IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LYNN STRANGE,	:	
	:	
Plaintiff,	:	**Civil Action No.: 25-cv-2711-TDC**
	:	
v.	:	
	:	
CAPITAL ONE, NATIONAL ASSOCIATION,	:	
	:	
Defendant.	:	
	:	

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANT CAPITAL ONE, N.A.'S MOTION TO DISMISS

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I. INTRODUCTION

Dr. Strange's opposition attempts to transform *Johnson v. Continental Finance Co.* into something it is not: a sweeping decision invalidating any contract that contains a change-in-terms provision. As *Johnson* itself and the subsequent cases relying on the decision make clear, *Johnson* did no such thing. Rather, the court ruled on a narrow issue: the enforceability of an arbitration agreement under Maryland law, finding the agreement was illusory because the issuer retained unilateral authority to amend or revoke it. It did not rule on the underlying contract. The Fourth Circuit repeatedly stated its holding in those precise terms, and the concurring opinion confirmed as much.

The court's rationale in *Johnson* does not support Dr. Strange's theory either. The court found the arbitration agreement was illusory because the only consideration for the agreement—the naked future promise to arbitrate—was illusory due to the defendant's unfettered authority to revoke its promise at any time, limited only by providing notice required by unspecified law. Dr. Strange does not dispute that the consideration for her Customer Agreement is not a bare future promise and instead is repeated performance by both sides. The change-in-terms clause does not somehow render this extensive consideration illusory. Nor does Dr. Strange grapple with the impact of the comprehensive regulatory regime that expressly authorizes the change-in-terms clause and provides precisely the notice that courts have found renders a change clause non-illusory under Maryland law.

The Customer Agreement is therefore valid and enforceable. As neither the holding nor the rationale of *Johnson* apply here, Dr. Strange's usury claim fails on its face.

Finally, Dr. Strange cannot avoid preemption of her claim by arguing she pursues a federal cause of action. She does not dispute that she seeks to invalidate the interest rate in her Customer

Agreement based on Maryland law. Even if she stated a claim—which she does not—it would be preempted by the National Bank Act and related statutes and regulations.

For these reasons, the Amended Complaint should be dismissed.

II. THE CUSTOMER AGREEMENT IS NOT ILLUSORY.

A. *Johnson* Is Limited to Arbitration Agreements.

Despite Dr. Strange's repeated assertions otherwise (*e.g.*, Opp. at 5, 26), the Fourth Circuit has not "already held [in Johnson that] a credit card 'agreement' which permits unilateral changes, restricted only by law, is 'illusory' and not an agreement." (Opp. at 3) Instead, the *Johnson* holding is clear: "[W]e think the district court was correct in interpreting Maryland law to hold that the ***arbitration agreement*** was rendered illusory." *Johnson v. Cont'l Fin. Co.*, 131 F.4th 169, 173 (4th Cir. 2025) (emphasis added); *see id.* at 179 ("We last consider whether the ***arbitration agreement*** is illusory under Maryland law") (emphasis added). *Johnson* relied on *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 378 Md. 139, 157 (2003), which found that an arbitration provision in a customer agreement is separate and distinct from the customer agreement and therefore must have its own consideration. *Accord Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 613 (4th Cir. 2013) ("[U]nder Maryland contract law, an arbitration provision must contain a mutually coextensive exchange of promises to arbitrate, regardless whether the contract as a whole is supported by adequate consideration.").[1]

Judge Wynn's concurrence confirms *Johnson*'s limited holding. He wrote specifically "to clarify that Johnson and Crider do not argue, nor did the district court conclude, that the cardholder agreement itself is unformed." *Johnson*, 131 F.4th at 181 (Wynn, J., concurring); *see also id.*

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[1] Dr. Strange argues the *Johnson* court must have ruled on the customer agreement because of its finding that it could not analyze severability for a contract found to be illusory and therefore unformed. (Opp. at 26-27.) This is a red herring. The court followed *Cheek* in evaluating consideration for the arbitration agreement separate and apart from the customer agreement.

(emphasizing that the district court found "'the arbitration agreement'—not the broader cardholder agreement—'lacks consideration'"). Dr. Strange cannot wish away this confirmation of the scope of the ruling by pointing out that Judge Wynn joined the majority. (Opp. at 27.) The holding must be viewed through the lens of Judge Wynn's clarification. *See, e.g.*, *Maryland Shall Issue, Inc. v. Moore*, 116 F.4th 211, 224 n.11 (4th Cir. 2024) (en banc) (treating Justice Kavanaugh's *Bruen* concurrence as confirming "a carefully crafted limitation on the Court's holding"); *Hetronic Int'l, Inc. v. Hetronic Ger. GmbH*, 99 F.4th 1150, 1167 & n.16 (10th Cir. 2024) (rejecting the notion that a concurrence can simply be "brush[ed] off" because the Justice joined the opinion in full and explaining the clarifying views the concurrence expressed).[2]

Not only do the majority decision and Judge Wynn's concurrence require a finding that *Johnson* addresses only an arbitration agreement, the *Johnson* Plaintiffs/Appellees, represented by Dr. Strange's counsel in this case, **expressly disclaimed** the theory Dr. Strange pursues here. Dr. Strange submitted Defendant/Appellant's Brief with her Opposition to support her argument that *Johnson* found the customer agreement was illusory. (Opp. at 28–29 & Ex. 1.) But she ignores the *Johnson* Appellees' Brief, in which Plaintiffs/Appellees stated:

> Plaintiffs do not argue that the lack of a mutual promise to arbitrate could or would interfere with the formation of the underlying Cardholder Agreement.
>
> * * *

[2] Dr. Strange truncates the *entire* concurrence and connects its first and last sentences, quoting Judge Wynn as saying "I agree with Judge Wilkinson's majority opinion . . . and therefore join that opinion in full." (Opp. at 27.) In fact, Judge Wynn explained, "I understand these observations to be in line with the majority opinion's reasoning, and ***therefore*** join that opinion in full." *Johnson*, 131 F.4th at 182 (Wynn, J., concurring) (emphasis added).

> [T]he fact that there is no promise to arbitrate does not operate to make the *Cardholder Agreement* itself illusory. For the *Cardholder Agreement* to be illusory, there would have to be some other failure of consideration or one of the other elements of contract.
>
> * * *
>
> Plaintiffs have always specifically argued that the Change Clause prevented formation of any arbitration or delegation agreements.

(Brief of Appellees at 21, 22, 24, *Johnson*, 131 F.4th 169 (Nos. 23-2047(L); 23-2049), copy attached as Exhibit A to Declaration of Patrick J. Curran, filed concurrently ("Curran Decl.").[3]). She also ignores that a decision is only authority for the issues presented and discussed, *United States v. Norman*, 935 F.3d 232, 240 (4th Cir. 2019), and there is no analysis of the consideration supporting the customer agreement at issue in *Johnson* in the decision. Yet more confirmation that *Johnson* did not concern or address the customer agreement in that case.

It is not surprising, then, that the cases relying on the holding in *Johnson* all describe it as a ruling on an arbitration agreement and all concern arbitration agreements. *See Bailey v. Mercury Fin., LLC*, 2025 WL 763671, at *1 (4th Cir. Mar. 11, 2025) (per curiam) (unpublished) (*Johnson* companion case that rejected argument that "the district court erred in holding the arbitration agreement illusory under Maryland law"); *Ford v. Genesis Fin. Sols., Inc.*, 2025 WL 1540933, at *1 (4th Cir. May 30, 2025) (per curiam) (unpublished) (appeal from denial of motion to compel arbitration affirmed based on *Johnson*); *Kiser v. Truist Fin. Corp.*, 796 F. Supp. 3d 207, 242–43 (E.D. Va. 2025) ("[T]he change-in-terms clause . . . renders any agreement to arbitrate illusory. . . . Because there is no agreement to arbitrate, the Court cannot compel the Kisers to do

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[3] The Court can take judicial notice of Appellee's Brief because "[a] court may take judicial notice of docket entries, pleadings and papers in other cases" in considering motion to dismiss *Brown v. Ocwen Loan Servicing, LLC*, 2015 WL 5008763, at *1 n.3 (D. Md. Aug. 20, 2015); *accord Barbour v. Garland*, 105 F.4th 579, 585 n.1 (4th Cir. 2024) (taking judicial notice of filings in separate litigation in appeal of order on motion to dismiss).

so."); *Egahi v. WorldRemit Corp.*, 2026 WL 73776, at *3 (D. Md. Jan. 9, 2026) (granting motion to compel arbitration; citing *Johnson* and referring to "a line of cases which holds that when a clause allows one party to unilaterally change the terms of a contract, the ***arbitration agreement*** located in the broader user agreement is unformed due to a lack of consideration") (emphasis added).[4]

Dr. Strange claims *Doe v. University of Maryland Medical Systems Corp.*, 2025 WL 3553026, at *1 (4th Cir. Dec. 11, 2025) (unpublished) establishes otherwise because it does not concern arbitration and supposedly "applied *Johnson's* contract formation rule". (Opp. at 27.) Not so. The *Doe* court cited *Johnson* only for the proposition that a court cannot conduct a severability analysis if it finds there is no enforceable contract. *Doe*, 2025 WL 3553026, at *6. The court found no contract was formed because plaintiff's advance directive "failed to comply with the statutory requirements for its creation." *Id*. The case did not consider, much less rule based on any finding that the contract was illusory.

Dr. Strange's remaining argument cannot expand *Johnson* beyond its holding either. (Opp. at 25-26.) That the Federal Arbitration Act requires courts to put arbitration contracts on equal footing with other types of contracts does not mean that a ruling on an arbitration agreement automatically applies to every other contract. A determination of whether contractual promises are illusory is specific to the terms of each contract.

Dr. Strange therefore has not established and cannot establish that the holding in *Johnson* applies here.

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[4] Although Dr. Strange asserts that the *Egahi* court "devotes an *entire section of the opinion* to the issue of the 'formation of the user agreement'" (Opp. at 28), she does not dispute that this discussion is dicta, that the court recognized "there is potentially an argument to be made that the modification clause does not render the user agreement illusory" (*Egahi*, 2026 WL 73776, at *6), or that the court did not consider any such argument in reaching its conclusion.

B. *Johnson*'s Rationale Does Not Apply to the Customer Agreement.

1. Consideration for the Customer Agreement goes far beyond the bare promise to arbitrate at issue in *Johnson*.

Dr. Strange cherry picks quotes from *Johnson* to argue that any contract with a change clause is illusory. But she does not and cannot show that the reasoning in the decision applies here because, unlike the promise to arbitrate at issue in *Johnson*, the parties' performance constitutes the requisite consideration to form an agreement.

The *Johnson* court found the only consideration for the arbitration agreement was the mutual promise to arbitrate. Once the court concluded that defendant could unilaterally escape that promise, no consideration remained to support the separate arbitration bargain. *Johnson*, 131 F.4th at 179. But as Judge Wynn previewed in his *Johnson* concurrence, the consideration supporting the Customer Agreement is different and more extensive than the consideration supporting the arbitration agreement. *Id.* at 182 (Wynn, J., concurring). The bargain is Capital One's extending of credit, honoring of charges, paying merchants, processing of transactions, and providing related services in exchange for Dr. Strange's acceptance of that credit by using her card and thereby promising to repay the amounts advanced, together with interest and fees pursuant to the Customer Agreement. *See, e.g., In re Mercer*, 246 F.3d 391, 405–06 (5th Cir. 2001) (en banc) ("[C]ard-use is both a request to the issuer for a loan against a line of credit and a promise to pay. Inherent in the loan's being made (and the consideration therefor) is that promise."); *Wise v. Zwicker & Assocs., P.C.*, 780 F.3d 710, 716–17 (6th Cir. 2015) ("The promise by the bank is to advance funds to merchants on the consumer's behalf, in exchange for a promise by the consumer to repay those amounts on a monthly basis."); *Pacanowski v. Financial*, 271 F. Supp. 3d 738, 744 (M.D. Pa. 2017) (finding consideration for credit card agreement where defendant issuer "exchanged a credit line for [plaintiff's] promise to pay off charges with interest").

Performance itself provides consideration here. As the Fourth Circuit explained in *Schwam v. XO Communications, Inc.*, 2006 WL 6884392, at *3 (4th Cir. Mar. 24, 2006) (per curiam) (unpublished), under Virginia law, a defendant's "consistent performance and compliance with the [agreement] removes the illusory nature of its promise leaving the [agreement] enforceable." The Maryland Supreme Court recognized as much in *Cheek*, 378 Md. 139. The court rejected defendant employer's argument that consideration for the employment agreement constituted consideration for the arbitration agreement, finding the arbitration agreement must have its own consideration. *Id*. at 152–61. In analyzing defendant's argument, the court explained "[i]f we were to conclude that consideration from the underlying agreement was sufficient to support the arbitration agreement, ***we would be precluded from ever finding an arbitration agreement invalid for lack of consideration when performance of a contract has already occurred,*** no matter how illusory the arbitration agreement was." *Id*. at 160 (emphasis added); *see id.* at 152 (explaining if it were to adopt defendant's position "we always would have to find that consideration exists to support an arbitration agreement in situations in which performance of the contract has occurred").

The Maryland Supreme Court, then, recognized that performance of a contract constitutes the consideration required to render a contract formed, even in the face of a change clause that could render the agreement illusory absent such consideration. *See also Questar Builders, Inc. v. CB Flooring, LLC*, 410 Md. 241, 278 (2009) (finding unilateral termination clause did not render contract illusory "so long as the party reserving the power to terminate [has] rendered some performance capable of operating as a consideration") (internal quotation marks & citation omitted); *Schwam*, 2006 WL 6884392, at *3 (recognizing "the prevailing rule that '[t]he test of mutuality of obligation of a contract is to be applied not as of the time when the promises are made

but as of the time when the contract is sought to be enforced'") (quoting 17A Am. Jur. 2d Contracts § 22 (2005)).

Dr. Strange admits both she and Capital One have performed their obligations under the Customer Agreement repeatedly since 2024. (First Am. Compl. ¶¶ 52–79, 84–87, 89–90.) This performance distinguishes the consideration under the Customer Agreement from consideration for the arbitration agreement in *Johnson*, in which the only consideration was the future promise to arbitrate.[5] And it requires a finding that the Customer Agreement is supported by consideration and therefore is not rendered illusory by the change clause.

2. The obligation to give notice required by law for interest rate changes is meaningfully different from the unspecified, ambiguous obligation for changes in an arbitration agreement.

Although Dr. Strange relies on the *Johnson* court's statement that an obligation to comply with law cannot provide consideration (Opp. at 20–21), she ignores the court's discussion of the defects in the notice requirement with respect to changes to the arbitration agreement. The court explained that the obligation to provide notice required by law was "so broad and vague as to be meaningless" because it "places no constraint on [defendant's] ability to escape its contractual obligations whenever it sees fit." *Johnson*, 131 F.4th at 180.

In contrast, as Capital One explained in its motion to dismiss, the statutes and regulations governing credit card agreements provide exactly the form of mandatory advance notice that courts have found provides the requisite limitations on a change clause. (Mot. at 19-21, citing *Johnson*, 131 F.4th at 181); *see also DIRECTV, Inc. v. Mattingly*, 376 Md. 302, 304 (2003); *Egahi*, 2026 WL 73776, at *7. Dr. Strange does not dispute the requirements of the federal regulatory

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[5] As reflected in this discussion, Capital One does not argue that because a loan was made there must be an express agreement. (Opp. at 4, 19–20.) Rather, Capital One's argument focuses on performance by both sides as consideration for the Customer Agreement.

framework and instead argues that these legal requirements do not "somehow translate[] into an express contract." (Opp. at 5.) But Capital One is not arguing those provisions create a contract. Rather, it is well established that "parties to a contract are presumed to contract mindful of the existing law and that all applicable or relevant laws must be read into the agreement of the parties just as if expressly provided by them, except where a contrary intention is evident." *Auction & Est. Reps., Inc. v. Ashton*, 354 Md. 333, 344 (1999) (internal quotation marks & citation omitted).

There is no such contrary intention evident here. When entering the Customer Agreement, both parties are presumed to have understood that Capital One would provide advance notice of "significant change[s] in account terms." 12 C.F.R. § 1026.9(c)(2)(i)(A). The Truth in Lending Act and Regulation Z expressly limit Capital One's ability to make changes unilaterally and instead would require Dr. Strange's approval. For that reason, in context, the change-in-terms clause in the Customer Agreement is not "materially identical" to the clause in the *Johnson* arbitration agreement as Dr. Strange contends. (Opp. at 3, 6.) Instead, federal law provides the required limitation on Capital One's discretion, so the change-in-terms clause does not render the Customer Agreement illusory.

III. DR STRANGE FAILS TO PLEAD A USURY CLAIM UNDER THE NATIONAL BANK ACT.Dr. Strange Fails to Allege Capital One Charged Interest At a Rate Exceeding What Section 85 Permits.

Dr. Strange concedes that pursuant to the National Bank Act, Virginia law governs the permissible rate. She does not dispute that Capital One assessed interest on her account consistent with Virginia law for a written agreement. As confirmed in her opposition, Dr. Strange's entire claim is premised on the theory that under *Johnson*, there is no valid binding agreement between her and Capital One. As discussed above, this premise is faulty.

The case Dr. Strange relies on does not support her faulty theory. (Opp. at 10–11 (citing *Landau v. Chase Manhattan Bank, N.A.*, 367 F. Supp. 992 (S.D.N.Y. 1973)). In *Landau*, the court

held only that defendant could not impose a charge not disclosed in the agreement because state law barred such charges unless provided for in the agreement. 367 F. Supp. at 999. Here, there is no dispute that Capital One assessed finance charges based on the interest rate disclosed in the Customer Agreement.

Because the rate was lawfully agreed and disclosed, there can be no usury.

B. Dr. Strange Fails to, and Cannot, Plausibly Allege that Capital One "Knowingly" Committed Usury.

Dr. Strange attempts to read the scienter requirement out of Section 86 in arguing that Capital One need only have known that it was charging or would receive interest at more than the 6% rate authorized under Virginia law for loans made pursuant to oral agreements. (Opp. at 15–19.) But the authority she cites establishes otherwise or has no application here.

McAdoo and *Williams* both applied state usury law, which has no application to the National Bank Act. *Am. Timber & Trading Co. v. First Nat'l Bank of Or.*, 511 F.2d 980, 983 (9th Cir. 1973) ("The National Bank Act 'adopts usury laws of the states only in so far as they severally fix the rate of interest.'") (quoting *Evans v. Nat'l Bank of Savannah*, 251 U.S. 108, 111 (1919)); *McAdoo v. Union Nat'l Bank of Little Rock*, 535 F.2d 1050, 1053 (8th Cir. 1976) ("The position of plaintiffs in the district court was that . . . the loan was usurious as a matter of Arkansas law."); *Williams v. Big Picture Loans, LLC*, 693 F. Supp. 3d 610, 642-43 (E.D. Va. 2023) (explaining the "Virginia [usury] statute . . . does not contain a mens rea or scienter requirement") (internal citation omitted), *aff'd sub nom.*, *Williams v. Martorello*, 143 F.4th 555 (4th Cir. 2025). Indeed, the Virginia usury statute differs from Section 86 in that it contains no scienter requirement (*Williams*, 693 F. Supp. 3d at 642–43), so any interpretation of that statute has no bearing on Dr. Strange's federal usury claim.

Neither the initial district court decision or the earlier appeal in the *American Timber* case help Dr. Strange either. (Opp. at 17–18 (discussing *Am. Timber & Trading Co.*, 511 F.2d at 983 and *Am. Timber & Trading Co. v. First Nat'l Bank of Or.*, 334 F. Supp. 888, 890 (D. Or. 1971), *aff'd and remanded sub nom.*, *Am. Timber & Trading Co.*, 511 F.2d 980)). The Ninth Circuit explained its earlier ruling in the second *American Timber* appeal, which—as Capital One explained in its motion to dismiss—made clear that the defendant must have "[k]nowledge that the benefits received were in excess of the legal rate." *Am. Timber & Trading Co. v. First Nat'l Bank of Or.*, 690 F.2d 781, 788 (9th Cir. 1982). In the second *American Timber* case, the court found this requirement satisfied because the loan at issue was made at the maximum legal rate, the defendant lender required the plaintiff borrower to maintain a compensating balance, and the lender was "aware, as a matter of mathematical computation, that requiring a non-interest bearing compensating balance would increase the effective interest rate on a loan." *Id.* In the earlier *American Timber* case, the court found 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." 511 F.2d at 983.

In contrast, here, Dr. Strange does not challenge Capital One's computation method and instead asserts a novel legal theory that has not been adopted by any court. Dr. Strange does not dispute that the allegations in the First Amended Complaint confirm that she must plead knowledge that the rate was usurious. (Mot. at 13–14, citing First Am. Compl. ¶¶ 50-52, 80-91.) She simply repeats those allegations in her opposition (Opp. at 15–16), ignoring Capital One's showing that this speculative chain of assertions does not come close to meeting the requirement to plead facts supporting a knowing violation. (Mot. at 13–14.)

Finally, Dr. Strange asserts that she can plead knowledge generally, citing the syllabus of *Guild v. First National Bank of Deadwood*, 57 N.W. 499, 503 (S.D. 1894), a South Dakota Supreme Court case decided in 1894 and *Goldstein v. Metropolitan Regional Information Systems, Inc.*, 2016 WL 4257457, at *4 (D. Md. Aug. 11, 2016), a case considering whether plaintiff had adequately pled defendant's knowledge of its copyright. (Opp. at 15, 17.) *Guild* does not discuss or consider the requirements to plead knowledge, and it was decided by a state court long before the U.S. Supreme Court clarified modern federal court pleading standards in *Iqbal* and *Twombly*. Although *Goldstein* did consider those pleading standards, the court in that case found plaintiff had sufficiently pleaded facts to support the knowledge requirement, including by alleging that the photograph at issue containing plaintiff's "copyright watermark" was uploaded to defendant's website. 2016 WL 4257457, at *4. Dr. Strange has not pleaded any such facts supporting a knowing violation here.

IV. DR STRANGE'S ACTION IS PREEMPTED.

Dr. Strange's only response to Capital One's showing that her claim is preempted is her argument that a claim under federal law cannot be preempted. (Opp. at 23–25.) She ignores, though, that her entire claim is premised on her assertion that Maryland law renders the Customer Agreement a nullity. Dr. Strange attempts to rely on state law to allege a usury claim against a national bank based on a change-in-terms clause that is authorized by federal regulations. She therefore claims state law trumps federal law, when the Supreme Court has repeatedly held exactly the opposite applies to national banks.

As Capital One explained in its motion to dismiss, Dr. Strange's claim is expressly preempted because she is attempting to use state-law formation doctrine to avoid federal preemption. Conflict preemption also bars Dr. Strange's claim because her theory relies on state law to significantly interfere with Capital One's federally authorized lending powers, including its

authority to determine the interest rates on its loans, and mandating a different approach for Maryland borrowers. (*See* Mot. at 21–26.) Accordingly, Dr. Strange's claims are preempted by federal law.

V. DR STRANGE'S DECLARATORY JUDGMENT CLAIM FAILS.

Dr. Strange does not dispute that her derivative declaratory judgment claim must be dismissed if her usury claim fails. As discussed above, Dr. Strange's usury claim fails for multiple reasons, so her declaratory judgment claim fails as well.

VI. CONCLUSION

For these reasons, and those stated in the motion, the Court should dismiss the Amended Complaint without leave to amend.

Dated: March 27, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on March 27, 2026, upon all parties in this matter who have entered their appearance via this Court's ECF system.

/s/ Patrick J. Curran Jr.
Patrick J. Curran Jr. (Bar No. 18872)