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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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

18 Plaintiff,

19 v.

20 Bank of America NT & SA,

21 Defendant.

No. 301917

**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
 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

Pursuant to Code of Civil Procedure Section 437c(b), Defendant Bank of America (“Bank of America” or the “Bank”), hereby submits the following Reply to Plaintiff Paul Miller’s (“Miller”) Separate Statement of Undisputed Facts in Opposition to Defendant’s Motion for Summary Judgment or Alternatively Summary Adjudication.

THIRD CAUSE OF ACTION
(VIOLATION OF CODE OF CIVIL PROCEDURE 0 704.080)

Defendant Bank of America’s Undisputed Material Fact(s) and Supporting Evidence	Plaintiff’s Response and Supporting Evidence	Bank of America’s Response
<p>1. Bank of America (the “Bank”) is a national bank organized and existing pursuant to the National Bank Act, 12 U.S.C. 0 21, et seq.</p>	<p>Plaintiff lacks sufficient information on which to admit or deny this alleged fact.</p>	<p>Remains competent and undisputed.</p> <p>Miller has failed to unequivocally state whether the fact is “disputed” or “undisputed” pursuant to Cal. R. Ct. 342(f) or to present evidence in opposition to this fact. Thus, this fact remains competent and undisputed.</p>
<p>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.</p>	<p>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. 1 14.</p>	<p>Remains competent and undisputed.</p> <p>Miller does not dispute that he elected to have his Social Security funds deposited directly into his Bank of America account by means of electronic transfer. Instead, Miller argues why he elected to have his Social Security funds deposited directly into his account - this is irrelevant to the issues raised in this motion. This fact is not in dispute.</p>

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Defendant Bank of America's Undisputed Material Fact(s) and Supporting Evidence	Plaintiffs Response and Supporting Evidence	Bank of America's Response
<p>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.</p>	<p>Disputed except as to the Bank's erroneous credit to Plaintiffs account. Plaintiff wrote checks and made ATM withdrawals only to the extent that they were authorized and approved by defendant. Miller Decl. 1 10.</p>	<p>Remains competent and undisputed.</p> <p>Miller does not dispute that the Bank erroneously credited his account with \$1,799.83. Miller also does not dispute that he withdrew and spent the erroneously credited funds. Rather, Miller explains how he withdrew and spent the erroneously credited funds - this is irrelevant to the issues raised in this motion. This fact is not in dispute.</p>
<p>4. On or about April 16, 1998, the Bank discovered its error and reversed the \$1,799.83 credit, which overdraw Miller's account.</p>	<p>Disputed insofar as it omits material facts. Defendant debited Plaintiffs 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. fi 6.</p>	<p>Remains competent and undisputed.</p> <p>Miller does not dispute that, on or about April 16, 1998, the Bank reversed the erroneous credit of \$1,799.83 and that such reversal overdraw his account. Instead, Miller argues that he received no notice of the reversal of erroneous credit - this is irrelevant to the issues raised in this motion and does not controvert this fact. This fact is not in dispute.</p>
<p>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.</p>	<p>Undisputed</p>	<p>Undisputed.</p>

Defendant Bank of America's Undisputed Material Fact(s) and Supporting Evidence	Plaintiff's Response and Supporting Evidence	Bank of America's Response
<p>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.</p>	<p>Disputed. Defendant initially refused to take any action to restore Plaintiffs 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 Deck 17. After being contacted by counsel on Plaintiffs 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 Deck 7 14; Bridegam Deck 17 5-6.</p>	<p>Remains competent and undisputed.</p> <p>Miller does <i>not</i> dispute that when he complained, the Bank replaced the old checking account with the a new account, and deposited \$670 of May Social Security funds into the successor account. Instead, Miller explains <i>how</i> he complained, which is irrelevant to the issues raised in this motion and does not controvert this fact. This fact is not in dispute.</p>
<p>7. Because an overdraft remained in Miller's predecessor account, the Bank's collection system continued to debit the successor account for the overdraft.</p>	<p>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 Plaintiffs new, separate and independent account, comprised entirely of directly deposited Social Security funds, in order to collect on that claim. Miler Deck 7715- 16; Johnson Decl.f 6, Exh. D (Daley Depo., pp. 15 1-55)</p>	<p>Remains competent and undisputed.</p> <p>Miller does not dispute that because an overdraft remained in his predecessor account, that the Bank's collection system continued to debit his successor account for the overdraft. Instead, Miller explains <i>how</i> the Bank's collection system operates, which is irrelevant to the issues in this case and does not controvert this fact. This fact is undisputed.</p>

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Defendant Bank of America's Undisputed Material Fact(s) and Supporting Evidence	Plaintiff's Response and Supporting Evidence	Bank of America's Response
<p>8. When Miller again complained, the Bank reversed the debit and again credited the Social Security funds to Miller's successor account.</p>	<p>Disputed. Defendant again failed to take any action to reverse its action appropriating Plaintiffs Social Security benefits until after Plaintiffs counsel contact Bank of America's legal department and reminded defendant's legal personnel of the assurances that had been given that Plaintiffs Social Security funds would not be appropriated again. Miller Decl. 7 15; Bridegam Decl. 17.</p> <p>Plaintiff also disputes this statement to the extent that it implies that Defendant's deliberate confiscation of Plaintiffs directly deposited Social Security benefits in his new account occurred only once. Defendant appropriated Plaintiffs Social Security Deposits after they were deposited to his new account in both June and July and only restored the funds to Plaintiff after the intervention of counsel. Miller Decl. 11 15-16; Bridegam Decl. 117-8.</p>	<p>Remains competent and undisputed.</p> <p>Miller does not dispute that when he complained, the Bank reversed the debit and again credit his Social Security funds to his account. Instead, Miller details <i>how</i> he complained - this is irrelevant to the issues raised by this motion. This fact is not in dispute.</p> <p>Miller also argues that the Bank debited his account more than once and that each time he complained, that the Bank restored the funds to him. The Bank does <i>not</i> dispute that it debited Miller's account on more than one occasion or that counsel intervened on his behalf. These additional facts are irrelevant to the issues raised by this motion.</p>

**FIRST CAUSE OF ACTION
(VIOLATION OF CALIFORNIA CIVIL CODE § 1709, 1710 (FRAUD))**

Defendant Bank of America's Alleged Undisputed Material Fact(s)	Plaintiff's Response and Evidentiary Support	Bank of America's Response
<p>9. As Material Facts in support of its motion as to the First Cause of Action, the Bank incorporates Material Facts 1-8, as set forth above.</p>	<p>In response to Defendant's Alleged 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>	<p>In response to plaintiffs response and purported evidentiary support as to the First Cause of Action, the Bank incorporates its Responses for Material Facts 1-8, as set forth above.</p>

**SECOND CAUSE OF ACTION
(VIOLATION OF CALIFORNIA CIVIL CODE 66 1709,1710 (NEGLIGENT
MISREPRESENTATION))**

Defendant Bank of America's Alleged Undisputed Material Fact(s)	Plaintiffs Response and Evidentiary Support	Bank of America's Response
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.	In response to Defendant's Alleged Undisputed Material Facts in support of its motion as to the Second Cause of Action, Plaintiff incorporates its response to Material Facts 1-8, as set forth above.	In response to plaintiffs response and purported evidentiary support as to the Second Cause of Action, the Bank incorporates its Responses for Material Facts 1-8, as set forth above.

**FOURTH CAUSE OF ACTION
(VIOLATION OF CALIFORNIA CIVIL CODE § 1709, ET SEQ.)**

Defendant Bank of America's Alleged Undisputed Material Fact(s)	Plaintiff's Response and Evidentiary Support	Bank of America's Response
11. 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.	In response to Defendant's Alleged Undisputed Material Facts in support of its motion as to the Fourth Cause of Action, Plaintiff incorporates its response to Material Facts 1-8, as set forth above.	In response to plaintiffs response and purported evidentiary support as to the Fourth Cause of Action, the Bank incorporates its Responses for 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)	Plaintiffs Response and Evidentiary Support	Bank of America's Response
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.	In response to Defendant's Alleged Undisputed Material Facts in support of its motion as to the Fifth Cause of Action, Plaintiff incorporates its response to Material Facts 1-8, as set forth above.	In response to plaintiffs response and purported evidentiary support as to the Fifth Cause of Action, the Bank incorporates its Responses for Material Facts 1-8, as set forth above.

**SIXTH CAUSE OF ACTION
(VIOLATION CIF BUS. & PROF. CODE #17201 ET SEQ.)**

Defendant Bank of America's Alleged Undisputed Material Fact(s)	Plaintiffs Response and Evidentiary Support	Bank of America's Response
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.	In response to Defendant's Alleged Undisputed Material Facts in support of its motion as to the Sixth Cause of Action, Plaintiff incorporates its response to Material Facts 1-8, as set forth above.	In response to plaintiffs response and purported evidentiary support as to the Sixth Cause of Action, the Bank incorporates its Responses for Material Facts 1-8, as set forth above.

**SEVENTH CAUSE OF ACTION
(VIOLATION CIF BUS. & PROF. CODE \$4 1750m, ET SEQ.)**

Defendant Bank of America's Alleged Undisputed Material Fact(s)	Plaintiffs Response and Evidentiary Support	Bank of America's Response
14. As Material Facts in support of its motion as to the ^A Seventh Cause of Action? the Bank incorporates Material Facts 1-8, as set forth above.	In response to Defendant's Alleged Undisputed Material Facts in support of its motion as to the Seventh Cause of Action, Plaintiff incorporates its response to Material Facts 1-8, as set forth above.	In response to plaintiffs response and purported evidentiary support as to the Seventh Cause of Action, the Bank incorporates its Responses for Material Facts 1-8, as set forth above.

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

Plaintiff's Additional Purported Material Fact in Dispute	Supporting Evidence	The Bank's Response
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 Dec. 14	Undisputed but irrelevant. Whether the Bank did or did not give Miller prior or concurrent notice that it had erroneously credited his account in January, 1998 is irrelevant to the issues raised in the Bank's motion.
2. Defendant did not explain the credit to Plaintiffs account on his account statement.	Miller Dec. 19; Bader Decl., 17, Exh. B.	Disputed but irrelevant. The Bank statement sent to Miller listing the erroneous credit speaks for itself. Bader Decl. 17, Ex. B.

Plaintiffs Additional Purported Material Fact in Dispute	Supporting Evidence	The Bank's Response
<p>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.</p>	<p>Miller Decl. fi 4.</p>	<p>Disputed but irrelevant' and misleading.</p> <p>For purposes of this motion, the Bank does not dispute that it encouraged Miller to have his Social Security funds deposited directly into his checking account. For purposes of this motion, the Bank also does not dispute that it made representations that directly deposited funds would be safe and secure and that such funds would be available to Miller. The Bank does, however, dispute Miller's misleading characterization of such representations as being the reason <i>why</i> he agreed to have his Social Security funds deposited directly to his account.</p>
<p>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.</p>	<p>Johnson Decl. fi 7, Exh. E.</p>	<p>Undisputed but irrelevant.</p>
<p>5. Bank of America did not provide Plaintiff with prior or concurrent notice of its decision (later determined to be an error) to credit plaintiffs checking account an amount of \$1,799.83 in January, 1998.</p>	<p>Miller Decl. 19.</p>	<p>Undisputed but irrelevant.</p> <p>This is the same purported "material fact in dispute" as set forth in No. 1 above. See Response to No. 1.</p>

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Plaintiffs Additional Purported Material Fact in Dispute	Supporting Evidence	The Bank's Response
<p>6. Defendant Bank of America did not include on Plaintiffs February checking account statement any adequate explanation of the credit that bank had erroneously applied to his account.</p>	<p>Bader Decl. 17, Exh. B.</p>	<p>Disputed but irrelevant.</p> <p>This is the same purported "material fact in dispute" as set forth in No. 2 above. See Response to No. 2. The Bank also disputes Miller's misleading characterization of the explanation on the checking account statement as inadequate.</p>
<p>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.</p>	<p>Miller Decl. f 9</p>	<p>Disputed, irrelevant and misleading.</p> <p>For purposes of this motion, the Bank does not dispute that Miller's declaration states that he believed that the erroneous credit appearing on his checking account statement in February represented a retroactive benefit adjustment from the Social Security Administration, The Bank does, however, dispute the misleading characterization of Miller's belief as being reasonable.</p>
<p>8. The funds credited to Plaintiffs 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>Miller Decl. 110; Bader Decl. 716-9, Exhs. B-C</p>	<p>Disputed but irrelevant and misleading.</p> <p>For purposes of this motion, the Bank does not dispute that the erroneously credited funds were made available to Miller for a period of approximately two and one half months. The Bank does, however, dispute Miller's misleading characterization of the Bank's conduct as providing him with erroneous funds without objection or complaint.</p>

Plaintiffs Additional Purported Material Fact in Dispute	Supporting Evidence	The Bank's Response
<p>9. In April, 1998, Defendant imposed a debit against Plaintiffs 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 Plaintiffs account.</p>	<p>Miller Decl. 7 11; Bader Decl. 118-9, Exh. C.</p>	<p>Undisputed but irrelevant.</p>
<p>10. The funds taken by Bank of America in April, -1998 consisted of Plaintiffs 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. fl 11.</p>	<p>Disputed but irrelevant and misleading.</p> <p>For purposes of this motion, the Bank does not dispute that it reversed the erroneous credit in April, 1998 from Miller's account. For purposes of this motion, the Bank also does not dispute that Miller's checking account had received Social Security funds by electronic funds transfers in February, March and/or April of 1998. The Bank does however dispute Miller's misleading characterization of these facts as implying that the funds debited from his checking account consisting only of Social Security funds. .</p>

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Plaintiff's Additional Purported Material Fact in Dispute	Supporting Evidence	The Bank's Response
<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>Miller Decl. 1 11; Bader Decl. T[n 10, 13, Exh. E.</p>	<p>Disputed but irrelevant and misleading.</p> <p>For purposes of this motion, the Bank does not dispute that its initial debit of Miller's account was insufficient to repay the overdraft in his account. For purposes of this motion, the Bank also does not dispute that it debited Miller's account for the amount of the direct deposit of his Social Security funds in May, 1998. The Bank does, however, dispute Miller's misleading characterization of the debit to his account as being a "seizure."</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. 'T[7; Johnson Decl. 7 3, Exh. A (Hahr Depo., pp. 40-42)</p>	<p>Disputed but irrelevant and misleading.</p> <p>For purposes of this motion, the Bank does not dispute that Miller informed the Bank that the funds debited from his account to satisfy the erroneously credited funds were Social Security funds. The Bank does, however, dispute Miller's misleading characterization of the Bank's debit to his account as a "confiscation."</p>

Plaintiff's Additional Purported Material Fact in Dispute	Supporting Evidence	The Bank's Response
<p>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.</p>	<p>Miller Decl. 7 13; Bridegam Decl. 713-5.</p>	<p>Disputed but irrelevant.</p> <p>For purposes of this motion, the Bank does not dispute that it had not returned Miller's Social Security funds that it had debited to cover the overdraft outstanding on his account. For purposes of this motion, the Bank also does not dispute that Miller's counsel contacted the Bank's legal department. The Bank does, however, dispute Miller's misleading characterization of the Bank's actions as being a result of his counsel's intervention and not because it was accommodating Miller.</p>
<p>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.</p>	<p>Miller Decl. 1 14; Bridegam Decl. 7 5; Johnson Decl. 13, Exh. A (Hahr Depo., pp. 64-66)</p>	<p>Disputed but irrelevant and misleading.</p> <p>For purposes of this motion, the Bank does not dispute that, at its recommendation, Miller opened a new and separate checking account at Bank of America into which his May Social Security funds were deposited. For purposes of this motion, the Bank also does not dispute that his original account was not closed at that time. The Bank does, however, dispute Miller's misleading characterization of its conduct as implying that it only acted upon the intervention of counsel and not because it was accommodating Miller. The Bank also disputes Miller's misleading characterization of the debit to his account as a "confiscation."</p>

Plaintiff's Additional Purported Material Fact in Dispute	Supporting Evidence	The Bank's Response
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. fl 14; Bridegam Decl. 15.	Undisputed but irrelevant.
16. In June, 1998, despite its representations to the contrary, Bank of America deliberately took steps to identify plaintiffs new account as a source from which to collect its prior claim, and upon the direct deposit of plaintiffs Social Security benefits for the month of June, seized those funds as partial satisfaction of that claim.	Miller Decl. 7 15; Bridegam Decl. 17; Johnson Decl. 16, Exh. D (Daley Depo., pp. 137-147)	Disputed but irrelevant and misleading. For purposes of this motion, the Bank does not dispute that, because an overdraft remained in his predecessor account, in June of 1998 the Bank's collection system continued to debit his successor account for the overdraft. The Bank does, however, dispute Miller's misleading characterization of the Bank's conduct as being a "seizure."
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. 14, Exh. B (Kastanes Depo., pp. 56-62); F 5;qEd;h. C (Jackson Depo.,	Disputed but irrelevant and misleading. For purposes of this motion, the Bank does not dispute that its collection system took action to debit Miller's account for the overdraft. For purposes of this motion, the Bank also does not dispute that it did not take any preventative measures to ensure that its collection system did not debit Miller's account. The Bank does, however, dispute Miller's misleading characterization of the testimony of Ms. Kastanes and Ms. Jackson. Miller's characterization of the Bank employees' testimony as taking action with the intention of causing emotional distress to Miller is false and without basis.

1 2 3 4 5 6 7 8 9 10 11 12	18. The bank agreed to reverse this action only-after the bank's legal department was again contacted.	Supporting Evidence	The Bank's Response
	18. The bank agreed to reverse this action only-after the bank's legal department was again contacted.	Miller Decl. f 15; Bridegam Decl. f 7.	Disputed but irrelevant and misleading. For purposes of this motion, the Bank does not dispute that it agreed to reverse the debit to Miller's account. For purposes of this motion, the Bank also does not dispute that Miller and his counsel contacted the Bank. The Bank does, however, dispute Miller's misleading characterization of such actions by the Bank as being done <i>because</i> Miller contacted the legal department and not because it was attempting to accommodate Miller.
	19. In July, 1998, following the direct deposit of plaintiffs Social Security benefits payment for that month, Bank of America once again, within days of the deposit, seized the entire amount of plaintiffs benefit payment, liquidating plaintiffs new account causing an overdraft to be charged against that account.	Miller Decl. 7 16; Bridegam Dec. f 8; Bader Decl. 1 16.	Disputed but irrelevant and misleading. For purposes of this motion, the Bank does not dispute that in July, 1998, its collection system debited Miller's checking account which contained the July 1998 Social Security funds. For purposes of this motion, the Bank also does not dispute that the debit to Miller's checking account liquidated the entire amount of funds in his account and caused an overdraft to be charged against his account. The Bank does, however, dispute the misleading characterization of the debit to Miller's account as constituting a "seizure."

Plaintiff's Additional Purported Material Fact in Dispute	Supporting Evidence	The Bank's Response
<p>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 plaintiffs behalf.</p>	<p>Miller Decl. 1 16; Bridegam Deck fi 8.</p>	<p>Disputed but irrelevant and misleading.</p> <p>For purposes of this motion, the Bank does not dispute that it did not honor checks written by Miller due to an overdraft that existed in his account. For purposes of this motion, the Bank also does not dispute that Miller's attorney contacted the Bank regarding the its decision not to honor Miller's checks. The Bank does, however, dispute Miller's misleading characterization of the Bank's actions as being done because his counsel contacted the Bank and not because it was accommodating Miller.</p>

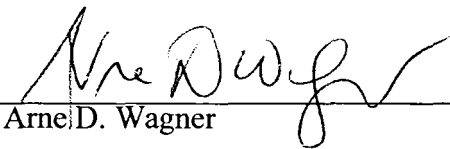
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21. In September, 1998, Bank of America caused a collection letter to be sent to plaintiff seeking collection of the amounts that had previously been the subject of its internal collection efforts.	Miller Decl. 7 18.	Disputed but irrelevant and misleading. For purposes of this motion, the Bank does not dispute that because an overdraft remained in Miller's original account, that its collection system referred the matter to an outside collection agency. For purposes of this motion, the Bank also does not dispute that the outside collection agency sent a collection letter to Miller. The Bank does, however, dispute the misleading characterization of the Bank's actions as implying that the Bank sent the collection letter to Miller.
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Dated: May 29,2001

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

By: 
Arne D. Wagner

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