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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 GREG J. REGAN (ECF 567)** 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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BANA moved to exclude Greg Regan's damages opinions and calculations for a very fundamental reason: Regan does not actually have an opinion and did nothing to verify whether any of the damages he purports to calculate were actually suffered by the class. *See* ECF 567-1 (Mot.). Regan does not even know whether any of the class members he purports to calculate damages for were injured *at all*, much less whether they paid 10% or 20% interest charges because they used credit cards to cover the full amount of their claims and/or frozen account balances.

The Opposition cannot deny this. *See* ECF 620 (Opp.). Instead, it attempts to foist Plaintiffs' burden to prove damages on BANA. Plaintiffs then attempt to portray Regan's methodology as something it is not: a purported measure of interest income based on the time value of money. But the face of Regan's Report and his testimony show this is not true. As Regan states in his Report and testified, his consequential damages methodology estimates the "cost of borrowing" on a credit-card interest rate. HX 41 ¶ 43. That is precisely the same methodology that this Court rejected at class certification because it was "not supported … *with evidence showing that [its] assumptions are true as to most or even any of the EDD cardholder's experience*," and thus "Plaintiffs have not demonstrate[d] that this method measures damages across the entire class that stem from BANA's actions that created the legal liability." ECF 494 at 88 (emphasis added). As BANA demonstrated in its Motion, and the Opposition cannot refute, Plaintiffs still have not supported Regan's methodology with *evidence* showing his assumptions are true *for the class*—as necessary to reliably measure damages across the entire class. In fact, the evidence—which the Opposition asks the Court to ignore—confirms they are not. Thus, Regan's methodology should be rejected again and excluded.

Regan's attempts to calculate BANA's purported profits should be excluded for similar reasons: he does not know what, if any, revenue BANA actually would have obtained. But they also must be excluded because Regan and Plaintiffs admit that his disgorgement estimates do not attempt to calculate the actual question they pertain to: BANA's *net* profits, not simply [redacted].

For each and all of these reasons, and the reasons stated in BANA's Motion, the Court should exclude Regan's opinions under Federal Rule of Evidence 702 and *Daubert* and its progeny as unreliable, irrelevant, unhelpful to the trier of fact.

ARGUMENT

I. Calculations that Do Not Exclude the Uninjured Must Be Excluded.

Plaintiffs do not dispute that Regan's methodology and damages calculations cannot exclude uninjured cardholders and fraudsters. *See* Opp. 7-8; Mot. 10-13. Nor could they; Regan admitted that his methodology cannot. *See* Mot. 10-12. Instead, Plaintiffs argue that Regan's damages calculations should be permitted because the Court has already decided that it is BANA's burden to disprove *liability* by showing whether or not the Claim Denial and Credit Rescission Classes' accounts were illegitimate and/or their transactions were authorized. *See* Opp. 7-8 (citing ECF 494 at 51-52). This misconstrues BANA's argument and the Court's prior holding.

Putting aside whether the Court is correct as to which party bears the burden to prove or disprove liability, it is undisputed that Plaintiffs have the burden to prove *damages* in this case. Mot. 1-3; *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1026 (9th Cir. 2011) ("a plaintiff must show that the claimed actual damages were 'as a result of' the violation"), *abrogated on other grounds by Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *see also* Opp. 2 (admitting that Plaintiffs have to establish the fact of damages). Specifically, EFTA requires that plaintiffs prove "actual damages" that occurred "as a result of" a financial institution's alleged misconduct. 15 U.S.C. § 1693m(a)(1); *see also* Mot. 10-11; ECF 589-1 (MSJ) at 16-17, 22-24. And to prove actual damages, the cardholder must have been subject to EFTA's protections (e.g., their accounts must have been established for non-fraudulent reasons), and their disputed transactions must have actually been unauthorized. *See* Mot. 10-11; *Stearns*, 655 F.3d at 1026-27 (holding that it would be "difficult or impossible" for *plaintiff* who "fully intended" to make transaction to show actual damages under EFTA).

The statute's clear language, which the Opposition does not address, is consistent with the Court's holding at the class certification stage. As the Court explained, while it held that Plaintiffs did not have the burden to establish that their accounts and claims were legitimate to certify a class and potentially to establish liability, it qualified that any non-injured class members would be culled out at the *damages phase*—where Plaintiffs would have the burden to prove "actual damages" to recover anything more than EFTA's capped statutory penalty. ECF 494 at 45; *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016) (court to winnow out uninjured class members at the damages phase); *see also Healy v. Milliman, Inc.*, 164 F.4th 701, 705 (9th Cir. 2026) (plaintiffs required to produce evidence of standing for named and unnamed class members at summary judgment).

As BANA established in its Motion, and as Plaintiffs cannot dispute, Regan's methodology cannot do this. *See* Mot. 10-13; *see also id.* 14-19. He simply assumes that every cardholder included in Plaintiffs' class definition who was [redacted] was harmed in the manner alleged. *Id*. 11-12. Regan did nothing to verify this assumption, and the Opposition does not address any of its fallacies—which are contradicted by testimony, documents, [redacted]. *See id.* Thus, Regan's damages calculations are unreliable and should be excluded because they "almost certainly include damages for uninjured class members." *Utne v. Home Depot U.S.A., Inc.*, 2022 WL 16857061, *5 (N.D. Cal. Nov. 10, 2022) (striking classwide damages estimates). None of Plaintiffs' cases, which are inapt and speak only to the general *Daubert* standard, hold otherwise.[1]

[1] The Opposition repeatedly cites *Primano v. Cook*, 598 F.3d 558 (9th Cir. 2010) *and Alaska Rent-a-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960 (9th Cir. 2013) to defend many of the fallacies in Regan's opinions and assumptions. *See, e.g.,* Opp. 7-9, 15. Both cases are completely inapt. *Primiano* concerned the admissibility of a medical expert's testimony concerning his opinion on plaintiff's elbow replacement based on his decades of experience in orthopedic medicine and his assessment of her medical records and images. 598 F.3d at 565-67. *Alaska Rent-a-Car* concerned expert testimony regarding how much business and profit a rental car company lost on account of another's breach of a settlement agreement and merger with another

II. Regan's Consequential Damages Opinions Are Inadmissible.

A. The Court already rejected the methodology Regan proposes here.

The Opposition does not dispute that Regan's consequential damages opinions are based on *hypothetical* consumers and *hypothetical* harm they *may* have incurred, rather than the *actual experience* of any class member. *See* Mot. 13, 15-16; HX 41 ¶¶ 40-51; HX 39 48:7-49:15. Plaintiffs also do not dispute that they have not offered any evidence showing that every class member had to borrow money at all, much less that they had to increase their credit card utilization *and* paid interest as a result of BANA's purported misconduct. Nor could they. Regan admitted that not every class member borrowed or incurred interest charges. HX 39 223:21-224:16; *see also id.* 48:7-49:7. Further, the undisputed evidence shows that [redacted]. Mot. 17-18.

Plaintiffs also do not dispute, and in fact readily admit that Regan's methodology and calculations rely on generalizations that have not been validated based on evidence of even one actual class member's experience—much less a sampling or the whole. *See* Opp. 9; Mot. 14-17. Plaintiffs simply argue that "[i]t is commonplace for experts to rely on data and draw conclusions that are not specific to any particular party," and claim that the Court's class certification approved the same or similar methodology that Regan offered in his Report. Opp. 9-10. But their case is clearly inapposite,[2] and their argument ignores the law of this case—which

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company. 738 F.3d at 967. Neither permitted expert testimony where the expert's calculations would compensate uninjured class members, or where the expert failed to validate that any of his assumptions were based on evidence and consistent with the actual experiences of class members. *See* Mot. 13-22; *supra* § I; *infra* at 4-7.

[2] In support, Plaintiffs cite *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1025-28 (9th Cir. 2022). But *Elosu* and the permitted opinion are completely inapt. There, the expert was proffered to opine on the cause of a fire. *Id.* at 1026-28. The court found the expert's testimony was admissible, in part, because it was clear the expert conducted an "independent investigation" and detailed his "exhaustive personal examination of the fire scene," and because his theory "was also fully consistent with the eyewitness testimony." *Id.* at 1026-27. Here, Plaintiffs concede Regan conducted no independent investigation, did not personally examine and does not know *any* of the class members' personal experiences, and his assumptions are [redacted]. *See supra* at 2-3; Mot. 15-18.

excluded the same opinion that Regan seeks to offer here again. ECF 494 at 88.

At class certification, the Court held that Regan's "Methodology 2" was inadmissible to prove damages because it was "not supported … *with evidence showing that [its] assumptions are true as to most or even any of the EDD cardholder's experience*," and thus "Plaintiffs have not demonstrate[d] that this method measures damages across the entire class that stem from BANA's actions that created the legal liability." ECF 494 at 88 (emphasis added); Mot. 13, 16-17. The Opposition seeks to get around this ruling, arguing that the Court accepted Regan's "Methodology 1," and only rejected Methodology 2. Opp. 10. That is true, but it does not save Regan's consequential damages opinions.

Methodology 1 was a generalized proposal to award class members damages based on an "interest rate that reflects the 'time value of money.'" ECF 494 at 86. Methodology 2 was a proposal to measure consequential damages based on the cost of credit card borrowing. *Id*. at 87-88. Regan's Report continues to propose the latter. Mot. 5-6, 13-20. As Regan testified and explicitly states in his Report, he continues to measure damages by estimating the "costs of borrowing." *E.g.*, HX 41 ¶¶ 43-44; HX 39 171:1-172:25. Further, his opinions continue to be based on assumptions only, as neither Regan nor Plaintiffs' other purported experts (East or Levine) made any attempt to validate whether their "assumptions are true as to most or even any of the EDD cardholder's experience." Mot. 14-17; *see also* ECF 565-1, 566-1 (moving to strike East and Levine for similar reasons and others). Regan does so despite admitting that his assumptions are not true for every class member, and conceding that borrowing costs—and the need to borrow at all—varies from person-to-person. Mot. 14-15 (citing HX 39 192:6-193:7, 211:14-213:1). The undisputed record (which Regan did not review) confirms this, as it shows that: [redacted] (before any credit-card interest charges could have become due). Mot. 15-20. As the Court previously held, this renders Regan's consequential damages opinions unreliable and inadmissible. ECF 494 at 88; *see also Kewazinga Corp. v. Google LLC*, 2024 WL 4894840, *4 (S.D.N.Y. Oct. 17, 2024) (striking damages computation not based on "sufficient facts or data").

The Opposition's cases (at 10-12) are distinguishable and cannot save Regan's cost of borrowing opinions. In *Van v. LLR, Inc.*, 962 F.3d 1160, 1164-65 (9th Cir. 2020), the class sought damages measured by the amount of money that the class could have earned if they were not charged a sales tax and put their money to an alternative use. The court ultimately held that could be measured on a classwide basis using the "time value of money," there a market interest rate of 4.35%—which resulted in a total of $3.76 on a claim concerning $531.25 in refunded sales tax charges based on what plaintiff could have earned on an "interest-bearing asset." *Van*, 61 F.4th at 1164-65. But that is not what Plaintiffs propose, and they do not try to evidence what class members could have earned in "interest income." *Id*. Instead, Plaintiffs seek damages based on the costs of credit-card borrowing, and attempt to support that claim with purported expert opinion regarding costs of credit-card borrowing. *Supra* at 3-4. The Court has already rejected that methodology and should do so again here. *See* ECF 494 at 88.

Plaintiffs' product claim cases also do not endorse the proposition that they are entitled to rely on "generalizations" in lieu of evidence about class members' actual damages.[3] *ConAgra* did not endorse any damages methodology at all; it merely held that plaintiffs' inability to discern "the identity of all class members" did not transgress the "defendant's due process rights" because the question at issue was a challenged sales practice. 844 F.3d at 1132. At most, these cases stand for the

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[3] *See* Opp. 11 & n.3 (citing *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017) (concerning price premium based on 100% natural claim); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 326 F.R.D. 592, 598 (N.D. Cal. 2018) (same based on "made from real ginger" claim)*; McMorrow v. Mondelez Int'l, Inc.*, 2021 WL 859137, *1 (S.D. Cal. Mar. 8, 2021) (same based on "nutritious" claim)).

proposition that in a case challenging a purportedly false product claim, classwide damages could potentially be calculated by determining the difference between the price class members in particular markets paid and the price that may have been charged in their market but for the false claim. *See, e.g.*, *ConAgra*, 844 F.3d at 1123; *Fitzhenry-Russell*, 326 F.R.D. at 605-06*; McMorrow*, 2021 WL 859137 at *5.

Again, that is not anything like what Regan purports to do here. *Supra* at 3-5. Whereas purported prices are set by markets and would have been paid equally by consumers who purchased the same product within that market, the need and "cost of borrowing" indisputably varies from consumer to consumer. *Supra* at 3-5. Indeed, in order for Regan's assumptions to be met, each and every class member must have, at minimum: (A) had insufficient funds to cover expenses as a result of the alleged wrong; (B) had access to a credit card; (C) had no alternative or cheaper sources to cover those expenses; (D) charged at least the full amount of the temporarily withheld funds to a credit card; and (E) incurred and paid interest on those charges before they regained access to their prepaid card funds. *See supra* at 5; Mot. 13-20. Regan does not claim to know, and Plaintiffs do not attempt to show whether any of these assumptions were met—and we know they were not, [redacted] *See* Mot. 15-18.

Finally, the Eighth Circuit's ruling in *Hartley v. Dillard's, Inc.*, 310 F.3d 1054 (8th Cir. 2022), is even further afield. It was not a class action at all but an individual employment-discrimination case where the parties disagreed over whether "declining profits [] justif[ied] Hartley's termination." *Id.* at 1060. Plaintiffs argue that this opinion supports their claim that a damages expert can opine on classwide damages based on "economic generalizations about national trends." Opp. 12. But the expert opinion had nothing whatsoever to do with damages, only with the factual issue of whether "Dillard's stated reason for Hartley's firing was pretextual." *Hartley*, 310 F.3d at 1058. To call this case inapposite is an understatement.

B. The delayed benefits opinion must be excluded for more reasons.

In addition to the reasons discussed above, Regan's delayed benefits opinion must be stricken because it relies on even more unreliable assumptions. Mot. 20-22. To estimate additional consequential damages for the Account Freeze Class, Regan *assumed* that each and every member of the Account Freeze Class incurred borrowing costs during the time their future EDD benefits payments may have been delayed. Regan admits that he made these assumptions without reviewing any data to confirm them, and without knowing: (1) the amount of bi-weekly payments the class or any individual received; (2) the length of delayed payment for the class or any individual; or (3) whether the class or individual class members remained eligible for benefits during the time their account frozen. HX 39 246:23-251:19; Mot. 20-21. The Opposition does not address this issue at all. Because Regan's delayed benefits opinions are "based on assumptions rather than evidence establishing each cardholder's experience," they must be excluded. ECF 494 at 87-88; Mot. 20-22.

III. Regan's Customer Service Opinions Are Unreliable and Inadmissible.

Plaintiffs admit that Regan and Jay Minnucci do not contend that every—or any—class member had to spend time they would have spent working at a minimum wage job on hold. Opp. 16; *see also* Mot. 22-23. Plaintiffs further concede that Regan and Minnucci do not intend to measure *actual* harm the class members incurred while on hold. Opp. 16; *see also* Mot. 23. Rather, Plaintiffs again attempt to equate their experts' approach to the interest income rate permitted in *Van* and similar cases, arguing that they simply need to offer a reasonable way to remedy the injury. Opp. 16. But Plaintiffs offer no case where a court permitted alleged damages for time spent on hold to be calculated using the minimum wage. Nor is there any basis to assume that would be a reasonable measure here, as Regan's other damages opinions rely on the assumption that each class member was unemployed—and therefore not earning wages when they were allegedly on hold. *See* Mot. 22-23; *Oliver v. Am. Express Co.*, 2024 WL 100848, *12 (E.D.N.Y. Jan. 9, 2024) (affirming exclusion of "conclusory and internally contradictory" expert opinion that "the *Daubert* gatekeeping function is meant to prevent"). Thus, Regan's customer service opinions and his damages calculations also must be excluded because they are "based on assumptions rather than evidence establishing each cardholder's experience." ECF 494 at 87-88; Mot. 22-23.

Regan's customer service opinions are also inadmissible because Plaintiffs concede the record does not contain the key inputs for his calculations: data concerning [redacted] for each Customer Service Class member. *See* Mot. 23; Opp. 16. Plaintiffs argue that exclusion of Regan's customer service opinions would be improper because without them, Plaintiffs cannot prove damages. Opp. 16. But that is not a legal basis for denying exclusion. Indeed, 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) (excluding expert testimony and granting summary judgment because without excluded expert, plaintiffs could not prove their case).

IV. Regan's [redacted] Opinions Are Irrelevant and Inadmissible.

Regan's disgorgement "[redacted]" opinions should be excluded because they also are based on assumptions and not evidence. The Opposition does not dispute that Regan's calculations are not based on records, data, or the experience of even a single class member. *See* Mot. 23-25. Rather, Plaintiffs concede that Regan relied solely on his interpretation of testimony from a BANA employee to assume that [redacted]. Opp. 13. But that assumption is not supported by information for any class members, and is in fact directly refuted by BANA data cited in Regan's own report—which indisputably confirms that many class members *did not* withdraw their funds immediately. Mot. 24 (citing HX 41, Schedule 2). Thus, Regan's [redacted] opinions also must be excluded because they are "based on assumptions rather than evidence establishing each cardholder's experience." ECF 494 at 87-88; *see also Kewazinga*, 2024 WL 4894840, *4 (striking expert computation as not based on "sufficient facts or data").

Plaintiffs claim the Court should nevertheless allow Regan's [redacted] opinion to survive because BANA purportedly made and had this argument rejected at class certification. *See* Opp. 14 (citing ECF 494 at 93). That misstates the record. BANA did not present and the Court did not address the issue raised here. Rather, the Court acknowledged that "BANA d[id] not dispute Plaintiffs' damages model for disgorgement" at class certification, and therefore concluded that it could satisfy "predominance." ECF 494 at 93. To the extent the Opposition (at 14) seeks to rely on the UCL's "particularly forgiving" classwide calculations or the interpretation of the UCL in *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1147-49 (2003), those cases are irrelevant now because *Plaintiffs gave up their UCL claim* in response to BANA's summary judgment motion. ECF 652 (MSJ Opp.) at 50 n.29.

Finally, the Opposition argues (at 14-15) that the accuracy of Regan's assumptions does not matter because California law is intended to eliminate even the possibility of profit, and because the risk of any uncertainty should be borne by defendant. But there is no uncertainty here. Plaintiffs cannot reasonably dispute that BANA incurred [redacted] that vastly overwhelm the [redacted] Plaintiffs seek to disgorge. *See* Opp. 14-15; Mot. 25; *see also* MSJ 3; ECF 589-2 (SUF) ¶¶ 21-22. Regan did not consider any of those costs or losses when he estimated BANA's alleged [redacted]. Mot. 25. Thus, his opinions are irrelevant and should be excluded because they do not estimate the relevant issue, [redacted]. *See* Mot. 25; *Meister v. Mensinger*, 230 Cal. App. 4th 381, 399 (2014).

CONCLUSION

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

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