Products Can be Substantial Relative to Benefits but are Not a Focus of Regulatory Oversight, U.S. Government Accountability Office, GAO-11-311, March 25, 2011 ("GAO Report"), attached as Ex. 1 to the Complaint.

Lawsuits are pending, including cases brought by Attorneys General. See *State of Minn. v. Discover Fin. Servs. et al.*, 27-CV-10-27510 (D. Minn. Dec. 6, 2010), (Ex. 2); *State of West Virginia v. Capital One Bank (USA), N.A., et al.*, 10-C-7-N (Cir. Mason, WV Jan. 20, 2010) (Ex. 3). At least two cases brought by consumer classes have settled. See Order Granting Final Approval of Class Action Settlement, *Spinelli et al. v. Capital One Bank and Capital One Servs.*, 08-cv-132-T-33EAJ, Dkt. 231 (M.D. Fla. Nov. 23, 2010), [Proposed] Order (Ex. 4), and *Kardonick et al. v. JP Morgan Chase & Co. and Chase Bank USA N.A.*, 10-cv-23235, Dkt. 23 (S.D. Fla. Feb. 3, 2011) (Ex. 5).

42. The ancillary products at issue in this Complaint, including but not limited to Payment Protection, are not deemed insurance products under Hawaii law, and the Defendants are not insurance companies.

43. Defendants do not consider Payment Protection an insurance product. Payment Protection Plans are not registered or identified as insurance products with the Department of Commerce & Consumer Affairs for the State of Hawaii, which is tasked with the responsibility of overseeing the insurance industry in Hawaii, or other appropriate authorities.

44. Defendants do not designate Payment Protection an “insurance product.” This way, they can avoid state regulation and charge higher fees. Payment Protection Plans are unregulated as to terms, conditions and fees, making them highly profitable for Defendants.

45. These types of plans offer little to no benefit to consumers for several reasons and have been subject to criticism from consumer advocates on several fronts. For example, it may not be disclosed to consumers that under the terms and conditions of the plan, the cardholder may not be permitted to use their credit card while they have invoked Payment Protection benefits, and in the periods of time when consumers actually invoke the benefits, such as in the case of unemployment, the cardholder often needs their credit the most.

46. Defendants market specifically to elderly consumers, for whom benefits may be of little or no value. Defendants know that their conduct is directed towards elderly consumers (defined as sixty-two years of age or older by HRS § 480-13.5(c)), because they have the consumer’s date of birth on file. The main benefit of Defendants’ Payment Protection plans is that they suspend payment obligations when the borrower’s income stream is lost due to unemployment, disability, or natural disaster. But for those on a fixed income, any such

“protection” may be illusory because the “qualifying events” will not disrupt the income stream coming from a fixed income.

47. Defendants market Payment Protection through direct mail and solicit Payment Protection customers over the phone. They represent Payment Protection as a product that pays the required minimum monthly payment due on the subscriber’s credit card account and the Payment Protection plan fee for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent. Defendants’ marketing for this product claims that it will “[p]ut your payments on hold for up to 2 years in the event of disability, hospitalization, or other qualifying events, depending on the product level.” See <http://www.discovercard.com/protection-solutions/payment-protection.html> (last viewed on Feb. 6, 2012).

48. As explained in Discover’s 2009 Annual Report, Payment Protection is purported to “allow customers to suspend their payments for up to one or two years, depending on the product, in the event of certain covered events. Different services cover different events, such as unemployment, disability or other life events. Depending on the service and state laws, outstanding balances up to certain amounts are canceled in the event of death.” DFS 2009 Annual Financial Report at 6.

49. The Plan also purports to allow account holders to put their payments on hold when “celebrating one of life’s happy events, like moving to a new home.” *Id.* The Plan is not an automatic benefit provided to all account holders. Instead, account holders’ purchase of Discover Payment Protection is “optional.”

50. However, Defendants misrepresent and/or fail to disclose the real nature of Payment Protection. While representing to consumers that Payment Protection is a “safeguard”,

among other representations, in fact, Defendants impose Payment Protection on customers who did not authorize the charges. Because these customers do not know this “coverage” has been imposed on them and that they were enrolled without their consent, they do not know they can avail themselves of it and do not have the necessary information to determine what Payment Protection covers and whether it would be a sound financial choice to continue paying for the Plan.

51. Defendants market their Payment Protection Plans to individuals who do not qualify for the alleged benefits of the Plans. The numerous qualifications and restrictions set forth in Defendants’ fine print expose the advertised “peace of mind” as an illusion, at best, because the Defendants do not determine consumers’ eligibility for various options under the Payment Protection Plan before marketing and selling Payment Protection to them.

52. Defendants market Payment Protection as a product that will safeguard subscribers’ credit card accounts by suspending or crediting the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts in other circumstances. When minimum monthly payments are credited, the monthly interest charges and the Payment Protection fee (and any other ancillary fees) continue to accrue without adequate disclosure to consumers.

53. The terms offered for the Payment Protection scheme are varied, complicated and always changing. However, all of the various plans provide for some form of payment suspension upon the occurrence of the following events, as it defines the terms: *Involuntary Unemployment, Disability, Leave of Absence, Disaster, Hospitalization, and Death of a Child, Spouse or Domestic Partner*, the occurrence of some *Celebration Events*, sometimes including things like marriage, child birth, adoption, college, a home move, a new job and retirement and

other closely defined events, and a *Death Benefit*. The restrictions, limitations and exclusions associated with these events that trigger supposed Payment Protection benefits are expansive and constantly evolving.

54. Defendants make no reasonable effort and undertake no investigation, including review of information in their possession regarding the cardholder, to determine if Payment Protection coverage would apply to the cardholder. Such information may include health status, name of last employer and date of birth, which would assist Defendants in knowing whether a particular cardholder is eligible for Payment Protection benefits.

55. Accordingly, Defendants engage in aggressively marketing to enroll Hawaii cardholders in Payment Protection even when they have information in their possession indicating that the product may have limited or no value to the particular consumer.

56. Telephone marketing scripts and written materials provided by Defendants to consumers are incomplete, indecipherable, misleading and obfuscatory.

57. One example of the misleading and obfuscatory language is Defendants' failure to disclose that Payment Protection is actually akin to an insurance product. Despite this fact, marketing materials carefully avoid any use of the word "insurance." The materials may, however, refer to "premiums," "claims" or "benefits," which indicates that Defendants internally regard and acknowledge this as an insurance product.

58. Defendants do not adequately describe or explain the exclusions to prospective subscribers so they can determine whether they have certain characteristics or meet certain factors that would bar them from being eligible for benefits under Credit Protection, even though Defendants have a common practice of imposing limitations on full coverage based on exclusions.

- a. Payment Protection benefits do not apply to retired persons. This most often affects “elder” consumers aged sixty-two or over;
- b. Payment Protection benefits do not apply to persons employed part time or seasonally;
- c. Payment Protection benefits do not apply to persons employed by family members or not employed;
- d. Payment Protection benefits are limited to persons self-employed;
- e. Payment Protection benefits do not apply immediately or for some period directly after unemployment or disability;
- f. Payment Protection benefits do not apply unless you qualify for state unemployment benefits and continue to meet qualifications;
- g. Payment Protection benefits do not apply unless you notify the company and provide Verification within a set period of time;
- h. Subscribers may not be able to use their credit card for new purchases while Payment Protection benefits are being provided;
- i. Payment Protection coverage is limited to per calendar year maximums; and
- j. Payment Protection benefits require continued treatment and verification by a physician for the duration of the disability.

59. For instance, retired persons in Hawaii, many of whom are “elder” senior citizens aged sixty-two or older, are charged for this product even though they are categorically excluded from receiving many of the benefits under the plan. Defendants do not ask customers whether they are retired.

60. Similarly, the benefits offered to self-employed persons are limited, but Defendants nevertheless fail to affirmatively inform self-employed persons of the limitations in benefits when they are enrolled. In fact, Defendants do not even ask customers whether they are self-employed.

61. Further, part-time workers, seasonal workers and workers concluding an employment contract (including ending a military tour of duty) are also limited or categorically

excluded from receiving benefits. To qualify for benefits, one needs to work a set number of hours a week in employment considered to be permanent. However, Defendants make no effort to investigate whether any of the Hawaii consumers they charge for Payment Protection are part-time, seasonal or military workers. These terms are not adequately communicated or defined in written materials.

62. Finally, benefits are limited for disabled persons, but Defendants nevertheless fail to affirmatively inform these individuals of the limitations in benefits when they are enrolled. In fact, Defendants do not even ask customers whether they are disabled.

63. Defendants have no process to keep updated on consumers' status, either. Accordingly, when consumers' statuses change, they will continue to pay for Payment Protection even though they may no longer be eligible for its benefits.

64. If consumers are eventually provided with written materials, the materials themselves are confusing, and do not require the consumers' signature or affirmative assent before they can be billed for the plan. It is virtually impossible for the subscriber to determine all of the exclusions and limitations of Payment Protection, or the value of the product, based on what is provided.

65. The cost of Payment Protection is set forth in a confusing and misleading manner. The premium for Payment Protection is set at a dollar amount per \$100.00 of the ending statement balance for each particular month. For example, the cost of Payment Protection is \$.89 per \$100 of the previous billing period's New Balance. Thus, a customer who charges \$1000 a month, and even pays off his balance every month, pays \$106.80 per year for Payment Protection. Defendants add these amounts directly to the credit card account statement each month.

66. Payment Protection also provides the added benefit to Defendants of lowering available credit to its subscribers because the imposition of this additional fee brings consumers closer to their maximum credit limit without their knowledge. This operates in some instances to cause consumers to exceed their credit limits, thereby incurring over-the-limit fees. Further, the imposition of the Payment Protection fee creates a cycle of profitability, in that the fee itself increases subscribers' monthly credit balances, which in turn increases Payment Protection fees in subsequent months.

67. Defendants' "customer service" support is set up in such a way that Hawaii consumers cannot easily cancel ancillary products or receive answers to benefit questions, nor can they easily file claims or receive benefits for filed claims.

68. Upon information and belief, employees at Defendants' Payment Protection call centers are given authority to deny claims immediately over the phone, but do not have authority to approve payment of benefits to claimants in the same manner.

69. Moreover, upon information and belief, when subscribers call Defendants attempting to cancel Payment Protection, employees at Defendants' call center are trained to attempt to talk the subscriber out of canceling by "selling" the supposed benefits of Payment Protection.

70. Further, when claims for Payment Protection benefits are denied, Defendants have not implemented a process through which subscribers' Payment Protection premiums are refunded, even if the subscribers are deemed to be *per se* ineligible for Payment Protection benefits. In fact, if Hawaii subscribers are denied Payment Protection benefits, Defendants neither affirmatively remove subscribers from Payment Protection enrollment going forward, nor

do they inform subscribers of their continued obligations to pay for Payment Protection, even though they have been deemed to be ineligible for benefits.

71. Payment Protection is so confusing as to when coverage is triggered, so restricted in terms of the benefits it provides to subscribers, and processing claims is made so difficult by Defendants, that it is essentially worthless.

72. Although heralded as coverage designed for a subscriber's peace of mind and for use when times get tough, the Payment Protection device is designed to prey on the financially insecure and is virtually worthless because of the numerous restrictions that are imposed, because of the exclusions of benefits, and because of the administrative and bureaucratic hurdles that are placed in the way of Hawaii consumers who attempt to secure payments from Defendants under Payment Protection coverage.

73. Discover is one of the largest credit card issuers in the United States. Discover's 2009 Annual Report boasts that 1 in every 4 American households has a Discover credit card. There are reportedly 54.4 million Discover credit cards in circulation in the United States. Payment Protection is the most lucrative of Discover's optional fee-based products. Discover earned close to \$300 million from its fee products in 2009, up from \$215 million just two years earlier. *See* DFS 2009 Annual Financial Report at 70.

74. As a result of their unfair and deceptive marketing practices in connection with sales of Payment Protection, Defendants have increased profits by substantial sums, all thanks to products which provide virtually no benefit to the Hawaii residents who are nevertheless charged for these products month in and month out.

COUNT I
VIOLATION OF HAWAII LAW ON UNFAIR OR DECEPTIVE ACTS OR
PRACTICES, HAW. REV. STAT. §§ 480-1 ET SEQ. (“UDAP”)

75. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

76. The UDAP sets forth that “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.” Haw. Rev. Stat. § 480-2(a).

77. Among other things, Haw. Rev. Stat. § 481A-3(a) defines actions that constitute a “deceptive trade practice” as including, but not limited to, the following:

(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

* * * *

(5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;

* * * *

(9) Advertises goods or services with intent not to sell them as advertised;

* * * *

(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Id. § 481A-3(a)(2), (5), (9), (12).

78. As set forth herein, the Defendants’ actions of marketing, selling and administering the ancillary products at issue in this Complaint, including Payment Protection, fit within the definitions and scope of the UDAP.

79. The Attorney General of the State of Hawaii “may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section.” *Id.* at § 480-2(d). The Attorney General is specifically charged with the administration of the UDAP, and may act *sua sponte* as the agent and legal representative of the State in civil proceedings to enforce the statute.

80. Defendants’ conduct described above constitutes multiple, separate violations of the UDAP.

81. Each violation of the statute by the Defendants is an unfair or deceptive act or practice in the conduct of the trade or commerce in violation of the UDAP. For example, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product without his or her assent constituted a separate violation of the UDAP. Likewise, each enrollment by Defendants of a Hawaii consumer who is ineligible for the plan’s benefits (due to age, work status, disability or for any other reason) constituted a separate violation of the UDAP. Similarly, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product but failed to disclose all material restrictions, limitations, and exclusions constituted a separate violation of the UDAP. Each time Defendants failed to refund premiums paid also constituted a separate violation of the UDAP.

82. The Defendants’ violations were and are likely to mislead Hawaii consumers. The Defendants are aware of the violations, including the widespread slamming practices engaged in and the enrollment of cardholders who are ineligible for benefits offered under Payment Protection, yet Defendants fail to adequately and affirmatively take steps to cure the violations or refund monies owed.

83. As a result of the Defendants' unfair or deceptive practices, the purported contracts between Hawaii consumers and the Defendants for purchase of the aforementioned ancillary products are "void and [] not enforceable at law or in equity." Haw. Rev. Stat. § 480-12.

84. Defendants' violations justify penalties of up to \$10,000 for each violation of the UDAP (*id.* at § 480-3.1) and injunctive relief (*id.* at 480-15).

COUNT II
VIOLATION OF THE UDAP, CONSUMER FRAUDS AGAINST ELDERS
HAW. REV. STAT. § 480-13.5

85. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

86. The UDAP sets forth that "[i]f a person commits a violation under section 480-2 which is directed toward, targets, or injures an elder, a court, in addition to any other civil penalty, may impose a civil penalty not to exceed \$10,000 for each violation." Haw. Rev. Stat. § 480-13.5(a).

87. Defendants knowingly market specifically to elderly consumers, many of whom are retired, and for whom benefits may be of little or no value.

88. As a result of the Defendants' unfair or deceptive practices directed specifically towards elders, Defendants' violations justify assessing additional penalties of up to \$10,000 for each violation of the UDAP committed against elders. *Id.*

COUNT III
UNJUST ENRICHMENT

89. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

90. By unknowingly paying unauthorized or otherwise improper charges to Defendants, as stated above, Hawaii consumers conferred a benefit on Defendants.

91. Defendants knowingly accepted such benefit, to which they are not entitled.

92. Defendants' acceptance and retention of such benefit under these circumstances is unjust and inequitable.

93. As a matter of equity, consumers within the State should be made whole by application of the doctrine of unjust enrichment.

RELIEF

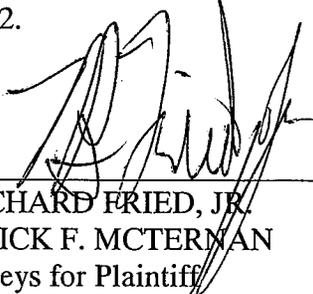
WHEREFORE, the State of Hawaii, by and through its Attorney General, respectfully prays that this Court grant the following relief:

1. Entering Judgment in favor of the State in a final order against each of the Defendants;
2. Enjoining the Defendants and their employees, officers, directors, agents, successors, assignees, merged or acquired predecessors, parent or controlling entities, subsidiaries, and all other persons acting in concert or participation with it, from engaging in unfair or deceptive practices in violation of Hawaii law and ordering temporary, preliminary or permanent injunction;
3. Awarding judgment against the Defendants for restitution and disgorgement of monies under the *parens patriae* doctrine, the general equitable powers of this Court, the doctrine of unjust enrichment and any other authority, for all Hawaii consumers injured by Defendants' acts described in this Complaint;
4. Declaring that each act of each of the Defendants described in this Complaint constitute multiple, separate violations of Hawaii law;
5. Imposing civil penalties for each repeated and willful violation of the UDAP;
6. Imposing additional civil penalties of up to \$10,000 for each repeated and willful violation of the UDAP committed against elders;
7. Awarding equitable relief, including but not limited to restitution and disgorgement of monies obtained as a result of the UDAP violations;
8. Granting the State:

- a. The cost of investigation and reasonable attorneys' fees, as authorized by the UDAP,
- b. Pre-judgment and post-judgment interest, and,
- c. All other relief as provided by law and/or as the Court deems appropriate and just.

Plaintiff asserts claims herein in excess of the minimum jurisdictional requirements of this Court.

DATED: Honolulu, Hawai`i, April 12, 2012.



L. RICHARD FRIED, JR.
PATRICK F. MCTERMAN
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, <i>EX. REL.</i> DAVID M. LOUIE, ATTORNEY GENERAL,	)	CIVIL NO. <u>12-1-0984-04</u>
	)	(Other Civil Action)
)	
Plaintiff,	)	SUMMONS
)	
vs.)	
)	
DISCOVER FINANCIAL SERVICES, INC., DISCOVER BANK, DFS SERVICES, L.L.C., ASSURANT, INC., and DOE DEFENDANTS 1-20,	)	No trial date has been set.
)	
Defendants.)	
)	

SUMMONS TO ANSWER CIVIL COMPLAINT

TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby summoned and required to file with the court and serve upon L. Richard Fried, Jr., Esq. and Patrick F. McTernan, Esq., plaintiff's attorneys, whose address is 600 Davies Pacific Center, 841 Bishop Street, Honolulu, Hawaii, 96813, an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

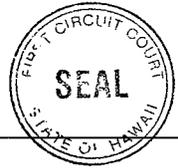
This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled court permits, in writing to this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATE ISSUED: _____ APR 12 2012 _____

F. OTAKE

CLERK



FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

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F. OTAKE
CLERK

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, EX. REL. DAVID M. LOUIE, ATTORNEY GENERAL,)	CIVIL NO. 12-1-0983-04 PWB -
	)	(Other Civil Action)
)	
Plaintiff,	)	COMPLAINT; SUMMONS
)	
vs.)	
)	
HSBC BANK NEVADA, N.A., HSBC CARD SERVICES, INC. and DOE DEFENDANTS)	
1-20,	)	No trial date has been set.
)	
Defendants.)	
)	
)	

COMPLAINT

Plaintiff, the State of Hawaii, by David M. Louie, Attorney General (“the State”) brings this Complaint against the Defendants HSBC Bank Nevada, N.A., HSBC Card Services, Inc. and Doe Defendants 1-20 (collectively “Defendants” or “HSBC”) and alleges, upon information and belief, as follows:

INTRODUCTION

1. This action stems from the Defendants’ marketing, selling, and administering to Hawaii consumers fee-based products, which are ancillary to their credit cards.
2. Defendants market such ancillary products as protection for consumers against improper or unauthorized charges on their credit cards, identity theft, and lost or stolen credit cards and/or as providing benefits in the event of unemployment or disability. Each ancillary product is marketed only to the Defendants’ current card holders, and the products themselves are attached to the cardholders’ specific account at issue.
3. Upon information and belief, when consumers apply for and receive Defendants’ credit cards, a process is triggered whereby a consumer can unknowingly and unintentionally sign up to receive ancillary products.
4. Additionally, Defendants often enroll consumers in these products even though the consumers did not assent to pay for them. This process is referred to as “slamming.” Enrollment may be based on highly deceptive and misleading telemarketing calls, forged or non-existent mailers or online applications, or nothing at all. In each instance, unknowing consumers are hit with monthly fees without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in a position to do this because, unlike a

typical marketer or seller, they are already the consumer's credit card company and already have their credit card number.

5. Further, for certain types of ancillary products, including but not limited to "Personal Account Protection" and other monikers that all offer similar coverage (hereinafter collectively referred to as "Payment Protection Plans" or "Plans"), that purport to pay the consumer's required minimum monthly payment for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent, Defendants make no effort to determine whether consumers are even eligible for the benefits at the time of sale. As a consequence, Defendants bill ineligible Hawaii citizens for this coverage, even though their status at the time of enrollment prevents them from receiving benefits under the terms of these Payment Protection Plans.

6. The Defendants commit unfair and deceptive business practices and violate statutory law by charging consumers for ancillary products, including Payment Protection Plans, who either did not want them or were not entitled to benefits from them, and by the unfair and deceptive manner in which Defendants offer and administer claims for benefits by consumers.

7. Upon information and belief, as a result of these unfair and deceptive practices, Defendants have amassed substantial sums of money with virtually no benefits to Hawaii citizens who are nevertheless charged for these products month in and month out.

PARTIES

8. This action, brought by the State of Hawaii in its sovereign capacity by and through David M. Louie, the Attorney General of the State of Hawaii, is authorized under Hawaii law on Unfair or Deceptive Acts or Practices ("UDAP"), Haw. Rev. Stat. § 480-2(d), and

under *parens patriae* authority, on behalf of the State and its citizens to enforce Hawaii law. The Attorney General has the power to bring these claims on behalf of the State under the provisions of Haw. Rev. Stat. § 661-10.

9. The State asserts no claims arising out of, under or in any way preempted by the laws (common, statutory or administrative) of the United States, nor does it bring this action on behalf of a class or any group of persons that can be construed as a class. The State specifically disclaims any such claims that would support removal of this action to a United States District Court on the basis of diversity, jurisdictional mandates under the Class Action Fairness Act of 2005 (28 U.S.C. §§ 1332(d), 1453, 1711-1715), federal question jurisdiction, or any other basis.

10. Upon information and belief, Defendant HSBC Bank Nevada, N.A. is a Nevada Corporation and under Nevada law it has the capacity to sue and be sued. Upon information and belief, HSBC Bank Nevada N.A. is a wholly owned subsidiary of HSBC Holdings PLC and has principal places of business in Las Vegas, Nevada and New York City, New York. HSBC Holdings PLC is not a defendant in this lawsuit. HSBC Holdings PLC is a public, limited liability international holding company incorporated in England and Wales with a principal place of business in London, England.

11. Upon information and belief, Defendant HSBC Card Services, Inc. is the U.S. consumer credit card segment of HSBC. HSBC Card Services, Inc. is a Maryland company with a principal place of business in Illinois.

12. HSBC Bank Nevada, N.A. and HSBC Card Services, Inc. (jointly referred to as “HSBC”) markets itself as “the world’s local bank.” HSBC serves 89 million customers through its global businesses Retail Banking and Wealth Management, Commercial Banking, Global Banking, and Markets and Global Private Banking. It has offices in 87 countries and territories.

Shares in HSBC Holdings PLC are held by over 220,000 shareholders in 129 countries and territories. See <http://www.hsbc.com/1/2/investor-relations/overview/fast-facts> (last viewed on February 6, 2012).

13. At all times material herein, Defendants HSBC Bank Nevada, N.A. and HSBC Card Services, Inc. have been doing business, and continue to do business, within the City & County of Honolulu, State of Hawaii.

14. DOE DEFENDANTS 1-20 are sued herein under fictitious names for the reason that after diligent and good faith efforts to ascertain their names and identities through review of applicable records and through interviews, their true names and identities are presently unknown to Plaintiff except that they are connected in some manner with the named Defendants and/or were the agents, servants, employees, employers, representatives, co-venturers, associates, sub-contractors or contractors of the named Defendants and/or were in some manner presently unknown to the Plaintiff engaged in the activities alleged herein and/or were in some manner responsible for the injuries or damages to Plaintiff and/or designed and/or placed on the market a product which was defective; which defect was proximate and/or legal cause of injuries or damages to Plaintiff and/or inspected and/or maintained and/or controlled some object or product in a negligent manner, which negligence was a proximate and/or legal cause of such injuries or damages to Plaintiff and/or conducted some activity in a negligent or dangerous manner; which negligent or dangerous conduct was a proximate and/or legal cause of injuries or damages to Plaintiff and/or were in some manner related to the named Defendants and Plaintiff pray for leave to insert herein their true names, identities, capacities, activities and/or responsibilities when the same are ascertained.

FACTUAL BACKGROUND

I. **Defendants' Ancillary Products Are Marketed and Sold to Hawaii Consumers in an Unfair and Deceptive Manner**

A. **Defendants Market and Sell Ancillary Products to Cardholding Consumers Which Generate Substantial Revenue for Them.**

15. Upon information and belief, Defendants market and sell ancillary products to all of their credit card customers, but most aggressively market these products to vulnerable Hawaii consumers who fall into the subprime credit category, who have low credit limits because of impaired credit ratings, or who are looking to establish or re-establish their credit.

16. Defendants' ancillary products share common characteristics in that each are: (a) marketed as ways for consumers to protect themselves from fraud or unauthorized charges, or to increase their financial security, (b) considered an optional product that is not required to have a credit card account, (c) tethered to consumers' specific credit card accounts, and (d) billed directly to the account monthly, with no separate bill provided.

17. Defendants' ancillary products are in fact a dense maze of limitations, exclusions and restrictions, making it impossible for consumers to knowingly determine what these products cover and whether they provide a worthwhile financial benefit.

18. Examples of Defendants' ancillary products include:

a. **Payment Protection** – this product allegedly safeguards subscribers' credit card accounts by canceling or temporarily suspending the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts in other circumstances.

b. **Identity Theft Protection** – In exchange for a fixed-rate monthly fee, this plan purports to monitor consumers' credit scores for indicia of identity theft and will alert the enrollee if something suspicious happens to their credit score.

c. **Wallet Protection** – In exchange for a fixed-rate monthly fee, if the consumers' wallet is lost or stolen, HSBC will contact the issuers of the consumers' credit cards to cancel the cards lost or stolen.

d. **Credit Score Tracker** – In exchange for a fixed-rate monthly fee, this product provides consumers with copies of their credit report(s) and tools that allow them to track their credit score on a daily basis. However, the three major credit reporting agencies are required by federal law to provide consumers with one free credit report each year.

19. Defendants have enrolled large numbers of Hawaii residents and charged them substantial sums of money for enrollment in these product plans.

20. Defendants have devised a scheme to increase the profits they receive from their ancillary products exponentially. Upon information and belief, by limiting the amount of credit given to Hawaii consumers, but issuing multiple cards to them, Defendants are able to impose separate monthly fees for these products on each of the consumers' cards. This scheme doubles, triples or more, the monthly fees charged without any analogous increased risk to Defendants.

B. Defendants Sign Up Unsuspecting Cardholding Consumers for Ancillary Products Without Their Meaningful, Knowing Authorization or Consent

21. Defendants often enroll consumers in these products based on highly deceptive and misleading telemarketing calls, charging some consumers without their meaningful consent or understanding that their credit card will be charged for these products. Defendants are in the unique position to do this because, unlike a typical seller or marketer, they are the consumer's credit card company and already have their credit card numbers. The State of Hawaii brings this *parens patriae* consumer protection lawsuit against Defendants to address their unfair and deceptive business practices.

1. The Way Ancillary Products Are Marketed is Unfair and Deceptive

22. Defendants sell ancillary products to consumers through a number of different channels, including online and direct mail marketing, in which they may ask that consumers "check the box" to initiate the plan, and through telemarketing, where consumers may be asked to press a button on the telephone or verbally agree in order to approve initiation of the plan.

The former channels require an affirmative action by the consumer to enroll, such as checking a box or initializing a monthly statement or other mailer or online form in a designated space to authorize enrollment. For a consumer that “checked the box” or initialized a document, confirming consumers’ assent to be billed for an ancillary product is easily traceable. On the other hand, for those whose assent was allegedly obtained through telemarketing (upon information and belief, the majority of ancillary product customers), confirmation of affirmative assent requires a review of the telephone call itself.

23. In addition to Defendants’ financial motive to enroll as many Hawaii customers as possible into these highly lucrative ancillary product schemes, upon information and belief, individual telemarketers are incentivized to enroll as many cardholders as possible, either because their compensation is commission-based or because their performance is otherwise evaluated and they are subsequently compensated based on the number of cardholders they enroll.

24. Unfair and deceptive practices are rife in telemarketing these products.

25. Defendants’ telemarketers employ an array of deceptive sales tactics to elicit cardholders into communicating some affirmative response, knowing that the cardholders do not actually understand that they are supposedly agreeing to purchase an ancillary product.

26. Defendants’ telemarketers characterize the call as a courtesy to thank cardholders and remind them of benefits they already get through their credit card agreement (like cash back, airline miles, rewards, etc.), when in fact they are calling to sell ancillary products.

27. Telemarketers may speed through, skip altogether or alter the text of the information they are required to provide to cardholders (the “disclosure”), in an effort to make the disclosure sound like confusing legalese, then say “OK?” or ask if the person heard them or

understood, knowing that such a question will almost always elicit an affirmative response such as “ok” or “yes.” The cardholder believes they have just listened to a courtesy call, but the Defendants treat the affirmative response as the cardholder’s agreement to enroll in the plan. These cardholders may say “ok” or “yes” at the conclusion of the call, but no reasonable person listening to the recordings of these calls would conclude the cardholder was giving their knowing, meaningful assent to be charged a monthly fee for enrollment in the plan.

28. Another tactic Defendants’ telemarketers use is to ask cardholders if they may simply send out a “packet of information” about the plan. Defendants treat an affirmative response to this inquiry as authorization for paid enrollment, even though consumers do not understand or believe that they have agreed to purchase anything.

29. Each Defendant has such a “packet of information” for each of the plans offered and Defendants are required to provide enrollees with this information. For example, Defendants use a packet sometimes referred to as a “Welcome Kit” for this purpose for its Payment Protection Plan. Many Hawaii customers never receive the packets allegedly sent out. Others who receive the packet ignore or disregard it because they do not understand that they had already been enrolled. They may reasonably assume it is just another piece of junk mail from a credit card company. While those cardholders that told the telemarketer they could send information about the plan may recognize what the packet relates to, they reasonably assume further steps must be taken by them before they will become enrolled in the plan. If the slammed consumer simply throws out the packet, without reading it, signing it or conferring with the credit card company about it, they are nevertheless still enrolled in the plan.

30. Defendants utilize the card activation process as another way to wrongfully enroll consumers. Consumers are told they must call Defendants from their home phone number to

activate their card. Defendants take this opportunity to sell ancillary products. Cardholders who are calling to activate a credit card are particularly susceptible to believing that the “disclosure” is some legal text that must be read to the cardholder, rather than an alleged contractual agreement to purchase an optional, ancillary product of little or no value to them. Many Hawaii cardholders, accustomed to all the legal language and fine print received when they open a new credit card account, become immune to the terms and conditions communicated to them. They reflexively reply “ok,” and have no idea that they have supposedly purchased some ancillary product.

31. In addition to deceptively inducing cardholders to say “yes” or “ok” during the call, Defendants enroll some cardholders who did not provide any affirmative response. In such instances, Defendants have no proof of affirmative assent, either because there is no affirmative response on the recording, there is a clear rejection of the offer, or a record of the call does not exist. The cardholder has been “slammed,” that is, involuntarily enrolled in the plan without their knowledge or consent.

32. And unlike in a typical telemarketing call, this telemarketer does not need the consumer to provide them with their credit card number and information to purchase the product because the telemarketer *is* the credit card company. As a result, Defendants can charge consumers’ accounts when there has been no clear and knowing consent given.

2. Hawaii Consumers “Slammed” with Ancillary Products Receive Little to No Relief from the Defendants

33. Defendants know that slamming occurs frequently. In fact, the “refund” process itself is set up on the assumption that consumers have been deceived and do not understand that they have been enrolled. When a consumer calls within thirty (30) days of being enrolled, they

are supposed to get their money back no questions asked, and Defendants make no effort to then determine how it came to be that the cardholder was enrolled without their authorization.

34. However, many Cardholders have no idea they are enrolled in an ancillary product plan and do not notice or appreciate the meaning of the line-item charge for the plan on their credit card bills. The charge appears among the other purchases on the cardholder's monthly statement.

35. Some cardholders have accounts that do not require close inspection of monthly statements. This may be because they are not making new purchases on the account (they may be simply seeking to pay off the balance, or took advantage of a balance transfer offer, or utilized the account to make a single purchase). Others do not receive monthly bills at all.

36. Consumers may pay this hidden charge month after month for many months before they become aware of it. For online accounts, add-on plans are often posted to a cardholder's account on the last day of each statement period, and that statement is then archived on the website. A cardholder may review current activity on their account regularly and yet never see the charge billed to their account on the last day of the previous billing cycle's statement.

37. In addition to the obvious unfairness of enrolling cardholders without their valid authorization, Defendants reap an extra windfall because these enrollees will never invoke the supposed benefits of the plans for which they were charged because they do not even know they may do so.

38. If cardholders do not discover the deceit until more than 30 days after being enrolled, Defendants will not automatically refund the overpayments to the cardholder.

39. Cancellation of plans and disputes about enrollment are so widespread in this industry that Defendants use template form letters to send to slammed consumers who complain. Instead of “coming clean” to these aggrieved consumers, Defendants make it exceedingly difficult for them to get relief, such that many Hawaii consumers give up hope of ever getting their money back after paying for a product they did not request and did not use.

II. Defendants Sell Payment Protection, a Specific Ancillary Product, to Hawaii Consumers Who Can Receive No Benefit from the Coverage Offered

40. Payment Protection has come under increased scrutiny recently from both the federal government and private plaintiffs.¹

41. The ancillary products at issue in this Complaint, including but not limited to Payment Protection, are not deemed insurance products under Hawaii law, and the Defendants are not insurance companies.

42. Defendants do not consider Payment Protection an insurance product. Payment Protection Plans are not registered or identified as insurance products with the Department of Commerce & Consumer Affairs for the State of Hawaii, which is tasked with the responsibility of overseeing the insurance industry in Hawaii, or other appropriate authorities.

¹ See, e.g., Credit Cards: Consumer Costs for Debt Protection Products Can be Substantial Relative to Benefits but are Not a Focus of Regulatory Oversight, U.S. Government Accountability Office, GAO-11-311, March 25, 2011 (“GAO Report”), attached as Ex. 1 to the Complaint.

Lawsuits are pending, including cases brought by Attorneys General. See *State of Minn. v. Discover Fin. Servs. et al.*, 27-CV-10-27510 (D. Minn. Dec. 6, 2010), (Ex. 2); *State of West Virginia v. Capital One Bank (USA), N.A., et al.*, 10-C-7-N (Cir. Mason, WV Jan. 20, 2010) (Ex. 3). At least two cases brought by consumer classes have settled. See Order Granting Final Approval of Class Action Settlement, *Spinelli et al. v. Capital One Bank and Capital One Servs.*, 08-cv-132-T-33EAJ, Dkt. 231 (M.D. Fla. Nov. 23, 2010), [Proposed] Order (Ex. 4), and *Kardonick et al. v. JP Morgan Chase & Co. and Chase Bank USA N.A.*, 10-cv-23235, Dkt. 23 (S.D. Fla. Feb. 3, 2011) (Ex. 5).

43. Defendants do not designate Payment Protection an “insurance product.” This way, they can avoid state regulation and charge higher fees. Payment Protection Plans are unregulated as to terms, conditions and fees, making them highly profitable for Defendants.

44. These types of plans offer little to no benefit to consumers for several reasons and have been subject to criticism from consumer advocates on several fronts. For example, it may not be disclosed to consumers that under the terms and conditions of the plan, the cardholder may not be permitted to use their credit card while they have invoked Payment Protection benefits, and in the periods of time when consumers actually invoke the benefits, such as in the case of unemployment, the cardholder often needs their credit the most.

45. Defendants market specifically to elderly consumers, for whom benefits may be of little or no value. Defendants know that their conduct is directed towards elderly consumers (defined as sixty-two years of age or older by HRS § 480-13.5(c)), because they have the consumer’s date of birth on file. The main benefit of Defendants’ Payment Protection plans is that they suspend payment obligations when the borrower’s income stream is lost due to unemployment, disability, or natural disaster. But for those on a fixed income, any such “protection” may be illusory because the “qualifying events” will not disrupt the income stream coming from a fixed income.

46. Defendants market Payment Protection through direct mail and solicit Payment Protection customers over the phone. They represent Payment Protection as a product that pays the required minimum monthly payment due on the subscriber’s credit card account and the Payment Protection plan fee for a limited period of time under certain triggering circumstances, such as involuntary unemployment, illness, or changes in family status, thus preventing the account from becoming delinquent. HSBC’s marketing for this product claims that “[i]n good

times and bad, we've got you covered." See http://www.personalaccountprotection.com/1/2/3/product_details_howitworks (last viewed on February 6, 2012).

47. However, Defendants misrepresent and/or fail to disclose the real nature of Payment Protection. While representing to consumers that "we've got you covered", among other representations, in fact, Defendants impose Payment Protection on customers who did not authorize the charges. Because these customers do not know this "coverage" has been imposed on them and that they were enrolled without their consent, they do not know they can avail themselves of it and do not have the necessary information to determine what Payment Protection covers and whether it would be a sound financial choice to continue paying for the Plan.

48. Defendants market their Payment Protection Plans to individuals who do not qualify for the alleged benefits of the Plans. The numerous qualifications and restrictions set forth in Defendants' fine print expose the advertised "got you covered" as an illusion, at best, because the Defendants do not determine consumers' eligibility for various options under the Payment Protection Plan before marketing and selling Payment Protection to them.

49. Defendants market Payment Protection as a product that will safeguard subscribers' credit card accounts by suspending or crediting the required minimum monthly credit card payments due in certain highly restricted circumstances, or permanently canceling accounts in other circumstances. When minimum monthly payments are credited, the monthly interest charges and the Payment Protection fee (and any other ancillary fees) continue to accrue without adequate disclosure to consumers.

50. The terms offered for the Payment Protection scheme are varied, complicated and always changing. However, all of the various plans provide for some form of payment

suspension upon the occurrence of the following events, as it defines the terms: *Involuntary Unemployment, Temporary or Permanent Disability, and the occurrence of a Personal Milestone or Life Event, including things like marriage, divorce or a home move, and Loss of Life.* The restrictions, limitations and exclusions associated with these events that trigger supposed Payment Protection benefits are expansive and constantly evolving.

51. Defendants make no reasonable effort and undertake no investigation, including review of information in their possession regarding the cardholder, to determine if Payment Protection coverage would apply to the cardholder. Such information may include health status, name of last employer and date of birth, which would assist Defendants in knowing whether a particular cardholder is eligible for Payment Protection benefits.

52. Accordingly, Defendants engage in aggressively marketing to enroll Hawaii cardholders in Payment Protection even when they have information in their possession indicating that the product may have limited or no value to the particular consumer.

53. Telephone marketing scripts and written materials provided by Defendants to consumers are incomplete, indecipherable, misleading and obfuscatory.

54. One example of the misleading and obfuscatory language is Defendants' failure to disclose that Payment Protection is actually akin to an insurance product. Despite this fact, marketing materials carefully avoid any use of the word "insurance." The materials may, however, refer to "premiums," "claims" or "benefits," which indicates that Defendants internally regard and acknowledge this as an insurance product.

55. Defendants do not adequately describe or explain the exclusions to prospective subscribers so they can determine whether they have certain characteristics or meet certain factors

that would bar them from being eligible for benefits under Credit Protection, even though Defendants have a common practice of imposing limitations on full coverage based on exclusions.

- a. Payment Protection benefits do not apply to retired persons or persons who are not employed. This most often affects “elder” consumers aged sixty-two or over;
- b. Payment Protection benefits do not apply to persons self-employed, employed part time or seasonally;
- c. Payment Protection benefits do not apply immediately or for some period directly after unemployment or disability;
- d. Payment Protection benefits do not apply unless you qualify for state unemployment benefits and continue to meet qualifications;
- e. Payment Protection benefits do not apply unless you notify the company and provide Verification within a set period of time;
- f. Subscribers may not be able to use their credit card for new purchases while Payment Protection benefits are being provided;
- g. Payment Protection coverage is limited to per calendar year maximums; and
- h. Payment Protection benefits require continued treatment and verification by a physician for the duration of the disability.

56. For instance, retired persons in Hawaii, many of whom are “elder” senior citizens aged sixty-two or older, are charged for this product even though they are categorically excluded from receiving many of the benefits under the plan. Defendants do not ask customers whether they are retired.

57. Similarly, the benefits offered to self-employed persons are limited, but HSBC nevertheless fails to affirmatively inform self-employed persons of the limitations in benefits when they are enrolled. In fact, HSBC does not even ask customers whether they are self-employed.

58. Further, part-time workers, seasonal workers and workers concluding an employment contract (including ending a military tour of duty) are also limited or categorically

excluded from receiving benefits. To qualify for benefits, one needs to work a set number of hours a week in employment considered to be permanent. However, Defendants make no effort to investigate whether any of the Hawaii consumers they charge for Payment Protection are part-time, seasonal or military workers. These terms are not adequately communicated or defined in written materials.

59. Finally, benefits are limited for disabled persons, but Defendants nevertheless fail to affirmatively inform these individuals of the limitations in benefits when they are enrolled. In fact, Defendants do not even ask customers whether they are disabled.

60. Defendants have no process to keep updated on consumers' status, either. Accordingly, when consumers' statuses change, they will continue to pay for Payment Protection even though they may no longer be eligible for its benefits.

61. If consumers are eventually provided with written materials, the materials themselves are confusing, and do not require the consumers' signature or affirmative assent before they can be billed for the plan. It is virtually impossible for the subscriber to determine all of the exclusions and limitations of Payment Protection, or the value of the product, based on what is provided.

62. The cost of Payment Protection is set forth in a confusing and misleading manner. The premium for Payment Protection is set at a dollar amount per \$100.00 of the ending statement balance for each particular month. For example, the cost of HSBC Payment Protection ranges from \$0.57 (Life) to \$0.96 (Basic) to \$1.35 (Life) per \$100 of the previous billing period's New Balance. Thus, a customer who charges \$1000 a month, and even pays off his balance every month, pays between \$68.40 and \$162.00 per year for Payment Protection. Defendants add these amounts directly to the credit card account statement each month.

63. Payment Protection also provides the added benefit to Defendants of lowering available credit to its subscribers because the imposition of this additional fee brings consumers closer to their maximum credit limit without their knowledge. This operates in some instances to cause consumers to exceed their credit limits, thereby incurring over-the-limit fees. Further, the imposition of the Payment Protection fee creates a cycle of profitability, in that the fee itself increases subscribers' monthly credit balances, which in turn increases Payment Protection fees in subsequent months.

64. Defendants' "customer service" support is set up in such a way that Hawaii consumers cannot easily cancel ancillary products or receive answers to benefit questions, nor can they easily file claims or receive benefits for filed claims.

65. Upon information and belief, employees at Defendants' Payment Protection call centers are given authority to deny claims immediately over the phone, but do not have authority to approve payment of benefits to claimants in the same manner.

66. Moreover, upon information and belief, when subscribers call Defendants attempting to cancel Payment Protection, employees at Defendants' call center are trained to attempt to talk the subscriber out of canceling by "selling" the supposed benefits of Payment Protection.

67. Further, when claims for Payment Protection benefits are denied, Defendants have not implemented a process through which subscribers' Payment Protection premiums are refunded, even if the subscribers are deemed to be *per se* ineligible for Payment Protection benefits. In fact, if Hawaii subscribers are denied Payment Protection benefits, Defendants neither affirmatively remove subscribers from Payment Protection enrollment going forward, nor

do they inform subscribers of their continued obligations to pay for Payment Protection, even though they have been deemed to be ineligible for benefits.

68. Payment Protection is so confusing as to when coverage is triggered, so restricted in terms of the benefits it provides to subscribers, and processing claims is made so difficult by Defendants, that it is essentially worthless.

69. Although heralded as coverage designed for a subscriber's peace of mind and for use when times get tough, the Payment Protection device is designed to prey on the financially insecure and is virtually worthless because of the numerous restrictions that are imposed, because of the exclusions of benefits, and because of the administrative and bureaucratic hurdles that are placed in the way of Hawaii consumers who attempt to secure payments from Defendants under Payment Protection coverage.

70. As a result of their unfair and deceptive marketing practices in connection with sales of Payment Protection, Defendants have increased profits by substantial sums, all thanks to products which provide virtually no benefit to the Hawaii residents who are nevertheless charged for these products month in and month out.

COUNT I
VIOLATION OF HAWAII LAW ON UNFAIR OR DECEPTIVE ACTS OR PRACTICES, HAW. REV. STAT. §§ 480-1 ET SEQ. ("UDAP")

71. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

72. The UDAP sets forth that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." Haw. Rev. Stat. § 480-2(a).

73. Among other things, Haw. Rev. Stat. § 481A-3(a) defines actions that constitute a "deceptive trade practice" as including, but not limited to, the following:

(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

* * * *

(5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;

* * * *

(9) Advertises goods or services with intent not to sell them as advertised;

* * * *

(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Id. § 481A-3(a)(2), (5), (9), (12).

74. As set forth herein, the Defendants' actions of marketing, selling and administering the ancillary products at issue in this Complaint, including Payment Protection, fit within the definitions and scope of the UDAP.

75. The Attorney General of the State of Hawaii "may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section." *Id.* at § 480-2(d). The Attorney General is specifically charged with the administration of the UDAP, and may act *sua sponte* as the agent and legal representative of the State in civil proceedings to enforce the statute.

76. Defendants' conduct described above constitutes multiple, separate violations of the UDAP.

77. Each violation of the statute by the Defendants is an unfair or deceptive act or practice in the conduct of the trade or commerce in violation of the UDAP. For example, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product without his or her assent constituted a separate violation of the UDAP. Likewise, each enrollment by Defendants of a Hawaii consumer who is ineligible for the plan's benefits (due to age, work status, disability or for any other reason) constituted a separate violation of the UDAP. Similarly, each time Defendants enrolled a Hawaii consumer in a Payment Protection Plan or similar ancillary product but failed to disclose all material restrictions, limitations, and exclusions constituted a separate violation of the UDAP. Each time Defendants failed to refund premiums paid also constituted a separate violation of the UDAP.

78. The Defendants' violations were and are likely to mislead Hawaii consumers. The Defendants are aware of the violations, including the widespread slamming practices engaged in and the enrollment of cardholders who are ineligible for benefits offered under Payment Protection, yet Defendants fail to adequately and affirmatively take steps to cure the violations or refund monies owed.

79. As a result of the Defendants' unfair or deceptive practices, the purported contracts between Hawaii consumers and the Defendants for purchase of the aforementioned ancillary products are "void and [] not enforceable at law or in equity." Haw. Rev. Stat. § 480-12.

80. Defendants' violations justify penalties of up to \$10,000 for each violation of the UDAP (*id.* at § 480-3.1) and injunctive relief (*id.* at 480-15).

COUNT II
VIOLATION OF THE UDAP, CONSUMER FRAUDS AGAINST ELDERS
HAW. REV. STAT. § 480-13.5

81. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

82. The UDAP sets forth that “[i]f a person commits a violation under section 480-2 which is directed toward, targets, or injures an elder, a court, in addition to any other civil penalty, may impose a civil penalty not to exceed \$10,000 for each violation.” Haw. Rev. Stat. § 480-13.5(a).

83. Defendants knowingly market specifically to elderly consumers, many of whom are retired, and for whom benefits may be of little or no value.

84. As a result of the Defendants’ unfair or deceptive practices directed specifically towards elders, Defendants’ violations justify assessing additional penalties of up to \$10,000 for each violation of the UDAP committed against elders. *Id.*

COUNT III
UNJUST ENRICHMENT

85. The State re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

86. By unknowingly paying unauthorized or otherwise improper charges to Defendants, as stated above, Hawaii consumers conferred a benefit on Defendants.

87. Defendants knowingly accepted such benefit, to which they are not entitled.

88. Defendants’ acceptance and retention of such benefit under these circumstances is unjust and inequitable.

89. As a matter of equity, consumers within the State should be made whole by application of the doctrine of unjust enrichment.

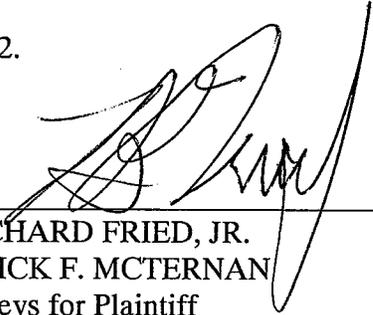
RELIEF

WHEREFORE, the State of Hawaii, by and through its Attorney General, respectfully prays that this Court grant the following relief:

1. Entering Judgment in favor of the State in a final order against each of the Defendants;
2. Enjoining the Defendants and their employees, officers, directors, agents, successors, assignees, merged or acquired predecessors, parent or controlling entities, subsidiaries, and all other persons acting in concert or participation with it, from engaging in unfair or deceptive practices in violation of Hawaii law and ordering temporary, preliminary or permanent injunction;
3. Awarding judgment against the Defendants for restitution and disgorgement of monies under the *parens patriae* doctrine, the general equitable powers of this Court, the doctrine of unjust enrichment and any other authority, for all Hawaii consumers injured by Defendants' acts described in this Complaint;
4. Declaring that each act of each of the Defendants described in this Complaint constitute multiple, separate violations of Hawaii law;
5. Imposing civil penalties for each repeated and willful violation of the UDAP;
6. Imposing additional civil penalties of up to \$10,000 for each repeated and willful violation of the UDAP committed against elders;
7. Awarding equitable relief, including but not limited to restitution and disgorgement of monies obtained as a result of the UDAP violations;
8. Granting the State:
 - a. The cost of investigation and reasonable attorneys' fees, as authorized by the UDAP,
 - b. Pre-judgment and post-judgment interest, and,
 - c. All other relief as provided by law and/or as the Court deems appropriate and just.

Plaintiff asserts claims herein in excess of the minimum jurisdictional requirements of this Court.

DATED: Honolulu, Hawai`i, April 12, 2012.



L. RICHARD FRIED, JR.
PATRICK F. MCTERNAN
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, <i>EX. REL.</i> DAVID M. LOUIE, ATTORNEY GENERAL,	)	CIVIL NO. <u>12-1-0983-04</u>
	)	(Other Civil Action)
)	
Plaintiff,	)	SUMMONS
)	
vs.)	
)	
HSBC BANK NEVADA, N.A., HSBC CARD SERVICES, INC. and DOE DEFENDANTS 1-20,	)	No trial date has been set.
)	
Defendants.)	
)	
)	
)	

SUMMONS TO ANSWER CIVIL COMPLAINT

TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby summoned and required to file with the court and serve upon L. Richard Fried, Jr., Esq. and Patrick F. McTernan, Esq., plaintiff's attorneys, whose address is 600 Davies Pacific Center, 841 Bishop Street, Honolulu, Hawaii, 96813, an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled court permits, in writing to this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATE ISSUED: APR 12 2012

F. OTAKE
 CLERK

