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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 CHLOE N. EAST (ECF 565)

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

TABLE OF AUTHORITIES

Plaintiffs' expert, Chloe N. East proposes to calculate class members' damages based on the amount it would, hypothetically, have cost them to incur credit-card debt at a 20.8% interest rate. BANA moved to exclude East's opinions because her opinions are not a relevant or reliable measure of actual damages (if any) suffered by the classes. *See* ECF 565-1 (Mot.). East claims that the 20.8% interest rate is "representative" of some unspecified other harm suffered by some unspecified "large number" of class members. East does not claim that her rate leads to an accurate or reliable damages figure. She merely claims it is a "conservative" "minimum bound" for damages for the classes. But her opinion does not even pretend to be a reliable way of measuring the harm *actually* suffered by even the unspecified "large number" of class members—much less any harm *uniformly* suffered across the class. Thus, it should be stricken under the *Daubert* standard.

Plaintiffs admit that East considered no data or information on actual class member behavior or harm. Nor does she claim that her damages estimates apply to every class member, or to *any* individual class member. Instead, East simply looked to research concerning the effects of a permanent deprivation of UI benefits during pre-pandemic time periods and concluded that class members faced with a temporary loss of COVID-related benefits would have borrowed on their credit cards at a 20.8% interest rate to cover the shortfall, regardless of whether that shortfall [redacted] or [redacted]. But *Daubert* requires that an expert's opinions and assumptions be anchored in evidence, not guesswork. East's analysis falls far short of the baseline requirements for admissibility and should be excluded.

ARGUMENT

East's proposal to measure damages based on a 20.8% credit-card interest rate is unreliable and unrooted in any evidence about credit-card borrowing or interest payments by class members, if any. Mot. 8-14. That was the basis behind the Court's exclusion of the identical damages methodology proposed by Plaintiffs' purported expert, Greg Regan.[1] The Court ruled that Regan's proposal to base a classwide damages calculation on credit-card interest rates was "not . . . a damages model that satisfies *Comcast*" because it "[redacted]," and the assumption that "impacted cardholders would likely have needed" to "utiliz[e] credit cards" was not "supported . . . with evidence showing that th[is] assumption [is] true as to most or even any of the EDD cardholders' experience." ECF 494 at 87-88.

Thus, it is curious that Plaintiffs' initial response to the motion to strike East's repeat of the same flawed analysis is to defend it as a method *approved* by the Court in its certification ruling. *See* ECF 611 (Opp.) at 5-6, 11-12. This is false. The method approved by the Court was "Methodology 1," a generalized proposal to award damages based on an "interest rate that reflects the 'time value of money.'" ECF 494 at 86. But the Court *rejected* Regan's "Methodology 2," for having exactly the same shortcoming that dooms East's analysis: it was "not supported . . . with evidence showing that [its] assumptions" about credit-card borrowing "are true as to most or even any of the EDD cardholder[s]" at issue. *Id.* at 88; *see also* Mot. 12.

To avoid the clear implications of the Court's ruling that Methodology 2 requires (but lacks) an evidentiary showing that the underlying assumptions are true on a classwide basis, Plaintiffs argue that the Court's ruling relates solely to [redacted] Opp. 12. The ruling itself does not support this constrained reading. The Court "*[f]irst*" ruled that "the Remediation Plan does not support a damages model that satisfies *Comcast*." ECF 494 at 87 (emphasis

[1] BANA has also moved to exclude Regan's opinions and the opinions of Plaintiffs' third damages expert, David Levine. *See* ECF 566, 567. As explained in BANA's motions and replies, East's and Levine's damages opinions—and Regan's damages calculations to the extent he relies on East and Levine and offers his own interest rate opinions—all generally suffer from the same maladies: each purport to offer damages opinions that are not "supported with evidence showing that the[ir] assumptions are true as to most or even any" class members. ECF 494 at 88. As such, many of Plaintiffs' arguments in opposition to Levine and Regan closely parallel those made in the East Opposition, and BANA incorporates the arguments made in its reply in support of its motion strike Levine and Regan herein.

added). *Then* the Court "[a]dditionally" ruled that Methodology 2 was an unreliable classwide damages methodology because Regan did not support his "assumptions about class members" with any "evidence" about actual class member experiences. *Id*. As BANA explained in its Motion (at 11-13), that is precisely the issue here. Like Regan, East failed to support her assumptions about class members with any evidence about *actual* class member experiences. Both the class certification order and the case law relied upon in BANA's opening brief (Mot. 8-13) require that East make assumptions grounded in the facts and circumstances of this case. *See* ECF 494 at 88; *see also Kewazinga Corp. v. Google LLC*, 2024 WL 4894840, *4-5 (S.D.N.Y. Oct. 17, 2024) (finding methodology unreliable where expert made assumption "contradicted by the record" and computation was not based on "sufficient facts or data"); *Brighton Collectibles, Inc. v. RK Texas Leather Mfg.*, 923 F. Supp. 2d 1245, 1254-55 (S.D. Cal. 2013) (excluding expert who did not "ground[] his assumption with the real world facts of [the] case" and noting that "the Court has a duty to ensure that [the expert's] methodology is sound and that his testimony is supported by the underlying facts").[2] East did not do so, so her opinions must be excluded.

Indeed, the Opposition highlights East's key assumption that lacks empirical foundation: that what is true for the "typical California UI recipient," the "majority of UI recipients," or the "median UI recipient" *before the pandemic* is also true for most (but not all) of the class during the pandemic. *See* Opp. 3-4. But class members received benefits under pandemic-related programs that did not exist before the pandemic. *See* Mot. 10-11. Through those new programs, many class members were able to qualify for pandemic assistance with financial and employment histories that did not qualify them for pre-pandemic UI benefits. *See id.* Additionally, some further

[2] Plaintiffs' attempt to distinguish *Brighton* (Opp. 11) is unavailing. This Court rejected a proposed damages methodology in *Brighton* after finding the "expert had not grounded his assumption with the real world facts of the case," or presented "data to demonstrate" that his assumption regarding the relationship between sales of the plaintiff's and defendants' products was "supported by the underlying facts." 923 F. Supp. 2d at 1255. Similar deficiencies are present here.

benefited from other financial relief (stimulus payments, repayment freezes and forbearance) unavailable pre-pandemic. *See id.*

Plaintiffs try to downplay the significance of these differences by arguing "the financial circumstances of the median UI benefit recipient remained precarious" in spite of them. Opp. 8. Even if that were true, and East reviewed no actual evidence to confirm and has no idea if it was, evidence about a purported "median" class member cannot satisfy Plaintiffs' *Comcast* burden to prove "actual damages" classwide. *See* ECF 494 at 87-88; *see also In re Flash Memory Antitrust Litig.*, 2010 WL 2332081, *11-13 (N.D. Cal. June 9, 2010) (finding regression model unreliable where expert relied on averages and "ma[de] no attempt to assess whether" key damages input varied across class). Beyond this, the testimony Plaintiffs cite in ostensible support of their argument does *not* address "the financial circumstances of the median UI benefit recipient." *See* Opp. 8. Instead, it reflects East's acknowledgment that COVID stimulus payments and programs increased UI recipients' liquidity, and that unnamed sources she referred to in the abstract "suggest[ed]" that none of these payments or programs was independently sufficient to "get them out of their difficult financial situation." *See* HX 33 76:2-80:22. But when asked about the cumulative effect of "expanded UI and stimulus payments," East conceded that certain UI households received replacement rates of over 300 percent. HX 52 86:7-12. Thus, East's analysis necessarily relies on the assumption that UI households receiving significant income replacement during the pandemic would have adopted identical income-replacement strategies as households faced with a loss of UI benefits before the pandemic with *no* income replacement.

The class certification order and the case law require East to rely on actual facts or data supporting the notion that this assumption is grounded in fact for the class members, but she offers none. *See* ECF 494 at 88; *see also Kewazinga*, 2024 WL 4894840, *4; *Brighton Collectibles*, 923 F. Supp. 2d at 1254-55. Plaintiffs attempt to handwave this away by repeatedly characterizing BANA's arguments as going to the weight of East's opinions, not their admissibility. *See* Opp. 1, 9, 13, 14. But the Court has already held they do not. *See* ECF 494 at 87-88. And Plaintiffs identify *no* authority for the proposition that the possibility of cross-examination can cure the methodological defects of a damages analysis that is wholly unmoored from the record. *See, e.g., Schulze v. United States*, 2019 WL 1440306, *3 n.3 (N.D. Okla. Apr. 1, 2019) ("Cross-examination cannot cure an expert's failure to apply a reliable methodology and does not satisfy this court's gatekeeping function."); *Orthoflex, Inc. v. ThermoTek, Inc.*, 986 F. Supp. 2d 776, 798-99 (N.D. Tex. 2013) ("the opportunity for cross-examination is not of itself sufficient to cure expert testimony that is unreliable under *Daubert*").

Plaintiffs' reliance on *Van v. LLR, Inc.*, 962 F.3d 1160, 1164-65 (9th Cir. 2020) (Opp. 10-11), furnishes no support for Plaintiffs' argument that East is entitled to base a damages calculation on credit-card costs with no evidence about any class member's use of credit cards. Plaintiffs cite *Van* to claim that interest rates are a permissible way to measure the time value of money and that "*any* interest rate . . . necessarily reflects a generalization about the time value of money that is not strictly tied to the specific economic circumstances of the individual" who pays it. Opp. 10. But what *Van* does *not* support, and what East fails to demonstrate by any reliable method, is that the lost access to funds *at issue here* can be appropriately measured using the 20.8% credit card interest rate without any evidence that the class members borrowed funds at all, or borrowed funds at or near that rate. *See* Mot. 14. Without such a showing, East's generalizations and statistics regarding UI recipients broadly across time and geography do not reliably demonstrate that a credit card interest rate is an appropriate measure of the lost time value of money *for the class members*.

Plaintiffs also rely on *Van* to suggest that they need not show any evidentiary connection between East's proposed credit-card interest rate and any class member utilization of credit cards because the interest rate is "simply a way of measuring . . . injury, not the injury itself." Opp. 10-11. But nothing in *Van* supports the notion that damages for the "lost time value of money" can be measured by the cost of borrowing on credit cards. Indeed, the *Van* court explicitly stated that it did not consider and made no determination as to whether the plaintiff made a sufficient evidentiary showing to prove damages. 962 F.3d at 1165 & n.3. Further, the Court has already held that damages based on the cost of borrowing on credit cards are not available absent evidence that assumptions about credit card utilization can be shown to be true. *See* ECF 494 at 88.[3] Merely proffering interest rates as "simply a way of measuring injury" does not establish that this "way of measuring injury" is accurate, reliable, or based on any evidence at all.

Had East even tried to sanity check her opinions by consulting the factual record—which she freely admits she did not (HX 33 at 141:25-142:24)—she would have had to reconcile her indiscriminate application of a 20.8% interest rate with evidence establishing that [redacted]. *See* Mot. 11-12. And, as the Opposition concedes, some of the class members were "able to borrow from friends and family at a *zero* percent rate." Opp. 10 (original emphasis); *see also* Mot. 11-12. East also would have had to grapple with the reasonableness of her assumption that turning to credit-card borrowing reflected the actual experience of class members who lost access to benefits of [redacted] or [redacted] *See* Mot. 11. East's failure to conduct any testing against the available record evidence to support her use of the 20.8% interest rate is fatal because where "an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the

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[3] Plaintiffs' claim that BANA's position "fairly stated" is that "*no* classwide interest rate could *ever* be supported by a factual basis due to variations in class members" (Opp. at 11 (original emphases)) is hyperbolic and untrue. Again, BANA's position, consistent with the Court's class certification ruling and the case law (*see generally* Mot. 8-13), is that an arbitrarily chosen interest rate that lacks an evidentiary connection to the class members' actual experience is improper.

opinion unreasonable, it cannot support a jury's verdict." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993).

Plaintiffs attempt to gloss over East's failure to consider the factual record by claiming that it is customary for economists to consider the "average experience" and disregard outliers. Opp. 3, 9. But East has no basis to classify any class members' experiences as outliers or "extreme values"—especially when the experiences she considers outliers or "extreme" are the experiences of *the class representatives themselves*, who are supposed to be *typical* of the class, not outliers. Opp. 9. And, while it may be "customary" to measure harms using average experiences in the field of economics, that says nothing about whether the measure is *reliable* or its "fit" to the case, since "scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993).

Moreover, even if a competent economist proffers a reliable measure of harm based on average experiences, that does not mean the measure suffices as a matter of law to carry Plaintiffs' *Comcast* burden, which requires a methodology that is valid classwide, not just valid on average. *See In re Flash Memory*, 2010 WL 2332081, *11-13 (regression model unreliable where expert relied on "average price trend" and "ma[de] no attempt to assess whether" key input varied across class); *accord* ECF 494 at 87-88. Where, as here, the harms suffered (if at all) by individual class members vary and there is no attempt even to try to account for those variations, aggregate damages calculations are unreliable. *See*, *e.g.*, *In re Flash Memory*, 2010 WL 2332081, *10; *Utne v. Home Depot USA, Inc.*, 2022 WL 16857061, *5, *7 (N.D. Cal. Nov. 10, 2022) (striking "aggregate" damage calculations because "neither model here purports to derive a total award from a sum of individual class members' awards" and "[w]ere the jury to return an aggregate award, it would 'not be possible to know which [class members] are entitled to share in the award,' or how much each should receive"); *In re Apple iPhone Antitrust Litig.*, 2022 WL 1284104, *16 (N.D.

Cal. Mar. 29, 2022) ("plaintiffs may rely on aggregate damage estimates, but must also establish that there is a method, common across the class, for arriving at individual damages") (internal quotations omitted); *Medlock v. Taco Bell Corp.*, 2015 WL 10791410, *6 (E.D. Cal. Dec. 11, 2015) (rejecting damages methodology based on "aggregate [] figures . . . instead of the actual rates" applicable to the class members).[4]

To the extent the Opposition argues that "[c]ourts do not exclude expert testimony because it is conservative," Opp. 12, Plaintiffs miss the point. Courts routinely exclude expert conclusions when their "conservative" nature is just a cover for their unreliability. *See* Mot. 8-9; *Sentius Int'l, LLC v. Microsoft Corp.*, 2015 WL 451950, *5 (N.D. Cal. Jan. 27, 2015) ("[a] damages theory that stems from an erroneous methodology is not admissible even if it results in a low ultimate damages figure"). This is not a situation where East devised a method for measuring damages, then settled on a figure at the low end of an estimated range for the sake of being conservative. Rather, East devised no method for measuring actual damages *at all*, and therefore measured something else. Mot. 11-13; *supra* at 4-7. She calls it "conservative" only because she claims that whatever the actual measure of damages is, it is likely higher than what she estimated. *See* Mot. 8-10; *supra* at 3-4. This wholly unsupported assumption is "connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). A damages expert is supposed to analyze the class's damages—not analyze something else that has *no* demonstrated connection to the class's damages, and ask the Court to accept her *ipse dixit* that whatever the class's damages are, they are probably higher.[5]

[4] *Accord*, *e.g.*, *Reed v. Advocate Health Care*, 268 F.R.D. 573, 590-91 (N.D. Ill. 2009) (collecting cases rejecting "reliance on averages" to estimate classwide damages without evidence that "all members of the proposed class suffered" the same harms); *In re Processed Egg Prods. Antitrust Litig.*, 312 F.R.D. 124, 159 (E.D. Pa. 2015) ("The case law understandably allows for averages and aggregations, but only if the court is convinced that the averages and aggregations are not masking individualized issues").

[5] The Opposition either unintentionally misconstrues or deliberately misstates BANA's challenge to East's analysis by citing cases for the proposition that it is

Plaintiffs' argument (Opp. 14) that aggregate damages may be calculated on a classwide basis based on an interest rate "if the evidence shows that number is a reasonable and defensible proxy for the class members' aggregate loss" confirms that exclusion is warranted here, because there is no such evidence. Indeed, there is no asserted nexus whatsoever between any losses actually suffered by the members of the class and East's "proxy," and therefore they must be excluded. *See* Mot. 10-12.

None of the cases Plaintiffs cite in contending that "aggregate classwide damages liability may be calculated based on a single number, such as an interest rate" support the proposition that *any* arbitrarily chosen number or rate will do. *See* Opp. 14-15.[6] Plaintiffs point specifically to *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), but the only issue presented there was "whether, to obtain class certification under Federal Rule of Civil Procedure 23, class representatives must demonstrate that there is an 'administratively feasible' means of identifying absent class members." *Id*. at 1123. That has nothing to do with the use of "generalizations"

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permissible to base a damages methodology on approximations. Opp. 15-16 n.5. Nothing in BANA's Motion claimed otherwise. The focus of BANA's challenge was and remains that the assumption that East's 20.8% interest rate is not a *reliable and supported* approximation of anything. *See* Mot. 11-12; ECF 494 at 87-88.

[6] In *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022), while the court permitted a regression analysis offered to show potential classwide *liability*, it explicitly stated that "individualized differences . . . may require a court to determine *damages* on an individualized basis." *Id.* at 679. Further, the court found that the price correlation test in *Olean*, which was offered to assess price-fixing impact but not damages, was subject to rigorous testing to assess its applicability to the facts and circumstances of the case. *See id.* at 670-72. East conducted no such testing here. *See supra* at 6; Mot. 11-13. In *Belyea v. GreenSky, Inc.*, 2025 WL 589037 (N.D. Cal. Feb. 24, 2025), the expert purported to estimate what class members would have paid if they had not been charged a fee they had all been charged, rather than purported cost-of-borrowing costs that were incurred as a result of money purportedly withheld. *Compare id.* *5, *with* Mot. 9. Further, the analysis was permitted, in part, because it relied on defendant's *actual* loan origination data for the class and because the expert reviewed and confirmed the analysis was consistent with the defendant's communications and training manual. *Belyea*, 2025 WL 589037, *5. Similarly, in *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 326 F.R.D. 592, 601 (N.D. Cal. 2018), the expert merely was asked to assess the difference between the price class members paid and the price that may have been charged in their market but for the false claim. The case says nothing about whether class members' purported costs of borrowing can be aggregated classwide. *See id.*

in measuring damages on any basis, which is the issue here. Plaintiffs' reliance on *Hartley v. Dillard's, Inc.*, 310 F.3d 1054 (8th Cir. 2002), to support their claim that East need not account for "damages suffered by . . . individual class member[s]" (Opp. 12) leaves one wondering whether Plaintiffs even read the case. *Hartley* was an individual employment case, not a class action, and says nothing about when damages might be measured in an aggregate or "general" fashion. *Id.* at 1058-60.[7]

The Ninth Circuit has "interpreted *Comcast* to mean that plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1154 (9th Cir. 2016) (internal quotation marks and citation omitted); *accord Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) ("a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to th[e] theory" of liability). Plaintiffs' liability case seeks compensation for "the loss of use of money" (ECF 494 at 86), and East proposes to measure damages for that alleged lost use of money by credit-card interest rates. But East does not, and cannot, claim that payment of credit-card interest occurred at all for the class members, much less that it is something that "stemmed from the defendant's actions." *Vaquero*, 824 F.3d at 1154. There is thus a fatal mismatch between the theory of liability and the damages model East offers. Her opinions should be stricken as unreliable and irrelevant.

CONCLUSION

For these reasons and the reasons set forth in BANA's Motion and evident from the record, East's report and opinions should be stricken and excluded.

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[7] Plaintiffs' attempt to distinguish *In re Blackbaud, Inc. Cust. Data Breach Litig.*, 2024 WL 2155221 (D.S.C. May 14, 2024), where the court excluded an expert who tested his methodology on the "three named plaintiffs" and failed to indicate whether or how he verified the accuracy . . . for those three individuals" (Opp. 16) falls flat. In *Blackbaud*, the court excluded an expert because it found the expert's proposed method was "unreliable and unhelpful" because several aspects of the method "were not properly tested" and the expert "extrapolated from numerous accepted premises to unfounded conclusions," which is precisely what East does here. 2024 WL 2155221, *14.

Dated: February 20, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated: February 20, 2026

s/ Matthew L. Riffee
MATTHEW L. RIFFEE