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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION

This document relates to All Actions

Case No. 3:21-md-02992-GPC-MSB

PLAINTIFFS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF *DAUBERT* MOTION TO EXCLUDE CERTAIN TESTIMONY OF VICTOR STANGO

Judge: Hon. Gonzalo P. Curiel
Ctrm: 12A
Date: April 17, 2026

REDACTED PUBLIC VERSION

INTRODUCTION

Plaintiffs' narrowly focused *Daubert* challenge to the Bank's consumer behavioral economist expert, Dr. Victor Stango, seeks to exclude the portions of Stango's report and testimony that purport to characterize as "matter[s] of economic fact," ECF 589-1 at 17, two pure questions of law: (1) whether class members' "actual damages" for purposes of 15 U.S.C. §1693f(e) (EFTA's treble damages provision) accrue at the time the Bank fails to meet the 10-day statutory deadline for conducting timely, good-faith investigations as EFTA requires; and (2) whether the Bank's untimely, post-deadline payments to class members should be offset from any final damages award *after* rather than *before* such damages are trebled. ECF 571-1. Because the answer to both legal questions is unquestionably "yes," *see* ECF 633 at 7-11; ECF No. 494 at 83-85, Stango's contrary opinions based on supposed "economic fact" must be excluded, as they improperly "usurp[] the role of the court," apply an incorrect legal standard, and risk confusing the jury. *See* ECF 571-1 at 1 (quoting *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 558 (C.D. Cal. 2014)). Even if those two questions were proper subjects of expert testimony, Stango's opinions should be excluded because they are not supported by the sources he cites.

The Bank's principal argument is that the challenged portions of Stango's testimony do not involve "legal conclusions," but have been incorrectly "characterize[ed]" as such by Plaintiffs. ECF 659 at 5-6. According to the Bank, Stango "[n]ever states a legal conclusion." *Id.* at 1. That is not true. Stango repeatedly states his opinion about how "actual damages" should be "accurately define[d]," ECF 571-3 ¶¶ 34, 72, even though the question of when "actual damages" accrue for purposes of §1693f(e) is a legal issue to be decided by the Court under applicable precedent, not by a behavioral economist as an "economic fact." Stango also states that, as a matter of economics, the "actual damages" for every class member [redacted]

[redacted] ECF 571-3 ¶ 74 & Figure 2. But that assertion necessarily rests upon the *legal* proposition, which this Court has already rejected, that the Bank's untimely, extra-statutory payments must be deducted from each class member's "actual damages" for purposes of 15 U.S.C. §1693f(e) *before* those damages may be trebled. This is a clear example of an expert improperly "rel[ying] on an incorrect legal standard." *Pelican Int'l, Inc. v. Hobie Cat. Co.*, 655 F.Supp.3d 1002, 1023 (S.D. Cal. 2023).

The Bank's reliance on Stango's challenged testimony in its summary judgment briefing vividly frames the problem. The Bank argues at length that "actual damages" under 15 U.S.C. §1693m(a)(1) cannot include "the principal claim amounts that have already been refunded" to class members, even though those amounts were not refunded within the statutory timelines set by Congress. ECF 589-1 at 16-17. The Bank then attempts to supplement that (erroneous) legal argument with the remarkable assertion that "[w]hat is true as a matter of law is also true as a matter of economic fact," because there is a factual "difference" between the world in which Plaintiffs' claims were reimbursed outside the statutorily prescribed timelines and the hypothetical world in which they were never reimbursed at all—a proposition for which the Bank cites only Stango's report. *Id.* at 17 (citing SUF ¶173) (citing Stango Report ¶¶31-32).

No one disputes that there is a difference between claims that are not timely paid and claims that are never paid. Given the "sheer obviousness" of that proposition (in the Bank's own words), there is no need for an economist expert to assert it. ECF 659 at 1. In any event, Plaintiffs' experts' proposed methodology for calculating consequential damages fully accounts for that difference, which is reflected in the periods of time between the class members' accrual of damages and the Bank's subsequent payments to those class members. *Infra* at 8-9.

Using an expert to present an insupportable legal conclusion or a factual assertion that contradicts settled law is not permitted under *Daubert*, which warned of the heightened risk that expert testimony poses of "confusion of the issues" and of "misleading the jury." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) (quoting Fed. R. Evid. 403). "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Id.* (quoting Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

Here, any dispute over when "actual damages" accrue for the purposes of 15 U.S.C. §1693f(e) treble damages calculations or how payments made after expiration of the statutory deadline should be applied to those calculations are legal questions for the Court, not factual issues for the jury. The Bank's efforts to resurrect its erroneous (and already rejected, ECF No. 494 at 83-85) legal arguments by invoking its expert's characterization of "economic fact" improperly "usurps the role of the court," *ConAgra*, 302 F.R.D. at 558, risks confusing and misleading the jury, *Daubert*, 509 U.S. at 595, and is thus an "inappropriate subject[] for expert testimony," *Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992).

ARGUMENT

I. The Challenged Portions of Dr. Stango's Testimony Apply an Incorrect Legal Standard and Are Neither Relevant Nor Reliable.

Applying settled Ninth Circuit precedent, this Court held in its class certification order that if an EFTA defendant fails to conduct the required good faith investigation within the prescribed statutory deadline but later reimburses claimants for all or part of their wrongfully withheld amounts (whether pursuant to an extra-statutory reconsideration process, a court order, or a settlement reached with the defendant's regulators), that payment should be applied as an offset from the final amount of damages "*after*" trebling, not before. ECF No. 494 at 83-85 (emphasis in original); *see also* ECF 571-1 at 4-8; ECF 633 at 7-11.

The Bank's summary judgment motion cites Stango's opinions as the basis for arguing that, notwithstanding the Court's legal analysis, the Bank's belated payments to class members retroactively eliminated those claimants' "actual damages" ab initio under 15 U.S.C. §1693m(a)(1) "as a matter of economic fact," with the result that there remain "no actual damages to treble" under §1693f(e). ECF 589-1 at 15-17, 22-24. But Stango's opinion is indistinguishable from the Bank's already-rejected legal argument that the Bank's untimely payments should be offset from actual damages before trebling. The Bank cannot transform its legal argument into a factual issue simply by funneling it through the report of a consumer behavioral economist, and no expert can offer opinions that are directly contrary to law.

The Bank insists that Stango is not offering a legal opinion about the order of applying offsets, only about whether the principal amount of the class members' unauthorized-transaction claims should be included in calculating their "actual damages" in the first instance. But as Plaintiffs explained in their opening brief, neither the Bank nor Stango dispute that if the Bank had not made any post-violation payments to members of the Claim Denial and Credit Rescission classes, those class members' actual damages would be the amount of their unauthorized-transaction claims (the principal) plus any proven consequential damages (the lost time value of money, under Plaintiffs' damages model). ECF 571-1 at 3, 5. That a consumer's "actual damages" includes the value of their unauthorized-transaction claim is, of course, consistent with the fact that a claimant's cause of action under §1693f(e)—and thus their "actual damage[s]" (as that term is used in 15 U.S.C. §1693m(a)(1))—accrues the moment a defendant (1) fails to issue provisional credit within the statutory 10-day deadline, without having made a good faith investigation of the unauthorized-transaction claim or without a reasonable basis for believing the cardholder authorized the transaction, or (2) knowingly and willfully concludes that the cardholder authorized the transaction when such conclusion could not reasonably have been drawn from the evidence available to the Bank at the time of its required investigation. *See* ECF 633 at 7-11; 15 U.S.C. §1693f(e)(1)-(2). If either circumstance is shown, the consumer "shall be entitled to treble damages" under 15 U.S.C. §1693f(e), and as this Court has held, any untimely, extra-statutory payments by the Bank would be applied as an offset "*after* trebling," not before. ECF 494 at 83-85.

The Bank asserts that Plaintiffs have sought to make Stango's opinions "*look*" like legal opinions by "resort[ing] to…their own paraphrase of Stango's opinions rather than his actual statements" and by "insert[ing] legal arguments and even a statutory citation where Stango offered neither." ECF 659 at 1, 6. But Plaintiffs' *Daubert* motion repeatedly quotes Stango; it does not merely "paraphrase" him. *See* ECF 571-1 at 3-4, 5, 8. And the "statutory citation" to which the Bank refers is to EFTA itself, which dictates how actual and treble damages under the statute are defined and calculated. ECF 571-1 at 1.

That Stango applied incorrect legal standards to reach incorrect legal conclusions is clearly demonstrated by his opinion about how treble damages should be calculated—and by the damages figures resulting from his "economic analysis." [redacted]

[redacted]

ECF 571-3 ¶ 74 (emphasis added). Under Stango's stated methodology, [redacted]

This Court has already rejected that methodology, as have the Ninth Circuit precedents interpreting other statutory treble damages provisions, many of which this Court cited. ECF 494 at 84; *see also* ECF 633 at 8-11.[1] Stango's methodology is also incompatible with EFTA's statutory text, legislative history, and case law, which uniformly teach that "actual damages" within the meaning of 15 U.S.C. §§1693m(a)(1) and 1693f(e) accrue *when* the Bank fails to meet the deadlines prescribed by Congress,[2] and that EFTA is to be "broadly construe[d] … in

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[1] The Bank never acknowledges this aspect of this Court's ruling on class certification, despite Plaintiffs' repeated citations in its opening brief. Instead, the Bank repeats its summary judgment argument that "the law of the case, as established in Judge Burns'[s] 2023 ruling interpreting EFTA" somehow requires that payments made outside the timelines prescribed by Congress eliminate ab initio, instead of merely offsetting, the class members' actual damages. As Plaintiffs explained in their Opposition to Summary Judgment, ECF 633 at 10, that is a mischaracterization of Judge Burns's holding, which did not address the calculation of actual or treble damages under EFTA at all (as that issue was not before him). Rather, Judge Burns made the point about additional consequential damages in rejecting the Bank's argument that its belated payment of the claim amounts mooted the claims of plaintiffs who pleaded additional consequential harms. ECF 126 at 23.

[2] 15 U.S.C. §1693f(e)(2) (treble damages liability accrues *when* a financial institution knowingly or willfully denies a claim if such conclusion could not reasonably have been drawn from the evidence available to the financial institution "*at the time*" of its investigation) (emphasis added); Electronic Fund Transfer Consumer Protection Act: Hearings on S. 2065 Before the S. Subcomm. On Consumer Aff. Of the Comm. On Banking, Housing, and Urb. Aff., 95th Cong., 1st

accordance with its remedial purpose," *Stout v. FreeScore, LLC*, 743 F.3d 680, 684 (9th Cir. 2014); *see* 15 U.S.C. §1693(b).

It is no answer to insist that "if Regan's opinions are relevant, then Stango's rebuttals are at least as relevant." ECF 659 at 4. Regan's methodology *comports* with and *applies* the governing legal standard. Stango's methodology seeks to replace that standard with what the Bank terms "economic fact." Nor does it help the Bank that Stango acknowledged at his deposition testimony that he is "not a lawyer." *See* ECF 659 at 9. If an expert's opinion contradicts the governing legal standard, it must be excluded, whether or not the expert purports to be knowledgeable about the law. *Cf. Pelican Int'l*, 655 F.Supp.3d at 1023.

For the same reasons, the Bank's attempt to defend the reliability of Stango's challenged testimony on factual grounds must also fail. As Plaintiffs' *Daubert* motion explained, Stango's assertion that [redacted] purports to be derived from a source—the *Litigation Services Handbook*—that does not address the operation of a statutory damages provision, and that expressly "put[s] aside punitive issues." ECF 571-4, p. 5.1. The Bank now asserts that Stango's reliance on this source cannot be challenged because Regan also relied on it. ECF 659 at 14. That, too, is not the law. The issue here is *how* Stango relies on it—to draw an incorrect legal conclusion not supported and expressly disowned by that very source. That is not a reliable application of economic expertise.

Sess. At 122 (Oct. 1977) ("If a court finds that a financial institution willfully reported to a consumer that his account was correct *when* such a conclusion could not reasonably be drawn, the bank *is* liable for treble damages.") (emphasis added); *Marquess v. PA State Emps. Credit Union*, 2010 WL 3448086, at *7-9 (E.D. Pa. Aug. 31, 2010), *rev'd in part on other grounds*, 427 F.App'x 188 (3d Cir. 2011) (holding that when a bank willfully violates EFTA in denying claims whose principal amounts totaled over $25,000, treble damages in the amount of over $75,000 are appropriate).

II. The Bank's Own Characterizations of Dr. Stango's Testimony Confirm That It Is Not Relevant.

The Bank now denies that Stango ever offered the opinions quoted above. ECF 659 at 1-3, 8-9. The Bank would have the Court believe that the only opinions Stango offers in the challenged portions of his testimony are that (1) "funds temporarily lost and then recovered do not impose the same economic harm as funds permanently lost," and (2) Regan's damages methodology "is economically illogical" because it fails to distinguish between consumers who received money from the Bank outside the timelines prescribed by EFTA and hypothetical consumers who never received any payments at all. ECF 659 at 8-9. Even if the Bank's revisionist mischaracterization of Stango's opinions were accurate, those opinions would still be inadmissible because they could not possibly "assist the trier of fact to…determine a fact in issue." *Daubert*, 509 U.S. at 592.

First, no one disputes the factual difference between "funds temporarily lost" and "funds permanently lost" (even where, as here, the class members had no way of knowing at the outset whether the Bank's refusal to reimburse them for their losses would be temporary or permanent). The Bank refers to the "sheer obviousness" of that opinion, but that obviousness makes it more rather than less "vulnerable to a *Daubert* attack," as a trier of fact does not need the help of a behavioral economist to grasp it. ECF 659 at 1. Using expert credentials to distort its significance—with the attendant risks of confusing the issues and misleading the jury, *Daubert*, 509 U.S. at 595—will only confuse rather than help the fact finder.

Second, the Bank ignores that Regan's methodology *does* reflect the obvious factual difference between "funds temporarily lost" and "funds permanently lost." Regan's methodology accounts for the time value of the money to which Plaintiffs lost access by applying a compound interest rate to the principal balances *for the specific periods during which each class member's access to those funds was denied*. *See* ECF 633 at 11. In a hypothetical world in which the Bank never made its untimely, extra-statutory payments, that period would still be ongoing and consequential damages would still be accruing. Stango's assertion that Regan's methodology ignores the distinction the Bank labels an "economic fact" is incorrect, because the methodology does not actually "treat customers in the two situations as similarly situated" at all. ECF 571-3 ¶32. An expert's demonstrably false assertions do not "help the trier of fact." Fed. R. Evid. 702.

III. None of the Bank's Attempts to Distinguish Applicable Legal Authority Make the Challenged Portions of Dr. Stango's Testimony Any More Admissible.

Finally, the Bank tries to distinguish the authorities cited by Plaintiffs for the legal proposition that treble damages provisions enacted by Congress require trebling *before* any offset is applied. But those authorities fully support that well-settled proposition, as this Court has already concluded.

In *Uthe Tech. Corp. v. Aetrium, Inc.*, 808 F.3d 755 (9th Cir. 2015), for example, the Ninth Circuit held that an offset arising from an untimely payment could not "fully extinguish" a plaintiff's treble damages under RICO because such offsets are to be applied only *after* trebling, not before. *Id.* at 756-60; *see also* ECF 494 at 84 (citing *Uthe*). The Bank asserts that *Uthe* is "entirely irrelevant" because that case involved multiple tortfeasors, while this case involves just one. ECF 659 at 12. That is a distinction without a difference. The one-satisfaction rule addressed in *Uthe* applies regardless of the number of defendants at issue, and the Bank's purported distinction does nothing to undermine Plaintiffs' legal position, or the Court's conclusion, as to how offsets interact with a treble damages provision enacted by Congress.

The Bank also tries to distinguish *Uthe*, as well as *Flintkote v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957), *B.P. v. Balwani*, 2021 WL 4077008 (9th Cir. 2021)[3], and *In*

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[3] The Bank emphasizes that *Balwani* was an unpublished decision but cannot dispute the merits of its analysis. In any case, *Balwani* correctly applies *Uthe*, which is published and controlling. 2021 WL 4077008 at *3 (citing *Uthe*, 808 F.3d at 760).

re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., 2017 WL 4890594 (N.D. Cal. Oct. 2017), on the ground that in those cases (which the Bank does not dispute hold that untimely payments are offset *after* trebling), the plaintiffs established actual damages, while in this case they supposedly have not. As explained above and in Plaintiffs' briefing, though, "actual damages" for purposes of treble damages calculations under 15 U.S.C. §1693f(e) accrue at the moment a financial institution fails to meet its statutory payment obligations within the deadlines prescribed by Congress, and Plaintiffs have presented evidence of (1) the amount of their unauthorized-transaction claims that were wrongfully denied without investigation based solely on CFF-1, and (2) the consequential harm class members suffered from being denied access to those funds between the time of the Bank's improper denials and the time of the Bank's eventual payments. *See* ECF 659-4 ¶¶9, 13 & Schedule 1. That a defendant may *later* reimburse a plaintiff for accrued damages (whether pursuant to an extra-statutory reconsideration process, a preliminary injunction, or a settlement with regulators) does not retroactively immunize it from liability for its statutory violations; instead, as in any case, a defendant's post-violation payments are treated as offsets against the amounts the plaintiffs later recover as damages. Again, when actual damages begin to accrue under EFTA and how those actual damages must be treated in any calculation of EFTA treble damages (assuming the statutory preconditions for trebling are satisfied) are pure questions of statutory interpretation whose resolution has nothing to do with the so-called "economic facts" that Stango purports to assert, making his testimony neither relevant nor reliable.

CONCLUSION

For the reasons stated above and in Plaintiffs' opening brief, the Court should exclude ¶¶ 31-35, 71-74, 82-83, 85-86, 89-90, 95-96 of Stango's report and any testimony based on those paragraphs.

Respectfully submitted,

Dated: February 20, 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 February 20, 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: February 20, 2026

/s/ Michael Rubin
Michael Rubin