

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM AND AVE BORTZ,  
Plaintiffs,  
v.  
JPMORGAN CHASE BANK, N.A.;  
SHAWNA BROWN; ARCHIE  
ALVARADO; JOEL PETRIASHVIL-  
REYES; MICHELLE MARTINEZ;  
ARNIE SINGSON; BRIAN CRUZ; and  
DOES 1–50, inclusive,  
Defendants.

Case No.: 21-CV-618 TWR (JLB)

**ORDER (1) GRANTING  
DEFENDANTS’ MOTION  
TO DISMISS COMPLAINT, AND  
(2) DISMISSING WITHOUT  
PREJUDICE PLAINTIFF’S  
COMPLAINT**

(ECF No. 5)

Presently before the Court is the Motion to Dismiss Complaint (“Mot.,” ECF No. 5) filed by Defendants JPMorgan Chase Bank, N.A. (“Chase”), Shauna Brown (erroneously named as Shawna Brown), Archie Alvarado, Joel Petriashvili-Reyes (erroneously named as Joel Petriashvil-Reyes), Michele Martinez (erroneously named as Michelle Martinez), Arnie Singson and Brian Cruz, as well as Plaintiffs William and Ave Bortz’s Opposition to (“Opp’n,” ECF No. 6) and Defendants’ Reply in Support of (“Reply,” ECF No. 7) the Motion. Pursuant to the Honorable Cynthia A. Bashant’s Standing Order for Civil Cases, the Parties declined oral argument unless ordered by the Court, and the undersigned concludes that the Motion is suitable for determination on the papers without oral argument

1 pursuant to Civil Local Rule 7.1(d)(1). Having carefully reviewed Plaintiffs’ Complaint  
2 (“Compl.,” ECF No. 1-2), the Parties’ arguments, and the law, the Court **GRANTS**  
3 Defendants’ Motion and **DISMISSES WITHOUT PREJUDICE** Plaintiffs’ Complaint.

#### 4 **BACKGROUND<sup>1</sup>**

5 At the time of the transactions that are the subject of their Complaint, Plaintiffs  
6 William and Ave Bortz were 76 and 77 years old, respectively. (*See* Compl. ¶¶ 1–2, 17,  
7 32–33, 39, 51, 54.) Plaintiffs have been banking with Defendant Chase since  
8 approximately 1971. (*See id.* ¶¶ 19, 49.) During those 49 years, Plaintiffs had never wired  
9 money to a foreign country. (*See id.* ¶¶ 20–21, 33, 39, 51, 54.)

10 On January 20, 2021, scammers took over Plaintiffs’ bank accounts and directed  
11 Mr. Bortz to go to a Chase branch located at 7176 Avenida Encinas, Carlsbad, California  
12 92011 (the “Encinas branch”), (*see id.* ¶ 22), which is managed by Defendant Brown. At  
13 the scammers’ instruction, Mr. Bortz kept them on the phone at the bank and was  
14 “groomed” how to answer questions related to his wire transfer, including whether he knew  
15 the recipients. (*See id.*) As instructed by Mr. Bortz, Defendant Alvarado wired \$198,000  
16 to a Standard Chartered Bank (Hong Kong) Limited (“SCHK”) account belonging to  
17 “eshamuddin.” (*See id.*; *see also id.* ¶ 39.)

18 At the scammers’ behest, Mr. Bortz made three additional wire transfers. First, on  
19 January 22, 2021, Mr. Bortz returned to the Encinas branch as directed by the scammers,  
20 who advised him that the first transfer had not gone through. (*See id.* ¶ 23.) At Mr. Bortz’s  
21 request, Defendant Petriashvil-Reyes wired another \$197,850 to a SCHK account  
22 belonging to “Boloy Analizo Jono.” (*See id.*; *see also id.* ¶ 39.) Second, on January 26,  
23 2021, the scammers sent Mr. Bortz to another Chase branch located in Poway (the “Poway  
24 branch”), again insisting that the wire transfer had not gone through. (*See id.* ¶ 24.) As  
25 directed by Mr. Bortz, Defendant Martinez wired \$197,500 to a SCHK account belonging  
26

---

27 <sup>1</sup> For purposes of Defendants’ Motion, the facts alleged in Plaintiffs’ Complaint are accepted as true. *See*  
28 *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007) (holding that, in ruling on a motion to  
dismiss, the Court must “accept all material allegations of fact as true”).

1 to “Tunit Rustiyawali.” (*See id.*; *see also id.* ¶ 39.) Finally, on January 28, 2021, the  
2 scammers instructed Mr. Bortz to return to the Poway branch, where Defendant Singson  
3 wired \$97,500 to a SCHK account belonging to “eshamuddin” as requested by Mr. Bortz.  
4 (*See id.* ¶ 25; *see also id.* ¶ 39.) Plaintiffs’ four transfers totaled \$690,500. (*See id.* at 1,  
5 ¶¶ 16, 41; *see also* Prayer ¶ 1.)

6 On January 28, 2021, Plaintiffs’ daughter, also named Ave Williams, learned of the  
7 wire transfers and drove her parents to the nearest Chase branch, located at 16861 Bernardo  
8 Center Drive, San Diego, California 92128 (the “Rancho Bernardo branch”). (*See id.* ¶ 26.)  
9 Defendant Cruz, who is the Vice-President and Branch Manager of the Rancho Bernardo  
10 branch, informed the Williamses that “the only thing Chase Bank could do was contact the  
11 wires department in New York but that he could not do that until the next day when they  
12 opened.” (*See id.*) Defendant Cruz took no further action to reverse the pending wire  
13 transfers, (*see id.*), and Defendant Chase failed to report the fraudulent wire transfers to its  
14 fraud department between January 28 and February 2, 2021. (*See id.* ¶¶ 26–30.) Plaintiffs’  
15 daughter attempted to contact Defendant Chase’s fraud department on February 2, 2021,  
16 and was told that the issue would be sent to the dispute department. (*See id.* ¶ 30.)

17 On March 4, 2021, Plaintiffs initiated this action in the Superior Court for the State  
18 of California, County of San Diego, alleging two causes of action against all Defendants  
19 for (1) financial elder abuse pursuant to California Welfare and Institutions Code  
20 § 15610.30, and (2) negligence. (*See generally* ECF No. 1-2.) Defendants removed to this  
21 Court on April 9, 2021, on the grounds that this Court has original jurisdiction pursuant to  
22 the Edge Act, 12 U.S.C. § 632.<sup>2</sup> (*See generally* ECF No. 1.) The instant Motion followed

23 ///

---

24  
25  
26 <sup>2</sup> Judge Bashant ordered Defendants to show cause why this action should not be remanded for lack of  
27 subject-matter jurisdiction on August 10, 2021. (*See generally* ECF No. 9.) Having reviewed Defendants’  
28 response, (*see generally* ECF No. 10), the Court is satisfied that Plaintiffs’ claims “arise[] out of  
transactions involving international or foreign banking ... or out of other international or foreign financial  
operations,” (*see id.* at 1 (quoting 12 U.S.C. § 632)), such that this Court has original jurisdiction under  
the Edge Act.

1 on April 26, 2021, (*see generally* ECF No. 5), and this action was transferred to the  
2 undersigned on September 30, 2021. (*See generally* ECF No. 11.)

### 3 **LEGAL STANDARD**

4 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to  
5 state a claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’”  
6 *Conservation Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting *Navarro*  
7 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). “A district court’s dismissal for failure to  
8 state a claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is a ‘lack of  
9 a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal  
10 theory.’” *Id.* at 1242 (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th  
11 Cir. 1988)).

12 “Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a ‘short and  
13 plain statement of the claim showing that the pleader is entitled to relief.’” *Ashcroft v.*  
14 *Iqbal*, 556 U.S. 662, 677–78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). “[T]he pleading  
15 standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands  
16 more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* at 678  
17 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “[a]  
18 pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a  
19 cause of action will not do.’” *Id.* (quoting *Twombly*, 550 U.S. at 555).

20 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
21 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting  
22 *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads  
23 factual content that allows the court to draw the reasonable inference that the defendant is  
24 liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “[W]here the  
25 well-pleaded facts do not permit the court to infer more than the mere possibility of  
26 misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is  
27 entitled to relief.” *Id.* at 679 (second alteration in original) (quoting Fed. R. Civ. P.  
28 8(a)(2)).

1 “Rule 9(b) requires that, when fraud is alleged, ‘a party must state with particularity  
2 the circumstances constituting fraud.’” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124  
3 (9th Cir. 2009) (quoting Fed. R. Civ. P. 9(b)). “Rule 9(b) demands that the circumstances  
4 constituting the alleged fraud be specific enough to give defendants notice of the particular  
5 misconduct . . . so that they can defend against the charge and not just deny that they have  
6 done anything wrong.” *Id.* (alteration in original) (internal quotation mark omitted)  
7 (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)). “Averments of  
8 fraud must be accompanied by the who, what, when, where, and how of the misconduct  
9 charged.” *Id.* (internal quotation marks omitted) (quoting *Vess v. Ciba-Geigy Corp. USA*,  
10 317 F.3d 1097, 1106 (9th Cir. 2003)).

11 “If a complaint is dismissed for failure to state a claim, leave to amend should be  
12 granted ‘unless the court determines that the allegation of other facts consistent with the  
13 challenged pleading could not possibly cure the deficiency.’” *DeSoto v. Yellow Freight*  
14 *Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well*  
15 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). “A district court does not err in  
16 denying leave to amend where the amendment would be futile.” *Id.* (citing *Reddy v. Litton*  
17 *Indus.*, 912 F.2d 291, 296 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991)).

## 18 ANALYSIS

19 Through the instant Motion, Defendants seek dismissal without leave to amend of  
20 both Plaintiffs’ causes of action for financial elder abuse and negligence. (*See, e.g.*, ECF  
21 No. 5-1 (“Mem.”) at 2, 10, 16, 17.)

### 22 I. First Cause of Action: Financial Elder Abuse

23 “‘Financial abuse’ of an elder or dependent adult occurs when a person or entity . . .  
24 [a]ssists in taking, secreting, appropriating, obtaining, or retaining real or personal property  
25 of an elder or dependent adult for a wrongful use or with intent to defraud, or both.” *See*  
26 *Cal. Welf. & Inst. Code* § 15610.30(a)(2). In their first cause of action, Plaintiffs allege  
27 that Defendants “are liable for the financial abuse of [Plaintiffs] because, not only should  
28 they have known they were assisting others’ financial elder abuse, but their knowledge of

1 facts makes it clear that they must have known they were assisting others’ financial elder  
2 abuse.” (See Compl. ¶ 48; see also generally *id.* ¶¶ 36–46.)

3 Under California law, liability may be imposed for “assist[ing]” in financial elder  
4 abuse under an aiding and abetting standard. See *Das v. Bank of Am., N.A.*, 186 Cal. App.  
5 4th 727, 744–45 (2010). This requires the plaintiff to plead that the defendant “knows the  
6 other’s conduct constitutes a breach of duty and gives substantial assistance or  
7 encouragement to the other to so act.” See *id.* at 744 (quoting *Casey v. U.S. Bank Nat’l*  
8 *Ass’n*, 127 Cal. App. 4th 1138, 1144 (2005)). Consequently, “when, as here, a bank  
9 provides ordinary services that effectuate financial abuse by a third party, the bank may be  
10 found to have ‘assisted’ the financial abuse only if it knew of the third party’s wrongful  
11 conduct.” See *id.* at 745;<sup>3</sup> see also *Paskenta Band of Nomlaki Indians v. Umpqua Bank*,  
12 846 F. App’x 589, 590 (9th Cir. 2021) (“[A]ctual knowledge is required to establish an  
13 aiding and abetting claim.” (first citing *Das*, 186 Cal. App. 4th at 745; then citing *Chavez*  
14 *v. United States*, 683 F.3d 1102, 1108–10 (9th Cir. 2012)). “An allegation of aiding and  
15 abetting fraud requires pleading with particularity under [Federal Rule of Civil Procedure]  
16 9.” *Mackintosh v. JPMorgan Chase Bank*, No. 18-CV-03348-SK, 2018 WL 3913791, at  
17 \*3 (N.D. Cal. July 13, 2018) (citing *S.E.C. v. Berry*, 580 F. Supp. 2d 911, 924 (N.D. Cal.  
18 2008)).

19 Defendants argue that dismissal of Plaintiffs’ first cause of action is required because  
20 Plaintiffs fail to allege that Defendants had actual knowledge of the fraud or that  
21 Defendants substantially assisted the scammers. (See Mem. at 4–10.) Plaintiffs counter  
22 that the following facts alleged in their Complaint support an inference of Defendants’  
23

---

24 <sup>3</sup> Plaintiffs argue that the California Court of Appeal in *Das* interpreted a prior version of Section  
25 15610.30, rendering its interpretation of Section 15610.30(a)(2) inapplicable. (See Opp’n at 7–10.) But  
26 as Defendants note, (see Reply at 1–7), the amendments not addressed by *Das* related to financial elder  
27 abuse liability under Section 15610.30(a)(1), which requires the “[t]ak[ing], secret[ing], appropriat[ion],  
28 obt[ention], or ret[ention of] real or personal property of an elder or dependent adult for a wrongful use or  
with intent to defraud, or both.” *Das* therefore remains good law as to liability under Section  
15610.30(a)(2), and was even recently followed by the Ninth Circuit in an unpublished memorandum  
disposition. See *Paskenta Band of Nomlaki Indians*, 846 F. App’x at 590.

1 actual knowledge of the underlying fraud: (1) the Department of the Treasury (“DOT”)  
2 published an advisory for financial institutions in February 2011, which “described the  
3 potential signs of elder financial exploitation,” including changes in banking patterns and  
4 “[u]ncharacteristic attempts to wire large sums of money”; (2) “the highly unusual activity  
5 in Plaintiff’s account must have raised huge red flags, all of which fell within the warning  
6 signs of financial elder abuse” under the February 2011 advisory; and (3) the wire transfers  
7 exceeded DOT’s \$10,000 threshold for filing a Currency Transaction Report, which would  
8 have required Chase’s management to scrutinize Plaintiffs, the transaction amount, and the  
9 recipient(s). (See Opp’n at 10–12 (citing Compl. ¶¶ 15, 17, 20, 22–25, 32–34).)  
10 Defendants respond that “‘red flags’ are insufficient to establish that a defendant had actual  
11 knowledge of fraudulent conduct.” (See Reply at 7–8 (emphasis in original) (first citing  
12 *Casey*, 127 Cal. App. 4th at 1147–49; then citing *S&S Worldwide, Inc. v. Wells Fargo*  
13 *Bank*, No. 20-cv-01926, 2020 WL 7714534, at \*7 (N.D. Cal. Dec. 29, 2020); and then  
14 citing *Mackintosh v. JPMorgan Chase Bank*, No. 18-cv-03348, 2018 WL 3913791, at \*3  
15 (N.D. Cal. July 13, 2018)).)

16 Although this case is undoubtedly a tragedy, the Court must agree that Plaintiffs fail  
17 sufficiently to plead that Defendants had actual knowledge of the scam such that they may  
18 be held liable for aiding and abetting financial elder abuse under Section 15610.30(a)(2).  
19 “[A]iding and abetting requires participation in a specific primary wrong ‘with knowledge  
20 of the object to be attained.’” *Casey*, 127 Cal. App. 4th at 1152 (quoting *Lomita Land &*  
21 *Water Co. v. Robinson*, 154 Cal. 36, 47 (1908)). Here, by contrast, Plaintiffs “essentially  
22 allege[] the banks knew *something* fishy was going on,” *see id.* at 1149 (emphasis in  
23 original), which does not suffice to establish actual knowledge. *See id.* at 1151–53  
24 (“[B]anks’ alleged knowledge of . . . suspicious account activities . . . [,] *without more*, does  
25 not give rise to tort liability for the banks.” (emphasis in original)); *see also S&S*  
26 *Worldwide, Inc. v. Wells Fargo Bank*, 509 F. Supp. 3d 1154, 1165 (N.D. Cal. 2020) (“[B]y  
27 alleging a [bank] branch manager ‘determined [the] [a]ccount and [the alleged fraudster]28 were involved with and/or participating in an illegitimate and fraudulent scheme’ . . . , [the

1 plaintiff] essentially alleges [the bank] knew ‘something fishy was going on with the  
2 account[’;] however, [the plaintiff] has not alleged the requisite ‘actual knowledge of the  
3 specific [wrongdoing] for which it seeks to hold [the bank] liable.’” (emphasis and third,  
4 fourth, and tenth alterations in original) (quoting *Casey*, 127 Cal. App. 4th at 1149, 1152)).  
5 Further, “[t]he elder abuse act does not impose a duty to investigate even if an entity is a  
6 mandated reporter, much less when it is not.” *Sterling Sav. Bank v. Poulsen*, No. C-12-  
7 01454 EDL, 2013 WL 3945989, at \*17 (N.D. Cal. July 29, 2013) (citing Cal. Wel. & Inst.  
8 Code § 15630.1(e)).

9         *Mackintosh v. JPMorgan Chase Bank*, No. 18-cv-03348-SK, 2018 WL 3913791  
10 (N.D. Cal. July 13, 2018), is instructive. In that case, three scammers convinced the 82-  
11 year-old plaintiff to withdraw over \$1,000,000 in cash from his bank accounts over an  
12 eight-month period to pay “taxes” and “fees” on purported lottery winnings of millions of  
13 dollars. *See id.* at \*1. Most of the more than thirty withdrawals, ranging from \$1,000 to  
14 over \$100,000, were from one Chase branch and from the same branch teller. *See id.* After  
15 eight months, a Chase representative asked the plaintiff why he was withdrawing the funds  
16 and warned him that he may have been a victim of fraud. *See id.* The plaintiffs sued Chase  
17 for negligence and aiding and abetting fraud, and Chase moved for dismissal. *See id.* The  
18 district court in *Mackintosh* dismissed the aiding and abetting claim on the grounds that the  
19 plaintiff had failed to allege actual knowledge, instead “only alleg[ing] facts to show  
20 constructive knowledge: that he and his wife ‘almost never withdrew cash from the bank,  
21 other than a few hundred dollars on occasion’ and yet, over an eight-month period, [the  
22 plaintiff] made over thirty cash withdrawals in sums ranging from \$1,000 to over  
23 \$100,000.” *See id.* at \*3.

24         As in *Mackintosh*, Plaintiffs here allege that Defendants had constructive knowledge  
25 of—*i.e.*, they should have known about—the underlying fraud based on their unusual  
26 account activity. (*See, e.g.*, Compl. ¶¶ 39–40.) That alone, however, fails sufficiently to  
27 allege the requisite actual knowledge. *See Mackintosh*, 2018 WL 3913791, at \*3; *see also*  
28 *S&S Worldwide*, 509 F. Supp. 3d at 1165; *Casey*, 127 Cal. App. 4th at 1151–53. The Court



1 therefore **GRANTS** Defendants’ Motion and **DISMISSES WITHOUT PREJUDICE**  
2 Plaintiffs’ first cause of action for aiding and abetting financial elder abuse.<sup>4</sup>

3 **II. Second Cause of Action: Negligence**

4 Plaintiffs’ second cause of action alleges that Defendants were negligent when they  
5 made the four wire transfers requested by Mr. Bortz totaling \$690,500 over the course of  
6 one week. (*See generally* Compl. ¶¶ 47–55.) Defendants contend that dismissal of this  
7 cause of action is merited on several grounds. (*See generally* Mem. at 11–15.) Plaintiffs,  
8 however, do not oppose dismissal of their second cause of action; rather, they request leave  
9 to amend to allege a new cause of action for breach of contract. (*See* Opp’n at 14–15.)  
10 Defendants respond that Plaintiffs’ failure to oppose dismissal of their second cause of  
11 action merits dismissal with prejudice pursuant to Civil Local Rule 7.1(f)(3)(c), that their  
12 request for leave to amend is procedurally improper under Civil Local Rule 15.1(b), and  
13 that the proposed amendment is futile. (*See* Reply at 9–10.)

14 None of Defendants’ arguments merit denial of Plaintiffs’ request for leave to  
15 amend. First, Plaintiffs’ concession to the dismissal of their negligence cause of action  
16 does not mean that any other claim must be foreclosed. Second, the Federal Rules of Civil  
17 Procedure direct the Court to “freely give leave [to amend] when justice so requires,” *see*  
18 Fed. R. Civ. P. 15(a)(2), and “there exists a *presumption* under Rule 15(a) in favor of  
19 granting leave to amend.” *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th  
20 Cir. 2003) (emphasis in original) (citing *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242,  
21 245 (5th Cir. 1997)). “Although [Plaintiffs’] rather informal mechanism for requesting  
22 leave to amend (*i.e.*, tucking the request into [their] response to [Defendants’] motion to  
23

---

24  
25 <sup>4</sup> Because the Court concludes that Plaintiffs fail adequately to allege Defendants’ actual knowledge, the  
26 Court declines to address Defendants’ additional argument that Plaintiffs fail to allege that Defendants  
27 “substantially assisted” the scammers. (*See* Mem. at 10; Reply at 8–9.) Further, although Defendants  
28 request dismissal of Plaintiffs’ first cause of action for financial elder abuse without leave to amend, (*see*  
*id.*), it is not yet clear to the Court that “the allegation of other facts . . . could not possibly cure the  
deficiency.” *See DeSoto*, 957 F.2d at 658. The Court therefore concludes that dismissal with prejudice  
is not warranted.

1 dismiss) is not a preferred practice, it is not necessarily improper under Ninth Circuit law.”  
2 *Olivas v. Arizona*, No. CV-19-02698-PHX-DWL, 2020 WL 6290486, at \*1 (D. Ariz.  
3 Oct. 27, 2020) (citing *Edwards v. Occidental Chem. Corp.*, 892 F.2d 1442, 1445 n.2 (9th  
4 Cir. 1990); *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 700–01 (9th Cir. 1988)  
5 (as amended), *overruled on other grounds by Bell Atl.*, 550 U.S. at 562–63). Indeed, it may  
6 constitute reversible error for the Court to dismiss Plaintiffs’ Complaint with prejudice as  
7 Defendants advocate here. *See Balistreri*, 901 F.2d at 700–02 (concluding that the district  
8 court had abused its discretion by dismissing claim with prejudice despite the plaintiff’s  
9 request for leave to amend contained in her opposition brief). Ultimately, “even assuming  
10 that [Plaintiffs’] approach violated the Local Rules, the Court will exercise its discretion to  
11 overlook [their] non-compliance.” *See Olivas*, 2020 WL 6290486, at \*2 (citing *Prof’l*  
12 *Programs Grp. v. Dep’t of Comm.*, 29 F.3d 1349, 1353 (9th Cir. 1994)). Third and finally,  
13 “denial [of leave to amend] on . . . ground[s of futility] is rare and courts generally defer  
14 consideration of challenges to the merits of a proposed amended pleading until after leave  
15 to amend is granted and the amended pleading is filed.” *Clarke v. Upton*, 703 F. Supp. 2d  
16 1037, 1043 (E.D. Cal. 2010) (citing *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539  
17 (N.D. Cal. 2003)).

18 The Court therefore concludes that the proper course of action is “to construe  
19 [Plaintiffs’] informal request as a motion for leave to amend, grant it, and then allow  
20 [Defendants] to move to dismiss the new claim [Plaintiffs] includes in the next iteration of  
21 [their] complaint.” *See Olivas*, 2020 WL 6290486, at \*2. Accordingly, the Court  
22 **GRANTS** Defendants’ Motion and **DISMISSES WITHOUT PREJUDICE** Plaintiffs’  
23 second cause of action.

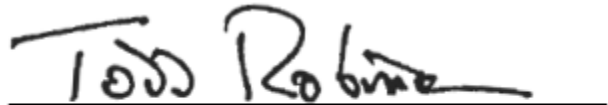
## 24 CONCLUSION

25 In light of the foregoing, the Court **GRANTS** Defendants’ Motion (ECF No. 5) and  
26 **DISMISSES WITHOUT PREJUDICE** Plaintiffs’ Complaint. Plaintiffs **MAY FILE** an  
27 amended complaint curing the deficiencies outlined in this Order within fourteen (14) days  
28 of the electronic docketing of this Order. *Should Plaintiffs elect not to file a timely*

1 *amended complaint, this action will be dismissed without prejudice without further Order*  
2 *of the Court.*

3 **IT IS SO ORDERED.**

4  
5 Dated: October 15, 2021

A handwritten signature in black ink that reads "Todd Robinson". The signature is written in a cursive style with a horizontal line underneath it.

6  
7 Honorable Todd W. Robinson  
8 United States District Court  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28