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FILED
SAN FRANCISCO COUNTY
SUPERIOR COURT

2009 APR -9 AM 12:58

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BY: ~~ELIAS BUITO~~
DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco
STREET ADDRESS: 400 McAllister Street
MAILING ADDRESS: Same
CITY AND ZIP CODE: San Francisco, CA 94102
BRANCH NAME: Civic Center

CASE NAME:
Steven Yourke, et al, v. Bank of America, NA, et al.

CIVIL CASE COVER SHEET
 Unlimited (Amount demanded exceeds \$25,000)
 Limited (Amount demanded is \$25,000 or less)

Complex Case Designation
 Counter **Joinder**
Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

CASE NUMBER:
CGC-09-487100
JUDGE:
DEPT:

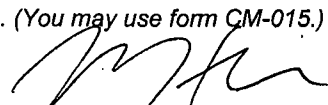
Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41)
Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23)	Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26)	Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20)
Non-PI/PD/WD (Other) Tort <input checked="" type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35)	Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38)	Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42)
Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)

2. This case is is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- a. Large number of separately represented parties
 - b. Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
 - c. Substantial amount of documentary evidence
 - d. Large number of witnesses
 - e. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
 - f. Substantial postjudgment judicial supervision
3. Remedies sought (check all that apply): a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive
4. Number of causes of action (specify):
5. This case is is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date:
Roger N. Heller
(TYPE OR PRINT NAME)


(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

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17 *Counsel for Plaintiffs and the Proposed Class*

18 [Additional Counsel Listed on Signature Page]

19 SUPERIOR COURT OF CALIFORNIA

20 SAN FRANCISCO COUNTY

21 STEVE YOURKE AND KRISTIN
22 RICHARDS, Individually and on behalf of All
Others Similarly Situated,

23 Plaintiffs,

24 v.

25 BANK OF AMERICA, N.A., BANK OF
26 AMERICA CORPORATION, BANK OF
AMERICA, CALIFORNIA and DOES 1-50,

27 Defendants.
28

ENDORSED
FILED
San Francisco County Superior Court
APR - 9 2009
GORDON PAK-LI, Clerk
ELIAS BLIT
Deputy Clerk
BY: _____

CASE MANAGEMENT CONFERENCE SET

SEP 11 2009 - 9⁰⁰ AM

DEPARTMENT 212

Case No. CGC-09-487100

COMPLAINT

CLASS ACTION

DEMAND FOR JURY TRIAL

1 Plaintiffs Steve Yourke and Kristin Richards (“Plaintiffs”), on behalf of themselves and
2 all similarly situated United States residents, allege the following:

3 **INTRODUCTION**

4 1. This is a civil action seeking injunctive relief, monetary damages, and restitution
5 from Defendants Bank of America, N.A. and Bank of America Corporation. (collectively herein
6 “the Bank,” “Bank of America,” or “Defendant”) arising out of their unfair, deceptive, and
7 unconscionable assessment and collection of excessive overdraft fees.

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

12 3. If, according to the Bank’s accounting practices detailed below, a customer does
13 not have sufficient funds in his or her account the transaction is considered an “overdraft.” The
14 Bank may honor or allow an overdraft to go through despite the lack of funds in the account. If
15 the Bank allows such a POS or debit transaction to proceed, the Bank charges its customer’s
16 account \$35 for each separate overdraft, after an initial rate of \$25 for the first occurrence. These
17 fees are known as “overdraft fees.”

18 4. Before check cards existed, banks occasionally extended the courtesy of honoring
19 paper checks written on overdrawn or otherwise deficient accounts for customers who were
20 typically in good standing. Banks extended this courtesy largely because the third party involved
21 in a sales transaction allowed the customer to purchase goods or services with a check with an
22 expectation that funds would be available and that the check would clear. For example, if a
23 customer used a check to purchase groceries, the grocery store would only know if the check
24 cleared *after* the groceries had been purchased.

25 5. The same considerations are not present when the transaction is one with a check
26 card. The bank could simply decline to honor debit or POS transactions made with check cards
27 where there are insufficient funds in the account. Retail and service transactions would simply
28 not take place if the consumer were unable to present an alternative form of payment. ATM

1 transactions could proceed if the Bank provided a warning that an overdraft fee would be incurred
2 and the consumer chose to proceed nevertheless. In fact, until a few years ago, most banks
3 simply declined debit and/or POS transactions that would overdraw an account.

4 6. Instead of declining debit and/or POS transactions when there are insufficient
5 funds, however, or warning the customer that an overdraft fee will be assessed if he or she
6 proceeds with the transaction, Bank of America routinely processes such transactions in order to
7 charge its customers an overdraft fee of \$25 or \$35, even when the transaction is for only a few
8 dollars. This automatic fee-based overdraft scheme is designed and intended solely to increase
9 overdraft fee revenue.

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

13 8. Because the Bank's check card customers are not notified of the potential
14 overdraft and are not given the option to decline the check card transaction or to provide another
15 form of payment, the customers incur monetary damages in the form of overdraft fees.

16 9. According to rules proposed by the Board of Governors of the Federal Reserve
17 System, the Office of Thrift Supervision, Treasury, and the National Credit Union Administration
18 ("Agencies") "Injury [caused by overdraft charges] is not outweighed by countervailing benefits.
19 . . . This is particularly the case for ATM withdrawals and POS debit card transactions where, but
20 for the overdraft service, the transaction would typically be denied and the consumer would be
21 given the opportunity to provide other forms of payment without incurring any fee." 73 F.R.
22 28904-01, 28929 (May 19, 2008).

23 10. The Bank's overdraft policies make it difficult for a customer to avoid injury even
24 if a customer carefully tracks the balance in his or her account. In fact, the Agencies have stated
25 that "Injury" resulting from such policies, "is not reasonably avoidable" by the consumer. 73
26 F.R. 28904-01, 28929. ("It appears that consumers cannot reasonably avoid this injury if they
27 are automatically enrolled in an institution's overdraft service without having an opportunity to
28 opt out. Although consumers can reduce the risk of overdrawing their accounts by carefully

1 tracking their credits and debits, consumers often lack sufficient information about key aspects of
2 their account. For example, a consumer cannot know with any degree of certainty when funds
3 from a deposit or a credit for a returned purchase will be made available.”)

4 11. The Bank seeks to maximize the number of overdraft fees it charges check card
5 customers because overdraft fees are a primary source of revenue for the Bank.

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

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

19 14. The “best practices” listed in the Joint Guidance also advises banks to “Alert
20 customers before a transaction triggers any fees. When consumers attempt to withdraw or
21 transfer funds made available through an overdraft protection program, provide a specific
22 consumer notice, where feasible, that completing the withdrawal may trigger the overdraft fees.”
23 70 F.R.D. 9127, 9132. It goes on to advise that “This notice should be presented in a manner that
24 permits consumers to cancel the attempted withdrawal or transfer after receiving the notice.” *Id.*

25 15. The list of “best practices” set forth in the “Overdraft Protection: A Guide For
26 Bankers” issued by the American Bankers Association includes offering customers the option of
27 “opting out” of any overdraft programs, and informing customers, before they access funds, that a
28

1 particular point of sale or ATM transaction will cause them to incur overdraft fees. (See Exhibit
2 B, attached, at 18, 20).

3 16. The Bank does not disclose or does not reasonably disclose to its customers that
4 they have the right to opt out of the Bank's overdraft scheme. The Bank also fails to notify
5 consumers when use of a check card, such as an ATM or POS transaction, will cause an overdraft
6 fee.

7 17. The Bank's lack of disclosure regarding the ability to opt out of the overdraft
8 scheme and its failure to notify customers when the use of a check card, such as an ATM or POS
9 transaction, will cause an overdraft fee, is a violation of California's consumer protection laws
10 and the implied covenant of good faith and fair dealing in the Bank's Deposit Agreement,
11 governing its checking accounts.

12 18. In an effort to cause as many overdrafts as possible, the Bank also manipulates and
13 reorders debits from highest to lowest during the course of a day.

14 19. Upon information and belief, Bank of America has a computer automated
15 overdraft system programmed to maximize the number of overdrafts, and thus the amount of fees
16 charged, per customer.

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

27 21. Thus, it is through manipulation and alteration of customers' transactions records
28 that the Bank maximizes overdraft penalties imposed on customers.

1 customers who are residents of the State of California. Through its substantial contacts there, the
2 Bank is subject to personal jurisdiction in California. Therefore, the Bank is deemed to reside in
3 this district.

4 27. Venue is also proper in this district because Plaintiff Yourke and many Class
5 Members live here, because the Bank has branches in the County of San Francisco, and because
6 the Bank has received substantial fees from consumers who hold accounts here.

7 **CHOICE OF LAW**

8 28. Plaintiffs bring this action under the laws of the State of California.

9 29. No enforceable choice-of-law agreement governs here or compels the application
10 of different states' laws.

11 30. California has the most significant relationship with the parties and to the events
12 and occurrences that form the basis of this litigation. The Bank maintains approximately 1,010
13 branches in California. The Bank has over 20% of the market share in California, and is the
14 largest bank in the State. All of the named Plaintiffs reside in California. Tens of thousands of
15 other California residents are Bank of America checking account holders who have been subject
16 to unlawful overdraft fees.

17 31. California's interest in this action, which seeks to protect the rights and interests of
18 California residents, is greater than any other state.

19 32. Application of California law is neither arbitrary nor fundamentally unfair because
20 California has significant contacts and a significant aggregation of contacts that create a state
21 interest in this litigation.

22 **PARTIES**

23 33. Plaintiff Steve Yourke is, and at all relevant times hereto has been, a resident of
24 San Francisco, California. Mr. Yourke is a former customer of the Bank who incurred multiple
25 improper overdraft fees in connection with use of his Bank of America check card.

26 34. Plaintiff Kristin Richards is, and at all relevant times hereto has been, a resident of
27 Citrus Heights, California. Ms. Richards is a current customer of the Bank who was charged
28 multiple improper overdraft fees in connection with use of her Bank of America check card.

1 35. Bank of America Corporation, the parent of all of the Bank of America entities, is
2 the largest bank and financial holding company in the United States in terms of deposits and
3 market capitalization. The Bank boasts the country's most extensive branch network, with more
4 than 6,100 locations covering some 30 states and the District of Columbia. In 2007, the Bank
5 employed over 209,000 people and had a net income of \$10.6 billion on revenues of over \$52
6 billion. The Bank has a headquarter in Charlotte, North Carolina, and does business throughout
7 the State of California and in the County of San Francisco, both directly and through its
8 subsidiaries.

9 36. Bank of America, N.A., is a national bank incorporated in the State of Delaware
10 with a principal place of business in Charlotte, North Carolina. Among other things, Bank of
11 America is engaged in the business of issuing debit cards for its customers to use in conjunction
12 with their checking accounts.

13 37. Bank of America California, N.A. is a direct subsidiary of Bank of America
14 Corporation, with its principal place of business in San Francisco, California. Bank of America
15 California, N.A. conducts substantial business in this County.

16 38. The true names and capacities of Defendants named as DOES 1-50, inclusive, are
17 currently unknown to Plaintiffs, and therefore are named as Defendants under fictitious names
18 pursuant to California Code of Civil Procedure, § 474. Plaintiffs will seek leave of Court to
19 amend the Complain to reflect their true identities if and when they become known.

CLASS ALLEGATIONS

21 39. Plaintiffs bring this lawsuit as a class action on behalf of themselves and all others
22 similarly situated as members of a proposed plaintiff Class pursuant to California Code of Civil
23 Procedure § 382 and California Civil Code § 1781. This action satisfies the numerosity,
24 commonality, typicality, adequacy, predominance, and superiority requirements of those
25 provisions.

26 40. The Class is defined as:

27 All individuals residing in California who, during the last four years, have had a
28 checking account with Bank of America and have been issued a check card with
 that account, and who have been charged overdraft fees, including those made in

1 connection with a transactions involving a check card (“Class,” “Class members,”
2 “Consumer,” and/or “Consumers”).

3 41. The following persons shall be excluded from the Class: (1) Defendants and their
4 subsidiaries and affiliates; (2) all persons who make a timely election to be excluded from the
5 proposed Class; (3) governmental entities; and (4) the judge(s) to whom this case is assigned and
6 any immediate family members thereof.

7 42. Plaintiffs reserve the right to modify or amend the Class definition before the
8 Court determines whether certification is appropriate.

9 43. The Class for whose benefit this action is brought is so numerous that joinder of all
10 Class members is impracticable. While the exact number and identities of individual Class
11 members are unknown at this time, Plaintiffs are informed and believe that thousands, if not tens
12 of thousands, of California residents have been assessed overdraft fees by the Bank in connection
13 with use of their check cards.

14 44. The claims of the representative Plaintiffs are typical of the claims of the Class in
15 that the representative Plaintiffs, like all Class members, were charged overdraft fees by the Bank.
16 The representative Plaintiffs, like all Class members, have been damaged by the Bank’s
17 misconduct in that they incurred and/or will incur the unlawful overdraft charges. Furthermore,
18 the factual basis of the Bank’s misconduct are common to all Class members and represent a
19 common thread of unconscionable, unfair and/or deceptive misconduct resulting in injury to all
20 members of the Class.

21 45. There are numerous questions of law and fact common to the Class and those
22 common questions predominate over any questions affecting individual Class members.

23 46. Among questions of fact common to the Class are whether the Bank:

24 (a) does not clearly disclose to check card customers that they have the right to
25 “opt out” of the Bank’s overdraft scheme;

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

1 (c) does not alert its customers that a check card transaction will trigger an
2 overdraft fee and does not provide the customer the opportunity to cancel this transaction;

3 (d) manipulates and reorders transactions so that it can increase the number of
4 overdraft charges it imposes;

5 (e) manipulates and reorders debits from highest to lowest in order to
6 maximize overdrafts;

7 (f) imposes overdrafts and overdraft fees when, but for reordering
8 transactions, there would otherwise be sufficient funds in the account; and

9 (g) engages in practices that have damaged Plaintiffs and Class members.

10 47. Among the questions of law common to the Class are whether the Bank:

11 (a) engages in deceptive or unfair acts and practices in violation of California
12 consumer protection laws, including, but not limited to, California Business & Professions Code
13 § 17200, *et seq.*, and California Civil Code § 1770, for which Plaintiffs and the other members of
14 the Class are entitled to recover;

15 (b) converts Plaintiffs' and Class members' funds;

16 (c) breaches the implied covenants of good faith and fair dealing;

17 (d) is unjustly enriched as a result of its overdraft fee policies and practices;

18 (e) causes injury to Plaintiffs and the other Class members; and

19 (f) engages in practices that warrant equitable, injunctive relief.

20 48. Plaintiffs' claims are typical of the claims of the other members of the Bank's
21 unfair implementation of centralized, common overdraft fee policies and practices and arise out
22 of the same unconscionable provisions of the Bank's Deposit Agreement and Disclosures and
23 other related documents. Plaintiffs have suffered the harm alleged and Plaintiffs have no interests
24 antagonistic to the interests of any other Class member.

25 49. Plaintiffs are committed to the vigorous prosecution of this action and have
26 retained competent counsel experienced in the prosecution of class actions, and in particular, class
27 actions on behalf of consumers and against financial institutions. Accordingly, Plaintiffs are
28

1 adequate representatives of the Class and will fairly and adequately protect the interests of the
2 Class.

3 50. A class action is superior to other available methods for the fair and efficient
4 adjudication of the controversy. Since the amount of each individual Class member's claim is
5 small relative to the complexity of the litigation, and due to the financial resources of the Bank,
6 no Class member could afford to seek legal redress individually for the claims alleged herein.
7 Therefore, absent a class action, the Class members will continue to suffer losses and the Bank's
8 violations of the law will proceed without remedy.

9 **FACTUAL ALLEGATIONS**

10 **A. Bank of America.**

11 51. According to its website, "Bank of America is one of the world's largest financial
12 institutions." It has "more than 59 million consumer and small business relationships with more
13 than 6,000 retail banking offices, more than 18,000 ATMs and award-winning online banking
14 with nearly 24 million active users," and has clients in 175 countries. *Id.* It claims to have
15 "relationships with 99 percent of the U.S. Fortune 500 companies and 80 percent of the Fortune
16 Global 500." *Id.*

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

19 53. The terms of the Bank's checking accounts are contained in a written standard
20 account holder agreement. The "Deposit Agreement and Disclosures" effective February 1, 2008,
21 is attached as Exhibit C. The Deposit Agreement is currently a 41-page, single-spaced document
22 written in small font.

23 54. The Bank's Deposit Agreement states that "[i]n *most* states we process and post
24 items within each category from the highest to lowest dollar amount" (p. 19, emphasis added).
25 The Deposit Agreement does not describe the states to which this applies. It further states that the
26 "the high-to-low posting order *may* result in more insufficient funds items and more fees," even
27 though it *will almost always* result in more fees (*Id.*, emphasis added; *see also* pp. 20-21).
28

1 55. The Deposit Agreement also states that the Bank “may charge you a fee for each
2 insufficient funds item whether we pay, permit, return, decline or reject the item.” (*Id.* at 20).

3 56. The Bank publishes a pamphlet that, upon information and belief, is available to
4 customers at the Bank branches, titled a “Personal Schedule of Fees.” Upon information and
5 belief, there is one Personal Schedule of Fees for each state in which the Bank conducts business,
6 including California. The California schedule (hereinafter “Fee Schedule”) is attached hereto as
7 Exhibit D. The Fee Schedule provides “Overdraft Item Fee and NSF: Returned Item Fee — For
8 the first day your account has an occurrence, fee for each overdraft item and for each returned
9 item” is “\$25.00 each item.” The Fee Schedule further provides: “For the second and subsequent
10 days your account has an occurrence, fee for each overdraft item and for each returned item” is
11 “\$35.00 each item.” Fee Schedule at p.9. An “occurrence” is defined as “a day with at least one
12 overdraft item or one returned item.” *Id.*

13 57. The Bank also publishes “Important Information About Your Card Agreement and
14 Disclosure” (herein, “Card Agreement,” attached as Exhibit E). The Card Agreement
15 “supplements the Deposit Agreement and Disclosures and related Personal Schedule of Fees
16 (collectively, the “Deposit Agreement”) that apply to each Bank of America deposit account that
17 you link to your card.” Card Agreement at p.1.

18 58. The Deposit Agreement and related documents, including the Fee Schedule and
19 Card Agreement, fail to disclose to depositors that they have the option to “opt out” from the
20 Bank’s overdraft scheme. However, it is possible for customers to opt out of the scheme upon
21 request. For instance, after several requests to opt out, Plaintiff Yourke was permitted to opt out
22 of the scheme.

23 59. At the time that the Bank’s check card is used, for example at a POS or at an
24 ATM, the Bank is able to determine almost instantaneously whether there are sufficient funds in a
25 customer’s account to cover that particular transaction. The Bank has the technological capability
26 to decline transactions or notify customers at that very moment that the particular check card
27 transaction would result in an overdraft. The Bank could give customers the option to decline the
28

1 transaction to avoid incurring the overdraft fee, but it does not do this because it seeks to
2 maximize its overdraft fees.

3 60. The Deposit Agreement also contains an arbitration agreement and a class action
4 waiver which states “YOU AND WE ARE BOTH GIVING UP THE RIGHT TO TRIAL BY
5 JURY,” AND “THIS SECTION PRECLUDES YOU AND US FROM PARTICIPATING IN OR
6 BEING REPRESENTED IN ANY CLASS OR REPRESENTATIVE ACTION OR JOINING
7 OR CONSOLIDATING THE CLAIMS OF OTHER PERSONS (HEREINAFTER REFERRED
8 TO AS THE ‘CLASS ACTION WAIVER.’)” Deposit Agreement at p.40.

9 61. Under California Civil Code § 1670.5, the Arbitration and Waiver of Jury & Class
10 Action Provision of the Deposit Agreement are unconscionable in that the Deposit Agreement
11 and related documents, to the extent they may be deemed contracts at all, are contracts of
12 adhesion because, among other reasons, they are standardized forms, imposed and drafted by the
13 Bank, which is a party of vastly superior bargaining strength, and relegate to the depositor only
14 the opportunity to adhere to them or reject them and because they lead to overly harsh results for
15 consumers.

16 **B. The Bank’s Overdraft Policies Are Unconscionable.**

17 62. Under California Civil Code § 1670.5, the Bank’s overdraft policies are
18 unconscionable in the following respects, among others:

19 (a) The Bank does not disclose or reasonably disclose to customers that they
20 have the option to “opt out” of the Bank’s overdraft scheme;

21 (b) The bank does not obtain affirmative consent from checking account
22 customers prior to processing a transaction that would overdraw the account and result in an
23 overdraft fee;

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

27 (d) The Deposit Agreement and related documents, including the Fee Schedule
28 and Card Agreement, to the extent they may be deemed contracts, are contracts of adhesion in

1 that they are standardized forms, imposed and drafted by the Bank, which is a party of vastly
2 superior bargaining strength, and relegates to the depositor only the opportunity to adhere to them
3 or reject them;

4 (e) The amount of overdraft fees are disclosed in an ineffective, ambiguous,
5 misleading and deceptive manner, since they are not contained in the Deposit Agreement, but
6 rather in a different and separate document, the Fee Schedule, which is not signed by the
7 depositor; and

8 (f) The Deposit Agreement provided to California customers is ineffective,
9 ambiguous, deceptive and misleading in that it does not unambiguously state that it always
10 reorders debits from high to low, even though the Bank always reorders transactions in this way
11 for California customers so as to maximize overdrafts and revenue for the Bank.

12 **C. Plaintiff Steve Yourke's Account History**

13 63. Plaintiff Steve Yourke is a former checking account customer of Bank of America.
14 He opened his account with the Bank in or about April 2002. The Bank issued Mr. Yourke a
15 check card when he opened his account.

16 64. The Bank has charged Mr. Yourke with multiple overdraft fees. For example, on
17 December 4, 2007, the Bank sent Mr. Yourke a notice that, as of December 3, 2007, the Bank had
18 received notice of five transactions, for \$32.83, \$4.35, \$4.35, \$6.05 and \$39.46, that his account
19 had become overdrawn for each of these transactions and that the Bank had charged \$35 fee for
20 each such transaction, for a total of \$175. If the Bank had not manipulated and reordered the
21 transactions from highest to lowest, Mr. Yourke would have incurred only two overdraft fees
22 instead of five overdraft fees.

23 65. On May 2, 2008, the Bank sent Mr. Yourke a notice that, as of May 1, 2008, two
24 transactions, for \$60 and \$21.39, had caused his account to be overdrawn and that the Bank had
25 charged him a fee of \$35 for each such charge. If the Bank had not manipulated and reordered
26 the transactions from highest to lowest, Mr. Yourke would have incurred one overdraft fee
27 instead of two overdraft fees.

1 66. In addition to the fees that Mr. Yourke was charged for overdrafts as the result of
2 reordering of transaction in December 2007 and May 2008, there were many other overdraft fees
3 he incurred as the result of the Bank’s manipulation and reordering of transactions starting in at
4 least February 2005 until the present.

5 67. On multiple occasions, the Bank charged Mr. Yourke with overdraft fees based
6 solely on the fact that he did not have sufficient funds in his account to cover prior overdraft fees
7 charged by the Bank. For instance, in or about November or December 2005 he was charged
8 multiple overdraft fees based on the fact that he incurred overdraft fees without sufficient funds in
9 the account to cover them.

10 68. The Bank never notified Mr. Yourke at the time he made the check card
11 transactions, including the POS transactions described above, that his checking account was
12 overdrawn or that it would charge him an overdraft fee as a result of the transaction.

13 69. The Bank never declined to pay any of Mr. Yourke’s check card charges, even
14 when his account was overdrawn.

15 70. In the past four years, the Bank has charged Mr. Yourke at least \$4,000 in
16 overdraft fees.

17 **D. Plaintiff Kristin Richards’ Account History**

18 71. Plaintiff Kristin Richards is a current checking account customer with Bank of
19 America. She opened her account on or about September 30, 2008. At that time, the Bank issued
20 Ms. Richards a check card.

21 72. The Bank account that Ms. Richards opened online was advertised as a “free”
22 checking account. At the time she opened her account, the Bank did not inform her about
23 overdraft fees or provide her with the ability to opt out of the overdraft scheme. Instead, the Bank
24 asked Ms. Richards to “accept” the terms and conditions associated with her account even though
25 the full disclosure was not available online. The Bank mailed the agreements that pertain to her
26 account to Ms. Richards after she had opened her account and “accepted” the terms.

1 73. The Bank charged Ms. Richards for overdraft fees incurred when she made
2 withdrawals from a Bank of America ATM on or about October 6, 2008. The Bank did not warn
3 Ms. Richards that the withdrawals would cause her to overdraft her account.

4 74. The Bank charged Ms. Richards an unwarranted \$25 overdraft fee on October 27,
5 2008 even though there was approximately \$219.07 in her account at the time that the overdraft
6 fee was imposed.

7 75. Many of the transactions for which Ms. Richards was charged overdraft fees were
8 related to use of her check card, including POS transactions, even though there were sufficient
9 funds in her account to cover them.

10 76. Between October 27, 2008 and October 28, 2008, the Bank charged Ms. Richards
11 two overdraft fees of \$35 each and one overdraft fee of \$25. If the Bank had not manipulated the
12 timing of her transactions by reordering them from highest to lowest, Ms. Richards would only
13 have incurred one overdraft fee instead of three fees between October 27, 2008 and October 28,
14 2008.

15 77. In one day, on November 18, 2008, the Bank charged Ms. Richards five overdraft
16 fees of \$35, for a total of \$175. According to her bank records, there was approximately \$150.39
17 in her account at the time the Bank imposed the first overdraft fee, enough to cover that first
18 transaction.

19 78. As a result of these five improper overdraft fees, totaling \$175, Ms. Richards'
20 account overdrafted. Because her account was already negative due to the improper overdraft
21 fees, her account became even more negative when three additional debits were posted to Ms.
22 Richards' account on November 18, 2008. Accordingly, on November 19, 2008, the Bank
23 charged Ms. Richards three more overdraft fees of \$35 each, for a total of \$105.

24 79. If the Bank had not manipulated Ms. Richards' transactions by reordering them
25 from highest to lowest, Ms. Richards would only have incurred one overdraft fee instead of eight
26 overdraft fees between November 18, 2008 and November 19, 2008.

1 80. Bank of America charged Ms. Richards a \$25 or \$35 fee for each overdraft,
2 regardless of whether there were sufficient funds in her account and regardless of the size of the
3 POS transaction that could have led to an overdraft.

4 81. Ms. Richards protested the fees to Bank of America by calling Bank of America's
5 customer service line, by visiting a Bank of America branch office in Roseville, California, and
6 by contacting Bank of America through its website.

7 82. In response to one of Ms. Richards' email inquiries, Bank of America stated that it
8 "implemented a change to the way Check Card transactions are processed on March 4, 2008." It
9 further stated that Ms. Richards was sent notice of this change on her June 2007 statement and
10 then on her March 2008 statement, despite the fact that Ms. Richards did not even open her Bank
11 of America account until September 2008.

12 83. Finally, in response to Ms. Richards' repeated and insistent protests, the Bank
13 ultimately refunded \$108 to her account, which is approximately the value of three \$35 overdraft
14 fees.

15 84. As a result of the improper overdraft fees that Ms. Richards was charged, her so-
16 called "free" checking account was not "free."

17 85. In addition to the circumstances described above, there are other occasions that
18 Bank of America has improperly charged Ms. Richards overdraft fees.

19 86. The Bank never notified Ms. Richards at the time she made the check card
20 transactions, including the POS transactions described above, that her checking account was
21 overdrawn or that it would charge her an overdraft fee as a result of the transaction.

22 87. As a result of these improper overdraft fees, Ms. Richards has suffered monetary
23 damages.

24 **FIRST CLAIM FOR RELIEF**
25 **(Violation of Consumers Legal Remedies Act**
26 **Cal. Civ. Code § 1750, *et seq.*)**

27 88. Plaintiffs, individually and on behalf of all others similarly situated, hereby
28 incorporate by reference the allegations contained in the foregoing paragraphs as if fully set forth
herein.

1 89. This claim for relief is brought pursuant to the California Consumer Legal
2 Remedies Act, California Civil Code § 1750, *et seq.*, (the “CLRA”).

3 90. Defendant provides “services” within the meaning of Civil Code §§ 1761(b) and
4 1770.

5 91. Defendant is a “person” within the meaning of Civil Code §§ 1761(c) and 1770.

6 92. Purchasers of Defendant’s services, including the Plaintiffs and other members of
7 the Class, are “consumers” within the meaning of Civil Code §§ 1761(d) and 1770.

8 93. Plaintiffs’ and each and every Class members’ purchases of the services sold by
9 Defendant constitute a “transaction” within the meaning of Civil Code §§ 1761(e) and 1770.

10 94. The policies, acts and practices of Defendant as described above were intended to
11 result in the sale of services to Plaintiffs and the other Class members. These actions violated,
12 and continue to violate, the Consumer Legal Remedies Act in at least the following ways:

13 (a) The Bank makes deceptive representations in connection with the services
14 in question in violation of Civil Code §§ 1770(a)(5) and (14);

15 (b) The Bank represents that its services have characteristics, uses or benefits
16 which they do not have in violation of Civil Code § 1770(a)(5); and

17 (c) The Bank’s Deposit Agreement includes unconscionable provisions in
18 violation of Civil Code § 1770(a)(19).

19 95. As a result of the Bank’s violation of the CLRA, Plaintiffs and the other Class
20 members have incurred damages in the form of overdraft fees.

21 96. The Bank has intentionally engaged in this conduct.

22 97. Despite its superior knowledge and awareness of the illegality of enforcing the
23 unconscionable provisions, the Bank intentionally withheld, and continues to withhold, such
24 knowledge from its account holders and has improperly continued to assess overdraft fees in a
25 deliberate scheme to boost business profits and/or to reap unconscionable unjust enrichment to
26 itself. This conduct was and is willful, malicious and oppressive, and in conscious disregard of
27 the rights of Plaintiffs and the Class.

1 98. Plaintiffs and the other Class members have suffered and will continue to suffer
2 irreparable damage unless the Bank is enjoined from continuing its unlawful and unfair practice
3 of assessing overdraft fees in the manner in which they are currently assessed.

4 99. Venue is proper pursuant to Civil Code § 1780(c) because the Bank does business
5 in the City and County of San Francisco. A declaration from Plaintiff Yourke establishing this
6 Court as the proper venue for this action is attached hereto as Exhibit F.

7 100. By nature of the aforementioned injury, Plaintiffs and the Class have no adequate
8 remedy at law.

9 101. Pursuant to § 1780(a)(2) of the CLRA, Plaintiffs seek an order enjoining the above
10 described wrongful practices of the Bank, including, but not limited to, an order: (1) enjoining the
11 Bank from continuing to collect unconscionable overdraft fees; (2) requiring the Bank to disclose
12 to its customers that they have the *right* to opt out of the Bank's overdraft scheme and providing
13 them with a process to do so; and (3) requiring the Bank to notify its customers when a POS
14 and/or ATM transaction will cause them to incur an overdraft charge and requiring the customer
15 to make an affirmative election whether or not to proceed.

16 102. On April 8, 2009, Plaintiffs sent a CLRA notice letter to the Bank, a copy of which
17 is attached hereto as Exhibit G. If the Bank fails to provide appropriate relief for its violations of
18 CLRA §§ 1770(a)(5), (14) and (19) within 30 days of receipt of Plaintiffs' notification, in
19 accordance with Civ. Code § 1782(b), Plaintiffs are entitled, under CLRA § 1780, to recover or
20 obtain any of the following relief for the Bank's violations of CLRA §§ 1770(a)(5), (14) and (19):

- 21 (a) actual damages under CLRA § 1780(a)(1);
22 (b) restitution of property under CLRA § 1780(a)(2);
23 (c) punitive damages under CLRA § 1780(a)(4) and because the Bank has
24 engaged in fraud, malice or oppression;
25 (d) attorneys' fees and costs under CLRA § 1780(d); and
26 (e) any other relief the Court deems proper under CLRA § 1780(a)(5).

1 **SECOND CLAIM FOR RELIEF**
2 **(Violations of California Business & Profession Code § 17200, *et seq.*)**

3 103. Plaintiffs, individually and on behalf of all others similarly situated, hereby
4 incorporate by reference all of the foregoing paragraphs as if fully set forth herein.

5 104. The Bank's conduct described herein violates Business and Professions Code
6 § 17200 (The Unfair Competition Law, or "UCL") in the following respects:

7 (a) The Bank's conduct in charging overdraft fees is unconscionable, a
8 violation of California Civil Code § 1770(a)(19) and, consequently, constitutes an unlawful
9 business act or practice within the meaning of the UCL;

10 (b) The Bank's practices, as described herein, violate California Civil Code
11 §§ 1770(a)(5), (14) and (19), and consequently, constitute unlawful business acts or practices
12 within the meaning of the UCL;

13 (c) The Bank's policies and practices regarding overdraft fees constitute unfair
14 business acts or practices within the meaning of the UCL; and

15 (d) The Bank's policies and practices regarding overdraft fees are likely to
16 mislead the general public and, consequently, constitute fraudulent business acts or practices
17 within the meaning of the UCL.

18 105. The harm to Plaintiffs and the Class arising from the Bank's unlawful, unfair and
19 fraudulent practices outweighs the utility, if any, of those practices.

20 106. The unlawful, unfair and fraudulent business practices of the Bank are immoral,
21 unethical, oppressive, unscrupulous, unconscionable and/or substantially injurious to Plaintiffs
22 and members of the Class.

23 107. As a result of the Bank's violation of the UCL, Plaintiffs and members of the Class
24 have paid, and/or will continue to pay, excessive amounts of money for banking services and
25 thereby suffered and will continue to suffer actual damages.

26 108. Pursuant to California Business and Professions Code § 17203, Plaintiffs and the
27 Class that they seek to represent are therefore entitled to:
28

1 (a) an Order requiring the Bank to cease the acts of unfair competition alleged
2 herein;

3 (b) an Order enjoining the Bank from continuing to collect overdraft fees from
4 California consumers on check-card transaction, including POS and ATM transactions, unless the
5 consumer is notified at the time of the transaction that an overdraft fee will be charged and unless
6 the consumer is given the option to decline the transaction without incurring an overdraft fee;

7 (c) full restitution of all overdraft fees paid to the Bank on check card
8 transactions, including POS and ATM transactions, pursuant to California Code of Civil
9 Procedure § 384;

10 (d) pre-judgment interest at the highest rate allowable by law; and

11 (e) payment of their attorneys' fees and costs pursuant to, *inter alia*, Cal. Code
12 Civ. Proc. § 1021.5.

13 **THIRD CLAIM FOR RELIEF**
14 **(Conversion)**

15 109. Plaintiffs incorporate by reference and re-allege all paragraphs previously alleged
16 herein.

17 110. Plaintiffs and Class members own and have the right to possess the money in their
18 checking accounts.

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

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

1 113. Plaintiffs and Class members have been, and will continue to be, damaged by the
2 Bank's wrongful assessment of overdraft fees in an amount that is capable of identification
3 through the Bank's records.

4 114. Plaintiffs are entitled to punitive damages because the Bank has engaged in fraud,
5 malice or oppression.

6 **FOURTH CLAIM FOR RELIEF**
7 **(Breach of Implied Covenant of Good Faith and Fair Dealing)**

8 115. Plaintiffs, individually and on behalf of all others similarly situated, hereby
9 incorporate by reference all of the foregoing paragraphs as if fully set forth herein.

10 116. Under California common law, a covenant of good faith and fair dealing is implied
11 into every contract.

12 117. The Bank violated this covenant of good faith and fair dealing in the Deposit
13 Agreement between it and Plaintiffs and the Class by charging Plaintiffs and the Class
14 unconscionable overdraft fees and disclosing the mechanism for assessing these fees in a
15 deceptive and misleading manner.

16 118. Plaintiffs and members of the Class performed all, or substantially all of the
17 significant duties required by the Deposit Agreement, Fee Agreement and Card Agreement.

18 119. The conditions required for the Bank's performance under the Deposit Agreement,
19 Fee Agreement and Card Agreement had occurred.

20 120. The Bank unfairly interfered with the right of Plaintiffs and Class members to
21 receive the benefits under the Agreement.

22 121. Plaintiffs and the Class have been, and will continue to be, damaged by the Bank's
23 breach of the implied covenant of good faith, and the resulting overdraft fees in an amount that is
24 capable of identification through the Bank's records.

25 **FIFTH CLAIM FOR RELIEF**
26 **(Unjust Enrichment and Restitution)**

27 122. Plaintiffs, individually and on behalf of all others similarly situated, hereby
28 incorporate by reference all of the foregoing paragraphs as if fully set forth herein.

1 123. By charging excessive overdraft fees pursuant to unconscionable contract terms, in
2 violation of the CLRA, Cal. Civ. Code §§ 1770(a)(5), (14)(19), and in violation of the Cal. Bus.
3 Prof. Code. § 17000, the Bank unjustly received a benefit at the expense of Plaintiffs and Class
4 members.

5 124. It is unjust to allow the Bank to retain the profits from its charging of unlawful and
6 unconscionable overdraft fees without providing compensation to Plaintiffs and the Class.

7 125. The Bank acted with conscious disregard for the rights of Plaintiffs and Class
8 members.

9 126. Plaintiffs and Class members are entitled to restitution.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiffs, on behalf of themselves and the members of the Class they
12 seek to represent, demand a jury trial and judgment as follows:

13 1. Preliminary and permanent injunctive relief enjoining the Bank from charging
14 overdraft fees under its current policies and from engaging in the acts of unfair competition
15 alleged herein.

16 2. Restitution of all overdraft fees paid to the Bank by Plaintiffs and the Class in the
17 past four years in an amount to be determined at trial;

18 3. Disgorgement of the ill-gotten gains derived from the Bank's misconduct;

19 4. Actual damages in an amount according to proof;

20 5. Punitive and exemplary damages;

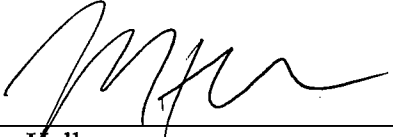
21 6. Pre-judgment interest at the highest rate permitted by law;

22 7. The costs and disbursements incurred by Plaintiffs in connection with this action,
23 including reasonable attorneys' fees pursuant to California Code of Civil Procedure § 1021.5 and
24 California Civil Code § 1780; and

25 8. Such other and further relief as the Court deems just and proper.

1 Dated: April 9, 2009

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2
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