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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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISSOLVE PRELIMINARY INJUNCTION

Date: April 29, 2024
Time: 11:30 AM
Ctrm: 14A - 14th Floor
Judge: Hon. Larry Alan Burns

Filed/Lodged Concurrently with:
1. Notice of Motion & Motion to Dissolve Preliminary Injunction
2. Declaration of Jennifer Lennon

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I. INTRODUCTION

This litigation concerns prepaid debit cards issued by Bank of America, N.A. ("BANA") and used by the California Employment Development Department ("EDD") to distribute unemployment, disability, and Paid Family Leave benefits. A preliminary injunction was issued in a member case in June 2021, setting forth certain ongoing requirements for BANA's servicing of the EDD prepaid debit cards. However, EDD has recently transitioned to a new vendor for the distribution of its benefits, and as a result, all of BANA's EDD prepaid debit cards will be closed in the coming weeks and months. This significant change in circumstances renders the requirements of the preliminary injunction both unnecessary and unworkable (and, in some cases, harmful to EDD prepaid debit cardholders). Therefore, the preliminary injunction should be dissolved, as set forth below.

Since January 4, 2024, Bank of America has repeatedly attempted to obtain Plaintiffs' agreement to dissolve the preliminary injunction in light of EDD's transition to a new vendor, and particularly the harmful impacts it could have on EDD prepaid debit cardholders during that transition. Despite Bank of America's best efforts, which included multiple meet and confers in which detailed explanations were provided concerning Bank of America's plan for the transition of EDD prepaid debit card services to another vendor, and Bank of America sharing this motion and its accompanying declaration and exhibits with Plaintiffs in advance of filing, Plaintiffs informed Bank of America on the afternoon of this filing that they would not join in this motion and did not provide any explanation of their position.

II. BACKGROUND

A. There Were Unprecedented Levels of Unemployment and Fraud During The COVID-19 Pandemic.

As a result of unprecedented levels of unemployment during the COVID-19 pandemic, millions of Californians sought financial assistance in the form of unemployment benefits. Many of these individuals did not traditionally qualify for state benefits, but became eligible for Pandemic Unemployment Assistance ("PUA") under the Federal CARES Act. *See* First Amended Master Consolidated Complaint ("FAMCC"), ECF No. 136, ¶¶ 75, 79. Unfortunately, PUA proved vulnerable to misuse and criminal activity, and the infusion of federal dollars that was intended to support California residents facing difficult times actually led to an explosion of fraudulent activity directed at EDD, the state agency responsible for administration of unemployment benefits. *See id.* at ¶¶ 38, 76, 79.

B. The California EDD Prepaid Debit Card Program.

Prior to the pandemic, EDD retained BANA to deliver unemployment, disability, and Paid Family Leave benefits to California residents, pursuant to an exclusive agreement between EDD and BANA (the "EDD Agreement"). *See id.* at ¶¶ 38–39. Under the EDD Agreement, BANA issued prepaid debit cards ("BANA EDD prepaid debit cards") to EDD-approved recipients who chose to receive their benefits through prepaid debit card rather than a check from EDD. *See id*. at ¶ 41. EDD distributed benefits by funding the BANA EDD prepaid debit cards. *See id*.

C. The *Yick* Lawsuit and Preliminary Injunction.

Plaintiffs filed a number of individual and class action proceedings against BANA, challenging BANA's efforts to manage the unprecedented surge in unemployment fraud that occurred during the pandemic following the implementation of the PUA. The surge in fraud was especially prevalent in California and in the EDD unemployment benefits program. Prior to the consolidation of these lawsuits before this Court in June 2021, Plaintiffs in one set of member cases sought a preliminary injunction, seeking changes to BANA's claims handling and account management practices. *Yick v. Bank of America, N.A.*, Case No. 21-cv-00376-VC (N.D. Cal.) ("*Yick*"), ECF No. 64.

On June 2, 2021, Judge Chhabria in the Northern District of California issued a preliminary injunction based on language that the parties worked together to craft, which was "designed to protect the class members from future harm while minimizing disruption to the defendant's operations." *Yick*, ECF No. 103 (June 2, 2021) ("Preliminary Injunction"), at 1. The Preliminary Injunction required BANA to: (1) cease using the Claim Fraud Filter to investigate claims or freeze accounts, or otherwise denying or closing claims without an investigation and a written explanation of findings (*id.* at ¶¶ 1–3); (2) reopen claims previously denied by the Claim Fraud Filter and any other claim upon request (*id.* at ¶¶ 4–6); (3) make changes to certain call center hours, toll-free numbers, and call center staffing and training (*id.* at ¶¶ 8–10); and (4) provide certain mail and email notices to cardholders (*id.* at ¶¶ 7, 8(c), 9(b), 11). In particular, the Preliminary Injunction required that BANA (i) operate its fraud and claims initiation call centers 24 hours a day, 7 days a week, and send (ii) monthly notices regarding call center hours and (iii) weekly notices with instructions for blocked cardholders to contact BANA to unblock their cards. *Id.* at ¶¶ 8, 9.

D. The Impending Closure of the BANA EDD Prepaid Debit Card Program.

On December 1, 2023, EDD publicly announced it was changing banks for the distribution of unemployment and other benefits, and would begin distributing benefits on Money Network prepaid debit cards.[1] EDD began notifying benefits recipients of this change in December 2023, and new Money Network cards were sent to benefits recipients beginning in late January 2024. *Id.* Beginning on February 15, 2024, EDD stopped funding all BANA EDD prepaid debit cards and began distributing benefits exclusively via the Money Network EDD prepaid debit cards instead. *Id.* EDD reviewed and approved BANA's plan for the transition and closure of accounts, including BANA's notices to cardholders, the timeline and approach for

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[1] *New: Changes to Your Debit Card*, California Employment Development Department, https://edd.ca.gov/en/about_edd/the_edd_debit_card/#:~:text=New%3A%20Changes%20to%20Your%20Debit%20Card&text=As%20of%20February%2015%2C%202024,active%20until%20April%2015%2C%202024 (last visited Feb. 26, 2024). *See e.g.*, *Kheriaty v. Regents of the Univ. of Cal.*, No. 22-55001, 2022 WL 17175070, at *1 (9th Cir. Nov. 23, 2022) ("Here, the district court properly took judicial notice of . . . the government websites; they are matters of public record made available by the government").

account closure, and the issuance of checks for remaining funds. Declaration of Jennifer Lennon ("Lennon Decl.") ¶ 11.

As a result of this transition, BANA EDD prepaid debit cards that were previously used to distribute EDD unemployment and other benefits either have been closed or will be closed in the coming months, and no BANA EDD prepaid debit card or account will be able to be used after April 30, 2024. BANA EDD prepaid debit card accounts that have had no activity (whether deposits or other transactions) for 120 days have been closed or will be closed in the coming days, and a notice will be sent for any such account with a balance greater than zero, with instructions for requesting a check for that balance. Lennon Decl. ¶ 6. With respect to active BANA EDD prepaid debit card accounts (those with any type of activity in the past 120 days), cardholders have been or will be sent a notice notifying them that they will be able to use their BANA EDD prepaid debit cards through April 15, 2024, and will be able to access their BANA EDD prepaid debit card account online through April 30, 2024 to transfer any remaining funds; after April 30, those accounts will be closed. *Id.* at ¶ 7. As the notices explain, even after a BANA EDD prepaid debit card account is closed (whether it was active or inactive), former BANA EDD prepaid debit cardholders will still be able to obtain any remaining funds in their EDD prepaid debit card account by contacting BANA to request a check for their remaining funds until such time as state law provides for any unclaimed funds to be escheated to the state. *Id* at ¶ 8.

III. LEGAL STANDARD

"[C]ourts have continuing jurisdiction to terminate, dissolve, vacate, or modify an injunction or an interlocutory order in the event that changed circumstances require it." *Univ. of Haw. Prof'l Assembly v. Cayetano*, 125 F. Supp. 2d 1237, 1240 (D. Haw. 2000) (citing *United States v. Oregon*, 769 F.2d 1410, 1416 (9th Cir. 1985)). Courts also "must never ignore significant changes in the law or circumstances underlying an injunction lest the decree be turned into an 'instrument of wrong.'" *Salazar v. Buono*, 559 U.S. 700, 714–15 (2010) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932)). Therefore, courts regularly dissolve preliminary injunctions when changed circumstances undermine the basis for the interlocutory relief. *See, e.g.*, *Ferguson v. Southern Highlands Golf Club, LLC*, No. 2:05-cv-103-BES-PAL, 2007 WL 879681, at *2-3 (D. Nev. Mar. 21, 2007) (granting motion to dissolve a preliminary injunction that prohibited golf club from interfering with plaintiff's use of club membership after plaintiff sold the property that gave him the right to that membership).

The legal test for dissolving an injunction requires the moving party to establish "that a significant change in facts or the law warrants revision or dissolution of the injunction." *Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019). This test, however, "recognizes district courts' 'wide' discretion to ensure their injunctions are just and to fit those injunctions to the evolving standards of each case," and also acknowledges that "a district court may be 'guided by' the 'traditional' standard for injunctive relief . . . without applying the standard mechanically or as a checklist." *Lo v. Cnty of Siskiyou*, No. 2:21-cv-00999-KJM-AC, 2022 WL 1505909, at *7 (E.D. Ca1. May 12, 2022) (citing *Karnoski*, 926 F.3d at 1199, 1202)).

IV. <u>ARGUMENT</u>

EDD's transition to Money Network and the conclusion of BANA's EDD prepaid debit card program is a significant change in facts that warrants dissolution of the Preliminary Injunction, as it renders the ongoing Preliminary Injunction requirements unnecessary, unworkable, and confusing to cardholders. In addition, the factors that Plaintiffs asserted and that Judge Chhabria found to support the Preliminary Injunction no longer exist once BANA's EDD prepaid debit card program is concluded. Accordingly, the Preliminary Injunction should be dissolved in its entirety as of June 1, 2024, with any notice requirements to cease immediately for closed accounts and by April 5, 2024, at the latest.

A. The Termination of the Program Renders the Ongoing Preliminary Injunction Requirements Both Unnecessary and Unworkable.

Most of the requirements in the Preliminary Injunction required actions to be taken within a short period of time after it was issued in June 2021, such as the requirements that BANA reopen claims denied by the Claim Fraud Filter. Preliminary Injunction ¶¶ 4, 5. At this point, the only ongoing actions required by the Preliminary Injunction are: (1) the maintenance of 24/7 hours for the Claims and Fraud Call Centers, and (2) the sending of weekly and monthly notices to certain cardholders.[2]

Now that BANA's EDD prepaid debit card program is set to conclude, these requirements make little sense. The last day that any EDD prepaid debit card can be used is April 15, 2024, and the last day for any cardholder to transfer funds by accessing their online account is April 30, 2024. Therefore, there can be no further transactions, authorized or unauthorized, after April 30, 2024.

Accordingly, there is no need to maintain either a 24/7 Fraud Call Center or a 24/7 Claims Initiation Call Center beyond May 31, 2024, one month after the last accounts are closed. The agents in the Fraud Call Center assist cardholders with resolving fraud blocks in order to regain access to their cards, which will no longer be necessary once the cards have all been closed. Lennon Decl. ¶ 10. The only role that the Fraud Call Center might play after April 30, 2024, is to verify the identities of cardholders with existing fraud blocks on their accounts or those who fail multiple levels of authentication when contacting the Main Servicing Call Center[3] to request a check for their balance. *Id.* at ¶¶ 9, 10. The agents in the Claims Initiation Call Center assist cardholders who wish to report unauthorized transactions on their account, but there will be no further transactions of any kind after April 30, 2024, and thus the volume of unauthorized transaction claims will decrease significantly.

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[2] As for the requirement that BANA reopen any claim upon request, that was BANA's practice even prior to the injunction.

[3] The Main Servicing Call Center is not subject to the Preliminary Injunction.

Id. at ¶ 7. BANA will maintain call center availability to allow cardholders to request checks for their remaining balances or file unauthorized transaction claims, but there is no need for 24/7 Fraud or Claims Initiation Call Centers, as neither a check request (only a fraction of which will require assistance from the Fraud Call Center) nor the reporting of past unauthorized transactions on a closed account involve such urgency that middle-of-the-night calls must be accommodated. Therefore, it is reasonable to dissolve the Preliminary Injunction, including the 24/7 requirement for the Fraud and Claims Initiation Call Centers, as of June 1, 2024; by then, all accounts will have been closed for at least one month, and there will have been no card usage for at least 45 days.

There is also no need for any ongoing mailing requirements once accounts are closed. The monthly notice regarding the hours and contact information for the Claims Initiation Call Center (Preliminary Injunction ¶ 8(b)) is unnecessary, as there will be no further unauthorized transactions after an account is closed. And, in any event, these monthly notices have been sent for over two and a half years at this point.

The weekly notice to blocked cardholders about the hours and contact information for the Fraud Call Center (Preliminary Injunction ¶ 9(b)) is also unnecessary once an account is closed, particularly where many of these cardholders have been receiving these weekly notices for over two and a half years. The continued mailing of these notices would also be inaccurate and confusing, as the notice informs cardholders that they can call the Fraud Call Center to regain access to their account, but once an account is closed the only action that a cardholder can take is to request a check or view their transaction history; they will not be able to use their cards or transfer their funds even if they successfully unblock the account. Lennon Decl. ¶¶ 6–8, 10. Thus, the notices should cease immediately for any account that is closed, and by April 5, 2024 at the latest (10 days before April 15, 2024, the last day on which any card can be used), so as to ensure that cardholders do not receive such notices after their account is closed.

B. The Equitable Factors that Judge Chhabria Found to Support the Preliminary Injunction in June 2021 No Longer Warrant Injunctive Relief.

The equitable factors that Judge Chhabria found to support the Preliminary Injunction in June 2021 no longer warrant injunctive relief in light of the conclusion of BANA's EDD prepaid debit card program. *See, e.g.*, *Ferguson*, 2007 WL 879681, at *2 (analyzing whether "the factual underpinning of the injunction" still exists because "[p]laintiff [was] no longer in a position to reap the benefits of the injunction"); *Index Newspapers, LLC v. Portland*, No. 3:20-cv-1035-SI, 2022 WL 72124, at *8 (D. Or. Jan. 7, 2022) (making an indicative ruling pursuant to Federal Rule of Appellate Procedure 12.1(a) dissolving preliminary injunction where "[t]he changed circumstances . . . show[ed] that . . . [p]laintiffs' . . . harm [was] too speculative to show the requisite immediate irreparable injury to support injunctive relief").

1. Plaintiffs Will Not Suffer Irreparable Harm if the Preliminary Injunction is Dissolved.

Plaintiffs previously argued that the Preliminary Injunction was necessary to prevent irreparable harm because the actions they sought to enjoin were depriving them of access to their ongoing and previously paid benefits. *See Yick*, ECF No. 64 at 17–18 (Apr. 1, 2021) (stating that the harm was Plaintiffs' "struggle to cover basic needs like housing, food, utility bills, and other expenses necessary for survival and basic dignity"). This argument no longer stands.

First, as of February 15, 2024, any ongoing and future EDD unemployment, disability, and Paid Family Leave benefits are being distributed via Money Network, not BANA. Second, Plaintiffs argued in 2021 that the Preliminary Injunction was necessary to prevent irreparable harm because they were unable to access previously-deposited funds because BANA froze or blocked their accounts, *Yick*, ECF No. 64 at 12, but account access cannot be restored for *any* cardholder once the accounts are all closed. The only way for BANA EDD prepaid debit cardholders to access any previously-deposited funds in their account is by calling BANA to obtain a check.

Since Plaintiffs can no longer establish irreparable injury, there is no basis for any ongoing injunctive relief. *Ewing v. Halbani*, No. 22-cv-00919-BAS-WVG, 2022 WL 4490166, at *1 (S.D. Cal. Sept. 27, 2022) ("Failure to establish a likelihood of irreparable harm sinks a movant's request for pretrial injunctive relief"); *Steinmeyer v. Lab. Corp. of Am. Holdings*, No. 22-cv-01213 DMS (DDL), 2023 WL 2534621, at *2 (S.D. Cal. Mar. 15, 2023) (("Although the Ninth Circuit evaluates the likelihood of success and the balance of equities on a 'sliding scale,' a federal court may not grant a TRO or preliminary injunction unless plaintiff shows he is likely to suffer irreparable harm") (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011)).

2. Balance of the Equities and Public Interest Favor Dissolution of the Preliminary Injunction.

The balance of equities and the public interest likewise do not warrant the continuation of the Preliminary Injunction. In analyzing the balance of equities, courts "'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 24 (2008) (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)).

Here, requiring 24/7 availability for two call centers is unnecessarily burdensome, with no corresponding benefit to Plaintiffs or any BANA EDD prepaid debit cardholders, given that there will be no active cards or accounts after April 30, 2024 and any prospective need for the Fraud or Claims Initiation Call Centers will be much more limited. The ongoing mailing requirements are likewise burdensome, and will also likely be misleading, confusing, and harmful to cardholders because they would create confusion as to the status of the BANA EDD prepaid debit cards. EDD benefits recipients were sent a notice from EDD regarding the transition to Money Network, and have started receiving EDD benefits distributions on their new Money Network cards as of February 15, 2024. BANA EDD prepaid debit cardholders also have been or will be sent notices from BANA about the closure of their BANA EDD prepaid debit cards. Lennon Decl. ¶¶ 6–7. Any continuing notices from BANA regarding their EDD prepaid debit card or account will cause confusion about whether the BANA EDD prepaid debit cards are still active, and whether customers should contact BANA or Money Network about their EDD benefits prepaid debit cards. Further, as noted above, the weekly notice regarding the Fraud Call Center is particularly confusing—and inaccurate—as it informs BANA EDD prepaid debit cardholders that they can regain access to their accounts by calling BANA, which is no longer the case after the accounts are closed. Sending confusing and contradictory notices to EDD prepaid debit cardholders is harmful and certainly not in the public interest, particularly as Plaintiffs have characterized the cardholder population as the "most vulnerable and financially at-risk customers." FAMCC ¶¶ 2, 69, 626. These mailings should therefore cease immediately for any closed accounts, and in all instances should cease by April 5, 2024 (10 days before the last date on which any EDD prepaid debit card can be used).

V. CONCLUSION

For the reasons stated above, BANA respectfully requests that the Preliminary Injunction be dissolved as follows:

- For accounts that are already closed, any ongoing notice requirements are immediately dissolved.
- For all other accounts, any ongoing notice requirements are dissolved as of April 5, 2024.
- All remaining provisions of the Preliminary Injunction to be dissolved as of June 1, 2024.

Dated: February 29, 2024

Respectfully submitted,

By: *s/ Matthew L. Riffee*

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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 February 29, 2024. 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: February 29, 2024 *s/ Matthew L. Riffee*