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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

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL ADDITIONAL ESI CUSTODIANS

Date: N/A, per Dkt. 205
Time: N/A, per Dkt. 205
Ctrm: 2C
Judge: Hon. Michael S. Berg

Plaintiffs' opening brief (Dkt. 212, "Pls. Br.") fails to show that additional ESI discovery is necessary or proportionate to the needs of this case. Their effort to compel ESI discovery from BANA's top executives is pure harassment, and they do not even try to argue that the non-executive custodians have unique documents compared to what they already have. Plaintiffs' motion should be denied.

Plaintiffs fail to show that the top executives were decision-makers on key issues. Plaintiffs concede that in order to justify collection of executive emails, they must show that the executives were "key decision-makers" regarding issues "at the core of Plaintiffs' claims." Pls. Br. 3-4. But despite Plaintiffs' bald assertion that "senior leaders were necessarily involved in directing this work," none of the documents they attach actually "confirm" this conclusion. *Id.* at 3. Instead, the documents unsurprisingly show that BANA's top executives received updates and briefings on the EDD program and the unprecedented fraud it was generating. It is hardly surprising that top executives were informed of unexpected and dramatic challenges facing the program. But receiving information about emerging challenges and the strategies being implemented to address them is not the same as being a "key" decision-maker on the details at the core of Plaintiffs' claims: when and how to rely on indicia of fraud in decisioning claims, implementation of EMV chip options, and demand-driven customer service issues. Executives are not decision-makers simply because they were made aware of others' decisions, and Plaintiffs' contention to the contrary is neither supported by any case law, nor how businesses work.[1]

The first 13 exhibits attached to Plaintiffs' brief are the same 13 documents attached to their IDC Letter, for which Plaintiffs make the same arguments that they

[1] The top executives are not "responsible for" relevant groups. *Contra* Pls. Br. 3, n.2. Plaintiffs' only support for this statement is the organizational charts (**Ex. 20**) that were created *for this case* and—*at Plaintiffs' request*—included reporting lines for the head of each group to the top executives. The organizational charts further show that *Plaintiffs already have* ESI from several executives who were responsible (not just "mid-level managers," *contra id.* 7). *Existing custodians* O'Neill, Ahmad, Lawlor, Daniels, Ehresman, Fox, Gargagliano and Golden were responsible for their respective groups, and each have the term "Head" or "Executive" in their titles.

made in connection with the IDC, and which were addressed in BANA's opening brief (Dkt. 209, "Def. Br."). As BANA explained, Plaintiffs only suggest that 3 of the 13 IDC documents are even relevant to decision-making, and those suggestions do not survive the first confrontation with the actual documents. Def. Br. 5. And Plaintiffs' remaining IDC documents show only executive *awareness*, which is not the standard Plaintiffs must meet. *Id.* at 5-6. The new documents do not help. Plaintiffs cite **Ex. 14** to "show[] Montag sought analyses on prepaid fraud losses," and **Ex. 15** to show Moynihan "received numerous emails from impacted EDD cardholders." Pls. Br. 4. But they make no argument for how these documents show anything more than awareness, which they concede is not enough.

Plaintiffs say that "Courts routinely grant requests" for executive documents. Pls. Br. 5, and n.3. But the cases Plaintiffs cite apply the *decision-maker on key issues* standard that Plaintiffs cannot satisfy here.[2]

Plaintiffs make no attempt to show that the non-executives possess unique documents. Plaintiffs' only argument for non-executives Boussuge, Johnson, and Blasi[3] is that BANA "previously conceded" they are "most likely to possess non-duplicative, relevant ESI." Pls. Br. 6. Plaintiffs mislead: BANA never "conceded" that these custodians possess unique, relevant documents but rather offered them as a compromise because they were among the "most likely" of the additional

[2] *See, e.g.*, *In re Envision Healthcare Corp.*, 2020 WL 6750397, at *3-4 (M.D. Tenn. Nov. 16, 2020) (executives were *decision-makers*, played *active roles* in allegations, or made public statements regarding same); *In re EpiPen*, 2018 WL 1440923, at *3-4 (D. Kan. Mar. 15, 2018) (executives were "involved in discussions *and decisions* regarding [relevant] price increases" and "part of a small team *making decisions* about [relevant] product launch"); *MariCal, Inc. v. Cooke Aquaculture, Inc.*, 2016 WL 9459260, at *2 (D. Me. Aug. 9, 2016) (CEO made *decisions* to license patents at issue and made public statements regarding same); *Dyson, Inc. v. Skarkninja Opg LLC*, 2016 WL 1613489, at *2 (N.D. Ill. Apr. 22, 2016) (executive was "the named inventor on the patents in this case"). Plaintiffs' remaining cases are inapposite. *Shenwick v. Twitter, Inc.* is a securities class action in which the executive *personally* made the corrective public disclosures. 2018 WL 833085, at *1 (N.D. Cal. Feb. 7, 2018). And in *Blankenship v. Fox News Network, LLC*, the "intertwining relationship between" the executives and "high-ranking Republican officials" was *itself* key to the allegations in the case. 2021 WL 2345972, at *2-5 (S.D. W.Va. June 8, 2021).

[3] BANA does not object to adding Channels as an ESI custodian. *See* Def. Br. 3, n.2.

custodians being demanded (i.e., *more likely* than the top executives Plaintiffs still demand) to have such materials. BANA made this compromise offer to avoid burdening the Court, to curtail Plaintiffs' effort to harass BANA's top executives, and before BANA understood that ESI costs already exceed $4.5 million. *See* McGarry Decl., Dkt. 209-1, ¶ 9; Anderson Decl., Dkt. 209-2, ¶ 6. Now, none of the benefits BANA hoped to gain with its compromise remain viable, so BANA maintains its original position that Plaintiffs have all the ESI they are entitled to.

Plaintiffs' documents underscore that ESI from Boussuge, Johnson, and Blasi is highly likely to be duplicative. The organizational charts (**Ex. 20**) show that Plaintiffs already have ESI from Boussuge's direct supervisor (Simpson) and two other "leaders" from her department (Gargagliano, Martin), from Johnson's direct supervisor (Ehresman) and two others from her departments (Daniels, Nail), and from Blasi's supervisors (Garfield and Smith). Indeed, Plaintiffs' say they need these documents for issues that are already covered by at least 9 custodians on the fraud filter (Boussuge) and at least 4 custodians on claims processing (Johnson) and customer service (Blasi). Plaintiffs make no argument that the ESI from these three is likely to be different.

Plaintiffs' assessment of the Rule 26(b)(1) factors is wrong. Plaintiffs say each of the Rule 26(b)(1) proportionality factors "weighs in Plaintiffs favor." Pls. Br. 6. Not so. Plaintiffs cite *nothing* to support their claim that the ESI they seek is "critical" to key issues such as "the Bank's reasons for implementing [the fraud filter] and its knowledge of [its] impact . . . on innocent cardholders" (*id.* at 7), because it is not. Plaintiffs cite no document showing that the requested custodians (executive or not) have information that would bear on the "reasons" for the fraud filter or "knowledge of [its] impact," and none of the documents contains more than a passing reference to the fraud filter. Plaintiffs downplay the millions BANA has spent on ESI already, but they have not shown why they need more.

CONCLUSION

For the foregoing reasons, BANA respectfully requests that the Court deny Plaintiffs' motion to compel additional ESI custodians.

Dated: January 30, 2024 Respectfully submitted,

By: *s/ James W. McGarry*

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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 January 30, 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 30, 2024 *s/ James W. McGarry*