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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

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

Plaintiff,)

vs.)

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

Defendants.)

CASE NO. 301917

CLASS ACTION

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO CERTIFY CLASS (CCP
5 382)

Date: June 8, 2001

Time: 2:06 P.M.

Location: .

Honorable Anne E. Bouliane

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1 recipients by a direct deposit to their checking or savings account through an
2 electronic funds transfer. In California approximately 85% of the Social Security
3 and Supplemental Security Income payments are made by direct deposit,
4 comprising more than 4.2 million payments every month. Request for Judicial
5 Notice in Support of Motion to Certify Class (hereinafter"Request"), Ex. A. Thus,
6 because of the large number of such payments, direct deposits are and will
7 continue to be, a regular, predictable and lucrative source of income for banks and
8 other financial institutions such as Bank of America. In addition, the direct deposit
9 of such payments increases profits for the bank since electronic funds transfers
10 cost less to process than paper deposit transactions. Declaration of Mark Johnson
11 in Support of Motion to Certify Class (hereinafter "Johnson Dec."), 1[3, Ex. A
12 (Deposition of Ronald Hahr), 39:19-40. Bank of America thus has an incentive for
13 encouraging the use of the direct deposit mechanism and engages in active
14 marketing of direct deposit to it's depositors and potential depositors by
15 representing it to be a safe and secure means for receiving benefit payments.

16 Pursuant to California Code of Civil Procedure § 704.080(b), the funds
17 deposited in bank accounts which receive the direct deposit of Social Security
18 benefits are statutorily exempt from execution, levy or attachment up to an amount
19 of \$2,000.00 per depositor, regardless of their source. Further, funds in those
20 accounts actually received from SSA are exempt regardless of the balance in the
21 account. CCP § 704.080(c). Any contractual or other prior waiver of these
22 statutory exemptions is against public policy and void under Code of Civil Procedure
23 § 703.040. Finally, as a matter of public policy, such exempt funds are not subject
24 to the right of set off or other informal means of collection. *Kruger v. Wells Fargo*
25 *Bank* (l 974) 11 Cal.3d 352, 367-371.

26 II. DEFENDANT'S ACTIONS AGAINST PLAINTIFF PAUL MILLER

27 Plaintiff Paul Miller is an individual who suffers from a total and permanent
28 mental disability as the result of head injury he suffered when he was physically

1 assaulted more than ten years ago. Due to this disability, he qualifies for and
2 receives monthly Social Security and Supplemental Security (SSI) Income
3 payments. He has been receiving those payments as his sole regular source of
4 income since approximately 1993. At the time of the events which gave rise to
5 this action in 1998, the total amount of the Social Security benefits Mr. Miller was
6 receiving was approximately \$670.00 per month. Declaration of Paul Miller in
7 Support of Motion to Certify Class (hereinafter "Miller Dec."), 7 3.

8 Mr. Miller is, and has been since 1978, a deposit account customer of
9 defendant BofA. Since approximately 1994, his monthly Social Security benefits
10 have been electronically deposited directly to his BofA checking account as
11 described above. Miller Dec., 7 4.

12 In January, 1998, BofA mistakenly and through no fault of plaintiff posted an
13 erroneous credit of approximately \$1,700.00 to plaintiff's checking account.
14 Plaintiff reasonably but mistakenly believed this credit to be a retroactive lump sum
15 adjustment to his payments from the Social Security Administration. BofA did not
16 recognize its error until more than three months later. At that time, it unilaterally
17 collected the amount mistakenly deposited to plaintiff's account by reversing the
18 January transaction and debiting his account for the same amount as the prior
19 credit. This action was taken without prior notice to plaintiff, causing his account
20 to be overdrawn by several hundred dollars and depriving him of access to his
21 exempt Social Security benefits which were needed by him to pay for food and the
22 rent on his apartment. Miller Dec., 11 5-8. When his regular Social Security
23 payments were received by BofA that month, they were immediately seized by the
24 bank and applied to the amount it claimed against plaintiff. *id.*

25 Plaintiff was unable to get BofA to return his Social Security benefits to his
26 account until *pro bono* counsel intervened on his behalf with BofA's legal
27 department. Even then, however, BofA's automatic, efficient and indiscriminating
28 internal collection procedures could not be checked. Although plaintiff opened a

1. new checking account at the specific advice and request of bank officials to
2 prevent his future benefit payments from being applied to the bank-created
3 overdraft on the existing account, BofA's "back room" collection arm proceeded to
4 debit the new account as soon as plaintiff's benefits were deposited to that
5 account the following month. Even the intervention of counsel on plaintiff's behalf
6 a second time was not enough to put a halt to the bank's collection action against
7 plaintiff. When plaintiff's benefit payments were received by BofA the following
8 month, defendant seized them and depleted his account for the third month in
9 succession. Miller Dec., 71 II-I 2.

10 III. BANK OF AMERICA'S INTERNAL COLLECTION PRACTICES GENERALLY

11 Plaintiff's experience described above is merely illustrative of the internal
12 collection practices engaged in by defendant BofA to which all depositors, including
13 those with Social Security direct deposit accounts, are subject. When an account
14 is overdrawn, it creates a debt in favor of the bank which the bank seeks to
15 recover. Johnson Dec., 7 5, Ex. C (Brenda Sue Jackson Deposition ("Jackson")),
16 39:3-I 1. In the first instance, the bank tries to recover the amount owed by
17 applying any incoming deposits to the account against the debt. Johnson Dec.,
18 7 5, Ex. C (Jackson), 48:12 - 49:14, 53:9-24; 1 4, Ex. B, (Ellen Branch Kastanes
19 Deposition ("Kastanes")), 60:25 - 61:10. It does so regardless of whether the
20 incoming deposits are exempt funds such as Social Security benefits and in fact
21 has no mechanism or procedure in place to prevent the seizure of incoming exempt
22 funds for that purpose. Johnson Dec., 1 5, Ex. C (Jackson), 64:24 - 67:9,
23 139:18 - 140:24; 11 4, Ex. B (Kastanes), 61:24 - 62:18. If the account remains
24 overdrawn for a specified period of time, steps are taken to close the account. As
25 part of that process, other BofA accounts are identified from which the debt might
26 be recovered Johnson Dec., 1 5, Ex. C (Jackson), 86:1 O-I 1 - 88:8-I 2. Once
27 again, there is no policy or procedure in place which permits or requires the
28 identification of those accounts as Social Security direct deposit accounts and

17 protects them from this collection effort. Finally, once an account is closed, it is
2 referred to the bank's internal collection department, which again looks for related
3 accounts from which the debt may be recovered. Johnson Dec., 7 6, Ex. D
4 (Deposition of Marie Daley ("Daley")), 40:22 - 41:3, 134:7 - 137:21, 138:25 -
5 139:4, 151 :l - 155:3. If such accounts are located, the bank simply seizes the
6 funds in the account, up to the amount owed, without regard to whether such
7 accounts are Social Security Direct Deposit Accounts.

8 Throughout the above-described process BofA makes no effort to identify
9 Social Security direct deposit accounts or treat them differently from other
10 accounts. Indeed, the bank contends that it has no system in place that would
11 enable it to do so and that, in any event, it is not required to treat such accounts
12 differently. As a result, the Social Security benefits of BofA customers which are
13 otherwise exempt from execution or collection and which by law and underlying
14 public policy are intended to be available for their exclusive benefit of the eligible
15 recipients may be and are regularly seized by defendant to satisfy the debts in
16 claims against its customers. While other creditors are prevented from collecting
17 debts against Social Security funds, BofA is able to circumvent the law simply
18 because it has inside access to those funds and has not yet been ordered to cease
19 the practice of confiscating them for its own benefit.

20 ARGUMENT

21 I. THE STANDARDS FOR CLASS CERTIFICATION

22 A. The Requirements of Class Certification.

23 Code of Civil Procedure § 382 sets forth the class certification standard. It
24 provides in pertinent part:

25 When the question is one of common or general interest,
26 of many persons, or when the parties are numerous, and
27 it is impracticable to bring them all before the Court, one
28 or more may sue or defend for the benefit of all.

California courts have focused on two primary requirements that must be
met in order to maintain a class action under this section:

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- 1. There must be an ascertainable class; and
- 2. There must be a well-defined community of interest in the questions of law or fact involved affecting the parties to be represented.

Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 482, 470; *Daar v. Yellow Cab* (1967) 67 Cal.2d 695, 704; *Deskbook*, § 3.71. In determining whether the foregoing requirements are met, California courts consider the following factors:

- 1. Numerosity - whether the class is so numerous that joinder of all members individually would be impractical;
- 2. Commonality - whether common issues of law and fact to the class predominate over individual issues;
- 3. Typicality - whether the claims of the representative plaintiff are typical of the class claims generally;
- 4. Adequacy of Representation - whether the representative plaintiff must fairly and adequately protect the interests of the class members; and
- 5. Superiority - whether a class action would be a fair and more efficient means of resolving the dispute.'

Daar, supra, 67 Cal.2d at 709; *B. W.I. Custom Kitchen v. Owens-Illinois* (1981) 191 Cal.App.3d 1341, 1347-55; *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 138-I 39, 142.

B. California Law Favors Class Certification.

It is the express public policy of California to encourage the use of class actions where, as here, all class members will rely on the same evidence to establish the defendants' liability. *Richmond, supra*, 29 Cal.3d at 473; *La Sala v. American Savings & Loan Assn.* (1971) 5 Cal.3d 864, 883. Class actions are the favored mechanism to adjudicate the rights of consumers and others whose individual stakes may be so small that individual litigation would otherwise be discouraged. *Linder v. Thrifty Oil* (2000) 23 Cal.4th 429, 435. Where, as in this

' Class claims brought under the Consumer Legal Remedies Act, however, do not require a showing of superiority or substantial benefit to the public for certification. Civ. Code § 1781 (b); *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 136.

1 case, “there exists the possibility of repetitious litigation,” the California Supreme
2 Court has directed the courts of this state to utilize the class action device to
3 fashion “an effective and inclusive group remedy.” *Richmond, supra*, 29 Cal.3d at
4 469; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807.

5 Because California law and policy favor the fullest and most flexible use of
6 class actions, any doubt as to the appropriateness of class certification must be
7 resolved in favor of certification. *Richmond*, 29 Cal.3d at 473; *La Sala*, 5 Cal.3d at
8 875; *Vasquez*, 4 Cal.3d at 821. Any issues regarding the advisability of
9 proceeding as a class action should be resolved in favor of an initial class
10 certification, subject to later modification. *Richmond*, 29 Cal.3d at 473-75; 2
11 *Newberg on Class Actions* (3d ed. 1992) (“*Newberg*”) § § 7.17-7.22.

12 Class certification is a procedural matter and is to be made without regard to
13 the merits of the Plaintiffs’ case. *Linder, supra*, 23 Cal.4th at 439-40.

14 Accordingly, the only issue before the Court at this juncture is whether Plaintiffs
15 meet the procedural requirements of CCP § 382.

16
17 **II. PLAINTIFFS HAVE SATISFIED ALL REQUIREMENTS FOR CERTIFICATION OF
THE CLASS**

18 **A. The Proposed Class Is Ascertainable and Sufficiently Numerous.**

19 Determining the existence of an “ascertainable” class is accomplished by
20 examining (1) the class definition, (2) the size of the class, and (3) the means
21 available for identifying class members. *Reyes v. San Diego County Bd. of Sup ‘rs.*
22 (1987) 196 Cal.App.3d 1263, 1271. “A class is ascertainable if it identifies a
23 group of unnamed plaintiffs by describing a set of common characteristics
24 sufficient to allow a member of that group to identify him or herself as having a
25 right to recover based on the description.” *Bartold v. Glendale Federal Bank* (2000)
26 81 Cal.App.4th 816, 828. Class members are “ascertainable” when they may be
27 readily identified. *Rose v. City of Hayward* (1982) 126 Cal.App.3d 926, 932.

28 The proposed class in this case is defined as California residents having the

1 following common and easily determined characteristics: (1) they have had a
2 checking or savings account at BofA at any time since August 13, 1994; (2) their
3 Social Security payments or other public benefits have been directly deposited into
4 that account. Based upon this class definition, there is no issue as to
5 ascertainability. BofA, the Social Security Administration and intermediaries such as
6 the Federal Reserve Bank each utilize sophisticated computerized databases in order
7 to accomplish the electronically transmitted direct deposit of Social Security into
8 BofA accounts. These databases contain the information necessary to identify
9 each BofA customer whose Social Security benefits are directly deposited to their
10 account. Johnson Dec., 1 8, Ex. F (Deposition of Brian Graff ("Graff")), 4:4 -
11 10: 14; Request, Ex. B. Accordingly, all class members are identifiable from these
12 records, and can be notified of the pendency of this action by mail, supplemented
13 by published notice, if necessary.' See *Lazar, supra*, 143 Cal.App.3d at 138.

14 Nor is there any issue as to numerosity. The BofA processing unit
15 responsible for receiving electronically transmitted direct deposits from the Social
16 Security Administration receives over a million such items per month, the "great
17 majority" of which are for California accounts. Johnson Dec., 7 8, Ex. F (Graff),
18 I:3 - 3:3. The number of BofA's depositors receiving Social Security benefits by
19 direct deposit must, therefore, number in the hundreds of thousands.

20 B. Common Issues of Law and Fact Predominate Over Individual Issues.

21 In order to sustain a class action, there must be a "well defined community
22 of interest in the questions of law and fact involved." *Daar, supra*, 67 Cal.2d
23

24 ' BofA is likely to contend that it has no mechanism in place for identifying en *masse* those
25 depositors who have Social Security direct deposit accounts. Although that fact helps explain why
26 defendant has failed exempt such accounts from the bank's internal collection procedures which
27 are the subject of this action, it is immaterial to the class certification determination. As the
28 California Supreme Court declared, "If the existence of an ascertainable class has been shown,
there is no need to identify its individual members in order to bind all members by the judgment.
The fact that the class members are unidentifiable at this point will not preclude a complete
determination of the issues affecting the class." *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695,
706. Here, the class definition provides objective criteria through which class members may be
identified from BofA's own customer records and/or other computerized databases.

1 at 704. Claims should be certified where they arise from the same nucleus of
2 facts. See *Richmond, supra*, 29 Cal.3d at 470; *Linder, supra*, 23 Cal.4th at 435.

3 The requirement that common questions of law and fact predominate over
4 individual issues is satisfied whenever the “issues which may be jointly tried, when
5 compared with those requiring separate adjudication, [are] sufficiently numerous
6 and substantial that the maintenance of a class action would be advantageous to
7 the judicial process and to the litigants.” *City of San Jose v. Superior Court (1974)*
8 12 Cal.3d 447, 460; *Collins v. Rocha (1972)* 7 Cal.3d 232, 238.

9 In this case BofA’s Social Security direct deposit customers are all subject to
10 the same common internal collection practices through which amounts the bank
11 claims are owed to it are offset against the balance in a depositor’s account and
12 incoming deposits to that account. Indeed, bank officials testified that all deposit
13 accounts are subject to the same practices, without regard to whether they are
14 Social Security direct deposit accounts. See Johnson Dec., 11 5, Ex. C (Jackson),
15 64:24 - 65:9. It follows that members of the class, consisting of BofA customers
16 with Social Security direct deposit accounts, are subject to the same practices
17 alleged in this action to be unlawful, unfair and fraudulent.

18 Common issues also predominate with respect to the claims arising from the
19 bank’s alleged false and deceptive representations as to the safety and security of
20 direct deposit. Defendant made common misrepresentations to the class as a
21 whole based upon an institution-wide marketing practices and the utilization of
22 standardized marketing materials. Johnson Dec., 1 9, Ex. G. Moreover, most of
23 the causes of action asserted in the First Amended Complaint which arise from the
24 allegations of misrepresentations include violations of the CLRA, Civil Code
25 § § 1750, *et seq.*; the UCL, Business and Professions Code § § 17200, *et seq.*; and
26 the False Advertising Law, Business and Professions Code § § 17500, *et seq.*
27 Unlike common law fraud, none of these consumer protection laws requires
28 allegations or proof of intent to deceive or proof of reliance on the part of the

1. individuals to whom the misrepresentations were made. *Committee on Children's*
2 *Television v. General Foods Corp.* (1983) 35 Cal.3d 197, 21 1. With respect to the
3 causes of action for fraud and negligent misrepresentation, class wide reliance is
4 established by virtue of the fact that all members of the class, by definition,
5 arranged to have their payments directly deposited to their accounts. *Vasquez v.*
6 *Superior Court, supra*, 4 Cal.3d at 809. Thus, there are no significant
7 individualized issues to be addressed with regard either to defendant's unlawful and
8 unfair collection practices or its fraudulent representations as to the benefits of
9 direct deposit for government benefits recipients.

10 The issues of fact and law common to the class are the principal issues
11 presented in the case and predominate over any individual issues that might exist.

12 They include, *inter alia*, the following:

13 (1) Whether BofA has engaged and continues to engage in a
14 regular practice of collecting debts it claims against account holders by
confiscating funds from their Social Security direct deposit accounts;

15 (2) Whether BofA falsely represented to members of the class
16 that the direct deposit of their benefit checks to a BofA account would
assure the safety and security of those checks and the availability of
17 their funds to them when they were needed;

18 (3) Whether the misconduct specified in questions (1) and (2)
violates the CLRA, Civil Code § § 1750, *et seq.*; the UCL, Business and
19 Professions Code § § 17200, *et seq.*; Business and Professions Code
§ § 17500, *et seq.*; and constitutes fraud and intentional or negligent
20 misrepresentation; Code of Civil Procedure § 704.080;

21 (4) Whether the members of the proposed class are entitled to
22 compensatory damages, double, treble and/or punitive damages,
injunctive relief, restitution and costs and attorneys' fees.

23 In this case plaintiff seeks, *inter alia*, relief in the nature of restitution of the
24 Social Security benefits and other funds exempt by law and public policy from
25 collection actions, which defendant nonetheless improperly collected from members
26 of the class through its internal collection procedures. Restitution and
27 disgorgement for such improperly collected amounts are well-established equitable
28 remedies in California class actions. See, e.g., *Committee on Children's*
Television v. General Foods Corp., supra, 35 Cal.3d at 207-08; *State of California*

1 v. *Levi Strauss & Co.* (1986) 41 Cal.3d 460, 473 (approving fluid recovery in class
2 actions); *Fletcher v. Security Pacific Nat% Bank* (1979) 23 Cal.3d 442, 451 3;
3 *Granberry v. /slay Investments* (1995) 9 Cal.4th 738, 750-75 1. They are also
4 specifically authorized under the CLRA, Civil Code § 1780(a)(3) and California
5 Business & Professions Code § § 17203 & 17535. The imposition of such
6 remedies results from an analysis of *defendants'* conduct that looks to whether
7 defendant's conduct violated the CLRA and was unlawful, unfair and fraudulent
8 within the meaning of the UCL, issues which are common to the class as a whole.

9
10 C. The Claims of the Representative Plaintiffs Are Typical of the Claims of
the Class.

11 In order to satisfy the typicality requirement, the named plaintiff's claims
12 must be similar to those of other members of the proposed class. The class
13 representative's claims and injuries need not be identical to those of the other class
14 members, however. See *Fanucchi v. Coberly-West Co.* (1957) 151 Cal.App.2d 72,
15 80-82. Their claims are typical of those of the class as a whole if they (1) arise
16 from the same event or course of conduct that gives rise to the claims of other
17 class members, and (2) are based on the same legal theory. See *Classen v. Weller*
18 (1983) 145 Cal.App.3d 27, 47-48. Here, plaintiff satisfies the typicality
19 requirement because his claims are identical to the claims of members of the
20 proposed class, rely on the same statutes; and rest upon the same course of
21 conduct by BofA.

22
23 ³ Pursuant to *Fletcher*, the commonality inquiry focuses on defendants' actions and intent. In
24 *Fletcher*, the plaintiff challenged, as an unfair bank practice, the use of a 360-day year in
25 computing "per annum" interest; defendants claimed some class members were aware of the
26 practice and consented, raising individual issues. The California Supreme Court held that, once an
27 unfair trade practice was established, a class action could proceed without individualized proof of
28 lack of knowledge of the fraud, and endorsed the disgorgement remedy in the class context,
commenting that "the requirement that a wrongdoing entity disgorge improperly obtained moneys
surely serves as the prescribed strong deterrent" envisioned by the California legislature when it
enacted the UCL and invested trial courts, under California Business & Professions Code 0 17535,
"with broad authority to fashion a remedy that would effectively prevent the use. . . of any
practices which violate [the UCL] and deter the defendant, and similar entities, from engaging in
such practices in the future." *Fletcher, id.*, 23 Cal.Brd at 450, as quoted in *Kraus v. Trinity
Management Serv.* (2000) 23 Cal.4th 116, 134.

1: D. Plaintiff Will Fairly and Adequately Represent the Interests of the
2 Class.

3 The adequacy of representation requirement is met if the plaintiff can show
4 (1) that he is represented by counsel experienced and qualified to conduct the
5 litigation, and (2) that his interests are not antagonistic to those of the class. See
6 *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450-51. The mere
7 potential for conflicts does not suffice. “[S]ubstantial conflict going to the subject
8 matter of the lawsuit is necessary to prevent class action treatment.” *National*
9 *Solar Equipment Owners Ass’n, Inc. v. Grumman Corp.* (1991) 235 Cal.App.3d
10 1273, 1285.

11 Here, plaintiff has retained counsel with extensive experience in prosecuting
12 complex class actions, including those involving consumer protection and financial
13 services.⁴ In addition, Plaintiff’s interests are consistent with those of the class he
14 seeks to represent: like members of the class, he has a Social Security direct
15 deposit’ account with defendant BofA which is and has been subject to the
16 defendant’s internal collection efforts resulting in the denial of access to his Social
17 Security benefits. His claims and the legal theories on which he seeks relief are the
18 same as those applicable generally to the class. Moreover, he has no interests
19 contrary to those of the proposed class, and no potential conflicts exist between
20 plaintiff and members of the proposed class.

21 E. Class Treatment Is Superior to Other Means of Resolving This Dispute.

22 With the exception of claims brought under the Consumer Legal Remedies
23 Act,⁵ in making its class certification decision, the Court must determine that a
24 class action is superior to alternative means for the fair and efficient adjudication of
25 these claims. Class certification is superior to individual litigation when the

26
27 ⁴ Counsel has submitted declarations in support of this motion attesting to their experience and
28 qualifications. See Declaration of James C. Sturdevant in Support of Plaintiffs’ Motion for Class
Certification; Declaration of Thomas Brandi in Support of Plaintiff’s Motion for Class Certification.

⁵ See *supra*, note 2.

1 plaintiffs' claims can be adjudicated in a single proceeding, thereby saving time,
2 conserving judicial resources, and limiting duplication of effort. See *Daar, supra*,
3 67 Cal.2d at 7 14-1 5. As recently emphasized by the California Supreme Court,

4 it is firmly established that the benefits of certification are
5 not measured by reference to individual recoveries alone.
6 Not only do class actions offer consumers a means of
7 recovery for modest individual damages, but such actions
8 often produce "several salutary by-products, including a
9 therapeutic effect upon those sellers who indulge in
10 fraudulent practices, aid to legitimate business enterprises
11 by curtailing illegitimate competition, and avoidance to
12 the judicial process of the burden of multiple litigation
13 involving identical claims."

14 *Linder, supra*, 23 Cal.4th at 445, quoting *Vasquez*, 4 Cal.3d at 808. Superiority is
15 demonstrated where the class action "both eliminates the possibility of repetitious
16 litigation and provides small claimants with a method of obtaining redress for claims
17 which would otherwise be too small to warrant individual litigation." *Richmond*,
18 *supra*, 29 Cal.3d at 469; see also 1 *Newberg on Class Actions*, § 1.06, at 1 -20.⁶

19 The superiority requirement is more than satisfied for the proposed class.
20 The issues of whether BofA engaged in systematic, and clearly defined, misconduct
21 proscribed by the CLRA, Business and Professions Code § § 17200 and 17500 and
22 other provisions of law can be most efficiently determined in a single proceeding.
23 Adjudicating these issues on a class basis will also eliminate the probability of
24 repetitious litigation or inconsistent rulings on the same operative facts. In
25 addition, class certification is particularly appropriate here because class members
26 have relatively small monetary claims that might otherwise go unaddressed. See
27 *Linder, supra*, 23 Cal.4th at 435; *Keating, supra*, 31 Cal.3d at 609; *Richmond*,
28 *supra*, 29 Cal.3d at 469.

Moreover, the Supreme Court has recently confirmed that there is no equally

⁶ On the other hand, the denial of class certification in cases in which class certification is appropriate "may have the effect of allowing an unscrupulous wrongdoer to retain the benefits of its wrongful conduct." *Keating v. Superior Court* (1 982) 31 Cal.3d 584, 609, *rev'd in part, on other grounds sub nom, Southland Corp. v. Keating* (1 984) 465 U.S. 1. *Linder, supra*, 23 Cal.4th at 435.

1. viable, much less superior, means available to the members of the class to seek
2. redress for their injuries. *Kraus v. Trinity Management Services (2000) 23 Cal.4th*
3. *1 16, 146*. In *Kraus*, the Court confirmed the propriety of asserting claims for
4. restitution and disgorgement under California's UCL, if and only if such claims are
5. asserted in a formal class action. *Id.* at 137. The ability of this Court to apply
6. "the full impact of the deterrent force that is essential if adequate enforcement' of
7. [California consumer law] is to be achieved" thus depends entirely upon whether
8. class certification is granted. (Werdegar, J., concurring. & dissenting), *quoting*
9. *Fletcher, supra, 23 Cal.3d at 451*.

10. Since there is *no* other currently-available procedural alternative for plaintiff
11. to obtain full disgorgement and restitution of BofA's revenues from the allegedly
12. unlawful, unfair and fraudulent conduct, a class action is not simply a superior
13. alternative, from the standpoints of judicial economy, efficiency, and *res judicata*,
14. to a non-class consumer action under the UCL; it is an absolute necessity.

15. CONCLUSION

16. For the reasons stated above, and based upon the evidence submitted
17. herewith, plaintiff respectfully requests that their motion be granted and that the
18. Court certify this case as a class action on behalf of the class described above.

19. DATED: April 25, 2001

Respectfully submitted,

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