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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)
others similarly situated,)
16)
Plaintiff,)
17)
vs.)
18)
19 BANK OF AMERICA N.T. & S.A.)
a California corporation, and DOES 1 - 50,)
20)
Defendants.)
21)

CASE NO. 301917
CLASS ACTION
PLAINTIFF'S REPLY
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO CERTIFY CLASS

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

Honorable Anne E. Bouliane

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INTRODUCTION

Plaintiff Paul Miller submits the following points and authorities in reply to Defendant Bank of America's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Certify Class. (Def's Opp.) As argued herein and in plaintiff's moving papers, all of the requirements for certification of this action as a class action are satisfied. Plaintiff therefore respectfully requests that the court enter an order certifying the class as proposed.

ARGUMENT

9
10

I. The Proposed Class Is Ascertainable.

11 BofA's argument that the proposed class is not reasonably ascertainable
12 confuses ascertainability at the class certification stage with manageability at the
13 remedial stage. No case cited by the bank on the issue of ascertainability stands
14 for the proposition that plaintiff must establish at the certification stage the actual
15 ability to identify each individual member of the class. To the contrary, "A class is
16 ascertainable if it identifies a group of unnamed plaintiffs by describing a set of
17 common characteristics sufficient to allow a member of that group to identify him
18 or herself as having a right to recover based on the description." **Bartold v.**
Glendale Federal Bank (2000) 81 Cal.App.4th 816, 828.

19 The description of the proposed class in this case is well-defined and not
20 complex. It identifies the members of the class as those persons having the
21 following set of "common characteristics: II

22 t They are residents of California;

23 . They have checking or savings accounts with Bank of America during
24 any period of time after August 13, 1994';

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' This includes persons who will have direct deposit Bank of America accounts in the future. Defendant argues that the inclusion of future customers also precludes a finding of ascertainability. The inclusion of future victims of an unlawful practice in a class is commonplace, however, and is designed to permit the full realization of injunctive relief. See, e.g. **Reyes v. Superior Court, 196** Cal.App.3d 1263, 1269 (endorsing certification of a class of "all individuals who will be sanctioned by the County and deprived general relief benefits on or after the date of entry of final judgment,"

1 They have received Social Security or other public benefits from the
2 government by means of a direct deposit of those funds into their
3 Bank of America accounts.

4 There is no question that individuals having these three common characteristics are
5 ascertainable. Defendant acknowledges that records maintained by the bank for
6 each account holder permit the determination of whether that customer receives
7 their benefits by direct deposit. (Declaration of David Rojas § § 4-6.) Similarly, the
8 Social Security Administration's electronic data and the data transmitted to the
9 bank by the Financial Management Service ("FMS") of the Treasury Department
10 both contain information identifying the individuals who receive direct deposit of
11 Social Security benefits. (Declaration of Mark Johnson, § 8, Ex. F.) Finally, any
12 Bank of America checking or savings account holder who receives notice of this
13 action and the definition of the class will be able to easily determine with certainty
14 whether they are a member of the class.

15 Defendant's argument is that it would be too difficult or burdensome to
16 identify the members of the class from its records. As discussed in **Reyes v. Board**
17 **of Supervisors of San Diego County (1987)** 196 Cal.App.3d 1263, this is not really
18 an issue of ascertainability but of manageability, i.e., "whether there exists
19 sufficient means for identifying class members at the **remedial stage**" and whether
20 "the administrative cost and identification and processing of [class member] claims
21 is so substantial to render the likely appreciable benefits to the class de minimus in
22 comparison, **Id.** at 1274, 1275 (emphasis added). The Supreme Court addressed
23 this issue in Reyes, **supra**, and squarely rejected the very arguments made here by
24 defendant.

25
26 emphasis added); **Miller v. Woods** (1983) 148 Cal.App.3d 862, 873 (reversing the refusal to certify
27 a class of consisting of "all applicants, recipients and providers of IHSS in California who have been
28 or will be disqualified from receiving or providing protective supervision . . .," emphasis added).
The lone case cited by defendant on this point, **Alvarez v. Wiley** (1977) 71 Cal.App.3d 599, 602, is
an aberration, reflecting not only the completely speculative nature of the proposed class, but also
the fact that the representative plaintiff was deceased.

1 In **Reyes** the California Supreme Court upheld the certification of a class
2 comprised of in excess of 15,000 general relief recipients who were improperly
3 denied such relief based upon illegal criteria regulations. The county argued, as the
4 bank does here, that the class was not ascertainable because it would be too
5 burdensome or impossible to identify members of the class. The Court rejected
6 this argument, noting that “a court should not decline to certify a class simply
7 because it is afraid that insurmountable problems may- later appear at the remedy
8 stage.” *Id* at 346. The court found that the existence of serious problems
9 affecting manageability must be established by substantial evidence at the
10 certification stage and that “[c]onsequently, unless the unmanageability of the class
11 action is essentially without dispute or clearly established, it should not foreclose
12 class certification. ^N *Id.*

13 As the Supreme Court established in **Reyes, supra**, it is the defendant’s
14 burden to show by substantial evidence that the administrative cost of identifying
15 members of the proposed class exceeds the benefits to the class and justifies the
16 denial of certification. *id.* Bank of America has not satisfied that burden. First, its
17 contention that the identity of class members cannot be discerned from the various
18 computerized databases that exist is conclusory and not credible. Second, even if
19 no data existed on members of the class, they could be identified through the
20 traditional means of mailing notice to the group of individuals likely to include the
21 members of the class.² Finally, BofA has presented no evidence of the cost or
22 burden that would be associated with the identification of class members.

23 Bank of America acknowledges the existence of computerized databases that
24 are used or maintained in connection with the process of electronically transferring

25
26 ² Of course, Bank of America mails statements to its checking and savings account customers
27 on a monthly basis. Notably, the fact that an account holder receives a direct deposit of Social
28 Security benefits on a monthly basis is indicated on those statements. See, e.g. Plaintiff’s
checking account statements attached as Exhibits C through E to the Declaration of Kheloud Bader
in Support of Bank of America N.A.’s Motion for Summary Judgment. Notice of this action could
be accomplished, in part, by enclosures in such statements which describe the definition of the
class.

1 Social Security and other government benefits from the originating government
2 agency through the Federal Reserve Bank and the Financial Management Service of
3 the Treasury Department to the bank. As one would expect (and as must be
4 necessary for the system to work), the data in these databases is maintained in a
5 format which includes separate "fields" to identify the bank, the type and source of
6 the funds and the account number to which the funds are to be deposited.
7 (Johnson Decl. lj 8, Ex. F.) The bank contends, however, that "there is no other
8 way for the Bank to tell which particular customers receive Social Security funds by
9 direct deposit other than by looking at their individual account histories, one by one
10 and line by line." (Rojas Declaration, 13.) That contention is not credible, as no
11 reason is given as to why a computer program can't be applied to one or more of
12 the databases to select out records based upon the criteria identifying members of
13 the class. While defendant's employee professes to be unaware of any existing
14 means for doing so, no showing has been made that it cannot be done with little
15 effort or cost.

16 Defendant also offers no reason why members of the class cannot be
17 identified by the traditional means of giving notice of the action to its checking and
18 savings account customers and allowing class members to self-identify. Certainly
19 there is no pre-requisite for certification of a consumer class action that particular
20 records exist, computerized or otherwise, which permit the independent
21 identification of each member of the class. Indeed, in *Reyes v. Superior Court*,
22 *supra*, the Supreme Court suggested that the alleged burden of identifying general
23 relief recipients who had been wrongfully denied benefits could be addressed by
24 simply giving notice of the action to *all* general relief recipients. *Id.* at 347.
25 Similarly, in this case, notice may be mailed to past and current account, holders
26 and membership in the class may be verified by reference to the bank's records.

27 **II. The Proposed Class Is Properly Defined and Numerous.**

2 8 BofA argues that the numerosity requirement for class certification is only

1 satisfied because plaintiff has improperly defined the class. (Def's Opp. at pp. 7-8.)
2 BofA would redefine the proposed class by limiting its members to those whom
3 plaintiff can show have actually suffered illegal collection actions by BofA. This
4 argument fails because it misunderstands the nature of the class claims and relies
5 upon inapplicable case law.

6 First, *a//* of the members of the proposed class are harmed by the practice
7 complained of in the complaint, even if they have not yet experienced a financial
8 loss resulting from the seizure of exempt funds from their Social Security Direct
9 Deposit accounts. BofA does not dispute that it treats Social Security direct
10 deposit accounts in precisely the same manner as it treats non-exempt accounts
11 when it comes to the collection of overdrafts and other debts it claims against
12 depositors. Its practice, as alleged in the First Amended Complaint ("FAC"), is to
13 seize funds in a deposit account to satisfy such debts regardless of whether the
14 accounts are exempt direct deposit accounts. This fact alone adversely impacts
15 the proposed class members and diminishes their rights under the law. Their public
16 benefits, which are otherwise exempt from collection, are placed at risk and subject
17 to total or partial confiscation by virtue of the bank's practices. This fundamentally
18 alters the rights and expectations of individual members of the class in their
19 relationship with the bank. Class members are thus presently harmed by the
20 bank's practice, whether or not they are ever actually victimized by the bank
21 through the confiscation of their funds. They are forced to choose between
22 terminating their direct deposit arrangement, terminating their relationship with the
23 bank or suffering the risk of loss of their benefits. It is therefore both reasonable
24 and appropriate for the court to certify a class of BofA depositors whose accounts
25 are exempt from collection actions but are nonetheless subject to the bank's
26 internal collection practices.

27 Second, the evidence is sufficient to establish that large numbers of account
28 holders are not only subject to BofA's unlawful practices, but have actually been

1 victimized by those practices. In determining whether to certify a class, it is
2 appropriate for the court to make reasonable inferences based upon the facts before
3 it. **Stephens v. Montgomery Ward** (1987) 193 Cal.App.3d 41 1, **419-21**; **Rosack v.**
4 **Volvo Corp. of America** (1982) 131 Cal.App.3d 741, 753. In this case BofA
5 admits to having as many as a million direct deposit Social Security accounts, all of
6 which are subject to the same off-set and internal collection practices that BofA
7 engages in against its non-exempt accounts. It is not reasonable to assume that all
8 but a small number of such accounts somehow elude the bank's allegedly unlawful
9 practices.

10 BofA's reliance on **American Suzuki Motor Corp. v. Superior Court (1995)**
11 37 Cal.App.4th 1291 is misplaced. Defendant argues based exclusively upon that
12 case that the class may not be certified because members of the class do not have
13 "a plausible cause of action against defendant." (Def's Opp., p. 6). Since
14 **American Suzuki Motor Corp.** was decided, however, this argument has been
15 rejected by the Supreme Court. In **Linder v. Superior Court** (2000) 23 Cal.4th 429,
16 the Court held that class certification may not be conditioned upon a showing that
17 class claims for relief are likely to prevail. The court in **Linder** was urged by the
18 defendant to follow **American Suzuki Motor Corp.** and similar decisions of the Court
19 of Appeal but explicitly refused to do so, calling into doubt the validity of that
20 authority. **Id.** at 442-443.

21 Further, the decision in **American Suzuki Motor Corp., supra**, was based upon
22 the fact that the cause of action alleged by plaintiffs - breach of the implied
23 warranty of merchantability - was dependent upon the product actually failing. A
24 bank account, however, unlike a vehicle, is a product which is comprised of the
25 relative rights and responsibilities of the parties. When the bank alters those rights
26 the customer is harmed, even if he or she never has occasion to take advantage of
27 the particular rights affected by the change. **All** of BofA's customers with Social
28 Security direct deposit accounts have the legal right to have those accounts be

1 exempt from collection activity. The bank's practice challenged by this action
2 unlawfully changes the status of **all** of those accounts from exempt to non-exempt.
3 The number of customers affected by this practice numbers, at a minimum, in the
4 hundreds of thousands. The requirement that the class be sufficiently numerous is
5 thus easily satisfied.

6 **III. Common Issues of Law and Fact Predominate Over Individual Issues.**

7 Based upon a litany of purportedly distinct and "endless" "possibilities," and
8 its contention that each different scenario "would require separate proof and
9 separate analysis," BofA argues that class certification is precluded because
10 individual issues predominate over common issues. (Def's Opp. pp. 9, 10.) This
11 argument fails because the various situations defendant describes are mostly
12 irrelevant to the allegations of the complaint and the right of class members to
13 recover.

14 Notwithstanding BofA's assertion to the contrary, the wrongful conduct
15 complained of in this action is **not** the creation of an overdraft on exempt direct
16 deposit accounts. The bank's unlawful conduct, for which injunctive relief and
17 restitution are sought, is its practice of using the funds in those exempt accounts
18 to pay itself for debts it claims against the holders of the accounts. This practice is
19 alleged to be unlawful whether or not the claim the bank seeks to collect on results
20 from an overdraft and regardless of the nature of any overdraft on which the claim
21 is based. Thus, the "myriad of situations" described by defendant concerning the
22 manner in which an overdraft is created do not require individual proof because
23 they are not material to a class member's right to recover. It is not necessary, for
24 example, to determine whether the bank was acting to recover an overdraft which
25 resulted from the bank's error or one which resulted from the customer's error.
26 The distinction is not relevant to the wrongfulness of the bank's conduct and
27 therefore not an issue requiring separate proof.

28 The same is true for the question of whether the next funds coming in to the

1 account following an overdraft are Social Security funds. Pursuant to Civil Code
2 section 704.080, *a//* of the funds in an account receiving direct deposits of Social
3 Security benefits are exempt, up to a maximum of \$2,000.00. It is therefore not
4 necessary to determine whether the next deposit to an exempt account which BofA
5 then takes to satisfy its claim against the account holder is actually Social Security
6 money. Unless the deposit exceeds \$2,000.00, the funds will always be exempt.

7 When the proper analysis is applied, therefore, BofA's "myriad of situations"
8 and the barrier they present to certification of the class, evaporate. Each class
9 members' right to recovery is not dependent upon individualized factual
10 determinations related to those various factual scenarios, but upon common issues
11 of law and fact which will predominate in this litigation. The case of ***Bozaich v.***
12 ***State of California*** (1973) 32 Cal.App.3d 688, relied upon by defendant, is
13 distinguishable for this very reason. In ***Bozaich*** the court identified dozens of
14 substantial issues related to the plaintiffs' relocation claims that would have to be
15 separately litigated for each member of the class. ***Id.*** at 696 and note 3. Here,
16 while BofA has described a number of different "situat/ons" leading up to or
17 resulting in the its confiscation of exempt funds, it fails to identify any issues
18 related to these situations which need to be litigated in this case. The only issue
19 that will require a separate determination in this case is the amount of the recovery
20 for each class member. That issue can be resolved administratively in the remedial
21 stage of this action by reference to bank statements and records and does not
22 preclude certification of the class. ***See Daar v. Yellow Cab (1967)*** 67 Cal.2d 695,
23 706-08.

24 Defendant also argues that the element of reliance necessary to establish
25 fraud and negligent misrepresentation require individualized proof.³ (Def's Opp.,
26

27 ³ Of course, plaintiff's causes of action for fraud and negligent misrepresentation are only two of
28 five causes of action based upon allegations of misrepresentation by the bank. None of the other
three causes of action, for violation of the Consumer Legal Remedies Act, Civil Code § § 1750, *et*
seq.; violation of the Unfair Competition Law, Business and Professions Code § § 17200, *et* ***seq.***;

1 p. IO.) Defendant relies upon *Mirkin v. Wasserman (1993) 5 Cal.4th 1082, a case*
2 in which plaintiffs did not and could not plead that members of the class relied
3 upon the alleged misrepresentations or even that they were exposed to them. **The**
4 bank also relies upon *Osborne v. Subaru of America (1988) 198 Cal.App.3d 646,*
5 in which the court, though it ultimately decided that class certification was
6 improper on the facts of that case, acknowledged that “individual questions of
7 reliance and damages are not necessarily by themselves sufficient to defeat class
8 treatment.” *Id.* at 651. The facts of this case are more like those of *Vasquez v,*
9 *Superior Court, supra,* however, than either *Mirken* or *Osborne*. Utilizing
10 standardized, institution-wide marketing materials, BofA made the same
11 misrepresentation to all of its customers regarding the safety and security of its
12 direct deposit accounts. (Johnson Dec., q 9, Ex. G.) From this fact, not pled in
13 either *Mirken, supra* or *Osborne, supra,* reliance can be inferred. *Wilner v. Sunset*
14 *Life Ins. Co. (2000) 78 Cal.App.4th 952, 963; Vasquez v. Superior Court, supra, at*
15 *815; Occidental Land, Inc. v. Superior Court (1976) 18 Cal.3d 355, 362-363.*

16 **IV. Plaintiff’s Claims Are Typical of and Not in Conflict with Those of the Class.**

17 BofA’s argument on the issue of typicality repeats, without adding anything
18 of significance, its argument on the issue of whether common issues predominate.
19 The argument should be rejected for the same reasons. It is irrelevant that the debt
20 BofA collected from plaintiff’s exempt bank account was based upon an overdraft
21 which was incurred under different circumstances than the overdrafts collected by
22 the bank from other exempt accounts. It is the collection activity that is unlawful
23 and that is at issue, not the nature of the overdraft or the state of mind of the
24 account holder. In this regard plaintiff’s claims are identical to those of the class.

25 For similar reasons there is no conflict between plaintiff’s interests and the
26 interests of the class. Plaintiff seeks to prevent the bank from seizing funds from

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28 and violation of the False Advertising law, Business and Professions Code § § 17500,et seq., require proof of reliance. See, *Committee on Children’s Television v. General Foods Corp. (1983) 35 Cal.3d 197, 211.*

1 lis and other customers' exempt direct deposit accounts. That goal that is not
2 antagonistic to the interests of any class member. Defendant's claim that other
3 members of the class, unlike plaintiff, "**have** paid their overdrafts" misses the point.
4 Those individuals have had their exempt funds seized by the bank to pay those
5 overdrafts, whether they could afford it or not. It is that practice which this action
6 seeks to enjoin, to the benefit of the entire class.

7 Nor does a conflict exist based upon defendant's unsubstantiated assertion
8 that "many of the purported class members surely would **want** the Bank to
9 overdraw their accounts." Customers have no control over whether BofA
10 Overdraws their accounts, and this litigation does not address that issue. It seeks
11 merely to protect exempt funds from being taken by the bank to recover claims it
12 has against direct deposit account holders.

13 **CONCLUSION**

14 For the reasons stated herein and in his moving papers, plaintiff respectfully
15 requests the defendant's arguments in opposition to class certification be rejected
16 and that the Court certify this case as a class action on behalf of the class
17 Proposed by plaintiff.

18
19 DATED: May 29, 2001

Respectfully submitted,
THE STURDEVANT LAW FIRM
A Professional Corporation
LAW OFFICES OF THOMAS J. BRANDI

22
23 By: 
24 MARK T. JOHNSON

Attorneys' for Plaintiff -

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PRGOF OF SERVICE BY HAND DELIVERY AND U.S. MAIL

I, the undersigned, declare that I am a citizen of the United States, over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 475 Sansome Street, Suite 1750, San Francisco, California 9411 1.

I am readily familiar with The Sturdevant Law Firm's practice for collection and processing of documents for mailing with the **United States Postal Service**, being that the documents are deposited with the United States Postal Service with postage thereon fully prepaid the same day as the day of collection in the ordinary course of business.

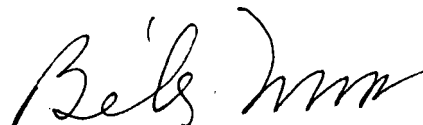
I am also readily familiar with The Sturdevant Law Firm's practice for collection and processing of documents for **hand delivery**, being that the documents are deposited with a messenger from NoBS Couriers, 388 Guerrero Street, San Francisco, California 94103, for service the same day as the day of collection.

On May 29, 2001, I served the within **PLAINTIFF'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO CERTIFY CLASS** on the parties listed below in this action as shown, addressed as follows:

band delivery:
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I declare under penalty of perjury that the foregoing is true and correct.
Executed on the date first written above at San Francisco, California.



Bela Nuss