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8 Attorneys for Defendant  
 9 BANK OF AMERICA, NATIONAL  
 ASSOCIATION

10 UNITED STATES DISTRICT COURT  
 11 CENTRAL DISTRICT OF CALIFORNIA

12 ROGER STANIONIS; AND, LEE  
 13 E. STANIONIS, INDIVIDUALLY  
 AND ON BEHALF OF ALL  
 14 OTHERS SIMILARLY SITUATED,

Plaintiffs,

15 vs.

16 BANK OF AMERICA, NATIONAL  
 17 ASSOCIATION,

18 Defendant.

Case No. 5:14-cv-02222-CBM (KKx)

**DEFENDANT BANK OF AMERICA,  
 NATIONAL ASSOCIATION'S NOTICE  
 OF MOTION AND MOTION TO  
 DISMISS PLAINTIFFS' COMPLAINT**

**[FED. R. CIV. P. 12(b)(6)]**

[Memorandum of Points and Authorities in  
 Support of Motion, Declaration of Brian M.  
 Jazaeri in Support of Motion, and Request  
 for Judicial Notice in Support of Motion  
 filed concurrently herewith; [Proposed]  
 Order lodged concurrently herewith]

Judge: Hon. Consuelo B. Marshall  
 Date: March 3, 2015  
 Time: 10:00 a.m.  
 Court: Room 2

Trial Date: None set  
 Complaint Filed: October 29, 2014

BANA'S NOTICE OF MOTION AND  
 MOTION TO DISMISS COMPLAINT  
 Case no. 5:14-cv-0222-cbm (kkx)

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on March 3, 2015, at 10:00 a.m. or as soon  
3 thereafter as this matter may be heard, in Courtroom 2, before the Honorable  
4 Consuelo B. Marshall of the United States District Court, Central District of  
5 California, United States Courthouse, 312 North Spring Street, Los Angeles, CA  
6 90012-4701, Defendant Bank of America, National Association (“BANA”) will and  
7 hereby does move the Court, pursuant to Rules 12(b)(6) of the Federal Rules of  
8 Civil Procedure, for an order dismissing the Complaint filed by plaintiffs Roger  
9 Stanionis and Lee E. Stanionis (“Plaintiffs”).

10 **Bank of America moves to dismiss on the following grounds:**

11 The Complaint fails to state a claim upon which relief can be granted.  
12 Plaintiffs have not alleged—and cannot allege—that BANA failed to comply with  
13 the Electronic Fund Transfer Act (the “EFTA”), 15 U.S.C. § 1693e(a), or that any  
14 of Plaintiffs’ “re-sequencing” claims are viable as a matter of law.

15 *First*, Plaintiffs have failed to adequately plead a violation of the EFTA, and  
16 moreover, cannot plausibly allege such a claim in light of BANA’s compliance with  
17 the EFTA. BANA voluntarily ceased charging any overdraft fees for one-time  
18 debit card transactions and most ATM transactions *prior* to the implementation of  
19 the EFTA regulations at issue. With respect to emergency ATM cash withdrawals,  
20 BANA complies with the EFTA notice provisions, negating Plaintiffs’ EFTA claim  
21 as a matter of law. To the extent Plaintiffs’ state law claims are based on violations  
22 of the EFTA, these claims also fail as a matter of law.

23 *Second*, Plaintiffs’ “re-sequencing” claims fail as a matter of law because  
24 they are preempted by federal law. The federal National Banking Act (“NBA”), 12  
25 U.S.C. § 1 *et seq.*, and the regulations promulgated by the Office of the Comptroller  
26 of the Currency, preempt any state law claim predicated on the theory that BANA’s  
27 posting practices were not in good faith. Accordingly, federal law preempts  
28

1 Plaintiffs’ breach of contract, breach of the covenant of good faith and fair dealing,  
2 unconscionability, conversion, unjust enrichment and the California UCL claims.

3 *Third*, Plaintiffs’ UCL claim also fails because Plaintiffs have not pleaded  
4 sufficient facts that BANA has engaged in an “unlawful” business practice.  
5 Plaintiffs’ claims under the “fraudulent” and “unfair” prongs sound in fraud and  
6 Plaintiffs have failed to plead these claims with particularity, as required by Rule  
7 9(b) of the Federal Rules of Civil Procedure.

8 *Fourth*, Plaintiffs’ breach of contract and breach of the covenant of good  
9 faith and fair dealing claim also fails because Plaintiffs have not specified or  
10 attached a specific contract at issue, or the specific provisions alleged to be  
11 breached.

12 *Fifth*, Plaintiffs’ unconscionability claim also fails because unconscionability  
13 is not an independent cause of action, and, in any event, Plaintiffs have not  
14 sufficiently alleged any wrongful conduct that would support the defense of  
15 unconscionability.

16 *Sixth*, Plaintiffs’ conversion claim also fails because Plaintiffs cannot allege  
17 conversion of funds deposited with a bank and Plaintiffs have not plausibly alleged  
18 any “wrongful” conduct by BANA relating to posting order that could support a  
19 claim for conversion.

20 *Seventh*, Plaintiffs’ unjust enrichment claim fails because unjust enrichment  
21 is not an independent cause of action under California law and, in any event,  
22 Plaintiffs have not sufficiently alleged any wrongful conduct that would support the  
23 remedy of unjust enrichment.

24 The Complaint should be dismissed with prejudice. Because Plaintiffs  
25 cannot amend to plead any plausible claims against BANA, leave to amend should  
26 not be granted.

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1 This motion is made following the conference of counsel pursuant to L.R. 7-  
2 3, which took place on December 17, 2014. This motion is based on this Notice of  
3 Motion and Motion, the Memorandum of Points and Authorities filed concurrently  
4 herewith, the Declaration of Brian M. Jazaeri and attached exhibits, Request for  
5 Judicial Notice and attached exhibits, on all pleadings and papers on file or to be  
6 filed in the above-entitled action, any reply papers filed in support of the Motion,  
7 arguments of counsel and any other matters that may properly come before the  
8 Court for its consideration.

9 Dated: January 6, 2015

Respectfully submitted,

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11 MORGAN, LEWIS & BOCKIUS LLP  
Kathleen MacFarlane Waters  
12 Brian M. Jazaeri  
Esther K. Ro

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14  
15 By /s/ Brian M. Jazaeri  
Brian M. Jazaeri  
16 Attorneys for Defendant  
BANK OF AMERICA, NATIONAL  
17 ASSOCIATION

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