

RECEIVED

APR 25 2001

THE STURDEVANT LAW FIRM

5447sc

1 ARNE D. WAGNER (BAR NO. 78464)  
 2 STEPHEN E. PAFFRATH (BAR NO. 195932)  
 3 JAIME GUERRERO (BAR NO. 192211)  
 4 MORRISON & FOERSTERLLP  
 425 Market Street  
 San Francisco, California 94105-2482  
 Telephone: (415) 268-7000

5 GREGORY SCOTT SPENCER (BAR NO. 94424)  
 6 OFFICE OF GENERAL COUNSEL, DEPT. #3017  
 7 BANK OF AMERICA N.A.  
 8 P.O. Box 37000  
 9 555 California Street  
 10 San Francisco, CA 94137  
 11 Telephone: (415) 622-3317  
 12 Facsimile: (415) 953-1334

13 Attorneys for Defendant  
 14 BANK OF AMERICA N.A., FORMERLY  
 15 KNOWN AS BANK OF AMERICA NT & SA

16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 COUNTY OF SAN FRANCISCO

Paul Miller, individually and on behalf of others  
 similarly situated,

Plaintiff,

v.

Bank of America, NT & SA,

Defendant.

No. **301917**

MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 BANK OF AMERICA N.A.'S  
 MOTION FOR SUMMARY  
 JUDGMENT OR ALTERNATIVELY  
 F&OR SUMMARY ADJUDICATION

Date: June 8, 2001  
 Time: **2:00** p.m.  
 Dept: **624**  
 The Honorable Anne Bouliane

Complaint Filed: September 16, 1998  
 Trial: Not Set

TABLE OF CONTENTS

		Page
1		
2		
3	TABLE OF AUTHORITIES .....	iii
4	INTRODUCTION .....	1
5	SUMMARY OF UNDISPUTED FACTS .....	1
6	SUMMARY OF ARGUMENT .....	3
7	ARGUMENT .....	4
8	I.    MILLER’S THIRD CAUSE OF ACTION FAILS AS A	
9	MATTER OF LAW BECAUSE THE BANK HAS NOT	
10	LEVIED AGAINST MILLERS SOCIAL SECURITY FUNDS	
11	IN VIOLATION OF CODE OF CIVIL PROCEDURE SECTION	
12	704.080 .....	4
13	A.    The Statutory Exemption at Section 704.080 Applies Only to	
14	Procedures for Enforcement of a Money Judgment .....	5
15	B.    The Bank Was Acting Within Its Powers When It Debited	
16	Miller’s Account to Reverse the Erroneous Credit and for	
17	Service Fees .....	7
18	1.    The Bank Is Expressly Allowed To Charge Service Fees	
19	to Its Deposit Account Customers .....	7
20	2.    The Bank Is Entitled To Pay Overdrafts and To Later	
21	Recover Those Overdrafts .....	8
22	3.    The Bank Is Entitled To Apply Funds In A Successor	
23	Deposit Account To Cover An Overdraft In A	
24	Predecessor Deposit Account .....	9
25	C.    Bank of America Did Not Owe Miller a Duty To Provide Him	
26	with an Account Free of Service Charges and Free of	
27	Responsibility for Repaying Overdrafts .....	11
28	II.   MILLER’S FIRST AND SECOND CAUSES OF ACTION FOR	
29	VIOLATION OF CIVIL CODE SECTIONS 1709 & 1710 FAIL	
30	AS A MATTER OF LAW BECAUSE MILLER CANNOT	
31	ESTABLISH THAT THE BANK MADE ANY	
32	MISREPRESENTATIONS OF PAST OR EXISTING	
33	MATERIAL FACT .....	13
34	A.    Elements of Causes of Action for Fraudulent and Negligent	
35	Misrepresentation in Violation of Civil Code Sections 1709 &	
36	1710 .....	13
37	B.    Miller Has Failed To Establish that Bank of America Made	
38	Any Misrepresentations of Past or Existing Material Facts in	
39	Violation of Civil Code Sections 1709 & 1710 .....	13

1 III. BANK OF AMERICA’S ACTIONS CANNOT BE UNFAIR AS  
2 THEY ARE PERMITTED BY LAW; THUS MILLER’S  
3 FOURTH AND SIXTH CAUSES OF ACTION FAIL AS A  
4 MATTER OF LAW ..... 14  
5  
6 IV. MILLER’S FIFTH CAUSE OF ACTION FOR INTENTIONAL  
7 INFLECTION OF EMOTIONAL DISTRESS FAILS AS A  
8 MATTER OF LAW AS THE BANK’S ACTIONS WERE  
9 PRIVILEGED ..... 15  
10  
11 V. MILLER’S SEVENTH CAUSE OF ACTION FOR VIOLATION  
12 OF BUSINESS AND PROFESSIONS CODE SECTION 17500  
13 FAILS AS A MATTER OF LAW AS THE BANK’S  
14 ADVERTISING WAS NOT FALSE OR MISLEADING ..... 16  
15  
16 CONCLUSION ..... 17  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF AUTHORITIES

CASES

*Borba v. Thomas*,  
70 Cal. App. 3d 144 (1977)..... 13

*Brannon v. First Nat? Bank of Atlanta*,  
223 S.E. 2d 473 (Ga. 1976)..... 8

*Cicone v. URS Corp.*;  
183 Cal. App. 3d 194 (1986)..... 13

*Fletcher v. Western Nat. Life Ins. Co.*3  
10 Cal. App. 3d 376 (1970)..... 16

*Florida-Patsand Corp. v. Central Bank & Trust Co.* 3  
177 So. 2d 533 (Fla. 1965)..... 8

*Freeman v. Time, Inc.*2  
68 F.3d 285 (9th Cir. 1995)..... 17

*Haskell v. Time, Inc.* 9  
965 F. Supp. 1398 (E.D. Cal. 1998)..... 17

*Hofian v Security Pac. Nat. Bank*,  
121 Cal. App. 3d 964 (1981)..... 8

*Kruger v. Wells Fargo Bank*,  
11 Cal. 3d 352 (1974) ..... 9, 10

*Lazar v. Hertz Corp.*9  
69 Cal. App. 4th 1494 (1999) ..... 14, 15

*People v. Dollar Rent-a-Car Sys., Inc.*9  
211 Cal. App. 3d 119 (1989)..... 17

*Perdue v. Cracker Natl Bank*,  
38 Cal. 3d 913 (1985) ..... 9

*Potter v. Firestone Tire & Rubber Co.*3  
6 Cal. 4th 965 (1993) ..... 15, 16

1 *Schnall v. Hertz Corp.*<sup>9</sup>  
2 28 Cal. App. 4th 1144 (2000) ..... 14

3 *Shapiro v United Cal. Bank,*  
4 133 Cal. App. 3d 256 (1982)..... 8

5 *Symona5 v. Mercury Sav. & Loan Ass'n,*  
6 225 Cal.App.3d 1458 (1990)..... 10

7 *Terre11 v. Hancock Bank,*  
8 7 F. Supp. 2d 812 (S.D. Miss. 1998)..... 8

9 *Video Trax, Inc. v. Nationsbank, N.A.*<sup>9</sup>  
10 33 F. Supp. 2d 1041 (S.D. Fl. 1998) ..... 8

11 *Walters v. Marlery*  
12 83 Cal. App. 3d 1 (1978)..... 13

12 STATUTES

13

14 12 U.S.C.  
15 § 1 ..... 7  
16 § 21 ..... 1, 7

17 12 C.F.R.  
18 § 7.4002 ..... 7, 14, 15, 16, 17  
19 § 7.4002(b)(1)-(4) ..... 7

20 Cal. Bus. & Prof. Code  
21 5 17200 ..... 3, 14, 15  
22 9 17500 ..... 3, 16, 17

23 Cal.Civ. Code  
24 § 1709 ..... 2, 13  
25 6 1710 ..... 2, 13  
26 § 1750 ..... 3, 14  
27 3 1936 ..... 15

28 Cal.Civ. Proc. Code  
29 \$488.600(5) ..... 5  
30 6 488.455(a) ..... 6  
31 § 680.260 ..... 5  
32 \$690.175 ..... 9

1 tj 703.010..... 6  
 2 tj 704.080..... *passim*  
 3 Cal. Fin. Code  
 \$864 ..... 10, 11, 13, 14, 15, 16, 17  
 4  
 5 Cal. U. Corn. Code  
 6 4401(a)..... 8  
 6

7 **OTHER AUTHORITIES**

8 5 Witkin, Summary of Cal. Law Torts, §407 (9th ed. 1988) ..... 16  
 9 5 Witkin, Summary of Cal. Law Torts, § 676 (9th ed. 1988)..... 13  
 10 Sen. Corn. on Judiciary, Analysis of Judiciary Bill No. 2724 (1997-1998  
 11 Reg. Sess.)..... 6  
 12 State Law Requiring Consumer Transaction Accounts Preempted, OCC Interpretive Letter  
 13 No. 572 [1991-1992 Transfer Binder] Fed. Banking L. Rep. (CCH)  
 14 783,342 (Jan. 15,1992) 1992 OCC Ltr. LEXIS 1 ..... 7  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

1 **INTRODUCTION**

2 Plaintiff Paul Miller (“Miller”), a recipient of Social Security benefits which are electronically  
3 deposited into his checking account with defendant Bank of America N.A. (“Bank of America” or the  
4 “Bank”), alleges that he need not pay the Bank’s standard fees and need not repay overdrafts. He  
5 relies principally on California Code of Civil Procedure section,704.080, which by its terms applies  
6 to levies by judgment creditors. It is undisputed that no judgment creditor ever levied on his account.

7 It is a pure question of law whether the Bank owed Miller or the proposed class of Social  
8 Security recipients a duty to exempt them from standard checking account fees or repayment of  
9 overdrafts. Bank of America therefore moves for summary adjudication in its favor as to each of  
10 Miller’s causes of action. Moreover, since Bank of America is entitled to summary adjudication as to  
11 each of Miller’s causes of action, Bank of America is also entitled to summary judgment.

12 **SUMMARY OF UNDISPUTED FACTS**

13 Bank of America is a national bank organized and existing pursuant to the National Bank Act,  
14 12 U.S.C. § 1, et seq. (Declaration of Kheloud Bader in Support of Bank of America’s Motion for  
15 Summary Judgment or Alternatively Summary Adjudication (“Bader Decl.”) at 7 2.) The Bank  
16 provides checking accounts, savings accounts and other banking services to its depositors. (*Id.* at 1  
17 2.) Some depositors elect to have certain payments, such as Social Security and other governmental  
18 benefits, deposited directly into their accounts by means of electronic funds transfers. (*Id.* at fi 2.)  
19 Miller, who established an account with the Bank in 1978, is such a depositor. (*Id.* at 13.) In June of  
20 1994, Miller elected to have his Social Security Disability Income and Supplemental Security Income  
21 (“Social Security funds”) deposited directly into his account by means of electronic funds transfer.  
22 (Plaintiff Paul Miller’s First Amended Complaint (“Compl.”) at f 8; Bader Decl. at 7 4.)

23 On or about January 30, 1998, the Bank erroneously credited \$1,799.83 to Miller’s account.  
24 (Compl. at 1 10; Bader Decl. at 16.) Miller withdrew and spent the erroneously credited funds.  
25 (BaderDecl. at ‘I[ 8.) On or about April 16, 1998, the Bank discovered its error and reversed the  
26 \$1,799.83 credit, which overdrew Miller’s account (created a negative balance). (Compl. at 17 11,  
27 12; Bader Decl. at ‘I[ 8.) In May of 1998, when Miller’s monthly Social Security payment of \$670

1 was electronically deposited into his account, that deposit was applied against the negative balance.  
2 (Bader Decl. at a 10.)

3 When Miller complained, the Bank, in an effort to accommodate him, replaced the old  
4 checking account with a new one, and deposited the \$670 of May Social Security funds into the  
5 successor account. (Bader Decl. at fi 11.) However, because an overdraft remained in Miller's  
6 predecessor account, the Bank's collection system continued to debit the successor account for the  
7 overdraft. That is, when new deposits (Social Security funds) arrived in the successor account, the  
8 overdraft in the predecessor account was applied against them,--- i.e., the overdraft balance was  
9 debited against (subtracted from) the deposits. (Id. at y 14.) When Miller again complained, the  
10 Bank reversed the debit and again credited the Social Security funds to Miller's successor account.  
11 (Id. at fl 15.)

12 During the time period that the Bank was applying the overdraft against incoming deposits,  
13 one of Miller's rent checks was returned unpaid for lack of funds. (Compl. at 1 16; Bader Decl. at 1  
14 16.) When this was brought to the Bank's attention, the Bank paid the rent check. (Bader Decl. at 1  
15 16.) The Bank also reversed the service charges resulting from the above described transactions.  
16 Miller has never repaid, and the Bank has never recovered, the \$1,799.83 that was erroneously  
17 credited to Miller's account, which Miller withdrew and spent. (Id. at 17 15, 16.)

18 On August 13, 1998, Miller, individually and on behalf of others similarly situated, filed his  
19 putative class action complaint. On September 8, 1998, he filed a First Amended Complaint, which  
20 is the operative complaint ("Compl."). Miller alleges that the Bank violated California Code of Civil  
21 Procedure section 704.080 (hereinafter, "Section 704.080") when it attempted to recover the  
22 erroneously credited funds from his checking account. (Compl., Third Cause of Action) Further,  
23 Miller alleges that the Bank violated Section 704.080 when it charged service fees for the processing  
24 of the resulting overdraft (as noted above, Miller did not ultimately pay any such service fees). (Id.)  
25 In addition to alleging that the Bank violated Section 704.080, the complaint contains six additional  
26 purported causes of action, all arising out of the same above-described transactions: violation of Civ.  
27 Code 6 6 1709, 17 10 (fraud); violation of Civ. Code §§ 1709, 1710 (negligent misrepresentation);

28

1 violation of the Consumer Legal Remedies Act, *id.* 5 1750, *et seq.*; intentional infliction of emotional  
2 distress; violation of the Unfair Competition Law, Bus. & Prof. Code 3 17200, *et seq.* ; and violation  
3 of the False Advertising Law, *id.* § 17500, *et seq.*

#### 4 **SUMMARY OF ARGUMENT**

5 The core issue is whether California law requires banks to treat a subgroup of those persons  
6 who receive Social Security funds and other government benefits - namely, the subgroup who  
7 receive such benefits directly by electronic funds transfer --in a discriminatory fashion. If Miller's  
8 construction of Section 704.080 were correct, banks could not allow the accounts of such customers  
9 to be overdrawn. (Or equivalently, in Miller's view, if a bank did allow an overdraft to occur in such  
10 a customer's account, the bank would have to "eat" the loss itself, because it could not recover the  
11 overdraft from the customer.) Thus, these Social Security recipients would be the sole class of  
12 depositors for whom the banks could never honor an insufficient funds check ("NSF check").  
13 Likewise, these Social Security recipients would be the sole class of depositors who could cause  
14 invalid credits to be placed into their accounts -by inadvertence or even by fraud - with no  
15 liability to ever repay the bank (since the bank could never reverse such credits or subtract them back  
16 out of the account). Fortunately, California law does not require such a bizarre set of separate rules  
17 for electronic recipients of Social Security benefits.

18 The Argument addresses first the allegations contained in Miller's Third Cause of Action,  
19 which is the cause of action directly predicated on Section 704.080. Once the Bank is found not to  
20 have violated Section 704.080, Miller's other causes of action evaporate, and the Bank will be  
21 entitled to summary adjudication as to all of Miller's claims.

22 As shown below, Section 704.080 is limited by its terms to the situation where a judgment  
23 creditor of an electronic recipient of Social Security or other government benefits seeks to levy on  
24 that person's bank account. The statute does not, and could not, impose a duty upon the Bank to  
25 exempt accounts receiving Social Security electronically from the Bank's right to recover overdrafts  
26 in those accounts (*i.e.*, the Bank's right to be reimbursed for money that it gave the accountholder out  
27 of the Bank's own pocket) or to be paid the Bank's standard service fees.

1 Miller wrongly contends that, under Section 704.080, the Bank has a duty not to impose  
2 certain debits - i.e., make certain subtractions - in accounts that receive Social Security funds  
3 electronically. In particular, he complains of three kinds of debits: service fees; reversals of invalid  
4 prior credits (at least where such reversal overdraws the account); and debits to a successor account  
5 to repay an overdraft in a predecessor account. However, Section 704.080 imposes no such duty.  
6 Moreover, the duties that Miller alleges are inconsistent with federal laws and regulations governing  
7 a bank's relationship with its customers. They also conflict with the stated purpose of the very statute  
8 that Miller invokes, and would make it impossible for banks to provide services to Miller and his  
9 purported class.

10 Because the Bank has a statutory and contractual right to impose each of the challenged debits  
11 (subtractions), the Bank is entitled to summary adjudication and summary judgment.

## 12 ARGUMENT

### 13 I. MILLER'S THIRD CAUSE OF ACTION FAILS AS A MATTER OF 14 LAW BECAUSE THE BANK HAS NOT LEVIED AGAINST MILLER'S SOCIAL SECURITY FUNDS IN VIOLATION OF SECTION 704.080

15 Miller's Third Cause of Action alleges a violation of Section 704.080, which exempts from  
16 levies certain funds in accounts into which public benefits, including Social Security funds, are  
17 directly deposited by the Government. Miller alleges that the Bank's debiting of his account for the  
18 erroneous credit and charging fees for the Bank's services constitute "levies" on his Social Security  
19 funds in violation of Section 704.080.

20 Miller's theory of liability is wrong as a matter of law, inasmuch as the Bank's actions did not  
21 constitute levies on Miller's account. Further, Miller's theory of liability, if accepted, would mean  
22 that banks could not feasibly maintain checking accounts for recipients of Social Security funds.

23  
24  
25 It is unclear from the complaint whether Miller is alleging that *all* service fees charged on  
26 his account are unlawful, or whether the allegation is limited to fees to handle overdrafts and NSF  
27 checks. (See Compl. at 7 45 (referring to "improper service fees").) Out of an abundance of caution,  
the Bank will assume Miller is challenging all fees.

1                   **A.     The Statutory Exemption Provided by Section 704.080 Applies**  
2                   **Only to Procedures for Enforcement of a Money Judgment**

3                   Section 704.080 is part of Chapter 4 of Title 9, Part 2, of the Code of Civil Procedure. Title 9,  
4 by its very title, applies to “enforcement of judgments.” Chapter 4, by its title, focuses on  
5 “exemptions” to the procedures for the enforcement of judgments. Section 704.080 sets forth the  
6 exemptions applicable to levies by judgment creditors upon deposit accounts into which Social  
7 Security funds are directly deposited, as follows:

8                   (a) For the purposes of this section:

9                   (1) “Deposit account” means a deposit account in which payments of  
10 public benefits are directly deposited by the government or its agent.

11                   (2) “Social security benefits” means payments authorized by the Social  
12 Security Administration for regular retirement and survivors’ benefits,  
13 and disability insurance benefits. “Public benefits” means aid  
14 payments authorized pursuant to subdivision (a) of Section 11450 of  
15 the Welfare and Institutions Code, payments for supportive services as  
16 described in Section 11323.2 of the Welfare and Institutions Code, and  
17 general assistance payments made pursuant to Section 17000.5 of the  
18 Welfare and Institutions Code.

19                   (b) A deposit account is exempt without making a claim in the  
20 following amount:

21                   (1) One thousand dollars (\$1,000) where one depositor is the  
22 designated payee of the directly deposited public benefits payments,  
23 and two thousand dollars (\$2,000) where one depositor is the  
24 designated payee of directly deposited social security payments.

25                   ...

26                   (d) Notwithstanding Article 5 (commencing with Section 701.010) of  
27 Chapter 3, when a deposit account is *levied* upon or otherwise sought to  
28 be subjected to *the enforcement of a money judgment* the financial  
institution that holds the deposit account shall either place the amount  
that exceeds the exemption provided in subdivision (b) in a suspense  
account or otherwise prohibit withdrawal of that amount pending  
[certain events relating to resolution of the funds’ exempt status]. . . .

Civ. Proc. Code 3 704.080 (emphasis added).

“Levy” is a term with a specific legal meaning in California. A “levy” is a notice of attachment served by a levying officer, i.e., a sheriff or marshal. See Civ. Proc. Code § 488.600(5) & 680.260. Thus, when a deposit account is sought to be attached, the levying officer serves a writ of

1 attachment on both the financial institution holding the account and the account holder, thereby  
2 creating an attachment lien on the property. Civ. Proc. Code § 488.455(a).

3 During its passage through the California Assembly and Senate, the bill that became Section  
4 704.080 was described as one that “would provide that governmental public benefit payments made  
5 by direct-deposit are included on the list of payments that are exempt from *attachment by judgment*  
6 *creditors* for up to \$2,000 for one depositor, or \$3,000 if two or more depositors share the account.”  
7 Sen. Corn. on Judiciary, Analysis of Judiciary Bill No. 2724 (1997-1998 Reg. Sess.) June 9, 1998  
8 (emphasis added). Its purpose was to relieve such depositors of the obligation to go to court and file  
9 for an exemption in relation to those amounts. *Id.* (“Under current law, . . . the recipient has to file a  
10 claim of exemption.”)

11 The exemption set forth at Section 704.080 applies to accounts subject to levy for the  
12 *enforcement of a money judgment* as provided in Civ. Proc. Code § 703.010 (emphasis added):

13 Except as otherwise provided by statute:

14 (a) The exemptions provided by this chapter or by any other statute  
15 apply to all procedures for *enforcement of a money judgment*.

16 (b) The exemptions provided by this chapter or by any other statute  
17 do not apply if the judgment to be enforced is for the foreclosure of a  
18 mortgage, deed of trust, or other lien or encumbrance on the property  
other than a lien created pursuant to this division or pursuant to [the  
attachment statutes].

19 By its express terms, Section 704.080 does not apply to the Bank’s conduct here. Miller does  
20 not allege, nor could he, that the Bank was attempting to enforce a money judgment or levy on his  
21 account when it reversed the erroneous credit or charged service fees. Thus, Miller is reduced to  
22 arguing that the Bank’s conduct should be *deemed* to be levies on his exempt Social Security funds in  
23 contravention of Section 704.080. This argument is without merit, as shown next below.

1                   **B.     The Bank Was Acting Within Its Powers When It Debited Miller's**  
2                   **Account to Reverse the Erroneous Credit and for Service Fees**

3                   **1.     The Bank Is Expressly Allowed To Charge Service Fees to**  
4                   **Its Deposit Account Customers**

5                   Bank of America is a national bank organized and existing pursuant to the National Bank Act,  
6                   12 U.S.C. § 21, *et seq.* The Bank is heavily regulated by federal law as well as regulations and legal  
7                   interpretations issued by the Office of the Comptroller of the Currency, which is given broad power  
8                   to prescribe rules and regulations governing national banks.

9                   Pursuant to 12 C.F.R. § 7.4002, national banks are expressly allowed to charge service fees  
10                  to deposit account holders and to set the amount of such fees based on their own business judgment,  
11                  considering factors such as profit, deterrence of bad check writing, and the safety and soundness of  
12                  the bank. Entitled "National bank charges[,]" 12 C.F.R. § 7.4002 provides as follows:

13                  (4     Customer charges and fees. A national bank may charge its  
14                  customers non-interest charges and fees, including deposit account  
15                  service charges. For example, a national bank may impose deposit  
16                  account service charges that its board of directors determines to be  
17                  reasonable on dormant accounts. A national bank also may charge a  
18                  borrower reasonable fees for credit reports or investigations with  
19                  respect to a borrower's credit. All charges and fees should be arrived at  
20                  by each bank on a competitive basis and not on the basis of any  
21                  agreement, arrangement, undertaking, understanding, or discussion  
22                  with other banks or their officers.

23                  (b)     Considerations. The establishment of non-interest charges and  
24                  fees, and the amounts thereof, is a business decision to be made by each  
25                  bank, at its discretion, according to sound banking judgment and safe  
26                  and sound banking principles. A bank reasonably established non-  
27                  interest charges and fees if the bank considers the following factors,  
28                  among others:

1.     The cost incurred by the bank, plus a profit margin, in providing the service;
2.     The deterrence of misuse by customers of banking services;

---

25                  <sup>7</sup> This is an Interpretive Ruling issued by the Office of the Comptroller of the Currency ("OCC"),  
26                  which regulates national banks pursuant to 12 U.S.C. 6 1. An Interpretive Ruling constitutes the OCC's  
27                  interpretation of federal law. State Law Requiring Consumer Transaction Accounts Preempted, OCC  
28                  Interpretive Ltr. No. 572, [1991-1992 Transfer Binder] Fed. Banking L. Rep. (CCH) q 83,342, at 71,473 (Jan.  
15, 1992), 1992 OCC Ltr. LEXIS 1, n.12.

1 3. The enhancement of the competitive position of the bank in  
2 accordance with the bank's marketing strategy; and

3 4. The maintenance of the safety and soundness of the institution.

4 Thus, in addition to other service fees, the courts have recognized a bank's ability to charge  
5 its depositor a fee or service charge for handling a check that overdraws the depositor's account -  
6 i.e., an "insufficient funds" or "NSF" check. See video *Trax, Inc. v. Nationsbank, N.A.*, 33 F. Supp.  
7 2d 1041, 105 1 (SD. Fl. 1998) (in finding that overdraft fees are not interest subject to usury laws, the  
8 court noted that overdraft fees arise from the terms of deposit agreements, are described in 12 C.F.R.  
9 5 7.4002, and are a "fair and efficient method of allocating the administrative costs consequent to  
10 processing checks presented against insufficient funds"); *Terre12 v. Hancock Bank*, 7 F. Supp. 2d 8 12,  
11 816 (S.D. Miss. 1998) (noting that NSF fees are "precisely those described in § 7.4002."). The fee  
12 that a bank may charge for processing an NSF check is to be based on the factors set forth at  
13 3 7.4002(b)(1)-(4) and includes the "'cost incurred' for processing bad checks, 'plus a profit  
14 margin. "' *Video Trax, Inc.*, 33 F. Supp. 2d at 105 1.

15 2. **The Bank Is Entitled To Pay Overdrafts and To Later  
16 Recover Those Overdrafts**

17 Pursuant to section 440 1 (a) of the California Uniform Commercial Code, "[a] bank may  
18 charge against the account of a customer an item that is properly payable from that account even  
19 though the charge creates an overdraft." Further, "[a]n item is properly payable if it is authorized by  
20 the customer and is in accordance with any agreement between the customer and bar&[.]" U. Corn.  
21 Code §4401(a).

22 California courts have interpreted section 440 1 of the California Uniform Commercial Code  
23 as specifically authorizing a bank "to pay overdrafts and to charge customers' accounts to recover  
24 amounts paid, even when payments result in overdrafts on the account." *Ho&an v. Security Pac.*  
25 *Nat. Bank*, 121 Cal. App. 3d 964,969 (1981); *accord Shapiro v. United Cal. Bank*, 133 Cal. App. 3d  
26 256,262 (1982). See also *Brannon v. First Nat'l Bank*, 223 S.E.2d 473 (Ga. 1976); *Florida-Pa&and*  
27 *Corp. v. Central Bank & Trust Co.*, 177 So. 2d 533 (Fla. 1965) (normally, where a bank collects an  
28 item for a customer and allows the customer to draw against the item before collection, the bank has

1 the right to recover on an overdraft from the customer when the item is charged back and the charge-  
2 back results in an overdraft). The bank thus retains discretion to honor checks that would overdraw  
3 the accounts (i.e., insufficient funds or NSF checks). *Perdue v. Cracker Nut'1 Bank*, 38 Cal. 3d 913,  
4 932 (1985).

5                   3.       **The Bank Is Entitled To Apply Funds In A Successor**  
6                               **Deposit Account To Cover An Overdraft In A Predecessor**  
7                               **Deposit Account**

8           The Bank's right to set off funds held in a successor deposit account that receives direct  
9 deposits of Social Security funds to cover an overdraft existing in a predecessor deposit account  
10 flows naturally from the Bank's right to overdraw accounts, and an account-holder's privilege of  
11 drawing NSF checks. It forms a part of the contractual relationship between bank and customer and  
12 operates *as a quidpro quo* for the benefits that the customer enjoys.

13           The development of the law in this area is instructive. In *Kruger v. WeUs Fargo Bank*, 11  
14 Cal. 3d 352 (1974), the California Supreme Court ruled that a bank could not set off an independent  
15 credit card debt against a checking account containing deposits which derived from unemployment  
16 and disability benefits and were therefore protected from the claims of creditors. In *Kruger*, the  
17 plaintiff held a checking account and a separate credit card account with the defendant bank. *Id.* at  
18 356. When the plaintiff defaulted on her credit card, the bank debited the unpaid balance against the  
19 checking account, without giving her advance notice. *Id.* The plaintiff asserted that the setoff of the  
20 credit card debt violated the applicable exemption statute, Civ. Proc. Code 5 690.175, because the  
21 account contained governmental benefits that were exempt from setoff. *Id.*

22           The court ruled that the setoff was a creditor action which the exemption statute intended to  
23 prohibit. *Kruger*, 11 Cal. 3d at 370-71. The court relied, in part, on the fact that the bank exercised  
24 its setoff without prior notice. *Id.* at 356. Further, noting the "growth of bank-sponsored credit  
25 systems," the court was concerned that the bank would "gather unto itself the debts incurred by a  
26 depositor for past living expenses and satisfy by setoff debts which, in the days before Master Charge  
27 and BankAmericard, would have been held by many separate merchants and enforceable only  
28 through execution." *Id.* at 371. Finally, the court noted that the policy against allowing a setoff

against exempt funds was to prevent a bank which “collected the past obligations of its depositor” from “satisfy[ing] those claims” against exempt funds - not to prohibit the payment of checks drawn on accounts containing exempt funds. *Id.*

After *Kruger*, the California Legislature enacted Financial Code section 864, which sets forth the procedures for banks to follow when exercising a setoff for a “debt” against a deposit account. In defining “debt” for purposes of a setoff, Fin. Code § 864 expressly excludes charges for bank services, such as NSF fees, and debits for account overdrafts:

“Debt” means an interest-bearing obligation or an obligation which by its terms is payable in installments, which has not been reduced to judgment, arising from an extension of credit to a natural person primarily for personal, family, or household purposes, and *does not mean a charge for bank services or a debit for uncollected funds or for an overdraft of an account imposed by a bank on a deposit account.*

Fin. Code § 864(a)(2) (emphasis added). Financial Code § 864(c) provides that banks are only required to give depositors notice and the opportunity to claim exemptions, such as the exemption for Social Security deposits under Section 704.080, if a bank is attempting to set off an obligation meeting the definition of “debt.” Further, under the terms of Fin. Code § 864, “any limitations on a bank’s ability to set off certain debts against a customer’s account do[] *not* apply to a charge for a debt for uncollected funds or for dishonored checks cashed for a customer.” *Symonds v. Mercury Sav. & Loan Ass’n*, 225 Cal. App. 3d 1458, 1464 n-1 (1990) (emphasis added).

By distinguishing between a “debit for uncollected funds” and a “debt[,]” the Legislature took care not to disrupt banks’ ability to continue assessing fees or collecting overdrafts. Thus, when a bank acts, as in *Kruger*, as an ordinary creditor - whose business is to lend money for profit - the policy, if not the language, of the exemption statutes may apply. But when a bank merely imposes fees, collects overdrafts, or sets off an overdraft in a predecessor account against a successor account, exemption statutes such as Section 704.080 simply do not apply.

In the instant action, unlike *Kruger*, the Bank has not set off a separate and independent debt owed by Miller. Instead, the Bank has merely reversed an erroneous credit that was posted to Miller’s account and has assessed normal and customary service charges, which service charges were

1 expressly agreed to by Miller when he opened his account. (Bader Decl., Ex. A at 57-60) Because  
2 the reversal of erroneous credits and the imposition of bank service charges do not fall within the  
3 definition of “debt” pursuant to Fin. Code 4 864(a)(2), they do not implicate the exemption statutes,  
4 such as Section 704.080.

5           **C.       Bank of America Did Not Owe Miller a Duty To Provide Him with**  
6           **an Account Free of Service Charges and Free of Responsibility for**  
7           **Repaying Overdrafts**

8           When the Bank applies funds coming into an account to cover debts incurred by the customer  
9 on that account, it is *not* enforcing a money judgment. It is merely performing the arithmetic of  
10 addition and subtraction that is necessary to maintain any checking account. The Bank’s contractual  
11 rights permit it to do so. Nothing in Section 704.080 or in *Kruger* requires the Bank to simply absorb  
12 the losses incurred by allowing its customers the convenience of overdrawing their accounts, or to  
13 provide free services for accounts that receive Social Security funds, as Miller would have this Court  
14 believe.

15           The simple arithmetic of Miller’s account history refutes his claims. The Bank did not “levy”  
16 or “appropriate” the Social Security funds coming into Miller’s account, as Miller alleges. (Compl.  
17 at 7 12.) Rather, the Bank credited and debited Miller’s account for the exact amounts deposited,  
18 withdrawn and disbursed by Miller, subject to any processing fees, as agreed to by Miller when he  
19 opened his account with the Bank and when he established the direct deposit of his Social Security  
20 funds. (Bader Decl. at 77 4,5, Ex. A.) The credits and debits posted to Miller’s account as follows:  
21 On or about January 30, 1998, the Bank erroneously credited Miller’s account with \$1,799 and on the  
22 monthly closing date, February 12, 1998, the balance on the account was +\$1,559 (positive account  
23 balance). (*Id.*, Ex. B.) Miller withdrew and spent the erroneously credited funds. On April 26, the  
24 Bank reversed the erroneous credit of \$1,799, and on the monthly closing date, April 26, 1998, the  
25 balance of Miller’s account became -\$1,577 (negative account balance, *i.e.*, *the* account was  
26 overdrawn). (*Id.*, Ex. C.) When Miller received his May 1998 Social Security funds of \$670 by  
27 means of an electronic funds transfer, the balance on the account became -\$907 (-\$1,577 plus \$670)  
28 - *i.e.*, it was still overdrawn, but not as much as before. Miller complained and, as an

1 accommodation, on or about May 6,1998, the Bank opened a new checking account for him and  
2 transferred the \$670 in Social Security funds into the new account. (*Id.*, Ex. D.) The balance on the  
3 new account was now +\$670, and the balance on the old account remained as an overdraft of -\$1,580  
4 (-\$1,577 minus \$3 in unpaid account fees). (*Id.*, Ex. E.)

5 In essence, what Miller is suggesting is that if the balance on his account is, say, negative  
6 \$1,000 due to overdrafts or reversals of erroneous credits, and then a Social Security payment of  
7 \$670.00 is directly deposited, the balance should become +\$670.00, and the Bank should simply  
8 absorb the \$1,000 overdraft or pretend it does not exist. The language of Section 704.080 says no  
9 such thing, and it cannot have been the intent of the Legislature that the statute be implicitly read to  
10 lead to such arithmetical absurdity.

11 The fallacy of Miller's contentions is apparent when one takes them to their theoretical limit.  
12 His theory is that banks are prohibited from charging (debiting) any amounts, even service charges,  
13 against an account containing directly-deposited Social Security funds. This would mean that: (1)  
14 banks would not be able to offer recipients of Social Security funds overdraft protection for  
15 themselves or for the benefit of accounts held by, say, their own children or grandchildren - because  
16 overdraft protection operates by using funds in one account to cover (and thus guard against) an  
17 overdraft in another account; (2) recipients of Social Security funds could not arrange to have their  
18 mortgages paid directly out of their accounts - because this would involve debiting those accounts;  
19 and (3) banks could not reverse erroneous or fraudulent credits (e.g., for deposits of bad checks).<sup>3</sup>

20 In sum, recipients of Social Security funds are not exempt from bank service charges nor from  
21 paying their overdrafts. Because the exemption provided by Section 704.080 does not extend to the  
22 Bank's conduct, this Court should summarily adjudicate Miller's Third Cause of Action, for violation  
23 of Code of Civil Procedure §704.080, in favor of the Bank.

---

24  
25 <sup>3</sup> Under Miller's theory that any debit constitutes a "levy" on a "debt", it is hard to see how  
26 banks could even pay ordinary checks written by the accountholder -- because, after all, in doing so  
27 the banks are debiting the account to pay a "debt" incurred by the accountholder to whoever the  
28 check is made payable to.

1           **II. MILLER'S FIRST AND SECOND CAUSES OF ACTION FOR**  
2           **VIOLATION OF CIVIL CODE SECTIONS 1709 & 1710 FAIL AS A**  
3           **MATTER OF LAW BECAUSE MILLER CANNOT ESTABLISH THAT**  
4           **THE BANK MADE ANY MISREPRESENTATIONS OF PAST OR**  
5           **EXISTING MATERIAL FACT**

6           **A. Elements of Causes of Action for Fraudulent and Negligent**  
7           **Misrepresentation in Violation of Civil Code Sections 1709 & 1710**

8           In order to establish a claim of the intentional tort of fraud, in violation of Civ. Code § 1709  
9           and 17 10, a plaintiff must prove the following elements: (1) a misrepresentation of a past or existing  
10          material fact; (2) defendant's knowledge of the falsity; (3) defendant's intent to defraud, i.e., to  
11          induce reliance; (4) plaintiff's actual and justifiable reliance on the misrepresentation; and (5)  
12          resulting damages. *Cicone v. URS Corp.*, 183 Cal. App. 3d 194,200 (1986); 5 Witkin, Summary of  
13          Cal. Law (9th ed. 1988) Torts, §676, p. 778. To establish a claim of negligent misrepresentation, in  
14          violation of Civil Code §§ 1709 and 17 10, plaintiff must prove the same five elements, except that,  
15          instead of proving that the defendant knew the misrepresentation of fact was false, the plaintiff need  
16          only show that, regardless of actual belief, defendant must have made the representation without any  
17          reasonable ground for believing it to be true. *Wakers v. Marler*, 83 Cal. App. 3d 1 (1978).

18           **B. Miller Has Failed To Establish that Bank of America Made Any**  
19           **Misrepresentations of Past or Existing Material Facts in Violation**  
20           **of Civil Code Sections 1709 & 1710**

21          Claims for fraudulent and negligent misrepresentation can be premised only upon  
22          misrepresentations of past or existing material facts. *Borba v. Thomas*, 70 Cal. App. 3d 144 (1977)  
23          (fraud); *Walters*, 83 Cal. App. 3d at 17 (negligent misrepresentation). Further, "[a] misrepresentation  
24          of law is ordinarily not actionable in the absence of a confidential relationship or other special  
25          circumstance." *Cicone v. URT Corp.*, 183 Cal. App. 3d at 202. Miller has failed to establish any  
26          misrepresentation of past or existing material fact in order to support his claims of fraudulent and  
27          negligent misrepresentation against the Bank.

28          With respect to Miller's claim for fraudulent misrepresentation, he alleges, in conclusory  
29          fashion, that "Bank of America represented to the public through brochures, advertisements, and  
30          other means that their direct deposit accounts were safe and secure." (Compl. at 129.) Miller then  
31          alleges that "Bank of America's representations concerning safety and security were untrue in that at

1 all times material herein Bank of America imposed unexpected and unlawful levies, in violation of 5  
2 704.080 upon its direct deposit account holders, rendering the direct deposit accounts unsafe and  
3 insecure.” (*Id.* at 130.) With respect to Miller’s claim for *negligent* misrepresentation, he alleges  
4 only that “[a]t the time Bank of America made the misrepresentations herein alleged, Bank of  
5 America had no reasonable grounds for believing the representations to be true.” (*Id.* at 138.)

6 Because the alleged misconduct is nondisclosure or misrepresentations about the “unlawful  
7 levies,” Miller must first establish that Bank of America violated Section 704.080. As shown above,  
8 the Bank’s actions with regard to Miller’s account do not violate Section 704.080. In particular,  
9 because the Bank’s reversal of erroneous credits and its imposition of service charges do not fall  
10 within the definition of “debt” pursuant to Fin. Code 6 864(a)(2) and are specifically authorized by 12  
11 C.F.R. 9 7.4002, they do not implicate the exemption statutes, such as Section 704.080.

12 Because Miller cannot establish that the Bank made misrepresentations about the safety and  
13 security of its direct deposit accounts, Miller’s First and Second Causes of Action for fraudulent and  
14 negligent misrepresentation, respectively, must fail as a matter of law.

15 **III. BANK OF AMERICA’S ACTIONS CANNOT BE UNFAIR AS THEY**  
16 **ARE PERMITTED BY LAW; THUS MILLER’S FOURTH AND SIXTH**  
17 **CAUSES OF ACTION FAIL AS A MATTER OF LAW**

18 Miller’s claims that Bank of America’s actions to reverse an erroneous credit and impose  
19 service charges violate the Consumer Legal Remedies Act (“CLRA”), Civ. Code § 1750, *et seq.*, and  
20 the Unfair Competition Law (“UCL”), Bus. & Prof. Code 0 17200, *et seq.*, must fail because the  
21 conduct complained of is expressly permitted by statute. “A business practice cannot be unfair if it is  
22 permitted by law. The [California Business Practices Act] does not apply if the Legislature has  
23 expressly declared the challenged business practice to be lawful in other statutes.” *Lazar v. Hertz*  
24 *Corp.*, 69 Cal. App. 4th 1494, 1505-06 (1999); *see also Schnall v. Hertz Corp.*, 78 Cal. App. 4th  
25 1144, 1154 (2000) (“Courts may not simply impose their own notions of the day as to what is fair or  
26 unfair. Specific legislation may limit the judiciary’s power to declare conduct unfair. If the  
27 legislature has permitted certain conduct or considered a situation and concluded no action should lie,  
28 courts may not override that determination. When specific legislation provides a ‘safe harbor,’

1 plaintiffs may not use the general unfair competition law to assault that harbor.” (quoting *Gel-Tech*  
2 *Comm., Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999)).

3 Miller contends that the Bank’s actions with respect to his account are contrary to the CLRA  
4 and the UCL. However, as discussed above, the Bank’s actions to reverse an erroneous credit and  
5 impose service charges are specifically allowed by Fin. Code § 864 and 12 C.F.R.  
6 § 7.4002, respectively. Those regulations permit the precise conduct of which Miller complains and,  
7 thus, bar Miller from stating causes of action for violation of the CLRA and UCL. *See Lazar*, 69 Cal.  
8 App. 4th at 1506 (affirming sustaining of demurrer without leave to amend where plaintiff sued under  
9 Bus. & Prof. Code 0 17200 for refusal to rent to persons under 25, because Civ. Proc. Code § 1936  
10 permits refusal to rent). In any event, there is nothing unfair or unlawful about debiting the accounts  
11 of Social Security recipients for service fees or for overdrafts.

12 Miller’s Fourth and Sixth Causes of Action thus fail as a matter of law.

13 **IV. MILLER’S FIFTH CAUSE OF ACTION FOR INTENTIONAL**  
14 **INFLECTION OF EMOTIONAL DISTRESS FAILS AS A MATTER OF**  
15 **LAW AS THE BANK’S ACTIONS WERE PRIVILEGED**

16 In his Fifth Cause of Action, Miller alleges that the Bank’s actions constitute intentional  
17 infliction of emotional distress. In particular, Miller alleges the Bank’s reversing the erroneous credit  
18 and imposing service charges “were contrary to the law and policy of the State of California, and in  
19 violation of the statutory rights of the plaintiff.” (Compl. at 152.) He further alleges that “[a]s a  
20 result of defendants’ acts as herein described, Plaintiff Miller has suffered severe emotional distress,  
21 including without limitation, anger, stress, worry, anxiety, humiliation, fear, depression, fatigue and  
22 frustration.” (*Id.* at 753.)

23 A claim for intentional infliction of emotional distress is based on a defendant’s  
24 “unprivileged” commission of an “outrageous act” with the intent to inflict mental suffering. *Potter*  
25 *v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001 (1993). An essential element of such a claim is  
26 “extreme and outrageous” conduct by the defendant, conduct that is so extreme as to “exceed all  
27 bounds of that usually tolerated in a civilized community.” *Id.* However, a defendant’s “outrageous  
28 conduct,” even if exceeding the “bounds of human decency,” is not actionable if it was *privileged*

1 because the defendant was acting on his or her legal rights in a permissible way. *Fletcher v. Western*  
2 *Nat. Life Ins. Co.*, 10 Cal. App. 3d 376,395 (1970); see also 5 Witkin, Summary of Cal. Law (9th ed.  
3 1988) Torts, 6 407, p. 487.

4 The alleged “outrageous acts” that underlie Miller’s claim for intentional infliction of  
5 emotional distress are the Bank’s actions of debiting his account for service fees and to reverse an  
6 erroneous credit. (Compl. at y 52.) However, the Bank has established that the .debits to Miller’s  
7 account are specifically allowed by Fin. Code § 864 and 12 C.F.R. 3.7.4002. Thus, the Bank’s acts  
8 were privileged and cannot form the basis of a claim for intentional infliction of emotional distress.  
9 *Fletcher*, 10 Cal. App. 3d at 395.

10 Further, even assuming *arguendo* that the Bank’s conduct was not privileged, which it was,  
11 Miller has failed to establish that the Bank’s actions with respect to his account were “outrageous.”  
12 In particular, Miller has failed to allege or prove *any* facts that support-a finding that the Bank was  
13 acting in a manner so extreme as to “exceed all bounds of that usually tolerated in a civilized  
14 community.” *Potter*, 6 Cal. 4th at 1001.

15 Miller’s Fifth Cause of Action, alleging intentional infliction of emotional distress, fails as a  
16 matter of law.

17 **V. MILLER’S SEVENTH CAUSE OF ACTION FOR VIOLATION OF**  
18 **BUSINESS AND PROFESSIONS CODE SECTION 17500 FAILS AS A**  
19 **MATTER OF LAW AS THE BANK’S ADVERTISING WAS NOT**  
20 **FALSE OR MISLEADING**

21 In support of his claim for violation of Business and Professions Code section 17500, *et seq.*,  
22 Miller alleges that Bank of America has advertised and promoted its bank accounts that include a  
23 direct deposit feature as “a safe and convenient means to deposit your money, no matter where you  
24 are.” (Compl. at 7 63.) Miller further alleges that the Bank’s advertising was “untrue or misleading  
25 and likely to deceive the public” because the direct deposit accounts “were subject to appropriation  
26 by defendant Bank of America itself for alleged debts owed to the bank, as well as excessive,  
27 escalating, recurring and unconscionable levies, overdraft and return charges, rendering the direct  
28 deposit accounts unsafe and insecure.” (*Id.* at 7 65.) As the Bank was justified in its actions of

1 reversing the erroneous credits and imposing service charges on Miller's account, Miller cannot  
2 identify any untrue or misleading statements that would support a claim for violation of Bus. and  
3 Prof. Code 5 17500.

4 Section 17500 of the Business and Professions Code prohibits false advertising and the use of  
5 any untrue or misleading statements in selling real or personal property or personal services. *People*  
6 *v. DolZar Rent-A-Car Sys., Inc.*, 211 Cal. App. 3d 119, 128 (1989). In order to establish liability  
7 under section 17500, a plaintiff must show that members of the public amlikely to be deceived. *Id.*  
8 at 129. Further, to survive summary judgment, a plaintiff must prove that a defendant's statements  
9 are misleading to a reasonable consumer. *Freeman v. Time, Inc.*, 68 F.3d 285,289 (9th Cir. 1995).  
10 Thus, to prevail, a plaintiff must demonstrate by extrinsic evidence, such as consumer survey  
11 evidence, that the challenged statements tend to mislead consumers. *Husk & v. Time, Inc.*, 965 F.  
12 Supp. 1398,1407 (E.D. Cal. 1998).

13 Miller has failed to identify any false advertising or any untrue or misleading statements by  
14 the Bank with regard to promotion of its deposit accounts that receive funds through the direct  
15 deposit feature. As discussed above, Fin. Code § 864 and 12 C.F.R. 9 7.4002 specifically allow the  
16 actions that Miller complains of. Further, all fees and costs are disclosed to customers who open a  
17 deposit account with the Bank. (Bader Decl., 13 and Ex. A at 57-60) Thus, no reasonable consumer  
18 could complain of overdrafts or imposition of service charges that are consistent with the Bank's  
19 disclosures. Miller's claim for violation of Bus. and Prof. Code 3 17500 must therefore fail as a  
20 matter of law.

21 **CONCLUSION**

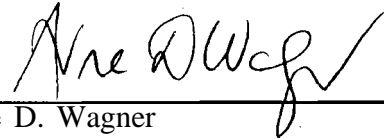
22 For the foregoing reasons, Bank of America is entitled to summary adjudication of all seven  
23 of plaintiffs' Causes of Action. Since Bank of America is entitled to judgment on each cause of  
24 action, Bank of America is entitled to summary judgment.

25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: April 25,2001

ARNE D. WAGNER  
STEPHEN E. PAFFRATH  
JAIME GUERRERO  
MORRISON & FOERSTERLLP

By:   
Arne D. Wagner

GREGORY SCOTT SPENCER  
OFFICE OF GENERAL COUNSEL  
BANK OF AMERICA, N.A.

Attorneys for Defendant  
BANK OF AMERICA N.A., FORMERLY  
KNOWN AS BANK OF AMERICA NT & SA