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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**IN RE BANK OF AMERICA
CALIFORNIA UNEMPLOYMENT
BENEFITS LITIGATION**

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

**PLAINTIFFS' OPPOSITION TO
REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF
MOTION TO DISMISS MASTER
CONSOLIDATED COMPLAINT**

This Document Relates to All Actions

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

1 Plaintiffs respectfully submit this Opposition to Defendant Bank of
2 America, N.A.'s ("BofA") Request for Judicial Notice ("BofA RJN") in support
3 of its Motion to Dismiss the Master Consolidated Complaint ("MCC"). Plaintiffs
4 object to the request that the Court take judicial notice of the documents attached
5 as Exhibits 1, 2 and 3 to the Declaration of Robert Chestnut ("Chestnut Decl.").

6 I. LEGAL STANDARD

7 It is axiomatic that if the "legal sufficiency of a complaint's allegations is
8 tested by a motion under Rule 12(b)(6), '[r]eview is limited to the complaint.'" *Lee*
9 *v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation omitted). A court
10 cannot consider "defendants' factual assertions . . . [and] evidence outside
11 plaintiffs' pleadings," *id.*, unless it "convert[s] the 12(b)(6) motion into a Rule 56
12 motion for summary judgment, and . . . give[s] the nonmoving party an opportunity
13 to respond," *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). There are
14 two narrow exceptions.

15 **First**, a court may take judicial notice of an "adjudicative fact . . . not subject
16 to reasonable dispute." Fed. R. Evid. 201; *Khoja v. Orexigen Therapeutics, Inc.*,
17 899 F.3d 988, 999 (9th Cir. 2018). A fact is "not subject to reasonable dispute" if it
18 is "generally known" or "can be accurately and readily determined from sources
19 whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. **Second**, the
20 incorporation by reference doctrine permits a court to consider an extrinsic
21 document "the complaint 'necessarily relies' on if (1) the complaint refers to the
22 document; (2) the document is central to the plaintiff's claim; and (3) no party
23 questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v.*
24 *Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (citations omitted).

25 II. ARGUMENT

26 A. Exhibit 1 to the Chestnut Declaration: Cardholder Agreement

27 Exhibit 1 purports to be a copy of the account agreement that sets forth the
28 "terms and conditions of recipients' California Employment Development

1 Department Debit Card.” BofA RJN at 4. However, Exhibit 1 is different from the
2 version of the Cardholder Agreement between BofA and Plaintiffs that is available
3 on BofA’s website for California Employment Development Department (“EDD”) Debit
4 Cardholders, which Plaintiffs relied upon, even though both documents state
5 “Effective Date March 1, 2018.” *Compare* Chestnut Decl., Ex. 1 with Declaration
6 of Brian Danitz (“Danitz Decl.”) ¶ 2, Ex. A. Specifically, section 18 of Exhibit 1 to
7 the Chestnut Declaration states that North Carolina law governs the agreement,
8 whereas the version of the Cardholder Agreement on BofA’s website for EDD
9 Debit Cardholders states that *California* law governs. *Compare* Chestnut Decl., Ex.
10 1, §18 with Danitz Decl., Ex. A, §18.¹ Accordingly, Exhibit 1 is not subject to
11 judicial notice because it is subject to reasonable dispute and the document may not
12 be incorporated by reference into the MCC because its accuracy and authenticity is
13 in doubt.

14 Plaintiffs have separately filed a Request for Judicial Notice (Plaintiff’s
15 RJN”) asking the Court to consider the copy of the Cardholder Agreement attached
16 as **Exhibit A** to the accompanying declaration, which is the publicly available
17 version of the Cardholder Agreement on the BofA EDD Debit Card website at
18 <https://www.visaprepaidprocessing.com/eddcard/Program/Terms> and requesting
19 that the Court consider that document as incorporated by reference in the MCC.
20 *See* Plaintiffs’ Request for Judicial Notice In Support Of Opposition to Motion to
21 Dismiss (Plaintiffs’ RJN”).

22 **B. Exhibit 2 to the Chestnut Declaration: EDD-BofA Agreement**

23 Exhibit 2 purports to be a “true and correct copy of excerpts of the agreement
24 between [BofA] and the California Employment Development Department.” RJN
25 at 5. While Plaintiffs agree in principle that the Court may take judicial notice of an
26

27 _____
28 ¹ The two documents are otherwise substantially the same. *Compare* Danitz Decl.,
Ex. A at 1 with Chestnut Decl., Ex. 1 at 1.

1 authentic copy of the 2015 EDD-BofA Contract referenced in the MCC,² Exhibit 2
2 is neither judicially noticeable nor incorporated by reference into the MCC because
3 there are serious questions about its authenticity. First, it includes uncompleted
4 edits which are plainly visible as redlined changes. *See* Chestnut Decl., Ex. 2 at 8.
5 These unaccepted redlined changes to the document create a factual dispute as to
6 whether the excerpt is the final version (which it likely isn't) and casts the
7 authenticity of Exhibit 2 into dispute, rendering it unsuitable for incorporation by
8 reference or judicial notice. *See Dual Diagnosis Treatment Ctr., Inc. v. Blue Cross*
9 *of Cal.*, 2016 WL 6892140, at *23 (C.D. Cal. Nov. 22, 2016) (“Where an offered []
10 document . . . still has redlining or edits in the document, the Court is unwilling to
11 accept the authenticity of the document even where no party has objected.”);
12 *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (incorporation by reference
13 appropriate only if “no party” questions authenticity); *Zapia v. Wells Fargo Bank,*
14 *N.A.*, 2018 WL 2461505, at *3 (S.D. Cal. June 1, 2018) (refusing to take judicial
15 notice of a document challenged as inauthentic). Second, Exhibit 2 is also facially
16 different than a copy of the EDD Agreement that California EDD produced to
17 Plaintiffs pursuant to the California Public Records Act (Cal. Gov. Code §6250 *et*
18 *seq.*). *See* Danitz Decl. ¶ 3 and Ex. B. For these same reasons, this altered exhibit
19 is also not a “generally known” adjudicative fact. Fed. R. Evid. 201. Accordingly,
20 the Court should not consider Exhibit 2.

21 **C. Exhibit 3 to the Chestnut Declaration: Letter Agreement**

22 Exhibit 3 purports to be excerpts from an August 24, 2020 “Letter
23 Agreement” between BofA and EDD. RJN at 5. The document is not incorporated
24 by reference into the MCC, which does not reference or rely upon Exhibit 3 at all,
25 let alone “extensively.” *Ritchie*, 342 F.3d at 908 (district court could not rely on
26

27 ² Plaintiffs’ RJN separately requests the Court to consider the copy of excerpts of
28 the EDD-BofA Agreement attached as **Exhibit B** to the Danitz Declaration. *See*
Plaintiffs’ RJN at 1-2; Danitz Decl., Ex. B.

extrinsic declaration to which plaintiff's complaint did not "extensively" refer); *Khoja*, 899 F.3d at 1002 ("[I]f the document merely creates a defense to the well-pled allegations in the complaint, then that document did not necessarily form the basis of the complaint."); cf. *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983, 995 (S.D. Cal. 2005) (declining to consider documents *that were* referenced in the complaint when offered as evidence in defense of securities claims, finding that "considering these documents as part of the pleadings at this stage would expand the 'narrow exception' and eliminate the distinction between a motion for summary judgment and a motion to dismiss").

Nor is Exhibit 3 subject to judicial notice. Exhibit 3 is not "generally known" or capable of "ready determination from sources of unquestionable accuracy." *Sporting Supplies Int'l, Inc. v. Tulammo USA, Inc.*, 2012 WL 12892310, at *2 (C.D. Cal. Mar. 5, 2012); see also *Nash v. Wachovia Bank*, 2016 WL 4771027, at *1 n.4 (E.D. Cal. Sept. 14, 2016) ("The contract is not part of the complaint and may be subject to reasonable dispute and therefore is not properly subject to judicial notice."). If the Court were to consider the existence of Exhibit 3, it should not consider its contents which raise disputed issues of fact. For example, BofA contends that the August 2020 "Letter Agreement" modified certain contractual obligations under the 2015 EDD-BofA Contract, but whether the "Letter Agreement" was itself modified or superseded by other agreements is a factual issue that cannot be resolved on a Rule 12(b)(6) motion. Accordingly, the Court should not consider Exhibit 3. *N. Cty. Transit Dist. v. Atlantic Richfield Co.*, 2006 WL 8455571, at *4 (S.D. Cal. Sept. 27, 2006) ("While the Court may take judicial notice of the existence of a contract, it may not take notice of the contents or terms of the contract. The Court, therefore, declines to take judicial notice of the terms of the subject Purchase Agreement.") (citations omitted); see also *Immune Response*, 375 F.Supp.2d at 995 ("Furthermore, consideration of the exhibits encourages a weighing of factual disputes; a process that is improper on a motion to dismiss.").

1 **III. CONCLUSION**

2 For the foregoing reasons, Plaintiffs respectfully request that the Court
3 deny the Request for Judicial Notice in its entirety.

4 Dated: November 15, 2021 **COTCHETT, PITRE & McCARTHY, LLP**

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11 Dated: November 15, 2021 **ALTSHULER BERZON LLP**

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Liaison Counsel for Class Plaintiffs

Liaison Counsel for Individual Plaintiffs

SIGNATURE ATTESTATION

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*

BRIAN DANITZ