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9 **UNITED STATES DISTRICT COURT**  
10 **SOUTHERN DISTRICT OF CALIFORNIA -**  
11 **SAN DIEGO DIVISION**  
12

13 IN RE: BANK OF AMERICA  
CALIFORNIA UNEMPLOYMENT  
14 BENEFITS LITIGATION

Case No. 21-MD-02992-LAB-MSB

**DEFENDANT BANK OF  
AMERICA, N.A.'S REPLY IN  
SUPPORT OF ITS REQUEST FOR  
JUDICIAL NOTICE AND  
OPPOSITION TO PLAINTIFFS'  
REQUEST FOR JUDICIAL  
NOTICE**

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

Filed/Lodged Concurrently with:  
21 1. Reply Memorandum of Points  
and Authorities in Support of  
22 Defendant's Motion to Dismiss

1 Plaintiffs' Opposition to BANA's Request for Judicial Notice (ECF No. 90-2;  
2 "Pl. RJN Opp.") and competing Request for Judicial Notice (ECF No. 90-1; "Pl.  
3 RJN") do not raise any issues that materially affect the Court's consideration of  
4 BANA's Motion to Dismiss (ECF No. 84). Plaintiffs offer their own versions of the  
5 Account Agreement and the EDD Agreement, but do not establish that their versions  
6 should control over BANA's, or that there are any differences material to the issues  
7 in the Motion to Dismiss. With respect to the Account Agreement (Chestnut Decl.  
8 (ECF No. 84-3) Ex. 1), Plaintiffs do not show that any of them actually reviewed  
9 (and thereby agreed to) the website version they submit, rather than the version  
10 authenticated by BANA's witness; in any event, the only difference between the two  
11 is the governing law (North Carolina versus California), and contract law in both  
12 states is substantially the same for purposes of the issues raised in BANA's Motion  
13 to Dismiss. As for the EDD Agreement (Chestnut Decl. Ex. 2), Plaintiffs similarly  
14 identify no material difference between the two versions: BANA's version includes  
15 redlines in the EDD RFP that is an exhibit to the agreement but the substance of the  
16 document is the same. Plaintiffs' version also attaches an outdated copy of BANA's  
17 response to the RFP but the cited pages are the same. Finally, with respect to the  
18 Letter Agreement between BANA and EDD (Chestnut Decl. Ex. 3), that document  
19 amends certain terms of the EDD Agreement—which is the subject of two of  
20 Plaintiffs' claims—and Plaintiffs cannot ignore it simply because they do not like its  
21 terms.

22 **I. THE ACCURACY AND AUTHENTICITY OF EXHIBIT 1 IS NOT SUBJECT TO**  
23 **REASONABLE DISPUTE.**

24 The Court should take judicial notice of the version of the Account Agreement  
25 attached to Mr. Chestnut's declaration, as that is the only version of this contract that  
26 has been authenticated by a BANA witness as the applicable agreement between  
27 BANA and EDD cardholders. *See* Chestnut Decl., Ex. 1. Plaintiffs have not  
28 provided a basis for relying instead on the version they found on the EDD Debit Card

1 website (Danitz Decl. (ECF No. 90-3), ¶ 3), as they do not establish that any of the  
2 Plaintiffs ever visited that website or viewed the website version of the Account  
3 Agreement such that they believed the website version governed their relationship  
4 with BANA. *See* Chestnut Decl., Ex. 1, at 1 (cardholders agree to be bound by terms  
5 and conditions “[b]y using or allowing another to use” their EDD Debit Card); *Zero*  
6 *Motorcycles Inc. v. Nikola Motor Co.*, 2018 WL 3009126, at \*3 (N.D. Cal. June 14,  
7 2018) (denying request for judicial notice of updated website and press release where  
8 “there [was] no indication . . . that customers viewing the old version of the website  
9 or press release would necessarily have seen the new versions”).

10 As Plaintiffs acknowledge, “[t]he two versions are substantively the same,  
11 including the same effective date, except for the governing law provision.” Opp.  
12 Def.’s Mot. Dismiss Master Consol. Compl. (“MTD Opp.”) (ECF No. 90) at 14 n.  
13 19; Pl. RJN. Opp. at 2 n. 1; Pl. RJN. at 2. BANA’s version states that North Carolina  
14 law governs the Account Agreement, while Plaintiffs’ version has a California  
15 governing law provision. Pl. RJN Opp. at 2. This difference does not call into  
16 question the authenticity of BANA’s version, as Plaintiffs suggest—indeed, of the  
17 267 Plaintiffs in this case, none have alleged that they received an Account  
18 Agreement from BANA that was different from Exhibit 1 to Mr. Chestnut’s  
19 declaration.

20 In any event, as BANA has noted—and Plaintiffs do not contest—there is no  
21 material difference between North Carolina and California law for purposes of the  
22 issues raised in BANA’s Motion to Dismiss. *See* Mem. of Pts. & Auth. In Support  
23 of Mot. to Dismiss (ECF No. 84-1) (“Mem.”) (ECF No. 84-1) at 9 n. 11. Thus, the  
24 difference in governing law provisions does not preclude the Court from taking  
25 judicial notice of BANA’s version for purposes of the Motion to Dismiss. *See*  
26 *Phillips v. P.F. Chang’s China Bistro, Inc.*, 2015 WL 469409, at \*2 (N.D. Cal. Aug.  
27 6, 2015) (taking judicial notice of a menu over the plaintiff’s objection that there was  
28 another version with irrelevant differences). Alternatively, the Court can take

1 judicial notice of both versions of the Account Agreement. *See Selznick v. Wells*  
2 *Fargo Bank, N.A.*, 2015 WL 4069076, \*2 (C.D. Cal. July 1, 2015) (taking judicial  
3 notice of the parties’ “somewhat different” versions of the same document where the  
4 relied-upon portion was the same, as it did “not matter whether the Court relie[d] on  
5 [Defendant’s] or Plaintiff’s version”).

6 **II. THE ACCURACY AND AUTHENTICITY OF EXHIBIT 2 IS NOT SUBJECT TO**  
7 **REASONABLE DISPUTE.**

8 The differences between the two competing versions of the EDD Agreement  
9 are likewise immaterial for purposes of BANA’s Motion to Dismiss. Plaintiffs note  
10 that BANA’s version contains redlining in the cover page of EDD’s Request for  
11 Proposal (“RFP”), which is an exhibit to the EDD Agreement. Pl. RJN. Opp. at 3.  
12 Plaintiffs further assert that BANA’s version is “facially different” from the version  
13 EDD provided Plaintiffs (*id.*), but do not identify any facial differences other than  
14 the redlining.

15 The redlining in the EDD RFP included in BANA’s version of the EDD  
16 Agreement does not prevent the Court from taking judicial notice of that document.  
17 The redlining, which appears in the cover page of the RFP, does not affect the  
18 substance of the RFP excerpts submitted to the Court—both versions reflect the same  
19 date (August 14, 2015), with the only difference being that BANA’s document has  
20 the prior date crossed out. *Compare* Chestnut Decl., Ex. 2, at 5, *with* Danitz Decl.,  
21 Ex. B, at 5. There are no differences, formatting or otherwise, in the RFP excerpts  
22 that the parties have submitted. Pl. RJN at 2 (“Exhibit B ... contains equivalent  
23 excerpts of the pages of the version submitted by BofA”).

24 The only other difference in the documents submitted by the parties relates to  
25 another exhibit to the EDD Agreement—the proposal BANA submitted in response  
26 to the EDD RFP. Plaintiff’s version attaches a BANA proposal dated July 10, 2015—  
27 *before* the final RFP (which both parties submit, with the redlining differences noted  
28 above), which is actually dated about *a month later*, August 14, 2015. BANA’s

1 version of the EDD Agreement attaches the Bank’s August 21, 2015 proposal from  
2 a week *after* the RFP. *Compare* Chestnut Decl., Ex. 2, at 7, *with* Danitz Decl., Ex.  
3 B., at 8. Plaintiffs’ version clearly attaches an outdated version of the BANA  
4 proposal, which cannot be the controlling document given that it was submitted  
5 *before* the RFP, and therefore there are doubts about the authenticity of Plaintiffs’  
6 version of the EDD Agreement.

7 In any event, the excerpts of BANA’s proposal that each party submits are  
8 substantively identical, save for a footer in Plaintiffs’ version that does not appear in  
9 BANA’s version. Because Plaintiffs do “not dispute the accuracy of the information  
10 contained” in BANA’s version of the EDD Agreement—and in fact seek to rely on  
11 that very same information—BANA’s request for judicial notice of Exhibit 2 to the  
12 Chestnut Declaration should be granted. *Phillips*, 2015 WL 4694049, at \*2.<sup>1</sup>

13 **III. EXHIBIT 3 IS AN AMENDMENT TO THE EDD AGREEMENT AND IS**  
14 **THEREFORE PROPERLY SUBJECT TO JUDICIAL NOTICE.**

15 Finally, Plaintiffs’ objection to the Letter Agreement that modified the EDD  
16 Agreement must be disregarded. As Plaintiffs admit, the EDD Agreement itself is  
17 incorporated by reference in the Master Consolidated Complaint (“MCC”). Pl. RJN  
18 at 1; Pl. RJN Opp. at 2-3. The case law is clear that a court can and should consider  
19 subsequent amendments and modifications to a contract that forms the basis of claims  
20 in the complaint. *See, e.g., Malley v. San Jose Midtown Dev. LLC*, 2021 WL  
21 1312792, at \*4 (N.D. Cal. Apr. 8, 2021) (considering an agreement and “its related  
22 amendments,” which formed “one agreement that the Court chooses to consider in  
23 its entirety”); *Congrove v. W. Mesquite Mines, Inc.*, 2008 WL 11337256, at \*2 (S.D.  
24 Cal. Dec. 10, 2008) (granting judicial notice to a document and the “corrections and  
25 amendments thereto”). The fact that Plaintiffs chose not to discuss the Letter

26 <sup>1</sup> *Dual Diagnosis Treatment Center, Inc. v. Blue Cross of California*, 2016 WL  
27 6892140 (C.D. Cal. Nov. 22, 2016), is not to the contrary. There the court declined  
28 to take judicial notice of draft documents where the redlining indicated that the  
document was still being edited. *Id.* at \*23. Here, by contrast, there is no material  
difference between BANA’s excerpts and Plaintiffs’ excerpts. *See supra*.

1 Agreement in their MCC (despite having had the Letter Agreement at least months  
2 before they filed the MCC in August) does not allow them to shield the Letter  
3 Agreement from the Court's consideration. *See Khoja v. Orexigen Therapeutics,*  
4 *Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018) (prohibiting "plaintiffs from selecting only  
5 portions of documents that support their claims, while omitting portions of those very  
6 documents that weaken—or doom—their claims"). Because the Letter Agreement  
7 modifies the EDD Agreement, it is part and parcel of that Agreement, and is therefore  
8 properly subject to judicial notice along with the EDD Agreement.

9 As for Plaintiffs' assertion that the Letter Agreement raises factual issues that  
10 cannot be resolved on a motion to dismiss (RJN Opp. at 4), contract interpretation is  
11 a question of law. *Irwin v. Carpenters Health & Welfare Tr. Fund for Cal.*, 745 F.2d  
12 553, 555 (9th Cir. 1984) ("The proper interpretation of language on the face of a  
13 contract is a matter of law . . ."). To the extent Plaintiffs are simply objecting that  
14 *they* do not know whether the EDD Agreement was subsequently modified, their lack  
15 of awareness about developments in the contracting relationship further underscores  
16 the conclusion that they are not third-party beneficiaries whose enforcement of the  
17 contract would be consistent with the parties' reasonable expectations. *See* Mem. at  
18 22.

### 19 CONCLUSION

20 For the reasons stated above, BANA respectfully requests that the Court grant  
21 its Request for Judicial Notice and deny Plaintiffs' Request for Judicial Notice.

22  
23 Dated: December 15, 2021 Respectfully submitted,

24  
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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 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