**No. 18-35735**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**DANICA BROWN,**
**ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,**

*Plaintiff-Appellant,*

v.

STORED VALUE CARDS, INC (d/b/a NUMI FINANCIAL) and CENTRAL NATIONAL BANK AND TRUST COMPANY, ENID, OKLAHOMA:

Defendants-Appellees.

Appeal from the United States District Court for the District of Oregon
**Case No. 3:15-cv-01370-MO**

# APPELLANT'S OPENING BRIEF


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## INTRODUCTION

Traditionally, the same governmental entities that arrest and detain members of the public have returned those arrestees' confiscated property to them at the end of their period of confinement. But counties and municipalities traditionally have not generated revenue through this program of handling and returning arrestee property. To the contrary, the task was often costly in both time and money, as it required each jail or detention center to develop and then implement accounting protocols for returning the correct amount of money to each person leaving custody.

All of this has begun to change in the last several years, as more and more local governments are delegating the function of returning arrestee property to private, for-profit companies like Defendant Stored Value Cards ("Numi"). Numi and other private companies that market similar services do not charge most jails for those services, so the public entities that run the jails are able to hand off a complex logistical task without any corresponding new costs. Meanwhile, Numi and its competitors in the arrestee property return business, as well as its many private partners like Defendant Central National Bank ("CNB"), are handsomely compensated for taking over this public task. In 2014 alone, Numi made $2.85 million in revenue from operating its release card program. ER 443.

How did Numi and other financial services companies transform arrestee property return, which had been a net drain on public coffers, into a money-making enterprise? Simply put, they performed this alchemy by charging fees to people like plaintiff Danica Brown.

Instead of returning arrestees' money via cash or check, as jails had traditionally done, Numi and its partners load the balance of each detained person's trust account—the money taken from them upon arrest or to which they are otherwise entitled—onto an already-validated payment card ("debit release card") that the arrestee never applied for or requested, and that in many cases they affirmatively do not want. Upon release from incarceration, Ms. Brown and thousands of other people every month are then given these cards as the sole means of accessing their money.

But the cards come with numerous, and costly, strings attached. In addition to fees for making various types of transactions or attempting transactions without success, the cards also charge consumers for doing nothing at all, assessing a $5.95 maintenance fee five days after card activation for the version of the card Ms. Brown was given. Another widely used version of the Numi card charges this maintenance fee after just two days. ER 163 ¶49. For the approximately one-third of card recipients who never use their debit release cards, the entire balance on the card is collected by Numi and its partners in maintenance fees. ER 163 ¶50; ER 361-362.

And even those releasees who do use the cards to access their money rarely do so without incurring fees. ER 301 ¶14 (describing Numi internal documents showing that around 80% of card users paid fees).

Thus, while Defendants may argue to this Court, as they did before the district court, that nothing was taken from Ms. Brown against her will because fees can be avoided, it is difficult to escape the conclusion that if all or even a large proportion of debit release card users managed to avoid these fees, there would be no more debit release cards because Numi's business model would cease to be viable. Put another way, user fees are an integral component of the debit release card program through which governmental entities like Multnomah County have chosen to return arrestees' property.

But because that debit release card program involves issuing unsolicited cards with illegal maintenance fees, it violates the Electronic Funds Transfer Act, 15 U.S.C. § 1693 et seq. And because the cards do not provide just compensation for the property they replace, and carry fees that do not fairly approximate the costs of the program, the program also constitutes a violation of the Fifth Amendment's Takings Clause, as applied to the states by the Fourteenth Amendment. Finally, because Defendants took possession of Ms. Brown's specific and identifiable property without the right to do so, and benefitted thereby, they are liable for conversion and unjust enrichment under Oregon law.

## JURISDICTIONAL STATEMENT

The district court had original subject matter jurisdiction over this action under 28 U.S.C. § 1331 because it arises under the laws of the United States, specifically, 15 U.S.C. § 1693 et seq. and 42 U.S.C. § 1983. The district court also had original subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d), because the amount in controversy exceeds $5 million and the proposed class includes at least some members who are citizens of states different from Defendants. The district court had subject matter jurisdiction over the pendent state law claims under 28 U.S.C. § 1367. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because after granting Defendants' motion for summary judgment, the court dismissed the entire action with prejudice. ER 3.

The order dismissing the case and awarding judgment to Defendants was entered on August 2, 2018. ER 3. Ms. Brown filed her Notice of Appeal on August 31, 2018, less than thirty days later. ER 1-2. Thus this appeal is timely. Fed. R. App. Proc. 4(a).

## STATEMENT OF THE ISSUES PRESENTED

1. Did the district court correctly conclude under the legal standard for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) that the Electronic Funds Transfer Act ("EFTA") does not apply to Defendants' debit release card program because the cards are not "marketed to the general public," where that term is defined by the relevant regulatory agency to include both direct and indirect advertising and promotion, and the Complaint has always alleged that Defendants market the debit release card program to government agencies with the intent that those agencies disseminate the cards to arrestees being released, as well as to jurors and other members of the general public to which those government agencies wish to make payments? ER 892 ¶9, 894 ¶18.

2. Did the district court abuse its discretion in denying Ms. Brown's motion to reinstate her EFTA claim after discovery revealed substantial evidence of direct as well as indirect marketing to the general public of the debit release cards' uses and benefits, evidence that was not available to Ms. Brown when opposing Defendants' motion to dismiss?

3. Did the district court apply the correct legal analysis in concluding as a matter of law that no permanent taking occurred when Ms. Brown's money was replaced with a fee-laden debit card because the card was the functional equivalent

of the cash that was taken from her and the transaction costs associated with using the card were "de minimis"? ER44.

4. Did the district court err in declining to separately analyze either of Ms. Brown's two alternative takings theories—that the debit release card fees were disproportionately high and did not fairly approximate the costs of the program as required by *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989), and that the program constituted a regulatory taking because of its economic impact and invasive character, *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)—once it determined that summary judgment for Defendants was appropriate on the per se takings theory?

5. Did the district court properly grant summary judgment to Defendants on Ms. Brown's conversion and unjust enrichment claims by applying the same functional equivalency analysis it had used to reject the per se takings claim? ER 44-45.

## STATEMENT OF THE CASE

### I. The Growing Use of Release Debit Cards

Approximately 11.6 million people are arrested and processed by local jails each year. ER 157 ¶15. Most of these people, like Ms. Brown, are released shortly after being arrested, and are never convicted of any crime. *Id.; see also* ER 263 ¶¶3-10 (Ms. Brown describing that she was arrested and detained for less than eight hours

after participating in a peaceful protest); ER 264 ¶18 (recounting that the charges against her were dropped).

One public function that counties and other local governments responsible for incarcerating people have traditionally performed is to keep arrestees' property safe during their period of detention, usually in an inmate trust account, and return it to them if and when they are released. ER 158 ¶16. For example, before Multnomah County contracted with Numi in 2014 to provide debit release cards, arrestees who had less than $60 in their inmate trust accounts when released were given the balance in cash, while those with higher balances in their account received a check. ER 404; *see also* ER970-71 (email exchange between Numi personnel and Multnomah County Sheriff's Department describing county's previous system for returning arrestee property).

Stored Value Cards, which currently does business as Numi Financial, began marketing prepaid debit cards for local governments to use for arrestee property return in 2009.[1] ER 440. Its operations have grown considerably since then, from 1,000 cards per month in April 2010 to nearly 50,000 cards per month in April 2015. ER 540. By the time Ms. Brown filed her Second Amended Complaint in 2016,

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Stored Value Cards previously did business under the name Futura Cards. ER 1175.

Numi's reach had expanded to over 400 jails in 44 states, with more than 600,000 cards issued annually. ER 160 ¶28.

This growth reflects a larger trend, where a 2015 survey of corrections administrators found that an increasing number of jails and other detention facilities were transitioning from cash or check to debit release cards as the preferred method for returning prisoners' property to them. ER 158 ¶18. The market is competitive, with several other corporations besides Numi offering similar release card products. ER 250.

In advertising release cards on its website, Numi emphasizes the advantages of "going completely cashless" and the costs governments can save by eliminating burdensome accounting practices and the need to track down uncashed checks, whose value must escheat to the state. ER 160 ¶30-31. *See* also ER 392-394 (deposition testimony); ER 970-71 (email exchange between Numi personnel and Multnomah County Sheriff's Department). Before delegating property return tasks to Numi and its partners, Multnomah County estimated that it spent $275,000 in labor costs annually and two to three hours of staff time per day handling inmate cash. ER 161 ¶¶36-37. Like most other counties and municipalities, Multnomah County pays Numi nothing to participate in its debit release card program. ER 161 ¶35.

## II. Numi's Product Offerings and Their Associated Fees

Numi contracts with a web of other corporations in providing release cards to arrestees. First, it must contract with a Federal Reserve bank, who actually issues the cards and who holds the card funds in one of its accounts once they leave the inmate trust account and until the card's value is either removed from that account by the arrestee or depleted by fees. ER 237-239, 345. Between 2013 and 2015, that partner bank was Defendant CNB. ER 160 ¶29. *See* also ER 1176 (2013 agreement between Numi and CNB); ER 1235-1237 (describing plan for winding down business relationship beginning in August 2015).

In addition to an issuing bank, Numi must also affiliate with a payment network (like Visa or Mastercard). Numi's release cards are issued on the Mastercard network and are called Numi Prestige Prepaid Mastercards. ER 160 ¶29. *See also* ER 615-616 (Cardholder Agreement); ER 1357-1370 (Mastercard Brand Agreement providing that Numi will be reimbursed for marketing expenses based on volume of card usage).

Numi also contracts with Arroweye to manufacture the cards. ER 252-253. And it contracts with Fidelity Information Systems, or FIS, to process transactions on the cards, to store transaction data, and to provide the online and mobile app-based support for cardholders to check their balances and transfer funds electronically. ER 254-56.

But all of these other contracts would be a mere academic exercise without customers, and Numi secures its customers by entering into agreements with local jails. Often, as in the case of Multnomah County, yet another company (called a distributor, channel partner, or commissary partner in Numi's internal documents) serves as an intermediary between Numi and the jail. ER 442 (describing flyers given to partners to share with jails "to see if they'd like to use the program").

In 2013, Multnomah County contracted with Securus Technologies as a commissary partner to offer a wide range of services in its jails, including video visitations; deposit kiosks (through subcontractor TouchPay) for making direct deposits into inmates' commissary, telephone, and self-bail trust accounts; and debit release cards. ER 159 ¶19. Numi was added to this agreement as a subcontractor the following year, ER 177-183, and the Numi-Multnomah County debit release card program "went live" in May of 2014. ER 342.

Numi offers multiple fee schedules for the Prestige Prepaid Mastercards in its release card program, distinguished by how often maintenance fees are charged. ER 339 (P7C cards charge maintenance fee once a month, while P1C cards charge weekly fee). *See also* ER 992 (describing fee structures in email to potential channel partner in terms of which are most lucrative and will earn the highest commissions). Each facility chooses which fee schedule it wants to use, either directly or through a partner. ER 346.

In rare cases, counties or municipalities have negotiated deviations from Numi's standard fees to offer more protections to consumers. ER 380-381 (one facility asked that their cardholders not be charged for denied transactions, and another extended the grace period to fifteen days before a maintenance fee would be charged). A few other counties, including Napa County, California and Broward County, Florida, have chosen to pay a flat fee per card issued "instead of passing fees on to cardholders." ER 340 (referring to these cards as "subsidized").

Multnomah County did not subsidize the Numi Prestige cards it began handing out to people it released from detention in 2014. Rather, its cards came with the standard P7C fee schedule in which maintenance fees are charged every month, beginning five days after the card is activated. ER 163 ¶48. Other fees on Multnomah County's cards include a $2.95 fee for each ATM withdrawal (in addition to any fee charged by the ATM terminal itself), a $0.50 fee for contacting the automated customer service system more than three times per month, a $9.95 fee for requesting the balance of the card via check, a $1.00 fee for each ATM balance inquiry,[2] a $3.00 fee for a paper statement, and a $0.95 fee for each transaction declined due to insufficient funds or an incorrect PIN. *Id.* *See* also ER 615 (fee schedule on Cardholder Agreement).

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[2] **This fee was later increased to $1.50 per balance inquiry.** *See* ER 992.

## III. Danica Brown's Experience with Defendants' Debit Release Card

Danica Brown is a doctoral candidate in Portland State University's social work program specializing in indigenous communities' methods of research and knowledge gathering. ER 584. On Tuesday, November 25, 2014, Ms. Brown was part of a public protest in Portland, Oregon of a Missouri grand jury's decision not to indict Darren Wilson in the death of teenager Michael Brown. ER 262 ¶2; ER 586. At approximately 7 PM, as she was attempting to guide people off of the highway in her role as a member of the protest's security patrol, she was arrested by Portland police. ER 263 ¶3. She had never been arrested before. *Id.* ¶4.

Ms. Brown was first taken to a precinct where her phone, backpack, and wallet (along with the $30.97 of cash in it) were confiscated. *Id.* ¶5. At around 11:00 PM, she was transferred to the downtown Justice Center, where she was formally booked into county custody. *Id.* ¶6. She was released approximately three hours later. *Id.* ¶10.

When Ms. Brown was released, her backpack and phone were not returned to her. *Id.* ¶11. And while her wallet was returned, its contents were not. Instead, she was given a Numi card that she neither expected nor wanted with $30.97 loaded onto it, along with a few small pieces of paper describing the card and its fees that she could not read because she had not brought her eyeglasses with her to the protest. ER 263-64 ¶¶12-15; ER 916-17 ¶¶3-4.

Ms. Brown did not consider the part of town she was released into to be safe, especially at the extremely late hour when she was released. ER 264 ¶16. She was scared, and her top priority was finding somewhere safe to spend the rest of the night. *Id.* ¶17. After getting a few hours of sleep at her partner's home, Ms. Brown spent the rest of the day on November 26 attending her arraignment and retrieving her phone and other property from the warehouse district in northwest Portland where it had been taken. *Id.* ¶¶18-20. The next day, Thursday, November 27, was Thanksgiving.

When Ms. Brown reviewed the card and its associated paperwork, she saw that there was a monthly service charge but assumed that charge would occur after she had been using the card for a month. ER 265 ¶24. She also visited Numi's website to learn more about the card and how to access her money, but chose not to use the website to transfer the card's balance to her bank account because this would have required giving Numi her personal financial information, which she did not want to do because she did not trust Numi. *Id.* ¶26. *See also* ER 597-98 (Ms. Brown testified at deposition that she associated Numi with other predatory lenders she had encountered in the past because "people who are being detained, who are being dehumanized already, who have very little power or say in what's happening in their life at that moment and only want to be released and go home to their families are being pushed a product that they didn't ask for. … That feels predatory to me.").

Ms. Brown determined that the only way to get the rest of her money off the card was to continue using it to make small-dollar purchases. ER 265-66 ¶27. She used it to buy coffee on several occasions. ER 596-97, 621-22. But she was surprised and embarrassed on December 1 when she tried to buy a $15 ticket for an event at Portland State and the transaction was declined. ER 266 ¶28. She later learned that this transaction was declined because Numi had debited her first monthly maintenance fee earlier that day, just five days after the card was given to her. *Id.* Numi then debited another $0.95 fee because of the declined transaction, and removed the remaining $0.07 from the card on January 1, 2015. ER 621-22, 1034. In all, Numi and its partners took $6.97, or 22% of the card's original $30.97 value, in fees. ER 419.

## IV. Procedural History

Ms. Brown filed a complaint against Numi and CNB in July 2015, alleging that their practice of returning arrestees' money only as a debit card with exorbitant fees, and with no option of requesting the money in an alternate form, violated the Electronic Funds Transfer Act and the Oregon Unfair Trade Practices Act, as well as constituting conversion. ER 192-208. Ms. Brown brought these claims on her own behalf and on behalf of a proposed nationwide class and Oregon subclass of formerly incarcerated people who received Defendants' debit cards upon release from detention to return funds that were either taken from them when arrested or that had

accumulated in their inmate trust accounts, and who paid fees associated with the use or maintenance of those cards. ER 200-201 ¶¶52-53.

Defendants initially moved to compel arbitration of Ms. Brown's claims based on an arbitration provision in the Cardholder Agreement, ER 933. The court determined that Ms. Brown raised genuine fact issues about whether she ever received the Cardholder agreement, and that her use of the card alone could not constitute acceptance of the Cardholder Agreement terms when she had no other means of accessing her confiscated money. ER 936 (Dkt. 61). The court held that a trial on arbitrability was necessary, but before one could be scheduled, Defendants filed and litigated two motions to dismiss, leading the court to conclude that they had waived their right to seek arbitration. ER 942 (Dkt. 140).

In response to Defendants' first motion to dismiss, Ms. Brown amended her complaint in April 2016 to remove the Oregon Unfair Trade Practices Act claim and add a 42 U.S.C. § 1983 claim on the theory that Defendants' debit release card program took Ms. Brown's and the proposed class's property without just compensation. ER 890-907. Defendants responded by filing a second motion to dismiss, in which they argued that the Takings Clause does not apply to Defendants' activities because they are not state actors and that the EFTA does not apply because Defendants' debit release cards are not "marketed to the general public." ER 713-732.

After full briefing and oral argument, ER 77-153, 661-712, the district court ruled in Defendants' favor on the EFTA claim, concluding that the release cards were not marketed to the general public. Like the example in the regulatory guidance of a tax preparer company that issues refunds to its customers through prepaid cards, the debit release card was "simply the mechanism for providing the money" to Ms. Brown, and there was "no allegation that either the jail or Multnomah County advertised the ability to obtain the money by a prepaid card." ER 68.

On the § 1983 claim, the court held that Ms. Brown had adequately pled that Defendants were state actors, both because they were performing the traditionally public function of returning arrestees' property, ER 69-70, and because they were acting in concert with the state in carrying out the challenged activity. ER 70-72. The court found that Ms. Brown had not adequately alleged that the deprivation of property associated with the fees was "the result of a governmental policy" or was caused "by a person for whom the state is responsible," but granted her leave to amend to allege additional facts to support one or both theories of deprivation. ER 72-74.[3]

[3] Defendants also moved to dismiss Ms. Brown's state-law claims for conversion and unjust enrichment, but the district court denied this aspect of their motion. ER 74-76.

Ms. Brown filed her Second Amended Complaint in December of 2016, ER 154-175, and Defendants again moved to dismiss the § 1983 claim on the ground that they are private, not state, actors and that the fees at issue are not the result of a governmental policy. The court held oral argument and denied Defendants' motion on June 7, 2017. ER 941 (Dkt. 136).

The parties then engaged in discovery, during which Ms. Brown obtained substantial evidence regarding Defendants' marketing activities for their debit release cards, including marketing conducted in jails and directed at the end users of the cards. Based on this new evidence, Ms. Brown sought leave to reinstate her EFTA claim and proposed a Third Amended Complaint including new factual allegations about this direct marketing activity. ER 1071-1149. The parties fully briefed the motion to reinstate the EFTA claim, ER 425-550, 1150-1443, but no oral argument was held. The court denied the motion without written opinion on July 2, 2018. ER 4 (Dkt. 188).

Defendants filed a motion for summary judgment on March 2, 2018. ER 551-580. The motion primarily argued that because Ms. Brown could have withdrawn her money at a bank within the first five days of receiving the debit card, her voluntary choices rather than Defendants' conduct caused her to incur fees, so no taking occurred. Ms. Brown responded that this question of voluntariness was irrelevant to the takings analysis, and that Defendants' replacement of Ms. Brown's

cash with a restrictive and fee-encumbered debit card constituted a taking in three distinct ways: 1) a per se taking of her cash for which the card was not just compensation; 2) unreasonable fees that were not a fair approximation of the debit release card program's costs; and 3) a regulatory taking that was invasive in character and substantially affected Ms. Brown's ability to use her money. ER 396-429.

The court held a hearing on the motion during which discussion focused on the first, per se takings, theory, and whether the card was the functional equivalent of the cash it replaced. ER 5-29. Concluding that money is more liquid, and thus more replaceable, than other types of property like land, ER 37-39, the court noted that it is nonetheless possible to put such heavy restrictions on the instrument redeemed in place of currency that the substitution with the more restrictive instrument constitutes a taking. ER 39. However, the court found that the burdens associated with Defendants' debit release cards relative to cash were de minimis and were balanced out by features, such as being able to use the card to make online purchases, that made it a superior alternative to cash. ER 40-41. The court also found it "very important" that Ms. Brown could withdraw the full value of her cash using the card at any Mastercard-affiliated bank without a fee, which made accessing her money without additional obstacles "ridiculously easy" in the district court's view. ER 41-42.

Accordingly, the district court granted summary judgment to Defendants, holding that "no permanent taking occurred because the government took Ms. Brown's money and then shortly thereafter returned to her her money in a highly transferable, usable liquid form with de minimis transaction costs and de minimis benefits that made what they gave her the functional equivalent of what they took." ER 44. In reaching that conclusion, the court chose not to resolve the "alternative argument" of whether the fees were reasonable, suggesting that the reasonableness question only arose if the fees were not incurred voluntarily. *Id.* However, the court also noted that "I don't find that this record is one, in the light most favorable to Ms. Brown, where it's susceptible to summary judgment on the reasonableness of the fees." *Id.* The court did not address Ms. Brown's regulatory taking theory.

Finally, the court dismissed Ms. Brown's conversion and unjust enrichment claims in a few brief sentences, maintaining that the conclusion as to takings and functional equivalence "drives the analysis" on the state-law claims. There could be no conversion without a permanent taking, and since the functional equivalent of Ms. Brown's property was returned to her, there was neither injustice nor enrichment. ER 45.

Following the court's oral recitation of its views, it issued an order dismissing the case with prejudice. ER 3. This appeal followed. ER 1-2.

## SUMMARY OF ARGUMENT

In Multnomah County and throughout the country, Defendants return arrestees' property to them on pre-activated debit cards that the arrestees never applied for or requested. These cards also charge the arrestees fees for everything from checking the card's balance to calling customer service to doing nothing at all and simply keeping money on the card for more than five, or in some cases just two, days. Providing unsolicited cards that are already activated,, without giving consumers a choice about receiving them, is a violation of the Electronic Funds Transfer Act. So is charging service fees as soon as two days after a card is activated; such service fees may not be charged until the card has been in a consumer's possession for at least a year.

The district court erred by dismissing Ms. Brown's claims under the Electronic Funds Transfer Act on the ground that the debit release cards were not marketed to the general public. Numi indirectly markets the cards to a subset of the general public—arrestees—by promoting their use at trade shows serving the corrections industry. And the district court compounded this error by abusing its discretion and refusing to allow Ms. Brown to amend her complaint to add newly discovered evidence of the precise sort of direct marketing that the court had found lacking, leading it to dismiss the claim in the first place.

Finally, Ms. Brown provided ample evidence the debit release card is fundamentally different, less valuable and more restrictive  than the cash it replaces. This specific evidence supports three different legal theories by which the replacement of Ms. Brown's cash with the card, and subsequent loss of 10% of that card's value to fees, constituted a taking by Defendants acting on behalf of the state without just compensation. Any of these theories was sufficient to defeat Defendants' motion for summary judgment, and the district courts grant of summary judgment on both the takings claim and Ms. Brown's state law claims should be reversed.

## STANDARD OF REVIEW

This Court reviews orders granting motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) de novo, accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party. *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012). This Court reviews denials of leave to amend pleadings for abuse of discretion. *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1124 (9 th Cir. 2018).

In reviewing orders granting summary judgment, this Court not only applies a de novo standard of review but "sits in the same position as the district court and applies the same summary judgment test that governs the district court's decision." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 629-30 (9th Cir.

1987). Under this test, all evidence must be viewed in the light most favorable to the nonmoving party, and if direct evidence between the parties conflicts, the Court must credit the evidence of the nonmoving party. *Id.* at 630-31. Inferences from background or contextual facts must also be made in the nonmoving party's favor, and "the court's ultimate inquiry is to determine whether the "specific facts" set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *Id.* at 631.

## ARGUMENT

### I. Ms. Brown's Claims Under the Electronic Funds Transfer Act Should Not Have Been Dismissed Because Defendants Issued Unsolicited Debit Cards With Illegal Maintenance Fees, and Those Cards Were Marketed to the General Public.

Congress passed the Electronic Funds Transfer Act ("EFTA") in 1978 "to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems." 15 U.S.C. § 1693. Its "primary objective" in enacting EFTA was to create "individual consumer rights." *Id.* And one of the consumer rights it created was a private right of action, with specific provisions for statutory damages and class-action liability against those who violate EFTA's provisions. 15 U.S.C. § 1693m.

Here, Defendants have violated two of EFTA's provisions with respect to Ms. Brown and the classes she seeks to represent: the ban on unsolicited debit cards and the ban on charging service fees within the first year of issuing a general-purpose prepaid card. Ms. Brown adequately pled the facts supporting each of these statutory violations, and the order dismissing her EFTA claim, ER-66-76, should be reversed.

### A. Defendants Violated EFTA by Issuing Already-Validated Debit Release Cards to Consumers Who Never Applied for or Requested Them.

EFTA makes the issuance of unsolicited debit cards to consumers flatly illegal, providing:

> [N]o person may issue to a consumer any card, code, or other means of access to such consumer's account for the purpose of initiating an electronic fund transfer other than-- (1) in response to a request or application therefor; or (2) as a renewal of, or in substitution for, an accepted card, code, or other means of access, whether issued by the initial issuer or a successor.

15 U.S.C. § 1693i(a).

This provision also contains an exception, allowing unsolicited cards to be issued as long as they are not validated until the consumer receives specified disclosures and affirmatively requests validation, where validation is defined as the ability to use the card to initiate an electronic funds transfer. 15 U.S.C. § 1693i(b)-(c). *See also* 12 C.F.R. § 1005.5(b)(4) (unsolicited debit card may only be validated in response to a consumer's oral or written request after verification of the consumer's identity).

In both her original and First Amended Complaint, Ms. Brown alleged that the debit release card was foisted upon her without her consent, and certainly without her applying for or requesting it. ER 199 ¶45 ("Ms. Brown's receipt of her cash in the form of the NUMI Card was completely and utterly involuntary."); ER 898 ¶49 (same). She made similar allegations of involuntariness with respect to the proposed class. ER 198 ¶33; ER 897 ¶36 (quoting Multnomah County Senior Assistant County Attorney who stated that if an arrestee attempts to reject the release card, "the money that was on the Card is simply reposted to the inmate's individual jail account and will be there waiting for them if they are arrested again and brought back to jail."). Finally, she alleged that when Defendants' release cards are handed to people leaving incarceration, they are already activated and ready to use. ER 196 ¶22; ER 895 ¶22.

In short, Ms. Brown pled with specificity the factual predicates of a violation of EFTA's unsolicited debit card provision, and she pled a violation of EFTA. ER 204 ¶¶61-66; ER 903 ¶¶65-69. This was sufficient to give Defendants fair notice of the legally cognizable EFTA claim against them and the factual grounds upon which it rested. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To the extent that Ms. Brown's First Amended Complaint lacked specificity about the provisions of EFTA Defendants allegedly violated, this was not a fatal defect and she should have been granted leave to amend, either in 2016 when that complaint was filed or,

certainly, in 2018 when she sought leave to file a Third Amended Complaint that specifically referenced 15 U.S.C. §1693i. ER 426 (describing Third Amended Complaint).

In fact, a district court in Ohio has recently held, in a case strikingly similar to this one, that there are factual questions sufficient to survive a motion for summary judgment on whether Numi's debit release card program violates 15 U.S.C. § 1693i. *Humphrey v. Stored Value Cards*, No. 1:18-CV-1050, 2019 WL 134306, at *2-4 (N.D. Ohio Jan. 8, 2019). It follows that Ms. Brown's First Amended Complaint, which provided ample factual support for this theory of EFTA liability, pled a plausible claim for relief that was legally sufficient to survive a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

The district court erred in dismissing Ms. Brown's EFTA claim with prejudice and without leave to amend. *See I.B. ex rel. Fife v. Facebook, Inc.*, 905 F. Supp. 2d 989, 1006-07 (N.D. Cal. 2012) (granting leave to amend where complaint did not allege which provision of EFTA was violated but where "amendment does not appear to be futile"). For these reasons and the reasons described in part II below, Ms. Brown's EFTA claim as pled in her proposed Third Amended Complaint should be reinstated. *See* ER 1076-1103 (proposed Third Amended Complaint).

### B. Defendants Also Violated EFTA by Charging a Service Fee on a General-Purpose Prepaid Card After Five Days Instead of One Year.

In 2009, Congress enacted the Credit Card Accountability Responsibility and Disclosure Act ("Credit Card Act"), which added a new section to the EFTA regarding gift certificates, store gift cards, and general-purpose payment cards. Pub. L. No. 111-24, 123 Stat. 1734 (2009). This provision, now codified at 15 U.S.C. § 1693l-1, prohibits any dormancy fees, inactivity fees or service fees from being charged on a general-purpose prepaid card (as well as a store gift card or gift certificate) unless proper disclosures are made ***and*** the card has not been used in the previous twelve months. 15 U.S.C. § 1693l-1(b). *See also* 12 C.F.R. § 1005.20(f)(1) (listing required disclosures for other fees).

Ms. Brown alleged in her First Amended Complaint that despite this prohibition, Defendants imposed a maintenance fee, which falls within the definition of "service fee" at 15 U.S.C. § 1693l-1(a)(3), after Ms. Brown had her card for only five days. ER 899 ¶51. Nor had her card been inactive during those five days, as she had used it to make several small purchases. ER 898 ¶50. Ms. Brown also alleged that Defendants charged people on a different Numi card program their first maintenance fee after having their cards for only two days. ER 896 ¶32.

Defendants contended in their motion to dismiss that their debit release cards fell outside the definition of "general-purpose prepaid card" because they were "not

marketed to the general public," one of the enumerated exceptions to coverage under that statute. 15 U.S.C. § 1693(a)(2)(D)(iv). The district court agreed. ER 68. But people being released from jail belong to the general public, and the First Amended Complaint stated a facially plausible claim that Defendants indirectly marketed debit release cards to this population. The exception from coverage does not apply.

### 1. Every Member of the General Public Is Subject to Being Arrested or Coming Into Contact with Numi's Products in Other Way*s*.

At the hearing on the motion to dismiss, the district court opined that the "not marketed to the general public" exception applied to Defendants' products because they were targeted at a "limited audience" and "not placed in the general market." ER 85. Elaborating, the court noted that the Numi card is "not readily available to the public, at least as I think of as the public, and so I think it's of limited use and limited audience, and therefore that the EFTA does not apply." *Id.*

This represents a misunderstanding of the "not marketed to the general public" exception as it has been interpreted by the two federal agencies responsible for promulgating EFTA and Credit Card Act regulations. Since its founding, the Consumer Financial Protection Bureau has taken over administering EFTA and its implementing regulation, Regulation E, from the Federal Reserve. The CFPB offers an Official Staff Commentary on each section of Regulation E. The staff commentary to 12 C.F.R. § 1005.20 includes examples of the various types of

prepaid products covered by the Credit Card Act, as well as the exceptions from coverage. 12 C.F.R. pt. 1005, supp. I (2013). *See also* 12 C.F.R. pt. 2005, supp. I (2010) (virtually identical staff interpretations provided by Federal Reserve).

The second example in both the CFPB and Federal Reserve staff interpretations of § 1005.20(b)(4), the "not marketed to the general public" exception, directly addresses the district court's "limited audience" point. That example states:

> ii. A national retail chain decides to market its gift cards only to members of its frequent buyer program. Similarly, a bank may decide to sell gift cards only to its customers. If a member of the general public may become a member of the program or a customer of the bank, the card does not fall within the exclusion in section 1005.20(b)(4) because the general public has the ability to obtain the cards.

12 C.F.R. pt. 1005, supp. I.

In other words, even if only a subset of the general public currently has access to the prepaid card at issue, the exception does not apply as long as anyone is eligible to join that smaller group. And given that 11.6 million people are processed by local jails each year, most of whom are never convicted of a crime, ER 893 ¶15, the population of the formerly incarcerated is at least as open to new entrants from the general public as the population of loyalty club members or bank customers discussed in the CFPB example. Moreover, the First Amended Complaint also

alleges that Numi markets its debit cards for use by jurors and people on work release programs, two other cohorts that any member of the public could join. ER 892 ¶9.

The end users of Defendants' debit release cards, while admittedly a "limited population," are a population that any member of the public may join. Their status as arrestees does not place them outside the scope of EFTA's protections.

### 2. Indirect Marketing to Government Agencies Still Constitutes Marketing to the General Public.

The district court did not address the frequent buyer/bank customer example discussed in the previous section, but did find another of the CFPB examples to be "a compelling analogy for our case." ER 68. That example describes a tax preparer who issues refunds to customers via prepaid cards but "does not advertise or otherwise promote the ability to receive proceeds in this manner." 12 C.F.R. pt. 1005, supp. I, cmt. 20(b)(4)-(2)(vi). The district court found this example fitting because "there is no allegation that either the jail or Multnomah County advertised the ability to obtain the money by a prepaid card." ER 68. However, the definition of "marketing," for purposes of determining whether the "not marketed to the general public" exception will apply, is more expansive than the district court's analysis seems to contemplate: "A card, code, or other device is marketed to the general public if the potential use of the card, code, or other device is directly **or indirectly** offered, advertised, or otherwise promoted to the general public." 12

C.F.R. pt. 1005, supp. I, cmt. 20(b)(4) (emphasis added). And the First Amended Complaint certainly describes a situation in which Numi markets its debit release cards, directly and through partners like Securus, to local governments to disseminate to people being released from jail. ER 894 ¶¶18-21.

The term "marketing," with its common connotation of sales, may seem inappropriate for a situation where Numi offers the debit cards to governments at no cost and where the end users of the cards have no choice but to take them if they want to access their own money. The first step in this chain may seem more like a bribe, and the second more like coercion. *See Humphrey v. Stored Value Cards*, 2019 WL 134306, at *4 ("[G]iven that the plaintiffs had no choice but to receive the cards, marketing would serve no purpose.").

But this reading overlooks the word "use" in the CFPB definition, which says that marketing has occurred if the "potential use of the card" is "directly or indirectly offered, advertised or otherwise promoted." This definition says nothing about money changing hands, and for that matter, says nothing about choice. Defendants' actions in contracting with Multnomah County and other public entities undoubtedly promoted greater use of its cards by members of the general public. And while it is certainly relevant to this case that those members of the general public had no say about whether to receive the card—indeed, this fact is the basis of the other alleged EFTA violation discussed in part I-A above—the involuntariness of the end users'

experience has no bearing on the indirect marketing by Numi to the entities that placed those cards in the releasees' hands.

Numi's relationship with its partners, including Multnomah County, involved marketing as alleged in the First Amended Complaint, ER 894 ¶¶18-19; the end result of that marketing was that more members of the general public used Defendants' cards. The fact that there were multiple links in the chain between Numi and the cards' ultimate users is a natural consequence of the marketing being indirect. But as the next section will describe, discovery in this case has revealed substantial evidence of direct marketing as well, so to the extent that the difference between direct and indirect marketing was material to the district court's analysis of the EFTA claim, that claim should be reinstated based on the factual allegations in the proposed Third Amended Complaint.

## II. The District Court Abused Its Discretion in Denying Ms. Brown Leave to Amend Her Complaint and Reinstate her EFTA Claim Based on Newly Acquired Evidence of Direct Marketing Activities.

The Federal Rules of Civil Procedure provide that courts "should freely give leave" to amend pleadings "when justice so requires." Fed. R. Civ. P. 15(a). In the absence of prejudice to the opposing party, or a strong showing that the proposed amendment would be futile or was made in bad faith or with a dilatory motive, this Court recognizes a presumption in favor of amendment. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). A court that refuses to grant leave

to amend, without explaining its reasons for the denial, is not "exercis[ing its] discretion; it is merely abus[ing] that discretion and [acting in a manner] inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The district court here denied Ms. Brown leave to amend her EFTA claim when it dismissed the First Amended Complaint. ER 68. *But see* ER 73 (granting leave to amend for Ms. Brown to add factual allegations to support her § 1983 claim). And it denied leave to amend again when Ms. Brown moved to reinstate the EFTA claim in a Third Amended Complaint. ER 4. On both occasions, the district court denied leave to amend without explaining its reasons or discussing the *Foman* factors. This constituted an abuse of discretion.

The party opposing amendment has the burden of proving why leave to amend should not be granted. *Genentech, Inc. v. Abbott Laboratories*, 127 F.R.D. 529, 530-31 (N.D. Cal. 1989). In opposing Ms. Brown's motion for leave to amend to reinstate her EFTA claim, Defendants did not argue that they would be prejudiced by allowing the amendment. They only argued that the amendment would be futile. ER 501.

However, the case for futility is weak. The proposed amendments directly addressed the district court's stated reason for granting Defendants' motion to dismiss—that there was no allegation of advertising the cards as a method for returning arrestees' money. ER 68. The proposed Third Amended Complaint

included twelve new paragraphs detailing Defendants' direct marketing of their cards in jails. ER 1087-88 ¶¶62-73. The proposed amendments also detailed how Numi entered into a Prepaid Card Brand Agreement with Mastercard to have its expenses reimbursed for "actively market[ing] and promot[ing] Prepaid Cards which are MasterCard-branded." ER 1088 ¶71.

Moreover, the factual allegations in the proposed Third Amended Complaint were based on discovery that occurred after the district court had already ruled on the motion to dismiss, so there was no bad faith or dilatory motive in Ms. Brown's failure to bring the information to the court's attention earlier. *E.g.*, ER 445-452 (deposition testimony describing wallet cards provided to all releasees explaining the features of Numi cards and posters about the Numi cards and their benefits that Defendants required all participating jails to display on the wall in release areas, where those posters contained the Mastercard logo and were reimbursed as marketing expenses under Numi's Brand Agreement with Mastercard); ER 442 (Numi received over $84,000 in "incentives" from Mastercard in 2014 under the Brand Agreement).

Finally, some Numi witnesses suggested that the wallet cards and posters explaining the cards' features and benefits to releasees were educational, not marketing materials. ER 467. But the Brand Agreement through which Mastercard compensated Numi for marketing based the level of reimbursement on the "volume"

of card use, where volume was defined as the dollar value of transactions made on the cards. ER 1357-1370. Thus, consistent with the CFPB definition of "marketing" that emphasizes activities promoting the card's potential use, 12 C.F.R. pt. 1005, supp. I, cmt. 20(b)(4), the Mastercard Brand Agreement also rewarded Numi for increasing the amount of money spent on the debit release cards.

By announcing on a large, brightly colored poster in the jails that the cards would allow releasees to "access [their] funds immediately and hassle-free," ER 1434, Defendants were promoting the use of the cards as a method of accessing money; in other words, they were marketing them to the general public. Amending the complaint to add these allegations and reinstate the EFTA claim would not have been futile, and leave to amend should have been granted.

## III. Ms. Brown Raised Genuine Issues of Material Fact About Whether the Replacement of Her Cash with Defendants' Fee-Infested Debit Card Was a Taking of Her Property Without Just Compensation, and Summary Judgment on Her § 1983 Claim Was Improper.

The Constitution provides that private property may not "be taken for a public use without just compensation." U.S. Const. amend. V. This prohibition has been extended to the states by the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980). Takings Clause jurisprudence has come to recognize two distinct types of takings: physical appropriations of real or personal property called per se takings, and restrictions on the use of property known as

regulatory takings. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426-27 (2015) (recounting history of the distinction).

In opposing Defendants' motion for summary judgment before the district court, Ms. Brown raised three arguments about the debit release cards: 1) that the seizure of cash upon arrest constitutes a per se taking for which the debit card does not provide just compensation; 2) that the fees charged to debit cardholders like Ms. Brown for use (or non-use) of the card constitute per se takings; and 3) that the restrictions placed on releasees' money by the debit card program constitute a regulatory taking. ER 396-424.

The district court only engaged fully with the first of these arguments, concluding that because the card was the "functional equivalent" of cash, no taking had occurred and so it was unnecessary to reach the just compensation stage of the analysis. ER 38-44. Regarding the second argument, the court suggested that the fees could only be takings if they were both involuntary and unreasonable, noting that summary judgment would not have been granted on the reasonableness prong but declining to conduct an analysis of the fee issue because "it's all in the alternative." ER 43-44. And the court simply failed to address Ms. Brown's regulatory takings theory. These were three separate errors, and any of them could provide an independent basis for reversal and remand of the summary judgment order.

### A. The Numi Card Was Not the Functional Equivalent of the Cash It Replaced.

The district court reached its conclusion that debit release cards and cash are functionally equivalent by comparing the transaction costs of using the card, as identified by Ms. Brown's expert, to the benefits of the card suggested in the declaration of Numi's president Brad Golden, and finding that these "pluses and minuses" were "a wash." ER 40-41. This fact-intensive assessment of the cards' benefits and costs was not an appropriate mode of analysis for resolving a summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1987) ("At the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.").

All Ms. Brown had to do to defeat the summary judgment motion was to raise factual questions that could lead a reasonable jury to rule that a taking occurred. On this record, she far surpassed that standard.

With respect to Ms. Brown's specific experience, she raised fact questions about whether she understood how to use the card without incurring fees. Defendants only gave her a five-day window to take her money from the card before maintenance fees would start being charged; on the first day of this window, she was preoccupied with getting to a safe place, attending her arraignment, and retrieving

the rest of her confiscated property from law enforcement. ER 263-64 ¶¶16-21. This five-day window also coincided with Thanksgiving weekend, during which many bank branches had limited hours. ER 166 fn.3. And the information sheet provided with the card, which was supposed to help her avoid fees, contained incorrect information about which ATMs were surcharge-free. ER 352-55. Nor did the information sheet give the impression that retrieving cash from a bank teller using the card would be a fee-free option, listing nearby bank locations with the notation "cost varies." ER 613. Far from making the conversion of the Numi card to cash "ridiculously easy" for Ms. Brown, ER 41, Defendants and Multnomah County gave her confusing and contradictory information at a stressful time when she was ill-equipped to make sense of these mixed messages.

Nor was Ms. Brown atypical in confronting particular challenges at the time of release from incarceration. John L. Clark, a former assistant director at the Federal Bureau of Prisons with over 40 years of corrections experience, provided an extensive declaration detailing the ways in which the population of people being released from detention are less able, on average, than the population as a whole to understand and comply with Defendants' terms and conditions for accessing the money on the debit release cards. ER 290 ¶¶38-39 (many releasees from jail or prison have low educational attainment, are functionally illiterate, are struggling with mental illness, or are experiencing drug or alcohol withdrawal); ER 290-91

¶¶40-44 (describing trauma and anxiety associated with incarceration and release from jail, especially for those experiencing their first arrest, which makes it difficult to pay attention and absorb information); ER 293-94 ¶¶52-53 (explaining that cash would be more useful than a debit card in arranging transport home for people released in unfamiliar areas with very limited resources).

Putting aside the individual characteristics of Ms. Brown and other releasees, or the individual circumstances in which they find themselves at the time of their release, there are also features of Defendants' debit cards that make them categorically less valuable than cash. Most notably, the maintenance fees, charged after five days for monthly cards and after just two days for Numi's many weekly cards, place everyone receiving these cards on a countdown clock where they must first figure out when the card was activated, in order to count forward the correct number of days, then either access a computer to make an online transfer (giving up private financial information in the process), assuming they have a bank account in which to deposit the funds; or figure out which bank branches in their area participate in the Mastercard network and get to one of those branches within business hours on a day that the bank is open. Or as Ms. Brown's economic expert Peter Brous put it in his declaration, "[a]lthough it is possible to completely avoid transaction fees when accessing the funds on the debit card (release card), there are many

impediments making it difficult to accomplish, meaning that transaction costs are incurred even if transaction fees are not." ER 301 ¶13.

But the best evidence for the proposition that maintenance fees on the Numi cards are hard to avoid is how few people manage to avoid them. Peter Brous analyzed data from the third quarter of 2014 and reported that 79% of card recipients incurred maintenance fees, while 31% never used their cards at all. ER 301 ¶14. Another sample from Multnomah County in March of 2015 found that over three-quarters of cardholders paid fees. *Id. See also* ER 1026 (24% of cardholders paid no fees). Indeed, Numi relies on the fact that most cardholders will not be able to avoid fees in order to keep making a profit while offering the debit release card program to local governments at no cost, since income from fees is the largest component of its annual revenue. *See* ER 1436-39.

Even accepting Defendants' premise that there are other ways in which the debit card is superior to cash, such as the ability to make purchases online when businesses are closed, the question for summary judgment is whether Ms. Brown has raised a genuine dispute of material fact about whether the debit card is less valuable. This is not a heavy burden, and she has carried it.

Finally, the equivalence question can be addressed from a less functional perspective, without the emphasis on transaction costs, by using the "bundle of

sticks" approach to property rights. *See* Horne, 135 S. Ct. at 2428 (referring to the "bundle of property rights" as the ability to "possess, use and dispose of" the property). When Defendants replaced arrestees' cash with a Numi card, they essentially replaced her original possession stick with a stick infested with termites, who will continue to chew away the value of the funds on the card in monthly or weekly maintenance fee-sized bites until they are depleted. Because replacing cash with the debit card means that a releasee can no longer hold onto their money without it decreasing in value, it is fundamentally not the same type of money that it was before the taking.

Because of this fundamental transformation of the property at issue, the district court was incorrect to conclude that "no permanent taking" occurred when Ms. Brown's cash was replaced with the card. ER 44. Instead, the proper question is whether the card constituted just compensation for the cash previously taken from her. For all of the reasons discussed in this section, it did not. At a minimum, Ms. Brown has created a factual dispute on that question sufficient to overcome summary judgment.

**B. Whether or Not They Were Voluntarily Incurred, the Debit Release Card Fees Bear No Fair Approximation to the Program's Costs, Making Them Per Se Takings.**

On two separate occasions during the summary judgment hearing, the district court noted that whether the fees on Defendants' debit release cards were too high

to be reasonable was a question on which the court was not prepared to grant summary judgment. ER 30 ("There is on this record right now sufficient evidence on which a rational jury could rely to say that these don't qualify as legitimate fees but are in some manner too high."); ER 44 ("I don't find that this record is one, in the light most favorable to Ms. Brown, where it's susceptible to summary judgment on the reasonableness of the fees."). But the court did not rule on Defendants' motion for summary judgment (or analyze Ms. Brown's arguments in opposition) based on fees because it had already concluded that the debit card was the functional equivalent of the cash it replaced, and had granted Defendants summary judgment on that basis. ER 44 ("because it's all in the alternative, and because the entire alternative argument is built on an assumption that's contradicted by the findings I'm making on this record, I find it particularly unhelpful here to do an alternative analysis that picks up the fees themselves.").

The "assumption" implicit in a fees-based takings theory that the district court believed to be "contradicted by" its earlier findings was apparently the notion of involuntariness—that the fees associated with Defendants' release cards could only constitute a taking if Ms. Brown and others incurred those fees involuntarily. ER 43-44 (discussing interplay between voluntariness and reasonableness of fees); ER 30-33 (colloquy between court and Defendants' counsel regarding voluntariness and reasonableness).

Ms. Brown did not "choose" to use the debit release card in a way that charged her fees; she simply did not know how to use it without incurring those fees. ER 597. For all the reasons discussed in Mr. Clark's and Mr. Brous's expert declarations, Ms. Brown and other releasees do not incur these fees voluntarily. ER 278-302.

But even if some or all of the fees were incurred voluntarily, voluntariness is utterly beside the point. None of the cases in which money has been the subject of a per se taking have turned on whether the actions causing that money to be charged were done voluntarily. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233-35 (2003) (interest on lawyer trust accounts); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 162-63 (interest on bond deposited with state court for interpleader action); *Schneider v. Cal. Dept. of Corrections*, 345 F.3d 716, 720 (9th Cir. 2003) (interest on inmate trust accounts). Instead, the only question courts consider in assessing whether charges are legitimate fees for services or illegal takings in disguise is whether the purported fee is a "fair approximation of the cost of benefits supplied." *U.S. v. Sperry Corp.*, 493 U.S. 52, 60 (1989). *See id.* at 62 ("The deductions . . . are not so clearly excessive as to belie their purported character as user fees.").

In contrast to the deductions in *Sperry*, the fees charged by Defendants do not fairly approximate the cost of maintaining the arrestee property return program. Specifically, Defendants charged Ms. Brown a $5.95 monthly maintenance fee and

a $0.95 denied transaction fee for a total of nearly $7 (seven dollars), whereas the costs to Defendant of setting up Ms. Brown's account and processing the five transactions she made using the card, based on their agreement with card processor FIS, were at most $0.64 (sixty-four cents). ER 413-14 (using data from Schedule of Charges in FIS Agreement found at ER 1010-1013). This ten-to-one ratio between fees and costs is so "clearly excessive as to belie" their designation as user fees. *See Sperry*, 493 U.S. at 62.[4]

More broadly, the record in this case demonstrates that Defendants, and particularly Numi, have not treated fees charged to cardholders as a means of recouping program costs. Rather, internal documents and correspondence with program partners show that the fees are adjusted to maximize profit and gain an

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[4] Ms. Brown sought discovery of Numi's fee-based revenue compared to costs across the debit release card program as a whole, but Numi, through counsel, limited its production, leading to a contested motion to compel. ER 944-45 (Dkt. 162-165, 179-182). The court granted that motion in relevant part but stayed further discovery until after ruling on the motion for summary judgment. ER 183. Ms. Brown also filed, on the same day that she filed her opposition to Defendants' motion for summary judgment, a motion to defer briefing on the summary judgment motion until certain additional discovery was received, including the aggregate fee and transactional data that was the subject of her motion to compel. ER 945 (Dkt. 168). The district court denied this motion as moot, without analysis. *Id.* (Dkt. 177). If this Court remands the case for re-consideration of Defendants' motion for summary judgment, Ms. Brown respectfully requests that she be permitted to conduct the additional discovery authorized by the district court's order on her motion to compel so that she can supplement her opposition with additional data about the ratio of release debit card fees to program costs.

advantage over competitors to improve Numi's share of the debit release card market. For example, an email from Numi president Brad Golden to a new channel partner counseled that "the best thing to do is to make sure we use the most lucrative plans [with the highest fees] where we can and to "fall back" to the "less lucrative" or more "consumer friendly" fee schedules "when the objections get to be a real issue at a particular site." ER 992. Another Numi employee, in an email describing a recent dip in revenue, suggested that a company policy of waiving denied transaction fees after the first three when cardholders called to complain seemed to be "the culprit," and proposed that the policy be changed so that cardholders would incur five such fees before being eligible for a discretionary waiver. ER 490.

Finally, in 2015 CNB became increasingly "uncomfortable" with the Numi release debit cards' fee structure and corresponding litigation risk. ER 343. During this process CNB suggested a modification to the program in which all of Numi's weekly maintenance fees would be replaced with monthly maintenance fees and no maintenance fees would be charged until ten days after the card had been activated. Numi's president rejected this proposal in strong terms, suggesting that it would have a "dramatic impact on our business" and would "result in reduced revenue" both for Numi itself and for its channel partners/distributors, who, he anticipated, would "leave us for a competitor." ER 1239-40.

In short, Numi relies on a high level of revenue from card fees, a level of revenue that far exceeds corresponding costs, to make the debit release card system profitable for itself and for the many other private companies with whom it contracts. As a corporation with responsibilities to its shareholders, Numi can and should pursue whatever business model will maximize its profits. But when Numi partnered with Multnomah County and other government agencies to perform the traditional state function of returning arrestee property, its business model became subject to constitutional scrutiny.[5] Because the fees Defendants charged for the property return program, by means of debit release card, did not fairly approximate the cost of that program, the fees constituted a per se taking. This is an alternative ground on which Defendants' motion for summary judgment should have been denied.

### C. The District Court Should Have Accepted, or at Least Considered, Ms. Brown's Alternative Argument that the Debit Release Card Program Effected a Regulatory Taking by Placing Severe Restrictions on the Use of Her Money.

Ms. Brown articulated a third theory of how Defendants' debit card program constituted a taking, which the district court failed to address at the summary judgment hearing. This theory argued in the alternative that even if neither the

[5] Defendants twice moved to dismiss Ms. Brown's takings claim on the theory that they were not state actors and the deprivations being challenged did not result from a government policy. The court denied these motions to dismiss and Defendants did not challenge their status as state actors in their motion for summary judgment. *See* ER 35-36 (colloquy between court and Defendants' counsel).

replacement of Ms. Brown's cash with the Numi card, or the fees charged in conjunction with her use of that card, constituted a per se taking, the debit card still interfered with her ability to use her money significantly enough to be a regulatory taking. ER 418-20.

Whether an economic infringement upon property is severe enough to be considered a regulatory taking involves "ad hoc, factual inquiries" in which certain factors are given particular significance. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 1004, 1024 (1978). These factors include the economic impact of the regulation, whether it interferes with any investment-based expectations of the property holder, and whether the governmental action can be analogized to a physical invasion upon property. *Id.*

Here, the economic impact of the debit card program upon Ms. Brown was quite severe. She lost $6.97 of the $30.97 that was taken from her, or over 20%, to program fees. And the invasive character of the governmental action is quite stark. Before the taking, Ms. Brown's money was in her wallet; after her release, that money was in an account owned and managed by CNB, ER 238-39, and she could access it only on the terms D*efendants* imposed.

Those terms interfered with nearly every way in which Ms. Brown and other cardholders would want to use their money. As discussed earlier, possession without use is one of the fundamental rights associated with property, but once under

Defendants' control, Ms. Brown and others could not simply possess their money without spending it or taking some other affirmative act (like initiating a cash advance at a bank) to gain back possession of it. Put another way, if Ms. Brown had put her $30.97 in a drawer after returning from the protest, she could have taken it back out again six months later and spent it on a purchase, or given it to a friend, or deposited it in her credit union account. But once that $30.97 was subject to the conditions of Defendants' debit release card program, she could not have done any of those things with her money six months later because the card's value would have been completely erased with six monthly maintenance fees. *See* ER 361-62 (deposition testimony regarding fees being depleted by maintenance fees).

Nor are Numi cardholders unencumbered if they choose to spend their money rather than retaining it. They may only use it with merchants that participate in the Mastercard network, which severely limits the card's utility abroad. ER 163-64 ¶54. To use it online, they must register and provide a ZIP code. ER 622 ¶8. And some merchants like gas stations may place a temporary hold on the card in the amount of $75 to $100, regardless of the amount actually charged to the card, ER 1301, which is more than most Numi cards have loaded on them to begin with. ER 273 ¶13. These temporary authorizations impair cardholders' ability to make other purchases and place them at risk for incurring yet more fees.

The Numi release debit card program is larded with terms that impede cardholders' ability to freely use their money. Ms. Brown certainly raised fact issues about whether these restrictions rose to the level of a regulatory taking, and the district court erred in failing to even consider this argument before granting summary judgment in Defendants' favor.

## IV. The District Court Improperly Granted Summary Judgment on Ms. Brown's State Law Claims After Conflating the Takings Clause Analysis with the Analysis of Conversion and Unjust Enrichment.

The district court dispensed with Ms. Brown's conversion and unjust enrichment claims very quickly at the end of the summary judgment hearing, finding that the conclusion on the two state-law claims followed inexorably from the conclusion that the card was the functional equivalent of Ms. Brown's cash. ER 45 ("you don't have conversion since you don't have a permanent taking, and you don't have unjust enrichment since my view that you're returning shortly thereafter the functional equivalent of what was taken, makes the unjust portion of that analysis missing, not to mention the enrichment.").

This conclusion was wrong in two ways. First, as discussed in part III-A above, it was based on an incorrect premise, because the debit release card was not the functional equivalent of the cash it replaced. But  was also procedurally wrong because the analysis of conversion and unjust enrichment under Oregon law is distinct from the constitutional analysis of whether a taking has occurred.

Conversion turns on whether the alleged convertor had the legal right to take dominion over the chattel, a separate question from whether Defendants did in fact take Ms. Brown's and other cardholders' money or give her back its equivalent. *In re Conduct of Martin*, 970 P.2d 638, 642 (Or. 1998). And a claim for unjust enrichment under Oregon law requires an analysis of what benefit the defendant wrongfully obtained. See *Larisa's Home Care, LLC v. Nichols-Shields*, 404 P.3d 912, 92021 (Or. 2017). By contrast, takings claims are always assessed based on what the plaintiff lost. This Court should also reverse the summary judgment finding on the unjust enrichment and conversion claims and, at a minimum, remand so that the district court can evaluate them under the correct legal standards.

## CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court reverse the order granting Defendants' motions to dismiss and for summary judgment. Alternatively, Plaintiff respectfully requests that this Court remand with instructions that Ms. Brown be permitted to file her Third Amended Complaint offering further allegations to support her EFTA claim and that the district court consider in the first instance her fee-based and regulatory takings theories, before ruling on Defendants' motion for summary judgment on her § 1983 claim.

## STATEMENT OF RELATED CASE

Ms. Brown is unaware of any related cases pending in this Court pursuant to Ninth Circuit Rule 28-2.6(c).

Respectfully submitted,

Dated: March 6, 2019

/s/ Karla Gilbride

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## CERTIFICATE OF COMPLIANCE

**(Fed. R. App. P. 32(a) & 9th Cir. Rule 32-l)**

I certify that this brief is proportionally spaced, was prepared in 14-point font, and contains 11,921 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: March 6, 2019 /s/ Karla Gilbride

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 6, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished using the appellate CM/ECF system.

Dated: March 6, 2019

PUBLIC JUSTICE, P.C.

/s/ Karla Gilbride