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8 *Attorneys for Plaintiff*  
 9 *Credit One Bank, N.A.*

10                                   **UNITED STATES DISTRICT COURT**  
 11                                   **CENTRAL DISTRICT OF CALIFORNIA**  
 12                                   **EASTERN DIVISION**

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 400 South Hope Street, 8th Floor  
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14 Credit One Bank, N.A.,

15                                   Plaintiff,

16                                   vs.

17 Michael A. Hestrin, District Attorney of  
 18 Riverside County, California,

19                                   Defendant.

Case No.: 5:20-cv-02156

**COMPLAINT**

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1 Plaintiff, Credit One Bank, N.A. (the “Bank”), a national banking association,  
2 alleges:

3 **SUMMARY OF ACTION**

4 1. The National Bank Act provides in relevant part: “No national bank shall  
5 be subject to any visitorial powers except as authorized by Federal law, vested in the  
6 courts of justice or such as shall be, or have been exercised or directed by Congress or  
7 by either House thereof or by any committee of Congress or of either House duly  
8 authorized.” 12 U.S.C. § 484(a). The U.S. Supreme Court has clarified that states may  
9 not engage in supervisory activities over national banks, but may engage in law  
10 enforcement activities only where such are carried out by the attorney general of the  
11 state, and even then only through a civil action, i.e., through litigation in the courts of  
12 justice. *Cuomo v. Clearing House Association, LLC*, 557 U.S. 519 (2009). In the  
13 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (July  
14 21, 2010) (“Dodd-Frank Act”), Congress clarified the law enforcement powers of state  
15 actors with respect to reviewing the activities and operations of national banks:

16 In accordance with the decision of the Supreme Court of the United  
17 States in *Cuomo v. Clearing House Assn., L.L.C.*, (129 S.Ct. 2710  
18 (2009)), no provision of title 62 of the Revised Statutes which relates  
19 to visitorial powers or otherwise limits or restricts the visitorial  
20 authority to which any national bank is subject shall be construed as  
21 limiting or restricting the authority of any attorney general (or other  
22 chief law enforcement officer) of any State to bring an action against a  
national bank in a court of appropriate jurisdiction to enforce an  
applicable law and to seek relief as authorized by such law.

23 12 U.S.C. § 25b(i)(1). Despite this clear limitation on the investigatory powers of state  
24 officials as articulated by the Supreme Court and Congress, the Defendant has issued  
25 and is attempting to enforce an investigatory subpoena against Plaintiff, a national  
26 banking association. In this action, Plaintiff seeks declaratory and injunctive relief  
27 against the Defendant’s actions in violation of the National Bank Act.  
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**JURISDICTION AND VENUE**

2. This is an action under the National Bank Act, 12 U.S.C. § 21 *et seq.* The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the laws of the United States.

3. Venue in this district is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the claim occurred in this district. In particular, the Defendant’s subpoena to the Bank originated from the Defendant’s executive office in this district.

**THE PARTIES**

4. Credit One Bank, N.A., is a national banking association, with its home office located in the state of Nevada. The Bank is chartered by and subject to the exclusive visitorial authority of the Office of the Comptroller of the Currency (“OCC”), a bureau of the U.S. Treasury Department.

5. Defendant Michael A. Hestrin is sued in his official capacity as District Attorney of Riverside County, California.

**DEFENDANT’S VIOLATIONS OF THE NATIONAL BANK ACT**

**The National Bank**

6. Plaintiff is a national bank chartered pursuant to the National Bank Act, 12 U.S.C. § 21 *et seq.* Pursuant to the National Bank Act, and regulations promulgated by the OCC, Plaintiff engages in lending activities on a nationwide basis, including in this district. National banks, such as Plaintiff, “are instrumentalities of the Federal government, created for a public purpose, and as such are necessarily subject to the paramount authority of the United States.” *Davis v. Elmira Savings Bank*, 161 U.S. 275 (1896).

7. As a federal instrumentality, Plaintiff is subject to the exclusive visitorial authority of the OCC, and is extensively examined by commissioned national bank examiners as to its lending, underwriting, loan servicing, debt collection, and other consumer compliance functions. 12 U.S.C. § 484.

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1 **The Riverside County District Attorney’s Subpoena**

2 8. On November 6, 2019, Defendant served an investigative subpoena on  
3 Plaintiff.

4 9. Defendant seeks an extensive amount of information from Plaintiff,  
5 including but not limited to: master services agreements and other agreements with  
6 third parties; internal compliance audits, reviews and evaluations related to the  
7 consumer compliance function; policies and procedures related to Plaintiff’s federally-  
8 authorized debt collection functions; voluminous call records related to  
9 communications with Plaintiff’s customers; and all policies, procedures, manuals or  
10 instructions regarding certain aspects of Plaintiff’s approach to communicating with its  
11 customers. A copy of Defendant’s subpoena is attached hereto as **Exhibit A**.

12 10. Under the National Bank Act and other federal banking laws, the OCC  
13 has licensing, regulatory, supervisory, examination, and enforcement authority with  
14 respect to national banks’ compliance with both federal and state laws. *See* 12 U.S.C.  
15 §§ 24 (Seventh), 93(a), 481, 1818(b); *see also* 12 C.F.R. § 7.4000.

16 11. In furtherance of the exclusivity of the OCC’s authority, a provision of  
17 the National Bank Act, now codified as 12 U.S.C. § 484(a) provides:

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

22 This provision is the cornerstone of Congress’ stated intent, as demonstrated by the  
23 legislative history of the National Bank Act, to ensure that national banks were not  
24 subject to supervision by state authorities.

25 12. As part of the Dodd-Frank Act, Congress would further clarify the narrow  
26 circumstances under which state officials may attempt to enforcement compliance with  
27 state law against a national bank as part of the state’s law enforcement role:  
28

1 ... no provision of title 62 of the Revised Statutes which relates to  
2 visitorial powers or otherwise limits or restricts the visitorial authority  
3 to which any national bank is subject shall be construed as limiting or  
4 restricting the authority of any attorney general (or other chief law  
5 enforcement officer) of any State to bring an action against a national  
6 bank in a court of appropriate jurisdiction to enforce an applicable law  
7 and to seek relief as authorized by such law.

7 Section 1047 of the Dodd-Frank Act, codified at 12 U.S.C. § 25b(i)(1). As this  
8 provision makes clear, and consistent with Supreme Court precedent, states may  
9 enforce non-preempted state law against a national bank only where the state actor  
10 bringing the action is the attorney general, and only where the action is commenced  
11 through the filing of a civil action in an appropriate court.

12 13. As a pervasively regulated national bank, Plaintiff commits considerable  
13 resources to ensuring its compliance with myriad applicable federal and state laws and  
14 regulations. Plaintiff undergoes continuous regulation, supervision, examination, and  
15 monitoring by the OCC, and is subject to the OCC's enforcement jurisdiction with  
16 respect to both federal and state law. Plaintiff is also subject to targeted examinations  
17 relating to laws governing consumer lending. By seeking to inspect the books and  
18 records of Plaintiff and to otherwise exercise visitorial powers over Plaintiff, the  
19 Defendant threatens to increase – and if not enjoined will increase – the oversight and  
20 examination burden faced by Plaintiff in a manner expressly prohibited by Congress in  
21 the Dodd-Frank Act, and by the Supreme Court in the *Cuomo* decision.

22 14. Plaintiff acknowledges the important role that the Defendant plays in  
23 serving the interests of California consumers, however Congress has limited the ability  
24 of state actors to enforce state law against national banks to actions brought by the  
25 state's attorney general, and only within the confines of civil litigation. An action by  
26 a local government official, conducted through an investigative subpoena, is not  
27 permitted by federal law.  
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**Views of the OCC**

15. As is reflected in the attached letter from the OCC to the Plaintiff, the OCC has reviewed Defendant’s subpoena, and has also come to the conclusion that Defendant’s actions are pursuant to his own investigative authority under California law, and that Defendant “is engaged in a nonjudicial investigation of [Credit One Bank, N.A.] and not an exercise of law enforcement authority that is permissible under *Cuomo*.” See **Exhibit B**. Moreover, the OCC has concluded that the Defendant’s investigatory subpoena constitutes “an unlawful exercise of visitorial power” in violation of federal law. *Id.*

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, Credit One Bank, N.A., demands judgment against Defendant Michael A. Hestrin, in his official capacity as District Attorney of Riverside County, California:

- A. Declaring the Defendant’s investigative subpoena as unenforceable as an unlawful encroachment upon the exclusive visitorial authority of the OCC.
- B. Preliminary and permanently enjoining the Defendant, his agents, and all persons acting in concert with them from (1) investigating, requesting or issuing subpoenas for information concerning, or taking any other action to enforce federal and state lending, debt collection, and consumer laws against Plaintiff, with respect to its credit card lending operations, or (2) otherwise exercising visitorial powers with respect to Plaintiff in violation of Section 484 of the National Bank Act.
- C. Granting Plaintiff such other and further relief, including costs, as this Court may deem justice and proper.

1 Dated: October 15, 2020

2 /s/ Raymond Y. Kim  
3 HOLLAND & KNIGHT LLP  
4 Abraham J. Colman  
5 Raymond Y. Kim  
6 Paul J. Bond) (*pro hac vice* application  
7 forthcoming  
8 Travis P. Nelson (*pro hac vice* application  
9 forthcoming)

10 *Attorneys for Plaintiff*  
11 *Credit One Bank, N.A.*

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# **EXHIBIT A**



1 MICHAEL A. HESTRIN  
2 District Attorney  
3 Riverside County  
4 Timothy S. Brown, SBN 281979  
5 Deputy District Attorney  
6 3960 Orange Street  
7 Riverside, CA 92501  
8 Tel: (951) 955.5400

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10  
11 **OFFICE OF THE DISTRICT ATTORNEY**  
12 **COUNTY OF RIVERSIDE**

13 In the Matter of the Investigation of:

14  
15 **INVESTIGATIVE SUBPOENA**  
16 **TO PRODUCE RECORDS AND**  
17 **DOCUMENTS**

18 **CREDIT ONE BANK, N.A.**

19 Pursuant to the powers conferred by Government Code section 11180 et. seq. and  
20 Business and Professions Code section 16759 upon the Riverside County District Attorney,  
21 which powers have been delegated to Deputy District Attorney Timothy S. Brown, an officer  
22 authorized to conduct the above-entitled investigation:

23 **CREDIT ONE BANK, N.A. IS HEREBY COMMANDED** to appear through a  
24 custodian of records or person(s) most knowledgeable before Deputy District Attorney Timothy  
25 S. Brown at 3960 Orange Street, Riverside, California 92501, on December 6, 2019, or at a place  
26 and time to which the parties otherwise agree, to produce the records and documents described  
27 below, in connection with the above-titled investigation, and to testify and answer questions  
28 under oath. This investigation also includes the San Diego County District Attorney's Office,  
Los Angeles County District Attorney's Office and the Santa Clara County District Attorney's  
Office. Attorneys and/or investigators from these offices may also be present on December 13,  
2019.



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**DEFINITIONS**

A. The terms “CREDIT ONE BANK, N.A.” or “CREDIT ONE BANK” or “YOU/YOUR” refers to the party to whom these requests are directed and includes all predecessors, subsidiaries, affiliates, agents, officers, directors, employees, attorneys and assigns.

B. The term “ALORICA” refers to Alorica, Inc. and any of its direct and indirect subsidiaries and affiliates involved in any consumer debt collection activities, including but not limited to, EGS Financial Care, Inc., Expert Global Solutions, EGS, NCO Financial Systems, Inc., Global Receivables Solutions, Inc., GRS and West Asset Management, Inc. (collectively “Alorica”).

**RECORDS AND DOCUMENTS**

1. Please provide all Master Services Agreements and Statements of Work, and all other agreements, instructions or directives related to the collection of debt, including changes and modifications, which were operative during the relevant time period for services performed by ALORICA.

2. Please provide all compliance audits, reviews or evaluations of accounts on which calls were made by ALORICA to collect debt on YOUR behalf and/or for accounts YOU originated. For the purposes of this request, these audits, reviews or evaluations include those which have been conducted by YOU or any third-party compliance monitor, as well as any responses by ALORICA to any compliance audit, review or evaluation.

3. Please provide all policies and procedures for the collection of debt performed on YOUR behalf and/or for accounts YOU originated, by ALORICA.

4. Please provide call records for all debt collection calls made to California residents on YOUR behalf and/or for accounts YOU originated, by ALORICA. For purposes of this request, please include data consisting of:

- a. The name of the alleged debtor or person to be called.
- b. The telephone number called, including area code.
- c. The address, including the zip code, of the person called.

- 1 d. Whether the telephone number is a cell phone, landline or unknown.
- 2 e. The date and time of the call.
- 3 f. The result of the call.
- 4 g. The calling campaign or program code.
- 5 h. The internal ALORICA account number and client account number.
- 6 i. The dialer or dialing system used to place the call.
- 7 j. The mode of dialing (e.g., manual, preview, predictive or other).
- 8 k. The consent to call the number (e.g., verbal, written, or unknown).
- 9 l. The source of the telephone number, including whether it was obtained
- 10 through skip tracing or from an internal database of phone numbers.
- 11 m. Any request to cease, or identification by the call recipient that the number
- 12 called was a wrong number.


13 5. Please produce all policies, procedures, manuals or instructions YOU followed,  
14 used or provided for all dialers or dialing systems used by ALORICA. YOUR response should  
15 specify the code used to identify each such dialer or dialing system.

16 6. Please provide a data dictionary or listing of all data fields, for each and every  
17 dialing system identified in YOUR response to request no. 5, above.

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Dated: November 6, 2019

MICHAEL A. HESTRIN  
District Attorney, Riverside County

  
Timothy S. Brown  
Deputy District Attorney

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PROOF OF SERVICE

*Investigative Subpoena re Credit One Bank, N.A.*

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

At the time of service, I was over 18 years of age and not a party to the action. My business address is located at 3960 Orange Street, Riverside, CA 92501.

On November 6, I served the following document(s):

INVESTIGATIVE SUBPOENA TO PRODUCE RECORDS AND DOCUMENTS

I served the documents on the following persons at the following addresses:

Barbara Hoerner  
Attorney  
Credit One Bank, N.A.  
Las Vegas, NV 89113

Narine Yenovkian  
Attorney  
Credit One Bank, N.A.  
Las Vegas, NV 89113

- (BY U.S. MAIL) I enclosed the documents in a sealed envelope deposited it with the United States Postal Service, with the postage fully pre-paid.
- (BY OVERNIGHT MAIL) I enclosed the documents in an envelope or package provided by an overnight mail carrier and addressed to the persons at the addresses listed above. The envelope was placed in a box or other facility regularly maintained by the overnight service carrier for the purpose of the receipt of mail with delivery fees paid or provided for, addressed to the person on whom it is to be served.
- (BY FEDERAL EXPRESS 3- DAY MAIL) I enclosed the documents in an envelope or package provided by an express mail carrier and addressed to the persons at the addresses listed above. The envelope was placed in a box or other facility regularly maintained by the express service carrier for the purpose of the receipt of mail with delivery fees paid or provided for, addressed to the person on whom it is to be served.

Executed on November 6, 2019, at Riverside, California.



Michelle R. O'Brien

# **EXHIBIT B**



Office of the Comptroller of the Currency

Washington, DC 20219

*Delivered By Secure Electronic Mail*

October 6, 2020

David C. Bouc, Esq.  
EVP Legal & Compliance  
Credit One Bank, N.A.  
6801 S. Cimarron Rd.  
Las Vegas, Nevada 89113  
david.bouc@creditone.com

Subject: Subpoena Seeking Bank Books and Records *In the matter of the Investigation of: Credit One Bank, N.A.*, Case No. 2001925 (Cal. Super. Ct., Riverside County)

Dear Mr. Bouc:

Recently, you informed the Office of the Comptroller of the Currency (“OCC”) that the Office of the District Attorney in Riverside County California (“DA”) served an investigative subpoena on Credit One Bank, N.A. (“Credit One” or “Bank”) on November 6, 2019 (“Subpoena”). The Subpoena includes requests for the Bank’s records relating to collection calls made by Alorica, Inc., a Bank service provider, to California residents on Credit One accounts, from February 12, 2015 to the present. The Bank provided a formal response to the Subpoena dated January 31, 2020 (“Response”), but has not produced documents or records in response to the Subpoena as of September 30, 2020.

In addition, you notified the OCC that the DA filed a petition to enforce the Subpoena with the Riverside County Superior Court. Specifically, the DA moved the Court for an Order to Show Cause “as to why the Court should not compel immediate production of each and every request as stated in the People’s investigative subpoena,”<sup>1</sup> on July 2, 2020 (“Petition”). The OCC has reviewed the Subpoena and the Petition and concludes, for the reasons described below, that the Subpoena calls for Credit One to produce bank books and records for inspection in violation of 12 U.S.C. § 484 and its implementing regulation 12 C.F.R. § 7.4000.<sup>2</sup>

The National Bank Act (NBA), at 12 U.S.C. § 484, vests the OCC with exclusive visitorial powers with respect to national banks, subject to certain express exceptions, which are detailed

<sup>1</sup> *In the Matter of the Investigation of Credit One*, No. 2001925, Pet. for Order to Show Cause re Enforcement of Investigative Subpoena, 1 (Cal. Super. Ct., Riverside County June 24, 2020).

<sup>2</sup> The OCC acknowledges that Credit One and the DA have submitted other court filings regarding enforcement of the Subpoena. These filings do not impact the OCC’s conclusion in this letter.

in 12 C.F.R. § 7.4000. Visitorial powers include, among other things, the examination of a bank, the inspection of a bank's books and records, and nonjudicial investigations of banks to enforce compliance with applicable law.<sup>3</sup>

In *Cuomo v. Clearing House Assn., L.L.C.*, 557 U.S. 519 (2009), the Supreme Court considered whether request letters sent to national banks by the New York Attorney General were impermissible visitations under 12 U.S.C. § 484. The letters were “in lieu of subpoena” and requested nonpublic lending information related to the national banks' compliance with state fair-lending laws. The Court upheld an injunction against the threatened issuance of executive subpoenas and stated that “the Attorney General's issuance of subpoena on his own authority” under state law would be an impermissible visitation under 12 U.S.C. § 484, rather than a permissible “exercise of the power of law enforcement.”<sup>4</sup> While the Court recognized that the Attorney General could file a lawsuit to enforce applicable law consistent with 12 U.S.C. § 484, the Court also clearly emphasized the distinction between visitation (including issuance of an executive subpoena) and law enforcement, explaining that this “would preserve a regime of exclusive administrative oversight by the Comptroller” applicable to national banks.<sup>5</sup> The Court went on to state that:

[o]n a pragmatic level, the difference between visitation and law enforcement is clear. If a State chooses to pursue enforcement of its laws in court, then it is not exercising its power of visitation and will be treated like a litigant. An attorney general acting as a civil litigant must file a lawsuit, survive a motion to dismiss, endure the rules of procedure and discovery, and risk sanctions if his claim is frivolous or his discovery tactics abusive. Judges are trusted to prevent “fishing expeditions” or an undirected rummaging through bank books and records for evidence of some unknown wrongdoing.<sup>6</sup>

Based on the facts in the current litigation, the Subpoena requests production of the Bank's books and records for purposes of investigating compliance with state law. As in *Cuomo*, the DA issued the Subpoena pursuant to its own investigative authority under California law. Therefore, the DA is engaged in a nonjudicial investigation of the Bank<sup>7</sup> and not an exercise of law enforcement authority that is permissible under *Cuomo*. Accordingly, it is the OCC's position that the Subpoena constitutes a visitation under *Cuomo*, the NBA, and the OCC's implementing regulations and is thus an unlawful exercise of visitorial power in violation of 12 U.S.C. § 484 and 12 C.F.R. § 7.4000. Credit One may share this letter with opposing counsel or attach it to

<sup>3</sup> 12 C.F.R. § 7.4000(a)(2). In 2011, the OCC amended 12 C.F.R. § 7.4000 to provide that “an action against a national bank in a court of appropriate jurisdiction brought by a state attorney general (or other chief law enforcement officer) to enforce an applicable law against a national bank and to seek relief as authorized by such law is not an exercise of visitorial powers under 12 U.S.C. 484.” 12 C.F.R. § 7.4000(b).

<sup>4</sup> *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 536 (2009). In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act codified the Supreme Court's decision in *Cuomo* regarding judicial enforcement of state law against national banks. 12 U.S.C. 25b(i)(1).

<sup>5</sup> *Id.* at 530.

<sup>6</sup> *Id.* at 531. The fact that the DA has initiated the present litigation to enforce the subpoena at issue does not bring this matter under the scenario set forth in *Cuomo*; there is a difference between filing an action to “pursue enforcement of its laws in court” and filing an action to enforce an investigatory subpoena for documents.

<sup>7</sup> As is made manifestly clear from the caption of the present action (“*In the matter of the Investigation of: Credit One Bank, N.A.*”), the DA's investigation targets the activities of Credit One.



any filing it makes in the above-referenced matter that addresses the issues of preemption and visitorial powers as discussed herein.

If you have any questions, please contact Kimberly Folk, Special Counsel at (720) 475-7663 or [kimberly.folk@occ.treas.gov](mailto:kimberly.folk@occ.treas.gov), or me at (202) 649-5558.

Sincerely,

Jonathan V. Gould

Digitally signed by  
Jonathan V. Gould  
Date: 2020.10.06  
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Jonathan V. Gould  
Senior Deputy Comptroller and Chief Counsel  
Office of the Comptroller of the Currency

cc: Abraham J. Colman, Partner  
Holland & Knight  
[Abe.colman@hklaw.com](mailto:Abe.colman@hklaw.com)  
Counsel for Credit One