

1 issued its remittitur to the court of appeal. Doc #30, Exh C.

2 On August 21, 2009, the court ordered plaintiff to show
3 cause why this action should not be dismissed in light of the fact
4 that his complaint challenges the same banking practices that the
5 supreme court, in Miller, found to be legal. Doc #31. In
6 response, plaintiff argues that "[t]he instant case is factually
7 distinguishable [from Miller] because in Miller, the bank's
8 overdraft fees were legitimate, while the allegations in this
9 complaint are based solely on bank error, and repeated negligent
10 mishandling of plaintiff's account thereafter by numerous bank
11 personnel." Doc #33.

12 In reply, defendant contends that despite the fact that
13 plaintiff did not oppose Bank of America's motion to stay this
14 action pending the resolution of Miller (doc #9) or Judge Claudia
15 Wilken's referral of this case for a determination of whether it
16 should be related to Wheeler v Bank of America, C-08-3230 VRW, (a
17 case that challenges the same banking practices as Miller) (doc
18 #18), plaintiff now, for the first time, claims that this case does
19 not involve the bank practices considered in Miller. Doc #35.
20 Defendant argues that dismissal is appropriate because it was not
21 until after the supreme court issued its opinion in Miller that
22 plaintiff "disclaimed that his complaint involved a challenge to
23 those banking practices." Id at 3.

24 Plaintiff, in arguing that his case is distinguishable
25 from Miller because the fees were charged to him in error, fails to
26 address the court's concern that he was not injured by the bank
27 charging him fees, but by the bank dipping into his public benefit
28 funds to satisfy the fees. The practice of applying public benefit

1 funds to account debits is allowed under Miller. 46 Cal 4th at
2 643-44. If plaintiff wishes to pursue a claim against Bank of
3 America for deceptive business practices or fraudulently charging
4 him an overage fee, he may do so. But that is not the claim he is
5 making here. Instead, plaintiff alleges that he was harmed by
6 defendant taking his public fund deposits and applying them towards
7 his account debits - precisely the activity Miller addressed.

8 Because plaintiff's claims address business practices
9 deemed legal by the supreme court in Miller, this action is
10 DISMISSED. To the extent plaintiff wishes to pursue claims against
11 Bank of America that do not arise out of or are related to the
12 banking practices at issue in Miller, he may file a new complaint
13 to address those claims.

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15 IT IS SO ORDERED.

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19 VAUGHN R WALKER
20 United States District Chief Judge
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