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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 17 COUNTY OF SAN FRANCISCO

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

20 Plaintiff,

21 v.

22 Bank of America NT & SA,

23 Defendant.

No. 301917

**REPLY OF DEFENDANT BANK OF
 AMERICA TO PLAINTIFF'S
 OPPOSITION TO DEFENDANT'S
 MOTION FOR SUMMARY
 JUDGMENT OR ALTERNATIVELY
 SUMMARY ADJUDICATION**

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

Trial Date: Not Set
 Complaint Filed: September 16, 1998

1 This is mere - and untrue - rhetoric. If, as Miller contends, Section 704.080 imposes a duty on the
2 Bank to exempt plaintiffs account from repaying overdrafts or paying the Bank's standard service
3 fees, that would obviously relieve him of those obligations -not to mention making it impossible
4 for banks to offer checking accounts at all to plaintiff and members of his proposed class. The Bank
5 respectfully submits that Section 704.080 imposes no such duty on the Bank.

6 2. Miller also argues that "Code of Civil Procedure § 704.080 is not the only, nor even
7 the primary, basis upon which plaintiff seeks relief." (Id. at 2.) In an attempt to rewrite his First
8 Amended Complaint ("Complaint"), Miller urges that his causes of action "are based on
9 misrepresentations of fact made by the Bank, and do not turn on the legality of the underlying
10 conduct that is the subject of the misrepresentations." (Pl. Opp'n Br. at 2.) Contrary to Miller's
11 assertions, however, the Bank's alleged misrepresentations all stem from its alleged violation of
12 Section 704.080. '

13 ARGUMENT

14 I. SECTION 704.080 DOES NOT IMPOSE A DUTY ON THE BANK TO 15 EXEMPT MILLER, OR HIS PROPOSED CLASS, FROM REPAYING OVERDRAFTS OR PAYING STANDARD SERVICE FEES

16 By its express terms, Section 704.080 of the Code of Civil Procedure does not apply to debits
17 that happen to create an overdraft or to the Bank's standard service fees. Rather, Section 704.080
18 applies to a judgment creditor's attempts to enforce a money judgment or levy on an account into
19 which Social Security funds are directly deposited by means of electronic fund transfers. See Civ.
20 Proc. Code 4 704.080. In his opposition, Miller does not even attempt to argue that Section

21 _____
22 Miller also offers an additional argument which is really a variation on his first one.
23 Observing that Social Security funds are protected by "state and federal law" (Pl. Opp'n Br. at 2), he
24 decries the Bank's refusal "to acknowledge the special status and protection afforded Social Security
25 direct deposit accounts and its deliberate failure and refusal to devise systems to identify adequately
26 those accounts and protect them from its internal collection system." (Id.) Miller misrepresents the
27 Bank's practices. The Bank does not deny that accounts that receive Social Security funds by
28 electronic fund transfers are afforded certain protections - namely, pursuant to federal and state law,
including Section 704.080, they are shielded from levies on money judgments. However, as the Bank
has shown, and as is demonstrated by Financial Code 0 864, 12 C.F.R. 5 7.4002 and case law
thereunder, debits for overdrafts or for standard service fees simply do not constitute levies.

1 704.080's terms apply to the Bank's conduct. Instead, he urges that the Bank's debits (subtractions)
2 to his account for overdrafts and standard service fees should be **deemed** to be levies. As shown
3 below, Miller's argument is without merit.

4 A. ***Kruger v. Wells Fargo Bank Does Not Apply to Situations Where***
5 ***the Bank Debits an Account of an Electronic Recipient of Social***
6 ***Security Funds for Overdrafts or for Standard Service Fees***

7 Miller cites ***Kruger v. Wells Fargo Bank***, 11 Cal.3d 352 (1971), in support of his argument
8 that the Bank's debits to his account for overdrafts and standard service fees constitute unlawful
9 levies. Miller's reliance on ***Kruger***, however, is misplaced. Further, Miller conveniently ignores
10 Financial Code § 864, which was enacted after the ***Kruger*** decision, and recent cases that have
11 interpreted that section.

12 In ***Kruger***, the California Supreme Court held that a bank could not set off ***an independent***
13 credit card debt against a checking account containing deposits which derived from unemployment
14 and disability benefits, because such funds were protected against claims of creditors. 11 Cal.3d at
15 371. The court noted that the setoff was a ***creditor*** action which the applicable exemption statute,
16 Civ. Proc. Code 3 690.175, intended to prohibit. ***Id.*** at 370-71. Of particular importance to the court
17 was the bank's status as a ***creditor***: “[w]ith the growth of bank-sponsored credit systems, a bank may
18 gather unto itself the debts incurred by a depositor for past living expenses and satisfy by setoff debts
19 which, in the days before Mastercharge and BankAmericard, would have been held by many separate
20 merchants and enforceable only through execution.” ***Id.*** at 371. Here, however, the Bank was not
21 acting as a creditor on independent debts that Miller had incurred to the Bank (or to third-parties), nor
22 was the Bank setting off such debts as an end-run around the procedures for creditor's levies and
23 executions. Rather, the debits in question occurred in the ordinary course of deposits and
24 withdrawals within Miller's own checking account.

25 Financial Code 3 864, which was enacted ***after*** the ***Kruger*** decision, makes clear that ordinary
26 subtractions to an account for fees, withdrawals, and other transactions within the account itself, do
27 not constitute a “debt.” If an obligation constitutes a “debt,” Section 864 requires banks to give the
28 depositor notice and the opportunity to claim exemptions, such as the exemption for Social Security

1 deposits under § 704.080, before setting off such “debt.” However, a debt, as defined by Fin. Code
2 § 864, “does not mean a charge for bank services or a debit for uncollected funds or for an overdraft
3 of an account imposed by a bank on a deposit account.” Accordingly, the courts have held that -
4 notwithstanding any limitations on setoffs contained in other provisions of the law - a bank may
5 debit an account to reverse a previous credit. As held in ***S’monds v. Mercury Sav. & Loan Ass’n***:
6 “any limitations on a bank’s ability to set off certain debts against a customer’s account do[] **not**
7 apply to a charge for a debt for uncollected funds or for dishonored checks cashed for a customer.”
8 225 Cal. App. 3d 1458, 1464 n.1 (1990) (emphasis added). Thus, contrary to Miller’ assertions, the
9 California Legislature has decided, and the California courts have held, that there **is** a difference
10 between a “debt”, on the one hand, and a debit for transactions within the account, on the other hand.

11 In short, debiting Miller’s account for overdrafts and standard service fees does not constitute
12 debt collection or enforcement by a creditor. Fin. Code 5 864(a)(2). Thus, because such debits do
13 not implicate the exemption statutes, such as Section 704.080, they are not prohibited by ***Kruger***.
14 The Bank is therefore entitled to summary judgment.

15 **B. Ordinary Principles of Arithmetic Demonstrate the Absurdity of**
16 **Miller’s Argument that Debits to his Account for Overdrafts and**
17 **Standard Service Fees are Illegal**

18 Under ordinary rules of grade school arithmetic, the process of addition and subtraction is
19 “commutative” and “transitive” - ***i.e.***, independent of order. In other words, $200 + 600 - 700$ is
20 equal to $200 - 700 + 600$ - either way, the answer is 100, unaffected by the order of operations.
21 Accepting Miller’s argument that debits for overdrafts and for standard service fees violate Section
22 704.080, however, would mean that checking accounts that receive Social Security funds by means of
23 electronic fund transfers must operate on principles different from those of ordinary arithmetic.

24 For instance, suppose that a Bank customer has a deposit account that receives Social Security
25 funds by means of electronic fund transfers and the balance on that account on the first day of the
26 month is \$200. On the second day of the month, two items arrive at the Bank for processing: a \$600
27 deposit from Social Security, and a \$700 check written by the customer. According to Miller, the
28 Bank’s actions may be either lawful or unlawful, depending only on the order of operations:

- 1 1. If the \$600 deposit arrives and is paid **into** the account before the Bank pays the \$700
2 check **out** of the account, this sequence of events can be represented as \$200 + \$600 -
3 \$700, which would result in a remaining balance of \$100. This is the result that simple
4 grade school arithmetic mandates and that Miller would (apparently) concede is legal and
5 proper.
- 6 2. According to Miller, however, if the \$700 check arrives and is paid out of the account
7 before the \$600 Social Security deposit is paid into the account, the outcome is far
8 different. By first paying the check, the Bank would overdraw the account by a negative
9 \$500 (\$200 - \$700). Of course, California Uniform Commercial Code 3 4401(a)
10 specifically authorizes such overdrafts.² Nonetheless, Miller contends that the overdraft
11 is illegal and the Bank must therefore absorb the \$500 loss, restoring the account balance
12 to zero. Then, when the \$600 Social Security deposit arrives and is paid into the account,
13 the account balance rises from zero to \$600. Thus, in Miller's view of banking (and
14 arithmetic), $\$200 - \$700 + \$600 = \600 .

15 It would obviously, and absurdly, exalt form over substance to hold that the first scenario is
16 legal, whereas the second scenario is illegal and confers a \$500 windfall on the customer who is
17 fortunate enough to have his Social Security deposit arrive after (rather than before) the Bank has
18 paid his check.

19 Moreover, accepting Miller's argument, even the first scenario would be illegal. Indeed, any
20 time the Bank were to debit Miller's checking account to make a payment to someone who is owed
21 money - e.g., by honoring a check written by Miller-that would be an illegal levy violating
22 Section 704.080. Such a rule would outlaw the most routine checking account activity. This
23 obviously cannot be the law.

24
25
26 ² U. Corn. Code 4 4401(a) permits a bank to "charge against the account of a customer an
27 item that is properly payable from an account even though the charge creates an overdraft."
28

1 Miller apparently seeks to ameliorate the absurdity of his argument by limiting his challenge
2 to those situations where a debit creates an overdraft which is then satisfied out offuture Social
3 Security funds. Thus, Miller seems to be saying, he is not challenging situations where a debit to an
4 account can be and is satisfied out **ofpresent** Social Security funds already on hand, without creating
5 an overdraft. However, under plaintiffs logic, there is no meaningful distinction among these
6 situations. That is, there is no difference between any of the following:

- 7 1. An account is debited, the debit creates a \$500 overdraft, and that \$500 overdraft is
8 recouped out of a subsequent deposit of \$600 in Social Security funds (the situation that
9 Miller explicitly challenges);
- 10 2. An account, which already contains \$600 from **aprior** deposit of Social Security funds, is
11 debited by \$500 to pay a check in that amount that the customer wrote to Bank of America
12 (e.g., to pay a credit card bill, automobile loan payment, or mortgage payment);
- 13 3. An account, which already contains \$600 from a prior deposit of Social Security funds, is
14 debited by \$500 to pay a check in that amount that the customer wrote to a third-party
15 (e.g., a grocery store, a department store, or a hospital for services rendered).

16 In each example, Social Security funds are being used to satisfy what Miller labels a “debt”
17 owed by the accountholder - owed to the Bank in the first two examples and owed to a third-party
18 in the third example. If the first scenario is illegal, so must be the other two. This, of course, would
19 mean that recipients of Social Security funds could not use their checking accounts to write checks.
20 This Court should reject Miller’s absurd interpretation of Section 704.080.

21 **II. BECAUSE THE BANK DID NOT VIOLATE SECTION 704.080 WHEN**
22 **IT DEBITED MILLER’S ACCOUNT FOR OVERDRAFTS AND**
23 **STANDARD SERVICE FEES, MILLER’S REMAINING CAUSES OF**
ACTION FAIL AS A MATTER OF LAW

24 **A. Miller’s First, Second, Fourth, Sixth and Seventh Causes of Action**
25 **Fail as Matter of Law Because they are Premised Entirely on The**
26 **Bank’s Alleged Violation of Section 704.080**

27 Realizing that he cannot prove that the Bank violated \$ 704.080, Miller attempts to salvage
28 his remaining causes of action by arguing that “Section 704.080 is not the only, nor even the primary,
basis upon which he seeks relief.” (Pl. Opp’n Br. at 2.) According to Miller, his First, Second,

1 Fourth, Sixth and Seventh causes of action are based “in part or in full upon his allegations that
2 defendant made misrepresentations to customers about the nature of direct deposit accounts.”³ (Id. at
3 13.) The alleged misrepresentations include the Bank’s statements that if he and his proposed class
4 had “their Social Security benefits directly deposited to their accounts that the funds would be ‘safe
5 and secure. “ (**Id.**) They also include the Bank’s alleged statements that “such funds would be
6 available to the account holders or available to them when needed after they were directly deposited
7 through electronic fund transfers.” (**Id.**) While Miller **argues** that these alleged ‘misrepresentations
8 are “not dependent on establishing a violation of CCP 9 704.080[.]” (**id.**), his own Complaint belies
9 him.

10 The entire basis of Miller’s misrepresentation claims is that the Bank allegedly violated
11 Section 704.080 by debiting accounts inconsistently with what customers were supposedly led to
12 expect. According to Miller, the Bank’s alleged misrepresentations are false **because** “the Bank
13 engages in the practices alleged in the complaint, i.e., seizing directly deposited Social Security funds
14 to satisfy the Bank’s own claims against the depositor.” (**Id.**) Thus, the falsity of the alleged
15 misrepresentations hinges on whether the Bank is violating Section 704.080. If not, then the Bank’s
16 representations of “safe and secure” direct deposit accounts or “available” funds are not false or
17 misleading. This is so because no reasonable person could construe a bank’s representations of a
18 “safe and secure” deposit account or availability of funds as meaning that the Bank would not charge
19 its standard service fees or debit the account for overdrafts.

20 _____
21 ³ Miller also contends that his Fourth Cause of Action for Violation of the Consumer Legal
22 Remedies Act (“CLRA”), Civil Code 9 1750 **et seq.**, cannot be the subject of a motion for summary
23 judgment pursuant to Code of Civil Procedure 0 437~. (Pl. Opp’n Br. at 12.) At most this is a
24 technical point of no consequence. Regardless of the applicability of Code of Civil Procedure
25 3 437c, the CLRA itself provides that CLRA claims can be summarily adjudicated on motion. Civ.
26 Code § 178 1 (c)(3). Accordingly, this Court has jurisdiction to entertain a motion pursuant to Civ.
27 Code § 178 1 (c)(3) that a cause of action for violation of the CLR4 is without merit. See **Olsen v.**
28 **Breeze, Inc.**, 48 Cal. App. 4th 608,623-24 (1996) (Civ. Code 3 1781(c)(3) “provides a means of
resolving CLRA actions prior to trial[.]”). To obviate any conceivable procedural quibble, the Bank
has submitted concurrently herewith a separate Notice of Motion and Motion for Determination,
Pursuant to Civ. Code 3 178 1(c)(3), that Plaintiffs Fourth Cause of Action for Violation of the
Consumer Legal Remedies Act, Civ. Code 3 1750 **et seq.**, is Without Merit.

1 In short, in order to establish that the Bank’s statements concerning direct deposit accounts
2 were misrepresentations, Miller must first establish that the Bank violated Section 704.080. Because
3 Miller cannot do so, his First, Second, Fourth, Sixth and Seventh Causes of Action fail as a matter of
4 law.

5 **B. Miller’s Sixth Cause of Action For Unfair Competition Also Fails**
6 **as a Matter of Law Because the Bank’s Conduct Is Expressly**
7 **Permitted by Law**

8 With respect to his Sixth Cause of Action for Violation of California’s Unfair Competition
9 Law (“UCL”), Bus. & Prof. Code § 17200 et **seq.**, Miller concedes, as he must, that the UCL
10 provides a “safe harbor” for alleged “unfair” business practices if such business practices are
11 expressly permitted by statute. (Pl. Opp’n Br. at 15.) He argues, however, that the provisions cited
12 by the Bank in support of its conduct do not **“specifically permit[] the precise conduct of which**
13 **plaintiff complains** here, i.e. the appropriation of Social Security funds from plaintiffs exempt direct
14 deposit account in order to satisfy the Bank’s claims against plaintiff.” (**Id.** at 16.) Miller’s attempt
15 to redefine the Bank’s conduct as being outside the scope of Fin. Code 5 864, U. Corn. Code
16 3 4401(a) and 12 C.F.R. 5 7.4002 is unavailing.

17 As shown above, the Bank’s debits to Miller’s account for transactions creating overdrafts
18 and for standard service fees are not creditor levies in violation of Section 704.080. This is so
19 because such debits are not “debts” as defined by Fin. Code 3 864. Moreover, such debits are
20 explicitly authorized by law. With respect to overdrafts, the Commercial Code permits banks to
21 “charge against the account of a customer an item that is properly payable from an account even
22 though the charge creates an overdraft.” U. Corn. Code 5 4401(a). Likewise, with respect to
23 standard service fees and fees for handling a check that overdraws a depositor’s account, i.e., an NSF
24 check, 12 C.F.R. 0 7.4002 specifically permits banks to charge such fees. See **Video Trax, Inc. v.**
25 **Nationsbank, N.A.**, 33 F. Supp. 2d 1041, 1051 (SD. Fl. 1998). Thus, contrary to Miller’s contention,
26 the Bank’s practices **are** expressly permitted by statute and therefore cannot be the basis of a claim
27 for violation of the UCL. Hence, Miller’s Sixth Cause of Action fails as a matter of law.
28

1 C. As the Bank's Actions Were Privileged, Miller's Fifth Cause of
2 Action for Intentional Infliction of Emotional Distress Fails as a
3 Matter of Law


4 Miller does not dispute that a claim for intentional infliction of emotional distress will not lie
5 where a defendant's conduct, even if outrageous and exceeding the "bounds of human decency," is
6 "privileged." (Pl. Opp'n Br. at 18.) As shown in the Bank's moving papers, the Bank's conduct
7 came nowhere near being "outrageous." Moreover, in any event, a defendant's outrageous conduct is
8 privileged if the defendant is acting on his or her legal rights in a permissible way. **Fletcher v.**
9 **Western Nat. L.S. Ins. Co.**, 10 Cal. App. 3d 376, 395 (1970). Here, the debits for overdrafts and
10 standard service fees are specifically allowed by Financial Code 5 864, Uniform Corn. Code
11 5 4401(a) and 12 C.F.R. 6 7.4002. Further, the debits were not levies in violation of Section 704.080
12 because they do not constitute creditor collection efforts prohibited by **Kruger**. Thus, the debits were
13 privileged conduct, and Miller's cause of action for intentional infliction of emotional distress must
14 fail.

15 CONCLUSION

16 For the foregoing reasons and because Miller has failed to refute **any** of the Bank's undisputed
17 material facts, Bank of America is entitled to summary adjudication of all seven of plaintiff's Causes
18 of Action. The Bank is therefore likewise entitled to summary judgment.

19 Dated: May 29, 2001

20 ARNE D. WAGNER
21 STEPHEN E. PAFFRATH
22 JAIME GUERRERO
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24 By: 
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26 GREGORY SCOTT SPENCER
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PROOF OF PERSONAL SERVICE
(CCP 1011,2015.5)

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I further declare that on the date hereof I served a copy of:

REPLY OF DEFENDANT BANK OF AMERICA TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT OF ALTERNATIVELY SUMMARY ADJUDICATION

BANK OF AMERICA N.A.'S REPLY TO PLAINTIFF'S SEPARATE STATEMENT OF FACTS IN OPPOSITION TO THE BANK'S SEPARATE STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY SUMA4ARY ADJUDICATION

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and delivery at the mailroom of Morrison & Foerster LLP, 425 Market Street, San Francisco, California, 94105, in accordance with Morrison & Foerster's ordinary business practices:

Mark T. Johnson
The Sturdevent Law Firm
475 Sansome Street
Suite 1750
San Francisco, California 94 111

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 29th day of May, 2001.

Edith E. Perez

(typed)

(signature)

r. .l

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PROOF OF SERVICE BY MAIL
(CCP 1013a, 2015.5)

3 I am employed with the law firm of Morrison & Foerster, whose address is 425 Market Street,
4 San Francisco, California, 94105; I am not a party to the within cause; I am over the age of eighteen
5 years and I am readily familiar with Morrison & Foerster's practice for collection and processing of
6 correspondence for mailing with the United States Postal Service and know that in the ordinary
course of Morrison & Foerster's business practice the document described below will be deposited
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7 I further declare that on the date hereof I served a copy of:

8
9 REPLY OF DEFENDANT BANK OF AMERICA TO PLAINTIFF'S OPPOSITION TO
10 DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT OF ALTERNATIVELY SUMMARY
ADJUDICATION

11 BANK OF AMERICA N.A.'S REPLY TO PLAINTIFF'S SEPARATE STATEMENT OF FACTS
12 IN OPPOSITION TO THE BANK'S SEPARATE STATEMENT OF UNDISPUTED FACTS IN
13 SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY SUMMARY
ADJUDICATION

14
15 on the following by placing a true copy thereof enclosed in a sealed envelope addressed as
16 follows for collection and mailing at Morrison & Foerster, 425 Market Street, San Francisco,
California, 94 105, in accordance with Morrison & Foerster's ordinary business practices:

17 Thomas J. Brandi
18 44 Montgomery Street
19 San Francisco, California 94 104

20 I declare under penalty of perjury under the laws of the State of California that the above is
true and correct.

21 Executed at San Francisco, California, this 29th day of May, 2001.
22

23
24 _____
Edith E. Perez

25 (typed)

_____ (signature)
26
27
28