DX 10.B

FILED PROVISIONALLY UNDER SEAL WITH REDACTIONS PURSUANT TO 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 RUSSELL CRONAN

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 address certain opinions and assumptions put forth in (a) the Expert Report of J. Daniel Kreis dated March 4, 2025 ("Kreis Report") and (b) the Expert Report Of William J. Abernathy, Jr. dated March 3, 2025 ("Abernathy Report").

2. My background and qualifications, which include approximately 30 years working as a federal bank compliance examiner, are detailed in my expert report dated March 4, 2025 ("Cronan Report"). All opinions expressed herein are my own. I have not provided expert testimony or authored any publications since I submitted the Cronan Report. In preparing this report, I personally considered various documents produced in this litigation and other materials which are identified in Appendix B to the Cronan Report. Any additional materials not identified in the Cronan Report are listed in Appendix A to this report. I also reviewed the materials listed in the Kreis Report and the Abernathy Report as well as the other expert reports of J. Daniel Kreis in this matter dated August 29, 2024 (the "Kreis Class Cert Report") and November 21, 2024 (the "Kreis Class Cert Rebuttal Report") and the expert report of William J. Abernathy Jr. in this matter dated November 19, 2024 (the "Abernathy Class Cert. Rebuttal Report").

3. In conducting my work on this matter, I have been assisted by individuals at Ankura Consulting Group, LLC ("Ankura"),[1] who worked at my direction and under my supervision. All opinions expressed herein are my own.

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

4. I reserve the right to supplement or amend my report should new information become available. I am prepared to testify at trial on the topics addressed in this report and in the Cronan Report.

II. Summary of Opinions

5. I have reviewed the Kreis Report and the Abernathy Report and continue to stand by the opinions expressed in the Cronan Report. In this report, I respond below to several issues raised in those reports.

6. First, Mr. Abernathy offers the extraordinary and unfounded implication that the Bank *knowingly or willfully* violated the Electronic Fund Transfer Act ("EFTA") and Regulation E when it implemented the Claim Fraud Filter ("CFF") in response to unprecedented levels of fraud, and that it further sought to shield this decision from its regulators because it supposedly "knew or should have known"[2] that its regulators would have found certain aspects of the CFF unacceptable.[3] His lone support for this serious and unsupported allegation is his hindsight-based reference to the consent orders the Bank subsequently entered into with the Office of the Comptroller of the Currency ("OCC") and the Consumer Financial Protection Bureau ("CFPB") in 2022; however, the fact the Bank ultimately entered into those consent orders does not mean the Bank's decision to implement the CFF was unreasonable at the time the decision was made, let alone a willful violation of EFTA and Regulation E. [redacted]

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[2] *See* Abernathy Report ¶ 26.

[3] Per Mr. Abernathy, it was "completely unreasonable" for the Bank to believe the CFF would be acceptable to its regulators and "the fact that the Bank could have easily communicated this plan to its regulators, but did not, indicates that the Bank was aware and concerned that the Claim Fraud Filter did not comply with the Bank's obligations…" *See* Abernathy Report ¶ 27 through ¶ 28.

[redacted] There were sound reasons why the Bank would not seek advance approval from its regulators before implementing the CFF, as both Messrs. Abernathy and Kreis opine the Bank should have done. Based on my extensive experience as a federal bank examiner, had the Bank requested and then in turn waited for regulatory guidance prior to taking action in response to the explosion of prepaid card fraud, such inaction would have allowed the fraud to continue unabated. In my opinion, the OCC would not consider a bank allowing uncontrolled fraud losses to be an effectively managed risk. Indeed, the OCC could deem a bank's inaction in the face of uncontrolled fraud to be an unsafe and unsound banking practice.

7. Second, Mr. Kreis asserts that the Bank could have adopted strategies other than CFF Indicator 1 to address the operational challenges related to cardholder claims of unauthorized ATM withdrawals.[5] Notably, Mr. Kreis bases his conclusions about claims-handling on a pre-pandemic, business-as-usual environment in which a claims system is not actively being targeted and taken advantage of by criminals and fraudsters. He does not account for the circumstances of the global pandemic and related safety-and-soundness obligations financial institutions are required to address. It is my opinion that the alternative scenarios proffered by Mr. Kreis that he claims the Bank could have undertaken -- *i.e.,* increasing staffing, increasing [redacted], and prioritizing the investigation of high-dollar claims -- were not viable solutions in the face of the unprecedented wave of fraud that infiltrated Bank of America's prepaid debit card program for

[4] Declaration of Laura Brys in Support of Defendant's Opposition to Plaintiffs' Motion for Class Certification, Ex. ("DX") 6, *See* Michael Letson October 23, 2024 Declaration, ¶ 10 through ¶ 27.

[5] [redacted]

California's Employment Development Department ("EDD") and specifically targeted the Bank's systems, and it was reasonable for the Bank to come to that conclusion.

8. [redacted].[6] However, Mr. Kreis ignores the fact that neither EFTA nor Regulation E contemplates industry standards as it relates to written explanations. Notably, EFTA and Regulation E provide flexibility relating to banks' obligations to report the results of investigations, specifying broadly that banks are to provide "… a written explanation of the institution's findings."[7] As Mr. Kreis notes, the claim denial letters set forth the following "reason" for the claim denial: "Your claim has been closed because we believe the account or the claim have been the subject of fraud or suspicious activity."[8] Based on my experience as a regulator, the aforementioned letters did provide a written explanation of the reason for the Bank's denial of the claims. Further, in concluding that the stated "reason" was somehow insufficient, Mr. Kreis appears to be selective in his reliance on the July 2022 consent orders. On the one hand, Mr. Kreis cites the July 2022 consent orders as "supporting [his] opinion" that the Bank "believed that its regulators would not have approved use of the CFF";[9] however, he makes no mention of the fact that the CFPB consent order, even years after the fact, did not take issue with the written explanation contained in the Bank's claim denial letters.

9. [redacted]

[6] *See* Kreis Report ¶ 77 through ¶ 80.
[7] *See* 12 CFR § 1005.11(d)(1).
[8] *See* Kreis Report ¶ 79.
[9] *See* Kreis Report ¶ 49.

[redacted][10] [redacted] In my experience, this is simply wrong. Regulators understand and accept that a [redacted] (here, whether because they submitted a claim by mistake or under false pretenses). This is particularly the case in this situation where the EDD cardholders were not traditional Bank customers (the program was administered by EDD), and the Bank and EDD have acknowledged they cannot identify all fraudsters given the scope and type of fraud at issue, and the bank's limited access to information concerning EDD cardholders and their entitlement to the benefits deposited in their EDD prepaid debit card account. Further, contrary to Mr. Abernathy's suggestion, [redacted]

III. Contrary to Messrs. Abernathy and Kreis's Assertions, It Was Reasonable for Bank of America to Believe That Its Response to the Explosion of Pandemic-Era Prepaid Card Fraud Would Have Been Acceptable to the Bank's Regulators.

10. Mr. Abernathy makes the extraordinary and unfounded implication that the Bank *knowingly or willfully* violated EFTA and Regulation E when it implemented the CFF in response to unprecedented levels of fraud in the EDD program and purportedly sought to shield this decision from its regulators.[12] His rationale for this serious and unsupported allegation is his hindsight-based reference to the consent orders the Bank subsequently entered into with the OCC and CFPB

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[10] *See* Abernathy Report ¶ 34.

[11] *Id.*

[12] Per Mr. Abernathy, it was "completely unreasonable" for the Bank to believe the CFF would be acceptable to its regulators and "the fact that the Bank could have easily communicated this plan to its regulators, but did not, indicates that the Bank was aware and concerned that the Claim Fraud Filter did not comply with the Bank's obligations…" *See* Abernathy Report ¶ 27 through ¶ 28.

in 2022; however, the fact the Bank ultimately entered into those consent orders does not mean the Bank's decision to implement the CFF was not reasonable at the time the decision was made, let alone a willful violation of EFTA and Regulation E.[13] [redacted]

A. The Bank Could Not Have Realistically Delayed Action Pending Solicitation and Receipt of Regulatory Guidance.

11. Mr. Abernathy asserts it was "unreasonable for the Bank to fail to communicate with its regulators that it was about to implement a new process" related to its EFTA and Regulation E investigations.[15] This statement ignores the urgent nature of the Bank's need to address the unprecedented levels of fraud impacting the EDD program and that delaying the implementation of the CFF until after soliciting and receiving regulatory guidance would have allowed the fraud to continue unabated.

12. In my experience, large banks have knowledgeable compliance and legal staffs and access to experienced outside counsel for relevant legal advice. As such, these banks make a myriad of operational decisions without approaching regulators for guidance. Indeed, this is the understanding and expectation of regulators, all the more so when banks are responding to rapid changes in circumstances. [redacted]

[13] Mr. Kreis likewise refers to the 2022 consent order as "supporting [his] opinion" that the Bank "believed that its regulators would not have approved use of the CFF." *See* Kreis Report ¶ 49. Mr. Kreis is apparently referring to the CFPB consent order as the OCC consent order is not listed among his materials relied upon. *See* Kreis Appendix B.

[14] DX 6, *See* Michael Letson October 23, 2024 Declaration, ¶ 10 through ¶ 27.

[15] *See* Abernathy Report ¶ 27.

[16] *See* Bank Of America's Responses And Objections To Plaintiffs' Sixth Set Of Interrogatories, Case No. 3-21-md-02992-LAB-MSB, pages 7-9.

[redacted] The governance exercised by Bank of America, including the participation of the Bank's legal team, among other groups, is consistent with my expectations.

13. Furthermore, bank regulators have their own processes and approvals to work through such that responding to a bank seeking regulatory guidance can be a time-consuming undertaking. I have personally seen routine regulatory inquiries (*e.g.*, a simple Regulation B violation determination) take weeks to be resolved at the CFPB. In another example involving a member of my examination team at the OCC, the OCC took months to respond to and opine on a question related to the Community Reinvestment Act. It is important to note that both of these examples took place when the agencies were operating under business-as-usual circumstances. In contrast, during the pandemic, bank regulators themselves, similar to the banks they regulated, faced unprecedented operational challenges (*e.g.*, transitioning to conducting remote supervision).[19] These challenges would have likely delayed regulatory response time to an even greater degree than such responses in a business-as-usual environment. Further, because the

[17] *See*, for example, BANA_EDD_MDL-00705467- BANA_EDD_MDL-00705470, BANA_EDD_MDL-00701607 - BANA_EDD_MDL-00701608, BANA_EDD_MDL-00705493 - BANA_EDD_MDL-00705497.

[18] *See* BANA_EDD_MDL-00497802 - BANA_EDD_MDL-00497804.

[19] *See* "Bank Supervision: Lessons Learned from Remote Supervision During Pandemic Could Inform Future Disruptions," U.S. Government Accountability Office, GAO-22-104569, September 2022. https://www.gao.gov/assets/gao-22-104659.pdf (Last accessed April 4, 2025). ("To manage pandemic-related challenges to their supervisory missions, banking regulators deferred examination activities, expanded off-site monitoring of institutions, adjusted telework policies, and provided technology tools and internal guidance to examiners.")

present issue for Bank of America involved two separate federal regulatory agencies (*i.e.*, the CFPB and OCC) that each had responsibility for and jurisdiction over different but interwoven elements of the Bank's operations (*i.e.*, the CFPB over EFTA and Regulation E, and the OCC over safety and soundness and compliance, which includes the Bank's Bank Secrecy Act ("BSA") / Anti-Money Laundering ("AML") obligations), the two agencies would have had to confer and come to agreement, thus further extending the timeline. As a result, Bank of America likely would not have received a prompt response under the hypothetical circumstance that it sought regulatory guidance as to how it should respond to rapidly-rising EDD prepaid card fraud.

14. In support of his position that "even a small financial institution has the ability to reach out to regulators" for approval, Mr. Kreis cites to an example of a FinTech firm, Upstart, that applied for and received a No-action Letter ("NAL") from the CFPB regarding its online lending platform.[20] To be clear, contrary to Mr. Kreis's suggestion, applying for an NAL was simply not an option that was available to the Bank relating to its operational decision to implement the CFF. For context, under an approved NAL, the CFPB agrees to not make supervisory findings or bring a supervisory or enforcement action against a company with respect to certain requirements relating to innovative financial products or services promising substantial consumer benefit that are covered under the NAL.[21] Importantly, because NALs relate only to the introduction of a novel financial product or service,[22] they simply do not apply to the situation in which the Bank hypothetically seeks a regulatory interpretation with respect to an operational

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[20] *See* Kreis Report, ¶ 49. Notably, NALs would not require approval from the OCC, which was the Bank's primary regulator.

[21] *See* "Policy on No-Action Letters; Information Collection," Federal Register, Vol. 81, No. 34, February 22, 2016, page 8686, https://www.govinfo.gov/content/pkg/FR-2016-02-22/pdf/2016-02390.pdf (Last accessed April 4, 2025).

[22] *Id.*

process change (*e.g.*, the implementation of the CFF). Indeed, Mr. Kreis identifies no evidence whatsoever that this option was available to the Bank. [redacted]

15. It is further worth noting that even with respect to Mr. Kreis's own inapposite example, Upstart subsequently requested early termination of the NAL, citing "…a need to be able to respond to the rapid pace of change in credit markets," and "… because [they] would like to make time-sensitive model changes that are not possible if the CFPB were to conduct the appropriate level of monitoring and review."[24] The CFPB itself noted that "Upstart has correctly identified that this review [by the CFPB to study the potential implications of Upstart adding variables to its underwriting and pricing model] would prevent [Upstart] from making quick business decisions with regard to its model."[25] The early termination of Upstart's NAL underscores the industry's need to be able to make time-sensitive business judgments while waiting on regulatory opinion. Indeed, had the Bank sought a regulatory interpretation, and waited for a response before implementing the CFF, as Messrs. Abernathy and Kreis advise, it would have prevented the Bank from addressing the unprecedented levels of fraud that were impacting the

[23] *See* Cronan Report Section V. *See* Cronan Report ¶ 43 through ¶ 52.

[24] *See* Order to Terminate No-Action Letter, CFPB, Upstart Network, Inc., In re November 30, 2020 No-Action Letter, June 8, 2022, pages 1-2, https://files.consumerfinance.gov/f/documents/cfpb_upstart-no-action-letter-termination_order_2022-06.pdf (Last accessed April 4, 2025).

[25] *See* Order to Terminate No-Action Letter, CFPB, Upstart Network, Inc., In re November 30, 2020 No-Action Letter, June 8, 2022, page 2, https://files.consumerfinance.gov/f/documents/cfpb_upstart-no-action-letter-termination_order_2022-06.pdf (Last accessed April 4, 2025).

EDD program and the Bank -- and may have allowed significant additional fraud to victimize taxpayers and the Bank.

16. After conducting a review of its own NAL policy in 2022, the CFPB issued a policy statement concluding that the NAL policies utilized by Upstart and in place during the pandemic "failed to advance their stated objective of facilitating consumer-beneficial innovation" and cited "a number of potential abuses and challenges with the NAL policy."[26] One such example of "abuses and challenges" cited by the CFPB was Upstart's NAL. The CFPB first noted that it "did not have enough time to review the implications of the significant changes" to Upstart's credit model and so terminated the NAL.[27] The CFPB also pointed out that -- despite initially granting a NAL to Upstart -- significant concerns subsequently arose with respect to the model's compliance with the Equal Credit Opportunity Act.[28] Thus, Mr. Kreis's example does nothing to support his assertion that the Bank should have sought regulatory guidance prior to implementing the CFF because the NAL process was not an option for the Bank and it further ignores that Upstart requested early termination of the NAL that it found too restrictive for making timely business decisions.

17. Based on my experience as a regulator, it was incumbent on Bank of America to take all reasonable actions to stem the tide of unprecedented fraud and potential fraud losses, rather than wait for regulators to eventually weigh in with guidance. Each passing day without action would have meant an unabated rise in fraudulent unauthorized transaction claims that the Bank believed were associated with fraudulent benefits accounts, which the OCC could have considered

[26] *See* Policy Statement on No Action Letters, CFPB, Federal Register, Vol. 90, No. 6, Friday, January 10, 2025, page 1971, https://www.govinfo.gov/content/pkg/FR-2025-01-10/pdf/2025-00378.pdf (Last accessed April 4, 2025).

[27] *Id.*

[28] *Id.*

in and of itself an unsafe and unsound banking practice (as discussed below). As such, it is my opinion that it was reasonable for the Bank to believe that implementing automated tools such as the CFF to address the explosion in prepaid fraud, rather than solicit and wait for regulatory guidance, was a prudent course of action.

B. It Was Reasonable for the Bank to Believe the Implementation of the CFF Would Have Been Acceptable to the Bank's Regulators.

18. Based on my experience with the OCC, the OCC would not consider a bank allowing uncontrolled fraud losses to be an effectively managed risk. The OCC could thus deem a bank's inaction in the face of uncontrolled fraud to be an unsafe and unsound banking practice. As I noted in the Cronan Report,[29] the OCC's Policies and Procedures Manual ("PPM") related to Civil Money Penalties indicates an unsafe or unsound practice includes a "…lack of action…the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the Deposit Insurance Fund."[30] The manual relatedly says, "'Risk of loss' refers to any time the bank was in danger of sustaining a financial loss as a result of the misconduct."[31] Based on the above, it would have been reasonable for the Bank to believe the OCC could consider a lack of action on its part to control fraud losses to be an unsafe and unsound practice. If fact, as noted in the Cronan Report, Bank employee Michael Letson described the [redacted] Accordingly, the Bank undertook mitigation steps to address the

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[29] *See* Cronan Report ¶ 19.

[30] *See* PPM-5000-7, Section: Bank, Supervision Subject: Civil Money Penalties, November 13, 2018 | OCC, page 14.

[31] *See* PPM-5000-7, Section: Bank, Supervision Subject: Civil Money Penalties, November 13, 2018 | OCC, page 15.

[32] *See* Cronan Report ¶ 45 through ¶ 48. DX 6, *See* Michael Letson October 23, 2024 Declaration, ¶ 10 through ¶ 27.

prepaid card fraud through its development of the CFF. Reports related to unemployment insurance fraud from the Financial Crimes Enforcement Network ("FinCEN")[33] [redacted][34] in March 2020 and May 2020, respectively, support the Bank's belief that such mitigation steps were reasonable. Indeed, in September 2020, the U.S. Department of Justice established a National Unemployment Insurance Fraud Task Force indicating that "[f]raudsters, some of which are transnational criminal organizations, are using the stolen identities of U.S. citizens to open accounts and file fraudulent claims for UI benefits, exploiting the unprecedented expansion of these benefits provided in response to economic disruption caused by the COVID-19 pandemic."[35]

19. [redacted] In my experience, an unsafe and unsound practice in itself does not indicate that a bank is in an unsafe and unsound condition. Rather, such practices could potentially *lead* to the bank being in an unsafe and unsound condition. For example, a practice of not addressing rapidly increasing fraud across the various areas of a bank would likely eventually put any bank in an unsafe and unsound condition.

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[33] *See* "The Financial Crimes Enforcement Network (FinCEN) Encourages Financial Institutions to Communicate Concerns Related to the Coronavirus Disease 2019 (COVID-19) and to Remain Alert to Related Illicit Financial Activity," FinCEN Press Release, March 16, 2020, https://www.fincen.gov/news/news-releases/financial-crimes-enforcement-network-fincen-encourages-financial-institutions (Last accessed April 4, 2025).

[34] *See* BANA_EDD_MDL-00205361.

[35] *See* "Unemployment Insurance Fraud Consumer Protection Guide," U.S. Department of Justice, National Unemployment Insurance Fraud Task Force, September 21, 2020, https://www.oig.dol.gov/public/Unemployment%20Insurance%20Fraud%20Consumer%20Protection%20Guide,%20Final.pdf (Last Accessed April 4, 2025).

[36] *See* Cronan Report ¶ 19.

20. Further to this point, I am aware that in July 2022 Bank of America entered into a consent order with the OCC around the administration of the Bank's prepaid cards for unemployment benefits. The OCC's order specifically states that the Bank engaged in "unsafe or unsound practice(s)" -- it notably did not say the Bank was in an unsafe and unsound condition.[37]

C. Mr. Abernathy's Reliance on the Consent Orders as the Basis for His Opinion That the Bank Could Not Have Reasonably Anticipated Regulatory Approval Is a Product of Hindsight.

21. Mr. Abernathy's opinion that the Bank "could not have reasonably believed" that the CFF complied with EFTA and Regulation E when it implemented the CFF[38] is colored with hindsight, as it is based on the fact the Bank subsequently entered into consent orders with the OCC and CFPB. Mr. Abernathy's reliance on the CFPB and OCC consent orders does not account for a practical reality of enforcement activity: agency priorities can experience shifts with changes in presidential administrations and corresponding leadership appointments, and such a priority shift happened here between the time the Bank made the decision to implement the CFF in late 2020 and the time the Bank entered into the CFPB and OCC consent orders in July 2022.

22. In my experience, different administrations and supervision and enforcement personnel may interpret and enforce regulations differently, particularly where the regulation itself does not contain specific requirements or provide specific guidance, as is the case with EFTA and Regulation E. Further, their interpretations of a given regulation may (and often does) differ.

23. As I noted in the Cronan Report, EFTA and Regulation E allow for flexibility given the need to respond to changing circumstances.[39] Likewise, the nature of an EFTA and Regulation

[37] *See* United States of America Department of the Treasury Office of the Comptroller of the Currency – Consent Order: In the Matter of: Bank of America, N.A. Charlotte, North Carolina, July 14, 2022, page 1.

[38] *See* Abernathy Report Section V ¶ 2 through ¶ 3.

[39] *See* Cronan Report ¶ 27 through ¶ 28.

E examination allows for flexibility in recognition of the potential for broad variances as it relates to the type of claims made by consumers. For these reasons, differing views across different administrations and appointed agency leaders can have a meaningful impact on whether or not an enforcement action may or may not be imposed.

24. In 2020, the OCC and CFPB, under the leadership of a Republican administration, issued guidance and bulletins acknowledging the impact of COVID-19 on the operations of financial institutions and potential CARES Act-related fraud, and indicated that the agencies would provide flexibility as banks sought to respond to the pandemic. At the outset of the pandemic, OCC Bulletin 2020-34 acknowledged the fraud challenges the pandemic would likely pose for financial institutions, particularly those charged with implementing programs under the CARES Act.[40] The OCC stated that "compliance with the BSA remains crucial to protecting national security by combating money laundering and related crimes . . . during national emergencies such as the COVID-19 pandemic" and proceeded to identify known scams and criminal attempts to infiltrate programs implemented under the CARES Act, "creating further challenges for financial institutions."[41] The early interagency guidance further stated: "[c]onsistent with long-standing practices, the OCC will consider the unusual circumstances faced during the COVID-19 crisis when reviewing BSA compliance programs and determining any supervisory response."[42]

25. Additionally, in June 2020, the OCC issued Bulletin 2020-64, which outlined supervisory principles for assessing bank safety and soundness given the ongoing impact of the

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[40] *See* "Bank Secrecy Act/Anti-Money Laundering: OCC Supports FinCEN's Regulatory Relief and Risk-Based Approach for Financial Institution Compliance in Response to COVID-19," OCC Bulletin 2020-34, OCC, April 7, 2020, https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-34.html (Last accessed April 4, 2025).

[41] *Id.*

[42] *Id.*

pandemic.[43] The interagency examiner guidance provided that "examiners will consider the unique, evolving, and potential long-term nature of the issues confronting banks and will exercise appropriate flexibility in their supervisory response."[44] Similarly, a March 2020 press release from the CFPB noted "that it is providing needed *flexibility* to enable financial companies to work with customers in need as they respond to the COVID-19 pandemic."[45]

26. Financial institutions reasonably rely on such agency pronouncements and guidance, particularly during periods of crisis, as they respond to dynamic circumstances. Further, given the unprecedented nature of the pandemic, its impact on financial institutions and consumers, and rapidly changing circumstances, this regulatory flexibility afforded to banks was important and necessary. When banks were facing new challenges they could not have reasonably expected to foresee, it was reasonable for banks to expect they would be provided some flexibility in responding to the crisis in ways they believed to be reasonable. In Bank of America's case specifically, it was reasonable for the Bank to expect they would be afforded some flexibility to respond to the explosion of EDD prepaid debit card fraud.

27. In January 2021, a new Democratic presidential administration appointed new agency heads, rescinded many earlier pandemic-related pronouncements, and announced that prior pronouncements and statements offering flexibility and acknowledging the challenges financial

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[43] *See* "Examinations: Interagency Examiner Guidance for Assessing Safety and Soundness While Considering the Effect of COVID-19 on Institutions," OCC Bulletin 2020-64, OCC, June 23, 2020, https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-64.html (Last accessed April 4, 2025).

[44] *Id.*

[45] *See* "CFPB Provides Flexibility During COVID-19 Pandemic," Bureau of Consumer Financial Protection, March 26, 2020, https://www.consumerfinance.gov/about-us/newsroom/cfpb-provides-flexibility-during-covid-19-pandemic (Last accessed April 4, 2025) (emphasis added).

institutions would not be honored.[46] Instead, agencies like the CFPB stated that they would take the opposite approach in enforcing (and sometimes second-guessing) decisions made by financial institutions during the COVID-19 crisis. In January of 2021, Acting Director of the CFPB, Dave Uejio, stated in a press release that there would be a "change of direction" and that "[m]oving forward, the CFPB [would] take *aggressive* action to ensure that regulated companies follow the law and meet their obligations to assist consumers during the COVID-19 pandemic."[47] That the OCC and CFPB under a different administration ultimately pursued aggressive enforcement actions against the Bank (and others) does not mean it was unreasonable for the Bank, in consultation with its compliance and legal team, to adopt the CFF to address the real-time fraud that was targeting the EDD prepaid debit cards.

28. In my opinion, it was further reasonable for the Bank to believe that its regulators would view the Bank's response to pandemic-driven fraud favorably, particularly where the OCC and CFPB themselves acknowledged that circumstances were not business-as-usual, and the OCC specifically acknowledged the challenges in dealing with COVID-19 and CARES Act-related fraud.[48] At the very least, it was reasonable for the Bank to assume that good-faith efforts to swiftly

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[46] *See e.g.* "The Bureau is taking much-needed action to protect consumers, particularly the most economically vulnerable," Consumer Financial Protection Bureau, January 28, 2021, https://www.consumerfinance.gov/about-us/blog/the-bureau-is-taking-much-needed-action-to-protect-consumers-particularly-the-most-economically-vulnerable/ (Last accessed April 4, 2025).

[47] *Id* (emphasis added).

[48] *See* "Statement on Bureau Supervisory and Enforcement Response to COVID-19 Pandemic," Bureau of Consumer Financial Protection, March 26, 2020, https://files.consumerfinance.gov/f/documents/cfpb_supervisory-enforcement-statement_covid-19_2020-03.pdf (Last accessed April 4, 2025). *See* "Semiannual Risk Perspective From the National Risk Committee," OCC, Spring 2020 (Page 1), https://www.occ.gov/publications-and-resources/publications/semiannual-risk-perspective/files/pub-semiannual-risk-perspective-spring-2020.pdf (Last accessed April 4, 2025).

address the massive and unprecedented fraud targeting a government program and the Bank's claim system would not be second-guessed.

29. That the agencies retroactively rescinded the prior administration's announcements months after the Bank acted, and pivoted to a more "aggressive" enforcement posture provides critical context in refuting Messrs. Abernathy and Kreis's opinions that the mere existence of the July 2022 consent orders establishes that the Bank's decision to implement the CFF at the height of the pandemic was not reasonable, let alone the extraordinary implication that the Bank *knew* its regulators would disapprove of its decision.

D. Mr. Abernathy Has Not Established the Bank Was Found to Have Committed Reckless Violations.

30. Mr. Abernathy further justifies his opinion by noting that the OCC consent order found that Bank of America's violations supported actions against the Bank under 12 U.S.C. § 1818(b) and (i)(2)(B).[49] He further notes that these specific provisions authorize "second-tier penalties for 'reckless' violations of law or 'breaches of fiduciary duty' that are 'part of a pattern of misconduct' or 'results in pecuniary gain or other benefit' to the bank" and goes on to state that "the Bank's regulators levied significant second-tier penalties based on this level of misconduct…"[50] Mr. Abernathy concludes that the fact that the consent orders imposed penalties under these provisions is "telling," implying that the regulators made a finding of recklessness or some other heightened scienter.[51] In my opinion, Mr. Abernathy has not established that the OCC found the Bank to have committed any "reckless violations of law or breaches of fiduciary duty that are part of a pattern of misconduct or results in pecuniary gain or other benefit" to the Bank.

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[49] *See* Abernathy Report ¶ 31 through ¶ 32.
[50] *See* Abernathy Report ¶ 32.
[51] *Id.*

This is all the more so given that the OCC consent order includes no such express finding whereas other OCC consent orders do.[52]

31. The OCC's PPM describes how the OCC assesses Tier 2 civil money penalties, under the statutes discussed above, which can be for a range of reasons. For example, the PPM notes that Tier 2 penalties can be assessed for various reasons such as "violations of law," including certain unsafe and unsound practices, "which cause or are likely to cause more than a minimal loss to the institution..."[53] As noted above, The PPM further says, "An unsafe or unsound practice is any action, *or lack of action*, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the Deposit Insurance Fund."[54] Based on this guidance, the OCC could levy a Tier 2 penalty against a bank that, say, did not take prompt action to stem fraud losses. Ultimately, it is unclear why the OCC issued Tier 2 penalties in this instance -- the consent order itself is silent on this issue, and Mr. Abernathy offers nothing more than conjecture to support his implication.

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[52] *Compare* United States of America Department of the Treasury Office of the Comptroller of the Currency – Consent Order: In the Matter of: Bank of America, N.A. Charlotte, North Carolina, July 14, 2022 to United States of America Department of the Treasury Office of the Comptroller of the Currency – Consent Order: In the Matter of: Ralph Derrickson, August 17, 2023, page 2, https://www.occ.gov/static/enforcement-actions/ea2023-026.pdf (Last accessed on April 4, 2025). ("Respondent engaged in violations of law, engaged in reckless unsafe or unsound practices, and breached his fiduciary duty to the Bank; which violations, practices, or breaches were part of a pattern of misconduct.")

[53] *See* PPM-5000-7, Section: Bank, Supervision Subject: Civil Money Penalties, November 13, 2018 | OCC, page 3.

[54] *See* PPM-5000-7, Section: Bank, Supervision Subject: Civil Money Penalties, November 13, 2018 | OCC, page 14 (emphasis added).

E. The CFF Was a Reasonable and Effective Fraud Rule That Regulators Typically Would Not Second Guess in Hindsight or Assess in the Manner Proposed by Mr. Kreis.

32. [redacted] In my experience, this understanding is inherent in bank examiners' assessment of such processes, and for this reason, the OCC does not focus on outcomes or results with hindsight; rather, the OCC generally considers the facts and circumstances surrounding a given fraud rule. [redacted]

33. [redacted] Based on my experience, regulators would view a fraud rule or process that identifies [redacted] to be an extremely reasonable and effective mechanism for identifying and deterring fraud.

34. Based on my experience and my review of the Expert Rebuttal Report of Teresa A. Pesce dated April 4, 2025 ("Pesce Rebuttal Report"), even if one were to accept the error rates Mr. Kreis alleges as accurate (and I do not have a basis to believe or accept that they are), regulators would typically view a fraud rule that successfully identifies more than one-third of accounts or

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[55] *See* Cronan Report ¶ 65.
[56] *See* Cronan Report Section V. *See* Cronan Report ¶ 43 through ¶ 52.
[57] DX 6, *See* Michael Letson October 23, 2024 Declaration, ¶ 34.
[58] DX 6, *See* Michael Letson October 23, 2024 Declaration, ¶ 36. *See* Pesce Rebuttal Report Section VI.

transactions as likely fraudulent as a reasonable and effective mechanism for identifying and deterring fraud. [redacted]

35. Mr. Kreis opines otherwise. [redacted] This statement appears to be based on Mr. Kreis's view that "an average claims analyst has an average claims audit overturn rate of approximately 1% or less."[61]

36. Mr. Kreis's focus on outcomes (*i.e.*, reconsideration and overturn rates) does not mean there was not a reasonable basis to believe the CFF was effective. Based on my experience, as it relates to banks' use of a tool like the CFF, regulators principally focus on whether the methodology and criteria developed by an institution is reasonable, rather than purely evaluating outcomes.[62] First, this is because it is the regulators' role to ensure the bank is being managed in a safe and sound manner and acting in compliance with applicable laws and regulations; it is decidedly not the regulators' role to micromanage a bank's operational decisions. Second, focusing purely on outcomes can obscure important context that may have informed the bank's methodology and criteria.

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[59] *See e.g.* DX 6, *See* Michael Letson October 23, 2024 Declaration, ¶ 34 through ¶ 36. *See* Pesce Rebuttal Report ¶ 16.

[60] *See* Kreis Report ¶ 72.

[61] *See* Kreis Report ¶ 68.

[62] During my time at the OCC, I worked extensively with BSA/AML, which has overlap and commonalities with fraud mitigation.

37. Here, context is important. For example, the inverse of the 68% average reconsideration rate cited by Mr. Kreis indicates that – in the context of the massive fraud targeting the EDD prepaid card program -- nearly one-third of claimants did not even attempt to challenge the denial. The fact that the remaining approximately two-thirds of claimants did is not dispositive that those were thus legitimate claims (as indicated by approximately 20% being denied a second time).

IV. Mr. Kreis's Proposed Alternative Approaches Ignore the Reality of the Bank's Position During Unprecedented Circumstances and Would Have Been Insufficient.

38. Mr. Kreis ignores the Bank's safety and soundness obligations imposed by the OCC, which included its obligation to control fraud. Instead, Mr. Kreis improperly bases his conclusions about claims-handling on a pre-pandemic, business-as-usual environment in which a claims system is not being actively targeted by criminals and fraudsters, and in which it would be possible to methodically review each and every claim before the criminals and fraudsters could abscond with additional stolen funds. It does not appropriately consider how the unprecedented pandemic circumstances, and the Bank's safety-and-soundness and compliance obligations, including those required of a bank to effectuate BSA/AML, can affect a financial institution's EFTA and Regulation E investigative processes.

39. Mr. Kreis critically ignores that, in light of the unprecedented unemployment benefits and unauthorized transaction claims fraud driven by the unpredictable circumstances of the pandemic, Bank of America's business-as-usual EFTA and Regulation E manual investigative processes put the Bank at risk both for meeting its EFTA and Regulation E obligations (*e.g.*, the required timing of investigations and provisional credits) and its safety and soundness requirements (*i.e.*, operational risk management expectations of the OCC, which includes fraud mitigation). In my experience as a regulator, on the one hand, banks are generally expected to

issue provisional credits to the extent they cannot conduct investigations in a timely matter. [redacted]

40. As explained above, the OCC expects that banks will adequately manage risk, and that the agency will hold bank management accountable to the extent they do not do so. As further explained, the OCC would not consider uncontrolled fraud losses to be an effectively managed risk.

A. The Exponential Increase in Claims Could Not Have Reasonably Been Addressed in a Timely Manner Through Additional Staffing.

41. Mr. Kreis's proposed alternative solution of hiring additional claims staff[64] fails to account for operational challenges, which were exacerbated by the pandemic in unprecedented ways. [redacted] The pandemic created many operational challenges for employers experiencing a first-of-its-kind migration to mass remote

[63] DX 6, *See* Michael Letson October 23, 2024 Declaration, ¶ 27.
[64] *See* Kreis Report ¶ 53.
[65] *See* Cronan Report ¶ 38.

work, which presented challenges as to training, and access to systems and data. Of note, staffing is an operational risk reviewed by the OCC, so Bank of America had to thoughtfully and deliberately cope with these challenges to ensure it met OCC expectations in this area.

42. It has been my experience over 30 years that banks (and particularly large banks) commonly have dedicated units that conduct investigations, including EFTA and Regulation E error investigations. These units are staffed by highly-specialized and trained analysts because the work is complex and difficult. Mr. Kreis seems to agree when he states, "To ensure EFTA/Reg E compliance, it is a standard practice in the banking and financial services industry for debit card issuers to have a department of trained personnel who are dedicated to investigating claims ('claims analysts')."[66]

43. Even in a business-as-usual environment, my experience is that it takes months to properly onboard and train claims analysts. Mr. Kreis suggests using contractors, but even if a bank can onboard contractors (or new employees) who are familiar with EFTA and Regulation E investigations, these individuals would still require significant training on the bank's processes, systems, and standards. Rapidly adding personnel with the necessary knowledge, skills, and aptitude was even more difficult during the pandemic given the logistical challenges with remote hiring and training.[67]

44. Mr. Kreis notes that he personally managed an engagement with Accenture "where it provided human resources to support the development of enhanced customer service operations for a leading US lender."[68] "Enhancing customer service operations" is not akin to conducting EFTA and Regulation E investigations under the [redacted] which is Mr. Kreis's purported

[66] *See* Kreis Report ¶ 20.
[67] DX 5, *See* Stephen Hindle October 24, 2024 Declaration, ¶ 24.
[68] *See* Kreis Report ¶ 53.

benchmark. It is unclear what precisely Mr. Kreis means when he refers to "customer service operations for a leading US lender," but that could involve tasks as simple as fielding basic customer inquiries related to, for example, simple rate quotes and loan payoff information. In contrast, conducting regulatory investigations under the Bank's [redacted] or other EFTA and Regulation E investigation processes would require requisite regulatory and procedural knowledge, as well as a comprehensive understanding of numerous bank systems.

45. Claims analysts also needed to have secure means to access all systems and databases necessary to conduct and document investigations and secure methods of communicating with consumers, which added further complexity to any such hiring during the novel work-from-home era introduced by the pandemic. Likewise, during the pandemic, increased employee absenteeism due to illness or caring for those who were ill would have negatively impacted the situation.

46. If a bank were to hire unqualified analysts, or any other employees, and/or fail to train them properly, the OCC would criticize management for those failures. The OCC expects bank management to staff bank business units with knowledgeable people in the case of a compliance matter like EFTA and Regulation E.[69] Over my 30 years as a regulator, I have written or contributed to many "Matters Requiring Attention," directing bank management to improve the training and/or quality of bank staff.

47. Even if the Bank could have hired immediately when claims first began to spike, it would not have had a timely impact on the backlog of claims due to the necessary on-boarding and ramp-up time for these positions. At the time, the Bank had no way of knowing if the increased

[69] DX 111, *See* Comptroller's Handbook: Compliance Management Systems, June 2018 | OCC (pages 6-7).

claims would be short-lived or sustained given the uncertain nature of the pandemic, so it did not know if mass hiring of employees or contractors was appropriate. The OCC will likewise criticize banks for over-hiring, too, if it presents an unnecessary drag on the bank's earnings.

B. Increasing [redacted] Would Have Risked Increased Fraud Losses.

48. Mr. Kreis's suggestion that Bank of America could have simply increased [redacted] likewise misses the mark, as it would not have prevented -- and instead likely would have exacerbated -- fraud losses that the Bank had regulatory obligations to control. Based on my experience, while using an [redacted] achieves the objective of expediting some claims, increasing an [redacted] in turn increases the number and amount of payments that might otherwise be denied as a result of an investigation. Among other things, it introduces a risk that any provisional credit extended pursuant to fraudulent circumstances (the crux of the fraud scheme against the Bank) effectively guarantees loss and could run afoul of the Bank's safety and soundness obligations.

49. It was reasonable for the Bank to [redacted] at a time when it was experiencing a targeted attack on its claim system designed to take advantage of provisional credits and the Bank's inability to review claims before payment.

C. Prioritizing Higher Dollar Claims for Investigation Would Have Exposed the Bank to Claims It Disadvantaged/Harmed Customers.

50. Prioritizing the investigation of higher dollar claims, an alternative recommended by Mr. Kreis, would have run the risk of disadvantaging customers with lower-dollar claims and would have put the Bank at significant risk of an unfair, deceptive, or abusive acts or practice ("UDAAP") violation under the Dodd-Frank Act.[70] Even absent other violations or regulatory

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[70] *See* 12 U.S.C. § 5536(a)(1)(B). I further note that neither EFTA nor Regulation E contemplate whether the order in which claims should be prioritized should be based on dollar value.

findings (*e.g.*, unsafe and unsound banking practices), UDAAP violations on their own can result in consent orders, remediations, and civil money penalties.[71]

51. In order for an act (one instance) or practice (more than one instance) to be considered an unfair violation, it has to meet three broad and subjective criteria, which are laid out in the CFPB Examination Manual:

> "(1) It causes or is likely to cause substantial injury to consumers;
>
> (2) The injury is not reasonably avoidable by consumers; and
>
> (3) The injury is not outweighed by countervailing benefits to consumers or to competition."[72]

52. As to whether the act or practice "causes or is likely to cause substantial injury to consumers," the CFPB Examination manual notes, in part: "An act or practice that causes a small amount of harm to a large number of people may be deemed to cause substantial injury.… Actual injury is not required in every case. A significant risk of concrete harm is also sufficient."[73]

53. As an examiner involved with many UDAAP issues and discussions at the CFPB, it is my opinion that the CFPB would likely find that consumers who filed smaller claims first but were delayed in getting provisional or permanent credits while the Bank (hypothetically) prioritized the investigations of larger claims filed later in time had suffered "substantial injury."

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[71] I understand that the CFPB and OCC cited UDAAP violations in their respective consent orders. Even if they had not done so (*i.e.*, viewed the CFF filter approach as compliant) or even if the Bank hypothetically had not implemented the CFF at all -- and instead instituted the suggested prioritization approach to address a backlog) the Bank would still have been at significant risk of a UDAAP violation for these actions unrelated to those UDAAP violations found in the consent orders.

[72] *See* Unfair, Deceptive, or Abusive Acts or Practices, CFPB Consumer Laws and Regulations, Manual V.2, October 2012, pages UDAAP 1- UDAAP 2 (As found in October 2012 CFPB Supervision and Examination Manual, pages 174-175).

[73] *See* Unfair, Deceptive, or Abusive Acts or Practices, CFPB Consumer Laws and Regulations, Manual V.2, October 2012, page UDAAP 2 (As found in October 2012 CFPB Supervision and Examination Manual, page 175).

54. As to whether the "injury is not reasonably avoidable by consumers," the CFPB Examination manual notes, in part: "Consumers cannot reasonably avoid injury if the act or practice interferes with their ability to effectively make decisions or to take action to avoid injury…."[74]

55. It is my opinion, as a former CFPB examiner, that the CFPB would likely find that consumers would have no insight into nor control over the Bank's (hypothetical) processing of larger claims over earlier-filed, smaller claims and so could not reasonably avoid the injury.

56. As to whether the "the injury is not outweighed by countervailing benefits to consumers or to competition," it is my opinion that the CFPB would likely find that the Bank's (hypothetical) practice of prioritizing high-dollar claims would be injurious in its net effects (*i.e.*, not outweighed by offsetting consumer or competitive benefits). I am not aware of a potential UDAAP violation where such countervailing benefits were deemed present and thus prevented a UDAAP finding.

V. EFTA and Regulation E Do Not Contemplate Industry Standards as It Relates to Written Explanations.

57. Mr. Kreis indicates that "[t]he claim denial letter that the Bank sent to EDD cardholders whose claims were denied, or whose prior permanent credit was rescinded, by CFF Indicator 1 was contrary to industry standards."[75] [redacted]

[74] *Id.*

[75] *See* Kreis Report Section VII.I.

[redacted] This language in the Bank's template letter reads, "Your claim has been closed because we believe the account or the claim have been the subject of fraud or suspicious activity."[77]

58. Related to this language, Mr. Kreis notes, "…the Bank's reason provided by its letters is contrary to industry standards for at least three reasons…" including "[it] is contrary to industry standards…not to provide the cardholder a single and reasonably clear reason why the claim was actually denied…." Immediately following that, Mr. Kreis says "…Although it could be consistent with industry standards to provide two reasons reason [sic] for denying the claim connected by an "or," the two reasons need to be closely related conceptually…"[78] These two statements made by Mr. Kreis are contradictory, and he seems to be allowing for both scenarios where one or two reasons provided by the Bank would be consistent with industry standards.

59. In my opinion, Mr. Kreis's interpretation of industry standards is irrelevant because neither EFTA nor Regulation E contemplate industry standards in this context. EFTA and Regulation E require banks to provide to consumers written explanations of the results of its investigations, but the requirements are very broad, noting: "The institution's report of the results of its investigation shall include a written explanation of the institution's findings and shall note the consumer's right to request the documents that the institution relied on in making its determination."[79] As Mr. Kreis notes, the claim denial letter set forth the following "reason" for the claim denial: "Your claim has been closed because we believe the account or the claim have

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[76] *See* Kreis Report ¶ 78.
[77] *See* Kreis Report ¶ 79.
[78] *See* Kreis Report ¶ 80.
[79] *See* 12 CFR 1005.11(d)(1).

been the subject of fraud or suspicious activity."[80] Based on my experience as a regulator, the aforementioned letters did provide a written explanation of the reason for the Bank's denial of the claims.

60. Further, Mr. Kreis appears to selectively rely on the July 2022 consent orders. On the one hand, he cites the July 2022 consent orders as "supporting [his] opinion" that the Bank "believed that its regulators would not have approved use of the CFF."[81] He does not mention, however, that the CFPB -- which is the only agency with the authority to enforce EFTA and Regulation E[82] -- did not identify the written explanations included in the Bank's letters as a violation in its consent order, even years after the fact. Based on my experience as a former regulator, if the CFPB believed that the evidence before it supported the contention that the Bank's written explanations violated EFTA and Regulation E, or anything else, it would have included such allegations in the consent order. In fact, the consent order only mentions the Bank's written explanations in that section of the order that relates to the use of the CFF to freeze accounts.[83] As I explained in the Cronan Report, account freezes are not even contemplated in EFTA or Regulation E.[84]

VI. [redacted]

61. [redacted]

[80] *See* Kreis Report ¶ 79.
[81] *See* Kreis Report ¶ 49.
[82] The CFPB has this authority for institutions over $10 billion in assets.
[83] *See* Consumer Financial Protection Bureau, Bank of America Consent Order dated July 14, 2022, ¶ 30 through ¶ 31.
[84] *See* Cronan Report ¶ 24.

[redacted][85] He further claims that [redacted] In my experience, this is simply wrong. Regulators understand and accept that [redacted] (whether because they submitted a claim by mistake or under false pretenses). The potential for such over-inclusion is particularly acute in an instance like this one where the Bank and EDD concluded they were unable to identify all fraudsters given the scope and type of fraud at issue.[87] Further, contrary to Mr. Abernathy's statements, [redacted] and the fact that fraudsters would go to great efforts to avoid detection,[91] it is readily apparent that the

[85] *See* Abernathy Report ¶ 34.

[86] *Id.*

[87] *See* "Examining Widespread Fraud in Pandemic Unemployment Relief Programs", Report Prepared by the House Committee on Oversight and Accountability Majority Staff, September 10, 2024, page 7. https://oversight.house.gov/wp-content/uploads/2024/09/UI-Report-FINAL.pdf (Last accessed April 4, 2025).

[88] [redacted] *See* BANA_EDD_MDL-00102557 (BANA_EDD_MDL-00102554-BANA_EDD_MDL-00102577).

[89] *See* Cronan Report ¶ 68.

[90] *See* Cronan Report ¶ 69.

[91] *See* Cronan Report ¶ 70.

Bank could not identify all fraudsters, especially given the scope and type of fraud at issue. In addition, the EDD program itself did not effectively vet EDD cardholders[92] and several reports have even noted that government agencies, with all of their financial and intelligence resources, could not identify all fraudsters in these types of unemployment insurance programs.[93]

62. [redacted]

63. Further, as I noted in the Cronan Report, it is my experience that banks that enter into regulatory settlements or consent orders typically take an extremely consumer-friendly approach to ensure that every *potentially* harmed consumer receives compensation, even if that means that some (and often many) unharmed consumers are also compensated.[95] [redacted]

[92] *See* "Examining Widespread Fraud in Pandemic Unemployment Relief Programs", Report Prepared by the House Committee on Oversight and Accountability Majority Staff, September 10, 2024, page 7. https://oversight.house.gov/wp-content/uploads/2024/09/UI-Report-FINAL.pdf (Last accessed April 4, 2025).

[93] *See* "Unemployment Insurance: Estimated Amount of Fraud During Pandemic Likely Between $100 Billion and $135 Billion," U.S. Government Accountability Office, GAO-23-106696, September 12, 2023. https://www.gao.gov/products/gao-23-106696 (Last accessed April 4, 2025). *See* "COVID-19 Fraud Enforcement Task Force 2024 Report," Council of Inspectors General on Integrity and Efficiency, April 2024. https://www.justice.gov/coronavirus/media/1347161/dl?inline (Last accessed April 4, 2025).

[94] *See* BANA_EDD_MDL-00102557 (BANA_EDD_MDL-00102554-BANA_EDD_MDL-00102577).

[95] *See* Cronan Report ¶ 13.

[redacted]

64. As I also note in the Cronan Report, [redacted] In my experience, regulators do not expect financial institution processes to identify and exclude 100% of illicit activity, including fraud. [redacted]

65. [redacted]

[96] *See* Cronan Report ¶ 63.
[97] *See* Cronan Report ¶ 64.
[98] *See* Cronan Report ¶ 65.
[99] [redacted] *See* BANA_EDD_MDL-00102557 (BANA_EDD_MDL-00102554-BANA_EDD_MDL-00102577).
[100] *See* BANA_EDD_MDL-00102558 (BANA_EDD_MDL-00102554-BANA_EDD_MDL-00102577).

VII. Conclusion

66. I have reviewed the Kreis Report and the Abernathy Report and continue to stand by the opinions expressed in the Cronan Report. In this report, I respond below to several issues raised in those reports.

67. First, Mr. Abernathy offers the extraordinary and unfounded implication that the Bank *knowingly or willfully* violated the EFTA and Regulation E when it implemented the CFF in response to unprecedented levels of fraud, and that it further sought to shield this decision from its regulators because it supposedly "knew or should have known"[101] that its regulators would have found certain aspects of the CFF unacceptable.[102] His lone support for this serious and unsupported allegation is his hindsight-based reference to the consent orders the Bank subsequently entered into with the OCC and the CFPB in 2022; however, the fact the Bank ultimately entered into those consent orders does not mean the Bank's decision to implement the CFF was unreasonable at the time the decision was made, let alone a willful violation of EFTA and Regulation E. [redacted] There were sound reasons why the Bank would not seek advance approval from its regulators before implementing the CFF, as both Messrs. Abernathy and Kreis opine the Bank should have done. Based on my extensive experience

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[101] *See* Abernathy Report ¶ 26.

[102] Per Mr. Abernathy, it was "completely unreasonable" for the Bank to believe the CFF would be acceptable to its regulators and "the fact that the Bank could have easily communicated this plan to its regulators, but did not, indicates that the Bank was aware and concerned that the Claim Fraud Filter did not comply with the Bank's obligations…" *See* Abernathy Report ¶ 27 through ¶ 28.

[103] DX 6, *See* Michael Letson October 23, 2024 Declaration, ¶ 10 through ¶ 27.

as a federal bank examiner, had the Bank requested and then in turn waited for regulatory guidance prior to taking action in response to the explosion of prepaid card fraud, such inaction would have allowed the fraud to continue unabated. In my opinion, the OCC would not consider a bank allowing uncontrolled fraud losses to be an effectively managed risk. Indeed, the OCC could deem a bank's inaction in the face of uncontrolled fraud to be an unsafe and unsound banking practice.

68. Second, Mr. Kreis asserts that the Bank could have adopted strategies other than CFF Indicator 1 to address the operational challenges related to cardholder claims of unauthorized ATM withdrawals.[104] Notably, Mr. Kreis bases his conclusions about claims-handling on a pre-pandemic, business-as-usual environment in which a claims system is not actively being targeted and taken advantage of by criminals and fraudsters. He does not account for the circumstances of the global pandemic and related safety-and-soundness obligations financial institutions are required to address. It is my opinion that the alternative scenarios proffered by Mr. Kreis that he claims the Bank could have undertaken -- *i.e.,* increasing staffing, increasing [redacted] and prioritizing the investigation of high-dollar claims -- were not viable solutions in the face of the unprecedented wave of fraud that infiltrated Bank of America's EDD prepaid debit card program and specifically targeted the Bank's systems, and it was reasonable for the Bank to come to that conclusion.

69. [redacted] However, Mr. Kreis ignores the fact that neither EFTA nor Regulation E contemplates industry standards as it relates to written explanations. Notably,

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[104] [redacted]

[105] *See* Kreis Report ¶ 77 through ¶ 80.

EFTA and Regulation E provide flexibility relating to banks' obligations to report the results of investigations, specifying broadly that banks are to provide "… a written explanation of the institution's findings."[106] As Mr. Kreis notes, the claim denial letters set forth the following "reason" for the claim denial: "Your claim has been closed because we believe the account or the claim have been the subject of fraud or suspicious activity."[107] Based on my experience as a regulator, the aforementioned letters did provide a written explanation of the reason for the Bank's denial of the claims. Further, in concluding that the stated "reason" was somehow insufficient, Mr. Kreis appears to be selective in his reliance on the July 2022 consent orders. On the one hand, Mr. Kreis cites the July 2022 consent orders as "supporting [his] opinion" that the Bank "believed that its regulators would not have approved use of the CFF";[108] however, he makes no mention of the fact that the CFPB consent order, even years after the fact, did not take issue with the written explanation contained in the Bank's claim denial letters.

70. [redacted] In my experience, this is simply wrong. [redacted] (here, whether because they submitted a claim by mistake or under false pretenses). This is particularly

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[106] *See* 12 CFR § 1005.11(d)(1).
[107] *See* Kreis Report ¶ 79.
[108] *See* Kreis Report ¶ 49.
[109] *See* Abernathy Report ¶ 34.
[110] *Id*.

the case in this situation where the EDD cardholders were not traditional Bank customers (the program was administered by EDD), and the Bank and EDD have acknowledged they cannot identify all fraudsters given the scope and type of fraud at issue, and the bank's limited access to information concerning EDD cardholders and their entitlement to the benefits deposited in their EDD prepaid debit card account. Further, contrary to Mr. Abernathy's suggestion, [redacted] nor could the Bank be reasonably expected to do so under these circumstances.

Executed this 4th day of April 2025.

Russell Cronan

Russell Cronan

APPENDIX A

HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY

In RE Bank of America California Unemployment Benefits Litigation

Expert Rebuttal Report of Russell Cronan

List of Materials Considered

I incorporate by reference the materials listed in Appendix B to the Cronan Report. In addition, I considered the following additional materials in preparing this rebuttal report.

1. Expert Reports and Declarations

Declaration of Stephen Hindle, dated October 24, 2024

Expert Report of William J. Abernathy, Jr., dated March 3, 2025

Expert Report of J. Daniel Kreis, dated March 4, 2025

Expert Rebuttal Report of Teresa A. Pesce, dated April 4, 2025

2. Case Filings

Bank Of America's Responses and Objections to Plaintiffs' Sixth Set of Interrogatories, dated April 11, 2024

3. Other Produced Documents

BANA_EDD_MDL-00003887 - BANA_EDD_MDL-00003911

BANA_EDD_MDL-00004535 - BANA_EDD_MDL-00004580

BANA_EDD_MDL-00006482 - BANA_EDD_MDL-00006535

BANA_EDD_MDL-00100634 - BANA_EDD_MDL-00100679

BANA_EDD_MDL-00205361

BANA_EDD_MDL-00497802 - BANA_EDD_MDL-00497804

BANA_EDD_MDL-00559693 - BANA_EDD_MDL-00559980

BANA_EDD_MDL-00701607 - BANA_EDD_MDL-00701608

BANA_EDD_MDL-00705467 - BANA_EDD_MDL-00705470

BANA_EDD_MDL-00705493 - BANA_EDD_MDL-00705497

4. Publicly Available Documents

Consumer Financial Protection Bureau, "CFPB Provides Flexibility During COVID-19 Pandemic," March 26, 2020, available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-provides-flexibility-during-covid-19-pandemic/

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Note: I also reviewed the materials listed in Appendix B of the Expert Report of J. Daniel Kreis dated March 4, 2025 and the materials listed in Appendix B of the Expert Report of William J. Abernathy Jr. dated March 3, 2025.[1]

[1] Materials listed in Appendix B of the Expert Report of William J. Abernathy Jr. dated March 3, 2025 include three documents for which not enough information was provided to identify the documents: (1) "Matthew Riffee Email re BofA Response to Plaintiffs' Interrogatories, Set 3" (2) "Matthew Riffee Email re BofA's Responses to ROGs, Set 4 & Exs 9-10" and (3) "CFPB Press Release."