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ENDORSED
FILED
San Francisco County Superior Court

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

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

17 Plaintiff,)

18 vs.)

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

21 Defendants.)
22)
23)
24)
25)
26)
27)
28)

CASE NO. 301917

CLASS ACTION

**- ORDER GRANTING IN
PART AND DENYING IN PART
DEFENDANT BANK OF AMERICA'S
MOTION FOR SUMMARY
JUDGMENT, OR IN THE
ALTERATIVE, SUMMARY
ADJUDICATION**

1 Defendant Bank of America's Motion for Summary Judgment, or in the
2 Alternative, Summary Adjudication, came on for hearing before this Court on
3 June 8, 2001 and again in continued proceedings on August 3, 2001, the
4 Honorable Anne E. Bouliane presiding. James C. Sturdevant and Mark T. Johnson
5 of The Sturdevant Law Firm appeared on behalf of plaintiff Paul Miller. Arne
6 Wagner of Morrison & Foerster LLP appeared on behalf of defendant Bank of
7 America ("BofA"). Having heard oral argument and read and considered the papers
8 submitted in support of and in opposition to the motion, as well as other pleadings
9 and papers on file in this case,

10 THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

11 1. The motion for summary judgment is DENIED.

12 2. The alternative motion for summary adjudication of issues as to the
13 Third Cause of Action for violation of Code of Civil Procedure § 704.080 is
14 GRANTED.

15 The court finds that the conduct alleged in the complaint and substantiated in
16 plaintiff's evidentiary submissions filed in opposition to the motion for summary
17 adjudication does not constitute a violation of § 704.080.

18 3. The motion for summary adjudication as to the Fifth Cause of Action
19 for intentional infliction of emotional distress is GRANTED.

20 The court finds that the evidence submitted by plaintiff in opposition to the
21 motion for summary adjudication does not establish an independent cause of action
22 for intentional infliction of emotional distress.

23 4. The motion for summary adjudication with respect to each of the
24 remaining causes of action alleged in the First Amended Complaint is DENIED.

25 The Court finds that there are triable issues of material fact as to each of
26 these causes of action, which include the First and Second Causes of Action for
27 fraud and negligent misrepresentation; the Fourth Cause of Action for violations of
28 the Consumer Legal Remedies Act ("CLRA"), California Civil Code § 1750, *et seq.*;

1 the Sixth Cause of Action for violation of the Unfair Competition Law ("UCL"),
2 California Business & Professions Code § 17200, **et seq.**; and the seventh Cause of
3 Action for violation of California Business & Professions Code § 17500, **et seq.**

4 The triable issues of fact which are material to each of the above-stated
5 causes of action include the following:

- 6 A. Whether defendant BofA made statements to plaintiff and members
7 of the class regarding the safety and security of direct deposit
8 accounts, including, but not limited to, the statement that depositors'
9 directly deposited funds would be available when needed, which
10 were false or misleading. (Miller Decl., IJ 4; Johnson Decl., (7,
11 Exh. E)
- 12 B. Whether BofA has a practice of debiting Social Security and other
13 government benefit direct deposit accounts to collect overdrafts,
14 erroneous credits or other claims or debts it has against the depositor
15 without regard to the source of the funds in the account or the fact
16 that the account is one into which such benefits are directly
17 deposited.
- 18 C. Whether BofA's alleged conduct as applied to plaintiff and the
19 members of the class is unfair or fraudulent within the meaning of
20 the Unfair Competition Law, Business and Professions Code § 17200
21 **et seq.**

22 The court also finds that the plaintiff's ability to establish a claim under the
23 First, Second, Fourth, Sixth and Seventh Causes of Action of the complaint does
24 not depend upon establishing a violation of Code of Civil Procedure Section
25 704.080 under the third Cause of Action.

26 As an independent and additional ground for denial of the motion for
27 summary adjudication of the Fourth Cause of Action, the Court finds that, pursuant
28 to Civil Code § 1781, a cause of action for violation of the Consumer Legal

1 Remedies Act under Civil Code § 1750, **et seq.** is not properly subject to summary
2 adjudication under Code of Civil Procedure § 437(e). The Court therefore has no
3 authority to enter judgment for defendant on the Fourth Cause of Action.

4 5. Each of plaintiff's objections to the evidence proffered by defendant
5 in support of the Motion for Summary Judgment or, in the Alternative, Summary
6 Adjudication, is OVERRULED.

7 6. Plaintiff's motion to strike the exhibits to defendant's supplemental
8 memorandum of points and authorities in support of the motion, consisting of
9 pleadings filed in other Superior Court cases, is OVERRULED. However, the court
10 has not considered such exhibits as evidence or precedent in support of its ruling.

11 IT IS SO ORDERED.

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ANNE BOULIAP:z

15 DATED: 102- / @ 0 1

The Honorable Anne Bouliane
JUDGE OF THE SUPERIOR COURT

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Approved as to form:

MORRISON & FOERSTER LLP

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22 DATED: 10/5/, 2001

By: 

Arne Wagner

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Attorneys for Defendant

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