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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 **JOINT STATUS CONFERENCE STATEMENT**
This Document Relates to All Actions	Date: February 14, 2025 Time: 1:30 p.m. Location: Via Zoom Judge: Hon. Gonzalo P. Curiel

The parties in the above-referenced matter, by and through their respective counsel, having met and conferred, submit this Joint Status Conference Statement to identify the issues the parties wish to discuss at the February 14, 2025 Status Conference (ECF 408, "Order Following Hearing on Class Certification").

I. Certification of Breach of Fiduciary Duty Claim as to Customer Service Class

Pursuant to the Order Following Hearing on Class Certification, the parties met and conferred regarding whether they believe the Court may decide, based on the existing briefing, whether to certify the breach of fiduciary duty claim on behalf of the proposed Customer Service Class. The parties failed to reach agreement and set forth their positions as follows.

Plaintiffs' Position: At the hearing, Plaintiffs requested leave to amend their complaint to clarify that the breach of fiduciary duty claim is also brought on behalf of the Customer Service Class based on the allegation that the Bank "breached its fiduciary duty by placing its own desire to achieve greater profits ahead of the financial security … interests of Plaintiffs and Class Members," ECF 304 (SAMCC) ¶634, including by deliberately understaffing its claims call center in a manner that saved the Bank money at the expense of legitimate cardholders seeking to regain access to their unemployment insurance (UI) benefits. *See* 1/17/25 Hr'g Tr. 6:3-13. The Bank did not oppose that request, which the Court granted. On January 24, 2025, Plaintiffs filed the Third Amended Master Consolidated Complaint ("TAMCC") with that clarification, and on February 7, 2025, Defendant filed a supplemental answer to respond to the few additions in the TAMCC.

Plaintiffs respectfully request that the Court certify the breach of fiduciary duty claim as to the Customer Service Class without the need for further motions or briefs because (1) the Bank was adequately on notice that Plaintiffs sought certification of the breach of fiduciary duty claim for the Customer Service Class, (2) the parties' arguments in the existing briefing regarding class certification of Plaintiffs' breach of fiduciary duty claim apply equally to all of the proposed Classes, and (3) any further briefing on this issue would be unduly duplicative and only cause unnecessary delay.

Plaintiffs' Notice of Motion and opening brief in support of class certification expressly stated that Plaintiffs were seeking certification as follows: "breach of fiduciary duty (all classes)," i.e., including the Customer Service Class. ECF 386-1 at 3:7; ECF 386-2 at 17:16; *see* also ECF 386-2 at 28:4-7 (discussing the Breach of Fiduciary Duty Claim as to the following classes: "*Claim Denial, Credit Rescission, Account Freeze, and Customer Service Classes*"). As Plaintiffs explained at the class certification hearing, their arguments for certifying their breach of fiduciary duty claim for the Customer Service Class are the same as their arguments for certifying that same claim for the other proposed classes. Just as with respect to the Claim Denial, Credit Rescission, and Account Freeze Classes, the predominating common issues for the Customer Service Class include "whether the Bank entered into a 'special relationship' with EDD cardholders and thereby incurred fiduciary obligations," ECF 386-2 at 26, and "whether the Bank breached its fiduciary duties," including by "(2) 'failing to take all adequate and necessary steps to ensure legitimate benefits recipients are not denied access to their Account funds without reasonable basis,' and (3) placing its own self-interest in achieving greater profits ahead of the interests of class members," *id.* at 27-28 (citations omitted), for example, by deliberately understaffing its Claims call center in a manner that impeded cardholders whose claims were denied based on the Bank's CFF-1 policies from regaining access to their wrongfully withheld funds. *See* ECF 386-2 at 26-27; *see also id.* at 17 ("Common issues include: (1) whether the Bank entered into a 'special relationship' with EDD cardholders and thereby incurred fiduciary obligations; and (2) whether the Bank breached its fiduciary duties by prioritizing its own financial self-interest above the interests of EDD cardholders."). In addition, Plaintiffs' argument for certifying the breach of fiduciary duty claim for the Customer

Service Class is essentially identical to the argument that Plaintiffs presented for certifying the breach of the implied covenant of good faith and fair dealing claim for that same Customer Service Class. *See id.* at 34 ("The Bank's own documents and testimony establish a lack of good faith, as they show that the Bank's principal motivation in implementing these policies and practices was to protect its own financial interests at the expense of class members' rightful access to their public benefits.").

Because the Bank had notice of these arguments and the parties have already fully briefed them in nearly identical contexts, Plaintiffs submit that it would be an unnecessary waste of time and resources for the parties to re-brief these issues. Accordingly, Plaintiffs respectfully request that the Court certify the breach of fiduciary duty claim as to the Customer Service Class without requiring further briefing on that issue.

Defendant's Position:

BANA agrees with the Court that Plaintiffs have not properly placed their request for certification of the customer service class on their breach of fiduciary duty claims before the Court because it (1) was not in the Second Amended Master Consolidated Complaint ("SAMCC") and (2) was not briefed in their motion for class certification. ECF No. 408 at 1-2. Therefore, BANA did not have notice and has not had the opportunity to respond to whether this claim, for this class, may be certified.

To assess whether Plaintiffs may still seek to certify their customer service class for this claim given that it was not pleaded in the SAMCC and was not briefed in Plaintiffs' class certification briefs, and to preserve the record and BANA's right to challenge class certification, BANA requests limited briefing on this single issue. BANA proposes that Plaintiffs file a 5-page brief within 14 days (February 28, 2025 based on the upcoming Status Conference), BANA will respond with a 5-page opposition brief within 14 days (March 14, 2025), and Plaintiffs may file a 2-page reply brief within 7 days (March 21, 2025) if they so choose. If Plaintiffs wish to forego their opening brief on this issue and rest on the argument raised in this joint statement, then BANA would propose that it would file its 5-page opposition brief within 14 days (February 28, 2025 based on the upcoming Status Conference), and Plaintiffs may file a 2-page reply brief within 7 days (March 7, 2025) if they so choose.

II. Class Notice – Joint Statement

The Parties continue to meet and confer regarding the best form of Class Notice should it be required. Plaintiffs believe Class Notice should be sent by e-mail (when available) as well as by U.S. Mail for all class members, and the Bank is considering the availability of class members' email addresses.

BANA believes that discussions regarding potential Class Notice are premature at this time. However, in accordance with the Court's Order (ECF 408), the Parties have engaged in discussions regarding the solicitation of potential administrators who may assist in providing class notice should notice be required. The Parties have an agreement as to how to proceed in soliciting bids for a potential class notice, and have begun that process.

III. Apex Depositions

Plaintiffs' Position: On December 23, 2024, Magistrate Judge Berg held an informal discovery conference regarding the Bank's objections to producing for deposition Chief Executive Officer Brian T. Moynihan and former Chief Operating Officer Thomas Montag. Judge Berg deferred ruling on the Bank's request for a protective order but tentatively ordered Plaintiffs to take the Zoom depositions of six additional mid-level executives, each limited to two hours, and for the parties then to return to Judge Berg to discuss the impact of those depositions, if any, on Plaintiffs' request to take the depositions of Mssrs. Moynihan and Montag. The parties met and conferred and agreed to proceed with depositions of four mid-level executives, limited to two hours over Zoom, all of which will be completed by February 21, 2025.

Based on the Bank's testimony and documents produced thus far, Plaintiffs feel more strongly than ever that the depositions of Messrs. Moynihan and Montag will be critically important to Plaintiffs' case. The Bank maintains its objections to producing Moynihan and Montag for deposition. Accordingly, in the interest of efficiency, Plaintiffs respectfully request that the Court hear this matter without requiring the parties first to participate in another IDC and additional briefing before Judge Berg, and that it order the matter presented on the following briefing schedule, with a hearing date to be determined: the Bank's motion for a protective order to be filed by February 28; Plaintiffs' opposition due March 14; the Bank's reply due March 21.[1]

Defendant's Position:

The Parties have a dispute concerning Plaintiffs' attempt to take the depositions of two of BANA's most senior executives, its CEO Brian Moynihan and its former COO Thomas Montag. BANA objected to both depositions, and the parties met and conferred. The parties then brought the issue to Magistrate Judge Berg, and BANA moved for a protective order via Judge Berg's Informal Discovery Conference process. After informal letter briefing and argument, Magistrate Judge Berg found that Plaintiffs had not sufficiently exhausted efforts to take discovery through less burdensome means, and tentatively ordered Plaintiffs to take two-hour remote depositions of certain BANA witnesses before Plaintiffs could renew their request to seek apex depositions. The parties accepted Judge Berg's tentative ruling, reached an agreement as to how the remaining depositions ordered by Judge Berg would proceed, and have been proceeding in accordance with Judge Berg's instructions. The remaining depositions are scheduled to occur the weeks of February 10 and 17, and will conclude on February 21, 2025. Thus, this issue is not

[1] At the February 6, 2025 Zoom discovery conference, Plaintiffs notified Judge Berg that, given the inevitable appeal of this Apex discovery issue to this Court, regardless of which side prevailed before Judge Berg, it would be most efficient for the briefing to proceed directly in this Court.

yet ripe for further consideration by Magistrate Judge Berg or this Court.

Given Magistrate Judge Berg's knowledge of the issue and the parties' agreement to abide by his tentative ruling, BANA's position is that it is appropriate for this issue to remain before and be re-raised to Magistrate Judge Berg after the conclusion of the remaining ordered and agreed depositions if Plaintiffs still seek these depositions at that time. However, if the Court would prefer for the parties to bring this issue directly to the Court after the remaining depositions conclude, there should be a formal briefing schedule that allows for at least the minimum amount of time and pages permitted by the Local Rules. Moreover, if the Court wishes to hear this issue, the parties have agreed that it would be raised by BANA in the form of a motion for a protective order.

If this issue is to be brought directly before the Court on BANA's motion, BANA proposes that it would file its motion within twenty-eight (28) days after the depositions conclude (on or before March 21, 2025). Twenty-eight (28) days is necessary to afford BANA sufficient time to receive and review all necessary transcripts from the depositions that Judge Berg ordered and determined are relevant to this dispute, and to allow the parties the time allotted under the Stipulated Protective Order to make any necessary confidentiality designations that will be relevant to subsequent filings and motions to seal.[2] BANA further proposes that Plaintiffs would have 14 days to respond (or 21 days if Plaintiffs prefer), and BANA would have 7 days for a reply (or 14 days if Plaintiffs seek 21 days for their opposition). BANA would notice its motion for the Court's next available hearing date at the time the motion for a protective order is filed.

[2] The Stipulated Protective Order provides that the parties will have twenty-one (21) days to designate confidentiality to transcripts. ECF No. 82. BANA is willing to request, review, and designate confidentiality of the transcripts on an expedited basis so that formal briefing could begin within 28 days of the conclusion of depositions (with BANA's opening brief filed on or after March 21, 2025).

IV. Plaintiffs' Supplemental Expert Designation and Expert Discovery Deadlines– Joint Statement

Pursuant to the December 24, 2024 Order Modifying Case Schedule (ECF 401), the parties on January 27, 2025 exchanged summary expert designations that largely mirrored the expert reports submitted in support of and in opposition to the motion for class certification, with both parties designating one additional expert. Plaintiffs subsequently learned of the availability of a new expert, Prof. Chloe East of the University of Colorado, a labor economist with specialized expertise in unemployment insurance matters, whom Plaintiffs would also like to designate as an expert for their case in chief. On February 3, 2025, the parties met and conferred and Plaintiffs informed Defendant that they wished to disclose Prof. East. That same day, Plaintiff served the Bank with a Supplemental Expert Designation for Prof. East.

The Parties further met and conferred on February 5, 2025, and the Bank subsequently agreed not to contest Plaintiffs' designation of Prof. East on timeliness grounds provided Plaintiffs agreed to request a 14-day extension of existing expert and pretrial motion deadlines to allow sufficient time to locate or identify additional experts and prepare reports. Plaintiffs did agree. Accordingly, the parties respectfully submit the accompanying Joint Motion to Extend Time Re: Expert Disclosures and Pretrial Motions and request that the Court extend the expert and pretrial motion deadlines as follows:

Event	Current Date	Proposed Date
Expert Designation	January 27, 2025	February 10, 2025
Rebuttal Expert Designation	February 3, 2025	February 17, 2025
Expert Disclosures	February 18, 2025	March 4, 2025
Rebuttal Expert Disclosures	March 14, 2025	March 28, 2025
Expert Discovery Cutoff	April 11, 2025	April 25, 2025
Pretrial Motions Cutoff	May 14, 2025	May 28, 2025

V. Defendants' Motion to Stay

Plaintiffs' Position: On January 28, 2025, the Bank filed a Notice of Supplemental Authority and stated its intent to file a motion to stay proceedings—including issuance of the Court's order on Plaintiffs' motion for class certification—based on the United States Supreme Court's grant of certiorari in *Laboratory Corp.* 24-0304 (*LabCorp*) (*see* ECF 409). Plaintiffs strongly oppose any stay of proceedings and will file an opposition to any formal motion the Bank files.

The Supreme Court's grant of review in *LabCorp* does not alter controlling Ninth Circuit law and does not provide a basis for staying proceedings or delaying issuance of the Court's order on Plaintiffs' motion for class certification, which has already been fully briefed and argued and thoroughly considered by the Court. Cases such as *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (en banc) and *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125 (9th Cir. 2016) are the law of this Circuit, and "once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority." *Yong v. INS*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000).

Further, there is no reason to stay proceedings because the resolution of *LabCorp*, whatever it may be, is unlikely to have any bearing on the appropriateness of class certification in this case. In *LabCorp*, the plaintiffs sought to certify a class of "[a]ll legally blind individuals who visited a LabCorp patient service center with a LabCorp Express Self-Service kiosk in California during the applicable limitations period and who, due to their disability, were unable to use the LabCorp Express Self-Service kiosk." Pet. for Cert. at 8 (quoting Pet.App.63a). As defined, the class included individuals who did not want to use a kiosk and preferred to use alternative check-in methods accessible to legally blind individuals, whom defendant argued did not suffer a concrete injury. *Id.*; *see* Reply to BIO at 8. Moreover, defendant presented "[u]nrebutted record evidence show[ing] that nearly *one-fourth* of all LabCorp PSC visitors prefer to check in at the front desk; and another *tenth* preferred to do so online." Pet. Cert. at 9.

The facts of this case and the evidence in this class certification record are materially distinguishable at every turn. First, each proposed Class here is narrowly defined expressly to *exclude* anyone who "(i) has been disqualified by the [S]tate [of California] from Program eligibility" or whom the Bank has determined "(ii) has previously engaged in fraudulent Program conduct, such as submission of fraudulent claims or other abuses of the claims process." ECF 386-1 at 2; *see* 1/17/25 Hr'g Tr. 21:18-22. Second, as the Court noted at the class certification hearing, the Bank has not presented any *evidence* that there are likely to be many, if any, uninjured class members who are subsequently discovered. *See, e.g.*, 1/17/25 Hr'g Tr. 21:8-18 ("[A]t this point, years after this fraud occurred and well into this litigation, we don't have Bank of America offering something more than what is in the record. … [W]e don't have any indication of … how many there are and how likely it is for … continued efforts to identify many more."). Third, there is no dispute that, as defined, every class member was subject to the same challenged Bank policies and practices at issue, and thus every class member suffered a concrete injury (independent of whether they suffered damages) as a result of the Bank's alleged violations of their EFTA rights to a reasonable and timely investigation and written findings and their due process rights to adequate notice and opportunity to be heard. *See* ECF 386-2 at 20-25; ECF 378 at 3-9; 1/17/25 Hr'g Tr. at 43:23-44:9.

Plaintiffs will respond fully to any arguments the Bank makes in its forthcoming motion to stay and as a general matter does not object to the Bank's proposal to the standard briefing schedule for that motion (14 days for Plaintiffs' opposition and 7 days for the Bank's reply). However, if the Court is inclined to hold issuance of the Court's order on Plaintiffs' motion for class certification pending resolution of the

Bank's motion to stay, Plaintiffs respectfully request that the Court set an expedited briefing and (if necessary) hearing schedule in order to minimize any further delay in bringing resolution to the claims of Plaintiffs and the more than 109,000 UI beneficiaries they seek to represent, which have now already been pending for more than four years.

Defendant's Position:

As stated in BANA's January 28, 2025 notice to the Court (ECF No. 409), BANA respectfully submits that the proceedings in this action, including the issuance of the Court's order on Plaintiffs' Motion for Class Certification, should be stayed pending the issuance of the United State Supreme Court's opinion in *Laboratory Corp. of America Holdings v. Davis*, No. 24-0304. The parties have met and conferred, and Plaintiffs informed BANA that they oppose a stay.

BANA will, therefore, be filing its motion to stay concurrently with this filing, and intends to notice the motion for the Court's next available hearing date. Notwithstanding the Local Rules, BANA proposes that Plaintiffs would have fourteen (14) days from the date the motion is filed (not based on the hearing date) to file their opposition brief, and that BANA will have until seven (7) days thereafter to file its reply brief.

Presently, the governing Amended Scheduling Order (ECF No. 401) sets expert disclosures to commence on February 18, 2025, and for dispositive motions be filed on May 14, 2025. Given the proposed briefing schedule, even with the parties' agreed 14-day continuance (discussed above in Section IV), the deadlines in the Amended Scheduling Order will begin to run while the Court is considering the motion to stay. Accordingly, and for the reasons stated in BANA's forthcoming motion to stay, BANA respectfully requests a brief continuance of expert and other pretrial deadlines while the Court is considering the motion to stay.

Dated: February 7, 2025

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SIGNATURE CERTIFICATION

Pursuant to Section 2(f)(4) of this Court's Electronic Case Filing Administrative Policies and Procedures Manual, I, Brian Danitz, hereby certify that the content of this document is acceptable to all the signatories herein and that I have obtained counsel's authorization to affix their electronic signatures to this document.

/s/ Brian Danitz
BRIAN DANITZ