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MAY 17 2001
San Francisco County Superior Court
FILED
ENDORSED

15 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **IN AND FOR THE COUNTY OF SAN FRANCISCO**
17 **UNLIMITED JURISDICTION**

18 PAUL MILLER, individually and on behalf of)
19 others similarly situated,)

20 Plaintiff,)

21 vs.)

22 BANK OF AMERICA N.T. & S.A.)
23 a California corporation, and DOES 1 - 50, ;

24 Defendants.)
25)
26)
27)
28)

CASE NO. 301917

CLASS ACTION

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT OR ALTERNATIVELY
FOR SUMMARY ADJUDICATION**

Date: June 8, 2001

Time: 2:00 p.m.

Location: Room 624

Honorable Anne E. Bouliane

TABLE OF CONTENTS

Page

1 INTRODUCTION 1

2 FACTUALBACKGROUND

3 ARGUMENT 5

4 A. Code of Civil Procedure § 704.080 and Its Underlying Policy
5 Prohibits Bank of America from Appropriating Plaintiff's Direct
6 Deposit Social Security Funds 5

7 B. Neither the Nature of Defendant's Claims Against Social
8 Security Recipients Nor the Provisions of Financial Code § 864
9 Permit Defendant to Collect Its Claims from Exempt Social
10 Security Funds 9

11 C. The Bank's General Authority to Charge Service Fees and
12 Recover Overdrafts Does not Override the Limitations on
13 Its Ability to Seize Exempt Funds to Collect Those
14 A m o u n t s 11

15 D. A Motion for Summary Judgment on Plaintiff's Cause of
16 Action for Violation of the Consumer Legal Remedies Act
17 Is Barred by Civil Code § 1781. 12

18 E. There are Disputed Issues of Material Fact Which Support
19 Defendant's Entitlement to Relief Based Upon BofA's
20 Misrepresentations 12

21 F. The Bank's Combined and Cumulative Conduct Violates
22 Business & Professions Code § § 17200, et seq. 14

23 G. Disputed Facts Support Plaintiff's Fifth Cause of Action for
24 Intentional Infliction of Emotional Distress 17

25 CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

1

2

3 **Barnhill v. Robert Saunders & Co.**

4 (1981) 125 Cal.App.3d 1 7

5 **Beckman v. Manlove**

6 (1861)18Cal.3887

7 **Bromberg v. Bank of America**

8 (1943)58Cal.App.2d1 5,9

9 **Bundren v. Superior Court**

10 (1983) 145 Cal.App.3d 784.. . . . , . . 18

11 **California State Employees ' Association v. The State of California**

12 (1988) 198 Cal.App.3d 374.. 7

13 **Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.**

14 (1999) 20 Cal.4th 163 14-16

15 **Committee on Children 's Television, Inc. v. General Foods Corporation**

16 (1983) 35 Cal.3d 197 14

17 **Crawford v. Gould**

18 (9thCir. 1995) 56F.3d. 1162 17

19 **Delno v. Celebrezze**

20 (9th Cir. 1965) 347 F.2d 159 8

21 **Ford Motors, Inc. v. Times Mirror Co.**

22 (1980) 102 Cal.App.3d 735.. 15

23 **Kruger v. Wells Fargo Bank**

24 (1974) 11 Cal.3d 352 *passim*

25 **Kruse v. Bank of America**

26 (1988) 202 Cal.App.3d 38.. 78

27 **Lazar v. Hertz Corp.**

28 (1999) 69 Cal.App.4th 1494 15

People v. Casa Blanca Convalescent Homes, Inc.

(1984) 159 Cal.App.3d 509.. 14

People v. II&Kale

(1979)25Cal.3d6267

Philpott v. Essex Co. Welfare Bd.

(1973) 409 U.S. 413 (1973) 16

Schnall v. The Hertz Corporation

(2000) 78 Cal.App.4th 1144 15, 16

1	Security Pacific National Bank v. Wozab	
2	(1990) 51 Cal.3d 991	5
3	Social Security Board v. Nierotko	
4	(1945)327U.S.358	8
5	Stop Youth Addiction, Inc. v. Lucky Stores, Inc.	
6	(1998) 17 Cal.4th 553	12, 14
7	Symonds v. Mercury Savings & Loan Association	
8	(1990) 225 Cal.App.3d 14..	18, 19
9	Tom v. First American Credit Union	
10	(10th Cir. 1998) 151 F.3d 1289..	17
11	Young v. Bank of America	
12	(1983) 141 Cal.App.3d 108..	18, 19

STATUTES AND OTHER AUTHORITIES

13	12 C.F.R.	
14	Section 7.4002	11, 16
15	42 U.S.C.	
16	Section 301	
17	Section 407	8, 16
18	Section 1383(D)(l)	8
19	Business & Professions Code	
20	Sections 17200, <i>et seq.</i>	14-17
21	Section 25658	12
22	California Constitution	
23	Article XX, Section 22	12
24	Civil Code	
25	Sections 1750, et seq.	2, 12-14
26	Section 178 1	
27	Section 178 1 (a) '	12
28	Section 1781(c)	12, 15
	Section 1781 (c)(3)	2
	Code of Civil Procedure	
	Section 437c	2, 12
	Section 690.18	6
	Section 703.040	8
	Section 704.080	passim
	Financial Code	
	Section 864	9, 10, 16
	Section 864(a)(2)	9
	Section 864(b)	10
	Section 864(c)	10

1 Penal Code
Section 308 12

2
3 Uniform Commercial Code
Section 4401 11

4
5
6
7
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INTRODUCTION

Defendant Bank of America's (hereinafter "BofA" or "the Bank") motion for summary judgment fails to identify or acknowledge the myriad of disputed material facts at issue in this case. These include the following:

- Plaintiff was induced by the bank to have his Social Security benefits directly deposited to his account by false statements that such deposits would be safe and secure and that the electronically deposited funds would be immediately available to him. Similar false statements are made to members of the proposed class.
- Defendant confiscated Plaintiff's directly deposited Social Security benefits from his account three months in a row. Two of those actions were taken against a new account that was unrelated to the claimed overdraft.
- The bank intentionally seized Plaintiff's benefit payments with knowledge that the funds were exempt from collection actions, after it had agreed not to confiscate them to satisfy its claim against plaintiff and after it had been made aware that they were plaintiff's sole source of income.
- Although it knew that the funds it had confiscated from plaintiff to satisfy its overdraft claim were exempt Social Security Funds and that its collection action had rendered Plaintiff destitute, Defendant refused to restore Plaintiff's benefits to him until legal counsel intervened on his behalf.
- Defendant represented that it would not continue to pursue its collection action against Plaintiff's Social Security funds. These assurances were not conditioned upon payments being made toward the claimed overdraft.
- Defendant did not notify Plaintiff of the erroneous credit to his account on which the overdraft was based at the time it was made. Nor did it adequately identify and explain the credit on Plaintiff's checking statement.

In addition, the motion is premised upon several false assumptions and intentional or unintentional mischaracterizations of the nature of this case. First, the claims asserted in this action have nothing to do with relieving plaintiff or members of the class from "liability to ever repay the bank" for amounts legally owed. (Memorandum of Points and Authorities in Support of Bank of America N.A.'s Motion for Summary Judgment or Alternatively For Summary Adjudication, hereafter "Defendant's MPA," p. 3.) Nor do seek relief requiring that BofA provide plaintiff or members of the class with an account "free of service charges or free of responsibility for repaying overdrafts." (Defendant's MPA, p. 1 1.) Rather, the claims asserted simply require BofA to abide by the same limitations imposed on all

1 other creditors when pursuing collection remedies against individuals who receive
2 Social Security benefits. The law and public policy protect those benefits from
3 collection actions in order that they might serve their intended purpose, *i.e.*, the
4 protection of the subsistence needs of those who receive the benefits by reason of
5 age or disability. Unlike all other creditors, defendant assumes that it is exempt
6 from those sound limitations by reason of its inside access to the protected funds.

7 Second, Code of Civil Procedure § 704.080 is not the only, nor even the
8 primary, basis upon which plaintiff seeks relief. Several of plaintiff's claims,
9 including the First, Second, Fourth and Seventh Causes of Action, are based upon
10 misrepresentations of fact made by the Bank, and do not turn on the legality of the
11 underlying conduct that is the subject of the misrepresentations. Moreover,
12 plaintiff's Fourth Cause of Action for Violation of the Consumer Legal Remedies
13 Act, Civil Code § 1750 *et seq.*, cannot legally be the subject of a motion for
14 summary judgment under Code of Civil Procedure § 437~. Civil Code § 1781 (c)(3).
15 Each of plaintiff's seven causes of action stands on its own; none are derivative of
16 or dependent on the third cause of action, as the Bank argues. (Defendant's MPA,
17 p. 3.) Thus, plaintiff's other six causes of action would not "evaporate," even if no
18 violation of CCP § 704.080 were found. (Defendant's MPA, p. 3). The Bank's
19 faulty assumption to the contrary explains why it has not bothered even to identify
20 any material facts related specifically to the other causes of action.

21 Third, defendant wrongly assumes that its general authority to take certain
22 collection actions against general deposit accounts trumps the specific limitations
23 arising from both state and federal law which circumscribe its ability to seize
24 protected Social Security benefits in direct deposit accounts. BofA's refusal to
25 acknowledge the special status and protection afforded Social Security direct
26 deposit accounts explains its repeated and continuous efforts to collect sums from
27 such accounts and its deliberate failure and refusal to devise systems to identify
28 adequately those accounts and protect them from its internal collection actions.

1 **FACTUAL BACKGROUND**

2 Plaintiff Paul Miller has been a continuous customer of BofA since 1978.
3 Since approximately 1993, plaintiff has been receiving Social Security and
4 Supplemental Security Income (SSI) benefits. He qualifies for those benefits
5 because of a permanent mental disability he suffered as the result of a head injury
6 caused by a physical assault in approximately 1989. In approximately 1994,
7 plaintiff was informed by BofA employees that his Social Security benefit payments
8 would be safe and secure through this direct deposit procedure and would be
9 available to him when needed. (Declaration of Paul Miller in Support of Opposition
10 to Motion for Summary Judgment/Adjudication ("Miller Decl.") 7 4.) Plaintiff
11 agreed, at the suggestion of BofA employees, to arrange to have his Social Security
12 benefits directly deposited to his BofA checking account. *Id.* Defendant BofA has
13 made similar written representations to other members of the proposed class who
14 have arranged to have their benefit checks directly deposited electronically to their
15 BofA deposit accounts.

16 In January, 1998, BofA credited a sum of \$1,799.83 to plaintiff's checking
17 account. The Bank did not give prior or concurrent notice to plaintiff of this credit
18 to his account. When it later returned the credit on his bank statement, it did not
19 provide an adequate explanation of the credit, permitting a reasonable interpretation
20 that the credit represented a retroactive adjustment in plaintiff's Social Security
21 benefits. (Miller Decl. 7 9.) The funds represented by this credit were actually
22 made available to plaintiff for his use by the Bank without its objection or complaint
23 for a period of at least two and a half months.

24 In April, 1998, BofA debited plaintiff's checking account to recover the
25 amount of \$1799.83 that it had credited in January. Specifically, it liquidated the
26 entire balance in the account. The funds seized by BofA in this manner consisted
27 of plaintiff's Social Security benefits for the months of February, March and/or April
28 of 1998 which had been directly deposited to the account at the beginning of each

1 of those months. (Miller Decl. 1 11.) Since this amount was insufficient to satisfy
2 the full amount of the “claim” the Bank asserted against plaintiff, again, without
3 prior notice, it subsequently seized plaintiff’s Social Security benefits for the month
4 of May after those funds were directly deposited .to the account.

5 After learning that his benefit payments had been confiscated by the Bank to
6 satisfy the Bank’s claim based upon the prior erroneous credit, plaintiff informed
7 representatives of the Bank that the funds seized were Social Security benefits
8 which he required to pay for rent, food and other basic needs. (Miller Decl. 11 7.)
9 The Bank initially refused to take any action to return Mr. Miller’s Social Security
10 benefit payments to him, despite knowledge that its action had left plaintiff
11 destitute. Only after plaintiff consulted an attorney who informed BofA’s legal
12 department that the confiscation of plaintiff’s funds was illegal did the Bank restore
13 the funds to him.

14 Subsequently, at the recommendation of bank employees, plaintiff opened a
15 new and separate deposit account at BofA. The Bank credited the new account
16 with plaintiff’s May Social Security benefits which had been confiscated by the
17 Bank. Bank employees represented to plaintiff that opening the new account would
18 assure that future Social Security benefit payments directly deposited to his
19 account would not be taken by the Bank. (Miller Decl. 7 14.)

20 In June, 1998, despite its representations to the contrary, BofA deliberately
21 took steps to identify plaintiff’s new account as a source from which to collect its
22 prior claim, and upon the direct deposit of plaintiff’s Social Security benefits for the
23 month of June, seized those funds as partial satisfaction of that claim. (Miller Decl.
24 (15.) BofA took this action with knowledge of the potential consequences and
25 emotional distress to plaintiff. It agreed to reverse the collection action only after
26 pro bono counsel again assisted plaintiff and the Bank’s legal department
27 intervened. (Miller Decl. 7 15; Declaration of Martha Bridegam in Support of
28 Opposition to Motion for Summary Judgment/Adjudication (“Bridegam Decl.”) 1 7.)

1 In July, 1998, within days of the direct deposit of plaintiff's Social Security
2 benefits payment for that month, BofA once again seized the entire amount of
3 plaintiff's benefit payment, liquidating plaintiff's new account and causing an
4 overdraft to be charged against that account. The Bank subsequently refused to
5 honor checks written by plaintiff to pay for rent and his automobile insurance
6 premium. The Bank reversed these actions only after a third intervention by
7 counsel on plaintiff's behalf. Thereafter, the Bank assigned it's claim against
8 plaintiff to a collection agency which sent a dunning letter to plaintiff demanding
9 payment for the amount of the claim it asserted against him.

10 All of these facts are material and a matter of record. None except the most
11 basic is even referred to in a conclusory manner in the Bank's moving papers,
12 including its legal memorandum and separate statement.

13 ARGUMENT

14 **A. Code of Civil Procedure § 704.080 and Its Underlying Policy Prohibits 15 Defendant from Appropriating Plaintiff's Direct Deposit Social Security 16 Funds.**

16 BofA claims that plaintiff's Third Cause of Action for violation of Code of
17 Civil Procedure Section 704.080 fails as a matter of law because that section
18 applies only to a levy for the enforcement of a money judgment and the Bank's
19 actions "did not constitute levies" on plaintiff's account. (See Defendant's MPA
20 4: 13-6:22.) This argument ignores controlling Supreme Court precedent.

21 As a general rule, an overdraft on a bank account creates an indebtedness on
22 the part of the customer, and all funds the bank has or subsequently obtains to the
23 customer's credit may be applied to such indebtedness until it is fully discharged.
24 ***Bromberg v. Bank of America*** (1943) 58 Cal.App.2d 1, 7. Plaintiff's accounts in
25 this case were deposit accounts. ***See Kruger v. Wells Fargo Bank*** (1974) 11 Cal.3d
26 352, 358, fn. 5. Thus, absent some statutory limitation, BofA could deduct the
27 amount of any overdraft and related charges from the accounts by the exercise of
28 its equitable right of setoff. ***Security Pacific National Bank v. Wozab*** (1990)

1 **51** Cal.3d **991, 996**, fn. **3**. In **Kruger v. Wells Fargo Bank, supra**, however, the
2 California Supreme Court expressly held that a bank's right of setoff may not legally
3 be exercised against funds that are exempt from levy or attachment. **Kruger,**
4 **supra**, at 868.

5 The plaintiff in **Kruger** maintained a checking account with Wells Fargo Bank.
6 Her sole source of income was unemployment compensation and state disability
7 benefits, both of which were deposited to her checking account. Those funds were
8 exempt from levy or attachment under former Code of Civil Procedure § 690.18,
9 just as plaintiff's Social Security benefits are exempt from levy or attachment under
10 current Code of Civil Procedure Section 704.080. When Wells Fargo, without prior
11 notice, exercised a setoff against Kruger's checking account to satisfy a
12 delinquency on her credit card, she filed suit, alleging a violation of due process
13 under the federal Constitution and the wrongful exercise of a banker's lien against
14 her exempt funds.'

15 Although the Supreme Court rejected the plaintiff's due process claims on
16 the grounds that the exercise of the bank's right of setoff did not involve state
17 action, it found that Wells Fargo could not legally exercise its right of setoff against
18 deposits protected from creditors under the applicable exemption statutes. In so
19 holding, the Court addressed and soundly rejected the very argument made here by
20 BofA:

21 The defendant points out that the banker's setoff is not an attachment
22 or execution, and thus does not contravene the specific prohibition of
23 the exemption statutes; it then leaps to the conclusion that it may
24 exercise a setoff against exempt deposits. This conclusion rests on
25 the implicit but mistaken assumption that a creditor's right of setoff is
26 absolute except when explicitly limited by statute. Rejecting that
27 assumption, we shall demonstrate that under the law of California, and
28 a majority of other jurisdictions, the courts in certain circumstances
have limited the right of setoff in order to protect the rights of the
debtor.

Kruger, supra, at 368.

' The Court noted that the action taken by the Bank was more properly considered a setoff rather than a banker's lien. **Kruger, supra**, at 357-9 and note 4. See **also** note 1, above.

1 Continuing it's analysis, the Supreme Court in **Kruger** noted that it had
2 refused to permit setoffs against exempt funds since 1861, realizing that "a
3 different doctrine would operate as a practical repeal of the exemption laws." */bid.,*
4 **quoting Beckman v. Manlove** (1861) 18 Cal.388, 389. Concluding that the bank's
5 right of setoff could be restricted by judicial limitations imposed to uphold a state
6 policy of protecting the rights of debtors, the Court then addressed the issue of
7 whether state policy regarding unemployment and disability benefits rendered such
8 benefits exempt from setoff. The Court focused on the fact that the purpose of
9 such benefits was to provide the recipient and his family with a stream of income
10 to defray the cost of their subsistence. It determined that the legislative objective
11 of providing such benefits "would obviously fail if creditors could seize that income
12 and apply it to past debts." *Id.* at 370. On that basis it determined that Wells
13 Fargo was barred from exercising its right of setoff against the plaintiff's
14 unemployment and disability benefits. *Id.* at 371.

15 The reasoning of **Kruger** has been adopted by courts dealing with similar
16 types of exemptions. For example, in **Barnhill v. Robert Saunders & Co. (I 981)**
17 125 Cal.App.3d 1, the First District held that an employer was **not** entitled to
18 exercise an equitable right of setoff against an employee's wages. Citing **Kruger**,
19 the court held that the employee's wages were immune from attachment and (for
20 the most part) exempt from execution. *Id.* at 6 and fn. 2. In words that are
21 equally applicable to the social security funds here at issue, the court explained the
22 basis for its reasoning:

23 The policy underlying the state's wage exemption statutes is to insure
24 that regardless of the debtor's improvidence, the debtor and his or her
25 family will retain enough money to maintain a basic standard of living,
26 so that the debtor may have a fair chance to remain a productive
27 member of the community. [Citation omitted.] . . . **Permitting appellant**
28 **to reach respondent's wages by setoff would let it accomplish what**
neither it nor any other creditor could do by attachment and would
defeat the legislative policy underlying that exemption.

Id. at 6 (emphasis added); **accord California State Employees' Association v. The**
State of California (1988) 198 Cal.App.3d 374, 377.

1 Like the unemployment and disability benefits in **Kruger** and the exempt
2 wages in **Barnhi//**, the benefits at issue in this case are intended to provide essential
3 financial assistance to those in need. See 42 U.S.C. § 301 (appropriation of funds
4 to furnish financial assistance to aged needy individuals); **Social Security Board v.**
5 **Nierotko** (1945) 327 U.S. 358, 364 (the purpose of federal old age benefits under
6 the Social Security is to provide funds for the decent support of elderly persons
7 who no longer work); **De/no v. Celebrezze** (9th Cir. 1965) 347 F.2d 159, 161 and
8 fn. 1 (these benefits are intended to protect workers and their dependents from the
9 **risk of loss of income** due to the insured's old age, death or disability). This
10 legislative objective is underscored and assured by Federal and state statutory
11 provisions which protect Social Security benefits from being assigned, attached or
12 executed upon, and which prohibit the waiver of such protections. 42 U.S.C.
13 § 407; 42 U.S.C. § 1383(D)(I); CCP §§ 703.040, 704.080.

14 To permit a setoff against Social Security benefits would have the same
15 nefarious consequences as permitting setoff against exempt wages and disability
16 benefits: persons needing those benefits to pay their daily expenses would be
17 deprived of them in violation of California public policy. It would allow the Bank as
18 a creditor to accomplish internally and without notice what every other creditor is
19 proscribed from doing. As the Supreme Court noted in **Kruger**:

20 Although the banker's setoff differs from attachment and execution in
21 that it does not require the aid of a state official, there is no relevant
22 difference between the two procedures as to the state objective of
23 protection of unemployment compensation and disability benefits from
24 claims of creditors. [Footnote omitted.] The assertion of a banker's
25 setoff has exactly the same effect as a third party's levy of execution
26 on the account - it deprives the depositor of the income which the
27 state provided him to meet subsistence expenses, compelling the state
28 either to give him additional money or leave him without means of
physical survival.

26 **Kruger v. Wells Fargo Bank, supra**, 11 Cal.3d at 371. The very same must be said
27 about social security and veterans benefits.

28 BofA's argument as to plaintiff's third cause of action is based entirely upon
the facile assertion that 5 704.080 "by its express terms" does not apply to the

1 Bank's conduct. The Bank thus ignores the teaching of *Kruger* and related cases
2 that it cannot thwart the objectives of the exemption statutes by accomplishing
3 informally and indirectly what it is explicitly prevented from doing formally and
4 directly. Its internal collection actions against plaintiff's Social Security benefits
5 were thus unlawful even though they did not involve state enforcement of a money
6 judgment.

7
8 **B. Neither the Nature of Defendant's Claims Against Social Security
Recipients Nor the Provisions of Financial Code § 864 Permit
9 Defendant to Collect Its Claims from Exempt Social Security Funds.**

10 BofA attempts to distinguish its conduct in this case from that in *Kruger v.*
11 *We//s Fargo, supra*, by arguing that its internal collection activities against plaintiff's
12 accounts were not for "a separate and independent debt" owed by him but merely
13 the reversal of an erroneous credit and the assessment of "ordinary and customary
14 service charges." ^U (Defendant's MPA, 10:25-1 1 :1.) It also argues that because
15 these claims are not included in the definition of "debt" under Financial Code
16 § 864(a)(2), the Bank's actions "do not implicate the exemption statutes."
17 (Defendant's MPA, 1 1 :1-4.) These arguments that the Bank's activities were not
18 tantamount to collecting a "debt" are contrary to both the law and reality.

19 First, as noted above, an overdraft on a bank account is considered to create
20 an indebtedness on the part of the customer, *Bromberg v. Bank of America, supra*,
21 58 Cal.App.2d at 7. Second, BofA itself regards fees and charges imposed on
22 deposit accounts as debts in its favor, including them in its customer disclosure
23 statement as examples of "amounts you owe us." (Declaration of Kheloud Bader in
24 Support of Bank of America N.A.'s Motion for Summary Judgment or Alternatively
25 for Summary Adjudication, 15, Ex. A, p. 3.) More tellingly, BofA actually treats its
26 claims for fees, charges and overdrafts as ordinary debts, utilizing traditional
27 collection remedies to recover those amounts when it is unable to do so by seizing
28 funds directly from the depositor's account. In this case, for after being compelled
to reverse its collection action against both plaintiff's original account and his new

1 account, defendant referred the claim to an outside collection agency which it
2 authorized to send a demand letter to plaintiff. (Miller Decl. 1 18.) Thus, BofA's
3 assertion that the types of claims it made in this action are not "debts" is
4 disingenuous at best.

5 Nor does Financial Code § 864 support defendant's argument that it was not
6 actually collecting a "debt" from plaintiff's direct deposit account. BofA's
7 argument suggests that § 864 was enacted to circumscribe the holding of *Kruger v.*
8 *We//s Fargo, supra*, by excluding from the definition of "debt" charges for bank
9 services or a debit for uncollected funds or for an overdraft of an account imposed
10 by a bank on a deposit account. In fact, § 864 was designed to provide **greater**
11 protection to depositors, not to limit the protections established by the Supreme
12 Court in *Kruger, supra*. Specifically, the purpose of § 864 is to require banks to
13 provide depositors with the very notice of a setoff action that *Kruger* held was **not**
14 required by the due process clause of the federal Constitution. (Declaration of
15 Mark T. Johnson in Support of Opposition to Motion for Summary Judgment/
16 Adjudication ("Johnson Decl.") 1 8, Exh. F.) Section 864(c) requires that a specific
17 written notice of a setoff action be sent to the depositor, with a response form to
18 allow the depositor to object to the setoff, within one day after the action is taken.²
19 The mere fact that the legislature chose to exclude claims for uncollected funds or
20 overdrafts from this particular notice requirement and other limitations on the
21 bank's right of setoff does not vitiate the Supreme Court's holding in *Kruger, supra*.
22 Section 864 represents a limitation on the banker's right of setoff, not an
23 expansion of that right. It cannot legitimately be interpreted to authorize the
24 exercise of that right against exempt Social Security funds to satisfy these types of
25 claims BofA asserts against plaintiff and members of the class.

26 Finally, BofA's argument that fees, charges and overdrafts are not "debts"
27

28 ² The statute also limits the exercise of the right of setoff to amounts that do not cause the
account to fall below \$1,000. Financial Code § 864(b).

1 and thus are not protected from the Bank's internal collection efforts would defeat
2 the very legislative objectives which led the Supreme Court to prohibit internal
3 collection procedures actions against exempt funds in **Kruger**. The Bank's actions
4 in this case had precisely the pernicious adverse effect on plaintiff and public policy
5 that the Supreme Court condemned in **Kruger**. But for the intervention of counsel,
6 plaintiff would have been deprived of his sole source of income from Social Security
7 for three consecutive months simply because BofA had access to those funds
8 through control of plaintiff's direct deposit Social Security accounts.

9 **C. The Bank's General Authority to Charge Service Fees and Recover**
10 **Overdrafts Does Not Override the Limitations on Its Ability Seize**
11 **Exempt Funds to Collect Those Amounts.**

12 As justification for its collection actions against the direct deposit Social
13 Security accounts of plaintiff and other members of the class, BofA places great
14 emphasis on its **genera/** statutory and regulatory authority to charge fees and
15 reverse erroneous credits against deposit accounts. Defendant thus quotes the
16 interpretive ruling of the Comptroller of the Currency, 12 C.F.R. § 7.4002, in its
17 entirety, and cites Section 4401 of the California Uniform Commercial Code as
18 authority for its ability to impose fees and charges on depositors and to pay and
19 recover overdrafts on deposit accounts. (Defendant's MPA p.7: 1-9:4.)

20 BofA's argument misses the point. Plaintiff does not contend that the Bank
21 in general lacks the authority to charge fees or recover overdrafts on regular deposit
22 accounts. He contends that it may not collect those amounts from exempt Social
23 Security funds and thereby deprive eligible Social Security recipients of those
24 funds. BofA's argument that it has general authority to assess fees or recover
25 overdrafts does not even pretend to address this point. Nor do any of the
26 statutory, regulatory or judicial authorities cited by BofA on this point concern
27 exempt funds or accounts. The mere fact that BofA may legally assess fees and
28 recover overdrafts from its ordinary deposit customers does not authorize its
confiscation of exempt funds from Social Security direct deposit accounts.

1 The fallacy of the Bank's argument is illustrated by a simple analogy.
2 Persons who have applied for and obtained liquor licenses in the State of California
3 have the legal authority to sell alcoholic beverages in California. They do not,
4 however, have the right to sell alcohol to persons under 21. California
5 Constitution, Article XX, § 22; Bus. & Prof. Code § 25658. The fact that a
6 corporation has the authority to engage generally in certain types of conduct does
7 not entitle it to engage in particularized conduct which violates legislative
8 proscription or public policy.³ Whatever legitimate general authority BofA may have
9 to charge and collect service fees from its regular deposit account customers, to
10 pay overdrafts and charge customer accounts in order to recover the amounts paid,
11 and even to apply funds in one deposit account to recover an overdraft on another
12 account, it does not have the right to appropriate exempt Social Security funds
13 from direct deposit accounts. Those funds are protected from such collection
14 actions pursuant to both state and federal law.

15 **D. A Motion For Summary Judgment on Plaintiff's Cause of Action for**
16 **Violation of the Consumer Legal Remedies Act Is Barred by Civil Code**
17 **§ 1781.**

18 Plaintiff filed this action for violations of the Consumer Legal Remedies Act,
19 Civil Code 1750 et **seq.**, on behalf of a class as authorized by Civil Code 5 1781 (a).
20 Section 1781 (c) provides as follows: "A motion based upon Section 437~ of the
21 Code of Civil Procedure shall not be granted in any action commenced as a class
22 action pursuant to subdivision (a)." This section provides an absolute bar to the
23 relief sought by BofA on its motion. The Bank has made no effort to explain how
24 this statutory prohibition is overcome by its motion in this case.

25 **E. There Are Disputed Issues of Material Fact Which Support Defendant's**
26 **Entitlement to Relief Based Upon BofA's Misrepresentations.**

27 Plaintiff's First, Second, Sixth and Seventh Causes of Action, in addition to

28 ³ The same is true with respect to the sale of cigarettes to minors. **See Stop Youth Addiction, inc. v. Lucky Stores, inc.** (1998) 17 Cal.4th 553, 559-60; Penal Code § 308.

1 his Fourth Cause of Action for violations of the CLRA, are based in part or in full
2 upon his allegations that defendant made misrepresentations to customers about
3 the nature of direct deposit accounts. BofA fails even to identify, let alone address
4 the various factual issues raised by these allegations. Nor does its Separate
5 Statement of Undisputed Facts identify any facts specific to these causes of action.
6 It relies instead on the specious assertion that the allegations concern
7 misrepresentations of law rather than fact, arguing on that basis that plaintiff “must
8 first establish that Bank of America violated Section 704.080” before he can
9 establish claims for intentional or negligent misrepresentation.

10 Defendant’s characterization of the nature of the misrepresentations on
11 which plaintiff’s claims are based is false. Specifically, plaintiff has alleged that
12 defendant represented to him and other members of the putative class who were
13 encouraged to have their Social Security benefits directly deposited to their
14 accounts that the funds would be “safe and secure.” (FAC 7 19; Miller Decl. l/ 4;
15 Johnson Decl. 7 7, Ex. E.) They also represented that such funds would be
16 available to the account holders or available to them when needed after they were
17 directly deposited through electronic fund transfers. (FAC g 63; Johnson Decl. f 7,
18 Ex. E.) These statements are statements of fact, not law. Further, such
19 statements, in fact, were false because the Bank engages in the practices alleged in
20 the complaint, ie., seizing directly deposited Social Security funds to satisfy the
21 Bank’s own claims against the depositor. At a minimum, the meaning and truth of
22 these statements are in dispute.

23 Because plaintiff’s causes of action for violation of the CLRA, false
24 advertising, fraud and negligent misrepresentation are based upon BofA’s alleged
25 misrepresentations of fact, they stand on their own and are not dependent on
26 establishing a violation of CCP § 704.080. Even if the Bank’s practice of seizing
27 Social Security funds from depositors’ accounts is determined to be legal, its
28 representations that the funds in those accounts would be “safe and secure”

1 through direct deposit are independently actionable. BofA's failure to inform
2 plaintiff and members of the class that their automatically deposited funds would
3 be subject to such seizure, while representing that the funds would be safe and
4 secure and available to them, is sufficient for a trier of fact to determine that
5 defendant engaged in fraud, negligent misrepresentation, violations of the CLRA
6 and false advertising.

7
8 **F. The Bank's Combined and Cumulative Conduct Violates Business &
Professions Code § 0 17200, et seq.**

9 California's Unfair Competition Law (UCL); Business & Professions Code
10 § § 17200, et **seq.**, authorizes restitution and injunctive relief to remedy practices
11 that are unlawful, unfair or fraudulent. The statute is written in the disjunctive.
12 **Stop Youth Addiction, Inc. v. Lucky Stores, Inc.** (I 998) 17 Cal.4th 553, 561.
13 Thus, a practice may be "unfair" -- and violative of the UCL - even if it is not
14 unlawful. **Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.**
15 (1999) 20 Cal.4th **163, 180**; **Committee on Children's Television, Inc. v. General**
16 **Foods Corporation** (I 983) 35 Cal.3d 197, 210. Similarly, a practice may be
17 determined to be fraudulent or deceptive even if it is neither unlawful nor unfair.

18 In this case, plaintiff has alleged and can establish at trial, by the resolution
19 in his favor of the disputed facts, that the Bank's conduct satisfies all three prongs
20 of the UCL. First, BofA's seizure of plaintiff's exempt Social Security funds in his
21 direct deposit account violated Code of Civil Procedure § 704.080 and its
22 underlying policy as established by **Kruger v. Wells Fargo Bank, supra**. Secondly,
23 defendant made false and misleading representations that the direct deposit of
24 Social Security funds would be safe and secure and that those funds would be
25 available to depositors following the monthly electronic transfers from the Social
26 Security Administration. Finally, as discussed further herein, the Bank's conduct
27 was unfair within the meaning of the UCL because it was "substantially injurious"
28 to plaintiff and other members of his proposed class. **People v. Casa Blanca**

1 **Convalescent Homes, Inc.** (1984) 159 Cal.App.3d 509, 530 (“What constitutes
2 ‘unfair competition’ or ‘unfair or fraudulent business practice’ under any given set
3 of circumstances is a question of fact.”; **People v. M&ale (1979)** .25 Cal.3d 626,
4 **635, cited with approval in Schnall v. The Hertz Corporation** (2000) 78 Cal.App.4th
5 1144, 1167.)

6 In **Schnall v. The Hertz Corporation, supra**, 78 Cal.App.4th 1144, the Court
7 of Appeal for the First District addressed the question of what constitutes an
8 “unfair” practice within the meaning of the UCL. Quoting extensively from **Ford**
9 **Motors, Inc. v. Times Mirror Co.** (1980) 102 Cal.App.3d 735, the court stated:
10 “Unlike ‘unlawfulness,’ ‘unfairness’ is an equitable concept that cannot be
11 mechanistically determined . . . ‘The determination of whether a particular
12 business practice is unfair necessarily involves an examination of its impact on its
13 alleged victim balanced against the reasons, justifications and motives of the
14 alleged wrongdoer. In brief, the court must weigh the utility of the defendant’s
15 conduct against the gravity of the harm to the alleged victim”
16 78 Cal.App.4th at 1167.

17 BofA’s sole argument in support of its motion for summary judgment on
18 plaintiff’s claim for violations of the UCL is that it “must fail because the conduct
19 complained of is expressly permitted by statute.”⁴ (Defendant’s MPA, 14: 15 -
20 15:12.) Defendant cites **Lazar v. Hertz Corp.** (1999) 69 Cal.App.4th 1494, but
21 ignores the more recent and definitive “safe harbor” test articulated by the Supreme
22 Court in **eel-Tech Communications, supra**, 20 Cal.4th at 183,184. In **Cel-Tech**, the
23 Court stated unequivocally that unless a law **directly and unambiguously authorizes**
24 particular conduct, it may be alleged that the conduct is “unfair” even if it is not
25 expressly unlawful. To preclude a UCL action under the “safe harbor” doctrine,
26

27 ⁴ Defendant also makes this argument with respect to plaintiff’s Fourth Cause of Action for
28 violation of the CLRA. There is no “safe harbor” doctrine applicable to the Consumer Legal
Remedies Act, however, and defendant cites no authority in support of this novel theory.
Moreover, as noted above, the Motion for Summary Judgment as to the CLRA is barred by Civil
Code 01781(c).

1 another provision of law must **actually bar** the action or **clearly permit the conduct**.
2 **Cel-Tech, supra**, at 183.

3 In arguing that the UCL cannot reach defendant's unfair and deceptive
4 business practice because the conduct is expressly permitted by statute, BofA
5 again relies upon the interpretive ruling by the Comptroller of the Currency,
6 12 C.F.R. 7.4002 and upon Financial Code §864. (See Defendant's MPA, 15:4-5.)
7 As discussed above, neither of those provisions **specifically permits the precise**
8 **conduct of which plaintiff complains** here, *i.e.* the appropriation of Social Security
9 funds from plaintiff's exempt direct deposit account in order to satisfy the Bank's
10 claims against plaintiff. Nor do they permit defendant to mislead customers about
11 the safety and security'of the funds deposited by direct deposit. **See SchnaN v.**
12 **Hertz Corp., supra**, at 1 136-64 (authorization to impose particular charges for
13 optional services does not constitute permission to mislead customers about such
14 charges). Defendant's assertions to the contrary simply ring hollow. Accordingly,
15 BofA's conduct may properly be determined to be unfair and violative of the UCL.
16 It is quintessentially a question of fact by the trier of fact.

17 Unfairness within the meaning of the UCL may be established by conduct
18 that is "tethered to some legislatively declared policy" and contravenes that policy.
19 **Cel-Tech, supra**. Whether or not BofA's conduct is determined to violate Code of
20 Civil Procedure § 704.080, it certainly satisfies this standard for unfairness. The
21 protection of retirement and disability benefits such as those provided by the Social
22 Security Administration from creditors and other claimants is well established legal
23 policy. As the Supreme Court in **Kruger v. Wells Fargo, supra**, stated, this policy is
24 established by the exemption statutes set forth in the California Code of Civil
25 Procedure. It is also established by the Social Security Act itself, which provides
26 that the right to receive such benefits may not be transferred or assigned to third
27 parties and prohibits them from being subjected to collection, levy or execution **of**
28 **any kind. 42 U.S.C. § 407; see also Philpott v. Essex Co. Welfare Bd. (1973)**

1 **409 U.S. 413 (1973); Tom v. First American Credit Union (10th Cir. 1998)**

2 **151 F.3d 1289, 1292; Crawford v. Gould (9th Cir. 1995) 56 F.3d. 1162, 1166.**

3 The contravention of these policies alone are a sufficient basis on which to
4 find that defendant's practice of collecting Social Security funds from depositors'
5 accounts is unfair within the meaning of the UCL. The particular scope and
6 character of defendant's practices, however, reinforce the unfairness of
7 defendant's conduct. Despite the special status afforded Social Security funds and
8 Social Security direct deposit accounts, defendant has made no effort whatsoever
9 to install or implement procedures to protect those funds from its internal collection
10 practices. To the contrary, absent the repeated intervention of counsel on their
11 behalf, customers with Social Security direct deposit accounts whose funds have
12 been taken by the Bank are informed that nothing can be done because they owe
13 the money. (Miller Decl. 71 7, 13-l 6.) Even after being informed that the funds are
14 Social Security benefits and essential to the depositor's food and shelter needs, the
15 Bank continued to engage in affirmative conduct designed to deplete the
16 depositor's account and deprive him of the Social Security benefits electronically
17 deposited to the Bank as they arrive each month. (Miller Decl. 77 13-l 6; Bridegam
18 Decl. 17 7-8.) The Bank's practice thus has a drastic and devastating impact on
19 vulnerable customers, depriving them of their sole source of income. In this
20 context, defendant's bald statement that "there is nothing unfair or unlawful about
21 debiting the accounts of Social Security recipients for services fees or overdrafts" is
22 for a fact finder to determine at trial.

23 **G. Disputed Facts Support Plaintiff's Fifth Cause of Action for Intentional**
24 **Infliction of Emotional Distress.**

25 The essential elements of an action for intentional infliction of emotional
26 distress include (1) outrageous conduct, (2) an intent to cause or a reckless
27 disregard of the possibility of causing emotional distress, (3) severe or extreme
28 emotional distress and (4) actual and proximate cause of the emotional distress by

1 the outrageous conduct. The evidence presented by plaintiff in support of this
2 cause of action establish, at a minimum, material issues of fact as to the existence
3 of each of these elements.

4 Defendant disputes that plaintiff suffered damages as a result of its conduct.
5 It also argues that the Bank's conduct cannot be the basis for a claim for intentional
6 infliction of emotional distress because such conduct was "privileged." This
7 argument hinges on the same faulty logic and contentions made by the Bank in
8 connection with the other causes of action, namely that it was specifically allowed
9 to engage in such conduct. No statute or regulation authorizes the Bank to collect
10 Social Security funds from direct deposit accounts to satisfy claims it has against
11 depositors.

12 Defendant BofA also contends that its conduct was not sufficiently
13 outrageous to support a claim for intentional infliction of emotional distress. Its
14 position on this point is unsupported. In **S ymonds v. Mercury Savings & Loan**
15 **Association** (1990) 225 Cal.App.3d 14, 58, the court addressed the same issue on
16 similar facts. In that case the plaintiff sued the defendant savings and loan
17 association for negligent handling of a check and the wrongful dishonor of a check
18 based upon a charge back. Plaintiff's complaint included the cause of action for
19 intentional infliction of emotional distress based upon the defendant's repeated
20 demands the appellant sign a promissory note for the amount owed as a result of
21 the charge back. The court noted that in the area of collection practices, a creditor
22 has a qualified privilege to protect its economic interests, but that the privilege
23 "may be lost if the creditor uses outrageous and unreasonable means in seeking
24 payment. " **See also Bundren v. Superior Court** (1983) 145 Cal.App.3d 784, 789-
25 **90; Kruse v. Bank of America** (1988) 202 Cal.App.3d 38, 67 [banks have a right to
26 pursue their financial interests but not in an impermissible manner]. The court in
27 **Symonds** concluded that defendant's knowledge of plaintiff's health and her
28 desperate financial situation, its repeated pressure on plaintiff to sign the

1 promissory note even though all of plaintiff's funds were held by defendant, and
2 defendant's direct contact to plaintiff after being asked to speak only with her
3 attorney, were sufficient facts upon which a jury might reasonably find defendant's
4 conduct to be outrageous.

5 Further support for plaintiff's emotional distress claim is found in **Young v.**
6 **Bank of America** (1983) 141 Cal.App.3d 108. In that case the plaintiff sought
7 damages for emotional distress based upon BofA's refusal to acknowledge that
8 expenditures on her credit card were unauthorized and its subsequent collection and
9 credit reporting actions against plaintiff based upon the unauthorized charges. As
10 it does here, BofA argued that its conduct was not sufficient to constitute "extreme
11 and outrageous conduct." *Id.* at 114. Finding that the bank's conduct had been
12 willful and persistent, and that it represented a "callous indifference to plaintiff's
13 credit rating and the financial difficulties that she would suffer," the Court of
14 Appeal for the First District sustained the award of emotional distress damages.

15 The conduct of BofA in this case is more outrageous than that of the
16 defendants in **Symonds** and **Young**. BofA not only demanded that plaintiff repay
17 the amounts that it had mistakenly credited to plaintiff's account, but prior to
18 intervention by counsel on plaintiff's behalf, refused to relinquish plaintiff's Social
19 Security benefits after having seized those amounts to satisfy its claim. Thereafter,
20 with knowledge of plaintiff's disability and his desperate financial situation, the
21 Bank deliberately pursued its collection actions against plaintiff not merely through
22 demands and threats, but by actually seizing the funds in plaintiff's account on two
23 additional occasions as they were received from the Social Security Administration,
24 assuring that plaintiff's only source of income for paying for food, shelter and other
25 necessities were denied to him. Defendant's knowledge of plaintiff's desperate
26 situation is acknowledged by BofA. (Johnson Decl. V 3, Exh. A.)

27 Finally, even after becoming aware of plaintiff's situation and ultimately
28 agreeing to restore plaintiff's May Social Security check to a new account opened

1 for that very purpose, defendant proceeded without notice to plaintiff to
2 appropriate his incoming Social Security benefit checks for the months of June and
3 July, requiring intervention on plaintiff's behalf by pro bono counsel on each
4 occasion. Defendant also blocked plaintiff's access to its automatic teller machine,
5 depriving plaintiff of any cash that may have remained in his account. It then
6 referred its claim to a collection agency, even though it know plaintiff was
7 represented by counsel. Ultimately, even when the Social Security benefits were
8 restored to plaintiff's account, he was forced to use bank tellers to deposit or
9 withdraw money to his account, resulting in additional fees charged by BofA for a
10 teller transaction, even for depositing funds. (Miller Decl. 11 17.) It is hard to
11 imagine more callous or outrageous conduct towards a bank customer than that
12 perpetrated against Mr. Miller by BofA. Accordingly, there are certainly material
13 facts sufficient to support plaintiff's cause of action for intentional infliction of
14 emotional distress. Defendant's motion for summary judgment as to that cause of
15 action should be denied.

16 CONCLUSION

17 Bank of America's motion lacks merit both because it fails to address
18 material issues of fact that are in dispute and because it is wrong on the law.
19 Plaintiff therefore respectfully requests that the Motion for Summary Judgment or
20 Alternatively For Summary Adjudication be denied in full and as to all Causes of
21 Action.

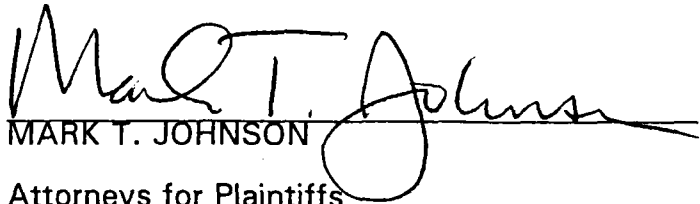
22 DATED: May 16, 2001

Respectfully submitted,

23 THE STURDEVANT LAW FIRM
24 A Professional Corporation

LAW OFFICE OF THOMAS J. BRANDI

25
26
27 By:


28 MARK T. JOHNSON

Attorneys for Plaintiffs

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PROOF OF SERVICE BY U.S. MAIL

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2
3 I, the undersigned, declare that I am a citizen of the United States, over the
4 age of 18 years, employed in the City and County of San Francisco, California, and
5 not a party to the within action. My business address is 475 Sansome Street,
6 Suite 1750, San Francisco, California 941 1 1.

7 I am readily familiar with The Sturdevant Law Firm's practice for collection
8 and processing of documents for mailing with the *United States Posta/ Service*,
9 being that the documents are deposited with the United States Postal Service with
10 postage thereon fully prepaid the same day as the day of collection in the ordinary
11 course of business.

12 I am also readily familiar with The Sturdevant Law Firm's practice for
13 collection and processing of documents for *band delivery*, being that the documents
14 are deposited with a messenger from NoBS Couriers, 388 Guerrero Street, San
15 Francisco, California 94103, for service the same day as the day of collection.

16 On May 16, 2001, I served:

- 17 1. **Plaintiff's Memorandum of Points and Authorities in Opposition to**
18 **Defendant's Motion for Summary Judgment or Alternatively for Summary**
Adjudication;
- 19 2. **Plaintiff's Separate Statement of Undisputed Facts in Opposition to**
20 **Defendant's Motion for Summary Judgment or Alternatively Summary**
Adjudication; and
- 21 3. **Declaration of Mark T. Johnson in Support of Plaintiff's Opposition to Bank**
22 **of America's Motion for Summary Judgment or Alternatively for Summary**
Adjudication
- 23 4. **Declaration of Paul Miller in Support of Plaintiff's Opposition to Bank of**
24 **America's Motion for Summary Judgment or Alternatively for Summary**
Adjudication;
- 25 5. **Declaration of Martha Bridegam in Support of Plaintiff's Opposition to Bank**
26 **of America's Motion for Summary Judgment or Alternatively, Summary**
Adjudication; and
- 27 6. **Appendix of Non-California Authority in Support of Plaintiff's Opposition to**
28 **Defendant's Motion for Summary Judgment or Alternatively for Summary**
Adjudication

1 on the parties to this action listed below by placing a true copy thereof in a sealed
2 envelope and causing it to be delivered as shown:

4 **hand delivery:**

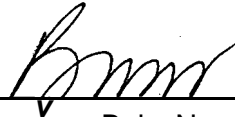
5 **Arne Wagner, Esq.**
6 **Morrison & Foerster LLP**
7 **425 Market Street**
8 **San Francisco, CA 94105-2482**

U.S. Mail:

Preston Dufauchard
Office of the General Counsel, Dept. 3017
Bank of America N.T. & S.A.
P.O. Box 37000
555 California Street, 7th Floor
San Francisco, CA. 94137

9 I declare under penalty of perjury that the foregoing is true and correct.

10 Executed on the date first written above at San Francisco, California.

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Bela Nuss