Exhibit 162

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

In re Bank of America California Unemployment Benefits Litigation,	Case No. 3-21-md-02992-GPC-MSB
This Document Relates to All Actions	

EXPERT REBUTTAL REPORT OF

GREG J. REGAN, CPA/CFF, CFE

November 21, 2024

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I. INTRODUCTION

A. Nature of My Assignment

1. My firm, Hemming Morse, LLP ("HM"), was retained by Plaintiffs' counsel in *In re Bank of America California Unemployment Benefits Litigation*, Case No. 3-21-md-02992-GPC-MSB. On August 29, 2024, I issued an expert report on this matter (the "Regan Report").[1] The Regan Report addressed five proposed classes: Claim Denial, Credit Recission, Account Freeze, Customer Service, and EMV Chip. For each of these classes, I presented methodologies to 1) identify proposed class members and 2) calculate classwide damages.

2. Bank of America (the "Bank") retained Victor Stango, Stephen Hindle and Pamela Joseph to, among other things, respond to the opinions I presented and documented in my Regan Report. On October 24, 2024, the Bank submitted reports it had obtained from Mr. Stango ("Stango Report"), Mr. Hindle ("Hindle Report), and Ms. Joseph ("Joseph Report"). In this Rebuttal Report, I respond to statements and opinions in the Stango Report, Hindle Report, and Joseph Reports (collectively the "Bank's Expert Reports") that respond to my Regan Report.

3. This Rebuttal Report should be read in conjunction with the Regan Report. None of Mr. Stango's, Mr. Hindle's, or Ms. Joseph's opinions, whether or not specifically addressed in this Rebuttal Report, change my opinions set forth in the Regan Report. Further, as set forth below in greater detail, many of the statements and opinions set forth in the Bank's Expert Reports are incorrect, unsupported by the facts and conditions as they existed during the Class Period, and/or are contradicted by available information produced in this matter.[2]

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[1] All defined terms used herein are consistent with those used in the Regan Report. I summarized my qualifications and compensation in the Regan Report. The additional data that I relied upon for purposes of this Rebuttal Report are identified in **Appendix C** hereto.

[2] My decision not to respond to a specific assertion made in the Bank's Expert Reports should not be construed to mean my agreement with such assertions.

B. Summary of My Responses to the Stango Report

4. The Stango Report mischaracterizes the Regan Report and provides a flawed analysis of the methodologies I proposed in the Regan Report. The first step in my analysis of classwide damages as presented in the Regan Report involved the identification of proposed class members. Mr. Stango states that my methodology would result in the inclusion of unharmed consumers. His criticism misstates my proposed methodology, a methodology that is consistent with the process implemented by the Bank under its Remediation Plan pursuant to the CFPB and OCC Consent Orders to exclude fraudulent claims, and is based on data produced by the Bank identifying EDD cardholders determined to be ineligible under the Remediation Plan as of April 19, 2024. Through application of my methodology, I excluded thousands of such fraudulent claims, as further addressed in § II.A. If the Bank were to identify additional individuals determined to be ineligible under the Remediation Plan, I could exclude them as well.

5. The methodologies I presented are designed to enable the trier of fact to calculate classwide damages on an independent basis for each of the five classes, mostly using the Bank's own data. In the Regan Report, I provided several illustrative calculations using my proposed damage methodologies, based on inputs informed by Bank and industry data, to demonstrate how the trier of fact could reasonably determine classwide damages. Mr. Stango's criticisms of my damages analysis reflect his disagreement with some of the inputs I presented for illustrative purposes, rather than with the underlying methodologies I had proposed. That is, instead of disputing the validity of my proposed methodologies or formulas for calculating damages, he disputes only some of the examples I used to show how some of the variable inputs that could be used in those methodologies or formulas could be quantified—which I understand is ultimately an issue for the trier of fact to determine.

6. The literature cited by Mr. Stango frequently fails to support his criticisms and in many cases confirms my analysis regarding the illustrative inputs he challenges, as further explained below. Mr. Stango also purports to identify certain examples among the more than

109,000 proposed class members that he uses as the basis for asserting that an individualized approach to damages is required and to criticize my methodologies. The examples he cites, however, are outliers. My methodologies continue to be reasonable to measure aggregate damages for each class. In fact, the reasonableness of my approach is underscored by [redacted]

C. Summary of My Responses to the Hindle Report

7. The Hindle Report inaccurately characterizes the Regan Report and provides a flawed analysis of the methodologies I proposed for calculating damages associated with the Customer Service Class. These issues are addressed further in § III.B.

D. Summary of My Responses to the Joseph Report

8. Ms. Joseph asserts that an EMV chip would not have been sufficient to prevent certain transactions, including card-not-present transactions, that were included in claims [redacted] I have been asked to assume that the Bank's existing records contain sufficient information to identify such transactions. To the extent a determination is made that such transactions should be excluded from the EMV Chip class members' damages, it would be straightforward to do so, using the Bank's own information identifying that sub-category of claims. These issues are addressed further in § IV.B.

II. RESPONSES TO MR. STANGO'S ANALYSIS OF THE CLAIM DENIAL, CREDIT RESCISSION, AND ACCOUNT FREEZE CLASSES

A. Mr. Stango's Assertions Regarding the Need to Exclude Additional Unharmed Cardholders Are Misleading and Misstate My Methodology

9. The methodology I proposed to identify which EDD debit cardholders were members of the Claim Denial, Credit Rescission, and Account Freeze classes was designed, among other things, to exclude Cardholders who had been disqualified by EDD from Program

eligibility, who had been found to have engaged in fraudulent conduct, or who have had their card frozen due to legal order processes. (*e.g.*, Regan Report ¶¶ 4, 31, 82, 97.) [redacted] I used the Bank's own data to exclude thousands of claims for these reasons, and under the methodologies I proposed, any additional claims that are subject to these exclusions would similarly be excluded.

10. Mr. Stango asserts that the Bank might have paid other fraudulent claims that require further exclusion.[3] Specifically, he focuses on the Bank's assertion that the Bank [redacted], as described in the Remediation Plan. Mr. Stango hypothesizes that some unknown number of those [redacted] may have resulted in the payment of fraudulent or mistaken claims.

11. The Remediation Plan was submitted to regulators in October 2022.[4] In the Remediation Plan, [redacted][5] [redacted][7] There are, however,

[3] Stango Report ¶ 32.

[4] Ex. 74.

[5] Ex. 74 at BANA_EDD_MDL-00102558.

[6] Declaration of William Martin in Support of Defendant's Memorandum in Opposition to Plaintiffs' Motion for Class Certification dated October 23, 2024 ("Martin Decl.") ¶ 12 (cited in Stango Report ¶ 33).

[7] Martin Decl. ¶ 12

approximately [redacted] EDD Cardholders whose claims triggered CFF-1 *and* another indicator,[8] and for that reason are not proposed class members. Despite this significant distinction between the two groups, Mr. Stango did not present any analysis to identify the extent to which the Bank's further investigation impacted proposed class members.[9] Accordingly, it is possible that many or even nearly all of the cardholders [redacted] are not proposed class members (*e.g*, are not within the narrower group of cardholders whose claims were denied solely based on CFF-1).[10] Out of the [redacted] CardAliasIDs that have been identified as potentially fraudulent, the Martin Declaration supplied evidence of class membership of five. An analysis of the Bank's data shows [redacted] There is no evidence to assess class membership for any other individual identified in the re-review process.

12. Solely for purposes of responding to Mr. Stango, [redacted].[12] [redacted]

[8] Ex. 59.

[9] At this time, the Bank has not identified [redacted] For clarity, my methodology would allow any of these EDD Cardholders to be excluded from all proposed classes if the Bank provided CardAliasID data.

[10] For example, the Bank's data shows that the two individuals identified in bold [redacted] on page 26 of the Bank's Opposition [redacted] and are, therefore, not members of Plaintiffs' proposed classes as defined. *See* Regan Rep. Schedule 1. The Bank also identifies one individual on page 16 of its Opposition [redacted] whose claim denial was purportedly upheld after a manual investigation; she is not a member of Plaintiffs' proposed classes either. *Id.*

[11] *See* DX 58-62; Regan Rep. Schedule 1.

[12] [redacted] (Martin Decl. ¶ 12.) In total, the Bank [redacted]

[redacted][14]

13. If the Bank or the EDD concludes that the claims of certain additional EDD Cardholders are actually fraudulent, these claims are easily removed from all proposed classes using the existing methodology that I have proposed.

B. Overarching Flaws in Mr. Stango's Analysis of My Proposed Methodologies to Calculate Classwide Damages

1. *The Stango Report Mischaracterizes My Illustrations of Proposed Methodologies to Calculate Classwide Damages*

14. As described above, I provided methodologies to calculate classwide damages available to each of the five classes. Additionally, I provided illustrations of my methodologies to show aggregate damages for each proposed class based on data provided by the Bank and the analyses presented in the Regan Report. Mr. Stango asserts that these illustrations are my actual

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[redacted] (Martin Decl. ¶ 12.) The Bank [redacted] It is possible that the positive rate could increase pending the Bank's completion of the remainder of the investigations or decrease to the extent that proposed class members are not amongst the cardholders subject to further investigation.

[13] Martin Decl. ¶¶8-21.

[14] *See* Martin Decl. ¶¶ 8, 12. Notably, [redacted] DX 58-62.

calculations of damages.[15] That is incorrect. The illustrations are examples of how the methodologies would be applied using inputs that, in my opinion, constitute a reasonable basis for approximating aggregate consequential damages for each class.

15. Mr. Stango also mistakenly asserts that my proposed methodologies assess the same consequential damages multiple times for Cardholders who have more than one claim or are members of more than one proposed class.[16] His assertion, however, misstates the methodologies used in the Regan Report, which were designed to address each proposed claim and ultimately each proposed class on an independent, standalone basis. I took this approach to allow damages to be readily calculated in the event a claim is removed, or damages are awarded for only one of the proposed classes. For this reason, an impacted Cardholder may have more than one claim or may belong to more than one class. Therefore, if an award is made, and depending on the nature of the award, it may be appropriate to disaggregate the damage amounts.[17] This disaggregation is easily undertaken using the existing data in my analysis.

2. *The Stango Report Incorrectly Asserts That Offsets for Funds Paid or To Be Paid to Class Members Have Been Ignored*

16. Mr. Stango also mistakenly asserts that the damage methodologies I proposed fail to account for funds that the Bank has already paid or will pay to proposed class members.[18] This assertion is simply wrong. I expressly stated that my *illustrative* damage calculations may require an offset for amounts paid or payable by the Bank to class members pursuant to the Remediation

[15] *E.g.*, Stango Report ¶¶ 11-12, 42, 53.

[16] Stango Report ¶¶ 108-110.

[17] Regan Report ¶ 62, n. 70; *see also, id.* at ¶ 104, n. 133. The disaggregation of late fees described in Regan Report ¶ 104, n. 133 also applies to the subset of Cardholders with multiple claims involving some period of overlap in a single proposed class.

[18] Stango Report ¶¶ 36-40 (*e.g.*, Stango Report ¶ 40, "The figures put forward by Mr. Regan in Section II.B.3 therefore unequivocally overstate economic harm by omitting Remediation Plan payments…").

Plan. (*e.g.*, Regan Report ¶ 52, n.55.) I also stated that such offset amounts are readily calculable based on the Bank's data and my existing analyses if an award is made in this matter. (*Id.*)

3. *Mr. Stango Analysis Regarding Income Levels and Other Sources of Liquidity for Impacted Cardholders Is Misleading, Unnecessary, and Not Tailored to Recipients of Unemployment Benefits*

17. For purposes of my evaluation of the types of harm experienced by proposed class members, I considered the circumstances faced by typical recipients of unemployment benefits in California in 2020. For example, I described a CFPB study that concluded that "consumers who lost their jobs during the pandemic tended to earn less than the median [wage]." (Regan Report ¶ 39, n. 36.) Next, I considered the fact that EDD benefits replaced only 60%-70% of wages prior to unemployment. (Regan Report ¶ 39.) I then observed that individuals receiving unemployment benefits were less likely to have available savings to bridge the time until re-employment. (Regan Report ¶ 39.) My observation was confirmed by a U.S. Department of Labor study of unemployment benefit recipients in California indicating that 97% of recipients reported those benefits were important to their ability to meet their financial obligations. (Regan Report ¶ 40.) These considerations, among others, provided the basis for my conclusion that the proposed members of the Claim Denial, Credit Recission, and Account Freeze classes were likely to incur a cost as a result of their inability to access their EDD Cardholder accounts when the Bank denied access to, froze or blocked those accounts as alleged by plaintiffs. (Regan Report ¶ 54.) The cost of obtaining substitute funds (or alternatively the cost of not having the EDD funds available) comprised the first type of consequential damages in both of my two proposed methodologies.

a) Mr. Stango Fails to Support His Contention that Proposed Class Members Were Unharmed Because Other Sources of Liquidity May Have Been Available to Replace Inaccessible Funds Held by the Bank

18. Mr. Stango first criticizes my observation that proposed class members tended to earn less than the median wage, which he asserts was not true with respect to every proposed

class member.[19] Mr. Stango attempts to support his claim by citing information he had regarding four proposed class members: [redacted][20] Mr. Stango provides two other data sources in support of his analysis. The first, a survey of 281 consumers sponsored by the Federal Reserve of New York, found that 58% of respondents had household incomes less than $50,000.[21] But the median household income in California in 2020 was considerably higher, $79,000.[22] Thus, the survey Mr. Stango relied upon on does not support his assertion that the remaining respondents with household income above $50,000 exceeded the California median household income. Additionally, Mr. Stango cites an article published by Politico as the basis for his assertion that there were millionaires who collected unemployment benefits in 2020.[23] The Politico article describes an IRS study of 30,000,000 tax returns that reported receiving unemployment income, of which 19,000 or 0.06%, reported income of $1 million or more. Altogether, the data gathered by Mr. Stango does not contradict my observation that the typical income level of proposed class members was below the median California household income. Even if Mr. Stango had been able to present data contradicting my observation, he failed to demonstrate why a recipient's income level prior to the onset of EDD benefits would be a sufficient reason to exclude that consumer from a consequential damages analysis. Additionally, while I observe that typical proposed class members had a lower average household income, the proposed damages calculations in the Regan Report are conservative because I do not, for

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[19] Stango Report ¶ 47.

[20] Stango Report ¶ 47.

[21] Stango Report ¶ 47.

[22] https://data.census.gov/table?q=median%20income&g=040XX00US06&y=2020 (accessed November 13, 2024).

[23] Stango Report ¶ 47, n. 71.

example, apply a higher than average APR to account for potentially increased credit risk. (Regan Report ¶¶ 49-51.)

19. Next, Mr. Stango disagrees with my assessment that proposed class members were unlikely to have significant available savings.[24] The implication of Mr. Stango's claim is that proposed class members may have had available alternative cashflow or savings that might have enabled them to partially or fully avoid consequential damages when the Bank denied them access to their EDD Cardholder accounts.[25] For example, Mr. Stango speculates that some proposed class members "could fund unanticipated expenses entirely from zero-interest sources, even amounting to three or six months' worth of total household expenses, meaning their 'consequential damages' for this component of the Regan damages methodology would be zero."[26]

20. The material that Mr. Stango cites for this contention, however, fails to support his position.[27] For example, Mr. Stango's article states that "many families have little to no financial cushion." (*See* orange highlight in excerpt below) As a result, the study found that, if confronted with an unexpected $400 expense, many consumers would need to either borrow or

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[24] Stango Report ¶ 49.

[25] Stango Report ¶ 54. Mr. Stango also criticizes my inclusion of "small" claims, which he describes as equal to or less than $10.00. (Stango Report ¶ 53.) There are [redacted] claims consistent with Mr. Stango's threshold included in the proposed Claim Denial class (*i.e.*, [redacted] of all included claims). Mr. Stango's observation that such members may have been able to avoid incurring costs for "small" claims ignores the fact that the proposed class members were deprived access to their funds. I am not aware of a basis to exclude claims for purposes of a damage calculation solely because of the dollar amount. Moreover, the damage methodologies I proposed result in commensurately reduced damages for individuals based on the amount of the claim. For example, there are approximately [redacted] claims, or [redacted] of the total number of claims, involving amounts equal to or less than [redacted] in the Claim Denial class. Pursuant to my methodologies, the *total* damages associated with these claims is between [redacted] of classwide Claim Denial damages.

[26] Stango Report ¶ 59.

[27] Stango Report ¶ 59, n. 101 citing Neil Bhutta, and Lisa Dettling, "Money in the Bank? Assessing Families' Liquid Savings using the Survey of Consumer Finances," FEDS Notes, November 19, 2018.

sell something. Further, the benefit of having available funds, such as the balance otherwise available in their EDD Cardholder account, would be that the consumer could avoid "costly borrowing or missed payments." (*See* yellow highlight) These harms, the cost of borrowing and the cost of missed payments, are the primary components of my proposed methodology to calculate consequential damages.

> Families often aim to build up easily accessible savings to help deal with unexpected expenses and disruptions to their income. Professional financial planners often recommend an "emergency fund" of three to six months of expenses.[2] Although interest rates on savings in highly liquid transaction accounts are generally quite low, such savings can help avoid costly borrowing or missed payments when unexpected events arise. Yet there is mounting evidence that many families have little to no financial cushion. For example, a recent survey finds that many Americans would borrow or sell something to cover an unexpected $400 expense, suggesting very low levels of liquid savings among a large fraction of the population.[3]

21. The remainder of Mr. Stango's analysis cites other surveys regarding the percentage of consumers who could fund expenses from sources such as checking or savings accounts.[28] Those surveys, however, also fail to support his contention.[29] Moreover, these surveys do not address the circumstances applicable to recipients of unemployment benefits, which is the relevant population for purposes of this damage calculation.

22. Finally, while Mr. Stango relies on public surveys and studies of consumers generally, he ignores the specific evidence in this case indicating that recipients of the EDD benefits at issue needed timely access to the funds in their Cardholder accounts. In particular,

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[28] Stango Report ¶ 59, n. 102-105.

[29] For example, Stango Report ¶ 49, n. 77 cites Fiona Greig, Erica Deadman, and Tanya Sonthalia, "Household Cash Balance Pulse: Family Edition," JPMorgan Chase Institute, November 2021. This survey found that the average cash on hand during 2020 was approximately $2,000 for families at the 75th percentile of income. (*Id.* at p. 5.) The study also found that low-income families (below the 75th percentile) needed a cash buffer of $2,500. (*Id.* at p. 5.) Another study cited by Mr. Stango discussed the typical recommendation in the financial industry that consumers have enough liquid savings to cover at least three-to-six months' worth of expenses—far more than $2,000 of cash on hand. *See* Stango Report ¶ 56, n. 92 citing Stavins, Joanna, "Unprepared for Financial Shocks: Emergency Savings and Credit Card Debt," Contemporary Economic Policy 39, no. 1, 2021, pp. 59–60.

the Bank's representative, Mr. Chestnut, testified that [redacted]:[30]

[redacted]

23. Mr. Chestnut also testified that [redacted] As a result, Mr. Chestnut's testimony, as well as the material cited by Mr. Stango, are consistent with my conclusion that the most appropriate measures of consequential damages are the costs experienced by proposed class members attributable to "costly borrowing" (*i.e.*, interest cost) and "missed payments" (*i.e.*, late fees). These costs are the focus in my two proposed methodologies to calculate classwide damages. (Regan Report ¶¶ 41-60.)

b) Responses to Mr. Stango's Assertions Concerning the Amount of Liquid Funds Available to Proposed Class Members

24. Notwithstanding the fact that [redacted], Mr. Stango takes the position that "the amount of liquid funds available to each proposed class member at the time of the claim denial would be highly individualized and would impact the likelihood of borrowing on a credit card or incurring credit card late fees due to the Bank's alleged misconduct."[32]

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[30] Ex. 179 (Chestnut Tr.) 63:5-14.

[31] Ex. 179 (Chestnut Tr.) 63:24-64:4, [redacted]

[32] Stango Report ¶¶ 52-53.

25. For the purpose of calculating damages, this is a false premise. The Bank unilaterally imposed a restriction on Cardholders' ability to access their funds. There are two similar outcomes in this situation: 1) the Cardholder did not have alternative liquid funds and was forced to acquire substitute funds with an attendant cost (*e.g.*, credit card interest) or 2) the Cardholder was forced to liquidate other funds, resulting in a lost benefit of having such funds available. For example, Mr. Stango's materials indicate that a substantial percentage of consumers receiving a stimulus payment used that payment to pay down existing debt (*i.e.*, reducing interest cost).[33] Consequently, contrary to Mr. Stango's claim,[34] even if impacted Cardholders had an alternative source of liquid funds, the inability to access their EDD Cardholder funds still had an economic impact. Those cardholders were not able to use those funds for other economically beneficial purposes such as paying down existing debt (*i.e.*, the Cardholder could have avoided other interest cost, but for the Bank's action). (Regan Report ¶ 48.)

C. Mr. Stango's Criticisms Focus on Inputs to My Methodology as Opposed to the Methodology Itself

26. I proposed two methodologies for calculating consequential damages. In related sub-sections, I first described the formula applicable to each method. Then, I provided illustrations of those formulas with selected inputs to clarify those formulas.

27. In Methodology 1, I limited my calculation of damages to the cost incurred by proposed class members associated with the inability to access impacted funds. (Regan Report ¶

[33] Stango Report ¶ 50, n. 83 (indicating 65% of consumers that received such stimulus used those funds to pay down debt); Stango Report ¶ 64, n. 117 ("Pandemic-related assistance provided by the federal government and credit card issuers likely contributed to cardholders paying down their credit card balances, according to our analysis.") This finding is also consistent with the data that I reviewed. For example, I cited a Federal Reserve (Boston) study indicating that, in 2020, many consumers paid down credit card debt. (Regan Report ¶ 48, n. 48; *see* p.2 of the study.)

[34] Stango Report ¶ 58 (asserting that "A consumer who funds unanticipated expenses out of zero-interest funds would incur zero 'consequential damages' associated with interest costs.")

45-52.) I proposed the following formula for calculating aggregate damages: [a]*[b]*[c] where [a] is the inaccessible amount, [b] is a compound interest rate, and [c] is the period of the funds were inaccessible. (Regan Report ¶¶ 42, 45.) The inputs for [a] and [c] in the Methodology 1 formula are known based on the Bank's data and presented on a claim-by-claim basis in Schedule 1 to my report. The input for [b], the interest rate, however, is ultimately an issue for the trier of fact. Accordingly, to illustrate my calculation, I used two interest rates as inputs: 10% and 20%, accompanied by a rationale for each.

28. In Methodology 2, I again focused on the cost incurred by proposed class members associated with the inability to access impacted funds. In addition, I addressed the cost of late or overdraft fees. For proposed members of the Account Freeze class, I also considered the cost of delayed benefit payments. To illustrate my methodology, I used inputs based on the expected experience of typical proposed class members if substitute funds were obtained using a credit card with attendant late fees. (Regan Report ¶¶ 53-61.) As shown by a study cited by Mr. Stango, credit cards are the most common consumer borrowing product and late fees are the most common penalty fee:[35]

[35] Stango Report ¶ 75, n. 143 citing Gathergood (highlighting added). Mr. Stango's cited material also supports my observation that consumers may have incurred additional costs in the form of penalty fees and/or declining credit scores, which I did not include in my analysis of consequential damages. (Regan Report ¶ 60.) Notwithstanding his own cited material, Mr. Stango claims that such additional costs would be "at odds with likely consumer experiences in the pandemic-era credit card market." (Stango Report ¶ 76, n. 146.) *See also*, Stango Report ¶ 56, n. 92 citing Zinman, Jonathan, "Household Debt: Facts, Puzzles, Theories, and Policies," Annual Review of Economics 7, no. 2, 2015, p. 252, "Another reason is that these high stakes are prevalent: They affect most households, including poor ones. According to recent Survey of Consumer Finances Chartbooks, more US households participate in the credit card market (approximately 70%) than hold stocks directly or indirectly (approximately 50%), and participation rates are substantial in the other big US consumer debt markets—mortgages (45%), student loans (19%), and car loans (30%)."

utility. Late payments result in modest direct monetary fees and, more significantly, worsening credit card terms (such as penalty interest rates) and deterioration in the card holder's credit score which can restrict access to future credit and make future credit more costly. Credit cards are the most common consumer unsecured borrowing product and late payment fees are the most common type of penalty fee, which may be an important source of profits for banks (especially in a low interest rate environment).[3] How consumers respond to these fees, and the

29. I address Mr. Stango's criticisms, which focus on the inputs I used to illustrate the two methodologies rather than the methodology itself, in the sub-sections below.

1. *Inputs Used in My Illustrations of the Cost of the Inability to Access Impacted Funds*

30. Mr. Stango asserts that Cardholders may have accessed substitute funds using different sources of funds with different interest rates.[36] My objective was to provide a methodology to reliably calculate classwide damages. For Methodology 1, I illustrated my analysis using interest rates of 10% and 20%. For Methodology 2, I used an interest rate of 20% but assumed proposed class members only needed to find a substitute for 50% of their inaccessible funds.[37] Thus, my methodologies provided a range of reasonably possible outcomes amongst potential class members. For example, Cardholders may have mitigated the loss of funds through other alternatives such as reduced consumption or Cardholders may have borrowed 100% of their denial amount at an average APR of 10% (or any other similar combination of utilization and APR). Again, however, the inability to access his or her funds was not a circumstance chosen by the Cardholder.

[36] Stango Report ¶ 56.

[37] Mr. Stango mischaracterizes the basis for my 50% utilization input. Specifically, Mr. Stango states that I assume proposed class members would have the same available remaining credit as the average consumer with a deep sub-prime credit rating. (Stango Report ¶ 58, n. 99.) In fact, I observed that all other consumer categories could have borrowed up to 100% of their claim denial amount. (Regan Report ¶ 56, n. 59.) I implemented the more conservative assumption of 50% utilization, however, to account for the fact that not all impacted Cardholders may have increased credit card utilization to the full extent possible.

31. Mr. Stango states that interest cost on credit cards "could be below the 20% figure" used in my analysis.[38] The study cited by Mr. Stango described the possibility that a consumer could avoid interest if repayment is made in full within one month from the consumer's disposable income.[39] The study, however, does not address recipients of unemployment benefits whose disposable income was reduced, or recipients who were unable to access their unemployment benefits to make payments sufficient to avoid the incurrence of interest. In fact, the study concludes that consumers forced to revolve their credit card balance will incur interest charges during that time consistent with my methodology to calculate consequential damages.[40]

32. The table below summarizes the typical period that impacted Cardholders were unable to access their EDD funds. This data indicates that the impacted Cardholders' ability to fully repay their existing balance would have been constrained during this time (*i.e.*, the resulting debt balance would have been revolving and thus would have incurred interest cost).[41]

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[38] Stango Report ¶ 64. Separately, Mr. Stango states that I acknowledge "credit cards have differing APRs across consumers, yet [apply] 20% identically to all proposed class members." (Stango Report ¶ 70.) This is a misleading assertion. I based my analysis of the applicable APR on a CFPB study of the credit card market segmenting consumers into five categories. In four of the five categories addressing prime to deep subprime consumers, the average APR exceeded 20%, ranging from 20.8% to 23.6%. (Regan Report ¶ 49.) The final category, Superprime consumers (those with a credit score above 720) had an average APR of 17.4%. (*Id.*) In my analysis, I explained why Superprime consumers were the *least* likely to be representative of the proposed class members and therefore conservatively selected an average APR of 20%.

[39] Stango Report ¶ 64, n. 116 citing Chris Wheat, Erica Deadman, and Daniel M. Sullivan, "How Vulnerable Are Americans to Unexpected Expenses?" JPMorgan Chase Institute, July 30, 2024.

[40] *Id.* at p. 4.

[41] The data for this table is available in Regan Report Schedule 1. Mr. Stango comments that [redacted] of proposed Claim Denial class members had a period of less than [redacted]. (Stango Report ¶ 65.) To be clear, the alleged harm experienced by proposed class members was the denial of access to their otherwise available EDD funds. I am not aware of any justification for deferring the onset of a damage calculation for [redacted] and Mr. Stango does not offer one. The methodology I proposed results in commensurately reduced damages for individuals based on their denial periods. For example, Mr. Stango focuses on claim number [redacted], which was denied for [redacted]. There are only [redacted] Cardholders who experienced a Claim Denial period

	Account Freeze (Days Account was Frozen/Blocked)	**Claim Denial (Days Between Claim Denial and Paid Date)**	**Credit Recission (Days Between Claim Denial and Paid Date)**
Median Days	[redacted]	[redacted]	[redacted]
% Greater than [redacted]	[redacted]	[redacted]	[redacted]

33. Mr. Stango cites two additional studies to support his contention that fewer than half of credit card accounts had a revolving balance, including accounts held by lower income households.[42] While these studies demonstrate that credit card balances commonly revolve, these studies addressed U.S. households overall rather than addressing revolving balances among recipients of unemployment benefits, or more specifically, recipients of such benefits who were unable to access their benefits. This subset of consumers, which would be consistent with the cohort of proposed class members, was under increased financial stress. (Regan Report ¶ 40.) As one of Mr. Stango's studies demonstrates, to address current financial stresses, consumers progress through increasingly costly options: 1) use available cash, 2) use disposable income, 3) use future disposable income to obtain free credit (*i.e.*, pay off credit card balances immediately using income to be earned in the following month), or 4) incur interest costs (*i.e.*, revolve a credit card balance).[43] This progression is consistent with my methodology to identify consequential damages experienced by proposed class members, which focused on the interest cost incurred due to the inability to access funds otherwise available in impacted Cardholders' EDD accounts.

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of one day or 0.02% of total proposed Claim Denial class members. My proposed methodologies calculate *total* consequential damages for these proposed class members in the range of $4.52 to $7.37.

[42] Stango Report ¶ 64, n. 117 and 118. For example, note 118 cites "Economic Well-Being of U.S. Households in 2021," Board of Governors of the Federal Reserve System, May 2022, p. 52, which states that 84% of adults had a credit card in 2021. Approximately 50% of all people carried a balance from month-to-month during the prior year. These percentages were higher amongst people with income from $25,000 to $99,000.

[43] Stango Report ¶ 64, n. 116.

2. Inputs Used in My Illustrations of Late Fees

34. As described in my report, as well as above, fees such as late or overdraft fees are commonly incurred and are most frequently incurred by consumers in financial distress such as the proposed class members. (Regan Report ¶ 58.) I observed that a consumer has an increased risk of incurring such fee(s) as the length of time that the consumer was unable to access the funds available in their EDD Cardholder account increased. (Regan Report ¶¶ 59-60.) Accordingly, I concluded that such fees constitute an additional form of consequential damages to proposed class members for purposes of my Methodology 2.[44]

35. To illustrate my Methodology 2, I relied on data from the CFPB regarding the typical amount of late fee charges for credit cards as the first input in my calculation. (Regan Report ¶ 60.) The second input in my calculation was the number of late fee charges that would have been incurred. As noted above, the number of late fees would be influenced by the duration of time the impacted Cardholder was unable to access the EDD funds. Accordingly, for those consumers with a denial or freeze period in excess of [redacted], I assumed the consumer would incur one late fee each month up to six months for purposes of my illustration. (Regan Report ¶ 59.) If the trier of fact were to determine that a lower frequency (or a lower typical late fee) were more reasonable, the proposed methodology could be easily adjusted to account for such determinations.

36. Mr. Stango criticizes my Methodology 2 for three reasons. First, Mr. Stango says my methodology assumes 100% of proposed class members would have possessed active cards.[45] This criticism mischaracterizes my methodology, which stated that the most likely harm experienced by proposed class members included "fees associated with late payments or overdrafts." (Regan Report ¶¶ 41, 53, 58.) I did not impose a limitation on the type of fee that an impacted Cardholder may have incurred due to inaccessible funds (*e.g.*, a Cardholder may have

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[44] For clarity, my Methodology 1 to calculate consequential damages for proposed class members does not include these types of fees.

[45] Stango Report ¶¶ 72-73.

incurred a late fee on a utility or a rent bill, or an overdraft fee on a bank account). Second, Mr. Stango states that I assume late fees in 100% of months following a claim denial.[46] This statement is also inaccurate. My illustration of my Methodology 2 limited the claim-specific damage calculation to one late fee per month across all of the Cardholder's external accounts for a maximum of six months, but only if the denial extended for that duration. Third, Mr. Stango suggests that impacted Cardholders may have had other liquid funds that could have enabled them to avoid such fees.[47] This suggestion, however, ignores the circumstances confronting the proposed class members. Namely, the proposed class members had lost their employment, applied for and obtained unemployment benefits, but then were denied access to those benefits by the Bank. The evidence I have reviewed, such as Mr. Chestnut's testimony that [redacted], is consistent with the CFPB's finding that unemployment benefits were "crucial in keeping consumers from suffering financially." (Regan Report ¶ 40.) Consequently, I disagree with Mr. Stango's assumption that a significant number of proposed class members had other liquid funds available to eliminate fees as a component of consequential damages for purposes of my Methodology 2.

37. Ultimately, I identified approximately [redacted] proposed class members who met the criteria to receive fees as a component of consequential damages using my Methodology 2. In my illustration of my Methodology 2, the median estimated total fees across all proposed class members are [redacted].[48]

38. Mr. Stango's criticisms focus on one Cardholder in my analysis with total estimated late fees of [redacted].[49] As described above, however, disaggregation of these damages

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[46] Stango Report ¶ 72.

[47] Stango Report ¶ 74.

[48] Regan Report Schedule 1. In my methodology, the maximum late fees for a single claim is [redacted].

[49] Stango Report ¶ 111.

would be appropriate depending on the circumstances of an award because [redacted] Again, however, the damages incurred by these proposed class members would be subject to disaggregation in the event the period of their claims overlaps.

3. Inputs Used in My Illustrations of the Cost of a Delayed Benefit Payment

39. For the Account Freeze class only, my proposed Methodology 2 included a third component of consequential damages to address the cost of the delay that impacted Cardholders experienced as a result of the EDD's inability to deposit additional funds into the Cardholder's account once it was frozen by the Bank. (Regan Report ¶¶ 105-106.) The CFPB concluded that such delays caused substantial hardship on consumers. (*Id.*) To illustrate my methodology, I calculated that [redacted]. (Regana Report ¶ 106.)

40. Mr. Stango criticizes this component of my Methodology 2 for the same reasons he criticized the first component (*i.e.*, the cost associated with obtaining substitute funds).[51] Mr. Stango also states that my methodology does not identify how to calculate the time between when the EDD would have credited the benefits to the Cardholder account and when the benefit check reached the Cardholder.[52] As I described, this data is available from the EDD's records, which I plan to incorporate into my damage calculations at the time it becomes available. (Regan Report ¶ 106.)

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[50] [redacted]

[51] Stango Report ¶ 94.

[52] Stango Report ¶ 95.

D. [redacted] Support the Reasonableness of My Proposed Methodologies to Calculate Classwide Damages

41. The methodologies to calculate classwide damages presented in the Regan Report were designed to address the types of harms experienced by the majority of proposed class members based on generally accepted financial theory. (Regan Report ¶¶ 46, 70.) In support of these conclusions, I described [redacted]

[redacted]

42. Ultimately, my illustrations of my proposed methodologies [redacted][54]

43. Mr. Stango does not dispute [redacted][55]

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[53] Regan Report ¶¶ 71-75 citing Ex. 74 at -102556, which described the key principles to guide the Remediation Plan. Stango Report ¶ 71, n. 135 references another similar assertion made by the Bank in the Remediation Plan.

[54] Stango Report ¶¶ 37, 39, 85, 91. Mr. Stango's comparisons focused only on my Methodology 2. However, Mr. Stango understates the degree to which [redacted]. This comparison is incorrect because Mr. Stango simply added together my illustration of consequential damages across all proposed classes, which is not an analysis that I provided. Also, as described in § II.B herein, the [redacted] million calculated by Mr. Stango would be reduced as a result of disaggregation across classes. Finally, for clarity, the total illustrative consequential damages using my Methodology 1 would be lower than using Methodology 2 (*i.e.*, [redacted]).

[55] *E.g.*, Stango Report ¶ 42 at n. 64, ¶ 58 at n. 98, ¶ 67.

44. Mr. Stango also comments [redacted][57]

E. Mr. Stango's Criticisms of My Disgorgement Methodology Are Flawed

45. It is my understanding that a disgorgement calculation involves an iterative process. First, the plaintiff's role is to make a reasonable approximation of the amount of the defendant's wrongful gain. At that point, the defendant's role is to resolve residual uncertainty in the net profit calculation.[58]

46. I presented a methodology to calculate disgorgement of the Bank's profits earned on the amounts withheld from proposed class members based on CFF-1. (Regan Report ¶¶ 78-79.) Specifically, during the time proposed class members were denied access to their funds, the Bank benefitted from incremental Float Revenue. (*Id.*) If the Bank had not denied Cardholders access to their funds, by contrast, [redacted]

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[56] Stango Report ¶ 69.

[57] DX 8 (Lennon Decl.) ¶16.

[58] In support of my methodology, I cited the Restatement of the Law, Restitution, and Unjust Enrichment 3d ("Restatement 3d"). (Regan Report ¶ 78, n. 99.) The Restatement 3d at (5)(d) states "A claimant who seeks disgorgement of profit has the burden of producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain. Residual risk of uncertainty in calculating net profit is assigned to the defendant."

[redacted][59]

47. Mr. Stango criticizes my proposed methodology for calculating disgorgement because he claims that Cardholders would not have withdrawn their balance immediately.[60] [redacted] Regardless, Mr. Stango failed to provide any data to demonstrate that my proposed methodology to approximate the Bank's alleged wrongful gain is unreliable, which, as described above, is the generally accepted role of the defendant's expert in a disgorgement analysis.

F. Treble Damage Calculations

48. I was also asked to provide illustrative calculations of treble damages. (Regan Report ¶¶ 76, 90.) Mr. Stango does not offer any new criticism regarding my illustrative treble damage calculations but instead repeats his earlier criticisms of my consequential damages calculations,[61] which I addressed above. I understand that offsets to damages for amounts that the Bank has paid or will pay to proposed class members are applied after calculating all damages, including treble damages.

III. CUSTOMER SERVICE CLASS

49. I provided a methodology to identify proposed members of the Customer Service class. Specifically, I used Bank records already produced to Plaintiffs to identify a subset of those EDD Cardholders impacted by CFF-1 who called the Bank's customer service phone number between September 13, 2020 and November 21, 2020, and explained that Bank records may be used to identify the remaining members of the class as well. (Regan Report ¶¶ 110-111.)

50. I also proposed a methodology to calculate aggregate classwide damages. Specifically, classwide damages may be calculated by multiplying [1] excess hold time by [2]

[59] *See* Ex. 179 (Chestnut Tr.) 61:9-64:4 described above.

[60] Stango Report ¶ 81.

[61] Stango Report ¶¶ 78-79, 87.

the number of times each Cardholder called, by [3] the applicable minimum wage or another reasonable metric to determine the total value of class members' lost time.[62] (Regan Report ¶¶ 113-114.) At the time of my initial report, the Bank had not produced data sufficient to determine excess hold time for each EDD Cardholder call. I understand Mr. Hindle has asserted the Bank claims not to have records showing the amount of time a proposed member of the Customer Service class spent on hold, but whether these records exist is in dispute.[63] My proposed methodology considers the average excess hold time experienced by EDD Cardholders on an aggregate basis, which, without further data from the Bank, provides the best estimate of the total time for all proposed class members. If such records do exist, the excess hold time could be calculated based on the hold time of each call.

51. I also proposed a methodology to calculate disgorgement of the Bank's profits related to the Customer Service class. (Regan Report ¶¶ 115-117.)

A. <u>Responses to the Stango Report</u>

52. Mr. Stango claims "an individualized inquiry would be required to measure any alleged harm" related to the Customer Service class.[64] Mr. Stango's first criticism is that the applicable minimum wage may vary.[65] To be clear, California has a statewide minimum wage.[66] A city or county may have a higher minimum wage than the state's rate.[67] My methodology,

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[62] Excess hold time may be measured based on (a) the average ASA across the entire class period or (b) the average ASA by week during the class period, which are presently available. Alternatively, excess hold time may be measured based on (c) the ASA of each call, which I understand to exist in the Bank's records. The data source selected by the trier of fact for the excess hold time may be used as the input in my proposed methodology.

[63] Hindle Report ¶ 18.

[64] *Id.*

[65] Stango Report ¶ 98.

[66] State of California, Department of Industrial Relations, https://www.dir.ca.gov/dlse/faq_minimumwage.htm.

[67] *Id.*

however, would apply the then-current California minimum wage as the basis to determine the value of proposed class members' lost time.[68]

53. Mr. Stango also expresses a concern that the value of consumer's time may not equal their wage.[69] As noted above, however, the use of the California statewide minimum wage to calculate damages is the lowest possible wage value of the consumer's time. Mr. Stango also cites studies purportedly supporting his surmisal that some class members may have been multi-tasking or may have contacted customer service during their less valuable leisure time.[70] As described above, however, the objective of my analysis is to provide a reasonable classwide calculation of damages, and I have provided a methodology to do so. If the trier of fact concludes that a modified input to measure the value of proposed class members' time applies, my methodology is easily updated with the modified input.

54. Mr. Stango did not address my disgorgement analysis.[71]

B. Responses to the Hindle Report

55. Mr. Hindle criticizes my use of the average excess hold time, which is an input to my methodology, because he contends that hold times vary.[72] Specifically, Mr. Hindle states that "applying an average wait time over the Proposed Class Period to the class members would overstate damages for some and understate damages for others."[73] The purpose of my analysis,

[68] Mr. Stango also suggests that variability would arise depending on whether the minimum wage was associated with the proposed class member's pre-benefit employment, the job after re-employment, or another factor. (Stango Report ¶ 98.) Again, the use of the California statewide minimum wage removes potential variability related to Mr. Stango's concern.

[69] Stango Report ¶ 100.

[70] Stango Report ¶¶ 101-104.

[71] Stango Report ¶ 6 (indicating that he was only asked to assess my methodologies to calculate disgorgement for the Claim Denial, Credit Recission, and Account Freeze classes).

[72] Hindle Report ¶¶ 16-17. I understand that Mr. Minnucci will concurrently issue a separate rebuttal report addressing other criticisms by Mr. Hindle, including his opinions regarding calculation of excess hold time.

[73] Hindle Report ¶ 17.

however, was to provide a methodology for calculating aggregate classwide damages, which may be measured using average wait times in the absence of additional data from the Bank's records.

IV. EMV CHIP CLASS

56. I proposed a methodology to identify proposed members of the EMV Chip class and methodologies to calculate aggregate actual damages for the EMV Chip class. (Regan Report ¶¶ 119-120.)

57. I also proposed a methodology to calculate disgorgement of the Bank's profits related to the EMV Chip class. (Regan Report ¶ 122.)

A. Responses to the Stango Report

58. Mr. Stango's criticisms regarding my methodology to identify proposed EMV Chip class members are identical to those he expressed with respect to the Claim Denial, Credit Recission and Account Freeze classes,[74] which I addressed in § II above.

59. Mr. Stango does not offer any additional criticisms regarding my methodologies to calculate EMV Chip class damages but instead relies on his criticisms of my methodologies to calculate Claim Denial and Credit Recission class damages. Additionally, Mr. Stango asserts that my calculation of EMV Chip class damages reflects double-counting.[75] I also addressed the flaws in those criticisms in § II.

60. Mr. Stango did not address my disgorgement analysis.[76]

B. Responses to the Joseph Report

61. For purposes of my analysis, I was asked to assume that the members of the Claim Denial and Credit Recissions classes would also be members of the EMV Chip class.

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[74] Stango Report ¶ 106.

[75] Stango Report ¶ 108.

[76] Stango Report ¶ 6 (indicating that he was only asked to assess my methodologies to calculate disgorgement for the Claim Denial, Credit Recission, and Account Freeze classes).

(Regan Report ¶ 119.) My methodology for calculating the EMV Chip class's damages tracks my methodology for calculating the damages of the Claim Denial and Credit Rescission classes, based on my assumption that EMV chips would have prevented the unauthorized ATM withdrawals that were the subject of all EMV Chip class members' CFF-1-triggering claims.[77]

62. Ms. Joseph asserts that my methodology overstates the damages attributable to the lack of an EMV chip in class members' EDD debit cards because [redacted]

63. At this time, the Bank has not produced information sufficient to identify claims meeting the criteria identified by Ms. Joseph. I have been asked to assume that the Bank's existing records contain sufficient information to identify such claims and to identify the particular disputed transactions included in those [redacted] To the extent a determination is

[77] My assumption was supported by the Expert Report of Jane Cloninger dated August 29, 2024.

[78] Joseph Report ¶¶ 86-88.

made that the amount of such disputed transactions should be excluded from the EMV Chip class's damages, the Bank's information could be used to do so.

64. Ms. Joseph also asserts that my methodology overstates the damages attributable to the lack of an EMV chip in class members' EDD debit cards because [redacted]. Regardless, it is my understanding that Bank records reflect whether a cardholder reported a lost or stolen card, so any such individuals are identifiable from the Bank's records, and their damages could be excluded from the EMV Chip class's damages calculations if necessary.

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Greg J. Regan, CPA/CFF, CFE
November 21, 2024

In Re: Bank of America California Unemployment Benefits Litigation
Appendix C - Documents Considered
Rebuttal Report of Greg J. Regan, CPA/CFF

File
Decl. of Jennifer Lennon ISO Defendant's Memorandum in Opposition to Plaintiffs' Motion for Class Certification
Decl. of William M. Martin ISO of Defendant's Memorandum in Opposition to Plaintiffs' Motion for Class Certification
Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Class Certification
Expert Report of Jane Cloninger dated August 29, 2024
Expert Report of Victor Stango dated October 24, 2024 and supporting materials
Expert Report of Pamela Joseph dated October 24, 2024
Expert Report of Stephen Hindle dated October 24, 2024
https://data.census.gov/table?q=median%20income&g=040XX00US06&y=2020
https://www.dir.ca.gov/dlse/faq_minimumwage.htm