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DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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Counsel for Plaintiff Mindy Pagsolingan

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CV 09

5039

MINDY N. PAGSOLINGAN, on Behalf of)
Herself and All Others Similarly Situated,)

Plaintiff,)

v.)

AMERICAN EXPRESS COMPANY and)
AMERICAN EXPRESS CENTURION)
BANK,)

Defendants.)

CASE NO.

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT
CASE NO.

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1 Plaintiff Mindy N. Pagsolingan, on behalf of herself and all others similarly situated, by
2 their undersigned counsel, allege against defendants the following upon personal knowledge as to
3 their own acts, and upon information and belief, based on the investigation conducted by counsel,
4 as to all other allegations:

5 **NATURE OF THE ACTION**

6 1. The American Express Company (hereinafter, "American Express"), world
7 renowned for its universally recognized name and logo and for its marketing success, began a new
8 marketing program in or about September of 2003, called "Blue Cash" by which consumers
9 accepted an offer to receive the American Express Blue Cash Card (the "Card") which was issued
10 by American Express Centurion Bank ("AECB"), a wholly owned subsidiary of American Express
11 Travel Related Services, Inc. Using its vast data bank of existing and potential customers,
12 American Express embarked upon a combined solicitation, marketing and advertising campaign to
13 sell this new financial service.

14 2. American Express sent millions of solicitations for Blue Cash touting it as a method
15 by which cardholders would be "rewarded for their spending by receiving a cash rebate. The offer
16 was, "Earn up to 5% Cash Back." The suggestion was not masked. The more one spends the more
17 one benefits, or so the literature and advertisements made customers believe.

18 3. The offer, once accepted by a consumer, was confirmed in writing by AECB with a
19 brochure entitled "Welcome to Blue Cash." The Card came with several features to make it
20 attractive. The features were also intended not just to produce and retain customers, but to induce
21 customers to move outstanding credit-card balances and to shift all of their consumer spending to
22 the Blue Cash Card.

23 4. Perhaps the strongest incentive advertised in defendants' marketing materials to the
24 consumer was the "reward" of "cash back," or, more specifically:

25 **REWARDS YOU WITH CASH BACK
26 WHEN YOU USE THE CARD**

27 **Earn up to 5% Cash Back.*** Starting today, you can earn cash back on virtually
28 everything you buy. You can earn rewards even faster for the purchases you make
every day in supermarkets, gas stations, drugstores, and home improvement stores.

1 There's no minimum spending required, so you can start earning cash back today.
2 The more you use your Card, the faster your earnings can add up.

3 **Pay Bills, Get Cash Back.** Pay all your regular monthly bills automatically with
4 Blue Cash from American Express and start earning cash back on everything from
5 telephone and cable bills to parking and transportation expenses.** Simply contact
6 your merchants and ask to have your bills charged to Blue Cash . . .

7 * Your annual cash reward for everyday purchases at stand-alone U.S. supermarkets,
8 drugstores, gas stations and home improvement stores is up to 3%. Stand-alone
9 locations do not include the departments of superstores or warehouse clubs where
10 the standard rebate of up to 1.5% applies. Your annual cash reward for all other
11 purchases is up to 1.5% You will receive an additional rebate of up to 2% for
12 purchases in months in which your account carries a balance. Your annual cash
13 rewards are limited to \$50,000 of eligible spending.

14 ** Special payment features may not apply to all long distance calling plans. Not all
15 providers service all markets.

16 5. The offer was clear and the incentive was compellingly strong that the consumer
17 would receive the stated discount based upon total amount spent but, in fact, this was not true.
18 American Express completely failed to advise its customers of all components of the offer and how
19 the calculations of "up to" a certain percentage was going to be made, as described more fully
20 below at paragraphs 15, 16 and 17.

21 6. Not only did American Express fail to tell its customers the truth when the offer was
22 made, they also failed to properly inform those same customers that there were additional
23 restrictions to the Blue Cash program before or even after they were made.

24 **JURISDICTION AND VENUE**

25 7. Jurisdiction is based upon the Class Action Fairness Act of 2005, 28 U.S.C.
26 §1332(d)(2) as this is a Class action in which the matter in controversy exceeds \$5,000,000 and the
27 named Plaintiff is a citizen of a state different from the Defendants.

28 8. Venue is proper in this district pursuant to 28 U.S.C. §1391, because Defendants
either maintain an active place of business, including retail outlets, within this district, or provided
services to Plaintiff and Class members located in this district, and conducted substantial business
in this district. Moreover, the Plaintiff resides in the district where he has been subjected to the
alleged wrongs complained of herein in the district.

1 **PARTIES**

2 9. Plaintiff is and was at all times relevant hereto a resident of San Mateo County, State
3 of California, and obtained the Card during the Class Period. Plaintiff accepted and relied upon
4 Defendants' offer for the Card through means of interstate commerce including, but not limited to
5 telephone, mail, and on-line computer transactions from and to her home in San Mateo County,
6 California. Plaintiff Mindy N. Pagsoligan has been damaged as a result of the fraud and deceptive
7 practices of the Defendants.

8 10. Defendant American Express is, *inter alia*, a national financial services vendor and
9 provider and a New York corporation. Since its founding, American Express has advertised,
10 marketed and provided various credit and other financial services throughout the United States,
11 including California. In particular, American Express has represented, impliedly and directly, that
12 the Card provides cash benefits to those persons who accepted Defendants' offer to obtain one.

13 11. Defendant AECB is a wholly owned subsidiary of American Express. AECB issues
14 and services American Express revolving credit cards and charge cards, including American
15 Express' Blue Cash Card. AECB is located at 4315 S. 2700 West, Salt Lake City, Utah.

16 **FACTUAL ALLEGATIONS**

17 12. In or about January, 2004, Defendants solicited Plaintiff and members of the Class to
18 apply for the American Express Blue Cash Card.

19 13. The solicitation from Defendants stated that the rebate percentages offered by
20 Defendants were to be applied to a cardholder's "Total Annual Spend."

21 14. Based on that representation by Defendants, the Plaintiff and other members of the
22 Class accepted Defendants' offer and commenced using the Card.

23 15. According to the on-line solicitations made upon information and belief during the
24 Class Period, as defined below, Defendants touted, *inter alia*, that Plaintiff would receive the 5%
25 cash back." Defendants in the offer stated as follows:

26 Fundamentals of the Card
27 Earn up to 5% Cash Back

28 Blue Cash offers you a great way to earn up to 5% cash back combined with a 0%
introductory APR and a smart chip for added online security. You'll earn cash back

1 on virtually everything you buy, and earn cash back even faster at supermarkets, gas
2 stations, drugstores, and home improvement stores. There's no minimum spending
required, so you can start earning cash back right away.¹

3 16. Footnote 1 states in relevant part:

4 The cash back reward structure is as follows (hereinafter "Chart A"):

Total Annual Spend	Cash Back on Everyday Purchases	Cash Back on Other Purchases
Up to \$2,000	0.50%	0.25%
\$2,001 - \$6,000	1.00%	0.50%
\$6,001 - \$50,000	3.00%	1.50%
Bonus % if you carry a balance	2.00%	0.50%

11
12 17. Based on Defendants' representations in paragraphs 2 through 5 and 15 and 16,
13 above (collectively, the "Offer"), Plaintiff reasonably believed, and the obvious impact of the
14 statements on members of the Class was, that if one spent up to an amount over \$6,000 annually,
15 they would receive 3% cash back for their total "Every Day Purchases" along with an additional
16 2.0% cash bonus on their everyday purchases for carrying a balance, and 1.5% back on all of their
17 other purchases along with an additional 0.5% bonus for carrying a balance. This representation
18 caused Plaintiff and members of the Class to apply, accept and use the Card. The Offer clearly
19 stated that the Card would permit card holders to "Earn up to 5% Cash Back." That statement has a
20 footnote which does not include any statement or explanation of a tiered rebate calculation method
21 to be applied by Defendant, but does state, *inter alia*, "You will receive an additional rebate of up to
22 2% in months in which your account carries a balance." During all or part of the Class Period, the
23 Plaintiff and members of the proposed SubClass, as defined below in paragraph 27, carried a
24 balance on the Card, yet did not receive the additional 2% cash bonus which was promised on
25 "Everyday Purchases" or the .5% rebate on "Other Purchases."

26 18. After accepting the Offer and the Card sent by Defendants, Defendants sent Plaintiff
27 a statement on which Defendants purported to have calculated the rebate due.
28

- 1 a. Whether Defendants misrepresented the terms and conditions of the Card
- 2 based on the Offer;
- 3 b. Whether Defendants misrepresented or failed to adequately disclose the
- 4 terms of the rebates offered to persons who obtained the Card;
- 5 c. Whether Defendants breached their agreements with those who obtained the
- 6 Card;
- 7 d. Whether Defendants should be enjoined from further wrongdoing;
- 8 e. Whether the Defendants were negligent in misrepresenting the terms of the
- 9 Offer; and
- 10 f. Whether Class and/or SubClass members are entitled to damages and in what
- 11 amount.

12 25. Plaintiff satisfies Federal Rule of Civil Procedure 23(a)(3) because Plaintiff's claims
13 are typical of those of the Class and SubClass and do not conflict with the interests of any other
14 members of the Class and/or SubClass because Plaintiff suffered damages as a direct result of the
15 misleading solicitations for the Card as advertised, publicized, marketed, and distributed by
16 Defendants without knowledge of the actual terms and conditions intended by Defendants to be
17 applied. Plaintiff's damages were directly caused by her acceptance and use of the Card from
18 Defendants for the Plaintiff's consumer purchases. Plaintiff asserts claims that are typical of the
19 claims of the entire Class and SubClass, and all Class and SubClass members have been subjected
20 to the same wrongful conduct.

21 26. In satisfaction of Federal Rule of Civil Procedure 23(a)(4), Plaintiff will fairly and
22 adequately represent and protect the interests of other Class members and has no interests
23 antagonistic to or which irreconcilably conflict with those of other Class members. Plaintiff is
24 committed to the vigorous prosecution of this action and has retained counsel experienced in
25 litigation of this nature to represent him and the Class. Plaintiff anticipates no difficulty in the
26 management of this litigation as a class action.

27 27. A class action is the only method for the fair and efficient adjudication of this
28 controversy. Class and SubClass members have suffered and will continue to suffer continuing

1 damages as a result of Defendants' wrongful conduct. Because of the nature of the individual Class
2 members' claims in this litigation, few, if any, could otherwise afford to seek legal redress against
3 Defendants for the wrongs complained of herein, and a representative class action is therefore
4 appropriate, the superior method of proceeding, and essential to the interests of justice. Absent a
5 representative class action, Class and SubClass members would continue to suffer losses for which
6 they would have no remedy; many Class and/or SubClass members would remain ignorant of the
7 significant violations of law to which they have been exposed and the damages they have suffered
8 or may suffer; the remedial action sought could not be secured or prosecuted. Even if separate
9 actions could be brought by individual members of the Class and SubClass, the resulting
10 multiplicity of lawsuits would cause undue hardship and expense for both the court and the
11 litigants, as well as create a risk of inconsistent rulings and adjudications which might be
12 dispositive of the interests of the other Class members who are not parties to the adjudications and
13 may substantially impede their ability to protect their interest and/or which would establish
14 incompatible standards of conduct for Defendants.

15 28. Pursuant to Federal Rule of Civil Procedure 23(b)(1) and (b)(2), Defendants have
16 acted or refused to act on grounds generally applicable to the Class, making appropriate injunctive
17 or declaratory relief with respect to the Class as a whole.

18 29. This class action is maintainable under Rule 23(b)(4) of the Federal Rule of Civil
19 Procedure because questions of law and fact common to the Class and/or SubClass predominate
20 over any questions affecting only individual members thus making a class action superior to other
21 available methods for fair and efficient adjudication of this controversy.

22 NUMEROSITY

23 30. The members of the Class are so numerous that joinder of all members is
24 impracticable. The Class is made up of thousands of members. The precise number of Class
25 members can only be ascertained through discovery, which includes Defendants' sales and
26 complaints records. The disposition of their claims through a Class action will benefit both the
27 parties and this Court.

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ADEQUACY OF REPRESENTATION

31. Plaintiff, as the representative plaintiff, will fairly and adequately assert and protect the interests of the Class as:

a. Plaintiff has retained attorneys who are experienced in prosecuting Class action claims and will adequately represent the interests of the Class; and

b. Plaintiff has no conflict of interest that will interfere with the maintenance of this Class action.

FIRST CAUSE OF ACTION

(Consumers Legal Remedies Act - Cal. Civ. Code §1750, et. seq.)

32. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein.

33. Defendants have violated the following provisions of Cal. Civ. Code §1750 et. seq.:

a. Cal. Civ. Code §1770(a)(5): by representing that its goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have;

b. Cal. Civ. Code §1770(a)(7): by representing that its goods or services are of a particular standard, quality, or grade, if they are of another;

c. Cal. Civ. Code §1770(a)(9): by advertising goods and services with the intent not to sell them as advertised; and

d. Cal. Civ. Code §1770(a)(16): by representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

34. Defendants undertook the above and acts or practices in transactions intended to result, or which did result, in the sale of goods to customers for personal, family, or household use.

35. Defendants have therefore violated the Consumers Legal Remedies Act, and Plaintiff prays for damages, equitable and injunctive relief authorized by that Act, and for such additional relief as is set forth below.

36. Pursuant to Cal. Civ. Code §1782, in conjunction with the filing of this action, Plaintiff's counsel notified Defendants of the particular violations of the CLRA and demanded that

1 it correct or agree to correct the actions described herein. Defendants did not correct the unlawful
2 conduct.

3 **SECOND CAUSE OF ACTION**

4 **(Unlawful, Unfair and Fraudulent Business Practices**

5 **Cal. Bus. & Prof. Code §17200, et seq. (“UCL”))**

6 37. Plaintiff hereby incorporates by reference each of the preceding allegations as
7 though fully set forth herein.

8 38. The acts and practices complained of by plaintiff are unlawful because they violate
9 California Business and Professions Code §17500 et seq., (Unfair Competition Laws - False
10 Advertising), and California Civil Code §1770 (a)(5), (7), (9), (14), and (16)(Consumers Legal
11 Remedies Act).

12 39. Defendants’ practice of not honoring the advertised and promoted price match
13 guarantee, and certainly the practice of doing so without clearly disclosing the practice or its
14 consequences to customers, were and are likely to mislead Class members and members of the
15 general public about the actual terms of the price match guarantee being supplied and the detriment
16 caused by its actual application.

17 40. Defendants’ conduct is unfair in that, *inter alia*, it constitutes a systematic breach of
18 its existing obligations to honor its advertised and promoted Offer.

19 41. The benefits of Defendants’ conduct accrue to Defendants alone, which has
20 surreptitiously retained monies due Class members under its public price match guarantee. While
21 this has substantially enhanced Defendants’ revenue, no Class member has obtained a benefit from
22 this practice.

23 42. Defendants’ conduct is an unlawful, fraudulent and unfair business practice under
24 Cal. Bus. & Prof. Code §17200, et seq., and Plaintiff prays for relief as set forth below.

25 **THIRD CAUSE OF ACTION**

26 **(False Advertising (UCL) - Cal. Bus. & Prof. Code §17500, et seq.)**

27 43. Plaintiff hereby incorporates by reference each of the preceding allegations as
28 though fully set forth herein.

1 44. As detailed above, Defendants have committed acts of untrue and misleading
2 advertising by disseminating statements misrepresenting its Offer, and by failing to disclose
3 material facts that contradict these statements. Defendants knew or should have known that its
4 advertising and marketing of the Offer were false and misleading.

5 45. Defendants knew or should have known that its Offer resulted in depriving
6 consumers of the complete benefit of the publicly advertised offer, yet Defendants continued to
7 advertise and promote the Offer in written advertisements directed at the Class.

8 46. These acts of untrue and misleading advertising present a continuing threat to Class
9 members and the general public, who may well not become aware of the practice. Plaintiff has no
10 adequate remedy at law to address these particular problems, particularly as it relates to customers
11 who may renew in the future.

12 47. Defendants have therefore violated Cal. Bus. & Prof. Code §17500 et seq., and
13 Plaintiff prays for relief as set forth below.

14 **FOURTH CAUSE OF ACTION**

15 **(Breach of Covenant of Good Faith and Fair Dealing)**

16 48. Plaintiff hereby incorporates by reference the allegations contained in all preceding
17 paragraphs of this Complaint as though set forth fully herein.

18 49. Defendants acted intentionally and in bad faith to frustrate the benefits owed to Class
19 members under their publicly advertised price match guarantee, despite a duty to refrain from doing
20 so.

21 50. Defendants' failure to deal fairly and in good faith caused damage to Plaintiff and
22 the Class.

23 51. As a result of the foregoing, Plaintiff the Class members are entitled to damages in
24 an amount to be proven at trial.

25 **FIFTH CAUSE OF ACTION**

26 **(Declaratory Relief)**

27 52. Plaintiff hereby incorporates by reference each of the preceding allegations as
28 though fully set forth herein.

1 53. There is a genuine controversy between Defendants, on the one hand, and Plaintiff
2 and the members of the Class, on the other, concerning their respective rights and obligations.
3 Specifically, Plaintiff contends that Defendants' acts and practices relating to its Offer are
4 prohibited by statute as well as equitable doctrines, whereas Defendants contends they are not.

5 54. Accordingly, plaintiff seeks declaratory relief concerning the respective rights and
6 obligations of the parties.

7 **SIXTH CAUSE OF ACTION**

8 **(Common Law False Advertising)**

9 55. Plaintiff hereby incorporates by reference the allegations contained in all preceding
10 paragraphs of this Complaint as though set forth fully herein.

11 56. In its advertisements, Defendants made a false or misleading statement, or
12 representation of fact.

13 57. Defendants actually deceived or had a tendency to deceive a substantial segment of
14 its audience.

15 58. Defendants' deception was material in that it is likely to influence the purchasing
16 decision of consumers.

17 59. The statement concerned concerns goods, services, or commercial activities, in
18 interstate commerce.

19 60. Plaintiff and the Class have been and are likely to continue to be injured as a result
20 of the false advertising.

21 **SEVENTH CAUSE OF ACTION**

22 **(Unjust Enrichment)**

23 61. Plaintiff hereby incorporates by reference the allegations contained in all preceding
24 paragraphs of this Complaint as though set forth fully herein.

25 62. Defendants were enriched by its deceptive acts.

26 63. The enrichment was at the expense of Plaintiff and the Class.

27 64. The circumstances were such that equity and good conscience require defendants to
28 make restitution.

1 65. Defendants have failed to make restitution.

2 66. As a result, Plaintiff and the Class have been damaged.

3 **EIGHTH CAUSE OF ACTION**

4 **(Injunctive Relief)**

5 67. Plaintiff repeats each and every allegation contained in the preceding paragraphs of
6 the complaint as if set forth at length herein.

7 68. Defendants' conduct is improper and deceptive and has caused injury to Plaintiff and
8 the Class.

9 69. The grounds for an injunction are present therein, including the fact that Plaintiff and
10 the Class has a likelihood of success on the merits; irreparable harm will be done if the injunction is
11 denied; the balance of the equities is in favor of granting the injunction and Plaintiff and the Class
12 have been injured by Defendants' action and will continue to be injured absent the requested
13 injunctive relief.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, prays
16 for a judgment against Defendants as follows:

- 17 1. For an order certifying the Class, appointing Plaintiff as representative of the Class
- 18 and appointing the law firms representing Plaintiff as counsel for the Class;
- 19 2. For compensatory damages sustained by Plaintiff and the Class;
- 20 3. For compensatory damages and/or restitution or refund of all funds acquired by
- 21 defendants from Plaintiff and the Class, and the general public as a result of
- 22 Defendants' unlawful, unfair, fraudulent, deceptive and unconscionable practices
- 23 described herein;
- 24 4. For punitive and all other damages available to the Class;
- 25 5. For payment of costs of suit herein incurred;
- 26 6. For both pre-and post-judgment interest on any amounts awarded;
- 27 7. For payment of reasonable attorneys' fees and expert fees;
- 28 8. For injunctive relief; and

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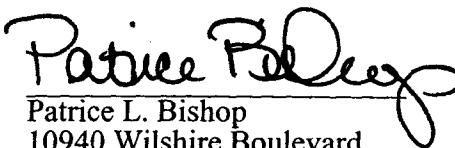
9. For such other and further relief as the Court may deem proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all claims so triable.

Dated: October 21, 2009

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Counsel for Plaintiff Mindy Pagsolingan

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AFFIDAVIT OF MINDY N. PAGESOLINGAN

I, MINDY N. PAGESOLINGAN, submit this affidavit pursuant to §1780(d) of the California Civil Code, Consumer Legal Remedies Act, and declare the following:

1. I am the plaintiff in the above-entitled action.
2. I am a resident of South San Francisco, California.
3. I am informed and believe the Defendants in this action conduct substantial business activity in San Mateo County and the transaction and wrongdoing complained of occurred in San Mateo County, and therefore this County is a proper place for trial of this action.

Dated: 9/21/2009



MINDY N. PAGESOLINGAN