

1 JAMES W. MCGARRY (*pro hac vice*)
JMcGarry@goodwinlaw.com
2 YVONNE W. CHAN (*pro hac vice*)
YChan@goodwinlaw.com
3 **GOODWIN PROCTER LLP**
100 Northern Avenue
4 Boston, MA 02210
Tel.: +1 617 570 1000
5 Fax: +1 617 523 1231

6 Attorneys for Defendant
7 BANK OF AMERICA, N.A.

8 [*ADDITIONAL COUNSEL LISTED IN SIGNATURE BLOCK*]
9

10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA –**
12 **SAN DIEGO DIVISION**

13 IN RE: BANK OF AMERICA
14 CALIFORNIA UNEMPLOYMENT
15 BENEFITS LITIGATION

Case No. 21-MD-02992-LAB-MSB

**DEFENDANT BANK OF
AMERICA, N.A.’S REQUEST FOR
JUDICIAL NOTICE IN SUPPORT
OF MOTION TO DISMISS
MASTER CONSOLIDATED
COMPLAINT PURSUANT TO
FED. R. CIV. P. 12(B)(1) AND
12(B)(6)**

Date: January 10, 2022
Time: 11:30 a.m.
Ctrm: 14A – 14th Floor
Judge: Hon. Larry Alan Burns

Filed/Lodged Concurrently with:
1. Notice of Motion & Motion
2. Memorandum
3. Declaration of Robert Chestnut
4. Declaration of Shane Daniels
5. [Proposed] Order

REQUEST FOR JUDICIAL NOTICE

Pursuant to Federal Rule of Evidence 201 and supporting case law, Defendant Bank of America, N.A. (“BANA” or “Bank of America”), requests that this Court take judicial notice of the following documents in connection with Bank of America’s Motion to Dismiss the Master Consolidated Complaint (“MCC”) pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6):

1. **Exhibit 1 to the Declaration of Robert Chestnut:** A true and correct copy of the California Employment Development Department Debit Card Account Agreement, expressly incorporated into the MCC by reference. This document is authenticated by the Declaration of Robert Chestnut filed concurrently with this request.
2. **Exhibit 2 to the Declaration of Robert Chestnut:** A true and correct copy of excerpts of the agreement between BANA and the California Employment Development Department (the “EDD Agreement”), expressly incorporated into the MCC by reference. This document is authenticated by the Declaration of Robert Chestnut filed concurrently with this request.
3. **Exhibit 3 to the Declaration of Robert Chestnut:** A true and correct copy of excerpts of the August 24, 2020 letter agreement between BANA and the California Employment Development Department which temporarily modifies the EDD Agreement, and thus is also incorporated by reference. This document is authenticated by the Declaration of Robert Chestnut filed concurrently with this request.

Dated: October 1, 2021

Respectfully submitted,

By: s/ Yvonne W. Chan

LAURA A. STOLL (SBN 255023)

LStoll@goodwinlaw.com

GOODWIN PROCTER LLP

601 South Figueroa Street, 41st Floor

1 Los Angeles, California 90017
2 Tel.: +1 213 426 2500
3 Fax: +1 213 623 1673

4 JAMES W. MCGARRY (*pro hac vice*)
5 *JMcGarry@goodwinlaw.com*
6 YVONNE W. CHAN (*pro hac vice*)
7 *YChan@goodwinlaw.com*
8 **GOODWIN PROCTER LLP**
9 100 Northern Avenue
10 Boston, MA 02210
11 Tel.: +1 617 570 1000
12 Fax: +1 617 523 1231

13 THOMAS M. HEFFERON (*pro hac vice*)
14 *Thefferon@goodwinlaw.com*
15 **GOODWIN PROCTER LLP**
16 1900 N St. NW
17 Washington, DC 20036
18 Tel.: +1 202 346 4000
19 Fax: +1 202 346 4444

20 JANICE P. BROWN (SBN 114433)
21 *jbrown@myersnave.com*
22 ARLENE R. YANG (SBN 297450)
23 *ayang@myersnave.com*
24 **MEYERS NAVE**
25 600 B Street, Suite 1650
26 San Diego, CA 92101

27 BARRY W. LEE (SBN 088685)
28 *bwlee@manatt.com*
29 **MANATT PHELPS & PHILLIPS LLP**
30 One Embarcadero Center, 30th Floor
31 San Francisco, CA 94111
32 Tel.: +1 415 291 7450
33 Fax: +1 415 291 7474

34 Attorneys for Defendant
35 BANK OF AMERICA, N.A.

MEMORANDUM OF POINTS AND AUTHORITIES

On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), “courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, ... matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Federal Rule of Evidence 201 authorizes the Court to “judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

It has been long recognized that a court may “consider a document if the plaintiff refers extensively to the document or the document forms the basis of the plaintiffs claim.” *Steinle v. City & Cnty. of San Francisco*, 919 F.3d 1154, 1162-63 (9th Cir. 2019) (internal quotation marks and citation omitted). This “incorporation by reference” doctrine provides a defendant the opportunity to submit additional documents outside of the complaint for the court’s consideration and denies a plaintiff the ability to mischaracterize key documents through selective quotation. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018) (the judicially-created doctrine of incorporation by reference “prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken—or doom—their claims.”).

The Ninth Circuit has “extended the ‘incorporation by reference’ doctrine to situations in which the plaintiff’s claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint.” *Kniesel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). A court “may treat such a document as part of the

1 complaint, and thus may assume that its contents are true for purposes of a motion to
2 dismiss under Rule 12(b)(6).” *Ritchie*, 342 F.3d at 908.

3 Each of the following exhibits is the proper subject of judicial notice because
4 it is referred to in detail in the Master Consolidated Complaint (“MCC”) and forms
5 the basis for several of Plaintiffs’ causes of action.

6 **Exhibit 1 to the Declaration of Robert Chestnut (“Chestnut Decl.”)**

7 Exhibit 1 to the Chestnut Decl. is a true and complete copy of the California
8 Employment Development Department Debit Card Account Agreement (the
9 “Account Agreement”), which discloses the terms and conditions of recipients’
10 California Employment Development Department Debit Card. The Account
11 Agreement is extensively referenced throughout the MCC. *See* MCC ¶¶ 70-71, 94,
12 441, 452, 475, 497, 531, 604–08. The Account Agreement forms the basis for
13 Plaintiffs’ claims for breach of contract and breach of the implied covenant of good
14 faith and fair dealing. *See id.* ¶ 608 (alleging that BANA violated the Account
15 Agreement); *id.* ¶ []. The Account Agreement also forms the basis for Plaintiffs’
16 Unfair Competition Law claim. *See id.* ¶ 577 (alleging that BANA committed
17 fraudulent acts against Plaintiffs by “failing to adequately investigate and resolve
18 Plaintiffs’ and Class Members’ claims of unauthorized transactions in a timely
19 manner despite the Bank’s promised ‘Zero Liability’ policy for unauthorized
20 transactions”).

21 Good cause exists to take judicial notice of Account Agreement because it
22 forms the basis for three of Plaintiffs’ causes of action and is, thus, incorporated by
23 reference. MCC ¶¶ 577, 608, 621; *Ritchie*, 342 F.3d at 908; *Khoja*, 899 F.3d at 1002.
24 Good cause also exists to take judicial notice of Account Agreement because the
25 MCC makes extensive references to, and directly quotes from, text contained in the
26 document. *See, e.g.*, MCC ¶¶ 70-73, 99, 605-06; *Steinle*, 919 F.3d at 1162-63.
27 Additionally, good cause exists to take judicial notice of the Account Agreement
28

1 because Plaintiffs cannot credibly dispute the authenticity of this document, as its
2 contents bear directly on the existence and nature of Plaintiffs' claims. *See* Fed. R.
3 Evid. 201(b); *Ritchie*, 342 F.3d at 908. Therefore, Exhibit 1 to the Chestnut Decl. is
4 the proper subject of judicial notice.

5 **Exhibits 2 and 3 to the Chestnut Decl.**

6 Exhibit 2 is a true and correct copy of excerpts of the agreement between
7 BANA and the California Employment Development Department (the "EDD
8 Agreement"). Exhibit 3 is a true and correct copy of excerpts of the August 24, 2020
9 letter agreement between BANA and the California Employment Development
10 Department (the "Letter Agreement"), which temporarily modifies the EDD
11 Agreement. The EDD Agreement is referenced in the MCC, and the MCC asserts
12 two separate claims based on the issuance of debit cards pursuant to the EDD
13 Agreement. MCC ¶¶ 42, 44-46, 48-50, 54, 88, 98, 640, 647-49; *Ritchie*, 342 F.3d at
14 908; *Khoja*, 899 F.3d at 1002. The EDD Agreement forms the basis of Counts XI
15 and XII, for breach of contract and breach of implied covenant of good faith and fair
16 dealing. *See id.* ¶¶ 640 ("As EDD benefits recipients and EDD Debit Cardholders,
17 Plaintiffs and Class Members are intended third-party beneficiaries of the [EDD
18 Agreement]"); 647-49.

19 Good cause exists to take judicial notice of EDD Agreement because it forms
20 the basis for two of Plaintiffs' claims and is, thus, incorporated by reference. Compl.
21 ¶ 640, 647-49; *Ritchie*, 342 F.3d at 908; *Khoja*, 899 F.3d at 1002. Good cause also
22 exists to take judicial notice of EDD Agreement because the MCC makes references
23 to the EDD Agreement. Additionally, good cause exists to take judicial notice of the
24 EDD Agreement because Plaintiffs cannot credibly dispute the authenticity of this
25 document. *See* Fed. R. Evid. 201(b); *Ritchie*, 342 F.3d at 908. Because the Letter
26 Agreement temporarily modifies the EDD Agreement and is therefore a necessary
27 part of the EDD Agreement, good cause exists to take judicial notice of the Letter
28

1 Agreement for the reasons stated above. Therefore, Exhibits 2 and 3 to the Chestnut
2 Declaration are the proper subjects of judicial notice.

3 For the reasons stated above, Defendant respectfully requests that the Court
4 grant this Request for Judicial Notice.

5
6 Dated: October 1, 2021

Respectfully submitted,

7 By: s/ Yvonne W. Chan

8 LAURA A. STOLL (SBN 255023)

LStoll@goodwinlaw.com

GOODWIN PROCTER LLP

601 South Figueroa Street, 41st Floor

Los Angeles, California 90017

Tel.: +1 213 426 2500

Fax: +1 213 623 1673

11 JAMES W. MCGARRY (*pro hac vice*)

JMcGarry@goodwinlaw.com

YVONNE W. CHAN (*pro hac vice*)

YChan@goodwinlaw.com

GOODWIN PROCTER LLP

100 Northern Avenue

Boston, MA 02210

Tel.: +1 617 570 1000

Fax: +1 617 523 1231

17 THOMAS M. HEFFERON (*pro hac vice*)

Thefferon@goodwinlaw.com

GOODWIN PROCTER LLP

1900 N St. NW

Washington, DC 20036

Tel: +1 202 346 4000

Fax: +1 202 346 4444

21 JANICE P. BROWN (SBN 114433)

jbrown@myersnave.com

ARLENE R. YANG (SBN 297450)

ayang@myersnave.com

MEYERS NAVE

600 B Street, Suite 1650

San Diego, CA 92101

25 BARRY W. LEE (SBN 088685)

bwlee@manatt.com

MANATT PHELPS & PHILLIPS LLP

One Embarcadero Center, 30th Floor

San Francisco, CA 94111

Tel.: +1 415 291 7450

Fax: +1 415 291 7474

Attorneys for Defendant
BANK OF AMERICA, N.A.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on October 1, 2021. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify under penalty of perjury that the foregoing is true and correct.

Executed: October 1, 2021

s/ Yvonne W. Chan

Yvonne W. Chan