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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 3:21-md-02992-GPC-MSB
	PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE CERTAIN EXPERT OPINIONS OF JANE CLONINGER
This Document Relates to All Actions	Date: April 17, 2026 Time: 1:30 p.m. Judge: Hon. Gonzalo P. Curiel Ctrm: 2D (2nd Floor)

[REDACTED]

Table of Contents

Table of Authorities

Other Authorities

INTRODUCTION

The Bank's *Daubert* challenge to the testimony of EMV chip technology expert Jane Cloninger focuses on just two of the opinions in her March 4, 2025 expert report and one in her April 4, 2025 rebuttal report. Cloninger Mot. at 5. The Bank contends that, despite Cloninger's 35 years of experience in the financial services industry, including 11 years (2004-15) creating models to analyze the costs (economic and otherwise) and benefits (including reduced card-present counterfeit fraud) of converting from magnetic-stripe-only ("mag-stripe-only") to EMV chip cards, Cloninger is somehow not qualified to opine on (1) the causal relationship between the lack of EMV chips on the Bank's EDD debit cards and the card-present ATM fraud reported by class members, or (2) the feasibility of the Bank migrating to EMV chip cards during the spring or summer of 2020, which Cloninger addressed [redacted]. Cloninger Mot. at 5-7, 13-15.

Notably, the Bank does *not* seek to exclude the vast majority of Cloninger's opinions, based on her same industry experience and expertise, including her opinions addressing (1) the vulnerability of mag-stripe-only cards to skimming and card-present counterfeit fraud, (2) the effectiveness of EMV chip cards in preventing such card-present counterfeit fraud, (3) the fact that EMV chip cards have been the industry standard in card security since at least 2019, and (4) the fact that any financial institution as sophisticated as Bank of America would have known that many EDD debit cardholders who reported unauthorized ATM withdrawals during the pandemic were true victims of card skimming and/or card-present counterfeit card fraud. *See* Ex. A[1] (Cloninger Rpt) ¶14(a)-(e), (h), (k) (summary of opinions); Ex. B (Cloninger Reb Rpt) ¶6(a)-(e) (summary of rebuttal opinions).[2]

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[1] All "Ex" citations refer to exhibits attached to the accompanying Declaration of Katherine Bass in Support of Plaintiffs' Opposition to Defendant's *Daubert* Motion to Exclude Certain Expert Opinions of Jane Cloninger.

[2] The Bank has also not challenged the closely related rebuttal testimony of Natalie Loebner, an expert on complex financial investigations and financial crimes who, like

The Bank's first argument, that Cloninger lacks sufficient expertise and experience to qualify as an expert for two of her many opinions, ignores Cloninger's extensive professional experience and her particularized expertise analyzing the operational costs and anti-fraud benefits of adding dynamic EMV chip technology to mag-stripe-only cards. That argument also misconstrues Rule 702's "broad conception of expert qualifications." *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1269 (9th Cir. 1994). Surely, Cloninger's years of experience analyzing the effectiveness of EMV chips in preventing card-present counterfeit fraud and the costs of implementing chip technology will "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702.

The Bank's second argument criticizes Cloninger's opinions because they do not rest on a quantitative, mathematical "methodology." But experts may offer opinions whose "reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000). Here, Cloninger's challenged opinions (one linking the vulnerability of EDD debit cards that lack industry-standard EMV chip security protections to the increase in ATM card-present counterfeit fraud directed against those cards, and the other explaining why it would have been operationally feasible for the Bank to have added EMV chip technology to the EDD debit cards long before it did) are well-grounded in her extensive professional experience in the payments industry and her specialized knowledge of EMV technology. Those opinions are also supported by numerous industry publications and the Bank's own documents, which she cites at length.

Not only do these opinions readily satisfy the "liberal[]" standard for experts whose testimony is grounded in special knowledge and experience, but Cloninger's qualifications far surpass those of the Bank's counterpart expert Pamela Joseph. *See Hankey*, 203 F.3d at 1168-69. While Joseph may disagree with Cloninger's opinions, the appropriate resolution

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Cloninger, explained that card skimming is a "well-known" and "pervasive" practice in which card information and PIN numbers are captured. [redacted] Ex. N (Loebner Rpt) ¶¶27-31.

of a "battle of expert witnesses" is trial before a jury—not the exclusion of testimony. *Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir. 2001).

BACKGROUND

I. EDD Card Security and Plaintiffs' Claims

Since 2014, the Bank has issued cards embedded with an EMV chip to all of its consumer and business debit card customers, thus providing them dynamic security technology that is highly effective at preventing card-present counterfeit fraud and that has been the industry-standard in card security technology since at least 2019. Ex. E (Martin Tr.) 61:19-23, 64:7-13, 65:4-66:3; Ex. A (Cloninger Rpt) ¶¶ 29-57. [redacted] throughout the period covered by this lawsuit, plaintiff class members' debit cards had only rudimentary and outmoded mag-stripe technology, making those cards highly vulnerable to card-present counterfeit fraud—the type of fraud at issue. Ex. E (Martin Tr.) 65:4-7. Unlike EMV chip cards, mag-stripe-only cards are particularly susceptible to "skimming," a practice that typically involves pairing a mag-stripe skimming device with a pinhole camera or PIN pad overlay to steal PIN numbers, which enables criminals to create exact counterfeit copies and to use the counterfeit cards to make unauthorized card-present ATM transactions. Ex. A (Cloninger Rpt) ¶¶ 17-25.

During the COVID-19 pandemic, class members began experiencing unauthorized ATM transactions on their Bank-issued EDD debit cards, despite having kept those cards in their possession. *See, e.g.*, Ex. D (Oosthuizen Res); Ex. L (Koole Res). Although the Bank directed debit cardholders to report any such unauthorized ATM transactions to the Bank, when class members did so the Bank responded by summarily denying their claims based solely on its automated CFF-1, which deemed every cardholder who disputed an ATM transaction to be a criminal rather than a legitimate EDD beneficiary victimized by third-party theft. Ex. F (Letson Tr.) 92:15-94:5, 178:7-20, 192:7-14.

Plaintiffs contend that the Bank knew or should have known that applying its automated claim filter to deny all claims of unauthorized ATM transactions would result in the sweeping denial of legitimate claims of tens of thousands of innocent cardholders who had been victimized by third-party skimming and counterfeit card fraud. ECF 324 at 3, 13; Ex. F (Letson Tr.) 165:1-10, 192:15-193:9, 283:14-21; Ex. E (Martin Tr.) 286:22-288:8, 308:9-18; Ex. G at -452826; Ex. H at -630754-55. Plaintiffs further contend that the Bank knew or should have known that the mag-stripe-only cards it issued to class members were highly susceptible to skimming and card-present counterfeit fraud, far more so than EMV chip-enabled cards, and that criminals looking to exploit the weakest link in a card-security system would gravitate to the Bank's EDD debit cards (the "weakest link" in the card security system), greatly increasing the likelihood that the cardholders' claims of unauthorized ATM transactions were actually valid, despite the Bank's automated CFF-1 policy of denying all such claims. TAMCC ¶556; Ex. A (Cloninger Rpt) ¶¶79-100.

II. Qualifications of Expert Jane Cloninger

Plaintiffs presented the expert testimony of Jane Cloninger to assist the trier of fact in understanding the EMV-related issues in this case—for example, by placing in context the Bank's own documents describing [redacted] long before the Bank actually did so.

Cloninger has worked with major payments industry actors (card issuers, brands, acquirers, third-party processors, merchants, etc.) in the United States and abroad for 35 years. Ex. A (Cloninger Rpt) ¶¶4-5 & Appx. A; Ex. I (Cloninger Tr.) 18:2-8. She has held senior positions at consulting firms with global practices in the payments industry, with a principal focus on product innovation for credit and debit cards, including EMV technology. Ex. A (Cloninger Rpt) ¶¶ 4-5. For more than a decade, from 2004 to 2015, her work focused on the emergence and adoption of EMV technology. *Id.* ¶7. Specifically, Cloninger assisted Interac (Canada's debit network) and MasterCard and Visa in the United States by developing "business cases" pertaining to potential conversion from mag-stripe-only to EMV technology, including by "creating models that captured the costs (including chip and card production costs, point of sale terminal, and ATM upgrade or replacement costs, and expenses related to changes to software) and the benefits (primarily reduction of card-present counterfeit fraud) for each of the major constituents of the payments [industry]." *Id.* ¶7. Among other projects, she analyzed the EMV conversion issues for a large regional issuer (a bank) of retail credit and debit cards and commercial and prepaid card portfolios, including prepaid debit cards used to disburse government assistance. Ex. A (Cloninger Rpt) Appendix A at 1; Ex. I (Cloninger Tr.) 20:20-24.

Cloninger explained in her reports that to enable her financial industry clients to assess when, whether, and how to migrate their cards to EMV chip technology, Cloninger prepared detailed business-case analyses of the economic and operational costs of conversion, and compared those costs to the financial and non-financial benefits of migrating to EMV technology—principally, the significantly increased anti-fraud protection benefit provided by EMV chips. Ex. A (Cloninger Rpt) ¶7; Ex. I (Cloninger Tr.) 22:6-17. Cloninger also reviewed her clients' prior fraud losses in particular portfolios to "forecast[]" for them what fraud losses might be expected if they continued to operate one or more product lines without EMV chip protection. Ex. A (Cloninger Rpt) ¶7; Ex. I (Cloninger Tr.) 40:8-25. She also analyzed factors pertaining to payment system security and safety in presenting her business case models. Ex. I (Cloninger Tr.) 22:18-24.

Cloninger is an acknowledged expert in her field. She has spoken and moderated panels at numerous industry conferences on payment card innovations, including EMV chip technology, and has contributed to several years of the Advanced Payments Report. Ex. A (Cloninger Rpt) ¶8, Appendix A.

III. Cloninger's Proposed Expert Testimony

Based on her extensive industry experience and professional expertise, Cloninger offered roughly a dozen opinions in her March 4, 2025 Expert Report and April 4, 2025 Rebuttal Report (Ex. A (Cloninger Rpt) ¶14(a)-(k); Ex. B (Cloninger Reb Rpt) ¶6(a)-(e)). The Bank has not disputed her qualification to formulate most of those opinions, including that: (1) mag-stripe-only cards "are highly vulnerable to card skimming and card-present counterfeit fraud," Ex. A (Cloninger Rpt) ¶14(a); (2) EMV was "designed to prevent card-present counterfeit fraud related to mag-stripe only cards, and EMV chips are highly effective at preventing card-present counterfeit fraud," *id.* ¶14(b); (3) "[b]y at least 2019, the use of EMV chips was an industry-standard security measure throughout the U.S. debit card market, including for debit cards used for the administration of government benefits," *id.* ¶14(c); (4) "[t]he Bank's failure to include EMV chips in its EDD debit cards was inconsistent with industry standard practices and caused those cards to be less secure and more vulnerable to skimming and card-present counterfeit card fraud (including unauthorized ATM withdrawals)" than EMV chip cards, *id.* ¶14(d); (5) "[t]he Bank's failure to include EMV chips in its EDD debit cards created an inferior level of card security for EDD debit cardholders compared to the level of card security the Bank provided to its non-prepaid consumer and business credit and debit cardholders, to whom the Bank issued EMV chip cards from 2014 onward," *id.* ¶14(e); (6) "[c]ard skimming results in the unauthorized access and exfiltration, theft, or disclosure of the cardholder's personal information," *id.* ¶14(h); and (7) "[a]ny major financial institution in the Bank's situation in 2020-21 would have known that many EDD debit cardholders who reported unauthorized ATM withdrawals during the pandemic were true victims of card skimming and/or card-present counterfeit card fraud," *id.* ¶14(k).

The Bank limits its challenges to two opinions in Cloninger's merits report, that: (1) the Bank's issuance of EDD debit cards without EMV chips led to greater targeting of those cards by criminal skimming and counterfeit card fraud rings, and (2) the unauthorized ATM transactions the class members experienced, which were the same type of card-present counterfeit fraud that EMV chip technology was designed to counteract, could have largely been averted by EMV chip technology. Cloninger Mot. at 5.

The opinions that the Bank challenges are supported by Cloninger's same qualifications and experience as the opinions it does not challenge. Those qualifications and experience also fully support Cloninger's expert rebuttal testimony, in which she opines that the "global chip shortage" [redacted] would not have prevented the Bank from issuing EDD cards with EMV chips and that migration to EMV chip technology would have been operationally feasible before mid 2021. *See* Ex. C (Joseph Rpt) ¶¶15, 125; Ex. B (Cloninger Reb Rpt) ¶¶20-23.

LEGAL STANDARDS

Federal Rule of Evidence 702 states that individuals qualified "by knowledge, skill, experience, training, or education" may serve as expert witnesses if their "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. The rule "contemplates a broad conception of" expert qualifications. *Thomas*, 42 F.3d at 1269.

An expert's testimony must also be reliable, or "based on sufficient facts or data [and] . . . the product of reliable principles and methods." Fed. R. Evid. 702. A trial court performs a "screening role," evaluating and precluding testimony—scientific or otherwise—lacking a "reliable foundation." *Daubert v. Merrel Dow Pharms., Inc.*, 509 U.S. 579, 596-97 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). With regard to the non-scientific testimony of experts offering "other specialized knowledge," Rule 702 is construed "liberally." *Hankey*, 203 F.3d at 1168-69 ("The *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to … testimony[] whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it."). A proponent need only prove an expert's qualification and testimony's reliability by a preponderance of the evidence. *Daubert*, 509 U.S. at 592 & n.10.

ARGUMENT

Jane Cloninger's specialized knowledge of EMV technology qualifies her to testify regarding the technology's ability to avert different types of fraud. Her testimony is also extensively reasoned and well-supported by her own professional experience, relevant Bank documents, and industry publications, and thus reliable. Finally, although her opinions may relate to an ultimate *issue* to be decided by the trier of fact, they do not state impermissible *legal* opinions.

I. Cloninger's Extensive Experience and Special Knowledge of EMV Technology Qualifies Her as an Expert.

Cloninger's 35 years' experience in the payments industry and 11 years specifically focused on EMV technology qualifies her to offer expert testimony regarding the protections EMV technology would have provided class members in 2020 and the feasibility of including EMV chips on EDD debit cards during the pandemic. Rule 702 "contemplates a broad conception of expert qualifications." *Thomas*, 42 F.3d at 1269. An expert may be qualified by "knowledge, skill, [or] experience" and may offer testimony where their "specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. The advisory notes to the rule explain that the "broadly phrased" wording of Rule 702 signal its intent to "embrace more than a narrow definition of a qualified expert." *Thomas*, 42 F.3d at 1269. That is why experts with significant experience in the relevant field are routinely deemed qualified to testify on subjects encompassed by that field. *See, e.g.*, *id.* at 1269 (abuse of discretion to preclude longshore worker with 29 years' work experience from testifying about the working conditions of longshore personnel); *United States v. Little*, 753 F.2d 1420, 1445 (9th Cir. 1984) (no abuse of discretion to admit testimony of income tax expert on partnership taxation). Here, Cloninger has extensive knowledge and expertise in EMV technology, the field to which all of her opinions are addressed.

The Bank contends that, because Cloninger has never served as a fraud investigator, the Court must preclude her from offering testimony regarding the relationship between the Bank's issuance of mag-stripe-only EDD cards and the fraud to which class members were victim. Cloninger Mot. at 6-7. While it may be true that an expert in one field may not be qualified to testify as to matters in an entirely separate field, that general principle has no application here.[3]

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[3] The Bank's cases are distinguishable. *See* Cloninger Mot. at 6-7, *citing Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, 839 (9th Cir. 2011) (precluding testimony of

EMV is a fraud-prevention technology, and experts in analyzing the costs and benefits of migrating to EMV technology from mag-stripe-only technology, like Cloninger, are necessarily experts in the improved anti-fraud security provided by EMV chips (which, unlike static magnetic strips, cannot be skimmed to produce a workable counterfeit card and are therefore far more effective at preventing the type of transactional fraud at issue). Ex. A (Cloninger Rpt) ¶¶18-34. In advising large-scale issuers and other payments industry actors about whether to migrate to EMV technology, Cloninger was required to thoroughly analyze the anti-fraud benefits of EMV chips as compared to mag-stripe-only cards. Ex. I (Cloninger Tr.) 40:4-7. She also developed considerable expertise as a result of having to analyze the extent of existing fraud on her clients' card portfolios, comparing that fraud to the level of fraud in programs that had migrated to EMV, and creating comparative projections of levels of fraud to expect with or without EMV migration. Ex. A (Cloninger Rpt) ¶7. Cloninger's expertise in the field of EMV technology thus fully encompasses her understanding of the types of fraud that EMV technology is effective at preventing, and her work on EMV conversion, in particular, required a sophisticated understanding of the technology's interaction with common types of card fraud and fraud trends in the payments industry. Similarly, Cloninger's opinions regarding card skimming, the risks of issuing a large portfolio of debit cards without EMV chips, and the nature and extent of the transactional fraud that could have been avoided had the Bank migrated to EMV, all fall squarely within her field of expertise.

Cloninger need not have personally worked as a fraud analyst or investigator for her to be qualified to discuss the risks of card-present counterfeit fraud on a mag-stripe-only card portfolio. Once an expert's qualifications in the relevant field "as a whole" have been established, *United States v. Laurienti*, 611 F.3d 530, 548 (9th Cir. 2010), any lack of

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physician regarding chemical biproducts in the metal working industry; *Morgan v. U.S. Soccer Fed'n, Inc.*, 445 F.Supp.3d 635, 662 (C.D. Cal. 2020) (human resources expert precluded from testifying about artificial sports turf); *AFMS LLC v. United Parcel Serv. Co.*, 2014 WL 12515335, *6 (C.D. Cal. Feb. 5, 2014) (communications law professor not qualified to testify regarding economic markets and shipping industry).

"specific experience . . . goes to the weight of [their] testimony, not to its admissibility," *Little*, 753 F.2d at 1445.

The Ninth Circuit has accepted testimony from experts on matters within their general field of expertise even when they had *no* prior experience or even any familiarity with the specific matters at issue. In *Laurienti*, for example, the Ninth Circuit held that it was an abuse of discretion to prohibit a securities expert from testifying about securities he had never heard of, as his lack of specific familiarity "[did] not undermine his general knowledge of [securities industry rules] and his general knowledge of the industry as a whole." 611 F.3d at 548. Similarly, in *United States v. Garcia*, a child mental health expert was found qualified to offer testimony regarding the possible trauma that testifying in front of a prior abuser could cause a minor, even though the expert had no prior experience with children testifying in court proceedings. 7 F.3d 885, 889-90 (9th Cir. 1993); *see also D.F. by & through Amador v. Sikorsky Aircraft Corp.*, 2017 WL 4922814, at *14 (S.D. Cal. Oct. 30, 2017) ("Even if a purported expert *admits* that she lacks specialized knowledge on the exact scenario being investigated, she may serve as an expert so long as she has experience in that general area.") (emphasis added). Here, not only does Cloninger have special knowledge about EMV "as a whole," but she is specifically familiar with the ability of EMV technology to prevent the exact type of fraud at issue in this case – card-present counterfeit fraud. *See Laurienti*, 611 F.3d at 548.

The testimony Cloninger offers regarding the vulnerability of mag-stripe-only cards to card-present counterfeit fraud is neither quantitative nor technical and is well within any EMV chip technology expert's likely expertise. Because of the narrow way the classes are defined, Cloninger has only been asked to address one specific type of unauthorized transaction: pin-enabled, card-present transactions at an ATM. She then explains how that type of fraud is typically accomplished; what makes non-EMV-chip-enabled cards particularly susceptible to such fraud; and why migrating to EMV chip technology can prevent that fraud—opinions that rest on her knowledge of fraud trends in the payments industry and EMV's capacity to prevent different types of fraud. Ex. A (Cloninger Rpt)

¶¶15-45, 103-113. Tellingly, the Bank does not challenge Cloninger's authority to opine on fraud trends in the payments industry or on the increase in skimming attacks on mag-stripe-only cards as EMV chips became the industry standard. Ex. A (Cloninger Rpt) ¶¶79-102. But the same qualifications that enable her to state those opinions generally also allow her to state those opinions as they apply in the context of this case (which is the core testimony the Bank seeks to preclude). In contrast to Cloninger, the Bank's proposed expert [redacted] *See* Ex. C (Joseph Rpt) ¶¶1-11 & Appx. A. If Joseph is sufficiently qualified to testify on the EMV issues in this case (as the Bank's reliance on Joseph's expertise necessarily assumes), surely Cloninger is equally if not more qualified to do so.

The Bank separately asks the Court to preclude Cloninger's rebuttal opinion concerning the feasibility of converting the Bank's EDD portfolio to EMV chips during the pandemic. The Bank contends that Cloninger lacks sufficient experience in "operational matters," generally, and during the COVID-19 pandemic in particular, to present these opinions. Cloninger Mot. at 13-15. Cloninger makes clear in her reports, though, that she is familiar with the operational requirements of EMV conversion, as she spent years consulting with industry clients about the costs, benefits, and feasibility of their own migration, [redacted]. *See Smilovits v. First Solar, Inc.*, 2019 WL 6875492, at *3 (D. Ariz. Dec. 17, 2019) (an expert's "substantial knowledge and experience . . . coupled with her . . . *exposure* [to the specialty at issue] are sufficient to qualify her to opine") (emphasis added); Ex. I (Cloninger Tr.) 23:3-22. Moreover, operational requirements of EMV conversion are well within the scope of the broader EMV technology field in which Cloninger is highly qualified. To the extent the Bank disagrees, it can cross-examine her on that basis. *See Laurienti*, 611 F.3d at 548.

For the same reasons, the Bank should not be able to preclude Cloninger from testifying about the feasibility of EMV migration in 2020 simply because she has not specifically identified any experience *during the first year of the Covid pandemic* helping clients migrate to a EMV chip environment. Cloninger Mot. at 14-15. While the Bank is free to cross-examine Cloninger on the impact, if any, the pandemic would have had on the types of cost-benefit analyses she undertook, her lack of direct experience conducting cost-benefit analyses during the pandemic goes only to the weight of her testimony, not its admissibility. *See Little*, 753 F.2d at 1445. Again, Pamela Joseph had no compunction about testifying that [redacted] Ex. C (Joseph Rpt) ¶¶1-11 & Appx. A. If pandemic operations experience were required, Joseph's report would also have to be excluded.

In sum, Cloninger's professional experience and special knowledge of EMV technology, including the ability of EMV chips to prevent the particular type of counterfeit fraud at issue (card-present counterfeit fraud), qualifies her to offer testimony regarding the relationship between the Bank's decision to issue mag-stripe only cards and fraud on the EDD portfolio and the feasibility of EMV conversion in 2020.

II. Cloninger's Testimony is Well-Grounded in Her Professional Experience and Analysis.

Cloninger's opinions regarding the relationship between inadequate security protections in the mag-stripe-only EDD debit cards and the unauthorized ATM transactions at issue, as well as the feasibility of migrating to EMV chip cards in the early months of the pandemic, are well-reasoned and grounded in her decades of professional experience and analysis of industry publications and Bank records. Expert testimony—scientific or otherwise—must have a "reliable foundation." *Daubert*, 509 U.S. at 597; *see Kumho Tire*, 526 U.S. at 141. Rule 702 requires that testimony be "based on sufficient facts or data" and "the product of reliable principles and methods . . . reliably appli[ed] . . . to the facts of the case." Fed. R. Evid. 702. The courts have considerable "latitude" in determining whether testimony has a reliable foundation. *Kumho Tire*, 526 U.S. at 139. Indeed, "the test of reliability is flexible," *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir.

2014), and "should be applied based on the circumstances of the case," *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.,* 752 F.3d 807, 817 (2014). "[U]nlike scientific or technical testimony," which is "contingent upon a particular methodology or technical framework," a non-technical expert's opinion may be "reliable based on [the expert's] knowledge and experience." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1018 (9th Cir. 2004); *see also Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017,1024 (9th Cir. 2022) ("An expert's specialized knowledge and experience can serve as the requisite 'facts or data' on which they render an opinion.").

The advisory notes to Rule 702 explain that "[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony." Fed. R. Evid. 702 advisory committee's notes. In such cases, reliability determinations "may focus upon personal knowledge or experience" rather than the soundness of a specific methodology. *United States v. Sandoval–Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006); *see also Hankey*, 203 F.3d at 1169-70 (expert's professional experience formed sufficient foundation on which to give non-scientific opinion testimony). Where the foundation on which testimony rests is professional experience, "the expert must explain how the conclusion is . . . grounded" in that experience. Fed. R. Evid. 702 advisory committee's notes (noting "testimony must be properly grounded, well-reasoned, and not speculative before it can be admitted"). "[I]n considering the admissibility of testimony based on some 'other specialized knowledge,' Rule 702 generally is construed liberally." *Hankey*, 203 F.3d at 1168.

A. Cloninger's Testimony Regarding the Causal Relationship Between the Lack of EMV Chips and Counterfeit Card Fraud Is Based on Facts or Data and Her Professional Experience.

In urging the Court to preclude Cloninger's conclusion that many of the unauthorized ATM transactions at issue could have been prevented with EMV technology, the Bank incorrectly asserts that Cloninger needed to have used an analytical methodology that generated "math." Cloninger Mot. at 10.[4] Cloninger is not offering a mathematical opinion. Her opinions are based on her extensive professional experience in the payments industry, her specialized knowledge of EMV technology, and her analysis of relevant Bank documents and industry publications.

The appropriate foundation for non-technical testimony will depend on the facts and circumstances of the case. *Pyramid Techs.,* 752 F.3d at 817; *Hankey*, 203 F.3d at 1168 (applicability of *Daubert* indicia of scientific reliability "depends on the nature of the issue at hand, the witness's particular expertise, and the subject of the testimony," requiring a "fact-specific inquiry") (quoting *Skidmore v. Precision Printing and Packaging, Inc.*, 188 F.3d 606, 618 (5th Cir. 1999)). Here, because the five classes are limited to individuals who reported unauthorized, pin-enabled ATM transactions, Cloninger has limited her opinions to the types of fraud most relevant to that type of transaction and to the effects EMV technology would have had on such transactions. As she explains, pin-enabled debit card transactions at an ATM are in the category of card-present counterfeit fraud, which is the type of fraud that EMV technology is highly successful at combating. Ex. A (Cloninger Rpt) ¶¶29-45. For those opinions, Cloninger's specialized knowledge of EMV technology and fraud trends in the payments sector makes her well-qualified to state the opinions she presents and explains in comprehensive and logical detail. *See United States v. Rogers*, 769 F.2d 1418, 1426 (9th Cir. 1985) (no error to admit testimony as to the frequency of bandana wearing in bank robberies in Los Angles from law enforcement agent who was "not qualified as a mathematician or statistician" as "such qualifications were hardly necessary to support the testimony given"). No mathematical calculations are required to conclude that a great deal of the fraud class members experienced would have been prevented had the Bank issued cards with EMV chips.

In her testimony, Cloninger offers a lengthy discussion of fraud trends, Bank documents, the efficacy of EMV technology, and the specific transaction type at issue. Ex.

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[4] For this proposition, the Bank cites *GPNE Corp. v. Apple, Inc.*, 2014 WL 1494247, at *2 (N.D. Cal. Apr. 16, 2014), which involved an expert tasked with "calculat[ing] Apple's average net incremental profit per [relevant] device."

A (Cloninger Rpt) ¶¶29-45, 79-84; Ex. B (Cloninger Reb Rpt) ¶¶70-81. In those discussions she cites FBI and payments industry publications, including the Nilson Report, FICO, and Equifax, on skimming operations, Ex. A (Cloninger Rpt) ¶¶20-28 (notes 10-26), and publications by the Community Banking Connection, American Banker, and Javelin Strategy and Research regarding the shifting focus of counterfeit fraud to mag-stripe only cards, *id.* ¶¶80-82 (notes 107-109), among the many other industry sources on which Cloninger draws throughout her reports [redacted] *Id.* ¶¶72-73 (notes 97-103); *see also Donahoe v. Arpaio*, 2013 WL 12419625, at *2-3 (D. Ariz. Sept. 20, 2013) (rejecting objection that expert failed to provide adequate reasoning where expert "based his opinions on the contents of a number of potentially relevant documents" and extensive professional experience).

Cloninger's detailed support for each of her opinions contrasts sharply with the facts in the cases the Bank relies upon, where the challenged expert did not provide *any* reasoning. *See* Cloninger Mot. at 8 (citing *Claar v. Burlington N.R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994)) and *United States v. Valencia-Lopez*, 971 F.3d 891, 899-901 (9th Cir. 2020)). In *Claar*, even after the district court ordered a party's experts to explain "the reasoning and methods underlying their conclusions," the only responses were affidavits "devoid of any such explanation." 29 F.3d at 502. In *Valencia-Lopez*, the expert's causation testimony, presented for the first time at trial, did not include any explanation of how the expert's professional experience, on which the testimony was based, supported that testimony, or any discussion of the underlying facts or evidence. 971 F.3d at 899-901.

[redacted] *See* Ex. A (Cloninger Rpt) ¶114; *see also* Ex. J (Bank Resp. to No. 28); Ex. L (Daniels Tr.) 285:22-

286:24. [redacted] Moreover, an expert's choice of evidence on which to base their opinions goes to weight, not admissibility. *See Primiano v. Cook*, 598 F.3d 558, 567 (9th Cir. 2010) (expert's decision not to speak to party "might be useful to the jury as impeachment, but [did not] furnish[] an adequate basis for excluding his opinion"); *Hangarter*, 373 F.3d at 1022, n.14 ("Although Defendants during voir dire argued that [the expert's] selection of documents to review went to the reliability of his 'methodology' as an expert, the district court correctly surmised that questions regarding the nature of [the expert's] evidence went more to the 'weight' of his testimony—an issue properly explored during direct and cross-examination."); *Donahoe*, 2013 WL 12419625, at *3 ("Whether [an expert] relied on the best evidence in forming [their] opinions . . . goes to the weight of his testimony rather than to its admissibility.").

Nor did Cloninger fail to consider alternatives to the fraudulent practices she principally discussed (skimming and shimming) as the most likely mechanisms used to obtain fraudulent access to the class members' accounts. Unlike the scientific experts in *Claar*, who failed to make "*any effort* to rule out other possible causes for the injuries" at issue, Cloninger systematically examined and rejected the various alternative explanations. 29 F.3d at 502 (emphasis added); Ex. A (Cloninger Rpt) ¶¶96 n.126, 104 n.130.[5] For example, she discussed and dismissed the possibility that lost or stolen cards, data breaches, family fraud, or cardholder mistake could account for any significant portion of the unauthorized ATM transactions that class members experienced. Ex. A (Cloninger Rpt) ¶¶96 n.126, 104 & n.130; Ex. B (Cloninger Reb Rpt) ¶¶73-75, 92-93. She also addressed the possibility of "fallback transactions," even had the cards contained EMV chips,

[5] The Bank also relies on *Engilis v. Monsanto Co.*, 151 F.4th 1040 (9th Cir. 2025), in which the Ninth Circuit upheld a district court's exclusion of an expert's proposed scientific testimony supported by a specific methodology–differential etiology–which, by definition, requires "ruling out" all other potential hypotheses. *Engilis* is inapplicable here, where no such elimination-based or scientific methodology has been proffered.

explaining that such transactions are rare and closely governed by restrictive rules. Ex. A (Cloninger Rpt) ¶¶34-39; Ex. B (Cloninger Reb Rpt) ¶¶82-89. Thus, even though some very small amount of counterfeit fraud could have occurred even with chip-enabled cards, Cloninger explained that EMV technology would still have prevented "all or nearly all" of the ATM transaction fraud that class members experienced. *Id.* ¶113. She also explained that she had no need to discuss first-party fraud because the class definition excludes individuals found to have engaged in fraud. Ex. B (Cloninger Reb Rpt) ¶¶71, 91. Cloninger additionally had no need to address [redacted]

The Bank disagrees with Cloninger's analysis of the types of fraud that can result in an unauthorized ATM transaction, but that "factual dispute is best settled by a battle of the experts before the fact finder." *City of Pomona*, 750 F.3d at 1049. The mere presence of alternative explanations does not preclude an expert from testifying about *that expert's* opinion of the most likely causes of a phenomenon. *See Elosu*, 26 F.4th at 1026-27 (abuse of discretion to exclude testimony of a fire investigator who testified about cause of fire where "the underlying facts were susceptible to competing interpretations"); *Sikorsky Aircraft*, 2017 WL 4922814 at *15 (no abuse of discretion to admit expert testimony despite argument that another explanation was more plausible, noting "that [an alternative explanation] is a matter of the weight of [the expert's] opinion, not its admissibility").

The Bank next challenges Cloninger's opinion that the Bank's decision to issue mag-stripe-only cards attracted fraud to the EDD portfolio as lacking "any methodology at all." Cloninger Mot. at 8-12. Again, the Bank ignores Cloninger's reasoning and the basis for that reasoning as explained in her reports. Cloninger explained that she reviewed numerous industry publications that discussed fraud trends in the payments industry, which supported her opinion that by 2017 and 2018, as a result of widespread adoption of the more secure EMV technology, criminals had begun to shift the focus of their fraud to the remaining mag-stripe-only cards on the market. Ex. A (Cloninger Rpt) ¶¶79-83. [redacted] *Id.* ¶¶84-95. [redacted] *Id.* ¶¶101-102; *see, e.g.*, Ex. K at -166345. Based on these documents and her own experience, Cloninger logically concluded that the Bank's decision to issue EDD cards without EMV chips likely made those cards an attractive target for fraudsters and increased the number of fraudulent attacks on the EDD portfolio. *Id.* ¶¶97-102. This is more than enough to satisfy Rule 702 and sharply contrasts with the Bank's cited cases. *See Claar*, 29 F.3d at 502; *Valencia-Lopez*, 971 F.3d at 899-901. The Bank's repeated argument that EMV does not prevent skimming and that EMV cards may also be skimmed ignores Cloninger's explanation that EMV chips largely prevent any skimmed information from being used to commit counterfeit card fraud, and in any event goes only to the "correctness" of Cloninger's opinion rather than its reliability and is not grounds for exclusion. *Humetrix*, 268 F.3d at 919; s*ee* Cloninger Mot. at 8-9; Ex. A (Cloninger Rpt) ¶¶34-42.

B. Cloninger's Rebuttal Testimony Regarding the Operational Feasibility of Chip Implementation Is Based on Sufficient Facts, Data, and Professional Experience.

Finally, the Bank seeks to exclude Cloninger's rebuttal opinion that the Bank could have migrated to EMV during the early months of the pandemic, contending that she failed to conduct sufficient "analysis" to account for operational difficulties facing the Bank in 2020. Cloninger Mot. at 15-18.

Again, although the Bank may disagree with Cloninger's conclusions, her rebuttal opinions are well-grounded in her professional experience and she clearly explains the facts and documents on which those opinions are based. *See, e.g.*, *Hankey*, 203 F.3d at 1169 (no abuse of discretion to admit testimony by expert on gang activity based on professional experience); *Hangarter*, 373 F.3d at 1018 & n.14 (no abuse of discretion to admit expert opinion as to causation based on expert's knowledge and experience and review of documents and facts of the case); *Donahoe*, 2013 WL 12419625, at *2-3 (despite opposing party's contention that non-scientific expert's opinions were conclusory, no abuse of discretion to admit opinions "based . . . on the contents of a number of potentially relevant documents.").

For example, in determining that EMV conversion would have been feasible in 2020, Cloninger considered the Bank's size and vendor relationships, Ex. B (Cloninger Reb Rpt) ¶58; that staffing issues were unlikely to impede migration, *id.* ¶59; the fact that the Bank did migrate its EDD debit card portfolio to EMV in 2021 when the global chip shortage was at its height, *id.* ¶63; and the timeline in which the Bank did eventually make the switch, *id.* ¶¶61-63; Ex. I (Cloninger Tr.) 174:11-175:11. She also considered that the Bank would not be [redacted] as it had already transitioned other card programs to EMV, so it could draw from the materials and personnel it had from those migrations for an EMV conversion for the EDD portfolio [redacted] Ex. B (Cloninger Reb Rpt) ¶58; Ex. I (Cloninger Tr.) 177:7-178:23.

The Bank's criticism that Cloninger did not quantify exactly how many cards would have been issued with EMV chips at which month of 2020 is misplaced – Cloninger was not asked to provide quantitative testimony, but rather to respond to the unsubstantiated assertion made by the Bank's expert that [redacted] Ex. C (Joseph Rpt) ¶¶58-64. No exact quantification or timeline was required for Cloninger to opine that it would have been possible for the Bank to have migrated to EMV during the pandemic.

III. Cloninger's Opinions Are Not Impermissible Legal Opinions.

Cloninger's opinions that the Bank's issuance of mag-stripe-only EDD cards led to an increase in skimming attacks on the EDD portfolio and that the Bank should have known that skimming fraud would continue to target mag-stripe-only cards are not impermissible legal opinions. Although an expert must refrain from "giv[ing] an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law," *Nationwide Transp. Fin. v. Cass Info. Sys.*, 523 F.3d 1051, 1058 (9th Cir. 2008), "[the] expert may give [her] opinion even if it embraces an ultimate issue to be decided by the jury," *Rogers*, 769 F.2d at 1425. "Federal Rule of Evidence 704(a) provides that expert testimony that is 'otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.'" *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1065 n.10 (9th Cir. 2002), *overruled on other grounds by United States v. Bacon*, 979 F.3d 766 (9th Cir. 2020). Experts may even use legal terms in providing their opinion as long as those terms "do not have a specialized meaning in law and do not represent an attempt to instruct the jury on the law, or how to apply the law to the facts of the case." *United States v. Diaz*, 876 F.3d 1194, 1199 (9th Cir. 2017). Even terms found in an applicable statute may be used in expert testimony when used in their "ordinary, everyday sense." *Id.*

Neither of the two opinions the Bank challenges improperly tread on the authority of the trier of fact. First, Cloninger's opinion that "[s]kimming and card-present counterfeit fraud targeting California EDD cards increased as a result of the Bank's failure to issue EMV-chip-enabled cards" is not a *legal opinion*. Ex. A (Cloninger Rpt) ¶14(g). In *Hangarter*, the Ninth Circuit found no abuse of discretion when a district court permitted an expert to testify that the fact that "[d]efendants deviated from industry standards supported a finding that they acted in bad faith" when that expert "never testified that he had reached a legal conclusion that Defendants actually acted in bad faith." 373 F.3d at 1016. Cloninger similarly does not opine that she reached the legal conclusion that the Bank caused the skimming attacks on class members' EDD cards. Even her use of the term "result" does not render her conclusion impermissible legal opinion as she uses that term in its "ordinary, everyday sense." *See Diaz*, 876 F.3d at 1199. Examples of experts providing testimony as to causation are plentiful. *See, e.g.*, *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1228-31 (9th Cir. 1998) (abuse of discretion to preclude expert testimony regarding causation in case in which causation was "[t]he crucial issue," noting that Ninth Circuit and others permit expert testimony as to causation where the testimony meets *Daubert*'s standards); *see also Elosu*, 26 F.4th at 1020 (expert offers a specific theory of causation as to the fire at issue in the case, noting "[the] case rises and falls on an expert report" hypothesizing as to the cause of the fire); *Claar*, 29 F.3d at 500 (experts proposed testimony, excluded on other grounds, regarding the cause of the injuries at issue in the case).

For the same reasons, Cloninger is not restricted from testifying as to whether fraud on the EDD portfolio was foreseeable, in the ordinary sense of the word, based on industry trends and the Bank's own documents—and the Bank cites no case to the contrary. Ex. A (Cloninger Rpt) ¶14(f)-(g).[6] Moreover, although Cloninger used the term "foreseeable," the substance of Cloninger's opinion is what the Bank, a sophisticated financial actor, knew or should have known before and at the onset of the pandemic. *See id.* ¶¶85-95, 86 ("Based on my experience, it would have been foreseeable to any sophisticated financial institution like Bank of America at the onset of the pandemic that the increase in EDD debit card load, combined with the known security vulnerabilities of mag-stripe-only EDD debit cards,

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[6] The Bank incorrectly relies on *Aguilar v. Int'l Longshoremen's Union Loc. No. 10*, 966 F.2d 443, 447 (9th Cir. 1992), for the proposition that an expert may not opine on foreseeability in any sense or in any case. *Aguilar* does not so hold. In *Aguilar*, the Ninth Circuit affirmed the exclusion of an expert who applied the law of promissory estoppel to the facts of the case, offering opinions on the exact contested elements of the claim, including the foreseeability and reasonableness of the plaintiffs' reliance. *Id.* at 447; *see also Nationwide*, 523 F.3d at 1057-59 (no abuse of discretion to preclude an expert from directly applying law to the facts of a case). The court precluded both opinions, explaining: "*Here*, the reasonableness and foreseeability of the [plaintiffs] were matters of law for the court's determination." *Aguilar*, 966 F.2d at 447 (emphasis added). By contrast, Cloninger in no way applies law to the facts of this case. Rather, her opinion that fraud would foreseeably continue to grow on the EDD portfolio would "help the trier of fact . . . to determine a *fact*" that is relevant to several of Plaintiffs' claims (whose elements Cloninger does not discuss, no less purport to resolve). Fed. R. Evid. 702 (emphasis added).

would make EDD debit cards an even more attractive target for card skimming and counterfeit fraud during the pandemic"). For example, Cloninger concludes this part of her testimony (Part F) with the statement that "the Bank knew its EDD debit card program was highly attractive to criminals given the high dollar amounts pre-pandemic and even higher dollar amounts during the pandemic" and "[t]he Bank nonetheless made a deliberate choice not to adopt EMV chips in EDD debit cards." *Id.* ¶95. Cloninger's opinion as to what the Bank knew is permissible expert opinion that does not intrude on the authority of the jury.

CONCLUSION

For these reasons, the Court should deny the Bank's motion to exclude Cloninger's testimony in its entirety.

Respectfully submitted,

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SIGNATURE ATTESTATION

Pursuant to section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I, Brian Danitz, attest that the other signatories listed, and on whose behalf this filing is submitted, concur in the filing content and have authorized this filing.

Dated: January 8, 2026

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