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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

DECLARATION OF JAMES W. MCGARRY IN SUPPORT OF DEFENDANT'S MOTION TO PRECLUDE ADDITIONAL ESI DISCOVERY

Filed/Lodged Concurrently with:

1. Mem. of Points and Auth. ISO Motion to Preclude Additional ESI Discovery
2. Declaration of Dustin Anderson
3. [Proposed] Order

I, James W. McGarry, state and declare as follows:

1. I am a partner with the law firm of Goodwin Procter LLP, and counsel of record for Defendant Bank of America, N.A. ("BANA") in the above-captioned lawsuit.

2. I have personal knowledge of the facts set forth in this declaration, and if called upon to do so, I could and would competently testify thereto.

3. I make this declaration in support of BANA's Motion to Preclude Additional ESI Discovery.

4. With the Court's assistance, the parties previously agreed that BANA would collect ESI from 24 custodians, and review and produce ESI from 20 of those custodians. Those custodians spanned 9 functional groups within BANA, and included the key decision makers on each of Plaintiffs' allegations, including the fraud filter and its use to decision error claims and freeze and/or block accounts (at least 9 custodians: Faiz Ahmad, Kevin Condon, Jennifer Ehresman, William Fox, Brad Garfield, Melissa Gargagliano, Michael Letson, Holly O'Neill, and Paul Simpson), the use of EMV technology for EDD prepaid cards (at least 8 custodians: Robert Chestnut, Sabrina Clark, Kevin Condon, Dawn Haddock, Louise Hennessy, John Lawlor, William (Matt) Martin, and Katie Smith) and customer service and claims processing for EDD prepaid cards (at least 4 custodians: Shane Daniels, Doris Dixon, William Golden, and Louise Nail). Many of these custodians were also key decision makers on more than one of the fraud filter, EMV, and customer service issues.

5. In connection with the parties' previous agreement regarding ESI discovery and the Court's direction, BANA reviewed more than 765,000 documents and produced nearly 200,000 documents over the course of two months, from October 2023 to December 2023, and has produced more than 200,000 documents to date.

6. The search terms Plaintiffs demanded BANA use for this ESI review were overbroad. 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.

7. On November 20, 2023, Plaintiffs served BANA with Interrogatory No. 24, asking BANA to, among other things, "IDENTIFY all DOCUMENTS" in its 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." Attached hereto as **Exhibit 1** is a true and correct copy of Plaintiffs' Interrogatory No. 24.

8. The additional ESI discovery Plaintiffs now seek includes 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).

9. In an effort at compromise, and before BANA understood the full cost of the ESI discovery incurred to date, BANA offered eight additional ESI custodians that were identified in BANA's interrogatory responses as involved in the fraud filter and other relevant issues, including Christine Channels. Plaintiffs rejected BANA's compromise proposal, and continued to insist on ESI collection from all five top executives.

10. During the late summer and fall of 2023, the Court held informal

discovery conferences ("IDCs") at which Plaintiffs' request for top executive ESI discovery was discussed. During one of those IDCs, Plaintiffs' counsel told the Court that the top executive emails were necessary because "they resolve cases. They settle cases."

11. The Court held another IDC on January 3, 2024. The parties submitted letters in advance of that IDC explaining their respective positions as to whether additional ESI discovery should be permitted. BANA is not including Plaintiffs' IDC Letter, Index of Exhibits, and Exhibits thereto here in an effort to make this submission less cumbersome, because the Court already has these materials in connection with the IDC process, and because the Exhibits were designated CONFIDENTIAL pursuant to the applicable Protective Order, Dkt. 82, as they reflect BANA's internal fraud processes, customer claims, and proprietary business information. If it would be helpful for the Court to have these previously-lodged materials attached to this submission, BANA would be happy to re-submit this Declaration, along with a motion to file the designated materials under seal.

12. During the January 3, 2024 IDC, Plaintiffs argued that there were "MTM meetings" among the top executives that did not include existing custodians. That is incorrect. Existing custodian Holly O'Neill is a member of the MTM group. *See* https://newsroom.bankofamerica.com/biographies?cm_re=EBZ-Corp_SocialResponsibility-_-About_Us-_-EI38LT000B_About_Us_Biography (identifying MTM group).

13. Based on my review of documents produced by BANA, I understand that other existing custodians also often presented at MTM meetings, including Paul Simpson and Faiz Ahmad.

14. Also based on my review of documents produced by BANA, I understand that BANA has also produced MTM presentations showing what was discussed at those meetings.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on January 23, 2024, in Boston, Massachusetts.

By: *<u>/s/ James W. McGarry</u>*

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION

This Document Relates to All Actions

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

PLAINTIFF YICK'S THIRD SET OF INTERROGATORIES

PROPOUNDING PARTY: Plaintiff Jennifer Yick

RESPONDING PARTY: Defendant Bank of America, N.A.

SET NUMBER: Three

*Highlighted portions of these Interrogatories contain information designated by Defendant as **CONFIDENTIAL** (highlighted yellow) or **HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY** (highlighted green) under the Stipulated Protective Order entered in this action.*

otherwise develop the criteria used by the CLAIM FRAUD FILTER, including but not limited to the dates when such processes occurred; the IDENTITY of all PERSONS involved in the process (including but not limited to YOUR employees and agents, third-party consultants, and any law enforcement agents); the name of any third-party product that was a source of any criteria or any part of any criteria of the CLAIM FRAUD FILTER; a description of all potential alternative anti-fraud strategies or CLAIM FRAUD FILTER criteria that YOU considered but ultimately did not use; and all of YOUR reasons at the time for deciding not to use those potential alternatives.

INTERROGATORY NO. 24

IDENTIFY all DOCUMENTS that reference, reflect, or otherwise evidence any actions that YOU took or caused to be taken, or that expressly reference YOUR failure to take any actions, at any time from March 1, 2020 to the present to test, ascertain, measure, or estimate the actual or likely accuracy, inaccuracy, effectiveness, or ineffectiveness of the CLAIM FRAUD FILTER and/or any its criteria (including but not limited to any of its three “Indicators” and Indicator 3 “Features” as described in BANA_EDD_MDL-00005524) in correctly or incorrectly decisioning CLAIMS, including but not limited to all DOCUMENTS that reflect any calculation YOU made or caused to be made of the actual, estimated, or likely “false positive” rate or ratio (however YOU use those terms in the ordinary course of business) of the CLAIM FRAUD FILTER and/or any of its criteria.

INTERROGATORY NO. 25

If YOU contend that YOUR use of the CLAIM FRAUD FILTER as the sole basis for making ADVERSE CLAIM DECISIONS constituted a “good faith investigation” of such CLAIMS under EFTA, including but not limited to under 15 U.S.C. §1693f(e)(1)(A), state all facts, IDENTIFY all DOCUMENTS, and IDENTIFY all witnesses and testimony that YOU contend support that contention.

INTERROGATORY NO. 26

If YOU contend that a CLAIM meeting the criteria of the CLAIM FRAUD FILTER’s “Indicator 1” (as described in BANA_EDD_MDL-00005524) provided YOU, on its own, a