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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE BANK OF AMERICA
CALIFORNIA
UNEMPLOYMENT BENEFITS
LITIGATION

This Document Relates to All
Actions

CASE: 3:21-md-02992-GPC-MSB

**REPLY IN SUPPORT OF
INDIVIDUAL PLAINTIFFS'
MOTION TO STAY
PROCEEDINGS PENDING
RESOLUTION OF RELATED
CLASS ACTION CERTIFICATION**

Date: September 9, 2024
Time: 2:30 p.m.
Crtrm.: 2D – 2nd Floor
Judge: Hon. Gonzalo P. Curiel

I. INTRODUCTION

The 133 Individual Plaintiffs submit this reply in support of their request that the Court stay their cases until the common issues of law and fact are adjudicated in the consolidated Class Case. As explained in their moving papers, a temporary stay will serve the interests of judicial and party economy by permitting Class Counsel, Bank of America (BANA), and this Court to focus on the class certification motion and related classwide issues, which would likely decrease the number of individual cases to be litigated and streamline the proceedings.

BANA's Opposition does not negate any of these points. Instead, it misstates the record and the Individual Plaintiffs' arguments, casts false aspersions on counsel for the Individual Plaintiffs, and greatly exaggerates the negative effect of a stay. Because BANA has not shown that a stay would cause it *any* prejudice—including because nearly 260 other individual plaintiffs' similar cases are *already* stayed by order of the JPML—BANA cannot overcome the Individual Plaintiffs' showing of the harm (and inefficiencies and potential inconsistent adjudications) that could result if the requested stay is denied.

Nor can BANA reasonably dispute that this litigation would proceed in a far more streamlined manner if the stay is granted. While BANA may be hoping to use the pendency of the 133 non-stayed Individual Plaintiffs' cases to take two-a-day depositions for its use *in preparing its brief in opposition to class certification*, BANA has not identified *any* reason why it needs those depositions *now*, in the *Individual Plaintiffs'* cases, rather than after the principal disputed issues are sorted out in MDL class proceedings.

II. LEGAL STANDARD

Federal courts have the inherent power to manage their dockets. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Incidental to this power is the discretion to stay proceedings. *See id.*; *see also Leyva v. Certified Grocers of Cal. Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979) (“A trial court may, with propriety, find it is efficient for its own docket

1 and the fairest course for the parties to enter a stay of an action before it, pending
2 resolution of independent proceedings which bear upon the case.”).

3 That discretion is guided by balancing the harms and benefits that may arise from
4 a stay. In particular, courts weigh three factors: (1) “the possible damage which may
5 result from the granting of a stay;” (2) “the hardship or inequity which a party may
6 suffer in being required to go forward;” and (3) “the orderly course of justice measured
7 in terms of the simplifying or complicating of issues, proof, and questions of law.”
8 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc. v.*
9 *Hall*, 300 F.2d 265, 268 (9th Cir. 1962)).

10 **III. ARGUMENT**

11 **A. BANA’s Preliminary Contentions**

12 Before turning to the propriety of a stay, the Individual Plaintiffs first address
13 several baseless contentions made by BANA in its opposition. To begin, the Individual
14 Plaintiffs did not bring their motion “in the twilight of discovery” or “hastily.” To the
15 contrary, the December 12, 2024 discovery deadline was set only recently — on June
16 27, 2024 — and the instant motion was filed just a few weeks later and only after BANA
17 changed its position and sent notice for approximately 122 individual depositions
18 packed tightly into the period between when Class Plaintiffs filed their motion for class
19 certification and when BANA’s opposition to class certification is due. That is not
20 dilatory behavior on the part of the Individual Plaintiffs.

21 As for not previously contesting Judge Burns’s July 2021 Order, it was entirely
22 unnecessary for the Individual Plaintiffs to have done so earlier, because there were no
23 practical consequences of that order until recently. Based on conversations with Class
24 Counsel, and as discussed with Judge Burns at the July 19, 2021 status conference, the
25 Individual Plaintiffs understood that individual litigation would be paused “at least until
26 the summary judgment stage, and even discovery will be limited only to the extent the
27 bank has unique defenses as to any individual plaintiff will the bank take discovery or
28 the individuals take discovery.” (ECF No. 55 at 27:5–14.) In all other regards, the

1 individual cases would be put “on hold” until “the MDL is over.” (*Id.* at 27:20–25; *see*
2 *also* Class Action Plaintiffs’ Status Conference Statement, ECF No. 31 at 10 [“Counsel
3 further agree that, with the exception of discovery relating to the specific records of the
4 individual plaintiffs at Bank of America, all discovery requests and depositions will be
5 made by and through interim co-lead counsel for the Class Action Plaintiffs in
6 coordination with counsel for the individual plaintiffs.”].)

7 Consistent with this understanding, Judge Burns’s July 2021 Order provided,
8 “No plaintiff may make any request for or response to discovery ... except through
9 Interim Co-Lead Counsel.” (ECF No. 48 at 3.). It was not until Magistrate Judge Berg’s
10 June 2024 Amended Scheduling Order that the December 12, 2024 discovery deadline
11 was, for the first time, applied to “all parties” and not just Class Counsel and defense
12 counsel as in the June 2023 Scheduling Order. It was only after receiving that June 2024
13 order that Individual Plaintiffs had the need to move, and did move, for a formal stay.

14 BANA next contends a stay is unnecessary because the Individual Plaintiffs have
15 already participated in this case and have conducted discovery. But the Individual
16 Plaintiffs have never claimed that they have been unable to participate in this case at
17 all. As BANA points out, counsel for the Individual Plaintiffs attended the September
18 2021 Early Neutral Evaluation conference, filed an opposition to BANA’s partial
19 motion to dismiss, and participated in meet and confer efforts with BANA.

20 The point we have repeatedly made, however, is that per Judge Burns’s July 2021
21 Order, the Individual Plaintiffs’ ability to conduct discovery was limited in two
22 meaningful ways. First, their participation in discovery was limited by the
23 organizational structure set forth in the Order. That is, to streamline the process, Judge
24 Burns directed Class Counsel to take the lead on discovery. Class Counsel does not
25 represent the individual Plaintiffs and have focused on their class case, as they should.
26 It is the job of the Individual Plaintiffs’ Counsel, who have been restricted by the
27 Court’s CMO, to further the individual matters (specifically the discovery process).
28 While the Individual Plaintiffs do not challenge this structure, it is undisputed that their

1 access to information has been limited; of the hundreds of thousands of pages of
2 documents produced by BANA, the Individual Plaintiffs have only received access to
3 a few thousand. BANA’s Opposition confirms this point, noting that when counsel for
4 the Individual Plaintiffs expressed concern about obtaining documents from Class
5 Counsel, BANA provided the Individual Plaintiffs a spreadsheet of documents
6 produced and BANA produced certain documents directly to counsel for the Individual
7 Plaintiffs. (*See* ECF No. 321 at 8.)

8 Second, as noted in the Individual Plaintiffs’ moving papers, most of the
9 discovery that has been conducted has been limited to the common Class issues. This
10 conforms with Judge Burns’s July 2021 Order and with the efficient prosecution of the
11 underlying MDL proceedings. The concern now is that Judge Berg’s June 2024
12 Amended Scheduling Order has apparently opened discovery for “all parties” (not just
13 Class Counsel and defense counsel) and, presumably, on all issues (not just common
14 Class issues). The effect of this sudden free-for-all is that the Individual Plaintiffs must
15 now scramble to conduct wide-ranging discovery for 133 individuals within a very short
16 period. Further, BANA seeks to depose four individual plaintiffs per day over a two-
17 month period, which will require counsel for the Individual Plaintiffs to allocate the
18 vast majority of their professional resources to the depositions. The court should see
19 BANA’s request to take the depositions for what it is—simply an attempt to gain more
20 information that BANA can use to oppose class certification. There is no harm in
21 allowing the depositions to take place after class certification and dispositive motions
22 are resolved.

23 **B. The Landis Factors**

24 As for the propriety of a stay, the *Landis* factors weigh in favor of a stay pending
25 resolution of the class issues. BANA contends that it will be prejudiced by a stay
26 because it has already expended considerable effort and resources in completing
27 discovery. However, BANA conflates the time and costs expended in relation to Class
28 issues with those related specifically to the Individual Plaintiffs. As the record shows,

1 of the hundreds of thousands of pages produced by BANA in response to discovery
2 requests by Class Counsel, only 14,000 pages relate to the Individual Plaintiffs.

3 Further, BANA repeatedly asserts that a stay is inappropriate at this “late stage,”
4 but it overlooks the fact that this matter is in pretrial proceedings, that BANA’s motion
5 to dismiss was only recently decided, that the scope of discovery was limited by Judge
6 Burns’s July 2021 Order, and that a class certification motion was not filed until August
7 29, 2024 and will not be fully briefed until late fall. Moreover, the Bank did not file its
8 Answer to the operative complaint until August 15, 2024, and that Answer included 38
9 Affirmative Defenses (EDF 316), none of have been the subject of discovery given how
10 recently that Answer was filed.

11 Along these lines, BANA’s reliance on *Seufert v. Merck Sharp & Dohme Corp.*,
12 2016 WL 9503735 (S.D. Cal. Mar. 9, 2016) is misplaced. There, the court held that a
13 stay was not warranted because, inter alia, the parties had completed preemption
14 discovery and expended resources. (*Id.*, at *2.) In *Seufert*, the case had been pending
15 for three years, a summary judgment motion was granted, and the judgment appealed.
16 By contrast, this case is still in the preliminary stages, with a class certification motion
17 just recently filed, and any summary judgment motions months away. Thus, the
18 concerns expressed in *Seufert* are simply inapplicable here. BANA’s remaining
19 citations are also inapposite as none concern the factual circumstances presented here,
20 namely, where discovery has thus far been limited in scope to common Class issues.

21 BANA next asserts that a stay is not warranted because it would be prejudiced
22 by a stay of “indefinite” duration. But BANA does not explain how such a stay, if it
23 could even be characterized as “indefinite,” would be substantively different from the
24 stay in any of the other 257 individual plaintiffs’ cases already stayed by Judge Burns.
25 The 133 Individual Plaintiffs merely ask that their cases be tracked alongside the other
26 257 individual cases except insofar as they relate to common Class issues (as originally
27 contemplated by Judge Burns). BANA does not and cannot provide a rationale for
28 treating individual Plaintiffs differently (those who are stayed and those who are not).

1 BANA also misstates the prejudice to the Individual Plaintiffs should a stay be
2 denied. The Individual Plaintiffs do not contend that merely participating in depositions
3 is prejudicial to them. The prejudice results from the fact that BANA intends to conduct
4 *four depositions per day over a two-month period* (which BANA is only doing to gain
5 an advantage in the class case, not because it needs that many depositions, in that
6 compressed a time period, in the Individual Plaintiffs' cases).¹ The strain this proposed
7 schedule would place on counsel for the Individual Plaintiffs cannot be overstated.
8 Likewise, and to reiterate a point made in the Individual Plaintiffs' moving papers,

9 Without a stay, [the Individual Plaintiffs] would be forced to scramble
10 to propound and respond to discovery in 133 cases (let alone the 257
11 individual cases that are currently stayed), review hundreds of thousands
12 of pages of documents, bring motions to compel (should they become
13 necessary), and conduct an unwieldy number of depositions, all in the
14 next three months. This would cause severe prejudice to the Individual
Plaintiffs, and it is not necessary for the efficient litigation of their
claims. (Mot. to Stay, at 14.)

15 Finally, while BANA argues that "it would be more efficient to simply complete
16 the depositions that have already been noticed," its argument can only properly be
17 construed as efficient for BANA only, but as the facts and circumstances show, denying
18 the stay would be wholly inefficient for Individual Counsel and Class Counsel, who
19 would attend the depositions of the Individual Plaintiffs instead of focusing their efforts
20 on class certification and expert discovery; the Individual Plaintiffs, who would be
21 required to scramble to conduct wide-ranging discovery and to attend over 100
22 depositions in a short period; and this Court, which would need to address any discovery
23 motions filed in the respective 133 individual cases.

24 Stated simply, the *Landis* factors heavily favor granting the Individual Plaintiffs'
25 motion to stay their individual cases pending resolution of the common Class issues.
26

27 ¹ We suspect that if the Court were to preclude BANA from using the Individual
28 Plaintiffs' depositions for the purpose of opposing class certification, BANA would
lose all interest in taking so many depositions in such a compressed time period.

1 **IV. CONCLUSION**

2 The Individual Plaintiffs therefore respectfully request that their motion to stay
3 until common issues of law and fact are determined in the Class Case be granted.
4 Granting the motion would not harm BANA while denying it would greatly impact the
5 Individual Plaintiffs' ability to litigate their respective cases by forcing them to conduct
6 extensive discovery during an extremely short time frame. Granting the motion would
7 also promote judicial economy and efficiency by focusing the litigation on issues
8 common to both the putative class and the Individual Plaintiffs, reducing duplication of
9 efforts, and reducing the risk of overlap.

10
11 Respectfully submitted,

12 **SWIGART LAW GROUP, APC**

13 Date: August 30, 2024

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