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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 21-MD-02992-GPC-MSB **DEFENDANT BANK OF AMERICA, N.A.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO EXCLUDE PURPORTED EXPERT OPINIONS OF JANE CLONINGER** Date: April 17, 2026 Time: 1:30 p.m. Ctrm: 12A – 12th Floor Judge: Hon. Gonzalo P. Curiel ORAL ARGUMENT REQUESTED FILED PROVISIONALLY UNDER SEAL PURSUANT TO STIPULATED PROTECTIVE ORDER

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Plaintiffs allege that Bank of America (BANA) should have implemented EMV chip technology in EDD prepaid cards before 2021, and that the failure to do so resulted in the fraud reported by class members—a causal link that is critical for their EMV claims to survive. In support, Plaintiffs offer "expert" opinions from Jane Cloninger, a former consultant. Cloninger's experience, however, is limited to preparing cost-benefit analyses to be used by her clients in evaluating whether to implement EMV chip technology in their card products. Cloninger has no experience analyzing the causes of fraud, including the determination of whether and how much fraud can be avoided by EMV chips. She also has no experience deciding whether to implement EMV chips, nor does she have any experience with the actual implementation process.

Despite the limits of her experience—including the complete lack of any experience with fraud analysis—Cloninger offers several opinions about a causal link between the absence of EMV chips on California's Employment Development Department (EDD) prepaid cards and the alleged fraud at issue in this case. She opines, for example, that the absence of EMV chips led to an increase in skimming attacks on these cards, and that EMV chip technology would have prevented "all or virtually all" of the fraud allegedly experienced by class members. Cloninger also opines that it would have been "feasible" to implement EMV chip technology into EDD prepaid cards during the COVID-19 pandemic—even though she has no operational experience on which to base such an opinion.

Not only are these opinions far outside the scope of Cloninger's expertise, they also are not based on a reliable methodology or, indeed, any discernable methodology at all. Cloninger conducted no analysis whatsoever before concluding that adding EMV chips before 2021 would have prevented "all or virtually all" of the alleged fraud—failing to consider (and rule out) other causes of fraud, despite admitting that EMV chip technology does not prevent all fraud. She similarly conducted no analysis before surmising that it would have been "feasible" to implement EMV chip technology during the height of the pandemic in the spring of 2020. These opinions are inadmissible and must be excluded.

BACKGROUND

I. Plaintiffs' EMV Chip Claims

Plaintiffs assert that they received unemployment benefits from the California Employment Development Department (EDD) via prepaid cards issued by BANA, and that they experienced fraudulent or unauthorized transactions on their cards. ECF 406 (TAMCC) ¶¶ 2, 59-69, 553, 556, 581, 582(f)-(g), 587-9; ECF 324 at 3, 5-6, 17-19, 27-31, 34-35, 40-41, 43. They allege, among other things, that BANA should have included EMV chip technology on their EDD prepaid cards, and that the decision not to do so resulted in the fraud that they claim to have experienced. TAMCC ¶¶ 2, 69, 553, 581, 582(f)(i), 588. They assert that BANA's issuance of EDD prepaid cards without EMV chip technology prior to 2021 was a violation of the California Consumer Privacy Act (CCPA; Cal. Civ. Code §§ 1798.100 et seq.) and the California Unfair Competition Law (UCL; Cal. Bus. & Prof. Code §§ 17200 et seq.), as well as negligence and negligence per se, and breach of fiduciary duty. TAMCC ¶¶ 553, 556, 581, 587-89, 632. These causes of action all require Plaintiffs to prove causation. For example, the CCPA indicates that disclosure of information must occur "as a result of" the defendant's breach, and to succeed on a negligence claim, Plaintiffs must prove that the alleged breach (issuance of non-EMV cards) caused their harm. Cal. Civ. Code § 1798.150(a)(1); *see also Palos v. United States*, 2025 WL 2681974, *5 (C.D. Cal. Sept. 15, 2025).[1]

II. Cloninger's Opinions

In support of their EMV claims, Plaintiffs disclosed Cloninger as an expert

[1] The UCL also requires that an individual must have "lost money or property ***as a result of*** the unfair competition" to seek relief. Cal. Bus. & Prof. Code § 17204 (emphasis added). The same is true of claims for breach of fiduciary duty, which require "damage proximately caused by th[e] breach." *Mosier v. S. California Physicians Ins. Exch.*, 63 Cal. App. 4th 1022, 1044 (1998).

on EMV chip technology. *See* HX[2] 1; HX 2. Cloninger was a career consultant, a role in which she prepared "business cases" for her clients to consider as those clients (not Cloninger) made decisions about whether or not to implement EMV chip technology. HX 3 at 22:6-17, 28:18-21. The "business cases" were cost-benefit analyses in which Cloninger "calculate[d] the net incremental difference" between the costs of EMV chip implementation (such as the costs of new cards, updating consumer communications, training, and changing other operational processes) and the benefits (the "primary" one being the amount of fraud loss that would be avoided). *Id.* at 22:6-23:22, 40:3-7. The inputs into Cloninger's model were provided by others; for example, the "fraud experts" (not Cloninger) would determine the amount of counterfeit fraud loss that they believed might be avoided by EMV chip technology, and Cloninger would use that information as her "starting point." *Id.* at 41:1-43:5.

Each "business case" model was different, such that Cloninger would "never" take a business case that was produced for one client and present the same analysis to another. *Id.* at 36:10-20. Cloninger also had no involvement in deciding whether to implement EMV chip technology, or the actual implementation of EMV chips. *Id.* at 28:18-21, 36:21-37:10, 43:6-12. Rather, she "la[id] out the parameters and le[ft] the decision to the client." *Id.* at 37:8-10. When Cloninger's clients (and not Cloninger) considered whether to implement EMV chip technology, her "impression" was that they considered her business case model as only "one of many parts of their decision." *Id.* at 32:10-17. Some of those clients chose not to implement EMV chip technology even when presented with positive business cases for EMV implementation. *Id.* at 28:22-29:5.

Plaintiffs have offered Cloninger's opinions on a broad range of topics that go beyond the preparation of cost-benefit analyses or models. For example, even though Cloninger has no experience with fraud analysis, identifying the causes of fraud, or

[2] Exhibits to the Declaration of Lindsay E. Hoyle shall be referred to as "HX."

calculating the impact of EMV chip technology on fraud loss, Cloninger offers multiple opinions describing a causal connection between BANA's issuance of cards without EMV chip technology and the fraud that Plaintiffs allege that they suffered. She opines, without conducting any analysis, that both card skimming[3] and counterfeit fraud increased "as a result of the Bank's failure to issue EMV-chip-enabled cards" (which she further opines was foreseeable), that card skimming is the "best explanation" for the fraud that class members allegedly experienced, and that the addition of EMV chips "would have prevented virtually all" of that fraud. *See, e.g.*, HX 1 ¶¶ 14(f)-(g), (i)-(j); HX 2 ¶¶ 6(e), 7. Likewise, despite having no experience in the operational aspects of implementing EMV chip technology, Cloninger opines that it would have been "feasible" for BANA to implement EMV chip cards during the spring and summer of 2020—at the height of the COVID-19 pandemic. *See, e.g.*, HX 2 ¶ 6(e).

STANDARD OF LAW

Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), "impose[] a special 'gatekeeping obligation' on trial judges" presented with expert testimony. *Brighton Collectibles, Inc. v. RK Tex. Leather Mfg.*, 923 F. Supp. 2d 1245, 1253 (S.D. Cal. 2013) (Curiel, J.). Under Rule 702, a witness proffered as an expert must satisfy the following requirements:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Under *Daubert*, district courts must "carefully apply[] Federal Rule of Evidence 702 to ensure that specialized and technical evidence is 'not only relevant, but reliable.'" *Brighton Collectibles*, 923 F. Supp. 2d at 1253. The reliability standard tests:

> (1) whether the scientific theory or technique can (and has been) be tested; (2) whether the theory or technique has been subjected to peer review and

[3] Card skimming is a type of fraud that "occurs when criminals surreptitiously install a device capable of reading the information on a magnetic stripe on an ATM's card reader." HX 1 ¶ 18.

> publication; (3) whether there is a known or potential error rate; and (4) whether the theory or technique is generally accepted in the relevant scientific community.

Domingo v. T.K., 289 F.3d 600, 605 (9th Cir. 2002). In addition, "[o]ne very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharms., Inc.* (*Daubert II*), 43 F.3d 1311, 1317 (9th Cir. 1995).

"[T]he burden of proving the expert's testimony satisfies Rule 702" and the *Daubert* standard rests on the Plaintiffs, as "[t]he proponent of the evidence." *Brighton Collectibles*, 923 F. Supp. 2d at 1253.

ARGUMENT

The standard outlined in Rule 702 and *Daubert* requires that expert testimony be based on "scientific, technical, or other specialized knowledge" and be "the product of reliable principles and methods" and the "reliable application" of those principles and methods. FED. R. EVID. 702(a), (c), (d). Cloninger's opinions regarding causation and feasibility fail to meet these requirements. She has no "specialized" knowledge that would allow her to determine whether the fraud alleged by Plaintiffs was caused by the absence of EMV chip technology. Further, she simply assumed that EMV chips would have prevented that fraud—despite acknowledging that EMV chips do not prevent all fraud, even counterfeit fraud—without applying any principles or methodology to analyze this question. As for her opinion that it was "feasible" for BANA to implement EMV chip technology into millions of cards at the onset of the COVID-19 pandemic, that, too, is based entirely on unfounded speculation. Cloninger has zero experience in any operational matters and failed to conduct any analysis—such as assessing how long it would have taken to implement EMV chip technology during the pandemic—before reaching that conclusion. These opinions must therefore be excluded.

I. Cloninger Should Not Be Permitted to Opine on a Causal Relationship Between EMV Chips and the Alleged Fraud Given Her Lack of Experience and Failure to Follow Any Methodology.

Cloninger offers multiple opinions which purport to draw a causal connection between BANA's issuance of EDD prepaid cards without EMV chip technology prior to 2021 and the fraud allegedly experienced by class members. She opines, for example, that: (a) "[s]kimming and card-present counterfeit fraud targeting California EDD cards ***increased as a result*** of the Bank's failure to issue EMV-chip-enabled cards" (HX 1 ¶¶ 14(g), 96-102); (b) "[c]ard skimming is the ***best explanation*** for the type of fraud class members experienced on their EDD cards in 2020-2021" *(id.* ¶¶ 14(i), 96; HX 2 ¶ 97); (c) "[t]he addition of EMV chips to the Bank's EDD Debit Cards ***would have prevented virtually all*** the card-present counterfeit fraud" (HX 1 ¶¶ 14(j), 103-113; HX 2 ¶¶ 6(e), 7); (d) "[h]ad the Bank issued … EMV chip cards…, EDD debit cardholders ***would have been protected*** from such fraud" (HX 1 ¶ 95); and (e) implementation of EMV chips during the spring or summer of 2020 "***would have averted virtually all*** the card-present counterfeit fraud at ATMs" experienced by class members between summer 2020 and July 2021 (HX 2 ¶¶ 6(e), 56). (emphasis added).

These opinions should be excluded because Cloninger is not qualified to opine on the causes of fraud, her opinions are not based on a reliable methodology (or any methodology at all), and her opinions constitute impermissible legal opinion.

A. Cloninger is not qualified to opine on the causes of fraud.

Cloninger does not have the "knowledge, skill, experience, training, or education" to "qualif[y] as an expert" on the causes of fraud or whether the alleged fraud in this case would have been prevented by EMV chip technology. FED. R. EVID. 702. For an expert to qualify under Rule 702, the court must "determine that the witness is qualified by special knowledge as an expert in the relevant area of expertise." *AFMS LLC v. United Parcel Serv. Co.*, 2014 WL 12515335, *6 (C.D. Cal. Feb. 5, 2014); *see also Morgan v. U.S. Soccer Fed'n, Inc.*, 445 F. Supp. 3d 635, 662

(C.D. Cal. 2020) (expert with "no specialized knowledge" on subject matter was "therefore not qualified to opine"). Testimony can be excluded for lack of expert qualification when the expert fails to "stay[] within the reasonable confines of his subject area"—and may be excluded "for this reason alone." *Avila v. Willits Env't Remediation Tr.*, 633 F.3d 828, 839 (9th Cir. 2011) (no abuse of discretion in holding that opinions on the contents of chrome-plating waste exceeded the expertise of an expert with degrees in chemistry, but no training specific to metal working). While courts have broad discretion in allowing expert testimony, the burden falls on the proffering party to prove that the expert is qualified to speak on the subject matter at hand. *Zaragoza v. Cnty. of Riverside*, 2024 WL 661177, *3 (C.D. Cal. Jan. 4, 2024).

Here, Cloninger readily admits that she is not a fraud expert. HX 3 at 171:8-23, 306:7-9. She has no experience investigating fraud. *Id.* at 171:5-7. She "ha[s] not been in fraud operations" and is "not a hands-on fraud person." *Id.* at 171:8-15. Nor does she have any experience identifying or calculating the amount of fraud that could be prevented by EMV chip technology. *Id.* at 42:6-43:5. When she prepared business cases (cost-benefit analyses) as a consultant, she relied on the "fraud experts" at her clients to identify the losses attributable to counterfeit fraud (as that was the only type of fraud potentially addressed by EMV chips), which served as the "starting point" for her analysis. *Id.* In other words, as a consultant, Cloninger relied on others to determine the amount of fraud that could potentially be prevented by EMV chips; she has no experience making that determination herself. Because nothing in Cloninger's background qualifies her to opine on the causes of fraud, or whether or how much fraud would have been averted, and she has no expertise in assessing the quality and validity of fraud data, this topic exceeds the "reasonable confines of [her] subject area" (payment technologies cost-benefit analyses) and her opinions should be excluded. *Avila*, 633 F.3d at 839.

B. Cloninger simply assumed that EMV chip technology would have prevented all fraud, without conducting any analysis or following any methodology at all.

Given Cloninger's lack of experience, it is unsurprising that her attempts to draw a causal connection between an absence of EMV chip technology and the fraud allegedly experienced by class members are not based on a reliable methodology. In fact, they are not based on any methodology at all.

To satisfy the strictures of Rule 702, an expert's conclusions must be more than "mere subjective beliefs or unsupported speculation," and an expert must "explain the reasoning and methods underlying [her] conclusions." *Claar v. Burlington N. R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994). Courts have excluded opinions when they "c[ould not] discern what, if any, method [the witness] employed in arriving at his opinions." *Ollier v. Sweetwater Union High Sch. Dist.*, 267 F.R.D. 339, 341 (S.D. Cal. 2010), *aff'd*, 768 F.3d 843 (9th Cir. 2014); *see also United States v. Valencia-Lopez*, 971 F.3d 891, 900-01 (9th Cir. 2020) (district court abused its discretion by admitting an expert's testimony when the expert "never explained the methodology, if any, that he relied on"). When no methodology is offered, the expert's "conclusions appear to be based on his personal opinions and speculation rather than on a systematic assessment." *Ollier*, 267 F.R.D. at 342; *see also GPNE Corp. v. Apple, Inc.*, 2014 WL 1494247, *5 (N.D. Cal. Apr. 16, 2014) (excluding testimony of expert who "admit[ted] that there [was] no methodology other than his '30 years of experience'").

Cloninger's opinions regarding the alleged causal connection between the issuance of cards without EMV chips and the fraud allegedly experienced by class members are not based on any methodology at all, never mind a reliable one. For instance, Cloninger opines that card skimming "increased as a result of" BANA's purported decision not to implement EMV chip technology for EDD prepaid cards prior to 2021.[4] HX 1 ¶¶ 14(g), 96, 99. But Cloninger acknowledged that EMV chip

[4] Cloninger's assertion that BANA "made a deliberate choice not to adopt EMV chips

cards can also be skimmed—and thus, simply adding EMV chip technology would not eliminate card skimming. HX 3 at 163:16-24; HX 1 ¶ 33; HX 2 ¶ 77. Yet instead of analyzing the amount of skimming that impacted EDD prepaid cards to determine whether any increase was attributable to the absence of EMV chips in EDD prepaid cards—or whether the increased skimming would have occurred even with EMV chip cards—Cloninger simply reviewed documents discussing skimming and relied on her "knowledge of the fact that the industry was reporting increased skimming" overall (not just for EDD prepaid cards) to conclude that (1) there was an increase in skimming of EDD prepaid cards, and (2) the increase was a result of BANA's alleged decision to not implement EMV chip technology. HX 3 at 291:17-292:10; HX 1 ¶¶ 14(g), 99.[5] Cloninger's opinion is an unsupported leap, not backed by the application of any methodology, and must be excluded. *See, e.g.*, *Valencia-Lopez*, 971 F.3d at 901 (district court abused discretion in admitting testimony of expert who gave "no explanation of his methodology" such that "'there is simply too great an analytical gap between' his experience and his conclusion") (quoting *United States v. Hermanek*, 289 F. 3d 1076, 1095 (9th Cir. 2002)).

Similarly, Cloninger followed no discernable methodology in reaching her opinions that (1) skimming was the cause of the alleged counterfeit fraud experienced by cardholders, and that (2) the failure to implement EMV chips prior to July 2021 resulted in the card-present counterfeit fraud that class members experienced, such that (3) "virtually all" of the alleged card-present counterfeit fraud would have been

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in EDD debit cards" is also wrong as the choice of card technology was not the Bank's to make. HX 1 ¶ 95. EDD decided when it issued its RFP in 2015 to require magnetic stripe technology and not EMV chip technology—despite the fact that, as Cloninger notes, EMV chip technology was well-known in the industry at that time. HX 3 at 83:15–18, 125:12–127:24; HX 1 ¶¶ 49–51.

[5] The documents that Cloninger relied on do not state that skimming increased as a result of the lack of EMV chips; but even if they did, the role of an expert is not to simply parrot a party's theory without doing her own independent analysis. *San Diego Comic Convention v. Dan Farr Prods.*, 2018 WL 4091734, *10 (S.D. Cal. Aug. 23, 2018) (the expert "cannot forgo his own independent analysis and rely exclusively on what an interested party tells him") (internal quotations omitted).

avoided with the addition of EMV chips to the EDD prepaid cards. *See supra* at 6. Cloninger admitted at her deposition that she performed *no* analysis into how many of the allegedly fraudulent transactions would actually have been prevented by the addition of EMV chips on the cards. HX 3 at 275:4-8, 284:8-13 ("I don't have the actual data"); *see GPNE*, 2014 WL 1494247, *4 (excluding expert who conceded "[t]here's no specific math"); FED. R. EVID. 702(b) (requiring expert testimony to be "based on sufficient facts or data"). She did not review (or ask to review) any [redacted] to analyze whether EMV would have prevented the fraud they allegedly experienced. HX 3 at 62:6-63:21, 297:16-18.

Instead, Cloninger's reports simply recite the ways in which EMV chip technology can potentially prevent fraud, and then conclude, without any further analysis, that "virtually all" of the transactions disputed by class members would have been prevented by EMV chips. That does not reflect a proper methodology. *AFMS LLC*, 2014 WL 12515335, *7 (excluding opinion as unreliable where expert "offer[ed] no explanation for how he arrived at his conclusions" and "admit[ted] that his opinions are not based on economic theories or principles"). That this assumption is unwarranted and flawed is demonstrated by Cloninger's own acknowledgment that [redacted]. HX 3 at 108:2-13, 274:23-275:1. As Cloninger testified, "[redacted]" HX 3 at 108:7-9. Yet rather than conducting any analysis to determine what amount of fraud would have been avoided, she applied her own personal opinions about the benefits of EMV chip technology to make an unsupported leap and conclude, without any support, that "virtually all" fraud would have been prevented. This is not a reliable methodology or basis for expert opinion, and thus should be excluded. *See Ollier*, 267 F.R.D. at 341-42 (excluding expert where "the Court cannot discern what, if any, method he employed" and "[h]is conclusions appear to be based on his personal opinions and speculation").

Cloninger also failed to rule out any of the other potential causes of fraud, such as [redacted], even though she admitted that there are multiple types of fraud that would not have been prevented by a chip.[6] HX 3 at 237:21-240:18, 242:6-13, 243:10-14, 260:20-23, 263:17-264:13, 265:17-22, 268:21-269:25, 273:11-274:11, 280:4-17, 284:14-285:9. Cloninger's failure to rule out other explanations for fraud renders her opinion unreliable. *See Avila*, 633 F.3d at 839 (affirming exclusion of expert who failed to rule out other causes).

Cloninger further compounded the deficiencies in her "methodology" by assuming that *all* of the alleged fraud experienced by class members was card-present counterfeit fraud—even though she acknowledged that certain instances of fraud, such as [redacted] and thus she could not determine whether an EMV chip would have prevented that transaction.[7] HX 3 at 259:13-19, 297:19-300:23. Her failure to exclude non-counterfeit fraud from her analysis—despite admitting that EMV chip technology only addresses counterfeit fraud—further dooms her opinions. *Id.* at 41:5-13.

Further, as Cloninger acknowledged, [redacted]. *Id.* at 242:6-13, 243:10-14; HX 1 ¶¶ 33-34. In other words, simply adding EMV chip technology does not and cannot prevent

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[6] Although the Court's class definition limited the EMV Chip class to exclude persons who claimed that their cards had been lost or stolen, Cloninger did not herself exclude those categories of individuals from her opinions offered at class certification or in her expert re[redacted]

[7] [redacted]

HX 5 ([redacted]

all counterfeit fraud, as [redacted]. As Cloninger explained, when a magstripe on an EMV chip card is used for transactions, the card issuer is alerted and can opt to "require additional security checks, decline the transaction, ***or approve the transaction with or without withdrawal limits***." HX 2 ¶ 84 (emphasis added); *see also* HX 3 at 241:2-12. [redacted]. HX 3 at 242:6-243:7. It is therefore [redacted]. But Cloninger, who has no experience in developing fallback rules (which vary by product and by issuer), [redacted]. *Id.* at 245:23-246:6, 248:12-19, 250:14-251:22, 252:19-253:2.

Experts "must provide reasons for rejecting alternative hypotheses using scientific methods and procedures and must rely on more than 'subjective beliefs or unsupported speculation.'" *Engilis v. Monsanto Co.*, 151 F. 4th 1040, 1053-55 (9th Cir. 2025) (excluding opinion where expert "rejected . . . a possible cause, but inadequately explained his reasons for doing so," thereby "fail[ing] to establish that his testimony was based on sufficient facts or data"). Cloninger's failure to follow a reliable methodology to conduct any analysis of the impact of implementing chip technology, including consideration and elimination of other potential causes of the fraud allegedly experienced by class members, is grounds for exclusion of her opinion. *See Claar*, 29 F.3d at 502 (excluding expert opinions, including because witnesses failed to "ma[k]e any effort to rule out other possible causes for the injuries plaintiffs complain of").

C. The causation opinions are impermissible legal opinions.

Cloninger's opinions are also "impermissible legal opinion evidence." *Nationwide Transp. Fin. v. Cass Info. Sys.*, 523 F.3d 1051, 1058, 1065 (9th Cir. 2008) ("[A]n expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law"). Legal opinions on an ultimate issue must be excluded because offering such testimony improperly "invades the province of the trial judge." *Bona Fide Conglomerate, Inc. v. SourceAmerca*, 2019 WL 1369007, *3 (S.D. Cal. Mar. 26, 2019) (Curiel, J.). Thus, experts may not offer opinions on legal issues such as foreseeability that veer into matters of law. *See*, *e.g.*, *Aguilar v. Int'l Longshoremen's Union Loc. No. 10*, 966 F.2d 443, 447 (9th Cir. 1992) (court did not abuse discretion in excluding opinions on reasonableness and foreseeability as "utterly unhelpful," as these "were inappropriate subjects for expert testimony").

Cloninger's opinions do just that. She opines, for example, that the alleged fraud was the "result of" BANA's issuance of cards without EMV chips. HX 1 ¶ 14(g). She also opines that it was "highly foreseeable" to "everyone in the industry, including the Bank," that "fraud targeting EDD cards would continue to increase during the pandemic" and during 2020. *Id*. ¶¶ 14(f), 100, 120, 123; HX 2 ¶ 65. These are plainly inadmissible legal opinions, on an ultimate issue of law, that "merely [tell] the jury what verdict to reach." *Bona Fide*, 2019 WL 1369007, *15.

II. Cloninger Cannot Opine on the Feasibility of Chip Implementation When She Has No Experience and Failed to Conduct Any Analysis.

Cloninger's opinion that it was "feasible" for BANA to implement EMV chips on EDD prepaid cards "during the spring or summer of 2020" (HX 2 ¶¶ 6(e), 54) should be excluded for the reasons discussed above (*supra* Section I.A), as she has no experience necessary to qualify her to opine on operational feasibility and did not conduct any analysis to test her speculative assumptions.

A. Cloninger is not qualified to opine on operational matters.

Cloninger is not qualified to opine on chip implementation because she has zero experience in any operational matters involving card issuance or card technology. As a consultant, Cloninger's clients were mostly card brands (*e.g.*, Visa, Mastercard), rather than the card issuers that actually issued cards to consumers under one of those brands and who would be dealing with the operational and financial considerations of doing so. HX 3 at 18:2-8, 19:2-15. Cloninger has also never worked with any client on the implementation of EMV chip technology into a card program. *Id.* at 43:6-12. Her role was to prepare the "business cases" (cost/benefit analyses) that were then considered by others who were responsible for deciding whether to implement EMV chips. *Id.* at 27:2-11, 28:18-21. Cloninger played no role in her clients' decisions whether to implement EMV chips—a decision that was based not just on the business case model she prepared, but on other considerations as well. *Id.* at 28:18-21, 32:10-17, 36:21-37:10, 43:6-12. Rather, she had only an outsider's view of EMV implementation decisions. For example, she was not told why her clients would ask her to update the business case "several times," and would only assume that this was in response to "change in the market." *Id.* at 27:2-28:10, 32:10-17.

Cloninger also has no experience with the operational issues that card issuers and banks were facing at the onset of the COVID-19 pandemic in 2020. *Id.* at 52:7-11, 182:2-15. Her understanding of these challenges is based solely on media reports and "general knowledge" from her work in consulting—which had ended more than a year earlier. *Id.* She therefore does not have the type of "special knowledge" required to offer testimony on these topics. *See AFMS LLC*, 2014 WL 12515335, *6. Assessing the feasibility of massive operational undertakings such as the implementation of EMV chip technology across a card portfolio that was growing exponentially in 2020 requires at least some experience with the unique challenges posed by the unprecedented situation at the time. *See Rogers v. Raymark Indus., Inc.*, 922 F.2d 1426, 1430 (9th Cir. 1991) (expert not qualified to opine on conditions during World War II where "primary experience came from working on ships long after World War II in shipyards other than [the one at issue]," and thus "his testimony would have been one step removed”). Cloninger has none, and therefore is ill-qualified to opine on the feasibility of chip implementation because she has no experience with or special knowledge about decisions on whether to implement chip technology (including whether implementation would be feasible) or in the actual implementation of chip technology (either before or during the pandemic).

B. Cloninger failed to conduct any analysis to determine whether implementation of EMV chip technology at the onset of the pandemic would have been feasible.

Cloninger also failed to employ a reliable methodology to reach her conclusion that the implementation of EMV chip technology would have been “feasible” in the spring and summer of 2020, during the early months of the COVID-19 pandemic. She simply applied [redacted] and assumed that the same timeline would have been possible in the spring and summer of 2020 (during the unprecedented early stages of the pandemic). HX 3 at 201:8-202:13. At best, her opinion amounts to reading a calendar in the same way that any juror could—[redacted]—and therefore does not “help the trier of fact to understand the evidence or to determine a fact in issue.” FED. R. EVID. 702(a). But her opinion is more than just unhelpful: the absence of any reliable methodology makes the opinion so flawed that it must be excluded. *See Ollier*, 267 F.R.D. at 342 (excluding expert opinion “based on his personal opinions” where “he has not provided a reliable methodology to apply to the facts of the case”).

Cloninger conducted no analysis other than [redacted] to arrive at a date in the summer of 2020. HX 3 at 189:18-25, 190:8-15, 217:12-22. She admits that she “didn’t analyze” [redacted] because she “wasn’t asked to do that.” *Id.* at 189:18-25, 190:8-15. Instead, she applied a [redacted] that was taken from a different time period that did not present the same challenges as the early days of the pandemic (*see infra*), and also did not involve the migration of the entire program to EMV chip technology. Indeed, the [redacted]—a much smaller number than the entire portfolio of active cards. *See* HX 6 at -4545. Further, the [redacted]. *See* HX 7. In contrast, in March 2020 [redacted]. *See* HX 3 at 205:20-206:14; HX 8 at -2965. Cloninger offered no basis to assume that the estimate for converting [redacted] could reasonably apply to the conversion of the entire program in the spring of 2020, or even to the conversion of the massive volume of new and replacement cards at that time. Instead, she admitted that she "didn't analyze" [redacted]—and tellingly, Plaintiffs' counsel objected that this was outside Cloninger's scope. HX 3 at 189:18-25.

Further, although Cloninger opined that implementation would have been "feasible" in the spring and summer of 2020, she admits that she did not consider whether BANA could have started the process of implementing EMV chips in March 2020 when the pandemic began. HX 2 ¶¶ 6(e), 54; HX 3 at 200:20-24, 209:4-8, 212:2-9. She also admitted that, due to operational challenges during COVID-19, the implementation process "might have taken a little bit longer to get done," but maintained that EMV chip implementation could have been complete by the summer of 2020 if BANA had started in January 2020—two months before the pandemic started. HX 3 at 183:17-184:24. Cloninger's opinion that implementation would have been feasible "during the first months of the pandemic" (including "had the Bank begun the migration in March 2020") is therefore unreliable as (1) it is based on an assumption that implementation would have started before, not "during," the pandemic, and (2) Cloninger admitted at her deposition that BANA "might not have been able to start" chip implementation at the beginning of the pandemic but "could have started" by "month four," which is the point at which her report states implementation could have been complete (not merely begun). HX 2 ¶¶ 54, 56; HX 3 at 209:14-20.

Cloninger failed to consider myriad operational issues—including the challenges created by the COVID-19 pandemic—that would have impacted the feasibility of converting an entire card portfolio to EMV chip technology in the spring of 2020. She acknowledged that BANA's systems would need to be changed to account for EMV chip technology and simply assumed that the systems used for consumer debit cards could be used for EDD prepaid cards—even though she did not know if they were "the same or different." HX 3 at 177:7-179:12. She also assumed that BANA employees—including particular "employees that were knowledgeable" about the Bank's EMV conversion practices and capabilities from specific prior experience on other programs—had the bandwidth to assume a [redacted], but admitted she had "no evidence either way." *Id.* at 180:24-181:16, 223:13-224:4, 224:25-225:14. She similarly assumed that employees' devotion of time to changing the card technology would not have taken away from other operational needs of the program and failed to consider whether this would have negatively impacted other aspects of the EDD card program—during a period of exponential growth. *Id.* at 176:3-177:1, 225:8-12.[8] She did not even consider the costs of EMV chip implementation in 2020. *Id.* at 175:19-176:1. All of these factors impact feasibility, and Cloninger's failure to consider even a single one of them further illustrates that her opinion is based on nothing but her own speculation.

Cloninger's failure to actually analyze the timing and feasibility of

8 [redacted] X 1 ¶ 86, n. 112; HX 2 ¶ 65; HX 9; HX 3 at 205:20–206:8.

implementation in 2020 also exacerbates the unreliability of the causation opinions discussed above. She opines that the implementation of chips in 2020 would have "averted virtually all" counterfeit fraud *beginning in the summer of 2020*. HX 2 ¶ 6(e). Yet she failed to consider how long the migration would have taken and thus has no basis for concluding that migration would have been complete by the summer of 2020, when she claims that fraud would have been averted. Cloninger also acknowledged that BANA could have implemented EMV chip technology by [redacted], rather than across the entire portfolio—which she admitted was common in the industry. HX 3 at 213:12-16. Thus, even if EMV chip implementation were "feasible" in the spring of 2020, it would have impacted only a portion of EDD prepaid cards—[redacted] *Id.* In other words, the entire card program would not have been converted to EMV chip technology by the summer of 2020. Cloninger admitted at her deposition that, in that scenario, adding EMV chips "wouldn't have alleviated all of" the fraud but instead "would be affecting a slightly different segment"—meaning that EMV chips would not have prevented "virtually all" of the fraud reported between the summer of 2020 and July 2021. *Id.* at 212:15-213:16. Because Cloninger does not offer any assessment to support her opinions on feasibility and causation, those opinions should be excluded. *See Ollier*, 267 F.R.D. at 342 (excluding expert conclusions based on "personal opinions and speculation rather than on a systemic assessment" of the subject matter).

CONCLUSION

For the reasons detailed above, this Court should grant this motion and exclude Cloninger's opinions regarding (1) any causal connection between BANA's issuance of EDD prepaid cards without EMV chip technology and the alleged fraud experienced by class members, and (2) the feasibility of implementing EMV chip technology prior to 2021.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on October 17, 2025. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify under penalty of perjury that the foregoing is true and correct.

Executed: October 17, 2025 *(/s/ Matthew L. Riffee)*