JAMES W. MCGARRY (*pro hac vice*)
JMcGarry@goodwinlaw.com
YVONNE W. CHAN (*pro hac vice*)
YChan@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Tel.: +1 617 570 1000
Fax: +1 617 523 1231

Attorneys for Defendant
BANK OF AMERICA, N.A.

[ADDITIONAL COUNSEL LISTED IN SIGNATURE BLOCK]

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 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS MASTER CONSOLIDATED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(1) AND 12(B)(6)

Date: January 31, 2022
Time: 11:30 a.m.
Ctrm: 14A - 14th Floor
Judge: Hon. Larry Alan Burns

Filed/Lodged Concurrently with:
1. Reply in Support of Defendant's Request for Judicial Notice and Opposition to Plaintiffs' Request For Judicial Notice

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INTRODUCTION

Plaintiffs' Opposition relies on the time honored tradition of attacking a corporate defendant in order to divert attention from the context surrounding Plaintiffs' complaint and the legal insufficiency of their own allegations. For example, Plaintiffs' assertion that this case has nothing to do with enrollment fraud (Opp. at 1) ignores the extraordinary amount of enrollment fraud targeting unemployment benefits programs during the pandemic—which Plaintiffs themselves acknowledge (MCC ¶ 79 & n.9). Plaintiffs' allegations must be viewed in light of these judicially cognizable facts, including the "flood of warnings" to states to "guard against fraud and abuse of their unemployment insurance systems," *id.*, and the State of California's own estimate that this unprecedented criminal activity resulted in the theft of up to $31 *billion* in fraudulently-obtained benefits (Mem. of Pts. & Auth. in Support of Mot. to Dismiss (ECF No. 84-1) ("Mem.") at 1, 4)—most of which criminals routed through illegally-obtained prepaid cards. Indeed, Plaintiffs' own alleged experiences confirm that enrollment fraud was rampant, as several Plaintiffs' personal information was used by unidentified criminals to obtain benefits payments from the State. *See, e.g.*, MCC ¶¶ 343, 346, 506, 518.

Against this backdrop, and despite their ad hominem attacks, Plaintiffs have failed to allege that BANA's operation of the debit card program while engaged in these necessary efforts to prevent and counter criminal activity were in violation of any law or other legal duty. Many of Plaintiffs' legal claims rest on theories that BANA did not conduct "reasonable" investigations, or has "implied duties," or took measures that were too severe or caused too much delay. Though these and their other theories of recovery command detail, Plaintiffs' MCC relies largely on general allegations about the experiences of unidentified "Cardholders," or generalizes from the experience of a few Plaintiffs and asserts that all of the Plaintiffs are therefore entitled to prevail. The MCC simply does not satisfy Plaintiffs' obligation to plead the basis of each individual claim for relief.

ARGUMENT

I. PLAINTIFFS HAVE NOT STATED A CLAIM UNDER ANY CONTRACT THEORY.

A. Plaintiffs Have Not Stated a Claim for Breach of the Account Agreement.

BANA argued in its Motion to Dismiss that the MCC's claim for breach of the Account Agreement is inadequate, because all 267 Plaintiffs seek to recover under three different theories but do not provide factual allegations showing that every Plaintiff had stated a claim based on his or her individual experiences. Mem. at 8-9, 12, 13. The Motion was accompanied by an Appendix that visually demonstrated the factual deficiencies that preclude each Plaintiff from seeking recovery under the various theories that each asserts. *See* App'x to Mem. Plaintiffs' Opposition continues to rely on broad generalizations that fail to address the specific deficiencies in each Plaintiff's allegations or otherwise to respond to BANA's arguments.[1]

Unauthorized Transaction Claims. Plaintiffs fail to dispel any of the four separate grounds for dismissal of their claim that BANA breached Sections 9 and 11, which govern claims of "unauthorized" transactions or transaction "errors."[2]

First, many Plaintiffs do not allege that they suffered unauthorized or erroneous transactions, but rather claim to have experienced other issues, such as unspecified fraud or identity theft, that are not covered by Sections 9 or 11. Mem. at 8 & n.9. The Opposition never responds to this point, and thus effectively concedes that those Plaintiffs have no claim of this type. The MCC's broad allegation of this breach on behalf of every Plaintiff must be dismissed. *Whooley v. Tamalpais Union High Sch. Dist.*, 399 F. Supp. 3d 986, 993 (N.D. Cal. 2019).

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[1] Plaintiffs continue to rely on the *Yick* preliminary injunction without responding to BANA's arguments as to why the order does not save the MCC. Mem. at 12.

[2] Plaintiffs rely upon a version of the Account Agreement with a different governing law provision. Opp. at 14 n.19. The Court should consider the version submitted by BANA. *See* Reply ISO Request for Judicial Notice ("RJN Reply"), filed concurrently herewith, at 1-2. In any event, there are no material differences between California and North Carolina law for purposes of the arguments in BANA's Motion to Dismiss, and Plaintiffs do not contend that any exist. *See, e.g.*, Mem. at 13-14.

Second, Plaintiffs have not alleged that each of them provided both timely and sufficient notice to trigger BANA's contractual obligations under either section. Mem. at 8. Plaintiffs attempt to defend some of their untimely reports of unauthorized transactions by suggesting that a "reasonable time" for Section 9 purposes can exceed the EFTA/Reg E deadlines (Opp. at 15), but they ignore that Section 9 grants BANA "sole discretion" to determine what is "reasonable" and that Section 11 imposes reporting deadlines that several Plaintiffs' allegations show they did not meet. Chestnut Decl., Ex. 1, §§ 9, 11; Mem. at 8. Independently, Plaintiffs also did not uniformly provide BANA with the contractually required information, which further defeats the MCC's sweeping demand. Mem. at 8; *see also infra* at 9.

Third, the Opposition does not deny that numerous Plaintiffs have been reimbursed, but asserts that because "not all" of them have been, their "class-wide claims" cannot be dismissed as moot. Opp. at 15. But BANA did not move to strike the class allegations—Plaintiffs' inability to satisfy Rule 23 will wait for another day if this case survives dismissal. Fully-reimbursed Plaintiffs have no standing to bring a contract claim because "when [a court] measure[s] a plaintiff's standing, regardless of whether the plaintiff sues individually or as class representative, [the court] look[s] concretely at the facts that pertain to *that* plaintiff." *B.K. ex. Rel. Tinsley v. Snyder*, 922 F.3d 957, 967 (9th Cir. 2019) (emphasis added) (cited by Plaintiffs, Opp. at 15); *see TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("Every class member must have Article III standing . . . ").[3] Therefore, "Plaintiffs" have not collectively stated a claim where many of their claims are mooted.

Finally, Plaintiffs do not respond effectively to BANA's argument that the

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[3] Plaintiffs argue that fully-reimbursed Plaintiffs nevertheless have standing to sue under Section 11 for untimely reimbursement, because the limitation of BANA's liability is in Section 9. Opp. at 14 n.20. But Section 9 defines the scope of BANA's liability for unauthorized transactions—which is limited to "the face amount of any unauthorized card transaction." Chestnut Decl., Ex. 1, § 9. Allowing Plaintiffs who received "the face amount of any unauthorized card transaction" to bring an *additional* claim for damages would render Section 9's limitation meaningless.

MCC allegations fail to state a claim for a violation of Section 9 and of Section 11 based on each Plaintiff's individual facts. Mem. at 9-10. With respect to Section 9, Plaintiffs ignore the express *contractual* language stating that transactions are not "unauthorized" if "for any other reason [BANA] conclude[s] that the facts and circumstances do not reasonably support a claim of unauthorized use." Mem. at 10. Plaintiffs allege only that the Claim Fraud Filter was "flawed," but the MCC does not allege any *facts* that would, if proven, show that the denial of each Plaintiff's Claim was necessarily an improper "conclu[sion] that the facts and circumstances do not reasonably support a claim of unauthorized use," particularly when this allegation is viewed against the backdrop of the massive amount of (undisputed) fraud targeting this program. Plaintiffs do not even allege that all of their Claims were denied based on the Filter. *See infra* at 10. With respect to Section 11, which does not specify *how* an investigation must be conducted, Plaintiffs likewise do not articulate how use of the Claim Fraud Filter breached any contractual provision.

Account Freezes. Plaintiffs attempt to defend their account-freeze theory of contract breach by asserting that BANA did not have a "reasonable basis" for suspecting fraud with respect to any of their accounts because the Claim Fraud Filter was "unreliable." Opp. at 15-16. But "reasonable basis" is not the relevant contractual standard; rather, Section 2 permits BANA to freeze accounts if it "*suspect[s]* irregular, unauthorized, or unlawful activities." Chestnut Decl., Ex. 1, § 2 (emphasis added). The MCC fails to allege any facts to show that BANA lacked such a suspicion, based on the Claim Fraud Filter or otherwise—and particularly in light of the overwhelming fraud targeting state benefits programs—when it froze any Plaintiff's account. Mem. at 12.

As for Plaintiffs' assertion that BANA maintained freezes for longer than necessary, they point only to general allegations that accounts belonging to unspecified "Cardholders" were not unfrozen immediately after they re-verified their application with EDD. Opp. at 16. As is typical of the MCC, although this theory seeks relief for *all* Plaintiffs (and is not even limited to those who allege frozen accounts, *see* App'x Column 6), only two (out of 267) Plaintiffs actually allege that they re-verified their applications and their account was not unfrozen right away, and even these two do not allege the length of the alleged delay. MCC ¶¶ 221, 259.

Funding Instructions. In response to BANA's argument that Plaintiffs alleged no facts to support their claim that BANA uniformly violated contractual provisions requiring funds to be available on the day EDD instructed BANA to fund an account, Plaintiffs point only to a general allegation that account freezes prevent access to continuing benefits payments. Opp. at 16. That allegation is not sufficient to support their claim, as it fails to establish that EDD gave BANA any funding instruction. Mem. at 13. Plaintiffs also fail to respond to the argument that the Account Agreement's general funding provisions cannot be used to override and nullify the specific provisions authorizing account freezes. *Id.* at 13-14.

In sum, the direct contract breach claims must be dismissed because they are brought on behalf of all Plaintiffs but the MCC does not support such a recovery. If this was a single-plaintiff lawsuit, the claim would fail unless that plaintiff alleged facts stating an individual claim for relief. The fact that there are 267 Plaintiffs provides no legal or practical excuse not to apply that same principle.

B. Plaintiffs Have Not Stated a Claim Under the Implied Covenant.

Plaintiffs' implied covenant claim impermissibly seeks to expand the Account Agreement. Mem. at 14-15. Plaintiffs assert that BANA breached the implied covenant by failing to provide chip cards and "reasonably adequate customer service." Opp. at 18. But the Account Agreement does not address card security or customer service, and so the claim fails because Plaintiffs have not identified any "express terms of the contract on which to hinge the implied duty."[4] *Quintero Fam.*

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[4] Plaintiffs' theory seemingly would imply a "good customer service" requirement into most consumer contracts, whenever one could argue that "reasonably adequate" customer service is needed to help them assert their rights. That is not the law.

Tr. v. OneWest Bank, F.S.B., 2010 WL 392312, at *13 (S.D. Cal. Jan. 27, 2010); *see Das v. WMC Mortg. Corp.*, 831 F. Supp. 2d 1147, 1165 (N.D. Cal. 2011) (dismissing implied covenant claim where "Plaintiffs have not stated that any of these alleged contractual duties were incorporated into the specific terms of the loan agreement"); *Hancock v. Americo Fin. Life & Annuity Ins. Co.*, 378 F. Supp. 3d 413, 431-32 (E.D.N.C. 2019) (same).

As for Plaintiffs' assertion that BANA's denial of Claims and freezing of accounts were contrary to Plaintiffs' "legitimate expectations," Opp. at 18, that theory fails because (1) it is impermissibly duplicative of the breach of contract claim based on the same allegations, Mem. at 15-16, and (2) the implied covenant cannot be invoked to challenge actions permitted by express contractual terms, *id.* at 14-15. *See EM Gen., LLC v. Ecommerce, LLC*, 2021 WL 4497888, at *4 (C.D. Cal. July 28, 2021) (freezing of plaintiff's funds was "expressly allowed" and therefore did not "frustrate[] Plaintiff's right to receive benefits"); *Carma Devs., Inc. v. Marathon Dev. Cal. Inc.*, 2 Cal. 4th 342, 374, 376 (1992) (same).

Plaintiffs' assertion that Claims were "arbitrarily" denied (Opp. at 18), is not supported by the MCC, which alleges that the Claim Fraud Filter was inaccurate, not arbitrary—an important distinction for a claim based on good faith. *See Shamiryan v. Allstate Northbrook Indem. Co.*, 2021 WL 3185782, at *5 (C.D. Cal. July 26, 2021) (breach of implied covenant cannot rest on "unreasonable honest mistakes" or "bad judgment"); *Danby N.A., Inc. v. Travelers Ins. Co.*, 25 F. App'x 186, 194 n.9 (4th Cir. 2020) ("honest disagreement" was not bad faith). As for Plaintiffs' assertion that accounts were frozen without "good cause" or investigation (Opp. at 19) that theory is an impermissible use of the implied covenant to alter the contractual standard for account freezes. Mem. at 14-15.

C. Plaintiffs Have Not Alleged the Existence of An Implied Contract.

In response to BANA's argument that Plaintiffs failed to allege facts to show an "implied" contract (Mem. at 16-17), Plaintiffs recast their claim as one based on "implied contractual duties" arising out of the Account Agreement. Opp. at 16-18. This theory was not pled in the complaint and therefore cannot be considered. *Whooley*, 399 F. Supp. 3d at 993. Further, none of the cases that Plaintiffs cite stand for the proposition that a separate "implied contract" exists on top of an express, written contract. This claim is simply duplicative of Plaintiffs' implied covenant claim, and must be dismissed. *See supra* at 5-6.

II. Plaintiffs Fail To State A Claim Under EFTA/Reg E.

As explained in BANA's opening brief, each Plaintiff's EFTA/Reg E claim fails for one or more of the following reasons: (1) many Plaintiffs do not allege that they reported any "error" under EFTA/Reg E; (2) many Plaintiffs fail to allege that they provided the requisite notice; (3) conclusory allegations about BANA's processes do not establish that BANA failed to investigate any individual Plaintiff's Claim; (4) a substantial number of Plaintiffs were fully reimbursed; and (5) EFTA/Reg E cannot be expanded to impose obligations that appear nowhere in the statute or regulation, such as limitations on account freezes.[5] Mem. at 17-20. As with the contract claim, the MCC seeks to hide its numerous pleading defects by asserting that "Plaintiffs" have claims, and Plaintiffs' Opposition again relies largely on sweeping generalizations that ignore both the deficiencies in their own allegations and the plain language of EFTA and Reg E.

A. Numerous Plaintiffs Fail To Allege They Reported An "Error" Within the Meaning of EFTA and Reg E.

Plaintiffs contend that they each adequately alleged that they reported an

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[5] With respect to this last argument, Plaintiffs merely assert, without explanation, that BANA's freezing or blocking of an account was an "unlawful effort to circumvent EFTA and gives rise to treble damages" (Opp. at 9 n.12), but the treble damages provision says nothing about frozen or blocked accounts. Nowhere does EFTA or Reg E prohibit or regulate frozen or blocked accounts. Mem. at 20. Nor do Plaintiffs attempt to defend their allegation that inadequate customer service can form the basis of an EFTA claim, which is presumably what they meant when they alleged that BANA adopted policies and practices to "frustrat[e] and obstruct[] [their] efforts to submit unauthorized transaction claims." MCC ¶ 536(a); *see* Mem. at 20.

"error" under EFTA and Reg E, because, they say, the term "error" includes not just an unauthorized or erroneous transaction, but also a mere request for information or clarification. Opp. at 13.[6] But such a request falls within Reg E's definition of "error" only if it "concern[s] an electronic fund transfer" ("EFT"). 12 C.F.R. § 1005.11(a)(1)(vii). A number of Plaintiffs allege only that they called BANA about frozen accounts or "issues related to their accounts" (Opp. at 13 n.18), which are not "errors" triggering the statute or regulation. Mem. at 17; App'x Columns 1 & 2. Plaintiffs suggest that "error" nevertheless covers inquiries about frozen accounts, on the theory that future benefits cannot be deposited and previously-deposited benefits cannot be accessed when an account is frozen. Opp. at 13. This attempt to expand EFTA and Reg E fails because (1) inquiries about the *absence* of an EFT do not "concern[]" an EFT;[7] (2) Plaintiffs allege that *BANA* funds their accounts (MCC ¶ 606), and therefore do not allege that deposits made to the accounts are EFTs;[8] and (3) even if an account was at one point funded by an EFT, subsequent account inquiries do not "concern[]" that EFT[9]—indeed, inquiries about account access do not appear anywhere on Reg E's long list of "errors."

B. Plaintiffs Do Not Allege That They Uniformly Provided Requisite Notice.

EFTA and Reg E require cardholders making an error claim to provide certain information to the card issuer, including the reason why they "believe[] an error exists." Mem. at 18. Plaintiffs claim that they met this requirement universally, but

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[6] This theory must be disregarded as the EFTA/Reg E claim was pled based on reports of "unauthorized transactions." MCC ¶ 535; *Whooley*, 399 F. Supp. 3d at 993.

[7] Reg E has another provision, separate and apart from the error resolution provision, addressing requests about "whether [an EFT] occurred." 12 C.F.R. § 1005.10(a)(1)(iii).

[8] Intra-bank transfers are excluded from the definition of "electronic fund transfer." *See* 12 C.F.R. § 1005.3(c)(5)(iii).

[9] *See, e.g.*, 12 C.F.R. § 1005.11(a)(2)(i) ("The term 'error' does *not* include: (i) A routine inquiry about the consumer's account balance") (emphasis added).

rely only on the assertion that 25 of them (out of 267) alleged *in the MCC* why they believed the disputed transactions to be unauthorized. Opp. at 6. But EFTA/Reg E require those reasons to be *reported to the financial institution*—and the Federal Rules require the remaining 242 Plaintiffs satisfy this requirement too. Mem. at 18. Indeed, Plaintiffs' acknowledgment that many of them merely allege that they "reported the fraud to Bank of America via phone" (Opp. at 7 n.9) confirms their failure to allege facts showing that each Plaintiff provided sufficient notice. *Hill v. Kaiser Found. Health Plan*, 2011 WL 13243748, at *3 (N.D. Cal. March 8, 2011) (requiring facts "specific to each plaintiff"). Alternatively, Plaintiffs argue that their reporting must have been sufficient because BANA acted on many of their Claims. Opp. at 7. But BANA's voluntary decision to investigate and credit Claims does not mean it was legally required to do so, nor does it mean that those Claims were adequately reported.[10] Finally, Plaintiffs' request to amend to remedy insufficient allegations should be rejected, as every Plaintiff has already amended their complaint (in some cases, more than once), and they have not identified what, if any, facts they would include in yet another amendment. *In re Disney ERISA Litigation*, 2017 WL 1505129, at *7 (C.D. Cal. April 21, 2017) (dismissing amended complaint where plaintiffs "have not identified what additional facts they would allege if given the opportunity to do so").

C. Plaintiffs Do Not Identify Specific Factual Allegations Showing That BANA's Investigation Violated EFTA/Reg E.

In defending their allegation that BANA did not conduct reasonable investigations of their claims, Plaintiffs once again rely on generalizations to gloss over the many deficiencies in individual Plaintiffs' claims. They assert, for example, that "Plaintiffs allege in detail" that their Claims were valid and BANA should have concluded as such (Opp. at 8), ignoring the fact that the vast majority of them offer

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[10] Plaintiffs do not address BANA's timeliness argument, which is another pleading deficiency that warrants dismissal. *See* Mem. at 18.

no facts whatsoever regarding their disputed transactions. Plaintiffs' arguments do not save their sweeping EFTA/Reg E claim, for two independent reasons.

First, Plaintiffs have offered no facts whatsoever to demonstrate that every one of the investigations into their particular Claims was inadequate and unreasonable given their individual facts. *Hill*, 2011 WL 13243748, at *2-3. In particular, Plaintiffs do not allege that *all* of their Claims were denied based on the Claim Fraud Filter—just those that were "flagged" (MCC ¶ 108)—and their assertion that Claims were "often" (but not always) summarily denied (Opp. at 8) does not establish that any particular Plaintiff's Claim was denied either summarily or based on the Claim Fraud Filter, or that the investigation into any particular Claim was inadequate. *See, e.g.*, App'x Column 5. The single example cited by Plaintiffs (that BANA failed to contact a Walgreens store for video footage) is insufficient, as a matter of law, to establish an EFTA/Reg E violation (Opp. at 8).[11] The vast majority of Plaintiffs do not even attempt to offer facts to support their assertion that BANA should have done more to investigate their particular Claims, nor do they identify any facts that should have distinguished them from fraudsters in BANA's eyes. Plaintiffs' sweeping characterizations are not sufficient to show an EFTA or Reg E violation as to any particular Plaintiff, *Hill*, 2011 WL 13243748, at *2-3, which means the MCC's allegations about an across-the-board violation cannot stand.

Second, even as to those Claims that may have been investigated with use of this Filter, Plaintiffs acknowledge that EFTA does not prohibit automated investigation measures; they simply assert, in a conclusory manner, that BANA's alleged "exclusive reliance" on its Claim Fraud Filter was nevertheless an EFTA violation. Opp. at 9. But Plaintiffs offer no factual or legal support for the notion that EFTA requires at least a portion of each investigation to be conducted manually,

[11] *See* 12 C.F.R. § 1005.11(c)(4) ("[A] financial institution's review of its *own* records regarding an alleged error satisfies the requirements of this section if: (i) The alleged error concerns a transfer to or from a third party; and (ii) There is no agreement between the institution and the third party for the type of electronic fund transfer involved.") (emphasis added).

or that it was unreasonable, as a matter of fact or law, for BANA to allegedly have relied on the Filter—particularly when BANA was facing an avalanche of fraudulent Claims from the individuals who defrauded the State out of billions of benefit dollars. Plaintiffs' assertions that the Claim Fraud Filter had a high false positive rate or that BANA reached the wrong conclusion (Opp. at 8-9) are also insufficient to state a claim standing on their own, as neither EFTA nor Reg E requires that an institution reach the correct result in every instance. *See* 15 U.S.C. § 1693f; 12 C.F.R. § 1005.11. The use of "substantively identical" denial letters likewise fails to establish that no reasonable investigation was conducted, as EFTA and Reg E do not require that institutions provide every detail of their investigations, but only a "written explanation" of the *findings*[12]—as is contained in the letters informing cardholders that their Claims were closed "because [BANA] believe[s] the account or the claim have been the subject of fraud or suspicious activity." MCC ¶ 89.[13]

D. Certain Plaintiffs' Claims Are Moot.

Plaintiffs' argument that they assert "class claims" (Opp. at 10-11) does not save the fully-reimbursed Plaintiffs' individual claims from dismissal. *See supra* at 3. Nor do Plaintiffs' purported claims for statutory or treble damages (Opp. at 11), since (1) claims for statutory damages do not create standing in the absence of concrete injury (*Ramirez*, 141 S. Ct. at 2204-07), and (2) a treble damages claim cannot confer standing, as "[t]here must be independent damages to treble" (*HCB Fin. Corp. v. McPherson*, 8 F.4th 335, 344 (5th Cir. 2021)). Plaintiffs' argument that they were not reimbursed for the "time value of money" (Opp. at 11-12) fails because fully-reimbursed Plaintiffs received *more* than required under EFTA, under which they could have been held liable for up to $50 for each transaction (*see* 15 U.S.C.

[12] 15 U.S.C. § 1693f(d); 12 C.F.R. § 1005.11(d)(1).

[13] This language directly contradicts Plaintiffs' assertion that they did not receive a "written explanation" of BANA's findings. Opp. at 10. No further detail or disclosure was required, as information about the *specific* reasons BANA suspected fraud could be used by criminals to circumvent BANA's anti-fraud measures.

§ 1693g(a)), and the MCC does not allege that the "time value of money" from any temporary delay was more than $50 for any transaction.

III. PLAINTIFFS HAVE NOT STATED A CLAIM FOR BREACH OF THE EDD AGREEMENT AS THIRD-PARTY BENEFICIARIES.

Plaintiffs' Opposition fails to dispel either of the reasons as to why their claims for breach of the EDD Agreement and its implied covenant fail: (1) Plaintiffs are not third-party beneficiaries of the EDD Agreement; and (2) Plaintiffs have failed to sufficiently allege any breach. Mem. at 20-23.

A. Plaintiffs Are Not Third-Party Beneficiaries.

Under *Goonewardene v. ADP, LLC*, 6 Cal. 5th 817, 830 (2019), it is clear that the "motivating purpose" of the EDD Agreement is to assist *EDD* in carrying out its required payment responsibilities. Mem. at 22. Plaintiffs nevertheless argue that they should be considered third-party beneficiaries because some contract provisions benefit cardholders, and therefore, they speculate that EDD and BANA "plainly intended" those provisions to benefit "only" cardholders and "not EDD." Opp. at 20. But the agreement clearly states that services are provided "for the EDD." Mem. at 22. Further, "even a showing that the contract operates to the third parties' benefit and was entered into with them in mind" is not sufficient. *Jafari v. F.D.I.C.*, 2015 WL 3604443, at *6 (S.D. Cal. June 8, 2015) (Burns, J.); *Cleveland v. Ludwig Inst. For Cancer Rsch. Ltd.*, 2020 WL 3268578, at *4, *7-10 (S.D. Cal. June 17, 2020).[14]

[14] The cases Plaintiffs point to (Opp. at 20) do not state otherwise. For instance, *Zigas v. Superior Court*, 120 Cal. App. 3d 827, 835 (1981), decided decades before *Goonewardene*, involved a provision requiring HUD approval of rent increases, which the court held could only benefit the tenants. Here, however, the fraud protection and customer service provisions are part and parcel of the services provided by BANA *to EDD*, in assisting EDD with the distribution of benefits. If BANA did not provide these services, EDD would have to distribute benefits and provide services itself, and therefore EDD also benefits from all of BANA's services. Plaintiffs' argument that they can enforce the EDD Agreement because it contains provisions not in the Account Agreement (Opp. at 21 n.27) would essentially allow any third-party to claim beneficiary status despite the contracting parties' intent to limit the third-party to a separate and narrower agreement.

Further, under California law, government contracts do not create third-party beneficiaries unless the "contracts manifest [an] intent that the defendants pay damages to compensate plaintiffs or other members of the public for their nonperformance." *Martinez v. Socoma Cos., Inc.*, 11 Cal. 3d 394, 402 (1974); *Lake Almanor Assocs. L.P. v. Huffman-Broadway Grp., Inc.*, 178 Cal. App. 4th 1194, 1200-01 (2009). Plaintiffs allege no facts to satisfy that requirement or otherwise show that their enforcement of the EDD Agreement is consistent with the contracting parties' objectives and "reasonable expectations." *Goonewardene*, 6 Cal. 5th at 836. To the contrary, allowing millions of benefits recipients to enforce the EDD Agreement would wreak havoc on EDD's own ability to administer its benefits program, directly contradicting the contract's goal of aiding in EDD's distribution of benefits. Mem. at 21; *see Goonewardene*, 6 Cal. 5th at 836 (considering "the potential effect that permitting third party enforcement would have on the parties' contracting goals"); *Cleveland*, 2020 WL 3268578, at *10. Doing so would also impede the State's future ability to seek assistance from vendors, if the specter of enforcement by millions of individuals hangs over every private company that contracts to provide services that in some way benefit State citizens, whether it is the distribution of State benefits, payroll assistance, or disaster response.

B. Plaintiffs Fail To Allege A Breach Of The EDD Agreement Or Its Implied Covenant.

Plaintiffs also fail to allege that BANA breached the EDD Agreement or its implied covenant.[15] Plaintiffs do not and cannot dispute that EDD explicitly required the use of magnetic strips and did not require chips. Chestnut Decl., Ex. 2, at 5 (Req. #323). Plaintiffs assert that the Agreement does not "prohibit" chip cards (Opp. at 23), but the failure to perform an action not required by a contract is not a breach of

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[15] To the extent Plaintiffs assert a breach of the EDD Agreement or the implied covenant based on a violation of EFTA, Regulation E, or the Account Agreement, that claim fails for the reasons stated above. *See supra* Section II.

that contract. *Vargas v. Potter*, 2009 WL 10699102, at *3 (C.D. Cal. Nov. 4, 2009). As for Plaintiffs' attempt to infer a chip-card obligation from the contract's *general* security provisions (Opp. at 23), that also fails because the contract contains a *specific* provision about card technology—which does not require chips. *See* Cal. Civ. Code § 3534 ("Particular expressions qualify those which are general.").

Plaintiffs argue that BANA breached the customer service requirements in the EDD Agreement even in light of the Letter Agreement modifying those requirements (Mem. at 23; Chestnut Decl., Ex. 3[16]), because, they say, BANA failed to use "commercially reasonable" efforts as required by the Letter Agreement. Opp. at 24-25. But Plaintiffs assert only that long wait times are not reasonable, and offer no facts to show that BANA made unreasonable *efforts* to provide customer service, particularly in light of skyrocketing unemployment rates. *See, e.g.*, MCC ¶¶ 74-75.[17]

Finally, Plaintiffs offer only a conclusory assertion that BANA "exercised [its] discretion in objectively unreasonable ways" in support of their implied covenant claim. Opp. at 25. But an implied covenant cannot be used to expand or contradict obligations in the written contract (such as by requiring chip cards) (Mem. at 23) and Plaintiffs' failure to tie an allegedly implied duty to any express contractual terms provides an additional reason to dismiss this claim. *See supra* at 5-6.

IV. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR NEGLIGENCE OR NEGLIGENT SUPERVISION.

Plaintiffs fail to rebut the three separate grounds for dismissal of their negligence claims: the economic loss rule, the law that banks do not owe tort duties of care, and the absence of factual allegations to establish causation. Mem. at 24-27.

A. The Economic Loss Rule Precludes Plaintiffs' Negligence Claims.

Although courts routinely dismiss economic loss claims in cases against a bank

[16] Plaintiffs' attempt to disregard the Letter Agreement fails, as that document amends the EDD Agreement on which Plaintiffs' claims are based. *See* RJN Reply at 4-5.

[17] Further, most Plaintiffs offer no facts about their customer service experiences and therefore have not stated a claim for relief based on their own individual situation.

arising from fraudulent activity (Mem. at 24-25), Plaintiffs suggest that their harms are not purely economic, pointing to the alleged "denial of access to necessary information and wasted time caused by grossly inadequate customer service." Opp. at 29. But those harms are also precluded as they are predicated on alleged economic losses. *See Anthony v. Kelsey-Hayes Co.*, 25 Cal. App. 3d 442, 446 (1972) ("loss of use" is "incidental damage" that is "properly classified" as "economic loss" due to "the nature of the damage of which it is an incident"); *Gardiner v. Walmart Inc.*, 2021 WL 2520103, at *8 (N.D. Cal. Mar. 5, 2021) ("the cost of lost time is an economic harm not recoverable under the economic loss doctrine").[18]

B. As A Matter Of Law, BANA Does Not Owe Tort Duties Of Care.

Plaintiffs' assertions that BANA owed "extracontractual duties," "independent of any contract," arising from a "special relationship" or from a statute (Opp. at 29), fail to establish that BANA owed any tort duty of care supporting a negligence claim.

First, California courts have repeatedly held that banks do not have a "special relationship" with their depositors. Mem. at 25. Plaintiffs cite a handful of data-breach cases (Opp. at 31), but those cases involved a narrow duty to safeguard personal information entrusted to an employer or retailer and do not support the broad duties Plaintiffs seek to impose here, such as a duty to provide a certain level of customer service staffing.[19] MCC ¶ 586. Plaintiffs' suggestion that possession of personal and account information gives rise to such broad tort duties directly contradicts the case law that banks do not owe separate tort duties. Mem. at 30-32.

Plaintiffs' special relationship theory also fails, as it hinges on the assertion that BANA was the "exclusive" distributor of EDD benefits (Opp. at 33), which is

[18] While a handful of courts have suggested that loss of time can form the basis of a negligence claim, those decisions involved "time spent responding to a data breach," a privacy injury distinct from time spent responding to an alleged loss of funds. *Stasi v. Inmediata Health Grp. Corp.*, 501 F. Supp. 3d 898, 913 (S.D. Cal. 2020).

[19] Plaintiffs cite *Garcia v. Ocwen Loan Servicing, LLC*, 2010 WL 1881098, at *3 (N.D. Cal. May 10, 2010), but that case involved a loan modification and in no way undermines the bedrock principle that banks do not owe depositors a tort duty of care.

contradicted by their own allegations that checks were available. *E.g.*, MCC ¶ 100; *infra* at 23. Plaintiffs' allegations establish that their relationship with BANA was a typical bank-depositor one that they were free to forgo, unlike in cases like *Corona v. Sony Pictures Entertainment, Inc.*, 2015 WL 3916744, at *5 (C.D. Cal. June 15, 2015), where the plaintiffs were *required* to provide personal information in order to receive compensation. Plaintiffs' assertion that a special relationship existed because BANA was motivated by financial interests would render any action by a commercial entity "morally condemnable." Opp. at 31-32. Plaintiffs' "special relationship" theory also means the existence of a duty would vary depending on the individual cardholder—there certainly is no "moral blame" or likelihood of injury in denying a Claim, for example, if that cardholder has committed fraud, whether by fraudulently obtaining benefits, or submitting false Claims to BANA, or both.[20]

Finally, Plaintiffs rely on assertions about "unreasonable data security practices" to support a statute-based tort duty of care (Opp. at 29-30) but they still identify no facts to support this theory, such as how data was actually stored. Mem. at 26. Their single conclusory assertion that they "plausibly allege" a tort duty to use EMV chips based on four statutes (GLBA, CFIPA, CCPA, and CCRA) is also insufficient. Opp. at 34. Plaintiffs do not plead any provision of the CCRA, GLBA, or CFIPA that require the use of chips; their CCRA claim is not even based on the use of magnetic strip cards. MCC ¶¶ 562-574. There is also no duty to use chips under the CCPA. *See infra* Section 19-20.[21]

C. Plaintiffs Have Not Sufficiently Alleged Causation.

In response to BANA's argument that Plaintiffs have alleged no facts to show

[20] It is worth noting that Plaintiffs' proposed class definition does not exclude all such fraudsters, nor could it, given the impossibility of identifying every single fraudster in a population of millions. MCC ¶ 527.

[21] Plaintiffs also have no response to BANA's argument that negligence per se is inapposite here. Mem. at 25. "Negligence per se delineates a specific manner, based upon statute or regulation, in which a breach of duty may be identified." *Heflebower v. JPMorgan Chase Bank, NA*, 2013 WL 5476806, at *11 (E.D. Cal. Sept. 30, 2013). But "a breach is irrelevant" where, as here, "no duty has first been established." *Id.*

that BANA caused the fraudulent transactions (Mem. at 26-27), Plaintiffs assert that some Plaintiffs experienced fraud after using their cards, and point to *one* plaintiff (out of 267) who speculates that her card was "skimmed." MCC ¶ 187; Opp. at 34. Such speculation does not provide a plausible basis for concluding that Plaintiffs' information was compromised because of BANA's alleged conduct, particularly in light of publicly-available information about EDD's own security breaches, and Plaintiffs' own allegations about massive data breaches in recent years that have nothing to do with BANA.[22] *E.g.*, MCC ¶ 62. The existence of so many other logical (and documented) explanations for Plaintiffs' asserted losses makes their single asserted explanation insufficiently plausible. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009); *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2012) (requiring "facts tending to exclude the possibility that the alternative explanation is true"). Plaintiffs' cited cases are inapposite, as they involved actual evidence that hackers had stolen information (Opp. at 36); here, Plaintiffs provide no concrete factual allegations to show any breach or theft. *See supra* at 2.

Plaintiffs' claim of negligent supervision suffers from the same lack of factual support for their "internal breach" theory. Plaintiffs merely assume that, because they were the victims of a fraudulent transaction, someone inside the Bank must have stolen their information. *See*, *e.g.*, MCC ¶ 58. The Rule 12(b)(6) plausibility threshold requires more than rank speculation. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 259 (4th Cir. 2009); *supra* at 17.[23]

V. PLAINTIFFS HAVE FAILED TO ALLEGE A BREACH OF FIDUCIARY DUTY.

Despite acknowledging that a bank generally owes no fiduciary duty to its

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[22] *See, e.g.*, California State Auditor Report 2018-129 (March 2019), at 9-14, *available at* https://www.auditor.ca.gov/pdfs/reports/2018-129.pdf.

[23] For this same reason, Plaintiffs have failed to establish a risk of future injury, as necessary to support their request for injunctive relief. *See* Mem. at 27. Plaintiffs object that they have standing because the alleged theft of their card information has already led to unauthorized transactions (Opp. at 36), but, as discussed, Plaintiffs have failed to sufficiently allege that the Bank's practices were the cause of their injuries or that any injury is "certainly impending." *See* Mem. at 27.

depositors, Plaintiffs nevertheless argue that BANA owes such a duty here, citing *Copesky v. Superior Court*, 229 Cal. App. 3d 678 (1991). Opp. at 38. But *Copesky* makes clear that the bank-depositor relationship is *not* "fiduciary, quasi-fiduciary or fiduciary-like" and noted only that there might "special circumstances" where "banks affirmatively offer trust and other specifically fiduciary services." *Id.* at 691 n.12, 693 n. 14, 694. There are no such "special circumstances" here. There was no "monopoly power" (Opp. at 38), as Plaintiffs were free to forgo the EDD Debit Card. *See infra* at 23. That Plaintiffs may have been swayed by the convenience of the EDD Debit Card did not "force[]" them to accept it nor put them in a "grossly unequal bargaining position[]." Opp. at 38. As for Plaintiffs' assertion that unemployment benefits recipients are "uniquely vulnerable" such that a financial institution holding their funds automatically becomes their fiduciary (Opp. at 39), that argument would impose fiduciary duties with respect to some depositors but not others based solely on individual economic circumstances (and could result in a disincentive for some banks to provide services to the economically disadvantaged). Plaintiffs' argument would also apply to any bank accepting direct deposits: as unemployment benefits are not need-based but act as a substitute for income, it necessarily follows that if a bank holding unemployment benefits is a fiduciary, then so is an institution that holds paychecks. That is not the law. *See supra* at 18.[24]

VI. PLAINTIFFS FAIL TO STATE CLAIMS UNDER THE CCPA AND CCRA.

In response to BANA's argument that the CCPA does not create any duty to issue chip cards (Mem. at 29-30), Plaintiffs assert that the statute creates a duty to generally follow "industry standards" (Opp. at 25). But Plaintiffs overlook the fact that the CCPA only creates a right of action for breach of an *existing* duty and does not create any new duties, and Plaintiffs do not identify any existing duty to issue

[24] Plaintiffs' reliance on a provision in the EDD Agreement about a "Contractor's Trust Account" (Opp. 39), is also not sufficient to establish that BANA held funds in trust or provided fiduciary services for any individual Plaintiff. This language refers to a *single* account held in the *Contractor's* (*i.e.*, BANA's) name and not to the millions of individual EDD cardholder accounts. ECF No. 90-6 at 19.

chip cards. Mem. at 29-30. Plaintiffs cite *Dugas*, 2016 WL 6523428, at *10-11 (Opp. at 25), but that case involved an alleged failure to maintain reasonable cybersecurity practices after the plaintiff provided personal identifying information to the defendant—it did not recognize any separate duty to issue chip cards.

Plaintiffs separately argue that the CCPA creates a duty here based on the "heightened vulnerability" of unemployment benefits recipients (Opp. at 26), but there is simply no support in the statute for a duty based on personal circumstances rather than the nature of the information to be protected. *See, e.g.*, Cal. Civ. Code § 1798.150(a)(1) ("duty to implement and maintain reasonable security procedures and practices *appropriate to the nature of the information*") (emphasis added).

With respect to Plaintiffs' theory that BANA improperly "collect[ed]," "transmitt[ed]," or "stor[ed]" information (MCC ¶¶ 57, 551, 553-54), Plaintiffs assert that BANA failed to conduct background checks or supervise subcontractors, and offer a conclusory assertion about "a series of internal data breache[s]." Opp. at 27. Those allegations, and their continued reliance on allegations made "on information and belief" (*id.*), fail to show that any breach actually occurred, let alone that it caused Plaintiffs' alleged losses. Mem. at 28. There is not a single Plaintiff—let alone a putative class representative—who offers concrete allegations establishing that they were the victim of an internal data breach. *See Hill*, 2011 WL 13243748 at *2.

Plaintiffs' CRA claim similarly fails, as Plaintiffs have not identified a data breach that triggered any notification requirements under the statute. Mem. at 30-31. Plaintiffs' contention that BANA was "on notice" of unidentified security breaches based on knowledge of unauthorized transactions is not sufficient to allege that a breach occurred, as a data security breach at BANA is not the only (or even the most likely) explanation for fraudulent transactions. *Supra* Section IV.C.

VII. Plaintiffs Have Failed To Allege A Violation Of The UCL.

A. Plaintiffs Cannot Recover Injunctive Relief Or Restitution.

In response to BANA's argument that Plaintiffs are not entitled to injunctive relief or restitution (Mem. at 31), Plaintiffs first assert that this argument is "premature." Opp. at 43. But courts "routinely" dismiss UCL claims under these circumstances. *See, e.g.*, *Klaehn v. Cali Bamboo, LLC*, 2020 WL 3971518, at *9 (S.D. Cal. July 13, 2020) (Burns, J.); *Mullins v. Premier Nutrition Corp.*, 2018 WL 510139, at *2 (N.D. Cal. Jan. 23, 2018).

Furthermore, Plaintiffs have not pled facts that would entitle them to any equitable remedy, and their reliance on the *Yick* preliminary injunction (Opp. at 43) does not remedy this deficiency. Plaintiffs' UCL claim seeks three forms of injunctive relief, two of which concern changes to BANA's practices to "prevent future unauthorized use" of Plaintiffs' accounts. MCC ¶ 584. But Plaintiffs lack standing to seek relief based on a "conjectural and hypothetical" future harm that their accounts will be compromised in the future. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). As for their request that BANA "process[]" their Claims (MCC ¶ 584), Plaintiffs do not respond to BANA's argument that this is merely an improper attempt to "transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money." Mem. at 32.

In response to the argument that restitution is not available because the alleged theft was committed by third-party fraudsters, Plaintiffs cite *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000), which held that unpaid wages are recoverable under the UCL. *Id.* at 178. That case is inapposite, as an employer clearly profits from retaining unpaid wages. Here, BANA received none of the funds allegedly taken upon Plaintiffs. Restitution is therefore not available. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1150 (2003); Mem. at 31-33.

B. Plaintiffs Have Failed To Allege A Violation Of The UCL.

Plaintiffs have failed to state a claim under either the "unlawful" or "unfair" prong of the UCL. With respect to "unlawful" acts, this claim must be dismissed to the extent it is predicated on Plaintiffs' EFTA, CCPA, CCRA, due process, and common law claims, as those claims also fail. *See Price v. Grand Bank For Sav.,* *FSB*, 2018 WL 4852198, at *5 (S.D. Cal. Oct. 4, 2018) (Burns, J.); *supra* at 7, 19-20. Plaintiffs have no response to BANA's argument (Mem. at 33) that they failed to plead a violation of the GLBA or the CFIPA, and therefore have "ma[de] no serious effort to plead a violation of . . . these predicate statutes." *Lit'l Pepper Gourmet, Inc. v. Airgas USA, LLC*, 2019 WL 6218780, at *4 (S.D. Cal. Nov. 21, 2019) (Burns, J.).

As to the unfairness prong, Plaintiffs recite the legal standard but fail to confront the fatal flaw in their theory: it cannot be "unfair," under any test, for a company to combat fraud targeted at a state benefits program into which the government has infused billions of dollars to help the economy during an unprecedented global pandemic. Plaintiffs' conclusory assertion that BANA's anti-fraud practices "had little (if any) legitimate utility" (Opp. at 41), is not plausibly supported by the facts, particularly Plaintiffs' own allegations about the level of fraud targeting government unemployment benefits programs. *E.g.*, MCC ¶ 79.[25]

Finally, Plaintiffs acknowledge that the UCL "does not give the courts a general license to review the fairness of contracts," but nevertheless assert that they can maintain a claim based on account freezes expressly permitted by the Account Agreement because other courts have permitted UCL claims based on conduct authorized by contract. Opp. at 42. Those cases, however, found the challenged contractual provisions to be unconscionable, and therefore "unlawful" under the UCL. *See Moran v. Prime Healthcare Mgmt., Inc.*, 3 Cal. App. 5th 1131, 1148-49 (2016); *De La Torre v. CashCall, Inc.*, 5 Cal. 5th 966, 981 (2018). Plaintiffs have failed to allege that a contract allowing a bank to freeze an account based on suspicion of "irregular, unauthorized, or unlawful activities" is unconscionable.

[25] Plaintiffs also fail to respond to BANA's argument that they have alleged no "established" public policy in California requiring chip cards and that UCL claims cannot be based on allegedly dissatisfactory customer service. Mem. at 34-35. As for Plaintiffs' argument that an unfairness claim cannot be resolved on a motion to dismiss, courts routinely dismiss unfairness claims at the pleading stage where, as here, plaintiffs have failed to plausibly allege an unfair practice. *See, e.g.*, *Klaehn*, 2020 WL 3971518, at *8; *Lit'l Pepper Gourmet*, 2019 WL 6218780, at *4.

VIII. PLAINTIFFS' DUE PROCESS ARGUMENT FAILS.

A. BANA Is Not a State Actor.

Plaintiffs fail to demonstrate that BANA—a private bank—was acting "under color of state law" when it froze certain Plaintiffs' accounts, such that this conduct was "fairly attributable to the State." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999); *see Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (critical question is whether "it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains"). BANA was neither performing a public function nor engaged in joint action with the state.

With respect to Plaintiffs' argument that BANA engaged in the "administration" of unemployment benefits (Opp. at 44), they do not allege that BANA played any role in determining or revoking their benefits eligibility; to the contrary, some allege that they continued to receive benefits even after their account was frozen. *E.g.*, MCC ¶¶ 100. *Cahoo v. SAS Inst Inc.*, 322 F. Supp. 3d 772 (E.D. Mich. 2018), is thus inapposite, as that case involved private entities operating a process that not only detected benefits fraud, but made subsequent determinations that claimants had acted unlawfully and assessed penalties. *Id.* at 785-86, 801-02. Plaintiffs' attempt to expand state action to cover, here, the freezing of a private bank account simply because it holds funds that were deposited by the State—based on an eligibility determination made by the State, not by BANA—ignores the Supreme Court's admonition that "very few" functions have been "exclusively reserved to the states." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). This theory, like many others asserted by Plaintiffs, would hamper the State's operations by disincentivizing private companies from providing any services to the State.

Plaintiffs' attempt to characterize the EDD Debit Card as the "exclusive" means of distributing their benefits is contradicted by their own allegations. They acknowledge that benefits can be distributed by check, but complain only that the check "option is neither publicized nor easily accessed." MCC ¶ 47 n.1.[26] The assertion that obtaining a check required "extraordinary efforts" (Opp. at 46 n.44) is not supported by the allegations Plaintiffs cite, which simply reflect the dates on which two Plaintiffs received checks from EDD, with no allegations about any "efforts" involved in that process. MCC ¶¶ 172-74, 221-23. This case is therefore entirely distinguishable from *Brown v. Stored Value Cards, Inc.*, 2016 WL 4491836 (D. Or. Aug. 25, 2016), where formerly incarcerated individuals had "no choice on how to retrieve" their funds. *Id.* at *2. That is decidedly not the case here.

As for joint action, although Plaintiffs allege that they are not challenging State-requested account freezes (MCC ¶¶ 50, 52-53)—and in fact propose a subclass of individuals whose accounts remained frozen in defiance of the State's alleged instructions (*id.* ¶ 528)—they now argue that EDD nevertheless "facilitate[d]" BANA's account freezes by "encouraging" BANA to combat fraud (including by asking BANA to freeze *other* accounts, not at issue here). Opp. at 46-47. But the specific account freezes challenged in this case were not requested or endorsed (and, according to Plaintiffs, may even have been opposed) by the State, and therefore cannot be "fairly treated as that of the State itself." *Sullivan*, 526 U.S. at 52; *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) ("inquiry begins by identifying the specific conduct of which the plaintiff complains"); *Blum*, 457 U.S. at 1003 (analyzing the precise conduct to which "respondents objected").[27]

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[26] Plaintiffs also offer no citation for their assertion that "class members are informed by EDD that debit cards are the *only* option." Opp. 46 n.44; *Sukumar v. Int'l Olympic Comm.*, 2021 WL 2206476, at *3 (S.D. Cal. June 1, 2021) (refusing to consider facts "raise[d]" in the opposition but "not alleged in the complaint").

[27] Plaintiffs' cited cases (Opp. at 47) are inapplicable as they involve situations where the private entity exercised the state's authority or acted with full government approval. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140-41 (9th Cir. 2012) (security guards had "the authority, normally reserved to the state," to issue criminal citations); *Swift v. Lewis*, 901 F.2d 730, 732 n.2 (9th Cir. 1990) (private actor determined applicability of prison policies); *Geneva Tower Tenants Org. v. Federated Mortg. Invs.*, 504 F.2d 483, 487-88 (9th Cir. 1974) (rent increases could be implemented only after approval from the federal government).

Plaintiffs' argument that revenue-sharing is sufficient to establish joint action because EDD "directly benefits financially from BofA's earnings" (Opp. at 48), is based solely on *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 716 (1961), a sixty-year-old case involving racial discrimination by a restaurant in a building "owned, "operated by," and leased from the State. But in *Burton*, the discriminating restaurant's profits "not only contribute[d] to, but also [were] *indispensable* elements in, the financial success of a government agency." *Id.* at 724 (emphasis added). As this statement suggests, and as the Supreme Court has since emphasized, mere financial benefit is insufficient. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982). In line with this approach, the Ninth Circuit has "repeatedly distinguished *Burton* and declined to expand its applicability." *Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1168 (9th Cir. 2021). Under Ninth Circuit precedent, the conduct at issue "must be *inextricably intertwined* with that of the government." *Id.* (emphasis added) Plaintiffs' allegations do not meet that standard, as they do not establish that the account freezes were "an indispensable element in [the state's] financial success." *Vincent v. Trend W. Tech. Corp.*, 828 F.2d 563, 569 (9th Cir. 1987).

B. Plaintiffs Have Not Sufficiently Alleged A Due Process Violation.

Even if BANA were a state actor, Plaintiffs have not adequately alleged any due process violation. To begin, Plaintiffs' allegations establish that an account freeze does not cut off eligibility or entitlement to benefits—it just requires the benefits recipient to choose a different method of delivery. *See supra* at 23. Thus, with respect to future benefits, there is no deprivation of any property interest, and therefore no due process claim. *See, e.g.*, *Tate v. Univ. Med. Ctr. of S. Nev.*, 637 F. Supp. 2d 892, 8998 (D. Nev. 2009) (no deprivation of property interest where defendants "limited one of several avenues" by which plaintiff could exercise his clinical privileges, but did not "limit the privilege itself"). The cases that Plaintiffs cite about termination of benefits, which involved eligibility determinations precluding all future benefits, are thus inapplicable. *See Mathews v. Eldridge*, 424

U.S. 319, 338 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 258 (1970); *Am. Federation of Lab. v. Emp't Dev. Dep't*, 88 Cal. App. 3d 811, 817-19 (1979).

With respect to previously deposited funds in a frozen account, pre-deprivation process can be suspended if "notice would defeat the entire point of the seizure." *Clement v. City of Glendale*, 518 F.3d 1090, 1094 (9th Cir. 2008). That is precisely the case here. Requiring advance notice would allow fraudulent actors to drain their accounts of the funds that the account freeze is intended to protect. *U.S. v. Real Property Located at 1184 Drycreek Road, Granville, Ohio 43023*, 174 F.3d 720, 730 (6th Cir. 1999) (government interest in avoiding loss or destruction of property can justify foregoing pre-deprivation process). Plaintiffs object that this principle applies only where there is "substantial assurance that the deprivation is not baseless or unwarranted," *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988), but they have not alleged facts to show that the freezes were "baseless or unwarranted," particularly in light of the extensive fraud targeting unemployment benefits programs. MCC ¶ 79 & n.9.

As for post-deprivation process, Plaintiffs simply cite two general assertions about BANA's processes (Opp. at 50), which is not sufficient to establish a due process violation as to any Plaintiff, particularly as Plaintiffs' allegations make clear that BANA provided a post-deprivation process for cardholders seeking access to their accounts. Mem. at 40 n.22; *see* MCC ¶¶ 193, 340.

CONCLUSION

For the foregoing reasons, and the reasons stated in its opening brief, BANA respectfully requests that the Court dismiss Plaintiffs' Master Consolidated Complaint (ECF No. 72) with prejudice.

Dated: December 15, 2021

Respectfully submitted,

By: *s/ Yvonne W. Chan*

JAMES W. MCGARRY (pro hac vice)
JMcGarry@goodwinlaw.com
YVONNE W. CHAN (pro hac vice)
YChan@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue Boston, MA 02210
Tel.: +1 617 570 1000
Fax: +1 617 523 1231

THOMAS M. HEFFERON (pro hac vice)
THefferon@goodwinlaw.com
GOODWIN PROCTER LLP
1900 N St. NW
Washington, DC 20036
Tel: +1 202 346 4000
Fax: +1 202 346 4444

LAURA A. STOLL (SBN 255023)
LStoll@goodwinlaw.com
GOODWIN PROCTER LLP
601 South Figueroa Street,
41st Floor Los Angeles, California 90017
Tel.: +1 213 426 2500
Fax: +1 213 623 1673

JANICE P. BROWN (SBN 114433)
jbrown@meyersnave.com
ARLENE R. YANG (SBN 297450)
ayang@meyersnave.com
MEYERS NAVE
600 B Street, Suite 1650
San Diego, CA 92101
Tel: +1 619 569 2099
Fax: +1 619 330 1701

BARRY W. LEE (SBN 088685)
bwlee@manatt.com
MANATT PHELPS & PHILLIPS LLP
One Embarcadero Center, 30th Floor
San Francisco, CA 94111
Tel.: +1 415 291 7450
Fax: +1 415 291 7474

Attorneys for Defendant
BANK OF AMERICA, N.A.

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 December 15, 2021. 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: December 15, 2021

s/ Yvonne W. Chan
Yvonne W. Chan