Exhibit 159

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

EXPERT REBUTTAL REPORT OF J. DANIEL KREIS

November 21, 2024

REDACTED PUBLIC VERSION

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I. ASSIGNMENT

1. I have been retained by Plaintiffs' counsel in *In re Bank of America California Unemployment Benefits Litigation*, Case No. 3-21-md-02992-LAB-MSB, to rebut specific opinions contained in the Declarations of Russell Cronan (DX 3) and Teresa A. Pesce (DX 2) provided by Bank of America's (the "Bank") counsel in their opposition to Plaintiffs' motion for class certification. On August 29, 2024 I submitted an expert report to this Court to which Mr. Cronan and Ms. Pesce's reports respond.

2. My rebuttal addresses the following opinions from Mr. Cronan and Ms. Pesce:

a. Section **V.** from Mr. Cronan's report
    i. "**It was Reasonable for Bank of America to Believe that Its Response to the Explosion of Pandemic-Era Prepaid Card Fraud Would have been Acceptable to the Bank's Regulators**"

b. Section **VII.** from Mr. Cronan's report and Section **VII.** from Ms. Pesce's report
    i. "**The Kreis Report Ignores the Reality of the Bank's Position During Unprecedented Circumstances**"
    ii. "**MR. KRIES IGNORES THE REALITIES OF THE BANK'S POSITION DURING UNPRECEDENTED CIRCUMSTANCES**"

c. Section **VI.** from Ms. Pesce's report

i. **"THE BANK MUST ADMINISTER THE PROGRAM FACING BOTH AN UNPRECEDENTED NUMBER OF CLAIMS AND AN UNPRECEDENTED VOLUME OF FRAUD"**

II. QUALIFICATIONS

3. The bulk of my qualifications can be found in my original expert report, attached as Exhibit 1 to Plaintiffs' motion for class certification.

4. For the purposes of this rebuttal, I have several additional qualifications of note.

5. During my career, I directly managed the planning, solution development, business document development execution and rapid scaling of two financial institutions' capabilities over short periods of time in response to extreme external pressures. These two operations involved many business challenges similar to those faced by Bank of America during the coronavirus pandemic.

6. First, at First Omni Bank, I personally managed all aspects of the scaling of a Credit Operation, moving the bank from a manual process capable of handling fewer than 90 new accounts per day in August of 1985, to a semi-automated process capable of handling over 10,000 per day by December of 1985. In other words, I have direct experience scaling a bank operation by 11,000% in just four months.

7. Second, working with the FDIC, I oversaw an operation that closed several hundred thousand accounts in a single day, and developed the call center expansion to handle the resulting dramatic increase in calls.

8. Third, I have personal experience working with a FinTech company "Upstart[1]" that sought and obtained a No-Action Letter ("NAL") from the CFPB prior to implementing an AI driven financial application processing system.[2]

9. Fourth, I have personal experience working with large-scale professional services staffing projects using Accenture, one of the largest professional services staffing firms on the planet.

III. FACTS AND DATA CONSIDERED

10. In preparing this report, I relied on my knowledge, training, experience, and expertise accumulated during my 42-year career in consumer payment systems and operations. I also relied on the Plaintiffs' complaint, documents and information produced in discovery in this case, documents provided in Defendants' opposition to Plaintiff's motion for class certification and documents and information that are publicly available. The specific materials I relied upon are cited in this report and in the list attached as Appendix B.

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[1] https://www.upstart.com/

[2] https://www.consumerfinancemonitor.com/2020/12/10/cfpb-issues-new-no-action-letter-to-upstart/

IV. HOURLY RATE

11. I am being paid for my work on this case at the rate of $450 per hour, which is not contingent on the opinions I express or the outcome of this matter.

V. SUMMARY OF OPINIONS[3]

12. Mr. Cronan's opinion that it was reasonable for the Bank to believe that the Bank's implementation of the Claim Fraud Filter and specifically the Bank's implementation of the Fraud Filter with Indicator 1, (automatically denying every unauthorized-transaction claim submitted by an EDD cardholder that involved an ATM withdrawal) ("CFF-1") in response to pandemic-era prepaid card fraud would have been acceptable to the Bank's regulators is unfounded and ignores the reality of the Bank's access to and relationship with its regulators.

13. Mr. Cronan and Ms. Pesce's nearly identical opinions, that my previous report ignored "the Bank's position during unprecedented circumstances," inaccurately characterize my report, are unfounded, and are not plausible given the Bank's tremendous resources and capabilities.

14. Ms. Pesce's opinion that the Bank was facing an unprecedented number of claims and an unprecedented volume of fraud and therefore had to implement the Claim Fraud Filter because the Bank could not verify that EDD prepaid cardholders

[3] All opinions stated in this report, including all opinions about what is consistent with or contrary to industry standards or contrary to industry standards, apply to the Class Period, unless otherwise indicated.

were who they said they were, conflates Enrollment fraud with Transaction fraud, ignores the information the Bank did have, and is otherwise unfounded.

VI. STATEMENT AND EXPLANATION OF OPINIONS

A. The Bank's regulators would not have accepted the Claim Fraud Filter and the opinion that it was "reasonable" for the Bank to believe they would have, is incorrect

15. Mr. Cronan claims in his report that it was reasonable for the Bank to deviate from its usual conduct regarding Regulation E investigations and implement the CFF and CFF-1 because of the extraordinary circumstances that existed in the summer of 2020, and that the Bank's regulators would likely have found this deviation acceptable. Mr. Cronan opines that during that time, the Bank was forced to modify its pre-pandemic investigation approach because of "unprecedented" levels of fraud, including the "new" fraud scenario of "double dipping.[4]" I do not disagree that the Bank faced substantial amounts of fraud during the relevant time period, but I strongly disagree with Mr. Cronan's assertion that the CFF was a response that its regulators reasonably would have approved of.

16. As stated in my opening report, the [redacted]

[4] The phenomenon of "double-dipping" has been around as long as EFTA has been around. It is a known risk in the financial services industry, which EFTA-compliant manual investigation protocols, such as the Bank's [redacted] are designed to identify. In my opinion if the Bank had continued to utilize the [redacted] to manually investigate unauthorized transaction claims on the scale that was necessary, it would have succeeded in identifying most of the transactions that involved double-dipping.

[redacted].[5] In my experience, manual reviews like the [redacted] which include mandatory procedures and supplemental procedures, are extremely effective in achieving what they are designed to do, i.e., identify whether the disputed transaction was unauthorized as the customer claimed, or authorized, whether as the result of first-party fraud or an innocent mistake by the customer.

17. In my opinion, the Bank's statement in its opposition brief that Claim Fraud Filter Indicator 1 was based on "[redacted]" is unsupportable.[6] In my experience, transaction fraud based on an unauthorized ATM transaction is very common in the financial services industry where mag-stripe-only cards are involved. It is for this reason that it is an industry standard for investigation protocols, like the Bank's [redacted] to include instructions for investigating unauthorized ATM withdrawals.

18. Nowhere in Mr. Cronan's report, or elsewhere in the record, is there any indication that the Bank approached its regulators for any kind of pre-approval

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[5] *See* Kreis Report § B, ¶¶31-41 ("The Bank's [redacted] and related training materials for claims analysts provide sensible procedures for EFTA/Reg E compliance that are consistent with well-established industry standards for investigating unauthorized transaction claims.").

[6] Opp. to Pls.'s Mot for Class Cert. 2:16-17.

(or post-approval) of the Bank's plan to implement the CFF. The Bank's representative testified to the same.:

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted].[7]

19. As the second largest bank in the country with over $2 trillion in assets, the Bank has unparalleled access to its regulators. Given the unprecedented and extraordinary nature of CFF-1, the Bank would most certainly have been able to approach its regulators to obtain an expedited opinion regarding its plan to implement CFF-1. In my experience, even a small financial institution has the ability to reach out to regulators to approve the future implementation of automated

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[7] Ex. 17 (30(b)(6) Deposition of the Bank by its designee Michael Letson) at 26:5-22. "Ex." refers to exhibits to the Chan Declaration and Supplemental Chan Declaration in support of Plaintiffs' class certification ("Mot."); "DX" refers to exhibits to the Brys Declaration in support of the Bank's opposition to class certification ("Opp.").

systems. I have worked with the startup FinTech company "Upstart," that sought and received a No-Action Letter from the CFBP regarding the implementation of an automated process. Based on my experience, in my opinion, it is implausible that Bank of America, the second largest bank in the country, would have been unable to consult its regulators prior to implementing the CFF-1. In my opinion, the Bank's failure to do so indicates that the Bank itself believed that its regulators would not have approved the Bank's implementation of the CFF.

20. As I explained in my original report from ¶¶ 67-75, the Bank's CFF was [redacted] In supporting his opinion, Mr. Cronan does not address this aspect of my report and only asserts that the Bank was justified in "leveraging automation and other tools to identify indicia of potential fraud." Beyond the fact that the Bank did not use the CFF to *identify* fraud as a standard red flag requiring follow-up inquiries or investigation, and instead used CFF-1 for the unprecedented purpose of *decisioning* unauthorized transaction claims without any further inquiry/investigation, that in fact Mr. Cronan ignores the [redacted] nature of CFF-1 further makes his opinion that the CFF would have been acceptable to regulators, unfounded and unreliable. As a general matter, Ms. Pesce and Mr. Cronan's opinions conflate use of automated tools as one step in a bank's investigation, which is not unusual, with what the Bank did here, which was rely on the CFF-1 to the exclusion of all other information available to the Bank.

B. Safety and Soundness Requirements Did Not Support the Implementation of CFF-1

21. Mr. Cronan further justifies his opinion that CFF-1 was reasonable by positing that "safety and soundness" would not affect the conduct of the Bank's Regulation E investigations in typical circumstances. (Cronan rpt. ¶ 32.) He then goes on to say that because of the unusual circumstances, namely the "unprecedented spike in fraud" during the pandemic, safety and soundness considerations could have made it reasonable for the Bank to believe that its deviation from its longstanding and usual Reg E investigation procedures by implementing CFF-1 would be acceptable to its regulators. *Id*. However, this opinion is directly contradicted by Mr. Cronan's concession in ¶ 18 of his report that "[redacted]." It is my opinion that Mr. Cronan's statement at ¶ 18 is correct, and that safety and soundness considerations would not have caused the Bank to reasonably believe that its regulators would have approved of the Bank implementing CFF Indicator 1. To the contrary, the absence of any actual threat to the safety and soundness of the Bank supports the likely outcome of such a request for advice from the Bank's regulators (which was never made); i.e., that CFF-1 is an unacceptable departure from the [redacted] and would be unduly harmful to consumers.

22. Lastly, in paragraph 43 of his report, Mr. Cronan admits that he is aware of the consent orders with the Bank's regulators, making specific factual findings regarding the impropriety of the Bank's unilateral actions and fining the Bank $225 million in connection with the Bank's implementation of the CFF, making his opinion that the regulators would have found it acceptable, even more perplexing.

C. My report did not ignore the Bank's position during unprecedented circumstances.

23. Both Mr. Cronan and Ms. Pesce assert that my opinions that the Bank could have prioritized higher-dollar-value claims and hired more staff in response to the spike of claims are "fatally flawed" because they assert my report ignores the unprecedented circumstances surrounding the Bank's implementation of the CFF. These opinions are unfounded and mischaracterize my report.

24. While the challenges presented by the pandemic were substantial, so too are the resources, experience and abilities of Bank of America, the second largest Bank in the United States. In my experience, the Bank had ample resources and ability to address the challenges created by the pandemic without resorting to implementing CFF-1.

25. First, as articulated above, Mr. Cronan admits in paragraph 18 of his report that it was "[redacted]" It does not follow then that my report and opinions are flawed because I did not "appropriately consider how pandemic

circumstances and safety-and-soundness obligations can affect a financial institution's Regulation E investigative processes." (Cronan ¶ 57) As discussed above, Mr. Cronan agrees that safety and soundness was not threatened by the EDD program, so my original opinion that higher dollar value claims could have been prioritized for review continues to be correct. Ms. Pesce opines that this option would not "solve the problem that the Bank was facing. (Pesce ¶ 53) Ms. Pesce is simply incorrect. Increasing the dollar value threshold would alleviate some of the burden the Bank faced in investigating claims and would have provided an opportunity to triage the Bank's exposure to fraud by ensuring it was focused on the most significant claims. Additionally, in my experience, low-dollar-value claims are the least likely to be fraudulent, as fraudsters typically are trying to extract maximum value in each fraudulent transaction. Notably, this strategy would also ensure that legitimate EDD cardholders were timely receiving their funds in their time of extreme need during the height of the pandemic.

26. Second, both Cronan and Pesce's assertions that hiring additional claims analysts was "unrealistic" and "challenging" are unfounded. Cronan asserts that hiring sufficient analysts would have taken "months to properly onboard and train" and Pesce nakedly asserts that "the Bank could not have just hired masses of workers from a temp agency."

27. I have direct experience working with Accenture and using its large scale professional staffing services. It is my opinion that Bank of America could have hired sufficient numbers of highly trained claims analysts in the relevant time from this or another highly specialized global professional services company.

28. I have personally managed an engagement with Accenture, where it provided human resources to support the development of enhanced customer service operations for a leading US lender. Accenture alone operates with approximately 774,000 people serving clients in over 120 countries.[8]

29. As I stated in my original report, utilizing the services of such an operation (or multiple) would have been expensive, but would have been realistic given the enormous resources of the second largest bank in the country. The Bank even boasted of its profitability during this same period. According to the Bank's Chief Financial Officer Paul Donofrio in a statement in the Bank's 3Q20 press release:

> "The past nine months have tested us and I'm proud to say that our teammates have responded extraordinarily well – continuing to deliver for our customers, our communities and our shareholders. In addition to providing billions of dollars in credit and liquidity to clients, and committing billions more to the communities in which we live and work, we have earned more than twice our dividend in every quarter since the crisis began. Equally important, **our capital position and credit reserves increased this quarter, which**

[8] https://newsroom.accenture.com/fact-sheet

positions us to continue to be a source of strength for all of our stakeholders."[9]

D. The Number of Claims and Volume of Fraud does not Excuse the Bank from its Obligations under EFTA and Regulation E.

30. Ms. Pesce's opinion that the Bank was facing an unprecedented number of claims and an unprecedented volume of fraud consistently confuses *Enrollment* fraud with *Transaction* fraud. My opinions are relevant to transaction fraud, (i.e., fraudsters withdrawing funds from legitimate cardholder accounts at ATMs) and Ms. Pesce's conflation of enrollment fraud with transaction fraud (i.e. EDD providing benefits to fraudsters) mischaracterizes and fails to respond to my opinions.

31. These two distinct types of fraud are important to distinguish as the losses from transactional fraud ATMs are borne by the Bank under EFTA. In my opinion, the Bank implemented the CFF to protect itself from these losses.[10]

32. In contrast, Ms. Pesce opines that the Bank needed to implement the CFF partly because [redacted] (Pesce rpt. ¶ 50.) This opinion is unfounded [redacted]

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[9]Bank of America Q3-2020 Press Release: https://d1io3yog0oux5.cloudfront.net/_bbf0ea09eaf78598eeac640a10954783/bankofamerica/db/806/8687/earnings_release/3Q20+Press+Release.pdf (emphasis added)

[10] With the CFF, [redacted]. (Letson Tr.) 239:3-243:5.

[redacted],[11] [redacted].[12] This is further borne out by the fact that in March 2021, the Bank [redacted].[13] Required procedures [redacted].[14] It is my understanding based on the Bank's records that the Bank applied its [redacted].[15]

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[11] Kreis report ¶ 36(5), (citing Ex. 14 (Daniels Tr.) 155:23-156:21).
[12] Kreis report ¶ 36(2), (citing Ex. 14 (Daniels Tr.) 90:1-91:5 ([redacted])
[13] Ex. 91 at -125921; Ex. 16 (Martin Tr.) 301:18-302:25.
[14] *See, e.g.*, Ex. 47 at -100663 (Bank instructing analysts to "[redacted]." *See also*, Kreis report ¶ 36 (6) "[redacted]"
[15] *Id. See also*, Opp. to Pls.'s Mot for Class Cert. 20:19-23:8.

33. Ms. Pesce's opinion even includes some of this evidence where she agrees [redacted]. (Pesce ¶ 43)

34. In my experience, the Bank also had other methods to ascertain customer information that would not have required them to resort to implementing the CFF. Namely, the Bank could have conducted a third-party automated screening of EDD accounts with an organization like LexisNexis or Trulioo. For example, in addition to "[redacted]" and "[redacted]," the Bank's "[redacted]" list other "[redacted]" including "[redacted]," "[redacted]," "[redacted]" "[redacted]" and [redacted][16] These and other tools could have been used to segment individuals with inconsistent information from other accountholders. The Bank's representative Martin [redacted] in his 30(b)6 deposition. According to Martin, [redacted]

[16] Ex. 64 at -90723

[redacted].[17]

Executed on November 21, 2024

J. DANIEL KREIS

[17] Ex. 16 (Martin Tr.) 217:20-220:7

APPENDIX B

Date	Doc Type	Title/Desciption	Bates Range
4/1/2020	PowerPoint (Training Slide Deck)	[redacted]	BANA_EDD_MDL-00100530
4/1/2020	PowerPoint (Training Slide Deck)	[redacted]	BANA_EDD_MDL-00006482 - 6535
4/24/2020	Email	[redacted]	BANA_EDD_MDL-00228914
6/1/2020	PowerPoint (Training Slide Deck)	[redacted]	BANA_EDD_MDL-00100741
8/18/2020	Email	[redacted]	BANA_EDD_MDL-00455617
8/19/2020	Email	[redacted]	BANA_EDD_MDL-00218256
8/31/2020	Letter	[redacted]	Moore_S_0000367
9/1/2020	PowerPoint (Training Slide Deck)	[redacted]	BANA_EDD_MDL-00004535-4580
9/1/2020	PowerPoint (Training Slide Deck)	[redacted]	BANA_EDDMDL-00003912 - 3937
9/2/2020	Letter	[redacted]	PLFF00000011
9/16/2020	Document	[redacted]	
9/22/2020	Email	[redacted]	BANA_EDD_MDL-00104526 - 104527
9/23/2020	Email	[redacted]	BANA_EDD_MDL-00225047-225048
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10/9/2020	Document	[redacted]	BANA_EDD_MDL-00592324-592330
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5/17/2021	Court Filing	[redacted]	
6/2/2021	Court Filing	[redacted]	
7/7/2021	Email	[redacted]	BANA_EDD_MDL-00406128-406130
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5/25/2023	Court Filing	[redacted]	
6/13/2023	Court Filing	[redacted]	
10/20/2023	Organizational Charts	[redacted]	BANA_EDD_MDL-00057837-57878

2/2/2024	Discovery Response	[redacted]	
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2/4/2024	Deposition Notice	[redacted]	
2/6/2024	Deposition Transcript	[redacted]	
2/8/2024	Deposition Transcript	[redacted]	
2/14/2024	Deposition Transcript	[redacted]	
2/16/2024	Deposition Transcript	[redacted]	
2/22/22024	Deposition Transcript	[redacted]	
4/23/2024	Discovery Response	[redacted]	
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10/24/2024	Court Filing	[redacted]	
10/24/2024	Court Filing	[redacted]	
10/24/2024	Court Filing	Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Class Certification	
8/29/2024	Court Filing	Expert Class Certification Report of J. Daniel Kreis	
N/A	Press Release	Bank of America Q3-2020 Press Release	

12/10/2020	Article	Alan S. Kaplinsky, "CFPB issues new no-action letter to Upstart"	