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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 3:21-md-02992-LAB-MSB **DECLARATION OF CONNIE K. CHAN IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL ADDITIONAL ESI CUSTODIANS**
This Document Relates to All Actions	Judge: Hon. Larry Alan Burns

DECLARATION OF CONNIE K. CHAN

I, Connie K. Chan, hereby declare as follows:

1. I am a partner at the law firm of Altshuler Berzon LLP, co-lead counsel for Plaintiffs and the putative class in this action. I submit this declaration in support of Plaintiffs' Motion to Compel Additional ESI Custodians. I have personal knowledge of the facts set forth in this declaration and if called as a witness in this action, I could and would testify competently to these facts.

2. An **Index of Exhibits** to this declaration is attached to this declaration.

3. Attached hereto as **Exhibit 1** is a true and correct copy of a document produced by Defendant Bank of America ("Defendant" or the "Bank") in this action Bates-stamped BANA_EDD_MDL-00106092-94.

4. Attached hereto as **Exhibit 2** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00106573.

5. Attached hereto as **Exhibit 3** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00118366.

6. Attached hereto as **Exhibit 4** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00118379-81.

7. Attached hereto as **Exhibit 5** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00141860.

8. Attached hereto as **Exhibit 6** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00188970-72.

9. Attached hereto as **Exhibit 7** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00293818-21.

10. Attached hereto as **Exhibit 8** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00376191-201.

11. Attached hereto as **Exhibit 9** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00389408-09.

12. Attached hereto as **Exhibit 10** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00516000.

13. Attached hereto as **Exhibit 11** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00516010-11.

14. Attached hereto as **Exhibit 12** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00516058.

15. Attached hereto as **Exhibit 13** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00571044.

16. Attached hereto as **Exhibit 14** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00171972-73.

17. Attached hereto as **Exhibit 15** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00105556.

18. Attached hereto as **Exhibit 16** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00090683-86.

19. Attached hereto as **Exhibit 17** is a true and correct copy of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00018423-28.

20. Attached hereto as **Exhibit 18** is a true and correct copy of Bank of America's Responses and Objections to Plaintiffs' Interrogatories 11-13, and Verification.

21. Attached hereto as **Exhibit 19** is a true and correct copy of a production cover letter from the Bank's counsel dated October 20, 2023, describing the documents Bates-stamped BANA_EDD_MDL-00057837–78.

22. Attached hereto as **Exhibit 20** is a true and correct copy of excerpts of a document produced by Defendant Bates-stamped BANA_EDD_MDL-00057837–78.

23. Attached hereto as **Exhibit 21** is a true and correct copy of Defendant's Responses and Objections to Plaintiffs' Requests for Production of Documents (Set

Three), RFPs 76-79, which Plaintiffs served August 15, 2023 and which seek communications and other documents exchanged "with or among any of your executive officers," or with the Bank's Board, regarding enumerated topics relevant to the issues in this case.

24. Since the Court's order on the Bank's motion to dismiss Plaintiffs' Master Consolidated Class Action Complaint, Plaintiffs have been diligently pursuing discovery and seeking to obtain documents from the Bank's relevant ESI custodians.

25. Plaintiffs served their Second Set of Requests for Production of Documents on June 12, 2023. The parties entered into a Stipulated Discovery & Search Protocol ("ESI Protocol"), dated June 16, 2023. Among other things, Section E.1(a) of the ESI Protocol provides that, "[w]ithin 45 days of stipulating to the ESI Protocol, the Parties agree to exchange in writing … [a] list of custodians (including current and former executives, employees, and any other individuals) likely to have relevant information, including job title and a brief description of job responsibilities for each individual …." The ESI Protocol further provides that "[t]he parties shall meet and confer regarding the list of custodians. The receiving party reserves the right to request additional custodians after reviewing documents produced."

26. On July 31, 2023, the parties exchanged ESI disclosures pursuant to the ESI Protocol. In the Bank's ESI disclosures, the Bank identified two service e-mail boxes and only five individual custodians: Robert Chestnut, Sabrina Clark, Kevin Condon, Dawn Haddock, and John Lawlor. The Bank described all five of these individuals as having documents relevant to the Bank's contract and communications with EDD.

27. The parties met and conferred on August 3, 2023 regarding, *inter alia*, the Bank's ESI disclosures, during which Plaintiffs explained why the Bank's ESI Disclosures were deficient and proposed additional custodians. Plaintiffs' counsel

sent a letter on August 4 memorializing the parties' discussion regarding ESI custodians. In that letter, Plaintiffs again identified additional custodian and reiterated the Bank's obligation under FRCP 26(a) and the ESI Protocol to identify custodians relating to the following five general categories of topics relevant to this litigation: (1) "the Bank's negotiation and servicing of the EDD-Bank Contract, and communications with EDD"; (2) "EDD debit card and account security (including the lack of an EMV chip and decisions around adding EMV chips, risk of skimming and transaction fraud, risk of data security breaches (including by employee and third-party vendor breaches), etc.)"; (3) the Bank's policies and practices for handling EFTA claims made by EDD debit card and account holders, including development and application of the 'Claim Fraud Filter'"; (4) "the Bank's policies and practices for freezing and blocking EDD debit cardholders' accounts, including development and application of the 'Claim Fraud Filter'"; and (5) "customer service for EDD debit card and account holders …." Plaintiffs proposed adding: (a) 12 individuals listed in the Bank's Rule 26(a) initial disclosures (Faiz Ahmad, William Fox, Michael Letson, Jennifer Ehresman, William Golden, Melissa Gargagliano, Shane Daniels, Holly O'Neill, Paul Simpson, Brad Garfield, Katie Smith, and Doris Dixon); (b) five individuals likely to have information related to the Bank's EDD contract based on publicly available information (Brian Putler, Jim Hackett, Jonathan Millard, Brian Grech, and Louise Hennessy); (c) CEO Brian T. Moynihan and Thomas M. Scrivener, based on their roles as signatories to the OCC Consent Order and CFPB Stipulation, respectively; and (d) all other Bank Board Members, based on their role as signatories to the OCC Consent Order.

28. On August 7, 2023, the Bank responded to Plaintiffs' August 4 letter, agreeing "to collect and search the remaining 12 individuals identified in BANA's Initial Disclosures and the five individuals that Plaintiffs assert have information related to the EDD-Bank Contract …." The Bank objected to Plaintiffs' request to

include any officers, directors, or board members as custodians, including based on its assertion that "none of those individuals are likely to have relevant, non-privileged communications …."

29. On August 10, 2023, Plaintiffs proposed another 15 potential custodians (for all RFPs) and an additional seven custodians for issue-specific RFPs, based on Plaintiffs' review of the limited documents produced by the Bank as of that time. Plaintiffs also served RFPs (Set Three, RFPs 80-81) seeking the Bank's relevant organizational charts. During the parties' August 18 meet-and-confer, and as memorialized in the Bank's letter dated August 23, the Bank agreed to add two of the proposed custodians (William Martin and Louise Nail), bringing the total number of agreed-upon custodians to 24. The Bank agreed that both Martin and Nail "are likely to possess responsive, relevant, non-duplicative documents," yet neither had been disclosed in either the Bank's Rule 26(a) initial disclosures or the Bank's July 31 ESI disclosures. This reinforced Plaintiffs' concerns that the Bank was not disclosing all relevant ESI custodians. The parties agreed to defer further negotiation of additional "Round 2" ESI custodians until after the Bank satisfactorily produced the relevant org charts.

30. Plaintiffs requested an Informal Discovery Conference (IDC) regarding the Bank's refusal to include *any* senior executives as ESI custodians, which Magistrate Judge Berg conducted on September 7, 2023. Although the Court was not inclined at the September 7, 2023 IDC to compel the Bank to add high-level executives as ESI custodians at that time given the early state of discovery, the Court stated it would reconsider Plaintiffs' request at a later time if documents obtained from lower-level custodians showed that executives were likely to have relevant information. In the interest of moving the ESI production process forward, particularly given the compressed discovery schedule in the case, Plaintiffs elected not to request formal briefing on the matter at that time, agreeing instead to proceed

with negotiating search terms for the 24 agreed-upon "Round 1" custodians while reserving their right to renew their request to compel executive ESI custodians after having an opportunity to review the "Round 1" documents.

31. Other disputes regarding search terms delayed the Bank's production of ESI from the 24 agreed-upon custodians. Accordingly, in an effort to jump start the production of ESI, Plaintiffs on or about September 22, 2023 offered to remove four custodians (Jim Hackett, Jonathan Millard, Louise Hennessy, and Kevin Condon) from the list of "Round 1" custodians, and to instead discuss them along with other potential additional custodians during the parties' "Round 2" negotiations.

32. The Bank subsequently produced documents from the remaining 20 "Round 1" custodians. To date, the Bank has produced approximately 200,000 documents total, the overwhelming majority of which were produced between October 23 and December 4, 2023.

33. After having an opportunity to begin reviewing the Bank's production, Plaintiffs requested to meet and confer about (1) the Bank's responses to Plaintiffs' RFPs 76-79 (seeking executive communications) and (2) additional "Round 2" custodians for RFPs Sets Two and Three. In a letter dated November 29, 2023, Plaintiffs' counsel requested that the Bank produce documents from eight executives (Brian Moynihan, Thomas Montag, Catherine Bessant, Dean Athanasia, Christine Channels, Geoffrey Greener, Paul Donofrio, and Thomas Scrivener), citing specific bases for their request. In that same letter, Plaintiffs also proposed 17 additional ESI custodians, narrowly tailored to topic-specific RFPs (eight relating to development of the Claim Fraud Filter, three relating to claims processing, three relating to card security, and four relating to call centers).

34. On December 8, 2023, the Bank's counsel provided its counterproposal for additional ESI collection, identifying Christine Channels, Jennifer Boussuge, Renee Johnson, and Scott Robbins as custodians "most likely to possess non-

duplicative, relevant ESI pertaining to the issues remaining in the case." A true and correct copy of the Bank's counsel's December 8 e-mail is attached hereto as **Exhibit 22.**

35. After the parties further met and conferred, the Bank sent a "revised counterproposal for additional ESI collection" on December 15, 2023, this time proposing eight total additional custodians (including Rocco Blasi). A true and correct copy of the Bank's counsel's December 15 e-mail is attached hereto as **Exhibit 23.**

36. On December 22, 2023, Plaintiffs' counsel sent a counterproposal to the Bank's revised counterproposal, agreeing to limit their request to only eight additional custodians and agreeing to four of the Bank's offered custodians, while proposing to exchange the other four lower-level custodians (Anne Holt, Ruchira Ghosh, John Denning, and Scott Robbins) for four executive custodians (Brian Moynihan, Thomas Montag, Catherine Bessant, and Dean Athanasia).

37. On December 29, 2023, the Bank rejected Plaintiffs' December 22 compromise proposal. The parties submitted informal letter briefs to Magistrate Judge Berg, who conducted an IDC on January 23, 2024 and tentatively ruled that the Bank should be ordered to add three executive custodians of the Plaintiffs' choosing.

38. The Bank reported over $94 billion in annual revenue and over $3 trillion in consolidated assets in its Form 10-K for the fiscal year ended December 31, 2022, pages 28 and 33, available at https://investor.bankofamerica.com/regulatory-and-other-filings/annual-reports/content/0001140361-23-013653/0001140361-23-013653.pdf.

39. The Bank reported that its CEO's compensation was more than $30 million in 2022, according to the Bank's 2023 Proxy Statement, page 68, available at https://investor.bankofamerica.com/2023-proxy-statement.

I declare under penalty of perjury that that the foregoing is true and correct. Executed this 23rd day of January, 2024 in Burlingame, California.

/s/ Connie K. Chan
Connie K. Chan