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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 21-MD-02992-LAB-MSB **DEFENDANT BANK OF AMERICA, N.A.'S REPLY IN SUPPORT OF PARTIAL MOTION TO DISMISS THE FIRST AMENDED MASTER CONSOLIDATED COMPLAINT** Date: October 2, 2023 Time: 11:30 a.m. PST Ctrm: 14A – 14th Floor Judge: Hon. Larry A. Burns

BANA's Partial Motion to Dismiss (Dkt. 146-1) ("Partial MTD") included three separate arguments regarding defects in Plaintiffs' FAMCC.[1] First, BANA argued that because Plaintiffs chose not to amend certain claims and theories dismissed by the Court's MTD Order, those claims and theories should now be dismissed with prejudice. Plaintiffs' Opposition (Dkt. 171) ("Opposition") offers no response, and therefore concedes that dismissal with prejudice is appropriate. Second, BANA argued that Plaintiff Jennifer Yick's amended allegation that she has been reimbursed by BANA dooms her contract claim for the reasons articulated in the Court's MTD Order. Plaintiffs' Opposition offers no response to this argument either, conceding dismissal with prejudice. Third, BANA argued that that the "freeze only" individual Plaintiffs' amended allegations still fail to allege a "qualifying error" as required to state an EFTA claim. This is the only argument to which Plaintiffs' Opposition responds. But the response fails. Plaintiffs' interpretation of "qualifying error" to include general requests for information is incorrect, and Plaintiffs point to no authority to support their reading of the statute. For these reasons, and as stated in BANA's Partial MTD, the claims in the FAMCC identified in the Partial MTD should be dismissed with prejudice.

I. PLAINTIFFS CONCEDE THE ARGUMENTS TO WHICH THEY DO NOT RESPOND.

Plaintiffs' Opposition does not address two of the three arguments raised by BANA's Partial MTD. Specifically, Plaintiffs do not refute that (1) the dismissed claims that Plaintiffs failed to amend should be dismissed with prejudice (Partial MTD at 5), or that (2) Plaintiff Yick's Section 9 and 11 contract claim should be dismissed with prejudice as a result of her amended allegation that she has been reimbursed by BANA (*id.* at 11).

[1] Unless otherwise stated, all defined terms herein have the same meaning as in BANA's Partial MTD.

Failure to oppose an argument serves as a concession. *See, e.g.*, *New York Marine and Gen. Ins. Co. v. Peters*, No. 3:21-cv-1692 W (WVG), 2022 WL 1104741, at *1 (S.D. Cal. Apr. 13, 2022) ("Having failed to oppose [defendants'] first two grounds for dismissal, [plaintiff] concedes that his Complaint fails to state a claim under Rule 12(b)(6)); *United States ex rel. Jones v. Sutter Health*, No. 18-cv-02067-LHK, 2021 WL 3665939, at *5 (N.D. Cal. Aug. 18, 2021) (failure to oppose arguments in motion to dismiss conceded those arguments); *Tapia v. Wells Fargo Bank, N.A.*, No. CV 15-03922 DDP (AJWX), 2015 WL 4650066, at *2 (C.D. Cal. Aug. 5, 2015) (arguments to which no response is supplied are deemed conceded); *Hall v. Mortg. Inv'rs Grp.*, No. 2:11-CV-00952-JAM-GGH, 2011 WL 4374995, at *5 (E.D. Cal. Sep. 16, 2011) (failure to oppose motion to dismiss serves as concession).

Accordingly, Plaintiffs concede that the FAMCC fails to state a claim with respect to the following claims, which should now be dismissed with prejudice:[2]

- Claim 2: Claims for violations of the California Consumer Privacy Act based on Plaintiffs' theory regarding unsecure data collection and storage;
- Claim 3: Claims for violation of the California Customer Records Act;
- Claim 5: Claims for negligence per se based on violations of the California Financial Information Privacy Act and California Customer Records Act; and
- Claim 7: Claims for breach of contract as to all Plaintiffs except for the Section 9 and 11 theories for Plaintiffs Smith, Burns and Horath (as identified in Column E of Appendix A to the Partial MTD), including all breach of contract claims for Plaintiff Yick.

[2] As noted in the Partial MTD, the claims previously dismissed with prejudice in the MTD Order require no response from BANA. *See* Partial MTD at 6 n. 1.

II. <u>PLAINTIFFS' INTERPRETATION OF EFTA'S "QUALIFYING ERROR" REQUIREMENT IS WRONG.</u>

The only argument in the Partial MTD to which Plaintiffs responded was Section II.A, that Plaintiffs' amendments in the FAMCC are insufficient to state a claim under EFTA for individual Plaintiffs who only allege account freezes or restrictions. Partial MTD at 9. But Plaintiffs misinterpret EFTA, arguing that requests for additional information and clarification "surrounding the issues related to [the individual Plaintiffs'] accounts, including any determination regarding missing deposits and failure to credit amounts to the accounts as a result of a freeze or restriction" constitutes reporting of "errors" under EFTA. Opposition at 6. Plaintiffs' argument is not only wrong as a matter of statutory construction, it is made without support of any kind.

EFTA and Regulation E clearly define a "qualifying error" for purposes of the statute. *See* 15 U.S.C. § 1693(f); 12 C.F.R. § 1005.11(a). These definitions plainly state that an information request must ***concern an electronic funds transfer***, to qualify as an error under the statute. *See* Partial MTD at 9–10. Plaintiffs acknowledge these unambiguous definitions in their Opposition, *see* Opposition at 5, and concede that an account freeze alone does not constitute a "qualifying error" under EFTA, as the Court previously held in its MTD Order, *id.* at 4. Despite that concession, Plaintiffs nevertheless insist that their inquiries regarding frozen accounts fall under the definition of "qualifying error," because, they say, the "issues" created by their frozen accounts included expected benefits from EDD that could not be deposited, as well as previously-deposited benefits that could not be accessed. *Id.* at 5–6. But the *inability* to make an electronic funds transfer is not, in itself, an electronic funds transfer that could form the basis of a qualifying error, and questions about access to funds that were previously deposited are not questions about the deposit itself.[3] To interpret EFTA to encompass all questions about previously-deposited funds would read out of the statute the requirement that an information request must relate to an "electronic funds transfer" in order to constitute an error. Plaintiffs identify no authority to support their position that any question about access to funds or the ability to make a transfer is a "qualifying error," simply stating, without explanation, that BANA's authority, *Hardin v. Bank of Am., N.A.*, is not relevant to this dispute. *See* Opposition at 6, citing *Hardin v. Bank of America, N.A.*, 2022 WL 3568568, at *3 (E.D. Mich. Aug. 18, 2022). Plaintiffs are wrong. *Hardin*'s holding 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***" is directly on point, and consistent with EFTA, Regulation E, and the MTD Order.

The "freeze only" individual Plaintiffs' amendments fail to state a claim under EFTA. Those individual Plaintiffs' EFTA claims (as identified in Column D of Appendix A to the Partial MTD) should be dismissed with prejudice.

Dated: September 25, 2023

Respectfully submitted,

By: s/ *James W. McGarry*

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[3] Nor did any of the amending plaintiffs (as identified in Column D of Appendix A to the Partial MTD) allege that they notified BANA of "[t]he *omission* of an electronic funds transfer from a periodic statement." MTD Order at 15 (emphasis added); *compare, e.g.*, FAMCC ¶ 358 (individual Plaintiff Franks alleged that he "checked his Account and noticed that he had not received his funds," and subsequently "reported the [alleged] fraud to Bank of America)", *with id.* ¶ 308 (individual Plaintiff Berlt merely alleged that he "requested additional information from Bank of America as to why his account was restricted").

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on **September 25, 2023**. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify under penalty of perjury that the foregoing is true and correct.

Executed: September 25, 2023

s/ James W. McGarry
JAMES W. McGARRY