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UNITED STATED DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION

Case No. 21-MD-02992-GPC-MSB

DEFENDANT BANK OF AMERICA, N.A.'S RESPONSE TO PLAINTIFFS' ADDITIONAL STATEMENT OF FACTS IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT

FILED PROVISIONALLY UNDER SEAL PURSUANT TO STIPULATED PROTECTIVE ORDER

As a threshold matter, Plaintiffs' Statement of Additional Facts (AF) (ECF 652-2) should be stricken or ignored. The 28-page AF was submitted in violation of the Court's explicit rules regarding factual statements (requiring separate statements in a two-column format limited to 15 pages) and ECF 560 (in which the parties stipulated to a 50-page separate statement limit).[1] Plaintiffs requested neither a stipulation from BANA[2] nor leave of Court for an exception. The Court should not allow this brazen end-run around the Court's rules or the page limitations negotiated by the parties and ordered by the Court. Nor should the Court countenance Plaintiffs' attempt to disguise argument—which the Court's standing order explicitly states must be reserved for opposition briefs—as "additional facts." The AF is littered with argument, unsupported speculation, and mischaracterizations of evidence. None of that is proper. *See* Curiel Standing Order (limiting statements to "plainly and concisely" stated facts, and stating that "[t]he parties should avoid using the separate statements as a means of presenting or repeating legal arguments that are or should be made in the memorandum of points and authorities in opposition to the motion for summary judgment"). Accordingly, the AF should not be considered in connection with BANA's Motion for Partial Summary Judgment (ECF 589), and the Court should limit its consideration to any responses or purported rebuttals included in Plaintiffs' Response to BANA's Undisputed Material Facts (ECF 652-1).

However, if the Court were to consider the AF (and it should not), BANA submits the below response (RAF).[3]

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[1] Per the Court's standing order, BANA converted Plaintiffs' improperly formatted AF to two equal columns. As converted, the AF exceeds 50 pages.
[2] All abbreviations have the same meaning as defined in BANA's Memorandum ISO Mot. for Partial Summary Judgment (MSJ) (ECF 589-1).
[3] DX 1-184 are exhibits to the Decl. of Laura G. Brys ISO BANA's Mot. for Partial Summary Judgment (ECF 591). RJN 1-22 are exhibits to the Decl. of Laura G. Brys ISO BANA's Request for Judicial Notice (RJN) (ECF 590-1). DX 185-192 are exhibits to the Decl. of Laura G. Brys ISO Reply.

PLAINTIFFS' ADDITIONAL STATEMENT OF FACTS	BANA'S RESPONSE
A. THE BANK PERFORMED A GOVERNMENTAL FUNCTION AND ENGAGED IN JOINT ACTION WITH EDD[4]	
1. The California Employment Development Department ("EDD") administers the issuance of unemployment insurance ("UI"), disability benefits, and other public benefits (collectively, "EDD benefits") in California. From 2010 to 2024, EDD delegated to Bank of America (the "Bank") the authority to administer the distribution of UI and other EDD benefits to beneficiaries in California via electronic payment services. PX 33; PX 34.	Unsupported/Mischaracterizes. Plaintiffs' cited exhibits do not support the statement that EDD "delegated to [BANA] the authority to administer the distribution of UI and other EDD benefits to beneficiaries in California via electronic payment services." Further, the undisputed evidence shows that EDD administers federal and state UI benefits in California, and that, pursuant to the contract between BANA and EDD, BANA distributes those benefits. SUF ¶ 1.
2. From 2010 until 2024, the Bank had the exclusive contractual right and duty to provide electronic benefits payment services for EDD. During that time, EDD beneficiaries did not have the option of receiving electronic benefits payments ("EBP") via direct deposit into their own personal banking account, nor did they have the option of receiving EBP via a debit card issued by any other bank or financial institution other than Bank of America. PX 13 (Chestnut) 75:4-13; PX 33 at 16; PX 34; PX 35 at -187054, 187057.	Immaterial. For the reasons explained in BANA's MSJ and Reply in Support (Reply), this purported fact is not material to the issues raised in BANA's MSJ. Further, undisputed evidence shows that EDD also made benefits available via paper check, and that EDD benefits recipients had the option to receive their benefits via paper check instead of via a prepaid card. SUF ¶¶ 2-3.
3. In 2020 and 2021, EDD's website presented Bank-issued debit cards as the exclusive means to receive EDD payments, and both EDD and the Bank promoted the benefits of receiving EDD benefits via a Bank-issued debit card.	Unsupported/Mischaracterizes & Immaterial. BANA offered prepaid debit cards, not debit cards, and Plaintiffs' cited exhibits do not support that BANA "promoted the benefits of receiving EDD benefits via a Bank-issued debit card." Further, for the reasons explained

[4] BANA does not respond to the headings in the AF, which cannot raise a material dispute as they do not purport to state material facts and contain argument only.

PX 36; PX 37; PX 38.	in BANA's MSJ and Reply, this purported fact is not material to the issues raised in BANA's MSJ. *See also* RAF ¶ 2.
4. The Bank's prepaid debit card was the default method of receiving EDD benefits. Requesting payment by check required affirmatively contacting EDD to make that request, and that option was neither well publicized nor easily accessed. As a result, the vast majority [redacted] of EDD benefits recipients received benefits by debit card. PX 39 at -153670; PX 13 (Chestnut) 136:2-21; PX 40 (Rivera) 61:2-6; PX 41 (McClure) 81:16-20.	<u>Immaterial</u>. For the reasons explained in BANA's MSJ and Reply, this purported fact is not material to the issues raised in BANA's MSJ. *See also* RAF ¶ 2.
5. Under the EDD-Bank Contract, Bank-issued debit cards and associated accounts could receive deposits only from the EDD, not from any other source. PX 33 at 233.	<u>Unsupported/Mischaracterizes</u>. BANA issued prepaid debit cards, not debit cards. *See, e.g.*, SUF ¶¶ 2-5.
6. The EDD-Bank Contract required the Bank to work jointly with EDD in identifying and investigating potential benefits enrollment fraud. The Bank contractually agreed, "Upon detection of suspicious circumstances (such as recipient spending time in prison), the fraud team will flag the account for further review. Our fraud team will contact EDD's Investigation Division to alert you of the possibility of benefits enrollment fraud and allow you to conduct further investigation." PX 33 at 253.	<u>Unsupported/Mischaracterizes</u>. Plaintiffs' cited exhibit does not support the statement that "[t]he EDD-Bank Contract required the Bank to work jointly with EDD in identifying and investigating potential benefits enrollment fraud." Further, the undisputed evidence shows tha [redacted]. SUF ¶¶ 6, 118.
7. The Bank promised, in the EDD-Bank Contract, to engage in efforts with EDD	<u>Incomplete/Document Speaks for Itself</u>. BANA's agreement with EDD speaks

to "[c]ombat[] fraud with proactive initiatives and ongoing communication," including quarterly and bi-weekly meetings with EDD. EDD required the Bank to provide personnel "to work with … EDD … to assist in [fraud] investigation, detection, deterrence and prevention activity," and to "cooperate with the EDD's Investigation Division and/or its contractors with regard to fraud investigations to the extent permissible by law." PX 33 at 8, 251-52.	for itself and is the best evidence of its content and terms. *See also* SUF ¶¶ 6-9.
8. During 2020-2021, the Bank and EDD were engaged in an ongoing and jointly undertaken process to detect suspected benefits enrollment fraud, freeze accounts, and require re-verification as a condition of regaining access to benefits. PX 42; PX 29 (EDD) 50:21-54:20; PX 13 (Chestnut) 105:9-21, 146:17-25; PX 20 (Garfield) 46:2-6, 47:16-48:2; PX 15 (Letson) 79:5-80:18; PX 280 at -169161 [*sic*]; PX 281 at -71120.	Unsupported/Mischaracterizes. Plaintiffs' cited exhibits do not support that BANA and EDD "jointly under[took]" the process of re-verifying accounts. Further, the undisputed evidence shows that [redacted] *See* SUF ¶¶ 6-9, 118.
9. In September 2020 (pre-CFF), the Bank provided EDD [redacted] PX 43 at -452826; PX 15 (Letson) 118:2-125:23, 130:5-132:5; PX 22 (Fox) 36:8-25; PX 44 at -421427; PX 42 at -71233.	Unsupported/Mischaracterizes & Incomplete. Plaintiffs' cited exhibits do not support the statement. BANA did not provide [redacted] prior to implementation of the CFF; rather, it provided [redacted] *See* DX 4 ¶ 21; DX 1 ¶¶ 30-33; DX 79 at -6223-24; SUF ¶¶ 63, 65-67, 120; RJN 12 at 23-27.
10. On September 28, 2020 and the following days, the Bank used its CFF to make benefits enrollment determinations and to freeze approximately [redacted]	Unsupported/Mischaracterizes. Plaintiffs' cited exhibits do not support the statement that BANA used the CFF to make benefits enrollment

prepaid UI accounts. The Bank later unfroze most of those accounts [redacted], but only after first clawing back any previously paid credits. PX 13 (Chestnut) 107:10-110:10, 110:14-113:17, 114:24-115:13, 116:21-118:22; PX 45 at -71588; PX 46 at -705534; PX 47 at -139424 [redacted]"); PX 280 at -169161; PX 283 at -631430.	determinations or that BANA unfroze accounts only after first clawing back any previously paid credits for [redacted] accounts. Undisputed evidence shows that [redacted] *See* RAF ¶ 8. Further, undisputed evidence shows that [redacted]. DX 78; DX 92; DX 182; DX 1 ¶¶ 31-32; DX 188 113:25-114:8.
11. From December 3, 2020 to March 17, 2021, the Bank resumed using CFF-1 to make benefits enrollment fraud determinations and automatically froze the account of any EDD cardholder who submitted a claim that triggered CFF-1. PX 14 (Martin) 223:23-224:4; PX 266 at -159383.	Unsupported/Mischaracterizes. Plaintiffs' cited exhibits do not support that BANA used the CFF to make benefits enrollment determinations. Undisputed evidence shows that [redacted]. *See* RAF ¶ 8; *see also id.* ¶ 10.
12. On or about December 17, 2020, the Bank used CFF-1 to make benefits enrollment fraud determinations and froze the account of any EDD cardholder who had submitted a claim between October 4, 2020 and December 2, 2020 that triggered CFF-1 [redacted]. The Bank knew that [redacted]. PX 48 at -77224; PX 14 (Martin) 221:1-224:4; PX 20 (Garfield) at 342:22-343:9; PX 266 at -159383; PX 277 [redacted]	Unsupported/Contains Legal Argument. Plaintiffs' cited exhibits do not support that BANA used the CFF to make benefits enrollment determinations. Undisputed evidence shows that [redacted]. *See* RAF ¶ 8; *see also id.* ¶¶ 10-11. Further, the second sentence of this paragraph consists of a legal conclusion and argument, not fact. Plaintiffs' cited exhibits do not support that BANA [redacted] *See also* SUF ¶¶ 115-147 [redacted]
13. EDD and the Bank engaged in an ongoing and jointly undertaken process of requiring cardholders whose accounts the Bank froze based on CFF-1 to re-	Incomplete. Undisputed that cardholders whose accounts were frozen based on the CFF were referred to EDD to re-verify their eligibility for UI benefits

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verify their eligibility with EDD as a condition of regaining access to their EDD benefits. PX 49 at -417556 [redacted]"); PX 29 (EDD) 23:12-17, 53:4-9; PX 13 (Chestnut) 146:17-25; DX 5 ¶5; PX 14 (Martin) 226:17-227:18, 232:2-12, 235:15-24; PX 16 (Golden) 149:10-21.	during certain periods. *See* SUF ¶¶ 116-117. But the evidence does not support that EDD cardholders were required to do so in all instances. *See, e.g.*, *id.* ¶ 126.
14. The EDD-Bank Contract had a revenue-sharing agreement providing for a 50-50 split between the Bank and EDD on all "float revenue" ([redacted]), which [redacted], creating a relationship of financial interdependency between EDD and the Bank. The Bank also retained [redacted] of "interchange fees" and cardholder fees generated by the EDD prepaid card program. PX 33 at Attachment V1.1; RSUF 19; PX 13 (Chestnut) 45:25-47:23, 166:24-167:23, 169:1-170:13; PX 20 (Garfield) 138:2-21; PX 5 (Regan Rpt) ¶¶61-62 & Schedule 2.	<u>Unsupported/Mischaracterizes & Contains Legal Argument</u>. This paragraph consists of argument, not fact. Plaintiffs' cited exhibits also do not support that the revenue-sharing agreement between BANA and EDD "creat[ed] a relationship of financial interdependency between EDD and [BANA]" or that BANA was financially dependent upon EDD in any way. Further, the undisputed evidence shows that BANA operated its UI benefits prepaid debit card program [redacted]. *See* SUF ¶¶ 21-22. This AF also fails to the extent it is premised on opinions from a purported expert that should be excluded. *See* ECF 567-1.
B. THE BANK OWED A FIDUCIARY DUTY TO EDD CARDHOLDERS, WHOM THE BANK KNEW WERE PARTICULARLY VULNERABLE	
15. The EDD-Bank Contract expressly required the Bank to maintain one or multiple "trust account[s]" with "funds held 'in trust'" "for the cardholders." DX 39 at -2518.	<u>Incomplete/Document Speaks for Itself</u>. BANA's agreement with EDD speaks for itself and is the best evidence of its content and terms. *See also* SUF ¶ 20 (trust account to be used to calculate EDD revenue share).
16. UI recipients are a highly vulnerable and financially precarious group. UI is a critical safety net program provided by the government to ensure that individuals who lose their job can afford food, health care, transportation, housing, and other life necessities. The typical UI recipient does not have enough savings to cover	<u>Unsupported/Mischaracterizes & Contains Legal Argument</u>. This paragraph consists of argument, not fact. Plaintiffs cited exhibit also does not support that "[t]he typical UI recipient does not have enough savings to cover their essential expenses during unemployment and relies on UI benefits

their essential expenses during unemployment and relies on UI benefits to pay for their daily living expenses. PX 7 (East Rpt) ¶¶8-9, 11-15.	to pay for their daily living expenses," and is premised on opinions from a purported expert that should be excluded. *See* ECF 565-1.
17. EDD cardholders rely on their EDD benefits to "[redacted]." The Bank recognizes that EDD cardholders [redacted]" PX 15 (Letson) 100:13-22; PX 13 (Chestnut) 128:14-129:15; PX 50 at -153421 ("[redacted]"); e.g., PX 51; PX 52; PX 53; PX 54; PX 55.	Unsupported/Mischaracterizes & Contains Legal Argument. This paragraph consists of argument, not fact. Plaintiffs' cited exhibits (which consist primarily of call recordings representing individual peoples' experiences) also do not support the conclusions drawn about all or most EDD cardholders. Objection. PX 51, PX 52, PX 53, PX 54, and PX 55 purport to be transcriptions of audio files prepared by Plaintiffs' counsel. They are inadmissible pursuant to the best evidence rule which requires "an original writing, recording, or photograph" "to prove its content." Fed. R. Civ. P. 1002. The transcripts are also unreliable and contain errors and improper editorialization. *See, e.g.*, PX 54 (incorrectly transcribing [redacted] rather than [redacted]) (emphasis added); PX 51 (example of inappropriate editorialization); *see also* RAF ¶ 82.
C. THE BANK KNEW ITS CFF-1 CLAIM DENIAL AND CREDIT RESCISSION POLICIES WERE INCONSISTENT WITH ITS REG E OBLIGATIONS AND WOULD ERRONEOUSLY DENY VALID CLAIMS	
18. [redacted], under the EDD-Bank Contract, the Cardholder Agreement, and EFTA and Reg E, it was required to reimburse EDD cardholders for any unauthorized transactions on their EDD debit card, including unauthorized ATM transactions. Under the EDD-Bank Contract, the Bank promised EDD it would (i) follow "[a]ll Regulation E requirements and timelines" for resolving "dispute claims by a claimant" and (ii) offer Cardholders "Zero Liability" for "unauthorized use of debit cards or debit card accounts," "including ATM and	Unsupported/Contains Legal Argument. This paragraph consists of argument, not facts, concerning what contracts, EFTA, and Reg E require. Further responding, BANA's agreements with EDD and with cardholders speak for themselves and are the best evidence of their contents. BANA otherwise does not dispute that it had an understanding of what its obligations were pursuant to its agreement with EDD, the Cardholder Agreement, and EFTA and Reg E. For reasons stated in its MSJ and Reply, BANA did not knowingly or intentionally violate those obligations.

pinned POS [point of sale] transactions." PX 33 at 8, 175, 199; PX 34 at –518187; PX 13 (Chestnut) 88:9-14; PX 56 §§10-11.	*See also, e.g.*, SUF ¶¶ 46-114.
19. [redacted] it was required to investigate EDD cardholders' claims and to provide cardholders with provisional credit within 10 business days of claim submission if the Bank could not complete its investigation and make a final decision within that time. [redacted] any provisional credit paid on an ATM or ATM/combo claim was to be made a permanent credit on the 45th day after claim submission, unless the Bank had determined based on a reasonable and good faith investigation that the cardholder had in fact authorized the transaction. PX 33 at 8, 199 ("Per Regulation E, within 10 business days of the initial dispute, we will promptly correct the error."), 232, 235, 253; PX 27 (Montag) 128:18-22; PX 20 (Garfield) at 86:24-87:17; PX 57 at -167414; PX 24 (Ehresman) 34:8-35:18; PX 18 (Johnson) 8:18-24; PX 12 (Daniels) 31:17-32:10, 199:10-200:13.	<u>Unsupported/Contains Legal Argument</u>. This paragraph consists of argument, not facts, concerning what EFTA and Reg E require. BANA does not dispute that it had an understanding of what its obligations were pursuant to EFTA and Reg E. For reasons stated in its MSJ and Reply, BANA did not knowingly or intentionally violate those obligations. *See also, e.g.*, SUF ¶¶ 46-114.
20. Before implementing its CFF-1 policies on September 28, 2020, the Bank's standard practice had always been to [redacted] and to make a pay or deny decision or to issue provisional credit within 10 business days of claim submission. The Bank's [redacted] were consistent with industry standards and reflected the Bank's understanding of [redacted]."	<u>Unsupported/Mischaracterizes & Incomplete</u>. Undisputed that BANA's general policy [redacted] prior to September 28, 2020 was to pay or decision a claim or to issue provisional credit within 10 business days of claim submission. Incomplete and mischaracterizes, as BANA witnesses testified that [redacted]. *See* SUF ¶¶ 81-93; DX 14.E 18:17-25; DX 187 50:21-51:1,

PX 12 (Daniels) 123:7-21, 124:24-125:6, 133:16-134:11, 135:21-136:10; PX 58 at -1312 (AISOP); PX 59 at -4543; PX 60; PX 24 (Ehresman) 17:8-19:12; PX 1 (Kreis Rpt) ¶¶27-41.	285:16-21. Immaterial. For the reasons explained in BANA's MSJ and Reply, this purported fact is not material to the issues raised in BANA's MSJ.
21. To ensure that the Bank's claims analysts would review all relevant records, [redacted]. PX 12 (Daniels) 120:16-121:1, 122:24-123:6, 147:16-150:11.	Immaterial. For the reasons explained in BANA's MSJ and Reply, this purported fact is not material to the issues raised in BANA's MSJ. *See also* RAF ¶ 20. Objection/Best Evidence. AF ¶ 21 purports to characterize or discuss [redacted], which is the best evidence of its content and terms.
22. Within each claim type, [redacted]." PX 59 at -4539, -4549; PX 12 (Daniels) 137:9-25, 147:21-151:20; PX 1 (Kreis Rpt) ¶¶31-36.	Immaterial. For the reasons explained in BANA's MSJ and Reply, this purported fact is not material to the issues raised in BANA's MSJ. *See also* RAF ¶ 20.
23. The Bank's training materials emphasize that [redacted]." PX 59 at -4542, -4543 ([redacted]); PX 12 (Daniels) 136:11-24, 141:14-142:15; PX 61; PX 62.	Immaterial. For the reasons explained in BANA's MSJ and Reply, this purported fact is not material to the issues raised in BANA's MSJ. *See also* RAF ¶ 20.
24. [redacted] absent evidence that the cardholder authorized the disputed transaction, the Bank was required to provide permanent credit in	Unsupported/Contains Legal Argument. This paragraph consists of argument, not facts, concerning what EFTA and Reg E require. BANA does not dispute that it

the amount of the claim, [redacted]." PX 63 at -290332; PX 12 (Daniels) 202:23-203:13; PX 15 (Letson) 245:25-246:5, 248:25-249:14.	had an understanding of what its obligations were pursuant to EFTA and Reg E. For reasons stated in its MSJ and Reply, BANA did not knowingly or intentionally violate those obligations. *See also* SUF ¶¶ 46-114.
25. The Bank's [redacted] PX 1 (Kreis Rpt) ¶¶34-37; PX 60 (AISOP) at -559893–901.	Immaterial. For the reasons explained in BANA's MSJ and Reply, this purported fact is not material to the issues raised in BANA's MSJ. *See also* RAF ¶ 20. Objection/Best Evidence. AF ¶ 25 purports to characterize or discuss [redacted] which is the best evidence of its content and terms.
26. The Bank's [redacted] PX 1 (Kreis Rpt) ¶¶34-36; PX 60 (AISOP) at –559893-95, -559898–901.	Immaterial. For the reasons explained in BANA's MSJ and Reply, this purported fact is not material to the issues raised in BANA's MSJ. *See also* RAF ¶ 20. Objection/Best Evidence. AF ¶ 26 purports to characterize or discuss [redacted] which is the best evidence of its content and terms.
27. The [redacted]	Immaterial. For the reasons explained in BANA's MSJ and Reply, this purported fact is not material to the issues raised in BANA's MSJ. *See also* RAF ¶ 20. Objection/Best Evidence. AF ¶ 27 purports to characterize or discuss [redacted] which is the best evidence of its

[redacted] PX 60 (AISOP) at -00559897, -559901 ("Use as supporting only"); PX 12 (Daniels) 138:14-140:4; PX 1 (Kreis Rpt) ¶¶38-39.	content and terms.
28. [redacted] EFTA and Reg E prohibited the Bank from rescinding credits issued on an ATM claim more than 45 days after notice of the claim or after the Bank had already informed the claimant that provisional credit had been made permanent, whichever came first. *See, e.g.*, PX 64 at -169954–56 ([redacted]); PX 18 (Johnson) 49:18-50:8.	Contains Legal Argument. This paragraph consists of argument, not facts, concerning what EFTA and Reg E require. BANA does not dispute that it had an understanding of what its obligations were pursuant to EFTA and Reg E. For reasons stated in its MSJ and Reply, BANA did not knowingly or intentionally violate those obligations. *See also, e.g.*, SUF ¶¶ 46-114.
29. [redacted] the CFF indicators [redacted] denying ATM and ATM/combo claims based solely on CFF-1 would result in erroneous denials of valid claims by legitimate EDD cardholders. PX 22 (Fox) 49:23-50:2 ([redacted]"); PX 14 (Martin) 103:7-14, 308:9-18 ("[redacted]); PX 65 at -630750); PX 21 (Ahmad) 64:25-65:15, 69:14-17; PX 66 at -169914; PX 23	Unsupported/Mischaracterizes & Incomplete. This paragraph consists of argument, not fact. Also incomplete and unsupported, as BANA witnesses, including Fox and Letson, testified that [redacted] SUF ¶¶ 81-94.

(Holt) 134:5-135:23, 138:10-140:5.	
30. [redacted] due to its own decision not to issue EMV chip cards, EDD cardholders were particularly vulnerable to skimming and card-present counterfeit fraud such as unauthorized ATM withdrawals—the precise type of claim that CFF-1 would automatically deny. *See* AF 109-112, 117; PX 21 (Ahmad) 50:22-52:16; PX 15 (Letson) 155:24-157:5, 164:6-165:10.	Unsupported/Contains Legal Argument. This paragraph consists of argument, not fact. Plaintiffs' cited exhibits do not support that it was BANA's own decision not to issue EMV chip cards, or that it knew EDD cards were "particularly vulnerable." Further, the undisputed evidence shows that [redacted] DX 12.A ¶ 41; *see* SUF ¶¶ 14, 15. Undisputed evidence also shows that [redacted] *See* SUF ¶¶ 246-248.
31. [redacted] CFF-1 could not distinguish between valid claims submitted by legitimate cardholders and fraudulent claims submitted by criminals engaged in benefits enrollment fraud using stolen identities. [redacted] the only way to differentiate between the two categories was to conduct a manual investigation of each claim, including [redacted] PX 278 at –87719 ("[redacted]"); PX 19 (Schwartz) 108:7-110:18; PX 14 (Martin) 286:25-288:8; PX 23 (Holt) 103:14-25, 127:9-25)	Unsupported. This paragraph consists of argument, not fact. Plaintiffs' cited exhibits do not support that: (i) BANA knew that CFF-1 could not distinguish between valid and fraudulent claims; or (ii) BANA knew that the only way to differentiate between the two categories was to conduct a manual investigation of each claim. Further, the undisputed evidence shows that [redacted], rendering a manual investigation unnecessary. *See* SUF ¶¶ 81-94.
D. THE BANK WAS CAPABLE OF MANUALLY INVESTIGATING ALL ATM CLAIMS IN ACCORDANCE WITH REG E	
32. Because the Bank, before July 2021, issued all EDD cardholders magstripe-only cards that did not have an EMV chip, EDD cardholders were vulnerable	Unsupported/Contains Legal Argument. This paragraph consists of argument, not fact. Plaintiffs' cited exhibits do not support that EDD cardholders were

to skimming and cardpresent counterfeit fraud, which led to [redacted] See AF 109-119; PX 21 (Ahmad) 78:12-79:16; PX 247 at -372043.	"vulnerable" to skimming because EDD cards did not have EMV chips. Further, the undisputed evidence shows that EMV chip technology does not [redacted] SUF ¶ 245.
33. Under the applicable Visa liability shift rules, losses from unauthorized ATM transactions on the Bank's mag-stripe-only cards [redacted] Had the Bank issued EMV chip cards to EDD cardholders, the EMV chip would have prevented counterfeit fraud at chip-enabled points of transaction (including the vast majority of ATMs), and under the Visa liability shift rules, [redacted] *See* AF 109-119; PX 2 (Cloninger Rpt) ¶49; PX 24 (Ehresman) 29:3-30:8, 30:18-32:10; PX 67 at -416779 ([redacted]"); PX 68 at -701418-19.	Unsupported/Contains Legal Argument. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that EMV chip technology would have prevented counterfeit fraud at chip-enabled points of transaction. Further, the undisputed evidence shows that [redacted] SUF ¶ 245. This AF also fails to the extent it is premised on opinions from a purported expert that should be excluded. *See* ECF 563-1 . Objection/Best Evidence. AF ¶ 33 purports to characterize or discuss Visa rules, which are the best evidence of their content and terms.
34. [redacted] which would have enabled the Bank to determine which claims were	Unsupported/Mischaracterizes & Contains Legal Argument. This paragraph consists of argument and speculation, not fact. Plaintiffs' cited exhibits do not support that: (i) [redacted] or (ii) that this would have

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valid and which were fraudulent claims submitted by criminals engaged in benefits enrollment and identity theft *before* having to pay any provisional or permanent credit. CR&R, as the Bank's Reg E experts, understood that "[redacted] PX 67 at -416779; PX 69; PX 24 (Ehresman) 34:8-35:18.	enabled BANA to determine which claims were fraudulently submitted by criminals engaged in benefits enrollment fraud and identity theft. Further, the undisputed evidence shows that [redacted] *See* SUF ¶ 73; DX 190 129:5-15; DX 11.B ¶ 45.
35. The head of the Bank's claims processing division, Renee Johnson, estimated that the [redacted] PX 70 at -426407.	Immaterial/Unsupported. This purported fact is not material to the issues raised in BANA's MSJ. Further, Plaintiffs proffer no evidence showing that BANA had the ability to do this, that they could have performed as estimated, or that it would have changed the outcome of any particular claim decision at issue. *See also* RAF ¶ 34.
36. On September 17, 2020, [redacted]	Undisputed, but immaterial. This purported fact is not material to the issues raised in BANA's MSJ.

[redacted] PX 69 at -225377; PX 71 at -181662; PX 18 (Johnson) 65:8-17, 69:5-8.	
37. The Bank [redacted] According to the Bank's CEO Brian T. Moynihan, [redacted] PX 24 (Ehresman) 34:8-36:2, 36:14-38:6, 97:4-23 (confirming that [redacted]); PX 70 at -426407 ([redacted]); PX 28 (Moynihan) 238:16-239:2 ([redacted]).	<u>Unsupported/Mischaracterizes</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that BANA [redacted] *See also* RAF ¶ 34.
38. CR&R's [redacted]	<u>Unsupported/Mischaracterizes & Contains Legal Argument</u>. This paragraph consists of argument and characterizations, not fact. Plaintiffs' cited exhibits do not support [redacted] *See also* SUF ¶¶ 81-94.

PX 69 at -225375; PX 18 (Johnson) 195:17-197:23; *see* AF 40-75, 87-95.	
E. THE BANK CHOSE NOT TO COMPLY WITH REG E AND INSTEAD TO IMPLEMENT ITS CFF POLICIES OF AUTOMATIC CLAIM DENIALS AND CREDIT RESCISSIONS BECAUSE ITS PRIORITY WAS REDUCING ITS REG E LIABILITY-RELATED OPERATIONAL LOSSES	
39. Under the EDD-Bank Contract, the Bank (not the State) was solely liable for any losses due to transaction fraud on EDD debit cards (also known as "fraud losses"). PX 33 at 8 ("Bank of America is responsible for external transaction fraud on cards that we issue"), 142 ("EDD shall not be liable for … fraud, misuse, and/or lost or stolen debit cards."), 235 ("The [Bank] shall not charge the EDD for … fraud, misuse, and lost or stolen debit cards."), 253; PX 63 at -290330; PX 13 (Chestnut) 87:21-88:14.	Undisputed.
40. The EDD card program was part of the Bank's Global Transaction Services (GTS) group, run by Faiz Ahmad, which was part of the Global Banking and Markets (GBAM) division, run by then-COO Thomas Montag. [redacted]. PX 27 (Montag) 6:18-7:16; PX 28 (Moynihan) 25:1-26:5, 36:1-5, 51:7-23; PX 20 (Garfield) 98:16-101:20, 103:2-6.	Unsupported/Mischaracterizes & Immaterial. Unsupported that Thomas Montag "r[a]n" GBAM. For reasons explained in BANA's MSJ and Reply, [redacted] are not material to any alleged bad faith and have no bearing on BANA's MSJ.
41. During the spring and summer of 2020, [redacted]	Unsupported/Mischaracterizes & Immaterial. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that [redacted]

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[redacted]." PX 68 (-701418) ([redacted]); PX 268 at -171973; PX 27 (Montag) 15:8-16:13, 113:18-114:6, 115:14-22, 116:12-14; PX 282 ([redacted]").	[redacted] Further, undisputed evidence shows that [redacted] SUF ¶ 111. Otherwise, this AF is not material to any alleged bad faith and has no bearing on BANA's MSJ.
42. The Bank created a [redacted] PX 72 at 8-9 (Rog 35 Resp.); PX 24 (Ehresman) 22:22-24:13.	Unsupported/Immaterial. Plaintiffs' cited exhibits do not support that [redacted] Further, undisputed evidence shows that [redacted] and that [redacted] PX 24 22:22-24:13. Otherwise, this AF is not material to any alleged bad faith and has no bearing on BANA's MSJ.
43. COO Tom Montag [redacted]	Unsupported/Mischaracterizes & Immaterial. Plaintiffs' cited exhibits do not support [redacted] Further, the undisputed evidence shows [redacted] PX 28 37:9-22, 39:4-10 [redacted] 43:2-5 [redacted]; PX 21 27:11-28:8

PX 27 (Montag) 9:23-10:7, 10:18-11:16, 12:7-14, 123:23-124:12, 125:8-11; PX 28(Moynihan) 25:1-27:2, 43:2-11; PX 21 (Ahmad) 27:11-28:11.	[redacted]. Otherwise, this AF is not material to any alleged bad faith and has no bearing on BANA's MSJ.
44. [redacted] which in 2020-21 [redacted] CEO and Bank Chairman Brian Moynihan and his direct reports, including then-COO Thomas Montag, Cathy Bessant, Paul Dinofrio, Dean Athanasia, and Chief Risk Officer Geoffrey Greener. PX 28 (Moynihan) 9:24-10:3, 16:7-23, 27:22-28:2; PX 27 (Montag) 7:5-8:16; PX 21 (Ahmad) 27:11-28:11; PX 26 (Simpson) 13:22-14:2; PX 22 (Fox) 21:25-22:13; PX 24 (Ehresman) 52:13-53:24.	Incomplete. Undisputed [redacted] individuals identified in AF ¶ 44. Incomplete because BANA witnesses testified that [redacted] *See* DX 186 88:13-18 [redacted]).
45. Starting in mid-August 2020, the Bank's projected fraud losses in the UI card program [redacted]" As of August 14, 2020, the projected losses for November were [redacted]." PX 73 at -706201; PX 202 at -706213; PX 20 (Garfield) 119:6-122:14 ([redacted]"), 125:19-126:17; PX 203 at -140413 ("[redacted]"); PX 270 at -883608–09 ([redacted]).	Unsupported/Mischaracterizes & Incomplete. Plaintiffs' cited exhibits do not support that "[s]tarting in mid-August 2020, the Bank's [redacted] in the UI card program [redacted] Further, the undisputed evidence shows that [redacted]. PX 28 67:25-69:7 [redacted]; SUF ¶ 111. [redacted] DX 14.X 53:6-54:2; *see id.* 63:8-13. Otherwise, this AF is not material to any alleged bad faith and has no bearing on BANA's MSJ.

46. By mid-September 2020, the Bank's projected losses in the UI card program [redacted]" Chief Risk Officer Geoffrey Greener knew that [redacted] PX 74 at -371658–59; PX 75 at -695594.	Unsupported/Speculative. Plaintiffs purport to characterize the documents, but do not cite any testimony reflecting Greener's actual knowledge.
47. The Bank's senior leaders directed their subordinates to develop a claims-screening mechanism that would enable the Bank "[redacted] and to stop issuing credit on certain claims. PX 76 at -630836; PX 77 at -371977; PX 271 at -874614–15.	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Further, Plaintiffs' cited exhibits do not support that "senior leaders" directed "subordinates" to reverse or stop issuing credits on any particular type of claim. To the extent the AF seeks to imply that BANA intentionally reversed permanent credits, evidence shows that is false. *See* SUF ¶¶ 104-107; RAF ¶ 87.
[redacted]	Unsupported/Mischaracterizes. This paragraph consists of argument and characterizations, not fact. Further, Plaintiffs' cited exhibits do not support [redacted] Plaintiffs' cite to PX 18 is also misleading, as the parenthetical quotes a question from counsel, not witness testimony. Further, the undisputed evidence shows that [redacted]

[redacted]	[redacted] *See* SUF ¶¶ 77-94.
49. GBAM turned to GFC to develop an automated "filter" that the Bank could use to automatically deny claims and rescind credits without a manual adequate investigation. Late on Friday, September 18, 2020, [redacted] i.e. on September 21, 2020. PX 76 at –630836; PX 19 (Schwartz) 126:9-127:17, 137:21-138:16; PX 23 (Holt) 119:23- 120:14.	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Further, Plaintiffs' cited exhibits do not support that the CFF was created late on September 18, 2020, that PX 76 refers to the CFF, or [redacted] Further, the undisputed evidence shows that [redacted] *See* SUF ¶¶ 77-94. Evidence also does not support that [redacted] *Id.* ¶¶ 104, 148. Evidence also does not support that [redacted] *See id.* ¶¶ 81-94. And the evidence does not support that [redacted]. *See id.* ¶110.
50. GBAM instructed GFC to create a "[redacted] PX 76 at -630836A; PX 23 (Holt) 117:7-19.	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Further, Plaintiffs' cited exhibits do not support [redacted] Also, the undisputed evidence shows that [redacted]

	[redacted] DX 4 ¶ 32; *see also* SUF ¶¶ 70-94.
51. On Sunday, September 20, 2020, [redacted] GFC analyst Ryan Schwartz, who conducted and presented the analysis, testified that [redacted] Schwartz testified that [redacted]" PX 79 at -630837; PX 19 (Schwartz) 152:5-155:8, 173:3-175:12, 178:3-183:18 ([redacted]	Unsupported/Mischaracterizes & Incomplete. This paragraph consists of argument, speculation, and characterizations, not fact. Further, the exhibits cited by Plaintiffs do not establish [redacted] At most, [redacted] *See* PX 19 152:5-155:8, 173:3-175:12, 178:3-183:18; DX 149. Moreover, undisputed evidence, including testimony from the leaders of BANA's antifraud groups, shows that [redacted] *See* SUF ¶¶ 77-94.

[redacted]; PX 80 at -125014; PX 15 (Letson) 236:25-238:20, 241:9-24, 243:20-244:7.	
52. GBAM/GTS leaders [redacted]." Instead, [redacted]" which was the screening thresholds that would capture [redacted]. GBAM/GTS "[redacted]" [redacted]. The selected criteria became CFF-3. PX 80 at -125014; PX 19 (Schwartz) 152:5-155:8, 178:3-183:18, 214:14-216:15; PX 79 ("[redacted]"); PX 81 at -87749–50 ([redacted]); PX 66 at -169914 ([redacted].	<u>Unsupported/Mischaracterizes, Incomplete & Immaterial</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Further, unsupported that Plaintiffs' cited exhibits [redacted] and they do not establish that: (i) GBAM and GTS [redacted]; (ii) [redacted] ([redacted] (iv) [redacted]; or (v) [redacted] Moreover, undisputed evidence, including testimony from the leaders of BANA's antifraud groups, shows that [redacted] *See* SUF ¶¶ 77-94.
53. After the September 20 meeting, GFC (Schwartz) provided GBAM additional information showing that [redacted] Nevertheless, [redacted] or Indicator 3. When it later adopted CFF-1 (*see* AF 57-66), the Bank did not apply *any* minimum dollar	<u>Unsupported/Mischaracterizes/ Incomplete & Immaterial</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' AF and characterization of PX 79 is unsupported and misleading, as PX 79 does not contain the words or phrase [redacted] Moreover, undisputed evidence, including testimony from the leaders of BANA's antifraud groups, shows that [redacted]

threshold to CFF-1. PX 79 at -630837; PX 19 (Schwartz) 158:23-162:25; PX 290 at 8 (Rog 28 Resp.).	[redacted] *See* SUF ¶¶ 77-94.
54. On September 21, 2020, the chief officers learned that [redacted]." The chief officers immediately briefed CEO Moynihan on [redacted], which were [redacted]" PX 82 at -372013; PX 28 (Moynihan) 66:4-67:23; PX 83 -118367; PX 44 at -421427.	Unsupported/Mischaracterizes & Immaterial. This paragraph consists of argument, speculation, and characterizations, not fact. Further, Plaintiffs' cited exhibits do not support that [redacted] Otherwise, this AF is not material to any alleged bad faith and has no bearing on BANA's MSJ.
55. With the next board meeting approaching on [redacted] and the CEO's [redacted], the Bank's senior officers intensified their pressure on subordinates to [redacted] in the prepaid UI program. That same day (September 21), Montag directed Ahmad and Lawlor to "[redacted]." PX 77 at -371977; PX 27 (Montag) 96:10-97:3, 110:18-111:6; PX 28 (Moynihan) 28:18- 29:25.	Unsupported/Mischaracterizes & Immaterial. This paragraph consists of argument, speculation, and characterizations, not fact. Further, Plaintiffs' cited exhibits do not support that there was [redacted] The undisputed evidence shows that [redacted] PX 28 29:2-14. Further, Plaintiffs' cited exhibits do not establish that "the Bank's senior officers intensified their pressure on subordinates [redacted] in the prepaid UI program." Otherwise, this AF is not material to any alleged bad faith and has no bearing on BANA's MSJ.
56. The next day, Lawlor told other managers he was [redacted]" and that "[redacted]	Incomplete/Immaterial. Moynihan testified that [redacted]

[redacted]." PX 84 at -694889-90.	[redacted] DX 14.X 53:6-54:2, 63:8-13.
F. THE BANK KNEW CFF-1 WOULD WRONGLY DENY VALID CLAIMS YET MADE NO ATTEMPT TO ASSESS OR VALIDATE THE ACCURACY OF CFF-1 IN IDENTIFYING FRAUD, EITHER BEFORE OR AFTER IMPLEMENTATION	
57. Following the directive that "[redacted]" In addition to the multi-factored CFF-3, the proposed CFF included CFF-1, which would "[redacted] PX 85 at -125059; PX 86 at -170046; PX 87 at -87766 ([redacted]), -87767 [redacted]"); PX 3 (Holt) 192:22-194:20; PX 19 (Schwartz) 204:10-205:20; *see* AF 61-62.	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that [redacted] and "[f]ollowing the directive that [redacted] Further, undisputed evidence shows that [redacted] DX 189 290:1-293:15 [redacted]); SUF ¶¶ 70-82. Plaintiffs' cited exhibits also do not support that [redacted] Further, Holt testified that [redacted] X 189 182:15-194:20; PX 86 ; PX 87 ; *see also* SUF ¶¶ 88-92.
58. The CFF proposal was updated [redacted]	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not

[redacted] (which would become part of CFF-3). PX 262 at -87776; PX 88 at -87780; PX 91 at -87760; PX 19 (Schwartz) 199:25-208:21.	support that [redacted] Further, undisputed evidence shows that [redacted] SUF ¶¶ 70-92. Plaintiffs' cited exhibits also do not support that [redacted] *See id.* ¶ 98. Further, [redacted] SUF ¶¶ 81-94.
59. The final version of the CFF was [redacted]" PX 135 at -125177; PX 90 at -450517.	Unsupported/Mischaracterizes. Plaintiffs' cited exhibits do not support that the final version of the CFF was [redacted]
60. On the final version of the CFF proposal [redacted] The Bank conducted *no* analysis as to what	Unsupported/Mischaracterizes. *See* RAF ¶ 59. Also unsupported. Plaintiffs' cited exhibits do not support that no one at BANA conducted an analysis as to what percentage of ATM claims were fraudulent. Further, undisputed evidence shows that [redacted]

percentage of those ATM claims were actually fraudulent. PX 90 at -450517; PX 91 at -87760; PX 19 (Schwartz) 199:25-208:21, 211:25-214:24; PX 20 (Garfield) 173:6-22, 271:23-278:1, 282:4-23; PX 15 (Letson) 199:22-201:7; AF 57- 58, 61-62.	[redacted] *See* SUF ¶¶ 79-94.
61. No one at GFC (or anyone else at the Bank) ever analyzed [redacted]. PX 23 (Holt) 92:6-19, 180:15-181:16, 191:3-194:20, 275:11-276:4; PX 19 (Schwartz) 37:20-38:20, 108:7-110:18, 201:11-205:20, 212:3-214:24, 260:6-263:16, 265:4-15; PX 92 at -881824; PX 15 (Letson) 144:11-145:3, 170:7-176:14, 179:9-180:16; PX 22 (Fox) 53:10-21; PX 21 (Ahmad) 68:14-16; PX 20 (Garfield) 173:6-22, 271:19-278:1, 282:4-23.	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that no one at BANA conducted an analysis as to the percentage or probability of fraudulent ATM claims. Further, undisputed evidence shows that [redacted] *See* ¶¶ SUF 79-94; RAF ¶ 60.
62. Bill Fox, Michael Letson, Anne Holt, and Ryan Schwartz were the GFC personnel who worked on developing the CFF indicators. Schwartz was [redacted]	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that Schwartz was [redacted] Further, undisputed evidence shows that [redacted] SUF ¶¶ 82-84, 87-92.

[redacted]. PX 19 (Schwartz) 37:20-38:20, 72:2-8, 77:3-7, 77:22-24, 108:7-110:18, 201:11-205:20, 212:3-214:24, 260:6-263:16, 265:4-15.	
63. [redacted] CFF-1 would incorrectly deny legitimate cardholders' valid ATM and ATM/combo claims, particularly because the Bank-issued mag-stripe-only cards were highly susceptible to skimming and card-present counterfeit fraud, including unauthorized ATM transactions. [redacted]. PX 22 (Fox) 49:23-50:6; *see* AF 109-112, 117; PX 14 (Martin) 127:8-132:15, 287:14-288:8; PX 43 at -452826 ("[redacted]"); PX 19 (Schwartz) 178:3-183:18, 201:11-205:20; 212:3-214:24; PX 23 (Holt) 161:24-162:25; 179:5-181:16; PX 21 (Ahmad) 64:25-65:15, 68:14-16; PX 93 (Rog 28 Resp.) at 8; PX 14 (Letson) 170:7-176:14; PX 105 at -100644–70 [redacted]	Unsupported. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that BANA "knew that CFF-1 would incorrectly deny legitimate cardholders' valid ATM and ATM/combo claims, particularly because the Bank-issued mag-stripe-only cards were highly susceptible to skimming and card-present counterfeit fraud, including unauthorized ATM transactions." Further, the undisputed evidence shows [redacted] *See* SUF ¶¶ 88-92, 246-248. Plaintiffs' cited exhibits also do not establish that [redacted] much less that [redacted]

[redacted]; AF 29-31.	
64. The Bank was aware that using the CFF to summarily deny claims would [redacted]. The Bank also knew that denying cardholders of access to their EDD benefits without notice and hearing would [redacted]. PX 66 at -169912 ("[redacted]...."); PX 95 at -429789 ([redacted]"); PX 18 (Johnson) 78:10-81:10; PX 78 at -57708; PX 277.	Unsupported/Mischaracterizes. This paragraph consists of legal argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that BANA knew or believed that the CFF [redacted]. Further, the undisputed evidence shows that [redacted] *ee* SUF ¶¶ 83-85, 88-94; *see also* DX 4 ¶¶ 33, 35. Plaintiffs' cited exhibits also do not support that BANA "knew that denying cardholders of access to their EDD benefits without notice and hearing would [redacted]," nor does it establish that cardholders were denied access to EDD benefits without notice or an opportunity to regain full access. Further, PX 277 merely indicates that [redacted] (emphasis added).
65. [redacted] despite having [redacted] of CFF-1 in identifying fraud. PX 27 (Montag) 17:14-19:8, 56:5-57:4; PX 22 (Fox) 81:1-82:1, 82:7-83:8; *see* AF 60-63, 68.	Unsupported/Mischaracterizes. This paragraph consists of argument, not fact. Plaintiffs' cited exhibits do not support that [redacted] without information about its accuracy or reliability. Further, undisputed evidence shows that the [redacted]

	[redacted] SUF ¶¶ 79-94; *see also* PX 22 81:18-21 [redacted].
66. After the CFF was implemented, [redacted]. PX 19 (Schwartz) 260:6-263:16, 265:4-15 [redacted]; PX 15 (Letson) 312:4-313:14 [redacted]); PX 24 (Ehresman) 92:23-93:14 ([redacted]).	Unsupported/Mischaracterizes. This paragraph consists of argument and characterizations, not fact. Plaintiffs' cited exhibits do not support that [redacted] Further, undisputed evidence shows that [redacted] SUF ¶¶ 99-103; *see also* PX 24 92:23-93:14.
G. THE BANK'S SENIOR LEADERS DIRECTED, AUTHORIZED, AND RATIFIED THE BANK'S CFF-1 POLICIES	
67. [redacted], including CEO Brian T. Moynihan, then-COO Thomas Montag, Cathy Bessant, Paul Dinofrio, Dean Athanasia, and Chief Risk Officer Geoffrey Greener, were executive officers of the Bank. PX 28 (Moynihan) 9:24-10:3, 16:7-23, 27:22-28:2; PX 27 (Montag) 6:18-8:16; PX 21 (Ahmad) 26:7-19; PX 22 (Fox) 21:25-22:13; PX 24 (Ehresman) 52:13-53:24.	Undisputed.
68. In addition to executive officers, "[redacted]" (i.e. direct reports to the CEO's direct reports), and others with comparable levels of responsibility within their units, [redacted] During 2020-21, this included Faiz Ahmad, who ran GTS (which included the prepaid UI	Unsupported/Mischaracterizes. This paragraph consists of argument and characterizations, not fact. Plaintiffs' cited exhibits do not support that "[i]n addition to executive officers, [redacted] (i.e. direct reports to the CEO's direct reports), and others with comparable levels of responsibility within their units . . . [redacted]

card program); Brad Garfield, who was responsible for overseeing the GTS prepaid product development team; John Lawlor, who was responsible for public sector banking; Paul Simpson, who was responsible for the Bank's call centers servicing prepaid cardholders; William Fox, who was head of GFC; Michael Letson, who was head of financial crimes analytics within GFC; Jennifer Ehresman, who was head of Consumer Client Protection; and Renee Johnson, who ran the Claims Resolution & Recovery unit. PX 28 (Moynihan) 21:7-23, 23:1-19, 25:1-26:5 ([redacted]), 27:12-21 ([redacted]), 41:6-24, 83:5-15, 86:1-2, 133:25-134:21, 138:4-139:13, 187:1-188:25, 235:8-15; PX 21 (Ahmad) 21:10-22:2; PX 20 (Garfield) 25:24-29:4, 35:4-37:18; PX 26 (Simpson) 9:12-11:5, 13:22-14:4; 16:7-17; PX 22 (Fox) 12:15-21, 13:1-23, 71:11-20; PX 15 (Letson) 37:1-9, 52:4-23 [redacted]), 257:14-20, 258:10-16; PX 24 (Ehresman) 11:22-12:23, 14:20-16:19 [redacted]), 22:22-24:17, 36:14-37:5, 41:1-42:1; PX 18 (Johnson) 7:4-10; PX 17 (Lennon) 192:1-192:23; PX 285.	[redacted] Additionally, Plaintiffs' cited exhibits do not support [redacted] <u>Immaterial</u>. Also immaterial for the reasons stated in BANA's MSJ and Reply because Plaintiffs cannot establish that any of these individuals acted in bad faith or with malice or oppression.
69. [redacted] PX 96 at -706496 [redacted]"); PX 272 at -163799 ("[redacted]"); PX 276 at -714621 ([redacted]").	<u>Unsupported</u>. Plaintiffs' cited exhibits do not support that [redacted] as defined in AF ¶¶ 43-44, [redacted] Further, BANA witnesses testified that [redacted] *E.g.*, SUF ¶ 110; DX 14.X 82:21-24; DX 186 244:18-22 (Ahmad never presented to Moynihan on the CFF's rules).
70. [redacted]	<u>Undisputed, but immaterial</u>. Undisputed

[redacted] PX 97 at -876417 ([redacted]"); PX 21 (Ahmad) 193:8-15, 195:8-18; PX 27 (Montag) 7:5-8:14, 82:10-18.	that [redacted] But immaterial for the reasons stated in BANA's MSJ and Reply because Plaintiffs cannot establish that [redacted] acted in bad faith or with malice or oppression.
71. [redacted]. PX 98 at -293818 [redacted]"), -29319-20 ([redacted]"); PX 99 at -162397 ([redacted]"); PX 22 (Fox) 64:21-66:13 [redacted] 68:10-71:10, 71:11-23 ([redacted]); PX 100 [redacted]").	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not establish the alleged "fact." Further, undisputed evidence, including direct deposition testimony from Moynihan, indisputably shows [redacted] SUF ¶ 110; DX 14.X 82:21-24; DX 186 244:18-22.
72. At a [redacted]	Undisputed that the [redacted]

[redacted] PX 101 at -497802 [redacted]), 497804 ("[redacted]"); PX 27 (Montag) 12:15-24 ([redacted]"), 30:13-20 ([redacted], 47:19-48:16, 128:7-11); PX 28 (Moynihan) 16:24-19:24 ([redacted].	[redacted] *See* SUF ¶ 86; *see also generally id.* ¶¶ 77-94.
73. In an [redacted], Moynihan provided an update on "[redacted]." At the [redacted]." The Board allowed the CFF policies to proceed. PX 103 at -882978 (CEO Memo; content redacted for attorney-client privilege); PX 104 at -882713 [redacted]); PX 27 (Montag) 23:25-24:20, 28:25-29 [redacted]; PX 28 (Moynihan) 28:18-29:25; PX 102 at -	<u>Unsupported/Mischaracterizes</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that [redacted], or that "[t]he Board allowed the CFF policies to proceed" [redacted] Further, it is undisputed that [redacted] *See* SUF ¶ 110.

878451 ([redacted]").	
74. The Board continued to be updated regularly on [redacted]" and permitted the CFF-1 policies to continue until enjoined by a federal court. On January 20, 2021, executive risk committee board members were notified of a [redacted]." Board risk committee members were informed that "[redacted]." PX 102 at -878451; PX 270 at -883608–09; PX 271 at -874614–15; PX 209; PX 210.	<u>Unsupported/Mischaracterizes</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that the Board was "updated regularly on [redacted]." Further, the undisputed evidence shows that [redacted] PX 28 52:1-5. Plaintiffs' cited exhibits also do not support that [redacted] Further, the undisputed evidence (cited by Plaintiffs themselves) shows that [redacted]. *See* AF ¶ 72.
H. THE BANK'S SENIOR LEADERS DISMISSED EMPLOYEE CONCERNS AND MAINTAINED THE CFF-1 POLICIES DESPITE MOUNTING EVIDENCE OF CFF-1'S INACCURACY AND HARMFUL CONSEQUENCES	
75. After CFF-1, the Bank was inundated with calls from cardholders seeking reconsideration of claims that had been summarily denied without explanation. PX 105 at -100641 ("[[redacted]), -100644 ("[[redacted]]"); PX 106 at -158953; PX 12 (Daniels) 252:5-10, 253:10-25 [redacted]	<u>Unsupported/Mischaracterizes</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that BANA was inundated with calls from cardholders "seeking reconsideration of claims that had been summarily denied without explanation." Further, undisputed evidence shows that [redacted] *See* DX 4 ¶ 35; DX 109; *see also* SUF ¶¶ 99-102. Plaintiffs' cited exhibits also do not support that cardholders were summarily

[redacted]).	denied without explanation. *See also* SUF ¶¶ 95-97.
76. If a cardholder succeeded in contacting the Bank's Claims Call Center and requested reconsideration of their CFF-denied claim, and the Bank actually investigated the claim on reconsideration (rather than summarily denying the claim again based on the CFF, as it did for cardholders whose accounts were also frozen based on the CFF), the Bank's CR&R department [redacted]. PX 24 (Ehresman) 90:9-17; *see generally* PX 105 ([redacted]); PX 267; PX 18 (Johnson) 191:8-12.	Unsupported/Mischaracterizes. This paragraph consists of argument and characterizations, not fact. Plaintiffs' cited exhibits do not support that BANA did not "actually investigate[]" claims prior to reconsideration, or that reconsiderations were the first investigation of the claims. *See also* SUF ¶¶ 81-84, 93. However, undisputed that if a cardholder contacted BANA and requested a reconsideration of their claim, reconsideration was provided. *See, e.g., id.* ¶¶ 119, 121, 132.
77. Although many cardholders were unable to get through to the Claims Call Center to request reconsideration, of those who did [redacted] PX 21 (Ahmad) 336:13-337:23; PX 15 (Letson) 292:9-298:8, 306:9-307:24; PX 107 at -556536; PX 108 at -143393.	Unsupported/Mischaracterizes & Incomplete. This paragraph consists of argument and characterizations, not fact. Plaintiffs' cited exhibits do not support that many cardholders were unable to get through to the Claims Call Center to request reconsideration, or [redacted] Further, as reflected in PX 107 and 108, undisputed evidence shows that [redacted] *See also* SUF ¶¶ 100-101; RAF ¶ 78.
78. The [redacted] CFF-1's extraordinarily high false positive rate. As of December 11, 2020, the Bank's data showed that approximately [redacted]	Unsupported/Mischaracterizes & Incomplete. This paragraph consists of argument and characterizations, not fact. Plaintiffs' cited exhibits do not support that CFF-1 had an "extraordinarily high false positive rate." Further, undisputed evidence shows that [redacted]

[redacted] Of claims submitted January to March 2021, [redacted]. PX 109 at -76994; PX 110 at -510145 [redacted]); PX 24 (Ehresman) 87:24-89:16; PX 111 at -77127; PX 21 (Ahmad) 336:13-337:23, 355:13-360:9 [redacted]); PX 227 at -159493; PX 1 (Kreis Rpt) ¶72 ("[S]uch rates are incredibly high and virtually unheard of in the industry.").	[redacted] SUF ¶¶ 100-101. In the first three months after the CFF was implemented, between October 2020 and December 2020, only about [redacted] of denied claims were reconsidered. For those claims reconsidered and decisioned in October through December 2020, approximately [redacted] were resolved in the cardholders' favor. *See id.*; DX 4 ¶ 35; DX 109; RAF ¶ 77. Further, [redacted] *See* SUF ¶¶ 148-150, 179-180.
79. The Bank knew that wait times in its Claims Call Center were extraordinarily long from September 28 until November 21, leading many callers to give up before ever reaching a customer service representative ("CSR"). [redacted] a failure to seek reconsideration does not prove a claim was fraudulent and that there are many reasons a legitimate cardholder might not seek reconsideration of a CFF-denied claim. PX 21 (Ahmad) 359:8-360:14; PX 10 (Loebner Reb Rpt) ¶¶ 46-61; *see* AF 96-108.	<u>Unsupported/Mischaracterizes & Inadmissible</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that: (i) "many callers [gave] up before ever reaching a customer service representative" or (ii) BANA knew there were many reasons a legitimate cardholder might not seek reconsideration. Further, undisputed evidence shows that [redacted] *See* SUF ¶ 99. Also, inadmissible to the extent this AF improperly relies on an expert to state facts and opine on BANA's state of mind and what it "knew." *See, e.g.*, *A.B. v. Cnty of San Diego*, 2020 WL 4431982, *3 (S.D. Cal. 2020) (testimony on "subjective state of mind and motives [is] impermissible").
80. The Bank's mid-level managers were	<u>Unsupported/Immaterial</u>. This paragraph

aware of the resulting harsh consequences on innocent cardholders and asked [redacted]" PX 14 (Martin) 308:9-311:15; PX 112 at -90640 (12/29/20: [redacted]"); PX 113 at -107261 (1/11/21: [redacted]]); PX 274 at -62175 (1/14/21: [redacted]"); PX 114 at –107327 ([redacted] PX 115 at -90683 [redacted]).	consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support the allegation that "mid-level managers were aware of the resulting harsh consequences on innocent cardholders" [redacted]. Additionally, for the reasons explained in BANA's MSJ and Reply, this purported fact is not material to the issues raised in BANA's MSJ. Further, the undisputed evidence shows that [redacted] *See* SUF ¶¶ 124-26.
81. Senior leaders dismissed concerns that the CFF-1 policies were harming legitimate cardholders. PX 116 at -273305 ([redacted]).	Unsupported/Mischaracterizes. This paragraph consists of argument, not fact. Plaintiffs' cited exhibit does not show that senior leaders dismissed concerns regarding the impact of CFF-1. Further, the email states [redacted] PX 116 [redacted]); *see also* SUF ¶¶ 99-102
82. The Bank received thousands of calls from EDD cardholders seeking to regain access to CFF-denied or CFF-frozen funds. Many broke down in tears on the phone with the Bank's CSRs, explaining the hardship caused by their denied accesss, sometimes for months on end.	Objection. PX 51, PX 53, PX 54, PX 55, PX 118, PX 119, and PX 120 purport to be transcriptions of audio files prepared by Plaintiffs' counsel. They are inadmissible pursuant to the best evidence rule which requires "an original writing, recording, or

Cardholders explained that they relied on their EDD benefits to feed their families, pay rent, and buy diapers and other daily necessities, and that because they were unable to access those benefits, they were at risk of eviction or homelessness. One Bank CSR explained to the press, "We're actually no longer allowed to tell them a timeframe [for when they'll regain access to their funds], because we have no clue …. Every day, I talk to 30 people with the same story. I just pray for them after my shift, honestly." PX 117; *e.g.*, PX 51; PX 53; PX 54; PX 55; PX 118; PX 119; PX 120.	photograph" "to prove its content." Fed. R. Civ. P. 1002. The transcripts are also unreliable and contain errors and improper editorialization. *See, e.g.*, PX 118 (incorrectly transcribing [redacted] rather than [redacted]) (emphasis added); RAF ¶ 17. Additionally, PX 117 quotes an alleged BANA employee mentioned in the article, but Plaintiffs cannot establish that the unidentified BANA representative was in fact a BANA employee or agent whose statements qualify as party-opponent admissions under Fed. R. Evid. 801(d)(2)(D). *See DiMare v. RealtyTrac, Inc.*, 714 F. Supp. 2d 199, 206-07 (D. Mass. 2010) (striking statements of unidentified persons quoted in an affidavit where proponent failed to establish agency relationship or that declarants were authorized to speak on behalf of party, rendering statements inadmissible as party-opponent admissions under Rule 801(d)(2)(D)). Moreover, the article improperly adds purportedly clarifying language and editorial commentary to interpret what the alleged CSR was "trying to say" beyond the actual quoted words, inserting meaning and context not reflected in the alleged CSR's actual statement and constituting inadmissible speculation about the speaker's intent. Unsupported/Mischaracterizations. This paragraph consists of argument and characterizations, not fact. Further, Plaintiffs' cited exhibits do not support that "[t]he Bank received thousands of calls from EDD cardholders seeking to regain access to CFF-denied or CFF-frozen funds."
83. On November 24, 2020, CEO Moynihan received a letter from all 56 California state legislators reporting that "[e]very legislative office in our state has experienced an unprecedented number of constituents contacting them requesting	Incomplete. Undisputed that BANA received the letter addressed to Moynihan, to which BANA provided a response. BANA's response can be found at DX 79.

assistance to resolve issues with … their Bank of America debit cards. …. EDD reports to legislative staff that Bank of America has a proprietary formula to detect fraud and has taken it upon themselves to freeze cards and take money from recipients. … [C]onstituents report they are unable to get through to your call centers, or when they do, the issue is not resolved. Many of our own staff have also tried to reach Bank of America to no avail. It is simply unacceptable that Californians entitled to benefits are suddenly not able to obtain them due to a Bank of America determination that is impossible to appeal." PX 121 at -58621.	
84. Moynihan [redacted] many communications from EDD cardholders harmed by the Bank's CFF policies and seeking assistance in regaining access to their EDD funds. Many of these cardholders explained to Moynihan that they had tried calling the Bank's call centers and EDD to no avail, that they were desperate to regain access to their funds, and that they relied on their EDD benefits to pay for food, rent, and other necessities. *See, e.g.*, PX 28 (Moynihan) 143:25-147:21, 150:23-151:25, 152:5-18, 152:20-154:12, 159:1-5, 169:19-171:23; PX 122 at -105556; PX 123 at -373787-88; PX 124 at -188717-78; PX 125 at -105900; PX 51; PX 128 at -284155; PX 129 at -41664; PX 130 at -27088; PX 131 at -41705; PX 132 at -27124; PX 133 at -41795; PX 134 at -27231-32; PX 135 at -29021-22.	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Undisputed that Moynihan received unsolicited communications from persons purporting to be EDD cardholders, but the cited exhibits do not support that they were "harmed by the Bank's CFF policies" in the manner they alleged in their communications. Objection. PX 51, which purports to be a transcription prepared by Plaintiffs' counsel of produced audio files, is inadmissible pursuant to the best evidence rule which requires "an original writing, recording, or photograph" "to prove its content." Fed. R. Civ. P. 1002; *see also* RAF ¶¶ 17, 82.
85. In December 2020, the Bank knew that EDD "[redacted]" Shortly after resuming its CFF-1 account freeze policy, the Bank learned that CFF-	Contains Legal Argument/Incomplete. This paragraph consists of argument and characterizations, not fact. However, undisputed that BANA attempted to address reports of long EDD call wait

frozen cardholders were unable to get unfrozen, even after reverifying with EDD, because they were stuck in a "[redacted]" of fruitless calls to EDD and the Bank who would each refer the cardholder to the other. Managers proposed as early as January 2021 that the Bank "[redacted], yet the Bank delayed until March 18, 2021 before changing to a "block" policy. PX 138 at -874570; PX 273 at -127438; PX 114 at -107328 (1/14/21: [redacted]"); PX 275 at -646321 (1/21/21: [redacted]"), -646333 ([redacted] PX 136 at -90722, -90725; PX 137 at -452795; PX 14 (Martin) 302:2-303:23, 308:9-310:4.	times and other efficiency-related concerns by, among other things, implementing a strategy whereby accounts would be [redacted] when fraud was suspected. *See* SUF ¶¶ 124-135. This allowed the affected [redacted] by working directly with BANA, rather than having to go through EDD. *See id.* ¶¶ 127, 129; *see also id.* ¶ 43.
86. Once the Bank began to allow cardholders to authenticate their identities with the Bank after March 18, 2021, [redacted]." Nevertheless, the Bank continued to use CFF-1 to auto-deny all ATM claims until enjoined by a federal court. PX 289 at -406129; PX 209; PX 210.	<u>Unsupported/Mischaracterizes</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that "after March 18, 2021," [redacted] and that BANA continued to use CFF-1 to deny claims "until enjoined by a federal court" in spite of that figure. Further, undisputed evidence cited by Plaintiffs states [redacted]

	[redacted] PX 289 at -6129.
I. THE BANK INTENTIONALLY ADOPTED ITS CFF-1 POLICIES OVER OTHER REASONABLY AVAILABLE ALTERNATIVES	
87. On or about September 28, 2020, relying solely on CFF-1, the Bank clawed back nearly $[redacted] in permanent credits that it had previously paid on ATM and ATM/combo claims submitted by approximately 6,100 Credit Rescission class members. The Bank's rescission of previously paid credit on any claim that triggered CFF-1 was intentional. Approximately [redacted] of Credit Rescission class members were denied access to rescinded credits for more than [redacted]. The median duration of credit rescission was [redacted]. PX 64 at -169954–55; PX 139 ; PX 140 at -571310; PX 141 at -417490; DX 31 at No. 39; DX 76 at -7224; PX 24 (Ehresman) 72:1-72:15 [redacted]"); PX 18 (Johnson) 60:20-24 (recalls [redacted]"); PX 14 (Martin) 177:4-178:23, 179:13-180:1; PX 5 (Regan Rpt) ¶¶65, 67-68 & Schedule 1; PX 284.	<u>Unsupported/Mischaracterizes</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that the "rescission of previously paid credit on any claim that triggered CFF-1 was intentional." Further, the undisputed evidence (which Plaintiffs themselves cite) shows recission of such credits was a mistake caused by a processing error. SUF ¶¶ 104-106; PX 64 [redacted] DX 76 [redacted]; DX 188, another excerpt of Plaintiffs' PX 24, 113:21-114:8 [redacted]). AF ¶ 87 also fails to the extent it is premised on opinions from a purported expert that should be excluded. *See* ECF 567-1.
88. From September 28, 2020 until June 8, 2021, the Bank relied solely on CFF-1 to autodeny without investigation or issuance of provisional credit all ATM and ATM/combo claims submitted by EDD cardholders and sending cardholders a form claim denial letter	<u>Unsupported/Mischaracterizes</u>. This paragraph consists of argument and characterizations, not fact. Plaintiffs' cited exhibits do not support that BANA relied upon the CFF-1 to summarily deny claims "without investigation[.]" *See also* SUF ¶¶ 81-94. Plaintiffs' cited

with no explanation of the reasoning for the denial. Pursuant to this policy, the Bank summarily denied without investigation the ATM and ATM/combo claims of approximately 104,300 Claim Denial class members, worth approximately $[redacted] Approximately [redacted] of class members' claims were not paid for more than [redacted]. The median duration of deprivation for class members was [redacted] PX 14 (Martin) 124:10-126:8, 127:20-132:17, 132:20-133:17; PX 5 (Regan Rpt) ¶¶37, 39, 45 & Schedule 1; PX 284; PX 291; PX 155.	exhibits also do not support that BANA sent cardholders claim denial letters "with no explanation of the reasoning for the denial." *See also id.* ¶ 95. Further, the undisputed evidence cited by Plaintiffs themselves expressly states: "Your claim has been closed because we believe the account or the claim have been the subject of fraud or suspicious activity." PX 155; PX 291; *see also* DX 58. AF ¶ 88 also fails to the extent it is premised on opinions from a purported expert that should be excluded. *See* ECF 567-1.
89. Instead of automatically denying claims that hit the fraud filter, the Bank could have prioritize" ATM claims for investigation in accordance with [redacted] within 10 business days, [redacted] The Bank [redacted] manually investigate all ATM and ATM/combo claims within 10 business days of claim submission, thereby complying with its Reg E obligations and not having to pay provisional (or permanent) credit for fraudulent claims submitted by those engaged in benefits enrollment fraud. Nevertheless, the Bank deliberately chose to implement its CFF-1 claim denial policy. PX 24 (Ehresman) 32:12-38:6, 97:4-23; PX 70 at -426407; PX 28 (Moynihan) 238:16-239:2 ([redacted]"); PX 20 (Garfield) 199:9-201:15; PX 66 at -169914 [redacted]).	<u>Unsupported/Mischaracterizes</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that [redacted] and do not support that BANA would have been able to [redacted] within 10 days of claim submission. RAF ¶ 37; *see also* DX 13.A ¶ 28; DX 14.U.1 ¶ 61 (acknowledging [redacted]). Further, undisputed evidence shows that [redacted] SUF ¶¶ 6, 118.
90. From September 28 to October 3, 2020, and again from December 3, 2020 to March 17, 2021, the Bank automatically froze the account of every EDD cardholder who submitted an ATM or ATM/combo claim; refused to allow	<u>Unsupported/Incomplete</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Also unsupported and inconsistent with the undisputed record, which shows that [redacted]

such cardholders to authenticate their identity with the Bank and instead directed cardholders to call EDD's call centers and authenticate their identity with EDD; and refused to unfreeze CFF-frozen accounts unless the EDD cardholder reverified their identity with EDD and EDD directed the Bank to unfreeze the account ("CFF-1 account freeze policy"). Pursuant to this policy, the Bank froze the accounts of approximately 65,800 Account Freeze class members, who were denied access to their frozen account balances totaling approximately $[redacted] Approximately [redacted] of Account Freeze class members were frozen for more than [redacted], and [redacted] were frozen for more than [redacted] PX 14 (Martin) 222:9-225:2, 232:2-12, 235:15-236:1; PX 142 (Simpson Ex 395) at -845906-07; PX 49 at -41755 [redacted]); PX 29 (EDD) 23:12-23; PX 13 (Chestnut) 146:17-25; PX 5 (Regan Rpt) ¶¶77, 79, 83 & Schedule 1; PX 284.	[redacted] *See* SUF ¶ 126. Further, this AF fails to the extent it is premised on opinions from a purported expert that should be excluded. *See* ECF 567-1.
91. When the Bank implemented its CFF-1 account freeze policy requiring frozen cardholders to call EDD to authenticate their identity to regain access to their account, it knew that EDD's call centers were overwhelmed and understaffed and unable to answer the vast majority of calls received. PX 13 (Chestnut) 154:11-157:14; PX 143 at 17-18; PX 144 at -71396 ("[redacted]); PX 138 at -874570 (as of December 2, 2020, [redacted]").	<u>Contains Legal Argument/Incomplete</u>. This paragraph consists of argument and characterizations, not fact. Undisputed that BANA attempted to address reports of long EDD call wait times and other efficiency-related concerns by, among other things, implementing a strategy whereby accounts would be [redacted] when fraud was suspected. *See* SUF ¶¶ 124-135; RAF ¶ 85. However, undisputed evidence shows that [redacted] SUF ¶¶ 116-119.
92. Instead of using CFF-1 to freeze cardholder accounts and require reverification with EDD, the Bank could	<u>Unsupported/Mischaracterizes</u>. This paragraph consists of argument, speculation, and characterizations, not

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have [redacted] used CFF-1 to "block" cardholders and allowed them to authenticate their identities through the Banks' own [redacted], which involve "[redacted]" PX 14 (Martin) 224:5-16, 242:22-247:2, 255:23-256:17; PX 145 (Bank's Rog 34 Response); *see* AF 93.	fact. Plaintiffs' cited exhibits do not support [redacted] could address the primary issue observed and reasonably suspected [redacted] *See* SUF ¶¶ 134-135. Further, undisputed evidence shows that [redacted] *Id.* ¶¶ 54, 57, 118, 134, 135.
93. Prior to its CFF policies, the Bank had [redacted] Instead, it had [redacted] PX 14 (Martin) 198:4-201:19, 205:1-206:8, 207:25-210:5, 236:13-25, 281:21-283:24, 286:2-19; PX 15 (Letson) 220:20-222:3 ([redacted]"), 334:21-335:4; PX 215 at -592330 ([redacted]"); PX 145 (Rog 34 Resp.).	<u>Contains Legal Argument/Incomplete & Immaterial</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that all [redacted] Further, undisputed evidence shows that [redacted] *See* SUF ¶¶ 79-94. Also immaterial: that BANA did not [redacted] (*see id.* ¶¶ 35-38, 46-54)—is not material to BANA's liability and has no bearing on BANA's MSJ.
94. The Bank's [redacted] is an effective tool for authenticating the true cardholder. The Bank also had numerous other sources of information for verifying the identity and transaction history of EDD cardholders, including information in the	<u>Unsupported/Immaterial</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that: (i) [redacted] could address the primary issue observed [redacted]

Bank's possession for EDD cardholders who also had consumer accounts with the Bank, which the Bank estimated was approximately [redacted]. PX 145 (Rog 34 Resp.) ([redacted]); PX 25 (Ramirez) 23:5-8; PX 12 (Daniels) 155:23-156:21; PX 26 (Simpson) 84:15-85:4; PX 23 (Holt) 127:9-17, 276:13-277:1 PX 149 at -631445 ("[redacted]]."); PX 14 (Martin) 30:25-31:3, 188:4-190:16, 218:2-220:7, 268:2-4, 301:18-302:25; PX 1 (Kreis Rpt) ¶ 66; PX 8 (Kreis Reb. Rpt) ¶¶ 23, 36; PX 136 at -90723 [redacted]); PX 146 at -405160 (same); PX 147 at -169898 ("[redacted]"); PX 148 at -417556-57; PX 138 at -125921; PX 273 at -127438.	[redacted]; (ii) "other sources of information" could actually "verify[] the identity" of EDD cardholders; or (iii) [redacted] had other BANA consumer accounts. *See* SUF ¶¶ 54, 57, 118, 134, 135. Further, undisputed evidence shows that [redacted] *See, e.g.*, *id.*; RAF ¶ 92.
95. The Bank was capable of authenticating legitimate EDD cardholders and identifying individuals using a stolen identity through its [redacted] and other processes and resources, and was aware that its CFF-1 freeze policy was trapping cardholders in a "[redacted]," but deliberately chose to implement and maintain its CFF-1 freeze policy until March 18, 2021. See AF 85-86, 93-94.	<u>Unsupported/Mischaracterizes</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited AFs do not support that BANA could actually "authenticat[e] legitimate EDD cardholders[,]" identify individuals engaged in benefits enrollment fraud, or identify fraudsters by using [redacted] and other processes and resources. *See, e.g.*, SUF ¶¶ 54, 57, 118, 134, 135; RAF ¶ 92.
J. THE BANK DELIBERATELY UNDERSTAFFED ITS CLAIMS CALL CENTER TO CREATE LONG WAIT TIMES	
96. The Bank required EDD cardholders	<u>Unsupported/Mischaracterizes</u>.

to call the telephone number on the back of their EDD debit card to report an unauthorized transaction (i.e. file a claim). PX 56 §§10-11; PX 33 §V at 198 ("Claims initiation can only be handled via a live representative within our Customer Service Center."); PX 3 (Minnucci Rpt) ¶¶23, 26, 47; PX 16 (Golden) 99:11-100:1; 100:2-9; PX 151 at -172243; PX 145 (Rog 34 Resp.).	Plaintiffs' cited exhibits do not support the claim that BANA "required" EDD cardholders to call the number on the back of their card to submit a claim. Moreover, this AF fails to the extent it is premised on opinions and fact summaries from a purported expert without personal knowledge that are not material facts and should be excluded. *See* ECF 564-1.
97. When EDD cardholders called the Bank's customer service number, they first navigated an IVR system (i.e., a pre-recorded menu of options) and then waited on hold for the Main Call Center. If the Main Call Center agent determined that the call was regarding an unauthorized transaction or unauthorized transaction claim, the agent would again place the caller on hold and transfer them to the Bank's Claims Call Center. All EDD cardholder calls seeking to submit a claim regarding an unauthorized transaction, to request reconsideration of a CFF-denied claim, or to inquire about the status of a pending claim were routed to the Claims Call Center. PX 3 (Minnucci Rpt) ¶¶22-26; PX 24 (Ehresman) 21:8-20; PX 16 (Golden) 32:5-21, 100:16-21, 168:5-17; PX 145 at 14-15 (Rog 34 Resp).	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that callers to BANA's customer service number "waited on hold for the Main Call Center" or for the Claims Call Center. Moreover, this AF fails to the extent it is premised on opinions and fact summaries from a purported expert without personal knowledge that are not material facts and should be excluded. *See* ECF 564-1.
98. In late summer 2020, the Bank implemented a policy of intentionally understaffing its Claims Call center, thereby increasing wait times and creating "[redacted]" in the Claims Call Center, making it more difficult for EDD cardholders to submit claims of unauthorized transactions, as a strategy "[redacted]." PX 152 at -118438 [redacted]	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that BANA had a "policy of intentionally understaffing its Claims Call center[.]" Further, undisputed evidence shows that [redacted] *See* SUF ¶¶ 221-226.

[redacted]); PX 153 at -106093-94 ([redacted]"); PX 154 at-876475; PX 24 (Ehresman) 50:5-13, 54:1-15, 62:21-63:3.	
99. The Bank's deliberate understaffing policy in late summer 2020 is reflected in its [redacted]. In response to the surge in call volume in Spring 2020, the Bank increased the number of CSRs until it [redacted] Rather than maintain an adequate staffing level in its Claims Call Center, the Bank then sharply reversed course and [redacted] as of September 27, 2020. PX 3 (Minnucci Rpt) ¶¶52-54, 58-81, 84, Tbls. 5 & 6, Fig. 3, Appx. F; PX 152 at –118438; PX 153 at -106094; PX 16 (Golden) 75:14-76:2; 85:25-87:2; 124:11-125:1; PX 156 at -719115; PX 286.	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that BANA had a policy of intentionally understaffing its Claims Call center, that it [redacted], or that it "sharply reversed course" and intentionally [redacted] Further, undisputed evidence shows that [redacted] *See* SUF ¶¶ 221-226; RAF ¶ 98; *see also* SUF ¶¶ 214, 216-217. Moreover, this AF fails to the extent it is premised on opinions and fact summaries from a purported expert that should be excluded. *See* ECF 564-1.
100. [redacted] its Claims Call Center staffing policies did not distinguish between deterring calls from legitimate and illegitimate claimants, and that "[redacted]," but it implemented its strategy of intentionally "[redacted]" anyway. PX 16 (Golden) 85:25-87:2; PX 24 (Ehresman) 24:7-13, 58:23-60:17; PX	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that BANA implemented a "strategy of intentionally [redacted]" Further, undisputed evidence shows that [redacted] *See* SUF ¶¶ 221-226; RAF ¶¶ 98-99.

152 at -118438.	
101. The Bank assumed that legitimate EDD Cardholders would tolerate long wait times, reasoning EDD [redacted]" PX 152 at -118438 ([redacted]").	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibit does not support that "long wait times" were part of an intentional strategy with respect to its call centers, or that BANA [redacted] *See* RAF ¶¶ 98-100. Further, undisputed evidence shows that BANA did not use [redacted] as an intentional strategy. *See id.* ¶¶ 98-100.
102. Deliberately subjecting customers to intentionally prolonged wait times is contrary to industry standards and "unheard of in the call center industry." PX 3 (Minnucci Rpt) ¶¶75-76.	Unsupported/Contains Legal Argument. This paragraph consists of argument, not fact. Plaintiffs' cited exhibit does not support that BANA was "[d]eliberately subjecting customers to intentionally long wait times." *See* RAF ¶¶ 98-101. This AF also fails because it is premised entirely on opinions from a purported expert that should be excluded. *See* ECF 564-1.
103. When the Bank implemented its CFF on September 28, 2020, the Bank knew that its Claims Call Center was already understaffed and that wait times were already extraordinarily elevated. The [redacted] implementing its CFF policies would cause a surge in call volume from cardholders impacted by the CFF. PX 16 (Golden) 75:8-22; 124:22-125:1; PX 3 (Minnucci Rpt) ¶72; PX 21 (Ahmad) 103:13- 104:19; 285:5-25, 287:14-288:4.	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that BANA knew that "wait times were already extraordinarily elevated" or that it "knew that implementing its CFF policies would cause a surge in call volume." Moreover, this AF also fails to the extent it is premised on opinions from a purported expert that should be excluded. *See* ECF 564-1.
104. From the CFF's implementation until November 21, 2020, EDD cardholders who called the Bank seeking to submit a claim, inquire about the status of a claim, or request reconsideration of a CFF-denied claim were required to wait on hold approximately [redacted] simply to speak with an agent in	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not establish that EDD cardholders calling to inquire about CFF-denied claims waited on hold [redacted], as that purported ASA includes non-EDD

the Claims Call Center, with average wait times peaking in late October 2020 at [redacted], compared to an industry average ASA in 2020 of 1.25 minutes. PX 3 (Minnucci Rpt) ¶¶36, 39-40, 52-54, Appx. E; PX 156 at -719115; PX 288.	cardholders and persons not impacted by the CFF. *See* 564-1 at 5; PX 3 ¶28. Moreover, this AF fails because it is premised entirely on opinions from a purported expert that should be excluded. *See* ECF 564-1.
105. As a result of these extraordinarily long wait times, the average call abandonment rate (i.e., the percentage of callers who hang up or are disconnected before their call is answered) in the Bank's Claims Call Center from September 13 to November 21, 2020 was [redacted], compared to an industry average of 6.1%. PX 3 (Minnucci Rpt) ¶¶14, 36, 39-40, 53, Fig. 2; PX 156 at -719115.	Unsupported/Contains Legal Argument. This paragraph consists of argument and characterizations, not fact. Plaintiffs' cited exhibits do not support that there was an industry standard during a once-in-a-lifetime pandemic. Moreover, this AF fails because it is premised on opinions from a purported expert that should be excluded. *See* ECF 564-1.
106. Understaffing was the root cause of the extreme performance failures of the Bank's Claims Call Center in the Fall of 2020, which fell far below industry standards. PX 3 (Minnucci Rpt) ¶¶58, 91-99.	Unsupported/Contains Legal Argument. This paragraph consists of argument, not fact. Plaintiffs' cited exhibit does not support that there was an industry standard during a once-in-a-lifetime pandemic or that BANA experienced "extreme performance failures." Further, undisputed evidence shows that [redacted] *See* DX 54. This AF also fails because it is premised entirely on opinions from a purported expert that should be excluded. *See* ECF 564-1.
107. Although the Bank had highly accurate and reliable forecasting based on the unemployment insurance daily average, and although onboarding a new call center staff person required at least [redacted], the Bank [redacted] PX 3 (Minnucci Rpt) ¶¶46, 60-67; PX 297 at -60339 ("[redacted]); PX 16	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that BANA had "highly accurate and reliable forecasting based on the unemployment insurance daily average[.]" Further, undisputed evidence shows that multiple factors rendered accurate forecasting impossible during 2020. *See* SUF ¶¶ 213, 216; DX 191

(Golden) 66:8-68:6, 69:5-20; PX 28 (Moynihan) 160:11-20; PX 160 at -13097, section 3.5; PX 158 at -90040, section 3.4; PX 159 at -13086, section 3.4; PX 160 at -13097, section 3.5.	62:21-63:11, 74:4-75:7 ([redacted]); PX 202, 203 ([redacted]). Had BANA used the model as Minnucci suggested, it would have predicted a decline in call volume rather than the actual increase. DX 13.A ¶ 18. This AF also fails because it is premised on opinions from a purported expert that should be excluded. *See* ECF 564-1.
108. The Bank's Claims Call Center staffing policies were directed by Paul Simpson and Faiz Ahmad, who were delegated authority over those policy decisions, and were authorized and/or ratified by then-COO Thomas Montag, [redacted]. Montag testified that [redacted] PX 26 (Simpson) 9:12-11:5; PX 24 (Ehresman) 21:22-22:2; PX 27 (Montag) 21:21-25, 22:8-16, 59:2-16, 60:3-23; PX 157 at -881851; PX 28 (Moynihan) 41:6-24.	<u>Unsupported/Mischaracterizes</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support any insinuation that [redacted] Further, undisputed evidence shows that [redacted] *See* SUF ¶¶ 220, 222, 225-227.
K. THE BANK DELIBERATELY DELAYED ISSUANCE OF EMV CHIP CARDS FOR SELF-INTERESTED FINANCIAL REASONS	
109. The Bank issued all EDD cardholders cards containing only a magnetic stripe and no EMV chip ("mag-stripe-only cards"), even though the Bank had included EMV chips on its other consumer and business account customers' debit cards since 2014. The Bank did not issue EDD debit cards with EMV chips until July 2021. PX 14 (Martin) 61:19-23, 64:7-13, 65:4-	<u>Incomplete/Immaterial</u>. Undisputed that BANA issued EDD cards without an EMV chip prior to July 2021 in accordance with its agreement with EDD. *See* SUF ¶¶ 10-16, 234-240. Unsupported that BANA included EMV chips in "business account" cards, and immaterial because Plaintiffs' exhibits do not support that EMV chips were industry standard in prepaid cards at this time. Moreover, this AF fails to the

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66:3; PX 161; PX 2 (Cloninger Rpt) ¶52; PX 18 (Johnson) 53:20-54:20; PX 15 (Letson) 161:7-162:3, 162:14-15.	extent it is premised on opinions from a purported expert that should be excluded. *See* ECF 563-1.
110. Because mag-stripe-only cards contain cardholder information on the unencrypted magnetic stripe and have no other security mechanism to complete transactions, they are easy for criminals to steal and counterfeit. For decades, criminals have stolen magstripe card data through "skimming," which involves installing inconspicuous "skimming" devices on payment terminals, typically in conjunction with the installation of a device to capture entry of PIN numbers, such as a pinhole camera or PIN pad overlay. EMV-chip cards, which require a fully encrypted, dynamic code specific to each transaction, cannot be counterfeited and are extremely effective at preventing card-present counterfeit fraud. PX 2 (Cloninger Rpt) ¶¶18-25 (citing FBI Overview of ATM Skimming report), 26-35, 58-75; PX 31 (Joseph) 94:5-9; PX 162 at -455617 ("[redacted] [.]"); PX 163 at -205594 [redacted]).”); PX 14 (Martin Dep) 65:21-66:3; PX 10 (Loebner Reb Rpt) ¶¶27-30; PX 164 at -370154 ("[redacted]"); PX 165 at -463207 ([redacted]"); PX 166 at -228914 ("[redacted]); PX 167PX 168 at -5007 ([redacted]	<u>Unsupported/Mischaracterizes</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that EMV chip technology is "extremely effective" at preventing fraud and "cannot be counterfeited," that magnetic stripe cards "are easy for criminals to steal and counterfeit," that criminals "for decades" have "stolen magstripe card data through skimming," or that skimming is "typically in conjunction with the installation of a device to capture entry of PIN numbers, such as a pinhole camera or PIN pad overlay." Further, undisputed evidence shows that EMV chip technology does not prevent all fraudulent transactions. SUF ¶ 241. Undisputed evidence also shows that cards with EMV chips [redacted] *Id.* ¶ 245. Moreover, this AF fails to the extent it is premised on opinions from a purported expert that should be excluded. *See* ECF 563-1.

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[redacted].”); PX 170 at -170413, 170416 ([redacted]); PX 171 at 167019-24 (“[redacted]; PX 172 at -401309; PX 161; PX 20 (Garfield) 384:1-385:6, 385:19-386:6, 386:11-15; PX 173 at -123235 [redacted]; PX 174 at -154043 (“[redacted].”); PX 175 at -166345 ([redacted]); PX 176 at -EDD2375 (“[redacted]; PX 167 at -495785 ([redacted]); PX 177 at -104749; PX 178 at -163307 (“[redacted]); PX 179 at -417363 ([redacted]”); PX 166; PX 180; PX 177 at -104749; PX 21 (Ahmad) 50:22-51:15, 79:9-16; PX 23 (Holt) 280:20-283; Exec. Order No. 13681, 79 F.R. 63491 (Oct. 23, 2014).	
111. EMV chips have been the industry standard for card security since at least 2019. PX 2 (Cloninger Rpt) ¶¶42-45, 46-55; PX 11 (Cloninger Reb Rpt) ¶¶8-45; PX 15 (Letson) 161:7-162:3, 162:14-25; PX 172 at -401309; PX 171 at -167021.	<u>Unsupported/Contains Legal Argument</u>. This paragraph consists of argument and opinion, not fact. Plaintiffs’ cited exhibits do not support that “EMV chips have been the industry standard for card security since at least 2019.” Further, undisputed evidence shows that EMV chips were not standard for prepaid debit cards at the time BANA entered into the

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	EDD Agreement and throughout the EMV Chip Class period. SUF ¶ 232. Moreover, this AF fails because it is premised on opinions from a purported expert that should be excluded. *See* ECF 563-1.
112. By 2020, even before the pandemic, the Bank was aware that [redacted] PX 2 (Cloninger Rpt) ¶¶61-62, 85, 87; PX 164 at -370154; PX 181 at -351839; PX 182 at -116001; PX 171 at -167022 ([redacted])"); PX 173 at -123235 ("[redacted]"); PX 183 at -406995 ([redacted]).	Unsupported/Contains Legal Argument. This paragraph consists of argument and speculation, not fact. Plaintiffs' cited exhibits do not support that [redacted] Further, undisputed evidence shows that EMV chip technology would not have [redacted] *See* RAF ¶¶ 110-111; SUF ¶¶ 241, 244-248. Undisputed evidence also shows that EMV chip technology does not [redacted] RAF ¶ 110; SUF ¶¶ 244-248. This AF also fails to the extent it is premised on opinions from a purported expert that should be excluded. *See* ECF 563-1.
113. In early January 2020, the Bank's [redacted] that [redacted] Once the pandemic began and the number of EDD cards and their load value grew, the Bank's [redacted] because fraud would foreseeably increase as a result of those changes. PX 14 (Martin) 81:7-83:13, 84:16-85:6, 86:9-24; PX 184 at -104744; PX 181 at -	Unsupported/Mischaracterizes. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that [redacted] Undisputed evidence shows [redacted] SUF ¶ 237. Moreover, this AF also fails to the extent it is premised on opinions from a purported expert that

351839; PX 2 (Cloninger Rpt) ¶¶60-64, PX 2 Rpt)76; PX 11 (Cloninger Reb Rpt) ¶¶65-67; PX 31 (Joseph) 149:21-150:8; PX 177 at -104749 ("[redacted]).	should be excluded. *See* ECF 563-1.
114. The Bank promised EDD to (i) be "at the forefront of fraud and data security strategies"; (ii) provide "immediate response to emerging fraud trends" and "industry best-in-class" fraud investigation; and (iii) "employ the highest level of security and fraud safeguards" with "multiple layers of extensive security" to "provide significant risk reduction associated with misuse of stolen [cardholder] information." PX 13 (Chestnut) 80:14-25, 85:12-86:9, 86:18-87:4, 87:11-20; DX 39 at -2761; PX 33 at 252-254; *see* RSUF 10.	Mischaracterizes/Incomplete/Best Evidence. To the extent the AF purports to quote from the agreement between BANA and EDD, that agreement is the best evidence of its content and terms. *See* DX 39. Further, it is undisputed that the EDD agreement did not require EMV chips and stated that EDD prepaid cards must be equipped with "no less than ISO 7811-compliant high coercivity magnetic strip." SUF ¶¶ 10-13.
115. The Bank did not offer to issue EMV chip cards before January 2021. The Bank's strategy was to [redacted]. PX 29 (EDD) 40:19-42:3; PX 20 (Garfield) 392:18-394:20; PX 171 at -167023 ([redacted]"); PX 185 at -124142 ([redacted]"); PX 186 at -352396 ("[redacted]."); PX 164 at -370154 ("[redacted]"); PX 269 at -698454–55; PX 287; PX 187 at -	Unsupported. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that BANA [redacted] Further, undisputed evidence shows that [redacted] DX 192 64:19-66:3; *see also* SUF ¶¶ 235-239. Moreover, this AF also fails to the extent it is premised on opinions from a purported expert that should be excluded. *See* ECF 563-1.

357755; PX 188 at -353034 ("[redacted] PX 189 at -678774; PX 173 at -123235 ([redacted] PX 2 (Cloninger Rpt) ¶¶68-74; PX 181 at -351839-40; PX 182 at -116001; see RSUF 11, 15, 236.	
116. The Bank [redacted] PX 173 at -123235 [redacted]"); PX 171 at -167019-24; PX 20 (Garfield) 390:9-391:23 ([redacted]."); cf. PX 161.	Unsupported/Mischaracterizes. This paragraph consists of argument and characterizations, not fact. Plaintiffs' cited exhibits do not support that BANA [redacted] or that BANA [redacted] Further, undisputed evidence shows that [redacted] RAF ¶ 115; *see also* SUF ¶¶ 235-239.
117. During the pandemic, mag-stripe-only EDD cards presented "[redacted]" in California. The Bank saw [redacted] resulted from low-security mag-stripe-only EDD debit cards PX 180 at -297295; PX 175 at -166345; PX 162 at -455617; PX 169 at -82602 ("[redacted]."); PX 166 at -228914 ("[redacted]); PX	Unsupported. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not establish that there was an [redacted] resulted from low-security mag-stripe-only EDD debit cards." Further, undisputed evidence shows that EMV chip technology does not [redacted] RAF ¶¶ 110, 112; SUF ¶ 245. This AF also fails to the extent it is premised on opinions from a purported expert that should be excluded. *See* ECF

165 at -463207 ([redacted]); PX 190 at -166417 ("[redacted]); PX 191 at -297351 [redacted]"); PX 192 at -82642 [redacted]); PX 193 at -431012 ([redacted]"); PX 167 at -495785 ; PX 2 (Cloninger Rpt) ¶¶14(g), 96-102; PX 194 at -218256 [redacted]; PX 195 at -166408 ("[redacted]").	563-1.
118. EMV would have prevented most, if not all, of the card-present fraud that EDD cardholders reported to the Bank. Had the Bank converted to EMV, any counterfeit fraud would have been extremely limited due to [redacted]. PX 162 at -455617 ("[redacted]); PX 185 at -124142 ([redacted]"); PX 178 at -163307 ("[redacted]; PX 177 at -104749; PX 196 at -632771 ([redacted]"); PX 2 (Cloninger Rpt) ¶¶14(j), 82-88, 103-113; PX 198 at -171973; PX 199 at -570314; PX 190 at -166417 ([redacted]	<u>Unsupported/Mischaracterizes</u>. This paragraph consists of argument, speculation, and characterizations, not fact. Plaintiffs' cited exhibits do not support that [redacted] Further, undisputed evidence shows that EMV chip technology does not [redacted] RAF ¶ 110; SUF ¶ 241. This AF also fails because it is premised on opinions from a purported expert that should be excluded. *See* ECF 563-1.

[redacted]"); PX 180 at -297295 ("[redacted]); PX 166 at -228914 ([redacted]); PX 193 at -431012 ([redacted]"); PX 136 at -57505 [redacted]; PX 11 (Cloninger Reb Rpt) ¶89; PX 14 (Martin) 112:1-113:25.	
119. When the Bank proposed to EDD that they amend their contract to allow the Bank to migrate EDD cards to EMV technology in 2021, EDD responded that it [redacted]." PX 29 (EDD) 38:3-39:10; 39:12-40:17; 61:9-62:17; PX 201 at –59312.	Unsupported/Immaterial. Plaintiffs' cited exhibits are testimony from 2025 and an email from March 2021, and in any event do not show that BANA believed it could migrate to EMV technology without EDD approval. Undisputed evidence shows that BANA believed it could not unilaterally [redacted] *See* SUF ¶¶ 14-15.

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Respectfully submitted,

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