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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

CHARLOTTE LEE, on behalf of herself
and all other similarly situated individuals,

Plaintiff,

vs.

BANK OF AMERICA CORPORATION, a
Delaware Corporation doing business in
California; BANK OF AMERICA,
NATIONAL ASSOCIATION, a national
association bank doing business in
California; and DOES 1 through 50,
inclusive,

Defendant(s).

Case No. BCV-21-100770

**MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION AND
PAGA SETTLEMENT; AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREIN**

PLEASE TAKE NOTICE THAT on February 14, 2022, at 8:30 a.m. or as soon
thereafter as the matter may be heard before the Honorable Thomas S. Clark in Department 17
of the Kern County Superior Court, located at 1415 Truxtun Avenue, Plaintiff Charlotte Lee
("Plaintiff"), on behalf of herself and all others similarly situated, by and through her counsel,

1 will move the Court pursuant to California Rules of Court 3.769 for an order: (1) granting
2 preliminary approval of the proposed class action settlement set forth in the Joint Stipulation of
3 Class Action and PAGA Settlement; (2) conditionally certifying the proposed class for settlement
4 purposes; (3) authorizing the parties to provide the proposed Notice of Class Action and PAGA
5 Settlement to the Class through mailing by the Claims Administrator; (4) approving the proposed
6 deadlines for the notice and settlement administration process; and (5) scheduling a hearing for
7 final approval of settlement. A Proposed Order is filed concurrently with this Motion.

8 This Motion is based on this Notice of Motion, the Memorandum of Point and Authorities
9 attached hereto, the Declaration of Joshua D. Buck attached hereto, the Joint Stipulation of Class
10 Action and PAGA Settlement attached to the Declaration of Joshua D. Buck as Exhibit 2, the
11 other papers on file in this action, and such other evidence, oral or documentary, as the Court may
12 receive at or before the hearing on this Motion.

13 DATED: February 2, 2022

THIERMAN BUCK LLP

s/ Joshua D. Buck

Mark R. Thierman

Joshua D. Buck

Leah L. Jones

Joshua R. Hendrickson

Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to California Rules of Court 3.769, Plaintiff respectfully requests that this Court grant preliminary approval of the Joint Stipulation of Class Action and PAGA Settlement (the “Settlement Agreement”) reached between Plaintiff, Charlotte Lee, and Defendant, Bank of America, N.A., Bank of America Corporation (collectively the “Parties”). A copy of the Settlement Agreement is attached as Exhibit 2 to the attached Declaration of Joshua D. Buck (hereinafter “Buck Dec.”). In particular, Plaintiff Lee requests that the Court: (1) grant preliminary approval of the proposed class action settlement set forth in the Joint Stipulation of Class Action and PAGA Settlement; (2) conditionally certifying the proposed class for settlement purposes; (3) authorizing the parties to provide the proposed Notice of Class Action and PAGA Settlement to the Class through mailing by the class administrator; (4) approving the proposed deadlines for the notice and settlement administration process; and (5) scheduling a hearing for final approval of the settlement.

Plaintiff Lee seeks preliminary approval of the Settlement Agreement entered into by herself, individually and on behalf of the Class, on the one hand, and Defendant Bank of America Corporation and Bank of America National Association (“Bank of America” or “Defendants”), on the other hand. The Parties have agreed to settle this lawsuit subject to approval by the Court, for a Total Settlement Amount of One Million Nine Hundred and Ninety Thousand Dollars (\$1,990,000.00). Settlement Agreement at ¶ 8.

The Total Settlement Amount includes the following: (1) attorneys’ fees in an amount of up to Six Hundred Sixty Three Thousand Three Hundred Thirty-Three and Thirty-Three Cents (\$663,333.33) (“Class Counsel Fee); (2) Twenty Five Thousand and no Cents (\$25,000.00) (Class Counsel Costs; (3) Payment to Plaintiff Lee in an amount up to Twenty Five Thousand Dollars (\$25,000) for serving as the Class Representative and in exchange for her signing a general release off all her potential claims; (4) Fifty Thousand Dollars (\$50,000.00) allocated towards penalties

under California Labor Code Private Attorneys General Act of 2004 (“PAGA”); ¹ (5) Settlement Administration Costs, which are currently estimated not to exceed Twelve Thousand Five Hundred Dollars (\$12,500); and (6) the Net Settlement Amount (which is the amount available for Class Members to claim under the Settlement). Settlement Agreement at ¶¶ 8, 38.

Class Members who do not opt-out of the Settlement (“Claimants”) will receive a *pro-rata* share of the Net Settlement Amount, based on their respective number of Individual Workweeks during the Class Period (“Individual Settlement Payment”). The Net Settlement Amount refers to the Total Settlement Amount, less the Court-approved amounts for the Class Counsel Fee and Cost Award, Class Representative Enhancement Award, Settlement Administration Costs, and Labor and Workforce Development Agency’s share of the PAGA penalties. This Settlement resolves the Released Claims of Plaintiff Lee and the Class Members who do not opt-out of the Settlement.

Plaintiff Lee also seeks to provisionally certify the following Class for settlement purposes, which consists of approximately 768 individuals, which Defendant does not oppose: All non-exempt Loan Officers of Defendant who held a job title of Lending Associate (SM171), FC Lending Officer (SM611), FC Lending Consultant (SM612), and Senior FCLO (SM614) who were employed by Bank of America at any time during the period from February 1, 2019, through the date the Court grants preliminary approval. *See* Buck Dec. at ¶ 12.

By way of this Motion, Plaintiffs also seek an order preliminarily appointing Plaintiff Lee as Class Representatives; preliminarily appointing Thierman Buck, LLP as counsel for the Class; appointing ILYM as Claims Administrator; and approving the proposed deadlines for the notice and settlement administration process. *See* Settlement Agreement at ¶ 14.

¹ In accordance with California Labor Code Section 2699(i), \$50,000.00 of the amount allocated to penalties under PAGA will be distributed to the California Labor Workforce Agency (i.e. 75% of \$37,500.00), and 25% or \$12,500.00) will remain a part of the Net Settlement Amount for distribution to Claimants on a claims-made basis.

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2 **III. THE PROPOSED SETTLEMENT**

3 The proposed settlement is on behalf of Plaintiff Lee and a proposed class of former and
4 current employees.

5 The settlement provides for a Total Settlement Amount of One Million, Nine Hundred
6 Ninety Thousand Dollars, and Zero Cents (\$1,990,000.00.). (Settlement Agreement at ¶¶ 8, 11.)

7 The settlement provides for individualized Notice to each Class Member. The proposed
8 Notice would be sent via First Class Mail and advise Class Members about the lawsuit and
9 settlement. (Settlement Agreement at ¶ 19).

10 The settlement provides for address verification by the Claims Administrator to help Class
11 Members receive the Notice even if the information provided to the Claims Administrator is not
12 current. (Settlement Agreement at ¶ 14). The proposed Notice will inform each Class Member
13 of the estimated amount each Class Member will receive, how it was calculated so that Class
14 Members will have complete information about the settlement, the estimated amount that they
15 will receive and can respond accordingly. (Settlement Agreement at ¶ 46).

16 A Notice of Settlement of Class Action and Settlement Hearing (“Notice of Class
17 Settlement”), in the form attached to the Settlement Agreement as Exhibit A, shall be sent by the
18 Claims Administrator to all Class Members by First Class Mail, within ten (10) days of the Claims
19 Administrator’s receipt of the Class List, which shall be delivered by Bank of America to the
20 Claims Administrator fifteen (15) days of the date that the Court signs the Order preliminarily
21 approving the settlement, or as otherwise ordered by the Court. *See* Settlement Agreement at ¶¶
22 17, 18. A follow-up mailing to any updated addresses shall be sent by First Class Mail. Included
23 in the Notice of Class Settlement will be the estimated amount that the Class Member will receive
24 as his or her share of the settlement. *See* Settlement Agreement ¶ 20.

25 The Claims Administrator shall set up and maintain a website to post the Notice and
26 provide other relevant information for Class Members about the Settlement. The Uniform
27
28

1 Resource Locator (“URL”) of said website shall not contain the terms “BofA” or “Bank of
2 America” or similar identifier. *See* Settlement Agreement at ¶ 21.

3 The Total Settlement Amount is \$1,990,000.00, which is inclusive of a request for
4 reasonable attorneys’ fees for Class in a sum not to exceed \$663,333.33 (i.e., 1/3 of the settlement
5 fund), actual litigation expenses incurred by Class Counsel in a sum not to exceed \$25,000.00,² a
6 request for a service enhancement to the Class Representative in the sum of \$25,000.00, payment
7 to the State of California (Labor and Workforce Development Agency (“LWDA”) for Penalties
8 under PAGA in the sum of \$50,000.00, and payment to the Claims Administrator in a sum not to
9 exceed \$12,500.00.

10 The amount of the Net Settlement Amount that each class member is eligible to claim
11 (“Individual Settlement Share”) will be calculated by dividing each Class Member’s Individual
12 Workweeks by the Total Workweeks, which will produce an “Individual Settlement Ratio.” Each
13 Class Member’s Individual Payment Ratio is then multiplied by the Net Settlement Amount to
14 yield his or her Individual Settlement Share. (Buck Dec. at ¶ 19.)

15 Pursuant to the Settlement Agreement, the Claims Administrator will be employed to
16 administer (a) The sending of Notice of Class Settlement, (b) The receipt of objections to the
17 settlement from the Class Members, (c) The issuance and mailing of checks to Class Members
18 covering their pro-rata portion of the net settlement amount (net of withholdings as to that portion
19 designated as wages); (d) The withholding and payment of income and the employees’ share of
20 employment taxes; (e) Payment to the named Plaintiff of the service enhancement, (f) Payment
21 to Class Counsel of attorneys’ fees and costs, (f) Payment to the LWDA for its share of PAGA
22 penalties; and (g) Resolving any disputes by a Class Member regarding the number of weeks
23 worked during the class period.

24 Excluded from the Class are all persons who elect to opt-out as set forth in ¶ 24 of the
25 Settlement Agreement. There is also a procedure by which Class Members can object to the

26 ² The Settlement Agreement provides that Bank of America will not oppose Class
27 Counsel’s request for attorneys’ fees of \$663,333.33, nor will it oppose Class Counsel’s request
28 for litigation costs incurred up to \$25,000.00, *see* Settlement Agreement at ¶ 38.

settlement. (Settlement Agreement at ¶ 23). In addition, Class Members will also have an opportunity to dispute the number of workweeks determined by Bank of America and verified by the Claims Administrator. (Settlement Agreement at ¶ 22.)

Upon the Final Approval Date, all Class Members, except those who have excluded themselves by a timely and valid submission of an Opt-Out request, will be deemed to have, by operation of the final approval order and judgment, released all Released Claims, as defined in ¶ 49 of the Settlement Agreement, and Plaintiff will be deemed to have, by operation of the final approval order and judgment, released all “Released Claims” as defined in ¶¶ 53, 55 and 56 of the Settlement Agreement.

IV. LEGAL STANDARD

Because the final approval hearing will provide a complete opportunity to review this settlement (with the benefit of the reaction of the Class), the burden on the party seeking preliminary approval is relatively light and such an approval is appropriate so long as the proposed settlement is “within the range of possible approval.” *In Re General Motors Corp. Engine Interchange Litigation* (7th Cir.1979) 594 F.2nd 1106, 1124 [quoting and following the Manual for Complex Litigation]; *Horton v. Merrill Lynch, Pierce, Fenner and Smith, Inc.* (E.D.N.C. 1994) 855 F.Supp.825, 827.³ In other words, because the party seeking preliminary approval is simply requesting the opportunity to allow absent or previously uninvolved Class Members to respond to the settlement, the preliminary approval is at most a determination that there is what might be termed “probable cause” to submit the proposal to Class Members and hold a full scale hearing to its fairness. *In Re Traffic Executive Association-Eastern Railroads* (2nd Cir. 1980) 627 F.2nd 631, 634. Because, as set forth above, the instant settlement was reached through informed, arm’s length bargaining between experienced counsel, with the assistance of David Rotman, a highly respected Mediator of class action disputes, it is clear that the parties have met the limited threshold. As set forth above, the instant settlement comes after lengthy litigation, extensive

³ The California Supreme Court has made clear that state courts should look to Federal precedent on class action procedures. *City of San Jose v. Superior Court* (1974) 12 Cal.3rd 447, 453; *Vasquez v. Superior Court* (1971) 4th Cal.3rd 800, 821.)

discovery, extensive investigation, and after mediation between the Parties. As such, the parties respectfully request that the Court grant preliminary approval of the settlement, authorize Notice to the Class Members, and schedule a final fairness hearing.

V. THIS CASE PRESENTS NO DEFICIENCIES SUGGESTING UNFAIRNESS

The proposed settlement was a product of an arms-length negotiation between experienced counsel that followed a mediation before David A. Rotman, a experienced and well-respected Mediator (Buck Dec., ¶ 9). Moreover, employee handbooks, MLR Employee Agreements, compensation plans, and job descriptions were provided to Class Counsel, all of which were more than sufficient information to allow Class Counsel to evaluate these claims. (Buck Dec., at ¶ 8). Class Counsel is experienced in this type of litigation, and they have represented that the settlement is fair and reasonable. (Buck Dec., at ¶ 4)

VI. LIABILITY IS CONTESTED AND THE SETTLEMENT PROVIDES FOR REASONABLE COMPENSATION FOR CLASS MEMBERS' DAMAGES

Pursuant to *Kullar v. Footlocker* (2008) 168 Cal.App.4th 116, Class Counsel have performed a class wide damages assessment and determined in Class Counsel's opinion that if Plaintiff Lee and all class members prevailed on their unlawful compensation and rest break theories, the non-penalty wage exposure would be approximately \$3.8 million. Bank of America, of course, disputed any potential liability with respect to its compensation plan. (Buck Dec., ¶7.). Counsel for Plaintiff Lee and the putative class and Counsel for Defendant believes that the settlement of \$1,990,000 is fair and reasonable given the uncertainty with respect to whether Bank of America's compensation plan was legal and the dispute over the calculation of damages.

VII. PLAINTIFF LEE'S INDIVIDUAL PAYMENT SHOULD BE PRELIMINARILY APPROVED

In exchange for her agreement to release all potential known and unknown individual claims against Defendant, Plaintiff Lee agrees to a service award of \$25,000, which also recognizes her time and efforts on behalf of the Class and the risk she took in being named Plaintiff. "Courts routinely approve incentive awards that compensate named Plaintiffs for the

services they provide and the risk they incur during the course of the class action litigation.” *Ingram v. Coca Cola Co.*, 200 F.R.D. 685, 694 (N.D. GA. 2001) (quoting *In Re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997)); *see also Manual on Complex Litigation*, ¶30.42 Fn. 763 (noting that such awards “may sometimes be warranted for time spent meeting with class members or responding to discovery”). In the *Coca Cola* case, the Court approved significant incentive awards to each named Plaintiff in recognition of the services he or she provided to the Class by responding to discovery, participating in the mediation process and taking the risk of stepping forward on behalf of the Class. *See Coca Cola, supra*, at 694; *see also Van Vranken v. Atlantic Richfield Co.*, 941 F.Supp.294 (N.D. Cal. 1995) (approving \$50,000 participation award). In this case, Plaintiff Lee will show that she spent substantial time with Class Counsel, provided information relevant to the case, reviewed documents, provided documents, provided declarations, was available to participate in the two mediation sessions, and reviewed the Settlement Agreement. More importantly, she took a substantial risk being a named Plaintiff in a class action lawsuit against her employer or former employer. Needless to say, this could adversely affect their prospects of future employment, in that any employer who performs a litigation search will see that they sued their former employer and will be less likely to hire them, or, in the real world, not likely to hire them at all. Furthermore, Plaintiff has agreed to release all of her other individual claims for relief against Defendant. Accordingly, her claim for Class Representative payment is very reasonable and appropriate at \$25,000.00.

VIII. CLASS COUNSEL’S FESS AND COSTS SHOULD BE PRELIMINARILY APPROVED

Courts have long recognized that when Counsel’s efforts result in the creation of a common fund that benefits plaintiffs and unnamed class members, counsel have an equitable right to be compensated from that fund as a whole. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (U.S. Supreme Court “has recognized consistently that a litigant or a lawyer who recovers a common fund ... is entitled to a reasonable attorney’s fee from the fund as a whole”). The traditional method for calculating a fee award in common fund cases is to award counsel a

percentage of the total fund. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The common fund doctrine rests on the understanding that attorneys should normally be paid by their clients and, unless attorneys' fees are paid out of the common fund, those who benefit from the fund will be "unjustly enriched." *Boeing*, 444 U.S. at 478. To prevent this result, courts exercise their inherent equitable powers to assess attorney's fees against the entire fund, thereby spreading the cost of those fees among all those who benefit from it. *Id.*

The California Supreme Court recently held that in common fund cases, a trial court may award class counsel a fee out of that fund by choosing an appropriate percentage of the fund. *Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 503-06 (2016). A court "may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." *Id.* at 503. California courts routinely award attorneys' fees of one-third of the common fund. *See Laffitte*, 1 Cal. 5th at 506 (affirming a fee award of one-third of the gross settlement amount).

Here, Class Counsel is requesting attorneys' fees in the sum of 33-1/3% of the settlement fund of \$1,990,000.00, for a total fee of \$663,333.33. Class Counsel believes the 1/3 requested fee is reasonable based on the results obtained under a percentage of recovery method. In addition, Thierman Buck, LLP has litigated this case on a pure contingency fee basis and has paid litigation costs that could have been non-recoverable should Plaintiff not prevail. Therefore, in addition to the risk of working a case without receiving any fees for the hours invested, Class Counsel has actually incurred litigation costs in prosecuting this action, such as mediator's fees, computerized research costs, filing fees, and photocopying. Accordingly, Class Counsel also requests that it be allowed up to \$25,000.00 in litigation costs to be recovered from the total settlement amount.

Bank of America does not oppose Class Counsel's request for attorneys' fees in the sum of \$663,333.33 and incurred costs that do not exceed \$25,000.00. (Buck Dec., at ¶ 25).

IX. THE PROPOSED NOTICE IS MORE THAN ADEQUATE

The California Supreme Court set forth the standard for class action Notices, as follows:

The class notice must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members. It must be scrupulously neutral and emphasize that the court is expressing no opinion on the merits of the case or the amount of the settlement. The court should clearly indicate that it has done nothing more than determine that there is, in effect, “probable cause” to submit the proposal to the members of the class and to hold a full-scale hearing on its fairness. *State of California v. Levi Strauss and Co.*, 41 Cal.3rd 460, 485 (1986) (internal citations and quotations omitted).

The proposed Notice fairly and neutrally appraises the Class Members of their rights and remedies in this action. Counsel for both parties has reviewed and approved it as drafted. The Notice will provide details on the settlement, the estimated amount to be paid to each Class Member, how the amount was calculated, and the options available to the Class Members, all as set forth in Exhibit A to the Settlement Agreement.

X. PROPOSED TIMELINE OF EVENTS

Plaintiffs also request that the Court set a final approval hearing in accordance with the chronology of events set forth in the Settlement Agreement as follows:

a) **Within fifteen (15) calendar days of the Court’s preliminary approval:** Bank of America will provide the Claims Administrator with the names, last known addresses, last known telephone numbers, and social security numbers of each Class Member, start and end dates of employment, and the Individual Workweeks worked by each Class Member during the Class Period;

b) **Within ten (10) calendar days after receipt of the Class List and Data:** The Claims Administrator will mail by First Class Mail, the Notice package to Class Members.

c) **Thirty (30) calendar days after the claims Administrator has mailed the Notice to Class Members:** This is the deadline for Class Members to postmark and submit opt-outs, and all written objections to the Claims Administrator and to file same with Court;

d) **Twenty-one (21) calendar days prior to the Final Fairness Hearing:** Plaintiffs to file their Motion for Final Approval of Class Action Settlement; and

1 **XI. CONCLUSION**

2 The Parties have negotiated a settlement of claims in the total settlement sum of
3 \$1,990,000.00 that almost certainly never would have been brought, much less successfully so,
4 but for the use of the class action procedural device. The fair resolution of this case was made
5 possible by combined efforts of dedicated and informed Class Representatives and experienced
6 Class Counsel, and Bank of America's Counsel, who were all able to realistically assess the costs
7 and risks in continued protracted litigation and appeals. Accordingly, Plaintiff respectfully
8 requests that the Court preliminarily approve the Settlement Agreement, approve the above-
9 referenced Notice and dissemination thereof, consistent with the manner and timing as set forth
10 in those documents. Additionally, the Parties request that the final approval hearing be set for
11 approximately mid to late April 2022.

12
13 Dated: February 2, 2022

Respectfully Submitted,
THIERMAN BUCK, LLP

By: /s/ Joshua D. Buck

Joshua D. Buck
Mark R. Thierman
Leah L. Jones
Joshua R. Hendrickson

*Attorneys for Plaintiff and Punitive
Class*

PROOF OF SERVICE

In accordance with California Rules of the Court 2.251(c)(3) I hereby certify that I am a resident of the State of Nevada and over the age of eighteen years and not a party to the within action. On this 2nd day of February 2022, I served a true and correct copy of the foregoing **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREIN** via email to the following recipients:

Adam P. KohSweeney
akohsweeney@omm.com
Racquel Martin
rmartin@omm.com
Two Embarcadero Center 28th Floor
San Francisco, CA 94111

/s/ Jennifer Edison-Strekal
An Employee of Thierman Buck, LLP