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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 3:21-md-02992-GPC-MSB **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' *DAUBERT* MOTION TO EXCLUDE CERTAIN TESTIMONY OF VICTOR STANGO**
This document relates to All Actions	Judge: Hon. Gonzalo P. Curiel Ctrm: 12A Date: April 17, 2026

REDACTED - PUBLIC VERSION

INTRODUCTION

Plaintiffs move this Court for an order excluding certain portions of the testimony and opinions of the Bank's damages expert, Victor Stango, specifically Dr. Stango's testimony and opinion that [redacted] *See* Decl. of James Baltzer ("Baltzer Decl.") Ex. 1 (Apr. 4, 2025 Expert Report of Victor Stango) ("Stango Rep.") ¶¶31-35, 71-74, 82-83, 85-86, 89-90, 95-96. Dr. Stango's testimony on this point does not meet the requirements of Federal Rule of Evidence 702 under *Daubert v. Merrell Dow Pharm, Inc.*, 509 U.S. 579 (1993), for at least two reasons, either of which is an independently sufficient ground for exclusion.

First, Dr. Stango's opinion does not actually draw upon any economic or financial expertise but instead impermissibly offers a legal conclusion—and an erroneous one at that, as it is directly contrary to Ninth Circuit precedent and this Court's ruling on class certification, which held as a matter of law that any amounts the Bank has already reimbursed cardholders (whether pursuant to the *Yick* Preliminary Injunction, the Bank's own reconsideration processes, the Consent Decrees with the Consumer Financial Protection Bureau and Office of Comptroller of the Currency, or otherwise) are to be applied as an offset "from the total amount of damages *after* trebling" and after determining punitive damages, not before. ECF No. 494 at 83-85 (emphasis in original) (citing cases). Dr. Stango's legal opinion to the contrary is not a proper subject of expert testimony. *See, e.g.*, *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 558 (C.D. Cal. 2014) (an expert who "offer[s] an improper legal opinion … usurps the role of the court.")

Second, Dr. Stango's testimony on this point also should be excluded because it is not supported by the sources he cites and is not based on reliable principles and methods, nor has he reliably applied any reliable principles and methods to the facts of this case.

BACKGROUND

In granting class certification, this Court expressly rejected the Bank's argument "that because [redacted] they are no longer economically damaged and are not entitled to any additional damages without a showing of further harm." ECF No. 494 at 83-84 (citing, *inter alia*, Brys Decl. Ex. 1, Stango Class Cert Expert Report ¶36)). The Court summarized Dr. Stango's opinion on this point, explaining, "Mr. Victor Stango reports that BANA has already paid the $128.4 million representing the total dollar amount Mr. Regan claims are owed to the Claim Denial Class …; therefore, because the class members have already been fully compensated for the dollar amounts denied by BANA, they have no damages." *Id.* at 84 (citing Brys Decl. Ex. 1, Stango Class Cert Expert Report ¶37). As the Court explained, "[t]he question raised by BANA is whether Plaintiffs are entitled to an offset from the principal amount of actual damages or from the total amount of total damages which may include treble or punitive damages." *Id.*

The Court unambiguously answered this question in plaintiffs' favor, rejecting Dr. Stango's conclusion and stating, based on controlling Ninth Circuit precedent and other cases: "An 'offset should be subtracted from the total amount of damages *after* trebling. In actions like this where treble damages are available, the plaintiff is entitled to full satisfaction of the claim for harm done. The amount awarded as damages is then trebled as punishment to the defendant. If the offset were subtracted from the initial damages award, the class members would be denied the full satisfaction of their claim.'" *Id.* at 84 (quoting *Van Vranken v. Atlantic Richfield Co.*, 699 F.Supp. 1420, 1428 (N.D. Cal. 1988) (emphasis in original); citing also *McCall v. Four Star Music Co.*, 51 Cal.App.4th 1394, 1399 (1996); *Uthe Tech. Corp. v. Aetrium, Inc.*, 808 F.3d 755, 762 (9th Cir. 2015)). The Court continued, "[s]imilarly, as to punitive damages, where 'a claimant's award of compensatory damages was completely offset, he could still receive punitive damages.'" ECF No. 494 at 85 (quoting *Colaco v. Cavotec SA*, 25 Cal.App.5th 1172, 1205 (2018)).

Thus, the Court concluded that "[t]o the extent that Plaintiffs demonstrate liability and have shown they are entitled to treble damages and punitive damages, they will be entitled to those damages [redacted]" *Id.*

Despite the Court's clear ruling as a matter of law that any reimbursed amounts shall be subtracted as an offset from the total damages award *after* treble damages are calculated and punitive damages are determined, Dr. Stango's April 4, 2025 Expert Report repeats his already rejected opinion that [redacted] Stango Rep. ¶72; *see id.* ¶¶31-35, 71-74, 82-83, 85-86, 89-90, 95-96.

Dr. Stango's report does not dispute that, [redacted] *See id.* ¶¶ 31-33. Dr. Stango nonetheless asserts that because Class Members [redacted] He therefore concludes, based upon this erroneous legal conclusion, that [redacted] (other than those he predicts could prove a separate category of consequential damages resulting from [redacted]" *id.* ¶¶31-33, 71-72), their actual damages would be [redacted] *Id.* ¶74. Dr. Stango further concludes that [redacted]

[redacted] *Id.*

LEGAL STANDARD

For expert testimony to be admissible, it must "help the trier of fact to understand the evidence or to determine a fact in issue"—that is, it must be "relevant to the task at hand," "based on sufficient facts or data," and "the product of reliable principles and methods" that the expert has "reliably applied to the facts of the case." Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). When considering evidence proffered under Rule 702, the Court must make a preliminary determination as to whether the proffered testimony is both relevant and reliable. *Elsayed Mukhtar v. Cal. State Univ. Hayward*, 299 F.3d 1053, 1063 (9th Cir. 2002), *as amended*, 319 F.3d 1073 (9th Cir. 2003).

Matters of law are "inappropriate subjects for expert testimony." *Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir.1992). "Courts will exclude expert testimony when it relies on an incorrect legal standard." *Pelican Int'l, Inc. v. Hobie Cat Co.*, 655 F.Supp.3d 1002, 1023 (S.D. Cal. 2023) (quoting *YETI Coolers, LLC v. RTIC Coolers, LLC*, No. 15-cv-597, 2017 WL 429210, at *2 (W.D. Tex. Jan. 28, 2017)). "Incorrect statements of law are no more admissible through 'experts' than are falsifiable scientific theories." *Hebert v. Lisle Corp.*, 99 F.3d 1109, 1117 (Fed. Cir. 1996).

ARGUMENT

I. Dr. Stango's Testimony Concerning EFTA Treble Damages Is Irrelevant Because It Applies an Incorrect Legal Standard.

EFTA requires financial institutions, upon receipt of a consumer's notice of an unauthorized transaction, to investigate the alleged error, determine whether an error has occurred, report or mail the results of such investigation and determination to the consumer within 10 business days, and "correct the error" by crediting the consumer's account "in no event more than one business day" after determining an error occurred. 15 U.S.C. §1693f(a)-(c). If a financial institution is unable to complete its investigation within 10 business days, it must "within ten business days … recredit the consumer's account for the amount alleged to be in error … pending the conclusion of its investigation and its determination of whether an error has occurred," which "shall be concluded not later than forty-five days after receipt of notice of the error." 15 U.S.C. §1693f(c). Unless the financial institution meets its burden of showing that the disputed transaction was in fact authorized by the cardholder, *see id.* §1693g(b), the provisional credit shall become permanent, *id.* §1693f. These strict statutory timelines are designed for the protection of "individual consumer rights." *Id.* §1693(b).

To incentivize financial institutions to comply with these statutory timelines and to punish them for noncompliance, 15 U.S.C. §1693f(e) further provides that when a financial institution fails to provisionally credit a consumer's account within the statutorily prescribed time period, without a reasonable basis or without conducting a good faith investigation, "the consumer *shall* be entitled to treble damages under section 1693m(a)(1) of this title"—that is, three times "any actual damage sustained by such consumer as a result of such failure." 15 U.S.C. §§1693f(e) (emphasis added); 1963m(a)(1). The question of whether a payment made long after payment is statutorily due under EFTA should offset (and potentially negate altogether) the "actual damages" subject to mandatory trebling under EFTA is a question of law, not a question of economic analysis.

As noted above, neither the Bank nor Dr. Stango disputes that, [redacted] Indeed, when plaintiffs filed this lawsuit, they had not suffered a merely temporary "[redacted]" to funds. To the contrary, they had been 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. *See, e.g.*, ECF Nos. 324-55, 324-56. While Dr. Stango contends that the Remediation Plan payments should have the effect of eliminating the principal balances of the claims denied or credits rescinded from the damages to be trebled, he ignores that those payments did not occur until over a year after this case was filed.

In the Ninth Circuit, courts—not economists—determine the impact of such untimely payments on the application of treble damages provisions enacted by Congress. In *Uthe Tech. Corp v. Aetrium, Inc.*, 808 F.3d 755, 756-58 (9th Cir. 2015), for example, it was clear that a plaintiff with a claim under the treble damages provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO") could not duplicate the recovery already obtained in an arbitration in Singapore. "The key question posed" was "how the one satisfaction rule interacts with RICO's treble damages provision. Specifically, to what extent does the one satisfaction rule operate to diminish the amount of damages claimed against the Defendants? Depending on the order in which the two rules are applied, the one satisfaction rule could either offset part of Uthe's RICO damages, or it could fully extinguish Uthe's claim to those damages." *Id.* at 760. The Ninth Circuit held that "the full measure of Uthe's claims… was not satisfied by the Singapore arbitration," because "[n]o remedy equivalent to RICO treble damages was available under Singapore law." *Id.* at 760-61. In other words, the full damages available to Uthe were three times those awarded in the Singapore arbitration, so any offset from the Singapore arbitration award would be deducted from the available damages in the federal action only *after* those damages had been trebled. The offset did not—as Dr. Stango would have it—"fully extinguish" Uthe's claim to treble damages. *Id.*

The Ninth Circuit has applied nearly identical reasoning in interpreting the treble damages provision of the Sherman Act. *See Flintkote Co. v. Lysfjord*, 246 F.2d

368, 398 (9th Cir. 1957). In *Flintkote*, a plaintiff seeking "threefold the damages by him sustained" under 15 U.S.C. §15(a) received a $20,000 payment from the defendant "after the action was filed but before trial." *Id.* at 397. "The question presented" was "whether the $20,000 should be subtracted from the actual damages fixed by the jury verdict ($50,000) before said damages are trebled, or whether the award should first be trebled and then the $20,000 deducted from the trebled amount of $150,000." *Id.* The Court held that the damages available as of the date the claim was filed should be trebled first, and that the $20,000 offset should be applied only *after* trebling, explaining that a contrary result would "do violence to the clear intent of Congress." *Id.* at 398.

Several cases have applied the Ninth Circuit's settled rule concerning offsets for treble damages in the specific context at issue here, where a settlement with regulators has been reached and paid after the filing of the plaintiffs' lawsuit. *See, e.g., B.P. v. Balwani*, No. 20-15974, 2021 WL 4077008 (9th Cir. Sept. 8, 2021) (requiring trebling of actual damages under RICO before offsetting the amount already paid to class members pursuant to a Consent Order with regulators*); In re Volkswagen "Clean Diesel" Mktg. Litig.*, No. mdl-2672-CRB, 2017 WL 4890594, at *4 (N.D. Cal. Oct. 30, 2017) (same).

This Court likewise correctly applied that very same precedent when it rejected the Bank's arguments (which were based on Dr. Stango's prior declaration in opposition to class certification) and held that any reimbursed amounts paid to Class Members would be applied as an offset "from the total amount of damages *after* trebling" and determining punitive damages, not before. ECF No. 494 at 83-85 (emphasis in original) (citing cases).

The Bank cannot avoid application of this controlling law—and this Court's class certification decision—by re-packaging its previously rejected legal argument in the form of purported expert testimony. Because Dr. Stango's opinions as set forth in paragraphs 31-35, 71-74, 82-83, 85-86, 89-90, 95-96 of his April 4, 2025 Expert

Report are legal argument inconsistent with this Court's prior rulings, they are not proper subjects of expert testimony and should be excluded.

II. Dr. Stango's Testimony Is Unreliable Because It Is Not Supported by the Sources He Cites.

Even if Dr. Stango's testimony as set forth in paragraphs 31-35, 71-74, 82-83, 85-86, 89-90, 95-96 were not excludable as improper legal opinion, that testimony would still be inadmissible as unreliable and not grounded in sound principles or methods. [redacted] Baltzer Decl. Ex. 2; *see also, e.g.*, *General Elec. Co. v. Joiner*,

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[1] [redacted]

522 U.S. 136, 145-47 (1997) (affirming exclusion of expert testimony where the testimony was not supported by sources cited); *Cabrera v. Cordis Corp.*, 134 F.3d 1418 (9th Cir.1998) (finding expert testimony unreliable because it had no support in medical literature). [redacted] Neither Dr. Stango's report nor his deposition testimony identifies any genuinely economic basis for excluding principal amounts of damages from statutory treble damages calculations—again, a legal question for courts, not for economists.

CONCLUSION

For the reasons stated above, paragraphs 31-35, 71-74, 82-83, 85-86, 89-90, 95-96 of Dr. Stango's report and any testimony based on those paragraphs should be excluded.

Respectfully submitted,

Dated: October 17, 2025

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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 October 17, 2025. 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.

Executed: October 17, 2025

/s/ Brian Danitz
BRIAN DANITZ