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ENDORSED
FILED
San Francisco County Superior Court

MAY 17 2001

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ALAN CARLSON, Clerk
BY: REMEDIOS DE LUNA
Deputy Clerk

11 Attorneys for Plaintiff

12 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 IN AND FOR THE COUNTY OF SAN FRANCISCO
14 UNLIMITED JURISDICTION

15 PAUL MILLER, individually and on behalf of i
16 others similarly situated,

CASE NO. 301917

) CLASS ACTION

17 Plaintiff,

i PLAINTIFF'S SEPARATE
STATEMENT OF UNDISPUTED
FACTS IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT OR
ALTERNATIVELY SUMMARY
ADJUDICATION

18 vs.

19 BANK OF AMERICA N.T. & S.A.
20 a California corporation, and DOES 1 - 50, ;

21 Defendants.

) Date: June 8, 2001
) Time: 2:00 p.m.
) Location: Room 624

i Honorable Anne E. Bouliane

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25 Pursuant to California Code of Civil Procedure § 437(b), plaintiff Paul Miller
2c submits this separate statement of facts, together with supporting evidence, in
2; opposition to defendant Bank of America's motion for summary judgment or
28 alternatively summary adjudication.

**THIRD CAUSE OF ACTION
(Violation of Code of Civil Procedure § 704.080)**

Defendant Bank of America's Allegedly Undisputed Material Fact(s) and Supporting Evidence	Plaintiff's Response and Supporting Evidence
1. Bank of America (the "Bank") is a national bank organized and existing pursuant to the National Bank Act, 12 U.S.C. § 21, et seq.	Plaintiff lacks sufficient information on which to admit or deny this alleged fact.
2. In June, 1994, plaintiff Paul Miller elected to have his Social Security Disability Income and Supplemental Security Income ("Social Security funds") deposited directly into his Bank of America account by means of electronic transfer.	Disputed insofar as it omits material facts. Plaintiff was induced by the bank to execute a document agreeing 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 deposited funds would be available to him when he needed it. Miller Decl. 7 4.
3. On or about January 30, 1998, the Bank erroneously credited \$1,799.83 to Miller's account. Miller withdrew and spent the erroneously credited funds.	Disputed except as to the Bank's erroneous credit to Plaintiff's account. Plaintiff wrote checks and made ATM withdrawals only to the extent that they were authorized and approved by defendant. Miller Decl. 1 10.
4. On or about April 16, 1998, the Bank discovered its error and reversed the \$1,799.83 credit, which overdraw Miller's account.	Disputed insofar as it omits material facts. Defendant debited Plaintiff's account for an amount of \$1,799.83 without any prior or concurrent notice to him of the action and with no explanation for the action. Miller Decl. II 6.
5. In May, 1998, when Miller's monthly Social Security payment of \$670 was electronically deposited into his account, that deposit was applied against the overdraft.	Undisputed

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Defendant Bank of America's Allegedly Undisputed Material Fact(s) and Supporting Evidence	Plaintiff's Response and Supporting Evidence
6. When Miller complained, the Bank replaced the old checking account with a new one, and deposited the \$670 of May Social Security funds into the successor account.	Disputed. Defendant initially refused to take any action to restore Plaintiff's Social Security funds to him and informed him that there was nothing that could be done to assist him despite the fact that the funds were essential to pay for his food and shelter. Miller Decl. 7 7. After being contacted by counsel on Plaintiff's behalf, Defendant opened a new, independent direct deposit checking account for plaintiff, into which the \$670.00 in Security Funds were restored. The existing account remained open for some period of time thereafter. Miller Decl. 7 14; Bridegam Decl. It[5-6.
7. Because an overdraft remained in Miller's predecessor account, the Bank's collection system continued to debit the successor account for the overdraft.	Disputed. Defendant took affirmative and intentional actions to identify other accounts held by Plaintiff to collect funds from such accounts to satisfy it's claim against Plaintiff for the prior overdrawn account. Defendant then intentionally liquidated Plaintiff's new, separate and independent account, comprised entirely of directly deposited Social Security funds, in order to collect on that claim. Miller Decl. 11 15 16; Johnson Decl. 7 6, Exh. D (Daley Depo., pp. 151-55)

<p>1 Defendant Bank of America's Allegedly 2 Undisputed Material Fact(s) and 3 Supporting Evidence</p>	<p>Plaintiff's Response and Supporting Evidence</p>
<p>4 8. When Miller again complained, the 5 Bank reversed the debit and again 6 credited the Social Security funds 7 to Miller's successor account.</p>	<p>8 Disputed. Defendant again failed to 9 take any action to reverse its action 10 appropriating Plaintiff's Social Security 11 benefits until after Plaintiff's counsel 12 contact Bank of America's legal 13 department and reminded defendant's 14 legal personnel of the assurances that 15 had been given that Plaintiff's Social 16 Security funds would not be 17 appropriated again. Miller Decl. 7 15; 18 Bridegam Decl., f 7.</p> <p>19 Plaintiff also disputes this statement to 20 the extent that it implies that 21 Defendant's deliberate confiscation of 22 Plaintiff's directly deposited Social 23 Security benefits in his new account 24 occurred only once. Defendant 25 appropriated Plaintiff's Social Security 26 Deposits after they were deposited to 27 his new account in both June and July 28 and only restored the funds to Plaintiff after the intervention of counsel. Miller Decl. %y 15-l 6; Bridegam Decl. 78 7-8.</p>

**FIRST CAUSE OF ACTION
(Violation of California Civil Code § § 1709, 1710 (Fraud))**

<p>20 Defendant Bank of America's Alleged 21 Undisputed Material Fact(s)</p>	<p>Plaintiff's Response and Evidentiary Support</p>
<p>22 9. As Material Facts in support of its 23 motion as to the First Cause of 24 Action, the Bank incorporates 25 Material Facts 1-8, as set forth 26 above.</p>	<p>27 In response to Defendant's Alleged 28 Undisputed Material Facts in support of its motion as to the First Cause of Action, Plaintiff incorporates its response to Material Facts 1-8, as set forth above.</p>

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SECOND CAUSE OF ACTION
(Violation of California Civil Code § § 1709, 1710 (Negligent Misrepresentation))

Defendant Bank of America's Alleged Undisputed Material Fact(s)	Plaintiff's Response and Evidentiary Support
10. As Material Facts in support of its motion as to the Second Cause of Action, the Bank incorporates Material Facts 1-8, as set forth above.	As Material Facts in support of its motion as to the Second Cause of Action, the Bank incorporates Material Facts 1-8, as set forth above.

FOURTH CAUSE OF ACTION
(Violation of California Civil Code § § 1750, et seq.)

Defendant Bank of America's Alleged Undisputed Material Fact(s)	Plaintiff's Response and Evidentiary support
1 1. As Material Facts in support of its motion as to the Fourth Cause of Action, the Bank incorporates Material Facts 1-8, as set forth above.	As Material Facts in support of its motion as to the Fourth Cause of Action, the Bank incorporates Material Facts 1-8, as set forth above.

FIFTH CAUSE OF ACTION
(Intentional Infliction of Emotional Distress)

Defendant Bank of America's Alleged Undisputed Material Fact(s)	Plaintiff's Response and Evidentiary Support
12. As Material Facts in support of its motion as to the Fifth Cause of Action, the Bank incorporates Material Facts 1-8, as set forth above.	As Material Facts in support of its motion as to the Fifth Cause of Action, the Bank incorporates Material Facts 1-8, as set forth above.

SIXTH CAUSE OF ACTION
(Violation of Bus. & Prof. Code § 5 17200, *et seq.* 1)

Defendant Bank of America's Alleged Undisputed Material Fact(s)	Plaintiff's Response and Evidentiary Support
13. As Material Facts in support of its motion as to the Sixth Cause of Action, the Bank incorporates Material Facts 1-8, as set forth above.	As Material Facts in support of its motion as to the Sixth Cause of Action, the Bank incorporates Material Facts 1-8, as set forth above.

SEVENTH CAUSE OF ACTION
(Violation of Bus. & Prof. Code § 0 17500, *et seq.*)

Defendant Bank of America's Alleged Undisputed Material Fact(s)	Plaintiff's Response and Evidentiary Support
14. As Material Facts in support of its motion as to the Seventh Cause of Action, the Bank incorporates Material Facts 1-8, as set forth above.	As Material Facts in support of its motion as to the Seventh Cause of Action, the Bank incorporates Material Facts 1-8, as set forth above.

**PLAINTIFF'S ADDITIONAL MATERIAL FACTS
IN DISPUTE AS TO ALL CAUSES OF ACTION**

Plaintiff's Additional Material Fact in Dispute	Supporting Evidence
1. Defendant did not give prior or concurrent notice to Plaintiff that it had unilaterally credited his account an amount of \$1799.83 in January, 1998.	Miller Decl. 1 9..
2. Defendant did not explain the credit to Plaintiff's account on his account statement.	Miller Decl. 1 9; Bader Decl., 7 7, Exh. B.

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Plaintiff's Additional Material Fact in Dispute	Supporting Evidence
3. In approximately 1994, Plaintiff was encouraged by Bank of America employees to agree to have his Social Security benefit payments deposited directly into his Bank of America checking account. The bank's representatives assured him that his directly deposited funds would be safe and secure and would be available to him when needed. Based upon those representations, Plaintiff agreed to have his Social Security benefits directly deposited to his account.	Miller Decl. 7 4.
4. Defendant Bank of America made written representations to members of the proposed class that directly deposited benefit checks will be safe and secure and available to them following the direct deposit.	Johnson Decl. (7, Exh. E.
5. Bank of America did not provide Plaintiff with prior or concurrent notice of its decision (later determined to be an error) to credit plaintiff's checking account an amount of \$1,799.83 in January, 1998.	Miller Decl. 7 9.
6. Defendant Bank of America did not include on Plaintiff's February checking account statement any adequate explanation of the credit that bank had erroneously applied to his account.	Bader Decl. 1 7, Exh. B.
7. Plaintiff reasonably believed that the erroneous credit appearing on his checking account statement in February represented a retroactive benefit adjustment from the Social Security Administration.	Miller Decl. 7 9.

Plaintiff's Additional Material Fact in Dispute	Supporting Evidence
<p>8. The funds credited to Plaintiff's checking account in January, 1998 were actually made available to plaintiff for his use by the Bank without objection or complaint for a period of at least two and a half months.</p>	<p>Fili; r ie; l. 1 10; Bader Decl. 71 6-9,</p>
<p>9. In April, 1998, Defendant imposed a debit against Plaintiff's checking account of \$1799.83 to recover the funds that had been made available to plaintiff through the January credit. This action liquidated the entire balance of Plaintiff's account.</p>	<p>F; VI-rc Decl. 1[11; Bader Decl. 11 8-9,</p>
<p>10. The funds taken by Bank of America in April, 1998 consisted of Plaintiff's Social Security benefits for the months of February, March and/or April, 1998 which had been directly deposited to the account at the beginning of each of those months.</p>	<p>Miller Decl. 7 1 1.</p>
<p>11. Since this amount was insufficient to satisfy the full amount of the claim the bank asserted against plaintiff, it subsequently seized plaintiff's Social Security benefits for the month of May after those funds were directly deposited to the account and applied the full amount of those benefits to its claim as well.</p>	<p>ylp; Decl. 1 11; Bader Decl. 111 10, 1 C}</p>
<p>12. After learning that his benefit payments had been confiscated by the bank to satisfy the bank's claim based upon the prior erroneous credit, plaintiff informed representatives of the bank that the funds were Social Security benefits which he required to pay for rent, food and other basic needs.</p>	<p>Miller Decl. 7 7; Johnson Decl. 1[3, Exh. A (Hahr Depo., pp. 40-42)</p>

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Plaintiff's Additional Material Fact in Dispute	Supporting Evidence
13. The bank refused to take any action to return Mr. Miller's Social Security benefit payments to him until plaintiff contacted an attorney who intervened on his behalf through the Bank of America's legal department.	Miller Decl. 11 13; Bridegam Decl. Bf 3-f
14. Following the intervention of counsel, at the recommendation of bank employees, plaintiff opened a new and separate checking account at Bank of America into which the May Social Security benefits which had been confiscated by the bank were deposited. The existing account was not closed at that time.	Miller Decl. 7 14; Bridegam Decl. f 5; .JJhns;;~ecl. f 3, Exh. A (Hahr Depo., -
15. Bank employees represented to plaintiff that opening the new account would prevent his future benefit payments from being taken by the bank to satisfy the claimed overdraft.	Miller Decl. v 14; Bridegam Decl. 7 5.
16. In June, 1998, despite its representations to the contrary, Bank of America deliberately took steps to identify plaintiff's new account as a source from which to collect its prior claim, and upon the direct deposit of plaintiff's Social Security benefits for the month of June, seized those funds as partial satisfaction of that claim.	Miller Decl. q 15; Bridegam Decl. 7 7; Johnson Decl. 1 6, Exh. D (Daley Depo., pp. 137-l 47)
17. Bank of America took his action intentionally, with knowledge of the potential consequences and emotional distress to plaintiff. It also failed to take any steps to assure that such collection was not undertaken.	Johnson Decl. y 4, Exh. B (Kastanes Depo., pp. 56-62); 7 5, Exh. C (Jackson Depo., p. 140)

Plaintiff's Additional Material Fact in Dispute	Supporting Evidence
18. The bank agreed to reverse this action only after the bank's legal department was again contacted.	Miller Decl. 1[15; Bridegam Decl. 1[7.
19. In July, 1998, following the direct deposit of plaintiff's Social Security benefits payment for that month, Bank of America once again, within days of the deposit, seized the entire amount of plaintiff's benefit payment, liquidating plaintiff's new account and causing an overdraft to be charged against that account.	Miller Decl. 1 16; Bridegam Decl. 7 8; Bader Decl. 1 16.
20. Subsequently, the bank failed and refused to pay on checks written by plaintiff to pay for rent and his automobile insurance premium. The bank reversed these actions only after the intervention by counsel on plaintiff's behalf.	Miller Decl. 7 16; Bridegam Decl. 1[8.
21. In September, 1998, Bank of America caused a collection letter to be sent to plaintiff seeking collection of the amounts that had previously been the subject of its internal collection efforts.	Miller Decl. 1 18.


bATED: May 11, 2001

Respectfully submitted,

THE STURDEVANT LAW FIRM
A Professional Corporation

LAW OFFICE OF THOMAS J. BRANDI

By:


MARK T. JOHNSON

Attorneys for Plaintiffs_w

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