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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 GREG J. REGAN

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

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Plaintiffs bear the burden of producing evidence of actual damages for themselves and their classes. Plaintiffs proffer the opinions of Greg Regan, a certified public accountant, on whom they rely (i) to identify the members of each of the five proposed classes, and (ii) to propose methodologies for calculating the various types of "damages" allegedly incurred by those class members. Because Regan's methodologies are admissible for neither purpose, Bank of America (BANA) moves to exclude his opinions from the record in their entirety.

Plaintiffs carry the burden of proffering a methodology that culls uninjured plaintiffs from the class—those class members who engaged in benefits fraud or filed fraudulent or mistaken claims. At the class certification stage, the Court held that the presence of uninjured class members did not defeat commonality or predominance because it believed "identifying non-injured class members" could readily be done at the "damages phase." ECF 494 at 45. Regan concedes that such cardholders *should* be excluded, but rather than proffer a methodology that does so for each of the five classes, Regan simply determines class membership based on [redacted] But Regan admits [redacted] HX[1] 39 at 77:3-80:3. Thus, [redacted] *Id.* And the discovery record reinforces that [redacted] The Court should exclude all of Regan's "damages" opinions for these reasons alone.

Regan's proposed methodologies for calculating consequential damages,

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

actual damages, and disgorgement should also be excluded because they are not based on the records, data, or asserted experiences of even a single class representative, individual plaintiff, or class member. Instead, Regan's tabulation of "consequential damages" is based on his assessment of the experiences of a hypothetical "typical" consumer, unmoored from evidence reflecting the actual experiences of any class member. He assumes that a typical class member would have needed to obtain substitute funds when BANA allegedly denied or rescinded their claim or froze their account balance, and that the "most likely" source of such funds would have been increased credit card utilization at a 20% interest rate for the full amount of the at-issue funds. But Regan fails to validate either of those assumptions. And, in fact, both assumptions are contradicted by [redacted]

Likewise, Regan calculates "consequential damages" arising from "delayed benefits payments"—*i.e.*, purported delays in cardholders receiving new benefit payment checks from California's Employment Development Department (EDD) when their prepaid card account was frozen. Here, too, Regan simply assumes that every class member had the same experience: that they remained eligible for and continued to receive additional unemployment insurance (UI) benefits at the average payment amount for all EDD cardholders during the 2020-2021 time period during the freeze. But Regan made no attempt to validate any of these implausible assumptions by reference to the record of any class representative or class member.

Regan calculates "actual damages" for the Customer Service Class by multiplying so-called excess hold time by the then-effective California minimum wage. In much the same way, Regan's methodology is based on no analysis of whether any class member—all of whom had been receiving *unemployment* benefits—could have earned minimum wage but for the time spent on hold.

Finally, to calculate disgorgement of profits, Regan assumes that [redacted]

[redacted] This assumption, too, is not based on an assessment of the account records of even a single class representative, individual plaintiff, or class member. And it is refuted by the data that Regan himself relies on in his report, which shows that [redacted]

For these reasons and others described below, Regan's opinions are unreliable, irrelevant, unhelpful to the trier of fact, and should be excluded under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

BACKGROUND

I. Plaintiffs' Claims and Damages Theories

On June 16, 2025, this Court certified five classes of California 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.* Although the Court acknowledged that the certified classes may include some uninjured cardholders, it held that their presence did not defeat commonality or predominance because "identifying non-injured class members" could be readily done at the "damages phase." ECF 494 at 45.

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 denied by the filter. *See generally* HX 28; HX 29. [redacted]

[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.

Therefore, through BANA's efforts prior to and in implementing the Remediation Plan, *every member* of the Claim Denial and Credit Recission Classes [redacted] HX 40 ¶¶ 33, 83.[2] And *every member* of the Account Freeze Class [redacted]

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[2] [redacted] ividuals [redacted] § 1693g(b).

ECF 497 at 97. Further, [redacted] *See* HX 31 at 5-13; HX 40 ¶¶ 73-75.

II. The Regan Report

Greg Regan is a certified public accountant. HX 41 ¶ 24. Plaintiffs proffer him as a damages expert, primarily as to "methodologies to measure the impact on each Class of the Bank's policies and practices." *Id.* ¶ 5. Regan first identifies the members of each of the five classes, using the class definitions he was provided by counsel. Regan then excludes "person[s] whom the Bank has determined, pursuant to its Remediation Plan" should be excluded from its remediation framework, specifically anyone who "(i) has been disqualified by [EDD] from Program eligibility; (ii) has previously engaged in fraudulent Program conduct, such as submission of fraudulent claims or other abuses of the claims process; or (iii) has had their card frozen due to legal order processes, as a result of Internal/Vendor fraud investigations, or by Global Financial Crimes Compliance." *Id.* ¶¶ 32, 65, 77, 88-90, 98. Regan thus determines class membership based on the Remediation Plan: [redacted]

Regan then purports to provide methodologies to tabulate "class damages"—which he deems actual damages, consequential damages, treble damages, statutory damages, and disgorgement—for members of each class. *Id.* ¶ 15. For the Claim Denial, Credit Rescission, and Account Freeze Classes, Regan calculates "actual damages" as the amount of funds that were temporarily unavailable to the cardholder due to CFF-1—*i.e.*, [redacted]. HX 40 ¶¶ 33, 83, 90. For the Customer Service Class, Regan proposes calculating actual damages based on multiplying the "average excess hold time" estimated by one of Plaintiffs' other experts, Jay Minnucci, by "how many times each class member called during the relevant period" and "the applicable minimum wage—or other reasonable metric—to calculate the total value of class members' lost time." HX 41 ¶ 19.[3]

Regan also proposes a "methodology for measuring the economic harm caused by a wrongful denial of funds"—what he terms "consequential damages." *Id.* ¶¶ 43-44. Regan characterizes this supposed "economic harm" in a variety of ways, including the "time value of money," "lost ability to use [] funds," "reduced consumption," and/or "the inability to pay down existing debt." *Id.* ¶¶ 44, 46. The "foundation" by which Regan proposes measuring these supposed harms is "the cost of borrowing." *Id.* ¶¶ 43-44. Regan opines that "impacted cardholders would have needed to mitigate the unexpected inability to access their funds otherwise available," and "the most likely source of funds accessible to an impacted cardholder would have been increased credit card utilization." *Id.* ¶ 46-47. Regan calculates "consequential damages" using two interest rates: a 10% interest rate he claims is "consistent with the interest rate applied to judgments in California," (*id.* ¶ 46), and a 20% credit card interest rate (*id.* ¶ 49). He calls the latter rate a "conservative" measure of the "time value of money," and says it is consistent with BANA's consequential harm payments. *Id.*

Despite using "credit card interest rates" as the basis for his measure of "consequential damages" (*id*. ¶¶ 48, 49), Regan does not claim that any class members actually *did* turn to credit card borrowing and pay this interest rate, or that they borrowed any funds at all. HX 39 at 223:20-224:16. Even if any did, the conceded effect of Regan's methodology is that every class member has already received full compensation for all of their claimed injuries, consisting of the full amount of their disputed claim and/or the funds that were temporarily inaccessible to them, [redacted]. HX 41 ¶¶ 56-57; HX 39 at 114:19-116:15.

[3] BANA has also moved to exclude Minnucci's opinions because the methodologies he uses to derive these inputs do not satisfy Fed. R. Evid. 702 and *Daubert*. ECF ###.

Regan opines that the Account Freeze Class suffered additional "consequential damages" because [redacted] HX 41 ¶¶ 83-86. Though Regan acknowledges [redacted] and thus "the cardholder was forced to access alternative funds during this time." *Id.* ¶¶ 83-84. Regan proposes calculating "consequential damages" for delayed benefit payments by multiplying "the average bi-weekly benefit payment to [] EDD cardholders" by the "length of the delayed receipt of their subsequent benefit payments." *Id.* Regan does not explain how he proposes to determine when each class member would have received their benefit check(s) from EDD, nor does he know if they in fact received further UI benefits while their accounts were frozen. *See* HX 39 at 251:6-19.

Finally, Regan proposes a method of measuring "disgorgement of profits the Bank earned" from the "[redacted]"—*i.e.*, income it derived from the funds held on deposit in class members' accounts. HX 41 ¶¶ 60-62. Regan theorizes that [redacted] *Id.* ¶ 61. Thus, Regan tabulates "disgorgement" by multiplying BANA's [redacted] *Id.* ¶ 62.

III. The Stango Rebuttal

Economist Dr. Victor Stango identified a litany of "methodological flaws" in Regan's damages methodologies and conclusions. HX 40 ¶ 8. To start, Regan's methodology for identifying impacted class members fails to "distinguish individuals who were harmed by the Bank's alleged misconduct from those who were unharmed." *Id.* ¶¶ 75-79. Regan simply assumes that the claims of any class members who [redacted] would have been paid in a but-for world. *Id.* But determining whether the class member had fraudulently obtained benefits or made a fraudulent or mistaken claim instead requires individual inquiry that Regan did not perform. *Id.* Regan has proffered no reliable methodology for excluding such cardholders from his damages tabulations, "rendering it an unreliable methodology for isolating harm from the alleged misconduct on a class-wide basis." *Id.* ¶ 79.

Further, Regan's proposed methodology for calculating actual damages "makes no economic sense" because the amounts that class members temporarily lost access to have either been restored to them [redacted]. *Id.* ¶¶ 33, 83, 90. For the proposed Customer Service Class, Regan's methodology does not measure economic harm because it assumes without any proffered facts or data that class members who were receiving and/or had recently received UI benefits would have earned California minimum wage but-for having been on hold. *Id.* ¶¶ 99-102.

Regan's proposed "consequential damages" methodology "cannot estimate economic harm on a class-wide basis" because it is based on "assumptions about proposed class members' economic circumstances and behaviors that are not derived from class data," and "obscure[s] important heterogeneity in alleged damages." *Id.* ¶¶ 10, 36-70. By failing to consider facts or data concerning the specific economic circumstances and heterogeneity of the class, Regan's credit card interest rate methodology "overstate[s] economic harm for proposed class members." *Id.* For the Account Freeze Class, moreover, Regan proposes estimating the "cost of delayed benefit payments" but such estimations are unreliable where Regan is "silent on how he plans to calculate, on a class-wide basis, [redacted] *Id.* ¶ 94.

Finally, Regan's disgorgement methodology also does not reliably estimate

BANA's profits because it assumes that all proposed class members [redacted] *Id.* ¶¶ 80-81. Not only are these assumptions bereft of factual support, data from Regan's report shows that "[redacted]." *Id.*

STANDARD OF LAW

Fed. R. Evid. 702 and *Daubert* "impose[] a special 'gatekeeping obligation' on trial judges" presented with expert testimony. *Brighton Collectibles, Inc. v. RK Texas 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 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 scientific community.

Domingo v. T.K., 289 F.3d 600, 605 (9th Cir. 2002). In addition, "one 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 bear the burden of proffering a damages methodology that winnows out uninjured class members. Plaintiffs' claims also 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). Regan's methodology does neither because *none* of his opinions are based on a consideration of data or evidence reflecting the actual facts, circumstances, and experiences of a single class representative, individual plaintiff, or class member, let alone the class writ large.

I. Regan Does Not Reliably Exclude Uninjured Class Members.

To assert EFTA claims, plaintiffs must show their accounts were "established primarily for personal, family, or household purposes," not criminal purposes. 12 C.F.R. § 1005.2(b)(1). Fraudulently obtained accounts get no protection. Likewise, cardholders who either intended to file fraudulent disputes or who simply reported authorized transactions by mistake cannot recover. *See* 15 U.S.C. § 1693a(12)(B) (transaction "initiated with fraudulent intent" cannot be appealed to card issuer as "unauthorized"). Though the Court has held that the presence of uninjured class members does not defeat commonality or predominance, it premised that decision on a belief that "identifying non-injured class members" could be readily done at the "damages phase." ECF 494 at 45; *see also Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016) (presence of injured class members did not defeat class certification because "the district court is well situated to winnow out those non-injured members at the damages phase of the litigation"); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624 (D.C. Cir. 2019) ("Uninjured class members cannot prevail on the merits, so their claims must be winnowed away as part of the liability determination.").

Regan has proffered no reliable methodology for the Court to use to perform the requisite "winnowing out" of non-injured class members. Though Regan acknowledged that non-injured class members should be excluded from the class, and excluded from his damages tabulations certain class members [redacted] Regan confirmed under oath that he "didn't form an opinion" as to whether those exclusions were sufficient or appropriate for purposes of calculating class damages. HX 39 at 72:17-25. Because Regan has proposed no reliable method of excluding non-injured class members, his method of determining class damages is inadmissible.

To identify members of the class, Regan relied on the class definitions provided to him by counsel. *See id.* at 69:18-70:13. Regan then reviewed "the Bank's records" to identify cardholders who met the class definition criteria provided to him by counsel. *See, e.g.*, HX 41 ¶ 33. Finally, Regan "[e]xcluded from the class [] any person whom the Bank has determined, pursuant to its Remediation Plan," had "(i) has been disqualified by [EDD] from Program eligibility; (ii) has previously engaged in fraudulent Program conduct, such as submission of fraudulent claims or other abuses of the claims process; or (iii) has had their card frozen due to legal order processes, as a result of Internal/Vendor fraud investigations, or by Global Financial Crimes Compliance." *Id.* ¶¶ 32, 65, 77.

Though Regan opines that he "[redacted]" HX 39 at 73:2-14 (emphasis added), his methodology does not reliably do so. Regan acknowledges that not every class member has been injured, [redacted] HX 41 ¶¶ 32, 65, 77. [redacted]—*i.e.*, that they did not make a fraudulent or mistaken claim, or were not ineligible for benefits. [redacted] HX 31 at 4 n. 16; *see also* ECF 350-9 ¶ 11 (describing Remediation Plan as [redacted]). To those ends, BANA provided compensation [redacted] HX 31 at 12. For example, [redacted] *Id.* at 4. [redacted][4] [redacted] *See* ECF 350-8 ¶¶ 8-15.

Regan performed no review of those procedures, nor does he [redacted] HX 39 at 77:3-80:3. Likewise, Regan testified that it was "[redacted]" (not BANA's) to determine [redacted] but acknowledged that he had not reviewed any information concerning [redacted]: "That wasn't the nature of my assignment." *Id.* at 96:6-97:14.

The inclusion in the class of cardholders who filed fraudulent or mistaken claims is no mere hypothetical concern. [redacted] ECF 350-8 ¶¶ 9-14. Regan acknowledges [redacted] HX 39 at 82:16-84:9. Instead, his methodology is premised on determinations made by others, based on a process he did not review, and concerning which he offers no opinions. Thus, it should come as little surprise that [redacted] *Id.* at 77:3-16. Because Regan's methodology does not reliably exclude uninjured class members from his

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[4] *See* HX 42 at Nos. 39 & 42.

damages computation, his opinions are inadmissible and should be excluded. *See, e.g.*, *Utne v. Home Depot U.S.A., Inc.*, 2022 WL 16857061, *5 (N.D. Cal. Nov. 10, 2022) (striking calculations where they "almost certainly include damages for uninjured class members").

II. Regan's Methodologies Produce No Evidence of Damages.

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). 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). Regan's proposed methods for measuring damages and "disgorgement" are not admissible for either purpose.

A. Regan's "consequential damages" opinions are inadmissible.

Regan purports to premise his "consequential damages" methodology on his research regarding the experience of a hypothetical "typical consumer" and the "typical type of harm" they would have incurred when faced with the lost ability to use their funds. HX 41 ¶¶ 40-51; HX 39 at 48:7-49:15. Regan opines that this "typical consumer" "would have needed to mitigate the unexpected inability to access their funds," and that "the most likely source of funds accessible to an impacted cardholder would have been increased credit card utilization." HX 41 ¶ 46-47. But as this Court found in its Class Certification Order, this methodology is "not supported . . . with evidence showing that these assumptions are true as to most or even any of the EDD cardholder's experience," and thus "Plaintiffs have not demonstrate[d] that this method measures damages across the entire class and that they stem from BANA's actions that created the legal liability." ECF 494 at 88. Regan's "consequential damages" methodology is therefore inadmissible.

1. Regan's 20% interest rate is not a reliable measure of harm.

Regan purports to calculate the "economic harm" he believes resulted from class members being temporarily unable to access the amount of their denied or rescinded claim, and/or their account balance. Regan characterizes this "economic harm" in a variety of ways, including the "time value of money," "lost ability to use [] funds," "reduced consumption," "missed payments," and/or "the inability to pay down existing debt." HX 41 ¶¶ 43, 44, 46. Regan proposes measuring all of these disparate harms through "the cost of borrowing." *Id.* ¶¶ 43-44. Though to illustrate his methodology Regan first applies a 10% interest rate, because that is "the interest rate applied to judgments in California,"[5] Regan opines that the 10% rate "likely understates the cost a consumer would have incurred" because "impacted cardholders would have needed to mitigate the unexpected inability to access their funds otherwise available." *Id.* ¶ 46. For "typical consumers," "the most likely source of funds . . . would have been increased credit card utilization." *Id.* ¶ 47. To measure the impact of credit card utilization, Regan "selected 20% as the APR for [] calculation of the time value of money," "to be conservative." *Id.* ¶ 49.

The primary flaw in Regan's methodology is that he is not claiming that every class member (or even *any* class member) had to borrow money or increase his or her credit card utilization as a result of a temporary inability to access funds. HX 39 at 48:7-49:7. Indeed, Regan candidly admits that not every class member would have increased their credit card utilization. *Id.* at 223:20-224:16. For any that did, Regan does not opine that they actually incurred debt at either a 10% interest rate or at his proposed 20% credit card interest rate. *Id.*

Regan's twin assumptions—that "cardholders would have needed to mitigate the unexpected inability to access their funds" and that "the most likely source of funds accessible to an impacted cardholder would have been increased credit card utilization" (HX 41 ¶ 46-47)—ignore that consumers can fund unanticipated expenses from a variety of sources other than credit cards. Indeed, Regan

[5] In addition to being unsupported by sufficient facts and data—*i.e.*, the actual experiences of class members—Regan's 10% interest rate is also irrelevant. The 10% interest rate applies to judgments in California state courts, not federal courts. *See* Cal. Civ. Proc. Code § 685.010.(a)(1).

acknowledged wide variability in the financial circumstances of class members, including the amount of liquid savings or cash that a class member may have had available to fund unanticipated expenses. HX 39 at 192:6-193:7. Regan also acknowledged that class members could have borrowed funds from family members or friends to meet unexpected expenses (*id.* at 211:14-213:1), or even simply reduced their consumption (*id.* at 224:18-225:8). Class members who borrowed funds from family members or friends at 0% interest, or who didn't need to borrow at all, would have incurred zero "consequential damages" from borrowing funds at Regan's credit card interest rate. HX 40 ¶ 57.

Despite acknowledging wide variability in how consumers could meet unexpected expenditures (if any) when faced with the temporary loss of access to funds, Regan did not review the records of even a single class representative, individual plaintiff, or proposed class member to determine if (i) they incurred such expenditures; *and* (ii) they increased their credit card utilization or incurred credit card debt at a 20% APR as a result. HX 39 at 45:2-47:2. He did not review the "financial cushion" (*i.e.*, available cash or savings) of any class member (*id.* at 210:21-211:5), data or evidence concerning any alternative sources of income or assets available to class members (*id.* at 190:9-21), or any class members' credit card statements or balances to determine whether they incurred additional debt or paid credit card interest and at 20% interest (*id.* at 171:1-172:2). Indeed, [redacted] *Id.* at 183:16-184:11.

Rather than attempt to support his methodology through review of the actual experiences of class representatives, individual plaintiffs, or proposed class members, Regan instead relies on inferences from reports and studies indicating that "many Americans live paycheck-to-paycheck," "many families have little to no financial cushion," and "many consumers" would be unable to meet significant unexpected expenses. HX 41 ¶¶ 41-43. But these broad brush generalizations regarding the circumstances of "Americans," "families," and "consumers" provide no reliable insight into the circumstances of the proposed class. Even those studies that Regan invokes concerning the circumstances of "unemployed consumers" provide no basis for generalizing about the proposed class members, who may have been employed or underemployed (rather than unemployed) at the time of the asserted economic harm. HX 39 at 188:23-191:19. Thus, as this Court has already concluded, Regan's methodology is "not supported . . . with evidence showing that these assumptions are true as to most or even any of the EDD cardholder's experience," and thus "Plaintiffs have not demonstrate[d] that this method measures damages across the entire class and that they stem from BANA's actions that created the legal liability." ECF 494 at 88.[6]

Moreover, by relying on these sweeping generalizations and not validating them by reference to the specific facts and circumstance of even a single class representative, individual plaintiff, or proposed class member, Regan fails to base his method on "sufficient facts or data" as required by Fed. R. Evid. 702(b). *See 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"). Because Regan's opinions are "connected to existing data only by the *ipse dixit* of the expert," his opinions are also irrelevant and inadmissible. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Regan tries to bridge this analytical gap by invoking [redacted] HX 41 ¶¶ 52-57. But the Court has already concluded "that the

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[6] In response to the Class Certification Order, Regan removed opinions concerning the "cost of late or overdraft fees" from his "consequential damages" analysis. But the fundamental flaw identified by the Court remains: his credit card interest rate methodology provides for a "range of reasonably *possible* outcomes amongst potential class members," (HX 41 ¶ 51), but is not supported by evidence showing most or even any class members actually experienced these outcomes.

Remediation Plan does not support a damages model that satisfies *Comcast*." ECF 494 at 87. The Remediation Plan did not [redacted]. *See* HX 31 at 12 [redacted] Rather, [redacted] *Id.* at 12; ECF 494 at 87. For [redacted] HX 31 at 7. That BANA's Remediation Plan [redacted] is irrelevant; the Remediation Plan did not [redacted] *See* ECF 494 at 87.

Not only is Regan's consequential harm calculation unsupported by facts and data, but also "the facts of the case contradict or otherwise render the opinion unreasonable." *United States v. Rushing*, 388 F.3d 1153, 1156 (8th Cir. 2004); *see also Bakst v. Cmty. Mem'l Health Sys., Inc.*, 2011 WL 13214315, *19-20 (C.D. Cal. Mar. 7, 2011) (excluding damages calculation "based on factual assumptions that are entirely unsupported by the record"). Indeed, Regan's assumptions about "consequential damages" are inconsistent with [redacted]. Every class representative answered interrogatories asking them to state [redacted] Of the nine class representatives, [redacted]

[redacted] HX 34 ¶ 75.[7] [redacted] *Id.* ¶ 75 n.194. [redacted] *Id.* For example, [redacted],[8] [redacted][9] *See* HX 40 ¶ 61. [redacted]. *Id.* For example, [redacted].[10] Still [redacted].[11] *See* HX 40 ¶ 62. Regan thus "renders an opinion about . . . economic harm based on economic assumptions not present in the plaintiff's case," and therefore his opinion "cannot be said to 'assist the trier of fact' as Rule 702 requires." *Elcock v. Kmart Corp.*, 233 F.3d 734, 756 & n. 13 (3d Cir. 2000) (holding that the district court abused its discretion in not excluding the expert opinion); *see also Greenwell v. Boatwright*, 184 F.3d 492, 497 (6th Cir. 1999) ("Expert testimony . . . is inadmissible when the facts upon which the expert bases his testimony contradict the evidence").

Though Regan admits that some class members did not actually incur credit card debt (HX 39 at 224:12-13), he nonetheless claims that a credit card interest rate "can be used to quantify the harm experienced" by class members, including harms

[7] HX 37 at 28:26-29:7; *see also* HX 34 ¶¶ 75-76.
[8] HX 43 at 26:2-6.
[9] HX 44 at 33:15-16; HX 45 at 29:24-25.
[10] HX 46 at 37:2-4.
[11] HX 44 at 33:13-15.

arising from "medical expenses" and even "reduced consumption," *Id.* at 224:18-225:8. Regan attempts to justify application of a 20% APR by asserting that it "is a conservative measurement because those other types of instances are associated with greater rates of harm," and therefore "credit card rate of interest appropriately captures calls-wide damages on an aggregate basis." *Id.* at 227:9-20; *see also id.* at 225:16-24. Far from being a "conservative" measure, one of plaintiffs' other experts, David Levine, purported to conduct a similar analysis to Regan but measured the cost of borrowing money on a credit card at a much-lower 15.9% APR. HX 35 ¶ 45. That one of plaintiffs' own experts disagrees with Regan about the appropriate measure of class members' "consequential damages" further illustrates that Regan's methodology is unreliable. *See, e.g.*, *Bradley v. Amazon.com, Inc.*, 2023 WL 2574572, *14-15 (E.D. Pa. Mar. 17, 2023) (striking expert report in part because the expert "offers theories of defect and causation that actually contradict those presented by its other experts; [the expert's] report would likely only serve to confuse or mislead the jury by introducing conflicting evidence.").

Even if both measures were conservative, however, "*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.* Regan's insistence that his credit card interest rate is a "conservative" measure of economic harm simply underscores that his credit card interest rate is an attempt to measure other supposed harms to "typical consumers" (not class members) that have nothing to do with credit card borrowing (*e.g.*, reduced consumption). But because nothing about those alleged damages has anything to do with a credit card interest rate, Regan's methodology has no connection at all to any class member's alleged damages.

Finally, Regan erroneously applies his methodology to certain specific class members in the proposed Claim Denial, Claim Rescission, and Account Freeze Classes, compounding its unreliability. For example, Regan calculates consequential harm for class members based on a 20% APR even if they were without funds for [redacted]. HX 41 ¶¶ 45, 84 n.119. These cardholders would have received credits and/or regained access to their account *before* any credit card interest payments would have become due. HX 39 at 221:18-224:11. Regan also calculates consequential harm for class members based on a 20% APR even [redacted] HX 41 ¶ 57. That is, class members in the population who had their claim [redacted] would have been in the same place but-for the alleged misconduct, and therefore suffered no "consequential damages." *See* 12 C.F.R. § 1005.11(c). As yet another example, Regan calculates consequential harm for class members regardless of the claim value or account balance. *See, e.g.*, HX 41 ¶¶ 45, 80-82. He simply assumes class members would have needed to incur 20% APR borrowing costs even if their claim value and account balance were relatively low (*e.g.*, $2). *See id.* & Sched. 2. These illogical and untested assumptions reinforce the unreliability of Regan's method of measuring "consequential damages."

2. Regan's method for calculating "consequential damages" from "delayed benefits payments" is unreliable for further reasons.

In addition to the reasons described above, Regan's "delayed benefits payments" "consequential damages" calculations must be excluded because he *applies* his interest rate calculation in an unreliable manner.

For cardholders in the Account Freeze Class, Regan opines that "[i]f a cardholder's account [redacted]." HX 41 ¶ 83. Though EDD would [redacted] paper [redacted] Regan opines [redacted] and, as a result, "[redacted]." *Id.* Regan, therefore, calculates the cost of delayed benefits payments as a [redacted] *Id.* ¶ 84.

In doing so, Regan admits that he does not actually know either "the amount of each class members bi-weekly benefit payment" *or* "the length of the delayed receipt of their subsequent benefit payments," and that he did not review any data or evidence reflecting either input. *See* HX 39 at 246:23-248:9. He also did nothing to verify that each class member remained eligible for EDD benefits after their account was frozen and during the pendency of the freeze, such that they would have even received additional benefit payments. *Id.* at 251:6-19.

Rather, Regan assumes that each proposed class member remained unemployed and eligible for benefits while their account remained frozen (*i.e.*, that they would have continued receiving new benefits payments). HX 39 at 250:23-251:12. Further, Regan assumes that "the average EDD benefit payment" for all EDD cardholders between 2020 and 2021—a period that includes nine months before and seven months after the class period—was the same as the average payment for members of this discrete class of cardholders. *See* HX 41 ¶ 84 n. 118. Although Regan claims EDD payment data is readily available, he did nothing to test these assumptions. HX 39 at 247:5-248:9. Thus, like the Court previously found for Regan's "consequential damages" opinions, Regan's delayed benefits damages calculations are also inadmissible because they are "based on assumptions rather than evidence establishing each cardholder's experience." *See* ECF 494 at 87-88.[12]

[12] *See also Waine-Golston v. Time Warner Ent.-Advance/New House P'ship*, 2013 WL 1285535, *10 (S.D. Cal. Mar. 27, 2013) (striking expert where his "conclusions about the aggregate number [of] under reported hours are not reliable as it includes a time period of almost three years that is not asserted in the first amended complaint"),

Regan's delayed benefits opinion is further inadmissible because his assumption that each cardholder had a [redacted] is bereft of factual support. *See* HX 41 ¶ 84. Regan acknowledges that the [redacted] is a placeholder assumption because he "do[es] not have that data." HX 39 at 248:4-9. He claims that he would "plan to consider" that data in his methodology "at the time it becomes available." *Id.* at 250:2-22. But when asked how EDD's data could possibly show the additional amount of time it took for each cardholder to receive their check, Regan conceded: "I don't know that EDD's data would have that." *Id.* at 249:1-10. Regan then suggested that instead he would derive a "median" "estimate" from other, unspecified data. *Id.* at 249:12-19. Because his methodology is premised on the existence of unavailable data, it is speculative and inadmissible. *See Stephens v. Union Pac. R.R. Co.*, 935 F.3d 852, 856 (9th Cir. 2019) (affirming exclusion where "the evidence in the record [did] not support the experts' assumption").

B. Regan's opinions for the customer-service class are inadmissible.

Regan uses the minimum wage to attach a value to the alleged "lost time" of the Customer Service Class, multiplying the then-current California minimum wage by the alleged "average excess hold time" of "[redacted]" calculated by plaintiffs' call center expert Jay Minnucci. HX 41 ¶ 93; HX 39 at 282:3-284:16. BANA has moved to exclude Minnucci's opinions because the purported "industry standard" hold time he proffers has no sound or reliable basis. To the extent the Court excludes the relevant opinions of Levine and Minnucci, therefore, Regan's opinions concerning "actual damages" for the customer-service class must also be excluded.

Additionally, Regan's proposed methodology is inadmissible to calculate "actual damages" for the Customer Service Class because it cannot reliably measure economic harm on a classwide basis. Regan's methodology assumes that "lost time" resulted in the same "economic harm" to each class member. HX 41 ¶ 93. But he

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aff'd sub nom. Corbin v. Time Warner Ent.-Advance/Newhouse P'ship, 821 F.3d 1069 (9th Cir. 2016).

does not assert that any member of the class could or would have collected compensation for their time at the minimum-wage rate had they not been on hold. HX 39 286:4-15. Indeed, as noted above, Regan's other opinions—including his calculation of the impact of delayed benefit payments—are based on the assumption that every class member was unemployed during the relevant time period, and so would *not* have earned minimum wage but for the "excess" hold time. *See id.* at 285:24-286:3. Opinions that rely on contradictory factual assumptions are inherently unreliable. *See Oliver v. Am. Express Co.*, 2024 WL 100848, *12 (E.D.N.Y. Jan. 9, 2024) (reasoning that "the *Daubert* gatekeeping function is meant to prevent" "internally contradictory argument[s]" by experts), *amended in part*, 2024 WL 217711 (E.D.N.Y. Jan. 19, 2024).

Regan's methodology would also require facts or data reflecting the number of times each class member called and was transferred to the claims call center during the relevant period. HX 41 ¶ 93. But [redacted]. ECF 350-6 ¶ 18. This means [redacted] *See generally Stephens*, 856-57 (affirming exclusion of expert opinion where "the evidence in the record [did] not support the experts' assumption").

C. Regan's "disgorgement" method should be excluded.

Plaintiffs allege that BANA earned so-called [redacted] *See* ECF 406 ¶ 49. Plaintiffs theorize that BANA earned more [redacted] *See* HX 41 ¶ 61. Likewise, Plaintiffs assert that [redacted] *See id.* Regan thus purports to measure the [redacted]

[redacted]. *Id.*

The fundamental methodological flaw in Regan's analysis is his assumption that in a but-for world, each class member would have immediately withdrawn all of their funds. *See* HX 41 ¶¶ 60-62. Rather than base that premise on a consideration of class members' account records, however, [redacted] HX 39 at 262:11-263:18. [redacted] HX 47 at 63:5-14. But even assuming [redacted] Regan has provided no basis for his assumption that observations regarding the general behavior of EDD cardholders are indicative of the behavior of class members specifically. *See Kewazinga* 2024 WL 4894840, *4 (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").

Regan acknowledged that he did not review specific information for any proposed class members to confirm this assumption. HX 39 at 190:9-21. Had Regan simply considered Schedule 2 of his own report, he would have identified [redacted] HX 41, Schedule 2. Clearly [redacted] Further, even if Plaintiffs could show that a "majority" of *class members* would have withdrawn their benefits "immediately" (*i.e.*, the same day), Regan miscalculates the disgorgement amount. He calculates disgorgement based on an assumption not that a *majority* of class members would have immediately withdrawn their benefits, but that *every* class member would have done so. *Id.*, ¶¶ 60-62. Regan provides no basis for assuming that 100% of class members would have immediately withdrawn their benefits, nor could he [redacted]

[redacted] *See id.*, Schedule 2.

Finally, Regan's disgorgement calculation is irrelevant and therefore inadmissible because it fails to reliably estimate BANA's "net profits." The purpose of a disgorgement award is to prevent unjust enrichment. *See SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1097 (9th Cir. 2010). Disgorgement is an appropriate remedy, for an alleged wrongdoers' "net profits." *See generally Liu v. SEC*, 591 U.S. 71, 79 (2020). Regan's methodology does not measure "net profits." He considers only the purported "[redacted]" earned by BANA, and fails to deduct BANA's operational costs. HX 39 at 266:20-268:4 (emphasis added). Regan's method, therefore, does not even purport to be a measure of "net profits." Regan's methodology also fails to account for the [redacted]. *See* HX 40 ¶ 98; HX 39 at 270:22-271:15. Regan claims that but-for BANA's alleged conduct, an additional [redacted] in benefits payments would have been deposited to prepaid debit card accounts. HX 41 ¶ 83. BANA would have earned [redacted] on these amounts but-for the alleged conduct challenged by Plaintiffs. By not factoring in these amounts, Regan's proposed "disgorgement" methodology fails to measure BANA's "net profits," and is therefore irrelevant and inadmissible. *See, e.g.*, *Duncan v. Blackbird Prods. Grp., LLC*, 2021 WL 7708670, *4 (W.D. Mo. Mar. 4, 2021) (excluding expert testimony because expert's calculations based on gross profits rather than net profits).

CONCLUSION

For the reasons discussed above, the Court should strike each and all of Regan's unreliable and irrelevant opinions from the record.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on 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*