UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 1:10-cv-23235/HOEVELER

DAVID KARDONICK, individually and on behalf of all others similarly situated and the general public,

Plaintiff,

v.

JPMORGAN CHASE & CO. and CHASE BANK USA, N.A.

Defendants.

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND SUPPORTING MEMORANDUM OF LAW

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MISCELLANEOUS

Defendants JPMorgan Chase & Co. ("JPMorgan") and Chase Bank USA, N.A. ("Chase") respectfully move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Complaint filed by Plaintiff David Kardonick for failure to state a claim for relief.

SUMMARY OF ARGUMENT

Plaintiff is a Chase credit card customer. His claims arise out of his enrollment in a financial product known as Chase Payment Protector. Cardholders who enroll in Payment Protector pay a fee to Chase in exchange for Chase's agreement to suspend or cancel their credit card debt under circumstances including the death, disability, unemployment, or hospitalization of the cardholder or the cardholder's spouse.

Plaintiff makes a variety of allegations that Payment Protector was improperly marketed and administered. Most of his allegations, however, are wholly generic and were copied verbatim from another complaint involving a different bank. These generic allegations are interspersed with only a few allegations that are specific to Plaintiff or Chase. In essence, Plaintiff alleges that he contracted for Payment Protector in 2005; he later encountered hardships at his business and had to shut the business down; and he was told by Chase that the loss of his business was not a ground for receiving Payment Protector benefits. Without attempting to tie these allegations to any of his causes of action, Plaintiff proceeds to assert claims for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, unconscionability, and violations of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). Each of these claims is defective as a matter of law.

The breach of contract and the good faith and fair dealing claims are defective because Plaintiff fails to identify *any* provision of the contract or *any* obligation of good faith and fair dealing that Chase allegedly breached. Plaintiff instead contents himself with a bare

allegation that "there are various terms of the contract" as well as "various . . . duties or obligations" that Chase supposedly did not perform. This wholly conclusory pleading will not sustain a claim for relief. Nor are these claims saved by the fact that Chase allegedly told Plaintiff that he could not qualify for benefits as a result of the loss of his business. This information was entirely accurate: the contract between the parties provides that a self-employed person's loss of employment is not a ground for receiving benefits.

Plaintiff fares no better on his remaining claims. First, the FDUTPA claim fails because the FDUTPA expressly states that it does not apply to banks. Second, the unjust enrichment claim is barred by Plaintiff's own allegation that a written contract governs his enrollment in Payment Protector. Third, Plaintiff's claim for unconscionability should be dismissed because unconscionability is not a cause of action; it is merely a defense to the enforcement of a contract. Finally, all of Plaintiff's claims against Chase's parent company, JPMorgan, should be dismissed because the Complaint makes no specific allegations against that company.

For these reasons, as more fully set forth below, the Complaint should be dismissed.

BACKGROUND

A. The Federal Regulatory Scheme That Governs Payment Protector.

As Plaintiff correctly alleges in his Complaint, Chase is a federally-chartered national bank. (Compl. ¶ 22.) Chase is thus empowered by the National Bank Act to make and collect loans and to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh).

For over forty years, the Office of the Comptroller of the Currency ("OCC"), the federal agency charged with regulating national banks, has recognized that a national bank's authority to make and collect loans also includes the right to cancel or suspend a borrower's obligation to repay a loan. *See* James J. Saxon, Comptroller of the Currency, Letter re: Debt Cancellation Contracts (March 10, 1964), in *Years of Reform: A Prelude to Progress, 101st Annual Report* 475 (1964); OCC Interp. Letter 827 (April 3, 1998). National banks typically exercise this authority by entering into agreements known as debt cancellation contracts ("DCCs") and debt suspension agreements ("DSAs"). *See id*.

In 2002, the OCC issued comprehensive regulations governing the manner in which national banks may enter into DCCs and DSAs. *See* 12 C.F.R. Part 37. These regulations were "intended to constitute the entire framework for uniform national standards for DCCs and DSAs offered by national banks." Debt Cancellation Contracts and Debt Suspension Agreements, 67 Fed. Reg. 58,962, 58,964 (Sept. 19, 2002). The regulations therefore provide that "National banks' debt cancellation contracts and debt suspension agreements are governed by this part and applicable Federal law and regulations, *and not by … State law*." 12 C.F.R. § 37.1(c) (emphasis added). Moreover, even before these regulations issued, courts had recognized that DCCs and DSAs were not subject to state insurance law. *See, e.g., First Nat'l Bank of E. Ark. v. Taylor*, 907 F.2d 775, 778 (8th Cir. 1990).

The 2002 regulations provide a variety of protections to consumers. For example:

- DCCs and DSAs must be optional, *i.e*., a borrower cannot be required to enter into a DCC or a DSA in order to obtain a loan, 12 C.F.R. § 37.3(a);
- banks must provide certain mandatory disclosures about DCCs and DSAs that must be "readily understandable," *id*. § 37.6(d);
- banks cannot "engage in any practice or use any advertisement that could mislead or otherwise cause a reasonable person to reach an

erroneous belief with respect to information that must be disclosed," *id*. § 37.3(b); and

- banks are prohibited from including certain contractual terms in their DCCs and DSAs, *id*. § 37.3(c).

The 2002 regulations also specify the means by which DCCs and DSAs may be marketed by phone or by mail. Banks may market these products by telephone if they (i) provide a standard set of short-form disclosures orally over the phone, (ii) mail the borrower a set of long-form disclosures within three days of the telephone solicitation, and (iii) provide an opportunity to cancel the DCC or DSA within thirty days at no charge. *See* 12 C.F.R. § 37.6(c)(3), § 37.7(b)(3), & Appendices A and B. Similar rules govern the marketing of DCCs and DSAs through the mail. *See* 12 C.F.R. § 37.7(c).

B. Plaintiff's Contract With Chase.

The Complaint correctly alleges that Plaintiff entered into a written contract with Chase that governed his participation in Payment Protector. (Compl. ¶¶ 74-75.) This contract ("Contract") may be considered on a motion to dismiss because it is referenced in the Complaint and is central to Plaintiff's claims. *See infra* at 8.

As required by OCC regulations, the Contract provides that Payment Protector is an "optional feature" of Plaintiff's credit card account that may be cancelled at no charge within thirty days of enrollment. (Fink Decl., Ex. C, §§ 1, 14.) The Contract also explains the circumstances under which Plaintiff's obligation to repay his credit card loans will be cancelled or suspended. Plaintiff's repayment obligations are suspended if a "Qualifying Event" affects a "Covered Person" within the meaning of the Contract. (*Id*. at § 1.) "Covered Persons" consist of the cardholder, the cardholder's spouse or domestic partner, any authorized user of the credit card account, and anyone living in the household who has a higher income than the cardholder. (*Id*. § 1.1(c).) "Qualifying Events" are major life events such as hospitalization, disability, a call

to active military service, a change of residence, marriage, divorce, birth of a child, retirement, natural disaster, or the death of a spouse. (*Id.* at §§ 1.1(d), 6.1.) Involuntary unemployment is also a Qualifying Event, but the Contract provides that self-employed individuals do not qualify for benefits on this basis. (*See id*. at § 9.5 ("As a self-employed Person, you may qualify for all benefits except for Involuntary Unemployment or a Leave of Absence unless you can demonstrate that you are a salaried employee of a corporation and payroll taxes are paid for you."). Finally, under most circumstances, Payment Protector provides a death benefit that cancels the balance due on the account upon the death of the cardholder. (*Id*. § 11.)

C. Plaintiff's Allegations.

Plaintiff asserts a total of six claims for relief based on a series of highly generalized allegations about Chase's Payment Protector product. Most of these allegations appear to have been cut-and-pasted verbatim from the complaint filed in *Tractenberg v. Citigroup, Inc*., 2:10-cv-03092-LS (E.D. Pa. June 25, 2010). Thus, in a number of instances, the Complaint uses mistaken references drawn from the *Tractenberg* complaint without conforming those references to the circumstances of this case.[1] In other instances, the Complaint appears to describe Citibank's payment protection product rather than Chase's product.[2]

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[1] For example, paragraph 22 of the Complaint refers to a non-existent entity called CHASECORP, presumably as a result of using a "Find and Replace" function to replace the word "CITI" in "CITICORP" with "CHASE." *Compare* Compl. ¶ 22 *with Tractenberg* Compl. ¶ 22). In another example, the Complaint fails to replace the *Tractenberg* Complaint's use of the pronoun "herself" with "himself" to refer to Plaintiff Kardonick. *Compare* Compl. ¶ 102 *with Tractenberg* Compl. ¶ 98. In still another instance, a cross-reference in the Complaint references the appropriate paragraph number in the *Tractenberg* Complaint, without recognizing that the cross-referenced paragraph bears a different number in the Complaint. *Compare* Compl. ¶ 16 (cross-referencing Paragraph 72 when Paragraph 69 appears to be intended) *with Tractenberg* Compl. ¶ 16 (cross-referencing Paragraph 72).

[2] Among many allegations recycled from *Tractenberg*, the Complaint alleges that Chase Payment Protector may only be used once each year, and further asserts that Payment Protector (continued…)

Similar to the *Tractenberg* complaint, most of the allegations in the Complaint assert only that consumers in general were harmed by Payment Protector, not that Plaintiff suffered any harm himself. For example, the Complaint asserts that Payment Protector "victimize[s] individuals who are 60 years of age or older" (Compl. ¶ 98), but alleges that Plaintiff is only 28 years old (*id*. ¶ 56). Similarly, the Complaint asserts that Chase "unilaterally impose[s]" Payment Protector on unsuspecting consumers who allegedly "did not request the product" (Compl. ¶¶ 29, 32-33), but makes clear that this did not occur in Plaintiff's case, alleging instead that Plaintiff "*contracted* for Payment Protection benefits." (*Id*. ¶ 74 (emphasis added).) Numerous other allegations likewise are asserted only about consumers in general.[3]

With respect to whether Plaintiff suffered any harm in his own right, the Complaint alleges that in March 2010, after Plaintiff told Chase that his business had been shut down, Chase informed him that self-employed individuals do not qualify for benefits as a result of a loss of employment. (Compl. ¶¶ 59-60.) These allegations, however, appear to be carefully drafted to refer only to an alleged exchange of information. Plaintiff stops short of alleging that

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"does not apply" to cardholders employed by family members or who qualify for state unemployment benefits. (*Compare* Compl. ¶ 39 *with Tractenberg* Compl. ¶ 40.) While these allegations may be true as to Citibank's payment protection product, no such terms appear in Chase's agreement with its customers. (*See* Fink Decl., Ex. C, §2 (no limitations on persons employed by family members), § 2.2 (persons receiving unemployment benefits *are* eligible for Payment Protection), § 9.6 (benefits may be used multiple times a year).) Similarly, the Complaint reiterates the *Tractenberg* allegations that several categories of people, including the self-employed, are ineligible for *any* type of Payment Protector benefit (*see* Compl. ¶ 39(c)), but Plaintiff's Payment Protector Contract makes clear that these individuals *are* eligible for most Payment Protector benefits. (See Fink Decl., Ex. C, §§ 9.5.)

[3] *See, e.g.*, Compl. ¶¶ 2, 23-25, 38 (alleging that Chase marketed Payment Protector without regard to state insurance law, but failing to allege that this had any effect on Plaintiff, and failing to address the authority exempting national banks from state insurance law); Compl. ¶ 10 (alleging that it is difficult to cancel enrollment in Payment Protector, but failing to allege that Plaintiff ever attempted to cancel); Compl. ¶ 42-43, 45 (alleging that Chase fails to investigate whether individuals are retired, employed part-time, or employed by family members, but failing to allege that Plaintiff falls within these categories).

he received no benefits at the time this information allegedly was exchanged; nor does he assert that the information allegedly supplied by Chase was inaccurate.[4]

STANDARD OF REVIEW

"To withstand a motion to dismiss, a complaint must state a plausible claim for relief." *Azar v. National City Bank*, 2010 WL 2381049, at *2 (11th Cir. June 15, 2010) (citing *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)). This requires sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. Although well-pleaded factual allegations should be accepted as true, the court need not accept as true "conclusory" allegations or "formulaic recitations of the elements" of a cause of action. *Id*. at 1949, 51. Rather, "the factual allegations must go beyond naked assertions and establish more than a sheer possibility of unlawful activity." *Azar*, 2010 WL 2381049, at *2 (citing *Iqbal*, 129 S.Ct. at 1949).

Moreover, in ruling on a motion to dismiss, courts may consider documents outside the complaint if the "plaintiff refers to [the] document in its complaint, the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss." *Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007). Here, the Contract between Plaintiff and Chase meets this standard because the Contract is referenced in the Complaint and its contents are not subject to dispute. *See, e.g.*, Compl. ¶¶ 73-76 (asserting breach of contract claim), ¶¶ 74-75 (alleging that "Plaintiff and Chase contracted for Payment Protection benefits" and that the terms of the contract are in Chase's

[4] Plaintiff has good reason for failing to allege that he did not receive Payment Protector benefits. If this case were to proceed past the motion to dismiss stage, Chase would show that, at or about the time that Plaintiff allegedly communicated with Chase about his employment status, he was receiving benefits based on a different Qualifying Event.

possession); *Duru v. HSBC Bank Nevada, N.A.*, 2009 WL 1410472, at *1 n.2 (S.D. Fla. May 20, 2009) (considering terms of credit card agreement on motion to dismiss); *Gillespie v. HSBC North America Holdings, Inc.*, 2006 WL 2735135, at *8 n.23 (M.D. Fla. Sept. 25, 2006) (same).

ARGUMENT

I. THE FDUTPA CLAIMS SHOULD BE DISMISSED BECAUSE THE FDUTPA DOES NOT APPLY TO NATIONAL BANKS.

Counts III and V of the Complaint allege that Chase violated the FDUTPA by failing to describe Payment Protector as an insurance product and imposing limitations on benefits. These counts fail for a simple reason: the FDUTPA does not apply to national banks.

The FDUTPA expressly provides that it does not apply to "banks … regulated by federal agencies." 23 Fla. Stat. Ann. § 501.212(4)(c). National banks, of course, are regulated by the Office of the Comptroller of the Currency, a bureau of the U.S. Treasury Department. *See* 12 U.S.C. § 93a; *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6 (2007). Courts therefore routinely dismiss FDUTPA claims asserted against national banks like Chase. *See, e.g.*, *Caban v. JPMorgan Chase & Co.*, 606 F. Supp. 2d 1361, 1372 (S.D. Fla. Mar. 23, 2009) ("Chase is exempt from FDUTPA"); *Bankers Trust Co. v. Basciano*, 960 So.2d 773, 778-79 (Fla. 5th DCA 2007) ("FDUTPA does not apply to banks and savings and loan associations regulated by the state or the federal government. … FDUTPA clearly excludes banks from its grasp. When a statute is free from ambiguity, we follow its plain meaning. … Here, the statute unambiguously excludes banks.").[5]

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[5] *See also St. Petersburg v. Wachovia Bank, N.A.*, 2010 WL 2991431, at *3 (M.D. Fla. July 27, 2010) ("it is clear that the FDUTPA does not apply to federally regulated banks such as Wachovia"); *De Leon v. Bank of Am., N.A.*, 2009 WL 3822392, at *5 (M.D. Fla. Nov. 16, 2009) ("[B]y its very terms, FDUTPA specifically excludes federally regulated banks from its coverage …. Because the Bank is a federally regulated national banking association, De Leon's claim (continued…)

Plaintiff correctly alleges in his Complaint that Chase is a federally-chartered national bank. *See* Compl. ¶ 22 ("Defendant Chase Bank USA, N.A. operates a nationally chartered bank."). Because Chase is a national bank regulated by a federal agency, the FDUTPA does not apply here, and Counts III and V should be dismissed.

II. PLAINTIFF'S COMMON LAW CLAIMS SHOULD BE DISMISSED.

Plaintiff also brings common law counts for breach of contract, breach of an implied covenant of good faith and fair dealing, unconscionability, unjust enrichment, and restitution. Each of these counts fails to state claim for relief.

A. Delaware Law Applies To Plaintiff's Common Law Claims.

The Payment Protector Contract between Plaintiff and Chase provides that it is governed by the law of Delaware and applicable federal law. (Fink Decl. at Ex. C, § 18.) Plaintiff's underlying credit card agreement is also governed by Delaware law. (Fink Decl. at Ex. A, p. 4.)

Under settled law, these contractual choice-of-law provisions are valid and enforceable. *See, e.g., Maxcess, Inc. v. Lucent Techs., Inc*., 433 F.3d 1337, 1341 (11th Cir. 2005); *Good v. Commerce and Industry Ins. Co.*, 2009 WL 1393423, at *2 (S.D. Fla. May 18, 2009); *Mazzoni Farms, Inc. v. E.I. DuPont de Nemours and Co.*, 761 So.2d 306, 311 (Fla. 2000). Moreover, courts consistently apply such clauses not only to breach of contract claims but also to

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fails as a matter of law, and the Bank's motion to dismiss must be granted as to Count III."); *Transland Fin. Svcs., Inc. v. Wells Fargo Ventures, LLC*, 2007 WL 1362752, at *3 (M.D. Fla. May 7, 2007) (noting that FDUTPA count against Wells Fargo Bank had been abandoned because the FDUTPA "includes an exemption for national bank associations"); *Florida v. Commerce Commercial Leasing, LLC*, 946 So.2d 1253, 1257-58 (Fla. 1st DCA 2007) (noting that banks are exempted because "if a state or federal agency already regulates banks, there is no need for the Act to interfere"); *Westernbank Puerto Rico v. Kachkar*, 2009 WL 6337949, at *40 (D. P.R. Dec. 10, 2009) (dismissing FDUTPA count against bank after taking judicial notice of fact that bank was FDIC-insured).

related common law claims such as claims of unjust enrichment, unconscionability, and breach of an implied covenant of good faith and fair dealing. *See Trumpet Vine Investments, N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110, 1120 (11th Cir. 1996) (applying contract choice of law analysis to unjust enrichment claim); *In re NationsRent Rental Fee Litig.*, 2009 WL 636188, at *3 (S.D. Fla. Feb. 24, 2009) (applying choice of law provision to claims of unjust enrichment and breach of implied covenant of good faith and fair dealing); *In re Managed Care Litig.*, 2009 WL 856321, at *2 (S.D. Fla. Mar. 30, 2009) (applying contractually-chosen law to claim that court should refuse to enforce an unconscionable agreement); *Pastor v. Union Central Life Ins. Co.*, 184 F. Supp. 2d 1301, 1306 (S.D. Fla. 2002) (bad faith claim against insurer governed by contract choice-of-law principles); *Muniz v. GCA Svcs. Group, Inc.*, 2006 WL 2130735, at *9 (M.D. Fla. July 28, 2006) (applying choice of law provisions to unjust enrichment claim).

Plaintiff's common law claims are therefore governed by Delaware law.

B. The Breach Of Contract Claim Should Be Dismissed.

Count I alleges that Chase breached the parties' Contract. This count fails because Plaintiff fails to identify the contractual provision that Chase allegedly breached.

Under Delaware law, the elements of a breach of contract claim are (i) the existence of a contract, (ii) a breach of an obligation imposed by the contract, and (iii) resulting damages. *Millett v. TrueLink, Inc.*, 533 F. Supp. 2d 479, 487-88 (D. Del. 2008).[6] To state a claim for breach of contract, however, a plaintiff must do more than simply recite these elements in a "formulaic" manner. *Iqbal*, 129 S.Ct. at 1951. At a minimum, the plaintiff must also

[6] The same elements apply to breach of contract claims under Florida law. *See Rollins, Inc. v. Butland*, 951 So.2d 860, 676 (Fla. 2nd DCA 2006) ("The elements of an action for breach of contract are: (1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach.").

identify "the specific provision of the contract allegedly breached." *Whitney Nat'l Bank v. SDC Communities, Inc.*, 2010 WL 1270264, at *3 (M.D. Fla. Apr. 1, 2010); *see also Anderson v. Wachovia Mortg. Corp*., 497 F. Supp. 2d 572, 582 (D. Del. 2007) (holding that a breach of contract claim should be dismissed if plaintiffs "have not identified any express contract provision that was breached"); *Stadt v. Fox News Network, LLC*, 2010 WL 2540957, at *3 (S.D.N.Y. 2010) (complaint "must allege the specific provisions of the contract upon which the breach of contract claim is based;" "claim for breach of contract cannot be sustained simply by a conclusory statement that the accused breached a contract").

Here, rather than identifying "the specific provision of the contract allegedly breached," *Whitney Nat'l Bank, supra*, at *3, the Complaint simply alleges that "various terms" of the contract were not performed:

> There are various terms of the contract that CHASE was obligated to perform but did not, thus breaching an express provision of the contract.

(Compl. ¶ 74.) This is the sum total of the Complaint's description of the alleged breach of contract. There is no identification of the "various terms" of the Contract that Chase allegedly breached; nor is there any description of the allegedly breaching conduct. Accordingly, here, as in *Whitney*, the breach of contract allegations are precisely the type of "'the-defendant-unlawfully-harmed-me-accusation' that *Iqbal* warned against." *Whitney National Bank, supra*, at *3 (citing *Iqbal*, 129 S.Ct. at 1951).

It makes no difference that the breach of contract count incorporates by reference the allegations made in the background section of the Complaint. (Compl. ¶ 73.) Like the breach of contract count, the background section fails to identify the "various terms" of the Contract that Chase allegedly breached. Moreover, while the background section asserts that Chase told Plaintiff that he could not qualify for benefits as a result of the loss of his business

(Compl. ¶¶ 59-60), Plaintiff does not allege – nor could he – that this was a breach of contract. The information that Chase allegedly provided was merely an accurate description of the Contract. Under the Contract, self-employed persons "may qualify for all benefits *except for Involuntary Unemployment or a Leave of Absence* unless [they] can demonstrate that [they] are [] salaried employee[s] of a corporation and payroll taxes are paid for [them]." (Fink Decl., Ex. C, § 9.5) (emphasis added).[7]

C. The Good Faith And Fair Dealing Claim Should Be Dismissed.

Count I alleges in the alternative that Chase breached an implied covenant of good faith and fair dealing. This claim should be dismissed for the same reason as the breach of contract claim: it fails to identify the contractual obligation that Chase allegedly breached.

Under Delaware law, the implied covenant of good faith and fair dealing is "only rarely invoked successfully." *Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 888 (Del. Ch. 2009); *see also Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426, at *6 (Del. Ch. Aug. 25, 2006). To plead a claim for breach of such a covenant, "the plaintiff must allege *a specific implied contractual obligation*, a breach of that obligation by the defendant, and resulting damage to the plaintiff." *S. Track & Pump, Inc. v. Terex Corp*., 623 F. Supp. 2d 558, 562 (D. Del. 2009) (emphasis added). If a party "fail[s] to identify a specific implied contractual obligation," the claim will be dismissed. *Penn. Mut. Ins. Co. v. Barbara Glasser 2007 Ins. Trust*, 2010 WL 3023420, at *4 (D. Del. July 30, 2010). Such claims will also be dismissed if an

[7] Even if Plaintiff had alleged that the Contract provides benefits to self-employed individuals who lose their employment, that allegation would be irrelevant because it would contradict the plain terms of the Contract. *See Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007) ("when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern"); *Indulgence Yacht Charters Ltd. v. Ardell, Inc.*, 2008 WL 4346749, at *4 (S.D. Fla. Sept. 16, 2008) (allegations in a complaint "can be trumped by contradictory facts presented in an exhibit or attachment to the pleading").

implied covenant is "invoked to override the express terms of the contract." *Kuroda*, 971 A.2d at 888; *see also In re IT Group, Inc.*, 448 F.3d 661, 671 (3d Cir. 2006) (holding that an implied covenant of good faith and fair dealing "may not be used to add new terms to an agreement or to override express contractual terms").[8]

Here, Plaintiff fails to allege the "specific implied contractual obligation" that Chase allegedly breached. *S. Track & Pump, Inc.*, 623 F. Supp. 2d at 562. Plaintiff vaguely asserts that Chase "breached the implied covenant of good faith and fair dealing" by exercising discretion with respect to "various express contractual duties or obligations" (Compl. ¶¶ 79, 83), but he is utterly silent as to what those "various express contractual duties and obligations" were and what Chase did to breach them. Because the Complaint "fail[s] to identify [any] specific implied contractual obligation" that Chase allegedly violated, the implied covenant claim should be dismissed. *Penn. Mut. Ins. Co.*, 2010 WL 3023420 at *4.[9]

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[8] The law is the same in Florida. "[A] cause of action for breach of the implied covenant cannot be maintained (a) in derogation of the express terms of the underlying contract or (b) in the absence of breach of an express term of the underlying contract." *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1317-18 (11th Cir. 1999); *accord Centurion Air Cargo, Inc. v. United Parcel Serv. Co.*, 420 F.3d 1146, 1152 (11th Cir. 2005) ("[A] claim for a breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law in the absence of a breach of an express term of a contract.").

[9] The same result applies under Florida law. *See Merrill Lynch Bus. Fin. Svcs., Inc. v. Performance Machine Sys. USA, Inc.*, 2005 WL 975773, at *10 (S.D. Fla. Mar. 4, 2005) (dismissing breach of duty of good faith and fair dealing claim where claimants failed to "advert to specific contractual provisions" or to plead facts demonstrating that the implied covenant claim "is not an askance attempt to vary the terms of an express contractual provision"); *Mendez-Arriola v. White Wilson Medical Center PA*, 2010 WL 3385356, at *6 (N.D. Fla. Aug. 25, 2010) ("[I]n order to state a claim for breach of the implied covenant of good faith and fair dealing, Plaintiffs must identify the specific contract term(s) giving rise to the implied duty of good faith and also allege how Defendants breached their implied duty, alleging facts different from those giving rise to the breach of contract claim."); *Akzo Nobel Coatings, Inc. v. Auto Paint & Supply of Lakeland, Inc.*, 2010 WL 2821950, at *3 (M.D. Fla. July 16, 2010) ("Since Count II of the Counterclaim fails to allege a specific contractual obligation that was breached, APS has failed to allege a basis for the implied duty of good faith and fair dealing.").

Once again, it makes no difference that Plaintiff cross-references the background section of his Complaint, *see* Compl. ¶ 73, because the background section does not describe the implied covenant that Chase allegedly breached any more than it describes the contractual provision that Chase allegedly breached. Furthermore, the Contract expressly states that self-employed persons do not qualify for involuntary unemployment benefits. (Fink Decl., Ex. C, § 9.5.) An implied covenant claim cannot be "invoked to override" this express term of the Contract. *Kuroda*, 971 A.2d at 888.

D. The Unconscionability Claim Should Be Dismissed.

Count II asserts a claim for "unconscionability." This claim fails because unconscionability is merely a defense to a breach of contract claim, not an affirmative cause of action. Furthermore, even if unconscionability were a cause of action, Plaintiff's claim would be barred by the statute of limitations.

As numerous courts have held, there is no such thing as a cause of action for unconscionability. *E.g.*, *Johnson v. Long Beach Mortgage Loan Trust 2001-4*, 451 F. Supp. 2d 16, 36-37 (D.D.C. 2006) (holding that a plaintiff could not recover compensatory damages or restitution under a common law unconscionability claim). Rather, "at common law, unconscionability is a *defense* against enforcement, not a basis for recovering damages." *Doe v. SexSearch.com*, 551 F.3d 412, 419 (6th Cir. 2008) (emphasis in original); *accord Cowin Equip. Co., Inc. v. General Motors Corp.*, 734 F.2d 1581 (11th Cir. 1984); *Bennett v. Behring Corp.*, 466 F. Supp. 689, 700 (S.D. Fla. 1979) ("[T]he equitable theory of unconscionability has never been utilized to allow for the affirmative recovery of money damages."); *Jeffery v. Seven Seventeen Corp.*, 461 A.2d 1009, 1011 (Del. 1983) ("Unconscionability is an affirmative defense...."); *USH Ventures v. Global Telesystems Group, Inc.*, 796 A.2d 7, 19 (Del. Super. Ct. 2000) ("[U]nconscionability, whose precepts are equitable in nature, is used as a defense under

the UCC and in other contract actions" under Delaware law). Count II should therefore be dismissed.

Plaintiff's unconscionability claim is also time-barred. The unconscionability of a contract is determined at the time a contract is formed. *See, e.g., Tulowitzki v. Atlantic Richfield Co.*, 396 A.2d 956, 961 (Del. 1978) ("Sufficient facts surrounding the commercial setting, purpose, and effect of a contract *at the time it was made* should be alleged so that the court may form a judgment as to the existence of a valid claim of unconscionability.") (emphasis added); *China Resource Products (U.S.A.) Ltd. v. Fayda Int'l, Inc.*, 747 F. Supp. 1101, 1107 (D. Del. 1990) ("Unconscionability is judged at the time the parties entered into the contract."); *Restatement (Second) of Contracts*, § 208 (unconscionability should be evaluated "at the time the contract is made"). Moreover, if unconscionability were a proper cause of action, a three-year statute of limitations would apply to Plaintiff's claim. *See* Del. Code tit. 10, § 8106(a) (applying a three-year statute of limitations to claims for "damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant"); *see also Wedderien v. Collins*, 2007 WL 3262148, at *4 (Del. 2007) (three-year limitations period applies to Delaware breach of contract claims).

Plaintiff alleges that he entered into a contract for Payment Protector in February 2005. (Compl. ¶¶ 57, 74.) Thus, if unconscionability were a cause of action, the statute of limitations on Plaintiff's claim would have expired in February 2008, long before Plaintiff filed this action in September 2010. Count II should be dismissed for this reason as well.

E. The Unjust Enrichment Claim Should Be Dismissed.

Count VI asserts a claim of unjust enrichment. This claim fails because a written agreement governs the relationship between Plaintiff and Chase.

The Complaint expressly acknowledges that Plaintiff entered into a contract to purchase Payment Protector. (Compl. ¶¶ 74-76.) That contract is therefore "the measure of plaintiff's right," and "there can be no recovery under an unjust enrichment theory independent of it." *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 942 (Del. 1979). Under settled law, Plaintiff's unjust enrichment claim should therefore be dismissed. *See, e.g.*, *Immediate Capital Group, Inc. v. Spongetech Delivery Sys., Inc.*, 2010 WL 1644952, at *3 (S.D. Fla. Apr. 22, 2010) (dismissing an unjust enrichment claim where plaintiff alleged that a written contract governed the parties' relationship); *Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 891-92 (Del. Ch. 2009) (same); *Segovia v. Equities First Holdings, LLC*, 2008 WL 2251218, at *20 (Del. Super. Ct. May 30, 2008) ("The existence of an express contract governing the relationship between the parties precludes a party from seeking restitution through unjust enrichment."); *Bakerman v. Sidney Frank Imp. Co.*, 2006 WL 3927242, at *18 (Del. Ch. Oct. 10, 2006) ("When the complaint alleges an express, enforceable contract that controls the parties' relationship … a claim for unjust enrichment will be dismissed.").

It does not matter that Plaintiff has failed to plead a viable claim for breach of contract. As this Court has previously observed, "recovery for unjust enrichment for conduct" covered by a contract "cannot be permitted, even if the contract ultimately does not provide a recovery to plaintiff." *Tracfone Wireless, Inc. v. Access Telecom, Inc.*, 642 F. Supp. 2d 1354, 1366 (S.D. Fla. 2009); *see also Central Mortgage Co. v. Morgan Stanley Mortgage Capital*

Holdings LLC, 2010 WL 3258620, at *11 (Del. Ch. 2010) (applying New York law and dismissing both contract and unjust enrichment claims).[10]

F. Plaintiff Fails To State A Claim For Restitution or Injunctive Relief.

Count IV asks the Court to grant "the remedy of restitution" as well as "injunctive relief." (Compl. ¶¶ 105-106.) Restitution and injunctive relief, however, are merely remedies and not free-standing causes of action. Because Plaintiff has failed to state a claim for relief in any of the substantive counts of the Complaint, his Count IV claim for the remedies of restitution and injunction should be dismissed as well. *See, e.g.*, *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999) (holding that a plaintiff must prevail on an unjust enrichment claim to be entitled to restitution); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062-63 (Del. 1988) (recognizing that restitution is merely a remedy for unjust enrichment); *see also Kelly v. Palmer, Reifler & Assocs., P.A.*, 681 F. Supp. 2d 1356, 1384 (S.D. Fla. 2010).

III. PLAINTIFF FAILS TO STATE A CLAIM AGAINST CHASE'S PARENT COMPANY.

As is evident from both the Complaint and the Contract, Defendant Chase Bank USA, N.A. is the national bank that contracted with Plaintiff to provide him with Payment Protector. (Compl. ¶¶ 22, 74; Fink Decl., Ex. A.) Defendant JPMorgan Chase & Co., by contrast, is a financial holding company that owns both Chase and other banking interests.[11]

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[10] The same result applies under Florida law. *See, e.g.*, *14th & Heinberg, LLC v. Terhaar & Cronley Gen. Contractors, Inc.*, 2010 WL 3464416 (Fla. 1st DCA 2010) (rejecting a claim of unjust enrichment because "the parties' rights are fixed by law and by the terms of the contract").

[11] While the Parent Company's status as a financial holding company is not material to this motion, the Court may take judicial notice of the fact that the Parent Company is listed as such an entity on the Federal Reserve's website. *See* The Federal Reserve Board: Financial Holding Companies, http://www.federalreserve.gov/generalinfo/fhc/ (last visited Oct. 12, 2010); *Serpentfoot v. Rome City Comm'n*, 322 F. App'x 801, 807 (11th Cir. 2009) ("[A] district court (continued…)

Rather than differentiating between these two entities in the Complaint, Plaintiff simply lumps them together by defining the term "CHASE" to refer to both of them. (Compl. at p. 1.) All of the Complaint's allegations of wrongdoing are then directed at "CHASE" collectively, without distinguishing between the alleged acts of the national bank and the alleged acts of the parent company. This indiscriminate style of pleading fails to state a claim for relief against the parent company.

It is well settled that a complaint that "lump[s] all the defendants together in each claim and provide[s] no factual basis to distinguish their conduct . . . fails to satisfy the minimum standard of Rule 8." *Lane v. Capital Acquisitions & Mgmt. Co.*, 2006 WL 4590705, at *5 (S.D. Fla. Apr. 14, 2006). Accordingly, courts routinely dismiss claims that are collectively pleaded against multiple defendants without identifying which conduct is attributable to which defendant. *See, e.g., Bruggemann v. Amacore Group, Inc.*, 2010 WL 2696230, at *5 (M.D. Fla. Jul. 6, 2010) (dismissing unjust enrichment claim that "lumps all of the Defendants together" because it is "vague and does not comport with *Iqbal*"); *Mukamal v. Bakes*, 383 B.R. 798, 827 (S.D. Fla. 2007) (dismissing four defendants from a lawsuit when the complaint "refers to them collectively in every instance").

These pleading requirements are "particularly pertinent" when a plaintiff sues both a parent company and its subsidiary. *See Court Appointed Receiver of Lancer Offshore, Inc. v. Citco Group, Ltd.*, 2008 WL 926512, at *3 (S.D. Fla. Mar. 31, 2008). Thus, in *Citco*, the court dismissed a claim against a corporate parent where the plaintiff lumped the parent and its

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may take judicial notice of matters of public record without converting a Rule 12(b)(6) motion into a Rule 56 motion."). *See also* Fed. R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

subsidiaries "together in each claim and provid[ed] minimal allegations . . . to distinguish their conduct." Courts have likewise dismissed claims against the very parent company at issue here – JPMorgan Chase & Co. – where the plaintiff failed to distinguish the alleged acts of the parent from the alleged acts of its subsidiary. *See, e.g., Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1135-37 (N.D. Cal. 2005) (granting JPMorgan Chase's motion to dismiss because "there are no allegations in the complaint specifically connecting . . . JPMorgan Chase to the alleged" wrongdoing); *Conomos v. Chase Manhattan Mortgage Corp.*, 1998 WL 118154, at *2-3 (S.D.N.Y. Mar. 17, 1998) (dismissing JPMorgan Chase's predecessor where complaint referred to parent and subsidiary collectively and alleged no separate wrongdoing by the parent company).

Here, as in *Brennan* and *Conomos*, Plaintiff wholly fails to differentiate between Chase and its parent company. Nor does Plaintiff attribute any of the challenged conduct to the parent company as opposed to the national bank. Plaintiff does not allege, for example, that the parent company played any role in the conception, implementation, or administration of Payment Protector. The absence of such allegations is no accident: no such allegation could responsibly be made. Because Plaintiff has not made a single specific allegation that JPMorgan engaged in any of the challenged conduct, all claims against JPMorgan should be dismissed.

CONCLUSION

For all the foregoing reasons, Chase respectfully requests that the Court enter an Order dismissing the Class Action Complaint with prejudice.

Respectfully submitted,

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