

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

**FILED**

NOV 22 2005

Court of Appeal - First App. Dist.  
DIANA HERBERT

By \_\_\_\_\_  
DEPUTY

A110137

(San Francisco County  
Super. Ct. No. 301917)

**FILED**

San Francisco County Superior Court

NOV 23 2005

GORDON PARK-LLI, Clerk

BY: \_\_\_\_\_  
Deputy Clerk

PAUL MILLER et al.,  
Plaintiffs and Respondents,  
v.  
BANK OF AMERICA, N.A.,  
Defendant and Appellant.

BY THE COURT:\*

Upon due consideration, the court rules on appellant Bank of America's petition for a writ of supersedeas or other appropriate stay order as set forth in this order. Item numbers referred to below correspond to numbered items beginning at page four of the March 4, 2005 judgment, a copy of which is attached to this order.

A. Monetary damages; identification of and payment to class members; class notification. Items (2), (3), and (4) of the judgment award money damages with interest to plaintiff Paul Miller and the plaintiff class. Items (6) and (7) of the judgment require appellant Bank of America to identify, locate, and pay compensatory and statutory damages to class members. Item (8) of the judgment requires appellant Bank of America to notify class members of the judgment.

Appellant Bank of America argues federal law prohibits enforcement of the monetary component of a judgment against a national bank until the bank has exhausted its appellate remedies. (See 12 U.S.C. § 91; *Third National Bank v. Impac Limited, Inc.* (1977) 432 U.S. 312, 324.) Respondents do not contend otherwise.

\* McGuiness, P.J., Corrigan, J., and Parrilli, J.

I, DIANA HERBERT, CLERK OF THE COURT OF APPEAL STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DO HEREBY CERTIFY THAT THE PRECEDING AFFIDAVIT IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.  
WITNESS MY HAND AND THE SEAL OF THE COURT THIS 22nd DAY OF NOV 2005  
DIANA HERBERT, CLERK  
BY: B. RUDAM DEPUTY

“Supersedeas is the appropriate remedy when it appears that a party is refusing to acknowledge the applicability of statutory provisions ‘automatically’ staying a judgment while an appeal is being pursued. [Citation.]” (*Nielsen v. Stumbos* (1990) 226 Cal.App.3d 301, 303; see also *Estate of Dabney* (1951) 37 Cal.2d 402, 408.) Respondents have not sought to enforce the monetary component of the judgment, and there is no indication the trial court has threatened to enforce this portion of the judgment notwithstanding the automatic stay. Nevertheless, respondents do not dispute the applicability of the stay, and there is no harm in confirming a stay to which appellant is entitled. Confirming the automatic stay clarifies the scope of the stay pending appeal and it eliminates the possibility of collateral litigation to enforce the judgment.

Although appellant could undertake efforts to identify, locate, and notify class members without paying any portion of the money judgment, it makes little sense to pursue such efforts before appellant has exhausted its appellate remedies. Moreover, notifying customers of the judgment would cause irreparable injury to appellant if the judgment is reversed on appeal. Therefore, enforcement of the monetary component of the judgment, including notice and other requirements intended to implement the monetary component of the judgment, is properly stayed pending appeal.

**B. Injunctive relief.** Item (5) of the judgment enjoins respondent Bank of America from making certain representations to California customers regarding the right to set off non-sufficient funds (NSF) fees and other money claims against directly deposited Social Security benefits and other public benefits, and enjoins respondent Bank of America from taking any directly deposited Social Security benefits or other public benefits from customer accounts in California to satisfy NSF fees and other monetary claims.

The “sole function” of the writ of supersedeas is to “preserv[e] the court’s jurisdiction while it prepares, usually in the context of an appeal, to rule on the merits.” (*People ex rel. S.F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 538.) Supersedeas is an appropriate remedy when (1) issuance of the writ is necessary to prevent irreparable injury (*Meyer v. Arsenault* (1974) 40 Cal.App.3d 986, 989), (2) the

issuance of the writ will not disproportionately injure the respondent (*California Table Grape Com. v. Dispoto* (1971) 14 Cal.App.3d 314, 316); and (3) the appellant has demonstrated a probability of success on the merits (*Nuckolls v. Bank of California* (1936) 7 Cal.2d 574, 578). Probability of success on the merits requires a showing that substantial issues will be raised on appeal. (*Deepwell Homeowners' Protective Assn. v. City Council* (1965) 239 Cal.App.2d 63, 67.)

Appellant contends the injunctive relief is automatically stayed because it is in the nature of a mandatory injunction. (See *Kettenhofen v. Superior Court* (1961) 55 Cal.2d 189, 191.) We need not decide whether the injunction is prohibitory or mandatory in nature because appellant is entitled to supersedeas relief irrespective of the characterization of the injunction. Appellant has demonstrated it will suffer irreparable injury absent a stay, that respondents will not be disproportionately affected by a stay, and that substantial issues will be raised on appeal. Therefore, enforcement of the injunctive relief component of the judgment is properly stayed pending appeal.

**C. Preservation of records allowing identification of class members.** Item (10) of the judgment requires appellant Bank of America to preserve all documents necessary to identify, locate, and repay class members. Because appellant has not demonstrated it will suffer irreparable injury as a consequence of complying with this aspect of the judgment, appellant has not justified a stay pending appeal with respect to item (10) of the judgment.

**D. Trial court retention of jurisdiction.** Item (11) of the judgment concerns the trial court's retention of jurisdiction to determine attorney fees and costs to be awarded to respondents and their class counsel. Item (11) also provides that the trial court retains jurisdiction to make orders necessary to implement the terms of the judgment, including efforts to identify, locate, and pay amounts owed to class members, as described in items (6) and (7) of the judgment.

With respect to that portion of the item (11) giving the trial court jurisdiction to issue rulings and orders implementing items (6) and (7) of the judgment, the power reserved to the trial court interferes with this court's order staying enforcement of items

(6) and (7) pending consideration of this appeal. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189-190.) A stay pending appeal of item (11) is therefore appropriate to the extent item (11) purports to allow the trial court to make orders or rulings necessary to implement the terms of the judgment. This stay does not affect the trial court's power to award reasonable costs to the prevailing party, including attorney fees awardable as costs, following entry of judgment. (*Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 666.)

**E. Remaining items in judgment.** Item (1) contains definitions used in the judgment, item (9) effected a temporary trial court stay that has since expired, and item (12) (erroneously identified as item (11) in the judgment) awards judgment to respondents on appellant's cross-complaint for declaratory relief. Because the remaining items in the judgment (items (1), (9), and (12)) are self-executing or otherwise do not require action or forbearance on the part of appellant, no stay is necessary with respect to these items to preserve the status quo pending appeal, and the petition for a writ of supersedeas or other appropriate stay order is accordingly denied as moot with respect to these items.

#### DISPOSITION

Pending consideration of the appeal on file herein, and subject to further order of this court, enforcement of items (2), (3), (4), (5), (6), (7), and (8) of the March 4, 2005 judgment is stayed pending consideration of the appeal on file herein. Enforcement of item (11) of the March 4, 2005 judgment is stayed pending consideration of the appeal to the extent item (11) purports to allow the trial court to make orders or rulings necessary to implement the terms of the judgment. This stay does not affect the trial court's power to award reasonable costs to the prevailing party, including attorney fees awardable as costs, following entry of judgment. The petition for a writ of supersedeas or other appropriate stay order is denied with respect to items (1), (9), (10), and (12) of the March 4, 2005 judgment.

This order supersedes the prior order of this court granting a temporary stay of the March 4, 2005 judgment. The clerk of the court is directed to serve a certified copy of

this order upon the Superior Court for the City and County of San Francisco. (Cal. Rules of Court, rules 49(d)(3), 56(j).)

Dated: NOV 22 2005

McGUINNESS, P.J. P.J.

**FILED**

San Francisco County Superior Court

MAR 4 - 2005

IN THE SUPERIOR COURT  
CITY AND COUNTY OF SAN FRANCISCO  
STATE OF CALIFORNIA

GORDON PARK-U, Clerk

By: D.L. Deputy Clerk

PAUL MILLER, individually and on behalf of  
others similarly situated,

CASE NO. CGC-99-301917

Plaintiffs;

JUDGMENT

vs.

THE ANNEXED INSTRUMENT IS A  
CORRECT COPY OF THE ORIGINAL  
ON FILE IN MY OFFICE  
ATTEST, CERTIFIED

MAR 4 - 2005

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

GORDON PARK-U, Clerk  
San Francisco County Superior Court

By: Daniel Lemire DEPUTY CLERK

Defendants.

This action came on regularly for jury trial on January 20, 2004 in Department 624 of the Superior Court, the Hon. Anne Bouliane, Judge assigned to the case for all purposes, presiding. The plaintiff Paul Miller and the certified plaintiff class of similarly situated persons appeared through their counsel Thomas J. Brandi of the Brandi Law Firm and James C. Sturdevant and Mark T. Johnson of the Sturdevant Law Firm. Defendant Bank of America, N.A., originally sued as Bank of America, N.T. & S.A., was represented by Joseph S. Genshlea of Weintraub Genshlea Chediak Sproul and by Arne D. Wagner, Arturo J. González and Heather A. Moser of Morrison & Foerster LLP.

On January 30, 2004 a jury of 12 persons and 4 alternates was regularly impaneled and sworn to receive evidence and render a verdict on plaintiffs' causes of action for intentional and negligent misrepresentation and for violations of the Consumer Legal Remedies Act, Civil Code sections 1770(a)(5) and 1770(a)(14). The court, sitting without a jury, received additional

1 evidence on plaintiffs' claims under Civil Code section 1770(a)(19), the Unfair Competition Law,  
2 Business and Professions Code section 17200, *et seq.* and the False Advertising Act, Bus. & Prof.  
3 Code § 17500, *et. seq.*

4         Witnesses were sworn and testified. After considering the evidence and the arguments of  
5 counsel related to the issues before the jury, the jury was duly instructed by the Court and the cause  
6 was submitted to the jury with directions to return a verdict on special issues. The jury deliberated  
7 and thereafter returned to court with its special verdict, a copy of which is attached hereto as  
8 Exhibit 1 and made a part hereof.

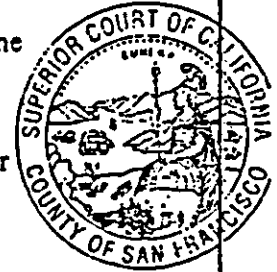
9         The jury awarded damages to the class in the amount of \$75,077,836.00 for amounts  
10 collected by the defendant in the form of NSF fees set off or assessed against class member  
11 accounts in violation of the law. In addition, having made the necessary findings, the jury  
12 determined that an additional statutory damage award for members of the class under Civil Code  
13 section 1780(b) was appropriate and awarded such damages in the amount of \$1,000.00 for each  
14 class member who suffered substantial economic or emotional damage as a result of the  
15 defendant's conduct. The jury also awarded additional individual damages for emotional distress to  
16 plaintiff Paul Miller in the amount of \$275,000.00.

17         Based upon its consideration of all of the testimony and evidence before it, and the  
18 arguments of counsel, the Court issued its Tentative Statement of Decision on the non-jury issues  
19 on October 13, 2004. Thereafter, the parties submitted objections and proposed changes to the  
20 Tentative Statement of Decision, together with additional materials and evidentiary submissions,  
21 and presented oral argument to the Court in support of their objections at a hearing on December 8,  
22 2004. After considering the parties' written objections and the argument in support of those  
23 objections, the Court issued its final Statement of Decision on December 30, 2004. A copy of the  
24 Court's Statement of Decision is attached hereto as Exhibit 2 and made a part hereof.

25         The Court has determined, and continues to find, that all of the conditions for treatment of  
26 this case as a class action pursuant to Code of Civil Procedure §382 and Civil Code §1781 have  
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1 existed and continue to exist. The class was certified by the Court on October 16, 2001 and  
2 includes the following persons:

3 All California residents who have, have had, or will have, at any time  
4 after August 13, 1994, a checking or savings deposit account with  
5 Bank of America into which payments of Social Security benefits or  
6 other public benefits are or have been directly deposited by the  
7 government or its agent.



8 Notice was given to the class during May and June, 2002 by means of an insert included  
9 with the bank statements mailed to Bank of America customers having California checking or  
10 savings accounts at that time. Following issuance of the notice and within the period permitted by  
11 the Court for opting out of the class, 3,314 persons exercised their right to exclude themselves from  
12 the class. A list of those persons is attached hereto as Exhibit 3 and is made a part hereof. All  
13 other persons satisfying the definition of the class above are members of the class to whom this  
14 judgment applies.

15 On February 19, 2004, at the close of the trial and approximately two years and four months  
16 after issuance of the initial order certifying the class, Bank of America moved for decertification of  
17 the class on the grounds that class treatment of the claims were inappropriate, that the class was  
18 impermissibly broad and that plaintiff Paul Miller was not an adequate class representative. On  
19 August 4, 2004, this Court, having considered the written memoranda in support of and in  
20 opposition to the motion, and having heard oral argument from the parties on several dates, denied  
21 the Bank's motion to decertify the class, finding that all of the criteria and conditions for class  
22 certification were satisfied.

23 Plaintiff Paul Miller and the certified plaintiff class are entitled to judgment against  
24 defendant Bank of America, N.A., originally sued as Bank of America N.T.S.A. ("the Bank"), in  
25 the amount of \$284,385,741.00, collected through December 31, 2003, plus an additional \$1,000.00  
26 per class member for each class member whose account was set off or assessed an NSF fee in  
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1 violation of law, and that plaintiff Paul Miller is entitled to judgment against the bank in the  
2 additional sum of \$275,000.00 in emotional distress damages awarded by the jury.

3 NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS  
4 FOLLOWS:

5 (1) Definitions:

6 (A) As used throughout this Judgment, "NSF (non-sufficient funds) fee(s)"  
7 means those fees which the Bank of America charges customers when a  
8 debit is posted to the account and there are insufficient funds in the account  
9 to cover the amount of the debit.

10 (B) As used herein, "Social Security benefits" means payments authorized by the  
11 Social Security Administration for regular retirement and survivors' benefits,  
12 supplemental security income benefits, coal miners' health benefits, and  
13 disability insurance benefits.

14 (C) As used herein, "public benefits" means aid payments authorized pursuant to  
15 subdivision (a) of section 11450 of the Welfare and Institutions Code,  
16 payments for supportive services as described in Section 11323.2 of the  
17 Welfare and Institutions Code, and general assistance payments made  
18 pursuant to Section 17000.5 of the Welfare and Institutions Code.

19 (2) Plaintiff and class members shall have judgment against and recover from defendant Bank  
20 of America the sum of \$295,650,220 (representing \$284,385,741.00 in NSF fees  
21 unlawfully collected through December 31, 2003, interest at the legal rate of ten  
22 percent (10%) per annum on \$75,077,836.00 of that sum from the date of the  
23 verdict, February 25, 2004, to the date of entry of judgment, and interest at the legal  
24 rate of 10% per annum on the balance of \$209,307,905 from the date of the Court's  
25 Statement of Decision, December 30, 2004 to the date of entry of judgment), plus  
26 interest at the legal rate of 10% per annum on this total from the date of the entry of  
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1 this judgment until paid. Any unpaid residue after reasonable efforts at payment are  
2 made to the Court's satisfaction shall be paid pursuant to California Code of Civil  
3 Procedure §384.

- 4 (3) Plaintiff and class members shall have judgment against and recover from  
5 defendant Bank of America the additional amount of \$1,000.00 per class  
6 member whose account was assessed an NSF fee in violation of law, with  
7 interest thereon at the rate of ten percent (10%) per annum from the date of  
8 the entry of the verdict, February 25, 2004, until paid.
- 9 (4) Plaintiff Paul Miller shall have judgment against and recover from defendant  
10 Bank of America the additional sum of \$275,000.00 for emotional distress  
11 damages, with interest thereon at the rate of ten percent (10%) per annum  
12 from the date of the entry of the verdict, February 25, 2004, until paid.
- 13 (5) Bank of America shall be and is permanently enjoined as follows:
- 14 (a) Bank of America shall cease and refrain from making any representation or  
15 statement to California customers or potential customers, in writing or orally  
through its employees or representatives, that it has the right to set off or take  
NSF fees or other non-bank-fee money claims it has against customers from  
directly deposited Social Security benefits and other public benefits in  
customer deposit accounts in California.
- 20 (b) Bank of America shall cease and refrain from taking any directly deposited  
21 Social Security benefits or other public benefits from customer accounts in  
22 California to satisfy NSF fees and other monetary claims it has against  
23 customers.
- 24 (6) Bank of America shall identify, locate and repay each class member from whom it  
25 seized exempt Social Security benefits to pay itself NSF fees the full amount of  
26 those fees, plus interest at the rate of 10% per annum, and make a full report to the  
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Court on its efforts quarterly beginning thirty (30) days following the entry of this judgment.

(7) Bank of America shall identify, locate and repay each class member from whom it seized exempt Social Security benefits to pay itself NSF fees the additional statutory damages of \$1,000.00, plus interest, and make a full report to the Court on its efforts to do so quarterly beginning thirty (30) days following the entry of this judgment.

(8) Pursuant to Civil Code §1781(g), Bank of America is ordered to prepare and give notice of this judgment, in the same manner as the original notice, to each class member who was previously served with notice of this action. Bank of America is further ordered to provide such notice in the same manner to those class members who did not have Bank of America checking or savings accounts at the time of the original notice but now have such. The notice described herein shall be given on or before the date which is 30 days from the date of entry of this judgment. The cost of notice is to be borne by Bank of America.

(9) Enforcement of the provisions of paragraphs 5, 6, 7 and 8 of this judgment is temporarily stayed pursuant to California Code of Civil Procedure §918 for a period not exceeding 10 days beyond the last date on which a notice of appeal may be filed.

(10) The Bank shall preserve all documents, as defined in Evidence Code § 250, that are necessary to enable it to identify, locate and repay plaintiff and class members.

(11) The Court retains jurisdiction to determine the amount of reasonable attorneys fees and costs payable to plaintiffs and class counsel pursuant to Civil Code section 1780(d), Civil Code section 1021.5 or any other statutory or other legal basis, as well as to determine the costs to which plaintiffs are entitled from Bank of America pursuant to Code of Civil Procedure section 1032(b). The Court further retains jurisdiction to make such other orders or rulings as are necessary to implement or



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enforce the terms of this judgment, including the Bank's efforts to identify, locate and pay the amounts owed to class members described in paragraphs 6 and 7, above.

(11) Cross-defendant Paul Miller, and the Cross-defendant class, are entitled to judgment on Bank of America's cross-complaint for declaratory relief.

DATED: *March 4, 2005* *Anne Bouliane*

Hon. Anne Bouliane  
Judge of the Superior Court

