UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In Re Bank of America California Unemployment Benefits Litigation.

No. 21-md-02992-LAB-MSB

July 19, 2021

11:39 a.m.

San Diego, California

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE LARRY ALAN BURNS
UNITED STATES DISTRICT JUDGE

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SAN DIEGO, CALIFORNIA, JULY 19, 2021, 11:39 A.M.

* * * *

THE COURT: Folks, you're here on the civil matter, the MDL case? All right. If you'll give us just a minute. We've been going for quite a while. Give us five minutes and I'll be back out.

(A recess was taken.)

THE COURT: Is it connected so they can hear me and anyone else by telephone, Tish?

(Discussion off the record.)

MS. SWOPE: Yes, hello. This is Karin Swope from Cotchett Pitre.

THE COURT: Okay, Ms. Swope. I got Ms. Swope's appearance. Are there other individual counsel who want to state their appearances?

MR. WARSHAW: Good morning, Your Honor. My name is Daniel Warshaw from Pearson, Simon & Warshaw.

THE COURT: Thank you, Mr. Warshaw.

MS. SCAPA: Good morning, Your Honor. Good morning, Your Honor. This is Arin Scapa from Mary Alexander & Associates on behalf of Plaintiff Clara Cajas.

THE COURT: All right. Thank you, Ms. Scapa.

Others? I'm sorry, start again, two people started at once.

MR. BONTRAGER: Nick Bontrager, Martin & Bontrager, Your Honor, representing Steven Hart and Michael Adams.

THE COURT: Okay. Mr. Bontrager.

MR. FRAYSSE: Good morning, Your Honor. This is Thomas Fraysse with Knox Ricksen, LLP for Plaintiff Robert Wilson.

THE COURT: Good morning, Mr. Fraysse.

MR. SWIGART: This is Josh Swigart, on behalf of the Meza and Meza-related matters.

THE COURT: Good morning, Mr. Swigart.

MS. CHAN: Good morning, Your Honor. This is Connie Chan from Altshuler Berzon, on behalf of the consolidated case plaintiffs.

THE COURT: All right, Ms. Chan. Good morning.

MR. HEFFERON: Your Honor, good morning. This is Thomas Hefferon, on behalf of the defendants.

THE COURT: All right, Mr. Hefferon. Good morning.

Is Mr. Nolan on the line? Jim Nolan? Chris Hamner? Jean Martin from Morgan & Morgan?

MS. MARTIN: Yes, Your Honor. Hello, this is Jean Martin from Morgan & Morgan.

THE COURT: Okay.

Mr. Boucher, Raymond Boucher, from Boucher, LLP?

MR. WARSHAW: Your Honor, Mr. Boucher is my cocounsel. This is Daniel Warshaw. I'm appearing on behalf of both of our plaintiffs. I've already made my appearance.

THE COURT: Okay. Thank you, Mr. Warshaw.

MR. WARSHAW: Jonathan Smith and Alex Yuan. Thank you, Your Honor.

THE COURT: How about Jackson Morgus from Anderlini & McSweeney? Andre Verdun?

All right. I think we've accounted for everyone who is appearing by telephone. May I have appearances of counsel that are here in person?

MR. DANITZ: Good morning, Your Honor. Brian Danitz of Cotchett, Pitre & McCarthy.

THE COURT: All right. Good morning.

MR. DANITZ: On behalf of the consolidated Yick Plaintiffs.

MR. RUBIN: Michael Rubin, Altshuler Berzon, on behalf of the consolidated Yick Plaintiffs.

MS. BLATT: Good morning, Your Honor. Gayle Blatt of CaseyGerry, also on behalf of the class plaintiffs.

THE COURT: All right.

MR. CASEY: Good morning, Your Honor. Dave Casey, CaseyGerry, on behalf of the class plaintiffs.

THE COURT: Good morning.

MR. KOLESNIKOV: Good morning, Your Honor. Yury Kolesnikov from Bottini Bottini, on behalf of Plaintiff Lindsay McClure.

THE COURT: We're having trouble. Can you restate

your name in the -- I'm having trouble hearing you.
MR. KOLESNIKOV: Yury Kolesnikov from Bottini Bottini, Your Honor.
THE COURT: Okay.
MR. SHAY: Good morning, Your Honor. Daniel Shay on behalf of Meza and Abarr, co-counsel with Josh Swigart.
THE COURT: All right. Good morning.
MR. KIRTLEY: Good morning, Your Honor. Andrew Kirtley, on behalf -- from Cotchett, Pitre & McCarthy, on behalf of the consolidated Yick Plaintiffs.
THE COURT: Good morning.
MS. NOCON: Good morning, Your Honor. Shannon Nocon, on behalf of Plaintiff Michael Willrich.
THE COURT: All right.
MS. SERINO: Natasha Serino of the Schack Law Group, on behalf of Plaintiff Michael Willrich.
THE COURT: Good morning.
MR. MCGARRY: Good morning, Your Honor. Jim McGarry from Goodwin Procter, on behalf of the defendant.
THE COURT: Mr. McGarry, good morning.
MS. CHAN: Good morning, Your Honor. Yvonne Chan from Goodwin Procter, also for the defendant.
THE COURT: Good morning.
MS. BROWN: Good morning, Your Honor. Janice Brown of Meyers Nave, on behalf of defendant.

THE COURT: All right. Good morning, Ms. Brown. I know some of you personally, some of you I don't know personally. I'm Judge Burns.

With us here today is the assigned magistrate judge on the case, the MDL case, Judge Berg. Do you want to raise your hand?

JUDGE BERG: Good morning.

THE COURT: Michael Berg and his staff are here. And he has his principal law clerk, as do I, who have looked at this.

This is our first meeting post-MDL certification. There are a number of things I want to go over, beginning with the organization of counsel, who will take the lead in this.

I have the proposal here to have lead counsel designated as the Cotchett firm, along with the Altshuler Berzon firm. And proposed liaison counsel is the Casey form. The first question I had for you is, why do I need so many lead or liaison counsel? It doesn't seem like it's that huge an action that's going to take three different law firms to organize this, but I'm happy to hear what the reasons might be.

MR. DANITZ: Well, Your Honor, what we have found --

THE COURT: State your names to begin with again.

MR. DANITZ: Brian Danitz of Cotchett, Pitre & McCarthy. Your Honor, the Altshuler firm and the Cotchett firm have been working very well together as colead counsel appointed in the Yick matter, the consolidated Yick matter.

There are quite a few plaintiffs to work with throughout the state. The consequence for so many Californians across the length and breadth of the state is rather pressing and severe.

THE COURT: What do you estimate the size of the -- potentially, the size of the plaintiffs' group?

MR. DANITZ: We have not yet gotten any discovery on that question, but we believe it is in the hundreds of thousands, Your Honor.

THE COURT: Okay. And tell me how that breaks down. Are these people that actually tried to get in touch with Bank of America, and were turned away by what you allege is, you know, faulty reporting systems or mechanisms for reporting fraud or nonreceipt of payments, or is this a -- is this a -- is that the whole group or is this --

MR. DANITZ: Well, Your Honor, we believe there will be subclasses in the final consolidated complaint for the class. One group will be those who were summarily -- had their claims for unauthorized transactions summarily closed due to a faulty fraud filter.

THE COURT: Right. That's the current certified class, right? Just that smaller group?

MR. DANITZ: Yes, Your Honor.

THE COURT: Do you have any idea how many people comprise that group?

MR. DANITZ: We actually do not know the exact number of that group.

THE COURT: Okay.

MR. DANITZ: And then the other issues are those of the security breaches, and that would be a larger group, Your Honor.

THE COURT: So these are the people that were issued the cards without the chip in them, with what you contend is the faulty strip that led to fraud and breaches of the security system.

MR. DANITZ: Yes, Your Honor. We further allege that there were security lapses within Bank of America.

THE COURT: All right. Do you have an idea, at this point, how many people actually lost money owing to fraud or nonreceipt of expected payments?

MR. DANITZ: We do not have the exact numbers yet.

THE COURT: All right.

MR. RUBIN: Your Honor, may I say a word?

THE COURT: Sure, of course.

MR. RUBIN: This actually relates mostly to an item later on the agenda, but I wanted to raise it early. I'm Michael Rubin from Altshuler Berzon.

THE COURT: Good morning, again.

MR. RUBIN: Good morning.

In a separate matter, the last item on the agenda involves adding the Employment Development Department as a defendant and we oppose that. And we had discussed that with Judge Chhabria earlier.

I have a separate client, the Center for Workers Rights, a nonprofit in Sacramento. The Center has been engaged in confidential negotiations with EDD about a separate set of issues that doesn't implicate the contract with the bank or the problems here.

When I received the Court's agenda listing that last item, I sent it to the Attorney General, and asked whether I could disclose anything to the Court, because we're starting out our relationship, and I wanted to be completely forthright and make sure that the Court understands.

This morning, I received an e-mail confirming that I may disclose to the Court that although there is no agreement, we are in settlement negotiations to resolve separate issues involving EDD's administration. This is before money even gets to the Bank of America, so there's no overlap, no conflict.

But I thought, and the Attorney General agreed, that it was appropriate to disclose that before Your Honor decided who should be interim or who should be co-counsel in this case, lead counsel, in case that affected the Court's consideration of the issues at all.

THE COURT: Okay. It may have bearing.

When you asked -- when you proposed the certification originally, was it for a larger class?

MR. RUBIN: No, Your Honor.

THE COURT: It was always limited to this class of -- that Judge Chhabria gave preliminary certification to.

MR. RUBIN: Your Honor, to clarify, there are really two separate sets of issues, as Mr. Danitz identified. Those that Judge Chhabria issued a preliminary injunction on.

THE COURT: Right.

MR. RUBIN: That is the certified class. And then there are the others who may be affected by the inadequate security measures that the bank implemented.

THE COURT: Okay.

MR. RUBIN: So the class that Judge Chhabria was focused on is narrower than the class --

THE COURT: Sure.

MR. RUBIN: -- that may be the focus of the consolidated complaint.

THE COURT: Yeah. As I look at this, do you have a sense -- I mean, it seems to me that obviously different people with entitlement would have suffered different losses, right? I mean, maybe somebody got fleeced one time with a hacker or somebody getting in, another time, you know, everything was gone. It might be hard to reach certification on any larger class, because the amounts of loss that the individual plaintiffs have are not typical of one another, they're very different, right?

MR. RUBIN: It might be, Your Honor, but the way that we have structured -- the way we structured the complaint in Yick, and the way we proposed to structure the consolidated complaint in this case, anticipates those issues, and does it in a way that we're confident would be appropriate for class certification, given the nature of the relief not only that we've obtained thus far, but intend to get in the future.

I think this can be effectively managed as a class action, and we'll set that out in detail in the forthcoming papers.

THE COURT: Do you share the estimate that there may be as many as a hundred thousand or more affected plaintiffs?

MR. RUBIN: There might be. Judge Chhabria opened up discovery on May 18th. We served discovery on June 9th at the same time the parties exchanged their Rule 26(f) disclosures. We haven't received that discovery yet, because as Your Honor knows, you have stayed discovery pending the issuance of the CMO. But we will get those numbers from the bank when the bank responds to the discovery that we issued back in early June.

THE COURT: All right. Ms. Blatt, anything to offer on behalf of the logistical firm?

MS. BLATT: Well, thank you, Your Honor. Gayle Blatt here. I think that it's -- the proposed structure is appropriate, because I think that there is an immediate need for relief for this class. Their information and their money is at risk. And for us, as liaison counsel, part of our role will be to, one, try to help resolve the issues, but also there's a great need for communication, because these people are suffering. And there are a lot of plaintiffs' counsel, as you see, that Judge Chhabria coordinated -- or consolidated the cases, but yet there is a whole slew of individual cases as well.

We are here for the class. We're asking for appointment for the class. But nonetheless, there is somebody who needs to be the intermediary to share the information, to obtain information, and to help facilitate and serve lead counsel in their efforts to get this case to conclusion as quickly as possible.

THE COURT: Has -- since the injunction was issued, has -- has any progress been made on getting people money that they didn't receive, for example, those that were entitled? Has the state or the bank started sending checks out at all? Has any of that happened?

MR. DANITZ: Well, Your Honor, letters went out per the injunction.

THE COURT: Right.

MR. DANITZ: Informing card holders of their rights. However, without discovery, we don't have access to that information.

THE COURT: Okay. Do defendants have any perspective on the proposal for lead and liaison counsel?

MR. MCGARRY: Jim McGarry, thank you, Your Honor.

You know, I guess it's all relative. When the cases were consolidated before Judge Chhabria, the Yick Plaintiffs asked for an organizational structure that had eight different law firms involved. And even Judge Chhabria thought that was a bit much.

And so from our perspective, three may seem a lot, I understand that, Your Honor.

THE COURT: It's better than eight, though.

MR. MCGARRY: Certainly better than eight. So we really don't take a position on that. I guess the one concern we do have is, there remains this issue of the individual plaintiffs who are not parties to the class action, but have largely identical claims, and how those people will be represented. Our concern is not with how they are represented, but our concern is that we are able to coordinate all of that in a way that makes sense, and we only have to deal with one set of counsel, and those types of logistical issues.

THE COURT: Are any of the individual claims materially different from those filed on behalf of this putative class?

MR. MCGARRY: The legal claims, Your Honor, are almost identical across the board. There are a handful of -- of individual plaintiffs who have a few slightly different variations on the claims.

THE COURT: Right.

MR. MCGARRY: But for the most part, the majority of the individual cases that have been filed are substantively almost identical to the Yick complaint.

THE COURT: Any reason why those can't be consolidated in the amended complaint?

MR. DANITZ: Well, Your Honor, the most recent -- this is Brian Danitz. The most recent individual complaint, the Abarr complaint, has over 250 plaintiffs. These are presumptive opt-outs from the class. They are not -- they are presumptively not part of the class.

There is a likelihood of some tension that the counsel be at cross-purposes in one single master complaint. Plaintiffs -- class plaintiffs suggest that an omnibus motion to dismiss, and an omnibus opposition to the motion to dismiss is an efficient way to go forward, but there need not be one unwieldy large complaint with counsel at cross-purposes.

We have no objection to two master complaints, one for the individuals, which will have almost 300 plaintiffs, one for the class action, consolidated for pretrial purposes. And we think that would be an efficient way to proceed.

THE COURT: I'm not sure why, though, if the substance in the legal claims are the same between the individuals at this point, it's not different. I mean, certainly, I have authority to have a single consolidated -- to order a single consolidated complaint, right?

MR. DANITZ: Well, Your Honor, yes.

THE COURT: Why would we have two that essentially raise the same legal claims on parallel track?

MR. DANITZ: There is no question that the individual complaints followed on from our complaint.

THE COURT: Yeah.

MR. DANITZ: And largely reflect our complaint.

THE COURT: Right.

MR. DANITZ: Some of the other causes of action include design defect, conversion, which are not part of the class -- class claims. But we agree that it is largely in line with the class claims, Your Honor.

THE COURT: All right. Assuming the Court adopts the proposed organizational structure, it seems to me the next issue is whether the discovery should continue at this point.

I'm inclined to lift the stay on discovery, and let it proceed at this point. I suppose I should talk to defense counsel first, pending an anticipated motion to dismiss and a timetable.

I think you propose a timetable for the filing of the consolidated complaint, and then a motion to dismiss, and a hearing on that.

Is your position that discovery should be stayed pending that?

MR. MCGARRY: Yes, it is, Your Honor. Jim McGarry.

THE COURT: Yeah. I don't know why I'd do that at this point. I mean, coming into it, you know, I was cautious until I want -- I wanted to learn more and read the complaint and all. But now, it seems to me that it will probably help us with the organization of the lawsuit to start the discovery.

They're unable to answer, for example, you know, the total number of people that are to be affected. I think they can get some clarification of that fairly quickly with discovery.

MR. MCGARRY: Your Honor, Jim McGarry, if I may, a couple things. One is, unlike most cases where you get to the motion to dismiss stage, and no information has been exchanged, the preliminary injunction proceedings actually resulted in a lot of information being exchanged. And there's a number -- there are numbers in those. There were declarations by, like, five different bank employees about the processes and procedures, including numbers around people potentially impacted.

The other thing is that, you know, we think that resolving the motion to dismiss will actually make this more efficient.

We do believe there are some claims that are straightforward legal claims for Your Honor to decide that we think we have a strong chance of winning.

So for example, Mr. Rubin talked about claims around data security, and Your Honor asked about claims around, you know, chip cards versus nonchip cards. We think those issues are straightforward legal issues. And if we're successful in knocking out at least those parts of the claim, there's significant amounts of discovery that won't need to occur.

The discovery -- the document requests that plaintiffs referenced had 89 separate document requests, and that was the very first thing that happened. And a lot of them had to do with data security, had to do with customer service issues, all of which we think are subject to dismissal.

So in order to address this case most efficiently, we think the logical thing to do is have the motion to dismiss briefed and decided. Then we will know what the scope of the case is. We will know what claims are left, and we will know what plaintiffs are left, because there are a number -- counsel represented the number of individual plaintiffs who have claims.

There are a number of those who we think will be subject to dismissal. And so the logical thing to do, from our perspective, is to figure out what the case is going to look like, and then we know what discovery we need. And then follow the normal local 16.1 procedures.

If the motion to dismiss is not granted in full, we'll answer, we'll have an ENE, and then we can have discovery go from there.

THE COURT: Walk me through -- there are parts of what is alleged that I don't fully understand, but maybe you can help me with some of the technical material.

If I were entitled to this -- to a payment, and I didn't get it. And then I called Bank of America's number, would I get a recording, or would I talk to a live person when I'm saying, hey, I didn't get my check, or you sent me a statement that shows I'm -- a deficit amount, rather than an amount that I'm owed. Would I talk to a live person or was there a recording?

MR. MCGARRY: You almost always will start with an electronic prompt, you know, like you call any company nowadays.

THE COURT: Right.

MR. MCGARRY: No one answers the phone on the first ring, right, you're always --

THE COURT: Right. So where does it go after I punch 2?

MR. MCGARRY: If you punch 2, it depends on your issue. If your issue is, I did not -- there's an unauthorized charge on my account, right? Then your call is going to go to the claims group. There is a --

THE COURT: Is that a recording or a live person?

MR. MCGARRY: Live person.

THE COURT: The way it was being administered.

MR. MCGARRY: It was a live person and -- it was a live person, other than on Sundays and --

THE COURT: Then it was call back during business hours or --

MR. MCGARRY: Yeah. And that has since changed as a result of our negotiations with the PI process.

THE COURT: Was there a record kept of those who called with complaints, either of nonreceipt or trying to report fraud? Did the bank keep a record of each person?

MR. MCGARRY: The records are maintained for each account. So if Your Honor were to call in, right?

THE COURT: Right.

MR. MCGARRY: And then someone at the bank were to go back and look to see what -- you know, when Judge Burns called in, that's the way the record would be kept.

THE COURT: Okay. And would it reference the person by name, too? I assume an account is registered in the name of a person, and maybe a telephone or Social Security number, something like that?

MR. MCGARRY: Yes. It would reference the name of the person, too.

THE COURT: The defendants at this point, at least the bank, has the ability to turn over that information to help us ascertain how big this might be?

MR. MCGARRY: We have -- we have the ability to turn over sort of high-level numbers on various subsets of the population that you're asking about.

THE COURT: Yeah.

MR. MCGARRY: Yes.

THE COURT: Because I'm assuming, and maybe this is wrong, but I'm assuming that there were some people that got paid as they were supposed to, and there was no fraud claims, even though they were, you know, given one of these cards with a stripe, rather than a chip. And they would be excluded, obviously, for most of the -- most of the claims.

Maybe some people never called in. But to, you know, get our arms around how many people called in and got what is alleged to have been, you know, a substandard response, I think if you could turn that information over, that would help, too.

We're going to end up with something, right? I mean, the motion to dismiss, you don't anticipate is going to be a complete winner, maybe some claims will be stripped, but there'll still be some part of this that survives, don't you anticipate?

MR. MCGARRY: Jim McGarry, Your Honor. Yeah, I think we intend to file a case dispositive motion. I think we have stronger arguments for resolution on a number of the claims. And I will say, in response to Your Honor's question about, you know, the number of people who just got their card and use it, you know, more than 91 percent of the people who actually got the cards, they used it.

They went through, they transferred the money to another account. They use it in their day-to-day. They had no problems with it.

THE COURT: Fully paid, then? I mean, no claim that money was fraudulently taken from my account, or I didn't get the full amount I was entitled to? Is that the 91 percent figure?

MR. MCGARRY: I'm talking about people that don't even get there. These are just people who they were unemployed, they applied for benefits, they got their card. They used their card. They had no reason to call in. There was no issues whatsoever with the --

THE COURT: I thought one of the allegations is that even after cards were issued to the proper person, that they were susceptible to some kind of hacking and fraud, where unauthorized people were drawing funds from the account, would that include the group you're talking about?

MR. MCGARRY: No, I'm talking about people who haven't even had that problem.

THE COURT: Okay. All right. So you're talking about the people that nothing went wrong. They got the card, they got paid as expected. There was never any claim of fraudulent charge. And what I'm trying to figure out, you gave me a figure of 91 percent. You say that 91 percent of the people who were entitled to draw benefits in this way got them without any known problems?

MR. MCGARRY: I would say -- that's not exactly right, because 91 percent of the people who got cards used them. There is no doubt whatsoever that lots of those people did not have a right to the cards that they got.

THE COURT: Oh.

MR. MCGARRY: And obtained them by fraud.

THE COURT: Yeah.

MR. MCGARRY: But they're gone. They used their card. They didn't try to --

THE COURT: Oh.

MR. MCGARRY: -- double dip. They didn't try to go and take extra funds. So they're in the 91 percent. People who had no problem, but we had no reason to believe they had a problem, because they just used the card.

THE COURT: Like the orange card, bank error in your favor, right, with Monopoly?

MR. MCGARRY: Something like that, Your Honor.

THE COURT: Yeah. You've estimated that it will take, what, 14 days to come up with a consolidated complaint?

MR. RUBIN: Yes, Your Honor.

THE COURT: And then as I understand it, the Bank of America and the defendants anticipate moving to dismiss the consolidated complaint. And you think you can have your motion ready in 30 days after the complaint is filed?

MR. MCGARRY: Jim McGarry. Your Honor, I guess it depends on what you order about what the complaint looks like. If the complaint is only about the class action plaintiffs, I think we can probably do that in 30 days. If we're adding the --

THE COURT: Yeah.

MR. MCGARRY: -- individuals to a consolidated complaint --

THE COURT: I'm leaning toward that, because I don't see how it helps to have, you know, parallel -- because you're going to have to answer both, right?

MR. MCGARRY: Yeah.

THE COURT: And you'd probably move to dismiss on both, so why not consolidate these? I don't want a bunch of fringe complaints out there.

MR. MCGARRY: I agree, Your Honor. And in that case, I think we'd ask for 45, because there will be a number of individual plaintiffs whose facts we need to address.

THE COURT: And then after that, the proposal is a reply in 20 days. I suppose we would up that to 30 now?

How about the complexity of these issues? Do you think these are straightforward? We have -- the reason I ask is, we have a local rule on 25 pages for movant's brief, 10 pages for a reply. Would that be adequate, given what you anticipate the challenges will be?

MR. MCGARRY: Probably not, Your Honor. What I would -- what I would ask for is maybe 40 pages. And we will try to do it for less. And if -- depending on the -- you know, what the consolidated complaint looks like, in the unlikely event we need to come back for more, we can ask you at that time.

THE COURT: All right.

MR. RUBIN: Your Honor, would you like us to address either the Court's questions about discovery and the appropriateness of the stay or the consolidation of the individual cases?

THE COURT: No, I think the latter has been addressed, to some extent. I'm leaning in favor of that. Not the discovery issue, which you're reading my mind, I was going to come back and ask you about your position on it.

MR. RUBIN: I can address one more point about the individuals, if I might.

THE COURT: Sure.

MR. RUBIN: We were very careful in the way we framed, in our status conference statement, how the individuals would be treated, partly because there are so many individuals and partly because, at present, we don't represent those individuals.

And we're concerned -- we want this to be as streamlined and as efficient a case as possible. What we proposed to the individual plaintiffs' counsel was that they accept all of the Court's rulings on legal matters.

They will be bound by the Court's determinations on the motion to dismiss as to all of the legal issues. There will be no need for individual litigation, at least until the summary judgment stage, and even discovery will be limited only to the extent the bank has unique defenses as to any individual plaintiff will the bank take discovery or the individuals take discovery.

So the agreement that we reached, obviously subject to Your Honor's approval, which we proposed in the interest of streamlining these procedures, is to basically take the individual cases, and we have all of the lawyers for the individuals on the phone, some in the courtroom now, and basically put them on hold, where they are stipulating, and they will formally stipulate in court to be bound by your legal rulings as to the overwhelming number of overlapping issues that will be in the consolidated complaint. To the extent the MDL is over, because you're just doing the pretrial, obviously, then those individual cases, if there's anything left, whatever the case looks like --

THE COURT: Will go back to the assigned judge.

MR. RUBIN: -- will be tried. But there shouldn't be any need for you, unless there's a unique defense applicable to a particular individual, to have to deal with the individuals.

THE COURT: Right.

MR. RUBIN: And if, Your Honor, there is a unique defense applicable to an individual, from our perspective as class counsel in the consolidated cases, we would prefer not to deal with it.

THE COURT: Sure.

MR. RUBIN: Because they're not our clients. That's why we would propose the language that we actually use there has been signed off specifically by counsel. And if Your Honor would consider that before issuing a ruling, I'd appreciate it.

THE COURT: Okay. Will do.

MR. RUBIN: And as to the discovery, Your Honor, this case -- these cases were filed at the end of last year, at the beginning of this year. So we're more than six months into the cases already.

Obviously, a great deal has transpired. Yes, it's true that Bank of America did disclose a fair amount of information to us during the very successful negotiations over what the terms of the preliminary injunction should be.

However, that was disclosed subject to a very strict confidentiality order, so we're limited in our ability to use it. We need discovery to confirm and make a matter of public record a lot of those facts.

And we were very careful in framing our initial request for production of documents, to focus on the issues that need to be confirmed as well as those issues to be explored.

And the fact that you have the magistrate judge in the room with us, we assume that we will be working with you and Judge Berg as a team. To the extent we have overreached in the slightest in our request for production, I'm sure we'll hear about it. But we've been very thoughtful, because once we did the Rule 26(f) disclosures, once Judge Chhabria opened up discovery, we went through, what do we need to know to prove the case. And having waited this long, and really as counsel has explained, we have people who are suffering.

We want to move this case along. We think the fact that we got a preliminary injunction after just a few months of litigation was extraordinary, in terms of the benefit it provided to these unemployed people who were really hurting.

We want to continue moving the case along at a comparable pace with the assistance of the Court. We can do that by pursuing discovery, subject to whatever limitations the magistrate judge imposes on that process.

THE COURT: What's being proposed is essentially an additional 60-day delay before discovery starts. And I have to take seriously the representation that defense counsel believes that at least some of the claims are going to be out. And the effect of that, if that happens, of course, is to narrow the discovery, I think, to some extent.

So I was leaning toward lifting the stay when I came in, but now in light of the representations and the estimate of how long it'll take, I'm inclined to leave it in place until the motion to dismiss is heard and decided.

MR. RUBIN: If I may?

THE COURT: Yeah, sure.

MR. RUBIN: I have heard what defense counsel said. I would have to balance against that what Judge Vince Chhabria said, in ordering the preliminary injunction on the principal issues in this case. And as you recall from his two orders, he found a strong likelihood of success on the merits.

Now, I understand, Your Honor, you're going to take a fresh look at all of the issues, but the fact that a federal district court judge, after extensive briefing, concluded that the principal legal theories we've advanced have a strong likelihood of success on the merits --

THE COURT: Right.

MR. RUBIN: -- is an indication that perhaps the bank is not going to be as successful in eliminating the claims.

THE COURT: It's a little more narrow, though, isn't it? I mean, I read his injunction carefully. And really, the injunction just concerned the bank's response to the problem, and that the response was inadequate. And Judge Chhabria thought that the bank should be more responsive. And then, you know, the individual bullet points in the injunction pointed out things that needed to be done to make that happen. It didn't implicate any of the broader issues, though.

MR. RUBIN: It did, Your Honor, and very briefly.

THE COURT: Sure.

MR. RUBIN: It specifically found on the EFTA, the Electronic Funds Transfer Act, the UCL, and the breach of contract claims, which are the backbone of the case, that we have a likelihood of success on the merits.

The only reason he ordered the bank to provide those particular remedies is because those remedies are required by law, by statute, by regulation, by the common law principles underlying our complaint.

Yes, he wanted to alleviate the irreparable harm to the affected individuals, to the greatest extent possible. But he never would have gotten to that point unless we had strong legal claims that compelled the bank to provide these protections and these procedures.

And what we're see seeking in the initial discovery and the discovery we anticipate now, rather than a further delay that would just extend the time of this case, is to nail down the details, take the discovery, so that we can prove up, so we can have Your Honor, if you agree with us, turn the preliminary injunction into a permanent injunction, grant the rulings that are necessary, because after waiting already six months in order to pursue discovery after it's been open once, to have it be shut down again would cause more harm to the plaintiffs who Judge Chhabria was trying to protect. And I'm sure Your Honor is going to be interested in ensuring that their legal rights are protected as well.

THE COURT: Is there a way to at least partially bifurcate the discovery, so the oppressive part doesn't begin until after the ruling on the motion to dismiss? I mean, could I leave that to Judge Berg to sit down with you, and figure out, well, okay, this portion of the discovery can go forward, and we're going to hold off on the other? I'm concerned about, you know, individual monetary claims, and all of that. That would be very intensive, I think, to produce all of that at this point.

MR. RUBIN: That would be acceptable to plaintiffs, Your Honor.

MR. MCGARRY: Your Honor, Jim McGarry. If I can address the concern about the immediacy of harm to individuals. The nature -- and this is the exact point that you were talking about, what Judge Chhabria found, and ordered.

The nature of the relief that was drafted cooperatively between the parties in connection with the preliminary injunction was such that for people who had their error claims denied, right, that's the sort of the meat of the people that we've been talking about, processes have been put in place so all of those people have their claims reconsidered, paid, or they have the opportunity to be reconsidered if they can only identify themselves, they can only a pass a verification -- identification verification process.

And so there are negotiated and ordered processes in place to actually make sure that anybody whose claim was wrongly denied has a fair shot to get it reinstated. And many have already.

THE COURT: Have all the letters gone out to the affected people, to your knowledge?

MR. MCGARRY: Yes, they have, Your Honor.

THE COURT: And what percentage -- if you know, what percentage of people have been at least made whole, according to their claims at this point? Do you know that? I'm talking about their loss claims or fraudulent amount of claims.

MR. MCGARRY: I'm conferring, Your Honor. Give me a second.

THE COURT: Yeah.

MR. RUBIN: Your Honor, while they're confirming, I could note that unauthorized transactions continue to occur. We keep getting calls from people in the same situation.

Because of Judge Chhabria's order, we're getting better protections for people once they've had funds stolen from them. We need to stop the process of people having funds stolen as well.

THE COURT: Tell me how this works. Do they get a new card or just money transferred to their account, and they're using the same cards, month to month, if they're still getting benefits?

MR. RUBIN: If there is no problem, then the person uses the same card and the money accumulates in the account unless they spend it.

THE COURT: What about those that have reported fraud or have had money unauthorized taken from their account.

MR. RUBIN: Just like you or I, if we reported fraud to the bank, they would stop the card, reissue immediately a new card.

THE COURT: With the chip or without? The new cards coming out, do they have a chip in them?

MR. RUBIN: No, no. And EDD --

THE COURT: Same cards?

MR. MCGARRY: Jim McGarry. At the moment, the same cards, Your Honor, yeah, but there is a process in place to add chips.

THE COURT: Okay.

MR. RUBIN: So we need to know.

THE COURT: So what's the answer to -- of the claims that have been made since the injunction, what percentage have been satisfied?

MR. MCGARRY: Roughly, slightly more than 50 percent.

THE COURT: Okay. Bank of America asked in its briefing to address the question of California EDD as a defendant. Are you satisfied with the representations that have been made? Do you want to table that, or is that something we should still discuss today?

MR. MCGARRY: Jim McGarry. Your Honor, I don't have an issue, one way or another.

We just wanted to put it on the table because one of the class action complaints names EDD as a party. And so in terms of how we're -- how this case is proceeding going forward, we need to understand whether they're going to continue to be a party.

My understanding, and counsel can correct me if I'm wrong, is that they believe, at this point, a consolidated amended complaint will not include EDD.

THE COURT: That's proceeding on a separate track now.

MR. RUBIN: Well, no, that claim is being dropped in the case it was raised. We are not including EDD as a defendant in this case, that's correct.

THE COURT: Okay. All right. And that'll be reflected in your consolidated pleading?

MR. RUBIN: Yes, it will, Your Honor.

THE COURT: All right. Well, those are the questions that I had. I'll tell you preliminarily what I'm inclined to do. I'm inclined to allow Judge Berg to meet and confer with you, and determine what, if any, discovery should go forward at this time.

I think there's a way to bifurcate that, where progress can be made. I am aware of the urgency, given the injunctive relief that's been issued so far. And I'm all about, you know, efficient resolution of matters.

But I think some compromise can be made, or Judge Berg can rule on what portion of discovery is likely to be unaffected and should go forward now, which will probably give you enough to do, given the projections of how many of the folks are involved here.

I have to think a little bit more about whether I want a single consolidated complaint. I really don't see the utility in having two complaints. I mean, I understand what you've said, and you've gotten the buy-in from the individual plaintiffs, but I don't -- except for the exotic defenses to maybe some of the individual claims, I don't see much utility in having two complaints that raise essentially the same legal issues. I think that's the whole purpose of the MDL, is to consolidate these things, and resolve them all at once.

MR. RUBIN: If I may, Your Honor.

THE COURT: Sure.

MR. RUBIN: If you had two consolidated complaints.

THE COURT: Right.

MR. RUBIN: Two separate complaints.

THE COURT: Right.

MR. RUBIN: The next question would be whether they go forward in parallel or not. And our proposal is essentially that only the consolidated class action case go forward, and the individual cases not go forward at this stage. So it's not really dealing with two cases at once.

THE COURT: Tell me the benefit if the individual consolidated cases raise the same legal claims, just as in the class action one. I don't understand why all of that wouldn't be resolved at once. You know, I'd hate to end up with an issue at the end, and says, oh, yeah, but that doesn't apply to us, because you were only ruling on the consolidated class action claim.

MR. RUBIN: That's, I think, the magic of the proposed stipulation we're offering, where counsel would bind them -- in the individual cases, would bind themselves and their clients to the rulings on the legal issues in the motion to dismiss.

THE COURT: Which brings me back to the question, why not have a single, you know, charging document, then. I don't get it.

MR. RUBIN: Because then --

THE COURT: I mean, we're going to be bound and then this one is going to sit dormant until I rule on -- it doesn't make sense to have two to me.

Unless I'm missing something here. The only thing you've raised is the prospect that there might be, you know, special defenses to some of the individual claims. And you don't want to get bogged down with that, defending, you know, that. And I understand that.

But as you pointed out, that can be remedied by just saying, look, we're going to stay all of those claims. And if it doesn't get worked out, you know, ultimately, it'll go back to the assigned judge to rule on special defenses to individualized and peculiar claims.

MR. RUBIN: I understand, Your Honor. Giving full party status to 250 individuals, in addition to roughly 20 class representatives makes for a cumbersome complaint, cumbersome pleadings, and potential complications, because as an individual, as a party, has additional rights, whether exercised or not. And I must defer to your experience on the bench.

From my perspective, it seems like it would make all of our jobs harder to have to deal with the individual parties in the consolidated case.

THE COURT: I don't want to make a hard one out of an easy one. If you're not opposed to it, then, you know, I guess

I'll accept that. Do you have a problem with having the two complaints as has been described?

MR. MCGARRY: Absolutely. I mean, the easiest and most efficient thing to do is get everybody together in one complaint, so we can have one set of legal rulings.

THE COURT: Yeah.

MR. MCGARRY: Now, so if Your Honor dismisses claims regarding -- under plaintiffs' proposal, if Your Honor were to dismiss claims regarding say, you know, negligence by the use of a card without a chip in it, right, that would apply to everybody across the board, okay?

But the problem is that there are many people with Electronic Funds Transfer Act and similar claims that don't have -- you know, we think there are defenses to people with certain fact patterns.

And so if we only have a single consolidated amended complaint, and there's a series of rulings on that, what's going to happen is there's going to be processes later that we'll have to build in the process. And say, okay, Judge Burns ordered people in these fact scenarios don't have a claim. So now we have to go back to all the individual complaints, and say, okay, does this person fit in this fact scenario, or does this person fit in a different fact scenario? That's the rationale behind putting it all together in one place.

THE COURT: Yeah, actually, though, I mean, I don't see it. If that's really a peculiar problem, it's going to arise whether we have a single complaint or a consolidated complaint with the class members and the individual members.

You're still going to run into that, right?

MR. MCGARRY: Right. But if we have it in -- if we do it in a single consolidated complaint at the beginning, right, if there's one set of legal rulings, and we know who it applies to and who it doesn't. Granted, it will be a little bit more work upfront.

THE COURT: Yeah.

MR. MCGARRY: But it will save a lot more work at the end, and it will allow us to have as streamlined a case as this is going to be from the beginning.

THE COURT: Plaintiffs are worried about some of the outlier claims, so what are you going to do about those? Because they're going to be hanging on.

MR. MCGARRY: There are very few, Your Honor. Almost everybody has virtually identical legal claims.

THE COURT: All right. Yes. Tell us your name again, because we're keeping a record.

MR. SHAY: Yes, Your Honor, Daniel Shay for Abarr, 230 plaintiffs in that complaint.

Two things -- or a few things. First of all, Your Honor was wondering about numbers. And there's a whole category of people we haven't talked about this morning, is the frozen accounts, where the defendant just unilaterally, when they started getting pressure from the government --

THE COURT: Right.

MR. SHAY: -- just froze, the media reports, 450,000 accounts. And our clients --

THE COURT: Was that ostensibly to what, prevent fraud, or further fraud?

MR. SHAY: Yes, Your Honor.

THE COURT: And is that covered by the injunction now where they're trying to fix that, remediate that, and take calls from people whose accounts have been frozen?

MR. DANITZ: This is Brian Danitz. I'll address that. Yes, Your Honor, in terms of no summary freezing of accounts based on the automated filter.

THE COURT: Yeah, okay, I saw that in there. So they at least potentially can get relief now, if their account is frozen, right? If they call in, the injunction requires the bank to take their call and look at it individually, and make an individual judgment.

MR. SHAY: Theoretically, Your Honor. However, we have a number of -- we have a lot of clients whose accounts are still --

THE COURT: They're under an injunction to act in a particular way, right, which is to fix this -- at least try to fix it by taking -- taking these calls.

MR. SHAY: Yes, Your Honor.

THE COURT: So tell me how that affects this question of consolidation of the claims?

MR. SHAY: Yes, Your Honor. Well, a few things. You know, we do intend to file more complaints. And so I'm not sure how, if we file a consolidated complaint, what happens with those. These are more like questions. How that would work.

THE COURT: You mean more individual complaints?

MR. SHAY: Yes, Your Honor.

THE COURT: All right. Raising the same legal claims, though?

MR. SHAY: Yes, Your Honor.

THE COURT: Yeah, all right. Well, they'd all be subsumed within a consolidated complaint, though, if those are being -- you know, of they're the same in nature, right?

MR. SHAY: I guess I'm just wondering about, like, then we have to file another -- keep filing new consolidated complaints?

THE COURT: No, I don't think so. I mean, I think I'd issue an order, saying anything subsequent filed late -- you know, raising the same claims falls within the purview of this consolidated complaint that I'm considering, so --

MR. SHAY: Yes, Your Honor.

THE COURT: Okay. I want some time to discuss this.

MR. SHAY: Yes, Your Honor.

THE COURT: And I'll make a decision on whether one or two complaints. I don't want to interfere with what's been agreed to, but this clearly has not been agreed to. And defense counsel thinks a more efficient way to handle this is with a single consolidated complaint.

MR. SHAY: No, Your Honor, we do agree. We wholly stand by Mr. Danitz and Mr. Rubin.

THE COURT: No, no, I'm not saying that. I know you do. I know that. It's been represented that there's been a stipulation by all individual plaintiffs' counsel, you know, that they'll be bound, and want to file their own. But the defense is saying, look, let's consolidate everything, because the legal claims, for the most part, are all the same. And to the extent there's some variance, we're prepared to deal with those, so --

MR. DANITZ: Your Honor, if I may add.

THE COURT: Sure.

MR. DANITZ: Should the Court decide that there should be one very large master complaint encompassing both the individuals and the class claims, we would require probably two more weeks to draft that complaint.

THE COURT: Extra time, then, okay.

All right. What else do we need to discuss in this preliminary meeting?

MR. RUBIN: I think from plaintiffs --

THE COURT: Have we canvassed all of this?

MR. RUBIN: I think that takes care of it, Your Honor.

THE COURT: Uh-huh.

MR. SHAY: Yes, Your Honor, Daniel Shay. Thank you for more time, just a second or two. You know, our goal -- our clients are calling us every day. We need our money. I can't pay my rent. I mean, a third of them are homeless.

THE COURT: They have a remedy now. I mean, the injunctive relief is in play. It's represented that the bank has changed -- is complying with the injunction, I assume?

MR. MCGARRY: It is.

THE COURT: So if somebody calls, they're going to get a live person. And they can say, here's my situation, and get individualized attention, rather than just a recording or a hang up, or this is the way this is being handled, don't call back, right?

MR. SHAY: Your Honor, with all -- it's not -- it's not happening. They're not getting their money back. Their accounts are still frozen. They're calling us, you know, every day. We have to, you know, deal with a lot of people calling us.

THE COURT: What's up with that?

MR. SHAY: We want to settle these cases. We don't want to be part of a class action.

THE COURT: Okay. No, no, I understand the urgency of it, but I'm getting mixed information from the sides. On the one hand, I'm being told, no, no, we're heeding the injunction, we're doing what we're supposed to.

MR. MCGARRY: We are heeding the injunction. I think I understand what the disconnect here is. And by the way, I will say, the bank is always willing to talk about individual problems, individual resolutions for anybody who's having any issues. And the plaintiffs on this side know that they can call us at any time.

I suspect that the confusion here is about the concept of a freeze. So there's two -- there's two related concepts here that I think will help explain.

The EDD, which is the issuing -- the EDD is the entity that determines who is eligible for benefits or not. All the bank does is distribute those funds. The EDD has placed a number of -- a large number of calls -- asked the bank to freeze certain accounts, because they think people are ineligible. We're obligated to do that. They are --

THE COURT: Those on the phone, if you'll mute your mics, please, because there's some static coming across.

MR. MCGARRY: So --

THE COURT: Are you saying, then, the freezes are not by the bank, they're ordered by EDD?

MR. MCGARRY: Two different kinds. The vast majority of freezes that have happened in the past, and that still exist today are as a result of EDD's direction.

So now the bank, even before the preliminary injunction, because of a concern about the number of freezes and the bank's efforts to work with EDD to get some of those freezes lifted, implemented its own policy, where it took a hundred thousand or more claims are -- accounts, excuse me, that were frozen, and converted them to a blocked status. And the only thing you need to know about that distinction is, for a frozen account, EDD has to say, yes, unfreeze that account.

For a blocked account, the bank will -- will unblock the account, and allow anyone access if they just call in and they're able to verify their identity through the types of things that we all do every day, if you have to do --

THE COURT: Was EDD represented at the hearing on the injunction?

MR. RUBIN: No, Your Honor.

THE COURT: I mean, I don't know how we deal with this problem, if the bank is being told by EDD, we're the ones that are freezing this. We think there is fraud.

MR. RUBIN: Your Honor, I believe this actually points out some of the differences in the approach to the cases. EDD has nothing to do with this case. We are not challenging anything that EDD has done.

We are -- any freeze that the EDD imposed is beyond the scope of this case. It may be in an individual case, it's certainly not in the consolidated class action. Judge Chhabria asked at the outset whether EDD was involved in the issues and we explained no.

This is -- this case only involves the bank imposed freezes, which makes it entirely separate. And I'm concerned that if some of these individual cases blend in EDD freeze issues --

THE COURT: Right.

MR. RUBIN: -- we're going to have a mess.

THE COURT: No, I agree with you. Is EDD part of your complaint as it stands?

MR. SHAY: No, Your Honor. We would like to get to the ENE, is what I'm getting at, with Judge Berg. We don't have to have 230 or 250. Just one, we could pick one, we could pick five.

THE COURT: All right. I'm going to try to keep this -- the perspective on this, though. And I don't want to expand it to include something that's not included in any complaint.

And if the freezes are coming at the direction of the EDD, then the bank can't be responsible for that. They're the source of authority for the payments. And the bank just facilitates what they're being told by them. If that's not implicated here, it's not an issue I'm going to deal with or have as part of this.

MR. SHAY: I mean, our position is that it's still -- it's still a violation of EFTA.

THE COURT: Well, okay. I mean, we can reach that another day.

MR. SHAY: Yes, Your Honor. Thank you.

THE COURT: But like I said, if the bank is taking instructions from EDD, and the EDD is saying there's evidence of fraud, freeze this account, what's the bank to do, pay it? So we'll leave that for another day.

Okay. I'm prepared to get with Judge Berg and issue orders on all of these matters that we've discussed. I'll have an order to you very, very soon, and we'll move forward.

I have written down your revised estimates on the motion to dismiss, and the time it takes to file a consolidated complaint if that's the way we go.

MR. RUBIN: Thank you, Your Honor. We appreciate your time.

THE COURT: Sure, of course. Anyone else have anything?

MS. BROWN: I have one just brief question, Your Honor.

THE COURT: Sure.

MS. BROWN: What is the timing that you're thinking about the discovery with Judge Berg?

THE COURT: You mean how long before -- if it starts, if it's not -- if the stay is lifted, how long? I think that'll be addressed in the order, which will be forthcoming within the next five days or so. And it'll give you directions. If I lift the stay and we do partial discovery, it'll have directions to contact my colleague here, and go forward quickly. You're able to see them quickly, and make time?

JUDGE BERG: Any time. And, in fact, I was going to throw out there, if we want to do an early settlement, perhaps, with all the individual plaintiffs, as opposed to the big MDL, I'm happy to do that, too, and get rid of a number of cases right off the bat.

THE COURT: I think that's a good idea.

So there's your at least partial answer. Maybe if we can handle individual cases that way, if you're willing to. If they want to say yeah, there's nothing that prevents us from going forward at this point.

MR. SHAY: Yes, Your Honor, absolutely. Thank you, Judge Berg.

THE COURT: So let me direct, then, the individual plaintiffs' counsel to contact Judge Berg's chambers, and he'll set something up. It'll probably be in the nature of a joint ENE, right, to start with?

JUDGE BERG: I think that would be better if there's a lot of them.

THE COURT: I assume defendants are in agreement with that. It'll help pare this down if some agreement can be reached as to individual plaintiffs, then we'd just be dealing with -- I mean, this issue of two complaints goes away, then, right?

MR. MCGARRY: I'm skeptical, Your Honor, that we'd get rid of everyone.

THE COURT: Oh, you don't know Judge Berg. He's got lots of talent. He's a real personality. So, force of nature.

MR. MCGARRY: So I've heard. My client is always happy to have discussions with any of the plaintiffs.

THE COURT: I chose him among the array of very talented magistrate judges we have here, because he's so adept at finding solutions to difficult problems.

Okay. Well, thank you all. Nice meeting those of you that I've not met before. Very nice meeting you. We'll have an order out very soon.

(The proceedings concluded at 12:45 p.m., July 19, 2021.)

COURT REPORTER'S CERTIFICATE

I, CYNTHIA R. OTT, Official Court Reporter, United States District Court, Southern District of California, do hereby certify that pursuant to 28 U.S.C. §753 the foregoing is a true, complete and correct transcript of the stenographically reported proceedings had in connection with the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at San Diego, California, July 26, 2021.

/s/ CYNTHIA R. OTT
CYNTHIA R. OTT, RDR, CRR