JAMES W. MCGARRY (*pro hac vice*)
JMcGarry@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Tel.: +1 617 570 1000
Fax: +1 617 523 1231

SABRINA M. ROSE-SMITH (*pro hac vice*)
SRoseSmith@goodwinlaw.com
MATTHEW L. RIFFEE (*pro hac vice*)
MRiffee@goodwinlaw.com
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
Tel.: +1 202 346 4000
Fax: +1 202 346 4444

Attorneys for Defendant
BANK OF AMERICA, N.A.

[*ADDITIONAL COUNSEL LISTED IN SIGNATURE BLOCK*]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 21-MD-02992-GPC-MSB **REPLY BRIEF IN SUPPORT OF DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO EXCLUDE PURPORTED EXPERT OPINIONS OF JAY MINNUCCI (ECF 564)** Date: April 17, 2026 Time: 1:30 p.m. Ctrm: 12A – 12th Floor Judge: Hon. Gonzalo P. Curiel FILED PROVISIONALLY UNDER SEAL PURSUANT TO STIPULATED PROTECTIVE ORDER

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The Opposition (ECF 614, Opp.) does not dispute many of the issues that were demonstrated in BANA's Motion to Exclude Jay Minnucci (ECF 564-1, Mot.). It merely argues that these demonstrated flaws in Minnucci's analysis can all be addressed through cross examination. But *Daubert* admonishes district judges to be "gatekeepers," and the "opportunity for vigorous cross examination . . . is not a basis for allowing otherwise inadmissible testimony to be admitted." *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 800 (N.D. Ill. 2005). Fundamentally, Minnucci's opinions cannot satisfy Rule 702, 703, or *Daubert* because they do not consider or account for the unique circumstances facing the Claims Call Center, rely on data that Minnucci did not review and that treats disparate call centers as fungible and assumes non-class members acted the same as class members, and are contrary to Minnucci's own professional experience and the evidence in the case. These are not minor flaws that a jury can discount; they are core issues that merit exclusion.

ARGUMENT

I. Minnucci's Damages Inputs and Calculations Should Be Excluded.

A. Minnucci's industry standard opinions should be excluded.

In its moving brief, BANA demonstrated that Minnucci's industry standard opinions—and any damages calculations based on them—are unreliable because they are based on third-party data that Minnucci admittedly knows almost nothing about, are inconsistent with industry practice and his own professional experience, and rely on indefensible apples-to-oranges comparisons. Mot. 10-15. Plaintiffs do not dispute many of these criticisms. Instead, they argue that experts are permitted to testify to industry standards, and claim that they may do so by relying "heavily" on their knowledge and experience. *See* Opp. 8. Accordingly, they claim Minnucci can rely on ContactBabel to set the industry standard applicable to the Claims Call Center during the Customer Service class period because it is "fully consistent with his knowledge of the industry and his client experiences." *Id.* Tellingly, though, Plaintiffs do not identify any "client experiences" that Minnucci had at call centers remotely like the Claims Call Center during the COVID-19 pandemic—which indisputably experienced a [redacted] *See* Mot. 2-3. And Plaintiffs significantly understate the extent to which Minnucci relies on ContactBabel's work to opine on what the industry standard purportedly was at the height of the COVID-19 pandemic. *See* Opp. 8-9.

Indeed, the ContactBabel survey is the linchpin of Minnucci's industry standard opinions and Plaintiffs' call center damages model. *See* Mot. 10. Minnucci simply took 2020-2021 post hoc data from the cross-industry survey and declared that it was the "industry standard" and performance benchmark for the Claims Call Center during the narrower Customer Service Class period. *See* HX 11 ¶¶ 19-20; Mot. 10-11, 13. He did so despite not reviewing *any* of the underlying data on which the report was based and not knowing: (1) how many or what divisions or departments each respondent call center had; (2) whether any of the respondents experienced significant increases or decreases in call volumes; (3) whether any of the respondents were targeted by criminals or fraudsters; or (4) even what time period(s) each respondents' data covered. *See* Mot. 11. Plaintiffs do not dispute this. *See* Opp. 8-9, 12. They simply claim that Minnucci had no obligation to familiarize himself with the data because the survey is "accepted as reliable within the industry," and because experts are granted "wide latitude to offer their opinions." Opp. 8-9. This misstates the requirements of Federal Rule of Evidence 703 and *Daubert*.

Rule 703 does not permit experts to use third-party data without a reasonable understanding of what the data contains.[1] *See, e.g.*, *OCG Energy, LLC v. Shen*, 2024 WL 694912, *11 (C.D. Cal. Feb. 12, 2024) (expert cannot "testify as to documents and facts as to which he lacks knowledge"); *see also* Mot. 10-11. Further, Rule 703

[1] For this reason, Plaintiffs' reliance on *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.* (Opp. 15) is off point. 618 F.3d 1025 (9th Cir. 2010). There, the court upheld a survey *conducted by the expert* who was able to explain the survey's methodology and contents. *Id.* 1037. Here, Minnucci adopted a survey he did not conduct and relying on data he has never seen and cannot explain. *See* Mot. 11-13.

states that an expert can rely on facts or data only "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." Here, there has been no showing that other experts in the call center industry use cross-industry ContactBabel surveys in the manner that Minnucci uses them here—which is to set *the* performance benchmark for a call center irrespective of the facts, circumstances, or service agreements specific to that call center. *See* Mot. 12.

To the contrary, Minnucci testified that cross-industry averages like the ContactBabel figures are "[redacted]" HX 16 202:3-5 (emphasis added); *see also id.* 180:2-7, 180:11-12. Minnucci also conceded that performance benchmarks change depending on "[redacted]" not industry averages. HX 51 194:8-13. And as he testified, industry practice is generally to [redacted] (HX 16 180:1-15)—just as [redacted]. *See* Mot. 14 n.7.[2]

Minnucci's "industry average" opinions also are unreliable and should be excluded because Plaintiffs cannot demonstrate that *any* of the respondent call centers—much less the majority or all of them—are aptly comparable to the Claims Call Center, which Plaintiffs admit "experienced an [redacted] during part of the class period" (Opp. 13). *See* Mot. 12-15. Plaintiffs also do not dispute this. *See* Opp. 10-12. Nor do they dispute that Minnucci did not attempt to account for the many differences that existed between the Claims Call Center and the ContactBabel survey respondents in propounding his "industry standard." *See id.*

[2] The Opposition admits that [redacted] Opp. 13 n.7 (emphasis in Opp.; citing HX 21). In doing so, Plaintiffs (and Minnucci) ignore two critical points. First, [redacted] (HX 21 at 1), which Minnucci did not attempt to do. *See* Mot. 13. Second, there is no evidence that EDD ever took the position that BANA's call center efforts were not commercially reasonable.

Indeed, there is no evidence that indicates that even one of the ContactBabel respondents had to deal with a [redacted], or offered a service [redacted], or had their [redacted]. *See* Mot. 11, 13-14. Moreover, the report itself confirms that many respondents did not, as evidenced by the fact that they reported flat or *decreasing* levels of demand. *See* HX 15 Fig. 2. These critical differences are not mere "disputes about the appropriateness of a benchmark" that can be addressed on cross-examination, as Plaintiffs contend (Opp. 12). *Daubert* and Rule 702 require more: experts must show the comparators they relied on are "tethered to the relevant facts and circumstances of the present case." *Multimedia Pat. Tr. v. Apple Inc.*, 2012 WL 5873711, *9 (S.D. Cal. Nov. 20, 2012); *see also Goodness Films, LLC v. TV One,* LLC, 2014 WL 12780291, *2-3 (C.D. Cal. May 19, 2014) (excluding expert opinion because they did not show comparators were sufficiently similar). Minnucci did not, thus his opinions should be excluded.[3]

Plaintiffs' blanket assertion that "disputes about the appropriateness of a benchmark go to weight" (Opp. 12) is not supported by the cases that they cite. *Roblox v. WowWee Grp., Ltd.* found the expert's opinion "sufficiently reliable"

[3] Plaintiffs' attempt to distinguish BANA's cases excluding analyses based on inappropriate comparisons falls flat. *See* Opp. 14. In *Goodness Films, LLC*, the court did not rely on plaintiffs' argument that their expert's examples were "not meant to be comparisons"; rather, it found that "to the extent that [the expert] provides comparisons . . . he has not identified *relevant, similar comparisons*." 2014 WL 12780291, *2 (emphasis added). That is precisely the problem here. *See* Mot. 11-15. *Faust v. Comcast Cable Commc'ns Mgmt., LLC*, 2014 WL 3534008, (D. Md. July 15, 2014) did not turn on the fact that the plaintiff said it would forgo expert testimony. The court struck the expert's report because it sought to establish a fact about call center workers in Maryland based on an analysis of practices at the defendant's Pennsylvania call centers because there was "nothing . . . that would support the extrapolation of conclusions concerning [workers] in Pennsylvania call centers with those working in" Maryland. *Id*. *5. In *Remien v. EMC Corp.*, 2008 WL 597439 (N.D. Ill. Mar. 3, 2008) the court excluded the expert because his "methods"—not his "concessions" (Opp. 14)—failed to provide "a minimum level of reliability [to] his opinions." *Id.* *3. Finally, Plaintiffs cite no authority for their claim that the rationale in *Multimedia Pat. Tr.*, which rejected an analysis like Minnucci's based on "generic industry data" because it was not tethered to the relevant facts and circumstances of the case, 2012 WL 587311, *9, is solely applicable to patent cases. Opp. 14.

because he showed "baseline comparability" and "appears to have made both downward and upward adjustments . . . to account for differences" between benchmark and comparator. 2024 WL 4057418, *14 (S.D. Cal. Sept. 3, 2024). Minnucci did not do that here. *See supra* at 1-4; Mot. 10-15. Plaintiffs' curious cite to *Sonos v. Google, LLC* is misleading, as there the court *rejected* the benchmark due to lack of comparability, stating "[d]istrict judges are admonished to be 'gatekeepers' and "[t]his gate should remain firmly closed." 2023 WL 3933071, *6 (N.D. Cal. June 9, 2023) (quoting *Daubert v Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596-97 (1993)). *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552 (N.D. Cal. 2020) is also of no help. There the court allowed price studies *designed and conducted by the expert*, *id.* at 574-76, not a third-party survey that Minnucci simply adopts as the "industry standard" despite not knowing its specifics or respondents, or how they compared to the call center at issue. *See supra* at 1-4.

To the extent Plaintiffs argue Minnucci's industry standard opinions should not be excluded because it would leave them unable to prove their case (Opp. 12 n.6), that is a problem of their own making and is not a legal basis for denying exclusion. Summary judgment is frequently granted for defendants in these circumstances. *See, e.g.*, *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 1000 (C.D. Cal. 2012). If anything, Plaintiffs' argument highlights the importance of ensuring that unsupported, unreliable and improper opinions are not presented to a jury.

B. Minnucci's use of aggregate call center data is unreliable.

Plaintiffs do not dispute that Minnucci's calculation of Customer Service Class damages [redacted], and assumes that all callers experienced the same wait times. *See* Opp. 15; Mot. 15-16. Plaintiffs also readily admit that the underlying assumption is not true, as "of course . . . some class members waited shorter or longer times than the average." Opp. 15. Plaintiffs claim Minnucci can calculate damages this way because the "issue is the Bank's aggregate damages liability, which is permissibly based on averages." *Id.* In support, Plaintiffs cite two cases. But in each, the experts calculated damages based on actual data pertaining to *class members only*, and provided further analysis to assess whether their calculations were reliable. *See Ngethpharat v. State Farm Mut. Auto. Ins. Co.*, 2025 WL 2161754, *11 (W.D. Wash. July 29, 2025); *Khadera v. ABM Indus. Inc.*, 2011 WL 6813454, *1 (W.D. Wash. Dec. 28, 2011).

Plaintiffs also argue Minnucci can rely on aggregated data because [redacted] but their case in support is distinguishable. *See* Opp 16. Again, there, the data the expert analyzed was limited to class members only, and the expert merely estimated the number of weeks they worked using data reflecting *each class members'* actual employment dates. *Ruiz v. XPO Last Mile, Inc.*, 2017 WL 2263046, *3 (S.D. Cal. May 23, 2017). Here, Minnucci purports to estimate individual call wait times for a heterogenous class using data that [redacted] *See* Mot. 15-16. Minnucci's belief that 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'" does not make it so. *See* Opp. 16. There is no dispute that Minnucci did not attempt to determine how class members' actual wait times compared to the average (*see* Mot. 16; Opp. 15-16), or how [redacted]. Thus, his opinion is unreliable and should be excluded.[4]

II. The Opposition Confirms the Avoided Cost Opinions Are Not Reliable.

A. Minnucci's distinct caller demand calculations are not reliable.

Plaintiffs also do not dispute that Minnucci's distinct caller demand analysis does not account for the significant differences between Minnucci's non-financial institution clients (from which he obtained the 2005-2013 data that he used to build his regression model) and the Claims Call Center during the class period (for which

[4] Plaintiffs' claim that Minnucci's conclusion is based on "his experience and expertise" (Opp. 15) is refuted by his own testimony. Minnucci admitted that he has no experience working with call centers like BANA's who experienced [redacted] during the COVID-19 pandemic. *See, e.g.*, HX 51 60:24-61:5, 65:24-66:14, 114:24-115:7; HX 16 219:22-223:1.

he purports to predict re-call rates using the model). *See* Mot. 17-19. They first blame BANA for not maintaining the data Minnucci claims he would need to conduct an "exact" analysis, and argue Minnucci was left to turn to the "next best thing"—which he deemed to be undisclosed data dating back more than two decades from a handful of non-financial services industry clients. *See* Opp. 17-18; Mot. 17.

Plaintiffs claim that Minnucci's reliance on this data is "permissible" because he determined that the "relationship between [the] abandonment rate and [the] re-call rate" for his clients remained "fairly constant across industries and time." Opp. 18. But Minnucci did not offer any analysis or citation to support this opinion in his Report, and the Opposition's citations either do not discuss this issue at all, or are completely silent as to its consistency over time. *See* Opp. 18. *Daubert* required Minnucci to show that the non-financial services call centers whose decades-old data he used are sufficiently comparable to BANA to make using their data to predict BANA's re-call rates reasonable. *See, e.g.*, *Loeffel*, 387 F. Supp. 2d at 812 ("to have the requisite predictive capacity and the reliability *Daubert* demands, [expert] had to select samples that are truly comparable") (internal quotations omitted). He did not, so his opinions are unreliable. *See* Mot. 17-19.

Plaintiffs next try to excuse Minnucci's failure to confirm that his clients calculated their own re-call rates correctly by claiming that experts are allowed to rely on others to collect data. *See* Opp. 19. But the problem is not that Minnucci relied on his clients to *collect* data; it is that he relied on his clients to derive re-call rates using their data and did not even spot check their work before dropping it into his model. *See* HX 16 407:17-23, 408:2-5. This also makes his analysis unreliable and merits exclusion. *See* Mot. 18 (citing cases). And, although "it is true that an expert opinion may be based on data collected by others, such facts must be of the type that are 'reasonably relied upon by experts in the particular field.'" *Heisler v. Maxtor Corp.*, 2011 WL 1496114, *8 (N.D. Cal. Apr. 20, 2011) (*quoting* Fed. R. Evid. 703 and *citing Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142 (9th Cir.

1997)). Here, there has been no showing that other call center experts calculate distinct caller *ex post* demand using decades-old, cross-industry data compiled by their clients at random time intervals. The best Plaintiffs can do is to claim that *Minnucci* has previously billed his clients for unspecified "similar analyses." Opp. 18. That unsupported assertion is not enough. *See In re Incretin-Based Therapies Prods. Liab. Litig.*, 524 F. Supp. 3d 1001, 1044 (S.D. Cal. 2021); Mot. 12.

Finally, Plaintiffs argue that the Court can ignore the many incongruities between his clients and BANA because *BANA* has not demonstrated that controlling for things like the absence of a global pandemic, [redacted] would have changed Minnucci's results. *See* Opp. 20. Plaintiffs attempt to distinguish *In re Live Concert* to support this argument. But there, the court found that although there "must be some indication that the excluded variables would have impacted the results," the "burden of proof . . . remains on the proponent of the expert testimony." 863 F. Supp. 3d at 974. Given Minnucci's testimony that COVID-19 led to higher abandonment rates for his clients (HX 16 215:18-21), and the general consensus that COVID-19 wreaked havoc in the call center industry (*see* Mot. 13), there is far more than an indication that factoring the impact of COVID-19 alone would have changed Minnucci's results. Minnucci did not attempt to account for that, or any of the other unique challenges or circumstances facing BANA's call center in calculating distinct caller demand. Mot. 15, 17-18. His calculations should be excluded for this reason too. *Id.*

B. Minnucci's avoided workload calculations are not reliable.

Plaintiffs concede Minnucci's avoided workload calculations are not limited to hours attributable to the class members, and thus overestimate alleged avoided costs. *See* Opp. 20; Mot. 19-20. Plaintiffs only answer is that [redacted] Opp. 20. But they cite no authority excusing them from putting forth a calculation that matches their theory of liability. Minnucci made no attempt to do so, thus his opinion must be excluded.

See McMorrow v. Mondelez Int'l, Inc., 2020 WL 1157191 *1 n.2 (S.D. Cal. Mar. 9, 2020) (excluding damages opinion that did not match liability theory).

C. Minnucci's calculation of idle hour charges are not reliable.

Plaintiffs do not deny that Minnucci's use of Erlang-C to calculate idle hour costs is unorthodox; they simply claim "there is no reason [Erlang-C] cannot be applied" in this manner. Opp. 22. But *Daubert* does not permit random applications of industry tools simply because they are possible; rather, it requires "objective, independent validation of [an] expert's methodology." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995). Neither Minnucci nor Plaintiffs can point to a single example of any other professional in the call center industry who has used Erlang-C post hoc to *compute purported cost savings*. *See* Opp. 21-22. Thus, exclusion is appropriate. *See* Mot. 20-21.[5]

Minnucci's idle cost savings opinions are also unreliable and should be excluded because the model's assumptions run counter to the facts of this case. *See* Mot. 21-22. Plaintiffs do not dispute this, nor do they attempt to address the incongruities between Erlang-C's assumptions and reality. Instead, they seek to misdirect, arguing that the authority cited in BANA's Motion showing that Erlang-C produces unreliable results when caller abandonment is high should not be considered. *See* Opp. 22. But Minnucci himself testified that Erlang-C's assumptions were not met here. *See* Mot. 21-22. Thus, his use of the model and related opinions must be excluded. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict").

III. The Opposition Concedes the WFM Opinions Are Improper.

BANA's Motion demonstrated that Minnucci's WFM opinions are unreliable

[5] *JH Kelly, LLC v. AECOM Tech. Servs., Inc.*, 605 F. Supp. 3d 1295 (N.D. Cal. 2022), cited at Opp. 22, does not hold otherwise. There, an expert declared under penalty of perjury that his method had been "'published in numerous peer-reviewed scientific journals,'" "ha[d] been 'tested,'" and "ha[d] a 'known' rate of error." *Id.* at 1311. The same cannot be said of Minnucci's *post hoc* application of Erlang-C here.

and irrelevant, and therefore must be excluded, because they are contradicted by the record and Minnucci's own professional experience. Mot. 22-24. In response, Plaintiffs repeat their mantra that these issues go to weight, not admissibility. Opp. 23-24. But Plaintiffs do not contest that Minnucci has no experience to rely on forecasting in this manner because he has never forecasted using a single variable, and has he ever attempted to forecast UI payment volumes during a global pandemic. *See* Mot. 24. Thus, he has no basis or relevant experience to support his opinion that [redacted]. *See id.* These issues, and others, go squarely to reliability and merit exclusion of Minnucci's WFM opinions. *See id.*

IV. The Opposition Confirms the State of Mind Opinions Are Improper.

Plaintiffs attempt to disavow Minnucci's opinions regarding BANA's purported intent and state of mind. *See* Opp. 25. But they cannot dispute that Minnucci explicitly offered such opinions. Mot. 24 (citing 15 paragraphs in Report where Minnucci claimed BANA "deliberately" took actions). Each of those opinions must be struck because case law holds that, absent some particular qualification or expertise, an expert may not opine on another's state of mind in a *civil* case. Mot. 24-25. Plaintiffs' first rejoinder, which notes that Rule 704(b)'s preclusion of state of mind testimony in criminal cases does not apply here, is nonresponsive. *See* Opp. 24. Their second, relying on *North Wind Constr. Servs., LLC v. Campos EPC, LLC*, 2023 WL 196618 (D. Idaho Jan. 13, 2023), is of no help either. In *North Wind*, the court denied a motion to exclude state-of-mind testimony based on the expert's "close relationship" with the defendant which the court found made "him more-than-usually qualified to draw . . . inferences" about the defendant's intent. *Id.* *5. Minnucci does not claim to have any such relationship with or knowledge of BANA.

CONCLUSION

For the foregoing reasons and the reasons stated in BANA's Motion, the Court should strike each and all of Minnucci's unreliable and irrelevant opinions.

Dated: February 20, 2026

Respectfully submitted,

By: *s/ Matthew L. Riffee*

MATTHEW L. RIFFEE (*pro hac vice*)
MRiffee@goodwinlaw.com
SABRINA M. ROSE-SMITH (*pro hac vice*)
SRoseSmith@goodwinlaw.com
KEITH LEVENBERG (*pro hac vice*)
KLevenberg@goodwinlaw.com
GOODWIN PROCTER LLP
1900 N Street NW
Washington, DC 20036
Tel: +1 202 346 4000
Fax: +1 202 346 4444

JAMES W. MCGARRY (*pro hac vice*)
JMcGarry@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Tel.: +1 617 570 1000
Fax: +1 617 523 1231

LAURA G. BRYS (SBN 242100)
LBrys@goodwinlaw.com
GOODWIN PROCTER LLP
601 S. Figueroa St., Suite 4100
Los Angeles, CA 90017
Tel.: +1 213 426 2500
Fax: +1 617 346 4444

VALERIE A. HAGGANS (*pro hac vice*)
VHaggans@goodwinlaw.com
LINDSAY E. HOYLE (*pro hac vice*)
LHoyle@goodwinlaw.com
GOODWIN PROCTER LLP
620 Eighth Avenue
New York, NY 10018
Tel: +1 212 813-8800
Fax: +1 212 355-3333

YVONNE W. CHAN (*pro hac vice*)
YChan@jonesday.com
JONES DAY
100 High Street
Boston, MA 02110
Tel.: +1 617 960 3939

Fax: +1 617 449 6999

JANICE P. BROWN (SBN 114433)
jbrown@myersnave.com
MATTHEW B. NAZARETH (SBN 278405)
mnazareth@myersnave.com
MEYERS NAVE
600 B Street, Suite 1650
San Diego, CA 92101

Attorneys for Defendant
BANK OF AMERICA, N.A.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on February 20, 2026. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify under penalty of perjury that the foregoing is true and correct.

Dated: February 20, 2026

s/ Matthew L. Riffee
MATTHEW L. RIFFEE