JOSEPH W. COTCHETT (SBN 36324)
jcotchett@cpmlegal.com
BRIAN DANITZ (SBN 247403)
bdanitz@cpmlegal.com
KARIN B. SWOPE (Pro Hac Vice)
kswope@cpmlegal.com
BLAIR V. KITTLE (SBN 336367)
bkittle@cpmlegal.com
VASTI S. MONTIEL (SBN 346409)
vmontiel@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
KATHERINE G. BASS (SBN 344748)
kbass@altber.com
COLIN C. 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	Case No. 3:21-md-02992-GPC-MSB **REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION** Judge: Hon. Gonzalo P. Curiel Ctrm: 2D (2nd Floor) Date: January 17, 2025 Time: 1:30pm
This Document Relates to All Actions	ORAL ARGUMENT REQUESTED

REDACTED PUBLIC VERSION

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INTRODUCTION

Plaintiffs' opening brief demonstrated that common classwide issues predominate in these MDL proceedings, which challenge a series of policy decisions by the Bank that placed its own economic self-interest above its legal obligations and the critical needs of tens of thousands of unemployed Californians who received public benefits through Bank-issued-and-administered EDD debit cards. Common evidence will show the Bank created and deployed its automated Claim Fraud Filter ("CFF") in late September 2020, not to combat *benefits enrollment fraud*—the issue EDD was grappling with—but to evade its statutory obligation to reimburse EDD debit cardholders victimized by *transaction fraud*, knowing that those cardholders were targeted by fraudsters because their Bank-issued mag-stripe-only cards were so easily counterfeited. Mot. 5-8.[1] Although the Bank knew that these public benefits recipients were its "[redacted]" customers, the Bank chose to abandon its longstanding, EFTA-mandated claims-investigation procedures ("[redacted]") *as to these claimants only*, and from September 2020 until enjoined in June 2021, to use its automated CFF-1 to "systemically" deny all class member claims of unauthorized ATM transactions, to rescind all credits previously paid to cardholders making such claims, and to freeze the accounts of those claimants. The Bank also understaffed its Claims call center to add "[redacted]" to the cardholders' efforts to assert their rights, preventing many from contesting the Bank's actions and subjecting others to unheard-of wait times.

The Bank does not dispute that it subjected all members of the proposed classes to the same uniformly applied policies and practices. In opposing certification, the Bank largely ignores these common issues of liability and relies on conclusory argument and speculation that the [redacted]-member classes might include as-yet-undiscovered fraudsters because the Bank's recent investigation uncovered *five* false claimants. While the Bank asserts that it has found [redacted] through its ongoing review process, it has not shown that *any* of these unidentified individuals are class members (i.e., cardholders whose claims were

[1] "Ex" refers to exhibits to the Chan Declaration (Exs 1-157) and Supp. Chan Declaration (Exs 158-183) iso motion for class certification ("Mot."); "DX" refers to exhibits to the Brys Declaration iso the Bank's opposition ("Opp."); "Reb" refers to Rebuttal Report.

denied *solely* due to CFF-1). *See infra* §II.B; Ex 162 (Regan Reb) ¶¶11-12. Even if they were, they would at most comprise a de minimis [redacted]% of the class. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc) (Rule 23 does not preclude "certification of a class that potentially includes more than a de minimis number of uninjured class members").

The Bank offers no evidence-based support for asserting that more than a de minimis number of false or mistaken claimants managed to escape its vetting processes over the past several years. Moreover, any claimant whom the Bank has determined (or determines before trial) has engaged in program fraud or is otherwise excluded from the Remediation Plan is by definition also excluded from class membership. *See* Notice of Motion (ECF 324, Exclusion ii). While the Bank now seeks to disavow its manual reconsideration and Remediation Plan review processes as unreliable, it expressly represented to its regulators that its vetting would "identify harmed consumers" (Ex 73 at 14-15) and would exclude all those who "[redacted]" (Ex 74 at -102557). The Remediation Plan review is nearly completed. Ex 180 (Lennon Tr.) 98:3-10, 299:1-14. That the Bank can identify only a handful of potential false claimants in the proposed classes confirms that outlier issues will not predominate; and if any outliers remain, they can be managed through Phase 2 proceedings or a claim administration process, after a classwide trial on the predominating common issues.

ARGUMENT

I. All Requirements of Rule 23(a) Are Satisfied.

Although the Bank purports to challenge commonality and typicality, it concedes that the members of each class (and their class reps) were subjected to the Bank's uniformly applied policies and practices of relying solely on CFF-1 to summarily deny claims (Claim Denial Class), rescind permanent credits (Credit Rescission Class), and freeze accounts (Account Freeze Class), and to the Bank's uniform practices of understaffing its Claims call center (Customer Service Class) and issuing mag-stripe only cards (EMV Chip Class).

Accordingly, commonality and typicality are satisfied. *See* Mot. 16-19; Opp. 18 (conceding 28 common questions and purporting to raise "other[s]").[2]

II. Common Issues Predominate.

Because Plaintiffs challenge common policies and practices, predominance is also satisfied. Mot. 19-43; *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 944 (9th Cir. 2019). Rule 23(b)(3) "does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 469 (2013) (cleaned up). Nor does it preclude "certification of a class that potentially includes more than a de minimis number of uninjured class members." *Olean*, 31 F.4th at 669; *see Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 460-63 (2016) (affirming certification of 3,344-member class though it was "undisputed that hundreds of class members suffered no injury"). As long as "one or more of the central issues in the action are common to the class and can be said to predominate," a class may be certified, "even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson*, 577 U.S. at 453-54.

A. Common Liability Issues Predominate.

1. EFTA (Claim Denial, Credit Rescission)

Liability and Statutory Damages. The Bank's principal argument against certifying plaintiffs' EFTA claims is that, *if* it had conducted the legally required investigation, it

[2] The Bank argues that the proposed class representatives were "cherry-picked" and are not subject to defenses the Bank contends may apply to others. Opp. 42-44. But class actions are often led by those most willing and able to represent the class members' interests, including by responding to voluminous discovery requests and sitting for deposition, as they did here. Courts throughout the Ninth Circuit have rejected the notion that typicality is defeated by an affirmative defense that may apply to an absent class member but *not* a class representative. *See, e.g.*, *Nitsch v. Dreamworks Animation SKG Inc.*, 315 F.R.D. 270, 284 (N.D. Cal. 2016); *Luviano v. Multi Cable, Inc.*, 2017 WL 3017195 at *16 (C.D. Cal. Jan. 3, 2017). The "primary" concern under typicality is whether the named plaintiff will be "preoccupied with defenses unique to it," not the reverse. *In re Digital Music Antitrust Litig.*, 321 F.R.D. 64, 87 (S.D.N.Y. 2017). While the Bank disputes certain class representatives' entitlement to certain damages, its legal arguments apply equally to absent class members, and individualized damages issues alone do not defeat typicality or predominance. *See, e.g.*, *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 817 (9th Cir. 2019).

might have denied some class members' claims for some reasons *other* than because the claim triggered CFF-1. After four years of claims review, however, the Bank cannot show that more than a miniscule number of class members' claims were false or fraudulent. Moreover, because EFTA is a strict liability statute that entitles plaintiffs to statutory damages and attorneys' fees and costs regardless of resulting economic injury, *see* 15 U.S.C. §1693m(a)(2), the Bank would be liable to the Claim Denial and Credit Rescission classes under EFTA even if some class members were uninjured.[3] By denying the claims of each Claim Denial class member pursuant to the same CFF-1 policy and by issuing each the same statutorily inadequate form denial letter, the Bank violated multiple provisions of EFTA, each of which triggers statutory damages. *See* Mot. 20, 23 (citing 15 U.S.C. §1693f(a), (c), (d)). Whether the Bank's uniformly applied Claim Denial Policy violated EFTA is thus a common question that will establish the Bank's classwide liability in one stroke. *See Almon v. Conduent Bus. Servs., LLC*, 2022 WL 4545530, at *15 (W.D. Tex. Sept. 28, 2022) ("[I]ndividual inquiries are not necessary to determine whether an investigation was timely completed, whether a provisional credit was properly given, or whether or not Defendants timely provided a cardholder with their investigative documents."). Whether the Bank's Credit Rescission Policy (rescinding previously issued credit pursuant to the same CFF-1 policy and issuing each class member an inadequate form credit rescission letter) also violated multiple provisions of EFTA, each triggering statutory damages, is also a common question. *See* Mot. 22.

The Bank contends that whether each class member's account is subject to EFTA requires individualized inquiries into whether the cardholder "established [the account] primarily for personal, family, or household purposes" rather than fraud. Opp. 19. But *every* class member's EDD debit account was "established" not by the individual cardholder, but by EDD, for the common purpose of "'distributing government benefits to

[3] *Bisbey v. D.C. Nat'l Bank*, 793 F.2d 315, 318 (D.C. Cir. 1986) (bank liable under §1693f although plaintiff suffered no damages and even may have benefitted from violation); *Burns v. First Am. Bank*, 2006 WL 3754820, at *6, *9 (N.D. Ill. 2006) (certifying EFTA statutory damages class because "[e]ach class member's claim requires proof only that EFTA was violated"); *Cobb v. PayLease LLC*, 34 F.Supp.3d 976, 984 (D. Minn. 2014).

[] consumer[s] electronically.'" *See Mohamed v. Bank of Am. N.A.*, 93 F.4th 205, 210 (4th Cir. 2024) (quoting 12 C.F.R. §1005.15(a)(2)). Prepaid government benefit accounts like these are expressly covered by EFTA and Regulation E, regardless of the subjective intent of each individual account cardholder. *See id.*; 12 C.F.R. §1005.2(b)(3)(i)(B).[4]

The Bank also contends that individualized inquiry is required into whether some class members submitted error notices outside the statutory 60-day window. *See* Opp. 24. Yet it does not identify any Credit Recission class member who submitted a claim outside the 60-day window, and only two members of the roughly [redacted]-member Claim Denial class who purportedly did so. *See* Opp. 24 n.3.[5] No trial time need be spent on this issue, though, as the Bank's records establish the date of each disputed transaction and subsequent bank statement, and the date of each claim submission. *See* Ex 4 (Regan) ¶¶32-36; *e.g.*, Ex 178 at -56916. "[U]nder this Circuit's binding precedent, no matter how laborious or imperfect the process of identifying Class Members is, it does not present a predominance issue." *Brown v. DirecTV, LLC*, 562 F.Supp.3d 590, 602 (C.D. Cal. 2021) (discussing *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017)).[6]

Entitlement to Treble Damages. Another predominating common issue is whether the Claim Denial class is entitled to mandatory treble damages under 15 U.S.C. §1693f(e)(1). It is undisputed the Bank failed to pay provisional credit within the 10-day period. Thus, the predominating question will be whether, by automatically denying each claim that triggered its automated CFF-1, the Bank either (A) did not make a good faith investigation, or (B) lacked a reasonable basis for believing the claim was invalid. *Bisbey*,

[4] The Bank's lone authority, *Hansen v. Ticket Track, Inc.*, 280 F.Supp.2d 1196 (W.D. Wash. 2003), arises under the Fair Debt Collection Practices Act, not EFTA. In any event, the *Hansen* court *certified* a Rule 23(b)(3) class, holding that "under the FDCPA courts have found that determining whether an obligation was incurred for personal or business purposes is not, alone a reason to preclude certification." *Hansen v. Ticket Track, Inc.*, 213 F.R.D. 412, 416-17 (W.D. Wash. 2003) (citation omitted).

[5] The third person is not a class member. *See* Ex 4 (Regan), Schedule 1.

[6] Whether the 60-day deadline should be strictly enforced given the Bank's Claims call center understaffing and imposition of "[redacted]" on the claim submission process raises a classwide issue as well. *See* Mot. 33; Ex 3 ¶¶43, 51-69; MTD Order at 11 n.3; *Parsons v. Bristol Dev. Co.*, 62 Cal.2d 861, 868–69 (1965) ("A party who prevents fulfillment of a condition of his own obligation cannot rely on such condition to defeat his liability.").

793 F.2d at 317-18. If the classwide answer to *either* prong is 'yes,' all Claim Denial class members are entitled to treble damages.

Plaintiffs also seek treble damages for the Credit Rescission class under 15 U.S.C. §1693m(e)(2), which mandates treble damages if the Bank knowingly and willfully concluded, after having already granted credit, that class members' claims were in error if that conclusion could not reasonably have been drawn from the evidence available to the Bank during its earlier investigation. This is not an individualized issue because, as to every member of the Credit Rescission class, the Bank *previously concluded when it paid the claim* that the disputed ATM withdrawal was unauthorized, based on its review of the "evidence available." The Bank *subsequently reversed* that original, evidence-based conclusion, based solely upon its retroactive application of CFF-1. Mot. 10, 22; *see Marquess v. Pa. State Emps. Credit Union*, 2010 WL 3448086, at *8 (E.D. Pa. Aug. 31, 2010), *rev'd on other grounds*, 427 F.App'x 188 (3d Cir. 2011) (awarding treble damages where denial of claim was based on "suspicion" which may even "have been reasonable" but was "not a conclusion based on evidence").

Entitlement to Actual Damages. The Bank argues that an EFTA claim for damages cannot be certified because determining whether each class member's claim was actually unauthorized will require individualized inquiries. Under EFTA, though, the Bank was *required* to conduct an individualized investigation of each class member's claims. Instead, it categorically deemed them all to be class members criminals and deprived them of their right to individualized investigations. Now that these twice-victimized benefits recipients (first by fraudsters, then the Bank) seek to enforce their statutory rights on a collective basis, the Bank insists they must proceed one-by-one—knowing the vast majority lack the resources or knowledge to do so. If that audacious argument were accepted, nothing would stop financial institutions from summarily denying all error claims without investigation, forcing each denied claimant to proceed individually or not at all, thereby completely nullifying EFTA's consumer-protection goals.

EFTA creates a pro-consumer presumption that disputed transactions are in fact unauthorized. 15 U.S.C. §1693g(b) (to deny a claim, "the burden of proof is upon the [bank] to show the [disputed transaction] was authorized"); *see Green v. Cap. One, N.A.*, 557 F.Supp.3d 441, 450 (S.D.N.Y. 2021). Because the Bank failed to investigate the class members' claims (and thus to base its denials on actual evidence), each class member's presumption of harm remains unrebutted. Although the Bank complains that some unknown number of unidentified fraudsters might still lurk among the [redacted] innocent class members, the Bank has had ample opportunity to identify them: first, pursuant to its reconsideration process; second, pursuant to the June 2021 *Yick* injunction (which required the Bank to investigate any claim by authenticated cardholders previously denied based solely on the CFF); and third, by the OCC/CFPB Consent Orders, which in July 2022 required the Bank to identify all those harmed by its use of CFF-1, and to exclude from Remediation Plan payments each individual who, inter alia, [redacted] Each putative class member covered by Exclusion ii—including those whose claims the Bank is still investigating—is by definition *excluded* from the class. All *other* class members are entitled to a presumption of injury.

The Bank's decision to abandon its EFTA-required investigation obligations is unprecedented. Ex 158 (Abernathy Reb) ¶23; Ex 1 (Kreis) ¶¶42-66. While the Bank cites two unauthorized-transaction cases in which class certification was denied because individualized issues predominated, no common thread linked together the class members' claims in those cases; while here, the Bank denied every class member's claim *without investigation* solely because the claim involved a PIN-enabled ATM withdrawal and therefore triggered CFF-1.[7] Because plaintiffs challenge the Bank's admitted policies of

[7] *See Nelson v. Conduent Business Servs. LLC*, 2020 WL 5587450 at *2 (N.D. Ga. Sept. 18, 2020) (proposed class of cardholders who "reported fraudulent charges on their accounts and were denied a refund"); *Almon*, 2022 WL 4545530, at *9 (proposed breach-of-contract class of all "denied a refund for allegedly unauthorized transactions that exceeded contractual limits on liability," noting "[u]nlike the rights granted under EFTA and Regulation E …[the contract] does not afford a cardholder a procedural protection"); *but see Nelipa v. TD Bank*, 2024 WL 3017141, at *22, *25 (E.D.N.Y. June 17, 2024) (Rep.

"systemically denying" without investigation and systematically rescinding credit for any claim involving a disputed ATM withdrawal, the Claim Denial and Credit Rescission class claims are susceptible to common proof.

2. Due Process (Credit Rescission, Account Freeze)

The Bank does not dispute that common issues central to the due process claims include: (1) whether EDD benefits are constitutionally protected property; (2) whether the Bank's Credit Rescission and Account Freeze Policies deprived class members of their property; and (3) whether the Bank's actions were taken under color of state law. Mot. 23-26. The Bank's only response focuses on supposed variations in cardholder experiences concerning the Bank's *post*-deprivation procedures. Opp. 27. That argument fails.

First, it is undisputed that the Bank failed to provide any *pre*-deprivation notice or opportunity to be heard. Mot. 24. Whether pre-deprivation procedures are constitutionally required is a predominating legal issue. Mot. 25 (citing cases). If a pre-deprivation process was required and not provided, the inadequacy of the Bank's post-deprivation process would be irrelevant. *Barberic v. City of Hawthorne*, 669 F.Supp. 985, 993 (C.D. Cal. 1987).

Second, common evidence can establish the gross inadequacy of the Bank's post-deprivation procedures, as the Bank could have adopted far less onerous alternatives to reduce the risk and duration of erroneous deprivation. The Bank's own documents and testimony establish its uniform policy of referring all frozen account cardholders to EDD and not affording them an opportunity to verify their identities with the Bank—even though the Bank plainly had the tools and capability to conduct the verification.[8] Bank documents and testimony also confirm that the Bank's Account Freeze Policy "[redacted]

& Recom.) (certifying EFTA and breach-of-contract classes based on defendant's uniform policy of denying certain claims, and distinguishing *Almon* because it involved no allegation that "the defendant engaged in uniform conduct or had a policy of denying certain types of fraud claims").

[8] Ex 159 (Kreis Reb) ¶¶32-33; Ex 64 at -90724 ([redacted]), -90723 ([redacted]).

[redacted]." Ex 64 at -90722.[9] Potential variations in class members' experiences navigating the Bank's onerous post-deprivation procedures do not alter the fundamental predominating common question: whether those procedures were constitutionally inadequate.

Finally, the Bank's contention that individualized inquiries are needed to determine whether some class members "fail[ed] to cooperate with customer service" (Opp. 28 n.5) is factually unsupported and legally incorrect. Far from demonstrating "a failure to … take[] advantage of the processes" (*id.* at 27), the Bank's own call records show that class members diligently and repeatedly called the Bank to regain access to their frozen accounts, including after being told the Bank "[redacted]" and to contact EDD, and after re-verifying with EDD as directed. DX 46.[10] Moreover, failure to avail oneself of procedures can only amount to a waiver of due process rights (an affirmative defense on which the Bank bears the burden, *see Barberic*, 669 F.Supp. at 992) if those procedures are adequate. *Cf. Correa v. Nampa Sch. Dist. No. 131*, 645 F.2d 814, 817 (9th Cir. 1981). Whether the Bank's procedures were constitutionally inadequate is again a predominating common issue that will dispose of its (unfounded) affirmative defense as to all in the class.

3. Common Law Claims (All Classes)

Duty. Whether the Bank owed EDD cardholders a fiduciary duty or duty of due care are common legal questions that turn entirely on common evidence. Mot. 26-29. In arguing that the existence of a "special relationship" requires individualized proof of "specific

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[9] *See also* Ex 65 at -452795 [redacted]); Ex 16 (Martin Tr.) 226:17-227:18, 272:16-274:13 ([redacted]).The facts of this case bear no resemblance to *Derrick v. Glen Mills Schs.*, 2024 WL 2134340 (E.D. Pa. May 13, 2024) or *Daskalea v. Wash. Humane Soc'y*, 275 F.R.D. 346 (D.D.C. Aug. 10, 2011) (Opp. 28), neither of which involved property requiring pre-deprivation notice or a challenge to a common and uniformly applied policy.

[10] *See also, e.g.*, DX 36 ([redacted]); DX 38 ([redacted]); DX 77 ([redacted]).

communications" with each class member showing the Bank "act[ing] as a financial advisor" (Opp. 31), the Bank relies on cases applying *Montana* law, while ignoring California law, plaintiffs' allegations, and the motion-to-dismiss order, which held that "[a] bank enters into a 'special relationship' with a depositor" giving rise to fiduciary duties when the relationship involves certain characteristics, none of which requires showing the Bank "act[ing] as a financial advisor." MTD Order at 59; Mot. 26-27. Plaintiffs' "special relationship" analysis does not depend on individualized evidence, and the Court already held that Plaintiffs' alleged facts, if true, establish a special relationship. *Id.*

Breach. Whether the Bank breached its common law duties by implementing its CFF Policies (Claim Denial, Credit Rescission, and Account Freeze Classes), understaffing its Claims call center (Customer Service Class), and deliberately choosing not to include EMV chips in its EDD debit cards (EMV Chip Class) are also common questions requiring no individualized evidence. Mot. 27-29. Despite overwhelming evidence that the Bank adopted its challenged policies to preserve its own funds at the expense of its "[redacted]" (Ex 17 at 100:13-22), the Bank now asserts that its decision to abandon [redacted] in favor of CFF-1 for these uniquely vulnerable benefits recipients was a "reasonable" response to pandemic-related fraud. Plaintiffs' expert Bill Abernathy, a former OCC Senior Chief Examiner (who supervised examiners at the level of the Bank's expert) vehemently disagrees. Ex 158 (Abernathy Reb) ¶¶13-33; *see also* Ex. 159 (Kreis Reb) ¶¶15-21. But that is a merits issue that can be resolved once, for the entire class.[11]

Causation. The Bank argues that causation is inherently individualized, but there is a direct link between the Bank's policies and practices and the resulting harm to class members. The Bank admits that its Claim Denial Policy caused the denial of each class member's claims, and thus the harm resulting from those denials. The Bank likewise admits that its Credit Rescission Policy caused the rescission of each Credit Rescission class member's credit and that its Account Freeze Policy caused the denial of access to frozen

[11] The Bank denies [redacted], but its documents show that "[redacted]." DX 26.

funds for each Account Freeze class member. Also, the Bank's Claims call center understaffing caused each Customer Service class member to suffer unprecedently long wait times,[12] and its use of mag-stripe only cards subjected each EMV Chip class member not only to a heightened risk of data exfiltration through skimming (*see infra* 11-12), but also to the unauthorized ATM withdrawals that an EMV chip card would have prevented. *See* Ex 160 (Cloninger Reb) ¶¶19-46. Those unauthorized ATM withdrawals are precisely what triggered CFF-1, causing the Bank to summarily deny or rescind the credit of each EMV Chip class member's claim.

<u>*Defenses.*</u> The Bank includes a passing reference to "sophistication" and "lack of reliance" "affirmative defenses" without citation or analysis. Opp. 32. Neither applies here. Even if they did, the Bank has not shown they would raise individualized issues. Similarly, the Bank's unsupported assertions that some class members received prompt customer service (*id.* 31), were themselves negligent (*id.* 32), or failed to fulfill material contractual obligations (*id.* 33) are inadequate to establish individualized issues, let alone predominance of those issues given the overwhelmingly classwide nature of plaintiffs' claims. *See infra* § II.B.[13]

4. CCPA (EMV Chip)

The Bank does not dispute that a common question central to the CCPA claim is whether its failure to include EMV chips in EDD debit cards violated its duty to

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[12] The three plaintiffs whom the Bank asserts have "no complaints about the call center" (Opp. 30) in fact did. *See* Exs 181-183. The Bank misleadingly cites *Roz v. Nestle Waters N. Am., Inc.*, 2017 WL 6942657, at *5 (C.D. Cal. Sept. 13, 2017), for the proposition that individualized inquiries are required for each class member's calls, but *Roz* was not about a uniformly applied policy; rather, liability turned "on whether each customer provided affirmative consent to a recurring credit card charge." *Id.* at *5. Here, the Customer Service class claims are based on the Bank's classwide practices that subjected EDD cardholders to elevated wait times, intended in part to avoid issuing credits on their claims, i.e., "[redacted]." Ex 3 (Minnucci) ¶¶ 51-52; 60-62. Common evidence will show that the Bank's understaffing caused more than [redacted]% of class members—"[redacted]." *Id.* ¶¶44, 59-60; *see also* Ex 161 (Minnucci Reb) ¶¶13-14.

[13] The Bank cites no evidence of any class member receiving prompt customer service or breaching the Cardholder agreement; all it cites for contributory negligence is Aders' customer service call in which he states he *did not* share his EDD card. DX 78 at 8:18.

"implement and maintain reasonable" data security practices under Cal. Civ. Code §1798.150(a)(1); Mot. 34-35. Nor does it dispute Cloninger's opinion that EMV chips were industry standard for payment card security by 2019. *See* Ex 2 (Cloninger) ¶¶36-45.

Whether EDD debit cards were "subject to"—i.e., especially susceptible to[14]—unauthorized access, theft, or disclosure of cardholder personal information ("PI"), and whether any such access was "as a result of" the Bank's failure to issue EMV chip cards, are also common questions provable through common evidence. First, as Cloninger explains, the PIN-enabled ATM withdrawals that all class members reported are the paradigm example of card-present counterfeit fraud resulting from skimming. *Id.* ¶¶89-91.[15] While EMV chips do not prevent data on a mag-stripe from being skimmed, the chip itself cannot be cloned, rendering the skimmed information useless for attempting counterfeit card fraud. *Id.* ¶¶29-35. Common evidence will show that the Bank's issuance of mag-stripe-only cards to EDD cardholders created an attractive target for fraudsters during the pandemic, causing an "[redacted]" that targeted those cards. Ex 168 at -166345; Ex 160 (Cloninger Reb) ¶54.[16] Second, common evidence, including expert testimony (and internal Bank documents acknowledging [redacted]), can establish that EMV chips would have prevented the unauthorized ATM withdrawals and other counterfeit-card transactions that all class members experienced. Ex 160 (Cloninger Reb) ¶¶19-46.

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[14] *See, e.g.*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/subject%20to (last visited Nov. 15, 2024) (Example: "… subject to change").

[15] The Bank identifies a few class members who reported lost or stolen cards and speculates those may not have been skimmed (Opp. 29), but it produces no evidence that PINs were also stolen or that lost/stolen cards affect more than a de minimis share of the class. *See* Ex 160 (Cloninger Reb) ¶¶36-40. In any event, Bank records reflect whether a cardholder reported a lost or stolen card, so any such individuals could be subclassed or removed from this class. *Id.* ¶44 & n.22.

[16] *See* Ex 32 at -228914 ([redacted]"); Ex 33 at -455617 ([redacted]"); Ex 154 at -154043 ([redacted]"); Ex 34 at -297295 ([redacted]"). Plaintiffs' evidence is far more specific and robust than in *Houston*, 2019 WL 1200574 (Opp. 29), where the plaintiff relied only on the existence of skimming generally.

5. UCL (Claim Denial, Credit Rescission, Account Freeze)

The Bank contends that the UCL balancing test necessarily "involves *two* individual inquiries" as to harm and benefit. Opp. 33. However, "[w]here (as here) a singular systemic practice is being challenged, that balancing test looks at the harm and benefits in the aggregate." *Brooks v. Thomson Reuters Corp.*, 2023 WL 9316647, at *8 (N.D. Cal. Aug. 10, 2023). "As with many UCL claims, the Court "'may make one uniform determination of whether the utility of the conduct outweighed the harm to class members.'" *Id.* at *12 (citing *Newton v. Am. Debt Servs., Inc.*, 2015 WL 3614197, at *10 (N.D. Cal. June 9, 2015)). Similarly, under the tethering test, "assessing a particular business practice in the context of public policy considerations entails an aggregative judgment." *Id.* at *13.

6. Entitlement to Punitive Damages (All Classes)

The Bank contends that its punitive damages liability depends on the degree of each class member's "vulnerability," but punitive damages turn "not on the facts unique to each class member, but on the defendant's conduct toward the class as a whole." *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 542, 546 (N.D. Cal. 2012) (approving class trial plan adjudicating "availability of punitive damages" in Phase 1 and determining "aggregate amount and individual distribution of punitive damages" in Phase 2); *see also, e.g.*, *Palmer v. Cognizant Tech. Sols. Corp.*, 2022 WL 18214014, at *31 (C.D. Cal. Oct. 27, 2022) (certifying 23(b)(3) class to determine "availability of punitive damages"). The Bank knew that EDD cardholders as a group were especially "[redacted]," (Ex 17 at 100:13-22), yet it adopted and uniformly applied to that group a unique set of harmful policies designed to save the Bank money, in callous and deliberate disregard of their rights. Mot. 41-42; *see, e.g.*, Ex 78 ([redacted]); Ex 69 ([redacted]). "Whether [this] conduct meets the standard for punitive damages" is a common issue that turns entirely on common evidence. *Ellis*, 285 F.R.D. at 546.

Plaintiffs' Trial Plan contemplates that "entitlement to punitive … damages" will be adjudicated in Phase 1. Ex 157 at 4. If the Bank fails to raise individualized issues regarding compensatory damages, aggregate punitive damages may also be determined classwide in Phase 1. If the Bank is able and chooses to raise such individualized issues based on its further review of class member files, those issues can be resolved in Phase 2, and the aggregate amount of punitive damages owed to each class can be determined by the jury and adjusted by the Court as needed. *Id.* Such an approach fully satisfies due process, affording the Bank "'the opportunity to present … individualized defenses'" and ensuring that punitive damages are "tethered" to class members' actual damages. *See* Opp. 33-34.

B. A Remote Possibility of Uninjured Class Members Does Not Preclude Class Certification.

At almost every turn, the Bank responds to Plaintiffs' showing of common, predominating issues by baselessly asserting that the mere *possibility* that some unharmed class members might be lurking among the more than 100,000 class members is sufficient to defeat predominance. That argument is legally and factually indefensible.

A defendant may not "support its invocation of individualized issues with mere speculation." *Van v. LLR, Inc.*, 61 F.4th 1053, 1068 (9th Cir. 2023) (*Van II*); *see Morgan v. Rohr, Inc.*, 2023 WL 8813171, at *1 (S.D. Cal. Dec. 20, 2023). Attorney argument and declarations based on assumptions rather than evidence fail to satisfy that burden. *Van II*, 61 F.4th at 1068.[17] After years of litigation, the Bank is only able to identify *one* potential fraudster in the Credit Recission class and *four* in the Claim Denial class—far from enough to overcome certification. Opp. 21-23; DX 7 ¶¶17-21; Ex 162 (Regan Reb) ¶11; *see* DX 58-62 (describing these five as "[redacted]").[18] While the Bank suggests

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[17] *See also Bazarganfard v. Club 360 LLC*, 2024 WL 3191226, at *5 (C.D. Cal. May 23, 2024) (class issues predominated EFTA claim where declaration "did not identify any specific members who were refunded or cancelled their membership nor identify how many members were actually refunded or cancelled their membership"); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825-26 (7th Cir. 2012) (no evidence of how many putative class members could not have been harmed).

[18] The Bank also points to: Cochran, and Stanfill (Opp. 26), but they are not part of the class because [redacted] (Ex 162 (Regan Reb) at 5 n.10); three individuals who have [redacted] (Opp. 20), but the Bank does not assert that their claims in this case are fraudulent; and [redacted] (Opp. 32) who, the Bank suggests, admitted that he gave a close friend his EDD debit card—however, [redacted]' call transcript is clear that [redacted] (DX 78 at 8:18 ["[redacted]

there may be more, a close reading of Martin's declaration dispels that suggestion. Martin asserts that the Bank recently [redacted]. DX 7 ¶8. [redacted] *Id.* ¶12. For two reasons, that assertion could not defeat predominance even if true. First, there is no evidence that any of those individuals are class members. [redacted] of individuals submitted claims that "triggered Indicator 1" *and* other CFF Indicators, and by definition, *none* are class members. *See* ECF 324 (Notice of Mtn.) at 1-2; Ex 162 (Regan Reb) ¶¶11-12. Martin fails to show, let alone "with certainty," that any of the unidentified [redacted] are actual class members. *Van II*, 61 F.4th at 1068. Second, even if the Bank could identify [redacted] in one or more proposed classes, that tiny percentage (e.g., [redacted]% of the [redacted] Claim Denial class and [redacted]% of the [redacted] Account Freeze class, *see* Ex 162 (Regan Reb) ¶12)) would not be enough to preclude certification under Rule 23(b)(3). *See Olean*, 31 F.4th at 669; *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co. Ltd.*, 674 F.Supp.3d 799, 825 (C.D. Cal. 2023) (de minimis number of uninjured class members comprised less than 3% of class); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 24 (1st Cir. 2015) (certified class had no more than 5.8% uninjured class members); *Kleen Prod. LLC v. Int'l Paper Co.*, 831 F.3d 919, 930 (7th Cir. 2016) ("smattering of individual ... defenses [affecting 190 of 100,000 class members identified by defendant] does not undermine the superiority of the (b)(3) class action").[19]

[redacted]."]). Petrova, referenced at Opp. 16, is also not a member of any of the proposed classes. Ex 162 (Regan Reb) at 5 n.10.

[19] *See also Tyson*, 577 U.S. at 460-63 (affirming certification of a class of 3,344 members though it was "undisputed that hundreds of class members suffered no injury in the case"); *Wortman v. Air New Zealand*, 326 F.R.D. 549, 560 (N.D. Cal. 2018) (4.3% of 1.1 million class members a "small number" of uninjured class members and "not an obstacle to class certification"); *Bouissey v. Swift Transp. Co.*, 2022 WL 16957830, at *8 (C.D. Cal. Sept. 27, 2022) (certifying class where all members were exposed to unlawful policy but "almost half" of 3,757-person class may not have been injured).

The Bank's remaining allegations are more speculative still. Martin's assertion (Opp. 20; DX 7 ¶¶12-14) that "[redacted]" lacks foundation or specificity, and the Bank cites no support for asserting that "EDD is still retroactively disqualifying many cardholders each month" (Opp. 36). Such bald statements are inadequate to establish individualized issues, let alone predominance of those issues. *Van II*, 61 F.4th at 1068.

The Bank has had ample time to establish which class members, if any, were unharmed or undamaged.[20] This case has been pending since January 2021. The *Yick* injunction, which required the Bank to end its use of the CFF and to reopen denied claims, took effect June 8, 2021. The CFPB and OCC Consent Orders issued July 14, 2022. This Court's motion to dismiss ruling was in May 2023. Yet despite the Bank's extensive, years-long efforts to identify unharmed class members, it still cannot point to more than a handful whose unauthorized-transaction claims may have been illegitimate.

There is a reason why the proposed classes include at most a de minimis number of potentially uninjured class members. Plaintiffs deliberately defined each class narrowly to avoid including potential fraudsters (e.g., limiting the class to cardholder claims decisioned *solely* by CCF-1) and to *exclude* anyone found to have made a fraudulent claim. *See* ECF 324 (Notice of Mot., Exclusion ii) at 1-2. For the past four years, the Bank has been re-reviewing claims under its [redacted] procedures and further investigating all claims with "indicia" of fraud. With the exception of the low-value claims that the Bank [redacted], each claim denied based on CFF-1 has been *manually investigated* under the Bank's [redacted], weeding out all or nearly all false claims. *See* Ex 14 (Daniels Tr.) 231:11-232:24; Ex 1 (Kreis) ¶¶31-41; Ex 159 (Kreis Reb) ¶16, 32. The Bank has not presented any evidence that any of those lower-value [redacted] claims were fraudulent (each claim referenced by Martin was above the [redacted] limit), and many tranches of [redacted] were permitted only after "[redacted]" or the cardholder "[redacted]

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[20] While some claims require resulting harm, others like EFTA merely require showing the Bank failed to provide the requisite investigation or notice of reasons. *Supra* at 3-4.

[redacted].” DX 43 at 7-8. Although [redacted] under the Remediation Plan (as “[redacted]”), the Plan required any claim that contained “[redacted].” Ex 74 at -102558.[21]

Despite now asserting that some class members may have been unharmed by its use of CFF-1, the Bank represented in the Remediation Plan submitted to its regulators that it would only include “[redacted]” in its Plan payments. Ex 74 at -00102557. Consistent with that representation, the OCC Consent Order specifically required the Bank in implementing the Plan to provide “a well-supported methodology to be used to *identify harmed consumers*” and “a description of the methodology used to calculate the amount of remediation to be paid to *each harmed consumer*.” Ex 73 at 14-15 (emphasis added). Not only did the Bank promise its regulators that it would limit Plan payments to “harmed consumers,” but the Plan specifically *excluded* fraudsters from such payments. Ex 74 at -00102557. Plaintiffs’ proposed classes are thus appropriately limited to “[redacted]” whom the Plan required the Bank first to “identify” as “harmed consumer[s]” using “a well-supported methodology” and then to exclude if they had engaged in fraud. *Id.* Given the Bank’s express representations to its regulators, it should be estopped from now asserting—especially in the absence of concrete evidence—that (1) its review and payment of the unauthorized-transaction claims that it had previously denied solely because of CFF-1 was actually *in*adequate to identify which EDD debit cardholders were harmed by its use of CFF-1 and (2) it did *not* exclude so-called fraudsters from its payments. *E.g.*, *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999) (“statements to administrative agencies ... may also give rise to judicial estoppel”); *see also* Ex 158 (Abernathy Reb) ¶¶34-35.

C. Each Class’s Damages Are Calculable Using a Common Methodology.

A damages model “must measure only those damages attributable to” plaintiffs’

[21] The Bank has not shown that *any* class members who were [redacted] are fraudsters. If the Bank’s “[redacted]” argument were found to have merit, though, the Court could re-define the class to eliminate the [redacted] claimants.

theory of liability. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). Plaintiffs have presented for each class a separate methodology for calculating the specific damages that "stemmed from [each of] the [Bank's] actions that created the legal liability." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013). The Bank's assertion that Plaintiffs seek to recover the same damages "over and over" (Opp. 37) is factually mistaken. Non-overlapping damages are appropriately cumulative, and any overlapping recoveries will be de-duplicated. Ex 162 (Regan Reb) ¶15. The Bank's other criticisms of Regan's proposed methodologies are similarly unfounded and do not defeat certification.

1. Claim Denial, Credit Rescission, and Account Freeze Classes

__Principal Amounts__. The Bank does not dispute that, had it not already reimbursed class members pursuant to the *Yick* injunction and Consent Decrees, the total amount of each claim the Bank denied or rescinded based solely on CFF-1, and the total dollar value in each account the Bank froze based solely on CFF-1 (the "principal amounts"), would be recoverable as damages. The Bank also does not dispute that these principal amounts are readily ascertainable from its own records. Ex 4 (Regan) ¶¶8, 12, 16, 20. Instead, it makes the legal argument that because those principal amounts have been already repaid, they "should be excluded" and may not be trebled. DX 1 (Stango Rep) ¶¶10, 15, 37; Opp. 37. Ninth Circuit law holds otherwise. When Congress enacts a treble damages remedy, damages must be trebled *before* any offset is applied, not after. *See, e.g.*, *Uthe Tech. Corp. v. Aetrium, Inc.* 808 F.3d 755, 756-58 (9th Cir. 2015); *B.P. v. Balwani*, 2021 WL 4077008, at *3 (9th Cir. Sept. 8, 2021); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir. 1957).[22] EFTA, like RICO and the Sherman Act, requires payment of treble damages if certain conditions are satisfied. 15 U.S.C. §1693f(e) (consumer "shall be entitled to treble damages"); *Marquess*, 2010 WL 3448086, at *8 ("no discretion as to whether to award" if statutory criteria met). It is thus entirely proper for Regan to use the principal amounts as a basis for trebling damages.

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[22] *See also, e.g.*, *In re Volkswagen "Clean Diesel" Mktg. Litig.*, 2017 WL 4890594, at *4 (N.D. Cal. Oct. 30, 2017) (same); *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 636 F.Supp.1138, 1151-52 (C.D. Cal. 1986) (same).

<u>*Lost Time Value of Money*</u>. Because class members could not use those principal amounts while the Bank improperly withheld them, Regan proposes two methodologies for calculating the lost time value of the class members' access to those amounts. *See* Ex 4 (Regan) ¶¶45-60; *see Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 828 (7th Cir. 2018) ("[U]nauthorized withdrawals from [plaintiffs'] accounts cause a loss (the time value of money) even when banks later restore the principal.").

The Bank's assertion that the lost time-value of money may never be subject to common proof is also contrary to Ninth Circuit law. In *Van v. LLR, Inc.*, 962 F.3d 1160, 1161 (9th Cir. 2020), LLR allegedly overcharged sales taxes to many online purchasers. LLR argued the purchasers had no claim because it had refunded the overcharges and plaintiffs had not "made specific allegations regarding how [each of them] would have earned interest on the money but for the defendant's wrongful conduct." *Id.* at 1164-65. Rejecting both arguments, the Ninth Circuit explained that loss of the use of money is an "actual, concrete, and particularized" injury, and "[i]nterest is simply a way of measuring and remedying" that injury. *Id.* at 1165. On remand, the district court certified the class, finding common issues predominated and the lost time value of money could be measured by using an interest rate of 4.35% per year. *Van II*, 61 F.4th at 1061. Here, as in *Van*, individual variation in class members' financial situations does not preclude consequential damages from being approximated based on a compound interest rate (or other conservative metric similar to those the Bank itself [redacted]). At trial, the Bank can argue that the interest rate proposed is too high or that a different metric should be used, but those are classwide issues.

The use of average or approximate measures of damages is common in class actions. In the consumer protection context, courts routinely allow the use of market data to approximate the value to consumers of product marketing claims. *See, e.g., Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, 326 F.R.D. 592 (N.D. Cal 2018); *McMorrow v. Mondelez Int'l, Inc.*, 2021 WL 859137 (S.D. Cal. March 8, 2021). In the antitrust context as well, courts routinely rely on market data and statistical sampling to approximate damages attributable to anticompetitive behavior. *See, e.g.*, *In re DRAM Antitrust Litig.*, 2013 WL 12333442 (N.D. Cal. Jan. 8, 2013); *In re High-Tech Employee Antitrust Litig.*, 289 F.R.D. 555, 568-70 (N.D. Cal. 2013).[23]

The Bank argues that "[n]o putative class member" could rely on this damages model "in an *individual* case" to establish damages. Opp. 39. This confuses the inquiry at class certification with summary judgment. At class certification, plaintiffs need not "put forward evidence capable of sustaining a jury verdict." *See Lytle*, 114 F.4th at 1028 ("To require an actual weighing, at class certification, of whether plaintiffs' evidence could sustain a jury verdict would collapse the class certification and summary judgment inquiries in precisely the manner *Tyson Foods* warns against").

Disgorgement. Plaintiffs have shown that disgorgement of the Bank's unjustly earned profits from "float revenue" may be calculated classwide using the amounts of class members' denied claims, rescinded credits, and frozen account balances. Ex 4 (Regan) ¶¶78-79, 92, 109. The Bank speculates that some cardholders may not have drawn down their entire account balance (DX 1 (Stango) ¶81), but that is factually unsupported and legally irrelevant.[24] Disgorgement of the full amounts is appropriate because class members had an "ownership interest" in the wrongfully withheld funds on which the Bank earned float revenue. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1148 (2003). Absent its unlawful conduct, the Bank could not have expected to earn revenue on those funds, because cardholders had a right to withdraw them at any time. *See* Ex 179

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[23] Courts are particularly willing to approve approximations where a defendant's conduct has made that the only feasible way of calculating damages. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (where employer violates statutory duty to keep records, employees may establish liability and damages through representative evidence); *Ruiz Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1140 (9th Cir. 2016) (same); *United States v. Fadul*, 2013 WL 781614, at *14 (D. Md. Feb. 28, 2013) (allowing statistical sampling where hospitals failed to maintain records); *Ratanasen v. Cal. Dep't of Health Servs.*, 11 F.3d 1467, 1471 (9th Cir. 1993) (same). Here, the Bank had statutory and common law duties to conduct an adequate, timely, individualized investigation of each claim (or to pay provisional or permanent credits), yet failed to do so.

[24] The Bank's designee testified that "[redacted]" did, in fact, "[redacted]." Ex 179 (Chestnut Tr.) 61:9-64:4; Ex 162 (Regan Reb) ¶¶22, 47.

(Chestnut Tr.) 61:9-64:4. Because the object of disgorgement is "to eliminate the possibility of profit from conscious wrongdoing," *Mesiter v. Mensinger*, 230 Cal.App.4th 381, 398 (2014), courts tolerate some imprecision in damages calculations. *See Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1183 (9th Cir. 2017) (classwide calculations under UCL "particularly forgiving.").

2. Customer Service Class.

The Bank does not contest Plaintiffs' disgorgement model for the Customer Service class. *See* Ex 4 (Regan) ¶¶113-117; Opp. 40-42; DX 1 (Stango) ¶6. The Bank contends that time spent on hold due to a defendant's misconduct is never compensable, Opp. 40-41, but Plaintiffs' cases show otherwise. Mot. 39-40. Regardless, whether such time is compensable is another common legal question that weighs in favor of class certification.

Plaintiffs have shown that the Customer Service class members' lost-time damages are "*capable* of measurement on a class-wide basis." *Owino v. CoreCivic, Inc.*, 60 F.4th 437, 447 (9th Cir. 2022). As in *Owino*, where plaintiffs' evidence of "'typical' shift lengths" was sufficient, *id.* at 447-48, Plaintiffs have produced evidence of the average *excess* hold time EDD cardholders experienced above the industry standard Average Speed to Answer ("ASA") ([redacted] per call). *See Tyson*, 577 U.S. at 459 (sufficiently reliable representative or statistical evidence can be used to establish the hours a class of employees worked). Plaintiffs' damages model proposes a common methodology for calculating each class member's lost time damages by multiplying (i) the number of times each class member called and was transferred to the Claims call center during the class period (ascertainable from the Bank's records, Ex 161 (Minnucci Reb) ¶¶40-43) times (ii) the average excess hold time EDD cardholders experienced during the class period,[25] times (iii) the applicable minimum wage or other reasonable metric. Ex 4 (Regan) ¶114. At trial,

[25] Damages could also be calculated using the average excess hold time per week or per class member, as Bank records capture each call's hold time. Ex 161 (Minnucci Reb) ¶¶36-43; Ex 162 (Regan Reb) ¶50; *Knutson v. Schwan's Home Service, Inc.*, 2013 WL 4774763, *10 (S.D. Cal. Sept. 5, 2013) (determining how many calls class members made "may be answered—at least in part—by resort to Defendants' records without the need for a multitude of mini-trials" and does not preclude certification).

the Bank may try to establish the applicability of a different industry-standard ASA or a different hourly rate, but these classwide factual disputes are no basis for denying certification. *See Tyson*, 577 U.S. at 459.[26]

3. EMV Chip Class

The Bank does not challenge Plaintiffs' disgorgement model for the EMV Chip Class. *See* Mot. 43:6-16; Ex 4 (Regan) ¶ 12; *cf.* DX 1 (Stango) ¶6. The Bank asserts that Regan's methodology overstates the compensatory damages attributable to the lack of an EMV chip in class members' EDD debit cards because some class members submitted "[redacted]" claims encompassing multiple disputed transactions, and the total dollar amount of such claims may include disputed transactions that an EMV chip would not necessarily have prevented, such as card-not-present (online) transactions or transactions occurring at non-chip enabled payment terminals. However, every class member's claim involved an unauthorized ATM withdrawal, which an EMV chip *would* have prevented. *See* Ex 160 (Cloninger Reb) ¶7. Each class member's act of disputing an unauthorized ATM withdrawal caused the Bank to deny the entire claim without investigation based solely on CFF-1. Therefore, the Bank's issuance of mag-stripe only cards is directly responsible for each class member being denied access to the full amount of their claim or credit. In any event, if the factfinder were to determine that non-ATM transactions are not compensable, those transactions could be identified in the Bank's records and easily excluded. *See* Ex 162 (Regan Reb) ¶63.

D. Any Individualized Issues Are Manageable.

At most, the Bank has presented "a smattering of examples involving a few isolated

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[26] The Bank challenges plaintiffs' call center expert's use of a 1.25-minute ASA as the industry standard, based on a survey of 214 call centers (Ex 3 (Minnucci) ¶12), by arguing the survey includes call centers in different industries. Opp. 41. But the use of multi-industry benchmarks is standard in the call center industry. Ex 161 (Minnucci Reb) ¶¶28-34. In any event, the ASA among only the Finance survey respondents (the largest represented sector, compared to only 5% in Transport and Travel) was still only 2.42 minutes, which yields an average excess hold time of [redacted] per class member. *Id.* ¶¶30-32. Alternatively, the Bank's own expert cites a source suggesting industry standard ASA is 8.2 seconds. *See* DX 5 (Hindle Decl.) ¶16 n.16.

cases" that may raise individualized issues. *Miles v. Kirkland's Stores Inc.*, 89 F.4th 1217, 1223-24 (9th Cir. 2024); *Kleen Prods. LLC*, 831 F.3d at 930; *Olean*, 31 F.4th at 669. Such isolated cases can be addressed and any uninjured class members eliminated after the predominating common issues of classwide liability and damages are determined. Ascertainability is not a requirement under Rule 23 and "courts should not refuse to certify a class merely on the basis of manageability concerns." *Briseno*, 844 F.3d at 1125, 1128; *Nevarez v. Forty Niners Football Co., LLC*, 326 F.R.D. 562, 590 (N.D. Cal. 2018) (same). Further, courts have repeatedly rejected defendants' objection that the process of identifying injured class members would require a manual file-by-file review that is laborious and time-intensive. *See, e.g.*, *Tavenner v. Talon Grp.*, 2012 WL 1022814, at *5 (W.D. Wa. Mar. 26, 2012) ("It would be ironic if plaintiff's attempt to narrow the class definitions to include only those who suffered direct financial injury should preclude class certification."); *Peel v. BrooksAmerica Mortg. Corp.*, 2012 WL 3808591, at *3 (C.D. Cal. Aug. 30, 2012) (need for "loan-by-loan review" did not preclude certification); *Brown*, 562 F.Supp.3d at 602-03.

Here, the Court also has the option of bifurcating the case into a liability and damages phase and, upon a determination of liability, creating a process for validating individualized claim determinations. *E.g., In re Nexium Antitrust Litig.*, 777 F.3d at 24 n.20 (affirming certification of class containing up to 5.8% uninjured class members because "de minimis number of uninjured class members does not bar certification if those members can be weeded out at a later stage").[27] As the Ninth Circuit explained in *Briseno*: "Defendant will have ... opportunities to individually challenge the claims of absent class members if and when they file claims for damages. At the claims administration stage, parties have long relied on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques

[27] *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (Sotomayor, J.) (listing "management tools available" to district courts); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801-02 (7th Cir. 2013) (it "would drive a stake through the heart of the class action device" to require uniform damages).

tailored by the parties and the court to validate claims. Rule 23 specifically contemplates the need for such individualized claim determinations after a finding of liability." 844 F.3d at 1131 (cleaned up).[28] Here, that process should be manageable as the Bank has been vetting the cardholders impacted by CFF-1 since at least the *Yick* injunction and it is nearly [redacted] its Remediation Plan. Ex 180 (Lennon Tr.) 98:3-10, 299:1-14.

Plaintiffs' Trial Plan demonstrates that bifurcation is a common way to manage individualized affirmative defenses and damages. Ex 157 (citing A*rthur Young & Co. v. U.S. District Ct.*, 549 F.2d 686 (9th Cir. 1977); *In re Exxon Valdez*, 270 F.3d 1215, 1225 (9th Cir. 2001); *Betances v. Fischer*, 304 F.R.D. 416, 432 (S.D.N.Y. 2015)). The Bank does not address these cases, although they provide a clear road map for efficiently using judicial resources by frontloading predominating classwide questions. Instead, the Bank argues that, despite its systemic conduct that impacted over 100,000 Californians and four years of subsequent reconsideration efforts, it has a due process right to call every class member to the stand because it may uncover a few outlier cases. If credited, this argument would render *any* class based on a bank's uniform (and intentional) failure to conduct a reasonable investigation under EFTA impossible to certify, as a defendant could always assert that it is entitled to litigate all affirmative defenses on an individual basis. That is contrary to EFTA's "remedial purpose" (*Stout v. FreeScore, LLC*, 743 F.3d 680, 684 (9th Cir. 2014); Mot. 20), its statutory scheme (15 U.S.C. §1693m), and controlling law (*Olean*, 31 F.4th at 669; *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2019); *accord Messner*, 669 F.3d at 826).

III. Class Action Is the Superior Method of Adjudication.

The Bank argues that a class action would duplicate the CFPB/OCC Consent Decrees and cannot be certified under *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (9th Cir.

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[28] *See also, e.g.*, *Mullins v. Direct Digit. LLC*, 795 F.3d 654, 667 (7th Cir. 2015); *Tyson*, 577 U.S. at 46; *Davis v. Lab. Corp. of Am. Holdings*, 2022 WL 22855520, at *12 (C.D. Cal. June 13, 2022); *Victorino v. FCA US LLC*, 2020 WL 2306609, at *3 (S.D. Cal. May 8, 2020) (due process "satisfied 'so long as the defendant is given a fair opportunity to challenge the claim to class membership and to contest the amount owed each claimant during the claims administration process.'") (citation omitted); *Lyngaas v. Curaden A.G.*, 436 F.Supp.3d 1019, 1023-25 (E.D. Mich. 2020).

1975)—even though the Bank acknowledges that this action asserts legal claims (due process, CCPA, common law, UCL) and seeks remedies that its regulators were not authorized to pursue (treble and punitive damages). Opp. 44-45. The Bank ignores *B.P. v. Balwani*, 2021 WL 4077008, at *2 (9th Cir. Sept. 8, 2021), which rejected this argument, holding that a prior consent decree requiring class member reimbursement did not defeat superiority, because the consent decree "did not comprehend the full scope of damages that might be available" to the class (including potential treble and punitive damages) and did not address plaintiffs' California statutory and common law claims. *See In re Arizona Theranos, Inc., Litig.*, 2020 WL 5435299, at *9 (D. Ariz. Mar. 6, 2020), *aff'd in relevant part, remanded sub nom. B.P. v. Balwani*, 2021 WL 4077008.[29]

Far from undermining the OCC/CFPB Consent Decrees, allowing plaintiffs to proceed on a classwide basis will supplement the regulators' enforcement actions and further Congress's deterrence objectives in authorizing treble damages. Consistent with those objectives, the CFPB and OCC took pains to preserve the class members' right to pursue private class litigation and expressly contemplated the recovery of additional remedies. *See* Ex 72 (CFPB Consent Decree) ¶¶3(p), 98, 103.[30]

Apart from its meritless *Kamm* argument, the Bank does not dispute that each Rule 23(b)(3)(A)-(D) superiority factor heavily favors certification. *See* Mot. 43-45. Because a single classwide trial of all common issues is far more efficient than the alternative of adjudicating more than 100,000 individual proceedings—and because the reality is that, in the absence of a class action, the overwhelming majority of class members' rights will never be adjudicated at all—superiority is satisfied, and the classes should be certified.

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[29] In the Bank's cited cases, the defendant's refund programs provided the "very remedy sought" in the litigation. *See Webb v. Carter's Inc.*, 272 F.R.D. 489, 505 (C.D. Cal. 2011); *see also Van II*, 61 F.4th at 1062 n.4 ("Rule 23 asks whether the class action format is superior to other methods of *adjudication*, not whether a class action is superior to other methods of compensating victims.").

[30] In contrast, *Conde v. Sensa*, 2018 WL 4297056 (S.D. Cal. Sept. 10, 2018) pointed to the lack of language in the prior settlement "stat[ing] whether it bar[red] class action claims."

Respectfully submitted,

Dated: November 21, 2024

COTCHETT, PITRE & McCARTHY, LLP

By: /s/ *Brian Danitz*
JOSEPH W. COTCHETT
BRIAN DANITZ
KARIN B. SWOPE
DAVID G. HOLLENBERG
BLAIR V. KITTLE
VASTI S. MONTIEL

Co-Lead Counsel for Plaintiffs and the Proposed Class

Dated: November 21, 2024

ALTSHULER BERZON LLP

By: /s/ *Michael Rubin*
MICHAEL RUBIN
STACEY M. LEYTON
CONNIE K. CHAN
JAMES BALTZER
KATHERINE G. BASS
COLIN C. JONES

Co-Lead Counsel for Plaintiffs and the Proposed Class