Exhibit 1

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED PURSUANT TO STIPULATED PROTECTIVE ORDER

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	No. 3:21-MD-02992-GPC
	January 17, 2025
	Courtroom 2D
	San Diego, California

TRANSCRIPT OF PROCEEDINGS

(MOTION HEARING)

BEFORE THE HONORABLE GONZALO P. CURIEL, DISTRICT JUDGE

COURT REPORTER: JENNIFER GIBSON
CACSR NO. 12802
U.S. District Court
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(Reported by Stenotype; Transcribed by Computer)

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(Friday, January 17, 2025; 1:37 P.M.)

P R O C E E D I N G S

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THE CLERK: MATTER 2 ON CALENDAR, 21-MD-2992, IN RE BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION FOR MOTION HEARING.

THE COURT: APPEARANCES, PLEASE.

MS. CHAN: GOOD AFTERNOON, YOUR HONOR. CONNIE CHAN OF ALTSHULER BERZON ON BEHALF OF CLASS PLAINTIFFS AND THE PROPOSED CLASSES. AND WITH ME TODAY ARE MY COLLEAGUES, MICHAEL RUBIN AND COLIN JONES.

THE COURT: ALL RIGHT. GOOD AFTERNOON.

MR. DANITZ: GOOD AFTERNOON, YOUR HONOR. BRIAN DANITZ OF COTCHETT, PITRE & MCCARTHY FOR PLAINTIFFS.

THE COURT: SAY THAT ONE MORE TIME. DANITZ?

MR. DANITZ: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

MS. BLATT: GOOD AFTERNOON, YOUR HONOR. GAYLE BLATT OF CASEY GERRY ON BEHALF OF THE CLASS PLAINTIFFS.

THE COURT: GOOD AFTERNOON.

MR. McGARRY: GOOD AFTERNOON, YOUR HONOR. JIM MCGARRY ON BEHALF OF THE DEFENDANTS -- DEFENDANT.

THE COURT: GOOD AFTERNOON.

MR. RIFFEE: GOOD AFTERNOON, YOUR HONOR. MATT RIFFEE, ALSO ON BEHALF OF DEFENDANT.

THE COURT: GOOD AFTERNOON.

MS. BRYS: GOOD AFTERNOON. LAURA BRYS, ALSO ON BEHALF OF BANK OF AMERICA.

THE COURT: ALL RIGHT. GOOD AFTERNOON TO YOU ALL. WE ARE HERE ON A MOTION TO CERTIFY CLASS. THE COURTS HAVE REVIEWED THE POSITIONS OF THE PARTIES, AND GIVEN THAT THERE'S SO MANY MOVING PARTS, THE COURT ISSUED A TENTATIVE SO THAT YOU'LL HAVE AN OPPORTUNITY TO ADDRESS ANY PORTION OF THE TENTATIVE THAT YOU BELIEVE REQUIRES FURTHER RESPONSE OR THAT YOU BELIEVE NEEDS CORRECTION. I HAVE A COUPLE OF QUESTIONS BEFORE WE START THAT PROCESS. I BELIEVE THAT THERE'S REFERENCE IN A -- IN A FOOTNOTE AND THAT'S WHETHER THE PLAINTIFFS CAN RAISE THE DUE PROCESS CLAIMS FOR CREDIT RESCISSION CLASS WHEN IT'S NOT RAISED IN THE SECOND-AMENDED MASTER COMPLAINT. AND SO LET ME TURN TO PLAINTIFF'S COUNSEL.

HOW DO YOU PROPOSE THAT WE ADDRESS THAT?

MS. CHAN: YES. THANK YOU VERY MUCH, YOUR HONOR. PLAINTIFFS WOULD REQUEST LEAVE OF COURT TO AMEND OUR COMPLAINT SO THAT WE CAN CLARIFY THAT THE DUE PROCESS CLAIM IS, IN FACT, BROUGHT ON BEHALF OF OUR CREDIT RESCISSION CLASS IN ADDITION TO THE ACCOUNT FREEZE CLASS. AS YOUR HONOR NOTED IN THE TENTATIVE, THE PARTIES HAVE FULLY BRIEFED THAT ISSUE, THE APPLICABILITY OF THE DUE PROCESS CLAIM TO THE CREDIT RESCISSION CLASS, AND SO WE BELIEVE THERE'S NO ARGUMENT THAT THE BANK COULD MAKE THAT THERE WOULD BE ANY PREJUDICE SUFFERED. FOR ALL

THE SAME REASONS THAT THE DUE PROCESS CLAIM APPLIES TO THE ACCOUNT FREEZE CLASS, IT EQUALLY APPLIES TO THE CREDIT RESCISSION CLASS WHO ARE EQUALLY DEPRIVED OF THEIR CONSTITUTIONALLY-PROTECTED PROPERTY IN UNEMPLOYMENT INSURANCE BENEFITS WITHOUT PRE-DEPRIVATION NOTICE AND OPPORTUNITY TO BE HEARD.

THE COURT: AND AT THIS TIME, DOES THE DEFENSE HAVE ANY OPPOSITION TO THAT PROPOSAL?

MR. McGARRY: NO, WE DON'T, YOUR HONOR.

THE COURT: ALL RIGHT. SO WE'LL GIVE YOU A COUPLE OF DAYS OR SO TO FILE THAT AMENDED MASTER COMPLAINT, AND IT WILL BE LIMITED -- AND WE'LL DIRECT THAT THE ADDITIONAL LANGUAGE THAT IDENTIFIES THIS ISSUE BE ADDED TO A ALREADY-EXISTING PARAGRAPH RATHER THAN CHANGING THE NUMBERING BECAUSE THEN ULTIMATELY TO THE EXTENT THAT WE HAVE AN ORDER AND IT KIND OF RELIES UPON THE CURRENT ENUMERATION, WE CAN MAINTAIN THAT. ALL RIGHT?

MS. CHAN: ABSOLUTELY, YOUR HONOR. THANK YOU VERY MUCH.

THE COURT: AND THEN THE NEXT QUESTION I HAD IS KIND OF A SIMILAR ONE, AND THAT'S WITH RESPECT TO THE BREACH OF A FIDUCIARY DUTY CLAIM. AND THERE'S A CLAIM THAT'S ATTACHED TO THE CUSTOMER SERVICE CLASS AND I BELIEVE AT THE PARAGRAPH 12, THE COURT RAISES THE QUESTION OF WHETHER OR NOT THE CURRENT MASTER COMPLAINT SUFFICIENTLY IDENTIFIES THAT AS A CAUSE OF

ACTION AS TO THAT CLASS. AND SO TO THE EXTENT THAT THERE'S ANY DEFICIENCY THERE, ARE YOU PROPOSING ALSO TO AMEND AS TO THAT?

MS. CHAN: THANK YOU AGAIN, YOUR HONOR. WE WOULD AGAIN REQUEST LEAVE TO CLARIFY THAT THE BREACH OF FIDUCIARY DUTY CLAIM IS ALSO BROUGHT ON BEHALF OF THE CUSTOMER SERVICE CLASS. THE CENTRAL ALLEGATION THERE IS THAT THE BANK BREACHED ITS FIDUCIARY DUTY TO THE CLASS BY PRIORITIZING ITS OWN PROFITS OVER THE INTERESTS OF LEGITIMATE CARDHOLDERS AND THAT THEY DID SO IN PARTICULAR BY DELIBERATELY UNDER-STAFFING THEIR CLAIM CALL CENTER THROUGH WHICH ALL CARDHOLDERS WERE REQUIRED TO SUBMIT THEIR CLAIMS AS WELL AS SEEK RE-CONSIDERATION OF THE CLAIMS THAT HAD BEEN DENIED PURSUANT TO THE BANK'S CLAIM FRAUD FILTER.

THE COURT: ALL RIGHT. IS THERE ANY OPPOSITION TO THAT ORAL REQUEST?

MR. McGARRY: OTHER THAN MS. CHAN'S CHARACTERIZATION, NO. NO OPPOSITION.

THE COURT: ALL RIGHT. THE OBJECTION IS NOTED, BUT WE'LL PROVIDE YOU WITH PERMISSION TO PROCEED AND MAKE THAT AMENDED CHANGE AS WELL.

MS. CHAN: THANK YOU, YOUR HONOR.

THE COURT: AND THEN I THINK THIS MIGHT BE BETTER POSED TO THE DEFENSE. AND THAT'S REGARDING THE -- THE REMEDIATION PLAN AND WHETHER OR NOT THE REMEDIATION PLAN WAS

[redacted]

[redacted]

[redacted]

MR. McGARRY: THE REMEDIATION PLAN, YOUR HONOR, WAS BROADER THAN JUST INDICATOR 1.

THE COURT: ALL RIGHT. AND WHERE WOULD THAT BE INDICATED SPECIFICALLY, THAT IT [redacted]?

MR. McGARRY: YEAH, I THINK IF YOU -- IF YOU READ THE PLAN -- AND I DON'T REMEMBER THE SPECIFICS CITE TO THE PLAN, BUT THE PLAN TALKS ABOUT [redacted]. I'M INTENTIONALLY BEING CAUTIOUS BECAUSE WE HAVEN'T DISCUSSED SEALING ISSUES.

THE COURT: ALL RIGHT. WELL, LET'S -- LET'S BRING THAT UP. THERE HAVE BEEN A NUMBER OF SEALED PLEADINGS, SEALED DOCUMENTS, SUPPORTING DOCUMENTS IN THIS CASE, AND WE DID RECEIVE A HEADS UP THAT THERE WOULD BE A REQUEST BY EITHER BOTH PARTIES OR ONE PARTY TO ALSO AFFORD CERTAIN PORTIONS OF THE ARGUMENTS IN A SEALED FASHION; IS THAT RIGHT?

MR. McGARRY: YES, YOUR HONOR. I THINK THE -- THE CONCEPT WOULD BE YOUR HONOR HAS ALREADY RULED THAT CONSIDERABLE AMOUNT OF THE RECORD IS SEALED, AND SO WE WANTED TO RAISE THE ISSUE SO THAT WE COULD COME UP WITH A PROCESS TO MAKE SURE THAT BEFORE A TRANSCRIPT IS MADE PUBLICLY-AVAILABLE, THAT WE HAVE AN OPPORTUNITY TO ESSENTIALLY APPLY THE EXACT LOGIC, THINGS THAT YOUR HONOR HAS ALREADY DEEMED SHOULD BE SEALED TO THE -- THE TRANSCRIPT. AND, ACTUALLY, THE SAME THING WOULD APPLY TO

WHATEVER THE FINAL ORDER ULTIMATELY LOOKS LIKE. THE TENTATIVE OBVIOUSLY DISCUSSES A LOT OF MATERIAL THAT YOUR HONOR HAS PREVIOUSLY FOUND WAS APPROPRIATE TO BE SEALED.

THE COURT: AND SO AS FAR AS THESE PROCEEDINGS HERE IN OPEN COURT WHICH ARE OTHERWISE OPEN TO THE PUBLIC, DO YOU HAVE ANY CONCERNS ABOUT WHAT WILL BE INTRODUCED INTO THE RECORD, WHAT WILL BE RELIED UPON?

MR. McGARRY: I -- I THINK SHORT OF, YOU KNOW, CLEARING THE COURTROOM, THERE'S REALLY NOT MUCH WE CAN DO ABOUT THAT. I THINK FROM -- FROM THE DEFENSE PERSPECTIVE, WE WILL TRY TO BE AS CIRCUMSPECT AS POSSIBLE IN TALKING ABOUT ISSUES. IF WE -- YOU KNOW, WE NEED TO ADDRESS THEM IN A WAY THAT HAS CONCERNS, WE CAN RAISE THEM AT THAT TIME, BUT I THINK WE'LL JUST DO OUR BEST.

THE COURT: OKAY. AND THE PLAINTIFFS AGREE THAT THAT'S THE APPROPRIATE WAY TO GO FORWARD?

MS. CHAN: YES, YOUR HONOR. WE HAVE NO OBJECTION TO DEFENDANT'S PROPOSAL.

THE COURT: OKAY. SO THAT'S HOW WE'LL PROCEED AT THIS HEARING, KEEPING IN MIND THAT WITH RESPECT TO ORDERS OF THE COURT, THAT WE WILL REMAIN TRUE TO THE SEALING ORDERS THAT HAVE BEEN ENTERED.

MR. McGARRY: THANK YOU, YOUR HONOR.

THE COURT: IS THERE ANYTHING ELSE PRELIMINARILY IN A SIMILAR VEIN THAT WE NEED TO ADDRESS THERE?

MR. McGARRY: I DON'T THINK SO. I DIDN'T ANSWER YOUR QUESTION FULLY BECAUSE --

THE COURT: ALL RIGHT.

MR. McGARRY: -- BECAUSE I WAS BEING CIRCUMSPECT ABOUT IT.

THE COURT: SO WE WERE TALKING ABOUT THE REMEDIATION PLAN AND WHETHER OR NOT IT [redacted] AND THE PLAINTIFFS AGREE WITH THAT?

MS. CHAN: YES, YOUR HONOR.

THE COURT: OKAY.

MR. McGARRY: YOUR HONOR HAD ASKED ME WHERE --

THE COURT: IN THE RECORD AND --

MR. McGARRY: -- SO I'M GOING TO LET MY COLLEAGUE, MATTHEW RIFFEE, ACTUALLY ADDRESS THAT QUESTION.

THE COURT: DO YOU KNOW?

MR. RIFFEE: IT IS IN A NUMBER OF PLACES IN THE RECORD, YOUR HONOR, BUT THE EASIEST PLACE TO FIND IT IS PAGE 3 OF THE REMEDIATION PLAN WHERE IT PROVIDES [redacted] --

THE REPORTER: I'M SORRY, I'M HAVING TROUBLE HEARING THAT WHOLE SIDE.

THE COURT: YEAH. SO IF YOU CAN DO THIS --

MR. RIFFEE: OF COURSE.

THE COURT: IF YOU CAN TAKE THAT MICROPHONE AND PLACE IT A LITTLE BIT CLOSER TO YOUR FACE. THEY MOVE. AND THEN THAT WAY THE COURT REPORTER CAN -- CAN HEAR YOU BETTER. AND THIS GOES AS TO EVERYONE.

MR. RIFFEE: MY APOLOGIES.

THE COURT: INCLUDING ME.

MR. McGARRY: SO THE EASIEST PLACE TO FIND IT IS PAGE 3 OF THE REMEDIATION PLAN WHERE IT PROVIDES [redacted].

THE COURT: ALL RIGHT. THANK YOU. THEN I HAVE TWO QUESTIONS RELATING TO THE MARTIN DECLARATION. ONE IS WITH RESPECT TO THE CONCLUSION THAT [redacted]. IT DOESN'T LOOK LIKE MR. MARTIN ADDRESSED THAT. DO YOU KNOW?

MR. RIFFEE: MY UNDERSTANDING, YOUR HONOR, IS THAT [redacted]

[redacted].

THE COURT: OKAY. [redacted]

[redacted]?

MR. RIFFEE: NOT SITTING HERE TODAY, YOUR HONOR.

THE COURT: OKAY. AND THEN LASTLY, FROM THE COURT'S SIDE OF THINGS, THERE'S REFERENCE IN MR. MARTIN'S DECLARATION DATED OCTOBER 23RD, 2024, THAT THE REMEDIATION PLAN WAS [redacted]

[redacted]?

MR. RIFFEE: MY UNDERSTANDING IS THAT IT [redacted]

[redacted].

THE COURT: OKAY. SO YOU DON'T HAVE AN UPDATE AS OF TODAY?

MR. RIFFEE: I DO NOT YOUR HONOR.

THE COURT: OKAY. SO THAT ANSWERS THE QUESTIONS THAT I HAD. AND TO THE EXTENT THAT WE PROVIDED THE TENTATIVE AND AS YOU CAN SEE IT TENTATIVELY GRANTS THE MOTION FOR CLASS CERTIFICATION, THE COURT HAS ENDEAVORED TO ADDRESS EACH OF THE DEFENSE ARGUMENTS THAT WERE PRESENTED AS TO WHY THE COURT SHOULD NOT CERTIFY, AND I BELIEVE THAT WE HAVE SUFFICIENTLY ADDRESSED THOSE ARGUMENTS. BUT TO THE EXTENT THAT DEFENSE

COUNSEL DISAGREES OR WISHES TO PRESENT SOMETHING AND PRESS IT FURTHER, LET ME GIVE YOU THAT OPPORTUNITY. AND YOU CAN DO IT AT THE PODIUM.

MR. McGARRY: THANK YOU, YOUR HONOR.

THANK YOU, YOUR HONOR. I THINK IT WILL COME AS NO SURPRISE TO YOUR HONOR THAT WE VERY RESPECTFULLY THINK YOU GOT A LOT OF IT WRONG, BUT WHAT I WANTED TO DO WAS FOCUS ON A HANDFUL OF ISSUES WHERE I THINK THERE'S SORT OF SIGNIFICANT ERROR INVOLVED.

THE COURT: ALL RIGHT.

MR. McGARRY: THE FIRST IS THE -- THE DEFENDANTS MADE A THRESHOLD ARGUMENT THAT THE -- THAT THE PROCESS OF IDENTIFYING ACCOUNTS WOULD REQUIRE AN INDIVIDUAL ANALYSIS ACCOUNT-BY-ACCOUNT BECAUSE UNDER THE DEFINITION -- THIS ALL RELATES TO THE ELECTRONIC FUNDS TRANSFER ACT, THE EFTA ARGUMENT. AND UNDER THE DEFINITION OF ACCOUNTS THAT ARE COVERED BY EFTA REQUIRES THAT THEY BE FOR PERSONAL, FAMILY, OR HOUSEHOLD PURPOSES. AND THERE'S TWO POINTS --

THE COURT: AND SO THE COURT HAS FOUND THAT THAT'S NOT, IN FACT, THE CASE AND THAT INSTEAD ANOTHER SECTION WHICH RELATES TO GOVERNMENTAL --

MR. McGARRY: RIGHT.

THE COURT: SO LET ME HEAR THEN --

MR. McGARRY: YES.

THE COURT: -- MORE ABOUT WHY THE PERSONAL AND THE

FAMILY PROVISION APPLIES.

MR. McGARRY: SO -- SO TWO POINTS, YOUR HONOR. ONE IS THAT I THINK THAT THE PLAINTIFFS AND YOUR HONOR GOT THE READING OF THE REGULATION WRONG. THE GOVERNMENT BENEFITS ACCOUNT LANGUAGE IS A CLARIFICATION OR AN EXPANSION OF THE DEFINITION OF AN ACCOUNT. THE DEFT ACCOUNT IS DEFINED IN 12 CFR 1005.2(b)(1), RIGHT? BUT (b)(1) REQUIRES THAT THE ACCOUNT BE ESTABLISHED FOR PERSONAL, FAMILY, OR HOUSEHOLD PURPOSES. THE GOVERNMENT BENEFITS PART IS NOT A SEPARATE DEFINITION. IT IS ANOTHER WAY IN WHICH -- IT'S AN EXPANSION OF THE ACCOUNT DEFINITION, BUT IT DOESN'T MEAN THAT THE ACCOUNT DOESN'T HAVE TO BE FOR PERSONAL, FAMILY, AND HOUSEHOLD PURPOSES. SO I THINK AS A -- AS A LEGAL MATTER THAT THE -- THE PLAINTIFF'S POSITION THAT THE COURT ADOPTED WAS -- WAS -- IT WAS LEGALLY INCORRECT. BUT EVEN ASSUMING FOR THE SAKE OF ARGUMENT THAT I'M WRONG ABOUT THAT, IT DOESN'T MEAN -- IT DOESN'T MEAN THAT CRIMINALS AND FRAUDSTERS HAVE PROTECTION UNDER EFTA. I MEAN --

THE COURT: BUT AS A THRESHOLD QUESTION, THE ISSUE IS WHICH ONE OF THESE SECTIONS APPLIES AND WHETHER OR NOT THE REQUIREMENTS FOR PERSONAL, FAMILY, OR HOUSEHOLD PURPOSES APPLIES VERSUS GOVERNMENT BENEFIT ACCOUNTS. SO IN ONE, THE ACCOUNTS ARE BEING ESTABLISHED FOR PERSONAL, FAMILY, OR HOUSEHOLD PURPOSES, AND THEN IN THE OTHER REALM, WE HAVE THESE ACCOUNTS THAT ARE ESTABLISHED ESSENTIALLY BY THE GOVERNMENT, THEY'RE GOVERNMENT BENEFIT ACCOUNTS, AND THEY PROVIDE A BENEFIT

TO PERSONS. AND SO IT SEEMS LIKE WE ARE TALKING ABOUT TWO DIFFERENT TYPES OF ACCOUNTS, THAT ONE IS WHERE AN INDIVIDUAL OPENS AN ACCOUNT FOR HIMSELF OR HIS FAMILY FOR HOUSEHOLD PURPOSES, AND THEN YOU HAVE THESE OTHER TYPES OF ACCOUNTS. DO YOU HAVE ANY AUTHORITY TO SUPPORT THE IDEA THAT IN FACT THERE AREN'T THESE TWO SEPARATE FORMS OF ACCOUNTS AND THAT THE -- THESE GOVERNMENT BENEFIT ACCOUNTS KIND OF FALL UNDER THE PERSONAL, FAMILY, OR HOUSEHOLD PURPOSES?

MR. McGARRY: I THINK IT'S JUST A STRAIGHT STATUTORY CONSTRUCTION POINT. I WOULD SAY THAT IF YOU -- IF YOU LOOK AT THE MOHAMED CASE WHICH IS A FOURTH CIRCUIT CASE THAT THE -- THAT THE PLAINTIFFS RELIED ON, THE ISSUE THERE HAD NOTHING TO DO WITH THE PERSONAL, FAMILY, OR HOUSEHOLD PURPOSES POINT. THE ISSUE IN THAT CASE WAS ENTIRELY ABOUT WHETHER THE -- THE ACCOUNT AT ISSUE WAS ESTABLISHED BY THE -- THE BENEFIT AGENCY OR BANK OF AMERICA. AND IT -- IT WAS A COMPLETELY DIFFERENT LEGAL ISSUE THERE. SO THERE'S NOT A LOT OF CASE LAW ON THAT PARTICULAR SECTION, BUT I THINK IT'S -- I THINK IT'S A STRAIGHT FORWARD STATUTORY CONSTRUCTION ARGUMENT.

THE COURT: AND TO A QUICK -- TO THE PLAINTIFF ON THAT, DO YOU HAVE RESPONSE AS TO THAT POINT?

MS. CHAN: WELL, I THINK, YOUR HONOR, MR. MCGARRY IS CORRECT THAT THE ISSUE -- THE ISSUE PRESENTED IN MOHAMED WAS DIFFERENT, BUT THE FOURTH CIRCUIT'S REASONING IS VERY CLEAR. THE FOURTH CIRCUIT RELIED ON, AS MR. MCGARRY SAYS, A STATUTORY

INTERPRETATION. AND THE COURT SAID THAT EFTA SPECIFICALLY APPLIES TO AN ACCOUNT, AND AN ACCOUNT EXPRESSLY INCLUDES A PREPAID ACCOUNT, AND A PREPAID ACCOUNT EXPRESSLY INCLUDES A GOVERNMENT BENEFIT ACCOUNT. THAT WAS INTERPRETING 12 CFR 1005.2(b)(3)(i)(B). THE FOURTH CIRCUIT SQUARELY HELD THAT THESE ARE GOVERNMENT BENEFIT ACCOUNTS AND THEREFORE ARE QUALIFYING ACCOUNTS UNDER EFTA. BUT ALSO TO EVEN IF THESE ACCOUNTS NEEDED TO SATISFY THE THRESHOLD INQUIRY THAT MR. MCGARRY IS POINTING TO ABOUT BEING ESTABLISHED FOR PERSONAL OR FAMILY OR HOUSEHOLD REASONS, THE SOLE AUTHORITY THAT THE BANK RELIES ON, THE HANSEN VERSUS TICKET TRACK CASE, IN THAT VERY CASE, THE COURT IN FACT CERTIFIED AND SAID THAT THAT DISTINCTION ALONE UNDER THE FDCPA WAS NOT A BASIS FOR DENYING CLASS CERTIFICATION. AND THIS SIMILAR LANGUAGE APPLIED IN YOUR HONOR'S DECISION IN VICTORINO WHERE THE SIMILAR LANGUAGE WAS USED IN THE CONTEXT OF THE SONG BEVERLY ACT. AND LIKEWISE THERE, YOUR HONOR DID NOT DETERMINE THAT THAT WAS NOT AN ISSUE THAT REQUIRED INDIVIDUALIZED INQUIRY OR THAT NECESSARILY DEFEATED A FINDING OF PREDOMINANCE IN THAT CASE.

THE COURT: ALL RIGHT. THANK YOU. YES, YOU CAN RETURN TO YOUR ARGUMENT.

MR. McGARRY: THANK YOU, YOU YOUR HONOR. SO BUT EVEN IF I'M WRONG ABOUT THE PERSONAL, FAMILY, HOUSEHOLD STATUTORY INTERPRETATION ISSUE, THAT DOESN'T MEAN THAT CRIMINAL FRAUDSTERS HAVE PROTECTION UNDER EFTA. THE WHOLE -- THE WHOLE

POINT OF THE ARGUMENT WAS THAT IT'S IMPOSSIBLE TO TELL FRAUDULENT INTENT WITHOUT GOING CASE BY CASE, RIGHT? THAT'S -- THAT'S SORT OF THE -- THAT'S THE GIST OF THE ARGUMENT THAT WE WERE MAKING. AND EFTA, AS THE PLAINTIFFS POINT OUT REPEATEDLY, IS A CONSUMER PROTECTION STATUTE. IT'S DESIGNED TO HELP CONSUMERS. WHAT IT'S NOT DESIGNED TO DO IS TO HELP CRIMINALS.

THE COURT: BUT IS THAT SOMETHING THAT THE PLAINTIFFS HAVE TO PROVE IN THEIR PRIMA FACIE CASE?

MR. McGARRY: IT DOESN'T -- SO I THINK -- I THINK MY VIEW, OUR VIEW IS THAT IT'S -- IF IT'S NOT COVERED BY THE STATUTE, RIGHT, IF -- IF CRIMINAL ACTIVITY IS NOT COVERED BY THE STATUTE, THEN THAT'S -- THAT'S SORT OF BEFORE YOU GET TO THE WHO-HAS-THE-BURDEN-OF-PROOF ISSUE, RIGHT? BUT THE -- THE POINT IS THAT --

THE COURT: I'M NOT SURE YOU'RE ANSWERING THE QUESTION. IS THIS SOMETHING THAT THE PLAINTIFFS HAVE TO DEMONSTRATE AS PART OF THEIR PRIMA FACIE CASE?

MR. McGARRY: I THINK THE PLAINTIFFS HAVE TO DEMONSTRATE THAT THEY CAN PURSUE THE CLASS --

THE COURT: THAT THEY MEET THE ELEMENTS, THAT -- THAT THEY --

MR. McGARRY: AND MEET THE ELEMENTS OF THE CLAIMS, BUT THIS --

THE COURT: AND IS THAT AN ELEMENT, THAT YOU HAVE TO DISPROVE THAT THERE WAS FRAUD INVOLVED?

MR. McGARRY: I THINK IT -- IT -- IT RAISES -- BECAUSE IT CAN'T POSSIBLY BE THE CASE THAT A CRIMINAL FRAUDSTER HAS STANDING UNDER THE ELECTRONIC FUNDS TRANSFER ACT, I DON'T THINK EVEN THE PLAINTIFFS TAKE THAT POSITION, RIGHT? BUT BECAUSE THERE'S NO WAY TO KNOW THAT WITHOUT DELVING INTO ALL OF THE RECORDS AND AS, YOU KNOW, BASICALLY SOME OF THE EXAMPLES -- EXCUSE ME -- THAT WE CITED IN OUR PAPERS, YOU KNOW, DOING ADDITIONAL INVESTIGATION, DOING -- LOOKING -- TAKING DEPOSITIONS OF PEOPLE, YOU CAN'T TELL ALL OF THAT, RIGHT? AND THE POINT IS THAT --

THE COURT: SO THEN LET ME ASK, SO WHAT'S THE PURPOSE OF THIS PROCESS THAT'S BEEN TAKING PLACE THAT MR. MARTIN REFERS TO [redacted] --

MR. McGARRY: YOUR HONOR, THAT PROCESS -- OR THAT PROCESS IS [redacted] I HAVE A WHOLE SEPARATE ARGUMENT ABOUT -- ABOUT [redacted], BUT THAT'S A SORT OF A DIFFERENT

POINT.

THE COURT: SO WHAT PROOF DO YOU HAVE BEYOND THESE EFFORTS THAT HAVE BEEN TAKEN WITH RESPECT TO THE REMEDIATION PLAN THAT DEMONSTRATES THAT THERE IS THIS LARGE NUMBER OF FRAUDSTERS THAT ARE CURRENTLY MEMBERS OF THE PROPOSED CLASS?

MR. McGARRY: I WOULD SAY A COUPLE THINGS, YOUR HONOR. FIRST, I MEAN, THE EDD ALONE, RIGHT, EDD HAD ITS ISSUES, RIGHT, BUT EDD ALONE PRECLUDED MORE THAN [redacted] FRAUDSTERS FROM WRONGFULLY CLAIMING BENEFITS, BUT THEY ALSO ALLOWED BILLIONS OF DOLLARS IN BENEFITS THAT -- THAT IT WASN'T ABLE TO CATCH, RIGHT, OR THE BANK OF AMERICA WASN'T ABLE TO CATCH. THERE ARE A NUMBER OF REPORTS FROM STATE AND FEDERAL AGENCIES IN OUR PAPERS THAT TALK ABOUT THE FACT THAT THIS IS SOPHISTICATED FRAUD AND THAT MOST OF THIS WILL NEVER BE RECOVERED. AND IT JUST DOESN'T --

THE COURT: TO THE EXTENT THAT IT WILL NEVER BE RECOVERED, WILL IT NEVER BE IDENTIFIED EITHER?

MR. McGARRY: WELL, THAT'S -- THAT'S THE POINT. THERE'S ACTUALLY AN INTERESTING ARTICLE IN YESTERDAY'S WALL STREET JOURNAL ADDRESSING EXACTLY THIS ISSUE, THAT THE CRIMINAL AUTHORITIES HAVE BEEN LOOKING AT THIS FOR FIVE YEARS AND THEY'RE RUNNING UP AGAINST A STATUTE OF LIMITATIONS PROBLEM FOR CRIMINAL PROSECUTION BECAUSE IT'S SO HARD TO IDENTIFY THE PEOPLE WHO ENGAGE IN THIS TYPE OF FRAUD THAT WAS GOING ON AT THE TIME OF THE PANDEMIC PROGRAMS LIKE PUA.

THE COURT: SO TO THE EXTENT THAT IT'S SO DIFFICULT TO ENGAGE IN THIS INVESTIGATION AND IDENTIFICATION OF THE FRAUDSTERS, THEN HOW WOULD THAT AFFECT TRIAL IN TERMS OF CREATING ALL OF THESE INDIVIDUALIZED DETERMINATIONS?

MR. McGARRY: RIGHT. BECAUSE THE -- THE POINT OF A NUMBER OF OUR ARGUMENTS, RIGHT, AND WE'RE TALKING RIGHT NOW ABOUT THE PERSONAL, FAMILY, HOUSEHOLD PURPOSES ARGUMENT, RIGHT, IS THAT IN ORDER TO ULTIMATELY GET TO THE -- THE LEGAL ISSUE, RIGHT, IT'S A GATEWAY STEP TO DO YOU EVEN HAVE RIGHTS UNDER THE STATUTE BEFORE YOU CAN EVEN CLAIM IT. AND THE -- THE -- THE ISSUE IS THAT THE PLAINTIFFS HAVE DONE NOTHING OTHER THAN POINT TO THE REMEDIATION PLAN AS A WAY TO SAY HOW THEY'RE GOING TO GRAPPLE WITH THE FACT THAT THERE'S UNDOUBTEDLY FRAUDSTERS IN THIS POPULATION. IT'S IMPOSSIBLE --

THE COURT: BUT, AGAIN, YOU'RE PLACING THE ONUS ON THE PLAINTIFFS. AND WE BOTH, YOU KNOW, APPRECIATE THAT THE GOVERNMENT'S BURDEN -- NOT THE GOVERNMENT'S BURDEN -- THE PLAINTIFF'S BURDEN IS TO ESTABLISH THAT THE ELEMENTS THAT EXIST WHICH WOULD NOT INCLUDE IDENTIFYING PEOPLE WHO AREN'T ENTITLED TO SOME REMEDIES, THAT THAT FALLS ON THE DEFENSE EITHER BY VIRTUE OF THE STATUTE PLACING THE BURDEN ON THE DEFENSE, OR TO THE EXTENT THAT IT'S A PART OF AN AFFIRMATIVE DEFENSE, AND AT THIS POINT, I HAVEN'T SEEN THE PROOF, THE EVIDENCE WHICH DEMONSTRATES THE MAGNITUDE OF THE AMOUNT OF EVIDENCE THAT WOULD BE COMING IN ON THIS QUESTION OF WHO ARE THE FRAUDSTERS AND

THESE INDIVIDUALIZED DETERMINATIONS TO TRY TO EXCLUDE THEM AT TRIAL.

MR. McGARRY: I THINK THAT'S -- THAT'S A FAIR POINT, YOUR HONOR. I GUESS I WOULD -- I WOULD POINT TO THE FACT THAT IN MATT MARTIN'S DECLARATION WHICH YOU ASKED A QUESTION ABOUT A FEW MINUTES AGO, HE TALKED ABOUT THE FACT THAT IT [redacted]. AND IF YOU'VE GOT [redacted] PEOPLE AND -- BANK OF AMERICA HAS TO HAVE THE RIGHT, WHETHER IT'S THE RIGHT AS A -- AS DEFENDING ITSELF IN A LAWSUIT OR WHETHER IT'S TRYING TO PROVE THAT A TRANSACTION WAS AUTHORIZED OR FRAUDULENT UNDER EFTA, IT HAS TO HAVE THE RIGHT TO EVALUATE EACH AND EVERY ONE OF THOSE. AND IF YOU TALK ABOUT JUST -- JUST AS A PRACTICAL MATTER, IF WE'RE TALKING ABOUT [redacted] PEOPLE AND WE'RE GOING TO TAKE [redacted] TO -- JUST TO EVALUATE EACH ONE OF THOSE AND THEN COME AND PRESENT THE EVIDENCE AT TRIAL, I'M NOT GOOD AT MATH, BUT THAT'S A VERY LONG AND -- AND LABORIOUS PROCESS.

AND THAT'S THE POINT, YOUR HONOR, IS THAT ULTIMATELY THE -- THE PREDOMINATING ISSUES AT TRIAL, IT'S EASY TO SAY THERE'S GOING TO BE A COMMON QUESTION OR A COMMON EVIDENCE, BUT WHAT'S GOING TO ULTIMATELY BE THE PREDOMINATING ISSUES AT TRIAL IS DO THESE PEOPLE EVEN HAVE RIGHTS, DO THEY -- IF THEY DO,

HAVE THEY COMPLIED WITH THE STATUTE. IF THEY HAVE, DID -- DID BANA, IN FACT, VIOLATE ITS DUTIES UNDER THE STATUTE, AND DO THAT INDIVIDUAL BY INDIVIDUAL.

THE COURT: AND -- AND, AGAIN, TO THE EXTENT THAT THE INFORMATION THAT WILL BE FOLLOWED UP ON IS IN THE POSSESSION OF BANK OF AMERICA, THEY -- IF NOT EXCLUSIVE POSSESSION, THEY ARE THE ONES THAT MANAGE AND HAVE THIS INFORMATION AVAILABLE TO THEM, AND AT THIS POINT, YEARS AFTER THIS FRAUD OCCURRED AND WELL INTO THIS LITIGATION, WE DON'T HAVE BANK OF AMERICA OFFERING SOMETHING MORE THAN WHAT IS IN THE RECORD. AND MEANWHILE, THE PLAINTIFFS OFFER A PRIMA FACIE CASE. IT SEEMS DIFFICULT FOR THE COURT TO SAY THAT, "OH, WOW, AT THIS POINT IT'S CLEAR THAT THE COMMON ISSUES THAT HAVE BEEN IDENTIFIED BY THE PLAINTIFF DO NOT PREDOMINATE OVER THE INDIVIDUAL ISSUES BECAUSE IT'S LIKELY THAT THERE'S A BUNCH OF FRAUDSTERS OVER THERE, EVEN THOUGH WE DON'T HAVE ANY INDICATION OF, YOU KNOW, HOW MANY THERE ARE AND HOW LIKELY IT IS FOR, YOU KNOW, CONTINUED EFFORTS TO IDENTIFY MANY MORE." AND KEEPING IN MIND THAT EVERY TIME A FRAUDSTER IS IDENTIFIED, THAT, YOU KNOW, YOU'VE SUCCEEDED IT IN HAVING THEM EXCLUDED FROM THE CLASS SINCE THE CLASS ITSELF RECOGNIZES THAT IT DOESN'T WANT ANY FRAUDSTERS AS A PART OF THE -- THE CLASS LITIGATION.

SO ALL RIGHT. DID YOU WANT TO MAKE ADDITIONAL POINTS?

MR. McGARRY: WELL, I JUST -- THE -- THE STANDING POINT I THINK I MADE WITH RESPECT TO THE REMEDIAL HOUSEHOLD

PURPOSE POINT, THERE'S A SIMILAR ARGUMENT, AND I -- AND I JUST WANT TO ARTICULATE IT EVEN THOUGH IT'S -- IT'S SIMILAR IN NATURE. AND I UNDERSTAND YOUR HONOR'S PROBABLY GOING TO HAVE THE SAME REACTION TO IT, BUT LET'S -- EVEN ASSUMING THAT WE DON'T HAVE THE PERSONAL, FAMILY, OR HOUSEHOLD QUESTION, RIGHT, THE -- THE HEART OF THIS CASE INVOLVES UNAUTHORIZED TRANSACTION CLAIMS, RIGHT? THAT'S WHAT ALL OF THIS IS ABOUT. UNAUTHORIZED TRANSACTION CLAIMS ARE DEFINED IN THE CFR AT 10 -- 1005.2(m) AS EXCLUDING -- IN ORDER TO HAVE AN UNAUTHORIZED TRANSACTION CLAIM, IT EXCLUDES CARDHOLDERS WHO ASSENTED TO THE TRANSACTIONS, CARDHOLDERS WHO BENEFITED FROM THE TRANSACTIONS, OR CLAIMS MADE WITH FRAUDULENT INTENT. AND AS I SAID BEFORE, FRAUDULENT INTENT IS NECESSARILY A CASE-BY-CASE ARGUMENT. SO EVEN IF BANK OF AMERICA HAS THE BURDEN OF PROOF, AS -- AS WE'VE ARTICULATED WITH RESPECT TO THE EARLIER ISSUE, ALL OF THOSE -- DID SOMEONE BENEFIT FROM THE TRANSACTION, DID THEY ASSENT TO THE TRANSACTION, WAS A CLAIM MADE WITH FRAUDULENT INTENT -- AND WE SITE SOME EXAMPLES IN OUR PAPERS -- ALL OF THOSE ARE FUNDAMENTALLY INDIVIDUAL.

THE COURT: WHILE THEY ARE FUNDAMENTALLY INDIVIDUAL, THE LAW REQUIRES THE DEFENDANT TO IDENTIFY INDIVIDUALS WHOSE, YOU KNOW, CONSENT IS AT QUESTION, BENEFITS -- MORE THAN THEY'RE JUST A CLASS AND THAT THESE ARE ISSUES AND THAT THESE ISSUES MAY END UP AFFECTING THE RIGHT OF A CLASS MEMBER TO RECOVERY, THE LAW REQUIRES MORE AT THIS POINT, DOESN'T IT?

MR. McGARRY: I THINK THE LAW REQUIRES THE PLAINTIFFS -- REMEMBER, THE BURDEN HERE IN THIS ENTIRE PROCEEDING IS ON THE PLAINTIFFS. I THINK THE LAW REQUIRES THE PLAINTIFFS TO DEMONSTRATE TO YOUR HONOR THAT --

THE COURT: THAT THEY DIDN'T CONSENT, THAT THEY DIDN'T BENEFIT, THAT THEY DIDN'T --

MR. McGARRY: THAT THOSE -- THAT THOSE ANSWERS -- THE ANSWERS TO THOSE QUESTIONS DON'T MATTER. THAT THERE'S A COMMON OVER-ARCHING QUESTION OR SERIES OF QUESTIONS THAT CAN BE RESOLVED THAT WILL BE PREDOMINANTLY COMMON, AND THAT THOSE QUESTIONS DON'T MATTER. AND I DON'T UNDERSTAND HOW THAT CAN BE THE CASE WHEN WE KNOW THE LEVEL OF FRAUD AND ACTIVITY THAT -- THAT THIS PROGRAM HAD MORE BROADLY THAN JUST THESE [redacted] PEOPLE.

THE COURT: ALL RIGHT.

MR. McGARRY: JUST A COUPLE OTHER QUICK POINTS, YOUR HONOR. THE -- YOUR HONOR MADE THE POINT THAT THE PLAINTIFFS ARGUED THAT A -- THAT A CLASS CAN BE CERTIFIED EVEN WITH UNINJURED PERSONS, AND I GUESS I WANT TO DRAW THE DISTINCTION BETWEEN THOSE CASES THAT TALK ABOUT UNINJURED PERSONS AND HERE WHERE YOU HAVE ACTUAL FRAUDSTERS, ACTUAL CRIMINALS WHO ARE PART OF THE CLASS, RIGHT? IT'S -- IT'S DIFFERENT FROM THE STANDING CASE WHICH SAYS, WELL, THERE'S A BUNCH OF PEOPLE, THERE MIGHT BE A HANDFUL WHO WEREN'T INJURED, RIGHT? THAT'S DIFFERENT IN CHARACTER FROM SAYING THERE'S A -- THERE'S A BUNCH OF PEOPLE,

SOME OF WHOM WERE ACTIVELY ENGAGING IN FRAUD ON THE BENEFIT SYSTEM.

FORGIVE ME, I'M JUST SEEING IF WE'VE ALREADY TALKED ABOUT MY OTHER POINTS. THE -- I GUESS A COUPLE OTHER POINTS. ONE IS THAT THE -- THE COURT SEEMS TO ASSUME THAT THE REMEDIATION PLAN EXCLUSIONS EXCLUDED ALL OF THE FRAUDSTERS FROM THE CLASS, BUT, YOUR HONOR, THAT CAN'T BE DONE OR HASN'T BEEN DONE OR CAN'T BE DONE BECAUSE NOT ALL THE INFORMATION IS IN BANA'S POSSESSION. SOMETIMES IT HAS TO COME FROM LAW ENFORCEMENT; SOMETIMES IT COMES FROM EDD. BANK OF AMERICA ONLY HAS ACCESS TO ATM FOOTAGE ON ITS OWN ATMs, AND SO THE -- THE FACT THAT THE REMEDIATION PLAN [redacted].

THERE'S -- THERE'S ONE OTHER POINT THAT I WANT ON THIS ISSUE THAT I WANTED TO ADDRESS WHICH IS THE -- YOUR HONOR SEEMED PERSUADED AND YOU'VE SAID TO ME THAT THERE'S ONLY EVIDENCE OF A HANDFUL OF PEOPLE HERE ON THE -- THE POINT THAT THE CLASS CAN BE CERTIFIED IF THERE'S A DE MINIMIS AMOUNT OF NON-CLASS MEMBERS INCORPORATED WITHIN IT. THE -- THERE'S A -- THERE'S [redacted]? SO THERE WAS -- RIGHT, THE -- THE CONCEPT OF THE THEORY THAT THE REMEDIATION PLAN ALREADY DID THE WORK AND THAT ANYBODY WHO WAS FRAUDULENT OR DIDN'T HAVE A CLAIM

WAS EXCLUDED, RIGHT, THE ASSUMPTION THERE IS THAT EVERYONE WHO ALREADY GOT PAID, RIGHT, THERE WAS AN ACTUAL ANALYSIS DONE, A SUBSTANTIVE ANALYSIS DONE AND THAT ALL OF THOSE PEOPLE WERE -- HAVE RIGHTEOUS CLAIMS FOR LACK OF A BETTER WORD. BUT LITERALLY, [redacted]. AND JUST SO THAT THE -- THE RECORD IS CLEAR BECAUSE THIS WILL TAKE A COUPLE OF STEPS TO GET TO, [redacted] --

THE COURT: SAY THAT AGAIN.

MR. McGARRY: SO WHERE DID THOSE [redacted], SO JUST SO THE RECORD IS CLEAR, RIGHT, SO BANK OF AMERICA RESPONDED TO A SERIES OF INTERROGATORIES THAT THE PLAINTIFF SUBMITTED, INCLUDING INTERROGATORY 39 WHICH IS DEFENDANT'S EXHIBIT 43. AND THAT INTERROGATORY IDENTIFIED [redacted]. THE RESPONSE STATES THAT [redacted] SO, FOR EXAMPLE, THE CREDIT RESCISSION CLASS IS [redacted] PEOPLE OR SO. ALL OF THAT RESCISSION OCCURRED IN [redacted]. ALL OF THEM WERE [redacted]. [redacted]

THE COURT: TO THE EXTENT THAT THEY WERE [redacted]

[redacted] WOULD THEY EVEN BE CLASS MEMBERS?

MR. McGARRY: THEY WOULD BECAUSE THE CLASS IS DEFINED AS WHETHER YOU WERE PAID UNDER THE -- UNDER THE REMEDIATION PLAN. AND THEY WERE, IN FACT, PAID.

THE COURT: ARE WE TALKING ABOUT THE REMEDIATION PLAN PAYMENTS VERSUS IN REAL TIME WHEN THE --

MR. McGARRY: NO. NO, SO THIS IS -- THERE'S A COUPLE STEPS HERE. THE -- THE CLASS IS -- THE WAY THE PLAINTIFFS DEFINE THE CLASS, IT'S -- IT'S ESSENTIALLY EVERYBODY WHO GOT -- I'M OVER SIMPLIFYING, BUT EVERYBODY WHO GOT PAID IN THE REMEDIATION PROCESS, THERE WERE PEOPLE WHO WERE PAID IN THE REMEDIATION PROCESS WHO -- WHOSE CLAIMS WERE ALLOWED EARLIER, PRIOR TO THE REMEDIATION PROCESS FOR VARIOUS REASONS. SO, FOR EXAMPLE, WITH THE CREDIT RESCISSION CLASS, RIGHT, THE -- THE -- ALL OF THE CREDIT RESCISSION CLASS FOLKS WHO ASKED FOR RECONSIDERATION, YOU KNOW, THE [redacted] OR SO, WERE [redacted]. SO AT THAT POINT, THEY HAD THEIR FUNDS BACK. BUT UNDER THE REMEDIATION PLAN, [redacted] RIGHT? AND SO THE -- SO THE REMEDIATION PLAN [redacted]

[redacted]. DOES THAT MAKE SENSE?

THE COURT: I -- I'M FOLLOWING MOST --

MR. McGARRY: OKAY.

THE COURT: -- OF WHAT YOU'RE REFERENCING, ALTHOUGH IN THE MIDDLE OF THAT, YOU SAID THAT A NUMBER OF THESE PEOPLE INVOLVED INDIVIDUALS WHO TRIGGERED MORE THAN JUST ONE OF THE FILTERS?

MR. McGARRY: THE -- THE -- I DIDN'T MEAN TO SUGGEST THAT THE -- THAT THE PLAINTIFFS HAVE DEFINED THEIR CLASS THAT WAY. THEY HAVEN'T. RIGHT? I JUST -- I'M JUST SAYING THAT THE REMEDIATION PLAN ITSELF, AS WE TALKED ABOUT EARLIER, [redacted].

THE COURT: RIGHT.

MR. McGARRY: SO ANYWAY, SO WE'RE TALKING ABOUT THE DIFFERENT POPULATIONS IN RESPONSE TO INTERROGATORY 39, RIGHT, [redacted]. AND I TALKED ABOUT THE CREDIT RESCISSION FOLKS. [redacted] SO THE BANK HAD OBLIGATIONS UNDER THE PRELIMINARY

INJUNCTION TO REVIEW CERTAIN -- AND PROCESS CERTAIN NUMBER OF CLAIMS ON CERTAIN TIMELINES, [redacted] AND THEN AS YOUR HONOR'S AWARE, THERE WERE [redacted]. AND, NOW, WHILE BANK OF AMERICA'S RECORDS CAN'T DISTINGUISH WHICH CLAIMS WERE OR WERE NOT [redacted] WITHOUT MANUALLY REVIEWING EACH CLAIM FILE, WE CAN'T ESTIMATE THE [redacted] BY LOOKING AT THAT CRITERIA THAT THE BANK APPLIED AND THE RECORDS THAT THE PLAINTIFFS AND THEIR EXPERTS RELIED ON TO IDENTIFY THE CLAIM DENIAL AND CREDIT RESCISSION CLASS MEMBERS.

SO THE PLAINTIFFS DEFINE THE CLAIM-DENIAL CLASS AS ESTIMATED TO BE [redacted] PEOPLE. AND PLAINTIFFS AND THEIR EXPERTS RELY, IN PART, ON BANK OF AMERICA'S RESPONSE TO INTERROGATORY 2 IN ORDER TO MAKE THOSE CALCULATIONS. THAT'S PLAINTIFF'S EXHIBIT 146. THAT RESPONSE IDENTIFIED [redacted] RIGHT? SO THE PLAINTIFFS HAVE ALL OF THAT INFORMATION. THEIR EXPERTS RELIED ON IT IN ORDER TO DEFINE THE CLASS. AND THEY ONLY ATTACH AN EXCERPT OF THE DATA THAT'S ACCOMPANYING THE RESPONSES WHICH THEY EXCERPTED AT PAGES 21 AND 22 OF PLAINTIFF'S EXHIBIT

146. THE FULL DATA SPREADSHEET, WHICH THE PLAINTIFFS HAVE AND THEIR EXPERTS RELIED ON AND WHICH WE'D BE HAPPY TO PROVIDE THE COURT IF YOU'D LIKE TO REVIEW IT, SHOWS THE FOLLOWING:

[redacted]

SO BASED ON THIS DATA -- AND I REALIZE THERE'S A LOT OF INFORMATION THERE, BUT THE COURT CAN REASONABLY ASSUME THAT [redacted]. NOW, THE POINT OF ALL THAT IS JUST TO MAKE THE POINT THAT IT IS NOT TRUE THAT EVERYBODY WHO GOT PAID OR EVEN CLOSE TO EVERYBODY GOT PAID ACTUALLY GOT A MANUAL REVIEW AS TO WHETHER OR NOT THERE WAS A -- A LEGITIMATE CLAIM MADE HERE. RIGHT? THE POINT IS THAT [redacted].

THE COURT: SO LET ME ASK, WITH RESPECT TO THE ACTUAL

NUMBER OF REVIEWED ACCOUNTS -- MR. MARTIN STATES THAT [redacted]. [redacted]

[redacted]

[redacted]

MR. McGARRY: I'M SORRY, I -- I APOLOGIZE, I'M NOT SURE I UNDERSTAND YOUR QUESTION.

THE COURT: I'M SORRY?

MR. McGARRY: I SAID I'M NOT SURE THAT I UNDERSTAND YOUR QUESTION.

THE COURT: OH. SURE.

MR. McGARRY: WHICH NUMBER ARE YOU ASKING FOR?

THE COURT: ALL RIGHT. SO THE -- THE MARTIN DECLARATION STATES [redacted] RIGHT?

MR. McGARRY: RIGHT.

THE COURT: AND SO MY QUESTION IS WHAT WAS THE BEGINNING NUMBER THAT [redacted]

MR. McGARRY: I DON'T -- DO YOU KNOW THE ANSWER TO THAT QUESTION, MATT?

MR. RIFFEE: SO, YOUR HONOR, [redacted]. TWO --

THE COURT: RIGHT. [redacted].

MR. RIFFEE: RIGHT. TWO, [redacted]

[redacted] --

THE COURT: BUT DO YOU UNDERSTAND MY QUESTION? IT SAYS THAT [redacted].

[redacted].

MR. RIFFEE: SO THIS IS OUT OF THE WHOLE POPULATION OF INDIVIDUALS WHO HAD CLAIMS PAID DURING THE REMEDIATION PLAN, NOT JUST IN CALIFORNIA. [redacted] NOT JUST BASED ON --

THE COURT: [redacted]

MR. RIFFEE: SO LET ME TAKE A STEP BACK. I UNDERSTAND IT'S SOMEWHAT CONFUSING. SO THESE INDIVIDUALS ALL HAD THEIR --

THE COURT: "THESE" BEING [redacted]

MR. RIFFEE: THE [redacted]

THE COURT: OKAY.

MR. RIFFEE: [redacted]

[redacted].

[redacted]

[redacted]

THE COURT: SO THEN THAT GOES TO THE IDEA THAT IN TERMS OF [redacted] AND THAT THE TOOLS THAT WOULD FOR EXAMPLE BE USED BY THE UNITED STATES ATTORNEY'S OFFICE TO IDENTIFY FRAUD,

THAT THOSE WEREN'T AVAILABLE TO THE BANK OF AMERICA, AND AS SUCH, AS A STARTING POINT, THE LEVEL OF INQUIRY WOULD HAVE BEEN LIMITED, THAT BANK OF AMERICA WOULD HAVE HAD KIND OF ONE ARM TIED BEHIND THEIR BACK IN TRYING TO PROCEED WITH THE --

MR. RIFFEE: THAT'S -- THAT'S PRECISELY IT, YOUR HONOR. AND THAT -- AND THAT'S THE ISSUE HERE. IF THERE WAS LITIGATION, IF THE BANK WAS ABLE TO CONDUCT DEPOSITIONS OR SEEK DISCOVERY FROM EACH OF THESE [redacted] INDIVIDUALS, IT WOULD BE ABLE TO GET MORE INFORMATION ON EACH OF THE INDIVIDUALS FROM THE INDIVIDUAL THEMSELF. IT'S LIMITED TO THE RECORDS THAT THEY HAVE. IT'S NOT ABLE TO TEST WHETHER OR NOT THEY WERE WHO THEY SAID THEY WERE WHEN THEY MADE CLAIMS FOR EDD BENEFITS. IT'S NOT -- THEY CAN'T TEST WHETHER THEY WERE, IN FACT, UNEMPLOYED OR SEEKING THE BENEFITS IN THE FIRST PLACE AND OBTAINED THE ACCOUNT FOR FRAUDULENT OR CRIMINAL PURPOSES.

THE COURT: ALL RIGHT. THANK YOU. YOU MAY PROCEED.

MR. McGARRY: THANK YOU, YOUR HONOR. I WANTED TO TALK FOR A MINUTE ABOUT THE CCPA CLAIM WHICH IS BASED ON THE -- THE MAGNETIC STRIPE, LACK-OF-AN-EMV-CHIP ARGUMENT. YOUR HONOR PROPOSED THAT LOST OR STOLEN CARDS SHOULD BE EXCLUDED FROM THE CLASS BECAUSE I THINK EVEN THE PLAINTIFFS ADMIT THAT PEOPLE WHO HAD LOST OR STOLEN CARDS WOULDN'T HAVE AN ISSUE IMPACTED BY THE MAG STRIPE. BUT LOST AND STOLEN CARDS ARE NOT THE ONLY PEOPLE WHO HAVE TO BE EXCLUDED. AND JUST DOING THAT REQUIRES LOOKING AT EACH INDIVIDUAL'S CLAIM FILE AND TRANSACTION HISTORIES TO

FIGURE OUT WHO THEY ARE. OTHERS WHO CAN'T POSSIBLY HAVE BEEN IMPACTED BY THE LACK OF AN EMV CHIP WOULD INCLUDE [redacted]. AND YOU CAN'T ISOLATE THESE GROUPS. YOU HAVE TO LOOK AT EACH INDIVIDUAL FILE AND ALL THE FACTS AND CIRCUMSTANCES AROUND THAT, AROUND THE POSSESSION OF THE CARD, IN ORDER TO MAKE THAT DETERMINATION. AND AT LEAST WITH RESPECT TO THIS ISSUE, THE BURDEN OF PROOF IS NOT ON BANK OF AMERICA. THE -- WE HAVE SOME OTHER DISAGREEMENTS, AS YOU MIGHT IMAGINE, BUT IN A 96-PAGE ORDER, IT WOULD TAKE SOME TIME TO GO THROUGH THEM ALL. I THINK THAT WITH THE EXCEPTION OF ALLOWING ME TO CONFER WITH MY COLLEAGUE FOR A SECOND --

THE COURT: OF COURSE.

MR. McGARRY: -- WE'LL RELY ON OUR PAPERS ON THE OTHER ISSUES. THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. LET ME HEAR FROM PLAINTIFF'S COUNSEL. WHAT DO YOU MAKE OF THE ARGUMENT THAT DEFENSE COUNSEL AND THE DEFENSE IS HAMSTRUNG BY THE LACK OF INVESTIGATIVE TOOLS THAT OTHERWISE WOULD BE ABLE TO IDENTIFY ANY NUMBER OF FRAUDSTERS? IS THAT SOMETHING THE COURT SHOULD TAKE INTO ACCOUNT, AND IF SO, HOW?

MS. CHAN: THANK YOU, YOUR HONOR. A COUPLE OF RESPONSES TO THAT POINT. THE FIRST IS THAT IF YOU LOOK AT DEFENDANT'S EXHIBIT 43, THEIR INTERROGATORY RESPONSES WHERE THEY TALK ABOUT [redacted], THE BANK'S INTERROGATORY RESPONSE SHOWS THAT [redacted] THERE ARE APPROXIMATELY [redacted] IDENTIFIED IN DEFENDANT'S EXHIBIT 43 THAT THE BANK SAYS [redacted]. THEN AGAIN --

THE COURT: DO YOU KNOW WHAT THAT WOULD HAVE INVOLVED OR ENTAILED, THAT ELIGIBILITY DETERMINATION?

MS. CHAN: I DON'T BELIEVE THE INFORMATION IS IN THE RECORD, BUT EDD CERTAINLY HAS BEEN AWARE OF THE ISSUES OF

BENEFITS ENROLLMENT FRAUD AND HAS OVER THE YEARS DEVELOPED MULTIPLE TOOLS TO ASSIST EDD ITSELF IN ALSO IDENTIFYING AND VERIFYING ELIGIBILITY OF INDIVIDUALS.

THE COURT: [redacted]?

MS. CHAN: IN THIS INSTANCE, [redacted].

THE COURT: OKAY.

MS. CHAN: AND THEN IN ADDITION TO THAT, AS YOUR HONOR NOTED IN YOUR TENTATIVE, THE BANK HAD AMPLE OPPORTUNITY AND WAS REQUIRED TO RECONSIDER CLAIMS PURSUANT TO THE TERMS OF THE FEDERAL PRELIMINARY INJUNCTION ORDER. AND THE BANK SAYS IN THEIR INTERROGATORY RESPONSE, AGAIN AT DEFENDANT'S EXHIBIT 43, [redacted] SO THE BANK ITSELF, AS A FINANCIAL INSTITUTION WITH ANTI-MONEY LAUNDERING OBLIGATIONS AS THE BANK REPEATEDLY UNDERSCORES, HAS OBLIGATIONS, HAS VERY SOPHISTICATED TOOLS WITHIN ITS OWN OPERATIONS TO IDENTIFY INDIVIDUALS AND TO IDENTIFY INDIVIDUALS WHO MAY OR MAY NOT BE FRAUDSTERS. AND [redacted]

[redacted]. AND AS YOUR HONOR NOTED, THE BANK HAS A [redacted] -- I'M SORRY, YOUR HONOR, I -- I'M ABOUT TO DISCUSS SOME MATTERS THAT HAVE BEEN DESIGNATED "CONFIDENTIAL," AND I WOULD LIKE THE OPPORTUNITY TO DISCUSS THE RECORD FULLY, BUT I DON'T WANT TO RAISE ISSUES GIVEN THAT WE DO HAVE AN OPEN COURTROOM.

THE COURT: ALL RIGHT. SO IS THIS SOMETHING THAT YOU CAN REFER TO BY CITING THE RECORD AND GIVING SOME GENERAL IDEA OF WHAT THE -- WHAT THE SUBSTANCE CONSISTS OF?

MS. CHAN: I CAN -- I CAN TRY TO DISCUSS IT IN GENERAL TERMS, BUT I DO WANT TO BE CONCRETE ABOUT WHAT THE EVIDENCE SHOWS.

THE COURT: DO YOU WANT TO APPROACH SIDEBAR WITH OPPOSING COUNSEL AND OUR REPORTER TO TAKE DOWN THAT INFORMATION TO MAKE THE RECORD?

MS. CHAN: PERHAPS I CAN JUST CONFER WITH MR. MCGARRY BRIEFLY?

THE COURT: OKAY.

MR. RUBIN: YOUR HONOR, WHILE THEY'RE CONFERRING -- MICHAEL RUBIN -- I'M NOT SURE THERE IS ANYONE IN THE COURTROOM WHO'S NOT COURT STAFF OR PARTY.

THE COURT: THAT WAS SOMETHING THAT MY CLERK POINTED OUT, BUT AT THE SAME TIME, I DON'T -- I RECOGNIZE MORE THAN HALF OF THE PEOPLE IN THE COURTROOM, BUT I DON'T RECOGNIZE EVERYONE. AND TO THE EXTENT THAT THERE WOULD BE SOMEONE WHO IS

FROM EITHER A NEWSPAPER OR FROM SOME OTHER CAMP THAT COULD POSE A PROBLEM FOR YOU, THEN I WANT TO BE RESPECTFUL.

MR. RUBIN: SURE. WHILE --

THE COURT: AND SO TO THE EXTENT THAT YOU'RE COMFORTABLE PROCEEDING IN OPEN COURT, THEN WE CAN ADDRESS THE SEALED PORTIONS BY WAY OF THE TRANSCRIPTS. THAT'S FINE.

MR. RUBIN: YOUR HONOR, WHILE I AGREE THAT EVERYONE IN THE PUBLIC HAS THE RIGHT TO BE HERE, IF THERE ISN'T, CAN WE SIMPLY ASK IF THERE'S ANYONE IN THE COURTROOM WHO IS NOT AFFILIATED WITH THE COURT OR EITHER PARTY? AND WE'RE NOT GOING TO EXCLUDE THAT PERSON, OF COURSE, BUT THAT INFORMS WHAT WE CAN SAY.

THE COURT: ALL RIGHT. IS THERE ANYONE WHO'S NOT ASSOCIATED WITH THE COURT EITHER AS A LAW CLERK, EXTERN, OR STAFF?

MR. RUBIN: I THINK WE'RE GOOD.

MS. CHAN: GREAT. OKAY.

THE COURT: THAT ASSUMES THAT THAT PERSON WHO'S NOT A MEMBER OF THE COURT WAS HONEST AND --

MR. McGARRY: I HAVE FAITH IN HUMANITY, YOUR HONOR.

THE COURT: ALL RIGHT. WELL, GOOD. THAT'S WHAT THIS CASE IS ABOUT, RIGHT?

MS. CHAN: OKAY. I APOLOGIZE FOR THE DISRUPTION, YOUR HONOR. THANK YOU. SO AS I WAS SAYING, THE BANK HAS [redacted]

[redacted]

SO THE BANK HAS HAD AMPLE RESOURCES TO INVESTIGATE THESE INDIVIDUAL CLAIMS.

THE OTHER IMPORTANT POINT I WANT TO UNDERSCORE -- AND THIS IS DISCUSSED AT LENGTH IN YOUR HONOR'S TENTATIVE AS WELL WITH WHICH WE STRONGLY AGREE -- THE BANK HAS AN AFFIRMATIVE OBLIGATION UNDER EFTA TO INVESTIGATE THESE CLAIMS REALLY WITHIN THE FIRST TEN DAYS OF THE CLAIM BEING FILED. BUT CERTAINLY AT THIS POINT, THE BANK HAS HAD MORE THAN FOUR YEARS TO

REINVESTIGATE THESE CLAIMS. WHAT WE HEARD MR. MCGARRY SAY IS THAT [redacted]. BUT THE BANK CANNOT NOW RELY ON ITS IGNORANCE OF WHETHER THESE CLAIMS WERE ULTIMATELY MERITORIOUS OR NOT AND RELY ON THE FACT THAT [redacted] AND NOW USE THAT PROFESSED IGNORANCE TO DENY THE CLAIMS OF [redacted] INDIVIDUAL CALIFORNIANS WHO WERE ALL VICTIMIZED BY THE BANK'S COMMON POLICIES AND PROCEDURES AND WHO ALL HAVE RIGHTS UNDER EFTA.

AS -- AS MR. MCGARRY IDENTIFIED, EFTA IS REALLY AT THE CORE OF THIS CASE. AND EFTA IS A REMEDIAL STATUTE WHOSE PRIMARY OBJECTIVE IS -- IS THE PROTECTION OF CONSUMER RIGHTS IN WHICH THE NINTH CIRCUIT HAS SAID "MUST BE CONSTRUED LIBERALLY IN THE CONSUMER'S FAVOR" TO FURTHER THOSE CONSUMER-PROTECTION OBJECTIVES. EFTA GUARANTEES ALL EDD CARDHOLDERS A CERTAIN NUMBER OF SPECIFIC SUBSTANTIVE RIGHTS. ONE, AS YOUR HONOR NOTES, IS A RIGHT TO A SUBSTANTIVELY REASONABLE AND ADEQUATE AS WELL AS TIMELY INVESTIGATION, AS WELL AS THE PAYMENT OF PROVISIONAL CREDIT WITHIN THE FIRST TEN DAYS IF THAT INVESTIGATION IS NOT YET COMPLETE WHICH IS TO BE MADE PERMANENT BY DAY 45.

AND AS YOUR HONOR NOTES, EFTA CREATES A PRESUMPTION IN FAVOR OF THE CONSUMER THAT THE CLAIM IS, IN FACT, VALID AND

PLACES THE BURDEN ON THE BANK TO REBUT THAT PRESUMPTION OF CLAIM VALIDITY THROUGH ACTUAL CONCRETE EVIDENCE. THE -- THE BANK HAS AN OBLIGATION, A BURDEN TO PROVE THAT THE TRANSACTION WAS, IN FACT, AUTHORIZED BY THE CARDHOLDER AND IS NOT A VALID CLAIM, AND THAT IS THE SOLE BASIS ON WHICH THE BANK IS ALLOWED TO DENY AN INDIVIDUAL'S CLAIM. TO ENSURE THAT THESE PROTECTIONS, THESE CONSUMER PROTECTIONS ARE STRICTLY ADHERED TO, EFTA CREATES STRICT LIABILITY AND PROVIDES FOR STATUTORY DAMAGES IN THE EVENT OF A VIOLATION, EVEN IN THE ABSENCE OF A SHOWING OF PECUNIARY HARM RESULTING FROM THESE VIOLATIONS OF LAW. AND, FURTHERMORE, EFTA CREATES AN ENTITLEMENT TO TREBLE DAMAGES TO ENSURE THAT THE PROVISIONS REQUIRING THE PAYMENT OF PROVISIONAL CREDIT AND THE RIGHT TO AN ADEQUATE AND TIMELY INVESTIGATION ARE ADHERED TO.

AS YOUR HONOR CORRECTLY NOTES IN THE TENTATIVE ORDER, WHETHER THE BANK'S CLAIM FRAUD FILTER POLICIES VIOLATED THESE REQUIREMENTS UNDER EFTA AND WHETHER IT GIVES RISE TO AN ENTITLEMENT TO TREBLE DAMAGES ARE COMMON ISSUES THAT APPLY EQUALLY TO ALL MEMBERS OF THE CLAIM DENIAL AND THE CREDIT RESCISSION CLASSES.

I ALSO WANT TO ADDRESS THE POINT THAT MR. MCGARRY MADE ABOUT THE CREDIT RESCISSION CLASS IN PARTICULAR. THOSE ARE INDIVIDUALS, REMEMBER, WHO'S [redacted]

[redacted].

I WANT TO ADDRESS THE REMEDIATION PLAN IN PARTICULAR. THAT IS CERTAINLY NOT THE ONLY BASIS FOR WHY THERE IS REASON TO BE CONFIDENT THAT OUR CLASSES, AS VERY NARROWLY DEFINED, DO NOT INCLUDE A GREAT NUMBER OF UNINJURED INDIVIDUALS. BUT THE REMEDIATION PLAN IS PARTICULARLY IMPORTANT BECAUSE [redacted] THAT'S SET FORTH IN ITS REMEDIATION PLAN AT PLAINTIFF'S EXHIBIT 74. AND TO THAT END, THE BANK SAID THAT

IT WOULD [redacted].

IN OTHER WORDS, ANYBODY -- EVERYONE IN OUR CLASS OF [redacted] INDIVIDUALS FALLS INTO ONE OF TWO CATEGORIES; [redacted].

AS YOUR HONOR CORRECTLY NOTED, THE CASE LAW DOES NOT REQUIRE PLAINTIFFS TO SHOW THAT AS THE BANK SAYS ON PAGE 19 OF ITS OPPOSITION THAT THE CLASS IS, QUOTE, 100 PERCENT PURGED OF UNINJURED INDIVIDUALS. THE CASE LAW SAYS IN TYSON FOODS THAT SO LONG AS PLAINTIFFS HAVE SHOWN THAT THERE ARE CENTRAL, COMMON ISSUES THAT PREDOMINATE, A CLASS CAN BE CERTIFIED EVEN IF THERE ARE INDIVIDUALIZED ISSUES OF AFFIRMATIVE DEFENSES AND DAMAGES. THE NINTH CIRCUIT SAID AGAIN IN OLEAN THAT A CLASS CAN BE CERTIFIED WHERE COMMON ISSUES PREDOMINATE, EVEN IF IT IS POSSIBLE THAT THE CLASS INCLUDES MORE THAN A DE MINIMIS NUMBER OF UNINJURED INDIVIDUALS. AND IMPORTANTLY IN RUIZ-TORRES, THE NINTH CIRCUIT AGAIN EXPLAINED THAT THE -- THE CORE CONCERN IS THAT A CLASS IS NOT DEFINED SO BROADLY AS TO SWEEP IN A GREAT

NUMBER OF INDIVIDUALS WHO COULD NOT POSSIBLY BE INJURED BECAUSE THEY SIMPLY WERE NOT SUBJECT TO THE CONDUCT THAT IS BEING CHALLENGED. WE CERTAINLY DO NOT HAVE THAT PROBLEM HERE. THERE IS NO DISPUTE THAT EVERY MEMBER OF EACH OF OUR FIVE PROPOSED CLASSES WAS EQUALLY SUBJECT TO THE EXACT SAME UNIFORMLY-APPLIED COMMON BANK POLICIES AND PROCEDURES WHICH COMMON EVIDENCE WILL SHOW THE BANK ENACTED AND ADOPTED TO PROTECT ITS OWN PROFITS DESPITE KNOWING THAT IT WAS DOING SO AT THE EXPENSE OF LEGITIMATE CARDHOLDERS' INTERESTS.

FURTHERMORE, AS YOUR HONOR NOTES IN THE TENTATIVE, WE HAVE ENSURED THAT OUR CLASSES DO NOT SWEEP IN A GREAT NUMBER OF UNINJURED INDIVIDUALS BECAUSE WE HAVE NARROWLY DEFINED THOSE CLASSES IN TWO IMPORTANT WAYS. AS YOUR HONOR NOTES, IT IS LIMITED TO INDIVIDUALS WHO TRIGGERED INDICATOR 1 AND INDICATOR 1 ALONE. AS -- AS THE BANK ACKNOWLEDGES, THERE WERE MANY -- [redacted] INDIVIDUALS WHO WERE TRIGGERED -- WHO TRIGGERED ADDITIONAL CLAIM FRAUD FILTERS BEYOND INDICATOR 1, AND BY DEFINITION, THOSE INDIVIDUALS ARE EXCLUDED FROM OUR CLASS.

AND -- AND, TWO, OUR CLASS DEFINITIONS EXCLUDE ALL INDIVIDUALS WHO ARE DETERMINED BY THE BANK TO HAVE ENGAGED IN ANY KIND OF BENEFITS ENROLLMENT OR PROGRAM FRAUD. AS YOUR HONOR NOTES, THE BANK HAS NOT MADE AN EVIDENTIARY SHOWING THAT THERE WAS A SIGNIFICANT -- ANYTHING CLOSE TO A SIGNIFICANT NUMBER OF INDIVIDUALS IN OUR CLASS WHO DO NOT HAVE -- HAVE

NOT -- WHO ARE UNINJURED. AND THE CASE LAW IS VERY CLEAR THAT WHEREAS HERE PLAINTIFFS HAVE MADE A SHOWING THAT COMMON ISSUES PREDOMINATE, THE DEFENDANT CANNOT OVERCOME THAT SHOWING OF PREDOMINANCE BY MERELY SPECULATING THAT THERE ARE SOME AFFIRMATIVE DEFENSES THAT MAY APPLY TO INDIVIDUALS OR BY POINTING TO A MERE SMATTERING OF EXAMPLES WHICH IS ALL THAT THE BANK HAS DONE HERE.

THE COURT: WOULD YOU LIKE TO RESPOND TO THE -- IF NOT THE INVITATION, THE DEFENSE POSITION THAT IF WE'RE GOING TO EXCLUDE THOSE WHO [redacted]?

MS. CHAN: WELL, YOUR HONOR, I THINK WE WOULD BE WILLING TO AGREE TO MODIFY THE CLASS DEFINITION SO THAT IT EXCLUDES ANYBODY WHO [redacted]. AND, AGAIN, THOSE ARE INDIVIDUALS WHO ARE READILY IDENTIFIABLE FROM THE BANK'S OWN RECORDS.

AS TO THE OTHER HYPOTHETICAL SITUATIONS THAT THE BANK RAISES, AGAIN I DON'T BELIEVE THE BANK HAS MET ITS BURDEN OF POINTING TO ANY EVIDENCE THAT THAT IS A DEFENSE THAT IS LIKELY

TO IMPACT A SIGNIFICANT NUMBER OF OUR PROPOSED EMV CHIP CLASS MEMBERS. AND OUR EXPERT, OUR EMV CHIP EXPERT, JANE CLONINGER, HAS OFFERED HER OPINION THAT [redacted] AS ACKNOWLEDGED BY THE BANK'S OWN DOCUMENTS -- WE CITED A NUMBER OF EXHIBITS -- THE BANK'S OWN DOCUMENTS [redacted] BECAUSE OF THE KNOWN VULNERABILITY OF THESE CARDS. THAT IS INFORMATION THAT IS ACKNOWLEDGED IN THE BANK'S OWN DOCUMENTS, AND OUR EXPERT PROVIDES HER OPINION AS TO WHY THAT IS -- [redacted] THE -- FOR OUR CLASS MEMBERS' UNAUTHORIZED TRANSACTIONS THAT THEY FELL VICTIM TO.

THE COURT: IS YOUR VIEW THAT UNAUTHORIZED ACCESS WOULD NOT HAVE BEEN POSSIBLE UNLESS THE CARD WAS USED, UNLESS THE CARD WAS SWIPED?

MS. CHAN: WELL, YOUR HONOR, I THINK ANOTHER REASON WHY THE EMV CHIP CLASS CERTAINLY SHOULD BE CERTIFIED IS BECAUSE THE CCPA CLAIM SAYS THAT FINANCIAL INSTITUTIONS SUCH AS THE BANK HAVE THIS OBLIGATION TO USE REASONABLE SECURITY MEASURES.

AND HERE IT IS A COMMON CLASS-WIDE QUESTION WHETHER THE BANK'S FAILURE TO INCLUDE EMV CHIPS IN EVERY SINGLE CARDHOLDER'S CARD SUBJECTED THEM TO A HEIGHTENED RISK OF EXFILTRATION OF THEIR DATA. IT'S UNDISPUTED AND IT'S SET FORTH IN OUR EXPERT'S REPORT THAT [redacted].

THE COURT: SO THAT'S THE THEORY THAT THE PLAINTIFFS ARE OPERATING UNDER AS TO THE SECOND ELEMENT ON THE EMV CHIP CLASS, THAT THERE WAS THIS EXFILTRATION VERSUS THEFT OR DISCLOSURE?

MS. CHAN: CORRECT, YOUR HONOR. OUR THEORIES ARE THAT ALL OF OUR CLASS MEMBERS WERE SUBJECT TO AN UNAUTHORIZED ACCESS AT TWO POINTS. THE FIRST IS THOSE WHOSE CARDS WERE SKIMMED, BUT THE SECOND IS THOSE WHOSE INFORMATION WAS ACCESSED AT THE POINT OF THE FRAUDSTER USING A COUNTERFEIT CARD TO ENGAGE IN AN UNAUTHORIZED ATM WITHDRAWAL.

THE COURT: [redacted]?

MS. CHAN: I DON'T -- [redacted].

THE COURT: ALL RIGHT. ANYTHING FURTHER?

MS. CHAN: NO, YOUR HONOR. I THINK YOUR TENTATIVE VERY THOROUGHLY ADDRESSES ALL OF THE POINTS THAT THE BANK HAS MADE. IF THERE ARE ANY OTHER QUESTIONS THAT THE COURT WOULD LIKE ME TO ADDRESS, I'D BE MORE THAN HAPPY TO; BUT OTHERWISE WE -- WE CERTAINLY AGREE WITH THE COURT'S TENTATIVE AND RESPECTFULLY ASK THAT THE COURT ADOPT THE TENTATIVE AS ITS RULING.

THE COURT: ALL RIGHT. LET ME RETURN TO MR. MCGARRY. DO YOU WISH TO REPLY OR ANYONE ELSE FROM THE DEFENSE TEAM WISH TO REPLY TO ANY ARGUMENTS THAT WERE JUST MADE?

MR. McGARRY: JUST A FEW POINTS, YOUR HONOR. ONE IS MS. CHAN SAID I THINK FOUR OR FIVE TIMES THAT THEIR CLASS AND THE CASE LAW ALLOWS FOR UNINJURED INDIVIDUALS TO BE INCLUDED, AND I MADE THE DISTINCTION EARLIER WHICH SHE DOESN'T ADDRESS THAT WHAT WE'RE TALKING ABOUT IS -- WERE -- IS PEOPLE WHO WERE ACTIVELY ENGAGED IN FRAUD AS OPPOSED TO PEOPLE WHO WERE UNINJURED.

THE REFERENCE TO -- ON -- ON THE ISSUE OF THE REMEDIATION PLAN EXCLUDING EVERYONE WHO COMMITTED FRAUD AND THEREFORE HAD SOLVED THE PROBLEM, THE DEFINITION THAT SHE READ, SHE -- SHE LEFT OFF -- AND THEY DID THIS IN THE REPLY BRIEF -- LEFT OFF THE FIRST WORD OF THE -- OF THE QUOTE WHICH IS "PREVIOUSLY." SO IF THE BANK HAD PREVIOUSLY MADE DETERMINATIONS THAT PEOPLE HAD ENGAGED IN SOME SORT OF FRAUD, THEN THEY WERE EXCLUDED FROM THE CLASS. THAT HAS NOTHING

WHATSOEVER TO DO WITH THE [redacted] PEOPLE WHO ARE GOING FORWARD AND HAVE BEEN PAID.

THE -- I THINK YOUR HONOR ASKED THE RIGHT QUESTION OF MS. CHAN ON THE [redacted], AS THAT'S THE PREDOMINATING THEORY OF THE PLAINTIFFS' CASE, THAT SOMEHOW THE -- [redacted], BUT THAT'S -- THAT'S NOT NECESSARILY THE CASE.

THE -- THE LAST POINT I'LL MAKE ON THE -- ON THIS -- ON THIS SKIMMING AND EXFILTRATION ISSUE IS MS. CHAN MADE REFERENCE TO A COUPLE OF POINTS IN THE RECORD ABOUT [redacted], AND THEN WE DON'T DISPUTE THAT. BUT WHAT IS CLEAR IS THAT [redacted]

[redacted] AND IF YOU WOULDN'T MIND, I'M GOING TO ASK MR. RIFFEE TO ADDRESS ONE MORE ISSUE, YOUR HONOR.

THE COURT: OF COURSE.

MR. RIFFEE: THANK YOU, YOUR HONOR. AND JUST ONE ADDITIONAL POINT, I THINK SOMETHING THAT MS. CHAN RAISED AT THE BEGINNING OF HER ARGUMENT -- OR HER RESPONSE WHEN SHE REFERENCED "D EX" -- OR "DEFENDANT'S EXHIBIT 43" AND NOTING THAT [redacted].

ONE, [redacted]. IT DOESN'T HAVE THAT INFORMATION. AS THE CALIFORNIA STATE AUDITOR, AS THE CALIFORNIA LEGISLATURE HAS NOTED, EDD HAD MANY ISSUES WITH WHAT IT DID OR DID NOT DO IN TERMS OF ACTUALLY VERIFYING PEOPLE'S ELIGIBILITY FOR BENEFITS, AND THE DEPARTMENT OF LABOR, THE HOUSE COMMITTEE, THE DOJ HAS ALL SAID THAT MUCH OF THE FRAUD STILL IS NEVER GOING TO BE RECOVERED, AND MANY OF THE FRAUDSTERS OR THE CRIMINALS ARE NEVER GOING TO BE IDENTIFIED. BUT, YES, SOME OF THE INDIVIDUALS AND PLAINTIFFS' PROPOSED EFTA

CLASS [redacted] AS YOUR HONOR NOTED IN THE -- IN YOUR TENTATIVE RULING, [redacted] -- [redacted].

THE COURT: ALL RIGHT. SO WE WILL TAKE THE MATTER UNDER SUBMISSION, BUT WE EXPECT THAT WE'LL ISSUE A FINAL OPINION WITHIN THE NEXT THREE OR FOUR DAYS. I THINK MONDAY IS A HOLIDAY. SO WE INTEND TO ISSUE AN ORDER NEXT WEEK. AND SO THEN WITH THAT, THAT RAISES THE QUESTION AS TO MOVING FORWARD WITH THIS CASE. NOW THAT WE'VE HANDLED THIS BIG-TICKET ITEM, I WOULD LIKE TO BECOME MORE INVOLVED THAN I HAVE BEEN IN

OVERSEEING AND SHEPHERDING THE CASE FORWARD, AND SO I WILL LIKELY BE SETTING SOME REGULAR KIND OF STATUS CONFERENCES TO SEE WHERE THINGS LIE. BUT AT THIS MOMENT, LET ME ASK, WHAT DO YOU SEE AHEAD OF THE BEND OR AT THE BEND THAT WE WILL WANT TO TAKE UP IN THE FORESEEABLE FUTURE? ANYTHING, MS. CHAN?

MS. CHAN: YES. APPRECIATE THAT, YOUR HONOR. I THINK THE NEXT ISSUE TO BE ADDRESSED WOULD BE CLASS NOTICE. AND PLAINTIFFS WOULD BE HAPPY TO, YOU KNOW, PREPARE A PROPOSAL OF PROPOSED CLASS NOTICE TO THAT END.

THE COURT: ALL RIGHT. SO TO THE EXTENT THAT WE THEN TAKE CARE OF THE -- KIND OF FINALIZE WHAT CORRESPONDS TO THEN THE CLASS CERTIFICATION, DO YOU ANTICIPATE ANY DISCOVERY OR EXPERT ISSUES THAT WE WILL WANT TO TAKE UP, AND AT WHAT POINT DO YOU THINK WE SHOULD THINK ABOUT A TRIAL DATE?

MR. RUBIN: I'M HAPPY TO RESPOND. FIRST, YOUR HONOR, WE DO WANT TO THANK JUDGE BERG WHO HAS STAYED ON TOP OF THIS AND REALLY HAS SET CONFERENCES EVERY TWO OR THREE WEEKS OVER THE LAST YEAR AND HAS HELPED MOVE US TO THIS POINT. WE WILL CONTINUE TO MEET WITH HIM. WE HAVE ANOTHER MEETING SCHEDULED. WE'RE HAVING -- WE'RE WORKING OUT DISCOVERY ISSUES. THE -- THE CLASS NOTICE, WE'VE DISCUSSED INTERNALLY WHAT THE PARAMETERS WOULD BE IF THIS WERE YOUR HONOR'S RULING. WE CAN WORK OUT THE TIMING AND MEET AND CONFER WITH THE BANK'S COUNSEL. WE'VE GOT VERY GOOD RELATIONS AMONG COUNSEL. YES, I THINK THAT PROBABLY AT THE NEXT STATUS CONFERENCE WE SHOULD TALK ABOUT TRIAL DATES,

WE SHOULD TALK ABOUT ADDITIONAL EXPERTS. WE DO HAVE AN EXPERT DISCLOSURE DATE. THE DATES HAVE BEEN EXTENDED FOR AN ADDITIONAL MONTH. THE PARTIES, IN LIGHT OF YOUR HONOR'S TENTATIVE AND RULING, WILL PROBABLY GIVE ADDITIONAL THOUGHT TO WHETHER WE NEED MORE EXPERTS THAN WE HAVE, BUT THERE'S TIME FOR THAT. THERE'S TIME FOR THE EXPERT DISCOVERY. WE HAVE OTHER MATTERS PENDING BEFORE JUDGE BERG THAT HOPEFULLY HE'LL BE ABLE TO RESOLVE. IF NOT, LIKE ONE OF THE ISSUES THAT CAME BEFORE HIM PREVIOUSLY THAT WAS THEN SUBMITTED TO YOU, IT MAY COME TO YOU. BUT I THINK THAT THOSE ARE THE PRINCIPAL ISSUES THAT WE'RE -- WE'RE FOCUSING. FOR EXAMPLE, WE HAVE PENDING BEFORE JUDGE BERG DISCUSSIONS ABOUT DEPOSITIONS OF TWO OF THE BANK'S EXECUTIVES, MR. MONTAG AND MR. MOYNIHAN. YOU RECALL THEM FROM THE RULING YOU MADE ABOUT THEIR DOCUMENTS NOW THAT WE'VE SEEN THEIR DOCUMENTS. WHAT JUDGE BERG ORDERED WAS THAT WE TAKE ADDITIONAL DEPOSITIONS OF SUBORDINATE BANK EXECUTIVES. WE'VE STARTED THAT PROCESS. WE'VE AGREED ON A SCHEDULE WITH THE BANK. AND THEN WE'RE GOING TO REVISIT WITH JUDGE BERG THE APPROPRIATENESS OF THOSE REMAINING TWO DEPOSITIONS. THAT MAY COME BEFORE YOU. PERHAPS WE CAN RESOLVE IT WITH JUDGE BERG. WE'RE NOT SURE. BUT THOSE ARE THE SORT OF ISSUES THAT HAVE BEEN PERCOLATING.

THE COURT: ALL RIGHT. AND WHAT I MAY DO -- WHAT I WILL DO IS I'LL TALK TO JUDGE BERG AND THEN SEE IF SOME OF THESE ISSUES ARE JUST SO CLEARLY ONES THAT WOULD END UP BEING

APPEALED TO ME THAT WE'LL JUST KIND OF CUT TO THE CHASE AND HAVE THOSE ISSUES PRESENTED TO THE DISTRICT COURT.

MR. RUBIN: AND THAT WOULD SAVE ALL OF US SOME -- SOME TIME AND MONEY, AND WE WOULD APPRECIATE THAT.

THE COURT: WELL, GIVEN THAT THIS IS A 2021 CASE, I'M EAGER TO MOVE THIS FORWARD AS QUICKLY, AS PRACTICAL, AS QUICKLY AS -- AS IS PRUDENT.

MR. MCGARRY, DO HAVE YOU ANY OFFERINGS AS TO MOVING FORWARD?

MR. McGARRY: I THINK THE PLAINTIFFS HAVE SUMMED IT UP REASONABLY WELL. OBVIOUSLY WE HAVEN'T TALKED ABOUT NOTICE. I THINK THEIR CHARACTERIZATION OF OUR WORKING RELATIONSHIP WITH JUDGE BERG IS ACCURATE. I THINK HE -- JUDGE BERG HAS HELPED ALL OF US STAY ON TRACK AND MOVED THINGS ALONG. AND, YEAH, I MEAN, WE'RE AWARE OF THE ISSUES THAT THE PLAINTIFFS RAISED. THERE'S A SCHEDULING ORDER IN THE CASE WHICH HAS PRE-TRIAL -- A PRE-TRIAL DATE OF -- I FORGET -- SEPTEMBER, OCTOBER, SOMETHING LIKE THAT.

THE COURT: OF THIS YEAR?

MS. BRYS: SEPTEMBER 12TH.

MR. McGARRY: SEPTEMBER 12TH? YOU KNOW, WHETHER THAT'S REALISTIC ACHIEVABLE IN LIGHT OF SUMMARY JUDGMENT DEADLINES AND EXPERT DEADLINES AND THE LIKE REMAINS TO BE SEEN, BUT THERE'S A REASONABLY-AGGRESSIVE SCHEDULE THAT'S CURRENTLY IN PLACE AND -- IF THAT HELPS, YOUR HONOR --

THE COURT: AND YOU EXPECT THAT WE WILL SEE MOTIONS FOR SUMMARY JUDGMENT FROM ONE SIDE OR THE OTHER?

MR. RUBIN: I THINK THAT'S LIKELY, YOUR HONOR.

MR. McGARRY: I WOULD BE SURPRISED IF YOU DIDN'T GET THEM FROM BOTH SIDES.

THE COURT: FROM BOTH SIDES. OKAY. ALL RIGHT. WELL, I'M NOT GOING TO TRY TO REINVENT THE WHEEL IN TERMS OF ASKING JUDGE BERG TO STEP ASIDE AS TO DISCOVERY ISSUES GIVEN HIS, I THINK, MORE -- HIS INSTITUTIONAL KNOWLEDGE REGARDING A LOT OF THIS, BUT IN THOSE CASES WHERE IT'S CLEAR THAT THERE IS GOING TO BE AN APPEAL TO THE DISTRICT COURT, I THINK IT DOES MAKE SENSE TO KIND OF TRY TO, IF NOT SHORT -- TRY TO SPEED UP THAT PROCESS BY COMING TO THE COURT AS AN INITIAL MATTER. AND ALSO I THINK I WILL SCHEDULE STATUS CONFERENCES AT LEAST EVERY FOUR TO SIX WEEKS JUST TO KIND OF SEE WHERE WE'RE AT AND TO SEE IF THERE'S ANY KIND OF FOLLOW-UP TO WHAT'S HAPPENING BEFORE JUDGE BERG AND TO SEE IF WE CAN MAYBE NIP SOMETHING IN THE BUD OR ADDRESS SOMETHING AND GIVE YOU ALL MY VIEW ON THINGS. ALL RIGHT?

MR. RUBIN: YES. THANK YOU, YOUR HONOR.

THE COURT: ANYTHING ELSE?

MS. CHAN: I'M SORRY, YOUR HONOR, BUT JUST ONE SMALL TECHNICAL ISSUE WE NOTED WITH THE TENTATIVE. ON PAGE 19, ONE OF OUR NAMED PLAINTIFFS, AZURI MOON, HIS PRONOUNCES ARE "HE/HIM," AND HE'S REFERRED TO AS "SHE" IN THE TENTATIVE. IF

YOU WOULDN'T MIND MAKING THAT CORRECTION --

THE COURT: OKAY.

MS. CHAN: -- WE'D APPRECIATE IT.

THE COURT: THANK YOU. ANYTHING ELSE?

MR. McGARRY: ONE SECOND, YOUR HONOR. NOTHING ELSE FROM US, YOUR HONOR.

THE COURT: LET ME DO THIS. LET ME ASK YOU TO MEET AND CONFER AND THEN IDENTIFY THOSE PORTIONS OF THE TRANSCRIPT THAT WE WILL WANT TO HAVE SEALED. I DON'T KNOW IF IT MAKES SENSE TO WAIT FOR A DRAFT TO BE PREPARED AND -- AND -- BEFORE IT'S MADE PUBLIC -- AND THEN HAVE YOU REVIEW THAT AND IDENTIFY THE SECTIONS, OR IF YOU ALREADY KNOW WHAT IT IS THAT OCCURRED AT THIS HEARING THAT WE NEED TO SEAL OFF.

MR. McGARRY: I WOULD SUGGEST, YOUR HONOR, KNOWING FROM -- FROM MY TEAM'S PERSPECTIVE HOW TIME-CONSUMING IT HAS BEEN TO TRY TO PROPOSE REDACTIONS GOING FORWARD AND NOT EVEN INCLUDING THE MEET-AND-CONFER PROCESS, JUST ACTUALLY DOING THAT, THAT IT PROBABLY MAKES SENSE TO HAVE A DRAFT WRITTEN, A DRAFT TRANSCRIPT. AND I WOULD SAY THE SAME THING WITH RESPECT TO YOUR ORDER AS YOUR CURRENT -- THE TENTATIVE ORDER HAS -- HAS A LOT OF INFORMATION IN IT THAT YOU'VE PREVIOUSLY FOUND SEALED. WE CAN WORK OFF THE TENTATIVE IF YOU WANT US TO, BUT IT PROBABLY MAKES SENSE TO HAVE A FINAL ORDER THAT WE COULD THEN --

THE COURT: ALL RIGHT. WE CAN DO THAT. I'LL ASK THE

COURT REPORTER TO PREPARE A DRAFT OF THE TRANSCRIPT, AND THEN UPON HAVING IT ISSUED AND REVIEWING IT AND MEETING AND CONFERRING, YOU CAN EITHER AGREE UPON WHAT PORTIONS TO BE SEALED, OR TO THE EXTENT THAT YOU DON'T AGREE, YOU CAN OFFER YOUR OWN RESPECTIVE VIEWS ON THE PORTIONS THAT YOU DON'T AGREE UPON, RIGHT.

MR. McGARRY: I SUSPECT, YOUR HONOR, BECAUSE YOU'VE GIVEN US PRETTY CLEAR GUIDANCE IN YOUR PRIOR ORDERS THAT WE SHOULD BE ABLE TO WORK THOSE OUT WITHOUT MUCH DIFFICULTY.

THE COURT: OKAY. AND THEN WHEN WE FINALIZE THE ORDER THAT WOULD OTHERWISE BE READY TO FILE, WE'LL PROVIDE IT TO YOU AGAIN FOR YOUR REVIEW AND SO THAT THEN YOU CAN IDENTIFY THE PORTIONS THAT WOULD REQUIRE ADDITIONAL ATTENTION, RIGHT?

MR. McGARRY: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. THANK YOU ALL SO MUCH FOR YOUR ARGUMENTS, AND GOOD TO SEE YOU ALL, AND WE'LL SEE YOU SOON.

ALL COUNSEL: THANK YOU, YOUR HONOR.

(WHEREUPON, THE PROCEEDING CONCLUDED AT 3:05 P.M.)

C E R T I F I C A T E

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I certify, by signing below, that the foregoing is a correct stenographic transcript of the oral proceedings had in the above-entitled matter this 17th day of January, 2025. A transcript without an original signature or conformed signature is not certified. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

/S/ JENNIFER GIBSON

JENNIFER G. GIBSON, CSR NO. 12802