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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE: BANK OF AMERICA
CALIFORNIA UNEMPLOYMENT
BENEFITS LITIGATION

Case No.: 21-md-2992-LAB-MSB

ORDER:

**(1) GRANTING IN PART
AND DENYING IN PART
MOTION TO DISMISS
MASTER CONSOLIDATED
COMPLAINT, [Dkt. 64];**

**(2) GRANTING IN PART
AND DENYING IN PART
REQUEST FOR JUDICIAL
NOTICE, [Dkt. 84-2]; and**

**(3) GRANTING REQUEST
FOR JUDICIAL NOTICE,
[Dkt. 90-1]**

This multi-district litigation arises from a wave of transaction fraud that targeted California’s public benefits programs in mid-2020. Numerous class and individual actions have been brought against Defendant Bank of America, N.A. (“BANA”) over its administration of California’s electronic benefits payment system. Those actions were transferred to this Court for consolidated pretrial

1 proceedings by the Judicial Panel on Multidistrict Litigation. (Dkt. 1). Following the
2 Court’s Case Management Order, (Dkt. 48), Plaintiffs filed a Master Consolidated
3 Complaint (“MCC”), (see Dkt. 72, MCC), which BANA now moves to dismiss in its
4 entirety. (Dkt. 84). BANA also filed a request for judicial notice in support of its
5 motion. (Dkt. 84-2). Plaintiffs oppose BANA’s motion and request for judicial
6 notice, (Dkt. 90, 90-2), and filed their own request for judicial notice in support of
7 their opposition, (Dkt. 90-1).

8 Having considered the parties’ submissions and the relevant law, the Court
9 **GRANTS IN PART** and **DENIES IN PART** BANA’s motion to dismiss; **GRANTS**
10 **IN PART** and **DENIES IN PART** BANA’s request for judicial notice; and **GRANTS**
11 Plaintiffs’ request for judicial notice.

12 **I. BACKGROUND**

13 **A. BANA’s Contract to Provide Public Benefits in California**

14 Bank of America, N.A., is a financial institution incorporated in Delaware and
15 headquartered in North Carolina. (MCC ¶ 35). In 2010, BANA entered into an
16 exclusive contract to provide electronic benefits payment services for the
17 California Employment Development Department (“EDD”). (*Id.* ¶ 39). EDD is the
18 state agency responsible for administering numerous benefits programs, including
19 providing unemployment insurance, pandemic unemployment assistance,
20 pandemic emergency unemployment compensation, disability insurance, and
21 paid family leave. (*Id.* ¶ 38). EDD extended BANA’s exclusive contract in 2015
22 and entered into the current BANA-EDD Contract. (*Id.* ¶ 42). The BANA-EDD
23 Contract expressly provides that the contracting parties entered into the
24 agreement “for the purpose of [BANA] establishing, operating and maintaining a
25 comprehensive Electronic Benefit Payment (EBP) service for the EDD.” (Chestnut
26 Decl., Ex. 2 at 6; Danitz Decl., Ex. B at 15).

27 Under the terms of the BANA-EDD Contract, approved applicants receive
28 periodic EDD benefit payments through prepaid debit cards (“EDD Debit Cards”)

1 issued and administered by BANA. (*Id.* ¶ 2). These cards are linked to individual
2 BANA deposit accounts. (*Id.*). EDD Debit Cards are the default means of receiving
3 EDD benefits, (*id.* ¶¶ 41, 47), and EDD presents them as the exclusive means of
4 receiving benefits payments, (*id.* ¶ 47 n.1). The cards issued by BANA use
5 magnetic stripe technology, which allows a cardholder to make payments by
6 swiping his or her card. (*Id.* ¶¶ 59, 69). Magnetic stripes, while once the industry
7 standard for debit cards, have more recently fallen out of favor because they are
8 easily readable and highly susceptible to misuse. (*Id.* ¶ 61). The current industry
9 standard for debit card security is the Europay, Mastercard and Visa (“EMV”) chip,
10 a technology that is substantially more secure than magnetic stripes. (*Id.*
11 ¶¶ 66–68). BANA has used EMV chips in corporate cards since 2011, and all
12 consumer debit cards since 2014, but didn’t use the technology in its EDD Debit
13 Cards. (*Id.* ¶¶ 64–65, 68–69).

14 BANA hired various subcontractors to assist it in completing its obligations
15 under the BANA-EDD Contract. (*Id.* ¶ 595). One of these subcontractors, TTEC
16 Holdings, Inc. (“TTEC”), provided customer service and ran call center operations
17 for BANA. (*Id.*). TTEC hired hundreds of employees without conducting
18 background checks. (*Id.*). These employees were granted access to Cardholders’
19 account and personal information. (*Id.*).

20 To receive an EDD Debit Card, BANA requires every EDD Cardholder to
21 disclose personal information and enter into a uniform written contract entitled
22 California Employment Development Department Debit Card Account Agreement
23 (“Account Agreement”). (*Id.* ¶ 71; see also Dkt. 90-3, Danitz Decl., Ex. A).¹ The
24

25
26 ¹ Both parties filed versions of the account agreement with their requests for
27 judicial notice. (See Dkt. 84-3, Chestnut Decl., Ex. 1 (BANA’s version); 90-3,
28 Danitz Decl., Ex. A (Plaintiffs’ version)). For the reasons discussed in the analysis
of Plaintiffs’ contract claim, the version submitted by Plaintiffs is incorporated by
reference into the MCC. See *infra* Section III.F.1.

1 Account Agreement details when funds become available and outlines BANA’s
2 right to place a “freeze” on a Cardholder’s account if BANA “suspect[s] irregular,
3 unauthorized, or unlawful activities.” (Danitz Decl., Ex. A § 2). The freeze may
4 continue until BANA completes an investigation. (*Id.*). The document also sets
5 forth detailed procedures Cardholders must follow to report unauthorized
6 transactions, (*id.* § 9), or errors in account statements, (*id.* § 11). These
7 procedures include BANA’s “zero liability” policy for unauthorized transactions,
8 which provides EDD Cardholders will incur no liability for unauthorized
9 transactions reported “within a reasonable time.” (*Id.* § 9, MCC ¶ 71). What
10 constitutes a “reasonable time” is determined at BANA’s sole discretion, but is no
11 less than 60 days. (Danitz Decl., Ex. A § 9; MCC ¶ 71). Cardholders must report
12 any other error within 60 days of the date BANA sends the statement on which
13 the error first appears. (Danitz Decl., Ex. A § 11; MCC ¶ 71). The Account
14 Agreement provides both a phone number and mailing address for Cardholders
15 to report unauthorized transactions or errors, and notes that “[t]elephoning is the
16 best way of keeping your possible losses down.” (Danitz Decl., Ex. A §§ 10–11;
17 MCC ¶ 71).

18 Once BANA receives notice of an error, the Account Agreement provides
19 that BANA “will determine whether an error occurred within 10 business days,”
20 but reserves the right to “take up to 45 days to investigate” if it “need[s] more time,”
21 in which case BANA promises to credit the Cardholder’s account within
22 “10 business days for the amount [of the reported] error, so that [the Cardholder]
23 will have the money” while BANA completes the investigation. (Danitz Decl., Ex. A
24 § 11; MCC ¶ 72).

25 **B. Fraud on EDD Debit Card Accounts and BANA’s Response**

26 In the spring of 2020, California’s unemployment rate increased
27 exponentially as a result of the COVID-19 pandemic and subsequent state and
28 county closure orders. (MCC ¶ 74). Since March 2020, EDD received at least

1 18.5 million claims for EDD benefits, and BANA issued more than 9 million EDD
2 Debit Cards to individuals found eligible for benefits. (*Id.* ¶ 75). During this time,
3 there was a marked increase in fraud targeting EDD Cardholders, with thousands
4 of benefits recipients experiencing substantial financial losses due to
5 unauthorized transactions. (*Id.* ¶¶ 76–77). Plaintiffs in this consolidated action
6 were among those affected by the fraud. (*See generally id.* ¶¶ 114–285 (Class
7 Plaintiffs’ allegations); 286–526 (individual Plaintiffs’ allegations)). Plaintiffs report
8 experiencing either: (1) the loss of account funds due to unauthorized
9 transactions, (*see, e.g., id.* ¶ 310); (2) fraud on their accounts, (*see, e.g., id.*
10 ¶ 292); or (3) account freezes, which prevented Plaintiffs from accessing their
11 EDD benefits, (*see, e.g., id.* ¶ 309).

12 Corresponding with the surge in fraud, BANA experienced a steep increase
13 in reports of unauthorized transactions and errors from EDD Cardholders,
14 including from Plaintiffs. Wait times on BANA’s customer service phone lines
15 increased substantially as the number of calls grew. (*Id.* ¶¶ 87–88, 99). Some
16 Plaintiffs waited on hold for hours, (*see, e.g., id.* ¶¶ 116–20), or had to call back
17 multiple days in a row to reach a customer service representative, (*see, e.g., id.*).
18 When Plaintiffs successfully reported unauthorized transactions, BANA often
19 denied the claims within one or two days using form letters. (*Id.* ¶¶ 89–91; *see,*
20 *e.g., id.* ¶¶ 130, 218). Some Plaintiffs were given “permanent” credits for stolen
21 funds, only to have those credits later reversed without warning or explanation.
22 (*Id.* ¶ 92; *see, e.g., id.* ¶¶ 127–35).

23 Starting in October 2020, BANA implemented a new policy of automatically
24 freezing the account of any EDD Cardholder who reported experiencing fraud,
25 without notice or explanation. (*Id.* ¶ 93). Many accounts were frozen for months;
26 some remain frozen. (*Id.* ¶¶ 94, 96).

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1 **C. Procedural History**

2 On January 14, 2021, Class Plaintiff Jennifer Yick commenced the class
3 action titled *Yick v. Bank of America, N.A.*, No. 3:21-cv-376, in the U.S. District
4 Court for the Northern District of California. (MCC ¶ 106). Eight additional class
5 actions were subsequently filed and consolidated with *Yick* on March 29, 2021.
6 (*Id.*). On April 1, 2021, the Class Plaintiffs in the *Yick* class action sought a
7 preliminary injunction enjoining BANA from automatically denying fraud claims
8 and freezing claimants accounts. The *Yick* court granted a preliminary injunction
9 on May 17, 2021, and provisionally certified a class of all EDD Cardholders who
10 call BANA to report unauthorized charges. (MCC, Ex. A). On June 1, 2021,
11 following negotiations between the parties, the *Yick* court entered a preliminary
12 injunction which: (1) barred BANA from considering the results of its Claim Fraud
13 Filter when investigating claims; (2) prohibited BANA from denying claims without
14 an investigation and providing the claimant with a written explanation; (3)
15 prohibited BANA from freezing any account based on the results of the Claim
16 Fraud Filter; (4) required BANA to reopen any claims previously denied based on
17 the results of the Claim Fraud Filter; and (5) required BANA to establish dedicated
18 toll-free numbers for Class Members seeking assistance with fraud claims or
19 frozen accounts. (*Id.*). Around that same time, numerous individuals initiated
20 actions against BANA for injuries stemming from the same alleged conduct.

21 On June 4, 2021, the Judicial Panel on Multidistrict Litigation transferred the
22 *Yick* class action and individually filed actions to this Court for consolidated pretrial
23 proceedings. (Dkt. 1). Plaintiffs filed the MCC on August 17, 2021. The MCC
24 includes the following claims:

- 25 1. Violation of the Electronic Funds Transfer Act, 15 U.S.C. §§ 1963 *et*
26 *seq.*, and Regulation E ,12 C.F.R. §§ 1005.1 *et seq.*;
- 27 2. Violation of the California Consumer Privacy Act, Cal. Civ. Code
28 §§ 1798.100 *et seq.*;

- 1 3. Violation of the California Customer Records Act, Cal. Civ. Code
- 2 §§ 1798.80 *et seq.*;
- 3 4. Violation of California’s Unfair Competition Law, Cal. Bus. & Prof.
- 4 Code §§ 17200 *et seq.*;
- 5 5. Negligence;
- 6 6. Negligent hiring, supervision, and retention;
- 7 7. Breach of contract;
- 8 8. Breach of implied contract;
- 9 9. Breach of the implied covenant of good faith and fair dealing;
- 10 10. Breach of fiduciary duty;
- 11 11. Third-party beneficiary breach of contract;
- 12 12. Third-party beneficiary breach of the implied covenant of good faith
- 13 and fair dealing;
- 14 13. Violation of the Due Process Clause of the Fourteenth Amendment of
- 15 the United States Constitution; and
- 16 14. Violation of the Due Process Clause of the California Constitution.

17 (*See generally* MCC). BANA now moves to dismiss the MCC in its entirety.
18 (Dkt. 84). BANA also filed a request for judicial notice in support of its motion.
19 (Dkt. 84-2). Plaintiffs oppose BANA’s motion and request for judicial notice.
20 (Dkt. 90, 90-2). They also filed a request for judicial notice support of their
21 opposition. (Dkt. 90-1).

22 **II. LEGAL STANDARD**

23 **A. Rule 12(b)(6): Failure to State a Claim**

24 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint.
25 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “To survive a motion to
26 dismiss, a complaint must contain sufficient factual matter, accepted as true, to
27 ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662,
28 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). A claim

1 is plausible if the factual allegations supporting it permit “the court to draw the
2 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*
3 The factual allegations need not be detailed; instead, the plaintiff must plead
4 sufficient facts that, if true, “raise a right to relief above the speculative level.”
5 *Twombly*, 550 U.S. at 545. The plausibility standard isn’t a “probability
6 requirement,’ but it asks for more than a sheer possibility that a defendant has
7 acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556).
8 Courts aren’t required to accept legal conclusions couched as factual allegations
9 and “formulaic recitation[s] of the elements of a cause of action” aren’t sufficient.
10 *Twombly*, 550 U.S. at 555. The Court accepts as true all facts alleged in the
11 complaint and draws all reasonable inferences in favor of the plaintiff. *Davis v.*
12 *HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012). Ultimately, a court
13 must determine whether the plaintiff’s alleged facts, if proven, permit the court to
14 grant the requested relief. *See Iqbal*, 556 U.S. at 666; Fed. R. Civ. P. 8(a)(2).

15 **B. Rule 12(b)(1): Lack of Standing**

16 A motion to dismiss for lack of standing is “properly raised in a Rule 12(b)(1)
17 motion to dismiss.” *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115,
18 1122 (9th Cir. 2010) (“[S]tanding . . . pertain[s] to federal courts’ subject matter
19 jurisdiction.”). To have standing to bring a suit in federal court, a plaintiff must
20 show: (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defenders of*
21 *Wildlife*, 504 U.S. 555, 560–61 (1992). To establish injury in fact, a plaintiff must
22 show she suffered “an invasion of a legally protected interest which is (a) concrete
23 and particularized . . . and (b) actual or imminent, not conjectural or hypothetical.”
24 *Id.* at 560 (internal marks and citations omitted).

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1 **III. DISCUSSION**

2 **A. Electronic Funds Transfer Act and Regulation E (Claim 1)**

3 The MCC's first claim alleges BANA violated the Electronic Funds Transfer
 4 Act ("EFTA"), 15 U.S.C. §§ 1963 *et seq.*, and Regulation E ("Reg E"), 12 C.F.R.
 5 §§ 1005.1 *et seq.*, by failing to comply with the required error resolution procedure.
 6 (MCC ¶¶ 533–45).² The EFTA is a federal consumer protection law "establishing
 7 the rights, liabilities, and responsibilities of participants in electronic fund and
 8 remittance transfer systems." 15 U.S.C. § 1693(a). The EFTA, together with its
 9 implementing regulation, Reg E, regulates electronic fund transfers which directly
 10 affect consumer accounts. § 1963(a)(7). Under § 1693f(a), which details the
 11 EFTA's error resolution procedures, when a consumer notifies a financial
 12 institution that the consumer believes an "error" has occurred in his or her account,
 13 the "financial institution shall investigate the alleged error, determine whether an
 14 error has occurred, and report or mail the results of such investigation and
 15 determination to the consumer within ten business days." § 1693f(a). The EFTA
 16 mandates specific steps the financial institution must take depending on the
 17 results of its investigation, as well as the time frames in which the steps must be
 18 taken. § 1693f(b)–(d).

19 **1. Sufficiency of Notice**

20 BANA first argues that Plaintiffs failed to provide notice sufficient to trigger
 21 BANA's obligations under the EFTA, 15 U.S.C. § 1693f, and Reg E, 12 C.F.R.
 22 § 1005.11. (Dkt. 84-1 at 17–18). A financial institution is only required to act if the
 23 consumer meets certain notice requirements. See 15 U.S.C. § 1693f(a); 12 C.F.R.
 24 § 1005.11(b). Crucially, the notice must identify a qualifying error as defined by
 25 the EFTA, 15 U.S.C. § 1693f(f), and Reg E, 12 C.F.R. § 1005.11(a). Additionally,
 26 the notice must: (i) be received by the financial institution no later than 60 days
 27

28 ² The EFTA claim is brought by all Plaintiffs. (See MCC at 236).

1 after the institution sends the documentation reflecting the error; (ii) “[e]nable[] the
2 institution to identify the consumer’s name and account number”; and
3 (iii) “[i]ndicate[] why the consumer believes an error exists and include[] to the
4 extent possible the type, date, and amount of the error.” 12 C.F.R.
5 § 1005.11(b)(1)(i)–(iii); see also 15 U.S.C. § 1693f(a)(1)–(3). Requests for
6 additional information or documentation don’t need to include the amount of the
7 error. 12 C.F.R. § 1005.11(b)(1)(iii).

8 i. Timely Notice

9 The EFTA requires consumers to report any alleged errors to a financial
10 institution within 60 days of the date the institution sends the written
11 documentation first reflecting the error. See *Camacho v. JPMorgan Chase Bank*,
12 No. 5:14-CV-04048-EJD, 2015 WL 5262022, at *3 (N.D. Cal. Sept. 9, 2015) (citing
13 15 U.S.C. § 1693f(a)). A complaint that doesn’t allege that a consumer provided
14 timely notice doesn’t state a claim under the EFTA. *Id.* at *4 (dismissing EFTA
15 claim when consumer didn’t notify bank within 60 days of receiving documentation
16 reflecting the error). At the pleading stage, a complaint must state sufficient facts,
17 construed in the light most favorable to the plaintiff, to plausibly allege timely
18 notice. *Id.* at *2, *4.

19 BANA argues several Plaintiffs fail to state claims under the EFTA because
20 they don’t sufficiently allege that timely notice was provided. (Dkt. 84-1 at 18). The
21 Court agrees in part, and holds that two groups of individual Plaintiffs haven’t
22 plausibly alleged providing timely notice. First, those individual Plaintiffs who have
23 failed to allege notifying BANA at all haven’t stated a claim under the EFTA. (See
24 MCC ¶¶ 302 (Christal Ayala); 325 (Randy Chase); 387 (Ivan Harris); 394 (Ruben
25 Hernandez); 399 (Terrance Howze); 407 (Robert Jaurigue, Jr.); 467 (Mykela
26 Raiff); 470 (Nehemiah Rima-Fleurima); 473 (Miguel Roa); 474 (Carmen
27 Robinson); 483 (Frankie Saldate); 485 (Timothy Schmitz); 488 (Jenna Silva);
28 505 (Thomas Turner); 526 (Christopher Zettlemyer)).

1 Second, those individual Plaintiffs who allege discovering and reporting
2 fraud more than 60 days after they would have plausibly been sent documentation
3 containing the error haven't plausibly alleged providing timely notice. The 60-day
4 notification period starts when the financial institution sends a consumer the
5 periodic statement which first reflects the error. See 15 U.S.C. § 1693f(b)(1)(i);
6 12 C.F.R. § 1005.11(b)(1)(i). Here, BANA provided Plaintiffs with monthly account
7 statements reflecting the previous month's transactions. (See, e.g., MCC ¶ 274).
8 Construing this allegation in the light most favorable to Plaintiffs, the 60-day period
9 started at the end of the month a statement was received. Any notification made
10 after the 60-day period was untimely, didn't trigger BANA's obligations under the
11 EFTA, and can't support a claim under the statute. (See MCC ¶¶ 312 (James
12 Brooks alleges fraud occurred in June 2020 and July 2020, but that he didn't
13 discover and report the fraud until January 2021, despite having access to his
14 account starting in July 2020); 422 (Ernie Loreda alleges fraud occurred in June
15 2020, but that he didn't discover and report the fraud until March 2021); 435
16 (Travis Middleton alleges fraud occurred in April 2020, but that he didn't discover
17 and report the fraud until December 2021); 491 (Denise Smith alleges fraud
18 occurred in November 2020, but that she didn't discover and report the fraud until
19 May 2021)).

20 BANA's motion to dismiss the MCC's EFTA claims as untimely is
21 **GRANTED** as to the individual Plaintiffs referenced above. Their EFTA claims are
22 **DISMISSED WITH LEAVE TO AMEND** for failure to provide timely notice.³

24 ³ BANA's motion to dismiss the EFTA claims as untimely is **DENIED** as to any
25 Plaintiff who alleges he or she attempted to call BANA to report fraud, but that
26 BANA never answered. (See, e.g., MCC ¶¶ 287 ("In March 2021, [Kobe Abbot]
27 attempted to report the fraud to Bank of America; however, Bank of America has
28 never answered a single call."); 472 ("In August 2020, [Israel Rivera] attempted to
report the fraud to Bank of America via phone. Bank of America has yet to respond

1 BANA also moves to dismiss Flouzel Paningbatan’s EFTA claim due to
 2 untimely notice. (Dkt. 84-1 at 18 (discussing MCC ¶ 451)). Paningbatan alleges
 3 fraud occurred in her account between May 2020 and October 2020, but that she
 4 didn’t discover and report the fraud to BANA until December 2020. (MCC ¶ 451).
 5 Construing this allegation in the light most favorable to Paningbatan, the latest
 6 she could have learned of the fraud was when she received her November 2020
 7 statement. Thus, the 60-day notification period would have expired in
 8 January 2021. The Court finds these allegations plausibly support the inference
 9 that Paningbatan’s notice was timely. BANA’s motion to dismiss Paningbatan’s
 10 EFTA claim as untimely is therefore **DENIED**. (See *also id.* ¶ 456 (Kenyon Perkins
 11 alleges fraud occurred between April 2020 and September 2020, but that he didn’t
 12 discover and report the fraud until December 2020)).

13 ii. Qualifying Error

14 BANA also argues that a number of individual Plaintiffs’ EFTA claims should
 15 be dismissed for failure to report an error as defined by the statute. (Dkt. 84-1).
 16 To trigger a financial institution’s obligations under the EFTA, consumers must
 17 identify a qualifying error—general allegations of fraud aren’t sufficient. See
 18 15 U.S.C. § 1693f(a); 12 C.F.R. § 1005.11(b). Qualifying errors include:
 19 “unauthorized electronic fund transfer[s],” 12 C.F.R. § 1005.11(a)(1)(i); “[t]he
 20 omission of an electronic fund transfer from a periodic statement,”
 21 § 1005.11(a)(1)(iii); “[t]he consumer’s request for documentation required by . . .
 22 § 1005.10(a) or for additional information or clarification concerning an electronic
 23 fund transfer, including a request the consumer makes to determine whether an
 24 error exists,” § 1005.11(a)(1)(vii). See *also* 15 U.S.C. § 1693f(f)(1), (3), (6) (EFTA
 25 _____
 26 to a single phone call.”)); see *also Jacobs v. Tenneco W., Inc.*, 186 Cal. App. 3d
 27 1413, 1418 (1986) (“A party who prevents fulfillment of a condition of his own
 28 obligation . . . cannot rely on such condition to defeat his liability.”) (citations
 omitted).

1 section listing errors). Under the EFTA, an “unauthorized electronic transfer” is
 2 defined as “an electronic fund transfer from a consumer’s account initiated by a
 3 person other than the consumer without actual authority to initiate such transfer
 4 and from which the consumer receives no benefit.” 15 U.S.C. § 1693a(12); see
 5 *also* 12 C.F.R. § 1005.2(m) (same). The definition of unauthorized electronic
 6 transfer doesn’t include any electronic fund transfer:

7 (A) initiated by a person other than the consumer who was
 8 furnished with the card, code, or other means of access to
 9 such consumer’s account by such consumer, unless the
 10 consumer has notified the financial institution involved that
 transfers by such other person are no longer authorized,

11 (B) initiated with fraudulent intent by the consumer or any
 12 person acting in concert with the consumer, or

13 (C) which constitutes an error committed by a financial
 institution.

14 15 U.S.C. § 1693a(12)(A)–(C); see *also* 12 C.F.R. § 1005.2(m)(1)–(3) (same).

15 A bare allegation that “fraud” occurred and was subsequently reported to
 16 the financial institution is insufficient to support an inference that the consumer
 17 reported a qualifying error. See, e.g., *Hardin v. Bank of Am., N.A.*, No. 2:22-cv-
 18 10023, 2022 WL 3568568, at *3 (E.D. Mich. Aug. 18, 2022). Individual Plaintiffs
 19 who allege they “experienced fraud on [their] account[s]” and reported the fraud
 20 to BANA, but didn’t report a qualifying error, therefore haven’t stated claims under
 21 the EFTA. (See MCC ¶¶ 292 (Kevin Alvarez); 296 (Rebekah Anderson); 297
 22 (Amanda Andrade); 298 (Samuel De Los Angeles, Sr.); 300 (Robert Arnoldstarr);
 23 301 (Vanessa Arrey); 303 (Celina Back); 305 (Douglas Beckham); 306 (Sky
 24 Beehler); 307 (Amber Bennett); 308 (Forrest Berlt); 317 (Mario Bynum); 321
 25 (Kimberly Carpenter); 322 (Patricia Castillo); 326 (Angela Chavez); 337 (Michell
 26 de Vera); 343 (Lorina Dones); 345 (Benjamin Douglass); 352 (Juan Estrada); 355
 27 (Jacob Flores); 359 (Meredith Friday); 365 (George Laquitta); 395 (Vanessa
 28 Hernandez); 404 (Juanita Isles); 454 (Ann Perez); 462 (Tina Pomeroy); 464

1 (Joshua Pummill); 469 (Kawana Reed); 476 (Joe Robles); 524 (Matthew Yeats);
 2 525 (Glen Young)).

3 Similarly, an allegation that a third party applied for benefits in another
 4 consumer's name or gained access to a consumer's account, while likely
 5 fraudulent, doesn't constitute a "qualifying error" under the statute. 15 U.S.C.
 6 § 1693f(f); 12 C.F.R. § 1005.11(a). Individual Plaintiffs who allege that they
 7 notified BANA that fraud occurred on their account after a third party applied for
 8 and/or received EDD benefits in their name therefore didn't report a qualifying
 9 error. (See, e.g., MCC ¶¶ 346 (Kayli Duey); 348 (Peter Echeverria); 383 (Micah
 10 Haney); 390 (Bahram Hassanshahi); 424 (Mario Madrid); 440 (Sharise Morgan);
 11 456 (Kenyon Perkins); 506 (Reina Valadez); 512 (Norman Walker); 518 (Tyrisha
 12 Williams)). The same holds true for individual Plaintiffs who allege they
 13 "experienced fraud" and notified BANA of fraud after: (1) a third party tried to
 14 change their account address, (see *id.* ¶¶ 335 (Teresa D'Agostino Criado); 336
 15 (Heather Dale)); (2) their account information or card was stolen, (*id.* ¶¶ 423
 16 (Raina Madrid alleging she experienced fraud when her phone containing her
 17 account information was stolen); 431 (Christina McCafferty alleging she
 18 experienced fraud when her phone and EDD card were stolen)); or (3) after they
 19 were unable to access their accounts; (*id.* ¶¶ 445 (Sarah Murphy alleging fraud
 20 when she was unable to sign into her account); 481 (Raylene Salaz alleging fraud
 21 when she was unable to access her account)).

22 BANA's motion to dismiss the MCC's EFTA claims for failure to report a
 23 qualifying error is **GRANTED** as to the individual Plaintiffs identified above. Those
 24 EFTA claims are **DISMISSED WITH LEAVE TO AMEND**.

25 On the other hand, allegations that a consumer: (1) identified a fraudulent
 26 or unauthorized transaction or withdrawal (including by looking at their account or
 27 transaction history); and (2) reported "fraud" to the financial institution are
 28 sufficient to support the reasonable inference that the consumer reported an

1 unauthorized transaction or withdrawal (both of which qualify as errors within the
2 meaning of the EFTA) when reporting the “fraud.” See *Iqbal*, 556 U.S. at 678.
3 BANA’s motion to dismiss is **DENIED** as to those individual Plaintiffs making such
4 allegations. (See, e.g., MCC ¶¶ 304 (Mark Barnettte); 310 (Dean Bommel); 375
5 (Jeffrey Guadalajara); 471 (Rhonda Ritchey); 384 (Preston Hanna); see also *id.*
6 ¶¶ 382 (James Hanes alleging he received a text alert following “fraud”); 500
7 (same for Tonya Taylor)).

8 Additionally, BANA’s motion to dismiss is **DENIED** as to Anthony Franks,
9 who alleges he contacted BANA after he discovered his account didn’t contain
10 expected funds from EDD. (*Id.* ¶ 358). Franks’s allegation supports the
11 reasonable inference that he notified BANA of “[t]he omission of an electronic fund
12 transfer from a periodic statement,” which constitutes error under the EFTA.
13 12 C.F.R. § 1005.11(a)(1)(iii); see also 15 U.S.C. § 1693f(f)(3) (same).

14 BANA also maintains that individual Plaintiffs who reported account freezes
15 alone should be dismissed for failing to report a qualifying error. (Dkt. 84-1 at 17).
16 Neither EFTA nor Reg E lists account freezes as a qualifying error. See 15 U.S.C.
17 § 1693f(f); 12 C.F.R. § 1005.11(a)(1); *Hardin*, 2022 WL 3568568, at *3 (“[T]he
18 EFTA does not regulate account freezes; it regulates electronic funds
19 transfers. . . . And the regulation does not define account freezes as an ‘error’
20 covered under the EFTA.”). Plaintiffs argue that reporting an account freeze
21 constitutes a qualifying error because each individual Plaintiff who reported an
22 account freeze was also requesting additional information to determine whether
23 there was an incorrect or omitted EDD benefits transfer into the account. (Dkt. 90
24 at 13 & n.18). While Plaintiffs are correct that a request for “additional information
25 or clarification concerning an electronic fund transfer, including a request [made]
26 to determine whether an error exists,” is a qualifying error, see 12 C.F.R.
27 § 1005.11(a)(1)(vii); see also 15 U.S.C. § 1693f(f)(6) (same); 12 C.F.R. § 1005,
28 Supp. I at 11(a) (Official Interpretation of § 1005.11(a)) (“A request for

1 documentation or other information must be treated as an error unless it is clear
 2 that the consumer is requesting a duplicate copy for tax or other record-keeping
 3 purposes.”), the MCC doesn’t allege that any individual Plaintiff reporting an
 4 account freeze also requested additional information. Because those allegations
 5 aren’t in the MCC, the Court can’t consider them. *Davis*, 691 F.3d at 1159 (noting
 6 that courts consider the factual allegations *in the complaint* when deciding a
 7 motion to dismiss). Without allegations that they specifically requested additional
 8 information, any individual Plaintiff who reported only an account freeze failed to
 9 report a qualifying error, and doesn’t state a claim under the EFTA (See MCC
 10 ¶¶ 309 (Stone Blacksands); 344 (Anthony Douglas); 357 (Stephanie Flores); 376
 11 (Noah Guirguis); 392 (Gretchen Heinz); 402 (Quoc Huynh); 413 (Victoria Jones);
 12 418 (Sabrina Laxton); 419 (Tonya Lind); 420 (Limmie Littles); 448 (Frank Ortiz,
 13 Jr.); 497 (Danny Talia); 514 (Cameren Wilburn); 516 (Terrence Wilkins); 517
 14 (Zacharia Williams); 523 (Colton Wood)). BANA’s motion to dismiss the MCC’s
 15 EFTA claims for failure to report a qualifying error is **GRANTED** as to the individual
 16 Plaintiffs, identified above, who reported account freezes only. Those EFTA
 17 claims are **DISMISSED WITH LEAVE TO AMEND**.

18 iii. Explanation of Belief an Error Exists

19 BANA next argues that the remaining Plaintiffs failed to notify BANA of the
 20 “reason why [they] believe[d] an error exist[ed].” (Dkt. 84-1 at 18 (quoting
 21 12 C.F.R. § 1005.11(b)(1)(iii)). To trigger a financial institution’s obligations under
 22 the EFTA, a consumer’s notice must “[i]ndicate[] why the consumer believes an
 23 error exists and include[] to the extent possible the type, date, and amount of the
 24 error.” 12 C.F.R. § 1005.11(b)(1)(iii); see *also* 15 U.S.C. § 1693f(a)(3). Requests
 25 for additional information or documentation don’t need to include the amount of
 26 the error. 12 C.F.R. § 1005.11(b)(1)(iii).

27 BANA argues that in order to state a claim under the EFTA a consumer’s
 28 notice to the financial institution must specifically indicate the reason for the

1 consumer’s belief that an error exists. (Dkt. 84-1 at 18). BANA contends that
2 generalized allegations, such as allegations that a consumer “reported the fraud,”
3 are insufficient. (*Id.*); see also *Ghalchi v. U.S. Bank, N.A.*, No. 2:14-cv-6619-PSG-
4 CW, 2015 WL 12655402, at *8 (C.D. Cal. Jan. 8, 2015) (dismissing the plaintiff’s
5 EFTA claim for failure to “pled that she informed Defendant of the type of error
6 that triggers Defendant’s duties under the EFTA or that she notified Defendant
7 with the specificity that triggers those duties” when the complaint’s “description of
8 her notice to Defendant only indicates that she ‘notified’ Defendant of
9 ‘unauthorized withdrawals’ from her Checking Account”). In response, Plaintiffs
10 argue that their “allegations show, and at minimum give rise to a plausible
11 inference, that Plaintiffs conveyed their stated reasons for claiming fraud . . . and
12 are far more detailed than the bare-bones allegations held insufficient in [BANA’s]
13 cited cases.” (Dkt. 90 at 6).

14 The allegations in the cases BANA cites are significantly less detailed than
15 the allegations here. Compare Compl. ¶ 28, *Ghalchi v. U.S. Bank, N.A.*, No. 2:14-
16 cv-6619-PSG-CW (C.D. Cal. Aug. 22, 2014), ECF No. 1 (Plaintiff notified U.S.
17 Bank, N.A., “that there were, among other things, unauthorized withdrawals from
18 the Account.”), with, e.g., (MCC ¶¶ 152–55 (Class Plaintiff Roland Oosthuizen
19 identified five \$1,000 withdrawals he didn’t make or authorize. When he called
20 BANA the day after discovering the withdrawals, he “made a fraud claim
21 concerning the missing \$5,000.”); 177–80 (Class Plaintiff J. Michael Willrich
22 identified \$4,000–\$5,000 in unauthorized transactions and contacted BANA to
23 speak to a “Bank representative and submit a fraud claim regarding the
24 unauthorized transactions. Willrich and the Bank representative spent
25 approximately one hour going through every charge during a three-month period
26 to ensure all fraudulent activity was accounted for.”); 286 (Individual Plaintiff Paul
27 Abarr identified “fraudulent transactions on his Account totaling approximately
28 \$8,000. . . . [H]e reported the fraud to Bank of America via phone.”).

1 Additionally, while BANA is correct that Plaintiffs haven't set out factual
2 allegations specifically demonstrating their notice included a reason for their belief
3 an error exists, (see Dkt. 92 at 9), the assertion that such detail is required by the
4 Federal Rules of Civil Procedure is incorrect, *Twombly*, 550 at 555 n.3 (noting that
5 "the Federal Rules eliminated the cumbersome requirement that a claimant 'set
6 out in detail the facts upon which he bases his claim'" (citation omitted). Instead,
7 a plaintiff must "state[] the circumstances, occurrences, and events in support of
8 the claim presented." *Id.* (citing 5 C. Wright & A. Miller, *Federal Practice and
9 Procedure* § 1202 (3d ed. 2004)). Factual allegations sufficient to support a
10 plausible inference are sufficient to state a claim under the Federal Rules. See
11 *Davis*, 691 F.3d at 1159.

12 The Court holds that Plaintiffs' allegations as to the remaining EFTA claims
13 are sufficient to support an inference that each Plaintiff notified BANA of the
14 reason for his or her belief an error existed. For example, Class Plaintiff Roland
15 Oosthuizen alleges he identified five \$1,000 withdrawals he didn't make or
16 authorize, (MCC ¶ 152), and that he called BANA and "made a fraud claim
17 concerning the missing \$5,000," (*id.* ¶ 155). Those allegations are more than
18 enough to permit the Court to infer that Oosthuizen "indicated why [he] believe[d]
19 an error exist[ed]" during his call with BANA. 12 C.F.R. § 1005.11(b)(1)(iii). The
20 same is true for the other Plaintiffs with remaining EFTA claims. BANA's motion
21 to dismiss the remaining EFTA claims for failure to allege "why the consumer
22 believes an error exists" is **DENIED**.

23 2. **Violation of EFTA**

24 BANA next argues that the MCC fails to identify conduct that violated the
25 EFTA or Reg E. (Dkt. 84-1 at 19–20). Plaintiffs disagree, arguing the MCC alleges
26 BANA failed to conduct a reasonable, good faith investigation and failed to provide
27 documentation required by the statute. (Dkt. 90 at 8–10). Section 1693f requires
28 that a financial institution investigate any qualifying error reported by the

1 consumer within ten business days of receiving notice of such error. 15 U.S.C.
2 § 1693f(a). For reports of unauthorized electronic fund transfers, “[t]he financial
3 institution bears the burden of establishing that a transaction was authorized.”
4 *Green v. Cap. One, N.A.*, 557 F. Supp. 3d 441, 450 (S.D.N.Y. 2021); *see also*
5 15 U.S.C. § 1963g(b).

6 Section 1693f offers little guidance on what constitutes a reasonable
7 investigation of a properly reported error. However, Reg E provides that “a
8 financial institution’s review of its own records regarding an alleged error” satisfies
9 § 1963f’s investigation requirement if:

- 10 (i) The alleged error concerns a transfer to or from a third
11 party; and
- 12 (ii) There is no agreement between the institution and the
13 third party for the type of electronic fund transfer involved.

14 12 C.F.R. § 1005.11(c)(4). The Official Interpretation of § 1005.11(c)(4) provides
15 additional detail on financial institutions’ investigative obligations under Reg E:

16 When there is no agreement between the institution and
17 the third party for the type of [electronic fund transfer]
18 involved, the financial institution must review any relevant
19 information within the institution’s own records for the
20 particular account to resolve the consumer’s claim. The
21 extent of the investigation required may vary depending on
22 the facts and circumstances. However, a financial
23 institution may not limit its investigation solely to the
24 payment instructions where additional information within its
25 own records pertaining to the particular account in question
26 could help to resolve a consumer’s claim.

24 12 C.F.R. § 1005, Supp. I at 11(c)(4) (Official Interpretation of § 1005.11(c)(4)).
25 “[W]hen read in conjunction with the implementing regulations and Official
26 Interpretation, § 1693f requires that any investigation under the statute include a
27 reasonable review of the financial institution’s own records.” *Green*, 577 F. Supp.
28 3d at 450–51.

1 Plaintiffs contend that BANA's investigations into their error reports were
2 inadequate for at least two reasons. First, they argue BANA summarily denied
3 their claims without completing the required investigations. (Dkt. 90 at 8). In
4 support of this argument, Plaintiffs point to information which, if reviewed, would
5 have led BANA to grant Plaintiffs' claims. (*Id.*; see, e.g., MCC ¶ 310 (Dean
6 Bommel, a California resident, reported \$5,000 of unauthorized, overseas
7 transactions)). They also contend the rapid denial of claims and use of boilerplate
8 denial letters lends additional support to their allegation. (Dkt. 90 at 8). Second,
9 Plaintiffs argue their allegation that BANA's admitted "policy and practice of
10 (a) subjecting every EDD Debit Cardholder who submitted a claim of unauthorized
11 transaction to an initial 'Claim Fraud Filter[]' [and] (b) automatically and without
12 investigation denying the fraud claim of any EDD Debit Cardholder flagged by the
13 Claim Fraud Filter," (MCC ¶ 108), plausibly suggests BANA wasn't conducting
14 individualized investigations. (Dkt. 90 at 9).

15 BANA argues these allegations are insufficient to state a claim because they
16 are conclusory and not specific to each Plaintiff. (Dkt. 84-1 at 19). It also argues
17 that the EFTA doesn't bar the use of automated investigative tools, such as the
18 Claim Fraud Filter. (*Id.*). BANA doesn't, however, make any "affirmative argument
19 regarding any review it actually conducted of its own records. Rather, [BANA's]
20 moving brief is silent as to what its investigation entailed." *Green*, 557 F. Supp. 3d
21 at 452.

22 Each remaining Plaintiff alleges either specific unauthorized transactions or
23 generalized "fraud" that impacted their accounts. Accepting those allegations as
24 true, it is reasonable to infer that BANA's records reflect the unauthorized nature
25 of the reported transactions and that, if reviewed, those records would have
26 resulted in different outcomes. Additionally, while the MCC's allegations could be
27 more detailed as to what specific information should have been reviewed, none of
28 the allegations (including the correspondence from BANA to Plaintiffs) indicate

1 that BANA reviewed its own records in any meaningful way as required by
2 § 1693f. See *Green*, 557 F. Supp. 3d at 453 (finding that “because Capital One’s
3 correspondence with Green shows no indication that its own records were
4 reviewed (and it makes no other representations this regard), Green has plausibly
5 alleged that it indeed failed to review this information”). Further, the allegations
6 that Plaintiffs’ claims were denied within one to two days based on the results of
7 an unreliable Claim Fraud Filter, and that BANA issued form letters lacking
8 individualized information support the inference BANA didn’t conduct a
9 reasonable review, including by not reviewing its own records. (See MCC ¶¶ 89,
10 130, 140, 156, 164, 181, 188, 218). Taking all the allegations as true and drawing
11 all inferences in favor of Plaintiffs, the MCC provides enough information to state
12 a plausible claim that BANA didn’t review its records when conducting its
13 investigation.⁴ Because the Court holds Plaintiffs state a plausible claim that
14 BANA’s investigation was inadequate, it doesn’t need to consider whether the use
15 of the Claim Fraud Filter alone constituted a violation of the EFTA.

16 The MCC also states a plausible claim that BANA didn’t provide the results
17 of its investigations of Plaintiffs’ claims. (MCC ¶ 536(h)). The EFTA provides that
18 after a financial institution completes its investigation of a consumer’s reported
19 error, the financial institution must “report or mail the results of such investigation
20 and determination to the consumer within ten business days.” 15 U.S.C.
21 § 1693f(a).⁵ Numerous Plaintiffs allege they received brief letters informing them

22
23 ⁴ While it’s possible that BANA did review its records as part of its investigation,
24 that information isn’t before the Court at this time. In deciding this motion to
25 dismiss, the Court declines to speculate about what this potential evidence will
26 show.

27 ⁵ See *also* 15 U.S.C. § 1693f(d) (“If the financial institution determines after its
28 investigation . . . that an error did not occur, it shall deliver or mail to the consumer
an explanation of its findings within 3 business days after the conclusion of its
investigation, and upon request of the consumer promptly deliver or mail to the

1 only that their claim was closed or denied, (see, e.g., MCC ¶ 196 (Clara Cajas
 2 “received a letter from the Bank . . . informing her that her fraud claim related to
 3 the \$700 ATM withdrawal had been closed”), while others allege they received
 4 letters containing very limited explanations, (see, e.g., *id.* ¶ 283 (Clare Blankship
 5 alleges the letter she received stated: “We’ve completed our review of the above
 6 referenced claim and have determined that no error has occurred in this instance.
 7 We now consider your claim resolved. [¶] What you need to know [¶] The
 8 transaction activity in question was authorized and posted correctly to your
 9 account.”)). Further, many individual Plaintiffs allege they didn’t receive any letter,
 10 (see, e.g., *id.* ¶ 293 (Courtney Alvarez)), permitting the inference the required
 11 letters weren’t sent. These allegations plausibly allege that Plaintiffs “got a
 12 ‘determination’ but not ‘the results of [the required] investigation’ or the supporting
 13 documentation,” *Gale v. Hyde Park Bank*, 384 F.3d 451, 453 (7th Cir. 2004), and
 14 are sufficient to state a claim under the EFTA.

15 BANA’s motion to dismiss the MCC’s EFTA claims for failure to allege facts
 16 showing a violation of that statute is **DENIED**.⁶

17 3. Mootness

18 BANA last moves to dismiss the EFTA claim of any Plaintiff that has been
 19 fully reimbursed for lack of Article III standing. (Dkt. 84-1 at 18–19). BANA
 20 challenges only injury in fact for the reimbursed Plaintiffs. (*Id.*). To establish injury
 21 in fact, a plaintiff must show she suffered “an invasion of a legally protected
 22 interest which is (a) concrete and particularized . . . and (b) actual or imminent,
 23

24 consumer reproductions of all documents which the financial institution relied on
 25 to conclude that such error did not occur. The financial institution shall include
 26 notice of the right to request reproductions with the explanation of its findings.”).

27 ⁶ Because the Court has already dismissed the EFTA claims of those Plaintiffs
 28 that allege reporting only an account freeze (and not fraud), the Court doesn’t
 need to consider BANA’s argument that account freezes aren’t prohibited by the
 EFTA. (See Dkt. 84-1 at 20).

1 not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (internal marks and
2 citations omitted).

3 Here, BANA has identified 59 Plaintiffs who have been fully reimbursed,
4 including 20 of the 25 Class Plaintiffs. (See Dkt. 84-1, App’x Column 4). BANA
5 argues those Plaintiffs lack a concrete injury sufficient for Article III standing. (*Id.*
6 at 18–19). BANA also argues that any reimbursement payment that didn’t include
7 interest nonetheless eliminates any § 1963f claim because, under § 1963g(a), a
8 consumer can still be liable for up to \$50 of a properly reported error, and the MCC
9 doesn’t allege any Plaintiff claims more than \$50 in interest. (Dkt. 92 at 11–12).

10 BANA, however, fails to address the actual damages Plaintiffs suffered as
11 a result of the delayed reimbursements. A financial institution that fails to comply
12 with the EFTA is liable for “any actual damages sustained by a consumer as a
13 result of such failure,” including the failure to properly resolve an error reported
14 under § 1963f. 15 U.S.C. § 1963m(a)(1). Possible compliance failures include:
15 (1) provisionally crediting a consumer pursuant to § 1963f(c) *but failing to provide*
16 *the consumer full use of the credited funds for the pendency of the investigation,*
17 *§ 1963f(c); (2) provisionally crediting a consumer but failing to complete the*
18 *investigation within the extended 45 day resolution period (including by rescinding*
19 *a provisional credit and then issuing a reimbursement later), id.; or (3) reimbursing*
20 *the consumer after the initial 10 business day resolution period expires without*
21 *having issued a provisional credit, § 1963(a), (b).*

22 Of the Plaintiffs who received full reimbursements, all but one plausibly
23 allege that BANA failed to comply with § 1963f’s procedures when issuing the
24 reimbursement. (See, e.g., MCC ¶ 314 (James Bruno alleges that he reported an
25 error in December 2020, but didn’t receive any credit until May 2021)). These
26 Plaintiffs allege that, as a result of BANA’s failure to comply with § 1963f’s error
27 resolution procedures, they sustained actual damages beyond the amount of the
28 reported error. (See, e.g., MCC ¶ 299 (Shelia Anistik alleges that, due to BANA’s

1 failure to make provisionally credited funds available during the investigation, she
 2 had to sell her home after missing a \$1,200 mortgage payment and was unable
 3 to pay her electric, gas, water, and cell phone bills). These alleged
 4 injuries—regardless of amount—constitute actual, concrete harms sufficient to
 5 support Article III standing. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464
 6 (2017) (“For standing purposes, a loss of even a small amount of money is
 7 ordinarily an ‘injury.’”); see, e.g., *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554
 8 U.S. 269, 289 (2008) (noting that the loss of “a dollar or two” is sufficient to confer
 9 standing); *Van v. LLR, Inc.*, 962 F.3d 1160, 1162 (9th Cir. 2020) (holding the loss
 10 of \$3.76 in interest was sufficient to confer standing). BANA’s motion to dismiss
 11 the fully reimbursed Plaintiffs’ EFTA claims for lack of standing is **DENIED** except
 12 as to Misty Pointer. (MCC ¶ 461 (Pointer alleges she reported an unauthorized
 13 transaction to BANA on May 12, 2021, and that, on May 24, 2021 (less than ten
 14 business days later), BANA credited her account). BANA’s motion to dismiss
 15 Pointer’s EFTA claim for lack of standing is **GRANTED**, and that claim is
 16 **DISMISSED WITH PREJUDICE**.

17 * * *

18 BANA’s motion to dismiss the MCC’s EFTA claims is **GRANTED IN PART**
 19 and **DENIED IN PART**. The EFTA claims of the individual Plaintiffs identified
 20 above are **DISMISSED WITH LEAVE TO AMEND**.⁷

21 **B. California Consumer Privacy Act (Claim 2)**

22 The MCC’s third claim alleges BANA violated the California Consumer
 23 Privacy Act (“CCPA”), Cal. Civ. Code §§ 1798.100 *et seq.*, by: (1) “issuing EDD
 24 Debit Cards to Plaintiffs and Class Members with magnetic stripes but without
 25 EMV chip technology”; (2) “collecting,” “transmitting,” and “storing” Plaintiffs’
 26

27 _____
 28 ⁷ For a summary of which Plaintiffs’ EFTA claims are dismissed, see Column 1 of
 the chart attached as Appendix A to this Order.

1 personal information in an inadequately secure manner; and (3) failing to ensure
 2 its subcontractors maintained the confidentiality of Plaintiffs' personal information.
 3 (MCC ¶¶ 546–561).⁸ The CCPA creates a cause of action for:

4 Any consumer whose nonencrypted and nonredacted
 5 personal information . . . is subject to an unauthorized
 6 access and exfiltration, theft, or disclosure as a result of the
 7 business's violation of the duty to implement and maintain
 8 reasonable security procedures and practices appropriate
 to the nature of the information to protect the personal
 information.

9 Cal. Civ. Code § 1798.150. BANA contests each of Plaintiffs' theories in turn.

10 First, it argues that the CCPA doesn't impose a duty to issue debit cards
 11 with EMV chips. (Dkt. 84-1 at 29). "The CCPA does not 'impose[]' a new duty, but
 12 rather incorporates 'existing law requir[ing] a business . . . to implement and
 13 maintain reasonable security procedures and practices appropriate to the nature
 14 of the information.'" (*Id.* (quoting S. Judiciary Comm. Rep. on A.B. 375 (June 25,
 15 2018), at 5 (citing Cal. Civ. Code § 1798.81.5(b), (e)) (emphasis added))).
 16 Because there is no existing duty for financial institutions to issue debit cards with
 17 EMV chips, BANA had no duty to issue EDD cards with chips. (*Id.* at 29–30). In
 18 response, Plaintiffs point to *Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*,
 19 No. 16-cv-14-GPC-BLM, 2016 WL 6523428 (S.D. Cal. Nov. 3, 2016).⁹ (Dkt. 90
 20 at 25–26). In *Dugas*, the court held the plaintiff "sufficiently alleged, at the pleading
 21 stage, a legal duty and a corresponding breach" based on the defendant's alleged
 22

23 ⁸ The CCPA claim is brought only by the Class Plaintiffs and the individual
 24 Plaintiffs in the *Abarr, Alvarez, Brotman, Meza, Morrell, Payton, Robinson, Rojas*
 25 *de Charolet, Talia, and Verdun* actions. (See MCC at 240).

26 ⁹ Although the claim in *Dugas* was brought under the California Customer Records
 27 Act ("CCRA"), Cal. Civ. Code §§ 1798.80 *et seq.*, see *Dugas*, 2016 WL 6523428,
 28 at *10, its analysis is still applicable to claims under the CCPA because that
 statute's private right of action arises from the CCRA. See § 1798.150(a)(1) (citing
 § 1798.81.5 of the CCRA) (CCPA private right of action).

1 failure to use industry-standard encryption. 2016 WL 6523428, at *10–11.

2 BANA attempts to distinguish *Dugas*, arguing that case “involved an alleged
3 failure to maintain reasonable cybersecurity practices after the plaintiff provided
4 personal identifying information to the defendant—it did not recognize any
5 separate duty to issue chip cards.” (Dkt. 92 at 19). While BANA is technically
6 correct that *Dugas* didn’t recognize a duty to issue debit cards with EMV chips,
7 that argument largely misses the point. Plaintiffs cite *Dugas* to support the
8 proposition that, at the pleading stage, allegations the defendant failed to utilize
9 industry-standard encryption are sufficient to allege a legal duty and
10 corresponding breach. (Dkt. 90 at 25–26); *Dugas*, 2016 WL 6523428, at *11.

11 Here, the MCC alleges BANA acknowledges EMV chip technology is the
12 industry-standard for debit card security. (See generally MCC ¶¶ 56–69
13 (discussing BANA’s implementation of EMV chips)). Specifically, the MCC alleges
14 that BANA’s website states that EMV chip technology “has been around for over
15 20 years and is the credit and debit card security standard in many countries
16 around the world.” (*Id.* ¶ 68). Despite BANA’s prior history with EMV chips, the
17 EDD Debit Cards it issued included the much less secure magnetic stripes. (*Id.*
18 ¶ 69). As in *Dugas*, because Plaintiffs allege that BANA “failed to employ
19 reasonable security measures to protect [their personal information], such as the
20 utilization of industry-standard encryption[, such as EMV chips], the Court finds
21 that Plaintiff[s] [have] sufficiently alleged a legal duty and a corresponding breach
22 at this stage.” See *Dugas*, 2016 WL 6523428, at *11; see also *In re Sony Gaming*
23 *Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 966
24 (S.D. Cal. 2014) (holding that plaintiffs adequately pled a breach of duty to provide
25 reasonable security by alleging they gave personal information to Sony as part of
26 commercial transaction and that Sony failed to employ reasonable security
27 measures to protect the information, including failing to use industry-standard
28 encryption).

1 Additionally, BANA argues that Plaintiffs “have not alleged facts to show that
2 they suffered any ‘unauthorized access . . . as a result of’ the use of the magnetic
3 strip [sic] cards.” (Dkt. 84-1 at 30 n.18). This argument ignores the MCC’s
4 allegations that: (1) Plaintiffs’ cards were susceptible to skimming (a process by
5 which a physical device collects information on a card’s magnetic stripe); (2) at
6 least one Class Plaintiff alleges her card was skimmed; and (3) cards with EMV
7 chips are less susceptible to this form of attack. (See MCC ¶ 61; see *also*, *e.g.*,
8 *id.* ¶ 187 (Lindsay McClure alleges her account was the subject of fraudulent
9 charges after her EDD Debit Card was skimmed)). These alleged facts are
10 sufficient to support the inference that Plaintiffs’ personal information was “subject
11 to an unauthorized access and exfiltration, theft, or disclosure” as a result of the
12 use of magnetic stripes. See Cal. Civ. Code § 1798.150(a)(1). BANA’s motion to
13 dismiss Plaintiffs’ CCPA claim is **DENIED** to the extent that claim is based on
14 BANA issuing debit cards without EMV chips. (See MCC ¶ 553(a)).

15 Second, BANA argues that Plaintiffs’ theory that BANA violated the CCPA
16 by “collecting,” “transmitting,” and “storing” Plaintiffs’ personal information in an
17 inadequately secure manner lacks sufficient factual support to state a plausible
18 claim. (Dkt. 84-1 at 29). The MCC alleges: “On information and belief, Bank of
19 America collected, stored, and/or transmitted Plaintiffs’ and Class Members’
20 personal information in a nonencrypted and nonredacted form or in some other
21 form that permitted unauthorized third parties to access that information in
22 violation of the CCPA.” (MCC ¶ 511; see *also id.* ¶¶ 55–58). Plaintiffs point to
23 Class Plaintiff Stephanie Smith’s allegation that her EDD benefits were
24 fraudulently transferred from her account, even though she never used her debit
25 card and kept it at home in a locked safe, arguing that allegation is sufficient to
26 infer BANA “collect[ed],” “transmitt[ed],” and “stor[ed]” Plaintiffs’ personal
27 information in an inadequately secure manner. (See Dkt. 90 at 27 (citing MCC
28 ¶¶ 58, 200)). The Court disagrees that these bare allegations are sufficient to state

1 a claim. While Smith’s allegations certainly suggest a *possibility* that inadequately
 2 secure collection, transmission, and storage may be the reason Smith’s data was
 3 stolen, they aren’t the only or even the most plausible inference supported by the
 4 allegations. *See Iqbal*, 556 U.S. at 678 (holding that the plausibility standard “asks
 5 for more than a sheer possibility that a defendant has acted unlawfully”); *In re*
 6 *Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (“When
 7 faced with two possible explanations, only one of which can be true and only one
 8 of which results in liability, plaintiffs cannot offer allegations that are ‘merely
 9 consistent with’ their favored explanation but are also consistent with the
 10 alternative explanation. . . . Something more is needed, such as facts tending to
 11 exclude the possibility that the alternative explanation is true.”) (citation omitted).
 12 BANA’s motion to dismiss Plaintiffs’ CCPA claim is **GRANTED** to the extent that
 13 claim is based on BANA “collecting,” “transmitting,” and “storing” Plaintiffs’
 14 personal information in an inadequately secure manner. (See MCC ¶ 553(b)–(d)).

15 Third, BANA again argues that Plaintiffs’ theory that BANA violated the
 16 CCPA by failing to ensure its subcontractors maintained the confidentiality of
 17 Plaintiffs’ personal information lacks sufficient factual support to state a plausible
 18 claim. (Dkt. 84-1 at 29). In support of this theory, the MCC alleges that BANA:

19 Fail[ed] to take reasonable steps to ensure that its
 20 subcontractors and their employees and agents, including
 21 [customer service representatives] and other Call Center
 22 agents, maintained the confidentiality of Cardholders’
 23 personal information, including by failing to ensure that all
 24 such agents were subject to background checks before or
 25 after being hired and failing to provide such agents proper
 26 training and supervision regarding their handling and
 27 maintaining the confidentiality of Cardholders’ personal
 28 information, and by failing to secure Cardholders’ personal
 information from unnecessary and unauthorized access by
 subcontractors’ employees and others.

(MCC ¶ 553(e); see also *id.* ¶ 55 (substantially the same)). The Court agrees that

1 these allegations are specific and concrete, and sufficient to state a claim. (Dkt. 90
2 at 27). The allegations—particularly the allegation that BANA failed to ensure its
3 agents were subjected to background checks—are sufficient to allege that BANA
4 failed “to implement and maintain reasonable security procedures and practices.”
5 Cal. Civ. Code § 1798.150; *see also Dugas*, 2016 WL 6523428, at *11. BANA’s
6 motion to dismiss Plaintiffs’ CCPA claim is **DENIED** to the extent that claim is
7 based on BANA’s failure to ensure its subcontractors maintained the
8 confidentiality of Plaintiffs’ personal information.

9 BANA also argues that the MCC fails to plead facts showing that the
10 personal information at issue here was “nonencrypted or nonredacted,” a
11 necessary condition for liability under the CCPA. *See* Cal. Civ. Code
12 § 1798.150(a)(1). However, the MCC alleges that the information contained on
13 magnetic stripes is “easily readable” and that, after a successful skimming attack,
14 recipients of the information can “use the information [from the magnetic stripe] to
15 clone the consumer’s card, conduct unauthorized transactions, and access the
16 bank account connected to the card.” (MCC ¶ 61). The allegation that at least one
17 Class Plaintiff’s information was stolen and used following a skimming attack
18 strongly supports an inference that Plaintiffs’ information was readable or useable
19 immediately after a skimming attack. (*See, e.g., id.* ¶ 187). These allegations are
20 sufficient to state a claim that Plaintiffs’ personal information was “nonencrypted
21 or nonredacted.” *See* § 1798.150(a)(1).

22 BANA’s motion to dismiss the MCC’s CCPA claim is **GRANTED IN PART**
23 and **DENIED IN PART**. To the extent that claim is dismissed, it is **DISMISSED**
24 **WITH LEAVE TO AMEND**.

25 **C. California Customer Records Act (Claim 3)**

26 The MCC’s third claim alleges BANA violated the California Customer
27 Records Act (“CCRA”), Cal. Civ. Code §§ 1798.80 *et seq.*, by failing to notify
28 Plaintiffs when BANA suffered a data breach and that Plaintiffs’ unencrypted

1 personal data was obtained by unauthorized persons. (MCC ¶¶ 562–574).¹⁰ The
2 CCRA provides, in relevant part:

3 A person or business that conducts business in California,
4 and that owns or licenses computerized data that includes
5 personal information, shall disclose a breach of the security
6 of the system following discovery or notification of the
7 breach in the security of the data to a resident of California
8 (1) whose unencrypted personal information was, or is
9 reasonably believed to have been, acquired by an
 unauthorized person. . . . The disclosure shall be made in
 the most expedient time possible and without
 unreasonable delay.

10 Cal. Civ. Code § 1798.82(a). The CCRA also describes the information that must
11 be included in the notification and the form the notification must take. See
12 § 1798.82(d).

13 The CCRA requires a business to notify customers only after the security of
14 system containing a customer’s personal data is breached. See § 1798.82(a).
15 Thus, to state a claim under the statute, a complaint must plausibly allege such a
16 breach occurred. See *In re Solara Med. Supplies, LLC Customer Data Sec.*
17 *Breach Litig.*, 613 F. Supp. 3d 1284, 1300 (S.D. Cal. 2020) (collecting cases in
18 which plaintiffs made specific allegations supporting the occurrence of a data
19 breach). BANA argues that the MCC makes only conclusory and speculative
20 allegations that a security breach occurred, and that such allegations are
21 insufficient to state a claim under the CCRA. (Dkt. 84-1 at 30–31). As the Court
22 found regarding Plaintiffs’ CCPA claim, the MCC states sufficient facts to
23 adequately allege that Plaintiffs’ personal information was “subject to an
24 unauthorized access and exfiltration, theft, or disclosure” as a result of the use of
25 magnetic stripes. § 1798.150(a)(1). This is also sufficient to allege “a breach of
26

27 ¹⁰ The CCRA claim is brought only by the Class Plaintiffs and the individual
28 Plaintiffs in the *Abarr*, *Brotman*, *Meza*, *Morrell*, *Payton*, and *Robinson* actions.
(See MCC at 244).

1 the security of [a] system” that includes Plaintiffs’ personal data, as required under
2 the CCRA. § 1798.82(a).

3 However, the CCRA requires businesses to notify customers of a breach
4 “without unreasonable delay” after the business “discover[s]” or is “notif[ie]d” of
5 the breach. See *id.* And the MCC doesn’t contain any facts alleging when BANA
6 “discover[ed]” or was “notif[ie]d” of the alleged data breach. See *id.* Without
7 alleging when the alleged breach occurred or when BANA learned of it, the MCC
8 doesn’t adequately allege that BANA “unreasonably delay[ed]” in notifying
9 Plaintiffs. See *id.*; *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-md-
10 2752-LHK, 2017 WL 3727318, at *38 (N.D. Cal. Aug. 30, 2017) (“[A]bsent any
11 allegations in the [complaint] suggesting when Defendants learned of the 2013
12 breach, Plaintiffs have not adequately alleged that Defendants ‘unreasonably
13 delay[ed]’ in notifying Plaintiffs of the 2013 Breach.”). Plaintiffs argue reliance on
14 *Yahoo!* is misplaced because here, unlike in *Yahoo!*, the MCC alleges that
15 BANA’s agents were responsible for the breach and therefore, BANA should have
16 known the breach occurred. (Dkt. 90 at 27–28). Even assuming that’s true, the
17 MCC doesn’t allege when the breach occurred, so it fails to adequately allege
18 BANA “unreasonably delay[ed]” in notifying Plaintiffs. See § 1798.82(a).

19 BANA’s motion to dismiss the MCC’s CCRA claim is **GRANTED**, and that
20 claim is **DISMISSED WITH LEAVE TO AMEND**.

21 **D. California’s Unfair Competition Law (Claim 4)**

22 The MCC’s fourth claim alleges BANA violated California’s Unfair
23 Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200 *et seq.* (MCC
24 ¶¶ 575–584).¹¹ The UCL is a consumer protection statute that broadly prohibits
25 “any unlawful, unfair or fraudulent business act or practice.” § 17200. “Each of
26

27 ¹¹ The UCL claim is brought only by the Class Plaintiffs and the individual Plaintiffs
28 in the *Abarr*, *Alvarez*, *Brotman*, *Meza*, *Morrell*, *Payton*, *Robinson*, *Rojas de Charolet*, *Talia*, and *Verdun* actions. (See MCC at 246).

1 these three adjectives captures ‘a separate and distinct theory of liability.’” *Rubio*
2 *v. Cap. One Bank*, 613 F.3d 1195, 1203 (9th Cir. 2010) (quoting *Kearns v. Ford*
3 *Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009)). The MCC alleges that BANA is
4 liable under the UCL for both “unfair” and “unlawful” conduct, (see MCC ¶¶ 577,
5 579), and seeks “restitution, disgorgement, and other equitable relief, including
6 injunctive relief,” (*id.* ¶ 584). BANA argues Plaintiffs’ UCL claim should be
7 dismissed for multiple reasons, including for failing to establish the inadequacy of
8 legal remedies. (Dkt. 84-1 at 31–32).

9 A plaintiff “must establish that she lacks an adequate remedy at law before
10 securing equitable restitution for past harm under the UCL.” *Sonner v. Premier*
11 *Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020); see also *Korea Supply Co. v.*
12 *Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003) (citing *Bank of the W. v.*
13 *Superior Ct.*, 2 Cal. 4th 1254, 1266 (1992)) (“A UCL action is equitable in nature;
14 damages cannot be recovered.”); *Mort v. United States*, 86 F.3d 890, 892 (9th Cir.
15 1996) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992))
16 (“It is a basic doctrine of equity jurisprudence that courts of equity should not
17 act . . . when the moving party has an adequate remedy at law.”) (ellipsis in
18 original); see also, e.g., *Schroeder v. United States*, 569 F.3d 956, 963 (9th Cir.
19 2009) (“[E]quitable relief is not appropriate where an adequate remedy exists at
20 law.”).

21 Plaintiffs oppose the application of *Sonner* to their UCL claims, arguing that
22 the argument is premature and that the Court should permit them to plead a UCL
23 claim in the alternative because this case is in a different procedural posture from
24 *Sonner*. (Dkt. 90 at 43 (citing *Edleson v. Travel Insured Int’l, Inc.*, No. 21-cv-323-
25 WQH-AGS, 2021 WL 4334075, at *6 (S.D. Cal. Sept. 23, 2021) (“[N]o controlling
26 authority prevents a plaintiff from asserting alternative legal remedies at the
27 pleading stage.”))). But *Sonner*’s holding applies regardless of a case’s procedural
28 posture. See *Rivera v. Jeld-Wen, Inc.*, No. 21-cv-1816-AJB-AHG, 2022 WL

1 3702934, at *12 (S.D. Cal. Feb. 4, 2022) (collecting cases rejecting arguments
 2 distinguishing *Sonner* based on procedural posture); see also *Lisner v. Sparc Grp.*
 3 *LLC*, No. 21-cv-5713-AB-GJS, 2021 WL 6284158, at *8 (C.D. Cal. Dec. 29, 2021)
 4 (collecting cases and holding that “*Sonner’s* reasoning applies at the pleading
 5 stage”). But see *Edleson v. Travel Insured Int’l, Inc.*, 2021 WL 4334075, at *6.
 6 And, under *Sonner*, “[t]he issue is not whether a pleading may seek distinct forms
 7 of relief in the alternative, but rather whether a prayer for equitable relief states a
 8 claim if the pleading does not demonstrate the inadequacy of a legal remedy. On
 9 that point, *Sonner* holds that it does not.” *Sharma v. Volkswagen AG*, 524 F. Supp.
 10 3d 891, 907 (N.D. Cal. 2021) (citing *Sonner*, 971 F.3d at 844).

11 Here, the MCC pleads claims for equitable relief under the UCL but doesn’t
 12 allege inadequate legal remedies. (MCC ¶¶ 575–584). The MCC therefore fails to
 13 state a UCL claim under *Sonner*. Accord *Sharma*, 524 F. Supp. 3d at 907. BANA’s
 14 motion to dismiss the MCC’s UCL claim is **GRANTED** and that claim is
 15 **DISMISSED WITH PREJUDICE**.

16 E. Negligence (Claims 5 & 6)

17 The MCC’s fifth claim alleges BANA breached its duty of care to Plaintiffs
 18 by failing to: (1) maintain the security of their personal and account information;
 19 (2) issue EDD Debit Cards with EMV chips; (3) employ reasonable fraud
 20 prevention and notification practices; (4) provide effective customer service;
 21 (5) process and investigate claims in a timely manner; and (6) provide provisional
 22 credits while investigating fraud claims. (MCC ¶¶ 585–593). The MCC’s sixth
 23 claim alleges BANA was negligent in its hiring, supervision, and retention of its
 24 subcontractors. (MCC ¶¶ 594–600).¹²

25
 26 ¹² The negligence claim is brought only by the Class Plaintiffs and the individual
 27 Plaintiffs in the *Abarr*, *Alvarez*, *Brotman*, *Meza*, *Morrell*, *Payton*, *Robinson*, *Rojas*
 28 *de Charolet*, *Talia*, and *Verdun* actions. (See MCC at 252). The negligent hiring,

1 Under California law, the elements of a negligence claim are (1) duty,
 2 (2) breach, (3) causation, and (4) injury. *Vasilenko v. Grace Family Church*, 3 Cal.
 3 5th 1077, 1083 (2017). BANA argues Plaintiffs’ claims are barred by the economic
 4 loss doctrine. (Dkt. 84-1 at 24–25). BANA also argues that the MCC fails to allege
 5 facts sufficient to establish the duty and causation elements of a negligence claim.
 6 (*Id.* at 25–27).

7 **1. Economic Loss Doctrine & Duty**

8 BANA first argues that the economic loss doctrine bars Plaintiffs’ claims. (*Id.*
 9 at 24–25). “In California, the ‘general rule’ is that people owe a duty of care to
 10 avoid causing harm to others and that they are thus usually liable for injuries their
 11 negligence inflicts.” *S. Cal. Gas Leak Cases*, 7 Cal. 5th 391, 398 (2019). However,
 12 “[i]n the absence of personal injury, physical damage to property, a special
 13 relationship between the parties, or some other common law exception to the rule,
 14 recovery of purely economic loss for negligence is foreclosed.” *Stasi v. Inmediata*
 15 *Health Grp. Corp.*, 501 F. Supp. 3d 898, 913 (S.D. Cal. 2020) (citing *J’Aire Corp.*
 16 *v. Gregory*, 24 Cal. 3d 799, 803–04 (1979)); *S. Cal. Gas*, 7 Cal. 5th at 400
 17 (“[L]iability in negligence for purely economic losses . . . is ‘the exception, not the
 18 rule.’”). Plaintiffs argue their negligence claims aren’t barred because: (i) they
 19 allege non-economic injuries; (ii) the independent duty exception applies; and
 20 (iii) the “special relationship” exception applies. (Dkt. 90 at 29–33).

21 **i. Non-Economic Injury**

22 Plaintiffs first argue that the economic loss doctrine doesn’t apply here
 23 because the MCC adequately alleges non-economic injuries, “including the denial
 24 of access to necessary information and wasted time caused by grossly
 25 inadequate customer service.” (Dkt. 90 at 29; see also, e.g., MCC ¶¶ 140, 158,
 26

27 supervision, and retention claim is brought only by the Class Plaintiffs and the
 28 individual Plaintiffs in the *Alvarez, Rojas de Charolet*, and *Verdun* actions. (See
 MCC at 255).

1 166, 218, 240, 283–84 (alleging BANA failed to respond to requests for
2 information); 117–26, 133, 141, 145–50, 179–84, 198, 209–13, 221–23, 251
3 (alleging extremely long phone wait times and inadequate customer service)).

4 For the most part, district courts in California have treated time lost
5 responding to a data breach as a purely economic injury for which recovery is
6 barred by the economic loss doctrine, including when the breach exposed
7 personal financial information, such as credit card numbers. *See, e.g., Dugas*,
8 2016 WL 6523428, at *12 (finding unauthorized credit card transactions, “theft of
9 [the plaintiff’s] credit card information, costs associated with prevention of identity
10 theft, and costs associated with time spent and loss of productivity” were purely
11 economic injuries); *Gardiner v. Walmart Inc.*, No. 20-CV-04618-JSW, 2021 WL
12 2520103, at *8 (N.D. Cal. Mar. 5, 2021) (finding time lost responding to a data
13 breach that exposed the plaintiff’s personal information was a purely economic
14 injury). However, some courts have treated lost time as a non-economic injury
15 when the data breach exposes medical information or leads to an increase in
16 spam or phishing attempts. *See, e.g., Stasi*, 501 F. Supp. 3d at 913 (distinguishing
17 *Dugas* and finding lost time a non-economic injury when the data breach exposed
18 medical information and increased spam/phishing attempts); *In re Solara*, 613 F.
19 Supp. 3d at 1294–95 (same); *Bass v. Facebook, Inc.*, 394 F. Supp. 3d 1024, 1039
20 (N.D. Cal. 2019) (finding time lost responding to spam emails following a breach
21 that disclosed non-financial personal information was a non-economic injury).

22 The situation here is closest to the facts in *Dugas*, 2016 WL 6523428. There,
23 the plaintiff alleged his credit card number and other personal information was
24 obtained by an unknown third party in a data breach and “used for unauthorized
25 purchases, exposing him to losses, frustration and on-going requirements to
26 protect himself from identity theft.” *Id.* at *1. The court found those losses were
27 purely economic injuries and that recovery under a negligence theory was barred
28 by the economic loss doctrine. *Id.* at *12. Here, the MCC alleges Plaintiffs’ account

1 and personal information was obtained by unknown third parties and used for
2 unauthorized transactions, forcing them to spend significant time responding to
3 the breach. (See, e.g., MCC ¶¶ 117–26, 133, 141, 145–50, 179–84, 198, 209–13,
4 221–23, 251). It also alleges BANA denied them access to information. (See, e.g.,
5 *id.* ¶¶ 140, 158, 166, 218, 240, 283–84). As in *Dugas*, the loss of money through
6 fraudulent transactions and time due to responding to the breach are purely
7 economic injuries. See *Dugas*, 2016 WL 6523428, at *12. Therefore, the Court
8 holds the MCC doesn’t allege non-economic injuries sufficient to overcome the
9 economic loss doctrine.

10 **ii. Independent Duty**

11 Plaintiffs next argue the economic loss doctrine doesn’t apply because the
12 “independent duty exception” applies to their claims. (Dkt. 90 at 29–30). “The
13 independent duty exception to the economic loss rule applies where the
14 defendant’s conduct ‘violates a duty independent of the contract arising from
15 principles of tort law.’” *R Power Biofuels, LLC v. Chemex LLC*, No. 16-cv-716-
16 LHK, 2016 WL 6663002, at *10 (N.D. Cal. Nov. 11, 2016) (quoting *Erllich v.*
17 *Menezes*, 21 Cal. 4th 543, 551 (1999)). But, “[a]s the California Supreme Court
18 has explained, the exception ‘focus[es] on intentional conduct.’” *In re Zoom Video*
19 *Commc’ns Inc. Priv. Litig.*, 525 F. Supp. 3d 1017, 1040 (N.D. Cal. 2021) (quoting
20 *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 990 (2004)) (second
21 alteration in original). Plaintiffs’ negligence claims aren’t based on intentional
22 misconduct. Therefore, the independent duty exception doesn’t overcome the
23 economic loss doctrine. See also *NuCal Foods, Inc. v. Quality Egg LLC*, 918 F.
24 Supp. 2d 1023, 1030 (E.D. Cal. 2013) (rejecting application of independent duty
25 exception to negligence claim).

26 //

27 //

28 //

1 **iii. Special Relationship**

2 Plaintiffs last argue the economic loss doctrine doesn't apply because the
3 "special relationship exception" applies. (Dkt. 90 at 30–33). "The primary
4 exception to the general rule of no-recovery for negligently inflicted purely
5 economic losses is where the plaintiff and the defendant have a 'special
6 relationship.'" *S. Cal. Gas*, 7 Cal. 5th at 400. Courts consider six factors to
7 determine whether a special relationship exists:

8 (i) "the extent to which the transaction was intended to
9 affect the plaintiff," . . . (ii) "the foreseeability of harm to the
10 plaintiff," (iii) "the degree of certainty that the plaintiff
11 suffered injury," (iv) "the closeness of the connection
12 between the defendant's conduct and the injury suffered,"
13 (v) "the moral blame attached to the defendant's conduct,"
14 and (vi) "the policy of preventing future harm."

15 *Id.* at 401 (quoting *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979)); see also
16 *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968) (articulating an earlier version
17 of the factors). "[T]he inquiry hinges not on mere rote application of these . . .
18 factors, but instead on a comprehensive look at the . . . sum total of the policy
19 considerations at play in the context before [the court]." *S. Cal. Gas*, 7 Cal. 5th
20 at 399 (internal quotation marks omitted). If a plaintiff demonstrates a special
21 relationship under the *Rowland* factors, such a showing is sufficient to both
22 overcome the economic loss doctrine and show the defendant owed the plaintiff
23 a duty of care. See, e.g., *Castillo v. Seagate Tech., LLC*, No. 16-cv-1958-RS,
24 2016 WL 9280242, at *3 (N.D. Cal. Sept. 14, 2016) (applying *Rowland* factors to
25 determine whether Defendants owed Plaintiffs a duty of care in a negligence
26 action); *Fabian v. LeMahieu*, No. 19-cv-54-YGR, 2019 WL 4918431, at *12
27 (N.D. Cal. Oct. 4, 2019) (same).

28 Applying the special relationship factors here counsels in favor of finding
BANA owed Plaintiffs a duty of care. The first factor is "the extent to which the
transaction was intended to affect the plaintiff." *J'Aire*, 24 Cal. 3d at 804. BANA

1 was the exclusive provider of electronic benefits payments for EDD, (MCC ¶ 39),
2 and Plaintiffs had to provide BANA their personal information to receive benefits
3 payments, (*id.* ¶¶ 46–47). This is sufficient to satisfy the first factor. *Huynh v.*
4 *Quora, Inc.*, 508 F. Supp. 3d 633, 655 (N.D. Cal. 2020) (collecting cases finding
5 that “the first factor is met when plaintiffs share personal data with a company with
6 the understanding that the company will protect that data”).

7 The second factor is “the foreseeability of harm to the plaintiff.” *J’Aire*, 24
8 Cal. 3d at 804. Courts “determine foreseeability not by reference to specific parties
9 but instead based on the general sort of conduct at issue.” *S. Cal. Gas*, 7 Cal. 5th
10 at 401 n.5. The MCC alleges BANA failed to use appropriate security procedures
11 to protect Plaintiffs’ account and personal information, including by failing to issue
12 EDD Debit Cards with EMV chips. (See generally MCC ¶¶ 59–69 (discussing
13 EMV chips)). Because it was foreseeable Plaintiffs would be subject to fraud if
14 BANA didn’t adequately protect their account information, see, e.g., *Huynh*, 508
15 F. Supp. 3d at 657 (finding it foreseeable that the plaintiff would suffer injury if the
16 defendant failed to adequately protect the plaintiff’s personal information); *In re*
17 *Yahoo!*, 313 F. Supp. 3d at 1132 (same); *Terpin v. AT&T Mobility, LLC*, 399 F.
18 Supp. 3d 1035, 1120, 1049 (C.D. Cal. 2019) (same), this factor is also met.

19 The third factor is “the degree of certainty that the plaintiff suffered injury”
20 and the fourth factor is “the closeness of the connection between the defendant’s
21 conduct and the injury suffered”. *J’Aire*, 24 Cal. 3d at 804. The MCC alleges
22 Plaintiffs were injured by the theft of their EDD benefits and their injuries were
23 made possible by BANA’s alleged failure to protect their account information.
24 (MCC ¶¶ 4, 591–92). Those allegations are sufficient to satisfy these factors. See
25 *Corona v. Sony Pictures Ent., Inc.*, No. 14-cv-9600-RGK-EX, 2015 WL 3916744,
26 at *3, *5 (C.D. Cal. June 15, 2015) (finding third factor satisfied by “inability to use
27 credit and assets frozen” due to fraud); *Huynh*, 508 F. Supp. 3d at 657–58 (finding
28 fourth factor satisfied by allegations injury stemmed from the defendant’s failure

1 to protect personal information).

2 The fifth factor is “the moral blame attached to the defendant’s conduct.”
3 *J’Aire*, 24 Cal. 3d at 804. The MCC alleges that BANA issued EDD Debit Cards
4 without EMV chips that were vulnerable to skimming and other forms of attack at
5 the same time it was issuing normal consumer debits card with EMV chips. (See
6 *generally* MCC ¶¶ 59–69 (discussing EMV chips)). In other words, the MCC
7 alleges that BANA issued Plaintiffs—recipients of public benefits—less secure
8 cards than its paying customers. Although Plaintiffs don’t impute an economic
9 incentive to BANA for this, the disparity in treatment is sufficient to satisfy the fifth
10 factor. *AFL v. EDD*, 88 Cal. App. 3d 811, 821 (1979) (noting that unemployment
11 benefits are made available to newly unemployed workers to allow them to survive
12 at a subsistence level).

13 The sixth factor is “the policy of preventing future harm.” *J’Aire*, 24 Cal. 3d
14 at 804. The Court agrees with Plaintiffs that imposing liability for the alleged
15 negligence would encourage companies facing similar circumstances in the future
16 to act more carefully. (See Dkt. 90 at 32); *Huynh*, 508 F. Supp. 3d at 658 (finding
17 sixth factor satisfied when imposing liability would encourage similar companies
18 to better safeguard consumers’ personal information); *In re Sony Gaming*, 996 F.
19 Supp. 2d at 972 (finding that “imposing liability might influence other businesses
20 to take the necessary precautions”).

21 BANA responds to only a few of Plaintiffs’ arguments regarding the *Rowland*
22 factors, instead primarily arguing that Plaintiffs’ “special relationship” argument
23 rests on the mistaken premise that BANA-issued debit cards were the only way to
24 obtain EDD benefits. (Dkt. 92 at 15–16). BANA has held the exclusive contractual
25 right to provide electronic benefits payments for EDD since 2010, (MCC ¶ 39),
26 and the MCC plausibly alleges that EDD presented BANA debit cards as the
27 “exclusive means” to receive EDD benefits, (see *id.* ¶ 47 (“EDD Debit Cards are
28 the default payment method for EDD benefits, and EDD’s website presents EDD

1 Debit Cards as the exclusive means of receiving EDD benefits.”)). Accepting
2 these allegations as true, the MCC plausibly alleges that Plaintiff had to provide
3 BANA their personal information in order to obtain EDD benefits. This is sufficient
4 to permit the application of the special relationship factors. See *Corona*, 2015 WL
5 3916744, at *5 (applying special relationship factors when Plaintiffs alleged having
6 to provide their personal information to receive employment benefits).

7 BANA also argues that, as a bank, it doesn’t owe Plaintiffs any duty of care
8 and that it doesn’t have a “special relationship” with Plaintiffs, its depositors. (See
9 Dkt. 84-1 at 25; Dkt. 92 at 15–16). BANA cites to cases supporting the proposition
10 that “the bank-depositor relationship is not a ‘special relationship.’” (See, e.g.,
11 Dkt. 84-1 (quoting *Belluomini v. Citigroup, Inc.*, No. CV 13-01743 CRB, 2013 WL
12 3855589, at *5 (N.D. Cal. July 24, 2013)). But that conclusion is qualified, with
13 courts noting that the bank-depositor relationship isn’t a “special relationship”
14 under *ordinary circumstances*. *Copesky v. Superior Ct.*, 229 Cal. App. 3d 678,
15 694 (1991) (“It is thus our conclusion that banks, *in general* and in this case, are
16 not fiduciaries for their depositors; and that the bank-depositor relationship is not
17 a ‘special relationship’ . . . such as to give rise to tort damages.”) (emphasis
18 added); *Lawrence v. Bank of America*, 163 Cal. App. 3d 431, 437 (1985) (“[U]nder
19 *ordinary circumstances* the relationship between a bank and its depositor is that
20 of debtor-creditor, and is not a fiduciary one.”) (emphasis added). BANA’s
21 relationship with Plaintiffs is clearly not an “ordinary” banking relationship.
22 Plaintiffs aren’t typical depositors because their only relationship with BANA is for
23 the purpose of facilitating the receipt of public benefits. And BANA isn’t operating
24 as a normal bank because it is distributing public benefit funds, as opposed to
25 holding funds deposited by Plaintiffs.

26 Having balanced the *Rowland* factors, the Court holds they weigh in favor
27 of finding a special relationship between BANA and Plaintiffs. Accordingly, the
28 Court holds the economic loss doctrine doesn’t bar Plaintiffs’ claims. Further, the

1 Court holds that Plaintiffs have sufficiently alleged that BANA owed Plaintiffs a
2 duty to exercise reasonable care with respect to their administration of EDD
3 benefits.

4 * * *

5 BANA's motion to dismiss the MCC's negligence claims as barred by the
6 economic loss doctrine or for failure to allege a duty is **DENIED**.

7 **2. Causation**

8 BANA argues the MCC fails to adequately allege causation for Plaintiffs'
9 negligence claim, (MCC ¶¶ 585–593), and negligent hiring, supervision, and
10 retention claim, (*id.* ¶¶ 594–600). (Dkt. 84-1 at 26–27).

11 **i. Negligence**

12 With respect to the negligence claim, BANA contends that the MCC's
13 allegations are too speculative to support an inference that the lack of EMV chips
14 caused Plaintiffs' injuries. (Dkt. 84-1 at 26). Specifically, BANA argues that the
15 allegations that some Plaintiffs experienced fraud after using their cards and that
16 one Plaintiff believes her card was skimmed are insufficient to state a claim. (*Id.*;
17 Dkt. 92 at 17). The MCC alleges that the EDD Debit Cards were more susceptible
18 to skimming attacks than cards with EMV chips. (See MCC ¶ 61); *supra* Section
19 III.B. Plaintiffs also allege that Lindsay McClure's EDD Debit Card was skimmed
20 when she used it at a gas station on December 1, 2020. (*Id.* ¶ 187). These facts
21 are sufficient to plausibly allege McClure's injuries occurred due to the lack of
22 EMV chips, which in turn supports an inference that other Plaintiffs were also
23 injured by the lack of chips. Additional facts about the prevalence of skimming
24 attacks and other alleged security failures are likely in BANA's possession. See
25 *Flores-Mendez v. Zoosk, Inc.*, No. C 20-4929 WHA, 2021 WL 308543, at *4
26 (N.D. Cal. Jan. 30, 2021) (finding causation allegations sufficient to survive a
27 motion to dismiss when the complaint alleged a data breach occurred and
28

1 additional information about security system was likely held by the defendant).¹³

2 BANA also argues that the MCC's allegations don't plausibly allege BANA's
 3 conduct caused Plaintiffs' injuries because the MCC doesn't rule out other
 4 possible causes, including security breaches at EDD. (Dkt. 92 at 25 (citing MCC
 5 ¶ 62)). BANA argues Plaintiffs' negligence claim must be dismissed because
 6 Plaintiffs fail to allege facts "tending to exclude the possibility that [an] alternative
 7 explanation is true." (*Id.* (quoting *In re Century Aluminum*, 729 F.3d at 1108)). The
 8 MCC's allegations about skimming are sufficient to satisfy that standard. (See
 9 MCC ¶ 187). Accepting those allegations as true tends to exclude the possibility
 10 that a separate data breach was a more likely cause of Plaintiffs' injuries than the
 11 lack of EMV chips. See *In re Century Aluminum*, 729 F.3d at 1108; *Starr v. Baca*,
 12 652 F.3d 1202, 1216 (9th Cir. 2011) ("If there are two alternative explanations,
 13 one advanced by defendant and the other advanced by plaintiff, both of which are
 14 plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6).").

15 With respect to the MCC's negligence *per se* theories, BANA argues that
 16 Plaintiffs fail to allege sufficient facts to support an inference BANA violated any
 17 of the four statutes cited in the MCC. (Dkt. 84-1 at 25–26).¹⁴ Plaintiffs' negligence

18
 19 ¹³ See also *Flores-Mendez*, 2021 WL 308543, at *4 ("[V]irtually all of the details
 20 that defendants insist on are in possession of the defendants, and not in
 21 possession of plaintiff. It is unreasonable for defendant to insist that the details be
 22 laid out in the initial complaint. The common law doctrine of *res ipsa loquitur* has
 23 some application here. The consuming public has come to believe that the internet
 24 companies, which take in their private information, have taken adequate security
 25 steps to protect the security of that information from any and all hackers or
 26 interventions. The ordinary consumer, however, has no clue what internet
 27 companies' security steps are. There would be no way for users to know what
 28 security steps were actually in place. Therefore, when a breach occurs, the thing
 speaks for itself. The breach would not have occurred but for inadequate security
 measures, or so it can be reasonably inferred at the pleadings stage.").

¹⁴ BANA also argues negligence *per se* doesn't support an independent cause of
 action absent a viable negligence claim. (Dkt. 84-1 at 25). BANA is correct, but

1 *per se* theories are based on alleged violations of: the Gramm-Leach-Bliley Act,
 2 15 U.S.C. §§ 6801 *et seq.*; the California Financial Information Privacy Act, Cal.
 3 Fin. Code §§ 4050 *et seq.*; the California Consumer Privacy Act, Cal. Civ. Code
 4 §§ 1798.100 *et seq.*; and the California Consumer Records Act, *id.* §§ 1798.80 *et*
 5 *seq.* (MCC ¶ 589). To allege a violation of the Gramm-Leach-Bliley Act (“GLBA”),
 6 a complaint must allege a bank failed to satisfy certain regulatory requirements
 7 regarding the way information is stored and transmitted. See 15 U.S.C. § 6801;
 8 16 C.F.R. §§ 314.3, 314.4. The MCC makes only conclusory allegations about
 9 how BANA stored and transmitted Plaintiffs’ personal information. (See MCC
 10 ¶¶ 55–58, 580–81, 589–90). These allegations are insufficient to allege BANA
 11 violated the GLBA. To allege a violation of the California Financial Information
 12 Privacy Act (“CFIPA”), a complaint must allege a bank disclosed or shared a
 13 consumer’s nonpublic personal information with an unauthorized third party. Cal.
 14 Fin. Code §§ 4052–4052.5, 4057. The MCC’s only allegations of such disclosures
 15 are entirely conclusory and don’t adequately state a claim under the CFIPA. (See
 16 MCC ¶¶ 582, 589–90). As for the California Customer Records Act (“CCRA”), the
 17 Court has already found the MCC fails to state a claim under the statute. See *infra*
 18 Section III.C. And the Court has already found the MCC adequately states a claim
 19 under the California Consumer Privacy Act (“CCPA”). See *infra* Section III.B.

20 BANA’s motion to dismiss the MCC’s negligence claim for failing to
 21 adequately allege causation is **GRANTED IN PART** and **DENIED IN PART**. The
 22 claim is **DISMISSED WITH LEAVE TO AMEND** to the extent it relies on
 23 allegations that BANA violated the GLBA, CFIPA, or CCRA.

24
 25 _____
 26 that conclusion has no effect here because, for the reasons discussed above,
 27 Plaintiffs plead a viable negligence claim and, therefore don’t assert an
 28 independent negligence *per se* claim. See *California v. Kinder Morgan Energy*
Partners, L.P., 569 F. Supp. 2d 1073, 1087 (S.D. Cal. 2008) (“[N]egligence *per se*
 is merely an evidentiary doctrine and not an independent cause of action.”).

1 **ii. Negligent Hiring, Supervision, & Retention**

2 With respect to the MCC’s negligent hiring claim, BANA argues Plaintiffs
3 make only speculative claims that BANA’s contractors committed a series of
4 internal data breaches without the support of any concrete allegations. (Dkt. 84-1
5 at 26–27). The MCC alleges that BANA, acting through its agent TTEC Holdings,
6 Inc. (“TTEC”), “hired hundreds if not thousands of employees *en masse* to perform
7 services for [BANA] without ever conducting a background check on these
8 individuals” who were subsequently given access to Plaintiffs’ personal and
9 account information. (MCC ¶¶ 596 (emphasis in original); 55 (substantially the
10 same)). Plaintiffs further allege the lack of background checks “harmed and
11 continues to harm Plaintiffs and Class Members by subjecting them to
12 unreasonable risk of fraud and exfiltration of their Cardholder Information and
13 enabled a series of internal data breaches committed by TTEC employees within
14 the scope of their employment.” (*Id.* ¶ 598). While the MCC could be more detailed
15 as to how the lack of background checks caused Plaintiffs’ injuries, at the pleading
16 stage, these allegations are sufficient to support the inference that data breaches
17 “likely occurred due to problems with [BANA’s] cybersecurity practices and
18 procedures.” *Top Trade v. Grocery Outlet*, No. 2:17-cv-8467-SVW-MRW, 2018
19 WL 6038297, at *4 (C.D. Cal. May 9, 2018).

20 BANA’s motion to dismiss the MCC’s negligent hiring, supervision, and
21 retention claim is **DENIED**.

22 **iii. Standing to Pursue Injunctive Relief**

23 BANA also argues that Plaintiffs lack standing to seek injunctive relief based
24 on their negligence claim because they allege only a conjectural and hypothetical
25 future harm (Dkt. 84-1 at 27). To establish Article III standing, a plaintiff must
26 show: (1) injury in fact; (2) causation; and (3) redressability. *Lujan*, 504 U.S.
27 at 560–61. “An injury sufficient to satisfy Article III must be ‘concrete and
28 particularized’ and ‘actual or imminent, not “conjectural” or “hypothetical.”” *Susan*

1 *B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Lujan*, 504 U.S.
2 at 560). “An allegation of future injury may suffice if the threatened injury is
3 ‘certainly impending,’ or there is a “substantial risk” that the harm will occur.” *Id.*
4 (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013)).

5 Allegations that a plaintiff faces a continued threat of future harm stemming
6 from the prior theft of personal information can constitute injury in fact sufficient to
7 confer standing. See *In re Adobe Sys., Inc. Priv. Litig.*, 66 F. Supp. 3d 1197, 1216
8 (N.D. Cal. 2014) (finding “increased risk of future harm” from theft of personal
9 injury sufficient for Article III standing when Plaintiffs allege their “stolen data ha[d]
10 already been misused”); see also *Krottner v. Starbucks Corp.*, 628 F.3d 1139,
11 1143 (9th Cir. 2010) (finding employees alleged “a credible threat of real and
12 immediate harm stemming from the theft of a laptop containing their unencrypted
13 personal data”). Other circuits have held the threat of future unauthorized
14 transactions is sufficient to show Article III standing when the complaint alleges
15 the theft of card information has already resulted in unauthorized transactions.
16 See, e.g., *Lewert v. P.F. Chang’s China Bistro, Inc.*, 819 F.3d 963, 965, 967
17 (7th Cir. 2016) (finding the theft of card information created an “increased risk of
18 fraudulent charges and identity theft” sufficient to confer standing when one
19 named plaintiff alleged unauthorized charges); *Remijas v. Neiman Marcus Grp.,*
20 *LLC*, 794 F.3d 688, 690, 693 (7th Cir. 2015) (finding allegations of theft of credit
21 card information and fraudulent charges sufficient to support inference of
22 “substantial risk of harm” that conferred class standing).

23 Here, the MCC alleges Plaintiffs’ account and personal information has
24 been stolen and that Plaintiffs have already experienced unauthorized
25 transactions. (See, e.g., MCC ¶ 137). Additionally, the MCC alleges that most
26 Plaintiffs continue to receive EDD benefits from BANA, (see, e.g., *id.* ¶ 143), and
27 that Plaintiffs continue to experience unauthorized transactions, (see *id.* ¶ 113).
28 These allegations are sufficient to allege a “substantial risk” that Plaintiffs will

1 suffer future harm stemming from the data breach, which is sufficient to establish
2 Article III standing to seek injunctive relief. *See, e.g., In re Adobe*, 66 F. Supp. 3d
3 at 1216.

4 BANA's motion to dismiss the MCC negligence claims to the extent they
5 seek prospective injunctive relief is **DENIED**.

6 **F. Contract (Claim 7)**

7 The MCC's seventh claim alleges BANA breached its contract with Plaintiffs
8 by: (1) violating the contract's claims investigation, reimbursement, and error
9 resolution provisions; (2) freezing or blocking Plaintiffs' accounts; or (3) failing to
10 make funds available when instructed to do so by EDD. (MCC ¶¶ 603–10).¹⁵
11 BANA moves to dismiss Plaintiffs' direct contract claims in their entirety. (Dkt. 84-1
12 at 7–14). To state a claim for breach of contract under California law, a complaint
13 must plead sufficient facts to plausibly demonstrate “(1) the existence of the
14 contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's
15 breach, and (4) the resulting damages to the plaintiff.” *Oasis W. Realty, LLC v.*
16 *Goldman*, 51 Cal. 4th 811, 820 (2011). Here, the parties don't dispute the
17 existence of a contract. (MCC ¶¶ 70–73).

18 Under California law, “[t]he interpretation of a written instrument, even
19 though it involves what might properly be called questions of fact, is essentially a
20 judicial function.” *Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865 (1965) (citation
21 omitted). Similarly, “[t]he determination of whether a written contract is ambiguous
22 is a question of law for the court.” *Han v. Mobil Oil Corp.*, 73 F.3d 872, 877 (9th Cir.
23 1995). A contract provision is considered ambiguous when it is capable of two or
24 more reasonable constructions. *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635,
25 648 (2003) (quoting *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995)). “But
26

27 ¹⁵ The contract claim is brought only by the Class Plaintiffs and the individual
28 Plaintiffs in the *Abarr, Brotman, Meza, Morrell, Payton, Robinson, and Talia*
actions. (See MCC at 257).

1 language in a contract must be interpreted as a whole, and in the circumstances
2 of the case, and cannot be found to be ambiguous in the abstract.” *Id.*

3 The Court first considers which contract forms the basis of Plaintiffs’ contract
4 claims before turning to the merits of those claims.

5 **1. Governing Account Agreement**

6 First the Court must determine which account agreement should be
7 considered when analyzing the MCC’s contract claim. BANA requests the Court
8 take judicial notice of one version, (see Dkt. 84-3, Chestnut Decl., Ex. 1), and
9 Plaintiffs request the Court take judicial notice of another, (see Dkt. 90-3, Danitz
10 Decl., Ex. A). Each party opposes the other’s request for judicial notice. (See
11 Dkt. 90-2 (opposing BANA’s request); 92-1 (opposing Plaintiffs’ request)). “When
12 ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers evidence
13 outside of the pleadings, it must normally convert the 12(b)(6) motion into a Rule
14 56 motion for summary judgment.” *United States v. Ritchie*, 342 F.3d 903, 907
15 (9th Cir. 2003); see also Fed. R. Civ. P. 12(b). However, a court may “consider
16 certain materials—documents attached to the complaint, documents incorporated
17 by reference in the complaint, or matters of judicial notice—without converting the
18 motion to dismiss into a motion for summary judgment.” *Ritchie*, 342 F.3d at 908
19 (citations omitted). A document not attached to the complaint “may be
20 incorporated by reference into a complaint if the plaintiff refers extensively to the
21 document or the document forms the basis of the plaintiff’s claim.” *Id.* Generally,
22 a document should only be treated as part of the complaint if: “(1) the complaint
23 refers to the document; (2) the document is central to the plaintiff’s claim; and
24 (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.”
25 *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). “[T]he district court may treat
26 [an incorporated document] as part of the complaint, and thus may assume that
27 its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).”
28 *Ritchie*, 342 F.3d at 908; see also *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d

1 988, 1003 (9th Cir. 2018).

2 Additionally, in ruling on a Rule 12(b)(6) motion, courts may consider
3 relevant matters subject to judicial notice. *See Swartz v. KPMG LLP*, 476 F.3d
4 756, 763 (9th Cir. 2007). A court may “judicially notice a fact that is not subject to
5 reasonable dispute because it: (1) is generally known within the trial court’s
6 territorial jurisdiction; or (2) can be accurately and readily determined from
7 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

8 As the parties concede, the two versions of the account agreements are
9 nearly identical. (Dkt. 90-1 at 2 n.1; 92-1 at 2). There is, however, one critical
10 difference: the version submitted by BANA states that North Carolina law governs
11 the contract, while the version submitted by Plaintiffs states that California law
12 governs. (*Compare* Chestnut Decl., Ex. 1 § 18, *with* Danitz Decl., Ex. A § 18). The
13 Account Agreement at issue here covered individuals receiving EDD benefits from
14 California, and Plaintiffs represent the version they provide—which states
15 California law governs the contract—was obtained from BANA’s website for EDD
16 Cardholders. (Dkt. 90-2). Due to the discrepancy in the governing law provision,
17 Plaintiffs’ dispute the authenticity of the version filed by BANA, rendering it
18 inappropriate for incorporation by reference. *See Marder*, 450 F.3d at 448.
19 Additionally, because BANA’s version is subject to reasonable dispute by
20 Plaintiffs, it isn’t an appropriate subject of judicial notice. Fed. R. Evid. 201(b). On
21 the other hand, Plaintiffs’ version includes identical provisions to BANA’s version,
22 and BANA doesn’t provide any reason to question the authenticity of a version of
23 the Account Agreement provided on its website. (*See* Dkt. 92-1 at 2). Accordingly,
24 BANA’s request for judicial notice is **DENIED** as to Exhibit 1 of to the Chestnut
25 Declaration, (Dkt. 84-2); and Plaintiffs’ request for judicial notice is **GRANTED** as
26 to Exhibit A of the Danitz Declaration, (Dkt. 90-1). The Court holds that the version
27 of the Account Agreement provided by Plaintiffs is incorporated by reference into
28 the complaint and appropriately assumed to be true for the purposes of this Order.

1 See *Ritchie*, 342 F.3d at 908; (Danitz Decl., Ex. A).

2 **2. Breach of Contract Claim**

3 **i. Claims Investigation and Reimbursement**

4 Sections 9 and 11 of the Account Agreement provide the contractually
5 mandated procedures for investigation claims of unauthorized transactions or
6 error. (Danitz Decl., Ex. A §§ 9, 11). BANA argues that the MCC fails to allege
7 sufficiently that it breached Sections 9 or 11. (Dkt. 84-1 at 8–12). BANA advances
8 three separate arguments, which the Court addresses in turn.

9 First, BANA argues all Plaintiffs fail to allege facts sufficient to trigger
10 BANA’s obligations under the contract. Specifically, it argues Plaintiffs failed to
11 identify an “unauthorized transaction” under Section 9 or an “error” under
12 Section 11, including by making bare allegations that “fraud” occurred; failed to
13 provide BANA timely notification; and failed to provide the information required
14 under the Account Agreement. (*Id.* at 9). The Account Agreement uses nearly
15 identical definitions of “unauthorized transaction” and “error” as those in the EFTA
16 and Reg E. (*Compare* Danitz Decl., Ex. A § 9 (unauthorized transaction)), *with*
17 15 U.S.C. § 1693a(12) (same), *and* 12 C.F.R. § 1005.2(m) (same); (*compare*
18 Danitz Decl., Ex. A § 11 (error)), *with* 15 U.S.C. § 1693f(f) (same), *and* 12 C.F.R.
19 § 1005.11(a)(1) (same). The Court holds that any Plaintiff failing to allege notifying
20 BANA of an unauthorized transaction or error within the meaning of the EFTA also
21 fails to make such an allegation within the meaning of the Account Agreement.
22 BANA’s motion to dismiss the MCC’s breach of contract is **GRANTED** as to any
23 Plaintiff failing to allege either an unauthorized transaction or error, and the
24 contract claim of any such Plaintiff is **DISMISSED WITH LEAVE TO AMEND**.
25 BANA’s motion to dismiss is **DENIED** as to any Plaintiff found to have adequately
26 alleged a claim under the EFTA.

27 BANA also argues that many Plaintiffs failed to provide timely notice of
28 fraud. The Account Agreement requires notice be provided soon after fraud

1 occurs. (See Danitz Decl., Ex. A § 9 (requiring notice of unauthorized transactions
2 “within a reasonable time,” to “be determined in [BANA’s] sole discretion”); § 11
3 (requiring notice of error no later than 60 days after the first statement on which
4 the error appeared)). The notice period closely tracks the EFTA’s notice period.
5 See 15 U.S.C. § 1693f(a) (error must be reported to financial institution within
6 60 days of the consumer having been sent written documentation containing the
7 error). The Court holds that any Plaintiff failing to allege timely notice under the
8 EFTA also fails to allege timely notice under the Account Agreement. BANA’s
9 motion to dismiss the contract claim of any Plaintiff who provided untimely notice
10 is **GRANTED**, and the contract claim of any such Plaintiff is **DISMISSED WITH**
11 **LEAVE TO AMEND**.

12 Additionally, BANA argues that many Plaintiffs failed to provide the
13 information required by the Account Agreement, including why they believe an
14 error occurred and the dollar amount involved. (See Danitz Decl., Ex. A § 11).
15 Here, the Account Agreement is slightly more restrictive than the EFTA. While the
16 EFTA also requires that a consumer’s notice “[i]ndicate[] why the consumer
17 believes an error exists,” the statute only requires consumers to include the
18 amount of the error “to the extent possible.” See 12 C.F.R. § 1005.11(b)(1)(iii);
19 15 U.S.C. § 1693f(a)(3). Every Plaintiff who sufficiently alleges providing the
20 reason for their belief under the EFTA also makes that showing here. However,
21 to state a claim for breach of Section 11 of the Account Agreement, each plaintiff
22 must allege they provided BANA with the amount of any error. Numerous Plaintiffs
23 fail to include such allegations. Therefore, BANA’s motion to dismiss the MCC’s
24 breach of contract claim is **GRANTED** as to Plaintiffs who didn’t allege notifying
25 BANA of the amount of the reported error. Those Plaintiffs’ claims are **DISMISSED**
26 **WITH LEAVE TO AMEND**.

27 Second, BANA argues that any Plaintiff who has been fully reimbursed fails
28 to state a claim for breach of contract because they can’t allege damages.

1 (Dkt. 84-1 at 9). Unlike the EFTA, which allows a consumer to recover actual
2 damages in limited circumstances, see 15 U.S.C. § 1963m(a)(1), Section 9 of the
3 Account Agreement limits BANA's liability to the amount of any unauthorized
4 transaction and precludes liability for special, indirect, or consequential damages,
5 (see Danitz Decl., Ex. A § 9). Therefore, any Plaintiff that has been completely
6 reimbursed can't recover contract damages, and can't state a claim for breach of
7 contract. *Loiseau v. VISA USA Inc.*, No. 09-cv-H-JMA, 2010 WL 4542896, at *2
8 (S.D. Cal. Feb. 10, 2010) ("Plaintiff cannot state a breach of contract claim as to
9 either [defendant], because he fails to allege damages."). BANA's motion to
10 dismiss the claims of any fully reimbursed Plaintiff is **GRANTED**, and the contract
11 claim of any such Plaintiff is **DISMISSED WITH PREJUDICE**.¹⁶

12 Third, BANA argues Plaintiffs fail to allege violations of Sections 9 or 11 of
13 the Account Agreement. (Dkt. 84-1 at 10–11). Section 9 provides that BANA's
14 "Zero Liability" policy doesn't apply to transactions that aren't considered
15 "unauthorized," and allows BANA to determine a transaction is "unauthorized"
16

17 ¹⁶ For Plaintiffs affected by this dismissal, see (MCC ¶¶ 136–43 (Candace Koole);
18 144–51 (Azuri Moon); 152–59 (Roland Oosthuizen); 160–70 (Rosemary
19 Mathews); 171–76 (Carlos Rodriguez); 177–86 (J. Michael Willrich); 187–91
20 (Lindsay McClure); 192–94 (Robert L. Wilson); 195–99 (Clara Cajas); 203–15
21 (Alan Karam); 216–24 (Luis Perez); 225–28 (Brian Wiggins); 229–36 (Jonathan
22 Smith); 250–53 (Cindy Baker); 254–57 (Ursula Auburn); 261–67 (Kuang Ting
23 Chong); 268–73 (Stephanie Moore); 308 (Forrest Berlt); 313 (Adam Brotman);
24 314 (James Bruno); 321 (Kimberly Carpenter); 322 (Patricia Castillo); 345
25 (Benjamin Douglass); 350 (Maritza Escalante); 353 (Dawn Farina); 359 (Meredith
26 Friday); 366 (Elizabeth Giddens); 367 (Seante Glassflowers); 369 (Barton
27 Gonzalez); 382 (James Hanes); 384 (Preston Hanna); 388 (Markee Harris);
28 392 (Gretchen Heinz); 396 (Anthony Hollingsworth); 406 (Shreel Jackson); 409
(Evet Johnson); 417 (Corey Lawson); 431 (Christina McCafferty); 434 (Michael
McCrary); 436 (Linda Miller); 441 (Tiffany Morrell); 444 (Robert Murphy); 450
(Mark Owensby); 452 (Laura Payton); 457 (Melanie Piette); 461 (Misty Pointer);
465 (Andrea Quesada); 469 (Kawana Reed); 472 (Israel Rivera); 479 (Jose
Rodriguez Romo); 482 (Miguel Salazar); 484 (Michael Schmidt); 498 (Cesar
Tamayo); 499 (Michelle Taylor); 502 (Tasha Trammel); 515 (Denise Wilds)).

1 when it “conclude[s] that the facts and circumstances do not reasonably support
 2 a claim of unauthorized use.” (Danitz Decl., Ex. A § 9). All BANA must do to trigger
 3 Section 9 is reach such a conclusion. Similarly, Section 11 provides BANA great
 4 flexibility in investigating allegations of error. (*See id.* § 11). To perform under
 5 Section 11, all BANA must do is “determine whether an error occurred.” (*Id.*). The
 6 allegations in the MCC don’t sufficiently allege BANA failed to reach the
 7 conclusion as required by Section 9 or conduct the investigation required by
 8 Section 11. (*See, e.g.*, MCC ¶ 283 (Plaintiff alleges receiving letter from BANA
 9 stating it had “determined that no error has occurred”). Based on the plain
 10 language of the contract, Plaintiffs can’t allege BANA breached its obligations
 11 under the Account Agreement simply by disagreeing with the outcome.

12 BANA concedes that there are a handful of Plaintiffs who have alleged they
 13 didn’t receive any determination from BANA. (*See id.* ¶¶ 114–26 (Jennifer Yick),
 14 200–02 (Stephanie Smith), 315 (Beth Burns), 337 (Michell de Vera); 346 (Kayli
 15 Duey); 384 (Preston Hanna), 398 (Crystal Horath), 440 (Sharise Morgan)).
 16 However, de Vera, Duey, Hanna, and Morgan’s claims under Section 9 and 11
 17 have already been dismissed for other reasons.

18 BANA’s motion to dismiss the MCC’s claim for breach of Sections 9 and 11
 19 of the Account Agreement is **GRANTED** as to all Plaintiffs except Jennifer Yick,
 20 Stephanie Smith, Beth Burns, and Crystal Horath. All other claims for breach of
 21 Section 9 and 11 of the Account Agreement are **DISMISSED WITH LEAVE TO**
 22 **AMEND**.¹⁷

23 ii. Account Freezes

24 Section 2 of the Account Agreement permits BANA to freeze an EDD
 25 Cardholder’s account if it “suspect[s] irregular, unauthorized, or unlawful activities
 26

27
 28 ¹⁷ For a summary of which Plaintiffs’ contract claims are dismissed, see Column 2
 of the chart attached as Appendix A to this Order.

1 involved” in the account. (Danitz Decl., Ex. A § 2). BANA is permitted to continue
2 the freeze until the end of its investigations into its suspicions. (*Id.*). Plaintiffs
3 allege BANA breached this section by automatically freezing accounts without a
4 reasonable basis to do so based on the results of an unreliable Claim Fraud Filter.
5 (MCC ¶¶ 93, 108). Additionally, Plaintiffs allege BANA breached Section 2 by
6 maintaining freezes longer than necessary to complete investigations. (*Id.*
7 ¶¶ 94–96, 108, 680(e)). BANA argues Plaintiffs’ allegations fail to make
8 non-conclusory allegations that BANA acted for any reason other than suspicions
9 of fraud or that it maintained account freezes for longer than necessary. (Dkt. 84-1
10 at 12). The Court agrees. The MCC doesn’t allege that BANA lacked the requisite
11 suspicion when freezing accounts. The Account Agreement doesn’t bar BANA
12 from forming its suspicion with the help of a claim filter, so the use of one doesn’t
13 constitute breach. As for the length of freezes, only two Plaintiffs allege that BANA
14 completed its investigation and then failed to lift an account freeze, but they don’t
15 allege how long BANA delayed between the resolution of the investigation and
16 unfreezing their accounts. (MCC ¶¶ 211, 259). BANA’s motion to dismiss the
17 MCC’s claims BANA breached Section 2 of the Account Agreement by issuing
18 account freezes is **GRANTED**, and those claims are **DISMISSED WITH LEAVE**
19 **TO AMEND**.

20 iii. EDD Instructions

21 Section 2 of the Account Agreement requires BANA to “make funds
22 available” in accordance with EDD instructions. (Danitz Decl., Ex. A § 2). Plaintiffs
23 allege BANA breached Section 2 by failing to make funds available when
24 instructed by EDD by freezing Plaintiffs’ access to their accounts. (MCC
25 ¶ 608(g)–(h)). Based on the plain language of the Account Agreement, this
26 argument fails. In addition to Section 2’s funding language, the Account
27 Agreement also contains numerous provisions that allow BANA to restrict access
28 to accounts—and therefore EDD benefits. (Danitz Decl., Ex. A § 2 (right to freeze,

1 right to withdraw funds the cardholder is “not entitled to,” delays for emergencies);
 2 § 3 (right to “restrict access” to card in light of “suspicious activities,” limits on
 3 frequency and types of transactions); § 4 (no illegal transactions); § 16 (right to
 4 “close or suspend” account “at any time”). Adopting Plaintiffs’ interpretation would
 5 render large portions of the Account Agreement of no effect. The Court avoids
 6 adopting this construction. *In re Outlaw Lab’ys, LP Litig.*, No. 18-cv-840-GPC-
 7 BGS, 2021 WL 1198652, at *3 (S.D. Cal. Mar. 30, 2021) (quoting 11 Williston on
 8 Contracts § 32:5 (4th ed. 2015)) (“An interpretation which gives effect to all
 9 provisions of the contract is preferred to one which renders part of the writing
 10 superfluous, useless or inexplicable.”). BANA’s motion to dismiss the MCC’s
 11 claims BANA breached Section 2 of the Account Agreement by failing to follow
 12 EDD instructions is **GRANTED**, and those claims are **DISMISSED WITH LEAVE**
 13 **TO AMEND**.

14 **G. Implied Contract (Claim 8)**

15 The MCC’s eighth claim alleges BANA breached its implied contract with
 16 Plaintiffs by failing “to take reasonable steps to ensure that [EDD Cardholders’
 17 accounts] were secure against unauthorized transactions and that any claims
 18 regarding unauthorized transactions were adequately investigated and resolved.”
 19 (MCC ¶¶ 611–18).¹⁸ BANA argues this claim should be dismissed because:
 20 (1) it’s duplicative of Plaintiffs’ express contract claim, (Dkt. 84-1 at 16–17); and
 21 (2) the MCC doesn’t allege facts suggesting BANA assented to the implied
 22 contract, (*id.* at 17). Plaintiffs respond that, as a bank, BANA was bound by a
 23 contractual duty of care that is implied in all contracts between banks and their
 24 depositors. (Dkt. 90 at 16–18).

25 Under California law, “[i]t is well established that a bank has ‘a duty to act
 26

27 ¹⁸ The implied contract claim is brought only by the Class Plaintiffs and the
 28 individual Plaintiffs in the *Abarr, Brotman, Meza, Morrell, Payton, Robinson, and Talia* actions. (See MCC at 259).

1 with reasonable care in its transactions with its depositors.” *Chazen v. Centennial*
 2 *Bank*, 61 Cal. App. 4th 532, 543 (1998) (quoting *Bullis v. Sec. Pac. Nat. Bank*, 21
 3 Cal. 3d 801, 808 (1978). “The duty is an implied term in the contract between the
 4 bank and its depositor.” *Id.* (citing *Barclay Kitchen, Inc. v. Cal. Bank*, 208 Cal. App.
 5 2d 347, 353 (1962)).

6 Plaintiffs argue this implied duty of care is sufficient to adequately allege the
 7 existence and breach of an implied contract. However, all of the cases Plaintiffs
 8 cite in support of this theory rely on the implied duty to support *negligence* claims,
 9 not implied contract claims. *See Chazen*, 61 Cal. App. 4th 543 (analyzing implied
 10 duty to establish duty for a negligence claim); *Webster v. HSBC Bank USA Nat’l*
 11 *Ass’n*, No. CV 11-10798-DMG-AGR_x, 2012 WL 13012700, at *3 (C.D. Cal. Mar. 5,
 12 2012) (finding implied duty sufficient to establish duty for negligence claim);
 13 *Hawkins v. Bank of Am., N.A.*, No. 17-cv-1954-BAS-AGS, 2018 WL 1316160,
 14 at *3 (S.D. Cal. Mar. 14, 2018) (same).

15 BANA’s motion to dismiss the MCC’s implied contract claim is **GRANTED**,
 16 and that claim is **DISMISSED WITH PREJUDICE**.

17 **H. Implied Covenant of Good Faith and Fair Dealing (Claim 9)**

18 The MCC’s ninth claim alleges BANA breached the implied covenant of
 19 good faith and fair dealing by: (1) failing to “safeguard” EDD benefits, including by
 20 issuing cards without EMV chips; (2) failing to ensure “effective” customer service;
 21 (3) failing to warn or notify Plaintiffs of unauthorized use of their cards; (4) failing
 22 to investigate unauthorized transaction claims or provide provisional credits;
 23 (5) failing to employ “reasonable practices and procedures” to safeguard Plaintiffs’
 24 personal information; and (6) freezing accounts without a “reasonable basis” and
 25 without providing a means to contest the freeze. (MCC ¶¶ 619–24).¹⁹ BANA
 26

27 ¹⁹ The implied covenant of good faith and fair dealing claim is brought only by the
 28 Class Plaintiffs and the individual Plaintiffs in the *Abarr*, *Brotman*, *Meza*, *Morrell*,
Payton, *Robinson*, and *Talia* actions. (See MCC at 261).

1 argues Plaintiffs' claims under the implied covenant fail for three reasons: (1) the
2 implied covenant can't "impose new obligations that extend beyond or contradict
3 the Account Agreement," (Dkt. 84-1 at 14–15); (2) an implied covenant claim can't
4 be based on the same allegations as those in the express breach of contract
5 claim, (*id.* at 15–16); and (3) the claim is too vaguely asserted to state a claim, (*id.*
6 at 16)).

7 "There is an implied covenant of good faith and fair dealing in every contract
8 that neither party will do anything which will injure the right of the other to receive
9 the benefits of the agreement." *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654,
10 684 (1988) (quoting *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 658
11 (1958)). The covenant can't be used to extend or create obligations not contained
12 in the original contract." *McKnight v. Torres*, 563 F.3d 890, 893 (9th Cir. 2009)
13 (quoting *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal. App. 4th
14 1004, 1033 (2009)). Instead, the implied covenant "prevent[s] a contracting party
15 from engaging in conduct which (while not technically transgressing the express
16 covenants) frustrates the other party's rights to the benefits of the contract." *Love*
17 *v. Fire Ins. Exchange*, 221 Cal. App. 3d 1136, 1153 (1990).

18 "The covenant of good faith finds particular application in situations where
19 one party is invested with a discretionary power affecting the rights of another."
20 *3500 Sepulveda, LLC v. Macy's W. Stores, Inc.*, 980 F.3d 1317, 1324 (9th Cir.
21 2020) (quoting *Carma Devs. (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th
22 342, 372 (1992)). "The party with discretionary power must exercise such power
23 in good faith and through 'objectively reasonable conduct.'" *Id.* (quoting *Badie v.*
24 *Bank of Am.*, 67 Cal. App. 4th 779, 796 (1998)). "The issue of whether the implied
25 covenant of good faith and fair dealing has been breached is ordinarily 'a question
26 of fact unless only one inference [can] be drawn from the evidence.'" *Hicks v. E.T.*
27 *Legg & Assocs.*, 89 Cal. App. 4th 496, 508 (2001) (quoting *Paulfrey v. Blue Chip*
28 *Stamps* 150 Cal. App. 3d 187, 194 (1983)).

1 Here, the MCC alleges BANA breached the implied covenant by: issuing
2 Plaintiffs inadequately secure debit cards, (MCC ¶ 622(a)(i)); unreasonably
3 denying Plaintiffs' unauthorized transaction claims, (*id.* ¶ 622(d)); freezing
4 Plaintiffs' accounts without a reasonable basis, (*id.* ¶ 662(f)); and failing to provide
5 reasonably adequate customer service to assist Plaintiffs in responding to
6 reported fraud or account freezes, (*id.* ¶ 622(b), (g)). The Account Agreement
7 contains no reference to either cards with EMV chips or the adequacy of customer
8 service. A claim under the implied covenant can't create new obligations not
9 contemplated by the underlying contract, so the MCC's claim under the implied
10 covenant is **DISMISSED WITH LEAVE TO AMEND** to the extent it relies on either
11 the security of debit cards or the adequacy of customer service. *McKnight*, 563
12 F.3d at 893.

13 In contrast, the Court finds the MCC's allegations that BANA unreasonably
14 denied claims or froze accounts sufficient to state a claim under the implied
15 covenant. When analyzing the MCC's EFTA claim, the Court found that the MCC's
16 allegations were sufficient to support the plausible inference that BANA failed to
17 conduct a reasonable investigation before denying Plaintiffs' unauthorized
18 transaction and error claims. *See supra* Section III.A.2. Specifically, the Court
19 found support for that inference in the MCC's allegations that many Plaintiffs'
20 claims were denied within one or two days and that BANA issued form letters
21 lacking individualized information about each Plaintiff's claims. (See MCC ¶¶ 89,
22 130, 140, 156, 164, 181, 188, 218). The same allegations are sufficient to support
23 an inference BANA failed to exercise its discretionary power under the contract
24 "in good faith and through 'objectively reasonable conduct.'" *3500 Sepulveda*, 980
25 F.3d at 1324 (quoting *Badie*, 67 Cal. App. 4th at 796), which is sufficient to allege
26 a violation of the implied covenant.

27 BANA argues this claim seeks to expand on BANA's obligations under the
28 Account Agreement and that it duplicates Plaintiffs' direct contract claim.

1 (Dkt. 84-1 at 14–16). The Court disagrees. The Account Agreement allows BANA
 2 great discretion to deny an EDD Cardholder’s claim, (see Danitz Decl., Ex. A §§ 9,
 3 11), or to freeze a Cardholder’s account, (see *id.* § 2). Plaintiffs’ implied covenant
 4 claim doesn’t expand or add to these obligations; instead, it alleges BANA failed
 5 to exercise its “discretionary power . . . in good faith and through ‘objectively
 6 reasonable conduct.’” *3500 Sepulveda*, 980 F.3d at 1324 (quoting *Badie*, 67 Cal.
 7 App. 4th at 796). This is a permissible claim under the implied covenant theory.
 8 Nor does this claim duplicate Plaintiffs’ contract claim. To state a breach of
 9 contract claim, Plaintiffs had to allege BANA denied claims without conducting any
 10 investigation or froze accounts without any suspicion of fraud. To state a breach
 11 of the implied covenant, Plaintiffs must allege BANA exercised its discretion
 12 unreasonably. These are distinct theories of liability that don’t simply duplicate
 13 each other.

14 BANA’s motion to dismiss the MCC’s claim under the implied covenant is
 15 **GRANTED IN PART** and **DENIED IN PART**. That claim is **DISMISSED WITH**
 16 **LEAVE TO AMEND** as to the allegations BANA breached the implied covenant
 17 by failing to provide debits cards with EMV chips or adequate customer service.

18 I. Fiduciary Duty (Claim 10)

19 The MCC’s tenth claim alleges BANA breached its fiduciary duties to
 20 Plaintiffs by failing to: (1) ensure Plaintiffs weren’t denied access to their benefits;
 21 (2) maintain the confidentiality of Plaintiffs’ personal information; (3) disclose the
 22 theft of Plaintiffs’ personal information; and (4) disclose that it had failed to protect
 23 Plaintiffs from fraudulent transactions. (MCC ¶¶ 625–36).²⁰ BANA argues this
 24 claim should be dismissed because the MCC doesn’t adequately allege that
 25 BANA owed Plaintiffs a fiduciary duty. (Dkt. 84-1 at 29–31). Plaintiffs don’t dispute
 26

27 ²⁰ The fiduciary duty claim is brought only by the Class Plaintiffs and the individual
 28 Plaintiffs in the *Abarr, Brotman, Meza, Morrell, Payton, Robinson, and Talia*
 actions. (See MCC at 263).

1 that premise, arguing instead that the MCC plausibly alleges that the relationship
2 between BANA and Plaintiffs isn't an ordinary bank-depositor relationship.
3 (Dkt. 90 at 38–39).

4 “[U]nder ordinary circumstances the relationship between a Bank and its
5 depositor is that of debtor-creditor, and is not a fiduciary one.” *Lawrence v. Bank*
6 *of Am.*, 163 Cal. App. 3d 431, 437 (1985); see also *Oaks Mgmt. Corp. v. Superior*
7 *Ct.*, 145 Cal. App. 4th 453, 466 (2006) (“[I]n ordinary banking transactions the
8 ‘bank is in no sense a true fiduciary.’”); *Simi Mgmt. Corp. v. Bank of Am., N.A.*,
9 930 F. Supp. 2d 1082, 1100 (N.D. Cal. 2013). (“A bank has limited duties to its
10 customers. The relationship between the two is not fiduciary, but rather is
11 contractual in nature.”). However, California courts recognize that, under “special
12 circumstances,” a bank may enter into a “special relationship” with a depositor
13 and owe fiduciary duties. *Copesky*, 229 Cal. App. 3d at 691 n.12. A bank enters
14 into a “special relationship” with a depositor either by “affirmatively offer[ing] trust
15 and other specifically fiduciary services,” *id.*, or when the relationship involves
16 characteristics of a “special relationship”: “(1) inherently unequal bargaining
17 positions; (2) nonprofit motivation [of the depositor], *i.e.*, objective of securing
18 peace of mind, security; (3) inadequacy of ordinary contract damages; (4) special
19 vulnerability of one party to harm as a result of breach of trust of the other; and
20 (5) awareness by the other of this special vulnerability,” *id.* at 687 n.7 (quoting
21 *Wallis v. Superior Ct.*, 160 Cal. App. 1109, 1118 (1984)).

22 Applying the “special relationship” factors to the relationship here, the Court
23 holds the MCC adequately alleges that BANA plausibly owed Plaintiffs a fiduciary
24 duty. The Court analyzes the *Wallis* factors in turn. First, BANA holds the exclusive
25 right to provide electronic benefits payment services for EDD. (MCC ¶ 39). Under
26 the terms of the BANA–EDD Contract, Plaintiffs couldn't seek similar services
27 elsewhere (eliminating competition) and BANA wasn't providing a standard
28 product. This is sufficient to allege “inherently unequal bargaining positions.” *Cf.*

1 *Copesky*, 229 Cal. App. 3d at 691 (holding the parties had equal bargaining power
2 when the defendant bank faced competition and offered a standard product).

3 Second, Plaintiffs used their EDD benefits “to pay for housing, food, and
4 other daily necessities.” (MCC ¶ 630). This is sufficient to allege Plaintiffs had a
5 “nonprofit motivation.” *Cf. Copesky*, 229 Cal. App. 3d at 691 (finding a depositor
6 had a profit motivation when the account was his business account).

7 Third, the EDD benefits Plaintiffs were to receive are unemployment
8 insurance or other public benefits. (MCC ¶ 626). This is sufficient to allege the
9 “inadequacy of ordinary contract damages.” *Cf. Copesky*, 229 Cal. App. 3d at 691
10 (noting this factor isn’t ordinarily satisfied for actions in commercial disputes); see
11 *also AFL*, 88 Cal. App. 3d at 821 (“A lump sum payment, which claimants who
12 successfully appeal a denial of continuing benefits receive, defeats the purpose
13 of unemployment insurance.”).

14 Fourth, the MCC alleges Plaintiffs, “as public benefits recipients, are
15 members of a uniquely vulnerable segment of the population.” (MCC ¶ 626); see
16 *also AFL*, 88 Cal. App. 3d at 821 (quoting *Cal. Hum. Res. Dept. v. Java*, 402 U.S.
17 121, 131–32 (1971)) (“These [unemployment] benefits ‘provide cash to a newly
18 unemployed worker “at a time when otherwise he would have nothing to spend,”
19 serving to maintain the recipient at subsistence levels.”). And relatedly, fifth,
20 BANA was aware of this vulnerability. *Cf. Copesky*, 229 Cal. App. 3d at 691
21 (holding that an ordinary checking account doesn’t suggest a “special
22 vulnerability”).

23 BANA argues the Court should reject Plaintiffs’ argument because it “would
24 also apply to any bank accepting direct deposits: as unemployment benefits are
25 not need-based but act as a substitute for income, it necessarily follows that if a
26 bank holding unemployment benefits is a fiduciary, then so is an institution that
27 holds paychecks.” (Dkt. 92 at 18). The Court disagrees that an ordinary banking
28 relationship would qualify under this test. For example, it’s unlikely a complaint

1 against a bank accepting direct deposits of paychecks could adequately allege
 2 facts demonstrating “inherently unequal bargaining positions.” See *Copesky*, 229
 3 Cal. App. 3d at 687 n.7.

4 Plaintiffs also argue that BANA owed EDD Cardholders fiduciary duties
 5 because the BANA–EDD Contract expressly provides that BANA will hold EDD
 6 Cardholders’ funds “‘in trust’ . . . for the cardholders.” (Dkt. 90 at 39 (quoting
 7 Dkt. 90-3, Danitz Decl., Ex. B at 19 (BANA-EDD Contract)).²¹ BANA responds that
 8 the provision Plaintiffs rely on refers to a “Contractor’s Trust Account” held in
 9 BANA’s name and isn’t “sufficient to establish that BANA held funds in trust or
 10 provided fiduciary services for any individual Plaintiff. (Dkt. 92 at 18 n.24). The full
 11 provision Plaintiffs rely on is from a section of the BANA-EDD Contract defining
 12 various terms and reads:

Contractor’s Trust Account	For the purpose of calculating revenue share, the average collected daily balance is the total of the daily collected balance on all funds held “ <i>in trust</i> ” (aggregated amount) <i>for the cardholders</i> each month divided by the number of days in the month. The contractor may maintain balances in individual accounts or one “trust account”, but the average collected daily balance calculation is based on the combined total of all cardholder funds.
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20 ²¹ Plaintiffs ask the Court to take judicial notice of excerpts of the BANA-EDD
 21 Contract filed with their opposition. (Dkt. 90-1). As discussed previously, see
 22 *supra* Section III.F.1, a document may be incorporated by reference if: “(1) the
 23 complaint refers to the document; (2) the document is central to the plaintiff’s
 24 claim; and (3) no party questions the authenticity of the copy attached to the
 25 12(b)(6) motion.” *Marder*, 450 F.3d at 448. Here, the MCC’s breach of fiduciary
 26 duty claim relies, in part, on the BANA-EDD Contract. (MCC ¶ 627). BANA doesn’t
 27 dispute the authenticity of the page relevant to this claim. (See Dkt. 92 at 18 n.24
 28 (citing Danitz Decl., Ex. B at 19). The Court finds the EDD-BANA Contract:
 (1) “forms the basis of the plaintiff’s claim”; (2) is incorporated by reference into
 the MCC; and (3) is appropriately assumed to be true for the purposes of this
 Order. *Ritchie*, 342 F.3d at 908. Plaintiffs’ request for judicial notice is **GRANTED**
 only as to Page 19 of Exhibit B to the Danitz Declaration. (Dkt. 90-1).

1 (Danitz Decl., Ex. B at 19 (emphasis added)). The second sentence clearly
 2 requires BANA to maintain either one or multiple “trust account[(s)].” However, the
 3 first sentence’s reference to “all funds held ‘in trust’ . . . for the cardholders” is less
 4 clear. Plaintiffs’ interpretation—that BANA was required to hold EDD Cardholders’
 5 funds in trust—is a plausible reading of the provision. Assuming that reading is
 6 correct, BANA, as the trustee of the funds, would owe EDD Cardholders fiduciary
 7 duties. *See Chang v. Redding Bank of Com.*, 29 Cal. App. 4th 673, 684 (1994)
 8 (“A trust is a fiduciary relationship with respect to property”) (internal quotation
 9 marks omitted). At the pleading stage, this is sufficient to allege BANA owed
 10 Plaintiffs a fiduciary duty.

11 BANA’s motion to dismiss the MCC’s breach of fiduciary duty claim is
 12 **DENIED.**

13 **J. Third-Party Beneficiary Claims (Claims 11 & 12)**

14 The MCC’s eleventh claim alleges BANA breached its contract with EDD
 15 and that Plaintiffs were third-party beneficiaries to that contract. (MCC
 16 ¶¶ 637–44). The MCC’s twelfth claim alleges BANA breached the implied
 17 covenant of good faith and fair dealing with EDD and that Plaintiffs were third-party
 18 beneficiaries. (*Id.* ¶¶ 645–50).²² BANA argues these claims should be dismissed
 19 because: (1) Plaintiffs aren’t third-party beneficiaries of the EDD-BANA Contract,
 20 (Dkt. 84-1 at 20–22); and (2) Plaintiffs failed to sufficiently allege breach of either
 21 the contract or the implied covenant, (*id.* at 22–23).

22 **1. Governing BANA-EDD Contract**

23 As for the MCC’s direct contract claims, *see supra* Section III.F.1, the Court
 24 must again first determine which contract to consider when analyzing the MCC’s
 25

26 ²² The third-party contract and implied covenant of good faith and fair dealing
 27 claims are brought only by the Class Plaintiffs and the individual Plaintiffs in the
 28 *Abarr, Brotman, Meza, Morrell, Payton, Robinson, and Talia* actions. (See MCC
 at 267, 269).

1 third-party contract claims. As before, BANA requests the Court take judicial
2 notice of one version, (see Dkt. 84-3, Chestnut Decl., Ex. 2), and Plaintiffs request
3 the Court take judicial notice of a similar version, (see Dkt. 90-3, Danitz Decl.,
4 Ex. B). The Court incorporates its earlier discussion of the standard for
5 incorporation by reference, *see supra* Section III.F.1, noting that a document
6 should generally only be incorporated by reference if: “(1) the complaint refers to
7 the document; (2) the document is central to the plaintiff’s claim; and (3) no party
8 questions the authenticity of the copy attached to the 12(b)(6) motion.” *Marder*,
9 450 F.3d at 448.

10 The parties appear to agree that the competing excerpts of the BANA-EDD
11 Contract are substantively identical. (Dkt. 90-1 at 2; 92-1 at 3).²³ Among other
12 things, the excerpts in question include portions of EDD’s request for proposals
13 (“RFP”) (including the cover page), (Chestnut Decl., Ex. 2 at 8; Danitz Decl., Ex. B
14 at 17), and the cover page of BANA’s response to the RFP, (Chestnut Decl., Ex. 2
15 at 10; Danitz Decl., Ex. B at 20). There are two differences the parties identify.
16 First, the cover page to EDD’s RFP included in BANA’s version has a visible
17 redline change to the date. (Chestnut Decl., Ex. 2 at 8). Second, the versions have
18 different dates on the cover page of BANA’s response to the RFP. (Chestnut
19 Decl., Ex. 2 at 10 (August 21, 2015); Danitz Decl., Ex. B at 20 (July 10, 2015)).

20 Plaintiffs argue BANA’s version can’t be incorporated by reference because
21 it includes redline changes, indicating it is a draft version and placing its
22 authenticity in doubt. (Dkt. 90-2 at 3 (citing *Dual Diagnosis Treatment Ctr., Inc. v.*
23 *Blue Cross of Cal.*, No. SA CV 15-0736-DOC-DFM, 2016 WL 6892140, at *23
24 (C.D. Cal. Nov. 22, 2016) (“Where an offered [document] still has redlining or edits
25 in the document, the Court is unwilling to accept the authenticity of the document
26

27 ²³ The excerpt provided by Plaintiffs has one additional page not included in the
28 excerpt submitted by BANA. (See Danitz Decl., Ex. B at 19). The Court has
already found that page to be incorporated by reference. *See supra* note 21.

1 even where no party has objected.”)). BANA argues that the authenticity of
 2 Plaintiffs’ version is doubtful because it is clearly out of date. Because each Party
 3 questions the authenticity of the other’s version of the BANA-EDD agreement,
 4 neither can appropriately be incorporated by reference into the MCC. *See Marder*,
 5 450 F.3d at 448. However, because the versions contain identical substantive
 6 information, the accuracy of which isn’t questioned by either party, the Court will
 7 take judicial notice of both versions. *See Fed. R. Evid. 201(b); Selznick v. Wells*
 8 *Fargo Bank, N.A.*, No. CV-15-812-MWF-MANx, 2015 WL 4069076, *2 (C.D. Cal.
 9 July 1, 2015) (taking judicial notice of the parties’ “somewhat different” versions of
 10 the same document where the relied-upon portion was the same, as it did “not
 11 matter whether the Court relie[d] on [Defendant’s] or Plaintiff’s version”). The
 12 Court **GRANTS** both BANA’s request for judicial notice of Exhibit 2 of the Chestnut
 13 Declaration, (Dkt. 84-2), and Plaintiffs’ request for judicial notice of Exhibit B of
 14 the Danitz Declaration, (Dkt. 90-1).²⁴

15 2. Intended or Incidental Beneficiary

16 “[O]nly a party to a contract or an intended third-party beneficiary may sue
 17 to enforce the terms of a contract or obtain an appropriate remedy for breach.”
 18 *GECCMC 2005-C1 Plummer St. Off. Ltd. P’ship v. JPMorgan Chase Bank, Nat.*
 19 *Ass’n*, 671 F.3d 1027, 1033 (9th Cir. 2012). “When a government contract is at
 20 issue, plaintiffs must overcome a presumption that nonparties who benefit from
 21 the contract are incidental, rather than intended, beneficiaries.” *Jafari v. FDIC*,
 22 No. 12-cv-2982-LAB-RBB, 2015 WL 3604443, at *6 (S.D. Cal. June 8, 2015)
 23 (citing *GECCMC 2005-C1*, 671 F.3d at 1033–34). Intended third-party beneficiary
 24

25 ²⁴ Because the Court finds Plaintiffs aren’t third-party beneficiaries of the
 26 BANA-EDD Contract, *see infra* Section. III.J.2, it doesn’t need to consider whether
 27 the August 24, 2020 letter agreement between BANA and EDD (“Letter
 28 Agreement”) is incorporated by reference into the MCC or properly the subject of
 judicial notice. (See Chestnut Decl., Ex. 3). Therefore, BANA’s request for judicial
 notice is **DENIED AS MOOT** as to the Letter Agreement. (Dkt. 84-2).

1 status isn't established by "a contract's recitation of interested constituencies,
2 vague hortatory pronouncements, statements of purpose, explicit reference[s] to
3 a third party, or even a showing that the contract operates to the third parties'
4 benefit and was entered into with them in mind." *GECCMC 2005-C1*, 671 F.3d at
5 1033 (citations, brackets, and quotations omitted). Instead, the language of the
6 contract must show a "clear intent' to rebut the presumption that the [third parties]
7 are merely incidental beneficiaries." *Orff v. United States*, 358 F.3d 1137, 1145
8 (9th Cir. 2004).

9 Here, the plain language of the BANA-EDD Contract states that BANA and
10 EDD entered into the agreement "for the purpose of [BANA] establishing,
11 operating and maintaining a comprehensive Electronic Benefit Payment (EBP)
12 service *for the EDD*." (Chestnut Decl., Ex. 2 at 6 (emphasis added); Danitz Decl.,
13 Ex. B at 15 (same)). Plaintiffs point to numerous provisions of the BANA-EDD
14 Contract that benefit only EDD Cardholders and argue they are third-party
15 beneficiaries even though they aren't the primary beneficiaries of the contract.
16 (Dkt. 90 at 20–22 (citing MCC ¶¶ 42–44)). But, "explicit reference[s] to a third
17 party" or "a showing that the contract operates to the third parties' benefit and was
18 entered into with them in mind" are both insufficient to show "a clear intent to rebut
19 the presumption that the third parties are merely incidental beneficiaries." *Jafari*,
20 2015 WL 3604443, at *6; *Martinez v. Socoma Cos.*, 11 Cal. 3d 394, 402 (1974)
21 (holding government contracts don't create third-party beneficiaries when the
22 "contracts manifest no intent that the defendants pay damages to compensate
23 plaintiffs or other members of the public for [the contractor's] nonperformance");
24 *Goonewardene v. ADP, LLC*, 6 Cal. 5th 817, 835 (2019) (holding employee wasn't
25 a third-party beneficiary of her employer's contract with a payroll company when
26 the "relevant motivating purpose" was to distribute payroll checks). The Court
27 holds that the language of the BANA-EDD Contract doesn't show a "clear intent"
28 that Plaintiffs were intended beneficiaries of the contract. See *Orff*, 358 F.3d at

1 1145. Because Plaintiffs aren't intended third-party beneficiaries of the
 2 BANA-EDD Contract, they can't bring a claim to enforce the terms of that
 3 agreement. See *Jafari*, 2015 WL 3604443, at *6 (quoting *Astra USA, Inc. v. Santa*
 4 *Clara Cnty.*, 563 U.S. 110, 118 (2011)) ("Thus, while there may have been 'an
 5 intention to benefit a third party,' Plaintiffs can't show 'an intention that the third
 6 party should have the right to enforce that intention.'").

7 BANA's motion to dismiss the MCC's third-party beneficiary claims for
 8 breach of contract and breach of the implied covenant is **GRANTED**, and those
 9 claims are **DISMISSED WITH PREJUDICE**.

10 **K. Due Process (Claims 13 & 14)**

11 The MCC's thirteenth and fourteenth claims allege BANA violated Plaintiffs'
 12 rights under the Due Process Clauses of the Fourteenth Amendment to the United
 13 States Constitution, (MCC ¶¶ 651–61), and California Constitution, (*id.*
 14 ¶¶ 662–66), by depriving them of constitutionally protected interested without due
 15 process.²⁵ BANA moves to dismiss both claims, arguing Plaintiffs (1) fail
 16 adequately allege BANA was acting as state actor; and (2) fail to allege facts
 17 showing a due process violation. (Dkt. 84-1 at 36–40).

18 **1. State Action**

19 BANA contends it wasn't acting as a state actor when it allegedly froze
 20 Plaintiffs' accounts. (Dkt. 84-1 at 36–39). Plaintiffs bring their Fourteenth
 21 Amendment claim under 42 U.S.C. § 1983. (MCC ¶ 653). To state a claim under
 22 § 1983, a complaint must allege facts showing the plaintiff was "deprived of a right
 23 secured by the Constitution or laws of the United States," and that "the alleged
 24 deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v.*
 25 *Sullivan*, 526 U.S. 40, 49–50 (1999). The requirements under the California
 26

27 ²⁵ The Due Process claims are brought only by the Class Plaintiffs and the
 28 individual Plaintiffs in the *Abarr*, *Brotman*, *Meza*, *Morrell*, *Payton*, and *Robinson*
 actions. (See MCC at 272, 274).

1 Constitution are the same. See *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 356
2 (1974). In other words, to state a claim under either the United States or California
3 constitutions, Plaintiffs must plead facts showing BANA was acting as a state
4 actor. To make that showing, Plaintiffs allege BANA was (1) “perform[ing] a
5 function that is both traditionally and exclusively governmental,” and (2) “engaged
6 in a joint undertaking with the State to provide and administer [unemployment
7 insurance] and other EDD benefits under a mutually beneficial relationship.” (MCC
8 ¶ 654). Either theory is sufficient to satisfy the state action requirement. See
9 *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (“Satisfaction of any one
10 test [of the four used in the Ninth Circuit] is sufficient to find state action.”).

11 “The public function test is satisfied only on a showing that the function at
12 issue is ‘both traditionally and exclusively governmental.’” *Rawson v. Recovery*
13 *Innovations, Inc.*, 975 F.3d 742, 748 (9th Cir. 2020) (quoting *Kirtley*, 326 F.3d
14 at 1093). “At bottom, the inquiry is always whether the defendant has ‘exercised
15 power “possessed by virtue of state law and made possible only because the
16 wrongdoer is clothed with the authority of state law.”” *Id.* (quoting *West v. Atkins*,
17 487 U.S. 42, 49 (1988)).

18 BANA argues that its conduct—servicing Plaintiffs’ EDD Debit Cards—is a
19 classic function of private bank, and that its conduct shouldn’t be treated as state
20 action simply because it is a government contractor. (Dkt. 84-1 at 37 (citing *Belue*
21 *v. Keefe Commissary Grp., LLC*, No. 1:20-cv-540-DCN, 2021 WL 1197749, at *3
22 (D. Idaho Mar. 29, 2021) (“[M]aintaining or managing financial accounts is not a
23 function that is traditionally and exclusively performed by the government.”);
24 *Venegas v. Bianco*, No. EDCV 19-01260-JLS-SHK, 2019 WL 10301094, at *9
25 (C.D. Cal. Aug. 26, 2019) (same); *Hester v. Regions Bank*, No. 2:09cv908–WHA,
26 2010 WL 2232158, at *5 (M.D. Ala. June 3, 2010) (“[T]he actions in question are
27 the freezing of private bank accounts, and the transfer of funds, which are not
28 traditionally the exclusive prerogative of the state.”); *Renderall-Baker v. Kohn*, 457

1 U.S. 830, 842 (1982) (“[S]erv[ing] the public does not make [a private actor’s
2 actions] state action.”); *Gonzalez-Maldonado v. MMM Healthcare, Inc.*, 693 F.3d
3 244, 248 (1st Cir. 2012) (holding a private entity does not become a state actor
4 merely because it manages government funds))).

5 Classifying BANA’s function as that of a “private bank,” “government
6 contractor,” or money manager understates BANA’s role in California’s EDD
7 benefits system. The MCC alleges, and BANA doesn’t dispute, that since 2010,
8 BANA has held the exclusive contractual right and duty to provide electronic
9 benefits payment services for EDD. (MCC ¶ 39). Additionally, the MCC plausibly
10 alleges that EDD presents BANA debit cards as the “exclusive means” to receive
11 EDD benefits. (See *id.* ¶ 47 (“EDD Debit Cards are the default payment method
12 for EDD benefits, and EDD’s website presents EDD Debit Cards as the exclusive
13 means of receiving EDD benefits.”)). Accepting these allegations as true—which
14 the Court must at this stage—the MCC plausibly alleges that BANA is responsible
15 for the administration and distribution of California’s EDD benefits. That leaves
16 the question of whether the distribution of such benefits is a function that is “both
17 traditionally and exclusively governmental.” *Kirtley*, 326 F.3d at 1093.

18 Plaintiffs cite two cases to support their argument that BANA has performed
19 a function that is traditionally and exclusively reserved to the state. First, they cite
20 *Cahoo v. SAS Inst. Inc.*, 322 F. Supp. 3d 772, 793 (E.D. Mich. 2018), *aff’d in part*,
21 *rev’d in part on other grounds*, 912 F.3d 887 (6th Cir. 2019). (See Dkt 90
22 at 44–45). In *Cahoo*, the district court found that unemployment insurance
23 claimants whose applications were incorrectly flagged as fraudulent by the state’s
24 automated fraud detection system stated a claim against the state contractor that
25 administered the system. 322 F. Supp. 3d at 793. BANA urges that *Cahoo* is
26 inapposite because the government contractor there not only had the power to
27 detect fraud (a power BANA possesses), but also made determinations that
28 claimants acted unlawfully and assessed penalties (a power BANA lacks).

1 (Dkt. 92 at 22 (citing *Cahoo*, 322 F. Supp. 3d at 785–86, 801–02)). While BANA
2 is correct that the contractor in *Cahoo* possessed greater power than BANA has
3 here, BANA is still invested with the power to distribute EDD benefits payments
4 and, if it freezes an account, to suspend a claimant’s access to those benefits
5 which have already been distributed. See *Cahoo*, 322 F. Supp. 3d at 793
6 (“[T]here is no question that the administration of unemployment benefits is a
7 power traditionally exclusively reserved to the State.”).

8 Plaintiffs also cite *Brown v. Stored Value Cards, Inc.*, No. 3:15-cv-1370-MO,
9 2016 WL 4491836 (D. Or. Aug. 25, 2016), rev’d on other grounds, 953 F.3d 567,
10 575 (9th Cir. 2020). (See Dkt 90 at 45). In *Brown*, the plaintiff was briefly held in
11 state custody and, when she was released, given a preloaded debit card with a
12 balance equivalent to the cash in her possession when she was booked. 2016 WL
13 4491836, at *1. The district court found that the complaint plausibly stated a claim
14 that the government contractor responsible for administering the debit card was a
15 state actor because the relationship between the plaintiff and the defendant
16 contractor “could only come about through the exercise of the state’s power.” *Id.*
17 at *2. BANA argues *Brown* is distinguishable because the plaintiff there had “no
18 choice on how to retrieve” her funds, whereas Plaintiffs here have the option to
19 receive a paper check—an option that some Plaintiffs took. (Dkt. 92 at 23 (quoting
20 *Brown*, 2016 WL 4491836, at *2)). But, as the Court has already discussed, the
21 MCC plausibly alleges that EDD presents BANA debit cards as the “exclusive
22 means” to receive EDD benefits. (See MCC ¶ 47). And while a small number of
23 Plaintiffs allege they eventually obtained paper checks directly from EDD, all
24 Plaintiffs allege that BANA’s conduct prevented them from receiving benefits to
25 which they were legally entitled for at least some period of time. (See, e.g., *id.*
26 ¶¶ 174–74 (Carlos Rodriguez alleging he obtained paper checks from EDD after
27 he was unable to access his benefits for two months because his account was
28 frozen)). Because BANA-provided debit cards were held out as the exclusive

1 means of receiving EDD benefits, the MCC plausibly alleges that the relationship
2 between Plaintiffs and BANA only came about “through the exercise of the state’s
3 power.” *Brown*, 2016 WL 4491836, at *2.

4 The Court holds the MCC plausibly alleges that BANA’s role in administering
5 the distribution of EDD benefits is a function that is “both traditionally and
6 exclusively governmental.” *Kirtley*, 326 F.3d at 1093. Because the Court holds
7 that the MCC satisfies the public function test, it need not consider whether the
8 MCC alleges sufficient facts to satisfy the joint action test. See *id.* at 1092.

9 2. Deprivation of Due Process

10 To state a claim for a procedural due process violation, the complaint must
11 allege “two distinct elements: (1) a deprivation of a constitutionally protected
12 liberty or property interest, and (2) a denial of adequate procedural protections.”
13 *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir.
14 1998). BANA can’t seriously dispute that Plaintiffs have a constitutionally
15 protected property interest in the EDD benefits for which they were approved. See
16 *AFL*, 88 Cal. App. 3d at 820 (“It is clear then that unemployment insurance
17 benefits are a type of property interest protected by the due process clause.”);
18 *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (holding the procedural due process
19 protections attach to the “withdrawal of public assistance benefits” and
20 “disqualification for unemployment compensation”).

21 With respect to future benefits—*i.e.* those payments not yet deposited in a
22 BANA account by EDD—BANA argues that, because the MCC establishes that
23 Plaintiffs could have requested an alternative method to receive their benefits
24 payments, there is no deprivation of a property interest, and therefore no due
25 process claim. (Dkt. 90 at 24 (citing *Tate v. Univ. Med. Ctr. of S. Nev.*, 637 F.
26 Supp. 2d 892, 898 (D. Nev. 2009) (finding no deprivation of property interest
27 where Defendants “limited one of several avenues” by which Plaintiff could
28 exercise his clinical privileges, but did not “limit the privilege itself”))).

1 The situation here is distinct from *Tate*. There, the only inference the
2 complaint permitted was that the defendants limited “one of several avenues” the
3 plaintiff doctor had for exercising his clinical privileges. *See Tate*, 637 F. Supp. 2d
4 at 898. Here, the only plausible inference the MCC permits is that EDD presented
5 BANA debit cards as the “exclusive means” of receiving EDD benefits. (See MCC
6 ¶ 47 (“EDD Debit Cards are the default payment method for EDD benefits, and
7 EDD’s website presents EDD Debit Cards as the exclusive means of receiving
8 EDD benefits.”); *see also id.* ¶ 39 (alleging BANA and EDD “entered into an
9 exclusive contract . . . for the provision of Electronic Benefits Payment . . .
10 Services”). Thus, when BANA froze or otherwise restricted Plaintiffs’ accounts,
11 BANA effectively denied them the benefit by blocking the only known method of
12 access. Allegations that a handful of Plaintiffs were able to request paper checks
13 directly from EDD don’t change that conclusion. (See *id.* ¶¶ 174, 223, 433, 452,
14 475 (Plaintiffs alleging they started receiving paper checks directly from EDD after
15 requested that form of payment)). These allegations are sufficient to allege the
16 “deprivation of a constitutionally protected . . . property interest.” *Brewster*, 149
17 F.3d at 982.

18 That leaves the question of whether the MCC plausibly alleges that BANA
19 failed to conform to the requirements of due process. To determine whether
20 procedural protections are adequate, the Ninth Circuit applies the three-part
21 balancing test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See, e.g.,*
22 *Franceschi v. Yee*, 887 F.3d 927, 936–37 (9th Cir. 2018) (applying the *Mathews*
23 test). “Under *Mathews* we consider (1) ‘the private interest that will be affected by
24 the official action’; (2) ‘the risk of an erroneous deprivation of such interest through
25 the procedure used, and the probable value, if any, of additional or substitute
26 procedural safeguards’; and (3) the government’s interest in minimizing the cost
27 and burden of additional or substitute procedures.” *Id.* (quoting *Mathews*, 424 U.S.
28 at 335).

1 Applying the *Mathews* factors to the EDD benefits at issue here, the MCC
2 plausibly alleges that BANA's procedures for freezing accounts failed to comply
3 with the requirements of due process. First, the private interests at issue here are
4 EDD benefits, including unemployment insurance, pandemic unemployment
5 assistance, pandemic emergency unemployment compensation, disability
6 insurance, and paid family leave. (MCC ¶ 38). While access to public benefits
7 such as these isn't a fundamental right, once EDD determined that Plaintiffs were
8 eligible, Plaintiffs had a protected property interest in the benefits. *See, e.g.,*
9 *Goldberg*, 397 U.S. at 262, 267–68 (holding the “termination” of public benefits
10 payments “involves state action that adjudicates important rights” and requires a
11 hearing). The nature of the protected interest is illustrated by the harms Plaintiffs
12 allege they experienced after their accounts were frozen. (*See, e.g.,* MCC ¶ 433
13 (Jennifer Meza alleges that she and her daughter became homeless after her
14 account was frozen)).²⁶

15 Second, the MCC plausibly alleges that the risk the challenged procedure
16 will result in erroneous deprivation of protected interests is high. It isn't entirely
17 clear what, if any, process BANA provides before or after instituting an account
18 freeze. BANA's briefing appears to admit that neither notice nor an opportunity to
19 be heard were provided to Plaintiffs before their accounts were frozen. (*See*

21 ²⁶ *See also Goldberg*, 397 U.S. at 264 (“[W]hen welfare is discontinued, only a
22 pre-termination evidentiary hearing provides the recipient with procedural due
23 process. For qualified recipients, welfare provides the means to obtain essential
24 food, clothing, housing, and medical care. Thus the crucial factor in this context—a
25 factor not present in the case of the blacklisted government contractor, the
26 discharged government employee, the taxpayer denied a tax exemption, or
27 virtually anyone else whose governmental entitlements are ended—is that
28 termination of aid pending resolution of a controversy over eligibility may deprive
an eligible recipient of the very means by which to live while he waits. Since he
lacks independent resources, his situation becomes immediately desperate. His
need to concentrate upon finding the means for daily subsistence, in turn,
adversely affects his ability to seek redress from the welfare bureaucracy.”).

1 Dkt. 84-1 at 39–40; Dkt. 92 at 25). And the MCC alleges that, starting in
2 October 2020, BANA implemented a policy of freezing accounts without providing
3 any notice. (See MCC ¶¶ 93–95, 108). Plaintiffs allege this practice continues to
4 this day. (See *id.* ¶¶ 111–12). The MCC also alleges that BANA’s “procedures”
5 frequently resulted in the erroneous deprivation of EDD benefits. For example,
6 numerous Plaintiffs allege that BANA froze their accounts before unfreezing them
7 months later with no explanation, or reversed course on whether to issue credits
8 for funds. (See, *e.g.*, *id.* ¶¶ 127–35 (Vanessa Rivera alleges her fraud claim was
9 denied and her account was frozen in February 2021, and that she was
10 reimbursed and her account was unfrozen only in April 2021, after the class action
11 suit was filed)). Allegations such as these strongly support an inference that the
12 lack of procedures resulted in erroneous deprivations of EDD benefits. The
13 second step of the *Mathews* framework also considers “the probable value, if any,
14 of additional or substitute procedural safeguards.” *Mathews*, 424 U.S. at 335.
15 Many of the account freezes described in the MCC involve circumstances that, if
16 raised in a pre-deprivation procedure, would have plausibly prevented the
17 erroneous deprivation. (See, *e.g.*, MCC ¶ 313 (Adam Brotman alleges his account
18 was frozen after he reported a fraudulent transaction that occurred in Birmingham,
19 England, the same day he, a San Diego County resident, conducted a transaction
20 in San Diego)). The Court holds that the MCC’s allegations plausibly support an
21 inference that additional procedures could have prevented erroneous
22 deprivations.

23 Third, BANA, acting on behalf of the State of California, obviously has a
24 strong interest in preventing fraud. BANA argues that if additional pre-deprivation
25 procedures were instituted, bad actors would take advantage of any additional
26 notice and move quickly to steal more money from the government. (Dkt. 84-1
27 at 40 (arguing it is reasonable and logical to “freeze accounts without advance
28 notice to ‘avoid the risk that [the cardholder] would dissipate his assets or attempt

1 to put them beyond the government’s reach”) (quoting *Spiegel v. Ryan*, 946 F.2d
2 1435, 1440 (9th Cir. 1991)). It also argues that its efforts to prevent EDD fraud
3 falls within the exception carved out by *FDIC v. Mallen*, 486 U.S. 230, 240 (1988),
4 which holds: “An important government interest, accompanied by a substantial
5 assurance that the deprivation is not baseless or unwarranted, may in limited
6 cases demanding prompt action justify postponing the opportunity to be heard
7 until after the initial deprivation.” (See Dkt. 84-1 at 40 (quoting *Mallen*, 486 U.S.
8 at 240)). While it’s possible facts uncovered during discovery will demonstrate that
9 this exception applies here, the allegations in the MCC don’t suggest that BANA
10 provided any post-deprivation notice or opportunity to be heard.

11 Upon consideration of the *Mathews* factors, the Court holds that the MCC
12 states a claim for a due process violation by alleging BANA deprived Plaintiffs of
13 a protected property interest without providing adequate due process.

14 * * *

15 BANA’s motion to dismiss the MCC’s due process claims is **DENIED**.

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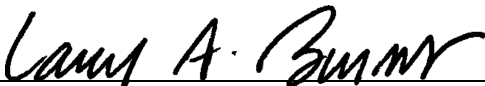
1 **IV. CONCLUSION**

2 The Court **GRANTS IN PART** and **DENIES IN PART** BANA's motion to
3 dismiss the MCC. The MCC's fourth, eleventh, and twelfth claims are **DISMISSED**
4 **WITH PREJUDICE**. The MCC's third and eighth claims are **DISMISSED WITH**
5 **LEAVE TO AMEND**. The MCC's first, second, fifth, seventh, and ninth claims are
6 **DISMISSED IN PART WITH LEAVE TO AMEND** as described herein. Plaintiffs
7 may file an Amended Master Consolidated Complaint addressing the deficiencies
8 identified in this order by June 6, 2023.

9 Further, to ensure this action continues to progress promptly, the discovery
10 stay is lifted and Magistrate Judge Michael Berg is directed to issue a Case
11 Management Order regulating discovery forthwith.

12 **IT IS SO ORDERED.**

13 Dated: May 25, 2023

14 
15 **Hon. Larry Alan Burns**
16 United States District Judge
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1 **Appendix A**

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Plaintiff			Claim	
Last Name	First Name	MCC Paragraphs	Column 1: EFTA (Claim 1)	Column 2: Contract (Claim 7) ²⁷
Abarr	Paul	¶ 286		
Abbot	Kobe	¶ 287		
Adams	Michael	¶ 289		
Aders	Jordan	¶ 288		
Aguirre	Jonathan	¶ 290		
Allison	Christopher	¶ 291		
Alvarez	Kevin	¶ 292	X – No qualifying error	X – No qualifying error
Alvarez	Courtney	¶ 293		
Alvarez	Rosa	¶ 294		
Anderson	David	¶ 295		
Anderson	Rebekah	¶ 296	X – No qualifying error	X – No qualifying error
Andrade	Amanda	¶ 297	X – No qualifying error	X – No qualifying error
Anistik	Sheila	¶ 299		
Arnoldstarr	Robert	¶ 300	X – No qualifying error	X – No qualifying error
Arrey	Vanessa	¶ 301		
Auburn	Ursula	¶¶ 254–57		X – Reimbursed
Ayala	Christal	¶ 302	X -No notice	X -No notice
Back	Celina	¶ 303	X – No qualifying error	X – No qualifying error
Baker	Cindy	¶¶ 250–53		X – Reimbursed
Barnette	Mark	¶ 304		
Beckham	Douglas	¶ 305	X – No qualifying error	X – No qualifying error
Beehler	Sky	¶ 306	X – No qualifying error	X – No qualifying error
Bennett	Amber	¶ 307	X – No qualifying error	X – No qualifying error
Bert	Forrest	¶ 308	X – No qualifying error	X – No qualifying error X – Reimbursed
Blacksands	Stone	¶ 309	X – Freeze	X – Freeze
Blankenship	Claire	¶¶ 279–84		
Bommel	Dean	¶ 310		
Brady	Nicholas	¶ 311		
Brooks	James	¶ 312	X -Untimely	X -Untimely
Brotman	Adam	¶ 313		X – Reimbursed
Bruno	James	¶ 314		X – Reimbursed
Burns	Beth	¶ 315		Not dismissed
Burrow	Dwight	¶ 316		
Bynum	Mario	¶ 317	X – No qualifying error	X – No qualifying error
Byrn	Daniel	¶ 318		
Cajas	Clara	¶¶ 195–99		X – Reimbursed
Calzado	Joseph	¶ 319		
Camberos	Stacey	¶ 320		
Cardenas Cortez	Victor	¶ 333		
Carpenter	Kimberly	¶ 321	X – No qualifying error	X – No qualifying error X – Reimbursed
Castillo	Patricia	¶ 322	X – No qualifying error	X – No qualifying error X – Reimbursed
Caton	Richard	¶ 323		
Chapple	Susan	¶ 324		
Chase	Randy	¶ 325	X -No notice	X -No notice
Chavez	Angela	¶ 326	X – No qualifying error	X – No qualifying error

27 ²⁷ Unless otherwise indicated, all the MCC's contract claims are also dismissed for
 28 failure to state a violation of Section 9 or 11 of the Account Agreement. See *supra*
 Section III.F.2.i.

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Plaintiff			Claim	
Last Name	First Name	MCC Paragraphs	Column 1: EFTA (Claim 1)	Column 2: Contract (Claim 7) ²⁷
Chavez	Phillip	¶ 327		
Chong	Kuang Ting	¶¶ 261-67		X - Reimbursed
Cochran	Tiffany	¶ 328		
Collins	LaMar	¶ 329		
Contreras	Jennifer	¶ 330		
Contreras	Jose	¶ 331		
Corella	Donmonique	¶ 332		
Cortez-Gonzalez	Crystal	¶ 334		
D'Agostino Criado	Teresa	¶ 335	X - No qualifying error	X - No qualifying error
Dale	Heather	¶ 336	X - No qualifying error	X - No qualifying error
De Hoyos	Marcus	¶ 400		
De Los Angeles, Sr.	Samuel	¶ 298	X - No qualifying error	X - No qualifying error
de Vera	Michell	¶ 337	X - No qualifying error	X - No qualifying error
Deasy	Timothy	¶ 338		
Delariva	Luis	¶ 339		
Delgado	Delbert	¶ 340		
Delgado	Selena	¶ 341		
Dirickson	Nickolaus	¶ 342		
Dones	Lorina	¶ 343	X - No qualifying error	X - No qualifying error
Douglas	Anthony	¶ 344	X - Freeze	X - Freeze
Douglass	Benjamin	¶ 345	X - No qualifying error	X - No qualifying error X - Reimbursed
Duey	Kayli	¶ 346	X - No qualifying error	X - No qualifying error
Eason	Roxanne	¶ 347		
Echeverria	Peter	¶ 348	X - No qualifying error	X - No qualifying error
Edwards	Linda	¶ 349		
Escalante	Maritza	¶ 350		X - Reimbursed
Espalin	Marley	¶ 351		
Estrada	Juan	¶ 352	X - No qualifying error	X - No qualifying error
Farina	Dawn	¶ 353		X - Reimbursed
Ferraro	Cody	¶ 354		
Flores	Jacob	¶ 355	X - No qualifying error	X - No qualifying error
Flores	Arnold	¶ 356		
Flores	Stephanie	¶ 357	X - Freeze	X - Freeze
Franks	Anthony	¶ 358		
Friday	Meredith	¶ 359	X - No qualifying error	X - No qualifying error X - Reimbursed
Friend	Joseph	¶ 360		
Gage	Latisha	¶ 362		
Galicia	Abigail	¶ 361		
Garcia	Monica	¶ 363		
Gaynor	Glynda	¶ 364		
George	Laquitta	¶ 365	X - No qualifying error	X - No qualifying error
Giddens	Elizabeth	¶ 366		X - Reimbursed
Glassflowers	Seante	¶ 367		X - Reimbursed
Gonzalez	Angela	¶ 368		
Gonzalez	Barton	¶ 369		X - Reimbursed
Gonzalez	Lizet	¶ 370		
Graham	Lainie Ann	¶ 371		
Grant	Audrey	¶ 372		
Gray	Willie	¶ 373		
Grimes	Sean	¶ 374		
Guadalajara	Jeffrey	¶ 375		
Guirguis	Noah	¶ 376	X - Freeze	X - Freeze
Gutcher	Lyndsey	¶ 377		

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Plaintiff			Claim	
Last Name	First Name	MCC Paragraphs	Column 1: EFTA (Claim 1)	Column 2: Contract (Claim 7) ²⁷
Gutierrez	Andres	¶ 378		
Gutierrez	Angelica	¶ 379		
Gutierrez	Crystal	¶ 380		
Hakopian	Shant	¶ 381		
Hanes	James	¶ 382		X - Reimbursed
Haney	Micah	¶ 383	X - No qualifying error	X - No qualifying error
Hanna	Preston	¶ 384		X - Reimbursed
Harden	Rebecca	¶ 385		
Harper	Johnny	¶ 386		
Harris	Ivan	¶ 387	X -No notice	X -No notice
Harris	Markee	¶ 388		X - Reimbursed
Hart	Steven	¶ 389		
Hassanshahi	Bahram	¶ 390	X - No qualifying error	X - No qualifying error
Hayden	Kaytricia	¶ 391		
Heinz	Gretchen	¶ 392	X - Freeze	X - Freeze X - Reimbursed
Hernandez	Ronnie	¶ 393		
Hernandez	Ruben	¶ 394	X -No notice	X -No notice
Hernandez	Vanessa	¶ 395	X - No qualifying error	X - No qualifying error
Hicks	Julie	¶¶ 258-60		
Hollingsworth	Anthony	¶ 396		X - Reimbursed
Holloway	Lindsie	¶ 397		
Horath	Crystal	¶ 398		Not dismissed
Howze	Terrance	¶ 399	X -No notice	X -No notice
Hutchins	Sharonna	¶ 401		
Huynh	Quoc	¶ 402	X - Freeze	X - Freeze
Idemudia	John	¶ 403		
Isles	Juanita	¶ 404	X - No qualifying error	X - No qualifying error
Jabara	Derrick	¶ 405		
Jackson	Shreel	¶ 406		X - Reimbursed
Jaurigue, Jr.	Robert	¶ 407	X -No notice	X -No notice
Jeff	Anthony	¶ 408		
Johnson	Evelt	¶ 409		X - Reimbursed
Johnson	Lester	¶ 410		
Johnson	Terrell	¶ 411		
Jones	Brian	¶ 412		
Jones	Victoria	¶ 413	X - Freeze	X - Freeze
Karam	Alan	¶¶ 203-15		X - Reimbursed
Kelly	Olivia	¶ 414		
Kessler	Erick	¶ 415		
Knight	Deandre	¶ 416		
Koole	Candace	¶¶ 136-43		X - Reimbursed
Lawson	Corey	¶ 417		X - Reimbursed
Laxton	Sabrina	¶ 418	X - Freeze	X - Freeze
Lind	Tonya	¶ 419	X - Freeze	X - Freeze
Littles	Limmie	¶ 420	X - Freeze	X - Freeze
Lopez	Ronda	¶ 421		
Loredo	Ernie	¶ 422	X -Untimely	X -Untimely
Madrid	Raina	¶ 423	X - No qualifying error	X - No qualifying error
Madrid	Mario	¶ 424	X - No qualifying error	X - No qualifying error
Magallan	Joseph	¶ 425		
Main	Joseph	¶ 426		
Martinez	Danela	¶ 427		
Mathews	Rosemary	¶¶ 160-70		X - Reimbursed
Matson, Jr.	Russell	¶ 428		

Plaintiff			Claim	
Last Name	First Name	MCC Paragraphs	Column 1: EFTA (Claim 1)	Column 2: Contract (Claim 7) ²⁷
Matthews	Vernon	¶ 429		
Maurer	Janelle	¶ 430		
McCafferty	Christina	¶ 431	X - No qualifying error	X - No qualifying error X - Reimbursed
McCann	Brenda	¶ 432		
McClure	Lindsay	¶¶ 187-91		X - Reimbursed
McCrary	Michael	¶ 434		X - Reimbursed
Meza	Jennifer	¶ 433		
Middleton	Travis	¶ 435	X -Untimely	X -Untimely
Miller	Linda	¶ 436		X - Reimbursed
Moon	Azuri	¶¶ 144-51		X - Reimbursed
Moore	Stephanie	¶¶ 268-73		X - Reimbursed
Moore	Lavell	¶ 437		
Morales	Sara	¶ 438		
Morales	Albert	¶ 439		
Morgan	Sharise	¶ 440	X - No qualifying error	X - No qualifying error
Morrell	Tiffany	¶ 441		X - Reimbursed
Morris	Heather	¶ 442		
Mouck	Janette	¶ 443		
Murphy	Robert	¶ 444		X - Reimbursed
Murphy	Sarah	¶ 445	X - No qualifying error	X - No qualifying error
Nicholson	Kimberly	¶ 446		
Ojeda	Lelanya	¶ 447		
Oosthuizen	Roland	¶¶ 152-59		X - Reimbursed
Ortiz, Jr.	Frank	¶ 448	X - Freeze	X - Freeze
Owen	Kelly	¶ 449		
Owensby	Mark	¶ 450		X - Reimbursed
Paningbatan	Flouzel	¶ 451		
Payton	Laura	¶ 452		X - Reimbursed
Pena, Jr.	Ismael	¶ 453		
Perez	Luis	¶¶ 216-24		X - Reimbursed
Perez	Ann	¶ 454	X - No qualifying error	X - No qualifying error
Perez	Paul	¶ 455		
Perkins	Kenyon	¶ 456	X - No qualifying error	X - No qualifying error
Petrova	Zinaida	¶¶ 274-78		
Piette	Melanie	¶ 457		X - Reimbursed
Pita	Ryan	¶ 458		
Pitts	Darnell	¶ 459		
Pitts	Vannessa	¶ 460		
Pointer	Misty	¶ 461	X - Moot	X - Reimbursed
Pomerooy	Tina	¶ 462	X - No qualifying error	X - No qualifying error
Posten	Randle	¶ 463		
Pummill	Joshua	¶ 464	X - No qualifying error	X - No qualifying error
Quesada	Andrea	¶ 465		X - Reimbursed
Quiroz	Maurilio	¶ 466		
Raiff	Mykela	¶ 467	X -No notice	X -No notice
Ray	Moaney	¶ 468		
Reed	Kawana	¶ 469	X - No qualifying error	X - No qualifying error X - Reimbursed
Rima-Fleurima	Nehemiah	¶ 470	X -No notice	X -No notice
Ritchey	Rhonda	¶ 471		
Rivera	Vanessa	¶¶ 127-35		
Rivera	Israel	¶ 472		X - Reimbursed
Roa	Miguel	¶ 473	X -No notice	X -No notice
Robinson	Carmen	¶ 474	X -No notice	X -No notice

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Plaintiff			Claim	
Last Name	First Name	MCC Paragraphs	Column 1: EFTA (Claim 1)	Column 2: Contract (Claim 7) ²⁷
Robinson	Stanley	¶ 475		
Robles	Joe	¶ 476	X - No qualifying error	X - No qualifying error
Rodriguez	Carlos	¶¶ 171-76		
Rodriguez	Catrina	¶ 477		
Rodriguez Romo	Jose	¶ 479		X - Reimbursed
Rojas de Charolet	Elana Martina	¶ 478		
Royston	Melissa	¶ 480		
Salaz	Raylene	¶ 481	X - No qualifying error	X - No qualifying error
Salazar	Miguel	¶ 482		X - Reimbursed
Saldate	Frankie	¶ 483	X -No notice	X -No notice
Schmidt	Michael	¶ 484		X - Reimbursed
Schmitz	Timothy	¶ 485	X -No notice	X -No notice
Serrato	Melissa	¶ 486		
Sevilla	Arminda	¶ 487		
Silva	Jenna	¶ 488	X -No notice	X -No notice
Simpson	Jessica	¶ 489		
Sims II	Michael	¶ 490		
Smith	Stephanie	¶¶ 200-02		Not dismissed
Smith	Jonathan	¶¶ 229-36		X - Reimbursed
Smith	Denise	¶ 491	X -Untimely	X -Untimely
Smith	Nicole	¶ 492		
Sparks	Jonathan	¶ 493		
Stanfill	Amy	¶ 494		
Stephens	Lucas	¶ 495		
Stidham	Crystal	¶ 496		
Talia	Danny	¶ 497	X - Freeze	X - Freeze
Tamayo	Cesar	¶ 498		X - Reimbursed
Taylor	Michelle	¶ 499		X - Reimbursed
Taylor	Tonya	¶ 500		
Tonna	Nicholas	¶ 501		
Trammel	Tasha	¶ 502		X - Reimbursed
Tressler	Jimmy	¶ 503		
Turnbull	Jason	¶ 504		
Turner	Thomas	¶ 505	X -No notice	X -No notice
Valadez	Reina	¶ 506	X - No qualifying error	X - No qualifying error
Valenzuela	Juan	¶ 507		
Vasquez	David	¶ 508		
Verdun	Jessie	¶ 509		
Villagomez	Manuel	¶ 510		
Viramontes	Luis	¶ 511		
Walker	Norman	¶ 512	X - No qualifying error	X - No qualifying error
Wallace	Jason	¶ 513		
Wiggins	Brian	¶¶ 225-28		X - Reimbursed
Wilburn	Cameren	¶ 514	X - Freeze	X - Freeze
Wilds	Denise	¶ 515		X - Reimbursed
Wilkins	Terrence	¶ 516	X - Freeze	X - Freeze
Williams	Zacharia	¶ 517	X - Freeze	X - Freeze
Williams	Tyrisha	¶ 518	X - No qualifying error	X - No qualifying error
Williams	Willie	¶ 519		
Williamson	Latasha	¶ 520		
Willis	Leanna	¶ 521		
Willrich	J. Michael	¶¶ 177-86		X - Reimbursed
Wilson	Robert L.	¶¶ 192-94		X - Reimbursed
Wise	Lacey	¶ 522		

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Plaintiff			Claim	
Last Name	First Name	MCC Paragraphs	Column 1: EFTA (Claim 1)	Column 2: Contract (Claim 7) ²⁷
Wood	Colton	¶ 523	X - Freeze	X - Freeze
Yeats	Matthew	¶ 524	X - No qualifying error	X - No qualifying error
Yick	Jennifer	¶¶ 114-26		Not dismissed
Young	Glen	¶ 525	X - No qualifying error	X - No qualifying error
Yuan	Alex	¶¶ 237-45		
Zettlemoyer	Christopher	¶ 526	X -No notice	X -No notice
Zoelle	Jory	¶¶ 246-49		