

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DAVID P.OETTING, individually, and on)	JURY TRIAL DEMANDED
behalf of all others similarly situated;)	
)	
Plaintiffs)	
)	
)	No. _____
VS.)	
)	
HEFFLER, RADETICH & SAIITA, LLP,)	
)	
Defendant)	

CLASS ACTION COMPLAINT

COME NOW, Plaintiff David P. Oetting (“Plaintiff”), individually and on behalf of all others similarly situated, by and through his undersigned counsel, respectfully files this Class Action Complaint, and alleges as follows:

Introduction

1. On October 16, 1998, a class action complaint which initiated against BankAmerica Corporation regarding the merger of NationsBank.
2. Numerous suits were filed throughout the country. The Multi-District Litigation Panel issued a transfer order on February 12, 1999. The cases were consolidated for discovery in the Eastern Division of the Eastern District of Missouri. The late Honorable John F. Nangle was the appointed Judge. This case is presently pending in this Division styled *In re BankAmerica Corp. Securities Litigation*, No. 4:99- MD-1264 (CEJ) (the “Action”).
3. The case was certified as a class action by Judge Nangle and plaintiff Oetting was

appointed one of the class representatives of the NationsBank Class and is presently the only class representative who is maintaining an active role in the Action.

4. On information and belief Green Jacobson P.C., formerly known as Green Schaff & Jacobson, P.C., were appointed as lead counsel for the NationsBank Class and, together with lead counsel for the BankAmerica Class, retained Heffler, Radetich & Saitta, LLP (“Heffler”) as Claims Administrator in or around 1999.

5. On April 5, 2002, Judge Nangle preliminarily approved the proposed settlement and appointed Heffler as Claims Administrator. In that Order, Judge Nangle set forth the duties of the Claims Administrator. Judge Nangle also set forth the conditions for a properly filed claim. On information and belief it was Claims Administrator’s responsibility to reject claims that were improper and such claimant had the right to be heard before the Court.

6. On September 30, 2002, the Court issued an Order approving the terms of the settlement and revised the plan of allocation for the plaintiff classes against BankAmerica Corporation.

7. The settlement fund was \$490 million (\$333.2 million to the NationsBank class and \$156.8 million to the BankAmerica class).

8. The plaintiff and the class now assert claims relating to the administration of the settlement and processing of proofs of claims against Heffler, the certified public accounting firm hired as the Claims Administrator in this action.

9. The plaintiff and the class are intended third-party beneficiaries of the contract for services between Heffler and lead counsel for classes in the Action. Heffler continues to serve as Claims Administrator.

10. Heffler's employee Christian Penta ("Penta") defrauded three separate class actions, including the Action, of tens of millions of dollars. The amount Heffler paid from the NationsBank Class settlement fund on the false claims submitted by Penta and his co-conspirators totaled somewhere over \$5.0 million.

11. The plaintiff and the class seek damages against Heffler for improperly paying on false claims filed by its employee in the Action.

Parties

12. David P. Oetting is a resident citizen of St. Louis, Missouri and is the lead plaintiff and class representative of the NationsBank Class.

13. Heffler is a limited liability partnership and a citizen of the States of Pennsylvania and New Jersey with its principal place of business in Philadelphia, Pennsylvania.

14. Heffler has submitted to the jurisdiction of this Court in connection with its service as Claims Administrator in the Action..

Jurisdiction and Venue

15. This class action consist of class members located throughout the United States. The class members in this case are the same class members in the Action. Less than one-third of the class members reside in Missouri. The defendants are not citizens of Missouri. The amount in controversy exceeds \$5,000,000.00 (five million dollars) exclusive of interest and costs. Accordingly, diversity jurisdiction exists pursuant to 28 U.S.C. § 1332(d) (as modified by the Class Action Fairness Act of 2005). Venue in this case is proper in this District pursuant to 28 U.S.C. § 1391, in that a

substantial portion of the acts and events giving rise to plaintiffs' causes of action occurred in this District. These acts include the release and payment of funds from the NationsBank Settlement Fund at US Bank in St. Louis, Missouri to Heffler's employee. Additionally, Heffler appeared before this Court on multiple occasions in connection with the work it performed in the Action and has voluntarily submitted itself to the jurisdiction of this Court.

General Allegations

16. On or about September 20, 2002, the Court approved a settlement in which the class action defendants agreed to pay \$490 million to the class members in the Action.

17. Heffler, as the Claims Administrator, was responsible for reviewing submitted claims, identifying valid and invalid claims, and distributing the settlement proceeds to valid claimants who were members of the NationsBank Class or the BankAmerica Class. As part of its responsibility, Heffler was required to determine whether, and to what extent, the claimants in each class were entitled to a share of the settlement.

18. To share in the NationsBank Class settlement fund, NationsBank Class members were required to submit to Heffler a signed proof of claim with supporting documentation by a date specified by the Court. The information in the proof of claim and supporting documentation was required to establish the legitimacy of the claim and the pro rata share of the settlement fund to which each NationsBank Class member was entitled.

19. Penta worked as a senior accountant for Heffler and was assigned to help administer the settlement in the Action. In his employment by Heffler, Penta was responsible for various aspects of the claims process, including reviewing claim documents to determine if a claimant was entitled to

recovery and addressing any issues that arose with claimants who had submitted claims. At all relevant times, Penta was Heffler's agent, servant and employee.

20. During the administration of the settlement, Penta submitted or cause to be submitted to Heffler false claims seeking payments from the NationsBank Class's settlement fund.

21. On or about May 13, 2004, lead counsel for the NationsBank Class filed a motion for distribution of the NationsBank Settlement funds. In support of the motion, lead counsel filed an affidavit from Heffler stating that Heffler had examined and calculated all claim forms to determine that they were properly completed, signed, and documented. Heffler also submitted a computer printout showing its proposed allocation of the NationsBank Settlement funds among the NationsBank Class claimants.

22. On or about June 14, 2004, the Court granted the motion for distribution and ordered distribution of the NationsBank Settlement fund in accordance with Heffler's examination and calculations. This distribution included payment(s) of over \$5.0 million based on false claims submitted by Penta and his co-conspirators and approved by Heffler.

23. On September 11, 2008, the United States Government charged six individuals, including Penta, with mail fraud and wire fraud for filing false claims in the Action and in other class action settlements. Penta later plead guilty.

Class Allegations

24. Plaintiff brings this action as a class pursuant to Federal Rules of Civil Procedure Rule 23. Plaintiff asserts his claims individually and on behalf of a class of all persons similarly situated, who are defined as all members of the NationsBank class who have or are to receive a distribution from the Action.

25. Specifically excluded from the Class action are the defendant, and any entity in which the defendant has a controlling interest, and the officers, directors, employees, successors or assigns of the defendant.

26. *Rule 23(a)(1) Numerosity.* The members of the class are numerous. Joinder is impractical. The number of shareholders who were members of the classes in the Action and who did or are to receive a distribution from that settlement fund is in the hundred of thousands. The members of the class are easily identifiable from the records in the court records in the Action.

27. *Rule 23(a)(2) Common Questions of Law or Fact.* There are questions of law or fact common to the class which predominate over any questions affecting only individual members.

Common question of law and fact include, *inter alia*:

- (a) Whether defendant, through its wrongful conduct, caused the settlement fund to be depleted by an amount of over \$5.0 million;
- (b) whether defendant, through its wrongful conduct, caused the claimants in the Action to receive less than their proportional share that otherwise would have been paid;
- (c) whether class members are entitled to have the monies wrongfully paid to non-claimants to be restored to the settlement fund to be redistributed on a proportional share; and
- (d) whether defendant's wrongful conduct caused injury to plaintiff and, if so, what are the appropriate measure of damages sustained as a result of the defendant's conduct and/or what other relief, if any, may be appropriate.

28. *Rule 23(a)(3) Claims of the Representative Party are Typical of the Claims of the Class.* Plaintiff is a member of the class. The claims of plaintiff are typical of those of the class. Plaintiff, as well as the other class members, were members of the previously certified class. Plaintiff and all class members filed valid claims with the claims administrator. All were or are to be paid on their claims. The wrongs against class members will be proven through proof of the wrongs against plaintiff. Plaintiff has no interests that are adverse or antagonistic to those of the class.

29. *Rule 23(a)(4) Adequacy of Representation.* Plaintiff and his counsel will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in the prosecution of class actions. Further, the acts of which plaintiff complains are applicable to all class members. All class members seek common forms of relief and present a common factual underpinning. Plaintiff suffered damages by reason of defendants' wrongful conduct. Plaintiff has no interest antagonistic to class members and will fairly and adequately represent them.

30. *Rule 23(b)(3) Predominate and Superiority of Class Actions.*

(i) A class action is superior to other available methods (if any) for the fair and just adjudication of class member's claims. The relatively small dollar amount individual and entities class members claims when compared to the impact that an adjudication of liability in an individual action would present for defendants makes costly individual suits impractical for class members. Defendant could pour tremendous resources into the litigation of an individual suit, forcing individual plaintiffs to expend comparable sums that would most likely consume the entire dollar amount of their claims. Absent a class action, class members will have no cost-effective form of relief.

(ii) A class action is in the best interest of judicial economy. Proof of the wrong committed against plaintiffs will provide proof of the wrong committed against all class members.

Identification of the class members can be easily determined from the court records in the Action. Notice can be easily provided to all class members. One court can thoroughly adjudicate all class members' claims with respect to the conduct complained of therein.

Count I
(Breach of Fiduciary Duty)

31. The plaintiff and the class incorporate by reference and re-allege the preceding paragraphs as though fully set forth herein.

32. As accountants, Heffler had fiduciary obligations to plaintiff and the class. Heffler had a duty of care and a duty of loyalty to the plaintiff and the class for so long as Heffler remained the Claims Administrator.

33. Heffler breached its duties to plaintiff and the class. Specifically, Heffler breached its duty of care by approving payment of false claims submitted by its employee Penta.

34. Plaintiff and the class were thereby damaged in amount believed to be in excess of \$5.0 million. It was improperly allocated to and paid on false claims submitted by Penta rather than paid out to the members of the plaintiff and the class.

35. Heffler's breach of its fiduciary duties was the direct and proximate cause of the damages to plaintiff and the class.

36. Heffler is liable to the plaintiff and the class for beach of its fiduciary duty.

Count II
(Accountant Malpractice)

37. Plaintiff and the class incorporate by reference and re-allege the preceding paragraphs as through fully set forth herein.

38. In the course of its business, Heffler was given the duty by the court to reject all unauthorized claims submitted to the Claims Administrator on behalf of the plaintiff and the class. The plaintiff and the class were third party beneficiaries to the contract of employment the Claims Administrator had with the counsel representing the classes in the Action.

39. Because of a failure by Heffler to exercise reasonable care, it approved unauthorized claims filed by Penta which should have been detected as false.

40. Heffler breach the standard of care as accountants by failing to detect the false claims of Penta.

41. Plaintiff and the class reasonably and justifiably relied on that Heffler would not authorize for payment bogus claims.

42. Due to their reliance, plaintiff and the class suffered a pecuniary loss of over \$5.0 million.

43. Heffler is liable to plaintiff and the class for negligence and malpractice in the amount to be determined by a jury.

**Count III
(Respondeat Superior)**

44. Plaintiff and the class incorporate by reference and re-allege the preceding paragraphs as through fully set forth herein.

45. At all times pertinent to this action, Penta, who committed the tortious conduct that injured plaintiff and the class as described herein, was employed by Heffler in the capacity of a certified public accountant assisting in the evaluation of submitted claims in the Action.

46. As a result of the tortious conduct perpetrated by Penta, plaintiff and the class suffered damages.

47. At the time the tortious conduct that injured plaintiff and the class was committed by Penta, the employee was acting within the scope of his employment duties and his tortious conduct was therefore imputable to Heffler under the doctrine of respondeat superior.

48. At the time the tortious conduct that injured plaintiff and the class was committed by Heffler's employee, Penta, he was engaged in and about Heffler's business, and was carrying out Heffler's purposes in part. Thus, the tortious conduct is imputable to Heffler under the doctrine of respondeat superior.

49. The tortious conduct that was committed by Heffler's employee was outrageous and oppressive and characterized by malice or wantonness justifying the imposition of punitive damages.

50. The imposition of punitive damages on Heffler for the outrageous tortious conduct of Penta is justified under this set of circumstances.

Prayer

WHEREFORE, Plaintiff prays that this Court enter judgment as follows:

1. That after due proceedings, this case be certified as a class action;
2. That plaintiff and the class members be awarded compensatory damages against the defendant in an amount to be proven at trial, together with both prejudgment and postjudgment interest as allowed by law, punitive damages, costs of attorney's fees afforded by law, where applicable, and all other costs and expenses incurred in bringing this action; and

3. For all other legal or equitable relief as may be proper under the circumstances.

Jury Demand

Plaintiff demands a trial by jury on all issues so triable.

Respectfully submitted,



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