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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' OPPOSITION TO
DEFENDANT'S MOTION TO
PRECLUDE ADDITIONAL ESI
DISCOVERY

21 This Document Relates to All Actions

Judge: Hon. Larry Alan Burns

1 The Bank fails to justify its refusal to search the eight key witnesses' ESI.

2 **First**, as to burden, the Bank admits it “offered eight additional ESI custodians”
3 to Plaintiffs (McGarry Decl. ¶9) and that its incremental per-custodian cost is the same
4 for executives and non-executives (Anderson Decl. ¶9). Adding executives Moynihan,
5 Bessant, Athanasia, Montag, and Channels, each of whom has relevant documents (*see*
6 Exs. 1-15), will cost the Bank no more than adding any other five custodians.

7 **Second**, each of the requested custodians has relevant and *unique* knowledge
8 about the issues—especially CEO Moynihan, who personally prepared memos and
9 presented on key issues at closed-door Board meetings. Exs. 1, 10-12. The Bank
10 responds by inventing a “key decision maker” standard, but the law is clear that an
11 executive’s documents are subject to ESI review if the executive has “uniquely relevant
12 information that is not available from the sources already designated.” *In re Facebook,*
13 *Inc. Consumer Privacy User Profile Litig.*, 2021 WL 10282213, at *1 (N.D. Cal. Nov.
14 14, 2021); *see also Blackberry Ltd. v. Facebook, Inc.*, 2019 WL 4544425, at *5-6 (C.D.
15 Cal. Aug. 19, 2019) (considering only whether custodian “has ‘unique or personal
16 knowledge of the subject matter’”); Fed. R. Civ. P. 26(b)(1).¹ Even under the Bank’s
17 test, Plaintiffs should prevail based on evidence indicating that Moynihan personally
18 authorized freezing 46,000 cards the very day the Bank deployed its Fraud Filter
19 strategy (Ex. 7),² and that Moynihan, Bessant, Athanasia, and other executives directed
20 changes to the Bank’s claims-processing procedures specifically to avoid paying
21 EFTA-required provisional credit (Exs. 4, 13). Those and other documents show that
22 top Bank executives were not merely aware of but were *driving* the key issues.³ And

23 ¹ The so-called “apex doctrine,” which applies to potentially disruptive *depositions*,
24 does not shield executives “from merely collecting and producing documents.”
25 *Blankenship v. Fox News Network LLC*, 2021 WL 2345972, *3 n.5 (S.D. W. Va. June
26 8, 2021); *accord Rosinbaum v. Flower Foods, Inc.*, 238 F.Supp.3d 738, 749 (E.D.N.C.
27 2017) (“apex doctrine” does not “shield an executive from a request for production”).

28 ² Notably, the Bank neither denies that Moynihan is the “Brian” who authorized those
freezes nor identifies any other “Brian” to whom the email may have been referring.

³ The evidence here is thus a far cry from *Blackberry*, in which plaintiff conceded the
CEO was “far afield” from the issues and relied solely on an editorial by the CEO
that showed no personal knowledge of the patent at issue. 2019 WL 4544425, at *7.

1 because those executives often communicated *only* with one another (*see, e.g.*, Exs. 1,
2 3), their documents are unique and cannot be obtained through other sources. *See In re*
3 *Facebook*, 2021 WL 10282213, at *2.⁴

4 **Third**, the requested documents are critical and will help resolve this case, at
5 trial or otherwise, if they confirm—as Plaintiffs have shown is likely (*see* Exs. 7, 11,
6 12, 15, 16)—that these executives *authorized the Fraud Filter’s continued use despite*
7 *knowing* it was wrongfully depriving tens of thousands of innocent Californians of
8 critical UI funds for weeks and months on end. That would establish the Bank’s
9 knowledge and willfulness and thus Plaintiffs’ entitlement to treble damages under
10 EFTA, as well as punitive damages. *See* 15 U.S.C. §1693f(e) (treble damages available
11 if no “good faith investigation,” if no “reasonable basis” for denying claim, or if
12 violations were “knowing[] and willful[]”); *Dang v. Cross*, 422 F.3d 800, 808-09 (9th
13 Cir. 2005) (punitive damages if defendant acted with malice, oppression, gross
14 negligence, willful or wanton misconduct, or in reckless disregard of plaintiffs’ rights).
15 Likewise, if those documents confirm—as Plaintiffs have shown is likely (*see* Exs. 3,
16 4, 11, 13, 14)—that top executives directed development of the Fraud Filter strategy *to*
17 *protect the Bank at the expense of innocent cardholders*, that would support Plaintiffs’
18 claims for breach of fiduciary duty, breach of the implied covenant, and treble and
19 punitive damages. Discovery into what executives knew about the Fraud Filter and its
20 impacts, when they knew it, and what actions they directed, authorized, or ratified is
21 critical to resolving these key issues, and Plaintiffs are entitled to it under Rule 26.

22 **Fourth**, the scope of discovery to date is nothing unusual for an MDL class
23 action of this complexity and scope. *See* Schoen Decl. ¶6.⁵ Plaintiffs’ search terms were

24 ⁴ While the Bank is of course right that the documents cited by Plaintiffs were
25 obtained from existing custodians, the point is that those documents show why the
26 requested custodians will undoubtedly have highly material, non-duplicative
27 documents. *See Shenwick v. Twitter*, 2018 WL 833085, at *1 (N.D. Cal. Feb. 7, 2018).
Because the Bank will not need to re-review any duplicate documents, its per-
custodian cost estimate is likely inflated. Decl. of Jaclyn Schoen ¶8.

28 ⁵ Nor is there anything improper about Plaintiffs’ interrogatories asking the Bank to
identify which documents it may rely upon in defending its use of the Fraud Filter.

1 not overbroad, yielding a reasonable hit rate by industry standards, and the Bank could
2 have reduced costs by choosing more efficient and cost-effective review methods. *Id.*
3 ¶¶3-5.⁶ Plaintiffs also reasonably limited the requested documents to a two-year period.
4 That the Bank had to hire more contract attorneys and expedite review to meet the
5 December 4 deadline is a problem of the Bank’s own making. Plaintiffs served their
6 RFPs on June 12. Had the Bank properly disclosed all relevant ESI custodians in its
7 July 31 disclosures, it could have begun collecting and reviewing documents in August
8 rather than waiting until October. *See* Chan Decl. ¶¶25-32; McGarry Decl. ¶5.

9 **Finally**, the requested discovery is proportional given the importance of issues
10 and the amount in controversy, notwithstanding the Bank’s attempt to downplay the
11 enormous harm it caused. The Bank used its Fraud Filter to automatically deny claims
12 and freeze or block accounts, depriving over 100,000 innocent Californians of access
13 to *hundreds of millions of dollars* in UI and disability benefits.⁷ The reason the Bank
14 stopped using the Fraud Filter after “approximately 9 months” (Bank Br. 2) was
15 because on June 1, 2021, a federal court issued a *preliminary injunction* enjoining the
16 Bank’s practices, based on Plaintiffs’ “strong likelihood of success” and showing of
17 irreparable harm. The CFPB and OCC then imposed on the Bank a *\$225 million fine*
18 for its misconduct. Plaintiffs and class members seek to recover treble and punitive
19 damages that the regulators were not statutorily authorized to pursue.⁸

20 For these reasons, Plaintiffs respectfully request that the Court deny the Bank’s
21 motion and compel the Bank to add the eight additional ESI custodians (executives
22 Moynihan, Bessant, Athanasia, Montag, and Channels, plus non-executives Boussuge,
23 Johnson, and Blasi) or, at minimum, adopt its tentative ruling compelling the Bank to
24 add three executive custodians of Plaintiffs’ choosing.

25
26 ⁶ In any event, Plaintiffs have already agreed to meet and confer with the Bank to
27 negotiate a narrower set of search terms for the eight requested custodians.

28 ⁷ [See https://www.consumerfinance.gov/enforcement/actions/bank-of-america-na-2/](https://www.consumerfinance.gov/enforcement/actions/bank-of-america-na-2/).

⁸ *See* 12 U.S.C. §5565(a)(3), 15 U.S.C. §1693o(a)(5) (authorizing CFPB to recover
restitution and civil money penalties but not exemplary or punitive damages).

1 Dated: January 30, 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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