

STATE OF NORTH CAROLINA	)	IN THE GENERAL COURT OF JUSTICE
	)	SUPERIOR COURT DIVISION
COUNTY OF FORSYTH	)	09 CVS 4007
	)	
	)	
	)	
BB&T BOLI PLAN TRUST, by	)	
and through its Trustee,	)	<b>FIRST AMENDED COMPLAINT</b>
	)	<b>AND JURY DEMAND</b>
Plaintiff,	)	
v.	)	
	)	
MASSACHUSETTS MUTUAL	)	
LIFE INSURANCE COMPANY	)	
and CLARK CONSULTING, INC.	)	
	)	
Defendants.	)	

Plaintiff BB&T BOLI PLAN TRUST, by and through its Trustee (together with the trust grantor acting as authorized under the trust documents, hereinafter “BB&T TRUST”) for its Complaint herein alleges as follows:

**I.**

**NATURE OF THE ACTION**

1. In this action, Plaintiff BB&T TRUST seeks to recover from Defendants Massachusetts Mutual Life Insurance Company (“MassMutual”) and Clark Consulting, Inc. (“Clark”) substantial damages that BB&T TRUST suffered in connection with lost premiums through which it purchased from MassMutual Bank Owned Life Insurance (“BOLI”) insuring the lives of a substantial number of people who live and work in North Carolina.

2. In August 2006, BB&T TRUST paid to MassMutual over \$112 million in premiums to purchase BOLI issued by MassMutual.

3. This purchase of a MassMutual BOLI policy was made upon the recommendation of Clark and MassMutual. Also based on advice from Clark and MassMutual, half of the premiums were directed into a subaccount that was invested in a non-traditional hedge fund called Falcon Strategies LLC (“Falcon”).

4. Due to the unique nature of the Falcon subaccount and the structure and intent of BB&T TRUST’s BOLI plan, the Falcon subaccount required careful monitoring and management to ensure that BB&T TRUST’s premiums received the protections set out in the documents governing BB&T TRUST’s BOLI purchase.

5. This careful monitoring and management was the responsibility of Clark and MassMutual. Despite their obligations, however, MassMutual and Clark utterly failed to properly manage and monitor the investment of BB&T TRUST’s BOLI premiums in the best interests of BB&T TRUST.

6. As a direct result of misrepresentations and omissions by Clark and MassMutual and their failure to properly manage, monitor and protect BB&T TRUST’s BOLI assets, BB&T TRUST lost premiums, in excess of \$10,000, that had been invested in the Falcon subaccount.

7. As set forth in greater detail below, the regulatory framework that governs BOLI products prohibited BB&T TRUST from making investment decisions or otherwise participating in the management of its investment after the initial investment decision.

8. Accordingly, Clark and MassMutual were responsible for monitoring the performance of BB&T TRUST’s investment in the Falcon fund for continuing compliance with the terms of the documents governing that investment.

9. In exchange for substantial and recurring fees and commissions that they charged and collected, MassMutual and Clark agreed to undertake fiduciary responsibilities to monitor, manage and protect BB&T TRUST's BOLI premiums.

10. Among the tools that were available to MassMutual and Clark to properly manage BB&T TRUST's BOLI premiums was their ability – and, under certain circumstances, their obligation – to transfer premiums out of the Falcon subaccount and into a more traditional investment such as money market funds or even cash.

11. Despite knowing of the meltdown in the mortgage-backed securities (“MBS”) market and that Falcon was heavily invested in MBS investments, MassMutual and Clark failed to take timely steps to protect BB&T TRUST's premiums.

12. As a result of MassMutual's and Clark's misrepresentations, omissions, and failures of duty, BB&T TRUST lost a substantial portion of its premiums that had been invested in the Falcon subaccount.

## **II.**

### **JURISDICTION AND VENUE**

13. This Court has jurisdiction over the subject matter of this action because this is a court of general jurisdiction, the causes of action arise under North Carolina law, and the matter in controversy exceeds \$10,000. This Court has jurisdiction over the parties to this action pursuant to at least N.C. Gen. Stat. § 1-75.4(1)(d) and due to the extensive contacts that MassMutual and Clark have with North Carolina.

14. Venue is proper in this Court pursuant to at least N.C. Gen. Stat. § 1-80(3) because, among other things, MassMutual and Clark are foreign corporations that usually

did and still do business in Forsyth County, and the causes of action arose in North Carolina.

### **III.**

#### **THE PARTIES**

15. BB&T BOLI Plan Trust is a Delaware trust with its principal place of business located at 1100 North Market Street, Wilmington, DE 19890-2300, acting by and through its Trustee, Wilmington Trust Company, which is a Delaware corporation acting solely in its capacity as Trustee for the BB&T BOLI Plan Trust.

16. Defendant Massachusetts Mutual Life Insurance Company is a mutual life insurance company organized under the laws of the Commonwealth of Massachusetts with its principal place of business at 1295 State Street, Springfield, Massachusetts 01111.

17. Defendant Clark Consulting, Inc. is a Delaware corporation with its principal place of business at 2100 Ross Avenue, Suite 2200, Dallas, Texas 75201.

### **IV.**

#### **FACTS**

##### **A. Bank Owned Life Insurance (“BOLI”) Policies**

18. BOLI policies are designed specifically for the financial institution marketplace. They are regulated by federal tax laws that govern life insurance products (including specifically IRC 7702) and must be filed and approved by each state’s insurance department prior to sale. BOLI is utilized by banks to offset the cost of wide-ranging employee benefit expenses, such as health care, disability, dental, group life insurance and certain retirement benefit expenses.

*1. BB&T TRUST's Separate Account*

19. A BOLI insurer's "separate account" – which is comprised of the assets into which the policy owner's premiums are invested – will generally provide several bank-eligible investment sub-accounts to which the policy owner may initially allocate the net premiums.

20. Although the owner of a BOLI policy may select the sub-account(s) into which the premiums are initially allocated, it has no control over the active management of the underlying assets within such sub-account(s).

21. Further, under the applicable regulations, the BOLI purchaser may not direct or control the actions of the investment manager of the underlying assets with respect to particular investment decisions. Rather, it is the insurer who is the legal owner of the assets. The insurer owns the assets for the purpose of maximizing their value and, as a result, the value of the separate account, for the benefit of the BOLI purchaser. To that end, the insurer undertakes the obligation and duty to direct the actions of the investment manager, often with the advice of a broker and/or investment advisor who specializes in BOLI products, for the benefit of the BOLI purchaser.

22. Moreover, it is the insurer who exercises any rights pursuant to the documents governing the assets that comprise the separate account – again, often in conjunction with a BOLI broker and/or investment advisor. Rather than exercising these rights for its own benefit, the insurer has an obligation and duty to exercise these rights to maximize the value of the separate account assets for the benefit of the BOLI purchaser.

23. The cash surrender value of a BOLI policy is recorded as an asset on the books of the purchaser of the BOLI policy. As the value of the separate account increases or decreases, the cash surrender value of the policy changes correspondingly.

2. *The Private Placement Memorandum*

24. The contractual terms required by each state's insurance regulations are set forth in an actual variable life insurance policy document. However, a BOLI investment is much broader than just the BOLI policy. Many of the terms of a BOLI investment are set forth in a private placement memorandum describing the investment component of the life insurance policy, which is presented by the insurer and its broker to the purchaser. These terms include (i) representations regarding each sub-account available for investment within the separate account; (ii) representations regarding the asset strategy to be utilized by each sub-account; (iii) representations regarding the investment manager who will manage the assets within each sub-account; and (iv) numerous obligations of the insurer in connection with the investment and protection of the underlying assets within all of the sub-accounts.

3. *Performance Reports*

25. The owner of a BOLI policy is typically provided with quarterly performance reports from the investment manager that set forth the performance history of the investment. These reports are prepared by the investment manager and delivered to the insurer, who typically provides them to the broker for delivery to the policy owner.

26. Thus, if the value of the assets in which the BOLI premium is invested begins to decline, the policy owner receives the investment manager's report on that decline well after the decline has occurred. Accordingly, under the terms of the private

placement memorandum, the insurer is obligated to monitor the performance of the separate account assets in a timely fashion, to timely notify the BOLI purchaser of any developments affecting the rights and interests of the BOLI purchaser, and to take action to preserve and maximize the value of the separate account assets for the benefit of the BOLI purchaser.

4. *The “Stable Value” Option*

27. One product option that is available to the purchaser of a separate account BOLI investment is a “stable value” option implemented through a “stable value” agreement. A stable value agreement is an agreement between the insurer and a third-party stable-value provider, usually a major financial services provider. A stable value investment feature is structured to provide smooth quarter-to-quarter investment returns expressed through an investment crediting rate formula. Unrealized gains and losses of the underlying investments are amortized over a pre-determined duration that is usually stated in years and closely corresponds to the investment strategy.

28. In the event a policyholder elects to surrender the BOLI policy and receive its cash value, the stable value provider will pay (pursuant to the terms of the stable value agreement) any difference between the underlying net investment value and the book value as reported by the insurer to the policyholder on a monthly basis. This allows the BOLI purchaser to carry the cash value of the BOLI separate account on its books at par without adjusting for decreases in the market value of the underlying assets, so long as the spread between book investment value and market investment value does not exceed the limit set forth in the stable value agreement (which limit is usually a percentage of par investment value).

29. Thus, the owner of a BOLI investment is required to write down the value of the investment only if the market value of the separate account assets declines such that the spread exceeds the stable value agreement limit.

30. Just as the BOLI policy owner may not direct or control the actions of the manager of the underlying assets, the owner of a BOLI policy may not direct or control the actions of the stable value provider. Accordingly, the insurer undertakes the duty to ensure that the stable value provider complies with its obligations under the stable value agreement. Of course, to be in a position to enforce the stable value provider's obligations, the insurer must also comply with its own obligations under the stable value agreement.

#### 5. *Mandatory and Elective Re-Allocation Provisions*

31. Another mechanism designed to mitigate investment risk of certain managed investment options offered in BOLI investments is a mandatory re-allocation provision that is set forth in both the stable value agreement and the private placement memorandum. This provision requires that if the value of the investment falls below a certain amount, then the investment must be re-allocated into less volatile, more conservative assets such as money market funds, government securities and cash. This prevents the market value of the investment from falling even further and, thus, is designed to benefit and protect both the BOLI purchaser and the stable value provider.

32. However, because the owner of a BOLI policy is not permitted to direct or control the actions of the investment manager for the underlying assets, it is the responsibility of the insurer and BOLI broker to: monitor and calculate the value of the investment to determine if an automatic re-allocation event has occurred; notify the

policy owner, the stable value provider and the investment manager if a reallocation event does occur; and ensure that the mandatory re-allocation occurs as required by the governing documents, including the private placement memorandum, the stable value agreement, and any other applicable agreements.

33. BOLI investments also often contain an elective re-allocation provision. This provides the ability to request a re-allocation of the underlying assets from one type of investment option to another or to move assets away from an underperforming investment sector or manager.

34. The effective use of an elective re-allocation provision is wholly dependent upon adequate monitoring of the investment managers and their funds by the insurer and BOLI broker because it is they – not the owner of the BOLI policy – who are (or, at least, are supposed to be) in possession of timely information about the managers and the performance of their funds, and it is they – not the owner of the BOLI policy – who are permitted and have the duty to direct or control the actions of the investment managers with respect to the BOLI premiums that were invested in the investment managers' funds for the ultimate benefit of the BOLI policy owner.

B. MassMutual and Clark Sell BOLI Products to BB&T TRUST

35. In 2006, BB&T TRUST investigated the BOLI investment offered by MassMutual.

36. This investigation was undertaken based on Clark's recommendation. To this end, Clark, through its employee Jason Whitlatch, who was located in Greensboro, North Carolina ("Whitlatch"), provided to BB&T TRUST, through its grantor Branch Banking and Trust Company located in North Carolina ("Grantor"), MassMutual's

Confidential Private Placement Memorandum No. 79, dated June 1, 2006 (the “PPM”), the receipt of which BB&T TRUST acknowledged in writing on August 16, 2006.

37. The PPM set out the terms of the BOLI product that MassMutual was offering to sell to BB&T TRUST. Those terms included a stable value agreement dated August 17, 2006 between Bank of America and MassMutual (the “Stable Value Agreement” or “SVA”).

38. Indeed, the PPM included both a summary of the SVA (Appendix B) and a copy of the executed SVA (Appendix D). Further, the Transaction Schedule attached to the SVA identified BB&T TRUST as the Policyholder, stated the Effective Date to be August 17, 2006, stated the Initial Investment Value to be \$112,513,063.51, and set out the investment guidelines applicable to each investment subaccount (Exhibits 3-5 to the Transaction Schedule).

39. Finally, the PPM also attached the February 2006 Offering Memorandum for Falcon Strategies LLC (Appendix E).

40. After considering and in reliance on the representations that MassMutual and Clark made to BB&T TRUST and the Grantor (through its employee Morris Marley (“Marley”) located in North Carolina), including the representations made in the PPM and its attachments, which was provided to BB&T TRUST and the Grantor in North Carolina, BB&T TRUST delivered to MassMutual, on August 16, 2006, a completed application for its purchase of the BOLI product offered under the PPM, and paid MassMutual a premium of approximately \$112.5 million.

41. On numerous occasions during July and early August 2006, MassMutual, through its employee Jeffrey Hug, who was located in Enfield, Connecticut (“Hug”), and

Clark, through its employee Whitlatch in North Carolina, represented to the BB&T TRUST and its Grantor, through its employee Marley located in North Carolina, that the benefits of the BOLI product offered would be as were ultimately set out in the PPM. In reliance on the representations that MassMutual (from Connecticut) and Clark (from North Carolina) made to the BB&T TRUST and its Grantor (in North Carolina), BB&T TRUST also elected the “Stable Value Endorsement,” under which BB&T TRUST’s BOLI premiums were to receive the benefits and protections of the Stable Value Agreement between Bank of America and MassMutual.

42. This election required that BB&T TRUST agree to pay a higher fee to MassMutual. Clark also received a higher fee as a result of the Stable Value Endorsement election by BB&T TRUST.

43. Based on the analysis and recommendation of Clark (through Whitlatch in North Carolina) and MassMutual (through Hug in Connecticut) made to the BB&T TRUST and its Grantor (through Marley in North Carolina) in early August 2006, BB&T TRUST elected to have 50% of its premium – more than \$55 million – invested in the Falcon fund.

44. In a letter agreement dated August 16, 2006 (the “Letter Agreement”), MassMutual acknowledged receipt of BB&T TRUST’s application and premium payment, accepted both, and acknowledged its issuance to BB&T Trust of a BOLI policy with the Stable Value Endorsement. The BOLI policy insures the lives of a substantial number of employees of the Grantor who live and work in North Carolina.

45. MassMutual also agreed in the Letter Agreement to use reasonable efforts to cause Bank of America to perform its obligations under the SVA. By implication,

MassMutual also agreed that it would perform its own obligations under the SVA, since it would be unable to cause Bank of America to perform its obligations if MassMutual were in breach of its own obligations under the SVA. One of the obligations that MassMutual thereby agreed to perform was to monitor the investment in the Falcon fund and to timely notify Bank of America in writing of the occurrence of a Reallocation Event.

46. The Letter Agreement was a supplement to the BOLI policy and the PPM. Indeed, the Letter Agreement specifically states that “[t]his Letter supplements, and as to matters set forth herein, modifies the disclosures outlined in the Private Placement Memorandum delivered to the Buyer with respect to the [BOLI] Policy and the Certificates. This letter also governs the exercise of discretion granted MassMutual under the [BOLI] Policy and the Certificates.” Thus, the Letter Agreement is part of the BOLI policy that it supplements.

#### C. The Protections of the Stable Value Agreement

47. The SVA provided certain protections to BB&T TRUST in the event that the investment of its BOLI premiums in Falcon performed poorly. These protections were summarized in Appendix B to the MassMutual PPM, and were set out in detail in the SVA itself, which was included as Appendix D to the MassMutual PPM.

48. According to the PPM, the SVA provided certain protections to BB&T TRUST if a “Reallocation Event” occurred. A “Reallocation Event” would include, among other things, (a) a drop in the gross net asset value (“Gross NAV”) of BB&T TRUST’s investment in the Falcon fund by more than 7% over a period of one month or less, or by more than 10% over a period of two months or less, or (b) a one-year rolling

annualized standard deviation of monthly Gross NAV of BB&T TRUST's investment in the Falcon fund of more than 10% after the first anniversary of the August 17, 2006 Effective Date.

49. If any of these Reallocation Events were to occur, MassMutual was obligated to ensure that BB&T TRUST's overall investment with MassMutual – that is, its “separate account” or “Stable Value Portfolio” – was to consist solely of cash and units of the Fixed Income Subaccounts.

50. Since the Falcon fund was not included within the Fixed Income Subaccounts, the SVA's provisions required that, if a Reallocation Event occurred, BB&T TRUST's Falcon investment was to be liquidated as quickly as possible and the proceeds were to be held as cash or used to purchase units of the Fixed Income Subaccounts.

51. This requirement was designed, at least in part, to protect the BOLI policy owner – BB&T TRUST – from further declines in the value of its Stable Value Portfolio.

#### D. MassMutual Breached its Duties to BB&T TRUST

52. As of August 31, 2007, the one-year rolling annualized standard deviation of monthly Gross NAV of the Falcon fund exceeded 10%.

53. This constituted a Reallocation Event, and Bank of America did not at any time elect otherwise. As a result, MassMutual was required to liquidate the portion of BB&T TRUST's premiums that had been invested in the Falcon fund as soon as practicable.

54. Had MassMutual and Clark timely notified BB&T TRUST and Bank of America that a Reallocation Event trigger had been hit in August 2007, BB&T TRUST

could have taken action to ensure that the Falcon fund investment was liquidated as soon as practicable, through either the mandatory liquidation contemplated by the Letter Agreement and the PPM or through a negotiated liquidation in which any waiting periods or advance notice requirements were waived. Further, on information and belief, Bank of America also would have taken such action. Indeed, Bank of America's interests were aligned with BB&T TRUST's interest immediately following the August 2007 Reallocation Event; on information and belief, had Bank of America known of the August 2007 Reallocation Event when it occurred, it would have taken all actions necessary to ensure that MassMutual liquidated the Falcon investment and, thereby, prevented Bank of America from incurring any additional losses under the Stable Value Agreement.

55. Indeed, both MassMutual and Clark knew that the interests of BB&T TRUST and Bank of America were perfectly aligned in the immediate aftermath of a Reallocation Event, especially during the extreme turmoil in the MBS markets in the fall of 2007. Both MassMutual and Clark knew that if they notified BB&T TRUST and Bank of America of the August 2007 Reallocation Event, both would take all immediate actions necessary – including obtaining waivers of any “advance notice” requirements, waiting periods, or comparable provisions that might delay the liquidation – to ensure that the Falcon investment was liquidated as quickly as possible so as to prevent further losses.

56. Even if Falcon's poor performance had not constituted a Reallocation Event in August 2007, given that poor performance MassMutual should have advised

BB&T TRUST to exercise its elective reallocation rights and thereby ensure that BB&T TRUST's investment was moved out of Falcon as quickly as possible.

57. In breach of its obligations, however, MassMutual took no action to liquidate the Falcon fund investment as a result of the August 2007 Reallocation Event and failed to timely advise BB&T TRUST with respect to its elective reallocation rights.

58. In fact, at no time did MassMutual ever notify BB&T TRUST or (on information and belief) Bank of America that a Reallocation Event for the Falcon fund investment had occurred in August 2007.

59. Indeed, in September 2007, following issuance of the month-end results for August 2007, MassMutual (through Hug in Connecticut) and Clark (through Whitlatch in North Carolina) affirmatively represented to BB&T TRUST and its Grantor (through Marley in North Carolina) that no Reallocation Event "triggers" had been "hit yet" for the Falcon fund investment.

60. Then, during November 2007, the Gross NAV of the Falcon fund dropped by more than 7% from the Gross NAV at the end of October 2007.

61. This also constituted a Reallocation Event, and at no time did Bank of America elect otherwise. This Reallocation Event required MassMutual to liquidate BB&T TRUST's Falcon investment as quickly as possible.

62. Again in breach of its obligations, MassMutual failed to take timely action following the November 2007 Reallocation Event to liquidate the Falcon investment or to advise BB&T Trust regarding its rights and protections.

63. Had MassMutual complied with its duties to BB&T TRUST, BB&T TRUST's investment in the Falcon fund would have been liquidated as soon as

practicable following the August 2007 Reallocation Event. Had MassMutual timely liquidated BB&T TRUST's Falcon investment, a substantial portion of the value of BB&T TRUST's Falcon investment would have been preserved.

64. Even if MassMutual had advised BB&T TRUST to exercise its elective reallocation rights in or after August 2007, a substantial portion of the losses that BB&T TRUST incurred would have been avoided.

65. But because MassMutual completely failed to comply with its duties to BB&T TRUST, BB&T TRUST suffered substantial damages from the Falcon investment. These damages were incurred by the BB&T TRUST and its Grantor, which is located and headquartered in North Carolina.

E. Clark Failed to Ensure that BB&T TRUST Received the Protections it Paid For

66. In exchange for substantial and recurring commissions it received on BB&T TRUST's investment with MassMutual, Clark undertook a fiduciary obligation to monitor BB&T TRUST's investment to ensure that all parties involved complied with the terms and protections set out in the PPM, SVA, and Letter Agreement, and to advise BB&T TRUST with respect to the performance of its investment and its rights and protections in connection therewith.

67. At no time did Clark advise BB&T TRUST that a Reallocation Event "trigger" had been "hit" in August 2007.

68. During the August 2007 – September 2007 time period, Clark did not take steps to ensure that MassMutual liquidated BB&T TRUST's investment in the Falcon fund as quickly as possible.

69. Indeed, in September 2007, Clark (through Whitlatch in North Carolina) falsely represented to BB&T TRUST and its Grantor (through Marley in North Carolina) that no Reallocation Event “triggers” had been “hit yet” as of the end of August 2007.

70. Even though Clark (through Whitlatch in North Carolina) continued to communicate with BB&T TRUST and its Grantor (through Marley in North Carolina) regularly throughout the August – December 2007 time period, Clark also failed to timely advise BB&T TRUST to exercise its elective reallocation rights – rights that existed regardless of whether a Reallocation Event had occurred in August 2007. Further, Clark failed to timely advise BB&T TRUST of the Reallocation Event trigger that was hit in November 2007, and again failed to ensure that MassMutual liquidated BB&T TRUST’s investment in the Falcon fund as quickly as possible thereafter.

F. Both Clark and MassMutual Failed to Properly Monitor the Falcon Investment

71. Since the “Reallocation Event” protections set out in the PPM, SVA, and Letter Agreement were to become effective on the very day that the Reallocation Event occurred, Clark and MassMutual were obligated to ensure that their monitoring efforts would enable them to immediately detect a Reallocation Event, notify Bank of America, and advise BB&T TRUST of its resulting rights and protections.

72. Despite their professional and fiduciary duties to BB&T TRUST, however, Clark’s and MassMutual’s monitoring efforts did not result in them reporting a Reallocation Event in August 2007 or during the month of November 2007. Rather, in December 2007, only *after* the November 2007 month-end results for the Falcon fund had been issued, Clark (through Whitlatch in North Carolina) advised BB&T TRUST and

its Grantor (through Marley in North Carolina) of the poor performance of the Falcon fund.

73. By the end of November 2007, the Gross NAV of the Falcon fund had deteriorated in value by more than 7% over the fund's Gross NAV as of October 31, 2007 – that is, over a period of one month or less.

74. In addition, by the end of November 2007, the Gross NAV of the Falcon fund had deteriorated in value by more than 10% over the fund's Gross NAV as of September 30, 2007 – that is, over a period of two months or less.

75. Indeed, the Gross NAV of BB&T TRUST's investment in the Falcon fund dropped from 0.9530 as of September 30, 2007 to 0.8988 as of October 31, 2007, and then dropped further to 0.7573 as of November 30, 2007.

76. As indicated above, had Clark and MassMutual complied with their professional and fiduciary obligations, BB&T TRUST's entire investment in Falcon would have been liquidated as soon as practicable following the August 2007 Reallocation Event, thereby minimizing or eliminating the losses suffered by BB&T TRUST.

77. In March 2008, the fund manager for the Falcon fund halted all further liquidations of interests in the fund.

78. This was months *after* the date by which MassMutual should have liquidated BB&T TRUST's entire Falcon investment.

79. Following the March 2008 announcement by the manager of the Falcon fund, the value of BB&T TRUST's investment in Falcon fell dramatically.

This dramatic decline in the value of BB&T TRUST's investment in Falcon caused BB&T TRUST to suffer substantial losses in excess of \$10,000. Had Clark and MassMutual complied with their duties, BB&T TRUST's losses would have been minimized or eliminated.

G. Scierter

80. On information and belief, in falsely representing to BB&T TRUST and its Grantor (through Marley in North Carolina) that no Reallocation Event had occurred in August 2007, both MassMutual (through Hug in Connecticut) and Clark (through Whitlatch in North Carolina) acted knowingly and intentionally with the purpose of deceiving BB&T TRUST regarding the true performance of the Falcon fund and BB&T TRUST's rights and protections. Similarly, on information and belief, in failing to timely notify BB&T TRUST of the November 2007 Reallocation Event, both MassMutual and Clark acted knowingly and intentionally to deceive BB&T TRUST regarding the true performance of the Falcon investment and BB&T TRUST's related rights and protections.

81. MassMutual and, on information and belief, Clark received regular, recurring commissions from BB&T TRUST's BOLI investment. On information and belief, MassMutual and Clark also received much larger commissions, that were also regular and recurring, from two other BOLI purchasers (the "Other Investors") who had allocated into the Falcon fund substantially larger amounts than BB&T TRUST had allocated into the Falcon fund.

82. On information and belief, MassMutual (through Hug) and Clark (through Whitlatch) recognized and understood that the regular and recurring commissions they

received from BB&T TRUST, as well as the much larger regular and recurring commissions they received from the Other Investors, would be in jeopardy if they timely notified BB&T TRUST of the August 2007 or November 2007 Reallocation Events.

83. MassMutual (through Hug) and Clark (through Whitlatch) recognized and understood that if they timely notified BB&T TRUST of the August 2007 or November 2007 Reallocation Events, (a) MassMutual and Clark would be forced to liquidate BB&T TRUST's Falcon investment as quickly as possible, (b) this rapid liquidation of BB&T TRUST's interest in Falcon could trigger a mandatory reallocation event for the Other Investors, (c) the Reallocation Event for BB&T TRUST and the mandatory reallocation event for the Other Investors would reduce the regular and recurring commissions that MassMutual and Clark received from those investors, and (d) those reallocation events could cause one or more of BB&T TRUST and the Other Investors to surrender their BOLI policies, which would dramatically reduce or eliminate entirely the commissions that MassMutual and Clark had been receiving and hoped to continue to receive going forward.

84. In short, on information and belief, MassMutual and Clark feared the domino effect that could result if they timely notified BB&T TRUST of the August 2007 and November 2007 Reallocation Events. To protect their very substantial, recurring commissions from BB&T TRUST, and especially the much larger commissions from the Other Investors, MassMutual (through Hug in Connecticut) and Clark (through Whitlatch in North Carolina) intentionally deceived BB&T TRUST by failing to immediately notify BB&T TRUST of the August 2007 and November 2007 Reallocation Events and by affirmatively misrepresenting to BB&T TRUST and its Grantor (through Marley in North

Carolina) in September 2007 that no Reallocation Event had yet occurred.

H. The Contract, Tortious Conduct and Damages at Issue Occurred in North Carolina

85. Virtually all of the hundreds of communications that occurred between BB&T TRUST, on the one hand, and MassMutual and/or Clark, on the other hand, with respect to BB&T TRUST's BOLI investment occurred in North Carolina, including all of the misrepresentations made by MassMutual (through Hug in Connecticut) and Clark (through Whitlatch in North Carolina) to BB&T TRUST and its Grantor (through Marley in North Carolina). Indeed, Clark's entire servicing center, through which it provided to BB&T TRUST all of the insurance brokerage and BOLI advisory services that are at issue here, was and is located in Greensboro, North Carolina.

86. In fact, MassMutual and Clark knew and intended that all of their substantive communications concerning BB&T TRUST's BOLI investment would occur with BB&T TRUST and the Grantor through their representatives located in Winston-Salem, North Carolina. This included all of the negotiations concerning the terms of the BOLI policy and the Letter Agreement, as well as all of the representations made by MassMutual and Clark concerning the terms of the BB&T TRUST/MassMutual contract.

87. Further, MassMutual and Clark knew that the BB&T TRUST was established for the purpose of purchasing and holding the MassMutual BOLI investment for the sole and exclusive benefit of the Grantor, and that the trustee of the BB&T TRUST took substantive action with respect to the MassMutual BOLI investment only at the direction of the Grantor. Thus, both MassMutual and Clark knew and intended that the BB&T TRUST would act, or refrain from acting, in reliance upon the representations

and omissions that they made to the BB&T TRUST and the Grantor through representatives located in North Carolina.

88. Because they knew that the Grantor was the sole beneficiary of the BB&T TRUST, MassMutual and Clark also knew that any harm incurred by the BB&T TRUST with respect to the MassMutual BOLI investment would be harm incurred by the Grantor in North Carolina.

I. Defendants Owed a Fiduciary Duty to Plaintiff

89. Both MassMutual and Clark owed, and breached, a fiduciary duty to BB&T TRUST.

90. MassMutual undertook a far broader duty to BB&T TRUST than simply that of an insurer selling an insurance policy to an insured. Rather, MassMutual undertook to provide an entire investment package to BB&T TRUST. Part of that investment package was providing the BOLI insurance policy. But part of the investment package also entailed MassMutual accepting over \$112 million from BB&T TRUST and investing that sum to increase the value of the separate account to the benefit of BB&T TRUST. Any gains from that investment benefited BB&T TRUST, and any losses from that investment were to BB&T TRUST's detriment. However, MassMutual's interests were aligned with those of BB&T TRUST, because (a) MassMutual received recurring commissions that increased as the investment increased in value, and decreased as the investment decreased in value, and (b) MassMutual would be entitled to share in any investment returns that exceeded a level specified in the PPM.

91. MassMutual undertook the duty to monitor the performance of the investment and, if a Reallocation Event occurred, to take immediate action to protect the

value of the Falcon investment, and thereby the separate account, for the benefit of BB&T TRUST. And, accordingly, BB&T TRUST reposed special trust and confidence in MassMutual to monitor the investment's value and to take action to protect the separate account value for the benefit of BB&T TRUST. Indeed, both MassMutual and Clark understood that BB&T TRUST was precluded from taking action directly to protect its investment, and that BB&T TRUST was entirely dependent upon MassMutual and Clark to monitor the investment, to inform BB&T TRUST regarding the performance of the investment, and to take action that was binding on BB&T TRUST and that was designed to protect the investment's value and, thereby, protect the separate account value for BB&T TRUST's benefit.

92. Likewise, Clark undertook a fiduciary duty to BB&T TRUST. In addition to acting as a broker who assisted BB&T TRUST in finding and administering a suitable insurance policy, Clark also acted as a trusted adviser to BB&T TRUST from the inception of its BOLI investment in 2006 and continuing well into 2008. Just as MassMutual knew, Clark also knew that BB&T TRUST was precluded from acting directly to protect the value of the investment in the Falcon fund, and that BB&T TRUST was entirely dependant upon MassMutual and Clark to take such actions. Clark knew that BB&T TRUST had reposed special confidence in Clark to monitor the Falcon investment, to notify BB&T TRUST of any developments affecting BB&T TRUST's rights or interests in the investment and its performance, to advise BB&T TRUST as to its rights, options and alternatives regarding that investment, and to ensure that MassMutual complied with its obligations and duties to BB&T TRUST. Clark knew that BB&T TRUST was precluded from monitoring the Falcon investment directly and that

BB&T TRUST was entirely dependent upon Clark and MassMutual to monitor the investment and notify BB&T TRUST of any Reallocation Event or any other development affecting BB&T TRUST's rights or interests.

93. Clark's interests were also aligned with BB&T TRUST's interests. Clark's recurring commissions were directly affected by the value of the Falcon investment – Clark's commissions increased if the Falcon investment did well, and decreased if the Falcon investment did poorly.

**V.**

**CAUSES OF ACTION**

**Count I – Breach of Fiduciary Duty  
(MassMutual and Clark)**

94. BB&T TRUST repeats and realleges each of the allegations contained in the paragraphs above as if fully set forth herein.

95. MassMutual undertook a fiduciary duty to BB&T TRUST to manage, monitor and safeguard the investment of BB&T TRUST's insurance premiums in the best interests of BB&T TRUST and to report to BB&T TRUST in a timely, accurate and comprehensive manner regarding the performance of that investment..

96. As an insurance broker and adviser to BB&T TRUST, Clark undertook a fiduciary duty to BB&T TRUST to monitor the investment of BB&T TRUST's insurance premiums, to accurately and comprehensively report to BB&T TRUST in a timely manner regarding the performance of that investment, to timely advise BB&T TRUST with respect to its rights, protections, and alternatives in respect of that investment, and to ensure that MassMutual complied with its duties to BB&T TRUST in a timely manner.

97. MassMutual and Clark knew that BB&T TRUST was precluded from directing the actions of the Falcon fund investment manager, precluded from obtaining investment-performance data directly from the Falcon fund investment manager, and entirely dependent upon MassMutual and Clark for monitoring the Falcon investment, notifying BB&T TRUST of any developments affecting BB&T TRUST's rights and interests, and taking action to protect and maximize the value of the Falcon investment and, as a result, the separate account for the benefit of BB&T TRUST.

98. MassMutual and Clark knew and intended that BB&T TRUST would repose, and had reposed, special trust and confidence in MassMutual and Clark to monitor the Falcon investment, timely notify BB&T TRUST of any developments affecting the rights and interests of BB&T TRUST, and take timely action to protect the value of the Falcon investment and, as a result, the separate account for the benefit of BB&T TRUST.

99. MassMutual and Clark breached their fiduciary duties to BB&T TRUST by failing to properly and timely monitor and report (to BB&T TRUST and to Bank of America) the performance of BB&T TRUST's investment, by failing to properly advise BB&T TRUST regarding its rights and protections given the performance of that investment, by failing to ensure that appropriate actions were taken as soon as practicable after a Reallocation Event to liquidate BB&T TRUST's investment in the Falcon fund, and by failing to timely advise BB&T TRUST to exercise its elective reallocation rights.

100. MassMutual and Clark further breached their fiduciary duties to BB&T TRUST by falsely representing that no Reallocation Event had occurred and no Reallocation Event trigger had been hit. In September 2007, MassMutual (through Hug

in Connecticut) and Clark (through Whitlatch in North Carolina) falsely represented to BB&T TRUST and its Grantor (through Marley in North Carolina) that “no triggers” for a Reallocation Event had been “hit yet”. On information and belief, MassMutual and Clark knew this representation was false when made, or made it recklessly without regard to whether it was true or false, and intended that BB&T TRUST rely on the representation. In fact, BB&T TRUST did rely on the representation, to its detriment.

101. MassMutual and Clark also failed to timely report to BB&T TRUST that a Reallocation Event had occurred in November 2007. On information and belief, MassMutual and Clark knew that this omission would mislead BB&T TRUST regarding the true performance of the Falcon investment, and intended that BB&T TRUST rely on that omission. In fact, BB&T TRUST did rely on that omission, to its detriment.

102. Had BB&T TRUST been timely informed that the Reallocation Event trigger had been hit in August 2007 and November 2007, BB&T TRUST could have avoided some or all of its damages by ensuring that the Falcon investment was liquidated as quickly as possible, either through the mandatory liquidation contemplated by the Letter Agreement and the PPM or through a negotiated liquidation in which any waiting periods or advance notice requirements were waived. As a result of MassMutual’s and Clark’s breaches of fiduciary duty, however, BB&T TRUST incurred substantial damages, exceeding \$10,000, that it would not have incurred had MassMutual and Clark complied with their fiduciary duties to BB&T TRUST. BB&T TRUST hereby demands recovery from MassMutual and Clark of the losses it incurred as a result of their breach of fiduciary duty, in an amount to be proven at trial.

103. On information and belief, MassMutual and Clark feared the domino effect that could result from their notifying BB&T TRUST that the Reallocation Event “triggers” had been hit in August 2007 and again in November 2007. MassMutual and Clark knew that the liquidation of BB&T TRUST’s Falcon investment could trigger reallocation events for the Other Investors, and/or could cause one or more of BB&T TRUST and the Other Investors to surrender their BOLI policies, and that these events would jeopardize the substantial, recurring commissions that they received from the BB&T TRUST investment, as well as the even more substantial and recurring commissions they received from the Other Investors. Indeed, they knew that even monitoring the Falcon fund’s performance on a daily or weekly basis and timely reporting that performance could endanger their commissions in the same way. Thus, on information and belief, MassMutual’s and Clark’s breaches of their fiduciary duties to BB&T TRUST were willful, wanton, intentional, and/or in reckless disregard for the rights of BB&T TRUST for the purpose of gaining a benefit to themselves at the expense of BB&T TRUST. Accordingly, BB&T TRUST hereby demands recovery of punitive and/or exemplary damages in an amount sufficient to punish Clark and MassMutual and to deter others from engaging in similar conduct in the future, which in any event should be an amount not less than three times the amount of actual damages incurred by BB&T TRUST.

**Count II – Aiding and Abetting Breach of Fiduciary Duty  
(MassMutual and Clark)**

104. BB&T TRUST repeats and realleges each of the allegations contained in the paragraphs above as if fully set forth herein.

105. As set forth above, each of MassMutual and Clark owed, and breached, a fiduciary duty to BB&T TRUST.

106. Clark knew of the existence and breach of MassMutual's fiduciary duty to BB&T TRUST, and knowingly provided substantial assistance to MassMutual in its breach of that duty to BB&T TRUST by concealing from BB&T TRUST the fact that a Reallocation Event trigger had been hit in August 2007 and November 2007 and by affirmatively representing to BB&T TRUST in September 2007 that no Reallocation Event "triggers" had been "hit yet" even though such a trigger had, in fact, been hit in August 2007. Thus, Clark aided and abetted MassMutual's breach of its fiduciary duty to BB&T TRUST, and is liable to BB&T TRUST for all damages incurred as a result of that breach of fiduciary duty, as set forth in Court I above.

107. MassMutual knew of the existence and breach of Clark's fiduciary duty to BB&T TRUST, and knowingly provided substantial assistance to Clark in its breach of that duty to BB&T TRUST by concealing from BB&T TRUST the fact that a Reallocation Event trigger had been hit in August 2007 and November 2007 and by affirmatively representing to BB&T TRUST in September 2007 that no Reallocation Event "triggers" had been "hit yet" even though such a trigger had, in fact, been hit in August 2007. Thus, MassMutual aided and abetted Clark's breach of its fiduciary duty to BB&T TRUST, and is liable to BB&T TRUST for all damages incurred as a result of that breach of fiduciary duty, as set forth in Court I above.

108. On information and belief, MassMutual's and Clark's conduct, as set forth above, was willful, wanton, intentional, and/or in reckless disregard for the rights of BB&T TRUST for the purpose of gaining a benefit to themselves at the expense of

BB&T TRUST. Accordingly, BB&T TRUST hereby demands recovery of punitive and/or exemplary damages in an amount sufficient to punish Clark and MassMutual and to deter others from engaging in similar conduct in the future, which in any event should be an amount not less than three times the amount of actual damages incurred by BB&T TRUST.

**Count III – Negligence  
(MassMutual and Clark)**

109. BB&T TRUST repeats and realleges each of the allegations contained in the paragraphs above as if fully set forth herein.

110. MassMutual and Clark undertook a duty to BB&T TRUST to monitor BB&T TRUST's Falcon investment, keep BB&T TRUST fully informed of the performance of that investment on a timely basis, timely advise BB&T TRUST of its rights and protections given the performance of that investment, and ensure that the proper actions were taken on a timely basis to protect that investment to the maximum extent possible.

111. Through the actions and omissions described above, MassMutual and Clark breached their duties to BB&T TRUST. These breaches included, without limitation, their failure to adequately monitor the performance of BB&T TRUST's Falcon investment, failure to timely advise BB&T TRUST of its rights and protections given the performance of that investment, failure to ensure that the required and proper actions were taken to protect BB&T TRUST's investment, failure to timely notify Bank of America of the August 2007 and November 2007 Reallocation Events, and their false representation in September 2007 that no Reallocation Event "triggers" had been hit when, in fact, such a trigger had been hit in August 2007.

112. As a result of MassMutual's and Clark's breaches of duty, BB&T TRUST incurred substantial damages, in excess of \$10,000, of which BB&T TRUST hereby seeks recovery from MassMutual and Clark. Had BB&T TRUST been timely informed that the Reallocation Event trigger had been hit in August 2007 and November 2007, BB&T TRUST could have avoided some or all of its damages by ensuring that the Falcon investment was liquidated as quickly as possible, either through the mandatory liquidation contemplated by the Letter Agreement and the PPM or through a negotiated liquidation in which any waiting periods or advance notice requirements were waived.

113. MassMutual's and Clark's breaches of duty were so egregious and reckless as to constitute gross negligence. MassMutual and Clark knew that the Reallocation Event "triggers" were, in some instances, measured on a daily basis, yet, on information and belief, they did not put in place monitoring systems that would allow them to detect that such "triggers" had been hit until, in some cases, weeks after they had been hit. Further, MassMutual and Clark either (a) knew that their representation in September 2007 that no Reallocation Event "triggers" had been hit yet was false when made, or (b) made that representation without regard to whether it was true or false, all the while knowing of the enormous financial impact that representation could have on BB&T TRUST. Accordingly, in addition to its actual damages, BB&T TRUST is entitled to recover from MassMutual and Clark punitive and/or exemplary damages in an amount sufficient to punish Clark and MassMutual for their egregious and reckless conduct and to deter others from engaging in similar conduct in the future, which in any event should be an amount not less than three times the amount of actual damages incurred by BB&T TRUST.

**Count IV – Negligent Misrepresentation  
(MassMutual and Clark)**

114. BB&T TRUST repeats and realleges each of the allegations contained in the paragraphs above as if fully set forth herein.

115. In their roles with respect to BB&T TRUST's BOLI investment, Clark and MassMutual owed BB&T TRUST a duty of care as set out above. Above and beyond serving as BB&T TRUST's insurer, MassMutual undertook the obligation to invest the money it received from BB&T TRUST according to the allocations initially made by BB&T TRUST. MassMutual and Clark both undertook the obligation to (a) monitor the performance of that investment in a manner that would ensure that MassMutual and Clark would detect in a timely manner any developments that affected the rights and interests of BB&T TRUST, and (b) timely notify BB&T TRUST of any such developments, including any circumstances that would constitute a Reallocation Event "trigger."

116. In the course of performing their obligations to BB&T TRUST, Clark and MassMutual represented to BB&T TRUST that no Reallocation Event "triggers" had been "hit yet" as of the end of August 2007 when, in fact, a Reallocation Event had occurred during August 2007. This misrepresentation was made in September 2007 in North Carolina by MassMutual (through Hug in Connecticut) and Clark (through Whitlatch in North Carolina) to BB&T TRUST and its Grantor (through Marley in North Carolina).

117. This representation was false, and was intended for BB&T TRUST's guidance and use in connection with BB&T TRUST's BOLI investment.

118. Clark and MassMutual did not exercise reasonable care in concluding that no Reallocation Event had occurred as of the end of August 2007.

119. BB&T TRUST reasonably and justifiably relied on this false representation in failing to take action to ensure that all protections to which it was entitled in light of the Reallocation Event were timely implemented on its behalf. Had BB&T TRUST been timely informed that the Reallocation Event trigger had been hit in August 2007, BB&T TRUST would have ensured that the Falcon investment was liquidated as quickly as possible, either through the mandatory liquidation contemplated by the Letter Agreement and the PPM or through a negotiated liquidation in which any waiting periods or advance notice requirements were waived.

120. As a proximate result of this false representation, BB&T TRUST incurred substantial damages, in excess of \$10,000, of which BB&T TRUST hereby demands recovery from Clark and MassMutual.

121. As indicated above, Clark's and MassMutual's conduct in making this false representation was so egregious and reckless as to constitute gross negligence. Accordingly, in addition to its actual damages, BB&T TRUST is entitled to recover from Clark and MassMutual punitive and/or exemplary damages in an amount sufficient to punish Clark and MassMutual for their egregious and reckless conduct and to deter others from engaging in similar conduct in the future, which in any event should be an amount not less than three times the amount of actual damages incurred by BB&T TRUST.

**Count V – Breach of Contract  
(MassMutual)**

122. BB&T TRUST repeats and realleges each of the allegations contained in the paragraphs above as if fully set forth herein.

123. A valid and binding contract existed between MassMutual and BB&T TRUST whereby BB&T TRUST agreed to purchase over \$112.5 million of BOLI policies from MassMutual. The terms of that contract were set out in the PPM, the BOLI policy, the August 16, 2006 Letter Agreement, and certain other representations, understandings and agreements between the parties.

124. BB&T TRUST performed all of its obligations under the contract and satisfied all conditions precedent, including without limitation the payment of over \$112.5 million of premiums to MassMutual.

125. The contract required MassMutual to administer and monitor the BB&T TRUST BOLI policy and investment according to the contract documents and its duty of good faith and fair dealing and in the best interests of BB&T TRUST. Among other things, the contract required MassMutual to monitor the performance of the Falcon investment in a manner that would enable MassMutual to detect the triggering of a Reallocation Event as soon as it occurred, and to immediately report that triggering event to both BB&T TRUST and Bank of America.

126. MassMutual breached the contract by failing to administer and monitor the BB&T TRUST BOLI policy and investment in accordance with the contract documents and its duty of good faith and fair dealing and in the best interests of BB&T TRUST. Among other things, MassMutual failed to timely report to BB&T TRUST and to Bank of America that a Reallocation Event trigger had been hit in August 2007 and in November 2007, and to take the actions required to preserve the value of BB&T TRUST's premiums paid for the BOLI investment. Had BB&T TRUST been timely informed that the Reallocation Event trigger had been hit in August 2007 and November

2007, BB&T TRUST would have ensured that the Falcon investment was liquidated as quickly as possible, either through the mandatory liquidation contemplated by the Letter Agreement and the PPM or through a negotiated liquidation in which any waiting periods or advance notice requirements were waived.

127. As a direct and proximate result of MassMutual's breach of contract, BB&T TRUST has suffered substantial damages, in excess of \$10,000, in an amount to be determined at trial. BB&T TRUST hereby demands recovery of these damages, together with its costs and attorneys' fees, from MassMutual.

**Count VI – Fraud  
(MassMutual and Clark)**

128. BB&T TRUST repeats and realleges each of the allegations contained in the paragraphs above as if fully set forth herein.

129. In performing their duties with respect to BB&T TRUST's BOLI investment, Clark and MassMutual represented to BB&T TRUST that no Reallocation Event "triggers" had been "hit yet" as of the end of August 2007 when, in fact, a Reallocation Event trigger had been hit during August 2007.

130. This representation was false and material, and was intended for BB&T TRUST's guidance and use in connection with BB&T TRUST's BOLI investment and, therefore, was reasonably calculated to deceive BB&T TRUST.

131. Further, Clark and MassMutual failed to timely report to BB&T TRUST that a Reallocation Event trigger had been hit during November 2007. This omission was material, and created a false impression of the true performance of the Falcon investment. This false impression was intended for BB&T TRUST's guidance and use in connection

with BB&T TRUST's BOLI investment and, therefore, was reasonably calculated to deceive BB&T TRUST.

132. On information and belief, MassMutual and Clark feared the domino effect that could result from their notifying BB&T TRUST that the Reallocation Event "triggers" had been hit in August 2007 and again in November 2007. MassMutual and Clark knew that the liquidation of BB&T TRUST's Falcon investment could trigger reallocation events for the Other Investors, and/or could cause one or more of BB&T TRUST and the Other Investors to surrender their BOLI policies, and that these events would jeopardize the substantial, recurring commissions that they received from the BB&T TRUST investment, as well as the even more substantial and recurring commissions they received from the Other Investors. Indeed, they knew that even monitoring the Falcon fund's performance on a daily basis and timely reporting that performance could endanger their commissions in the same way. Thus, on information and belief, MassMutual and Clark knew the representation was false when made, and they made the false representation intentionally for the purpose of inducing BB&T TRUST to rely on that false representation to its detriment. Alternatively, MassMutual and Clark made the false representation recklessly, as a positive assertion, and without knowledge of its truth, and intended that BB&T TRUST rely on the representation.

133. BB&T TRUST reasonably and justifiably relied on this false representation in failing to take action to ensure that all protections to which it was entitled were timely implemented on its behalf. Had BB&T TRUST been timely informed that the Reallocation Event trigger had been hit in August 2007 and November 2007, BB&T TRUST would have ensured that the Falcon investment was liquidated as

quickly as possible, either through the mandatory liquidation contemplated by the Letter Agreement and the PPM or through a negotiated liquidation in which any waiting periods or advance notice requirements were waived.

134. As a proximate result of Clark's and MassMutual's fraud, BB&T TRUST incurred substantial damages, in excess of \$10,000, of which BB&T TRUST hereby demands recovery from Clark and MassMutual.

135. In making this false representation, Clark and MassMutual acted willfully, wantonly, and/or in reckless disregard for the rights of BB&T TRUST in an attempt to deceive BB&T TRUST to advance their own interests at the expense of BB&T TRUST's interests. Accordingly, in addition to its actual damages, BB&T TRUST is entitled to recover from Clark and MassMutual punitive and/or exemplary damages in an amount sufficient to punish them for their willful, wanton and/or reckless conduct and to deter others from engaging in similar conduct in the future, which in any event should be an amount not less than three times the amount of actual damages incurred by BB&T TRUST.

**Count VII – Unfair and Deceptive Trade Practices  
(MassMutual and Clark)**

136. BB&T TRUST repeats and realleges each of the allegations contained in the paragraphs above as if fully set forth herein.

137. In performing their obligations with respect to BB&T TRUST's BOLI investment, Clark and MassMutual breached their fiduciary duties and other duties of care as set forth above, made material misrepresentations as set forth above, and defrauded BB&T TRUST as set forth above, all willfully, wantonly, and/or in reckless

disregard for the rights of BB&T TRUST for the purpose of gaining a benefit to themselves at the expense of BB&T TRUST.

138. On information and belief, MassMutual and Clark feared the domino effect that could result from their notifying BB&T TRUST that the Reallocation Event “triggers” had been hit in August 2007 and again in November 2007. MassMutual and Clark knew that the liquidation of BB&T TRUST’s Falcon investment could trigger reallocation events for the Other Investors, and/or could cause one or more of BB&T TRUST and the Other Investors to surrender their BOLI policies, and that these events would jeopardize the substantial, recurring commissions that they received from the BB&T TRUST investment, as well as the even more substantial and recurring commissions they received from the Other Investors. Indeed, they knew that even monitoring the Falcon fund’s performance on a daily basis and timely reporting that performance could endanger their commissions in the same way. Thus, on information and belief, MassMutual and Clark acted intentionally to deceive BB&T TRUST with respect to the performance of the Falcon investment, by (a) failing to timely report important developments respecting the Falcon investment, (b) making false statements and creating false impressions concerning the Falcon investment, and (c) failing to timely advise BB&T TRUST to exercise and enforce its reallocation rights. MassMutual’s and Clark’s deceptive actions and omissions were undertaken for the purpose of ensuring that the Falcon investment was not timely liquidated and ensuring that BB&T TRUST (and the Other Investors) did not surrender their BOLI policies, which would have jeopardized MassMutual’s and Clark’s substantial and recurring commissions.

139. The unlawful and wrongful actions of Clark and Mass Mutual are unfair methods of competition, unfair and deceptive acts and practices, and unconscionable business conduct, all in violation of the common law and Chapter 75 of the North Carolina General Statutes.

140. Such actions were “in or affecting commerce” as that phrase is defined by N.C. Gen. Stat. § 75-1.1.

141. These unfair and deceptive actions have directly and proximately caused damage to BB&T TRUST as set forth above.

142. Pursuant to N.C. Gen. Stat. § 75-16, BB&T TRUST is entitled to recover, and hereby demands recovery of, treble the amount of its actual damages. Pursuant to N.C. Gen. Stat. § 75-16.1, BB&T TRUST is entitled to recover, and hereby demands recovery of, its costs and reasonable attorneys’ fees incurred in the prosecution of this action.

## VI.

### **JURY DEMAND**

143. BB&T TRUST hereby respectfully requests that its claims against MassMutual and Clark be tried before a jury.

## VII.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff BB&T TRUST demands judgment against Defendants Massachusetts Mutual Life Insurance Company and Clark Consulting, Inc. as follows:

- (a) compensatory damages in excess of \$10,000 in an amount to be determined at trial;

- (b) consequential and incidental damages, including out-of-pocket expenses, attorneys' fees and court costs;
- (c) punitive and/or exemplary damages in an amount to be determined at trial;
- (d) treble damages;
- (e) pre- and post-judgment interest; and
- (f) such other and further relief as the Court may deem necessary or appropriate.

DATED: August 6, 2009.

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/s/ Joey H. Foxhall

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*Of Counsel for BB&T Trust*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing *First Amended Complaint and Jury Demand* was served on all parties to this action this 6th day of August, 2009, via electronic mail, according to stipulation of the parties, as follows:

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