JOSEPH W. COTCHETT (SBN 36324)
jcotchett@cpmlegal.com
BRIAN DANITZ (SBN 247403)
bdanitz@cpmlegal.com
KARIN B. SWOPE (Pro Hac Vice)
kswope@cpmlegal.com
ANDREW F. KIRTLEY (SBN 328023)
akirtley@cpmlegal.com
COTCHETT, PITRE & McCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000
Fax: (650) 697-0577

MICHAEL RUBIN (SBN 80618)
mrubin@altber.com
STACEY M. LEYTON (SBN 203827)
sleyton@altber.com
CONNIE K. CHAN (SBN 284230)
cchan@altber.com
COLIN JONES (SBN 354301)
cjones@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Fax: (415) 362-8064

Co-Lead Counsel for Plaintiffs and the Proposed Class

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION

This Document Relates to All Actions

Case No. 3:21-md-02992-LAB-MSB

PLAINTIFFS' RESPONSE TO MOTION TO DISSOLVE PRELIMINARY INJUNCTION

Judge: Hon. Larry Alan Burns

REDACTED VERSION FOR PUBLIC FILING

On February 29, 2024, defendant Bank of America ("Bank") filed a motion to dissolve the June 2, 2021 preliminary injunction issued by the Hon. Vince Chhabria in *Yick v. Bank of America, N.A.*, Case No. 21-cv-00376-VC (N.D. Cal.) ("*Yick*"), the initial set of consolidated consumer class action lawsuits that resulted in this multidistrict litigation.

The Bank does not dispute that for the past 2-1/2 years, Judge Chhabria's carefully crafted preliminary injunction has provided crucial economic relief and procedural protections to the hundreds of thousands of unemployed Californians in the provisionally certified class of Bank of America EDD debit cardholders who contacted the Bank during the pandemic to report an unauthorized transaction on their account.[1] The Bank also does not challenge the validity of any of the factual findings or legal analysis underlying Judge Chhabria's issuance of injunctive relief. Instead, after a self-justifying historical narrative that completely ignores the reasons why Judge Chhabria found that plaintiffs had "a strong likelihood of success" on the merits of their claims under federal and state law, that class members were suffering irreparable injury and that the equities favored entry of an injunction, the Bank seeks relief from the ongoing injunction based on the fact that in December 2023, the California Employment Development Department ("EDD") replaced the Bank with a different financial institution (Money Network) to administer public benefits payments to members of the provisionally certified class, thereby setting in motion a series of events that will inevitably moot most of the provisions in the preliminary injunction.

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[1] Because the Bank did not include a copy of the preliminary injunction orders with its motion, plaintiffs attach a copy of Judge Chhabria's May 1, 2021 Order re Preliminary Injunction (*Yick* ECF 89), which held that plaintiffs were entitled to injunctive relief and which provisionally certified the requested class (Appendix A); and a copy of the June 2, 2021 Preliminary Injunction itself (*Yick* ECF 103) (Appendix B), the specific terms of which the parties negotiated with the assistance of a magistrate judge, pursuant to Judge Chhabria's direction.

Plaintiffs do not oppose the Bank's request to dissolve the injunction effective June 1, 2024 in light of EDD's termination of its longstanding contract with the Bank, given the Bank's representation that EDD has not only stopped funding all provisionally certified class members' Bank of America-branded EDD debit cards, but has also directed the Bank to close those cardholders' existing EDD debit card accounts – after providing the required notice to each affected cardholder – and to inform each cardholder with an existing account balance as of April 30, 2024 how to recover any funds remaining in their account before they would escheat to the state.[2]

Plaintiffs write separately to highlight that their non-opposition rests upon two understandings that are not expressly addressed in the Bank's motion or proposed order.

First, plaintiffs understand that the Court's dissolution of the June 2021 injunction will *not* preclude them from later pursuing appropriate relief if they determine that any of the Bank's representations about its compliance with the preliminary injunction were inaccurate or that the Bank failed to comply with its material obligations under the injunction in any significant respect.[3] Although the

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[2] In particular, the Bank has represented that after the EDD fired the Bank in December 2023, terminating the series of contracts going back to 2010 and transferring responsibility for administration of the EDD benefits program to Money Network: (1) EDD in January 2024 began paying all public benefits that had been funded through Bank of America-branded EDD prepaid debit cards through Money Network prepaid debit cards instead; (2) EDD on February 15, 2024 stopped paying any benefits to claimants on their Bank of America-branded prepaid debit cards; (3) EDD has agreed that the Bank of America-branded prepaid EDD debit cards will be deactivated and will no longer be useable by provisionally certified class members after April 15, 2024; (4) EDD has agreed that all Bank of America-branded EDD prepaid debit card accounts with fund balances will be closed on April 30, 2024; and (5) the Bank has begun the process of sending notices to its EDD debit account cardholders informing them of these developments and informing them how to obtain a check for any balance remaining in their accounts after April 30, 2024, before those funds escheat to the State.

[3] Contrary to the Bank's representation, those obligations are not limited to operating its Claims and Fraud Call Centers 24 hours per day/seven days per week

Bank's Rule 30(b)(6) designee on preliminary injunction compliance testified that the Bank has complied with each of its obligations under the June 2021 injunction, that designee did not have personal knowledge or a detailed understanding of the Bank's procedures for processing EDD cardholders' claims either before or after the preliminary injunction. Plaintiffs are therefore continuing to pursue discovery into the Bank's past compliance with the preliminary injunction and into EDD's termination of its relationship with the Bank.

Second, plaintiffs further understand that the Court's dissolution of the injunction will not preclude plaintiffs from later seeking prevailing party attorneys' fees and expenses under applicable state and federal law for their successful efforts in pursuing, obtaining, overseeing, and evaluating compliance with the preliminary injunction – although we recognize that any such prevailing party fees and expenses will likely be subsumed within a broader award of statutory fees and expenses for the case as a whole once judgment is entered in any or all plaintiffs' favor.

The June 2021 preliminary injunction has been enormously successful in reducing the ongoing irreparable harm to the uniquely vulnerable class of unemployed workers whose claims are the focus of this MDL litigation. According to the Bank's written discovery responses and the testimony of its designated representatives during the recent Rule 30(b)(6) depositions, the Bank has implemented the following changes in its policies and practices since June 2021, each of which was required by the injunction:

* The Bank has stopped using its automated Claim Fraud Filter as a mechanism for investigating or denying claimants' unauthorized-transaction claims, and has stopped considering the results of its automated Claim Fraud Filter to freeze the EDD benefits account of any claimant. *See* Prelim. Inj. ¶ 1, 3.

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and sending weekly and monthly notices to certain cardholders. *Compare* Mot. at 6 *with* Appendix B ¶¶ 1, 2, 3, 6, 10 (other continuing obligations).

* The Bank has stopped denying unauthorized-transaction claims and has stopped denying provisional or permanent credit to claimants in those circumstances where the Bank failed to conduct and complete an investigation into the alleged unauthorized transaction as required by EFTA and its Regulation E. *See* Prelim. Inj. ¶ 2.a.

* The Bank has stopped denying or closing unauthorized-transaction claims without providing the affected claimants a written explanation of the findings that resulted from its EFTA- and Regulation E investigations. *See* Prelim. Inj. ¶ 2.b.

* The Bank has reopened the claims it had closed or denied based solely upon the results of its Claim Fraud Filter and, on request, has reopened other claims that it closed or denied after January 1, 2020. *See* Prelim. Inj. ¶¶ 4(a), 6.[4]

* The Bank has provided a series of notices to approximately [redacted] members of the provisionally certified class, informing them what the Bank was doing in response to the injunction, what rights to reopen claims the injunction provided, and how to authenticate their identities if necessary to regain access to their funds. *See* Prelim. Inj. ¶¶ 4(b), 7, 11.

* The Bank has created and has informed the claimants about new, dedicated toll-free telephone numbers that enabled claimants to reach the Bank's customer service representatives and claims analysts ("CSRs") directly at the Banks' Claims

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[4] In December 2021, just six months after the preliminary injunction took effect, the Bank reported that "[redacted]" pursuant to the preliminary injunction. Dec. 5, 2021 Letter from Bank's Counsel at 2. Since then, the Bank has produced data indicating that substantially more money has been returned to class members since the preliminary injunction was entered. Although the Bank has repaid well over $[redacted] to members of the provisionally certified class thus far, that amount remains far less than the Bank is legally required to provide under EFTA, *see* 15 U.S.C. § 1693f(e) (providing for treble damages), and under other applicable statutory and common law provisions, *see, e.g.*, Cal. Civil Code § 3294 (providing for punitive damages).

Initiation Call Center and at its separate Fraud Call Center, both of which centers the Bank (eventually) staffed 24/7 with enough trained CSRs (it contends) to comply with the injunction's requirement "that the average speed to answer calls from Class Members to these centers is no more than five minutes, 90% of the time." Prelim. Inj. ¶¶ 9-10.[5]

In light of those developments, and because there can be no new claims of unauthorized transactions made on accounts once they have been closed or can no longer be accessed, plaintiffs agree that after April 30, 2024, the provisions of the preliminary injunction requiring the Bank to properly handle unauthorized-transaction claims on those accounts, to staff the Claim Initiation and Fraud Call Centers 24/7, and to give claimants notice of their rights under the injunction will no longer be required. Plaintiffs also agree that the Bank's proposed June 1, 2024 date for dissolving the Bank's remaining obligations under the injunction seems reasonable, because by then all accounts will have been closed for at least one month and there will have been no card usage for at least 45 days. *See* Mot. at 6.

With the twin understandings set forth above (reserving the right to continue to pursue compliance discovery and to seek appropriate relief for non-compliance, if shown; and to seek statutory attorneys' fees and expenses for all reasonable efforts relating to securing, monitoring, and enforcing the preliminary injunction), plaintiffs do not oppose the specific terms of the proposed order submitted by the Bank in support of its motion.

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[5] Data produced by the Bank through September 2023 indicates that the Bank complied with the requirements of ¶ 10 of the preliminary injunction during [redacted] weeks after it took effect. The Bank's performance falls short of strict compliance, but it was nonetheless a dramatic improvement and provided significant benefit to the EDD debit cardholders who placed [redacted] calls to the Claims Initiation and Fraud Call Centers during that period.

Respectfully submitted,

Dated: March 26, 2024

COTCHETT, PITRE & McCARTHY, LLP

By: */s/ Brian Danitz*
JOSEPH W. COTCHETT
BRIAN DANITZ
KARIN B. SWOPE
ANDREW F. KIRTLEY

Dated: March 26, 2024

ALTSHULER BERZON LLP

By: */s/ Michael Rubin*
MICHAEL RUBIN
STACEY M. LEYTON
CONNIE K. CHAN
COLIN JONES

Co-Lead Counsel for Plaintiffs and the Proposed Class

SIGNATURE CERTIFICATION

Pursuant to Section 2(f)(4) of this Court's Electronic Case Filing Administrative Policies and Procedures Manual, I, Michael Rubin, hereby certify that the content of this document is acceptable to all the signatories herein and that I have obtained counsel's authorization to affix their electronic signatures to this document.

/s/ Michael Rubin

MICHAEL RUBIN

APPENDIX A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JENNIFER YICK, et al., Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.	Case No. 21-cv-00376-VC **ORDER RE PRELIMINARY INJUNCTION** Re: Dkt. No. 64

Because of the time-sensitivity involved, this ruling assumes that the reader is familiar with the applicable legal standards, the parties' arguments, the evidence in the record, and the discussion that took place at the preliminary injunction hearing on May 13, 2021.

1. The plaintiffs have demonstrated a strong likelihood of success on their claims that Bank of America (BofA) has violated, and continues to violate, the Electronic Fund Transfers Act by failing to conduct an adequate, good faith investigation when cardholders report unauthorized charges, and often simply freezing cardholder accounts based on a faulty screening process. 15 U.S.C. § 1693f. This has resulted (and will likely continue to result) in the improper denial of cardholders' reimbursement claims for unauthorized charges, the unlawful deprivation of provisional credits for such charges, and the inability to access benefits to which cardholders are entitled. For similar reasons, the plaintiffs have demonstrated a strong likelihood of success on their claims that BofA is systematically breaching its contracts with cardholders and violating California's Unfair Competition Law.

2. Provisional certification of a class of all cardholders who call to report unauthorized charges to their accounts is warranted for purposes of a preliminary injunction. *See, e.g.*, *Zepeda*

Rivas v. Jennings, 445 F. Supp. 3d 36, 39 (N.D. Cal. 2020); *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1201-05 (N.D. Cal. 2017), *affirmed as Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018).

3. BofA is wrong to argue that the named plaintiffs or the class are categorically barred from obtaining interim relief. There is Article III standing because many of the named plaintiffs were being injured by the conduct described in Section 1 at the time they filed their lawsuits, and some of the named plaintiffs continue to suffer injury today. *Buckeye Tree Lodge v. Expedia, Inc.*, 2020 WL 5372246, at *2 (N.D. Cal. Sept. 9, 2020); *see Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 184 (2000). And the evidence presented by BofA in response to this preliminary injunction motion does not refute the plaintiffs' strong showing that class members are likely to suffer similar violations in the future.

4. The harm being suffered by the class members is irreparable. The class is comprised of people who depend on unemployment benefits to get through the pandemic. As the plaintiffs' evidence shows, continued denial of these benefits will seriously hinder the ability of many class members to feed their families and keep a roof over their heads. Thus, although the general rule is that financial harm is not "irreparable" (because plaintiffs can generally recoup the money if they ultimately prevail), this is precisely the type of case where the exception to the general rule applies. Just as companies can establish irreparable harm by showing that losing money will likely cause them to shut down, human beings can establish irreparable harm by showing that losing wages or benefits will likely cause them to be evicted, go hungry, or be denied necessary medical care. *Cf. Carrillo v. Schneider Logistics, Inc.*, 823 F. Supp. 2d 1040, 1045 (C.D. Cal. 2011) ("Because plaintiffs are low-wage workers, and lost wages or delays in compensation threaten or impair their ability to meet basic needs, such harms are irreparable."); *see also United Steelworkers of America, AFL-CIO v. Fort Pitt Steel Casting, Division of Conval-Penn, Division of Conval Corp.*, 598 F.2d 1273, 1280 (3d Cir. 1979).[1]

[1] In some cases involving wages or benefits, courts have intoned the general rule about financial injury without acknowledging the exception, perhaps because the exception did not apply on

5. The balance of hardships and the public interest almost certainly support some form of preliminary injunctive relief. *See, e.g.*, *Golden Gate Restaurant Association v. City & County of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) ("'Faced with . . . a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly' in favor of the latter." (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983))). But it ultimately depends on the nature of the relief sought. At the hearing, the Court suggested that the parties participate in a settlement conference with a Magistrate Judge to carefully review and discuss the plaintiffs' proposed preliminary injunction to ensure that it does not interfere with BofA's operations more than is necessary to sufficiently minimize the risk of innocent cardholders being improperly deprived of their benefits, and also to carefully review and discuss the proposed injunction to ensure that it does not unduly hinder BofA from freezing the accounts of people who are likely to have obtained their cards through fraud. Both sides accepted this invitation. Accordingly, the case is referred to Judge Sallie Kim for a settlement conference to take place on May 26 and May 27, 2021. The parties are ordered to work as much as possible before the conference, including with one another, to maximize the chances of coming out of the conference with a joint proposal. A joint proposal or competing proposals should be filed with the Court no later than May 28. As stated at the hearing, BofA's participation in this conference, which is designed primarily to ensure that any relief ordered is not overbroad, does not constitute a waiver of its right to challenge the validity any preliminary injunction that is ultimately issued.

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those facts. *See, e.g.*, *Hale v. Wood*, 89 F.3d 840 (8th Cir. 1996) ("Hale failed to establish a threat of irreparable harm because the injuries he alleged as the basis for his claim for relief—wrongfully withheld wages, statutorily inadequate wages, and termination of his work assignment—were compensable through his section 1983 claim for money damages."); *Johnson v. City of San Francisco*, 2010 WL 3078635, at *3 (N.D. Cal. Aug. 5, 2010) ("Lost wages alone do not constitute a claim for irreparable harm as money damages would be sufficient to remedy the wrong should one ultimately be found to have been committed."); *see also Ahuruonye v. U.S. Department of Interior*, 312 F. Supp. 3d 1, 23-24 (D.D.C. 2018). But those cases should not be read to suggest that the loss of wages or benefits can never constitute irreparable harm. When a case involves the deprivation of wages or benefits to low-income people living hand to mouth, a preliminary injunction may well be warranted (depending, of course, upon the strength of the plaintiffs' claims on the merits and other factors).

IT IS SO ORDERED.

Dated: May 17, 2021

VINCE CHHABRIA
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JENNIFER YICK, et al., Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.	Case No. 21-cv-00376-VC **PRELIMINARY INJUNCTION** Re: Dkt. Nos. 64, 100

With the assistance of Magistrate Judge Kim, the plaintiffs and defendants worked together to craft preliminary injunction language that is designed to protect the class members from future harm while minimizing disruption to the defendant's operations. This language is an improvement over what was presented by the plaintiffs in support of their motion. The hardship to the defendant from this injunction is outweighed by its benefits to the class members. The injunction is also in the public interest. Accordingly, in accordance with the language submitted by the parties, and for the reasons discussed in the order issued on May 17, 2021:

Bank of America, N.A. (the "Bank"), and the Bank's officers, directors, agents, employees, representatives, and all persons acting under, in concert or participation with, or for them ("Defendant") are preliminarily enjoined in the administration of prepaid debit cards for Employment Development Department ("EDD") unemployment or disability benefits issued by Defendant to members of the certified class as follows:

(1) Defendant shall be prohibited from considering the results of the Bank's initial automated claims fraud filter (Claim Fraud Filter) in investigating or resolving unauthorized transaction error claims (*see* 12 C.F.R. 1005.11) (Claims).

(2) a. Defendant shall be prohibited from denying or closing Claims or denying provisional or permanent credit to claimants' accounts without conducting and concluding an investigation into the alleged unauthorized transaction, pursuant to EFTA and Regulation E.

b. Defendant shall be prohibited from denying or closing claims without providing the claimant a written explanation of the findings of its investigation, pursuant to EFTA and Regulation E.

(3) Defendant shall not consider the results of the Bank's Claim Fraud Filter as a basis for freezing card accounts of any Class Member.

(4) a. Beginning ten (10) days after the entry of this Order, Defendant shall reopen any Claim that it closed or denied based solely upon the results of its Claim Fraud Filter and that it has not previously paid or previously reopened and investigated (Previously Closed Claim). Defendant may stagger the reopening of such Claims in roughly equal amounts over thirty (30) additional days.

b. For Previously Closed Claims filed by a class member who has not yet authenticated their identity through either EDD (in the knowledge of the Bank) or the Bank, Defendant shall, within ten (10) days of reopening, and thereafter at least weekly for five weeks, send the class member a written notice (by mail and email, if available) explaining the basis for the original denial; that the claim has been reopened; what steps they need to take to authenticate their identity (which may include presenting identification at a Bank branch or by calling the dedicated toll free number for the Fraud Call Center referred to in paragraph 9); that if they do not authenticate their identity within 45 calendar days of the original notice, the claim will be denied; and that if they authenticate their identity, the Bank will commence and complete the investigation and resolve the claim within 45 calendar days of the authentication and, if such claim has not been resolved within 10 business days of the authentication, provide provisional credit in the amount of the alleged error(s) to the account. Persons subject to this Paragraph 4(b) are subject to Paragraph 5(a) if they authenticate.

(5) a. For Previously Closed Claims that were filed by a class member who has

authenticated their identity through either EDD (in the knowledge of the Bank) or the Bank, Defendant shall complete the investigation and resolve the claim within 45 calendar days of the entry of this Order (or of the date the class member authenticates their identity, if later) and, if the claim has not been resolved within 10 business days of the entry of this Order (or of the date the class member authenticates their identity, if later), provide provisional credit in the amount of the alleged error(s).

b. For any Previously Closed Claims that were filed by a class member who has authenticated their identity through either EDD (in the knowledge of the Bank) or the Bank, but the Claim has never been reopened, Defendant shall reopen such Claim within ten (10) days of the entry of this Order and Defendant shall complete the investigation and resolve the claim within 45 calendar days of reopening and, if the claim has not been resolved within 10 business days of reopening, provide provisional credit in the amount of the alleged error(s).

(6) In addition to Claims that Defendant reopens pursuant to paragraphs 4 and 5(b), Defendant shall, upon request from the affected cardholder, reopen any Claim that it closed or denied on or after January 1, 2020.

(7) Within 10 days of the entry of this Order (by mail and email, if available) or after the date of the blocking (by mail, within three (3) business days, and email, if available, within one (1) business day), whichever is later, Defendant shall give written notice to class members whose accounts are blocked solely based upon its Claims Fraud Filter that explains that the Bank will promptly unblock their account if the class member authenticates their identity. The written notice shall explain: the basis for the previous block; what steps the class member needs to take to authenticate their identity (which may include presenting identification at a Bank branch or by calling the dedicated toll free number at the Fraud Call Center referred to in paragraph 9); that if they do not authenticate their identity, their account will remain blocked or will be closed; and that they have the right to ask EDD to issue future benefits payments by paper check instead of by the Bank Debit Card.

(8) Defendant shall:

a. As soon as practicable, and in no event later than twenty (20) days of the entry of this Order, establish a dedicated toll-free number to enable class members to directly reach the Claims Initiation Call Center, which shall be staffed by customer service representatives (CSRs) who are trained to handle Claims intake;

b. Within thirty (30) days of the entry of this Order, the Claims Initiation Call Center hours to receive calls shall consist of at least fourteen (14) hours on weekdays and ten (10) hours on Saturdays, which shall be expanded within forty-five days of the entry of this Order to include ten (10) hours on Sundays, and expanded within sixty days of the entry of this Order to include 24 hours per day, 7 days per week coverage; and

c. As soon as practicable after the establishment and successful testing of the dedicated toll-free number for the Claims Initiation Call Center, but in no event later than ten (10) days thereafter, and at least monthly thereafter, provide written notices (by mail and email, if available) to all class members regarding the available toll free number and providing the information in paragraphs 6, and (8)(a) and (b).

(9) Defendant shall:

a. As soon as practicable, and in no event later than twenty (20) days after the entry of this Order, establish a dedicated toll-free number to enable class members to directly reach the Fraud Call Center, which shall be available 24 hours per day, 7 days per week, and which shall be staffed by CSRs who are trained to authenticate identity and resolve challenges to blocked accounts.

b. As soon as practicable after the establishment and successful testing of the dedicated toll-free number for the Fraud Call Center, but in no event later than ten (10) days thereafter, and thereafter at least weekly, provide written notice (by mail and email, if available) to all class members whose accounts are blocked of the availability of this dedicated toll-free number.

(10) Defendant shall, within 20 days of the entry of this Order:

a. Staff the Claims Initiation Call Center and Fraud Call Centers, such that the average speed to answer calls from Class Members for these centers is no more than five minutes, 90% of the time, separately measured for the Claims Initiation and Fraud Call Centers and based on all callers to such centers (rather than just calls by Class Members).

b. Train and require CSRs in the Claims Initiation Call Center to request email contact information from a claimant at the time a claim is filed (if email is not already available for that claimant), so that the Bank may use that information to contact the claimant regarding authentication, if and to the extent this is consented to by EDD.

c. Train and require CSRs in the Fraud Call Center to immediately inform cardholders who are unable to authenticate their identity by phone that they have the option of authenticating their identity at a Bank branch.

(11) Within 10 business days of the entry of this Order, Defendants shall provide email and mail notice to all Class Members of their rights under paragraphs (1) through (7) of this Order.

(12) Paragraphs 2 and 4 of this Order shall not apply to,

a. Claims made with respect to accounts that EDD has found to be disqualified or not entitled to benefits, or has requested an account freeze; or

b. Claims made with respect to accounts that Defendant has frozen or blocked based on (i) receipt of legal process or (ii) information provided or made available by law enforcement, or (iii) the outcome of an investigation of suspicious facts and circumstances related to an individual cardholder developed independent of the Claim (if such cardholder has been sent a notice that the action has occurred and a statement of what the cardholder can do in response).

Defendant shall implement the requirement of paragraph 1 as soon as practicable but in no event more than seven (7) days from the entry of this Order.

There shall be no bond required.

IT IS SO ORDERED.

Dated: June 2, 2021

VINCE CHHABRIA
United States District Judge