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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 **PLAINTIFFS' OPPOSITION TO BANK OF AMERICA, N.A.'S PARTIAL MOTION TO DISMISS THE FIRST AMENDED MASTER CONSOLIDATED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)** Date: Oct. 2, 2023 Time: 11:30 a.m. PST Ctrm: 14A – 14th Floor Judge: Hon. Larry A. Burns

In its Order dated May 25, 2023 ("Order") this Court granted in part and denied in part Defendant Bank of America, N.A.'s ("BofA" or the "Bank") Motion to Dismiss Master Consolidated Complaint ("MCC"), and provided Plaintiffs an opportunity to amend with respect to some of their claims. (Dkt. No. 126). Plaintiffs filed the First Amended Master Consolidated Complaint ("FAMCC") on June 13, 2023. Dkt. No. 136.

BofA has now filed a short partial Motion to Dismiss ("Motion") targeted at the allegations of certain Individual Plaintiffs. (See Colum D of Appendix A filed with BofA's renewed motion to dismiss). The Court should reject BofA's argument that each Plaintiff that requested information from BofA regarding the Bank's failure to make electronic fund transfers from their account due to BofA's freezing of their accounts fails to state a claim under the Electronic Fund Transfer Act ("EFTA"). BofA's position conflicts with this Court's analysis in its Order as well as with the statutory language on which that analysis was based.

I. BOFA DOES NOT SEEK TO DISMISS MOST OF THE INDIVIDUAL PLAINTIFFS' AMENDED CLAIMS

As a preliminary matter, BofA does not challenge the legal sufficiency of the amended allegations relating to the EFTA claims asserted by Individual Plaintiffs who reported and sought additional information regarding unauthorized transactions. These include curative amendments by 19 Individual Plaintiffs, whose EFTA claims had previously been dismissed for failure to allege timely notice to the Bank,[1] and by 63 Individual Plaintiffs, whose EFTA claims had previously been dismissed for failure to

[1] *See* FAMCC ¶¶ 302 (C. Ayala), 312 (J. Brooks), 325 (R. Chase), 387 (I. Harris), 394 (R. Hernandez), 399 (T. Howze), 407 (R. Jaurigue, Jr.), 422 (E. Loredo), 435 (T. Middleton), 467 (M. Raiff), 470 (N. Rima-Fleurima), 473 (M. Roa), 474 (C. Robinson), 483 (F. Saldate), 485 (T. Schmitz), 488 (J. Silva), 491 (D. Smith), 505 (T. Turner), 526 (C. Zettlemoyer).

allege reporting a qualifying error.[2] These claims and allegations are not at issue in this Motion.

BofA only challenges the EFTA claims asserted by Individual Plaintiffs who requested additional information as to the basis for the failure to make transfers as a result of BofA's freezing or restriction of their accounts (whom BofA refers to as the "Freeze Only" Individual Plaintiffs). However, these claims are adequately pled.

II. THE "FREEZE ONLY" INDIVIDUAL PLAINTIFFS' AMENDED ALLEGATIONS ARE SUFFICIENT TO STATE AN EFTA CLAIM

BofA contends that the Individual Plaintiffs who allege that they requested additional information in connection with an account freeze or restriction in the FAMCC do not state a claim under EFTA, 15 U.S.C. §§ 1963 et seq. and Regulation E, 12 C.F.R. §§ 1005.1 et seq. Mot. at 6-8. According to BofA, "[n]one of these Plaintiffs have identified the electronic fund transfer that they sought information or clarification about," and "[i]n fact, these Plaintiffs make no allegations regarding any electronic fund transfers on their accounts at all," but instead allege that "they sought information about freezes or restrictions that *prevented* transfers on their accounts." Mot. at 8 (emphasis in original). However, as discussed below, BofA imposes an artificially restrictive standard for what is purportedly required to seek information or clarification about an "electronic fund transfer" on a bank account, and BofA's argument conflicts with the Court's own analysis in its Order.

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[2] *See* FAMCC ¶¶ 292 (K. Alvarez), 296–298 (R. Anderson, A. Andrade, S. De Los Angeles, Sr.), 300 (R. Arnoldstarr), 301 (V. Arrey), 303 (C. Back), 305–309 (D. Beckham, S. Beehler, A. Bennett, F. Berlt, S. Blacksands), 317 (M. Bynum), 321 (K. Carpenter), 322 (P. Castillo), 326 (A. Chavez), 335–337 (T. D'Agostino Criado, H. Dale, M. de Vera), 343–346 (L. Dones, A. Douglas, B. Douglass, K. Duey), 348 (P. Echeverria), 352 (J. Estrada), 355 (J. Flores), 357 (S. Flores), 359 (M. Friday), 365 (L. Georege), 376 (N. Guirguis), 383 (M. Haney), 390 (B. Hassanshahi), 392 (G. Heinz), 395 (V. Hernandez), 402 (Q. Huynh), 404 (J. Isles), 413 (V. Jones), 418–420 (S. Laxton, T. Lind, L. Littles), 423 (R. Madrid), 424 (M. Madrid), 431 (C. McCafferty), 440 (S. Morgan), 445 (S. Murphy), 448 (F. Ortiz, Jr.), 454 (A. Perez), 456 (K. Perkins), 462 (T. Pomeroy), 464 (J. Pummill), 469 (K. Reed), 476 (J. Robles), 481 (R. Salaz), 497 (D. Talia), 506 (R. Valadez), 512 (N. Walker), 514 (C. Wilburn), 516–518 (T. Wilkins, Z. Williams, T. Williams), 523–525 (C. Wood, M. Yeats, G. Young).

The EFTA is a federal consumer protection law "establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems." 15 U.S.C. § 1693(a). The EFTA, together with its implementing regulation, Reg E, regulates electronic fund transfers which directly affect consumer accounts. § 1963(a)(7). Under Section 1693f(a), which details EFTA's error resolution procedures, when a consumer notifies a financial institution that the consumer believes an "error" has occurred in his or her account, the "financial institution shall investigate the alleged error, determine whether an error has occurred, and report or mail the results of such investigation and determination to the consumer within ten business days." *Id*., § 1693f(a). The EFTA mandates specific steps the financial institution must take depending on the results of its investigation, as well as the time frames in which the steps must be taken. *Id*., § 1693f(b)–(d).

Significantly, the Court noted that while an account freeze *alone* did not constitute a qualifying error as defined by the EFTA, consumers whose accounts were frozen could establish a qualifying error on some other basis, such as that those Individual Plaintiffs "reporting an account freeze *also requested additional information*" to determine whether an error existed in the Bank's failure to make EDD benefits transfers into their EDD Debit Card accounts. See Order, 2023 WL 3668535, at *8 (emphasis added).

In adopting this reasoning, the Court necessarily rejected BofA's position that the 16 Individual Plaintiffs who reported account freezes *and* requested additional information "to determine whether there was an incorrect or omitted EDD benefits transfer into the account" failed to report a qualifying error or to state a claim under the EFTA. Instead, the Court dismissed these Plaintiffs' EFTA claims with leave to amend due to the MCC's failure to "allege that any individual Plaintiff reporting an account freeze also requested additional information." *Id*. (citing MCC ¶¶ 309 (Stone Blacksands); 344 (Anthony Douglas); 357 (Stephanie Flores); 376 (Noah Guirguis); 392 (Gretchen Heinz); 402 (Quoc Huynh); 413 (Victoria Jones); 418 (Sabrina Laxton);

419 (Tonya Lind); 420 (Limmie Littles); 448 (Frank Ortiz, Jr.); 497 (Danny Talia); 514 (Cameren Wilburn); 516 (Terrence Wilkins); 517 (Zacharia Williams); and 523 (Colton Wood)).

BofA does not dispute that each of these Freeze Only Individual Plaintiffs has now amended their claims to clarify that each requested additional or clarifying information regarding bank errors resulting in missing deposits or other omissions of EDD benefits transfers into their accounts while the freeze continued to be in effect. See FAMCC ¶¶ 309, 344, 357, 376, 392, 402, 413, 418, 419, 420, 448, 497, 514, 516, 517 and 523. These amended allegations adequately allege that each of those Individual Plaintiffs timely informed BofA representatives, repeatedly, that their accounts were frozen or otherwise restricted and they could not conduct transfers, and each of those Individual Plaintiffs requested additional documentation and clarification into the omitted transfers.

BofA asks the Court to reverse itself and hold that EFTA only applies to fraudulent "unauthorized transactions." However, the statutory coverage under EFTA is much broader. While EFTA defines "errors" to include "unauthorized transactions," such "errors" also include 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" in turn 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 ignores, an EFTA "error" includes any "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.

Every “Freeze Only” Individual Plaintiff alleges that they timely notified BofA and requested “additional information or clarification” from BofA surrounding the issues related to their accounts, including any determination regarding missing deposits and failure to credit amounts to the accounts as a result of a freeze or restriction. Under those circumstances, the requests for additional information and clarification constitute reporting of “errors” under 15 U.S.C. § 1693f(f)(6). Additionally, contrary to BofA’s assertion, a reversal of a provisional credit and an account freeze or block are errors under EFTA when a consumer asks for “additional information or clarification” from BofA pursuant to 15 U.S.C. § 1693f(f)(6).

BofA cites *Hardin v. Bank of America, N.A.*, 2022 WL 3568568 (E.D. Mich. Aug. 18, 2022) in support of its argument, but that case did not purport to analyze this issue and instead merely reiterated that “the EFTA does not regulate account freezes” and that “requests for additional information or clarification apply only for requests ‘concerning an electronic fund transfer’” and “do not include ‘routine inquir[ies] about the consumer’s account balance,’ among other ‘recordkeeping’ requests.” *Id.* at *3 (citations omitted).

In short, the Court already properly rejected the erroneous interpretation of EFTA, which BofA reiterates in its Motion. BofA provides no new arguments that would justify revisiting the issue. Each of the “Freeze Only” Individual Plaintiffs has amended her factual allegations to address the Court’s concerns. Accordingly, the Motion to Dismiss their EFTA claims should be denied.

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CONCLUSION

For the foregoing reasons, this Court should deny the Motion to Dismiss as to the "Freeze Only" Individual Plaintiffs' EFTA claims.

Dated: September 17, 2023

SWIGART LAW GROUP, APC

By: /s/ *Joshua B. Swigart*______
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