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Co-Lead Counsel for Plaintiffs and the Proposed Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

**IN RE BANK OF AMERICA
CALIFORNIA UNEMPLOYMENT
BENEFITS LITIGATION**

Case No. 3:21-md-02992-LAB-MSB

**DECLARATION OF ANDREW F.
KIRTLEY IN SUPPORT
PLAINTIFFS' *EX PARTE*
APPLICATION FOR LEAVE TO
FILE MOTION FOR
RECONSIDERATION**

This Document Relates to All Actions

Judge: Hon. Larry Alan Burns

1 I, **ANDREW F. KIRTLEY**, declare as follows:

2 1. I am a partner with the law firm of Cotchett, Pitre & McCarthy, LLP,
3 Co-Lead Counsel for Plaintiffs and the proposed class in this action. I submit this
4 declaration in support of Plaintiffs' *Ex Parte* Application for Leave to File a Motion
5 for Reconsideration ("*Ex Parte* Application") concerning the dismissal of Plaintiffs'
6 Unfair Competition Law ("UCL") claim with prejudice. *See* Dkt. 126 ("MTD Order")
7 at 31–33, 75. I make this declaration of my own personal knowledge and, if called to
8 testify as a witness, could and would testify competently to the matters stated herein.

9 2. As required by S.D. Cal. Civ. L.R. 7.1(i)(1), this declaration sets forth
10 the material facts and circumstances surrounding (a) each prior motion, application,
11 or petition for relief that has been decided by any judge (i.e., in this case, the Bank's
12 October 2021 motion to dismiss, the parties' subsequent briefing of that motion, and
13 the Court's resulting MTD Order dated May 25, 2023), and (b) any subsequent
14 motion, application, petition that is made for the same relief in whole or in part (i.e.,
15 in this case, the *Ex Parte* Application that accompanies this declaration). As of the
16 filing of this declaration, no new or different facts or circumstances exist which did
17 not exist at the time the above-referenced motion to dismiss, motion to dismiss
18 briefing, or the Court's MTD Order were filed. Rather, Plaintiffs seek leave to file a
19 motion for reconsideration based on clear error.

20 3. On August 17, 2021, Plaintiffs filed their Master Consolidated
21 Complaint ("MCC") (Dkt. 72) in this multidistrict litigation. The MCC included a
22 UCL claim challenging the Bank's practices as "unlawful" and "unfair." MCC
23 ¶¶575–84; *see* Cal. Bus. & Prof. Code §17200. In connection with their UCL claim,
24 Plaintiffs sought restitution and prospective injunctive relief, including "an order
25 making the existing Preliminary Injunction permanent." MCC ¶584, Prayer.

26 4. On October 1, 2021, the Bank moved to dismiss Plaintiffs' UCL claim
27 for lack of equitable jurisdiction, arguing Plaintiffs had "an adequate remedy at law."
28

1 Dkt. 84-1 at 32:1. On November 15, 2021, Plaintiffs opposed, including on the
2 ground that their UCL claim sought prospective injunctive relief to permanently
3 enjoin the Bank’s “continued implementation of its challenged business practices.”
4 Dkt. 90 at 43:13–18 (citing, as an example, MCC ¶111). Plaintiffs also requested leave
5 to amend if the Bank’s motion were granted. *Id.* at 14:3–4, 50:12–15. On December
6 15, 2021, the Bank filed a reply brief that did not respond to Plaintiffs’ argument that
7 a damages remedy could not prevent future harm. *See* Dkt. 92 at 19:27–20:23.

8 5. On May 25, 2023, the Court ruled that Plaintiffs’ MCC “fails to state a
9 UCL claim” under *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir.
10 2020), because it “doesn’t allege inadequate legal remedies.” MTD Order at 33:8,
11 33:11–13. The Court then dismissed the UCL claim in its entirety “with prejudice,”
12 *id.* at 33:14–15, 75:3–4, without stating why it denied leave to amend or why the
13 dismissal was with prejudice. Elsewhere in the MTD Order, the Court allowed claims
14 that “seek prospective injunctive relief” to proceed. *Id.* at 46:4–5.

15 6. On June 23, 2023, Plaintiffs filed their First Amended Master
16 Consolidated Complaint (“FAMCC”) (Dkt. 136), which maintained the same
17 paragraph numbering as the MCC, while expressly noting any claims or legal
18 theories that the Court dismissed in its MTD Order. *See* FAMCC at 1 n.1. As relates
19 to the dismissed UCL claim, the FAMCC notes that the Court “dismissed this claim
20 with prejudice for failure to allege inadequate legal remedies,” but noted that
21 “Plaintiffs intend to seek leave to file a motion to reconsider that ruling.” FAMCC at
22 282 n.34.

23 7. On June 19, 2023, Co-Lead Counsel for Plaintiffs (Michael Rubin)
24 emailed the Bank’s counsel (James McGarry) that Plaintiffs “plan to file an
25 application for leave to file a motion for reconsideration re the UCL claim,” and that
26 Plaintiffs would like to meet and confer on that issue.

8. On June 20, 2023, Co-Lead Counsel for Plaintiffs (Michael Rubin) and the Bank's counsel (James McGarry) met and conferred by telephone regarding the anticipated motion for reconsideration in an attempt to informally resolve the issue. On that call, Mr. Rubin summarized the four arguments that Plaintiffs were intending to advance in a motion to reconsider the dismissal of the UCL claim (i.e., the same four arguments set forth in Plaintiffs' *Ex Parte* Application). In response, Mr. McGarry acknowledged having heard Mr. Rubin's summary of Plaintiffs' intended arguments and indicated that he thought Plaintiffs had met their meet-and-confer obligations.

I declare, under penalty of perjury, that the foregoing is true and correct.
Executed this 21st day of June 2023 at Burlingame, California.

/s/ Andrew F. Kirtley
ANDREW F. KIRTLEY