

The JS 44 civil cover sheet and the information contained therein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

BZ

**I. (a) PLAINTIFFS**  
**CAPITAL ONE BANK (USA), N.A.**

**(b) County of Residence of First Listed Plaintiff** City of Richmond, Virginia  
 (EXCEPT IN U.S. PLAINTIFF CASES)

**(c) Attorney's (Firm Name, Address, and Telephone Number)**  
 James F. McCabe MORRISON & FOERSTER LLP  
 James R. McGuire 425 Market Street  
 Rita F. Lin San Francisco, CA 94105-2482  
 Sarah E. Griswold (415) 268-7000

**DEFENDANTS**  
 EDMUND G. BROWN, JR., in his capacity as Attorney General of the State of California

County of Residence of First Listed Defendant San Francisco County  
 (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

1 U.S. Government Plaintiff  
 2 U.S. Government Defendant

3 Federal Question (U.S. Government Not a Party)  
 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business in This State.	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<b>PERSONAL INJURY</b>	<b>PERSONAL INJURY</b>	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury — Med. Malpractice	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury — Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<b>PROPERTY RIGHTS</b>	<input checked="" type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	<b>PERSONAL PROPERTY</b>	<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 650 Airline Regs.	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 660 Occupational Safety/Health		<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 690 Other	<b>LABOR</b>	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 710 Fair Labor Standards Act	<b>SOCIAL SECURITY</b>	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury		<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 861 HIA(1395ff)	<input type="checkbox"/> 850 Securities/Commodities/Exchange
<input type="checkbox"/> 195 Contract Product Liability			<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 196 Franchise			<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 890 Other Statutory Actions
			<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 891 Agricultural Acts
<b>REAL PROPERTY</b>	<b>CIVIL RIGHTS</b>	<b>PRISONER PETITIONS</b>	<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 892 Economic Stabilization Act
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence		<b>FEDERAL TAX SUITS</b>	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<b>Habeas Corpus:</b>		<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 530 General	<b>IMMIGRATION</b>	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 462 Naturalization Application		<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 463 Habeas Corpus - Alien Detainee		<input type="checkbox"/> 950 Constitutionality of State Statutes
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities - Other	<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 465 Other Immigration Actions		
	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 555 Prison Condition			

**V. ORIGIN** (Place an "X" in One Box Only)

1 Original Proceeding  2 Removed from State Court  3 Remanded from Appellate Court  4 Reinstated or Reopened  5 Transferred from another district (specify)  6 Multidistrict Litigation  7 Appeal to District Judge from Magistrate Judgment

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
 12 U.S.C. § 484; 42 U.S.C. § 1983

Brief description of cause:  
 Plaintiff seeks declaratory and injunctive relief from Defendant's unlawful attempts to exercise visitatorial powers.

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$** \_\_\_\_\_

CHECK YES only if demanded in complaint:  
**JURY DEMAND:**  Yes  No

**VIII. RELATED CASE(S) IF ANY**

PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE". Not applicable.

**IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY)**

SAN FRANCISCO/OAKLAND  SAN JOSE

DATE: May 2, 2008

SIGNATURE OF ATTORNEY OF RECORD: James F. McCabe / 556

ORIGINAL

FILED  
DEPT-2 MAIL: 17  
COURT OF APPEALS  
SACRAMENTO, CALIFORNIA

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CAPITAL ONE BANK (USA), N.A.

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

BZ

13 CAPITAL ONE BANK (USA), N.A.,

CV

08 No.

2289

14 Plaintiff,

15 v.

16 EDMUND G. BROWN, JR., in his capacity as  
17 Attorney General of the State of California,

18 Defendant.

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF  
(12 U.S.C. § 484; 42 U.S.C. § 1983)

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19 Plaintiff Capital One Bank (USA), N.A. ("Plaintiff") alleges as follows:

20 **OVERVIEW OF THE ACTION**

21 1. Plaintiff brings this action to require the Attorney General of the State of California  
22 (the "Attorney General") to comply with long-established federal law. The Attorney General  
23 seeks to exercise rights of "visitation" over Plaintiff by demanding that Plaintiff respond to  
24 information requests directed at whether their credit card marketing, advertising, issuing,  
25 servicing, and related banking practices violate California or federal law. Plaintiff is a national  
26 bank, and as such is an instrumentality of the federal government, authorized under the National  
27 Bank Act (12 U.S.C. §§ 21 *et seq.*) to exercise enumerated and incidental powers related to the  
28 business of banking. Plaintiff is subject to the exclusive visitorial power of the Office of the

1 Comptroller of the Currency (“OCC”) under the Visitorial Powers Statute, 12 U.S.C. § 484.  
2 “Visitorial powers” include the power to examine books and records of a national bank, as well as  
3 the power to enforce a national bank’s compliance with applicable law in the exercise of its  
4 federally authorized banking functions.

5 **PARTIES**

6 2. Plaintiff Capital One Bank (USA), N.A. is a national bank organized under the  
7 National Bank Act, as administered by the OCC, and is headquartered in Virginia. Capital One  
8 Bank (USA), N.A. is a wholly-owned subsidiary of Capital One Financial Corporation, a publicly  
9 traded company. Capital One Bank (USA), N.A. provides traditional banking services to its  
10 customers, including receiving deposits, cashing checks, making loans, and extending credit  
11 through credit cards. Capital One Bank (USA), N.A. was formerly chartered as Capital One  
12 Bank, a Virginia general purpose bank, but on March 1, 2008, converted its charter to that of to a  
13 national banking association organized under the National Bank Act. Assets and records  
14 formerly owned by Capital One Bank are now owned by Capital One Bank (USA), N.A. To the  
15 extent this Complaint refers to Capital One Bank (USA), N.A., that term includes Capital One  
16 Bank.

17 3. Defendant Edmund G. Brown, Jr. is the Attorney General of the State of California  
18 and is sued herein in his official capacity. He maintains offices at 455 Golden Gate Avenue,  
19 Suite 11000, San Francisco, California.

20 **JURISDICTION AND VENUE**

21 4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.  
22 § 1331, in that it arises under the Constitution and laws of the United States, including the  
23 Supremacy Clause of the United States Constitution, U.S. Const. art. VI, the National Bank Act,  
24 the regulations duly promulgated thereunder, and 42 U.S.C. § 1983. In addition, jurisdiction is  
25 proper under 28 U.S.C. § 1343(a)(3), in order to protect federal rights and immunities that are  
26 subject to deprivation under color of state law. This Court is authorized to issue a declaratory  
27 judgment pursuant to 28 U.S.C. §§ 2201-02.

1 5. Venue of this action is proper in this district pursuant to 28 U.S.C. § 1391(b)(2)  
2 because a substantial part of the events giving rise to these claims occurred in this district.

3 **INTRADISTRICT ASSIGNMENT**

4 6. Pursuant to Civil Local Rule 3-2(c), assignment to the San Francisco Division is  
5 proper because a substantial part of the events or omissions which give rise to Capital One Bank  
6 (USA), N.A.'s claims occurred in San Francisco County.

7 **FACTUAL ALLEGATIONS**

8 7. On or about November 13, 2006, Defendant made demands upon "Capital One" for  
9 production of books and records concerning and interviews with employees knowledgeable about  
10 various banking practices of Plaintiff. The Attorney General's demand stated that "the California  
11 Attorney General has substantial concerns about the credit card practices of Capital One. We are  
12 offering you the opportunity to meet with us before we determine what action, if any, should be  
13 taken to address these concerns." The subjects on which interviews and documents were  
14 requested included solicitation of credit card account applications mentioning balance transfers,  
15 issuance of credit cards on reaffirmation of preexisting debt, account closing practices, and some

16 8. At the time of the Attorney General's demand, the only affiliates of Capital One  
17 Financial Corporation that had theretofore offered credit card accounts to U.S. residents were  
18 Capital One Bank and Capital One, F.S.B. a federally chartered savings bank. On July 1, 2007,  
19 Capital One, F.S.B. merged into Capital One, N.A., a national bank. In that transaction, Capital  
20 One, F.S.B.'s credit card receivables relating to "Capital One" credit card accounts and associated  
21 records were transferred to Capital One Bank, which has since converted to Capital One Bank  
22 (USA), N.A. All credit card accounts established with the "Capital One" mark and their related  
23 records – whether opened with Capital One Bank, Capital One, F.S.B. or with Capital One Bank  
24 (USA) N.A. – are currently held by Plaintiff.

25 9. On receipt of the information demand, Plaintiff began discussions with the Attorney  
26 General's Office in an effort to understand the nature of any specific business practices of  
27 concern, to work with the Attorney General's Office to narrow the scope of the requests. Plaintiff  
28 provided a number of documents responsive to the Attorney General's demands, as well as a

1 narrative description of certain credit card practices, in December, 2006. The Attorney General  
2 made further requests for documents and information regarding Plaintiff's credit card lending in  
3 January, 2007. Plaintiff provided further information responsive to the Attorney General's  
4 demands in the fall of 2007.

5 10. The OCC acknowledged in its publicly available Weekly Bulletin for the week  
6 ended September 8, 2007 that on September 4, 2007 it received from Capital One Bank an  
7 application to convert its charter to that of a national bank. The OCC acknowledged in its  
8 publicly available Weekly Bulletin for the week ended October 20, 2007 that it approved that  
9 application on October 19, 2007.

10 11. As of March 1, 2008, Capital One Bank, a Virginia state-chartered bank, converted  
11 its charter to that of a national banking association organized under the National Bank Act, as  
12 administered by the OCC, and known as Capital One Bank (USA), N.A. Capital One Bank's  
13 assets are now owned by Capital One Bank (USA), N.A.

14 12. On March 18, 2008, Plaintiff advised the Attorney General of its charter conversion,  
15 and explained that the OCC now exercises complete and exclusive visitorial powers over  
16 Plaintiff, which include the ability to inspect Plaintiff's books and records and to enforce  
17 Plaintiff's compliance with applicable federal and state laws concerning its banking practices.

18 13. On April 8, 2008, the Attorney General responded by letter, making demands for  
19 inspection of Plaintiff's books and records regarding its exercise of its banking powers. The  
20 Attorney General also asked that "Capital One" enter into a form of tolling agreement that  
21 recited:

22 The California Attorney General is conducting an inquiry into  
23 [COMPANY NAME]'s practices and the Attorney General and  
24 [COMPANY NAME] have begun discussions with respect to the Attorney  
25 General's concerns regarding what it views as [COMPANY NAME]'s  
26 possible violations of Business and Professions Code sections 17200 and  
27 17500 and other possible violations of statutory and common law. The  
28 Attorney General has refrained from filing any action in connection with  
those concerns during the discussion.

1 The form provided for a waiver of all of “Capital One’s” defenses based on delay or passage of  
2 time that might be applicable with respect to “any action brought by the People based on causes  
3 of action that exist on” a date to be entered into the Attorney General’s form tolling agreement.

4 14. On May 2, 2008, counsel for the Plaintiff, in a telephone conference with Deputy  
5 Attorney General Kathrin Sears, asked that the Attorney General withdraw both his request for  
6 inspection of books and records relating to the banking business of Plaintiff and his request for a  
7 tolling agreement with respect to claims against “Capital One.” DAG Sears declined to withdraw  
8 the Attorney General’s requests.

9 **FIRST CAUSE OF ACTION**  
10 **(For Injunctive Relief Based Upon**  
11 **the Visitorial Powers Statute and the National Bank Act)**

12 15. Plaintiff realleges and fully incorporate by reference each of the preceding  
13 paragraphs as if fully set forth herein.

14 16. The pertinent provisions of the Visitorial Powers Statute, which is part of the  
15 National Bank Act, are codified at 12 U.S.C. § 484(a) and provide as follows:

16 No national bank shall be subject to any visitorial powers except as  
17 authorized by Federal law, vested in the courts of justice or such as  
18 shall be, or have been exercised or directed by Congress or by  
19 either House thereof or by any committee of Congress or of either  
20 House duly authorized.

21 17. The Comptroller of the Currency, the officer authorized by Congress to charter  
22 national banks and to regulate them, is authorized by 12 U.S.C. § 93a to issue regulations with  
23 respect to the National Bank Act.

24 18. The Comptroller of the Currency has issued, as part of Title 12, Chapter I, Part 7 of  
25 the Code of Federal Regulations, certain regulations at section 7.4000 thereof, entitled “Visitorial  
26 Powers” (the “Visitorial Powers Regulations”).

27 19. In 12 C.F.R. section 7.4000(a)(1), the Visitorial Powers Regulations provide:

28 Only the OCC or an authorized representative of the OCC may  
exercise visitorial powers with respect to national banks . . . . State  
officials may not exercise visitorial powers with respect to national  
banks, such as conducting examinations, inspecting or requiring the  
production of books or records of national banks, or prosecuting  
enforcement actions, except in limited circumstances authorized by  
federal law.

1 20. The Visitorial Powers Regulations have the force of federal law.

2 21. Through his issuance of multiple letters requesting production of banking records  
3 and his request for a tolling agreement to extend the time in which he might sue the Plaintiff, the  
4 Attorney General impermissibly and unlawfully attempts to exercise visitorial powers that state  
5 officials are prohibited from exercising by federal law.

6 22. Through the requests for production of banking records, and the request for a tolling  
7 agreement, the Attorney General seeks to investigate and bring suit with respect to Plaintiff's  
8 credit card activities. By attempting to enforce such laws against what is now a national bank, the  
9 Attorney General impermissibly and unlawfully attempts to exercise visitorial powers that state  
10 officials are prohibited from exercising by federal law.

11 23. Unless enjoined by order of this Court, the Attorney General threatens to investigate  
12 and to sue Plaintiff for possible violations of federal or state law, in violation of the United States  
13 Constitution (Supremacy Clause), the Visitorial Powers Statute, the Visitorial Powers  
14 Regulations, and the National Bank Act by exercising visitorial powers over a national bank and  
15 obstructing and conditioning its exercise of incidental and enumerated powers under the National  
16 Bank Act and its implementing regulations.

17 24. Such violation of federal law by the Attorney General will inflict irreparable harm  
18 on Plaintiff and will violate its legal rights under federal law.

19 25. Plaintiff has no adequate remedy at law.

20 26. Accordingly, Plaintiff prays that the Court, preliminarily and permanently, issue an  
21 injunction requiring the Attorney General and his agents to cease and desist from all attempts to  
22 investigate or bring suit against Plaintiff regarding banking activities.

23 **SECOND CAUSE OF ACTION**  
24 **(For Declaratory Relief Based Upon**  
25 **the Visitorial Powers Statute and the National Bank Act)**

26 27. Plaintiff realleges and fully incorporate by reference each of the preceding  
27 paragraphs as if fully set forth herein.

28 28. A real and justiciable controversy exists between the Attorney General, on the one  
hand, and the Plaintiffs, on the other. Plaintiff contends that the Attorney General may not,

1 consistent with the United States Constitution, the Visitorial Powers Statute, the Visitorial Powers  
2 Regulations, and the National Bank Act, investigate or sue Plaintiff regarding banking activities.  
3 The Attorney General contends otherwise.

4 29. Accordingly, Plaintiff prays that the Court issue a declaratory judgment that the  
5 Attorney General and his agents may not, consistent with the United States Constitution, the  
6 Visitorial Powers Statute, the Visitorial Powers Regulations, and the National Bank Act,  
7 investigate or sue Plaintiff regarding banking activities.

8 **THIRD CAUSE OF ACTION**  
9 **(For Injunctive Relief Based Upon 42 U.S.C. § 1983)**

10 30. Plaintiff realleges and fully incorporate by reference each of the preceding  
11 paragraphs as if fully set forth herein.

12 31. Under federal law, including the United States Constitution (Supremacy Clause),  
13 the Visitorial Powers Statute, the Visitorial Powers Regulations, the National Bank Act, and the  
14 regulations duly promulgated thereunder, a national bank has the right to be free from unlawful  
15 attempts to exercise visitorial powers over it and the right to be free from unlawful attempts to  
16 obstruct or condition its exercise of its incidental and enumerated banking powers.

17 32. The Attorney General seeks and threatens to deprive Plaintiff of its rights to be free  
18 from unlawful exercises of visitorial powers and unlawful attempts to obstruct and condition the  
19 exercise of its incidental and enumerated banking powers.

20 33. The Attorney General has purported to act under color of state law.

21 34. Unless enjoined by order of this Court, the Attorney General threatens to investigate  
22 or sue the Plaintiff regarding banking activities, in violation of 42 U.S.C. § 1983, under color of  
23 state law, by exercising visitorial powers over Plaintiff and obstructing and conditioning its  
24 exercise of incidental and enumerated powers under the National Bank Act.

25 35. Such violation of federal law by the Attorney General will inflict irreparable harm  
26 on Plaintiff and will violate its legal rights under federal law.

27 36. Plaintiff has no adequate remedy at law.  
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E. Such other and further relief as the Court may deem just and proper.

Dated: May 2, 2008

JAMES F. MCCABE  
JAMES R. MCGUIRE  
RITA F. LIN  
SARAH E. GRISWOLD  
MORRISON & FOERSTER LLP

By: James F. McCabe / SEG  
James F. McCabe

Attorneys for Plaintiff  
CAPITAL ONE BANK (USA), N.A.