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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 21-MD-02992-GPC-MSB **REPLY BRIEF IN SUPPORT OF DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO EXCLUDE PURPORTED EXPERT OPINIONS OF JANE CLONINGER (ECF 563)** Date: April 17, 2026 Time: 1:30 p.m. Ctrm: 12A – 12th Floor Judge: Hon. Gonzalo P. Curiel FILED PROVISIONALLY UNDER SEAL PURSUANT TO STIPULATED PROTECTIVE ORDER

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Plaintiffs' Opposition (ECF 623, Opp.) asks the Court to abandon its gatekeeping function under Rule 702 and *Daubert*. According to Plaintiffs, Cloninger's experience "in the financial services industry" qualifies her to offer *any* opinion on *any* topic related to financial services, even if she has no experience with the subject matter. From Plaintiffs' perspective, although Cloninger-as-a-consultant relied on other "fraud experts" to analyze the amount of fraud that would be prevented by EMV chips, Cloninger-as-an-expert-witness is somehow qualified to do that analysis herself. Likewise, although Cloninger never provided *consulting* services to any client about the implementation of EMV chips, Plaintiffs assert that Cloninger is somehow qualified to provide *expert* opinions regarding implementation here. As for Rule 702's requirement that expert opinion be based on a reliable methodology, Plaintiffs seem to believe that the requirement can be satisfied by an expert's *ipse dixit*. Rule 702, and *Daubert* and its progeny, require more.

ARGUMENT

I. Each of Cloninger's Opinions Must Be Separately Examined.

Plaintiffs spend much of their opposition focusing on opinions that are not subject to a motion to strike—their argument being that if Cloninger is qualified to offer at least *some* of her opinions, then she must be qualified to offer them *all*. But "although a party's expert testimony may build upon itself, in no instance does the Court relax the admissibility threshold of any given expert opinion, and *each opinion* remains subject to the underlying requirement" of Rule 702. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prods. Liab. Litig.*, 978 F. Supp. 2d 1053, 1066 (C.D. Cal. 2013) (emphasis added). Thus, each of Cloninger's proffered opinions must be examined separately, and each must independently satisfy the requirements of Rule 702. Her opinions on causation and feasibility do not.[1]

[1] Although BANA did not move to exclude them, Cloninger's other opinions are nevertheless flawed. She opines, for example, that BANA's actions were inconsistent with industry standard—yet her definition of "industry standard" is simply based on what she believes the majority of issuers did (such that her opinion amounts to nothing more than an observation as to whether BANA was in the majority or

II. Cloninger Is Not Qualified to Opine on the Alleged Loss or Feasibility.

As BANA explained in its Motion (ECF 563-1, Mot.), Cloninger's experience does not extend to opinions on causation or feasibility. She was a career consultant who prepared "business cases" (cost-benefit analyses) for her clients to consider when deciding whether to implement EMV chip technology. Mot. 3. Cloninger prepared her analyses using data inputs *from others*—such as the amount of fraud that might be avoided by the implementation of EMV chip technology, which was determined by "fraud experts" at her clients (not Cloninger). *Id.* Cloninger then "calculate[d] the net incremental difference" between the benefits that those experts had ascertained and the costs of implementation (also provided to her by others). *Id.*

Cloninger's experience conducting analyses based on data prepared by others does not qualify her to develop that data herself. Just as questions about the amount of fraud prevention were deferred to "fraud experts" when Cloninger consulted, here questions such as whether "virtually all" of the fraud would have been prevented fall outside her expertise. After all, Cloninger, by her own admission, is not a fraud expert. HX 3 306:7-9. Her knowledge of how fraud is carried out is not based on her own experience—as she was "not a hands-on fraud person"—but instead on things she has read and heard from people who *are* fraud experts. *Id.* 171:5-23.

Plaintiffs overlook those admissions in their efforts to pad Cloninger's resume. They describe Cloninger's purported work as "analyz[ing] the extent of existing fraud on her clients' card portfolios" and "comparing that fraud to the level of fraud in programs that had migrated to EMV," citing her preparation of cost-benefit models. Opp. 9. But those models, Cloninger explained, relied on fraud analyses prepared by others. HX 3 42:6-43:5. The same goes for the "fraud forecasts" that

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minority). HX 50 64:15-65:22. Cloninger acknowledges that many issuers (including her own clients) [redacted] *See id*. 65:24-69:11, 77:20-79:11, 82:8-83:13. Further, as discussed in BANA's summary judgment motion (ECF 589-1, MSJ) and reply, Cloninger's "industry standard" opinions cannot save Plaintiffs' EMV claims from summary judgment because they are unsupported and refuted by material facts showing that EMV chips were not industry standard for *prepaid cards*.

Plaintiffs reference (HX 1 ¶ 7; *see also* Opp. 5): the fraud loss data that Cloninger used as a "baseline" to "develop various scenarios based on historical markets" was provided to her by the "experts" at her clients, and she did not do her own analysis of the fraud loss that would have been avoided through EMV. HX 3 40:8-41:4, 42:6-12, 42:25-43:5.[2] Cloninger may be experienced in developing models to synthesize data inputs provided by others, but has no experience developing those inputs herself.

Likewise, Cloninger had no involvement in either *deciding* whether to implement EMV technology or actually *implementing* it. *See* Mot. 3, 14. Plaintiffs assert that Cloninger is "familiar with the operational requirements of EMV conversion," but acknowledge that her experience is just in "[redacted]" of conversion. Opp. 11. That does not qualify her to testify about the *feasibility* of such changes. *See* Mot. 13-14. Further, Cloninger does not limit her opinion to describing the "operational requirements of EMV conversion" (Opp. 11), even though that already stretches the bounds of her experience. Cloninger has opined on the feasibility of implementation in light of operational challenges, despite testifying that she has never worked with any client on implementing EMV chip technology because "[i]t gets into the – mostly the technical side of it, and I am not a technical – I'm a – I'm a business strategy/product innovation kind of person." HX 3 43:6-12.

Cloninger's experience as a consultant in the payments industry does not qualify her to provide expert testimony about all facets of that industry, particularly in areas in which she admits to having no experience: determining the amount of loss avoided by EMV chip technology and the implementation of EMV chip technology. *See Bunker v. Ford Motor Co.*, 2013 WL 4505798, *7 (D. Nev. Aug. 22, 2013), *aff'd* 640 F. App'x (9th Cir. 2016) ("Although Lepper is qualified by his experience,

[2] Plaintiffs similarly assert that Cloninger's experience required her to "thoroughly analyze the anti-fraud benefits of EMV chips as compared to mag-stripe-only cards," citing her testimony that fraud loss was the primary benefit input into her models. Opp. 9. That input, as discussed above and in BANA's Motion, was provided to Cloninger by others. There may have been a "thorough[] analy[sis]" of that data input once received, but that does not qualify Cloninger to prepare the input herself. *Id.*

training, and education to testify as to automotive mechanical failures generally, Lepper has little to no knowledge, training, experience, education, or expertise specifically related to brake shift interlock systems.”).[3] Cloninger’s opinions on this topic should be excluded.

III. Cloninger’s Summary Dismissal of Considerations That Do Not Support Her Opinion Is Not a Reliable Methodology.

Cloninger’s causation and feasibility opinions suffer from the same fatal methodological flaw: she simply assumes that her opinion is correct and summarily rejects any fact or consideration that would undermine her conclusion. Her causation opinions (that EMV chips would have prevented “virtually all” fraud, and that skimming and fraud increased as a result of not having EMV chips) are based on her understanding that EMV chips prevent some fraud and can make skimming more difficult. But whether something *can* happen and the extent to which it *did* happen are two different questions, and Cloninger leaps from one to the other by simply dismissing any and all alternative explanations for fraud without any analytical consideration. Her opinion that it would have been feasible to implement EMV chips during the COVID-19 pandemic relies on similarly flawed reasoning: she simply assumes that implementation was possible and dismisses or refuses to consider any operational challenges or practical considerations that contradict that assumption.

A. Cloninger’s causation opinions are not reliable.

Plaintiffs assert that “math” is not required for Cloninger’s opinions (Opp. 13-

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[3] Plaintiffs’ cases do not hold otherwise. *United States v. Little*, 753 F.2d 1420 (9th Cir. 1984) involved a professor who had taught about the subject he was opining on. In *United States v. Laurienti*, 611 F.3d 530 (9th Cir. 2010), the expert had experience with and knowledge of the NASD rules on which they opined. Similarly, the expert in *D.F. v. Sikorsky Aircraft Corp.*, 2017 WL 4922814 (S.D. Cal. Oct. 30, 2017) had “*actual experience* with the subject of his inquiry.” *Id.* *15 (original emphasis). Further, *United States v. Garcia*, 7 F.3d 885 (9th Cir. 1993) involved an expert who had experience counseling dozens of sexually abused children and who offered an opinion regarding the impact of testimony on an abused child. None of these cases involved an expert purporting to offer opinions on matters that she readily admitted had been handled by others (the “experts”) during her career, not her.

14)—which is ironic, given their defense of her qualifications based on her experience preparing cost-benefit models; in other words, math. Their concession that Cloninger did not do the very analysis that they say qualifies her as an expert is, alone, enough to compel the exclusion of these opinions. *See In re Incretin-Based Therapies Prods. Liab. Litig.*, 524 F. Supp. 3d 1007, 1042-43 (S.D. Cal. 2021) (excluding the opinions of an expert who admitted that he "failed to independently analyze relevant . . . data," and who thereby "failed to reliably apply his stated methodology"), *aff'd*, 2022 WL 898595 (9th Cir. Mar. 28, 2022).

That is particularly the case where Cloninger's causation opinions are quantitative in nature. Her opinions about whether EMV chip technology can prevent *some* fraud are not being challenged here. Rather, BANA's Motion challenges Cloninger's attempt to quantify the amount of fraud that would have been prevented—"virtually all"—and her conclusion that the decision not to issue EMV card "led to an increase in skimming attacks." Mot. 1, 10; *see also* HX 1 ¶¶ 14(j), 102, 113. Cloninger asserted "no reason to believe" that transactions *not* preventable by EMV chips "constitute[d] more than a de minimis percentage of the fraud class members experienced." HX 1 ¶ 104 n.130. Yet she did no analysis or calculation of any kind to determine what that "percentage" was before concluding that it was "de minimis." *Id. United States v. Rogers*, 769 F.2d 1418 (9th Cir. 1985), which Plaintiffs cite, does not dispense with the methodology requirement. There, an FBI agent was permitted to testify that 2 of 1,800 robberies in the Los Angeles area involved a person wearing a bandana from a vault based on FBI statistics. *Id.* at 1425.[4] That is what Cloninger should have done: analyze the underlying occurrences to determine how they actually occurred, instead of simply assuming that EMV chips would have prevented "all or nearly all" of the fraud simply because they prevent some fraud. HX 1 ¶ 113.

[4] *Rogers* is further distinguishable because there, defendant did not challenge the admissibility of the evidence at trial, and stipulated to the expert's expertise in the investigation of bank robbery cases. *Id.* at 1425-26.

Even if Cloninger's opinions did not require "math," they are still subject to the requirements of Rule 702. As the Ninth Circuit has observed, there is "a strong argument that reliability becomes ***more, not less, important*** when the 'experience-based' expert opinion is perhaps not subject to routine testing, error rate, or peer review type analysis, like science-based expert testimony." *United States v. Valencia-Lopez*, 971 F.3d 891, 898 (9th Cir. 2020) (emphasis added). "The Supreme Court has made it abundantly clear that reliability is the lynchpin—the flexibility afforded to the gatekeeper goes to *how* to determine reliability, not *whether* to determine reliability." *Id.* (original emphasis).

According to Plaintiffs, Cloninger's "methodology" consists of three parts: (1) "her extensive professional experience in the payments industry," (2) "her specialized knowledge of EMV technology," and (3) "her analysis of relevant Bank documents and industry publications." Opp. 13-14. But as discussed above, Cloninger does not possess the experience or knowledge necessary to opine on fraud causation. Moreover, Rule 702 requires more: the expert's testimony must also be "the product of reliable principles and methods." FED. R. EVID. 702; *see Valencia-Lopez*, 971 F.3d at 901 ("The issue is not whether [the expert] had knowledge and experience . . . the issue is whether he provided a reliable basis for his opinion.").

As for Cloninger's "analysis of relevant Bank documents and industry publications," merely reviewing documents is not the type of "analysis" that Rule 702 requires. Even if the documents stated the conclusions that Cloninger offers (and they do not), then Cloninger's opinions would amount to nothing more than a recitation of the contents of those documents—which is not the role of an expert and is not helpful to a jury. *See Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 613 F. Supp. 3d 1308, 1322 (S.D. Cal. 2020), *aff'd*, 9 F.4th 1102 (9th Cir. 2021) ("[E]xpert testimony cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence," as this "intrudes on the province of the jury, who is capable of evaluating the same evidence and drawing conclusions without [the] proffered testimony."). *Donahoe v. Arpaio*, 2013 WL 12419625 (D. Ariz. Sept. 20, 2013) does not help Plaintiffs (Opp. 15), because that expert was an experienced law enforcement officer who reviewed documents to opine on "customary norms of police investigative practices." *Id.* *2-3. Further, he did not offer any opinions as to the results of those practices or whether certain events would have been avoided using different practices, and his opinions that charges were fabricated and motivated by politics and retaliation were excluded. *Id.* *4-5. Cloninger's "methodology" of merely reviewing materials before determining that "virtually all" fraud would have been prevented goes far beyond what *Donahoe* allowed, and fails to demonstrate "a reliable application of the principles and methods to the facts of the case." FED. R. EVID. 702; *see also* Mot. 9-10.

The absence of a reliable methodology is evident from Cloninger's failure to rule out other explanations for fraud. She simply concludes that because EMV chip technology prevents *some* fraud, it must have prevented *all* fraud. *See* Mot. 10-11. Cloninger offers no analytical support for that logical leap, nor does Plaintiffs' Opposition identify one. Plaintiffs' assertion that "Cloninger *systematically examined and rejected the various* alternative explanations" (Opp. 16, emphasis added) is undermined by their two cites. Paragraph 96 of Cloninger's Report asserts that "the most likely explanation" for the fraud is "counterfeit card[s] created as a result of skimming," but cites only to the class definition and concludes that the definition "immediately excludes as a possibility the use of a lost or stolen card to carry out the transactions class members reported." HX 1 ¶ 96 & n.126. Cloninger does so [redacted][5] Paragraph 104 states that EMV chips "are effective" at preventing

[5] Plaintiffs' argument that [redacted] because of the class definition is further undermined by their admission that [redacted] Opp. 15-17. Plaintiffs suggest that [redacted] *See id.* But it is not BANA's job to do Cloninger's analysis for her. Cloninger opined that "virtually all" of this fraud would have been prevented. She should have

fraud and then concludes that "EMV would have prevented all or nearly all" fraud, summarily dismissing fraud by family members that EMV "would not have prevented" because Cloninger claims to be "aware of no reason to believe that family fraud constitutes more than a de minimis percentage of the fraud." *Id.* ¶ 104 n.130.

That is not a "systematic[] examin[ation] and reject[ion]." Opp. 16. It is a results-oriented approach that fails Rule 702. *Engilis v. Monsanto Co.*, 151 F.4th 1040, 1048-49, 1053-55 (9th Cir. 2025) (experts "must provide reasons for rejecting alternative hypotheses using scientific methods and procedures and must rely on more than subjective beliefs or unsupported speculation") (internal quotations omitted). Cloninger cannot rule out other explanations simply because she does not believe there is a reason to rule them in.

B. Cloninger's feasibility opinion is also unreliable.

Plaintiffs try to sidestep the most critical flaw in Cloninger's opinion that it would have been feasible to implement EMV chip technology in 2020: *she never considered how long implementation would take*. How, then, could she opine that it was feasible? Cloninger clearly testified, and Plaintiffs do not dispute, that she [redacted] HX 3 189:18-25. Her "analysis" consisted of using a [redacted] that was taken from a different time period and that applied to a much smaller subset of cards—new and replacement cards only, rather than all active cards. *See* Mot. 15-17. The issue is not, as Plaintiffs misleadingly claim, that Cloninger failed to quantify how many cards would have been issued. Opp. 19. The problem is that Cloninger *assumed* that quantification when she opined that "virtually all" of the fraud would have been prevented with EMV chip technology in the spring or summer of 2020 (HX 2 ¶ 6(e)), thus assuming that all—or at least "virtually all"—of the cards could be migrated to EMV technology at that time. She was also unclear as to [redacted]

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considered how much of the fraud would *not* have been prevented, but she did not.

would even start and thus did not consider when it would be complete. Mot. 16. Indeed, Plaintiffs' admission that Cloninger did not determine when and the extent to which EMV chip technology could have been implemented before determining the amount of fraud the technology would prevent further underscores the complete lack of methodology in her causation opinions. *See supra* § III.A.

Additionally, Cloninger's so-called consideration of operational challenges at the beginning of the COVID-19 pandemic reveals the same results-oriented approach that infects her causation opinions: she assumed that implementation was feasible and then rejected any consideration that might call her conclusion into question. For instance, Plaintiffs say Cloninger "considered that the Bank would not be '[redacted]' as it had already transitioned other card programs to EMV." Opp. 19. But Cloninger admits [redacted] HX 3 179:9-10. Cloninger also made assumptions about BANA employees with no basis and did not even consider the costs of EMV chip implementation in determining feasibility. *See* Mot. 17.

IV. Cloninger Cannot Offer Legal Opinions.

As discussed above, the disputed opinions consist merely of Cloninger's subjective beliefs based on her review of selective portions of the record, devoid of any the application of any reliable methodology. *See supra* § III. They are therefore utterly unhelpful to the jury, who are just as capable of reviewing portions of the record and deciding what to think, which is all that Cloninger did. *See id*. But Cloninger's causation and foreseeability opinions go a step further. Not only do they fail to "help the trier of fact" (Fed. R. Evid. 702); they also "invade[] the province of the trial judge" and tell "the jury what verdict to reach." *Bona Fide Conglomerate, Inc. v. SourceAmerica*, 2019 WL 1369007, *3, 16 (S.D. Cal. Mar. 26, 2019).

Plaintiffs' attempt to characterize those opinions as being limited to the "ordinary," rather than "legal," meanings of causation and foreseeability completely fails to account for the claims that these opinions are being used to support. *See*

Opp. 20. Plaintiffs try to distinguish *Aguilar v. Int'l Longshoremen's Union Loc. No. 10*, 966 F.2d 443 (9th Cir. 1992) because foreseeability was a contested element of the claim in that case, and therefore the reasonableness and foreseeability were "matters of law for the court's determination." Opp. 21 n.6. But that is precisely the scenario here. Plaintiffs' CCPA claim, for instance, requires that they prove unauthorized access and exfiltration, theft, or disclosure "as a result of" the alleged breach. Cal. Civ. Code § 1798.150(a)(1); *see also* Mot. 2. BANA disputes that Plaintiffs can make that showing. MSJ 26-27. Yet Cloninger offers a host of opinions that go directly to that point, including that fraud "increased as a result of the Bank's failure to issue EMV-chip-enabled cards," and that "[t]he addition of EMV chips to the Bank's EDD Debit Cards would have prevented virtually all the card-present counterfeit fraud." Mot. 6. These opinions are not limited to "ordinary" non-legal meanings; they purport to opine on critical elements of liability and should be excluded.

Foreseeability is equally critical to liability, such as for Plaintiffs' negligence claim. *See Pontier v. GEICO Ins.*, 775 F. Supp. 3d 1072, 1094-95 (S.D. Cal. 2025) (proximate cause is an element of negligence under California law and requires a showing that defendant could "reasonably foresee the risk of injury"). Cloninger tries to answer the for the jury by opining that it was "highly foreseeable" that fraud would increase. *See* Mot. 13. That, too, is improper and should not be permitted.

CONCLUSION

For the foregoing reasons and the reasons stated in BANA's Motion, BANA respectfully requests that the Court grant BANA's Motion.

Dated: February 20, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on February 20, 2026. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify under penalty of perjury that the foregoing is true and correct.

Dated: February 20, 2026

s/ Matthew L. Riffee
MATTHEW L. RIFFEE