

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr, Circuit Court Judge

Case No. 2009-CP-10-2433

RECEIVED

MAY 13 2013

SC Court of Appeals

ORIGINAL

Floyd E. Jernigan..... Respondent,

v.

Suzanne Boone Katz and Bank of America, N.A..... Defendants,

Of Whom Suzanne Boone Katz is..... Respondent,

And Bank of America, N.A. is..... Appellant.

RECORD ON APPEAL
VOLUME I OF III

Bryson M. Geer
Merritt G. Abney
NELSON MULLINS RILEY &
SCARBOROUGH, LLP
151 Meeting Street/6th Floor
Charleston, SC 29401
(843) 853-5200
*Attorneys for Appellant, Bank of America,
N.A.*

Geoffrey H. Waggoner, Esq.
WAGGONER LAW FIRM
PO Box 865
Mt. Pleasant, SC 29465

Brooks R. Fudenberg, Esq.
LAW OFFICE OF BROOKS R.
FUDENBERG
1004 Anna Knapp Blvd., Second Floor
Mt. Pleasant, SC 29464
Attorneys for Respondent Jernigan

Aaron E. Edwards, Esq.
Lawrence E. Richter, Jr., Esq.
THE RICHTER LAW FIRM
622 Johnnie Dodds Boulevard
Mt. Pleasant, SC 29464
Attorneys for Respondent Katz

INDEX

Official Record Page Number at Bottom Center of Page

VOLUME I

ORDERS AND JUDGMENTS

1. Order of Judgment entered December 12, 2011 (Katz).....1
2. Order of Judgment entered December 12, 2011 (Jernigan).....8
3. Form 4 Order denying Motion to Alter or Amend Judgment entered
February 21, 2012 14
4. Order Denying Defendant Bank of America's Motion to Alter or Amend
Judgment entered March 22, 2012 (Katz)..... 15
5. Order Denying Defendant Bank of America's Motion to Alter or Amend
Judgment entered March 22, 2012 (Jernigan).....24

PLEADINGS

6. Complaint dated April 17, 2009.....32
7. Answer, Counterclaim, and Crossclaim of Defendant Suzanne Boone Katz
dated June 5, 2009.....39
8. Amended Answer of Defendant Bank of America, N.A. to the Complaint
dated December 21, 2009 48
9. Amended Answer of Defendant Bank of America, N.A. to the Crossclaim
of Defendant Suzanne Boone Katz dated December 21, 2009 58

TRANSCRIPTS

10. Trial Transcript dated September 13, 2011.....65
- Opening Statements 70
- Direct Examination of Floyd Jernigan by Mr. Waggoner 98
- Cross Examination of Floyd Jernigan by Mr. Edwards.....129
- Cross Examination of Floyd Jernigan by Mr. Abney 135
- Redirect Examination of Floyd Jernigan by Mr. Waggoner.....146

Direct Examination of Suzanne Katz by Mr. Waggoner	152
Cross Examination of Suzanne Katz by Mr. Abney	174
Redirect Examination of Suzanne Katz by Mr. Waggoner.....	182
Direct Examination of Susan Dunn by Mr. Waggoner.....	184
Cross Examination of Susan Dunn by Mr. Edwards	208
Cross Examination of Susan Dunn by Mr. Abney.....	210
Direct Examination of Donald Daquigan by Mr. Waggoner	215
Cross Examination of Donald Daquigan by Mr. Edwards	228
Cross Examination of Donald Daquigan by Mr. Abney.....	232
Redirect Examination of Donald Daquigan by Mr. Waggoner	237
Re-Cross Examination of Donald Daquigan by Mr. Edwards.....	238
Direct Examination of William Nevarez by Mr. Waggoner.....	244
Cross Examination of William Nevarez by Mr. Edwards	278
Cross Examination of William Nevarez by Mr. Abney.....	300
Redirect Examination of William Nevarez by Mr. Waggoner	310
Re-Cross Examination of William Nevarez by Mr. Abney.....	315
Examination of William Nevarez by Court	316
11. Trial Transcript dated September 14 and 15, 2011	325
Direct Examination of Laura Brisson by Mr. Waggoner.....	331
Cross Examination of Laura Brisson by Mr. Edwards	359
Cross Examination of Laura Brisson by Mr. Abney.....	361
Redirect Examination of Laura Brisson by Mr. Waggoner	368
Re-Cross Examination of Laura Brisson by Mr. Abney.....	370
Examination of Laura Brisson by Court	370
Re-Cross Examination of Laura Brisson by Mr. Edwards	375
Direct Examination of Al Katz by Mr. Edwards	387
Direct Examination of Suzanne Katz by Mr. Edwards.....	405
Cross Examination of Suzanne Katz by Mr. Abney	448
Redirect Examination of Suzanne Katz by Mr. Edwards	458

VOLUME II

Examination of Suzanne Katz by Court.....	460
Motion for Non-Suit by Mr. Abney.....	462

Direct Examination of Kimberly Steele by Mr. Abney	487
Examination of Kimberly Steele by Court.....	496
Cross Examination of Kimberly Steele by Ms. Flumian	497
Cross Examination of Kimberly Steele by Mr. Edwards.....	513
Redirect Examination of Kimberly Steele by Mr. Abney.....	536
Re-Cross Examination of Kimberly Steele by Ms. Flumian	545
Direct Examination of Jeff Mitchell by Mr. Abney.....	551
Cross Examination of Jeff Mitchell by Ms. Flumian.....	568
Cross Examination of Jeff Mitchell by Mr. Edwards	585
Redirect Examination of Jeff Mitchell by Mr. Abney	589
Re-Cross Examination of Jeff Mitchell by Ms. Flumian.....	590
Motion for Non-Suit by Mr. Abney.....	593
Closing Statements.....	597
12. Transcript from Post-Trial Evidentiary Hearing held October 24, 2011	638
13. Transcript from Hearing on Motion to Alter or Amend held February 15, 2012.....	645
14. Transcript of Deposition with exhibits of Lucy W. Preyer, M.D. taken August 31, 2010	689

TRIAL EXHIBITS

15. Bank of America's Trial Exhibit No. 1 (BOA_3, Signature Card – 8854 Account).....	829
16. Bank of America's Trial Exhibit No. 2 (BOA_262-266, Account Statement of Boone for the period 12.27.06- 1.26.07)	830
17. Bank of America's Trial Exhibit No. 3 (BOA_352-355, Account Statement of Jernigan for the period 1.06.07- 2.02.07)	835
18. Bank of America's Trial Exhibit No. 4 (BOA _373-378, BOA Complaint Tracker Notes)	839
19. Bank of America's Trial Exhibit No. 5 (BOA_379-382, Boone Letter to BOA dated 7.23.07).....	845
20. Bank of America's Trial Exhibit No. 6 (BOA_402-403, Nevarez Letter to Boone dated 8.3.07)	849

21.	Bank of America's Trial Exhibit No. 7 (BOA_404-414, Boone Letter to BOA dated 9.2.07).....	851
22.	Bank of America's Trial Exhibit No. 8 (BOA_415-416, Nevarez Letter to Boone dated 9.10.07).....	862
23.	Bank of America's Trial Exhibit No. 9 (BOA_383-384, BOSS Screens – 8854 Account).....	864
24.	Bank of America's Trial Exhibit No. 10 (BOA_438-439, BOSS Customer Profile Screen – Jernigan).....	866
25.	Bank of America's Trial Exhibit No. 11 (BOA_598-600, BOSS Screen – 4502 Account).....	868
26.	Bank of America's Trial Exhibit No. 12 (BOA_473-492, Online Banking and Transfers Service Agreement and Disclosures).....	871
27.	Bank of America's Trial Exhibit No. 13 (BOA_609, Jernigan Signature Card)	891
28.	Bank of America's Trial Exhibit No. 14 (BOA_610-630, BOA Deposit Account Agreement, effective 7.1.06).....	892
29.	Bank of America's Trial Exhibit No. 15 (BOA_631-670, BOA Deposit Account Agreement, effective 9.1.03).....	913
30.	Bank of America's Trial Exhibit No. 16 (BOA_671-674, BOA Outgoing Payments Module, effective 12.3.06)	953
31.	Bank of America's Trial Exhibit No. 17 (BOA_675-683, IMPACS Status Codes)	957

VOLUME III

32.	Bank of America's Trial Exhibit No. 21 (Jernigan 62, Expungement Order dated 5.22.08).....	966
33.	Bank of America's Trial Exhibit No. 29 (CPD 0001-0024, Charleston Police Department File – Case # 0701386)	967
34.	Bank of America's Trial Exhibit No. 30 (SOLICITOR_0001-0107, Charleston County Solicitor's Office File – State v. Jernigan).....	991

35.	Bank of America's Trial Exhibit No. 31 (Plaintiff's Response to Defendant Katz's Requests for Admission of Facts dated 8.4.10).....	1098
36.	Bank of America's Trial Exhibit No. 32 (Plaintiff's Response to Defendant Bank of America, N.A.'s First Requests for Admission to Plaintiff 9.16.10)	1104
37.	Bank of America's Trial Exhibit No. 33 (Defendant Katz's Responses to Plaintiff's Request for Admission dated 07.17.09)	1110
38.	Bank of America's Trial Exhibit No. 34 (Defendant Katz's Responses to Plaintiff's Supplemental Requests for Admission of Facts dated 2.12.10)	1112
39.	Bank of America's Trial Exhibit No. 35 (Defendant Katz's Responses to Defendant Bank of America, N.A.'s First Request for Admission dated 9.23.10)	1115
40.	Bank of America's Trial Exhibit No. 36 (Defendant Katz's Supplemental Responses to Defendant Bank of America, N.A.'s First Request for Admission dated 9.24.10)	1119
41.	Bank of America's Trial Exhibit No. 37 (Defendant Katz's Responses to Defendant Bank of America, N.A.'s Second Request for Admission dated 9.30.10)	1123
42.	Bank of America's Trial Exhibit No. 39 (Rule 30(b)(6) Deposition Notice of Bank of America, N.A. dated October 9, 2009)	1129
43.	Plaintiff's Trial Exhibit No. 1 (BOA 2-3, Customer Removal/Signature card 8854 Account).....	1131
44.	Plaintiff's Trial Exhibit No. 5 (Jernigan 50, Affidavit/Arrest Warrant)	1133
45.	Defendant Katz' Trial Exhibit No. 2	1134
46.	Defendant Katz' Trial Exhibit No. 3	1174

OTHER MOTIONS AND DOCUMENTS

47.	Defendant Bank of America, N.A.'s Motion to Strike the Jury Demand or, in the Alternative, to Stay the Case and Compel Arbitration dated July 29, 2010, and Affidavit of Donna Hoskins Poitevien filed in support thereof....	1207

48.	Plaintiff's Memorandum in Opposition to Defendant Bank of America, N.A.'s Motion to Compel Arbitration dated September 17, 2010	1276
49.	Bank of America's Pre-Trial Brief dated September 12, 2011	1282
50.	Defendant Bank of America, N.A.'s Motion to Alter or Amend Judgment dated December 22, 2011	1298
51.	Notice of Appeal filed April 3, 2012	1306

Certificate of Counsel

Certificate of Compliance

Proof of Service

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Floyd E. Jernigan,)
Plaintiff,)
v.)
Suzanne Boone Katz and)
Bank of America Corporation,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-10-2433

ORDER ON DEFENDANT KATZ
CROSSCLAIM

FILED
2011 DEC 12 PM 3:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

This matter came to me pursuant to a non jury bench trial. After hearing the testimony, witnesses, evidence, the arguments and positions of counsel, the pleadings and other relevant documents and evidence in the record, as well as considering the credibility of the witnesses, I find as follows:

1907
Plaintiff Floyd E. Jernigan ("Jernigan") and Defendant Suzanne Boone Katz ("Katz") were previously husband and wife. Among the issues in their marriage and divorce were financial mistrust between the two, allegations of unauthorized transactions, and other financial issues. During this time, on or about the 5th day of January, 2004, Jernigan and Katz met with Defendant Bank of America ("Bank") employee Michael Boyle at a local branch to sign the documents. Jernigan executed a document entitled "Customer Removal Authorization/Modification Agreement" acknowledging that Jernigan had no interest in the funds in the bank account ending in 8854 and that sole ownership and access to the account, including online access, was to be held by Katz. Katz simultaneously executed a signature card for the 8854 account to obtain sole ownership of the account. During this meeting, Boyle was informed by Katz of many of the

financial issues that existed between Jernigan and Katz and the negative damaging effect these things had upon her mental and emotional well being.

After discussing the financial issues and their damaging effects upon Katz regarding her soon to be ex-husband, Katz was assured by Boyle that Bank of America would take the appropriate steps to prevent Jernigan from accessing or otherwise viewing the account ending in 8854. In fact, it was Bank policy for all access to be removed, including online access, when a customer is removed from a joint account.

Upon receipt of the Customer Removal Authorization/Modification Agreement, the Bank removed Jernigan's name from the 8854 account title, but inexplicably failed to remove Jernigan as co-owner of the account for online and bill-pay purposes, thereby permitting Jernigan to remain able to access and view Katz' accounts electronically.

gen
On or about January 19, 2007, Katz discovered funds missing from the 8854 account. She immediately called the Bank to inquire about the missing funds. After many hours of discussions, phone conversations, the Bank ultimately informed Katz that Jernigan had made online bill payments from the 8854 account, and acknowledged the fact that the Bank erred in failing to remove him from such access in 2004. The Bank further informed Katz that in order to make the online bill payments from the 8854 account, Jernigan had to have knowingly and deliberately accessed her account to make the payments at issue.

At this point, the Bank, against its own policy, refused to reimburse Katz, or to conduct an investigation, and informed her that if she wanted reimbursement, the only way for her to do so would be to file a criminal report and a fraud report. The Bank further informed Katz that she was not to contact Jernigan under any circumstances about this matter. Katz, relying upon the bank, and in compliance with the bank's instructions, reported the incidents to the Charleston

Police Department on or about January 20, 2007, who opened a file and began investigating the matter, and did not discuss the matter with Jernigan.

Later, on or about January 22, 2007, Katz, seeking further information from Bank authorities on how such an egregious error had been committed on behalf of the Bank, met with Bank personnel with her then fiancé, and now husband, Al Katz, in the hopes of getting to the bottom of the situation. During the meeting, the Bank employee contacted Jernigan via telephone and Plaintiff agreed to replace the funds that had been withdrawn from her account. However, Katz was given no new information regarding the disputed BillPays and was advised to conduct a further investigation on her own if she desired additional information.

Thereafter, while the criminal investigation remained pending, Katz continued to seek information from the Bank on the specifics on how her account was accessed and how such an egregious error could be committed. Katz was repeatedly informed that, although the Bank permitted him to retain access, Jernigan had to have acted intentionally, deliberately, and knowingly in effectuating the bill payments. At some point during this time, Katz learned that Jernigan (who is not conversant in bank lingo) had disclosed to one of her sons that the bill payments resulted from some form of "overdraft protection." The Bank assured Katz that checking accounts could not be linked for overdraft protection and thus Jernigan's assertions were not true. This caused Katz a considerable amount of additional, unnecessary and undue mental distress, anxiety, and depression and created independent and exacerbated the harm to the relationship between Katz and her ex-husband Jernigan as well as her sons in addition to the harm that was already resulting from the criminal investigation.

The Police department, having conducted an initial investigation of the matter, including interviews with Bank employees who indicated Jernigan must have acted knowingly, concluded

there was probable cause to bring charges against Jernigan. Shortly thereafter, Plaintiff was arrested and charged with obtaining goods under false pretenses by the Charleston Police Department. Unbeknownst to Katz or the Charleston Police Department, however, at about the same time as the disputed bill payments, Plaintiff's own account had been frozen or restricted and that it was possible that the restricted/frozen status of the Plaintiff's own account may have been the cause of the bill payments at issue. The witness testimony and other evidence support the conclusion that had the Bank revealed this information in a timely manner to Katz, she would not have filed a police report.

Katz thereafter continued her effort to obtain full and complete information from the Bank as to how this could have occurred, and was repeatedly told the Jernigan could not have effectuated the bill payments accidentally and that he had to have acted deliberately. She met with Bank employees, spoke with Bank personnel over the phone, and wrote letters to the CEO of the Bank requesting a complete investigation and investigation of the matter.

The Bank acknowledged and knew that the situation was causing her undue distress and other damage, yet refused to conduct a complete investigation and further refused to examine the precise mechanics of how the BillPays at issue were made, despite the ability to do so. Further, the Bank never disclosed to Katz, the Charleston Police Department, or the Charleston County Solicitor's office, that there was any problem whatsoever with Jernigan's own account. At this same time, the Charleston Police Department as well as counsel for Jernigan also sought information from the Bank as to how these events occurred. The precise mechanics of the Bill Pay process were never fully disclosed by the Bank, and the solicitor eventually declined to prosecute the matter.

Thereafter, this civil litigation ensued and only then did the Bank reveal that Jernigan's account ending in 4502 had been frozen or restricted at or near the time of the disputed BillPay transactions, that Jernigan's account status may have contributed to or caused the disputed BillPay transactions, and that the Bank had the ability to examine the precise mechanics of how the BillPays were made.

The record reveals, and I find, that Defendant Bank of America never fully explained to Defendant Katz the Charleston Police Department or Plaintiff Jernigan how the money was removed from the Defendant Katz's account.

Defendant Bank of America never fully investigated whether the money was or could have been removed from Defendant Katz's account due to any computer glitch or other technical issue between Bank of America and the third-party vendor, Check-Free Corp. (Fiserv) used to complete Bank of America's bill pay transactions, despite repeated requests to do so by Katz, Jernigan, and others, despite the ability and wherewithal to do so, and despite the knowledge that refusing to do so was causing Katz damage

Defendant Bank of America neither preserved nor attempted to preserve any electronic information regarding the bill pay transaction associated with the accounts of the customers involved in this suit. Moreover, Bank of America did not request any information from Check-Free Corp. (Fiserv) regarding the bill pay transaction, which is the subject of this suit.

Defendant Bank of America's explanation at trial that Defendant Katz was fully informed about the bank's error is not believable.

Defendant Bank of America's failure to fully explain what they knew or should have known and their failure to cooperate with investigating officer, Sergeant Daquigan of the Charleston Police Department is both absurd and ridiculous. Defendant Bank of America merely

told their customer, Defendant Katz to file a fraud report for her loss with the police. Defendant Bank of America subsequently stonewalled all other requests for information regarding the loss.

Defendant Katz is very believable. She believed Plaintiff Jernigan acted deliberately to remove money from her account despite the fact that Defendant Bank of America informed Defendant Katz that they had failed to remove Plaintiff Jernigan from her account.

I find that Plaintiff Jernigan suffered the following damages: psychological trauma and injury, mental anguish, mental distress, apprehension, anxiety, and emotional injuries.

On Defendant Katz's cross claim, I find that Defendant Katz suffered the following damages: psychological trauma and injury, mental anguish, mental distress, apprehension, anxiety, and emotional injuries. The Bank knew as early as 2004 of the financial issues and mistrust that existed between Jernigan and Katz and the resulting mental and emotional injury was causing Katz. It was therefore reasonably foreseeable that the Bank's failure to secure the 8854 account would result in Katz suffering further emotional or psychological distress, and the record reveals that she did in fact suffer substantial emotional and psychological damage as a result of these BillPays and the resulting Bank conduct.

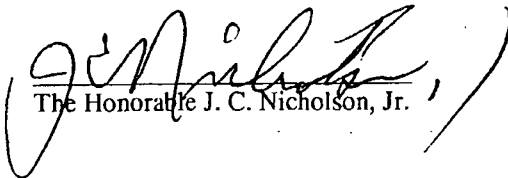
Katz placed her trust in the Bank and relied upon the Bank to investigate the matter and explain what happened and how it happened. The Bank, however, recklessly refused to investigate and/or conducted its investigation in a negligent manner, and refused to disclose material information such as the frozen/restricted status of Jernigan's account to Katz. Prominent Bank employees acknowledged in writing the fact that the Bank's failure to remove Plaintiff from online access to account 8854 was causing Katz mental and emotional distress and still refused to take appropriate action to prevent further harm and continued their course of conduct in the face of such knowledge. The Bank's conduct directly and proximately caused

Katz's damage in this case, which includes medical/therapy costs as well as intangible mental and psychological damage.

In failing and neglecting to follow its standard procedures for the removal of the Plaintiff from Defendant Katz's account, in failing to properly investigate the circumstances thereof, in failing to communicate with the Plaintiff or Katz, and in leading Defendant Katz and the police to believe that the Plaintiff's Bill Pay transactions could not have been made from Defendant Katz's account without deliberation on the Plaintiff's part, Defendant BOA breached its duties of due care to the Plaintiff as well as Katz, thereby proximately causing Jernigan to be arrested on criminal charges, and proximately causing both Jernigan and Katz tangible and intangible damages.

Accordingly, judgment is hereby rendered in favor of Defendant Suzanne Boone Katz on her cross-claim of Negligence/Gross Negligence/Recklessness against Defendant Bank of America. The Court finds that Defendant Katz has sustained actual damages in the amount of One Hundred Thousand (\$100,000) Dollars and this sum is fair compensation for the actual damages sustained by the Defendant Katz. Defendant Bank of America is therefore **ORDERED** to pay Defendant Suzanne Boone Katz the sum of One Hundred Thousand (\$100,000.00) Dollars within thirty (30) days of the entry of this order.

AND IT IS SO ORDERED!


The Honorable J. C. Nicholson, Jr.

This 12 Day of December 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

FLOYD E. JERNIGAN,

Plaintiff,

vs.

SUZANNE BOONE KATZ and
BANK OF AMERICA, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-10-2433

FILED
2011 DEC 12 PM 3:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Findings of Fact

The Plaintiff, Floyd Jernigan, MD, at all times relevant hereto was a resident of Charleston County, South Carolina.

The Defendant, Suzanne Boone Katz (hereinafter "Katz"), at all times relevant hereto was a resident of Charleston County, South Carolina.

 The Defendant, Bank of America, N.A. (hereinafter "BOA"), is a corporation which does business in, and maintains property and employs individuals in Charleston County, South Carolina, and circumstances of which the Plaintiff complained occurred in Charleston County, South Carolina.

The controversy was tried by this Court on September 13-15, 2011, by agreement of the parties.

The Plaintiff and Defendant Katz were married on May 21, 1983. In January 2004, while contemplating a divorce, the parties agreed to have the Plaintiff removed from the joint checking account, 8854, they shared at Defendant BOA.

Plaintiff and Defendant Katz met at a Defendant BOA branch on January 5, 2004, and each executed the required paperwork for the removal of the Plaintiff from the now formerly joint account, 8854.

Thereafter, Defendant BOA, through its employees and agents, failed to follow its internal policies and procedures for the removal of the Plaintiff from the 8854 account.

This failure was not discovered until January 17, 2007, when \$1100 of "Bill Pay" payments made by the Plaintiff from his personal account, and intended for his personal expenses, were funded from Defendant Katz's 8854 account.



Upon discovery of the missing funds from her account on the evening of January 18, 2007, Defendant Katz called Defendant BOA and spoke to several individuals about the discrepancy. During the course of the evening's phone calls, Defendant Katz learned that the transactions had been initiated by the Plaintiff and was told by Defendant BOA that the transactions were the result of deliberate action on his part. Defendant Katz was also told by Defendant BOA that to recover the missing funds, she was required to file a report of the incident with police. Defendant BOA also instructed Defendant Katz to avoid communication with the Plaintiff regarding the situation.

After making her report to the police on January 20, 2007, Defendant Katz visited a BOA branch and it was at this time that Plaintiff was first notified of the situation by an employee of Defendant BOA.

Plaintiff immediately reimbursed Defendant Katz's account for the full amount after being notified of the unauthorized transactions by Defendant BOA.

During the course of this litigation, it was discovered by the Plaintiff that at virtually the same time that Plaintiff had made these Bill Pay transactions, his personal BOA account had been restricted by Defendant BOA in connection with an unusually large deposit which had initially been rejected and was subsequently re-deposited by Defendant BOA.

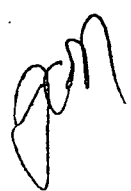
Without knowledge of these circumstances, Defendant Katz spent the next several months investigating and inquiring with Defendant BOA as to how these transactions took place. Defendant Katz was informed that Defendant BOA had failed to remove the Plaintiff from the 8854 account; however, there was no mention of the restricted status of Plaintiff's account at the same time, and Defendant BOA's assertion, and her belief that the transactions could not have occurred without deliberate action on the Plaintiff's part, motivated Defendant Katz to revive the police investigation and pursue criminal charges.

Charged with Obtaining Property By False Pretenses, the Plaintiff was arrested at his home during the early hours of May 25, 2007, in the presence of his minor son, and spent 18 hours in custody, before he was released on his own recognizance.

With the initiation of formal criminal proceedings against him, the Plaintiff and his attorney, Susan Dunn, Esq., made several attempts to inquire with Defendant BOA as to how these transactions occurred, but were not provided complete answers. Ms. Dunn eventually discovered that Defendant BOA out-sources its Bill Pay processing to a third party vendor, Check-Free Corp (otherwise known as Fiserv) and was told that the transactions occurred because the 8854 account was still linked to the Plaintiff's online bill pay, without his knowledge. The coincident restriction of Plaintiff's personal account at the same time was not acknowledged, or volunteered by, Defendant BOA.

The investigating officer, Sgt. Daquigan, testified that he would have interfered with, and recommended against prosecution, if the Defendant BOA representative had told him of the bank failure to remove the Plaintiff from the account four years before, or the restricted status of Plaintiff's account, at the time of the disputed transactions.

 ~~that~~ that Defendant Bank of America never fully explained to Defendant Katz the Charleston Police Department or Plaintiff Jernigan how the money was removed from the Defendant Katz's account.

 Defendant Bank of America never fully investigated whether the money was or could have been removed from Defendant Katz's account due to any computer glitch or other technical issue between Bank of America and the third-party vendor, Check-Free Corp. (Fiserv) used to complete Bank of America's bill pay transactions.

Defendant Bank of America neither preserved nor attempted to preserve any electronic information regarding the bill pay transaction associated with the accounts of the customers involved in this suit. Moreover, Bank of America did not request any information from Check-Free Corp. (Fiserv) regarding the bill pay transaction, which is the subject of this suit.

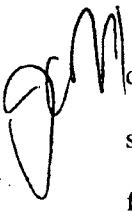
Defendant Bank of America's explanation at trial that Defendant Katz was fully informed about the bank's error is not believable.

Defendant Bank of America's failure to fully explain what they knew or should have known and their failure to cooperate with investigating officer, Sargent Daquigan of the Charleston Police Department is both absurd and ridiculous. Defendant Bank of America merely

told their customer, Defendant Katz to file a fraud report for her loss with the police. Defendant Bank of America subsequently stonewalled all other requests for information regarding the loss.

After the case was assigned to Solicitor Kim Steele, and after she was informed by Defendant BOA that there was no information they could provide to indicate how the disputed transactions had occurred, the charges against the Plaintiff were dropped and eventually expunged.

 ~~that~~ that Plaintiff Jernigan suffered the following damages: psychological trauma and injury, mental anguish, mental distress, apprehension, anxiety, and emotional injuries.

 Beyond the \$2650 the Plaintiff expended on his criminal defense, and though he did not require professional therapy, as a physician with no experience with the criminal justice system, the Plaintiff was fearful of professional repercussions, and embarrassed in the face of his family, and otherwise emotionally distressed, during the ten month pendency of the proceedings against him.

Based on these Findings of Fact, I make the following

Conclusions of Law

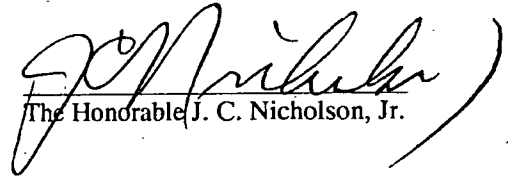
1. This Court has jurisdiction of the parties hereto.
2. In failing and neglecting to follow its standard procedures for the removal of the Plaintiff from Defendant Katz's account, in failing to properly investigate the circumstances thereof, in failing to communicate with the Plaintiff, and in leading Defendant Katz and the police to believe that the Plaintiff's Bill Pay transactions could not have been made from Defendant Katz's account without deliberation on the Plaintiff's part, Defendant BOA breached

its duty of due care to the Plaintiff, and thereby caused his arrest on criminal charges, and the tangible and intangible damages caused thereby.

3. The Court finds that the sum of Eighty Five Thousand (\$85,000) Dollars is fair compensation for the actual damages sustained by the Plaintiff and declines to award punitive damages.

Now therefore, it is **ORDERED** that the Defendant BOA pay to the Plaintiff, Floyd Jernigan, the sum of Eighty Five Thousand (\$85,000) Dollars actual damages and the costs of this action within thirty (30) days of the date hereof.

AND IT IS SO ORDERED!


The Honorable J. C. Nicholson, Jr.

This 12 Day of December, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-10-2433

Floyd E. Jernigan

Suzanne Boone Katz, ET AL

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE. ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Motion for Alter or Amend Judgment by defendant was heard and denied. Judge Nicholson will retain jurisdiction in this case. Formal Order to follow. *to sign formal order. jcn*

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Signature]
Circuit Court Judge

2117
Judge Code

02/15/2012
Date

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Floyd E. Jernigan,)
Plaintiff,)
v.)
Suzanne Boone Katz and)
Bank of America Corporation,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-10-2433

ORDER

FILED
2012 MAR 22 PM 2:34
JULIE L. HARRIS-RODG
CLERK OF COURT
BY

207
This matter came to me pursuant to Defendant Bank of America's (the "Bank") motion to alter or amend the final judgments entered in favor of Plaintiff Floyd E. Jernigan ("Jernigan") and Defendant Suzanne Boone Katz ("Katz"). After reviewing the testimony, evidence, the arguments and positions of counsel, the pleadings and other relevant documents and evidence in the record, as well as considering the credibility of the witnesses, I find as follows:

The Bank argues that the only damage to Katz was emotional distress and a party may not recover for a defendant's negligent conduct when the only damage suffered is emotional distress.

The court first notes that Defendant Katz and her husband, Al Katz, both testified that she suffered physical pain and suffering as a result of her emotional distress. Katz further testified that she watched closely over her finances and, when she discovered the Bill pays, she was overcome with fear that her identity had been stolen or her account fraudulently accessed. As articulated in the judgment, Defendant Katz is very believable and the Bank's explanation of the events is not believable. Judging the credibility of

testimony of witnesses is a function of the fact finder as is determining the weight to be given that testimony. Tisdale v. Kerr McGee Chemical Corporation, 266 S.C. 64, 221 S.E. (2d) 531 (1976).

I find no error in the award of damages with respect to Katz's emotional distress. In order to receive bodily injury, it was not necessary that Katz lose a limb, receive a broken bone, or have wounds inflicted on her body. Being made sick, nauseous, and otherwise experiencing physical manifestations of pain and discomfort in the manner she testified and as a consequence of her emotional upset constitutes bodily injury for which Katz is entitled to recover damages. See Padgett v. Colonial Wholesale Distributing Co., 232 S.C. 593, 605-607 (S.C. 1958); See also Murray v. Bank of Am., N.A., 354 S.C. 337, 580 S.E.2d 194 (Ct. App. 2003); Doe v. Greenville Hosp. Sys., 323 S.C. 33, 448 S.E.2d 564 (Ct. App. 1994); ("the fact that...[plaintiff] may have received no physical injury at the time of the assault is not determinative").



The Bank further argues that expert testimony is required to prove Katz's damages and the evidence at trial was insufficient to prove emotional distress. In the alternative, the Bank argues the damages should be reduced.

"In personal injury actions, great latitude is allowed in the introduction of evidence to aid in determining the extent of damages...any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of defendant's acts is admissible." Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139 (Ct. App. 2011). Katz was not required to submit expert testimony as to her medical expenses and I find no error in admitting her personal testimony as to her injuries and bills. Wilder, 396 S.C. 139. The deposition testimony of Katz's treating psychiatrist,

Dr. Lucy Preyer, M.D., including treatment and billing records, was admitted without objection. Dr. Preyer's deposition testimony indicates that Katz suffered setbacks and exacerbation of her depression and anxiety as a result of the events that transpired. Katz's medication was modified and Katz's treating physician's medical records reflecting these modifications were also admitted into evidence without objection and support the nature and extent of Katz's injuries.

Much of the damages Katz suffered were intangible. One cannot easily or with any mathematical certainty place a value on the amount of a person's emotional and mental well being. Murray v. Bank of Am., N.A., 354 S.C. 337, 345 (Ct. App. 2003); Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 218, 528 S.E.2d 682, 687 (Ct. App. 2000). I find that the evidence and testimony presented reasonably supports the amount of damages sustained by Katz and that \$100,000 is fair compensation for the actual damages sustained by the Defendant Katz.

The Bank further argues that Katz may not recover emotional distress damages against the Bank's negligent conduct unless she demonstrated intentional or "outrageous" conduct.

The court notes that the evidence of the existence of physical injury caused by the emotional distress is sufficient to support damages for such mental trauma. Padgett v. Colonial Wholesale Distributing Co., *supra*; F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts (3rd Ed. 2004). Assuming, for argument's sake, there was insufficient evidence of physical injury and, further assuming physical injury is a requirement for the recovery of mental trauma, I find in the alternative that Katz presented evidence sufficient to prove outrageous conduct on behalf of the bank and

sufficient to support a recovery for mental and emotional distress in the absence of physical injury. See Sossamon v. Peeler, 291 S.C. 256, 258 (Ct. App. 1987) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings") quoting SCRCP Rule 54(c); accord Ringer v. Graham, 293 S.C. 238, 245 (Ct. App. 1987).

It is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and where reasonable persons may differ is the question an issue of fact. RESTATEMENT (SECOND) OF TORTS SECTION 46, comment h; Todd v. South Carolina Farm Bureau Mut. Ins. Co., 283 S.C. 155, 167 (Ct. App. 1984)



In Todd v. South Carolina Farm Bureau Mut. Ins. Co., the Court of Appeals articulated that with conduct which has been deemed "outrageous" and thus liability found, the common thread has been the existence of three factors, 1) a pre-existing legal relationship, 2) excessive self-help in asserting a legal right or avoiding a legal obligation flowing out of the relationship, and 3) contemptuous disregard for the plaintiff's emotional suffering either to force the plaintiff to accede to the defendant's wishes or to punish the plaintiff for failure to comply. 283 S.C 169-07.

With this guidance, I find the evidence supports the conclusion that the Bank's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery for Katz. Here, Katz satisfies these three factors by and through her pre-existing banking relationship with the Bank, the Bank's excessive self-help in avoiding disclosure of the Billpay process despite repeated demands to do so by the police, Jernigan, and Katz, and the disregard shown by the Bank with regard to Katz's emotional suffering after the Bank

refused to reimburse her account, required Katz file a police report, and refused to even investigate, much less disclose, other material information relating to the Billpay transfers and accounts at issue. Accordingly, the court rules in the alternative that to the extent Katz did not sufficiently prove physical injury, the evidence supports a judgment for purely emotional and mental distress damages.

Moreover, the record supports the conclusion that Katz, as a result of the Bank's negligence, suffered limitations on her ability to participate in, and derive pleasure from, the normal activities of her daily life. Further, the record indicates that Katz's ability and inclination to pursue her talents, recreational interests, hobbies, and avocations was also negatively impacted. This supports a recovery of damages, separate and apart from pain and suffering and emotional distress, for loss of enjoyment of life. Boan v. Blackwell, 343 S.C. 498, 502 (S.C. 2001). Accordingly, the court rules in the alternative that to the extent Katz did not sufficiently prove physical injury, mental injury, or emotional injury, the evidence supports a judgment for loss of enjoyment of life.

Bank of America also argues that it did not owe a duty of care to Defendant Katz and any duty owed was contractual in nature.

Questions of negligence and proximate cause are ordinarily questions of fact which are not to be disturbed. Davenport v. Walker, 280 S.C. 588, 591 (S.C. Ct. App. 1984). In order to establish a claim for negligence the plaintiff must prove the following elements: 1) a duty of care owed by the defendant to the plaintiff; 2) a breach of that duty by the defendant's negligent act or omission; 3) the plaintiff was damaged; and 4) the damages proximately resulted from the breach of the duty. Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002).

An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The issue of whether the law recognizes a particular duty is an issue of law to be decided by the court. Ellis by Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996).

Duty is generally defined as "the obligation to conform to a particular standard of conduct toward another." Shipes v. Piggly Wiggly St. Andrews 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977). An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance. Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997).

98
The case of Murray v. Bank of Am., N.A., 354 S.C. 337 (Ct. App. 2003), is particularly instructive on this issue. In Murray, the Court of Appeals found a relationship between the Bank and Murray arose sufficient to impose upon the Bank a duty of care when Murray went to the Bank seeking closure of her account. The Bank failed to follow its own procedures, did not timely close the account, and the account was thereafter fraudulently accessed. Murray, 354 S.C. 337, 343. The Court of Appeals found that this was sufficient evidence to establish the existence of a duty and a breach thereof. Id at 343-44.

I find a relationship between the Bank and Katz arose sufficient to impose upon the Bank a duty of care when Katz went to the Bank seeking closure of her and Jernigan's joint account. After discussing the financial issues and their damaging effects upon Katz regarding her soon to be ex-husband, Katz was assured the Bank would take the appropriate steps to prevent Jernigan from accessing or otherwise viewing the account

ending in 8854. In fact, it was Bank policy for all access to be removed, including online access, when a customer is removed from a joint account. The Bank failed to follow its own procedures, did not timely close the account, and did not notify Katz that the account remained open. I find this to be sufficient evidence to establish a duty of care and determine the Bank breached its duty to Katz after these duties arose, proximately causing Katz's damage.

 I further find a relationship between the Bank and Katz arose sufficient to impose upon the Bank a duty of care when Katz discovered the unauthorized Billpay transfers and contacted the Bank seeking assistance and investigation into the matter. The Bank again failed to follow its own procedures regarding fraudulent activity, requiring that she file a police report, refusing to reimburse Katz, and the Bank did not investigate or disclose the mechanics of the Billpay process during the police investigation despite specific requests to do so and, did not investigate or disclose the restriction on Jernigan's account at or around the same time as the Billpay transfers at issue. I find this to be sufficient evidence to establish a duty of care and determine the Bank breached its duty to Katz after these duties arose, proximately causing Katz's damage.

Alternatively, the record supports, and I find, that a fiduciary relationship was created between the Bank and Katz when the Bank advised Katz to file a police report. Rush v. South Carolina Nat'l Bank, 288 S.C. 560, 562 (S.C. Ct. App. 1986). The Bank was in a superior position to Katz with respect to knowledge and information regarding the circumstances with which the Billpay transfers were made. This enabled the Bank to exercise influence over Katz with respect to her actions after the discovery that her account had been accessed. The record indicates Katz placed her confidence and trust in

the Bank in this regard, and I find that she had a reasonable foundation to believe the Bank was acting in her interest, rather than its own, when the Bank led her to believe Jernigan deliberately accessed her account and induced her to file a police report against him in order to be reimbursed. This fiduciary relationship was breached when the Bank failed to investigate or disclose the mechanics of the Billpay process during the police investigation despite specific requests to do so and when the Bank failed investigate or disclose the restriction on Jernigan's account at or around the same time as the Billpay transfers at issue. See Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 41 (S.C. 1986).

Accordingly, the court rules in the alternative that the record supports a judgment in favor of Katz for breach of fiduciary duty. See also SCRCF Rule 54(c) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings").

Finally, the Bank, referencing Defendant Katz's pleadings, argues that the Katz order should be amended to state only "negligence" and nothing more.

The court first notes "the ultimate viability of any claim is determined by the evidence produced at trial rather than the allegations of the pleadings." Todd v. South Carolina Farm Bureau Mut. Ins. Co., 283 S.C. 155, 168 (S.C. Ct. App. 1984). This notwithstanding, the Cross-Claim pled by Katz stated the Bank owed Katz a duty and breached that duty "by and through it's...**grossly negligent, and/or reckless acts and/or omissions**" (emphasis added). Gross negligence is defined as "the failure to exercise slight care." Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999). It has also been defined as "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a

thing intentionally that one ought not to do." Id. Gross negligence "is a relative term, and means the absence of care that is necessary under the circumstances." Id.; see also Doe v. Greenville County Sch. Dist., 375 S.C. 63, 71 (S.C. 2007).

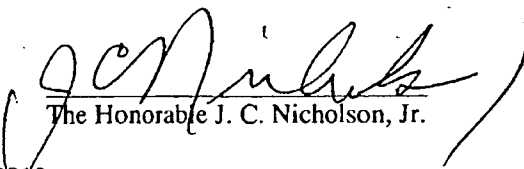
Here, written evidence indicates the Bank knowingly refused to provide further information or investigation regarding the Bill pays at issue, the status of Jernigan's account, and the precise mechanics of the Billpay system. The Bank engaged in this conduct after requiring Katz file a police report, refusing to reimburse her account, and with actual knowledge that Katz was being harmed as a result. This and other evidence in the record supports a finding of gross negligence under the circumstances.

To the extent gross negligence and recklessness were not adequately stated in the pleadings, there was no timely objection to the presentation and evidence of gross negligence and recklessness at trial. As such, those issues were tried by the express or implied consent of the parties. See SCRCF Rule 15(b); Crawford v. Crawford, 321 S.C. 511, 514 (Ct. App. 1996); McCurry v. Keith, 325 S.C. 441, 447 (S.C. Ct. App. 1997) (When issues not raised in the pleadings are tried by consent, they will be treated as if they had been raised in the pleadings).

For the reasons set forth on the record, in the judgment, and as articulated herein, Defendant Bank of America's motion to alter or amend the judgment entered in favor of Defendant Katz is hereby **DENIED**.

AND IT IS SO ORDERED!

This 20 Day of MARCH, 2012
Charleston, South Carolina.


The Honorable J. C. Nicholson, Jr.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-10-2433

FLOYD E. JERNIGAN,

Plaintiff,

vs.

SUZANNE BOONE KATZ and
BANK OF AMERICA, N.A.,

Defendants.

**ORDER DENYING DEFENDANT
BANK OF AMERICA'S MOTION
TO ALTER OR AMEND JUDGMENT**

FILED
JUL 12 11 AM 22 PM 2:35
CLERK OF COURT

Procedural Background

THIS MATTER came before me for trial on September 13-15, 2011, by agreement of the parties. Based on the evidence presented, the Court found the Defendant Bank of America Corporation (BOA) was negligent in failing to follow its standard procedures, in failing to properly investigate the circumstances thereof, in failing to communicate with the Plaintiff about the consequences of its error, and in leading Defendant Katz and investigating law enforcement to believe that the Plaintiff deliberately misappropriated funds from her account.

As a result of BOA's acts and omissions, Plaintiff was arrested and charged with a crime, and suffered tangible and intangible damages as a result, and was awarded the sum of \$85,000 in compensatory damages.

Defendant BOA filed a Motion to alter or amend this judgment on December 22, 2011. This Court heard oral arguments by the parties on February 15, 2012. For the following reasons, Defendant BOA's Motion is DENIED.

Factual Background

The Plaintiff and Defendant Katz were married on May 21, 1983. In January 2004, while contemplating a divorce, the parties agreed that the Plaintiff should be removed from the joint checking account, 8854, which they shared at Defendant BOA.

Plaintiff and Katz met at a BOA branch on January 5, 2004, and each executed the required paperwork for the removal of the Plaintiff from the now formerly joint account, 8854.

Thereafter, BOA, through its employees and agents, failed to follow its internal policies and procedures for the removal of the Plaintiff from the 8854 account.

This failure was not discovered until January 17, 2007, when \$1100 of "Bill Pay" payments made by the Plaintiff from his personal account, and intended for his personal expenses, were funded from Katz's 8854 account.

Upon discovery of the missing funds from her account on the evening of January 18, 2007, Katz telephoned BOA and spoke to several representatives about the concerning transaction. During the course of the evening's phone calls, Katz learned that the transactions had originated with Plaintiff's personal account. Further, it was suggested by BOA that the transactions required deliberate action on his part. Finally, Katz was told that if BOA was to recover the funds, she would have to file a report of the incident with police. BOA also instructed Katz to avoid any communication with the Plaintiff regarding the situation.

Katz made her report to the Charleston Police Department on January 20, 2007, and thereafter visited a BOA branch. It was then that Plaintiff was first notified of the situation

by an employee of Defendant BOA, and immediately reimbursed Katz's account for the full amount.

During the course of this litigation, it was discovered by the Plaintiff that at virtually the same time that Plaintiff had made these Bill Pay transactions, his personal BOA account had been restricted by BOA in connection with an unusually large deposit which had initially been rejected and was subsequently re-deposited by BOA.

Without knowledge of these circumstances, Katz spent the next several months investigating the circumstances of the transaction with inquiries to BOA. She did learn that BOA had failed to remove the Plaintiff from the 8854 account; however, there was no mention of the restricted status of Plaintiff's account at the same time, and BOA's assertion, and her belief, that the transactions could not have occurred without deliberate action on the Plaintiff's part, motivated Defendant Katz to revive the police investigation and pursue criminal charges.

Charged with Obtaining Property by False Pretenses, the Plaintiff was arrested at his home during the early hours of May 25, 2007, in the presence of his minor son, and spent 18 hours in custody, before he was released on his own recognizance.

With the initiation of formal criminal proceedings against him, the Plaintiff and his attorney, Susan Dunn, Esquire, made several inquiries with BOA into the mechanics of the transactions, but were not provided complete answers. Ms. Dunn eventually discovered that BOA engaged a third-party vendor for its Bill Pay processing: Check-Free Corp (otherwise known as Fiserv); and also learned that the transactions occurred because the 8854 account was still linked to the Plaintiff's online Bill Pay, without his knowledge. The coincident restriction of Plaintiff's personal account at the same time was not acknowledged, or volunteered, by BOA.

The investigating officer, Sgt. Daquigan, testified that he would have interfered with, and recommended against prosecution, if the BOA representative had told him of the Bank's inadvertent failure to remove the Plaintiff from the account four years before, or the restricted status of Plaintiff's account, at the time of the disputed transactions.

BOA never fully explained to Katz, the Charleston Police Department, or Plaintiff Jernigan how the money was removed from the Defendant Katz's account.

BOA never fully investigated whether the money was or could have been removed from Katz's account due to any computer glitch or other technical issue between BOA and the third-party vendor, Check-Free Corp. (Fiserv) involved in the processing of Bill Pay transactions.

BOA neither preserved, nor attempted to preserve, any electronic information regarding the Bill Pay transaction associated with the accounts of the customers involved in this suit. Moreover, BOA did not request any information from Check-Free Corp. (Fiserv) regarding the Bill Pay transaction, which is the subject of this suit.

BOA's explanation at trial that Katz was fully informed about the Bank's error is not believable.

After the case was assigned to Charleston County Assistant Solicitor Kim Steele, and after she was informed by Defendant BOA that there was no information they could provide to indicate how the disputed transactions had occurred, the charges against the Plaintiff were dropped and eventually expunged.

As a result of the acts and omissions of the employees and agents of BOA, Plaintiff suffered the embarrassment, distress and related consequences of unexpected physical

arrest and confinement; he also spent \$2650 on his criminal defense. Though he did not require professional therapy, as a physician with no experience with the criminal justice system, the Plaintiff was fearful of professional repercussions, and embarrassed in the face of his family, and otherwise emotionally distressed, during the ten month pendency of the proceedings against him.

Arguments of Defendant Bank of America

I. Breaches of Duty

Defendant BOA argues in its motion to alter or amend the Court's judgment that the Plaintiff failed to present evidence that it had a duty to the Plaintiff to remove him from the 8854 account, to investigate the circumstances regarding the transactions, to communicate with the Plaintiff, and to correctly inform Katz and the police as to the circumstances surrounding the transactions. In the alternative, Defendant BOA argues that if such a duty did exist, it did not breach that duty. Defendant BOA's arguments fail as evidence supporting each of those duties, and BOA's breaches of said duties, were made to the Court.

Once it agreed to do so, upon request of the Plaintiff and Katz, BOA had a duty to properly remove Plaintiff from the 8854 account. Neither of its customers could do so. BOA created, controlled, and operated all aspects of the ownership and online access functions. Only BOA could have controlled these issues. However, for reasons which remain unexplained, the request was not properly executed. Such failure resulted not only in Plaintiff's retained ability to view the 8854 account online, but also the continued "linking" of the 8854 account to the Plaintiff's online Bill Pay function. Had it not been for the failure to follow its own procedures, the Bill Pay transaction resulting in Plaintiff's arrest would not have taken place.

BOA further argues that it owed no duty to investigate the circumstances of the disputed transactions. This argument fails to appreciate the special relationship the Bank has with all of its customers as the sole custodian of transactional processes and data. In the present case, such information was necessary to substantiate criminal charges which BOA insisted Katz file so that she could recover the funds missing from her account. Katz was instructed by BOA to file a police report - an action she would not have taken but for the insistence of the Bank. And without which, she was told, the Bank could not have requested the Plaintiff return the funds.

Further, BOA's argument fails because both the Plaintiff and Katz requested explanations of the transaction, and BOA undertook to fulfill that duty when it provided limited answers to Katz. The Court heard evidence that employees for Defendant BOA did not investigate the circumstances surrounding how these transactions occurred until they were preparing for their depositions. Even at the time of trial, BOA had no explanation of the role which the third party vendor, FiServ, might have played in the unauthorized Bill Pay transaction.

BOA also led the investigating police, whose involvement it required as condition of Katz's recovery of her funds, to believe that the actions of the Plaintiff must have been deliberate. During trial, BOA employee Brisson acknowledged that she did not review Plaintiff's account status or review how the transactions may have occurred. Brisson further testified she did not discuss the Plaintiff's account with either Katz or the police. In short, the entity which had required police involvement failed or refused to acknowledge details which only it was privy to.

II. Contractual Claim

BOA argues that any duty to remove Plaintiff from the joint account was owed to Katz as the remaining owner, and not to Plaintiff. Defendant BOA failed to provide any evidence regarding the existence, terms, or applicability of any contractual relationships in this case. Therefore, any argument that the negligence claim is barred by the contractual relationship fails. Further, as discussed previously, the negligence claim relied on facts beyond the failure of BOA to remove the Plaintiff from the 8854 account. The damages sustained by the Plaintiff were the result of Defendant BOA's failure to remove him from the account, investigate the circumstances regarding the transactions, and provide accurate information to Katz and the police.

III. Plaintiff was Comparatively Negligent

BOA argues that even if BOA was negligent, Plaintiff's negligence was greater and should bar recovery. This Court finds that while Plaintiff might have taken steps to ask why he could still view the account to which he had renounced ownership, he had no duty to do so and, in any case, his failure to do so was not a proximate cause of his arrest, or prosecution, or the damages he suffered.

IV. Katz's Intervening Negligence

BOA also argues that Katz's actions were negligent, and superceded any negligence of BOA. Among other evidence, this argument ignores the testimony of Sgt. Daquigan, who was provided incomplete and misleading information when he investigated the matter, as urged by Katz, and as required by BOA. As Sgt. Daquigan made clear from the witness stand, if he had known the facts and circumstances as they were ultimately disclosed, there would have been no arrest.

Finally BOA argues that even if it is liable for damages to the Plaintiff, the amount awarded should be reduced as excessive, or because any damages should be attributed to his own conduct or the conduct of Katz. This Court finds no negligence of Plaintiff that was a proximate cause of his arrest. Further, the Court finds that any acts or omissions of Katz were the result of BOA's requirement of police involvement, combined with an incomplete investigation of, and failure to timely acknowledge or communicate its role in, the disputed transaction.

For the foregoing reasons, Defendant Bank of America's Motion to Alter or Amend the Order dated December 12, 2011, is DENIED.

And it is so ordered!


Hon. J. C. Nicholson, Jr.
Presiding Judge
Ninth Judicial Circuit

March 20, 2012
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-10- 2433

FLOYD E. JERNIGAN,)
)
Plaintiff,)
)
vs.)
)
SUZANNE BOONE KATZ and)
BANK OF AMERICA CORPORATION,)
)
Defendants.)

COMPLAINT

(False Arrest & Imprisonment)
(Malicious Prosecution)
(Slander)
(Negligence)

JURY TRIAL DEMAND

FILED
2009 APR 17 PM 2:51
CLERK OF COURT

TO THE DEFENDANTS ABOVE NAMED:

COMES NOW the Plaintiff, who respectfully alleges and would show unto this Court as follows:

1. The Plaintiff Floyd E. Jernigan is a citizen and resident of the State of South Carolina, County of Charleston and at all times relevant hereto was a licensed physician practicing his profession at the Veteran's Administration Hospital in Charleston, South Carolina.
2. The Defendant Suzanne Boone Katz (hereinafter "Boone") on information and belief, is a citizen and resident of the State of South Carolina, County of Charleston.
3. The Plaintiff and Defendant were at one time husband and wife, having been married on May 21, 1983, and divorced on April 8, 2005.
4. The Defendant Bank of America Corporation (hereinafter "Bank") is an international banking institution which among other financial and investment services provides checking accounts with a variety of features including electronic transfer of funds, overdraft protection, and electronic

"Bill Pay", and provides these and other services and maintains property and agents in virtually every jurisdiction, including the County of Charleston, State of South Carolina.

5. At all times during their marriage, both the Plaintiff and the Defendant Boone maintained sole and separate checking accounts and, additionally, were joint owners of a checking account in the names of Floyd E. Jernigan and Suzanne B. Jernigan, account number *****8854, with the Defendant Bank.

6. While he and his wife, the Defendant Boone (then Suzanne B. Jernigan), were customers of the Defendant Bank, the Plaintiff was persuaded to take advantage of the relatively new "Bill Pay" option and, when he agreed, agents and employees of the Defendant Bank took the necessary action to establish a service under which bills would be paid out of the Plaintiff's individual account and, if and when his balance was insufficient, out of the joint account number *****8854.

7. On January 5, 2004, in contemplation of their divorce, and in connection with the settlement of financial affairs incidental to their marriage, the Defendant Boone (then Suzanne B. Jernigan) and the Plaintiff agreed that the latter would remove his name from the joint account, and the Plaintiff complied by signing all necessary forms presented to him by the Defendant Bank. Thereafter, although Plaintiff periodically deposited his alimony and/or other financial obligations to account number *****8854 for the benefit of Defendant Boone, he had no right and made no attempt to withdraw funds therefrom for his benefit.

8. More than three years later, in January 2007, through his error, a deposit made by the Plaintiff to his own checking account was not credited to that account and, as a result, five "Bill

Pay” transfers from that account, totaling \$1100, between January 16 and January 19, were ineffective.

9. Unbeknownst to the Plaintiff, and through means and for reasons to this date not comprehended by the Plaintiff, when Plaintiff’s checking account had insufficient funds, the Defendant Bank allowed the \$1100 in “Bill Pay” transfers to be made from the Defendant Boone’s account number *****8854, which had not been a joint account, and over which Plaintiff had no withdrawal rights, after January 5, 2004. On information and belief, these unauthorized transactions were immediately reported by the Defendant Boone to the Defendant Bank, whose agents and employees contacted the Plaintiff and, with his approval, credited account number ***** 8854 with the full amount of the withdrawn funds.

10. On January 20, 2007, and with knowledge that the transaction had been discovered and her account fully reimbursed, the Defendant Boone made a Complaint with the Police Department of the City of Charleston, claiming that the Plaintiff had wrongfully and without authorization accessed her account number *****8854 and removed \$1100 therefrom.

11. Thereafter, on or about February 1, 2007, the Defendant Boone reported to a member of the Charleston County Police Department that she wished to file criminal charges against the Plaintiff because she had been advised by the agents and employees of the Defendant Bank that the Plaintiff’s actions were deliberate, and not the result of innocent error.

12. Soon thereafter, Plaintiff was interviewed by the investigating officer and learned that the Defendant Boone had filed a complaint against him and that criminal charges for obtaining goods under false pretenses might be levied against him. In response, the Plaintiff advised the

investigating officer of the facts recited above, and that the matter had been corrected on the date of its discovery, and invited confirmation of those facts by personnel from the Defendant Bank.

13. Approximately one month later, the same police officer again telephoned the Plaintiff and advised him that the Defendant Bank had not sufficiently confirmed that the withdrawal from the Defendant's account had been inadvertent and Defendant Boone was still "pushing the matter."

14. At 5:10 a.m. on May 25, 2007, the Defendant was forcibly arrested, handcuffed, shackled and taken from his home by several officers of the Charleston City Police Department. Ultimately, he was held at the Charleston County Detention Center for approximately 18 hours before being released on bond.

15. Thereafter, he had to hire an attorney to defend against the charges and, when they were dismissed on March 25, 2008, to have the record of his arrest expunged.

FOR A FIRST CAUSE OF ACTION

As to the Defendant Boone

False Arrest and Imprisonment

16. The allegations of Paragraphs 1 through 15, above, are reiterated, as fully as if repeated verbatim herein.

17. The arrest, restraint and incarceration of the Plaintiff was unlawful, and resulted from the intentional, malicious conduct of Defendant Boone, and caused injuries, losses and damages hereinafter described.

FOR A SECOND CAUSE OF ACTION

As to the Defendant Boone

Malicious Prosecution

18. The allegations of Paragraphs 1 through 17, above, are reiterated, as fully as if repeated verbatim herein.

19. The criminal proceedings against the Plaintiff were initiated by the Defendant Boone without probable cause, and were malicious, and caused injuries, losses, and damages, hereinafter described, both before and after the proceedings were dismissed.

FOR A THIRD CAUSE OF ACTION

As to the Defendants Boone and Bank

Slander

20. The allegations of Paragraphs 1 through 19, above, are reiterated, as fully as if repeated verbatim herein.

21. The Defendants' publication, through word and deed to members of the public who were or became aware thereof, that the Plaintiff was guilty of a crime, or had engaged in criminal conduct, was false, and known to be false at the time of its making, and caused the Plaintiff injuries, losses and damages, hereinafter described.

FOR A FOURTH CAUSE OF ACTION

As to the Defendant Boone

Negligence

22. The allegations of Paragraphs 1 through 21, above, are reiterated, as fully as if repeated verbatim herein.

23. To the extent that the Defendant Boone's conduct was not motivated by malice, it resulted from her unreasonable, negligent, careless, groundless, irrational and reckless assumptions or deductions about the Plaintiff's conduct, which had no basis in fact or logic, and constituted a

breach of duty to avoid injury to the Plaintiff, and thereby caused injury to the Plaintiff, as hereinafter alleged.

FOR A FIFTH CAUSE OF ACTION

As to the Defendant Bank

Malicious Prosecution

24. The allegations of Paragraphs 1 through 23, above, are reiterated, as fully as if repeated verbatim herein.

25. On information and belief, rather than acknowledging its error in allowing the debiting of the Defendant Boone's account, as herein alleged, agents and employees of the Defendant Bank, and without probable cause to do so, advised the Defendant Boone that the Plaintiff had done so with criminal intent, and urged or encouraged the Defendant Boone to involve law enforcement and file a criminal complaint.

FOR A SIXTH CAUSE OF ACTION

As to the Defendant Bank

Negligence

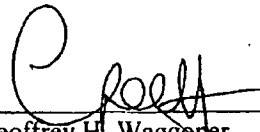
26. The allegations of Paragraphs 1 through 25, above, are reiterated, as fully as if repeated verbatim herein.

27. If the Defendant Bank's refusal to acknowledge its error in allowing the debiting of the Defendant Boone's account, and to provide timely and total disclosure to the Plaintiff, or his attorney, or to representatives of law enforcement, as herein alleged, was not malicious and motivated by self-interest, it was careless, negligent and reckless, and thereby caused injury to the Plaintiff as hereinafter alleged.

28. As a result of the acts and omissions of the Defendants Boone and Bank, through its agents and employees, as herein alleged, the Plaintiff was unlawfully detained and deprived of his freedom; he suffered emotional distress and mental anguish; he was fearful of the prospect of criminal prosecution and punishment for a crime which he had not committed; he was subjected to the unfounded scorn and ridicule of those who witnessed his arrest or became aware of his arrest; he was embarrassed and humiliated; and he was required to expend monies to engage the services of an attorney to defend the criminal charges; all of which were the direct and proximate result of the Defendants' wrongful conduct as herein alleged.

Wherefore, having fully set forth his Complaint herein, the Plaintiff prays that the Court inquire into the matters herein alleged, and render judgment in an amount exceeding \$100,000 and for such additional exemplary damages as may be awarded by the trier of fact, for the costs of this action, and for such additional and further relief as may be deemed appropriate by the Court.

WAGGONER LAW FIRM



Geoffrey H. Waggoner SC Bar No. 5766
Post Office Box 865
Mt. Pleasant, SC 29465
Office: (843) 972-0426
Fax: (843) 972-0427
email: ghwaggoner@waggonerfirm.com
Attorney for the Plaintiff

April 17, 2009

Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

FLOYD E. JERNIGAN,

Plaintiff,

v.

SUZANNE BOONE KATZ and
BANK OF AMERICA CORPORATION,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-10-2433

ANSWER, COUNTERCLAIM, AND
CROSSCLAIM OF DEFENDANT
SUZANNE BOONE KATZ

FILED
2009 JUN -5 PM 3:58
JULIE J. ARMSTRONG
CLERK OF COURT

COMES NOW defendant Suzanne Boone Katz by and through her attorneys and answers to the Complaint of Floyd E. Jernigan as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not hereinafter specifically admitted is denied and strict proof thereof demanded.

FOR A SECOND DEFENSE

2. The Complaint should be dismissed with prejudice for failure to state a claim upon which relief may be granted pursuant to SCRCR Rule 12(b)(6).

FOR A THIRD DEFENSE

3. Any liability found to be imposed upon defendant Katz as a result of the conduct complained of should be indemnified by defendant Bank of America.

FOR A FOURTH DEFENSE

4. The plaintiff's claims should be barred in whole or in part by the doctrine of estoppel.

FOR A FIFTH DEFENSE

5. The plaintiff's claims should be barred in whole or in part by the illegality of the plaintiff's conduct.

FOR A SIXTH DEFENSE

6. Defendant Katz is without sufficient information or knowledge to admit or deny the allegations of paragraph 1 of the Complaint. The allegations are therefore denied and strict proof thereof demanded.
7. Upon information and belief, Defendant Katz admits Paragraph 2 of the Complaint.
8. Upon information and belief, Defendant Katz admits the allegations contained in Paragraph 3 of the Complaint.
9. Defendant Katz is without sufficient information or knowledge to admit or deny the allegations of paragraph 4 of the Complaint. The allegations are therefore denied and strict proof thereof demanded.
10. The allegations of paragraph 5 of the Complaint are denied and strict proof thereof demanded.
11. The allegations in paragraph 6 are denied and strict proof thereof is demanded.
12. Paragraph 7 of the Complaint is admitted to the extent it alleges that Plaintiff Jernigan had no right to withdraw or attempt to withdraw funds from the account number *****8854. All other allegations in paragraph 7 of the complaint are denied and strict proof thereof demanded.
13. Paragraph 8 of the Complaint is admitted to the extent it alleges that the Plaintiff unlawfully accessed and/or withdrew or attempted to withdraw funds from Defendant Katz' account. All other allegations in paragraph 8 of the complaint are denied and strict proof thereof demanded.

14. Defendant Katz lacks information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the Complaint. The allegations are therefore denied and strict proof thereof demanded.
15. Paragraph 10 of the Complaint is admitted to the extent it alleges that Defendant Katz reported the Plaintiff's conduct to the Police Department of the City of Charleston. All other allegations in Paragraph 10 are denied and strict proof thereof demanded.
16. Paragraph 11 of the Complaint is admitted to the extent it alleges that Defendant Katz was informed and reasonably believed the Plaintiff's conduct was not lawful. All other allegations in Paragraph 11 are denied and strict proof thereof demanded.
17. Defendant Katz lacks information sufficient to form a belief as to the truth of the allegations contained in paragraphs 12, 13, 14, and 15 and therefore denies the same, and demands strict proof thereof.
18. Responding to the allegations contained in Paragraph 16, each allegation contained above is realleged and incorporated by reference.
19. The allegations of Paragraph 17 contain legal conclusions to which no response is required. To the extent a response is required, the allegations contained in paragraph 17 of the Complaint are denied and strict proof thereof is demanded.
20. Responding to the allegations contained in Paragraph 18, each allegation contained above is realleged and incorporated by reference.
21. Paragraph 19 contains legal conclusions to which no response is required. To the extent that a response is required, the allegations of Paragraph 19 of the Complaint are denied and strict proof thereof is demanded.

22. Responding to the allegations contained in Paragraph 20, each allegation contained above is realleged and incorporated by reference.
23. Paragraph 21 is a legal conclusion to which no response is required but to the extent that a response is required, the allegations of Paragraph 21 of the Complaint are denied and strict proof thereof is demanded.
24. Responding to the allegations contained in Paragraph 22, each allegation contained above is realleged and incorporated by reference.
25. Paragraph 23 is a legal conclusion to which no response is required but to the extent that a response is required, the allegations of Paragraph 23 of the Complaint are denied and strict proof thereof is demanded.
26. Responding to the allegations contained in Paragraph 24, each allegation contained above is realleged and incorporated by reference.
27. Paragraph 25 is a legal conclusion to which no response is required but to the extent that a response is required, the allegations of Paragraph 25 of the Complaint are denied and strict proof thereof is demanded.
28. Responding to the allegations contained in Paragraph 26, each allegation contained above is realleged and incorporated by reference.
29. Defendant Katz lacks information sufficient to form a belief as to the truth of the allegations of Paragraph 27, and therefore denies the same, and demands strict proof thereof.
30. The allegations of Paragraph 28 of the Complaint are denied and strict proof thereof is demanded.

FOR A SEVENTH DEFENSE

31. To the extent that the Plaintiff has sought an equitable remedy against the Defendant, the Plaintiff's unclean hands bars such action.

FOR AN EIGHTH DEFENSE

32. Defendant Katz reserves the right to allege additional defenses and additional facts and circumstances in support of their defenses as the facts become available.

**FURTHER ANSWERING AND BY WAY OF COUNTERCLAIM AGAINST
PLAINTIFF, DEFENDANT BOONE ALLEGES AS FOLLOWS:**

33. Plaintiff and Defendant Katz were formerly husband and wife.
34. On or about the 5th day of January, 2004, the plaintiff purportedly was removed by defendant Bank of America as an authorized user of the bank account at issue.
35. However, the plaintiff improperly and unlawfully remained able to access Defendant Katz' account electronically or otherwise.
36. Plaintiff was able to access, view, and otherwise intrude upon Defendant Katz' account during their divorce proceedings and up to and including the time frame alleged in the plaintiff's Complaint.
37. At no time did Defendant Katz authorize either the plaintiff to so access and withdraw funds from the account at issue or authorize defendant Bank of America to permit the same.
38. The plaintiff, having access to defendant Katz' account, intentionally electronically accessed her account and caused the funds therein to be converted and used for his own purposes.
39. At all times relevant, defendant Katz was unaware of the plaintiff's access to her account, and unaware of defendant Bank of America's conduct which permitted the plaintiff's unlawful access.

FOR A FIRST COUNTERCLAIM
(Conversion)

- 40. The foregoing paragraphs are realleged and incorporated by reference.
- 41. The bank account at issue and the funds contained therein are property of defendant Katz.
- 42. By and through the plaintiff's intentional access of defendant Katz' bank account without defendant Katz' authorization or permission, the plaintiff converted the property of defendant Katz for his own use.
- 43. The plaintiff's assumption and exercise of the right of ownership over defendant Katz' property was unauthorized.
- 44. As a direct and proximate result of the plaintiff's conduct, defendant Katz has been injured and suffered damages. Defendant Katz is entitled to judgment against the plaintiff for actual, compensatory damages, consequential damages, incidental damages, and such other further relief as the court deems proper.

FOR A SECOND COUNTERCLAIM
(Invasion of Privacy/Wrongful Intrusion into Private Affairs)

- 45. The foregoing paragraphs are realleged and incorporated by reference.
- 46. The plaintiff had access to, and in fact intentionally accessed, defendant Katz' bank account subsequent to his purported removal from the account.
- 47. Defendant Katz' bank account and the information contained therein concern those aspects of herself, home, family, and personal relationships and communications that she normally and reasonably expects to be free from exposure to the plaintiff.
- 48. The plaintiff's conduct was of a nature that caused mental injury to defendant Katz, a person of ordinary feelings and intellect.

49. As a direct and proximate result of the plaintiff's conduct, defendant Katz has been injured and suffered damages. Defendant Katz is entitled to judgment against the plaintiff for actual, compensatory damages, consequential damages, incidental damages, and such other further relief as the court deems proper.

FOR A THIRD COUNTERCLAIM
(Breach of Contract)

50. The foregoing paragraphs are realleged and incorporated by reference.
51. The customer removal authorization/modification agreement executed by and between the plaintiff, defendant Katz, and defendant Bank of America constitutes a legally binding agreement.
52. By and through the access of defendant Katz' bank account, the plaintiff breached the agreement, thereby damaging defendant Katz.
53. As a direct and proximate result of the plaintiff's conduct, defendant Katz has been injured and suffered damages. Defendant Katz is entitled to judgment against the plaintiff for actual, compensatory damages, consequential damages, incidental damages, and such other further relief as the court deems proper.

FOR A FIRST CROSSCLAIM
AGAINST DEFENDANT BANK OF AMERICA
(Negligence)

54. The foregoing paragraphs are realleged and incorporated by reference.
55. By and through the relationship established between defendant Katz and defendant Bank of America, defendant Bank of America had a duty to promptly and adequately remove the plaintiff as an authorized user of defendant Katz' bank account when requested.

56. By and through its willful, wanton, negligent, grossly negligent, and/or reckless acts and/or omissions, defendant Bank of America breached the duties owed to defendant Katz in the following particulars:

- a. Failing to promptly and adequately remove the plaintiff as an authorized user on defendant Katz' bank account;
- b. Failing to adequately and properly secure online access to defendant Katz' bank account;
- c. Failing to adequately and properly utilize and/or secure the "bill pay" function of its online banking operations;
- d. Allowing the plaintiff to obtain access to defendant Katz' bank account after his purported removal as an authorized user of the same;
- e. Failing to use the amount of care one ordinarily would have under the circumstances;
- f. In such other particulars as the evidence may show.

57. As a direct and proximate result of defendant Bank of America's conduct, defendant Katz has been injured and suffered damages. Defendant Katz is entitled to judgment against defendant Bank of America for actual, compensatory damages, consequential damages, incidental damages, and such other further relief as the court deems proper.

FOR A SECOND CROSSCLAIM
AGAINST DEFENDANT BANK OF AMERICA
(Breach of Contract)

58. The foregoing paragraphs are realleged and incorporated by reference.

59. The customer removal authorization/modification agreement executed by and between the plaintiff, defendant Katz, and defendant Bank of America constitutes a legally binding agreement.

60. By and through the conduct of defendant Bank of America in failing to prevent the plaintiff from being able to access and/or actually accessing defendant Katz' bank account, defendant Bank of America breached the agreement, thereby damaging defendant Katz.

61. As a direct and proximate result of defendant Bank of America's conduct, defendant Katz has been injured and suffered damages. Defendant Katz is entitled to judgment against defendant Bank of America for actual, compensatory damages, consequential damages, incidental damages, and such other further relief as the court deems proper.

WHEREFORE having fully answered the complaint of the plaintiff, defendant Katz requests this Honorable Court to inquire into the matters set forth herein and to grant the relief herein requested and all other relief this Honorable Court deems just and proper. Jury trial demanded.

THE RICHTER FIRM, LLC

BY:



Lawrence E. Richter, Jr.
Aaron E. Edwards
P. O. Box 1089
Mt. Pleasant, SC 29465
(843) 849-6000 phone
(843) 881-1400 fax

ATTORNEYS FOR DEFENDANT KATZ

This 5th day of June, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

FLOYD E. JERNIGAN,) Civil Action No. 2009-CP-10-2433

Plaintiff,)

vs.)

SUZANNE BOONE KATZ and BANK
OF AMERICA CORPORATION,)

Defendant.)

AMENDED ANSWER OF
DEFENDANT BANK OF AMERICA
N.A.

FILED
2009 DEC 11 PM 1:07
J. ARMSTRONG
CLERK OF COURT

Defendant Bank of America, N.A., improperly identified above as Bank of America Corporation (the "Bank") hereby answers the Complaint of the plaintiff Floyd E. Jernigan ("Plaintiff") as follows:

The Bank denies all allegations in the Complaint unless specifically admitted, modified or explained herein.

FOR A FIRST DEFENSE

1. Responding to Paragraph 1, the Bank admits upon information and belief that Plaintiff is a resident of Charleston County, South Carolina. The Bank is without knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 1 and therefore denies same.

2. Upon information and belief, Paragraph 2 is admitted.

3. Responding to Paragraph 3, the Bank admits upon information and belief that Plaintiff and Defendant Boone were formerly husband and wife. The Bank is without knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 3 and therefore denies same.

4. Responding to Paragraph 4, the Bank admits that Bank of America, N.A. is a banking institution that maintains property and agents and provides banking services in Charleston County, South Carolina. The Bank further admits that, among other banking services, it maintains customers' deposit accounts, which often include features such as electronic transfer of funds, overdraft protection and electronic bill pay. The Bank denies any remaining allegations contained in Paragraph 4.

5. Responding to Paragraph 5, the Bank admits only that during the time period at issue Plaintiff was the sole owner of a deposit account maintained by the Bank and bearing account number *****4502 (the "4502 Account"), and, until January 5, 2004, Plaintiff and Defendant Boone were joint owners of a deposit account maintained with the Bank bearing account number ***** 8854 (the "8854 Account"). The Bank is without knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 5 and therefore denies same.

6. Responding to Paragraph 6, the Bank admits only that the 4502 Account included a feature that allowed Plaintiff to make online bill payments from the account. The Bank denies the remaining allegations contained in Paragraph 6.

7. Responding to Paragraph 7, the Bank admits that on January 5, 2004, Plaintiff executed a customer removal form and that no further action was required of Plaintiff pursuant to the Bank's policies and procedures in order for the Bank to remove him as an owner on the 8854 Account. The Bank further admits that after January 5, 2004, Plaintiff periodically transferred funds into the 8854 Account. The Bank is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 7 and therefore denies same.

8. Responding to Paragraph 8, the Bank denies the allegation that the 4502 Account lacked funds between January 16, 2007 and January 19, 2007 sufficient to cover the disputed online bill payments and the allegation that Plaintiff scheduled the disputed online bill payments to be made from the 4502 Account during this time period. The Bank is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 8 and therefore denies same.

9. Responding to Paragraph 9, the Bank admits that on or about January 18, 2007, Defendant Boone contacted the Bank regarding the unauthorized transactions. The Bank further admits that an employee of the Bank subsequently contacted Plaintiff and obtained his approval to transfer funds in the amount of \$1,153.70, which was the total amount of the five unauthorized transactions, from the 4502 Account to the 8854 Account. The Bank further admits that on January 22, 2007, \$1,153.70 was debited from the 4502 Account and credited to the 8854 Account. The Bank denies the remaining allegations in contained in Paragraph 9.

10. Upon information and belief, the Bank admits that on or about January 20, 2007, Defendant Boone reported the unauthorized transactions to the Charleston Police Department. The Bank is without knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 10 and therefore denies same.

11. The Bank is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 11 and therefore denies same.

12. The Bank is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 12 and therefore denies same.

13. The Bank is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 13 and therefore denies same.

14. The Bank is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 14 and therefore denies same.

15. The Bank is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 15 and therefore denies same.

FOR A FIRST DEFENSE TO THE FIRST CAUSE OF ACTION

16. This cause of action is not asserted against the Bank and therefore requires no response from this defendant. To the extent a response is required, the allegations are denied.

17. This cause of action is not asserted against the Bank and therefore requires no response from this defendant. To the extent a response is required, the allegations are denied.

FOR A FIRST DEFENSE TO THE SECOND CAUSE OF ACTION

18. This cause of action is not asserted against the Bank and therefore requires no response from this defendant. To the extent a response is required, the allegations are denied.

19. This cause of action is not asserted against the Bank and therefore requires no response from this defendant. To the extent a response is required, the allegations are denied.

FOR A FIRST DEFENSE TO THE THIRD CAUSE OF ACTION

20. The Bank reasserts its responses to the previous allegations as if set forth verbatim herein.

21. The Bank denies the allegations in Paragraph 21.

FOR A FIRST DEFENSE TO THE FOURTH CAUSE OF ACTION

22. This cause of action is not asserted against the Bank and therefore requires no response from this defendant. To the extent a response is required, the allegations are denied.

23. This cause of action is not asserted against the Bank and therefore requires no response from this defendant. To the extent a response is required, the allegations are denied.

FOR A FIRST DEFENSE TO THE FIFTH CAUSE OF ACTION

24. The Bank reasserts its responses to the previous allegations as if set forth verbatim herein.

25. The Bank denies the allegations in Paragraph 25.

FOR A FIRST DEFENSE TO THE SIXTH CAUSE OF ACTION

26. The Bank reasserts its responses to the previous allegations as if set forth verbatim herein.

27. The Bank denies the allegations in Paragraph 27.

28. The Bank denies the allegations in Paragraph 28.

FOR A FIRST DEFENSE TO THE PRAYER FOR RELIEF

29. The Bank denies the allegation that Plaintiff is entitled to the relief against the Bank requested in the paragraph at the end of the Complaint beginning with the word "WHEREFORE," including all subparts.

FOR A SECOND DEFENSE
(Failure to State a Claim)

30. The Complaint fails to state facts sufficient to constitute a cause of action and, therefore, it must be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE
(Terms and Conditions of Agreements)

31. The Bank pleads and incorporates herein by reference all terms and conditions set forth in the agreements between the parties.

FOR A FOURTH DEFENSE
(Limitations on Remedies and Damages)

32. The Bank pleads and incorporates herein by reference all limitations on remedies and damages set forth in the agreements between the parties.

FOR A FIFTH DEFENSE
(Waiver)

33. Plaintiff's claims are barred by the equitable doctrine of waiver.

FOR A SIXTH DEFENSE
(Estoppel)

34. Plaintiff's claims are barred by the equitable doctrine of estoppel.

FOR A SEVENTH DEFENSE
(Unclean Hands)

35. Plaintiff's claims are barred by the equitable doctrine of unclean hands.

FOR AN EIGHTH DEFENSE
(Intervening Acts)

36. Any injuries sustained by Plaintiff were due to and proximately caused by the sole or intervening acts of third parties, which occurred prior to or subsequent to any acts or omissions by the Bank, which are expressly denied. Therefore, the sole or intervening acts of third parties were the real, efficient and proximate causes of any injuries to Plaintiff, and, therefore, Plaintiff may not recover against the Bank

FOR A NINTH DEFENSE
(Comparative Fault)

37. Plaintiff's claim is barred in whole or in part by his own negligence, indifference, willful misconduct, careless actions, or inactions.

38. Any award of damages against the Bank must be reduced by those amounts attributable to Plaintiff's comparative fault, negligence, indifference, willful misconduct, careless actions, or inactions.

FOR A TENTH DEFENSE
(Statute of Limitations)

39. All or a portion of Plaintiff's claim may be barred by the applicable statute of limitations.

FOR AN ELEVENTH DEFENSE
(Truth of Statements)

40. Plaintiff's claims fail as a matter of law because any statements made by the Bank or its agents or employees were either absolutely or substantially true.

FOR A TWELFTH DEFENSE
(Qualified Privilege)

41. Plaintiff's claims fail as a matter of law because any statements made by the Bank were qualifiedly privileged.

FOR A THIRTEENTH DEFENSE
(Unconstitutionality of Punitive Damages)

42. An award of punitive damages violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that:

- a. the judiciary's ability to correct a punitive damages award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;
- b. any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- c. any award of punitive damages based upon the wealth of the Bank violates due process guarantees;
- d. the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- e. an excessive award of punitive damages violates the due process guarantees of the Bank ;
- f. an award of punitive damages that is neither reasonable nor proportionate to the alleged wrong committed is irrational, arbitrary, furthers no legitimate purpose, and is an unconstitutional deprivation of the property of the Bank ;
- g. an award of punitive damages that is grossly disproportionate to any compensatory damages awarded violates the Bank's due process guarantees;
- h. an award of punitive damages based solely on vicarious liability or the doctrine of respondeat superior is violative of due process guarantees;
- i. due to the lack of standards for determining punitive damages, the Bank lacks fair notice of the punishment to which they could be subjected;
- j. even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness;

- k. an award of punitive damages that does not comport with the three guideposts articulated in *State Farm Mutual Automobile Insurance Company v. Campbell* fails to satisfy constitutional due process guarantees; and
- l. Plaintiff's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Bank.

FOR A FOURTEENTH DEFENSE
(Binding Arbitration)

43. Plaintiff's claims against the Bank may be subject to binding arbitration.

FOR A FIFTEENTH DEFENSE
(Statute of Limitations)

All or a portion of Katz's claim may be barred by the applicable statute of limitations.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Bryson M. Geer
SC Bar No. 13606
E-Mail: bryson.geer@nelsonmullins.com
Merritt G. Abney
SC Bar No. 71893
E-Mail: merritt.abney@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Bank of America, N.A.

Charleston, South Carolina

December 21, 2009

09-2433

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Bank of America, N.A., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

AMENDED ANSWER OF DEFENDANT BANK
AMERICA, N.A.

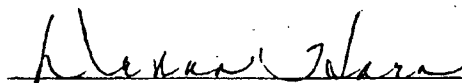
Counsel Served:

Geoffrey H. Waggoner, Esq.
Waggoner Law Firm
P.O. Box 865
Mt. Pleasant, SC 29465

Aaron E. Edwards, Esq.
Lawrence E. Richter, Jr., Esq.
The Richter Law Firm
P.O. Drawer 1089
Mt. Pleasant, SC 29465

2009 DEC 21 PM 4:07
JULIE J. ARMSTRONG
CLERK OF COURT

FILED



Donna Horn
Administrative Assistant

December 21, 2009

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

FLOYD E. JERNIGAN,)

Plaintiff,)

vs.)

SUZANNE BOONE KATZ and BANK
OF AMERICA CORPORATION,)

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Civil Action No. 2009-CP-10-2439

AMENDED ANSWER OF
DEFENDANT BANK OF AMERICA,
N.A. TO THE CROSSCLAIM OF
DEFENDANT SUZANNE BOONE
KATZ

FILED
2009 DEC 21 PM 4:08
JULIE ARMSTRONG
CLERK OF COURT

Defendant Bank of America, N.A., improperly identified above as Bank of America Corporation (the "Bank") hereby answers the Crossclaim of the defendant Suzanne Boone Katz ("Katz") as follows:

The Bank denies all allegations in the Crossclaim unless specifically admitted, modified or explained herein.

FOR A FIRST DEFENSE

1. Upon information and belief, The Bank admits the allegations contained in Paragraph 33 of the Counterclaim and Crossclaim.

2. Responding to Paragraph 34, the Bank admits that on January 5, 2004, the plaintiff, Floyd E. Jernigan ("Plaintiff"), executed a customer removal form, the purpose of which was to remove him as an owner on the deposit account jointly owned by Plaintiff and Katz and maintained with the Bank bearing account number ***** 8854 (the "8854 Account"). However, until January 18, 2007, Plaintiff retained the ability to make payments from the 8854 Account via the Bill Pay feature attached to the account. The Bank denies any remaining allegations contained in Paragraph 34.

3. Responding to Paragraph 35, the Bank admits only that until January 18, 2007, Plaintiff retained the ability to make payments from the 8854 Account via the Bill Pay feature attached to the account. The remaining allegations in Paragraph 35 are denied.

4. Paragraph 36 is denied.

5. The Bank is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 37 and therefore denies same.

6. Responding to Paragraph 38, the Bank admits only that until January 18, 2007, Plaintiff retained the ability to make payments from the 8854 Account via the Bill Pay feature attached to the account. The Bank is without knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 38 and therefore denies same.

7. The Bank is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 39 and therefore denies same.

8. Paragraphs 40 through 53 assert no allegations against the Bank, and therefore no response is required from this defendant. To the extent that the Court determines a response is required, the allegations are denied.

FOR A FIRST DEFENSE TO THE FIRST CROSSCLAIM

9. Responding to Paragraph 54, the Bank reasserts its responses to the previous allegations as if set forth verbatim herein.

10. The Bank denies the allegations in Paragraph 55.

11. The Bank denies the allegations in Paragraph 56.

12. The Bank denies the allegations in Paragraph 57.

FOR A FIRST DEFENSE TO THE SECOND CROSSCLAIM

13. Responding to Paragraph 58, the Bank reasserts its responses to the previous allegations as if set forth verbatim herein.

14. The Bank denies the allegations in Paragraph 59.

15. The Bank denies the allegations in Paragraph 60.

16. The Bank denies the allegations in Paragraph 61.

FOR A FIRST DEFENSE TO THE PRAYER FOR RELIEF

17. The Bank denies the allegation that Katz is entitled to the relief against the Bank requested in the paragraph at the end of the Crossclaim beginning with the word "WHEREFORE," including all subparts.

FOR A SECOND DEFENSE
(Failure to State a Claim)

18. The Crossclaim fails to state facts sufficient to constitute a cause of action and, therefore, it must be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE
(Terms and Conditions of Agreements)

19. The Bank pleads and incorporates herein by reference all terms and conditions set forth in the agreements between the parties.

FOR A FOURTH DEFENSE
(Limitations on Remedies and Damages)

20. The Bank pleads and incorporates herein by reference all limitations on remedies and damages set forth in the agreements between the parties.

FOR A FIFTH DEFENSE
(Waiver)

21. Katz's claims are barred by the equitable doctrine of waiver.

FOR A SIXTH DEFENSE
(Estoppel)

22. Katz's claims are barred by the equitable doctrine of estoppel.

FOR A SEVENTH DEFENSE
(Unclean Hands)

23. Katz's claims are barred by the equitable doctrine of unclean hands.

FOR AN EIGHTH DEFENSE
(Intervening Acts)

24. Any injuries sustained by Katz were due to and proximately caused by the sole or intervening acts of third parties, which occurred prior to or subsequent to any acts or omissions by the Bank, which are expressly denied. Therefore, the sole or intervening acts of third parties were the real, efficient and proximate causes of any injuries to Katz, and, therefore, Katz may not recover against the Bank

FOR A NINTH DEFENSE
(Comparative Fault)

25. Plaintiff's claim is barred in whole or in part by his own negligence, indifference, willful misconduct, careless actions, or inactions.

Any award of damages against the Bank must be reduced by those amounts attributable to Plaintiff's comparative fault, negligence, indifference, willful misconduct, careless actions, or inactions.

FOR A TENTH DEFENSE
(Unconstitutionality of Punitive Damages)

26. An award of punitive damages violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that:

- a. the judiciary's ability to correct a punitive damages award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;
- b. any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- c. any award of punitive damages based upon the wealth of the Bank violates due process guarantees;
- d. the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- e. an excessive award of punitive damages violates the due process guarantees of the Bank ;
- f. an award of punitive damages that is neither reasonable nor proportionate to the alleged wrong committed is irrational, arbitrary, furthers no legitimate purpose, and is an unconstitutional deprivation of the property of the Bank ;
- g. an award of punitive damages that is grossly disproportionate to any compensatory damages awarded violates the Bank's due process guarantees;
- h. an award of punitive damages based solely on vicarious liability or the doctrine of respondeat superior is violative of due process guarantees;
- i. due to the lack of standards for determining punitive damages, the Bank lacks fair notice of the punishment to which they could be subjected;
- j. even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness;

- k. an award of punitive damages that does not comport with the three guideposts articulated in *State Farm Mutual Automobile Insurance Company v. Campbell* fails to satisfy constitutional due process guarantees; and
- l. Katz's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Bank.

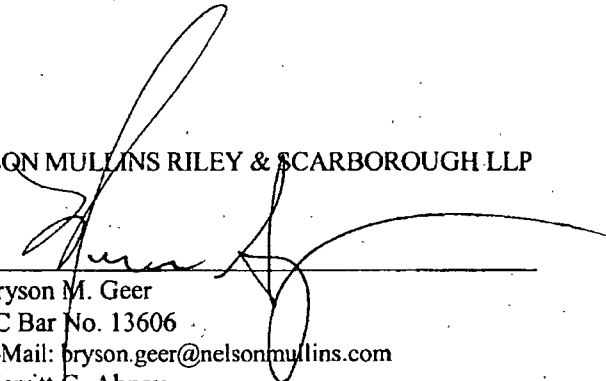
FOR AN ELEVENTH DEFENSE
(Binding Arbitration)

27. Katz's claims against the Bank may be subject to binding arbitration.

FOR A TWELFTH DEFENSE
(Statute of Limitations)

28. All or a portion of Katz's claim may be barred by the applicable statute of limitations.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Bryson M. Geer
SC Bar No. 13606
E-Mail: bryson.geer@nelsonmullins.com
Merritt G. Abney
SC Bar No. 71893
E-Mail: merritt.abney@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Bank of America, N.A.

Charleston, South Carolina

December 21, 2009

09 - 2433

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Bank of America, N.A., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

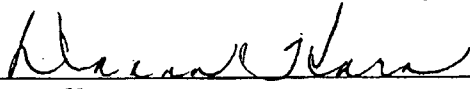
Pleadings:

AMENDED ANSWER OF DEFENDANT BANK
AMERICA, N.A. TO CROSSCLAIM

Counsel Served:

Geoffrey H. Waggoner, Esq.
Waggoner Law Firm
P.O. Box 865
Mt. Pleasant, SC 29465

Aaron E. Edwards, Esq.
Lawrence E. Richter, Jr., Esq.
The Richter Law Firm
P.O. Drawer 1089
Mt. Pleasant, SC 29465


Donna Horn
Administrative Assistant

December 21, 2009

2009 DEC 21 PM 4:08
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

COURT OF COMMON PLEAS
2009-CP-10-05861

FLOYD E. JERNIGAN,

Plaintiff,

V.

SUZANNE BOONE KATZ and
BANK OF AMERICA, N.A.,

Defendant.

TRANSCRIPT OF RECORD

BENCH TRIAL

September 13, 2011
Charleston, South Carolina

B E F O R E:

THE HONORABLE J.C. NICHOLSON, JUDGE

A P P E A R A N C E S:

MR. GEOFFREY H. WAGGONER, ESQUIRE
REPRESENTING THE PLAINTIFF

MR. AARON EDWARDS, ESQUIRE
REPRESENTING THE DEFENDANT KATZ

MR. MERRITT ABNEY, ESQUIRE
REPRESENTING THE DEFENDANT BANK OF AMERICA

Anne Bouley Meyer, RPR
Circuit Court Reporter

I N D E X WITNESSES

ALL WITNESSES:	PAGE:
PRELIMINARY MATTERS by THE COURT	4:1
OPENING STATEMENT by MR. WAGGONER	6:20
OPENING STATEMENT by MR. EDWARDS	15:8
OPENING STATEMENT by MR. ABNEY	22:23
DR. FLOYD JERNIGAN:	
Direct Examination by MR. WAGGONER	34:5
Cross-Examination by BY MR. EDWARDS	65:4
Cross-Examination by BY MR. ABNEY	71:8
Redirect Examination by BY MR. WAGGONER	82:11
MS. SUZANNE BOONE KATZ:	
Direct Examination by BY MR. WAGGONER	88:3
Cross-Examination by BY MR. ABNEY	110:2
Redirect Examination by BY MR. WAGGONER	118:20
MS. SUSAN DUNN:	
Direct Examination by BY MR. WAGGONER	120:23
Cross-Examination by BY MR. EDWARDS	144:10
Cross-Examination by BY MR. ABNEY	146:4
MR. DONALD DAQUIGAN:	
Direct Examination by BY MR. WAGGONER	151:7
Cross-Examination by BY MR. EDWARDS	164:20
Cross-Examination by BY MR. ABNEY	168:4
Redirect Examination by BY MR. WAGGONER	173:23
Recross-Examination by	174:22
BY MR. EDWARDS	
MR. WILLIAM NEVAREZ:	
Direct Examination by BY MR. WAGGONER	180:12
Cross-Examination by BY MR. EDWARDS	214:9
Cross-Examination by BY MR. ABNEY	236:16
Redirect Examination by BY MR. WAGGONER	246:7
Recross-Examination by BY MR. ABNEY	251:18
Examination by THE COURT	253:1

Exhibits

NO.:	DESCRIPTION:	PAGE:
	For Plaintiff:	
1	For Identification	43:20

1			
2	2		
3		For Identification	49:22
4	3		
5		For Identification	53:9
6	4		
7		For Identification	63:10
8	1 - 4		
9		In Evidence	64:13
10	17		
11		For Identification	94:16
12	5		
13		For Identification	103:25
14	6		
15		For Identification	105:20
16	7		
17		For Identification	106:12
18	8		
19		For Identification	106:24
20	9		
21		For Identification	107:11
22	10		
23		For Identification	135:3
24	5 - 13, 17		
25		In Evidence	180:5
		For Defendant Bank of America:	
	1 - 21, 25, 28 - 38		
		In Evidence	71:4

1 THE COURT: Mr. Waggoner.

2 MR. WAGGONER: Yes, sir.

3 THE COURT: Are you still proceeding, I believe
4 we had six causes of action, are you proceeding on all
5 of them?

6 MR. WAGGONER: Not aggressively.

7 THE COURT: Pardon?

8 MR. WAGGONER: No, sir.

9 THE COURT: Tell me which ones we are proceeding
10 on.

11 MR. WAGGONER: Negligence and defamation
12 primarily.

13 THE COURT: Which one? The first one is false
14 imprisonment against the Defendant Katz. You have
15 malicious prosecution against the Defendant Katz. And
16 you've got slander against the bank and the Defendant
17 Katz.

18 MR. WAGGONER: Correct. All causes of action
19 against Ms. Katz have been resolved.

20 THE COURT: Okay. So she is out of the lawsuit?

21 MR. WAGGONER: Out of the plaintiff's action.

22 THE COURT: Out of the plaintiff's action. So is
23 she still in as far as the cross-claim?

24 MR. EDWARDS: That's correct, she has got a
25 cross-claim against the bank, Your Honor. No

1 counterclaims against the plaintiff.

2 THE COURT: So what are you proceeding against
3 as far as the bank is concerned then?

4 MR. WAGGONER: Negligence, defamation, and
5 malicious prosecution.

6 THE COURT: All right. So negligent as to these
7 I believe six causes of action. Malicious prosecution
8 you say?

9 MR. WAGGONER: As the third one. Negligence,
10 defamation and malicious prosecution.

11 We submitted a pretrial brief, I don't know if
12 Your Honor got it.

13 THE COURT: Yes, I got it this morning.

14 As far as the defendant is concerned, the
15 cross-claim is breach of contract, and I believe --
16 what else?

17 MR. EDWARDS: Negligence.

18 THE COURT: Negligence and breach of contract.

19 MR. EDWARDS: Yes, sir.

20 THE COURT: Is that correct on the cross-claim?

21 MR. EDWARDS: Yes, sir. And there is also, in
22 the negligence allegation, a cause of action allegation
23 of gross negligence.

24 THE COURT: Against the bank; is that correct?

25 MR. EDWARDS: Against the bank, yes, sir.

1 THE COURT: Then we have got Bank of America's
2 answer.

3 MR. ABNEY: Yes, Your Honor.

4 THE COURT: Is that correct?

5 MR. ABNEY: Denying all claims.

6 THE COURT: I understand. You've got a bunch of
7 waiver doctrine, you've got estoppel, intervening acts,
8 statute of limitations and binding arbitration. Which
9 ones are you proceeding on?

10 MR. ABNEY: We are dropping all of those. We
11 are not proceeding on any of those primary defenses.

12 THE COURT: The only thing you are proceeding on
13 is general denial.

14 MR. ABNEY: General denial, yes, Your Honor.

15 THE COURT: All right.

16 All right, you all want to make a brief opening
17 statement as to your position, Mr. Waggoner? I will
18 hear from the respective attorneys, and we will get
19 started.

20 MR. WAGGONER: Thank you, Your Honor.

21 Your Honor, this is case about a bank error and
22 how the bank's failure or refusal to investigate and
23 acknowledge the true extend of that error led to the
24 plaintiff's arrest and prosecution for something he
25 didn't do.

1 Plaintiff is a local physician, was employed by
2 the Veteran's Administration Hospital. And he and his
3 wife were married for more than 20 years when they
4 experienced marital discord, separation and ultimately
5 divorced.

6 In connection with their settlement, back in
7 January of 2004, the plaintiff gave up his rights to
8 their joint account Number 8854 with the Bank of
9 America. And for the next three years, again pursuant
10 to that settlement agreement, the plaintiff maintained
11 his own account, 4502, with the Bank of America.

12 And from that account, on a monthly basis, he
13 transferred various obligations, financial obligations
14 to his wife's support in varying amounts, but typically
15 in the 3- to 4- to \$5,000 a month amount to her account
16 at 8854, the one he had renounced.

17 Throughout those three years he also used his
18 own account to accomplish what is called bill-pay
19 payments through his own account which had been set up
20 by Bank of America to pay his own household bills.

21 In January 2007, three years almost to the day
22 after he had renounced his rights to 8854, as a result
23 of an unusual series of deposits into his account,
24 which have nothing to do with this case, his account
25 was restricted, 4502 was restricted from outgoing

1 transactions.

2 At or near the same time that that account was
3 restricted, he made his usual electronic bill payments
4 for his own bills in the amount of \$1,100. At this
5 time, through a mechanism which has not been fully
6 understood or explained, the 1,100 that he had intended
7 to go out of his account per usual, as it has been for
8 three years, went out of his ex-wife's account, 8854,
9 the account that he had renounced ownership with three
10 year earlier.

11 When his ex-wife, Ms. Katz, discovered the
12 unauthorized payments, she immediately alerted them.
13 She discovered them within days, if not hours, she
14 immediately alerted the bank and the matter was
15 researched.

16 And it was discover that when he had renounced
17 his account, his rights to the account 8854 three years
18 earlier, the bank had failed to follow its standard
19 procedures and that had allowed access. And so when
20 the plaintiff was notified -- when the plaintiff was
21 notified of the situation by the bank, he immediately
22 and unhesitatingly refunded the \$1,100 in his normal
23 bill pay account.

24 However, the bank maintained and advised his
25 ex-wife that the plaintiff could not have defaulted, or

1 there could not have been some automatic connection to
2 her account, but that instead he had to have done
3 something deliberately. It had to have been
4 accomplished by some deliberate act on his part.

5 In fact, Your Honor, as you will hear, the bank
6 continued to deny that plaintiff's account had been
7 restricted. In its answer, amended answer to the
8 complaint, in requests to admit where we asked them to
9 admit that his account at this very same month, days
10 really three years later had been restricted, they
11 denied that.

12 And it wasn't until -- they even denied it when
13 he was being deposed. And you will see from the tenure
14 of the questions they asked him that nobody believed
15 his long expressed theory to others that something had
16 happened with his deposits going into his account, his
17 account being somehow restricted, and that having a
18 relation to the very identical week that his bill pay,
19 normal bill pay went out of his wife's account.

20 It wasn't until March of 2010 in a multiple
21 supplementation of defendant's discovery responses that
22 it was finally acknowledged by the bank that his
23 account indeed had been restricted for as a result of
24 those deposits in January of 2007.

25 No one had ever spoken to the plaintiff, and no

1 one had ever considered his view that there must have
2 been a connection between the status of his account and
3 the fact that his normal bill pay payments went out of
4 his ex-wife's account.

5 So when the bank explained all of this to the
6 wife, they didn't tell her about the restricted
7 account. They did admit the error initially, but they
8 never told her that the account had been restricted.
9 They never told the police that the account had been
10 restricted.

11 So the police and the ex-wife were led to
12 believe that without the information about a restricted
13 account, that he must have indeed done something
14 deliberately to take advantage of the first bank error
15 which is acknowledged by the bank, that they failed to
16 follow procedures, so to speak, and left the door open.

17 Accordingly, as I say, the wife and the police
18 were led to believe that he must have used, you're
19 going to hear words like pass code, access code, PIN
20 number, some mechanisms where he knowingly entered her
21 account.

22 As mentioned, the -- that assumption on the
23 wife's part based on what the bank told her, and the
24 assumption on the police part based on what the bank
25 told the investigating officer was maintained

1 throughout much of the litigation. And it wasn't until
2 well into the litigation that the bank ever said, oh,
3 we looked into it, yes, his account had been
4 restricted.

5 THE COURT: When you say account, was that the
6 past joint account was restricted or was the new
7 account restricted?

8 MR. WAGGONER: His old personal account.

9 THE COURT: His old personal joint account?

10 MR. WAGGONER: No, the old joint account was now
11 had been his ex-wife's account for about 3 years. He
12 had signed off on that.

13 THE COURT: Right.

14 MR. WAGGONER: When he did sign off, they did
15 something or failed to do something which was required
16 on their part to prevent access to that account.

17 THE COURT: So that was the account that was
18 restricted?

19 MR. WAGGONER: That was the account -- no, no,
20 his account coincidentally.

21 THE COURT: His account was restricted.

22 MR. WAGGONER: Later on. The same account that
23 he had been transferring.

24 THE COURT: What restrictions were placed on it?

25 MR. WAGGONER: Outgoing restrictions is all we

1 are going to hear; bill pay restrictions and check
2 restrictions. It was open for deposits.

3 Again the restriction had little to do with
4 anything that brings us here today. He was going to
5 pay his son's college tuition. He wrote a large check
6 off one of those credit card accounts. It was the
7 wrong credit card so the check bounced.

8 The bank tried to re-deposit it, apparently it
9 bounced again. So as a result of this unusual
10 activity, and with the bank's normal vigilance, it
11 restricted his accounts. And this is the very same few
12 days that his average, his normal bill pay out of that
13 account went to his ex-wife's account, the one that had
14 been left unlocked, so to speak, by the original
15 banking error.

16 Our suit is primarily based on two factors, Your
17 Honor. One is the original error, which is
18 acknowledged and was acknowledged initially, which is
19 they failed to complete the renunciation on their end.

20 But more seriously, Judge, after telling Ms.
21 Katz to file a police report, which she did when they
22 learned -- when she was told that her ex-husband, that
23 his account had invaded hers, they never looked into
24 his account. There are two parts to this equation.
25 And these two moons, if you will, met up in atmosphere

1 and coincided.

2 The same week his account was restricted three
3 years later was the same week he made the bill pays as
4 usual. And for some mechanisms that nobody I think can
5 understand to this day, it went to her account.

6 It wasn't until his lawyers, his criminal
7 defense lawyer, after he had been arrested and after
8 there had been a preliminary hearing where the police
9 testified to all this, it wasn't until then that his
10 criminal lawyer learned that the bill pay mechanism had
11 in fact been controlled by a third party, an
12 independent contractor, known as CheckFree or Fiserv.

13 And that indeed it was possible that there had
14 been some mechanism, again I'm not a technofile so I
15 can't explain everything, I don't think the bank can
16 either, that it was possible that his restricted status
17 related to the fact that his normal bill pay that week
18 went out of her account.

19 So what happened? He was dragged out of -- this
20 is a physician, obviously, no criminal record, never
21 been disciplined in his profession. He was dragged out
22 of his house at 5:00 in the morning, his son was there.
23 Three or four police cars pulled up, taken out, taken
24 to jail where he sat for 18 hours or so until he bonded
25 out. Then he was ultimately there was a preliminary

1 hearing, the police officer testified.

2 It wasn't until the prosecutor realized, and I
3 think perhaps because the bank also, that she did not
4 have any evidence of hacking or the use of unauthorized
5 codes or anything like that, the charges were dropped.

6 We, of course, maintain that all of this is the
7 proximate cause not only of the bank error, but their
8 failure to investigate his account. They never spoke
9 with him. He was a premier account holder too. They
10 never spoke with him. They never looked into the
11 status of his account.

12 He was telling people between the date of his
13 arrest and after his arrest and before -- after his
14 complaint was filed, before his arrest, that he didn't
15 know, he thought it was like a default or an
16 insufficient funds situation, something had bounced,
17 but it was all settled and he paid it back immediately.

18 But when the bank and police persisted with
19 their assumption that it wasn't so, he had to have done
20 something differently, he was arrested and as I said
21 prosecuted.

22 We are asking for actual damages for what he
23 went through. We are asking for punitive damages. Not
24 so much for the bank's initial error, but for the
25 bank's failure, after telling his wife to file a police

1 report, to contact him, to understand the transaction,
2 and their attitude as measured by the continued denial
3 of the restricted status even through the formality of
4 the request to admit and the complaint at his
5 deposition. Thank you, Your Honor.

6 THE COURT: Okay, thank you very much.

7 Mr. Edwards, who wants to go first?

8 MR. EDWARDS: Probably makes sense for me to go
9 first because I have got a claim against the bank, and
10 then he can respond to all of it.

11 I represent the defendant, Suzanne Boone Katz,
12 the ex-wife of the plaintiff. And this situation is an
13 odd situation. They were at one time married in '03,
14 '04, '05. I think they were divorced sometime in '05.

15 When they separated, one of the issues, probably
16 the main issue in their marriage and their divorce, was
17 financial issues. It caused a lot of marital discord
18 at the time, and in particular caused Ms. Katz distress
19 over her finances.

20 So in January of '04 they go to the bank and
21 have Mr. Jernigan, Dr. Jernigan removed from the joint
22 account dated 54; having it transferred to her sole
23 ownership at that time.

24 Now Ms. Katz, being the friendly and outgoing
25 person that she is, she engages in conversation and she

1 tells the bank employee everything that's going on in
2 her life, just like she tells everybody everything
3 that's going on in her life. Says, I'm so relieved to
4 have this taken care of. There are these issues that
5 we are dealing with in our marriage and divorce, and
6 I'm just happy that you are going to take this burden
7 off of me now.

8 The bank assures her that they will do what
9 they're supposed to do, he won't be able to access it
10 in any shape, form or fashion.

11 So they move on. They go through their divorce.
12 They get divorced. Time passes. She was a
13 stay-at-home mother and wife with Dr. Jernigan.
14 She then started to work. Had formed up her own
15 interior design business. Met a new man, got engaged,
16 Citadel graduate, honor student, honorable man in
17 general.

18 They get engaged. They get married. Her life
19 is turning around at this point. And then this
20 happens, the bill pay transfers happened.

21 She is still very guarded on her finances, very
22 watchful over her accounts so she checks them often.
23 One night she checks it and learns that \$1,100 or so is
24 just missing from her account. No idea where it went.
25 Knew she didn't spend \$1,100. Didn't know where it

1 could have gone or what happened. Thought she was the
2 victim of identity fraud.

3 called up the bank, called up one of those 800
4 numbers, not too much fun, on the phone for hours.
5 Shuffled around from bank person number one to bank
6 person number two to bank person number three to bank
7 person number four.

8 Finally they say, do you know a Dr. Jernigan?
9 She said, yes, I do. The bank says, well, looks like
10 he is the one that accessed your account. And despite
11 our policy of reimbursing you for these fraudulent
12 transfers, we are not going to give you anything.
13 If you want to get your money back, you're going to
14 have to go file a police report and file a fraud report
15 or we are not going to give you any money. So she does
16 that.

17 They're telling her, I don't know what happened
18 but I know based on our records he must have accessed
19 your account, must have selected your account, must
20 have made bill payments go through, it couldn't have
21 been an accident.

22 She doesn't have any reason to suspect
23 otherwise, the bank set this up, they know how it
24 works, they know how it worked here. So she goes to
25 the police department, files a report, goes and meets

1 with the bank personnel down at the branch office and
2 they call up -- they still refuse to reimburse her, but
3 they call up Dr. Jernigan and tell him what the
4 situation is and he puts the money back in out of his
5 own account.

6 So he's put it back in. But the criminal
7 investigation is still pending, and they're asking for
8 information from the bank. So she goes and endeavors
9 to get information from the bank. Never gets an
10 explanation as to how exactly this happened. They just
11 won't tell her.

12 All they will tell her is he must have done it
13 intentionally. Don't go talk to him about it until the
14 investigation is over. But he did it intentionally.

15 If you heard that he said that it was overdraft
16 protection that ain't true because we don't provide
17 overdraft protection from checking account to checking
18 account, it has got to be from a line of credit or a
19 credit card or something else, an equity line. It
20 can't be from checking account to checking account. So
21 if you heard that, that's not true.

22 Well she listens to the bank, relies on the bank
23 says, okay, I guess he did it intentionally. They
24 never look into his account. They never tell her, had
25 they looked into his account, something screwy is going

1 on with his account. At the same time these bill
2 payments went through his account was restricted, there
3 was a check had bounce or there was some issue with
4 that check and, you know, not sure what is going on but
5 these things all happened at the same time.

6 Now I understand plaintiff and Ms. Katz have two
7 sons. They are her world. They will always be her
8 world, and it will be that way for the rest of their
9 lives, or her life or his life. At the same time, even
10 though they're divorced now, he remains the father of
11 those two boys and that will never change.

12 They had their own issues in the marriage, and
13 obviously that led to a divorce, and that is what it
14 is. But this issue resulted from the bank. Had they
15 investigated his account and learned whatever they
16 could have learned about his account had they said, why
17 don't you go talk to your husband, go ahead and do
18 that, find out what is going on.

19 Had they done anything to take responsibility
20 for the fact that they left him on the account, and
21 that this never would have happened but for the fact
22 that they left him on the account, we wouldn't be here.

23 But, no, they denied any responsibility. Said,
24 yeah, we made a mistake and left him on there. So
25 sorry. But, Ms. Katz, although we recognize you're

1 being caused distress and anxiety and you're very
2 worried and anxious about this, we can't help you. We
3 are not going to help you. We admit that we left him
4 on the account, but he must have done it on his own and
5 deliberately and with intention.

6 well the police investigated. They seek
7 information from the bank. Don't get any explanation
8 as to how this happened. So eventually it's dismissed.

9 Dr. Jernigan, nobody contacted him from the
10 bank, nobody talked to him. Ms. Katz never talked to
11 him because the bank told her, don't talk to him until
12 the investigation is over. He is out there thinking,
13 she is out to get me. I have been falsely imprisoned,
14 defamed, so on and so forth. Brings this suit.

15 So she is now involved in litigation. She has
16 got to hire lawyers, she has got to pay legal expenses,
17 fees, she got to do all kinds of things. She's now
18 back where she was in 2004 reliving all these things;
19 back where she was in 2007 reliving all the stress that
20 resulted from learning about all this, the stress that
21 was caused between her and her sons. My dad says this,
22 my mom says this, who do I believe, I don't know.

23 Nothing hurts a family apart quicker than
24 finances. This could have been avoided and should have
25 been avoided had the bank done their job.

1 And he brought a claim against Ms. Katz. She
2 brought a counter-claim understanding what the bank led
3 her to believe that he had done it intentionally.
4 After learning about the restriction, check issues, all
5 of these other screwy things that are going on with his
6 account, she didn't know what is going on. Nobody
7 knows what happened. Nobody knows.

8 But she has a life to live. She has got
9 children to raise. She has got a father of the
10 children to deal with. The last thing they need is
11 litigation. So they resolved their claims.

12 From our perspective, from her perspective, he
13 wants to say what he wants to say. Plaintiff wants to
14 prove his case. The bank wants to prove their case.
15 From Defendant Katz perspective, it really doesn't
16 matter how the bill pay transfers happened.

17 If he had been removed from the bank, it never
18 would have happened, never would have happened. And
19 the bank knew, knew of the financial issues between her
20 and her husband, and they still didn't do anything to
21 help her. They knew that she was being caused harm,
22 did nothing to help her. So she filed a claim against
23 the bank as well.

24 And here we are, she is seeking damages. She
25 has seen doctors, she has seen therapists, she has

1 incurred medical expenses, had prescriptions, had
2 prescriptions modified.

3 she's gotten intangible injuries that are quite
4 severe when you are talking about a family, a mother
5 and her sons and the damage that can result from the
6 type of knowledge, or the belief that one parent is
7 lying to you. And one parent has filed a police
8 report, criminal charge, attempted to file criminal
9 charges against the other. But it never would have
10 happened if the bank had done what was required.

11 So we are seeking actual damages. Given the
12 bank's posture, the acknowledgement of the harm that
13 she was suffering, the acknowledgment that they had
14 made an error in leaving him on the account, and the
15 disdain and refusal to do anything, even to reimburse
16 her on their own accord for damage that -- for just the
17 \$1,100 taken out of her account, we are seeking
18 punitive damages. It's a knowing violation of her
19 rights. They knew what they did caused her harm and
20 they kept on doing it.

21 THE COURT: Okay, thank you very much.

22 Yes, sir.

23 MR. ABNEY: Thank you, Your Honor. Your Honor,
24 Bank of America is not in the business of sending
25 people to jail. There is no profit in that for the

1 bank. The bank did not want Floyd Jernigan to get
2 arrested, there -- they have no motive to see Floyd
3 Jernigan get arrested, and they didn't cause him to get
4 arrest.

5 Neither did any of the employees who are
6 involved in this case. You will not see a shred of
7 evidence in this trial that any individual on behalf of
8 Bank of America bore any ill will towards Floyd
9 Jernigan, or frankly that they even knew who he was.

10 what the evidence will show is that the bank
11 conveyed truthful information. A customer of the bank,
12 Suzanne Katz, called them up and asked them why money
13 is missing from her account. What she was told were
14 facts, and the facts were accurate.

15 She was told that Jernigan was the person who
16 made the payments. She was told that he was able to
17 make those payments because the bank inadvertently
18 failed in 2004 to eliminate his ability to access that
19 account online. She was also told, according to Ms.
20 Katz, that he had to have selected her account number
21 online in order to make the payments.

22 The first two items are undisputed, the
23 underlying facts regarding those first two items. I
24 don't think anybody here disputes that Floyd Jernigan
25 sat down at a computer at some time and directed online

1 that payments be made to these payees in the amounts
2 that they were paid, at least from some account. And
3 nobody disputes the fact that he wouldn't have been
4 able to make it from the 8854 account if his access to
5 the account had been eliminated in 2004.

6 But as to the third item, what we will show in
7 the course of this trial, is that in order to make the
8 payments from the 8854 account, Dr. Jernigan still had
9 to pick it. And any statements to that effect by the
10 bank were absolutely true.

11 Now you'll hear this week from the bank
12 witnesses regarding how bill pay works. And what
13 you'll hear is that in order to make a payment online,
14 a customer has to log on using their personalizing
15 access ID and pass code. And that brings them to a
16 display page that shows them a list of their available
17 accounts.

18 In order to make a bill payment from any of
19 those available accounts, they have to click on the tab
20 that says bill pay and that brings them to the bill pay
21 screen.

22 When they arrive at bill pay, they have got to
23 supply four pieces of information to the bank in order
24 to make a payment. One, whom to pay. Two, how much to
25 pay them. Three, when to pay. And four, the account

1 from which the payment should be made.

2 The bank will not make a payment on a customer's
3 behalf unless all that information is supplied. And
4 bill pay will not make a payment other than as directly
5 specified by the customer.

6 Under no circumstances does the bill pay system
7 just disregard a customer's instruction and make a
8 payment from an account other than the one picked by
9 the customer. It doesn't think for itself. It
10 responds to the customer's direction.

11 THE COURT: So the bank's position is that he,
12 Mr. Jernigan still went on and used her information to
13 take -- pay from her account; is that still your
14 position?

15 MR. ABNEY: Our position is that when he logged
16 onto bill pay that account was still there, and it had
17 always been there because it wasn't removed in 2004.
18 To make the payment he had to pick that account as the
19 account to make payments from.

20 THE COURT: So you are saying it's Mr.
21 Jernigan's error not the bank's error; is that what
22 you're saying?

23 MR. ABNEY: We have never disputed the fact that
24 the bank made an error in failing to remove Dr.
25 Jernigan from the account.

1 THE COURT: I understand that.

2 MR. ABNEY: But at the time he made the
3 payments, we are saying he had to pick it. I don't
4 know what was in his head when he did it, all we know,
5 and what the evidence will show, is that he had to go
6 onto that account and pick it. And any statements by
7 the bank to that effect were absolutely truthful.

8 Now as for this issue of the restriction, I
9 think I heard him say that it didn't have any impact,
10 but you'll hear evidence this week that the restriction
11 was a check-only status restriction.

12 The problem was apparently due to a check, and
13 the restriction that was placed on the account for some
14 period of time, would only have restricted checks
15 coming out of that account. It did not restrict online
16 electronic payments, like the ones at issue in this
17 case.

18 THE COURT: So the bank wouldn't honor a check
19 out of that account.

20 MR. ABNEY: That's right. If he had written a
21 paper check, it would not have been honored because --
22 if it had processed at the time that restriction was in
23 place. But it doesn't affect online payments. And it
24 wasn't even in effect when these payments processed.

25 And as for the fact, the statements regarding

1 our failure to acknowledge that, the reason we didn't
2 acknowledge that, Your Honor, is because they didn't
3 plead it in the complaint. That's not what they said
4 happened.

5 what the complaint says is that the payments
6 happened without any affirmative conduct on his part
7 because he overdrafted his account, and therefore it
8 defaulted to the 8854 account.

9 we looked at the statements, we can tell he
10 clearly didn't overdraft the account because he has
11 plenty of money in there to cover his payments. So we
12 weren't looking for any sort of restriction. There
13 wasn't one in place at the time the payments were made.
14 There is no reason for us to bring it up on our own.

15 when we finally learned about Dr. Jernigan's,
16 for the first time, about Dr. Jernigan's theory that
17 his account was somehow frozen, and that caused the
18 account to default, caused the system to default to Ms.
19 Katz' account, we looked at that.

20 Initially that was right before the deposition,
21 and so the guy that is responding to the deposition
22 said, sure I don't know anything about frozen account.
23 It wasn't frozen. There was a no-check activity
24 restriction that had no impact on these payments. They
25 had a chance, and they did take a deposition, almost

1 entirely on that issue. It has been responded to in
2 discovery, so it's surprising that they're claiming now
3 that we did not acknowledge that because we have.

4 We will also show this week, Your Honor, that
5 the bank did not cause Dr. Jernigan to get arrested.
6 In January of 2007 Ms. Katz, not the bank, contacted
7 the Charleston Police Department and told them that
8 Jernigan had fraudulently accessed her account.

9 The police told her she'd have to swear out a
10 warrant in support of the arrest, and she didn't do
11 that. A couple months later the case was closed. It
12 was all over. Closed for lack of prosecution by the
13 police department.

14 The following month, however, Ms. Katz, not the
15 bank, called the police department and asked them to
16 reopen the investigation. And they did that. And at
17 the time she did that, she had heard that Dr. Jernigan
18 was telling people that he didn't make these payments
19 on purpose and that it was a bank error or something to
20 that effect.

21 At the same time, Dr. Jernigan and Ms. Katz are
22 back in court over lingering outstanding issues from
23 their divorce.

24 In May of 2007 Ms. Katz, not the bank, signed an
25 affidavit in support of the warrant for Dr. Jernigan's

1 arrest. And he was arrested on May 25th, released on
2 bond later that same day.

3 You'll see the police file. And you'll see a
4 lot of references in the police file to conversations
5 that the police officers had with Dr. Jernigan and with
6 Ms. Katz, and other steps they took in the
7 investigation. What you will not see anywhere in the
8 police file is a single reference to a conversation
9 between police officers and Bank of America anywhere.

10 Now you will hear from an officer who claims
11 that he had a conversation, one conversation with a
12 Bank of America associate four months after the case
13 was initially opened, and after it had been closed once
14 for lack of prosecution.

15 But listen to him. He doesn't remember who he
16 spoke with, where she was. He doesn't recall her
17 saying that Dr. Jernigan had to actually do this
18 deliberately. What he remembers her telling him is
19 that in order for someone else to access another
20 party's online account, they would have to have an
21 access ID. That is absolutely true. There is nothing
22 false about that statement.

23 After the arrest, Your Honor, the case went to
24 the solicitor's office. It was handled primarily by
25 assistant solicitor Kimberly Steel. Ms. Steel will

1 testify this week that she contacted the bank during
2 her investigation to try and find out how these
3 transactions occurred, and she will testify that it was
4 based upon those conversations with the bank that she
5 ultimately decided to drop the charge against Dr.
6 Jernigan.

7 The solicitor's office dismissed the case
8 against Jernigan in March 2008, and the arrest was
9 expunged from his record in May of the same year. Not
10 only will we show that the bank didn't cause Dr.
11 Jernigan's arrest, we will show that Dr. Jernigan had a
12 hand in these events that led to his arrest as well.

13 The disputed transactions at issue in this case
14 were not the first time after January of 2004 that Dr.
15 Jernigan accessed Ms. Katz' account. After the
16 paperwork was submitted to remove him as an owner of
17 the account, the account remained in that online
18 profile, that list of accounts that appears, displays
19 online that I was referring to earlier.

20 When Dr. Jernigan logged on in July of 2004, in
21 September of 2005, August of 2006, and most importantly
22 in January of 2007, that 8854 account was right there
23 on the screen at all times.

24 In July of 2004 Dr. Jernigan actually clicked on
25 it to take a look and see about activity going on in

1 Ms. Katz' account. Shortly, sometime thereafter he
2 clicked on it again to take a look at what was
3 happening in Ms. Katz' account.

4 We will show, Your Honor, that when Dr. Jernigan
5 clicked on this account between January of '04 and
6 January of '07 when these payments were made, he knew
7 that he should not be able to access this account.

8 He did not tell Bank of America about his
9 continued ability to access the account after January
10 '04, that it remained right there on his online profile
11 right up until the time these disputed payments were
12 made.

13 THE COURT: When did the bank finally remove him
14 off the account?

15 MR. ABNEY: The night she called. When she
16 reported the transactions, immediately he was de-linked
17 from that account.

18 THE COURT: What was the date on that?

19 MR. ABNEY: January 19, 2007. The payments were
20 made on the 17th and 19th, I believe. As soon as she
21 called, the account was de-linked immediately and Dr.
22 Jernigan could no longer view activity on that account
23 or access it in any way.

24 THE COURT: Go ahead.

25 MR. ABNEY: Your Honor, as for damages, we'll

1 also show that Jernigan is only out-of-pocket here what
2 he had to pay to his criminal defense attorney, Ms.
3 Dunn, to get the case expunged.

4 The charge did not adversely impact his
5 employment. You'll see no concrete evidence that his
6 reputation was harmed, or that anyone other than the
7 two people who were at the house with him witnessed him
8 being arrested.

9 As for any emotional distress, the evidence will
10 show he never required treatment, and never sought any
11 from any sort of emotional distress type issues.

12 Now of course Ms. Katz has sued the bank as
13 well. And the evidence will show, Your Honor, she has
14 suffered no cognizable damages. It is undisputed that
15 the money was back in her account within a few days
16 after the payments were made.

17 THE COURT: Well the plaintiff put the money
18 back, not the bank.

19 MR. ABNEY: That's right. Well it came from his
20 account. And the bank contacted him about it and asked
21 him if he would put that money -- if it was okay to
22 transfer the funds from his account to hers, and he
23 said yes. That's how that occurred. But it came out
24 of his account, so of course that should be the source
25 of the funds to reimburse her.

1 The evidence will show, as I said, Ms. Katz has
2 suffered no cognizable damages, no economic harm
3 clearly because the money was almost immediately put
4 back into her account. We will argue later on that any
5 type of emotional distress type damages are not
6 recoverable in what is essentially a breach of contract
7 case by Ms. Katz against the Bank of America.

8 In any event, the evidence will show that any
9 emotional distress type issues she had, she was
10 suffering from long before these payments occurred in
11 connection with her divorce. And that she manifested
12 no physical symptoms that would be cognizable under
13 South Carolina law in connection with this alleged
14 emotional distress.

15 At the bottom, Your Honor, what this case is
16 about, and what we will show this week, is that this
17 case is really the last battle of this couple's
18 divorce. The bank is simply the tool that has been used
19 on this occasion by these folks to put each other
20 through the ringer. So at the end of the week, Your
21 Honor, we will ask for a defense verdict on all claims.

22 THE COURT: Okay, thank you very much.

23 Mr. Waggoner, call your first witness, please.

24 MR. WAGGONER: Plaintiff calls Floyd Jernigan.

25 DR. FLOYD JERNIGAN,

1 after having first been duly sworn to state the truth,
2 the whole truth and nothing but the truth, testified on
3 his oath as follows:

4 DIRECT EXAMINATION

5 BY MR. WAGGONER:

6 Q You are Dr. Floyd Jernigan?

7 A Yes.

8 Q Dr. Jernigan, if you don't mind speaking up,
9 perhaps a little closer to that microphone.

10 You are a physician, correct?

11 A Correct.

12 Q And you live in Charleston?

13 A Yes.

14 Q Are you married?

15 A No.

16 Q Are you formally married to Suzanne Katz, her
17 name now is Katz?

18 A Yes.

19 Q And do you have two sons Carter and Case?

20 A Yes.

21 Q That's the truth detector.

22 How old are Carter and Case and what are they
23 doing now?

24 A They are 27 and 25.

25 Q What are they doing? Just briefly.

1 A Carter is an entrepreneur. And Case is in art
2 school.

3 Q They both go to college?

4 A Yes.

5 Q Where do they go?

6 A MIT and William and Mary.

7 Q Now before the events that bring us here today,
8 had you ever been charged with a crime?

9 A No.

10 Q Had you ever been arrested?

11 A No.

12 Q Before I get into the events that bring us here
13 today, Dr. Jernigan, tell the Court a little bit about
14 your background. Where were you born, where did you go
15 to school, that sort of thing?

16 A I was born in Florence and I went to public
17 school, state schools.

18 Q Did you go to college?

19 A Francis Marion College. Medical University.

20 Q Of South Carolina?

21 A South Carolina.

22 Q Are you board certified in any subspecialty?

23 A Yes, internal medicine and pulmonary disease.

24 Q When did you come to Charleston after -- did you
25 do a residency somewhere?

1 A In Columbia.

2 Q Then came back to Charleston?

3 A No. I came to Charleston later in '93 -- '91.

4 Q Okay. And where did you work from -- tell us
5 about your work history in Charleston?

6 A Yeah. I retired from the VA Medical Center in
7 Charleston in 2007.

8 Q Was it specifically January of 2007?

9 A It was January of 2007.

10 Q All right. And in addition to your work at the
11 VA Center, did you also what they call moonlight at
12 other facilities?

13 A Yes, I moonlighted on weekends at the urgent
14 care center.

15 Q Speak up just a little, sir.

16 A Urgent care.

17 Q All right. Is that what you were doing when
18 this -- these events happened?

19 A I just -- yes. I just -- I was just leaving the
20 VA and I was transitioning into working at a hospital
21 which is what I do now.

22 Q Have you ever in your medical career been
23 warned, reprimanded or disciplined by any professional
24 board or employer during your medical career?

25 A No, I have a clean record.

1 Q How long were you married to Ms. Katz?

2 A About 20 years.

3 Q During that marriage were you the primary, if
4 not the sole, source of income for your wife and your
5 sons?

6 A Yes.

7 Q And did, during your marriage, did Ms. Katz ever
8 work outside the home?

9 A She worked when we were first married.

10 Q Doing what?

11 A She worked as a nurse.

12 Q For how long approximately?

13 A I would say less than a year.

14 Q How would you describe during this period where
15 you are working at the VA and your wife primarily at
16 home, how was your lifestyle?

17 A It was comfortable.

18 Q Where did you live?

19 A We lived in Columbia initially. And then we
20 lived in Orangeburg for a few years. And then we moved
21 to Charleston.

22 Q Where did you live in Charleston?

23 A We lived downtown Charleston on Berry Street.
24 Prior to that we lived in Mount Pleasant.

25 Q Did your sons go to private school here in

1 Charleston?

2 A Yes.

3 Q How many years, Dr. Jernigan, approximately, had
4 you been -- have you been a Bank of America customer?

5 A At least 15 or 20 years. I'm not sure exactly.

6 Q Have you done all your banking exclusively at
7 Bank of America?

8 A Yes.

9 Q And in fact were you what the bank calls a
10 premier banking customer at Bank of America?

11 A Yes.

12 Q Tell the Court how you and your wife while
13 living together, and before any disharmony, had the
14 bank accounts set up? Did you have a joint bank
15 account?

16 A Yes.

17 Q Was that Number 8854?

18 A Yes.

19 Q And in whose names was that account while you
20 were married?

21 A Both names.

22 Q And since sometime before that, sometime
23 earlier, have you had your own account 4502?

24 A Yes.

25 Q And how was the household account, the 8854

1 account funded while you were working and had your own
2 account 4502?

3 A By direct deposit.

4 Q So direct deposit from 4502 into joint account
5 8854?

6 A No, direct deposit from my employer.

7 Q From your employer into 8854?

8 A Yes.

9 Q All right. But you had your own account 4502?

10 A Yes.

11 Q Out of which you did what? What did you use
12 that account for primarily?

13 A Just personal expenses.

14 Q Your own bills, that sort of thing?

15 A Some, yes. Spending money.

16 Q So with regard to the account 8854, during your
17 marriage, were both of you entitled to withdraw funds
18 from it and write checks on it?

19 A Yes.

20 Q And did you in fact?

21 A Yes.

22 Q Who was the primary check writer on 8854 while
23 you were married?

24 A Suzanne was.

25 Q At any point during your marriage did you

1 withdraw funds from or take cash out of 8854?

2 A Yes.

3 Q All right. What were those occasions?

4 A I don't remember any specific occasions. There
5 were times I would pay bills and there were other times
6 she would pay bills.

7 Q But would you withdraw funds from that?

8 A Cash?

9 Q For yourself, yes, cash?

10 A Generally not, no.

11 Q Now did you, at any point during your marriage
12 to Ms. Katz, have any credit cards or debit cards
13 attached to 8854?

14 A No. Not that I'm aware of.

15 Q Dr. Jernigan, at some point with regard to your
16 account 4502, did you set up what we are hearing today
17 referred to as a bill pay function?

18 A Yes.

19 Q Tell the Court how that happened and what you
20 understood it to be.

21 A Yes. While I was in the bank, branch bank one
22 day in the neighborhood and the branch manager, who I
23 knew from other business, he ask me had I started using
24 the bill pay because it was a new -- relatively new at
25 that time. I said no, I didn't know how to set it up,

1 I thought it might be too complicated.

2 Q Let me just interrupt. Is this the branch
3 manager at Bank of America?

4 A Yes.

5 Q Do you remember his name?

6 A Michael Boil.

7 Q All right.

8 A So he said, it's not difficult, I will help you,
9 I'll set it up for you and he did right there and I
10 started using it.

11 Q Okay. What did you use it for?

12 A I used it to pay -- eventually used it to pay
13 all my bills.

14 Q Do you recall if there was any discussion at the
15 time that you set up your own bill pay account on your
16 own account, 4502, if there was any discussion about
17 the involvement of other accounts?

18 A No.

19 Q You don't recall or there was none?

20 A My belief is it was only 4502.

21 Q And did you thereafter -- where was this that
22 this was set up by Bank of America approximately?

23 A Approximately in the fall of '03.

24 Q of 2003?

25 A Yes.

1 Q So before your divorce or your separation or
2 your settlement with Ms. Katz?

3 A Yes.

4 Q When did you begin to use it, immediately?

5 A Yes.

6 Q And what bills did you pay from 4502? With the
7 bill pay?

8 A All of my bills later after the separation.

9 Q Give us an example.

10 A Mortgage, utilities.

11 Q Okay. And this is after you separated?

12 A Credit cards. Yes.

13 Q Now again was there any discussion when you set
14 up 4502 at the -- with the assistance of Mr. Boil, was
15 there any discussion of linking that account to 8854?

16 A No.

17 Q Did you set up the bill pay function to link
18 with the account 8854?

19 A No.

20 Q Was it ever your intention to use your account
21 to pay bills out of 8854?

22 A No.

23 Q All right. At some point in 2003 did you and
24 your wife experience marital conflict and separate?

25 A Yes.

1 Q And in fact when you and your wife separated,
2 did her lawyers ask that you be removed from ownership
3 or rights to account 8854?

4 A Yes.

5 Q And when was that?

6 A January of '04 I believe.

7 Q Okay. And did you do so willingly?

8 A Yes.

9 MR. WAGGONER: Judge, I'm not sure how you want
10 to handle the exhibits. Do you want me to hand this to
11 you as I hand this to him?

12 THE COURT: Pardon? I'm sorry?

13 MR. WAGGONER: I'm just going to show him an
14 unmarked exhibit, it will be marked as Exhibit No. 1.

15 THE COURT: That's fine. Have you already
16 pre-marked exhibits?

17 MR. WAGGONER: We have agreed on them, we
18 haven't pre-marked them.

19 THE COURT: Okay. Go ahead one at a time.

20 (Whereupon, Plaintiff's Exhibit No. 1 is marked
21 for identification.)

22 Q (By Mr. Waggoner) Dr. Jernigan, I'm showing you
23 now a two-page document that has been marked
24 Plaintiff's Exhibit 1. And can you tell me what that
25 is and what do you see your signature on?

1 A It's a form that releasing me in the ownership
2 from 8854.

3 Q okay. Does that have anything to do with the
4 4502?

5 A None.

6 Q Did you continue to maintain 4502 in your name
7 for your own expenses after you released yourself from
8 8854?

9 A Yes, sir.

10 Q while you were separated, and as part of any
11 ultimate agreement that the various lawyers reached,
12 did you continue to transfer funds from your account
13 4502 into what was now your ex-wife's or soon to be
14 ex-wife's account of 8854?

15 A Yes. I began doing those transfers during the
16 separation time as a support order. And then just
17 continued to do it for the next three -- more than
18 three years.

19 Q All right. So you started in soon after January
20 '04, after signing that in January of 2004 --

21 A No, I had actually start in '03.

22 Q okay, but formally --

23 A But prior to signing this I was doing transfers.

24 Q After signing that in January of '04, did you
25 continue to make transfers from 4502 into 8854?

1 A Yes, the same way.

2 Q And in very rough terms, how much money are we
3 talking about on a monthly basis going from you or the
4 VA into that account?

5 A 4,000 or so.

6 Q All right.

7 A And it decreased some over time.

8 Q okay. Several thousands is fair, 2 to 5, 2 to
9 4?

10 A 3 to 4.

11 Q 3 to 4, all right. Now what about the amount of
12 your bills on a monthly basis that you paid from bill
13 pay? How much was that, roughly, on a monthly basis?

14 A 4 or 5,000 I guess.

15 Q In January it was 1,100 of '07, do you recall
16 that?

17 A Yes..

18 Q How much was it typically when you paid your own
19 bills out of 4502?

20 A 4 or 5,000.

21 Q Same amount?

22 A Including my mortgage, yes.

23 Q How would you effectuate your bills out of 4502
24 once 8854 was out of the picture?

25 A Through the bill pay process.

1 Q All right.

2 A which was very, very simple.

3 Q After renouncing your rights to 8854 in January
4 of '04, and did you ever withdraw or attempt to
5 withdraw funds from that account, 8854?

6 A No.

7 Q With regard to 4502, either before or after your
8 bill pay function was set up by Mr. Boil, were you
9 aware of any overdraft protection forwarded to that
10 account?

11 A Yes.

12 Q What did you understand to be the overdraft
13 protection afforded to 4502?

14 A A credit card.

15 Q Your own credit card?

16 A Yes.

17 Q So fair to say you understood if there was
18 insufficient funds in 4502, it would go to a credit
19 card in your name?

20 A Yes.

21 Q It would have nothing to do with 8854?

22 A Correct.

23 Q Did there come a time, Dr. Jernigan, more than
24 three years, or roughly three years after renouncing
25 your rights to 8854, that you got a call from a Bank of

1 America representative regarding your former wife's
2 account of 8854?

3 A Yes.

4 Q Tell the Court about that phone call.

5 A Yes. I recall that I was at work and I got the
6 call -- and I don't remember the young lady's name, I
7 was not familiar with her -- saying that it had been
8 brought to their attention that funds from 8854 were
9 used by bill pay to pay my bills.

10 Q Okay.

11 A In the amount of total \$1,100. I said I had no
12 knowledge of that. But I was near the computer so I
13 accessed it and saw that indeed that was the case, that
14 these funds had been disbursed from 8854. I didn't
15 have any knowledge of that or knew how it happened.

16 Q You had never done anything like that before?

17 A No.

18 Q Did you --

19 A I didn't do it that time.

20 Q I understand. Were you aware after speaking
21 with this bank representative, did you have a sense of
22 how it had happened?

23 A No. I wasn't given any information.

24 Q What happened with that conversation?

25 A I was asked to repay the funds and I said sure.

1 Q And did you?

2 A Yes.

3 Q All right. That same moment electronically?

4 A Well actually she did it for me. She just got
5 my permission and she transferred it for us.

6 Q All right. So you are talking on the phone with
7 the bank representative, you are learning for the first
8 time that this has happened, she asks you if it can be
9 paid back and you said yes?

10 A Yes.

11 Q Do I understand that your understanding was she
12 did something from her office?

13 A Yes.

14 Q And did you at the same time pay something else,
15 authorize additional payment?

16 A Oh, I believe at that time we also paid the
17 alimony or support.

18 Q All right. And that is the account you had been
19 putting the alimony into?

20 A Yes.

21 Q Did that -- did you -- I may have asked this, I
22 apologize -- did you and/or the bank representative
23 during that phone call have any discussion about how
24 this had happened?

25 A If we did, I don't recall what it was.

1 Q Do you recall making the online bill payments
2 three years earlier -- I'm sorry, at that point?

3 A Not specifically. But all I recall -- I don't
4 know that I did anything. To the best of my knowledge
5 I did it the same way I'd always done it the previous
6 three plus years.

7 Q You had been using bill pay in that same manner
8 for approximately three years?

9 A At that time more than three years, yes.

10 Q Had you ever used any other account besides your
11 account 4502 to pay bill pays?

12 A Not to my knowledge, no.

13 Q Did you have any other accounts from which you
14 paid using bill pay?

15 A No.

16 Q Did you in fact intentionally charge the January
17 '07 bill pay payments in \$1,100, roughly \$1,100, to
18 your wife's account 8854?

19 A No.

20 Q Would you have known how to if you wanted to?

21 A No.

22 (Whereupon, Plaintiff's Exhibit No. 2 is marked
23 for identification.)

24 Q (By Mr. Waggoner) Doctor, I'm now showing you a
25 two-page document marked as Plaintiff's Exhibit 2

1 titled Outgoing Payments Module. Do you see that?

2 A Yes.

3 Q That, I will suggest to you, as it has been
4 suggested to us, represents the screen, the computer
5 screen that you most likely would have seen at the time
6 in January of '07 that you made your bill pay payments.

7 Can you confirm that?

8 A I wouldn't know.

9 Q Okay.

10 A Because as you know the screen has changed many,
11 many times since then.

12 Q Do you see -- did you ever see the second page
13 of Exhibit 2 as a screen?

14 A I can't say specifically.

15 Q You don't know?

16 A Don't know.

17 Q You have no recollection?

18 A No. I'm not familiar with it.

19 Q All right. Maybe it would be a good idea to
20 describe for the Court what you did customarily when
21 you made your normal bill pay payments out of 4502?

22 A Well I have all my accounts set up so all one
23 needs to do is logon and scroll to bill pay, scroll
24 down and put in the amount for the individual payee, be
25 it SCE&G, or whoever it might be.

1 Q To your knowledge did you do anything different
2 in January of '07 that you had ever done before?

3 A No.

4 Q That's a sure no?

5 A Yes.

6 Q All right. Now --

7 A Definite no.

8 Q Definite no. Doctor --

9 A There was no reason to. Nothing was different.

10 Q Understood.

11 A It was the same.

12 Q Now at about the same time, that is to say
13 around January of 2007 when you got the call from the
14 bank, did you also learn that your account, 4502, had
15 been what's been called frozen or restricted or
16 otherwise interfered with because of some transaction
17 you took with your own account?

18 A Yes.

19 Q Tell the Court, as good a detail as you can
20 recall, what happened in January of '07 with 4502, and
21 the same time period that the bill pay went to your
22 wife's account, your ex-wife's account?

23 A Yes. The first I knew of a problem was I got a
24 letter from the bank, not a phone call, not an e-mail,
25 not a text, a letter.

1 Q Letter by a U.S. Mail?

2 A A form letter by U.S. Mail saying that my -- and
3 I believe the word was frozen -- that there was no
4 explanation, that my checking account had been frozen.
5 And I was given a number to call, which I did.

6 Q What did you learn to have been the origin of
7 your frozen account?

8 A It was because this large deposit, \$17,500 had
9 been denied. And they had re-deposited it and it was
10 denied. And that's the only explanation I ever got.

11 Q Okay. Now tell us about this check for 17,500,
12 where did it -- this was a deposit you made into your
13 own account?

14 A Yes.

15 Q Where did that check come from?

16 A Yes. There were two Chase, it was a Chase
17 account with two Chase credit cards, the one where they
18 send you the checks that you can write against the
19 credit card just like a check.

20 And I had written one of those for 17,500. I
21 was going to put it in my account, and then write a
22 check on my account for college tuition. And I
23 inadvertently wrote it on the wrong account.

24 Q Okay.

25 A And the account I wrote it on, I didn't have --

1 there wasn't 17,500 available in that account. So that
2 deposit was denied.

3 Q Okay. So you had two accounts, two credit cards
4 both of which send you checks. You wrote a check on
5 one but it was invalid or didn't have the ability --

6 A I wrote it on the wrong one.

7 Q What was the purpose of that check?

8 A To pay college tuition.

9 (Whereupon, Plaintiff's Exhibit No. 3 is marked
10 for identification.)

11 Q (By Mr. Waggoner) Dr. Jernigan, I'm showing you
12 now what has been marked as Exhibit 3 which I suggest
13 to you may be a bank statement of yours.

14 Please take a look at that and tell the Court
15 whether that document reflects the transaction you've
16 just described, that is the failed deposits.

17 A Yes. On the 5th of January.

18 Q 5th of January of what year?

19 A 2000 --

20 Q Top right corner, Dr. Jernigan.

21 A '07.

22 Q Okay.

23 A '07.

24 Q Let's get that again. What is the date of the
25 statement showing the bad transaction?

1 A January 5th, '07.

2 Q 2007?

3 A Yes.

4 Q And that's the same month that the bank called
5 you and said that your bill pay had gone to the
6 ex-wife's account?

7 A Yes.

8 Q No one had called you, as I understand your
9 testimony, to alert you to that account being
10 interfered with or frozen or restricted?

11 A No.

12 Q You got a letter?

13 A I got a letter.

14 Q Did you keep the letter?

15 A I did not unfortunately.

16 Q After this conversation with Bank of America
17 when they called and said that your former wife had
18 complained, was concerned about the transaction going
19 from her account, the \$1,100 you immediately paid back,
20 did you eventually hear from the police?

21 A Yes.

22 Q Tell the court about that first contact that you
23 had from the police.

24 A Yes. I got a phone call from a police officer.
25 I returned his call and he said this complaint had been

1 filed, and he asked me for my explanation.

2 And at that time I was -- I was aware of the
3 frozen account, and I explained to him that it was my
4 belief, because of this frozen account, that the
5 computer -- and I will use the word default because I
6 think it's appropriate -- defaulted to this other
7 account which I didn't know, had only learned later
8 from your investigation, that the bill pay was also
9 linked to 8854. I was not aware of that.

10 I never selected 8854, the computer selected
11 8854 itself. I didn't do it.

12 Q All right.

13 A Because 4502 was not accessible is my belief.

14 Q All right. Fair to say that you told the police
15 you had no knowledge, no intent to access your wife's
16 account?

17 A Yes. I told him I believed it was a bank error
18 pure and simple. And I was sure the bank would tell
19 him the same thing.

20 Q Did you hear from him again?

21 A Yes.

22 Q When -- well after that, when did you hear from
23 him again? When was that conversation, the first one,
24 approximately?

25 A I'm guessing it was in late January or early

1 February. But I don't know the exact date.

2 Q All right. And once you spoke with him, was
3 there a period of time where you heard nothing?

4 A Yes, a long period of time.

5 Q How long?

6 A Several weeks. I'm not sure of the exact time.

7 Q So what happens next then in terms of the
8 police?

9 A I get another call from the same officer saying
10 that the case was still being pursued. And I said,
11 why? Didn't you speak with the bank and get the
12 information that you needed to determine there was no
13 criminal activity on my part?

14 And he said he had spoken with the bank but he
15 had not gotten the information he needed to drop the
16 case.

17 Q Had you talked with your ex-wife, or she with
18 you, during any of this period?

19 A No.

20 Q That is between the time of the refunding of her
21 account and the time of the first police officer coming
22 to you?

23 A No.

24 Q Or the second time the police officer came to
25 you?

1 A No.

2 Q So you and your former wife had not talked at
3 all about your frozen account, or what you were telling
4 people or anything like that?

5 A No. And when you speak about people, that's
6 kind of irritating because it's not something that I
7 spoke about. So I don't know where this people
8 information comes from.

9 Q Did you ever have, that was my question, I
10 apologize. Did you ever have any occasion to mention
11 this incident to anyone?

12 A No.

13 Q You never talked to your son or anything about
14 that?

15 A Oh my sons, of course, once I was arrested.

16 Q Right. But prior to your arrest?

17 A No.

18 Q Never talked to anybody about it?

19 A No. Not to my knowledge, no.

20 Q Okay. So you talked to the police officer the
21 second time. You reiterated what you said the first;
22 is that correct?

23 A Yes.

24 Q What happened next in terms of police
25 involvement?

1 A Well I encouraged him in that conversation to go
2 back to the bank and get the information he needed
3 because I was sure it was available.

4 Then I never heard another thing back. And I
5 assumed -- I assumed because, I knew there was no
6 criminal activity on my part, I assumed that it was
7 over and done with. I never heard back from the
8 officer.

9 I had been away working, and I came home one day
10 to find a business card from a warrant officer on my
11 porch. And I called and he was off duty. And the next
12 morning at 5:00 a.m. is when the police officers showed
13 up at my house.

14 Q Describe that, what police officers, what
15 happened?

16 A It was approximately 5:00 a.m. and someone is
17 ringing the doorbell, which is very disconcerting.
18 Then they started beating on the house.

19 Q Were you asleep at the time?

20 A Yes.

21 Q Or in bed at least?

22 A Yes, I was asleep.

23 So I look out and there are I believe three or
24 four officers on the porch, and one or two in the yard,
25 and four police vehicles in the driveway and in the

1 street.

2 And I go to the door, and they ask me to
3 identify myself, and they tell me they have a warrant
4 for my arrest. And I ask to see it, and I see it's a
5 warrant that was signed by Suzanne alleging obtaining
6 goods under false pretenses.

7 He says, let's go. And I am cuffed behind the
8 back, walked out to the patrol car, put in the back,
9 taken down to Lockwood, processed, photographed,
10 fingerprinted, put in a cell.

11 Stayed there most of the morning. I was the
12 first one in the cell. As the morning proceeded more
13 and more prisoners were brought in. The cell was
14 filled up to overflowing. Prisoners were on the floor,
15 lying the floor.

16 Q Did you have neighbors at that time?

17 A Yes.

18 Q People who lived next door to you?

19 A Was there anyone in the house with you when the
20 police arrived?

21 A Yes. My girlfriend at the time and my younger
22 son were there.

23 Q When were you released from confinement? How
24 many hours after your arrest approximately?

25 A Approximately 19 hours.

1 Q Are you able today, and I realize you're a
2 science-oriented physician, but are you able today to
3 recall the emotions that you were feeling from the
4 moment of that knock on the door and beyond?

5 A Yes, of course. First the disbelief, shock,
6 anger and horror. Because actually I was later, just
7 to tell you the rest of the story, I was later taken
8 out of the Lockwood facility, handcuffed behind the
9 back, put in leg-shackles, walked out to a patty-wagon
10 with some other inmates and transported to the Leeds
11 Avenue facility.

12 Put in a really large cell with inadequate
13 seating with large numbers of inmates. And I spent the
14 remainder of the day, the afternoon, the evening until
15 approximately 11:00 p.m. when I was finally processed
16 out.

17 So, yes, humiliation, anger, really disbelief.
18 Disbelief, I guess, was my biggest emotion.

19 Q You went home that night?

20 A Yes.

21 Q Did you have to do any explaining to anybody?

22 A Yes. I had to speak with my son, my younger
23 son.

24 Q How did that go?

25 Q Well he was confused. And I explained to him,

1 well I thought it was important to let him know his
2 father wasn't a criminal.

3 I said it just wasn't anything I did, this was
4 just a banking error, a bank error. And at some point
5 he expressed to me -- I don't know whether it was that
6 conversation or a later conversation, we had a number
7 of conversations about it -- well you must have, you
8 know, you must have done something. You must have done
9 something wrong or you would not have been arrested.

10 Q Now after your arrest, did you speak with a
11 lawyer?

12 A Yes.

13 Q And who was that?

14 A Susan Dunn.

15 Q Had she been your divorce lawyer?

16 A Yes.

17 Q And did she agree to represent you in this
18 matter, this was what was now a criminal matter?

19 A Yes.

20 Q What do you recall that she did in an effort to
21 get to the bottom of this?

22 A Yeah. Well the first thing she called and made
23 an appointment with the Bank of America vice president.
24 And she and I went in person to meet with this vice
25 president to find out what we could do to get these

1 charges dismissed.

2 And basically we were shown the door and told
3 that the legal department would be handling it, the
4 bank's legal department.

5 Q So you and Ms. Dunn, your lawyer, went and made
6 an appointment with somebody at the bank?

7 A Yes.

8 Q Do you recall the name of the person?

9 A Yes, it was Suzanne Horris.

10 Q Horris?

11 A Horris.

12 Q All right. And again what if anything did you
13 learn from that conversation?

14 A We learned nothing.

15 Q Did anyone tell you at any point -- well did you
16 have any other meetings with the bank?

17 A I did not. Ms. Dunn did.

18 Q Did you learn from Ms. Dunn or anybody else at
19 the bank ever, until this lawsuit was filed, that the
20 unauthorized access to your wife's account, 8854, might
21 have been related to the restricted status of your
22 account, 4502?

23 A No.

24 Q Were you ever contacted by a gentleman named
25 William Nevarez from Bank of America?

1 A No.

2 Q What happened to the criminal charges?

3 A They were eventually dismissed after almost a
4 year.

5 Q And when you were arrested, did you have to pay
6 for bond?

7 A Yes.

8 Q Then you paid a lawyer?

9 A Yes.

10 (Whereupon, Plaintiff's Exhibit No. 4 is marked
11 for identification.)

12 Q (By Mr. Waggoner) Dr. Jernigan, I'm showing you
13 a document consisting of two pages marked as Exhibit 4
14 and just ask you whether that reflects both the bail
15 bondsman payment and your attorney's fee payments in
16 connection with the criminal prosecution?

17 A Yes.

18 Q Other than your attorneys and/or bank personnel,
19 do I understand you never talked to anybody, perhaps
20 your son that you mentioned, anybody else about your
21 arrest?

22 A My son's former girlfriend.

23 Q The bank and the police?

24 A Yes. It's not something I would choose to
25 discuss.

1 Q Okay. All right. Please answer any questions
2 that either Mr. --

3 THE COURT: I assume you offer 1 through 4; is
4 that correct?

5 MR. WAGGONER: Yes, sir, I'm sorry.

6 THE COURT: Any objection to Exhibits 1 through
7 4?

8 MR. EDWARDS: We have already stipulated those
9 in, Your Honor. No objection.

10 THE COURT: All right. 1 through 4 are admitted
11 without objection.

12 MR. WAGGONER: Thank you, Your Honor.

13 (Whereupon, Plaintiff's Exhibit Nos. 1, 2, 3 and
14 4 are admitted into evidence.)

15 THE COURT: We'll take a short break before we
16 start cross-examination.

17 Mr. Edwards, I guess you'll go first. We will
18 take about 10 or 15 minutes.

19 Dr. Jernigan, during the break please don't
20 discuss the case with anyone.

21 THE WITNESS: Yes, sir.

22 THE COURT: You may step down. Thank you very
23 much.

24 (Whereupon, a recess was taken.)

25 THE COURT: Cross-examination.

1 I'm sure you gentleman want a court reporter?

2 MR. ABNEY: Yes, sir. Thank you.

3 CROSS-EXAMINATION

4 BY MR. EDWARDS:

5 Q Dr. Jernigan, my name is Aaron Edwards, I
6 represent defendant, cross-claimant Suzanne Katz.

7 How are you, sir?

8 A I'm well, thank you.

9 Q I'm going to ask you just a couple questions,
10 then I'm going to pass you off to Mr. Abney who's going
11 to ask you questions about the bank, okay?

12 You are a physician, and at this time that the
13 bill pay transfers happened you were also a physician;
14 is that right?

15 A Yes.

16 Q And did your work require that you travel?

17 A Yes.

18 Q Okay. And do you know if you were traveling at
19 the time, around the time that these bill pay transfers
20 occurred?

21 A I don't recall.

22 Q Okay. Do you know whether you took any personal
23 trips during that time between January and spring of
24 2007?

25 A Yes.

1 Q where did you go?

2 A I went to Italy.

3 Q And why did you go to Italy?

4 A Just for vacation.

5 THE COURT: Dr. Jernigan, can you speak up a
6 little bit, please?

7 THE WITNESS: Certainly.

8 A Vacation.

9 Q (By Mr. Edwards) Vacation. Did you visit with
10 anybody?

11 A Yes.

12 Q Was your son there?

13 A Yes.

14 Q Did your son go with you?

15 A No.

16 Q Which son are we talking about?

17 A My younger son, Case.

18 Q Case. Now Case was in Italy, wasn't he?

19 A He was.

20 Q Studying abroad?

21 A Yes.

22 Q You went to go visit him?

23 A Yes.

24 Q Now do you recall the timeframe? Between
25 January and spring?

1 A April.

2 Q April. How long were you there?

3 A I was there approximately a month.

4 Q okay. So the entire month of April?

5 A Mostly.

6 Q okay. Do you know if Ms. Katz made a similar
7 trip to Italy?

8 A I don't know.

9 Q You don't know, okay.

10 Now you know now Ms. Katz' allegations that the
11 bank informed her that the bill pay transfers could not
12 have occurred without some sort of deliberate act on
13 your part. Is that your understanding?

14 A Yes.

15 Q Now that you have fully investigated the matter,
16 do you have any reason to dispute that allegation?

17 A No.

18 Q Before you went to Italy to visit with your son
19 Case, did you -- you testified earlier that when you
20 were arrested your son Carter was present; is that
21 right?

22 A No, Case.

23 Q Case was present?

24 A Yeah.

25 Q So you discussed the matter with him?

1 A Yes.

2 Q Prior to that, had you ever discussed the matter
3 with your other son Carter?

4 A I don't know at what time. I had discussed it
5 with him but I don't know the timeframe, to tell you
6 the truth.

7 Q Before you were arrested, the timeframe I'm
8 asking about is the timeframe between January when the
9 bill pays went through, and May I believe when you were
10 arrested.

11 During that timeframe, did you speak at all with
12 Carter about the bill pay issue?

13 A I may have.

14 Q Okay. Do you think it would be -- I'm sorry.
15 Is it possible you could have used the term overdraft
16 protection when discussing the matter with Carter?

17 A I could have.

18 Q You don't know all the bank lingo, do you?

19 A No.

20 Q Regarding overdraft protection, restrictions,
21 freezes, access, whatever terms may be used, you are
22 not conversant in that, are you?

23 A Not particularly.

24 Q Okay. So when you discussed it with Carter, you
25 may have said this was some sort of default; is that

1 right?

2 A Yes. I know I have used the word default
3 because that's my impression and belief.

4 Q Default?

5 A Default.

6 Q When you say default, you mean defaulting from
7 your account to the account ending in 8854?

8 A Yes.

9 Q Okay. Thank you, sir.

10 A Yes, thank you.

11 MR. EDWARDS: That's all I have.

12 THE COURT: Cross-examination by.

13 MR. ABNEY: Your Honor, the court reporter has
14 asked me to place on the record that defendant's
15 exhibits are being contained in the binder. I have
16 supplied one to the witness, one to the court reporter
17 and one to Your Honor.

18 THE COURT: What are the numbers? 1 through 38?

19 MR. ABNEY: That's correct, Your Honor.

20 THE COURT: Any objection to 1 through 38 from the
21 defendant Bank of America?

22 MR. EDWARDS: I think there are joint objections
23 to several of them.

24 THE COURT: Which ones do you have objection to?
25 Let's see what you got by stipulation.

1 okay, 22, 23, 24, 27 is objection. Those are
2 the only ones objected to.

3 MR. ABNEY: Correct, Your Honor.

4 THE COURT: All right. 1 through 21 is
5 admitted; 25 and 26 admitted; 28 through 38 is admitted
6 without objection; is that correct?

7 MR. EDWARDS: If I may, Your Honor. I also had
8 an objection to 26.

9 MR. ABNEY: It's not noted on here.

10 THE COURT: You do have an objection to 26?

11 MR. EDWARDS: Yes, sir.

12 THE COURT: Okay. Whenever they come up we'll
13 listen to your objection.

14 Does the plaintiff have any objection to 26?

15 MR. WAGGONER: Bear with me, Your Honor. We
16 were just given a different list with different
17 numbers.

18 I don't think we have any objections. But if we
19 do we will let you know. I'm just trying to coordinate
20 a list that I had which is different than the one we
21 were just given.

22 MR. ABNEY: We removed the ones that I told you
23 I would remove.

24 MR. WAGGONER: Then we have no objections.

25 MR. ABNEY: We haven't added anything.

1 MR. WAGGONER: Okay.

2 THE COURT: All right. Thank you very much.
3 Please proceed.

4 (Whereupon, Defendant Bank of America's Exhibit
5 Nos. 1 through 21, 25, and 28 through 38 are admitted
6 into evidence.)

7 CROSS-EXAMINATION

8 BY MR. ABNEY:

9 Q Dr. Jernigan, you submitted Plaintiff's Exhibit
10 No. 1, the change of ownership form to the bank in
11 2004, correct?

12 A Yes.

13 Q In January of 2004, correct?

14 A Yes.

15 Q And after you submitted the change of ownership
16 form, the 8854 account continued to appear among the
17 list of accounts on your online banking page, correct?

18 A Correct.

19 Q When you logon a list of accounts was displayed
20 there, correct?

21 A Correct.

22 Q And among that list was the 8854 account?

23 A Yes.

24 Q And that was the case from January 2004 until
25 January 2007, correct?

1 A Correct.

2 Q And you accessed the 8854 account to view
3 activity in that account on two occasions after January
4 2004, correct?

5 A Yes.

6 Q With your mouse you moved the cursor to the 8854
7 account, you clicked on it and viewed activity in that
8 account, correct.

9 A Yes.

10 Q On both occasions you accessed that account
11 intentionally, correct?

12 A Correct.

13 Q You were not authorized to view activity in the
14 8854 after January 2004, correct?

15 A No.

16 Q You knew you didn't have authorization to view
17 the 8854 account after January of 2004, correct?

18 A Yes.

19 Q Is it correct you knew you did not have
20 authorization?

21 A Correct.

22 Q And it occurred to you on the occasions when you
23 did view activity in that account that you should not
24 be able to access the 8854 account, correct?

25 A Correct.

1 Q And you never told the bank that you remained
2 able to view activity in the 8854 account, correct?

3 A Correct.

4 Q You agree that you made the five disputed bill
5 payments at issue in this case, correct? You went
6 online and you directed that payments be made?

7 A Yes.

8 Q You don't remember the online session when you
9 actually made the payments?

10 A No.

11 Q You don't recall sitting at the computer and
12 actually making those payments online, do you?

13 A No.

14 Q You don't know the date on which you actually
15 made the online payments that are at issue, do you?

16 A I think they're in the record, but I don't know
17 the dates off the top of my head.

18 Q What I'm asking is you don't actually remember
19 the day that you sat down at the computer and went
20 online and scheduled, directed that the payments be
21 made, correct?

22 A Correct.

23 Q You had overdraft protection for your 4502
24 account in January of 2007, right?

25 A Right.

1 Q And you had overdraft protection for the 4502
2 account since the time you actually set up online
3 banking in '03, correct?

4 A Correct.

5 Q The 8854 account was never in your overdraft
6 protection account, correct?

7 You never designated 8854 --

8 A No. No, I didn't.

9 Q You never told the bank to make the 8854 account
10 an overdraft account?

11 A No.

12 Q And the overdraft protection account that you
13 have is a credit card account, correct?

14 A Correct.

15 Q And you actually overdrafted your account in
16 January of 2007, correct?

17 A No, incorrect.

18 Q Can you look with me at Bank of America Exhibit
19 No. 3.

20 And would you agree with me this is the
21 statement for your 4502 account for the period
22 beginning January 6, 2007 and ending February 2nd,
23 2007?

24 A Yes.

25 Q We turn to the second page, please.

1 Now I will direct your attention to the very top
2 transaction, first thing on January 11. Do you see
3 that overdraft protection from and there is an account
4 number ending in 3679?

5 A Yes.

6 Q Having seen this now, do you agree that you had
7 an overdraft, you overdrafted your account in January
8 2007?

9 A Yes.

10 Q And overdraft protection was not supplied by the
11 8854 account on this occasion, correct?

12 A Correct.

13 Q It was supplied by your credit card, correct?

14 A Correct.

15 Q And this overdraft occurred days before the
16 disputed payments that are at issue in this case,
17 correct?

18 A Correct.

19 Q I have heard your testimony that you believe
20 your account was frozen?

21 A It was frozen?

22 Q Okay.

23 A That's a statement of fact.

24 Q In January of 2007 when these payments were
25 made?

1 A Yes.

2 Q You believe it to have been frozen at the time
3 that you made these payments?

4 A I do.

5 Q Looking at the same Exhibit No. 3. Would you
6 glance a little bit further down from the top of the
7 page. Do you see transactions listed at January 17,
8 January 18th and January 19th?

9 A Yes.

10 Q You agree that the statement shows checks
11 posting to your account on January 17?

12 A Yes.

13 Q And you'd agree that the statement shows an
14 online banking transfer to another checking account on
15 January 18th?

16 A Yes.

17 Q And you'd agree that the statement shows what
18 appears to be a debit payment to a Publix on January
19 19th?

20 A Yes.

21 Q You found out about the disputed payments by a
22 telephone call from the bank in January 2007, correct?

23 A Correct.

24 Q The person you spoke with told you that Katz
25 reported to the bank that you paid bills from her

1 account, correct?

2 A Correct.

3 Q You don't recall any discussion during that
4 conversation with the bank about how the disputed
5 transactions occurred, correct?

6 A I don't.

7 Q After that call in January of 2007, you had no
8 further communication with the bank regarding these
9 disputed payments prior to your arrest, correct?

10 A Correct.

11 Q You were initially contacted by the police in
12 late January, early February 2007, correct?

13 A Correct.

14 Q And the police informed you that Katz had filed
15 charges against you related to the disputed payments,
16 correct?

17 A Correct.

18 Q You told the officer that the transactions
19 occurred through bank error, correct?

20 A I did.

21 Q About a month later he called you back to say he
22 had been unable to confirm with the bank that the
23 transactions occurred due to bank error, correct?

24 A Correct.

25 Q He told you Katz was still, quote, pushing the

1 matter, end quote?

2 A Yes.

3 Q Even after that second conversation with the
4 police department, you did not call the bank to discuss
5 how the transactions occurred prior to your arrest,
6 correct?

7 A That's correct.

8 Q Correct?

9 A Correct.

10 Q And you never contacted Katz to discuss how the
11 disputed payments occurred, correct?

12 A Correct.

13 Q You never attempted to contact her, correct?

14 A Correct.

15 Q Even after you had been contacted by police you
16 didn't attempt to contact her, correct?

17 A Correct.

18 Q On the afternoon of May 24th, the day before you
19 were arrested, you came home and found a business card
20 from a warrant officer on your front porch, correct?

21 A Correct.

22 Q You don't know how long that business card had
23 been there, correct?

24 A Correct.

25 Q You had been away from home for some period

1 before you found the card, correct?

2 A I had.

3 Q Out of town, correct?

4 A Yes.

5 Q You may have been away for as long as a week
6 prior to May 24th, correct?

7 A Possibly.

8 Q At the time of your arrest you were practicing
9 medicine in Loris, correct?

10 A Yes.

11 Q You had started working there before your
12 arrest, correct?

13 A Correct.

14 Q And you were happy with your job there, right?

15 A Yes.

16 Q At least until 2010 you were still working in
17 Loris, correct?

18 A Yes.

19 Q As far as you know none of your coworkers or
20 superiors in Loris learned of your arrest, correct?

21 A Correct.

22 Q You had lined up a job in Maine prior to your
23 arrest as well, correct?

24 A Correct.

25 Q And you weren't impacted in that job as a result

1 of your arrest, correct?

2 A Correct.

3 Q In fact no employer has ever taken an adverse
4 action towards as a result of this arrest, correct?

5 A Correct.

6 Q You weren't denied employment as a result of the
7 arrest?

8 A Correct.

9 Q The charge against you was dropped in March
10 2008, correct?

11 A Correct.

12 Q The arrest was expunged in May 2008, correct?

13 A Correct.

14 Q You remained employed from the time of your
15 arrest through the day of the expungement, correct?

16 A Correct.

17 Q You are arrested at 5:00 a.m. approximately,
18 correct?

19 A Correct.

20 Q And you don't know if any of your neighbors
21 actually saw you be arrested, correct?

22 A I don't know.

23 Q You never received any treatment for emotional
24 distress in connection with your arrest, correct?

25 A Correct.

1 Q You never saw a therapist, correct?

2 A Correct.

3 Q And you took no medication?

4 A No.

5 Q No, you took no medication?

6 A No, I took no medication.

7 Q You took no medication because you felt you did
8 not need medication to cope with any of the stress
9 connected to this case, correct?

10 A Correct.

11 Q You've settled your claim against Ms. Katz in
12 this matter, correct?

13 A Correct.

14 Q So you've settled with each other, she settled
15 her claim against you, correct?

16 A Correct.

17 Q You paid her no money, correct?

18 A Correct.

19 Q She paid you no money in connection with this
20 case, correct?

21 A Correct.

22 Q Your only remaining claim is against the bank,
23 correct?

24 A Correct.

25 Q Dr. Jernigan, you're still a customer with the

1 Bank of America today, aren't you?

2 A I am.

3 Q You still have the 4502 account that is at issue
4 in this case?

5 A I do.

6 Q And you still use it today, don't you?

7 A Yes.

8 MR. ABNEY: That's all I have. Thank you.

9 THE COURT: Redirect.

10 REDIRECT EXAMINATION

11 BY MR. WAGGONER:

12 Q Dr. Jernigan, to your knowledge had you ever
13 done anything differently when you made your bill pay
14 in January from any other time during the three-year
15 period preceding it?

16 A No.

17 Q Would it have occurred to you as a physician
18 with a good bit of education, obviously, that you would
19 never be caught if you did deliberately transfer bill
20 pay payments from your former wife's account?

21 A Of course not.

22 Q Would you have thought that that would be a way
23 to get away with it?

24 A No.

25 Q When you went through the business of your

1 account and told your account was frozen, did you know
2 then that the management of bill pay, unlike the check
3 negotiation part of Bank of America, was actually
4 handled by a third party called Check-Free or Fiserv?

5 A No.

6 Q Did you know then that the bill pay function,
7 the electronic bill pay function, was managed entirely
8 differently than the check negotiating function?

9 A No.

10 Q When you mentioned that you experienced no
11 employment interruption. Did you have any concerns
12 about employment because of your arrest?

13 A Yes, I had serious concerns.

14 Q What were those concerns specifically?

15 A Well had I been convicted of a felony, I would
16 have lost my license, it would have been revoked. I
17 would never work again as a physician. I would have
18 been unemployed.

19 And also, as you know, anytime one applies for
20 hospital privileges or any privileges the question is
21 always there, have you ever been arrested.

22 Q So although you may not have suffered any
23 financial consequences, you did have some anxieties
24 about your employment?

25 A I did. And for a period of time I was unable to

1 apply for any new positions. I do work as a locum's
2 hospitalist so I take --

3 Q what is a locum's hospitalist?

4 A Short assignment. It's like a temporary or
5 travel assignment.

6 Q Locum tenens means where needed?

7 A Yes.

8 Q So you work in varying locations?

9 A I do. Since I retired I have worked at
10 approximately ten different facilities.

11 During this period I was unable to make any
12 application because I would have had to fill out a form
13 saying, yes, I have been arrested. And they would have
14 said, well thank you very much but I don't think we
15 need to talk to you any further.

16 Q As best you can, tell the Court how it feels to
17 tell a son, who thinks you have been arrested for
18 wrongdoing, that you did nothing wrong?

19 A Well it's a very uncomfortable, unpleasant
20 situation that I never thought I'd find myself in. I
21 guess the part that was most hurtful was his disbelief,
22 skepticism and lack of trust, which I feel hasn't been
23 restored to this day.

24 Q When you accessed, as you've testified under
25 cross-examination, your ex-wife's account, explain what

1 actually you were doing?

2 A Well I was just paying routine bills on a
3 routine basis the same way I had done it over and over
4 and over again.

5 Q No I mean when you viewed, when you looked at
6 the account during this period before the January 2007,
7 you've testified under cross-examination that you did
8 access for viewing?

9 A Oh, right.

10 Q Explain to the Court the circumstances of that?

11 A Yeah. To the best of my knowledge it was in '04
12 when we had sold our home. And of course when one
13 sells a home there are different funds that come back,
14 insurance that has been paid, maybe deposits from
15 utilities, those sorts of things. And I had noticed
16 those checks never came.

17 And it occurred to me that perhaps they had gone
18 to her. And I just thought I would check and see. And
19 my research turned out that she had gotten these checks
20 and actually had, although the checks were made out to
21 both parties, she had put my name on there and actually
22 cashed and taken the funds for her own use.

23 Q Without getting into the -- what I want to know
24 was what you actually physically did to view the
25 account?

1 A I misunderstood. One would have to go
2 specifically select that account from the menu.

3 Q okay.

4 A And then you can view.

5 Q Now this is when your account wasn't restricted
6 in any way?

7 A Yes.

8 Q 4502 was not restricted?

9 A Right.

10 Q Did you have any sense that being able to look
11 into the account to which you had been transferring
12 money for months, that that would enable you to
13 withdraw money out of the account?

14 A No.

15 Q Did you see those as two separate?

16 A I did.

17 Q Explain that?

18 A Well I knew I had signed off the account so it
19 seemed reasonable that I would not be able to remove
20 funds from the account, that makes sense.

21 It didn't surprise me that I was able to still
22 put funds in the account. I just continued doing what
23 I was doing and I really didn't pay any attention to
24 it. I didn't know how long it would take the bank to
25 remove me from the account once I signed off. I didn't

1 know how long it would take for it to disappear from my
2 menu.

3 It just never really occurred to me at the time.
4 I was busy at the time. I had a lot on my plate. And
5 I actually didn't pay attention to it. I just kept
6 transferring the funds every month like I was
7 accustomed to doing and I got no complaints.

8 Q why didn't you call the bank then out of concern
9 when you saw that you were able to view the account
10 shortly after you renounced ownership of it?

11 A I wasn't concerned. I didn't know that I had
12 any obligation to police the bank.

13 MR. WAGGONER: That's all I have, thank you.

14 THE COURT: Any re-cross from either party?

15 MR. ABNEY: No, Your Honor.

16 MR. EDWARDS: No, sir.

17 THE COURT: Okay. You may step down, sir.

18 Thank you very much.

19 You may call your next witness.

20 MR. WAGGONER: Call Suzanne Katz.

21 MS. SUZANNE BOONE KATZ,
22 after having first been duly sworn to state the truth,
23 the whole truth and nothing but the truth, testified on
24 her oath as follows:

25 MR. WAGGONER: Ms. Katz, if you'll pull up close

1 to the microphone, appreciate it. Thank you.

2 DIRECT EXAMINATION

3 BY MR. WAGGONER:

4 Q Ms. Katz, you are the former wife of Floyd
5 Jernigan; is that correct?

6 A That's correct.

7 Q And you were divorced six or seven years ago
8 perhaps, thereabouts?

9 A Yes, thereabouts.

10 Q Fair to say you were married for roughly 20
11 years?

12 A Correct.

13 Q You have two well-educated sons, graduated from
14 William and Mary and MIT?

15 A Correct.

16 Q Now I think by any stretch of the imagination,
17 what we have all learned thus far is that this divorce
18 and this break up of a marriage was emotionally painful
19 for you?

20 A It was emotionally painful for everyone, yes.

21 Q And financially stressful for you?

22 A Yes.

23 Q I'm going to ask, though, that you try to put
24 aside those emotions and concentrate specifically on
25 the events that bring us here today, which are the

1 transaction beginning in January of '04, all the way up
2 through the expungement of Dr. Jernigan's arrest
3 record, fair enough?

4 A Yes.

5 Q In January, 2004, were you legally married to
6 Dr. Floyd Jernigan, and at the same time experiencing
7 some marital difficulties with him?

8 A What year was that? I'm sorry.

9 Q In January of 2004?

10 A Yes.

11 Q All right. And at that time, and as a result of
12 and continuing from your marriage, did you and he
13 maintain a bank account that was in both names and it
14 was numbered 8854, which was pretty much used to pay
15 household bills?

16 A Right.

17 Q And did you at the time that you and he began
18 trying to settle up your differences, was it agreed
19 that he would take his name off that account 8854?

20 A Yes.

21 Q Did he in fact sign the documents to that
22 effect?

23 A Yes, he did.

24 Q If we have Exhibit 1 close by. I just want you
25 to look at Exhibit 1 and tell me if that is what you

1 recall the document to be?

2 A Yes, it is.

3 Q All right. What did you understand, at the time
4 it was signed, what did you understand the importance
5 of that document to be? What did you understand it was
6 going to accomplish?

7 A It was going to accomplish the fact that he
8 would no longer have any access whatsoever to that
9 account. The account had been the account that I had
10 used anyway. He had not really used this account.

11 But that this would become my sole account. And
12 that he would have no access, no ownership, nothing.

13 Q Got it. Now did, after your separation and up
14 to and throughout to your divorce and perhaps after,
15 did Dr. Jernigan provide you with financial support?

16 A Yes.

17 Q Whether it be towards the house or children or
18 college or yourself or whatever?

19 A Alimony, yes.

20 Q Did he flow money from his account, 4502, into
21 your account now 8854?

22 A I know that money went into my account, I don't
23 know what account it came from.

24 Q Fair enough. But you knew it was being
25 transferred by him on a monthly basis?

1 A For the most part, yes.

2 Q What was the range of amounts that was coming
3 into that account?

4 A It was higher at first because I was still
5 paying the mortgage on the house until we sold it.
6 Then it went down, it was graduating down payments. So
7 3- or \$4,000 a month.

8 Q All right. Was it always more than 1,100 a
9 month?

10 A Yes.

11 Q Other than in January 2007, did you ever know
12 Floyd Jernigan to make any transfers, withdrawals or
13 other interferences with the funds in 8854?

14 A No.

15 A After he renounced?

16 A No.

17 Q And then in January of '07 you saw evidence that
18 8854 had been used to pay roughly 1,100 in bill
19 payments that were not your bills, correct?

20 A And that was not your account. I mean it was
21 your account, but not your bills?

22 A Right.

23 Q Right. How did you react to that knowledge?
24 Explain to the court, please, how you came about to
25 discover this?

1 A Well I came home that evening that two friends
2 to watch TV and got pizza. And I checked my bank
3 account and I saw that there had been five things paid
4 out of my account that weren't my bills. And it had
5 put me into overdraft on my home equity loan.

6 Q Fair to say you were surprised?

7 A I was shocked.

8 Q What did you do and when did you do it?

9 A Well I told my friends downstairs I have got a
10 problem, I'm going to be up here calling the bank to
11 try and figure out what is going on. So I began an
12 evening of conversations with various members of Bank
13 of America.

14 Q Okay.

15 A About what had happened, to try and figure out
16 what had happened.

17 Q Based on those conversations, what did you learn
18 that you needed to do?

19 A Well at first they thought that this was just
20 someone had gotten into my account, I guess an identity
21 theft type of situation. But continuing a conversation
22 that I got moved to different people to try and find
23 out what happened.

24 One of the people I talked to asked me if I knew
25 a Floyd E. Jernigan. And I said yes, that's my

1 ex-husband. And he said, this is the person who has
2 accessed your account.

3 And, do you want me to keep going or do you have
4 questions?

5 Q Just talk about the conversation that you are
6 referring to now as best you can recall?

7 A Well it was lengthy. I was on the phone for
8 quite some time, as I said, talking to different
9 people.

10 And I mean I just said basically how could this
11 happen, what is going on. And I was told, you know,
12 through a series of multiple conversations, that he had
13 had access to my account and had set up these things.
14 And that they told me that -- first they told me they
15 were going to put the money back in, this was before
16 they knew that he had --

17 Q Just to be clear, this is all in a series of
18 phone conversations that evening?

19 A That evening.

20 Q The night your friends were there for pizza, you
21 discovered it?

22 A Yes.

23 Q Go head.

24 A First they told me that they would give me the
25 money back if it were some kind of identity theft or

1 someone had gotten into my account.

2 But then when they found out that it was my
3 ex-husband things changed dramatically and they said,
4 you will have to go and file a police report at the
5 police station and get like a number or something. But
6 I'd have to go to the police, and then I would have to
7 go to the bank and sign a fraud statement.

8 And so this happened on a Thursday or Friday
9 night.

10 Q Is that where you left it after those series of
11 Friday, Thursday or Friday night conversations?

12 A Well --

13 Q Before we get to the next day I mean.

14 A Yes.

15 Q So that's where you left it.

16 (Whereupon, Plaintiff's Exhibit No. 17 is marked
17 for identification.)

18 Q (By Mr. Waggoner) Ms. Katz, I'm showing you now
19 what has been marked as Plaintiff's Exhibit 17, a
20 little out of order, and ask you if you recognize that
21 document?

22 A Yes.

23 Q And is that a bank document which bears
24 handwriting?

25 A Yes. I printed it off my screen.

1 Q So you printed it off your screen that evening?

2 A Yes.

3 Q Then did you make notes on it as you spoke with
4 the bank?

5 A I did.

6 Q What parts of those notes are scratched off, can
7 you read through them?

8 A Yes. It says, the bank refunded the money. I
9 am to fill out forms. I can't read the other part. It
10 has been scratched through.

11 The bank refunded the money. I at that point
12 thought the bank was putting in the money. And I
13 thought they did, or they were going to put in before
14 they found out that it was Floyd.

15 Then later --

16 Q What part did you scratch out, as best you can
17 read it now?

18 A Well about the bank refunded the money to fill
19 out something. But they -- then they said no --

20 Q Does it say fill out police report?

21 A No, I don't think so.

22 Q Or report?

23 A Fill out forms as it -- as they told me or
24 something like that. Doesn't say anything about the
25 police.

1 Q You scratched that out?

2 A I scratched that out because then they said, no,
3 we are not refunding that money. Then they told me I
4 had -- again, to get my money back I had to go and fill
5 out a police report. Then go to the bank and fill out
6 a fraud report.

7 And they also told me not to talk to Floyd about
8 this at all, and I wrote that that night.

9 Q So you wrote not to talk to Floyd at all during
10 the conversation with the bank?

11 A They told me. They said, do not talk to Floyd
12 about this at all.

13 Q All right. And then after your evening of
14 telephone calls to the bank, did you go face-to-face
15 with -- have a meeting face-to-face with somebody at
16 the bank?

17 A No. We went to -- I was dating my present
18 husband at the time. He took me, I guess a Saturday
19 after that, up to the police station. And he got a
20 police officer to come to the car because I was so
21 nervous and did not want to go into the police station.
22 And the police officer was kind enough to just come
23 over to the car and take my statement.

24 Q So, all right. So the first thing you did then
25 was, per the bank's instructions, go file a police

1 report?

2 A Yes.

3 Q After that, did you meet with a bank
4 representative?

5 A Yes. I believe that was on the next Monday.
6 And again my present husband went with me.

7 Q Mr. Katz?

8 A Mr. Katz. And we went to and we met with a
9 Laura Brison. I think it's Laura Brison. And she was
10 in premiere banking where I banked.

11 And I didn't know her before. And we went in.
12 She was very gracious. We sat down. she was behind
13 her desk. I was there with my husband, now husband was
14 over here and she had a computer screen.

15 And she called Floyd and asked him about the
16 money. I don't remember all the words that were said,
17 but she did ask him if he would put the money -- if he
18 was willing to put the money back in and he said yes.

19 And whether he did something on his end, or she
20 did something on her end, the money did come back in.
21 Then he told her that there was some other money that
22 he needed to put in and would he be able to do that at
23 that time too and that the alimony and he did that.

24 Q So that was alimony in the amount of \$3,000?

25 A Right.

1 Q Yes?

2 A Yes.

3 Q Plus the 1,100 that had gone out of your
4 account?

5 A Right.

6 Q Was there any discussion then between you and
7 your now present husband and the representative who you
8 recall as Ms. Brison about the mechanics, about how
9 this happened?

10 A She, as I said, was very gracious. And I was
11 very upset about the way this whole thing had happened.
12 We did discuss it. I talked to so many people at the
13 bank about all this that I cannot sit here with my hand
14 on the bible and tell you exactly what was said to what
15 person at what time.

16 Q Understood.

17 A She was concerned for me and being protected and
18 my account being protected. I do remember having a
19 discussion about that. Because there was another --
20 something other than a credit line or something that
21 she said I needed to get that taken care of.

22 Q All right. Now you knew she was supportive of
23 you as in your role as a distressed wife going through
24 a divorce?

25 A Well I don't think that was the -- I'm a

1 divorced wife. It was more my ex-husband has accessed
2 my account. The bank is telling me that he had to have
3 done it. And she was interested I think in being
4 protective of anything else further happening.

5 She was very gracious. Very kind and very
6 gracious.

7 Q What I want to know is you just said the bank
8 had told you he had to have done it, that's what I want
9 to know. What did you understand then from the bank?

10 A Well from that night on the phone with the bank,
11 that is what I had been told.

12 Q Which is what?

13 A That he had to have accessed it.

14 Q Had you ever been told, as long as we are
15 talking about ever, have you ever -- has it ever been
16 suggested to you that this could have been an
17 inadvertent error or something that automatically
18 happened because of the status of his account?

19 A Never.

20 Q Never?

21 A Never.

22 Q Was it always your understanding from the bank
23 that Floyd Jernigan had to have used our somehow
24 accessed your account with a code or a PIN number or
25 something like that?

1 A Yes. That he had to have set it up to pay these
2 bills.

3 Q Out of your account?

4 A Out of my account.

5 Q Did you tell that essentially to the police?

6 A Yes.

7 Q So is it fair to say in both cases, well when
8 you spoke to the police you told them the truth to the
9 best of your ability?

10 A Of course.

11 Q And everything you told them was based on what
12 you understood from the bank?

13 A Correct.

14 Q Is it fair to say that after you first reported
15 the matter to the police, was that in January? I think
16 you said Monday, shortly after?

17 A Yes.

18 Q After you reported things to the bank, things
19 cooled up off somewhat, meaning you got your money back
20 and there was no further action taken on your part for
21 a few months?

22 A Well, no. I did call the bank and want an
23 explanation. I felt like there was more that needed to
24 be -- I wanted an explanation. I trusted the bank.
25 I'd banked there for a long time. And I wanted to know

1 how this had occurred. And I did ask the bank for
2 explanation.

3 Q All right. I know we will get shortly to your
4 letter-writing campaign beginning in late July. But
5 before that, is it your testimony you spoke with the
6 bank several times after going to the police?

7 A Yes.

8 Q And essentially no change in the bank's position
9 as far as you understood it?

10 A I'm not completely sure. I mean, they still
11 kept telling me the same thing.

12 Q That's what I'm asking. You did not come to
13 suddenly understand a different mechanism other than he
14 had deliberately done it?

15 A Right. Right. There was nothing ever mentioned
16 about a hold or anything. They didn't communicate
17 anything like that to me.

18 Q So you kept going to the bank between January
19 and then ultimately I can tell you he was arrested --
20 or you went back to the police May 5th, 2007.

21 In that period of time nothing changed. But
22 then you did go back to the police and I think someone
23 has said push for an investigation?

24 A Right.

25 Q Further push for action, correct?

1 A Correct.

2 Q Tell the Court why you did that?

3 A Well continuing along with the bank telling me
4 what they did over and over, and just -- I mean that's
5 what I believed. I believed a crime had taken place.

6 And I went back to the police to bring it up
7 again. And the police, I think, had attempted to get
8 in touch with him without a lot of answers. I don't
9 know. That's --

10 Q Speculation, okay.

11 A Yeah, that's speculation.

12 Q Was your return to the police in May of '07 in
13 any way prompted by what you were hearing that Floyd
14 was telling others, perhaps your sons?

15 A Well Floyd had told Carter, our son in Boston,
16 that he had overdrafted his account. And the way that
17 came about, I was on a phone conversation with Carter
18 and just threw in a general thing. I don't know if I
19 said I might be having a problem with dad, or if he
20 brought something up, but he said something about, oh,
21 dad overdrafted his account.

22 And I think he said, oh, I heard something about
23 you all had a problem with dad overdrafted his account.
24 I said, really? And he said, yeah. He said that he
25 overdrafted, it went into your account, he overdrafted

1 and it went into Mill's account, that's their
2 grandmother.

3 So that was really not what the bank was saying
4 at all. And I went to the bank. I had been told that
5 one account could not cover -- after I found this out
6 then I looked into that and I was told that that one
7 account couldn't cover -- a checking account can't
8 cover another checking account for overdraft purposes.

9 Q Is it fair to say that you went to the police in
10 May of '07 because you thought your husband, ex-husband
11 or soon-to-be ex-husband was lying about how this
12 transaction had occurred?

13 A Yes.

14 Q Lying to your son or anybody else?

15 A (Affirmative head shake.)

16 Q And is it fair to say that when you went to the
17 police with your then husband, Mr. Katz, in May of '07,
18 you told them what you had been telling us?

19 A I can't remember everything that I told them
20 then. But I would suppose it is likely that I would
21 have given them the additional information that I had.

22 Q Okay. You did sign an affidavit, though,
23 correct?

24 A Yes.

25 (Whereupon, Plaintiff's Exhibit No. 5 is marked

1 for identification.)

2 Q (By Mr. Waggoner) Ms. Katz, I'm showing you now
3 a three-page document listed as Exhibit 5. And can you
4 just look at it now and tell the court whether that is
5 the document you signed to prompt the arrest of Floyd
6 Jernigan.

7 A This looks like the document I signed, yes.

8 Q All right. Did you ever talk with Dr. Jernigan
9 about any of this during this time period?

10 A No, the bank told me not to.

11 Q So you've never heard him directly say or
12 explain it to anyone. You know what your son said he
13 said, but you never heard from anyone what his
14 explanation was?

15 A Only what he told the police. No.

16 Q Well I mean you never overheard him --

17 A No. No. No.

18 Q -- say, hear is what I think happened?

19 A No.

20 Q But what you believe, fair enough, is that
21 whatever he was saying was different from what the bank
22 was telling you?

23 A Yes.

24 Q When you heated up the prosecution, so to speak,
25 and went to the police and signed the arrest warrant on

1 May 5, 2007, had the bank ever suggested to you that
2 there was some other explanation besides his deliberate
3 action?

4 A No.

5 Q At that point had any employee of the bank, and
6 this is again in May '07, suggested to you that his
7 account had been frozen?

8 A No.

9 Q Did you have any knowledge of that?

10 A No. I had no knowledge of his account
11 whatsoever.

12 Q After signing the affidavit leading to his
13 arrest in May of '07, did you continue to attempt to
14 find out from the bank what had happened?

15 A Yes, yes, I did.

16 Q Did you in fact end up writing to Chief
17 Executive Officer Ken Lewis of Bank of America --

18 A Yes.

19 Q -- a personal letter.

20 (Whereupon, Plaintiff's Exhibit No. 6 is marked
21 for identification.)

22 Q (By Mr. Waggoner) Ms. Katz, I'm showing you a
23 single page marked as Plaintiff's Exhibit 6. Is that a
24 Photocopy of the letter you wrote to Ken Lewis on July
25 23rd, 2007?

1 A Yes, it is.

2 Q July 23rd?

3 A On July 23rd, 2007.

4 Q And did that prompt a phone call from Mr.
5 William Nevarez on August 2nd, 2007 or at any time
6 after that letter? Did you get a phone call from Mr.
7 Nevarez?

8 A Yes. No. I called him at one point, and I
9 think he called me. I think he called me first. I'm
10 not completely sure about that.

11 Q Okay.

12 (Whereupon, Plaintiff's Exhibit No. 7 is marked
13 for identification.)

14 Q (By Mr. Waggoner) Ms. Katz, let me show you a
15 two-page document marked as Exhibit 7. Is that a
16 letter that you received from Mr. Nevarez following
17 your July 23rd letter to Ken Lewis and a phone call
18 from Mr. Nevarez?

19 A Yes.

20 Q And then did you respond to that letter? Did
21 you write another letter after hearing from Mr. Nevarez
22 back to Mr. Lewis?

23 A I think so.

24 (Whereupon, Plaintiff's Exhibit No. 8 is marked
25 for identification.)

1 Q (By Mr. Waggoner) Showing you, Ms. Katz, a
2 letter an exhibit, two-page document marked as Exhibit
3 8, is that --

4 A Yes, I wrote this.

5 Q -- your follow-up letter in response to Mr.
6 Nevarez's letter?

7 A It is.

8 Q And finally, did your letter again to Mr. Lewis
9 result in another letter from Mr. Nevarez dated
10 September 10, 2010.

11 (Whereupon, Plaintiff's Exhibit No. 9 is marked
12 for identification.)

13 Q (By Mr. Waggoner) Showing you now a two-page
14 document marked Exhibit 9. Is that another letter from
15 Mr. Nevarez to you?

16 A Yes.

17 Q Following your letter to him, your second letter
18 actually to Mr. Lewis?

19 A Yes.

20 Q Okay. Now was that the last communication you
21 had from any representative of the Bank of America
22 regarding those transactions in January of '07?

23 A Okay. Was it the last?

24 Q Written communication I meant to say.

25 A Yes, I think so.

1 Q Okay. Again between his arrest and your contact
2 of Bank of America through its Chief Executive Officer
3 Ken Lewis, did anybody from the bank, or did you rather
4 speak to Floyd Jernigan?

5 A I'm sorry, ask that again please.

6 Q Between the time of his arrest and your writing
7 to the bank in late July and exchanging correspondence
8 with Mr. Nevarez, had you spoken with Dr. Jernigan?

9 A No.

10 Q Did Mr. Nevarez when you talked to him on the
11 phone ever say that he had talked to Dr. Jernigan?

12 A I don't think so. I'd have to read this letter
13 again.

14 Q Okay. To your knowledge after the account had
15 been replenished on the first or second day when you
16 reported it and visited with the women you recall as
17 Ms. Brison, had anybody from the bank spoken to your
18 husband about the transaction?

19 A I don't know.

20 Q So to your knowledge no?

21 A I don't know.

22 Q Okay. And as I understand you said even before
23 this litigation was filed and your deposition was taken
24 and so forth, had you ever heard from any source, from
25 Floyd, from his lawyer, from the bank, from the police,

1 from the solicitor, that at the time this occurred, his
2 account had been frozen or restricted?

3 A Never.

4 MR. WAGGONER: That's all I have.

5 THE COURT: Cross-examination.

6 MR. EDWARDS: Your Honor, I don't have cross at
7 this time. I'd like to reserve the right to recall
8 her.

9 THE COURT: Okay. Your Cross-examination.

10 MR. ABNEY: Thank you, Your Honor.

11 THE COURT: Would you mind handing me those
12 letters?

13 MR. ABNEY: They're in the binder as well.
14 They're just going to have different numbers.

15 THE COURT: You got them in exhibits. So both
16 parties put them in?

17 MR. ABNEY: Yes, Your Honor. We didn't get it
18 done early enough to do a joint notebook.

19 THE COURT: Are you going to do cross on any of
20 these letters?

21 MR. ABNEY: Yes, sir, Your Honor.

22 THE COURT: Give me a chance to look at them,
23 sir, if you don't mind. If you are going to.

24 MR. ABNEY: I think I will mention a couple of
25 them.

1 THE COURT: Just give me a chance to scan them
2 real quick, okay?

3 MR. ABNEY: Oh, sure.

4 THE COURT: Okay, please proceed.

5 MR. ABNEY: Thank you, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. ABNEY:

8 Q Ms. Katz, you contacted the bank I believe it
9 was on or about January the 18th to request information
10 about the unauthorized transactions on your account,
11 correct?

12 A Yes.

13 Q And the bank informed you that evening that Dr.
14 Jernigan had made the bill pay payments from your
15 account, correct?

16 A Yes.

17 Q I believe you spoke with a man named Derek
18 LaMont; is that right?

19 A Yes.

20 Q Mr. LaMont did not say anything to you about Dr.
21 Jernigan's state of mind in making these transactions,
22 correct?

23 A No.

24 Q Mr. LaMont didn't tell you that Dr. Jernigan
25 must have intended to steal these funds, did he?

1 A No.

2 Q In fact no one from the bank ever told you that
3 Dr. Jernigan must have intended to steal this money,
4 correct?

5 A Correct.

6 Q What they told you was that the transaction
7 would require active participation on his part,
8 correct?

9 A Yes.

10 Q And you understood Dr. Jernigan had to, at least
11 from what the bank was telling you, that Dr. Jernigan
12 had to have selected your account for the payments,
13 correct?

14 A Yes.

15 Q The bank employees you spoke with that evening
16 told you that the bank made an error in failing to
17 eliminate Dr. Jernigan's ability to access the account
18 in 2004, correct?

19 A Correct.

20 Q And I believe Ms. Brison also told you that the
21 bank made an error in failing to eliminate Dr.
22 Jernigan's access in 2004; is that right?

23 A I can't remember exactly what her words were. I
24 already testified to that.

25 Q The statements were to that effect, that the

1 bank had made a mistake by failing to eliminate his
2 access?

3 A Again being totally honest I can't -- I know
4 there was a discussion, I cannot tell you what her
5 exact words were.

6 Q And you did not speak to Dr. Jernigan about the
7 transactions at any time before his arrest, correct?

8 A I did not, as per what I was told by the bank.

9 Q Well and you and Dr. Jernigan do not communicate
10 at all, do you?

11 A Not really.

12 Q And the police told you they didn't think it was
13 a good idea for you to talk to Dr. Jernigan, correct?

14 A Right.

15 Q You filed for divorce in 2003 or early 2004; is
16 that right?

17 A Let's see. 2003, yes.

18 Q And Dr. Jernigan initially asked for the
19 divorce, correct?

20 A Yes.

21 Q And when you were married, one cause of your
22 marital problems was your belief that Dr. Jernigan had
23 become secretive with finances, correct?

24 A That was a part of the problems in our
25 relationship.

1 Q In fact you believed that the main problem you
2 had in your marriage was that Dr. Jernigan was
3 secretive and controlling with money, correct?

4 A Money issues, yes.

5 Q That's correct?

6 A Uh-hum.

7 Q You believe he kept accounts secret from you?

8 A I found that out, yes.

9 Q And you believe that he is an accomplished liar,
10 correct?

11 A Yes.

12 Q After Dr. Jernigan retired from the VA in 2004,
13 you believed you weren't receiving a portion of those
14 retirement benefits to which you were entitled,
15 correct?

16 A Correct.

17 Q And you took him to court over that fact, didn't
18 you?

19 A I had to, yes.

20 Q And you took him to court over that fact in
21 2007, correct?

22 A Yes. I don't remember the exact dates.

23 Q Okay.

24 A That was a court-ordered retirement was
25 court-ordered by our separation agreement. And he was

1 not complying with the court order and that's why we
2 went to court.

3 Q Prior to the disputed payments in this case, you
4 did not trust Dr. Jernigan, did you?

5 A That's very broad. Did not trust him in what
6 way?

7 Q Well I'm just as I'm asking it. At the time
8 these transactions occurred, did you trust Dr.
9 Jernigan?

10 A I trusted him with our children. I trusted him
11 in certain areas. I probably didn't trust him with
12 money.

13 Q Thank you. Now you reported the disputed
14 payments to the police in January of 2007, correct?

15 A As required by the bank, yes.

16 Q You told them you believed a fraud had occurred
17 on the account, correct?

18 A Those words were the words used by the bank.

19 Q Okay. But you told the police?

20 A Whatever the bank told me, I told the police.

21 Q You told the police that you believed a fraud
22 had occurred, that Dr. Jernigan had fraudulently
23 accessed your account?

24 A If that's what's written down, then I said then
25 those are the words that came from the bank.

1 Q If the police records reflect that you stated
2 Dr. Jernigan --

3 A If they reflect that --

4 Q -- fraudulently accessed your account --

5 A -- I --

6 THE COURT: Both of you stop for a second, okay.
7 Ask the question, give her a chance to answer, don't
8 interrupt.

9 Ma'am, listen to his question and answer it. I
10 want to hear both of you and I can't listen to both of
11 you at once.

12 This lady can't take both of you down. So give
13 her a chance to answer, okay?

14 MR. ABNEY: Yes, Your Honor.

15 THE COURT: Please proceed.

16 Q (By Mr. Abney) If the police records reflect
17 that you informed the police that Dr. Jernigan
18 fraudulently accessed your account, you do not dispute
19 that?

20 A Correct.

21 Q A few months later the police dropped the case,
22 correct?

23 A I didn't know that the police had dropped the
24 case.

25 Q Understood. But you contacted them in May to

1 ask that the case be reopened, correct?

2 A Correct.

3 Q And you did that because you believed that Dr.
4 Jernigan was lying about how these transactions
5 occurred?

6 A Correct.

7 Q And during this time you and Dr. Jernigan were
8 back in court over your allegation that you weren't
9 receiving your fair share of the retirement benefits,
10 correct?

11 A Correct.

12 Q After you signed the warrant you learned that
13 the police were attempting to contact Dr. Jernigan,
14 correct?

15 A I'm sorry. Ask me that again.

16 Q Yes. After you signed the warrant, you
17 understood that the police were attempting to contact
18 Dr. Jernigan regarding the warrant; is that right?

19 A That they would contact him.

20 Q And you actually understood that they were
21 attempting to contact him?

22 A Yes, I suppose that's correct.

23 Q And you told the police that Dr. Jernigan would
24 not call them back?

25 A Yes, I did.

1 Q And you actually told them that he wouldn't
2 answer the door if they came to the house, didn't you?

3 A I did.

4 Q You said you did draft the letter that was
5 marked as Plaintiff's Exhibit No. 6 to Ken Lewis. Do
6 you have that in front of you?

7 A I think that got moved.

8 THE COURT: Here it is.

9 MR. ABNEY: Great.

10 Q (By Mr. Abney) You drafted this letter dated
11 July 23rd to Ken Lewis, correct?

12 A Yes.

13 Q And you received a response dated August 3rd,
14 2007 which is from Mr. Nevarez which is Plaintiff's
15 Exhibit No. 7, correct?

16 A August 3rd, 2007?

17 Q Correct.

18 A Okay, yes.

19 Q And you never supplied Mr. Nevarez's response,
20 Plaintiff's Exhibit 7 to the solicitor's office, did
21 you?

22 A Did I give this to the solicitor's office? Is
23 that what you are asking?

24 Q Yes, ma'am.

25 A I don't know why I wouldn't have. I can't

1 answer that. I don't know.

2 Q You don't know whether you did or not?

3 A I don't know.

4 Q You don't know whether you conveyed the
5 substance of Plaintiff's Exhibit 7 to the solicitor
6 either, do you?

7 A I don't know.

8 Q Ms. Katz, you are still a Bank of America
9 customer today, aren't you?

10 A I have three mortgages -- I'm sorry, I have two
11 mortgages with bank -- Bank of America. And I have, I
12 have this 8854 account still open, it has \$2 in it. I
13 have left it open just in case I needed it to go back
14 for anything with this.

15 MR. ABNEY: Understood. That's all I have.
16 Thank you.

17 THE COURT: Any redirect?

18 MR. WAGGONER: Just little bit, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. WAGGONER:

21 Q Is it fair to say, Ms. Katz, that when you went
22 back to the police in May and thereafter when you might
23 have talked to them about whether he, your ex-husband,
24 would or would not answer the door, is it fair to say
25 that you were fuming mad at him?

1 A No, not when I told them that.

2 Q Is it fair to say that when you testified he was
3 an accomplished liar, it's because you believed he was
4 lying about how this transaction occurred?

5 A No. I believe that he has lied a lot, not just
6 about this event.

7 Q When you went to the police, though, did you
8 believe that he was lying about this transaction?

9 A Well I believed he was -- based on what I was
10 told because nothing had been told directly to me from
11 him. I believe that what he had told to other people
12 was a lie.

13 Q You thought he was guilty of a crime, correct?

14 A Well I thought something certainly was up. And,
15 you know, it was up to the police and other people to
16 look into this and provide me with some answers.

17 So the bank is telling me that he couldn't have
18 done it without willingly doing it. Everyone else that
19 I talked to at the bank and whatever. So that's where
20 my information came from.

21 Q And you told the police everything the bank told
22 you?

23 A Yes.

24 Q But the bank didn't tell you his account was
25 restricted?

1 A No.

2 THE COURT: Any re-cross?

3 MR. ABNEY: No, Your Honor.

4 THE COURT: You may step down. Thank you very
5 much.

6 Do you want to call a witness and break at 1:00,
7 or do you want to break at this time?

8 MR. WAGGONER: We sort of predicted the witness
9 would come after lunch.

10 THE COURT: All right. It's ten minutes to
11 1:00, we'll recess until 2:15.

12 MR. WAGGONER: Thank you.

13 (Whereupon, a recess was taken.)

14 THE COURT: Ready to proceed?

15 MR. WAGGONER: Plaintiff is ready.

16 THE COURT: Call your next witness, please.

17 MR. WAGGONER: Plaintiff calls Susan Dunn.

18 MS. SUSAN DUNN,
19 after having first been duly sworn to state the truth,
20 the whole truth and nothing but the truth, testified on
21 her oath as follows:

22 DIRECT EXAMINATION

23 BY MR. WAGGONER:

24 Q Ms. Dunn, thank you for speaking up.

25 You are a lawyer in Charleston?

1 A That's correct.

2 Q How long have you been a lawyer?

3 A Since 1977.

4 Q And do you also serve as a minister at the
5 Circular Congregation Church?

6 A I have in the past. I'm not employed there now.

7 Q Where are you employed now?

8 A I'm the legal director for the ACLU for the
9 state.

10 Q That's the American Civil Liberties Union?

11 A That's correct.

12 Q Were you formally in private practice?

13 A Yes.

14 Q What type of area did you gravitate toward in
15 your private practice?

16 A You know, I did a funny collection of things.
17 But publicly I was probably known for doing domestic
18 work and doing mediation.

19 Q Do you know Floyd Jernigan?

20 A Yes, I do.

21 Q Did you represent him during the course of his
22 separation and divorce from Suzanne Boone Jernigan
23 then, and now Ms. Katz?

24 A Yes, I did.

25 Q How would you characterize the level of, if you

1 will, contention between those two parties during the
2 time you were representing him in their divorce? And
3 when was this approximately?

4 A I guess the divorce itself would have been 2003,
5 2004. I'm not really clear about that. It was -- I
6 would have to say it was sort of a peculiar case
7 because at least in the initial phases of the case,
8 even though it was clear feelings were pretty badly
9 hurt, we were able to resolve everything without a lot
10 of excessive lawyering.

11 Q Do you recall, for instance, that Dr. Jernigan
12 generally respected -- let me set the foundation.

13 Did he and his then wife enter into some sort of
14 a property settlement and support agreement?

15 A If they entered into it, initially I actually
16 got involved in this case before the first temporary
17 hearing.

18 Q Okay.

19 A We reached a temporary agreement. We were able
20 to reach a final agreement. The final agreement was
21 incorporated as a final order of separate maintenance
22 even before the parties had been separated for a year.

23 Once the parties were separated for a year, then
24 the divorce itself was completely uncontested because
25 everything had already been resolved.

1 Q So the Court at the time of the divorce adopted
2 by its terms the property settlement agreement?

3 A That's correct.

4 Q All right. And during that period of time while
5 you were representing Dr. Jernigan, and up to and
6 including the time of the divorce, would it be fair to
7 say he respected and generally obeyed the terms of
8 those -- of the agreement?

9 A In the big picture of things, yes.

10 Q All right. And in the smaller picture?

11 A Well, you know, I think it was very frustrating
12 for Ms. Jernigan, Ms. Katz at that point.

13 Q She was represented at the time?

14 A She has always been represented. I think it was
15 very frustrating for her. For instance, there was --
16 he had an obligation to make a support payment by I
17 think the date was the 20th, it was an odd day in the
18 month. And he paid it by direct deposit.

19 It was very frustrating to her that if that
20 deposit went in after noon on Friday the 20th, and the
21 20th happened to be a Friday, those funds weren't
22 actually going to be available to her until Monday.
23 And in her mind he was violating the court order
24 because he was supposed to have the money to her on the
25 20th.

1 And, yes, things like that did happen. And I do
2 understand the frustration that when your life kind of
3 rotates around that, those details are very important.

4 Q But as compared with perhaps other clients that
5 you've either represented or been on the other side of,
6 would you describe his attitude as contemptuous of the
7 legal process or anything like that?

8 A It didn't seem that way to me. There were never
9 months without payment or anything like that. It was
10 always a matter of days.

11 Q When did you sort of finish up your work with
12 him as his divorce lawyer?

13 A I think I finished it up when we had the final
14 divorce. At that point everything was pretty much
15 done.

16 Q So that would have been 2004 roughly?

17 A I believe so.

18 Q Was he, by its term as you recall, required to
19 pay his ex-wife then support directly to her account?

20 A Actually I don't remember when the change took
21 place. It was changed from being paid by direct
22 deposit to being paid through the court because of
23 exactly the same problem that I described with the
24 direct deposit on the 20th not necessarily being
25 available to her.

1 Q So you finished up your work when they got
2 divorced. Did you then come to hear from him that
3 there was a problem with the bank?

4 A You know, I had heard from Floyd not about a
5 problem with the bank but a problem with his
6 retirement. So he had contacted me about that. And I
7 knew that that was going to be something that was going
8 to go require some fine-tuning because it was a very
9 confusing issue.

10 And so I had been in conversation with him about
11 that. While I was in conversation about that, he did
12 mention to me that there had been a bank problem, but
13 he represented to me that he had taken care of it.

14 Q What did you understand in that first mention of
15 it to have been the bank problem from him?

16 A You know, my real understanding that it was just
17 some kind of a problem with funds, you know, over a
18 long weekend. And it was all fixed by the next week.

19 And he did mention that he had to go down and
20 talk to the police, but he talked to them and he
21 thought everything was fine. I didn't give it another
22 thought.

23 Q So you did not get involved at that point?

24 A No, I did not.

25 Q Did you ultimately go on vacation?

1 A Yes. In the case dealing with the QDRO,
2 qualified domestic relations order, and the underlying
3 retirement, Ms. Katz, through her attorney, had brought
4 a rule to show cause. That rule to show cause was
5 scheduled at a time that Dr. Jernigan was out of town
6 and the case was continued.

7 It was continued on my motion, so I had to pay
8 the \$25. I remember that. And when I had submitted
9 the order to opposing counsel to send it in, I said,
10 don't schedule it during this time, I have got an order
11 of protection because I'm going to be away in May. So
12 I had given that information to the counsel who was
13 representing Ms. Katz in the family court case.

14 Q Okay. So was it when you returned from your
15 vacation that you learned he had been arrested?

16 A Yes.

17 Q And describe that. Describe your first
18 awareness of it, or his reaction and so forth.

19 A As I recall I learned it by telephone. I needed
20 to talk with him about stuff anyway, so I was sort of
21 expecting his call.

22 And, you know, he said, you are not going to
23 believe what happened. And then he proceeded, you
24 know, to tell the story of the police coming and
25 leaving their card. And him calling them back after he

1 got back from work, his hours are often kind of odd so
2 he had gotten back late. And the next thing he knows
3 he was arrested early in the morning from his home.

4 Q Did he tell you -- what was his emotion besides,
5 you are not going to believe what happened? Was he
6 angry first?

7 A He was a combination, it seemed to me, of angry
8 and embarrassed. You know, I can't say that he was
9 completely peeved, but it did seem to feel -- I think
10 he was -- knowing that I was gone at the time when he
11 might have needed me. So it had all of those
12 combinations.

13 He was particularly at that point, really, I do
14 recall him being quite upset that one of his sons was
15 staying with him when this happened. That that was
16 something he really found quite offensive.

17 Q Did you know or learn then what had actually
18 happened from him?

19 A You know, I have to say that he tried to explain
20 it to me and that I didn't understand it.

21 Q All right. Was it your understanding that
22 whatever funds had been taken were -- had been paid
23 back. Did he tell you that?

24 A He told me that back in January.

25 Q So you knew he was talking about the same

1 transaction?

2 A Yes.

3 Q And what did he understand the police or bank --
4 what did he tell you that he understood the gravamen of
5 the complaint was?

6 A Was that there was no way that this could have
7 happened without him intentionally trying to get the
8 funds from his ex-wife's account.

9 Q Was it your understanding that he disputed that?

10 A Yes.

11 Q Were you his lawyer then when he -- was he on
12 bond when you first met up with him after that?

13 A Yes. He was out on a PR bond, but a PR bond
14 that had restrictions to it.

15 Q What were those restrictions?

16 A I don't know remember all of them, but I know
17 that the restriction was that he could not leave the
18 state.

19 Q Do you recall any discussion from him then, or
20 soon thereafter, about the status of his account when
21 this happened?

22 A Frankly I don't remember whether there was in
23 January when he first called me or after the arrest.
24 But, you know, I had worked with Floyd long enough to
25 know that at the point in times during the year when

1 the college tuition was due, Floyd was always kind of
2 doing scrambley things with money, you know, to make it
3 so that he could pay those bills.

4 So in January was one of those scrambley times.
5 My understanding is that Floyd was doing another one of
6 his trying move this from there to be able to pay those
7 big checks for his sons. And that somehow in the
8 middle of all this, one of the big deposits, he thought
9 it had cleared but it didn't clear. That was the
10 understanding that I had.

11 Q All right. Did he -- and that's from him?

12 A Yes.

13 Q Okay. So you didn't at that point have any
14 understanding about the situation other than from him?

15 A That's correct.

16 Q And sometime after that, did you and he go to
17 the bank to see what else you might find out?

18 A Yes, we did.

19 Q Who did you meet with there?

20 A We met with Suzanne Horris.

21 Q Okay. She was a bank representative?

22 A I think she was a vice president.

23 Q Was that by prearrangement or did you just drop
24 by?

25 A No, we made an appointment.

1 Q And did you tell them why you were coming?

2 A I believe that I did.

3 Q Tell me what you learned, if anything, at the
4 first appointment with Ms. Horris. Tell me roughly
5 when it was.

6 A I imagine it was in June, maybe early July,
7 summertime after he was arrested in May.

8 Q Okay.

9 A It didn't take us that long to get in. Ms.
10 Horris had sort of a printout that she gave to us. I'm
11 not sure whether I had already seen it before or not
12 because the solicitor's office also had the same
13 document. So it was sort of a printout of transactions
14 that I looked at several times. And it was pretty much
15 Greek to me.

16 So part of what I was trying to do with her was
17 to find out what that piece of paper told me. And to
18 ask questions about it. And to try and see if we could
19 get behind what had happened.

20 But we were also trying to figure out who had
21 talked to whom and who had done what, trying to
22 recreate back to January now. And it really felt as if
23 this conversation, Ms. Horris really didn't know that
24 much herself.

25 Q Okay. So you left then with what as compared --

1 in terms of your understanding, how much more
2 understanding did you leave with then when you arrived?

3 A Well I left with a certain understanding of
4 watching the money flow through Floyd's account. I
5 actually probably came out of that meeting with more
6 questions than I had answers.

7 Because in that account it also showed sort of
8 a, you know, he had at one point had an account that
9 was sort of a line of credit that he could call on.
10 And I couldn't tell how that related to this, so I was
11 confused about that. And I think I came out of the
12 meeting realizing that it was actually true, that I
13 basically didn't understand online banking.

14 Q Did you have a second conversation with Ms.
15 Horris?

16 A Yes.

17 Q Before that did you speak with anybody else at
18 the bank?

19 A No.

20 Q So the second conversation with the bank was
21 again with Ms. Horris?

22 A Yes.

23 Q How was that and roughly when was that in
24 relation to your June or July conversation?

25 A It seems to me it was maybe a month, perhaps a

1 little bit longer than that, after the first
2 conversation.

3 Q Was it again set up with an appointment?

4 A Yes.

5 Q What was the tenure of that conversation?

6 A It sort of started off a little sour as I had
7 left the making of the appointment to my assistant to
8 make. And it appeared that my assistant and Ms. Horris
9 didn't communicate very well with each other. And both
10 of them blamed the other one on the difficulty in terms
11 of getting it set up. So that there was already sort
12 of a sense of pique.

13 But this time I at least I went in trying to get
14 certain specific questions answered because I had at
15 least been able to move myself a little bit along from
16 my prior ignorance to at least figure out I'd like this
17 piece of information, this piece of information.

18 So I came in with very specific questions that I
19 wanted to have answered and none of them were answered.

20 Q Can you recall what any of those questions were?

21 A Well there was a document that I had been given
22 that had been sent to Ms. Katz. It appeared to
23 document that the funds had been replaced in her
24 account. And there was a code on that document that
25 indicated who had done it.

1 And I asked who this person was. I tried to
2 find out who this was who had done this transaction.
3 Because it seemed to me that person could give me some
4 useful information. And I could not find out who that
5 person was.

6 And I wanted to know who at the bank had talked
7 to the solicitor's office or to the police. And I was
8 never, never able to find a name.

9 Q Were you generally there to ask, ask again how
10 did this all happen? Is that a fair summary of your
11 visit?

12 A Yes. I was trying to figure out how it all
13 happened. But primarily I was trying to find out where
14 we were along the line of communications. My real goal
15 was to get this criminal case to go ahead, that's what
16 I was interested in.

17 I was interested in either getting enough
18 information or enough confusion for it to go away.
19 Either one would have worked.

20 Q What sort of information were you hoping for
21 that would make it go away?

22 A I was hoping for there to be some information
23 that would indicate that somehow or another there was a
24 bank error involved in this, or that there had been a
25 miscommunication involved in it. That's what I was

1 looking for.

2 Q Did you get that?

3 A Not really. Not really.

4 Q So when you left, what were the parting words?

5 what was in your mind about what to do next?

6 A I guess what my feeling was is that I didn't get
7 the questions answered when I asked them in person that
8 I would need to ask them in writing. So I think that's
9 what I did.

10 Q So do I understand that at that point there was
11 no mention by Ms. Horris that this was a bank error
12 or anything like that?

13 A No.

14 Q Did you, or during this period after the arrest
15 and before the ultimate dismissal of the charges, did
16 you speak with the solicitor? I gather you did?

17 A Yes, I did.

18 Q And in response to a subpoena from the bank,
19 this case, in this civil litigation, did you produce
20 e-mail correspondence between you and a bank employee,
21 specifically I guess Ms. Horris?

22 A Yes.

23 Q Did you receive any mail from Ms. Horris in
24 response?

25 A Yes, I did.

1 Q After your second meeting with her?

2 A Yes.

3 (Whereupon, Plaintiff's Exhibit 10 is marked for
4 identification.)

5 Q (By Mr. Waggoner) Showing you what has been
6 marked as Exhibit 10, and ask you if that is a printout
7 of both your e-mail to and from Ms. Horris?

8 A Yeah. This is an exchange between the two of
9 us.

10 Q Understood. And in that e-mail did Ms. Horris
11 advise you that she had done all she could to answer
12 your questions about Dr. Jernigan?

13 Do you need to look at it?

14 A I think actually the last one in the chain of
15 this is me.

16 Q It's printed in reverse, right.

17 A But I think she really had basic -- at a point,
18 whether it was this e-mail or a different e-mail, she
19 did by e-mail say that she really had nothing else she
20 could give me.

21 Q So there might have been another e-mail --

22 A That's right.

23 Q -- that you don't have --

24 A That's right.

25 Q Could not produce?

1 A That's right.

2 Q In September of that year, 2007, did you
3 ultimately attempt to contact a different -- go a
4 different route with the bank on this issue of what
5 happened?

6 A You know, I was able to, and I believe it was
7 sort of through customer service for the online banking
8 did try -- because I know so very little about online
9 banking I was still trying -- I was still trying to
10 visualize not only what had happened, what could
11 possibly have happened in order to then be able to kind
12 of figure out what physically went wrong.

13 Q So you could go back to the solicitor and
14 explain that?

15 A Yes.

16 Q Right. Had there been a preliminary hearing at
17 this time?

18 A Yes. The preliminary hearing was really not
19 long after he was arrested.

20 Q All right. When you went through this customer
21 service and bill pay, did you speak to somebody
22 ultimately?

23 A Yes.

24 Q Did they identify themselves?

25 A They did identify themselves but I didn't get

1 the name.

2 Q Do you remember whether they had an affiliation,
3 claimed an affiliation with one group or another, one
4 business or another?

5 A I really don't recall that.

6 Q Did you get any sense of the mechanics about how
7 this occurred after speaking to that person?

8 A I certainly learn a little bit more. This
9 person was able to explain to me that, you know, one of
10 the things I couldn't understand was why I couldn't
11 actually get a print-up of the screen so we could
12 actually -- whatever Floyd did that time, there seemed
13 to me there ought to be a record that I could actually
14 see it to see. But he explained to me how it really
15 didn't work that way.

16 Q Just so we are clear that time, meaning January
17 of '07, this transaction over which he had been
18 arrested?

19 A That's right. It was clear there was specific
20 checks that were written at the specific time and that
21 they were done -- I knew at this point it was specific
22 check, I knew to whom they were, what the amount was,
23 and that they had been done by online banking.

24 I had been able to figure that out, but I
25 couldn't figure out how it had happened.

1 Q Just for everybody's purposes it's probably good
2 to distinguish between checks, meaning written checks,
3 and pay bill payments. Did you mean bill payments?

4 A Yeah, bill payments. It was done by a computer.

5 Q All right. And after that call did you receive
6 something from the man that you had spoken to?

7 A Yes, several hours later. I believe I had spoke
8 to him in the morning and he sent it to me in the
9 afternoon.

10 Q I'm showing you now what is marked as Exhibit
11 11. I'm asking, is that the fax sent to you by the man
12 you talked to when you called customer service?

13 A Yes. He didn't identify himself here either.
14 But, yes, this is what I got.

15 Q Got it. And can you say looking at the upper
16 left corner, maybe right corner, from what group that
17 came?

18 A It claims to come from -- well the fax is from
19 Cheek Free Corporation, and the name on the fax is
20 Payment Processing Center.

21 Q Not Bank of America?

22 A It's not from Bank of America, but it's signed
23 Bank of America, so it's --

24 Q Confusing?

25 A Confusing, yes.

1 Q Was this the first time you'd ever seen any
2 written documentation to reflect this transaction of
3 which he had been arrested?

4 A No. I had seen the long printout, but I just
5 could not understand anything on that. And it didn't
6 seem to give me any real information directly connected
7 with online banking.

8 Q This was --

9 A This was the first online banking information I
10 got.

11 Q The first indication regarding the online track
12 mechanism?

13 A That's right. It's sort of backwards getting
14 the information. But it's the first verification that
15 I got that the former joint account had been linked to
16 Floyd's online banking until that morning when somebody
17 inactivated it.

18 Q Okay. Now after that fax from the Payment
19 Processing Center, did you send another e-mail to Ms.
20 Horris?

21 A I believe so.

22 Q Showing you now Exhibit 12. And is that a copy
23 of your e-mail to Ms. Horris?

24 A Yes.

25 Q All right. And you asked a number of questions

1 in that e-mail, did you not?

2 A Yes, I did.

3 Q And what was the Question Number 5 as reflected
4 on that e-mail?

5 A Number 5 is: several of the critical
6 communications in this case were handled by someone
7 identified as NBKE4QI. Can you tell me who that is and
8 how I might connect him or her.

9 Q And what was her -- did you telephone her or was
10 there a response?

11 A You know, I believe it was an e-mail response,
12 but I do not have that response.

13 Q What do you recall about her response to that
14 e-mail?

15 A I recall that basically as to the first four
16 questions she really said, you are going to need to
17 talk to something other than me, either legal
18 department. Those are technical questions that I don't
19 know anything about.

20 But as to Number 5 she said that she could not
21 or would not release that information to me.

22 Q So the first four dealt with, as you suggested,
23 technical issues. The last one was for the
24 identification of an individual?

25 A Yes.

1 Q Whose code name was what you recited?

2 A That's correct. Or I assumed it was an
3 individual.

4 Q What did you do then when Ms. Horris advised you
5 to contact the legal department at the Bank of America
6 if anything?

7 A I'm sure that I didn't call the legal
8 department. At that point in time, you know, I can't
9 remember exactly what the pressures were, but there was
10 some pressures on us to get this case dismissed because
11 of something that Floyd would have an opportunity to do
12 professionally.

13 I think he had to apply for a temporary medical
14 license in another state for work that he needed to get
15 in order to support his boys and his former wife. He
16 needed to be able to apply for that. So he had a real
17 time -- I was working on that time pressure.

18 And, you know, what I decided to do was to go to
19 the solicitor's office rather than to the legal
20 department at Bank of America. I didn't care about
21 Bank of America, I cared about the criminal charge
22 going away.

23 Q And that's because it had some effect on his
24 upcoming job search?

25 A That's correct.

1 Q You mentioned that the preliminary hearing had
2 been held considerably before all this?

3 A That's correct.

4 Q Shortly after he was arrested. Did you attend
5 the preliminary hearing?

6 A Yes.

7 Q Did you, as most criminal lawyers would then do,
8 attempt to interrogate the police officer who there?

9 A You know, I did. But if the truth be known I'm
10 not much of a criminal lawyer. And my real interest at
11 the bond hearing, I really didn't see that there was
12 going to be much possibility of getting the case
13 dismissed at the temporary hearing.

14 What I was interested in was getting the
15 out-of-state restriction off of the PR bond so that Dr.
16 Jernigan could work out of state during that summer
17 that was coming heavy upon us.

18 That's what I was focused on. While I kind of
19 went through the motions of what you do in a
20 preliminary hearing, I did not use it as kind of
21 discovery as a regular criminal lawyer might have.

22 Q Do you recall, though, that a police officer
23 testified at that preliminary hearing?

24 A Yes.

25 Q Do you recall anything about what the police

-1 officer told the judge?

2 A I do believe that the police officer
3 represented --

4 MR. ABNEY: Objection, Your Honor, hearsay.

5 Q (By Waggoner) Following the police officer's
6 testimony to the court, what did the court decide
7 regarding the existence of probable cause?

8 A That it did bind -- I guess that's the right
9 term -- bind the case over. But we were successful in
10 getting the bond changed.

11 Q From the time of his arrest up through the
12 preliminary hearing, and up through your continuing
13 efforts and meetings with Ms. Horris, and all the way
14 up to the point where ultimately the record -- you
15 succeeded in expunging the record after the case was
16 dismissed, had anybody ever from the bank or the police
17 suggested to you that the account from which these
18 unauthorized bill pays had theoretically been launched
19 had been restricted at the time?

20 A I certainly don't recall anybody using that
21 term.

22 Q All right.

23 Had anybody ever to this day explained to you
24 what the relation was between the bill pay account from
25 4502, Dr. Floyd's account, and the ultimate payment out

1 of his former wife's account, the mechanics of it?

2 A No. The most insight I got into that was what I
3 had to assume from the facts, which is if it was
4 inactivated at that time, prior to that time, it had
5 been activated in connection with his online bank
6 account. That's an assumption. Nobody told me other
7 than that fact.

8 MR. WAGGONER: All right. Thank you, ma'am.

9 CROSS-EXAMINATION

10 BY MR. EDWARDS:

11 Q Good afternoon, Ms. Dunn.

12 Have you ever personally spoken with Ms. Katz
13 about the source of her frustrations?

14 A At what point in time, sir?

15 Q At any point. Have you ever spoken directly to
16 Ms. Katz about the source of her frustration?

17 A Ms. Katz and I have had occasion to have direct
18 communication over the years in a variety of different
19 settings.

20 Q And was the source of her frustration primarily
21 relating to financial issues with her now ex-husband?

22 A The financial -- I mean her connections with him
23 were financial. I think some of it was financial, and
24 some of it really was with her seemed to be sort of
25 matters of principle.

1 Q You understand that Ms. Katz has alleged,
2 testified here today under oath, that the bank had told
3 her that Dr. Jernigan had to have acted with some sort
4 of deliberate action on his part. Do you understand
5 that?

6 A I do understand that.

7 Q Do you have any reason to dispute that
8 allegation, that the bank told her that Dr. Jernigan
9 had to have acted deliberately?

10 A I obviously was never successful in being able
11 to find out who told who what. However, I have been
12 connected with Ms. Katz over years in this case --

13 Q Well you went to the bank, didn't you, to seek
14 -- to find out whether or not there was a bank error or
15 some sort of communication error; isn't that correct?

16 A Absolutely, but that's not what you asked me.
17 You asked me what did Ms. Katz believe.

18 Q No. I asked you if you had any reason to
19 dispute her allegation that the bank told her that Dr.
20 Jernigan had to have acted deliberately?

21 A What I was trying to say is I don't have any
22 reason to dispute it. I, in fact, having dealt with
23 her as long as I have wouldn't doubt that that's
24 exactly what happened.

25 MR. EDWARDS: Thank you, ma'am.

1 THE COURT: Cross-examination.

2 MR. ABNEY: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. ABNEY:

5 Q Ms. Dunn, you referred in your testimony earlier
6 about the rule to show cause that I believe Ms. Katz
7 filed against Dr. Jernigan in connection with some
8 issues related to their divorce. Do you remember that?

9 A Yes.

10 Q And I believe a rule to show cause was filed in
11 2007; is that correct?

12 A I think that's correct.

13 Q At least it was pending in April or May of 2007
14 when you required to obtain a continuance, correct?

15 A The original hearing had been scheduled in
16 April. I cannot remember exactly when it was continued
17 to. But, yes, the rule had been filed.

18 Q And what was alleged in the rule to show cause
19 was essentially that Dr. Jernigan was not complying
20 with obligations from the divorce agreement, correct?

21 A That's correct.

22 Q And the specific allegation on this occasion was
23 essentially that Dr. Jernigan was not paying her a
24 portion of his retirement benefit, correct?

25 A It had several issues involved in it, but that

1 was part of it, yes.

2 Q I'd like to talk about your initial conversation
3 with Ms. Horris at the bank. I believe you were trying
4 to obtain a meeting with someone else at the bank,
5 someone who had been identified as Dr. Jernigan's
6 personal banker?

7 A That's correct.

8 Q And you were unable to obtain a meeting with
9 her, correct?

10 A That's correct.

11 Q And she was, you understood, to be ill with --
12 had some medical condition?

13 A That's correct.

14 Q And you ended up with Ms. Horris?

15 A Right.

16 Q You actually personally didn't make the call to
17 set up the appointment, correct?

18 A I don't believe that I did. When I had a
19 secretary I rarely did that.

20 Q So you don't know from personal knowledge what
21 Ms. Horris was told in advance about the meeting?

22 A No, I do not.

23 Q And when you were at the meeting you perceived
24 her to be making an effort to help you within her
25 capability, correct?

1 A The first meeting, yes. The first meeting was
2 very cordial. I felt like she was trying to understand
3 what we needed, and we were trying to understand what
4 she could tell us, and we were trying to figure out
5 what other information we might need.

6 I would say it was quite a fortune hunt.

7 Q And the e-mail that has been marked as Exhibit
8 10, do you have that in front of you?

9 A Is that it?

10 Q Yes, ma'am. Thank you.

11 A I have it.

12 Q Now this e-mail from Ms. Horris at the bottom is
13 dated August 14, 2007, correct?

14 A Yes.

15 Q Ms. Horris tells you in the e-mail that, quote,
16 she has, quote, provided all the information I can to
17 you and Dr. Jernigan. If you need additional
18 information or documentation, that request will need to
19 be handled by Bank of America's legal department.

20 Did I read that correctly?

21 A That's correct.

22 Q You were trying to obtain information from her
23 in connection with a legal matter, correct?

24 A Well sort of.

25 Q There was a criminal charge against Dr. Jernigan

1 at the time, correct?

2 A That's correct.

3 Q And you had been retained in connection with
4 that charge, correct?

5 A Right.

6 Q And she's referred you to the bank's legal
7 department, correct?

8 A Yes. She -- well, I mean, if you read it
9 carefully she says, I will be happy to meet with you
10 again, let me know what you need to talk about. Then
11 it says also to talk to the legal department.

12 I then responded to her with the e-mail that's
13 in the same e-mail. And we set up another appointment.
14 So she agreed to talk with us after that, and we did.

15 Q But she told you on August 14th that she had
16 supplied all the information and documentation she had,
17 correct?

18 A That's correct.

19 Q And she told you that if you needed additional
20 information to contact the bank's legal department?

21 A She also said, I just need to know the topic of
22 the conversation. And I understood there were some
23 things she was willing to talk to us about, and other
24 things that had to go to the legal department.

25 So I gave her what I thought we needed to talk

1 about, and she agreed to meet with us.

2 Q You never contacted the legal department?

3 A No, I did not.

4 Q You never sent a subpoena to the bank in
5 connection with the legal work?

6 A No. I was not -- I was representing Mr.
7 Jernigan in his criminal case. I wasn't a lawyer
8 representing Dr. Jernigan against Bank of America who
9 at that time I assumed was his bank.

10 I was working with Mr. Jernigan with his bank as
11 a customer who's trying to get basic information out of
12 his bank. You know, this was not a big deal.

13 Q I believe you didn't contact the legal
14 department because ultimately you had obtained all the
15 information that you needed in order -- in connection
16 with the criminal matter?

17 A That's correct.

18 MR. ABNEY: No further questions. Thank you.

19 THE COURT: Any redirect?

20 MR. WAGGONER: Nothing on redirect, Your Honor.

21 THE COURT: Okay.

22 You may step down. Thank you very much.

23 (Whereupon, a recess was taken in order to
24 receive the Grand Jury Report.)

25 THE COURT: Call your next witness.

1 MR. WAGGONER: Plaintiff calls Sgt. Daquigan.

2 MR. DONALD DAQUIGAN,
3 after having first been duly sworn to state the truth,
4 the whole truth and nothing but the truth, testified on
5 his oath as follows:

6 DIRECT EXAMINATION

7 BY MR. WAGGONER:

8 Q Is it Sgt. Daquigan?

9 A It's Sgt. Daquigan, yes.

10 Q And are you with the Charleston City Police
11 Department?

12 A Yes.

13 Q Tell us a little bit about your education
14 becoming a police officer, are you from South Carolina,
15 that sort of thing.

16 A I have a degree in criminal justice from Trident
17 Tech. Also from the University of South Carolina, I
18 attended classes there.

19 Also I have attended the police academy. I have
20 attended numerous classes involving white-collar crimes
21 and computer crimes.

22 Q Were you member of the Charleston Police
23 Department in 2007?

24 A Yes, sir.

25 Q And are you still a member?

1 A Yes, sir.

2 Q And how long have you been a police officer?

3 A Since 1974, April 19th.

4 Q And you mentioned white-collar crime. How long
5 have you been involved in, I gather, the investigation
6 of white-collar crime?

7 A April of 1992.

8 Q And what is white-collar crime?

9 A It involves any type of fraud type crimes;
10 breach of trust, larceny by false pretenses,
11 embezzlement, things like that, forgeries.

12 Q And you say you have been doing that since 1992
13 in the City of Charleston?

14 A Yes.

15 Q In connection with your position with
16 Charleston, were you the head of white-collar crime?

17 A I was at one time until they did a
18 reconstruction. Now I'm an investigator in the same
19 unit.

20 Q In 2007 what was your position?

21 A I was in charge of the white-collar crime unit,
22 but not the entire -- we had a computer crime unit
23 which consisted of a white-collar crime unit also. And
24 I had to report to a certain sergeant. But I was in
25 charge of white-collar crime unit at that time.

1 Q You felt comfortable with the computer aspect of
2 it?

3 A Yes.

4 Q Did you become, in that context, aware of a
5 complaint filed by Ms. Suzanne Boone, now Katz,
6 regarding alleged unauthorized transfers from her
7 checking account back in late January of 2007?

8 A I'm not sure if it was checking account or some
9 other account. But it was an account where money was
10 compromised.

11 Q Did you ultimately talk to Ms. Boone about this?

12 A Yes.

13 Q Did she tell you that she suspected her husband
14 had intentionally chosen her account to make bill pay
15 payments from?

16 A Yes.

17 Q And with her initial appearance at the
18 Charleston -- City of Charleston Police Department to
19 make this complaint, was a police incident report
20 completed?

21 A Yes.

22 Q Showing you a three-page document marked as
23 Exhibit 13. Is that a photocopy of the incident report
24 prepared in response to and in connection with Ms.
25 Katz's initial complaint?

1 A It's a copy of the incident report along with
2 additional supplemental reports.

3 Q Does that comprise then the initial as well as
4 some subsequent materials produced in connection with
5 this investigation?

6 A Yes.

7 Q And as reflected in those documents, beginning I
8 guess with the initial report, did Ms. Boone tell the
9 reporting officer that her ex-husband had taken
10 approximately \$1,100 from her account without
11 authority?

12 A Yes.

13 Q And that she didn't know how he was able to do
14 that?

15 A Right, because that was supposed to have been
16 her account.

17 Q At some point after the initial complaint was
18 file, before and after the date it was signed by Ms.
19 Boone, did you investigate the allegations?

20 A Yes, sir.

21 Q What did you do?

22 A Well I spoke to her and she gave me some
23 documents, I believe, that showed that money was taken
24 out of the account. She also stated that she was
25 informed the only way to get into that account you have

1 to have a code number, which is more or less a PIN
2 number.

3 He apparently went on the computer and used that
4 PIN number and went into the account.

5 Q That's what you were hearing from her?

6 A Yes.

7 Q Did she indicate she had spoken to the bank, or
8 had done any homework before filing this complaint?

9 A Yes.

10 Q Did you recall anything about whether when she
11 spoke to you the money had been repaid at the time?

12 A I believe it had been -- the money had been put
13 back into her account. When she found out about it,
14 according to what she told us in the police report, is
15 that the bank had contacted her and told her that there
16 was money out of her account I believe.

17 Q Did you speak to Dr. Jernigan in connection with
18 your initial involvement.

19 A I spoke to him over the phone, yes.

20 Q And tell me generally what you learned from him?

21 A He said it was all a mistake, it was an error on
22 the bank's part.

23 Q And what happened then, as you recall it, during
24 the weeks or months following this complaint filed in
25 January? Did anything happen?

1 A Originally she wasn't sure whether or not she
2 wanted to actually have him arrested for the incident
3 or not.

4 Q She meaning Ms. Katz?

5 A Right. But we are an accredited police
6 department. As an accredited police department we
7 can't leave a case open for a long period of time
8 without some action being conducted.

9 So I close the case out pending notification if
10 she was going to press charges or not. She came back
11 later on and decided she did want to press charges.
12 And at that time I reopened the case.

13 Q In connection with the reopening, if you will,
14 of those charges, did she sign an affidavit?

15 A Yes.

16 Q Is that part of exhibit --

17 A I don't think that affidavit.

18 Q I'm sorry, it's already in evidence as Exhibit
19 5. Let me show it to you.

20 I'm showing you now Exhibit 5. Is that the
21 affidavit? Does it at least bear her signature?

22 A This is the arrest warrant affidavit. But this
23 is a different signed affidavit from what originally
24 was signed. She originally signed that affidavit too.

25 Q So what is -- just so we are clear on this --

1 A This is the affidavit portion of it. The front
2 part of it is the arrest warrant.

3 Q Understood, okay.

4 Now so you've got a situation where a lady comes
5 to the police in January, you speak to her, you speak
6 to her ex-husband who tells you it's a bank mistake and
7 then there seems to be no action.

8 Did you in fact close the file or were you close
9 to closing the file in May when she came back and
10 signed that?

11 A The file, I think, was already closed and I had
12 to reopen it. That's when the supplemental was made to
13 indicate.

14 Q At that point, meaning before she came back in
15 May, had you spoken to anybody at the bank?

16 A I'm not sure the time period that I talked to
17 somebody. But there was somebody I talked to and they
18 indicated also that it had to be -- someone had to use
19 the code to get into the account.

20 Q And do you recall anything about the person's
21 name or any initials that anybody you spoke to at the
22 bank?

23 A I think it was Barbara, but I don't know what
24 her last name was at this point.

25 Q Okay. You think it was Barbara?

1 A I think that's what the name was, yes, sir.

2 Q Do you recall whether it was on the phone or
3 face to face?

4 A It was on the phone.

5 Q Do you recall whether this person -- did you
6 have any doubt you were speaking to a bank person?

7 A No, sir.

8 Q So you just don't recall the name, but you are
9 not doubting that you did it?

10 A No, sir. I know I talked to somebody at the
11 bank.

12 Q All right. Did you identify yourself as a
13 police officer investigating this particular case?

14 A Yes.

15 Q All right. And did the bank person with whom
16 you spoke seem to have knowledge of the matter that you
17 were investigating?

18 A Yes.

19 Q And did that person -- it was a female I gather
20 if she was named Barbara perhaps?

21 A Yes.

22 Q Did she speak to you willingly?

23 A Yes, sir.

24 Q Did she suggest to you in any manner that she
25 did not have authority to speak to you about these

1 matters?

2 A No, sir.

3 Q All right. Did she tell you that you should be
4 speaking with someone else other than her?

5 A No, sir. Not that --

6 Q All right. Based on your conversation with this
7 women at the bank whenever it was, do you come to
8 believe that the unauthorized transfers of which Ms.
9 Katz was complaining resulted from the deliberate
10 access of the account rather than a bank error or some
11 inadvertence?

12 A I believe that it was a crime committed based on
13 the testimony of Ms. Katz, Ms. Boone at the time. She
14 provided a document that showed money was taken out of
15 her account. She provided a document from the bank
16 that showed how the only way the money could be removed
17 was through a code or a PIN number.

18 That's what I based it on, yes.

19 Q So you have no doubt that you spoke to this
20 person and that you determined a crime had been
21 committed?

22 A Yes, sir.

23 Q But you did not, did you, Sergeant, even write
24 down the name of the person that you spoke with?

25 A No, sir.

1 Q Can you explain that to the Court, please?

2 A At that point after talking to her and talking
3 with Ms. Boone, she wasn't ready to make a decision
4 whether or not she wanted to prosecute.

5 Q All right, so. But you kept other -- you
6 compiled other supplemental reports?

7 A Right.

8 Q I think it has been pointed out that you did not
9 have any reference to a conversation with a Barbara or
10 anybody at the bank?

11 A Right. There is no written document that says
12 that.

13 Q Did you also keep personal notes when you did
14 investigations?

15 A If I did I don't have them now, sir. The case,
16 I don't know what happened to the case, but it never
17 went to trial.

18 Q But you are absolutely sure, even in the absence
19 of any notes, that you did speak with someone from the
20 bank?

21 A Yes.

22 Q Did you then thereafter attend a preliminary
23 hearing?

24 A Yes.

25 Q And you've done -- I gather that was not your

1 first preliminary hearing?

2 A No, sir.

3 Q How many before?

4 A I do 200 cases a year, and 80 percent of them I
5 could solve.

6 Q Okay. So he was -- before the preliminary
7 hearing, Dr. Jernigan was arrested because of what, if
8 I am understanding you, the bank told you and what Ms.
9 Katz told you?

10 A Based on that testimony, yes.

11 Q And you weren't part of the arrest ever itself,
12 were you, the physical arrest?

13 A No, sir.

14 Q And you did attend a preliminary hearing?

15 A Yes.

16 Q And do you recall that Dr. Jernigan had a woman
17 lawyer there?

18 A Yes, sir.

19 Q A lady lawyer. And did you present the facts
20 there as you understood them to be truthfully to the
21 judge?

22 A Yes.

23 Q And you were under oath at the time, correct?

24 A Yes.

25 Q And did you tell the court what the bank had

1 told you?

2 A I believe I did, yes, sir.

3 Q And did you --

4 A Or I may have told him what Ms. Katz had told
5 me. I'm not sure.

6 Q But you had spoken to the bank?

7 A Right.

8 Q I mean I don't want to put words in your mouth,
9 that's my understanding. Did you?

10 A Yes, I talked to Barbara. I can't remember her
11 last name.

12 Q All right. Understood. Did you also show the
13 court or bring to that preliminary hearing a pamphlet
14 that had been -- a bank pamphlet that had been given to
15 you by Ms. Katz or Ms. Boone then?

16 A That was the pamphlet that showed how to get
17 access to the account, yes.

18 Q And what was your understanding, in non-computer
19 terms?

20 A To get access to that account you would have to
21 have a PIN number, and that person had to enter that
22 PIN number to remove the money.

23 Q And was it your understanding it could not have
24 happened through inadvertence?

25 A You had to have that PIN number to stick the

1 PIN number in there and remove the money.

2 Q All right. Did you ever from any source, the
3 bank or Ms. Katz, ever have the sense that this could
4 have been an inadvertent transaction, meaning no access
5 code entered into deliberately?

6 A Sir, I was never led to that understanding there
7 was no access code used.

8 Q Did you ever hear of the word bank error from
9 anybody?

10 A From the doctor and his attorney.

11 Q From?

12 A From Mr. Jernigan.

13 Q Dr. Jernigan and his lawyer used that term?

14 A Yes.

15 Q But not anybody else?

16 A No, sir.

17 Q And fair to say, Sgt. Daquigan, that after your
18 testimony before the court at the preliminary hearing,
19 Dr. Jernigan's was bond over for prosecution in general
20 sessions court?

21 A Yes.

22 Q Was it a felony that had been alleged?

23 A Yes, sir. Because at the time, until the law
24 charged recently, it was \$1,000.

25 Q From that point on did you have anything further

1 to do with this matter?

2 A Not until you guys called me.

3 Q If you had been aware, Sgt. Daquigan, that at
4 the time that these bill payments were made from Ms. --
5 former Ms. Jernigan's account three years earlier two
6 things; one the bank had made an error which allowed
7 that transaction to go through, and two, Dr. Jernigan's
8 account, his own private account had been restricted,
9 would you have pursued this matter as a criminal case?

10 A If the facts were the same facts that I were
11 presented with then yes. Because he had to have an
12 access code, and she is the only one that was
13 authorized to use the access code.

14 Q Right. But if you knew what I just said, that
15 there had been a bank error, would you have prosecuted?

16 A I wouldn't be here today.

17 MR. WAGGONER: That's all I have. Thank you.

18 THE COURT: Cross-examination.

19 CROSS-EXAMINATION

20 BY MR. EDWARDS:

21 Q Sergeant.

22 A Yes, sir.

23 Q I just want to make sure I got my timeline in
24 order. You were contacted initially on January 20th,
25 2007 by Ms. Katz?

1 A Yes, sir.

2 Q And then she reported the incident to you, and
3 you then contacted Dr. Jernigan; is that right?

4 A That's not quite how the procedure worked. The
5 police report was taken first by a uniformed officer.
6 He took the initially report.

7 And it's my job after getting the report
8 assigned, or assigning it at that time to myself, I
9 contacted Ms. Boone and talked to her about the case.
10 I went and met with her and she showed me some
11 documents at that time.

12 Then I called -- she was not real sure what she
13 wanted to do at the time as far as pursuing charges. I
14 talked to Dr. Jernigan on the phone and asked him what
15 happened. He explained it was some kind of bank error.

16 Q So you picked up the phone and called Dr.
17 Jernigan?

18 A Yeah. I went to his house a couple times but he
19 wasn't home, I think he was away somewhere. And I left
20 a card and he called me back.

21 Q After that you spoke with a bank employee?

22 A At some point I talked to the bank, yes.

23 Q And then you closed the case?

24 A I closed the case because Ms. Boone at the time
25 didn't know if she wanted to pursue charges.

1 Q But you did believe that a crime had been
2 committed based on your conversations with Ms. Katz and
3 the bank employee?

4 A Yes.

5 Q You just decided to close it?

6 A Again we are an accredited police department.
7 At some point you either close the case or move forward
8 with it. So at that time I closed it waiting on her to
9 decide what she wanted to do.

10 We can reopen a case at any time, but we have to
11 close a case out. We can't keep it inactive.

12 Q All right. After you spoke with the bank
13 employee, what did you do to further your
14 investigation.

15 A Again I called Ms. Boone to see what she was
16 wanted to do, and she wasn't sure what she wanted to do
17 at that point. So at some point I closed the case and
18 reopened it later.

19 Q Then she contacted you; is that right?

20 A Yes.

21 Q She signed that affidavit?

22 A We reopened the case and she came in and signed
23 the affidavit, yes.

24 Q You all got a warrant out?

25 A She signed the arrest warrant.

1 Q You all got a warrant?

2 A Yes.

3 Q And you arrested Dr. Jernigan?

4 A He was arrested. I didn't arrest him but he was
5 arrested.

6 Q How long did that take between the time she
7 signed the affidavit and the time the police officers
8 arrested Dr. Jernigan?

9 A I'm not sure what the time period was. It's on
10 the warrant here when he was picked up.

11 Q Well the warrant was signed on May 15th.

12 A Right. Can I look at the warrant?

13 Q Sure. I'm not trying to trick you. I want to
14 save you from looking at some point.

15 A It was served on the 25th of 2007.

16 Q Served on the 25th. But the affidavit, which I
17 believe you have there as well, was signed on the 15th,
18 wasn't it?

19 A Yes.

20 Q So ten days went by?

21 A Yes, sir.

22 Q Can you explain the delay?

23 A Couldn't find him.

24 MR. EDWARDS: Thank you, sir.

25 THE COURT: Cross-examination from the

1 defendant?

2 MR. ABNEY: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. ABNEY:

5 Q officer Daquigan, how are you?

6 A All right, sir.

7 Q In your initial conversation with Ms. Katz,
8 after the unauthorized access was reported?

9 A Yes, sir.

10 Q She told you that she believed Jernigan intended
11 to steal from her, correct?

12 A I believe she made use of some type of comment
13 like that, you know, it was deliberate.

14 Q And you perceived that she was very angry?

15 A She was angry.

16 Q She wasn't sure at that point, however, if she
17 wanted to press charges, correct?

18 A Yeah. At some point she wasn't sure whether or
19 not she wanted to press charges.

20 Q And after you initial spoke with her, that's
21 when you contacted Dr. Jernigan?

22 A Right.

23 Q You spoke with him sometime, I believe, between
24 February 1 and February 13?

25 A Yes, sir.

1 Q 2007?

2 A Yes, sir.

3 Q And Dr. Jernigan told you the payments occurred
4 through bank error?

5 A Yes.

6 Q He didn't describe the nature of the error,
7 however, did he?

8 A I have never been told what kind of error it
9 was.

10 Q He didn't mention anything about his account
11 being frozen at that time, did he?

12 A Never heard that.

13 Q He didn't tell you he received a notice from the
14 bank that said his account was frozen, did he?

15 A No.

16 Q He described nothing about how he believed these
17 transactions could have occurred other than through
18 bank error, correct?

19 A No, sir.

20 Q My statement was correct?

21 A Yes. Your statement was correct.

22 Q He didn't give you the name of anyone for you to
23 follow up with at the bank, did he?

24 A No, sir.

25 Q He didn't give you any documentation in support

1 of his claim that it was a bank error, did he?

2 A No.

3 Q Never told you to contact the bank, did he?

4 A Not that I recall, sir. No, sir.

5 Q And that was the only conversation you had with
6 Dr. Jernigan during the course of the investigation,
7 correct?

8 A Yes.

9 Q You cleared the case for lack of prosecution in
10 April of 2007, correct?

11 A Yes, sir. That could have been the time that's
12 when it was closed.

13 Q When Ms. Katz called you to reopen the
14 investigation in May, she told you at that point she
15 wanted to press charges, correct?

16 A Yes.

17 Q And she didn't provide you any new factual
18 information regarding the case, correct?

19 A No, sir.

20 Q She told you she wanted him to be arrested?

21 A Yes, sir.

22 Q Now this conversation you had with the bank, you
23 mentioned the name Barbara, but you don't really
24 remember what the person's name was, do you?

25 A I cannot recall. For some reason Barbara just

1 sticks in my mind.

2 Q You don't know what her position was at the
3 bank, do you?

4 A No, sir. She had something to do with this
5 case, though, because she had knowledge of it.

6 Q And you had only one conversation with her
7 during the course of your investigation?

8 A Right.

9 Q And that was the only conversation you had with
10 anyone at the bank during the course of this
11 investigation?

12 A Yes.

13 Q I believe the conversation actually occurred no
14 earlier than May 5th of 2007, correct?

15 A Yes, sir. Somewhere around there.

16 Q May of 2007?

17 A Yes.

18 Q You asked her, what you asked her was how
19 someone would be able to access another person's
20 account online, correct?

21 A Yes.

22 Q She told you the person would need an access
23 code to access another person's account, correct?

24 A Yes.

25 Q You did not ask Barbara whether it could have

1 been an accident?

2 A No, sir.

3 Q You did not ask her that?

4 A No, sir.

5 Q You don't actually recall whether Barbara ever
6 said these transactions would have had to have been
7 deliberate? You don't recall her ever using the word
8 deliberate?

9 A No, sir.

10 Q Would Charleston Police Department's normal
11 practice in a situation where you have a man like Dr.
12 Jernigan, who's a doctor, a non-violent crime, would
13 the normal practice be to give him a courtesy call
14 prior to going to his house and arresting him?

15 A Yes, sir.

16 Q Or at least contacting him in some fashion
17 before the actual arrest?

18 A Yes.

19 Q And you don't know whether the police officers,
20 the warrants officer actually made a courtesy call?

21 A No, sir, I'm not sure if he did or not.

22 Q You actually don't know what caused them to go
23 and arrest him at his home rather than placing some
24 courtesy call or trying to contact him ahead of time?

25 A No, sir. I'm not sure they didn't try to give

1 him a courtesy call.

2 Q Understood.

3 The incident reports and the supplemental
4 reports that you were looking at a little bit earlier
5 with Mr. Waggoner, the purpose of these reports is to
6 document your activities in connection with the
7 investigation of a crime, correct?

8 A Yes.

9 Q You are trained to fill out these reports,
10 correct?

11 A Yes.

12 Q You are actually required by the police
13 department to fill out these reports?

14 A Yes.

15 Q And you would agree with me that there is no
16 reference whatsoever to any conversation between law
17 enforcement and the bank in those records?

18 A I would agree with that.

19 Q Okay, thank you.

20 MR. ABNEY: Nothing further.

21 THE COURT: Any redirect?

22 REDIRECT EXAMINATION

23 BY MR. WAGGONER:

24 Q Was it your understanding, Sgt. Daquigan, when
25 you did talk to the bank that the money, either from

1 Dr. Jernigan, that the money had been paid back, or
2 from Ms. Katz or from any source?

3 A I think Ms. Katz told me that the money had been
4 replaced.

5 Q So before you attended the preliminary hearing,
6 you knew that that money had already been paid back?

7 A Right.

8 Q Right. And as a person who had been doing
9 white-collar crime by my estimation maybe 15 years or
10 so, do you think it's fair for us to assume that when
11 you left there with the assumption that a crime had
12 been committed that that's what you reasonably
13 believed?

14 A Yes, sir.

15 MR. WAGGONER: That's all I have. Thank you.

16 THE COURT: Re-cross from either party?

17 MR. ABNEY: Nothing, Your Honor.

18 MR. EDWARDS: Two questions.

19 THE COURT: Yes, sir.

20 MR. EDWARDS: Thank you, sir.

21 RE-CROSS EXAMINATION

22 BY MR. EDWARDS:

23 Q Do you know the name Bernadette Dewitt?

24 A I'm not sure, sir, who that is.

25 Q You don't know if that could have been the bank

1 employee?

2 A That's possible. Barbara could have been
3 somebody else, whoever that was.

4 Q You testified that you believed a crime had been
5 committed?

6 A If I didn't believe there was a crime committed,
7 I wouldn't be here today.

8 Q And Ms. Katz reported to you what she learned
9 from the Bank of America; isn't that right?

10 A Right.

11 Q So she must have believed a crime had been
12 committed as well, wouldn't you say?

13 A You would have to ask her what she believed.
14 What she told me the bank told her, based on the
15 testimony and the evidence I had, that's what I
16 believed.

17 Q She testified to the same thing. You were not
18 here, but she did.

19 So my question then is, is there anything wrong
20 with the person who believes that a crime has been
21 committed against them, that they're told that a crime
22 has been committed against them, and the police believe
23 that a crime has been committed against her, is there
24 anything wrong with prosecuting on that crime?

25 A When you talk prosecution, you leave my area.

1 Because once I make the arrest, it's up to the
2 solicitor's office to determine whether or not they go
3 forward or not. And I, you know --

4 Q Let me rephrase it.

5 A -- I don't know what caused them to prosecute or
6 not prosecute.

7 Q Let me rephrase. Is there anything wrong with
8 her signing the affidavit?

9 A No, sir.

10 Q To get the arrest warrant at that point?

11 A No, sir.

12 MR. EDWARDS: Thank you, sir.

13 THE COURT: Okay.

14 You may step down. You may be excused. Thank
15 you very much.

16 Call your next witness.

17 MR. WAGGONER: Our next witness would be Ms.
18 Martha Grisson who we agreed to call on Wednesday,
19 Judge, because of her schedule I believe.

20 THE COURT: So she is going to be here tomorrow?

21 MR. WAGGONER: Right.

22 THE COURT: Okay.

23 MR. WAGGONER: We are going much faster than I
24 think anybody anticipated.

25 THE COURT: What about William T. Nevarez. You

1 are going to do him by deposition apparently, the
2 30(B)(6)?

3 MR. WAGGONER: No. I was going to call him as
4 the last witness.

5 THE COURT: Where is he?

6 MR. WAGGONER: He's right here.

7 THE COURT: All right. Let's call him.

8 MR. WAGGONER: The problem is some of it will be
9 less sensible without Ms. Brison having testified, but
10 I can wing it.

11 THE COURT: What do you mean less sensible?

12 MR. WAGGONER: Well it won't make as much sense
13 because some of his testimony would, for its value, be
14 based on what she has testified to. But I can go into
15 it.

16 THE COURT: Well then why don't we back off of
17 these two witnesses and let's see, is Jeffrey Mitchell
18 here? Can you call him out of order?

19 MR. ABNEY: No, Your Honor, he is arriving this
20 evening.

21 THE COURT: Okay. How about we got Suzanne
22 Katz, she's already testified. And then on your list
23 you got Al Katz, Floyd Jernigan, Laura Brison.

24 Can you call Mr. Katz out of order?

25 MR. EDWARDS: I hadn't planned on it.

1 THE COURT: I understand you hadn't planned on
2 it. It's 3:30, I'm not going to waste an hour and a
3 half.

4 I don't have any problem if you want to take a
5 short break and have an opportunity to talk to him.
6 I'm not going to close down at 3:30 because you all
7 don't have any witnesses.

8 I'm not trying to fuss at you. I'm just saying
9 we got an hour and a half and we are going to use it.
10 So you all get together and let's get some witnesses
11 and let's use up the time. At least get to 4:30,
12 quarter to 5:00.

13 MR. ABNEY: All right, sir.

14 THE COURT: I understand a lot of his testimony
15 is going to be based upon Laura Brison's testimony.

16 MR. WAGGONER: It's a logical order to it. I
17 can try.

18 THE COURT: What's so mind-boggling about not
19 call him now?

20 MR. WAGGONER: Nothing is that mind-boggling.

21 THE COURT: I think I got enough sense to listen
22 to him and listen to her and tie it together at a later
23 date.

24 MR. WAGGONER: Let's do it.

25 THE COURT: If there is something evidentiary

1 wise that you need to get in before you get him up, I
2 understand.

3 MR. WAGGONER: I think it's more a matter of
4 rhythm.

5 THE COURT: I'm not worried about your rhythm,
6 that's the least of my worries is your rhythm. Because
7 there is not a jury there and I will tie the rhythm
8 together.

9 MR. WAGGONER: All right.

10 THE COURT: Which way you all want to go? It's
11 doesn't matter. You can call Mr. Katz, you can call --
12 however you all want to do it. You all talk for a few
13 minutes and decide how you want to proceed.

14 We will take about a ten minute break.

15 (Whereupon, a recess was taken.)

16 THE COURT: How do you want to proceed?

17 MR. WAGGONER: We are going to proceed a little
18 out of order with William Nevarez.

19 Your Honor, just to the point of confusion, I'm
20 going to formally move to enter the exhibits we have
21 been talking about.

22 THE COURT: You want to what?

23 MR. WAGGONER: I want to move for admission of
24 Exhibits 5 through 13 and Number 17 I believe without
25 objection.

1 THE COURT: Any objection?

2 MR. ABNEY: No objection.

3 THE COURT: 5 through 13 are admitted without
4 objection, plus 17.

5 (Whereupon, Plaintiff's Exhibit Nos. 5 through
6 13 and 17 are admitted into evidence.)

7 MR. WILLIAM NEVAREZ,
8 after having first been duly sworn to state the truth,
9 the whole truth and nothing but the truth, testified on
10 his oath as follows:

11 DIRECT EXAMINATION

12 BY MR. WAGGONER:

13 Q Good afternoon, Mr. Nevarez. I might have been
14 mispronouncing your name, I apologize.

15 You have come from California today, or at some
16 point?

17 A Yes, sir.

18 Q All right. And you are here to testify on
19 behalf of the Bank of America; is that correct?

20 A Yes, sir.

21 Q And you in fact were deposed as the, what we
22 lawyers call, the 30(B)(6) witness, meaning the
23 corporate representative to represent the corporation
24 in this lawsuit?

25 A Yes, sir.

1 Q All right. What is your present position with
2 Bank of America?

3 A Currently I am a process design consultant.

4 Q All right. And in November of 2009, you were a
5 senior operation project analyst?

6 A Correct.

7 Q So what is the distinction if any?

8 A I was promoted shortly after my trip here to
9 South Carolina. I essentially do the same position
10 that I did when I was deposed, which is a bit of
11 project management. What I do is I help manage the
12 retirement of various bank systems.

13 Q All right, meaning the computer systems or the
14 software systems?

15 A Correct.

16 Q When you manage their retirement, you mean you
17 oversee their disuse?

18 A To an extent.

19 Q Do you have a computer background?

20 A I do, yes.

21 Q All right. Now in August of 2007 when Ms. Katz
22 testified that she engaged you with some
23 correspondence, I believe in July of 2007, what was
24 your position then?

25 A At that time I was a senior operations analyst

1 for the office of the chairman, the president of Bank
2 of America.

3 Q And it's in that position that you came to
4 respond to Ms. Katz's letters addressed to CEO Ken
5 Lewis?

6 A Correct.

7 Q So that was your job to respond on his behalf?

8 A Correct.

9 Q Among other things. And when -- and I think
10 Exhibit 6 has already been admitted and should be in
11 front of you and it is.

12 Just to confirm, is that the letter from Ms.
13 Katz that first brought to your attention the dispute
14 or the concern she had regarding Bank of America?

15 A I'm sorry, sir, you will have to re-ask that.

16 Q Sure. Exhibit 6, is that a letter from Ms. Katz
17 dated July 23rd, 2007?

18 A Yes, sir.

19 Q Is that the first notice you had of Ms. Katz's
20 concerns about this transaction that brings us here
21 today?

22 A First notice that I had?

23 Q Yes.

24 A Yes.

25 Q So that's what brought all of this to your

1 attention?

2 A Correct.

3 Q Her letter. And in response to her letter, did
4 she -- well in her letter did she tell you that she was
5 concerned that her husband had accessed her account
6 without authorization, and had paid personal bills
7 totaling \$1,100 in January 2007?

8 A Correct.

9 Q All right. And did she provide a document in
10 that letter reflecting his purported renunciation of
11 any rights to that account in January of 2004?

12 A I'm not for sure if the document you are
13 referring to was with this letter. I would have to
14 check my case notes to find out.

15 Q Okay. Does that letter refer to a document that
16 purportedly?

17 A Yes, sir.

18 Q All right. And I'm showing you now Exhibit 1.
19 Does that refresh your memory as to what might have
20 been enclosed with that letter?

21 A Yes, sir.

22 Q Is Exhibit 1 the affidavit that she did enclose
23 with her first letter?

24 A Yes, sir.

25 Q All right. And did she say that she had already

1 contacted someone at the Bank of America, specifically
2 Derek LaMont, and had been told to file a police report
3 after she discovered the unauthorized access?

4 A Yes, her letter does state that.

5 Q Was Mr. LaMont, then did you know whether he was
6 the E-Solutions manager?

7 A I'm not sure I understand your question.

8 Q Did you know Mr. LaMont when you received that
9 letter? Did you know who he was? Had you heard of
10 him?

11 A No, sir.

12 Q So you didn't know who she was referring to?

13 A Correct.

14 Q Because he's in South Carolina and you're in
15 where?

16 A Southern California.

17 Q Okay. And did she also say in her first letter
18 that when she had contacted another bank employee, the
19 money had been returned immediately by her husband,
20 ex-husband?

21 A Yes, sir.

22 Q And did she tell you in that letter that her
23 husband has been arrested and faced criminal
24 prosecution in Charleston, South Carolina?

25 A Yes, sir.

1 Q And did she request a thorough investigation and
2 a written report for the office of the prosecutor?

3 A Yes, sir.

4 Q Okay. Now in response to that letter, did you
5 call Ms. Katz?

6 A Yes, sir.

7 Q All right. And did she say anything in that
8 conversation that was inconsistent with what she had
9 expressed in her letter?

10 A I don't know if I could really answer that.

11 Q Okay. Why could you not answer it?

12 A One, we are going off of memory.

13 Q I'm sorry?

14 A One, we are going off of memory for a call that
15 took place. And, two, I'm just not comfortable with
16 inconsistent, if you will.

17 Q The word itself?

18 A Yes.

19 Q All right. Well did she say, for instance, that
20 in the -- I'm talking about a significant fact. Did
21 she say anything, for instance, that would indicate her
22 husband had not taken money from her account, or that
23 the money had not been paid back, or that she had not
24 filed a police report, or that anything along those
25 lines in the phone conversation?

1 A In the phone conversation along those lines, no,
2 sir.

3 Q All right. Fair to describe her, if you
4 remember, as upset when you talked to her on the phone?

5 A Yes, sir.

6 Q And did she keep asking how it happened? It
7 meaning what she perceived as an unauthorized transfer
8 of funds?

9 A I wouldn't necessarily say she kept asking what
10 happened, but she did want an explanation.

11 Q All right. And did you tell her you would look
12 into it?

13 A Yes, sir.

14 Q And did you look into it?

15 A Yes, sir.

16 Q And does Exhibit 7 in front of you, a letter
17 dated August 3rd, which essentially was your response
18 to her following that phone call?

19 A Yes, sir.

20 Q Okay. And in that letter, Exhibit 7, your
21 letter dated August 3rd, 2007, did you acknowledge to
22 Ms. Katz that the bank had allowed access by not
23 removing Floyd Jernigan from the account as intended
24 back in January of 2004?

25 A Yes, sir.

1 Q And did you tell her that you could not comment
2 on his state of mind at that moment, or his intent?

3 A Yes, sir.

4 Q Now do you recall on the phone whether there was
5 also discussion with Ms. Katz about Mr. -- Dr.
6 Jernigan's assertion that this had occurred as a result
7 of an overdraft, or something like that?

8 A Without reading my notes I would not be able to
9 answer.

10 Q Did you mention it in your letter?

11 A Yes, sir, I did.

12 Q So if you mentioned it in your letter, is it
13 fair to assume, and since it wasn't in her letter, is
14 it fair to assume that you did talk about it?

15 A Yes, sir.

16 Q So she was telling you her husband thought it
17 was an overdraft type of situation?

18 A Yeah, I believe so.

19 Q In the phone call?

20 A In the phone call.

21 Q And in the letter you were telling her that's
22 impossible?

23 A Correct.

24 Q All right. At that point when you wrote back,
25 did you feel confident that you had done all you could

1 do to investigate the matter, the manner in which this
2 had occurred?

3 A Are you referencing him actually processing the
4 online payments?

5 Q When you wrote to her on August 7 and answered
6 her concerns, were you confident that you had done all
7 you could do?

8 A Yes, sir.

9 Q All right. But in fact as reflected in Exhibit
10 8, Ms. Katz wrote another letter, did she not, to Mr.
11 Lewis?

12 A Yes, sir.

13 Q And that was dated September 2nd of '07?

14 A Yes, sir.

15 Q Correct? And fair to say, by way of summary,
16 that she expressed dissatisfaction with your letter and
17 continued to be upset and want an explanation?

18 A Yes, sir.

19 Q And in highly emotional terms; is that a fair
20 assessment?

21 A Yes, sir.

22 Q All right. And then again on behalf of Mr.
23 Lewis, of course her letter was addressed to Mr. Lewis
24 and then again on his behalf you wrote her back, is
25 that right, Exhibit 9?

1 A Yes, sir.

2 Q Okay. And that's dated September 10th of '07?

3 A Yes, sir, it is.

4 Q Okay. And you reiterate your apology on behalf
5 of the bank?

6 A Yes, sir.

7 Q Acknowledge the error?

8 A Correct.

9 Q Assure Ms. Katz that all corrections had been
10 made?

11 A Correct.

12 Q And reminded her that unauthorized payments were
13 repaid when her ex-husband had been notified?

14 A Correct.

15 Q And then declined her request for compensation
16 for emotional distress?

17 A Correct.

18 Q All right. And was that the last time you heard
19 from Ms. Boone before this litigation was initiated by
20 Dr. Jernigan?

21 A Heard from Ms. Boone personally?

22 Q Yes.

23 Last time you communicated with her?

24 A Yes, sir.

25 Q All right. And is it fair to say, Mr. Nevarez,

1 that when you wrote those two letters you felt you were
2 giving her, to the best of your ability, a complete
3 understanding of the facts?

4 A Yes, sir.

5 Q Okay. And that was that the bank had made a
6 mistake in 2004 when he, Dr. Jernigan, signed that
7 affidavit renouncing an ownership interest in the
8 account 8854, right?

9 A I can't agree with the way you've asked that
10 question or made that statement.

11 Q What do you think the bank had done in 2004 to
12 constitute the bank error that you refer to with Ms.
13 Katz's communication?

14 A Simply failing to remove the online banking
15 access of that account.

16 Q Okay. As opposed to -- I'm not even sure what
17 my question was. What had it done?

18 A Well based on Exhibit 1, the actual customer
19 removal authorization form, the bank removed Dr.
20 Jernigan from the --

21 Q Statement?

22 A Yes, from the statement as an owner.

23 Q Right. So the statement would have continued to
24 go to Ms. Katz at her address and there was no
25 indication that Dr. Jernigan was on the account?

1 A Correct.

2 Q But the mistake was that it did not block access
3 to the bill paying process?

4 A Did not remove access, not block access.

5 Q Did not remove access, as opposed to blocking.

6 A Okay. That may or may not be a distinction
7 without difference, I don't know. But in your words it
8 did not remove access, right?

9 A The bank failed to remove online banking access.

10 Q And was that a procedure which was set in place
11 for the bank to do. When I say the bank, I obviously
12 mean an employee of the bank?

13 A Correct.

14 Q There were written procedures in effect that
15 somebody had not followed back in January of '04?

16 A Correct.

17 Q Or thereafter. And as a result, access had been
18 accomplished?

19 A Correct.

20 Q These payments had occurred?

21 A Correct.

22 Q And you knew that the money had been restored
23 fairly quickly by Dr. Jernigan?

24 A Correct.

25 Q And you told her the overdraft scenario was not

1 possible?

2 A Correct.

3 Q Now I want to talk more specifically, Mr.
4 Nevarez, about what you actually did and how you
5 responded to the concerns of, you know, who you talked
6 to and when, that sort of thing, as you investigated
7 the situation following receipt of Ms. Boone's letter
8 of July 23rd.

9 And in that regard I'm showing you Exhibit 16
10 and asking if you can recognize that. And it has been
11 marked for the record BOA document 00373 through 00378?

12 A You are asking if I recognize this document?

13 Q Tell me what it is.

14 A This is a printed copy of what we -- of a system
15 we have called tracker, and they're referred to as
16 tracker notes.

17 Q All right. Fair to say that that is intended to
18 document your actions, and perhaps others, but let me
19 start by asking you. Is it intended to document your
20 actions in responding to Ms. Katz's initial inquiry?

21 A Correct.

22 Q Does it also document the actions of others in
23 responding to Ms. Katz's inquiry?

24 A It's my account of what others have done, yes.

25 Q So you're entering the text so to speak?

1 A Correct.

2 Q Like a diary?

3 A Correct.

4 Q So every entry in that document is yours?

5 A Incorrect.

6 Q Incorrect?

7 A Yes.

8 Q All right. So somebody else is writing your
9 diary?

10 A No, sir.

11 Q All right. I thought I understood that you said
12 it was your entry of your actions?

13 A That is correct. But you also said all entries
14 in this are mine and that is incorrect.

15 Q Okay. We will get to that. I didn't mean to
16 try to confuse you.

17 That is, though, a record of your efforts to
18 deal with the complaint of Ms. Katz, correct?

19 A Yes, sir.

20 Q Is it fair to say that it reflects that your
21 first involvement, and I'm looking at Page 2 toward the
22 bottom, there is an entry for August 1st with your name
23 and then your code number, correct?

24 A Correct.

25 Q And MBK, et cetera. And then you in that

1 paragraph detail what the complaints are?

2 A Correct.

3 Q So somebody got a letter and sent it to you and
4 you are making your entry?

5 A Correct. That first entry on August 1st is
6 simply my short synopsis of the letter received by the
7 customer.

8 Q Right. It said that she filed a police report
9 and a fraud report as the bank advised, correct?

10 A Correct.

11 Q All right. And the ex-husband had been
12 arrested?

13 A Correct.

14 Q And then she went to a Ms. Laura Brison,
15 correct?

16 A Correct.

17 Q And the money was repaid. So that's essentially
18 what you were aware of ultimately when you responded to
19 her?

20 A Incorrect.

21 Q Okay. Let's go to the next entry on August 1st.
22 You pulled records of cases generated, correct?

23 A Yes, sir.

24 Q And tell me what that was?

25 A When -- cases generated. When someone contacts

1 the bank, either through customer service, online
2 banking, whatever the case may be, whatever the
3 department is, those associates, essentially each group
4 has their own case system if you will.

5 And any call that would have been made as far as
6 the case with regards to these online banking
7 transactions would have been documented.

8 Q Okay.

9 A So when I referenced pulling records of cases
10 generated, I'm pulling what others have documented and
11 performed on that particular account for this customer.

12 Q All right. For those of us who are consumers,
13 generally I'm familiar with the concept if you call a
14 service provider and they say, for future reference
15 this is case number such-and-such. Is that, so is a
16 case number then assigned early on and then whoever is
17 involved on behalf of the bank enters that case number
18 and then you are reviewing those entries? Is that sort
19 of what I'm understanding?

20 A In the simplest form, yes.

21 Q That's all I can do is the simplest form, okay.

22 And so that's what you were doing, you were
23 looking at what other people had done based on their
24 work on this case?

25 A Correct.

1 Q And you also, I think, indicated on the very
2 bottom that you called Ms. Laura Brison because she is
3 the one mentioned by Ms. Boone-Katz in her letter,
4 correct? So you called the one name who had been
5 mentioned?

6 A Correct.

7 Q And Dr. Jernigan was a Premier customer, was he,
8 as you could sense at that point?

9 A Correct.

10 Q And what is that exactly?

11 A Premier is essentially a level that our
12 customers are. There are several different levels
13 based on --

14 Q Let me guess, money?

15 A Not just money, but different relationships with
16 the bank as well.

17 Q Okay. And Dr. Jernigan was one and Ms. Katz was
18 one, Premier customer?

19 A At that time to my knowledge, yes.

20 Q Later on, as reflected on the next page of your
21 Exhibit 16, did you speak with a Sean or Sean Lauer?

22 A According to my notes, I -- oh, yes. August 1st
23 I left a message, and then the next note I did speak
24 with Sean Lauer.

25 Q You learned then, did you not, that when the

1 problem was brought to the attention at the bank by Ms.
2 Katz it was immediately taken care of?

3 A It being Dr. Jernigan's online banking access
4 being removed?

5 Q Right.

6 A Yes.

7 Q Right. The lock that was supposed to have been
8 put on three years ago was put on?

9 A Correct.

10 Q According to the bank procedure, correct?

11 A Correct.

12 Q All right. And did in your next conversation
13 with Ms. Brison, who I gather you made a connection
14 with, she told you that the money had been paid back by
15 the ex-husband, correct?

16 A Correct.

17 Q And you then pulled records to show why he could
18 still be on the account but not named on the statement?
19 Looking at an entry for August 2nd, sort of the top
20 third of the page.

21 A Correct.

22 Q Okay. And I guess you are trying to figure out
23 how this happened?

24 A Correct.

25 Q Because you knew the money had been paid back,

1 and you knew that it had happened because a mistake had
2 been made, meaning the unauthorized access had been
3 permitted, it was now fixed? Bad question.

4 You knew that, from Sean Lauer, that something
5 had been repaired, correct?

6 A Correct.

7 Q Whatever it was, something had been repaired.
8 Were you now trying to figure out what it was?

9 A Correct.

10 Q Okay. So you knew whatever it was had been
11 repaired, you just weren't sure what had been repaired?

12 A That's correct.

13 Q So that's why you were -- that's your note for
14 August 2nd.

15 And you made a note of your phone conversation,
16 pointed out to yourself that it had never happened
17 before meaning what? That the account of Dr. Jernigan
18 had never before caused bill pays to come from his
19 ex-wife's account?

20 A That was a long question or statement, sir.

21 Q All right. Let's look at your -- I probably
22 should have -- looking at the next entry for August
23 2nd. It's the longest paragraph on the page.

24 Do you see that?

25 A Yes, sir.

1 Q Okay. You are talking about your conversation,
2 I think, with Ms. Boone?

3 A That is correct.

4 Q All right. And you discussed the length that is
5 involved with setting up a bill payee for online?

6 A That is correct.

7 Q You advised her that it could have been an
8 honest mistake if he believed he was accessing his
9 account?

10 A That is correct.

11 Q Correct. But you could not -- ultimately you
12 could not tell her what the intent was?

13 A I could not tell her --

14 Q Ultimately, I mean, in your communications by
15 letter you said you could not tell her what his intent
16 was when he accessed the account?

17 A That is correct.

18 Q You then drafted a letter. In fact your letter
19 that you sent her was reviewed by the legal department
20 before it went out?

21 A That is correct.

22 Q Now at some point after Dr. Jernigan's suit was
23 filed, you were designated to speak on behalf of the
24 corporation, correct?

25 A Correct.

1 Q And that would be you were there to respond to
2 the allegations of the complaint on behalf of Bank of
3 America?

4 A To the best of my knowledge, yes.

5 Q Understood. And the complaint, generally
6 speaking, blamed Bank of America for the fact of Dr.
7 Jernigan's arrest and suggested it had occurred by bank
8 error, did it not?

9 A I'm sorry, sir, you are confusing me with your
10 question.

11 Q Okay. Did you ever look at the complaint before
12 speaking on behalf of the corporation?

13 A Yes.

14 Q All right. Do you recall what the complaint
15 generally said?

16 A To the best of my knowledge, yes.

17 Q Didn't it generally say that as a result of a
18 bank error Dr. Jernigan had been arrested?

19 A I believe so.

20 Q Okay. And were you aware that when you were
21 deposed in November of '09 that in Paragraph 8 of that
22 complaint, plaintiff alleged that the bill pay payments
23 he made from 4502 came out of his ex-wife's account in
24 connection with a deposit that hadn't been credited to
25 his account at the same time?

1 A I honestly couldn't tell you what Paragraph 8
2 said from memory.

3 Q All right. But you could tell -- were you aware
4 during your deposition that that is what Paragraph 8
5 said and that's what he was saying?

6 A I honestly don't know, sir.

7 Q Okay. Are you aware then that in the amended
8 answer filed by the defendant, Bank of America, for
9 whom you speak, the -- it was denied, and that there
10 was no information, or no knowledge or information
11 regarding those allegations regarding the deposit?

12 A Again I honestly do not know, sir.

13 Q All right. You knew both as an employee who was
14 dealing with the complaints of Ms. Boone, and
15 ultimately as the corporate spokesman, that Dr.
16 Jernigan was claiming some sort of overdraft
17 protection, I put that in quotes, had shifted or
18 defaulted or bounced his bill pay payments to his
19 ex-wife's account?

20 A I understood that to be a belief, yes.

21 Q And that's what you and his wife talked about
22 when she called you or when you called her?

23 A Correct.

24 Q And you told her that didn't happen?

25 A Correct.

1 Q Could not have happened?

2 A Could not have happened.

3 Q But at that time in August of 2007, or even
4 before your deposition of November of '9, or before the
5 bank filed its amended answer, you never looked at the
6 history of Dr. Jernigan's account to confirm that
7 transaction, that deposit transaction. Isn't that a
8 fair statement?

9 A Yes, fair statement.

10 Q Okay. You never looked at his account to, and
11 no one to your knowledge had ever checked into his
12 account, which he claims to be the basis of this whole
13 transaction?

14 A Correct.

15 Q And if you had looked at it you would have seen
16 that the -- at the at least within the same seven-day
17 period of the week, that his account was restricted
18 with the same seven-day period that this first ever
19 unauthorized access to his wife's account occurred with
20 the bill pay?

21 A Incorrect.

22 Q What's incorrect about it?

23 A For starters any investigation into Dr.
24 Jernigan's account would have been solely driven by the
25 information provided by Ms. Katz with regards to online.

1 banking bill pay, and the setting up of those payees to
2 come out of her account.

3 I would have had no knowledge or information to
4 look into Dr. Jernigan's account for a deposit or
5 issues with a deposit.

6 Q You mean when she said he is telling people
7 there is an overdraft is responsible, and you said no,
8 that doesn't work that way. Then when he filed a
9 complaint mentioning the deposits that went wrong and
10 clearly relating them to the bill pay transaction, it
11 didn't occur to you to look at his account and see if
12 he was telling the truth?

13 A Well I didn't find out anything about an issue
14 with the deposit until I got here for my first
15 deposition.

16 Q That's all I'm asking you.

17 A Oh.

18 Q Before your deposition, or even after your --
19 during your deposition on behalf of the bank and during
20 your investigation in response to Ms. Boone's concerns,
21 it never occurred to you or to anyone else to look at
22 his account to see if there had been some sort of an
23 insufficient funds or default or bounce or whatever?

24 A No, it's not possible.

25 Q But you learned later, you did it later, did you

1 not? Did you not later discover that he was correct?

2 His account had been restricted?

3 A I learned at a later period, yes, Dr. Jernigan's
4 account had been restricted.

5 Q And you learned it by looking at his account in
6 some computer way?

7 A Well yes. Yes.

8 Q And you could have done it earlier?

9 A Honestly, sir, yes, I could have done it
10 earlier.

11 Q Okay. So when the bank formally denied Dr.
12 Jernigan's accounting of the frozen, what he called
13 frozen status of the account, that was also an error?

14 A I'm sorry?

15 Q When the bank denied his allegation, in the
16 complaint and in the request to admit and at the time
17 of his deposition, that they denied his claim that the
18 bank has been restricted or frozen to use his words,
19 that was a mistake because it had in fact been
20 restricted?

21 A From the information I saw during my last
22 deposition, the freeze, if you will, on his account was
23 prior to these online transactions.

24 Q How much prior? Middle of January 2007?

25 A I don't know specifically.

1 Q okay.

2 A But I know it was prior.

3 Q okay, same week?

4 A If you show me the report.

5 Q If your lawyer says that the restriction was
6 lifted on the 16th of January, or intended to be
7 restricted, and these bill pays were written on the
8 16th, how much prior are we talking about?

9 A Again I don't know without the information here
10 in front of me.

11 Q okay, well we'll get to that.

12 It's also true, isn't it, Mr. Nevarez, that no
13 one documented, and to your knowledge and you didn't
14 document, any conversation with Dr. Jernigan?

15 A That is correct.

16 Q And you heard his testimony. You have been in
17 the courtroom all day, you heard his testimony that you
18 never talked to him?

19 A I did hear Dr. Jernigan, I did. He did not talk
20 with me.

21 Q And you don't know from all your research of the
22 entries by other people that anybody else talked to him
23 other than the occasion where he paid the money back?

24 A From my research?

25 Q Yeah.

1 A That would be correct.

2 Q In fact you didn't know, did you, until your
3 deposition that his lawyer had attempted to contact the
4 bank, and/or had emailed the bank?

5 A Correct.

6 Q The documents that you ultimately determined to
7 reflect the restricted status of Dr. Jernigan's account
8 were documents called loss documents?

9 A Correct.

10 Q And they were available, just so there is no
11 question, they were available and existed throughout
12 the period we are talking about?

13 A Correct.

14 Q And yet in your deposition you said you had no
15 idea how -- you had never seen anything to show that
16 4502 was frozen, correct?

17 A Correct.

18 Q You acknowledge that they might have been frozen
19 with a vigilance system in place, meaning because of a
20 giant, unusually large deposit being bounce around a
21 couple times, the bank might in fact look at it and
22 freeze it. You just had no knowledge that it had been
23 in this case?

24 A I think during my deposition you and I agreed
25 that was possible.

1 Q Right. For the first time?

2 A For the first time.

3 Q For the first time it was agreed that it was
4 possible?

5 A Yes.

6 Q It had been denied previously, not by you
7 personally?

8 A I would not be able to answer that.

9 Q And it's the scenario that was possible, as
10 you've described it, of resulting from bank vigilance
11 on transactions which were unusual, that was
12 essentially the transaction or the scenario that Dr.
13 Jernigan had alleged in his complaint, specifically
14 Paragraph 8?

15 A To the best of my knowledge, yes.

16 Q And in fact -- I'm going to I think -- for the
17 record we are now looking at the loss document. But is
18 it my understanding right now you don't know the dates
19 at which the actual restricted account 4502 and the
20 bill pays coincided?

21 A Correct.

22 Q There are other examples, are there not, Mr.
23 Nevarez, of facts not being properly investigated or
24 acknowledged during your investigation, at least during
25 the bank's response of this litigation?

1 For example, in plaintiff's interrogatory number
2 12, dated July 30th -- and all of these will be
3 exhibits -- we asked for the identities of bank
4 employees who had responded to Ms. Katz's initially
5 notice that her account had been debited, and the bank
6 responded, had no record of such notice.

7 Can you explain that?

8 A No I can't, sir.

9 Q And I think you were not aware until the evening
10 of your deposition back in November of 2009, that Susan
11 Dunn had in fact corresponded with the bank?

12 A I believe that's correct.

13 Q And that's after your search through the various
14 entries of all the people theoretically involved in
15 this case?

16 A Here's where I believe I'm confused with your
17 question, sir. My research, my investigation involved
18 the account Ms. Boone wrote the letter on, which I
19 believe 8854.

20 So during my research and response to Ms. Boone,
21 now Katz, I would not have gone through Dr. Jernigan's
22 account ending in 4502. So that's where my confusion
23 is coming with my understanding of your questions here.

24 Q Okay. You understood all along that this was an
25 allegation by Ms. Boone that entries by Dr. Jernigan,

1 in his account, had caused bill payments from her
2 account, correct?

3 If you didn't know it all along, didn't you soon
4 know it after talking to Ms. Brison, for instance?

5 A To be 100 percent honest, I'm not sure.

6 Q All right. Let me refer you to your deposition
7 testimony in that case.

8 MR. WAGGONER: Your Honor, do you know the
9 sealed deposition?

10 THE COURT: You can use it if you want.

11 I don't care to see it. If you want to use it
12 with him, that's fine.

13 MR. WAGGONER: Will do.

14 Q (By Mr. Waggoner) Mr. Nevarez, I'm handing you
15 the original sealed deposition.

16 You talked at that point something about the
17 terms access which was another confusing part.

18 THE COURT: Tell him what page and line, please.

19 MR. WAGGONER: I will.

20 Q (By Mr. Waggoner) Looking at page 36.

21 THE COURT: Sir, do you see the line numbers on
22 the left.

23 THE WITNESS: Thank you, sir.

24 Q (By Mr. Waggoner) Page 36, Line 4.

25 A I see that.

1 Q Okay. Do you see, there is an objection and I
2 say -- you say, quote, from the information I have read
3 and my involvement, Dr. Jernigan did not access his
4 wife's account.

5 Do you see that?

6 A Yes, I do.

7 Q Then I say: Okay, what did he do?

8 And you said, what?

9 A Dr. Jernigan chose his wife's account to make
10 payments.

11 Q And I said: Okay. And payments were made from
12 his wife's account?

13 And you said?

14 A Correct.

15 Q All right. So I don't understand what you mean
16 when you say you don't -- had no reason to look at his
17 account?

18 A Well based on this section that we read, we are
19 referencing the wife's account. The wife's account
20 being 8854.

21 Q Right.

22 A So again I'm still a bit confused with your
23 questions in reference to 4502. Because my
24 investigation in this had to do with Ms. Boone -- Boone
25 at the time Katz now -- her account 8854, which is the

1 account we are discussing in this section.

2 Q So nobody investigated his account and the
3 actions that he was claiming to be --

4 THE COURT: We have covered that probably a dozen
5 times.

6 MR. WAGGONER: All right, sir.

7 THE COURT: And I have heard it all 12 times. I
8 don't need to hear it anymore, okay?

9 MR. WAGGONER: Fair enough.

10 Q (By Mr. Waggoner) Mr. Nevarez, did you ever at
11 any time speak to a representative from CheckFree Corp
12 about how these transactions occurred?

13 A May I check my tracker notes?

14 Q Yes.

15 A According to my tracker notes, sir, I did not
16 speak with someone from CheckFree.

17 Q Did you know then who CheckFree was?

18 A Yes, sir.

19 Q And do you agree that they were an outsourced
20 source of this bill pay arrangement?

21 A Yes, sir.

22 Q And you were aware then that CheckFree would
23 have been the entity which housed the actual
24 transactions which detail the payments that concern us?

25 A To an extent, yes.

1 Q But you made no phone calls or had no
2 communications with them?

3 A Correct.

4 Q Finally I think you've acknowledged you didn't
5 speak to law enforcement?

6 A Correct.

7 Q And that nowhere in your notes, either compiled
8 as you investigated the matter or as you referred to
9 those who had been involved, could you find any
10 indication that anybody had talked to law enforcement?

11 A Correct.

12 Q So you are not in a position then to contradict
13 the testimony of the officer who testified here shortly
14 ago that he did talk to somebody at the bank named
15 Barbara?

16 A I have no knowledge of that.

17 Q And if someone from the bank had advised the
18 police that the matter involved Dr. Jernigan's use of
19 an access ID, and that there was no way it would have
20 been linked to overdraft protection, would that be a
21 true statement from what you thought at the time you
22 investigated it?

23 A Unfortunately because I know the bank jargon, I
24 don't understand your question.

25 Q Okay. If you look at Exhibit 16 on the first

1 page.

2 A okay.

3 Q Bottom left of the page. Do you see under
4 category you've got online access ID?

5 A Oh, yes.

6 Q Would that perhaps be the reason that somebody
7 at the bank might have told the police officer that it
8 involved an access ID?

9 A I would honestly have to say no.

10 Q Why is that?

11 A These tracker notes, at the time of this case
12 being sent to the office of the president, are only
13 accessible by any associates within that department if
14 you will.

15 Q But this type of case it used the words online
16 access ID, correct?

17 A Yes.

18 Q That's the category of case it was thought to
19 be?

20 A Correct.

21 Q And obviously the police could never have known
22 about the restricted status of Dr. Jernigan's account
23 because you didn't know until after litigation was
24 initiated?

25 A I can't answer what the police could have known.

1 Q To your knowledge did anyone at the bank know of
2 that when the police were investigating?

3 A To my knowledge, no.

4 MR. WAGGONER: That's it. Thank you, Mr.
5 Nevarez

6 THE COURT: Cross-examination.

7 MR. EDWARDS: Thank you, sir.

8 CROSS-EXAMINATION

9 BY MR. EDWARDS:

10 Q Good afternoon, Mr. Nevarez.

11 A Hello.

12 Q Thank you for flying in from California.

13 I'd like to walk through some of these documents
14 with you. If you could turn to the letter marked
15 Exhibit No. 6. I have a couple questions about the
16 exchange that you had in writing with Ms. Katz.

17 A Okay.

18 Q This letter was addressed to Ken Lewis; is that
19 right?

20 A Correct.

21 Q He was the Chairman, CEO and President of Bank
22 of America on July 23rd, 2007?

23 A Correct.

24 Q Is he currently the Chairman, CEO and President?

25 A Currently, no.

1 Q How did it get to you?

2 A At the time of this letter I had a role as a
3 senior operations analyst. And we were referred to as
4 the office of the president.

5 So any complaints that came into the bank by
6 mail would go to designated offices depending on the
7 products involved. Without getting too detailed,
8 deposit accounts, checking and saving would go to one
9 area, which was mine; credit cards would go to another;
10 mortgage to another; so on and so forth.

11 So this particular letter coming in addressed to
12 Mr. Lewis is then sent to the either the Brea office
13 which I am or was involved in, or our Tampa office.

14 Q And you were in the Tampa office?

15 A No, sir. I was in Brea, California.

16 Q So they sent it from Charlotte, North Carolina
17 to you all the way in California?

18 A Correct.

19 Q And what were your marching orders?

20 A Same as all cases and complaints. Look through
21 the information. Investigate to see what the complaint
22 is about, what has transpired. And reach out to the
23 customer to provide the findings of our research.

24 Q So you had never heard of Ms. Katz, never spoken
25 to her, prior to this letter July 23rd, '07?

1 A Correct.

2 Q And who did you -- where did your investigation
3 lead you in the bank? who did you speak to at the
4 bank?

5 A well I spoke to the associates that are named in
6 my tracker notes. And they are in various areas within
7 the bank, which are also named in these tracker notes
8 as well.

9 Q Ms. Laura Brison?

10 A Correct.

11 Q You spoke with her?

12 A Correct.

13 Q Sean Lauer?

14 A Correct.

15 Q According to your notes at least?

16 A Yes, sir.

17 Q Did you speak -- I think you testified earlier
18 who was Sean Lauer? Did you say who he was?

19 A According to my notes Sean Lauer was a
20 representative that was assisting the customer with her
21 matter back in January. So I didn't document what
22 department Mr. Lauer is from.

23 Q Okay. And you are looking at Exhibit 16,
24 correct?

25 A I'm sorry, yes, sir, that is correct.

1 Q The second page, the second note said you spoke
2 with him. Do you see that?

3 A That would be the third page, second paragraph
4 dated August 1st, 2007.

5 Q And he said what? I looked into it, here's what
6 I know?

7 A Do you want me to read what I?

8 Q I'm asking you what you remember?

9 A I couldn't tell you what I remember today.

10 Q Just remember what's in the notes?

11 A Correct.

12 Q Back to No. 6, a letter July 23rd, '07. Third
13 paragraph Ms. Katz writes and says, I was required to
14 fill out a police report, did so on January 20th, 2007.
15 Do you dispute that?

16 A Am I disputing that's what her letter says? No.
17 Her letter clearly states that.

18 Q Are you disputing that she was required by the
19 bank to fill out a police report if she wanted to get
20 her money back?

21 A No, I could see that happening.

22 Q Also required, by your bank, to complete a fraud
23 report which I did. Do you dispute that?

24 A No, I could see that happening as well.

25 Q Second to the last paragraph says: The purpose

1 of this letter is to determine the exact circumstances
2 which led to Floyd E. Jernigan being able to access my
3 personal account and remove these funds. I'm
4 requesting a thorough investigation of this matter, and
5 a written report stating the facts.

6 Did that happen?

7 A Yes, I believe so.

8 Q Okay. And the report, did you write the report?

9 A The report being my letter response.

10 Q So your report on the investigation of the
11 matter is in the letter that you wrote back to her in a
12 subsequent letter?

13 A Correct.

14 Q Let's look at that, No. 7. It's your letter,
15 correct, dated August 3rd, 2007?

16 A Yes, sir.

17 Q At that time Ms. Boone, who is now Ms. Katz?

18 A Correct.

19 Q Okay. She -- in the second paragraph says Bank
20 of America regrets any undue frustrations and
21 inconveniences you have experienced.

22 Did you know that she had been frustrated and
23 inconvenienced at that time?

24 A Yes.

25 Q Okay. I'm not trying to trick you, it might

1 sound like silly questions but I just want to ask you.

2 A No.

3 Q And you are speaking on behalf of the bank,
4 correct, in this letter and also here today?

5 A Correct.

6 Q And you say you understand the importance of
7 accuracy in fulfilling the account maintenance
8 requests, and you fell short here?

9 A That is correct.

10 Q You made a mistake?

11 A That is correct.

12 Q What was your mistake?

13 A Our mistake was not removing Dr. Jernigan's
14 online banking and bill pay access to the 8854 account.

15 Q But you didn't make a mistake in not looking
16 into his accounts?

17 A No, sir.

18 Q Okay. You did not make a mistake in -- okay.

19 Going down to the next paragraph. You say just
20 what you said, inadvertent error, name remained as
21 co-owner, had access to the online banking, processed
22 the payments in the amount of \$1,153.78.

23 In the next paragraph you say, once this matter
24 has been brought to your attention, was that the first
25 time that the bank had ever learned that Dr. Jernigan

1 had retained online access?

2 A I'm not sure I understand your question.

3 Q Well did you know before Ms. Katz called the
4 bank on January 18th, 2007 and inquired about these
5 payments that had been withdrawn from her account, did
6 you all know before then that Dr. Jernigan had access
7 online to her account?

8 A To the best of my knowledge, no.

9 Q Okay. How did you know that he accessed her
10 account on this occasion?

11 A January of 2007?

12 Q Yes.

13 A Well we learned from Ms. Katz's phone call to
14 the bank.

15 Q But she didn't tell you that Dr. Jernigan
16 accessed her account, she called and asked what was
17 going on, didn't she?

18 A Correct.

19 Q And you all told her that Dr. Jernigan accessed
20 the account; is that right?

21 A That is correct.

22 Q How did you know that?

23 A Because we would have investigated at the point
24 of the call the transactions in question.

25 Q And how would that lead you to the conclusion

1 that Dr. Jernigan retained the ability to access her
2 account online? Could you see it on the computer
3 screen?

4 A well what may have and would have happened
5 during that phone call with Ms. Katz, as she spoke to a
6 bank representative, as they looked into the details of
7 those online bill pays, we would have learned who
8 initiated the payment.

9 At that time we would have investigated and
10 found out how he was able to do that.

11 Q so you would have went into the 8854 account and
12 looked at how that was done. And you could tell by the
13 8854 account that it had been accessed by Dr. Jernigan
14 through his online profile?

15 A That is correct.

16 Q okay. Did you do anything at all prior to that
17 to monitor the access to Ms. Katz's online account?

18 A That I don't know.

19 Q Is it your standard policy to monitor that in
20 any way?

21 A well I don't have information on online banking
22 security as far as the monitoring is concerned, so I'm
23 unable to answer that.

24 Q so you don't know if the bank ever decided to
25 monitor its online banking access?

1 A I know that there are monitors in place, yes.
2 How those monitors work, and if those particular
3 monitors would have in fact monitored the 8854 account,
4 that I cannot answer today.

5 Q All right. So there is a procedure in place
6 that monitors it, but you don't know how it works and
7 you don't know whether it worked in this case; is that
8 fair to say?

9 A I don't think so. And again because I
10 understand the bank jargon I think that might be
11 causing me not to understand what you are asking.

12 Q Okay. Do know how it works?

13 A To an extent I know how online banking works.

14 Q Do you know how the monitoring system works?

15 A That I do not know, sir.

16 Q Do you know whether it worked in this case?

17 A I wouldn't be able to answer that.

18 Q If it had worked, the issue wouldn't have
19 presented itself, don't you agree?

20 A The issue being Dr. Jernigan being able to pay
21 online bill pays?

22 Q That's correct.

23 A He still would have been able to pay those bill
24 pays.

25 Q What is the purpose of the online monitoring

1 system?

2 A Well to the best of my knowledge, if I were to
3 try to let's say access a customer's account using
4 their online ID and pass code, if I use an incorrect
5 pass code I believe the monitoring would kick in and
6 prevent access to that account.

7 But if I'm using a valid online ID and pass
8 code, you would be able to enter online banking.

9 Q Okay. Maybe we are missing each other then.
10 When Dr. Jernigan logs on to his own online profile and
11 obtains access to the account 8854, which is now Ms.
12 Katz's account, which he relinquished authorization to
13 and the bank was supposed to have removed him from
14 being able to access it, is there anything in place to
15 be able to monitor that type of situation?

16 A Not to my knowledge.

17 Q Back to No. 7. The second to the last paragraph
18 from the bottom. You say, while I understand the
19 extent of the distress this matter has caused you, I
20 cannot determine or comment on the state of mind or
21 intent in Dr. Jernigan accessing the account.

22 Do you know, before you got involved, that the
23 bank employees told her he had to do it deliberately?

24 A Unless she would have mentioned that in her
25 letter, I wouldn't have known what someone would tell

1 her.

2 Q Another person you spoke with was Sean Lauer,
3 right?

4 A Incorrect.

5 Q who else did you speak with?

6 A As we discussed earlier, I spoke with Laura
7 Brison.

8 Q I'm sorry. From the first night, the bank
9 employee from the call center that she called up the
10 first night, was that Sean Lauer?

11 A I don't know who she spoke with the first night.

12 Q Then you go on to say, we can't link one
13 checking account to serve as overdraft protection.

14 so you know she is under stress, she is being
15 caused distress by this situation, you know that, you
16 are telling her; and you know that one checking account
17 can't be linked to the other one; and you know that she
18 understands that that's what she had heard from Dr.
19 Jernigan; isn't that right?

20 It was her understanding, didn't she tell you,
21 that she had heard Dr. Jernigan had said that it was
22 going to be some kind of overdraft protection?

23 A Oh, yes, as part of our conversation.

24 Q You are telling her, no, that can't be?

25 A Correct.

1 Q All right. But you say you can't comment on
2 state of mind or intend. Did you -- did this letter go
3 through any revisions?

4 A It went through an approval process.

5 Q Who did it go through to be approved?

6 A According to Exhibit 16, my tracker notes, page
7 three, an entry for August 3rd. E-mail sent to
8 Mercedes Tunstall to approve my letter response to our
9 customer.

10 I had received an out-of-office from her. I
11 will continue to wait to Monday to speak to Ms. Nicky
12 (phonetic), or Michelle Nicky, to have her approve the
13 letter in Ms. Tunstall's absence.

14 Q Who is Ms. Nicky?

15 A These are individuals within our legal
16 department?

17 A Both of them?

18 A Correct.

19 Q So you had to send it through the lawyers first
20 before you sent it to her?

21 A Actually I didn't have to, I chose to.

22 Q You thought it was wise to do that?

23 A Based on the conversation I had on the phone
24 with Ms. Boone, yes, I chose to send it to our legal
25 department.

1 Q Okay. So at that point a criminal complaint had
2 already been filed, hadn't it?

3 A I don't know.

4 Q You don't know. Okay.

5 Let's look at No. 8. Ms. Katz's letter in
6 response to your letter, again addressed to Mr. Ken
7 Lewis who did not respond to her first letter. Got
8 filtered to you in California, I am assuming you read
9 it; is that right?

10 A Yes.

11 Q Okay. And she attached some photos of her sons,
12 didn't she? She said, these are my sons, they are very
13 good boys, I love them, this is causing me a lot of
14 harm with them, lots of distress, lot of anxiety.
15 Isn't that right? Didn't you understand that?

16 A Yes, I believe that.

17 Q Okay. And she said that's why she also told you
18 some of the issues that she had previously in family
19 court with Dr. Jernigan, and that's why she was so
20 protective of her finances. Didn't she tell you that?

21 A Yes, she did mention something along those
22 lines.

23 Q So you knew that. Did you do anything to
24 compensate her for that?

25 A No.

1 Q Okay. Turn to the next page.

2 A Excuse me, sir, still within?

3 Q Yes, No. 8. The top of the page referencing Mr.
4 Lewis, asking him to look at the picture, to look into
5 their eyes, says these are real people. It's a
6 terrible, terrible thing that did not have to happen to
7 them. It didn't have to happen to them, did it?

8 A Correct.

9 Q Correct. If you had removed Dr. Jernigan from
10 online access, this would have never happened, would
11 it?

12 A Correct.

13 Q She goes on and say, you also failed to close
14 another account, an equity line account. And that Dr.
15 Jernigan accessed that during the divorce taking
16 \$27,000. It was supposed to be closed 2002.

17 Do you know anything about that?

18 A Not until reading her letter.

19 Q Okay. She sent you some more documents on that.
20 Did you give her a full explanation why the bank
21 didn't close it down?

22 A I may have in my letter.

23 Q Well in your next letter you may have?

24 A Correct.

25 Q Okay. We'll get to that in a second.

1 A okay.

2 Q She concludes, by referencing a discussion with
3 you about monetary restitution, do you see that?

4 A Yes, sir.

5 Q Do you remember that discussion?

6 A No, I don't remember the discussion.

7 Q Do you know what monetary restitution is?

8 A Yes, I do.

9 Q Is that a term the bank uses?

10 A No. To be honest I have heard it watching Court
11 TV.

12 Q You think it's a criminal term?

13 A I don't know what kind of term it is.

14 Q okay. But you never said anything about
15 monetary restitution to her, or you just don't know?

16 A Well, what I know is I wouldn't have made this
17 quote as she states in her letter.

18 Q What does that mean? Did you say the words or
19 do you not now remember? Or do you now remember that
20 you didn't say the words --

21 A No. I'm telling you --

22 Q Which one of those is it? Did you say them?

23 A I did not make this comment.

24 Q When you spoke with her on the phone, you didn't
25 never use the words monetary restitution?

1 A I can't say I didn't use the term monetary
2 restitution. But I can say is I did not tell her to
3 consider what she wanted as monetary restitution.

4 Q Okay. All right. She asked your bank to make
5 an equitable offer. Did you do that?

6 A I did not.

7 Q Did the bank do that?

8 A Not to my knowledge.

9 Q Did they offer anything?

10 A Not to my knowledge.

11 Q Have they denied the fact that she has even been
12 caused any stress?

13 A I wouldn't say that.

14 Q You wouldn't say that?

15 A No.

16 Q But she hasn't been harmed?

17 A As I look at the word harmed, I would say no.

18 Q Okay. But you acknowledge in your writing that
19 you recognize the undue stress that has been caused?

20 A Correct.

21 Q Okay. But you don't think anything of that? Or
22 do you leave that decision up to your lawyers too?

23 A What I have here is I know there was undue
24 stress. Because again had the bank removed Dr.
25 Jernigan's online bill pay access, this situation would

1 not have happened.

2 Q And that's the bank's fault, right?

3 A I would say yes.

4 Q Let's go to 9, your response that you talked
5 about earlier.

6 Again you say, apologize, so sorry for the undue
7 frustrations and inconveniences you've experienced
8 throughout the whole process. Still no resolution of
9 the matter. Just saying I'm sorry that you feel that
10 way. Is that a fair assessment?

11 A I would say no.

12 Q Okay. Why didn't you make her an equitable
13 offer like she asked and like you told her to consider?

14 A Because I didn't tell her to consider.

15 Q You just said a second ago you told her to
16 consider what she may want in terms of monetary
17 restitution. And she wrote you and said --

18 THE COURT: He said he may have used the words
19 monetary restitution, but he didn't say that he asked
20 her to consider how much.

21 MR. EDWARDS: I'm sorry, I must have misheard.
22 Used the words, but didn't say that.

23 THE COURT: He said he maybe used the words, but
24 he didn't ask her to consider that.

25 MR. EDWARDS: Okay. I must have misheard.

1 THE WITNESS: You are correct, Your Honor.

2 Q (By Mr. Edwards) All right. Well you write
3 down there at the bottom, Bank of America is unable to
4 compensate you for any emotional distress you may have
5 incurred during your experience.

6 Was that your statement? Or was that the
7 lawyer's too?

8 A This is my statement. I wrote this letter.

9 Q Okay. What makes you think the Bank of America
10 is unable to compensate her for her emotional distress
11 that was caused by your error?

12 A Well, if you continue reading, I call out the
13 fact that the amount had been repaid in full.

14 Q Okay. So she is made whole by that?

15 A Correct.

16 Q Let's turn to 16. Second page down at the
17 bottom there is a note 8107. According to notations,
18 customer had been made whole through restitution.

19 And that's what you're referring to? The return
20 of the money?

21 A Correct.

22 Q But you all didn't do that, did you?

23 A Correct.

24 Q Dr. Jernigan, you called him up and made him do
25 it?

1 A Correct.

2 Q Go to the next page, third comment down from
3 top. Says you spoke with Laura Brison?

4 A I see that.

5 Q Okay. Says the bank did not provide the
6 customer with restitution. And then she said, this
7 matter is being handled by Michelle Nicky in the legal
8 department?

9 A I'm not arguing the bank did not provide
10 restitution. We didn't refund the money back, Dr.
11 Jernigan did.

12 Q You just said previously, the customer -- you
13 think that what Dr. Jernigan did made her whole?

14 A Yes. Because the money should have come out of
15 Dr. Jernigan's account to begin with.

16 Q All right. Go down two more comments.

17 A Which page, sir?

18 Q Same page, third page, August 2nd. Said
19 couldn't put in writing, and you won't put in writing
20 the state of mind of Dr. Jernigan.

21 She goes on and says, customer advised me I
22 don't know the type of man her ex-husband is, he did
23 this deliberately. She testified earlier, you were
24 here, you heard her, that the bank told her that it
25 didn't learn anything otherwise.

1 which I explained, you explained, that she is
2 true, is what it says. Can't say he did or did not
3 access her account deliberately, and I would not make
4 that statement.

5 Is that a fair and accurate statement?

6 MR. ABNEY: Your Honor, objection. The question
7 was argumentative and completely incomprehensible.

8 THE COURT: Overruled. Rephrase your question.

9 Q (By Mr. Edwards) Does that reflect your
10 conversation with her? She said, you don't know my
11 husband, this is causing me a lot of stress. And you
12 said, that may be true, I'm not going to comment on his
13 state of mind?

14 A What I recall the conversation is her saying, I
15 do not know the type of man her husband is. Which is
16 true, I do not know Dr. Jernigan.

17 Q And you refused to comment on his state of mind?

18 A That is correct.

19 Q This is after, eight months after the incident
20 happened and she went, at the insistence of Bank
21 America who refused to compensate her -- let me ask you
22 this.

23 what is the bank's policy on returning money on
24 customer fraud liability?

25 A I don't know it off memory, sir.

1 Q Isn't it their policy to give the money back to
2 them?

3 A Yes.

4 Q When they're not at fault?

5 A Correct.

6 Q Okay. Why didn't you all give her the money
7 back here?

8 A Well in this situation we didn't see fraud that
9 had occurred. We saw a transaction that had occurred
10 because the bank failed to remove online banking bill
11 pay access from Dr. Jernigan, his online profile.

12 So no fraud had happened in this particular
13 situation.

14 Q Okay. So in this circumstance your policy is to
15 make her file a police report?

16 A I am not arguing she wasn't told that.

17 Q Okay. And you never -- I know you went over
18 this quite a bit with Mr. Waggoner -- you never spoke
19 with Dr. Jernigan, did you?

20 A Well I believe I may have spoken to Dr.
21 Jernigan. Unfortunately, I didn't document it.

22 And he testified that he did not speak to me, so
23 I could be mistaken.

24 Q All right. Do you know if anybody else spoke
25 with Dr. Jernigan from the bank, any of the people that

1 she spoke to that first night?

2 A To my knowledge, no.

3 Q Do you know what your policy is on recorded
4 phone calls when people call in the call center?

5 A I know they're randomly recorded.

6 Q No particular rhyme or reason to it?

7 A No. I am aware that our quality monitoring
8 team, they have a system set up to have randomly
9 recorded calls. And we can go in and actually listen
10 to those calls at a later period.

11 Q Just the ones that were randomly recorded?

12 A Yes. If it was randomly recorded, we can go in
13 at a later date and listen to that particular call.
14 But then I also know that we are able to dial in, if
15 you will, and listen to a live call as it's happening.

16 Q Okay. But unless it's one of those randomly
17 selected calls it's not recorded?

18 A To my knowledge, correct.

19 Q Even calls to the fraud center?

20 A To my knowledge, correct.

21 Q Okay. Do you know what the bank's policy is
22 regard liability, its own liability for its failures
23 relating to transfers? Money transfers?

24 A No, I don't, sir.

25 Q No idea, okay. Do you know what the activity

1 levels are for linked accounts?

2 A I don't understand what you mean activity
3 levels.

4 Q Do you know what that means? Ever heard that
5 term?

6 A I have heard the term activity levels in several
7 different fashions.

8 Q Do you know how the term applies to online
9 accounts that are linked?

10 A No, sir.

11 Q Okay.

12 MR. EDWARDS: Thank you, sir.

13 THE WITNESS: Thank you.

14 THE COURT: Cross-examination from the bank?

15 CROSS-EXAMINATION

16 BY MR. ABNEY:

17 Q What is an overdraft?

18 A An overdraft is when there are unavailable funds
19 in an account when an item tries to pay.

20 Q Insufficient funds. There is not enough money
21 in the account to pay whatever payment is attempted to
22 be made?

23 A Correct.

24 Q And when you spoke with Ms. Katz, I think your
25 initial conversation in August of 2007, she related to

1 you that someone at least was saying Mr. Jernigan --
2 someone else was saying, or at least the possibility
3 that these payments occurred because Dr. Jernigan had
4 overdrawn his account and had insufficient funds at the
5 time that he tried to make these bill payments; is that
6 correct?

7 A Correct.

8 Q And the theory was, that she related to you, was
9 that because of those insufficient funds, the system
10 somehow defaulted to the 8854 account to make the
11 payments, correct?

12 A Correct.

13 Q And you responded to her that that is not
14 possible; is that correct?

15 A Correct.

16 Q Can you explain to us why that's not possible?

17 A Yes.

18 Q Please do.

19 A Well in the simplest fashion a checking account
20 or a demand deposit account cannot serve as overdraft
21 protection for another checking or better known as
22 demand deposit account.

23 Q Okay. So the theory that she was conveying to
24 you, you could fairly quickly determine was not
25 possible. That's not a way these transactions could

1 have occurred?

2 A Correct.

3 Q Was there any need, in light of that, to
4 determine whether or not there had been a freeze on Dr.
5 Jernigan's account in January of 2007?

6 A No.

7 Q Okay. I want to read to you from Paragraph 9 of
8 the complaint filed by Dr. Jernigan.

9 Unbeknownst to plaintiff, and through means and
10 for reasons to this day is not comprehended by
11 plaintiff, when plaintiff's checking account had
12 insufficient funds, the defendant bank allowed the
13 1,100 in bill pay transfers to be made from the
14 Defendant Boone's account number 8854, which had not
15 been a joint account and over which plaintiff had no
16 withdrawal rights after January 5, 2004.

17 Now first of all, does that paragraph I just
18 read say anything about the account being frozen?

19 A No, sir.

20 Q It actually stated that the payments occurred
21 because Jernigan's account had insufficient funds,
22 correct?

23 A Correct.

24 Q And you reviewed the complaint before you were
25 produced for deposition, correct?

1 A Correct.

2 Q Again, based on the allegations in the
3 complaint, was there any reason to try and determine
4 whether there was a freeze placed on Dr. Jernigan's
5 account in January of 2007?

6 A No, sir.

7 Q Can you turn to its Bank of America Exhibit No.
8 6. I'm using the plaintiff's exhibit. It's in the
9 binder.

10 A I'm there.

11 Q This is the letter you drafted to Ms. Boone
12 dated August 3rd, 2007, correct?

13 A Correct.

14 Q What was the purposes, what was your purpose in
15 drafting this letter?

16 A Really two purposes. One, to respond to the
17 letter that the office of the chairman had received
18 from Ms. Boone. And, two, to answer her questions with
19 regards to why her ex-husband, Dr. Jernigan, was able
20 to access her account for bill pay.

21 Q And looking at the third paragraph of the
22 letter?

23 A Okay.

24 Q I'm not going to ask you to read it, but can you
25 tell me, does this paragraph essentially summarize your

1 findings from your investigation?

2 A Yes.

3 Q And the following paragraph, reading the first
4 two sentences, once this matter had been brought to our
5 attention we properly removed Dr. Jernigan from the
6 account profile as co-owner eliminating any access to
7 the above-mentioned account.

8 while I understand the extent of distress this
9 matter has caused you, I cannot determine or comment on
10 the state of mind or intent of Mr. Jernigan in
11 accessing the account in question through our online
12 banking service.

13 why did you include the comment in that last
14 sentence?

15 A well during the conversation that I had with Ms.
16 Katz, the conversation was understandably heated, if
17 you will. She was upset. She didn't know how this
18 happened. She wanted answers.

19 During that conversation she had made the
20 comment that, I don't know the type of man that her
21 ex-husband is. And during the conversation I explained
22 to her that's true.

23 She explained she wanted me to put in writing
24 that he had acted deliberately or maliciously in
25 accessing her account. And I tried to explain on the

1 telephone that I have no way of knowing that. And I
2 was not going to put something like that in writing.

3 Q So she asked you for a statement that Jernigan
4 did this deliberately?

5 A Correct.

6 Q And you refused to give her that?

7 A Correct.

8 Q And how did she respond to that? During the
9 telephone conversation?

10 A Well again it was -- there was a lot of
11 exchange, if you will, as far as her really explaining
12 to me the history they had. She also mentioned some
13 of, if I remember correctly, some other court issues or
14 just personal affairs and matters that the two had gone
15 through.

16 And again, regardless if Dr. Jernigan is who she
17 claims he was to be during that telephone call, I could
18 not say that. I don't know Dr. Jernigan. I cannot put
19 in writing, especially in the position I held with the
20 bank at that time, to say, I know someone acted
21 maliciously or deliberately. I couldn't do it.

22 And not only to protect myself mainly, but to
23 protect the bank, I was not going to put that in
24 writing.

25 Q So you told her that you could determine he

1 actually accessed the account, that Dr. Jernigan was
2 the one who accessed the account?

3 A Correct.

4 Q But you would not comment on his state of mind
5 in doing that?

6 A Correct.

7 Q Now in your conversation with Ms. Katz, did you
8 ever ask her to consider what she wanted in monetary
9 restitution?

10 A No, sir.

11 Q Did you ask her anything remotely like that
12 question?

13 Did you ask her if she wanted any money,
14 anything like that?

15 A No, sir.

16 Q Did you make any sort of offer of settlement or
17 anything like that in your conversation?

18 A No, sir.

19 Q Did you document, when you saw her letter
20 commenting that you had asked her what she wanted in
21 monetary restitution, did you document your reaction to
22 that?

23 A I may have in my tracker notes, yes.

24 Q Can you turned to BOA Exhibit 4, please.

25 A okay.

1 Q And approximately, I guess it's the third or
2 second full entry dated September 10, 2007.

3 And would September 10, 2007 been the date you
4 created this note?

5 A Yes, sir.

6 Q Okay. Could you read the note into the record,
7 please. The one beginning, reviewed customer's new
8 letter.

9 A Thank you. September 10th, 2007. Reviewed
10 customer's new letter and she mentions a new account
11 that may still be open which was a joint account with
12 her ex-husband. The customer is requesting that the
13 account be closed, if it is not closed at this time.

14 The customer also closes her letter with the
15 manipulation of my comment to her over the phone --
16 over the telephone, I'm sorry. She mentions that I
17 asked her, quote, to consider what I wanted in monetary
18 restitution, end quote. I did not ever make this
19 comment to the customer.

20 As seen in my previous notations and
21 conversations with other associates who have dealt with
22 this customer, she is known to manipulate things that
23 are said to her. My response will address the results
24 of the line of credit the customer is requesting to
25 have closed, and advised the other matter has already

1 been addressed and corrected, and we are sorry for any
2 inconvenience.

3 Q Thank you. In your investigation of the matter,
4 did you find any evidence that anyone at the bank spoke
5 with law enforcement?

6 A No, I didn't.

7 Q okay. And are you aware of any fraud report
8 that was completed by Ms. Katz and received by the bank
9 in connection with this case?

10 A It may be one of those documents that are in all
11 these binders. I couldn't be for certain.

12 Q okay. You are not aware of anything that could
13 be considered a fraud report that has not been produced
14 in this litigation?

15 A No, I am not.

16 Q okay. In your investigation, did you find any
17 evidence that the bank encouraged Ms. Katz to contact
18 law enforcement regarding access to her account?

19 A Not in my investigation, no.

20 Q When a customer reports that a third party has
21 accessed his account, is it bank policy to suggest to
22 the customer that they contact law enforcement?

23 A Yeah, I would say yes.

24 Q And what's the purpose behind that policy?

25 A well I would presume the purpose behind it is to

1 rule out the customer's being involved.

2 Q Is it also one purpose behind the policy to have
3 those who are charged by law with investigating whether
4 crimes have been committed to do their jobs?

5 A I would say yes.

6 Q To your knowledge, does Bank of America harbor
7 any ill will toward Floyd Jernigan?

8 A No, sir.

9 Q Why did Katz tell -- why did the bank -- excuse
10 me. why did the bank tell Katz that Dr. Jernigan was
11 the one who accessed her account?

12 A Well we would have seen that on the actual
13 system, if you will, showing who initiated the online
14 bill pay.

15 Q So I would have told her that because that's
16 what you determined the facts to be?

17 A Right. That's what we saw had happened.

18 Q Had you ever heard the theory that these
19 transfers occurred due to Dr. Jernigan's account being
20 frozen before you traveled to South Carolina to appear
21 for a deposition?

22 A No, sir.

23 Q Okay. So was there any need at any time before
24 that point for you to try and determine whether Dr.
25 Jernigan's account was frozen in 2007?

1 A No, sir.

2 MR. ABNEY: Your Honor, I reserve the right to
3 call him in my case in chief, but no further questions

4 THE COURT: All right. Redirect?

5 MR. WAGGONER: Little bit, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. WAGGONER:

8 Q Mr. Nevarez, when I was questioning you earlier
9 you said more than once something about you didn't
10 understand my language because you understood bank
11 language. Do you remember that?

12 A Yes, sir.

13 Q Did I infer from that that there is a perhaps
14 distinction between bank language and lay person
15 language?

16 A And what person?

17 Q Lay person, non-bank person?

18 A I would say, yes.

19 Q All right. Is it possible that a doctor who
20 felt confused about setting up bill pay, for instance,
21 and then relied on a bank employee to set it up, might
22 have a different understanding of the bank language
23 than you would?

24 A It's possible, yes.

25 Q So that if he said in Paragraph 8 of his

1 complaint that more than three years later than
2 renouncing the ownership of his account he made
3 deposits, and as a result -- deposits which were not
4 credited, and as a result the bill pays went to his
5 ex-wife's, do you think -- and then assume it was
6 insufficient funds, could it just be a language thing?

7 A I don't know because you lost me in your
8 question. You started and stopped.

9 Q All right. If Dr. Jernigan alleged in Paragraph
10 8 of his complaint, which is all about these
11 unauthorized transactions, being arrested for these
12 unauthorized transactions out of 8854. If he alleged
13 in his complaint that at that time 4502 had a deposit
14 that wasn't credited, okay?

15 A Okay.

16 Q That to you, I guess, means what? Insufficient,
17 he was alleging insufficient funds in Paragraph 9?

18 A I don't understand.

19 Q Is it not -- is it not possible, from reading 8
20 and 9, that Dr. Jernigan is making a connection between
21 his account, which we know later turns out to be frozen
22 and because of those deposits, and the unauthorized
23 bill pay in non-bank language?

24 A It's possible that there could have been
25 confusion on Dr. Jernigan's part.

1 Q Right. And that in the sense that an
2 insufficient funds sort of automatically, although it
3 doesn't do it to checking accounts as I understand it,
4 automatically goes from his insufficient account to
5 somewhere else is sort of an automatic transaction,
6 correct?

7 A I don't understand what you just said.

8 Q If you have insufficient funds protection, and
9 you write a check or do a bill pay out of an account
10 and you have that protection, and I don't even remember
11 the technical name of it. What's it called? It's not
12 insufficient -- overdraft protection, see, overdraft.

13 A Right.

14 Q If you have overdraft, doesn't it automatically
15 go to the account that has the sufficient funds?

16 A No. It actually goes --

17 Q What is the mechanism then by which overdraft
18 protection goes?

19 A What question do you want me to answer? The one
20 you started or --

21 Q That one.

22 A Okay. Can you repeat it, please.

23 Q What is the mechanism by which overdraft
24 protection protects?

25 A The mechanism would be a checking account.

1 Q That's not an answer.

2 A Overdraft protection protects a checking
3 account.

4 Q How?

5 A Through our bank systems. I don't know the
6 specifics on how it works.

7 Q All right. That's because you know the bank
8 language. But what I want you to say is, isn't true it
9 true that it goes -- when it's insufficient in one
10 account, it goes automatically to another account where
11 there are sufficient funds in theory? In this case a
12 credit card?

13 THE COURT: It goes debit to a checking account
14 or savings account, right?

15 THE WITNESS: Correct.

16 THE COURT: All right, please move on.

17 Q (By Mr. Waggoner) That's what I'm trying to get
18 you to understand. And isn't there something automatic
19 about that process?

20 A Yes.

21 Q All right. To that extent, isn't it similar to
22 what Dr. Jernigan was alleging in this case? That as a
23 result of something that happened to his account, the
24 bill pays went from instead of his account to her?

25 In that sense, isn't it similar? I'm not taking

1 about bank language.

2 A Again the --

3 THE COURT: He's already said the doctor could
4 have misunderstood.

5 A He could have been confused.

6 THE COURT: He could have misunderstood.

7 MR. WAGGONER: All right.

8 THE COURT: He may have thought it was checking
9 account to checking account was overdraft protection.
10 He's already said that. He's agreed to it once or
11 twice.

12 MR. WAGGONER: All right.

13 Q (By Mr. Waggoner) You also acknowledge today you
14 may not have spoken to Dr. Jernigan after hearing his
15 testimony and seeing that you don't record it in your
16 notes.

17 THE COURT: Yes, sir. He said he may have or
18 may not have. He didn't remember.

19 Q (By Mr. Waggoner) Right. And didn't you say in
20 your deposition that after speaking with him you were
21 not able to determine his intent?

22 A Correct.

23 Q So that suggests that his intent would have been
24 something you would have gained if you had spoken to
25 him?

1 A Correct.

2 MR. WAGGONER: That's it. Thank you.

3 THE COURT: Thank you.

4 Any recross?

5 MR. ABNEY: One quick follow-up, Your Honor.

6 THE COURT: What about Katz?

7 MR. EDWARDS: None from Defendant Katz.

8 MR. WAGGONER: I just wanted to move 16 into
9 evidence in this case

10 THE COURT: Okay, 16 into evidence. No
11 objection?

12 MR. ABNEY: No objection.

13 MR. EDWARDS: No objection.

14 (Whereupon, Plaintiff Exhibit No. 16 is admitted
15 into evidence.)

16 THE COURT: Okay. What is your question?

17 RECROSS-EXAMINATION

18 BY MR. ABNEY:

19 Q Mr. Nevarez, in the case of overdraft
20 protection, isn't it true that overdraft protection
21 account, whatever it may be, supplies funds to the
22 account that it is protecting, the checking account?

23 A That's correct.

24 Q Is it ever the case that overdraft, in the
25 overdraft protection, that the overdraft protection

1 account will make -- there will be payments made if --
2 if it's the case that a customer is trying to make a
3 payment from the protected checking account.

4 A Okay.

5 Q Okay, and has insufficient funds. Is it ever
6 the case that the payment will then be made directly
7 from that overdraft protection account?

8 A No.

9 MR. ABNEY: Thank you.

10 THE COURT: Mr. Nevarez, can you look at your
11 tracker system and tell me when did the bank actually
12 remove Dr. Jernigan from the, I believe you referred to
13 it account profile, so he could -- the account online
14 profile. When was that actually done by the bank?

15 THE WITNESS: I couldn't tell you the exact date
16 from the tracker notes. It would be in what we
17 considered a boss report.

18 THE COURT: In a what? Do you have that
19 information? What I want to know is when was the
20 doctor actually removed from the online, I believe you
21 referred to it, the online profile in your letter?

22 THE WITNESS: I'm sorry. That was removed
23 January 18th, 2007.

24 THE COURT: January 18th, 2007?

25 THE WITNESS: Correct.

1 THE COURT: Okay. All right. When back in '04,
2 when the doctor was taken off, as you stated in your
3 letter, removed from the monthly statements as
4 co-owner, how is that actually done?

5 You sign a signature card and then it's put into
6 the computer; is that correct?

7 THE WITNESS: Correct.

8 THE COURT: And if he had written a check, you
9 would not have honored it; is that correct?

10 THE WITNESS: Correct.

11 THE COURT: All right. So that's -- the
12 checking system is not tied into the pay system, online
13 pay system; is that correct?

14 THE WITNESS: Correct.

15 THE COURT: Do you know why not? In other
16 words, in '04 when the bank entered that on the joint
17 account, took him off the joint account as co-owner,
18 why didn't it automatically go to the online pay
19 system?

20 THE WITNESS: Oh, that's a separate step in the
21 process of removing a customer from an account.

22 So may I explain?

23 THE COURT: Yes, sir, that's why I'm asking.
24 I'm trying to get you to explain it to me.

25 THE WITNESS: Sure. So in the simplest form the

1 customers would come in with that signed form that we
2 have seen here today. And that form is designating
3 which customer to remove from the account.

4 The banking associate, Bank of America
5 associate, would then verify signatures, verify
6 identities; go in to the actual banking system for the
7 checking accounts, or whatever account in question, and
8 do what's considered a title change, removing that name
9 or the name of the customer coming off of the account;
10 they would update any information, and quickly put --
11 sometimes the owner we are removing is the primary name
12 and social security number, so we would have to update
13 that with the customer that's remaining.

14 THE COURT: Your tax ID or your social security
15 number?

16 THE WITNESS: Exactly. So within that, that
17 completes the updating of the account.

18 Well there are several relationships that can be
19 tied to accounts, overdraft protection as we have been
20 discussing, online banking, bill pay. Well the
21 associate would need to go in and update the
22 relationships as well.

23 So they would go into a separate system, in this
24 case the online banking system, and remove the account
25 in question from that customer's online profile.

1 THE COURT: So it doesn't happen automatically?

2 THE WITNESS: Correct.

3 THE COURT: And that's not because CheckFree has
4 any involvement in that process?

5 THE WITNESS: No, sir.

6 THE COURT: What involvement does the CheckFree,
7 or I believe somebody has referred to it as Fiserv,
8 what do they have that's involved as far as to pay
9 bills?

10 THE WITNESS: CheckFree at the time, now
11 considered Fiserv, or called Fiserv, they essentially
12 process the payments. So our online banking captures
13 the information for the account in question that needs
14 to be paid, the amount, the date, what account to pay
15 from.

16 And then Fiserv is actually a vendor that
17 supplies payment processing for these online bill pays.

18 THE COURT: Does the bank lock in the amount, or
19 does Fiserv go into the account and take the money out?

20 In other words who takes the money out, the bank
21 or Fiserv?

22 THE WITNESS: To my understanding it's the bank.

23 THE COURT: The bank?

24 THE WITNESS: Correct.

25 THE COURT: So the bank transmits the money

1 electronically to Fiserv, and they pay the vendor,
2 whoever it may be?

3 THE WITNESS: For the most part that's correct.

4 THE COURT: Electronically I assume.

5 THE WITNESS: For the most part, that's correct.

6 THE COURT: Is there any monitoring? Does the
7 bank do any monitoring with Fiserv?

8 THE WITNESS: I'm sure they do, I'm just not
9 aware.

10 THE COURT: You just don't know what?

11 THE WITNESS: Right.

12 THE COURT: Let me ask you, you said you were, I
13 think, a programmer?

14 THE WITNESS: No, sir.

15 THE COURT: No, you are not a programmer?

16 THE WITNESS: No.

17 THE COURT: Why, in other words when in '04 when
18 they took Dr. Jernigan off, why didn't -- I guess you'd
19 have to ask a programmer this question I guess.

20 why wouldn't it automatically change everything
21 attached to the accounts?

22 THE WITNESS: That would be wonderful if it did.
23 I don't know why all the individual systems are not
24 linked.

25 THE COURT: So really the technician would have

1 to go in, or the associate as you referred to it, would
2 have to go in and check everything attached to the
3 account as well as the ownership?

4 THE WITNESS: Correct.

5 THE COURT: Or would just pulling up the account
6 show that?

7 THE WITNESS: Pulling up the account will show
8 you what the relationship holds, such as other linked
9 accounts. Essentially a snapshot of that customer, if
10 you will.

11 And it will supply information such as online
12 bill pay, online banking access. To my knowledge you
13 can have online banking access, but not have bill pay.
14 So you can have the ability to view an account, but
15 just not pay bills through online banking.

16 So all of these different features and products
17 within the accounts and the relationship are found on
18 the main system, if you will, when you pull up the
19 accounts.

20 THE COURT: So when an associate pulled up the
21 account, all of that would have shown what was
22 available on that joint account?

23 THE WITNESS: Correct.

24 THE COURT: For the parties, correct?

25 THE WITNESS: Correct.

1 THE COURT: All right. Thank you very much.
2 Does anybody have any questions subject to the
3 questions I've asked?

4 MR. WAGGONER: None from the plaintiff.

5 MR. EDWARDS: None.

6 MR. ABNEY: No, Your Honor.

7 THE COURT: All right, thank you very much. You
8 may step down.

9 All right, I believe you have one more witness;
10 is that correct?

11 MR. WAGGONER: Tomorrow morning.

12 THE COURT: Tomorrow morning. How long is she
13 going to take? Laura Brison, I believe?

14 MR. WAGGONER: Yes. Direct, 15 minutes.

15 THE COURT: Okay. I believe you have got listed
16 about seven witnesses. How many do you plan on
17 calling?

18 MR. EDWARDS: Most of them have already been
19 called. I'd like to call Ms. Katz again.

20 THE COURT: Then Dr. Lucy Frayer (phonetic),
21 that's a deposition, right?

22 MR. EDWARDS: That's right.

23 THE COURT: John Zinser (phonetic)?

24 MR. EDWARDS: We will read that. Zinser, I have
25 issued a subpoena. He is supposed to be here tomorrow.

1 THE COURT: All right. Then the bank is going
2 to have Mr. Mitchell, Jeff Mitchell. Is that correct?

3 MR. ABNEY: Yes, Your Honor.

4 THE COURT: Kimberly Still (phonetic)?

5 MR. ABNEY: Correct.

6 THE COURT: And then Mr. Nevarez.

7 MR. ABNEY: Possibly, yes.

8 THE COURT: That's up to you.

9 So technically we are going to have probably 7
10 or 8 witnesses tomorrow?

11 MR. ABNEY: Sounds about right.

12 THE COURT: Does that sound right?

13 MR. WAGGONER: Sound rights.

14 THE COURT: All right. Thank you all very much.
15 See you at 9:30.

16 (Whereupon, the proceedings in this matter
17 before the Court were adjourned.)

18 * * * * *

C E R T I F I C A T E

I, the undersigned, ANNE BOULEY MEYER,
Official Court Reporter for the Ninth Judicial
Circuit of the State of South Carolina, do hereby
certify that the foregoing is a true, accurate, and
complete transcript of record, and of all the
proceedings had and evidence introduced in the above
captioned case, relative to appeal, in the Circuit
Court for South Carolina, on the indicated date.

I do further certify that I am neither
of kin, counsel, nor interest to any party hereto.

Anne Bouley Meyer, RPR
Circuit Court Reporter

IN THE COURT OF COMMON PLEAS

2009-CP-10-02433

SEPTEMBER 14 AND 15, 2011

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD

THE HONORABLE J.C. NICHOLSON, JR., JUDGE

GEOFFREY H. WAGGONER, ESQUIRE
JULIA FLUMIAN, ESQUIRE
ATTORNEYS FOR THE PLAINTIFF

AARON ERIC EDWARDS, ESQUIRE
ATTORNEY FOR THE DEFENDANT, SUZANNE BOONE KATZ

MERRITT ABNEY, ESQUIRE
ATTORNEY FOR THE DEFENDANT, BANK OF AMERICA

DANETTE P. HANKS
CIRCUIT COURT REPORTER

INDEX

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Laura Heape Brisson				
Waggoner	7		44/52	
Edwards		35		51
Abney		37		56/54
The Court		46		
Al Katz				
Edwards	63			
Suzanne Katz				
Edwards	81		134	
Abney		124		
The Court		136		
Kimberly Steele				
Abney	163		212	
The Court		172		
Flumian		173		221
Edwards		189		
Jeff Mitchell				
Abney	227		265	
Flumian		244		266
Edwards		261		

PAGE

Certificate	313

PLAINTIFF'S EXHIBITS

NO	DESCRIPTION	ID	EV
	(NONE)		

DEFENDANTS' EXHIBITS

	(NONE)		

COURT'S EXHIBITS

	(NONE)		

1 SEPTEMBER 14, 2011

2 (Court convened with all parties present and the
3 following proceedings were had.)

4 THE COURT: They're putting a new air
5 conditioning unit in my -- at the house and they told me
6 they'd be there at eight o'clock. Well, they got there at
7 nine-fifteen. And I'm sorry. I should have realized that
8 and started at ten o'clock and I apologize for keeping
9 y'all -- being thirty minutes late. Are you ready to call
10 your first witness?

11 MR. WAGGONER: We are, Your Honor.

12 MR. ABNEY: Your Honor, I've got one issue that I
13 wanted to put on the record before we get started if that's
14 okay.

15 THE COURT: Yes, sir.

16 MR. ABNEY: I made a mistake when you were asking
17 me yesterday about our defenses in the original answer.

18 THE COURT: Uh-huh (affirmative).

19 MR. ABNEY: We actually filed an amended
20 answer to Dr. Jernigan's complaint in December of 2009.

21 THE COURT: Okay.

22 MR. ABNEY: In which we allege the affirmative
23 defense of comparative fault to the negligence claim.

24 THE COURT: All right. You'll be -- the

1 comparative?

2 MR. ABNEY: Yes, Your Honor.

3 THE COURT: Okay.

4 MR. ABNEY: And we have also alleged the truth of
5 statements made in response to the defamation claim and
6 qualified privilege as well. And I've spoken to Mr.
7 Waggoner and he has no objection to us proceeding on those.

8 MR. WAGGONER: That's correct.

9 THE COURT: All right. Qualified privilege and
10 what was that other one?

11 MR. ABNEY: Truth of the statements made. I
12 don't actually believe that that's an affirmative defense,
13 Your Honor, but I've seen some case law to that effect, so
14 I just want to make clear that we're not waiving it.

15 THE COURT: Okay. All right. Thank you very
16 much.

17 MR. ABNEY: And, also, one other thing, Your
18 Honor, we stipulated that the deposition notice of William
19 Navarez, 30(b)(6) deposition notice may come into evidence
20 and I've provided the Court ---

21 THE COURT: Yeah. I think you sent me a copy of
22 that deposition. I don't know what I did with it, but you
23 sent me notice of that.

24 MR. ABNEY: Okay.

25 THE COURT: Whenever you want to make it part of

1 the record, that's fine.

2 MR. ABNEY: Okay. I actually have it. I can --
3 you can add this to your binder.

4 THE COURT: Okay. That would be fine. I know
5 you sent the -- here it is. You sent the excerpts.

6 MR. WAGGONER: And, Judge, as long as we're
7 talking about pleadings, we have pleadings as exhibits. Do
8 you want them published or just handed up, since they are
9 without objection, at the appropriate time.

10 THE COURT: I'd just as soon you hand them up. I
11 mean, publish it and make sure on the record what you're
12 handing up.

13 MR. WAGGONER: Sure.

14 THE COURT: I'm not just going to sit there and
15 listen to you read to me, okay?

16 MR. WAGGONER: I didn't think you would want
17 that.

18 THE COURT: All right. Okay. I can read. All
19 right.

20 MR. WAGGONER: Yes, sir.

21 THE COURT: All right. Anything else?

22 MR. ABNEY: No, sir.

23 MR. WAGGONER: Plaintiff calls Laura Brisson.

24 THE CLERK: Place your left hand on the bible and
25 raise your right, please.

1 Do you swear or affirm the testimony you shall give
2 the Court in the trial of this case shall be the truth, the
3 whole truth and nothing but the truth, so help you God?

4 THE WITNESS: I do.

5 THE CLERK: Thank you. Please be seated. Ma'am,
6 for the record if you would state your name, spelling your
7 last name.

8 THE WITNESS: Laura Heape Brisson, B-r-I-s-s-o-n.

9 LAURA HEAPE BRISSON,

10 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

11 DIRECT EXAMINATION

12 BY MR. WAGGONER:

13 Q. Ms. Brisson, you are an employee of the Bank of
14 America. Is that Correct?

15 A. I am.

16 Q. And are you the Vice President -- a Vice President of
17 Wealth Management Banking?

18 A. I am.

19 Q. And is that something that title which restricts your
20 dealings to those clients, those Bank of America customers,
21 who have relationships with Merrill Lynch?

22 A. Currently, yes, it is.

23 Q. All right. And what is the relation between Bank of
24 America and Merrill Lynch?

25 A. Bank of America acquired Merrill Lynch in 2008.

1 Q. All right. So Bank of America owns Merrill Lynch?

2 A. Correct.

3 Q. And how would you describe your role and
4 responsibilities as an Assistant Vice -- is it Assistant
5 Vice president or Vice President?

6 A. Vice President.

7 Q. Vice President dealing with premier customers?

8 A. Actually, the premier division no longer exist, so I
9 work, currently I work with Merrill Lynch clients as
10 basically a private banker.

11 Q. All right. Back in 2007, did you then have the title
12 that restricted your work to premier clients?

13 A. Yes.

14 Q. And what were the premier clients?

15 A. I believe in 2007 the requirement was a two hundred
16 and fifty thousand dollar relationship with Bank of
17 America.

18 Q. So they were, fair to say, the wealthier of the people
19 that you dealt with, that Bank of America dealt with?

20 A. Yes.

21 Q. And I gather if somebody walked in off the street and
22 had a problem with a check, you wouldn't be the one dealing
23 with them unless they were a premier banking customer?

24 A. Correct.

25 Q. Are you able to talk with assurance about the on-line

1 banking procedures that were in force back when Dr.

2 Jernigan and his former wife were concerned about that ---

3 A. I had a working knowledge of the system and I used it
4 personally. I'm certainly not an expert on it.

5 Q. All right. You were identified though as a witness,
6 the only witness as I understand it, who had a face-to-face
7 meeting -- at least the witness at trial that had a face-
8 to-face meeting with Ms. Katz, is that correct, when this
9 problem arose?

10 A. That's my understanding.

11 Q. And you were talking, when you were deposed, about
12 matters within the scope of your responsibility when Ms.
13 Katz came to you?

14 A. Yes.

15 Q. Now, at some point you had a conversation with William
16 Navarez in connection with the Jernigan/Katz issue,
17 correct?

18 A. Correct.

19 Q. And that followed by several months the initial
20 contact you had with Ms. Katz?

21 A. Correct.

22 Q. And in preparation of your deposition in March of -- I
23 don't remember off-hand where it was, but in preparation of
24 your deposition you had already talked to Mr. Navarez and
25 you had also talked with Bank of America's lawyer, Merritt

1 Abney regarding this transaction.

2 A. In preparation for the deposition I did not speak to
3 William Navarez, but I had spoken to him previously, yes.

4 Q. Correct. And you had spoken to him in -- roughly in
5 August as he was investigating the incidents of January?

6 A. Roughly, I believe so, yes.

7 Q. And as I recall, you said nothing about your
8 conversations with Mr. Navarez in August or your
9 conversations with Mr. Abney prior to your deposition
10 interfered with whatever independent memory you had of your
11 first meeting with Ms. Katz in January of 2007?

12 A. No, it did not.

13 Q. So it's all pretty much confirmed?

14 A. Yes.

15 Q. All right. Tell me what you do recall about your
16 first meeting with Ms. Katz?

17 A. She and a gentlemen who I now believe is -- I think
18 I've been told is her husband, current husband, came into
19 my office, actually came to the department and wanted to
20 speak to someone. Their current client manager was out on
21 medical leave, so she and her now husband came into my
22 office and we sat down and she just started telling me the
23 issues as she knew them at that point.

24 Q. You understood then or did you understand then that
25 you were having the first face-to-face conversation with

1 Ms. Katz after she'd made a series of phone calls to the
2 bank?

3 A. Yeah, I did, I guess I did recognize that.

4 Q. All right. Tell me what you recall about the level of
5 Ms. Katz's concern on the day when you first met her in
6 January of 2007?

7 A. Highly agitated, aggravated in that she thought her
8 ex-husband, I guess at that point, had stolen her money.

9 Q. All right. Did she tell you that at first she had not
10 known who it was and then in one of her phone calls learned
11 that it -- via the bank, that it had been her husband, ex-
12 husband?

13 A. I don't remember that specific wording, but I think
14 overall the gist of the conversation was yes. When she
15 first called, she didn't realize who had done it. And by
16 the end of her phone calls she realized that it was Dr.
17 Jernigan.

18 Q. All right. Now, I realize you're not a psychologist.
19 But as between the two choices of calm versus agitated, how
20 would you describe Ms. Katz at that meeting in January of
21 '07?

22 A. Extremely agitated.

23 Q. And can you elaborate at all?

24 A. Emotional, very ---

25 Q. Was she crying?

1 A. I don't remember crying. I just remember her being
2 very upset, very one -- kind of tunnel visioned about what
3 had happened or how things had happened, or maybe the
4 purpose of why they happened. Just extremely upset.

5 Q. Okay. Fair to say that she was primarily interested
6 in how this had occurred, how had he been allowed to do
7 this kind of thing?

8 A. Yes.

9 Q. Is it also true that you weren't then able to tell her
10 how it had happened?

11 A. Not specifically, no.

12 Q. All right. You never told her, I gather, that he had
13 to have deliberately stolen from her?

14 A. Deliberately stolen from her? Absolutely not.

15 Q. But you still had little knowledge of what had, in
16 fact, transpired at least at that meeting?

17 A. Fair to say yes.

18 Q. What did you tell her then after she had emoted her
19 situation?

20 A. I remember the conversation being very hypothetical.
21 She would ask lots of questions and was getting lots of
22 hypothetical answers from me, just because I didn't know
23 the specifics of what exactly had happened. You know, how
24 could this have happened on-line? How would he have been
25 able to do this. Or, you know, was this done deliberately

1 or not deliberately. Or, you know, a lot of it was
2 hypothetical answers because I couldn't answer the specific
3 questions.

4 Q. In fact, you didn't know it had been a bank error,
5 correct?

6 A. I believe by the time she left we had established that
7 it had been a bank error.

8 Q. Had you established that he had paid the money back?

9 A. Absolutely.

10 Q. All right. And if you had -- is that about all you
11 had established?

12 A. We established -- by the time she left my office, we
13 had established the money had been returned and that he had
14 properly been removed from the account.

15 Q. All right. And did you tell her that any further
16 answers to her questions would require further
17 investigation?

18 A. As to regards of the how it happened.

19 Q. The mechanics of it.

20 A. The mechanics of it, yes.

21 Q. All right. And that's because you didn't know,
22 correct?

23 A. Correct.

24 Q. And did you suggest to her that it would be the bank's
25 responsibility to investigate further or hers?

1 A. She had actually already started most of the
2 investigations at that point. So the issues that were at
3 hand in my officer were, how -- you know, had he been
4 removed and had the money been returned.

5 Q. But sitting there, wouldn't you have knowledge that
6 the answer to the question how, meaning the mechanics,
7 would be coming ultimately from the bank, the bank records?

8 A. I don't remember specifically stating that, but I
9 would assume, you know, I have to assume that we talked.
10 If there was a further investigation as to how the
11 mechanics of it happened that, yes, that would require an
12 investigation.

13 Q. And if you had taken the first -- you understood you
14 were not the first responder, so to speak?

15 A. Oh, absolutely not.

16 Q. All right. Had you been the first responder, you
17 would have, under these circumstances, initiated or
18 suggested a fraud report, correct?

19 A. Not necessarily, no. Depending upon the situation,
20 had she walked into my office and said, someone walked in
21 -- you know, somebody has hacked into my on-line banking
22 account or whatever terminology and I don't know who it is
23 or what's going on, the first, I guess, thing that we as an
24 employee do is say, well, you know, we need to start a
25 fraud investigation as to how this occurred or what had

1 happened. By the time she reached me, we knew what, you
2 know, maybe not the mechanics of it but we knew who and
3 how. So, no, I would have not -- I didn't suggest a fraud
4 investigation.

5 Q. No, no. I understand that. But it would have been
6 appropriate with bank policy when she first called ---

7 A. Oh, absolutely.

8 Q. --- to suggest that a fraud report be completed if she
9 believed there was fraud involved with this?

10 A. Absolutely.

11 Q. All right. Now, as part of having a relationship with
12 Bank of America, all customers agree in fact to cooperate
13 with the bank in the investigation of any irregularities or
14 presumed illegalities involving their accounts, correct?

15 A. I can't answer that yes or no. I would assume that
16 that's part of our deposit agreement, but I don't know that
17 word-for-word.

18 Q. You don't know that it's part of a written agreement
19 between the bank and the customer?

20 A. As you've stated it, I mean, that's always been my
21 understanding, but I'm certainly not an expert on the
22 legalese in that deposit agreement.

23 Q. Oh, I understand, but I'm trying to avoid the
24 legalese. Bottom line, doesn't the customer sign an
25 agreement when they -- a customer like this, which says

1 they will cooperate with the bank in the investigation and
2 report any unusual transactions?

3 A. Do they sign something? Actually, I don't think that
4 ---

5 Q. Isn't there an agreement with the bank?

6 A. I think that -- not my area of expertise.

7 Q. Okay.

8 A. However, in being an account holder, you are subject
9 to the deposit agreement. I don't know that you sign
10 anything to that effect, but in accepting the accounts at
11 Bank of America.

12 Q. And there's an agreement between the bank and the
13 customer, correct?

14 A. Yes.

15 Q. And that agreement includes the customer's obligation
16 to cooperate and to report concerns about activities
17 involving that. And if you don't know ...

18 A. I don't know. I guess I don't know with certainty.
19 It's been years since I've read that deposit agreement.
20 That's my assumption, but I don't have it in front of me
21 so, no, I can't swear to it.

22 Q. At some point did you learn that Dr. Jernigan had
23 once, in fact, been on the account 8854?

24 A. Yes.

25 Q. And had renounced ownership?

1 A. Yes.

2 Q. And at that point you became aware, but had obviously
3 no independent memory of it?

4 A. No.

5 Q. And if all goes according to plan when somebody
6 renounces ownership, the access, the means of access, the
7 linking to an account would be terminated, correct?

8 A. Correct.

9 Q. It would end. They would no longer have any
10 connection with that account?

11 A. Correct.

12 Q. And at some point you did learn that in some manner
13 that that had failed to completely terminate the
14 relationship between Dr. Jernigan and 8854, his ex-wife's
15 account?

16 A. Correct.

17 Q. And you don't remember when you learned that, correct?

18 A. Not specifically, no. I mean, I think that when Ms.
19 Katz was in my office we had established that it hadn't
20 been done properly. But exactly the mechanics of seeing
21 the paperwork and all of that stuff came later.

22 Q. Are you familiar generally with the process by which
23 accounts are renunciated?

24 A. Yes.

25 Q. Do you know what steps would have had to have been

1 taken by the bank if it had been done properly?

2 A. I believe that the title correction should have been
3 made, the ownership change -- and ownership change from co-
4 owners to an ownership to Ms. Katz would have occurred, and
5 then a delinking of access to on-line banking.

6 Q. So there are multiple steps?

7 A. Yes. And then obviously also some forms that need to
8 be filled out.

9 Q. All right. Let me show you what's been marked as
10 Exhibit 15, a five-page document and ask you if that five-
11 page document outlines the multiple steps that are
12 required, among other things, to deactivate an account?

13 A. Deactivate access to an account?

14 THE COURT: What number is that?

15 MR. WAGGONER: 15.

16 THE COURT: Any objection to 15?

17 MR. ABNEY: No, Your Honor.

18 MR. EDWARDS: None.

19 THE COURT: Oh, okay. Thank you.

20 Q. I'm sorry. Have you already answered that, yes,
21 that's the -- that includes the various steps?

22 A. Yes.

23 Q. Now, the fact is that although Dr. Jernigan was in
24 some sense taken off the account, there were several steps
25 that were not taken, correct?

1 A. One step, is my understanding, was not taken?

2 Q. The accounts were not delinked. Is that true?

3 A. Correct.

4 Q. That was an error?

5 A. Correct.

6 Q. So for the whatever period of time he had a bill-pay
7 account of his own because of the bank's error, it was
8 still linked to 8854?

9 A. 8854 was still linked to his on-line banking profile,
10 is my understanding, correct.

11 Q. And he didn't know that at the beginning, January of
12 '04 when he renounced it. He had no reason to know that
13 the account should be delinked, correct, or was linked.

14 MR. ABNEY: Objection. Calls for speculation.

15 THE COURT: Overruled. Go ahead.

16 A. I'm sorry. Could you ask it again?

17 Q. Yeah. Would he have been aware when he renounced that
18 the account would still remain linked?

19 A. He would have been aware when he could see it on his
20 on-line banking profile, yes.

21 Q. Do you have any -- did he also have to link the --
22 that's if there was a mistake, correct?

23 A. If there was a mistake he would have still been able
24 to see the account on his on-line banking profile, correct.

25 Q. But they were not delinked?

1 A. They were not delinked, so he could still see the
2 account on his on-line banking profile.

3 Q. He didn't change -- the bank didn't change the access
4 ID either, correct? In other words ---

5 A. I think it ---

6 Q. --- if it came up, it was the bank's fault that it
7 came up, the bank's error?

8 A. Correct.

9 Q. Now, do you know if during any of the -- do you know,
10 and if you don't, fine -- but do you know if at all during
11 the period in which he maintained bill-pay on his own
12 account 4502, he ever did make payments out of 8854?

13 A. To my knowledge, he did not.

14 Q. And to your knowledge he didn't know in January of '07
15 that this account was still linked, correct?

16 A. Actually, I believe from reading his deposition he
17 acknowledged the fact that he had seen the account on-line
18 previously during that time frame.

19 Q. All right. And what was his -- do you today have a
20 sense of the mechanics of the transaction, what had to have
21 been done that wasn't done?

22 A. In the delinking of the accounts?

23 Q. Right.

24 A. Today I have a sense of what happened.

25 Q. Today as we sit here?

1 A. Correct.

2 Q. But not then and not when you talked to Mr. Navarez?

3 A. I don't believe I knew the exact, the exact error of
4 where the removal error came from, no.

5 Q. Right. And you've never talked, have you, to any of
6 the -- don't recall talking to anybody involved in the
7 phone calls that Ms. Katz made? Specifically Mr. Boyle who
8 might have set up the account, either LaMont or Flowers or
9 Garcia?

10 A. In regards to this, those four people, no.

11 Q. Okay. And you didn't ever speak to any member of the
12 police department regarding the criminal complaint filed by
13 Ms. Katz?

14 A. No.

15 Q. And they didn't speak to you and you don't know who,
16 if anyone, spoke to them at the bank?

17 A. No, I do not.

18 Q. And you didn't speak with Dr. Jernigan ever?

19 A. No, I did not.

20 Q. And you're not aware of anyone else's communication
21 with Dr. Jernigan at all during this period?

22 A. No, I'm not.

23 Q. You did at some point speak to William Navarez. Had
24 you ever met or known him before?

25 A. No, I hadn't.

1 Q. What was the occasion of that conversation and when
2 was it?

3 A. I believe the first conversation was either at the end
4 of July or the beginning of August of '07 and it was in
5 regards to a letter -- if I'm not mistaken, it was in
6 regards to a letter that Ms. Katz had sent our CEO, Ken
7 Lewis.

8 Q. All right. And as I -- as you've testified, this was
9 the first time you had spoken to him about this transaction
10 back in January?

11 A. Yes.

12 Q. All right. Did you understand when you spoke with him
13 that Dr. Katz had been arrested?

14 A. Dr. Jernigan?

15 Q. I'm sorry. Dr. Jernigan?

16 A. That's the first time I'd heard it, yes.

17 Q. What did Mr. Navarez ask you specifically, if you
18 recall?

19 A. I don't recall specific questions. I think we just
20 talked about the general meeting in my office, because my
21 name was in the letter that she wrote.

22 Q. Okay. Did you tell him or in your own way describe
23 the level of her concern when you met with her?

24 A. Yes.

25 Q. You painted her in that light, so to speak?

1 A. Yes.

2 Q. And did you tell him anything else that we haven't
3 already touch on today?

4 A. I don't recall, no.

5 Q. Was there -- after you spoke with him, was there any
6 further work you were supposed to do?

7 A. No.

8 Q. In that discussion, did Mr. Navarez mention that when
9 Dr. Jernigan set up his bill-pay process, it had been done
10 significantly earlier than January of '07?

11 A. I don't remember that.

12 Q. Was there any particular discussion about when the
13 payees at issue in this case, that is the people who
14 received money in January of '07, had been identified?

15 A. I don't recall us discussing it.

16 Q. Was there any mention of the three to four thousand
17 dollars that Dr. Jernigan had been paying, transferring
18 into 8854 during that period of time?

19 A. I don't remember.

20 Q. From your conversation, the second half of this
21 equation, and that is the status of Dr. Jernigan's account
22 when all of this happened, is it fair to say that after
23 your initial contact with Ms. Katz and your subsequent
24 conversation with Mr. Navarez who was investigating the
25 matter, that you were not aware at that time that around

1 this same time that these unauthorized bill payments were
2 made, Dr. Jernigan's account had been restricted by the
3 bank?

4 A. At that time, no.

5 Q. Is it fair to say that your first awareness of Dr.
6 Jernigan's perspective that his account had been, to use
7 his words, frozen and somehow defaulted to his ex-wife's
8 account, came when you read his deposition?

9 A. I'm sorry. Could you say that again?

10 Q. Yeah. Is it fair to say that your first awareness of
11 his contention, his perspective, that this had happened
12 because his account had been frozen, to use his word, came
13 with your reading of his deposition?

14 A. I don't recall if it was with -- in reading his
15 deposition or in preparing for mine. I don't remember.

16 Q. How about in connection with this litigation?

17 A. Absolutely.

18 Q. All right. And you understood that it, in fact, had
19 been restricted at that time? Then you later came to
20 understand that it had been restricted or frozen. And I'm
21 going to use them interchangeably unless you can tell me
22 why not?

23 A. It came to my knowledge that the account had been in a
24 restricted status actually before this incident occurred.

25 Q. Before, as in what, hours or days?

1 A. Days, to my knowledge.

2 Q. Days. But the same week out of about a hundred and
3 fifty-six weeks, that he had maintained the account, would
4 you agree?

5 A. I don't know if it was the same week. I mean, I would
6 say two -- probably within two weeks, but I ---

7 Q. You don't know the dates?

8 A. I don't remember the dates.

9 Q. All right. And that's -- and it had been put in a
10 restricted status, did you not learn, because of deposits
11 that he made?

12 A Yes.

13 Q. All right. And that was as alleged in his complaint,
14 was it not?

15 A. I don't remember. I don't remember reading it in his
16 complaint. I'm sorry.

17 Q. Do you remember reading it in his deposition?

18 A. No, actually.

19 Q. Okay. So you don't know when or what the bank had
20 responded to his longstanding complaint and concern that
21 the status of his account, in connection with the bank
22 error had been responsible for the unauthorized transfers?

23 A. Do I know how we responded to that?

24 Q. Right.

25 A. No, I don't.

1 Q. Okay. In other words, you haven't followed all of
2 that?

3 A. No.

4 Q. How would you assume today that that information would
5 have been made available to anyone at the bank interested
6 in his account?

7 A. I'm not sure. I ---

8 Q. Well, let me ask it this way. Are you familiar with
9 something called BOSS reports?

10 A. Yes.

11 Q. All right. And what are BOSS reports?

12 A. I'm not a BOSS expert and it's a system that I very
13 rarely used. It's always been explained to me that it was
14 almost somewhat of a mainframe system that drove all the
15 other consumer systems or account systems that we as, you
16 know, client facing associate saw.

17 Q. Okay. You understand today that it was available in
18 January of '07?

19 A. BOSS itself, yes.

20 Q. That system that you described as best you can?

21 A. Yes.

22 Q. To your knowledge was the restricted status -- well,
23 to your knowledge was the restricted or frozen status of

24 Dr. Jernigan's account discovered by the review of the BOSS
25 Reports?

1 A. That's my understanding, yes.

2 Q. And never had been acknowledged, and to your
3 knowledge, by anybody including Ms. Katz or Dr. Jernigan or
4 the police prior to his arrest?

5 A. I guess it would depend on what you mean acknowledged.

6 Q. Mentioned?

7 A. When the account went into the restricted status, he
8 would have gotten a notice from the bank saying that it was
9 in a restricted status ---

10 Q. All right.

11 A. --- by form of a letter or -- I'm not sure what the
12 notification would be, but he would have received
13 notification. But as far as, you know, me calling Dr.
14 Jernigan or me saying something or someone at the bank
15 calling him and saying, hey, your account was in a
16 restricted status, no, I don't know that.

17 Q. But the notice -- you know, you've never seen the
18 notice that he got in this case?

19 A. No, I haven't.

20 Q. Could it have arrived after this, after the
21 transactions in question?

22 A. I think that would depend on the dates. I don't know.

23 Q. And would it depend on the manner of communication,
24 meaning letter versus email versus ---

25 A. It would have gone out in a letter.

1 Q. All right. It would not have popped up on his screen,
2 correct?

3 A. It could have on his on-line banking part. I wouldn't
4 know that.

5 Q. You don't know. It's true though, is it not, that if
6 his account had been frozen, he could not make bill
7 payments from it?

8 A. If the account had been -- I'm not an expert on BOSS
9 and the restriction profiles, but if the account status had
10 been frozen, my understanding is, no, he couldn't have.
11 But that's not the restriction his account was under.

12 Q. Okay. Do you recall in your deposition saying that if
13 he selected payment from restricted account it might go
14 through?

15 A. I believe that would depend on the restricted status
16 that it was in. I was mistaken -- if I remember correctly,
17 he was in a no check activity status. My understanding at
18 the deposition of what that status code actually meant was
19 different than -- once I read the actual status codes
20 later, my understanding of what the code meant was actually
21 different than what it truly meant. But a no check
22 activity status just means that, no paper checks. And
23 that's the status his account was in.

24 Q. You've got your deposition in front of you. And if
25 you would turn to page sixty, please. Have you got that in

1 front of you?

2 A. Yes, sir.

3 Q. And line nine on page sixty, I say, I think you

4 testified that even if it was restricted, it would still be

5 listed as an eligible account for bill-pay transfers. Is

6 that right? And you said?

7 A. Correct.

8 Q. And it could have been selected to make a payment,

9 correct?

10 A. Correct.

11 Q. If the account selected was unavailable for whatever

12 reasons the payments would not -- would just not go. Is

13 that your answer? I'm sorry.

14 A. Correct.

15 Q. So you told me in a deposition that if the account

16 that was selected was unavailable for whatever reason, the

17 payments would just not go?

18 A. For -- depending on the reason.

19 Q. You did say ---

20 A. If there was a specific reason that wouldn't let the

21 payments go, yes, that is correct.

22 Q. And I said, is there any reason that pops up after

23 this that says this account is not eligible at this time?

24 And your answer was?

25 A. To my knowledge, no.

1 Q. Okay. And then looking at page sixty-one. Question,
2 okay, can bill pays be made if the account is frozen?

3 Answer?

4 A. No.

5 Q. Same page. Okay, so you can't make payments, you
6 can't deposit funds, you can't do anything with a frozen
7 account? Answer?

8 A. Correct.

9 Q. All right. Looking now, Ms. Brisson, at page forty-
10 eight of your deposition -- I'm sorry, forty-seven, line
11 fifteen. Okay. And from which account would the payment
12 be made? Answer?

13 A. Whatever account he selected.

14 THE COURT: I'm sorry. What did you say?

15 A. That -- my answer on line seventeen was whatever
16 account he selected.

17 THE COURT: Okay.

18 Q. Question, including the one that was restricted?
19 Answer?

20 A. That would be the account he selected, yes.

21 Q. Would the payments come from that account?

22 A. Only if the funds were available.

23 Q. Which they wouldn't be in a restricted account,
24 correct?

25 A. Depending on the restricted code, correct.

1 Q. No, no, what was your answer?

2 A. Oh, correct.

3 Q. So then it would go through the account?

4 A. No, it would not.

5 Q. It would not?

6 A. It would not.

7 Q. What would happen?

8 A. The payment would just not be made.

9 Q. Okay. All right. And in this case they were made?

10 A. Correct.

11 Q. Correct. Out of the other accounts and that's the
12 basis for which you understand everybody else is saying,

13 because I gather you don't have sufficient personal
14 knowledge or do you to know what happened in this case?

15 And then Mr. Abney objected?

16 A. My answer was, to my knowledge the payments were made
17 out of the account in question.

18 Q. Correct. Answer?

19 A. How they were made, I do not know.

20 Q. And, in fact, I'm going to show you Plaintiff's
21 Exhibit 18 and I point to -- it's a three-page document and
22 I will point you to the -- the print is sort of small.

23 Isn't there a reference in that document to frozen
24 accounts?

25 A. I would have to read it.

1 Q. All right. Well let me point you to it. Last page,
2 top of the page, BOA page 00624. Do you see freezing your
3 account?

4 A. Uh-huh (affirmative).

5 THE COURT: What page?

6 MR. WAGGONER: The last page of Exhibit 18.

7 THE COURT: Your Exhibit 18 or their Exhibit?

8 MR. WAGGONER: Plaintiff's Exhibit 18.

9 THE COURT: Pardon?

10 MR. WAGGONER: Yes.

11 THE COURT: I don't have a Plaintiff's 18.

12 MR. WAGGONER: One second.

13 THE COURT: This is 18, okay. Any objection to
14 18?

15 MR. ABNEY: No, Your Honor.

16 THE COURT: Now, where are you reading from?

17 MR. WAGGONER: All I'm asking the witness to note
18 is that there is a provision for freezing the account.

19 THE COURT: I understand. But where are you
20 reading from on page ---

21 MR. WAGGONER: Oh, I'm sorry. The top of the
22 third page, page 00624.

23 THE COURT: Okay. All right. Please proceed.

24 Q. All right.

25 A. So, yes, there's a provision for freezing your

1 account, yes.

2 Q. All right. And that's what Dr. Jernigan had all along
3 maintained, correct, using his words?

4 A. What he maintained, yes.

5 Q. All right. And that's what -- you may have not
6 realized, that's what had been denied by the bank?

7 A. Correct.

8 Q. And not acknowledged until much later in the
9 litigation?

10 A. That his account was frozen?

11 Q. Correct.

12 A. His account wasn't frozen. It was in a restricted
13 status. They're different.

14 Q. All right. Do you think Dr. Jernigan understood the
15 difference between restricted and frozen?

16 A. I can't answer that.

17 Q. In any case whether it's called restricted or frozen,
18 to use the bank's term in Exhibit 18, you -- well, let me
19 make this clear. It was frozen, was it not, because of the
20 bank's awareness of an irregularity, to use the word from
21 the bank's document, there were multiple efforts to make a
22 large deposit?

23 A. It was restricted.

24 Q. Because of that?

25 A. Correct.

1 Q. Did you speak to Susan Dunn, Dr. Jernigan's lawyer,
2 during the pendency of the criminal prosecution?

3 A. No, I did not.

4 Q. And you don't know, do you, if anyone else at Bank of
5 America ever communicated with Susan Dunn, his lawyer
6 during the pendency of the criminal prosecution?

7 A. I don't know.

8 Q. As a Bank of American employee with -- and you said
9 you do have knowledge of the bill pay process, correct?

10 A. I'm certainly not an expert, but I have knowledge of
11 it.

12 Q. Right. And you were the only person to have face-to-
13 face contact with Ms. Katz, as you know it?

14 A. As I know it, yes.

15 Q. All right. And you knew that she was pushing hard to
16 understand the mechanism of the transaction xwon top of the
17 bank error, correct?

18 A. Yes.

19 Q. Had you ever seen, again, as the only person face-to-
20 face, had you ever seen any evidence of any communication
21 between the bank and/or Dr. Jernigan's lawyer, Susan Dunn?

22 A. No.

23 Q. Were you even aware that there was such communication?

24 A. No.

25 Q. You never saw any emails?

1 A. No.

2 Q. To your knowledge, was Mr. Navarez aware of that?

3 A. (Negative nod).

4 Q. Was there any discussion of it?

5 A. I don't recall, no.

6 Q. All right. Thank you, Ms. Brisson.

7 A. Uh-huh (affirmative).

8 **CROSS-EXAMINATION**

9 **BY MR. EDWARDS:**

10 Q. Good morning, Ms. Brisson.

11 A. Good morning.

12 Q. I'm Aaron Edwards. We met at your deposition and I
13 represent Ms. Katz. I just have a couple of questions and
14 then I'll pass it on to the bank's lawyer, Mr. Abney. When
15 you met that day in January 2007 with Ms. Katz and her now
16 husband, Al Katz, and you talked about -- you established
17 that it was a bank error and you discussed the mechanics of
18 how this all happened, I believe you said earlier that that
19 would require some kind of further investigation as to the
20 specific mechanics on how it happened because you didn't
21 know.

22 A. Of this specific transaction, no, I didn't.

23 Q. Did you give her any guidance as to how to conduct
24 this investigation?

25 A. She had actually at that point already really started

1 that investigation. She had already talked to the on-line
2 banking group. She had talked to my service team. She had
3 -- specific to this is what we need to do from now on, no.
4 Because she had really already started everything.

5 Q. So you gave her no guidance on how to proceed?

6 A. Specific guidance, I don't recall, no.

7 Q. You thought that she already knew how to do it?

8 A. I thought she was already in the process.

9 Q. You thought that she knew how to do it? You knew she
10 was doing something, correct?

11 A. Right.

12 Q. Because she had talked to other bank employees,
13 correct?

14 A. Correct.

15 Q. But you don't have any idea whether or not she knew
16 what exactly she was looking for, who to talk to, where to
17 go and how to do it. Isn't that right?

18 A. I'm sorry. Say that again.

19 Q. You knew she had done something. She had come to you
20 and was asking some questions, some of which you had no
21 answer to.

22 A. Correct.

23 Q. She wanted to figure out those things that you didn't
24 have the answer to, right?

25 A. Correct.

1 Q. Did you tell her who to talk to?

2 A. Specific names, no.

3 Q. Did you tell her where to go?

4 A. No.

5 Q. How to do it at all?

6 A. No.

7 Q. If Dr. Jernigan had been removed from on-line access
8 in 2004, is there any way at all that the bill pays that
9 we're talking about here today could have been withdrawn
10 from her account, 8854?

11 A. To my knowledge, no.

12 Q. Thank you, ma'am.

13 **CROSS-EXAMINATION**

14 **BY MR. ABNEY:**

15 Q. Laura, was the Jernigan 4502 account frozen from
16 January 17th to January 19th, 2007?

17 A. No.

18 Q. How do you know that?

19 A. I've seen the restricted status codes since then on --
20 in the BOSS and in preparing for this.

21 Q. You've also seen the statements, Dr. Jernigan's bank
22 statements?

23 A. Oh, yes, I have.

24 Q. Can you turn to Exhibit Number 3 in the Bank of
25 America exhibit file. And if you would, turn to the second

1 page. At the bottom it's labeled BOA.

2 THE COURT: Which number?

3 MR. ABNEY: It's Exhibit 3, Bank of America
4 binder.

5 Q. Would you turn to the second page, which is BOA 353.

6 There are a list of transactions and on the left the date,
7 posted date appears. And for the transactions dated 1/17
8 and 1/18 and 1/19 of 2007, do you see check activity
9 occurring in that account?

10 A. I do.

11 Q. Do you see on-line banking transfers occurring in that
12 account on those dates?

13 A. I do.

14 Q. Do you see debit card activity occurring in that
15 account on this date, on January 19th specifically, to
16 Publix?

17 A. Yes, I do.

18 Q. So virtually every form of debit activity that can
19 occur on an account is occurring in Dr. Jernigan's account
20 between the dates January 17 and January 19, 2007.

21 Correct?

22 A. Correct.

23 Q. Okay. Could those transfers, those transactions have
24 occurred if Dr. Jernigan's account was frozen on those
25 dates?

1 A. No.

2 Q. Now you talked about the BOSS records. Could you
3 turn, please, to Exhibit Number 11 in the binder. And are
4 you able to discern from this document that a restriction
5 of some type was placed on Dr. Jernigan's account?

6 A. Yes.

7 Q. Okay. And can you direct us to where you see that?

8 A. The third instance from the bottom, deposit hold
9 indicator A. And then the second one, account status on
10 the -- in ---

11 Q. 02?

12 A. Correct.

13 Q. The 02, that is a code, correct, for a status in which
14 an account can be placed?

15 A. Correct.

16 Q. And when you were deposed, did you know those codes
17 specifically?

18 A. No.

19 Q. Had you reviewed documentation describing those
20 various codes?

21 A. At that point, no.

22 Q. Okay. So you understood that there was some form of a
23 restriction placed on the account, but at the time of your
24 deposition, you did not have specific knowledge as to the
25 exact nature of the restriction. Is that correct?

1 A. Correct.

2 Q. If you turn with me to Exhibit 17.

3 THE COURT: Are you going to ask her what are
4 restrictions? What does that code mean?

5 MR. ABNEY: That's what I'm getting to, Your
6 Honor. That's the next document.

7 THE COURT: Okay. Go ahead.

8 Q. Exhibit Number 17. Now, is this a Bank of America
9 document?

10 A. Yes, it is.

11 Q. And you've seen this document since your deposition,
12 correct?

13 A. Yes, I have.

14 Q. And does this contain descriptions of the various
15 status codes that are used in the BOSS system?

16 A. Yes, it does.

17 Q. Okay. And the very code is 00. And can you just read
18 the description.

19 THE COURT: Just go to the one on his account. I
20 don't care about the other. What was his account?

21 Q. Can you turn to page three, please?

22 THE COURT: Was it a three or a two?

23 MR. ABNEY: 02.

24 THE COURT: All right. 02.

25 MR. ABNEY: 02.

1 THE COURT: So it was a 02, no check activity.

2 Is that correct?

3 MR. ABNEY: That'S correct, Your Honor.

4 THE COURT: Okay.

5 Q. And on the second sentence under the no check activity
6 description, it reads; all other debits and credits will
7 still ---

8 THE COURT: All right. Where are you reading
9 from?

10 MR. ABNEY: The second sentence under the 02.

11 THE COURT: Okay. That's on page 000677,
12 correct?

13 MR. ABNEY: Correct.

14 THE COURT: Okay. All right.

15 Q. The first sentence says, this status will cause any
16 checks attempting to post in batch to reject and appear on
17 the daily posting rejects journal. All other debits and
18 credits will still post to the account. Okay. Do you
19 understand that electronic payments may be made during that
20 no check activity restriction?

21 A. Correct.

22 Q. And electronic bill payments may also occur during a
23 no check activity restriction?

24 A. Yes.

25 Q. And turning back to the BOSS record, which is Exhibit

1 11, are you able to tell from this third page when the no
2 check activity status was lifted from Dr. Jernigan's
3 account?

4 A. On the third page?

5 Q. Uh-huh (affirmative). The third page of the BOSS
6 documents.

7 A. The second entry from the bottom on 1/16/07, the
8 account status was changed back to a 00, which is in a
9 normal status.

10 Q. And 1/16/07 is the date, correct?

11 A. Correct.

12 Q. Okay. And looking back at Exhibit 17, which is the
13 status codes ---

14 THE COURT: All right. Where are you talking
15 about where it was listed, on what page?

16 MR. ABNEY: Third page of Exhibit 11, Your Honor.

17 THE COURT: Third page, Exhibit 11. All right.
18 Where?

19 MR. ABNEY: Second entry from the bottom.
20 Account status 0 -- double 0.

21 THE COURT: Double 0, okay. That's where the
22 restrictions were removed, right?

23 MR. ABNEY: That's correct.

24 Q. And looking back at Exhibit Number 17, the very first
25 description on the page, the double 0 is the code for an

1 open account that has no restrictions, correct?

2 A. Correct.

3 Q. When you met with Ms. Katz, you established that

4 payments were made by her husband from the account,

5 correct? You had established that during the meeting?

6 A. Actually, she had established that prior to me being

7 there, so, yes. Or her being there.

8 Q. And it was established during that meeting or prior --

9 at some point by the end of that meeting, it was understood

10 that the bank had made an error in failing to remove Dr.

11 Jernigan from the on-line account?

12 A. Correct.

13 Q. You didn't necessarily know the mechanics of it, but

14 the fact that the bank had made an error was established?

15 A. Correct.

16 Q. And the money -- you established that the money was

17 back in her account?

18 A. Correct.

19 Q. And you established that Dr. Jernigan was no longer

20 able to access the account, correct?

21 A. Correct.

22 Q. And were you asked by Ms. Katz to conduct any further

23 investigation?

24 A. No, I wasn't.

25 Q. Were you asked to get back to her with findings?

1 A. No, I wasn't.

2 Q. Were you asked to prepare a written report as to how
3 these transactions had occurred?

4 A. No, I wasn't.

5 Q. And after your discussions with Ms. Katz, did you feel
6 this issue was resolved?

7 A. Yes.

8 MR. ABNEY: Nothing further.

9 Q. Thank you.

10 THE COURT: Any redirect?

11 **REDIRECT EXAMINATION**

12 **BY MR. WAGGONER:**

13 Q. Ms. Brisson, you've testified that to your knowledge
14 this unauthorized bill pay from Dr. Jernigan's account
15 through his former wife's account had never occurred
16 before, to your knowledge, during the years that they had
17 been divorced and were maintaining separate accounts?

18 A. A bill pay.

19 Q. Yes.

20 A. Correct.

21 Q. All right. And you said that the restriction of his
22 account was lifted on 1/16/07?

23 A. Correct.

24 Q. And we've been calling it frozen and you've
25 distinguished the two. When were the unauthorized bill pay

1 made, the payments made?

2 A. I don't remember the exact date.

3 Q. Okay. If I told you they were on the 16th, would you
4 still maintain that the restricted account had no relation
5 to the unauthorized payments?

6 A. Yes.

7 Q. All right. What would you then be saying the
8 mechanics would be?

9 A. Of the bill pay itself?

10 Q. Would it be inadvertence, perhaps, because of a bank
11 error?

12 A. Inadvertent meaning?

13 Q. Meaning unintentionally not deliberately knowing to be
14 -- that he did not know he was going to his ex-wife's
15 account?

16 A. He would have actually had to choose his ex-wife's
17 account as the bill pay option. Did he do that
18 deliberately? Obviously, I don't know that.

19 Q. Could he have done it inadvertently?

20 A. Could he have done it by mistake, yes.

21 Q. And could it have had a relation to his restricted
22 account?

23 A. No. Well -- I can't ---

24 Q. So it's pure coincidence that in the three years where
25 this had never happened, that on the same week, in fact in

1 the same day, several of the unauthorized bill payments
2 were made while his account was restricted?

3 A. Absolutely.

4 Q. All right. Thank you.

5 THE COURT: Any recross?

6 MR. ABNEY: Just one quick question.

7 MR. EDWARDS: None from Defendant Katz.

8 **RECROSS EXAMINATION**

9 **BY MR. ABNEY:**

10 Q. Laura, does the restriction, a freeze or any sort of
11 restriction on an account prevent a customer from being
12 able to schedule -- go on-line and schedule payments from
13 that account?

14 A. No, it does not.

15 MR. ABNEY: No further questions.

16 **EXAMINATION**

17 **BY THE COURT:**

18 Q. Ms. Brisson. Is it Ms. Brisson?

19 A. Yes.

20 Q. Would you look in that book, Exhibit Number, I
21 believe, 17, page 0067 where it shows no check activity
22 beside ...

23 A. Yes, sir.

24 Q. All right. The first page, it says this status will
25 cause any checks attempted to post in batch to reject and

1 appear in daily posting reject journals. Put that in
2 layman's language to me. Posting batch. What does that
3 mean?

4 A. Basically, any paper check trying to post against the
5 account will reject and basic -- just not post against the
6 account.

7 Q. And then it says all other debits and all credits will
8 still post. That means any electronic debits?

9 A. Correct, whether it be by ---

10 Q. Whether a credit card or a debit card or whatever?

11 A. Debit card, on-line banking, bill payment, yes, sir.

12 Q. And it would also receive deposits, i.e., credits. Is
13 that correct?

14 A. Correct.

15 Q. When did you actually determine Dr. Jernigan's actual
16 status of his account on the days in question, January
17 16th, 17th, and 18th?

18 A. Meaning when did I know that it was ---

19 Q. Yeah, when did you -- because apparently in your
20 deposition you weren't aware of this.

21 A. I wasn't aware of it at the time she was in my office.
22 We established it at some point in either -- in preparing
23 for my deposition.

24 Q. Well, that's what I'm asking. When did you personally
25 find out or make a determination that the status of the

1 account was 02, no check activity?

2 A. I don't know the exact date, Your Honor, but it would
3 have been in ---

4 Q. Was it before your deposition or after your
5 deposition?

6 A. I can't, I can't remember exactly when I got the
7 information. I believe that it was before.

8 Q. Where did you get the information from?

9 A. From the bank's counsel?

10 Q. From who?

11 A. The bank's counsel, Mr. Abney.

12 Q. So you got it from the lawyer when talking to him
13 about preparing for trial. Is that correct?

14 A. Yes, sir.

15 Q. Okay. Now, at some point in time the bank apparently,
16 according to the testimony, told Ms. Katz to file a fraud
17 report. And I assume that's the bank policy. Is that
18 correct?

19 A. In a case where a customer suspects fraud, yes, sir.

20 Q. All right. Then why doesn't the bank report that to
21 the police themselves since they have access to the
22 accounts, all the accounting. The customer doesn't have
23 that. Why doesn't the bank cooperate with the customer in
24 making that report rather than saying, hey, go to the
25 police, you deal with it. Why doesn't the bank make the

1 report?

2 A. I don't know the answer to that. I'm sorry.

3 Q. Does the bank ever make the report?

4 A. I would assume in cases where we discover the fraud
5 ourselves, yes, we would. But I don't know the specifics
6 of that.

7 Q. Okay. When did you finally determine that when Mr.
8 Jernigan, apparently from your testimony, went into the ex-
9 joint account, which is 8854, and made these bill payments,
10 when did you make a determination that he could have
11 inadvertently done that? And who did you tell and when?

12 A. I'm sorry. Your Honor, I'm not ---

13 Q. All right. Wait ---

14 A. I'm not trying to be difficult. I'm just not sure how
15 to answer the question.

16 Q. All right. Let me clarify what I'm trying to ask you,
17 okay?

18 A. Okay.

19 Q. Ms. Katz goes to the bank.

20 A. Uh-huh (affirmative).

21 Q. Hey, my money's missing. The bank looks and says,
22 okay, go make a fraud report. And then the bank determines
23 you made an error. He still had access to the bank -- to
24 that account.

25 A. Uh-huh (affirmative).

1 Q. So he goes into that account and makes -- pays the
2 bills, whether it was done intentionally, whether it was
3 done by error.

4 A. Uh-huh (affirmative).

5 Q. But the police are out investigating a fraud.

6 A. Uh-huh (affirmative).

7 Q. Did the bank ever call up Ms. Katz or call up the
8 police and say, hey, we have found out we made an error.
9 Therefore, he could have made an error when he went into
10 the account by mistake. Was that information ever given to
11 the police or Ms. Katz?

12 A. I don't know if it was ever given to the police
13 because I never ---

14 Q. Was it ever given to Ms. Katz?

15 A. When she left my office, she understood that the error
16 was that he still had access to her account inadvertently,
17 because he hadn't been removed properly.

18 THE COURT: Okay. Any questions based on my
19 questions.

20 MR. EDWARDS: If I may:

21 THE COURT: I'm not trying to restrict you to
22 what I asked. Feel free. I just wanted to clear up some
23 things in my mind and get some things straight on what was
24 actually going on with this fiasco.

25 MR. EDWARDS: I just wanted to clarify the last

1 thing she said actually.

2 **RECROSS-EXAMINATION**

3 **BY MR. EDWARDS:**

4 Q. You said that Ms. Katz understood it was a bank error.

5 Y'all had failed to remove him from the account, correct?

6 A. Uh-huh (affirmative).

7 Q. But you never told her at the time?

8 A. I didn't know at the time. But, also, that's not
9 information I would have given her. It was his account,
10 not hers.

11 Q. But you had already identified in her case, she
12 reports fraud to you, y'all had already identified that in
13 your eyes the person who did it was Dr. Jernigan, right?

14 A. Yes.

15 Q. But you never investigated his account, did you?

16 A. He never asked us to, no. Or me to. Excuse me.

17 Q. And you never did that?

18 A. I didn't, no.

19 Q. And you now know that his account had a restricted
20 status at or around the same time as these bill pay
21 transfers occurred, correct?

22 A. Correct.

23 Q. And you never told that to Ms. Katz, did you?

24 A. I haven't had any conversations with her since that.

25 No.

1 Q. You didn't know that, did you?

2 A. I didn't at the time, no.

3 Q. And you didn't look into it?

4 A. At the time, no.

5 Q. Thank you.

6 THE COURT: Any questions from the Plaintiff?

7 RE-REDIRECT EXAMINATION

8 BY MR. WAGGONER:

9 Q. Just a clarification based on the -- a clarification
10 based on the Court's questioning of you. When the Court
11 said when was it discovered that he went into her account,
12 it's your understanding and everybody else's that he made
13 bill pays from his account, which were linked to her
14 account, correct?

15 A. No.

16 Q. And inadvertently, at best, selected the account. In
17 other words, he was not paying money out of her -- he was
18 doing what he'd always done but somehow selected her
19 account. Is that generally what you're saying, as opposed
20 to knowingly going into her account?

21 A. He went -- my understanding is he went in to do the
22 same bill pay process that he always did.

23 Q. Correct.

24 A. He selected her account to do the bill pays out of.

25 Q. Her account would not have been there for an

1 inadvertent selection had the bank not made an error?

2 A. Correct.

3 Q. All right.

4 THE COURT: I understand that. He was in his
5 account and then it comes up and shows you what account you
6 want the bills paid, you can have money market, savings,
7 checking, various checking accounts and you make that
8 selection.

9 MR. WAGGONER: Correct.

10 THE COURT: Now, I'm not trying to take the
11 position whether he made it intentional or by accident.

12 MR. WAGGONER: I understand.

13 THE COURT: He could very easily make it by
14 accident. But he apparently chose her account and that's
15 where the bills were paid from.

16 MR. WAGGONER: That's the allegation.

17 THE COURT: I understand the process, okay?

18 MR. WAGGONER: We're not saying he chose it.
19 We're saying something happened automatically.

20 THE COURT: I understand. You're saying it
21 happened automatically. The bank's saying there's no way
22 it could have happened automatically. I understand what
23 you're saying.

24 MR. WAGGONER: All right, sir.

25 THE COURT: I don't know how it happened. But,

1 you know, that's neither here nor there.

2 MR. ABNEY: I just have one quick question,
3 please.

4 RE-RECROSS EXAMINATION

5 BY MR. ABNEY:

6 Q. Laura, at any time prior to this litigation, had you
7 ever -- you had no knowledge that there was any sort of
8 restriction on Dr. Jernigan's account, correct?

9 A. Correct.

10 Q. Okay. And you believe here today that that
11 restriction, it had no impact on these disputed
12 transactions, correct?

13 A. Correct.

14 Q. Was there any reason to start looking for a
15 restriction on the account?

16 A. No.

17 THE COURT: Mr. Edwards, anything else?

18 MR. EDWARDS: Nothing further, Your Honor.

19 THE COURT: All right. Thank you so very much.

20 I appreciate you being here and thank you for answering my
21 questions, okay. You may be -- is there any reason she
22 can't be excused?

23 MR. EDWARDS: None from ---

24 THE COURT: Mr. Wagoner, any reason she can't be
25 excused?

1 MR. WAGGONER: No.

2 THE COURT: I'm sorry. You want her excused her
3 or you want her around?

4 MR. ABNEY: I'd like her excused.

5 THE COURT: Okay. I mean, you don't want to call
6 her in your case?

7 MR. ABNEY: No, sir. I don't believe so.

8 THE COURT: Pardon?

9 MR. ABNEY: I don't believe so, no.

10 THE COURT: All right. Thank you very much. Any
11 further witnesses?

12 MR. WAGGONER: No further witnesses. Subject to
13 making sure our Exhibits are in, we would rest.

14 THE COURT: All right. You want to go ahead. I
15 believe you've got ---

16 MR. WAGGONER: 16 and 18.

17 THE COURT: 16 and 18.

18 MR. WAGGONER: And then we have a number of
19 pleadings, which I will ---

20 THE COURT: Some interrogatories, right? Do you
21 want them marked?

22 MR. WAGGONER: Well, there's ---

23 THE COURT: All right. Go ahead for the record
24 and put down what you're marking and she'll mark it. Just
25 mark them as exhibits or however you want to do it.

1 MR. WAGGONER: All right. Plaintiff's Exhibit 20
2 is the complaint that Dr. Jernigan filed in April '09.
3 Exhibit 21 is the amended answer of the Defendant, Bank of
4 America. Exhibit 22 is the Defendant Bank's answers to
5 Plaintiff's interrogatories. Plaintiff's 23 is Bank of
6 America's response to plaintiff's request for admission of
7 facts. Plaintiff's 24 is Defendant Bank's responses to
8 plaintiff's second supplemental request for admission of
9 facts. Plaintiff's 25 is Defendant's response to
10 plaintiff's third supplemental request for admission of
11 facts. And Plaintiff's 26 is a letter from Mr. Abney,
12 which ask that it be considered a supplement to previous
13 discovery and which we accepted as such, which for the
14 first time acknowledges the restricted or held or frozen,
15 hold is his word, on account, on Dr. Jernigan's account at
16 the time. And all of those to my knowledge are offered
17 without objection.

18 THE COURT: Okay.

19 MR. ABNEY: No objection.

20 THE COURT: All right. Thank you very much.

21 (WHEREUPON, Plaintiff's Exhibit Numbers 16, 18, 20,
22 21, 22, 23, 24, 25, and 26 are admitted into
23 evidence.)

24 THE COURT: Anything else that you need to offer?

25 MR. WAGGONER: No, sir. Thank you.

1 THE COURT: Okay. So the Plaintiff rest?

2 MR. WAGGONER: The Plaintiff rest.

3 THE COURT: Do you want to hear motions now or do
4 you want to wait until he finishes his cross-claim?

5 MR. ABNEY: Well, I guess we'll just wait and
6 then do them all at once, Your Honor.

7 THE COURT: I mean, if that's okay. I mean, I'll
8 ---

9 MR. ABNEY: That's fine with me.

10 THE COURT: I'm not trying to short-circuit you.
11 I think it would be more beneficial if we at least hear the
12 cross -- the subject matter cross-claim before we hear any
13 motions because it's going to be basically one in the same
14 or very similar anyhow.

15 MR. ABNEY: That's fine with me, Your Honor.

16 THE COURT: Okay. I'm not trying to preclude you
17 if you want to make them now, okay?

18 MR. ABNEY: We're going to have to hear his case
19 anyway, so I can just do them both at the same time.

20 THE COURT: Okay. All right. Mr. Edwards, you
21 can call your first witness. Are you going to rest on what
22 we've already heard or have you got something else you want
23 to add?

24 MR. EDWARDS: I have -- very briefly, I have
25 deposition testimony that's been highlighted with color.

1 codes for my purposes and the bank's purposes. I can read
2 that in or I can hand it up.

3 THE COURT: Why don't you hand it up to me and
4 let me read it.

5 MR. EDWARDS: I'd be happy to. I was dreading
6 reading it all.

7 THE COURT: Pardon me?

8 MR. EDWARDS: I was dreading reading it all.

9 THE COURT: That's Dr. Bilton?

10 MR. EDWARDS: Yes. And also her medical records
11 go along with that.

12 THE COURT: I'd be glad to look at them if you
13 would provide them to me.

14 MR. EDWARDS: Yes, sir.

15 MR. WAGGONER: Your Honor.

16 THE COURT: Yes, sir. Yes, sir.

17 MR. WAGGONER: Just for clarification, the
18 medical records are being offered by Dr. Bilton and Dr.
19 Pryor, the deponent.

20 THE COURT: All right. You say Dr. Pryor -- have
21 you highlighted what you want me to look at or do you want
22 me to read the whole thing?

23 MR. EDWARDS: We've highlighted what we want you
24 to look at and on the front page.

25 THE COURT: Who's the orange?

1 MR. EDWARDS: That's me.

2 THE COURT: Who's the yellow?

3 MR. ABNEY: I'm yellow. And you'll see there ---

4 THE COURT: What are you, Mr. Wagoner, are you
5 red?

6 MR. WAGGONER: We're invisible.

7 THE COURT: You're invisible. Okay. All right.
8 Give me a chance to look at it and then -- real quick,
9 okay? And then he's -- these are the medical records. Is
10 that correct?

11 MR. EDWARDS: Yes, sir.

12 THE COURT: If y'all want to take a break and
13 move around, feel free to do that while I sit here and
14 read. I don't y'all to sit here and watch me read, okay?

15 (WHEREUPON, the Court stood at recess for a short
16 break.)

17 THE COURT: You weren't at the deposition?

18 MR. ABNEY: Sir?

19 THE COURT: You weren't at the deposition, right?

20 MR. ABNEY: I wasn't there.

21 THE COURT: Did y'all pretty well cover these
22 notes or anything in these notes I need to look at that
23 wasn't covered by the doctor in the deposition questions?

24 MR. EDWARDS: No, and in qualification, I would
25 say that I don't know that every note in that record is a

1 financial stressor. She said she would ---

2 THE COURT: Y'all kept referring to the notes,
3 tab number so and so and so and so.

4 MR. EDWARDS: Yeah. So I wrote every single note
5 that mentioned a financial stressor that was discussed at
6 her deposition.

7 THE COURT: Are you familiar with the doctor's
8 notes? Is there anything you would like to point me to?

9 MR. EDWARDS: Nothing in particular.

10 THE COURT: All right. Let me just look at them
11 very briefly. Did you find anything in his notes in
12 reviewing, Mr. Edwards, about the deposition. He says he
13 couldn't remember if he recorded the removal of the money
14 or not. And that was referred to several times in the
15 deposition. Did you find anything in his notes about the
16 money removal?

17 MR. EDWARDS: A specific reference to ---

18 THE COURT: Right.

19 MR. EDWARDS: No.

20 THE COURT: Okay.

21 MR. EDWARDS: But I think her testimony also said
22 that she probably wouldn't know that.

23 THE COURT: He acknowledged that he knew about it
24 and she had told him about it, in the deposition. It just
25 was not in the notes.

1 MR. EDWARDS: Yes, sir.

2 MR. ABNEY: Your Honor, I think her testimony was
3 that she didn't remember being told about it.

4 THE COURT: I disagree with you. The doctor
5 acknowledged it in the deposition. Now, if you want to
6 point -- I think at one point in time, the question -- who
7 did the deposition, you did?

8 MR. ABNEY: I did.

9 THE COURT: Merritt Abney did the deposition.
10 If you want to point me to something in the deposition,
11 I'll be glad to look at it.

12 MR. ABNEY: Sure.

13 THE COURT: But I think at one point in time it
14 said that she couldn't remember it, and I think later on in
15 the deposition she did acknowledge that there was a
16 problem.

17 MR. ABNEY: On page 12 at line 19, this is after
18 extended discussion, and the question. Would you rather
19 just read it? 12, 19 through 13, 9.

20 THE COURT: It says, I can't remember what she --
21 exactly what during that time was going on. Later on I
22 think he acknowledged knowing about it in the deposition.
23 Anyplace else you want me to look? I mean, he basically
24 acknowledged that was just one in a series since '04, that
25 the husband had done it because of major depression. It

1 was just another episode.

2 MR. ABNEY: I think that was ---

3 THE COURT: He couldn't necessarily carve that
4 out.

5 MR. ABNEY: He couldn't carve out this incident
6 and assign any percentage to it or anything like that.

7 THE COURT: I understand. But he did acknowledge
8 it. And are you trying to tell me the doctor wasn't aware
9 of it. Is that what you're trying to tell me?

10 MR. ABNEY: I mean, what I think -- what I
11 understood the doctor's testimony to be and that she
12 couldn't remember even being told of the events at the time
13 of her deposition and couldn't say whether her conversation
14 with Mr. Edwards was the first she'd heard of it.

15 THE COURT: Well, that's true. But the doctor
16 did acknowledge that that was just another series of events
17 from '04 up until about '08/'09, the latter part of '07
18 that she had major depression because of conduct of her ex-
19 husband. That was just another series that she couldn't
20 say that -- carve that out and put a -- as lawyers want to
21 know, well, what's the percentage of this based upon the
22 causation of this issue. She couldn't do that.

23 MR. ABNEY: And I guess what I was sort of
24 getting at is that it seems to me that it would be
25 difficult to do that if you can't even remember whether or

1 not you were told about it and it doesn't appear in the
2 notes.

3 THE COURT: Okay. You can make your argument at
4 the appropriate time.

5 MR. ABNEY: Thank you, Your Honor.

6 THE COURT: All right. You want to call your
7 next witness?

8 MR. ABNEY: I call Al Katz.

9 THE COURT: Okay.

10 THE CLERK: Place your left hand on the bible and
11 raise your right, please.

12 Do you swear or affirm the testimony you shall give
13 the Court in the trial of this case shall be the truth, the
14 whole truth and nothing but the truth, so help you God?

15 WITNESS: I do.

16 THE CLERK: Thank you. Please be seated. Sir,
17 for the record, if you will please state your name,
18 spelling your last name.

19 WITNESS: Al Katz, K-a-t-z.

20 AL KATZ,

21 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

22 DIRECT EXAMINATION

23 BY MR. EDWARDS:

24 Q. Good morning, Mr. Katz.

25 A. Good morning.

1 Q. Tell me, please, how you have knowledge of the damage
2 that Ms. Katz has suffered in this case?

3 A. I'm married to her.

4 Q. Did you know her from January 2007 until the present?

5 A. I had just met Suzanne probably a week or two before
6 she found out about the bank incident. So I really didn't
7 know her well. But my observation of what she went through
8 and the devastation she had to deal with, it was awful, you
9 know. I had no history, so I'm just telling you as I saw
10 it at the time.

11 Q. That's all I'm asking you, what you saw at the time.

12 A. Yeah.

13 Q. If you don't mind, please, I'd like to ask you a
14 little bit about your background. Can you tell me where
15 you were born, where you went to school, what you do for a
16 living?

17 A. I was born in Greenville, South Carolina. Came down
18 to the Citadel, went to undergraduate school at the
19 Citadel, graduated in '61. I went to graduate school at
20 Georgia Tech, got a Master's Degree. I spent a couple of
21 years on active duty in the military and I went back to
22 Atlanta, Georgia and spent my first career in retailing. I
23 spent twenty-three years working with a business and became
24 President and CEO until it was sold in '85.

25 Q. What did you do then?

1 A. Since '85, I've been a business coach. I work with
2 businesses, primarily family-owned and closely held
3 businesses. I've done that since '85. I've been in
4 Charleston for about twenty years.

5 Q. When you say you work with businesses, what exactly do
6 you do with these businesses?

7 A. I'm a business coach.

8 Q. What is that?

9 A. I work primarily with businesses in helping them
10 achieve better relationships internally and better
11 relationships with outside businesses. Because that's the
12 -- my point of view, the relationships has everything to do
13 with successful businesses. I've written a book about it,
14 A Journey with Mac, and it's all about how to build those
15 relationships.

16 Q. Okay. And that's been published?

17 A. That's been published.

18 Q. Do you have -- did you have any accolades on your time
19 at the Citadel?

20 A. I was an Honor Graduate. I was a Military,
21 Distinguished Military Graduate. I was on the Honor Court.
22 I was on the Somerall Guards. I was a Battalion Officer
23 and battalion staff. I graduated in the upper part of my
24 class.

25 Q. And I believe you served in the military for some

1 period of time?

2 A. After graduate school, I was in the medical service
3 corp as a hospital administrative officer for two years.

4 Q. Honorably discharged?

5 A. Honorably discharged, first lieutenant.

6 Q. Are you -- outside are you engaged in any churches or
7 organizations, anything like that?

8 A. I'm actively involved in our community. I believe in
9 that. I have been on numerous boards like the Gibbs
10 Museum, Charleston Ballet, the College of Nursing at MUSC,
11 organizational boards and private company boards.

12 Q. The arts and ballet, are you a lover of the arts?

13 A. I am.

14 Q. And did you bring that passion for the arts into your
15 relationship with Ms. Katz?

16 A. Yes. In fact, I had season tickets to the concert
17 association, which brings all kind of venues into
18 Charleston and one of them that I wanted to take Suzanne to
19 was an opera that was coming to town.

20 Q. When was this?

21 A. This happened to be the Saturday night after she found
22 out what went on with the bank.

23 Q. But she knew about it before?

24 A. Oh, yes. And we'd planned this probably for a week or
25 so and Suzanne wasn't familiar with the opera. She was

1 very, very excited about going and I took the libretto,
2 which is the book that explains all about the opera in
3 English, and gave it to her so she would have an
4 understanding of what was going on. We were both really
5 looking forward to going, yes.

6 Q. And you showed her that and told her about that
7 earlier that week?

8 A. Earlier that week, yes, sir.

9 Q. Did she, based on your observations, was she excited?

10 A. Very excited.

11 Q. Looking forward to it?

12 A. Absolutely.

13 Q. And in anticipation, fair to say?

14 A. Yes, absolutely.

15 Q. What then happened between the time you put the opera
16 in English, explained it to her and told her about it, got
17 her all jazzed up about it, and then Saturday night when
18 the opera came?

19 A. Well, it was on Thursday that she found out what went
20 on and was just -- I wish all of you could understand how
21 devastated she was. It was something we both looked
22 forward to and yet this was one of the first ---

23 Q. Was it your first date?

24 A. No, it was about the second or third, though.

25 Q. Very early on.

1 A. Very early. I had met her on January the 12th.

2 Q. The newness was still there?

3 A. Absolutely. Still is.

4 Q. And how would you learn of what happened on Thursday
5 night?

6 A. Well, I spoke with her sometime after that. I can't
7 remember when it was, but I spoke with her and she had told
8 me what had happened and she also learned that she had to
9 file a police report.

10 Q. Did she tell you she'd been on the phone with the
11 bank?

12 A. Yes.

13 Q. For several hours?

14 A. I don't remember how long. But, yes, she told me
15 she'd been on the bank [sic].

16 Q. And as she was describing it to you, what was her
17 demeanor? Was she upset?

18 A. Yes, she was.

19 Q. Could you describe how she seemed to you?

20 A. She was angry and frustrated and mad and crying and
21 just, just really -- my heart went out to her. I mean, it
22 was really -- it was something that touched me.

23 Q. So she told you that the bank had told her she had to
24 go file a police report. Is that right?

25 A. Yes. And also a fraud report.

1 Q. And also a fraud report. And so did you -- were you
2 with her when she did that?

3 A. Well, we went Saturday night before the concert to
4 file that police report because there seemed to be some
5 urgency to it. And so we went. And she didn't want to go
6 into the police station, which was on Lockwood. And so
7 there was a policeman that just was driving up in his
8 patrol car and he came up in the parking lot where we were.
9 And I asked him how do we go about filing a police report,
10 that Suzanne was really upset and she was just physically
11 trembling, she didn't want to go into the police station.

12 And he said well he'll do it. And he went back to his
13 patrol car and got the paperwork and he sat next to our car
14 and we filled it out in the parking lot.

15 Q. So she didn't even go into the police station?

16 A. She wouldn't go in.

17 Q. The officer had to come out to her?

18 A. Yeah.

19 Q. She was so ---

20 A. She wouldn't go in, no.

21 Q. Was she afraid?

22 A. She was afraid and just -- yes, very much afraid.

23 Q. So you did that and you went to the opera. How was
24 she that night?

25 A. Not much better. It was very disappointing because,

1 again, we were looking forward to it and it really impacted
2 the whole evening and even the next day. On Sunday we went
3 to church and it was still a problem.

4 Q. Did y'all go to the same church?

5 A. Yes.

6 Q. Having done so since, at least since this time?

7 A. Yes. St. Phillips.

8 Q. St. Phillips downtown?

9 A. Yes.

10 Q. The Episcopal Church?

11 A. The Episcopal Church.

12 Q. And are you actively engaged in that church?

13 A. I am on the Vestry. I am involved with the men's
14 ministry. Alpha program, which is basic Christianity.
15 Yes, I'm very active in it.

16 Q. Is she actively engaged as well?

17 A. Absolutely.

18 Q. And you all have people within the church who you
19 asked -- did you pray for this, what happened that night.

20 Did you pray about that that day at church?

21 A. Yes, we did.

22 Q. Have you prayed about it subsequently?

23 A. Daily.

24 Q. Have you prayed with others in your church about it?

25 A. Yes, we have.

1 Q. Is that something that you have done and to your
2 knowledge that's something she has done as well?

3 A. She is on the prayer list.

4 Q. She's on the prayer list for people praying for her?

5 A. For her, yes.

6 Q. As a result of what we're discussing here today?

7 A. Absolutely. And we prayed with others and with the
8 Priest. Yes, we committed this in prayer.

9 Q. And then the next day was a Monday, the 22nd, I
10 believe. Do you remember that day?

11 A. Yes.

12 Q. What did you do on that day?

13 A. We went to the bank. I went with Suzanne. She asked
14 me to go. And I went with her and we went up ---

15 Q. Had she calmed down or was she still upset?

16 A. No. She was still really agitated. And we went to --
17 I remember going up on the elevator to private banking and
18 we met the last witness.

19 Q. Ms. Brisson?

20 A. Yes.

21 Q. Did you recognize her from that meeting in 2007?

22 A. Yes. I didn't remember her until I saw her in here
23 today.

24 Q. So you met with her and you heard her testify earlier?

25 A. Yes.

1 Q. And is there any -- well, y'all went to her to discuss
2 the situation and money was -- phone calls were made and
3 money was placed in the account. Did y'all discuss how it
4 was that this had happened from the bank's end?

5 A. One of the things I quickly learned about Suzanne is
6 she's very inquisitive. She asked a lot of questions. And
7 she was there asking lots of questions trying to resolve
8 how this all occurred. Ms. Brisson was unbelievably nice.
9 I remember how supportive she was and how much she tried to
10 calm down Suzanne and tried to help her understand what
11 went on. I don't remember how long we were there, but I
12 can tell you, she did an excellent job representing the
13 bank.

14 Q. But she didn't know the answer to those ---

15 A. Had no idea.

16 Q. Didn't know how it happened ---

17 A. No.

18 Q. --- in internet land, how that works?

19 A. No.

20 Q. But she was nice, wasn't she?

21 A. Absolutely.

22 Q. And you heard her testify that further investigation
23 would be required as to the mechanics of how it worked.

24 A. Yes.

25 Q. The computers, the internet and all the on-line

1 conditions because she didn't know. Is that ---

2 A. That's correct.

3 Q. --- accurate? And she also said she didn't give y'all
4 any real instructions on how to do that?

5 A. No.

6 Q. Is that true?

7 A. Yes.

8 Q. She said you needed to ask somebody else but didn't
9 tell you who to ask?

10 A. No.

11 Q. Did you then after that meeting continue -- do you
12 know if Ms. Katz continued to contact the bank and ask
13 questions?

14 A. Yes. Because I helped her with that.

15 Q. Did you ever go with her to the bank to visit any bank
16 employee after that first meeting?

17 A. No.

18 Q. But you know that she had been in contact with the
19 bank?

20 A. I know because I helped her write the letters.

21 Q. Okay. The letters that were written to Ken Lewis?

22 A. Ken Lewis, right.

23 Q. The correspondence you wrote to Mr. Navarez we talked
24 about yesterday?

25 A. Yes.

1 Q. And you recall in those letters what was asked for was

2 a full ---

3 A. A full explanation.

4 Q. An investigation and explanation?

5 A. Yes. Yes.

6 Q. And did you ever get one?

7 A. No.

8 Q. All they ever told you was they'd left him on the

9 account. Isn't that right?

10 A. Yes.

11 Q. But they never told you how it was that that happened

12 internally within the banking system itself?

13 A. No.

14 Q. Is that what you were hoping to hear some kind of

15 explanation other than, well, we just goofed and he got on

16 there?

17 A. Yes. I became curious too. I wanted to find out how

18 something like this could happen.

19 Q. Okay. And you never learned anything about Dr.

20 Jernigan's account ended in 4502?

21 A. No.

22 Q. I mean, no discussion about that?

23 A. No.

24 Q. No knowledge about any type of restriction, freeze,

25 any issue at all?

1 A. No. I never heard those terms until we started
2 getting ready ---

3 Q. The only information as you understood from the bank
4 was that he had to have done it deliberately and a police
5 report was required to be filled out because of that?

6 A. Yes, and a fraud report.

7 Q. Now, your relationship essentially began at this
8 point. How long was it before you got engaged?

9 A. We got engaged July of '08.

10 Q. Okay. So about almost a year and a half later?

11 A. Yes.

12 Q. And at that point the criminal investigation had died,
13 died down, gone away?

14 A. I didn't hear you.

15 Q. The criminal investigation was no longer pending,
16 correct?

17 A. That's correct.

18 Q. And that being behind her, how was she doing at his
19 point?

20 A. Well, this has been an issue in our whole family.
21 It's been an issue with Suzanne and that becomes my issue.
22 It's been an issue with her sons. As I told you earlier,
23 it's all about relationships and when you cannot have
24 trusting relationships that becomes a problem in any kind
25 of family unit and that's what's going on.

1 Q. And then y'all were engaged and got married. When
2 were you married?

3 A. December 21st, '08.

4 Q. Okay. And then a period of time goes by and this
5 lawsuit begins. Do you remember that?

6 A. Oh, yes.

7 Q. Okay. Tell me what you know about that?

8 A. Well ---

9 Q. How did you learn about the lawsuit? Ms. Katz told
10 you?

11 A. Yes, she told me.

12 Q. How did -- what did she say to you about ---

13 A. Again, she was -- she had the full range of emotions.
14 I mean it was everything from just total anger to sadness
15 to frustration and fear. I think fear was a big thing.

16 Q. What was she fearful of?

17 A. The process, going through this, talking to more
18 lawyers, dealing with the court.

19 Q. Was she afraid of the impact it would have on her
20 relationship with her sons?

21 A. And me.

22 Q. And you as well?

23 A. Yes.

24 Q. Did she cry?

25 A. Totally, yes.

1 Q. When she first was served?

2 A. Yes.

3 Q. Has she cried on other occasions?

4 A. Many times.

5 Q. Over this issue?

6 A. Too many to count.

7 Q. Has she lost sleep?

8 A. She's lost sleep. She's had terrible headaches.

9 She's -- as you already know, she's gone to doctors, she's
10 taking prescribed medications. She's had all kinds of what
11 I think are results of just depression and anxiety.

12 Q. Physical manifestations?

13 A. Physical, yes. She has irritable bowel syndrome.

14 Q. And has that affected her?

15 A. Oh, yeah. And she has her neck and -- gets all tensed
16 up. You can just literally feel the knots in her neck and
17 back.

18 Q. And you've rubbed them out, haven't you?

19 A. I've tried to, yeah.

20 Q. Many times?

21 A. Many times, yes. As recently as this morning.

22 Q. As recently as this morning. And, in fact, you went
23 with her, didn't you, to go see in addition to Dr. -- you
24 didn't go with her to see Dr. Crotts, did you?

25 A. I have been with her.

1 Q. And y'all -- did you discuss this issue?

2 A. Yes.

3 Q. And that was relating to her ...

4 A. Depression, anxiety, state of mind.

5 Q. On more than one occasion or just on one occasion?

6 A. I only remember going there once.

7 Q. But you did go in there?

8 A. Yes.

9 Q. You also went with her to a guy named John Zinzer.

10 Isn't that right?

11 A. Numerous times.

12 Q. Who is John Zinzer?

13 A. John Zinzer is someone that Suzanne met. He deals in
14 conflict resolution and she met him at the Center for Women
15 at some function they were having and they started talking.
16 She met him before I did, but I went with her as I became
17 -- as I started spending more time with her. I went with
18 her to John Zinzer and we spent a lot of time talking about
19 this issue.

20 Q. On many occasions?

21 A. On many occasions.

22 Q. And on those many occasions that you were present, did
23 this topic come up?

24 A. Absolutely.

25 Q. This conflict?

1 A. Yes.

2 Q. The conflict with ...

3 A. Yes.

4 Q. And y'all obviously worked through that, tried to work
5 through that with Mr. Zinzer [phonics] in addition to Dr.
6 Pryor?

7 A. Yes.

8 Q. And she also went to see her primary doctor, isn't
9 that right?

10 A. That's correct.

11 Q. And did she -- to your knowledge, the physical
12 manifestations that you discussed earlier resulting from
13 this issue with the bank, was that in any way related to
14 her visits with Dr. Anderson?

15 A. It was.

16 Q. And go back to Zinzer. Did he charged for his
17 services?

18 A. Every bit of them.

19 Q. He did not do it for free?

20 A. He did not do it for free.

21 Q. And did he give you a discount?

22 A. Did he what?

23 Q. Did he give you a discount in rate?

24 A. No.

25 Q. Do you recall how much it was that he charged?

1 A. A hundred dollars a visit.

2 Q. And do you know how much he charged since January
3 2007?

4 A. No, but it's in the thousands. I don't know how much.

5 Q. I'm going to hand you a document from Dr. Zinzer and
6 ask you if that refreshes your recollection as to the
7 number of visits and the amounts charged for those
8 services?

9 A. Okay. Well, I did not know it was discounted, but it
10 is a hundred dollars an hour. His total bill, all sessions
11 including Ms. Katz in a period was just more than five
12 thousand dollars.

13 Q. And you testified that the main issue that was
14 discussed was the conflict resolution, particularly as it
15 relates to the bill pay issues of Dr. Jernigan?

16 A. That's correct.

17 Q. That's all I have. Thank you, sir.

18 THE COURT: Cross-Examination. Mr. Waggoner?

19 MR. WAGGONER: Nothing, Your Honor.

20 MR. ABNEY: No cross.

21 THE COURT: No cross? Okay. You may step down.

22 Thank you very much. You may call your next witness.

23 MR. EDWARDS: Suzanne Katz.

24 THE COURT: Okay.

25 THE CLERK: Do you swear or affirm the testimony

1 you're to give the Court in the trial of this case shall be
2 the truth, the whole truth and nothing but the truth, so
3 help you God?

4 WITNESS: Yes.

5 THE CLERK: Thank you. Please be seated. Again,
6 for the record, if you'll please state your name, spelling
7 your last name.

8 WITNESS: Suzanne Boone Katz, K-a-t-z.

9 SUZANNE KATZ,

10 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

11 DIRECT EXAMINATION

12 BY MR. EDWARDS:

13 Q. Good morning, Ms. Katz.

14 A. Good morning.

15 Q. You talked, covered a good bit, a good bit of things
16 yesterday and so we don't need to rehash. But there are
17 some things I'd like to ask you about and I'll pass you
18 along to anybody else that wants to ask you questions.

19 Now, you're married to Al Katz and he mentioned that you
20 were involved in the Church. Is that right?

21 A. Yes.

22 Q. Are you involved in any other organizations?

23 A. I'm involved in a lot of things like Junior League and
24 Daughter's of American Revolution. A lot of organizations
25 like that.

1 Q. And do you also -- what do you do in the church? Do
2 you have any particular title or membership?

3 A. Al and I taught Alpha, which is a basic Christian
4 Education course. We are both Dave Ramsey counselors.

5 Q. That's a financial responsibility?

6 A. Like financial peace. But we're also counselors for
7 Dave Ramsey.

8 Q. All right. And do you work?

9 A. I work part-time as an interior designer.

10 Q. What's the name?

11 A. Bailey House Interiors.

12 Q. And that's your own business?

13 A. That's my business.

14 Q. And you are a mother as well, is that correct?

15 A. I'm a mom. I'm a full-time mom.

16 Q. All the time, twenty-four hours a day, right?

17 A. (Affirmative nod.)

18 Q. How many children do you have?

19 A. I have two sons.

20 Q. What are their names?

21 A. Carter and Case.

22 Q. And the father of Carter and Case is?

23 A. Is Floyd, their dad.

24 Q. How old are they?

25 A. Carter was twenty-seven on September 5th, and Case is

1 twenty-five.

2 Q. And do you speak with them often?

3 A. I speak with them every day.

4 Q. And they're not in Charleston. Is that right?

5 A. Case is in New York City in graduate school and Carter
6 is in -- graduated from MIT and he works in the technology
7 field in Boston.

8 Q. And how long have they been out of the home, so to
9 speak?

10 A. Well, Carter went to college and Case went to boarding
11 school before that, but they were home for summers and
12 breaks.

13 Q. So at least seven or eight years?

14 A. They've been out a while.

15 Q. And you still talk to them every day?

16 A. Yeah. We're real close.

17 Q. When was the last time you talked to them?

18 A. They both called me last night.

19 Q. Why did they call you last night?

20 A. Check-in. Say, Mom, hi, what you doing? I mean, we
21 have a very kind of a relationship where they'll just call
22 and say, hey, mom, I just went to see a great movie. You
23 might want to put it on the que for Netflix or, you know,
24 we went to see something great. We have a real kind of a
25 free flowing -- they keep up, I just read an article or

1 I'll -- it's real ---

2 Q. Is it fair to say that you're that type of person in
3 relationships where you communicate and conversate, you
4 engage in ---

5 A. Yes.

6 Q. --- those types of activities with whoever it is that
7 you come into contact with?

8 A. Right.

9 Q. And do they know what they're going through here?

10 A. Do the boys?

11 Q. Yes.

12 A. Carter knows part of it. Case does not know we're in
13 court.

14 Q. He does not know?

15 A. He does not know that we're in court.

16 Q. And we'll talk more about your sons in just a minute.

17 I'd like to now turn back to 2004 and I would like to
18 specifically go to the meeting that you had with Mr. Boyle
19 in May. Do you remember that meeting?

20 A. I do.

21 Q. Now, at this time, you were married or separated?

22 A. Separated.

23 Q. And Dr. Jernigan had moved out?

24 A. He had moved out, correct.

25 Q. And we talked about it earlier, one of the issues was

1 between the two of you, probably the main issue was
2 financial issues?

3 A. The main problem between us was money, yes.

4 Q. And as a result of that, you were going to the bank to
5 have the accounting in the 8540 be transferred solely into
6 your name and his access/ownership would be removed. Is
7 that right?

8 A. That's right.

9 Q. Now, do you know -- did you meet at the bank?

10 A. Yes. We didn't go together. We met at the bank.

11 Q. You and Dr. Jernigan ---

12 A. Yes.

13 Q. --- met at the bank? Do you remember which branch?

14 A. Yes. It's the funny looking branch on Calhoun Street
15 near the hospital. It comes across the road. I think it's
16 closed now.

17 Q. But it was open at that time?

18 A. It was open.

19 Q. All right. And so you drove there and met. How long
20 have you been a Bank of America customer?

21 A. I've been a Bank of America customer for years. I
22 think they had another name a long time ago.

23 Q. NationsBank?

24 A. Forever.

25 Q. Since before they were Bank of America?

1 A. I think they might have been something else before

2 then. I can't remember. Many, many, many years.

3 Q. And you were a premier customer?

4 A. Yes.

5 Q. So you met at the office and you met with Mr. Boyle.

6 Is that right?

7 A. Yes.

8 Q. Do you remember him?

9 A. I do.

10 Q. Could you describe him?

11 A. Not accurately. But he was a young man. I know he
12 was young and I would say thirty, maybe. Brown hair. Very
13 pleasant.

14 Q. And did you meet in his office?

15 A. We did. We went into one of the back offices.

16 Q. You and Dr. Jernigan?

17 A. Yes.

18 Q. And did you and Dr. Jernigan interact at all?

19 A. Yes. Very unpleasantly.

20 Q. Did you have an argument?

21 A. We did.

22 Q. In the office?

23 A. In the office.

24 Q. In front of Mr. Boyle?

25 A. In front of Mr. Boyle.

1 Q. So there was conflict then and there in front of the
2 bank employee?

3 A. There was?

4 Q. Okay. So why were you there? Can you tell me in your
5 own words why you were there?

6 A. I was there to -- well, we were separating things and
7 that was the account that I had always used. He had -- his
8 name was on it, you know, for I guess the reasons if I
9 should die or be disabled, he could access the account, but
10 he did not really use that account. I used that account.
11 And so, according to our lawyers, we needed to start
12 separating things.

13 Q. And that's what you wanted to do?

14 A. And I did, yes.

15 Q. And you told that to Mr. Boyle?

16 A. Yes. Very clearly. And so I -- we talked about that
17 account and, you know, whether my ex-husband could be
18 removed or did I need another account. And he said, oh,
19 no, this is -- we can get him off. And I am very, very,
20 very particular about my money and about details like this.
21 And so I asked repeatedly, are you sure? Are you sure?
22 Because I don't want him to have any access to my account.
23 Are you sure? Well, yes, yes, yes, yes. And we signed an
24 affidavit to that effect. And I mean, I still asked. I
25 wanted complete reassurance and I was told, yes, this is no

1 problem. He will be removed in every way. Will he have
2 any access? No.

3 Q. And did you then engage -- did he ever tell you that
4 he didn't -- it was a difficult process?

5 A. No.

6 Q. And it would take some time?

7 A. No.

8 Q. And he would let you know what happened?

9 A. No.

10 Q. You thought it was done or would be done?

11 A. Sure. We were signing the forms. My impression was
12 that he would do it in the next few minutes or hour,
13 whatever, but it was a done deal. And particularly, my
14 husband had signed an affidavit he would not have any
15 access to the account. And so I thought there was some
16 protection from his signature in the next, you know, time
17 until it was official.

18 Q. And did you engage in conversation with Mr. Boyle
19 about any issues that existed between you and Dr. Jernigan?

20 A. Yes. I expressed to him my frustration with the
21 financial issues. And actually we had had a joint checking
22 account that had, I don't know, five or six thousand
23 dollars in it to repair our roof. And the way this whole
24 separation thing started, he took that ---

25 Q. Was that a joint checking account or joint savings?

1 A. Savings. And my ex-husband had taken that out without
2 telling me. And when I discovered that, I was very
3 distraught because he just took the money and wouldn't tell
4 me what he did with the money. And so I had already one
5 experience, even though that was a joint account, where he
6 took something that belonged to both of us to repair our
7 roof and wouldn't tell me where that was and what was going
8 to happen with that. And so I was very, very clear to make
9 sure.

10 Q. And you discussed that with Mr. Boyle?

11 A. I did. I did.

12 Q. And that issue, whatever that issue may have been was
13 resolved -- all of the financial issues relating to your
14 marriage were resolved?

15 A. I guess.

16 Q. You had subsequent ---

17 A. As best it could be, yes.

18 Q. You're not the only divorcee that's had ---

19 A. Pardon?

20 Q. You're not the only divorcee that's ever had to go
21 back to Court, nor is Dr. Jernigan. When you met and spoke
22 with Mr. Boyle, did you place your trust and confidence in
23 him?

24 A. I did, totally. He was just as nice as he could be.

25 He was just as nice as he could be.

1 Q. Were you upset at that moment that day after having an
2 argument with Dr. Jernigan, discussing these issues with
3 him?

4 A. Well, sure. That is the kind of thing that I didn't
5 want. I didn't want an argument ---

6 Q. Visibly upset?

7 A. --- in the bank. He knew I was upset.

8 Q. Did you expect that he would do what they said they
9 were going to do?

10 A. Of course.

11 Q. Now, let's go from that meeting to January of 2007.

12 At this point, your divorce is over with?

13 A. My divorce is over.

14 Q. You had met Mr. Katz?

15 A. I had met Mr. Katz.

16 Q. And you at that time were known by the last name of
17 Boone?

18 A. Boone. I took my maiden name back, yes.

19 Q. So you were not Suzanne Katz at that time?

20 A. Right. I was Suzanne Boone.

21 Q. And you had just met Mr. Katz? Were you happy?

22 A. Oh, yeah.

23 Q. Did you think that the issues had generally been put
24 in the past between you and your ex-husband?

25 A. Yes. And I think they had been put in the past as

1 much as any two people can ever be divorced and have
2 everything wonderful. I thought they had been put in the
3 past prior to meeting Al, too. I mean, my life was in a
4 good place and I was still -- you know, there's adjustments
5 and things, but, yes.

6 Q. And at the time you had some issue that was discussed
7 yesterday about Quadro?

8 A. Yes.

9 Q. Something that y'all had agreed to in resolution of
10 your divorce, but there was a dispute as to how that was to
11 work?

12 A. Right. It was something that was in our divorce
13 agreement, in our separation agreement that had gone to the
14 Court. The Court had signed-off on and it was something he
15 needed to do and he didn't want to do it.

16 Q. But it ultimately got resolved?

17 A. It did.

18 Q. Now, you heard Mr. Katz talk about the night that you
19 learned of it. How did you feel? Tell me how you learned
20 of it, what you were doing, how you discovered that the
21 funds had been withdrawn from your account and then the
22 process with the payment, how it all affected you?

23 A. I had two friends and we watched -- sometimes a third
24 friend -- we watched Grey's Anatomy. We watched some other
25 shows too, and they would come to my house and we would get

1 pizza or something ---

2 Q. On a weekly basis?

3 A. Pardon?

4 Q. On a weekly basis?

5 A. Pretty much. As much as everybody was available to

6 get together with regularity. I think at that point we

7 were meeting every week. So Julian Buxton and Rena Provost

8 came over with pizza and we were going to get setup to

9 watch TV and I went and checked my, I checked my banking,

10 on-line banking. And I realized when I looked at the

11 screen that something was wrong and that -- the first thing

12 I saw was that there had been some overdraft and money put

13 back in. Well, I never overdraft, ever. So there was an

14 overdraft and then I think some more money had gone in and

15 then I noticed that money had gone out for different things

16 that I didn't have.

17 Q. Things that you didn't know about?

18 A. Right.

19 Q. Payments to people that you couldn't place?

20 A. Right. And I pay my bills every month at the same

21 time and I pay all of my bills at once.

22 Q. Did you then and do you now check your account

23 frequently?

24 A. Yeah. That's part of me.

25 Q. What you do?

1 A. What I do.

2 Q. So you discovered this and called the bank. Tell me
3 about that process?

4 A. Well, I did. I kept looking at it and looking at it,
5 trying to figure out what in the world had gone on. And so
6 I called out to my friends and I said, something strange is
7 going on with my bank account. And so I got an 800 number
8 either off the screen or somewhere, I don't remember, you
9 know, on the banking information and I got someone, and I
10 can't remember who the first person was, but ---

11 Q. Did the first person resolve the issue?

12 A. Pardon?

13 Q. Did the first person resolve the issue?

14 A. No.

15 Q. How many people did you speak with?

16 A. Several. I can't tell you really how many.

17 Q. How long were you on the phone?

18 A. I was on the phone about four hours. And I kept
19 getting moved up to different people. It seemed like it
20 was going higher and higher. They weren't local people.
21 They were -- it seems like they were not even in South
22 Carolina.

23 Q. From the 800 number?

24 A. Yeah. And then they would switch me to another
25 department, you know, they would -- and they'd say, we're

1 going to switch you. So anyway, I mean, anyone was very,
2 very helpful. They were very nice and helpful.

3 Q. When you first checked your account and saw these
4 transfers, what did you think had happened?

5 A. Well, I thought that somebody had gotten into my
6 account.

7 Q. Did you tell that to the bank official?

8 A. Well, yeah. I mean, I said, money has come out of my
9 account and I don't know where it's gone and I don't know
10 if somebody else has gotten into my account. I don't know
11 what's gone on.

12 Q. You had no idea who it could have been?

13 A. No, none whatsoever.

14 Q. And you never -- that was your account at that point,
15 correct?

16 A. It was totally my account and no one had access to my
17 account.

18 Q. You never gave anybody -- you never gave Dr. Jernigan
19 certainly your access ID or your PIN number?

20 A. No. My kids didn't have it. Nobody had it. It was
21 totally my account.

22 Q. And ultimately did some bank employee tell you who
23 they thought had done it?

24 A. Well, yes. As this continued and this night as they
25 were trying to figure out things, at one point they thought

1 that it was like, I guess, identity theft or that somebody
2 had gotten my account and they told me that they would
3 refund the money. And so I said, okay.

4 Q. The bank employees told you they would refund -- the
5 bank would refund the money?

6 A. Yes. They told me that the bank would refund the
7 money. But then later, and I can't remember if someone
8 called me back or they just put me on hold or what, but
9 finally I talked to someone who said -- they asked me a
10 question. And they said, do you know a Floyd E. Jernigan?
11 And I said, yes, that's my ex-husband. Why? And ---

12 Q. Is that when they told you you had to go to the
13 police?

14 A. Well, no. At first they said that's who's gotten into
15 your account. This is the person who has accessed your
16 account. And I mean, I was stunned, absolutely stunned. I
17 could not understand how he could possibly have gotten into
18 my account. And I looked at this -- I mean, we had a lot
19 of discussion about this. I mean, I asked how did this
20 happen? Well, we don't know. I mean, they were nice to me
21 but there was not an answer as to how -- they did not offer
22 any information. As a matter of fact, they sort of cut it
23 off at that point where they told me that they could not
24 give me the money back because it was my ex-husband. And I
25 said, well, I mean, I don't understand, you know, why? And

1 they just said, we can't because it's your ex-husband and
2 you're going to have to go and file a police report about
3 this and then you're going to have to go to the bank and
4 file a fraud report and when that's done, then we'll, you
5 know, work this out.

6 Q. And did you do what the bank told you?

7 A. I did.

8 Q. Did you want to file a police report against Dr.
9 Jernigan?

10 A. No, I did not want to. This is the father of my
11 children. And, you know, we have had plenty of problems,
12 but this seemed to go way beyond my imagination of anything
13 anybody, you know, would do.

14 Q. And the bank didn't tell you any different, did they?

15 A. Like what?

16 Q. That it could have been some kind of accident?

17 A. Oh, no, no, no. The bank actually, like I said, just
18 sort of at that point, you know, they -- they did say that
19 he, in further conversation that night, had to have
20 selected my account to do this.

21 Q. They told you it would have to take some kind of
22 deliberate action?

23 A. They told me that he had to take deliberate action.

24 Q. They never told you anything about a restriction that
25 was placed on his account?

1 A. Nothing. Nothing.

2 Q. Didn't tell you about a freeze on his account?

3 A. No.

4 Q. Never told you anything about that?

5 A. I mean, like I said, the people were very nice. But,

6 I mean, they were very clear that this wasn't an accident.

7 Q. And when did you first learn about the restrictions,
8 the freeze, whatever you want to call it, that was actually
9 on his account? At or about the same time, when did you
10 learn that information?

11 A. Well, I'm really learning about it now. And there may
12 have been a time in the last month or so that that came up.
13 But ---

14 Q. But they never in your writings to Ken Lewis, they
15 never mentioned that either?

16 A. Never.

17 Q. In your phone conversation?

18 A. Never.

19 Q. You asked them specifically, didn't you?

20 A. I really wanted to know. I wanted to know exactly how
21 it happened. Because there was basically an allegation
22 from the bank telling me that my ex-husband, the father of
23 my children, had stolen money from me, essentially, is the
24 message. And to get my money back I had to go to the
25 police and file a police report and then go to the bank.

1 And I was very disturbed about this whole thing. And it
2 also put me in overdraft into my home equity loan. So my
3 home equity loan was tied to this. So that was ---

4 Q. And did they ever credit that back for you?

5 A. Well, they did, but that was another thing, too. I
6 mean, first the money went back into my regular checking
7 account. Then, you know, I had to take some steps.

8 Q. You had to do it?

9 A. I think, yeah, I had to put it back because there was
10 -- or they had to -- I don't know. I can't remember
11 exactly. But there was like a few pennies of interest or
12 something, which they cleaned up.

13 Q. But at that moment when you went and met with the
14 bank, they didn't credit your account. They didn't credit
15 your line of credit, did they?

16 A. No, they did not.

17 Q. Now, after you filed the police report and you heard
18 your husband discuss how frightened you were, is that an
19 accurate assessment?

20 A. That's very accurate.

21 Q. You were afraid to get out of the car to even go into
22 the police station?

23 A. I was. I was just -- I was sick about it. I was just
24 absolutely sick about it.

25 Q. Nauseous sick?

1 A. Just sick and shaky. I remember I was so shaky and I
2 remember Al was so excited about taking me to the opera.
3 I'd never been to the opera, never particularly been
4 interested in the opera, but Al had talked about it and had
5 written all of this down so I could understand it and I
6 thought that was the kindest thing to just introduce me to
7 something that I wasn't familiar with. And I was looking
8 forward. It was -- his excitement was so contagious and,
9 you know, like I said, we had just met each other and I
10 thought he was a pretty spectacular man to take me to the
11 opera and ---

12 Q. And you were looking forward to it?

13 A. I was looking forward, yes, very much.

14 Q. Did you get to enjoy it that night?

15 A. I don't really remember anything about that opera, if
16 you want to know the truth.

17 Q. Consumed by this issue?

18 A. All I could think about.

19 Q. So you went and filed the police report after the
20 bank. Did you then after that first meeting with Ms.

21 Brisson, did you continue to seek answers from the bank?

22 A. I did. And I would, I would like to correct something
23 if I may ---

24 Q. Please.

25 A. --- about her testimony. She actually called him,

1 called my ex-husband to ask him about putting the money
2 back. She testified that she had not talked to him at that
3 time, but that's incorrect. We were in there. My now
4 husband and I were in there in her office in Premier. I
5 had never seen her before, I've never seen her after until
6 this and I still have her card. And she actually called
7 and she had her computer screen and I don't know if she
8 asked him if he would be willing to put this money back and
9 he said, yes. And ---

10 Q. You heard this?

11 A. I think he was, I think he was on the speaker because
12 we could hear it. And then he also said to her, I also --
13 can I transfer some more money because I need to put some
14 more in and it was alimony, and then that came in as well.

15 Q. So he put ---

16 A. He did two things. He put the money back and the
17 alimony while we were in her office.

18 Q. And Ms. Brisson had indicated to you that this could
19 have been some sort of accident on behalf of Dr. Jernigan?

20 A. No. As a matter of fact, she was gracious, is the
21 word that comes to mind. She was, at this point, the bank,
22 I felt, was being really nice, gracious to me,
23 understanding my frustration. And she actually talked to
24 me as a woman about being -- protecting myself.

25 Q. And that's how you felt after that first meeting as to

1 her conduct in that meeting?

2 A. Oh, I thought she was wonderful. And I felt very much
3 that she spoke to me woman-to-woman about taking care of
4 things and whatever.

5 Q. After that meeting and your subsequent request for
6 information, did you ever get any kind of answer as to how
7 it happened?

8 A. I never got any answer. And I've talked to different
9 people. I was just referred to different people. It was
10 almost always on the phone. There would be somebody in
11 Tampa. There would be somebody -- I kept saying, I need to
12 know how this happened. I need to know how this happened.

13 Q. Nobody gave you an answer?

14 A. Nobody gave me an answer.

15 Q. Did they give you any kind of explanation other than
16 Dr. Jernigan had access to your account?

17 A. No other explanation whatsoever.

18 Q. Now, we heard -- why didn't you just call Dr.
19 Jernigan?

20 A. The bank that night on the phone, and I wrote that
21 down, it's on my -- on a piece of paper that was up here
22 the other day. The bank said, do not call him. I was not
23 -- they were absolutely specific, do not call him. So that
24 made me think that they were going to look into it
25 somewhat, too. I mean, you know, they didn't -- I didn't

1 understand ---

2 Q. They prohibited you from doing your own investigation?

3 A. Right. And we didn't truthfully talk. But this is
4 something that I probably would have called him about. I
5 mean, this was big. I mean, I felt very violated. I am
6 very personal about -- I'm very friendly and I will talk to
7 people, but when it comes to my personal business and my
8 money, I am very, very protective.

9 Q. Did you feel like your privacy had been invaded?

10 A. Well, I felt like -- yes. And what concerned me is
11 that at some point I was told, and I can't remember the
12 point, that he could actually look into my account and see,
13 see my account.

14 Q. After the fact?

15 A. Yes, after the fact. Which was very -- you know, part
16 of that time we were in divorce negotiations.

17 Q. How did that make you feel?

18 A. Pardon?

19 Q. How did that make you feel?

20 A. I felt completely violated. I used a debit card for
21 everything. I carried no cash. So you could track
22 everywhere I went, what I did, what I spent by my on-line
23 banking debit.

24 Q. So you feared that he had the ability to view it if he
25 wanted to. You don't know if he did or not?

1 A. No. But I now know that he did because he said it in
2 Court yesterday.

3 Q. But you did fear -- after learning that he had access
4 the whole time, you feared that he had that ability in your
5 divorce, which involved financial issues.

6 A. Oh, absolutely. The whole time that, you know -- yes.

7 Q. Now there was testimony yesterday about after you
8 filed the police report, there was a comment heard from
9 your son, Carter, about something about overdraft
10 protection.

11 A. Right.

12 Q. And you investigated that issue with the bank as well,
13 didn't you?

14 A. Yes. And that was actually fairly early on. And so I
15 did, as a matter of fact -- I'm very thorough and the bank
16 told me that that couldn't happen. And then I went to the
17 bank to get basically a statement to that effect. So I got
18 that statement. But then that statement had been an
19 updated statement, but one of the bankers actually happened
20 to have the one that was ---

21 Q. A written policy?

22 A. The policy, yeah, that went back a while.

23 Q. And you heard the bank personnel testify here that
24 that couldn't happen. And in fact they wrote you and said,
25 checking account to checking account could be quote unquote

1 overdraft protection?

2 A. Right. Right.

3 Q. Did they ever tell you that maybe he got the term
4 wrong, maybe he thought it was something else and maybe he
5 thought it was a freeze that was on his account, could have
6 been what he was thinking was overdraft protection?

7 A. No, they never discussed anything like that.

8 Q. All they told you was that can't be?

9 A. That can't be.

10 Q. All right. So having heard that from your son, how
11 did that affect you, the fact that your son -- you'd heard
12 that Dr. Jernigan was in overdraft protection. Whether or
13 not he said that word or not or meant restriction, freeze,
14 whatever he meant, your son said to you that Dr. Jernigan
15 told him overdraft protection. You heard that and then the
16 bank tells you, no, no, no, that can't be. How did that
17 affect you?

18 A. Well, there's -- then there becomes an issue with my
19 son who's -- the bank's telling me one thing, then he told
20 our son something else, and then there's that -- you know,
21 in terms of our family dynamics, what do you do? What do
22 you think and what do you do?

23 Q. Your child is now placed in the middle of this?

24 A. My child is now in this. The other child didn't know,
25 but this child is in this. I didn't want to say anything

1 bad about his dad.

2 Q. Sure. And did that cause you distress?

3 A. Well, it did. It caused me -- because we're so close
4 and we talk. I mean, and then there's this big elephant in
5 the room of, you know. I mean, he told it to me like his
6 father mentioned it to him, which I thought was really
7 strange because from all the years I've lived with Floyd,
8 he doesn't offer an awful lot of information, and I just
9 couldn't see that he would just tell Carter, oh, by the
10 way, I overdrafted my account and it went into mom's and
11 your grandmother's.

12 Q. Did it upset you to think that he was -- his mother
13 had filed a police report, obviously thinking a crime had
14 been committed.

15 A. Right.

16 Q. And his father had said that it was an overdraft ---

17 A. Right.

18 Q. --- issue and that can't be. Did that upset you
19 knowing that your son saw two different things and didn't
20 know ---

21 A. I think that's the part where the bank had told me
22 that that couldn't happen. And then I really went to
23 investigate that to make sure, to be certain.

24 Q. And you said your son, Case, had not -- where was Case
25 at this time?

1 A. Case was in Italy. Case had gone to study abroad that
2 semester. And so Case had already gone and did not know
3 anything. And if Case knew anything, it was very little.
4 If he got any from his brother, I don't know.

5 Q. You don't remember talking about it?

6 A. I don't remember. And, actually, I went to visit him
7 in ---

8 Q. When did you go visit?

9 A. --- Italy, in March after this happened.

10 Q. How long were you gone?

11 A. Oh, I don't know. Two and a half weeks, maybe.

12 Q. You heard Dr. Jernigan testify yesterday he was there
13 for a month?

14 A. Right.

15 Q. So y'all both ---

16 A. And so there was a period of time where, you know, I
17 was trying to figure out what to do, trying to keep my life
18 going, going to Italy. Still doing things. Taking care of
19 my mother. I mean, life went on, so ... But I was still
20 wanting to get some answers.

21 Q. And so you never got an answer from the bank, other
22 than he did it deliberately?

23 A. Right.

24 Q. And in May did you contact the police about checking
25 on the investigation?

1 A. I can't remember exactly. Yes, I think it was May and

2 I think they had closed the case.

3 Q. Did you know they had closed it?

4 A. No, I didn't know the case was closed.

5 Q. Why did you contact the police then at that particular
6 time?

7 A. Well, I thought -- I just thought that something
8 wasn't right and I wanted to get to the bottom of it. I
9 really felt that this one explanation by the bank,
10 something else coming from him, me being told not to talk
11 to him, our kids are now sort of in it, plus Case was
12 getting ready to come back from Italy at the end of May,
13 and I thought, all right, the police have already been
14 involved. I was required to file this police report.

15 Q. And you had no answers from them?

16 A. And had no answers from the bank. And I thought,
17 well, maybe the police can find out. Maybe they're the
18 ones who can really kind of figure this out and we can
19 figure it out.

20 Q. And Case was coming back from Italy?

21 A. He was coming back from Italy the end of May.

22 Q. Were you fearful that he would be placed in the same
23 position as Carter?

24 A. Absolutely. Case is a very sensitive and emotional
25 fellow. And, you know, I had done all I could throughout

1 this divorce to keep their relationships as good as it
2 could be with their dad.

3 Q. So you tried to get to the bottom of it?

4 A. Protect, protect them.

5 Q. So you tried to get to the bottom of it?

6 A. Yes.

7 Q. Now, do you understand that Case was present in the
8 home with Dr. Jernigan when he was arrested?

9 A. I do.

10 Q. Did you ever intend for that to happen?

11 A. Never.

12 Q. In fact, that was ---

13 A. Never.

14 Q. That was probably the last thing you wanted ---

15 A. And as a matter of fact, when I knew that this was
16 probably going forward and an arrest, I told them that Case
17 would be coming home and to make, you know, just to be so
18 cautious about getting in touch with him or whatever they
19 were going to do, however they were going to do it. And
20 Case was asleep, so he did not know that his father had
21 been arrested and he called me about ten-thirty that
22 morning and he was extremely upset then. And I remember I
23 was driving the car and I asked him if he wanted me to come
24 pick him up. Floyd's girlfriend at the time, Cindy, was
25 there. And when Case woke up, she told Case what had

1 happened. And so I think he, he got that interpretation of
2 what happened and he didn't have all the other information.
3 And it was a very, it was a very, very, very difficult time
4 to try and explain to a child what was going on.

5 Q. And did that -- he was upset. Did that cause you to
6 be upset as well?

7 A. Well, it did. I mean, it caused me to be very upset.

8 Q. Is that one of the stressors that you suffer from?

9 A. The relationship with my kids. I mean, I'm very
10 honest with them. We have a close relationship and I want
11 them to love their dad, and I want ---

12 Q. Is that one of the issues?

13 A. So now we're in a -- I'm sorry.

14 Q. Take your time. Is that one of the issues that you
15 discussed with Dr. Pryor?

16 A. Yes.

17 Q. Is that one of the issues you discussed with Dr.
18 Anderson?

19 A. Yes.

20 Q. And as a result of that type of stress and anxiety,
21 did you have any physical manifestations of nausea, stomach
22 issues ---

23 A. Well, I do have IBS. I have that irritable bowel
24 syndrome so that was heightened.

25 Q. Did that flare at all?

1 A. Yes. And I sought medical -- additional help and
2 medication for that.

3 Q. Do you know whether or not that flared at or around
4 the time you were deposed in this case?

5 A. When I was deposed in this case? I don't know.

6 (WHEREUPON, Defendant Katz Exhibit Number 3 was marked
7 for identification.)

8 Q. Ms. Katz, I'm handing you what's been marked as
9 Defendant's Exhibit Number 3, Katz 3.

10 THE COURT: What number was it?

11 MR. EDWARDS: 3.

12 Q. Can you identify what that is?

13 A. Are you asking me?

14 Q. Yes. Do you know what those documents are? You may
15 want to look past the cover page and all. There was a
16 subpoena.

17 A. Oh, okay. Okay. It says it's medical records from
18 Dr. Durrence's office.

19 Q. And have you seen them before?

20 A. Pardon?

21 Q. Have you seen these before?

22 A. Yes.

23 Q. Does what is in front of you appear to be a complete
24 and accurate copy. Feel free to review that to be sure.

25 THE COURT: I'm sorry. What doctor?

1 MR. EDWARDS: Anderson. Dr. Hugh Durrence is the
2 office. She primarily saw Dr. Anderson.

3 A. Yes.

4 Q. And you wanted to go see -- she's your primary doctor?

5 A. Yes.

6 Q. Did you see her about some issues that were discussed
7 in here today ---

8 A. Oh, yeah. She knew all about it, yes.

9 Q. I'd like to move that Katz Exhibit into evidence.

10 MR. WAGGONER: Objection, Your Honor. It's
11 hearsay. And lack of authentication. The doctor has not
12 been named as a witness in the trial. There's no one, no
13 doctor to come in and testify regarding those records or to
14 establish a foundation for some -- exception to hearsay.

15 THE COURT: You're going to make him bring the
16 doctor in to authenticate these documents?

17 MR. ABNEY: Well, Your Honor, the doctor's not
18 going to testify regarding, I don't believe. The documents
19 just stand on their own.

20 THE COURT: Well, I mean ---

21 MR. EDWARDS: I would note there is a certificate
22 of ---

23 THE COURT: I'm sorry. What?

24 MR. EDWARDS: There is a certificate on the front
25 page from the records custodian saying that these are a

1 complete copy of all requested medical records kept in the
2 regular course of business with regard to a particular
3 patient. And they were produced pursuant to a subpoena by
4 the bank.

5 THE COURT: They were what?

6 MR. EDWARDS: Produced pursuant to a subpoena
7 from the bank for those records.

8 THE COURT: Well, that doesn't make them
9 admissible. What's your legal objection to the records?

10 MR. ABNEY: Mine, Your Honor.

11 THE COURT: Yes, sir.

12 MR. ABNEY: The objection is lack of
13 authenticity, hearsay. It doesn't meet any exception
14 because we don't have anyone to authenticate them. I don't
15 think Ms. Katz can authenticate the documents any more than
16 I could.

17 THE COURT: I mean, I don't think there's any
18 question they're probably, they're probably hearsay or at
19 least part of them has opinions. And it hasn't been
20 authenticated.

21 MR. EDWARDS: The records themselves qualify as
22 business records, Your Honor.

23 MR. ABNEY: My objection ---

24 THE COURT: Medical records as business records,
25 no, I don't think so. Have you got a case that says

1 medical records qualify under business exceptions as far as
2 authentication, but that doesn't get around the hearsay
3 rule.

4 MR. EDWARDS: That's true.

5 THE COURT: I mean, on what exception do you
6 think it should come in on the hearsay rule?

7 MR. EDWARDS: Business records in *Crowell versus*
8 *Benson*, 285 SC 397 which dealt with this issue.

9 THE COURT: All right. Let me see the case. You
10 got the case?

11 MR. EDWARDS: I do.

12 THE COURT: Pardon?

13 MR. EDWARDS: I do, Your Honor.

14 THE COURT: Let me look at the case.

15 MR. EDWARDS: I believe the relevant portions are
16 on here.

17 THE COURT: All right. Thank you very much.

18 MR. EDWARDS: It stands for the position
19 generally medical records are admissible as business
20 records and certainly as to the factual observations the
21 statements included in the medical records and in that
22 particular case it admitted, over objection, subjective
23 opinions and conclusions in the medical records because it
24 related to what a third-party knew or should have known.
25 And that the bank has stated in the writing that they knew

1 that she was distressed or otherwise disturbed by what's
2 going on and has denied that she's entitled to
3 compensation. I think that these medical records will show
4 that they knew that she was suffering from these stressors
5 or should have known based on their interactions with her.
6 And I'll note these medical records don't contain any or
7 very few at best subjective opinions or conclusions. You
8 can take a look at what they are as observations and
9 reports of the patient, which are not subject to the
10 hearsay rule.

11 THE COURT: The case says the trial court did not
12 abuse its discretion in allowing the mother's medical
13 records to come into evidence because the records
14 appropriately were showing the extent of the grandparents'
15 knowledge of the mother's illness. I mean, that's not
16 necessarily the situation. These are just her medical
17 records of her treating physician. I mean, so how -- let
18 me finish reading your case before I ask you the question.

19 MR. EDWARDS: It goes on first and second ---

20 THE COURT: Well, let me finish reading it and
21 I'll listen to your argument, okay?

22 MR. EDWARDS: Yes, sir.

23 THE COURT: I think the fact scenario on this
24 case are entirely different than what -- it's a wrongful
25 death against a grandparent arising from the death of two

1 minor children.

2 MR. WAGGONER: Your Honor, I -- the plaintiff has
3 no dog in this fight. May I take two minutes?

4 THE COURT: Yes, sir.

5 MR. WAGGONER: Thank you, sir.

6 (WHEREUPON, the Court stood at recess for a short
7 break.)

8 THE COURT: I think the Court allowed these in on
9 a different reason. I think the records could correctly
10 come in under the business act. I think if you allow them
11 in, you're going to have redact all of the subjective
12 opinionated remarks of the doctor. Now, if y'all want to
13 go through that and do that, I'll allow that portion in. I
14 think they would come in as far as clinical findings,
15 etcetera, etcetera, etcetera. But as far as his subjective
16 opinions, I think you're going to have to redact them
17 unless he's here to testify and you have the right to
18 cross-examine him. Now, if y'all want to redact it to that
19 point, that's fine or if y'all want to try to get the
20 doctor in here. It doesn't matter to the Court. I just
21 disagree that this case allows you to walk into the
22 courtroom and say, here's medical records, they're
23 admissible. I disagree with that.

24 MR. EDWARDS: I understand.

25 THE COURT: I think this case was unique in that

1 it was -- the probative value was to show almost an
2 impeachment situation where the survivors would show that
3 they had knowledge of illnesses, and that's the reason the
4 subjective portion of the records were admitted under the
5 business act. And I agree with you that they can come
6 under the business act, excluded as I've said. Now, if
7 y'all want to do that, that's fine. Now, why don't we take
8 a lunch break and y'all decide what you want to do. And if
9 you want to postpone it and get the doctor in here and --
10 plus he's got authentication. You're really going to make
11 him bring the doctor in to authenticate this stuff?

12 MR. ABNEY: Your Honor, my objection is really, I
13 just one of fundamental fairness, just to have the
14 opportunity to examine the doctor.

15 THE COURT: Well, I've excluded all of his
16 subjective opinions.

17 MR. ABNEY: And I think that's a fair resolution.
18 I'm fine with that. I have no problem.

19 THE COURT: And if you want to get those in,
20 you're going to have to get the doctor here.

21 MR. EDWARDS: To authenticate?

22 THE COURT: Pardon?

23 MR. EDWARDS: To authenticate?

24 THE COURT: To authenticate and testify so he'll
25 have an opportunity to cross-examine the doctor about his

1 opinions, his subjective opinions.

2 MR. EDWARDS: If we redact the subjective
3 opinions.

4 THE COURT: He says he'll withdraw his motion for
5 authentication. Is that correct?

6 MR. ABNEY: That's correct, Your Honor.

7 THE COURT: Okay. He said he would ---

8 MR. EDWARDS: If it's all the same with you and
9 you, why don't I finish my examination with her, we can
10 take a break, redact and then place them into evidence.

11 THE COURT: I mean, that's fine. Whichever way
12 you want to do it. I give you the option. You can get
13 somebody to subpoena the doctor, bring him in here tomorrow
14 morning, if that's what you want to do. I want to make it
15 clear I'm giving you that opportunity.

16 MR. EDWARDS: I understand.

17 THE COURT: If you want to subpoena the doctor,
18 bring him in tomorrow morning, I'll be happy to hear him.

19 MR. EDWARDS: I'd like to finish the examination
20 now and then conclude either by redacting and placing into
21 the record or by doing just that, calling the doctor.

22 THE COURT: All right. Go ahead.

23 Q. All right. Ms. Katz, I would like to ask you now how
24 did you learn ---

25 THE COURT: Hold on just a second. I still

1 haven't got the doctor's name. I want to get it written
2 down. Annette Anderson Bilton. Is that correct?

3 MR. EDWARDS: Yes, sir.

4 Q. I'd like to talk, turn now to this case. How did you
5 learn that you'd been sued?

6 A. I was having lunch with a girlfriend at Hominy Grill
7 and I got a phone call from a process server.

8 Q. How did you react to that conversation?

9 A. Well, I couldn't -- I was so upset I sat and cried the
10 entire time through lunch. I couldn't eat and I didn't
11 know what to do and I didn't know what in the world was
12 going on. It was awful.

13 Q. Now, before you learned the suit was filed. Is that
14 correct?

15 A. Before I learned the suit was filed.

16 Q. When you learned what it was about, how then did you
17 feel, was it better or worse?

18 A. I couldn't believe it. I just could not believe it.

19 Q. Shocked?

20 A. Shocked. Frustrated. Angry.

21 Q. Is that because you thought at that time all you knew
22 was what you had learned from the bank and your
23 investigation of the bank's investigation. Is that
24 correct?

25 A. Right.

1 Q. And did you make ---

2 A. And I thought -- and I also thought it had been so
3 long since all this had happened and, you know, I had just
4 gotten married and I thought that our relationship, the ex
5 relationship was broken. He no longer has to pay me
6 alimony or have any responsibility. And I had gotten
7 married and I was gloriously happy and then to have that
8 just come in was just ...

9 Q. Took you right back to where you were before?

10 A. Oh, further.

11 Q. And so you answered that complaint, didn't you? And
12 once you made claims against both the bank and Dr.
13 Jernigan, didn't you?

14 A. Yes.

15 Q. And that was without knowledge of any issues that
16 existed with his account, correct?

17 A. I'm sorry. Ask me that again?

18 Q. Now, before you learned that there had been a
19 restriction ---

20 A. Oh, I didn't know anything -- no.

21 Q. --- on his account or any other accounts?

22 A. I didn't know anything about a restriction or a
23 problem with his account.

24 Q. And you had resolved your claims with Dr. Jernigan.
25 Wasn't that after you learned of the account restrictions

1 and in order to preserve harmony?

2 A. I'm sorry. I've lost you. What now?

3 Q. Resolved your claim, dropped it, let it go after
4 learning about the account description issue and in order
5 to stop the damage?

6 A. Oh, oh, oh, yes, yes. I didn't understand your
7 question.

8 Q. Do you understand now?

9 A. Yes, I do.

10 Q. Can you tell me why then in your own words?

11 A. Why we dropped the thing against each other?

12 Q. Yes.

13 A. Well, basically, for our children.

14 Q. You were worried about your relationship between you
15 and your sons ---

16 A. I mean it just needed to end. The kids were aware of
17 it. The kids had -- when they found out that he sued me,
18 they had each called him and asked him what he was doing
19 and why he was doing this and, you know, it just had
20 everybody stirred up all over again. And, you know, it's a
21 very difficult position to be in because what do you say to
22 your children? How do you explain something when, you
23 know, one person's done something and continuing to do
24 something and I'm trying to move forward and not say
25 anything bad about him and it was -- it's very, very

1 difficult, especially for boys who need to love and look up
2 to their dad.

3 Q. And you want that for them as well?

4 A. Pardon?

5 Q. Do you want that for them as well?

6 A. I do. I absolutely do.

7 Q. Has this impeded that relationship?

8 A. I think it has. They would be the ones to have to
9 answer that.

10 Q. Has it damaged your own relationship with your sons?

11 A. It has because they have known that I have been very
12 nervous and upset about it and several times they've said,
13 you know, mom, you seem like you're really stressed. And,
14 you know, I don't want to say, well, I am stress because I
15 have to go to a deposition or I am stressed because, you
16 know, it's -- so it's a -- they know. They know. Case
17 knows less about it. Carter knows a little more, but we
18 haven't really discussed it. We discuss it on a certain
19 level.

20 Q. Would you agree that had the bank removed Dr. Jernigan
21 from having access in 2004, this would have never happened?

22 A. This would have never happened.

23 Q. I'm going to pass you off to Mr. Abney. Answer all
24 the questions he has.

25 THE COURT: Mr. Waggoner, do you have any

1 questions?

2 MR. WAGONER: I have no questions.

3 THE COURT: All right. We'll just take a lunch
4 break at this time. It's five minutes 'till one. If
5 you'll be back at two-thirty. Two-thirty give you enough
6 time to get something to eat and look at these records and
7 see if y'all can get them redacted?

8 MR. ABNEY: I think so.

9 THE COURT: Since I'm also the fact finder, I'd
10 rather not get involved in that. I hope y'all can agree.
11 If you don't, I guess I'll have to try resolve -- I'm going
12 to take out all the opinions and all the subjective
13 findings. This is clinical findings is what I'm allowing
14 in. I'm going to make it real -- make real sure you
15 understand.

16 MR. EDWARDS: Yes, sir. I understand.

17 THE COURT: Okay. And if I've got to get into
18 deciding what's going to be redacted, then I will. I
19 prefer not to since I'm also acting as fact finder.

20 MR. EDWARDS: I will make the decision unless
21 it's absolutely necessary for ---

22 THE COURT: Okay. We'll recess until two-thirty.

23 (WHEREUPON, the court stood at recess for a lunch
24 break.)

25 THE COURT: Thank you. Keep your seats. Have

1 y'all agreed on the medical records?

2 MR. EDWARDS: We have. We're going to redact
3 them.

4 THE COURT: You've got them redacted?

5 MR. EDWARDS: Yes.

6 THE COURT: All right. So that would be
7 Defendant Katz's what number?

8 MR. EDWARDS: 3, I believe.

9 MADAM COURT REPORTER: 4.

10 MR. EDWARDS: 4.

11 MADAM COURT REPORTER: That's it. You've already
12 marked it. It's 3. I'm sorry.

13 MR. EDWARDS: But can we mark this one as the
14 redacted document? It would not be that one.

15 MADAM COURT REPORTER: We'll just do it as 3,
16 since that 3's ...

17 (WHEREUPON, Defendant Katz Exhibit Number 3 was
18 admitted into evidence.)

19 THE COURT: Are there medical bills attached to
20 that?

21 MR. EDWARDS: There are medical bills attached.
22 They don't reflect billing for each visit.

23 THE COURT: But there are medical bills attached?

24 MR. EDWARDS: Yes, sir.

25 THE COURT: Okay. Do you want to call your next

1 witness?

2 MR. EDWARDS: As I recall, I concluded direct of
3 Ms. Katz.

4 THE COURT: That's correct, you had finished her
5 direct, right?

6 MR. EDWARDS: That's correct.

7 THE COURT: Ms. Katz, if you'll comes around and
8 have a seat in the witness stand, please, ma'am. Mr.
9 Waggoner, you don't have any cross, is that correct?

10 MR. WAGGONER: That's correct.

11 THE COURT: Okay. Cross-examination by the bank.

12 MR. ABNEY: Thank you, Your Honor.

13 **CROSS-EXAMINATION**

14 **BY MR. ABNEY:**

15 Q. Ms. Katz, the bank employees that you spoke with told
16 you Mr. Jernigan was able to make the payments because the
17 bank made an error in failing to eliminate his access,
18 correct?

19 A. Correct.

20 Q. They told you that he would have to have selected the
21 8854 account for the payments, correct?

22 A. Correct.

23 Q. No one told you he intended to steal the funds?

24 A. Correct.

25 Q. And Mr. Navarez told you he couldn't comment on

1 Jernigan's state of mind in accessing the account?

2 A. Correct.

3 Q. He told you that on the phone?

4 A. I don't remember if it was in a letter or phone.

5 Q. He definitely told you in writing?

6 A. If it's in the letter. I don't have it in front of
7 me. I think it was in the letter, but if you want to be a
8 hundred percent correct, I guess I should look at it.

9 Q. Sure. It's Bank of America's Exhibit Number 6.
10 Looking down on the fourth paragraph, second sentence.

11 While I understand the extent of distress this matter has
12 caused you, I cannot determine or comment on the state of
13 mind or intent of Mr. Jernigan.

14 A. Okay. I don't see that. Wait a minute. Wait a
15 minute.

16 Q. Sure.

17 A. Where are we?

18 Q. Fourth paragraph, second sentence.

19 A. Okay. I have it.

20 Q. While I understand the extent of distress this matter
21 has caused you, I cannot determine or comment on the state
22 of mind or intent of Mr. Jernigan accessing the account in
23 question through our on-line banking service.

24 A. Yes, I see that.

25 Q. And you agree. He told you that he can't comment on

1 Dr. Jernigan's ---.

2 A. Right.

3 Q. --- state of mind?

4 A. Right.

5 Q. And if you'll turn with me to Exhibit Number 4. And
6 here, if you'll turn to the page marked BOA375. This is
7 Mr. Navarez's note regarding his conversation with you. It
8 reads, spoken to customer and she advised her ex-husband
9 entered her account deliberately. You told him that?

10 A. He wrote it. If he wrote it, I can't say that I told
11 him that, but he wrote it.

12 Q. You can't say either way?

13 A. I can't say either way.

14 Q. Okay. She wanted me to put in writing her ex-husband
15 did this deliberately and has been reviewing her account.
16 Did you ask him to put in writing that your ex-husband
17 accessed your account deliberately?

18 A. I wanted in writing what had happened.

19 Q. I understand that. But did you ask him to put in
20 writing that your ex-husband accessed your account
21 deliberately?

22 A. I don't know.

23 Q. You don't remember?

24 A. I don't know.

25 Q. Further down, third to the last sentence, the sentence

1 that begins, we discussed. We discussed the length that is
2 involved with setting up a bill payee for on-line banking
3 and she advised this also means he deliberately did this.
4 I again advised her that it could have been an honest
5 mistake if he believed he was accessing his account. Mr.
6 Navarez told you this could have been an honest mistake,
7 correct?

8 A. I don't remember that at all.

9 Q. You don't remember either way?

10 A. No. I don't remember that.

11 Q. If Mr. Navarez testifies that he has told you that it
12 could have been an honest mistake, you don't dispute that
13 do you?

14 A. I'm not sure I understand your question. Could you
15 ...

16 Q. Well, Mr. Navarez says that he told you this could
17 have been an honest mistake. And my understanding of your
18 testimony is you don't remember one way or the other?

19 A. I don't remember. I don't think -- I do not think he
20 told me this could have been an honest mistake. I do not
21 remember that at all.

22 Q. You don't remember one way or the other?

23 A. I don't really remember that he said it could be an
24 honest mistake. I don't remember that.

25 Q. Okay.

1 A. Up to this point, everybody at the bank had said this
2 had been a deliberate action.

3 Q. Well, deliberate in the sense that it required
4 affirmative conduct on his part, correct? It required Dr.
5 Jernigan to pick the account, correct?

6 A. Correct.

7 Q. And they're telling you they can't comment on what is
8 in his head.

9 A. Correct.

10 Q. They can't comment on his state of mind, correct?

11 A. Correct.

12 Q. So are you telling me that after you received Exhibit
13 Number 6 from Mr. Navarez, in which he says to you in
14 writing, I cannot comment on his state of mind in accessing
15 the account, you're telling me that after you received
16 that, you didn't think there was any chance this could be
17 an accident?

18 A. No.

19 Q. You're not telling me that?

20 A. What are you asking me?

21 THE COURT: She's already, she's already --
22 you've asked it three times. She's answered it, okay?
23 Move on. Unless you want to rephrase the question. I
24 mean, she's already said, no, she didn't think it was an
25 accident. But she said it three times. You've ask her

1 three different ways. But if you want to ask her again one
2 more time, rephrase the question.

3 Q. After you received this letter from Mr. Navarez saying
4 that he cannot comment on Dr. Jernigan's state of mind, did
5 you think there was any chance this could be an accident?

6 A. No.

7 Q. You say you were required by the bank to file a police
8 report?

9 A. Yes.

10 Q. And you understood that you had to do that to get your
11 money back?

12 A. Absolutely.

13 Q. And you got your money back?

14 A. Yes, but not from the bank.

15 Q. You got it back after the weekend?

16 A. But not from the bank. Correct.

17 Q. From Dr. Jernigan?

18 A. Yes.

19 Q. Right. You got it back from Dr. Jernigan. So when
20 you went back to the police in April of 2007 and told them
21 you wanted to swear out a warrant for Dr. Jernigan's
22 arrest, you didn't have to do that to get your money back,
23 correct?

24 A. You know, I don't -- in my mind -- maybe I don't think
25 correctly, but in my mind, if someone has stolen something

1 from you and returned it, that doesn't make it okay.

2 Q. Okay.

3 A. I mean, I don't really think that I would feel very
4 good if someone came in my house and stole something but
5 then brought it back later and said, now we're fine.

6 Q. My question is, though, you didn't have to swear out a
7 warrant ---

8 A. I didn't -- okay. I'm sorry. Go ahead.

9 Q. You didn't have to sign an affidavit in support of a
10 warrant for your husband's arrest to get your money back?

11 A. No, I did not.

12 Q. And no one ever told you that Dr. Jernigan's account
13 was in a no check activity status?

14 A. No one discussed his account with me whatsoever.

15 Q. And you think the bank should have told you that?

16 A. You know, I think that had the bank done the right
17 thing to begin with in not making this error, which has
18 caused all these problems, we wouldn't be here today going
19 through all this.

20 Q. You think the bank should have told you that Dr.
21 Jernigan's account was in a no check activity status?

22 A. I think the bank had some responsibility to both me
23 and my ex-husband to offer some explanation, yes.

24 Absolutely.

25 Q. And if the restriction, the no check activity

1 restriction, had no impact on these disputed payments, how
2 would that have helped you?

3 A. I'm not sure I understand what you're asking.

4 Q. If it's true that the restriction that prevented Dr.
5 Jernigan from writing checks on the account had no impact
6 at all on these disputed payments, how would that
7 information have helped you?

8 A. You said that the restrictions didn't impact.

9 Q. That's our position is it had no impact whatsoever.
10 And if that's the case, why should the bank tell you that,
11 that the account was restricted?

12 A. Well, first of all, I don't really understand this
13 restriction thing at all. I'm totally in the dark on this,
14 quote unquote, restriction, whatever. I'm saying had the
15 bank done the right thing and looked into this and brought
16 us together, knowing what the situation was like, from Mr.
17 Boyle who understood from the very beginning that we had a
18 problem over money, I think that I was so clear with the
19 bank at that day to make sure that I was protected and I
20 was not. Now, I can't tell you how everything happened,
21 but here we are in Court because money was accessed out of
22 my account, putting me in a very vulnerable and violated
23 position. I trusted the bank. I asked the bank to do
24 something. I was very clear with what I needed from the
25 bank and the bank didn't do it. Now, I don't know about

1 this frozen thing, but I do know that I called many, many
2 people asking for clarification and direction and I didn't
3 get it.

4 Q. Well, they told you that he had to have picked the
5 account. I mean, they told you that that was their belief,
6 that he had to have picked the account?

7 A. Okay.

8 Q. And if they thought this restriction had no impact on
9 these payments, it's still the case he had to pick the
10 account, what good would telling you about the restriction
11 do? What information would that give you?

12 A. Well, it didn't happen so it's kind of a moot point.
13 No one did tell me. So I don't understand your question at
14 all.

15 Q. My question is ---

16 A. I feel like you're badgering me. If you could ---

17 Q. I'm not badgering you.

18 A. If you could ---

19 Q. I'm trying to get you to answer the question. How
20 would it help you ---

21 A. I don't understand. Try and ask me in a better way
22 because I don't get it.

23 Q. What I've asked you is that if this restriction had no
24 impact on these payments made by Dr. Jernigan from your
25 account, how would it have helped you for the bank to tell

1 you about the restriction?

2 MR. EDWARDS: Objection. Asked and answered.

3 MR. ABNEY: No, it hasn't been answered, Your
4 Honor.

5 THE COURT: Well, the restriction issue, even
6 your own witness didn't know about it until you had a
7 conference with her. Okay? So that didn't even come up
8 until after the litigation. I don't know what's the
9 relevancy of that issue with this particular witness is,
10 but go ahead. Overruled.

11 Q. Ms. Katz, all I'm asking you is what -- how would it
12 have helped you to know about this restriction if it didn't
13 impact the payments? It wouldn't have helped you at all,
14 would it? It wouldn't have added to your information about
15 ---

16 THE COURT: Ask her one question.

17 A. I don't even know what you're ---

18 THE COURT: Hold on a second, Ms. Katz. Ask her
19 one question. You've asked her three questions and she
20 hasn't answered any of them. Give her a chance to answer
21 the question. And, ma'am, let me say this. You can either
22 answer the question yes or no, I don't know, I don't
23 understand and you can give whatever explanation you want
24 to give. Okay?

25 WITNESS: Thank you.

1 THE COURT: But you're entitled for him to give
2 you an opportunity to answer before you ask another
3 question. Okay?

4 MR. ABNEY: Fair enough.

5 THE COURT: Please proceed.

6 Q. Ms. Katz, this restriction had no impact on the
7 payments your husband made. That information would not
8 have helped you find out how these transactions occurred,
9 correct?

10 A. I don't know.

11 THE COURT: Any redirect?

12 MR. EDWARDS: Yes, sir.

13 **REDIRECT EXAMINATION**

14 **BY MR. EDWARDS:**

15 Q. Let's assume -- are you okay?

16 A. Go ahead. I am.

17 Q. Tell me when you're ready?

18 A. I am. Go ahead.

19 Q. If they had looked at his account and discovered the
20 restriction, and they had told you that, whether or not at
21 or about the same time as these bill pays were paid, would
22 that have not given you pause or concern to question what
23 had really happened?

24 A. Yes.

25 Q. But you heard nothing from the bank but he had to do

1 it deliberately. Isn't that right?

2 A. That's right. That's correct.

3 Q. And that you had to file a police report to get your
4 money back?

5 A. To get my money back.

6 Q. You didn't want to do that, did you?

7 A. I didn't.

8 Q. But that's what you had to do?

9 A. To get my money back, that's what I was required to
10 do.

11 Q. When you asked Navarez -- you wrote Mr. Lewis, the CEO
12 of the bank and Mr. Navarez wrote you back, that was in
13 August of that year, wasn't it?

14 A. Yes.

15 Q. When did you first go to the police? January, is that
16 right?

17 A. January.

18 Q. Eight months later was the first time that I've seen
19 and I don't think anybody has seen, certainly not in
20 writing from the bank stating specifically, we can't
21 comment on his state of mind, is that the first time you
22 heard that from anyone?

23 A. (Affirmative nod.)

24 Q. After he was arrested? And after the -- is that a
25 yes?