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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 ETOP UDO,
8 Plaintiff,
9 v.
10 WELLS FARGO BANK, N.A., et al.,
11 Defendants.

Case No. [23-cv-02935-JSW](#)

**ORDER GRANTING MOTIONS TO
DISMISS, WITHOUT LEAVE TO
AMEND**

Re: Dkt. Nos. 22, 24, 25, 59

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13 Now before the Court for consideration are motions to dismiss filed by Defendants Wells
14 Fargo Bank, N.A. (“Wells Fargo”), Bank of America, N.A. (“BANA”), BMO Harris Bank, N.A.
15 (“BMO Harris”), and U.S. Bank, N.A. (“US Bank”). The Court has considered the parties’ papers
16 relevant legal authority, and the record in this case.¹ The Court GRANTS each of the motions,
17 without leave to amend.

18 The Court addresses two preliminary matters. First, BANA argues the Court should strike
19 Udo’s omnibus opposition because it exceeds the Court’s page limitations. Udo could have filed
20 four separate 15 page briefs in response to Defendants’ motions. Accordingly, the Court denies
21 BANA’s request. Second, Udo submitted exhibits with his opposition: two police reports from
22 2019 and bank account statements for accounts at Wells Fargo, BMO Harris, and BANA. BMO
23 Harris requests that the Court take judicial notice of complete copies of Udo’s statements. Udo
24 did not object to that request. The Court GRANTS BMO Harris’ request for judicial notice, but it
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26 ¹ US Bank filed its motion to dismiss on October 16, 2023. Plaintiff Etop Udo (“Udo”) did
27 not file a separate opposition to US Bank’s motion. In response to an order to show cause, Udo
28 has stated he will stand on the arguments in the omnibus opposition filed in August 2013. (*See*
Dkt. Nos. 62-64.)

1 has considered the bank statements only to determine if it should grant Udo leave to amend.

2 **BACKGROUND**

3 On July 13, 2022, Udo set his briefcase on the ground in a parking garage, while he
4 prepared to leave for work. The briefcase contained a number of debit and credit cards, including
5 cards issued by Defendants, and Udo’s passport. Udo failed to retrieve his briefcase from the
6 ground before he departed and left it unattended in the garage. When he realized he did not have
7 his briefcase with him, he returned to the garage, but it was no longer there. (First Amended
8 Complaint (“FAC”) ¶¶ 11-17.) Thereafter, “many of Udo’s accounts began experiencing
9 unexplained and unauthorized activity,” including deposits using bad checks which were charged
10 back to Udo’s account. (*See generally id.* ¶¶ 19-22.) Although Udo reported the fraud to the
11 Defendants, he claims they failed to take “sufficient steps to protect [him] from additional harm or
12 to safeguard his accounts.” (*Id.* ¶ 29.) On July 16, 2022 and January 23, 2023, Udo reported this
13 activity to the San Francisco Police Department. (*Id.* ¶¶ 18, 23.)

14 The Court will address additional facts as necessary in the analysis.

15 **ANALYSIS**

16 **A. Applicable Legal Standard.**

17 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the
18 pleadings fail to state a claim upon which relief can be granted. A court’s “inquiry is limited to
19 the allegations in the complaint, which are accepted as true and construed in the light most
20 favorable to the plaintiff.” *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even
21 under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), “a plaintiff’s
22 obligation to provide ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
23 conclusions, and formulaic recitation of the elements of a cause of action will not do.” *Bell Atl.*
24 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).
25 Pursuant to *Twombly*, a plaintiff cannot merely allege conduct that is conceivable but must instead
26 allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. “A claim
27 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the
28 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,

1 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

2 **B. The Court Grants the Motions to Dismiss.**

3 **1. The Court Dismisses the Negligence Claim.**

4 Defendants argue that Udo’s negligence claim is barred by economic loss rule. Udo does
5 not address this argument in his opposition. In general, a plaintiff may not recover in tort for
6 purely economic losses. *See, e.g., S. Cal. Gas Leak Cases*, 7 Cal. 5th 391, 400 (2019) (“[L]iability
7 in negligence for purely economic losses, ... is the exception, not the rule[.]” (internal quotations
8 and citations omitted). For example, a plaintiff may recover economic losses in tort if the parties
9 have a “special relationship,” *i.e.* “the plaintiff was an intended beneficiary of a particular
10 transaction but was harmed by the defendant’s negligence in carrying it out.” *Id.*

11 The Court concludes that Udo has not alleged facts the parties had a “special relationship”
12 or that some other exception to the economic loss rule applies. *See, e.g., Widjaja v. JPMorgan*
13 *Chase Bank, N.A.*, No. CV 19-7825-MWF-AFM, 2019 WL 8108716, at *7 (C.D. Cal. Nov. 19,
14 2019) (“Multiple courts have applied the economic loss rule to bar a plaintiff’s claim against a
15 bank arising from fraudulent activity.”); *Barvie v. Bank of America, N.A.*, No. 18-cv-449-JLS
16 (BGS), 2018 WL 4537723, at *4-*5 (S.D. Cal. Sept. 21, 2018) (dismissing negligence claim based
17 on economic loss rule and failure to allege facts that would be sufficient to show “specific ‘danger
18 signals’ or ‘red flags’ indicative of negligence stemming from the debits from” the plaintiff’s
19 account). He has also alleged the parties had a contractual relationship but does not allege facts
20 that show any duty Defendants may have owed him that would give rise to a negligence claim “is
21 either completely independent of” their contractual relationship or “arises from conduct which is
22 both intentional and intended to harm.” *Erlich v. Menzies*, 21 Cal. 4th 543, 552 (1999).

23 Accordingly, the Court GRANTS the motion to dismiss the negligence claim.

24 **2. The Court Dismisses the Breach of Contract Claim.**

25 Defendants argue Udo fails to allege sufficient facts to state the existence of a contract or
26 the specific term breached. They also argue that Udo fails to allege facts that would show *they*
27 disclosed any private information, in light of Udo’s allegations that he either lost his briefcase or it
28 was stolen. Udo has not provided a substantive response to those arguments. Instead, he repeats –

1 nearly verbatim – the allegations in the FAC. (*Compare* Opp. Br. at 14 *with* FAC ¶¶ 36-44.)

2 Udo alleges that the Defendants breached an “implicit” term of their contracts with him by
3 “repeatedly” disclosing information about his accounts to third parties without his authorization.
4 (FAC ¶¶ 39-40, 43.) To the extent Udo alleges any Defendant breached a written contract, the
5 Court dismisses the claim for failure to sufficiently allege the terms of the contract. In addition, if
6 Udo intended to rely on a theory of an implied in fact contract, he must allege facts to show that
7 “the parties [do not have] a valid express contract covering the same subject matter.” *Lance*
8 *Camper Mfg. Co. v. Republic Indem. Co. of America*, 44 Cal. App. 4th 194, 203 (1996). Udo has
9 not done so.

10 Accordingly, the Court GRANTS the motions to dismiss the breach of contract claim.

11 **3. The Court Dismisses the Claim for Violations of California Commercial Code**
12 **Section 11204.**

13 Defendants argue that the facts alleged do not show a violation of Section 11204. “If a
14 bank fails to comply with sections 11202 or 11203,” of California’s Commercial Code, “section
15 11204 provides that the bank must refund money sent by ... noncompliant payment orders.”
16 *Prima Donna Dev. Corp. v. Wells Fargo Bank, N.A.*, 42 Cal. App. 5th 22, 39 (2019). Section
17 11204 applies to “receiving banks” and the term “[p]ayment order” means an instruction of a
18 sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause
19 another bank to pay, a fixed or determinable amount of money to a beneficiary if” three conditions
20 apply.² Cal. Com. Code § 11103(a)(1).

21 Although Udo alleges that “unauthorized transactions” were made from his accounts and
22 that “fraudulent and unauthorized checks” were written, he fails to allege facts that show the
23 allegedly unauthorized transactions fall within the statutory definition of a “payment order.” The
24 Court has reviewed the account statements for the period *after* July 13, 2022, which do not reflect
25 transactions that would qualify as a “payment order.”

26 Accordingly, the Court GRANTS Defendants’ motions to dismiss this claim.

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28 ² A classic example of a payment order is a wire transfer. *See Chino Com. Bank, N.A. v. Peters*, 190 Cal. App. 4th 1163, 1174 (2010).

1 **4. The Court Dismisses the Claim for Violations of California Consumer Privacy**
2 **Act (“CCPA”), Civil Code section 1798.150.**

3 Defendants also argue that Udo has not, and cannot, state a claim under the CCPA. The
4 CCPA provides a cause of action to

5 [a]ny consumer whose nonencrypted and nonredacted personal
6 information, as defined in subparagraph (A) of paragraph (1) of
7 subdivision (d) of Section 1798.81.5, or whose email address in
8 combination with a password or security question and answer that
9 would permit access to the account is subject to an unauthorized
 access and exfiltration, theft, or disclosure as a result of the
 business’s violation of the duty to implement and maintain
 reasonable security procedures and practices appropriate to the
 nature of the information to protect the personal information.

10 Cal. Civ. Code § 1798.150(a)(1). “Personal information” means a consumer’s first and last name
11 in combination with, *inter alia*, “[a]ccount number or credit or debit card number, in combination
12 with any required security code, access code, or password that would permit access to an
13 individual’s financial account.” *Id.* § 1798.81.5(d)(1)(A)(iii).

14 Udo simply recites the elements of the statute, which is insufficient under *Twombly* and
15 *Iqbal* to state a claim. *See Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause
16 of action, supported by mere conclusory statements, do not suffice.”) (citing *Twombly*, 550 U.S. at
17 555); *Maag v. U.S. Bank, N.A.*, No. 21-cv-00031-H-LL, 2021 WL 5605278, at *2 (S.D. Cal. Apr.
18 8, 2021). Udo also fails to include facts that show the disclosure of any of his “personal
19 information” was “the result of” Defendants’ conduct rather than as a result of the loss and/or theft
20 of his briefcase and its contents. *See, e.g., Florence v. Order Express, Inc.*, -- F. Supp. 3d --, 2023
21 WL 3602248, at *7 (N.D. Ill. May 23, 2023) (applying California law, and noting that to state a
22 claim “the plaintiff must allege that the defendant’s failure to implement reasonable security
23 measures allowed third parties to access and steal his personal information”).

24 Accordingly, the Court GRANTS Defendants’ motion to dismiss this claim.

25 **5. The Court Dismisses the Claim for Unjust Enrichment – Quasi Contract.**

26 Defendants argue unjust enrichment is not a valid claim for relief. In California, there is no
27 independent claim for unjust enrichment because unjust enrichment “describe[s] the theory
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1 underlying a claim that a defendant has been unjustly conferred a benefit through mistake, fraud,
2 coercion, or request.” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015)
3 (internal quotation marks omitted). However, the Court can “construe the cause of action as a
4 quasi-contract claim seeking restitution.” *Id.* (quoting *Rutherford Holdings, LLC v. Plaza Del*
5 *Rey*, 223 Cal. App. 4th 221, 231 (2014)); *see also Spartan Cap. Sec., LLC v. Vicinity Motor Corp.*,
6 No. 23-cv-01180-TSH, 2023 WL 4004116, at * 8 (N.D. Cal. 2023) (stating that although there is
7 no independent claim, “courts construe the cause of action as a quasi-contract claim seeking
8 restitution”). Udo alleges that he seeks restitution based on a theory of quasi contract. (FAC ¶
9 62.)

10 A quasi-contract claim for unjust enrichment “cannot lie where there exists between the
11 parties a valid express contract covering the same subject matter.” *Lance Camper Mfg. Corp v.*
12 *Rep. Indem. Co.*, 44 Cal. App. 4th 194, 203 (1996); *see also Durell v. Sharp Healthcare*, 183 Cal.
13 App. 4th 1350, 1370 (2010) (“As a matter of law, an unjust enrichment claim does not lie where
14 the parties have an enforceable express contract.”)). In light of Udo’s allegations that the parties
15 had a contractual relationship, if an express contract exists covering the same matter exists, Udo
16 needs to plead facts to show any express contract that exists was unenforceable or void. *See*
17 *Saroya v. Univ. of the Pac.*, 503 F. Supp. 3d 986, 999 (N.D. Cal. 2020) (noting a plaintiff may
18 alternatively plead a breach of contract claim and quasi-contract claim only if “the plaintiff also
19 pleads facts suggesting that the contract may be unenforceable or invalid”). He does not make
20 those allegations. Udo also does not allege facts that would support a conclusion that Defendants
21 obtained a benefit at Udo’s expense.

22 Accordingly, the Court GRANTS Defendants’ motion to dismiss this claim.

23 **6. The Court Dismisses the Claim for Deprivation of Civil Rights.**

24 Udo alleges each of the Defendants violated his civil rights and seeks relief pursuant to 42
25 U.S.C. section 1983. In order to state a claim under Section 1983, Udo must allege facts to show
26 (1) that a right secured by the Constitution or laws of the United States was violated and (2) that
27 the alleged violation was committed by a person acting under the color of state law. *West v.*
28 *Atkins*, 487 U.S. 42, 48 (1988); *see also Ketchum v. Alameda Cty.*, 811 F.2d 1243, 1245 (9th Cir.

1 1987). In his FAC, Udo did not specify which constitutional rights Defendants allegedly
2 violated.³

3 Generally, private parties like Defendants do not act under color of state law. *Price v.*
4 *Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991). Therefore, a plaintiff must allege facts that tend to
5 show that the private party’s conduct has caused a deprivation of federal rights that may be fairly
6 attributable to the State. *Id.* at 708 (holding that “conclusionary allegations of action under color
7 of state law, unsupported by facts, will be rejected as insufficient to state a claim”) (quoting *Jones*
8 *v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (internal quotations and
9 brackets omitted). A two-part test exists to determine whether private-party action causes a
10 deprivation that occurs under color of state law. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937
11 (1982).

12 First, the deprivation must be caused by the exercise of some right
13 or privilege created by the State or by a rule of conduct imposed by
14 the State or by a person for whom the State is responsible. ...
15 Second, the party charged with the deprivation must be a person
16 who may fairly be said to be a state actor. This may be because he is
17 a state official, because he has acted together with or has obtained
18 significant aid from state officials, or because his conduct is
19 otherwise chargeable to the State.

17 *Id.*

18 Using the framework outlined in *Lugar*, the Court concludes Udo fails to include any
19 allegations in the FAC or with his opposition that would support a conclusion that the Defendants
20 conspired or engaged in “joint activity with state officials,” are “so closely related to the state that
21 [their] actions can be said to be those of the State itself,” or performed “public functions or [were]
22 regulated to the point that the conduct in question is practically compelled by the State.” *Price*,
23 929 F.2d at 708-09 (internal quotations and citations omitted).

24 Accordingly, the Court GRANTS Defendants’ motion to dismiss.

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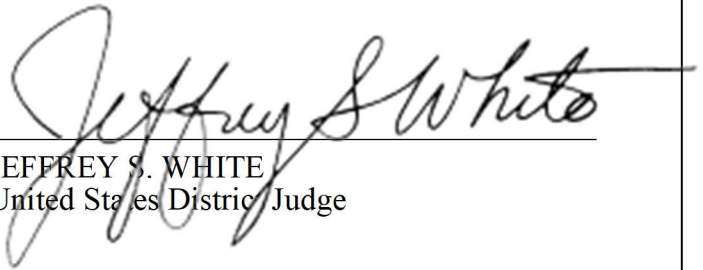
26 _____
27 ³ In his opposition, Udo states he is Nigerian-American and claims Defendants deprived him
28 of his constitutional rights to equal protection and due process based on “sex, national origin, race,
and/or religion.” (Opp. Br. at 22:3-6.) The Court considers those facts and allegations for
purposes of evaluating whether it should grant him leave to amend.

1 transactions in his Wells Fargo account, but the bank statements he has placed in the record do not
2 show transactions of that size for the period after the loss and/or theft of his briefcase. (*Id.* at ECF
3 pp. 35-52.) In addition, at least some of Udo’s claims are not legally viable.

4 Accordingly, the Court concludes that leave to amend would be futile and DENIES Udo
5 leave to file a second amended complaint. The Court dismisses this case with prejudice and will
6 issue a separate judgment. The Clerk shall close the file.

7 **IT IS SO ORDERED.**

8 Dated: December 12, 2023

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11 JEFFREY S. WHITE
12 United States District Judge

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