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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION

This Document Relates to All Actions

Case No. 3:21-md-02992-GPC-MSB

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

[ORAL ARGUMENT REQUESTED]

Date: April 17, 2026
Time: 1:30 p.m.
Judge: Hon. Gonzalo P. Curiel
Ctrm: 2D (2nd Floor)

REDACTED PUBLIC VERSION

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INTRODUCTION

The Court should deny the Bank's Motion for Partial Summary Judgment, which rests upon legal arguments the Court previously rejected, presents 252 "facts" that are either immaterial or are genuinely disputed,[1] and quibbles with the factual underpinnings of Plaintiffs' experts' damages analyses—quintessential jury questions.

The Bank's principal argument is that it cannot be liable for treble or punitive damages because it acted appropriately and with benign intent in using Indicator 1 of its Claim Fraud Filter ("CFF-1") to deny 109,000 EDD cardholders of access to more than [redacted] in crucial benefits at the height of the pandemic. Yet the record includes considerable evidence from which a jury could find, clearly and convincingly, that (1) the Bank deliberately implemented CFF-1 to further its own economic self-interest despite knowing that its policies would cause grievous harm and violate the rights of tens of thousands of legitimate EDD cardholders; (2) the Bank was well aware of reasonable alternatives that would have prevented or mitigated those harms; and (3) the Bank's senior leadership callously and deliberately chose to pursue the "[redacted]" approach available to limit *the Bank's* financial losses and to shift those losses to its "[redacted]"—the unemployed EDD benefits recipients who were hard hit by the pandemic to whom the Bank owed a special duty of care. Because there is ample evidence that the Bank's EFTA and other violations were knowing, willful, and done in conscious disregard of its legal obligations to class members, the motion should be denied.

FACTUAL BACKGROUND

A. The Bank Violated the Rights of EDD Cardholders.

From September 28, 2020 until enjoined on June 8, 2021, the Bank violated the rights of tens of thousands of vulnerable Californians who received unemployment and other public benefits issued by EDD through Bank-issued EDD debit cards, by implementing an unprecedented series of policies, including a policy of automatically

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[1] *See* Plaintiffs' Response to Statement of Undisputed Facts ("RSUF") and Plaintiffs' Additional Statement of Facts ("PASF").

denying all EDD debit cardholders' unauthorized-ATM-transaction claims based solely on Indicator 1 of Bank's Claim Fraud Filter ("CFF-1").

The CFF in general, and CFF-1 in particular, was a radical departure from the Bank's [redacted] for conducting the "reasonable investigation" of claims required by EFTA and its Regulation E. PASF 18-31; RSUF 71, 88. In violation of its own policies, the Bank used CFF-1 to auto-deny the claims of tens of thousands of EDD debit cardholders who reported that their benefits had been stolen through an unauthorized ATM transaction, even though the Bank was capable of manually investigating all claims in accordance with Reg E, and even though the Bank knew that due to its refusal to issue more secure EMV chip cards, many EDD claimants were genuine victims of skimming and card-present counterfeit fraud. PASF 32-38, 88-89, 109-119; RSUF 85; PX 58. The Bank also intentionally used CFF-1 to automatically rescind "permanent" credits for claims the Bank had already investigated and paid, PASF 87; RSUF 105, 108, 149, and to "freeze" (rather than simply "block") cardholders' EDD debit card accounts without providing any reasonable opportunity or process to regain access, PASF 90-95; RSUF 101, 116, 119, 125, 136. The Bank also deliberately increased wait times to create "[redacted]" in its call centers, subjecting cardholders to unheard of delays, disconnected calls, and other systemic obstacles that impeded their ability to report claims or regain access to frozen accounts. PASF 96-108; RSUF 43, 99, 116, 119.

As a result of these practices, more than 109,000 class members had their unauthorized-transaction claims wrongfully denied and lost access to more than [redacted] in critically important unemployment and disability benefits during the height of the pandemic, often for months on end. PASF 15-17, 87, 88, 90; PX 4 (Regan Rpt) Sched. 1; PX 261. The Bank took these actions despite knowing that these cardholders "[redacted]." PX 15 (Letson) 100:13-22; PASF 15-17.

B. The Bank Implemented CFF-1 to Protect its Bottom Line.

When the pandemic arrived in March 2020, California's unemployment rate soared, creating millions of new UI benefits recipients. PX 13 (Chestnut) 31:13-23; 50:15-21; RSUF 34-37. Criminals took advantage of the crisis. EDD and other state-run UI programs across the country became targets of benefits enrollment fraud. At the same time, the Bank's outmoded mag-stripe-only EDD debit cards inevitably became fraud magnets, and criminals drained tens of thousands of EDD debit card accounts by using counterfeit cards at ATMs. PASF 117; RSUF 64. The Bank knew that the lack of industry-standard EMV chips had made the Bank's EDD debit cards particularly vulnerable to fraud and would lead to significant increases in counterfeit card fraud. PASF 111-12; RSUF 64, 232A, 237, 241, 249.

Beginning in July 2020, the Bank worked with EDD to address concerns about potential benefits enrollment fraud. PASF 6-9; RSUF 63, 65, 80, 81. Members of Global Financial Crimes ("GFC"), primarily Mike Letson, Anne Holt, and Ryan Schwartz, developed [redacted], to identify such fraud. *Id*. Using this multi-factor model, on September 18, 2020, the Bank identified individuals potentially engaged in UI benefits fraud and provided that list to EDD. RSUF 65, 66; PASF 9. That [redacted] would eventually be incorporated into CFF Indicator 3 (which is not at issue in this case). *Id.*; *see also* PX 90 at -450516.

The Bank's executive management team ("[redacted]"), consisting of CEO Moynihan and his direct reports, met daily during the pandemic to discuss topics of importance, including [redacted]. PASF 39-41, 43; PX 21 (Ahmad) 27:11-28:11; PX 27 (Montag) 7:5-8:16; PX 28 (Moynihan) 16:7-18. As early as May 2020, Montag asked internally about [redacted]. "[redacted] [redacted]" about "[redacted]" these losses and [redacted] members, including Moynihan, requested and received regular updates. PX 20 (Montag) 11:9-16; RSUF 79, 112; PASF 41-43.

In mid-September 2020, the Bank's executive officers received reports that the Bank's fraud losses in the UI card program—which had originally been estimated to be about [redacted] for the year—were projected to exceed [redacted], which risked "[redacted]." PX 44 at –421427; *see* PX 202 at -706213 (fraud losses risked "[redacted]"); PASF 45-46; RSUF 56, 111. On September 21, 2020, the Bank's chief officers learned that "[redacted]," which would be [redacted]. PX 82 at -372013; PX 28 (Moynihan) 66:4-67:4. With the next board meeting ([redacted]) rapidly approaching and the CEO's advance board memo due [redacted], COO Montag directed mid-level executives to "[redacted]." PX 77 at -371977; RSUF 56. The Bank's senior officials directed their subordinates to develop a claims-screening mechanism to enable the Bank "[redacted]." PX 76 at -630836; PASF 47-53. Senior executives were "[redacted]" and "[redacted]." PX 84 at -694889-90; PX 83 at -118378; *see* PASF 39-56. GFC hastily devised options for an even "[redacted]" screen than the Bank had previously considered "[redacted]." PX 76 at –630836 (emphasis added). "[redacted]" meant a "[redacted]" that would be "[redacted]." PX 23 (Holt) 117:7-19.

CFF-1 was cobbled together and pushed through over a single chaotic weekend without any analysis or testing, as GFC was pressured to implement it by Monday, September 28. PASF 57-66. GFC's Letson and Holt put together the proposed CFF policy in a series of emails exchanged from 7:22 p.m. on Thursday, September 24 to 12:11 a.m. on Friday, September 25. PX 85 at -125059; PX 83 at -170046; PX 91 at -87763; PX 87 at

-87767. The 12:11 a.m. version of the slide included the following [redacted] PX 87 at -87767 (emphasis added). That slide was updated on September 25 at 8:38 p.m. and made clear that the [redacted] were driving the policy: "[redacted]." PX 88 at -87780. The Bank did not conduct any research or analysis to determine whether claims of unauthorized PIN-enabled transactions were indicative of fraud. PX 19 (Schwartz) 201:11-205:20. Instead, CFF-1 was just "[redacted]," based on untested assumptions and [redacted] ATM claims. RSUF 82, 85.

C. The Bank's Executives and Board Approved and Ratified CFF-1.

[redacted] member [redacted]. PX 21 (Ahmad) 193:8-25, 194:15-195:25; PX 97 -876417; PX 27 (Montag) 7:5-8:16, 82:10-18; PSAF 69-70; RSUF 86, 112. [redacted] presented the proposed Claim Fraud Filter to [redacted] on Sunday, September 27, 2020. PX 96 at -706496. On Monday September 28, [redacted]." PX 90 at -450516.

At or around 6:00 pm on September 28, [redacted]." PX 208 at -162409. [redacted]." *Id.* at -162408; PX 21 (Ahmad) 203:10-23, 209:9-210:8. In text exchanges [redacted]." PX 98 at -293818. [redacted]" *Id.* at -293819. [redacted] *Id.* at -293820; PASF 71.

The next day, September 29, [redacted]. PX 101 at -497802-03; PX 27 (Montag) 30:13-20; 47:19-48:16, 128:7-11; PASF 72; RSUF 114. Two days later, [redacted].” PX 103 at -882977-78. The [redacted].” PX 104 at -882712; PASF 73-74.

D. The Bank Continued to Use CFF-1 Until Enjoined in June 2021.

In the following weeks and months, panicked cardholders unable to access their benefits flooded the Bank’s call centers, only to experience unheard of wait times, high call abandonment rates, and the Bank’s refusal to assist frozen cardholders until they re-authenticated with EDD—which the Bank knew was overwhelmed—subjecting those callers to a “[redacted]” of futile calls between EDD and the Bank. RSUF 43, 97, 99, 116, 125, 221; PASF 75, 82-85, 91, 103-08. Desperate cardholders emailed the Bank’s CEO directly and journalists and legislators contacted the Bank looking for answers. *See, e.g.*, PX 114 at -107334-35; PX 115 at -90683-86; PX 228 at -37137; PX 121 at -58621-22; PX 128-133. Yet the Bank persisted in using CFF-1 without modification despite knowing that CFF-1 was uniquely ineffective at identifying fraud, with initial false positive rates of [redacted], later shown to be [redacted]. PASF 77-80; RSUF 84, 113; PX 112 at –90640; PX 116 at –273306-07; PX 109 at 76994; PX 227 at -159493.

This case was filed on January 14, 2021. On June 1, 2021, the district court entered a Preliminary Injunction (“PI Order”) that, among other things, prohibited the Bank from using its CFF to deny claims and freeze accounts and from denying provisional credit without an investigation. PX 209, 210. More than a year later, the CFPB and OCC entered into Consent Orders with the Bank, imposing $225 million in penalties based on factual findings similar to those underlying the PI Order. PX 211, 212, 213, 279.

ARGUMENT

I. The Bank Is Not Entitled to Summary Judgment on Plaintiffs' Claims for EFTA Damages.

The Bank does not contest its classwide *liability* for violating EFTA, based on evidence that it (1) summarily denied without investigation every Claim Denial class member's unauthorized ATM claim; (2) summarily rescinded previously issued permanent credit on every Credit Rescission class member's unauthorized ATM claim; and (3) failed to properly explain the basis for its claim denials and credit rescissions. *See* 15 U.S.C. §§1693f(a)-(d), 1693g; 12 C.F.R. §1005.11. The Bank also does not contest Plaintiffs' entitlement to statutory damages for these violations under 15 U.S.C. §1693m(a)(2)(B), which provides for a recovery of up to $500,000 "in any class action or series of class actions arising out of [a] failure to comply [with EFTA]." MSJ at 16; *see also* 15 U.S.C. §1693m(a)(3). Nor does the Bank contest Plaintiffs' entitlement to attorneys' fees and costs pursuant to 15 U.S.C. §1693m(a)(3).

Instead, the Bank's principal argument is that Plaintiffs cannot prove "actual" damages because class members were reimbursed after these lawsuits were filed and thus have no damages to treble under 5 U.S.C. §1693m(a)(1) and §1693f(e)(1)-(2). The Court previously rejected this argument as a matter of law at class certification, holding that whatever amounts the Bank paid to class members should be offset *after* trebling, not before. ECF 494 at 84. Even as to Plaintiffs' single damages claim, there are fact disputes as to whether the Bank's long-overdue payments fully compensated class members.

While the Bank makes a half-hearted attempt to argue Plaintiffs cannot establish entitlement to treble damages because its CFF-1 policies were enacted either mistakenly (in the case of the Credit Rescission policy) or not in "bad faith," MSJ at 24-26, there is overwhelming evidence that the CFF-1 policies were *not* a mistake and were enacted in conscious disregard of the class members' EFTA rights. RSUF 105, 149; PASF 18-38, 87;

§VII *infra*. These material factual disputes preclude summary judgment.

A. The Bank's Long-Withheld Payments to Class Members Could Not Eliminate its EFTA Treble Damages Liability Even if They Were Fully Compensatory, Because the Statute Requires Trebling Before Offset.

The Bank does not dispute that, had it not made payments to class members as required by the *Yick* injunction and CFPB/OCC Consent Decrees, any award of EFTA treble damages would be calculated by tripling the sum of (1) the principal amounts of the unauthorized-transaction claims that the Bank wrongfully denied or rescinded, and (2) the lost-time-value of those wrongfully withheld funds. Although Plaintiffs agree that whatever amounts the Bank has paid to class members should be offset *after* trebling (resulting in 2x rather than 3x actual damages), the Court has already ruled that the Bank may not have those amounts offset *before* trebling (which according to the Bank would reduce their EFTA damages liability to zero, MSJ at 15).

The Court's class certification order unambiguously holds that

> [a]n offset should be subtracted from the total amount of damages after trebling. In actions like this where treble damages are available, the plaintiff is entitled to full satisfaction of the claim for harm done. The amount awarded as damages is then trebled as punishment to the defendant. If the offset were subtracted from the initial damages award, the class members would be denied the full satisfaction of their claim.

ECF 494 at 84 (quoting *Van Vranken v. Atlantic Richfield Co.*, 699 F.Supp. 1420, 1428 (N.D. Cal. 1988), and citing *McCall v. Four Star Music Co.*, 51 Cal.App.4th 1394, 1399 (1996); *Uthe Tech. Corp. v. Aetrium, Inc.*, 808 F.3d 755, 762 (9th Cir. 2015)).

In *Uthe*, the Ninth Circuit concluded that a RICO treble damages plaintiff that had already won single damages in arbitration would be eligible only for twice that amount, not three times *and not zero*, if it prevailed under RICO. 808 F.3d at 756-60. Although the amount of that arbitration award would be offset from any treble damages payment, the initial award would not "fully extinguish" the plaintiff's treble damages claim. *Id.* Similarly, in *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957), a plaintiff seeking treble damages under the Sherman Act received $20,000 from the defendant "after the action was filed but before trial." *Id.* at 397. "The question presented" was "whether the

$20,000 should be subtracted from the actual damages fixed by the jury verdict ($50,000) before said damages are trebled, or whether the award should first be trebled and then the $20,000 deducted from the trebled amount of $150,000." *Id.* The Ninth Circuit held that the damages owed at the time of filing should first be trebled and the $20,000 offset only *after* trebling, to avoid "do[ing] violence to the clear intent of Congress." *Id.* at 398.

Several lower courts have applied this same rule where, as here, a settlement with regulators was reached and paid after the filing of the plaintiffs' lawsuit. *See, e.g.*, *B.P. v. Balwani*, No. 20-15974, 2021 WL 4077008 (9th Cir. Sept. 8, 2021) (requiring trebling of actual damages under RICO before offsetting amount paid to class members pursuant to Consent Order with regulators)*; In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2017 WL 4890594, at *4 (N.D. Cal. Oct. 30, 2017) (same); *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 636 F.Supp.1138 1151-52 (C.D. Cal. 1986) ("[T]o ensure that plaintiffs receive complete satisfaction of their claims, settlement payments should be deducted from the award against the non-settling defendant(s) *after* actual damages are trebled.").

The uniformity of this precedent should not be surprising given the perverse incentives that would arise from a contrary rule. If settlement payments were offset *before* trebling, a defendant could ferociously defend against a claim (as the Bank has done) and, if at any point its risk tolerance faltered or a court or agency required payment, it could avoid treble damages liability simply by paying what it has owed for months or years and asserting there is "nothing left to treble." MSJ at 15.

The Bank offers no reason why EFTA's treble damages provisions should be interpreted differently, and the statutory text and legislative history make clear that treble damages liability accrues as soon as a defendant fails to meet its good-faith investigation obligations within the statutorily prescribed deadlines. *See* 15 U.S.C. §1693f(e).[2]

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[2] *See* Electronic Fund Transfer Consumer Protection Act: Hearings on S. 2065 Before the S. Subcomm. On Consumer Aff. Of the Comm. On Banking, Housing, and Urb. Aff., 95th Cong., 1st Sess. At 122 (Oct. 1977) ("If a court finds that a financial institution willfully reported to a consumer that his account was correct *when* such a conclusion could not reasonably be drawn, the bank *is* liable for treble damages.") (emphasis added).

The Bank does not engage with these authorities. Instead, it relies on out-of-context snippets from Judge Burns's order denying the Bank's motion to dismiss, three inapposite authorities, and a "legal" analysis presented by its economics expert Victor Stango that this Court already rejected.

The Bank represents that Judge Burns previously ruled that "Plaintiffs who have been fully reimbursed…have no actual damages" for the purposes of treble damages calculations. MSJ at 16 (citing ECF 126 at 23-24). That is not true. The cited language did not address the calculation of treble damages at all, only the Bank's previously rejected contention that its payments pursuant to the *Yick* injunction and Remediation Plan mooted this case. ECF 126 at 22-24. Judge Burns explained that Plaintiffs' EFTA claims were not moot given the additional harms caused by the Bank's delay in making payments. ECF 126 at 23. He did not address how treble damages should be calculated or how any offset should be applied, because those issues were not before him. *See* ECF 84-1. The only claim that Judge Burns dismissed in response to the Bank's mootness arguments was from a single plaintiff who is no longer part of this action, whose claim had been paid in full *within the statutory deadline*—not months later in response to the *Yick* injunction or the Consent Decrees. ECF 126 at 24.

The Bank's other citations are equally misleading. The Bank cites *Newman v. JP Morgan Chase Bank, N.A.*, 2024 WL 3227094 at *3 for the proposition that full reimbursement of an EFTA claim moots that claim. MSJ at 17. But *Newman* held that plaintiff's case was not moot because plaintiff sought "statutory damages, *treble damages*, attorney's fees, and costs" in addition to actual damages. 2024 WL 3227094 at *3 (emphasis added). Similarly, the court in *Johnson v. U.S. Bank N.A.*, 2012 WL 12995323 at *3-5 (W.D. Wis. Dec. 17, 2012), only held that U.S. Bank's "offer to pay Johnson in complete satisfaction of his prayer for relief" mooted the plaintiff's EFTA claim (which in that case sought only statutory damages under 15 U.S.C. §1693m(a)(2)(B)). *Id.* at *1. Here, the Bank has made no such offer of complete satisfaction of Plaintiffs' prayer for relief, which requests, among other things, treble damages.

Finally, the Bank relies on the Stango report, which asserts "[redacted]" that the Bank's payments pursuant to the *Yick* injunction and Remediation Plan eliminated its treble-damages liability. MSJ at 17. As the Court previously concluded, the proper approach for calculating treble damages is a question of law, not "[redacted]." ECF 494 at 84-85. As further addressed in Plaintiffs' *Daubert* Motion to Exclude Certain Testimony of Victor Stango, and Opposition to the Bank's Daubert Motion to Exclude the Testimony of Greg Regan, the Bank's attempt to repackage its failed legal arguments as "expert" economic testimony must again be rejected.

B. Plaintiffs' Damages Model is Consistent with this Court's Class Certification Order and Ninth Circuit Precedent.

The Bank next asserts that "Plaintiffs have no classwide evidence of damages," because according to the Bank, Plaintiffs' damages expert relies on classwide findings and generalizations rather than individualized evidence of each class member's financial circumstances. MSJ at 17-20. That argument misconstrues Plaintiffs' experts' analyses and misunderstands this Court's prior rulings and the governing standards.

At the class certification stage, Plaintiffs' expert CPA Greg Regan proposed two methodologies for calculating actual damages. Methodology 1, which the Court accepted as valid, proposed to approximate on a classwide basis the time value of the money to which class members lost access by applying a uniform, compound interest rate to the principal amounts of the class members' unauthorized ATM transactions—a "standard way of calculating the financial impact resulting from denial of access to funds." PX 263 (Regan Class Cert Report) ¶¶8, 45-52, 85, 90, 100. Methodology 2, which the Court did not accept, largely mimicked the methodology and assumptions the Bank had [redacted]. *Id.* ¶¶8, 53-75, 86-89, 101. The Court rejected Methodology 2 after concluding that several underlying assumptions were not supported by sufficient indicia of reliability. ECF 499 at 87-88.

While the Bank takes pains to emphasize the Court's rejection of Methodology 2, it largely ignores the Court's express approval of Methodology 1 and the fact that Regan's post-certification merits report includes extensive supporting materials for every statement it makes (which the Bank will be free to probe on cross-examination).

This Court based its approval of Methodology I in part on the Ninth Circuit's approval of a similar classwide approach for calculating the lost time value of money. *See* ECF 499 at 86 (quoting *Van v. LLR, Inc.*, 962 F.3d 1160, 1165 (9th Cir. 2020) (*Van I*). In *Van*—a class action against a company that charged an improper sales tax to many customers but later refunded the overcharge—the Ninth Circuit approved the use of a classwide interest rate to calculate the lost time value of money attributable to the delayed refunds, despite variations in the individual economic situations of class members and the absence of any proof of any individual class members' borrowing practices. *See also Van v. LLR, Inc.*, 61 F.4th 1053, 1061 (9th Cir. 2023) (*Van II*); *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 821 (9th Cir. 2019) (approving classwide benefit-of-the-bargain damages in defective auto part case, in which plaintiffs proposed using average estimated replacement cost despite variations in cost, timing, and fact of replacement).

The Bank's arguments ignore that *any* classwide interest rate necessarily reflects a generalization about the time value of money and is not strictly tied to any particular class member's economic circumstances. In *Van*, for example, there were undoubtedly variations in the economic circumstances of the class members who were deprived of their sales tax funds for different lengths of time. Some may have had more "liquid savings"; others perhaps "could have borrowed funds from family members" or could more readily have "reduced consumption," etc. ECF 567-1 at 15. Although the defendant in *Van* argued that plaintiffs' failure to specifically demonstrate how each class member "would have earned interest on the money but for the defendant's wrongful conduct" defeated their claims, the Ninth Circuit disagreed, explaining:

> Van does not assert that she is injured because she lost interest income. She asserts that she is injured because she lost the use of her money… Interest is simply a way of measuring and remedying Van's injury, not the injury itself.

Van I, 962 F.3d at 1164-65; *see also Van II*, 61 F.4th at 1061. The Bank offers no reason why this Court should revisit its reliance on that binding precedent. ECF 494 at 86-87.

The Bank's position is also contrary to the case law holding that expert opinions—particularly the opinions of economic and accounting experts—are admissible even when based on generalizations rather than the summing of each class member's individual damages amounts (a requirement that would eliminate classwide relief in a broad swath of circumstances). In *Briseno v. ConAgra Foods, Inc.*, for example, the Ninth Circuit found it appropriate for plaintiffs to calculate classwide damages for an allegedly false representation that certain cooking oils were "100% natural" by "(1) calculating the price premium attributable to the allegedly false statement…and (2) multiplying that premium by the total number of units sold during the class period." 844 F.3d 1121, 1132 (9th Cir. 2017); *accord, Nguyen*, 932 F.3d at 821. The class members' individual circumstances necessarily varied, as not everyone could be expected to attach precisely the same value to a representation that a cooking oil is "100% natural." The court nonetheless recognized that injuries arising from classwide misconduct may be measured and remedied on a classwide basis, regardless of each class member's individual experiences, based on generalizations about the relevant population's economic behavior. *Id.*[3]

Similarly, in *Hartley v. Dillard's, Inc.*, the defendant attempted to exclude an economic expert's generalizations about national trends affecting "mall and retail store sales" because the expert did not address the "specific financial conditions" of the defendant's store. 310 F.3d 1054, 1061 (8th Cir. 2002). The Eighth Circuit held that "the jury could consider" such generalizations and that "it [was] up to the opposing party to examine the factual basis for the opinion in cross-examination." *Id.* (citation omitted).

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[3] The district court in *ConAgra* rejected defendant's efforts to exclude plaintiffs' damages expert on the ground that her proposed analysis impermissibly relied in part on "future data" to estimate the "historical" price premium—i.e., data concerning the market behavior of persons *outside* the class to make classwide generalizations—finding that the expert's proposed generalizations based on market data "d[id] not make her methodology unreliable." *In re ConAgra Foods, Inc.*, 90 F.Supp.3d 919, 1028 (C.D. Cal. 2015); *see also, e.g.*, *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, 326 F.R.D 592 (N.D. Cal 2018) (approving use of market data to calculate "price premium" that approximated value to consumers of false representation that beverage was "made from real ginger"); *McMorrow v. Mondelez Intl. Inc.*, 2021 WL 859137 (S.D. Cal. Mar. 8, 2021) (approving class-wide damages model approximating value of representation that product was "nutritious.").

The Bank has not identified any authority to support its assertion that Plaintiffs' experts' analyses of the financial circumstances of class members as a whole, which are supported by cited reports and studies, are so unreliable as to preclude all lost-time-value damages. The factfinder should therefore be permitted to give those expert opinions the weight it finds appropriate, even though those opinions are not—and realistically, could not be—based on the "specific financial conditions" of each of the 109,000 class members. *Hartley*, 310 F.3d at 1061. At trial, the Bank may attempt to challenge this testimony through cross-examination or through its own experts' testimony (which includes *competing* economic generalizations). *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929-30 (8th Cir. 2001).[4] Those arguments necessarily go to weight, not admissibility. *City of Pomona v. SQM N. Am. Copr.*, 750 F.3d 1036, 1044 (9th Cir. 2014). After all, even if the trier of fact adopts a lower interest rate than Plaintiffs' experts propose, the *formula* Regan offers for calculating the lost time value of money will still "assist the trier of fact," because whatever interest rate it adopts can easily be plugged into Regan's three-variable (amount, time, rate) formula. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993).

C. The Bank's "Causation" Arguments Ignore EFTA's Burden-Shifting Framework.

The Bank next presents two reasons why it believes Plaintiffs cannot establish that the class members' lost-time-value-of money damages (as opposed to the underlying principal amounts, *see* § I.A *supra*) were "sustained as a result of [the Bank's] failure to comply" with EFTA: (1) the Bank believes it [redacted] when compensating class members for their actual damages; and (2) the Bank asserts that any class member who failed to seek reconsideration must be excluded for failing to mitigate. MSJ at 21.

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[4] *See, e.g.*, DX 8.A McCrary Report ¶13 (in general, "[redacted]" that "[redacted]"); ¶17 & n.23 ([redacted]")

The Bank's argument that the payments it made pursuant to the *Yick* injunction and the Remediation Plan were [redacted] and thus eliminated all lost-time-value damages is unsuitable for summary judgment. As this Court previously held, "which interest rates should be applied is an issue for the factfinder," ECF 494 at 86. Any interest rate selected by the factfinder may be plugged into the formula for calculating consequential damages, and in the event of treble damages pursuant to 5 U.S.C. §1693f(e)(1)-(2), any offset would be applied *after* trebling, § I.A *supra*.

The Bank's reliance on the "reconsideration" procedures identified in its claim denial letters to members of the Claims Denial class cannot support summary judgment either. *See* RSUF 95, 97; PASF 76; *see also, infra* at 43 n.21. As an initial matter, whatever "reconsideration" process the Bank offered is legally immaterial. The Bank's liability for violating EFTA arose once the Bank failed to timely perform its EFTA investigation obligations. *See supra* at 7. Even if the Bank offered some class members a voluntary, extra-statutory procedure that allowed them to renew their wrongfully denied claims (which the Bank denied without basis or explanation in further violation of EFTA), class members had no legal obligation to pursue extra-statutory reconsideration procedures offered by the very entity that had wronged them—and the Bank cites no authority to the contrary.[5] The class members' only statutory obligation was to submit a claim, not to persist, after having been wrongfully denied their funds, in asking the Bank to mitigate the harm it caused.

Moreover, whether the Bank actually afforded class members a meaningful and accessible "reconsideration" process is factually disputed. For example, there is ample evidence that, in the seven weeks after the Bank implemented its CFF, the average speed to answer in its Claims Call Center (the exclusive means by which class members could request reconsideration) was approximately [redacted], with high call-abandonment rates;

[5] Although *Bartashnik v. Bridgeview Bancorp, Inc.*, 2005 WL 3470315 at *3 (N.D. Ill. Dec. 15, 2005), recognizes a "failure to mitigate damages defense" under EFTA, that claim concerned damages allegedly resulting from improperly noticed ATM fees, not damages caused by the Bank's failure to meet its obligations to investigate unauthorized-transaction claims, which accrues when the Bank fails to meet the statutory deadlines.

and the Bank's refusal to assist frozen cardholders until they re-authenticated with EDD—which the Bank knew was overwhelmed—subjected those callers to a "[redacted]" of futile calls between EDD and the Bank. RSUF 43, 97, 99, 100, 101, 116, 125, 221; PASF 79, 85, 103-04; PX 3 (Minnucci Rpt) ¶¶36, 39-40, 52-54, Appx. E. The Bank's assertion that some or all class members failed to sufficiently mitigate their statutory damages must be tested against this evidence at trial. *See Parsons v. Bristol Dev. Co.*, 62 Cal.2d 861, 868-69 (1965) ("A party who prevents fulfillment of a condition of his own obligation cannot … rely on such condition to defeat his liability.").[6]

The Bank also reiterates its argument, which would pertain to all damages claims, that no class member may recover anything because there may still be "fraudsters" lurking within the class. That argument has been repeatedly rejected by the Court, and the Bank offers no new authorities or analysis. *See, e.g.,* ECF 494 at 51-12, citing 15 U.S.C. §1693g(b). As Plaintiffs previously explained, if the Bank were right that each class member should be required to personally prove at trial that their claim arose from an unauthorized transaction, nothing would stop financial institutions from summarily denying all error claims without investigation, forcing each denied claimant to proceed individually or not at all, completely nullifying EFTA's consumer protection goals. ECF 392 at 6. Again, if the Bank were able to identify any actual fraudsters in the class prior to trial, they could easily be excluded from any damages calculation under Regan's proposed methodology. PX 5 (Regan Rep) ¶¶4, 32, 65.

D. There are Material Disputes of Fact as to Whether the Bank's Failure to Comply with EFTA Justifies Treble Damages.

The Bank's final EFTA damages argument is that the jury could not reasonably award treble damages because: (1) it "reasonably believed" that its CFF (as a whole, not limited to CFF-1) was "[redacted]" global pandemic, and was endorsed by its "[redacted]," MSJ at 25-26; and (2) although it

[6] None of the Bank's mitigation cases address the situation where a defendant's own conduct obstructed (deliberately or not) the mitigation it asserts should have been pursued.

unlawfully clawed back permanent credits, that was just a "mistake." MSJ at 24.

EFTA authorizes treble damages *whenever* a financial institution (1) fails to issue a provisional credit within the prescribed 10-day period without first undertaking "a good faith investigation of the alleged error" or without "a reasonable basis for believing that the consumer's account was not in error" or (2) "knowingly and willfully conclude[s]" that a transaction was not unauthorized "when such conclusion could not reasonably [be] drawn from the evidence available…at the time." 15 U.S.C. §1693f(e)(1)-(2). The statute makes no exception for violations that the financial institution deems "practically necessary" to improve its bottom line. MSJ at 24-26.

The record includes extensive evidence from which a reasonable jury could conclude that the Bank's EFTA violations were knowing, willful, and made without any attempt to fulfill its obligation to undertake good faith investigations of unauthorized-transaction claims. *See* PASF 18-89; RSUF 57, 71, 83-85, 88, 90, 93-95, 98, 122; §VII *infra*. The evidence shows, for example, that just before implementation of the unlawful CFF, Bank [redacted]," PX 77 at -371977; PX 15 (Letson) 236:3-240:24, 249:16-251:14, PX 44 at -421427; that the Bank was [redacted]," PX 76 at -630836; that, faced with increasingly large payment obligations, the Bank [redacted], PX 206 at -87750; PX 90 at -450517; PX 207 at -125863; PX 101 at -497803-04; RSUF 98; and that the Bank did so despite having done no analysis on the accuracy or reliability of CFF-1 in identifying fraud, and despite knowing that relying on CFF-1 would result in erroneous denials that could have been avoided with a manual adequate investigation, PX 86 at -87767; PX 3 (Holt) 92:6-19, 180:15-181:16, 191:3-194:20, 275:11-276:4; 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 22 (Fox) 49:23-50:2; PX 59 at -4539; PX 105 at -100644, -100649.

The Bank asserts that its decision to rescind the permanent credits paid to Credit Rescission class members after its retroactive application of CFF-1 to their claims was just a "mistake." MSJ at 24. The Bank's evidence in support of its "mistake" defense is remarkably thin, consisting of self-serving testimony (DX 14.I at 246:13-249:14, DX 14.G 113:25-114:8; DX 31 at No. 39) and a couple of ambiguous emails that do not explain *what* was inadvertent and what wasn't (DX 76 at-7224; DX 135 at -8995). The trier of fact will need to assess the credibility of the Bank's assertion that a practice that extended over eight months and affected the rights of [redacted] class members who lost a total of [redacted] rested on a "good faith investigation," had "a reasonable basis," and could "reasonably [be] drawn from the evidence available" within the meaning of 15 U.S.C. §1693f(e)(1)-(2), rather than being another unjustified effort to save the Bank money by implementing "[redacted]" to cost-cutting by running all unauthorized-transaction claims through the automated CFF-1 filter. *See* RSUF 105–06.

During the Bank's rushed development and implementation of CFF-1 in late September 2020, [redacted]." PX 265 at -169949 (emphasis added). [redacted]" PX 20 (Garfield) at 251:3-18 (emphasis added). Consistent with this intentional strategy and its objective of recouping millions of dollars for itself, the Bank clawed back approximately [redacted] in previously paid permanent credits on class member claims between September 28 and October 4, 2020.

RSUF 106-108; PASF 10, 87. That may have been a "mistake" in the sense of a misguided decision that subjected the Bank to considerable liability, but it was not an inadvertent, unintended act for which the Bank should bear no responsibility.

The Bank's failure to reimburse Credit Rescission class members for many months—in some cases, years—further undermines the Bank's post-hoc assertion that the rescission of permanent credits was an inadvertent "mistake" that the Bank "automatically" corrected upon discovery. *See* RSUF 106. Bank documents show that after the Bank applied the CFF to rescind permanent credits on approximately [redacted] claims, the Bank received approximately [redacted] requests for reconsideration, squarely putting the Bank on notice of the credit rescissions (even if they had been "[redacted]"). PX 140 at -571309. Even then, the Bank did not "[redacted]" the claims of all Credit Rescission class members. Instead, it sent a letter to affected cardholders, informing them they *could* "request reconsideration." *Id.* at -571310. The Bank mailed [redacted] letters the week of [redacted], and received [redacted] reconsideration requests as of [redacted]. *Id.* Not until the Bank's "[redacted]" of a sample of those reconsideration requests yielded an overturn rate of "[redacted]" did the Bank decide "[redacted]" (not to repay *all* rescinded credits). *Id.*

The stated rationale for the Bank's decision to [redacted]." *Id.* That rationale did *not* include any suggestion that the rescission of credits had been an "[redacted]" rather than a deliberate policy that, on reflection, could not be justified. *Id.* Indeed, the Bank's payment data shows that [redacted]. RSUF 106; PASF 87; PX 139; PX 5 ¶ 63-64. Such wide-ranging and delayed repayment dates are incompatible with the notion that the Bank's rescission of permanent credits was an inadvertent "mistake" that the Bank immediately and automatically corrected upon discovery.

II. Material Disputes of Fact Preclude Summary Judgment on Plaintiffs' Due Process Claims.

In denying the Bank's motion to dismiss, the Court held that Plaintiffs had pleaded facts sufficient to establish that the Bank deprived them of rights secured by the Constitution, and that in doing so, the Bank "was acting as a state actor" because it was "performing a function that is both traditionally and exclusively governmental." ECF 126 at 66-74. Each of Plaintiffs' underlying factual allegations is amply supported by evidence, including the Bank's own documents and testimony, thus precluding summary judgment. *See* PASF 1-14, 61-64, 75, 78-79, 82, 85-88, 90-91, 96-105.

A. Material Disputes of Facts as to Whether the Bank Acted Under Color of State Law.

Plaintiffs may establish that the Bank acted under color of state law through *either* of two independent theories: the Bank performed a function that is "both traditionally and exclusively governmental," *Kirtley v. Rainey*, 326 F.3d 1088, 1093 (9th Cir. 2003), *or* the Bank acted jointly with the State, *See, e.g. Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013); *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140-41 (9th Cir. 2012). Because the Court held in rejecting the Bank's motion to dismiss that Plaintiffs "satisfie[d] the public function test," it had no need to address whether Plaintiffs also satisfied the joint action test. ECF 126 at 70. The Bank now moves for summary judgment on the public function test alone, offering no argument as to joint action. Both theories raise genuine disputes of material fact.

The Bank makes the same arguments as before in disputing that it performed a "traditionally and exclusively governmental" function when distributing EDD benefits. *Compare* MSJ at 39-40 *with* MTD at 37-38. The Bank again insists that "BANA prepaid cards were not the 'exclusive means' to receive EDD benefits" and that cardholders could have "opt[ed] for benefits by paper check." MSJ at 40. But there is ample factual support for the two key allegations on which the Court relied in denying the Bank's motion to dismiss: (1) the Bank had "the exclusive contractual right and duty to provide *electronic* benefits payment service for EDD," and (2) "EDD present[d] BANA debit cards as the 'exclusive means' to receive EDD payments." ECF 126 at 69; RSUF 2; PASF 2-4. The Bank renews its assertion that the act of merely "servic[ing] Plaintiffs' prepaid card accounts *after* the benefits were already distributed" cannot as a matter of law be a government function. MSJ at 40. But this Court held otherwise, noting that "[c]lassifying [the Bank's] function as that of a 'private bank,' 'government contractor,' or money manager understates BANA's role in California's EDD benefits system." ECF 126 at 68.

The record shows that the Bank was not acting in a role akin to a private bank, but had contracted with EDD to play a central role in the "administration of unemployment benefits[,] … a power traditionally exclusively reserved to the state." *Cahoo v. SAS Inst. Inc.*, 322 F.Supp.3d 772, 793 (E.D. Mich. 2018), *aff'd in part, rev'd in part on other grounds*, 918 F.3d 887 (6th Cir. 2019). The relationship between the Bank and class members existed solely "through the exercise of the state's power." *See Brown v. Stored Value Cards, Inc.*, 2016 WL 4491836 (D. Or. Aug. 25, 2016), *rev'd on other grounds*, 953 F.3d 567, 575 (9th Cir. 2020). Moreover, in rescinding class members' credits and freezing their accounts, the Bank acted pursuant to its "exclusive contractual right and duty [under its EDD contract] to provide electronic benefits payment services for EDD," ECF 126 at 68, a duty that included the contractually imposed responsibility to work jointly with EDD in combatting benefits enrollment fraud. PASF 6-10; RSUF 62-66.[7]

Plaintiffs can independently establish that the Bank acted under color of state law through joint action, an alternative theory as to which the Bank has entirely failed to carry its burden. Evidence shows that the Bank and EDD were engaged in an ongoing and jointly

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[7] In *American Mfrs.Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), the Supreme Court held that private insurers providing private insurance to individuals were not state actors simply because the individuals were legally obligated to obtain the insurance. *Id.* at 48. Here, the Bank distributed *public benefits* to *state beneficiaries*. It cannot reasonably assert that its administration of those benefits was subject only to "private prerogative[s]." *Id.* at 57; MSJ at 40. Indeed, in defending its summary deprivation of class members' property, the Bank emphasizes that it acted on behalf of the State to prevent "taxpayer funds from being stolen." MSJ at 43.

undertaken and mutually beneficial process to detect suspected benefits enrollment and other types of fraud, freeze accounts, and require re-verification as a condition of regaining access to benefits. PASF 1-14; RSUF 18-19, 62-66. There is evidence that EDD facilitated the Bank's account freezes by (1) [redacted], and (2) [redacted], before EDD would issue replacement benefits by paper check. RSUF 62-66,126, 136; PASF 1-14; *see Naoko Ohno*, 723 F.3d at 996; *Tsao*, 698 F.3d at 1140-41; *Swift v. Lewis*, 901 F.2d 730, 732 n.2 (9th Cir. 1990), *superseded by statute on other grounds*; *Geneva Towers Tenants Org. v. Federated Mortg. Invs.*, 504 F.2d 483, 487-88 (9th Cir. 1974); *Cahoo v. Fast Enterprises LLC*, 580 F.Supp.3d 494, 498-502 (E.D. Mich. 2022). Whether the Bank performed a public function or engaged in joint action with EDD raises similarly genuine questions of material fact.[8]

B. Material Disputes of Fact as to Whether the Bank's Post-Deprivation Procedures Were Constitutionally Inadequate.

To prevail on their procedural due process claims, Plaintiffs must establish that (1) class members had a constitutionally protected interest in their EDD benefit funds, and (2) the Bank's interference with those interests denied those class members "'adequate procedural protections.'" ECF 126 at 70 (quoting *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998)).

The Bank does not dispute that it deprived Credit Rescission and Account Freeze class members of access to their EDD benefits or that those class members "have a constitutionally protected property interest in the EDD benefits for which they were approved" (as the Court already held, ECF 126 at 70 (citing *AFL v. EDD*, 88 Cal.App.3d

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[8] *See also Sloman v. Tadlock*, 21 F.3d 1462, 1474 (9th Cir. 1994) (reversing summary judgment where plaintiff "raised a genuine issue of fact as to whether [defendant] was engaged in 'joint action'"); *Brees v. Courtesy Ford, Inc.*, 45 Fed. App'x 711, 715-17 (9th Cir. 2002) (reversing summary judgment on a due process claim where the plaintiff produced sufficient evidence to show state action); *Fraser v. County of Maui*, 855 F.Supp. 1167, 1178 (D. Hawaii 1994); *Baugus v. Brunson*, 890 F.Supp. 908, 913 (E.D. Cal. 1995).

811, 820 (1979); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970)). The Bank also does not dispute that it failed to provide *pre*-deprivation notice and an opportunity to be heard, as the law requires. *See AFL*, 88 Cal.App.3d at 820 & n.5 (UI benefits are due process-protected property interest requiring *pre*-deprivation notice and hearing); *Goldberg*, 397 U.S. at 262, 267-68 (*pre*-deprivation notice and hearing required for public assistance benefits). The Bank nevertheless argues that it is entitled to summary judgment because (1) its rescission of permanent credits was a "mistake" (addressed *supra* at 17-19); (2) its failure to afford *pre*-deprivation procedures was justified under the limited exception recognized in *FDIC v. Mallen*, 486 U.S. 230, 240 (1988), which allows post-deprivation procedures only where there is a sufficiently "important government interest" "accompanied by a substantial assurance that the deprivation is not baseless or unwarranted," and (3) the Bank's *post*-deprivation procedures were adequate. MSJ at 41-44. Each of these propositions is factually disputed.

1. Material Disputes of Fact as to Whether the Bank's Failure to Provide Pre-Deprivation Process Is Excusable.

The Bank concedes that it did not provide *any* pre-deprivation process to Credit Rescission or Account Freeze class members, which should be dispositive of its challenge to Plaintiffs' due process claims. *See AFL*, 88 Cal.App.3d at 820-21 (denial of UI benefits requires pre-deprivation notice and hearing); *Goldberg*, 397 U.S. at 262, 267-68. The Bank tries to justify its failure by invoking *Mallen*, 486 U.S. 230, but *Mallen* allows post-termination procedures to substitute for pre-termination procedures only "in limited cases" where there is an "important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted." *Id.* at 240. Whether that narrow and limited exception applies here turns on material disputes of fact.

First, there are material disputes as to whether the Bank's reliance on CFF-1 to rescind credits and freeze accounts provided sufficiently "substantial assurance that the deprivation [was] not baseless or unwarranted," i.e., whether there was a low "likelihood that the deprivation [was] without basis." *Id.* at 244-45. In *Mallen*, the court upheld post-suspension procedures for an indicted bank official because a *grand jury*'s findings provided reasonable assurance that the suspension was not baseless. *Id.* at 241. Similarly, the court in *Spiegel v. Ryan*, 946 F.2d 1435 (9th Cir. 1991), upheld a post-deprivation hearing procedure because regulations required the agency to "meet specific statutory requirements before issuing the [relevant] order," and the "decision was supported by detailed findings … following a long investigation." *Id.* at 1440.

Here, the Bank did not conduct individualized investigations of any class member's claim or account and it had *no* evidentiary basis for suspecting fraud. RSUF 82, 84-85, 91, 92, 99; PASF 12, 38, 63, 90. Although the Bank contends that the mere fact of submitting a claim disputing an unauthorized ATM transaction rendered these class members "suspicious," the Bank's [redacted] and the Bank knew that many class members were legitimate EDD beneficiaries whose benefits were being targeted by large-scale skimming rings. RSUF 71, 88, 90, 241, 245; PASF 29-30, 109-112, 117. Not only did the Bank lack any individualized evidence to support its credit rescissions and account freezes, but the Bank developed and implemented its credit rescission and freeze policies without *any* reliable data or analysis about the anticipated efficacy or false positive rate of CFF-1. PASF 60-66; RSUF 82, 84-85, 92, 99. By the time the Bank analyzed available data, it found initial false positive rates of approximately [redacted], later shown to be [redacted]. RSUF 84, 100, 113; PX 227 at -159493; PX 112 at –90640; PX 116 at -273305; PASF 78. Far from affording "substantial assurance the deprivation [was] not baseless or unwarranted," CFF-1 was a wildly unreliable basis for the Bank to rely on in rescinding credits and freezing accounts.

Second, it is disputed whether the Bank's credit rescission and account freeze policies were exclusively undertaken in service of legitimate government interests, rather than (in whole or in part) to protect the Bank's bottom line. PASF 39-60; RSUF 56, 83, 98, 111, 113, 122. In contrast to [redacted] for referral to EDD, the Bank designed CFF to be a "[redacted]." PX 76; PASF 49-50; RSUF 83. Bank documents further show that [redacted]

[redacted]." PX 44 at -421427; PASF 45-59; RSUF 83. Whether any legitimate government interest justifies the Bank's failure to provide pre-deprivation process turns on triable issues of fact.

2. Material Disputes of Fact as to Whether, Even if Pre-Deprivation Procedures Were Not Required, the Bank's Post-Deprivation Procedures Were Constitutionally Adequate.

Even if *pre*-deprivation procedures were not required, there remains a dispute about whether the Bank's *post*-deprivation procedures were constitutionally adequate, considering (1) the property interest at stake, (2) the risk of erroneous deprivation, and (3) the value of additional safeguards. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); RSUF 95, 97, 99, 101; PASF 82, 84, 57-66, 77-89, 79, 90-95.

The Bank erroneously asserts that "[redacted]." MSJ at 43. The evidence is to the contrary. RSUF 105, 106. As explained (*supra* 18-19), the Bank repaid only those who sought reconsideration (RSUF 106, 121), and whether the Bank's "reconsideration" process was constitutionally adequate also turns on disputed facts, as excessive wait times and high call abandonment rates prevented many from seeking reconsideration, and the Bank's refusal to assist frozen cardholders until they re-authenticated with EDD—which the Bank knew was overwhelmed—subjected those callers to a "[redacted]" further obstructing reconsideration. PX 52; RSUF 43, 97, 99, 116, 125, 221; PASF 85, 90-91, 104-105.[9] Although [redacted].

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[9] *Altheide v. Klenczar*, which holds that a third-party vendor's actions cannot be attributed to the State, cannot immunize the Bank from liability for its *own* decision to require cardholders to verify their identities at EDD, which it knew would not be possible. 2019 WL 3413845, at *5 (D. Nev. July 29, 2019).

PX 136 at -90725; PASF 85, 90-91; RSUF 116, 125. The Bank adopted this re-authentication policy even though it was fully *capable* of verifying class members' identities through [redacted]. RSUF 9, 133; PASF 92, 94. Indeed, the Bank's CFF-1 account freeze policy was a stark departure from the Bank's usual practice of simply "[redacted]" accounts suspected of fraud and requiring cardholders to pass the Bank's [redacted]. RSUF 122, 127; PASF 93-95.

In addition, each of the facts on which the Bank relies is disputed. The Bank asserts that it "[redacted]" accounts on its own; that [redacted]; and that the Bank, when it realized EDD was unable to respond to inquiries, "[redacted]." MSJ at 43. The evidence shows, however, that the Bank's "[redacted]" process was not communicated to cardholders and that most individuals reporting "[redacted]" were still required to verify their identities with EDD, so the [redacted] process was not a functional option to unfreeze any significant number of accounts. PX 120; PASF 82-85; RSUF 126, 136. Many class members' accounts remained frozen for months or even years. PASF 82; PX 205; PX 5 at ¶74. Evidence also shows that Account Freeze class members experienced delays in receiving continuing benefits by paper check; and in any event, that in no way undid the harm caused by their deprivation of access to funds that remained trapped in their frozen accounts. PASF 82-85; RSUF 137, 143; *e.g.* RSUF 145, 147.

These facts raise a material dispute as to whether the Bank's post-freeze procedures created an unnecessarily high risk of erroneous—and prolonged—deprivation, and whether there were reasonably available alternatives the Bank could have used to mitigate that risk.

III. The Bank Is Not Entitled to Summary Judgment on Plaintiffs' CCPA Claim.

The Bank's challenges to Plaintiffs' claims under the California Consumer Privacy Act, Cal. Civ. Code §1798.150 et seq. ("CCPA"), also fail, factually and legally.

The Bank renews its argument that the CCPA does not require EMV chip-enabled debit cards. MSJ at 26-28. However, the CCPA imposed on the Bank a "duty to implement and maintain reasonable security procedures and practices" in collecting and storing EMV class members' personal identifying information ("PII"), Civ. Code §1798.150(a)(1), and this Court already held that the Bank's failure to "employ reasonable security measures to protect [class members PII], such as the utilization of industry-standard encryption [including EMV chips]," if proven, would constitute a breach of a legal duty under the CCPA. ECF 126 at 26 (quoting *Dugas v. Starwood Hotels & Resorts Worldwide, Inc*., 2016 WL 6523428, at *11 (S.D. Cal. Nov. 3, 2016)).

The Bank disputes whether EMV chips were industry standard in 2020-21, relying principally on the testimony of the Bank's expert Pamela Joseph. MSJ at 28. But Plaintiffs' expert Jane Cloninger presented extensive factual support for her opinion that EMV chips *were* the industry standard no later than 2019–an opinion the Bank has *not* challenged in its motion to exclude Cloninger's testimony. *See* PX 2 (Cloninger Rpt) ¶¶47-56; PX 11 (Cloninger Reb Rep) ¶¶8-23, 24-45; *see also* RSUF 232-234; PASF 111; ECF 623 (Cloninger *Daubert* Opp) at 6-7. Whether EMV chips were industry-standard during the relevant period is, at a minimum, a disputed issue of material fact. *See S.E.C. v. Dain Rauscher, Inc.*, 254 F.3d 852, 854 (9th Cir. 2001) ("genuine issues of material fact [existed] as to . . . applicable industry standard").[10]

Although the Bank's failure to conform to industry standards is the principal reason the jury might conclude that the Bank failed to "implement and maintain reasonable security procedures and practices" by issuing mag-stripe-only EDD debit cards, it is not the only reason. *Cf. Dain Rauscher*, 254 F.3d at 857 ("industry standard is a relevant factor [under Civ. Code §1798.150(a)(1)], but the controlling standard [should] remain[] one of

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[10] The Bank apparently meant to cite *Razuki v. Caliber Home Loans, Inc.*, 2018 WL 6018361 (S.D. Cal. 2018), in stating that the court in "*Maag v. U.S. Bank, N.A.*, 2021 WL 6018361, at *2 (S.D. Cal. Apr. 15, 2018)" dismissed a CCPA claim "because there were no factual allegations of how procedures were insufficient compared with industry standards." MSJ at 28. Here, Plaintiffs clearly alleged that the Bank's issuance of mag-stripe-only cards during the class period fell below the industry standard for card security.

reasonable prudence" because uncoupling the standard of reasonable care from industry standards could create "a 'race to the bottom.'"). Also relevant are, for example, the Bank's awareness of [redacted] in the years before the pandemic; the Bank's knowledge that counterfeit fraud could be prevented by EMV technology; and the strong foreseeability, given fraud trends in the payments industry as a whole, that continuing to issue EDD debit cards on highly vulnerable mag-stripe-only cards would inevitably attract fraud rings targeting the "[redacted]" in card security. PX 2 (Cloninger Rpt) ¶79; *id.* ¶¶61, 42-45, 80-95; RSUF 88, 90, 92, 241-245; PASF 110, 112-13. Each of these facts is supported by evidence, and considered as a whole could support a reasonable finding that the Bank breached its duty to use reasonable security practices to protect the class members' PII. *See Lawrence v. La Jolla Beach & Tennis Club, Inc.*, 231 Cal.App.4th 11, 32 (2014) ("[B]reach of [legal] duty and causation are ordinarily questions of fact for the jury's determination.") (citation omitted).[11]

The Bank next argues that its failure to issue EMV chip cards was not a cause of any ATM fraudsters' unauthorized access and exfiltration of the EMV class members' PII. MSJ at 28-29. This Court has already concluded that "to resolve [these causation] question[s], the fact finder will have to consider the evidence of the two competing experts." ECF 499 at 66. The record continues to support a finding that EMV class members were the victims of skimming. In addition to Cloninger's fully supported conclusion that the class members' unauthorized ATM transaction claims are textbook examples of fraud resulting from skimming, the Bank's own documents acknowledge that skimming "[redacted]. PX 175; PX 162; PX 2 (Cloninger Rep) ¶¶96 &

[11] The Bank asserts that its contract with EDD excuses any breach of its duty to adopt reasonable security measures. MSJ at 27-28. But as EDD informed the Bank, it disagrees with that contract construction. RSUF 11, 16, 239; PASF 119. Moreover, the CCPA declares void and unenforceable any "provision of a contract or agreement of any kind …that purports to waive or limit in any way [a consumer's] rights under [the CCPA]" as a matter of public policy. §1798.192. Also, unlike *Gershfeld v. Teamviewer US, Inc.*, 2021 WL 3046775 (C.D. Cal. June 24, 2021), *aff'd*, 2023 WL 334015 (9th Cir. Jan. 20, 2023), where the plaintiff affirmatively authorized the disclosure of his payment information to his own credit card processor, MSJ at 28, no EMV class members authorized the Bank to disclose their PII to any third parties.

n.126, 85-89; RSUF 90; PASF 111, 117. The Bank continues to insist that alternative explanations exist for the enormous number of unauthorized ATM transactions accomplished through exfiltration of class member PII, but fails to show that any other alternative likely affected any significant portion of the class. PX 2 (Cloninger Rpt) ¶¶104 n.130; PX 11 (Cloninger Reb) ¶¶73-75, 92-93; RSUF 242. And for some alternatives the Bank suggests such as phishing, EMV technology would still have prevented the unauthorized access and exfiltration of class member PII and subsequent unauthorized ATM transactions, because phishing cannot capture the dynamic CVV code created by an EMV chip required to complete additional card-present transactions (discussed more below). PX 2 (Cloninger Rpt) ¶¶15-18, 29-34, 42-45, 104; RSUF 243; PASF 110.

A jury could also reasonably conclude from Cloninger's reports and other evidence that EMV chips would have prevented the unauthorized access and exfiltration of class member PII and the resulting injury from fraudulent ATM transactions. Although the Bank is right that EMV cards and mag-stripe-only cards [redacted], MSJ at 29 & n.8, fraudsters cannot access complete *security code* information (the dynamic CVV) on EMV chip cards necessary to carry out fraudulent transactions, while such information is entirely susceptible to skimming on a mag-stripe-only card. PX 2 (Cloninger Rpt) ¶¶15-18, 29-34; PX 11 (Cloninger Reb) ¶¶77-79; RSUF 243; PASF 110.

Under the CCPA, PII is defined to include the cardholder's name and debit card account "in combination with any required security code, access code, or password that would permit access to an individual's financial account." Civ. Code §§1798.150(a)(1); 1798.81.5(d)(1)(A)(iii). When a mag-stripe-only card is skimmed, the cardholder account information and PIN number are captured, and the fraudster requires nothing more to access the victim's account to carry out card-present counterfeit fraud. PX 2 (Cloninger Rpt) ¶15-18; RSUF 241; PASF 110. By contrast, because EMV chips generate a dynamic (constantly changing) CVV code *in addition to the cardholder PIN* required to complete ordinary transactions, PX 2 (Cloninger Rep) ¶29; RSUF 243-44; PASF 110, it is nearimpossible to clone an EMV chip, and skimming (or shimming) *cannot* access and exfiltrate the dynamic CVV code–the "access code … that would permit access to an individual's financial account." Civ. Code §1798.81.5(d)(1)(A)(iii); PX 178; PX 197; PX 2 (Cloninger Rpt) ¶¶29-32, 42-45, 103-104; RSUF 241; PASF 118. Accordingly, a reasonable jury could find that issuing EMV chip cards with the dynamic CVV code required to complete most purchases and ATM transactions would have largely prevented the access and exfiltration of class members' PII, as defined by the CCPA.

For the same reasons, EMV chip cards would have prevented the vast majority of unauthorized transactions on class members' accounts, as any information obtained through skimming (or shimming) could only be used to create a functionally useless counterfeit card unable to complete normal transactions. PX 178; PX 197; PX 2 (Cloninger Rpt) ¶¶29-32, 42-45, 1-3-14; RSUF 241, 243-245; PASF 110, 118. Not surprisingly, the Bank's EMV chip-enabled consumer card programs [redacted] during the pandemic. PX 180; PX 193; PX 2 (Cloninger Rpt) ¶¶105-113; RSUF 244; PSAF 118. The evidence would therefore fully support a jury finding that the Bank's issuance of mag-stripe-only cards resulted in the unauthorized access of EMV class members' PII and resulting fraud.[12]

The Bank's remaining arguments also raise material factual disputes. The record contains considerable evidence that the EMV class members' PII (in the form of their debit card account number and passcode/PIN) was subject to unauthorized access and exfiltration. *See* Civ. Code §1798.81.5(d)(1)(A)(iii). Here, every class member reported a PIN-enabled unauthorized ATM transaction. Thus, by definition, the class only includes individuals whose debit account number *and relevant passcode* were exfiltrated and, in this case, used to create a counterfeit card to complete an ATM withdrawal. ECF 384 (Notice

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[12] Issuing EDD debit cards with mag-stripe-only cards also made every EDD debit cardholder "subject to," i.e., more susceptible to, unauthorized access and exfiltration of their PII by skimming, because it attracted skimming operations to target EDD cards in California. PX 160; PX 191; PX 2 (Cloninger Rpt) ¶¶79-102; RUSF 241, 249; PASF 117; *see also* Merriam-Webster Dictionary, https://www.merriam-webster.com/ dictionary/ subject%20to (last visited Jan. 6, 2026) (Example: "… subject to change").

of Mot.) at 2. Although the Bank contends that "[redacted]," substantial evidence, including the Bank's own records, FBI and other publications, and the Cloninger report, shows that skimming operations *typically* capture card account information from a card's mag stripe *and* the cardholder's PIN (by use of a pinhole camera or a pinpad overlay). PX 2 (Cloninger Rpt) ¶¶19-25; RSUF 247; PASF 110.

The record also contains considerable evidence that the Bank acted unreasonably and willfully in failing to issue EMV chip cards, for purposes of CCPA statutory damages. *See* Civ. Code §1798.150(a)(1)-(2). The Bank's own records demonstrate, for example, that [redacted]. *See infra* 47-48; PX 2 (Cloninger Rep) ¶¶58-75, 78-95; RSUF 236-38, 241, 243-245; PASF 112-116.

Finally, the Bank asserts that CCPA statutory damages are unavailable because Plaintiffs failed to provide the required 30-day notice. That argument overlooks that on January 26, 2021, Plaintiffs Oosthuizen and Mathews provided the required CCPA notice to the Bank on behalf of themselves and the class. TAMCC ¶¶ 559-60; *see* PX 258.[13] Those Plaintiffs did not seek CCPA statutory damages in their initial complaint. Instead, they appropriately waited until after having exhausted the 30-day waiting period, at which point they filed an amended complaint asserting a CCPA statutory damages claim on behalf of themselves and the proposed class. *See* ECF 60, ECF 63 at ¶229. That procedure—serving notice and filing a complaint without a statutory damages claim, and amending the complaint more than 30 days later to add such a claim—fully satisfies the CCPA's notice requirement. *See, e.g., In re Eureka Casino Breach Litig.*, 2024 WL 4253198, at *13 (D. Nev. Sept. 19, 2024) ("There is no harm . . . to a defendant who (1) has been notified of a

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[13] *See Asghari v. Volkswagen Grp. of Am., Inc.*, 42 F.Supp.3d 1306, 1317 (C.D. Cal. 2013) ("When a named plaintiff provides written [CCPA] notice to a defendant not only on his own behalf but on behalf of similarly situated consumers, the named plaintiff's notice suffices to satisfy §1782 for all class members.")

lawsuit on other grounds and (2) is separately provided thirty days' notice of the plaintiff's seeking statutory damages in a CCPA claim. If, thirty days later, the plaintiff determines that the defendant has not sufficiently cured its alleged violations, there should be no reason the plaintiff is prevented from pursuing those claims."); *Archambault v. Riverside Resort & Casino, Inc.,* 2025 WL 2614044, at *9 (D. Nev. Sept. 9, 2025) (denying motion to dismiss CCPA statutory damages claim because plaintiff "did not seek statutory damages until more than 30 days had passed and she filed the FAC"). Accordingly, Section 1798.150(b) does not bar class Plaintiffs' CCPA statutory damages claim.[14]

IV. Material Disputes of Fact Preclude Summary Judgment on Plaintiffs' Breach of Fiduciary Duty Claims.

"In California, a plaintiff must prove the following elements to establish a cause of action [for] breach of fiduciary duty: '(1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach.'" ECF 494 at 67 (quoting *Gutierrez v. Girardi*, 194 Cal.App.4th 925, 932 (2011)). This Court has already held that although the typical bank-depositor relationship does not give rise to fiduciary obligations, a fiduciary relationship may arise in the "special circumstance" in which a bank has entered into a "special relationship" with a particular category of depositors:

> A bank enters into a "special relationship" with a depositor either by "affirmatively offering] trust and other specifically fiduciary services," or when the relationship involves characteristics of a "special relationship" such as "(1) inherently unequal bargaining positions; (2) nonprofit motivation [of the depositor], i.e., objective of securing peace of mind, security; (3) inadequacy of ordinary contract damages; (4) special vulnerability of one party to harm as a result of breach of trust of the other; and (5) awareness by the other of this special vulnerability."

[14] In a series of footnotes, the Bank contends that it is also entitled to classwide summary judgment on the legal theories that Plaintiffs never sought leave to certify. *See, e.g.,* MSJ at 27 n.7, 31 n.12, 35 n.17, 37 n.22. That is not the law, and it would violate the class members' due process rights to have summary judgment entered against them on non-certified claims. The Bank's cited cases are inapposite. In *Abbit v. ING USA Annuity & Life Ins. Co.*, 2016 WL 4542204 (S.D. Cal. Aug. 30, 2016), the court held that plaintiffs may not oppose summary judgment by presenting a new theory they failed to preserve in their class certification briefing, and in *Ahussain v. GNC Franchising,* LLC, 2009 WL 10672353 (C.D. Cal. Mar. 18, 2009), the court held that plaintiffs could not pursue new theories under the UCL's "fraudulent" and "unlawful" prongs because they had only obtained certification under the "unfair" prong and the named class representatives had agreed to dismiss their individual claims.

ECF 126 at 59 (quoting *Copesky v. Superior Ct.*, 229 Cal.App.3d 678, 691 n.12 (1991); *id.* at 687 n.7).

The Bank argues that it has no "'special relationship' with EDD cardholders," MSJ at 37, but that is for the jury to decide. First, a jury could find that the Bank assumed fiduciary duties because the Bank's contract with EDD expressly required the Bank to maintain one or more "trust account[s]" with "funds held 'in trust'" "for the cardholders." DX 39 at -2518; RSUF 20. The Bank argues that the "Trust Account" was only "[f]or the purpose of calculating [EDD's] revenue share." MSJ at 38. But this Court has already held that "Plaintiffs' interpretation—that BANA was required to hold EDD Cardholders' funds in trust—is a plausible reading of the provision," and that the Bank "as the trustee of the funds, would owe EDD Cardholders fiduciary duties." ECF 126 at 61-62 (citing *Chang v. Redding Bank of Com.*, 29 Cal.App.4th 673, 684 (1994)).

Second, this Court has held that Plaintiffs' allegations, if true, are sufficient to establish all required characteristics of a "special relationship" giving rise to fiduciary duties: (1) "inherently unequal bargaining positions" based on the allegations that "BANA holds the exclusive right to provide electronic benefits payment services for EDD" and that "[u]nder the terms of the BANA-EDD Contract, Plaintiffs couldn't seek similar services elsewhere (eliminating competition) and BANA wasn't providing a standard product"; (2) Plaintiffs' "nonprofit motivation" based on the allegation that "Plaintiffs used their EDD benefits to pay for housing, food, and other daily necessities"; (3) "inadequacy of ordinary contract damages" based on the allegation that "the EDD benefits Plaintiffs were to receive are unemployment insurance or other public benefits"; (4) Plaintiffs' membership in "a uniquely vulnerable segment of the population" as "public benefits recipients"; and (5) "BANA['s] aware[ness] of this vulnerability." ECF 126 at 59-60 (citations omitted); *see* PASF 2-3, 16-17, 82, 84; PX 15 (Letson Dep.) 100:13-22 ([redacted]).

The Bank disputes only the first of these five factors, based on its representation that class members could have opted out of the default Bank-issued card option and chosen to receive their UI benefits by paper check. MSJ at 38. But it is undisputed that the Bank held the exclusive right to distribute *electronic* benefits payments to EDD beneficiaries and faced no competition in that space (which the Court found relevant in denying the Bank's motion to dismiss). It is also undisputed that payment of EDD benefits via a Bank-issued prepaid debit card was the *default* option through which approximately [redacted] of EDD beneficiaries received their EDD benefits. RSUF 2; PASF 2-4. There is also considerable evidence establishing that cardholders were not given clear notice that payment by check was an option. RSUF 2. A reasonable jury could thus find that the Bank and class members had "inherently unequal bargaining positions" such that, in conjunction with the other factors, the Bank owed fiduciary duties to class members.

The Bank also briefly asserts that it was merely exercising its rights under the Account Agreement. The record, however, contains extensive evidence that the Bank knowingly acted against the interests of cardholders to prioritize its own fiscal interests. *See* RSUF 56, 111, 122,; *e.g.*, PX 133 ([redacted]"); PX 22 (Fox Dep) 49:23-50:2 ([redacted].); *see also* PASF 49-53, 57, 60, 63, 73, 82-84.

The Bank also reiterates its position that Plaintiffs have no damages, MSJ at 39, although there are fact disputes about the amount of any set-off and ample evidence from which a jury could award punitive damages. *See infra* at 44-46. Moreover, not only is disgorgement available under California law, *Alkayali v. Hoed*, 2018 WL 3425980, at *6 (S.D. Cal. July 16, 2018) (disgorgement remedy available for breach of contract), but it is "particularly applicable in cases dealing with breach of a fiduciary duty," *Cnty. of San Bernardino v. Walsh*, 158 Cal.App.4th 533, 542-43 (2008); *see also Am. Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal.App.4th 1451, 1482 (2014). While the amount of profits to disgorge is disputed, that is a factual question for the jury. PX 5 (Regan Rpt) ¶¶62, 72, 87, 101.[15] Because a reasonable jury could find the existence of a fiduciary duty, a breach, and damages, summary judgment must be denied.

V. Material Disputes of Fact Preclude Summary Judgment on Plaintiffs' Claims for Breach of the Implied Covenant of Good Faith and Fair Dealing.

The covenant of good faith and fair dealing is implied in every contract and "requires each contracting party to refrain from doing anything to injure the right of the other to receive the agreement's benefits." *Wilson v. 21st Century Ins. Co.*, 42 Cal.4th 713, 720 (2007). The Bank makes three arguments, all unavailing.

First, it argues that Plaintiffs cannot establish damages. For the same reasons discussed *supra* at 34, disgorgement is an available remedy, and there are fact disputes concerning whether Plaintiffs' harms have been fully compensated and whether Plaintiffs are entitled to punitive damages.

Second, the Bank argues that it did not intentionally act in bad faith to interfere with Plaintiffs' right to receive the benefits of their agreement. Whether the implied covenant has been breached is a question of fact. ECF 126 at 56 (quoting *Hicks v. E.T. Legg & Assocs.*, 89 Cal.App.4th 496, 508 (2001)). Here, the relevant facts are disputed. The evidence shows that the Bank's rescission of permanent credits was very much intentional, not an "honest mistake." PASF 87; RSUF 105-108. The evidence also demonstrates that the Bank adopted CFF-1 to protect its own bottom line and never analyzed CFF-1's reliability in identifying fraud, despite knowing that CFF-1 would erroneously deny the

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[15] The Bank cites *Gerlinger v. Amazon.Com Inc.*, 311 F.Supp.2d 838, 856 (N.D. Cal. 2004), which rejected a quasi-contract claim for unjust enrichment because the plaintiff had only alleged the existence of an express contract and had not also pled a quasi-contract claim. *Gerlinger* says nothing about the general availability of disgorgement as a remedy for unjust enrichment, breach of fiduciary duty, or other common law tort claims. *See* Restatement (Third) of Restitution and Unjust Enrichment §51 (disgorgement appropriate if defendant is a "conscious wrongdoer" who acted with knowledge or "despite a known risk that the conduct in question violates the rights of the claimant"); *id.* §52(1)(a) & cmt. b (updated Oct. 2024) (if defendant is at fault and sufficiently blameworthy, even if not a conscious wrongdoer, disgorgement may be appropriate). "California courts apply principles in the Restatement Third of Restitution and Unjust Enrichment." *City of Oakland v. Oakland Raiders*, 83 Cal.App.5th 458, 479 (2022) (citing cases).

valid claims of many legitimate EDD cardholders. PASF 29-31, 63, 78-86; RSUF 84, 85, 91, 92, 98. The Bank contends that it [redacted], MSJ at 36 n.19, but the evidence shows that it intentionally kept call center staffing low to introduce "[redacted]" to make it harder for cardholders to pursue claims. *See* PX 24 (Ehresman) 54:1-55:23; PX 154 at -876476; PX 3 (Minnucci Rpt) ¶¶15, 58-68; *see also* RSUF 43, 99-101. The [redacted] is irrelevant, as Plaintiffs are not asserting breach of contract but breach of the implied covenant which requires the Bank to act in good faith and not to impair the cardholders' receipt of the benefits of the agreement. A jury could find that the Bank breached this duty by understaffing its call centers and subjecting cardholders to extraordinary wait times, causing [redacted] of callers to abandon their calls before being able to speak to a service representative. PX 3 (Minnucci Rpt) ¶¶44, 47; RSUF 100, 101.

Third, the Bank argues that the Bank had discretion to freeze accounts and the implied covenant cannot "limit" that discretion. This merely recycles, with new phrasing, the argument that the covenant cannot impose a new obligation. But as this Court already explained, "where one party is invested with a discretionary power affecting the rights of another," it "must exercise such power in good faith and through 'objectively reasonable conduct.'" ECF 126 at 56 (quoting *3500 Sepulveda, LLC v. Macy's W. Stores, Inc.*, 980 F.3d 1317, 1324 (9th Cir. 2020)). Plaintiffs claim (and the evidence shows) that the Bank failed to exercise its discretion reasonably. *Id.* at 57-58. In arguing otherwise, the Bank misreads *Haggarty v. Wells Fargo Bank, N.A.,* 2012 WL 4742815 (N.D. Cal. Oct. 3, 2012), which recognized that the covenant "finds particular application in situations where one party is vested with a discretionary power affecting the rights of another." *Id.* at *5; *see also Carma Devs. (Cal.), Inc. v. Marathon Dev. California, Inc.*, 2 Cal.4th 342, 372 (1992). *Haggarty* distinguished cases where courts declined to apply the implied covenant because the contract offered one party the "power to refrain from acting at all," in contrast to cases like this in which the Bank had the "power to exercise discretion" in how it implemented contract provisions. *Haggarty*, 2012 WL 4742815, at *5.

The Bank breached the implied covenant by failing to properly investigate the class members' unauthorized-transaction claims and instead automatically treating every unauthorized ATM transaction claim as fraudulent under its CFF-1.[16] The Bank never tested the accuracy or reliability of CFF-1 before its implementation. Even after compelling evidence showed that CFF-1 produced an incredibly high rate of false positives, the Bank continued to use it to summarily deny claims, freeze accounts, and rescind credits without further investigation. RSUF 113; PASF 78, 80-81, 86. Because a reasonable jury could find the Bank breached the implied covenant and there are recoverable damages, summary judgment is improper.

VI. The Bank Is Not Entitled to Summary Judgment on Plaintiffs' Negligence Claims.

The Bank mostly repeats its previous arguments in asserting that Plaintiffs' negligence claims are barred by the "pure economic loss" rule. This time, the Bank relies on *Sheen v. Wells Fargo Bank, N.A.*, 12 Cal.5th 905, 919 (2022), which clarified that the *Biakanja* factors used in *J'Aire Corp. v. Gregory*, 24 Cal.3d 799 (1979), only apply when assessing whether a tort remedy is available for purely economic losses between parties not in privity with each other, and do not apply when the parties are in privity, as here. *Sheen*, 12 Cal.5th at 936-42. But *Sheen* "does not state a broad rule against recovery for pure economic loss in tort in the context of a contractual relationship," even when the parties are in privity. *Id.* at 952 (Liu, J., concurring). Not only was the holding narrowly tailored to the policy considerations of mortgage modifications, but *Sheen* expressly carved out two circumstances in which a tort remedy remains available for pure economic losses even where the parties are in privity.

First, a duty of reasonable care may arise through statute. *Id.* at 920–21. Here, the CCPA and GLBA support Plaintiffs' negligence per se claims. The Bank half-heartedly

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[16] *See Egan v. Mut. of Omaha Ins. Co.*, 24 Cal.3d 809, 819 (1979) ("Although we recognize that distinguishing fraudulent from legitimate claims may occasionally be difficult for insurers, especially in the context of disability policies, an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial.").

argues that these theories fail because there is no violation of the CCPA and the Bank had a GLBA compliant security program. Plaintiffs have already explained the CCPA breach. *Supra* §III. For the GLBA, the Bank is incorrect that the GLBA "simply requires financial institutions to maintain a written information security program." MSJ at 33. The operative regulations require the Bank to "develop, *implement*, and maintain a comprehensive information security program" that has safeguards appropriate to the "nature and scope of [its] activities, and the sensitivity of any customer information at issue." 16 C.F.R. §314.3 (emphasis added). The Bank breached this standard for reasonable care when it chose not to issue industry standard EMV-chip prepaid cards despite knowing that its mag-stripe-only cards would render EDD debit cardholders particularly susceptible to frauds like skimming. *See* PX 2 (Cloninger Rpt); PASF 109-119.

Second, as *Sheen* recognized, California permits tort actions despite the economic loss rule in contexts that share "special characteristics," such as insurance contracts and professional service contracts. *Sheen*, 12 Cal.5th at 929-30. These special characteristics are identical to the "special …relationship" characteristics that determine whether the Bank owed class members a fiduciary duty. *See id.* at 930-31; *supra* § IV. The Bank's unique position as the exclusive distributor of California UI benefits distinguishes this case from the more typical lender-borrower relationship addressed by *Sheen* and places Plaintiffs squarely within an exception to the economic loss rule.

The Bank also argues that there is no evidence of breach or proximate cause, but that is for the jury to decide. Considerable evidence shows that the Bank operated well below industry and statutory standards, evidencing breach. *E.g.*, PX 2 (Cloninger Rpt) ¶57; PX 3 (Minnucci Rpt) ¶¶70, 101. The Bank insists that it did not violate any contractual obligations, but those are distinct from the Bank's tort duty to exercise reasonable care. Second, the Bank's proximate cause arguments rely entirely on disputed facts: whether CFF-1 caused damages, PX 5 (Regan Rpt); PX 6 (Levine Rpt) PX 7 (East Rpt); whether EMV chips would have prevented the challenged transactions, PX 2 (Cloninger Rpt); and whether customer service delays caused harm, PX 3 (Minnucci Rpt). Finally, there are disputes of fact as to whether Plaintiffs suffered recoverable damages. Summary judgment on Plaintiffs' negligence claim should therefore be denied.

VII. Material Disputes of Fact Preclude Summary Judgment Regarding Punitive Damages.

The Bank's punitive damages arguments rest upon a selective presentation of the facts and a mischaracterization of governing law. *See* RSUF 46-69, 81-101, 115-36.

The Bank's principal argument is that it acted appropriately and with benign intent in formulating and implementing each challenged policy. MSJ at 46-50. The record, though, includes considerable evidence from which a jury could find, clearly and convincingly, that the Bank implemented those policies for its own economic self-interested reasons despite knowing that those policies would cause harm and violate the rights of legitimate EDD cardholders, RSUF 56, 11, 113; PASF 41-66, 75-86; that the Bank deliberately chose these self-interested policies over other reasonably available alternatives that would have prevented or mitigated those harms to cardholders, RSUF 9, 118, 102, 133, 134; PASF 34-38, 89, 92-95; and that the Bank's senior leaders callously dismissed [redacted] of CFF-1 and maintained the CFF-1 policies even in the face of mounting evidence of their grievous impacts on legitimate cardholders, PASF 75-86.

The Bank also contends that because its CEO Moynihan and then-COO Montag [redacted], Plaintiffs cannot establish "managing agent" responsibility under state law. Although there is ample evidence that Moynihan and Montag *were* personally involved in directing, authorizing, and ratifying the policies at issue, Plaintiffs are not required to establish which particular corporate officer or executive was responsible for adopting a challenged corporate policy to establish "managing agent" liability under Civ. Code §3294. Rather, corporate liability can be established by showing that challenged conduct was "'grounded in established company policy,'" *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1165 (9th Cir. 2002) (quoting *Neal v. Farmers Ins. Exch.*, 21 Cal.3d 910, 923 (1978)), or based on corporate policies adopted in "conscious disregard of the rights or safety of others," *Grano v. Sodexo Mgmt., Inc.*, 2023

WL 125590, at *27 (S.D. Cal. Jan. 6, 2023) (quotation marks and citations omitted); *see also Romo v. Ford Motor Co.*, 99 Cal.App.4th 1115, 1140-41 (2002). There is ample evidence that the Bank executives who had been delegated responsibility for developing and implementing the challenged policies were "managing agents" with respect to those policies *and* that their proposed policies were authorized and ratified at the Bank's highest levels, up to and including [redacted]. RSUF 86, 112; PASF 67-74.

A. Evidence that the Bank Acted with Malice, Oppression, and Reckless Disregard of Plaintiffs' Rights and Interests.

As the Court held in granting class certification, punitive damages may be awarded on Plaintiffs' federal due process claims if a jury finds that the Bank acted with "reckless or callous indifference to the federally protected rights of others," *Smith v. Wade*, 461 U.S. 30, 51, 56 (1983); *see Dang v. Cross*, 422 F.3d 800, 807 (9th Cir. 2005), and on Plaintiffs' breach of fiduciary duty and implied covenant claims if a jury finds that the Bank's officers, directors, or "managing agents" authorized or ratified Bank policies that "conscious[ly] disregard … the rights or safety of others," *Grano*, 2023 WL 125590, at *27 (internal quotation marks and citations omitted); Civ. Code §3294. *See* ECF 494 at 91-92. "'Determinations related to assessment of punitive damages have traditionally been left to the discretion of the jury.'" *Amadeo*, 290 F.3d at 1165 (quoting *Egan*, 24 Cal.3d at 821).

1. The Bank's Malicious, Oppressive, and Reckless CFF-1 Claim Denial and Credit Rescission Policies

a. There is evidence the Bank *knew* that its reliance on CFF-1 to summarily deny all unauthorized-ATM-transaction claims without a manual investigation was contrary to its Reg E obligations. The Bank's own [redacted]," PX 12 (Daniels) 124:24-125:6; *see also id.* at 123:7-21, 133:16-134:11, 135:21-136:10, [redacted]. PX 60 at -559893–901; PX 1 (Kreis Rpt) ¶¶34-39; PX 12 (Daniels Dep)

138:14-140:4; PX 59 at -4543; PX 58 at -1312; PASF 20-27. The Bank also knew that placing sole decisional reliance on CFF-1 would result in erroneous claim denials. PASF 63; RSUF 85, 88, 91-92; PX 22 (Fox) at 49:23-50:2. The Bank's intentional departure from its EFTA-compliant operating procedures strongly supports an inference of bad faith. *See, e.g. Downey Sav. & Loan Ass'n v. Ohio Cas. Ins. Co.*, 189 Cal.App.3d 1072, 1097-98 (1987) (affirming punitive damages where insurer failed to follow its internal claims manual, which adhered to industry standards, and did not take actions it knew were necessary to complete the claim investigation).[17]

The Bank's callousness is particularly egregious because it knew EDD cardholders were "[redacted]" who depended on public benefits to pay for housing, food, medical care, and other necessities, and that depriving them of those crucial benefits during the height of the pandemic could have devastating consequences. *See* PX 15 (Letson Dep) 100:13-22; PX 13 (Chestnut) at 33:14-34:3, 128:14-129:15; PX 7 (East Rpt) ¶¶8-9, 11-15; *AFL*, 88 Cal.App.3d at 821 (EDD benefits recipients often need benefits to survive "at subsistence levels"); PASF 17.[18] The Bank also knew that, due to its own decision not to issue EMV chip cards, these 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 auto-deny. RSUF 90, 92, 245; PASF 110, 117. Even if there were grounds for suspecting that *some* ATM claims were submitted by criminals, the Bank had sufficient resources to hire more claims analysts to distinguish between valid and fraudulent claims ([redacted]). PASF 34-38; RSUF 102; *see*

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[17] In the analogous insurance claims context, courts routinely allow punitive damages where the defendant's wrongful claim denial results from a deliberate failure to conduct an adequate investigation. *See Amadeo*, 290 F.3d at 1164-65; *Hughes v. Blue Cross of N. Cal.*, 215 Cal.App.3d 832, 858-59 (1989); *Moore v. Am. United Life Ins. Co.*, 150 Cal.App.3d 610, 637-38 (1984); *Ghazarian v. Magellan Health, Inc.*, 53 Cal.App.5th 171, 195 (2020).

[18] *Amadeo*, 290 F.3d at 1164 (quoting *Fletcher v. W. Nat'l Life Ins. Co.*, 10 Cal.App.3d 376 (1970) (justification for punitive damages is "particularly acute in disability insurance cases where '[t]he very risks insured against presuppose that if and when a claim is made, the insured will be disabled and in strait financial circumstances and, therefore, particularly vulnerable to oppressive tactics on the part of an economically powerful entity'").

PX 24 (Ehresman) 34:8-38:6, 97:4-23; PX 70 (investigating all ATM claims within 10 business days would require only "[redacted]" claims analysts, and the Bank had the resources to hire "[redacted]" if needed); PX 28 (Moynihan) 181:25-182:10 (Bank had "[redacted]"). Instead, the Bank deliberately chose to maximize its fraud loss savings, despite the consequences to "[redacted]" EDD cardholders, by implementing CFF-1 to deny all ATM claims without investigation. PASF 39-66.

Immediately upon implementing CFF-1, the Bank was inundated with calls from cardholders seeking reconsideration of claims that had been summarily denied without the legally required explanation. *See* PASF 75; PX 105 at -100641, -100644; PX 106 at -158953; PX 12 (Daniels) 253:10-25.[19] When the Bank eventually manually investigated claims that had been auto-denied based on CFF-1, those manual investigations confirmed that CFF-1 was highly inaccurate and erroneously denied valid claims at alarmingly high rates. *See, e.g.*, PX 227 at -159493 ([redacted]); PX 1 (Kreis Rep) ¶72 ("[S]uch rates are incredibly high and virtually unheard of in the industry[.]"). The Bank's mid-level managers were [redacted],"[20] but [redacted]. *See, e.g.,* PX 116 [redacted]."). The Bank's leaders [redacted] persisted in using CFF-1 to automatically deny all ATM and ATM/combo claims until the Court preliminarily enjoined it from doing so in June 2021. RSUF 93-94; PASF 86, 88. *See, e.g.*, *Nolin v. Nat'l Convenience Stores, Inc.*, 95 Cal.App.3d 279, 288 (1979) (affirming punitive

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[19] The Bank contends that initially [redacted] of CFF-denied denied claimants sought reconsideration, but that figure ignores the many callers who gave up after enduring unduly long call wait times. *See* RSUF 100-101. A jury could also infer bad faith from the Bank's erroneous and untested "[redacted]" that anyone who did not seek reconsideration was necessarily a criminal. RSUF 99.

[20] *See, e.g.*, PX 14 (Martin) 308:9-312:1; PX 112 at -90640 (12/29/20 email from head of prepaid fraud operations noting due to CFF-1, Bank is "[redacted]"); PX 113 at -107261; PX 114 at -107328.

damages award where there was evidence that "the employees who observed the danger daily communicated it upward to supervisory personnel, but to no avail").[21]

The Bank does not dispute CFF-1's extremely high false positive rate. While it contends that GFC initially believed "[redacted]" accurate at identifying fraudulent accounts, MSJ at 46, there is overwhelming evidence that the Bank had *no* level of confidence in *CFF-1* and made no effort to validate its accuracy. PASF 57-58, 60-62, 66; RSUF 84, 85, 88.[22]

There is also overwhelming evidence from which a reasonable jury could conclude that the Bank hastily adopted its untested, unvalidated CFF-1 despite the availability of other reasonable options (such as using CFF-1 as just a screening device, to identify claims to *prioritize* for a manual [redacted] investigation, *see* PX 24 (Ehresman Dep) 97:4-23)—and did so not to protect the State's interest but to protect its own bottom line. PASF 34-38, 49, 51, 54-58; RSUF 56, 102. At no point before implementing CFF-1 did the Bank attempt to

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[21] The Bank contends that its failure to investigate ATM claims *before* systemically denying them is justified because claimants could seek "reconsideration" *after* being auto-denied. MSJ at 47. But the Bank admits [redacted]. RUSF 95. Moreover, because the Bank did not explain in its denial letters *why* it had denied the class members' claims (another EFTA violation), cardmembers could not know whether they had any basis for reconsideration; and for those who nonetheless tried to seek reconsideration, the Bank erected numerous hurdles, resulting in many legitimate cardholders not being repaid for months or even *years*. PASF 76, 79, 103-05.

[22] Even the Bank's reference [redacted] is subject to dispute, as it rests exclusively upon a declaration prepared for this [redacted]. PX 15 (Letson) 144:11-146:16, 169:12-16, 170:7-176:14, 179:9-180:16. [redacted]." PX 22 (Fox) 49:23-50:10, 53:10-21. [redacted]. 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.

assess its accuracy when used as an automated fraud filtering tool to replace the [redacted] procedures previously used to conduct all EFTA-compliant investigations. *See* RSUF 88, 90. While the Bank touts the role played by its so-called "[redacted]" PX 91 at -87763. The *only* stated rationale for CFF-1 was that [redacted], PX 90 at -450517; PX 91 at -87760, but the Bank conducted *no* analysis as to what percentage of those ATM claims were actually fraudulent. PX 19 (Schwartz) 200:5-202:6; RSUF 81-85.

b. For these same reasons, there is ample evidence from which the jury could reasonably award punitive damages based on the Bank's retroactive application of CFF-1 to claw back the nearly $[redacted] in permanent credits already paid to 6,100 Credit Rescission Class members. Although the Bank now contends that was just a "mistake," a reasonable factfinder could conclude otherwise, RSUF 105-106, 149; *supra* at 17-19, including because the Bank *knew* that EFTA prohibited it. *See, e.g.*, PX 64 at -169954–56 ([redacted]); PX 222 at –426938.

2. The Bank's Malicious, Oppressive, and Reckless Freeze Policy

There is also considerable evidence that the Bank acted with malice, oppression, and reckless disregard of class members' rights when it automatically "froze" the accounts of class members who submitted an ATM claim, thereby knowingly depriving class members of access to their account balances *and* delaying or cutting off entirely their access to continuing benefits. RSUF 116, 122, 125, 127, 136.

As discussed, the Bank had no reasonable basis for assuming that every cardholder who disputed an ATM transaction was a criminal engaged in benefits enrollment fraud. *See supra* at 41-44. Moreover, before CFF, the Bank had never systematically "frozen" any cardholder accounts (requiring cardholders to call EDD and authenticate their identity as the first step to regaining account access). PASF 93; RSUF 122; PX 14 (Martin) 224:5-

16. Instead, the Bank typically "[redacted]" accounts that triggered its fraud rules, allowing cardholders to regain access by calling the Bank and authenticating identity through the Bank's [redacted] which involved "[redacted]." PX 145; RSUF 122; PASF 93-94.

In an unprecedented departure from these past practices, the Bank on September 28, 2020 began systematically freezing all EDD cardholder accounts that triggered CFF-1—even though the Bank knew that EDD's call centers were so "[redacted]" that no more than "[redacted]." PX 143 at 17-18; RSUF 116. The Bank implemented this unprecedented account freeze policy knowing that most frozen accountholders would be unable to reach EDD, and despite the continued availability of the Bank's own "[redacted]" procedures for card holders to authenticate their identities directly with the Bank. RSUF 9, 133; PASF 92-94. Although the Bank contends that the reprehensibility of its conduct should be excused because some of its account freezes lasted only a short period, the only reason the Bank began unfreezing accounts is because EDD required it to ([redacted]). RSUF 108, 120. [redacted].[23] [redacted]," PX 112 at -90640, while trapping legitimate cardholders in a "[redacted]" of futile calls between EDD and the Bank. RSUF 99, 116, 125; PASF 85. Huge numbers of desperate cardholders contacted the Bank for help—including by calling the Bank's call centers, beseeching legislators and journalists to reach out to the Bank, and emailing the Bank's CEO (making him personally aware of the

[23] The Bank also applied CFF-1 retroactively to freeze accounts tied to claims submitted between October 4 and December 2, 2020. PX 14 (Martin) 221:1-224:4; PX 48 at -77224.

personal anguish the Bank's CFF-1 policies were causing). PASF 82-84; *see, e.g.*, PX 114 at -107334-35; PX 115 at -90683-86; PX 228 at -37137; PX 121 at -586281-22; PXs 128-133. Not until March 18, 2021 did the Bank finally stop using CFF-1 to "freeze" class members' accounts and began "blocking" them instead, enabling class members to authenticate their identities through the Bank's [redacted] procedures. PX 14 (Martin) 302:2-8; RSUF 127. This evidence, too, amply supports a finding of malice, oppression, and reckless disregard for the vulnerable class members' rights.

3. The Bank's Malicious and Oppressive Policy of Creating Excessive Wait Times in Its Claims Call Center

A jury could also find that the Bank acted with malice and oppression by intentionally understaffing its Claims Call Center pursuant to its deliberate "strategy for long call center wait times" to create "[redacted]" that would "[redacted]). PX 153 at -106094-; *see also* PX 152 at -118438 ("[redacted]").[24] The Bank's practice of deliberately subjecting customers to prolonged wait times is "unheard of in the call center industry." PX 3 (Minnucci Rpt) ¶75. While the Bank points to several witnesses who dispute that the admittedly lengthy waiting time increases were intentional, the contemporaneous emails describing this strategy are corroborated by [redacted]. *Id.* ¶¶58-81, Tbls. 5 & 6, fig. 3. The Bank's implementation of CFF-1 on September 28, 2020 led to a predictable surge in call volume and even longer wait times. *Id.* ¶¶72-74. Compounding the harm, Claims Call Center personnel were often unable or unwilling to provide relief, including by denying reconsideration without an investigation, forcing long-suffering callers to abandon their claims or to call back time and again in the hope of

[24] The Bank asserts that these statements refer to "additional caller authentication requirements." SUMF 223. A reasonable jury could disagree.

regaining access to critically needed benefits. *See, e.g.*, PX 251 at 13-14 ([redacted]); PX 252 at 18 ([redacted]).

The Bank recognized that its call center policies did not [redacted], PX 16 (Golden) 85:25-87:2, but callously rationalized that EDD [redacted].” PX 152 at -118438. The Bank knew that excessively long wait times would impact customers’ ability to obtain relief, but intentionally induced that “[redacted],” PX 153 at -106094–in conscious disregard for EDD cardholders’ rights.

4. The Bank’s Malicious and Oppressive Refusal to Issue EMV Chip Cards

The Bank tries to justify its decision to use outmoded mag-stripe-only security on EDD debit cards by asserting it “reasonably believed adding [EMV] was both impractical and could not be done without EDD’s approval.” MSJ at 49. There is considerable evidence to the contrary upon which the jury could base a punitive damages award. By February 2020, the Bank not only knew that EMV technology had long been the industry security standard for debit cards, but it had determined that the incremental cost of adding EMV chips to EDD cards would be only [redacted] per card, a cost that would [redacted]. PASF 111, 113; RSUF 232A. Nevertheless, the Bank did not offer to add EMV chips to EDD cards, despite its contractual commitment to be “[redacted]” and to “[redacted].” RSUF 10, 235; PASF 114-115. [redacted]. RSUF 15, 236; PASF 115-116. [redacted]

[redacted].

PX 173 at -123235; *see also* PX 171 at -167021–22.[25] Despite knowing the harsh consequences, the Bank decided not to provide that industry-standard protection unless [redacted].” PX 173 at -123235.

In other words, the Bank understood it could “[redacted],” but chose not to unless [redacted]—knowingly imposing a greater risk that class members would thereby become fraud victims.[26] The Bank's prioritization of its own economic interests over Plaintiffs' rights and interests amounts to malice and oppression as well. *See, e.g.*, *Cynthia Mahon v. Crown Equip. Corp.*, 2007 WL 4557094, at *3 (E.D. Cal. Dec. 21, 2007) (denying punitive damages summary judgment based on evidence that defendant knew lack of forklift doors increased risk of injury, cost of adding doors to prevented injury was low); *Romo*, 99 Cal.App.4th at 1140-45 (substantial evidence supported inference of corporate malice where policymakers disregarded safety standards to bring product to market).

B. Evidence that the Challenged Bank Policies Were Perpetrated, Authorized, or Ratified by the Bank's Senior Leaders.

The Bank next asserts that Plaintiffs cannot establish punitive damages on their state law claims because Moynihan and Montag did not admit complicity when deposed. MSJ at 44-49. A “corporate defendant cannot shield itself from liability through layers of management committees and the sheer size of the management structure.” *Romo*, 99 Cal.App.4th at 1140-45; *Romo II*, 113 Cal.App.4th 738, 743 n.1 (2003); *Lannes v. CBS Corp.*, 2013 WL 12125425, at *5 (C.D. Cal. July 3, 2013)). “[I]t is enough if the evidence

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[25] Pursuant to court order, the Bank has produced a sample of these audio calls, which capture the true anguish experienced by class members as a result of the Bank's challenged policies. *E.g.*, PXs 51-55, 118-119

[26] When the Bank finally offered to add EMV chips in 2021, EDD confirmed that [redacted] PX 201 at -59312.

permits a clear and convincing inference that within the corporate hierarchy authorized persons acted despicably in "willful and conscious disregard of the rights or safety of others,"' and that "the information in fact moved upward to a point where corporate policy was formulated." *Romo*, 99 Cal.App.4th at 1141; *Amadeo*, 290 F.3d at 1165.[27]

Plaintiffs challenge a series of Bank *policies*, not isolated acts committed by rogue, low-level employees, and there is ample evidence from which a jury could reasonably infer that the Bank adopted these policies in conscious disregard of the harms they would cause class members. *See* PASF 18-20, 27-31, 50, 53, 60, 63, 64; Civ. Code §3294(b) (limiting corporate employer's liability for "acts of an employee"); *Romo*, 99 Cal.App.4th at 1140 (purpose of "managing agent" requirement is to limit corporate liability for acts beyond its control). The Bank's CFF-1 policies were developed [redacted], PX 89 at -125177; presented to [redacted], PX 96 at -706496, PX 90 at -450517, approved by [redacted] member [redacted], PX 97 at -876417; PX 21 (Ahmad) 193:8-25, 194:15-195:25; RSUF 86, 112, approved by officer-level executives on the Bank's [redacted], PX 101 at -497802–04; [redacted], PX 103; PX 231; and implemented as official Bank policy, PX 13 (Chestnut) 18:7-8. The policy decisions to drive up call center wait times and to withhold EMV chips [redacted] were similarly made by the Bank executives who had been delegated authority to develop and implement those policies. PASF 96,98, 108, 115-116; RSUF 43, 112, 114, 236.

There is also evidence from which a jury could find that the high-level Bank employees directly responsible for developing and implementing the challenged policies, including [redacted], were delegated responsibility to "exercise substantial independent authority and judgment over decisions that ultimately determine[d] corporate policy," and were thus "managing agents" under Civ. Code §3294, *see White v. Ultramar, Inc.*, 21 Cal.4th 563, 573 (1999); PASF 67-74.

[27] *See also Neal*, 21 Cal.3d at 923 (inference of malice where denial of coverage was "part of a conscious course of conduct, firmly grounded in established company policy"); *Hughes*, 215 Cal.App.3d at 847 (similar); *Moore*, 150 Cal.App.3d at 637 (similar).

The Bank has not refuted this evidence. *Cf. Davis v. Kiewit Pac. Co.*, 220 Cal.App.4th 358, 369-71 (2013) (summary judgment not warranted where employer failed to show absence of triable issue as to whether employees were managing agents). CEO Moynihan himself [redacted], PX 28 (Moynihan Dep) at 23:3-10; 25:15-25, [redacted], *id.* 18:21–19:3. [redacted]. *Id.* 83:5-25, 131:19-132:15, 133:25-134:22.

The evidence further confirms the Bank's CFF-1 policies were approved by [redacted]. RSUF 86, 110, 112, 114; PASF 67, 69-72. Although Moynihan and Montag recently claimed an inability to recall exactly what they approved or ratified, it is ultimately the factfinder's role to assess the weight and credibility of this testimony, given the strong circumstantial evidence supporting an inference that they in fact personally authorize these policies. RSUF 110, 114.[28]

CONCLUSION

For all the foregoing reasons, the Bank's motion should be denied.[29]

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[28] Unlike *In re Pacific Fertility Center Litigation*, 2021 WL 2476799 (N.D. Cal. June 17, 2021), this record includes contemporaneous communications about each challenged policy, among management committees, C-Suite executives, and Directors. PASF 41, 43, 54, 59, 68-74. A reasonable factfinder could thus find corporate authorization and ratification through direct evidence as well as by drawing reasonable inferences.

[29] Plaintiffs do not dispute the Bank's assertion that their UCL claim is now moot, but note that as a result of the preliminary injunction in effect from June 8, 2021 until the termination of the Bank's EDD debit card program nearly three years later, i.e., when equitable relief was still available, tens of thousands of Class Members were reimbursed the principal amounts of their denied claims, regained access to their accounts, and obtained considerable additional benefits as mandated by that injunction.

Respectfully submitted,

Dated: January 9, 2026

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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 9, 2026

<u>/s/ Brian Danitz</u>
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