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16 **UNITED STATES DISTRICT COURT**
17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 **IN RE BANK OF AMERICA**
19 **CALIFORNIA UNEMPLOYMENT**
20 **BENEFITS LITIGATION**

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

PLAINTIFFS' OPENING BRIEF IN
SUPPORT OF MOTION TO
COMPEL ADDITIONAL ESI
CUSTODIANS

21 This Document Relates to All Actions

Judge: Hon. Larry Alan Burns

REDACTED VERSION FOR PUBLIC
FILING

1 Plaintiffs respectfully request that the Court compel Bank of America (1) to add
2 four additional ESI custodians—Brian Moynihan (CEO), Thomas Montag (President
3 of Global Banking and Markets and COO until December 2021), Catherine Bessant
4 (Chief Operations and Technology Officer until 2021), and Dean Athanasia (President
5 of Regional Banking)—to produce documents responsive to Plaintiffs’ RFPs 76-79,
6 and (2) to add back the four additional ESI custodians for limited RFPs whom the Bank
7 previously offered—Christine Channels, Jennifer Boussuge, Renee Johnson, and
8 Rocco Blasi. All eight are now known to have highly relevant, non-duplicative
9 documents; and Plaintiffs’ need for those documents far outweighs any potential burden
10 to the Bank of a simple document collection given the amounts at stake, the significance
11 of those documents to the issues, and the Bank’s considerable resources.

12 BACKGROUND

13 Plaintiffs’ claims in this complex MDL litigation encompass many issues,
14 including the Bank’s reasons for developing its Claim Fraud Filter, its policies of
15 automatically denying EDD cardholders’ unauthorized-transaction claims and
16 automatically freezing their accounts based on that Claim Fraud Filter, its vendor
17 oversight and security risk management practices, its decision not to include EMV
18 chips in EDD debit cards, the inadequacy of its prepaid call center operations, and its
19 relationship with EDD. Plaintiffs served their Second Set of RFPs relating to those
20 topics on June 12, 2023, and their Third Set on August 15. Decl. of Connie K. Chan
21 (“Chan Decl.”) ¶¶23-24.

22 Notwithstanding the broad range of disputed issues and the parties’ ESI Protocol
23 requiring disclosure of all potential document custodians, the Bank initially disclosed
24 only *five*, limited to the topic of the Bank’s contract and communications with EDD.
25 *Id.* ¶¶25-26. Plaintiffs responded by proposing 34 additional individuals likely to have
26 relevant ESI based on the Bank’s Rule 26(a) initial disclosures and publicly available
27 information. *Id.* ¶¶27, 29. The Bank agreed to 19 of the 34, excluding all executives.
28 *Id.* ¶¶28-29. Given the time constraints, the parties agreed to proceed with document

collection for this initial “Round 1” set of 24 custodians and to meet and confer about “Round 2” custodians after the Bank produced organizational charts and Plaintiffs had sufficient opportunity to review the Round 1 documents. *Id.* ¶30.

Other disputes delayed the start of the Bank’s ESI production. To kick start the process, Plaintiffs offered to remove four of the 24 custodians, subject to Round 2 negotiations. *Id.* ¶31. The Bank subsequently produced about 200,000 documents from the remaining 20 custodians, plus 40 pages of org charts identifying hundreds of employees across 11 different relevant practice groups. *Id.* ¶32; Exs. 19-20.¹

Based on these documents, Plaintiffs asked the Bank also to produce (1) documents responsive to RFPs 76-79 from eight senior executives, and (2) documents responsive to a narrow range of RFPs from 17 additional non-executive custodians (eight relating to the Claim Fraud Filter, three relating to claims processing, three relating to card security, and four relating to call centers). *Id.* ¶33. The Bank countered by **offering eight custodians total**, one executive and seven non-executives. *Id.* ¶¶34-35, Exs. 22-23. To resolve the dispute, *Plaintiffs agreed to add only eight*, as follows:

Bank’s 12/15 Proposal		Plaintiff’s 12/22 Proposal
<i>General Topic (RFPs)</i>	<i>Custodian</i>	<i>(RFPs)</i>
Fraud Filter (39-41, 44-45)	Christine Channels	Agreed
	Jennifer Boussuge	Agreed
	Anne Holt	Brian Moynihan (76-79)
	Ruchira Ghosh	Thomas Montag (76-79)
	John Denning	Catherine Bessant (76-79)
Claims Processing/Vendor Oversight (33-37, 39-41, 66)	Renee Johnson	Agreed
Customer Service Call Centers (61, 64-66)	Scott Robbins	Dean Athanasia (76-79)
	Rocco Blasi	Agreed

Although the Bank would face *no* additional burden in exchanging one custodian for another, it rejected Plaintiffs’ proposed compromise, recanted its prior offer, and insisted in the January 3, 2024 IDC that *no* new ESI custodians should be added—a position Judge Berg rejected in his tentative ruling ordering the Bank to add three executives of Plaintiffs’ choosing. *Id.* ¶¶36-37.

¹ All exhibits are attached to the accompanying Chan Declaration.

LEGAL STANDARD

Under the FRCP’s “liberal discovery principles,” the party resisting discovery bears a “heavy burden” of showing that the requested discovery is improper. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975); Fed. R. Civ. P. 26(b)(1). So long as the party seeking discovery “satisfies the relevancy requirements of Rule 26(b)(1),” the party resisting discovery “has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections.” *Williams & Cochrane, LLP v. Quechan Tribe of Fort Yuma Indian Reservation*, 2020 WL 2745246, *1 (S.D. Cal. May 27, 2020) (citation omitted).

ARGUMENT

A. The Four Requested Senior Executives (Moynihan, Montag, Bessant, and Athanasia) Possess Unique, Relevant Documents.

In verified interrogatory responses, the Bank attested that

_____” Ex. 18 at 17.

Given the large number of Bank divisions affected, senior leaders were necessarily involved in directing this work. Indeed, the Bank's documents confirm that CEO **Moynihan**, along with **Bessant**, **Montag** and **Athanasia**,² were not merely passive recipients of information but [REDACTED]

² **Cathy Bessant** is the senior executive [REDACTED]
[REDACTED]; **Tom Montag** is the senior executive [REDACTED] S.
Ex. 20 at -0057843, -47848, -57853. **Dean Athanasia** is the senior executive
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Ex. 18; Ex. 20 at -0057841-42.

1 [REDACTED]
2 [REDACTED]—strategies at the core of Plaintiffs’ claims,
3 including for treble damages under the Electronic Funds Transfer Act, 15 U.S.C.
4 §1693f(e) (“EFTA”), and for punitive damages. See First Am. Master Consol. Compl.
5 (“FAMCC”) ¶¶537-38, 545(e), Prayer ¶¶3-4; Exs. 1-14.

6 For example, the Bank’s documents show that **CEO Moynihan** [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]. See Exs. 10-12.
10 The documents also indicate that Moynihan [REDACTED]
11 [REDACTED] (Ex. 7),
12 and [REDACTED]
13 [REDACTED]. See, e.g., Ex. 15.

14 The documents further show that **Moynihan**, along with **Bessant, Montag**, and
15 **Athanasia**, [REDACTED]
16 [REDACTED]
17 [REDACTED] See, e.g., Ex. 2 ([REDACTED]
18 [REDACTED]
19 [REDACTED]); Ex. 3 ([REDACTED]
20 [REDACTED]
21 [REDACTED]); Ex. 4 ([REDACTED]
22 [REDACTED]); Ex. 5 ([REDACTED]
23 [REDACTED]); Ex. 6 ([REDACTED]
24 [REDACTED]
25 [REDACTED]; Ex. 9 ([REDACTED]
26 [REDACTED]; Ex. 13 ([REDACTED]);
27 Ex. 14 ([REDACTED]).

28 The Bank’s documents also show **these executives communicated about these**

1 **key issues among themselves** and with other non-custodian executives and the Bank’s
2 Board members—communications not in the possession of any lower-level custodians.

3 *See, e.g.*, Ex. 1 ([REDACTED])
4 [REDACTED]
5 [REDACTED]); Ex. 3 ([REDACTED])
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]); Ex. 4 ([REDACTED])
9 [REDACTED]
10 [REDACTED]); Ex. 8 [REDACTED]
11 [REDACTED]). The

12 requested custodians likely possess relevant documents “not available through other
13 data sources,” including their communications with: (1) each other (and non-custodian
14 executives), (2) Board members, (3) third parties, and (4) non-custodian subordinates.
15 *See In re Facebook*, No. 18-md-02843-VC-JSC, 2021 WL 10282213 at *2, 5-6 (N.D.
16 Cal. Nov. 14, 2021) (compelling Facebook to produce CEO and COO custodial files).

17 Courts routinely grant requests to add corporate officers and directors (including
18 CEOs) as document custodians if they are likely to possess relevant documents.³ The
19 Court should likewise do so here.

20 **B. Channels, Boussuge, Johnson, and Blasi Also Possess Unique,**
21 **Relevant Documents.**

22 The Bank has no justification for refusing to produce the documents of Channels,

23 ³ *See, e.g., id.*; *Blankenship v. Fox News Network, LLC*, No. 19-cv-00236, 2021 WL
24 2345972, at *3-5 (S.D. W. Va. June 8, 2021) (upholding magistrate judge order
25 compelling discovery from six senior executives, in addition to 16 other executives or
26 directors); *Shenwick v. Twitter, Inc.*, No. 16-cv-05314-JST (SK), 2018 WL 833085, at
27 *1 (N.D. Cal. Feb. 7, 2018) (compelling CEO custodial files); *In re Envision*
28 *Healthcare Corp.*, No. 17-cv-01112, 2020 WL 6750397, at *4 (M.D. Tenn. Nov. 16,
2020) (adding senior executives); *In re EpiPen*, No. 17-md-2785-DDC-TJJ, 2018 WL
1440923, at *3-4 (D. Kan. Mar. 15, 2018) (adding former CEOs); *MariCal, Inc. v.*
Cooke Aquaculture, Inc., No. 14-cv-00366-JDL, 2016 WL 9459260, at *2-3 (D. Me.
Aug. 9, 2016) (adding CEO); *Dyson, Inc. v. Sharkninja Op’g LLC*, No. 14-cv-0779,
2016 WL 1613489, at *1 (N.D. Ill. Apr. 22, 2016) (ordering company to produce
emails of its “global leader”).

1 Boussuge, and Johnson, each of whom the Bank previously conceded are “most likely
2 to possess non-duplicative, relevant ESI pertaining to the issues remaining in the case,”
3 Ex. 22, and designated in its interrogatory responses as among those “
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C. Adding the Requested Custodians Is Proportional to the Needs of the Case and Not Unduly Burdensome.

Adding the requested custodians is also proportional to the needs of the case, “considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1); see *Oracle Am., Inc. v. Google Inc.*, 2015 WL 7775243, *1 (N.D. Cal. Dec. 3, 2015). Each of these factors weighs in Plaintiffs’ favor.

First, the issues at stake are of paramount importance. The class comprises over

1 100,000 vulnerable Californians who were deprived of their unemployment insurance
2 benefits during the height of the pandemic as a result of the Bank's policies and
3 procedures, in violation of their federal and state constitutional, statutory, and common
4 law rights. The requested damages are in the hundreds of millions of dollars, even after
5 offsetting the amounts the Bank paid pursuant to the June 2021 preliminary injunction
6 and July 2022 CFPB/OCC Consent Order.

7 Second, the requested discovery is critical to the disputed issues, including the
8 Bank's reasons for implementing its Claim Fraud Filter and its knowledge of the impact
9 of these policies on innocent cardholders—issues that directly bear on
10 unreasonableness and willfulness and thus on treble and punitive damages.

11 Third, the Bank is well-resourced. In 2022, the Bank reported over \$94 billion
12 in revenue and \$3 trillion in consolidated assets, and its CEO's compensation topped
13 \$30 million. Chan Decl. ¶¶38-39.

14 Finally, only the Bank has access to these documents, and the burden of "having
15 to produce relevant emails is low." *Dyson, Inc.*, 2016 WL 1613489, at *2. The Bank's
16 assertion of burden is not credible, particularly given that (1) the Bank agreed to 24
17 Round 1 custodians but has so far only reviewed and produced documents for 20, and
18 (2) in the parties' Round 2 negotiations, the Bank itself offered to add eight new
19 custodians. There is no plausible burden-based argument for refusing to include
20 Moynihan, Montag, Bessant, and Athanasia along with the other four custodians the
21 Bank offered, as the Bank faces no greater burden in collecting and reviewing the
22 documents of senior executives than of mid-level managers.

23 CONCLUSION

24 For the foregoing reasons, Plaintiffs respectfully request that the Court compel
25 the Bank to add the eight requested additional ESI custodians, and alternatively request
26 that the Court at minimum adopt its tentative ruling from the January 3 IDC compelling
27 the Bank to add three senior executive custodians of Plaintiffs' choosing.
28

1 Dated: January 23, 2024

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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, Connie K. Chan, 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/ Connie K. Chan

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