

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

PEOPLE OF THE STATE OF NEW YORK,  
by LETITIA JAMES, Attorney General of the State of  
New York,

Petitioner,

- against -

CAPITAL ONE FINANCIAL COPORATION,

Respondent.

**EX PARTE PETITION FOR  
ISSUANCE OF SUBPOENA**

Index No. \_\_\_\_\_

Petitioner, the People of the State of New York, by Letitia James, Attorney General of the State of New York (“Attorney General”), as and for her Ex Parte Petition, respectfully alleges:

**INTRODUCTION**

1. The Attorney General brings this Petition to request the Court’s issuance of an out-of-state subpoena (the “Proposed Subpoena”) on Capital One Financial Corporation (“Capital One”), pursuant to the Court’s authority under G.B.L. § 343.

2. The sole purpose for the Proposed Subpoena is to further the Attorney General’s investigation into whether Capital One’s proposed acquisition of Discover Financial Services (“Discover”) violates New York antitrust law, G.B.L. § 340 *et. seq.*

3. As described below, there is good cause for the Attorney General’s investigation and the Court’s issuance of the Proposed Subpoena:

4. Capital One and Discover are already two of the largest issuers of credit cards in the U.S. Together, they would be the largest credit card issuer, with \$250 billion in combined outstanding credit card loans.

5. Capital One is also the largest issuer of credit cards to customers with subprime credit scores. Together, Capital One and Discover would control over 30% of the subprime credit card market, double the market share of their closest competitor.

6. The proposed transaction could have a significant impact on New York specifically, since Capital One and Discover have over \$9.5 billion and \$6.5 billion in credit card loans in New York, respectively. The effects will be particularly felt by the often vulnerable New Yorkers with subprime credit scores.

7. G.B.L. § 343 authorizes the Court, upon the Attorney General's request, to issue subpoenas on witnesses and entities located "without the state" upon a showing that the information or testimony sought bears a reasonable relationship to the subject matter under investigation.

8. All of G.B.L. § 343's conditions are met: the statute authorizes the Court to issue the Proposed Subpoena, the information sought is relevant to the Attorney General's investigation of the proposed transaction's effects on competition, and there is a clear factual basis for the investigation.

9. For the reasons described herein, the Attorney General respectfully requests that the Court grant the Petition, issue the Proposed Order, and authorize the Attorney General to serve the Proposed Subpoena on Capital One.

### **PARTIES, JURISDICTION, AND VENUE**

10. Petitioner Letitia James is the Attorney General of the State of New York. She is responsible for enforcing the laws of the State of New York, including New York's Donnelly Act, G.B.L. § 340 *et seq.*

11. Respondent Capital One Financial Corporation is a national bank holding company incorporated in Delaware and headquartered in McLean, Virginia.

12. The Court has jurisdiction to issue the Proposed Subpoena because Capital One does business in New York State and supplies goods and services in New York State. *See* C.P.L.R. §§ 301, 302. Specifically, Capital One has infrastructure, corporate offices, bank branches, and billions of dollars in credit card loans in New York State.<sup>1</sup> Ex. 1 at 42, 45, 111.<sup>2</sup>

13. Venue is properly set in New York County because the Attorney General is resident in New York County and has selected New York County, and because the Attorney General is a public authority whose facilities involved in the action are located in New York County. *See* C.P.L.R. §§ 503, 505, 509.

### **BACKGROUND**

#### **I. Capital One's Proposed Acquisition of Discover**

14. In February 2024, Capital One announced that it had executed a merger agreement to acquire Discover in an all-stock transaction valued at \$35.3 billion. Ex. 2. The transaction is expected to close in late 2024 or early 2025, pending regulatory approval. Ex. 3 at 20.

15. Capital One and Discover are direct competitors in the credit card issuer market. This market is highly concentrated, with the top ten card issuers holding 82% of outstanding credit card balances. Ex. 4 at 5; Ex. 5 at 18-19.

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<sup>1</sup> If and when the Court issues the Proposed Subpoena, the Attorney General will comply with applicable Delaware and Virginia laws (such as the Uniform Interstate Deposition and Discovery Act) prior to serving the subpoena.

<sup>2</sup> Citations to "Ex." refer to exhibits to the supporting Affirmation of Michael D. Schwartz.

16. In 2023, Capital One and Discover were the fourth and fifth largest credit card issuers in the U.S., with outstanding credit card loans of \$148 billion and \$102 billion, respectively. Ex. 3 at 12. Together, they would be the largest credit card issuer in the U.S., owning about 24% of all outstanding U.S. credit card loans. Ex. 3 at 12; Ex. 6 at 7.

17. Capital One and Discover are also direct competitors in the submarket for subprime credit card issuers. In 2023, customers with credit scores 660 or below comprise 32% of Capital One's credit card portfolio and 20% of Discover's portfolio. Ex. 7 at 7; Ex. 1 at 94; Ex. 10 at 102; Ex. 6 at 16.

18. Capital One is the largest subprime credit card issuer in the U.S., with \$47 billion in subprime credit card loans in 2023. Ex. 6 at 5. Adding Discover's \$20 billion in subprime card loans would result in the combined firm controlling over 30% of the subprime card issuer market, with more than double the subprime card loans of its closest competitors JPMorgan Chase (\$30 billion) and Citigroup (\$33 billion). Ex. 8 at 7, 15; Ex. 6 at 16.

19. A calculation by outside groups of the widely-used Herfindahl-Hirschman Index found that the proposed transaction would be "inherently likely to lessen competition substantially" and therefore presumptively unlawful under Supreme Court precedent and U.S. Department of Justice and Federal Trade Commission guidelines. See Ex. 7 at 5-6; Ex. 9 at 5-6 (a proposed merger is presumptively unlawful if, as here, it results in a merged firm with market share over 30% and a change in Herfindahl-Hirschman Index greater than 100) (citing *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)).

20. Although both Capital One and Discover operate nationwide, they have significant business and operations in New York. In 2023, Capital One had over \$9.5 billion in credit card loans in New York and Discover had over \$6.5 billion in credit card loans in New

York. Ex. 1 at 91; Ex. 10 at 111. Capital One also has significant infrastructure, corporate office space, and bank branches in New York. Ex. 1 at 42, 45.

## II. The Attorney General's Investigation

21. The Attorney General's Antitrust Bureau is confidentially investigating the proposed transaction's effects on competition, pursuant to the Attorney General's authority under New York's Donnelly Act, G.B.L. § 340 *et. seq.*

22. The U.S. Department of Justice's Antitrust Division is also reviewing the proposed transaction, and served Civil Investigatory Demands on both Capital One and Discover, seeking information and documents pertinent to the proposed transaction's effects on competition. Schwartz Aff. ¶ 6.

23. In May 2024, undersigned counsel contacted counsel for both Capital One and Discover, and requested that they voluntarily waive applicable federal confidentiality protections to permit the U.S. Department of Justice's Antitrust Division to discuss and share documents and information produced by the parties with the Attorney General's Antitrust Bureau. *Id.* ¶ 7.

24. Such voluntary waivers are common when both federal and state antitrust enforcers are reviewing a proposed merger, as they streamline the investigations and minimize burdens on the merging parties by generally allowing them to receive a single subpoena and make unified document productions. *Id.* ¶ 8.

25. Discover agreed to provide a waiver in June 2024, authorizing "the Antitrust Division of the United States Department of Justice and the New York State Office of the Attorney General to share documents, testimony, information, analyses, or any other materials provided to the Antitrust Division by Discover." Ex. 11.

26. Capital One declined to provide such a waiver. Instead, its counsel stated that it had been told by the OCC that issuing a voluntary waiver of federal confidentiality protections

would contravene OCC regulations that restrict the ability of State law enforcement agencies to exercise “visitorial powers” over national banks. Schwartz Aff. ¶ 9; *see also* 12 C.F.R. § 7.4000 (Visitorial powers with respect to national banks).

27. Attorneys in the Attorney General’s Antitrust Bureau later spoke with attorneys at the OCC, who confirmed the OCC’s position that Capital One granting a voluntary waiver—thereby permitting the Attorney General to confidentially review documents that Capital One had already produced to the U.S. Department of Justice’s Antitrust Division—would be an unlawful exercise of visitorial powers by the Attorney General. Schwartz Aff. ¶ 10.

28. Thereafter, Capital One proposed a “limited waiver,” whereby it would permit “the DOJ to orally communicate and share analysis (but not data, documents, or the specific contents thereof, provided by Capital One to the DOJ) with the [Attorney General].” *Id.* ¶ 11. The Attorney General did not accept this proposal, having concluded that it could not meaningfully investigate the proposed transaction without access to Capital One’s data and documents. *Id.* ¶ 12.

### III. The Proposed Subpoena

29. The Attorney General requests the Court’s issuance of a subpoena for documents and information on Capital One, a foreign corporation located “without the state,” pursuant to G.B.L. § 343. The Attorney General’s Proposed Subpoena is submitted as Exhibit A to the Proposed Order.

30. The Proposed Subpoena’s specifications for documents and information are identical to the specifications in the subpoenas issued by the U.S. Department of Justice’s

Antitrust Division.<sup>3</sup> See Proposed Subpoena at 10-23; Schwartz Aff ¶ 13. The specifications are tailored to information pertaining to the competitive effects of the proposed transaction in the several markets in which Capital One and Discover operate, specifically:

- Documents and information concerning the people responsible for negotiating and approving the proposed transaction and Capital One’s contemplation, due diligence, and approval of the proposed transaction (Specifications 3, 31, 32, 54);
- Documents and information discussing Capital One’s competitors or its competitive strategies as to its different products and services (Specifications 12, 37-40);
- All agreements related to the proposed transaction, documents reflecting the strategic rationale for the proposed transaction, and analyses prepared by Capital One’s employees and its outside bankers and consultants related to the proposed transaction (Specifications 19-26, 53, 55, 57);
- Documents submitted to Capital One’s senior management, its board of directors, its investors, and competition authorities concerning with the proposed transaction (Specifications 7-8, 17, 27-28, 56);
- Documents and information necessary to understand and define the product and services markets in which Capital One operates, and its competitors in those markets (Specifications 10-16, 18, 32, 33, 35-52, 58-60); and
- Information regarding Capital One’s corporate structure and its document retention policies and practices (Specifications 1, 2, 4, 5, 6, 9, 29-30, 32, 34)

**FIRST CAUSE OF ACTION**  
**ISSUANCE OF SUBPOENA (G.B.L. § 343)**

31. The Attorney General incorporates the allegations in the foregoing Paragraphs.
32. G.B.L. § 343 authorizes the Court to issue subpoenas on witnesses and entities

located “without the state” upon a showing that the information or testimony sought bears a

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<sup>3</sup> The only exception is specification 61, which seeks copies of any documents that Capital One produces to the U.S. Department of Justice’s Antitrust Division in the future.

reasonable relationship to the subject matter under investigation.

33. Capital One is located without the State of New York. The information sought in the Proposed Subpoena bears a reasonable relationship to the Attorney General's investigation of the competitive effects of Capital One's proposed acquisition of Discover. There is a compelling factual basis for the Attorney General's investigation.

34. Federal banking statutes and regulations are not an impediment to the Court's issuance of the Proposed Subpoena, for several independent reasons. *First*, those laws only apply to national banks, and Capital One is a bank holding company, not a national bank. *Second*, this Petition seeks relief that falls within statutory and regulatory exceptions for subpoenas issued by a court "under normal judicial process" and pursuant to "powers as are vested in the courts of justice." *Third*, the Proposed Subpoena is not an exercise of visitorial powers within the meaning of 12 U.S.C. § 484.

### **PRAYER FOR RELIEF**

**WHEREFORE**, the People of the State of New York respectfully request that the Court grant the Petition in all respects by issuing an order and judgment:

- A. Adopting the Proposed Order *ex parte*;
- B. Issuing the Proposed Subpoena;
- C. Authorizing the Attorney General to serve the Proposed Subpoena, submitted as Exhibit A to the Proposed Order, on Respondent Capital One Financial Corporation; and
- D. Granting such other and further relief as the Court deems just and proper.

Dated: October 23, 2024  
New York, New York

Respectfully submitted,

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Attorney General of the State of New York

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