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10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 IN AND FOR THE COUNTY OF SAN FRANCISCO

12 Unlimited Jurisdiction

13 ERIC PARKE and ROYAL SLEEP) Case No.
14 CLEARANCE CENTER, INC., a California)
corporation, On Behalf Of Themselves, All) CLASS ACTION
15 Others Similarly Situated, and in the Interest of)
16 the General Public of the State of California,) COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF; VIOLATIONS OF
17 Plaintiffs,) CALIFORNIA BUSINESS AND
PROFESSIONS CODE §§ 17200 ET SEQ.;
18 vs.) UNFAIR, UNLAWFUL AND DECEPTIVE
BUSINESS PRACTICES
19)
20 CARDSYSTEMS SOLUTIONS, INC., a)
corporation; MERRICK BANK)
21 CORPORATION, a corporation; VISA)
INTERNATIONAL SERVICE)
22 ASSOCIATION, a corporation; VISA U.S.A.
INC., a corporation; MASTERCARD)
23 INTERNATIONAL INCORPORATED, a)
24 corporation; and DOES 1-200, inclusive,

25 Defendants.
26

27 Plaintiffs Eric Parke and Royal Sleep Clearance Center, Inc. (“Royal Sleep”) bring this
28 action on behalf of themselves, all others similarly situated and in the interest of the general public.

1 The allegations pertaining to plaintiffs are made upon personal knowledge. The allegations
2 pertaining to defendants Cardsystems Solutions, Inc., Merrick Bank (Cardystems Solutions, Inc. and
3 Merrick Bank referred to herein as “Cardsystems”), Visa International Service Association (“Visa
4 International”), Visa U.S.A. Inc. (“Visa USA”) (Visa International and Visa USA referred to herein
5 collectively as “Visa”), MasterCard International Incorporated (“MasterCard”) and Does 1-200
6 (hereinafter all referred to collectively as “defendants”) are made upon information and belief, and
7 formed after an inquiry reasonable under the circumstances.

8 9 I. INTRODUCTION

10 1. This action is brought on behalf of Plaintiffs individually, as a representative of the
11 common or general interest pursuant to Cal. Civ. Proc. Code 382, and as class representatives for all
12 others similarly situated in California against Visa, MasterCard, and Cardsystems to redress
13 defendants’ violations of consumers’ rights of privacy, defendants’ failure to protect those rights,
14 and defendants’ failure and on-going refusal to timely inform consumers of unauthorized third party
15 access to their credit card account and other nonpublic and private financial information. This action
16 arises from Cardsystems failure to maintain adequate computer data security of consumer credit card
17 data and the reasonably foreseeable exploitation of such inadequate security at defendant
18 Cardsystems by computer “hackers,” causing the compromise of the privacy of private information
19 of approximately Forty (40) Million consumer credit card account holders. This breach of security
20 was caused by Cardsystems negligence in data security including its failure to maintain a proper
21 firewall and computer security system, failure to properly encrypt data, its unauthorized storage of
22 data, and its violation of Payment Card Industry Data Standard(s) and rules and regulations it was
23 bound to obey for the benefit of consumers concerning the storage of consumers’ private identifying
24 transaction and credit card information. Subsequent to the theft and disclosure of private consumer
25 information, defendants unduly delayed or failed to inform in a timely fashion the appropriate
26 entities and consumers whose data was compromised of their vulnerabilities and potential exposure
27 to credit card (or other) fraud such that consumers could make an informed decision as to whether to
28 change credit card numbers, close the exposed accounts, check their credit reports, or take other

1 mitigating actions. Defendants have failed to provide regular credit reports and credit monitoring at
2 their own expense to those whose private data was exposed and left vulnerable. This has caused, and
3 continues to cause, millions of consumers fear and apprehension and burden, and is harming both
4 consumers' and merchants' ability to protect themselves from such fraud. This lawsuit seeks to
5 remedy this reprehensible situation.

6 **II. GENERAL FACTUAL ALLEGATIONS**

7 2. As a result of wrongful acts and omissions of the defendants in this case, California
8 consumers and merchants have been exposed to what is almost certainly the largest compromise of
9 credit card security and the greatest potential for credit card fraud to ever occur in United States
10 history.

11 3. Defendant Cardsystems is a company based in Tucson, Arizona, that processes credit
12 card transactions. According to Cardsystems, some time in 2004, more than six (6) months ago,
13 computer "hackers" gained access to Cardsystems' computer databases and compromised the
14 security of approximately Forty (40) Million credit card accounts and related security and
15 transaction data. Most of these accounts are Visa and MasterCard credit card accounts.

16 4. The compromised and stolen data was private and sensitive in nature and was left
17 unencrypted by Cardsystems on its servers and included (without limitation) on information and
18 belief, consumers' names, credit card account numbers, bank names, transactional data, magnetic
19 stripe data, PIN verifications values, CVV2 and CVC2 card validation codes, other credit card
20 security codes and other personal identifying information.

21 5. Cardsystems claims that it did not discover the breach of its security until May 22,
22 2005, and reported it the next day to the Federal Bureau of Investigation ("FBI"). Subsequently, it
23 informed Visa and MasterCard. But MasterCard has publicly disclosed that as early as April 2005 it
24 detected multiple instances of fraud that it traced back to Cardsystems. Further, on information and
25 belief, Cardsystems knew or should have known of its unreasonable data security prior to April 2005
26 as it was notified by other entities on or around the fourth quarter of 2004 that such consumer data
27 was exposed and/or compromised and failed to take prompt remedial action or to take steps to notify
28 impacted consumers directly or indirectly through other entities.

1 6. The Arizona FBI office that is handling the investigation of the security breach has
2 stated that it is important for the public to be warned about the security breach so that card holders
3 can be more careful when checking their credit card statements. FBI denies it ever instructed
4 Cardsystems to not disclose the security intrusion and theft of data.

5 7. MasterCard did “generally” publicly disclose the breach of security and compromise
6 of consumers’ private information, but waited until late on June 17, 2005, to do so—even though it
7 apparently knew or had reason to know of the breach (based on its awareness of incidents of fraud
8 traceable to Cardsystems) as early as last April, and was informed by Cardsystems of the enormity
9 of the breach on or about May 23, 2005 (about three weeks before it disclosed it to the public).

10 8. Cardsystems was in violation of Visa and MasterCard rules against storing consumer
11 information and was in violation of the Payment Card Industry Data Security Standard that it was
12 bound to follow by, including but not limited to, the following conduct: Cardsystems improperly
13 stored credit card transaction and customer data; Cardsystems failed to properly install, implement,
14 and maintain a firewall to protect consumer data; Cardsystems failed to properly analyze and restrict
15 IP addresses to and from its computer systems; or properly perform dynamic packet filtering;
16 Cardsystems failed to properly restrict access to its computers; Cardsystems failed to properly
17 protect stored data; Cardsystems failed to encrypt cardholder data and other sensitive information;
18 Cardsystems failed to properly implement and update adequate anti-virus and anti-spyware software
19 that would properly prevent unauthorized data transmissions caused by viruses, executables or
20 scripts, from its servers or computer systems; Cardsystems failed to track and monitor all access to
21 network resources and cardholder data; Cardsystems failed to regularly test security systems and
22 processes or maintain an adequate policy that addresses information security, or to run vulnerability
23 scans.

24 9. Defendants, by failing to timely disclose the security compromise or data theft to
25 affected consumers and merchants, are attempting to shift the burden of discovering resultant fraud
26 away from themselves—even though they are responsible and are in a better position to discover and
27 prevent fraud—to consumers and merchants. They have deceptively informed consumers that their
28 liability for credit card fraud is limited in that they have failed to make it clear to consumers that this

1 is only the case if the consumer discovers and reports the fraud within a certain time period of
2 discovering a fraudulent charge on his or her credit card statement and proves up the fraud. If a
3 consumer is not informed that his account information has been compromised, he will not know to
4 closely examine his account statement. Even if the consumer does examine his or her statement,
5 fraud is often difficult to detect, because of the complex nature of the credit card codes and merchant
6 codes used to report charges.

7 10. California law gives the protection of its citizens' privacy the highest priority.
8 Citizens' rights to privacy have been compromised and infringed by the acts and omissions of
9 defendants described herein. California Constitution, Article 1, Section 1, states:

10 All people are by nature free and independent and have inalienable rights.
11 Among these are enjoying and defending life and liberty, acquiring,
12 possessing and protecting property, and pursuing and obtaining safety,
happiness, and *privacy*. (Emphasis added).

13 The common law in California also recognizes and protects citizens' rights of privacy, as do many
14 California statutes. These include (without limitation) the California Financial Information Privacy
15 Act (Finance Code §§ 4050 *et seq.*); Civil Code §§ 1798.80 *et seq.* (protecting customer information
16 and requiring notice of unauthorized disclosure), California Credit Reporting Act, and other laws.

17 For example, Finance Code § 4052.5 states, "a financial institution shall not sell, share, transfer, or
18 otherwise disclose nonpublic personal information to or with any nonaffiliated third parties without
19 the explicit prior consent of the consumer to whom the nonpublic personal information relates."

20 Finance Code § 4057 makes it unlawful to negligently disclose or share nonpublic information. Civil
21 Code § 1798.81.5(a) explicitly states:

22 "It is the intent of the Legislature to ensure that personal information about
23 California residents is protected. To that end, the purpose of this section is to
24 encourage businesses that own or license personal information about Californians
to provide reasonable security for that information."

25 Civil Code § 1798.82 imposes civil liability for failing to disclose any breaches of security of
26 unencrypted personal information.

27 11. Defendants have failed in a variety of ways to use reasonable care and to fulfill their
28 other legal duties to protect cardholders from loss and the fear of loss due to breaches of security

1 regarding their accounts and other private information, to minimize the burden on consumers from
2 such breaches, and to protect consumers' privacy rights. These breaches include (without limitation)
3 the failure to employ and maintain adequate data security measures and systems to prevent "hackers"
4 or others from stealing private information and unauthorized retention of cardholder information in
5 violation of Visa and MasterCard rules and regulations and industry standards. Defendants have
6 further breached their duties to both cardholders and merchants who accept credit cards by failing to
7 timely inform those cardholders' directly or through other entities whose account security has been
8 compromised that this occurred, so that they can investigate and protect themselves against loss from
9 the unauthorized use of their credit card accounts. The benefits of requiring defendants to inform
10 customers that their account security has been compromised and to provide periodic credit reports
11 and monitoring far outweighs any burdens. The amount of consumer apprehension, anxiety and
12 burden caused by defendants' on-going refusal to do so is immense. Defendants' failure to notify
13 consumers that their accounts have been compromised so they can opt to change their account
14 numbers and get new cards is inexcusable. It should be ordered forthwith.

15 III. PARTIES

16 12. Plaintiff Eric Parke resides in Marin County, California. Eric Parke is the holder of
17 several Visa and MasterCard credit card accounts which he used, in part, in the City and County of
18 San Francisco. Plaintiff Eric Parke has been exposed to the possibility of unauthorized use of his
19 credit card accounts and nonpublic information as a result of the security breach that occurred at
20 Cardsystems, as described herein, and has a reasonable apprehension that the security of one or more
21 of his credit card accounts, financial transactions, security information and codes, and other non-
22 public information pertaining to him, has been compromised as a result of the security breach that
23 occurred at Cardsystems, as described herein. The acts and omissions of defendants described herein
24 have caused plaintiff Parke an undue burden to monitor and detect fraudulent use of his credit card
25 accounts and has, on information and belief, caused plaintiff Eric Parke to lose control of his private
26 financial information to a "hacker".

27 13. Plaintiff Royal Sleep is a California corporation engaged in the retail sales business,
28 with its main place of business located in Carmichael, California. Plaintiff Royal Sleep currently

1 accepts Visa and MasterCard credit card charges for merchandise, and has accepted such charges
2 prior to the Cardsystems security breach described herein. Plaintiff Royal Sleep is subject to the
3 chargeback charges and penalties imposed by Visa and MasterCard, and has been exposed to the
4 likelihood that it will be assessed such charges and penalties due to the security breach described
5 herein. The acts and omissions of defendants described herein has caused Royal Sleep an undue
6 burden to monitor for unauthorized charges and fraud in connection with credit card charges at its
7 retail store.

8 14. Plaintiffs bring this action on behalf of themselves, all others similarly situated,
9 and/or the general public and assert claims against defendants in this complaint under the provisions
10 of the California Unfair Business Practices Statute (“UCL”), Cal. Bus. & Prof. Code §§ 17200, *et*
11 *seq.* Plaintiffs seek a declaration that defendants have a duty to use reasonable means to protect the
12 security of credit card holders’ account and transaction information and other nonpublic information,
13 and to inform them if the security of such information has been breached. Plaintiffs also seek an
14 injunction requiring defendants to inform those credit card holders for whom the security of account
15 information or other public information has been breached of this fact so they can take steps to
16 protect themselves against the unauthorized use of such accounts or information and plaintiffs also
17 seek that defendants provide regular credit reports and monitoring at no expense to the consumer
18 plaintiffs.

19 15. Defendant Cardsystems Solutions, Inc., at all times relevant herein, is and was a
20 corporation organized under the laws of the State of Delaware, with its main offices located in
21 Tucson, Arizona. Cardsystems, at all times relevant herein, is and was in the business of providing
22 credit card processing services for credit cards used by consumers in the State of California, the
23 United States and abroad.

24 16. Defendant MERRICK BANK CORPORATION, at all times relevant herein, is and
25 was a corporation organized under the laws of the State of Utah, with its main offices located in
26 Utah. Merrick Bank, at all times relevant herein, is and was in the business of providing credit card
27 merchant and processing services for credit cards used by consumers in the State of California, the
28 United States and abroad, owned and controlled Cardsystems Solutions, Inc. and “subcontracted” its

1 payment processing to them and was, on information and belief the sponsoring member to Visa and
2 MasterCard that was responsible for the conduct, acts, and omissions of Defendant Cardsystems
3 Solutions, Inc., and knew or should have known of its wrongful and negligent conduct and security
4 vulnerabilities on or about the fourth quarter of 2004.

5 17. Defendant Visa International, at all times relevant herein, is and was a corporation
6 with its main office in San Francisco, California, doing business in the County of San Francisco and
7 the State of California. Visa, at all times relevant herein, is and was in the business of providing
8 network, merchant account credit card services and consumer credit card services to consumers and
9 businesses throughout the State of California, the United States and abroad.

10 18. Defendant Visa USA, at all times relevant herein, is and was a corporation with its
11 main office in San Francisco, California, doing business in the County of San Francisco and the
12 State of California. Cross-defendant VISA, at all times relevant herein, is and was in the business of
13 providing network, merchant account credit card services and consumer credit card services to
14 consumers and businesses throughout the State of California, the United States and in conjunction
15 and partnership with Visa International abroad.

16 19. Defendant MasterCard, at all times relevant herein, is and was a corporation with its
17 main offices in Purchase, New York, doing business in the County of Alameda and the State of
18 California. Defendant MasterCard, at all times relevant herein, is and was in the business of
19 providing network, merchant account credit card services and consumer credit card services to
20 consumers and businesses throughout the State of California, the United States and abroad.

21 20. The true names and capacities whether individual, corporate or otherwise, of Does 1-
22 200 are at this time unknown to plaintiffs, who therefore sue said defendants by such fictitious
23 names and will ask leave of the Court to amend this complaint to reflect their true names and
24 capacities when the same are ascertained. On information and belief each of the said Doe defendants
25 is responsible in some manner for the events, acts and injuries described below and caused damage,
26 and are likely to cause damage, to plaintiffs and the General Public as alleged.

27 21. On information and belief, at all times mentioned herein, each and every defendant,
28 including Doe defendants, was the owner, agent, principal, employee, employer, master, servant,

1 partner, franchiser, franchisee, or joint venturer of each of his or her co-defendants, and in doing the
2 actions described below was acting within the scope of his or her authority in such ownership,
3 agency, employment, service, partnership, franchise and joint venture and with the permission and
4 consent of each co-defendant. Each of said Doe defendants is, therefore, liable under the law,
5 including but not limited to, under the doctrines of respondeat superior and the law of agency, to
6 plaintiffs for the acts, omissions and injuries inflicted upon and likely to be inflicted upon plaintiff
7 and the General Public, as described herein.

8 **IV. JURISDICTION AND VENUE**

9 22. This Court has jurisdiction over the causes of action asserted herein pursuant to
10 California Constitution, Article VI, § 10, because this case involves causes of action not given by
11 statute to other trial courts or administrative agencies.

12 23. This Court has jurisdiction over defendants because each defendant is a corporation
13 that conducts substantial business in the State of California. The Visa defendants are California
14 corporations, and have their main office in San Francisco, California. Each of the defendants have
15 significant business contacts with this state, have sufficient minimum contacts with California or
16 otherwise intentionally avail themselves of consumer markets within California through their
17 business activities, advertising or marketing in California, so as to render the exercise of jurisdiction
18 by California courts and the application of California law to the claims of the plaintiffs and the
19 general public permissible under traditional notions of fair play and substantial justice.

20 24. Venue is proper in this county as the acts upon which this action is based occurred in
21 part in this county. The general public was damaged and subjected to irreparable harm in this venue
22 due to defendants' unfair, unlawful and deceptive business activities in this county. Further,
23 defendants received substantial compensation and profits in this county.

24 **V. CLASS ACTION ALLEGATIONS**

25 25. Plaintiffs bring this action on their own behalf, and on behalf of all other persons
26 similarly situated (the Classes), in addition to the general public, pursuant to the provisions of CCP §
27 382 and CC §§ 1781.

28 26. The Class that plaintiff Eric Parke seeks to represent (the "Consumer Class") is

1 defined as:

2 All California residents who possessed Visa or MasterCard accounts on
3 the dates that the security of defendant Cardsystems was compromised,
4 and the privacy or security of whose credit card, check card, or debit card
account, transaction, or nonpublic information was compromised.

5 27. The class that plaintiff Royal Sleep seeks to represent (the “Merchant Class”) is
6 defined as:

7 All California merchants who have accepted or will accept Visa or
8 MasterCard charges for merchandise, from the date that the security of
9 defendant Cardsystems was compromised, and who may be exposed to
chargeback fees or penalties as a result of such security compromise.

10 28. The Classes are composed of millions of persons and thousands of businesses, the
11 joinder of which would be impracticable. The individual identities of the individual members are
12 ascertainable through defendants’ records or by public notice.

13 29. There is a well-defined community of interest in the questions of law and fact
14 involved affecting the members of the Classes. The questions of law and fact common to the Classes
15 predominate over questions affecting only individual class members, and include, but are not limited
16 to, the following:

- 17 a. Whether defendant Cardsystems and other defendants breached a duty and was
18 negligent in failing to keep cardmembers’ account, transactions, and other
19 nonpublic information secure;
- 20 b. Whether all defendants, or any of them, breached duties and was negligent in
21 failing to inform directly or indirectly in a timely fashion cardmembers (the
22 security of whose accounts or other nonpublic information was compromised) of
23 the occurrence of such a compromise of security;
- 24 c. Whether the Consumer Class is entitled to notice as to whether the security of
25 their credit card account or other nonpublic information was compromised as a
26 result of a breach of security at Cardsystems;
- 27 d. Whether the Consumer Class is entitled to any other remedies, such as on-going
28 credit monitoring, on account of the breach of duties of defendants, or any of

- 1 them;
- 2 e. Whether the Merchant Class is entitled to a waiver of chargeback fees or penalties
- 3 for chargebacks that occur as the result of the breach of Cardsystems' security;
- 4 f. Whether the Classes are entitled to declaratory relief;
- 5 g. Whether the Classes are entitled to injunctive relief;
- 6 h. Whether the Classes are entitled to an award of reasonable attorneys fees and
- 7 costs of suit.

8 30. Plaintiffs are adequate representatives of the Classes above because their interests do
 9 not conflict with the interests of the class members they seek to represent, and they are similarly
 10 situated with members of their Classes. Plaintiffs will fairly and adequately represent and protect the
 11 interests of the Classes, and plaintiffs’ interests are not antagonistic to the Classes. Plaintiffs have
 12 retained counsel who are competent and experienced in the prosecution of class action litigation.

13 31. A class action is superior to other available means for the fair and efficient
 14 adjudication of plaintiffs’ and class members’ claims. Plaintiffs and the members of the Classes have
 15 suffered irreparable harm as a result of defendants’ unfair, deceptive and unlawful conduct. Because
 16 of the size of the individual class members’ claims, few, if any, class members could afford to seek
 17 legal redress for the wrongs complained of herein. Absent the class action, the members of the
 18 Classes will continue to suffer losses and the violations of law and wrongs described herein will
 19 continue without remedy. Defendants continue to deny wrongdoing and to engage in the unfair,
 20 unlawful and deceptive conduct that is the subject of this complaint.

FIRST CAUSE OF ACTION
(Unfair, Deceptive And Unlawful Business Practices)
[Business & Professions Code §§ 17200 et seq.]
(Against All Defendants)

24 32. Plaintiffs incorporate by reference into this cause of action all of the allegations
 25 contained in the preceding paragraphs of this complaint.

26 33. The above-described acts and omissions of defendants, and each of them, constitute
 27 unfair, unlawful and deceptive business practices, in violation of California Business & Professions
 28 Code §§ 17200 *et seq.*

1 34. The nonpublic information and private financial information of the Consumer Class
2 herein, that was compromised by the breach of Cardsystems' security, included, without limitation,
3 information that was being improperly stored, in violation of Visa and MasterCard rules and
4 regulations prohibiting credit card processors from retaining or storing such information.
5 Cardsystems was bound by such card association rules and regulations. The compromise of the
6 security of said Consumer Class nonpublic information, and the resultant, burden, fear, anxiety,
7 emotional distress and other damages to the Classes herein were the direct and proximate result of
8 Cardsystems' violation of said Visa and MasterCard rules and regulations. Cardsystems' conduct
9 constituted unlawful negligence.

10 35. The doctrine of *res ipsa loquitur* applies to the acts and omissions of defendants
11 herein, and the damages they have caused. Plaintiffs' harm would not ordinarily have occurred in the
12 absence of negligence; defendants were in control of the cause of the harm; and plaintiffs' voluntary
13 actions did not cause or contribute to the events that caused them, or are causing them, harm.

14 36. The breach of Cardsystems' security was the direct and proximate result, on
15 information and belief, of Cardsystems' failure to implement and maintain security procedures and
16 practices reasonably designed to protect the credit card account and other nonpublic information of
17 consumers, including, without limitation, the Consumer Class herein. Said breach of security and
18 unauthorized access to the private nonpublic information of the Consumer Class herein was
19 reasonably foreseeable.

20 37. Defendants, and each of them, through their business relationship with the Consumer
21 Class and the Merchant Class herein, and with each other, assumed the duty to keep the credit card
22 account and other nonpublic information of the Consumer Class that is in their possession private
23 and secure. By their acts and omissions described herein, defendants, and each of them, unlawfully
24 breached this duty.

25 38. Defendants were in a special and a fiduciary relationship with the Consumer Class by
26 reason of their entrustment with credit card account and other nonpublic information. By reason of
27 said special and fiduciary relationship, defendants had a duty of care to use reasonable means to
28 keep the credit card account and other nonpublic information of the Consumer Class that is in their

1 possession private and secure, and to inform Consumer Class members forthwith when any
2 compromise of the security of such information occurred. Defendants have unlawfully breached
3 these duties.

4 39. Pursuant to the right to privacy insured by California Const., Art. I, Section I,
5 defendants had a duty to use reasonable care to prevent the unauthorized access, use or
6 dissemination of the credit card account and other nonpublic information of the Consumer Class
7 herein. On information and belief, defendants unlawfully breached said duty.

8 40. Pursuant to California Civil Code § 1798.81.5, defendants had a duty to implement
9 and maintain reasonable security procedures and practices to with respect to the credit card account
10 and other nonpublic information of consumers, including, without limitation, the Consumer Class
11 herein, in order to protect such information from unauthorized access, use or disclosure. On
12 information and belief, defendants unlawfully breached said duty.

13 41. On information and belief, the Consumer Class's information that was disclosed to
14 unauthorized third parties, due to the breach of Cardsystems' security was not encrypted. Pursuant to
15 California Civil Civil Code § 1798.82, defendants had, and continue to have, a duty to timely
16 disclose the breach of security to all members of the Consumer Class whose personal information
17 was, or is reasonably believed to have been, acquired by unauthorized persons. Defendants
18 unlawfully breached this duty by, amongst other ways, delay and failure to properly disclose.

19 42. Pursuant to the California Financial Information Privacy Act, California Finance
20 Code §§ 4050 *et seq.*, defendants breached unlawfully the requirement to prevent the unauthorized
21 disclosure of nonpublic personal information of the Consumer Class to unaffiliated third parties. Fin.
22 C. § 4052.5. Defendants also unlawfully breached their duty to refrain from negligently disclosing
23 nonpublic information pertaining to the Consumer Class to third parties. Fin. C. § 4057.

24 43. Pursuant to the California Constitutional Right to Privacy and California law there is
25 an explicit public policy, creating and affirmative and continuing obligation on defendants herein, to
26 respect consumers' privacy and to provide reasonable consumer computer data security under the
27 circumstances, including, without limitation, the Consumer Class herein, and to protect the security
28 and confidentiality of their nonpublic personal information. Such duties include, without limitation,

1 the duty to ensure security, protect against anticipated threats, and protect against unauthorized
2 access. Defendants, and each of them, on information and belief, breached said duties.

3 44. As a direct and proximate result of defendants' failures and on-going refusal to
4 inform the Consumer Class as to whether their credit card account or other nonpublic information
5 was compromised or stolen when Cardsystems' security was breached, the Consumer Class has
6 suffered and, unless disclosure by defendants is required, will continue to suffer, fear, anxiety and
7 emotional distress as to the theft of their private information and the possibility or likelihood of
8 incurring unauthorized charges on their credit cards.

9 45. As a direct and proximate result of defendants' failures and on-going refusal to timely
10 inform the Consumer Class as to whether their credit card account or other nonpublic information
11 was compromised or stolen when Cardsystems' security was breached, the Merchant Class has
12 suffered and, unless disclosure by defendants is required, will continue to suffer, the possibility and
13 the likelihood of incurring chargeback fees and penalties as a result of chargebacks resulting from
14 unauthorized charges on the Consumer Class's credit cards.

15 46. Defendants had a duty to the Consumer Class and the Merchant Class to inform
16 members of the Consumer Class forthwith and in a timely fashion of any breach of the security of
17 their credit card account and other nonpublic information, so that the Consumer Class could take
18 appropriate measure to avoid the incurring of unauthorized charges on their credit card accounts,
19 including, without limitation, canceling or changing the account number on said accounts.
20 Defendants, and each of them, by failing to inform members of the Consumer Class, directly or
21 indirectly of the compromise of the security of such information in a timely fashion have unlawfully
22 and unfairly breached this duty.

23 47. Defendants, and each of them, have, and continue to, hold themselves out as
24 fiduciaries who implement and maintain systems to ensure the security of consumers' credit card
25 account and other nonpublic information, including such information of the Consumer Class herein,
26 and who act to protect members of such class from unauthorized charges on their credit cards.
27 Based, in part on such representations, members of the Consumer Class herein have entrusted such
28 private information to defendants, and have opened credit card accounts with defendants. Such

1 representations of defendants are false and misleading, and constitute unfair and deceptive business
2 practices, in violation of Cal. Bus. & Prof. C. §§ 17200 et seq.

3 48. Defendants' breaches of statutory and common law duties described herein constitute
4 unfair and unlawful business practices, in violation of Cal. Bus. & Prof. C. §§ 17200 et seq.

5 49. Acts, omissions and events constituting unfair competition and unlawful, deceptive
6 and unfair business practices described herein occurred in, continue to occur in, and will, unless
7 enjoined, be likely to occur in the State of California.

8 50. As a direct and proximate result of the acts and omissions of defendants, and each of
9 them, described herein, plaintiff, the General Public, and the Classes herein have been misled and
10 are likely to be misled; and the privacy rights of plaintiff, the General Public and the Consumer
11 Class herein have been violated and are likely to be violated, unless defendants, and each of them,
12 are enjoined from said acts and omissions.

13 **SECOND CAUSE OF ACTION**
14 **(Declaratory Relief)**
15 **[California Code of Civil Procedure § 1060]**
16 **(Against All Defendants)**

17 51. Plaintiffs incorporate by reference into this cause of action all of the allegations
18 contained in the preceding paragraphs of this complaint.

19 52. An actual and present controversy exists concerning the duties and breaches of duties
20 of defendants with respect to the Classes herein.

21 53. Plaintiffs request a declaration that:

- 22 a. Defendants had a duty to keep the Consumer Class's credit card account,
23 transaction and other nonpublic information secure and breached such duty;
- 24 b. Defendants violated Business and Professions Code 17200 et seq.
- 25 c. Defendants, and each of them, breached the duty to timely inform the Consumer
26 Class members the security of whose accounts or other nonpublic information
27 was compromised of the occurrence of such a compromise of security;
- 28 d. The Consumer Class is entitled to notice as to whether the security of their credit
card account or other nonpublic information was compromised as a result of a

1 breach of security at Cardsystems;

2 e. The Consumer Class is entitled to other appropriate remedies, including, without
3 limitation, on-going credit monitoring, on account of the breach of duties of
4 defendants provided by defendants;

5 f. The Merchant Class is entitled to a waiver of chargeback fees and penalties for
6 chargebacks that occur as the result of the breach of Cardsystem's security;

7 g. The Classes herein are entitled to injunctive relief;

8 h. The Classes herein are entitled to an award of reasonable attorneys fees and costs
9 of suit.

10 **PRAYER FOR RELIEF**

11 WHEREFORE plaintiffs, on behalf of themselves, all others similarly situated and/or in the
12 interest of the general public as appropriate under California law, pray for judgment against
13 defendants as appropriate for the particular Causes of Action:

14 A. For the declaratory, equitable, preliminary and permanent injunctive relief;

15 B. For notice to consumers whose private information was compromised and regular
16 and periodic credit checks and reports with the results privately supplied to the
17 consumer plaintiffs and the consumer class by defendants;

18 C. For attorneys' fees pursuant to, *inter alia*, C.C.P. § 1021.5, and other applicable
19 statutes and for costs of suit;

20 D. For such other and further relief as this Court may deem just and proper.

21 PLAINTIFFS HEREBY REQUEST A JURY TRIAL FOR ALL CLAIMS AND CAUSES OF
22 ACTION TRIABLE BY JURY

23 DATED: June 24, 2005

THE ROTHKEN LAW FIRM

LAW OFFICES OF MALLISON &
MARTINEZ

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27 By:



Ira P. Rothken, Esq.
Attorney for Plaintiffs