JAMES W. MCGARRY (*pro hac vice*)
JMcGarry@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Tel. +1 617 570 1000
Fax: +1 617 523 1231

SABRINA M. ROSE-SMITH (*pro hac vice*)
SRoseSmith@goodwinlaw.com
MATTHEW L. RIFFEE (*pro hac vice*)
MRiffee@goodwinlaw.com
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
Tel.: +1 202 346 4000
Fax: +1 202 346 4444

Attorneys for Defendant
BANK OF AMERICA, N.A.

[ADDITIONAL COUNSEL LISTED IN SIGNATURE BLOCK]

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 DAVID I. LEVINE

Date: April 17, 2026
Time: 1:30 p.m.
Dept: 12A – 12th Floor
Judge: Hon. Gonzalo P. Curiel

ORAL ARGUMENT REQUESTED

FILED PROVISIONALLY UNDER SEAL PURSUANT TO STIPULATED PROTECTIVE ORDER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Plaintiffs cannot survive summary judgment without carrying the burden of producing evidence of actual damages for themselves and their classes. Labor economist David I. Levine is one of the purported "experts" on whom they rely for this purpose. His report does not so much *perform* any expert analysis, but rather merely serves to put the imprimatur of a credentialed expert on a simplistic proposition that Plaintiffs could just as easily have argued without him, and in fact already did. Plaintiffs and their classes consist of debit cardholders who temporarily lost access to a portion of their benefits payments when Bank of America (BANA) denied their disputes of allegedly unauthorized charges. Those charges have all since been credited back to them ([redacted]), so their claims for actual damages rest on claims of being injured by the delay.

Levine's role in this is to assert that the class's damages can be measured by the cost of borrowing money on a credit card at a 15.9% annual interest rate to make up for the temporarily unavailable funds. He does not, and cannot, contend that Plaintiffs or any class members *actually* borrowed money on credit cards and paid 15.9% interest. Rather, he claims (more accurately, presumes) that they suffered other damages based on other expenses and inconveniences, and thus the 15.9% interest rate does not measure their actual damages, but rather serves as a "conservative" lower bound on an actual-damage total that for "most" class members he believes is much higher. In other words, Levine has *no idea* the actual damages suffered by the Plaintiffs or by any class member—he is just in search of some number, *any* number, comfortably beneath it, to avoid overshooting it.

As a purported damages model, this fails the *Daubert* criteria for relevance and reliability. It is, in fact, indistinguishable from a purported damages model this Court already rejected. Plaintiffs relied on another of their experts at the class certification stage to propose a damages methodology based on the assumptions that (i) class members "would likely have needed alternative funds to mitigate the inability to access their funds" and (ii) that "the most likely source of credit for these consumers was utilization of credit cards." ECF 494 at 87-88. This Court determined that these "assumptions about class members . . . may not be true classwide" as the purported expert "has not provided any evidence in support," and thus rejected the method for failure to "measure[] damages across the entire class." *Id.* The same applies to Levine's opinions, which rest on the same unsupported assumptions.

Moreover, Plaintiffs' burden is to evidence their actual damages. A method that does not even attempt to calculate those damages is, by its own terms, irrelevant for that purpose. Calling it a "conservative lower bound" does not change that: precedent cases repeatedly affirm that the expert's duty is to produce an analysis that's reliable and accurate, not "conservative." Levine's concession that his analysis does not even apply on a classwide basis, but only to "most" of the class—a claim itself made without factual foundation, and without considering records on even a *single* member of the class to validate the assumption—compounds the defects. In fact, Levine's analysis does not even apply to most of the class *representatives*, [redacted], and he admits that his method cannot be used to measure the damages of any person individually. But Plaintiffs carry the burden of producing evidence of their damages individually, and to show that the same evidence applies classwide—not merely to a tiny portion of the class. As Levine's analysis concededly does neither, it should be excluded from the record.

BACKGROUND

I. Plaintiffs' Claims and Damages Theories

On June 16, 2025, this Court certified five classes of California unemployment insurance (UI) benefits recipients alleging that they contacted BANA claiming unauthorized use of their benefits prepaid debit card, but had those claims denied because BANA's records showed that the disputed transactions were made in-person at ATMs, requiring the cardholder's physical card and a claim that their private PIN passcode was somehow compromised. ECF 494 at 96-97. The relevant time period runs about seven-and-a-half months, from September 28, 2020, when BANA implemented the challenged fraud-detection process (CFF-1), to June 8, 2021, when BANA ceased using CFF-1 to deny claims. *See id.*

Separately, in July 2022, BANA entered into a settlement agreement with the Office of the Comptroller of the Currency (OCC) and the Consumer Financial Protection Bureau (CFPB) that included a framework providing full compensation for cardholders whose claims might have been inaccurately decisioned by CFF-1. *See generally* HX[1] 28; HX 29. [redacted] *See* HX 30 at 77:7-17 (testifying that BANA [redacted]). Following that settlement agreement, [redacted] HX 31 at 4 n.16; ECF 350-8 ¶¶ 9-14. In addition to paying cardholders the full value of their disputed claims, [redacted] HX 31 at 5-13. BANA used [redacted] even though it [redacted] and determined such a rate to be [redacted] *Id.* at 7, 9, 13. The Remediation Plan did not attempt to [redacted] *id.*, at 12, but cardholders were [redacted] *Id.* [redacted] *See* ECF 350-9 ¶¶ 14-15.

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

Plaintiffs assert that [redacted] But the Court determined that "the Remediation Plan does not support a damages model" that carries Plaintiffs' burden because it [redacted] ECF 494 at 87. In particular, the Court rejected a proposed method of basing damage calculations on assumptions that class members "would likely have needed alternative funds" [redacted] and would "most likely" have used credit card borrowing to obtain them, on the ground that Plaintiffs lacked "evidence showing that these assumptions are true as to most or even any of the EDD cardholders." *Id.* at 87-88.

II. The Levine Report

David I. Levine claims expertise "in the field of labor economics" and teaches at the Haas School of Business. HX 35 ¶¶ 1, 7. Plaintiffs proffer him as a damages expert, primarily to furnish a "methodology for determining the value of the lost opportunity costs to the class members whose access to UI benefits was delayed or denied by the Bank's challenged policies and practices"—which he considers "an appropriate measure of damages." *Id.* ¶¶ 5, 16. Just like another of Plaintiffs experts, Greg J. Regan, the method Levine proposes is to use "the credit card interest rate" as "a conservative measure of the average opportunity cost faced by members of the impacted classes." *Id.* ¶ 44. He "estimate[s] that class members paid an effective interest rate of at least 15.9%" and describes this 15.9% figure as "a conservative lower bound on the average opportunity cost funds [*sic*] for UI recipients in California during the COVID pandemic." *Id.* ¶ 45. [redacted] But the theory is that consumers temporarily lacking access to funds might need "alternative sources of funds" during that time period, and borrowing funds on a credit card is one such alternative source. *Id.* ¶ 13.

Despite using "the credit card interest rate" as the basis for his "measure of damages" (*id*. ¶¶ 16, 44), Levine does not claim [redacted] He claims this is irrelevant, because "the alternative sources of funds available to most class members are higher cost than the cost of credit card borrowing." *Id*. ¶ 13. For example, he considers "borrowing from friends or family" to be one of the alternatives that is higher cost than the cost of credit card borrowing, because it might come with a "nonfinancial burden in terms of status or reputation." HX 36 at 55:23-57:13. Thus, he assumes that "most" class members had to choose between credit card borrowing at an average 15.9% interest rate and an alternative whose "nonfinancial" costs were higher. *Id.*

But in presuming this true for "most" class members, Levine does not contend it to be true for *all* class members, or even for *any* identifiable class member—indeed, he has *no idea* the number of class members for whom it is true. *See id*. at 57:24-58:1. He did not review any information about any of the class members, nor even the class representatives. *See*, *e.g.*, *id*. at 30:4-24, 39:2-18. He admits that "not everybody" would need to borrow money if faced with a temporary loss of access to UI benefits, that "some" people might simply access their own savings, and when questioned about how many class members did one or the other, admitted that "I don't have any data." *Id*. at 69:9-70:8; *see also id*. at 71:13-16 ("Q. Right. Do you have any data on the proportion of class members who chose to pay on credit cards in lieu of accessing liquid funds? A. No.").

That is why he couches his opinions in terms of proposing a damage measure in the form of "a conservative lower bound that would apply to the vast majority of the class members." *Id*. at 32:19-24. But he acknowledges multiple factors that could make his methodology *inapplicable* to some unspecified "minority" of class members. Asked what factors "would cause somebody to belong to that small minority" for whom his damages methodology is inapplicable, he cited:

> Not have any liquidity constraints, not have concerns about precautionary savings, not have a high subjective discount rate, not be overly concerned about the duration of the delay, not be facing uncertainty in the pandemic about income or expenses or correlated shocks that might increase the need for precautionary savings. . . . Not have transaction costs be a large portion of the opportunity cost of not having access to funds, not have credit card debt that they could be repaying or any other high-interest rate debt they could be repaying, and anything I'm forgetting. . . . [N]ot be reducing consumption in things that are hard to substitute across time, not be relying on sources of credit with high nonmonetary costs in terms of reputation or status or social obligations. . . . I'm pretty sure I'll want to add to this list as the day proceeds.

Id. at 47:10-48:15; *see also id*. at 100:18-101:1 (similar). In brief, Levine's "conservative lower bound that would apply to the vast majority of class members" does not actually measure the damages experienced by *any* class members, just a claimed "lower bound" on their alleged damages, and does not claim that even the "lower bound" applies to everyone, just to the "majority." But whether it *actually* applies to the majority is just an assumption, not based on any review of any records of their behavior or experiences.

Apart from his opinions on the damages allegedly suffered from temporarily losing access to a portion of their benefits, Levine also proposes a "methodology for calculating the value of the time lost by class members" who dialed BANA's customer-service number and claim to have spent "excess" time on hold before reaching a representative. HX 35 ¶ 5. He does not offer any opinion on how much hold time is "excess[ive]" and is "unsure how [Plaintiffs] [a]re computing that." HX 36 at 142:16-143:2. But he proposes to attach an economic value to whatever number Plaintiffs compute. His proposal is to value the time at "the minimum wage," but again only proffers this as "a conservative estimate" and claims the actual value of the lost time is even higher. HX 35 ¶ 53. Most studies, he claims, "have found that the typical value of time is close to the *median* wage," not the *minimum* wage. *Id*. ¶ 48. But this "typical value" is really just an average value, based on some people valuing their time above the median and others below the median, because people tend to value their time in line with their own respective earnings potential. *See* HX 36 at 146:7-148:5. Thus, his minimum-wage measurement figure again is not proffered as a damages measure applicable to all class members—only Levine's idea of a "lower bound" applicable to the class on "average." HX 35 ¶ 55.

III. The McCrary Rebuttal

Economist Justin McCrary addressed Levine's conclusions and methods in a rebuttal report. He considered Levine's claim of a 15.9% opportunity cost of temporarily lost funds based on the credit card interest rate "unsupported and inflated" for multiple reasons. HX 34 ¶ 17. First, there was "evidence to suggest proposed class members would have had access to alternative sources of capital, and *no* evidence they uniformly or typically turned to credit cards." *Id.* ¶ 73. These alternative sources of capital "would have no or lower cost of borrowing than the average credit card interest rate," but Levine did not consider them in his analysis. *Id.* The class representatives themselves were demonstrative. "Of the nine class representatives, . . . [redacted]" *Id.* ¶ 75. [redacted] *Id.* Of the remaining class representatives, [redacted] *Id.* ¶¶ 75-76. Among the larger group of named Plaintiffs not proffered as class representatives, 48 provided interrogatory responses on their claimed damages, and "[redacted]." *Id.* ¶ 77.

Furthermore, Levine based his conclusion that "most" class members would have needed to resort to credit card borrowing on the premise that "UI benefits are typically used for essential expenses." *Id.* ¶ 73; HX 35 ¶ 12. But Levine's claims about the "typical" uses of UI benefits were based on data related to equally typical

UI programs *predating the pandemic*—not the pandemic-era benefits at issue here. *See* HX 34 ¶¶ 50-58. The distinction is significant because during the pandemic, the "pandemic-related stimulus resulted in many households *increasing* their savings"—in contrast to the usual profile of a UI benefits recipient—and because many of the "essential expenses" that recipients might otherwise have needed to pay *were no longer essential*: for example, borrowers could benefit from a year-long forbearance on making mortgage-loan payments, three-and-a-half years of forbearance on student-loan payments, and similar forbearance on auto loans. *Id*. ¶¶ 36, 38, 80 (emphasis added). For all these reasons, far from its being the case that "most UI recipients turn to credit cards" when their benefits lapse (HX 35 ¶ 1), the pandemic era saw a *decrease* in credit card borrowing as consumers used the various forms of available assistance to pay down credit card debt. HX 34 ¶¶ 57, 67. Thus, "far from being conservative, the credit card borrowing rate . . . represents an *inflated* cost of the temporary inability to access a portion of UI benefits for the proposed class members." *Id*. ¶ 103.

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

Plaintiffs' claims require them to furnish evidence of "actual damage sustained by [Plaintiffs] as a result of" the defendant's conduct. 15 U.S.C. § 1693m(a)(1). And Because Plaintiffs assert their claims on behalf of a class, the method they use to evidence actual damages must measure them "across the entire class." *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013); *accord* ECF 494 at 87-88. Levine's proposed method is not admissible for either purpose. It does not even pretend to measure the "actual damage sustained" by any Plaintiff individually or by the "entire class" of Plaintiffs. It leaves both questions consigned to the realm of the unknown (and unknowable), and instead simply opines that *whatever* the correct measure of damages is for any Plaintiff or for the class as a whole, it can be assumed to be higher than his proposed "conservative lower bound." This fails the *Daubert* standard on multiple grounds. It is not a reliable method for measuring actual damages (since it does not even pretend to do so) and is not based on any evidence or data. It is therefore not relevant to the Court or to a factfinder in assessing whether Plaintiffs have the evidence of actual damages that they need.

I. *Daubert* Requires A Reliable Analysis, Not A "Conservative" Guess Untethered To Evidence.

"*Daubert* asks whether expert opinions are reliable and relevant, not whether they are conservative." *Orshan v. Apple Inc.*, 2024 WL 4353034, *3 (N.D. Cal. Sept. 30, 2024). "If a damage model could survive Daubert by simply underestimating true damages, an expert could avoid having a court exclude her opinions by picking an arbitrary damage figure that is comfortably below any reasonable amount of true damages even though such an opinion would be plainly unreliable." *Id*. But that is all Levine has done, and Plaintiffs cannot "sneak" his model "past *Daubert*" in that manner. *Id*.

The case law is unequivocal about this. "Just because an approach is conservative does not mean it is reliable." *United States ex rel. Fitzer v. Allergan, Inc.*, 2024 WL 1156310, *5 (D. Md. Mar. 18, 2024); *accord*, *e.g.*, *Unwired Planet, LLC v. Apple Inc.*, 2017 WL 589195, *2 (N.D. Cal. Feb. 14, 2017) ("Nor does the fact that the . . . model yields relatively conservative results offer assurance that those figures are useful or reliable. . . . Instead, by shrouding the results in an air of legitimacy, these factors raise the risk of juror confusion, making it all the more essential that the Court exercise its gatekeeping function until admission is adequately supported.").[2] As one court reasoned:

> Note, for example, how quick [the purported expert] is to exploit the method's malleability by suggesting that he could have picked a higher number . . . and that by opting for the lower figure he is somehow rendering a "conservative" opinion. Maybe so, but a conservative opinion in that sense does not equate to a scientific one. Someone who states on the basis of a dull pain in his right knee that he thinks it is going to rain less than .1 inch expresses a conservative, but surely an unscientific, opinion.

Ayers v. Robinson, 887 F. Supp. 1049, 1060-61 (N.D. Ill. 1995).[3]

---

[2] *See also Guardant Health, Inc. v. Found. Med., Inc.*, 2020 WL 2461551, *18 (D. Del. May 7, 2020) ("merely labelling a value 'conservative' is no substitute for a showing that there is an evidentiary foundation for the particular percentage selected"); *Stokes v. John Deere Seeding Grp.*, 2014 WL 675820, *4 (C.D. Ill. Feb. 21, 2014) ("the fact that an opinion is conservative does not make it scientific").

[3] *See also Stragent, LLC v. Intel Corp.*, 2014 WL 1389304, *4 (E.D. Tex. Mar. 6, 2014) (rejecting "attempts to justify [expert's] estimate on the ground that it is 'quite

Levine's reference to the credit card interest rate is perhaps not *quite* as unscientific as the proverbial dull pain in the knee, but it is not as far off as he thinks. In both situations, the dispositive fact is that the premise for the opinion has no analytical connection to the conclusion. Levine is not claiming that every class member (or any class member) was damaged in the amount of the credit card interest rate because they paid credit card interest. Rather, his claim is that their damages are based on other factors (and most likely higher), but since he doesn't know what they are, he will use the credit card interest rate instead of actually trying to measure them or risk overestimating them. Nothing about their alleged or actual damages has anything to do with the credit card interest rate—it has no connection at all to any class member's alleged or actual damages apart from Levine's confidence that *whatever* those damages are, they are probably higher.

Demonstrating this at his deposition, Levine speculated about a consumer who "loses access to $1,000 for 3 days," which "means the damages are on the order of $1.50 using my method." HX 36 at 50:3-14. The $1.50 is supposed to represent "the transaction cost of dealing with why our debit card isn't working as expected," but Levine simultaneously contended that the actual cost "is more than $1.50 for the vast majority of the class." *Id*. Levine then repeatedly dodged questions asking him to describe "the connection" between the actual costs "and the credit card interest rate," but ultimately admitted there was no such connection at all beyond his assertion that the actual costs are "at least" that much. *Id*. at 50:25-53:8.

> Q. So this person's damages are not based on the credit card rate, you're just certain that whatever damages those are, they are more than the credit card rate?
> A. For the vast majority of people, the transaction cost would be more than what would be implied by the credit card interest rate, yes.
>
> * * *
>
> Q. Do the damages they suffered have anything to do with the credit card

---

conservatively low,' because "[d]espite [plaintiff's] assertions, a 'conservative opinion in that sense does not equate to a scientific one'") (quoting *Ayers*, 887 F. Supp. at 1060)); ECF 494 at 87 (method "based on assumptions rather than evidence" that "could fall short of compensating all cardholders" is not "a damages model that satisfies *Comcast*").

interest rate other than being more than it?

A. In this hypothetical, I'm assuming that their only cost are these transaction costs. They could also be—they might have other costs and then some of those would be tied to the credit card interest rate. But I'm saying, in this simplest example where they have no other cost, the credit card interest rate remains a conservative lower bound.

Id. (objections omitted). The fatal problem is that calling the interest rate a "lower bound" does not establish any *connection* between that rate and Plaintiffs' damages. If the class were limited to people who actually paid interest on loans, it would be fair to assume that the lower bound on what they paid is the lowest interest rate available. But in a class *not* limited to people who paid interest on loans, selecting an interest rate as the lower bound of damages is arbitrary and disconnected from their theory of recovery. *See*, *e.g.*, *Kolcraft Enters. v. Chicco USA, Inc.*, 2018 WL 10772693, *4 (N.D. Ill. July 16, 2018) ("the arbitrary baseline taints the entire damages calculation").

In other words, the interest rate "is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). It serves as the "lower bound" of damages only because Levine says so. But its relevance is actually even more attenuated than that. Levine doesn't *even* offer his say-so that the interest rate is connected to Plaintiffs' actual damages. He expressly concedes otherwise, that their actual damages are based on other costs unaccounted for in his model, and that the interest rate has nothing to do with those costs:

Q. . . . Where their only costs are the transaction costs, their costs are greater than the credit card interest rate; is that your opinion?

A. Yes, for these small or short claims. . . . [T]he transaction costs are going to be higher. . . . So the point is, even for small or short claims, the credit card interest rate, even if they have no need to borrow, remains a very conservative lower bound.

Q. Can the credit card interest rate be used to calculate their transaction costs?

A. I'm using it as a conservative lower bound. Does that answer your question?

Q. Not quite. So I understand your opinion that the interest rate is a conservative lower bound, meaning the transaction costs are higher than the figure produced by the interest rate. Am I stating that accurately?

A. Yes.

Q. Can the interest rate be used to figure out what the transaction costs are?

A. That's not part of how I calculated the transaction costs, using the credit card interest rate.

HX 36 at 53:21-55:7. In sum, Levine admits that the correct measure of Plaintiffs' damages would be based on "transaction costs" and unspecified other costs they may have incurred, but does not base his damages measure on those costs. Instead, he bases his damages measure on costs they did *not* incur, only because he is confident that it makes his measure "conservative." But that does not make it *correct* or reliable. This is fatal.

Levine's other damages measure, using the minimum wage as a basis for attaching a value to the alleged "lost time" of the customer-service class, suffers from the same fundamental defects. He does not assert that any member of this class could or would have collected compensation for their time at the minimum-wage rate if they were not spending that time telephoning Bank of America's customer service. Rather, he admits that every class member values their time differently, but he will use the minimum wage "[t]o err on the side of a conservative estimate." HX 35 ¶ 53. But to err on the side of a conservative estimate is still to err. That is especially so when the erroneous estimate has no factual basis beyond "the unsurprising conclusion that people do not like waiting on hold for customer service." *Id.* ¶ 51. That conclusion may perhaps be unsurprising, but it is also unscientific as a basis for calculating damages. A dislike of waiting on hold is not a justification for attaching a wholly arbitrary value to the time, much less for affording that arbitrary value the imprimatur of an "expert." *See*, *e.g.*, *Opperman v. Path, Inc.*, 2016 WL 3844326, *14 (N.D. Cal. July 15, 2016) ("No damages number arising from this model will apply to all class members," "because consumers do not have identical preferences" and "each class member will place a very different value on" their alleged injury).

II. Levine Offers No Evidence Of Damages, Individually Or Classwide.

Plaintiffs argued at the class certification stage that they "need only 'establish that damages are *capable* of measurement on a classwide basis,'" and that "[u]ncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages." ECF 324-1 at 37-38 (emphasis in original); *see generally Comcast*, 569 U.S. 27. But this case is no longer at the certification stage. Plaintiffs' burden at the summary judgment stage is not merely to show that actual damages are "*capable*" of classwide measurement, but to produce actual *evidence* of those damages. *See* 15 U.S.C. § 1693m(a)(1)[4]. Since Levine's report furnishes no such evidence, it is not relevant to the Court or to a factfinder, and does not clear the *Daubert* hurdle.

Levine admits that his method cannot be used to calculate any Plaintiff's damages—or any class member's damages—individually. Or, more pointedly, he *eventually* admitted as much after multiple efforts to dodge the question:

> Q. Can your method be used to measure the individual harms suffered by any individual class member?
>
> A. I was asked to create a method to get a conservative lower bound for estimating the aggregate harm. I wasn't asked to—
>
> Q. . . . So can your method be used to assess the harm experienced by any individual class member?
>
> A. I wasn't asked to do that, so I don't . . .
>
> Q. Do you have an opinion on it?
>
> A. Ask the question again.
>
> Q. Can your method be used to assess the harm experienced by any individual class member?
>
> A. I'm hesitant to answer because it's an ill-posed question. My method was

---

[4] *See also Sabicer v. Form Motor Co.*, 362 F. Supp. 3d 837, 840 (C.D. Cal. 2019) (negligence claim requires damages); *Obesity Rsch. Inst., LLC v. Fiber Rsch. Int'l LLC*, 165 F. Supp. 3d 937, 947 (S.D. Cal. 2016) (plaintiff must "establish a loss or deprivation of money or property sufficient to qualify as injury in fact" under Unfair Competition Law); *Gutierrez v. Girardi*, 194 Cal. App. 4th 925, 932 (2011) (fiduciary duty requires showing of "damage proximately caused by the breach) (internal quotations omitted).

> trying to create a conservative lower bound for the class and then use the individualized information on claimed amounts and duration. It makes it very hard to say how . . . it was not designed for any other purpose besides that. . . .
>
> Q. Can your method be used to assess the harms experienced by any member of the class?
>
> A. I wasn't designing the method with that intent, and I don't have an expert opinion on that. I just—you guys are welcome to hire me to answer that question, but I just don't have an opinion that I can defend right now.

HX 36 at 73:22-75:25 (objections omitted). The exchange continued further in that vein, and BANA's counsel then asked Levine, "[F]or any individual class member, if we wanted to know what their damages were, what would we do?" *Id*. at 77:18-78:3. Levine had no idea. He responded that "that's a really different question" from the one on which he opined. *Id*.; *see also id*. at 79:11-18. He ultimately admitted that he considers his method appropriate for assessing the aggregate damages for a class of thousands, but not for smaller groups of people or for any one person. *See id*. at 80:24-81:16. Having obtained class certification on the premise that "individualized damages issues do not alone defeat certification" (ECF 324-1 at 37), Plaintiffs cannot now escape the implication that "each individual class member will need to submit proof of their damages." *Treviso v. Nat'l Football Museum, Inc.*, 2018 WL 4608197, *7 (N.D. Ohio Sept. 25, 2018) (ruling proposed expert methodology unacceptable for failure to account for costs incurred by individual class members, "all of which are damages Plaintiff alleges the class is entitled to recover"). The conceded inability of Levine's method to serve that purpose renders it irrelevant and inadmissible.

Likewise, Levine expressly disclaimed any notion that his method could be used to prove the damages incurred by the class representatives. He considered "the named plaintiffs . . . a nonrandom sample that was small," and so "didn't look at [] any evidence about them when preparing [his] report." HX 36 at 30:13-18; *see also id*. at 92:14-20 ("I had not looked at the interrogatories of the named plaintiffs because they're a nonrandom sample and a small sample."). He had not even reviewed Plaintiffs' complaint. *Id*. at 84:13-17. But BANA's counsel presented

Levine with the class representatives' allegations and discovery responses at his deposition, and asked him what information he considered relevant to forming an opinion on their damages. Levine stated at the outset that his method was not "designed" for that purpose and could not be used to determine whether their damages were above or below the credit card interest rate. *E.g.*, *id.* at 86:2-24, 102:22-24.

Nonetheless, Levine had no trouble opining that at least some class representatives had experienced an array of pecuniary and nonpecuniary damages based on their allegations and discovery responses. What he could *not* do was articulate any connection between those damages and the credit card interest rate. Levine opined that class member Stephanie Moore suffered consequential damages in the form of "[redacted]." *Id.* at 95:25-97:20.[5] But his method "wasn't designed to value each of these," and he was confident Moore "suffer[ed] more harm" than his method measured. *Id.* As for class representative Kuang Ting Chong, who "[redacted] and thus did not claim any of the sort of consequential damages claimed by Moore, Levine determined that Chong did not furnish "enough information here to judge" whether or not his damages were above or below the figure Levine's method would produce based on the credit card interest rate. *Id.* at 102:5-24.

The conceded inapplicability of Levine's method to the actual class representatives—and to some other unspecified proportion of the class—is highly significant to assessing the relevance and reliability of his analysis under the *Daubert* standard. A damages method that underestimates damages for "most" class members

[5] *See also* HX 37 at No. 14.
[6] *See* HX 38 at No. 14.

and overestimates damages for the rest is of no use to the Court. *See*, *e.g.*, *Opperman*, 2016 WL 3844326, *14 ("It may be that the average damages that [a proffered expert economist]'s model would predict will be very close to the damages actually suffered by every class member, but there is no way of knowing this. It is equally or more likely that his model would overcompensate some class members while undercompensating others."); ECF 494 at 87. The prospect of overcompensation here is not merely "likely," but certain. Levine has specifically described the characteristics of class members he admits his method would overcompensate. *See* HX 36 at 47:10-48:15, *see also id.* at 100:18-101:1. He also described the characteristics of class members he believes his method would undercompensate. *E.g.*, *id*. at 95:25-97:20 (discussing Moore); ECF 494 at 87 (rejecting method that "could fall short of compensating all cardholders" as unsupported by "evidence establishing each cardholder's experience").

Further, a "key question" under *Daubert* is whether the expert's method "can be (and has been) tested." 509 U.S. at 593. A method that does not produce reliable and accurate conclusions as applied to the class representatives or some other sample of the class *ipso facto* cannot serve as a reliable and accurate method as applied to the class as a whole. *See*, *e.g.*, *In re Blackbaud, Inc. Cust. Data Breach Litig.*, 2024 WL 2155221, *10, 13-14 (D.S.C. May 14, 2024) (excluding expert who "tested his method on three named plaintiffs," failed to "indicate whether or how he verified the accuracy of the [method] for those three individuals," and "chose not to conduct any testing beyond [the] three named plaintiffs").

Daubert also requires that expert opinion be "based on sufficient facts or data." FED. R. EVID. 702(b); *see*, *e.g.*, *Kewazinga Corp. v. Google LLC*, 2024 WL 4894840, *4 (S.D.N.Y. Oct. 17, 2024) (striking damages computation as not based on "sufficient facts or data," because "a very high-level view" "does not mean that those numbers are sufficiently reliable to develop a ratio to compute damages"); *Metaswitch Networks Ltd. v. Genband US LLC*, 2016 WL 874775, *3 (E.D. Tex.

Mar. 7, 2016) (excluding part of expert's report as "not supported by sufficient 'facts or data'" where expert "admit[ted] in his report that 'there is no information available with regard to'" the subject matter, and ruling that "[a]n absence of information is not a license to speculate"). Levine plainly fails to base his method on "sufficient facts or data," given that the facts or data he considered relevant to the harms allegedly incurred by individual Plaintiffs like Moore are not accounted for in his method, and given his admission that he did not even *have* enough facts or data to form an opinion on the harms allegedly incurred by individual Plaintiffs like Chong. Plaintiffs' complaint itself is also replete with claims of injury by the named Plaintiffs that Levine makes no effort to account for with his method. *E.g.*, ECF 304 ¶ 519 (claiming consequential harms from missing rent payments, eviction, car repossession, and skipped cable and electric bills).

Applying Levine's method to the entire class, as he urges, merely exacerbates its unreliability. As already shown, Levine admits his method does not apply on a classwide basis—only to a claimed "majority" of the class, although Levine has no facts or data to back up that claim, or to assess how large that "majority" is even if the claim is true. But he sets forth multiple factors that would make a class member a member of the "minority" whom he admits his damages method would over-compensate. These include class members who:

- "did not face any liquidity constraints";
- "did not have [a] high subjective discount rate";
- "w[ere] not reducing their spending on hard-to-shift items";
- "w[ere] not foregoing repaying a credit card";
- had "precautionary savings that permitted them to self-insure against shocks to their income or expenses";
- did "[n]ot have transaction costs be a large portion of the opportunity cost of not having access to funds";
- were not "relying on sources of credit with high nonmonetary costs in terms of reputation or status or social obligation."

HX 36 at 47:10-48:15; *see also id.* at 100:18-101:1. These are not fanciful hypotheticals: as noted, multiple named Plaintiffs confirmed [redacted]

[redacted] (*see*, *e.g.*, *id*. at 101:5-102:24), so the class of a hundred thousand people undoubtedly contains more. But Levine's method would award damages to class members without considering any "facts or data" relevant to whether they are in the population to whom he admits his method does not apply.

Lastly, *Daubert* asks whether a proffered expert's methods enjoy "general acceptance" in the field. 509 U.S. at 594. "Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique which has been able to attract only minimal support within the community' may properly be viewed with skepticism." *Id*. Levine does not make any claims that using the credit card interest rate to calculate damages for a class of people who did not pay credit card interest enjoys any such general acceptance. The most he offers are his citations to academic studies for the proposition that "[w]hen UI payments disappear, most UI recipients turn to credit cards to cover those expenses." HX 35 ¶ 12. That falls far short of indicating any general acceptance for his method here, where there is *no* evidence that most class members turned to credit cards and ample evidence of class members who did not. And, as McCrary pointed out in rebuttal, this case does not present a situation where "UI payments disappear[ed]"—the only claim is that "the proposed class members were *temporarily* unable to access a *portion* of their UI benefits." HX 34 ¶ 48. Levine does not present any studies that measure the opportunity costs of that scenario, much less any studies that do so using the method he proposes.

Nor is there any precedent case law ratifying this method of calculating damages for a temporary loss of access to funds. The cases do not permit plaintiffs to claim interest expenses as damages with no evidence of actually paying them. *See*, *e.g.*, *Munoz v. JLO Automotive, Inc.*, 2020 WL 6607789, *3 (D. Conn. Nov. 12, 2020) (interest charges not cognizable as "actual damages" with "no evidence in the record" that plaintiff "actually incurred those interest charges"). To the contrary, in *Van v. LLR, Inc.*, 962 F.3d 1160, 1161-65 (9th Cir. 2020), the Ninth Circuit assessed "time value of money" damages for a delayed reimbursement based on the 4.35% interest the plaintiff would have *earned* on the money, not the interest the plaintiff would have paid to *borrow* the money. *See* ECF 494 at 86-87. This Court found *Van*'s logic applicable here, but rejected the notion that the interest rate could be based on assumptions about "increased utilization of credit cards" where Plaintiffs had no "evidence showing these assumptions are true as to most or even any of the EDD cardholders' experience." *Id*. at 88.

Levine's method thus enjoys no general acceptance in the field of economic damage analysis, nor any general acceptance by the courts as a method of calculating actual damages as a matter of law. It is thus neither a reliable measure of Plaintiffs' actual damages nor relevant to the Court in ruling on summary judgment, since it sets forth no material factual evidence about the actual damages suffered by any Plaintiff or the Plaintiff class as a whole.

Defendant thus respectfully submits that Levine's unreliable and irrelevant analysis should be stricken from the record.

CONCLUSION

For each and all of the foregoing reasons, Levine's report and opinions should be excluded and stricken from the record.

Dated: October 17, 2025

Respectfully submitted,

By: */s/ Matthew L. Riffee*

MATTHEW L. RIFFEE (*pro hac vice*)
MRiffee@goodwinlaw.com
SABRINA M. ROSE-SMITH (*pro hac vice*)
SRoseSmith@goodwinlaw.com
KEITH LEVENBERG (*pro hac vice*)
KLevenberg@goodwinlaw.com
GOODWIN PROCTER LLP
1900 N St. NW
Washington, DC 20036
Tel: +1 202 346 4000
Fax: +1 202 346 4444

JAMES W. MCGARRY (*pro hac vice*)
JMcGarry@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Tel.: +1 617 570 1000
Fax: + 1 617 523 1231

LAURA G. BRYS (SBN 242100)
LBrys@goodwinlaw.com
GOODWIN PROCTER LLP
601 S Figueroa St., Suite 4100
Los Angeles, CA 90017
Tel.: +1 213 426 2500
Fax: +1 617 346 4444

VALERIE A. HAGGANS (*pro hac vice*)
VHaggans@goodwinlaw.com
LINDSAY E. HOYLE (*pro hac vice*)
LHoyle@goodwinlaw.com
GOODWIN PROCTER LLP
620 Eighth Avenue
New York, NY 10018
Tel: +1 212 813-8800
Fax: +1 212 355-3333

YVONNE W. CHAN (*pro hac vice*)
YChan@jonesday.com
JONES DAY
100 High Street
Boston, MA 02110
Tel.: +1 617 960 3939
Fax: +1 617 449 6999

JANICE P. BROWN (SBN 114433)
jbrown@myersnave.com
MATTHEW B. NAZARETH (SBN 278405)
mnazareth@myersnave.com
MEYERS NAVE

600 B Street, Suite 1650
San Diego, CA 92101

Attorneys for Defendant
BANK OF AMERICA, N.A.

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]*