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

YVONNE W. CHAN (admitted pro hac vice)
YChan@jonesday.com
JONES DAY
100 High Street
Boston, MA 02110
Tel.: +1 617 960 3939
Fax: +1 617 449 6999

Attorneys for Defendant
BANK OF AMERICA, N.A.

[*ADDITIONAL COUNSEL LISTED IN SIGNATURE BLOCK*]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 21-MD-02992-LAB-MSB **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO PRECLUDE ADDITIONAL ESI DISCOVERY** Date: N/A, per Dkt. 205 Time: N/A, per Dkt. 205 Ctrm: 2C Judge: Hon. Michael S. Berg Filed/Lodged Concurrently with: 1. Declaration of James W. McGarry 2. Declaration of Dustin Anderson 3. [Proposed] Order

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INTRODUCTION

Plaintiffs challenge a Bank of America, N.A. ("BANA") fraud strategy that was conceptualized, implemented, and eliminated in a 9-month period, from late September 2020 to early June 2021. Despite the narrow set of facts from which their allegations stem, Plaintiffs have demanded and received wide-ranging discovery, including more than 200,000 documents from 20 custodians, three non-custodian mailboxes, six targeted databases, and all of the relevant board and board committee materials. BANA has spent more than $4.5 million—and counting—on vendor costs alone to comply with Plaintiffs' overbroad demands. Plaintiffs *themselves* have been unable to parse the vast materials they have demanded and received, and have even asked *BANA* to tell them which materials are important. Now, Plaintiffs seek even *more* ESI, including from five of BANA's top executives. The Court should not allow it.

Courts limit discovery from top executives where the requesting party cannot show that the executives were decision makers for the key issues in the case. *See Blackberry Ltd. v. Facebook., Inc.*, Case No. CV 18-1844-GS (KSx), 2019 WL 4544425, at *6 (C.D. Cal. Aug. 19, 2019). This is because it is improper for litigants to use the burden and expense of overbroad discovery demands as leverage for settlement. But that is what Plaintiffs attempt here. They have ESI from BANA's key decision makers on the fraud filter, EMV and customer service issues that remain in their case. They have data, metrics, and reports regarding the same. They have all of the information BANA's board and board committees received on these issues. They even have documents provided to BANA's regulators in response to regulatory investigations of these same issues.

To require more would be out of proportion to the needs of this case.

PROCEDURAL BACKGROUND

The Limited Scope of Plaintiffs' Allegations. Plaintiffs primarily allege that BANA should not have used the fraud filter to deny error claims or to freeze or block

EDD prepaid accounts. First Amended Master Consolidated Complaint, Dkt. 136 ("FAMCC"), ¶¶ 89-96. The fraud filter was used to decision claims only for approximately 9 months, from late September 2020 until early June 2021. *Id.* ¶¶ 89, 110. Plaintiffs also allege that BANA's failure to use EMV chip technology for EDD prepaid cards exposed their accounts to fraud and that BANA's customer service was inadequate over the same pandemic time period. *See id.* ¶ 2.

BANA's Discovery Efforts. BANA has expended enormous resources to provide Plaintiffs with discovery pursuant to the Court's expedited schedule. On top of substantial pre-motion-to-dismiss discovery, data compilations, targeted collections, board materials and materials provided to BANA's regulators, ESI discovery has already been extensive. With the Court's assistance, the parties agreed that BANA would review and produce ESI from 20 custodians, spanning 9 functional groups within BANA, and including the key decision makers on each of the fraud filter (9 custodians), EMV (8 custodians) and customer service and claims processing (4 custodians). Declaration of James W. McGarry ("McGarry Decl."), ¶ 4. BANA reviewed more than 765,000 documents and produced nearly 200,000 documents in two months, and more than 200,000 documents to date. *Id.* ¶ 5; *see also* Declaration of Dustin Anderson ("Anderson Decl.") ¶ 5. To do so, BANA enlisted more than 400 contract reviewers at a cost of more than $4.5 million, to say nothing of outside counsel expenses. Anderson Decl. ¶ 6.[1]

Indeed, Plaintiffs seem to have realized that they asked for too much, and have resorted to interrogatories asking BANA to identify the documents in the production that are important to Plaintiffs' case. *See* McGarry Decl. ¶ 7 (Plaintiffs' Interrogatory No. 24 asks BANA, among other things, to "IDENTIFY all DOCUMENTS" in its

[1] The expense was driven in part by Plaintiffs' overbroad search terms. Even with the use of a TAR algorithm, designed to prioritize the documents most likely to be relevant for review, BANA was forced to review more than 765,000 of the approximately 1 million documents in the revised search population. Of the documents in the review population that contained Plaintiffs' search terms, *only 24%* of them were responsive. McGarry Decl. ¶ 6.

productions "that reference, reflect, or otherwise evidence any actions" or that "expressly reference" BANA's "failure to take any actions . . . to test, ascertain, measure, or estimate the actual or likely accuracy, inaccuracy, effectiveness, or ineffectiveness of the CLAIM FRAUD FILTER and/or any [of] its criteria").

Plaintiffs' Request For More ESI. Despite having demanded and received more discovery than they can apparently digest, Plaintiffs now seek even more. Among other things, they want ESI from five of BANA's top executives: Brian Moynihan (CEO), Thomas Montag (President of Global Banking and Markets and COO until December 2021), Catherine Bessant (Chief Operations and Technology Officer until 2021), Dean Athanasia (President of Regional Banking), and Christine Channels (Head of Client Services and Credit Assistance). McGarry Decl. ¶ 8.

The vendor costs alone of ESI discovery for these five custodians would exceed $1.4 million. Anderson Decl. ¶ 10. More concerning, however, is Plaintiffs' attempt to use discovery as leverage for settlement by exposing BANA's top executives to unwarranted harassment. Plaintiffs' intent to harass is clear. To the extent Plaintiffs believe they need more ESI (BANA disagrees), BANA offered *eight* more custodians who *were involved* in the fraud filter and other relevant issues, including Channels. McGarry Decl. ¶ 9. Plaintiffs rejected BANA's compromise proposal, and insisted on ESI from all five top executives. *Id.*[2] Indeed, at a prior IDC, Plaintiffs' counsel expressly told the Court that the top executive emails were necessary because "they resolve cases. They settle cases." *Id.* ¶ 10.

ARGUMENT

Courts allow document discovery from top executives only where the executives were involved in *decision making relating to key issues* in the case. In *Blackberry*, 2019 WL 4544425, at *6, the court held that mere "discussions at 'the highest level' about" the issues in the case were "too attenuated" to justify searching

[2] BANA does not object to adding Channels as an ESI custodian, subject to the parties' negotiation of appropriate search parameters.

the CEO's emails. The court in *In re Facebook, Inc. Consumer Priv. User Profile Litig.*, Case No. 3:18-MD-02843-VC-JSC, 2021 WL 10282213, at *2 (N.D. Cal. Nov. 14, 2021) applied the same standard and allowed ESI searches of Facebook's top two executives based on documents in which both executives *identified themselves as being involved in "decision making"* on "issues at the heart of Plaintiffs' allegations." Even where top executives have relevant information, courts will nonetheless deny discovery absent a showing that they have "*unique or personal knowledge*" that "is necessary and *not cumulative.*" *Harris v. Union Pacific R.R.*, Case No. 8:16CV381, 2018 WL 2729131, at *4 (D. Neb. June 6, 2018) (emphasis added) (denying collection of CEO's documents absent showing they contain unique information); *see also Lutzeier v. Citigroup, Inc.*, Case No. 4:14-cv-00183-RLW, 2015 WL 430196, at *6-7 (E.D. Mo. Feb. 2, 2015) (same).[3]

Here, the key issues are BANA's use of the fraud filter to decision error claims and freeze or block suspected fraudulent accounts, BANA's use of EMV chip technology for EDD prepaid cards and customer service of those cards. Thus, to justify the discovery they seek, Plaintiffs must show that the executives were the key decision makers regarding the fraud filter, EMV, and customer service. But they cannot do so. In the IDC process, Plaintiffs attempted to satisfy this standard by pointing to—and mischaracterizing—13 documents. These documents show only that BANA's top executives received updates on the prepaid card program, including the unprecedented levels of unemployment claims and fraud and BANA's response. But there is a difference between "the executives were *involved and making decisions*," which courts have found sufficient to justify discovery, and "the executives were *aware*," which courts have found insufficient. The basic awareness Plaintiffs have shown with their cited documents is not enough.

[3] The cases cited in Plaintiffs' IDC letter apply the same standard, and allowed discovery because the proponent identified evidence that the executives were decision makers relating to the key issues in those cases.

First, Plaintiffs concede that only three of the documents are even remotely relevant to decision-making. But Plaintiffs' claims that these documents show executive "approval" or "direction" of fraud filter and customer service decisions are dubious. *See* IDC Ltr. at 1.[4] Plaintiffs say **Ex. 5** (-1860) "show[s] Montag's approval was required for contracts relating to call center services," (*id.*), but the document makes clear that Montag was *not involved* in the contract negotiations. Plaintiffs *already have ESI* from the decision makers on that email who were seeking perfunctory sign-off from Montag. Plaintiffs' claims regarding **Ex. 7** (-3818) fare no better. They say this chat "indicat[es] that Moynihan approved the use of the Claim Fraud Filter to freeze 46k cards." *Id.* Not so. In the chat, a BANA employee asks whether "Brian" approved "moving forward," to which an *existing custodian* responds "we are freezing all the atm/combo cards but that's all we have approval for." There is no indication *who* approved the freeze, particularly given the implication that other actions required further approval from unnamed individuals. And no court has ordered the collection of a global bank's CEO's emails based on a single document, particularly where the document does not clearly show that the CEO was a key decision-maker, and where Plaintiffs have demanded and received ESI from *nine* other custodians who were decision-makers for account freezes. As for **Ex. 13** (-1044), which Plaintiffs say "show[s] Moynihan directed changes to claims processing strategy," (*id.* at 2), this is an email from Channels that says only that "BTM [Moynihan] asked for claims to be decisioned faster than 4-7 days," but the number of days it took BANA to process claims is not an issue in this case, and the email does not reflect any decision-making by Moynihan.

Second, Plaintiffs don't even try to suggest that their remaining documents satisfy the "decision-maker on key issues" standard, arguing instead the completely

[4] The Court is in possession of Plaintiffs' IDC materials. The BANA emails are identified herein by the exhibit numbers in Plaintiffs' IDC Letter, and by the last four digits of their Bates number. BANA can re-submit the McGarry Declaration, along with a motion to file the designated confidential materials under seal, should the Court desire. *See* McGarry Decl. ¶ 11.

unsurprising—and insufficient—fact that BANA's top executives were *aware* of certain issues in the prepaid card program. For example, several of the documents Plaintiffs cite underscore the unremarkable position that BANA's top executives and board received updates on the prepaid card program. Plaintiffs claim **Ex. 1** (-6092) "show[s] Moynihan asked Bessant to brief the [board] on prepaid card issues." *Id.* at 1. But "brief[ing]" others on issues does not make one a decision-maker. This email also demonstrates Plaintiffs' overreach, as it shows Bessant did not have the information for briefing, and so reached out to Ahmad, *a custodian whose ESI Plaintiffs already have*. Moreover, any information Bessant actually presented to the board would be reflected in the *board materials Plaintiffs already have*. Similarly, Plaintiffs say **Exs. 10-12** (-6000, -6010, -6058) "show[] Moynihan reported and provided memos to the Board" on relevant issues. *Id.* at 2. But if any of these emails resulted in relevant board materials, *Plaintiffs already have them.* And none of them suggest that Moynihan made decisions on the fraud filter, EMV, or customer service.

Other documents demonstrate that the top executives Plaintiffs seek were merely provided with information by *existing custodians*. Plaintiffs say **Ex. 6** (-8970) "show[s] Bessant and Athanasia provided input regarding [relevant] talking points for [a] meeting with Moynihan," (*id.* at 1), but this email shows only feedback from Athanasia to *existing custodian* O'Neill about the formatting and organization of her email update; the update itself, drafted by O'Neill, concerned work done by *custodians whose ESI Plaintiffs already have* or have been offered, including fraud (Simpson), claims (Channels), call centers (Simpson), and state contracts (Lawlor and Ahmad). Plaintiffs—with no support—say **Ex. 9** (-9408) "show[s] Bessant conducted [an] end-to-end review of [the] UI card program," (*id.* at 1-2), but this email is from *existing custodian* Chestnut regarding a presentation titled "Cathy Bessant UI E2E Benefit Program Review," and references decisions by Garfield and Lawlor, *both existing custodians.* Bessant is not on the email or otherwise referenced, which could just as easily indicate the review was prepared *for her*. In any event, it does not show she had any decision-making role on these issues. The same goes for **Exs. 4** (-8379) and **8** (-6191). Referencing these documents, Plaintiffs argued during the January 3, 2024 IDC that there were "MTM meetings" among top executives that did not include existing custodians, but that is incorrect. Existing custodian O'Neill is a member (*see* McGarry Decl. ¶ 12), other existing custodians often presented at MTM meetings (*id* ¶ 13), and BANA produced the presentations showing what was discussed at the meetings (*id.* ¶ 14). In any event, receiving updates at meetings does not make each executive a decision-maker.

The remaining documents are emails that were sent to or from *multiple existing custodians*, and for which Plaintiffs offer no reason to think the top executives made any decisions. Plaintiffs say **Ex. 2** (-6573) "show[s] Moynihan and Bessant *directed* teams to 'generate ideas and articulate Fraud Strategies' and manage claims resolution processes." IDC Ltr. at 1. But the email shows only that O'Neill (an *existing custodian*) communicated to *four other existing custodians* (Ahmad, Lawlor, Ehresman and Simpson) an update from a meeting with the top executives during which prepaid issues were discussed, and nowhere suggests that Moynihan or Bessant "directed" anyone to do anything. Plaintiffs say **Ex. 3** (-8366) "indicat[es] Athanasia and Montag were responsible for briefing Moynihan about potential operational losses relating to prepaid claims fraud," (*id.*), but a review of the email reveals that when a question was raised about the amount of prepaid fraud losses (which did not involve decision-making), the top executives did not have the relevant information and reached out to *offered custodian* Channels and *existing custodian* Ehresman to obtain the relevant information.

During the January 3, 2024 IDC, the Court suggested a tentative decision allowing for three executive ESI custodians of Plaintiffs' choosing. Plaintiffs already have what they need; more would be overly burdensome and disproportionate. However, if additional ESI discovery is allowed, it should be limited to custodians

Plaintiffs have shown were decision-makers for key issues—not simply an invitation for Plaintiffs to put pressure on BANA by choosing the top three executives.

CONCLUSION

For the foregoing reasons, BANA respectfully requests that the Court grant this motion and issue an order precluding additional ESI discovery.

Dated: January 23, 2024

Respectfully submitted,

By: *s/ James W. McGarry*

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

THOMAS M. HEFFERON (pro hac vice)
THefferon@goodwinlaw.com
GOODWIN PROCTER LLP
1900 N St. NW
Washington, DC 20036
Tel: +1 202 346 4000
Fax: +1 202 346 4444

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
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 January 23, 2024. 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: January 23, 2024 *s/ James W. McGarry*