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RICHARD H. WICKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

EDL

CV 11 3780
Civil Case Number

ANDRE BEARD and GLORIBEL
GUERRERO, On Behalf Of Themselves
And All Others Similarly Situated,

Plaintiffs,

vs.

PACIFIC BELL TELEPHONE
COMPANY, a California Corporation,
d/b/a AT&T California; and DOES 1-20,
inclusive,

Defendants.

CLASS ACTION
COMPLAINT FOR VIOLATIONS OF
THE FAMILY MEDICAL LEAVE ACT
DEMAND FOR JURY TRIAL

1 Plaintiffs Andre Beard and Gloribel Guerrero, by and through their attorneys, bring
2 this action on behalf of themselves and all others similarly situated against Defendants
3 PACIFIC BELL TELEPHONE COMPANY, a California Corporation, d/b/a AT&T
4 California (“AT&T” or “Defendant”) and Does 1 through 20, and hereby allege as follows:

5 **I. NATURE OF THE ACTION**

6 1. Plaintiffs bring this action on behalf of themselves and all other
7 similarly-situated AT&T customer service representatives and “Level 1” Managers (“Class
8 Members”) for AT&T’s violations of the Family Medical Leave Act (“FMLA”).

9 2. AT&T ranks its employees by total absences each month. AT&T
10 calculates its employees’ absences using a “total absence policy” whereby all absences,
11 including AT&T-designated FMLA-protected leave, are the basis for the rankings. When
12 AT&T determines that an employee is in the bottom 30% of its attendance records based on
13 its monthly total absence calculations, its policy is to “black list” the so-called “FMLA
14 abuser” and target the employee for termination. AT&T’s policy is therefore to consider
15 AT&T-designated FMLA-protected leave as a negative factor in its adverse employment
16 decisions.

17 3. Plaintiffs seek all available remedies under the FMLA for their
18 claims and the claims of putative class members including damages, interest, liquidated
19 damages, attorney fees, and costs.

20 **II. JURISDICTION**

21 4. This Court has jurisdiction pursuant to 28 USC § 1331 because the
22 claims of Plaintiffs and the putative class arise under the Federal Family Medical Leave
23 Act, 29 USC § 2601, *et seq.*

24 **III. VENUE**

25 5. Venue is proper in this District pursuant to 28 USC § 1391(b)(2)
26 because a substantial part of the events on which the claim is based occurred in San
27 Francisco County.
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IV. PARTIES

A. Plaintiffs

6. Plaintiff Andre Beard was employed by AT&T as an Account Manager, Account Executive, and Coach Leader at AT&T’s San Jose, San Ramon, and Sacramento branches from November 8, 1999 to April 10, 2010. Beard took AT&T-designated FMLA-protected leave and was told that because he took the protected leave he would be ineligible for a promotion. Beard was also placed on a “do not hire” list because he took protected leave.

7. Plaintiff Gloribel Guerrero was employed by AT&T as a customer service representative at AT&T’s Spanish Language Center in Oakland, California from June 4, 2011 to May 18, 2010. Guerrero was told she would not receive a promotion because she took AT&T-designated FMLA-protected leave and was eventually terminated because she took AT&T-designated FMLA-protected leave.

B. Defendants

8. Defendant AT&T is a California Corporation with its principal place of business in San Francisco, California. At all relevant times, AT&T was an employer or joint employer of Plaintiff and all putative Class Members.

9. Plaintiffs do not know the true names and capacities of Defendants DOES 1-20, inclusive, and for that reason sues DOES 1-20 under fictitious names and prays leave to amend the complaint to insert the true names and capacities of DOES 1-20 when Plaintiffs ascertain said true names and capacities.

10. Plaintiffs are informed and believe that Defendants and each of them are responsible in whole or in part for Plaintiff’s damages.

11. At all relevant times, Defendants, their employees, agents, successors, and each of them participated in the doing of acts or authorized or ratified the doing of the acts hereinafter alleged to have been done by the named Defendants.

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V. FACTUAL ALLEGATIONS

12. AT&T is a covered entity or employer under the FMLA.

13. AT&T has a “total absence policy” pursuant to which all absences, including absences recognized by AT&T as FMLA-protected absences, are counted together for purposes of calculating absences. The total absence policy took effect in July 2008.

14. AT&T ranks its non-managerial and managerial employees according to their total absences using “Black Lists.”

15. Black Lists are color-coded lists that identify employees in the bottom 30% of AT&T’s attendance records.

16. AT&T’s policy was to actively harass, formally reprimand, intimidate, demote, refuse to promote, discharge, or constructively discharge all employees who were in the bottom 30% of AT&T’s attendance records.

17. Plaintiffs and putative Class Members took AT&T-designated and FMLA-protected leave.

18. Plaintiffs and putative Class Members were in the bottom 30% of AT&T’s attendance records pursuant to their total absences.

19. Plaintiffs and putative Class Members’ use of AT&T-designated FMLA-protected leave was therefore a negative factor in AT&T’s adverse employment decisions including harassment, intimidation, demotion, refusal to promote, discharge, or constructive discharge.

20. AT&T therefore willfully interfered with Plaintiff and putative Class Members’ FMLA rights by adopting a total absence policy and basing its adverse employment actions upon the results of the total absence policy.

VI. CLASS ACTION ALLEGATIONS

21. Plaintiff Gloribel Guerrero brings this lawsuit for violations of FMLA on her behalf and on behalf of all other similarly situated non-managerial members of the Proposed Class pursuant to FRCP 23.

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22. The “Non-Managerial Sub-Class” is defined as:

All non-managerial employees employed by AT&T at call centers, collection centers, or bilingual centers within the State of California at any time during the period of three years prior to the date of the commencement of this action through the final disposition of this action who took AT&T-designated FMLA-designated leave and who, during the Class Period, were in the bottom 30% of AT&T’s total absence records.

23. Plaintiff Andre Beard brings this lawsuit for violations of FMLA on his behalf and on behalf of all other similarly situated first level managerial members of the Proposed Class pursuant to FRCP 23.

24. The “Managerial Sub-Class” is defined as:

All first level managerial employees employed by AT&T at call centers, collection centers, or bilingual centers within the State of California at any time during the period of three years prior to the date of the commencement of this action through the final disposition of this action who took AT&T-designated FMLA-designated leave and who, during the Class Period, in the bottom 30% of AT&T’s total absence records.

25. Excluded from the Proposed Classes are: (1) Defendants, any entity or division in which Defendants have a controlling interest, and its/their legal representatives, officers, directors, assigns and successors; (2) the judge to whom this case is assigned and any member of the judge’s immediate family; (3) non-California residents; and (5) claims for personal injury, wrongful death and emotional distress and claims of consequential property damage and loss.

26. Both Class Periods run from three years prior to the date of the commencement of this action through the date of final disposition of this action pursuant to 29 USC § 2617(c)(2) and 29 CFR § 825.400.

A. NUMEROSITY

27. Plaintiffs are informed and believe that thousands of non-managerial persons were employed by AT&T at call centers, collections centers, and bilingual centers

1 within the State of California during the Class Period. Plaintiffs are informed and believe
2 that hundreds of managerial persons were employed by AT&T at call centers, collections
3 centers, and bilingual centers within the State of California during the Class Period.
4 Plaintiffs are informed and believe that the number of putative Class Members is readily
5 ascertainable through discovery of Defendants' payroll and personnel records.

6 **B. TYPICALITY**

7 28. Plaintiffs claim that they took AT&T-designated FMLA-protected
8 leave and that the fact that they took AT&T-designated FMLA-protected leave was a
9 negative factor in AT&T's employment decisions towards them. Plaintiffs' claims are
10 typical of the claims of all putative Class Members in both sub-classes, all of whom allege
11 the same FMLA violation based on the same company policies.

12 **C. COMMONALITY**

13 29. Class Members in both sub-classes share common issues of fact,
14 including:

15 a. All Class Members in both sub-classes took AT&T-
16 designated FMLA-protected leave.

17 b. All Class Members in both sub-classes were in the bottom
18 30% of AT&T's attendance records.

19 c. All Class Members in both sub-classes were subject to
20 AT&T's adverse employment actions because they were in the bottom 30% of AT&T's
21 total absence records.

22 d. AT&T-designated FMLA-protected leave was a negative
23 factor in AT&T's adverse employment actions against all Class Members in both sub-
24 classes.

25 30. Class Members in both sub-classes share a common issue of law,
26 including:

27 a. Whether Defendants violated the FMLA, 29 USC 2615(a)(1).
28

D. ADEQUACY

31. Plaintiffs are members of their respective sub-classes and will fairly and adequately represent and protect the interests of the Class. Plaintiffs have retained counsel competent and experienced in complex class actions and federal labor and employment litigation.

F. PREDOMINANCE

32. Common issues predominate over individualized issues. The Court can determine liability on a class-wide basis in both sub-classes with common proof of AT&T's policy of taking adverse employment actions against all employees whose total absences – including absences that were designated by AT&T as FMLA-protected – placed them in the bottom 30% of AT&T's total absence records.

G. SUPERIORITY

33. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Because of the relatively small size of the individual Class Members' claims, absent a class action, most Class Members would likely find the cost of individually litigating their claims against Defendants to be prohibitive. Current AT&T employees in that putative class may also fear retaliation for filing an individual complaint. Class treatment also conserves the resources of the courts and the litigants, and promotes consistency and efficiency of adjudication.

VII. FIRST CLAIM**Interference With FMLA Rights****Against All Defendants**

34. Plaintiffs, on behalf of themselves and the proposed sub-classes, reallege and incorporate by reference the allegations in the preceding paragraphs as if fully set forth herein.

35. The federal Family Medical Leave Act prohibits covered employers from interfering with, restraining, or denying an employee from exercising any right under the FMLA. 29 USC 2615(a)(1); 29 CFR § 825.220(c).

1 36. AT&T willfully interfered with Plaintiffs' and putative Class
2 Members' rights guaranteed by the FMLA by using AT&T-designated FMLA-protected
3 leave as a negative factor in its employment decisions regarding the putative Class
4 Members. AT&T's total absence policy – which factored in absences that were designated
5 by AT&T as FMLA-protected – and corollary policy of formally reprimanding, harassing,
6 intimidating, demoting, refusing to promote, discharging, or constructively discharging its
7 employees who were in the bottom 30% of its total absence records combined to interfere
8 with Class Members' right to take leave under the FMLA.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiffs on behalf of themselves and all putative Class
11 Members in both sub-classes, pray for relief as follows:

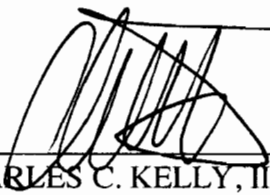
- 12 A. Certification of this action as a class action on behalf of the both proposed sub-
- 13 classes;
- 14 B. Designation of Plaintiffs as Representatives of their respective sub-classes;
- 15 C. Designation of Plaintiffs' counsel as Class Counsel;
- 16 D. An award of damages, interest, liquidated damages, attorneys fees, and costs to be
- 17 paid by Defendant according to proof;
- 18 E. Pre-Judgment and Post-Judgment interest, as provided by law;

19 **DEMAND FOR JURY TRIAL**

20 Plaintiffs hereby demand, on behalf of themselves and both proposed sub-classes, a
21 jury trial on all claims to which a right to jury trial exists.

22 DATED: July 28, 2011.

23 HERSH & HERSH

24
25
26 By 
27 CHARLES C. KELLY, II
28 Attorneys for Plaintiff

HERSHANDHERSH
A Professional Corporation

JS 44 (Rev. 12/07) (CAND Rev 1/10)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

<p>I. (a) PLAINTIFFS</p> <p>ANDRE BEARD and GLORIBEL GUERRO, On Behalf of Themselves And All Others Similarly Situated</p>	<p>DEFENDANTS</p> <p>PACIFIC BAL TELEPHONE COMPANY, a California Corporation, d/b/a AT&T California; and DOES 1-20, inclusive</p>
<p>(b) County of Residence of First Listed Plaintiff San Joaquin County (EXCEPT IN U.S. PLAINTIFF CASES)</p>	<p>County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.</p>
<p>(c) Attorney's (Firm Name, Address, and Telephone Number)</p> <p>HERSH & HERSH, A Professional Corporation 601 Van Ness Ave, Suite 2080 San Francisco, CA 94102 (415) 441-5544</p> <p style="text-align: right; font-size: 2em; font-family: cursive;">37 YUEN</p>	<p>Attorneys (If Known)</p>

<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <p>(For Diversity Cases Only)</p> <table style="width:100%;"> <tr> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td></td> <td></td> <td>Incorporated or Principal Place of Business In This State</td> <td></td> <td></td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td></td> <td></td> <td>Incorporated and Principal Place of Business In Another State</td> <td></td> <td></td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> <tr> <td></td> <td></td> <td>Foreign Nation</td> <td></td> <td></td> </tr> </table>	PTF	DEF		PTF	DEF	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Citizen of This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4			Incorporated or Principal Place of Business In This State			<input type="checkbox"/> 2	<input type="checkbox"/> 2	Citizen of Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5			Incorporated and Principal Place of Business In Another State			<input type="checkbox"/> 3	<input type="checkbox"/> 3	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 6	<input type="checkbox"/> 6			Foreign Nation		
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IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<p>PERSONAL INJURY</p> <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p>PERSONAL PROPERTY</p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <p>LABOR</p> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input checked="" type="checkbox"/> 740 Railway Labor Act <input checked="" type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <p>IMMIGRATION</p> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <p>PROPERTY RIGHTS</p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <p>SOCIAL SECURITY</p> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <p>FEDERAL TAX SUITS</p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<p>REAL PROPERTY</p> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<p>CIVIL RIGHTS</p> <input type="checkbox"/> 441 Voting <input checked="" type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<p>PRISONER PETITIONS</p> <input type="checkbox"/> 510 Motions to Vacate Sentence <p>Habeas Corpus:</p> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 another district (specify) 6 Multidistrict Litigation 7 Judge from District Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
 Violations of the Family Medical Leave Act ("FMLA").

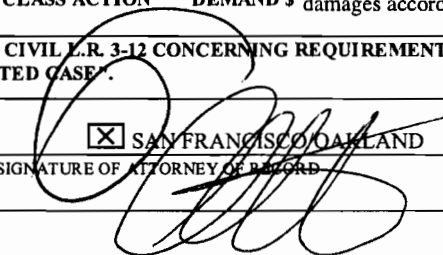
Brief description of cause:
 Class Action by former AT&T Employees

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ _____ damages accord. proof CHECK YES only if demanded in complaint: **JURY DEMAND:** Yes No

VIII. RELATED CASE(S) IF ANY: PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY)

SAN FRANCISCO OAKLAND SAN JOSE EUREKA

DATE: 8/1/11 SIGNATURE OF ATTORNEY OF RECORD: 

Court Name: U.S. District Court, NDCA
Division: 3
Receipt Number: 34611862839
Cashier ID: bucklen
Transaction Date: 08/01/2011
Payer Name: law offices of hersh and her
sh

CIVIL FILING FEE

For: andre beard
Case/Party: D-CAN-3-11-CV-003780-001
Amount: \$350.00

PAPER CHECK CONVERSION

Check/Money Order Num: 602718
Amt Tendered: \$350.00

Total Due: \$350.00
Total Tendered: \$350.00
Change Amt: \$0.00

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Checks and drafts are accepted
subject to collections and full
credit will only be given when the
check or draft has been accepted by
the financial institution on which
it was drawn.