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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 FOR PARTIAL SUMMARY JUDGMENT (ECF 589)** 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 first brought this lawsuit accusing BANA of not being aggressive enough policing the undisputed fraud that infiltrated the EDD UI program. The case has since transmogrified into a complaint that BANA did *too much* to police fraud. Not only that, Plaintiffs claim BANA did so in such bad faith so as to permit them to recover treble and punitive damages because nothing else is left to litigate, as Plaintiffs do not dispute that every class member has already been fully reimbursed.

Plaintiffs' opposition (ECF 652, Opp.) to BANA's summary judgment motion (ECF 589-1, MSJ) contains a startling claim that makes it apparent that their plea for EFTA damages and related harms rests on an alternative reality fundamentally contrary to the undisputed record: Plaintiffs claim their hundred thousand class members would never have been credited for their disputed transactions if not for the injunction granted in this lawsuit and the CFPB/OCC regulatory settlement. Opp. 8, 10. On that basis, they claim everything paid back to them is recoverable again (and subject to trebling) as actual damages. That might be the class Plaintiffs wish they had. But the reality is that nearly [redacted] were paid before the injunction and more than [redacted] were paid before the regulatory settlement—not because Plaintiffs brought suit, but because of the very BANA processes Plaintiffs try to impugn, through aspersions rather than evidence. As for the rest, it is still unknown how many (if any) experienced the harms theorized by Plaintiffs' purported experts because they offer no evidence that they did. With their claims of liability and injury unsupported by the record, contrary to *multiple* prior rulings in this case rejecting their damages theories, and otherwise foreclosed as a matter of law, BANA's motion for summary judgment should be granted.

ARGUMENT

I. Summary Judgment Is Due on the EFTA Claim for Lack of Damages.

Plaintiffs have *no* evidence of any actual damage sustained as a result of any failure to comply with EFTA, which dooms their treble damages claim too. MSJ 15-26; 15 U.S.C. § 1693m(a)(1); *id.* § 1693f(e). Plaintiffs' first theory of damages seeks the full amount of each disputed transaction as actual damages. But Plaintiffs do not dispute that all of those claims were paid back long ago, and the law of the case has already established that the damages cognizable for consumers "who have been fully reimbursed" are the "damages [they] suffered *as a result* of the delayed reimbursements"—*not* the full disputed claim amount. ECF 126 at 23; *see also* 15 U.S.C. § 1693m(a)(1). This makes perfect economic sense, as a person who temporarily loses access to money does not experience the same economic harm as a person who *permanently* loses money. Plaintiffs' second theory of damages seeks "consequential damages" in the amount of the interest payments it would have cost each class member to use credit cards to borrow their full claim amounts between their initial dispute and reimbursement. But Plaintiffs have not evidenced that any class members actually experienced this harm. Nor do they dispute that the classes, in any event, have *also* already had [redacted] paid back.

A. Fully Reimbursed Claim Amounts Are Not Actual Damages.

Unable to show they have *evidenced* the economic damages they seek to treble (as they must to withstand summary judgment), Plaintiffs rely instead on a legal argument that simply *assumes* they have already evidenced them. They argue: "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," they would be entitled to claim the full "principal amounts of the unauthorized-transaction claims" as actual damages, and BANA's prior reimbursement of those claims would only reduce the total damages as an "offset *after* trebling." Opp. 8. It is mystifying how Plaintiffs can say "[t]he Bank does not dispute" this, since BANA squarely disputed it as a central argument in its summary judgment motion. *See* MSJ 16-17.

Plaintiffs rely on the Court's remarks at class certification that an EFTA plaintiff is entitled to recover "full satisfaction of the claim for harm done" and then "[a]n offset should be subtracted from the total amount of damages after trebling." Opp. 8 (quoting ECF 494 at 84). But this merely raises the question of *what* the "harm done" *actually was*. To claim the full principal of the disputed claim as actual damages requires *evidence* that class members were (uniformly) harmed in those amounts. Here, however, Plaintiffs "received a full refund" and are therefore entitled only to "interest income" to reflect "loss of use of money." *See Van v. LLR, Inc.*, 962 F.3d 1160, 1161-65 (9th Cir. 2020). It is unrebutted that the full refunded amounts are [redacted] of that alleged harm. *See* RSUF 172 (non-responsive counter).

Plaintiffs provide *no* evidence to show that the "harm done" equals or exceeds the full amount of the credited claims. Rather, Plaintiffs assert that class members were only credited for their disputed transactions "in response to the *Yick* injunction or the Consent Decrees." Opp. 10. And they ask the Court to presume that the credits to class members were only made because they were "required by the *Yick* injunction and CFPB/OCC Consent Decrees." *Id*. 8. The evident purpose of making these assertions is to insinuate that the credits only came about *because of this litigation*, and therefore should not be considered relevant in assessing what harm occurred independently of this litigation. That is simply not true—as evident from Plaintiffs' own expert's analysis. [redacted] (about [redacted]) had their claims paid *before* the *Yick* injunction. DX 185 ¶ 6.a (relying on DX 14.AB.1; DX 27-27.B; DX 28.A.1; DX 31.B.1). Another [redacted] were paid back after the injunction but before the consent orders—totaling [redacted] (about [redacted]). *Id*. ¶ 6.b. Moreover, nearly [redacted] were fully credited for their claim amounts within 30 days of their dispute, and therefore have no damages at all, since that is less time than Reg E allows for an investigation. RSUF 174; 12 C.F.R. § 1005.11(c)(2)-(3) (45- and 90-day investigation periods). *None* of these people have any factual basis on which to claim that they were only credited because of this lawsuit or the regulatory settlement.

That distinguishes Plaintiffs' case law. First, they cite *Uthe Tech. Corp. v. Aetrium, Inc.*, 808 F.3d 755 (9th Cir. 2015), about "the 'one satisfaction' rule"—an "equitable principle" BANA never invoked. *Id*. at 757. BANA's arguments concern

Plaintiffs' failure to evidence the "actual damage sustained by [the class] as a result of" the alleged EFTA noncompliance as a matter of EFTA's statutory language. 15 U.S.C. § 1693m(a)(1). Plaintiffs cite *Uthe* for its holding that a plaintiff that won $9 million in an arbitration in Singapore was entitled to sue again in the U.S. for treble damages under RICO. The Ninth Circuit recognized that "[t]he $9 million arbitral award roughly corresponded to [the plaintiff's] losses," but held that it did not "extinguish" its RICO claim under U.S. law because "[t]he Singapore arbitration was limited [to] claims . . . arising under Singapore law," which does not recognize treble damages. *Id*. at 760. "[F]ull satisfaction" of the RICO claim, the Ninth Circuit ruled, is "three times the proven actual damages," and the $9 million was cognizable only as "partial credit[]" toward the trebled amount. *Id*. at 762. Relying on this, Plaintiffs argue that they are entitled to walk away from this case with "twice" their actual damages, "not three times *and not zero*." Opp. 8. But Uthe had actually evidenced his actual "losses." *Uthe,* 808 F.3d at 759-60. Here, Plaintiffs do *not* evidence the principal claim amounts as *their* actual losses. They simply declare it. Uthe also had to go through the legal process to win back his $9 million. *See id.* The tens of thousands of class members credited through BANA's reconsideration process—which was offered and utilized *before* any litigation was filed (RSUF 97, 158)—and the tens of thousands more automatically credited before the *Yick* injunction (RSUF 179) are not comparable to Uthe, who was paid nothing until he won in arbitration.

The same applies to *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957), and *B.P. v. Balwani*¸ 2021 WL 4077008 (9th Cir. Sept. 8, 2021). *Flintkote* was an antitrust conspiracy case where the plaintiff settled and released its claims against all defendants except one for $20,000, then won $50,000 in compensatory damages from the remaining defendant, "trebled by the court to $150,000." *Id*. at 373. The court's holding that the $20,000 should be deducted from the $150,000 after trebling, rather than the $50,000 before trebling, necessarily hinged on the plaintiff's having proven $50,000 in actual harm. *Id.* at 397. The case merely speaks to the order of operations in a treble-damages calculation *after* the plaintiff has evidenced and proven its actual damages—exactly what remains to be evidenced and proven here. *See id*.

Balwani, a lawsuit over the notorious Theranos fraud, involved an argument that class members who already recovered compensatory damages in a settlement with the State of Arizona are not barred from recovering RICO treble damages. 2021 WL 4077008, *2. In a non-precedential opinion, the Ninth Circuit cited *Uthe* in ruling that "the [c]onsent [d]ecree does not bar plaintiffs' RICO treble damages recovery so long as plaintiffs establish defendants' liability for actual damages and additional damages are 'offset' by the amount already paid." *Id*. The key phrase, of course, is "*so long as plaintiffs establish defendants' liability for actual damages.*" *Id.* Nothing in the ruling accepted the consent decree as evidence that the amount of actual damages had *already* been established, which is the proposition Plaintiffs argue here. Further, as already shown, the classes here are *not* in the same position as litigants who had only been paid by virtue of litigation, given the tens of thousands of members credited in the ordinary course of business and *not* because anyone brought suit.

As Judge Burns held at the Rule 12(b)(6) posture, and as BANA reiterated in its opening brief (MSJ 16), class members paid before the injunction might still have *some* claim of actual damages they can press, based on "the actual damages [they] suffered as a result of the delay"—assuming the "delay" went beyond the statutory limits. ECF 126 at 23. But that amount falls well short of the full claim amount. Plaintiffs respond to Judge Burns' holding by misrepresenting both the holding and the arguments BANA made based on it. They argue, "[t]he 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." Opp. 10. But the important part of Judge Burns' ruling is not the plaintiff he dismissed (who *of course* "is no longer part of this action," by virtue of the dismissal), but the plaintiffs he did *not* dismiss. Those plaintiffs alleged being paid back outside the statutory deadline, and on that basis the Court permitted their claims to go forward, but it still held their "actual damages" were limited to harms "suffered as a result of the delayed reimbursements"—consequential damages like being "unable to pay [utility] bills"—*not* "the amount of the reported error." ECF 126 at 23-24. The same applies to any similarly situated class members.

Plaintiffs do not even dispute their failure to evidence the claim amounts as actual damages. Rather, they claim they do not have to, because "the proper approach for calculating treble damages is a question of law, not '[redacted].'" Opp. 11. But the "question of law" does not arise until actual damages have *first* been evidenced as a matter of fact (and the other factual elements of a treble-damages claim have been established). And because Plaintiffs are litigating this case as a class action, that factual showing must be made "on a classwide basis." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Plaintiffs proffer *no* classwide evidence of actual damages in the full claim amounts. Thus, summary judgment for BANA is warranted.

B. Summary Judgment Is Due on Consequential Damages Too.

Plaintiffs also lack evidence of consequential damages resulting from their allegedly delayed reimbursements. The *only* evidence Plaintiffs proffer on consequential damages is their three experts who purport to measure the costs class members might have incurred taking gap loans on credit cards—a methodology already rejected by the Court when their accounting expert proposed it, and that remains just as deficient with two more hired experts proposing the same thing. *See* MSJ 18-20. The Court ruled that a methodology based on assumptions about "increased utilization of credit cards" did not carry Plaintiffs' *Comcast* burden because the assumptions were not supported by evidence "as to most or even any of the EDD cardholders' experience" and therefore does not produce a reliable "measure[] [of] damages across the entire class." ECF 494 at 87-88 (citing *Comcast*).

The Opposition argues that the Court only rejected Regan's "Methodology 2," not his "Methodology 1." Opp. 11. True, but the only evidence Plaintiffs furnish goes to the rejected Methodology 2, which proposed to measure consequential damages based on the cost of credit-card borrowing (ECF 494 at 88). *See* MSJ 17-20; ECF 567-1, 565-1, 566-1 (motions to strike Regan, East, and Levine). Methodology 1 was a generalized proposal to award class members damages based on an "interest rate that reflects the 'time value of money.'" ECF 494 at 86. That is not what Plaintiffs' experts propose to measure here. *See* MSJ 17-20; ECF 565-1, 566-1, 567-1.

Plaintiffs proffer *Van* in support of their damages methodology, but the *Van* court explicitly stated that it did not consider and made no determination whether plaintiff made a sufficient evidentiary showing to prove damages. 962 F.3d at 1165 & n.3. Further, plaintiffs there claimed damages on what they could have earned if refunded sales tax had been placed in an "interest-bearing asset." *Id.* at 1165. That is not what Plaintiffs are alleging and trying to prove here. Instead, they seek damages based on purported expert opinions regarding costs of credit-card borrowing based on their assumption (not evidence) that every class member borrowed that way. *See* MSJ 17-20. The Court's rejection of that methodology makes those opinions immaterial (and due to be excluded). *See* ECF 565-1; 566-1, 567-1.

Separately, the class certification ruling cannot properly be read as a preemptive ruling on summary judgment. The Court found Methodology 1 sufficient to carry Plaintiffs' burden at the certification stage only by determining that "BANA does not dispute Methodology 1." ECF 494 at 86. At this posture, however, it is very much in dispute. And the Court based its certification ruling on the premise that the only thing in dispute is "the interest rate used," and "which interest rates should be applied is an issue for the factfinder, not a determination to be made at class certification." *Id.* At summary judgment, however, Plaintiffs must provide evidence to support the use of *any* interest rate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986). And Plaintiffs' sole "evidence" is the credit-card rate pertinent only to the methodology the Court rejected, and continues to rely on the assumption that every class member actually borrowed at and paid that rate. *See* ECF 494 at 88.

Moreover, Plaintiffs must not merely evidence a figure—they must evidence it classwide. *Comcast*, 569 U.S. at 34-35. Plaintiffs are wrong twice over that they can rely 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)." Opp. 13. Substituting generalizations for evidence is *not* a permissible damages methodology, and variations in individual damages preclude classwide relief in this exact circumstance: when the plaintiff does not have a damages methodology to account for them. *See Comcast*, 569 U.S. at 34-35. The cases Plaintiffs cite do not license their effort to propose a uniform damages methodology for class members in extremely heterogeneous circumstances.

Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017), is a class-certification decision that says nothing about whether Plaintiffs can rely on "generalizations" in lieu of evidence about class members' actual damages. The Ninth Circuit did not conclude that "class member's individual experiences" can be replaced by "generalizations about the relevant population's economic behavior," and Plaintiffs notably have no citation for this assertion. Opp. 13. *Briseno* merely held that the plaintiffs' inability to identify all class members at certification did not transgress the "defendant's due process rights," in particular because—under the unique facts of that case—each class member suffered the same damages (they paid the same inflated price for a product). 844 F.3d at 1132.

Hartley v. Dillard's, Inc., 310 F.3d 1054 (8th Cir. 2002), is even further afield. It was not a class action but an individual employment discrimination case where the parties disagreed over whether "declining profits [] justif[ied] Hartley's termination." *Id*. at 1058-60. Whether a jury could consider an expert's testimony on the financial problems of malls nationwide when evaluating whether the plaintiff's "firing was pretextual," *id.* at 1058, says absolutely nothing about whether it is permissible to base a class-wide damages methodology on "generalizations about national trends."

Meanwhile, Plaintiffs have no response to the authorities BANA cited rejecting classwide damages methodologies that fail to account for heterogeneity. *E.g.*, *Opperman v. Path, Inc.*, 2016 WL 3844326, *24 (N.D. Cal. July 15, 2016) (rejecting damages model that failed to account for "variation across individual[]" class members and therefore "would overcompensate some class members, while undercompensating others").[1] At the end of the day, the sum total of Plaintiffs' evidence on consequential damages consists of irrelevant expert opinions on what it might have cost to incur credit-card debt followed by a factually and legally groundless argument that the Court should award that sum in damages, just because.

C. Plaintiffs Fail to Evidence Causation.

Plaintiffs' burden is not merely to evidence damages, but to evidence a causal link between those damages and the specific EFTA violations they allege. *See* MSJ 21-24. Plaintiffs allege that the specific EFTA violation consists of denying transaction disputes based on CFF-1, but they fail to show that their alleged damages were the "result" of this, for multiple reasons. 15 U.S.C. § 1693m(a)(1).

First, they have no classwide evidence that the outcome of using CFF-1 was uniformly *wrong*. When CFF-1 led to a *proper* denial, there is no resulting "actual damage": consumers are not harmed by proper outcomes. *See* MSJ 21. Plaintiffs' only counterargument is that "fraudsters in the class . . . could easily be excluded from any damages calculation." Opp. 16. But the burden to figure out how to exclude them from the damages calculation rests on Plaintiffs, and their only method for accomplishing this is to foist the burden onto BANA. *See* MSJ 21-22; ECF 567-1 at 10-13. The headline of their argument accuses BANA of "ignor[ing] EFTA's burden-

[1] *See also, e.g.*, *Medlock v. Taco Bell Corp.*, 2015 WL 10791410, *5 (E.D. Cal. Dec. 11, 2015) (rejecting damages methodology based on "aggregate [] figures . . . instead of the actual rates" applicable to the class members); *In re Flash Memory Antitrust Litig.*, 2010 WL 2332081, *10 (N.D. Cal. June 9, 2010) (rejecting methodology that "look[s] only at an *average price trend*," ignoring "individual variances"); *Reed v. Advoc. Health Care*, 268 F.R.D. 573, 590-91 (N.D. Ill. 2009) (collecting cases rejecting "reliance on averages" to estimate classwide damages without evidence that "all members of the proposed class suffered" the same harms).

shifting framework." Opp. 14. There is no burden-shifting framework. Plaintiffs made it up: they cite no case recognizing such a thing and never return to this theory.

Second, many class members avoided harm altogether by availing themselves of the opportunity BANA offered [redacted]. *Supra* § I.A. *Every* class member had that opportunity, and the ones who failed to take it cannot claim damages "result[ing]" from the filter—their only damages are the "result" of their own inaction. *See* MSJ 21-22 (citing cases); *see also id.* 23-24 (citing cases precluding trebling where plaintiffs failed to mitigate). Plaintiffs assert that "whatever 'reconsideration' process the Bank offered is legally immaterial." Opp. 15. Plaintiffs cite no authority for this proposition and ignore the authority BANA cited to the contrary. Their fallback is to argue that the efficacy of the reconsideration process is "disputed" because consumers allegedly had trouble getting their accounts "authenticated with EDD" or spent too long on hold. *Id.* 15-16. But it is undisputed that the class contains [redacted] faster than the statutory requirement. *See supra* § I.A. Further, any problems consumers experienced with EDD are the "result" of EDD's processes, not BANA's. Even if there are class members who [redacted]—something Plaintiffs have not evidenced—class members who [redacted] cannot claim damages as a "result" of a process they left unpursued.

D. Plaintiffs Fail to Evidence Bad Faith for Treble Damages.

Lastly, Plaintiffs do not satisfy the statutory requirements to treble any damages, apart from their failure to evidence them in the first place. *See* MSJ 22-26. Trebling requires a degree of bad faith no reasonable jury could find on this record.

Plaintiffs say that rescission was intentional to try to salvage their claim for the Credit Rescission Class, but the argument relies on nothing more than a deliberate mischaracterization or ignorance of the evidence they proffer. *See* RSUF 104-06, 108; *see also* RSUF 149. For example, Plaintiffs cite PX 20, but it clearly states (at 248:11-15) that "paid claims" were "accidentally reversed." Plaintiffs cite PX 64, but it plainly reflects [redacted]. Because no material facts can dispute BANA's sworn testimony and contemporaneous records establishing that the rescission was simply a coding mistake, treble damages are not available on this claim. *See* MSJ 22, 26.

As to the Claim Denial Class, recall that this case began with a complaint that BANA was "either unwilling or unable to stop criminals . . . from siphoning off millions of dollars" in fraudulent transactions. *Yick v. Bank of Am., N.A.*, No. 21-0376, ECF 1 ¶ 1 (N.D. Cal. Jan. 14, 2021). Against this background, and the evidence that the CFF was implemented in response to fraud patterns observed by BANA's antifraud experts, BANA's "reasonable basis" for believing the subject transactions were suspect is beyond dispute. *See* MSJ 24-25. Plaintiffs do not dispute the evidence of rampant fraud and pandemic challenges, but declare it all "immaterial"—as if the black swan event that was the pandemic was business-as-usual. *See, e.g.*, RSUF 46-55, 57-63, 67-69; *see also id.* 75, 77-78, 80-81; *infra* § VII.B. Plaintiffs then note that "Bank [redacted] (Opp. 17), but there is nothing unreasonable, much less in bad faith, about [redacted]. Plaintiffs insinuate BANA was only concerned "for itself," but concede it was [redacted] too—a laudable purpose, not a culpable one. *Id.* 18. None of this is *evidence* of bad faith.

Plaintiffs further accuse BANA of "having done no analysis on the accuracy or reliability of CFF-1 in identifying fraud." Opp. 17. But the record evidence of the fraud—particularly benefits and ATM fraud—that BANA's antifraud experts observed is not genuinely disputed, as is BANA's good-faith belief that the CFF's indicators were [redacted] of such fraud. *See, e.g.*, RSUF 46-55, 57-69, 75, 77-85, 92, 94; *see also infra* § VII.B. Plaintiffs conclude by claiming that the [redacted] for the Credit Rescission Class yielded [redacted] "overturn rate" that BANA decided [redacted]. Opp. 19. But this argument rests on hindsight, and Plaintiffs have no supporting evidence—other than BANA's [redacted]—that the initial decision was wrong or unsupported. *Supra* § I.C; *see also infra* § VII.B. In any event, "subsequent remedial measures" cannot be deemed "culpable conduct." FED. R. EVID. 407. BANA's decision to be just as "aggressive" in correcting potential mistakes as in combatting the frauds in the first place is laudable, not culpable.

II. Plaintiffs Cannot Establish a Violation of the CCPA or Resulting Harm.

Plaintiffs' CCPA arguments failed to show a material dispute as to the existence of a duty to implement EMV chips, or that any alleged harm was caused by the absence of a chip or unreasonable or willful conduct by BANA.

Plaintiffs do not dispute that no statute, regulation, or rule explicitly required BANA to issue prepaid UI cards with EMV chips. MSJ 27. Nor do they dispute that BANA's contract with EDD only required cards to be issued with "ISO 7811-compliant high coercivity magnetic strip[es]," or that the cards issued by BANA met that requirement. *See id.*; RSUF 11, 13. Nor does the Opposition address the fact that the CFPB advised *after* BANA and EDD entered into the agreement that EMV chips *were not required* on *any* type of card. *See* RSUF 232A (immaterial response).

Instead, Plaintiffs claim that the motion to dismiss order held that a failure to include EMV chips violated the CCPA. *See* Opp. 26. But the Court simply allowed discovery on the issue, and it confirmed that Plaintiffs cannot support their claim. *See* ECF 126 at 25-26. Critically, Plaintiffs cite no material facts showing what other companies did with respect to prepaid cards. *See Razuki v. Caliber Home Loans, Inc.*, 2018 WL 6018361, *1 (S.D. Cal. Nov. 15, 2018) (claim concerning "reasonable security procedures" failed because no allegation that "security measures [were] unreasonable by comparison to what other companies are doing"). Rather, they rely on their expert Cloninger, who claims that EMV chips were industry standard. *See* RSUF 232-34; ECF 652-2 (AF) 111.[2] But Cloninger opined only that EMV chips

[2] Plaintiffs submitted the AF in direct violation of the Court's explicit rules regarding factual statements and ECF 560, with no request for an exception. The Court should not countenance their disregard of the rules by considering the AF.

were industry standard for credit and non-prepaid debit cards. *See* PX 2 ¶¶ 47-56. And the materials Plaintiffs rely on support only that limited opinion.[3]

To the extent Cloninger argues that prepaid cards do not merit their own classification, her unsupported opinion is refuted by undisputed facts. In 2019 and 2020, *the majority (65%-74%) of in-person prepaid transactions were completed without an EMV chip.* RSUF 233 (immaterial response). This is in stark contrast to the purported 99% of transactions on Visa *credit and debit cards* that Cloninger claims were EMV-chipped (*see* PX 2 ¶ 54)—confirming that prepaid cards were handled differently. On this record, Plaintiffs cannot show that EMV chips were "industry standard" for prepaid cards. Their cases do not help them either. Opp. 27-28. Neither addresses industry standards concerning "reasonable security procedures," which is the standard under the CCPA. Cal. Civ. Code § 1798.150(a)(1).

Plaintiffs also offered no material facts to establish that the purported stealing of PII and passcodes or the disputed ATM transactions were *actually caused* by the lack of an EMV chip. MSJ 28-29. Plaintiffs do not dispute that a PIN was required to use an EDD card at an ATM. RSUF 246; *see also* MSJ 28; Opp. 30. Plaintiffs also do not dispute that [redacted]. RSUF 247-48; MSJ 28.[4] Nor do they dispute that account information can also be [redacted]. *See* RSUF 244-45. Thus, Plaintiffs cannot show as a matter of law that the magstripe resulted in the combination of their PII and passcode being stolen—as required under the CCPA. Cal. Civ. Code §§ 1798.150(a)(1), 1798.81.5(d)(1)(A). Moreover, Plaintiffs have no facts that could prove that the magstripe was the actual

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[3] The BANA documents Plaintiffs cite (*e.g.*, PX 171) [redacted]. *See* RSUF 232-34. The 2014 Executive Order they cite concerned cards for certain federal benefits payments, not prepaid cards for state and UI benefits. Exec. Order No. 13681, 79 F.R. 63491 (Oct. 23, 2014). *After* that order was issued, (1) EDD issued an RFP and entered into an agreement with BANA that *did not require* EMV chips, and (2) the CFPB explicitly stated that EMV chips were not required in any type of card. *See* RSUF 11, 13, 232A.

[4] The Opposition is internally inconsistent, but Plaintiffs ultimately concede (as they must) that [redacted]. *See* Opp. 31; RSUF 247-48 (conceding that a separate device or act is required to capture a PIN).

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cause of anyone's alleged harm (*i.e.*, the disputed ATM transactions). MSJ 29.

Finally, summary judgment should be entered on Plaintiffs' statutory damages claim because Plaintiffs cannot establish that BANA acted unreasonably or willfully. MSJ 29. Plaintiffs do not dispute that BANA complied with the EDD agreement. RSUF 11-13. Plaintiffs claim that bad faith can be inferred because EDD later opined in a March 2021 email (PX 201) and 2025 testimony that [redacted]. Opp. 28 n.11. But there is no evidence that EDD informed BANA of [redacted], and contemporaneous documents and testimony show that [redacted]. *See, e.g.*, RSUF 14-15. Plaintiffs also claim that bad faith can be inferred because BANA noted the potential costs of implementing EMV chips. Opp. 31, 47-48. This makes no sense because the CFPB explicitly advised that expenses were something card providers *could consider*. MSJ 27-28; RSUF 232A. Further, the cost-benefit analyses that Cloninger conducts for her own clients consider precisely that: *costs*. *See* ECF 563-1 at 2-3. In any event, contemporaneous evidence indisputably shows EMV discussions were put on hold due to the massive expansion of the UI program and pandemic challenges (not costs), and that BANA and EDD [redacted]. *See* RSUF 235-40; *see also id.* 34-42.[5]

III. Plaintiffs Cannot Recover on Their Negligence Claims.

Plaintiffs' negligence arguments fail on the law and the facts. On the law, Plaintiffs ask this Court to apply special relationship factors to avoid the economic loss rule despite the California Supreme Court's holding in *Sheen* that the factors "*do*[] *not apply* when the plaintiff and defendant are in contractual privity for

[5] Statutory damages also are not available because Plaintiffs did not provide sufficient notice of their EMV-related CCPA claim. Plaintiffs cite PX 258, but offer no evidence that BANA actually received the alleged notice. *See* Opp. 31. PX 258 also did not explicitly state Mathews' or Oosthuizen's basis for their CCPA claim, nor did it demand that EMV chips be added. In any event, it is undisputed that BANA and EDD agreed to add EMV chips in March 2021, curing the EMV allegations weeks before Plaintiffs filed their amended complaint. *See* RSUF 238-39.

purposes of the suit at hand." *Sheen v. Wells Fargo Bank, N.A.*, 12 Cal. 5th 905, 937 (2022) (emphasis added). Plaintiffs do not dispute contractual privity, but say that this case falls within one of the "two circumstances" that "*Sheen* expressly carved out" from the economic loss rule. Opp. 37. Plaintiffs are wrong.

First, Plaintiffs say that *Sheen* recognized that "a duty of reasonable care may arise through statute," clearing the way for Plaintiffs' negligence per se claim based on the CCPA and GLBA. Opp. 37. Plaintiffs have no evidence of a CCPA breach or resulting harm. *Supra* § II. As Plaintiffs concede, the GLBA requires only that a financial institution have an appropriate information security program. *See* Opp. 38 (citing 16 C.F.R. § 314.3). Plaintiffs' only evidence that BANA did not meet this requirement is Cloninger's unsupported opinion that EMV chips were "industry standard" for prepaid cards. *Id.* (citing PX 2); *supra* at 12-13. Plaintiffs cite no case holding that the GLBA requires either EMV chips *or* adherence to purported "industry standards," and they do not dispute that BANA both had and complied with an information security program. *See* RSUF 249 (non-responsive counter).

Second, Plaintiffs say this case is analogous to the insurance and professional services contracts that *Sheen* excepted from the economic loss rule because BANA was the "exclusive distributor of California UI benefits." Opp. 38. That is false; benefits recipients could and did receive benefits via paper check. RSUF 2 (conceding beneficiaries could "contact EDD to request paper checks instead of using the Bank-issued EDD debit card"). This does not give rise to a material dispute either.

Plaintiffs' negligence claims also fail because they cannot identify any recoverable harm. Plaintiffs provide no citation or explanation for the purported "disputes of fact" as to "recoverable damages" on the negligence claims. Opp. 38-39. BANA has already paid class members their "EDD benefits" and "[redacted]," which is all Plaintiffs seek on these claims. TAMCC ¶ 592; RSUF 168. The Opposition also identifies no material dispute on the availability of restitutionary disgorgement. Plaintiffs' reliance on *Alkayali v. Hoed*, 2018 WL

3425980 (S.D. Cal. July 16, 2018), for the proposition that disgorgement is "available for breach of contract" (Opp. 34) is inapposite because the Court did not certify any classes on the contract claim.[6] Their attempt to distinguish *Gerlinger v. Amazon.Com, Inc.*, 311 F. Supp. 2d 838 (N.D. Cal. 2004), relies on splitting hairs about the difference between disgorgement as a remedy for "a quasi-contract claim for unjust enrichment" and "disgorgement as a remedy for . . . common law tort claims." Opp. 35 n.15. The justification supporting *Gerlinger*'s holding that "[a] plaintiff may recover for unjust enrichment *only* where there is *no contractual relationship* between the parties" is the same reason underlying the economic loss rule. 311 F. Supp. 2d at 856 (emphasis added). "[A]n action in quasi-contract is inappropriate" where "a valid express contract covering the same subject matter exists between the parties." *Id.* This same reasoning precludes Plaintiffs' negligence claims seeking recovery of unjust enrichment. In any event, there is no dispute that Plaintiffs lack evidence of profits to disgorge. *See* MSJ 34; ECF 567-1 at 23-25; ECF 564-1 at 22-24.

IV. There Is No Material Dispute That Plaintiffs' Implied Duty Claim Fails.

The Opposition's arguments for the implied duty claim fail for similar reasons. Plaintiffs do not explain what damages are available beyond what they concede they already received. *See* Opp. 35 (claiming "fact disputes" on damages but identifying none). Plaintiffs' argument that there "is a question of fact" as to whether the implied covenant was breached (Opp. 35) fails for the same reason their pleas for treble and punitive damages fail: Plaintiffs lack actual evidence of a "*conscious* and *deliberate* act." *Beatty v. PHH Mortg. Corp.*, 2021 WL 6116957, *6 (N.D. Cal. Dec. 27, 2021); *see supra* § I.D, *infra* §§ VII-VIII. Finally, it is *Plaintiffs* that misread *Haggarty v. Wells Fargo Bank, N.A.*, 2012 WL 4742815 (N.D. Cal. Oct. 3, 2012). Plaintiffs

[6] Plaintiffs argue that claims they alleged but did not seek to certify or prove should nonetheless survive, but offer no case law in support. Opp. 32 n.14. They attempt to distinguish *Abbit*, but this Court granted summary judgment on the uncertified claim in that case too. *See Abbit v. ING USA Ann. & Life Ins. Co.*, 2016 WL 4542204, *4-5 (S.D. Cal. Aug. 39, 2016); *see also* MSJ 27 n.7 (citing cases).

attempt to draw a distinction between contracts that offer a party the "power to refrain from acting act all" (where they concede the covenant *does not* apply) and contracts that offer a party the "power to exercise discretion" (where they say the covenant *does* apply). *See* Opp. 36. But *Haggarty* turned on whether the discretion afforded by the contract is "express," complete, or unfettered, *regardless* of whether the contract allows the party to act or refrain from acting. *Id.* *5-6. "[T]he implied covenant of good faith and fair dealing does not override [an] express grant of plenary discretion." *Id.* There is no dispute that the Account Agreement expressly grants BANA unilateral discretion to freeze accounts. RSUF 28-29 (claiming "dispute" of facts, but stating no challenge to the Account Agreement's freeze provisions). For this independent reason, the implied covenant claim cannot be sustained by the Account Freeze Class.

V. There Is No Material Dispute on the Fiduciary Duty Claim.

Plaintiffs' arguments for the fiduciary duty claim also fail to raise a material dispute. Most obviously, there is nothing left that Plaintiffs can receive. Plaintiffs say "there are fact disputes about the amount of any set-off" of damages on this claim (Opp. 34), but identify none. Their claims for disgorgement and punitive damages fail for the reasons discussed above (§ III) and below (§§ VII-VIII).[7]

Plaintiffs further concede that no duty exists absent evidence that BANA provided "specifically fiduciary services" or entered into a "special relationship" under *Wallis v. Superior Ct.*, 160 Cal. App. 3d 1109, 1118 (1984). *See* MSJ 37; Opp. 33. The undisputed evidence shows no such relationship existed. Plaintiffs suggest that the "Trust Account" established pursuant to the EDD Agreement was maintained "for the cardholders." Opp. 33 (purporting to quote DX 39 at -2518). But the EDD Agreement includes no such language and explicitly states (as BANA represented) that the "Trust Account" for EDD prepaid funds would be used "[f]or the purpose of calculating [EDD's] revenue share." SUF 20.[8] On the special relationship factors,

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[7] Plaintiffs' cases allowing disgorgement in fiduciary cases are irrelevant. *See* Opp. 34. Neither involved claims where there was an express contract between the parties.

[8] Plaintiffs' brief appears to be quoting their own language from RSUF 20, not the

Plaintiffs do not dispute that every EDD cardholder had the right to refuse BANA's services and receive their benefits via paper check, [redacted]. *See* RSUF 2-3.

VI. Plaintiffs' Due Process Claims Must Fail.

A. BANA Was Not a State Actor.

Plaintiffs fail to show a material dispute under the state actor tests. On public function, Plaintiffs emphasize that BANA had the "exclusive" right to provide "*electronic* benefits payment service for EDD." Opp. 21 (quoting ECF 126 at 69). Plaintiffs' own emphasis belies the fatal flaw: BANA was *not*, as Plaintiffs alleged, the exclusive provider of benefits, but only of *electronic* benefits—as EDD also made benefits available via paper check. RSUF 2. Further, Plaintiffs do not dispute that [redacted]. RSUF 144-47 ([redacted]).[9] Plaintiffs ask the Court to ignore *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), on the grounds that BANA "distributed *public benefits* to *state beneficiaries*," Opp. 21, n. 7, but that is irrelevant. There, as here, the respondents challenged a government contractor's discretionary decision—specifically, a workers' compensation insurer's determination that treatment was "reasonable and necessary." *Sullivan*, 526 U.S. at 56-57. BANA's determination to temporarily freeze certain bank accounts bearing reasonable indicia of fraud similarly falls within its "traditionally private prerogative." *Id.* at 57.

On joint action, Plaintiffs have no response to the fact that their failure to sue EDD suggests the *absence* of joint action. MSJ 39. Plaintiffs say EDD "facilitated" the account freezes by "[redacted]" (Opp. 22), but Plaintiffs do not challenge EDD-directed freezes: their class

EDD Agreement (DX 39)—which speaks for itself.

[9] *Cahoo* is inapposite because, unlike here, the Michigan benefits recipients in that case had no other option to avoid "the State's robo-fraud-detection system" and the vendors that administered it. *Cahoo v. SAS Inst. Inc.*, 322 F. Supp. 3d 722, 784, 793 (E.D. Mich. 2018), *aff'd in part, rev'd in part on other grounds*, *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887 (6th Cir. 2019). *Cf.* RSUF 2 (beneficiaries could get benefits via "paper checks").

definitions *exclude* cardholders whose accounts were restricted at EDD's direction. *See* ECF 494 at 97. Plaintiffs further say [redacted] (Opp. 22), but the evidence is the opposite—an EDD representative testified that [redacted], as the Account Freeze Class Representatives' own facts confirm. *See* RSUF 136 (identifying fact as "[d]isputed" but failing to dispute testimony or [redacted]), 144-47 ([redacted]).

B. Cardholders Received All Procedural Protections Potentially Due.

Setting aside the threshold failure, Plaintiffs also failed to show a material dispute as to the merits of their claim. As explained *supra* § I.D, the use of CFF-1 to rescind credits was a mistake, and Plaintiffs do not dispute that a mistake cannot support a due process violation. *Robledo v. Bautista*, 2023 WL 35026, *5 (D. Ariz. Jan. 4, 2023), *aff'd* 2025 WL 1202216 (9th Cir. Apr. 25, 2025).

Plaintiffs do not dispute that the Court has already recognized that "BANA, acting on behalf of the State of California, obviously has a strong interest in preventing fraud." ECF 126 at 73; *see* MSJ 42. Nor do they address the Ninth and Fifth Circuit holdings that the government's interests in preventing fraud and protecting public confidence in the banking system were sufficient to overcome the general requirement of a pre-deprivation hearing and notice. *See* MSJ 42-43. Indeed, Plaintiffs do not dispute—and in fact, themselves quote—the Supreme Court's language in *Mallen* that pre-hearing deprivation can be appropriate where "there is little likelihood that the deprivation is without basis" and a "substantial assurance that the deprivation [was] not baseless or unwarranted." Opp. 23-24 (quoting *FDIC v. Mallen*, 486 U.S. 230, 244-45 (1988)). Plaintiffs quibble over whether BANA's reasons for taking the actions it did were "sufficient[]." Opp. 23. But they do not, and cannot, suggest that the challenged deprivations were "without basis" entirely, which is the relevant question under *Mallen*. 486 U.S. at 244-45.

Plaintiffs also cite no cases that support that BANA's post-deprivation procedures were inadequate. Opp. 25-26.[10] Indeed, Plaintiffs do not dispute the key facts: [redacted]. *Id.*[11] On these facts, there is no material dispute that the post-deprivation procedures were sufficient to satisfy constitutional requirements.

VII. Plaintiffs Cannot Obtain Punitive Damages Under California Law.

A. Plaintiffs Misread § 3294(b), and Ignore § 3294(a).

Plaintiffs concede that to proceed with their request for California punitive damages, they must provide "clear[] and convincing[]" evidence that BANA's actions were "malicious" or "oppressive." Opp. 39; Cal. Civ. Code § 3294(a).[12] Plaintiffs do not dispute that the "despicable conduct" required to establish malice or oppression is "conduct that is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people" and has "the character of outrage frequently associated with crime." *Johnson & Johnson Talcum Powder Cases*, 37 Cal. App. 5th 292, 332-33 (2019) (internal quotations omitted); MSJ 45. Nor do they dispute that malice requires "*more* than a willful and conscious disregard of the plaintiff[s'] interest." *Coll. Hosp. Inc. v. Superior Ct.*, 8 Cal. 4th 704, 708 (1994) (emphasis added); MSJ 45.

Plaintiffs further do not dispute that California's statute has *two* subsections, both of which must be satisfied. *See* Opp. 48-50. Cal. Civ. Code § 3294(a) details the

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[10] The only legal cite in this section of Plaintiffs' brief is Plaintiffs' attempt to distinguish *Altheide v. Klenczar*, 2019 WL 3413845 (D. Nev. July 29, 2019). Opp. 25 n.9. Plaintiffs concede that *Altheide* "holds that a third-party vendor's actions cannot be attributed to the State." *Id.* But in Plaintiffs' argument, *BANA is the State*. As such, a third party's (EDD's) failure to timely authenticate accounts cannot support a due process claim against BANA.

[11] In making this argument, Plaintiffs equate [redacted] (which BANA could do) with [redacted] (which BANA has never been able to do). There is no evidence to support this false equivalence. *See, e.g.*, RSUF 118 (responding to fact about [redacted]) (emphasis added).

[12] California also makes punitive damages available for "fraud," but Plaintiffs make no argument that BANA engaged in fraud.

requisite scienter—malice or oppression. Cal. Civ. Code § 3294(b) places a further limitation on punitives in cases against a "corporation," allowing them only when the malice or oppression was "perpetrated, authorized, or knowingly ratified by an officer, director, or managing agent." ECF 487 at 10; *see also McNutt v. Veolia Transp. Servs., Inc.*, 2010 WL 11507371, *3 (C.D. Cal. Feb. 1, 2020) (in case against "a corporate employer," "Plaintiffs must meet two elements for their request for punitive damages"); *MV Universal, LLC v. Unisys Corp.*, 2013 WL 12142616, *2 (C.D. Cal. Jan. 2, 2013) (same). Plaintiffs have no material facts to satisfy either.

Recognizing that the evidence flatly refutes their theory that BANA's highest executive officers personally approved the fraud filter (MSJ 46-49), Plaintiffs suggest they need not substantiate § 3294(b) because they "challenge a series of Bank *policies*," rather than "isolated acts." Opp. 49. This directly contradicts the Court's finding, based on *Plaintiffs'* prior arguments, that evidence in support of punitive damages "can only be obtained" from BANA's CEO and former CFO. ECF 487 at 3. Regardless, Plaintiffs are wrong. There is no "corporate policy" exception to 3294(b), nor do Plaintiffs' cited cases support one here. The products liability cases cited by Plaintiffs show only that courts have found evidence to support punitive damages where *long-standing* corporate policies *resulted in death*. *See* Opp. 48-49.[13] No such facts exist here. Indeed, the deliberate design of a vehicle to rollover and a decades-long coverup of cancer risk are far afield from the short-lived fraud strategy developed in response to a black swan event that Plaintiffs challenge in this case. Plaintiffs' insurance cases are equally distinguishable; BANA indisputably was not the *insurer* of class members' benefits. *See* Opp. 49 n.27; RSUF 1.

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[13] In *Romo v. Ford Motor Co.*, a car manufacturer sold a car with "a known propensity to roll over and, while giving the vehicle the appearance of sturdiness, consciously decid[ed] not to provide adequate crush protection to properly belted passengers." 99 Cal. App. 4th 1115, 1141 (2002). Similarly, in *Lannes v. CBS Corp.*, asbestos manufacturer "would have known *in 1936* that asbestos can cause the disease asbestosis," but nonetheless "failed to attach any warnings about the presence or dangers of asbestos in its products *until the 1980s*." 2013 WL 21225425, *5-6 (C.D. Cal. Jul. 3, 2013) (emphasis added).

Plaintiffs' new theory that *other* BANA employees are "managing agents" under § 3294(b) is of no help and, again, is flatly inconsistent with their apex deposition position. There is no evidence that *anyone* at BANA acted with the malicious or oppressive intent required by § 3294(a). *See* Opp. 49-50. Plaintiffs argued that they could only get such evidence from Moynihan and Montag. *See* MSJ 46. But their testimony disproved Plaintiffs' speculation, so now Plaintiffs seek to dismiss the explicit testimony from Moynihan and Montag that [redacted]. *See* RSUF 110-113 (identifying facts as "[d]isputed" but not challenging underlying testimony). Plaintiffs pivot and claim *eight* other employees were sufficiently "high level" to satisfy § 3294(b), but they offer no evidence that any of them intentionally engaged in the "despicable conduct" required to establish malice or oppression under § 3294(a) either. *See Johnson*, 37 Cal. App. 5th at 332-33; MSJ 46-49; *infra* § VII.B.

B. Plaintiffs Misdirect, But Identify No Material Dispute.

Plaintiffs ignore or declare irrelevant BANA's undisputed facts that demonstrate Plaintiffs cannot get punitives. Opp. 39-50; *cf.* MSJ 46-49.

CFF-1. Plaintiffs' argument that the use of CFF-1 to rescind permanent credits was intentional is unsupported. *Supra* § I.D. It was a mistake, and Plaintiffs do not dispute that "a mistake . . . cannot support punitive damages." *Chamberlin v. Hartog, Baer & Hand, APC*, 2022 WL 1502587, *7 (N.D. Cal. May 12, 2022). Further, even if there were a dispute as to whether the rescission was a mistake (and there is not), Plaintiffs have no evidence that the purported decision was made with the requisite scienter, much less that it was made by a BANA managing agent with such intent.

As to the Claim Denial Class, it is undisputed that: (1) the CFF was put in place during a once-in-a-lifetime pandemic to stem unprecedented fraud attacks; (2) BANA's antifraud experts believed and represented that the CFF would likely be [redacted] at identifying fraud; (3) [redacted] supported this; and (4) BANA implemented procedures to balance interests of legitimate cardholders. *See* MSJ 46-47. Plaintiffs do not engage with *any* of these dispositive facts or the evidence supporting them. Instead, they declare any fact that does not support their narrative "immaterial" or "disputed" because they claim BANA was also concerned about its own fraud losses and costs and therefore [redacted]. *See* Opp. 40-46; *see also e.g.*, RSUF 46-55, 57-69, 75, 77-79, 80-93. But concerns about losses does not, itself, show malice.[14] Nor does it obviate BANA's concerns about stemming the criminal infiltration of the EDD program and BANA's claims process—which of course are material to determining BANA's intent, and are also undisputed. *See* RSUF 46-55, 57-69, 75, 77-79, 80-93.

Plaintiffs next claim that the information BANA's antifraud experts considered was not good enough. Opp. 43-44. But they cannot meaningfully dispute that [redacted] and that BANA believed [redacted].[15] Plaintiffs argue that the CFF was "[redacted]," Opp. 42,[16] but the relevant question for punitive damages is BANA's intent *at the time the challenged decisions were made*, not whether the CFF turned out to be accurate after the fact. *Bookhamer v. Sunbeam Prods., Inc.*, 913 F. Supp. 2d 809, 820 (N.D. Cal. 2012) (denying punitive damages absent evidence of intent "during the time period" of challenged conduct). The argument also ignores that tens of thousands of [redacted] and that BANA still has no way of determining whether [redacted].[17] RSUF 149, 153-61, 178-83.

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[14] Plaintiffs paint profit as the principal motivator for CFF-1, but that narrative is belied by the record (including the documents Plaintiffs cite) which reflects [redacted]. *See, e.g.*, RSUF 56, 77-79, 98, 111.

[15] *See* RSUF 65, 81, 82. 83, 84, 85, 92, 94.

[16] Plaintiffs cite PX 227 for [redacted] *See* Opp. 42; RSUF 100-101.

[17] Plaintiffs' nonresponsive counter to RSUF 179 can be disregarded. It ignores that Pry did consider [redacted] (DX 9.A at

To the extent Plaintiffs argue that punitive damages should be available because CFF-1 may not have fully complied with EFTA (Opp. 40-44), the standard for punitive damages requires them to show far more. *Cf. Bigge Crane & Rigging Co. v. Workers' Comp. Appeals Bd.*, 188 Cal. App. 4th 1330, 1349 (2010) ("[t]he mere failure to perform a statutory duty is not, alone, willful misconduct"). Plaintiffs' purported "disputes" do not undermine BANA's evidence, which establishes the *absence* of the required despicable, malignant, or quasi-criminal conduct. *See Johnson*, 37 Cal. App. 5th at 332-33.

Call centers. The Opposition cites no evidence that there was any direction from a BANA managing agent to extend wait times. Plaintiffs do not even dispute—with *facts*—Ehresman's explanation that [redacted] (RSUF 223) or Ahmad's testimony that [redacted] (RSUF 224). Plaintiffs just say BANA's evidence of the absence of bad intent is immaterial and refer the Court to their own expert's irrelevant and inadmissible state of mind testimony. *See* ECF 564-1 at 24-25. Plaintiffs' refusal to engage with the challenges of the pandemic also demonstrates their inability to satisfy the high standard for punitives. In response to BANA's evidence that [redacted] (SUF 225-26), Plaintiffs state—again, incredibly—that these facts are "immaterial." RSUF 225-226. Plaintiffs' plea for punitive damages requires them to show not just that wait times were too long, but that they were too long because a BANA managing agent engaged in "despicable conduct" to make them so. *Johnson*, 37 Cal. App. 5th at 332-33. Their proffered evidence falls far short.

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n.61). [redacted] *See* DX 31 and 31.A ([redacted]); SUF 179; RSUF 179.

EMV. Like the call centers, Plaintiffs have no evidence that there was any direction from a BANA managing agent not to include EMV chips to save money. *See supra* § II; MSJ 49. Plaintiffs do not dispute that the CFPB explicitly said that financial institutions *could* consider costs in deciding whether to implement EMV chips. RSUF 232A. They offer no explanation for how BANA's purported policy to delay EMV chips due to costs (even if it were true, which it is not) could possibly constitute malice or oppression when the CFPB told financial institutions they could make such a decision. Plaintiffs also ignore the practical challenges that made implementation of EMV impossible at the beginning of the class period with or without EDD approval (and they offer no evidence to dispute BANA's belief that such approval was required). *See supra* § II; *see also* RSUF 237.

VIII. Plaintiffs Cannot Obtain Punitives on Their Federal Due Process Claim.

Plaintiffs concede that their federal punitives plea requires them to show that BANA's actions were driven by "reckless or callous indifference." Opp. 40. The rescission was unintentional (*supra* § I.D), and Plaintiffs do not dispute that federal punitives are "not assessed . . . for mere negligence or mistake." *Aguilar v. Dixon*, 1995 WL 319621, *3 (N.D. Ill. May 25, 1995). And again, Plaintiffs do not actually challenge the facts BANA proffered showing its attempts to balance the interests of potentially legitimate cardholders in the Account Freeze Class. Plaintiffs do not dispute that [redacted] MSJ 50. Plaintiffs argue, instead, that BANA's procedures were not good enough, and [redacted] Opp. 44-46. Again, Plaintiffs' hindsight challenges do not show reckless or callous intent.

CONCLUSION

For each and all of the foregoing reasons, and the reasons stated in the MSJ, summary judgment should be granted for BANA on the aforementioned claims.

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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/James W. McGarry
JAMES W. MCGARRY