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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

PAULA SPARKMAN, on behalf of herself and all others similarly situated,

Plaintiff,

v.

COMERICA BANK, a foreign corporation, CONDUENT BUSINESS SERVICES, LLC, a foreign limited liability corporation,

Defendants.

No. 4:23-cv-02028-DMR

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS CLASS ACTION COMPLAINT PURSUANT TO FEDERAL RULE 12(B)(6)

The Honorable Donna M. Ryu

CLASS ACTION

DATE: July 27, 2023
TIME: 1:00 p.m.
LOCATION: Courtroom 4 – 3rd Floor

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

RULES

REGULATIONS & STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiff Paula Sparkman is a single mother. She relies on her income and court-ordered child support payments to support her daughter. As required by California law, Ms. Sparkman receives her child support payments through California Child Support Services. The agency contracted with Defendants Comerica Bank and Conduent Business Services, LLC to issue child support payments through prepaid debit cards. Ms. Sparkman had no ability to select another financial institution to administer the payments.

In late November 2022, Ms. Sparkman's prepaid debit card was stolen. She immediately called Defendants and reported the card stolen and Defendants opened a dispute claim. Defendants refused to reimburse Ms. Sparkman for the unauthorized charges initiated by the thief or thieves, despite their obligations to do so under both federal law and their own contractual promises. Among other consequences, Ms. Sparkman had to cancel her daughter's birthday party after invitations had been sent because she could not afford to pay for the party.

Defendants' motion to dismiss should be denied because it seems to be directed at some complaint other than the one Ms. Sparkman filed. For example, Defendants argue that Ms. Sparkman's claim under the Electronic Funds Transfer Act (EFTA) should be dismissed because Ms. Sparkman does not allege she gave Defendants "information about the basis she believed each transaction was unauthorized." Mot. at 10. But Ms. Sparkman alleges that she called Defendants and told them her card had been stolen and then provided a written list of the disputed transactions initiated by the thief or thieves. Docket No. 1 ("Complaint") ¶¶ 19–23. She further alleges that Defendants actually investigated the disputed charges as potential fraud and wrongfully denied her claim. Complaint ¶¶ 19, 29–33. The notion that a consumer does not adequately notify a financial institution of why transactions were unauthorized when she (1) calls

and tells the institution her card was stolen; (2) specifically identifies the dates and amounts of the disputed transactions in writing; and (3) the institution actually investigates whether there was fraud, is baseless.

Similarly, Defendants argue that Ms. Sparkman's breach of contract claims should be dismissed for failure to specifically identify the promises she claims were breached. But her complaint quotes the relevant portions of Defendants' documents. Complaint ¶¶ 14–17 (language from Defendants' documents in quotation marks).

Defendants argue vociferously that Ms. Sparkman's EFTA claim fails because she has not alleged sufficient facts to show that their investigation was inadequate under 15 U.S.C. § 1693f. But the gravamen of Ms. Sparkman's EFTA claim is that Defendants wrongfully refused to reimburse her for unauthorized transactions under a separate provision—15 U.S.C. § 1693g(a). The motion does not grapple with Ms. Sparkman's theory that Defendants shift the burden of proof to the consumer by denying claims when Defendants "cannot confirm that fraud occurred" or find a "conflict in the information provided by you and the information resulting from our research," in violation of the EFTA's requires that claims only be denied when Defendants "show that the electronic fund transfer was authorized". 15 U.S.C. § 1693g(b).

Defendants' motion is factually and legally flawed and should be denied.

II. BACKGROUND

A. California parents must use Defendants' Way2Go card to receive court ordered child support via prepaid debit card.

All child support payments in California are made through California Child Support Services. Docket No. 1 (Complaint) ¶ 12. The state agency contracts with financial institutions

Comerica Bank and Conduent Business Services ("Defendants") to issue court ordered child support payments through "Way2Go Card" prepaid debit cards. *Id.* ¶¶ 12-13.

B. Ms. Sparkman receives court ordered child support on Defendants' Way2Go card. Defendants promised that her money would be protected if her card was stolen.

Paula Sparkman is a single mother who lives in Red Bluff with her daughter. *Id.* ¶ 11. Ms. Sparkman has had a Way2Go prepaid debit card issued by Defendants since approximately 2020. *Id.* ¶ 13. Defendants sent Ms. Sparkman her Way2Go Card with both an informational sheet and Terms of Use that made a series of contractual promises. Defendants' Way2Go Card informational sheet promises: "Mastercard's Zero Liability Protection assures you do not lose any funds if your Card is lost or stolen." *Id.* ¶ 14. Defendants' Terms of Use also say that if the account holder notifies Defendants within two business days after learning that a card was lost or stolen, a PIN was compromised, or unauthorized transactions were made then "you can lose no more than $50." *Id.* ¶ 15. Defendants' Terms of Use further provide that if the account holder notifies Defendants more than two days after learning of the loss, theft, or unauthorized use of the account holder's Way2Go Card, and Defendants can show that they could have stopped the unauthorized transactions if they had been informed sooner, then the account holder "could lose as much as $500," but not more. *Id.* ¶ 16. Defendants' Terms of Use further provide that the account holder "will not be responsible for unauthorized use of your Card." *Id.* ¶ 17.

C. Despite Ms. Sparkman reporting her card stolen within one day of the theft and diligently following up on her claim, Defendants refused to reimburse stolen funds.

On November 29 or 30, 2022, Ms. Sparkman's Way2Go Card was stolen out of her parked car. *Id.* ¶ 18. The next day, Ms. Sparkman called the Way2Go Card Program and reported the card stolen. *Id.* Defendants assigned Ms. Sparkman's claim Tracking ID: 1-6950303458. *Id.* ¶ 19. Defendants said she would receive paperwork to dispute the unauthorized transactions

within ten days. She did not receive the paperwork. *Id.* ¶ 21. Ms. Sparkman followed up with Defendants by phone many times, including on December 9, 2022, when Defendants directed her to hand write out the list of charges she disputed. *Id.* ¶ 22.

On approximately December 13, 2022, Ms. Sparkman emailed to Defendants a handwritten list of 21 disputed charges made using her card on November 30 and December 1, 2022. The charges total more than $1,000. She sent a photo of the handwritten list via email as directed by one of Defendants' agents. *Id.* ¶ 23. Ms. Sparkman's list is found on page 9 of Exhibit A to the Declaration of Blythe Chandler in support of this response.

The thief or thieves made unauthorized charges on Ms. Sparkman's account without entering a PIN. The transactions were instead processed as credit transactions with a signature. Complaint ¶ 24. Ms. Sparkman always uses her PIN to make purchases with her Way2Go Card. She never signs for charges on the card. *Id.* ¶ 25.

Ms. Sparkman received no paperwork from Defendants until after she made repeated follow up calls and was eventually told that Defendants had already denied her claim for reimbursement of the disputed charges. *Id.* ¶ 27. Defendants mailed Ms. Sparkman a packet of information that included reprinted copies of letters Ms. Sparkman had not previously received from Defendants. *Id.* ¶ 28. Exhibit A to the Declaration of Blythe Chandler in support of this motion is the packet of information Ms. Sparkman received from Defendants. Chandler Decl. ¶ 2.

Defendants' letter dated December 1, 2022 acknowledged receipt of Ms. Sparkman's complaint the same date. *Id.* ¶ 29. Defendants' other records confirm that Defendants opened her dispute claim on December 1, 2022, within hours after she discovered the card was stolen. *Id.*

D. Defendants' form letter denying Ms. Sparkman's claim reflects a policy of denying claims even when Defendants cannot show the claims were authorized.

Defendants' letter to Ms. Sparkman dated December 14, 2022, states the following grounds for denying her claim for reimbursement of unauthorized charges (1) "we found a conflict in the information provided by you and the information resulting from our research"; and (2) "we cannot confirm that fraud occurred." *Id.* ¶ 30. Ms. Sparkman appealed the decision to no avail. *Id.* ¶ 32. Without the missing funds, Ms. Sparkman could not afford to host her daughter's birthday party—despite invitations already having been sent before the theft. Ms. Sparkman was also unable to purchase a Christmas tree or many gifts. *Id.* ¶ 33.

III. ARGUMENT AND AUTHORITY

The court should dismiss under Rule 12(b)(6) only if the complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or insufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990). The court accepts all facts alleged in the complaint as true and draws all inferences in the light most favorable to the non-moving party. *Baker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009). The court may consider documents not attached to the complaint in ruling on a Rule 12 motion only when the plaintiff's claim depends on the contents of the document and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

A. California law governs Ms. Sparkman's breach of contract claim, but she adequately pled breach of contract under any state's law.

1. Defendants' Michigan choice of law provision is not enforceable against Ms. Sparkman or the proposed class.

Defendants contend that the choice of law clause contained in their Way2Go card Terms of Use requires application of Michigan, rather than California, law to Ms. Sparkman's claims. Defendants are wrong. The choice-of-law provision, stating that "[t]hese Terms will be governed by and construed in accordance with applicable federal law and the laws of the State of Michigan," should not be enforced by the Court for several reasons.

As an initial matter, Defendants are incorrect that federal common law governs choice of law in this case. "In a federal question action where the federal court is exercising supplemental jurisdiction over state claims, the federal court applies the choice-of-law rules of the forum state—in this case, California." *Paracor Fin., Inc. v. Gen. Elec. Cap. Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996); *see also Ramirez v. Baxter Cred. Union*, 2017 WL 1064991, at *6 (N.D. Cal. Mar. 21, 2017). Here the Court has federal question jurisdiction based on Ms. Sparkman's EFTA claims and supplemental jurisdiction over her state law claims. Thus, the Court should apply California choice-of-law principles to determine whether to enforce the contractual choice-of-law provision. As a practical matter, however, both federal and California courts look to the Restatement (Second) of Conflict of Laws, and specifically to § 187, to determine whether a contractual choice of law clause is enforceable. *See Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 464-66 (1992).

First, the Terms of Use is a form contract that was imposed on Ms. Sparkman as a condition of her receipt of child support payments via debit card. Ms. Sparkman had no ability to negotiate the terms of the contract or choose to utilize a different prepaid debit card provider to

access money that, by court order, is owed to her every month. In a similar context, the Ninth Circuit has held that where a person is issued a prepaid card by a government contractor as the means to access their own money, the person is not bound by the standard terms and conditions they purportedly accept by use of the card. *See, e.g., Reichert v. Rapid Investments, Inc.*, 56 F.4th 1220 (9th Cir. 2022) (plaintiff not required to arbitrate based on terms and conditions attached to prepaid debt card issued by government contractor upon release from jail to access funds confiscated upon arrest); *see also Cain v. JPay, Inc.*, 2023 WL 2637733, at *3-4 (C.D. Cal. Mar. 1, 2023) (same). For these reasons, the Court should decline to enforce the choice-of-law provision here.

Second, contrary to Defendants' argument, § 187(1), which provides that a choice of law clause "will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue," does not end the inquiry. In fact, it is irrelevant. As the commentary to § 187 explains, "[t]he rule of [subsection 1] is a rule providing for incorporation by reference and is not a rule of choice of law." Restatement (Second) of Conflict of Laws § 187 cmt. c (emphasis added). Rather, the rule is designed to permit parties to incorporate by reference a specific provision of foreign law to fill a contractual gap. The California Supreme Court has rejected the broad application of § 187(1) that Defendants suggest. *Nedlloyd*, 3 Cal. 4th at 465 n.3.

Third, when, as here, there is an express choice of law clause, the Court must turn to § 187(2), which asks whether the chosen state has a "substantial relationship" to the parties or the transaction, or whether there is any other "reasonable basis" for the parties' choice. *See Nedlloyd*, 3 Cal. 4th at 465. "If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law." *Id.* at 466. Here, Defendants offer no

argument that Michigan has a "substantial relationship" to the parties or their transaction, nor any other reasonable basis for application of Michigan law. Nor could they. Ms. Sparkman is a California resident whose relationship with Defendants is based on her Way2Go Card Prepaid Mastercard containing child support payments made through California Child Support Services, a California governmental agency. Defendants are citizens of Texas, Delaware, and New Jersey, and have alleged no specific connection between themselves and Michigan. In short, there is no reasonable basis for the choice of Michigan law here. The Court should therefore decline to enforce the choice of law clause.[1]

2. Ms. Sparkman adequately pled a breach of contract claim by quoting the contractual promises she alleges Defendants breached.

As explained above, Michigan law does not apply to Ms. Sparkman's claims. But neither California nor Michigan courts impose the onerous pleading requirements Defendants argue for. In *Milican v. Home Depot U.S.A., Inc.*, 2020 WL 4001900, at *3 (E.D. Mich. July 15, 2020), the court distinguished *Young v. International Union*, 148 F. Supp. 602 (E.D. Mich. 2015), rejecting the notion that plaintiff must either attach any contract to his complaint or allege "the specific terms of the contract allegedly breached." The court explained there is nothing in the Federal Rules of Civil Procedure or "any Michigan law" establishing such requirements. *Milican*, 2020 WL 4001900, at *3.

But even if the more demanding standard Defendants argue for applied, Ms. Sparkman's complaint meets it. The complaint quotes the Terms of Use provisions she alleges Defendants

[1] Because it is so clear that Defendants cannot show any reasonable basis for applying Michigan law to the parties' contract here, Ms. Sparkman need not show that applying Michigan's law "is contrary to a *fundamental* policy of California." *Nedlloyd*, 3 Cal. 4th at 466 (emphasis in original); *see also* Restatement (Second) of Conflict of Laws § 187(2)(b) & cmt. b. Ms. Sparkman preserves that argument in the alternative.

breached. Paragraph 15 quotes the promise that "you can lose no more than $50" if the consumer notifies Defendant their card was lost or stolen within two business days after learning of the loss. This promise appears in section 10 of the Terms of Use. Docket No. 16-2, § 10 ("If you tell us within two (2) business days, after you learn of the loss or theft of your Card or PIN you can lose no more than $50 if someone used your Card or PIN without your permission."). Paragraph 16 of Ms. Sparkman's complaint directly quotes from the next paragraph of section 10 in the Terms of Use.

3. Defendants' argument that the Terms of Use give them "great flexibility" to deny claims is inconsistent with rules of contract interpretation and the EFTA.

Defendants argue that they limited the promises Ms. Sparkman cites by stating in the Terms of Use that they "may refuse to reimburse you for a transaction you assert is unauthorized if . . . (2) we conclude that the facts do not reasonably support a claim of unauthorized use." *See* Docket No. 16-2, § 10. Citing *In re Bank of Am. Cal. Unemployment Benefits Litig.*, 2023 WL 3668535 (S.D. Cal. May 25, 2032), Defendants contend that this contractual provision gives them "'great flexibility' in concluding when transactions are unauthorized." Mot. at 7. Whether that is true is at least ambiguous in light of the promises to reimburse for unauthorized transactions made earlier in the Term of Use. "In the case of ambiguous terms within a form contract, such terms would be construed against the drafter." *Congdon v. Uber Techs., Inc.*, 291 F. Supp. 3d 1012, 1022 (N.D. Cal. 2018).

But Defendants' proffered interpretation also fails as a matter of law. The EFTA puts the burden of proof on the financial institution to show that disputed electronic fund transfers were authorized. "In any action which involves a consumer's liability for an unauthorized electronic

fund transfer, the burden of proof is upon the financial institution to show that the electronic fund transfer was authorized." 15 U.S.C. § 1693g(b).

A financial institution's conclusion that "the facts do not reasonably support a claim of unauthorized use" is not the same as that institution "show[ing]that the electronic fund transfer was authorized," as required by the statute. Defendants' Terms of Use cannot flip the EFTA's burden of proof and permit denial whenever Defendants "conclude that the facts do not reasonably support a claim of unauthorized use" under the EFTA's anti-waiver provision. The anti-waiver provision provides: "No writing or other agreement between a consumer and any other person may contain any provision which constitutes a waiver of any right conferred or cause of action created by this subchapter." 15 U.S.C. § 1693*l*; *Jordan v. Freedom Nat'l Ins. Servs.*, 2016 WL 5363752, at *2 (D. Ariz. Sept. 26, 2016) (section 1693*l* known as the EFTA's "anti-waiver provision").

Defendants' heavy reliance on *Bank of America California Unemployment Benefits* is unwarranted for several reasons. First, *Bank of America* does not address whether the account terms at issue were barred by the EFTA's anti-waiver provision. 2023 WL 3668535, at *27.

Second, the *Bank of America* court considered whether a defendant violated its obligation to conduct a reasonable investigation under section 1693f (entitled "Error Resolution"), whereas Ms. Sparkman's claim is under section 1693g (entitled "Consumer Liability"). Section 1693f requires a financial institution to reasonably investigate alleged billing errors but does not set forth in detail what steps it must take, leaving some room for discretion. But section 1693g caps how much a consumer can lose and specifically sets out the burden of proof that governs a financial institution's determination that a disputed transfer was authorized. Whatever flexibility

a financial institution has to design and implement investigatory processes under section 1693f, a defendant cannot alter the burden of proof applicable to its obligation to reimburse under 1693g.

Indeed, setting standards for the allocation of liability regarding allegedly unauthorized transactions is a core attribute of the EFTA. *Bank of Am. v. City & Cnty. of S.F.*, 309 F.3d 551, 564 (9th Cir. 2002) ("The language of the EFTA indicates that the consumer protection measures contemplated by it are aimed at promoting disclosure, preventing fraud, *and allocating liability*") (emphasis added). Even minor limitations and impediments on a consumer's EFTA rights are routinely found to violate section 1693*l*'s anti-waiver provision. *Baldukas v. B&R Check Holders*, 2013 WL 950847, at *3 (D. Colo. Mar. 8, 2013) (denying motion to dismiss claim that account agreement improperly waived rights under § 1693*l*; *Simone v. M & M Fitness LLC*, 2017 WL 1318012, at *2–4 (D. Ariz. Apr. 10, 2017); *Jordan*, 2016 WL 5363752, at *2–4. In short, Defendants' interpretation of their Terms of Use would shift the burden of proof regarding allegedly unauthorized transfers in violation of the EFTA's anti-waiver provision. Defendants' self-serving interpretation of its form agreement is no basis for dismissal of Ms. Sparkman's breach of contract claim.

Defendants' arguments also fail because Ms. Sparkman alleges a separate breach relating to promises Defendants made in the information sheet attached to their prepaid debit cards. There Defendants promised: "Mastercard's Zero Liability Protection assures that you do not lose any funds if your Card is lost or stolen." Complaint ¶ 14. Defendants breached this promise when Ms. Sparkman's card was stolen, she reported it stolen to Defendants, and they denied her claim for reimbursement of the stolen funds. Complaint ¶ 34. Contrary to Defendants' arguments, the Zero Liability Protection promise does not appear in the Terms of Use but is instead in a separate document. Nothing in the complaint or the Terms of Use Defendants filed

with their motion suggests that the Zero Liability Protection promise is limited by provisions of the Terms of Use.

Bank of America California Unemployment Benefits is distinguishable on that basis as well. Bank of America's "Zero Liability" policy appeared within a section of an Account Agreement providing that the policy "doesn't apply to transactions that aren't considered unauthorized." *Bank of Am. Cal. Unemployment Benefits Litig.*, 2023 WL 3668535, at *27. But the promise at issue here is not part of the Terms of Use at all and there is no similar limitation on Defendants' assurance that a consumer will not "lose any funds if your Card is lost or stolen." Complaint ¶ 14. The *Bank of America* court's interpretation of different contractual provisions, which do not "mirror" the provisions at issue here, is wholly unpersuasive here. [2]

B. Ms. Sparkman states a claim under the EFTA because Defendants refused to credit her account for unauthorized transactions after she reported her card stolen.

Defendants' motion to dismiss Ms. Sparkman's single claim under the EFTA should be denied because it fails to address her primary theories of liability. *See, e.g., Guarnieri v. Be Money Inc.*, 2022 WL 11381916, at *6 (C.D. Cal. Oct. 18, 2022) (declining to dismiss EFTA claim supported by multiple theories despite successful challenge to pleading of one theory).

A brief overview of the EFTA's statutory scheme and the various procedural and substantive protections it affords consumers reveals the flaws in Defendants' arguments. Congress enacted the EFTA to address the risks to consumers associated with electronic banking transactions. *Widjaja v. JPMorgan Chase Bank, N.A.*, 41 F.4th 579, 580–81 (9th Cir. 2021). The statute's "primary objective" is "the provision of individual consumer rights." 15 U.S.C.

[2] Defendants' reliance on *Bank of America*, 2023 WL 3668535, at *24–27, which cites only California contract cases and applies California rules of contract interpretation, is also inconsistent with their argument that Michigan law applies.

§ 1693(b) (Congressional declaration of purpose). It "was established to protect consumers from errant and unauthorized monetary transfers." *Guarnieri*, 2022 WL 11381916, at *8. The Consumer Financial Protection Bureau (CFPB) promulgated Regulation E, 12 C.F.R. § 1005, under the EFTA.

The statute imposes a "cap on a consumer's liability for unauthorized electronic fund transfers." *Widjaja*, 41 F.4th at 581. The EFTA defines the term "unauthorized electronic fund transfer" as "an electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate such transfer and from which the consumer receives no benefit." 15 U.S.C. § 1693a(12). The EFTA caps the consumer's potential losses as follows:

> In no event, however, shall a consumer's liability for an unauthorized transfer exceed the lesser of—
> **(1)** $50; or
> **(2)** the amount of money or value of property or services obtained in such unauthorized electronic fund transfer prior to the time the financial institution is notified of, or otherwise becomes aware of, circumstances which lead to the reasonable belief that an unauthorized electronic fund transfer involving the consumer's account has been or may be effected. Notice under this paragraph is sufficient when such steps have been taken as may be reasonably required in the ordinary course of business to provide the financial institution with the pertinent information, whether or not any particular officer, employee, or agent of the financial institution does in fact receive such information.

15 U.S.C. § 1693g(a).

The EFTA puts the burden of proof on the financial institution to show that disputed electronic fund transfers *was authorized* before denying a claim under section 1693g. "In any action which involves a consumer's liability for an unauthorized electronic fund transfer, the burden of proof is upon the financial institution to show that the electronic fund transfer was authorized." 15 U.S.C. § 1693g(b); *see also Bank of Am. Cal. Unemployment Benefits Litig.*,

2023 WL 3668535, at *10 ("the financial institution bears the burden of establishing that a transaction was authorized."); Complaint ¶¶ 51-54.

Ms. Sparkman's claims arise primarily under section 1693g, which caps consumer liability for unauthorized electronic fund transfers, not the separate provisions under 1693f dealing with correction of account errors. She alleges that Defendants violated the EFTA when they refused to reimburse her for the more than $1,000 in charges that she told Defendants were unauthorized after her card was stolen. Complaint ¶¶ 19–23. Ms. Sparkman lost at least $950 more than she should have under the express terms of section 1693g.

Ms. Sparkman further alleges that Defendants have a policy or practice of wrongfully denying consumer claims because their form denial letters state that they deny claims when they find "conflicting information" and "cannot confirm that fraud occurred." Complaint ¶ 30. Refusing to cap the consumer's loss at $50 where a financial institution has "conflicting information" or "cannot confirm that fraud occurred" is the opposite of what the statute requires, which is to reimburse amounts above the cap unless the financial institution shows the transfers were authorized. If Defendants deny consumers' claims based on a flipped burden of proof, which their form denial letters say they do (Complaint ¶¶ 30–31, 54), then they are violating the statute when they deny claims. Defendants' motion to dismiss makes no direct challenge to this legal theory. *See* Motion at 8–9 (failing to cite 15 U.S.C. § 1693g(b)). Defendants' motion to dismiss the EFTA claim should be denied on that basis alone. *Guarnieri*, 2022 WL 11381916, at *6.

1. Ms. Sparkman pled facts that plausibly suggest Defendants' investigation was inadequate, which supports her request for treble damages under the EFTA.

Instead of directly addressing Ms. Sparkman's primary theory of liability, Defendants argue that she pled "no facts" to support a claim that Defendants' fraud investigation procedures are inadequate. *See* Motion at 4, 8-9. But Ms. Sparkman's allegation that Defendants' investigations are inadequate support her claim for treble damages under the EFTA. Section 1693f(e) authorizes treble damages if the court determines that a financial institution "did not make a good faith investigation of the alleged error," "did not have a reasonable basis for believing that the consumer's account was not in error," or "knowingly and willfully concluded that the consumer's account was not in error when such conclusion could not reasonably have been drawn from the evidence available to the financial institution at the time of its investigation."

In other words, whether Defendants conducted a good faith investigation does not bear directly on their liability for failure to reimburse Ms. Sparkman under section 1693g, but rather will be one of several additional inquiries undertaken to determine whether Defendants are also liable for treble damages. *Compare* Complaint ¶¶ 47-56 *with* ¶ 57. Because Defendants' motion is directed only at one remedy sought, it is not a basis for dismissal of her entire claim under the EFTA. *See* Complaint ¶¶ 47-57.

In addition to that legal failing, Defendants' argument ignores the factual allegations in the complaint. To seek treble damages for investigative failures or unreasonable denials under 1693f(e), a plaintiff need not detail in her complaint what exactly the financial institution did wrong because a consumer does not know what steps a financial institution did or did not take to investigate a claim absent discovery. *See Widjaja*, 21 F.4th at 585 (where consumer challenged

adequacy of financial institution's procedures under less favorable standard applicable only to certain types of late disputes not at issue here, plaintiff's allegations need only "plausibly suggest *some sort of failure*" by the institution) (emphasis added).

But Ms. Sparkman has pled facts that plausibly suggest some sort of failure in Defendants' fraud investigation procedures occurred. Defendants' documents show that they deny claims when their investigation reveals conflicting information or they cannot "confirm" that fraud occurred. Complaint ¶¶ 30-31. Those documents suggest that Defendants have a policy of denying claims unless they are convinced that fraud occurred, which is impermissible under the EFTA. Investigating in a manner that impermissibly shifts the burden of proof is an investigative failure that implicates the EFTA's treble damages provision. But Ms. Sparkman alleges more. After she reported her card stolen, Defendants said they would mail her paperwork to complete, but failed to do so. Complaint ¶ 21. It is at least plausible that failing to provide Ms. Sparkman with an opportunity to fully explain her claims constitutes inadequate investigation. Ms. Sparkman alleges that the unauthorized charges were made "without entry of a PIN" but with a signature instead. Complaint ¶ 24. Ms. Sparkman "always uses her PIN to make purchases with her Way2Go card. She never signs for charges on the card." Complaint ¶ 25. It is at least plausible to conclude from these allegations that Defendants have records about Ms. Sparkman's normal use of the card and could have compared that information with the disputed transactions and identified them as inconsistent with her normal patterns of use. *See In re Bank of Am.*, 2023 WL 3668535, at *10 ("§ 1693f requires that any investigation under the statute include a reasonable review of the financial institution's own records").

Ms. Sparkman's allegations of failure to conduct a good faith investigation and unreasonable denial are far more detailed than those at issue in *Chen v. Bank of America, N.A.*,

2019 WL 9633650, at *8 (C.D. Cal. Oct. 29, 2019). There, the plaintiff merely stated that Bank of America failed to properly or in good faith investigate his claims before denying them with no further factual support. *Id.* Ms. Sparkman alleges that she gave Defendants detailed information, they failed to apply the proper burden of proof, failed to provide paperwork, and that unauthorized transactions were inconsistent with her prior account use.

Moreover, the court dismissed Chen's claim *under section 1693f* with leave to amend. If the Court has any concern about the adequacy of Ms. Sparkman's factual allegations supporting her request for treble damages under section 1693f, she should be granted leave to amend those allegations.

2. Ms. Sparkman alleges that she told Defendants her prepaid debit card was stolen, which is plainly why she believed the charges were unauthorized.

Defendants' argument that Ms. Sparkman didn't give them notice of the reason she disputed the transactions again focuses on requirements under section 1693f, when Ms. Sparkman's claims are primarily under section 1693g. Defendants also mistakenly cite the Regulation E notice requirements for resolving errors (12 C.F.R. § 1005.11(b)), instead of those governing liability of the consumer for unauthorized transactions (12 C.F.R. § 1005.6(b)). The applicable provision of Regulation E provides: "Notice to a financial institution is given when a consumer takes steps reasonably necessary to provide the institution with the pertinent information." 12 C.F.R. § 1005.6(b)(5)(i).

But even if the notice requirements of EFTA section 1693f and Regulation E section 1005.11(b) apply to any of Ms. Sparkman's theories, she has pled facts showing they are met. Section 1693f calls for the consumer to provide her name, account, and her belief that the account "contains an error and the amount of such error." 15 U.S.C. § 1693f(a)(1)-(3).

Regulation E and its official commentary emphasize that these requirements are construed consistent with the EFTA's remedial purpose rather than in a technical manner. *See, e.g.* CFPB Official Interpretation of 12 C.F.R § 1005.11(b)(1), Supp. I at 11(b)(1) ("The notice of error is effective even if it does not contain the consumer's account number, so long as the financial institution is able to identify the account in question."); 12 C.F.R. § 1005.11(b)(1)(i) – (iii) (providing that the financial institutions must comply with its obligations under 1693f where the information provided by the consumer meets the statutory minimum).

Ms. Sparkman's allegations easily show the notice requirements were met. She called Defendants and reported her card stolen on December 1, 2022, and Defendants assigned her claim a tracking ID. Complaint ¶ 19. Subsequently, and at Defendants' direction, she emailed Defendants a handwritten list of the 21 charges made on November 30 and December 1, 2022, which she disputed. Complaint ¶ 23. After Defendants denied her claim for reimbursement, she submitted "an appeal of Defendants' decision not to reimburse the stolen funds." Complaint ¶ 32.

Ms. Sparkman's allegations are far more detailed than the ones deemed insufficient in *Hardin v. Bank of Am., N.A.*, 2022 WL 3568568, at *3 (Aug. 18, 2022), where the plaintiff "did not comply" with the bank's request to verify his identity. They are also nothing like the allegations in *Ghalchi v. U.S. Bank, N.A.*, 2015 Wl12655402, at *8 (C.D. Cal. Jan. 8, 2015), where the pro se plaintiff alleged only that she "notified" the bank of "unauthorized withdrawals," and was granted leave to amend.

In sum, any allegation that Ms. Sparkman failed to provide enough information for her claim to be considered a dispute under 1693f is baseless. If the Court concludes that Ms. Sparkman needs to provide any more detail about the notice she provided to Defendants, which it should not, then she should be granted leave to amend to add allegations.

C. Ms. Sparkman states a claim for violation of the California Unfair Competition Law.

Defendants contend that Plaintiff's UCL claim should be dismissed on the basis of the contractual choice-of-law provision. But for the reasons detailed in Section III.A.1, *supra*, the choice-of-law provision selecting Michigan law should not be enforced. Defendants' argument that Ms. Sparkman has not adequately alleged unlawful acts under the UCL fails for the same reasons as Defendants' arguments for dismissal of her EFTA claims. *See* section III.B, *supra*.

1. Ms. Sparkman's claim under the UCL should not be dismissed at the pleading stage under *Sonner v. Premier Nutrition Corp.*

Defendants argue based on the Ninth Circuit's decision in *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020), that Ms. Sparkman's UCL claim should be dismissed because she has not alleged that she lacks an adequate remedy at law. In *Sonner*, the Ninth Circuit held that "the traditional principles governing equitable remedies in federal courts, including the requisite inadequacy of legal remedies, apply when a party requests restitution under the UCL and CLRA in a diversity action." 971 F.3d at 844. Thus, a plaintiff "must establish that she lacks an adequate remedy at law before securing equitable restitution for past harm under the UCL and CLRA." *Id.*

Numerous courts, including this one, have held that this rule does not call for dismissal of UCL claims at the pleading stage because plaintiffs may plead in the alternative. "Unlike in *Sonner*, where the plaintiff dropped her damages claim on the eve of trial, this case is at the pleading stage. Thus, *Sonner* has 'limited applicability.'" *Carroll v. Progressive Cas. Ins. Co.*, 2023 WL 3526137, at *6 (C.D. Cal. Mar. 6, 2023). "This court agrees with the reasoning of courts holding that *Sonner* does not impose strict requirements at the pleading stage." *Sinatro v. Barilla Am., Inc.*, --- F. Supp. 3d ---, 2022 WL 10128276, at *16 (N.D. Cal. Oct. 17, 2022); *see*

also Jeong v. Nexo Fin. LLC, 2022 WL 174236, *27 (N.D. Cal. Jan. 19, 2022) ("The Court finds that *Sonner* has limited applicability to the pleading stage because it pertained to circumstances in which a plaintiff dropped all damages claims on the eve of trial."). Despite some courts having gone the other way, Ms. Sparkman's UCL claim should proceed beyond the pleading stage because the Court may reassess the issue of available remedies at a later stage of the case. *See Barrilla*, 2022 WL 10128276, at *16.

2. Ms. Sparkman has adequately alleged unfair acts under the UCL.

The UCL prohibits "any [1] unlawful, [2] unfair or [3] fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. "As the UCL's three-prong structure makes clear, a business practice may be unfair, and therefore illegal under the UCL, even if not specifically proscribed by some other law." *Epic Games, Inc. v Apple, Inc.*, 67 F.4th 946, 1000 (9th Cir. 2023) (internal quotation marks omitted). "The unfair prong is intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." *Id.* (internal quotation marks omitted). "To support a finding of unfairness to consumers, a court uses the balancing test, which weigh[s] the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Id.* (internal quotation marks omitted). To the extent the *Klaehn v. Cali Bamboo, LLC*, 2020 WL 3971518 (C.D. Cal. July 13, 2020), the unpublished order on which Defendants rely, is inconsistent with the standards applied by the Ninth Circuit, it has no persuasive force.

Ms. Sparkman has alleged conduct that meets this standard. Defendants wrongfully deny reimbursement to Californians whose prepaid debt cards were lost or stolen or on whose cards fraudsters made other unauthorized electronic fund transfers. In denying claims, Defendants routinely apply a burden of proof that is impermissible under federal law and inconsistent with

their contractual promise of "Zero Liability" for consumers whose cards are lost or stolen. Defendants' alleged conduct easily falls within the "broad, sweeping language" of the UCL's unfair prong. There is no utility to Defendants' conduct other than increasing their own profits despite Congress's choice to make financial institutions, not consumers, bear most of the risk associated with unauthorized electronic fund transfers. And the harm to victims like Ms. Sparkman is severe. Complaint ¶ 33. Californians who rely on court ordered child support payments may be unable to feed their families or pay rent as when they are wrongfully denied reimbursement for even a few hundred or a few thousand dollars in unauthorized electronic fund transfers. That is unfair.

IV. CONCLUSION

Ms. Sparkman respectfully requests that the Court deny Defendants' motion to dismiss her complaint (Docket No. 16). In the alternative, she requests leave to amend any claim that the Court concludes is inadequately pled.

RESPECTFULLY SUBMITTED AND DATED this 26th day of June, 2023.

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I, Beth E. Terrell, hereby certify that on June 26, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to all registered CM/ECF users:

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