

1 JAMES W. MCGARRY (pro hac vice)
2 *JMcGarry@goodwinlaw.com*
3 **GOODWIN PROCTER LLP**
4 100 Northern Avenue
Boston, MA 02210
Tel.: +1 617 570 1000
Fax: +1 617 523 1231

5 SABRINA M. ROSE-SMITH (pro hac vice)
6 *SRoseSmith@goodwinlaw.com*
7 MATTHEW L. RIFFEE (pro hac vice)
8 *MRiffee@goodwinlaw.com*
9 **GOODWIN PROCTER LLP**
10 1900 N Street, NW
Washington, DC 20036
Tel.: +1 202 346 4000
Fax: +1 202 346 4444

11 Attorneys for Defendant
12 BANK OF AMERICA, N.A.

13 *[ADDITIONAL COUNSEL LISTED IN SIGNATURE BLOCK]*

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

17 IN RE: BANK OF AMERICA
18 CALIFORNIA UNEMPLOYMENT
19 BENEFITS LITIGATION

Case No. 3:21-MD-02992-GPC-MSB

**REPLY IN SUPPORT OF
DEFENDANT'S MOTION TO
STAY PENDING RESOLUTION
OF ITS RULE 23(f) PETITION**

Date: September 16, 2025
Time: 1:30 PM
Ctrm: 12-A – 12th Floor
Judge: Hon. Gonzalo P. Curiel

FILED PROVISIONALLY UNDER SEAL
PURSUANT TO STIPULATED PROTECTIVE
ORDER

TABLE OF CONTENTS

I.	BANA’s Rule 23(f) Petition Presents a Substantial Case For Relief.	1
II.	The Balance of Equities, Efficiency, and Public Interest All Favor A Stay.	5

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>Altamura v. L'Oreal, US, Inc.</i> , 2013 WL 4537175 (C.D. Cal. Aug. 26, 2013)	6
<i>Alvarez v. NBTY, Inc.</i> , 2020 WL 804403 (S.D. Cal. Feb. 18, 2020)	2, 5
<i>Andrews v. Plains All Am. Pipeline, L.P.</i> , 2018 WL 4191409 (C.D. Cal. August 28, 2018)	10
<i>Brown v. Wal-Mart Stores, Inc.</i> , 2012 WL 5818300 (N.D. Cal. Nov. 15, 2012)	9
<i>Canchola v. Allstate Ins. Co.</i> , 2025 WL 1712395 (C.D. Cal. May 12, 2025)	6
<i>Chamberlan v. Ford Motor Co.</i> , 402 F.3d 952 (9th Cir. 2005)	2, 4
<i>CMAX, Inc. v. Hall</i> , 300 F.2d 265 (9th Cir. 1962)	8
<i>Evans v. Wal-Mart Stores, Inc.</i> , 2019 WL 7169794 (C.D. Cal. Oct. 23, 2019)	2
<i>Johnson v. Yahoo! Inc.</i> , 2018 WL 835339 (N.D. Ill. Feb. 13, 2018)	4
<i>Leiva-Perez v. Holder</i> , 640 F.3d 962 (9th Cir. 2011)	1
<i>Moyle v. Liberty Mut. Ret. Benefit Plan</i> , 2012 WL 13149096 (S.D. Cal. June 4, 2012)	6
<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	1, 2, 5, 8
<i>Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC</i> , 31 F.4th 651 (9th Cir. 2022)	4

1	<i>Ontiveros v. Zamora</i> ,	
2	2013 WL 1785891 (E.D. Cal. Apr. 25, 2013).....	6
3	<i>Owino v. CoreCivic, Inc.</i> ,	
4	2021 WL 3186500 (S.D. Cal. July 28, 2021).....	8
5	<i>Pecora v. Big M Casino, Inc.</i> ,	
6	2019 WL 302592 (D.S.C. Jan. 23, 2019).....	9
7	<i>In re Rail Freight Fuel Surcharge Antitrust Litig.</i> ,	
8	725 F.3d 244 (D.C. Cir. 2013).....	2
9	<i>Reyes v. Educ. Credit Mgmt. Corp.</i> ,	
10	2018 WL 1316129 (S.D. Cal. Mar. 13, 2018).....	8
11	<i>Romero v. Securus Techs., Inc.</i> ,	
12	383 F. Supp. 3d 1069 (S.D. Cal. 2019)	5, 7, 10
13	<i>Salhotra v. Simpson Strong-Tie Co.</i> ,	
14	2022 WL 1091799 (N.D. Cal. Apr. 12, 2022)	2
15	<i>Senne v. Kansas City Royals Baseball Corp.</i> ,	
16	2017 WL 5973487 (N.D. Cal. May 5, 2017)	6
17	<i>Tinsley v. McKay</i> ,	
18	2018 WL 11352146 (D. Ariz. Feb. 13, 2018).....	6
19	<i>Tinsley v. McKay</i> ,	
20	No. 2:15-cv-00185 (D. Ariz.), <i>stayed sub nom. B.K., et al. v.</i>	
21	<i>McKay</i> , No. 17-17502, Dkt. 19 (9th Cir. Feb. 27, 2018)	6
22	<i>Van v. LLR, Inc.</i> ,	
23	61 F.4th 1053 (9th Cir. 2023).....	3, 4
24	<i>Wang v. Zymergen Inc.</i> ,	
25	No. 21-cv-06028-PCP (N.D. Cal. Aug. 4, 2025), Dkt. No. 590	2
26	<i>Wilcox v. Lloyds TSB Bank, PLC</i> ,	
27	2016 WL 917893 (D. Hawaii March 7, 2016)	10
28	Statutes	
	15 U.S.C. §§ 1693f(e)(2), 1693m(a)(1).....	7

Other Authorities

12 C.F.R. § 1005.2(b)(1)	7
Bryan Lammon, <i>An Empirical Study of Class-Action Appeals</i> , 22 J. App. Prac. & Process 283, 315 (2022)	8

1 Plaintiffs’ brief effectively argues that the case should not be stayed because
2 the district court decided class certification in their favor. *See* Dkt. 529, Class Cert.
3 Opp. (“Opp.”). This argument could be made in every case where a Rule 23(f)
4 petition is filed, yet district courts routinely stay further proceedings pending
5 appellate resolution of such petitions (and appeal, if allowed). *See* Dkt. 513, Motion
6 (“Mot.”) at 2 n.2 (citing cases). Regardless of whether the Court uses *Landis* or *Nken*,
7 BANA demonstrated that a stay is appropriate. To the extent Plaintiffs seek to litigate
8 the merits of BANA’s petition through their opposition, *Nken* does not ask the Court
9 to consider whether it will change its own mind, nor does it ask the Court to assess
10 whether it is more likely than not that the petition will ultimately succeed. *Nken v.*
11 *Holder*, 556 U.S. 418 (2009). Rather, this Court need only consider whether BANA
12 has a “substantial case for relief on the merits”—meaning the petition raises “serious
13 legal questions” or has a “fair prospect” of success. *Leiva-Perez v. Holder*, 640 F.3d
14 962, 966-68 (9th Cir. 2011). BANA easily satisfies this standard. *See* Mot. at 9-10;
15 Dkt. 513-2, BANA’s Rule 23(f) Petition (“Mot. Ex. 1”).¹

16 Plaintiffs further attempt to skirt the fact that the Court has already found it
17 would be an unnecessary waste of resources and would cause prejudice to BANA to
18 force the parties to prepare pretrial motions seeking class-wide decisions on the
19 merits before class certification issues are resolved. Dkt. 448, Stay Order, at 8-9.
20 Against this prejudice, the Court also found that Plaintiffs and their classes will not
21 be prejudiced by a stay because *every single class member has already been paid. Id.*
22 at 8. Nothing in Plaintiffs’ opposition brief compels a different result now, before the
23 Ninth Circuit potentially decertifies or alters the classes. *See infra* pp. 6-7. The Court
24 should stay all proceedings until BANA’s Rule 23(f) Petition is resolved.

25 **I. BANA’s Rule 23(f) Petition Presents a Substantial Case For Relief.**

26 To start, Plaintiffs’ argument that *Landis* does not apply to a stay pending
27

28 ¹ *See also* BANA’s Reply Brief in Support of Rule 23(f) Petition, Exhibit 1 (“Reply
Ex. 1”) to the Declaration of Valerie A. Haggans submitted herewith.

1 resolution of a Rule 23(f) petition, Opp. at 5 n.1, is both wrong and irrelevant. Many
2 courts in this Circuit and elsewhere have applied *Landis* in this context, as recently
3 as this week. *E.g.*, Order at 2, *Wang v. Zymergen Inc.*, No. 21-cv-06028-PCP (N.D.
4 Cal. Aug. 4, 2025), Dkt. No. 590 (applying *Landis* to grant stay pending Rule 23(f)
5 appeal); *see also Evans v. Wal-Mart Stores, Inc.*, 2019 WL 7169794, *2-3 (C.D. Cal.
6 Oct. 23, 2019) (same, and noting other courts also apply *Landis*).

7 Regardless of which test applies (*Landis* or *Nken*), BANA has demonstrated
8 that a stay is warranted here. *See* Mot. at 2-10 & Ex. 1; Reply Ex. 1. The *Nken* test
9 does not require BANA to convince the Court to change its own mind. *See Salhotra*
10 *v. Simpson Strong-Tie Co.*, 2022 WL 1091799, at *2 (N.D. Cal. Apr. 12, 2022) (“[O]f
11 course the Court thinks [its Order] is correct; that’s why the Court issued it.”). *Nken*
12 only requires that a petition raise “serious legal questions” or has a “fair prospect” of
13 success. Mot. at 9 (quoting *Leiva-Perez*, 640 F.3d at 967-68); *Alvarez v. NBTY, Inc.*,
14 2020 WL 804403, at *1 (S.D. Cal. Feb. 18, 2020) (serious legal questions “satisfy
15 this first prong” of *Nken*). BANA’s petition clearly satisfies each of the circumstances
16 that allow Rule 23(f) review. *See* Mot. at 9-10 & Ex. 1; Reply Ex. 1.

17 **Plaintiffs misunderstand the “death knell” factor.** Plaintiffs misstate a
18 standard for a Rule 23(f) petition, and contend it *requires* an “evidentiary showing
19 that the defendant lacks the resources to defend the case to a conclusion.” Opp. at 7
20 (internal quotation marks omitted). That is not the standard. The pertinent death knell
21 is “the death knell of the *litigation*,” not the *defendant*. *Chamberlan v. Ford Motor*
22 *Co.*, 402 F.3d 952, 958 (9th Cir. 2005) (emphasis added). Further, “it is enough that
23 certification generates unwarranted pressure to settle nonmeritorious or marginal
24 claims,” which a “vast sum in damages” that is “subject to trebling” could create even
25 for an amply capitalized defendant. *In re Rail Freight Fuel Surcharge Antitrust Litig.*,
26 725 F.3d 244, 251-52 (D.C. Cir. 2013); *accord Chamberlan*, 402 F.3d at 958 (Rule
27 23(f) enables review of certifications that “put considerable pressure on the defendant
28 to settle independent of the merits of the plaintiffs’ claims” (citation modified)). If

1 the law were otherwise, no large company could ever obtain Rule 23(f) review.
2 Plaintiffs cannot deny that the [REDACTED] they seek easily satisfies this factor.

3 **BANA demonstrated manifest errors.** BANA’s petition identified a number
4 of manifest errors that, individually and collectively, raise substantial legal questions
5 with a fair prospect of success. *See* Mot. Ex. 1 at 9-12, 14-23; Reply Ex. 1 at 3-10.

6 *First*, as BANA explained, the Class Certification Order misapplied *Van*. *See*
7 Dkt. 494 (“Order”). BANA identified undisputed evidence that there were [REDACTED]
8 [REDACTED], which was “sufficient to prove that an
9 inquiry into the circumstances and motivations behind each of the [thousands of class
10 members] might be necessary.” *Van v. LLR, Inc.*, 61 F.4th 1053, 1069 (9th Cir. 2023);
11 *see also* Mot. Ex. 1 at 14-18; Reply Ex. 1 at 3-6. The Order did not meaningfully
12 require Plaintiffs to propose a response, thus finding predominance satisfied where
13 plaintiffs failed to meet their burden. *See* Mot. Ex. 1 at 14-18; Reply Ex. 1 at 3-6.

14 *Second*, the Order wrongly determined predominance is no obstacle to
15 certification so long as BANA shoulders all the work of conducting the required case-
16 by-case adjudications. This is wrong in at least four different ways: (1) the
17 predominance analysis focuses on whether individualized inquiries will be required,
18 not which party furnishes the evidence needed to conduct them; (2) irrespective of
19 who bears the burden, a class cannot be certified on the premise that the defendant
20 will not be entitled to litigate its statutory defenses to individual claims; (3) it is
21 *Plaintiffs* that have the burden of proving each individual’s account was subject to
22 EFTA and that they suffered actual damages; and (4) the information necessary to
23 prove class members’ legitimacy and entitlement (or not) to actual damages lies with
24 EDD, the class members themselves, and other third parties, *not just BANA*. Mot. Ex.
25 1 at 9-12, 20-23; Reply Ex. 1 at 4-6.

26 *Finally*, in relying on the class definition to solve the predominance problem,
27 the Order turned it into a failsafe problem, which Plaintiffs have now compounded
28 by claiming (Opp. at 13) no trial time is needed to determine who should be in the

1 classes because BANA can *unilaterally* kick out—and Plaintiffs will simply accept—
2 anyone it suspects engaged in fraud. Mot. Ex. 1 at 18-20; Reply Ex. 1 at 7-11.
3 Plaintiffs’ willingness to completely abdicate the interests of persons whom they
4 purport to represent raises a host of further issues, including their “adequacy of
5 representation and loyalty to the class[es].” *Johnson v. Yahoo! Inc.*, 2018 WL
6 835339, at *4 (N.D. Ill. Feb. 13, 2018) (“[C]ounsel’s idea to exclude potential class
7 members based on defendant’s investigation” presents adequacy concerns.).

8 **BANA’s petition raises unsettled issues of law.** Manifest error would be
9 enough to grant the petition by itself, *Chamberlan*, 402 F.3d at 952, but this case also
10 warrants review to clarify the applicable legal principles for courts in this Circuit.
11 Plaintiffs’ assertion that the petition presents no “*unsettled* issue” rests on a
12 misstatement of the issues presented. *See* Opp. at 7. The petition seeks “guidance on
13 *how to assess whether individualized inquiries predominate* when all agree the class
14 contains some number of uninjured class members.” Mot. Ex. 1 at 24 (emphasis
15 added). *Olean* made it clear that “[w]hen individualized questions relate to the injury
16 status of class members, Rule 23(b)(3) requires that the court determine whether
17 individualized inquiries about such matters would predominate over common
18 questions.” *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31
19 F.4th 651, 668 (9th Cir. 2022). But *Olean* said nothing about *how* the uninjured might
20 be “winnow[ed] out” in a manner comporting with the predominance requirement
21 because it ultimately found that “all class members ha[d] standing here.” *Id.* at 683.
22 It falls to some other case—like this one—to provide the necessary guidance. Indeed,
23 Plaintiffs’ brief only ratcheted up the need for guidance (and guardrails), as their
24 disingenuous claim that they can solve predominance by allowing BANA to
25 *unilaterally* exclude *any class member* places this case at the intersection of the
26 predominance and failsafe lines of cases. Opp. at 13. To the extent Plaintiffs’ argue
27 BANA can “challenge the Court’s application of [*Olean* and *Van*] after entry of final
28 judgment” (Opp. at 8), this ignores that these critical issues are likely to evade end-

1 of-case review given intense settlement pressure on BANA, which is the point of
2 Rule 23(f) review for defendants. *Supra* pp. 2-3; Reply Ex. 1 at 10-11.

3 **II. The Balance of Equities, Efficiency, and Public Interest All Favor A Stay.**

4 The remaining *Nken* prongs substantially overlap with *Landis*,² and are easily
5 satisfied. *See* Mot. at 8-9. As the Court has already held, BANA will be prejudiced
6 by the continuation of litigation while class issues remain undecided. *See* Dkt. 448 at
7 8-9. This prejudice stands to harm BANA irreparably. *See* Mot. at 10; *infra* pp. 5-6.
8 The Court has further acknowledged that any potential prejudice to the already-
9 compensated Plaintiffs and class members is not enough to overcome the benefits of
10 judicial and party efficiency that a brief stay would provide. *See* Dkt. 448 at 8.
11 Plaintiffs’ latest objections based on fading witness memory and stale contact
12 information are overblown, disingenuous, and insufficient to require a different
13 result. And the public’s interest in the efficient adjudication of this case supports a
14 stay, particularly where any interest in the timely enforcement of the consumer
15 protection laws at issue was already satisfied by the regulatory settlement.

16 **BANA faces irreparable harm absent a stay.** The Court has already found that
17 barreling through class-wide dispositive motions and other pretrial activities while
18 class certification issues remain undecided will prejudice BANA. *See* Dkt. 448 at 8-
19 9 (“engaging in unnecessary ‘motion practice, planning and preparing for trial’”
20 would be an “unnecessary waste of resources” while class action issues remained
21 undecided). There is no reason for the Court to make a different finding now,
22 especially when courts have found such waste of resources can amount to irreparable
23 harm under *Nken*. *See Alvarez*, 2020 WL 804403, at *2; Mot. at 10. Plaintiffs cite
24 cases for the general proposition that litigation expenses usually do not constitute
25 irreparable harm. *See* Opp. at 16-17. But even those cases acknowledge that where,
26 as here, “granting a motion to stay would avoid *substantial, unrecoverable*, and

27
28 ² *See Romero v. Securus Techs., Inc.*, 383 F. Supp. 3d 1069, 1073 (S.D. Cal. 2019)
(outcome of request to stay is often “the same under either standard”).

1 *wasteful*” “pretrial litigation” expenses, the irreparable harm test may be satisfied.
2 *E.g., Canchola v. Allstate Ins. Co.*, 2025 WL 1712395, at *5 (C.D. Cal. May 12,
3 2025). Plaintiffs’ reliance on *Tinsley* is also misplaced. The district court’s decision
4 there was promptly reversed by the Ninth Circuit, *which granted the stay. Tinsley v.*
5 *McKay*, No. 2:15-cv-00185 (D. Ariz.), *stayed sub nom. B.K., et al. v. McKay*, No.
6 17-17502, Dkt. 19 (9th Cir. Feb. 27, 2018). Indeed, even the district court recognized
7 continuing with pretrial activities could cause irreparable harm. *See Tinsley v.*
8 *McKay*, 2018 WL 11352146, at *7 (D. Ariz. Feb. 13, 2018).

9 Plaintiffs argue (wrongly) that this case is different because dispositive motion
10 practice and pretrial activities would be the same even if the classes were decertified.
11 Opp. at 17-18. But what is left of the case may well be “changed in scope or
12 eliminated on appeal,” which bears heavily on both the irreparable harm and public
13 interest factors under *Nken. Moyle v. Liberty Mut. Ret. Benefit Plan*, 2012 WL
14 13149096, at *3 (S.D. Cal. June 4, 2012).³ In these circumstances, courts have found
15 “Defendants will suffer substantial harm if [actions are] not stayed pending appeal”
16 and that it does not make sense to “devote[] very substantial time and resources on
17 the litigation, particularly with respect to . . . dispositive motions and trial preparation
18 on class claims” if an appeal would change what remains of the case. *Senne v. Kansas*
19 *City Royals Baseball Corp.*, 2017 WL 5973487, at *3 (N.D. Cal. May 5, 2017).

20 If the case is not stayed, arguments that may be raised at summary judgment
21 could either be mooted or require re-briefing if any classes are decertified or their
22 parameters are modified. At the most basic level, if all classes remain certified, the
23 parties may move for summary judgment as to each of the five classes and the claims
24 they are pressing. If any class (or aspects or claims thereof) are decertified, arguments

25
26 ³ *See also Ontiveros v. Zamora*, 2013 WL 1785891, at *5 (E.D. Cal. Apr. 25, 2013)
27 (defendant would suffer irreparable harm if “forced to proceed to trial, only to
28 afterwards” receive a favorable Ninth Circuit opinion, which “would constitute a
hollow victory”); *Altamura v. L’Oreal, US, Inc.*, 2013 WL 4537175, at *3 (C.D. Cal.
Aug. 26, 2013) (if “class is eventually decertified,” stay helps courts “avoid[] costly
and potentially unnecessary litigation”).

1 would be different, and many may not need to be decided at all.⁴ Even taking
2 Plaintiffs at their word that they would “pursue their claims on an individual basis”
3 if any of the classes were decertified (Opp. at 17), the evidence presented on summary
4 judgment would be different. For example, if Plaintiffs’ EFTA classes are decertified,
5 Plaintiffs would need to show—and BANA would attempt to refute—that: (1) each
6 individual plaintiff’s account was “established for personal, family, or household
7 purposes,” not criminal or fraudulent purposes, as required to trigger EFTA’s
8 protections; (2) each disputed transaction was unauthorized; and (3) each individual
9 plaintiff incurred “actual damages” as alleged. *See* 12 C.F.R. § 1005.2(b)(1); 15
10 U.S.C. §§ 1693f(e)(2), 1693m(a)(1); *see also* Mot. Ex. 1 at 9-10, 20 n.2.

11 Expert motions may also change based on the appeal. Opinions offered by the
12 parties’ damages experts, in particular, would be implicated if there is no class, or if
13 class scopes change. Similarly, Plaintiffs claim the petition will have no impact on
14 their request to depose Messrs. Moynihan and Montag (Opp. at 17) but the stated
15 purpose for both depositions is *solely* to seek evidence supporting punitive damages
16 for two common law claims and a state due process claim. Dkt. 488 at 18. Those
17 claims may be mooted or of less import if the classes bringing them are decertified,
18 in whole or in part. The expenditure of “unrecoverable time and resources spent on
19 class discovery weighs in [Defendant’s] favor.” *Romero*, 383 F. Supp. 3d at 1075.

20 **A stay will not harm Plaintiffs or the classes because** [REDACTED]

21 [REDACTED]. The Court already found a stay would not harm Plaintiffs and the
22 classes [REDACTED]. Dkt. 448 at 8 (“injured class
23 members have received direct compensation, and if sought and approved,
24 consequential damages,” so “the economic vulnerabilities raised by Class Plaintiffs
25 are not as paramount as they claim”). Plaintiffs do not meaningfully explain why the
26

27 ⁴ For example, if the EMV class is decertified, the Court likely would not need to
28 consider arguments regarding Plaintiffs’ CCPA claims, because these claims are
brought only on behalf of the EMV class. *See* Order at 64.

1 outcome should be different now, arguing only that the prior stay “was decided under
2 a different standard (*Landis*) and in a different posture (pre-certification)” and that
3 BANA “now seeks a potentially far longer stay.” Opp. at 19 n.8.

4 With respect to the potential harm to Plaintiffs or the classes, the *Landis* and
5 *Nken* tests ask the same question, so Plaintiffs’ complaints about the “different
6 standard” ring hollow.⁵ And Plaintiffs offer no explanation for how the “different
7 posture” impacts the Court’s assessment of how they will be prejudiced by a stay.
8 Opp. at 19 n.8. Further, their arguments about the stay’s length are misleading.
9 Plaintiffs cite statistics about how long it takes to resolve a “civil appeal.” *Id.* But
10 BANA has not filed a civil appeal; it filed a Rule 23(f) petition that will likely be
11 decided within 30 days from the hearing on this Motion.⁶ If the Ninth Circuit denies
12 the petition, the stay will lift and the case will proceed, likely as soon as this fall. If
13 the Ninth Circuit accepts BANA’s petition and allows the filing of a civil appeal, it
14 will be because the appellate court *agrees* there are serious questions regarding class
15 treatment of this case—which in and of itself will justify a stay regardless of how
16 long it may be. *See, e.g., Owino v. CoreCivic, Inc.*, 2021 WL 3186500, at *3 (S.D.
17 Cal. July 28, 2021) (granting stay for appeal); *Reyes v. Educ. Credit Mgmt. Corp.*,
18 2018 WL 1316129, at *1 (S.D. Cal. Mar. 13, 2018) (same).

19 As to the memories of witnesses, discovery is substantially complete, and the
20 record is effectively set. The only potentially outstanding testimony from BANA
21 witnesses is the two apex depositions, which BANA has been telling Plaintiffs for
22 years present no risk of “lost” or “fading” memory because the apex executives do
23 not have relevant, unique information. *See, e.g.,* Dkt. 453 at 1-2; Dkt. 503-1 at 9-12.
24 Plaintiffs’ fear that class member memories will fade is disingenuous. Indeed,

25 ⁵ Compare *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (applying *Landis*,
26 and considering “the possible damage which may result from the granting of a stay”),
27 with *Nken*, 556 U.S. at 434 (assessing “whether issuance of the stay will substantially
injure the other parties”).

28 ⁶ See Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. App. Prac.
& Process 283, 315 (2022) (87% of petitions decided within 120 days).

1 Plaintiffs’ *entire argument* for class certification was that class member testimony
2 and inquiries assessing the merits of their individual accounts, claims, and damages
3 *are not necessary*. *See, e.g.*, Dkt. 378, Class Cert. Reply, at 6-7 (arguing there is no
4 need for “individualized inquiries” into Plaintiffs’ EFTA claims because the statute
5 carries a “presumption of harm”), 10 (common law claims require “no individualized
6 evidence”), 13 (rejecting need for ““unique facts to each class member”” to support
7 punitive damages). If, as Plaintiffs apparently now claim, class member testimony is
8 necessary, that just further shows that the classes must be decertified for the reasons
9 set out in the Rule 23(f) Petition. *See* Mot. Ex. 1 at 15-18.

10 Plaintiffs’ concern about stale contact information for class members is
11 addressed by the Parties’ proposed notice plan. *See* Opp. at 19. The Parties agreed to
12 use email notice as part of the negotiated notice plan should class notice be necessary,
13 and BANA has email addresses for 85-90% of class member cardholders. *See* Dkt.
14 518, Class Notice Joint Statement, at 2. Courts have recognized that “while mailing
15 addresses tend to change, e-mail addresses are more likely to stay the same,”
16 resolving Plaintiffs’ concern. *See Pecora v. Big M Casino, Inc.*, 2019 WL 302592, at
17 *5 (D.S.C. Jan. 23, 2019). Further, the notice administrator will use “skip tracing”⁷
18 to update contact information for class members when needed. *See* Haggans Decl. ¶¶
19 5-6. And in any event, any risk that a small percentage of class members’ information
20 may become stale is outweighed by the unnecessary confusion that would arise in the
21 event the Order is reversed or modified. *See* Mot. at 11; *Brown v. Wal-Mart Stores,*
22 *Inc.*, 2012 WL 5818300, at *4-5 (N.D. Cal. Nov. 15, 2012) (finding “that the balance
23 of hardships tips sharply toward a stay” on this basis).⁸

24
25 ⁷ Skip tracing is a process by which, if mail or email is returned as non-deliverable,
26 an analysis is conducted by the notice administrator to locate more recent contact
information for a given individual. *See* Haggans Decl. ¶¶ 5-6.

27 ⁸ Plaintiffs claim that language in the Long-Form Notice regarding the existence of
28 BANA’s Rule 23(f) petition can resolve the confusion that would arise from appeal.
Opp. at 22. This naively assumes that every class member will actually read the Long-
Form Notice (which would only be available on the administrator’s website) *and then*
track the appeal themselves. *See* Dkt. 518 at 4. Even if that were to occur, and it

The efficient use of resources and the public interest support a stay. The district court should have the benefit of the Ninth Circuit’s view on predominance issues before deciding dispositive motions. *See* Mot. at 11-12. Plaintiffs assert that the public has an interest in prompt enforcement of consumer protection laws. *Opp.* at 24. But the public’s interest in prosecution of this particular case is comparatively low here where the laws at issue have already been enforced by the OCC and CFPB, with BANA having entered into settlements with both regulators. Order at 32. The point is further mooted where all of the class members [REDACTED]

[REDACTED]

[REDACTED]. *See* Dkt. 448 at 7-8. All Plaintiffs have left to seek in this case are treble damages, which the Court has already found do not warrant denying a stay. *Id.* Meanwhile, as the Court also already found, a stay would conserve judicial resources—avoiding costly litigation over issues that may be mooted, modified, and require re-litigation if the classes are decertified or defined differently. *See supra* pp. 6-7. Thus, a stay pending resolution of these issues would better serve the public interest. *See Romero*, 383 F. Supp 3d at 1077.

* * *

For the forgoing reasons and the reasons in BANA's opening brief, BANA respectfully requests that the Court grant its motion to stay.

certainly will not, there would still be substantial confusion if and when the classes are decertified or modified regarding class members' standing, representation, and potential right to sue, and staying class notice would further prevent the unnecessary dissemination of personal information (which Plaintiffs' counsel has requested for class members). *See, e.g., Romero*, 383 F. Supp. 3d at 1077 ("stay may benefit class members as it would protect against the possibility of unnecessary disclosure of personal information and avoid any confusion caused by issuing a class notice that may later need to be revised or withdrawn"); *Wilcox v. Lloyds TSB Bank, PLC*, 2016 WL 917893, at *7 (D. Hawaii March 7, 2016) ("if the parties are obligated to disseminate class notice prior to such a decision, significant confusion could result to potential class members who would be uncertain whether they needed to opt out of the class or whether they were still included in the class action at all"). Even *Andrews*, which Plaintiffs cite (Opp. at 19), acknowledges the potential for confusion for class notice in large class actions. *See* 2018 WL 4191409, at *2-3 (C.D. Cal. August 28, 2018) (denying stay, in part, because subclass at issue had only 500 members).

1 Dated: August 8, 2025

2 Respectfully submitted,

3 By: s/ James W. McGarry

4 JAMES W. MCGARRY (*pro hac vice*)

5 *JMcGarry@goodwinlaw.com*

6 **GOODWIN PROCTER LLP**

7 100 Northern Avenue

8 Boston, MA 02210

9 Tel.: +1 617 570 1000

10 Fax: +1 617 523 1231

11 THOMAS M. HEFFERON (*pro hac vice*)

12 *THefferon@goodwinlaw.com*

13 SABRINA M. ROSE-SMITH (*pro hac vice*)

14 *SRoseSmith@goodwinlaw.com*

15 MATTHEW L. RIFFEE (*pro hac vice*)

16 *MRiffee@goodwinlaw.com*

17 **GOODWIN PROCTER LLP**

18 1900 N St. NW

19 Washington, DC 20036

20 Tel: +1 202 346 4000

21 Fax: +1 202 346 4444

22 LAURA G. BRYIS (SBN 242100)

23 *LBrys@goodwinlaw.com*

24 **GOODWIN PROCTER LLP**

25 601 S Figueroa St., Suite 4100

26 Los Angeles, CA 90017

27 Tel.: +1 213 426 2500

28 Fax: +1 617 346 4444

VALERIE A. HAGGANS (*pro hac vice*)

VHaggans@goodwinlaw.com

LINDSAY E. HOYLE (*pro hac vice*)

LHoyle@goodwinlaw.com

GOODWIN PROCTER LLP

620 Eighth Avenue

New York, NY 10018

Tel: +1 212 813-8800

Fax: +1 212 355-3333

YVONNE W. CHAN (*pro hac vice*)

YChan@jonesday.com

JONES DAY

100 High Street

Boston, MA 02110

Tel.: +1 617 960 3939

Fax: +1 617 449 6999

JANICE P. BROWN (SBN 114433)

jbrown@myersnave.com

MATTHEW B. NAZARETH (SBN 278405)

mnazareth@myersnave.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEYERS NAVE
600 B Street, Suite 1650
San Diego, CA 92101

Attorneys for Defendant
BANK OF AMERICA, N.A.

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 August 8, 2025. 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: August 8, 2025

s/ James W. McGarry