

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DENIS MAYERS, NANCY CICCONE,
and ELBA QUINONES,

Plaintiffs,

CV-03-5837 (CPS/JMA)

-against-

SECOND AMENDED
COMPLAINT

NEW YORK COMMUNITY BANCORP, INC.;
NORTH FORK BANK; FLEET BANK;
MKM ACQUISITIONS, LLC; ARROW
FINANCIAL SERVICES, LLC; BETH ISRAEL
HOSPITAL; the Law Firm of MEL S. HARRIS
AND ASSOCIATES; the HON. JUDITH S. KAYE,
as Chief Judicial Officer of the State of New York;
JONATHAN LIPPMAN, as Chief Administrative
Judge of the Courts of the State of New York;
and DIANA L. TAYLOR, the New York State
Superintendent of Banks,

Defendants.

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PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief that directly challenges the constitutionality of a statute as applied. Three judgment creditors, using a New York Statute, have repeatedly sought to collect debts by restraining (i.e. freezing) the bank accounts of the plaintiffs. The defendant banks, the recipients of the New York State mandated restraining notice on nine occasions, have placed restraints on the accounts of the plaintiffs even though the defendant banks knew or should have known that the accounts exclusively contained

electronically deposited Social Security Disability (SSD) funds that are exempt from collection under 42 U.S.C. § 407(a).

2. Plaintiffs seek:

a) a declaration that defendants' actions in freezing the bank accounts of the plaintiffs violate 42 U.S.C. § 407(a), the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Process Clause of Article 1, § 6 of the New York State Constitution;

b) a declaration that N.Y. Civ. Prac. L. & R. § 5222 (N.Y. State post judgment collection procedures), as applied to an attempt to collect a debt by freezing a bank account that contains, at the time the restraining notice is served, only electronically deposited exempt Social Security funds, violates 42 U.S.C. § 407(a), the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Supremacy Clause of the United States Constitution, and the Due Process Clause of Article 1, § 6 of the New York State Constitution; and

c) an injunction requiring defendants to implement procedures to ensure that a bank account that contains only electronically deposited Social Security funds, at the time a restraining notice is received by a bank, is not restrained.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the plaintiffs' federal claims pursuant to 28 U.S.C. § 1331 as an action raising a federal question; and pursuant to 28 U.S.C. § 1343(3) as an action to redress a deprivation under color of state law of rights secured by the Constitution of the United

States. This Court has supplemental jurisdiction over the state claims pursuant to 28 U.S.C. § 1367(a).

4. Plaintiffs seek declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure and injunctive relief pursuant to 28 U.S.C. § 2202 and Rule 65 of the Federal Rules of Civil Procedure.

5. Venue lies in the Eastern District of New York pursuant to 28 U.S.C. § 1391(b)(2) as the judicial district in which the events occurred that gave rise to the causes of action of plaintiffs Mayers and Ciccone.

PARTIES

6. Plaintiff DENIS MAYERS is 61 years old and resides in Brooklyn, New York.

7. Plaintiff NANCY CICCONE is 70 years old and resides in Lindenhurst, New York.

8. Plaintiff ELBA QUINONES is 58 years old and resides in New York, New York.

9. Defendant NEW YORK COMMUNITY BANCORP, INC. (“NY Community Bank”) is a banking institution licensed to do business in New York State with corporate headquarters at 615 Merrick Avenue, Westbury, NY 11590. On October 31, 2003, it acquired the Roslyn Savings Bank (“Roslyn Bank”). The events related to plaintiff Mayers’ action occurred at the Roslyn bank before it was purchased by the NY Community Bank. Mr. Mayers had the same local branch office for his Roslyn Bank account as he does now for NY Community Bank account. It is located at 1024 Gates Avenue, Brooklyn NY, 11221.

10. Defendant NORTH FORK BANK (“North Fork Bank”) has a branch office at 300 South Wellwood Ave., Lindenhurst NY 11757 where Plaintiff Ciccone banks. North Fork Bank

is a banking institution licensed to do business in New York State. Its corporate headquarters is located a 275 Broadhollow Road, Melville, NY 11747.

11. Defendant FLEET BANK has a branch office at 72 Second Ave., New York, NY 10003 where Plaintiff Quinones banks. Fleet Bank is a banking institution licensed to do business in New York State.

12. Defendant MKM ACQUISITIONS is the judgment creditor to whom plaintiff Mayers owes a debt. It is located at 245 Eighth Avenue, suite 272, New York, NY 10011.

13. Defendant ARROW FINANCIAL SERVICES, LLC (“Arrow Financial”) is the judgment creditor to whom plaintiff Ciccone owes a debt. It is located at 5996 W. Touhy Ave., Niles, IL 60714.

14. Defendant BETH ISRAEL HOSPITAL is the judgment creditor to whom plaintiff Quinones owes a debt. It is located at First Avenue at 16th Street, New York, NY 10003.

15. Defendant law firm MEL S. HARRIS AND ASSOCIATES, acted as attorneys for MKM Acquisitions, Arrow Financial Services, and Beth Israel Hospital. In such capacity, and as an officer of the court, defendant MEL S. HARRIS AND ASSOCIATES, served restraining notices upon the defendant banks requiring them to freeze the bank accounts of the plaintiffs. Mel S. Harris and Associates maintains its office at 116 Johns Street, Suite 1510, New York, NY 10038.

16. Defendant Hon. JUDITH S. KAYE is the Chief Judge of the State of New York and maintains her office at 230 Park Avenue, Suite 826, New York City, New York 10169-0007, as well as the New York State Court of Appeals, 20 Eagle Street Albany, New York 12207. As chief judge, she ensures that the laws of the State, including contempt orders, are enforced by the

judges below her.

17. Defendant JONATHAN LIPPMAN is the Chief Administrative Judge of the Courts of the State of New York, and maintains his office at 25 Beaver Street, New York, NY 10004. Judge Lippman is responsible, on behalf of the Chief Judge of the State of New York, for supervising the administration and operation of the trial courts, and for directing the administrative office for the courts - the Office of Court Administration.

18. Defendant DIANA L. TAYLOR is the New York State Superintendent of Banks. As such, she supervises and regulates banks to insure their safe and sound conduct and to protect the public interest including the interests of depositors. Her office is located at the New York State Banking Department, One State Street, New York, NY 10004-1417.

STATUTORY AND REGULATORY FRAMEWORK

SOCIAL SECURITY PAYMENTS

19. The Social Security Administration ("SSA") administers the Federal Old-Age, Survivors, and Disability Insurance Benefits program (42 U.S.C. §§ 401 et seq.). This program provides cash benefits ("Social Security payments") to persons in three categories: retired workers("aged"); disabled workers ("Social Security Disability or SSD"); and dependants of disabled or deceased workers ("survivors.")

20. Congress enacted 42 U.S.C. § 407(a) to ensure that Social Security payments, including Social Security Disability (SSD) benefits, are available to meet subsistence needs. Section 407(a) provides that "none of the moneys paid or payable . . . under this title [42 U.S.C.

§§ 401 et seq.] shall be subject to execution, levy, attachment, garnishment, or other legal process"

21. Since 1996, Congress has required federal agencies, including the Social Security Administration, to convert their payment method from paper check to electronic transfer. 31 U.S.C. § 3332.

22. Since 1998, the Social Security Administration has required Social Security recipients to receive payments electronically. 31 C.F.R. Pt. 208, 63 Fed. Reg. 186 (September 25, 1998). However, Social Security recipients can opt out of electronic payment and receive paper checks by mail if electronic payment causes a "hardship." 31 C.F.R. Pt. 208.4.

NEW YORK STATE POST JUDGMENT COLLECTION PROCEDURES

23. Article 52 of the N.Y. Civil Practices Law and Rules ("N.Y. CPLR") sets out the procedures creditors must use in attempting to collect money judgments.

24. One way to enforce the judgment is by "freezing" twice the amount of the judgment in the bank account of the debtor. N.Y. CPLR § 5222.

25. N.Y. CPLR § 5222(a) gives the creditor's attorney the authority, as an "officer of the court," to serve a restraining notice on any entity holding the debtor's funds. The only other persons authorized to issue a restraining notice are governmental entities: the clerk of the court, and the support collection unit of the N.Y. Department of Social Services.

26. Service of the notice "freezes" twice the amount of the judgment in the debtor's account. The notice of restraint forbids the recipient of the notice (the "garnishee") from selling, assigning, transferring, or interfering with the restrained property of the judgment debtor, except

upon direction of a sheriff or marshal or the Court. N.Y. CPLR § 5222(b). During the time a restraint is in effect, no checks may be cashed or cleared and no funds can be withdrawn from the frozen moneys of the account. The account, however, remains open for deposits.

27. The effect of the restraining notice is to freeze the debtor's funds in an amount up to twice the amount of the judgment until either the debtor agrees to pay or the creditor engages a marshal or sheriff to seize the debtor's funds. N.Y. CPLR § 5222(b).

28. Failure to freeze or otherwise prevent transfer of the funds contained in a bank account after receipt of a restraining notice is punishable by contempt of court. N.Y. CPLR §§ 5222(a) and 5251.

29. The creditor must mail or personally delivered a copy of the restraining notice and a "notice to judgment debtor" to the judgment debtor within four days of service of the restraining notice on the garnishee. N.Y. CPLR § 5222(d).

30. The "notice to judgment debtor" advises the debtor that his or her funds have been restrained and that certain property, such as Social Security, is exempt from collection efforts. N.Y. CPLR § 5222(d). The contents of the required notice are described in N.Y. CPLR § 5222(e).

31. The "notice to judgment debtor" also explains that if the debtor thinks his or her account contains any money that is exempt, the debtor may contact the attorney who issued the restraining notice, or Legal Aid. N.Y. CPLR § 5222(e). The notice further cites N.Y. CPLR §§ 5239 and 5240 2(e) as the statutory "procedure for determining a claim to an exemption."

32. The judgment creditor who restrains an account in good faith is not liable to the judgment debtor for damages, even when the account contains only statutorily exempt money.

FACTS CONCERNING ELECTRONIC PAYMENT AND SOCIAL SECURITY RECIPIENTS

33. The federal government requires electronic payment of Social Security benefits because it is inexpensive, costing the federal government only four cents per transaction as compared to 45 cents per paper check. Social Security Administration, Direct Deposit: Frequently Asked Questions (available at www.ssa.gov/deposit/DDFAQ898.htm).

34. The Social Security Administration also requires it because it decreases crime and fraud, and ensures timely receipt of crucial benefits.

35. Over 80% of the nation's 45 million Social Security recipients receive their payments by electronic deposit. Social Security Administration, Trends In Direct Deposit Participation (December 2002) (available at www.ssa.gov/deposit/trendenv.shtml).

36. About 9 million Social Security recipients live in poverty or on the brink of poverty. Social Security Administration, Fast Facts & Figures about Social Security, pp. 8, 14, 30 (June 2002).

37. As a result, a significant portion of Social Security recipients have no money in their bank accounts other than their electronically deposited Social Security payments upon which they are dependent.

38. Electronic deposit allows a bank to readily identify an account as containing statutorily exempt Social Security payments at a cost to the bank that is negligible or non-existent. Each electronic Social Security payment sent to a bank has the word "SOC SEC" for Social Security imbedded in its electronic message. A Guide to Federal Government ACH Payments and Collections (known as "The Greenbook"), ch. 2, pt. D, p. 9 (U.S. Treasury Dep't,

2000).

39. New York State banks, including defendants North Fork Bank and Fleet routinely freeze accounts that the banks know, due to electronic deposit, exclusively contain Social Security payments that are exempt from collection.

40. Defendant New York Community Bank has a written policy that employees not restrain bank accounts in response to restraining notices where the account contains only electronically deposited SSD or SSI payments in accordance with 42 U.S.C. Sect. 407(a). However, the bank it acquired on October 31, 2003, Roslyn Bank, where plaintiff Mayers banked at the time, did not have such a policy. Instead, Roslyn Bank routinely froze accounts that the bank knew, due to electronic deposit, exclusively contained Social Security payments.

FACTS CONCERNING PLAINTIFF MAYERS

41. Plaintiff Denis Mayers is a Social Security recipient who lives in poverty. He is unable to work due to a disability. He receives \$689.00 each month in Social Security Disability ("SSD") payments. Other than a \$4.50 per diem stipend he receives for volunteer work at a social service agency and \$141 in monthly food stamps, he has no other income or savings.

42. At the time the events occurred that gave rise to this action, Mr. Mayers banked at the Roslyn Bank. Roslyn Bank merged with the New York Community Bank on October 31, 2003.

43. SSA electronically deposited his Social Security check into his bank account on or about the third of each month. Each SSD deposit was clearly marked on Mr. Mayers' Roslyn bank statements as "US Treasury-303 Soc Sec." From this account at Roslyn Bank, Mr. Mayers

withdrew cash and wrote checks to pay for rent, phone, gas, electricity, and other bills.

44. Generally, the only deposit activity in his account at the Roslyn Bank was his Social Security payment and the few cents of interest it generated each month (e.g. \$0.04 for September 2003). Indeed, during the six months preceding the events that gave rise to this action (May through October 2003), Mr. Mayers made only one deposit other than Social Security (a \$30.00 rebate check deposited in June 2003.)

45. Mr. Mayers incurred a credit card debt with a bank in the late 1980's or early 1990's when he worked as a security guard. After his disability stopped him from working, he was unable to keep up with his credit card payments. Sometime thereafter, this debt was transferred to the Fleet Bank, and then assigned to defendant MKM Acquisitions.

46. In 2000, defendant MKM Acquisitions filed suit in New York State Civil Court in Kings County seeking judgement on the Fleet Bank credit card debt. Mr. Mayers appeared before the judge and explained that he was disabled and could not pay the debt. He also stated that if he ever returned to work, he would repay the debt. On May 24, 2001, judgement was entered in favor of defendant MKM Acquisitions in the amount of \$1594.15. At that time Mr. Mayers was banking at the Chase Bank ("Chase"), not the Roslyn Bank.

47. In 2001 or 2002, MKM Acquisitions, through an attorney, made its first restraint of an account of Mr. Mayers containing only electronically deposited, exempt Social Security benefits. At the time, Mr. Mayers' account was at Chase. It is unknown whether Mel S. Harris and Associates was the attorney that issued the restraint. The restraint on the Chase account was later lifted after a South Brooklyn Legal Services ("SBLs") attorney, on behalf of Mr. Mayers, presented to the attorney representing defendant MKM Acquisitions, bank statements showing

the account contained only electronically deposited Social Security payments.

48. Four checks that Mr. Mayers had written shortly before the restraint was levied at Chase bounced as a result of the restraint. After Mr. Mayers' account was unfrozen, Chase debited Mr. Mayers' account by \$100.00 for a fee related either to the bounced checks or for processing the restraining notice. Mr. Mayers complained to the manager of his local Chase branch, but was told there was nothing the manager could do regarding the fee.

49. Angered by this fee that reduced his monthly income by almost a sixth, Mr. Mayers closed his account at Chase and opened a checking account with Roslyn Bank.

50. On or about September 19, 2002, defendant MKM Acquisitions made a second attempt to collect the underlying judgement. A law office other than the defendant in this action issued, on behalf of MKM Acquisitions, a restraint on Mr. Mayers' Roslyn account, and Roslyn Bank froze the account. The checks that Mr. Mayers wrote that month had cleared prior to this freeze, so the freeze did not generate any bounced checks. Nevertheless, Mr. Mayers could not access his account, and thus had to borrow money to pay his rent. Mr. Mayers sought legal help at SBLS because he was afraid that his next Social Security check would be unreachable once deposited into his frozen account. On Monday, September 30, 2002, SBLS established to the lawyer of defendant MKM Acquisitions that the account contained only exempt social security payments that were electronically deposited, and defendant MKM Acquisitions faxed a letter that same day releasing the restraint to Roslyn Bank. Nevertheless, it was not until Thursday, October 3, 2002, that Roslyn Bank lifted the restraint.

51. On or about October 16, 2003, defendant MKM Acquisitions made its third attempt to collect the underlying judgement. Defendant Mel S. Harris and Associates, as legal

representative of Defendant MKM Acquisitions and as an “officer of the court” pursuant to N.Y. CPLR § 5222(a), served a restraining notice on Roslyn Bank. The notice bore the caption of the case in which a judgment had been entered against Mr. Mayers in favor of MKM Acquisitions, and commanded Roslyn Bank to place a freeze on Mr. Mayer’s account. The notice cited Section § 5222 of the New York Civil Practice Law and Rules as its authority for this action. The notice ended with the warning to Roslyn Bank: “TAKE FURTHER NOTICE that disobedience of Restraining Notice is punishable as a contempt of court.”

52. Roslyn Bank’s compliance with the restraining notice was also based on the threat of sanctions by Diana L. Taylor, the New York State Superintendent of Banks.

53. At the time the third restraining notice was served on Roslyn Bank, Mr. Mayer’s account contained \$415.30, all of which was the balance of Mr. Mayers’ Social Security check that was electronically deposited on October 3, 2003.

54. Defendant Mel S. Harris and Associates failed to send Mr. Mayers a copy of the restraining notice it served on Roslyn Bank as required by N.Y. CPLR § 5222(d). Nor did defendant Mel S. Harris and Associates send to Mr. Mayers a "notice to judgment debtor" that advised Mr. Mayers that certain property, such as Social Security, is exempt from collection as also is required by N.Y. CPLR § 5222(d) and (e).

55. Mr. Mayers learned of the bank freeze through an October 23, 2003 letter from Roslyn Bank.

56. Because of the freeze, Mr. Mayers’ rent check for October 2003 bounced, generating a \$20.00 banking fee for Mr. Mayers as well as a bounced check fee for Mr. Mayers’ landlady.

57. Mr. Mayers sought help at SBLS on Wednesday, October 29, 2003.

58. On November 3, 2003, Mr. Mayers' next Social Security check was due for electronic deposit. Unbeknownst to Mr. Mayers, Roslyn Bank returned this electronically transferred check to SSA that same day due to the restraint on his account. There was no legal mandate requiring Roslyn Bank to return this electronic payment.

59. On Monday, November 3, 2003, SBLS contacted defendant Mel S. Harris and Associates, and advised them orally and by letter with a supporting bank statement that the account contained only exempt SSD payments. The next morning, November 4, 2003, Defendant Mel S. Harris and Associates faxed a letter lifting the restraint to the legal department at Roslyn Bank's corporate headquarters in Jericho, New York.

60. Despite the November 4th instruction to lift the restraint on the account, Roslyn Bank did not release the account until Thursday, November 13, 2003. This was nine days after the release was originally faxed to it by defendants Mel S. Harris and Associates and MKM Acquisitions, and almost a month after the restraint was imposed.

61. After the restraint was released on November 13, 2003, Mr. Mayers learned that his November 3, 2003 electronic deposit of Social Security had been returned to SSA by Roslyn Bank due to the restraint. This required Mr. Mayers to call SSA twice and Roslyn Bank once to determine the necessary steps to get his payment reissued. On or about November 20, 2003, Mr. Mayers received his November 3rd payment.

62. Not having access to his Social Security Disability benefits caused Mr. Mayers hardship and great inconvenience. He had to borrow \$100.00 from a 70 year-old friend, who herself is on a fixed income of Social Security. His rent check for October bounced, generating a

\$20.00 banking fee that defendant Roslyn collected from his account. His landlady was assessed a bounced check fee. He was late in paying his rent for October and November. He had to forgo his plan to celebrate his birthday in October by buying himself a new coat (rather than a used coat from the Salvation Army, where he buys most of his clothes.)

63. On October 31, 2003, Roslyn Bank merged with Defendant the New York Community Bankcorp Inc. (NY Community Bank). The NY Community Bank has a written policy that its legal department is not to restrain accounts containing only electronically deposited Social Security payments in accordance with 42 U.S.C. Sect. 407(a).

64. Mr. Mayers continues to receive his SSD checks by electronic deposit at the NY Community Bank at 1024 Gates Avenue. Despite the above policy, Mr. Mayers is fearful that his account will be unnecessarily restrained for a fourth time even though it contains readily identifiable, electronically deposited Social Security payments. He fears that the NY Community Bank will change its policy if creditors or Diana L. Taylor, in her capacity as the New York State Superintendent of Banks, complain, or bring contempt or other proceedings against it for not complying with restraining notices.

65. If a fourth restraint occurs, Mr. Mayers plans to switch to paper check, which must be cashed for a fee at a cash checking establishment.

66. Electronic deposit into a bank account is cheaper than a cash checking establishment.

67. A check cashing store charges one to two percent (1-2%) of the face value of a check in order to cash it.

68. The NY Community Bank, like the Roslyn Bank, charges no fee regardless of Mr.

Mayers' account balance and provides unlimited free checking.

69. Obtaining and paying for money orders would be expensive and inconvenient for Mr. Mayers, who writes about three checks a month.

FACTS CONCERNING PLAINTIFF CICCONE

70. Plaintiff Nancy Ciccone is a 70 year old widow. She lives with her 45 year old son who is disabled by schizophrenia. Mrs. Ciccone receives a \$954 monthly widow's check from Social Security. Because her son's mental illness is so severe, Mrs. Ciccone also receives a \$715 monthly Social Security disability check as the representative payee of her son.

71. Mrs. Ciccone receives both her and her son's Social Security checks by electronic deposit at North Fork Bank. Each Social Security deposit is clearly marked on Mrs. Ciccone's bank statements as "US Treasury-303."

72. From her account at North Fork Bank, Mrs. Ciccone withdraws cash and writes checks to pay for rent, phone, gas, electricity, medical insurance and a number of credit card bills.

73. Generally, the only deposits into Mrs. Ciccone's account at North Fork Bank is her and her son's monthly Social Security payments. This is because neither her son nor she have any other income.

74. In the late 1990's, while working as a babysitter and while her husband was still alive, Mrs. Ciccone obtained a credit card with Caldor's Department Store under her social security number and her maiden name, Nancy F. Catuara. Sometime thereafter, Mrs. Ciccone established a debt that she was unable to repay.

75. Defendant Arrow Financial Services, LLC (Arrow Financial), assignee of GCC Group, acquired the debt and in 1999, filed suit to collect the debt in the District Court of the

County Of Suffolk, State of New York, Fourth District, Hauppauge Part. On January 19, 2000, a \$2,006.63 judgment was entered in favor of defendant Arrow Financial.

76. In July 2002 and again in April 2003, defendant Arrow Financial, through an attorney other than defendant Mel S. Harris and Associates, twice restrained Mrs. Ciccone's account at North Fork Bank. At the time of the two restraints in 2002 and 2003, Mrs. Ciccone's account contained only electronically deposited Social Security payments. Mrs. Ciccone succeeded on her own in getting the two restraints lifted in about ten to 14 days by calling and mailing documents (probably her bank statements and Social Security award letters, although Mrs. Ciccone cannot recall exactly) to the attorney representing Defendant Arrow Financial.

77. The restraints on Mrs. Ciccone's account in 2002 and 2003 caused great financial hardship. She bounced a number of checks, each of which generated a banking fee of about \$30.00. On top of that, she the bounced checks written to credit cards also triggered late-payment penalties of \$29.00 per card. Further, each restraint triggered a \$100 banking fee. In short, the two restraints in 2002 and 2003 drained several hundred dollars from her monthly income.

78. In response to the second restraint in April 2003, Mrs. Ciccone switched her check from electronic deposit to paper check that was mailed to her home. However, she soon switched back to electronic payment because receiving a paper check proved impractical. She needed a bank account because each month she had to write about eight checks. In addition, she lacked a driver's license or other form of identity that enabled her to cash paper checks. (The few paper checks she did get, she cashed at North Fork Bank, whose employees knew her.)

79. On or about May 19, 2004, Mrs. Ciccone asked North Fork Bank to change the title of her account so that it would be in trust for her disabled son in the event she died. To do this,

North Fork Bank closed her existing account and opened a new account. North Fork Bank also transferred the balance of the old account, \$7.71 (all of which were remnants of her and her son's Social Security payments), into the new account.

80. Thereafter, Mrs. Ciccone called SSA to report the account change so that she could receive electronic payment. The SSA worker advised her that it was too late in the month for the June 3rd Social Security checks to be delivered electronically to her new account and that it would be done by paper for that month only. Thereafter, she would get her and her son's checks electronically.

81. Unbeknownst to Mrs. Ciccone, on May 28, 2004, defendant Arrow Financial restrained for a third time her accounts (both new and old) at North Fork Bank. At the time of the restraint, the new account contained only \$7.71 remaining from the earlier, electronically deposited Social Security payments, while the old account had \$0.00 balance.

82. More specifically, Defendant Mel S. Harris and Associates, as legal representative of Defendant Arrow Financial and as an "officer of the court" pursuant to N.Y. CPLR § 5222(a), served a restraining notice on North Fork Bank on or shortly before May 28, 2004. The notice bore the caption of the case in which a judgment had been entered against Mrs. Ciccone in favor of defendant Arrow Financial and commanded North Fork Bank to place a freeze on Mrs. Ciccone's account. The notice cited Section § 5222 of the New York Civil Practice Law and Rules as its authority for this action. The notice ended with the warning to North Fork Bank: "TAKE FURTHER NOTICE that disobedience of Restraining Notice is punishable as a contempt of court."

83. North Fork Bank's compliance with the restraining notice was also based on the

threat of sanctions by Diana L. Taylor, the New York State Superintendent of Banks.

84. North Fork Bank knew or should have known that Mrs. Ciccone's new account contained only electronically deposited Social Security payments exempt from attachment.

85. Defendant Mel S. Harris and Associates failed to send Mrs. Ciccone a copy of the restraining notice it served on North Fork Bank as required by N.Y. CPLR § 5222(d). Nor did defendant Mel S. Harris and Associates send to Mrs. Ciccone a "notice to judgment debtor" that advised Mrs. Ciccone that certain property, such as Social Security, is exempt from collection as also is required by N.Y. CPLR § 5222(d) and (e).

86. On the afternoon of Friday, May 28, 2004, Mrs. Ciccone called North Fork Bank and learned that her account had been restrained for a third time.

87. In response to the freeze, she called SSA that afternoon and obtained a phone number for her local Legal Aid office. Because it was late on Friday, Mrs. Ciccone did not reach any legal aid office that day.

88. Over the three day Memorial Day weekend, Mrs. Ciccone was unable to sleep due to her inability to access her account. She worried about credit card late-payment fees she was likely to incur. Two of her credit cards had to receive minimum payments by June 5, 2004, otherwise she would be charged \$29.00 a piece in late fees. Usually, Ms. Ciccone was able to make such payments on time (despite having only a few dollars in her account at the end of the month) by writing and mailing checks on the first of the month. By the time those checks were received by the credit card companies, her anticipated Social Security payments would have arrived. The restraint completely thwarted this practice. She could not deposit her paper check into the frozen account as it would be restrained, and thus could not write and mail credit card checks in advance.

Moreover, while she could cash the paper check the day it was received (June 3, 2004) and then buy and mail a money order, it was more than likely that the June 5 deadline to avoid the late fee would pass by the time the credit card company received the payment.

89. Mrs. Ciccone also worried that she would be late in paying Medicaid its \$37.00 monthly “spend down” bill that kept her schizophrenic son eligible for Medicaid. This had happened once before and the consequences had been severe. Without Medicaid, her son went without his psychiatric medication for about ten days, during which time he became belligerent and irrational.

90. On Tuesday, June 1, 2004, Mrs. Ciccone made a number of calls to her local legal aid offices and eventually obtained help at South Brooklyn Legal Services (SBLS)

91. On June 1, 2004, a lawyer at SBLS made a three party call with Mrs. Ciccone and a representative at North Fork Bank. The representative, who personally knew Mrs. Ciccone, looked on her computer and confirmed over the phone that the only money in the restrained account was electronically deposited Social Security payments. The North Fork representative then faxed an account transaction history to SBLS so it could establish that exemption to defendant Mel S. Harris and Associates.

92. On Wednesday, June 2, 2004, SBLS requested via phone and fax that defendant Mel. S. Harris lift the restraint. Attached to the faxed letter was the North Fork transaction history showing the account contained only electronically deposited Social Security payments. Mel S. Harris and Associates released the restraint that day.

93. It was not until Monday, June 8, 2004 that North Fork Bank actually lifted the restraint.

94. Because of the restraint, Mrs. Ciccone was late in paying three credit cards for which she incurred \$ 87.00 in late fees. (Mrs. Ciccone had purchased and mailed money orders to the credit card companies on June 3, 2004, but the payments were nevertheless late.) Ms. Ciccone later persuaded the credit card companies to waive these fees in light of her long history of timely payments.

95. Defendant North Fork also charged her a \$100.00 fee for restraining her account, which it plans to collect from future Social Security deposits into her account.

96. Mrs. Ciccone plans to continue to receive her and her son's social security payments by electronic transfer at North Fork Bank. This is because she needs a bank account with which to write checks, lacks appropriate ID with which to cash paper checks, and, even if she had such identification, cannot afford the \$10.00 taxi ride required for her to get to the local check cashing business.

97. Mrs. Ciccone is fearful that another restraint will occur, generating more bounced checks fees and late-payment fees from credit cards.

98. She needs every cent she receives from Social Security for basic necessities such as food, rent, clothing, and does not have any money with which to pay the judgement.

99. She is looking for a lawyer to help her file bankruptcy in hopes of discharging the judgment so that she can stop worrying about a future freeze.

FACTS CONCERNING PLAINTIFF ELBA QUINONES

100. Plaintiff Elba Quinones is 58 years old and disabled. She receives \$241 a month in Social Security Disability (SSD) benefits. Because her Social Security payment is so small and

she has no assets or other income, she also receives \$430 a month in Supplemental Security Income (SSI).

101. Ms. Quinones used to receive both her checks electronically at defendant Fleet Bank. Each Social Security deposit was clearly marked on Ms. Quinones's bank statements as "US Treasury SOC SEC" and as "US Treasury SUPP SEC." Social Security delivered the SSI and SSD payment on the first and third of each month, unless that day fell on a weekend or holiday, where upon it was the previous work day.

102. From Ms. Quinones's account at Defendant Fleet Bank, Ms. Quinones withdrew cash and wrote checks to pay for rent, phone, gas, electricity, and credit card bills.

103. Generally, the only deposit activity in Ms. Quinones's account at Defendant Fleet Bank was her SSI and SSD payments because she had no other income.

104. In May 1995, Ms. Quinones was twice treated at Defendant Beth Israel Hospital, for which she was billed \$1445.00. Thereafter, in 1997, she was sued in Civil Court, New York County, after which a \$1,797.10 Judgment was entered in favor of defendant Beth Israel Hospital.

105. Sometime thereafter, defendant Beth Israel Hospital restrained Ms. Quinones's account for the first time at a Norwest Bank, which was later acquired by defendant Fleet Bank. The Norwest account at the time contained only electronically deposited Social Security and SSI payments. Ms. Quinones went in person to the billing department at Beth Israel, and was able to get them to lift the restraint on the account. She cannot recall exactly how long this took, but she thinks it was about five days.

106. During or about the year 2002, defendant Beth Israel Hospital restrained Ms. Quinones' same account (now at Fleet Bank) for a second time. At the time, the account also

contained only electronically deposited SSI and SSD payments. Ms. Quinones was able to get the account released by going directly to Beth Israel's billing department. Ms. Quinones thinks, but is not certain, it took five days for the restraint to be lifted.

107. Defendant Beth Israel Hospital's third restraint against Ms. Quinones' account occurred on February 26, 2004, at which time the account contained only \$2.18, all of which was the balance of Ms. Quinones' February SSD check that was electronically deposited. Defendant Mel S. Harris and Associates, as legal representative of Defendant Beth Israel Hospital and as an "officer of the court" pursuant to N.Y. CPLR § 5222(a), served a restraining notice dated January 28, 2004 on defendant Fleet Bank. The notice bore the caption of the 1997 case in which a judgment had been entered against Ms. Quinones in favor of defendant Beth Israel Hospital and commanded defendant Fleet Bank to place a freeze on Ms. Quinones's account. The notice cited Section § 5222 of the New York Civil Practice Law and Rules as its authority for this action. The notice ended with the warning to Defendant Fleet Bank: "TAKE FURTHER NOTICE that disobedience of Restraining Notice is punishable as a contempt of court."

108. Defendant Fleet Bank's compliance with the restraining notice was also based on the threat of sanctions by Diana L. Taylor, the New York State Superintendent of Banks.

109. Defendant Fleet Bank knew or should have known that Ms. Quinones's new account contained only electronically deposited SSD payments exempt from attachment.

110. Ms. Quinones learned of the restraint on March 1, 2004 when she went to Fleet and was unable to withdraw any of her electronically deposited SSI check that was deposited that day. She also received a letter from Fleet later on March 1, 2004 regarding the restraint. It included a copy of the restraining notice with Defendant Mel S. Harris and Associates' name and phone

number on it.

111. Defendant Mel S. Harris and Associates failed to send Ms. Quinones a copy of the restraining notice it served on Defendant Fleet Bank as required by N.Y. CPLR § 5222(d). Nor did defendant Mel S. Harris and Associates send to Ms. Quinones a "notice to judgment debtor" that advised Ms. Quinones that certain property, such as Social Security, is exempt from collection as also is required by N.Y. CPLR § 5222(d) and (e).

112. Over a three day period between March 1 and March 3, 2004, Ms. Quinones called Defendant Mel S. Harris and Associates' office about nine times. Many times, Ms. Quinones told the receptionist and the voice mail recipient to whom she was transferred that her frozen account contained only her SSI check. No one from Defendant Mel S. Harris and Associates ever called her back.

113. In addition to calling Mel S. Harris and Associates, Ms. Quinones sought legal help. She started by calling 311, (New York City's help line) which in turn led to a series of five referrals to various free legal services offices, none of whom could help her.

114. Realizing that her \$241 Social Security Disability check due on March 3, 2004 was going to be electronically sent into her frozen account, Ms. Quinones called the Social Security Administration on March 1, 2004 and asked it to switch her payment method from electronic to paper. SSA said it was too late to redirect the March 3, 2004 electronic payment, but that thereafter Ms. Quinones would receive her checks by mail.

115. Finding Mel S. Harris and Associates unresponsive, Ms. Quinones called and left two messages with the billing director at defendant Beth Israel Hospital on Tuesday and Wednesday, March 2 and 3, 2004. The Director never called her back.

116. On Wednesday, March 3, 2004, Ms. Quinones called South Brooklyn Legal Services and was able to reach a lawyer who set up an appointment the next day. Upon review of Fleet banks statements showing only electronic deposits of SSI and SSD, Mel S. Harris and Associates lifted the restraint on March 4, 2004. It was not until Monday, March 8, 2004 that Fleet actually lifted the freeze.

117. During the eight days in March 2004 when Ms. Quinones was unable to withdraw her March SSI and SSD payments totaling \$607, she had to buy food on credit at the local bodega. She was late in making the minimal payments on three or four credit, most of whom charged her a \$29.99 late-payment fee. Ms. Quinones was also late in paying her rent causing a \$10.00 late-payment penalty.

118. Ms. Quinones continues to rely on paper checks rather than electronic deposits, although she continues to have an account open at Fleet. She would rather bank electronically at Fleet because it is far cheaper and more convenient than using a check cashing business. The Check Cashing store she uses charges her about \$1.00 for each money order she purchases, and about \$3.00 to cash her two SSI and SSD checks. Ms. Quinones is unwilling to receive electronic payments because she is afraid of the ensuing financial and emotional hardship a fourth restraint would cause. If the law were changes so that Fleet would not restrain her account if it only contained electronically deposited SSI or SSD, she would switch back to electronic deposit.

CLAIMS FOR RELIEF

First Claim

119. The actions of Defendants MKM Acquisitions, Arrow Financial, Beth Israel, and

attorney Mel S. Harris and Associates, pursuant to the authority vested in them by N.Y. CPLR § 5222 and the Courts of the State of New York, of issuing restraining notices ordering the freezing of bank accounts containing only exempt, electronically deposited SSD payments of the plaintiffs, and of thereby invoking the contempt powers of the courts, violates 42 U.S.C. § 407(a), the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Process Clause of Article 1, § 6 of the New York State Constitution;

Second Claim

120. The actions of Defendants NY Community Bank (via Roslyn Bank), North Fork Bank, and Fleet Bank of freezing the bank accounts of the plaintiffs pursuant to N.Y. CPLR 5222, when defendant banks knew or should have known the accounts contained only SSD funds that were electronically deposited, violates 42 U.S.C. § 407(a), the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Process Clause of Article 1, § 6 of the New York State Constitution;

Third Claim

121. Defendants Kaye, Lippman and Taylor violate plaintiffs' rights under 42 U.S.C. § 407(a), the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Supremacy Clause of the United States Constitution, and the Due Process Clause of Article 1, § 6 of the New York State Constitution because they require banks, pursuant to N.Y. CPLR § 5222 and the resulting contempt power of the courts, to restrain bank accounts that contain only electronically deposited Social Security funds that are exempt from attachment.

RELIEF REQUESTED

WHEREFORE, plaintiff prays that the Court:

1. Assume jurisdiction of this action;
2. Declare that the action of judgment creditor defendants MKM Acquisitions, Arrow Financial Services, Beth Israel Hospital, and their attorney, Mel S. Harris and Associates, pursuant to the authority vested in them by N.Y. CPLR § 5222 and the Courts of the State of New York, of issuing a restraining notice that mandates the freezing of the plaintiffs' bank accounts containing only exempt SSD payments that were electronically deposited, and of thereby invoking the contempt powers of the courts, violates 42 U.S.C. § 407(a), the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Process Clause of Article 1, § 6 of the New York State Constitution;
3. Declare that the actions of NY Community Bank, (via Roslyn Bank), North Fork Bank and Fleet Bank of freezing the bank accounts of the plaintiffs when their accounts contain only exempt SSD payments that were electronically deposited violates of 42 U.S.C. § 407(a), the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Process Clause of Article 1, § 6 of the New York State Constitution;
4. Declare that Defendants Kaye, Lippman and Taylor violate plaintiffs' rights under 42 U.S.C. § 407(a), the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Supremacy Clause of the United States Constitution, and the Due Process Clause under Article 1, § 6 of the New York State Constitution, because they require banks, pursuant to N.Y. CPLR § 5222, to restrain bank accounts that contain only electronically deposited Social Security funds that are exempt from attachment;

5. Declare that N.Y. CPLR § 5222 is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Supremacy Clause of the United States Constitution, and the Due Process Clause under Article 1, § 6 of the New York State Constitution, so far as it requires the restraint of bank accounts that contain only electronically deposited Social Security funds that are exempt from attachment;

5. Enjoin defendants to develop procedures to ensure that accounts that contain only electronically deposited exempt funds will not be frozen in the future in response to requests from debt collectors;

5. Award costs and reasonable attorneys' fees for time expended by New York Legal Assistance Group under 42 U.S.C. § 1988.

6. Award such other and further relief that seems just and proper.

Dated: August 3, 2004

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