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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 3:21-md-02992-GPC-MSB **PLAINTIFFS' OPPOSITION TO DEFENDANT'S *DAUBERT* MOTION TO EXCLUDE CERTAIN EXPERT OPINIONS OF GREG J. REGAN**
This document relates to All Actions	Judge: Hon. Gonzalo P. Curiel Ctrm: 12A Date: April 17, 2026 Time: 1:30 p.m.

FILED PROVISIONALLY UNDER SEAL

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INTRODUCTION

The Bank's *Daubert* challenge to damages expert Greg Regan rehashes the same arguments this Court already considered and squarely rejected in granting Plaintiffs' motion for class certification. While the Bank now cloaks those arguments in the trappings of Federal Rule of Evidence 702 and *Daubert* rather than Rule 23(b)(3) predominance, that repackaging is more stylistic than substantive. The Bank's meritless arguments should once again be rejected.

First, the Bank contends that Regan's expert opinions should be precluded because his proposed damages methodology does not include a mechanism for independently detecting which class members are secret fraudsters—those whom the Bank has long insisted (without providing supporting evidence) may be lurking among the certified class members. Not only does this recycled argument ignore the Court's prior ruling that EFTA places the burden on *the Bank* to identify any such fraudsters, but it also ignores that Regan's damages methodology includes an easily applied mechanism for carving out from the classwide damages calculations all damages attributable to any individuals who are at any point eliminated from the class or whose damages turn out to be zero when Regan's formulas are applied (say, because there were no funds in an Account Freeze class member's account when it was wrongfully frozen). As an accounting expert, Regan's testimony need not and could not go beyond that.

Second, the Bank contends that "Regan's methodologies produce no evidence of damages." Regan Mot. at 13. Initially, this contention fails because it entirely ignores Regan's methodology for calculating the *principal* amount of damages for members of the Claim Denial, Credit Rescission, and Account Freeze classes, Decl. of James Baltzer ("Baltzer Dec.") Ex. A (Regan Report dated March 4, 2025) ¶¶38-39, 66-67, 78-79, a methodology the Bank does not challenge. The Bank's contention also fails as to Regan's methodology for calculating those class members' *consequential* lost-time-value-of-money damages, because the Bank simply repeats the same challenges to that methodology that this Court rejected in its class certification order. In that order, this Court emphasized that the Ninth Circuit in *Van v. LLR, Inc.*, 962 F.3d 1160 (9th Cir. 2020) (*Van I*), had approved that same approach for calculating the class members' lost time value of money in the aggregate, while concluding that any dispute over "which interest rates should be applied is an issue for the fact finder." *Infra* at 5. Because the Court has already accepted Regan's classwide interest rate Methodology 1 as a valid basis for calculating classwide damages, any arguments the Bank offers to dispute Regan's underlying assumptions go to the *weight* of Regan's opinions (i.e., to reduce or increase the interest rates he proposes) rather than their admissibility. Once Plaintiffs establish the *fact* of damages, as they unquestionably can, their proof of the *amount* of damages is subject to a far lesser burden, and Regan's methodologies are certainly sufficiently supported to meet that burden. *See, e.g.*, *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 392 (9th Cir. 1957).

Third, the Bank's objections to Regan's methodologies for calculating disgorgement and for calculating Consumer Service class damages also repeat the same arguments this Court has already rejected. *Infra* at 4.

The Bank does not challenge Regan's proposed calculation of: (1) statutory damages under 15 U.S.C. §1693m(a)(2)(B); (2) the principal amounts of the class members' unauthorized ATM transaction claims at issue; or (3) the lengths of time those amounts were withheld from class members (as the first two amounts are set by statute and the latter is based on the Bank's own discovery responses).

The Bank also makes no effort to challenge Regan's experience and expertise as a damages expert (and could not plausibly do so given his vast experience in the field and as a testifying expert). Instead, the Bank picks away at a few points as to which it contends Regan's methodology is inadequate, like his supposed failure to independently determine which, if any, of the roughly [redacted] class members are hidden fraudsters. But Regan's methodology for determining class membership appropriately relies on the Bank's own data reflecting the Bank's determinations of fraud and expressly excludes all fraudsters identified to date; that same methodology can be applied to exclude any additional individuals the Bank determines to be fraudsters. *Infra* at 8-9. It was not Regan's job to ferret out whether any of the remaining class members should be excluded from the class. So even if the Bank were right that "*Plaintiffs* carry the burden of proffering a methodology that culls uninjured plaintiffs from the class," Regan Mot. at 1, which is contrary to this Court's previous burden-of-proof rulings, that would still not be a basis for excluding Regan's testimony.

The law is clear that an expert's testimony "need not establish every element that the plaintiff must prove[] in order to be admissible." *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010). It is also well accepted that, "[a]s a general rule, questions relating to the basis and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *United States v. 17.69 Acres of Land*, 2004 WL 5632928 at *1 (S.D. Cal. 2004). Thus, even if the Bank's misplaced arguments as to the nature of Plaintiffs' burdens of proof were accepted, those arguments would go to the weight of Regan's testimony, not to its admissibility. *City of Pomona v. SQM North America Corp.,* 750 F.3d 1036, 1044 (9th Cir. 2014).

For these reasons, as further explained below, none of the Bank's renewed efforts to relitigate its repeatedly rejected legal arguments come close to requiring the exclusion of Greg Regan, an undisputedly qualified damages expert. The Bank's motion should therefore be denied.

BACKGROUND

Greg Regan is a Certified Public Accountant. *See* Baltzer Dec. Ex. A ¶24 & Appendix A. He has previously been retained as an expert by governmental entities such as the SEC, the CFPB, and numerous State Attorneys General, and he has performed expert analyses in cases involving a broad range of companies, including Amazon, Avaya, ASML, Beyond Meat, Cisco, Fitbit, Google, Intuit, and PNC Bank.

Id. ¶26. The Bank does not dispute Regan's expertise or qualifications to testify as an expert. Instead, it contends that his "methodologies and conclusions" are so "flaw[ed]" in this particular case as to require their exclusion. *See* Regan Mot. at 5, 7.

Regan submitted his initial report on August 29, 2024 in support of Plaintiffs' motion for class certification. Baltzer Dec. Ex. B (Regan Report dated August 29, 2024). That report proposed two alternative methodologies for calculating the Bank's total damages liability, including the classwide damages attributable to the Claim Denial, Credit Rescission, and Account Freeze class members' lost access to their unemployment insurance ("UI") funds. His "Methodology 1" proposed to calculate class members' consequential damages by applying to their principal damages a uniform, compound interest rate reflecting the time value of money for this particular population (unemployment insurance beneficiaries during the height of the pandemic) deprived of these particular funds (UI benefits). The time value of money is the uncontroversial concept that a dollar now is worth more than a dollar later, and a compound interest rate reflecting that concept is a "standard way of calculating the harm resulting from denial of access to funds." Baltzer Dec. Ex. B ¶¶8, 45-52, 85, 90, 100. His "Methodology 2," by contrast, proposed to calculate the actual costs most likely incurred by class members (credit card debt and late fees) as a result of being denied access to their funds, based on the assumptions [redacted] *Id.* ¶¶8, 53-75, 86-89, 101. The Court found that the assumptions underlying Methodology 2 were not sufficiently supported by evidence in the class certification record. *Id.* ¶¶8, 53-75; *see also* ECF 494 at 87-88.

While the Bank emphasizes the Court's rejection of Methodology 2, it ignores that the Court accepted Methodology 1, the only methodology that Regan advocates in his merits report presently at issue. The Court based its approval of Methodology 1 on the Ninth Circuit's decision in *Van I*, in which "[t]he Ninth Circuit [] recognized injury in the form of 'the lost time value of money' and an award of interest as a way of measuring and remedying that injury." ECF 494 at 86 (quoting *Van I,* 962 F.3d at 1162).

In *Van*, a class action against a company that charged an improper sales tax to many customers but later refunded the overcharged amounts, the Ninth Circuit approved the use of a classwide interest rate to calculate the lost time value of the delayed refunds, despite variations in the individual economic situations of class members and the absence of any proof of any particular class members' borrowing practices. *Van v. LLR, Inc.*, 61 F.4th 1053, 1061 (9th Cir. 2023) (*Van II*) (approving a classwide annualized interest rate of 4.35%); *accord Nguyen v. Nissan North America, Inc.*, 932 F.3d 811, 821 (9th Cir. 2019) (approving classwide benefit-of-the-bargain damages in defective auto part case, in which plaintiffs proposed using average cost of replacing defective clutch system as proxy for the amounts of customer overpayment, despite classwide variations in cost, timing, and fact of replacement).

As in *Van,* this Court concluded in its class certification order that the class members' "varying economic circumstances" could not preclude Plaintiffs from calculating the lost time value of unlawfully withheld funds through application of a classwide interest rate, and that any dispute over "which interest rates should be applied is an issue for the factfinder" at trial. ECF 494 at 86-87. After all, if damages in cases like this and *Van* could not be based on generalized classwide assumptions (the underpinnings of which can be probed on cross-examination), no case involving the lost time value of money could ever proceed to trial on a classwide basis.

Regan's March 4, 2025 merits report, here at issue, is fully consistent with *Van* and this Court's class certification order. Baltzer Dec. Ex. A. That report no longer relies on assumptions [redacted] and no longer proposes Methodology 2 as a mechanism for calculating classwide damages. Instead, Regan draws upon the extensive economic literature analyzed by Plaintiffs' expert labor economists—Profs. Chloe East and David Levine—to present an evidence-based calculation of a classwide interest rate based on the lost time value of money for the population affected by the Bank's misconduct. *Id.* ¶¶40-51. Given the evidence of that population's "lower incomes" in general and the associated likelihood that their lost access to the wrongfully held principal would require them to borrow, reduce consumption, or forgo payments that would have reduced existing debt, Regan proposes that a 20% interest rate would be an appropriate approximation of the time value of money for this particular population. He also illustrates his calculations with a 10% interest rate as an alternative. *Id*.

Nothing in Regan's report or analysis conflicts with the basic premise, embraced by this Court and the Ninth Circuit, that the specific interest rate to be used to calculate classwide lost time-value damages is ultimately for the trier of fact to determine. *Id.* ¶46 & n.46. Should the trier of fact determine that a different interest rate should be used—if not the rates proposed by Regan, then perhaps the rates proposed by Prof. East, Prof. Levine, or [redacted]—that interest rate can be inserted into Regan's formulas to determine that element of classwide damages (amount of funds withheld x length of time withheld x interest rate). Baltzer Dec. Ex. A ¶¶44, 69, 80; *see also* ECF 494 at 86-87.

LEGAL STANDARD

To be admissible, testimony from a qualified expert need only "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702; *see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). As the Supreme Court has explained, Rule 702's application must be consistent "with the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony." *Daubert*, 509 U.S. at 588 (cleaned up). Expert witnesses are thus "permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation," so long as "the expert's opinion [has] a reliable basis in the knowledge and experience of his discipline." *Id.* at 592; *see also, e.g.*, *Jinro Am., Inc. v Secure Invs., Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001).

Under this standard, a district court's task is not to "decid[e] whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury." *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969-70 (9th Cir. 2013). Expert testimony "need not establish every element that the plaintiff must prove[] in order to be admissible." *Primiano*, 598 F.3d at565. "As a general rule, questions relating to the basis and sources of an expert's opinion affect the *weight* to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *17.69 Acres*, 2004 WL 5632928, at *1 (emphasis added). "[I]t is up to the opposing party to examine the factual basis for the opinion in cross examination. Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." *Bonner v. ISP Tech., Inc.*, 259 F.3d 924, 929-30 (8th Cir. 2001) (citations omitted); *see also City of Pomona*, 750 F.3d at 1044 ("Challenges that go to the weight of the evidence are within the province of the fact finder… A district court should not make credibility determinations that are reserved for the jury.")

ARGUMENT

I. As the Court Held, It Is the Bank's Burden, Not Regan's, to Identify Any Fraudsters Remaining in the Class.

The Bank begins with the brazen assertion that Regan's EFTA-related methodologies must be excluded in their entirety because they do not "reliably" identify "cardholders who either intended to file fraudulent disputes or who simply reported authorized transactions by mistake," Regan Mot. at 10, thus repackaging into *Daubert* trappings an argument the Court squarely rejected on class certification.

In opposing certification, the Bank had argued that Plaintiffs' EFTA claims could not be certified because individualized inquiries would be required to determine which, if any, class members were in fact undiscovered fraudsters. ECF 347 at 19-23.

In support, the Bank pointed to photographic evidence from a few ATM withdrawals that it contended were proof that some class members' purportedly unauthorized ATM transactions were in fact authorized. *Id.* In reply, Plaintiffs pointed out that under EFTA, it is the Bank's burden to establish that any disputed transactions were in fact authorized and that the Bank, despite having many opportunities, had repeatedly failed to meet that burden as to the class members. ECF 392 at 6-7 (citing 15 U.S.C. 1693g(b) ("[T]o deny a claim, 'the burden of proof is upon the [bank] to show the [disputed transaction] was authorized.'")). Plaintiffs further explained that "the Bank has had ample opportunity to identify" any fraudsters: "first, pursuant to its reconsideration process; second, pursuant to the June 2021 *Yick* injunction (which required the Bank to investigate any claim by authenticated cardholders previously denied based solely on the CFF); and third, by the OCC/CFPB consent orders, which in July 2022 required the Bank to identify all those harmed by its use of CFF-1 and [redacted]" *Id.* at 7. Plaintiffs also pointed out that if the Bank were right that the law required each class member to individually prove that their claim arose from a genuinely unauthorized transaction, "nothing would stop financial institutions from summarily denying all error claims without investigation, forcing each denied claimant to proceed individually or not at all, thereby completely nullifying EFTA's consumer protection goals." *Id.* at 6.

This Court agreed with Plaintiffs. It explained: "Contrary to BANA's argument, the burden of proving each disputed transaction was 'unauthorized' is on BANA, not Plaintiffs, the EDD debit cardholders.… BANA, not EDD cardholders, has to [] 'show that claims are unauthorized before denying claims[.]'" ECF 494 at 51-52. That burden belongs to the Bank, not to Plaintiffs' damages expert. Nothing prevents the Bank from attempting to meet its burden of identifying fraudsters going forward, and if it does, those fraudsters would be excluded from Regan's damages calculations under his proposed methodology. Baltzer Dec. Ex. A ¶¶ 4 & nn.10, 32.

The Bank's argument thus ignores the basic principle that an expert's testimony "need not establish every element that the plaintiff must prove[] in order to be admissible." *Primiano*, 598 F.3d at 565; *see also Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). Regan's testimony need not itself establish liability or defeat every defense the Bank might assert for his testimony to assist the trier of fact. *See Alaska Rent-A-Car, Inc.*, 738 F.3d at 969-70. That is especially true because Regan's formula for calculating damages stands ready to accommodate any evidence the Bank might ultimately muster as to any class members it can establish are ineligible fraudsters.[1]

II. Regan's Testimony Concerning Consequential Damages is Admissible.

The Bank asserts that Regan's compound-interest-rate-based methodology is inadmissible because Regan "is not claiming that every class member (or even *any* class member)" actually "had to borrow money" at the specific interest rates Regan identifies. Regan Mot. at 14. According to the Bank, because Regan relies on "generalizations" without "validating them by reference to the specific facts and circumstances of even a single…proposed class member," the factfinder must be precluded from considering his testimony. Regan Mot. at 16; *see also id.* at 20-22. This argument misstates the law. It is commonplace for experts to rely on data and draw conclusions that are not specific to any particular party. Courts routinely reject attempts to exclude expert testimony on the grounds that the testimony is

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[1] The Bank has not yet identified any such evidence. *See* RSUF 9, 134-35; PSAF 95. Although it now asserts that Regan "acknowledge[d]" in his deposition testimony the "existence" of "*hundreds* of likely fraudsters," Regan Mot. at 12, in fact, Regan conceded only that [redacted]

"speculative" or "not sufficiently corroborated," as such "concerns go to the weight of the testimony and its credibility, not its admissibility." *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1025-28 (9th Cir. 2022) (citations omitted).

The Bank's argument also ignores the Court's previous ruling as to Regan's Methodology 1. An interest rate—*any* interest rate—necessarily reflects a generalization about the time value of money that is not strictly tied to the specific economic circumstances of each individual to whom it is paid. In *Van*, for example, the economic circumstances of the class members who were deprived for different lengths of time of the sales taxes they were unlawfully required to pay surely varied. Some may have had more "liquid savings"; others perhaps "could have borrowed funds from family members" or could more readily have "reduced consumption"; and so forth. Regan Mot. at 15. Like the Bank here, the defendant in *Van* argued that plaintiffs' failure to make "specific allegations regarding how [each class member] would have earned interest on the money but for the defendant's wrongful conduct" defeated their claims. *Van I*, 962 F.3d at 1164. The Ninth Circuit rejected that argument, holding that it "misstate[d] Van's claimed injury," explaining:

> Van does not assert that she is injured because she lost interest income. She asserts that she is injured because she lost the use of her money… Interest is simply a way of measuring and remedying Van's injury, not the injury itself.

Id. at 1164-65. In *Van,* then, the inevitable individual variations in the class members' economic situations did not preclude the use of a uniformly applied interest rate to approximate the lost time value of money on a classwide basis. *Van II*, 61 F.4th at 1061, 1063-68. The Bank offers no reason why this Court should reconsider its previous reliance on that binding precedent. ECF 494 at 86-87.[2]

[2] For the same reasons, the Bank's reliance on class representatives' interrogatory responses indicating that they did not actually borrow at the particular interest rates proposed by Regan misses the point. No class representative in *Van* claimed to have actually experienced a loss of interest income at precisely the classwide interest rate

The Bank's argument is also contrary to the established case law holding that expert opinions—particularly the opinions of economic and accounting experts—are admissible even when based on "generalizations" rather than on adding together the precise amount of damages suffered by each individual class member (a requirement that would eliminate classwide relief in a broad swath of circumstances). Regan Mot. at 16. In *Briseno v. ConAgra Foods, Inc.*, for example, the Ninth Circuit held that it was consistent with due process for plaintiffs to measure, on a classwide basis, the aggregate liability attributable to an allegedly false representation that certain cooking oils were "100% natural" by "(1) calculating the price premium attributable to the allegedly false statement…and (2) multiplying that premium by the total number of units sold during the class period." 844 F.3d 1121, 1123, 1132 (9th Cir. 2017); *accord, Nguyen*, 932 F.3d at 821. In *ConAgra*, too, the individual circumstances of class members surely varied. After all, not everyone could be expected to attach precisely the same value to a representation that a cooking oil is "100% natural." The court nonetheless concluded that the injury arising from such classwide misrepresentations may be determined on a classwide basis, regardless of each class member's individual experiences and belief system, based on generalizations about the economic behavior of the relevant population. 844 F.3d at 1123, 1132.[3] Notably, ConAgra had attempted

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ultimately embraced by the court either. As the Ninth Circuit explained, "[i]nterest is simply a way of measuring and remedying[the] injury, not the injury itself." *Van I*, 962 F.3d at 1165.

[3] *See also, e.g.*, *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, 326 F.R.D. 592 (N.D. Cal 2018) (certifying a 23(b)(3) class and approving the use of market data to calculate a "price premium" approximating the value to consumers of Dr. Pepper's false representation that a beverage was "made from real ginger"); *McMorrow v. Mondelez International, Inc.*, 2021 WL 859137 (S.D. Cal. March 8, 2021) (approving a class-wide damages model approximating the value to consumers of the representation that a product was "nutritious."); *Belyea v. GreenSky, Inc.*, 2025 WL 589037 at *6 (N.D. Cal., 2025) (denying motion to exclude damages expert and finding that, although individualized questions as to damages may be relevant to the appropriateness of class certification, "they are not a basis for challenging the reliability of [the expert's] assessment of classwide damages").

in the district court to exclude a damages expert on the ground that her proposed analysis would impermissibly seek to approximate the value to consumers of the allegedly false representation by relying in part on "future data" to estimate the "historical" price premium—that is, by relying on data concerning the market behavior of persons *outside* the class to make classwide generalizations untethered from the specific circumstances of any particular class member. *In re ConAgra Foods, Inc.*, 90 F.Supp.3d 919, 1028 (C.D. Cal. 2015). The district court held that the expert's generalizations based on market data "d[id] not make her methodology unreliable," even though neither the data nor the generalizations were class member-specific. *Id.*

Similarly, in *Hartley v. Dillard's, Inc.*, the defendant attempted to exclude an expert economist's proffered testimony—consisting of economic generalizations about national trends affecting "mall and retail store sales"—because it did not address the "specific financial conditions" of the defendant's retail store. 310 F.3d 1054, 1060-61 (8th Cir. 2002). The Eighth Circuit nonetheless held that "the jury could consider" such economic generalizations, and that "it [was] up to the opposing party to examine the factual basis for the opinion in cross-examination"—not through a *Daubert* motion. *Id.* (citing *Bonner*, 259 F.3d at 929-30).

Here, the Bank has not identified any authority that so much as suggests that Regan's "generalizations" about the financial circumstances of class members—which the Bank does not dispute are supported by the "reports and studies" he cites, Regan Mot. at 15—are so unreliable as to be inadmissible. The factfinder should therefore be permitted to "consider" such generalizations and to give them whatever persuasive weight is appropriate, even though they are not—and realistically, could not be—based on the "specific financial conditions" of each of the approximately 109,000 individual class members. *Hartley*, 310 F.3d at 1061. At trial, the Bank may challenge Regan's testimony through cross-examination or through the presentation of its own experts' testimony (testimony which includes those experts' own economic generalizations about class members, which are also not rooted in any class member's specific financial situation). *Bonner*, 259 F.3d at 929-30.[4] Such arguments necessarily go to the weight the factfinder should give the experts' testimony—not to admissibility. *City of Pomona*, 750 F.3d at 1044. After all, even if the trier of fact ultimately determines that a lower interest rate than those Regan proposes should be used, the *formula* he offers for calculating the lost time value of money will still "assist the trier of fact," because whatever interest rate the factfinder adopts can be inserted into that three-variable formula (amount, time, rate). *See Daubert*, 509 U.S. at 591.

III. Regan's Testimony as to Disgorgement Based on "Float Revenue" Is Admissible.

Regan has explained that disgorgement damages for the Claim Denial, Credit Rescission, and Account Freeze classes may be calculated based on the "float revenue" earned by the Bank on the balance of funds to which class members lost access as a result of the Bank's wrongdoing, for the period of time in which those funds were wrongfully withheld. Baltzer Dec. Ex. A ¶¶60-62, 72, 87.[5] In stating this opinion, Regan noted the deposition testimony of the Bank's Rule 30(b)(6) designee Robert Chestnut, who testified that [redacted] *Id.* ¶40 & n. 34.

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[4] *See, e.g.* [redacted]

[5] The Bank does not challenge Regan's proposed disgorgement methodologies for the Customer Service and EMV Chip classes.

The Bank seeks to exclude Regan's testimony about disgorgement of float revenue on the theory that he needed to cite evidence establishing that every member of those three classes would have immediately withdrawn the Bank's provisional credit payments had the Bank timely complied with its obligation to make those payments rather than wrongfully withholding them in reliance on CFF-1. Regan Mot. at 23-25. That, too, is a repackaging of the same argument the Bank presented and lost on class certification through its economic expert Victor Stango. Baltzer Dec. Ex. C ¶81 (asserting that "not all proposed class members [immediately] withdrew all available funds from their EDD accounts"). Plaintiffs countered that the assertion was "legally irrelevant," because the object of the disgorgement remedy in California is to "eliminate" even the "*possibility* of profit from conscious wrongdoing." ECF 392 at 20-21 (quoting *Meister v. Mensinger*, 230 Cal.App.4th 381, 398 (2014)) (emphasis added). Because Plaintiffs had an "ownership interest" in the wrongfully withheld funds on which the Bank earned float revenue, they had the right to withdraw those funds at any time. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1148 (2003). By unlawfully withholding those funds, the Bank converted them from a potential source of Bank revenue (with respect to those class members who had chosen not to withdraw their provisional credit payments) into a certain source of revenue (because the Bank, by its unlawful conduct, thereby ensured that no class members could exercise their ownership rights). Under California law, *all* revenue thereby generated is fairly "attributable to the underlying wrong." *Mensinger*, 230 Cal.App.4th at 398; *see also Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1183 (9th Cir. 2017) (classwide calculations under the UCL are "particularly forgiving"). This Court agreed, holding that Regan's disgorgement damages model for float revenue satisfied predominance. ECF 494 at 93. The Bank offers no basis for this Court to reconsider that ruling.

The Bank also contends that Regan's disgorgement calculation should be excluded because, according to the Bank, it "fails to deduct BANA's operational costs" and thus does not measure "net profits." Regan Mot. at 25. The Bank further asserts, remarkably, that the float revenue it *might* have earned on funds that would have been deposited if not for the Bank's own misconduct (depending on when those funds would have been withdrawn) must be deducted from any damages. But in the disgorgement context, any "risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010) (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989)); *see also* Restatement (Third) of Restitution § 51 (explaining that the burden of dispelling any uncertainty in disgorgement calculations is assigned to the wrongdoer). Any lost profits the Bank would have earned but-for its misconduct are "attributable to the underlying wrong." *Mensinger*, 230 Cal.App.4th at 398. In any event, even if such costs were relevant, Regan's methodology would still be helpful to the factfinder and therefore admissible, because such costs could simply be deducted from the damages figures Regan's methodology produces. *Alaska Rent-A-Car, Inc.*, 738 F.3d at 969-70; *Primiano*, 598 F.3d at 565.[6]

IV. The Bank's Challenges to Regan's Customer-Service Class Methodology Also Fail

Regan has proposed to calculate damages for the Customer Service Class by taking the average length of excess hold time caused by the Bank's failure adequately to staff its call centers and multiplying that figure by "the applicable minimum wage or other reasonable metric." Baltzer Dec. Ex. A ¶¶ 92-93. On class certification, this Court held that Regan's proposed methodology satisfied the predominance requirement, because the Plaintiffs' damages theory concerns "not just time lost but

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[6] The only case identified by the Bank that so much as suggests that an expert's failure to measure "net profits" could render his testimony inadmissible does not even involve disgorgement. Regan Mot. at 25 (citing *Duncan v. Blackbird Prods. Grp., LLC,*, 2021 WL 7708670 at *4 (W.D. Mo. Mar. 4, 2021)). That holding was instead specific to "Missouri law" concerning the elements of claims for lost profits, not disgorgement. *Duncan*, 2021 WL 7708670 at *2.

an excessive amount of lost time" and because the use of "the applicable minimum wage or other reasonable metric," as applied to the average length of excess hold time, offers a legally permissible mechanism for approximating the harm inflicted on a classwide basis. ECF 494 at 89-91. Again, the alternative would be no damages at all, even though the evidence of liability and fact of damages is compelling.

Despite this Court's prior ruling, the Bank again asserts that damages cannot be measured on a classwide basis because "Regan's methodology assumes that 'lost time' resulted in the same 'economic harm' to each class member." Regan Mot. at 22. It assumes no such thing. Neither Plaintiffs nor Regan contend that every class member would have spent the excess hold time wasted by the Bank by working a job that paid precisely the minimum wage. As with the interest-rate-based approach approved by the Ninth Circuit in *Van* and similar cases, "[Plaintiffs] do[] not assert that [they are] injured because [they] lost…income. [The reasonable metric proposed by Regan] is simply a way of measuring and remedying [the] injury, not the injury itself." *Van I*, 962 F.3d at 1164-65; *see also Van II*, 61 F.4th at 1063. The law fully tolerates such classwide approximations of aggregate damages. *Supra* at 2, 9-13. As Plaintiffs' expert Prof. Levine has explained, economists routinely "use wage data to represent the value of time," even for the unemployed, and unemployed persons whose time was wrongfully denied to them by the Bank likely faced higher costs. Baltzer Dec. Ex. E (Levine Report) ¶¶14-30. Should the Bank argue at trial that a lower reasonable metric for approximating the value of excess hold time should be used, it must do so through cross-examination or through the introduction of its own evidence or expert testimony—not by repackaging its rejected class certification arguments as a *Daubert* challenge. *Supra* at 12-13.

CONCLUSION

For the reasons stated above, the Bank's motion to exclude the expert testimony of Regan should be denied in its entirety.

Respectfully submitted,

Dated: January 7, 2026

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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 January 8, 2026. 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: January 8, 2026

/s/ Brian Danitz
Brian Danitz