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12 *[ADDITIONAL COUNSEL LISTED IN SIGNATURE BLOCK]*

13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**
15 **SAN DIEGO DIVISION**

16 IN RE: BANK OF AMERICA
CALIFORNIA UNEMPLOYMENT
17 BENEFITS LITIGATION

Case No. 21-MD-02992-GPC-MSB

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF AUGUST 20, 2024 TENTATIVE
ORDER**

18 Date: N/A, per Dkt. 319
19 Time: N/A, per Dkt. 319
20 Ctrm: 2C
21 Judge: Hon. Michael S. Berg
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1 Class Plaintiffs have incomprehensively injected themselves into a discovery
2 dispute in which they have no interest, with the sole objective of preventing BANA
3 from obtaining evidence relevant to its defense of this MDL. The only explanation
4 for Class Counsel's dogged insistence that BANA not be allowed to take Individual
5 Plaintiffs' depositions (or, alternatively, that BANA not be allowed to use the
6 depositions) is Class Counsel's fear that the evidence obtained will harm their class
7 certification arguments. This is not a reason why the evidence cannot be taken.

8 As this Court has previously stated on multiple occasions, it cannot seriously
9 be disputed that BANA is entitled to depose the Individual Plaintiffs who have each
10 sued BANA in their individual capacities, and the Court has already tentatively
11 ordered that the depositions should proceed in person because no Individual Plaintiff
12 has made any showing of burden. The December 14, 2024 deadline for fact discovery
13 is fast approaching, and BANA must be able to start scheduling and taking these
14 depositions now in order to complete them on time.

15 Class Plaintiffs' request that the Court preclude BANA from using the
16 Individual Plaintiff depositions in the class case lacks support, makes no sense, and
17 exposes their true motives. The Individual Plaintiffs are putative class members who
18 have plainly injected themselves into the MDL by virtue of filing individual
19 allegations in the MDL master consolidated complaints and making discovery
20 demands in the MDL. The facts of their cases are directly relevant to the class action.

21 The Court should make its August 20, 2024 tentative order ("Tentative Order")
22 final, and require Plaintiffs to comply with the 10 previously-ordered in-person
23 depositions as noticed in Exhibit A.¹

24 ¹ BANA is entitled to proceed with all Individual Plaintiff depositions unless or until
25 Individual Plaintiffs' motion to stay, ECF 311 ("Stay Motion"), is granted; and it
26 should not be for the reasons explained in BANA's opposition brief, ECF 321 ("Stay
27 Opp."). The Stay Motion is currently scheduled for expedited hearing on September
28 9, 2024, ECF 315, and BANA is hopeful that a decision will issue soon. If, however,
the Stay Motion is still pending when the 10 previously-ordered depositions are
complete, BANA will seek the Court's assistance with taking additional Individual
Plaintiff depositions while awaiting the decision.

I. Class Plaintiffs Have No Interest In This Dispute.

Class Plaintiffs have no colorable interest in this dispute that concerns Individual Plaintiffs who Class Counsel do not represent, and because of the limited scope of the Tentative Order. At the conclusion of the August 20, 2024 Informal Discovery Conference (“IDC”), the Court issued the Tentative Order allowing BANA to proceed with 10 in-person Individual Plaintiff depositions while the Stay Motion is pending after receiving briefing and argument from the parties. In issuing the Tentative Order, the Court relied on certain key facts: 1) BANA has been working with Individual Counsel on Individual Plaintiff discovery for months; 2) BANA has been trying to schedule additional Individual Plaintiff depositions for weeks (Plaintiffs first raised the concept of a stay on July 25, 2024, more than a month before the Stay Motion was filed on August 13, 2024); and 3) there has been no showing of undue burden by *any* Individual Plaintiff as to why the depositions should not occur in person. Nothing Class Counsel may raise changes these key facts.

Class Counsel’s objection to the Tentative Order is just their latest attempt to prevent BANA from taking discovery that Class Counsel fears will be unhelpful to their case. On multiple occasions, Class Counsel asked the Court to delay Individual Plaintiff depositions because they would divert Class Counsel’s resources from their class certification motion. *See* Stay Opp., Declaration of Laura Brys, ECF 321-1 (“Brys Decl.”), ¶ 39. Since BANA served its first deposition notice, the class certification deadline has been extended *three times*, giving Class Counsel *seven extra months*. *See* ECF 139, 229 and 302. And this round of depositions was noticed to begin *two weeks after* their long-extended deadline. *See* Brys. Decl. ¶ 56. Yet, Class Counsel still complains, pointing now to a supposed end-run around Rule 30 (which arguments fail as explained below). Even now, after the Court ordered 10 depositions to proceed, Class Counsel intervened to prevent them from being scheduled. Before the IDC, Individual Counsel identified seven Individual Plaintiffs

1 available for deposition the week of September 16, 2024, and immediately after the
2 IDC, Counsel offered to quickly identify three more. Brys Decl. ¶¶ 61, 65. However,
3 four days later, Individual Counsel terminated scheduling discussions, referring
4 BANA to Class Counsel. Class Counsel's concerns about attorney resources and the
5 Federal Rules are just a pretext for the real reason they do not want these depositions
6 to go forward: they are worried the evidence will be bad for their case. The fact that
7 discovery may reveal evidence so relevant as to be harmful to one side has *never*
8 been endorsed by a court as a reason not to allow it. The Court should reject Class
9 Counsel's improper intervention.²

10 **II. BANA Is Entitled To Take The Individual Plaintiff Depositions.**

11 BANA is entitled to depose Individual Plaintiffs who have sued BANA in their
12 individual capacities. As a preliminary matter, Individual Counsel has challenged
13 the manner and timing of the Individual Plaintiff depositions, but notably *has not*
14 disputed BANA's right to take them. *See generally* Individual Plaintiffs' 8/16/ Letter
15 Brief; Stay Motion. The dispute before the Court at the IDC was simply whether the
16 Individual Plaintiffs would be required to appear in person or remotely. Thus, an
17 order from the Court is not required for these Individual Plaintiff depositions to be
18 taken, as their counsel has already agreed they should. *See* Brys Decl. ¶¶ 61, 65.

19 In any event, this Court has already stated numerous times that BANA is
20 entitled to take the deposition of each Individual Plaintiff. And Rule 30 certainly
21 allows for it, specifically providing for party depositions, and for "more than 10
22 depositions" upon "leave of court," which is exactly what the Court provided in the
23 Tentative Order. *See* Fed. R. Civ. P. 30(a)(1), (2)(A)(i). Courts routinely extend the
24 10-deposition limit in cases—like this one—with large numbers of plaintiffs. *See*,

25 ² Class Counsel also did not properly raise these issues with the Court. Class
26 Plaintiffs' formal brief will raise issues beyond the scope of the dispute that was
27 presented by Individual Plaintiffs and BANA at the IDC, beyond the scope of the
28 Court's Tentative Order, and beyond the issues raised at the IDC. To the extent Class
Plaintiffs' brief goes beyond the issues Class Counsel disclosed to BANA would be
included, BANA reserves its right to seek further briefing or pages to fairly respond.

1 *e.g.*, *Agena v. Cleaver-Brooks, Inc.*, 2020 WL 6929671, at *6-7 (D. Haw. June 15,
2 2020) (granting defendants’ request to depose each of 73 plaintiffs); *Chavez v. Wis*
3 *Holdings Corp.*, 2013 WL 2181214, at *2 (S.D. Cal. May 20, 2013) (permitting
4 depositions of 30 opt-in plaintiffs because they have “freely chosen to participate”
5 and likely have “relevant information with respect to the claims and defenses”)
6 (internal quotations omitted).

7 It is irrelevant that Individual Plaintiffs may also be putative class members
8 and some may elect, at some point in the future, to withdraw their individual claims
9 and proceed as non-plaintiff or absent class members. *See* Stay Motion at 4.
10 Individual Plaintiffs are not absent putative class members now; they have each sued
11 BANA in their individual capacities. Moreover, even discovery from absent putative
12 class members is permitted when putative class members have “injected” themselves
13 into the litigation (*see Antoninetti v. Chipotle, Inc.*, 2011 WL 2003292, at *2 (S.D.
14 Cal. May 23, 2011)), as Individual Plaintiffs have plainly done here by including
15 individual allegations in the master consolidated MDL complaints and making
16 burdensome discovery demands on BANA—discovery demands to which BANA has
17 already spent countless hours and dollars responding. *See* Brys Decl. ¶¶ 13-16.
18 Individual Plaintiffs possess information about their specific allegations “which may
19 not be documented and thus not within [BANA’s] possession absent a deposition,”
20 and such information is “reasonably necessary to [BANA’s] preparation of its
21 opposition to the class certification motion.” *Moreno v. Autozone, Inc.*, 2007 WL
22 2288165, at *1 (N.D. Cal. Aug. 3, 2007).

23 Regarding timing, the close of fact discovery on December 14, 2024 is fast
24 approaching. To date, BANA has taken five Individual Plaintiff depositions; the first
25 was noticed in December 2023, but not taken until March 7, 2024, and the fifth
26 deposition was not taken until 2 months later, on May 7, 2024. Brys. Decl. ¶¶ 40,
27 45. If BANA is to take depositions of the remaining 128 Individual Plaintiffs before
28

1 or near the close of fact discovery, it must begin scheduling and taking them as soon
2 as possible given the previous scheduling challenges.

3 Regarding manner, BANA is entitled to in-person depositions as stated in
4 BANA's prior brief, Exhibit B. As the Court found at the IDC, no Individual Plaintiff
5 has identified a burden sufficient to justify foregoing an in-person examination.

6 **III. The Depositions Are Directly Relevant To The Class Case.**

7 Class Counsel seeks to preclude BANA from using evidence from the
8 Individual Plaintiff depositions in its defense of the class case on the basis that such
9 use would be an end-run around Rule 30. This non-sensical, unsupported, argument
10 exposes the pretextual nature of Class Counsel's objections. This is not about Rule
11 30, which has nothing to do with how BANA can *use* relevant discovery. It further
12 has nothing to do with attorney resources, timing, or whether the Individual Plaintiffs
13 are parties subject to discovery in this action.³ Individual Plaintiffs are putative class
14 members who have "injected" themselves into the MDL. The facts of their individual
15 cases are plainly relevant to the class case. *See Antoninetti*, 2011 WL 2003292, at
16 *2; *Moreno*, 2007 WL 2288165, at *1. Class Counsel is concerned that Individual
17 Plaintiffs' facts will *undermine* their class certification arguments. This is why they
18 would "stipulate" and allow the depositions to go forward if BANA agreed "that it
19 will not use the[m]" to oppose class certification. Class Plaintiffs' Stay Brief, ECF
20 320, at 4 n.4. Put plainly, Class Counsel only objects to the Individual Plaintiff
21 depositions if they matter to the class case. But that they may matter is just another
22 reason why they should be allowed.

23 For these reasons, BANA asks that the Court affirm the Tentative Order and
24 require 10 Individual Plaintiffs to appear as noticed and agreed in Exhibit A.

25 _____
26 ³ Indeed, Class Counsel did not object to BANA producing documents regarding
27 Individual Plaintiffs' claims, or to BANA answering Individual Plaintiffs'
28 allegations. In fact, they demanded it in their own requests. *See* Class Plaintiffs'
RFP 46 (seeking "ALL DOCUMENTS . . . concerning the EDD DEBIT CARD
ACCOUNTS of *each plaintiff in this action*") (emphasis added).

1 Dated: September 3, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on September 3. 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: September 3, 2024 s/ Laura G. Brys