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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 **DEFENDANT BANK OF AMERICA, N.A.'S OPPOSITION TO PLAINTIFFS' *DAUBERT* MOTION TO EXCLUDE CERTAIN TESTIMONY OF VICTOR STANGO (ECF 571)** Ctrm: 12A – 12th Floor Judge: Hon. Gonzalo P. Curiel FILED PROVISIONALLY UNDER SEAL PURSUANT TO STIPULATED PROTECTIVE ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

Consumer behavioral economist Victor Stango provided relevant, supported, reliable expert analysis on Plaintiffs' damages claims grounded in nearly 30 years of experience studying behavioral economics in financial services markets.[1] Plaintiffs' *Daubert* motion (Mot., ECF 571-1) takes no issue with the majority of his analysis but seeks to exclude "certain portions"—specifically, the portions of Stango's Report where he opines that a consumer who temporarily loses access to funds and then regains it does not suffer the same economic harms as a consumer who loses those funds *permanently*. If this opinion were vulnerable to a *Daubert* attack on *any* grounds, one might think it could only be on account of sheer obviousness, but Plaintiffs are so threatened by it that they endeavor to make it a point of some controversy and seek to strike it.

They do so by characterizing Stango's analysis as a "legal conclusion." Mot. at 1. They do so not because Stango *himself* ever states a legal conclusion, but because *Plaintiffs* make legal arguments that Stango's analysis of economic harm should not be considered in calculating what actual damages (if any) class members have experienced. That legal argument on *Plaintiffs'* part, regardless of its merits (or lack thereof), does not retroactively turn Stango's purely economic analysis into a legal one. Thus, it is unsurprising that Plaintiffs resort to basing their Motion on their own paraphrase of Stango's opinions rather than his actual statements—paraphrases that conveniently insert legal arguments and even a statutory citation where Stango offered neither. *See id*. Misattributing statements to an expert that the expert never made is not a valid basis for excluding the expert's opinion.

And Plaintiffs' legal argument that actual economic harm is not relevant to a factual assessment of economic damages does not provide a valid basis for excluding the economic analysis, either. Plaintiffs' argument is that a consumer who temporarily loses access to (say) $100 in funds can, as "a matter of law," claim the

[1] *See* BX 1 ¶¶ 1-4 & App'x A; HX 48 at 59:20-60:10. Exhibits to the Declaration of James Baltzer shall be referred to as "BX," and exhibits to the Declaration of Lindsay E. Hoyle shall be referred to as "HX."

full $100 as actual damages, even after regaining access to the money, just as if they had lost the funds permanently—and that a defendant's only recourse against this is to seek a $100 offset *after* those "damages" are trebled. That argument is contrary to the plain language in the Electronic Funds Transfer Act (EFTA), which provides that only "*actual* damages" sustained "as a result" of the alleged violation are trebled—which cannot include a temporarily withheld provisional credit or a fully reimbursed claim itself. *See* 15 U.S.C. §§ 1693m(a)(1), (a)(2)(B); *see also* ECF 589-1 at 16-17. And it is also contrary to the law of the case, as established in Judge Burns' 2023 ruling interpreting EFTA, that "fully reimbursed" Plaintiffs can claim damages suffered "as a result of the delay" but not the whole (reimbursed) amount. ECF 126 at 22-23.

Moreover, even if the Court were to end up *agreeing* with Plaintiffs' legal argument in every respect, it would not render Stango's analysis irrelevant. That is because Plaintiffs and their *own* purported expert agree that BANA is entitled to offset any damages Plaintiffs claim against the amounts Plaintiffs were already paid back. The only legal dispute is whether Stango's analysis is relevant to calculating actual damages, or relevant to calculating the offset. Plaintiffs' argument that this analysis must be performed later rather than sooner does not undercut its relevance—it merely *confirms* it. Their motion to exclude Stango's expert economic analysis should therefore be denied.

BACKGROUND

A. The Regan Report

Stango's Report responds to the opinions of Plaintiffs' purported expert on damages, accountant Greg J. Regan. Regan is not an economist but claims his accounting experience qualifies him to offer a damages opinion because he has experience "identify[ing] and implement[ing]" a damages model, even though he does not claim any qualifications for opining on the "suitability" of a model. HX 39.A at 283:16-19, 284:4-5. Based on this, he purports to calculate damages for the five classes at issue as follows.

The **Claim Denial** and **Credit Recission** classes consist of people who made claims of unauthorized transactions where BANA, respectively, either denied the claim or issued a credit which it then reversed. All such class members have since been credited the full amount of those claims. Regan opines that they nevertheless suffered actual damages in the full "amount of each class member's claim(s)." HX 41 ¶¶ 38, 66, 99. He says the same about the **EMV Chip** class, which just combines the other Claim Denial and Credit Rescission classes and (groundlessly) blames the unauthorized transactions on the cards' lacking EMV chips.

The **Account Freeze** class consists of consumers whose accounts BANA temporarily froze based on claims concerning transactions that BANA believed were authorized by the cardholder. Regan opines that they suffered actual damages equal to the full amount of funds in their account when they were denied access, even though their access was subsequently restored. *Id.* ¶ 78.

The **Customer Service** class consists of people who phoned BANA about their accounts and spent time on hold, which Plaintiffs allege was excessive. Regan opines that they suffered damages based on the "applicable minimum wage—or other reasonable metric" during whatever portion of their time on hold is deemed "excessive." *Id.* ¶¶ 92-93; *see* HX 39.A at 282:25-284:16.

Across the Claim Denial, Credit Rescission, Account Freeze, and EMV Chip classes, Regan proposes the use of a single formula purporting to measure "the time value of money for impacted cardholders, or comparable measure of the economic loss to class members resulting from their inability to access their UI benefits," which entails awarding them their full claim amount plus interest of either (i) 10%, which he states "is consistent with the interest rate applied to judgments in California," and (ii) 20%, which is "based on [his] review of the types of credit accessed by typical consumers" (albeit not by any of the consumers in *this* litigation). HX 41 ¶¶ 43, 46, 47, 49. Regan says he picked the 10% rate due to his "familiarity with the California

Civil Code," HX 39.A at 154:2-9, and the 20% rate as the "best estimate of the costs that consumers incurred . . . of borrowing on a credit card"—even if they never borrowed on a credit card. *Id.* at 161:7-24. Regan also claims these classes are entitled to "disgorgement" damages based on the profits he imagines BANA might have made from money kept in customer accounts he assumes consumers would (uniformly) otherwise have withdrawn. HX 41 ¶¶ 61-62.

B. The Stango Report

Stango's Report addresses "Mr. Regan's damages methodologies and the calculations he performs to measure alleged damages for all five proposed classes." BX 1 ¶ 6; HX 48 at 34:21-35:13. Stango's Report is directly responsive to Regan's and addresses precisely the same subject matter, so if Regan's opinions are relevant, then Stango's rebuttals are at least as relevant.

Stango challenges as "economically illogical" Regan's presumption that consumers who "only lost access to their funds for a period of time" are damaged in an amount equal to the full amount of their funds, just as if they had lost those funds permanently. BX 1 ¶¶ 32, 90. Indeed, Regan himself had acknowledged that his damages calculations "require an offset for amounts that the Bank has paid or presently expects to [redacted]," HX 41 ¶ 50 n. 60, yet made no acknowledgement "[redacted]" of those amounts. BX 1 ¶ 33 (emphasis in original). Regan "provides no economic argument for why a dollar amount that was temporarily lost and then returned later represents economic harm in the amount of the dollars to which the individual regained complete access," Stango concluded. *Id.* ¶ 83. The result is that Regan "substantially overstates" actual damages in multiple ways. *Id.* §§ IV.A, VII.A, VIII.A, ¶¶ 38, 105.

Stango also cited a variety of ways in which Regan ignored heterogeneity in the classes—such as his proposed use of "the then-current California minimum wage" as the "identical" value for all Customer Service class members' alleged "lost time," and his proposal to attribute every single class members' alleged damages to the lack of an EMV chip regardless of whether they "would [] have been protected from fraud by the presence of an EMV chip." *Id.* ¶¶ 102, 105.

Stango further criticized Regan for failing to account for the unknown and unknowable portion of class members who are entirely unharmed. *Id.* ¶ 105. Regan fails to identify "[redacted]" in the Claim Denial and Credit Recission classes. *Id.* ¶ 75, 87. These "[redacted]" *Id.*

In response to Regan's unsupported assumptions that class members were (uniformly) damaged to the tune of interest rates of 10 to 20 percent, Stango criticizes Regan for "fail[ing] to analyze the types of credit accessed specifically by the proposed class or any individual proposed class member during the proposed class period" and relying on "assumptions about proposed class members' economic circumstances and behaviors that are not derived from class data and may be non-representative of proposed class members' economic circumstances and behaviors, both individually and on average." *Id.* ¶ 41. He also identifies invalid assumptions behind Regan's disgorgement proposal, such as "erroneously assum[ing] that [redacted]" when Regan's own Schedule 1 shows that "[redacted]" *Id.* ¶ 81.

C. Plaintiffs' Motion to Exclude

Plaintiffs move to exclude "certain portions" of Stango's Report, which they describe as those "portions" expressing the opinion that "[redacted]

[redacted]" Mot. at 1. That quote is from Plaintiffs, not Stango, who expressed no opinion whatsoever about the order of operations in an EFTA damages calculation or about EFTA at all. Plaintiffs apparently decided that by inserting the EFTA citation into their *own* (mis)characterization of Stango's opinions, they could make it *look* like a "legal conclusion"—as if Stango was performing statutory interpretation rather than economics. *Id.*

But then, after criticizing Stango for offering a "legal conclusion," Plaintiffs Motion proceeds to criticize Stango for *declining* to offer a legal conclusion—asserting that his opinions are somehow inadmissible because he does not "dispute" how "[redacted]" *Id.* at 1, 5. That is because Stango only opined on what "makes [] economic sense" and what, in his opinion as an expert economist, "represents economic harm"—not on what the law requires or how the Court should "proceed." BX 1 ¶ 83. Plaintiffs do not take issue with Stango's opinions as a matter of economics. They devote the majority of their memorandum to arguing that he is wrong "as a matter of law." Mot. at 1.

Separately, Plaintiffs challenge "the distinction [Stango] . . . draw[s] between '*lost funds*' and '*lost access to funds*'" as "unreliable and not grounded in sound principles or methods." *Id.* at 8. But they do not actually offer any arguments against this grounded in any principles of economics—they just rehash their arguments that Stango's economic opinions are inconsistent with their *legal* arguments "[redacted]" *Id.*

Plaintiffs do not challenge any of the remainder of Stango's well-grounded opinions. Notably, Plaintiffs do not challenge Stango's opinions:

1) That Regan's consequential damages interest rate calculations for the Claim Denial, Credit Recission, and Account Freeze classes are

methodologically flawed, cannot be applied class-wide, and overstate economic damages;

2) That Regan's Claim Denial, Credit Recission and EMV Chip methodologies fail to distinguish between harmed and unharmed consumers;

3) That Regan's damages methodology for the Customer Service and EMV Chip classes ignores heterogeneity and fails to reliably measure class-wide economic harm; and

4) That Regan's disgorgement methodologies for the Claim Denial, Credit Recission, Account Freeze, and EMV Chip classes fall short of reliably estimating BANA's profits.

They concede each of these critiques are admissible expert testimony.

Plaintiffs also do not challenge Stango's qualifications as a damages expert.

ARGUMENT

I. Economists Are Entitled to Offer Opinions on Economic Damages.

Plaintiffs' characterization of Stango's economic opinions as legal arguments is without merit. As shown above, the only legal arguments made were by Plaintiffs. Stango, for his part, offered opinions about "economic harm" from his perspective as an economist. BX 1 ¶ 83. And he did so on the very same subject matters on which Regan offered his own opinions (albeit in Regan's case, *not* informed by any economic expertise). *See, e.g.*, *id*. ¶ 6 ("I have been asked to respond to Mr. Regan's damages methodologies and the calculations he performs to measure alleged damages for all five proposed classes.").[2] Economists are entitled to offer opinions on economic damages, experts are entitled to disagree with each other, and there is

[2] *See also*, *e.g.*, HX 48 at 35:9-13 ("Q. Your assignment was to respond only to those opinions of Greg Regan that are set forth in this rebuttal report? A. Yes. That was my assignment for this report."), 116:9-14 ("Q. The Bank, the Bank's counsel, framed the scope of your assignment. Is that right? A. I was given my assignment which was to respond to the opinions in the Regan report by counsel, yes."), 119:6-11 ("I was asked to address the Regan report and its methodologies. And so my focus was on his analysis. And my opinions are about his analysis and his methodology.").

no sense in which Regan's opinions on damages calculations come within the proper bounds of expert testimony while Stango's opinions in *response* somehow do not. *See*, *e.g.*, *Lindner v. Meadow Gold Dairies, Inc.*, 249 F.R.D. 625, 636 (D. Haw. 2008) (rebuttal expert reports are "proper rebuttal reports if they contradict or rebut the subject matter" of the expert report); *Laflamme v. Safeway, Inc.*, 2010 WL 3522378, *3 (D. Nev. Sept. 2, 2010) ("As long as defendant's rebuttal expert witnesses speak to the same subject matter the initial experts addressed and do not introduce novel arguments, their testimony is proper under Federal Rule of Civil Procedure 26(a)(2)(C) and related case law from District Courts in this circuit.").

Stango offered no legal opinions. Rather, he offered opinions, as an expert economist, on whether Regan's proposed measure of "actual damages" served "to reliably measure economic harm on a class-wide basis" as a matter of economic principle and logic—and concluded that it did not. BX 1 ¶ 13. He grounded this conclusion on the premise that economic damages are properly measured "as the difference between actual consumer outcomes and consumer outcomes in a 'but-for' hypothetical world absent the at-issue conduct." *Id*. ¶ 31; *see also id.* ¶ 72; *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 624 n.33 (N.D. Cal. 2015) ("The difference between prices actually charged for CRTs during the Class Period and prices in a 'but for' world is sometimes called the 'usual measure' of damages. This is a common damages calculation method."). Seen from that perspective, a consumer temporarily denied access to (say) $100 is not in the same position as a consumer *permanently* denied access to $100: "the consumer who has *lost funds* does not have $100 in the actual world but does have $100 in the but-for world, and the consumer who has *lost access to funds* has $100 in both the actual and but-for worlds." BX 1 ¶ 32. "To treat customers in the two situations as similarly situated," as Regan proposes to do, "is economically illogical." *Id.*

On the above basis, Stango analyzed how the measure of actual damages would be different if the funds already recompensed to class members were excluded from the calculation. *See id.* ¶¶ 73-74. And therein lies the crux of Plaintiffs' objection: they insist that [redacted], and claim they are correct about this "as a matter of law." Mot. at 1. And based on *Plaintiffs'* legal argument, they accuse *Stango* of making legal arguments instead of economic analysis—specifically, a legal argument that [redacted]" *Id*. This accusation is false on multiple levels and furnishes no valid ground on which to exclude Stango's economic analysis.

First and most fundamentally, it is not true—Stango offered no opinion whatsoever on legal questions around damages trebling. Stango has been lucidly clear about this. *See*, *e.g.*, BX 1 ¶ 11 ("I do not opine on the legal question of whether any damages in this matter should be trebled."); HX 48 at 139:15-21 ("Q. You are aware that [EFTA] provides for treble damages under certain circumstances? . . . A. I have no opinion about that. I'm not a lawyer."), 142:8-17 [redacted]), 143:3-14 ("[redacted] Q. Okay. So you have no opinion about whether trebling should occur based on the amount of lost funds before those funds are reimbursed or whether trebling should occur after the lost funds have been reimbursed? . . . A. No. I wasn't asked to think about that, particularly as it would represent a legal conclusion or opinion.").

Stango's opinion was an *economic* one, not a legal one—namely, that funds temporarily lost and then recovered do not impose the same economic harm as funds permanently lost. *See supra* at 1-2, 4, 8-9. At no point in their Motion do Plaintiffs argue that this opinion is in any way unsound or unreliable as a principle of economics. Rather, their argument is that Stango's economic opinion is "irrelevant" because *the law* supposedly permits Plaintiffs to claim the full, recovered principal amounts as damages *even if* they do not qualify as economic harms. Mot. at 4. But EFTA only allows for the recovery and trebling of "actual damages" incurred "as a result" of the alleged harm. 15 U.S.C. §§ 1693m(a)(1), (a)(2)(B). And Judge Burns already confirmed this was the case when he ruled that under EFTA, the damages cognizable for "fully reimbursed" Plaintiffs are "the actual damages Plaintiffs suffered *as a result of the delayed reimbursements*"—*not* the full principal amount reimbursed. ECF 126 at 22-23. Moreover, even if the Court lets Plaintiffs go to the jury arguing otherwise, the jury would still be tasked with deciding what actual damages (if any) Plaintiffs have evidenced, and would be fully entitled to consider Stango's assessments of actual economic harm in doing so.

Plaintiffs try to support their legal argument by contending that this is not a case about "a merely temporary '[redacted]' to funds," that class members still had not been credited "when plaintiffs filed this lawsuit," and that they were only credited in "[redacted]" that "did not occur until over a year after this case was filed." Mot. at 5-6. This is false. Judge Burns' motion-to-dismiss ruling encompassed "20 of the 25 Class Plaintiffs" "who have been fully reimbursed" based on their own Complaint allegations—one who was credited back "less than ten business days" after her dispute. ECF 126 at 23. The classes include many more. For example, nearly 30% of the Claim Denial Class members who took advantage of BANA's [redacted] were [redacted] of initiating their error claim, which is less time than Regulation E requires for an investigation. *See* BX 1 ¶ 64; ECF 589-2 ¶ 174 (which Plaintiffs do not dispute, ECF 652-1); 12 C.F.R. § 1005.11(c)(2) (financial institution has 45 days to complete investigation of ATM disputes and 90 days to investigate point of sale transactions). This confirms that many class members understood the decision was appealable and were able to quickly regain access to their funds. And at minimum, it further precludes the tens of thousands of cardholders who received prompt repayments from claiming any actual harm resulting from CFF-1, the ATM indicator, in the principal amount of their claim.

Plaintiffs would also have this Court believe that filing a lawsuit and/or the CFPB's enforcement action were the only reason that they were credited at all, and point to the Preliminary Injunction, CFPB and OCC Consent Orders, and the Remediation Plan as evidence of needing the legal process or regulatory intervention to recoup their claim amounts. *See* Mot. at 3. This is also untrue. The vast majority of the Claim Denial and Credit Rescission Classes' claims were paid well before the Preliminary Injunction was issued or the Consent Order and Remediation Plan were entered and agreed to. [redacted] class members had their claims [redacted] the Preliminary Injunction was issued on June 9, 2021. *See* HX 41.A. An additional [redacted] class members ([redacted] in total) had their claims [redacted] the Consent Order was entered and agreed to in July 2022. *See id*. That is, [redacted]% of the approximately 109,000 class members had their claims [redacted] the Preliminary Injunction was issued, and approximately [redacted]% had their claims paid *before* the Consent Orders were entered. *See id.* [redacted]. HX 49 ¶ 37; HX 42 at 8-10.

Plaintiffs assert that class members were all "told by the Bank in no uncertain terms that their unauthorized-transaction claims had (permanently) been denied or that their credits had (permanently) been rescinded." Mot. at 6. That is simply false. Well before this lawsuit was filed, Plaintiffs were on notice that [redacted]. BX 1 ¶ 15. Although BANA believed that [redacted]. *See* ECF 589-2 ¶¶ 80-81, 95, 97, 99. Plaintiffs' "expert" opinions must be excluded as lacking a sufficient factual basis if they are founded on the false premise that BANA denied all claims permanently (and

Plaintiffs' damages arguments based on this same false premise must likewise fail).

In any event, even if the Court were to *agree* with Plaintiffs' legal arguments about offsetting, and even if the Court were *further* to agree with Plaintiffs that Stango's analysis of economic harm is not relevant to determining class members' actual damages, that *still* would not support Plaintiffs' argument that Stango's analysis is "irrelevant." It would just make the analysis relevant to offsetting issues instead of actual damages issues—but the analysis is relevant just the same. Plaintiffs' own expert Regan concedes that actual damages "require an offset for amounts that the Bank has paid or presently expects to pay pursuant to the Remediation Plan." HX 41 ¶ 50 n.60. Even if somehow relevant to nothing else, Stango's calculations are plainly relevant when it comes to calculating what that offset should be.

Not a single one of Plaintiffs' cited authorities precludes the admissibility of Stango's analysis. To start, Plaintiffs cite *Uthe Tech. Corp. v. Aetrium, Inc.*, 808 F.3d 755 (9th Cir. 2015) for its holding that while a "$9 million arbitral award roughly corresponded to [the plaintiff's] losses," the court could not "extinguish" the plaintiffs' claim to RICO treble damages under U.S. law because "[t]he Singapore arbitration was limited [to] claims . . . arising under Singapore law," which did not recognize treble damages. *Id.* at 760. "[F]ull satisfaction" of the RICO claim, the Ninth Circuit ruled, is "three times the proven actual damages," and the $9 million was cognizable only as a "partial credit[]" toward the trebled amount. *Id.* at 762. The material difference between *Uthe* and Plaintiffs here is that the *Uthe* plaintiff had *actually evidenced* $9 million as actual "losses," *id.* at 760, while Plaintiffs here have not. *Uthe* also emphasizes "the equitable principle that a plaintiff who has received full satisfaction of its claims *from one tortfeasor* generally cannot sue to recover additional damages corresponding to the same injury *from the remaining tortfeasors*." *Id.* at 760 (emphasis added). As there is only one Defendant at issue here, *Uthe* is entirely irrelevant.

B.P. v. Balwani, 2021 WL 4077008 (9th Cir. Sept. 8, 2021) fares no better. *Balwani* is "not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3," and no Rule 36-3 exception applies here. *Id.* at *1 n.1. Nonetheless, *Balwani*'s holding (that Plaintiffs are entitled to treble damages so long as, among other things, "additional damages are 'offset' by the amount already paid," *id.* at *3) is not helpful to Plaintiffs because Stango offers an opinion on whether Regan's proposed measure of "actual damages" served "to reliably measure economic harm on a class-wide basis"—not whether trebling should occur *at all*. BX 1 ¶ 13.

In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., 2017 WL 4890594 (N.D. Cal. Oct. 30, 2017) is equally unhelpful. Plaintiffs not only cite *Clean Diesel*'s analysis of mootness in the motion to dismiss context (which is entirely irrelevant)—they also cite only to *Clean Diesel*'s analysis of *Flintkote Co. v. Lysfjord,* 246 F.2d 368 (9th Cir. 1957). This harms Plaintiffs more than it helps them because *Flintkote* was an antitrust conspiracy case where the plaintiff settled and released its claims against all defendants except one for $20,000, then won $50,000 in compensatory damages from the remaining defendant, "trebled by the court to $150,000." *Id.* at 373. In applying *Flintkote*, other Ninth Circuit courts held that the "critical factor" allowing it to deduct the $20,000 from the total award after trebling rather than the compensatory award before trebling was that "the 'full-satisfaction' to which treble damage claimants are entitled is 'three times the proven actual damages.'" *Clean Diesel*, 2017 WL 4890594, *4 (emphasis added) (internal citations omitted). *Flintkote*, like *Balwani* and *Uthe*, therefore touches only on the order of operations in a treble-damages calculation after the plaintiff has already evidenced and proven its actual damages. *See Flintkote* at 397. Stango "do[es] not opine on the legal question of whether any damages in this matter should be trebled," BX 1 ¶ 11, and therefore his opinion on what constitutes actual damages in the first place is not impacted by these (or any) of Plaintiffs' authorities. Citing *Clean Diesel* and

Flintkote to support the notion that Plaintiffs have already proven actual damages in the full amount of their disputed transactions is circular reasoning: that is exactly what remains to be evidenced and proven, and exactly what experts are meant to opine on and rebut. *Id.*

II. Stango's Economic Analysis Is Reliable.

Perhaps recognizing that they raise no serious challenge to the relevance of Stango's analysis and no serious argument that it is a "legal opinion," Plaintiffs conclude their Motion with a short, half-hearted argument that it should also be excluded as "unreliable." Mot. at 8. Plaintiffs' only ground for doing so is to criticize his reliance on the text, *Litigation Services Handbook, The Role of the Financial Expert*. *Id*. Plaintiffs, however, are in no position to argue that reliance on this text makes an opinion unreliable, since their own expert relies on the same text. *See* HX 41 ¶ 62 n.87.

Plaintiffs nonetheless contend it improper for *Stango* to rely on the text on the asserted ground that [redacted] Mot. at 8. This argument does nothing to impugn the reliability of Stango' analysis, since Stango did not express any opinions at all on "[redacted]" *Id., see supra* at 9. Thus, after (groundlessly) accusing Stango of offering legal opinions, Plaintiffs' fallback argument is to complain about Stango's *refraining* from offering legal opinions.

Plaintiffs also insinuate—falsely—that the *Handbook* is the "[redacted]" Stango relied on in drawing "[redacted]" Mot. at 8. It is not. Stango referenced and relied on multiple studies analyzing the time value of money as a well-established concept in economics and finance. BX 1 ¶ 39; HX 48 at 178:14-179:10, 188:11-189:2. He cited the *Handbook* solely for the basic proposition that "[o]ne can calculate economic damages as the difference between actual consumer outcomes and consumer outcomes in a 'but-for' hypothetical world absent the at-issue conduct." BX 1 ¶ 31 & n.45. Plaintiffs do not contest that proposition, nor could they. *See supra* at 8. It is a broadly established principle generally accepted as a matter of economics and generally accepted by the courts. *See CRT Antitrust Litig., supra*. Plaintiffs' argument that economic damages should be calculated *without* regard to the difference between the actual world and the but-for world is an argument they are free to make, but it does not go to the reliability or admissibility of Stango's economic analysis. *See*, *e.g.*, *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 n. 14 (9th Cir. 2004) ("Although Defendants during voir dire argued that [expert's] selection of documents to review went to the reliability of his 'methodology' as an expert, the district court correctly surmised that questions regarding the nature of [an expert's] evidence went more to the 'weight' of his testimony—an issue properly explored during direct and cross-examination").[3]

CONCLUSION

For the foregoing reasons and on the basis of the Reports in the record, Plaintiffs' Motion should be denied.

Dated: February 5, 2026

Respectfully submitted,

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[3] Plaintiffs' citations to *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 145-47 (1997) and *Cabrera v. Cordis Corp.*, 134 F.3d 1418 (9th Cir. 1998) to support exclusion because of the alleged gap between Stango's sources and his contested opinion holds no weight. Nowhere does Stango fail to point to objective sources that are practiced and recognized by other economists, including Plaintiffs' own expert, Regan. These are not grounds for exclusion. *See Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1352 n.5 (9th Cir. 1987), *opinion modified on reh'g*, 866 F.2d 318 (9th Cir. 1989) ("The relative weakness or strength of the factual underpinnings of the expert's opinion goes to weight and credibility, rather than admissibility.").

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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 5, 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 5, 2026

/s/ Matthew L. Riffee
MATTHEW L RIFFEE