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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
This Document Relates to All Actions	**PLAINTIFFS' MOTION FOR PROTECTIVE ORDER RE: 128 DEPOSITIONS**

Pursuant to the Court's Order Setting Briefing Schedule For Discovery Dispute (ECF 319), Plaintiffs move for a protective order precluding Defendant Bank of America (the "Bank") from taking 128 additional Plaintiff depositions at this time as noticed.

I. FACTUAL BACKGROUND

Between February and May 2024, the Bank deposed five Class Plaintiffs and five Individual Plaintiffs in response to this Court's ruling that it could take a total of 10 depositions, in any combination, before Plaintiffs filed the Motion for Class Certification.

On August 6, 2024, the Court held a status conference in which Liaison Counsel for Individual Plaintiffs stated the Bank had recently noticed 122 additional depositions of Individual Plaintiffs and asked about the proper procedure for seeking a stay of the 133 Individual Plaintiffs' cases. The Court instructed that the stay motion should be directed to Judge Curiel and, if the motion were filed within a week, any decision on additional depositions could wait until after the ruling on that motion.

On August 9, the Bank served an amended notice of deposition for 128 Individual Plaintiffs. (Exhibit A). The Bank's August 9 Deposition Notice set a highly compressed schedule for the remaining 128 Individual Plaintiffs' depositions to be taken in-person, four-per-day, from September 16 to November 7, 2024 in four different cities: Bakersfield, San Francisco, Los Angeles, and San Diego. *Id.*

On August 13, the Individual Plaintiffs timely moved to stay their cases until the common issues of law and fact could be adjudicated in the consolidated Class Case. ECF 311. The motion argued, *inter alia*, that a temporary stay will serve the interests of judicial and party economy and that taking the depositions of 128 Individual Plaintiffs at this time would be wasteful because the Courts' adjudication of common issues in the Class Case will narrow the issues to be litigated and decrease the number of Individual Plaintiffs who will proceed on an individual basis. *Id.* The motion also pointed out that 257 *other* individual plaintiffs' cases are already stayed, and that the Bank has not identified *any* prejudice that would result from the requested stay.

That stay motion is set to be heard by Judge Curiel on September 9, 2024.

On August 20, 2024, at a scheduled status conference, the Court held an informal discovery conference ("IDC") to address whether the Individual Plaintiff depositions could be taken remotely. The IDC was the result of a meet and confer between the Bank and Liaison Counsel for the Individual Plaintiffs that *excluded* Class Counsel–who did not receive proper notice of the IDC or an opportunity to brief the issues. At the IDC, Co-Lead Counsel objected on that basis, pointing out that their exclusion violated the Court's Order Re: Case Management, ECF 48 at 3:6-10. The Court offered additional informal briefing but advised that the tentative would not change, at which point Co-Lead Counsel declined to request additional informal briefing.

The Court tentatively found that the Individual Plaintiffs had not demonstrated that in-person depositions would be unduly burdensome. Although the dispute concerned only *the method* by which the depositions could be taken—not whether any of the depositions *should be allowed to proceed*, and if so, on *what schedule*—the tentative further provided that 10 additional depositions may proceed now, that other depositions may proceed after Judge Curiel rules on the pending Motion to Stay, and that the December 12, 2024 discovery deadline may be extended to accommodate those additional 128 depositions. Class Counsel requested formal briefing and the Court granted the request on an abbreviated schedule. On August 27, 2024, the Bank re-noticed ten of the 128 depositions to be taken two-per-day from September 16 to September 20. (*See* Exhibit B).

II. ARGUMENT

A party may move for a protective order and "the court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including … forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters." Fed. R. Civ. P. 26(c).

A. An Order Permitting Individual Depositions to Go Forward Is Premature.

Good cause exists to preclude the 128 additional Plaintiff depositions as premature. An order permitting additional individual plaintiff depositions to go forward now, before Judge Curiel's ruling on the pending stay motion, would be premature for two reasons.

First, the Bank has not yet filed a motion seeking leave to take any depositions beyond the 10-deposition limit set forth in Rule 30(a)(2)(A)(i), and that issue was not fairly presented at the IDC. The IDC only requested the Court's ruling on the *method* to be used in taking Individual Plaintiff depositions. The IDC did not raise the issue of *whether* and *to what extent* any of these depositions should go forward or their *timing*. Even the Bank acknowledged in footnote 1 of its IDC letter brief that "the timing of Plaintiffs' depositions is not ripe for the Court's decision at the IDC."

In the absence of a motion seeking leave to take additional depositions beyond the 10 permitted by the Federal Rules, the Bank has not made the requisite showing of good cause and proportionality warranting any depositions beyond those already taken, let alone 128 more. Because the parties did not ask the Court to rule on the propriety of taking these depositions or their timing, the Court should decline to do so until that issue is briefed and ripe for decision.

Second, any decision regarding the propriety and/or timing of these depositions is premature because Judge Curiel has not yet issued a ruling on the pending motion to stay (ECF 311) and Class Plaintiffs' Joinder in that motion (ECF 320)—which seek a temporary stay of the individual plaintiff cases in the interests of justice and judicial and party economy, until the Court has ruled on common issues of law and fact in the class case. This will narrow the issues to be litigated and likely substantially reduce the number of Individual Plaintiffs who will opt out of any class that is certified to proceed on an individual basis—i.e., there will be fewer individual plaintiffs, thereby reducing the number of depositions to be taken.

Judge Curiel's ruling on the Motion to Stay will provide needed guidance regarding how this multi-district litigation should proceed, including on the question of whether the 128 Individual Plaintiff depositions noticed by the Bank should proceed in parallel with the Motion for Class Certification and at the same time expert discovery is taking place. Accordingly, consistent with the Court's direction at the August 6 status conference, and to avoid any potential conflict with Judge Curiel's forthcoming ruling on the Motion to Stay, the Court should defer any ruling regarding the need for these depositions or their timing until after Judge Curiel issues an order on the Motion to Stay, as that order will clarify a number of issues pertinent to these depositions.

B. 128 Additional Depositions Exceeds the 10-Deposition Limit Imposed by FRCP 30 and the Bank Has Not Made the Requisite Showing of Need.

Even if the Motion to Stay were not pending before Judge Curiel, good cause would still exist to preclude the 128 additional Plaintiff depositions because the Bank has not made the requisite particularized showing of need to expand the number of depositions beyond the 10-deposition limit imposed by Rule 30 (a)(2)(A)(i), which imposes that same limit *on both sides* of the litigation, no matter how many parties are named, as made clear in the 1993 advisory committee notes.

The Bank can cite no legal authority to support its apparent position that it is permitted to take an additional 128 depositions as a result of the number of named parties. Therefore, the Bank has exceeded the 10-deposition-per-side limit and must obtain either Plaintiffs' stipulation or leave of Court to take these additional depositions, especially if it intends to use them in the Class Case, which is the Bank's apparent intent.

Plaintiffs have not stipulated to allow these depositions. To the contrary, they have moved to stay the individual claims, in response to the Bank's overreaching deposition notice. The Bank has also made no showing why it needs those 128 depositions, let alone now. Parties seeking to exceed the 10-deposition limit "must make a particularized showing of why the discovery is necessary." *Acosta v. Southwest Fuel Management, Inc*., 2018 WL 1913772, at *6 (C.D. Cal., 2018) (*citing Lloyd v. Valley Forge Life Ins*. Co., No. C06–5324 FDB, 2007 WL 906150, at *2 (W.D. Wash. Mar. 23, 2007); *Bell v. Fowler*, 99 F.3d 262, 271 (8th Cir.1996)). Here, the Bank has not come close to making the requisite showing; indeed, it *never even filed a motion* seeking leave to proceed. Because the Bank has not identified any particularized need for the 128 additional depositions, the Court should not permit these depositions to proceed without providing a full opportunity to be heard on why each of these depositions is needed, and what the fair, reasonable, and non-prejudicial timing of the depositions should be. *See Rieman v. Cnty. of San Bernardino*, 2021 WL 8918563, at *2 (C.D. Cal. 2021) (denying additional depositions absent particularized showing of need: "The court here is not being asked to limit discovery otherwise allowed, but rather to expand the scope of discovery, and plaintiffs have made little showing of the need for such expansion.").

C. The 128 Noticed Depositions Are Unduly Burdensome.

Good cause also exists to preclude the 128 depositions from proceeding at this time because, as noticed, the depositions are unduly burdensome and plainly calculated to harass Class Plaintiffs when the parties will be engaged in expert discovery and briefing. As discussed above, the Bank has not explained and cannot explain why it must take these depositions *now*, rather than after Judge Curiel's rulings on the pending motions. In contrast, Plaintiffs will be severely prejudiced if these depositions are permitted to go forward. The timing of the 128 noticed depositions overlaps completely with the period during which Class Plaintiffs will be preparing for and defending depositions of Plaintiffs' four experts between now and the Bank's class certification opposition, due October 24, preparing for and taking depositions of the Bank experts, and preparing Plaintiffs' reply in support of class certification, due November 21. If depositions of 128 additional Individual Plaintiffs are allowed to proceed before Plaintiffs' class certification motion is resolved, and unless the Bank is precluded from using those Individual Plaintiff depositions in the Class case, Class Plaintiffs will be forced to divert resources from those class certification efforts to prepare for, attend, and participate in the Individual Plaintiffs' depositions. Further, scheduling multiple depositions per day for two months straight deprives Plaintiffs' Counsel of any reasonable opportunity to prepare the Individual Plaintiffs for their depositions. It is patently unfair to require these plaintiffs to be subject to deposition without adequate preparation. The Bank's unduly burdensome, oppressive, and harassing schedule is entirely unnecessary and would have no practical impact on this litigation but to drain Plaintiffs' resources.

Respectfully submitted,

Dated: September 3, 2024

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SIGNATURE ATTESTATION

Pursuant to section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I, Brian Danitz, attest that the other signatories listed, and on whose behalf this filing is submitted, concur in the filing content and have authorized this filing.

Dated: September 3, 2024

/s/ Brian Danitz
Brian Danitz