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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' REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF DISMISSAL WITH PREJUDICE OF UCL CLAIM

Date: August 28, 2023
Time: 11:30 a.m.
Dept. Courtroom 14A, 14th Floor
Judge: Hon. Larry Alan Burns

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

I. INTRODUCTION

In their opening brief, Plaintiffs demonstrated four independent reasons why the Court should reconsider its dismissal of Plaintiffs' UCL claim with prejudice. *See* Dkt. 151-1 ("Mot."). First, the Court overlooked that the UCL claim sought *prospective injunctive relief* based on future irreparable harms, for which no legal remedies exist. *See* Dkt. 72, Master Consolidated Complaint ("MCC") ¶¶5, 9–33, 111–13, 285, 584. Second, the UCL claim alleged that the Bank's challenged practices, even if not "unlawful," are independently actionable under the UCL as "*unfair*" practices, for which no legal remedies are available. Third, the Court dismissed the UCL claim *without leave to amend* even though, if amendment were permitted, Plaintiffs could allege inadequate legal remedies. Fourth, dismissal of the UCL claim *with prejudice* is contrary to Ninth Circuit precedent governing dismissals for lack of equitable jurisdiction. Plaintiffs also showed that the MCC's allegations amply supported their requests for prospective injunctive relief under both prongs of their UCL claim, and for equitable restitution under the UCL's unfairness prong.

The Bank's opposition ignores the MCC's actual allegations and relies on case law that supports, rather than undercuts, Plaintiffs' arguments. *See* Dkt. 158 ("Opp."). The Bank also attempts improperly to use its opposition brief as a *motion* seeking, for the first time, dismissal of Plaintiffs' requests for injunctive relief based on the July 2022 CFPB Order. The Bank argues, in cursory fashion, that unspecified provisions in the 48-page CFPB Order have secured *all* the injunctive relief sought in the MCC, depriving Plaintiffs of standing to seek an injunction. The argument is both procedurally improper and factually incorrect.

For the reasons stated in Plaintiffs' Motion for Reconsideration ("Motion") and below, the Court should grant the Motion and permit Plaintiffs' UCL unlawful-and-unfair prong claims for prospective injunctive relief, and their UCL unfair-prong claim for restitution, to proceed on the merits.

II. ARGUMENT

A. The Court should reconsider dismissal of the UCL claims for injunctive relief because damages are inadequate to prevent future harm.

In their Motion, Plaintiffs showed that "retrospective damages are not an adequate remedy for the prospective harm that injunctions are designed to prevent." Mot. at 5–6 (collecting cases, including *Graham*, *Warren*, *Dekker*, *Souter*, *Brooks*, and *Andino*). The Bank does not dispute this controlling principle. Instead, it falsely asserts that the MCC contains only boilerplate allegations of irreparable harm, when in fact the MCC alleges detailed and extensive facts—including by incorporating the Preliminary Injunction's *factual findings based on evidence*—demonstrating that Plaintiffs have suffered and will continue to suffer irreparable harm unless the Bank is permanently enjoined. Mot. at 4–5 (citing MCC ¶¶5, 9–33, 109, 285 & Ex. A at 2). While the Bank also falsely asserts that the CFPB Consent Order (entered nearly one year *after* the MCC was filed) will provide Plaintiffs all the injunctive relief they need, that argument is both procedurally improper and factually incorrect.

1. Reconsideration is appropriate because the Court did not address, much less reject, Plaintiffs' injunctive relief argument.

The Bank provides no response to Plaintiffs' point that damages are necessarily inadequate to prevent future harm. *See* Opp. at 4–7. Instead, it asserts generic arguments that ignore the record and the MCC's allegations.

The Bank asserts that reconsideration is unwarranted because the Court "plainly understood that Plaintiffs' UCL claims sought … a forward-looking injunction" when it dismissed the UCL claim. Opp. at 1:7–10 (citing MTD Order at 33). But the cited portion of the MTD Order makes no mention of injunctive relief, and the Bank's argument ignores the Court's express acknowledgment that "the May 25 Order didn't adequately address … the distinction between the prospective injunctive relief sought by the MCC and the 'equitable restitution for past harm' sought in *Sonner*." Dkt. 148

(Order Granting Leave to File) at 3. The issue addressed in the May 25 MTD Order was limited to whether Plaintiffs had pleaded inadequate legal remedies with respect to their UCL unlawful-prong claim for restitution; it did not address Plaintiffs' separate request for prospective injunctive relief. *See* MTD Order at 31–33.

Next, the Bank asserts that the MCC contains only "conclusory allegations," and that it lacks "factual allegations … demonstrating that legal remedies are inadequate, and Plaintiffs do not (and cannot) direct the Court to any." Opp. at 5:3, 5:13–15. That is plainly wrong. The MCC includes detailed allegations that the Bank continues to engage in specifically designated unlawful and unfair practices that will cause future harm if not enjoined. *See, e.g.,* Mot. at 2 n.1 (citing MCC ¶¶ 51, 56, 107, 111–12, 542, 584); *see also* FAMCC ¶¶285, 575 (alleging "the Bank's unlawful and unfair conduct … is or would be ongoing but for the preliminary injunction").

Curiously, the Bank also asserts that the MCC fails to specify which of the Bank's practices are allegedly unfair or unlawful, Opp. at 7 (citing ¶584), even though the MCC includes lengthy paragraphs making those precise allegations in detail. *See, e.g.*, MCC ¶577(a)–(o) (alleging that 15 specific Bank practices are "unfair"); ¶¶579–82 (alleging specific Bank practices that are "unlawful"); *see also* Dkt. 90 (MTD MCC Opp.) at 40 n.41 (summarizing the Bank practices the MCC alleges are "unfair"). Instead of addressing those detailed allegations, the Bank focuses exclusively on the final summary paragraph of the UCL claim (MCC ¶584), as if that were the only paragraph containing charging allegations. *See* Opp. at 7:7 (complaining that MCC ¶584 seeks to enjoin "unspecified business practices"). This is not a proper argument.

The Bank's case citations are similarly misleading. For example, the Bank cites *Stafford v. Rite Aid Corp.*, No. 17-cv-01340-TWR-JLB, 2023 WL 2876109, at *4 (S.D. Cal. Apr. 10, 2023), for the proposition that a claim for relief under the UCL must be dismissed if there is no express allegation that plaintiffs have an "inadequate remedy at law." Opp. at 5:1–2. That is not what the court held, which was that plaintiffs could not proceed on their "equitable claims for alleged past harm" (i.e., restitution) because they had not established an inadequate remedy at law for *that* form of relief. The court *denied* defendants' motion to dismiss the UCL with respect to plaintiffs' "claims for future equitable relief" (and even as to the restitution claim, the court granted plaintiffs leave to amend). *See Stafford*, 2023 WL 2876109, at *5, *6.

The Bank also cites *Antonyan v. Ford Motor Co.*, No. 21-cv-0945-DMG-RAO, 2022 WL 1299964, at *6 (C.D. Cal. Mar. 30, 2022). *See* Opp. at 5–6. But the fact-specific ruling in that case focused almost entirely on the implausibility of the plaintiff's inadequate-relief theory. The plaintiff in *Antonyan* was a car owner whose vehicle broke down while under warranty; the defendant manufacturer repaired the car free of charge. 2022 WL 1299962, at *1. After the plaintiff sued seeking damages as well as restitution, the court concluded there was no basis for awarding restitution because the complaint contains "nothing … to suggest that damages would fail to make [the plaintiff] whole." *Id.* at *6. Further, there was no basis for injunctive relief because plaintiff's "car has been fixed, and there is no allegation that it will break down again." *Id.* The allegations and claims in *Antonyan* bear little resemblance to those at issue here.

2. The Bank's argument that the CFPB Order deprives Plaintiffs of standing to seek injunctive relief is procedurally improper and misrepresents the CFPB Order.

The Bank next argues that Plaintiffs lack standing to seek reconsideration because in July 2022—nearly a year after the August 2021 MCC—the Bank entered into a Consent Order with the CFPB, in which the Bank agreed to some forms of injunctive relief. Opp. at 6–7, referring to *In re Bank of Am., N.A.*, No. 2022-CFPB-0004, Dkt. 1 (C.F.P.B. July 14, 2022) ("CFPB Order").

First, the Bank's argument is procedurally improper. This is a motion for *reconsideration* based on the Court's dismissal of allegations filed long before the CFPB Order; new arguments based on post-complaint facts and entirely new legal theories are not appropriately considered. *See, e.g.*, *Trading Bay Energy Corp. v.*

Union Oil Co. of California, 225 F. App'x 428, 430 (9th Cir. 2006); *Newmark Realty Cap., Inc. v. BGC Partners, Inc.*, No. 16-CV-01702-BLF, 2017 WL 8294275, at *2 (N.D. Cal. Dec. 6, 2017). Not only is the CFPB Order neither attached to, nor referenced in, the MCC (nor could it have been, since it didn't exist at the time), but even now, the Bank has not cited or quoted any of the CFPB Order's relevant provisions. Nor has it sought leave to submit the CFPB Order or to file supplemental briefing regarding its contents.

Of course, the Bank *could* have cited specific provisions in the CFPB Order to the Court, and *could* have preserved its argument that the CFPB Order precludes injunctive relief in this case—either by seeking leave to file supplemental briefing in connection with its first motion to dismiss the MCC before that motion was decided, or by raising the argument in its recent motion to dismiss the FAMCC (Dkt. 146), which the Bank filed a month before filing its Opposition (Dkt. 158) to the present Motion. After all, there are claims for prospective injunctive relief that survived dismissal in the FAMCC. *See, e.g.*, MTD Order at 44–46. But the Bank failed to include this argument as part of either of its motions to dismiss and should not be allowed to assert it for the first time here in an opposition brief to Plaintiffs' Motion. *See, e.g.*, *Smith v. Premiere Valet Servs., Inc.*, No. 19-cv-09888-CJC-MAA, 2020 WL 7034346, at *14 (C.D. Cal. Aug. 4, 2020) (collecting cases ruling that "a request for affirmative relief is not proper when raised for the first time in an opposition").

Even if the Court were to ignore all of these procedural improprieties and consider the Bank's argument based on the CFPB Order, the Bank is simply wrong on the facts. The Bank argues, without citation, that Plaintiffs lack standing to seek to enjoin *any* of "the business practices complained about in the MCC" because all those business practices are the exact same business practices as those at issue in, and "already permanently enjoin[ed]" by, the CFPB Order. Opp. at 7:14–15; *see also* Opp. at 7:21–24 (arguing, also without citations, that "Plaintiffs do not seek to require

BANA to do anything beyond what it has been ordered to do by its federal regulators"). But this is demonstrably false.

The CFPB Order concerns only five specific business practices that violate the letter or spirit of EFTA and its Regulation E, and is thus much narrower in scope than the MCC. ***Compare*** CFPB Order at pp. 1–2 (listing the five business practices at issue as the Bank denying EFTA claims and freezing accounts "based solely on the results of [BofA's] automated Fraud Filter," "fail[ing] to conduct reasonable investigations" of EFTA claims, "retroactively applying its automated Fraud Filter to reverse permanent credits" for EFTA claims, "impeding … cardholders' efforts to file" EFTA claims, and "fail[ing] to timely investigate and resolve" cardholders' EFTA claims), ***with****, e.g.*, MCC ¶577 (alleging 15 "unfair" practices that go far beyond EFTA-related misconduct, including failure to secure personal information, issuance of debit cards without industry-standard EMV chips, false representations to cardholders about fraud protection, and failure to take reasonable steps to monitor for and prevent unauthorized transactions), ¶¶579–82 (alleging "unlawful" practices that include all those practices that are the subject of Plaintiffs' other claims for relief, as well as data-security violations under the GLBA and CFIPA), ¶584 (seeking to enjoin the Bank's unfair and unlawful practices, including by requiring the Bank to take reasonable steps "to prevent future unauthorized use of … Cards and Accounts"), *and* MCC Prayer ¶2 & Ex. B (seeking an order making permanent the Preliminary Injunction, which includes detailed customer service provisions at ¶¶8–10 that go far beyond what is required under the CFPB Order). Additionally, the MCC's proposed class includes several groups of EDD benefits recipients (such as those who receive disability insurance benefits, MCC ¶¶38, 527–28), who are not among the narrower category of "Affected Consumers" covered by CFPB Order (which is limited to recipients of "unemployment insurance benefit[s]," CFPB Order ¶3(a)(1)).

In sum, the Bank's argument based on the CFPB Order is procedurally improper, unsupported, and should not be considered. And even if considered, the

Court should find that the business practices and injunctive relief at issue in the MCC are broader than the practices and relief at issue in the CFPB Order. Accordingly, the CFPB Order does not moot Plaintiffs' well-pleaded request for injunctive relief.

B. There is no adequate legal remedy for the Bank's conduct that, although not "unlawful," violates the UCL because it is "unfair."

Plaintiffs' MCC challenged the Bank's conduct as not only "unlawful" under the UCL but also as "unfair"—a separate violation. *See* MCC ¶¶577–78. Should the Court conclude later in this case that Plaintiffs failed to prove that the Bank's challenged conduct is unlawful, it could still conclude that Plaintiffs proved that the Bank's conduct was unfair and thus actionable under the UCL—and no legal remedy would be available to remediate the resulting harm. *See* Mot. at 6–9. Thus, reconsideration is also appropriate with respect to the dismissal of Plaintiffs' UCL "unfair" claim for restitution.

The Bank does not dispute that when conduct is found to be unfair under the UCL, the only remedies available are equitable—namely, restitution and an injunction. The Bank also does not dispute that conduct that is *alleged* to be both unfair and unlawful can be judicially *determined* to be unfair even if not unlawful. After all, conduct may be actionable as "unfair" under the UCL "even if not specifically proscribed by some other law." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tele. Co.*, 20 Cal.4th 163, 180 (1999); *see also* Mot. at 7 (collecting cases).

The Bank contends that to state a claim for restitution under the UCL's unfairness prong, Plaintiffs must plead "a different [legal] theory" and a "[different] factual predicate" than those underlying "the complaint's legal claims." Opp. at 8–9 (citing *Shuman v. SquareTrade Inc.*, No. 20-cv-02725-JCS, 2021 WL 5113182 (N.D. Cal. Nov. 3, 2021). But the *Schuman* case is readily distinguishable, and besides, Plaintiffs have alleged ample facts demonstrating why the Bank's various challenged actions and inactions in this case could be found independently actionable under the UCL's unfair prong even if the core conduct at issue were found not to be unlawful.

In *Shuman*, there was no daylight between the plaintiff's breach-of-contract claim and his UCL "unfair" claim, both of which claimed that the defendant accounted for depreciation in a way that resulted in "systematic underpayment of customer claims by 14.2%." *Id.* at *9. Either the challenged underpayments breached the parties' contract or they did not. If there was no breach (i.e., if the parties' contract permitted the alleged underpayments), the plaintiff would not be entitled to money damages *or* an equitable remedy. *Id.* at *9–10.

Here, by contrast, Plaintiffs' MCC (and FAMCC) pleaded 15 separate "unfair" acts and practices, each of which was tethered to a well-established public policy, and each of which Plaintiffs allege is unfair even if they do not rise to the level of unlawfulness. *See, e.g.*, MCC ¶577(c) ("failing to respond to the rise in demand for EDD benefits caused by or related to the COVID-19 pandemic by issuing chip cards"]; ¶577(h) ("establishing 'customer service' procedures designed to frustrate and obstruct efforts by Plaintiffs and Class Members to file their fraud claims"); ¶577(n) ("freezing and/or blocking EDD Debit Card Accounts not to protect the Cardholders but to protect the Bank's own interests"). Plaintiffs' MCC (and FAMCC) also expressly pleaded a theory of unfairness that was *independent* of their theory of unlawfulness. *See* MCC ¶578 (alleging the actions and inactions pleaded in ¶577 "offend public policy and constitute immoral, unethical, oppressive, and unscrupulous activities that caused substantial injury [and that] outweighs any potential benefits attributable to such conduct [notwithstanding] reasonably available alternatives to further the Bank's legitimate business interests ....").

The present case is therefore indistinguishable from the unfair-prong cases cited by Plaintiffs (and ignored by the Bank), in which the courts permitted a plaintiff's claims to proceed under the UCL's unfairness prong if plaintiffs' legal claim failed on its merits. *See* Mot. at 7–8, citing *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 1001 (9th Cir. 2023); *Zuniga v. Bank of Am., N.A.*, No. 14-cv-06471-MWF, 2014 WL 7156403, at *4–5, *7 (C.D. Cal. Dec. 9, 2014) (customer whose fraud claim was dismissed could proceed on UCL unfair-prong claim alleging Bank foreclosed on her home despite having promised her a loan modification); *Elgindy v. AGA Serv. Co.*, No. 20-cv-06304-JST, 2021 WL 1176535 at *7–10 (N.D. Cal. Mar. 29, 2021) (applying alternative tests to conclude the same factual allegations supported both "unlawful" and "unfair" prong claims).[1] It was clear error to deny Plaintiffs leave to amend their UCL claim to allege inadequate legal remedies more specifically.

C. It was clear error to deny Plaintiffs leave to amend their UCL claim to allege inadequate legal remedies more specifically.

Moreover, Plaintiffs showed that courts routinely grant leave to amend UCL claims that they dismiss under *Sonner*, especially on the first motion. Mot. at 9–10. Basic procedural fairness requires that "Plaintiffs should be permitted to amend their UCL claim to address whatever concerns the Court expresses with respect to those allegations, so that Plaintiffs can attempt to cure whatever remaining defects the Court identifies." Mot. at 10:21–24.

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[1] The Bank errs in asserting that Plaintiffs miscited *Elgindy* for the proposition that violations of the UCL's different prongs may be pleaded in the alternative, even when the underlying factual allegations are the same. *See* Opp. at 9. In *Elgindy*, plaintiff consumers brought a UCL claim against a company that sold travel-and-event insurance, alleging the company's pricing had a hidden service fee. 2021 WL 1176535, at *1. The plaintiffs asserted separate arguments as to why that fee was unlawful, unfair, and fraudulent. Crediting the complaint's allegation that the challenged practice would be unfair even if not found to be unlawful, the court concluded that "at the pleading stage, Plaintiffs have plausibly alleged a practice injurious to consumers and contrary to California's public policy [and have thus] stated a claim for a violation of the UCL's unfairness prong." *Id.* at *10.

The Bank's citation to *Bazarganfard v. Club 360 LLC*, No. 21-cv-02272-CMB-PLA, 2023 WL 2354810 (C.D. Cal. Jan. 26, 2023), cuts against its position because that decision expressly *rejected* an argument similar to one the Bank advances here. *See id.* at *13 (rejecting argument that an unfair prong claim necessarily fails if it is based on allegations that "overlap" with dismissed claims under the UCL's unlawful and fraudulent prongs); *see also id.* at *13–14 (holding plaintiff pled a UCL unfair-prong claim by alleging facts stating an EFTA claim).

D. It was clear error to dismiss the UCL claim with prejudice for lack of equitable jurisdiction.

Finally, Plaintiffs argued that controlling Ninth Circuit precedent requires that dismissals for lack of federal equitable jurisdiction be without prejudice. Mot. at 10–11 (citing, primarily, *Guzman v. Polaris Indus. Inc.*, 49 F.4th 1308, 1314 (9th Cir. 2022), *cert. denied sub nom. Polaris Indus. Inc. v. Albright*, No. 22-987, 2023 WL 3937623 (U.S. June 12, 2023)). The Bank offers no response, other than to point to their arguments in their motion to dismiss that there are other grounds for dismissal than lack of federal equitable jurisdiction. *See* Opp. at 10, citing Dkt. 84 (MTD MCC) at 43–47. Those arguments fail for the reasons previously argued by Plaintiffs. *See* Dkt. 90 (MTD MCC Opp.) at 39–44.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court vacate its dismissal with prejudice of the UCL claim, and deny the Bank's motion to dismiss the UCL claim.

Respectfully submitted,

Dated: August 21, 2023

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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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