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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE: BANK OF AMERICA
CALIFORNIA UNEMPLOYMENT
BENEFITS LITIGATION,

Case No.: 21MD2992-GPC(MSB)

**ORDER GRANTING CLASS
PLAINTIFFS’ MOTION FOR CLASS
CERTIFICATION; APPOINTING
CLASS REPRESENTATIVES; AND
APPOINTING CO-LEAD CLASS
COUNSEL**

[REDACTED]

[Dkt. No. 324.]

Before the Court is Class Plaintiffs’ motion for class certification, appointing them as class representatives for each of the classes and appointing Cotchett Pitre & McCarthy LLP and Altshuler Berzon LLP to serve as co-lead class counsel. (Dkt. No. 324.) Defendant Bank of America, N.A. filed an opposition and Class Plaintiffs replied. (Dkt. Nos. 349, 378.) A hearing was held on January 17, 2025. (Dkt. No. 405.) Based on discussions during the hearing, Class Plaintiffs filed a third amended master consolidated complaint on January 24, 2025. (Dkt. No. 406.)

On February 7, 2025, Defendant filed a motion to stay the case pending the United States Supreme Court review in *Lab’y Corp. of Am. Holdings v. Davis*, No. 24-0304.

1 (Dkt. No. 415.) After full briefing and hearing oral argument, (Dkt. Nos. 427, 433, 446),
2 the Court granted in part and denied in part Defendant’s motion to stay proceedings
3 pending Supreme Court review. (Dkt. No. 448.) The Court granted a stay as it
4 concerned class certification and dispositive motion practice but denied it as to expert
5 discovery and any discovery disputes. (*Id.* at 9.)

6 On June 5, 2025, the Supreme Court dismissed the writ of certiorari in the *Davis*
7 case as improvidently granted. *Lab’y Corp. of Am. Holdings v. Davis*, 605 U.S. ___, 2025
8 WL 1583302, at *1 (2025). As such, on the same day, the Court lifted the stay and
9 indicated it would issue its decision on Class Plaintiffs’ motion for class certification.
10 (Dkt. No. 492.)

11 Based on a review of the briefs, the supporting documentation, the applicable law,
12 and hearing oral argument, the Court GRANTS Class Plaintiffs’ motion for class
13 certification, appoints Plaintiffs to be class representatives and appoints Cotchett Pitre &
14 McCarthy LLP and Altshuler Berzon LLP to serve as co-lead class counsel.

15 **Background**

16 Class Plaintiffs Kuang Ting Chong, Candace Koole, Lindsay McClure, Azuri
17 Moon, Stephanie Moore, Roland Oosthuizen, Vanessa Rivera, J. Michael Willrich, and
18 Alex Yuan (collectively “Plaintiffs” or “Class Plaintiffs”), individually and on behalf of a
19 putative class, bring the operative third amended master consolidated complaint
20 (“TAMCC”) against Defendant Bank of America, N.A. (“Defendant” or “BANA”) for
21 allegedly mishandling, through unlawful policies and practices, reports of unauthorized
22 transaction claims, involving an ATM, brought by prepaid debit cardholders (“EDD
23 cardholders”) who were deemed eligible and received unemployment insurance benefits
24 with California’s Employment Development Department (“EDD”) during the height of
25 the COVID-19 pandemic in 2020-21 and causing them harm. They allege, among other
26 things, that BANA violated its statutory and regulatory obligations under the Electronic
27 Funds Transfer Act (“EFTA”) by using its newly created automated fraud monitoring
28 program, Claim Fraud Filter, Indicator 1 (“CFF-1”) as the sole basis for summarily

1 denying every EDD cardholders’ unauthorized transaction claims involving an ATM
2 without the mandated manual investigations. (Dkt. No. 406, TAMCC.) By relying solely
3 on the automated CFF-1 to combat the exponential increase of fraud during the COVID-
4 19 pandemic, Plaintiffs claim that BANA also summarily reversed or rescinded all
5 permanent credits issued to EDD cardholders and summarily froze EDD cardholders’
6 accounts. (*Id.*) Further, Class Plaintiffs complain that BANA knowingly understaffed its
7 Claims call center subjecting EDD cardholders to significant wait times in violation of
8 California common law. (*Id.*) Finally, they allege that BANA’s decision to provide
9 magnetic-stripe (“mag-stripe”) only debit cards, and not industry-standard EMV chip
10 cards, exposed EDD cardholders to significant fraud due to card “skimming” and
11 counterfeit card fraud violating California statutory and common law. (*Id.*)

12 California’s EDD administers unemployment benefits in California, and between
13 2011 to February 2024, it exclusively contracted with BANA to distribute unemployment
14 insurance, disability insurance and paid family leave benefits to Californians through
15 bank-issued EDD prepaid debit cards. (Dkt. No. 393-3, Chan Decl., Ex. 15, Chestnut
16 Depo. at 54:19-24; 75:8-13; 76:3-7; 129:2-13¹ (UNDER SEAL); Dkt. No. 225-2, Lennon
17 Decl. ¶ 3.) As part of the contract, individuals receiving unemployment insurance
18 benefits from EDD were able to access their benefits through an EDD prepaid debit card
19 issued by BANA. BANA’s relationship with EDD Cardholders was governed by the
20 EDD debit card account agreement which included the process through which EDD
21 cardholders could file disputes with BANA regarding alleged unauthorized transactions
22 on their accounts. (Dkt. No. 350-10, Brys Decl., Ex. 9, Lorenzen Decl. ¶ 5; Dkt. No.
23 379-5, Chan Decl., Ex. 76.)

24 The relevant contract at issue, in effect from August 1, 2016 through July 31, 2021,
25 included a revenue-share agreement. (Dkt. No. 393-3, Chan Decl., Ex. 15, Chestnut
26
27

28 ¹ Deposition page numbers are based on the pagination of the deposition transcript.

1 Depo. at 42:8-10.) Initially, all EDD debit cards were mag-stripe only cards. (Dkt. No.
2 362-2, Chan Decl., Ex 16, Martin Depo. at 65:8-14 (UNDER SEAL).) During the
3 COVID-19 pandemic (“pandemic”), these pre-paid debit cards were subject to rampant
4 third-party fraud and tens of millions of dollars were stolen from these bank accounts.
5 (See Dkt. No. 350-7, Brys Decl., Ex. 6, Letson Decl. ¶¶ 12, 15.)

6 The EDD prepaid debit cards are subject to the Electronic Funds Transfer Act
7 (“EFTA”), 15 U.S.C. §§ 1693 *et seq.*, and its implementing Regulation E (“Reg E”), 12
8 C.F.R. §§ 1005.1 *et seq.* which regulates electronic fund transfers that directly affect
9 consumer accounts. In brief, under the EFTA, once a consumer notifies BANA of any
10 “error” or “unauthorized electronic fund transfer transaction,” 15 U.S.C. § 1693f(f)(1),
11 BANA is required to “investigate the alleged error, determine whether an error has
12 occurred, and report or mail the results of such investigation and determination to the
13 consumer within ten business days.” 15 U.S.C. § 1693f(a). A bank’s investigation
14 includes a review of its own records. 12 C.F.R. § 1005.11(c)(4); 12 C.F.R. § 1005, Supp.
15 I at 11(c)(4).

16 If the institution cannot complete the investigation within ten business days, it may
17 “provisionally recredit” the consumer’s account within ten business days of receiving
18 notice of an error and complete its investigation within forty-five days. 15 U.S.C. §
19 1693f(c). If the financial institution discovers that an error occurred, it must promptly, no
20 later than one business day after the discovery, correct the error, 15 U.S.C. § 1693f(b),
21 but if the financial institution concludes after its investigation that an error did not occur,
22 it must provide an explanation of findings to the consumer within three business days
23 after the conclusion of the investigation. 15 U.S.C. § 1693f(d). Ultimately, “the burden
24 of proof is upon the financial institution to show that the electronic fund transfer was
25 authorized or, if the electronic fund transfer was unauthorized, then the burden of proof is
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1 upon the financial institution to establish that the conditions of liability set forth in
2 subsection (a)² have been met.” 15 U.S.C. § 1693g(b).

3 **A. BANA’s Use of AISOP³ - EFTA Investigations Prior to September 28, 2020**

4 Prior to September 28, 2020, BANA had applied its [REDACTED]
5 [REDACTED] which it claims adhered to the requirements
6 under Reg E.⁴ (Dkt. No. 362-4, Brys Decl., Ex. 14, Daniels Depo. at 120:16-121:1;
7 124:24-125:6 (UNDER SEAL); Dkt. No. 366-11, Chan Decl., Ex. 35 [REDACTED] (UNDER
8 SEAL); Dkt. No. 366-12, Chan Decl., Ex. 36 (UNDER SEAL); Dkt. No. 367-13, Chan
9 Decl., Ex. 82 (UNDER SEAL).) [REDACTED]
10 [REDACTED]. (Dkt.
11 No. 362-4, Chan Decl., Ex. 14, Daniels Depo. at 122:13-123:6 (UNDER SEAL).)

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]. (Dkt. No. 362-
16 4, Chan Decl., Ex. 14, Daniels Depo. at 147:25-148:19; 150:13-151:20 (UNDER SEAL);
17 Dkt. No. 366-12, Chan Decl., Ex. 36 at -4539 (UNDER SEAL).) [REDACTED]
18 [REDACTED]. (Dkt. No. 362-4, Chan
19 Decl., Ex. 14, Daniels Depo. at 147:25-148:19 (UNDER SEAL); Dkt. No. 366-12, Ex. 36
20 at -4549 (UNDER SEAL).)

21 **B. BANA’s Use of CFF-1 - EFTA Investigations After September 28, 2020**

22 BANA recognizes it has statutory and regulatory duties to address fraudulent
23 transactions, and therefore, [REDACTED]
24 _____

25 ² Subsection (a) requires the consumer to notify the financial institution within 60 days of receiving
26 documentation of the error and the consumer’s reasons. 15 U.S.C. § 1693g(a).

27 ³ [REDACTED].
28 ⁴ Plaintiffs do not dispute that [REDACTED] complied with the investigation mandates of the EFTA.

⁵ [REDACTED].

1 [REDACTED]. (Dkt. No. 382-2, Brys Decl., Ex. 6, Letson Decl. ¶ 6 at 209⁶ (UNDER SEAL).)
2 BANA also realize a fraud strategy cannot be 100% effective at identifying only
3 fraudulent activity and acknowledges that its fraud strategy may inconvenience
4 cardholders whose card activities appear to be fraudulent but are not. (Dkt. No. 350-7,
5 Brys Decl., Ex. 6, Letson Decl. ¶ 7.) Therefore, BANA, in implementing fraud
6 strategies, has to balance between protecting legitimate customers and combatting fraud.
7 (*Id.* ¶ 8.)

8 Starting in the Spring of 2020, BANA noticed and was informed by law
9 enforcement agencies and other third-party sources about unprecedented, enormous
10 large-scale fraud in the unemployment insurance (“UI”) programs due to the
11 opportunities created by the pandemic for benefits eligibility fraud and unauthorized
12 transaction claims that had not ever been seen. (Dkt. No. 350-7, Brys Decl., Ex. 6,
13 Letson Decl. ¶ 12.) As of January 2021, California’s State Auditor estimated nearly
14 \$10.4 billion in fraudulent claims and over \$32 billion of unemployment benefits stolen
15 and illegally issued in California. (*Id.* ¶ 15.)

16 In May 2020, BANA learned of massive benefits eligibility fraud against state
17 unemployment programs where [REDACTED]
18 [REDACTED]
19 [REDACTED]. (Dkt. No. 382-2, Brys Decl.,
20 Ex. 6, Letson Decl. ¶ 14 at 212 (UNDER SEAL).)

21 Because EDD was responsible for determining eligibility based on cardholders’
22 applications, [REDACTED]
23 [REDACTED]. (*Id.* ¶ 17 at 213 (UNDER SEAL).) BANA’s Global Financial Crimes (“GFC”)
24 team [REDACTED]
25 [REDACTED]

26
27 _____

28 ⁶ Unless otherwise noted, page numbers are based on the CM/ECF pagination.

1 [REDACTED]. (*Id.* ¶¶ 18, 19 at 213-14
2 (UNDER SEAL).) This information was also publicly available on YouTube and other
3 social messaging platforms. (Dkt. No. 350-7, Brys Decl., Ex. 6, Letson Decl. ¶ 19.)

4 During the first six months of the pandemic, BANA noted two key features in
5 fraud activity in State UI programs using BANA’s prepaid cards: 1) [REDACTED]

6 [REDACTED]
7 [REDACTED]; and 2) [REDACTED]

8 [REDACTED]
9 [REDACTED]

10 [REDACTED]. (Dkt. No. 382-2, Brys Decl., Ex. 6, Letson
11 Decl. ¶ 21 at 214 (UNDER SEAL).) While BANA [REDACTED]

12 [REDACTED]
13 [REDACTED]

14 [REDACTED]. (*Id.* ¶¶ 22, 23 at 215 (UNDER SEAL).)
15 BANA’s fraud strategies for the UI programs created during the pandemic [REDACTED]

16 [REDACTED]. (*Id.* ¶ 25 at 216 (UNDER SEAL).) At issue in this case
17 was a fraud strategy [REDACTED]

18 [REDACTED]. (*Id.* at 216-
19 17 (UNDER SEAL).) The CFF [REDACTED]

20 [REDACTED]
21 [REDACTED]. (*Id.* at 217 (UNDER SEAL).)

22 Starting in June 2020, unauthorized claims submitted by EDD cardholders
23 [REDACTED].

24 (*Id.* ¶ 26 at 217 (UNDER SEAL).) BANA’s GFC, the Global Information Security
25 (“GIS”) and BANA’s Global Banking and Markets (“GBAM”) [REDACTED]

26 [REDACTED]
27 [REDACTED]

28 [REDACTED]. (*Id.* ¶ 27 at 217

1 (UNDER SEAL.) [REDACTED]
2 [REDACTED]
3 [REDACTED]. (Id. (UNDER SEAL.) [REDACTED]
4 [REDACTED]. (Id. (UNDER
5 SEAL.) [REDACTED]. (Id. (UNDER
6 SEAL.)

7 Another type of fraud identified was [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]. (Id. ¶ 28 at 218 (UNDER SEAL.) [REDACTED]
11 [REDACTED]
12 [REDACTED]. (Id. (UNDER SEAL.)

13 In order to combat the fraud, in late summer of 2020, the GFC and GIS teams were
14 directed to develop a fraud strategy [REDACTED]

15 [REDACTED]. (Id. ¶ 30 at 218 (UNDER SEAL.) They determined that [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED] (Id. ¶ 31 at 219 (UNDER SEAL.) The Fraud

19 Filter was [REDACTED]

20 [REDACTED]. (Id. ¶ 32 at

21 219 (UNDER SEAL.) [REDACTED] the Fraud Filter [REDACTED]

22 [REDACTED] (Id. (UNDER SEAL.)

23 The fraud filter was approved for use in the UI prepaid card programs in late September
24 2020. (Id. ¶ 35 at 220 (UNDER SEAL.)

25 [REDACTED]

26 [REDACTED], BANA determined that the Fraud Filter [REDACTED]

27 [REDACTED]. (Id. ¶

28 37 at 220 (UNDER SEAL.) [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]. (*Id.* ¶ 36 at 220 (UNDER SEAL).) [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]. (*Id.*

7 (UNDER SEAL).)

8 From September 28, 2020 until June 8, 2021, when the PI was imposed, BANA

9 implemented the CFF as a basis to investigate and make decisions on certain error claims

10 or unauthorized transaction claims. (Dkt. No. 366-24, Chan Decl., Ex. 49, BANA’s

11 Resp. to Interrog. 28 at 9-10 (UNDER SEAL); Dkt. No. 362-2, Chan Decl., Ex. 16,

12 Martin Depo. at 124:20-125:14 (UNDER SEAL).) The CFF involved three indicators,

13 Indicator 1, Indicator 2 and Indicator 3, but only Indicator 1 (“CFF-1”) is relevant and

14 subject to this litigation.⁷ CFF Indicator 1 was triggered when a claim involved “PIN

15 enabled transactions claiming a PIN compromise.” (Dkt. No. 366-24, Chan Decl., Ex.

16 49, BANA’s Resp. to Interrog. 28 at 9-10 (UNDER SEAL); *see also* Dkt. No. 366-22,

17 Chan Decl., Ex. 47 at 17 (UNDER SEAL).) This meant the CFF-1 applied to ATM

18 withdrawals requiring the use of a PIN [REDACTED]

19 [REDACTED]. (Dkt. No. 393-4, Chan

23 ⁷ Indicator 2 was applied to [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 (Dkt. No. 366-24, Chan Decl., Ex. 49, BANA’s Resp. to Interrog. 28 at 9-10 (UNDER SEAL).)

1 Decl., Ex. 17, Letson Depo. at 92:15-23 (UNDER SEAL); Dkt. No. 362-2, Chan Decl.,
2 Ex. 16, Martin Depo. at 125:18-126:8 (UNDER SEAL).)

3 Under this new anti-fraud system, once an EDD debit cardholder submits an
4 authorized transaction claim, the CFF is run [REDACTED], and if triggered,
5 the claim is automatically denied [REDACTED], the cardholders receives a letter
6 denying the claim and giving them the option to submit a reconsideration request. (Dkt.
7 No. 362, Chan Decl., Ex. 14, Daniels Depo. at 52:21-53:9; 234:13-21 (UNDER SEAL);
8 (Dkt. No. 366-24, Chan Decl., Ex. 49, BANA's Resp. to Interrog. 28 at 9 (UNDER
9 SEAL).)

10 The denial letter was a template form letter that automatically populated the
11 cardholder's information. (Dkt. No. 362, Chan Decl., Ex. 14, Daniels Depo. at 53:12-
12 54:12; 220:12-221:11 (UNDER SEAL).) The uniform template denial letter which was
13 provided to all EDD cardholders' unauthorized transaction claims involving an ATM
14 stated, "Your claim has been closed because we believe the account or the claim have
15 been the subject of fraud or suspicious activity. Any temporary credit that was applied to
16 your account related to this claim, including any related reimbursement of fees, has been
17 or will be debited from your account and reflected in your available balance, if any."
18 (Dkt. No. 324-55, Chan Decl., Ex. 52.) The letter further stated, "If you contact us by
19 phone or in writing, you may request that we reopen your claim for further consideration.
20 You will be asked to give us information, including any documents you may have, to
21 support your claim. You have the right to request documents, if any, that we relied on in
22 making our determination." (*Id.*)

23 If a cardholder submitted an unauthorized transaction claim based on an ATM
24 withdrawal, it automatically triggered CFF-1 and the claim was summarily denied
25 [REDACTED].
26 (Dkt. No. 362-2, Chan Decl., Ex. 16, Martin Depo. at 162:1-25 (UNDER SEAL); Dkt.
27 No. 393-4, Chan Decl., Ex. 17, Letson Depo. at 93:20-94:5, 192:7-14 (UNDER SEAL).)
28 CFF-1 did not take into account the [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED].

10 (Dkt. No. 362-2, Chan Decl., Ex. 16, Martin Depo. at 129:16-132:4 (UNDER SEAL).)
11 CFF was merely [REDACTED]. (*Id.* (UNDER SEAL).)

12 While the CFF was in effect, it was the bank’s policy and practice to apply the CFF
13 to 100% of incoming unauthorized transaction claims brought by EDD debit cardholders.
14 (Dkt. No. 362, Chan Decl., Ex. 14, Daniels Depo. at 42:3-8 (UNDER SEAL).) Further,
15 because [REDACTED]

16 [REDACTED]. (Dkt. No. 362, Chan Decl., Ex. 14, Daniels Depo. at 49:24-
17 50:6 (UNDER SEAL); Dkt. No. 368-36, Chan Decl., Ex. 156 at -426938 (UNDER
18 SEAL).) According to BANA, [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]. (Dkt. No. 362, Chan Decl., Ex. 14, Daniels Depo. at 247:16-248:14.)

22 **C. BANA’s Use of CFF-1 to Rescind Permanent Credits Paid on ATM claims**

23 Starting on September 28, 2020, BANA also retroactively applied its CFF to all
24 claims submitted since April 1, 2020 that it had previously investigated and resolved in
25 EDD cardholders’ favor [REDACTED]; therefore, despite the prior
26 investigation, if the claim triggered the CFF, the account was frozen and the claims
27 denied. (Dkt. No. 362-2, Chan Decl., Ex. 16, Martin Depo. at 179:13-180:1 (UNDER
28 SEAL); Dkt. No. 362, Chan Decl., Ex. 14, Daniels Depo. at 234:24-236:5 (UNDER

1 SEAL.) This applied to claims brought before the CFF took effect and who had their
2 prior unauthorized claims paid with permanent credits. (Dkt. No. 362, Chan Decl., Ex.
3 14, Daniels Depo. at 234:24-235:9.) The accounts were frozen and permanent credits
4 rescinded without any notice. (Dkt. No. 362-2, Chan Decl., Ex. 16, Martin Depo. at
5 224:17-225:2.)

6 **D. BANA's Use of CFF-1 to Freeze Account**

7 BANA [REDACTED]

8 [REDACTED]. (Dkt. No. 382-2, Brys
9 Decl., Ex. 6, Letson Decl. ¶ 9 (UNDER SEAL); Dkt. No. 382-2, Brys Decl., Ex. 7,
10 Martin Decl. ¶ 4 (UNDER SEAL).) [REDACTED]

11 [REDACTED]. (Dkt. No. 362-2, Chan Decl., Ex. 16, Martin
12 Depo. at 180:10-22 (UNDER SEAL).) For the cardholder, [REDACTED]
13 [REDACTED]. (*Id.* at 182:11-15 (UNDER SEAL).)

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]. (Dkt. No. 382-2, Brys Decl., Ex. 6, Letson Decl. ¶ 9 (UNDER SEAL);
17 Dkt. No. 382-2, Brys Decl., Ex. 7, Martin Decl. ¶ 4 (UNDER SEAL).) [REDACTED]

18 [REDACTED]
19 [REDACTED]. (Dkt. No. 362-2, Chan Decl., Ex. 16, Martin Depo. at 183:3-6
20 (UNDER SEAL).)

21 [REDACTED]
22 [REDACTED]. (Dkt. No. 382-2, Brys Decl., Ex. 6, Letson Decl. ¶ 9 (UNDER SEAL);
23 Dkt. No. 382-2, Brys Decl., Ex. 7, Martin Decl. ¶ 4 (UNDER SEAL).) [REDACTED]

24 [REDACTED]
25 [REDACTED]. (Dkt. No. 362-2,
26 Chan Decl., Ex. 16, Martin Depo. at 182:25-183:2 (UNDER SEAL).) Once frozen, the
27 cardholders were directed to EDD to authenticate their identities in order to unfreeze their
28 accounts because BANA believed that EDD would be better positioned to authenticate

1 accounts in order to restore access. (Dkt. No. 382-2, Brys Decl., Ex. 7, Martin Decl. ¶ 5
2 (UNDER SEAL).) However, at the time, EDD was unable to handle the incoming
3 inquiries from cardholders about their accounts [REDACTED]
4 [REDACTED]. (Dkt. No.
5 382-2, Brys Decl., Ex. 7, Martin Decl. ¶ 6 (UNDER SEAL).)

6 Between September 28, 2020 to March 18, 2021, BANA automatically froze
7 accounts that triggered the CFF. (Dkt. No. 362-2, Chan Decl., Ex. 16, Martin Depo. at
8 221:11-18 (UNDER SEAL).) At first, accounts were initially frozen on September 28,
9 2020, then unfrozen from October 2020 through December 2020, and then later frozen
10 again from December 2020 to March 18, 2021. (*Id.* at 222:9-12; 223:1-224:4 (UNDER
11 SEAL).) No notice was provided to cardholders before freezing their accounts but a
12 letter was sent a few days after the freeze. (*Id.* at 224:17-225:14.) The freeze prevented
13 cardholders from accessing the funds in their accounts and barred EDD from depositing
14 on-going benefits. (*Id.* at 224:5-16.) BANA explains that when the CFF was first
15 implemented, cards that triggered the CFF were frozen because [REDACTED]

16 [REDACTED]
17 [REDACTED]. (Dkt. No. 382-2, Brys Decl., Ex. 7, Martin Decl. ¶ 5 (UNDER SEAL).)

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]. (Dkt. No. 382-2, Brys Decl., Ex. 7, Martin Decl. ¶ 6 (UNDER SEAL).)

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]. (*Id.*
26 (UNDER SEAL).) Therefore, cardholders could regain access by [REDACTED]

27 [REDACTED]
28 [REDACTED]. (*Id.* ¶ 7 (UNDER SEAL).)

1 Starting March 18, 2021, BANA stopped using the CFF to automatically freeze
2 EDD cardholder accounts and instead “blocked” the accounts which prevented
3 cardholders from accessing funds in their account. (Dkt. No. 362-2, Chan Decl., Ex. 16,
4 Martin Depo at 301:18-302:25 (UNDER SEAL.) [REDACTED]

5 [REDACTED]
6 [REDACTED]. (*Id.* (UNDER SEAL).)

7 **E. Understaffing Claims Call Center**

8 While BANA was implementing its new CFF fraud strategies, [REDACTED]
9 [REDACTED]. (Dkt. No. 393-1, Chan
10 Decl. Ex. 3, Minnucci Expert Report ¶ 43 (UNDER SEAL).) From September 13, 2020
11 to November 21, 2020, the average speed to answer (“ASA”), “an industry-standard
12 metric that reflects the average amount of time a customer is kept waiting on hold before
13 their call is initially answered”, was [REDACTED] in contrast to the average ASA of 1.25
14 minutes among 214 call centers surveyed in 2020. (*Id.* ¶¶ 12, 43-46 (UNDER SEAL).)
15 The wait times for all EDD debit cardholders during this two-month period far exceeded
16 any industry standard norms and on average cardholders waited [REDACTED] minutes longer than
17 they would have had BANA complied with industry-standard response times. (*Id.* ¶ 13
18 (UNDER SEAL).) According to Plaintiff’s expert, BANA should have known that [REDACTED]

19 [REDACTED]
20 [REDACTED]. (*Id.* ¶ 15 (UNDER SEAL).)

21 **F. EMV Chip Card**

22 Initially, all EDD debit cards were mag-stripe only cards. (Dkt. No. 362-2, Chan
23 Decl., Ex 16, Martin Depo. at 65:9-14 (UNDER SEAL). Yet, since 2014, BANA
24 included EMV chips on its other consumer and small business debit card accounts. (Dkt.
25 No. 324-26, Chan Decl., Ex. 23; Dkt. No. 362-2, Chan Decl., Ex 16, Martin Depo. at
26 61:19-23.) BANA was aware, as of 2014, that EMV chips increase security and protect
27 cardholders from fraud. (Dkt. No. 362-2, Chan Decl., Ex 16, Martin Depo. at 64:7-13.)
28 [REDACTED]

1 [REDACTED] (Dkt. No. 366, Chan Decl., Ex. 24 at 2
2 (UNDER SEAL).) [REDACTED]

3 [REDACTED]
4 [REDACTED]. (Dkt. No. 366-4, Chan Decl. Ex. 28 at 2 (UNDER SEAL).)

5 In July 2021, BANA began issuing EDD debit cards with EMV chips. (Dkt. No.
6 362-2, Chan Decl., Ex 16, Martin Depo. at 65:4-7 (UNDER SEAL).) Initially the EDD
7 debit cards did not have EMV chips because the contract with EDD did not provide for
8 chips and BANA needed to get permission and work with EDD to provide the EMV
9 chips. (*Id.* at 65:15-20 (UNDER SEAL).)

10 The parties provide competing experts disputing the reasons why [REDACTED]
11 [REDACTED]

12 [REDACTED]. (*Compare* Dkt. No. 324-5, Chan Decl.,
13 Ex. 2 Cloninger Expert Report *with* Dkt. No. 350-5, Brys Decl., Ex. 4, Joseph Expert
14 Report.) Those factual disputes going to the merits of the claim are not to be resolved at
15 class certification. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*
16 (“*Olean*”), 31 F.4th 651, 664-65 (9th Cir. 2022) (*en banc*) (“district court is limited to
17 resolving whether the evidence establishes that a common question is *capable* of class-
18 wide resolution, not whether the evidence in fact establishes that plaintiffs would win at
19 trial. While such an analysis may entail some overlap with the merits of the plaintiff's
20 underlying claim, the [m]erits questions may be considered [only] to the extent [] that
21 they are relevant to determining whether the Rule 23 prerequisites for class certification
22 are satisfied[.]”) (internal citations and quotation marks omitted)).

23 **G. Class Plaintiffs’ Experiences with CFF-1**

24 **1. Kuang Ting Chong**

25 Kuang Ting Chong (“Chong”) began receiving EDD unemployment insurance
26 benefits through a BANA EDD debit card with a magnetic stripe that was linked to a
27 BANA EDD debit card account in June 2020. (Dkt. No. 324-8, Chan Decl., Ex. 5, Chong
28 Decl. ¶¶ 2, 3.) On July 20, 2020, when Chong tried to withdraw cash from his EDD debit

1 card account at a BANA branch ATM in Monterey Park, CA, the ATM screen stated that
2 he had reached his daily withdrawal limit. (*Id.* ¶ 4.) He realized there was an
3 unauthorized ATM withdrawal because he had not withdrawn any cash earlier that day.
4 (*Id.*) He immediately went home, checked his EDD debit card account and saw one
5 ATM withdrawal for \$1,000 on the same day that he had not authorized and was not
6 aware. (*Id.*) He then printed out the transaction record, went to a BANA branch location
7 but the teller informed him that the branch could not help him and instructed him to call
8 BANA instead. (*Id.* ¶ 5.) After leaving the branch, he called BANA’s customer service
9 and filed a claim for the unauthorized transaction informing the representative that he did
10 not make or authorize the \$1,000 withdrawal and sought credit for the amount taken. (*Id.*
11 ¶ 6.) He also informed the representative that the \$1,000 withdrawal was made in
12 Alhambra, a different city than his usual transactions and the amount was about double
13 his typical transactions. (*Id.*) Around July 30, 2020, BANA provisionally credited his
14 account \$1,000. (*Id.* ¶ 7.) On September 2, 2020, BANA mailed a letter that informed
15 him that the investigation of the disputed transaction was completed and the \$1,000
16 provisional credit was now permanent. (*Id.* ¶ 8.) However, on September 28, 2020,
17 BANA froze his account and it remained frozen until October 4, 2020. (*Id.* ¶ 9.) He was
18 not provided with any notice that BANA would freeze his account or an explanation why
19 it was frozen. (*Id.*) In a letter dated October 2, 2020, BANA informed him that the
20 unauthorized transaction he had reported had been closed stating “we believe the account
21 or the claim have been the subject of fraud or suspicious activity. Any temporary credit
22 that was applied to your account related to this claim, including any related
23 reimbursement of fees, had been or will be debited from your account and reflected in
24 your available balance, if any.” (*Id.* ¶ 10.) On October 4, 2020, BANA rescinded the
25 \$1,000 permanent credit creating a negative balance in his account. (*Id.* ¶ 11.) Even
26 though he continued receiving EDD benefits in his EDD debit card account, BANA
27 denied him access because the funds were applied against the negative account balance
28 created by it. (*Id.*) He repeatedly called BANA to obtain the \$1,000 permanent credit

1 that had been rescinded as well as the additional EDD funds that he was unable to access
2 due to the negative balance BANA created in his account when it rescinded the \$1,000.
3 (*Id.* ¶ 12.) Between September 28, 2020 and November 15, 2020, Chong called BANA
4 at least seven separate occasions, sometimes making multiple calls, waiting on hold for
5 hours and being shuffled between multiple agents in one day. (*Id.* ¶ 13.) He estimates
6 that he spent more than one hour on hold each time he called and nearly three hours on
7 the phone with a BANA representative to resolve these issues. (*Id.*)

8 Chong filed a class action lawsuit in the Central District of California in November
9 2020. (*Id.* ¶ 14.) In a letter dated December 10, 2020, BANA stated that it had
10 performed an additional review of his claim and had credited him the \$1,000 which was
11 received 143 days after he submitted his unauthorized transaction claim and 67 days after
12 BANA rescinded the \$1,000 credit. (*Id.*)

13 **2. Candace Koole**

14 Candace Koole (“Koole”) began receiving EDD unemployment insurance benefits
15 through a BANA EDD debit card with a magnetic stripe that was linked to a BANA EDD
16 debit card account in April 2020. (Dkt. No. 324-9, Chan Decl., Ex. 6, Koole Decl. ¶¶ 2,
17 3.) On December 30, 2020, when she tried to use her EDD debit card to buy groceries,
18 the card was repeatedly declined at checkout. (*Id.* ¶ 4.) She left the groceries at the store,
19 went home to check her EDD debit card account balance, and was surprised that her
20 account had only \$8.37, down from over \$9,000 the week before. (*Id.*) Her online
21 account statement showed that daily \$1,000 ATM withdrawals were made from
22 December 19 to 26, 2020 and an ATM withdrawal on December 27, 2020 for \$760
23 totaling \$8,760 of ATM withdrawals that she had not authorized and was unaware. (*Id.*)

24 Koole immediately contacted BANA to ask about the status of her account, report
25 the unauthorized transactions, and sought to get reimbursed for the money that had been
26 taken out of her account. (*Id.* ¶ 5.) Later that same day, BANA froze her account. (*Id.*)

27 In early January 2021, Koole received a letter from BANA dated December
28

1 31, 2020, one business day after she had submitted her unauthorized transaction claim,
2 stating that it had closed her claim and would not be reimbursing her the \$8,760 taken
3 from her account. (*Id.* ¶ 6.) The letter did not provide an explanation for the denial
4 stating only: “Your claim has been closed because we believe the account or the claim
5 have been the subject of fraud or suspicious activity.” (*Id.*)

6 Koole’s EDD debit card account remained frozen for 77 days, from December 31,
7 2020, to March 18, 2021. (*Id.* ¶ 7.) During that period, she could not access the EDD
8 benefits that were in her account at the time of the freeze, and she could not receive or
9 access any new periodic EDD benefits payments that she would have received and would
10 have been able to use if BANA had not frozen her account. (*Id.*) Through discovery in
11 this litigation, she learned that on March 18, 2021, BANA converted her account status
12 from frozen to blocked but it still prevented her from being able to access any of the EDD
13 benefits that were in her account. (*Id.*) BANA unblocked her account on April 5, 2021,
14 after she filed this lawsuit. (*Id.*)

15 On April 6, 2021, five days after the Consolidated Class Action Complaint
16 was filed and 96 days after she submitted her unauthorized transaction claim to BANA,
17 BANA credited her the \$8,760 that had been stolen from her. (*Id.* ¶ 8.) She received a
18 letter stating that BANA had “completed an additional review” of her claim and that her
19 account would be credited in the full claim amount “[a]s a result of [BANA’s] research.”
20 (*Id.*)

21 **3. Lindsay McClure**

22 Lindsay McClure (“McClure”) began receiving EDD unemployment insurance
23 benefits through a BANA EDD debit card with a magnetic stripe that was linked to a
24 BANA EDD debit card account in April 2020. (Dkt. No. 324-10, Chan Decl., Ex. 7,
25 McClure Decl. ¶¶ 2, 3.) On November 30, 2020, she received a text notification of a
26 balance inquiry and cash withdrawal of \$1,003 from her EDD debit card account at an
27 ATM in Los Angeles, CA. (*Id.* ¶ 4.) At the time of the unauthorized ATM withdrawal,
28 she was in El Cajon, CA about 127 miles away from Los Angeles. (*Id.*) Immediately

1 after receiving the text notification, she called BANA to report the unauthorized
2 transaction of \$1,003 and to get reimbursed for the money that had been taken out of her
3 account. (*Id.*) When she reached the claims department, the representative responded
4 that she needed to call back the following morning to the claims department at 5:00 a.m.
5 (*Id.*)

6 The following morning on December 1, 2020, she called BANA back around 5:00
7 a.m. to initiate a claim. (*Id.* ¶ 6.) She informed the BANA representative that the \$1,003
8 withdrawal was not made or authorized by her, that it was made more than 100 miles
9 from where she lived and where she typically used her BANA EDD debit card, and that
10 she did not even know it was possible to withdraw more than a few hundred dollars at a
11 time. (*Id.*) The BANA representative confirmed McClure had successfully filed a claim
12 and said that it would take 30 to 45 business days to complete a thorough investigation.
13 (*Id.*) McClure subsequently received a letter from BANA dated December 2, 2020, just
14 one business day after she submitted her unauthorized transaction claim, stating that
15 BANA had closed her claim and would not be reimbursing her the \$1,003 taken from her
16 account. (*Id.* ¶ 7.) The letter did not provide an explanation for the denial, stating only:
17 “Your claim has been closed because we believe the account or the claim have been the
18 subject of fraud or suspicious activity.” (*Id.*)

19 On December 20, 2020, she could no longer access the benefits in her EDD debit
20 card account after her EDD debit card was declined at a drive-through. (*Id.* ¶ 8.) At the
21 time, her unemployment insurance benefits were in the amount of about \$660 biweekly.
22 (*Id.*) Immediately after, she called BANA’s customer service department, and a customer
23 service representative informed that her account had been frozen. (*Id.* ¶ 9.) The
24 representative also told her that, because of the freeze, BANA could not do anything
25 further and she would have to contact EDD to unfreeze her account. (*Id.*) She was not
26 provided any notice about the freeze of her account. (*Id.* ¶ 8.) Weeks later, she received
27 a letter from the BANA dated February 1, 2021, stating that a “freeze (or hold) has been
28 placed in your account.” (*Id.* ¶ 9.) The letter further stated that she would be unable to

1 use her EDD debit card or access the money in her EDD debit card account while the
2 freeze was in place. (*Id.*)

3 After she filed a class action lawsuit against BANA on January 26, 2021, she
4 received a letter from BANA dated January 27, 2021, 57 days after she submitted her
5 unauthorized transaction claim, stating her EDD debit card account was credited the
6 \$1,003 that had been stolen. (*Id.* ¶ 10.) But her account remained frozen and she
7 remained unable to access those reimbursed funds. (*Id.*) Her EDD debit card account
8 remained frozen for 55 days, from December 17, 2020, to February 10, 2021. (*Id.* ¶ 11.)
9 At the time of the freeze, her account balance was \$229.31. (*Id.*) During that period, she
10 could not access any of the EDD benefits as of the time of the freeze, and she could not
11 receive or access any new periodic EDD benefits payments that she would have received
12 and would have been able to use if BANA had not frozen her account including her
13 \$1,003 claim credit received on January 27, 2021. (*Id.*)

14 **4. Azuri Moon**

15 Azuri Moon (“Moon”) began receiving EDD unemployment insurance benefits
16 through a BANA EDD debit card with a magnetic stripe that was linked to a BANA EDD
17 debit card account in June 2020. (Dkt. No. 324-11, Chan Decl., Ex. 8, Moon Decl. ¶¶ 2,
18 3.) Around October 20, 2020, he tried to buy lunch at a restaurant with his EDD debit
19 card, but the transaction was declined for insufficient funds. (*Id.* ¶ 4.) When he checked
20 his EDD debit card account, he saw two ATM withdrawals totaling \$1,800 that he had
21 not authorized. (*Id.*)

22 On October 23, 2020, after several previous attempts to reach someone at
23 BANA by calling the number listed on the back of his card, he was finally able to get
24 through to BANA’s customer service department to report these unauthorized
25 transactions and sought a credit for the \$1,800 that was stolen. (*Id.* ¶ 5.) Between
26 October 20 and 23, 2020, he spent approximately eleven hours on the phone, on multiple
27 calls, before he was able to get through to anyone in BANA’s claims department. (*Id.*)
28 When he finally reached the claims department, he made a claim concerning the two

1 unauthorized ATM withdrawals totaling \$1,800 explaining that he had never given or
2 disclosed the PIN for his EDD debit card to anyone, had never authorized anyone to use
3 his EDD debit card, and did not authorize the two ATM withdrawals. (*Id.* ¶ 6.) BANA’s
4 representative told him that BANA had opened his claim and would investigate and make
5 a decision on his claim within 30-45 days. (*Id.*)

6 In mid-November, since he had not received any communication from BANA, he
7 contacted BANA to get an update. (*Id.* ¶ 7.) He was told that BANA would not be
8 returning the money because he was liable for the disputed transactions. (*Id.*) The
9 BANA representative told him that she should file a police report, write a detailed
10 description of what happened and fax it to BANA. (*Id.*) He complied with BANA’s
11 directions and faxed a police report. (*Id.*)

12 He later learned during discovery that BANA had mailed him a letter dated
13 October 28, 2020, which he did not receive, informing that it had closed his claim and
14 would not be reimbursing the \$1,800 taken from his account. (*Id.* ¶ 8.) The letter did not
15 provide an explanation for the denial, stating only: “Your claim has been closed because
16 we believe the account or the claim have been the subject of fraud or suspicious activity.”
17 (*Id.*) During October 20, 2020 and November 15, 2020, he repeatedly called BANA’s
18 customer service to obtain assistance with his unauthorized transaction claim and
19 estimates he spent over an hour on hold each time he called and several more hours on
20 the phone with BANA’s representative trying to resolve the issues. (*Id.* ¶ 9.)

21 In mid-December 2020, nearly a month after faxing the police report and other
22 requested documents to BANA, he called to get an update. (*Id.* ¶ 10.) BANA’s
23 representative told him it did not receive his fax. (*Id.*) Due to the confusion between
24 claim number and case number and because the information on the fax reflected a
25 mistake, it derailed his fraud claim. (*Id.*) He then re-faxed everything that BANA
26 requested. (*Id.*)

27 On December 17, 2020, he could no longer access his EDD benefits which was
28 about \$600 biweekly. (*Id.* ¶ 11.) Shortly after he discovered that his account had been

1 frozen, he contacted BANA’s customer service department, and after calling multiple
2 times and waiting on hold for more than an hour each time, he finally reached a customer
3 service representative who said that his account had been frozen. (*Id.* ¶ 12.) The BANA
4 representative also told him that, because his account was frozen, it could not do anything
5 further either to address his earlier unauthorized transaction claim or to enable him to
6 access his frozen benefits funds. (*Id.*) BANA froze his account without any notice or
7 explanation. (*Id.* ¶ 13.) He later learned, through discovery in this case, that BANA
8 froze his account on December 17, 2020, based on the application of its Claim Fraud
9 Filter. (*Id.*) Moon’s EDD debit card account remained frozen for 91 days, from
10 December 17, 2020, to March 18, 2021. (*Id.* ¶ 14.) During that period, he could not
11 access any of the EDD benefits that were in his account as of the time of the freeze and
12 could not receive or access any new periodic EDD benefits payments that he would have
13 received and would have been able to use if BANA had not frozen his account. (*Id.*)
14 Through discovery in this litigation, he learned that on March 18, 2021, BANA converted
15 his account status from frozen to blocked but he was still not able to access any of the
16 EDD benefits that were in his account. (*Id.*) BANA finally unblocked his account on
17 April 15, 2021, after he filed this lawsuit. (*Id.*) On April 5, 2021, four days after the
18 Consolidated Class Action Complaint was filed and 164 days after he submitted his
19 unauthorized transaction claim to BANA, it finally credited his debit card account the
20 \$1,800 that had been stolen from him in October 2020. (*Id.*)

21 **5. Stephanie Moore**

22 Stephanie Moore (“Moore”) began receiving EDD unemployment insurance
23 benefits through a BANA EDD debit card with a magnetic stripe that was linked to a
24 BANA EDD debit card account in June 2020. (Dkt. No. 324-12, Chan Decl., Ex. 9,
25 Moore Decl. ¶¶ 2, 3.) On July 18, 2020, her EDD debit card was declined when she tried
26 to make a purchase. (*Id.* ¶ 4.) She checked her EDD debit card account and saw two
27 transactions from the same day, an ATM withdrawal in the amount of \$1000 and a
28 purchase from Target in the amount of \$482.13, that she had not authorized. (*Id.*)

1 Within minutes of discovering the unauthorized transactions, she called BANA and
2 reported the unauthorized transactions and asked for credit in the amount of \$1,482.13
3 that was stolen. (*Id.* ¶¶ 5-6.) Around July 30, 2020, BANA provisionally credited the
4 \$1,482.13 to her account, and on August 31, 2020, BANA mailed a letter informing her
5 that the \$1,482.13 provisional credit was now permanent and that “We’ve completed
6 our investigation of this disputed transaction. The provisionally issued credit for
7 \$1,482.13 is now permanent.” (*Id.* ¶ 7.)

8 On September 30, 2020, when she attempted to use her EDD debit card to
9 purchase a tire for her vehicle, the transaction was declined. (*Id.* ¶ 8.) She then
10 attempted to check the balance on her EDD debit card account but was unable to log into
11 her account. (*Id.*) Through discovery produced in this litigation, she learned BANA
12 froze her account between September 28, 2020 and October 4, 2020. (*Id.*) Then, on
13 October 4, 2020, BANA rescinded the \$1,482.13 permanent credit creating a negative
14 balance in her account. (*Id.* ¶ 9.) On October 5, 2020, she called BANA’s customer
15 service to ask about the rescinded \$1,482.13 credit and was informed that the funds were
16 taken back by EDD, and because of this, BANA would not be able to assist her any
17 further. (*Id.* ¶ 10.)

18 Between September 30, 2020, and November 15, 2020, Moore called BANA at
19 least 15 separate times in an attempt to resolve the issues stemming from the
20 rescinded credit and freeze of her EDD debit card account and estimates she spent over
21 an hour on hold each time she called BANA during that time. (*Id.* ¶ 11.) Further, during
22 those calls, BANA gave her conflicting information but never afforded her a way to
23 regain access to her rescinded credits. (*Id.*) One BANA representative told her that there
24 had been a glitch in the system and her funds would be returned shortly, but they were
25 not. (*Id.*) At a later point, she was told the investigation was reopened. (*Id.*) She even
26 asked for documentation regarding the investigation, but never received any. (*Id.*)

27 After she filed a class action lawsuit against BANA in November 2020, she
28

1 received a letter from BANA dated December 9, 2020, stating that it had conducted an
2 additional review of her claim and had credited her the \$1,482.13 that had been stolen
3 from her in September 2020. (*Id.* ¶ 12.) She received the credit 144 days after she
4 submitted her claim for unauthorized transaction and 66 days after BANA rescinded the
5 \$1,482.13 credit. (*Id.*)

6 **6. Roland Oosthuizen**

7 Roland Oosthuizen (“Oosthuizen”) began receiving EDD unemployment insurance
8 benefits through a BANA EDD debit card with a magnetic stripe that was linked to a
9 BANA EDD debit card account in April 2020. (Dkt. No. 324-13, Chan Decl., Ex. 10,
10 Oosthuizen Decl. ¶¶ 2, 3.) Around September 28, 2020, he logged in his EDD debit card
11 account online and noticed daily unauthorized withdrawals from BANA’s ATMs on five
12 consecutive days beginning September 24, 2020 through September 28, 2020 in the
13 amount of \$1,000 each, totaling \$5,000. (*Id.* ¶ 4.) Immediately, Oosthuizen used the
14 online portal to suspend his card and then called BANA to report the unauthorized
15 withdrawals and get reimbursed for the money taken from his account. (*Id.* ¶ 5.) He
16 spent three hours on hold before being disconnected. (*Id.*) The next day, after holding
17 for about two and a half hours, he reached a representative in the claims department.
18 (*Id.*) He identified the specific ATM unauthorized withdrawals and informed the
19 representative that he had the card in his possession and did not authorize anyone to make
20 the withdrawals. (*Id.*) He was told that his claim had been filed and would be
21 investigated. (*Id.*)

22 In mid-October 2020, he received a letter from BANA dated October 1, 2020, one
23 business day after he filed his claim, informing him that BANA had closed his claim and
24 would not be reimbursing the \$5,000 taken from his account. (*Id.* ¶ 6.) The letter
25 provided no explanation and stated only that “Your claim has been closed because we
26 believe the account or the claim have been the subject of fraud or suspicious activity.”
27 (*Id.*) After receiving BANA’s letter denying his claim, he called BANA to re-open his
28 claim. (*Id.*) A BANA representative advised him to send information about his claim

1 and any police report he had filed. (*Id.* ¶ 7.) On November 5, 2020, he faxed a written
2 statement about the theft, a request to re-open his claim with information about the police
3 report he filed, and other documentation showing he was at work when some of the
4 unauthorized ATM withdrawals occurred. (*Id.* ¶ 8.) He also asked BANA to provide
5 him with the information it had discovered in any investigation it conducted before
6 denying his fraud claims but he never received a response. (*Id.*)

7 After he filed a class action lawsuit against BANA on January 26, 2021, he
8 received a letter from BANA dated January 27, 2021, stating that it “completed an
9 additional review” of his claim and, “[a]s a result of [BANA's] research” credited him
10 with the \$5,000 that had been stolen from him the previous September. (*Id.* ¶ 10.) He
11 received the credit 120 days after he submitted his unauthorized transaction claim to
12 BANA. (*Id.*) Between September 28, 2020 and November 15, 2020, he called BANA on
13 multiple occasions concerning the unauthorized transaction claims typically waiting on
14 hold for more than an hour and often not being able to reach a representative. (*Id.* ¶ 9.)

15 **7. Vanessa Rivera**

16 Vanessa Rivera (“Rivera”) began receiving EDD unemployment insurance benefits
17 through a BANA EDD debit card with a magnetic stripe that was linked to a BANA EDD
18 debit card account in January 2020 and from April 2020 to August 2021. (Dkt. No. 324-
19 14, Chan Decl., Ex. 11, Rivera Decl. ¶¶ 2, 3.)

20 On January 29, 2021, Rivera got a text notification that the balance on her EDD
21 debit card account was \$4.17. (*Id.* ¶ 4.) She was shocked because she knew she had over
22 \$800 remaining in the account. (*Id.*) She immediately logged into her EDD debit card
23 account found that someone had conducted a balance inquiry from an ATM in Newport
24 Beach, CA, about an hour away from where she lives and withdrew \$800. (*Id.*) She
25 then called BANA’s number to report these unauthorized transactions and to credit her
26 EDD debit card account for the \$800 that was stolen. (*Id.* ¶ 5.)

27 When she finally reached BANA, the first BANA representative transferred her to
28 another department. (*Id.* ¶ 6.) She then spoke with a second BANA representative and

1 made a claim concerning the unauthorized ATM withdrawal totaling \$800. (*Id.*) She
2 explained that she did not make or authorize the \$800 withdrawal, and she had never
3 given or disclosed the PIN for her EDD debit card to anyone, had never authorized
4 anyone to use her EDD debit card, and was not in Newport Beach, CA on the day of the
5 unauthorized withdrawal. (*Id.*) She was provided a claim number and she understood
6 that the claim would be investigated. (*Id.*)

7 On February 4, 2021, she called BANA again and was told that the representative
8 she had spoken with on January 29, 2021 never actually submitted a claim and that
9 person had just put a “note” in her account and sent her a new card. (*Id.* ¶ 7.) The
10 representative informed her that, this time, she had successfully submitted the fraud claim
11 for investigation. (*Id.*)

12 In a letter dated February 5, 2021, one day after the BANA representative
13 submitted her fraud claim, BANA informed her that her claim was closed and she would
14 not be reimbursed for the \$800 taken from her account and without explanation stated,
15 “Your claim has been closed because we believe the account or the claim have been the
16 subject of fraud or suspicious activity.” (*Id.* ¶ 8.)

17 On February 6, 2021, she received a replacement card in the mail and when she
18 tried to activate the card online, she was not allowed to access her account. (*Id.* ¶ 9.) She
19 then called the number on the back of the card to activate it and a BANA representative
20 told her that her account was frozen due to suspicious activity and fraudulent charges.
21 (*Id.*) BANA did not provide any notice before freezing the account. (*Id.*) Her EDD
22 debit card remained frozen for 41 days from February 5, 2021 to March 18, 2021. (*Id.* ¶
23 10.) She was not able to access any of her EDD benefits that were in her account as of
24 the time of the freeze and could not receive or access any new periodic EDD benefits
25 payments she would have received and would have been able to use if BANA had not
26 frozen her account. (*Id.*) She called BANA repeatedly informing she had verified her
27 identity with EDD, expressed the extreme hardship this account freeze imposed on her,
28 and received conflicting information from BANA representatives about what she could

1 do to get BANA to unfreeze her account. (*Id.*) Through documents produced in this
2 litigation, she later learned that on March 18, 2021, BANA converted her account status
3 from frozen to blocked but she was still not able to access her EDD benefits. (*Id.*)
4 BANA unblocked her account on April 20, 2021 after she filed this litigation. (*Id.*)

5 On June 21, 2021, after the Consolidated Class Action Complaint was filed
6 and 140 days after she submitted her unauthorized transaction claim, BANA finally
7 credited her the \$800 to her EDD debit card account that had been stolen from her in
8 January 2021. (*Id.* ¶ 11.)

9 **8. J. Michael Willrich**

10 J. Michael Willrich (“Willrich”) began receiving EDD unemployment insurance
11 benefits through a BANA EDD debit card with a magnetic stripe that was linked to a
12 BANA EDD debit card account in April 2020. (Dkt. No. 324-15, Chan Decl., Ex. 12,
13 Willrich Decl. ¶¶ 2, 3.) Around October 27, 2020, he discovered that there had been 27
14 unauthorized transactions on his EDD debit card account from October 10, 2020 to
15 October 26, 2020. (*Id.* ¶ 4.) The unauthorized transactions included 21 charges at a store
16 in the State of Washington that he had never heard of or shopped at, two ATM
17 transactions for \$1,000 each and a \$700 ATM withdrawal in the State of Washington.
18 (*Id.*) The unauthorized transactions totaled \$5,083.75. (*Id.*) At the time of the
19 unauthorized transactions, he was over 1,200 miles away in San Diego, CA, where he
20 resides. (*Id.*)

21 He immediately went to a BANA branch but the teller informed him that the
22 branch could not help him and instructed him to call the number on the back of his EDD
23 debit card. (*Id.* ¶ 5.) That same day, he called the number on the back of his card to
24 report the unauthorized transactions and to seek reimbursement of the money that had
25 been taken out of his account. (*Id.* ¶ 6.) After spending more than three hours on hold,
26 he was disconnected before he was able to get through to the claims department. (*Id.*)

27 The next morning, on October 29, 2020, he woke up at 5:00 am hoping to speak
28 with a BANA representative. (*Id.* ¶ 7.) After holding, he was connected with a

1 representative in the claims department and spent about an hour on the phone going
2 through each unauthorized transaction and explaining why each was not authorized. (*Id.*)

3 On October 30, 2020, just one business day after he reported the unauthorized
4 transaction claim, BANA mailed a letter informing him that it had closed his claim and
5 would not be reimbursing him for the \$5,083.75 taken from his account. (*Id.* ¶ 8.) The
6 letter stated: “Your claim has been closed because we believe the account or the claim
7 have been the subject of fraud or suspicious activity.” (*Id.*) Over the next three
8 weekends, he made several attempts to contact BANA’s customer service, including
9 waiting on hold for three or four hours before being disconnected at the end of BANA’s
10 business hours. (*Id.* ¶ 9.) On November 9, 2020, he again woke up before dawn and was
11 able to connect with the claims department and request that his claim be reconsidered.
12 (*Id.*) The BANA representative told him that baseless denials were a known issue, that
13 many people were having the same problems, and that no human had ever looked at his
14 claim. (*Id.*) He later learned that his claim had been denied based on the Claim Fraud
15 Filter. (*Id.*)

16 Between October 27, 2020 and November 15, 2020, Willrich called BANA for
17 assistance on at least six separate occasions, sometimes making multiple calls in a day,
18 typically waiting on hold for at least an hour each time he called and being shuffled
19 between multiple agents in one day. (*Id.* ¶ 10.) In total, he estimates he spent
20 approximately three hours on the phone with BANA’s representatives trying to resolve
21 these issues, and at least eight hours on hold during this period. (*Id.*)

22 Around January 12, 2021, 75 days after he submitted his unauthorized transactions
23 claim, he learned BANA finally credited his EDD debit card account the \$5,083.75 that
24 had been stolen from him the previous October. (*Id.* ¶ 11.)

25 **9. Alex Yuan**

26 Alex Yuan (“Yuan”) began receiving EDD unemployment insurance benefits
27 through a BANA EDD debit card with a magnetic stripe that was linked to a BANA EDD
28 debit card account in May 2020. (Dkt. No. 324-16, Chan Decl., Ex. 13, Yuan Decl. ¶¶ 2,

1 3.) In September 2020, he discovered that two separate unauthorized ATM withdrawals
2 of \$900 each, totaling \$1,800, were made from his EDD debit card. (*Id.* ¶ 4.) One
3 withdrawal was made on August 24, 2020, in Los Angeles, CA, and another on
4 September 7, 2020, in Pasadena, CA but at the time of the unauthorized ATM
5 withdrawals, he was more than 300 miles away from Los Angeles and Pasadena in San
6 Jose, CA. (*Id.*)

7 On September 10, 2020, he called BANA’s customer service number to report
8 these unauthorized ATM withdrawals and to ask BANA to credit his EDD debit card
9 account for the \$1,800 that was stolen. (*Id.* ¶ 5.) After spending more than one hour on
10 hold, he spoke with a BANA representative in the claims department and identified the
11 two unauthorized ATM withdrawals totaling \$1,800, informed the BANA representative
12 that he had never used an ATM anywhere near the ones used for the withdrawals, and
13 confirmed that he had his debit card in his possession at all relevant times, and had not
14 authorized anyone else to make the withdrawals. (*Id.* ¶ 6.) The BANA representative
15 confirmed that his claim had been filed and would be investigated. (*Id.*)

16 On September 13, 2020, BANA provisionally credited his account \$1,800 but on
17 September 28, 2020, BANA froze his account and it remained frozen until October 4,
18 2020. (*Id.* ¶¶ 7, 8.) In a letter dated October 3, 2020, BANA informed Yuan that it had
19 closed his claim and would be rescinding the \$1,800 credit. (*Id.* ¶ 9.) The letter provided
20 no explanation of BANA’s findings stating only: “Your claim has been closed because
21 we believe the account or the claim have been the subject of fraud or suspicious activity”
22 and that the credit applied to his account “has been or will be debited from [his] account.”
23 (*Id.*) Beginning on October 4, 2020, he called BANA on multiple occasions seeking to
24 have the \$1,800 unauthorized transaction claim reconsidered. (*Id.* ¶ 10.) During these
25 calls, he experienced long wait times, dropped calls, and elusive responses concerning
26 why the credit had been rescinded from his account, why his claim was denied, and when
27 and how the matter would be resolved. (*Id.*)
28

1 After he made multiple calls to BANA seeking reconsideration of his claim,
2 BANA sent a letter dated November 9, 2020, stating that BANA had “completed an
3 additional review” of his claim and, “[a]s a result of [BANA’s] research” had credited
4 him the \$1,800 that had been stolen from him. Yuan received this credit approximately
5 60 days after he submitted his unauthorized transaction claim to BANA and 36 days after
6 BANA rescinded the \$1,800 credit. (*Id.* ¶ 11.)

7 Between September 10, 2020 and November 15, 2020, he called BANA on at least
8 seven separate occasions, sometimes making multiple calls and getting shuffled between
9 multiple agents on the same day. (*Id.* ¶ 12.) He waited on hold for at least an hour each
10 time he called trying to resolve these issues. (*Id.*)

11 On or about October 26, 2020, Yuan experienced another \$900 unauthorized ATM
12 withdrawal from his EDD debit card account that occurred in North Hills, CA. (*Id.* ¶ 13.)
13 Around November 11, 2020, he called BANA’s customer service to inquire about the
14 \$1,800 unauthorized transaction claim and also whether he could amend that claim to
15 add a claim regarding the \$900 unauthorized ATM withdrawal or whether he had to make
16 a new claim for the \$900 unauthorized transaction that occurred on October 26, 2020.
17 (*Id.* ¶ 14.) During this call, he learned that BANA had recently reimbursed the \$1800
18 claim and so he was given a new claim number for the October 26, 2020 unauthorized
19 transaction of \$900. (*Id.* ¶ 15.)

20 On November 18, 2020, he again called BANA’s customer service to follow up on
21 the \$900 unauthorized transaction claim and to ask BANA to credit his EDD debit card
22 account for the \$900 that was stolen. (*Id.* ¶ 16.) After waiting on hold, he finally spoke
23 with a BANA representative and identified the unauthorized ATM withdrawal totaling
24 \$900 and confirmed that he had the card in his possession at all relevant times and did not
25 authorize anyone to make the withdrawals. (*Id.* ¶ 17.)

26 In a letter dated November 19, 2020, one business day after he followed up on his
27 claim disputing the unauthorized withdrawal, BANA had closed his claim and indicated
28 it would not be reimbursing the \$900 taken from his account. (*Id.* ¶ 18.) The letter

1 provided no explanation of BANA’s investigation or findings, stating only: “Your claim
2 has been closed because we believe the account or the claim have been the subject of
3 fraud or suspicious activity.” (*Id.*)

4 In December 2020, he received a letter from BANA notifying him that it
5 had again frozen his account due to fraud. (*Id.* ¶ 19.) Through this litigation, Yuan
6 learned that BANA froze his account on December 17, 2020 and the freeze remained in
7 effect for 28 days until January 15, 2021. (*Id.*) During that period, he could not receive
8 or access any new periodic EDD benefits payments that he would have received and
9 would have been able to use if BANA had not frozen his account. (*Id.*)

10 After he made multiple calls to BANA seeking reconsideration of the
11 \$900 unauthorized transaction claim of October 26, 2020, he received a letter from
12 BANA dated January 13, 2021, stating that the BANA had once again “completed an
13 additional review” of his claim and, based on that research, had credited him the \$900
14 that had been taken from him the previous October. (*Id.* ¶ 20.) He received this credit 56
15 days after he submitted his unauthorized transaction claim to BANA. (*Id.*)

16 **Procedural Background**

17 On January 14, 2021, former Class Plaintiff Jennifer Yick commenced a purported
18 class action in the United States District Court for the Northern District of California
19 against BANA. (*See Yick v. Bank of Am.*, Case No. 21cv376-VC, Dkt. No. 1, Compl.
20 (N.D. Cal. 2021).) Eight additional class actions were subsequently filed and
21 consolidated with *Yick* on March 29, 2021. (*Id.*, Dkt. No. 60.) On April 1, 2021,
22 Plaintiffs in the *Yick* consolidated class action sought a preliminary injunction enjoining
23 BANA from automatically denying fraud claims based on its faulty “Claim Fraud Filter”
24 and freezing or blocking claimants’ accounts without investigation. (*Id.*, Dkt. No. 64.)
25 The *Yick* court granted a preliminary injunction on May 17, 2021, and provisionally
26 certified a class of all EDD Cardholders who called BANA to report unauthorized
27 charges. (Dkt. No. 324-73, Chan Decl., Ex. 73.) On June 2, 2021, following negotiations
28 between the parties and with the assistance of the magistrate judge, the *Yick* court entered

1 a preliminary injunction which: (1) barred BANA from considering the results of its CFF
2 when investigating claims or resolving unauthorized transaction error claims; (2)
3 prohibited BANA from denying claims or denying provisional or permanent credits
4 without an investigation and providing the claimant with a written explanation; (3)
5 prohibited BANA from freezing any account based on the results of the CFF; (4) required
6 BANA to reopen any claims previously denied based on the results of the CFF and that it
7 had not previously paid or previously reopened and investigated; and (5) required BANA
8 to establish dedicated toll free numbers for Class Members to be available 24 hours per
9 day, 7 days a week for those seeking assistance with claims intake and frozen accounts.
10 (Dkt. No. 324-74, Chan Decl., Ex. 71.) Around that same time, a number of individual
11 plaintiffs initiated actions against BANA for injuries stemming from the same alleged
12 conduct. The injunction was eventually dissolved as of June 1, 2024 when EDD
13 terminated its contract with BANA. (Dkt. No. 255.)

14 In July 2022, the Consumer Financial Protection Bureau (“CFPB”) and the Office
15 of the Comptroller of the Currency (“OCC”) separately entered into Consent Orders with
16 BANA regarding findings of violations of federal law related to its use of the CFF. (Dkt.
17 No. 324-75, Chan Decl., Ex. 72; Dkt. No. 324-76, Chan Decl. Ex. 73.) In response to the
18 Consent Orders, BANA created the Unemployment Insurance Prepaid Card Program
19 Remediation Plan (“Remediation Plan”) along with its Addendum and Second

20 Addendum [REDACTED]
21 [REDACTED]
22 [REDACTED]. (Dkt. No. 368-29, Chan Decl.,
23 Ex. 147 (UNDER SEAL).)

24 Under the Remediation Plan, [REDACTED]
25 [REDACTED]
26 [REDACTED]. (Dkt. No. 368-29, Chan Decl., Ex. 147 § III(B) at 6 & n.16
27 (UNDER SEAL).) [REDACTED]. (*Id.* at 7 (UNDER
28

1 SEAL.) As of October 23, 2024, the review process was still ongoing. (Dkt. No. 350-8,
2 Brys Decl., Ex. 7, Martin Decl. ¶ 15.)

3 On June 4, 2021, the Judicial Panel on Multidistrict Litigation (“JPML”)
4 transferred the *Yick* class action and individually filed actions to this Court for
5 consolidated pretrial proceedings. (Dkt. No. 1.) Pursuant to the Court’s order following
6 a case management conference, (Dkt. No. 48), Plaintiffs filed a Master Consolidated
7 Complaint (“MCC”) on August 17, 2021. (Dkt. No. 72.) On May 25, 2023, the Court
8 granted in part and denied in part Defendant’s motion to dismiss the MCC with leave to
9 amend. (Dkt. No. 126.) On June 13, 2023, Plaintiffs filed a First Amended Master
10 Consolidated Complaint (“FAMCC”) against BANA. (Dkt. No. 136.)

11 Subsequently, on July 11, 2023, Defendant filed a motion to dismiss certain claims
12 of the FAMCC. (Dkt. Nos. 146, 171, 175.) On August 7, 2023, Plaintiffs filed a motion
13 for reconsideration of the UCL claim that was dismissed with prejudice. (Dkt. Nos. 151,
14 158, 161.)

15 On April 8, 2024, the case was transferred to the undersigned judge. (Dkt. No.
16 261.) On June 25, 2024, the Court granted in part and denied in part Defendant’s motion
17 to dismiss the FAMCC and granted Plaintiffs’ motion for reconsideration with leave to
18 amend. (Dkt. No. 297.)

19 On July 16, 2024, Plaintiffs filed a Second Amended Master Consolidated
20 Complaint (“SAMCC”). (Dkt. No. 304.) After the hearing on class certification, on
21 January 24, 2025, Class Plaintiffs file the operative Third Amended Master Consolidated
22 Complaint, (“TAMCC”).⁸ (Dkt. No. 406.) The TAMCC alleges the following remaining
23 claims:

24 _____
25 ⁸ At the hearing, Class Plaintiffs sought leave to amend when the Court questioned whether Plaintiffs
26 could seek class certification on a due process claim for the Credit Rescission Class when it was not
27 raised in the SAMCC and whether Plaintiffs could raise the breach of fiduciary claim for the Customer
28 Service Class when it was not alleged in the SAMCC. (Dkt. No. 422 at 5-6.) Plaintiffs filed the
TAMCC to add the Credit Rescission Class to the due process claims and to add the Customer Service
Class to the breach of fiduciary duty claim. Defendant did not oppose. (*Id.* at 6.)

- 1 1. First Claim -violation of the Electronic Funds Transfer Act (“EFTA”),
- 2 15 U.S.C. §§ 1963 *et seq.*, and Regulation E ,12 C.F.R. §§ 1005.1 *et*
- 3 *seq.*;
- 4 2. Second Claim - violation of the California Consumer Privacy Act
- 5 (“CCPA”), Cal. Civ. Code §§ 1798.100 *et seq.*;
- 6 3. Fourth Claim - violation of California’s Unfair Competition Law
- 7 (“UCL”), Cal. Bus. & Prof. Code §§ 17200 *et seq.*;
- 8 4. Fifth Claim - Negligence and Negligence Per Se;
- 9 5. Sixth Claim - Negligent Hiring, Supervision, and Retention;
- 10 6. Seventh Claim - Breach of Contract;
- 11 7. Ninth Claim - Breach of the Implied Covenant of Good Faith and Fair
- 12 Dealing;
- 13 8. Tenth Claim - Breach of Fiduciary Duty;
- 14 9. Thirteenth Claim - violation of the Due Process Clause of the
- 15 Fourteenth Amendment of the United States Constitution; and
- 16 10. Fourteenth Claim - violation of the Due Process Clause of the
- 17 California Constitution.

13 (*Id.*) On February 7, 2025, Defendant filed an answer. (Dkt. No. 414.)

14 On August 29, 2024, Plaintiffs filed the instant motion for class certification which
15 is fully briefed.⁹ (Dkt. Nos. 324, 349, 378.)

16 Class Plaintiffs seek to certify the following five classes:

17 1 **Claim Denial Class:** All Bank of America EDD cardholders who
18 notified the Bank that an unauthorized transaction had occurred on their
19 Bank of America EDD debit card account (“Claim”) at an automated teller
20 machine (“ATM”), and whose Claim the Bank denied or closed at any time
21 from September 28, 2020 through June 8, 2021, based solely on Indicator 1
22 of the Bank’s Claim Fraud Filter (“CFF”).

23 2 **Credit Rescission Class:** All Bank of America EDD cardholders who
24 received permanent credit from the Bank in connection with their Claim,
25 which credit the Bank rescinded at any time from September 28, 2020
26 through June 8, 2021, based solely on Indicator 1 of the Bank’s CFF.

27 3 **Account Freeze Class:** All Bank of America EDD cardholders whose
28 EDD debit card account (“Account”) the Bank froze at any time from
September 28, 2020 through March 17, 2021, based solely on Indicator 1 of

⁹ The filing of the TAMCC does not impact the Court’s ruling on the motion for class certification as the parties briefed the two issues that were absent from the SAMCC.

1 the Bank’s CFF, and whose Account the Bank (i) subsequently unfroze, or
2 (ii) subsequently converted from frozen to blocked status on or after March
3 18, 2021 and then unblocked.

4 **Customer Service Class:** All members of the Claim Denial class
5 and/or the Credit Rescission class who telephoned the Bank’s customer
6 service telephone number for its EDD cardholders at any time from
7 September 13, 2020 through November 21, 2020, and whose telephone call
8 was routed to the Bank’s Claims call center.

9 **EMV Chip Class:** All members of the Claim Denial class and/or
10 Credit Rescission class whose EDD debit card did not include an EMV chip
11 prior to June 9, 2021.

12 Excluded from each class is any person whom the Bank has determined,
13 pursuant to its Remediation Plan with the United States Consumer Financial
14 Protection Bureau (CFPB) and Office of the Comptroller of the Currency
15 (OCC), “(i) has been disqualified by the [S]tate [of California] from
16 Program¹⁰ eligibility; (ii) has previously engaged in fraudulent Program
17 conduct, such as submission of fraudulent claims or other abuses of the
18 claims process; or (iii) has had their card frozen due to legal order processes,
19 as a result of Internal/Vendor fraud investigations, or by Global Financial
20 Crimes Compliance.” Also excluded from each class is any person whose
21 Claim or Account the Bank closed, in whole or in part, because the State of
22 California requested the Bank to close that person’s Claim or Account.

23 (Dkt. No. 386-1.)

24 Specifically, Plaintiffs seek certification of the designated classes based on their
25 claims for relief pursuant to:

- 26 (1) the Electronic Fund Transfers Act (“EFTA”), 15 U.S.C. §§1693(a)-(r), and its
27 implementing Regulation E (“Reg E”), 12 C.F.R. pt. 1005 (**Claim Denial and
28 Credit Rescission Classes**);
- 29 (2) the due process clauses of the United States Constitution, amend. XIV (42
30 U.S.C. § 1983), and California Constitution, art. I § 7(a) (**Credit Rescission
31 and Account Freeze Classes**);

32 ¹⁰ Program refers to Defendant’s “Unemployment Benefits Prepaid Card Program.” (Dkt. No. 367-6,
33 Chan Decl., Ex. 74 at 3 (UNDER SEAL).)

- 1 (3) breach of fiduciary duty (**Claim Denial, Credit Rescission, and Account**
- 2 **Freeze, and EMV Chip Classes**);¹¹
- 3 (4) breach of the implied covenant of good faith and fair dealing under the Bank’s
- 4 account agreement with EDD cardholders (**Claim Denial, Credit Rescission,**
- 5 **Account Freeze, and Customer Service Classes**);
- 6 (5) California Consumer Privacy Act (“CCPA”), Cal. Civ. Code §§ 1798.100-.199
- 7 (**EMV Chip Class**);
- 8 (6) negligence and negligence per se (**all Classes**); and
- 9 (7) the Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§17200-17210.
- 10 (**Claim Denial, Credit Rescission, and Account Freeze Classes**).

11 Plaintiffs also seek the appointment of Plaintiffs Koole, McClure, Moon,

12 Oosthuizen, Rivera, Willrich, and Yuan as class representatives for the Claim Denial

13 class; the appointment of Plaintiffs Chong and Moore as class representatives for the

14 Credit Rescission class; the appointment of Plaintiffs Chong, Koole, McClure, Moon,

15 Moore, Rivera, and Yuan as class representatives for the Account Freeze class; the

16 appointment of Plaintiffs Chong, Moon, Moore, Oosthuizen, Willrich, and Yuan as class

17 representatives for the Customer Service class; and the appointment of Plaintiffs Chong,

18 Koole, McClure, Moon, Moore, Oosthuizen, Rivera, Willrich, and Yuan as class

19 representatives for the EMV Chip class. Finally, they seek the appointment of Cotchett

20 Pitre & McCarthy LLP and Altshuler Berzon LLP to serve a co-lead Class Counsel.

21 ///

22 ///

23 ///

24 _____

26 ¹¹ In an order filed on January 27, 2025, the Court noted that the breach of fiduciary duty claim as to the

27 Customer Service Class was not briefed in the motion for class certification and set a briefing schedule.

28 (Dkt. No. 408 at 2; Dkt. No. 423.) Subsequently, on February 28, 2025, Class Plaintiffs notified the Court that it will not seek to certify the breach of fiduciary duty claim as to the Customer Service Class. (Dkt. No. 434.)

1 **Discussion**

2 **A. Legal Standard on Class Certification**

3 “The class action is an exception to the usual rule that litigation is conducted by
4 and on behalf of individual named parties only. In order to justify a departure from that
5 rule, a class representative must be a part of the class and possess the same interest and
6 suffer the same injury as the class members.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S.
7 338, 348-49 (2011) (internal quotation marks and citations omitted). A plaintiff seeking
8 class certification must affirmatively show the class meets the requirements of Federal
9 Rule of Civil Procedure (“Rule”) 23. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432
10 (2013) (citing *Dukes*, 564 U.S. at 350-51). To obtain certification, a plaintiff bears the
11 burden of proving that the class meets all four requirements of Rule 23(a)--numerosity,
12 commonality, typicality, and adequacy. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970
13 979-80 (9th Cir. 2011). If these prerequisites are met, the court must then decide whether
14 the class action is maintainable under Rule 23(b). *United Steel, Paper & Forestry,*
15 *Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int’l Union AFL–CIO, CLC v.*
16 *ConocoPhillips Co.*, 593 F.3d 802, 806 (9th Cir. 2010). This case involves Rule
17 23(b)(3), which authorizes certification when “questions of law or fact common to class
18 members predominate over any questions affecting only individual class members,” and
19 “a class action is superior to other available methods for fairly and efficiently
20 adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Plaintiffs must prove, by a
21 preponderance of the evidence, that the prerequisites of Rule 23 have been satisfied.
22 *Olean*, 31 F.4th at 665. The Court exercises discretion in granting or denying a motion
23 for class certification. *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003).

24 The Court is required to perform a “rigorous analysis,” which may require it “to
25 probe behind the pleadings before coming to rest on the certification question.” *Dukes*,
26 564 U.S. at 350-51. “[T]he merits of the class members’ substantive claims are often
27 highly relevant when determining whether to certify a class. More importantly, it is not
28 correct to say a district court may consider the merits to the extent that they overlap with

1 class certification issues; rather, a district court must consider the merits if they overlap
2 with Rule 23(a) requirements.” *Ellis*, 657 F.3d at 981. Nonetheless, the district court
3 does not conduct a mini-trial to determine if the class “could actually prevail on the
4 merits of their claims.” *Id.* at 983 n.8; *United Steel*, 593 F.3d at 808 (citation omitted)
5 (court may inquire into substance of case to apply the Rule 23 factors, however, “[t]he
6 court may not go so far . . . as to judge the validity of these claims.”).

7 **B. Federal Rule of Civil Procedure 23(a)**

8 **1. Numerosity**

9 Plaintiffs maintain that the numerosity factor is easily met because there are
10 significantly more than forty members. (Dkt. No. 324-1 at 28.) Defendant does not
11 challenge that numerosity has been satisfied. (*See* Dkt. No. 349.)

12 To establish numerosity, a plaintiff must show that the represented class is “so
13 numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1); *Bates v.*
14 *United Parcel Serv.*, 204 F.R.D. 440, 444 (N.D. Cal. 2001). A court may reasonably
15 infer based on the facts of each particular case to determine if numerosity is satisfied.
16 *Ikonen v. Hartz Mtn. Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988). “As a general rule,
17 classes of 20 are too small, classes of 20–40 may or may not be big enough depending on
18 the circumstances of each case, and classes of 40 or more are numerous enough.” *Id.*

19 Because the proposed claim members, in each proposed class, are in the thousands,
20 the Court finds that numerosity has been satisfied.

21 **2. Commonality**

22 Because the requirements of Rule 23(a)(2)’s “commonality” overlaps with the
23 predominance requirements of Rule 23(b)(3) requiring questions common to the class
24 must predominate over individualized ones, the Court addresses commonality in its
25 discussion of Rule 23(b)(3) below. *See Olean*, 31 F.4th at 664 (“The requirements of
26 Rule 23(b)(3) overlap with the requirements of Rule 23(a) . . . Therefore, courts must
27 consider cases examining both subsections [Rule 23(a) and Rule 23(b)(3)] in performing
28 a Rule 23(b)(3) analysis[]”); *see Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir.

1 2017) (addressing Rule 23(a) and Rule 23(b)(3) requirements concurrently); *see also*
2 *Raines v. U.S. Healthworks Med. Grp.*, Case No.: 19-cv-1539-DMS-DEB, 2024 WL
3 3850812, at *5 (S.D. Cal. Aug. 16, 2024) (addressing commonality with predominance).

4 **3. Typicality**

5 Under typicality, the Court must determine whether the claims or defenses of the
6 representative parties are typical of the claims or defenses of the class. Fed. R. Civ. P.
7 23(a)(3). Typicality focuses on ensuring that the interests of the class representatives
8 “aligns with the interests of the class.” *Just Film, Inc.*, 847 F.3d at 1116 (quoting *Hanon*
9 *v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). “The requirement is
10 permissive, such that representative claims are typical if they are reasonably coextensive
11 with those of absent class members; they need not be substantially identical.” *Id.*
12 (citation and internal quotation marks omitted). “Measures of typicality include ‘whether
13 other members have the same or similar injury, whether the action is based on conduct
14 which is not unique to the named plaintiffs, and whether other class members have been
15 injured by the same course of conduct.’” *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125,
16 1141 (9th Cir. 2016) (quoting *Hanon*, 976 F.2d at 508). Recognizing that “class
17 certification is inappropriate where a putative class representative is subject to unique
18 defenses which threaten to become the focus of the litigation”, the Ninth Circuit held that
19 “class certification should not be granted if ‘there is a danger that absent class members
20 will suffer if their representative is preoccupied with defenses unique to it.’” *Hanon*, 976
21 F.2d at 508 (citation omitted).

22 Class Plaintiffs argue that they are typical of those class members they seek to
23 represent because their claims and injuries all arise from BANA’s Claim Denial, Credit
24 Rescission and Account Freeze policies applied to all EDD cardholders; BANA’s
25 intentional and uniform practice of understaffing its Claims call center; and BANA’s
26 failure to include industry-standard EMV chips on its EDD debit cards. (Dkt. No. 324-1
27 at 30-31.) Defendant contends the class includes putative class members who are subject
28 to defenses that they do not share with the nine representative Class Plaintiffs. (Dkt. No.

1 349 at 50-51.) In reply, Plaintiffs maintain that typicality focuses on whether the named
2 plaintiff will be subject to defenses unique to it and not the reverse. (Dkt. No. 378 at 11
3 n.2.)

4 The Court agrees with Class Plaintiffs that the question on typicality is whether
5 they will be subject to defenses that are unique to them which will threaten to become the
6 focus of the litigation, and not, as BANA argues, whether the putative class members
7 have defenses unique to them.¹² See *Hanon*, 976 F.2d at 508 (“Typicality refers to the
8 nature of the claim or defense of the class representative.”); *Nitsch v. Dreamworks*
9 *Animation SKG Inc.*, 315 F.R.D. 270, 284 (N.D. Cal. 2016) (“Thus, the fact that
10 Defendants may have affirmative defenses against some absent class members does not
11 affect the Court’s typicality analysis.”); *Barnes v. AT&T Pension Benefit Plan-*
12 *Nonbargained Program*, 270 F.R.D. 488, 494 (N.D. Cal. 2010) (“More generally,
13 defenses that may bar recovery for some members of the putative class, but that are not
14 applicable to the class representative do not render a class representative atypical under
15 Rule 23.”) (citing *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 117 (C.D. Cal. 2007)
16 (holding that unique defenses against some class members do not make a class
17 representative atypical) and *Winkler v. DTE, Inc.*, 205 F.R.D. 235, 241-42 (D. Ariz.
18 2001) (holding that typicality requirement met even though the defendant argued “it ha[d]
19 valid defenses and counterclaims it may assert against some class members but not the
20 named representative”)). Therefore, Defendant’s argument that putative class members
21 may have defenses unique to them is not relevant to the question of typicality.

22 BANA additionally contends that Class Plaintiffs are subject to unique defenses
23 because each Class Plaintiff will be subject to different damages depending on the facts
24 and absent class members may be harmed by relying on a Class Plaintiff who is not
25

26
27 ¹² BANA relies on *In re Digital Music Antitrust Litig.*, 321 F.R.D. 64, 88 (S.D.N.Y. 2017) where it held
28 that typicality considers the unique defenses of the putative class members but without any legal
analysis. (See Dkt. No. 349 at 51.) *In re Digital Music Antitrust Litig.* is not in line with the Ninth
Circuit’s ruling in *Hanon* and the Court declines to adopt its conclusion.

1 entitled to damages. (Dkt. No. 349 at 52 (citing *Williams v. Warner Music Grp.*, 884 Fed
2 App’x 284, 285 (9th Cir. 2021) (“Plaintiffs were atypical class members because they
3 apparently would not be entitled to damages.”).) The Court again disagrees. First, there
4 is no indication that any of the Class Plaintiffs would not be entitled to damages.
5 Moreover, typicality relates to the nature of the lead plaintiff’s “claims and defenses,” not
6 to the amount of damages. *See* Fed. R. Civ. P. 23(a)(3). Differences related to Class
7 Plaintiffs’ potential damages and potential damages of the putative class members do not
8 defeat typicality as long as the alleged injury is common to the putative class members.
9 *See Coppel v. SeaWorld Parks & Ent.*, 347 F.R.D. 338, 357 (S.D. Cal. 2024) (“Although
10 the losses attributable could differ from participant to participant, individual damages
11 should not defeat typicality.”) (quoting *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 110
12 (N.D. Cal. 2008)); *Mendoza v. Zirkle Fruit Co.*, 222 F.R.D. 439, 446 (D. Wash. 2004)
13 (“The fact that damage claims will vary among [class members] does not defeat
14 typicality.”); *Carlos v. Wal-Mart Assocs., Inc.*, Case No. 5:21-CV-00294-AB (KKx),
15 2022 WL 17885691, at *8 (C.D. Cal. Sept. 6, 2022) (typicality satisfied because the
16 alleged injury was common to plaintiff and the putative class members, and rejecting the
17 defendant’s argument that differences in the plaintiff’s and putative class members
18 potential damages defeat typicality).

19 As discussed below on commonality, Class Plaintiffs have claimed that they and
20 all putative class members were subject to and injured by BANA’s uniform practice and
21 policy of implementing CFF-1 when it automatically denied claims, rescinded permanent
22 credits and froze accounts. Further, they and the putative class members were injured by
23 BANA’s practice of understaffing its Claims call center and failing to include industry-
24 standard EMV chips on all its EDD debit cards. Thus, Plaintiffs have shown their claims
25 are typical of the claims and defenses of the putative class members.

26 **4. Adequacy**

27 As to adequacy, Rule 23(a)(4) provides that class representatives must “fairly and
28 adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). In analyzing

1 whether Rule 23(a)(4) has been met, the Court must ask two questions: “(1) do the named
2 plaintiffs and their counsel have any conflicts of interest with other class members and
3 (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf
4 of the class?” *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir.
5 2012) (quoting *Hanlon*, 150 F.3d at 1020).

6 Plaintiffs argue that they have shown their ability to litigate the case vigorously on
7 behalf of class members and have no interests adverse to the class. (Dkt. No. 324-1 at
8 31.) Further, they maintain that proposed Co-Lead Class Counsel satisfy the adequacy
9 requirement. (*Id.*) In response, BANA repeats the same argument raised on typicality
10 raising differences in defenses between the Class Plaintiffs and the putative class
11 members.¹³ (Dkt. No. 349 at 51.)

12 Contrary to BANA’s argument, “a named plaintiff is not rendered inadequate
13 merely because he or she is not subject to every affirmative defense that a defendant may
14 assert against particular absent class members.” *Nitsch*, 315 F.R.D. at 285 (citing *Barnes*,
15 270 F.R.D. at 495 (holding that “the potential existence of [affirmative] defenses against
16 absent class members does not, standing alone, make [the named plaintiff] inadequate”);
17 *see also Boyd v. Bank of Am. Corp.*, 300 F.R.D. 431, 439 (C.D. Cal. 2014) (noting that
18 “there is no authority for the proposition that an affirmative defense, which may affect
19 some members of the class, creates a conflict that otherwise defeats the adequacy of a
20 proposed class representative”) (quotation marks omitted).

21 In support of adequacy, Class Plaintiffs have declared that they do not have any
22 conflicts of interest with other class members and will prosecute the action vigorously on
23 behalf of the class. (*See* Dkt. No. 324-8, Chan Decl., Ex. 5, Chong Decl. ¶¶ 16, 17; Dkt.
24 No. 324-9, Chan Decl., Ex. 6, Koole Decl. ¶¶ 10, 11; Dkt. No. 324-10, Chan Decl., Ex. 7,
25

26
27 ¹³ BANA does not provide a separate, distinct argument on adequacy because typicality and adequacy
28 become a “single inquiry.” (*See* Dkt. No. 349 at 51 (citing *James v. Uber Tech. Inc.*, 338 F.R.D. 123,
133 (N.D. Cal. 2021)).

1 McClure Decl. ¶¶ 13, 14; Dkt. No. 324-11, Chan Decl., Ex. 8, Moon Decl. ¶¶ 17, 18;
2 Dkt. No. 324-12, Chan Decl., Ex. 9, Moore Decl. ¶¶ 14, 15; Dkt. No. 324-13, Chan Decl.,
3 Ex. 10, Oosthuizen Decl. ¶¶ 12, 13; Dkt. No. 324-14, Chan Decl., Ex. 11, Rivera Decl. ¶¶
4 13, 14; Dkt. No. 324-15, Chan Decl., Ex. 12, Willrich Decl. ¶¶ 12, 13; Dkt. No. 324-16,
5 Chan Decl., Ex. 13, Yuan Decl. ¶¶ 22, 23.) Defendant does not challenge any of these
6 Class Plaintiffs’ assertions. Thus, the Court finds that Class Plaintiffs have demonstrated
7 they are adequate representatives.

8 As to adequacy of counsel, Rule 23(g)(4) requires that “[c]lass counsel must fairly
9 and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(4). BANA
10 does not dispute the adequacy of proposed Co-Lead Class Counsel. In the *Yick*
11 consolidated case, the district court appointed Cotchett Pitre & McCarthy (“CPM”) and
12 Altshuler Berzon LLP as interim co-lead counsel. (Dkt. No. 324-161, Jt. Decl. ¶ 2.)
13 Once the JPML ordered that these cases be transferred to this district, on July 20, 2021,
14 the court appointed them as Interim Co-Lead Counsel in this case. (*Id.*; *see also* Dkt. No.
15 48 at 2.) Based on these prior designations as well as the joint declaration of counsel
16 providing support for CPM and Altshuler Berzon LLP to be co-lead class counsel, the
17 Court finds that the adequacy requirement is satisfied with respect to both counsel.

18 **C. Federal Rule of Civil Procedure 23(a)(2) and 23(b)(3)**

19 The commonality prerequisite of Rule 23(a)(2) requires that plaintiffs show that
20 “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2).
21 Commonality requires the plaintiff to demonstrate that the class members ‘have suffered
22 the same injury.’” *Dukes*, 564 U.S. at 350. “That common contention . . . must be of
23 such a nature that it is capable of classwide resolution – which means that determination
24 of its truth or falsity will resolve an issue that is central to the validity of each one of the
25 claims in one stroke.” *Id.* “What matters to class certification . . . is not the raising of
26 common ‘questions’ . . . but, rather the capacity of a classwide proceeding to generate
27 common *answers* apt to drive the resolution of the litigation. Dissimilarities within the
28 proposed class are what have the potential to impede the generation of common

1 answers.” *Id.* (emphasis in original) (citation omitted). “Therefore, to prove there is a
2 common question of law or fact that relates to a central issue [in this case], plaintiffs must
3 establish that the “essential elements of the cause of action . . . are capable of being
4 established through a common body of evidence, applicable to the whole class.” *Olean*,
5 31 F.4th at 666 (internal quotation marks and citation omitted). “Commonality mandates
6 there be a common question of law or fact among the class members ‘where the same
7 evidence will suffice for each member to make a prima facie showing [or] the issue is
8 susceptible to generalized, class-wide proof.’” *Small v. Allianz Life Ins. Co. of N. Amer.*,
9 122 F.4th 1182, 1198 (9th Cir. 2024) (quoting *Lara v. First Nat’l Ins. Co. of Am.*, 25
10 F.4th 1134 11134, 1138 (2022) (alteration in original) (internal quotation marks and
11 citation omitted)).

12 Once Plaintiffs show that there are “questions of law or fact common to class
13 members,” then they must prove, under Rule 23(b)(3), that “the questions of law or fact
14 common to class members predominate over any questions affecting only individual
15 members.” Fed. R. Civ. P. 23(b)(3); *see Olean*, 31 F.4th at 664. “The predominance
16 inquiry ‘asks whether the common, aggregation-enabling, issues in the case are more
17 prevalent or important than the non-common, aggregation-defeating, individual issues.’”
18 *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted). Rule
19 23(b)(3) requires the court to make a “rigorous assessment of the available evidence and
20 the method or methods by which plaintiffs propose to use the [class-wide] evidence to
21 prove the common question in one stroke.” *Olean*, 31 F.4th at 666 (internal quotation
22 marks and citation omitted).

23 A key concern of the Rule 23(b)(3) requirement is whether “adjudication of
24 common issues will help achieve judicial economy.” *Vinole v. Countrywide Home*
25 *Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (quoting *Zinser v Accufix Research Inst.*,
26 253 F.3d 1180, 1189 (9th Cir. 2001)). The predominance inquiry focuses on whether the
27 proposed class is “sufficiently cohesive to warrant adjudication by representation.”
28 *Amchem*, 521 U.S. at 623 (citation omitted).

1 When “one or more of the central issues in the action are common to the class and
2 can be said to predominate, the action may be considered proper under Rule 23(b)(3)
3 even though other important matters will have to be tried separately, such as damages or
4 some affirmative defenses peculiar to some individual class members.” *Tyson Foods,*
5 *Inc.*, 577 U.S. at 453 (citation omitted). In short, “Rule 23(a)(2) asks whether there are
6 issues common to the class, and Rule 23(b)(3) asks whether these common questions
7 predominate.” *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013).
8 “By contrast, an individual question is one where members of a proposed class will need
9 to present evidence that varies from member to member.” *Olean*, 31 F.4th at 663 (citing
10 *Tyson Foods, Inc.*, 577 U.S. at 453).

11 Ultimately, Plaintiffs must prove by a preponderance of evidence that common
12 questions predominate over questions affecting only individual members, and that the
13 common questions relate to “a central issue in the plaintiffs’ claim.” *Olean*, 31 F.4th at
14 665. Therefore, “[c]onsidering whether ‘questions of law or fact common to class
15 members predominate’ begins, of course, with the elements of the underlying cause of
16 action.” *Id.* at 665 (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804,
17 809 (2011)).

18 **1. EFTA (Claim Denial and Credit Rescission Classes)**

19 As discussed briefly above, the EFTA is a federal consumer protection law
20 “establishing the rights, liabilities, and responsibilities of participants in electronic fund . .
21 . transfer systems.” 15 U.S.C. § 1693(b). Congress enacted the EFTA due to the
22 increasing use of electronic banking transactions and recognized these transactions as
23 “much more vulnerable to fraud, embezzlement, and unauthorized use than the traditional
24 payment method.” *Bank of Am. v. City and Cnty. of San Francisco*, 309 F.3d 551, 564
25 (9th Cir. 2002) (quoting H.R. Rep. No. 95-1315, at 2 (1978)). Reg E implements the
26 EFTA. 12 C.F.R. § 205.1. An “electronic fund transfer” is “any transfer of funds . . .
27 initiated through an electronic terminal, telephonic instrument, or computer or magnetic
28 tape so as to order, instruct, or authorize a financial institution to debit or credit an

1 account.” 15 U.S.C. § 1693a(7). To achieve its purpose of providing for individual
2 consumer rights, the EFTA grants consumers a private cause of action against “any
3 person who fails to comply with any provision” of the EFTA. *Id.* § 1693m.

4 Among their many provisions, the EFTA and Reg E require financial institutions to
5 timely investigate and resolve “errors” on electronic fund transfers. 15 U.S.C. § 1693f;
6 12 C.F.R. § 1005.11. In order to invoke the protections of the EFTA and Reg E, the
7 consumer must notify the bank, orally or in writing, of any “errors” concerning an
8 electronic fund transfer within 60 days of receipt of a bank statement or other document
9 detailing the alleged erroneous electronic fund transfer. 15 U.S.C. § 1693f(a); 12 C.F.R.
10 § 1005.11. Once the bank is properly notified, it must “investigate the alleged error,
11 determine whether an error has occurred, and report or mail the results of such
12 investigation and determination to the consumer within ten business days.” 15 U.S.C. §
13 1693f(a). However, if the institution cannot complete the investigation within 10 days as
14 required under §§ 1693f(a) and (b), it may “provisionally recredit” the consumer’s
15 account within ten business days of receiving notice of an error and complete its
16 investigation within 45 days. 15 U.S.C. § 1693f(c). If a provisional credit is issued, the
17 consumer has full use of the funds during the pendency of the investigation. *Id.*

18 If the financial institution discovers that an error occurred, it must promptly, no
19 later than one business day after the discovery, correct the error, and must include
20 interest, if applicable. 15 U.S.C. § 1693f(b). If the financial institution concludes after
21 its investigation that an error did not occur, it shall deliver or mail its explanation of
22 findings to the consumer within three business days after the conclusion of the
23 investigation. 15 U.S.C. § 1693f(d). “[T]he burden of proof is upon the financial
24 institution to show that the electronic fund transfer was authorized or, if the electronic
25 fund transfer was unauthorized, then the burden of proof is upon the financial institution
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27
28

1 to establish that the conditions of liability set forth in subsection (a)¹⁴ have been met.” 15
2 U.S.C. § 1693g(b).

3 If a bank fails to comply with any provisions of the statute, it is liable for damages.
4 15 U.S.C. §§ 1693f(e); 1693m(a). Additionally, a consumer is entitled to treble damages
5 if “the court finds that-- (1) the financial institution did not provisionally recredit a
6 consumer’s account within the ten-day period . . . and the financial institution (A) did not
7 make a good faith investigation of the alleged error, or (B) did not have a reasonable
8 basis for believing that the consumer's account was not in error. 15 U.S.C. § 1693f(e)(1).
9 Treble damages are also warranted when “the financial institution knowingly and
10 willfully concluded that the consumer's account was not in error when such conclusion
11 could not reasonably have been drawn from the evidence available to the financial
12 institution at the time of its investigation.” 15 U.S.C. § 1693f(e)(2).

13 Reg E provides that “a financial institution’s review of its own records regarding
14 an alleged error” satisfies § 1693f's investigation requirement. *See* 12 C.F.R. §
15 1005.11(c)(4); *see Green v. Capitol One, N.A.*, 557 F. Supp. 3d 441, 451 (S.D.N.Y. 2021)

17
18 ¹⁴ Subsection (a) of 15 U.S.C. § 1693g provides,

19 A consumer shall be liable for any unauthorized electronic fund transfer involving the
20 account of such consumer only if the card or other means of access utilized for such
21 transfer was an accepted card or other mean[s] of access and if the issuer of such card,
22 code, or other means of access has provided a means whereby the user of such card, code,
23 or other means of access can be identified as the person authorized to use it, such as by
signature, photograph, or fingerprint or by electronic or mechanical confirmation. In no
event, however, shall a consumer's liability for an unauthorized transfer exceed the lesser
of--

24 (1) \$50; or

25 (2) the amount of money or value of property or services obtained in such unauthorized
26 electronic fund transfer prior to the time the financial institution is notified of, or
27 otherwise becomes aware of, circumstances which lead to the reasonable belief that an
28 unauthorized electronic fund transfer involving the consumer's account has been or may
be effected. Notice under this paragraph is sufficient when such steps have been taken as
may be reasonably required in the ordinary course of business to provide the financial
institution with the pertinent information, whether or not any particular officer, employee,
or agent of the financial institution does in fact receive such information.

1 (“[W]hen read in conjunction with the implementing regulations and Official
2 Interpretation, § 1693f requires that any investigation under the statute include a
3 reasonable review of the financial institution's own records.”).

4 **a. Commonality**

5 Class Plaintiffs seek to certify the Claim Denial and Credit Rescission Classes
6 alleging BANA violated the EFTA and Reg E. (Dkt. No. 324-1 at 32-35.) Because
7 BANA applied the same uniform policy, CFF-1, to all EDD cardholders, Plaintiffs claim
8 that common issues include “(1) whether the Bank had a policy of summarily denying
9 cardholders’ unauthorized transaction claims based solely on CFF-1; (2) whether the
10 Bank automatically rescinded previously paid permanent credits based solely on the
11 results of CFF-1; (3) whether the Bank’s automated claim denial procedures violated
12 EFTA’s ‘investigation’ requirement, 15 U.S.C. §1693f; (4) whether the Bank’s use of
13 CFF-1 to summarily deny claims violated its EFTA obligation to pay provisional credit,
14 *id.* §1693f(e)(1); (5) whether, by using CFF-1 to automatically deny claims and rescind
15 permanent credits, the Bank ‘did not make a good faith investigation of the alleged error’
16 or ‘knowingly and willfully concluded that the consumer’s account was not in error when
17 such conclusion could not reasonably have been drawn from the evidence available to the
18 financial institution at the time,’ *id.* §1693f(e); and (6) whether the form letters the Bank
19 sent every cardholder whose claim it auto-denied or auto-rescinded under CFF-1 failed to
20 provide an ‘explanation of its [investigation] findings,’ *id.* § 1693f(d).” (*Id.* at 28-29.)
21 Plaintiffs argue that common evidence, including BANA’s own documents, will confirm
22 the existence and implementation of the Claim Denial and Claim Rescission policies.
23 (*Id.* at 33-35.)

24 BANA does not challenge the common questions raised by Plaintiffs that it
25 uniformly denied all cardholders’ unauthorized transactions claims based on CFF-1, it
26 uniformly rescinded all cardholders’ permanent credits based on use of the CFF-1,
27 uniformly provided all putative class members the same letter without an explanation of
28 its findings, and that these actions may be subject to treble damages under the EFTA.

1 Instead, BANA responds that Plaintiffs omits disparate questions concerning elements to
2 prove an EFTA violation.¹⁵ (Dkt. No. 349 at 26-35.)

3 First, BANA argues that Plaintiffs must demonstrate that their accounts were
4 “established for personal, family, or household purposes,” not criminal purposes and this
5 issue cannot be common with every class member because it is a fact-driven one. (Dkt.
6 No. 349 at 27 (citing 12 C.F.R. § 1005.2(b)(1).¹⁶) In reply, Plaintiffs argue that their
7 accounts are not subject to 12 C.F.R. § 1005.2(b)(1) as BANA claims; rather their
8 accounts are prepaid accounts or “government benefit accounts” subject to 12 C.F.R. §
9 1005.2(b)(3)(i)(B)¹⁷ which is defined as “an account established by a government agency
10 for distributing government benefits to a consumer electronically, such as through
11 automated teller machines or point-of-sale terminals” 12 C.F.R. § 1005.15(a)(2).

12 At the hearing, BANA, relying on its statutory construction, argued that
13 “government benefit accounts” fall under the definition of an “account” requiring a
14 showing that it was established primarily for person, family or household purposes. The
15 Court disagrees.

16 Under the definition section of Reg E, subsection (b) defines an “account.” 12
17 C.F.R. § 1005.2(b). Under subsection (b), there are three distinct paragraphs defining
18 what an account is or is not. 12 C.F.R. §§ 1005.2(b)(1), (2), & (3). The first paragraph
19 defines account as a “demand deposit (checking), savings, or other consumer asset
20 account . . . held . . . by a financial institution and established primarily for personal,
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23 ¹⁵ Some of Defendant’s arguments on commonality would have been more appropriately raised under
24 predominance because commonality focuses simply on identifying at least one common issue of fact or
25 law, Rule 23(a)(2); *see Dukes*, 564 U.S. at 359 (“We quite agree that for purposes of Rule 23(a)(2), even
26 a single common question will do.”) (internal quotation marks omitted), while predominance looks at
27 whether these common questions of law or fact predominate over individual ones, Rule 23(b)(3). *See*
28 *Olean*, 31 F.4th at 663-66.

¹⁶ “‘Account’ means a demand deposit (checking), savings, or other consumer asset account . . . held
directly or indirectly by a financial institution and established primarily for personal, family, or
household purposes.” 12 C.F.R. § 1005.2(b)(1).

¹⁷ “(3) The term [account] includes a prepaid account. (i) ‘Prepaid account’ means: . . . (B) A
‘government benefit account,’ as defined in § 1005.15(a)(2).” 12 C.F.R. § 1005.2(b)(3)(i)(B)

1 family, or household purposes.” 12 C.F.R. § 1005.2(b)(1). Under the second paragraph,
2 an account is not one “held by a financial institution under a bona fide trust agreement.”
3 12 C.F.R. § 1005.2(b)(2). Lastly, the third paragraph states that an “account” includes a
4 prepaid account. 12 C.F.R. §§ 1005.2(b)(3). Prepaid account is then described in four
5 subparagraphs. *See* 12 C.F.R. § 1005.2(b)(3)(A)-(D). Subparagraph B includes a
6 “government benefit account” which is at issue in this case. Contrary to Defendant’s
7 interpretation, the Court views each paragraph as distinct definitions of an “account.”
8 One account is opened by an individual for personal or family purposes while the
9 government benefit account is being established by a government entity to distribute
10 government benefits. It is not logical to impose the requirement that all “accounts” be
11 established “primarily for personal, family, or household purposes” on government
12 benefit accounts. Because EDD cardholders’ accounts are “government benefit
13 accounts”, the Court concludes there is no required showing that the accounts were
14 created for personal, family or household purposes; thus, BANA’s argument is
15 unavailing.

16 Second, BANA maintains that Plaintiffs must show that each challenged
17 transaction was in fact “unauthorized”, 15 U.S.C. § 1693a(12)(b)¹⁸ because class
18 members who filed fraudulent disputes cannot recover, relying on 15 U.S.C. §
19 1693g(a).¹⁹ (Dkt. No. 349 at 27-28.) As such, it maintains that Plaintiffs cannot prove
20

21 ¹⁸ “The term ‘unauthorized electronic fund transfer’ means an electronic fund transfer from a
22 consumer’s account initiated by a person other than the consumer without actual authority to initiate
23 such transfer and from which the consumer receives no benefit, but the term does not include any
24 electronic fund transfer (A) initiated by a person other than the consumer who was furnished with the
25 card, code, or other means of access to such consumer’s account by such consumer, unless the consumer
26 has notified the financial institution involved that transfers by such other person are no longer
27 authorized, (B) initiated with fraudulent intent by the consumer or any person acting in concert with the
28 consumer, or (C) which constitutes an error committed by a financial institution.” 15 U.S.C. §
1693a(12).

¹⁹ “A consumer shall be liable for any unauthorized electronic fund transfer involving the account of
such consumer only if the card or other means of access utilized for such transfer was an accepted card
or other mean[s] of access and if the issuer of such card, code, or other means of access has provided a
means whereby the user of such card, code, or other means of access can be identified as the person

1 fraudulent intent with common evidence. (*Id.* at 28.) In reply, Plaintiffs assert that all
2 putative class members were subject to the same uniform policies and practices, and
3 BANA has only demonstrated a possibility of a de minimis number of fraudulent or
4 mistaken claims which does not defeat commonality. (Dkt. No. 378 at 9-10.)

5 BANA misunderstands what showing Plaintiffs must present on a prima facie
6 violation of the EFTA in order to satisfy commonality. *See Small*, 122 F.4th at 1198
7 (commonality looks at whether “the same evidence will suffice for each member to make
8 a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.”).
9 Contrary to BANA’s argument, the burden of proving each disputed transaction was
10 “unauthorized” is on BANA, not Plaintiffs, the EDD debit cardholders. The EFTA
11 expressly states that “the burden of proof is upon the financial institution to show that the
12 electronic fund transfer was authorized or, if the electronic fund transfer was
13 unauthorized, then the burden of proof is upon the financial institution to establish that
14 the conditions of liability set forth in subsection (a) have been met.” 15 U.S.C. §
15 1693g(b). BANA, not EDD cardholders, has to “to show that claims are unauthorized
16 before denying claims[.]” *Merisier v. Bank of Am., N.A.*, 688 F.3d 1203, 1210 (11th Cir.
17 2012). In order to invoke the protections of the EFTA, Class Plaintiffs are only required
18 to timely notify BANA and provide information about the unauthorized transaction. *See*
19 15 U.S.C. § 1693f(a). Once that notice is provided, the bank must investigate within ten
20 business days, or within 45 days if the bank provisionally recredits the consumers’
21 account within ten business days. *See* 15 U.S.C. §§ 1693f(a) & (c). It is during this
22 investigation that the bank determines whether an unauthorized transaction occurred or
23 not. *See* 15 U.S.C. §§ 1693f(b) & (d). Therefore, contrary to BANA’s position, on a
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28 authorized to use it, such as by signature, photograph, or fingerprint or by electronic or mechanical
confirmation.” 15 U.S.C. § 1693g(a).

1 prima facie case, Plaintiffs do not have to demonstrate that their challenged transactions
2 were “unauthorized”²⁰ or show each of the cardholders lacked fraudulent intent, and its
3 argument does not defeat commonality.

4 Third, BANA argues that individual questions exist about adequate notice because
5 discovery revealed multiple individual plaintiffs whose account records show untimely
6 notices despite their allegations in the consolidated complaint to the contrary. (Dkt. No.
7 349 at 32.) Therefore, according to BANA, determining which putative class members
8 satisfy the notice element is fact-intensive and dependent on each EDD cardholders’
9 online banking habits. (*Id.* at 32-33.) In reply, Plaintiffs argue that BANA has only
10 identified two members²¹ of the roughly 104,300 members in the Claim Denial Class who
11 did not provide adequate notice and has not identified any members of the Credit
12 Rescission class who submitted a claim outside the 60-day period. (Dkt. No. 378 at 13.)
13 Further, they argue that BANA’s records can easily establish if the notice requirement
14 was met. (*Id.*)

15 In order to invoke the protections of the EFTA, a plaintiff must provide notice
16 within 60 days of receipt of a bank statement or other document detailing the alleged
17 erroneous electronic fund transfer. *See* 12 C.F.R. § 1005.11(c). Here, whether a
18 proposed class member has met the 60-day notice requirement can easily be determined
19 by a review of BANA’s records which include [REDACTED]
20 [REDACTED]. (Dkt. No. 393-2, Chan
21
22

23
24 ²⁰BANA’s relies on *Nelson* and *Almon* to support its argument that Plaintiffs must demonstrate the
25 alleged transactions are unauthorized. The two cases are inapplicable because they did not address the
26 EFTA, a strict liability statute, but, rather, breach of contract claims. *See Nelson v. Conduent Bus.*
27 *Servs. LLC*, Civil Action No. 1:18cv669-SDG, 2020 WL 5587450, at *6 (N.D. Ga. Sept. 18, 2020);
28 *Almon v. Conduent Bus. Servs., LLC*, SA-19-CV-1075-XR, 2022 WL 4545530, at *14-15 (W.D. Tex.
Sept. 28, 2022) (“Unlike the rights granted under the EFTA and Regulation E, however, Section 8 [of
the contract] does not afford a cardholder a procedural protection.”).

²¹[REDACTED]. (*See* Dkt. No. 393-2,
Chan Decl., Ex. 4, Regan Expert Report, Sch. I (UNDER SEAL).)

1 Decl., Ex. 4, Regan Expert Report ¶¶ 32, 34 (UNDER SEAL); Dkt. No. 378-23, Chan
2 Suppl. Decl., Ex. 178 (Account History).)

3 Therefore, commonality is not defeated by individual questions on whether
4 putative class members provided timely notice to BANA because ascertaining members
5 of the Claim Denial Class can be addressed and easily determined at the claims stage.
6 *See e.g., Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1131-32 (9th Cir. 2017)
7 (defendants can “challenge the claims of absent class members if and when they file
8 claims for damages” explaining that parties have “long relied on ‘claim administrators,
9 various auditing processes, sampling for fraud detection, follow-up notices to explain the
10 claims process, and other techniques tailored by the parties and the court’ to validate
11 claims.”)

12 Lastly, BANA contends that the evidence concerning treble damages is not
13 common because it will depend on each individual account and as such, it will not
14 generate common answers. (Dkt. No. 349 at 33-35.) According to BANA, discovery has
15 already revealed individual Plaintiffs’ claims would likely fail based on evidence on their
16 individual accounts. (*Id.* at 34.) Plaintiffs reply that treble damages can be determined
17 on a classwide basis because it is not disputed that BANA failed to provide provisional
18 credit within the 10-day period as to all in the Class Denial class and it summarily
19 rescinded permanent credits as to all in the Credit Rescission class. (Dkt. No. 378 at 13-
20 14.)

21 Under the EFTA, a consumer is entitled to treble damages under two
22 circumstances. First, a consumer is entitled to treble damages if “the court finds that-- (1)
23 the financial institution did not provisionally recredit a consumer’s account within the
24 ten-day period . . . and the financial institution (A) did not make a good faith
25 investigation of the alleged error, or (B) did not have a reasonable basis for believing that
26 the consumer's account was not in error. 15 U.S.C. § 1693f(e)(1). Second, treble
27 damages are warranted when “the financial institution knowingly and willfully concluded
28 that the consumer's account was not in error when such conclusion could not reasonably

1 have been drawn from the evidence available to the financial institution at the time of its
2 investigation.” 15 U.S.C. § 1693f(e)(2).

3 Here, Plaintiffs’ theory is that BANA failed to conduct *any* investigation and
4 summarily denied EDD cardholders’ unauthorized transaction claims and rescinded
5 permanent credits [REDACTED]; therefore, whether its failure to
6 investigate subjects it to treble damages is a classwide common question that
7 predominates. BANA’s argument on treble damages is without merit.

8 Other courts have similarly found that a financial institution’s failure to comply
9 with the EFTA satisfies commonality. *See Almon, LLC*, 2022 WL 4545530, at *11
10 (violations of EFTA and Reg E’s timeliness of investigation and credits satisfied
11 commonality that affects all or a large number of putative class members); *Nelpia v. TD*
12 *Bank*, 21cv1092, 2024 WL 3017141, at *15-16 (E.D.N.Y. June 17, 2024) (commonality
13 met where the bank “maintains a policy and procedure of denying claims where the
14 accountholder approves the subject transactions or otherwise provides access to their
15 account” and the putative class members “were subject to the same unitary course of
16 conduct, which is sufficient to establish commonality.”).

17 In conclusion, because the EFTA claim relies on BANA’s uniform policy and
18 practice applicable to all EDD cardholders, commonality is easily satisfied and BANA
19 does not dispute that common evidence from its own records reveal this uniform practice
20 and policy. *See Beaver v. Omni Hotels Mgmt. Corp.*, Case No.:20cv191-AJB-DEB, 2023
21 WL 6120685, at *5 (S.D. Cal. Sept. 18, 2023) (“[w]here common questions stem from
22 the same source, or focus on the defendant’s conduct, commonality is generally satisfied)
23 (citing *Just Film, Inc.*, 847 F.3d at 1124 n.3 (“These issues are appropriate for classwide
24 litigation because they focus on Leasing Defendants’ conduct.”)); *Baghdasarian v.*
25 *Amazon.com, Inc.*, 258 F.R.D. 383, 388 (C.D. Cal. 2009) (finding commonality where
26 “the claims of all members of the class ‘stem from the same source’”); *Haley v.*
27 *Medtronic, Inc.*, 169 F.R.D. 643, 650-51 (C.D. Cal. 1996); *see e.g., Small*, 122 F.4th at
28

1 1198 (whether an insurance company violated a statute giving rise to the action can be a
2 common question to the class”).

3 **b. Predominance**

4 On predominance, BANA similarly argues that questions regarding whether the
5 alleged error claims were “authorized” will require individual inquiries whether the
6 transactions were honest mistakes or fraudulent. (Dkt. No. 349 at 42.) According to
7 BANA, “(i) criminals who defrauded the EDD with fraudulent benefits claims; (ii)
8 legitimate beneficiaries and criminals alike who defrauded BANA with fraudulent
9 transaction disputes; (iii) legitimate cardholders who disputed their own transactions by
10 honest mistake; and (iv) legitimate cardholders already compensated for their potential
11 injuries” will be in the class and subject to windfalls from double-dipping or quadruple
12 dipping. (*Id.* at 43.) Plaintiffs reply that BANA relies on speculation and fails to support
13 its argument with evidence. (Dkt. No. 378 at 22.) Further, they argue that to the extent
14 BANA has provided evidence, it has cited only a de minimis number of uninjured class
15 members which does not defeat predominance. (*Id.*)

16 In *Ruiz Torres*, the Ninth Circuit rejected the argument that “a class cannot be
17 certified if it contains both injured and non-injured parties” explaining that a “well-
18 defined class may inevitably contain some individuals who have suffered no harm as a
19 result of a defendant’s unlawful conduct.” *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d
20 1125, 1137 (9th Cir. 2016) (citing *Newberg on Class Actions* § 2:3) and *Messner v.*
21 *Northshore Univ. HealthSystem*, 669 F.3d 802, 823 (7th Cir. 2012) (“[S]ome class
22 members' claims will fail on the merits if and when damages are decided, a fact generally
23 irrelevant to the district court’s decision on class certification.”)). The *Ruiz* court
24 acknowledged “the possibility that an injurious course of conduct may sometimes fail to
25 cause injury to certain class members.” *Id.* at 1136.

26 Similarly, here, all putative class members were subject to Defendant’s uniform
27 practice and policy of applying CFF-1 which automatically denied EDD cardholders’
28 error claims and rescinded permanent credits. Therefore, the legal issue of whether these

1 policies violate the EFTA predominates over a handful of identified class members who
2 were not injured. *See id.* at 1134 (“more important questions apt to drive the resolution
3 of the litigation are given more weight in the predominance analysis over individualized
4 questions which are of considerably less significance to the claims of the class.”). In
5 addition, identifying non-injured class members may be done at the claims and/or
6 damages phase. *See id.* at 1137 (“that such fortuitous non-injury to a subset of class
7 members does not necessarily defeat certification of the entire class, particularly as the
8 district court is well situated to winnow out those non-injured members at the damages
9 phase of the litigation, or to refine the class definition.”).

10 The Court also disagrees with BANA’s assessment that individual questions,
11 concerning non-injured and/or fraudulent class members, will predominate over common
12 issues for several reasons. First, the proposed Class definition already excludes any
13 person who “(i) has been disqualified by the [S]tate [of California] from Program²²
14 eligibility; [or] (ii) has previously engaged in fraudulent Program conduct, such as
15 submission of fraudulent claims or other abuses of the claims process[.]” (Dkt. No. 384-
16 1, Notice of Mot. at 3.)

17 Second, when the CFF was first implemented, if the EDD cardholders’ claims
18 were denied based on CFF-1, they could seek reconsideration of their denials. (Dkt. No.
19 362, Chan Decl., Ex. 14, Daniels Depo. at 52:21-53:9; 234:13-21 (UNDER SEAL); (Dkt.
20 No. 366-24, Chan Decl., Ex. 49, BANA’s Resp. to Interrog. 28 at 9 (UNDER SEAL).)

21 [REDACTED]
22 [REDACTED]. (See Dkt No. 382-2, Brys Decl., Ex. 6, Letson Decl. ¶ 36
23 at 220 (UNDER SEAL); Dkt. No., 382-2, Brys Decl., Ex. 43 at 400 (UNDER SEAL).)

24 Third, under the PI order in *Yick*, dated June 2, 2021, BANA was required, within
25 10 days of the Order, to reopen any claims it closed or denied based solely on the results
26

27
28 ²² Program means “the Bank’s Unemployment Benefits Prepaid Card Program.” (Dkt. No. 367-6, Chan Decl., Ex. 74 at 5 (UNDER SEAL).)

1 of the CFF and that it had not previously paid or previously reopened and investigated,
2 and conduct an investigation within 10 business days or 45 calendar days, if provisional
3 credits in the amount of the alleged error were provided. (Dkt. No. 324-74, Chan Decl.,
4 Ex. 71.) BANA was also required to provide notice to class members whose accounts
5 were blocked solely due to CFF and the accounts would be unblocked if the class
6 members authenticate their identities. (*Id.*) Implementing the PI was an opportunity for
7 BANA to further investigate claims that were denied due to the CFF.

8 Then, in response to the Consent Orders in July 2022 between BANA and the
9 CFPB and the OCC, (Dkt. No. 324-75, Chan Decl., Ex. 72; Dkt. No. 324-76, Chan Decl.
10 Ex. 73), in October 2022, BANA implemented the Remediation Plan [REDACTED]
11 [REDACTED]. (Dkt. No. 367-
12 6, Chan Decl., Ex. 74 (UNDER SEAL). Under the Remediation Plan, [REDACTED]
13 [REDACTED].
14 [REDACTED].
15 (Dkt. No. 367-6, Chan Decl., Ex. 74, at 6 (UNDER SEAL).) But on this population,
16 [REDACTED]
17 [REDACTED]
18 [REDACTED] (Dkt. No. 367-6, Chan Decl., Ex. 74 at 6
19 (UNDER SEAL).) Then, [REDACTED]
20 [REDACTED]. (Dkt. No. 367-
21 6, Chan Decl., Ex. 74 at 7 (UNDER SEAL).) According to the Remediation Plan, [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]. (*Id.* at 6 (UNDER SEAL).)

26 Through the reconsideration process, the PI and the Remediation Plan, [REDACTED]
27 [REDACTED]
28 [REDACTED]. There is no evidence

1 that many unearthed fraudulent claims will arise. In a declaration dated October 23,
2 2024, William M. Martin, Senior Vice President of Fraud Operations and a Prepaid Fraud
3 Operations Executive, states that in connection with the Remediation Plan, [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]. (Dkt. No. 382-2, Brys Decl., Ex. 7, Martin Decl. ¶ 8 at 225 (UNDER SEAL).)

8 Martin declares that [REDACTED]

9 [REDACTED]. (*Id.* ¶
10 9 at 226 (UNDER SEAL).) [REDACTED]

11 [REDACTED]. (*Id.* ¶ 12 at 227 (UNDER SEAL).) [REDACTED]

12 [REDACTED]. (*Id.* (UNDER SEAL).) [REDACTED]

13 [REDACTED]. (*Id.* (UNDER SEAL).) [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]. (*Id.* (UNDER SEAL).)

19 [REDACTED]
20 [REDACTED]. (*Id.* (UNDER SEAL).) [REDACTED]

21 [REDACTED]. (*Id.* (UNDER SEAL).) [REDACTED]

22 [REDACTED]. (*Id.* (UNDER
23 SEAL).) BANA states [REDACTED]

24 [REDACTED]. (*Id.* (UNDER SEAL).) At the hearing, BANA asserted
25 [REDACTED].

26 Plaintiffs respond that a careful review of Martin's declaration reveal [REDACTED]

27 [REDACTED] are actual class members because [REDACTED]

28 [REDACTED]

1 [REDACTED]. (Dkt. No. 378 at 23.) It is true that Martin has not stated [REDACTED]
 2 [REDACTED]
 3 [REDACTED]. At the hearing, when the Court raised this question, [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED], it amounts to a de minimis number of
 8 uninjured class members. *See Olean*, 31 F.4th at 669 (no per se rule preventing district
 9 courts from certifying a class that may include more than a de minimis number of
 10 uninjured class members).

11 The Court agrees with Plaintiffs that BANA has not sufficiently demonstrated with
 12 evidence that individual issues will predominate on the EFTA claim. *See Van v. LLR,*
 13 *Inc.*, 61 F.4th 1053, 1067 (9th Cir. 2023) (“If the plaintiff demonstrates that class issues
 14 exist, the defendant must invoke individualized issues and provide sufficient evidence
 15 that the individualized issues bar recovery on at least some claims, thus raising the
 16 spectre of class-member-by-class-member adjudication of the issue.”); *True Health*
 17 *Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 932 (9th Cir. 2018) (“[W]e do not
 18 consider . . . defenses that [the defendant] might advance or for which it has presented no
 19 evidence.”). Martin’s declaration, nor other evidence, support BANA’s position that
 20 individual inquiries will predominate over common ones.

21 BANA also maintains that the Remediation Plan is [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]. (See Dkt. No. 367-6, Chan Decl., Ex. 74 at
 27 6 (UNDER SEAL).) At the hearing, BANA argued [REDACTED]
 28 [REDACTED]

1 [REDACTED]
2 [REDACTED]. (See Dkt. No. 382-2, Brys Decl., Ex. 43 at 406 (UNDER SEAL).)

3 However, the evidence does not support BANA’s claim. In response to Plaintiffs’
4 Interrogatory No. 39 to [REDACTED]
5 [REDACTED]
6 [REDACTED] (Id. at 404
7 (UNDER SEAL)), BANA states it [REDACTED]

8 [REDACTED]
9 [REDACTED]. (Id. at 406.) BANA also states
10 that it [REDACTED]
11 [REDACTED]
12 [REDACTED]. (Id. at 406.)

13 BANA’s response to Interrogatory No. 39 does not [REDACTED]
14 [REDACTED].
15 Therefore, BANA has not shown, with evidence, that individual inquiries will
16 predominate over common ones.

17 BANA also incorrectly claims that illegitimate cardholders still need to be sorted
18 out and “those who remain still need to prove they would have prevailed on their error
19 claims (had the filter not been used) under the law and contract that constrained their
20 legally enforceable rights.” (Dkt. No. 349 at 44.) However, as noted above, the
21 claimants do not need to prove their unauthorized transaction claim, it is BANA that
22 needs to conduct the investigation by reviewing its own records. Individual inquiries to
23 EDD cardholders will not be necessary.

24 Even if fraudulent claimants need to be sorted out, the process of fact-intensive
25 analysis will come from BANA and EDD’s records and not any evidence that a class
26 member will need to present; therefore, additional discovery or many mini-trials will not
27 overwhelm the proceedings. See *Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459, 469
28 (9th Cir. 2023) (ordering the de-certification of a class action where the trial of the

1 individualized issues would be “prohibitively cumbersome” and the plaintiff had failed to
2 prove that the class issues nevertheless predominated over the individualized issues).
3 Predominance is not defeated in a case where there may be some individual inquiries
4 which can be determined by a review of Defendant’s records rather than a “prohibitively
5 cumbersome” trial of individualized issues. *See id.*

6 The Court concludes that the putative class members are linked by a significant
7 operative fact, having been denied a claim or having their permanent credits rescinded,
8 and a primary legal issue, whether the subject policy violated the EFTA and whether each
9 class member suffered the same statutory injury. *See Mabary v. Hometown Bank, N.A.*
10 Civ. No. 4:10–cv–3936, 2011 WL 5864325, at *3 (S.D. Tex. Nov. 22, 2011)
11 (predominance satisfied where plaintiff and potential class assert the same statutory
12 injury by the same course of conduct) (citing *Burns v. First Am. Bank*, No. 04–C–7682,
13 2006 WL 3754820, at *9 (N.D. Ill. Dec. 19, 2006) (observing, in the context of an EFTA
14 suit against a bank, that “[w]hatever the ultimate merits of this claim, it will be decided
15 predominately, if not entirely, based on common evidence of Defendant's conduct”)).

16 Finally, BANA summarily argues that because each member of a certified class
17 must have Article III standing, a class with uninjured class members cannot be certified
18 because individual inquiries would predominate over common ones relying on
19 *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021). (Dkt. No. 349 at 42-43.)

20 While the Supreme Court held “[e]very class member must have Article III
21 standing in order to recover individual damages[.]” *TransUnion LLC v. Ramirez*, 594
22 U.S. 413, 431 (2021), the Court specifically did not address “the distinct question
23 whether every class member must demonstrate standing *before* a court certifies a class.
24 *Id.* at 431 n.4. In fact, the Ninth Circuit held there is no per se rule preventing district
25 courts from certifying a class that may include more than a de minimis number of
26 uninjured class members. *Olean*, 31 F.4th at 669 (“[W]e reject the dissent's argument
27 that Rule 23 does not permit the certification of a class that potentially includes more
28 than a de minimis number of uninjured class members.”). Therefore, the Court rejects

1 BANA’s argument that prior to class certification, Plaintiffs must demonstrate that all
2 class members have Article III standing. *See Weiner v. Ocwen Fin. Corp.*, 343 F.R.D.
3 628, 631 (E.D. Cal. 2022) (granting reconsideration because court improperly held that
4 Plaintiff was required to establish Article III standing at certification).

5 **2. Due Process Violation under United States and California Constitution**
6 **(Credit Rescission and Account Freeze Classes)**

7 Plaintiffs move to certify the Credit Rescission Class and Account Freeze Class
8 alleging their due process rights under the Fourteenth Amendment of the United States
9 Constitution pursuant to 42 U.S.C. § 1983 and Article I, § 7 of the California Constitution
10 were violated “by [BANA] seizing previously awarded permanent credits from their
11 EDD debit card accounts (Credit Rescission Class) and freezing those accounts (Account
12 Freeze Class) based solely on CFF-1, without providing pre-deprivation notice or a
13 meaningful opportunity to be heard, or even reasonable post-deprivation procedures.”
14 (Dkt. No. 324-1 at 35.)

15 “The touchstone of procedural due process is notice and an opportunity to be
16 heard” and “is a flexible concept that varies with the particular situation.” *Miranda v.*
17 *City of Casa Grande*, 15 F.4th 1219, 1225 (9th Cir. 2021) (citations omitted). A
18 procedural due process claim has two elements: “(1) a deprivation of a constitutionally
19 protected liberty or property interest, and (2) a denial of adequate procedural
20 protections.” *Id.* at 1224-25 (citation omitted). Further, BANA must have been acting
21 under color of state law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999).
22 Article 1, section 7 of the California Constitution protects persons from deprivation of
23 “life, liberty, or property without due process of law,” Cal. Const. art. I, § 7(a), and is
24 “identical in scope with the federal due process clause.” *Owens v. City of Signal Hill*,
25 154 Cal. App. 3d 123, 127 n. 2 (1984).

26 Plaintiffs propose the following questions common to the proposed class “(1)
27 whether the Bank had a policy and/or practice of automatically freezing the accounts, or
28

1 rescinding the previously awarded credits, of EDD cardholders who submitted claims
2 involving unauthorized ATM withdrawals; (2) whether cardholders have a
3 constitutionally protected property interest in the EDD benefits the Bank froze and/or
4 rescinded; (3) whether the Bank’s policies and procedures for freezing accounts and
5 rescinding credits based solely on CFF-1 were constitutionally inadequate; and (4)
6 whether the Bank acted under color of law.” (Dkt. No. 324-1 at 29.) They maintain
7 these common questions predominate as to the absence of pre-deprivation notice or a
8 meaningful opportunity to be heard as well as failing to provide these cardholders any
9 reasonable post-deprivation procedures to regain access to their funds through BANA.
10 (*Id.* at 36.) Instead, the EDD cardholders were subject to an unending loop where BANA
11 would refer cardholders to EDD and EDD would refer cardholders back to BANA
12 causing delays in resolving the status of their accounts. (*Id.*)

13 BANA does not challenge that its failure to provide any pre-deprivation notice or
14 opportunity to be heard is a common issue that predominates. (*See* Dkt. No. 349 at 35-
15 36). Rather, BANA disputes Plaintiffs’ claim that there are common questions as to its
16 failure to provide a reasonable post-deprivation procedure to regain access to
17 cardholders’ funds through BANA because there were individuals whose issues EDD
18 handled and those it did not handle, cardholders who verified their identities with EDD
19 and those who did not, and cardholders who did not take advantage of the processes that
20 were available, all raising individual inquiries. (*Id.* at 35, 36.)

21 A review of the evidence BANA provides to support the variation in EDD
22 cardholders’ experience with resolving account freezes does not support BANA’s claim.
23 The Account Freeze Class involves frozen accounts from September 28, 2020 to March
24 17, 2021. (Dkt. No. 386-1.) First, as to whether EDD handled some cardholders’ frozen
25 account status and did not handle others, none of the supporting documents provide
26 succor because the communications are not clear whether these class member cards were
27 frozen rather than blocked, and no dates are provided as to when the freeze occurred or
28 when their issues were resolved. (Dkt. No. 350-49, Brys Decl., Ex. 48; Dkt. No. 382-2,

1 Brys Decl., Ex. 73 (UNDER SEAL); Dkt. No. 350-75, Brys Decl., Ex. 74 at 17-18; Dkt.
2 No. 350-76, Brys Decl., Ex. 75 at 6-7; Dkt. No. 350-77, Brys Decl., Ex. 76 at 6-7.)

3 BANA’s proposed evidence also does not show that [REDACTED]

4 [REDACTED]
5 [REDACTED].

6 (See Dkt. No. 382-2, Brys Decl., Ex. 36 at 364 (UNDER SEAL) [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]; Dkt. No. 382-2, Brys Decl., Ex. 38 at 367 (UNDER SEAL) [REDACTED]

10 [REDACTED]; Dkt. No. 392-2, Brys Decl., Ex.

11 77 at 476 (UNDER SEAL) [REDACTED]

12 [REDACTED]

13 [REDACTED]. BANA has failed to show, by evidence, that individual issues predominate
14 over common ones. See *Van*, 61 F.4th at 1067.

15 Instead, Plaintiffs have shown that common issues predominate on each element of
16 a due process violation under the United States and California Constitutions based on
17 BANA’s uniform policy and practice of rescinding permanent credits and freezing
18 accounts solely relying on CFF-1 without any prior notice and the question can be
19 answered by common evidence. They have also demonstrated common issues
20 predominate as to whether the post-deprivation due process procedures were adequate by
21 requiring cardholders to call EDD rather than BANA to unfreeze their accounts which
22 can be determined by common evidence because unfreezing accounts involved a uniform
23 procedure.

24 **3. California Consumer Privacy Act (EMV Chip Class)**

25
26
27 ²³ BANA relies on call notes but they are hard to decipher and BANA has not provided any explanation
28 or guidance as to abbreviations/terminology/acronyms to assist the Court on its review. The Court is
only able to glean a general understanding of its contents.

1 Plaintiffs seek to certify an EMV Chip Class alleging a violation of California
2 Consumer Privacy Act (“CCPA”).

3 The CCPA provides a private right of action for actual or statutory damages to “[1]
4 [a]ny consumer whose nonencrypted and nonredacted personal information . . . [2] is
5 subject to an unauthorized access and exfiltration, theft, or disclosure [3] as a result of the
6 business’s violation of the duty to implement and maintain reasonable security
7 procedures and practices appropriate to the nature of the information to protect the
8 personal information[.]” Cal. Civ. Code § 1798.150(a)(1).

9 Plaintiffs assert that common issues include: “(1) whether all EDD debit cards
10 issued during the class period were mag-stripe only cards; (2) whether the unencrypted
11 information on EDD debit cards’ mag-stripes is ‘personal information’ (“PI”) under the
12 CCPA; (3) whether EMV chip technology was an industry-standard security measure;
13 and (4) whether EDD cardholders’ PI was ‘subject to unauthorized access and
14 exfiltration, theft, or disclosure’ due to the Bank’s issuance of mag-stripe only cards.”
15 (Dkt. No. 324-1 at 30.)

16 Defendant disputes the fourth common question contending that individual issues
17 prevail on whether EDD cardholder’s PI was subject to an unauthorized access,
18 exfiltration, theft or disclosure due to issuance of mag-stripe only cards because some
19 cardholders who made an honest mistake disputed their own authorized transactions and
20 other cardholders’ PI was subject to unauthorized access because either they lost their
21 cards or their cards were stolen. (Dkt. No. 349 at 36-37.) BANA presents eleven
22 individuals who [REDACTED]. (Dkt. No. 382-2, Brys Decl., Exs. 30-
23 40 (UNDER SEAL).)

24 First, to the extent individual issues may exist as to those cardholders who reported
25 lost or stolen cards, Plaintiffs are willing to amend the Class definition to remove
26 cardholders who reported a lost or stolen card and this can easily be identified through
27 BANA’s records. (Dkt. No. 392 at 20 n. 15.) Second, BANA has not identified any
28

1 EDD cardholders who innocently reported an unauthorized transaction. Therefore,
2 Plaintiffs have shown that common questions exist.

3 The parties dispute whether class members’ PI was subject to unauthorized access
4 and exfiltration, theft, or disclosure’ due to the Bank’s issuance of mag-stripe only cards
5 relying on their respective experts. Ultimately, to resolve this question, the fact finder
6 will have to consider the evidence of the two competing experts. Jane Cloninger,
7 Plaintiffs’ expert on EMV chip cards, opines that from January 2020 to July 2021,
8 BANA’s decision to proceed without EMV chips in its EDD debit cards rendered the
9 cardholders especially vulnerable to counterfeit card fraud. (Dkt. No. 324-5, Chan Decl.,
10 Ex. 2, Cloninger Expert Report ¶¶ 14, 93-96.) In contrast, Pamela Joseph, Defendant’s
11 expert, concludes that [REDACTED]
12 [REDACTED]
13 [REDACTED]. (Dkt. No. 350-
14 5, Brys Decl., Ex. 4, Joseph Expert Report ¶¶ 14-16, 93-94.) This question can be
15 resolved with common evidence using the parties’ expert reports and documents
16 produced by BANA. As such, BANA has not shown that individual issues will prevail
17 on whether EDD cardholders’ PI was subject to an unauthorized access, exfiltration, theft
18 or disclosure.

19 Accordingly, the Court amends the EMV Chip Class definition to exclude EDD
20 cardholders who reported a lost or stolen card and concludes that Plaintiffs have shown
21 that common questions predominate on the CCPA cause of action for the EMV Chip
22 Class.

23 **4. Breach of Fiduciary Duty²⁴ (Claim Denial, Credit Rescission, Account**
24 **Freeze, and EMV Chip Classes)**

25 _____
26 ²⁴ In its opposition, under the heading “Common-law claims”, BANA lumps the arguments on the
27 breach of fiduciary duty, negligence and breach of the covenant of good faith and fair dealing together
28 as to each common law cause of action. The Court did its best to decipher which argument
corresponded to which cause of action.

1
2 Plaintiffs seek to certify the Claim Denial, Credit Rescission, Account Freeze, and
3 EMV Chip Classes alleging that BANA breached its fiduciary duty by failing to take all
4 reasonable and necessary steps to “protect, preserve, and secure Plaintiffs’ and class
5 members’ private data and confidential information from unauthorized access, fraud or
6 theft” and to ensure legitimate benefits recipients were not denied access to their account
7 funds by taking all necessary steps including encrypting such information, using EMV
8 chips and other measures. (Dkt. No. 324-1 at 39; Dkt. No. 406, TAMCC ¶¶ 632-33.)
9 They also claim that BANA breached its duty by prioritizing its own financial self-
10 interest above the interests of EDD cardholders by utilizing mag-stripe only cards rather
11 than industry-standard EMV chips and by implementing its policy and practice of using
12 CFF-1 in denying claims, rescinding credits and freezing accounts. (Dkt. No. 406,
13 TAMCC ¶ 634.)

14 In California, a plaintiff must prove the following elements to establish a cause of
15 action breach of fiduciary duty: “(1) existence of a fiduciary duty; (2) breach of the
16 fiduciary duty; and (3) damage proximately caused by the breach.” *Gutierrez v. Girardi*,
17 194 Cal. App. 4th 925, 932 (2011) (citation omitted).

18 Ordinarily, a relationship between a bank and its depositor is not a fiduciary one,
19 *Oaks Mgmt. Corp. v. Superior Ct.*, 145 Cal. App. 4th 453, 466 (2006) (“[I]n ordinary
20 banking transactions the ‘bank is in no sense a true fiduciary.’”), but courts recognize
21 that, under “special circumstances,” a bank may enter into a “special relationship” with a
22 depositor and owe fiduciary duties. *Copesky v. Superior Ct.*, 229 Cal. App. 3d 678, 691
23 n.12 (1991). A bank enters into a “special relationship” with a depositor either by
24 “affirmatively offer[ing] trust and other specifically fiduciary services,” *id.*, or when the
25 relationship involves characteristics of a “special relationship” such as “(1) inherently
26 unequal bargaining positions; (2) nonprofit motivation [of the depositor], i.e., objective of
27 securing peace of mind, security; (3) inadequacy of ordinary contract damages; (4)
28 special vulnerability of one party to harm as a result of breach of trust of the other; and

1 (5) awareness by the other of this special vulnerability.” *Id.* at 687 n.7 (quoting *Wallis v.*
2 *Superior Ct.*, 160 Cal. App. 3d 1109, 1118 (1984)). In particular, “[m]any banks
3 affirmatively offer trust and other specifically fiduciary services, and as such are in a
4 position to do great harm if the trust agreement is broken in bad faith.” *Id.*

5 A fiduciary relationship is any relation existing between parties to a
6 transaction wherein one of the parties is in duty bound to act with the utmost
7 good faith for the benefit of the other party. Such a relation ordinarily arises
8 where a confidence is reposed by one person in the integrity of another, and
9 in such a relation the party in whom the confidence is reposed, if he
10 voluntarily accepts or assumes to accept the confidence, can take no
11 advantage from his acts relating to the interest of the other party without the
12 latter's knowledge or consent. . . .

13 *Wolf v. Superior Ct.*, 107 Cal. App. 4th 25, 29 (2003) (internal quotation marks and
14 citations omitted).

15 According to Plaintiffs, common issues include: “(1) whether the Bank entered
16 into a ‘special relationship’ with EDD cardholders and thereby incurred fiduciary
17 obligations; and (2) whether the Bank breached its fiduciary duties by prioritizing its own
18 financial self-interest above the interests of EDD cardholders by choosing not to include
19 industry-standard EMV chips in EDD debit cards and by implementing its CFF-1 Claim
20 Denial, Credit Rescission, and Account Freeze Policies.” (Dkt. No. 324-1 at 29.)

21 In opposition, BANA argues that the first common issue, whether there was a
22 special relationship between BANA and EDD cardholders, will require fact intensive
23 inquiries into each cardholders’ communications with the bank to determine if a special
24 relationship was established and is not subject to common proof. (Dkt. No. 349 at 39.)
25 The Court disagrees. BANA fails to explain or provide evidence that each cardholder
26 had communications with it when it created the debit card accounts. Instead, the putative
27 class includes cardholders who uniformly received unemployment insurance benefits
28 through debit cards issued by BANA pursuant to the exclusive contract between BANA
and EDD. BANA has not provided any evidence that the EDD cardholders had any

1 communications with BANA prior to receiving the debit cards. The question of whether
2 there was a special relationship created from receiving unemployment insurance benefits
3 through the debit card accounts with BANA is a common one that predominates and that
4 can be resolved with common evidence. Accordingly, the Court finds predominance
5 satisfied as to Plaintiffs’ claim for breach of fiduciary duty.²⁵

6 **5. Negligence/Negligence Per Se (all Classes)**

7 Plaintiffs seek to certify all Classes alleging negligence claiming that Defendant
8 breached its duty of care by failing to (1) maintain the security of their personal and
9 account information; (2) issue EDD Debit Cards with EMV chips; (3) employ reasonable
10 fraud prevention and notification practices; (4) provide timely and effective customer
11 service; (5) process and investigate claims in a timely manner; and (6) provide
12 provisional credits while investigating fraud claims. (Dkt. No. 324-1 at 41-43; Dkt. No.
13 406, TAMCC ¶¶ 586-87). They also seek to certify all Classes alleging negligence per se
14 based on violations of (1) the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 *et seq.*; (2)
15 the California Financial Information Privacy Act, Cal. Fin. Code §§ 4050 *et seq.*; (3) the
16 California Consumer Privacy Act, Cal. Civ. Code §§ 1798.100 *et seq.*; and (4) the
17 California Consumer Records Act, *id.* §§ 1798.80 *et seq.* (Dkt. No. 324-1 at 43; Dkt. No.
18 406, TAMCC ¶¶ 589-90.)

19 Under California law, the elements of a negligence claim are (1) duty, (2) breach,
20 (3) causation, and (4) injury. *Vasilenko v. Grace Family Church*, 3 Cal. 5th 1077, 1083

21
22
23 ²⁵ BANA argues, in one sentence, that the affirmative defenses of sophistication and lack of reliance
24 defeat commonality as to the breach of fiduciary duty claim yet provides no explanation as how it
25 applies to the facts of the case and does not provide any legal authority. (Dkt. No. 349 at 40.) The
26 Court declines to consider a one-sentence argument. *See Mooney v. Roller Bearing Co. of Am., Inc.*,
27 CASE NO. 2:20-cv-01030-LK, 2023 WL 6807198, at *6 (W.D. Wash. Oct. 2013) (“The Court also
28 declines to consider that one-sentence argument because RBC did not elaborate on it or cite to anything
in the record to support it.”) (citing *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010)
 (“Arguments made in passing and not supported by citations to the record or to case authority are
generally deemed waived.”)); *Delashaw v. Seattle Times Co.*, No. C18-0537-JLR, 2018 WL 4027078, at
*14 (W.D. Wash. Aug. 23, 2018) (declining to address a party’s “cursory argument” because the party
did “not provide enough detail to allow the court to fully evaluate it.”).

1 (2017). “In California, the ‘general rule’ is that people owe a duty of care to avoid
2 causing harm to others and that they are thus usually liable for injuries their negligence
3 inflicts.” *S. Cal. Gas Leak Cases*, 7 Cal. 5th 391, 398 (2019). However, “[i]n the
4 absence of personal injury, physical damage to property, a special relationship between
5 the parties, or some other common law exception to the rule, recovery of purely
6 economic loss for negligence is foreclosed.” *Stasi v. Inmediata Health Grp. Corp.*, 501
7 F. Supp. 3d 898, 913 (S.D. Cal. 2020) (citing *J’Aire Corp. v. Gregory*, 24 Cal. 3d 799,
8 803-04 (1979)); *S. Cal. Gas*, 7 Cal. 5th at 400 (“[L]iability in negligence for purely
9 economic losses . . . is ‘the exception, not the rule.’”). Negligence per se borrows statutes
10 to prove duty of care and standard of care. *Elsner v. Uveges*, 34 Cal. 4th 915, 927 n.8
11 (2004); *David v. Hernandez*, 226 Cal. App. 4th 578, 584 (2014) (“Under the doctrine of
12 negligence per se, the plaintiff ‘borrows’ statutes to prove duty of care and standard of
13 care.”). Therefore, a presumption of negligence arises from a violation of a statute. *Id.*

14 Plaintiffs rely on the “special relationship” exception to the economic loss
15 doctrine. “The primary exception to the general rule of no recovery for negligently
16 inflicted purely economic losses is where the plaintiff and the defendant have a ‘special
17 relationship.’” *S. Cal. Gas*, 7 Cal. 5th at 400. “What we mean by special relationship is
18 that the plaintiff was an intended beneficiary of a particular transaction but was harmed
19 by the defendant's negligence in carrying it out.” *Id.* The California Supreme Court set
20 out six factors to determine whether a special relationship exists:

- 21 (i) the extent to which the transaction was intended to affect the plaintiff, . . .
- 22 (ii) the foreseeability of harm to the plaintiff, (iii) the degree of certainty that
- 23 the plaintiff suffered injury, (iv) the closeness of the connection between the
- 24 defendant’s conduct and the injury suffered, (v) the moral blame attached to
- 25 the defendant’s conduct, and (vi) the policy of preventing future harm.

26 *Id.* at 401 (internal quotations and citations omitted).

27 Here, Plaintiffs assert that common issues include “(1) whether the Bank had a
28 ‘special relationship’ with class members and owed them a duty of care; (2) whether the

1 Bank breached that duty by using CFF-1 to auto-deny claims, auto-rescind permanent
2 credits, and auto-freeze accounts; (3) whether the Bank breached its duty by grossly
3 understaffing its Claims call center; and (4) whether the Bank breached its duty by failing
4 to include industry-standard EMV chips in EDD debit cards.” (Dkt. No. 324-1 at 29.)
5 They contend that these common issues predominate and can be demonstrated by
6 common evidence. (*Id.* at 41-43.)

7 In opposition, BANA only dispute that there are not common issues as to
8 causation. (Dkt. No. 349 at 37-38.) However, Plaintiffs need not demonstrate that all
9 elements to support a cause of action must be common; only one common issue suffices.
10 *See Dukes*, 564 U.S. at 359 (“We quite agree that for purposes of Rule 23(a)(2), even a
11 single common question will do.”) (internal quotation marks omitted); *Wang v. Chinese*
12 *Daily News*, 737 F.3d 538, 544 (9th Cir. 2013) (“Plaintiffs need not show that every
13 question in the case, or even a preponderance of questions, is capable of classwide
14 resolution.”); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012)
15 (“[C]ommonality only requires a single significant question of law or fact.”); *Rodriguez*
16 *v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (Commonality is satisfied “if the named
17 plaintiffs share at least one question of fact or law with the grievances of the prospective
18 class.”) (quoting *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)).

19 Nonetheless, in reply, Plaintiffs contend that BANA admits denying claims,
20 rescinding permanent credits, and freezing accounts based solely on CFF-1; therefore, the
21 Claim Denial, Credit Rescission and Account Freeze Class members suffered harm from
22 BANA’s uniform policy and practice demonstrating causation. (Dkt. No. 392 at 18.)
23 Further, Plaintiffs argue that the Customer Service Class members suffered
24 unprecedented long wait times and BANA’s use of mag-stripe only cards subjected each
25 EMV Chip class member to a heightened risk of skimming. (*Id.* at 19.) The Court agrees
26 and concludes that Plaintiffs have raised common questions on causation.

27 Next, BANA objects to the negligence claim as to the Customer Service Class
28 arguing that not all class members had complaints about the call center, including three of

1 the nine Class Plaintiffs.²⁶ (Dkt. No. 349 at 38.) However, the Court notes that the
2 Customer Service Class includes members who telephoned the Claim call center between
3 September 13, 2020 through November 21, 2020. (See Dkt. No. 386-1.) The three
4 unidentified Class Plaintiffs BANA claims had no complaints about the call center, which
5 the Court presumes is Class Plaintiffs Koole, McClure, and Rivera, are not members of
6 the Customer Service Class as they called outside these dates and therefore, do not
7 represent the Customer Service Class.

8 BANA next argues that there is no evidence that each of the 15,600 class members
9 spent more than an hour on hold each time and relying on “average” hold times cannot
10 suffice to demonstrate what class members actually experienced. (Dkt. No. 349 at 39.)
11 Plaintiffs’ theory on the Customer Service Class is that BANA made class members
12 suffer elevated wait times, purposely in part to avoid issuing credits on claims, and
13 common evidence will show that [REDACTED]
14 [REDACTED]. (Dkt. No. 378-6, Chan Suppl. Decl.,
15 Ex. 161, Minnucci Rebuttal Expert Report ¶¶ 13-14.)

16 In *Tyson Foods*, the United States Supreme Court held that representative or
17 statistical evidence can be used to show damages as long as the evidence is reliable.
18 *Tyson Foods*, 577 U.S. at 454-55. The Court explained that “[w]hether and when
19 statistical evidence can be used to establish classwide liability will depend on the purpose
20 for which the evidence is being introduced and on ‘the elements of the underlying cause
21 of action[.]’” *Id.* at 455. The statistical evidence was permitted, in *Tyson Foods*, because
22 the employer failed to keep adequate time keeping records and the statistical evidence
23

24
25 ²⁶ Even though BANA recognizes Plaintiffs’ theory on the Claims call center has shifted from the
26 original allegation that BANA failed to provide reasonably timely and effective customer service to
27 BANA failed to staff its call centers causing EDD cardholders to spend an excessive amount of time on
28 hold each time, it repeatedly argues that individual issues will predominate as the fact-finder will have to
look at each cardholders’ experience with the Claims call center. (See Dkt. No. 349 at 38, 39, 41.) As
explained above, individual inquiries will not need to be made as to the alleged uniform excessive hold
times.

1 was used to fill this evidentiary gap. *Id.* at 456. Further, the Court suggested that
2 statistical evidence is a permissible method to prove classwide liability when the
3 plaintiffs can “show[] that each class member could have relied on that sample to
4 establish liability if he or she had brought an individual action.” *Id.* at 455.

5 Here, it is disputed whether BANA’s call records capture [REDACTED].
6 (*Compare* Dkt. No. 378-7, Chan Suppl. Decl., Ex. 162, Minnucci Rebuttal Expert Report
7 ¶¶ 36-37 (“Bank’s phone systems [REDACTED]
8 [REDACTED]
9 [REDACTED]”) *with* Dkt. No. 382-2, Brys Decl., Ex. 5, Hindle Expert Report ¶ 18
10 (UNDER SEAL) (“Claim call center systems of record between September 13, 2020 and
11 November 21, 2020 did not contain or retain data or information showing the time a
12 particular, individual EDD prepaid cardholder spent on hold when calling the Claims call
13 center during the Proposed Class Period”).) The Court notes that expert discovery has
14 not yet concluded and to the extent it remains an issue of fact, it will be presented to the
15 factfinder at trial. (Dkt. No. 302.)

16 Nonetheless, Plaintiffs claim that the average excess hold time can still be used to
17 determine classwide damages for the Customer Service Class. Mr. Minnucci analyzed
18 the Claims call center data from 2020-21 which revealed that [REDACTED]
19 experienced an extremely long wait for service. (Dkt. No. 393-1, Chan Decl., Ex. 3,
20 Minnucci Expert Report ¶¶ 42-50 & App’x F (UNDER SEAL).) To the extent that
21 BANA does not have records that capture each caller’s hold time, statistical evidence is
22 permissible to show classwide damages in this case because Class Plaintiffs Chong,
23 Moon, Moore, Oosthuizen, Willrich and Yuan contacted the Claim call center on
24 multiple occasions. Therefore, if they were to prove their damages on an individual
25 basis, they would be entitled to use statistical evidence to support their individual
26 damages claim. *See Tysons Food*, 577 U.S. at 455 (statistical evidence permitted to show
27 classwide damages where “each class member could have relied on [the average excess
28 hold time] to establish liability if he or she had brought an individual action.”).

1 To the extent BANA disputes the ASA calculated by Mr. Minnucci, (Dkt. No. 349
2 at 49), that question may be litigated at trial. *See Tysons Foods*, 577 U.S. at 459
3 (“Reasonable minds may differ as to whether the average time [] calculated is probative
4 as to the time actually worked by each employee. Resolving that question, however, is
5 the near-exclusive province of the jury.”).

6 As to BANA’s other arguments, similar with the analysis and conclusion above on
7 breach of fiduciary duty, common issues predominate on whether there was a special
8 relationship between BANA and the EDD cardholders because they uniformly received
9 unemployment insurance benefits with EDD through debit cards issued by BANA
10 pursuant to the exclusive contract between BANA and EDD. The same evidence can be
11 used to make this determination.

12 As with the analysis and conclusion on the CCPA claim, common issues
13 predominate on whether EDD cardholders’ PI was subject to an unauthorized access and
14 exfiltration, theft, or disclosure due to BANA’s violation of the duty to implement and
15 maintain reasonable security procedures and practices appropriate to the nature of the
16 information to protect the personal information.” *See* Cal. Civ. Code § 1798.150(a)(1).

17 BANA also summarily argue that affirmative defenses, like contributory
18 negligence, such as those who compromised their own accounts by giving friends or
19 family access to their cards or PINs and one cardholder who gave access to his card to his
20 close friend defeats predominance. (Dkt. No. 349 at 40.) As discussed above,
21 affirmative defenses can be determined at the claim or damages stage and does not defeat
22 predominance. *See Ruiz Torres*, 835 F.3d 1125. In conclusion, the Court finds that
23 Plaintiffs have demonstrated that common issues predominate on the
24 negligence/negligence per se cause of action.

25 **6. Breach of the Implied Covenant of Good Faith and Fair Dealing (Claim**
26 **Denial, Credit Rescission, Account Freeze and Customer Service**
27 **Classes)**
28

1 Plaintiffs seek to certify the Claim Denial, Credit Rescission, Account Freeze and
2 Customer Service Classes alleging BANA breached the implied covenant of good faith
3 and fair dealing. (See Dkt. No. 406, TAMCC ¶¶ 619-623.)

4 “There is an implied covenant of good faith and fair dealing in every contract that
5 neither party will do anything which will injure the right of the other to receive the
6 benefits of the agreement.” *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 684 (1988)
7 (quoting *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 658 (1958)). The implied
8 covenant “prevent[s] a contracting party from engaging in conduct which (while not
9 technically transgressing the express covenants) frustrates the other party’s rights to the
10 benefits of the contract.” *Love v. Fire Ins. Exchange*, 221 Cal. App. 3d 1136, 1153
11 (1990).

12 The elements to support a claim for breach of the covenant of good faith and fair
13 dealing are: “(1) the parties entered into a contract; (2) the plaintiff fulfilled his
14 obligations under the contract; (3) any conditions precedent to the defendant's
15 performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to
16 receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's
17 conduct.” *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 968 (N.D.
18 Cal. 2010) (citing Judicial Council of California Civil Jury Instruction No. 325).

19 “The covenant of good faith finds particular application in situations where one
20 party is invested with a discretionary power affecting the rights of another.” *3500*
21 *Sepulveda, LLC v. Macy’s W. Stores, Inc.*, 980 F.3d 1317, 1324 (9th Cir. 2020) (quoting
22 *Carma Devs. (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 372 (1992)). “The
23 party with discretionary power must exercise such power in good faith and through
24 ‘objectively reasonable conduct.’” *Id.* (quoting *Badie v. Bank of Am.*, 67 Cal. App. 4th
25 779, 796 (1998)). “A party violates the covenant if it subjectively lacks belief in the
26 validity of its act or if its conduct is objectively unreasonable.” *Carma Devs.*, 2 Cal. 4th
27 at 372. “In the case of a discretionary power, it has been suggested the covenant requires
28 the party holding such power to exercise it ‘for any purpose within the reasonable

1 contemplation of the parties at the time of formation—to capture opportunities that were
2 preserved upon entering the contract, interpreted objectively.” *Id.* (citation omitted).

3 Plaintiffs contend common issues include: “(1) whether the Bank had a policy or
4 practice of automatically denying and rescinding unauthorized-transaction claims and
5 freezing accounts based solely on CFF-1; (2) whether the Bank’s decision to auto-deny
6 unauthorized-transaction claims, rescind grants of permanent credit, and freeze
7 cardholder accounts based solely on CFF-1 was objectively reasonable; (3) whether the
8 Bank subjectively lacked belief in the validity of its decision to implement its CFF-1
9 Policies; and (4) whether the Bank reduced call center staffing knowing or intending the
10 resulting impairment of class members’ rights.” (Dkt. No. 324-1 at 30.) They contend
11 that common issues predominate because BANA engaged in objectively unreasonable
12 exercise of its discretionary contractual authority by adopting policies and practices
13 applicable to all class members in the same manner and pursuant to the same form
14 contract. (*Id.* at 43-44.)

15 For the reasons stated above on the EFTA claims and the Customer Service Class
16 claims, the Court rejects Defendant’s argument that the question of whether its denial of
17 error claims was objectively reasonable will require looking at individual account records
18 to determine a violation of the EFTA claim and looking at individual call center
19 experiences to determine if each class members’ rights was impaired by reduced call
20 center staffing. (Dkt. No. 349 at 40-41.)

21 The Agreement granted BANA discretion which applied to all EDD cardholders.
22 On the Claim Denial and Credit Recission Classes, the relevant provisions under the
23 California EDD Debit Card Account Agreement (“Agreement”) provided that “you may
24 incur no liability for unauthorized use of your Card up to the amount of the unauthorized
25 transaction, provided you notify us within a reasonable time of the loss or theft of your
26 Card, Card number or PIN or its unauthorized use” (Dkt. No. 379-5, Chan Decl.,
27 Ex. 76 at ¶ 9.) A transaction is not considered “unauthorized” . . . “for any other reason
28

1 we conclude that the facts and circumstances do not reasonably support a claim for
2 unauthorized use.” (*Id.*)

3 Further, as to Account Freeze Class, the Agreement provided BANA with
4 discretion if we “suspect irregular, unauthorized, or unlawful activities may be involved
5 with your Account, we may ‘freeze’ (or place a hold on) the balance pending an
6 investigation of such suspected activities. If we freeze your Account, we will give you a
7 notice required by law.” (*Id.* ¶ 2.)

8 Finally, as to the Customer Service Class, the Agreement stated,

9 Please contact us at the numbers listed below AT ONCE if you believe your
10 Card has been lost or stolen, or if you believe that someone may use or has
11 used your PIN assigned to your Card without your permission. Telephoning
12 is the best way of keeping your possible losses down. You could lose all the
13 money in your Account. If you tell us within two business days after you
14 learn of the loss or theft, you can lose no more than \$50 for an unauthorized
15 transaction or a series of related unauthorized transfers should someone use
16 your Card or PIN.

17 If you believe your Card has been lost or stolen, telephone us at
18 1.866.692.9374, 1.866.656.5913 TTY, or 423.262.1650 (Collect, when
19 calling outside the U.S.), or write to: Bank of America. P.O. Box 8488,
20 Gray, TN 37615-8488.

21 (*Id.* ¶¶ 10-11.)

22 Therefore, based on the discretion granted to BANA under the Agreement
23 applicable to all EDD cardholders, the Court concludes that common issues predominate
24 on whether BANA’s uniform practice and policy of automatically denying unauthorized
25 transaction claims, rescinding permanent credits, and freezing cardholder accounts based
26 solely on CFF-1 was objectively reasonable; whether BANA subjectively lacked belief in
27 the validity of its decision to implement its CFF-1 Policies; and whether BANA reduced
28 its call center staffing knowingly to impair class members’ rights. Further, because the
same form contract was used for all EDD cardholders and California law applies an
objective standard, the duty of good faith and fair dealing is amenable to class action.

1 *See Vaccarino v. Midland Life Ins. Co.*, No. CV 11–5858 CAS (MANx), 2013 WL
2 3200500, at *19 (C.D. Cal. June 17, 2013) (common issues predominated as to breach of
3 implied covenant claims against insurer with regard to annuity contracts) (citing *Lazar v.*
4 *Hertz Corp.*, 143 Cal. App. 3d 128, 141 (1983) (holding that “[t]he essence of the good
5 faith covenant is objectively reasonable conduct,” and certifying class on this claim));
6 *Yue v. Conseco Life Ins. Co.*, 282 F.R.D. 469, 476 (2012) (individual issues do not
7 predominate on whether the defendant breached the implied covenant of good faith and
8 fair dealing because it is determined by an objective standard).

9 Finally, BANA contends those cardholders who did not fulfill their own
10 contractual obligations by lending their cards and disclosing their PINs to friends are not
11 subject to recovery. (Dkt. No. 349 at 41.) The Court agrees; however, Defendant has not
12 shown with evidence that cardholders lent their debit cards to friends with the PINs.

13 Therefore, the Court concludes that Plaintiffs have demonstrated common issues
14 will predominate over individual ones on the claim for breach of the implied covenant of
15 good faith and fair dealing.

16 **7. UCL (Claim Denial, Credit Rescission and Account Freeze Classes)**

17 Plaintiffs move to certify the Claim Denial, Credit Rescission and Account Freeze
18 Classes with respect to UCL claim under the Balancing, Immoral or Tethering tests of the
19 “unfair” prong. (Dkt. No. 406, TAMCC ¶¶ 581(a)-(c), 582(a)-(c), 584.)

20 The UCL prohibits “any [1] unlawful, [2] unfair or [3] fraudulent business act or
21 practice.” Cal. Bus. & Prof. Code § 17200. The “unfair” prong of the UCL creates a
22 cause of action for a business practice that is unfair even if not proscribed by some other
23 law. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143 (2003). The
24 Ninth Circuit has identified the following three tests that California courts have
25 considered in addressing the “unfair” prong in a consumer case: “(1) whether the
26 challenged conduct is ‘tethered to any underlying constitutional, statutory or regulatory
27 provision, or that it threatens an incipient violation of an antitrust law, or violates the
28 policy or spirit of an antitrust law,’ [the Tethering test] ; (2) whether the practice is

1 ‘immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,’
2 [the Immoral test]; or (3) whether the practice's impact on the victim outweighs “the
3 reasons, justifications and motives of the alleged wrongdoer [the Balancing test].” *Doe*
4 *v. CVS Pharm.*, 982 F.3d 1204, 1214-15 (9th Cir. 2020) (internal citations omitted).

5 Plaintiffs propose that common issues include: “(1) whether the Claim Denial,
6 Credit Rescission, and Account Freeze Policies were ‘unfair’ to class members under any
7 of the UCL’s three tests for unfairness; and (2) whether class members, if they do not
8 prevail on their damages claims, lack an adequate legal remedy and can therefore be
9 awarded restitution.” (Dkt. No. 324-1 at 30.) In addition, they assert common issues will
10 predominate because the answers will be the same for all class members. (*Id.* at 47-48.)
11 Finally, they advance the argument that whether class members lack an adequate legal
12 remedy will be answered the same for all class members and UCL restitution can also be
13 calculated on a class wide basis. (*Id.* at 48.)

14 BANA repeats its argument that the class definition does not distinguish between
15 legitimate cardholders and criminal fraudsters; therefore, fraudsters were not treated
16 “unfairly.” (Dkt. No. 349 at 41.) Further, BANA claims that legitimate cardholders who
17 made innocent mistakes, those whose notices were untimely or those who reported
18 unauthorized transactions made by someone whom they let access their cards were not
19 treated unfairly. (*Id.*) But, as discussed above on the EFTA claim, the Class excludes
20 those who engaged in fraudulent conduct, and to the extent that not all fraudsters have
21 been identified, BANA has not provided evidence that the individual numbers of
22 fraudsters would predominate. BANA has already conducted reviews of Class members’
23 claims that were denied during the reconsideration process, while the PI was in effect and
24 during the implementation of the Remediation Plan [REDACTED].
25 Furthermore, BANA retains documents to make these determinations, thereby, forgoing
26 the need for hundreds of mini-trials that would defeat predominance.

27 BANA also simply argues that when conducting an analysis on the “balancing
28 test”, questions regarding “gravity of the harm to the alleged victim” with the “reasons,

1 justifications and motives” of BANA’s policies will inevitably require individualized
2 determinations relying on *Herskowitz v. Apple, Inc.*, 301 F.R.D. 460, 476 (N.D. Cal.
3 2014); however, in that case, the court found individual questions will predominate
4 because “Plaintiffs have failed to provide any evidence to support the existence of a
5 uniform business practice or series of practices respecting refunds in cases of double-
6 billing.” *Id.* In contrast, here, Plaintiffs have provided evidence of a uniform policy and
7 practice by BANA using CFF-1 to deny claims, rescind permanent credits and freeze
8 accounts; therefore, these common issues predominate as all EDD cardholders suffered
9 the same harm of being denied access to their funds through these policies and the
10 reasons, justification and motives for the Bank’s policy of using CFF-1 will also be
11 common. *See Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 737 (9th Cir. 2007)
12 (affirming class certification where court found common issues predominated on the
13 unfair prong of UCL claim because claim was based on “uniform disclosures made” to all
14 consumers). BANA’s records also show how long class members were deprived of their
15 funds.

16 In addition, district courts routinely certify classes under the unfair prong of the
17 UCL based on the uniform conduct by the defendant. *See Brooks v. Thomson Reuters*
18 *Corp.*, Case No. 21-cv-01418-EMC, 2023 WL 9316647, at *8 (N.D. Cal. Aug. 10, 2023);
19 *Gaudin v. Saxon Mortg. Servs., Inc.*, 417 F.R.D. 417, 430 (N.D. Cal. 2013) (finding
20 common issues predominate under the unfair prong of the UCL based on “Defendant's
21 uniform practices”); *Vaccarino v. Midland Nat. Life Ins. Co.*, No. CV 11-5858 CAS
22 MANX, 2013 WL 3200500, at *15-16 (C.D. Cal. June 17, 2013) (finding common issues
23 predominate for common law fraud and the fraud prong of the UCL where “all class
24 members here received uniform representations, and [Defendant] treated the proposed
25 class the same”). Accordingly, the Court concludes that Plaintiffs have demonstrated
26 common issues will predominate on the unfair prong of the UCL.

27 ///

1 **8. Whether the Damages Models Satisfy Predominance**

2 Plaintiffs bear the burden of providing a damages model showing that “damages
3 are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).”
4 *Comcast*, 569 U.S. at 35. The damages model “must measure only those damages
5 attributable to” the plaintiff’s theory of liability. *Id.* Plaintiffs “must be able to show that
6 [their] damages stemmed from the defendant’s actions that created the legal liability.”
7 *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013). While a plaintiff must
8 present the likely method for determining class damages, “it is not necessary to show that
9 [this] method will work with certainty at this time.” *Chavez v. Blue Sky Natural*
10 *Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010). Furthermore, Plaintiffs “need only
11 show that such damages can be determined without excessive difficulty and attributed to
12 their theory of liability”, that any “uncertainty regarding class members’ damages does
13 not prevent certification of a class as long as a valid method has been proposed for
14 calculating those damages”, and “precise [data] is unnecessary for class certification”
15 because “the question is only whether [plaintiff] has presented a workable method.” *See*
16 *Lytle v. Nutramax Labs, Inc.*, 114 F.4th 1011, 1025 (9th Cir. 2024) (citations omitted)
17 (class treatment appropriate if damages could be calculated on a classwide basis, “even
18 where such calculations have not yet been performed.”) Class certification should not be
19 denied “even if plaintiffs may have to prove individualized damages at trial, a conclusion
20 implicitly based on the determination that such individualized issues do not predominate
21 over common ones.” *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th
22 Cir. 2016); *see also Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988 (9th
23 Cir. 2015) (“differences in damage calculations do not defeat class certification” survives
24 *Comcast.*)

25 **a. Actual Damages for Credit Denial, Credit Rescission, Account**
26 **Freeze and EMV Chip Classes**

27 Plaintiffs seek actual damages under the EFTA, due process, breach of fiduciary
28 duty, negligence, and breach of the implied covenant of good faith and fair dealing

1 claims. (See Dkt. No. 406, TAMCC.) They argue that damages can be calculated using
2 common methodologies using BANA’s databases which contain detailed information
3 about the amount of each denied claim, rescinded credit, and frozen account, and the
4 length of time each class member was deprived of the benefits. (Dkt. No. 324-1 at 49-
5 52.) According to Plaintiffs, actual damages is calculated by adding the principal amount
6 of actual damages with consequential damages.

7 **i. Principal Amount of Actual Damages for the Credit Denial,**
8 **Credit Rescission, Account Freeze and EMV Chip Classes**

9 Plaintiffs propose that the principal amount of actual damages for the Claim
10 Denial, Credit Rescission and Account Freeze Classes equal the total dollar amount of
11 each claim BANA denied, the total dollar amount of credit rescinded, and the total dollar
12 amount of frozen balances based on CFF-1 which are readily available using BANA’s
13 documents. (Dkt. No. 386-4, Chan Decl., Ex. 4, Regan Expert Report ¶¶ 8, 12, 16, 32-
14 34, 37, 81, 83, 94-96, 98, 111, 119 (UNDER SEAL).)

15 On this calculation, BANA presents two arguments. First, it objects asserting the
16 “total dollar value” of each claim fails to distinguish between fraudulent and valid claims
17 made by EDD cardholders. (Dkt. No. 349 at 45.) Second, even if those fraudulent
18 claims were accounted for [REDACTED], the putative class
19 members have already been paid the total dollar value, and as such, they would receive a
20 windfall. (*Id.*)

21 BANA does not dispute that Plaintiffs’ damages model stems from BANA’s
22 actions that created the legal liability. Instead, BANA challenges the determination of
23 who among the class member are entitled to actual damages which courts have repeatedly
24 held does not defeat predominance. *See Vaquero*, 824 F.3d at 1155; *Lytle*, 114 F.4th at
25 1026-27 (holding “that individual questions of damages do not necessarily defeat class
26 certification” and “the possibility that an ascertainable portion of the class may be unable
27 to recover . . . does not in itself demonstrate class certification was improper.”) (citing
28 *Olean*, 31 F.4th at 680-81 (holding that the possibility some class members suffered no

1 injury does not, by itself, defeat class certification); *Just Film*, 847 F.3d at 1120 (“To gain
2 class certification, Plaintiffs need to be able to allege that their damages arise from a
3 course of conduct that impacted the class. But they need not show that each members’
4 damages from that conduct are identical.”). Moreover, as discussed above, BANA has
5 not demonstrated that individual questions will predominate on whether the putative class
6 members’ claims were fraudulent or not. BANA’s concern about uninjured class
7 members can be resolved at the claims or damages phase. *See Ruiz Torres*, 835 F.3d at
8 1137.

9 Second, BANA contends that even if Plaintiffs’ actual damages model can be a
10 valid measure of damages, the class members in the Class Denial, Credit Rescission and
11 Account Freeze Classes were already paid the actual dollar value of their claims. (Dkt.
12 No. 349 at 45-46; *see* Dkt No. 350-2, Brys Decl., Ex. 1, Stango Expert Report ¶ 37
13 (“because consumers have been fully repaid for the principal amounts of damages, they
14 are no longer economically damaged by those amounts”).) Plaintiffs are not in
15 disagreement with BANA that EDD cardholders are not entitled to a windfall or double
16 recovery of actual damages and is acknowledged in Mr. Regan’s expert report explaining
17 that any overlapping recoveries will be de-duplicated.²⁷ (Dkt. No. 378-7, Chan Suppl.
18 Decl., Ex. 162, Regan Rebuttal Report ¶ 15; *see also* Dkt. No. 386-4, Chan Decl., Ex. 4,
19 Regan Expert Report ¶ 62 n. 70; ¶ 104, n. 133.)

20 While not expressly argued or analyzed, BANA seems to suggest that because

21 [REDACTED]

22 [REDACTED], they are no longer economically damaged and are

23 _____
24

25 ²⁷ Mr. Regan explains that he calculated damages on an independent, standalone basis for each claim so
26 that damages could be easily calculated if a claim were to be dismissed or if damages were to be
27 awarded for only one of the proposed classes. (Dkt. No. 378-7, Chan Suppl. Decl., Ex. 162, Regan
28 Rebuttal Report ¶ 15 (“Therefore, if an award is made, and depending on the nature of the award, it may
be appropriate to disaggregate the damage amounts”); *see also* Dkt. No. 386-4, Chan Decl., Ex. 4,
Regan Expert Report ¶ 62 n. 70 (“if damages are awarded to the Claim Denial Class and the Account
Freeze Class, it is appropriate to disaggregate the damages amount”); *id.* ¶ 104, n. 133.)

1 not entitled to any additional damages without a showing of further harm. (Dkt. No 349
2 at 45-46; *see also* Dkt No. 350-2, Brys Decl., Ex. 1, Stango Expert Report ¶ 36 (“Mr.
3 Regan’s damages methodology fails to account for funds that BANA has already paid to
4 proposed class members, and Mr. Regan fails to investigate whether any proposed class
5 member remains harmed after receiving those payments from BANA.”).) According to
6 BANA’s damages expert, Mr. Victor Stango reports that [REDACTED]
7 [REDACTED] representing the total dollar amount Mr. Regan claims are owed to the
8 Claim Denial Class, (Dkt. No. 382-2, Brys Decl., Ex. 1, Stango Expert Report ¶ 37);
9 therefore, because the class members have already been fully compensated for the dollar
10 amounts denied by BANA, they have no damages. (*Id.*) In reply, as to treble damages,
11 Plaintiffs respond that damages must be trebled before any offset is applied. (Dkt. No.
12 392 at 26.)

13 The question raised by BANA is whether Plaintiffs are entitled to an offset from
14 the principal amount of actual damages or from the total amount of total damages which
15 may include treble or punitive damages. An “offset should be subtracted from the total
16 amount of damages *after* trebling. In actions like this where treble damages are available,
17 the plaintiff is entitled to full satisfaction of the claim for harm done. The amount
18 awarded as damages is then trebled as punishment to the defendant. If the offset were
19 subtracted from the initial damage award, the class members would be denied the full
20 satisfaction of their claim.” *Van Vranken v. Atlantic Richfield Co.*, 699 F. Supp. 1420,
21 1428 (N.D. Cal. 1988) (emphasis in original); *see e.g.*, *McCall v. Four Star Music Co.*, 51
22 Cal. App. 4th 1394, 1399 (1996) (a “plaintiff is only entitled to a single recovery of *full*
23 compensatory damages for a single injury”) (emphasis in original); *Uthe Tech. Corp. v.*
24 *Aetrium, Inc.*, 808 F.3d 755, 762 (9th Cir. 2015) (the plaintiff was not barred from
25 pursuing treble damages against the defendant as long as there was an offset for the sums
26 paid under the foreign arbitral award and pursuing treble damages does not amount to
27 double recover but “full satisfaction” to which the plaintiff were entitled).
28

1 Similarly, as to punitive damages, where “a claimant’s award of compensatory
2 damages was completely offset, he could still receive punitive damages.” *Colaco v.*
3 *Cavotec SA*, 25 Cal. App. 5th 1172, 1205 (2018) (rejecting argument that because the
4 offset wipes out liability for compensatory damages, the punitive damages award must be
5 reversed because the satisfaction of a compensatory damage award by offset does not
6 mean those damages were never awarded, it means the award was effectively paid).

7 To the extent that Plaintiffs demonstrate liability and have shown they are entitled
8 to treble damages and punitive damages, they will be entitled to those damages [REDACTED]

9 [REDACTED]
10 [REDACTED]. The calculation of the offset to damages already paid by BANA can
11 be determined at trial or after. *See Peters v. Equifax Info. Servs. LLC*, Case No. EDCV
12 12–1837–TJH (OPx), 2013 WL 12169355, at *3 (C.D. Cal. 2013) (offset issues, if any,
13 could be handled post-trial by the trial judge if necessary); *Cheetham v. Specialized Loan*
14 *Servicing LLC*, CASE NO. 2:20-CV-762-JCC-DWC, 2021 WL 2137823, at *2 (W.D.
15 Wash. May 26, 2021) (“[E]ven if the ‘one satisfaction rule’ does apply, offset issues can
16 be resolved post-trial.”). Therefore, the Court concludes that Plaintiffs have proposed a
17 valid model for actual damages.

18 **ii Consequential Damages for the Credit Denial, Credit**
19 **Rescission, Account Freeze and EMV Chip Classes**

20 Plaintiffs’ damages expert, Mr. Regan, proposes two methodologies to determine
21 consequential damages for the Claim Denial, Credit Rescission and Account Freeze
22 Classes. (Dkt. No. 386-4, Chan Decl., Ex. 4, Regan Expert Report ¶¶ 45-60, 85-89; 100-
23 07, 120.) Plaintiffs propose that consequential damages measure the economic value of
24 the time class members were deprived of the use of their funds (lost “time value of
25 money”) or loss of access to the principal amount due to CFF-1. (*Id.* ¶¶ 8, 39, 44, 52.)
26 BANA argues that calculating each class members’ lost time value of money will require
27 individual inquiries rather than a method to assess classwide damages.
28

1 The Ninth Circuit has recognized injury in the form of “the lost time value of
2 money” and an award of interest as a way of measuring and remedying that injury. *Van*
3 *v. LLR Inc.*, 962 F.3d 1160, 1165 (9th Cir. 2020) (“*Van I*”); *see also W. Va. v. United*
4 *States*, 479 U.S. 305, 310-11 n.2 (1987) (“Prejudgment interest serves to compensate for
5 the loss of use of money due as damages from the time the claim accrues until judgment
6 is entered, thereby achieving full compensation for the injury those damages are intended
7 to redress.”).²⁸

8 According to Mr. Regan, Methodology 1 is multiplying the principal amount of
9 actual damages (the total dollar amount of each claim denied, of credit rescinded and
10 total dollar amount when accounts were frozen) with a compound interest rate that
11 reflects the “time value of money . . . based on the total length of time the class members
12 were denied access to those funds.” (Dkt. No. 386-4, Chan Decl., Ex. 4, Regan Expert
13 Report ¶ 45.) Mr. Regan applied two different interest rates. First, he applied a 10%
14 interest rate, the rate applied to judgments in California. (*Id.* ¶¶ 48, 49.) But he asserts
15 the 10% interest rate understates the costs the cardholder would have incurred in the form
16 of increased borrowing through use of their credit cards, with average APRs between
17 17.4% to 23.5% during that time period until the amounts denied was credited. (*Id.*)
18 Cardholders also incurred costs based on their inability to pay down existing debt. Mr.
19 Regan also applied a 20% interest rate to reflect the representative APR for the lost time
20 value of money. (*Id.* ¶ 51.)

21 BANA does not dispute Methodology 1, only the interest rate used; however,
22 which interest rates should be applied is an issue for the factfinder, not a determination to
23 be made at class certification. Therefore, Methodology 1, Plaintiffs’ damages model for
24 assessing consequential damages for lost time value of money measures damages

25
26
27 ²⁸ BANA relies on *Park v. Webloyalty.com, Inc.*, Case No.: 12cv1380-LAB (LL), 2019 WL 1227062, at
28 *3 (S.D. Cal. Mar. 15, 2019) arguing Plaintiffs lack standing because they have already been refunded,
(Dkt. No. 349 at 46), but that case pre-dates the ruling in *Van* which held that injury due to the “lost time
value of money” confers Article III standing. *Van I*, 962 F.3d at 1165.

1 attributable to their theory of liability and can be calculated classwide. *See Van*, 962 F.3d
2 at 1161, 1164 (noting district court used an interest rate of 4.35% per year).

3 Methodology 2 is an alternative method to calculate financial harms experienced
4 by cardholders impacted by BANA’s use of CFF-1 and to assess the financial cost of
5 borrowing substitute funds, (*see* Dkt. No. 386-4, Chan Decl., Ex. 4, Regan Expert Report
6 ¶¶ 54-57), as well as late or overdraft fees due to BANA’s denial of their claims and their
7 inability to access funds, (*id.* ¶¶ 58-60). Mr. Regan asserts [REDACTED]
8 [REDACTED]. (*Id.* ¶ 53 & n.56.)

9 In rebuttal, Mr. Stango challenges Methodology 2 arguing that because [REDACTED]
10 [REDACTED]
11 [REDACTED]. (Dkt No. 350-2, Brys Decl., Ex. 1, Stango Expert
12 Report ¶ 39.) Mr. Stango also opines that consumer heterogeneity cannot measure
13 economic harm on a class-wide basis due to the varying economic circumstances of each
14 cardholder where the costs associated with obtaining substitute funds and credit card late
15 fees will depend on the financial circumstance of each EDD cardholder. (*Id.* ¶¶ 45-77.)

16 First, the Court agrees that the Remediation Plan does not support a damages
17 model that satisfies *Comcast*. While the Remediation Plan [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED] (Dkt. No.
22 367-6, Chan Decl., Ex. 74 at III.C.4 at 13-14 (UNDER SEAL).)

23 Additionally, the Court agrees with BANA that Mr. Regan’s assumptions about
24 class members in arriving at Methodology 2 may not be true classwide as he has not
25 provided any evidence in support. In explaining this methodology, Mr. Regan stated that
26 EDD cardholders “tended to earn less than the median wage (i.e., were less likely to have
27 available savings to bridge the time until re-employment)[]”, (Dkt. No. 386-4, Chan
28 Decl., Ex. 4, Regan Expert Report ¶ 39); “impacted cardholders would likely have

1 needed alternative funds to mitigate the inability to access their funds” and “[t]he most
2 likely source of credit for these consumers was increased utilization of credit cards”, (*id.*
3 ¶ 54); and as to late fees, he stated “it is likely that Claim Denial class members relied on
4 their EDD funds to make timely payments and avoid late fees . . . As a result, it is likely
5 that the impacted cardholders incurred late fees during the time, (*id.* ¶ 58). Based on
6 these statements, Mr. Regan conducts an analysis of the cost of the inability to access
7 impacted funds and the cost of late or overdraft fees based on the “typical consumer”.
8 (*Id.* ¶¶ 53-60.) Mr. Regan has not supported Methodology 2 with evidence showing that
9 these assumptions are true as to most or even any of the EDD cardholders’ experience.
10 Therefore, as to Methodology 2, the Court concludes that Plaintiffs have not
11 demonstrates that this method measures damages across the entire class and that they
12 stem from BANA’s actions that created the legal liability. *See Comcast*, 569 U.S. at 35.

13 **iii. Principal Amount of Actual Damages for Customer Service**
14 **Class**

15 As to the Customer Service Class, Plaintiffs seek actual damages in the form of
16 “compensation for the value of class members’ lost time spent on hold with the Bank’s
17 claims call center that was greater than the reasonable wait-on-hold time by industry
18 standards.” (Dkt. No. 386-4, Chan Decl., Ex. 4, Regan Expert Report ¶¶ 113.)
19 According to Mr. Regan’s calculations, damages can be calculated from BANA’s records
20 showing [REDACTED]

21 [REDACTED]
22 [REDACTED]. (*Id.* ¶ 114; *see also* Dkt. No.
23 393-1, Chan Decl., Ex. 3, Minnucci Expert Report ¶¶ 12, 94-100 (UNDER SEAL).)

24 BANA first argues that the customer service theory of liability is legally invalid
25 because damages are not recoverable for lost time relying on *Kleef v. Goodman Mgf. Co.,*
26 *L.P.*, CASE NO. 4:15CV00176 BSM, 2015 WL 4512200, at *3 (E.D. Ark. July 24,
27 2015). In *Kleef*, the plaintiff purchased air condition units and HVAC equipment that he
28 alleged were defective. *Id.* at *1. He sought damages, *inter alia*, for the lost time he

1 spent coordinating and waiting for repairs which the court rejected explaining consumers
2 could bring a lawsuit every time they were on hold with a company's customer service
3 line while they waited to resolve a problem. *Id.* at *3. “Thus, to say that damages for
4 lost time are recoverable in a products liability action makes no sense, and it is not
5 commercially practicable.” *Id.*

6 However, in this case, the Customer Service Class seeks relief under negligence
7 and breach of the implied covenant of good faith and fair dealing which provide for
8 liability and damages distinct from a products liability case. *See e.g., Conte v. Wyeth,*
9 *Inc.*, 168 Cal. App. 4th 89, 101 (2008) (“Negligence and strict products liability are
10 separate and distinct bases for liability that do not automatically collapse into each other .
11 . . .”). The Customer Service Class alleges that BANA breached a duty to provide
12 effective customer service and to process and investigate claims in a timely manner and
13 the reduced call center staffing impaired their rights under the EDD Debit Card Account
14 Agreement. Further, the damages sought in this case is not just time lost but an excessive
15 amount of lost time. *See Stasi v. Immediata Health Grp. Corp.*, 501 F. Supp. 3d 898,
16 916-18 (S.D. Cal. 2020) (lost time spent making sure she did not become further
17 victimized due to data breach of medial information stated plausible lost time damages
18 for negligence); *Dieffenbach v. Barnes & Nobles, Inc.*, 887 F.3d 826, 828 (7th Cir. 2018)
19 (plaintiffs suffered injuries “because the data theft may have led them to pay money for
20 credit-monitoring services, because unauthorized withdrawals from their accounts cause a
21 loss (the time value of money) even when banks later restore the principal, and because
22 the value of one's own time needed to set things straight is a loss from an opportunity-
23 cost perspective.”); *In re Solara Med. Supplies, LLC Customer Data Sec. Breach Litig.*,
24 613 F. Supp. 3d 1284, 1296 (S.D. Cal 2020) (increased time spent monitoring one's credit
25 and other tasks associated with responding to a data breach have been found by others
26 courts to be specific, concrete, and non-speculative).

27 Here, Mr. Regan asserts that actual damages for the Customer Service Class will
28 measure the “value of class members’ lost time spent on hold with the Bank’s Claims call

1 average retail price.”). The Court concludes that at this stage, predominance has been
2 satisfied as to actual damages on the issues raised by the Customer Service Class.

3 **b. Treble and Statutory Damages**

4 Plaintiffs argue common questions predominate on whether they are entitled to
5 treble damages for the Claim Denial and Credit Rescission Classes under the EFTA
6 which can be calculated by simple arithmetic. (Dkt. No. 324-1 at 52; *see* Dkt. No. 386-4,
7 Chan Decl., Ex. 4, Regan Expert Report ¶¶ 76, 90.) As to statutory damages, Plaintiffs
8 argue that common issue predominate for statutory damages on behalf of the Claim
9 Denial and Credit Rescission classes under the EFTA and the EMV Chip class under the
10 CCPA. (*Id.*) The EFTA provides for statutory damages of up to \$500,000 in a class
11 action and the CCPA provides for damages of \$100 to \$750 per violation per consumer,
12 or actual damages, whichever is greater. Cal. Civ. Code § 1798.150(a). Both are
13 formulaic and can be calculated using BANA’s records. (Dkt. No. 386-4, Chan Decl.,
14 Ex. 4, Regan Expert Report ¶¶ 77, 91, 121.) BANA does not dispute that treble and
15 statutory damages are susceptible to being measured across the entire class. Thus,
16 because Plaintiffs’ treble damages and statutory damages methodology measure damages
17 attributable to BANA’s conduct and can be formulaically calculated using Defendant’s
18 records, predominance has been met.

19 **c. Punitive Damages**

20 Plaintiffs maintain they are entitled to punitive damages for their due process,
21 breach of fiduciary duty and breach of implied covenant of good faith and fair dealing
22 claims. (Dkt. No. 324-1 at 53 & n.23.) Defendant argues that entitlement to punitive
23 damages turns on class members’ actual damages so BANA is entitled to individualized
24 determinations of each putative class members’ eligibility. (Dkt. No. 349 at 41-42.)

25 Punitive damages may be awarded under § 1983 action “when the defendant's
26 conduct is shown to be motivated by evil motive or intent, or when it involves reckless or
27 callous indifference to the federally protected rights of others.” *Smith v. Wade*, 461 U.S.
28 30, 56 (1983). Punitive damages are also allowable for the breach of fiduciary duty and

1 breach of the implied covenant of good faith and fair dealing. *See* Cal. Civ. Code §
2 3294(a) (“In an action for the breach of an obligation not arising from contract, where it
3 is proven by clear and convincing evidence that the defendant has been guilty of
4 oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover
5 damages for the sake of example and by way of punishing the defendant.”).

6 Because the Court concluded that actual damages can be assessed on a classwide
7 basis, punitive damages can also be calculated on a classwide basis. Moreover, punitive
8 damages typically can be assessed classwide because punitive damages focuses on the
9 defendant’s conduct and state of mind and not any individual conduct of class members.
10 *See Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 543 (N.D. Cal. 2012) (citing *Ellis v.*
11 *Costco Wholesale Corp.*, 657 F.3d 970, 987 (9th Cir. 2011) (punitive damages claims “do
12 not require an individual determination”); *Doe v. Mindgeek USA Inc.*, 702 F. Supp. 3d
13 937, 951 (C.D. Cal. 2023) (punitive damages do not bar predominance because “[t]he
14 availability of punitive damages here ‘hinges, not on facts unique to each class member,
15 but on the defendant's conduct toward the class as a whole.’”) (quoting *Opperman v.*
16 *Path, Inc.*, Case No. 13-cv-00453-JST, 2016 WL 3844326, at *16 (N.D. Cal. July 15,
17 2016)). BANA has not shown that the determination on punitive damages will defeat
18 predominance.

19 **d. Restitution under UCL**

20 Plaintiffs pursue restitution under the UCL’s unfair prong as an alternative to their
21 legal claims for damages. (Dkt. No. 324-1 at 54.) BANA does not challenge the
22 alternative equitable damages of restitution under the UCL. (*See* Dkt. No. 349.)

23 Plaintiffs seek restitution in the form of “(1) money in which class members have a
24 vested ownership interest but which the Bank wrongfully withheld from class members
25 (i.e., the amount of the denied claims, rescinded credits, and frozen funds), . . . (2)
26 prejudgment interest of 7% per annum for the periods the Bank wrongfully withheld from
27 class members the money attributable to denied claims, rescinded credits, and frozen
28 accounts . . . and (3) restitutionary disgorgement of the float revenue the Bank earned on

1 wrongfully withheld funds.” (Dkt. No. 324-1 at 54.) They claim that calculations can be
2 based on BANA’s records.

3 Restitution is “compelling a UCL defendant to return money obtained through an
4 unfair business practice to those persons in interest from whom the property was taken,
5 that is, to persons who had an ownership interest in the property or those claiming
6 through that person.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134,
7 1149 (2003) (quotation marks and citation omitted). The purpose of restitution “is to
8 restore the status quo by returning to the plaintiff funds in which he or she has an
9 ownership interest.” *Id.*

10 The Court concludes that Plaintiffs have shown that restitution based on BANA’s
11 alleged liability can be calculated on a classwide basis using Defendant’s records. (Dkt.
12 No. 386-4, Chan Decl., Ex. 4, Regan Expert Report ¶¶ 37 78-79, 83, 98.)

13 **e. Disgorgement**

14 Plaintiffs seek disgorgement of BANA’s unjustly earned profits as to its breach of
15 fiduciary duty, breach of the implied covenant of good faith and fair dealing and
16 negligence causes of action. (Dkt. No. 324-1 at 55.) According to Plaintiffs, BANA
17 earned profits on funds on deposit and amounts it wrongfully withheld from Plaintiffs
18 and putative class members as well as profits in the form of avoided costs by
19 intentionally understaffing its Claim call centers and issuing debit cards without EMV
20 chips. (*Id.*) Calculation of avoided costs is readily ascertainable from the Bank’s own
21 records and does not depend on any individualized inquiries. (*See* Dkt. No. 386-4, Chan
22 Decl., Ex. 4, Regan Expert Report ¶¶ 79, 92, 109, 116, 122; Dkt. No. 393-1, Chan Decl.,
23 Ex. 3 (Minnucci Rep.) ¶¶ 94-100 (UNDER SEAL).) BANA does not dispute Plaintiffs’
24 damages model for disgorgement. (*See* Dkt. No. 349.) Accordingly, the Court concludes
25 that Plaintiffs’ disgorgement damages model satisfies predominance.

26 **9. Superiority Under Rule 23(b)(3)**

27 Under Rule 23(b)(3), the plaintiff must also demonstrate “that a class action is
28 superior to other available methods for fairly and efficiently adjudicating the

1 controversy.” Fed. R. Civ. P. 23(b)(3). Superiority requires a consideration of “(A) the
2 class members' interests in individually controlling the prosecution or defense of separate
3 actions; (B) the extent and nature of any litigation concerning the controversy already
4 begun by or against class members; (C) the desirability or undesirability of concentrating
5 the litigation in the particular forum; and (D) the likely difficulties in managing a class
6 action.” Fed. R. Civ. P. 23(b)(3)(a)-(d); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d
7 1180 (9th Cir. 2001).

8 Plaintiffs maintain that the class action is superior to proceeding individually
9 because BANA engaged in uniform policies and practices discussed above and classwide
10 adjudication will achieve “economies of time, effort and expense” and promote
11 “uniformity of decisions as to persons similarly situated.” (Dkt. No. 324-1 at 55.)
12 Specifically, they contend that class members’ interest in pursuing and controlling their
13 own litigation is reduced where the questions of law and fact are common. (*Id.* at 56.)
14 Second, they have identified more than 100,000 EDD cardholders impacted by BANA’s
15 uniform policies and the only related litigation are the Individual Plaintiffs who have
16 filed cases in this MDL and these cases are currently stayed pending the Class Plaintiffs’
17 claims. (*Id.*) Third, the high cost of pursuing claims against BANA outweighs any
18 potential recovery in an individual case. (*Id.*) Finally, Plaintiffs assert the likely
19 difficulties in maintaining a class action is not outweighed by the benefits of considering
20 common issues in one action. (*Id.* at 57.) BANA solely disputes the second factor
21 arguing that this action is not superior to the Consent Decrees with the CFBP and OCC
22 because [REDACTED] under the Remediation Plan.
23 (Dkt. No. 349 at 52-53.)

24 The existence of a prior consent decree is relevant to the superiority question.
25 *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1314 (9th Cir. 1977) (citing *Kamm v.*
26 *Cal. City Dev. Co.*, 509 F.2d 205 (9th Cir. 1975)). In *Doninger*, the court noted the
27 consent decree was similar “in scope” as the class action litigation and “[p]rior similar
28 litigation is often the critical factor in denying (b)(3) certification.” *Id.* at 1314. In

1 *Doninger*, the plaintiffs were 31 females suing the defendant for sex discrimination in the
2 workplace under Title VII and the Equal Pay Act seeking injunctive relief and backpay
3 awards as remedies. *Id.* at 1306. The defendant had entered into a consent decree with
4 the Equal Employment Opportunity Commission (“EEOC”) in the United States District
5 Court for the Eastern District of Pennsylvania and resolved issues against AT&T and 22
6 operating entities arising from alleged violations of the Fair Labor Standards Act, Title
7 VII of the Civil Rights Act of 1964, and the Equal Employment Opportunity Act. *Id.* at
8 1306-07. The consent decree provided for back payments and directed “implementation
9 of affirmative action programs to prevent discrimination in employment, including
10 setting goals and timetables for the programs covering transfers, promotions, layoffs,
11 recalls, employee information, testing, promotion pay, hiring of female college graduates
12 directly into management, and pay rate adjustments.” *Id.* at 1306-07. Individuals who
13 opted to avail themselves to the remedies under the consent decree had to sign a waiver,
14 release, and covenant not to sue defendants regarding any claims for violations of any
15 federal or state fair employment practice law or regulation. *Id.* at 1307. At class
16 certification, the defendant argued that class treatment was not appropriate because many
17 individuals had accepted the benefits available, and waived their right to bring suit, and
18 would be precluded from seeking certain remedies sought by individuals. *Id.* The Ninth
19 Circuit held that the district court did not abuse its discretion in denying class
20 certification based on superiority because the consent decree was “similar in scope” and
21 “the effect of the consent decree would be drastically to reduce and fragment the potential
22 class.” *Id.* at 1314.

23 Similarly, in *Kamm*, the district court held that the class action was “not superior to
24 other available methods for the fair and efficient adjudication of the controversy . . .
25 especially in light of the proceedings already brought by the California Attorney General
26 and Real Estate Commissioner . . . the relationship of these proceedings to the facts and
27 posture of this particular case.” *Kamm*, 509 F.2d at 209. In *Kamm*, per the settlement
28 between the Attorney General and Real Estate Commissioner and the defendant, those

1 that accepted the settlement offer also executed a release “from instituting action against
2 the defendants or otherwise seeking recovery for any alleged damage.” *Id.* at 208.
3 Therefore, the Ninth Circuit held the district court did not err in dismissing the class
4 action based on superiority. *Id.* at 213.

5 In contrast, in *B.P. v. Balwani*, No. 20-15974, No. 20-15976, 2021 WL 4077008, at
6 *2 (9th Cir. Sept. 8, 2021), the Ninth Circuit held that the district court did not abuse its
7 discretion in concluding that superiority had not been defeated because it concluded “that
8 the Arizona Consent Decree ‘did not comprehend the full scope of damages that might be
9 available,’ and that it did not include a battery or medical battery claim.” *Id.* at *2. The
10 court also noted that Plaintiffs’ California statutory claims were also unaffected by the
11 Arizona Consent Decree.” *Id.*

12 Similarly, in this case, the CFBP and OCC Consent Decrees, while they provided
13 compensatory damages to EDD cardholders, they carved out a provision preserving class
14 members’ rights to pursue additional remedies. (*See e.g.*, Dkt. No. 324-75, Chan Decl.,
15 Ex. 72, CFBP Consent Decree ¶ 98.) Further, unlike the plaintiffs in *Doninger* and
16 *Kamm*, EDD cardholders subject to the Remediation Plan [REDACTED]
17 [REDACTED]. Therefore, BANA’s argument on
18 superiority is not convincing and not legally supported. Accordingly, the Court
19 concludes Plaintiffs have demonstrated that this class action is “superior to other
20 available methods for fairly and efficiently adjudicating the controversy.” *See Fed. R.*
21 *Civ. P.* 23(b)(3).

22 Conclusion

23 Based on the reasoning above, the Court GRANTS Plaintiffs’ motion for class
24 certification and CERTIFIES the following five classes:

25 1 **Claim Denial Class:** All Bank of America EDD cardholders who
26 notified the Bank that an unauthorized transaction had occurred on their
27 Bank of America EDD debit card account (“Claim”) at an automated teller
28 machine (“ATM”), and whose Claim the Bank denied or closed at any time

1 from September 28, 2020 through June 8, 2021, based solely on Indicator 1
2 of the Bank’s Claim Fraud Filter (“CFF”).

3 **2 Credit Rescission Class:** All Bank of America EDD cardholders who
4 received permanent credit from the Bank in connection with their Claim,
5 which credit the Bank rescinded at any time from September 28, 2020
6 through June 8, 2021, based solely on Indicator 1 of the Bank’s CFF.

7 **3 Account Freeze Class:** All Bank of America EDD cardholders whose
8 EDD debit card account (“Account”) the Bank froze at any time from
9 September 28, 2020 through March 17, 2021, based solely on Indicator 1 of
10 the Bank’s CFF, and whose Account the Bank (i) subsequently unfroze, or
11 (ii) subsequently converted from frozen to blocked status on or after March
12 18, 2021 and then unblocked.

13 **4 Customer Service Class:** All members of the Claim Denial class
14 and/or the Credit Rescission class who telephoned the Bank’s customer
15 service telephone number for its EDD cardholders at any time from
16 September 13, 2020 through November 21, 2020, and whose telephone call
17 was routed to the Bank’s Claims call center.

18 **5 EMV Chip Class:** All members of the Claim Denial class and/or
19 Credit Rescission class whose EDD debit card did not include an EMV chip
20 prior to June 9, 2021. Excluded are EDD cardholders who reported not
21 having the card in their possession at the time of the unauthorized
22 transaction or who never received their card, including those who reported a
23 lost or stolen card.

24 Excluded from each class is any person whom the Bank has determined,
25 pursuant to its Remediation Plan with the United States Consumer Financial
26 Protection Bureau (CFPB) and Office of the Comptroller of the Currency
27 (OCC), “(i) has been disqualified by the [S]tate [of California] from
28 Program²⁹ eligibility; (ii) has previously engaged in fraudulent Program
conduct, such as submission of fraudulent claims or other abuses of the
claims process; or (iii) has had their card frozen due to legal order processes,
as a result of Internal/Vendor fraud investigations, or by Global Financial
Crimes Compliance.” Also excluded from each class is any person whose
Claim or Account the Bank closed, in whole or in part, because the State of
California requested the Bank to close that person’s Claim or Account.

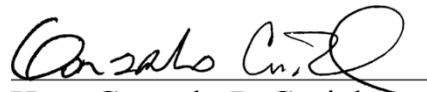
²⁹ Program refers to Defendant’s “Unemployment Benefits Prepaid Card Program.” Dkt. No. 367-6, Chan Decl., Ex. 74 at 3 (UNDER SEAL.)

1 The Court also appoints Plaintiffs Koole, McClure, Moon, Oosthuizen, Rivera,
2 Willrich, and Yuan as class representatives for the Claim Denial class; the appointment of
3 Plaintiffs Chong and Moore as class representatives for the Credit Rescission class; the
4 appointment of Plaintiffs Chong, Koole, McClure, Moon, Moore, Rivera, and Yuan as
5 class representatives for the Account Freeze class; the appointment of Plaintiffs Chong,
6 Moon, Moore, Oosthuizen, Willrich, and Yuan as class representatives for the Customer
7 Service class; and the appointment of Plaintiffs Chong, Koole, McClure, Moon, Moore,
8 Oosthuizen, Rivera, Willrich, and Yuan as class representatives for the EMV Chip class.
9 Finally, the Court appoints Cotchett Pitre & McCarthy LLP and Altshuler Berzon LLP to
10 serve a co-lead class counsel.

11 Rule 23 provides that for any class certified under Rule 23(b)(3), “the court must
12 direct to class members the best notice that is practicable under the circumstances,
13 including individual notice to all members who can be identified through reasonable
14 effort.” Fed. R. Civ. P. 23(c)(2)(B). The parties shall meet and confer regarding the form
15 of a proposed notice pursuant to Rule 23(c)(2)(B) and shall submit a stipulation or a joint
16 update describing the parties’ positions within thirty days of this Order.

17 IT IS SO ORDERED.

18 Dated: June 16, 2025

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20 Hon. Gonzalo P. Curiel
21 United States District Judge
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