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2 UNITED STATES DISTRICT COURT
3 FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

4 DORIS POWELL-PERRY and CURNIE
5 SANDERS, Individually and on behalf of All
6 Others Similarly Situated,

7 Plaintiffs,

8 v.

9 BB&T CORPORATION and BRANCH
10 BANKING AND TRUST COMPANY,

11 Defendants.

**FIRST AMENDED CLASS ACTION
COMPLAINT**

DEMAND FOR JURY TRIAL

12 Plaintiffs Doris Powell-Perry and Curnie Sanders (“Plaintiffs”), on behalf of themselves
13 and all similarly situated United States residents, allege the following:

14 **INTRODUCTION**

15 1. This is a civil action seeking injunctive relief, monetary damages, and restitution
16 from Defendants BB&T Corporation (“BB&T”) and Branch Banking and Trust Company
17 (“Branch Bank”) (collectively herein “the Bank” or “Defendant”) arising out of their unfair,
18 deceptive, and unconscionable assessment and collection of excessive overdraft fees.

19 2. The Bank provides debit cards and/or ATM cards (collectively herein “check
20 cards”) to its checking account customers. Through those check cards, customers may engage in
21 transactions using funds directly from their accounts or may withdraw money from their accounts
22 at automatic teller machines. These are called “point of sale” (“POS”) or “debit” transactions.

23 3. If, according to the Bank’s accounting practices detailed below, a customer does
24 not have sufficient funds in his or her account the transaction is considered an “overdraft.” The
25 Bank may honor or allow an overdraft to go through despite the lack of funds in the account. If
26 the Bank allows such a POS or debit transaction to proceed, the Bank charges the customer’s
27 account \$35 for each separate overdraft. These fees are known as “overdraft fees.”
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1 4. Before check cards existed, banks occasionally extended the courtesy of honoring
2 paper checks written on overdrafted or otherwise deficient accounts for customers who were
3 typically in good standing. Banks extended this courtesy largely because the third party involved
4 in a sales transaction allowed the customer to purchase goods or services with a check with an
5 expectation that funds would be available and that the check would clear. For example, if a
6 customer used a check to purchase groceries, the grocery store would only know if the check
7 cleared *after* the groceries had been purchased.

8 5. The same considerations are not present when the transaction is one with a check
9 card. The bank could simply decline to honor debit or POS transactions made with check cards
10 where there are insufficient funds in the account. Retail and service transactions would simply
11 not take place if the consumer were unable to present an alternative form of payment. ATM
12 transactions could proceed if the Bank provided a warning that an overdraft fee would be incurred
13 and the consumer chose to proceed nevertheless. In fact, until a few years ago, most banks
14 simply declined debit and/or POS transactions that would overdraw an account.

15 6. Instead of declining debit and/or POS transactions when there are insufficient
16 funds, however, or warning the customer that an overdraft fee will be assessed if he or she
17 proceeds with the transaction, the Bank routinely processes such transactions in order to charge
18 its customers an overdraft fee of \$35, even when the transaction is for only a few dollars. This
19 automatic fee-based overdraft scheme is designed and intended solely to increase overdraft fee
20 revenue.

21 7. Although it is possible to do so, the Bank does not alert its check card customers at
22 the time a POS transaction or ATM withdrawal is made that the transaction will overdraw their
23 account and cause them to incur fees.

24 8. Because the Bank's check card customers are not notified of the potential
25 overdraft and are not given the option to decline the check card transaction or to provide another
26 form of payment, the customers incur monetary damages in the form of overdraft fees.
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1 9. According to rules proposed by the Board of Governors of the Federal Reserve
2 System, the Office of Thrift Supervision, Treasury, and the National Credit Union Administration
3 (“Agencies”) “Injury [caused by overdraft charges] is not outweighed by countervailing benefits.
4 . . . This is particularly the case for ATM withdrawals and POS debit card transactions where, but
5 for the overdraft service, the transaction would typically be denied and the consumer would be
6 given the opportunity to provide other forms of payment without incurring any fee.” 73 F.R.
7 28904-01, 28929 (May 19, 2008).

8 10. The Bank’s overdraft policies make it difficult for a customer to avoid injury even
9 if a customer carefully tracks the balance in his or her account. In fact, the Agencies have stated
10 that “injury” resulting from such policies “is not reasonably avoid[able]” by the consumer. 73
11 F.R. 28904-01, 28929 (“It appears that consumers cannot reasonably avoid this injury if they are
12 automatically enrolled in an institution’s overdraft service without having an opportunity to opt
13 out. Although consumers can reduce the risk of overdrawing their accounts by carefully tracking
14 their credits and debits, consumers often lack sufficient information about key aspects of their
15 account. For example, a consumer cannot know with any degree of certainty when funds from a
16 deposit or a credit for a returned purchase will be made available.”).

17 11. The Bank has not followed the list of “best practices” with respect to overdraft
18 programs set forth in the “Joint Guidance on Overdraft Protection Programs” (herein “Joint
19 Guidance”) (attached hereto as Exhibit A), issued by the United States Department of the
20 Treasury, the Office of the Comptroller of the Currency, the Board of Governors of the Federal
21 Reserve System, the Federal Deposit Insurance Corporation and the National Credit Union
22 Administration. These “best practices” include: “Provide election or opt-out of service. Obtain
23 affirmative consent of consumers to receive overdraft protection. Alternatively, where overdraft
24 protection is automatically provided, permit consumers to ‘opt out’ of the overdraft program and
25 provide a clear consumer disclosure of this option.” 70 F.R. 9127-01, 9132.

26 12. The “best practices” listed in the Joint Guidance also advise banks to “[a]lert
27 customers before a transaction triggers any fees. When consumers attempt to withdraw or
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1 transfer funds made available through an overdraft protection program, provide a specific
2 consumer notice, where feasible, that completing the withdrawal may trigger the overdraft fees.”
3 70 F.R.D. 9127, 9132. The “best practices” go on to advise that “[t]his notice should be
4 presented in a manner that permits consumers to cancel the attempted withdrawal or transfer after
5 receiving the notice.” *Id.*

6 13. The list of “best practices” set forth in the “Overdraft Protection: A Guide For
7 Bankers” issued by the American Bankers Association includes offering customers the option of
8 “opting out” of any overdraft programs, and informing customers, before they access funds, that a
9 particular POS or ATM transaction will cause them to incur overdraft fees. (*See* Exhibit B,
10 attached, at pp. 18, 20).

11 14. The Bank does not clearly or reasonably disclose to its customers that they have
12 the right to opt out of the Bank’s overdraft scheme. The Bank also fails to notify consumers
13 when use of a check card, such as an ATM or POS transaction, will cause an overdraft fee.

14 15. The Bank’s lack of reasonable disclosure regarding the ability to opt out of the
15 overdraft scheme and its failure to notify customers when the use of a check card, such as an
16 ATM or POS transaction, will cause an overdraft fee, is a violation of North Carolina’s consumer
17 protection laws and the implied covenant of good faith and fair dealing in the Bank Services
18 Agreement, governing its checking accounts.

19 16. The Bank seeks to maximize the number of overdraft fees it charges check card
20 customers because overdraft fees are a primary source of revenue for the Bank.

21 17. On August 9, 2009, an article was published in the *Financial Times* that stated that
22 United States banks “stand to collect a record \$38.5 [billion] in fees for customer overdrafts this
23 year,” and that “fees are nearly double those reported in 2000.” The article goes on to find that
24 “Overdraft fees accounted for more than three-quarters of service fees charged on customer
25 deposits.” *See* Exhibit C.

26 18. The Bank’s overdraft fees can cost the account holders hundreds of dollars in a
27 matter of days, or even hours, when they may be overdrawn only by a few dollars. Even more
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1 egregious, a customer's account may not actually be overdrawn at the time the overdraft fee is
2 charged or at the time of the POS transaction.

3 19. In an effort to cause as many overdrafts as possible, the Bank manipulates and
4 reorders debits from highest to lowest during the course of a day.

5 20. Upon information and belief, the Bank has a computer-automated overdraft system
6 programmed to maximize the number of overdrafts, and thus the amount of fees charged, per
7 customer.

8 21. As a result of the Bank's manipulation of customers' transactions, funds in a
9 customer's account are depleted more rapidly and more overdraft fees are likely to be charged for
10 multiple smaller transactions. Indeed, overdraft charges are likely to occur at times when, but for
11 the manipulation, there would be funds in the account and no overdraft would occur. For
12 example, if a customer has an account with a \$50 balance and makes four transactions of \$10 and
13 one later transaction of \$100 the same day, the Bank debits the transactions from the account
14 largest-to-smallest, thus subjecting the customer to four overdraft fees. Conversely, if the \$100
15 transaction were debited last (in the order it was made), the customer would only be subject to
16 one overdraft fee. *See* FDIC Study of Bank Overdraft Programs, November 2008, available at
17 <http://www.fdic.gov/bank/analytical/overdraft/>, at p. 11, n.12.

18 22. Thus, it is through manipulation of customers' transaction records that the Bank
19 maximizes overdraft penalties imposed on customers.

20 23. The Bank reorders transactions for no reason other than to increase the number of
21 exorbitant overdraft fees it can charge. This practice is a violation of North Carolina's consumer
22 protection laws and the implied covenant of good faith and fair dealing in the Bank's Bank
23 Services Agreement.

24 24. In addition, the Bank misleads its customers regarding its reordering practices.
25 Instead of unequivocally telling its customers that it will reorder debits from highest to lowest, the
26 Bank instead states in its contract that "[w]e *may* process items for payment against your account
27 in any order that we choose. Currently, we process items from highest to lowest dollar based on
28

1 certain priorities.” (Emphasis added). This statement is deceptive because it is, in fact, the
2 practice of the Bank to *always* reorder debits from highest to lowest. Likewise, the Bank fails to
3 disclose to its customers that its reordering practices necessarily *will* result in more overdraft
4 charges. The Bank’s statements and failures to disclose in this regard violate North Carolina’s
5 consumer protection laws and the implied covenant of good faith and fair dealing in the Bank’s
6 Bank Services Agreement.

7 25. In addition, the Bank advertises “free” checking accounts that are not in fact “free”
8 because of the improper and excessive overdraft fees that are charged.

9 26. Upon information and belief, the Bank’s policies alleged herein have a
10 disproportionate impact on low-income customers.

11 **JURISDICTION**

12 27. This Court has original jurisdiction of this action pursuant to 28 U.S.C. § 1332(d),
13 since there are at least 100 class members in the proposed class, the combined claims of proposed
14 class members exceed \$5,000,000 exclusive of interest and costs, and there are numerous class
15 members who are citizens of states other than the Bank’s state of citizenship, which is North
16 Carolina.

17 **VENUE**

18 28. Venue is proper in this district pursuant to 20 U.S.C. § 1391(a). BB&T, through
19 its subsidiary, Branch Bank, has approximately 355 branches in North Carolina. Both are
20 incorporated and headquartered in Winston-Salem, North Carolina. Through its substantial
21 contacts there, the Bank is subject to personal jurisdiction in North Carolina. Pursuant to 20
22 U.S.C. § 1391(a), therefore, the Bank is deemed to reside in this district.

23 29. Venue is also proper in the Middle District of North Carolina because BB&T and
24 Branch Bank are headquartered here and many class members live here, and because the Bank
25 has received substantial fees from North Carolina consumers who hold accounts here.

1 **PARTIES**

2 30. Plaintiff Doris Powell-Perry is, and at all relevant times hereto has been, a resident
3 of Henderson, North Carolina. Ms. Powell-Perry is a customer of the Bank who was charged
4 improper overdraft fees in connection with the use of her BB&T check card.

5 31. Plaintiff Curnie Sanders is, and at all relevant times hereto has been, a resident of
6 West End, North Carolina. Mr. Sanders is a customer of the Bank who was charged improper
7 overdraft fees in connection with the use of his BB&T check card.

8 32. BB&T Corporation, headquartered in Winston-Salem, N.C. is a financial holding
9 company with \$137 billion in assets. Its bank subsidiary Branch Banking and Trust Company,
10 also headquartered in Winston-Salem, N.C., operates approximately 1,500 financial centers in the
11 Carolinas, Virginia, West Virginia, Kentucky, Georgia, Maryland, Tennessee, Florida, Alabama,
12 Indiana and Washington, D.C.

13 33. The Bank ranks second in market share for banks in North Carolina.

14 **GENERAL FACTUAL ALLEGATIONS**

15 34. BB&T is a financial holding company. According to its website, as of December
16 31, 2008, BB&T is the 12th largest U.S. financial services holding company, with \$152 billion in
17 assets and market capitalization of \$15.4 billion.

18 35. Through its subsidiary, Branch Bank, BB&T operates approximately 1,500
19 financial centers in the Southeast. It is second in market share in North Carolina.

20 36. The Bank is a national bank subject to the National Bank Act, 12 U.S.C. § 1, *et*
21 *seq.*, and OCC regulations.

22 37. The terms of the Bank's checking accounts are contained in a written standard
23 account holder agreement. The "Bank Services Agreement," effective June 1, 2008, is attached
24 as Exhibit D. The Bank Services Agreement is currently a 32-page, single-spaced document
25 written in small font.

26 38. The Bank Services Agreement states that "[w]e may process items for payment
27 against your account in any order that we choose. Currently, we process items from highest to
28 lowest dollar based on certain priorities. These priorities may be determined by the date and/or

1 time a transaction was initiated. For example, a point-of-sale (POS) transaction conducted on a
2 Monday may not post to your account until Wednesday. The POS transaction may be processed
3 before checks and other items that are also presented for payment on Wednesday. This method
4 would allow more items to be paid in the order they were conducted but could result in additional
5 overdrafts. The Bank has discretion to process items even if your account has an insufficient
6 available balance to pay such items.” Bank Services Agreement at p. 6.

7 39. The Bank Services Agreement fails to clearly or reasonably disclose to depositors
8 that they have the option to “opt out” of the Bank’s overdraft scheme.

9 40. At the time that the Bank’s check card is used, for example at a POS or at an
10 ATM, the Bank is able to determine almost instantaneously whether there are sufficient funds in a
11 customer’s account to cover that particular transaction. The Bank has the technological capability
12 to decline transactions or notify customers at that very moment that the particular check card
13 transaction would result in an overdraft. The Bank could give customers the option to decline the
14 transaction to avoid incurring the overdraft fee, but it does not do this because it seeks to
15 maximize its overdraft fees.

16 41. The Bank Services Agreement also contains an arbitration agreement and a class
17 action waiver provision, which states “YOU ARE WAIVING RIGHTS YOU MAY HAVE TO
18 LITIGATE THE CLAIMS IN A COURT OR BEFORE A JURY. YOU ARE WAIVING YOUR
19 RIGHT TO PARTICIPATE IN A CLASS ACTION LAWSUIT, CLASS ACTION
20 ARBITRATION OR OTHER REPRESENTATIVE ACTION WITH RESPECT TO SUCH
21 CLAIMS.”

22 42. Such arbitration agreements are procedurally and substantively unconscionable
23 and unenforceable under North Carolina law in that, *inter alia*, the Bank Services Agreement, to
24 the extent it may be deemed a contract at all, is a contract of adhesion because, among other
25 reasons, it is a standardized form, imposed and drafted by the Bank, which is a party of vastly
26 superior bargaining strength, and relegates to the depositor only the opportunity to adhere to it or
27

1 reject it, and because it leads to overly harsh results for consumers and prevents consumers from
2 having a meaningful opportunity to redress their grievances.

3 43. Under North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat.
4 § 75-1.1, *et seq.*, the Bank's overdraft policies are unfair, deceptive and unconscionable in the
5 following respects, among others:

6 (a) The Bank does not clearly or reasonably disclose to customers that they
7 have the option to "opt out" of the Bank's overdraft scheme;

8 (b) The Bank does not obtain the affirmative consent from checking account
9 customers prior to processing a transaction that would overdraw the account and result in an
10 overdraft fee;

11 (c) The Bank does not alert its customers that a check card transaction will
12 trigger an overdraft fee and does not provide the customer the opportunity to cancel that
13 transaction;

14 (d) The Bank Services Agreement, to the extent it may be deemed a contract,
15 is a contract of adhesion in that it is a standardized form, imposed and drafted by the Bank, which
16 is a party of vastly superior bargaining strength, and relegates to the depositor only the
17 opportunity to adhere to it or reject it;

18 (e) The Bank Services Agreement provided to the Bank's customers is
19 ineffective, ambiguous, deceptive and misleading in that it does not unambiguously state that it
20 always reorders debits from high to low (even though the Bank always reorders transactions in
21 this way so as to maximize overdrafts and revenue for the Bank), or that its reordering of debits
22 will necessarily increase the number of overdraft charges; and

23 (f) The amounts of overdraft fees are disclosed in an ineffective, ambiguous,
24 misleading and deceptive manner, since they are not contained in the Bank Services Agreement.
25

1 51. Plaintiff Curnie Sanders is a current checking account customer of the Bank. He
2 opened his checking account with the Bank in approximately [REDACTED]. He was issued a check card
3 when he opened his account.

4 52. During his time as a checking account customer of the Bank, Mr. Sanders has been
5 charged with numerous overdraft fees. Some months, he has been charged with several hundreds
6 of dollars in overdraft charges. In all, the Bank has charged Mr. Sanders well over \$1,000 in
7 overdraft fees.

8 53. Numerous times, Mr. Sanders has been charged overdraft fees for transactions
9 when there were sufficient funds in his account to cover the transaction at the time of the
10 transaction at issue. In these instances, he would not have incurred overdraft fees but for the
11 Bank's reordering of his debit transactions from highest to lowest.

12 54. For example, on a single day, March 2, 2009, the Bank charged Mr. Sanders with
13 \$175 in overdraft charges. Several of these charges were assessed in connection with relatively
14 small check card purchases that Mr. Sanders made (*e.g.*, one such purchase was for \$4.15). In
15 addition, the Bank reordered his debits from highest (\$1,097.56) to lowest (\$4.15) that day,
16 causing him to be charged with more overdraft fees than he would have been charged with had
17 his debits been registered in the order in which they were made.

18 55. As another example, on April 7, 2009, the Bank charged Mr. Sanders with \$105 in
19 overdraft charges. The Bank reordered his debits from highest (\$1,097.56) to lowest (\$25.00)
20 that day, causing him to be charged with more overdraft fees than he would have been charged
21 with had his debits been registered in the order in which they were made.

22 56. The Bank did not reasonably provide Mr. Sanders with notice that he could opt out
23 of the Bank's overdraft program.

24 57. The Bank has never notified Mr. Sanders at the time he made check card
25 transactions, including POS transactions, that his checking account was overdrawn or that it
26 would charge him an overdraft fee as a result of the transaction.

1 the right to “opt out” of the Bank’s overdraft scheme;

- 2 • Whether the Bank does not obtain affirmative consent from checking account
- 3 customers prior to processing a transaction that would overdraw the account and
- 4 result in an overdraft fee;
- 5 • Whether the Bank does not alert its customers that a check card transaction will
- 6 trigger an overdraft fee and does not provide customers the opportunity to cancel
- 7 such transactions;
- 8 • Whether the Bank manipulates and reorders transactions so that it can increase the
- 9 number of overdraft charges it imposes on customers;
- 10 • Whether the Bank manipulates and reorders debits from highest to lowest in order
- 11 to maximize overdrafts;
- 12 • Whether the Bank imposes overdrafts and overdraft fees when, but for reordering
- 13 transactions, there would otherwise be sufficient funds in the account;
- 14 • Whether the Bank engages in practices that have damaged Plaintiffs and members
- 15 of the Class;
- 16 • Whether the Bank engages in deceptive or unfair acts and practices in violation of
- 17 the North Carolina’s Unfair and Deceptive Trade Practices Act, for which
- 18 Plaintiffs and the other members of the Class are entitled to recover;
- 19 • Whether the Bank converts the funds of Plaintiffs and members of the Class;
- 20 • Whether the Bank breaches the implied covenants of good faith and fair dealing;
- 21 • Whether the Bank is unjustly enriched as a result of its overdraft fee policies and
- 22 practices;
- 23 • Whether the Bank causes injury to Plaintiffs and the other members of the Class;
- 24 • Whether the Bank engages in practices that warrant equitable and injunctive relief;
- 25 and
- 26 • Whether the Bank engages in practices that warrant the award of treble damages.

21 (c) Typicality Under Rule 23(a)(3): The named Plaintiffs’ claims are typical
22 of (and not antagonistic to) the claims of the members of the Class. Plaintiffs, like all members of
23 the Class, have been subject to the Bank’s overdraft charge policies and practices and have
24 damaged by the Bank’s misconduct in that they incurred unlawful overdraft charges.
25 Furthermore, the factual bases of the Bank’s misconduct are common to all members of the Class
26 and represent a common thread of unconscionable, unfair and/or deceptive misconduct resulting
27 in injury to all members of the Class.

1 (d) Adequacy of Representation under Rule 23(a)(4): Plaintiffs are committed
2 to the vigorous prosecution of this action. Plaintiffs will fairly and adequately protect the
3 interests of the members of the Class, and Plaintiffs' interests are coincident with and not
4 antagonistic to those of the other class members they seek to represent. Plaintiffs have retained
5 competent counsel experienced in the prosecution of class actions to represent them and the
6 Class.

7 (e) The Class Can be Properly Maintained Under Rules 23(b)(2) and(c). The
8 Bank has acted or refused to act, with respect to some or all issues presented in this Complaint, on
9 grounds generally applicable to the Class, thereby making appropriate final injunctive relief with
10 respect to the Class as a whole.

11 (f) The Class Can Be Properly Maintained Under Rules 23(b)(3) and (c).
12 Questions of law common to the members of the Class predominate over any questions affecting
13 only individual members with respect to some or all issues presented in this Complaint. A class
14 action is superior to other available methods for the fair and efficient adjudication of this
15 controversy. Individual litigation of the claims of all class members is impracticable because the
16 cost of litigation would be prohibitively expensive for each class member and would impose an
17 immense burden upon the courts. Individualized litigation would also present the potential for
18 varying, inconsistent, or contradictory judgments and would magnify the delay and expense to all
19 parties and to the court system resulting from multiple trials of the same complex factual and
20 legal issues. By contrast, the conduct of this action as a class action, with respect to some or all
21 of the issues presented in this Complaint, presents fewer management difficulties, conserves the
22 resources of the parties and of the court system, and is the only means to protect the rights of all
23 class members.

1 **CAUSES OF ACTION**

2 **FIRST CAUSE OF ACTION**

3 **(Violation of North Carolina Unfair and Deceptive Trade Practices Act,
4 N.C. Gen. Stat. § 75-1.1, *et seq.*)**

5 63. Plaintiffs, individually and on behalf of the Class, hereby incorporate by reference
6 the allegations contained in the foregoing paragraphs as if fully set forth herein.

7 64. This cause of action is brought pursuant to North Carolina's Unfair and Deceptive
8 Trade Practices Act, N.C. Gen. Stat. § 75.1, *et. seq.* ("UDTPA").

9 65. The Bank's conduct complained of herein violates the UDTPA in the following
10 respects:

11 (a) the acts of the Bank complained of herein possess the tendency or capacity to mislead,
12 or create the likelihood of deception;

13 (b) the acts of the Bank complained of herein violate public policy, amount to an
14 inequitable assertion of its power and position, are immoral, unethical, oppressive, unscrupulous,
15 and/or substantially injurious to consumers; and

16 (c) the acts of the Bank complained of herein are unconscionable.

17 66. The unfair and deceptive acts of the Bank complained of herein were committed
18 willfully.

19 67. The unfair and deceptive acts of the Bank complained of herein were acts and
20 practices that affected commerce.

21 68. As a result of the Bank's violation of the UDTPA, Plaintiffs and members of the
22 Class paid excessive amounts of money for banking services and paid excessive fees, and thereby
23 suffered actual injury proximately caused by the Bank's conduct.

24 69. Plaintiffs and the members of the Class are therefore entitled to:

25 (a) an Order requiring the Bank to cease its unfair and deceptive trade
26 practices alleged herein;

27 (b) an Order enjoining the Bank from continuing to collect overdraft fees from
28 consumers on check-card transactions, including POS and ATM transactions, unless the

1 consumer is notified at the time of the transaction that an overdraft fee will be charged and unless
2 the consumer is given the option to decline the transaction without incurring an overdraft fee;

3 (c) full restitution of all overdraft fees paid to the Bank on check-card
4 transactions, including POS and ATM transactions;

5 (d) compensatory damages;

6 (e) treble damages pursuant to N.C. Gen. Stat. § 75-16;

7 (f) pre-judgment interest at the highest rate allowable by law; and

8 (g) payment of their attorneys' fees and costs.

9
10 **SECOND CAUSE OF ACTION**
11 **(Conversion)**

12 70. Plaintiffs, individually and on behalf of the Class, hereby incorporate by reference
13 the allegations contained in the foregoing paragraphs as if fully set forth herein.

14 71. Plaintiffs and Class members own and have the right to possess the money in their
15 checking accounts.

16 72. The Bank interfered with Plaintiffs' and Class members' possession of this money
17 and wrongfully converted the funds by assessing unwarranted and unlawful overdraft fees as the
18 result of check card transactions, including POS and ATM transactions, despite the fact that
19 Plaintiffs and the Class members had and/or have sufficient funds in their accounts to cover these
20 transactions at the time they were and/or are made.

21 73. Plaintiffs and Class members never affirmatively consented to the Bank's direct
22 debit of overdraft fees from their checking accounts as a result of check card transactions,
23 including POS and ATM transactions that occurred at a time when there were sufficient funds in
24 their accounts to cover these transactions.

25 74. Plaintiffs and Class members have been, and will continue to be, damaged by the
26 Bank's wrongful assessment of overdraft fees in an amount that is capable of identification
27 through the Bank's records.
28

1 Dated: September 15, 2009

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

2
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