

CAUSE NO. \_\_\_\_\_

<b>NATASHA GOLDEN DURHAM,</b>	§	<b>IN THE DISTRICT COURT OF</b>
<b>PATRICIA SMITH, BRENDA WAGNER,</b>	§	
<b>JANET LUNA, LATONYA</b>	§	
<b>BUSBY, MICHAEL SCONION, LEONARD</b>	§	
<b>RAMIREZ, TIFFANY JOHNSON,</b>	§	
<b>CYNTHIA KEITH, BRENDA MORROTT,</b>	§	
<b>JOSEPH MURRAY, MICHAEL SHARP,</b>	§	
<b>SHANNON SOTO, RICHARD STEWART,</b>	§	
<b>ROY STEWART, AND MICHAEL TURNER,</b>	§	
<b>Plaintiffs,</b>	§	
	§	
<b>v.</b>	§	<b>HARRIS COUNTY, T E X A S</b>
	§	
<b>FORT HOOD NATIONAL BANK, FIRST</b>	§	
<b>NATIONAL BANK</b>	§	
<b>TEXAS D/B/A FIRST</b>	§	
<b>CONVENIENCE BANK,</b>	§	
<b>FCBI DELAWARE, INC.</b>	§	
<b>AND FIRST COMMUNITY</b>	§	
<b>BANCSHARES, INC.,</b>	§	<b>_____ JUDICIAL DISTRICT</b>
<b>Defendants.</b>	§	

**PLAINTIFFS' ORIGINAL CLASS ACTION PETITION**

**TO THE HONORABLE JUDGE OF SAID COURT:**

COME NOW Plaintiffs and purported Class members, Natasha Golden Durham, Patricia Smith, Brenda Wagner, Janet Luna, Latonya Busby, Michael Sconion, Leonard Ramirez, Tiffany Johnson, Cynthia Keith, Brenda Morrott, Joseph Murray, Michael Sharp, Shannon Soto, Richard Stewart, Roy Stewart and Michael Turner, and complain of Defendants Fort Hood National Bank, First National Bank Texas d/b/a First Convenience Bank, FCBI Delaware, Inc. and First Community Bancshares, Inc. (collectively "FNB"). In support of all Plaintiffs' claims and causes of action, Plaintiffs would respectfully show this Honorable Court as follows:

### **DISCOVERY LEVEL**

1. Based upon the complex nature of this case, the number of potential Class members involved, and due to the sheer amount of documentary evidence and witnesses anticipated, Plaintiffs intend for discovery to be conducted at Level 3, pursuant to Rule 190 of the Texas Rules of Civil Procedure.

### **JURISDICTION AND VENUE**

2. This Honorable Court has jurisdiction to hear Plaintiffs' claims under Texas common law and Texas statutory law. Inarguably, the amount in controversy vastly exceeds the minimum jurisdictional limits of this Court. Venue is also proper, as all or a substantial part of the events giving rise to this suit occurred within Harris County, Texas.

### **THE NATURE OF PLAINTIFFS' LAWSUIT AND THE CRITICAL IMPORTANCE OF THIS MATTER**

3. The Defendants in this case are comprised of banking institutions that make daily, monthly and yearly profits into the billions of dollars, based in large part upon complete and blatant misrepresentations made consciously and systematically to its customer base, which includes both new and veteran members of our United States Armed Forces. Indeed, while the Plaintiffs in this case include our American soldiers, it is all the more shocking and sickening that the financial institutions, which include the FNB Defendants, purposely take advantage of the individuals that sacrifice their lives so that the American public can eat, sleep, work and otherwise exist beneath the blanket of freedom that these troops provide. Moreover, it is horribly ironic that our American way of life, which clearly includes capitalism and the ability to seek profit through doing business with the consumer public, is being taken advantage of by the FNB Defendants, who have devised systematic schemes to defraud and deprive our soldiers, as well as

the remaining Plaintiffs and purported Class members, of their hard earned wages and salaries in order to unduly profit from deceit and duplicity.

4. As this Honorable Court will see, as the parties well know, and as our American public will quickly learn, the above described actions of FNB are replete with fraud, misrepresentation, conversion, and innumerable deceptive acts all operating in concert to achieve a single purpose: depriving the members of our Armed Forces, and of our working public, of their hard earned pay. Also undisputed is that the FNB Defendants carry out such acts with full knowledge that our soldiers and citizens have placed their trust and (in many instances) their entire family's income into the hands of the FNB Defendants, who have calculated, re-calculated and mastered exactly how to thief as much money as possible from these individuals. Until the American public is aware of these actions, and until our American jury system renders its verdict regarding the consequences that the FNB Defendants must reap, such unscrupulous methodologies will prevail, taking full advantage of, and completely abusing, the very freedoms that our United States troops sacrifice their lives to secure and defend.

#### **THE PARTIES**

5. All Plaintiffs include members of the United States armed forces, and are residents of the State of Texas. Plaintiffs maintain checking accounts with FNB, and have been injured as a result of FNB's improper practices as alleged herein.

6. The members of the Class are those individuals that have been charged overdraft fees as a result of FNB's use of a non-chronological and/or largest-to-smallest re-ordering system for the posting of debits to customer accounts, and due to the practice of assessing overdraft fees when sufficient funds exist in each customer's account. Upon well founded information and good faith belief, members of the Class number into the thousands.

7. Fort Hood National Bank is a wholly-owned subsidiary of FCBI Delaware, Inc., which has its banking offices located in Texas. This Defendant is principle among those directly responsible for the above described actions, which operate to deceive Plaintiffs and purported Class members alike, and defraud the same of their families' livelihood. Fort Hood National Bank may be served with citation and a copy of this Original Class Action Petition by serving its registered agent, James W. Meredith, at 507 North Gray Street, Killeen, Texas 76540, or at any location where he may be found.

8. First National Bank Texas d/b/a First Convenience Bank is a wholly-owned subsidiary of FCBI Delaware, Inc., which has its principle banking offices located in Texas. First National Bank Texas d/b/a First Convenience Bank may be served with citation and a copy of this Original Class Action Petition by serving its registered agent, James W. Meredith, at 507 North Gray Street, Killeen, Texas 76540, or at any location where he may be found.

9. Defendant FCBI Delaware, Inc. is an entity incorporated under the laws of Delaware, with a principal place of business located at 1105 N. Market St., Wilmington, Delaware 19801. FCBI Delaware, Inc. may be served with citation and a copy of this Original Class Action Petition by serving its registered agent, Wilmington Trust SP Services, Inc., at 1105 N. Market Street, Suite 1300, Wilmington, Delaware 19801, or at any location where it may be found.

10. Defendant First Community Bancshares, Inc. is a bank holding company headquartered in Texas. First Community Bancshares, Inc. may be served with citation and a copy of this Original Class Action Petition by serving its registered agent, James W. Meredith, at 507 North Gray Street, Killeen, Texas 76540, or at any location where he may be found.

## THE CLASS

11. Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to Rule 42 of the Texas Rules of Civil Procedure. In that regard, this action objectively satisfies the numerosity, commonality, typicality, adequacy, predominance and superiority requirements of Rule 42.

12. Specifically, the proposed Class is defined as:

All FNB customers in the United States who, within the applicable statute of limitations preceding the filing of this action to the date of Class certification, incurred any overdraft fee(s) as a result of FNB's practices of re-sequencing financial transactions from highest to lowest, and by assessing overdraft fees even when a customer had sufficient funds in their account (the "Class").

For instance, when a customer transaction was declined for insufficient funds and no transaction was processed or funds expended by the bank on behalf of the customer, FNB nevertheless repeatedly charged unlawful and egregious fees to customer accounts in a fraudulent manner.

13. Plaintiffs reserve the right to modify or amend the definition of the proposed Class before this Honorable Court determines whether certification is appropriate.

14. Included in the Class are FNB, its parents, subsidiaries, affiliates, officers and directors, any entity in which FNB has a controlling interest, save and except all customers who make a timely election to be excluded, governmental entities and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

15. The members of the Class are so numerous that joinder is impractical. The Class consists of thousands of members, the identity of whom is within the knowledge of and can be ascertained only by resort to FNB's records.

16. The claims of the representative Plaintiffs are typical of the claims of the Class in that the representative Plaintiffs, like all Class members, were charged overdraft fees by FNB as a result of its practices of re-sequencing transactions from highest to lowest, and by assessing overdraft fees even when a customer had sufficient funds in their account. The representative Plaintiffs, like all Class members, have been damaged by FNB's conduct, in that they have been assessed and/or will continue to be assessed unfair and unconscionable overdraft charges. Furthermore, the factual basis of FNB's misconduct is common to all Class members, and represents a common thread of unfair and unconscionable conduct resulting in injury to all members of the Class.

17. There are numerous questions of law and fact common to the Class, and those common questions predominate over any questions affecting only individual Class members.

18. Among the questions of law and fact common to the Class are whether FNB:

- a. did not clearly disclose and/or refused to allow customers to opt out of their overdraft protection programs;
- b. did not obtain affirmative consent from customers prior to processing transaction that resulted in overdraft fees;
- c. did not alert its customers that a debit card transaction will trigger an overdraft fee, and did not provide its customers with an opportunity to cancel such transactions;
- d. manipulates and re-orders transactions so that it can increase the number of overdraft fees it imposes;

- e. manipulates and re-orders debits from highest to lowest in order to maximize the number of overdrafts and, consequently, the amount of overdraft fees;
- f. imposes overdrafts and overdraft fees when, but for re-ordering transactions, there would otherwise be sufficient funds in the account;
- g. fails to provide customers with accurate balance information;
- h. charges exorbitant overdraft fees that bear no relationship to the actual costs and risks of covering insufficient funds transactions;
- i. breaches its covenant of good faith and fair dealing with Plaintiffs and other members of the Class through its overdraft policies and practices;
- j. requires its customers to enter into standardized account agreements which include unconscionable provisions;
- k. coverts moneys belonging to Plaintiffs and other members of the Class through its overdraft policies and practices; and
- l. is unjustly enriched through its overdraft policies and practices.

19. Other questions of law and fact common to the Class specifically relate to:

- a. the proper method or methods by which to measure damages; and
- b. the declaratory relief to which the Class is entitled.

20. Plaintiffs' claims are typical of the claims of other Class members, in that they arise out of the same wrongful overdraft policies and practices, and the same or substantially similar unconscionable provisions of FNB's account agreements and other related documents. Plaintiffs have suffered the harm alleged and have no interests antagonistic to the interests of any other Class member.

21. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in the prosecution of Class actions and, in particular, Class actions on behalf of consumers and against financial institutions. Accordingly, Plaintiffs are adequate representatives and will fairly and adequately protect the interests of the Class.

22. Clearly and objectively, a Class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the amount of each individual Class member's claim is small relative to the complexity of the litigation, and due to the financial resources of FBN, no Class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a Class action, all Class members will continue to suffer losses, and FNB's misconduct will proceed without remedy.

23. Even if Class members themselves could afford such individual litigation, the court system could not. Given the complex legal and factual issues involved, individualized litigation would significantly increase the delay and expense to all parties and to the Court. Individualized litigation would also create the potential for inconsistent or contradictory rulings. By contrast, a Class action presents far fewer management difficulties, allows claims to be heard which might otherwise go unheard because of the relative expense of bringing individual lawsuits, and provides the benefits of adjudication, economies of scale and comprehensive supervision by a single court.

### **INTRODUCTION**

24. This is a civil Class action seeking monetary damages, restitution and declaratory relief from Defendants, including Fort Hood National Bank, First National Bank Texas d/b/a First Convenience Bank, FCBI Delaware, Inc. and First Community Bancshares, Inc., arising from

their unfair and unconscionable assessment and collection of excessive overdraft fees, which have included the following unlawful tactics and activities:

- a. Charging overdraft fees when an item is not covered;
- b. Denying charges for customer purchases yet still assessing overdraft fees;
- c. Assessing uneven dollar amount overdraft fees to make tracking such fees harder for customers;
- d. Imposing overdraft fees when an overdraft limit is exceeded; and
- e. Encouraging lower-income customers to open accounts for \$1 in order to establish a cycle of debt with a new customer.

25. In the era of electronic banking and the ubiquitous use of debit card transactions, the assessment of overdraft fees has become a major profit center for many United States banks, including FNB. For years, banks covered customers who occasionally bounced checks and even did so for a time for customers using debit cards, without charging their customers. Since the early 1990s, however, banks have devised methods to provide overdraft “protection” for customers and charge them in each instance including charging overdraft fees for items that are not covered. A recent FDIC report estimated that overdraft fees represent 74 percent of the total service charges that are imposed on deposit accounts in the United States. Moreover, a 2008 FDIC study reports that overdraft fees for debit cards can carry an effective annualized interest rate that *exceeds 3,500 percent*. Nevertheless, the Consumer Federation of America reports that five of the ten largest banks raised their overdraft fees in the last year.

26. In 2007, banks collected more than \$17 billion in overdraft fees. That number nearly doubled in 2008, as more and more consumers struggled to maintain positive checking account

balances. *In 2009, banks were estimated to bring in between \$27 billion to \$38.5 billion in overdraft charges alone.*

27. Almost by definition, these fees disproportionately affect the poor, who are most likely to maintain low balances. Moebs Services, a research company that has conducted studies for the government as well as banks, estimates that 90 percent of overdraft fees are paid by the poorest 10 percent of banks' customer base. Moreover, these fees have the tendency to create a domino effect, because the imposition of a service charge on an account with a negative balance will make it less likely that the account holder's balance will reach positive territory, resulting in more fees.

28. Before debit cards existed, banks occasionally extended the courtesy of honoring paper checks written on overdrawn or otherwise deficient accounts for customers who were typically in good standing. FNB extended this courtesy largely because the third party involved in a sales transaction allowed the customer to pay by check, expecting the funds to be available and the check to clear. For example, if a customer wrote a check to purchase groceries, the grocery store would only know whether the check cleared *after* the groceries had been purchased.

29. The same considerations are not present when customers use debit cards. FNB could simply decline to honor debit or point of sale transactions where accounts lack sufficient funds to execute the transactions. Retail and service transactions could still be executed if consumers presented an alternative form of payment. ATM transactions could still proceed if banks provided a warning that an overdraft fee would be assessed, and customers chose to proceed nevertheless. In fact, until a few years ago, most banks simply declined debit transactions that would overdraw an account.

30. Instead of simply declining debit transactions when there are insufficient funds, or warning its customers that an overdraft fee will be assessed if they proceed with the transaction, FNB routinely processes such transactions and then charges its customers an overdraft fee for each charge, even when the transactions is for only a few dollars.<sup>1</sup> This automatic, fee-based overdraft scheme is intentionally designed to maximize overdraft fee revenue for FNB. Additionally, as part of its inequitable motive to generate obscene profits gained through the imposition of unconscionable overdraft fees, FNB fails to adequately disclose to its customers that they may elect to opt out of overdraft protection.

31. In many instances, these overdraft fees cost FNB account holders hundreds of dollars in a matter of days, or even hours, when they may be “overdrafted” by only a few dollars. Even more egregious, customer accounts may not actually be overdrawn at the time the overdraft fees are charged, or at the time of the debit transaction.

32. Thus, it is through manipulation and alteration of customers’ transaction records that FNB maximizes overdraft penalties imposed on customers.

### **COMMON FACTUAL ALLEGATIONS**

#### **A. Fort Hood National Bank**

33. Fort Hood National Bank is in the business of providing its armed forces customers with a variety of banking services. In addition, Fort Hood National Bank enjoys the distinction of being the only bank on the base at Fort Hood - the United States largest military base. One of the services provided by Fort Hood National Bank for its armed forces customers who open a checking account, is the use of a debit card, also known as a check card or ATM card. Through those debit cards, customers can engage in transactions using funds directly from their accounts

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<sup>1</sup> Previously, FNB charged \$34 per overdraft occurrence, but at some point in the last year increased that amount to \$36. At other times FNB has staggered fee amounts to make it harder for customers to track.

by engaging in “debit” or POS transactions, or may withdraw money from their accounts at ATMs. Whether the card is used to execute POS transactions or to withdraw cash from ATMs, the transaction is processed electronically. As a result, Fort Hood National Bank is notified instantaneously when the card is swiped, and has the option to accept or decline transactions at such time.

34. Fort Hood National Bank employs sophisticated software to automate its overdraft system. This program maximizes the number of overdrafts, and thus, the amount of overdraft fees charged per customer.

35. As a result of Fort Hood National Bank’s manipulation and alteration of customers’ transaction records, funds in a customer’s account are depleted more rapidly and more overdraft fees are likely to be charged for multiple smaller transactions. Indeed, overdraft charges are likely to occur at times when, but for the manipulation and alteration, there would be funds in the account and no overdraft would occur. For example, if a customer, whose account has a \$50 balance at the time Fort Hood National Bank processed several transactions, made four transactions of \$10 and one subsequent transaction of \$100 on the same day, FNB would re-order the debits from largest to smallest, imposing five overdraft fees on the customer. Conversely, if the \$100 transaction were debited last – consistent with the actual order of transactions – only one overdraft fee would be assessed. *See* FDIC Study of Bank Overdraft Programs, November 2008, available at: <http://www.fdic.gov/bank/analytical/overdraft/>, at 11, n. 12.

36. Fort Hood National Bank has established a practice of setting accounts based on income and balance levels in order to maximize the overdraft fees it could charge armed forces customers.

37. Further, Fort Hood National Bank has established a highly sophisticated practice of placing their armed forces customers in perpetual and revolving cycles of negative account balances by systematically selecting fee payments to ensure amounts owed are never fully paid by armed forces customers, thus starting each armed service man or woman in a negative overdraft cycle monthly.

38. Perhaps most egregiously, Fort Hood National Bank has established a practice of providing early deposits to men and women of the United States Armed Forces to encourage spending while either in an overdraft position or in anticipation of placing the individual in an overdraft position.

39. Fort Hood National Bank has established a highly sophisticated practice of placing armed forces personnel in perpetual and revolving cycles of negative account balances by allowing military personnel to open accounts with zero balances knowing direct deposits will be received in order to establish customers who Fort Hood National Bank believes cannot maintain consistent balances and/or are more likely to incur overdraft charges.

40. Fort Hood National Bank has also established a highly sophisticated electronic practice of drafting accounts based upon prior monthly deposits wherein armed forces customers are allowed to overdraft accounts up to, but not exceeding, monthly deposits. This practice is designed to prevent customers from escaping the cycle of debt related fees and to ensure Fort Hood National Bank maintains a steady pattern of perpetually over-drafted armed forces customers.

**B. First National Bank Texas d/b/a First Convenience Bank**

41. First National Bank Texas d/b/a First Convenience Bank is also in the business of providing its customers with a variety of banking services. One of the services provided by First National

Bank Texas d/b/a First Convenience Bank for customers who open a checking account is a debit card, also known as a check card or ATM card. Through those debit cards, customers can engage in transactions using funds directly from their accounts by engaging in “debit” or “point of sale” (“POS”) transactions, or may withdraw money from their accounts at automated teller machines (“ATMs”). Whether the card is used to execute POS transactions or to withdraw cash from ATMs, the transaction is processed electronically. As a result, First National Bank Texas d/b/a First Convenience Bank is notified instantaneously when the card is swiped, and has the option to accept or decline transactions at such time.

42. First National Bank Texas d/b/a First Convenience Bank employs sophisticated software to automate its overdraft system. This program maximizes the number of overdrafts, and thus, the amount of overdraft fees charged per customer.

43. As a result of First National Bank Texas d/b/a First Convenience Bank’s manipulation and alteration of customers’ transaction records, funds in a customer’s account are depleted more rapidly and more overdraft fees are likely to be charged for multiple smaller transactions. Indeed, overdraft charges are likely to occur at times when, but for the manipulation and alteration, there would be funds in the account and no overdraft would occur. For example, if a customer, whose account has a \$50 balance at the time First National Bank Texas d/b/a First Convenience Bank processed several transactions, made four transactions of \$10 and one subsequent transaction of \$100 on the same day, FNB would re-order the debits from largest to smallest, imposing five overdraft fees on the customer. Conversely, if the \$100 transaction were debited last – consistent with the actual order of transactions –only one overdraft fee would be assessed. See FDIC Study of Bank Overdraft Programs, November 2008, *available at: <http://www.fdic.gov/bank/analytical/overdraft/>*, at 11, n. 12.

44. First National Bank Texas d/b/a First Convenience Bank has established a practice of setting accounts based on income and balance levels in order to maximize the overdraft fees it could charge Plaintiffs.

45. First National Bank Texas d/b/a First Convenience Bank has established a highly sophisticated practice of placing Plaintiffs in perpetual and revolving cycles of negative account balances by systematically selecting fee payments to ensure amounts owed are never fully paid by Plaintiffs thus starting Plaintiffs in a negative overdraft cycle monthly.

46. First National Bank Texas d/b/a First Convenience Bank has established a highly sophisticated practice of placing Plaintiffs in perpetual and revolving cycles of negative account balances by allowing lower income customers to open accounts for as little as \$1 in order to establish new customers who FNB believes cannot maintain consistent balances and who are more likely to incur overdraft charges.

47. First National Bank Texas d/b/a First Convenience Bank has established a highly sophisticated electronic practice of drafting accounts based upon prior monthly deposits wherein customers are allowed to overdraft accounts up to but not exceeding monthly deposits. This practice is designed to prevent customers from escaping the cycle of debt related fees and to ensure FNB maintains a steady pattern of perpetually over-drafted customers.

**C. FNB's Relevant Customer Documents Regarding Overdrafts**

48. Plaintiffs and all members of the Class maintain or maintained a checking account with FNB. The terms of FNB's checking accounts are contained in standardized account holder agreements, presented to its customers on a "take it or leave it" basis, drafted and imposed by FNB, which was the party of vastly superior bargaining strength, and thus constitute agreements of adhesion.

49. Until required to do so by federal regulators in 2010, FNB failed to give customers the opportunity to “opt out” of FNB’s overdraft scheme.

50. FNB’s account agreement did not disclose FNB’s improper re-ordering and overdraft assessment practices described herein.

**D. FNB’s Re-Ordering of Checking Account Transactions**

51. In the effort to maximize overdraft revenue, FNB manipulates and re-orders debits from highest to lowest. Further, FNB re-orders transactions for no reason other than to increase the number of exorbitant overdraft fees it can charge. This practice violates numerous consumer protection laws and the account agreement, which is subject to the covenant of good faith and fair dealing.

52. In addition, FNB misleads its customers regarding its re-ordering and overdraft assessment practices which are never properly disclosed.

53. Transactions involving debit cards used by FNB customers, including the withdrawal of cash from ATM machines and POS transactions with vendors, are processed electronically. As a result, FNB is notified instantaneously when the customer’s debit card is swiped, and has the option to accept or decline these transactions.

54. Notwithstanding the instantaneous nature of these electronic debit card transactions, under FNB’s posting system, it fails to post charges in the order in which they are assessed or received. FNB developed a policy and employs a practice whereby account charges and debits are posted to its customers’ accounts out of chronological order for the sole purpose of maximizing the number of overdraft transactions and, therefore, the amount of overdraft fees charged to its customers. Debit card transactions which have a time-stamp for the precise time of authorization are also re-ordered and posted after transactions for which no time-stamp exists for the sole

purpose of maximizing the number of overdraft transactions and, therefore, the amount of overdraft fees charged to its customers.

55. Instead of processing such transactions in chronological order, FNB processes them starting with the largest debit and ending with the smallest debit, so as to generate the largest possible number of overdrafts and the greatest possible amount of overdraft fees.

56. FNB refrains from immediately posting charges to a customer's account as it receives them. By holding charges rather than posting them immediately to an account, FNB is able to amass a number of charges on the account. Subsequently, FNB posts all of the amassed charges on a single date. When the group of charges is eventually posted to the customer's account, FNB posts them in the order of largest to smallest – not in the order in which they were received or in the order in which they were charged. It also posts transactions with no time-stamp before debit card transactions for which a precise time-stamp is known. This delayed posting results in the imposition of multiple overdraft fees that would not otherwise be imposed. The delayed posting also prevents customers from ascertaining the accurate balances in their accounts.

57. FNB's policy and practice of posting charges from largest to smallest, rather than chronologically, or from smallest to largest, is specifically designed to maximize the generation of overdraft fees by triggering overdraft fees for account charges that would not otherwise result in such fees.

58. FNB enforces an unconscionable policy whereby charges assessed are posted to customers' accounts in a non-chronological order, from highest to lowest, and are held and then batched together, to maximize the number of overdraft transactions and fees. FNB's processing practices substantially increase the likelihood that customers' small charges will result in multiple

overdraft fees. The practices provide FNB with substantially higher service fee revenues than it would otherwise achieve absent these practices.

59. As a result, Plaintiffs and all members of the Class have been assessed overdraft fees for transactions which occurred when they actually had sufficient funds in their accounts to cover those transactions.

**E. FNB's Cloaking of Accurate Balance Information**

60. FNB actively promotes the convenience of its debit cards and other electronic debiting, but fails to provide customers with accurate balance information. When customers executed account transactions, they generally do not have access to an accurate balance register or balance information.

61. FNB provides inaccurate balance information to its customers through its electronic network. In certain cases, FNB informs its customers that they have a positive balance when, in reality, FNB has actual knowledge of outstanding debits and transactions which should be made clear to the customer but are not.

62. Even when FNB has actual knowledge of outstanding transactions that have already created a negative balance in a customer's account, it encourages the customer to incur more overdraft charges by approving – rather than prudently declining or at least notifying the customer of the status – subsequent debit card purchases and other electronic transactions.

**F. FNB's Failure to Notify Customers of Overdraft or Advise Customers of their Right to Opt Out**

63. At the time its debit cards are in POS transactions or at ATMs, FNB is able to determine, almost instantaneously, whether there are sufficient funds in a customer's account to cover that particular transaction. FNB has the technological capability to decline transactions (which it does when a pending transaction would exceed a pre-determined, overdraft tolerance limit for the

account), or notify customers at that very moment that the particular debit card transaction would result in an overdraft. Prior to the effective date of the opt in/opt out requirements of Regulation E (the “Effective Date”), FNB could have given customers the option to decline the transaction to avoid incurring overdraft fees, but it failed to do so because it sought to maximize the amount of revenue generated through its assessment of overdraft fees.

64. Notwithstanding its technological capabilities and actual knowledge, FNB failed to provide notice to Plaintiffs and the Class that a particular debit card transaction would result in an overdraft and, hence, an overdraft fee. Because FNB’s customers were not notified of the potential overdraft, and were not given the option of declining the debit card transaction or providing another form of payment, the customers were assessed monetary damages in the form of overdraft fees.

65. Prior to the Effective Date, FNB failed to allow Plaintiffs and Class members to opt out of its overdraft scheme, thereby preventing them from ensuring that they avoided any overdraft fees from being charged.

**G. FNB’s Overdraft Policies and Practices Are Contrary to Best Practices**

66. By engaging in the conduct described herein, FNB has failed to follow the list of “best practices” for overdraft programs set forth in the “Joint Guidance on Overdraft protection Programs” (“Joint Guidance”) issued by the United States Department of the Treasury, the Office of the Comptroller of the currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the National Credit Union Administration (collectively, the “Agencies”). These “best practice” recommendations include: “Provide election or opt-out of service. Obtain affirmative consent of consumers to receive overdraft protection. Alternatively, where overdraft protection is automatically provided, permit

consumers to ‘opt-out’ of the overdraft program and provide a clear consumer disclosure of this option.” 70 F.R. 9127-01, 9132.

67. According to rules proposed by the Agencies: “Injury [caused by overdraft charges] is not outweighed by countervailing benefits . . . This is particularly the case for ATM withdrawals and POS debit card transactions where, but for the overdraft service, the transaction would typically be denied and the customer would be given the opportunity to provide other forms of payment without incurring any fee.” 73 F.R. 28904-01, 28929 (May 19, 2008).

68. The Joint Guidance also advises banks to “[a]lert customers before a transaction triggers any fees. When consumers attempt to withdraw or transfer funds made available through an overdraft protection program, provide a specific consumer notice, where feasible, that completing the withdrawal may trigger the overdraft fees.” 70 F.R.D. 9127, 9132. The Joint Guidance further advises that “[t]his notice should be presented in a manner that permits consumers to cancel the attempted withdrawal or transfer after receiving the notice .” *Id.*

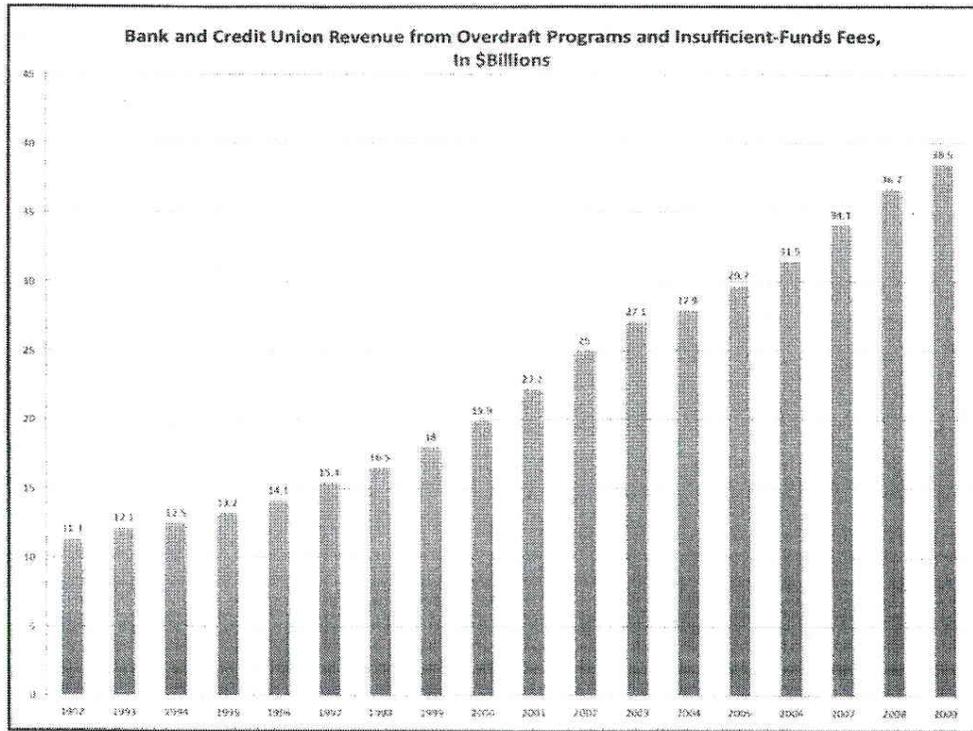
69. Similarly, the list of “best practices” recommended in “Overdraft Protection: A Guide for Bankers,” issued by the American Bankers Association, includes offering customers the option of “opting out” of any overdraft programs, and informing customers, before they access funds, that a particular point of sale or ATM transaction will cause them to incur an overdraft fee. A copy of “Overdraft Protection: A Guide for Banks” is attached as Exhibit “A.”

70. FNB’s overdraft policies make it difficult for customers to avoid injury even if they carefully track the balance of their account. In fact, the Agencies have stated that “Injury” resulting from such policies, “is not reasonably avoidable” by the consumer. 73 F.R. 28904-01, 28929. “It appears that consumers cannot reasonably avoid this injury if they are automatically enrolled in an institution’s overdraft service without having an opportunity to opt out. Although

consumers can reduce the risk of overdrawing their accounts by carefully tracking their credits and debits, consumer often lack sufficient information about key aspects of their account. For example, a consumer cannot know with any degree of certainty when funds from a deposit or a credit for a returned purchase will be made available.” *See id.*

71. On October 6, 2009, the Center for Responsible Lending issued a report entitled “Overdraft Explosion: Bank Fees for Overdrafts Increase 35% in Two Years.” The report, attached hereto as Exhibit “B,” finds that it is now “standard procedure to automatically enroll checking account customers in their most expensive overdraft loan program.” The report finds that debit card transactions account for more overdraft fees than traditional checks or any other type of transaction, even though “debit card transactions and ATM withdrawals . . . could easily be denied for no fee.” The report also finds that overdraft fees increased 35 percent from 2006 to 2008, and that over 50 million Americans overdrew their accounts in a 12-month period, with 27 million accounts incurring five or more overdraft fees.

72. A chart from the research company Moebs Services reflects that, in every year since 1992, banks have gained increased revenues from overdraft fees:



**H. FNB’s Unconscionable Provisions and Policies**

73. Based upon the above, it is clear that FNB’s overdraft policies and practices are unconscionable in the following respects, among others:

- a. Prior to the Effective Date, FNB did not actually disclose or reasonably disclose to customers that they had the option to “opt out” of FNB’s overdraft scheme;
- b. FNB did not obtain affirmative consent from checking account customers prior to processing a transaction that would overdraw the account and result in an overdraft fee;
- c. FNB did not alert its customers that a debit card transaction will trigger an overdraft, and does not provide the customer the opportunity to cancel that transaction before assessing an overdraft fee to the account;

- d. The account agreement and related documents are contracts of adhesion in that they are standardized forms, imposed and drafted by FNB, which is a party of vastly superior bargaining strength, and only relegates to the customer the opportunity to adhere to them or reject the agreement in its entirety; and
- e. The account agreement provided to customers is ineffective, ambiguous, deceptive, unfair, and misleading.

74. The above cited provisions are unconscionable because the contract and related documents, to the extent they are deemed contracts, are unenforceable contracts of adhesion and substantively unconscionable.

**I. FNB's Overdraft Practices Harmed Plaintiffs**

75. FNB's wrongful overdraft policies and practices described above harmed Plaintiffs and members of the Class. The following allegations are made for purposes of illustrating the harm and damage sustained by Plaintiffs and members of the Class as a result of FNB's wrongful overdraft policies and practices.

76. Plaintiffs were at all relevant times checking account customers of FNB.

77. In connection with their account, FNB issued a debit card to Plaintiffs. A debit card allows customers to access their checking account funds by using the card to execute a transaction. The charge is processed electronically, and FNB has the option to accept or decline the transaction at the point of sale.

78. FNB wrongfully charged Plaintiffs multiple overdraft fees.

79. FNB failed to notify Plaintiffs that they could incur overdraft fees on transactions even though there were sufficient funds in the checking account to cover the transaction at the time the

transaction was executed. In addition, FNB never notified Plaintiffs, at the time they executed the purported insufficient funds transactions described above, that their checking account was overdrawn or that they would be charged an overdraft fee as a result of the transactions. Furthermore, FNB paid, rather than returned, all of the debit card charges described above, even though Plaintiffs' respective accounts purportedly lacked sufficient funds to cover the transactions.

80. Based on information and belief, the overdraft charges incurred by Plaintiffs are representative of hundreds of millions of dollars of overdraft fees that FNB wrongfully assessed and deducted from its customers' accounts. These wrongful takings are especially egregious considering the fact that FNB approved each transaction and knew at the time of approval whether there were sufficient funds in the account to cover the transaction.

**J. The Damages Sustained by Plaintiffs and the Class**

81. As shown by these examples, FNB's overdraft policies make it difficult for a customer to avoid injury, even if the customer keeps close track of the balance in his or her account. In fact, the Agencies have stated that "injury" resulting from such policies "is not reasonably avoidable" by consumers. 73 F.R. 28904-01, 28929. "It appears that consumers cannot reasonably avoid this injury if they are automatically enrolled in an institution's overdraft service without having an opportunity to opt out. Although consumers can reduce the risk of overdrawing their accounts by carefully tracking their credits and debits, consumers often lack sufficient information about key aspects of their account. For example, a consumer cannot know with any degree of certainty when funds from deposit or a credit for a returned purchase will be made available." *Id.*

82. According to rules proposed by the Agencies, "Injury [caused by overdraft charges] is not outweighed by countervailing benefits . . . . This is particularly the case for ATM withdrawals

and POS debit card transactions where, but for the overdraft service, the transaction would typically be denied and the consumer would be given the opportunity to provide other forms of payment without incurring any fee.” 73 F.R. 28904-01, 28929 (May 19, 2008).

83. Thus, as a consequence of FNB’s overdraft policies and practices, Plaintiffs and the Class have been wrongfully forced to pay overdraft fees. FNB has improperly deprived Plaintiffs and the Class of significant funds, causing ascertainable monetary losses and damages.

84. Moreover, as a consequence of FNB’s improper overdraft fees, FNB has wrongfully deprived Plaintiffs and the Class of funds to which it had no legitimate claim.

85. Ultimately, Plaintiffs had sufficient funds to cover at least some of the transactions for which they and the Class were charged overdraft fees. Moreover, Plaintiffs and members of the Class either had adequate funds to cover the transactions posted to their accounts, or the accounts were allowed to become overdrawn, even by *de minimis* margins, exclusively so that FNB could impose these wrongful charges. In fact, in many instances, FNB’s manipulation of the process for imposing overdraft fees triggered a cascade of charges that exponentially added to the charges it collected from Plaintiffs and Class members.

86. All conditions precedent to the relief sought herein have either occurred or have been performed or waived.

#### **ALTER EGO**

87. All acts by FNB were undertaken and completed by its officers, agents, servants, employees, and/or representatives. Such were either done with the full authorization or ratification of FNB and/or were completed in their normal and routine course and scope of employment with FNB.

88. Plaintiffs file this lawsuit, in addition to all claims and causes of action set forth below, pursuant to the theory of alter ego. Specifically, the Defendants acted as an alter ego of one another, none of whom had any specific purpose other than to act as a shield in situations where liability is certain, such as in the present lawsuit.

89. As such, any corporate shield or veil that exists to protect FNB individually is thereby pierced, allowing such personal liability to exist against all Defendants, individually, in this matter.

**FIRST CLAIM FOR RELIEF**  
**Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing**  
**(On Behalf of the Class)**

90. Plaintiffs incorporate by reference all facts and circumstances contained within the foregoing paragraphs. Further, this claim is asserted on behalf of the members of each State Sub-Class, pursuant to their respective statutes.

91. Plaintiffs and FNB have contracted for bank account deposit, checking, ATM and debit card services, as embodied in FNB's account agreement and related documentation. FNB has breached its contractual agreements with Plaintiffs and the Class.

92. Breach has also occurred as to FNB's legal and ongoing covenant of good faith and fair dealing. Specifically, good faith is an element of every contract, and pertains in particular to the assessment of overdraft fees. Whether by common law or statute, all such contracts impose upon each party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit – not merely the letter – of the bargain. Indeed, the parties to a contract are mutually obligated to comply with the substance of their contract, in addition to its

form. Evading the spirit of the bargain, and abusing the power to specify terms, constitute examples of bad faith in the performance of contracts.

93. Subterfuge and evasion clearly violate the obligation of good faith in performance, even when an actor believes his conduct to be justified. Moreover, bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of bad faith are evasion of the spirit of the bargain, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

94. In addition to the above, FNB has also breached its contract with Plaintiffs and the Class by failing to comply with the covenant of good faith and fair dealing through its overdraft policies and practices as alleged herein.

95. Without agreement, both the Plaintiffs and the Class have performed all, or substantially all, of the obligations imposed upon them under the account agreement.

96. Accordingly, Plaintiffs and members of the Class have sustained damages as a result of FNB's breach of the covenant of good faith and fair dealing.

## **SECOND CLAIM FOR RELIEF**

### **Unconscionability**

#### **(On Behalf of the Class)**

97. Plaintiffs incorporate by reference all facts and circumstances contained within the foregoing paragraphs. Further, this claim is asserted on behalf of the members of each State Sub-Class, pursuant to their respective statutes.

98. FNB's overdraft policies and practices are or were substantively and procedurally unconscionable in the following respects, among others:

- a. Prior to the Effective Date, FNB did not disclose or reasonably disclose to customers that they had the option to “opt out” of FNB’s overdraft scheme;
- b. FNB did not obtain affirmative consent from check account customers prior to processing a transaction that would overdraw the account and result in an overdraft fee;
- c. FNB did not alert its customers that a debit card transaction will trigger an overdraft, and does not provide the customer the opportunity to cancel that transaction before assessing an overdraft fee;
- d. The account agreement and related documents are contracts of adhesion in that they are standardized forms, imposed and drafted by FNB, which is a party of vastly superior bargaining strength, and only relegates to the customer the opportunity to adhere to them or reject the agreement in its entirety;
- e. The amount of the overdraft fees is disclosed in an ineffective, ambiguous, misleading and unfair manner; and
- f. The account agreement provided to customers is ineffective, ambiguous, deceptive, unfair, and misleading in that it does not unambiguously state that FNB always re-orders debits from high to low, even though FNB *always* re-orders transactions in this way for customers in order to maximize overdrafts and overdraft fee revenues for FNB.

99. Considering the great business acumen and experience of FNB in relation to Plaintiffs and the Class, the great disparity in the parties’ relative bargaining power, the inconspicuousness and

incomprehensibility of the contract language at issue, the oppressiveness of all contract terms, the commercial unreasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and based upon similar public policy concerns, these provisions are unconscionable and, therefore, unenforceable as a matter of law.

100. The imposition of overdraft charges which exceed the amount overdrawn (i.e., the imposition of a \$36 charge on an overdraft of less than \$36) is itself unconscionable. Such charges are not reasonably related to FNB's cost of covering the overdraft and/or its risk of nonpayment (where FNB pays the overdraft), or to FNB's cost of returning the item unpaid (where FNB does not pay the overdraft).

101. Plaintiffs and members of the Class have sustained damages as a result of FNB's unconscionable policies and practices as alleged herein.

### **THIRD CLAIM FOR RELIEF**

#### **Conversion**

#### **(On Behalf of the Class)**

102. Plaintiffs incorporate by reference all facts and circumstances contained within the foregoing paragraphs. Further, this claim is asserted on behalf of the members of each State Sub-Class, pursuant to their respective statutes.

103. Under Texas law, FNB had and continues to have a duty to maintain and preserve its customers' checking accounts, and to prevent their diminishment through its wrongful acts.

104. For years, FNB has wrongfully collected overdraft fees from Plaintiffs and the members of the Class, and has taken specific and readily identifiable funds from their accounts in payment of these fees in order to satisfy them.

105. FNB has, without proper authorization, assumed and exercised the right of ownership over these funds, in hospitality to the rights of Plaintiffs and the members of the Class, without legal justification.

106. At the present time, FNB continues to retain these funds unlawfully, and without the consent of Plaintiffs or members of the Class.

107. Based on its above described conduct, FNB obviously intends to permanently deprive Plaintiffs and the members of the Class of these funds.

108. By definition, these funds are properly owned by Plaintiffs and the members of the Class, and not FNB, which now claims that it is entitled to their ownership. This is objectively and legally contrary to the rights of Plaintiffs and the members of the Class.

109. Plaintiffs and the members of the Class are entitled to the immediate possession of these funds, which FNB has wrongfully and continuously converted.

110. As a direct and proximate result of this wrongful conversion described above, Plaintiffs and the members of the Class have suffered and continue to suffer damages.

111. By reason of the foregoing, both Plaintiffs and the members of the Class are entitled to recover from FNB all damages and costs permitted by law, including, but not limited to, all amounts that FNB has wrongfully converted.

**FOURTH CLAIM FOR RELIEF**

**Unjust Enrichment**  
**(On Behalf of the Class)**

112. Plaintiffs incorporate by reference all facts and circumstances contained within the foregoing paragraphs. Further, this claim is asserted on behalf of the members of each State Sub-Class, pursuant to their respective statutes.

113. By means of FNB's wrongful conduct alleged above, FNB knowingly provides banking services to Plaintiffs and members of the Class that are unfair, unconscionable and oppressive.

114. Further, FNB knowingly received and retained wrongful benefits and funds from Plaintiffs and from members of the Class. In so doing, FNB acted with conscious disregard for the rights of Plaintiffs and members of the Class.

115. As a result of FNB's wrongful conduct, FNB has been unjustly enriched at the expense of, and to the detriment of, both Plaintiffs and all members of the Class.

116. FNB's unjust enrichment is traceable to, and resulted directly and proximately from, the conduct alleged above.

117. Under the common law doctrine of unjust enrichment, it is inequitable for FNB to be permitted to retain the benefits it received through this wrongful conduct and is still receiving, without justification, from the imposition of overdraft fees on Plaintiffs and members of the Class in an unfair, unconscionable and oppressive manner. FNB's retention of such funds under circumstances making it inequitable to do so, constitutes unjust enrichment.

118. The financial benefits derived by FNB rightfully belong to Plaintiffs and members of the Class. As such, FNB should be legally compelled to disgorge in a common fund, for the benefit of Plaintiffs and members of the Class, all wrongful or inequitable proceeds wrongfully received by them. Moreover, a constructive trust should be imposed upon all wrongful or inequitable sums received by FNB, which is traceable to Plaintiffs and the members of the Class.

**FIFTH CLAIM FOR RELIEF**  
**Violations of State Unfair Trade Practice Laws**  
**(On Behalf of the State Sub-Classes)**

119. Plaintiffs incorporate by reference all facts and circumstances contained within the foregoing paragraphs. Further, this claim is asserted on behalf of the members of each State Sub-Class, pursuant to their respective statutes.

120. As to the count, it is clear that FNB engages in unfair business practices relating to the imposition of overdraft fees on consumers, which shows a violation of all applicable provisions of the Texas Deceptive Trade Practices Act.

121. FNB's collective actions constitute violations of the DTPA, including but not limited to, Sections 17.46(b) (12), (14), (20), (24), and Section 17.50(a) (4) of the Texas Business & Commerce Code. FNB collectively engaged in false, misleading, or deceptive acts or practices that included, but were not limited to:

- a. Representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
- b. Misrepresenting the authority of a salesman, representative, or agent to negotiate the final terms of a consumer transaction;
- c. Failing to disclose information concerning goods or services which were known at the time of the transaction, and the failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had such information been disclosed;

- d. Using or employing an act or practice in violation of the Texas Insurance Code;
- e. Unreasonably delaying the investigation, adjustment and resolution of Plaintiff's claims;
- f. Failure to properly investigate Plaintiff's claims; and/or
- g. Hiring and relying upon a biased engineer and/or adjuster to obtain a favorable, result-oriented report to assist Defendants in low-balling and/or denying Plaintiff's damage claims.

122. As redress for FNB's repeated and ongoing violations of this consumer protection statute, Plaintiffs and the Class are entitled to, *inter alia*, damages, declaratory relief, and injunctive relief requiring FNB to immediately cease the practices alleged in this Original Class Action Petition.

**SIXTH CLAIM FOR RELIEF**  
**Violations of Texas Theft Liability Act**  
**(On Behalf of the State Sub-Classes)**

123. Plaintiffs incorporate by reference all facts and circumstances contained within the foregoing paragraphs. Further, this claim is asserted on behalf of the members of each State Sub-Class, pursuant to their respective statutes.

124. In addition to the above, Plaintiffs seek all damages compensable under Chapter 134 of the Texas Theft Liability Act, due to FNB's unlawful appropriation of Plaintiffs' property. Such damages would include, but not be limited to, actual damages, additional damages awarded by the trier-of-fact, attorneys' fees and court costs.

125. Further, Plaintiffs seek exemplary damages from Defendants who knowingly and intentionally committed the above-described theft of funds and fiduciary property belonging to Plaintiffs. (Pursuant to §§ 134.005, 41.001 of the Texas Civil Practice and Remedies Code).

**SEVENTH CLAIM FOR RELIEF**  
**Breach of Fiduciary Duty**  
**(On Behalf of the State Sub-Classes)**

126. Plaintiffs incorporate by reference all facts and circumstances contained within the foregoing paragraphs. Further, this claim is asserted on behalf of the members of each State Sub-Class, pursuant to their respective statutes.

127. FNB had a fiduciary relationship, or in the alternative, a relationship of trust and confidence with Plaintiffs. As a result of all conduct described above, FNB owed a duty of good faith and fair dealing to Plaintiffs. FNB legally breached that fiduciary in that:

- a. FNB did not make reasonable use of the confidence that Plaintiffs placed in them;
- b. FNB did not act in the utmost good faith, and did not exercise the most scrupulous honesty toward Plaintiffs;
- c. FNB did not place the interests of Plaintiffs before their own, and further took advantage of their position to gain a benefit for themselves at the expense of Plaintiffs;
- d. FNB placed themselves in a position where their self-interest clearly conflicted with their obligations as a fiduciary; and
- e. FNB did not fully and fairly disclose (and in fact willfully withheld) all important information to Plaintiffs concerning the sale of the subject policy.

128. FNB is liable for Plaintiffs' damages for breach of fiduciary duty, as such damages were objectively caused by FNB's conduct.

**EIGHTH CLAIM FOR RELIEF**  
**Conspiracy to Commit Common Law Fraud**  
**(On Behalf of the State Sub-Classes)**

129. Plaintiffs incorporate by reference all facts and circumstances contained within the foregoing paragraphs. Further, this claim is asserted on behalf of the members of each State Sub-Class, pursuant to their respective statutes.

130. FNB in this matter conspired to unjustly profit through blatant misrepresentations and fraudulent activity, objectively aimed at fleecing Plaintiffs of personal funds. Based on the above-described conduct, it is clear that Defendants combined to act with an unlawful purpose through unlawful means, objectively designed to lure Plaintiffs into relinquishing personal funds based upon Defendants' deceit and duplicity.

131. Defendants clearly had a meeting of the minds as to this objective, and all Defendants acted in the furtherance thereof. Without exception, all Plaintiffs suffered tremendous financial loss due to these untoward acts. Accordingly, each Defendant co-conspirator bears responsibility for its own actions, as well as that of all fellow conspirators.

**NINTH CLAIM FOR RELIEF**  
**Common Law Fraud by Negligent Misrepresentation**  
**(On Behalf of the State Sub-Classes)**

132. Plaintiffs incorporate by reference all facts and circumstances contained within the foregoing paragraphs. Further, this claim is asserted on behalf of the members of each State Sub-Class, pursuant to their respective statutes.

133. FNB, individually or collectively, perpetrated fraud by misrepresentation (either intentionally or negligently) by falsely representing countless facts of materiality to Plaintiffs,

who relied upon such representations that ultimately resulted in their injuries and financial damages. Alternatively, FNB fraudulently concealed material facts from Plaintiffs, the result of which caused damage to Plaintiffs.

134. Specifically, and as a proximate cause and result of this fraudulent concealment, fraud and negligent misrepresentation, all of which was perpetrated without the knowledge or consent of Plaintiffs, Plaintiffs have sustained damages far in excess of the minimum jurisdictional limits of this Court.

135. Plaintiffs further allege that because FNB, individually and/or collectively, knew that the misrepresentations made to Plaintiffs were false at the time they were made, such misrepresentations are legally fraudulent, negligent, or grossly negligent on the part of FNB, individually and/or collectively. This objectively constitutes conduct for which the law allows the imposition of exemplary damages.

**TENTH CLAIM FOR RELIEF**  
**Fraud by Non-Disclosure**  
**(On Behalf of the State Sub-Classes)**

136. Plaintiffs incorporate by reference all facts and circumstances contained within the foregoing paragraphs. Further, this claim is asserted on behalf of the members of each State Sub-Class, pursuant to their respective statutes.

137. All Defendants willfully concealed, or failed to disclose, certain pertinent facts to Plaintiffs regarding the above-described transactions. Moreover, FNB had a duty to disclose the facts to Plaintiffs, and knew Plaintiffs were ignorant of the facts, and that Plaintiffs did not have an equal opportunity to discover such facts.

138. Continuing, by failing to disclose these facts, FNB intended to induce Plaintiffs to take action regarding the above-described transactions. As designed by Defendants, Plaintiffs relied on FNB's

non-disclosure, and were injured as a result of acting or failing to act without the knowledge of the undisclosed facts. Specifically,

- a. FNB did not clearly disclose and/or refused to allow customers to opt out of their overdraft protection programs;
- b. FNB did not obtain affirmative consent from customers prior to processing transaction that resulted in overdraft fees;
- c. FNB did not alert its customers that a debit card transaction will trigger an overdraft fee, and does not provide its customers with an opportunity to cancel such transactions;
- d. FNB manipulated and re-ordered transactions so that it can increase the number of overdraft fees it imposes;
- e. FNB manipulated and re-ordered debits from highest to lowest in order to maximize the number of overdrafts and, consequently, the amount of overdraft fees;
- f. FNB imposed overdrafts and overdraft fees when, but for re-ordering transactions, there would otherwise be sufficient funds in the account;
- g. FNB failed to provide customers with accurate balance information;
- h. FNB delayed posting of transactions by customers so that customers are charged overdraft fees on transactions, even though the customers had sufficient funds in their accounts to cover the transactions upon execution;  
and
- i. FNB charged exorbitant overdraft fees that bear no relationship to the actual costs and risks of covering insufficient funds transactions.

**ELEVENTH CLAIM FOR RELIEF**

**Negligence**

**(On Behalf of the State Sub-Classes)**

139. Plaintiffs incorporate by reference all facts and circumstances contained within the foregoing paragraphs. Further, this claim is asserted on behalf of the members of each State Sub-Class, pursuant to their respective statutes.

140. Defendants had a duty to exercise the degree of care that a reasonably careful person would use to avoid harm to others under circumstances similar to those described herein.

141. Plaintiffs' injuries were proximately caused by Defendants' negligent, careless and reckless disregard of said duty.

142. The negligent, careless and reckless disregard of duty of Defendants, in particular consisted of, but is not limited to, the following acts and omissions:

- a. Required its customers to enter into standardized account agreements which include unconscionable provisions; and
- b. Converted moneys belonging to Plaintiffs and other members of the Class through its overdraft policies and practices.

**REQUEST FOR DISCLOSURE**

143. Pursuant to Rule 194 of the Texas Rules of Civil Procedure, Plaintiff requests that each and every Defendant provide all information required in a formal Request for Disclosure.

**REQUEST FOR PRODUCTION TO FORT HOOD NATIONAL BANK**

144. Produce all copies of individual banking records in existence throughout the active time period that each Plaintiff was a Fort Hood National Bank customer.

145. Produce all documentation provided by Fort Hood National Bank to each Plaintiff after they signed up for an account at Fort Hood National Bank.

146. Produce all correspondence drafted and/or exchanged by and between Fort Hood National Bank and each Plaintiff after such Plaintiff signed up for an account at Fort Hood National Bank.

147. Produce all updated copies of Fort Hood National Bank's formal Disclosure Statements, New Customer Packets, or related materials, as provided to any Plaintiff or other client who opens an account with Fort Hood National Bank.

148. Produce copies of call reports issued by the FDIC to Fort Hood National Bank during the last 10 years.

**REQUEST FOR PRODUCTION TO FIRST NATIONAL BANK TEXAS**

149. Produce all copies of individual banking records in existence throughout the active time period that each Plaintiff was a First National Bank Texas customer.

150. Produce all documentation provided by First National Bank Texas to each Plaintiff after they signed up for an account at First National Bank Texas.

151. Produce all correspondence drafted and/or exchanged by and between First National Bank Texas and each Plaintiff after such Plaintiff signed up for an account at First National Bank Texas.

152. Produce all updated copies of First National Bank Texas's formal Disclosure Statements, New Customer Packets, or related materials, as provided to any Plaintiff or other client who opens an account with First National Bank Texas.

153. Produce copies of call reports issued by the FDIC to First National Bank Texas during the last 10 years.

**REQUEST FOR PRODUCTION TO FCBI DELAWARE, INC.**

154. Produce all copies of individual banking records in existence throughout the active time period that each Plaintiff was a FCBI Delaware, Inc. customer.

155. Produce all documentation provided by FCBI Delaware, Inc. to each Plaintiff after they signed up for an account at FCBI Delaware, Inc.

156. Produce all correspondence drafted and/or exchanged by and between FCBI Delaware, Inc. and each Plaintiff after such Plaintiff signed up for an account at FCBI Delaware, Inc.

157. Produce all updated copies of FCBI Delaware, Inc.'s formal Disclosure Statements, New Customer Packets, or related materials, as provided to any Plaintiff or other client who opens an account with FCBI Delaware, Inc.

**REQUEST FOR PRODUCTION TO FIRST COMMUNITY BANCSHARES, INC.**

158. Produce all copies of individual banking records in existence throughout the active time period that each Plaintiff was a First Community Bancshares, Inc. customer.

159. Produce all documentation provided by First Community Bancshares, Inc. to each Plaintiff after they signed up for an account at First Community Bancshares, Inc.

160. Produce all correspondence drafted and/or exchanged by and between First Community Bancshares, Inc. and each Plaintiff after such Plaintiff signed up for an account at First Community Bancshares, Inc.

161. Produce all updated copies of First Community Bancshares, Inc.'s formal Disclosure Statements, New Customer Packets, or related materials, as provided to any Plaintiff or other client who opens an account with First Community Bancshares, Inc.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs and the Class demand a jury trial on all claims so triable, and judgment as follows:

- a. Injunctive relief, enjoining FNB from charging overdraft fees under its current policies and from engaging in the wrongful, unfair and unconscionable practices alleged herein;

- b. Restitution of all overdraft fees paid to FNB by Plaintiffs and the Class as a result of the wrongful practices alleged herein in an amount to be determined at trial;
- c. Disgorgement of the ill-gotten gains derived by FNB from its misconduct;
- d. Actual damages against FNB in an amount according to proof;
- e. Punitive and exemplary damages and penalties against FNB;
- f. Pre-judgment interest against FNB at the maximum rate permitted by applicable law;
- g. Costs and expenses incurred by Plaintiffs in connection with this action, including reasonable attorneys' fees pursuant to applicable law; and
- h. Such other relief as this Court deems just and proper.

Respectfully submitted,

**THE VOSS LAW FIRM, P.C.**



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