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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION

This Document Relates to All Actions

Case No. 3:21-md-02992-LAB-MSB

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS MASTER CONSOLIDATED COMPLAINT

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

<u>ORAL ARGUMENT REQUESTED</u>

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INTRODUCTION

The 25 Class Plaintiffs are among the hundreds of thousands of Californians who lost their jobs during the pandemic and were declared entitled to receive unemployment insurance ("UI") and other public benefits from California's Employment Development Department ("EDD") through Bank of America ("BofA") prepaid debit card accounts. In mid-2020, a wave of transaction fraud hit these accounts, often in the form of highly suspicious transactions that BofA failed to detect. When Plaintiffs discovered those unauthorized transactions and reported them, BofA was legally obligated to investigate, and to reimburse Plaintiffs unless the evidence showed that Plaintiffs had actually authorized the transactions. Instead of complying with its obligations, BofA summarily denied the claims of Plaintiffs and tens of thousands of class members without a good faith investigation or explanation, then compounded the harm by freezing their accounts, thereby denying them access to their EDD benefits *for months* on end, without notice or an opportunity to be heard.

BofA responds by portraying itself as an innocent victim of "legions of criminals," and by describing the devastating impact of its own admitted conduct on legitimate UI recipients as "regrettably unavoidable" collateral damage. Mot. at 1-5. Not only does this self-serving narrative improperly ask this Court to decide disputed factual issues at the pleading stage, but it is highly misleading. This case is not about the widespread *enrollment fraud* that criminals perpetrated against EDD by submitting fraudulent claims for benefits. Nor is it about the accounts that *EDD* directed BofA to freeze due to suspected enrollment fraud. This case is about *transaction fraud* committed against innocent UI recipients, and BofA's decision to abuse its EDD-conferred powers by denying those recipients' claims and freezing their accounts, not because BofA had a reasonable and good faith basis for suspecting enrollment fraud, but simply because BofA sought to avoid its legal obligation to reimburse transaction-fraud victims.

Plaintiffs obtained the June 2021 preliminary injunction after establishing a "strong likelihood of success" on their claims that BofA violated, and continues to violate, the Electronic Fund Transfer Act ("EFTA") and California's Unfair Competition Law ("UCL"), and "is systematically breaching its contracts with cardholders" by "failing to conduct an adequate, good faith investigation when cardholders report unauthorized charges, and often simply freezing cardholder accounts based on a faulty screening process." Master Consolidated Complaint (Dkt. 72) ("MCC") Ex. A at 1.[1]

The MCC builds on the complaint underlying the preliminary injunction and contains even *more* specific detail supporting Plaintiffs' claims. For example, the MCC includes BofA's admission that, in October 2020, it began summarily denying the unauthorized transaction claims and freezing the accounts of all EDD Debit Cardholders whose claim was flagged as "suspicious" by its automated initial screening filter ("Claim Fraud Filter"), without BofA conducting *any* further investigation or taking any steps to validate the accuracy of its "Filter," which it *knew* had an extraordinarily high error rate. As a result, BofA deprived *tens of thousands* of legitimate UI beneficiaries of their rightful EDD benefits for prolonged periods of time, causing irreparable harm to them and their families.

The MCC also contains detailed allegations about BofA's various security failures and breaches that led to the widespread theft of Plaintiffs' EDD benefits and account information, including BofA's issuance of debit cards ("EDD Debit Cards") that did not use the industry-standard, information-encrypting EMV chip technology that BofA has used in all its consumer credit and debit cards since 2014

[1] The MCC includes the allegations of 25 Class Plaintiffs (¶¶114-285) and 241 separately represented Individual Plaintiffs (¶¶286-526), most of whom also experienced unauthorized transactions that BofA failed to investigate and remedy as EFTA requires. *See infra* at 5-10. Some Individual Plaintiffs also brought separate claims that were not included in the MCC, such as the identity theft and conversion claims by the three Individual Plaintiffs in *Alvarez*, *Rojas*, and *Verdun*, which are stayed by order of this Court. Dkt. 48 at 2.

and which BofA acknowledges "has been around for over 20 years and is the credit and debit card security standard in many countries around the world." ¶68.[2] The MCC also alleges that BofA negligently subcontracted much of its customer service to call center company TTEC, which hired hundreds if not thousands of customer service representatives ("CSRs") without any background checks, gave those unvetted CSRs open access to Plaintiffs' financial and other personal information ("PI"), failed to secure Plaintiffs' PI from unnecessary or unauthorized access and disclosure, and failed to train or supervise CSRs on proper data security practices, leading to a series of internal data breaches. ¶¶55, 595-96.

BofA is not the victim here. The heartbreaking testimony of financial hardship, frustration, and fear presented in the preliminary injunction proceedings that preceded this motion and are pleaded in the MCC make that clear. The massive theft of UI funds from class members whom EDD properly found eligible for UI benefits resulted from BofA's deliberate decision to cut as many corners as it could get away with in distributing EDD benefits. When the foreseeable consequences of its cost-cutting practices were realized—i.e., when its customer service phone lines began to be overwhelmed with thousands of EDD Debit Cardholders complaining that their accounts had been breached and their critically needed UI funds stolen—BofA cold-heartedly ignored their pleas and further deprived them of the funds they needed to survive. The preliminary injunction in this case was a stop-gap measure that enabled tens of thousands of class members to recover millions of dollars of wrongfully withheld funds. The MCC appropriately seeks to hold BofA liable for its unlawful practices, which caused enormous hardship to class members.

Plaintiffs' allegations are more than sufficient at this pleading stage. BofA's failure to secure EDD Debit Cardholders' PI, which foreseeably caused the theft of their EDD benefits, was negligent, violated the California Consumer Privacy Act ("CCPA") and California Customer Records Act ("CCRA"), and breached BofA's

[2] "¶_" refers to paragraphs in the MCC, unless otherwise indicated.

contractual obligations to secure Plaintiff cardholders' funds and PI. BofA's summary denial of Plaintiffs' unauthorized transaction claims without the legally required good faith investigation or written explanation violated their rights under EFTA and their account agreement with BofA ("Cardholder Agreement"), as well as their third-party rights under BofA's contract with EDD ("EDD-BofA Contract"). BofA's freezing of Plaintiff cardholders' accounts without a reasonable basis and without providing timely notice and an opportunity to contest the freeze violated those cardholders' contractual and due process rights. BofA's customer service, characterized by hours-long wait times, frequent dropped calls, and no meaningful assistance, violated BofA's contractual and tort obligations to Plaintiffs. All of BofA's challenged conduct also violated the UCL. Finally, BofA's decision to reimburse *some* Plaintiffs in response to this litigation does not address numerous concrete harms caused by BofA's EFTA and contractual violations, nor does it moot any underlying legal claims or fully satisfy BofA's liability for actual damages, EFTA statutory and treble damages, or other requested relief.

LEGAL STANDARDS

BofA moves to dismiss under Rules 12(b)(1) and 12(b)(6) but fails to meet its burden under either Rule. The applicable standards are well settled. Under Rule 12(b)(6), plaintiffs need only present "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Grandesign Advertising Firm, Inc. v. Talon US (Grandesign) LLC*, 2021 WL 780477, at *1 (S.D. Cal. Mar. 1, 2021) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The Court must accept the allegations in the complaint as true, construing them in the light most favorable to plaintiffs and drawing all reasonable inferences in plaintiffs' favor. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

Under Rule 12(b)(1), the Court may consider evidence presented by a defendant that moves to dismiss based on mootness or lack of Article III standing, but it should not resolve disputed factual issues where "jurisdiction is dependent on the resolution of factual issues going to the merits." *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (cleaned up). Class claims may be adjudicated if *any* Class Plaintiff has standing, *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc), and they all do here. *See infra* at 10-13, 36-38.

ARGUMENT

I. Plaintiffs State Claims Under EFTA/Regulation E (Count 1)

The MCC alleges in detail how BofA has circumvented its EFTA obligations and systematically violated Plaintiffs' EFTA rights. *See generally* ¶¶3-4, 80, 285, 536.[3] In the *Yick* case, No. 21-cv-00376 (N.D. Cal.), the court entered a preliminary injunction against BofA after concluding that Plaintiffs established a "strong likelihood of success on their claims that [BofA] has violated, and continues to violate, the Electronic Fund Transfers Act by failing to conduct an adequate, good faith investigation when cardholders report unauthorized charges." MCC Ex. A at 1 (citing 15 U.S.C. §1693f). Plaintiffs' EFTA claims now rest on even more detailed factual allegations, including those revealed during the preliminary injunction proceedings. Yet BofA seeks dismissal of these claims, arguing that Plaintiffs do not adequately allege that they provided BofA notice of their unauthorized

[3] Specific violations include (1) making it unreasonably difficult to report and obtain customer service for fraud claims, ¶536(a) (*e.g.*, ¶¶87-88, 90, 96-104, 117-26, 133, 141, 145-50, 179-84, 198, 209-13, 221-23, 251); (2) not providing provisional credit, ¶536(b)-(c) (*e.g.*, ¶¶89-91, 202, 275); (3) denying fraud claims without conducting good faith investigations, ¶536(a), (c)-(g) (*e.g.*, ¶¶9-33, 89-91, 188, 240, 249, 252, 256, 259, 277); (4) freezing Plaintiffs' Accounts indefinitely when they submit fraud claims, ¶536(a), (j) (*e.g.*, ¶¶93-96, 100, 138-39, 149, 196-97, 226-27); (5) withholding EFTA-mandated information, such as a written explanation of why it denied individual claims, ¶536(h) (*e.g.*, ¶¶89-90, 140, 158, 166, 218, 240, 283-84); (6) rescinding prior "permanent" credits, ¶536(k) (*e.g.*, ¶¶92, 207-08, 232, 240, 263-64, 269-71); and (7) issuing permanent credit long after the EFTA deadline to do so had expired, ¶536(e), (i) (*e.g.*, ¶¶135, 143, 151, 159, 168-69, 176, 191, 236).

transaction claims, and they do not specify precisely how BofA failed to conduct good faith investigations into their claims. Mot. at 17-20. BofA further moves to dismiss under Rule 12(b)(1), contending its recent reimbursements mooted certain claims. *Id.* at 9. These arguments are meritless.

A. Plaintiffs Provided Sufficient Notice under EFTA.

BofA's only challenge to the *Class Plaintiffs*' EFTA notice allegations is that they do not allege they informed BofA of the specific "reasons for their belief" that "an error exists" on their account. Mot. at 8, 17-18, App'x Column 3. But all 25 Class Plaintiffs detail why they believed the disputed transactions were unauthorized, and alleged that they promptly reported those transactions to BofA. *See, e.g.*, ¶129 (Rivera discovered $800 ATM withdrawal made an hour from her home and "immediately … submit[ted] a claim disputing the transaction").[4] These allegations show, and at minimum give rise to a plausible inference, that Plaintiffs conveyed their stated reasons for claiming fraud, *see Grandesign*, 2021 WL 780477, at *1, and are far more detailed than the bare-bones allegations held insufficient in BofA's cited cases. *Compare Shapiro v. Am.'s Credit Union*, 2013 WL 5373269, at *2 (W.D. Wash. Sept. 25, 2013) (*pro se* plaintiff failed to identify dates or amounts of disputed transactions at summary judgment), *and Ghalchi v. U.S. Bank, N.A.*, 2015 WL 12655402, at *8 (C.D. Cal. Jan. 8, 2015) (plaintiffs vaguely pled they "notified" bank of unspecified disputed transactions), *with, e.g.*, ¶180 (Willrich and BofA CSR "spent approximately one hour going through every charge during a three-month period to ensure all fraudulent activity was accounted for"); ¶188 (McClure "presented evidence … regarding the unauthorized transactions, which the Bank representative acknowledged was indicative of fraud"); ¶192 (Wilson told BofA CSR he had not used his card in location where disputed transactions occurred).

[4] *See also* ¶¶129, 137-38, 144-45, 152-55, 160-63, 172-73, 195, 198, 200-05, 207, 216-17, 225-26, 230-31, 238-39, 250, 254, 258-59, 261, 268-69, 274-75, 280.

The plausibility of Plaintiffs' showing is reinforced by their allegations that BofA *acted* on Plaintiffs' reports by opening unauthorized transaction claims—and, eventually, by crediting many of their accounts for the amounts in dispute (albeit only *after* Plaintiffs filed this action),[5] further demonstrating that BofA found Plaintiffs' notices sufficient to trigger its own error resolution procedures. In some instances, BofA's claims representatives affirmatively acknowledged receipt of the claims, provided claim numbers, and/or assured Plaintiffs that their claims would be investigated.[6] In others, BofA issued the Plaintiff "permanent" credit (before reversing that credit months later).[7] Plaintiffs further allege that BofA sent them boilerplate denial letters that identify their claims by claim number and transaction amount, and deny their claims without saying anything about the Plaintiff having failed to provide sufficient information or notice.[8] These facts are or should be confirmed by BofA's own records. ¶535; *see Grandesign*, 2021 WL 780477, at *1 (allegations sufficient if they "'raise a reasonable expectation that discovery will reveal evidence' supporting that inference") (quoting *Twombly*, 550 U.S. at 556).[9]

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[5] *See, e.g.*, ¶¶135, 143, 151, 159, 168, 176, 191, 194, 199, 215, 224, 228, 253, 267, 273. BofA cannot escape liability to the Plaintiffs who, despite diligent efforts, were unable to get through to BofA due to hours-long wait times and other barriers BofA imposed that made it exceedingly difficult to report and submit claims. *Supra* note 3, item 1; *see Jacobs v. Tenneco W., Inc.*, 186 Cal.App.3d 1413, 1418 (1986) ("A party who prevents fulfillment of a condition of his own obligation … cannot rely on such condition to defeat his liability.") (citation omitted); *accord* Restatement (First) of Contracts §295 (1932) ("If a promisor prevents or hinders the occurrence of a condition … the condition is excused."); Restatement (Second) of Contracts §245 (1981) (similar).

[6] *See, e.g.*, ¶¶129-30, 145, 148, 248, 281.

[7] *See, e.g.*, ¶¶207-08, 231-32, 239-40, 246-47, 263-64, 269, 271.

[8] *See, e.g.*, ¶¶130, 140, 156, 164, 181, 188, 218, 248, 271, 276, 283.

[9] This is equally true for the 241 Individual Plaintiffs, most of whom also alleged reporting unauthorized transactions. *See, e.g.*, ¶382 (Individual Plaintiff "reported the fraud to Bank of America via phone" day after receiving text alert concerning fraudulent $65 transaction); ¶¶286, 288-301, 303-24, 326-86, 388-93, 395-98, 400-06, 408-66, 468-69, 471, 475-82, 484, 486-87, 489-516, 518-25.

Alone and in combination, these allegations adequately plead that BofA had sufficient notice of Plaintiffs' unauthorized transaction claims to trigger its error resolution obligations under EFTA, 15 U.S.C. §1693f, and Regulation E, 12 C.F.R. §1005.11.

B. Plaintiffs Adequately Allege that BofA Denied Claims Without Having Conducted a Reasonable, Good Faith Investigation.

Plaintiffs' allegations are also more than sufficient to plead that BofA failed to conduct the legally required "good faith investigation[s]" of their unauthorized transaction claims and wrongfully denied their claims without a "reasonable basis," in violation of EFTA and Regulation E. 15 U.S.C. §1693f(e). Far from being "conclusory" (Mot. at 20), Plaintiffs' allegations are detailed, specific, and based in part on BofA's *own* submissions in opposition to Plaintiffs' preliminary injunction motion in *Yick*.

As shown above (at 6-8), Plaintiffs allege in detail *why* their unauthorized transaction claims were valid, and *why* BofA should have reached that same conclusion (had it conducted the legally required investigations). Instead of conducting the required investigations, BofA often summarily denied Plaintiffs' claims within just one or two days and sent them substantively identical form denial letters with no real explanation of the results or findings of any investigation.[10] The timing and boilerplate nature of these denial letters strongly support the inference that BofA did not actually investigate those claims—an inference supported by allegations that confirm BofA's failure to investigate. *See, e.g.*, ¶256 (after claim was denied, Auburn called New York Walgreens where fraudulent charges had occurred and spoke with manager who informed her that store had video of transactions, but "neither [BofA] nor anyone else had contacted the store to ask about or investigate the transactions"). Moreover, BofA's subsequent decisions to "reconsider" and pay Plaintiffs' claims (*after* the statutory deadline and *after*

[10] *See, e.g.*, ¶¶89, 130, 140, 156, 164, 181, 188, 218.

Plaintiffs filed suit)[11] further supports the inference that BofA's initial claim denials were not based on reasonable or good faith investigations.

Plaintiffs further allege that BofA's own declarations, filed in opposition to Plaintiffs' preliminary injunction motion, confirm that instead of conducting the required individualized investigations into disputed transactions, BofA wrongfully maintained (from at least October 2020 until the injunction issued in June 2021) a "policy and practice of (a) subjecting every EDD Debit Cardholder who submitted a claim of unauthorized transaction to an initial 'Claim Fraud Filter,' [and] (b) *automatically and without investigation* denying the fraud claim of any EDD Debit Cardholder flagged by the Claim Fraud Filter." ¶108 (emphasis added). Plaintiffs allege that BofA adopted these policies and practices "to circumvent its obligations under EFTA and Regulation E," which require it to issue provisional and permanent credit within specified time periods. ¶¶91, 536(a)-(c).[12] Even if EFTA does not prohibit the use of "automated" measures as an investigatory tool (Mot. at 19), BofA's *exclusive reliance* on the results of an automated filter—which BofA concedes is only "a screening step to first determine whether a Claim itself is *likely* fraudulent" (Mot. at 11) (emphasis added)—to conclusively determine claims without *any* additional investigation was not reasonable or in good faith. BofA's reliance on that filter was particularly unreasonable given Plaintiffs' allegation that the filter "has an extremely high false positive rate, and erroneously flagged tens of thousands of [legitimate] claimants as criminals using stolen identities," and BofA knew this. ¶108. BofA's exclusive reliance on its automated filter was also particularly unreasonable given the ease with which BofA could have validated the

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[11] *See, e.g.*, ¶¶135, 143, 151, 159, 168, 176, 191, 194, 199, 214-15, 224, 228, 253, 267, 273.

[12] BofA also had a "policy and practice of … automatically and without investigation freezing or blocking the Account of any … Cardholder flagged by the Claim Fraud Filter," which was a further unlawful effort to circumvent EFTA and gives rise to treble damages. ¶¶108, 536(j); *see* 15 U.S.C. §1693f(e).

filter's results—such as providing flagged cardholders the opportunity to authenticate their identity by answering security questions over the phone or by presenting a photo ID at a Bank branch, as BofA must now provide under the preliminary injunction order. MCC Ex. B, para. 4(b).

Finally, allegations that BofA denied Plaintiffs' unauthorized transaction claims "without providing a report of the results of [BofA]'s investigation of the claim that includes a written explanation of [BofA]'s findings" (¶536(h)) state an additional, independent claim for violation of EFTA. *See* 15 U.S.C. §1693f(a), (d) (requiring BofA to provide "the results of [its] investigation" and written "explanation of its findings"); 12 C.F.R. §1005.11(c)(1), (d)(1) (similar); *Gale v. Hyde Park Bank*, 384 F.3d 451, 453 (7th Cir. 2004) (plaintiff stated EFTA claim by alleging bank "rejected his claim without much explanation," thus providing "a 'determination' but not 'the results of such investigation'"). BofA entirely ignores this additional theory of statutory liability, providing yet another reason its motion should be denied.

C. BofA's Systemic EFTA and Contract Violations Caused Concrete Injuries That Were Not Redressed by Reimbursement.

BofA argues that it mooted many Plaintiffs' EFTA and contract claims by "reconsidering" its prior denials and crediting their accounts. Mot. at 2, 9, 18. But even if BofA were to belatedly reimburse every Class Plaintiff with interest and tender all relief requested, including statutory and treble damages (*see* ¶¶545, 610, pp. 275-76), that still would not moot Plaintiffs' *class* claims. *See Bates*, 511 F.3d at 985 (only one class plaintiff need have standing).[13] Under the "pick off" doctrine,

[13] To be clear, Plaintiffs allege BofA acted unreasonably and in bad faith and *knowingly and willfully* violated their EFTA and contract rights, giving rise to treble damages. ¶¶537-38; *see* 15 U.S.C. §1693f(e)(1)-(2) (providing for treble damages if bank (1) did not provisionally recredit a consumer's account within 10 business days and either "(A) did not make a good faith investigation of the alleged error, or (B) did not have a reasonable basis for believing that the consumer's account was

class claims cannot be mooted by "picking off" plaintiffs before they have had "a reasonable opportunity to file a motion seeking class certification." *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1148 (9th Cir. 2016); *accord Buckeye Tree Lodge & Sequoia Vill. Inn, LLC v. Expedia, Inc.*, 2019 WL 1170489, at *1-2 (N.D. Cal. Mar. 13, 2019). The doctrine applies with particular force here, since at least seven Class Plaintiffs were reimbursed only *after* they successfully moved for provisional class certification in *Yick* on April 1, 2021. ¶¶135, 143, 151, 176, 194, 199, 224; MCC Ex. A at 1-2 (provisional certification).

In any event, five Class Plaintiffs still have not been reimbursed for unauthorized transactions on their accounts. *See* ¶¶126, 202, 260, 278, 284; *accord* Mot. App'x Column 4. BofA's reimbursements of the other 20 Class Plaintiffs were *all* untimely (i.e., after expiration of the 45-day deadline under EFTA and the Cardholder Agreement), yet BofA *has not paid them treble or other statutory damages* (*see* 15 U.S.C. §§1693f(e), 1693m(a)(2)), *nor has BofA compensated them for all actual damages caused by* the unlawful delay (*see id.* §1693m(a)(1)). *Supra* note 3, item 7; ¶¶545(a), 609-10, pp. 275-76 (seeking actual damages with interest).[14] These are all concrete, compensable monetary harms that establish Article III standing. *See Van v. LLR, Inc.*, 962 F.3d 1160, 1162, 1164 (9th Cir. 2020) ("the inability to have and use money to which a party is entitled is a concrete injury," and thus plaintiff had standing to seek $3.76 for loss of use of funds after receiving mid-lawsuit refund without interest); *Dieffenbach v. Barnes & Noble,*

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not in error"; or (2) "knowingly and willfully concluded that the consumer's account was not in error when such conclusion could not reasonably have been drawn from the evidence available to the financial institution at the time of its investigation").

[14] Of the 20 "reimbursed" Class Plaintiffs, 16 were untimely reimbursed only after filing suit. *See* ¶¶135, 143, 151, 159, 168, 175, 191, 194, 199, 224, 228, 253, 267, 273; Mot., Daniels Decl. (Dkt. 84-8) ¶¶3c, 3d (Yuan and Zoelle reimbursed after MCC filed). Two others were untimely reimbursed only after threatening suit (¶215) or after a news reporter contacted BofA to ask why it had denied her claims (¶257).

Inc., 887 F.3d 826, 828 (7th Cir. 2018) (plaintiffs had standing "because unauthorized withdrawals from their accounts cause a loss (the time value of money) even when banks later restore the principal"). As this Court has held, "loss of interest and/or loss of beneficial use" of unauthorized transaction funds is recoverable under EFTA and not mooted by reimbursement without interest. *Park v. Webloyalty.com, Inc.*, 2019 WL 1227062, at *3 (S.D. Cal. Mar. 15, 2019).[15]

BofA's practices also caused numerous concrete intangible harms. For example, Plaintiffs were denied access to statutorily mandated information, making it difficult or impossible for them to challenge BofA's denials of their claims. *Supra* note 3, item 5; *see Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 679-80 (9th Cir. 2021) (failure to provide statutorily mandated itemized wage statements caused concrete injury); *Robertson v. Allied Sols., LLC*, 902 F.3d 690, 697 (7th Cir. 2018). Plaintiffs also had to spend many hours or days on hold waiting to speak with CSRs to seek, among other things, "reconsideration" of unlawfully denied claims. *Supra* note 3, items 1, 3, 6; *see Dieffenbach*, 887 F.3d at 828 (loss of "time needed to set things straight" was concrete injury); *Sisley v. Spring Commc'ns Co.*, 284 F.App'x 463, 466 (9th Cir. 2008) (similar).[16]

None of the above injuries were remedied by BofA's lawsuit-induced change of heart to "reconsider" its prior unlawful denials and finally to pay Plaintiffs' unauthorized transaction claims without interest. Thus, Plaintiffs' claims are not moot. *See Chen*, 819 F.3d at 1138, 1148 (claim is not moot until plaintiff has been

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[15] These same authorities support standing for similar harms, such as those arising from unlawful denials of provisional credits and from unreasonable account freezes and blocks. *See supra* note 3, items 2, 4. They also support Plaintiffs' standing to bring their contract claims. *See Castanares v. Deutsche Lufthansa AG*, 2021 WL 811455, at *2-4 (C.D. Cal. Jan. 26, 2021) (applying *Van* to contract claim).

[16] *See also Curtis v. Propel Prop. Tax Funding, LLC*, 915 F.3d 234, 241 (4th Cir. 2019) (violation of plaintiff's EFTA right to enter contract "without being required to agree to preauthorized [electronic fund transfer]" was "substantive violation" causing concrete injury).

afforded "all relief requested in the complaint") (citation omitted); *T.K. v. Adobe Sys. Inc.*, 2018 WL 1812200, at *10-12 (N.D. Cal. Apr. 17, 2018) (collecting cases).

D. All Plaintiffs Reported "Errors" Within the Scope of EFTA.

BofA contends some *Individual Plaintiffs*[17] have not stated an EFTA claim because they "failed to plead that they reported any unauthorized transaction or other transaction error." Mot. at 17, App'x Columns 1-2; *see* Mot. at 8. But EFTA defines "errors" broadly to include not just "unauthorized transactions," but also other events such as "a consumer's request for additional information or clarification concerning an electronic fund transfer or any documentation" required by EFTA. 15 U.S.C. §1693f(f)(6). The term "electronic fund transfer" means "any transfer of funds … initiated through an electronic terminal … or computer … so as to order, instruct, or authorize a financial institution to debit or credit an account." *Id.* §1693a(7); 12 C.F.R. §1005.3(b)(1) (similar). Under the statute, then, whose language BofA entirely ignores, an EFTA "error" includes any Plaintiff's "request for additional information or clarification" from BofA about a periodic EDD benefits payment (which EDD, as a matter of routine practice, electronically transfers to BofA with instructions to BofA to credit the payment to the Plaintiff's account) that was *not* deposited to the Plaintiff's account, or that the Plaintiff was otherwise unable to access, because BofA had frozen or blocked their account. Each Class and Individual Plaintiff alleged that they gave BofA notice of an "error" as defined by the statute.[18]

Because all Plaintiffs plead facts alleging that they timely reported to BofA an unauthorized transaction or other account "error" with enough specificity to satisfy EFTA's notice requirements, especially when construed in the light most

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[17] BofA does not make this argument as to any Class Plaintiffs.

[18] Individual Plaintiffs further contend that they each notified BofA and requested "additional information or clarification" about issues related to their accounts, and that these requests for additional information and clarification constitute reporting an "error" under 15 U.S.C. §1693f(f)(6).

favorable to Plaintiffs, the Court should reject BofA's arguments to the contrary. *See Twombly,* 550 U.S. at 555 (plaintiffs need only give "fair notice of what the claim is and the grounds upon which it rests"). Nonetheless, if any particular Plaintiff's allegations are found insufficient, the Court should grant leave to amend.

II. Plaintiffs State Breach of Contract Claims (Counts 7, 8, 9)

The preliminary injunction order in *Yick* also held that Plaintiffs had a "strong likelihood of success on their claims that [BofA] is systematically breaching its contracts with cardholders …." MCC Ex. A at 1. Despite the even more detailed allegations of breach in the MCC, BofA contends that the contract claims should be dismissed as insufficiently pled. That argument fails as well.

A. Plaintiffs State a Claim for Breach of the Cardholder Agreement.

For the same reasons Plaintiffs have standing and adequately stated claims under EFTA, they also have standing and stated valid claims for breach of Section 11 of the Cardholder Agreement,[19] which expressly incorporates all their rights under EFTA and Regulation E. *See* ¶605; Cardholder Agreement §9 (incorporating "any consumer rights you may have under Regulation E, as described in Sections 10 and 11," with respect to unauthorized transactions); *id.* §11 (explaining error resolution process and timelines under EFTA and Regulation E).[20]

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[19] Citations to the "Cardholder Agreement" refer to Exhibit A to the accompanying Declaration of Brian Danitz (downloaded from BofA's EDD Debit Card website), and Exhibit 1 to BofA's Declaration of Robert Chestnut (Dkt. 84-5). The two versions are substantively the same, including the same effective date, except for the governing law provision. *Compare* Danitz Decl., Ex. A, §18 (California law), *with* Chestnut Decl., Ex. 1, §18 (North Carolina law). *See also* Pls.' Opp'n to Def.'s RJN at 2; Pls.' RJN at 1.

[20] BofA contends that any Plaintiff whose unauthorized transaction claims were *untimely* reimbursed cannot recover contract damages for that delay, arguing that the Cardholder Agreement limits BofA's contractual liability to the "face amount of any unauthorized card transaction" and exempts it from "claims of special, indirect or consequential damages." Mot. at 9 (quoting Cardholder Agreement §9). Not so. That quoted language appears in Section 9, which describes "Bank of

Plaintiffs also state a claim for breach of BofA's "Zero Liability" guarantee under Section 9 of the Cardholder Agreement, which goes beyond EFTA and Regulation E by providing cardholders additional protections for unauthorized transactions. *See* ¶605; Cardholder Agreement §9 ("Under the Bank of America 'zero liability' policy, you may incur no liability for unauthorized use of your Card up to the amount of the unauthorized transaction, provided you notify us within a reasonable time …."). Section 9 defines "reasonable time" as "not [] less than the time frames specified under the [EFTA] or Regulation E." *Id.* BofA acknowledges that not all Plaintiffs have been reimbursed for disputed transactions (Mot. at 9), which precludes dismissal of Plaintiffs' class-wide claims on standing and mootness grounds. *See B.K. ex. rel. Tinsley v. Snyder*, 922 F.3d 957, 966-67 (9th Cir. 2019). Plaintiffs' claim for breach of Section 9 thus remains a live controversy.

Plaintiffs also adequately plead three separate claims for breach of Section 2 of the Cardholder Agreement, which narrowly limits the circumstances under which BofA may freeze or block accounts and which guarantees that funds will be made available to cardholders in accordance with EDD's instructions. *See* ¶¶606, 608; Cardholder Agreement §2 (allowing BofA to freeze accounts only "pending an investigation" of suspected "irregular, unauthorized or unlawful activities").

First, Plaintiffs allege that BofA had a policy and practice of responding to cardholders who reported unauthorized transactions "by automatically and indefinitely freezing or blocking their Accounts" (¶93), including based solely on the results of an unreliable Claim Fraud Filter with an "extremely high false positive rate" that "erroneously flagged tens of thousands of [legitimate] claimants" (¶108). These allegations are more than sufficient to state a claim that BofA violated

America's 'Zero Liability' Policy for Unauthorized Transactions," and limits BofA's liability only "under this policy"—that is, only under the Zero Liability Policy. *See* Cardholder Agreement §9. Accordingly, nothing precludes Plaintiffs who received untimely reimbursements from recovering contract damages for that delay in breach of their rights under Section 11 of the Cardholder Agreement.

Section 2 by *initiating* freezes and blocks "without a reasonable basis for suspecting irregular, unauthorized, or unlawful activities in the Account." ¶608(e).[21]

Second, Plaintiffs allege that BofA had a policy and practice of *maintaining* freezes and blocks on accounts "beyond the length of time necessary for a reasonable investigation" (¶608(e))—especially because it routinely maintained freezes and blocks for "months on end" without *any* post-freeze investigation, and continued to maintain them *even after* cardholders "obtain[ed] confirmation from EDD that they either [did] not need to re-verify or [had] successfully re-verified their benefits eligibility" (¶¶94-96, 108). Clearly, BofA's freezes were not limited to the time necessary to conduct an "investigation," as required by Section 2.

Finally, BofA largely ignores (*see* Mot. at 13-14) allegations that its "practice of freezing or blocking Accounts cuts off the affected EDD Debit Cardholders' access to any continuing benefits … to which EDD has determined the Cardholder is entitled." ¶93; *see also* ¶53. These allegations plainly state a claim that BofA further violated Section 2 by failing to make "[f]unds … available for your use on the day we have been instructed by the EDD to fund your Account." ¶606 (quoting Cardholder Agreement §2).

B. Plaintiffs State a Claim for Breach of Implied Contract.

Plaintiffs also state a claim for BofA's breach of its implied contractual duties, including its duty to "take reasonable steps to ensure that [Plaintiffs'] Accounts were secure against unauthorized transactions and that any claims

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[21] While Section 2 does not expressly state that BofA must have a *reasonable, good faith basis* for "suspecting irregular, unauthorized, or unlawful activities" before it freezes an account, that obligation is an implied term of the contract. *See* Cal. Civ. Code §1643 ("A contract must receive such an interpretation as will make it … reasonable … if it can be done without violating the intention of the parties."); Restatement (Second) of Contracts §203, cmt. c (1981) ("In the absence of contrary indication, it is assumed that each term of an agreement has a reasonable rather than an unreasonable meaning …."). At the very least, good faith implementation is required by the covenant of good faith and fair dealing. *See infra* at 18-20.

regarding unauthorized transactions were adequately investigated and resolved." ¶612. "It is well established that a bank has 'a duty to act with reasonable care in its transactions with its depositors ….'" *Chazen v. Centennial Bank*, 61 Cal.App.4th 532, 543 (1998) (quoting *Bullis v. Sec. Pac. Nat'l Bank*, 21 Cal.3d 801, 808 (1978)). "The duty is an implied term in the contract between the bank and its depositor." *Id.* (citing *Barclay Kitchen, Inc. v. Cal. Bank*, 208 Cal.App.2d 347, 353 (1962)). Because this duty is implied in *every* contract between banks and depositors, there is no merit to BofA's insistence that it never "assent[ed]" to it. Mot. at 17.

Moreover, this implied contractual obligation applies to (and supplements) each of BofA's express contractual obligations. *See Webster v. HSBC Bank USA Nat'l Ass'n*, 2012 WL 13012700, at *3 (C.D. Cal. Mar. 5, 2012) (quoting *Das v. Bank of Am., N.A.*, 186 Cal.App.4th 727, 741 (2010)). That implied obligation has specifically been held to require banks to make reasonable efforts to protect depositors when, as here, "[an] individual notifies a bank of potential fraud occurring with respect to bank accounts." *Hawkins v. Bank of Am., N.A.*, 2018 WL 1316160, at *3 (S.D. Cal. Mar. 14, 2018) (citing *Das*, 186 Cal.App.4th at 741-42).[22]

BofA violated this implied contractual duty to take reasonable care, including by failing to provide reasonably secure benefits cards and accounts; failing to hire, train, and manage a customer service operation sufficient to provide reasonable and timely responses to the foreseeable surge in claims during the pandemic; and failing

[22] Because the implied duty to take care in the performance of express contractual obligations is distinct from the express obligations themselves, BofA's reliance on cases where implied contract allegations merely duplicated breach of express contract allegations is misplaced. Mot. at 16 (citing *Berkla v. Corel Corp.*, 302 F.3d 909, 918 (9th Cir. 2002), and *APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth.*, 110 N.C. App. 664, 675 (1983)). In any event, any alleged overlap of implied and express contract claims is not a basis to dismiss alternative theories at the pleading stage. *See Cal. Spine & Neurosurgery Inst. v. United Healthcare Ins. Co.*, 2019 WL 4450842, at *5 (N.D. Cal. Sept. 17, 2019).

to timely and adequately investigate fraud claims and provide provisional credits when required to do so. *See id.*; ¶¶55-56, 59-69, 80-105, 614-17.

C. Plaintiffs State a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance." *Carma Developers (Cal.) Inc., v. Marathon Dev. Cal., Inc.*, 2 Cal.4th 342, 371 (1992) (citation omitted). This "implied covenant … prevent[s] a contracting party from engaging in conduct that—though not technically violating the express covenants—nonetheless 'frustrates the other party's rights to the benefits of the contract.'" *Webster*, 2021 WL 13012700, at *3 (citation omitted). "'The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another,'" and requires that "[t]he party with discretionary power [] exercise such power in good faith and through 'objectively reasonable conduct.'" *3500 Sepulveda, LLC v. Macy's W. Stores, Inc.*, 980 F.3d 1317, 1324 (9th Cir. 2020) (citations omitted).

BofA breached this covenant. ¶¶619-24. By issuing Plaintiffs cards with inadequate security protection that subjected Plaintiffs to widespread theft of their EDD benefits, by unreasonably denying Plaintiffs' unauthorized transaction claims and freezing their accounts, and by denying Plaintiffs reasonably adequate customer service to assist them in reporting and remedying unauthorized transactions and frozen and blocked accounts, BofA "frustrate[d] [Plaintiffs'] rights to the benefits of" the Cardholder Agreement and Plaintiffs' third-party beneficiary rights under the EDD-BofA Contract. Further, whatever discretion the Cardholder Agreement may purport to confer about what constitutes an "investigation" and when BofA "may 'freeze'" accounts, the implied covenant precludes BofA from exploiting that discretion through "unreasonable conduct" that denies Plaintiffs the benefit of their bargain, contrary to their "legitimate expectations." *Carma Developers*, 2 Cal.4th at 373. Allowing BofA to exploit such discretion by arbitrarily denying claims and freezing accounts without good cause and without a reasonable and good faith investigation would "virtually eliminate[] the good faith and fair dealing requirement." *Badie v. Bank of Am.*, 67 Cal.App.4th 779, 795-97 (1998), *rev. denied* (banks must exercise discretion reasonably and consistent with parties' expectations).

Because BofA's obligation to exercise its discretion in good faith is consistent with its express obligations under the Cardholder Agreement, its reliance on cases where the plaintiff sought to contradict the express terms of the agreement,[23] or where the implied covenant allegations merely duplicated express terms,[24] misses the point. BofA's contention that Plaintiffs' claims are "too vaguely alleged" because they include claims that BofA did not act "reasonably" (Mot. at 16) ignores the complaint's detailed allegations (*see* ¶¶619-24) and the reality that "reasonableness" standards apply throughout the law. *Badie*, 67 Cal.App.4th at 796 ("essence of the good fair covenant is objectively reasonable conduct"); *Peak-Las Positas Partners v. Bollag,* 172 Cal.App.4th 101, 106 (2009) ("Good faith and

[23] *See* Mot. at 14-15 (citing *Dos Beaches, LLC v. Mail Boxes Etc., Inc.*, 2012 WL 506072, at *15 (S.D. Cal. Feb. 15, 2012) (covenant cannot prohibit something "contract *expressly permits*," but "[j]ust because the contract does not expressly *prohibit* a certain course of conduct does *not* mean the covenant of good faith and fair dealing allows it") (emphasis added); *Gilmore v. Garner*, 157 N.C. App. 664, 667 (2003) (implied terms cannot be "inconsistent" with express terms); *N.C. Mail Haulers & Postal Labor Local 8001, Am. Postal Workers Union, AFL-CIO v. E. Coast Leasing, Inc.*, 2006 WL 3068497, at *7 (M.D.N.C. Oct 27, 2006) ("implied covenant cannot add new obligations," without disputing implied covenant applies to exercise of conferred discretion); *McKnight v. Torres*, 563 F.3d 890, 893 (9th Cir. 2009) (implied covenant does not "alter" or "add" duties but *does* operate "to prevent a party from taking action that 'will injure the right of the other to receive the benefits of the agreement'") (citations omitted)).

[24] *See* Mot. at 15-16 (citing *Rezapour v. Earthlog Equity Grp.*, 2013 WL 3326026, at *4 (W.D.N.C. July 1, 2013) (dismissing "freestanding" implied covenant claim and permitting "theories of breach of good faith" in support of breach of contract claim); *Diehl v. Starbucks Corp.*, 2013 WL 12108658, at *6 (S.D. Cal. Oct. 16, 2013) (plaintiffs failed to allege a contractual relationship)).

objective reasonableness are questions of fact, based on all the circumstances.”).

III. Plaintiffs State Claims for Breach of the EDD-BofA Contract as Third-Party Beneficiaries (Counts 11, 12)

Plaintiffs adequately plead that they are third-party beneficiaries of the EDD-BofA Contract and that BofA breached the provisions they seek to enforce as well as the implied covenant of good faith and fair dealing.

A. Plaintiffs Adequately Plead Third-Party Beneficiary Standing.

As BofA acknowledges (Mot. at 21), third-party beneficiary status may be established by evidence that the contracting parties expressly intended to benefit a third party, including a showing that the contract terms at issue benefit only an identifiable third-party group. *See, e.g.*, *Zigas v. Superior Court*, 120 Cal.App.3d 827, 834-41 (1981) (tenants were third-party beneficiaries of rent-cap provisions in contract between landlord and government because tenants were only group that would benefit from rent caps, which “were obviously designed to protect” them and were “not intended to benefit the government”); *Shell v. Schmidt*, 126 Cal.App.2d 279, 287, 289-90 (1954) (third-party veterans who purchased homes could enforce building specifications in homebuilder’s contract with government because they were “the class intended to be benefited”). Whether a person is an intended third-party beneficiary is often a question of fact not suitable for resolution on a motion to dismiss. *See Bozzio v. EMI Grp.*, 811 F.3d 1144, 1153-54 (9th Cir. 2016) (citing *Prouty v. Gores Tech. Grp.*, 121 Cal.App.4th 1225, 1233 (2004)).[25]

Here, Plaintiffs seek to enforce provisions of the EDD-BofA Contract that are plainly intended to benefit only EDD Debit Cardholders and not EDD. Those provisions include BofA’s promise “to apply ‘the most rigorous fraud detection

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[25] *See also Stasi v. Immediata Health Grp.*, 501 F.Supp.3d 898, 920 (S.D. Cal. 2020) (third-party beneficiary allegations made on information and belief were sufficient at motion to dismiss stage); *Vepo Design Corp. v. Am. Econ. Ins. Co.*, 2020 WL 10689644, at *6 (C.D. Cal. Aug. 7, 2020); *Deerpoint Grp., Inc. v. Agrigenix, LLC*, 393 F.Supp.3d 968, 978 (E.D. Cal. 2019).

procedures,' including 'the highest level of security and fraud safeguards' based on 'multiple layers of extensive security' *to ensure that EDD Debit Cardholders* do not become the victims of fraud" (¶42) (emphasis added); to "*fully protect EDD Debit Cardholders* in case they became victims of fraud" by complying with EFTA and Regulation E (¶43) (emphasis added); to "extend our Zero Liability protection on disputed claims" to all cardholders (¶43); and to provide "'[s]uperb customer service'" to cardholders, including by ensuring "that live CSR agents would be available 24/7 *to assist EDD Debit Cardholders*" (¶44) (emphasis added).

Because EDD has no potential liability for fraud on the BofA-issued debit cards (¶54), these anti-fraud and customer-service guarantees benefit only cardholders, not EDD, and any breach of these provisions likewise harms only cardholders, not EDD. *See Zigas*, 120 Cal.App.3d at 837-38 (that breach of rent-cap provisions would directly injure tenants, not the government, supported third-party beneficiary standing). Unlike in *Goonewardene v. ADP, LLC*, 6 Cal.5th 817, 834-35 (2019), in which the defendant payroll company contracted with the plaintiff's employer with the sole intent of "provid[ing] a benefit *to the employer*" (*id.* at 830), here the contracting parties included anti-fraud and customer service obligations that could only have been intended to provide a benefit to the third-party cardholders.[26] Allowing cardholders to enforce these contractual provisions is thus fully consistent with the parties' reasonable expectations. ¶640.[27]

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[26] Similarly, in *Cleveland v. Ludwig Inst. for Cancer Research Ltd.*, 2020 WL 3268578, at *8-9 (S.D. Cal. June 17, 2020) (applying *Goonewardene*), the motivating purpose of the funding provisions in an affiliation agreement between a cancer research institute and a university was to advance cancer research, not to fund specific third-party researchers' work.

[27] *Goonewardene* is further distinguishable because the plaintiff employee had "no need" to sue the payroll company for alleged unpaid wages that she could fully recover directly from her employer. *Id.* at 836. Plaintiffs here have no similar recourse against EDD. And unlike in *Cleveland*, where there was "no apparent need" to recognize third-party rights because plaintiffs could bring suit "under their

BofA's argument that Plaintiffs are merely incidental beneficiaries ignores the specific provisions of the EDD-BofA Contract that Plaintiffs seek to enforce, and relies on a single provision from the 600-plus-page contract stating that services will be provided "for the EDD." Mot. at 21-22. But a contract "need not be exclusively for the benefit of the third party" to confer third-party standing; indeed, the third party need not even be the "primary beneficiary." *Prouty*, 121 Cal.App.4th at 1233 (citing *Johnson v. Superior Court*, 80 Cal.App.4th 1050, 1064 (2000)); *see, e.g.*, *id.* at 1233-34 (former employees were intended beneficiaries of contract provision notwithstanding general disclaimer of third-party rights); *SEIU, Local 99 v. Options*, 200 Cal.App.4th 869, 872-73 (2011) (members of public were intended beneficiaries of contract provisions requiring contractor's compliance with Brown Act); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1194 (2008), *rev. denied* (employees of government contractors were intended third-party beneficiaries of contract provisions requiring they be paid living wages).[28]

B. Plaintiffs Adequately Plead Breach of the EDD-BofA Contract and the Implied Covenant of Good Faith and Fair Dealing.

BofA is doubly wrong in arguing that its issuance of EDD Debit Cards without now-industry-standard EMV chips cannot breach the EDD-BofA Contract

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own individual employment contracts," 2020 WL 3268578, at *10, here, the customer service and anti-fraud provisions of the EDD-BofA Contract do not appear in the Cardholder Agreement, so Plaintiffs have no first-party contractual basis for enforcing these same rights.

[28] Two cases cited by BofA (Mot. at 21), *GECCMC 2005-C1 Plummer St. Office L.P. v. JPMorgan Chase Bank, N.A.*, 671 F.3d 1027, 1033 (9th Cir. 2012), and *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999), are inapposite because they are based on federal common law, whereas Plaintiffs' claims here are governed by California law. *See SEIU Local 99*, 200 Cal.App.4th at 878-83; *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1016 (9th Cir. 2020). In any event, they are distinguishable. *See GECCMC*, 671 F.3d at 1034 (contract had express disclaimer of intent to create third-party beneficiaries); *Klamath Water Users*, 204 F.3d at 1211-12 (contract merely preserved the United States' control over the dam and its operations and did not confer rights on the irrigators).

simply because EDD's 2015 Request for Proposals ("RFP") required that Cards include a "magnetic strip." Mot. at 23 (citing Chestnut Decl. Ex. 2, at 5 (Req. #323)) (requiring BofA to issue cards with "no less than an ISO 7811-compliant high coercivity magnetic strip"). First, all or virtually all U.S.-issued debit cards, including those issued by BofA, have both a magnetic strip *and* an EMV chip. *See* ¶68. The RFP does not prohibit BofA from issuing such cards; it merely requires that the strip component of the card meet a certain ISO specification. Second, even though the RFP does not specifically require an EMV chip, BofA's proposal in response to the RFP, which is incorporated into the terms of the EDD-BofA Contract, makes specific representations guaranteeing far more than the bare minimum in security—including by providing "the highest level of security and fraud safeguards" and by being "at the forefront of fraud and data security strategies." ¶42; *see also* ¶¶69, 639. In breach of these contractual promises, BofA issued cardholders substandard cards that were highly susceptible to fraud because they did not include EMV chips—technology that BofA itself publicly acknowledges "has been around for over 20 years and is the credit and debit card security standard in many countries around the world," and which BofA itself has included in all its consumer credit and debit cards since 2014. ¶68; *see also* ¶¶59-67, 69, 639, 642.[29]

Plaintiffs also allege that BofA breached its obligation under the EDD-BofA Contract to protect cardholders from liability for unauthorized transactions and to comply with all error resolution procedures under EFTA and Regulation E. ¶¶43, 639, 642-43. Plaintiffs state a claim for breach of these provisions based on their allegations detailing how BofA failed to comply with EFTA, Regulation E, and

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[29] BofA's reliance on an online news article (Mot. at 5 n.6, 23) is improper on a Rule 12(b)(6) motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

BofA's own Zero Liability policy. *See supra* at 5-20.[30]

Finally, Plaintiffs allege that BofA breached the EDD-BofA Contract provisions requiring it to provide cardholders certain minimum levels of customer service, such as live CSR support "24 hours a day, seven days a week" to assist cardholders with "[i]nvestigat[ing] transactions (fraud, security, use)" and "[c]heck[ing] on the Status of Disputed Transactions." ¶¶44, 639, 642. BofA did so by failing to make its "Claims Initiation Call Center" and "Fraud Call Center" available 24/7, preventing cardholders from submitting unauthorized transaction claims outside of limited business hours, keeping callers on hold for hours, and repeatedly dropping calls or sending callers directly to voicemail without offering meaningful assistance. *See supra* note 3, item 1; ¶110 & MCC Ex. B, paras. 8-10.

BofA's reliance on an August 2020 letter agreement purportedly amending certain customer service requirements is misplaced. *See* Mot. at 23 (citing Chestnut Decl. Ex. 3). Even if appropriately considered on a Rule 12(b)(6) motion, which it is not (*see* Pls.' Opp'n to Def.'s RJN), the letter agreement does not excuse BofA's contractual obligation to "provide and maintain a CSC [Customer Service Center] seven (7) days a week, twenty-four (24) hours per day." Chestnut Decl. Ex. 3, at 12, 16 (Req. #224, 225). Instead, it only provides an "accommodation[]" to that requirement allowing up to "four (4) hours per month" for "routine scheduled maintenance." *Id.* Further, the letter agreement purports to excuse compliance only with certain contractual requirements listed in its Appendix 1—*e.g.*, the requirement that BofA "limit the average wait time to speak to a live CSR to no more than 30 seconds for 70 percent of the calls, and no more than two (2) minutes for all calls" (*id.* at 14 (Req. #226))—and only if the non-compliance occurs "despite [BofA]'s use of efforts that are commercially reasonable in the context of

[30] Because Plaintiffs identify the specific provisions of the EDD-BofA Contract that BofA allegedly breached, *Ironshore Specialty Ins. Co. v. 23andMe, Inc.*, 2018 WL 5316173, at *2 (N.D. Cal. Oct. 26, 2018), is inapposite.

the COVID-19 pandemic" (*id.* at 12). Even under this standard, Plaintiffs have stated a breach of contract claim, as BofA's abysmal customer service was not "commercially reasonable" by any measure. ¶642(f)-(g). Even if the letter agreement were operative during all relevant times (which BofA has not established and cannot establish on a Rule 12(b)(6) motion), excusing violations of the 30-second wait time requirement cannot justify routinely keeping cardholders on hold *for hours* when those cardholders were seeking to regain access to desperately needed EDD benefits during a pandemic.

To the extent BofA had any discretion in performing its duties under the EDD-BofA Contract, it exercised that discretion in objectively unreasonable ways, breaching the implied covenant of good faith and fair dealing by depriving Plaintiffs as third-party beneficiaries of the contract's benefits. *See* ¶¶646-48.

IV. Plaintiffs State Claims under the CCPA and CCRA (Counts 2, 3)

BofA's principal CCPA argument is that Plaintiffs cannot state a claim based on BofA's failure to add EMV chips to its cards because "[t]here is no existing duty on financial institutions to issue cards with EMV chips instead of magnetic strips" and the EDD-BofA Contract only "require[s] magnetic strip technology." Mot. at 29-30. BofA is wrong on both counts.

First, the CCPA requires BofA to have "reasonable security procedures and practices appropriate to the nature of the information." Cal. Civ. Code §1798.150(a)(1). This includes a duty to implement security procedures and practices consistent with industry standards. *See, e.g.*, *Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*, 2016 WL 6523428, at *10-11 (S.D. Cal. Nov. 3, 2016) (denying motion to dismiss CCRA claim where complaint alleged defendant failed to "appropriately encrypt customers' data" and to employ security systems "consistent with industry standards and requirements"); *In re Brinker Data Incident Litig.*, 2020 WL 691848, at *17 (M.D. Fla. Jan. 27, 2020) (allegations that defendant had sub-industry standard security measures stated UCL claim based on predicate violations of CCRA's reasonable security practices provision).[31] Here, Plaintiffs allege—and BofA has publicly acknowledged—that "EMV chip technology 'has been around for over 20 years and is the credit and debit card security standard in many countries around the world.'" ¶68. Consistent with that industry standard, BofA began adding EMV chips to its corporate credit cards as early as 2011 and to its consumer debit cards in 2014. ¶¶64-65; *see also* ¶¶59-69 (detailing BofA's awareness and use of EMV chip technology as an industry standard). Allegations regarding BofA's failure to comply with industry security standards are sufficient to state claims under the CCPA and CCRA.

Moreover, even if there were no general duty to include industry-standard EMV chip technology on *all* credit and debit cards, imposing such a duty on issuers of government-sponsored debit cards whose purpose is to disburse subsistence UI benefits is certainly "reasonable" and "appropriate to the nature of the information" at issue, given the heightened vulnerability of such cardholders to the consequences of security breaches that could deprive them of essential public benefits on which they depend for basic needs, such as food, shelter, and medicine. *See, e.g.*, ¶¶114-285, 626.

Second, the 2015 RFP's magnetic strip specification does not excuse BofA's failure in 2020 or 2021 to add the same industry-standard EMV chip technology to its EDD Debit Cards that it uses in all its other debit and credit cards. *See* ¶¶42, 69. The RFP certainly cannot excuse BofA's *statutory* obligation to its cardholders under the CCPA to maintain reasonable security practices "appropriate to the nature of the information," because the CCPA expressly renders void and unenforceable

[31] Like the CCPA, the CCRA requires businesses to "implement and maintain reasonable security procedures and practices appropriate to the nature of the information, to protect the personal information from unauthorized access, destruction, use, modification, or disclosure." Cal. Civ. Code §1798.81.5(b). Because the CCPA's private right of action arises from the CCRA, *id.* §1798.150(a)(1), courts discussing the sufficiency of claims based on violations of the duty sometimes cite the CCRA section imposing the duty instead of the CCPA.

any "provision of a contract or agreement of any kind that purports to waive or limit in any way a consumer's rights [under the CCPA]" on the basis that such a provision would be contrary to public policy. Cal. Civ. Code §1798.192.

BofA's remaining arguments also fail. BofA contends that Plaintiffs' allegations are factually deficient, but Plaintiffs expressly allege that BofA's inadequate security practices—including its failure to "ensure that all [of its agents] were subject to background checks before or after being hired," "to provide such agents proper training and supervision regarding their handling and maintaining the confidentiality of Cardholders' [PI]," and "to secure Cardholders' [PI] from unnecessary and unauthorized access by subcontractors' employees and others"—"enabled a series of internal data breached committed by [subcontractor] TTEC employees," ¶¶553, 598; *see also* ¶¶55-58, 554-55, 595-97. These factual allegations are specific and concrete, not "vague" and "conclusory." Mot. at 30; *see infra* at 33-36.

Plaintiffs' other allegations, including those made on information and belief, further support their CCPA and CCRA claims. *See Karter v. Epiq Sys., Inc.*, 2021 WL 4353274, at *3 (C.D. Cal. July 16, 2021) (refusing to dismiss CCPA claim where "[p]laintiff alleged that his [PI] was exfiltrated in a nonencrypted and nonredacted form"); *see also infra* at 35. Further, the plausibility of Plaintiffs' allegations that BofA collected, stored, and transmitted cardholders' PI in an unsecure manner is underscored by the experiences of plaintiffs like Stephanie Smith, whose PI was compromised and whose account was hacked despite her never having used her physical card, which she kept locked in a safe immediately upon activating it on BofA's website. ¶¶58, 200. It is certainly reasonable to infer that her PI would not have been accessed absent a security failure by BofA. *See Grandesign*, 2021 WL 780477, at *1.

BofA's reliance on *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2017 WL 3727318, at *38 (N.D. Cal. Aug. 30, 2017) ("*Yahoo!*"), is misplaced. Here, unlike in *Yahoo!* where the breach had occurred several years earlier (*id.*, at *2-3), there is no colorable argument that BofA was unaware of the security breaches. As discussed above (at 6-8), the MCC details how each Plaintiff provided timely notice of the fraud and how the wave of transaction fraud affecting EDD Debit Cardholders was widely reported in the media, all of which put BofA on notice of the security breaches. Additionally, in *Yahoo!*, the plaintiffs did not allege that the company had any involvement in the alleged breach or that due to such involvement it should have known when the breach occurred. *Id.*, at *4-6. Here, Plaintiffs allege that BofA's own agents were responsible for the breaches and that BofA discovered or should have discovered the breaches when they occurred, including because of the huge volume of unauthorized transaction complaints it received during a relatively short time frame. ¶599. Yet it still failed to provide notice to the affected cardholders in violation of the CCRA. ¶571; *see Grandesign*, 2021 WL 780477, at *1 (plaintiff entitled to reasonable inferences where factual allegations "'raise a reasonable expectation that discovery will reveal evidence' supporting that inference") (citation omitted).

V. Plaintiffs State Claims for Negligence and Negligent Supervision (Counts 5, 6)

BofA contends that Plaintiffs' negligence claims (¶¶586-87) are barred by the economic loss rule because it owes no tort duties to Plaintiffs, and that the MCC fails to adequately plead the elements of negligence. Those arguments also fail.[32]

A. The Economic Loss Rule Does Not Apply.

The economic loss rule does not apply for two separate and independent reasons: (1) Plaintiffs' harms are not purely economic, and (2) BofA's "conduct

[32] BofA's threshold argument that the economic loss rule precludes all negligence claims except those seeking damages for personal injury (Mot. at 24) is plainly wrong. *See N. Am. Chem. Co. v. Superior Court*, 59 Cal.App.4th 764, 783 (1997) ("economic damages claimed by a plaintiff need *not* be accompanied by personal injury or property damage in order to be recoverable") (citation omitted).

'violate[d] [duties] independent of the contract.'" *Pac. Concours Corp. v. Fives Machining Sys., Inc.*, 2018 WL 6204579, at *7 (C.D. Cal. Oct. 29, 2018) (quoting *Erlich v. Menezes*, 21 Cal.4th 543, 551 (1999)).

First, the economic loss rule applies only to claims seeking recovery for "purely economic losses," meaning "pecuniary or commercial loss" not arising from injury to persons or property. *S. Cal. Gas Leak Cases*, 7 Cal.5th 391, 398 (2019). The rule does not apply here because Plaintiffs suffered harms beyond purely economic losses, including the denial of access to necessary information and wasted time caused by grossly inadequate customer service. *See supra* note 3, items 1, 5; *Stasi v. Inmediata Health Grp. Corp.*, 501 F.Supp.3d 898, 913 (S.D. Cal. 2020) (alleged "time spent responding to a data breach is a non-economic injury, that … defeats an economic loss doctrine argument"); *Bass v. Facebook, Inc.*, 394 F.Supp.3d 1024, 1039 (N.D. Cal. 2019) (same).

Second, even if Plaintiffs' allegations were limited to purely economic losses (which they are not), the economic loss rule still would not apply because Plaintiffs seek to enforce a tort duty that arises independent of any contract. *See Erlich*, 21 Cal.4th at 551 ("[C]onduct amounting to a breach of contract becomes tortious … when it also violates a duty independent of the contract arising from principles of tort law."). Plaintiffs here allege that BofA violated extracontractual duties arising from two sources: several statutes and BofA's "special relationship" with Plaintiffs.

A tort "duty of care may arise through statute." *J'Aire Corp. v. Gregory*, 24 Cal.3d 799, 803 (1979). Courts have found, for example, that the Gramm-Leach-Bliley Act ("GLBA"), the California Financial Information Privacy Act ("CFIPA"), and other statutes impose on banks a statutory duty of care to safeguard their customers' PI. *See, e.g.*, *Erhart v. BofI Holding, Inc.*, 2020 WL 1550207, at *38 n.26 (S.D. Cal. Mar. 31, 2020). Here, Plaintiffs allege that BofA owed Plaintiffs statutory duties under the GLBA, CFIPA, CCPA, and CCRA. ¶¶589-92. Plaintiffs' allegations about BofA's unreasonable data security practices further plead that

BofA breached those duties (*see* ¶¶55-58, 69, 76-86, 116, 206, 553, 556, 577(a)-(f), 579-82, 595-99, 642(a), 648(a)-(c)) and that its breaches resulted in widespread theft, fraudulent charges, and unauthorized disclosure of cardholders' PI (¶¶76-79, 542), including for cardholders who *never* used their card or card information to complete a transaction (*see* ¶¶57 n.3, 200).[33]

Independent tort duties also arise between parties when, as here, a "special relationship" exists. *Pac. Concours Corp.*, 2018 WL 6204579, at *7. To determine whether a "special relationship" exists, courts weigh six factors: "(1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm." *J'Aire*, 24 Cal.3d at 804; *Aas v. Superior Court*, 24 Cal.4th 627, 645 (2000) (*J'Aire* factors apply to parties in contractual privity), *superseded by statute on other grounds*. Based on these factors, Plaintiffs more than adequately allege a special relationship.

First, BofA's role in distributing EDD benefits was "intended to affect" Plaintiffs. For example, all EDD Debit Cardholders trusted BofA to implement reasonable data security practices to protect their account funds and PI (which they

[33] BofA's alleged unreasonable data security practices include: (1) failing to add EMV chips to Cards; (2) hiring thousands of CSRs without conducting background checks; (3) failing to appropriately limit CSRs' access to Plaintiffs' PI; (4) failing to ensure CSRs received reasonable training and supervision on data security practices; (5) continuing to use TTEC despite knowing of its inadequate data security practices and resulting thefts of Plaintiffs' PI; (6) failing to adjust its data security practices in anticipation of widely predicted surges in transactional fraud; and (7) failing to monitor for, detect, and promptly notify cardholders about suspicious transactions, or to conduct reasonable investigations of suspicious and disputed transactions as part of its ongoing GLBA obligation to continuously evaluate the effectiveness of and make necessary adjustments to its information security procedures. *Id.*

were required to disclose to BofA) and to provide reasonable access to CSRs when these breaches occurred. ¶¶39, 46-47, 55-56; *see Corona v. Sony Pictures Ent., Inc.*, 2015 WL 3916744, at *5 (C.D. Cal. June 15, 2015) (factor satisfied where plaintiff had to disclose PI to obtain employment benefits); *Huynh v. Quora, Inc.*, 508 F.Supp.3d 633, 655 (N.D. Cal. 2020) ("*Huynh II*") (factor satisfied where plaintiffs shared their PI "with the understanding that [defendant] will protect that data").

Second, the harm was foreseeable, as BofA was fully aware of the consequences of inadequate customer service and security. ¶¶68-69, 81-86, 88, 556, 577, 591, 599, 615. BofA's assertion that the "surge in fraud" was "wholly-unexpected" (Mot. at 1) is a disputed fact directly contradicted by the MCC (¶79 & nn.6-10).

Third, there is a high "degree of certainty" that Plaintiffs suffered resulting injury, including by having to waste tens of hours due to inadequate customer service, having their EDD benefits stolen from their accounts, and having their PI stolen and disclosed. ¶¶4, 591-92; *see Corona*, 2015 WL 3916744, at *3, 5 (alleged "lost opportunity costs" and "inability to use" frozen assets provided sufficient "degree of certainty" at pleading stage); *Garcia v. Ocwen Loan Servicing, LLC*, 2010 WL 1881098, at *1-3 (N.D. Cal. May 10, 2010) (homeowner stated negligence claim against lender based on difficulty reaching customer service and lender misrouting homeowner's loan modification application).

Fourth, Plaintiffs' injuries are closely connected to BofA's conduct. ¶¶4, 591-92; *see Huynh v. Quora, Inc.*, 2020 WL 7408230, at *8 (N.D. Cal. June 1, 2020) ("*Huynh I*") (fourth factor satisfied where damages alleged from failure to protect PI); *Portier v. NEO Tech. Solutions*, 2019 WL 7946103, at *17 (D. Mass. Dec. 31, 2019) (harm was "natural consequence" of "careless release of information" under California law).

Fifth, BofA's alleged negligence is morally condemnable, especially since the alleged purpose of BofA's wrongful conduct was to limit costs and otherwise "protect its own financial interests at the expense of" tens of thousands of cardholders who needed their EDD benefits to survive. ¶¶40-45, 49, 91, 588-90; *see Am. Fed'n of Labor v. EDD*, 88 Cal.App.3d 811, 821 (1979) ("*AFL*") (EDD benefits recipients often have no money and need benefits to survive "at subsistence levels"); *Huynh II*, 508 F.Supp.3d at 658 (failure to protect PI is "morally blameworthy").

Sixth, BofA's negligence in allowing the rampant theft of PI and government benefits strongly militates in favor of finding a special relationship to further the "policy of preventing future harm." *See* MCC Ex. A at 2 (Judge Chhabria: harm irreparable because loss of benefits "will seriously hinder the ability of many class members to feed their families and keep a roof over their heads" and "likely cause them to be evicted, go hungry, or be denied medical care"); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F.Supp.3d 1113, 1132-33 (N.D. Cal. 2018) (failure to protect PI implicates policies underlying California statutes, such as CCRA); *Huynh I*, 2020 WL 7408230, at *9 (similar).

BofA's authorities are inapposite[34] and speak only to the bank-depositor

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[34] *See* Mot. at 24-25 (citing *Widjaja v. JPMorgan Chase Bank, N.A.*, 2020 WL 2949832 (C.D. Cal. Mar. 31, 2020) (dismissing negligence claim by ordinary banking customer based solely on alleged breaches of contractual duty); *Spa-Kur Therapy Dev., Inc. v. Bank of Am., N.A.*, 2019 WL 1099834 (S.D. Cal. Mar. 8, 2019) (same); *Barvie v. Bank of Am., N.A.*, 2018 WL 4537723 (S.D. Cal. Sept. 21, 2018) (parties agreed any duty arose solely from ordinary bank-customer contract); *Simi Mgmt. Corp. v. Bank of Am., N.A.*, 930 F.Supp.2d 1082 (N.D. Cal. 2013) (discussing implied contractual duties banks owe ordinary customers, without addressing negligence or economic loss rule); *Smith v. Visa U.S.A., Inc.*, 2011 WL 2709819 (N.D. Cal. July 12, 2011) (*pro se* plaintiff sought $2.8 billion for "strict liability" on bare allegations); *Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*, 2016 WL 6523428 (S.D. Cal. Nov. 3, 2016) (hotel guest alleged "no facts" showing special relationship); *Nevada Fleet LLC v. Fedex Corp.*, 2021 WL 2402953 (E.D. Cal. June 11, 2021) (claims based on business-to-business sale of used vehicles through third party); *Valenzuela v. ADT Sec. Servs., Inc.*, 820 F.Supp.2d 1061 (C.D. Cal. 2010) (*summary judgment* ruling that alarm company had no extracontractual duties to burgled store)).

relationship "[u]nder ordinary circumstances." *Belluomini v. Citigroup, Inc.*, 2013 WL 3855589, at *5 (N.D. Cal. July 24, 2013) (citation omitted). Here, the relationship between cardholders and BofA is anything but "ordinary," as BofA is not acting as an ordinary bank but as the *exclusive* distributor of cardholders' public benefits (¶¶2, 35), on which cardholders are uniquely "depend[ent] … to get through the pandemic" (MCC Ex. A at 2). Further, cardholders do not have ordinary BofA accounts but special benefits-only accounts (¶48); and the customer service available to cardholders is separate from (and far worse than) the customer service available to ordinary BofA customers (¶87).

B. Plaintiffs Adequately Allege Negligence.

BofA argues Plaintiffs do not adequately plead that its failure to add EMV chips to EDD Debit Cards caused harm, and the negligence *per se* claims regarding its inadequate data security practices are insufficiently detailed. Mot. at 25-26. As for negligent hiring, supervision, and retention, BofA contends that Plaintiffs do not adequately plead breach or causation. Mot. at 26-27. These arguments lack merit.

Plaintiffs' claims for negligent data and account security practices target many of BofA's practices, just one of which is its failure to add EMV chips to Cards. *See* ¶¶57, 586-87; *supra* note 33, item 1. On that EMV chip issue, Plaintiffs allege that BofA has long known that use of EMV chips is the industry standard because cards without such chips are highly vulnerable to fraud (¶¶59-69); that BofA nevertheless issued EDD Debit Cards without chips, even during the pandemic, despite the widely-predicted and reported surge in transactional fraud (¶¶9-33, 69, 79); and that this "led to rampant fraud" and "the ongoing loss of millions of dollars in EDD benefits" through transactional fraud on accounts (¶69). Once plaintiffs have sufficiently pleaded a duty to "provide reasonable security," the "burden to plead a corresponding breach based on … inadequate security measures is not high," *Schmitt v. SN Servicing Corp.*, 2021 WL 3493754, at *5 (N.D. Cal. Aug. 9, 2021), as it is reasonably "foreseeable" that inadequate or outdated security measures would cause "a data breach [to] occur and that Plaintiffs would suffer harm." *Corona*, 2015 WL 3916744, at *5; *see also Flores-Mendez v. Zoosk, Inc.*, 2021 WL 308543, at *4 (N.D. Cal. Jan. 30, 2021) ("The breach would not have occurred but for inadequate security measures, or so it can be reasonably inferred at the pleadings stage.").[35] Moreover, because Plaintiffs plausibly allege BofA's failure to use EMV chips violated the GLBA, CFIPA, CCPA, and CCRA, BofA's negligence may be presumed. *Nowlon v. Koram Ins. Ctr., Inc.*, 1 Cal.App.4th 1437, 1441 (1991).

Many Plaintiffs also detail how the fraud on their accounts occurred,[36] and allege it was only after they had used their cards for everyday transactions that they began experiencing fraud. *See, e.g.*, ¶¶115, 127, 136, 203. At least one Class Plaintiff specifically alleges "her Card was skimmed" (to which non-EMV chip cards are susceptible) at a gas station where other cards were also reportedly skimmed. ¶¶2, 61, 187. These allegations, which support a plausible inference that Plaintiffs' card information was exfiltrated due to making transactions without an EMV chip, are sufficient at the pleading stage.

On the negligence *per se* theories, BofA argues that Plaintiffs fail to allege how BofA and its agents "actually stored or transmitted" card and account information in violation of the GLBA, and precisely "when," "to whom," and "in what context" such information was disclosed in violation of the CFIPA. Mot. at 25-26. Those arguments mischaracterize the MCC and misstate the pleading standards. First, the MCC details BofA's deficient data security practices, *see supra* at 30 & note 33, each of which is sufficient to support predicate violations. To the

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[35] Courts recognize "it is reasonable to infer that [a] data breach" will result in later injury because the breach can "drastically increase[]" the risk of identity theft "relative to both the time period before the breach, as well as to the risk born by the general public." *Corona*, 2015 WL 3916744, at *4. Thus, the risk of fraud or exfiltration are cognizable harms, contrary to BofA's contentions (Mot. at 27).

[36] *See, e.g.*, ¶¶114, 128, 137, 144, 152, 160, 172, 187, 195, 200, 204, 216, 225, 230, 238, 246, 250, 254, 258, 268.

extent Plaintiffs' allegations are based on information and belief, they are sufficient because courts "relax pleading requirements" and permit such allegations when, as here, "the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible." *Park v. Thompson*, 851 F.3d 910, 928 (9th Cir. 2017); *see also Stasi*, 501 F.Supp.3d at 920 (denying dismissal where, "without discovery, it is not clear what more Plaintiffs could plead"); *Moser v. Health Ins. Innovations, Inc.*, 2018 WL 325112, at *7 (S.D. Cal. Jan. 5, 2018) (denying dismissal where facts pled on "'information and belief'" were "peculiarly within the possession and control" of defendants). This is particularly true in data breach cases, where "virtually all of the details that defendants insist on are in possession of the defendants, and not in possession of plaintiff." *Flores-Mendez*, 2021 WL 308543, at *4; *see also Stasi*, 501 F.Supp.3d at 914 (rejecting, for similar reasons, argument at pleading stage that economic loss rule defeated negligence claim).

Regarding the negligent hiring and supervision claim, Plaintiffs allege BofA subcontracted much of its customer service to TTEC, which hired "hundreds if not thousands of [CSRs]" without any background checks, gave those "unvetted" CSRs open access to cardholders' PI, failed to secure PI from "unnecessary or unauthorized access" and "disclosure," and failed to train or supervise CSRs on data security practices. ¶¶55, 595-96. This was a clear breach of BofA's duty of care. *See Portier*, 2019 WL 7946103, at *13 (failure to provide supervision and training to prevent employees from releasing sensitive tax data breached duty of care).[37]

Plaintiffs further allege that these breaches of duty foreseeably resulted in the theft and disclosure of cardholders' PI through "a series of internal data breaches committed by TTEC employees," that the breaches resulted in rampant fraudulent

[37] In contrast to BofA's cited cases, Plaintiffs set forth specific facts regarding how BofA breached its duty, not mere "conclusions," *Abdulaziz v. Twitter, Inc.*, 2020 WL 6947929, at *7 (N.D. Cal. Aug. 12, 2020), or "pure speculation," *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 259 (4th Cir. 2009).

charges on EDD Debit Card accounts, that BofA knows all this but negligently continued to use TTEC to operate its call centers, and that this conduct harmed and "continues to harm Plaintiffs and Class Members by subjecting them to unreasonable risk of fraud and exfiltration of their [PI]." ¶¶597-99. Such allegations are sufficient to plausibly allege causation at the pleading stage. *See Portier*, 2019 WL 7946103, at *14; *Top Trade v. Grocery Outlet*, 2018 WL 6038297, at *4 (C.D. Cal. May 9, 2018) (drawing reasonable inference that data breach "likely occurred due to problems with Defendant's cybersecurity practices and procedures").

C. Plaintiffs Have Standing to Pursue Injunctive Relief.

Plaintiffs seek injunctive relief to prevent likely future harm from an "unreasonable risk of fraud and exfiltration" due to BofA's ongoing negligent hiring, supervision, and retention of its agents. ¶¶598, 602. BofA contends that no Class Plaintiff has Article III standing to seek this relief. Mot. at 27.[38]

"An allegation of future injury" establishes Article III standing "if the threatened injury is 'certainly impending,' *or* there is a 'substantial risk that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1150 n.5 (2013)) (emphasis added); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016) ("material risk of harm" can be Article III injury). At the pleading stage, suits should proceed when plaintiffs demonstrate a factual issue about "whether they suffer a substantial risk of [future] harm." *Cent. Delta Water Agency v. United States,* 306 F.3d 938, 947-48 (9th Cir. 2002). Article III's injury-in-fact requirement poses only "a low threshold," *Ross v. Bank of Am., N.A.(USA)*, 524 F.3d 217, 222 (2d Cir. 2008), that

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[38] BofA does not challenge Plaintiffs' standing to seek relief for past or present injuries due to negligent hiring or supervision, or for future harm under other claims. *See* Mot. at 27; *see also* MCC Ex. B at 1 (noting "plaintiffs and defendants worked together to craft preliminary injunction … to protect the class members from future harm" in areas of claims investigation, use of the Claim Fraud Filter, account freezing and blocking, and customer service).

"in no way depends on the merits" of the underlying claim, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

Ninth Circuit precedent disposes of BofA's argument that Plaintiffs lack standing to seek injunctive relief to redress future harms from the past or ongoing theft of their PI. *See Krottner v. Starbucks Corp.,* 628 F.3d 1139, 1143 (9th Cir. 2010) (Article III injury based on "a credible threat of real and immediate harm stemming from the theft of … their unencrypted" PI);[39] *In re Adobe Sys., Inc. Priv. Litig.*, 66 F.Supp.3d 1197, 1211-16 (N.D. Cal. 2014) (rejecting argument that "increased risk" of harm from theft of PI was not cognizable Article III injury).

Standing is even more likely to be found in cases like this, where Plaintiffs allege that the theft of card information has already led to unauthorized transactions. *See, e.g.*, *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 965, 967 (7th Cir. 2016) (noting one named plaintiff had fraudulent charges and finding theft of card information created "increased risk of fraudulent charges and identity theft" sufficient to confer standing); *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 690, 693 (7th Cir. 2015) (allegations hackers stole card information and customers reported fraudulent charges created plausible inference of "substantial risk of harm" that conferred class standing, and there was "no need to speculate as to whether [named plaintiffs'] information has been stolen and what information was taken").[40]

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[39] Courts have repeatedly held the 2010 *Krottner* decision is consistent with *Clapper* and remains binding law. *See, e.g.*, *In re Adobe*, 66 F.Supp.3d 1197, 1211-14 (N.D. Cal. 2014); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F.Supp.2d 942, 961-62 (S.D. Cal. 2014).

[40] *See also* Jay P. Kesan & Carol M. Hayes, *Liability for Data Injuries*, 2019 Univ. of Ill. L. Rev. 295, 343 (2019) ("The general rule forming from standing cases appears to be a preference for finding standing when there has at least been one incident of attempted fraud," such as "a fraudulent credit card charge"); Thomas Martecchini, Note, *A Day in Court for Data Breach Plaintiffs: Preserving Standing Based on Increased Risk of Identity Theft After* Clapper v. Amnesty International USA, 114 Mich. L. Rev. 1471, 1485-87 (2016) (concluding courts in data breach cases decide whether future harm is imminent at pleading stage based on alleged

Here, Plaintiffs adequately allege Article III injury because they allege facts that establish a substantial risk of harm. Unlike the *Clapper* plaintiffs' allegations that a speculative chain of future events might eventually lead to their communications being intercepted, Plaintiffs here allege their PI has *already* been stolen, that criminals have *already* used that information to make fraudulent charges on their EDD Debit Card accounts, and that thousands of other Class Members have *already* experienced fraudulent charges as well. For Plaintiffs and Class Members, the increased risk of future fraudulent charges and identity theft, and future theft of data due to BofA's and TTEC's ongoing negligent practices, is real and substantial.

VI. Plaintiffs State a Claim for Breach of Fiduciary Duty (Count 10)

BofA disclaims having a fiduciary duty to Plaintiffs (Mot. at 27-29), but the MCC plausibly alleges the existence of a fiduciary relationship that is different from an ordinary bank-depositor relationship. *See Kudokas v. Balkus*, 26 Cal.App.3d 744, 750 (1972) ("Existence of fiduciary relationship depends on the circumstances of each case and is a question of fact for the fact trier.").

First, a bank owes a fiduciary duty to a depositor where, unlike in an ordinary bank-depositor relationship, their relationship involves: "(1) inherently unequal bargaining positions; (2) nonprofit motivation [by the depositor], i.e., objective of securing peace of mind, security; (3) inadequacy of ordinary contract damages; (4) special vulnerability of one party to harm … and (5) awareness by the other of this special vulnerability." *Copesky v. Superior Court*, 229 Cal.App.3d 678, 687 n.7 (1991) (citing *Wallis v. Superior Court*, 160 Cal.App.3d 1109, 1118 (1984)).

The MCC alleges such a relationship: (1) The parties here were in grossly unequal bargaining positions. BofA is the *only* bank authorized to issue EDD Debit Cards, and BofA's monopoly power forced Plaintiffs to accept the terms of its non-negotiable Cardholder Agreement. ¶¶46-47, 627, 630. (2) Plaintiffs had no profit

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sensitivity of data at issue, data thief's intentions, defendant's methods of protecting data, and whether there has already been actual or attempted misuse of stolen data).

motive; they sought EDD benefits to survive "at subsistence levels," *AFL*, 88 Cal.App.3d at 821, and to "secure their peace of mind … to pay for housing, food, and other daily necessities." ¶631. (3, 4) Given Plaintiffs' "precarious financial position," delayed lump-sum contract damages could not adequately remedy Plaintiffs' injury, "namely[,] the immediate inability to support oneself and its attendant horrors." *Wallis*, 160 Cal.App.3d at 1109; *see also AFL*, 88 Cal.App.3d at 821 ("A lump sum payment, which claimants who successfully appeal a denial of continuing [unemployment] benefits receive, defeats the purpose of unemployment insurance."); MCC Ex. A at 2 & n.1. (5) BofA knew that Plaintiffs, "as public benefits recipients, are members of a uniquely vulnerable segment of the population" who depended on BofA to distribute life sustaining EDD benefits. ¶626; *cf. Copesky*, 229 Cal.App.3d at 692 ("dependent people" who rely upon "liquidity of their bank account" are uniquely vulnerable).

Second, BofA owed fiduciary duties because the EDD-BofA Contract expressly provides BofA will hold the EDD Debit Card account funds "'in trust' … for the cardholders." Danitz Decl., Ex. B at 19 ("Contractor's Trust Account"). That is more than sufficient at the pleading stage to allege BofA owed fiduciary duties by holding the funds EDD deposited in trust for Plaintiffs' benefit. *Chang v. Redding Bank*, 29 Cal.App.4th 673, 684 (1994) ("A trust is a fiduciary relationship"); *Moeller v. Superior Court*, 16 Cal.4th 1124, 1133-34 (1997) ("A trust is a fiduciary relationship with respect to property in which the [trustee] … has an equitable obligation to manage the property *for the benefit of another*—the beneficiary").

VII. Plaintiffs State Claims for Violations of the UCL (Count 4)

California's UCL was "intentionally framed" in "sweeping language" to enable courts to address "the innumerable new schemes which the fertility of man's invention would contrive." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 181 (1999) (cleaned up). It prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code §17200. Plaintiffs bring claims under the "unlawful" and "unfair" prongs of the UCL. ¶¶577-82.

A. Plaintiffs Adequately Allege "Unlawful" and "Unfair" Acts or Practices.

"Virtually any law or regulation—federal or state, statutory or common law—can serve as a predicate for an 'unlawful' prong violation." *Candelore v. Tinder, Inc.*, 19 Cal.App.5th 1138, 1155 (2018). Here, BofA's challenged conduct is "unlawful" because as discussed herein it violates EFTA, CCPA, CCRA, GLBA, CFIPA, due process, and common law. ¶¶579-82; *see also* MCC Ex. A. at 1 ("strong likelihood" BofA was violating EFTA, "systematically breaching" its cardholder agreements, and violating UCL). Each of these claims "identify the particular section of the statute that was violated" and "describe with reasonable particularity the facts supporting the violation." *In re Solara Med. Supplies, LLC Customer Data Sec. Breach Litig.*, 2020 WL 2214152, at *11 (S.D. Cal. May 7, 2020).

BofA's practices are also "unfair." ¶¶577-78.[41] The UCL term "'unfair' … undeniably establishes only a wide standard to guide courts of equity" in dealing with business practices that "may run the gamut of human ingenuity and chicanery." *Cel-Tech*, 20 Cal.4th at 181. "[U]nfair" practices are those that "offend[] an established public policy or … [are] immoral, unethical, oppressive, unscrupulous or

[41] The alleged unfair practices include (1) failing to secure cardholders' PI, including by failing to use EMV chips, ¶577(a)-(c), (e); (2) failing to use reasonable practices to monitor for, detect, stop, and promptly notify cardholders about suspicious transactions, ¶577(f) (*e.g.*, ¶¶3, 76-78); (3) denying fraud claims without adequate investigation or explanation, ¶577(i)-(k) (*e.g.*, ¶¶3, 89-91); (4) rescinding prior "permanent" credits, ¶577(l) (*e.g.*, ¶¶92, 207-208, 232, 240, 263-64, 269-71); (5) freezing accounts without a reasonable basis and then falsely telling cardholders EDD had ordered the freezes and they would need to speak to EDD to unfreeze their accounts, ¶577(m)-(n) (*e.g.*, ¶¶3, 51-53, 91, 93-96, 100); (6) making it unreasonably difficult to submit fraud claims and seek help with frozen and blocked accounts, ¶577(h), (o) (*e.g.*, ¶¶87-88, 90, 96-104, 117-26, 133, 141, 145-50, 179-84, 198, 209-13, 221-23, 251); and (7) making numerous false and deceptive representations about the zero liability and level of customer service and security and fraud protection it would provide, ¶577(d), (i) (*e.g.*, ¶¶42-44, 73, 81-86, 99).

substantially injurious to consumers." *Candelore*, 19 Cal.App.5th at 1155. Unfairness "is an equitable concept" that requires weighing evidence, *Schnall v. Hertz Corp.*, 78 Cal.App.4th 1144, 1167 (2000), and thus "is generally a *question of fact* and unsuited for dismissal at the pleading stage." *Zemola v. Carrington Tea Co., LLC*, 2017 WL 4922974, at *5 (S.D. Cal. Oct. 30, 2017) (cleaned up); *accord Brooks v. Bank of Am., N.A.*, 2021 WL 1541643, at *4 (S.D. Cal. Apr. 20, 2021).

The Ninth Circuit uses a balancing test to determine if a practice is unfair, weighing the harm to the consumer against the utility of the practice. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 735-36 (9th Cir. 2007). BofA's practices fail this test because they caused substantial harm to Plaintiffs yet had little (if any) legitimate utility. ¶578 & MCC Ex. A; *see, e.g.*, ¶91 (BofA's scheme "sought to protect its own financial interests at the expense of legitimate claimants"); ¶108 (fraud filter has "extremely high false positive rate"). *See Brooks*, 2021 WL 1541643, at *4 (S.D. Cal. Apr. 20, 2021) (declining to dismiss claim based on balancing test); *accord In re Solara*, 2020 WL 2214152, at *11 (S.D. Cal. May 7, 2020); *In re Anthem, Inc. Data Breach Litig.*, 162 F.Supp.3d 953, 990 (N.D. Cal. 2016). BofA's arguments under the balancing test (Mot. at 35) impermissibly rely on disputed assertions outside the MCC.

The Ninth Circuit also recognizes a tethering test, which requires the alleged unfairness be "tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Lozano*, 504 F.3d at 735-36. Plaintiffs satisfy this test because BofA's practices violate the public policy of the laws supporting Plaintiffs' unlawful prong claim and those underlying California's EDD benefits programs. *See, e.g.*, 15 U.S.C. §1693(b) (EFTA's "purpose" is "establishing the rights, liabilities, and responsibilities of participants in electronic fund … transfer systems," and its "primary objective … is the provision of individual consumer rights"); *Cal. Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 131-32 (1971) (purpose of UI is to "maintain the recipient at subsistence levels" and to allow recipients to focus on "[nothing] else but looking for a job"); *AFL*, 88 Cal.App.3d at 818 (achieving UI's purposes requires "prompt payment of benefits").

BofA further argues that its account-freeze practices cannot be unfair because they are permitted by the Cardholder Agreement. Mot. at 35. As discussed above (at 15-16, 19), this argument rests on an erroneous interpretation of the Cardholder Agreement and the MCC. *See also* MCC Ex. A at 1 (finding "strong likelihood" that "BofA is systematically breaching its contracts with cardholders," including by "freezing [] accounts based on a faulty screening process"). "[S]ystematically breaching a form contract affecting many consumers," as BofA is alleged to have done, is actionable under the UCL. *Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal.App.4th 700, 719 (2001).[42] Also, while the UCL "does not give the courts a general license to review the fairness of contracts" (Mot. at 35) (quoting *South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.App.4th 861, 887 (1999)), it does impose liability where, as here, the challenged practice is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *South Bay*, 72 Cal.App.4th at 886-88. Courts have permitted UCL claims to go forward even where a contract purported to authorize the challenged conduct. *See De La Torre v. CashCall, Inc.*, 5 Cal.5th 966, 981 (2018); *Moran v. Prime Healthcare Mgmt., Inc.*, 3 Cal.App.5th 1131, 1149 (2016). Here, Plaintiffs allege with specificity that, among other unfair acts, BofA froze thousands of accounts without a reasonable basis and as part of a scheme to avoid its EFTA obligations, and then falsely told cardholders that EDD had ordered the freezes and that they would need to speak with EDD to unfreeze their accounts. This is sufficient to state a UCL unfair

[42] *South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.App.4th 861 (1999), is thus distinguishable as it involved a commercial transaction between sophisticated parties, affirming *judgment after trial* on the grounds that the UCL "*is directed toward protecting the general public*, not automotive dealerships" challenging a standard method of calculating loan interest that plaintiff "knew, understood, agreed, and expected" to be used when it agreed to the loan at issue. *Id.* at 870, 878 (emphasis added).

business practice claim at the pleading stage.

B. Plaintiffs Adequately Plead Their Entitlement to Injunctive Relief and Restitution.

The UCL authorizes injunctive relief and equitable restitution as two "wholly independent remedies." *Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758, 790 (2010) (citing Cal. Bus. & Prof. Code §17203). Plaintiffs seek both. ¶584. BofA argues they are barred from requesting either (Mot. at 31-33), but those are merits arguments.

BofA argues Plaintiffs are not entitled to equitable relief because they "have an adequate remedy at law." Mot. at 32. First, that argument is premature. *Edelson v. Travel Ins. Int'l, Inc.*, 2021 WL 4334075, at *6 (S.D. Cal. Sept. 23, 2021) ("no controlling authority prevents a plaintiff from asserting alternative legal remedies at the pleading stage"); *Wildin v. FCA US LLC*, 2018 WL 3032986, at *7 & n.4 (S.D. Cal. June 19, 2018) (similar). Second, BofA ignores the obvious point that the request for injunctive relief seeks to prevent future harm and that the *Yick* court already granted a preliminary injunction in this case. *See, e.g.*, *Heredia v. Sunrise Senior Living LLC*, 2021 WL 819159, at *7 (C.D. Cal. Feb. 10, 2021). BofA's alleged continued implementation of its challenged business practices (*see, e.g.*, ¶111) shows that those practices are likely to continue absent injunctive relief.[43]

Finally, BofA argues that there can be no restitution because it was not BofA but third-party criminals who stole Plaintiffs' money. Mot. at 32-33. That argument is not supported by the law. The UCL authorizes restitution of any money in which plaintiffs have a "vested interest," including any "quantifiable sums" "due and payable" under a statute that defendants "unlawfully withheld." *Cortez v. Purolator*

[43] BofA's cases are distinguishable. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020) (affirming dismissal where plaintiff strategically amended complaint "on the eve of trial" despite being warned by court not to do so); *Huynh*, 508 F.Supp.3d at 662 (N.D. Cal. Dec. 21, 2020) (dismissing claim *on summary judgment*); *Gibson v. Jaguar Land Rover N. Am., LLC*, 2020 WL 5492990, at *3 (C.D. Cal. Sept. 9, 2020) (only harm was "lost money or property").

Air Filtration Prods. Co., 23 Cal.4th 163, 178 (2000) (order for payment of earned wages proper under UCL). The UCL authorizes, for example, restitution of the unauthorized transaction reimbursements (and interest thereon) that BofA unlawfully withheld from Plaintiffs in violation of EFTA. Additionally, in class actions, the UCL may authorize disgorgement of profits obtained by unfair practices to the extent those profits are monies in which plaintiffs have an ownership interest. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1148 (2003). This principle would apply, for example, to the interest that BofA has earned by unlawfully withholding funds and unlawfully freezing accounts. *See* ¶¶49, 51, 583.

VIII. Plaintiffs State Claims for Violations of Due Process (Counts 13, 14)

A. Plaintiffs Adequately Allege State Action.

Plaintiffs also state a claim that BofA acted as a state actor when it froze their accounts and denied them EDD benefits based on its automated Claim Fraud Filter that incorrectly flagged Plaintiffs as suspected criminals, both because (1) BofA was performing a "traditionally and exclusively governmental" function and (2) BofA and EDD were engaged in joint action. ¶¶654-59; *see Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 748 (9th Cir. 2020); *Cahoo v. SAS Inst. Inc.*, 322 F.Supp.3d 772, 793 (E.D. Mich. 2018), *aff'd in part, rev'd in part on other grounds*, 912 F.3d 887 (6th Cir. 2019) (UI claimants, who were subjected to false fraud determinations by state's automated fraud detection system, adequately alleged state action with respect to state contractors that administered the system).

In urging this Court to hold as a matter of law that it is not a state actor, BofA attempts to characterize its "servicing of [Plaintiffs'] debit card accounts" as "a classic function of a private bank." Mot. at 37-38. But BofA is not acting in a role akin to a private bank here; rather, it has contracted with EDD to play a central role in the "administration of unemployment benefits[,] … a power traditionally exclusively reserved to the state." *Cahoo*, 322 F.Supp.3d at 793; *see* ¶¶46-48. Not only has EDD "delegated to [BofA] the public functions of distributing EDD benefits to Cardholders" (¶48) through BofA-issued debit cards and accounts, but the EDD has specifically "authorize[d] and obligate[d] [BofA] to work jointly with EDD to combat EDD benefits enrollment fraud," including by freezing certain accounts at EDD's direction when EDD itself discovers enrollment fraud. ¶¶50-51, 629, 631. Just as the State's ability to terminate UI benefits is constrained by the constitutional requirements of due process, *see AFL*, 88 Cal.App.3d at 820 & n.5, so is BofA's under these circumstances. *See Rawson*, 975 F.3d at 753 ("[P]rivate parties may act under color of state law when they perform actions under which the state owes constitutional obligations to those affected"; government cannot "contract away its constitutional duties by having private actors rather than state actors perform some of the work") (cleaned up); *West v. Atkins*, 487 U.S. 42, 56 (1988) (private physician providing medical treatment to prisoners was state actor because "the State bore an affirmative obligation to provide adequate medical care" to prisoners, "the State delegated that function" to the physician, and the physician "voluntarily assumed that obligation by contract").

In *Brown v. Stored Value Cards, Inc.*, 2016 WL 4491836 (D. Or. Aug. 25, 2016), *rev'd on other grounds*, 953 F.3d 567, 575 (9th Cir. 2020), a government contractor that had been delegated the function of returning released inmates' money through prepaid debit cards sought to characterize its role as merely providing "a debit card service" or "charging fees for debit cards." *Id.*, at *2. The court rejected this argument, explaining that "[t]he relationship of [plaintiff] and the Defendants is one that could only come through the exercise of the state's power." *Id.* Likewise here, the relationship between Plaintiffs and BofA exists solely by virtue of BofA's exclusive contract with EDD and Plaintiffs' entitlement to EDD benefits. ¶¶39, 47-48; *see also* ¶48 (describing unique nature of EDD Debit Card accounts as holding only EDD-deposited funds). As in *Brown*, where the bank-issued debit card was the only state-provided option for the plaintiff to retrieve her funds, Plaintiffs allege that BofA has the "exclusive contract" to deliver Plaintiffs'

EDD benefits through prepaid debit cards, that these cards are the "default means" for distributing these public benefits, and that EDD presents these cards as the "exclusive means of receiving such benefits." ¶¶39, 47.[44] BofA's role in the administration of EDD benefits bears no resemblance to a private bank that happens to allow public employees to deposit their paychecks (Mot. at 37-38) but has not been granted an exclusive role or authority by the State to freeze access to those funds as a component of the State's *own* anti-fraud measures.[45]

BofA also denies that it is a "joint actor" with the state, and points to allegations that EDD did not endorse the specific account freezes at issue here. Mot. at 36. But Plaintiffs allege an ongoing and jointly undertaken process by EDD and BofA to detect suspected enrollment fraud, freeze accounts, and require re-verification as a condition of regaining access to benefits. *See* ¶¶50, 52 (alleging a "joint fraud-prevention undertaking with EDD" and that after freezing accounts BofA required class members to re-verify eligibility with EDD). Even if EDD did not specifically instruct BofA to freeze the particular accounts at issue, EDD "facilitate[d]" the freezes by (1) encouraging BofA generally to "work jointly with

[44] BofA argues that some class members were able to receive benefits by paper checks, but the MCC alleges that class members are informed by EDD that debit cards are the *only* option. That a few cardholders who through extraordinary efforts were able to request paper checks after BofA had illegally frozen their accounts does not undermine the exclusive role BofA plays in administering EDD benefits programs. *See*, *e.g.*, ¶¶172-74 (account frozen in December 2020 and deprived of benefits until paper checks received in February 2021); ¶¶221-23 (same).

[45] BofA's cases (Mot. at 37) are distinguishable. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (private insurers not state actors simply because they are heavily regulated); *Gonzalez-Maldonado v. MMM Healthcare, Inc.*, 693 F.3d 244, 248 (1st Cir. 2012) (operating HMO not a public function); *Hester v. Regions Bank*, 2010 WL 2232158, at *5 (M.D. Ala. June 3, 2010) (concerning only the freezing of purely private bank accounts); *Venegas v. Bianco*, 2019 WL 10301094, at *9 (C.D. Cal. Aug. 26, 2019) (holding that, "[a]s alleged," complaint did not sufficiently state that a prison commissary employee's actions were fairly attributable to the state); *Belue v. Keefe Commissary Grp., LLC*, 2021 WL 1197749, at *3 (D. Idaho Mar. 29, 2021) (relying on *Venegas* without further analysis).

EDD to combat EDD benefits enrollment fraud," including by authorizing BofA to freeze accounts at EDD's direction (which authority BofA then abused by unilaterally freezing accounts based on its own objectively unreasonable suspicion of enrollment fraud) (¶¶50-51, 629, 631), and (2) requiring beneficiaries frozen by BofA to first re-verify their identity (as BofA instructed) before issuing them replacement benefits by paper check (*see* ¶¶52, 95, 221-23). *See Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013); *see, e.g.*, *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140-41 (9th Cir. 2012) (private casino security guard's decision to make citizen's arrest was "part and parcel of the overall trespass enforcement program established by [casino] and [police department] jointly," and thus state action); *Swift v. Lewis*, 901 F.2d 730, 732 n.2 (9th Cir. 1990) (private individual contracted to help state determine whether certain prisoners should be classified as Sikhs was state actor), *superseded by statute on other grounds*; *Geneva Tower Tenants Org. v. Federated Mortg. Invs.*, 504 F.2d 483, 487-88 (9th Cir. 1974) (private landlords' receipt of federal subsidies and agreement to abide by those subsidies' rules rendered them participants in joint undertaking); *Cahoo*, 322 F.Supp.3d at 793-94 (private entities authorized under state contracts to design and manage fraud detection software system were state actors).[46]

Finally, in arguing that the EDD-BofA revenue-sharing agreement (*see* ¶49)

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[46] The EDD-BofA relationship is a far cry from the arm's-length contracting relationship at issue in BofA's cases. *See Pasadena Republican Club v. W. Justice Ctr.*, 985 F.3d 1161, 1165, 1169-71 (9th Cir. 2021) (under private actor's lease agreement, government lessor received no revenue and had "no input or control" over or knowledge of the acts at issue of renting out meeting rooms); *Brunette v. Humane Soc'y of Ventura Cnty.*, 294 F.3d 1205, 1212 (9th Cir. 2002) (plaintiff failed to allege "any substantial cooperation or inextricably intertwined activity" between government actor that conducted an animal welfare raid and media invited to observe, and government "did nothing to facilitate" media's actions); *Black by Black v. Indiana Area Sch. Dist.*, 985 F.2d 707, 710-11 (3d Cir. 1993) ("no symbiotic relationship" between the state and its school bus contractor and "no state regulation that 'compelled or even influenced'" the contractor's alleged conduct).

is irrelevant to the joint action inquiry (Mot. at 39), BofA completely ignores the leading authority on the issue: *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724-25 (1961). The direct revenue-sharing authorized in the EDD-BofA Contract is a far more direct financial relationship than the "incidental variety of mutual benefits" present in *Burton.*[47] BofA mistakenly contends that *Pasadena Republican Club* requires a showing of complete state dependence on the private entity. To the contrary, that decision involved an arm's-length commercial lease arrangement where the public entity's revenue bore *no* relationship to the private entity's. *See* 985 F.3d at 1170. Here, Plaintiffs allege EDD directly benefits financially from BofA's earnings (and, in fact, that EDD and BofA jointly profit from decisions to freeze accounts). *See* ¶49. At a minimum, the twin grounds for establishing state action in this case cannot be adjudicated without further factual development.

B. Plaintiffs Adequately Allege Due Process Violations.

BofA does not seriously dispute that Plaintiffs' factual allegations make a strong showing of all three *Mathews v. Eldridge* factors: the property interest at stake, the risk of erroneous deprivation, and the value of additional safeguards. 424 U.S. 319, 335 (1976). Nor could it, given Plaintiffs' allegations (1) that they depend on their EDD benefits for life's basic necessities like food and shelter, (2) that BofA froze the accounts of eligible beneficiaries in response to their reports of being victims of unauthorized transactions, based exclusively on its highly unreliable Claim Fraud Filter that erroneously flagged tens of thousands of cardholders as "criminals," without BofA ever conducting follow-up investigations or testing the accuracy of its filter, (3) that these freezes lasted for months on end, without any pre-deprivation (or even prompt post-deprivation) notice or opportunity to contest

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[47] The Supreme Court reasoned that the privately owned restaurant benefited from customer access to the public parking facility, while the parking facility benefited from parking demand created by the restaurant. *Id.* at 724; *see also id.* at 719-20 (project's finances depended on long-term leases to multiple private tenants including bookstore, food store, jeweler, and restaurant).

the basis for the freezes, and (4) that had BofA afforded claimants an opportunity to be heard and to verify their identities, BofA could have avoided erroneously depriving them of their subsistence public benefits. *See* ¶¶93-95, 108, 111-12, 651-66; *see also AFL*, 88 Cal.App.3d at 820 & n.5 (1979) (UI benefits are due process-protected property interest requiring *pre*-deprivation notice and hearing); *Goldberg v. Kelly*, 397 U.S. 254, 262, 267-68 (1970).[48]

BofA asserts that its interest in preventing fraud justifies its practice of freezing cardholders' accounts without prior notice. Mot. at 39-40. Even if BofA's freezes bore some relationship to legitimate concerns about fraud,[49] the authority BofA cites only allows post-termination procedures to substitute for pre-termination procedures "'in limited cases'" where there is "'substantial assurance that the deprivation is not baseless or unwarranted.'" Mot. at 40 (quoting *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988)). That limited exception does not apply here, where Plaintiffs set forth specific factual allegations that BofA's decisions to freeze their accounts were based exclusively on an automated and unreliable Claim Fraud Filter without *any* investigation, resulting in tens of thousands of erroneous deprivations. ¶¶93-96, 108.[50] Nor does the mere possibility that some actual criminals might benefit from pre-deprivation notice negate legitimate EDD beneficiaries' constitutional right to due process. *See AFL*, 88

[48] *See also, e.g.*, ¶¶130-135, 138-43, 145-51, 163-70, 173-75, 188-91, 195-99, 217-24, 226-28, 246-49, 250-53, 258-60, 269-73.

[49] BofA's assertion that its freeze practices are necessary to protect against criminal activities (i.e., UI enrollment fraud) is belied by the fact it kept accounts frozen long after the EDD confirmed entitlement to benefits in the account. *See* ¶96.

[50] In contrast, *Mallen* upheld post-suspension procedures for an indicted bank official suspended from bank affairs because the *grand jury's* findings provided reasonable assurance that the suspension "was not baseless." 486 U.S. at 241. Similarly, *Spiegel v. Ryan*, 946 F.2d 1435 (9th Cir. 1991), upheld a post-deprivation hearing procedure because regulations required the agency to "meet specific statutory requirements before issuing the [relevant] order," and the "decision was supported by detailed findings … following a long investigation ...." *Id.* at 1440.

Cal.App.3d at 821 ("The potential abuse by some of the procedures designed to protect all claimants cannot be the basis for deciding whether the procedures are required by due process."); *Goldberg*, 397 U.S. at 266 (pre-termination hearing required even though "benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped"). In any event, Plaintiffs have also alleged that BofA failed to provide even reasonable *post*-deprivation notice or opportunity to be heard, and that BofA continued to deny access to accounts even after cardholders re-verified their entitlement to benefits. ¶¶95-96. Under any standard, then, Plaintiffs have adequately alleged claims for violations of due process.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that BofA's motion to dismiss be denied. If any part of the motion is granted, Plaintiffs respectfully request leave to amend, as there has been no bad faith or undue delay, amendment would not be futile, and BofA would suffer no prejudice. *See Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014).

Respectfully submitted,

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SIGNATURE CERTIFICATION

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I, Brian Danitz, hereby certify that the content of this document is acceptable to all the signatories herein and that I have obtained counsel's authorization to affix their electronic signatures to this document.

/s/ Brian Danitz
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