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16 BANK OF AMERICA, N.A.

17 **UNITED STATES DISTRICT COURT**
18 **SOUTHERN DISTRICT OF CALIFORNIA –**
19 **SAN DIEGO DIVISION**

20 IN RE: BANK OF AMERICA
21 CALIFORNIA UNEMPLOYMENT
22 BENEFITS LITIGATION
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Case No. 21-MD-02992-LAB-MSB

**DEFENDANT BANK OF
AMERICA, N.A.'S DISCOVERY
POSITION STATEMENT**

Courtroom: 14A – 14th Floor
Judge: Hon. Michael S. Berg

1 Pursuant to the Court’s July 21, 2021 Order (Dkt. No. 51), Defendant Bank
2 of America, N.A. (“BANA”) submits its discovery position statement. Simply put,
3 no discovery is needed for “urgent relief and timely payment of unemployment
4 benefits.” *Id.* at 2. That is so because virtually every cardholder is presently able to
5 access their accounts and seek payment of any unauthorized transaction “claims”
6 they have made.

7 The crux of Plaintiffs’ case is the freezing or blocking of cardholder accounts
8 or unauthorized transaction claims being disallowed as a result of suspected
9 fraudulent activity. Neither presents the type of urgent circumstance that justifies
10 the burdensome discovery Plaintiffs seek.

11 The vast majority of currently frozen accounts were frozen at EDD’s request,
12 and Plaintiffs have stated many times that such freezes are not part of their case.
13 The limited number of remaining, currently frozen accounts were frozen by BANA
14 because its investigation or law enforcement information revealed ties to criminal
15 networks or other fraudulent behavior, or because of legal process (*e.g.*, seizure
16 warrants). BANA also “blocks” accounts based on suspected fraudulent activity,
17 including concerns about identity theft or account compromise. A cardholder
18 whose account is blocked may contact BANA (either by phone or by visiting a
19 branch) to verify their identity; once verified, the account is immediately unblocked
20 and the cardholder’s use of the card is restored.

21 As for Plaintiffs’ attack on BANA’s handling of claims, BANA no longer
22 uses the automated claims fraud filter to close claims of allegedly unauthorized
23 transactions (“Claims”). Virtually every such Claim that was previously closed
24 based solely on the claims fraud filter has been addressed: either already paid, or
25 reopened and investigated, or allowed reconsideration under the *Yick* preliminary
26 injunction procedures. As of July 26, 2021, over 29,000 Claims have been
27 reconsidered and paid, and over 17,000 Claims have been reconsidered and denied.

28 Thus, discovery is not needed to achieve any “need for urgent relief” because

1 current processes provide that relief. Specifically, all cardholders have or can
2 restore access to their accounts unless (a) they cannot prove their identity, or
3 (b) EDD identified them as fraudulent, they have ties to criminal networks or other
4 suspicious behavior, or they are subject to legal process. And almost all
5 cardholders with Claims that were closed or denied based on the claims fraud filter
6 are subject to the reconsideration processes in the preliminary injunction.

7 Given the lack of urgency, conducting discovery before the Court rules on
8 BANA's motion to dismiss would be particularly inefficient and unnecessarily
9 burdensome. Plaintiffs should not be permitted to conduct discovery regarding
10 frozen or blocked cards, for example, when the cardholder agreement expressly
11 permits BANA to freeze accounts if BANA "suspect[s] irregular, unauthorized, or
12 unlawful activities." Discovery about BANA's claims investigation practices also
13 should not be permitted until the Court has ruled on, among other things:

14 (i) whether Plaintiffs' accounts are covered by EFTA/Reg E; (ii) whether Plaintiffs
15 have adequately pled an EFTA/Reg E violation or breach of contract (where many
16 have been fully reimbursed, and others do not even allege they experienced
17 unauthorized transactions); and (iii) the scope of any remaining claim.

18 The remaining legal claims in the case (and the discovery served in *Yick*)
19 focus on three main areas: the use of magnetic stripe versus chip cards, an alleged
20 data breach, and customer service issues. None of this discovery is urgent and all
21 of it relates to claims that will be subject to a motion to dismiss. There is no legal
22 support for the novel theory that the magnetic stripe cards that EDD specified in its
23 contract as a technology requirement violate the California Consumer Privacy Act
24 or any other legal duty owed by BANA; Plaintiffs have alleged no facts whatsoever
25 to support their theory that a data breach occurred; and BANA's customer service
26 obligations are rooted solely in its agreement with EDD, which Plaintiffs have no
27 right to enforce as they are not third-party beneficiaries under California law.

28 BANA looks forward to discussing these issues with the Court on August 5.

1 Dated: July 29, 2021

Respectfully Submitted,

3 By: /s/ Yvonne W. Chan

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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 July 29, 2021. 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: July 29, 2021 /s/ Yvonne W. Chan