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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 21-MD-02992-GPC-MSB **DEFENDANT BANK OF AMERICA, N.A.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO EXCLUDE PURPORTED EXPERT OPINIONS OF JAY MINNUCCI** Date: April 17, 2026 Time: 1:30 p.m. Ctrm: 12A – 12th Floor Judge: Hon. Gonzalo P. Curiel ORAL ARGUMENT REQUESTED FILED PROVISIONALLY UNDER SEAL PURSUANT TO STIPULATED PROTECTIVE ORDER

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Plaintiffs cannot survive summary judgment without producing evidence of actual damages incurred by themselves and their classes. To help shoulder that burden for their Customer Service Class, they rely on the opinions of Jay Minnucci, an independent consultant in the call center industry. *See* ECF 494 at 97. Minnucci is not designated as a damages expert, nor is he qualified to serve as one, so his report does not calculate damages outright. Instead, Minnucci proposes and generates inputs for Plaintiffs' Customer Service Class damages calculation.

Specifically, Minnucci claims that a third-party survey of unspecified call centers in different industries spanning periods before the COVID-19 pandemic and after the class period should serve as the "industry standard" and performance benchmark for Bank of America (BANA)'s Claims Call Center. He does so even though BANA's call center indisputably experienced a [redacted], while the call demand *decreased* or remained flat for many survey participants.

Minnucci further opines that BANA's Claims Call Center's performance, and the Customer Service Class's purported damages, should be measured based on that metric and the average call wait times for the Claims Call Center even though (1) Minnucci has never seen the underlying data for the survey, (2) Minnucci does not know how those call centers and the circumstances they faced compared to BANA's, (3) the wait times varied among class members, and (4) [redacted]. Having no knowledge of the data underlying the survey or its averages, Minnucci is in no position to opine that they reflect industry standards or appropriate benchmarks, much less damages for the class. Thus, his opinions, and any damages calculations relying on them, must be excluded as unreliable and irrelevant.

To the extent Minnucci purports to calculate BANA's purported cost savings, those opinions also must be excluded because they improperly rely on the survey as the "industry average and benchmark" and [redacted]

[redacted] rendering it unreliable and inflated. The opinions also must be excluded because they rely on undisclosed, decades-old data, that Minnucci did not verify, from a handful of clients in other industries, and because they apply a formula (Erlang-C) for which the underlying assumptions are inapplicable here.

To the extent Minnucci opines that [redacted] his opinion and assumptions should be excluded because they are refuted by the record and his own testimony. Further, they should be excluded because his suggestion that [redacted] is at odds with his own experience and forecasting activities of his clients. Finally, to the extent Minnucci seeks to opine on BANA's intent, those opinions are improper and must be excluded under well-established law.

BACKGROUND

I. BANA's Claims Call Center

During the COVID-19 pandemic, BANA call centers performed three functions: [redacted] HX[1] 10 at 14. [redacted] HX 11A. By contrast, [redacted]. *Id.* [redacted] *See id.* [redacted]

[1] Exhibits to the Declaration of Lindsay E. Hoyle shall be referred to as "HX."

[redacted]. *Id*. These efforts were complicated as call center agents transitioned to work-from-home, [redacted]. HX 12 . Further complicating matters, many state and local governments shut down, [redacted] HX 13 at 273:7–19. [redacted] *See* HX 14 .

II. Plaintiffs' Customer Service Claims

Plaintiffs assert that they received UI benefits from EDD via prepaid cards issued by BANA, and that they experienced unauthorized transactions on their cards. ECF 406 (TAMCC) at 2; ECF 324-1 at 1. Plaintiffs allege, among other things and with the benefit of hindsight, that BANA failed to provide "reasonable and adequate customer service" to certain callers by deliberately understaffing the Claims Call Center to achieve cost savings and "forcing" callers "to wait for hours on hold" causing "significant foreseeable harm." *See* TAMCC ¶ 582(d)(i)(E). They further allege that BANA could "forecast customer service call volume and adequately staff its call centers" yet did not do so. *Id*. They allege on behalf of the Customer Service Class that these actions were negligent and breached an implied covenant of good faith and fair dealing. TAMCC ¶¶ 585–593; 619–624. Both causes of action, among other things, require Plaintiffs to prove damages resulting from the purported misconduct.[2]

III. Minnucci's Inadmissible Damages Inputs and Opinions

In support of their Customer Service claims, Plaintiffs proffer Minnucci as an

[2] *See Sabicer v. Ford Motor Co.*, 362 F. Supp. 3d 837, 840 (C.D. Cal. 2019) (negligence claim requires damages); *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010) (good faith and fair dealing requires showing that "plaintiff was harmed by the defendant's conduct").

expert in the call center industry where he has been a consultant since 2000. HX 11 ¶ 8. Plaintiffs rely on Minnucci to provide the inputs for their damages calculations. Specifically, they rely on his opinions that (1) virtually all EDD prepaid cardholders who had their calls routed to the Claims Call Center during the class period waited [redacted] (*id.* ¶ 107); (2) "[t]he total number of excess hours" that class members waited to speak to a Claims Call Center agent can be calculated by multiplying [redacted] by the number of calls class members made to the Claims Call Center during the class period (*id.*); and (3) understaffing the Claims Call Center allowed BANA to avoid [redacted] which it would have had to incur if it had provided "industry standard" service (*id.*, Tables 10, 11; *see id.* ¶ 17).

For his **"industry standard" opinion**, Minnucci relies entirely on two data points as the building blocks for Plaintiffs' damages inputs: a 75-second average speed to answer ("ASA") and a 6.1% abandonment rate. *Id.* ¶¶ 12, 14. He sources these figures from the 2021 iteration of an annual publication by ContactBabel designed to "study[] the performance, operations, technology and HR aspects of US contact center operations" using survey responses from certain call centers. HX 15 at 13. Minnucci opines that the survey averages are "industry-standard performance benchmarks" for "all call centers, including specialty call centers like" the Claims Call Center. HX 11 ¶ 42; *see id.* ¶¶ 40, 49. Minnucci offers this opinion despite the fact that: (1) he did not review the data on which the averages are based (HX 16 at 220:16–19); (2) he does not know who the survey respondents are, what type of call centers or services they offered, or whether their data included multiple or aggregated call centers (*id.* at 205:3–15, 205:23–206:4, 220:16–19, 221:3–18); (3) he does not know whether any respondent experienced call volumes spikes or fraud attacks similar to BANA's (*see id.* at 220:11–18, 222:14–223:1); and (4) he does not even know what specific timeframe the respondents used to compile their data (*id.* at

222:2-11).

For his **<u>"excess hours" opinion</u>**, Minnucci takes the purported "industry average" ASA from the ContactBabel survey and subtracts it from the ASA for all individuals who called the Claims Call Center during the class period. HX 11 ¶ 107. He does so even though he admits that the [redacted] HX 16 at 398:1-18. Further, he agrees that some class members would have experienced shorter wait times depending on when they called. *Id.* at 139:22-140:2. And he admits that he does not know if or the extent to which the experience of an individual, or the class as a whole, differed from the aggregate average. *Id.* at 135:8-136:4. Plaintiffs then take Minnucci's excess hours opinion and propose that they would multiply it by (1) the number of calls made by Customer Service Class members and (2) the minimum wage even though each caller was collecting UI benefits (and therefore claiming to be unemployed and not earning wages at the time). *See* ECF 324-1 at 39–40.

For his **<u>"avoided workload" opinion</u>**, Minnucci claims he can estimate the total workload avoided costs from BANA's alleged understaffing by estimating the number of agents and related costs that would have been needed to achieve the ContactBabel "industry standard" 75-second ASA and 6.1% abandonment rate. HX 11 ¶¶ 109-111. To do so, he first attempts to estimate the amount of distinct caller demand in the Claims Call Center using unproduced data from "probably about eight clients." HX 16 at 408:16-17; *see* HX 11 ¶ 110 & Table 9. Minnucci claims these clients included members of the property and casualty industry, health insurance clients, utilities, and a membership organization, and says that the data was collected over a six-to-eight year period *beginning in 2005*. *See* HX 16 at 411:21-413:1. Minnucci uses his clients' data to develop a regression formula that purports to calculate an expected recall percentage for abandoned calls based on call abandonment percentages. *See* HX 11 ¶ 110, Table 9 & App'x H. He then applies that formula to BANA's [redacted] which includes [redacted]

[redacted] to estimate the number of callers to the Claims Call Center who abandoned their calls and did not call back in an effort to remove duplicates who may have called and abandoned their calls multiple times. *See* HX 11 Table 9 & App'x H. Next he adds this estimate to the number of answered calls to compute the total distinct caller demand. *Id.* Table 9.

Finally, to estimate workload charges avoided, he multiplies his distinct caller demand calculations by 93.9% (based on the ContactBabel 6.1% abandonment rate), and then multiplies that figure by BANA's average call length to calculate the number of paid workload hours required to achieve a purported industry standard rate. *Id.* Table 10. From this figure he [redacted] *Id.* Minnucci admits this calculation, which relies on [redacted], does not reflect workload charges solely attributable to the class. *See* HX 16 at 449:11–21.

For his **<u>"avoided idle charge" opinion</u>**, Minnucci claims he can estimate avoided costs associated with times between calls when call center agents are waiting to service new customers. To do so, Minnucci apportions his distinct caller demand figures across 30-minute intervals using call distribution percentages experienced by some of his consulting clients that he describes as having a "majority West Coast calling base." *See* HX 11 App'x I.[3] He next uses a formula, Erlang-C, to generate a retroactive estimate of the staffing requirements for the Claims Call Center during each interval necessary for BANA to achieve the ContactBabel 75-second ASA. *Id.* ¶ 113 & Table 11. He does so even though he admits that Erlang-C is not typically used in this fashion as it is typically used for forecasting (not *ex post* modeling), and even though its key assumptions were not actually present at the Claims Call Center during the class period. *See* HX 16 at 438:1-9.

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[3] Minnucci's Report does not provide any other information about his clients, or indicate when this data was collected or compiled, or whether it reflects call percentages during the class period.

Minnucci then subtracts the number of minutes he claims would need to be staffed from the number of minutes he claims agents would have spent answering calls and divides the result by 60 to compute idle hours. HX 11 ¶ 113, App'x I & Table 11. He then [redacted]. *Id.* Table 11. Like his workload charges calculation, this calculation uses [redacted] and therefore does not reflect avoided costs solely attributable to class members. HX 16 at 449:23–450:7.

IV. Minnucci's Other Inadmissible Opinions

Minnucci opines that [redacted]. HX 11 ¶¶ 63–65. In support, he points to [redacted] *Id.* ¶ 64. Minnucci further surmises, in hindsight, that because [redacted] *Id.* ¶ 65. Minnucci makes these claims despite the fact that his own analysis showed a [redacted]. HX 16 at 288:12–20. He further concedes that he cannot recall ever forecasting call volumes in this way. *Id.* at 291:21–292:14. Nor has he ever attempted to [redacted] *See id.* at 292:5–14; HX 11 ¶ 61.

Finally, based on his selective review of the record, Minnucci opines that [redacted] HX 11 ¶ 81; *see also id.* ¶¶ 15, 51, 58–61, 63, 66, 69–70, 74, 78, 82, 101. To do so, Minnucci relies on [redacted] *See* HX 17 at 14:20–16:19, 20:25–21:6. He concedes that he did not review her testimony or the testimony of the individual who allegedly understaffed the call center prior to issuing his report. *See* HX 16 at 145:9–146:3, 357:17–358:18.

STANDARD OF LAW

Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), "impose[] a special 'gatekeeping obligation' on trial judges" presented with expert testimony. *Brighton Collectibles, Inc. v. RK Tex. Leather Mfg.*, 923 F. Supp. 2d 1245, 1253 (S.D. Cal. 2013) (Curiel, J.). Under Rule 702, a witness proffered as an expert must satisfy the following requirements:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Under *Daubert*, district courts must "carefully apply[] Federal Rule of Evidence 702 to ensure that specialized and technical evidence is 'not only relevant, but reliable.'" *Brighton Collectibles*, 923 F. Supp. 2d at 1253. The reliability standard tests:

> (1) whether the scientific theory or technique can (and has been) be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential error rate; and (4) whether the theory or technique is generally accepted in the relevant scientific community.

Domingo v. T.K., 289 F.3d 600, 605 (9th Cir. 2002). In addition, "[o]ne very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharms, Inc*. (*Daubert II*), 43 F.3d 1311, 1317 (9th Cir. 1995).

"[T]he burden of proving the expert's testimony satisfies Rule 702" and the *Daubert* standard rests on the Plaintiffs, as "[t]he proponent of the evidence." *Brighton Collectibles*, 923 F. Supp. 2d at 1253.

ARGUMENT

None of the opinions discussed above passes muster under Fed. R. Evid. 702 or *Daubert*. As set forth below, Minnucci has no basis to opine that the ContactBabel survey provides appropriate industry averages or performance benchmarks for the Claims Call Center during the class period, making his opinions—and the Customer Service damages and cost savings models that rely on ContactBabel to assess purported harm and cost savings—unreliable. Minnucci's opinions and Plaintiffs' calculations of Customer Service Class "harm" and "cost savings" are also unreliable and irrelevant because they rely on [redacted]. Thus, they cannot serve as a reliable measure of any purported harm or cost savings for the Customer Service Class or any individual class member. Minnucci's purported "cost savings" measures are further unreliable and irrelevant because they rely on (1) cherry-picked data (that he did not check for accuracy) from eight unidentified clients from decades before the class period, and (2) a formula whose assumptions were not met during the class period and that is not used in the industry to assess staffing or measure damages *ex post*. For each and all of these reasons, Minnucci's damages inputs and any related opinions must be excluded and cannot serve as evidence in support of Plaintiffs' Customer Service Class damages claims.

As for Minnucci's opinion that BANA could and should have used the [redacted] the opinion is unreliable and irrelevant because it is contradicted by the record, his own forecasting experience, and the practice of his consulting clients. And to the extent Minnucci repeatedly attempts to offer an opinion as to BANA's intent or state of mind, those opinions must be excluded because they are not proper bases for expert opinion.

I. Minnucci's Damages Inputs and Calculations Must Be Excluded.

A. Minnucci's industry standard opinion should be excluded.

Minnucci opines that [redacted] HX 11 ¶¶ 12, 107. Further, he opines that the average industry abandonment rate was 6.1%. *Id.* ¶¶ 14, 40. He derives both averages from a 2021 report issued by ContactBabel, which surveyed call centers from various industries providing various services and levels of customer support over periods that include time before the pandemic and after the class period ended in November 21, 2020. *Id.* ¶ 12 n.1; HX 16 at 208:7–14. Plaintiffs then use Minnucci's opinion, and the survey specifically, to calculate damages for the Customer Service Class by subtracting the "industry average" from the aggregate average wait for callers to the Claims Call Center during the class period, and multiplying it by the minimum wage in California. *See* ECF 324-1 at 39–40.[4] Minnucci's opinion, and any damages calculations based on them, must be excluded for at least three reasons.

First, Minnucci's opinions must be excluded because they are conclusory, speculative, and not based on any analysis of the data from which ContactBabel's averages were derived. An "expert's opinion must rest on 'facts or data in the case that the expert has been made aware of or personally observed,' not merely assumptions and speculation." *Stephens v. Union Pac. R.R. Co.*, 935 F.3d 852, 856 (9th Cir. 2019) (quoting Fed. R. Evid. 703); *see also McCoy v. DePuy Orthopaedics, Inc.*, 2024 WL 1705952, *11 (S.D. Cal. Apr. 19, 2024) (excluding expert opinion where expert "simply parrot[ed] the opinions of other experts . . . without conducting

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[4] As discussed above and further below, Minnucci also improperly relies on the ContactBabel abandonment average to estimate avoided costs. *Supra* at 5-6; *infra* 16.

an independent investigation of the underlying evidence.") (internal quotations omitted). Yet Minnucci concedes he did not review *any* of the data on which these numbers are based. *See* HX 16 at 220:16–19. Nor does he know "how each individual call center responded" to ContactBabel's questionnaire, or who the respondents are or "what . . . makes up their call center[s] and what different divisions and departments they may have." *Id.* at 206:1–4, 220:16–19, 221:3–9. Nor does he know whether any respondent experienced a dramatic increase in call volumes in 2020 similar to that experienced by the Claims Call Center (*see id.* at 220:11–19), which was experiencing a [redacted] *See* HX 11A. Nor does he know how many survey respondents were a [redacted], or whether any survey respondents provided general customer service or more complex services such as fraud claims processing. HX 16 at 220:21–221:18. Nor does he know whether any respondent experienced a [redacted] (*id.* at 222:14–223:1), as the Claims Call Center did. *See* HX 18 ¶ 46; HX 19 at 60:23–61:9; HX 20 at -6783–84. And most basically, Minnucci does not even know *what timeframe* the respondents used to compile their data, or whether respondents with more than one call center provided aggregate data to ContactBabel. HX 16 at 222:2–11.

These admissions, and others, confirm that Minnucci has no basis to assert that the ContactBabel numbers are even accurate, much less that they constitute an appropriate "industry average" or performance benchmark for a call center facing similar facts and circumstances as BANA's Claims Call Center during the class period. Thus, they must be excluded. *See, e.g., McCoy*, 2024 WL 1705952, *11 (excluding expert opinion where expert conducted no "independent investigation of the underlying evidence") (internal quotations omitted).[5]

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[5] *See also Griffo v. Oculus VR, Inc.*, 2018 WL 6265067, *6 (C.D. Cal. Sept. 18, 2018) (expert report failing to provide "facts underlying [a particular] calculation" inadmissible as "[t]he conclusions do not 'rest[] on a reliable foundation.'") (quoting

Second, Minnucci's "industry average" and performance benchmark opinions also should be excluded because he concedes that neither he, nor any other industry participant, uses or relies on aggregate data across various industries or call center functions to set performance targets. Minnucci cites no source to show that other call center industry professionals use the ContactBabel survey averages as performance benchmarks. And at his deposition, Minnucci conceded that he does not even use them as such in his own consulting business. *See* HX 16 at 202:3–5. Rather, Minnucci testified that he relies on multi-industry averages to answer client questions about how a call center's *existing* performance targets "compare to what others are doing," not to set the targets in the first instance. *See id*. at 210:2–22. Thus, Minnucci has no basis to rely on the ContactBabel averages to set performance standards for BANA because that is not consistent with the industry's use or "the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); *see also In re Incretin-Based Therapies Prods. Liab. Litig.*, 524 F. Supp. 3d, 1001, 1044 (9th Cir. 2022) (excluding opinion due to "discrepancy between what [expert] endorses in this litigation and in the scientific community").

Third, Minnucci's "industry average" and performance benchmarks should be excluded because what little Minnucci does know about the ContactBabel survey confirms that the respondents are not apt comparators for BANA's Claims Call Center during the class period. *See, e.g., Goodness Films, LLC v. TV One, LLC*, 2014 WL 12780291, *2–3 (C.D. Cal. May 19, 2014) (excluding damages opinion based on comparisons where experts failed to show comparators were sufficiently similar to be relevant); *Multimedia Pat. Tr. v. Apple Inc.*, 2012 WL 5873711, *9 (S.D. Cal. Nov. 20, 2012) (excluding opinion based on "generic industry data [that] is not tethered to the relevant facts and circumstances of the present case"); *Faust v.*

Daubert, 509 U.S. at 597); *Rodman v. Otsuka Am. Pharm., Inc.*, 564 F. Supp. 3d 879, 889–91 (N.D. Cal. 2020) (excluding opinion where expert "exceed[ed] the boundaries of the sources she relie[d] on by going beyond what the sources concluded"), *aff'd* 2021 WL 5850914 (9th Cir. Dec. 9, 2021).

Comcast Cable Commc'ns Mgmt., LLC, 2014 WL 3534008, *5 (D. Md. July 15, 2014) (refusing to allow extrapolation of conclusions concerning employees working in one set of call centers to employees working in a different call center).

Most basically, the ContactBabel survey includes periods of time outside the narrow class period (September 13, 2020 through November 21, 2020), including data from January and February 2020 (before the pandemic impacted U.S. call centers). *See* HX 16 at 208:7-14; HX 15 at 13. Minnucci does not explain how pre-pandemic data could be relevant or serve as an appropriate yardstick against which to measure BANA's performance during the class period (which was at the height of the pandemic). Nor could he, as it is widely acknowledged that the contact center industry experienced "enormous upheaval … as a result of the pandemic." *Id.* at 34.[6] Minnucci conceded as much, admitting that the pandemic caused [redacted] HX 11 ¶ 59; HX 16 at 215:18–21. Because the circumstances call centers faced before and during the pandemic were vastly different, it is unreasonable for Minnucci to rely on ContactBabel's ASA and call abandonment figures to define pandemic-era performance standards. *See Multimedia*, 2012 WL 5873711, *9; *Faust*, 2014 WL 3534008, *8.

Minnucci's reliance on the ContactBabel survey is also unreliable and misplaced because, as stated in the report, its averages incorporate data from a significant number of respondents (approximately 40%) that experienced *flat or decreased call volumes* from March 2020 to November 2020. *See* HX 15 Fig. 2. [redacted] HX 11A. [redacted]. *Id.* Minnucci does not, and

[6] *See also* Paul Stockford, "*Automation Key to COVID-19 Contact Center Crisis*" Contact Ctr. Pipeline (Mar. 25, 2020), https://blog.contactcenterpipeline.com/2020/03/automation-key-to-covid-19-contact-center-crisis/ (COVID "put the contact center industry in a manner of disarrayed motion the likes of which have never been seen before").

cannot, account for the clear differences between the unspecified survey respondents and BANA's call center. *See* HX 16 at 219:22–223:1. Nor does his use of the ContactBabel survey as a standard or benchmark account in any way for the fact that [redacted] *See* HX 21 at -4091.[7] This, too, requires exclusion of his opinions because he has no reliable basis to opine that it is an industry standard or appropriate benchmark for BANA based on the facts and circumstances it was facing at the time. *See Multimedia*, 2012 WL 5873711, *9–10; *Faust*, 2014 WL 3534008, *8.[8]

Finally, Minnucci has no reliable basis to opine that the ContactBabel survey provides the "industry standard" or is *the* appropriate performance benchmark for BANA's Claim Call Center because it is based mostly on dissimilar call centers for different industries. As the survey states, the 75-second industry average ASA Minnucci relies on was computed from data submitted by mostly non-financial call centers. HX 15 at 15. Yet in a follow-on report Minnucci cites (*see* HX 11 ¶ 40 & n.33), ContactBabel notes that (1) the ASA for financial call centers "has been considerably higher than the industry average for the past nine years" (HX 22 at 7); (2) the ASA for financial call centers increased from 2013 to 2022 at a rate "much higher than the industry average" (*id.* at 31); and (3) financial call centers "generally . . . have a considerably higher average speed to answer than the US contact center

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[7] Minnucci testified that it is "very common" in call center service level agreements "to have a waiver clause" addressing "differences in actual volume versus forecast volume if the difference is more than ten percent," and that under such circumstances, "typically all be [redacted] HX 21 at 1.

[redacted] *ar v. Burlington N. R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994) (upholding exclusion of testimony as unreliable where experts failed to explain basis for conclusions); *Rodman*, 2021 WL 5850914, *1 (where there is simply too great an analytical gap between the data and the opinion proffered, a court cannot permit the expert to testify) (internal quotation omitted).

industry as a whole, being higher than the overall average for all of the past nine years, and seeing major increases in the years of the pandemic" (*id.*). Despite this, Minnucci still opines that the lower, 75-second ASA was the appropriate average and benchmark. *See* HX 11 ¶ 107. This also requires exclusion of his opinions. *See, e.g., Goodness Films*, 2014 WL 12780291, *2–3; *Multimedia*, 2012 WL 5873711, *9.[9]

B. Minnucci's use of aggregate call center data is unreliable.

Minnucci further opines that the Customer Service Class's damages can be calculated based on the assumption that every class member experienced the average ASA irrespective of when they called. *See* HX 11 ¶ 107; HX 16 at 400:10–19. Relying on this assumption, Plaintiffs then propose to calculate damages for the Customer Service Class by multiplying the number of calls made by class members to the Claims Call Center during the class period by (1) [redacted] (the approximate difference between the ContactBabel industry average ASA and the average call wait time), and (2) the California minimum wage at the time. *See generally* ECF 324-1 at 39-40. Minnucci's assumption, and any damages calculations based on them, also must be excluded because they are purely speculative and have no reliable basis in fact or the record.

Minnucci concedes that not all callers to the Claims Call Center experienced the same wait times. *See* HX 16 at 135:8–16. Further, he acknowledges (as he must) that some callers waited less than the average amount. *See id.* Thus, he necessarily acknowledges that relying on the aggregate data and averages would overcompensate some Customer Service Class members (to the extent they are entitled to any compensation at all, which they are not).

Additionally, Minnucci concedes that [redacted].

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[9] *See also Remien v. EMC Corp.*, 2008 WL 597439, *1 (N.D. Ill. Mar. 3, 2008) (striking opinion where expert "arbitrarily eliminate[d] relevant portions of data that could have been used to arrive at more complete and accurate assessments").

Minnucci admits that he cannot distinguish the class members' experience from any of these callers, or whether the class members' experience was the same or similar or skewed by others included in this population. *Id.* at 135:18–136:23. And he did not review any individual caller data or call recordings to assess how the class members' experiences compared to the average or to each other. *Id.*at 137:21–138:4; *see also* HX 11 App'x D. He simply throws his hands up and assumes for damages that they all experienced the average ASA. *See* HX 16 at 400:10–19. Such speculative and conclusory assumptions are not reliable expert opinion and must be excluded. *See Claar*, 29 F.3d at 502 (affirming exclusion of expert testimony because no evidence that the expert's conclusions were "based on anything more than subjective belief and unsupported speculation"); *Lloyd v. Conseco Fin. Corp.*, 2001 WL 36097624, *6 (C.D. Cal. Oct. 19, 2001) (excluding expert opinion that "does not speak clearly and directly to the issue in dispute") (citation modified).

II. Minnucci's Avoided Cost Opinions Are Unreliable.

Minnucci's avoided cost opinions also must be excluded for the reasons discussed above, as they too rely on ContactBabel and [redacted], rendering them unreliable and inflating the purported avoided costs. *Supra* Section I.A. Separately, and in addition, Minnucci's avoided workload opinions must be excluded as unreliable because he relies on undisclosed data from unspecified clients from different industries during periods long before the pandemic, and he cannot explain how or why that data correlates to BANA's Claims Call Center and the call volume spikes it experienced during the class period. HX 11 App'x H; HX 16 at 411:21–413:1. Similarly, Minnucci's avoided idle time opinions also must be excluded because there is no basis for the use of Erlang-C to calculate call center demand or damages *ex post*, as he does to estimate avoided costs. Further, and in any event, Erlang-C is not a reliable methodology here because the record shows that its underlying assumptions were not present during the class period.

Each of these fatal defects warrants exclusion of Minnucci's opinions. Moreover, even if the Court were to find that some of these flaws could be addressed on cross-examination, their cumulative effect would still justify exclusion. *See Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 570 (S.D.N.Y. 2007) (finding expert report and testimony unreliable "considering the cumulative effect of the numerous flaws identified"); *see also JMJ Enters., Inc. v. Via Veneto Italian Ice, Inc.*, 1998 WL 175888, *9 (E.D. Pa. Apr. 15, 1998), (granting motion to disallow expert report where expert analysis suffered from methodological flaw and significant errors), *aff'd*, 178 F.3d 1279 (3d Cir. 1999).

A. Minnucci's distinct caller demand calculations are unreliable.

Minnucci attempts to estimate the amount of distinct caller demand in the Claims Call Center—which he uses as an input to calculate BANA's purported avoided costs (*see supra* at 5-6)—by using call data that has not been produced in this case that he says he obtained from his consulting clients. HX 16 407:17–23; *see also* HX 11 App'x H. Minnucci's report provides no information about these clients or how their data was compiled. However, he subsequently testified that he obtained the data from "probably about eight clients" that included members of the property and casualty industry, health insurance clients, utilities, and a membership organization—no financial institutions. HX 16 408:16–17, 411:21–412:7. He further testified that the data was collected over a six-to-eight year period (*beginning in 2005*), that the data covered single days (not a two-month period like the class period), and that he relied on his clients to determine their own recall rates. *Id.* at 407:7–408:10, 412:17–413:1, 455:20–456:1. Minnucci's reliance on his client's data renders his caller demand estimate, as well as any purported avoided costs derived from it, unreliable for at least three reasons.

First, the aggregated client data points Minnucci relies on to estimate distinct caller demand are unreliable and cannot be used for this purpose because none of the clients operated call centers in the same industry, much less the same time period (at the height of the COVID-19 pandemic), as BANA's Claims Call Center. It is well-established that "[r]esearch begins with a clear formulation of a research question" and the "data to be collected and analyzed must relate directly to this question; otherwise, appropriate inferences cannot be drawn."[10] For this reason, courts hold that for a comparison "to have the requisite predictive capacity and the reliability *Daubert* demands," the samples selected must be "truly comparable." *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 812 (N.D. Ill. 2005), *amended,* 2005 WL 8178971 (N.D. Ill. Sept. 8, 2005) (internal quotation omitted); *Goodness Films*, 2014 WL 12780291, *2-3 (excluding opinion for failure to demonstrate comparators were sufficiently similar). Minnucci's use of his undisclosed, non-financial industry clients' data from 2005-2013 in no way satisfies this requirement. *See supra* at 5-6.

Second, Minnucci relied on his clients to crunch their own data and provide him with recall statistics without verifying their work. *See* HX 16 407:17–23, 408:2–5. This defect further renders his distinct demand calculation unreliable, as he did not and cannot verify the accuracy of the data on which his opinions rest. *See McCoy*, 2024 WL 1705952, *11 (excluding testimony where report adopted conclusions reached by others without reviewing supporting documents); *Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534, 546 (C.D. Cal. 2012) (excluding expert declarations because expert used reports prepared by others and "engaged in little, if any evaluation of their merits"); *Legendary Art, LLC v. Godard*, 2012 WL 3550040, *4 (E.D. Pa. Aug. 17, 2012) (expert's reliance on figures generated by another "without independent verification, renders his analysis unreliable").

Third, Minnucci's regression model fails to account for significant variables that likely impacted BANA's recall rates that were not present in his clients' data. Most obviously, BANA's call center was impacted by the onset of the pandemic and

[10] Reference Manual on Scientific Evidence: Third Edition at 311 (Washington DC: The National Academies Press) *available at* https://doi.org.10.17226/13163 (the "Manual on Scientific Evidence").

[redacted]. *See* HX 11A; HX 18 ¶ 46; HX 19 60:25–61:9; HX 20 . Minnucci cannot claim that any of his unspecified clients experienced such unprecedented challenges in the decades prior when the data was obtained. *See* HX 16 at 68:12–15, 115:22–116:12. This, again, renders his analysis both irrelevant and unreliable. *See Kim v. Benihana, Inc.*, 2024 WL 3550390, *5 (C.D. Cal. May 20, 2024) (finding "regression model should have controlled for several independent variables" but did not and therefore model was "unreliable and unhelpful to the trier of fact under Rule 702 and under *Daubert*); *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 975–76 (C.D. Cal. 2012) (excluding expert analysis that assumed disparity was attributable to defendant's conduct alone and did not account for other explanations); *Lloyd*, 2001 WL 36097624, *6 (excluding opinion that "fails to account adequately for potentially explanatory variables").

For each and all of these reasons, Minnucci's regression analysis and any related avoided cost opinions should be excluded as unreliable and irrelevant.

B. Minnucci's avoided workload calculations are unreliable.

Minnucci's computation of avoided workload charges is also flawed because it is not based on the number of avoided workload hours attributable to class members, and thus overestimates BANA's purported avoided costs. To estimate BANA's purported avoided workload costs, Minnucci takes the distinct caller demand he calculated based on his clients' data (which must be excluded for the reasons discussed above, *supra* Section II.A) and multiplies the figure by the average call length for the Claims Call Center during the class period. HX 11 ¶ 111 & Table 10. From this figure he subtracts the workload hours BANA actually incurred and multiplies the difference by the hourly rate BANA paid its vendors to compute total workload charges allegedly avoided. *Id.* Yet Minnucci admits that this avoided workload calculation relies on [redacted]

[redacted]. HX 16 449:11–21. Accordingly, Minnucci's cost savings calculation does not and cannot measure the cost savings attributable to Customer Service Class members. *Id.* Further, Minnucci admits that using only class member data would decrease his cost savings calculation, but he has no way to disaggregate the data to determine what portion of the purported cost savings he attributes to the class members as opposed to other callers. *Id.* at 451:20–452:4. This further counsels exclusion of Minnucci's purported cost savings opinions. *See McMorrow v. Mondelez Int'l, Inc.*, 2020 WL 1157191, *1 n.2 (S.D. Cal. Mar. 9, 2020) (excluding damages opinion because model "does not measure only the damages attributable to [plaintiffs'] liability theory").

C. Minnucci's idle hour charges calculations are unreliable.

Minnucci purports to calculate costs BANA may have avoided associated with "idle" call center agent hours. *See* HX 11 ¶¶ 112–113. To do so, he takes the distinct caller demand estimates, which must be excluded for the reasons discussed above, *supra* Section II.A, and applies a formula called "Erlang-C" to generate a retroactive estimate of BANA's purported staffing requirements for the actual call volume necessary to achieve the purported ContactBabel "industry-standard" ASA. HX 11 ¶ 113, Table 11. In addition to the reasons above (*supra* at 17-20), Minnucci's avoided idle hour charge opinions must be excluded because his reliance on Erlang-C is unreliable and unsupported by the record.

First, Minnucci's reliance on Erlang-C is not consistent with the industry's use or "the practice of an expert in the relevant field," and therefore is unreliable. *Kumho Tire*, 526 U.S. at 152. As *Daubert* recognizes, scientific validity for one purpose does not automatically confer scientific validity for all purposes. *See Daubert*, 509 U.S. at 591–92. Erlang-C is a mathematical equation that is sometimes used to *predict* the number of agents a call center *may* need to service a given number of calls while achieving a specific service level.[11] But that is not how Minnucci uses it here; rather,

[11] *See* Rahul Awati, *Erlang C*, Tech Target (Mar. 3, 2022)

he applies Erlang-C post hoc to *compute purported cost savings*. *See* HX 11 ¶¶ 112–13. Yet he and Plaintiffs have no "verifiable evidence" that could show that Erlang-C has ever been used in this manner by the scientific community. *Daubert*, 43 F.3d at 1317-18. Absent such evidence—and the record contains none—his idle work hours calculation should be excluded. *See Daubert II*, 43 F.3d at 1316 ("objective, independent validation of the expert's methodology" is required).

Second, Minnucci's idle hours cost savings calculation is unreliable because the assumptions built into the Erlang-C model run counter to the facts of this case. For example, Erlang-C assumes independent and random call arrivals (*i.e.,* a "Poisson process"), but "doesn't work if customer requests are not independent or triggered by a common event [like] natural disasters."[12] This makes Erlang-C particularly inappropriate to use during times when call volumes are spiking as a result of common causes like a pandemic, or [redacted]—as was the case here. *See supra* at 2-3. Similarly, as Minnucci conceded at his deposition, Erlang-C "assumes infinite caller patience," meaning a caller will stay on hold for as long as it takes to have her call answered. HX 16 at 442:14–17. But Minnucci admits that [redacted] HX 11 ¶¶ 48, 109; HX 16 at 442:4–5. And as published studies have found, Erlang-C error rates are "*highly correlated*" with realized abandonment rates.[13]

Erlang-C further assumes that all customer service representatives handling calls are "statistically identical" and equally skilled.[14] HX 16 at 436:5–437:10. But

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https://www.techtarget.com/searchunifiedcommunications/definition/Erlang-C

[12] *What is Erlang, and Why Does it Matter*, cxtoday (Nov. 25, 2022) https://cxtoday.com/contact-center/what-is-erlang-and-why-does-it-matter/.

[13] Thomas R. Robbins, *Evaluating the Performance of the Erlang Models for Call Centers*, at 14, 24, https://myweb.ecu.edu/robbinst/PDFs/S-12130-TR.pdf; *see also* Thomas R. Robbins, D.J. Medeiros and Terry P. Harrison, Working Paper "*Does the Erlang C Model Fit in Real Call Centers?*" (2010) §§ 2, 4.3, 5.

[14] *See* Robbins, "*Evaluating the Performance of the Erlang Models for Call Centers*" at 4.

Minnucci admits this was not the case, and that more experienced agents are often able to handle calls more efficiently than newer agents. *See id.* at 437:12–15 (testifying that representatives in "every call center" vary as to speed and level of performance). And regardless of skill, some calls and caller issues take longer to resolve than others, which Erlang-C also cannot account for.[15] Thus, because the assumptions built into the Erlang-C model are hopelessly at odds with the actual facts, Minnucci's idle hours cost savings calculation should be excluded. *See Bakst v. Cmty. Mem'l Health Sys., Inc.*, 2011 WL 13214315, *20 (C.D. Cal. Mar. 7, 2011) (excluding damages calculation based on expert's "factual assumptions that are entirely unsupported in the record"); *United States v. Rushing*, 388 F.3d 1153, 1156 (8th Cir. 2004) (upholding exclusion where expert made "assumptions contrary to the established facts of the case").

III. Minnucci's WFM Model Opinions Are Uninformed And Unhelpful.

Minnucci opines that [redacted] *See* HX 11 ¶¶ 63–66. Specifically, Minnucci opines that [redacted] *Id.* ¶¶ 63–65. His opinion is based on a [redacted]. *See id.* These opinions should also be excluded because they are contradicted by the record, Minnucci's own professional practice, and the practices of his clients.

As a threshold matter, Minnucci's opinion is not supported by the record, and therefore is unreliable and irrelevant. *See Payan v. Los Angeles Cmty. Coll. Dist.*, 2019 WL 8163479, *3–4 (C.D. Cal. June 13, 2019) (excluding expert report based on factual assumptions contradicting the record as "entirely speculative . . . [and]

[15] *See* Robbins, *supra* note 14 at 4.

unhelpful to the jury"). [redacted] *See* HX 23 Ex. 15; HX 11 ¶ 65; *see also* HX 24 ¶¶ 18(a)(ii), 42. Minnucci acknowledges this discrepancy, and concedes the model would be [redacted] HX 11 ¶ 65. Nevertheless, he opines—with the benefit of hindsight—that it could have been used to generate forecasts for the Claims Call Center that "would likely still meet industry standard accuracy rates." *Id.* ¶ 65; HX 16 at 284:13–17. This is not reliable expert testimony.

Indeed, Minnucci's report cites no support for the proposition that [redacted] And the record shows it did not, as Minnucci admitted his own analysis revealed that [redacted] HX 16 at 288:7–13, 288:19–20. Further, and in any event, Minnucci does not explain exactly how the purported [redacted] would have permitted [redacted] *See* HX 11 ¶ 61 (accepting five-to-seven week lead time required for new agents). For each and all of these reasons, Minnucci's characterization of the [redacted] is highly speculative, unsupported, and unreliable. *See Brighton*, 923 F. Supp. 2d at 1255 (excluding opinion because "expert has not grounded his assumption with the real world facts of this case"); *Robinson v. G.D. Searle & Co.*, 286 F. Supp. 2d 1216, 1221 (N.D. Cal. 2003) (opinion "lacks sufficient factual basis as required . . . and is therefore inadmissible" where contradicted by record).

Minnucci's contention that [redacted] should also be excluded because it is contrary to his own experience and otherwise devoid of support. *See U.S. Aviation Underwriters*, 2024 WL 2948626, *25 (excluding expert testimony on this basis). Minnucci's report cites nothing to indicate that single-variable forecasting is an accepted industry practice, much less that it can and would have accurately achieved the results he says BANA's call center should have achieved. Further, at his deposition, Minnucci testified that he could not recall a *single instance* in which he or anyone else generated staffing forecasts using a single variable. HX 16 at 291:21–292:4. He further conceded that planning staffing needs for his own clients during the pandemic was "not just simple forecasting," but instead relied on "a lot of factors," including "any factors that you can identify and quantify to be able to forecast." *Id.* at 76:12–17, 242:11–15. Because Minnucci's hindsight opinions are once again contrary to what he (and others) do in the field, they should be excluded. *See In re Incretin-Based Therapies*, 524 F. Supp. 3d at 1044 (excluding opinion due to "discrepancy between what [expert] endorses in this litigation and in the scientific community").

IV. Minnucci's State of Mind Opinions Are Improper.

It is well-established that, absent personal knowledge, an expert's testimony on another's "subjective state of mind and motives [is] impermissible." *A.B. v. Cnty. of San Diego*, 2020 WL 4431982, *3 (S.D. Cal. July 31, 2020); *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 613 F. Supp. 3d 1308, 1320–21 (S.D. Cal. 2020) (expert opinions on "intent, motives or states of mind . . . have no basis in any relevant body of knowledge or expertise") (internal quotation omitted), *aff'd*, 9 F.4th 1102 (9th Cir. 2021). Yet Minnucci repeatedly opines that BANA "deliberately" understaffed the Claims Call Center. *E.g.,* HX 11 ¶¶ 15, 51, 59–61, 63, 66, 69, 70, 74, 78, 81, 82, 101, 113. These are clearly improper expert opinions that must be excluded. *E.g., Kawasaki Jukogyo Kabushiki Kaisha v. Rorze Corp.*, 2025 WL

1407350, *9 (N.D. Cal. May 12, 2025) (excluding state of mind opinion); *Gold v. Lumber Liquidators, Inc.*, 323 F.R.D. 280, 294 (N.D. Cal. 2017) (same). Moreover, Minnucci's opinions are unreliable and irrelevant because they are contradicted by the record and witness testimony, which Minnucci did not fully review.[16] *See* HX 16 at 145:9–146:3, 357:17–358:18.

CONCLUSION

For the reasons detailed above, this Court should grant this motion and exclude Minnucci's opinions concerning (1) the industry average or performance benchmark applicable to the Claims Call Center during the class period, (2) the actual wait time experienced by the Customer Service Class members, and any damages or avoided cost calculations relying on them. Additionally, for the reasons detailed above, the Court should further exclude (3) Minnucci's avoided cost opinions, (4) his opinions concerning the reliability and potential use of the [redacted] and (5) any opinion he has or intends to offer concerning BANA's intent or state of mind in staffing the Claims Call Center.

Dated: October 17, 2025

Respectfully submitted,

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16 [redacted] 13 at 82:5–83:8; HX 27 at 204:19–21.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on October 17, 2025. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify under penalty of perjury that the foregoing is true and correct.

Executed: October 17, 2025 *s/ Matthew L. Riffee*