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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' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE CERTAIN EXPERT OPINIONS OF JAY MINNUCCI**
This Document Relates to All Actions	Date: April 17, 2026 Time: 1:30 p.m. Judge: Hon. Gonzalo P. Curiel Ctrm: 2D (2nd Floor)

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I. INTRODUCTION

Jay Minnucci is an expert on the call center industry. Based on his more than four decades of industry experience and his personal review of the Bank's documents, data, and testimony and other evidence in the record, Minnucci reached a series of well-supported opinions. *See* Ex. 1 (Minnucci Rep) ¶¶ 12-17 (summary of opinions).[1] Among these were his principal opinion that during the applicable two-month class period (September 13, 2020 to November 21, 2020), members of the Customer Service Class who telephoned the Bank's Claims Call Center to pursue unauthorized ATM transaction claims were forced to wait on hold for an average of [redacted], an extraordinarily long wait time that far exceeded any average wait time in the call center industry, where the industry standard metric, Average Speed to Answer ("ASA"), is customarily measured in *seconds*, not *minutes*. *Id.* ¶¶ 12, 36, 52.

Minnucci also concluded, again based on a combination of his industry experience and his review of the relevant evidence, that the Bank's extraordinarily lengthy ASA of [redacted] was driven by the Bank's inadequate staffing at its Claims Call Center during periods of [redacted]. *Id.* ¶¶ 15, 58-81. Finally, Minnucci calculated the likely "avoided cost" financial savings to the Bank resulting from its gross understaffing of its Claims Call Center during the class period. *Id.* ¶¶ 106-113.

The Bank does not challenge Minnucci's expertise or his extensive call center industry experience. Nor can it dispute that its Claims Call Center's ASA was nearly [redacted] during the class period, a figure based on the Bank's own data. Instead, the Bank seeks to exclude Minnucci's testimony because it disagrees with his opinion about the "industry standard" call wait time, to which Minnucci compared the [redacted] that Customer Service Class members had to wait, on average, before someone would pick up the telephone at the designated (800) number to respond to them. Bank Mot. at 4, 3-15; Ex. 1 ¶¶12, 52. According to the Bank, Minnucci cannot consider the call center performance

[1] "Ex." refers to Exhibits to the Declaration of Regina Wang.

data of 214 call centers in 2020, as aggregated and published by ContactBabel, because he did not personally analyze and verify all of the supporting data provided by that well-respected publication. Bank Mot. 9-11; *see* Ex. 1 ¶ 12. But "objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility." *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002). Under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), the trial judge must determine only "whether or not the reasoning is scientific and will assist the jury. If it satisfies these two requirements, then it is a matter for the finder of fact to decide what weight to accord the expert's testimony." *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230 (9th Cir. 1998).

The Bank's remaining challenges likewise question whether certain aspects of Minnucci's opinions are sufficiently supported. For example, the Bank disputes whether Minnucci properly disaggregated the data he received from the Bank to evaluate its performance (even though the only reason disaggregation was necessary was because the Bank did not maintain and produce more granular data), whether the Bank's forecasting models could be accurately relied upon to predict call demand, and whether Minnucci's evidence-based assessment of the grounds for the Bank's staffing decisions impermissibly veered into testimony about the Bank's state of mind. None of these are valid grounds for excluding Minnucci's expert analysis in its entirety.

II. BACKGROUND

Minnucci's expert opinions principally apply to the claims of the Customer Service Class, i.e., members of the Claim Denial Class and Credit Recission Class who telephoned the Bank's customer service telephone number for EDD cardholders (in accordance with the instructions on the back of their Bank-issued debit cards) at any time from September 13, 2020 through November 21, 2020 and had their call routed to the Bank's Claims Call Center. ECF 494 at 96-97; ECF 324 at 1:27-2:2.

Jay Minnucci has worked in the call center industry for more than 40 years. Ex. 1 ¶5. He was retained by Plaintiffs to review Bank data related to its Claims Call Center and to evaluate the Call Center's performance during 2020 and 2021, in particular, to assess: whether and to what extent that performance fell below industry standards; whether the Call Center's operational processes and technology fell below industry standards; whether there were reasonable alternatives the Bank could have implemented to anticipate call volumes and increase staffing or otherwise reduce ASA wait times; and how to determine the Bank's "avoided costs" savings resulting from its understaffing decisions. *Id.* ¶ 2. In formulating his opinions, Minnucci considered hundreds of Bank documents, the Bank's 2020-2021 Call Metrics, Claims Call Center data in the Bank's Avaya database, ContactBabel publications from 2012 to 2020, declarations and depositions of the Bank's 30(b)(6) designees and other Claims Call Center personnel, and call center industry documents and other external sources. *Id.* ¶ 5, n.1, App. D, E, F, G, H, I.

Minnucci's principal opinion was that the Bank's Claims Call Center subjected callers to extremely long wait times, resulting in performance "far below" the industry standard: in contrast to the [redacted], the industry standard ASA was 75 *seconds*. *Id.* ¶¶ 12 & n.1, 48, 51-52. Minnucci reached this conclusion based on extensive review of Bank Call Center data, comparison of the Bank's performance to aggregate data in the 2021 ContactBabel U.S. Contact Center Decision-Makers' Guide (the "2021 ContactBabel Report"), which included performance data from 214 U.S.-based call centers, and on his own industry experience. *Id.* ¶ 12 & n.1. Minnucci also noted that because [redacted]. *Id.* ¶¶ 49-50. Even worse, because the ASA data only accounts for the time spent waiting on calls that are eventually answered and not the time spent by callers who eventually hang up while till on hold, [redacted]. *Id.* ¶¶ 14, 53, 55-57.

Next, Minnucci analyzed whether there were reasonable alternative procedures the Bank could have implemented to [redacted]. In conducting this analysis, Minnucci drew on his own significant and direct experience with call center staffing, industry publications, relevant Bank documents, including call center staffing reports, and deposition testimony of Bank employees. *Id.* ¶¶ 61-66. He determined that in 2020, the [redacted]. *Id.* ¶¶ 64-65. The Bank nonetheless ignored this [redacted]–a practice Minnucci concluded was completely inconsistent with industry practice and was known to result in [redacted]. *Id.* ¶¶ 1-66. Despite delays caused by this [redacted]. *Id.* ¶¶ 67-76. Minnucci accordingly concluded, given the [redacted]. *Id.* ¶¶ 15, 68-76.[2]

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[2] Minnucci also surveyed the then-available call center technology and determined that there were [redacted]. *Id.* ¶¶ 78-80.

Minnucci also made a series of straightforward calculations regarding the money the Bank likely saved by [redacted]. *See Id.* § VII.D. These calculations also rested on Minnucci's extensive industry experience and the data obtained through discovery and otherwise. *Id.*

First, to calculate the total number of *excess* hours that Customer Service Class members had to wait for their calls to be answered, Minnucci subtracted the industry standard ASA wait time from the Bank's average ASA wait time. *Id.* ¶ 107. He then multiplied the resulting average *excess* wait time per call ([redacted]) by the total number of calls made by Customer Service Class members to the Bank's Claims Call Center during the class period. *Id.*

Second, to calculate the Bank's "avoided cost" savings resulting from understaffing, Minnucci calculated the number of additional calls the Bank would have answered and handled with adequate staffing and the total estimated duration of all of those avoided calls, and compared that time to the Bank's actual call center hours to determine the difference, i.e., the time saved due to understaffing. *Id.* ¶¶ 107-113. To perform these calculations, [redacted] (i.e., callers who called and hung up before their calls were answered and then called again), Minnucci first estimated the distinct caller demand, or the estimated total number of unique individuals who called the Bank but whose calls were not answered. *Id.* ¶ 109. While the distinct caller demand number would have been easily determined from review of the Bank's own records if the Bank had maintained individual call record data from that period, the Bank insists that it kept no such records. *Id.* ¶ 110. In the absence of direct Bank data, Minnucci relied upon data created in the ordinary course of business from his own call center clients as a basis for estimating the likely proportion of Claims Call Center callers who did not call the Bank multiple times, and he explained in his Report why it was reasonable for him to use his own clients' data to make that comparison. *Id.* ¶ 110, Tbl. 9, App. H. Minnucci then multiplied the likely percentage of distinct callers by the total number of calls that were not answered before the caller hung up to calculate the total distinct caller demand. *Id.* To calculate the Bank's cost savings resulting from its failure to provide industry-standard service, Minnucci multiplied the distinct caller demand number by the average length of call time, yielding the total workload hours the Bank *should have* provided, and he subtracted from that number the Bank's actual paid workload hours to determine its net savings. *Id.* ¶ 111, Tbl. 10.

Minnucci also explained that call centers must build in and pay for agent idle time to achieve industry-standard ASA. *Id.* 112-113. In order to factor in the appropriate amount of idle time that should be built into his calculations, Minnucci applied the industry-standard Erlang-C formula, a methodology for determining staffing requirements based on distinct call volume and average call length. *Id.* Finally, to calculate the Bank's savings from avoided costs associated with agent idle time, Minnucci applied the Erlang-C formula to the Bank's distinct call volume and call lengths separately for each week during the class period. *Id.* ¶ 113, App. I, Tbl. 11.

III. LEGAL STANDARDS

Under Federal Rule of Evidence 702, a witness who is "qualified as an expert by knowledge, skill, experience, training, or education" may testify if the proponent of the expert's testimony demonstrates it is more likely than not that (1) "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;" (2) "the testimony is based on sufficient facts or data;" (3) "the testimony is the product of reliable principles and methods;" and (4) "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." "Rule 702 should be applied with a 'liberal thrust' favoring admission." *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014).

The trial judge has "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597; *accord Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). "[T]he test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology." *Daubert v. Merrell Dow Pharms., Inc. (Daubert II)*, 43 F.3d 1311, 1318 (9th Cir. 1995). "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013). "'[T]he factual basis of an expert opinion goes to the credibility of the testimony, not [] admissibility.'" *United States Equal Emp. Opportunity Comm'n v. Placer ARC*, 147 F. Supp. 3d 1053, 1060 (E.D. Cal. 2015) (quoting *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 n.14 (9th Cir. 2004)); *see also United States v. Sandoval-Mendoza*, 472 F.3d 645, 654–56 (9th Cir. 2006).

IV. ARGUMENT

Unable to dispute Minnucci's qualifications, the Bank first seeks to exclude Minnucci's "inputs and calculations" and then attacks his specific opinions on its avoided costs and whether the Bank acted deliberately. None of these challenges should succeed.

A. Minnucci's opinions on excess wait time are well supported by the evidence and his extensive industry experience.

Minnucci's principal opinion is that the wait times to which the Bank subjected Customer Service class members during the class period, an extraordinary [redacted] on average, far exceeded industry standards. Ex. 1 § VII.A. That opinion is fully supported by (1) Minnucci's analysis of the Claims Call Center performance data, which includes industry-standard performance metrics like average speed to answer and call abandonment rates, and (2) his understanding of call center industry performance standards, based on over 40 years of call center industry experience (including firsthand observation and analysis of hundreds of call center operations and performance metrics) as well as his review of the relevant industry literature and survey data, including data from the 2021 ContactBabel Report, a well-respected survey widely used throughout the call center industry that included performance metrics from 214 call centers, as well as other years of ContactBabel data. Ex. 1 ¶¶ 12 & n.1, 48, App. F. The Bank does not challenge Minnucci's analysis of the Bank's own call center data or his expertise to opine on the industry standard. Nor does the Bank seriously dispute Minnucci's conclusion that the Bank's ASA during the claims period [redacted]. Instead, the Bank mostly challenges the accuracy of the data used by Minnucci to quantify that difference, contending that the ContactBabel survey is not a sufficiently reliable source of information about what constitutes the industry standard. Bank Mot. 10-16. Those challenges go to weight, not admissibility.

1. Minnucci's opinions regarding industry standards are well-supported.

It is well established that "experts may testify about industry standards." *King v. GEICO Indem. Co.*, 712 Fed. App'x 649, 651 (9th Cir. 2017). The Bank nonetheless challenges Minnucci's use of the ContactBabel report to supplement his experience in determining the applicable industry standard for average call wait time. Bank Mot. 10-11. For "testimony about industry standards," though, "reliability depends heavily on the knowledge and experience of the expert rather than the methodology or theory behind the testimony." *Johnson v. Nat. Gas Fuel Sys., Inc.*, No. 1:19-CV-00105-SAB, 2024 WL 3718097, at *6 (E.D. Cal. Aug. 8, 2024). As Minnucci has explained, the results set forth in the ContactBabel report are fully consistent with his knowledge of the industry and his client experiences. Ex. 1 ¶¶ 12, 59.

The Bank contends that Minnucci should not be allowed to rest his opinion on the ContactBabel report, even in part, because he did not personally analyze the data underlying the ContactBabel survey results, and it further contends that the ContactBabel industry standard is not an appropriate benchmark for the Bank's performance. But "[t]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *Hangarter*, 373 F.3d at 1017 n.14 (citation omitted).

a. Minnucci was not required to review ContactBabel's underlying data because the survey is well accepted as reliable within the industry.

Federal Rule of Evidence 703 allows experts to rely on the kinds of facts or data that "experts in the particular field would reasonably rely on . . . in forming an opinion on the subject," whether or not those facts and data would otherwise be admissible. Indeed for "testimony about industry standards, . . . reliability depends heavily on the knowledge and experience of the expert rather than the methodology or theory behind the testimony." *Johnson*, 2024 WL 3718097, at *6; *Snead v. Wright*, 625 F. Supp. 3d 936, 939 (D. Alaska 2022) (same); *United States Fid. & Guar. Co. v. Ulbricht*, 576 F. Supp. 3d 850, 856-57 (W.D. Wash. 2021) (admitting evidence supported by knowledge and experience); *Christensen v. Lemaster*, 2006 WL 753227, at *3 (D. Idaho Mar. 21, 2006) (allowing expert on industry standards to "render an opinion on how far [defendant] strayed from those standards"). Here, the Bank does not challenge Minnucci's knowledge and experience from his 40 years in the industry. Instead, the Bank criticizes Minnucci for not having personally analyzed the data underlying ContactBabel's industry survey results even though "an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert*, 509 U.S. at 592; *see also Hangarter*, 373 F.3d at 1022, n.14 ("questions regarding the nature of [the expert's] evidence went more to the 'weight' of his testimony—an issue properly explored during direct and cross-examination"); *Primiano v. Cook*, 598 F.3d 558, 567 (9th Cir. 2010), *as amended* (Apr. 27, 2010) (expert's decision not to speak to party "might be useful to the jury as impeachment, but [did not] furnish[] an adequate basis for excluding his opinion"). Minnucci also explained that when his own clients ask him how their wait times compare with others, he turns to the ContactBabel survey for a benchmark. Ex. 2 (Minnucci Depo.) at 209:19-210:22. He also explained that the ContactBabel performance metrics were consistent with the industry standards that he was familiar with based on his own professional experience. Ex. 1 ¶ 40.

The Bank challenges Minnucci's opinions as conclusory and speculative, but its cited cases are inapposite. In *Stephens v. Union Pac. R.R. Co.*, 935 F.3d 852, 855-57 (9th Cir. 2019), for example, the court excluded expert testimony about secondary exposure to asbestos because the testimony depended on an assumption (that the plaintiff's father had been repeatedly exposed to asbestos at work and carried residue on his clothes back home), yet there was no evidence of significant exposure at his father's work and thus no basis for that assumption. *Id. Stephens* explicitly distinguished cases in which expert opinions "rest on actual data, not unfounded assumptions." *Id.* at 858. Here, the Bank does not and cannot argue that Minnucci has no basis for his conclusions; rather, it objects to the persuasiveness of his analysis. Such an argument is for a jury, not a *Daubert* motion.

Similarly, the Bank cites *McCoy v. DePuy Orthopaedics, Inc.*, 2024 WL 1705952, at *11 (S.D. Cal. Apr. 19, 2024), where the court excluded an expert who merely parroted the opinions of the hiring party's other experts. Unlike the expert in *McCoy*, Minnucci did not adopt another expert's conclusions as his own; he reviewed the Bank's call center data and analyzed it in comparison with the ContactBabel industry baseline. The *Daubert* inquiry is about the reliability of the method by which Minnucci conducted that analysis. The Bank may raise any perceived deficiencies on cross-examination, F.R.E. 705, but those arguments go to the weight a jury should place on Minnucci's opinion, not whether his methodology was reliable. *See United States v. W.R. Grace*, 504 F.3d 745, 765 (9th Cir. 2007) (argument about limitations of study relied on by expert "goes to the weight it should be accorded, but does not mean that an expert could not rely on it in forming an opinion").[3]

b. Minnucci had sufficient justification to use the ContactBabel benchmark as one basis for evaluating the Bank's Claims Call Center call wait-time performance.

The Bank's specific challenges to the ContactBabel survey as a comparator for evaluating the Bank's Claims Call Center performance also fail.

The Bank objects that the data underlying that survey is derived from call centers servicing multiple industries, not just banks or other financial institutions. Bank Mot. 12-15. As Minnucci explained, though, call center experts routinely rely on multi-industry

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[3] The Bank's citation to *Griffo v. Oculus VR, Inc.*, 2018 WL 6265067 (C.D. Cal. Sept. 18, 2018), is similarly inapplicable. In *Griffo*, the court excluded an expert who made the completely unsupported assertion that a copyright infringement led to 20% of the defendant's revenue. *Id.* at *5-6 (citing *Daubert*, 509, U.S. at 597). Minnucci's conclusions about the applicable industry standards are based on an identifiable source reasonably relied on by the field, not mere speculation.

data.[4] In his report, Minnucci explained that "it is standard practice for call center leaders to compare across industries when establishing performance targets" and that "multi-industry call center performance data is the best source for identifying ASA and abandonment rate benchmarks applicable to the Bank's Claims call center." Ex. 1 ¶¶ 41-43. At his deposition, he further explained that customers "don't pigeonhole their experience on a industry-by-industry basis," which is why call center leaders do not ask for targets "specific to the Finance and Outsourcing industries." Ex. 2 at 200:23–202:5.[5] In his rebuttal report, Minnucci further explained that "[b]ecause callers compare their experiences—and form their reasonable expectations—based on interactions with call centers in different industries, it is standard practice for call center leaders to compare across industries when establishing performance targets," and for that reason, "multi-industry call center performance data across call center types, like the data contained in the 2021 ContactBabel Report, is the best source for identifying industry-standard performance benchmarks that apply to even specialty call centers like the Bank's Claims call center." Ex. 3 (Minnucci Class Cert Rebuttal Rep.) ¶ 9; *see City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014) (test for inclusion "is not the correctness of the expert's conclusions but the soundness of his methodology") (citations omitted).

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[4] Contrary to the Bank's mischaracterization, Minnucci never conceded that multi-industry averages should not be used to set call wait-time performance targets for a company operating in a single industry. Mot. at 12. Rather, he consistently reiterated, in both his report and his deposition, that it is common for call centers to rely on inter-industry data for establishing benchmarks and setting performance targets. Ex. 1 ¶¶ 41-42; Ex. 2 (Minnucci Dep) 200:15-202:17.

[5] Even if there were "evidence in the record from which a reasonable factfinder could discredit [Minnucci's] conclusion," "[i]t is the jury's province to determine how much weight, if any, to give the conclusions reached by [Minnucci] or any of the experts at trial." *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 821 (9th Cir. 2014). "Weakness in the factual basis of an expert witness' opinion generally 'bear on the weight of the evidence rather than the admissibility.'" *Camenisch v. Umpqua Bank*, 763 F. Supp. 3d 871, 884 (N.D. Cal. 2025) (citation omitted).

In any event, Minnucci has explained that, "[a]lthough it is my opinion, for the reasons stated above, that multi-industry call center performance data is the best source for identifying an ASA benchmark applicable to the Bank's Claims call center, performance data specific to the Finance … industr[y] is available," and that industry-specific data shows that "[t]he average ASA reported in 2020 across the 29 Finance call centers surveyed by ContactBabel was 145 seconds (2.42 minutes)." Ex. 1 ¶ 43; Ex. 3 ¶ 33. "Even if one were to limit the comparison group to the 29 Finance call centers in the survey, the Bank subjected EDD cardholders to an average wait time that was [redacted]—longer than the 2 minute 25 second average of the Finance call center peer group." *Id.* ¶ 34. Thus, "[r]egardless of whether one compares the Bank's Claims call center to the Finance group … or all call centers, the performance of the Bank's Claims call center is exceptionally poor and impacted all or nearly all CA EDD callers." *Id.*

Next, the Bank points to supposed differences between the call centers surveyed by ContactBabel and the Claims Call Center. Bank Mot. 12-15. But disputes about the appropriateness of a benchmark go to weight, not admissibility, as a party "can cross-examine [the expert] on whether he accounted for all the relevant differences between the benchmark and [the circumstances] in this case." *Roblox Corp. v. WowWee Grp. Ltd.*, 2024 WL 4057418, at *14 (N.D. Cal. Sept. 3, 2024).[6] Moreover, Minnucci has explained why he believes the Bank's performance during the class period was indicative of its performance throughout 2020 and 2021, making data from all of 2020 an appropriate baseline industry standard. Ex. 1 ¶¶ 82-105.

[6] *See also Sonos, Inc. v. Google LLC*, 2023 WL 3933071, at *6 (N.D. Cal. June 9, 2023) ("that a benchmark product is an imperfect benchmark product, or that there exists a better benchmark product, goes to evidentiary weight, not admissibility"); *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 576 (N.D. Cal. 2020) (failure to account for certain variables "go to weight and not admissibility"). In particular, these questions do not go to admissibility because, if the Bank's position were adopted, a jury that found the *fact* of damage (based on the [redacted] average wait time) would be deprived of any basis for determining the resulting *amount* of damages.

The Bank next argues that Minnucci should not be permitted to place any reliance on pre-pandemic ContactBabel survey data because the Bank’s Claims Call Center experienced an [redacted] during part of the class period. Bank Mot. 13-14. Minnucci explained, though, that the data was relevant because there was considerable evidence that the Bank [redacted] (as shown in Figure 3 from his report, pasted below). Ex. 1 ¶¶ 52-53, 58-60; Ex. 2 at 76:8-77:8. Indeed, Minnucci’s testimony is undisputed that by July 2020, the Bank had [redacted].” Ex. 1 ¶ 67.[7]

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[7] Additionally, the Bank points to the EDD’s decision to waive the Bank’s ASA and related call center service-level obligations. Bank Mot. 14. That waiver language has nothing to do with Minnucci’s ability to testify as an industry expert concerning excessive wait times during the class period. Moreover, the actual waiver language falls far short of the Bank’s characterization. What the contract actually stated was that the Bank’s failure to perform its ASA obligations “will be excused if such failure occurs *despite the Bank’s use of efforts that are commercially reasonable* in the context of the COVID-19 pandemic.” Ex. 4 (Bank Letter to EDD) (emphasis added). As previously discussed and shown in Figure 3, the Bank’s failure to adjust its staffing to manage its call volume was far from commercially reasonable. Moreover, Minnucci has also testified that the Bank also failed to use readily available technology and procedures that would have substantially improved waiting time performance. Ex. 1 ¶¶ 74-81.

[redacted]

The Bank cites several cases to support its challenge to Minnucci's reliance on pre-pandemic ContactBable survey data as an appropriate comparator. Those cases are readily distinguishable and unpersuasive.

The Bank first cites the tentative ruling in *Goodness Films, LLC v. TV One, LLC*, 2014 WL 12780291, at *2 (C.D. Cal. May 19, 2014), where the party offering the expert testimony expressly conceded that the examples cited were not meant to be comparators. *Id.* The Bank then cites *Multimedia Pat. Tr. v. Apple Inc.*, 2012 WL 5873711, at *9 (S.D. Cal. Nov. 20, 2012), where the court's decision was narrowly tailored to the requirements for calculating reasonable royalty damages under patent case law. The citation to *Faust v. Comcast Cable Commc'ns Mgmt., LLC*, 2014 WL 3534008, at *5 (D. Md. July 15, 2014), is inapposite because the plaintiffs had represented they would not offer expert testimony and the offered report was prepared for a different action. Finally, *Remien v. EMC Corp.*, 2008 WL 597439, at *1 (N.D. Ill. Mar. 3, 2008), is not analogous because the expert there conceded that none of his studies assessed the relevant practice and that he "chose to arbitrarily eliminate relevant portions of data." *Id.* In contrast, Minnucci has explained that the ContactBabel survey provided an industry-standard ASA, and he has explained why this standard provides an appropriate comparison for the Bank's performance. Ex. 1 ¶¶ 12-14, 40-43, *supra* § IV(A)(1)(b).

For these reasons, the Bank's purported justifications for its Claims Call Center's deplorable performance metrics do not require the exclusion of any of Minnucci's opinions, let alone all of them. *See Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1037–38 (9th Cir. 2010) (admitting results from survey although it "failed to replicate real world conditions, failed to properly screen participants, and was 'highly suggestive,'" because "these criticisms, valid as they may be, go to 'issues of methodology, survey design, reliability, ... [and] critique of conclusions,' and therefore 'go to the weight of the survey rather than its admissibility'").

2. Minnucci's analysis of the Bank's Claims Call Center data is reliable.

In assessing the impact of the Bank's excessive call wait times on Customer Service class members during the class period, Minnucci relied on the Bank's own data. Ex. 1 ¶ 107. The Bank challenges Minnucci's use of that data to establish average Claims Call Center wait times because (1) some class members experienced shorter wait times, so they would be overcompensated (while others would presumably be undercompensated), and (2) the Bank's aggregate Claims Call Center data includes data from non-class members. Bank Mot. 15. Both arguments fail.

First, while it of course true that some class members waited shorter or longer times than the average, at issue is the Bank's aggregate damages liability, which is permissibly based on averages. *See, e.g., Khadera v. ABM Industries Inc.*, 2011 WL 6813454, at *1, 6 (W.D. Wash. Dec. 28, 2011) (allowing expert testimony calculating damages by applying average amount for representative group to the whole class); *Ngethpharat v. State Farm Mut. Auto. Ins. Co.*, 2025 WL 2161754, at *11 (W.D. Wash. July 29, 2025), *amended*, 2025 WL 2372904 (W.D. Wash. Aug. 14, 2025) (permitting expert to calculate classwide damages based on average damages amount and class size).

Second, Minnucci explained why, based on his experience and expertise, he believed that the Bank's ASA data appropriately captured the class members' experiences. *Contra*

Bank Mot. 15–16. According to Minnucci, it was reasonable for him to conclude that "EDD cardholders experienced the same average wait times as all prepaid cardholders routed to the same call centers," because those EDD cardholders accounted for most of the Claims Call Center's call volume after the pandemic began and because all callers to the Bank's Claims Call Center were routed in the same manner. Ex. 1 ¶¶ 29-30. Minnucci further explained that to the extent EDD cardholders' experiences differed from the experiences of other callers, those class member cardholders would likely have experienced *longer* wait times because they were in California and thus were unlikely to receive the faster early morning service available when the Bank first opened at 8:00 a.m. Eastern/5:00 am Pacific. *Id.* ¶ 31. Where, as here, an expert has explained why a dataset is comparable to class members' experience, challenges to the reasonableness of that opinion go to weight, not admissibility. *See Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 968–69 (9th Cir. 2013) (admitting opinion extrapolating data from City of Juneau to estimate entire Alaska car market and applying a national market share comparison to Alaska).

It was particularly reasonable for Minnucci to rely on the Bank's aggregated Claims Call Center data because that was the only data the Bank kept and provided. The Bank failed to maintain that data on an individual caller basis, and it did not [redacted]. Ex. 2 at 134:20–135:5, 398:20-399:11; *Ruiz v. XPO Last Mile, Inc.*, 2017 WL 2263046, at *2 (S.D. Cal. May 23, 2017) (admitting expert's use of averages because a defendant "cannot be heard to complain that the damages [calculations] lack the exactness and precision of measurement that would be possible had he kept records") (citation omitted).

The Bank's cited cases are again inapposite. In *Claar v. Burlington N. R. Co.*, 29 F.3d 499, 500-02 (9th Cir. 1994), the court found the experts' conclusions were based only on subjective belief and unsupported speculation because they never explained their reasons and methods despite repeated orders from the court to do so and they made no effort to rule out other possible explanations. In contrast, Minnucci has explained his methods and why the aggregated data reliably describes the class members' experiences.

Ex. 1 ¶¶ 29-31. Again, "[t]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility." *Hangarter*, 373 F.3d at 1017 n.14 (citation omitted).[8]

B. Minnucci's Avoided-Cost Opinions Are Reliable.

The Bank challenges Minnucci's calculations of the Bank's avoided costs due to understaffing as unreliable, repeating its unfounded and legally incorrect critiques of Minnucci's reliance on the 2021 ContactBabel Report and his own clients' sample data, Claims Call Center data that was [redacted], and the industry-standard Erlang-C formula to calculate idle time. Bank Mot. 16-22. The Bank's disagreements with Minnucci's well-reasoned and supported methodologies are not grounds for their exclusion.

1. Minnucci permissibly relies on his own clients' sample data.

The Bank first argues that Minnucci's distinct, i.e., non-repeat, caller calculation must be excluded because it rests in part on undisclosed data from unspecified clients of Minnucci's operating in different industries pre-pandemic. Bank Mot. 17-19.[9] As Minnucci explained, an exact determination of the distinct caller demand number could have been made using the Bank's own call record data to isolate phone numbers that called once, abandoned the call, and then never called back, but the Bank stated that it did not maintain that data. Ex 1 ¶ 110. Minnucci explained that the next best thing was to use data from other clients, which is why he relied on data from his own clients which he had previously

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[8] The Bank also cites *Lloyd v. Conseco Fin. Corp.*, 2001 WL 36097624, *6 (C.D. Cal. Oct. 19, 2001), in which the court rejected an expert opinion as irrelevant (not unreliable), because it did not speak to the issue in dispute and made no effort to screen for other variables. In contrast, the [redacted].

[9] Plaintiffs did not produce Minnucci's underlying client data because it included client names and was proprietary. The Bank did not object, request a meet and confer, or move to compel for Plaintiffs to produce Minnucci's clients' data.

shared with other clients interested in distinct caller analyses. *Id.*; Ex. 2 at 407:7–13, 410:22–411:13.

The Bank contends that any opinion given by Minnucci that relies in whole or in part on his distinct caller calculations must be rejected because his clients did not operate call centers in exactly the same industry or time period as the Claims Call Center during the class period. But Minnucci explained that distinct caller calculations are typically based on abandonment and re-call rates, that he used the Bank's own abandonment rate, and that he was able to calculate the relationship between abandonment rate and re-call rate using his clients' data because this relationship remains fairly constant across industries and time. Ex. 1 ¶¶ 36, 53, App. H; Ex. 2 408:2-23, 409:3-10, 413:24-414:5, 414:7-20, 415:1-8, 419:11-420:6.

The Bank challenges that explanation, based on its reading of two trial court rulings, *Goodness Films,* 2014 WL 12780291, and *Loeffel Steel Prods., Inc. v. Delta Brands, Inc*., 387 F.Supp.2d 794, 812-13 (N.D. Ill. 2005). But as previously explained, the court in *Goodness Films*, 2014 WL 12780291, at *2, excluded an expert's opinion because it was based only on his experience rather than any principle or method, and because it provided comparisons even though the plaintiff had specifically "argue[d] that the examples in the [] report [were] not meant to be comparisons." Here, Minnucci has explained that the data supplied by his consulting clients is an appropriate comparison because of the consistency in re-call rates across industries; indeed, he bills his own consulting clients for similar analyses using this cross-industry data. *See* Ex. 2 at 411:1-13, 414:7-415:8, 419:19-22.

Loeffel also does not help the Bank's argument. In that case, the court rejected comparators that the expert determined were comparable by tacitly assuming that "each participant in 'an industry' necessarily competes with every other participant in the industry," even though this assumption itself was "demonstrably false, as [the expert]'s own report show[ed]." 387 F. Supp. 2d at 812-13. Here, by contrast, Minnucci explained that re-call rates from his clients' call centers are appropriate comparators for the Bank's Claims Call Center because those rates tend not to change much between industries, and because the specific data he used has already proven effective as a benchmark for other clients. Ex. 2 at 411:1-13, 419:19-420:6. To the extent the Bank disputes these factual premises, "[t]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility." *Hangarter*, 373 F.3d at 1017 n.14 (citation omitted).

Next, the Bank challenges Minnucci's reliance on his clients' re-call statistics because he did not personally verify their accuracy. The Bank cannot dispute that Minnucci came up with his own regression analysis to apply to that data, Ex. 2 at 405:6-13, so it takes issue with the fact that Minnucci relied on the re-call rates his clients determined by identifying which abandoned calls resulted in re-calls. Bank Mot. 18 (citing Ex. 2 at 407:17-23, 408:2-5). But "[t]he fact that [an expert]'s opinions are based on data collected by others is immaterial." *Southland Sod Farms v. Stover Seed Co*., 108 F.3d 1134, 1142 (9th Cir. 1997). The Bank again cites cases where an expert adopted the *hiring party* or its other experts' *conclusions* without analysis. *See supra* at 10 (distinguishing *McCoy*, 2024 WL 1705952, at *11).[10] These cases are clearly distinguishable because Minnucci did not parrot anyone else's opinions but prepared his own calculations using data from his other clients. Ex. 1 App. H, Ex. 2 at 407:3-8. "Experts can rely on data provided to them without independent verification because the 'factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.'" *Mighty Enters., Inc. v. She Hong Indus. Co*., 745 F. App'x 706, 709 (9th Cir. 2018) (quoting *Hangarter*, 373 F.3d at 1018 n.14).

The Bank also rehashes its earlier argument that Minnucci's model failed to account for significant variables that may have affected the Bank's re-call rates such as the [redacted]

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[10] *See also Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534, 546 (C.D. Cal. 2012) (excluding opinion of expert who "reproduced [the hiring party's other expert's] declaration wholesale (*including its typographical errors*) as his own work") (emphasis in original); *Legendary Art, LLC v. Godard*, 2012 WL 3550040, *4 (E.D. Pa. Aug. 17, 2012) (rejecting breach of contract damages opinion as unreliable because it merely adopted an interested party's unsupported, subjective opinion of the business' estimated profit/loss and the expert disclaimed any familiarity with the industry).

[redacted]. But the Bank's own cases acknowledge the general rule that "flaws in a proffered expert's analysis typically go to the weight, rather than the admissibility, of the expert's testimony." *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 973 (C.D. Cal. 2012) (citing *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002). Only if the analysis is "so incomplete as to be inadmissible as irrelevant" should the opinion be excluded. *Id.* (citation omitted).[11] And the party challenging the relevance must show the variables omitted from the analysis were "major factors" and their inclusion would have impacted the results. *Id.* at 974. The Bank's mere assertion of possible other variables is not enough, and its failure to proffer counterevidence supporting its claims distinguishes the present case from those it cites. *Cf. Camenisch v. Umpqua Bank*, 763 F.Supp.3d 871, 884 (N.D. Cal. 2025) (arguments about assumptions underlying expert conclusion go to impeachment not admission).

2. Minnucci's avoided workload calculations are reliable.

After calculating distinct caller demand, Minnucci multiplied this number by average call length to determine the total workload hours needed to provide those callers with industry-standard performance levels. Ex. 1 ¶ 111. To determine the Bank's avoided workload charges, he then subtracted the workload hours the Bank actually incurred. Ex. 1 Tbl. 10. The Bank contends that Minnucci's opinion about avoided workload charges is flawed because he relied on [redacted]. Bank Mot. 19-20. But Minnucci appropriately relied on [redacted]. Ex. 3 (Minnucci Reb) ¶ 24; Ex. 2

[11] For instance, in *Kim v. Benihana, Inc.*, 2024 WL 3550390, *5-6 (C.D. Cal. May 20, 2024), the court excluded conclusions that were blindly reliant on a study about an entirely different type of sushi than the one at issue in the case. In contrast, here, Minnucci has carefully explained why his sources appropriately inform his conclusions about the call center waits at issue here and are not so incomplete as to be irrelevant. *See also supra* n.7 (distinguishing *Lloyd*).

(Minnucci Dep) at 450:9-451:9. Thus, [redacted]. Ex. 1 ¶¶ 106-112.

3. Minnucci's idle hour charges calculations are reliable.

The Bank also attacks Minnucci's calculated avoided costs associated with agent idle time. To calculate the minimum number of idle hours required to achieve the industry standard ASA, Minnucci input the Claims Call Center data into the industry standard measure of the Erlang-C formula, which is frequently used by call centers to estimate upcoming staffing needs. Ex. 1 ¶¶ 112–13, Tbl. 11, App. I. The Bank contends that this methodology is so unreliable and so unsupported by the record that it must be stricken.

The Bank starts by asserting that Minnucci's reliance on Erlang-C is not consistent with the industry's typical use of that formula. But Minnucci explained that the Erlang-C formula is in fact "most commonly employed by call centers to estimate staffing needs." Ex. 1 ¶ 112. He also explained at his deposition that many call centers, including call centers operated by own clients, have used the Erlang-C for this purpose:

> **Defendant**: Have you advised any of your clients to use the Erlang-C formula?
> **Minnucci**: Absolutely. It's -- it's almost -- it really is assumed -- I don't have to say it, if they're using workforce management system, they're – they're using it, or a slightly modified version of it. If they're using a calculator, it's Erlang-C. If they're using an add-in to Excel, it's Erlang-C. It is the standard beyond question in – in any call center that does this kind of work.

Ex. 2 at 440:13–24.

Unable to contest the general reliability of Erlang-C, the Bank argues that Minnucci's methodology is improper because he applied Erlang-C retrospectively to model and predict past staffing needs, even though call centers generally use Erlang-C prospectively to forecast future staffing requirements. Bank Mot. 20–21. But the Bank acknowledges that Erlang-C is regularly used by call centers to predict the number of agents a call center may need, and there is no reason it cannot be applied to historical data to show what the outcome would have been had it been properly used earlier. After all, Minnucci simply used the Erlang-C to calculate the amount of staffing that the Bank could and should have projected (and then hired and paid for) based on the [redacted]. Ex. 1 ¶¶ 112-113. "Rule 702 is satisfied where the proffered testimony is based on scientifically valid principles.'" *Daubert II*, 43 F.3d at 1316. To the extent the Bank is arguing this valid method is "'not appropriate for or used in [this circumstance,]' [t]his challenge plainly goes to the weight of the evidence." *JH Kelly, LLC v. AECOM Tech. Servs., Inc.*, 605 F. Supp. 3d 1295, 1311 (N.D. Cal. 2022).

The Bank also points to several websites about Erlang-C that the Bank has not indicated are properly subject to judicial notice and to a supposed concession at Minnucci's deposition to argue that Erlang-C is not reliable here because its underlying assumptions were not present during the class period. Bank Mot. 21-22. The Bank has not explained why the Court may properly consider the websites it cites, or why its interpretation of the facts trumps Minnucci's expert opinion. "Rule 702 does not license a court to engage in freeform factfinding, to select between competing versions of the evidence, or to determine the veracity of the expert's conclusions at the admissibility stage." *Hyer v. City & Cnty. of Honolulu*, 118 F.4th 1044, 1058 (9th Cir. 2024) (quoting *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1026 (9th Cir. 2022)).

Even if the Bank had presented its competing views on the applicability of Erlang-C through the testimony of its own expert, that could not change the result because the Bank "fails to cite any cases holding that an expert's opinion is unreliable and should be excluded merely because it differs from other expert opinions." *United States v. Nichols*, 786 F. App'x 624, 628 (9th Cir. 2019). Instead, "cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion under an uncompromising 'general acceptance' standard, is the appropriate means by which evidence based on valid principles may be challenged." *Daubert*, 507 U.S. at 596.

C. Minnucci's Workforce Management opinion is well-supported and helpful.

In support of his opinion that the Bank's understaffing of its Claims Call Center in the face of foreseeable call volume surges was inconsistent with industry standards, Minnucci explained that the Bank could have relied on the forecasts of the [redacted]. Ex. 1 ¶¶ 63-65. A WFM team in a call center is responsible for forecasting incoming call volumes and associated average handling times and projecting the number of staff needed to meet performance goals. Ex. 1 ¶¶7(c), 63. Here, the record shows [redacted].

The Bank's assertion that Minnucci's opinion is not supported by the record is therefore incorrect. Bank Mot. 22-23. The Bank contends that it used its [redacted] Ex. 1 ¶ 65; Bank Mot. 23 (citing Ex. 5). Moreover, the [redacted] Ex. 5. Even though the Bank's expert Steve Hindle had a different view of the [redacted], the Ninth Circuit has rejected the notion that "an expert's opinion is unreliable and should be excluded merely because it differs from other expert opinions." *Nichols*, 786 F. App'x at 628. While the Bank also tries to gain traction for its argument by asserting that the [redacted], that assertion again goes to weight, not admissibility. *Daubert*, 507 U.S. at 596.

The Bank's assertion that Minnucci did not adequately explain how the [redacted], Bank Mot. 23, also goes to weight but carries little, since the [redacted]. Ex. 1 ¶ 64. ([redacted]) Minnucci's opinion is thus clearly supported by the record, while it is the Bank's own "expert [who] has not grounded his assumption with the real world facts of this case." *Brighton Collectibles, Inc. v. RK Tex. Leather Mfg.*, 923 F. Supp. 2d 1245, 1255 (S.D. Cal. 2013).

D. Minnucci's Opinions on the Deliberateness of the Bank's Staffing Decision Are Based on Extensive Industry Experience and Will Assist the Trier of Fact.

At various points in his report, Minnucci refers to evidence that the Bank allowed its [redacted]. *See, e.g.*, Ex. 1 (Minnucci Rep) ¶¶ 68-74). The Bank argues that these straightforward assessments must be stricken as inadmissible state-of-mind opinions. Bank Mot. 24-25. While Federal Rule of Evidence 704(b) provides that "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense," that Rule "does not apply in civil cases." *Diaz v. United States*, 602 U.S. 526, 534 (2024). Instead, "generally, experts may offer testimony about a person's state of mind in civil cases." *N. Wind Constr. Servs., LLC v. Campos EPC, LLC*, 2023 WL 196618, at *5 (D. Idaho Jan. 13, 2023) (citing Fed. R. Evid. 704 (a)–(b)). Even in criminal cases, courts have rejected Rule 704(b) challenges to experts opining on industry practice and, for instance, "how [a defendant's] call center and its practices aligned (or did not align) with [industry] norms." *United States v. Zafaranchi*, 2024 WL 3924705, at *4 (W.D. Wash. Aug. 23, 2024) (citations omitted).

The Bank cites cases excluding experts who did not have relevant knowledge or expertise allowing them to opine on the subjective state of mind or motives of the defendant. Bank Mot. 24-25. Those cases are not analogous because Minnucci is not speculating unjustifiably about a party's subjective motive but rather applying his expertise about the industry to reach reasoned conclusions. *See Camenisch*, 763 F. Supp. 3d at 882 (distinguishing inadmissible state of mind opinions from admissible testimony about industry practices and atypical behaviors that assist jury in evaluating whether to draw an inference of knowledge). Minnucci clarified in his deposition that he is "not in any way commenting on somebody's state of mind." Ex. 2 at 356:4-7. Instead, his opinion that the Bank "deliberately" understaffed the call center is based on his analysis of the Bank's staff data, which shows that the [redacted]. Ex. 1 ¶¶ 67-68; Ex. 2 at 354:4-22, 355:16. That opinion is also based on his observation of the [redacted]. Ex. 1 ¶¶ 59-71. These are not opinions on the Bank's "state of mind," but are permissible opinions rooted in Minnucci's 40+ years of relevant industry experience and his analysis of the Bank's own records and data.

V. CONCLUSION

Minnucci's opinions are relevant, reliable and will assist the trier of fact. They should be admitted under Rule 702. Accordingly, Plaintiffs respectfully request that the Court deny the Bank's motion to exclude his expert opinion testimony.

Respectfully submitted,

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SIGNATURE ATTESTATION

Pursuant to section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I, Brian Danitz, attest that the other signatories listed, and on whose behalf this filing is submitted, concur in the filing content and have authorized this filing.

Dated: January 8, 2026

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