IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

LYNN STRANGE, individually and on behalf of all others similarly situated,	:	
Plaintiff,	:	
v.	:	Civil Action No. 8:25-cv-02711-TDC
CAPITAL ONE, N.A.,	:	
Defendant.	:	

PLAINTIFF'S OPPOSITION TO DEFENDANT CAPITAL ONE N.A.'S MOTION TO DISMISS

Eric S. Zell (admitted *pro hac vice*)
eric@consumeradvocates.org
National Association of Consumer Advocates
1667 K St., NW Suite 620
Washington, DC 20006
Telephone: 202-452-1989 x111

Benjamin H. Carney (Fed. Bar No. 27984)
bcarney@GWCfirm.com
Richard S. Gordon (Fed. Bar No. 06882)
rgordon@GWCfirm.com
Gordon, Wolf & Carney, Chtd.
Executive Plaza 1, Suite 1000
11350 McCormick Dr.
Hunt Valley, MD 21031
Telephone: (410) 825-2300
Facsimile: (410) 825-0066

Attorneys for Plaintiff

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Plaintiff, Dr. Lynn Strange, respectfully opposes the motion to dismiss (ECF 27) (the "Motion") filed by Defendant Capital One, N.A. ("Capital One").

I. INTRODUCTION

Plaintiff pays Capital One roughly thirty percent annual interest on her credit card account. Under the National Bank Act ("NBA"), however, a national bank may only charge the interest permitted by the laws of its home state. 12 U.S.C. § 85. Capital One's home state is Virginia.

Virginia law sets a default maximum annual rate of six percent, unless there is an "express contract to pay interest at a specified rate." Va. Code Ann. § 6.2-301.B. In the specific context of credit cards, Virginia reiterates the requirement: a bank may impose finance charges only "at such rates and in such amounts and manner ***as may be agreed by the borrower*** under an open-end credit plan." Va. Code Ann. § 6.2-313 (emphasis added).

Thus, both federal and Virginia law make clear that Capital One may charge more than six percent only if it has an *agreement* with the borrower to a specified interest rate.

Indeed, Capital One concedes this premise. *See* ECF 27-1 at 1-2 (acknowledging that "Virginia law…permits lenders of open-end credit to charge interest ***as agreed*** between the creditor and obligor.") (emphasis added).

Where the parties disagree is on whether such an agreement exists here. Capital One contends that what it calls a "Credit Card Agreement" establishes an express contract to the varying rates it charges. But that document contains a unilateral change-in-terms clause which reserves *maximum flexibility* for Capital One to *change* its interest rates, with no restriction on Capital One other than obeying the law (which everyone already must do).

Under the Credit Card Agreement, Capital One has *no commitment* and *no agreement* as to interest rates – its actions are only restricted by what is legal. The Credit Card Agreement

explicitly allows Capital One to "increase your APRs," to "increase your *Interest Charges* and *Fees*," and to "add, delete, or change ***any term***" of the "Agreement" (specifically including "*Interest Charges*") at "***any time***" (emphasis added), subject only to preexisting legal requirements, through the following change-in-terms clause (the "Change Clause"):

> **Changes to Your Agreement**
>
> ***At any time***, we may add, delete or change ***any term*** of this Agreement, unless the law prohibits us from doing so. We will give you notice of any changes as required by law. We may notify you of changes on your Statement or in a separate notice. Our notice will tell you when and how the changes will take effect. The notice will describe any rights you have in connection with the changes.
>
> Your variable APRs (if applicable) can go up or down as the index for the rate goes up or down. If we increase your APRs for any other reason, or if we change your Fees or other terms of your Account, we will notify you ***as required by law***.

ECF 20, First Amended Complaint ("FAC") ¶ 33 (emphasis added); *see also* ECF 27-3 at 6.

Capital One's own document emphasizes that the Change Clause specifically applies to interest rates, and states disjunctively that interest rates can be raised ***either*** via the Change Clause, ***or*** pursuant to the requirements of the Truth-in-Lending law: "We may increase your *Interest Charges* and *Fees* as described in the **Changes to Your Agreement** section or in your *Truth-in-Lending Disclosures*."[1] ECF 27-3 at 4 (emphasis in original).

In fact, the "Credit Card Agreement" *begins* with the incredible statement that the cardholder is bound by any unknown *future* changes to the "agreement":

> This Customer Agreement ***including any changes to it*** ("Agreement") contains the terms of your agreement with Capital One.

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[1] The "*Truth-in-Lending Disclosures*" are disclosures required by external law; they are defined to be "disclosures that the federal Truth in Lending Act and Regulation Z require for any *Account*. This includes your application and solicitation disclosures, *Account* opening disclosures, subsequent disclosures, Statements, and change in terms notices." ECF 27-3 at 7.

Id. at 2 (emphasis added). Almost immediately after that, Capital One again states that the "documents" which "govern your *Account* with us" include not only the listed existing account documents, but also "any future changes we make" to those documents. *Id*.

The Fourth Circuit has already held that a credit card "agreement" which permits unilateral changes, restricted only by the law, is "illusory" and not an agreement. In *Johnson v. Cont'l Fin. Co., LLC*, 131 F.4th 169, 180 (4th Cir. 2025), the court explained:

> The change-in-terms clause here…allows Continental to change "any term of [the] Agreement" at its "sole discretion, upon such notice ... required by law." …***The plain language of the clause merely commits Continental to do what it is already required to do by law. That cannot furnish consideration***. A bargained-for-exchange by definition assumes that each party will undertake some obligation ***beyond those already imposed by law***.

(emphasis added) (*citing* 3 Williston on Contracts § 7:42 (4th ed. 2024)).

Here, as in *Johnson*, Capital One has undertaken no obligation beyond its preexisting duty to comply with the law. The change-in-terms clause in *Johnson* was materially identical to Capital One's Change Clause. *See Johnson*, 131 F.4th at 174. Indeed, Capital One acknowledges the similarity. *See* ECF 27-1 at 2-3 (conceding that the *Johnson* "agreement contained a clause similar to Capital One's "Changes to Your Agreement" clause"). As in *Johnson*, the Change Clause gives Capital One unilateral power to change any term (including interest terms) at any time, subject only to external legal requirements. Under the controlling Fourth Circuit authority in *Johnson*, Capital One's interest rate arrangement is not an agreement.

Virginia law expressly anticipates this situation. Where a loan is extended, but no "express contract" to a "specified rate" exists, the six percent legal rate is implied and acts as a cap on what the creditor can charge. *See* Va. Code Ann. § 6.2-301. There is no windfall to the borrower, and the creditor is not deprived of its principal or interest. Instead, the creditor is merely limited

to collect the legal default rate of interest, plus principal. *See id*. Here, however, Capital One allegedly collected interest at a far higher rate, giving rise to Plaintiff's claims.

Capital One moves to dismiss on five grounds. **First**, Capital One argues it has not "knowingly" collected excessive interest, because it disagrees with Plaintiff's legal argument. But that is not the standard. Even if a bank does not "intend to violate the law," its knowledge of the fact that it is collecting interest which turns out to be in violation of the NBA is sufficient. *See*, *e.g.*, *Am. Timber & Trading Co. v. First Nat. Bank of Oregon*, 511 F.2d 980, 983 (9th Cir. 1973). Capital One's knowledge is particularly acute here, because the FAC alleges that Capital One continued to collect excessive interest from Plaintiff after this lawsuit was filed and after Capital One was placed on actual notice of Plaintiff's claims.

Second, Capital One argues that the Court must determine, on the pleadings, that there is an "express contract to pay interest at a specified rate" here, *see* Va. Code Ann. § 6.2-301.B. But according to the Fourth Circuit's decision in *Johnson*, the Change Clause provides Capital One with an "escape hatch from its contractual obligations," so Capital One is not tied by agreement to any interest rate. Capital One counters that it would be impossible for it to make any loan without an agreement to the interest rate, because "the loan itself is consideration." ECF 27-1 at 10. But the Virginia rate statute itself contemplates that a loan can be made without an agreement to the rate; by its own terms, the default interest rate of six percent applies where there *is* a loan, but there is *not* an agreement on the rate. *See* Va. Code. Ann. § 6.2-301.B ("the legal rate of interest ***shall*** be implied when there is an obligation to pay interest and ***no express contract to pay interest at a specified rate***.") (emphasis added). Under the allegations of the FAC, there is no rate agreement here.

Third, Capital One argues that the law imposes an agreement between the parties on the interest rate. Capital One's position is that because federal consumer protection regulations under the Truth in Lending Act require it to provide notice of interest rate changes, that legal requirement of notice somehow translates into an express contract between private parties. The Fourth Circuit rejected this argument head-on in *Johnson*, 131 F.4th at 180. As *Johnson* stated, "language" which "merely commits" a defendant "to do what it is already required to do by law… ***cannot furnish consideration***. A bargained-for-exchange ***by definition assumes that each party will undertake some obligation beyond those already imposed by law***." *Id*. (emphasis added) (*citing* 3 Williston on Contracts § 7:42 (4th ed. 2024)).

Fourth, Capital One argues that Plaintiff's NBA claim – which is under a *federal* statute – is somehow preempted by federal law. To state the argument is to refute it. Capital One argues that Plaintiff's NBA claim is a state law usury claim "in disguise," but it is nothing of the sort. The NBA has provided a *federal* cause of action for usury against national banks since the Lincoln administration. It is simply not subject to preemption.

Fifth, Capital One argues that *Johnson* was limited to arbitration; but that argument ignores both the *Johnson* decision itself, and the fact that the Fourth Circuit and this Court have already applied *Johnson* outside of the arbitration context.

The Motion to Dismiss should be denied.

II. BACKGROUND FACTS

The Consumer Financial Protection Bureau reports that "the average APR margin (the difference between the average APR and the prime rate) has reached an all-time high." "By some measures, credit cards have never been this expensive." *See* FAC ¶ 9.

Even though credit card margins are at an all-time high for banks, Capital One refuses to commit to any obligation to Plaintiff for her Capital One credit card account. *Id.* ¶ 11. Instead, Capital One reserved the unilateral right to change any term of its loan, including the interest rate, using its one-sided Change Clause. *Id.* ¶ 12.

However, Capital One's home state is Virginia, and Virginia law only allows charging interest in excess of six percent per year if there is an "express contract to a specified rate." *See* Va. Code Ann. § 6.2-301.A & B. Virginia's credit card lending law reiterates this requirement, and allows interest rates only "as may be agreed by the borrower." *See* Va. Code Ann. § 6.2-313.

That is important here, because in this case there is no *agreement* as to the interest rate Capital One will charge. *See* FAC, *e.g.*, ¶ 3. Instead, Capital One's "Credit Card Agreement" contains the Change Clause, which gives Capital One unilateral power to "add, delete or change any term" of the purported agreement, specifically including interest rate terms, "[a]t any time," with notice only "as required by law." *Id.* The "Credit Card Agreement" also states that the account is governed not only by the presently available documents, but also by "any future changes" Capital One chooses to make to those documents down the road. *Id.* ¶ 34.

Indeed, the "Credit Card Agreement" is one-sided in favor of Capital One, throughout. Consistent with the Change Clause, the document reserves wide powers to Capital One, including the ability to modify or unilaterally cancel credit limits, to decline credit authorizations when the account is not even in default, and to unilaterally choose to close accounts and terminate credit access at any time. *Id.* ¶¶ 38-42.

However, *Johnson* and other decisions from the Fourth Circuit and this Court have held that change-in-terms clauses materially identical to Capital One's Change Clause prevent formation of an agreement. *Id.* ¶ 4. In *Johnson*, for example, the same type of unilateral change-

in-terms clause allowed the card issuer to alter the agreement at will so that any bargained-for promises "mean nothing," and therefore no agreement was formed. *Id*. ¶ 50.

Here, Capital One's contract language presents the same problem addressed in *Johnson*: a purported agreement that, by its terms, allows one side to unilaterally re-write "any term" at "any time." *See* FAC ¶ 33. Capital One specifically reserved the right to change the interest rate, and did change it. *Id*. ¶¶ 3, 12, 33, 52, 64, 89, 105, 112, 132, 134; *see also* ECF 27-3 at 4 ("We may increase your Interest Charges and Fees as described in the **Changes to Your Agreement** section or in your *Truth-in-Lending Disclosures*.").

As a result, there is no agreement to an interest rate here. Because Virginia law permits interest in excess of six percent only where there is an "express contract to pay interest at a specified rate," and only permits credit card finance charges if they are "agreed," and because any rate "agreement" by Capital One is illusory due to the Change Clause, Capital One lacks the required agreement to collect interest in excess of the default six percent rate. *Id*., *e.g*., ¶ 42.

Nevertheless, Capital One charged and collected interest from Plaintiff far in excess of six percent. *Id*. ¶ 43. Month after month, Capital One charged, and Plaintiff paid, interest at a rate hovering around thirty percent annually. *Id*. ¶¶ 52-90. Indeed, Capital One continued to collect excessive interest from Plaintiff even after *Johnson* was decided, and even after Plaintiff served Capital One with this lawsuit and put it on actual notice of its illegal interest collection. *Id*.

III. "FACTS" IN CAPITAL ONE'S MOTION, NOT THE COMPLAINT

Capital One's Rule 12(b)(6) motion to dismiss is accompanied by six evidentiary attachments – two declarations (ECF 27-2 & 27-6), two different versions of a so-called "Credit Card Agreement" (ECF 27-3 and 27-7), and then yet *another*, separate document under correspondence (ECF 27-4), which Capital One's affiant also claims is or was the "Account

Terms for Dr. Strange's account." ECF 27-2 ¶ 5. Capital One also filed Plaintiff's credit card statements. ECF 27-5.

True, a document attached to a motion to dismiss may be considered if it is "integral" to the complaint," *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016), but a document is only "integral" if its "very existence, and not the mere information it contains, gives rise to the legal rights asserted." *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 611 (D. Md. 2011). While the so-called original "Credit Card Agreement" document, ECF 27-3, is referred to in the FAC, *see*, *e.g.*, FAC ¶ 52, and portions of the statements (ECF 27-5) confirm Plaintiff's allegations of Capital One's interest collection, the balance of the extrinsic materials "should not be considered" at this stage. *Goldstein v. Metro. Regl. Info. Sys., Inc.*, No. CV TDC-15-2400, 2016 WL 4257457, at *2 (D. Md. Aug. 11, 2016).

IV. LEGAL STANDARD

Capital One's motion seeks dismissal of Plaintiff's claims under Fed. R. Civ. P. 12(b)(6).

> To defeat a motion to dismiss under Rule 12(b)(6), the complaint must allege enough facts to state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible when the facts pleaded allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Legal conclusions or conclusory statements do not suffice. *Id*. A court must examine the complaint as a whole, consider the factual allegations in the complaint as true, and construe the factual allegations in the light most favorable to the plaintiff. *Albright v. Oliver*, 510 U.S. 266, 268 (1994); *Lambeth v. Bd. of Comm'rs of Davidson Cnty.*, 407 F.3d 266, 268 (4th Cir. 2005).

Lacey v. Mercedes-Benz USA, LLC, No. CV 24-2770-TDC, 2025 WL 2597118, at *6 (D. Md. Sept. 5, 2025).

V. ARGUMENT

A. Plaintiff Alleges a Violation of the National Bank Act

1. The National Bank Act Provides a Federal Cause of Action for Charging Rates in Excess of the Maximum Rate Allowed in the Bank's Home State

The NBA allows a national bank to "charge its out-of-state credit-card customers an interest rate on unpaid balances ***allowed by its home State***, when that rate is greater than that permitted by the State of the bank's nonresident customers." *Marquette Nat'l Bank of Minn. v. First of Omaha Serv. Corp*., 439 U.S. 299, 301 (1978) (emphasis added).

The NBA is "an exclusive federal cause of action for usury against national banks." *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 10 (2003). Section 86 of the NBA "sets forth the elements of a usury claim against a national bank." *Id*. (*citing* 12 U.S.C. § 86; *Beneficial Nat. Bank*, 539 U.S. at 10). Those elements are: 1) the collection of interest in excess of the rate permitted by section 85 (namely, the rate allowed by the bank's home state); 2) done knowingly. *See* 12 U.S.C. § 86.

2. Consumer Remedies under the National Bank Act Are Subject to a Liberal Construction

The borrower remedies provided by section 86 of the NBA are "liberally construed":

> the section of the [NBA] statute upon which the action is founded is *remedial* as well as penal, and is to be liberally construed to effect the object which Congress had in view in enacting it.

Ordway v. Cent. Nat. Bank of Baltimore, 47 Md. 217, 241 (1877) (emphasis in original) (*citing Farmers' Nat. Bank vs. Dearing*, 91 U. S., 29, 35 (1875)); *see also Wheeler v. Union Nat. Bank of Pittsburg*, 96 U.S. 268, 270 (1877) ("The statute should be liberally construed…").

3. Section 85 of the NBA Caps the Annual Interest Capital One May Charge at Six Percent, in the Absence of an Agreement

The laws of Capital One's home state are clear that six percent is the default maximum rate of interest that can be charged. *See* Va. Code Ann. § 6.2-301.A ("The legal rate of interest shall be an annual rate of six percent.")

Although Virginia law permits exceptions to the legal rate, and allows higher rates of interest where the rate is the subject of an *agreement*, the law is equally clear that, with limited exceptions not applicable here, where there is "no ***express contract*** to pay interest at a ***specified rate***," then "the legal rate of interest [the annual rate of six percent] ***shall be implied***." *See* Va. Code Ann. § 6.2-301.B (emphasis added).

The requirement of an agreement is then reiterated in the specific Virginia law which regulates credit card lending by banks. That law allows a bank to "impose finance charges and other charges and fees at such rates and in such amounts and manner ***as may be agreed*** by the borrower under an open-end credit plan." Va. Code Ann. § 6.2-313 (emphasis added).[2]

Virginia law thus requires an agreement to a specified rate before a credit card lender may collect more than the "legal rate of interest," *i.e.*, more than six percent annually.

4. The FAC Alleges there Is No Agreed Rate and No Express Contract to Pay Interest at a Specified Rate

As discussed above, Capital One's home state requires an "contract to pay interest at a specified rate" and "agree[ment]" to charge more than six percent interest. *See* Va. Code Ann., §§ 6.2-301.B, 6.2-313. Where, as here, a national bank's home-state law requires an "agreement"

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[2] Where Virginia law requires disclosure of charges, instead of specific agreement to charges, it uses different language. *See*, *e.g.*, Va. Code Ann. § 6.2-400 (requiring only that certain charges be "specified," instead of "agreed," as is required under § 6.2-313).

for certain amounts to be charged, federal courts enforce that requirement under the NBA. For example, in *Landau v. Chase Manhattan Bank, N.A.*, 367 F. Supp. 992, 999 (S.D.N.Y. 1973), the state law in question required that the "bank's intention to impose service charges be 'provided in the agreement.'" *Id*. Where that intention was not "provided in the agreement," and such charges were collected, summary judgment was granted to the plaintiff. *Id*.

This case presents a similar situation. Capital One collected interest from Plaintiff far in excess of six percent when the FAC alleges that there is no agreed rate, and no contract to pay interest at a specified rate. *See* FAC at, *e.g.*, ¶¶ 3-6, 11-13, 30-47, 52, 125. Instead, Capital One affirmatively reserved the right to make the interest rate whatever it wants, subject only to the restrictions of the law. *See id*. Even Capital One's own document confirms it. *See* ECF 27-3 at 4 ("We may increase your *Interest Charges* and *Fees* as described in the **Changes to Your Agreement** section or in your *Truth-in-Lending Disclosures*.") Under *Johnson*, an agreement only to do what the law allows is no agreement at all. *See Johnson*, 131 F.4th at 180 ("A bargained-for-exchange by definition assumes that each party will undertake some obligation beyond those already imposed by law.")

As in *Landau*, the excessive interest charges Capital One collected here are not "provided in the agreement," 367 F. Supp. at 999, because there is no enforceable agreement to a specified interest rate. By its terms, Capital One's credit card plan reserves unilateral power to change the interest rate, constrained only by what the law independently requires. *See*, *e.g.*, FAC ¶ 33. There is no agreed rate. Capital One is limited only by the *law* in changing interest rates. Capital One's own "Credit Card Agreement" fails to even identify an interest rate, anywhere. *See* ECF 27-3.

Capital One attached "Disclosures" to its Motion to Dismiss, which "disclose" an Annual Percentage Rate of 30.74%. *See* ECF 27-4 at 4.[3] However, to dispel any potential misunderstanding that Capital One is committing to that rate, on the very next page of the very same "Disclosures," and immediately before it describes how it calculates interest rates, Capital One reiterates in question-answer format that it can change any term:

> **Can You Change My Account Terms?**
>
> We can change the terms of your account as permitted by law. When required, we will send you notice before doing so.

ECF 27-4 at 5. Later, the same document reiterates that Plaintiff is "bound by the terms of the Capital One Customer Agreement ***and any changes made to that Agreement***." *Id*. at 7 (emphasis added). Such an arrangement cannot constitute an agreement under *Johnson*.

In *Johnson*, the Fourth Circuit held that a "change-in-terms clause" which allows the defendant to "change any term of [the] Agreement in [its] sole discretion, upon such notice … as is required by law" to be "so one-sided and vague that it allows a party to escape all of its contractual obligations at will." *Johnson*, 131 F.4th at 179. Indeed, "[w]hen one side can avoid all of its obligations, the agreement lacks the kind of basic reciprocity that is necessary to form a binding contract." *Id.* at 178.

Applying that controlling rationale here, to the extent that Capital One's so-called "Credit Card Agreement" purports to obligate the bank to any rate, its Change Clause allows it to "escape" that obligation. *Id*. As the Fourth Circuit put it, such a Change Clause means that "every…supposed 'right' in the agreement… exists only at [defendant's] pleasure." *Id*. at 180. The fact that external law may not give the defendant *complete* flexibility – that it may still have

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[3] The Disclosures document is not helpful to Capital One; it is also extrinsic and "should not be considered" in support of the Motion. *See Goldstein*, 2016 WL 4257457, at *2.

some notice obligations, for example, because of the law – is of no moment to whether a private agreement exists, because, as noted earlier, "[a] bargained-for-exchange by definition assumes that each party will undertake some obligation beyond those already imposed by law." *Id*. (*citing* 3 Williston on Contracts § 7:42 (4th ed. 2024)).

Johnson was a Maryland law decision, and the Motion to Dismiss vacillates between whether Maryland or Virginia law applies here. *See* ECF 27-1 at 22 n.3. However, on the issue of whether an agreement is illusory when it is subject to a change-in-terms provision limited only by the law, there is no difference between Maryland and Virginia. *See*, *e.g*., *Kiser v. Truist Fin. Corp*., 796 F. Supp. 3d 207, 238 (E.D. Va. 2025).

Kiser, a Virginia case, recently relied on *Johnson*'s discussion of Maryland contract law, and "general principles of Virginia contract law," to conclude that no agreement existed where a similar unilateral change-in-terms clause in an agreement with a lender allowed any changes to the agreement without notice "except when required by law":

> In essence, Truist never agreed to be bound by anything. Truist retained the ability to hold the Kisers to their promises while also reserving for itself a unilateral escape hatch to activate whenever it sees fit. Returning to where the Court started—general principles of Virginia contract law—such an arrangement "is nothing more than an illusory promise, and thereby invalid," because "it leaves [Truist] with complete discretion of whether [it] chooses to perform." …It also violates the Supreme Court of Virginia's clear demand that "there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement."

Kiser, 796 F. Supp. 3d at 238 (citations omitted).[4]

Kiser observed that *Johnson*'s analysis of the illusory contract issue "is helpful and consistent with Virginia case law." *Id*. at 242 ("It is rudimentary contract law that an agreement

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[4] *Kiser* is far from alone in holding that *Johnson*'s rationale is consistent with basic principles of contract law. *See*, *e.g.*, *Watson v. EnableUtah*, 787 F. Supp. 3d 1245, 1255 (D. Utah 2025) ("Courts across the country …have reached the same conclusion.").

lacks consideration, and is therefore never formed, when it consists entirely of illusory promises.") (*citing Johnson*, 131 F.4th at 178; Restatement (Second) of Contracts § 77)).

Kiser was clear that a promise to obey the law does not provide an obligation sufficient to support an agreement, under Virginia law, because, echoing *Johnson*, "[a] bargained-for-exchange by definition assumes that each party will undertake some obligation ***beyond those already imposed by law***." *Id*. (emphasis added) (*quoting Johnson*, 131 F. 4th at 180; 3 Williston on Contracts § 7:42 (4th ed. 2024)).

Even the "Disclosures" document Capital One provided is careful to reserve all of Capital One's rights to change terms. *See* ECF 27-4 at 5, 7. So, even though an APR is "disclosed" on that document, there is no question that by the terms of both the Disclosures and the "Credit Card Agreement," Capital One can freely *change* the APR (and any other term). The extrinsic Disclosures document, just like the "Credit Card Agreement," carefully preserves Capital One's *maximum ability under the law* to change the interest rate.

Because "[a] bargained-for-exchange by definition assumes that ***each party will undertake some obligation beyond those already imposed by law***," *Johnson,* 131 F.4th at 180, and Capital One has limited its obligations on the interest rate to those already imposed by law, no bargain exists. Due to the Change Clause, the interest-rate relationship between Plaintiff and Capital One is defined only by Capital One's obligations under the law, not by any private agreement. There is no *agreed* rate of interest between Plaintiff and Capital One, there is only what is legal. Therefore, because there is "no ***express contract*** to pay interest at a specified rate … the legal rate of interest ***shall be implied***." Va. Code Ann., § 6.2-301.B (emphasis added). The "legal rate of interest" is six percent annually, *id*. § 6.2-301.A, so the laws of Capital One's home state limit it to charge and collect interest from Plaintiff at that rate.

5. Plaintiff Alleges Capital One's Knowing Collection of Excess Interest

The FAC alleges in detail that Capital One collected interest from Plaintiff in excess of six percent, giving dates and amounts, and alleges that Capital One charged and collected the excessive interest knowingly. *See* FAC, *e.g.*, ¶¶ 7-8, 49, 53-79, 84-87, 90-102, 127-134. These allegations state a claim under § 86 of the NBA:

> A complaint that alleges that the defendant "knowingly and usuriously charged, took, received, and reserved from plaintiff, and that plaintiff paid to defendant, for interest, *** being at the rate of 24 per centum per annum," giving time, amount, etc., ***states facts sufficient to constitute a good cause of action for the recovery of such alleged illegal interest, under the national banking act***.

Guild v. First Nat. Bank of Deadwood, 57 N.W. 499 (S.D. 1894) (syllabus by the Court); *see also Wheeler*, 96 U.S. at 270 ("It should appear affirmatively that the bank knowingly received or reserved an amount in excess of the statutory rate of interest"). Plaintiff's FAC easily meets this standard.

For example, the FAC includes detailed allegations that Capital One regularly collected interest from her, "on her credit card account at varying rates around 30% per annum, despite the fact that it has no agreement with her which would allow it to do so, and despite the fact that Capital One knew the interest it charged to and collected from her was in excess of the maximum rate Capital One was permitted to charge or collect under the National Bank Act." FAC ¶ 53. Plaintiff details numerous months of payments to Capital One, including the interest rate Capital One charged, the credit card balance, the dollar amount of interest Capital One charged, and the date Plaintiff paid what Capital One demanded. *Id*. ¶¶ 54-79.

Capital One kept collecting excessive interest from Plaintiff even after the Fourth Circuit decided and published *Johnson*, compounding its "knowing" activity. *See* FAC ¶¶ 52-79. The FAC then relates that Plaintiff filed this lawsuit, which "discussed and described, among other things, that Capital One did not have an agreement with Plaintiff or Class members and that

Capital One could not legally bill or collect interest from Plaintiff or Class members at a rate exceeding 6% per annum." *Id*. ¶ 80. As a result, Capital One was on *actual notice* of its excessive interest collection no later than July 18, 2025 – the date it was served. *Id*. ¶ 83.

Nevertheless, as the FAC discusses, Capital One refused to change its practices even after being put on *actual notice*. Instead, Capital One continued to collect interest from Plaintiff at a rate far in excess of the six percent it is allowed under the NBA. *See id*. ¶¶ 80-91.

In light of the specific facts alleged in the FAC, Plaintiff directly alleges that Capital One's excessive interest collection was done "knowingly":

> Capital One collected the usurious interest which it demanded that Dr. Strange must pay to it, despite the fact that Capital One ***knew*** the interest it charged to and collected from her was in excess of the maximum rate Capital One was permitted to charge or collect under the National Bank Act….Capital One at all relevant times ***knew*** that its "Credit Card Agreement" with Plaintiff and Class members contained the Change-in-Terms Clause…Capital One at all relevant times ***knew*** that the Change-in-Terms Clause made the "Credit Card Agreement" illusory. …Capital One at all relevant times ***knew*** that it was required by law to have an agreement with Plaintiff and Class members to charge and collect interest at a rate of more than 6% per annum from them. …Capital One at all relevant times ***knew*** that it legally had no agreement with Plaintiff and Class members to charge interest at a rate of more than 6% per annum from them. …Nevertheless, despite ***knowing*** that it had no agreement with Plaintiff or Class members, and ***knowing*** that it could not take, receive, reserve, or charge a rate of interest greater than 6% per annum, Capital One took, received, reserved and charged a rate of interest greater than 6% per annum in its dealings with Plaintiff and Class members.

Id. ¶¶ 91, 96-100.

B. Capital One's Arguments for Dismissal Lack Merit

1. Capital One's Challenge to Plaintiff's "Knowing" Allegations

As discussed above, the FAC contains page upon page of detailed allegations concerning Capital One's charging and collection of excessive interest from Plaintiff, including the time of the collection, the amounts of interest charged, and the principal balance at issue; and, in addition, Plaintiff directly alleged Capital One's knowledge. Yet Capital One argues that

dismissal is proper because Plaintiff's "knowing" allegations are "conclusory," ECF 27-1 at 19-21, not mentioning the fact that "knowledge [ ] and other conditions of a person's mind may be alleged generally" under Fed. R. Civ. P. 9(b). *Goldstein*, 2016 WL 4257457, at *4.

Instead, ignoring Rule 9(b), Capital One asserts that even though it is collecting more than six percent interest from Plaintiff while litigating this case, it still cannot "know" that it is collecting illegal interest, because it disagrees with Plaintiff's legal theory. That is not the standard. It is not necessary that a bank intend to violate the law, to knowingly violate the NBA:

> "Usurious intent" is not necessarily an intent to violate the usury laws as such. It is sufficient if it appears that the lender knowingly sets out to receive for the use of his money compensation in excess of the interest permitted by law.

McAdoo v. Union Nat. Bank of Little Rock, Arkansas, 535 F.2d 1050, 1055 (8th Cir. 1976) (citations omitted); *see also Williams v. Big Picture Loans, LLC*, 693 F. Supp. 3d 610, 642 (E.D. Va. 2023) ("a creditor's belief that he is acting in accordance with the law is no defense" to a claim of violation of Virginia's usury law), *aff'd sub nom. Williams v. Martorello*, 143 F.4th 555 (4th Cir. 2025).

As the Ninth Circuit put it, the NBA's "knowing" requirement is satisfied if "the act of charging excessive interest" is intentional, even if the bank does not "realize" the illegality:

> The bank further contends that it did not intend to violate the law, so it did not knowingly exact excess interest. We disagree. While the bank may not have realized that its method of computation was illegal, it was agreed that the bank knew that its computation of interest on the 360 day year would result in a borrower paying more in one year than at the maximum legal rate when computed on a calendar year. The act of charging the excessive interest was intentional. This is sufficient to constitute a knowing violation of the law.

Am. Timber & Trading Co., 511 F.2d at 983 (*citing United States v. Int'l Minerals & Chemical Corp.*, 402 U.S. 558 (1971)); *see also Am. Timber & Trading Co. v. First Nat. Bank of Or.*, 334 F. Supp. 888, 890 (D. Or. 1971) ("The word 'knowingly' ordinarily means that the act or omission was intentional. It is not necessary that the actor intended to break the law. It is enough

that he intended the act. One may be ignorant of the law, and yet be found to have violated its demands.") (*citing Int'l Minerals & Chemicals Corp*., 402 U.S. 558). The same is true here.

For example, a bank cannot push the envelope on its interest rates, and then complain that it did not know the rates were illegal when challenged:

> If a bank chooses to elevate its interest charges to the legal ceiling, then it reduces the length of the year at its peril. If the bank is concerned about the judicial interpretation of the legal ceiling, it can protect itself by charging a rate that will be legal whichever way the courts might interpret the words "per annum."

Am. Timber & Trading Co., 334 F. Supp. at 890; *see also Int'l Mins. & Chem. Corp*., 402 U.S. at 563 ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation.").

Here, Capital One not only pushed the envelope on its interest rates, by reserving maximum flexibility to change them; the FAC alleges it also refused to change its practices even after *Johnson* was published, and it even continued to collect excessive interest from her after being placed on actual notice, by Plaintiff, of its legal violations. *See* FAC ¶¶ 80-90. The FAC therefore alleges Capital One "knowingly" collected excess interest from Plaintiff. *See*, *e.g.*, *Goldstein*, 2016 WL 4257457, at *4 ("By at least August 11, 2014, when Goldstein's attorney sent a cease and desist letter to MRIS, MRIS then knew or had reason to know that the use of the Metro Photograph on the MRIS site was in violation of that copyright.")

Capital One also suggests that Plaintiff's claim that it collected roughly thirty percent interest from her, when six percent is allowed, should be dismissed because " 'an honest mistake of fact … is not usurious.' " *See* ECF 27-1 at 13 (*quoting Walters v. First Tennessee Bank, N.A. Memphis*, 855 F.2d 267, 272 (6th Cir. 1988)). But the phrase Capital One replaced with ellipses in that quote makes all the difference. *Walters* actually held as follows: "an honest mistake of fact, ***e.g., a mistake in computation***, is not usurious." 855 F.2d at 272 (emphasis added). Plaintiff

does not allege a mistake in computation, and Capital One does not argue she does. Instead, Plaintiff alleges that Capital One intentionally charged her rates approaching and exceeding thirty percent, *even after she put Capital One on actual notice, through her original complaint, that its interest charges are illegal*.[5] The FAC adequately alleges Capital One's knowledge.

2. The Existence of a Loan Does Not Mean a Rate Was Agreed

Capital One argues that the fact that it extended a loan to Plaintiff means, by definition, that an agreement to the interest rate on the loan exists. ECF 27-1 at 10. That argument ignores Virginia's statutory scheme.

Virginia law expressly contemplates that a loan may exist without an agreement on the interest rate. As discussed above, Va. Code Ann. § 6.2-301.A sets a default rate of six percent, which § 6.2-301.B says applies when there is no "express contract to pay interest at a specified rate." Obviously, a loan may exist without an agreed rate, because an interest rate of six percent applies to such a loan under § 6.2-301.B. "In Virginia, the legal rate of interest is 6% per annum, and this rate is implied 'when there is an obligation to pay interest and *no express contract to pay interest at a specified rate*.'" *Galdamez v. I.Q. Data Intl., Inc*., 170 F. Supp. 3d 890, 893 (E.D. Va. 2016) (emphasis added) (*quoting* Va. Code Ann. § 6.2–301).

If extending credit alone established an agreement to whatever interest rate Capital One chooses, then the requirements that the borrower "agree" to the rate, and that an "express contract to pay interest at a specified rate" exist, would be meaningless. Indeed, while the FAC (ECF 20) alleges that Capital One's Change Clause has the effect of making the entire credit card

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[5] Furthermore, *Walters* was a decision on a motion for summary judgment, an the "mistake" there resulted from an employee's accidental entry of improper rates into a computer. This lack of intent is fundamentally different from Capital One's refusal to agree to an interest rate here.

"agreement" illusory, with respect to this Motion, the relevant question is whether there is an agreed *interest rate*. The FAC specifically alleges that there is no such rate agreement. *See id*. at, *inter alia*, ¶¶ 2, 3, 12, 30, 33, 42, 47. Whether a lending relationship exists is a different question from whether there is an agreed interest rate. That distinction is recognized by Va. Code Ann. § 6.2-301, and its default six percent rate where no interest rate is agreed. And Capital One's argument that the loan was "performed," ECF 27-1 at 25, is not a defense. The NBA *contemplates* extension and payment of usurious loans. *See* 12 U.S.C. § 86. So does Virginia's interest rate law. *See Big Picture Loans, LLC*, 693 F. Supp. 3d at 642 (a usury claim must show "that defendants 'collected or received payments on loans that violated Virginia's statutory limits.")

3. The Law Does Not Create an Agreement to a Rate

As discussed above, the law establishes a default interest rate of six percent in the absence of an agreement on the rate. And Virginia law only permits interest rates in excess of six percent when there is a rate agreement with the borrower. Desperate to find an agreement to permit it to collect unlimited interest from consumers, Capital One ironically seeks protection in *consumer protection* statutes and regulations.

In particular, Capital One attempts to cure the illusory nature of its "agreement" by arguing that Regulation Z, promulgated under the consumer protection Truth in Lending statute, supplies the missing agreement. ECF 27-1 at 26-28. Capital One says that it would have to give Plaintiff advance notice if it were to raise her interest rate – but Capital One cites Regulation Z for this proposition, not any "agreement." *Id*. at 27. Capital One says that if Plaintiff rejected its unilateral changes to her interest rate (by closing her account) the new interest rate would not apply – but again, Capital One cites Regulation Z for that proposition; not any "agreement." *Id*.

Capital One thus claims the *law* provides the necessary mutuality to create an agreement, despite its Change Clause which allows it to change "any term" at "any time." Even Capital One's gratuitous commitment to comply with the law is subject to the Change Clause. *See*, *e.g.*, *Johnson*, 131 F.4th at 180 (the change-in-terms clause meant "every … supposed "right" in the agreement…exists only at [defendant's] pleasure.")

Furthermore, as noted above, the only place the Credit Card Agreement even mentions Regulation Z is to define disclosures pursuant to Regulation Z as "Truth in Lending Disclosures." ECF 27-3 at 9. And then, the Credit Card Agreement explicitly states, in the *disjunctive*, that Capital One can increase interest rates *either* pursuant the Regulation Z disclosure regime, *or* pursuant to its Change Clause: "We may increase your *Interest Charges* and *Fees* as described in the **Changes to Your Agreement** section ***or*** in your *Truth-in-Lending Disclosures*." *Id*. at 6 (bold italic emphasis added). Nothing in the Change Clause promises a particular time period for notice or guarantees any right to reject changes.

The Fourth Circuit directly rejected the idea that a commitment to comply with the law can create the necessary mutuality to form a contract:

> The change-in-terms clause here … allows Continental to change "any term of [the] Agreement" at its "sole discretion, upon such notice ... required by law." ... The plain language of the clause merely commits Continental to do what it is already required to do by law. ***That cannot furnish consideration***. A bargained-for-exchange by definition assumes that each party will undertake some obligation ***beyond those already imposed by law***.

Johnson, 131 F.4th at 180 (emphasis added) (citation omitted).

External legal requirements to provide notice before imposing a change simply cannot supply an *agreement* to a rate, under *Johnson*. Whether an agreement exists is a different question from whether something is legally required. Here, the language of Capital One's "agreement" does not condition amendments on post-notice use of the credit card, affirmative

assent, or any contract-defined mechanism. Instead, it reserves the right to change "any term" of the "agreement" at "any time," including "*Interest Charges*," and merely states that notice will be provided "as required by law." ECF 27-3 at 4, 6. A promise to do only what the law requires is not a bargained-for limitation; there is no other legal option than to obey the law. An agreement to comply with the law therefore cannot transform Capital One's unilateral pricing power into an "agreed" term or into an "express contract" with a "specified rate." *See* Va. Code Ann. §§ 6.2-301, 6.2-313.

Indeed, Virginia law expressly distinguishes between credit card plans that expressly limit amendments, and plans that do not, and it requires lenders to honor contractual amendment limitations where they exist. *See*, *e.g.*, Va. Code Ann., § 6.2-433.[6] Under § 6.2-433, if the plan "otherwise expressly provides" for a limitation on amendments, the lender must abide by those limitations. If there is not such a limitation, the lender has broad rights to amend the plan, and the statute provides the legal mechanics for making such amendments.

Capital One has invoked this statutory amendment authority before, to *disclaim* contractual commitment to interest rates. Long before the *Johnson* decision emphasized how unilateral change-in-terms clauses undermine credit card agreements, Capital One defended the flip side of this case; *contract*-based challenges to APR increases which were advanced in *In re Capital One Bank Credit Card Interest Rate Litigation*, 51 F.Supp.3d 1316 (N.D. Ga. 2014). There, the district court explained that Capital One's unilateral rate changes were "in compliance with Virginia law," *citing* Va. Code Ann. § 6.2–433(A) - (B). *See id*. Importantly, in that case there was no dispute that an agreement existed. *Id*. To the contrary, the plaintiffs claimed that their

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[6] Section § 6.2-433 again illustrates that a loan can exist without a contract; the statute by its terms distinguishes between "contracts" and non-contract "plans." *See id*.

agreements contractually prevented Capital One from raising rates the way it did, but Capital One prevailed precisely because there were *not* contractual limits on Capital One's ability to change rates. Here, by contrast, Plaintiff makes a different argument. Instead of claiming that Capital One is contractually prohibited from raising rates, Plaintiff affirmatively disputes the existence of an agreement to the rate.

Accordingly, the question here is not whether Capital One complied with the law or gave advance notice of rate changes. Instead, the question is whether Capital One had an "express contract" to a "specified rate;" whether Capital One had an "agreed" rate with Plaintiff. Reference to externally imposed laws or regulations like Regulation Z cannot answer the question of whether an agreement exists. There is *no* agreed rate; *no* express contract to a specified rate. Instead, Capital One maintains maximum contractual flexibility on the rate. To the extent there are any purported undertakings respecting the interest rate, Capital One explicitly reserves the right to change them – it can change "any term," including "*Interest Charges*," at "any time." FAC ¶ 33; ECF 27-3 at 4, 6.

4. Plaintiff's Federal NBA Cause of Action Is Not Preempted

Capital One argues, incorrectly, that the NBA preempts Plaintiff's NBA claim. *See* ECF 27-1 at 21-26.

It is true that under federal law, state-law usury claims against national banks are completely preempted. *See*, *e.g.*, *Anderson*, 539 U.S. at 11 ("there is, in short, no such thing as a state-law claim of usury against a national bank.") That is because, under the NBA, any state-law causes of action for usury against a national bank actually "arise under" the NBA, even if they are pled under state-law. As a result, if a complaint asserts state-law usury claims against a national bank, those state-law claims are construed as claims *under the NBA* and are thus subject

to federal question removal. *See Anderson*, 539 U.S. at 11 ("Even though the complaint makes no mention of federal law, it unquestionably and unambiguously claims that petitioners violated usury laws. This cause of action against national banks only arises under federal law and could, therefore, be removed [to federal court] under § 1441.")

Here, however, the parties are already in federal court.

It is also true that the NBA provides a complete defense to claims challenging rates that are permitted under § 85 of the NBA. *See Anderson*, 539 U.S. at 9 ("[i]f… the interest that the bank charged to respondents did not violate § 85 limits, the statute unquestionably pre-empts any common-law or [state] statutory rule that would treat those rates as usurious.")

Here, however, Plaintiff's claim is that Capital One's rates **violate** § 85. As discussed above, § 85 allows Capital One to charge the rate allowed under the laws of its home state, Virginia. Virginia law only allows interest of six percent annually unless there is an agreed interest rate. And Capital One is charging and collecting around 30% interest from Plaintiff, without an agreed rate. That, as discussed above, states a claim under § 86 of the NBA.

The FAC is not seeking to enforce any state law as an independent state cause of action. Instead, the Plaintiff's solely federal claims, under § 86 of the NBA, seek an answer to a federal statutory question arising under § 85 of the NBA: namely, what rate does Virginia law permit? That inquiry necessarily includes whether Virginia law requires an "agreement," and whether a rate must be "specified." But that inquiry is built-in to the federal claim. It does not transform the federal claim into one under state law. There is, in short, no federal preemption problem when federal law itself incorporates reference to state law.

Capital One also invokes conflict preemption under *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al*., 517 U.S. 25 (1996). The "legal standard for preemption" under *Barnett Bank* is as follows:

> If the state law prevents or significantly interferes with the national bank's exercise of its powers, the law is preempted.

Cantero v. Bank of Am., N. A., 602 U.S. 205, 220 (2024) (*citing Barnett Bank*, 575 U.S. 25).

The relevant "powers" for a national bank arise *under the NBA*:

> The national banking system began in 1863 when Treasury Secretary (later Chief Justice) Salmon Chase proposed, Congress passed, and President Lincoln signed the National Bank Act. 12 Stat. 665; 13 Stat. 99. When a bank obtains a federal charter ***under the National Bank Act, the national bank gains various enumerated and incidental powers***. 12 U.S.C. § 24.

Id. at 210 (emphasis added).

Here, Plaintiff's challenge is that Capital One ***violated the NBA*** – which is the source of Capital One's banking powers. The NBA does not preempt itself.

5. Johnson *Is Not Limited to Arbitration*

Capital One insists that there is an agreed rate here, despite the presence of the Change Clause, because "the holding in *Johnson* was cabined to the arbitration-clause context." ECF 27-1 at 16. That argument ignores the U.S. Supreme Court's mandate that arbitration agreements and other contracts are subject to the same standards; ignores the fact that *Johnson* was decided on basic contract principles not unique to arbitration agreements (indeed, the plain language of *Johnson* makes clear that the decision was not limited to an analysis of the enforceability of the arbitration clause at issue in that case); and, it ignores the application of *Johnson* outside of the arbitration context by both the Fourth Circuit and this Court.

First, the Supreme Court has made it clear that arbitration agreements and other contracts are to be treated equally. Arbitration agreements are to be treated on "the same footing as other

contracts," and "[t] he policy is to make 'arbitration agreements as enforceable as other contracts, ***but not more so***. … a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation." *Morgan v. Sundance, Inc*., 596 U.S. 411, 418 (2022) (citations omitted, emphasis added).

Consistent with this mandate, *Johnson* was decided on basic contract principles not limited to arbitration agreements. Although the issue of "severing" the arbitration provision in *Johnson* from the underlying credit cardholder agreement, for separate treatment, was raised, the Fourth Circuit rejected its application to a formation dispute. *See Johnson*, 131 F. 4th at 176 ("The severability doctrine … plainly applies to 'a challenge to the validity of [a] contract,' ***not a challenge to its formation***.") (emphasis added) (*citing Prima Paint Corp. v. Flood & Conklin Manufacturing Co*., 388 U.S. 395 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006)). *Johnson* then held that when a contract is illusory, "there is no agreement from which any provision, including an arbitration clause, can be severed." *Id*. at 177.[7]

As a result, the issue in *Johnson* was whether the cardholder agreement was illusory:

> We first address Continental's argument that ***whether the change-in-terms clause rendered the cardholder agreement illusory*** was a question for the arbitrator, not the district court.

Johnson, 131 F.4th at 174–75 (emphasis added); *see also id*. at 179 ("We … apply Maryland law to determine ***whether the cardholder agreement was formed***.") The Fourth Circuit did not sever the arbitration provisions from the contract in *Johnson* to consider only those provisions, as

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[7] Capital One's representation that the Fourth Circuit "viewed the arbitration agreement as a standalone contract," ECF 27-1 at 22, is incorrect. As quoted above, *Johnson* took the *opposite* view and held that the arbitration provision *could not be severed* from the overall agreement.

Capital One suggests. *See id*. at 177 ("if a contract was never formed, there is no agreement from which any provision, including an arbitration clause, can be severed.")

Capital One also contends that a concurrence by Judge Wynn nevertheless supports its argument that, in *Johnson*, "no challenge to the basis for the underlying cardholder relationship was raised or considered." ECF 27-1 at 23. But Judge Wynn made clear that he joined the majority opinion in full, stating, "I agree with Judge Wilkinson's majority opinion... and therefore join that opinion in full." 131 F.4th at 181-82. As discussed above, the question "raised and considered" in that opinion was explicitly "whether the cardholder agreement was formed." *Id.* at 179. Judge Wynn's separate concurrence clarified that the plaintiffs in *Johnson* had not expressly argued on appeal that the broader cardholder agreement lacked consideration. And while Judge Wynn expressed a view that "the change clause is not necessarily fatal to the cardholder agreement itself," he acknowledged that "the majority opinion suggests otherwise."131 F.4th at 182 n. * (emphasis added).

In fact, Judge Wynn's own later opinion, applying *Johnson* in a case that had nothing to do with arbitration, proves the point that the *Johnson* decision means what it says. *See Doe v. University of Maryland Medical System Corporation, et al*., No. 24-1994, 2025 WL 3553026, at *6 (4th Cir. Dec. 11, 2025). *Doe* did not involve an arbitration agreement, even peripherally; instead, it involved the formation of an advance directive contract. *See Doe*, 2025 WL 3553026, at *1. Nevertheless, it applied *Johnson*'s contract formation rule:

> Formation challenges render the ***whole contract*** unenforceable. There is nothing to enforce if a contract never existed. And if a contract was never formed, there is no agreement from which any provision … can be severed.

Id. at *6 (*quoting Johnson*, 131 F. 4th at 176-77) (emphasis added). Ironically, Capital One relies on Judge Wynn's concurrence in *Johnson* for the proposition that *Johnson* cannot be applied outside of arbitration, but it never even mentions *Doe*, where the opinion authored by Judge

Wynn applies *Johnson* entirely outside of the arbitration context. Judge Wilkinson, the author of *Johnson*, was also on the *Doe* panel. *See id*.

Capital One does mention, in a footnote, this Court's own application of *Johnson* outside the arbitration context in *Egahi v. WorldRemit Corp*., No. CV JKB-24-03728, 2026 WL 73776 (D. Md. Jan. 9, 2026). *See* ECF 27-1 at 17 n.4. Nevertheless, Capital One claims *Egahi* did this "in dicta and without analysis." *See id*. Capital One is incorrect. *Egahi* devotes an ***entire section of the opinion*** to the issue of the "Formation of the User Agreement" – not the arbitration provisions – and ***holds*** that "User Agreements" with a unilateral change-in-terms clause are "unformed." *See Egahi*, 2026 WL 73776, at *5-6 ("Thus, the Court ***finds*** that the December 2024 user agreement is ***unformed***, along with the arbitration agreement.") (emphasis added). This is not *dicta*, and it is not without analysis.

Capital One also incorrectly asserts that the *Johnson* panel would have reached a different conclusion "had the *Johnson* court been faced with an argument that there was no consideration for the credit card loan the lender in *Johnson* had extended pursuant to the cardholder agreement at issue there." ECF 27-1 at 17. In fact, the *Johnson* court *was* presented with that argument. The defendants/appellants in that case, Continental Finance Company, LLC and Continental Purchasing, LLC ("Continental") repeatedly argued that if there was no consideration for its arbitration agreement, there was no consideration for the underlying cardholder agreement, either. Indeed, the first question presented in Continental's appellate brief characterized the plaintiffs' challenge as one "to the validity of the cardholder agreement as a whole." *See* **Exhibit 1**, Continental's Opening Appellate Brief at 12; *see also id*. at 21 (describing "Plaintiffs' challenge to the entirety of the Cardholder Agreements" and stating that "Plaintiffs' challenge was to the validity of the Cardholder Agreement as a whole"). And the first

line of Continental's argument was that "[t]he District Court refused to compel arbitration ***because it concluded that the broader Cardholder Agreement, in which the Arbitration Agreement was embedded, lacked "sufficient consideration,"*** due to Continental's ability to modify certain terms." *Id*. at 23 (emphasis added). Continental argued that if the plaintiffs prevailed, the entire cardholder agreement was invalid. *See id*. at 24 ("if the entire Cardholder Agreement lacked consideration, then the entire Cardholder Agreement is invalid."). In the same vein, Continental told the Fourth Circuit that "the District Court's reading of the Cardholder Agreement …. has the effect of rendering ***both the entire Cardholder Agreement generally, and the Arbitration Agreement specifically, as 'illusory***.'" *Id*. at 31 (emphasis added).

The Fourth Circuit in *Johnson* was therefore *directly presented* with the argument that there was no consideration for the entire credit card agreement; and the Fourth Circuit *agreed* that the issue was the formation of the entire cardholder agreement. *See Johnson*, 131 F.4th at 174 ("the [district] court concluded that the cardholder agreement was illusory under Maryland law."); *see also id*. at 175 ("It would put the cart before the horse to enforce any provision of the agreement…before deciding ***whether the agreement itself was ever formed***.") (emphasis added).

Finally, Capital One points to settlement agreements in *Johnson* and a similar case, *Bailey v. Mercury Financial, LLC*, in which the parties agreed, as a part of negotiated class action settlements, that class members who chose to accept the benefits of the settlements would waive arguments that the cardholder agreements were unformed due to change-in-terms clauses. *See* ECF 27-1 at 24-25. That agreed compromise simply illustrates the fact that the credit card lender defendants in those cases recognized that *Johnson* undermined the formation of their entire cardholder agreements – otherwise, the defendants would not have sought such a settlement term in exchange for the payment of millions of dollars in settlement funds to their customers.

Accordingly, *Johnson*'s holding is not arbitration specific. It is a formation decision applying ordinary contract principles that govern all contract terms on an equal footing. Under *Johnson*, a one-sided arrangement like Capital One's alleged interest rate regime, which is subject to a Change Clause that limits the drafter only by what is "required by law," involves no bargained-for constraint and therefore cannot reflect an agreement. *See* 131 F. 4th at 180.[8]

VI. CONCLUSION

Plaintiff respectfully requests that this Court deny Capital One's Motion to Dismiss.

Respectfully submitted,

/s/ Eric S. Zell (signed, with permission, by Benjamin H. Carney)
Eric S. Zell (admitted *pro hac vice*)
eric@consumeradvocates.org
National Association of Consumer Advocates
1667 K St., NW Suite 620
Washington, DC 20006
Telephone: 202-452-1989 x111

/s/ Benjamin H. Carney
Benjamin H. Carney (Fed. Bar No. 27984)
bcarney@GWCfirm.com
Richard S. Gordon (Fed. Bar No. 06882)
rgordon@GWCfirm.com
Gordon, Wolf & Carney, Chtd.
11350 McCormick Dr., EP 1, Suite 1000
Hunt Valley, MD 21031
Telephone: (410) 825-2300
Facsimile: (410) 825-0066

Attorneys for Plaintiff

[8] Capital One argues that Plaintiff's declaratory judgment claim should be dismissed for the same reasons as her NBA claim. However, Plaintiff's NBA claim is, as discussed, not subject to dismissal, and Capital One advances no independent reasons to dismiss the declaratory claim.