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 **JOINT STATEMENT RE: CLASS NOTICE**
This Document Relates to All Actions	Judge: Hon. Gonzalo P. Curiel Ctrm: 2D (2nd Floor)

JOINT STATEMENT RE: CLASS NOTICE

Pursuant to the Court's June 16, 2025 Order Granting Class Plaintiffs' Motion for Class Certification; Appointing Class Representatives; and Appointing Co-Lead Class Counsel (ECF 494), the Parties have met and conferred and have reached agreement regarding the form and manner of class notice; copies of the Parties' proposed long-form and short-form notices are attached hereto as **Exhibits 1, 2, and 3**, and are described further below. The Parties disagree only as to the timing of class notice, as Bank of America has moved to stay class notice pending the outcome of its Rule 23(f) petition to the Ninth Circuit. *See* ECF 513. Accordingly, the Parties hereby respectfully submit this Joint Statement (i) proposing a stipulated class notice plan, and (ii) setting forth their respective positions regarding the timing of class notice.

I. Stipulated Proposed Notice Plan

The Court has certified five classes pursuant to Rule 23(b)(3). Members of each certified class are entitled to "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Notice of the pendency of a Rule 23(b)(3) class action may be made by "United States mail, electronic means, or other appropriate means." *Id.* The class must be notified in a manner that "does not systematically leave any group without notice." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982).

A. Form of Notice

The Parties have met and conferred regarding the best form of class notice pursuant to Rule 23(c)(2)(B). The Parties propose that notice will be provided to class members in both long-form and short-form formats.

Long-Form Notice. The proposed Long-Form Notice is attached hereto as **Exhibit 1**. Consistent with the requirements of Rule 23(c)(2)(B), the Long-Form Notice includes a clear and concise statement explaining: (i) the nature of the action; (ii) the class definition of each of the five certified classes; (iii) the class claims, issues, and defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Short-Form Notice. The proposed Short-Form Notice is attached hereto as **Exhibit 2**. The Short Form Notice provides a clear and concise summary of the nature of the action, explains why the class member is receiving notice, explains the class member's legal rights and options, explains how class members can request exclusion and the deadline for doing so, and directs class members to the case website (*see infra*) where they can access the Long-Form Notice and additional case information.

B. Notice Plan

The Parties have agreed upon the following proposed Notice Plan consisting of three components: (1) individual direct notice via e-mail to all class members for whom the Bank has e-mail contact information; (2) individual direct postcard notice to all class members via USPS first class mail; and (3) publication notice via a case-specific website.

Direct Notice by E-Mail. The Short-Form Notice (**Exhibit 2**) will be sent as an e-mail to all class members for whom the Bank has e-mail contact information, which the Bank estimates is approximately 85-90% of all individuals receiving direct notice under the proposed Notice Plan. E-mail is recognized as a proper method for class notice. *See, e.g.*, *In re LinkedIn User Privacy Litig*., 309 F.R.D. 573, 586 (N.D. Cal. Sept. 15, 2015) (approving e-mail notice); *DZ Reserve, et al, v. Meta Platforms, Inc*., No. 3:18-cv-4978-JD, ECF Nos. 470, 471 (N.D. Cal. Apr. 10, 2025) (approving e-mail as the primary form of notice). The e-mail will include a hyperlink to the case website, where class members will have access to the Long-Form Notice (**Exhibit 1**), and will also provide the Notice Administrator's toll-free telephone number.

<u>Direct Postcard Notice By U.S. Mail.</u> The Short-Form Notice will be sent as a postcard to all class members via USPS first class mail ("Postcard Notice"). The proposed Postcard Notice is attached hereto as **Exhibit 3**. Bank of America has a mailing address on file for each class member. Prior to mailing, the Notice Administrator will update the Bank-provided mailing address information for class members through the U.S. Postal Service's National Change of Address database. The Postcard Notice will direct class members to the Case Website, where they will have access to the Long-Form Notice, and will also provide the Notice Administrator's toll-free telephone number. *See Utne v. Home Depot U.S.A., Inc*., 2018 WL 11373654, at *1 (N.D. Cal. Aug. 21, 2018) (approving mailed notice that directs class members to a website that contains the long-form notice); 3 Newberg on Class Actions §8:28 (5th ed. 2017) ("Notice sent by postcards is particularly useful when used in conjunction with other forms of notice, including publication and email.").

<u>Publication Notice via Case Website.</u> The Notice Administrator will create and maintain a dedicated case-specific website. The Case Website will contain a summary of the case, a copy of the Long-Form Notice (**Exhibit 1**), and links to key case documents, including the complaint and the publicly filed version of the class certification order. Class members will be able to opt out electronically through the case website. The Notice Administrator will also maintain a toll-free telephone number through which class members can request additional information.

<u>Notice Administrator.</u> The parties have solicited proposals from five agreed-upon experienced class notice administrators and have received bids from four of them. Having reviewed the proposals submitted pursuant to this competitive bidding process, Plaintiffs propose that Simpluris be appointed the Notice Administrator. Simpluris has extensive experience in providing notice of class actions and has provided notice and/or claims administration services in hundreds of class actions, and submitted the lowest-cost bid. Bank of America is presently reviewing the bids received, and the Parties expect to be able to reach agreement on a Notice Administrator.

II. Timing of Class Notice

Plaintiffs' Position

Plaintiffs respectfully request that the Court approve the proposed Notice Plan and order that class notice be provided immediately, so that class members may be apprised of the pendency of this certified class action and how it may affect their legal rights.

There is no reason to delay class notice. The Court has issued a thorough, carefully reasoned 98-page class certification order and has found that all five classes meet the requirements for class certification. ECF 494. Members of the certified classes have "an undeniable interest in receiving fulsome information" concerning the litigation and "clear and prompt notice" of their rights as class members. *Behar v. Northrup Grumman Corp.*, No. 2:21-CV-03946-HDV-SK, 2024 WL 5275027 at *1, 6 (C.D. Cal. Dec. 3, 2024) (denying stay). "'Ordinarily, notice to class members should be given promptly after the certification order is issued,'" and there is no reason to depart from this sound principle here. *See Andrews v. Plains All Am. Pipeline, L.P.*, No. CV154113PSGJEMX, 2018 WL 4191409 at *2-3 (C.D. Cal. Aug. 28, 2018) (quoting *Manual for Complex Litigation* (Fourth) § 21.311 (2004)) (denying request to stay class notice pending Rule 23(f) appeal).

After having already previously moved to stay this case pending resolution of *Lab'y Corp. of Am. Holdings v. Davis*, the Bank once again seeks to stay all proceedings, this time based on its pending Rule 23(f) petition. ECF 513. But the Bank's Rule 23(f) petition fails to demonstrate any basis for interlocutory review, which is a "rare occurrence" that the Ninth Circuit grants only "sparingly." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955, 959 (9th Cir. 2005).[1] The Bank's

[1] Notably, the Ninth Circuit grants only 17% of such petitions for review by defendants and reverses fewer than half of these. *See* Bryan Lammon, *An Empirical*

Rule 23(f) petition, which argues principally that this Court "manifestly erred" in finding predominance satisfied, is meritless and will likely be denied, and is not a basis for delaying class notice. Even in the highly unlikely event that the petition is granted *and* the certification decision is reversed in full or in part, "[t]he risk of confusion decertification may have on class members is inherent in any class action suit" and is no greater here than in any other class action. *Andrews*, 2018 WL 4191409, at *3. Moreover, any potential risk of confusion is mitigated by language the parties have agreed to in the Long-Form Notice explaining that the Bank has filed a petition seeking interlocutory review and directing class members to the case website for up-to-date information on the status of the Bank's petition and any appeal. *See* Exhibit 1 at 9; *Andrews*, 2018 WL 4191409, at *3 ("[A]dding curative language about the appeal in the class notice provides 'information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action.'") (citation omitted).

This case has already been pending for more than **4 1/2 years**. *See* 1/17/25 Hrg. Tr. at 54:5-7 ("[G]iven that this is a 2021 case, I'm eager to move this forward as quickly, as practical … as is prudent."). The cumulative delays in this case are prejudicing Plaintiffs, as witness memories fade, and class members—many of whom are economically vulnerable and face housing instability—become more difficult to contact over long periods of time. *See, e.g.*, *Blair v. Rent-A-Center, Inc.*, No. C 17-02335 WHA, 2018 WL 2234049, at *3 (N.D. Cal. May 16, 2018) (denying stay in class action on behalf of low-income consumers where "delay would exacerbate the risk that putative class members could not be located by the time the case finishes").

For all these reasons, Plaintiffs respectfully request that the Court: (1) approve the parties' proposed Notice Plan set forth above; (2) order the Bank to provide a class list, in electronic form, containing the name, last-known mailing address, and

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Study of Class-Action Appeals, 22 J. App. Prac. & Process 283, 310-11 (2022), available at https://ssrn.com/abstract=3589733.

last-known e-mail address, where available, corresponding to the Card Alias ID for each class member (i.e. those EDD cardholders identified by Card Alias ID in Schedule 1 to the Expert Class Certification Report of Greg Regan (ECF 324-007)) to Class Counsel and the Notice Administrator within 21 days of entry of the Court's order, *see Utne*, 2018 WL 11373654, at *2 (ordering production of class member contact information to class counsel); (3) direct the Notice Administrator to create a case-specific website and disseminate notice in accordance with the proposed Notice Plan within 40 days of entry of the Court's order; (4) set the deadline for class members to submit exclusion requests 60 days after the date of notice dissemination; and (5) order Class Counsel to file all exclusion requests with the Court within 10 days of the deadline for exclusion requests.

Bank of America's Position

For the reasons stated in Bank of America's pending Motion to Stay (ECF 513), the Court should stay all proceedings in this action—including class notice—while the Ninth Circuit considers Bank of America's pending Rule 23(f) petition. As Bank of America explained in its Motion to Stay, there is a substantial likelihood that the Ninth Circuit will grant Bank of America's petition, and it would be unnecessarily confusing and inefficient to require notice before the Ninth Circuit addresses Bank of America's petition and appeal. *See* ECF 513 at 11-12. Accordingly, Bank of America's position with respect to class notice is that it should not be issued until the Ninth Circuit has resolved BANA's Rule 23(f) petition and, if the petition is granted, Bank of America's appeal.

Refraining from requiring class notice while the Ninth Circuit considers Bank of America's Rule 23(f) petition will not prejudice Plaintiffs or the class members they seek to represent. ECF 513 at 11. As Plaintiffs have defined their classes, *every single class member has already received more than full compensation for their alleged damages*, and all Plaintiffs seek now are punitive or statutory damages beyond amounts to which they would have otherwise been entitled but for the alleged conduct. *See id.* Conversely, requiring the parties to issue class notice without knowing the Ninth Circuit's position on Bank of America's petition and appeal would be inefficient and unnecessarily confusing to the class members Plaintiffs seek to represent in the event the class certification order is reversed, in full or in part. *Id.* at 10-11. If any or all of the classes are later decertified, confusion will abound and Plaintiffs will be confronted with classes they have communicated with but no longer represent. *Id.* at 11*; Brown v. Wal-Mart Stores, Inc.*, 2012 WL 5818300, *4-5 (N.D. Cal. Nov. 15, 2012) (finding "that the balance of hardships tips sharply toward a stay in this action" where class certification notice will go out to 22,000 class members who may require a curative notice if the Ninth Circuit reverses).[2] Thus, Bank of America has respectfully requested that the Court stay further proceedings, including class notice pursuant to Rule 23(c)(2)(B), while the Ninth Circuit considers Bank of America's Rule 23(f) petition and appeal. *See* ECF 513.

However, subject to Bank of America's pending Motion to Stay, counsel for Bank of America met and conferred with Plaintiffs in accordance with the Court's June 16, 2025 class certification order (ECF 494), and the Parties were able to reach the agreement described in Section I of this Joint Statement as to the form and plan for class notice if or when it may be required. With respect to administration of the proposed notice, the Parties have met and conferred and have obtained bids from four administrators to potentially handle the administration and issuance of the proposed notices if and when notice may be required. Bank of America is in the process of reviewing those bids, which Bank of America received from Plaintiffs on the evening

[2] Plaintiffs argue that potential confusion concerning Bank of America's Rule 23(f) petition and appeal can be mitigated by language included in the Parties' proposed Long-Form Notice referencing the existence of the petition. But that language, which serves as a placeholder only in the event that the Court were to require notice before the Rule 23(f) petition is decided (which it should not), cannot address the primary issues and inefficiencies that merit a stay of class notice—which is that confusion would abound if and when curative notices are sent to classes of persons who Plaintiffs communicated with who they no longer represent. *See* ECF 513 at 11.

of July 15, 2025, and will continue to work with Plaintiffs to select and retain a mutually agreeable notice administrator who could issue notice if or when it may be required.

With respect to certain other requests stated in Plaintiffs' position, the Parties have not discussed or reached an agreement regarding the amount of time that may be required for Bank of America to provide updated data and contact information concerning the classes in advance of class notice. However, if or when class notice may be required, Bank of America would request at least 21 days from the issuance of an order requiring class notice to update and provide any information necessary regarding class members to administer the class notices.

Additionally, the Parties have not met and conferred or reached an agreement regarding Plaintiffs' request that certain class members' personally identifiable or confidential unemployment information be provided not only to the Notice Administrator, but also to Class Counsel. If or when class notice is required, Bank of America would of course provide the information necessary to the Notice Administrator to administer class notices. However, federal and California privacy laws, as well as Bank of America's agreements with EDD and EDD cardholders, would preclude Bank of America from sharing confidential information concerning EDD cardholders with Class Counsel at least until class members are given the opportunity to opt-out of the class and/or object to the disclosure of their contact information. Thus, if the Court were to issue an order requiring class notice (and it should not), it should only require that Bank of America provide the personally identifiable information necessary to administer the notice to the Notice Administrator at the appropriate time.

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Respectfully submitted,

Dated: July 16, 2025

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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: July 16, 2025

/s/ Brian Danitz
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