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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JENNIFER YICK, *et al*, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A.; and DOES 1 through 50, inclusive,

Defendants.

Case No. 3:21-cv-00376-VC

DEFENDANT BANK OF AMERICA'S NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(1) AND 12(B)(6); MEMORANDUM OF POINTS & AUTHORITIES

Date: Thursday, June 10, 2021
Time: 2:00 p.m.
Courtroom: 4
Judge: Hon. Vince Chhabria

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 10, 2021 at 2:00 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Vince Chhabria, United States District Judge, located at the 450 Golden Gate Avenue, San Francisco, California, 17th Floor, Courtroom 4, defendant Bank of America, N.A. ("BANA"), by its undersigned counsel, will and hereby does move for an order dismissing all claims alleged in Plaintiffs' Consolidated Complaint with prejudice pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

This motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Robert Chestnut and the exhibits thereto, the Declaration of Melissa Gargagliano, the Request for Judicial Notice, and all papers, pleadings, documents, arguments of counsel, and other materials presented before or during the hearing on this motion, and any other evidence and argument the Court may consider.

STATEMENT OF ISSUES TO BE DECIDED

Pursuant to Civil Local Rule 7-4(a)(3), BANA sets forth the following statement of issues to be decided:

1. Whether Plaintiffs' claim for breach of contract (Count 8) should be dismissed under Federal Rule of Civil Procedure 12(b)(1) as to the Plaintiffs who have already been reimbursed and/or whose accounts are not frozen or blocked, and their claim for violations of the Electronic Funds Transfer Act, 15 U.S.C. §§1693 *et seq.* (Count 1) should similarly be dismissed as to reimbursed Plaintiffs, because there is no live controversy and those Plaintiffs therefore lack standing?

2. Whether Plaintiffs' Consolidated Complaint should be dismissed under Federal Rule 12(b)(6) as to all counts for failure to state a claim upon which relief may be granted?

Dated: May 6, 2021

Respectfully submitted,

By: */s/ Yvonne W. Chan*

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MEMORANDUM OF POINTS AND AUTHORITIES

These consolidated cases arise from a massive surge in fraud targeting California's unemployment benefits program during the COVID-19 pandemic. At a time when millions of unemployed Californians were relying on government assistance, legions of criminals were exploiting this unprecedented crisis to target the state agency providing that assistance, the California Employment Development Department ("EDD"), by filing fraudulent unemployment benefits claims. The responses to this wholly-unexpected crisis are the subject of this suit.

EDD administers unemployment benefits in California, and retained BANA to distribute those benefits through prepaid debit cards. As the Consolidated Complaint acknowledges, frauds perpetrated on the unemployment program exploded in mid-2020. *See* Consolidated Class Action Complaint, ECF No. 63 ("CCAC" or "Consolidated Complaint"), ¶ 63. EDD has called the pervasive fraud a "criminal assault on the benefits system," and public reports suggest the deep involvement of sophisticated overseas criminal gangs, "money mules," users of the "dark web," prison inmates, and other malevolent groups and individuals seeking to take advantage of federal and state responses to the current health and employment crisis—to the tune of $11 to $31 billion of dollars of outright theft.

BANA has taken many steps to combat this unprecedented surge of criminal activity, including working with EDD and other State officials to identify and freeze accounts that likely belong to the perpetrators, and denying cardholder claims that appear to represent further attempts to defraud the system. The measures BANA has taken to respond to these widespread crimes have also had an unintended but regrettably unavoidable impact on some legitimate EDD cardholders. That is why BANA has provided numerous avenues for affected cardholders to access their accounts and recover their funds—avenues that a number of Plaintiffs have already pursued successfully to regain access to their unemployment funds.

BANA is both aware of and deeply sympathetic to the plight of cardholders whose accounts were incorrectly identified as suspicious or who experienced fraudulent charges on their legitimate accounts, and remains committed to working with these cardholders to regain access to their funds. But Plaintiffs have not demonstrated that they are entitled to any relief on their claims. Their

contract claims suffer from standing issues where none of them have frozen or blocked accounts, and several admit they were fully reimbursed (which also deprives them of standing to bring their claim under the Electronic Funds Transfer Act ("EFTA")). Plaintiffs also fail to allege sufficient facts to show any contract-based or EFTA violation, where they rely only on their conjecture that BANA did not investigate their claims, and they offer no facts to show that they are third-party beneficiaries of the contract between EDD and BANA as a matter of law. Plaintiffs' tort, California Consumer Privacy Act ("CCPA"), and fiduciary duty claims likewise fail because they seek to impose duties on BANA that go far beyond any law or contract. Plaintiffs ask this Court to find, for example, that BANA had a legal duty to issue cards with embedded "chips" even though EDD chose to require cards with magnetic strips rather than chips in its contract with BANA. Plaintiffs also cannot impose due process duties on BANA where they have not alleged facts sufficient to show that BANA was a state actor when it froze their accounts. And Plaintiffs have no claim under the Unfair Competition Law where they have failed to allege any of the predicate violations and the challenged conduct was expressly permitted by contract.

For these and the other reasons set forth below, Plaintiffs' Consolidated Complaint must be dismissed in its entirety.

BACKGROUND

I. THE EDD BENEFITS PROGRAM.

EDD retained BANA to deliver benefits to California residents pursuant to an agreement between EDD and BANA (the "EDD Agreement"). *See* CCAC ¶¶ 28–30. Under the EDD Agreement, BANA issues prepaid debit cards ("EDD Debit Cards") to EDD-identified and approved recipients who choose to receive their benefits through a prepaid debit card rather than a check from EDD, and EDD distributes benefits by funding those debit card accounts. *See id.* ¶ 35. EDD chose to require magnetic strip cards, and not chip cards, for its prepaid card program; as required by the EDD Agreement and EDD's own specifications, BANA issued EDD Debit Cards with magnetic strip technology. *See* Chestnut Decl., Ex. 2, at 5 (Req. #323).[1] EDD has, in

[1] The contract between EDD and BANA was referenced in the Consolidated Complaint (*see* CCAC ¶ 37) and forms the basis of Count 12 (*id.* ¶¶ 290-96). "In considering a motion to dismiss,

fact, publicly confirmed that it chose not to require chip cards in the EDD Agreement.[2] And the Consolidated Complaint fails to allege any legal requirement to use chips (an unsurprising omission, as there is none).

An account agreement ("Account Agreement") between BANA and each cardholder governs each cardholder's contractual relationship with BANA. CCAC ¶ 55. The Account Agreement expressly permits BANA to take the initiative to prevent fraud. Among other terms, the Account Agreement states that BANA may "freeze" accounts if it "suspect[s] irregular, unauthorized, or unlawful activities may be involved" (Chestnut Decl., Ex. 1, § 2); may restrict access to any prepaid debit card if BANA notices suspicious activity (*id.* § 3); and may deduct from an account funds that a cardholder is not entitled to keep (*id*. § 2). These rights are consistent with BANA's numerous obligations under federal law, including under the Bank Secrecy Act (31 U.S.C. § 5311 *et seq.*), to monitor and report fraudulent and suspicious activity, and to prevent BANA from being used as an instrument of fraud or illegal acts such as money laundering.[3]

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judicial notice of the full text of documents referenced in a complaint is proper." *Wyman v. First Am. Title Ins. Co.*, 2017 WL 1508864, at *2 (N.D. Cal. Apr. 27, 2017); *see also Steinle v. City & Cnty. of San Francisco*, 919 F.3d 1154, 1162–63 (9th Cir. 2019) (court may "consider a document 'if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim'"). Thus, the EDD Agreement, the Account Agreement, and the correspondence that Plaintiffs allege they received from BANA are all part of the record that the Court may consider in ruling on BANA's motion to dismiss.

[2] *See* Kenny Choi, *Update: Outrage Mounts After Bank of America Denies Claims From Victims of EDD Bank Card Scammers*, CBS Local News (Nov. 9, 2020), https://sanfrancisco.cbslocal.com/2020/11/09/outrage-mounts-after-bank-of-america-denies-claims-from-victims-of-edd-bank-card-scammers/ (EDD: "Providing chip technology is a rather new offering and was not included in the current contract with Bank of America to provide debit card services for Unemployment Insurance (UI) claimants.").

[3] BANA has also taken many steps to educate cardholders on ways to avoid fraudulent activity. Each EDD Debit Card is associated with a personal identification number ("PIN"). The Account Agreement advises cardholders: "Do not write your PIN on your Card or carry your PIN with you. This reduces the possibility of someone using your Card without your permission if it is lost or stolen." Chestnut Decl., Ex. 1, § 10. A BANA webpage dedicated to EDD Debit Card users contains a section called "Avoiding Fraud" that provides further security information and informs cardholders, among other things, not to disclose "any personal information," including the PIN, to anyone, and to avoid persons impersonating BANA who attempt to obtain information from them.

II. THE COVID-19 PANDEMIC RESULTED IN UNPRECEDENTED LEVELS OF UNEMPLOYMENT AND WIDESPREAD FRAUDULENT ACTIVITY.

Since the beginning of the pandemic, millions of Californians have sought unemployment benefits, including persons not traditionally eligible but who now qualify for Pandemic Unemployment Assistance ("PUA") under the federal CARES Act.[4] *See* CCAC ¶¶ 59, 63. Unfortunately, this infusion of federal dollars has led to an explosion of fraudulent activity directed at the EDD program.[5]

The frauds have taken two main forms. First, individuals who are not entitled to any unemployment relief from EDD (*e.g.*, prisoners, international syndicate members, non-Californians, even those who are gainfully employed) have submitted false applications (often using stolen identities).[6] The "overwhelming majority" of this "enrollment fraud" has been associated with federal PUA claims "due to federal policymakers' decision to prioritize immediate assistance," and thus require a "lower standard of identity and wage information" from applicants.[7] EDD, which is responsible for making eligibility determinations and approving benefits claims, has confirmed that it paid between $11 billion and $31 billion to fraudulent claims. *See supra* n.6.

Bank of Am., *EDD Debit Card*, https://visaprepaidprocessing.com/EddCard (last accessed May 5, 2021) ("Avoiding fraud").

[4] PUA is designed to provide benefits to persons generally not previously eligible for unemployment assistance, such as the self-employed and contractors (including participants in the "gig" economy). *See* Cal. Empl. Dev. Dep't, Rep. No. 2020-128/628.1, EDD's Poor Planning and Ineffective Management Left It Unprepared to Assist Californians Unemployed by COVID-19 Shutdowns 10 (2021), https://www.auditor.ca.gov/pdfs/reports/2020-128and628.1.pdf.

[5] *See*, *e.g.*, U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 28-20 (Aug. 31, 2020), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_28-20.pdf; News Release, U.S. Secret Serv. Media Rels., Secret Service Announces the Creation of the Cyber Fraud Task Force (July 9, 2020), https://www.secretservice.gov/newsroom/releases/2020/07/secret-service-announces-creation-cyber-fraud-task-force.

[6] *See* News Release, Cal. Empl. Dev. Dep't, EDD Provides Updates on Unemployment Benefit Fraud and Fraud Prevention Efforts (Jan. 25, 2021), https://edd.ca.gov/about_edd/pdf/news-21-05.pdf ("January 25, 2021 EDD News Release"); *CA EDD Admits Paying as Much as $31 Billion in Unemployment Funds to Criminals*, ABC7 News (Jan. 25, 2021), https://abc7news.com/california-edd-unemployment-fraud-ca-scam-insurance/10011810/ ("January 25, 2021 News Article").

[7] Legis. Analyst's Office, Legislative Oversight of Ongoing Challenges at EDD 5 (Jan. 26, 2021), https://lao.ca.gov/handouts/state_admin/2021/EDD-Challenges-012621.pdf.

Second, criminals have exploited the Electronic Funds Transfer Act ("EFTA") and its implementing regulation, Regulation E ("Reg E"), which generally require a prepaid card issuer like BANA to provisionally credit an account if an investigation into a claimed account error is not completed within ten business days, thereby making the disputed funds available pending the completion of the investigation. *See* 15 U.S.C. § 1693f(c); 12 C.F.R. § 1005.11(c)(2)(i). Unfortunately, criminals have taken full advantage of this federally-mandated protection by committing a separate and additional "double dipping" fraud also referred to as "card cracking": filing fraudulent error claims, obtaining provisional credits, and then depleting the provisionally credited funds before the credit can be reversed when the false claim is finally identified.

BANA, in close collaboration with EDD, has taken a number of steps to address both types of fraud. Among other things, BANA freezes accounts and closes claims that it believes to be the subject of fraud or suspicious activity.

III. PLAINTIFFS' ALLEGATIONS.

Plaintiffs allege that they are each valid recipients of EDD benefits and that BANA improperly froze their EDD Debit Card accounts and/or did not reimburse them for unauthorized transactions on their accounts. *See* CCAC ¶¶ 1, 3. They allege a range of different experiences. *See id.* ¶¶ 85–184. Some Plaintiffs received a provisional credit while their claims were being investigated, while others did not. *See id.* ¶¶ 134, 141. Some Plaintiffs' claims were fully credited, while others allege no credits were provided. *See id.* ¶¶ 87, 104, 113, 126, 157. Some Plaintiffs allege that their accounts remain frozen while others have been able to regain access; others do not allege that their accounts were frozen at all. *See id.* ¶¶ 104, 114, 119, 132, 145, 163. Some Plaintiffs allege that they were unable to reach BANA's customer service representatives, *see, e.g.*, *id.* ¶ 87, and others admit that they reached BANA but express dissatisfaction with the service those representatives provided. *See, e.g.*, *id.* ¶¶ 121, 132, 139, 144, 153–154, 173.

LEGAL STANDARD

A complaint should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) if there is no "live" controversy or the plaintiff has not suffered an injury in fact and therefore has no standing. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980); *Lujan v. Defenders*

of Wildlife, 504 U.S. 555, 560 (1992). In ruling on a Rule 12(b)(1) motion based on mootness or standing, this Court may "rely on affidavits or any other evidence properly before the court." *Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 930 (N.D. Cal. 2009).

To survive a Rule 12(b)(6) motion, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiff's pleading obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). "'[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.'" *Asarco LLC v. Shore Terminals LLC*, 2011 WL 6182123, at *2 (N.D. Cal. Dec. 13, 2011) (quoting *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996)).

ARGUMENT

I. PLAINTIFFS' DIRECT CONTRACT-RELATED CLAIMS MUST BE DISMISSED (COUNTS 8, 9 & 10).

Plaintiffs assert three claims based on their own contractual relationship (or alleged contractual relationship) with BANA: Breach of Contract (Count 8) based on the Account Agreement; Breach of Implied Contract (Count 9); and Breach of the Implied Covenant of Good Faith and Fair Dealing in the Account Agreement (Count 10). All of these claims fail.

A. Plaintiffs' Claim for Breach of the Account Agreement (Count 8) Must Be Dismissed.

Plaintiffs allege that BANA breached the Account Agreement by (1) failing to investigate and reimburse them or limit their liability for unauthorized transactions on their accounts; and/or (2) freezing their accounts such that they could not access their EDD funds. CCAC ¶ 265.

As an initial matter, a number of Plaintiffs lack standing to bring this claim. Plaintiffs Oosthuizen, Mathews, Willrich, and Karam lack standing to claim a breach of contract based on the alleged failure to investigate their claims and reimburse them, as they admit that they were fully credited for the disputed transactions. *Id.* ¶¶ 104, 113, 126, 157; *see Becker v. Skype*, 2014

WL 556697, at *3 (N.D. Cal. Feb. 10, 2014) (customer who received a refund had no injury in fact and lacked Article III standing). Nor is there a "live controversy" where the relief Plaintiffs seek—reimbursement of the disputed transactions—has already been received and there is nothing more they are asking from this Court. *See Campos v. Fresno Deputy Sheriff's Association*, 441 F. Supp. 3d 945, 954 (C.D. Cal. Feb. 27, 2020) (case was moot where "the Court cannot give [plaintiff] any other effective relief").[8] As for account freezes, Plaintiffs Oosthuizen, Smith, and Karam do not allege their accounts were ever frozen, and Plaintiffs Mathews and Wilson allege their accounts are no longer frozen. CCAC ¶¶ 97–104, 114, 135, 146–58. In fact, as of April 30, none of the Plaintiffs have a blocked or frozen account. Gargagliano Decl., ¶ 4.[9] Thus, Plaintiffs lack standing to bring a breach of contract claim based on account freezes, and those claims are also moot.[10]

Plaintiffs also fail to state a claim for breach of contract. With respect to their first theory, concerning BANA's claim investigation and payment practices, Plaintiffs point to Section 9,

[8] Plaintiffs' claims are also unripe for those Plaintiffs who have not asked for reconsideration (which they were told they could do, ECF No. 76-16 (Daniels Decl., Ex. 4)), as BANA has made no "final decision" regarding these claims. *Phan v. Colvin*, 2014 WL 794255, at *6 (S.D. Cal. Feb. 25, 2014); *see Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122–26 (9th Cir. 2009) ("A claim is fit for decision if . . . the challenged action is final.") (internal quotation marks omitted); *Lin v. Gov't Employees Ins. Co.*, 2017 WL 2992442, at *3 (C.D. Cal. June 27, 2017) (breach of contract claim "never ripened" where plaintiff did not follow resolution protocol). These Plaintiffs' allegations are nothing more than "subjective apprehension" that BANA will not resolve the reexamination process in their favor. *Phan*, 2014 WL 794255, at *6. But if BANA were to determine that Plaintiffs' reopened claims should be paid—as it has already done for several Plaintiffs—"Plaintiffs will not have suffered any damages." *Burdge v. Analytics Consulting LLC*, 2015 WL 12732414, at *6 (D. Idaho Jan. 21, 2015). The "basic rationale" of the Article III ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Here, the question of how BANA might resolve a reconsideration request that has not been made is a purely "abstract" disagreement that does not belong before this Court.

[9] These facts are submitted in support of BANA's facial attack on subject matter jurisdiction and thus may be considered on a motion to dismiss. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

[10] In particular, Plaintiffs who have been credited and/or whose accounts are not frozen or blocked have no standing to seek injunctive relief as they face no "certainly impending" injury. *See Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018). BANA does not concede that any Plaintiff has standing to bring any other claim.

which sets forth BANA's "Zero Liability" Policy, and Section 11, which describes BANA's process for investigating claims. Chestnut Decl., Ex. 1, §§ 9, 11. Plaintiffs have not plausibly alleged a breach of either provision. Section 9 states that an EDD cardholder "may incur no liability for the unauthorized use of [their] Card," but the Plaintiffs who have been reimbursed (Oosthuizen, Mathews, Willrich, Karam) have no claim because they have incurred, as promised, "zero liability." CCAC ¶¶ 104, 113, 118, 126, 157. These Plaintiffs also fail to allege any damages resulting from the alleged breaches, as they have not suffered the loss of any funds.[11] *Menzel v. Metrolina Anesthesia Assocs., P.A.*, 66 N.C. App. 53, 59 (1984) (breach of contract properly dismissed where"[d]efendant presented no evidence that it sustained damages as a result of plaintiff's breach").[12] As for those Plaintiffs who do not allege that they sought reconsideration of their claim despite being told that they could contact BANA to do so (*see, e.g.*, ¶¶ CCAC 136–140 (Mosson), 166–169 (Rivera)), their claims also fail, as Section 9 conditions reimbursement on cardholders providing information as requested by BANA.[13]

Plaintiffs also fail to allege a breach of Section 11 of the Account Agreement. They assert that BANA failed to provide provisional credits, but those are required only if an investigation is not completed within 10 business days. Chestnut Decl., Ex. 1, § 11. Those Plaintiffs who allege that BANA's investigation took weeks allege that they were provisionally credited. CCAC ¶¶ 134,

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[11] Plaintiffs' general assertion that their contract damages should be measured by "an amount equal to the difference in the value of the banking services for which they provided valuable consideration and the banking services they received" (*id.* ¶ 266) is precluded by the Account Agreement, which expressly limits BANA's liability to the "face amount of any unauthorized card transaction" and provides that BANA is "not liable for any claims of special, indirect or consequential damages." Chestnut Decl., Ex. 1, § 9.

[12] The Account Agreement is governed by North Carolina law. Chestnut Decl., Ex. 1, § 18.

[13] *See* Chestnut Decl., Ex. 1, § 9 ("We may ask you for a written statement, affidavit or other information necessary to support your claim. If you do not provide the requested materials within the time requested or within a reasonable time if no date is stated, and we have no knowledge of the facts or other documentation to further investigate or confirm your claim, our zero liability policy may not apply."); *Farmers Bank, Pilot Mountain v. Michael T. Brown Distributors, Inc.*, 307 N.C. 342, 351 (1983) ("Use of the words 'whether' and 'if' obviously are words [] which give 'clear indication that a promise is not to be performed except upon the happening of a stated event.'") (citation omitted).

141. Other Plaintiffs allege they were notified within several days that BANA had completed its investigation, and so they assert, "[o]n information and belief," that BANA breached Section 11 by not conducting a good-faith investigation before denying their claims. *See, e.g.*, *id.* ¶¶ 101, 123, 130, 142. Such conclusory assertions cannot withstand a motion to dismiss. *See, e.g.*, *Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 694 (9th Cir. 2009) (allegations based "upon information and belief" are insufficient); *Solis v. City of Fresno*, 2012 WL 868681, at *8 (E.D. Cal. Mar. 13, 2012) ("In the post-*Twombly* and *Iqbal* era, pleading on information and belief, without more, is insufficient to survive a motion to dismiss for failure to state a claim.").

Plaintiffs' second theory—that BANA breached the Account Agreement by freezing their accounts—is a non-starter because the express language of the Agreement permits BANA to freeze accounts. *See* Chestnut Decl., Ex. 1, § 2 ("If we suspect irregular, unauthorized, or unlawful activities may be involved with your Account, we may 'freeze' (or place a hold on) the balance pending an investigation of such suspected activities."). Plaintiffs fail to allege any facts to show that BANA breached that provision in freezing their accounts. Plaintiffs' conclusory allegations are insufficient to defeat a motion to dismiss. *See Epstein*, 83 F.3d at 1140.

B. Plaintiffs Fail To Allege Any Implied Contract (Count 9).

Plaintiffs' attempt to create an "implied" contract to impose additional obligations not contained in the Account Agreement fails for two separate reasons. First, it is well-settled that "[t]here cannot be a valid, express contract and an implied contract, each embracing the same subject matter, existing at the same time." *Berkla v. Corel Corp.*, 302 F.3d 909, 918 (9th Cir. 2002); *see APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth.*, 110 N.C. App. 664, 675 (1993) ("[N]o contract will be implied where an express contract covers the same subject matter."). The "subject matter" here—BANA's servicing of EDD Debit Cards—is already governed by an "express contract"—the Account Agreement—thus foreclosing Plaintiffs' implied contract claim as a matter of law. Second, "an implied-in-fact contract requires an ascertained agreement of the parties." *Unilab Corp. v. Angeles-IPA*, 244 Cal. App. 4th 622, 636 (2016). Plaintiffs assert that BANA had an implied contractual obligation to take "reasonable steps" to protect their accounts, including by issuing chip cards. *See, e.g.*, CCAC ¶¶ 268, 270. But Plaintiffs allege no facts showing BANA's

assent to any such obligations. *See Benton v. Baker Hughes*, 2013 WL 3353636, at *7 (C.D. Cal. June 30, 2013) (dismissing claim for breach of implied contract where no "mutual assent").

C. Plaintiffs Have Not Stated A Claim For Breach of the Implied Covenant of Good Faith and Fair Dealing (Count 10).

Plaintiffs allege that BANA breached the implied covenant of good faith and fair dealing in the Account Agreement by (1) failing to "safeguard" EDD benefits, including by issuing magnetic strip rather than chip cards; (2) failing to ensure "effective" customer service, (3) failing to warn or notify Plaintiffs and Class Members of unauthorized use, (4) failing to investigate unauthorized transaction claims or provide provisional credits, and (5) freezing accounts without a "reasonable basis" and without providing means to contest the freeze. CCAC ¶ 277. These allegations fail, for a number of reasons.

First, Plaintiffs cannot use the implied covenant to impose new obligations that go beyond or contradict the Account Agreement. *N.C. Mail Haulers & Postal Lab. Loc. 8001, Am. Postal Workers Union, AFL-CIO v. E. Coast Leasing, Inc.*, 2006 WL 3068497, at *7 (M.D.N.C. Oct. 27, 2006) ("implied covenant cannot add new obligations to [] agreement [as] it only governs the existing ones"); *Chesson v. Rives*, 2016 WL 7018529, at *7 (N.C. Super. Nov. 30, 2016) (plaintiffs cannot use "the implied covenant to vary the terms of [the] express provision[s] in the [Account Agreement]"). Thus, Plaintiffs cannot use the implied covenant to manufacture an obligation to issue chip cards, provide a certain level of customer service, or provide warnings to cardholders, where the Account Agreement contains no such requirements. Similarly, Plaintiffs' claim that BANA failed to provide a "reasonable means" for contesting or reversing account freezes, or was obligated to freeze accounts "only to protect [them] from third-party fraud," CCAC ¶¶ 276, 277, is an improper use of the implied covenant to expand the Account Agreement, which does not require any measures for unfreezing and expressly permits BANA to freeze accounts if it "suspect[s] irregular, unauthorized, or unlawful activities." Chestnut Decl., Ex. 1, § 2; *see Gilmore v. Garner*, 157 N.C. App. 664, 667 (2003) ("No meaning, terms, or conditions can be implied which are inconsistent with the expressed provisions.") (alterations and citation omitted).

Second, Plaintiffs cannot bring an implied covenant claim based on the same allegations

as those underlying their breach of contract claim. *Biosignia, Inc. v. Life Line Screening of Am., Ltd.*, 2014 WL 2968139, at * 5 (M.D.N.C. July 1, 2014) ("[A] claim for breach of the covenant of good faith and fair dealing based on facts identical to those supporting a breach of contract claim should not be pursued separately."); *Rezapour v. Earthlog Equity Grp., Inc.*, 2013 WL 3326026, at *4 (W.D.N.C. July 1, 2013) (dismissing implied covenant claim as "Plaintiffs' allegations are duplicative of Plaintiffs' allegations of breach of contract elsewhere in the complaint"). Thus, Plaintiffs cannot bring an implied covenant claim based on claims investigations or account freezes as those allegations form the basis of Plaintiffs' contract claim.[14]

II. PLAINTIFFS HAVE NOT STATED A CLAIM UNDER EFTA/REG E (COUNT 1).

Plaintiffs allege that BANA violated EFTA and Reg E by failing to investigate their claims and provisionally credit their accounts, and by subjecting them to more than the maximum amount of liability permitted for unauthorized transactions. CCAC ¶¶ 193, 196. Section 1693f of EFTA sets forth the procedures that financial institutions must follow in investigating a consumer's claims of unauthorized transactions, including the issuance of provisional credit if the investigation is not completed within ten business days. 15 U.S.C. § 1693f; *see also* 12 C.F.R. § 1005.11. Section 1693g limits consumer liability for unauthorized transactions to $50 or less in most instances. 15 U.S.C. § 1693g; *see also* 12 C.F.R. § 1005.6. Plaintiffs' EFTA/Reg E claim falls short for a number of reasons.

First, as with the contract claim, Plaintiffs who have been fully credited lack standing because they have incurred no liability for the disputed transactions (not even the amount of liability permitted by EFTA and Reg E). *See* 15 U.S.C. § 1693g; 12 C.F.R. § 1005.6; *see also supra* at pp. 6–7. Nor can they point to alleged deficiencies in the investigation of their claims to create standing in the absence of any concrete injury. *Gunn v. Thrasher, Buschmann & Voelkel,*

[14] *Compare* CCAC ¶ 265 (asserting breach of contract based on alleged failure to "timely investigate and resolve [Plaintiffs'] fraud claims" and "to provide [Plaintiffs] with provisional credit when the Bank's investigation into their fraud claims exceeds 10 business days") *with id.* ¶ 277 (asserting breach of covenant based on alleged failure to "timely or adequately process and investigate EDD Debit Cardholders' claims regarding unauthorized transactions" and "to extend provisional credit in cases where EDD Debit Cardholders' fraud claims are not timely resolved").

P.C., 982 F.3d 1069, 1072 (7th Cir. 2020) (procedural violation of the Fair Debt Collection Practices Act without a concrete injury did not confer standing). Their claims are moot for the same reasons. As for Plaintiffs who have not been credited and have not sought reconsideration, their EFTA/Reg E claims suffer from the same ripeness issues as their contract claims. *See supra* n. 8.

Second, Plaintiffs have not adequately pleaded an EFTA/Reg E violation. They allege no facts to support their assertion that BANA failed to investigate their claims, instead relying on speculation ("information and belief") that BANA did not conduct a good-faith investigation simply because the claim was denied, sometimes shortly after it was filed. *See, e.g.*, CCAC ¶¶ 101, 109, 123, 130, 141–142. Allegations made "on information and belief" are not sufficient to withstand a motion to dismiss. *See Vivendi*, 586 F.3d at 694; *Solis*, 2012 WL 868681, at *8. Accordingly, Plaintiffs' claim for violation of section 1693f must be dismissed. *See Chen v. Bank of Am., N.A.*, 2019 WL 9633650, at *7–8 (C.D. Cal. Oct. 29, 2019) (dismissing claim where plaintiff alleged that "the Bank 'failed to investigate in good faith the fraudulent transactions,'" but "does not allege details establishing any bad faith on [the Bank]'s part"); *cf. DeWitt v. Cal. Citizens Redistricting Comm'n*, 2016 WL 3049732, at *3 (N.D. Cal. May 31, 2016), *aff'd*, 705 F. App'x 594 (9th Cir. 2017) (dismissing claim where plaintiff alleged "no more than conclusory allegations" that the Secretary of State failed to investigate).

Further, "EFTA and its implementing regulation contain specific notice requirements with which the consumer must comply before the financial institution is required to take action." *Ghalchi v. U.S. Bank, N.A.*, 2015 WL 12655402, at *8 (C.D. Cal. Jan. 8, 2015). That notice must include, among other things, reasons "why the consumer believes an error exists." 12 C.F.R. § 1005.11(b)(1)(iii). Thus, where Plaintiffs allege only that they "presented evidence over the phone regarding the unauthorized transactions" (*e.g.*, CCAC ¶ 130[15]), that vague statement is

[15] *See also id.* ¶¶ 100 ("made a fraud claim"); 108 ("made a claim"); 117 ("followed up with the Bank"); 120–22 ("reported it" and reviewed charges with Bank representative); 134 ("approximately $2,600" allegedly stolen); 138 ("reported the fraudulent charges"); 141 ("reported these transactions to the Bank and submitted a fraud claim"); 147 ("reported the transactions, and submitted a fraud claim"); 160 ("report[e]d] these unauthorized transactions"); 167 ("submit[ted]

insufficient to plead an EFTA violation. *See Ghalchi*, 2015 WL 12655402, at *8 (dismissing plaintiff's EFTA claim where plaintiffs' "description of her notice to Defendant only indicates that she 'notified' Defendant of 'unauthorized withdrawals' from her Checking Account"); *Shapiro v. Am.'s Credit Union*, 2013 WL 5373269, at *2 (W.D. Wash. Sept. 25, 2013), *aff'd*, 650 F. App'x 447 (9th Cir. 2016) (dismissing Reg E claim with prejudice where plaintiff "presented no evidence that [he] notified [defendant] with sufficient particularity to constitute a proper EFTA 'notice'" because he did not allege he provided defendant with "the amount of the error or the reasons for his belief that an error has occurred"). The fact there are a number of Plaintiffs does not excuse any of them from properly stating their individual claim in detail.

III. PLAINTIFFS HAVE NOT STATED A DUE PROCESS CLAIM (COUNTS 2 & 3).

A plaintiff seeking relief under 42 U.S.C. § 1983 for violation of the United States Constitution must show that she was "deprived of a right secured by the Constitution or laws of the United States," and that "the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). The requirements to show a violation of the California Constitution are the same. *Kruger v. Wells Fargo Bank*, 11 Cal.3d 352, 356 (1974). Here, Plaintiffs have not adequately alleged that BANA was acting as a state actor when it froze their accounts, nor have they sufficiently alleged that due process would require notice and a pre-deprivation hearing under these extraordinary circumstances.[16]

A. Plaintiffs Have Not Alleged Facts Sufficient to Establish That Bank of America Is A State Actor.

Plaintiffs assert that BANA was a state actor—a requirement in order to sue BANA for a due process violation—because the bank performed a "function that is both traditionally and exclusively governmental" and engaged in a "joint undertaking" with the state. CCAC ¶¶ 35, 206. Both of these arguments are meritless.

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a claim disputing the transaction"); 171 ("submitted a claim disputing the fraudulent transactions"); 177 ("report[ed] the unauthorized transaction").

[16] In addition, Plaintiffs Oosthuizen, Smith, and Karam have not stated any due process claim because they do not allege that their accounts were ever frozen. *See* CCAC ¶¶ 97–104, 146–58.

No Public Function*:* A public function is one "traditionally exclusively reserved to the State"; "very few" functions satisfy this standard. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978). Plaintiffs have failed to allege any facts that would transform BANA's servicing of their debit card accounts—a classic function of a private bank—into a function that is both traditionally and exclusively governmental. *Hester v. Regions Bank*, 2010 WL 2232158, at *5 (M.D. Ala. June 3, 2010) ("[T]he actions in question are the freezing of private bank accounts, and the transfer of funds, which are not traditionally the exclusive prerogative of the state."). It matters not that the prepaid card accounts are used to distribute public benefits; merely "serv[ing] the public does not make [a private actor's actions] state action." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

Plaintiffs nonetheless assert that the *effect* of the act in question, the account freeze, was to "cut[] off their access" to already-issued benefits, and "suspend[] their receipt of any future EDD benefits to which they may be entitled." CCAC ¶ 208. But if a private banking function became a governmental function simply because it affected privately-owned funds that originated from the State, any bank would become a state actor merely by allowing government employees to deposit their paychecks, which is inconsistent with the Supreme Court's holding that "very few" functions are public functions. Further, Plaintiffs' own allegations undercut their assertions that account freezes somehow suspend future benefits, as they acknowledge that they can choose to receive checks from EDD, and some of them already have. *See, e.g.*, *id.* ¶¶ 79, 118, 174, 183.

No Joint Undertaking: To be deemed a state actor due to joint action, BANA's purportedly unconstitutional acts must be "inextricably intertwined with those of the government." *Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1167 (9th Cir. 2021) (internal quotations omitted). Here, however, Plaintiffs allege that BANA's actions were *not* endorsed by the State. CCAC ¶ 37 (alleging that BANA freezes accounts "regardless of whether EDD itself has raised any question"). Actions taken independently of the State do not demonstrate a joint undertaking. *See Sullivan*, 526 U.S. at 52 (private insurers not state actors where state "authorizes, but does not require" withholding of payments); *Pasadena*, 985 F.3d at 1171 (private club not a state actor where City did not participate in the club's allegedly unconstitutional cancellation of a speaking event); *Brunette v. Humane Soc'y of Ventura Cnty.*, 294 F.3d 1205, 1212 (9th Cir. 2002)

(private party and a "quasi-public" entity "acted independently" where neither "assisted the other in performance of its separate and respective task").

Plaintiffs are also wrong in asserting that the EDD Agreement creates a joint undertaking. "[M]erely contracting with the government does not transform an otherwise private party into a state actor." *Pasadena*, 985 F.3d at 1170; *see Kohn*, 457 U.S. at 841 (private corporation whose business depended primarily on state contracts did not become a state actor solely because of its "significant or even total engagement in performing public contracts"); *Black by Black v. Indiana Area Sch. Dist.*, 985 F.2d 707, 710–711 (3d Cir. 1993) (contractor and employees not "state actors" in carrying out state-sponsored program with state compensation). The revenue-sharing arrangement in the EDD Agreement does not meet the Ninth Circuit's "significant financial integration" standard, which requires a showing that the private entity's financial success "depends" on EDD's revenue sharing, or vice versa. *See Pasadena,* 985 F.3d at 1170 (contractor's maintenance services at Air Force base were "most certainly not an indispensable element in the Air Force's financial success"); *Brunette*, 294 F.3d 1213–14 (private news company did not "render[] any service indispensable to the Humane Society's continued financial viability"). Rather, where Plaintiffs allege only that the EDD Agreement provides for an "exchange of mutual benefits" (CCAC ¶ 39)—as required in any contract supported by consideration—these allegations "fall[] far short of creating the substantial interdependence legally required to create a symbiotic relationship." *Brunette*, 294 F.3d at 1214.

B. Plaintiffs Have Not Alleged Any Due Process Violation.

Even if BANA somehow were a state actor, Plaintiffs have failed to adequately allege any due process violation. The scope of procedural protections required by due process depends upon the "particular situation" or circumstances at issue. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Plaintiffs have failed to allege any facts to show that notice or additional procedures are required where an account is being temporarily frozen to investigate "suspect[ed] irregular, unauthorized, or unlawful activities," Chestnut Decl., Ex. 1, § 2. The Supreme Court has held that "[a]n important government interest, accompanied by substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the

opportunity to be heard until after the initial deprivation." *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988) (citing cases) (state's interest in maintaining public confidence in bank management justifies absence of pre-deprivation hearing before removing bank manager). Here, BANA and the State have a compelling interest in preventing fraud, and it is not unreasonable to freeze accounts without advance notice to "avoid the risk that [the cardholder] would dissipate his assets or attempt to put them beyond the government's reach." *Spiegel v. Ryan*, 946 F.2d 1435, 1440 (9th Cir. 1991). Providing advance notice under these circumstances would simply tip off fraudsters to abscond with the funds before the freeze took effect, potentially putting billions of additional dollars into the hands of criminals who have already swindled billions from the state.[17]

IV. PLAINTIFFS FAIL TO STATE ANY CLAIM AS "THIRD-PARTY BENEFICIARIES" UNDER THE EDD AGREEMENT (COUNTS 12 & 13).

As a threshold matter, Plaintiffs cannot succeed on their claim for breach of the EDD Agreement, or breach of the implied covenant of good faith and fair dealing in that agreement, because they are not entitled to enforce the agreement or its implied covenant as a matter of law. "[A] person seeking to enforce a contract as a third party beneficiary must plead a contract which was made expressly for his [or her] benefit and one in which it clearly appears that he [or she] was a beneficiary." *The H.N. & Frances C. Berger Found. v. Perez*, 218 Cal. App. 4th 37, 43 (2013) (citation and internal quotations omitted). Plaintiffs allege that they are intended third party beneficiaries of the EDD Agreement because (i) they benefit from the performance of the contract, (ii) providing that benefit was a motivating purpose of the parties entering into the contract, and (iii) allowing them to enforce the EDD Agreement would be consistent with its objectives and the parties' reasonable expectations. CCAC ¶¶ 293. This theory fails, for several reasons.

First, "[p]arties that benefit from a government contract are generally assumed to be incidental beneficiaries, rather than intended beneficiaries, and so may not enforce the contract absent a clear intent to the contrary." *GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JPMorgan Chase Bank, Nat'l Ass'n*, 671 F.3d 1027, 1033 (9th Cir. 2012) . Courts "examine the

[17] To the extent Plaintiffs argue insufficient post-deprivation process, their own allegations show the ability to unfreeze their accounts. *See* CCAC ¶ 114 ("[T]he Bank unfroze [Mathews's] account."); *id.* ¶ 135 ("[Wilson] was able to get the Bank to unfreeze his account.").

'precise language of the contract for a 'clear intent' to rebut the presumption that the [third parties] are merely incidental beneficiaries.'" *Id.* at 1033–34. No such intent is evident in the EDD Agreement, which specifies that services are provided "for the EDD." Chestnut Decl., Ex. 2, at 2.

Second, it is not enough for Plaintiffs to simply assert that because they received a benefit, that must have been a "motivating purpose" of the EDD Agreement. The California Supreme Court rejected a similar argument in affirming dismissal of a breach of contract claim in *Goonewardene v. ADP, LLC*, holding that an employee was not a third-party beneficiary of her employer's contract with the payroll company that calculated and issued her paychecks—even though she, like Plaintiffs, received money from those services—as the "relevant motivating purpose of the contract is simply to assist the employer in the performance of its required tasks, not to provide a benefit to its employees with regard to the amount of wages they receive." 6 Cal. 5th 817, 837–841 (2019). Similarly, here, the "relevant motivating purpose" of the EDD Agreement is to assist EDD with its obligation to distribute benefits, not to enrich those who receive the benefits (who would receive them regardless of how EDD chose to distribute them).

Third, allowing Plaintiffs to sue for breach of the EDD Agreement would not be "consistent with the objectives of the contract and the reasonable expectations of the contracting parties," *id.* at 821, particularly as each Plaintiff is a party to an Account Agreement with BANA. *See Cleveland v. Ludwig Inst. for Cancer Rsch. Ltd.*, 2020 WL 3268578, at *9–10 (S.D. Cal. June 17, 2020) (applying *Goonewardene* to dismiss third-party beneficiary claim, as plaintiffs could sue "under their own individual employment contracts").

Even if EDD cardholders were deemed to be third-party beneficiaries entitled to enforce the EDD Agreement on top of their own Account Agreement with BANA, Plaintiffs have not sufficiently alleged a breach of the EDD Agreement. Plaintiffs baldly assert, for example, that BANA breached the EDD Agreement by "failing to issue EDD Debit Cards that incorporate EMV chip technology." CCAC ¶ 295. But EDD confirms that it chose magnetic strip technology, *supra* at n. 2, and the contract—which incorporates EDD's own RFP—requires magnetic strip technology with no mention of chips. Chestnut Decl., Ex. 2, at 5 (Req. #323). Plaintiffs' remaining

allegations fail to identify which provisions of the EDD Agreement were breached[18]—nor could they, particularly with respect to their customer service allegations, as the EDD Agreement was amended in 2020 to excuse compliance with a number of customer service requirements, such as wait times for calls, in light of the pandemic. Chestnut Decl., Ex. 3.

V. PLAINTIFFS HAVE NOT STATED A CLAIM FOR NEGLIGENCE (COUNT 7).

Plaintiffs allege that BANA acted negligently by (1) failing to issue chip cards and "protect" them from fraudulent third parties, (2) failing to provide "effective" customer service, and (3) failing to adequately investigate and provisionally credit their claims of unauthorized transactions. CCAC ¶ 253. This claim fails for three independent reasons.

First, this claim is barred by the economic loss doctrine, which generally limits liability for negligence and strict liability to damages for physical injuries. *See Widjaja v. JPMorgan Chase Bank*, 2020 WL 2949832, at *8 (C.D. Cal. Mar. 31, 2020) ("[P]laintiffs may recover in tort for physical injury to person or property, but not for 'purely economic losses that may be recovered in a contract action.'") (quoting *Lusinyan v. Bank of Am., N.A.*, 2015 WL 12777225, at *4 (C.D. Cal. May 26, 2015)). By contrast, economic losses "are primarily the domain of contract and warranty law or the law of fraud, rather than of" tort. *S. Cal. Gas Leak Cases*, 7 Cal. 5th 391, 402 (2019). The economic loss doctrine thus bars a tort claim against a debit card provider based on harm allegedly caused by the company's lax security procedures which allowed "hackers to commit theft from multiple debit and credit card accounts." *Smith v. Visa U.S.A., Inc.*, 2011 WL 2709819, at *1–2 (N.D. Cal. July 12, 2011); *see also Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*, 2016 WL 6523428, at *12 (S.D. Cal. Nov. 3, 2016) (economic loss doctrine bars tort claim based on defendant's failure to exercise reasonable care in securing a plaintiff's personal information from hackers). It likewise bars a tort claim against a bank based on improper withdrawals from an account. *See Barvie v. Bank of Am., N.A.*, 2018 WL 4537723, at *5 (S.D.

[18] *See Ironshore Specialty Ins. Co. v. 23andMe, Inc.*, 2018 WL 5316173, at *2 (N.D. Cal. Oct. 26, 2018) ("23andMe does not identify which provision or provisions of the policy it believes Ironshore breached… 23andMe thus has failed to allege facts sufficient to make out a plausible claim for breach of contract.").

Cal. Sept. 21, 2018). Here, Plaintiffs assert only economic losses—the loss of their funds—for the three predicate failures under Count 7. CCAC ¶ 259. Under the economic loss rule, these allegations are insufficient to support Plaintiff's negligence claims as a matter of law. *See, e.g.*, *Kalitta Air, L.L.C. v. Cent. Tex. Airborne Sys., Inc.*, 315 F. App'x. 603, 605 (9th Cir. 2008).

Second, the Consolidated Complaint does not adequately allege any tort duty owed by BANA to the Plaintiffs. *See Ruiz v. Gap, Inc.*, 380 F. App'x 689, 691 (9th Cir. 2010) (duty is a required element of negligence claim). To begin with, BANA was retained by EDD to distribute EDD funds to persons identified by EDD; under these circumstances, BANA owes no tort duty of care to those persons. *See Goonewardene*, 6 Cal. 5th at 837–41 (company hired by employer to administer payroll did not owe a duty of care to employees).

Rather, the scope of BANA's duties is governed by the Account Agreement, as "[t]he relationship between the two is not fiduciary, but rather is contractual in nature." *Simi Mgmt. Corp. v. Bank of Am., N.A.*, 930 F. Supp. 2d 1082, 1100 (N.D. Cal. 2013). Plaintiffs must therefore "tie [their] alleged breaches . . . to the duties arising out of the contractual basis of the Bank-depositor relationship." *Across Am., Inc. v. Bank of Am., N.A.*, 2018 WL 5906674, at *4–5 (C.D. Cal. Sept. 24, 2018); *see also Summit Fin. Holdings, Ltd. v. Continental Lawyers Title Co.*, 27 Cal. 4th 705, 707 (2002) (declining to find escrow holders had duty to assignee). The Account Agreement, however, does not include any duty to issue chip cards or to provide a certain level of customer service. *See* Chestnut Decl., Ex. 1. As for Plaintiffs' claim that BANA acted negligently in investigating their allegedly unauthorized transactions, that claim necessarily fails because "[t]he failure to perform a contractual obligation is never a tort unless it constitutes a failure to perform an independent legal duty." *See, e.g., Valenzuela v. ADT Sec. Services, Inc.,* 820 F. Supp. 2d 1061, 1071 (C.D. Cal. 2010) (internal quotations and citations omitted).

Third, even if BANA somehow owed broad duties untethered to the parties' contractual relationship, Plaintiffs do not adequately allege that any breach of those duties caused any alleged harm to them. *See Ruiz*, 380 F. App'x at 691. For example, Plaintiffs allege that they received magnetic strip cards and their accounts were compromised—but they do not allege facts to establish, as to each Plaintiff, that the magnetic strips caused the alleged fraud. Plaintiffs cannot

rely on conclusory allegations when they have offered no facts to establish a chain of causation. *Asarco*, 2011 WL 6182123, at *2 ("'[C]onclusory allegations of law and unwarranted influences are insufficient to defeat a motion to dismiss for failure to state a claim.'"). Such speculation is particularly insufficient here where some Plaintiffs allege that their cards were used for online transactions, such that a chip would have made no difference. *See, e.g.*, CCAC ¶¶ 85, 136, 146.

VI. PLAINTIFFS HAVE NOT STATED A CLAIM FOR VIOLATION OF THE CALIFORNIA CONSUMER PRIVACY ACT (COUNT 4) OR CALIFORNIA CUSTOMER RECORDS ACT (COUNT 5).

Plaintiffs fail to state a claim under the California Consumer Privacy Act ("CCPA") because that claim rests primarily on the novel and unsupported theory that BANA owed Plaintiffs a duty to issue EDD Debit Cards with EMV chip technology. CCAC ¶ 222. Contrary to Plaintiffs' assertion, the CCPA does not "impose[]" a duty on businesses, but rather incorporates "*existing* law requir[ing] a business . . . to implement and maintain reasonable security procedures and practices appropriate to the nature of the information . . . ." S. Judiciary Comm. Rep. on A.B. 375, at 5 (June 25, 2018) (citing Cal. Civ. Code § 1798.81.5(b) & (e)) (emphasis added). As relevant to this case, all the CCPA does is create a right of action where a business breaches an existing "duty to implement and maintain reasonable procedures." *See* Cal. Civ. Code § 1798.100(e). But, as discussed above, BANA owed no duty to issue cards with chips instead of magnetic strips. *See supra* at Section IV. Indeed, the EDD Agreement contradicts the notion of such a duty, as EDD specifically chose magnetic strip technology instead of chip cards. *Id*. Plaintiffs' CCPA claim asks the Court to create a new duty that would prohibit any institution in California from issuing cards without chip technology. There is no support for such a duty.

Plaintiffs assert three other theories in support of their CCPA claim: that BANA collected their personal information "in an unsecure manner," transmitted their personal information "in unencrypted or otherwise inadequately secured form or channels," and stored their information "on unsecured or inadequately secured data storage devices, including at EDD." CCAC ¶ 222. These theories also fail to support a claim for relief as Plaintiffs allege no facts to support them; for instance, Plaintiffs offer no factual basis regarding data storage devices at EDD. *See, e.g.*, *Fronda v. Staffmark Holdings, Inc.*, 2015 WL 3866860, at *2 (N.D. Cal. June 22, 2015) (granting

motion to dismiss where complaint provided "nothing more than vague, conclusory allegations unsupported by any facts"). Plaintiffs' claim for violation of the California Customer Records Act ("CRA") (Count 5) fails for the same reason, as Plaintiffs do not allege a single fact to support their assertion that there was a data breach requiring notification under the CRA. CCAC ¶¶ 235–36. They only suggest that a data breach *must* have occurred because account information was compromised even in cases where a debit card was never used. *See id.* ¶ 18. That is not enough to sustain a CRA claim, and the claim should also be dismissed. *See In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2017 WL 3727318, at *38 (N.D. Cal. Sept. 22, 2020) (dismissing CRA claim where complaint "does not contain any allegations about when Defendants discovered or were notified of the [alleged] breach").

VII. PLAINTIFFS HAVE NOT STATED A CLAIM FOR BREACH OF FIDUCIARY DUTY (COUNT 11).

Plaintiffs' claim for breach of fiduciary duty must be dismissed because it is well settled that "under ordinary circumstances the relationship between a Bank and its depositor . . . is not a fiduciary one." *Lawrence v. Bank of Am.*, 163 Cal. App. 3d 431, 437 (1985); *see Oaks Mgmt. Corp. v. Superior Court*, 145 Cal. App. 4th 453, 466 (2006) ("in ordinary banking transactions the 'bank is in no sense a true fiduciary'"); *Bernardo v. U.S. Bank Nat. Ass'n*, 2011 WL 3667475, at *4 (N.D. Cal. Aug. 22, 2011) ("[A] loan transaction, like all ordinary banking transactions, does not establish a fiduciary relationship between the borrower and lender."); *Simi Mgmt. Corp.*, 930 F. Supp. 2d at 1100 ("A bank has limited duties to its customers. The relationship between the two is not fiduciary, but rather is contractual in nature.").

Plaintiffs nevertheless assert that BANA owes a fiduciary duty because it is "charged with implementing EDD benefits programs." CCAC ¶ 285. They allege that their relationship with BANA is somehow different from an ordinary bank-customer relationship because BANA allegedly had "unbridled access to [their] personal, confidential, and financial information," and an "absolute ability" to control Plaintiffs' account data, and "delegated authority" to deny Plaintiffs access to EDD benefits. *Id.* These allegations are insufficient to transform the contractual relationship between BANA and EDD cardholders into a fiduciary one.

First, Plaintiffs have alleged no facts to show how access to personal or financial information—the type of information that customers routinely provide in order to obtain banking services—somehow renders BANA a fiduciary. If access to such information and the ability to control account data—which all financial institutions maintain for their customers—sufficed to create a fiduciary relationship, then all banks would be fiduciaries for all of their customers. But they are not. *Chazen v. Centennial Bank*, 61 Cal. App. 4th 532, 537 (1998) ("[B]anks are not fiduciaries for their depositors.") (internal quotation marks omitted).

Second, BANA did not have or exercise any authority to deny Plaintiffs their benefits. Indeed, Plaintiffs allege that EDD, not BANA, approved them for benefits, and that cardholders are able to receive checks from EDD even if BANA has frozen their accounts. *See, e.g.*, CCAC ¶¶ 79, 118, 174, 183. That BANA has the ability to freeze the accounts into which EDD benefits are deposited does not transform BANA into an arbiter of benefits eligibility, just as BANA would not become a customer's employer by freezing an account into which paychecks are deposited.

Because Plaintiffs have alleged nothing more than a standard banking relationship, without the "special circumstances" that would give rise to a fiduciary relationship, *Oaks Mgmt. Corp.*, 145 Cal. App. 4th at 570, Plaintiffs' fiduciary duty claim must be dismissed.

VIII. PLAINTIFFS HAVE NOT STATED A CLAIM UNDER THE CALIFORNIA UNFAIR COMPETITION LAW (COUNT 6).

Plaintiffs assert that BANA's conduct violated California's Unfair Competition Law ("UCL"), which prohibits "three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent." *Davis v. HSBC Bank Nev, N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012); CCAC ¶¶ 95–101. These allegations are meritless as well.

A. Plaintiffs Have Not Adequately Alleged "Unlawful" Acts.

As an initial matter, Plaintiffs' claim under the "unlawful" acts and business practices prong of the UCL fails because they have not adequately alleged any violation of law. *Lopez v. Apple, Inc.*, 2021 WL 823122, at *12 (N.D. Cal. Feb. 10, 2021) (prong prohibits business practices that are "forbidden by law"). Plaintiffs cannot base their UCL claim on Due Process, EFTA/Reg E, CCPA, or CRA, because they failed to adequately allege any of these primary violations, for

the reasons set forth above. *See supra* Sections II–IV. Their allegations regarding the Gramm-Leach-Bliley Act and California Financial Information Privacy Act are also insufficient, as Plaintiffs have not identified the particular provisions purportedly violated, nor have they pled with particularity the facts supporting the alleged violations. *See Baba v. Hewlett-Packard Co.*, 2010 WL 2486353, at *6 (N.D. Cal. June 16, 2010) (granting motion to dismiss where plaintiffs failed to "plead with particularity how the facts of this case pertain to that specific statute.").

B. Plaintiffs Have Not Adequately Alleged "Unfair" Acts.

Conduct cannot be "unfair" under the UCL if it was permitted by the plain terms of the parties' contract, as "the unfairness prong of [the UCL] does not give the courts a general license to review the fairness of contracts." *Roots Ready Made Garments Co., W.L.L. v. Gap, Inc.*, 405 F. App'x 120, 122–23 (9th Cir. 2010) (quotations and citations omitted); *Quattrocchi v. Allstate Indem. Co.*, 2018 WL 347779, at *2 (E.D. Cal. Jan. 9, 2018), *aff'd*, 775 F. App'x 330 (9th Cir. 2019). Thus, Plaintiffs cannot sustain their UCL claim based on allegations about account freezes, CCAC ¶ 246, which are expressly authorized by the Account Agreement. *See supra* at p. 9. Nor have they alleged that BANA's claims investigation practices were "unfair," where those practices complied with the Account Agreement. *Id*. Likewise, Plaintiffs have not adequately alleged that BANA's issuance of magnetic strip cards was "unfair," CCAC ¶ 246, as EDD specifically chose to require magnetic strip technology in the EDD Agreement. *See supra* at Section IV.

C. Plaintiffs Have Not Alleged "Fraudulent" Acts.

Plaintiffs allege that BANA violated the "fraudulent" prong of the UCL by making allegedly false representations that prepaid debit cards are a "[f]aster, easier and more secure" way to receive benefit payments, that cardholders would incur "Zero Liability" for unauthorized transactions, that it would provide "dedicated customer service representatives" "available 24 hours a day, 7 days a week," and that it would issue provisional credits. CCAC ¶ 249. To state a claim under the UCL's "fraudulent" prong, plaintiffs must plead actual reliance on the alleged misrepresentation, and "allege that they actually read the challenged representations." *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1220 (N.D. Cal. 2014); *In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1111 (N.D. Cal. 2015). Those allegations must satisfy Rule 9(b)'s heightened pleading

standard. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003).

Plaintiffs do not even attempt to make this showing, as they do not allege that they read or relied upon any of the alleged misrepresentations; they simply allege that the purportedly false representations "were likely to deceive, and did deceive" them. CCAC ¶ 249. These conclusory allegations do not adequately allege a UCL violation based on fraud, as they fail to establish that any Plaintiff actually read and relied upon the alleged misrepresentations. *Williams v. Apple, Inc.*, 449 F. Supp. 3d 892, 913 (N.D. Cal. March 27, 2020) (dismissing UCL claim as complaint "does not allege that Plaintiffs viewed Apple's alleged misrepresentations regarding iCloud storage"); *Phillips v. Apple Inc.*, 2016 WL 1579693, at *7 (N.D. Cal. Apr. 19, 2016) (no reliance where plaintiffs failed to plead that they "read or relied on [the] statement when choosing" to download and use defendant's software); *Coleman-Anacleto v. Samsung Elecs. Am., Inc.*, 2016 WL 4729302, at *17 (N.D. Cal. Sept. 12, 2016) (dismissing UCL claim where "the complaint does not allege that Plaintiff relied upon, or saw, any misrepresentations by Defendant").

Moreover, the Consolidated Complaint does not allege facts to show that BANA "did not intend to perform" its contractual obligations at the time it entered into the Account Agreement, as required to state a fraud claim based on a contractual promise. *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 159 (1991); *see Sanchez v. Aurora Loan Services, LLC*, 2014 WL 12589660, at *26 (C.D. Cal. 2014) (dismissing UCL claim as plaintiff "failed to allege facts showing that [the defendant] never intended to abide by the terms of [its] promise"); *U.S. Bank for Registered Holders of ML-CFC Com. Mortg. Trust 2007-7 v. Miller*, 2013 WL 12183652, at *7 (C.D. Cal. May 8, 2013) ("An alleged promise to do or not do something in the future is not actionable fraud . . . unless the party makes the promise with no present intention of performing.").

D. THE UCL Does Not Provide for the Damages Sought by Plaintiffs.

Plaintiffs' UCL claim must also be dismissed because the UCL is equitable in nature and provides for only two forms of relief: injunctive relief and restitution. *See Hyp3r Inc. v. Mogimo Inc.*, 2017 WL 11515712, at *4 (N.D. Cal. Nov. 8, 2017); *see also Haynish v. Bank of Am., N.A.*, 284 F. Supp. 3d 1037, 1052 (N.D. Cal. 2018). With respect to the first, Plaintiffs' proposed injunction (CCAC ¶ 251) is just a just a thinly disguised effort to shoehorn a damages claim, which

is not permitted by the UCL, into a request for injunctive relief. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003) ("A UCL action is equitable in nature; damages cannot be recovered."); *Herskowitz v. Apple, Inc*., 301 F.R.D. 460, 482 (N.D. Cal. 2014) ("[A] plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money."). In any event, the availability of monetary damages for Plaintiffs' claims means they have failed to demonstrate, as required by the UCL, that there is no adequate remedy at law. *See Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020); *Huynh v. Quora, Inc.*, 2020 WL 7495097, at *19 (N.D. Cal. Dec. 21, 2020) (granting summary judgment for defendant where plaintiff "fails to allege or demonstrate that any remedy at law is inadequate" and brought other damages claim based on same alleged conduct).

Plaintiffs' claim for restitution also fails because their funds were allegedly taken by third party criminals, not by BANA. *See, e.g.*, CCAC ¶¶ 85, 97, 116, 129, 146, 166, 176. It is not enough for Plaintiffs to allege that BANA receives a benefit from not paying claims, *id.* ¶ 70, as this theory could transform any claim for money damages into a claim for restitution. The UCL does not allow for the disgorgement of profits where "the money sought to be disgorged was not taken from plaintiff." *Korea Supply Co.*, 29 Cal. 4th at 1144–45. The account freezes also do not provide any basis for restitution, as Plaintiffs do not allege that BANA takes their funds when it freezes an account, only that Plaintiffs are unable to access the funds while their accounts are frozen. CCAC ¶¶ 73, 79, 114, 145. Thus, restitution is not an available remedy where Plaintiffs do not allege that BANA benefited financially from taking their money. *See In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 970 (S.D. Cal. 2012) ("Sony did not benefit financially from the Data Breach, nor did Sony receive monies paid by Plaintiffs for Third Party Services."); *Chose v. Accor Hotels & Resorts (Maryland) LLC*, 2020 WL 759365, at *6 (N.D. Cal. Feb. 14, 2020) ("Plaintiff does not allege that she—or any other members of the putative class—actually paid Defendant any money.").

CONCLUSION

For all the foregoing reasons, BANA respectfully requests that the Court dismiss Plaintiffs' Consolidated Complaint with prejudice.

Dated: May 6, 2021

Respectfully submitted,

By: */s/ Yvonne W. Chan*

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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 Northern District of California by using the CM/ECF system on **May 6, 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: May 6, 2021 */s/ Yvonne W. Chan*
Yvonne W. Chan