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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 DAVID I. LEVINE**
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

The Bank seeks to exclude three opinions offered by Dr. David I. Levine: (1) that, consistent with 'well-established concept[s] in economics,' a compound interest rate is an appropriate measure of the opportunity cost of delayed access to Unemployment Insurance ("UI") benefit funds, Declaration of Vasti S. Montiel ("Montiel Decl.") Ex. A (Levine Report ¶¶9-11, 15-30), (2) that the credit card interest rate of 15.9% is a reasonable, indeed conservative, proxy for the opportunity costs suffered by class members who were deprived of access to their UI benefits, and (3) that the minimum wage is a reasonable, and again, conservative measure of the value of lost time for the customer service class.[1]

Under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 580 (June 28, 1993), expert testimony is admissible if it can "assist the trier of fact to understand the evidence or determine a fact in issue." The Bank contends that each of Dr. Levine's opinions is inadmissible because they are not sufficiently tied to specific experiences of individual class members and because they are "conservative." But expert witnesses are "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 America, Inc. v Secure Investments, Inc.*, 266 F.3d 993, 1004 (9th Cir. September 14, 2001).

Dr. Levine, who is undisputedly qualified to testify as a labor and household economist, applied reliable principles and methods that are widely accepted in his discipline to the facts and data he reviewed. His opinions are fully consistent with this Court's rulings on class certification that (a) the Bank's classwide damages liability for the Credit Denial, Credit Rescission, Account Freeze, and EMV Chip classes may be calculated by multiplying the principal amounts by a compound interest rate that

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[1] The Bank does not seek to exclude Dr. Levine's opinion that UI benefits were used during the pandemic to cover the cost of such necessities as bills, rent, childcare, and healthcare. Montiel Decl. Ex. A (Levine Report ¶¶33, 36-37, 40, 42).

approximates, on a classwide basis, the time value of the money to which class members were denied access, and that the question of "which interest rates should be applied is an issue for the fact finder," ECF 494 at 86-87 and (b) damages for the Customer Service Class can be measured classwide by multiplying "the average excess hold time" by the minimum wage or some "other reasonable metric." ECF 494 at 88-91. At best, the Bank's arguments go only to the weight that the fact finder should assign to Dr. Levin's testimony—not to its admissibility. The Bank's *Daubert* motion should be denied.

II. BACKGROUND

This class action challenges the Bank's treatment of unauthorized transaction claims by unemployed Californians during the COVID-19 pandemic. From 2011 to February 2024, the California Employment Development Department ("EDD") exclusively contracted with the Bank to distribute unemployment insurance, disability insurance and paid family leave benefits to Californians through bank-issued EDD prepaid debit cards. Plaintiffs allege that the Bank implemented practices that systemically deprived more than 100,000 Californians of access to their benefits. On June 16, 2025, this Court certified five classes: (1) Claim Denial class, (2) Credit Recission class, (3) Account Freeze class, (4) Customer Service class, and (5) EMV Chip Class. ECF 494 at. 96-97. The class period is from September 28, 2020, when the Bank implemented the Claim Fraud Filter Indicator 1 ("CFF-1"), to June 8, 2021, when the Preliminary Injunction issued in this case, preventing the Bank from continuing to use CFF-1 to automatically deny unauthorized transaction claims, rescind permanent credits, and freeze accounts. ECF 494 at 9-14.

In its order on class certification, this Court recognized that consequential damages for the Credit Denial, Credit Rescission, Account Freeze, and EMV Chip classes could be calculated by multiplying the principal amount of actual damages by a compound interest rate. ECF 494 at 85-87. The Court held that the precise compound interest rate to be applied was "an issue for the fact finder." *Id.* at 86. As discussed further in Plaintiffs' opposition to the Bank's motion to exclude the testimony of Greg Regan, the Court rejected a second methodology proposed by Mr. Regan that would have been based on the assumptions the

Bank itself had used in calculating payments under the [redacted] with its two government agency regulators, the CFPB and OCC. *Id.* at 86-87.

Dr. Levine is an expert in the field of labor and household economics. Montiel Decl. Ex. A (Levine Report ¶¶ 1-3, 7 & App. A). He has a B.S. in Economics from the University of California, Berkeley, and an M.A. and Ph.D. in Economics from Harvard University. He has been the Trefethen Professor at the Haas School of Business, University of California, Berkeley, since 2006. He has published widely in labor and household economics and has consulted with a myriad of public and private organizations, including the US Department of Labor, the World Bank, the Bill and Melinda Gates Foundation, and UBS. The Bank does not dispute Dr. Levine's qualifications as an economic expert.

In arriving at his opinions, Dr. Levine analyzed case materials, including the expert reports of Plaintiffs' damages expert Greg Regan and the Bank's expert economist Victor Stango, literature concerning the behavior and necessities of recipients of UI benefits during the relevant time period (both in California and nationally), literature on UI recipients' borrowing needs while unemployed; studies showing what alternative options are available to UI recipients who are denied access to their funds, academic studies and literature regarding the value individuals and institutions place on time, and data from the U.S. Census Bureau and the CFPB regarding the employment status and borrowing needs of households during the pandemic (again, both in California and nationally). Montiel Decl. Ex. A (Levine Report ¶¶ 19-30, 37-40, 49-52 & App. B.).

Dr. Levine does not purport to opine on the legal questions of whether the use of a compound interest rate is a permissible methodology by which to approximate damages on a classwide basis, or whether a "reasonable metric," like the minimum wage, may permissibly be used to approximate on a classwide basis the value of the excess waiting time to which the Customer Service class was subjected—questions this Court has already settled. ECF 494 at 86-87, 89-91. Instead, drawing upon the sources identified above, he explains that reliance upon "aggregate measure[s] of harm" is "common practice in the discipline of economics," and that a compound interest rate is economically "an appropriate way to measure the harm caused by the Bank's policies and practices." Montiel Decl. Ex. A (Levine Report ¶¶9-11). Based on his analysis of scholarship and data concerning "how recipients use UI benefits and what alternative options are available to recipients who are denied access to their funds," he concludes that it is unlikely that "the typical class member…could fall back on savings to cover expenses the whole time their UI benefits were denied," both because "UI recipients in general have lower levels of savings than those who were employed" and because, in general, "families with uncertain delays [in receiving UI benefits] will not want to deplete all of their savings—especially if they have children or other reasons to be risk averse." *Id.* ¶¶17, 34-35. Relying on that same literature and data—which show that the population of UI recipients is especially likely to be denied credit, to receive less credit than they seek, and to be forced to cut spending on necessities such as food and medical care—Dr. Levine concludes that a 15.9% interest rate (the lower end of credit card interest rates he finds California UI recipients would have faced) is "a conservative lower bound on the average opportunity cost" of being denied access to UI benefits. *Id.* ¶¶36-45. After all, class members faced with "sudden" loss of access to the benefits on which they depended could not have known in advance, at the time of the deprivation, "if and when their UI [benefits] would arrive," much less that they would arrive only after a preliminary injunction or after the Bank [redacted] with its regulators—a fact that surely compounded the adverse impacts associated with the dire circumstances they faced. *Id.* ¶¶19-30, 36, 43

As to the Customer Service Class, Dr. Levine explains that "[e]conomists frequently measure the value of time" and that it is "typical," even for economists who use "very different methodologies," to measure the value of time with the median wage. *Id.* ¶¶46-49 (citing analyses performed by the National Academies of Sciences, Engineering, and Medicine, the U.S. Department of Transportation, and the National Bureau of Economic Research). "To err on the side of a conservative estimate," he opines that the minimum wage, rather than the median wage, "is an appropriate measure of the value of time UI beneficiaries in the Customer Service Class spent waiting on hold for the Bank's assistance." *Id.* ¶¶53-55.

III. LEGAL STANDARD

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 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." 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).

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 the plaintiff must prove[] in order to be admissible." *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. June 19, 2010). "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." *U.S. v. 17.69 Acres of Land*, 2004 WL 5632928 at *1 (S.D. Cal. December 20, 2004) (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. August 3, 2001) (citations omitted); *see also City of Pomona v. SQM North America Corp.*, 750 F.3d 1036, 1044 (9th Cir. May 2, 2014) ("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.")

IV. ARGUMENT

A. Dr. Levine's Testimony Will Assist the Trier of Fact

In assessing whether an expert's opinion satisfies the *Daubert* standard, "'[t]he district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury.'" *City of Pomona*, 750 F.3d at 1044 (citing *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.,* 738 F.3d 960, 969-70 (9th Cir. 2013)). An expert's testimony should be admitted where Plaintiffs' damages model for assessing consequential damages for the lost time value of money is attributable to their theory of liability and can be calculated for the class as a whole. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35; *Van v. LLR Inc*., 962 F.3d 1160, 1164-1165 (9th Cir. June 24, 2020); *Hunt Foods, Inc. v. Phillips*, 248 F.2d 23, 33 (9th Cir. August 7, 1957) ("The fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery.")

In support of Plaintiffs' motion for class certification, Plaintiffs' damages expert, Greg Regan, proposed two alternative methodologies for calculating the Bank's total damages liability, including the aggregate classwide damages attributable to the Claim Denial, Credit Rescission, and Account Freeze class members due to their lost access to UI benefit funds. His "Methodology 1" proposed to calculate those damages by applying to the class members' principal damages amounts a uniform, compound interest rate that reflected the time value of money for this particular population (unemployment insurance beneficiaries during the height of the pandemic) who were deprived of access to UI benefit funds without any basis for knowing when or if such access would be restored. ECF 494 at 86. In accepting this proposed methodology for calculating aggregate classwide damages, the Court recognized that consequential damages for the Credit Denial, Credit Rescission, Account Freeze, and EMV Chip classes could be calculated by multiplying the principal amount of actual damages by a compound interest rate. ECF 494 at 85-86. Unlike

Regan's "Methodology 2," which [redacted] into which it entered with the CFPB and the OCC, nothing about "Methodology 1" or in Dr. Levine's testimony has anything to do with the Bank's [redacted]. *Supra* at 2-3.

Instead, as explained above, Dr. Levine analyzed substantial data in formulating his expert opinion on an appropriate interest rate that reflects the "time value" of the UI benefits that were delayed or denied by the Bank's challenged treatment of unauthorized ATM transaction claims. Montiel Decl. Ex. A (Levine Report ¶¶5, 16). Based on his expertise as a labor economist, economic studies analyzing how recipients use UI benefits and what alternative options are available to recipients who are denied access to their funds, studies concerning California UI benefits recipients, and information concerning this case and the class, Dr. Levine opines that a 15.9% interest rate is an appropriate measure of the "time value" or "opportunity costs" of the class members' lost access to those funds. *Id.* ¶¶1-3, 5, 7, 15, 16, 17, 29, 33, 45. This interest rate falls squarely between the 10% and 20% interest rates proposed by Mr. Regan. ECF 494 at 86. Dr. Levine's well-founded opinion is relevant and will assist the factfinder in determining what interest rate should apply to Plaintiffs' damages model. ECF 494 at 86 (determining which interest rates should apply to be "an issue for the fact finder."); *Daubert,* 509 U.S. at 587 (evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); *United States v. Sandoval-Mendoza,* 472 F.3d 645 (9th Cir. December 27, 2006) ("Expert opinion testimony is relevant if the knowledge underlying it has a 'valid connection to the pertinent inquiry.'"); *EFCO Corp. v. Symons Corp.*, 219 F.3d 734, 739 (8th Cir. 2000) (district court did not abuse its discretion by allowing plaintiff's expert who possessed adequate credentials to testify where defendant's expert, who disputed plaintiff's expert's methodology, also testified; jury left with "ultimate decision as to which theory was the sounder"). Dr. Levine's expert opinion is therefore admissible under *Daubert* and should not be excluded.

B. Dr. Levine's Opinions Are Not Inadmissible Merely Because They Are Conservative

Dr. Levine does not, as the Bank contends (Levine Mot. at 2, 10), contend that his opinion is reliable *because* it is conservative. Dr. Levine's opinions are reliable *and* conservative. Courts do not exclude expert testimony simply because it is conservative. To the contrary, experts routinely provide conservative opinions and courts routinely admit them. *See, e.g., Beijing Meishe Network Tech. Co. v. TikTok Inc.*, 2025 WL 2522375, at *5 (N.D. Cal. Sept. 2, 2025) (denying motion to exclude where defendant argued expert was "dressing up his revised damages calculation in a 'cloak of conservativism,'" finding "these concerns go to the weight, not the admissibility, of Dr. Putnam's report."); *San Francisco Baykeeper v. City of Sunnyvale*, 627 F.Supp.3d 1085, 1101 (N.D. Cal. 2022) (finding expert's "conservative approach is not an analytical gap"); *M. G. v. Bodum USA, Inc.*, 2021 WL 718839, at *13 (N.D. Cal. Feb. 24, 2021) (denying motion to exclude where "Dr. Ganot appears to have accounted for variations . . . including adopting the most conservative values possible . . . This is sufficient to satisfy the requirements of Rule 702."); *United States v. Romero-Lobato*, 379 F.Supp.3d 1111, 1121 (D. Nev. 2019) (denying motion to exclude where the "CMS method was later modified and refined to establish a 'conservative quantitative criteria for identification'"); *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000) (affirming decision to admit expert's testimony that "he used the low-end figure cited by the Narcotics Information Network to estimate conservatively the wholesale value of the marijuana seized"); *Sentius Int'l, LLC v. Microsoft Corp.*, 2015 WL 451950, at *9 (N.D. Cal. Jan. 27, 2015) (denying motion to exclude expert's opinion that 'an effective $0.44 per-copy royalty is a 'conservative outcome'"); *Todd v. Tempur-Sealy Int'l, Inc.*, 2016 WL 5462428, at *6 (N.D. Cal. Sept. 28, 2016) (denying motion to strike expert opinions, finding arguments regarding expert's "conservative estimate" [] "should be raised on cross-examination, not at the Daubert stage"); *Rodriguez v. Google LLC*, 2024 WL 38302, at *12 (N.D. Cal., January 3, 2024) (denying motion to exclude expert opinion because expert's reference to "$3 valuation as 'conservative' in his deposition'" did not mean it was inaccurate where expert provided sufficient analysis to explain why he settled on...the $3 figure).

"Expert opinion testimony is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Primiano,* 598 F.3d at. 565, citing *Sandoval-Mendoza*, 472 F.3d 645 (reversing district court's decision to exclude expert witness testimony and finding that defendant's experts were well qualified and had sufficient expertise in their field and the case to be useful to the jury). Here, Dr. Levine's opinions are reliable and relevant. That they are also "conservative" is no basis for excluding them.

The Bank's cases do not hold otherwise. *See, e.g., Orshan v. Apple Inc*., 2024 WL 4353034 *3 (N.D. Cal. Sept. 30, 2024). ("*Daubert* asks whether expert opinions are reliable and relevant, *not* whether they are conservative") (emphasis added); *United States ex rel. Fitzer v. Allergan, Inc*., 2024 WL 1156310, *5 (D. Md. Mar. 18, 2024) (excluding expert testimony because it rested upon a "faulty premise" and failed to account for a "critical element of causation," not because it was conservative); *Unwired Planet, LLC v. Apple Inc*., 2017 WL 589195, *2 (N.D. Cal. Feb. 14, 2017) (excluding expert testimony because expert "in large part ha[d] not even attempted to explain the basis for and importance of the assumptions supporting [his approach]) (cleaned up)."[2]

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[2] *See also Ayers v. Robinson*, 887 F.Supp. 1049, 1060 (N.D. Ill. May 23, 1995) (excluding expert testimony in a wrongful death case based on hedonic damages, which employed "a simple eyeballing technique"); *Guardant Health, Inc. v. Foundation Medicine, Inc*., 2020 WL 2461551 (D. Del., May 7, 2020) (granting motion to exclude expert report as damages expert provided no evidentiary foundation for the 50% apportionment value selected); *Stokes v. John Deere Seeding Group*, 2014 WL 675820, at *4 (C.D .Ill., February 21, 2014) (hedonic damages expert's methodology unreliable because expert provided no "explanation or method for calculating the conservative factor based on data or theories originating from economic research"); *Stragent, LLC v. Intel Corporation*, 2014 WL 1389304 *4 (E.D. Tex., March 6, 2014) (expert's methodology relied in arbitrary assumptions that had no basis in the facts of the case or hedonic analysis in general excluding thereby excluding expert's hedonic regression analysis).

1. Dr. Levine's Interest-Rate Opinions are the Product of Reliable Principles and Methods

In challenging Dr. Levine's expert opinions, the Bank does not dispute the soundness of Methodology 1, only the factual basis for Dr. Levine's opinion on the appropriate interest rate to use for calculating the Bank's classwide damages liability. Levine Mot. at 1-2 and 11-12. According to the Bank, Dr. Levine's use of the credit card interest rates as one basis for estimating classwide damages is flawed because Dr. Levine did not specifically investigate each class members' personal circumstances and calculate the sum of the resulting damages on an individual-by-individual basis. Levine Mot. at 11-12. But Dr. Levine's report clearly explains, from the perspective of an experienced labor economist, the connection between the proposed interest rate and the damages suffered by the class. Based on academic literature, studies and data, Dr. Levine's report demonstrates that: (1) the use of a compound interest rate to measure the aggregate harm inflicted on class members is consistent with "common practice in the field of economics"; (2) in the absence of access to their UI benefits, unemployed individuals suffer various harms flowing from the sudden loss of resources; and (3) these harms can reliably be quantified as more damaging than incurring debt at credit card interest rates. Montiel Decl. Ex A. (Levine Report ¶¶9-11, 17-30, 31-44); *see also supra* at 6-7. Dr. Levine's report further explains that, in light of the California UI recipients' difficulties in accessing credit and the higher costs associated with the other forms of borrowing to which they would likely have been forced to turn, 15.9% is a "conservative lower bound on the average opportunity cost" that class members would have faced. Montiel Decl. Ex A. (Levine Report ¶¶36-45). Dr. Levine's expert opinion is thus "consistent with the basic function of expert testimony: to help the trier of fact understand highly specialized issues that are not within common experience." *Elosu v. Middlefork Ranch, Inc.*, 26 F.4th 1017, 1026 (9th Cir. February 23, 2022) (citing *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 131, 148–49 (1999)).

2. Dr. Levine's Testimony Need Not Be Based on Each Class Member's Individual Financial Circumstances to Be Admissible

The Bank also argues that Dr. Levine's testimony is inadmissible because it is not sufficiently tied to the particular financial circumstances of individual class members. This argument misstates the law. It is commonplace for experts—especially *economics* 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 ground that the testimony is "speculative" or "not sufficiently corroborated"; again, such "concerns go to the weight of the testimony and its credibility, not its admissibility." *Elosu*, 26 F.4th at 1025-28 (citations omitted).

The Bank's argument also ignores the Court's previous ruling as to 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, there was surely variation in 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. A lucky few may have been able to borrow "from friends and family at a *zero* percent interest rate," East Mot. at 11, while others were forced to forgo spending on basic necessities. Like the Bank here, the defendant in *Van* argued that plaintiffs' failure to make "specific allegations about 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 1164-1165. 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 v. LLR, Inc.*, 61 F.4th 1053, 1061 (9th Cir. 2023) (*Van II*).[3]

Although the Bank acknowledges this Court's previous reliance on *Van I* and *Van II*, it contends that those holdings were limited to approving the use of a classwide interest rate only for "interest the plaintiff would have *earned* on the money, not interest the plaintiff would have paid to *borrow* the money." Levine Mot. at 19-20 (emphases in original). But nothing in *Van I* or *Van II* supports such a limitation. As the above-quoted passage from *Van I* makes clear, Van was "injured because she lost the use of her money," *not* "because she lost interest income." *Van I*, 962 F.3d at 1164-65. The particular interest rate to be used as "a way of measuring and remedying [plaintiffs'] injury" was not there disputed. *Id.* at 1165; *see also Van II*, 61 F.4th at 1061. But where, as here, the appropriate interest rate to be applied *is* disputed, the question of "which interest rates should be applied is an issue for the fact finder." ECF 494 at 86.

The Bank's argument is also contrary to longstanding caselaw holding that expert opinions—particularly the opinions of economics 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). For example, in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1132 (9th Cir. January 3, 2017), the Ninth Circuit held that it permissible and consistent with due process for plaintiffs to measure the aggregate classwide 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

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[3] 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 Levine misses the point. No class representative in *Van* claimed to have actually experienced a loss of interest income at precisely the classwide interest rate ultimately embraced by the court either. As the Ninth Circuit explained, "[i]nterest is simply a way of measuring [the] injury, not the injury itself." *Van I*, 962 F.3d at 1165.

class period." *Id.* at 1132. There, too, the individual circumstances of class members surely varied, yet the Ninth Circuit found it permissible to determine the defendant's liability on an aggregate basis. *Id.*[4]

Not only are class damages based on generalizations acceptable, but it is well settled that experts may rely on studies and data from individuals outside the class as the basis for opining on the damages suffered by individuals within the class. In *ConAgra*, ConAgra had argued in the district court that a damages expert's conjoint analysis was insufficiently reliable because it relied on future survey data to calculate the importance of the company's " '100% Natural' label in the past, i.e., during the class period"—that is, the expert relied on data concerning the market behavior of persons *outside* the class to make 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 rejected ConAgra's challenge, holding that the fact that plaintiffs' experts' proposed generalizations were based on market data that was not specific to class members "d[id] not make her methodology unreliable." *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 that testimony did not address the "specific financial conditions" of the defendant's retail store. 310 F.3d 1054, 1061 (8th Cir. 2002). The Eighth Circuit rejected that argument, holding that "the jury could consider" such economic generalizations and that "it [was] up to the opposing party to examine the

[4] *See also, e.g.*, *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, 326 F.R.D 592 (N.D. Cal 2018) (certifying 23(b)(3) class and approving use of market data to calculate "price premium" that approximated the value to consumers of Dr. Pepper's false representation that beverage was "made from real ginger"); *McMorrow v. Mondelez International, Inc.*, 2021 WL 859137 (S.D. Cal. March 8, 2021) (approving classwide damages model that approximated value to consumers of representation that 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.").

factual basis for the opinion in cross-examination"—not through a *Daubert* motion. *Id.* (citing *Bonner*, 259 F.3d at 929-30).

Consistent with Methodology 1 and with these precedents, Dr. Levine's approach provides a proposed interest rate for consideration by the finder of fact:

> Q. If you have information about the aggregate measure of harm for a group, can you use that to draw conclusions about the harms suffered by individual members of the group?
>
> A. So the method I'm proposing is to say that this credit card interest rate is a conservative lower bound on the opportunity cost of funds.
>
> My expectation is one would then take the individual claims amounts and durations to create a damage per person. Is that what you're asking? I'm not sure what you're asking.
>
> Q. Well, that is helpful. So I guess let's back up a little. Tell me how you would propose to arrive at the aggregate measure of harm.
>
> A. If I can find opportunity cost to funds --a lower bound on the opportunity cost to funds for the vast majority of the class, and we apply that to the total amount of UI payments that were delayed times their delay, we would get an aggregate measure of harm.
>
> Q. Okay. And that aggregate measure of harm is basically just the sum total of all individual harms?
>
> A. It is a conservative lower bound on the sum of the individual harms… [that is] what it's intended to create.

Montiel Decl. Ex B. (Levine Tr. 72:14-73:20). (objections omitted).

The Bank's insistence that the only permissible means of calculating damages requires Plaintiffs to identify with complete certainty the exact quantum of each individual's damages disregards the aggregate nature of classwide damages in general, especially where damages may be calculated by applying an interest rate to a population of over 100,000 class members. Mot at. 14-15. After all, "[l]ack of certainty is not, for a qualified expert, the same thing as guesswork." *Primiano*, 598 F.3d at 565. As Dr. Levine testified:

> Q. Could that method also be used to create an aggregate measure of harm for a class of 50,000 people?
>
> A. Yes.
>
> Q. Could it be used to create an aggregate measure of harm for a class of 100 people?

> A. As members get smaller, reliance on averages gets more challenging and sampling variation, random errors, and things like that, become more important.
>
> So as -- for 50,000, it's easy, and for numbers at 100 and below, one has to be more careful, so I would need to know a lot more.
>
> Q. Okay. And could it be used to create an aggregate measure of harm for a class of one person?
>
> A. This wouldn't be how I would approach that problem.

Montiel Decl. Ex B. (Levine Tr. 80:24-81:22). (objections omitted).

Against this backdrop, the Bank's reliance on *Treviso v. National Football Museum, Inc*., 2018 WL 4608197 (N.D. Ohio, 2018) for the proposition that "each individual class member will need to submit proof of their damages" falls flat. Levine Mot. at 15. That out-of-circuit, unpublished opinion denied class certification on the basis that individualized issues would predominate where the expert's proffered testimony concerning damages arising from a cancelled football game made no attempt to account for variations in disappointed customers' missed "merchandise purchases," disrupted vacation arrangements, or transportation costs. *Id*. at *7. But—even leaving aside that this case is at the summary judgment stage, not the class certification stage—the damages sought here are not at all like those that could be associated with the cancellation of a particular Hall of Fame Game between the Green Bay Packers and the Indianapolis Colts. As the foregoing discussion makes clear, the law of this circuit and the discipline of economics accept as appropriate classwide (or "aggregate") approximations of more mundane values, like the price premium consumers may attach to a marketing misrepresentation or, here, the time value of money. *See, e.g.*, *Van II*, 61 F.4th at 1061; *ConAgra*, 844 F.3d at 1132. And unlike the expert in *Treviso*, Dr. Levine has explicitly reckoned with potential variations in the time value of money to the particular population at issue, using principles and methods that are widely accepted in his field. Montiel Decl. Ex. A (Levine Report ¶¶9-11); *ConAgra*, 844 F.3d at 1132; *Hartley,* 310 F.3d at 1061.

The Bank's reliance on *In re Blackbaud, Inc. Cust. Data Breach Litig*., 2024 WL 2155221 (D.S.C. May 14, 2024), is also misguided. In that case, the expert's testimony concerned a multi-step method for identifying class members, which changed during the course of the litigation, could not be replicated, and was not shown to be valid on a large scale across a wide number of data sources. *Id.* at *8-14. In contrast, the question here is not administrative feasibility; it is what interest rate the trier of fact could find appropriate for calculating classwide damages attributable to the class members' lost access to their UI funds.

That the parties and their experts would draw different inferences from the available evidence, scholarship, and data is not a basis for the exclusion of expert testimony. *Elosu*, 26 F.4th at 1026 ("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."); *Rocky Mountain PSI, LLC v. Thayer*, No. CV 13-23, 2015 WL 1579492, at *3 (D. Mont. Apr. 9, 2015) ("It is not uncommon for opposing experts to reach different conclusions, using different methodologies. It is for the jury to assess which is the more reliable and helpful.") (citing *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1196 (9th Cir. February 7, 2005)). The Bank's argument that Dr. Levine does not precisely measure each class members' individual damages is not a basis for excluding his opinions. Ultimately, the Bank's arguments regarding Dr. Levine's methodology and proposed interest rate go to weight, not admissibility. *See, e.g., Hangarter v. Provident Life & Acc. Ins. Co.,* 373 F.3d 998 1017 n. 14 (9th Cir. 2004) ("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."); *MedImpact Healthcare Sys., Inc. v. IQVIA Holdings Inc.,* 2022 WL 5460971at *5 (S.D. Cal. Oct. 7, 2022) (even improper assumptions are not bases to exclude expert testimony as they concern the weight of the testimony and may be challenged on cross-examination); *Shimozono v. May Dept. Stores Co.*, WL 3437390, at *8 (C.D. Cal. Nov. 20, 2002) (similar); *In re Toyota Motor Corp. Hybrid Brake Marketing, Sales Practices and Products Liability Litigation,* 2012 WL 4904412 *4 (C.D. Cal., September 20, 2012) (finding that the efficacy or applicability of plaintiff's expert's methods of calculating classwide damages to the facts of the case were better suited for cross-examination and closing argument.).

Finally, the Bank argues that Dr. Levine's opinions lack "sufficient facts or data." But "Rule 702's 'sufficient facts or data' element requires foundation, not corroboration. . . The court's role is … not to determine whether their hypothesis is correct, or to evaluate whether it is corroborated by other evidence on the record." *Elosu,* 26 F.4th 1025-26, citing *Daubert*, 509 U.S. at 594–95. Here, Dr. Levine has used his specialized knowledge and experience as a labor economist to consider relevant facts and data following a method this Court has already approved. To the extent the Bank believes Dr. Levine should have incorporated different facts and assumptions into his methodology, that is for the parties to argue at trial, and for the factfinder to weigh. *Elosu,* 26 F.4th 1025-26.

More-over, "experts are allowed to rely on records created by others if they disclose their assumptions and use those records to apply their own specialized expertise." *Chandler Gas and Store Incorporated v. Treasure Franchise Company LLC,* 2025 WL 3018829, at *7 (D. Ariz., October 29, 2025); Fed. R. Evid. 703; *see also Hyer v. City & Cnty. of Honolulu*, 118 F.4th 1044, 1056 (9th Cir. September 23, 2024) (experts may rely on "knowledge and experiences that are not necessarily in the record."). This is exactly what Dr. Levine has done. "Ultimately, if an assumption has a reasonable basis in the record, an economics expert may stretch the assumption to extremes so long as he does not veer into 'unreliable nonsense.'" *Chandler Gas*, 2025 WL 3018829, at *7 (citing *Unknown Party v. Arizona Bd. of Regents*, 641 F.Supp.3d 702, 727 (D. Ariz. November 18, 2022)); *see also Alaska Rent-A-Car*, 738 F.3d at 969–70 (expert's reliance on assumptions affects weight, not admissibility, where methodology is otherwise sound). Each of Dr. Levine's opinions and assumptions regarding California UI recipients is supported by data, Dr. Levine's experience as a labor economist, and the facts of this case. Ultimately, the reasonableness of Dr. Levine's assumptions in arriving at a 15.9% compound interest rate is a matter for the factfinder to determine. *Chandler Gas*, 2025 WL 3018829, at *8; *see also* ECF 494 at 86.

3. Dr. Levine's Minimum Wage Measure is Similarly Reliable

The Bank also completely ignores the methodology Dr. Levine uses to conclude that, in his expert opinion, the California minimum wage rate is a reliable metric for lost time in the customer-service class, and the Bank again rests its challenge in large part on Dr. Levine's characterization of his opinion as "conservative." In reaching this conclusion, Dr. Levine carefully examined numerous scientific studies evaluating how various populations value lost time, and he concluded that "in all of these instances, the median wage (or higher) is used to represent the value of time." Montiel Decl. Dec. Ex. A (Levine Report ¶53). Using these sources and his specialized expertise, Dr. Levine opined that the measure of damages is at least the minimum wage, which creates a reliable measure of a minimum amount of damages that is capable of measurement on a classwide basis. *Id.*¶55.

Contrary to the Bank's assertion, Dr. Levine did not arrive at this number merely by "eyeballing." Mot at 10, 13. Instead, he applied his expert experience to empirical scientific studies. For example, Dr. Levine relied upon studies examining monetary time-value in situations relating to leisure travel, Montiel Decl. Ex. A (Levine Report ¶49 & n.33); government infrastructure projects, *id.* ¶49 & n. 34; the value of time where individuals are directly able to purchase faster transport, *id.* ¶49 & n.35; studies examining time spent unproductively and how people value their time, *id.* ¶50 & ns. 36 & 37; and studies that directly assess people's dislike of waiting on hold for customer service, *id.* ¶51 & ns.38 & 39. Dr. Levine's use of these studies provides the finder of fact with relevant and reliable information and is manifestly admissible. *Monroe v. Zimmer U.S. Inc.*, 766 F.Supp.2d 1012, 1027-1028 (E.D. Cal. February 14, 2011) (denying motion to exclude expert opinion because expert "analyzed the work of others" as the expert used "accepted [] methods to support all of his reported conclusions")

Courts in this district and throughout the Ninth Circuit have "expressly held that an expert's opinion is not unreliable as a matter of law simply because the expert's opinions 'are based on data collected by others.'" *Lewert v. Boiron, Inc.*, 212 F.Supp.3d 917, 930 (C.D.Cal., May 12, 2016), citing *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1141–42 (9th Cir. May 11, 1997); *see also* Fed. R. Evid. 703; *Hyer, supra,* 118 F.4th at 1056. Here, Dr. Levine stated that economists frequently measure the value of time using the median wage. Montiel Decl. Ex. A (Levine Report ¶48). After reviewing the empirical scientific studies outlined above, Dr. Levine concluded that the minimum wage is a conservative metric for approximating the value of the excessive time UI beneficiaries in the Customer Service Class spent on hold due to the Bank's challenged practices. *Id.*¶54. Dr. Levine's opinion is thus reliable and relevant to the trier of fact and admissible under *Daubert*. *See, e.g.*, *Khadera v. ABM Industries Inc*., 2011 WL 6813454 *6 (W.D. Wash., December 28, 2011).

Here, too, the Bank's challenge to the factual basis of Dr. Levine's opinion regarding individual preferences with waiting on hold for customer service is an issue of *weight* not *admissibility*, as the *Daubert* standard makes clear. Levine Mot. at 13; *see SPS Technologies, LLC v. Briles Aerospace, Inc.* WL 4913509, at *2 (C.D. Cal. Sept. 8, 2021) ("Challenges to 'the factual basis of the [expert's] opinion rather than the methodology upon which it is based,' particularly when the facts 'are subject to reasonable dispute' go to the weight of the expert's opinion, not the admissibility'") (citing *Higley v. Cessna Aircraft Company*, 2013 WL 12112167, at *4 (C.D. Cal., July 8, 2013)). (emphasis added). The Bank has no basis for excluding Dr. Levine's expert opinion regarding the minimum wage damages measure for the lost time of the customer service class.

V. CONCLUSION

Dr. Levine's opinions will assist the trier of fact because they are relevant and reliable. The Bank's motion to exclude his testimony should be denied.

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Respectfully submitted,

Dated: January 8, 2026

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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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