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STIPULATED
PROTECTIVE ORDER**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION**

IN RE: BANK OF AMERICA
CALIFORNIA UNEMPLOYMENT
BENEFITS LITIGATION

Case No. 1-MD-02992-GPC-MSB

EXPERT REBUTTAL REPORT OF PAMELA JOSEPH

April 4, 2025

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I. ASSIGNMENT

1. I was asked by Goodwin Procter LLP, on behalf of Bank of America, N.A. (“Bank of America” or the “Bank”), to review and respond to opinions expressed in the expert report of Jane Cloninger submitted on March 4, 2025 (the “Cloninger Report”), in connection with the above-referenced matter.

2. My background and qualifications, which include more than 30 years in the electronic payments industry, are detailed in my expert report dated March 4, 2025 (“Initial Report”).¹ I have not provided expert testimony or authored any publications since my Initial Report. In preparing this report, I personally considered various documents produced in this litigation and other materials, which are identified in Appendix B to my Initial Report. Any additional materials not identified in my Initial Report are listed in Appendix A to this report. I also reviewed the materials listed in the Cloninger Report, as well as the other expert reports of Jane Cloninger in this matter dated August 29, 2024 (the “Cloninger Class Cert. Report”) and November 21, 2024 (the “Cloninger Class Cert. Rebuttal Report”). I reserve the right to supplement or amend my report should new information become available.

3. In conducting my work on this matter, I have been assisted by individuals at Ankura Consulting Group, LLC (“Ankura”),² who worked at my direction and under my supervision. All opinions expressed herein are my own.

¹ See my Initial Report at Section I.

² Ankura is a professional services and consulting firm that provides dispute-related, investigative, financial, and operational consulting services to various types of organizations.

II. SUMMARY OF OPINIONS

4. I have reviewed the Cloninger Report and continue to stand by the opinions expressed in my Initial Report. In this report, I respond below to a number of issues raised in the Cloninger Report.

5. First, Ms. Cloninger's opinion that "by at least 2019, EMV had become the industry standard for payment card security in the United States"³ is overly broad and bears little relevance to the specific card product at issue in this matter -- prepaid debit cards. As detailed in my Initial Report, EMV chip cards were *not* industry standard for prepaid debit cards at that time.⁴ Ms. Cloninger's amalgamation of all card types, including credit cards and non-prepaid debit cards, fails to acknowledge fundamental differences in characteristics, purpose, and usage across different payment products and programs. EMV chip cards were simply not industry standard for prepaid debit cards, which differ in significant ways from credit cards and non-prepaid debit cards. The Bank acted swiftly once it received approval from California Employment Development Department ("EDD") to implement EMV chip technology.

6. Second, Ms. Cloninger's opinion that the Bank should have implemented EMV chip technology prior to July 2021 ignores certain practical realities, including the fact that the Bank could not do so without approval from the EDD program, which it did not receive until March 2021. Ms. Cloninger's focus on the incremental cost of adding chip technology to a card ignores the multifaceted considerations that impact the determination of whether to migrate a card product or program to EMV chip technology. Ms. Cloninger's view that EMV chip technology should have been immediately implemented throughout the EMV Prepaid Debit Card program at

³ See Cloninger Report at ¶ 55.

⁴ See my Initial Report at Section V.A.

the beginning of the Covid-19 pandemic ignores the reality of how card technology changes are typically implemented from an operational perspective, as well as the formidable challenges associated with an immediate, wholesale replacement of millions of cards in the midst of a global pandemic, which would include, among other things, cardholder confusion, program disruption, increased fraud risk, and other transition costs.

7. Third, Ms. Cloninger’s opinion that fraud in the EDD Prepaid Debit Card program during the Covid-19 pandemic was foreseeable ignores the low rates of fraud in the program prior to the pandemic, as well as the nature of the fraud that emerged during the pandemic. Her opinion is also based on the assumption that the Bank should have foreseen both a historic global pandemic and an unprecedented U.S. governmental fiscal response to the pandemic. Based on my more than 30 years in the electronic payments industry, prior to the onset of the pandemic (and even then), it was not reasonable to anticipate the level and sophistication of fraud that would descend upon the EDD program, which included significant amounts of fraud that would not have been prevented by EMV chip technology.

8. Fourth, Ms. Cloninger’s opinion that EMV chips “would have prevented virtually all the card-present counterfeit fraud (including unauthorized ATM withdrawals) that class members experienced”⁵ relies on her speculative assumption that all of the reported fraud was counterfeit fraud and that no meaningful amounts of benefits fraud, first-party fraud, or cardholder mistakes took place. More specifically, she assumes that “virtually all” reported unauthorized ATM transactions resulted from cardholders’ EDD cards being surreptitiously skimmed *and* hidden pinhole cameras or keypad overlays capturing each cardholder’s PIN as they entered it.

⁵ See Cloninger Report at ¶ 14(j).

Those assumptions are implausible and counter to contemporaneous evidence gathered by the Bank, which indicated that much of the reported fraud they were observing was actually benefits fraud and first-party fraud. They also ignore the many other ways in which card information can be compromised and fraud can occur.

III. EMV CHIPS WERE NOT INDUSTRY STANDARD FOR PREPAID DEBIT CARDS

9. Ms. Cloninger's assertion that "by at least 2019, EMV had become the industry standard for payment card security in the United States"⁶ is inaccurate and inapplicable to the facts of this case, which specifically pertain to prepaid debit cards. As explained in my Initial Report, EMV chip cards were demonstrably *not* industry standard for prepaid debit cards at that time.⁷

10. In opining that "by at least 2019, EMV had become the industry standard for payment card security in the United States,"⁸ the Cloninger Report improperly considers all payment card products as a whole, failing to acknowledge the differences and heterogeneity among them. Indeed, at one point, Ms. Cloninger opines that EMV chips were standard for the "debit card market,"⁹ but throughout her report she treats all debit and credit card products and programs as a single market.¹⁰ As explained in my Initial Report, there are myriad differences in characteristics, purpose, and usage across various payment products and programs, and one cannot look at them as a single group for purposes of assessing whether EMV chips were industry

⁶ See Cloninger Report at ¶ 55.

⁷ See my Initial Report at Section V.A.

⁸ See Cloninger Report at ¶ 55.

⁹ See Cloninger Report at ¶ 14(c).

¹⁰ See e.g., Cloninger Report at Heading VI.C, ¶¶ 55, 57.

standard.¹¹ Credit cards and non-prepaid debit card products present different considerations when evaluating conversion to EMV chip technology than do prepaid debit cards.¹²

11. It is therefore improper to consider the “industry standard” for all payment cards; rather, one must consider the industry standard for the particular product at issue—in this case, prepaid debit cards. Prepaid debit cards are different from other debit cards (and other payment cards) for the reasons I cited in my Initial Report, and present different considerations that impact a determination of whether to implement EMV chip technology.¹³

12. Ms. Cloninger fails to address whether EMV chips were industry standard for prepaid debit cards. She does not consider or even acknowledge the differences between prepaid debit cards and other debit cards that affect the decision whether to implement EMV chips. She makes no attempt to distinguish prepaid debit cards from other payment card products. Rather, in forming her opinions, Ms. Cloninger relies on data and information that are primarily about credit cards and other non-prepaid debit card payment products,¹⁴ and does not consider data specific to prepaid debit cards, such as the data I cited in my Initial Report regarding the use of chips in card-present transactions made with prepaid debit cards.¹⁵ Data and information pertaining to credit cards and non-prepaid debit cards cannot be relied upon to determine industry standards for prepaid debit cards.

¹¹ See my Initial Report at ¶¶ 29-34.

¹² *Id.*

¹³ See my Initial Report at Section V.A.

¹⁴ See *e.g.*, Cloninger Report at ¶¶ 48, 50.

¹⁵ See my Initial Report at Appendix C.1-C.3.

13. The only information about prepaid debit cards that Ms. Cloninger references is the Executive Order regarding cards for federal government benefit programs.¹⁶ But the conclusion reached by a single decision-maker is still only one data point, regardless of how many cards that decision-maker can control, and it does not and cannot determine industry standard.

14. As explained in my Initial Report, EMV chips were not industry standard for prepaid debit cards during the relevant period.

IV. IT WAS REASONABLE FOR THE BANK TO NOT MIGRATE THE EDD PREPAID DEBIT CARD PROGRAM TO EMV CHIPS UNTIL 2021

15. As discussed in my Initial Report, and despite Ms. Cloninger's assertion otherwise, the Bank's decision to migrate the EDD Prepaid Debit Card program to EMV chip technology in 2021 was reasonable and consistent with industry standard. Ms. Cloninger's opinion that "the Bank's decision not to include EMV chips in EDD debit cards at least as of January 2020 was highly inconsistent with how [she] would expect a sophisticated financial institution in the payments industry to make decisions regarding payment card security"¹⁷ ignores the differences between payment card products, as described above. Ms. Cloninger's opinion also ignores the many considerations in the EDD Prepaid Debit Card program that made it reasonable for the Bank to not begin implementation of EMV chip technology until 2021.¹⁸

¹⁶ See Cloninger Report at ¶ 53.

¹⁷ See Cloninger Report at ¶ 58.

¹⁸ See my Initial Report at Section V.B.

**A. Ms. Cloninger Does Not Consider the Fact That the Bank Needed the State's
Approval to Migrate the Program to EMV Chip Technology**

16. Ms. Cloninger opines on the “Bank’s failure to include EMV chips in its EDD debit cards”¹⁹ and asserts that the Bank “did not act swiftly,”²⁰ without considering the fact that the Bank needed EDD’s approval to migrate the program to EMV chip technology. She cites the October 17, 2014, Executive Order requiring EMV chips for certain federal programs,²¹ but does not acknowledge that not only was the EDD Prepaid Debit Card program not covered by the Executive Order, but, in fact, the contracting government agency for the EDD Prepaid Debit Card program (1) did not require EMV chips and (2) [REDACTED] [REDACTED].²² In fact, the evidence I have reviewed reflects that the Bank had several discussions with EDD in early 2021 before the state agency ultimately approved the transition to EMV chip technology in March 2021.²³ Based on my experience, it is reasonable for a financial institution to follow the direction of the contracting agency for a program like the EDD Prepaid Debit Card program. In fact, it would be unreasonable for a financial institution to unilaterally take steps that required the contracting agency’s approval without first obtaining that [REDACTED] which, in this case, [REDACTED] [REDACTED]²⁴

¹⁹ See e.g., Cloninger Report at ¶¶ 14(d), 14(e).

²⁰ See Cloninger Report at ¶ 76.

²¹ See Cloninger Report at ¶ 53.

²² Executed letter from D. Haddock, Sr. Client Manager, March 17, 2021, BANA_EDD_MDL-00002230-BANA_EDD_MDL-00002231, at BANA_EDD_MDL-00002230.

²³ See my Initial Report at ¶ 61.

²⁴ Executed letter from D. Haddock, Sr. Client Manager, March 17, 2021, BANA_EDD_MDL-00002230-BANA_EDD_MDL-00002231 at BANA_EDD_MDL-00002230.

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17. Ms. Cloninger refers to internal Bank documents about the [REDACTED]
[REDACTED]²⁵ These
[REDACTED]
[REDACTED]²⁶ Ultimately,
[REDACTED]
[REDACTED]²⁷ Much of what Ms. Cloninger cites relates to internal Bank discussions, rather than to
[REDACTED], and she does not acknowledge the evidence that
[REDACTED]²⁸ In my opinion, the evidence
does not support Ms. Cloninger's "understanding" that [REDACTED]
[REDACTED]²⁹ Rather, the evidence
shows that [REDACTED]
[REDACTED]³⁰ at which point it was no longer feasible or practicable to convert
the program for all of the reasons discussed herein and also in my Initial Report.³¹

18. Once the Bank received that approval from EDD, the Bank acted swiftly to migrate
the program to EMV chip technology. As Ms. Cloninger notes, [REDACTED]

²⁵ See Cloninger Report at Section VI.E. *See e.g.*, Email from B. Garfield re Continued Discussion - EDD Rev Share and EMV, February 26, 2020, BANA_EDD_MDL-00123235-BANA_EDD_MDL-00123236, at BANA_EDD_MDL-00123235.

²⁶ *See* William Matthew Martin deposition, February 14, 2024, 65:15 – 65:20; 78:13 – 78:22.

²⁷ Executed letter from D. Haddock, Sr. Client Manager, March 17, 2021, BANA_EDD_MDL-00002230-BANA_EDD_MDL-00002231 at BANA_EDD_MDL-00002230.

²⁸ *See* Bradley Garfield deposition, December 10, 2024, 389:7 – 389:20.

²⁹ *See* Cloninger Report at ¶ 74.

³⁰ *See* my Initial Report at ¶¶ 61-64. *See* Email from H. Wilson re Prepaid SIAI - AS2 evidence *PLEASE REVIEW*, April 24, 2020, BANA_EDD_MDL-00678774-BANA_EDD_MDL-00678775, at BANA_EDD_MDL-00678774.

³¹ *See* my Initial Report at Section V.C.2.

19. Based on the EDD's approval in March 2021, EMV chip technology implementation beginning in July 2021 was a reasonable timeline. Ms. Cloninger suggests that the adoption of EMV chip technology was due to the Court's preliminary injunction in June 2021.³⁴ This conclusion ignores the agreement with EDD that was signed in March 2021, as well as [REDACTED]

period of time and on a gradual basis as cards become expired, damaged, or lost, and new or replacement cards need to be issued. In my experience, financial institutions do not replace all of the cards in a program at once, which would include active unexpired cards that have not been reported as lost or stolen, or otherwise needing replacement.

21. Indeed, the [REDACTED] that Ms. Cloninger cites refers to the [REDACTED]

[REDACTED]

[REDACTED].³⁶ Ms. Cloninger's reliance on the [REDACTED]

[REDACTED]

[REDACTED].³⁷ There would be much more significant cost involved in migrating the entire card program to EMV chip technology at the same time, instead of waiting for a need for new and replacement cards to arise.

22. In addition, based on my experience, implementing EMV chip technology across the entire program at once would cause significant issues for both cardholders and the Bank. Cardholders would not be expecting the arrival of new cards, which creates risk of cardholder confusion, disruption, and fraud. Customers may not notice if the replacement cards are stolen and used fraudulently, as they are not expecting the cards to be issued in the first place. There is also disruption and confusion for cardholders, for example, if the original cards are being used for auto-pay and saved for other payments.

³⁶ See Cloninger Report at ¶ 63.

³⁷ See Cloninger Report at ¶ 62.

**C. Ms. Cloninger's Opinion Fails to Consider Other Factors Relevant to
Implementation of EMV Chip Technology**

23. Ms. Cloninger's opinion that the Bank should have migrated the EDD Prepaid Debit Card program to EMV chip technology by January 2020³⁸ appears to be based solely on the [REDACTED]

[REDACTED].³⁹ Ms. Cloninger's view that the decision whether to transition to EMV chip technology is solely a cost-based assessment (which, as explained above, is also erroneous and misleading in this case) is an oversimplification and is not consistent with how financial institutions actually operate. The considerations surrounding the implementation of EMV chip technology in a particular card program involve more than just the cost of adding an EMV chip. Ms. Cloninger fails to consider the multifaceted nature of this decision.

24. Ms. Cloninger does not consider the other features of the program, which I note in my Initial Report, that made it reasonable to not implement chip cards at the time. She does not consider the [REDACTED]

[REDACTED].⁴⁰ Nor does she consider the [REDACTED]

[REDACTED].⁴¹

25. She cites to the [REDACTED]

[REDACTED].⁴² She does not, however, consider or acknowledge the [REDACTED]

³⁸ See Cloninger Report at ¶¶ 58-60.

³⁹ Email from B. Garfield re EMV Cost Benefit Analysis, January 10, 2020, BANA_EDD_MDL-00351839-BANA_EDD_MDL-00351840.

⁴⁰ See my Initial Report at ¶ 48.

⁴¹ *Id.*

⁴² See Cloninger Report at ¶ 84.

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[REDACTED]

[REDACTED].⁴³

A program with significant overall load value would be less of a target for fraud if the average balances and average loads were low, as was the case here.

26. Ms. Cloninger also relies on a [REDACTED]

[REDACTED]⁴⁴ However, financial institutions do not make decisions about implementing EMV chip technology for a product or program based simply on whether “some” fraud will be avoided. As discussed in my Initial Report, financial institutions consider many other factors when evaluating whether to convert a product or program to EMV chip technology including low balances, short program duration, and low incidence of card-present fraud, among others.⁴⁵

27. Without providing any specific examples, Ms. Cloninger opines that “for many markets,” other institutions moved forward with adoption of EMV chip technology based on a break-even point of four to seven years.⁴⁶ She makes no mention of other considerations in those programs (such as those discussed in my Initial Report) which would weigh in favor of implementing EMV chip technology. In my experience, if an issuer was willing to undertake a significant financial commitment despite an up to seven-year break-even point, that is likely because there were other reasons to adopt EMV chip technology, such that the decision was not made based on the cost of the EMV chip alone.

⁴³ See my Initial Report at ¶ 48.

⁴⁴ See Cloninger Report at ¶ 65.

⁴⁵ See my Initial Report at Section IV.C.3.

⁴⁶ See Cloninger Report at ¶ 67.

28. Ms. Cloninger's opinion that the Bank "did not act swiftly" to implement EMV chip technology "[e]ven after witnessing historic fraud on EDD debit cards in 2020 during the COVID-19 pandemic" also ignores the evidence, as described herein and in my Initial Report, that significant amounts of the fraud reported to the Bank did not involve fraud that would have been prevented by EMV chips. That included the evidence of benefits fraud and other first-party fraud. Ms. Cloninger also ignores testimony that the Bank did not believe skimming to be a significant problem, even during the pandemic.⁴⁷

V. THE TYPE OF FRAUD THAT OCCURRED IN 2020 WOULD NOT HAVE BEEN ANTICIPATED

29. Ms. Cloninger's opinion that it was "highly foreseeable" that the absence of EMV chips would lead to counterfeit fraud⁴⁸ is based on a number of erroneous assumptions.

30. Ms. Cloninger cites publications noting that fraud would eventually migrate to magstripe-only cards.⁴⁹ While it is generally true that fraudsters will target what they perceive to be weaknesses, that does not mean that the EDD Prepaid Debit Card program was at significant risk of fraud. In fact, Ms. Cloninger cites publications from 2017 and 2018, yet as discussed in my Initial Report, the [REDACTED]

[REDACTED]⁵⁰ This was due to the various features of the program that I noted in my Initial Report, including low balances and short duration.⁵¹ Ms. Cloninger's opinions about

⁴⁷ See Anne Holt deposition, January 8, 2025, 296:1 – 297:9.

⁴⁸ See Cloninger Report at Section VI.F.

⁴⁹ See Cloninger Report at ¶¶ 80-82.

⁵⁰ See my Initial Report at ¶ 48.

⁵¹ *Id.*

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the risk of fraud are broad and theoretical and they are not supported by the actual EDD Prepaid Debit Card program data, which she does not consider.

31. As discussed above, Ms. Cloninger opines that the pre-pandemic load values made the EDD Prepaid Debit Card program an “attractive target for counterfeiting,” [REDACTED] [REDACTED].⁵² Ms. Cloninger ignores the evidence that I addressed in my Initial Report, [REDACTED] [REDACTED] – and thus hardly an “attractive target,” as Ms. Cloninger asserts.⁵³ As discussed in my Initial Report, and ignored by Ms. Cloninger, the [REDACTED] [REDACTED] [REDACTED].⁵⁴

32. Ms. Cloninger goes on to cite [REDACTED] [REDACTED] But as the record shows, and as I discuss in my Initial Report, [REDACTED] [REDACTED]; the State later confirmed that billions of dollars of benefits fraud had been committed.⁵⁵ Ignoring this, Ms. Cloninger concludes that “the most likely explanation” for the reported fraud is use of counterfeit cards created as a result of skimming, but cites no data to support that conclusion.⁵⁶ She does not even address any other type of fraud or other possibility, including benefits fraud, first-party fraud, or

⁵² See Cloninger Report at ¶ 84.

⁵³ See my Initial Report at ¶ 48.

⁵⁴ *Id.*

⁵⁵ See my Initial Report at Section V.C.1.

⁵⁶ See Cloninger Report at ¶ 96.

cardholder mistakes, despite the evidence in the record that significant amounts of benefits fraud and first-party fraud were occurring.

33. As explained in my Initial Report, none of that fraud would have been prevented by a chip.⁵⁷ In my opinion, a reasonable financial institution would not respond to first-party fraud and other fraud that would not be prevented by EMV chip technology by implementing EMV chip technology.

34. Also, prior to the pandemic and even in its early days, the Bank could not have foreseen the explosion of benefits fraud and first-party fraud to come.

35. Ms. Cloninger states “[b]ecause prepaid cards with high load values and low security are particularly attractive to criminals and because the COVID-19 pandemic was projected to result in a large increase of the EDD debit card load, it was also highly foreseeable that fraud targeting EDD cards would continue to increase during the pandemic.”⁵⁸ Again, Ms. Cloninger ignores the data showing that the EDD Prepaid Debit Card program was not experiencing significant fraud prior to the pandemic. Further, the Bank could not have anticipated the various changes that led to increased account balances during the Covid-19 pandemic, including the influx of federal funds into unemployment benefits programs. Based on my more than 30 years of experience in the electronic payments industry, I would not expect banks to anticipate and prepare for the series of interrelated events that began in 2020 with the onset of a global pandemic and which was followed by a massive spike in unemployment and the U.S. government’s response, including unprecedented lockdowns and a flood of unemployment benefits. In my experience, it

⁵⁷ See my Initial Report at Section VI.

⁵⁸ See Cloninger Report at ¶ 14(f).

is unreasonable to expect a financial institution to anticipate and plan in advance for what the government response might be to an unprecedented global event like the Covid-19 pandemic.

36. Additionally, the rapid increase in both the number of unemployment benefits recipients and the average balance of the EDD Prepaid Debit Cards during the pandemic, which Ms. Cloninger argues made the program more attractive for counterfeit fraud, also made the EDD program more attractive to benefits fraud, which EMV chips would not prevent, and which the Bank could not have reasonably anticipated.

37. Once the pandemic was underway and the impacts on the EDD program began to manifest, including the increase in both beneficiaries and card balances, it remained reasonable for the Bank to not implement EMV chip technology at that time, given the conditions and factors described in my Initial Report.⁵⁹ Conversion of the entire program at that time, which is what Ms. Cloninger seems to suggest the Bank should have done, would also have presented a number of other challenges, as discussed above.

38. Ultimately, the Bank could not have reasonably anticipated the pandemic or the government's response to it. I therefore disagree with Ms. Cloninger's opinion that a "sophisticated financial institution like Bank of America"⁶⁰ would, at the start of the pandemic, have been aware of the risks caused by the pandemic and the resulting government response. I also disagree that these risks would have been avoided with EMV chip technology.

⁵⁹ See Initial Report at Section V.

⁶⁰ See Cloninger Report at ¶ 85.

VI. EMV CHIPS WOULD NOT HAVE PREVENTED “ALL OR NEARLY ALL” OF THE UNAUTHORIZED ATM WITHDRAWALS REPORTED

39. Ms. Cloninger’s opinion that adoption of EMV chip technology would have prevented “all or nearly all” of the unauthorized ATM withdrawals reported⁶¹ relies on several unsupported assumptions.

i) First, Ms. Cloninger assumes that none of these transactions reflect first-party fraud or mistake, but makes no effort to verify her assumption or consider the evidence in the record showing that the State had identified billions of dollars in benefits fraud and that the Bank likewise found significant amounts of benefits and first-party fraud.⁶² As discussed in my Initial Report, the record contains significant evidence of both.

ii) Second, she assumes that skimming is the “best explanation” for the fraud,⁶³ but fails to consider all the other ways that fraud can occur (e.g., through EDD’s mailing of social security numbers), and that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁶⁴

iii) Third, she assumes that if the Bank had implemented EMV chip technology, certain fallback rules would have been put in place to prevent the use of a counterfeit magstripe-only card. She does not consider the [REDACTED]

[REDACTED]

⁶¹ See Cloninger Report at Section VI.H.

⁶² See Cloninger Report at ¶ 96.

⁶³ See Cloninger Report at ¶ 14(i).

⁶⁴ See my Initial Report at Section VI.C.

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[REDACTED]

[REDACTED]⁶⁵

iv) Fourth, she assumes that none of the transactions occurred at a non-chip-enabled ATM. Fallback rules do not apply at such ATMs. As discussed in my Initial Report, there continue to be non-chip-enabled ATMs.⁶⁶

v) Fifth, she assumes that internal Bank emails about fraud losses that could have been avoided if EDD Prepaid Debit Cards had EMV chips refer to avoidance of *fraud*, rather than the avoidance of *fraud loss*. As explained in my Initial Report, even if adding an EMV chip resulted in the shifting of fraud loss for a particular transaction, the underlying fraud would not have been avoided.⁶⁷

40. Ms. Cloninger's opinions that EMV chip technology is "extremely effective" in preventing counterfeit fraud⁶⁸ and that the absence of a chip made EDD Prepaid Debit Cards "highly vulnerable"⁶⁹ also erroneously assume that all of the reported fraud was counterfeit fraud resulting from skimming accompanied by PIN compromise. As explained in my Initial Report, not all fraud is counterfeit, and EMV chip technology does not prevent all fraud.⁷⁰

⁶⁵ See my Initial Report at ¶ 114. See Email from M. Gargagliano re Action Required: CA Transition to EMV Cards: Fraud Workstream Status Report, July 23, 2021, BANA_EDD_MDL-00166750-BANA_EDD_MDL-00166754.

⁶⁶ See my Initial Report at ¶ 110.

⁶⁷ See my Initial Report at Section VI.A.

⁶⁸ See Cloninger Report at Section VI.B.

⁶⁹ See Cloninger Report at Section VI.A.

⁷⁰ See my Initial Report at Section VI.

41. Ms. Cloninger also does not consider the evidence that [REDACTED]

[REDACTED]⁷¹ As I explained in my Initial Report, in order to determine whether each of the reportedly unauthorized transactions could have been prevented with an EMV chip, one would need to review each compromise and each transaction individually.⁷²

VII. A REASONABLE FINANCIAL INSTITUTION WOULD NOT HAVE ASSUMED THAT EVERY OR EVEN MANY OF THE REPORTS OF FRAUD WERE MADE BY “TRUE” VICTIMS OF COUNTERFEIT FRAUD

42. For the same reasons stated above, I disagree with Ms. Cloninger’s opinion that the Bank knew or should have known that all or even many of the cardholders who reported ATM withdrawals were “true” victims of counterfeit fraud resulting from card skimming.

43. Ms. Cloninger does not consider the fact that the [REDACTED]

[REDACTED]⁷³ She does not address the evidence that significant benefits fraud and first-party fraud occurred during the pandemic. Also, as Ms. Cloninger acknowledges, a cardholder’s Personal Identification Number (“PIN”) cannot be obtained via a skimming device and would have to be obtained through other means, such as a keypad overlay or pinhole camera.⁷⁴ Yet she does not cite any basis for believing that every instance of skimming also involved PIN compromise, which would be required for subsequent fraudulent ATM transactions conducted through counterfeit fraud. In fact, cards can

⁷¹ See my Initial Report at ¶ 57. See Email from W. Martin re ACP - August Incoming Prepaid Claims, August 30, 2021, BANA_EDD_MDL-00520383. See Email from M. Bartlett re FW Possible request for GIS assistance, September 1, 2021, BANA_EDD_MDL-00464666.

⁷² See my Initial Report at Section VI.H.

⁷³ See my Initial Report at ¶¶ 93-98. See Bradley Garfield deposition, December 10, 2024, 164:20 – 166:21; 167:21 – 168:15; Email from B. Garfield re Samples of ATM Claims, September 15, 2020, BANA_EDD_MDL-00706295-BANA_EDD_MDL-00706303, at BANA_EDD_MDL-00706296.

⁷⁴ See Cloninger Report at ¶¶ 18-19.

also be skimmed at other places, such as payment terminals that do not require PINs, in which case it would be impossible to obtain the cardholder's PIN as it is not entered during the transaction. Further, not every ATM skimmer is accompanied by a keypad overlay, pinhole camera, or other device that would successfully capture the PIN.

44. In my opinion, it is implausible that all of the ATM fraud reported in 2020 and 2021 could be a result of skimming given that skimming alone does not compromise the cardholder's PIN. Ms. Cloninger's assumption is also directly contradicted by the evidence in the record of benefits fraud and first-party fraud. Generally, the only terminals that require cardholders to enter PINs are ATMs, so Ms. Cloninger's opinion assumes that virtually all of the compromised cards were compromised at ATMs through ATM skimmers and separate PIN capture devices. Not only does that assumption seem unreasonable for the reasons stated above, but it is contradicted by the fact that, in the United States, cash usage itself dropped from 26% of all transactions in 2019 to 19% of all transactions in 2020, and remained low at 20% of all transactions in 2021.⁷⁵ In my experience, given the volume of fraud reported during the pandemic, including unauthorized ATM transactions, there was no reason for the Bank to believe that all or nearly all of the fraud being reported was counterfeit fraud as a result of card skimming at ATMs, particularly in light of the information indicating significant benefits fraud and first-party fraud.

VIII. CONCLUSION

45. Ms. Cloninger's opinion that "by at least 2019, EMV had become the industry standard for payment card security in the United States"⁷⁶ is overly broad and bears little relevance

⁷⁵ Federal Reserve Bank of San Francisco, "2022 Findings from the Diary of Consumer Payment Choice, May 5, 2022, <https://www.frbsf.org/research-and-insights/publications/fed-notes/2022/05/2022-findings-from-the-diary-of-consumer-payment-choice/> (Last visited on April 4, 2025).

⁷⁶ See Cloninger Report at ¶ 55.

to the specific card product at issue in this matter -- prepaid debit cards. As detailed in my Initial Report, EMV chip cards were *not* industry standard for prepaid debit cards at that time.⁷⁷

46. Ms. Cloninger's opinion that the Bank should have implemented EMV chip technology prior to July 2021 ignores certain practical realities, including the fact that the [REDACTED] Ms. Cloninger's focus on the incremental cost of adding chip technology to a card ignores the multifaceted considerations that impact the determination of whether to migrate a card product or program to EMV chip technology and also ignores the reality of how card technology changes are typically implemented. Further, Ms. Cloninger's view that EMV chip technology should have been immediately implemented throughout the EMV Prepaid Debit Card program at the beginning of the Covid-19 pandemic ignores the formidable challenges associated with an immediate, wholesale replacement of millions of cards in the midst of a global pandemic, which would include, among other things, cardholder confusion, program disruption, increased fraud risk, and other transition costs. The Bank acted swiftly when it received approval from EDD to implement EMV chip technology.

47. Ms. Cloninger's opinion that fraud in the EDD Prepaid Debit Card program during the Covid-19 pandemic was foreseeable ignores the low rates of fraud in the program prior to the pandemic. Her opinion is also based on the tenuous assumption that the Bank should have foreseen both a historic global pandemic and an unprecedented U.S. governmental fiscal response to the pandemic. Based on my more than 30 years in the electronic payments industry, prior to the onset of the pandemic (and even then), it was not reasonable to anticipate the level and sophistication of

⁷⁷ See Initial Report at Section V.A.

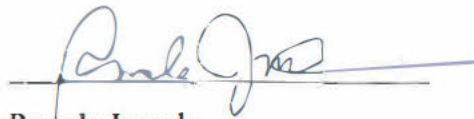
fraud that would descend upon the EDD program, which included significant amounts of fraud that would not have been prevented by EMV chip technology.

48. Ms. Cloninger's opinion that EMV chips "would have prevented virtually all the card-present counterfeit fraud (including unauthorized ATM withdrawals) that class members experienced"⁷⁸ relies on her speculative assumption that all of the reported fraud was counterfeit fraud and that no meaningful amounts of benefits fraud, first-party fraud, or cardholder mistake took place. Her assumptions are implausible and counter to contemporaneous evidence gathered by the Bank, which indicated that much of the reported fraud they were observing was actually benefits fraud and first-party fraud, as well as the reports from the State Auditor regarding the significant amounts of benefits fraud that occurred during the Covid-19 pandemic. Ms. Cloninger's assumptions also ignore the many other ways in which card information can be compromised and fraud can occur.

⁷⁸ See Cloninger Report at ¶ 14(j).

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Executed on this 4th day of April 2025.



Pamela Joseph

In RE Bank of America California Unemployment Benefits Litigation

Expert Rebuttal Report of Pamela Joseph

List of Materials Considered

I incorporate by reference the materials listed in Appendix B to my Initial Report dated March 4, 2025. In addition, I considered the following additional materials in preparing this rebuttal report.

1. Expert Reports

Expert Report of Jane Cloninger dated March 4, 2025

2. Depositions and Exhibits

Anne Holt Deposition Transcript

Robert Chestnut Deposition Transcript

3. Other Produced Documents

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BANA_EDD_MDL-00100634

BANA_EDD_MDL-00125177

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BANA_EDD_MDL-00678778 - BANA_EDD_MDL-00678782

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4. Publicly Available Documents

Federal Reserve Bank of San Francisco, “2022 Findings from the Diary of Consumer Payment Choice,” May 5, 2022, available at <https://www.frbsf.org/research-and-insights/publications/fed-notes/2022/05/2022-findings-from-the-diary-of-consumer-payment-choice/>

Note: I also reviewed the materials listed in Appendix B of the Expert Report of Jane Cloninger dated March 4, 2025.