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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-GPC-MSB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' OBJECTIONS TO AND MOTION TO REVERSE IN PART MAGISTRATE JUDGE'S APRIL 24, 2024 DISCOVERY ORDER [ECF 268]

Judge: Hon. Gonzalo P. Curiel
Date: July 19, 2024
Time: 1:30 PM
Ctrm: 2D (floor)

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I. INTRODUCTION

These coordinated MDL proceedings challenge unlawful policies and practices that Defendant Bank of America, N.A. ("BANA" or the "Bank") implemented at the height of the Covid pandemic in 2020-2021 to protect *itself* from financial losses at the expense of some of its most vulnerable customers—Californians who received unemployment and other public benefits from California's Employment Development Department ("EDD") through Bank-issued "EDD debit cards." The proposed class consists of more than 100,000 of these public benefits recipients whom the Bank deprived of their benefits, often for months on end, in violation of their constitutional, statutory, and common law rights. Because Plaintiffs seek *inter alia* punitive damages and treble damages under the Electronic Fund Transfers Act, 15 U.S.C. §1693 *et seq.*("EFTA"), issues about the Bank's knowledge, motive, and intent in adopting its challenged policies are central to the case. Documents showing what the Bank's senior executives knew, when they knew it, and what policies they personally directed or authorized are critical for proving those claims.

Despite the breadth and complexity of this case and the importance of the issues, the Bank originally proposed only five ESI custodians. The Bank eventually agreed to an initial set of 24 ESI custodians (which the parties later reduced to 20 to expedite review and production) and to negotiate additional custodians after the initial production. But after that initial production (half of which did not occur until early December 2023), the Bank refused to add any more ESI custodians *unless Plaintiffs would agree to forego seeking documents from any of its senior executives*, in which case the Bank would agree to add eight more custodians.

Plaintiffs agreed to a limit of eight more ESI custodians (thus eliminating the Bank's purported burden concerns). But because the Bank refused to search ESI of any senior executive, Plaintiffs moved Judge Berg to compel the Bank to produce ESI from eight designated custodians, including four senior executives Plaintiffs had reason to believe were directly involved in directing development of and authorizing the policies and practices at issue: Brian Moynihan (CEO), Thomas Montag (until December 2021, COO and President of Global Banking and Markets ("GBAM"), the division responsible for the EDD debit card program and for creating the Claim Fraud Filter ("CFF") policy that Plaintiffs challenge), Catherine Bessant (Chief Operations and Technology Officer until 2021), and Dean Athanasia (President of Regional Banking). Plaintiffs supported their motion with documents showing that these executives were key decision-makers who determined priorities, gave directives, approved major decisions about the Bank's management of its EDD debit card program, and often communicated only among themselves. Because Plaintiffs filed their motion to compel before they could review all 194,000 documents the Bank produced from late October to early December 2023, Plaintiffs have since uncovered additional documents and testimony making even clearer that Moynihan and Montag in particular were driving forces behind the development and approval of the CFF policies at the core of Plaintiffs' claims, including those for treble and punitive damages. *See* Supp. Decl. of Connie K. Chan ("Supp. Decl.") ¶24 & Exs. 24-35.[1]

Despite Plaintiffs' strong showing that Moynihan and Montag were key decision-makers likely to have highly relevant, non-duplicative documents and that including them among the eight additional custodians was proportional to the needs of the case, Judge Berg denied Plaintiffs' request to include them, applying the equivalent

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[1] On February 20, 2024, Plaintiffs sought leave from Judge Berg to submit some of that newly identified evidence to supplement their motion, which he denied on the ground that briefing had closed. Supp. Decl. of Connie K. ("Supp. Decl.") ¶15, Ex. 37. However, "[a] 'district court has discretion … to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation.'" *Sundby v. Marquee Funding Grp., Inc.*, No. 19-cv-00390-GPC-AHG, 2020 WL 1674417, at *2 (S.D. Cal. Apr. 6, 2020) (quoting *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000)); *see, e.g.*, *United States v. Caro*, 461 F.Supp.2d 478, 480-81 (W.D. Va. 2006) (considering supplemental declarations and sustaining objections to a magistrate judge discovery order), *aff'd*, 597 F.3d 608 (4th Cir. 2010); *Perkins v. Suzuki Motor Corp.*, No. 1:18-cv-00893-DDD-GPG, 2021 WL 5629067, at *8 (D. Colo. Feb. 19, 2021) (electing "to exercise its discretion to consider new evidence" rather than remanding to the magistrate judge to consider, "in the interests of justice and efficiency").

of the "apex doctrine" standard that governs the *deposition* of high-level executives. *See* ECF 268 ("Discovery Order") at 7-9. But the apex doctrine does not apply to requests for electronic document collection, a far-less burdensome process. Even if the apex doctrine did apply, Plaintiffs easily satisfy that standard, as the record shows that Moynihan and Montag were key decision-makers with direct and contemporaneous knowledge of the Bank's CFF policy, and who are highly likely to have unique documents not in the possession of any existing custodians.

Because the Discovery Order applied the wrong legal standard and failed to consider proportionality under Rule 26(b)(1), it is contrary to law and must be reversed in relevant part. For the reasons stated below, the Court should modify the Discovery Order to compel the Bank to produce Moynihan and Montag's ESI responsive to RFPs 76-79, or alternatively, remand this matter to Judge Berg for reconsideration under the correct legal standard and in light of Plaintiffs' subsequently identified evidence.

II. BACKGROUND[2]

From 2011 until this year, Bank of America had an exclusive contract with EDD to distribute unemployment insurance ("UI"), disability insurance, and paid family leave benefits to millions of Californians through Bank-issued prepaid debit cards ("EDD debit cards") linked to an individual Bank account ("EDD debit card account"). Although the Bank has for years issued its *commercial* customers debit cards with an industry-standard "EMV chip," which encrypts card data and prevents cards from being easily counterfeited, BANA chose not to include EMV chips in EDD debit cards, instead issuing EDD cardholders outdated and unencrypted "magnetic stripe"-only cards, which are notoriously easy to "skim" and clone and thus highly susceptible to unauthorized transactions.[3]

[2] Because this is the first substantive motion filed since these MDL proceedings were reassigned, Plaintiffs include some case background and procedural history to place the current discovery dispute in context.

[3] Criminals insert "skimming" devices into payment terminals and ATMs to capture the unencrypted card information stored on the magnetic stripe that is transmitted to

In mid-2020, amid the surge in the number of UI recipients, a wave of transaction fraud not surprisingly hit these vulnerable EDD debit cards and accounts. Thousands of EDD debit cardholders discovered—often when trying to use their card to buy groceries or other basic necessities—that their UI funds had been drained from their accounts, often through unauthorized ATM withdrawals. Thousands of EDD cardholders began reporting these unauthorized transactions to the Bank, triggering the Bank's obligations under EFTA and its implementing regulation, Regulation E, to: (1) investigate the disputed transactions by reviewing available evidence in its records, such as ATM footage and the cardholders' transaction history, (2) complete its investigation or issue provisional credit to the affected account within 10 business days, and (3) issue permanent credit to the account within 45 days unless the Bank's evidence showed that the cardholder had actually authorized or benefitted from the transaction. *See* 15 U.S.C. §§1693f, 1693g (burden of proof on bank to show transaction was authorized); 12 C.F.R. §1005.11 (Regulation E error resolution procedures); CFPB Official Interpretation of 12 C.F.R. §1005.11(c)(4) (bank "must review any relevant information within the institution's own records" and "within the control of the institution's third-party service providers").

Instead of complying with its legal obligations, the Bank implemented a policy that resulted in the systemic denial without investigation of the claims of more than 100,000 unemployed Californians, depriving them of more than $200 million in UI and other public benefits to which they were entitled, and upon which many of them depended for food, medicine, and other basic life necessities. Beginning September 28, 2020, the Bank abandoned its longstanding prior policies and procedures for conducting EFTA-compliant claims investigations and adopted a new policy of first

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the terminal when the card is swiped, which can then be used to make a counterfeit copy of the card with relative ease. Criminals use skimming devices in conjunction with virtually undetectable PIN hole cameras or PIN pad overlays to capture the cardholder's entry of their PIN number into the terminal when the card is used.

running every EDD cardholder's claim through a newly created tool, the "Claim Fraud Filter." For every claim that met one of the CFF's three "indicators"—which included every claim of an unauthorized [redacted]—the Bank automatically denied the claim without any human review or investigation (referred to internally as a "[redacted]" Supp. Decl. Ex. 36).

The Bank used the CFF not only to automatically deny all EDD debit cardholders' new unauthorized-transaction claims stemming from [redacted], but also to *rescind permanent* credits the Bank had previously issued to cardholders after investigating their claims. Additionally, when the Bank used the CFF to auto-deny an EDD debit cardholder's new authorized-transaction claim or to rescind permanent credit, the Bank also automatically *froze* the cardholder's account without any advance notice or reasonable process for regaining access to the account. This resulted in tens of thousands of Californians being summarily cut off from desperately needed public benefits, often for months. Cardholders who telephoned the Bank's customer service department were subjected to hours-long wait times and, if they finally got through, were told that there was nothing the Bank could do to assist them.

A. Federal Preliminary Injunction

On April 1, 2021, plaintiffs filed a consolidated complaint in *Yick v. Bank of America, N.A.*, No. 21-cv-00376-VC, and a motion for preliminary injunction and provisional class certification. Judge Chhabria granted that motion and provisionally certified a Rule 23(b)(2) class on May 17, 2021, concluding that Plaintiffs had shown a "strong likelihood of success" on their EFTA and California Unfair Competition Law ("UCL") claims because the Bank "fail[ed] to conduct an adequate, good faith investigation when [EDD] cardholders report unauthorized charges," and instead relied on "a faulty screening process" (i.e., the CFF) as the sole basis for denying claims and freezing accounts. FAMCC, Ex. A ("PI Order") at 1. The Court also found irreparable injury, noting that "[t]he class is comprised of people who depend on unemployment benefits to get through the pandemic," and that Plaintiffs' evidence (which included declarations from 50 EDD debit cardholders) had shown the Bank's "continued denial of these benefits will seriously hinder the ability of many class members to feed their families and keep a roof over their heads." *Id.* at 2.

On June 1, 2021, the district court entered a preliminary injunction ("PI") providing broad and immediate relief to the provisionally certified class. Among other things, the PI *prohibited* the Bank from denying unauthorized-transaction claims or freezing accounts based on its CFF, from denying claims or provisional credit without conducting an investigation, and from denying claims without providing the cardholder a written explanation of the Bank's findings. The PI also required the Bank to implement a process to *reopen* claims it had previously denied based on its CFF, to provide provisional credit for any such reopened claims within 10 business days of reopening, and to properly investigate and resolve all such claims within 45 days of reopening. FAMCC, Ex. B (PI) ¶¶1-5. Pursuant to the PI, the Bank on June 8, 2021 finally stopped using its CFF to auto-deny EDD cardholders' unauthorized-transaction claims and auto-freeze their accounts, and the Bank reopened [redacted] of claims it had wrongfully denied during the pandemic based on its CFF, resulting in class members being reimbursed [redacted] of dollars. Supp. Decl. ¶16.[4]

B. CFPB and OCC Consent Orders

More than a year after the PI took effect, the Consumer Financial Protection Bureau ("CFPB") and Office of the Comptroller of the Currency ("OCC") made similar findings against the Bank, fining the Bank $225 million for violations of federal law, and causing the Bank to enter into Consent Orders. Consent Order, *In the Matter of Bank of Am.*, No. 2022-CFPB-0004 (July 14, 2022) ("CFPB Order"); Consent Order, *In the Matter of Bank of Am., N.A.*, No. AA-ENF-2022-21 (July 14, 2022) ("OCC Order"). Among other things, these financial regulators found that the Bank "violated the requirement to conduct a reasonable Error Resolution Investigation under

[4] The PI also required the Bank to notify EDD cardholders of their rights under the PI and to adequately staff its call centers. PI ¶¶7-10.

… EFTA," CFPB Order ¶58; "violated EFTA and Regulation E by failing to timely investigate EDD Cardholders' notices of error," *id.* ¶83; "took unreasonable advantage of EDD Cardholders' inability to protect their interests" by "reversing the permanent credits for EDD Cardholders," *id.* ¶53; and subjected EDD Cardholders to "transfers, dropped calls, and misinformation," which "impeded their ability to successfully file notices of error" under EFTA and the Bank's EDD Debit Cardholder Agreement, *id.* ¶72. *See also* OCC Order Art. II(3)-(6) (substantially similar findings). The CFPB and OCC required the Bank to develop a remediation plan to compensate affected consumers. CFPB Order ¶¶93, 99; OCC Order Art. IX-X.

C. Plaintiffs' Remaining Claims for Damages, Including Treble and Punitive Damages.

Although the CFPB's findings would support an award of treble and punitive damages,[5] the CFPB is not statutorily authorized to obtain treble or punitive damages. *See* 12 U.S.C. §5565(a)(3); 15 U.S.C. §1693o(a)(5). Thus, while the payments made pursuant to the *Yick* PI and the Consent Orders have provided some compensation, they fall well short of providing the full scope of relief sought in this MDL.

Of particular relevance to the current ESI discovery dispute, Plaintiffs seek treble damages under EFTA and punitive damages on their claims for the Bank's violations of due process, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing. Under EFTA, a consumer is entitled to treble damages in any one of three scenarios: (1) where "the financial institution did not provisionally recredit a consumer's account within the ten-day period … and the financial institution

[5] *See, e.g.*, CFPB Order ¶¶55-58 (finding Bank's use of its "Fraud Filter to determine no error had occurred for approximately 188,000 notices of error submitted by Affected Consumers nationwide concerning alleged unauthorized EFTs, without any further investigation or considering any other [relevant] information," violated Bank's EFTA obligations to "conduct[] a 'good faith investigation of the alleged error,'" and to have "'a reasonable basis for believing that the consumer's account was not in error'" (quoting 15 U.S.C. §1693f(e)); *id.* ¶53 (finding Bank "took unreasonable advantage of EDD Cardholders' inability to protect their interests"))).

(A) did not make a good faith investigation of the alleged error, or (B) did not have a reasonable basis for believing that the consumer's account was not in error," or (2) where "the financial institution knowingly and willfully concluded that the consumer's account was not in error when such conclusion could not reasonably have been drawn from the evidence available to the financial institution at the time of its investigation." 15 U.S.C. §1693f(e)(1)-(2). The Bank's knowledge and intent is thus relevant to Plaintiffs' treble damages claim.

Plaintiffs will be entitled to punitive damages if they can show that the Bank's conduct was either (1) "malicious," (2) "oppressive," or (3) "in reckless disregard of the plaintiff's rights," meaning done with "'complete indifference to the plaintiff's safety, rights, or the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law.'" *Dang v. Cross*, 422 F.3d 800, 809-10 (9th Cir. 2005) (quoting 9th Cir. Model Civ. Jury Instr. 7.5 (2002)); *see also Smith v. Wade*, 461 U.S. 30, 56 (1983) (punitive damages available under §1983 when defendant's conduct "involves reckless or callous indifference to the federally protected rights of others"); Cal. Civ. Code §3294(a). The availability of punitive damages thus turns on the defendant's "motive and intent." *Neal v. Farmers Ins. Exch.*, 21 Cal.3d 910, 922 (1978). For a corporate defendant, that means the motives and intent of an "officer, director, or managing agent," which can be imputed to the corporation. Cal. Civ. Code §3294(b); *see also White v. Ultramar, Inc.*, 21 Cal.4th 563, 576-77 (1999) ("managing agents" are those who "exercise substantial discretionary authority over decisions that ultimately determine corporate policy").

Issues central to resolution of this case thus include the Bank's motives and reasons for (a) developing its Claim Fraud Filter; (b) using its CFF as the basis for automatically denying EDD debit cardholders' unauthorized-transaction claims, rescinding their previously issued permanent credits, and freezing their accounts; (c) adopting a policy and practice of understaffing its EDD debit card customer service call centers, such that cardholders were subjected to hours-long wait times; and (d) maintaining these policies even after the Bank knew they were harming large numbers of legitimate cardholders. Discovery into what the Bank's *senior executives* knew about the CFF and its impacts on legitimate EDD cardholders, when they knew it, what actions they directed, authorized, or ratified, and why, is critical to these key issues.

III. HISTORY OF DISCOVERY DISPUTE

Following entry of the *Yick* PI in June 2021, the JPML transferred the *Yick* consolidated cases and many other similar class and individual actions to this Court, and Judge Burns stayed most discovery during the 20 months the Bank's motion to dismiss the prior master complaint was under submission. *See* ECF 1; ECF 67.[6] On May 25, 2023, the Court denied the Bank's motion to dismiss the Class Plaintiffs' EFTA, due process, breach of fiduciary duty, breach of the implied covenant of good faith, California Consumer Privacy Act ("CCPA"), and negligence claims, and allowed discovery to proceed. ECF 126.[7] The Court also *sua sponte* entered an accelerated case schedule that gave Plaintiffs less than eight months to file their motion for class certification (by January 15, 2024), and the parties less than 10 months to complete all fact discovery (by March 15, 2024). ECF 139.

Plaintiffs served their Second Set of Requests for Production of Documents (RFPs 31-73) on June 12, 2023, and their Third Set (RFPs 74-84) on August 15. ECF 212-1 ("Chan Decl.") ¶¶23, 25.[8] Notwithstanding the broad range of disputed issues and the requirement in the parties' ESI Protocol to disclose all "custodians (including current and former executives, employees…) likely to have relevant information," the Bank initially disclosed only *five* individuals, whose knowledge was purportedly limited to the Bank's contract and communications with EDD. *Id.* ¶¶25-26. Plaintiffs

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[6] Limited discovery was permitted regarding the Bank's PI compliance. ECF 67.

[7] The Court dismissed Plaintiffs' UCL claim but subsequently granted Plaintiffs leave to move for reconsideration on that claim. ECF 148.

[8] Plaintiffs submitted the Chan Declaration and all exhibits thereto in support of their Motion to Compel Additional ESI Custodians. ECF 212-1 to -25.

used the Bank's Rule 26(a) initial disclosures and publicly available information to identify 34 additional individuals who seemed likely to have relevant ESI, and sought production of the Bank's relevant organizational charts to enable Plaintiffs to identify other relevant custodians. *Id.* ¶¶27, 29. The Bank agreed to add 19 of the 34 but refused to include any senior executives or board members. *Id.* ¶¶28-29.

Despite the parties' dispute over the adequacy of the Bank's proposal and the lack of organizational charts, the parties agreed in September 2023, given the significant time constraints under the case schedule, 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 org charts and Plaintiffs had sufficient opportunity to review the Round 1 documents. *Id.* ¶¶29-30. When disputes over search terms delayed the Bank's production, Plaintiffs further offered to omit four of the custodians, reducing the number of "Round 1" custodians to just 20. *Id.* ¶31.

The Bank did not make its first substantial production of ESI documents until October 23, 2023. Supp. Decl. ¶19. On October 27, given the impending class certification deadline of January 15, 2024, Judge Berg ordered the Bank to produce all responsive documents from these first 20 custodians by December 4, 2023, via weekly rolling productions. ECF 185; Supp. Decl. ¶20. Between October 23 and December 4, 2023, the Bank produced nearly 190,000 documents, approximately half of which (94,000) were produced on December 1 and 4. Supp. Decl. ¶21.

By late November 2023, it was becoming clear from Plaintiffs' ongoing review of the first half of these documents that senior Bank executives (including Moynihan and Montag) were directly involved in directing and approving the Bank's CFF policy, and that they regularly communicated with each other, meaning the previously designated custodians would be unlikely to have many of their relevant documents. Chan Decl. ¶33. By then, the Bank had also produced 40 pages of organizational charts identifying hundreds of employees across 11 relevant departments who were not among the original 20 ESI custodians. Supp. Decl. ¶18, Exs. 19-20. On November 29, Plaintiffs requested that the Bank produce (1) documents responsive to RFPs 76-79 from six senior executives (Brian Moynihan, Thomas Montag, Catherine Bessant, Dean Athanasia, Geoffrey Greener, and Paul Donofrio) and two mid-level executives (Christine Channels and Thomas Scrivener)[9]; and (2) documents from 17 non-executives responsive to a narrow set of RFPs relating to four key topics: the Bank's CFF policy, claims processing, card and account security, and customer service call centers. Chan Decl. ¶33. On December 15, the Bank stated its refusal to produce the documents of any senior executives, and offered instead to add a single mid-level executive (Channels) and seven non-executives. *Id.* ¶¶34-35, Exs. 22-23. To resolve the dispute, Plaintiffs offered to compromise by agreeing to a total of only *eight* additional ESI custodians, as follows:

Bank's 12/15 Proposal		**Plaintiffs' 12/22 Proposal**	
General Topic (RFPs)	*Custodian*		*(RFPs)*
CFF (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 (61, 64-66)	Scott Robbins	Dean Athanasia	(76-79)
	Rocco Blasi	Agreed	

Although the Bank could not face *any* additional burden by exchanging one ESI custodian for another, it rejected Plaintiffs' proposed compromise, withdrew its prior offer, and argued at the IDC before Judge Berg on January 3, 2024 that *no* new ESI custodians should be added. *Id.* ¶¶36-37. At the IDC, Judge Berg tentatively ruled that the Bank should add three executive ESI custodians *of Plaintiffs' choosing*. *Id.* ¶37.

[9] RFPs 77 and 79 seek only relevant documents "exchanged with or among any of YOUR EXECUTIVE OFFICERS," and RFPs 76 and 78 seek only relevant documents exchanged with or among any member of the Bank's board of directors. Chan Decl. Ex. 21. Because no Bank senior executives or directors were among the initial 20 custodians, these requests by definition seek relevant, non-duplicative documents.

Plaintiffs would have accepted the tentative ruling as a compromise, but because the Bank insisted on formally briefing the matter (the first and only time in this case that either party has challenged a tentative discovery ruling), Plaintiffs did so as well. Supp. Decl. ¶22. The parties filed cross-motions on January 23 and responsive briefs on January 30. ECF 205, 209, 212, 214, 215.

Plaintiffs continued reviewing the 94,000 documents (comprising 327,000 pages) that the Bank had produced in early December, including in preparation for depositions of the Bank's Rule 30(b)(6) designees from February 6-23, 2024. Supp. Decl. ¶¶21, 23. In doing so, Plaintiffs unearthed several key documents revealing that, in the week before the Bank's implementation of its CFF on September 28, 2020, there was a [redacted]. The Bank's Rule 30(b)(6) designee on the CFF, Michael Letson, discussed several of these documents at his deposition on February 16, 2024. Supp. Decl. ¶24 & Exs. 25, 29-32.

The very next court day, Plaintiffs asked the Bank to consent to Plaintiffs' submission of additional recently identified evidence to support the pending motion to compel additional ESI custodians, including several exhibits from the Letson deposition. *Id.* ¶25. The Bank refused and said it would seek additional briefing if the Court permitted Plaintiffs to submit additional evidence. *Id.* The parties then placed a joint call to Judge Berg's chambers, during which Plaintiffs requested leave to submit a limited number of supplemental exhibits and agreed to the Bank submitting a responding brief, with no additional briefing from Plaintiffs. *Id.* The next day, Judge Berg informed the parties he would not allow any new evidence or briefing, because briefing "has been closed for nearly three weeks." Supp. Decl. ¶26 & Ex. 37.

On April 24, Judge Berg granted Plaintiffs' request for ESI discovery from three specific custodians (Bessant, Athanasia, and Channels), but denied Plaintiffs' request for ESI from the two highest-level executives with the most direct involvement in approving the CFF policy (CEO Moynihan and GBAM President and COO Montag), as well as from three lower-level managers. ECF 268 at 2. Although Plaintiffs object to Judge's Berg's denial of all five custodians as contrary to law, *see infra* at 13-17, Plaintiffs by these objections seek only to set aside the portion of the order denying discovery from Moynihan and Montag, and to compel the Bank to add Moynihan and Montag as ESI custodians (in addition to Bessant, Athanasia, and Channels).

IV. LEGAL STANDARD

"In reviewing a magistrate judge's order, the district judge 'must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.'" *In re BofI Holding, Inc. Sec. Litig.*, 318 F.R.D. 129, 132 (S.D. Cal. 2016) (quoting Rule 72(a)); *see Rockwell Int'l, Inc. v. Pos-A-Traction Indus., Inc.*, 712 F.2d 1324, 1325 (9th Cir. 1983) (per curiam) (discovery order is non-dispositive order). "A magistrate judge's legal conclusions are reviewable de novo to determine whether they are 'contrary to law' and findings of fact are subject to the 'clearly erroneous' standard." *In re Qualcomm Litig.*, No. 17-cv-00108-GPC-MDD, 2018 WL 6617294, at *3 (S.D. Cal. Dec. 18, 2018) (citation omitted). The "'contrary to law' standard 'allows independent, plenary review of purely legal determinations by the Magistrate Judge.' … A magistrate judge's order 'is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure.'" *Id.* (citations omitted).

V. ARGUMENT

A. The Discovery Order Is Contrary to Law Because it Applies the Wrong Legal Standard for Compelling Production of Documents.

The standards governing motions to compel discovery are clearly established. First, Rule 26(b)(1) broadly permits discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense and 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).

Second, the Court "must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that … the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2).

Given the Federal Rules' "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). 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 the Fort Yuma Indian Reservation*, No. 17-cv-1436-GPC-MSB, 2020 WL 2745246, at *1 (S.D. Cal. May 27, 2020) (citation omitted).

Courts in this district and across the country routinely grant requests to compel additional ESI custodians—including CEOs and other senior executives—under this well-established Rule 26 standard. *See, e.g.*, *Henriquez v. Cemex, Inc.*, No. 22-cv-1645-JGB-SP, 2024 WL 1600663, at *4 (C.D. Cal. Jan. 18, 2024) (applying Rule 26 to compel production of CEO's documents because "the RFPs are limited to … the core topics of the case" and were not "cumulative or disproportionate to the needs of the case"); *In re Envision Healthcare Corp. Sec. Litig.*, No. 17-cv-1112, 2020 WL 6750397, at *4 (M.D. Tenn. Nov. 16, 2020) (adding two senior executive custodians because the "discovery sought is relevant to [plaintiffs'] claim or defense"); *MariCal, Inc. v. Cooke Aquaculture, Inc.*, No. 14-cv-0366-JDL, 2016 WL 9459260, at *2 (D. Me. Aug. 9, 2016) (adding CEO as custodian under Rule 26 standard because "Plaintiffs have established that [the CEO's] ESI likely includes information that is 'relevant to any party's claim or defense' as contemplated by [Rule] 26(b)(1)").[10]

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[10] *See also Rosales v. FitFlop USA*, No. 11-cv-0973-W(KSC), 2012 WL 13176110, at *7 (S.D. Cal. Dec. 10, 2012) (compelling three additional ESI custodians likely to have relevant evidence based on their job responsibilities); *SPS Techs., LLC v. Briles Aerospace, Inc.*, No. 18-cv-9536-MWF (ASx), 2019 WL 13108021, at *1 (C.D. Cal.

Instead of applying this Rule 26 framework, Judge Berg's ruling is based on certain "general principles," the first of which is that "the party seeking designation of additional custodians must show 'that the disputed custodians possess uniquely relevant information that is not available from the sources already designated.'" ECF 268 at 7 (citations omitted).[11] Under that standard, Plaintiffs bear the initial burden of showing not just that a requested custodian has relevant information, but that their information is "uniquely relevant" and "not available from the sources already designated." *Id.*

This heightened standard, which was the basis for Judge Berg denying Plaintiffs' request to add Moynihan and Montag (and several non-executives) as custodians, is effectively the "apex doctrine" standard—a judicial doctrine derived from Rule 26*(c)(1)* to protect high-level executives from the "potential for abuse or harassment" from being ***deposed***. *Apple Inc. v. Samsung Elecs. Co.*, 282 F.R.D. 259, 262-63 (N.D. Cal. 2012). The apex doctrine requires the party seeking to compel the *deposition* of a high-level executive to meet a heightened standard of showing the executive "has unique first-hand, non-repetitive knowledge of the facts at issue in the case," and that the party seeking the deposition "has exhausted other less intrusive discovery methods"—including obtaining information through document requests. *WebSideStory, Inc. v. NetRatings, Inc.*, No. 06-cv-408, 2007 WL 1120567, at *2 (S.D. Cal. Apr. 6, 2007); *accord Apple*, 282 F.R.D. at 263; *In re Google Litig.*, No. C 08-03172 RMW (PSG), 2011 WL 4985279, at *2 (N.D. Cal. Oct. 19, 2011). The rationale

June 25, 2019) (compelling additional ESI custodian where resisting party failed to carry its burden under Rule 26 of showing disproportionate burden); *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 269 F.R.D. 609, 617 (S.D. W. Va. 2010) (ordering nine additional ESI custodians likely to have "documents which are relevant to the claims and defenses of the parties").

[11] Judge Berg cites only two authorities for this standard: *In re Facebook, Inc. Consumer Priv. User Profile Litig.*, No. 18-md-02843-VC-JSC, 2021 WL 10282213, at *3, *7 (N.D. Cal. Nov. 14, 2021), a Special Master ruling that *compelled* Facebook to produce the ESI of its CEO and COO; and *B&G Foods N. Am., Inc. v. Embry*, No. 20-cv-0526-KJM-DB, 2024 WL 626962, at *3 (E.D. Cal. Feb. 14, 2024) (citing *Facebook*, but quoting from Facebook's brief, not the order).

for this heightened standard is that depositions of high-level executives pose a heightened risk of harassment—one that does not exist in a mere ESI search of executives' documents. *See, e.g.*, *Celerity, Inc. v. Ultra Clean Holding, Inc.*, No. C 05-4374-MMC(JL), 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007) (noting document production is one of the "less intrusive discovery methods" that parties may use to show that high-level executives made key decisions, thus, and have unique information that could appropriately subject them to an apex deposition).

Critically here, "courts have declined to extend the apex doctrine outside the context of depositions …." *L.A. Alliance v. Los Angeles*, No. 20-CV-2291-DOC, 2023 WL 5505037, at *6 (C.D. Cal. Aug. 2, 2023) *Rosinbaum v. Flower Foods, Inc.*, 238 F.Supp.3d 738, 749 (E.D.N.C. 2017) ("In no case of which the court is aware has the apex doctrine successfully been invoked to shield an executive from a request for production of documents."); *Dyson, Inc. v. Sharkninja Operating LLC*, No. 14-cv-0779, 2016 WL 1613489, at *1 (N.D. Ill. Apr. 22, 2016) (similar). So while the doctrine "protect[s] senior executives from attending costly and distracting depositions," it is not available to shield a defendant from "merely collecting and producing documents" from senior executives' ESI. *Blankenship v. Fox News Network, LLC*, No. 2:19-cv-00236, 2021 WL 2345972, at *3 n.5 (S.D. W. Va. June 8, 2021) (rejecting defendant's argument for applying the apex doctrine and ordering production from 22 executives); *see also Shenwick v. Twitter, Inc.*, No. 16-cv-05314-JST-SK, 2018 WL 833085, at *1 (N.D. Cal. Feb. 7, 2018) (rejecting argument that search of CEO documents was "premature" or "should be limited in time and scope," and adding CEO to 25 agreed-upon custodians).

Although Judge Berg's Order correctly *states* that the "apex doctrine" is inapplicable to a dispute over collecting executives' documents, the standard applied in that Order is indistinguishable from the apex doctrine standard it purports to reject. *Compare* ECF 268 at 5 n.3 (finding two out-of-circuit cases, which denied discovery requests because plaintiffs "failed to demonstrate executives had 'unique or personal knowledge' that was 'necessary and not cumulative,'" to be "inapplicable because they relied on the 'apex deposition doctrine'"), *with id.* at 8-9 (denying Plaintiffs' request to add Moynihan and Montag as custodians because "Plaintiffs have not demonstrated that [they] possess[] '*uniquely* relevant information that is *not available from the sources already designated*'"). Even more concerning, the Order applies this heightened "apex doctrine" standard not only to "apex" custodians, but to *all* requests for additional ESI custodians, no matter their level of seniority. *See id.* at 7, 12. The standard set forth in the Order turns the burdens under Rule 26 on their head.

Because the apex doctrine does not apply to disputes concerning whether senior executives (or non-executives) should be added as document custodians, its application here is contrary to law. The Court should review the evidence *de novo* under the proper standard, or remand to Judge Berg to reconsider the evidence under the correct legal standard.

B. Under Any Potentially Applicable Legal Standard, Plaintiffs Have Shown Entitlement to ESI from Moynihan and Montag.

As the Discovery Order acknowledges, Plaintiffs demonstrated that Moynihan and Montag are likely to have *relevant* documents concerning the Bank's reasons for implementing its CFF policy. *See* ECF 268 at 8-9. That should have been sufficient by itself to shift the burden to the Bank to show that the requested discovery was improper (which the Bank failed to do). *See Blankenship*, 519 F.2d at 429; *Williams & Cochrane*, 2020 WL 2745246, at *1. Even under the heightened apex doctrine standard—indeed, even under the Bank's "key decision maker" standard that Judge Berg correctly rejected—Plaintiffs have shown entitlement to Moynihan and Montag's documents because they were among the key decision-makers who approved the Bank's CFF strategies at the heart of this case and who are likely to have unique, non-duplicative documents not obtainable from the existing custodians. Judge Berg's decision was thus contrary to law and must be reversed. *See Cohen v. Trump*, Nos. 13-cv-2519-GPC-WVG, 10-cv-0940-GPC-WVG, 2015 WL 3966140, at *7 (S.D. Cal.

June 30, 2015) (reversing magistrate judge discovery order as contrary to law).

1. Moynihan not only has relevant information, he was a *key decision-maker* with *unique* information not available from other sources.

Evidence shows that Moynihan did not just passively receive information about the EDD debit card program and the CFF policy *after the fact*; rather, he was involved in ground-level discussions around the policy's very formation and ultimately approved its implementation. For example, [redacted]—just one week before the CFF policy took effect—establishes that the Bank was [redacted]." Supp. Decl. Ex. 24 (emphasis added). [redacted]" *Id.* [redacted] Moynihan's ESI likely contains documents related to [redacted]. Moynihan also likely personally attended other meetings related to development of the CFF and has personal knowledge about the Bank's reasons for pursuing a "[redacted]" as well as documents related to those issues. Even if *some* of his documents might be available from other sources, it is at least plausible, if not likely, that Moynihan has additional, unique documents not in others' possession, given his deep level of engagement on this issue.[12] Moreover, a document in Moynihan's possession, even if also possessed by others, is itself uniquely relevant, because it shows *what the Bank's CEO knew*.

The Bank's documents confirm that Moynihan had other meetings—often with

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[12] *See Shenwick*, 2018 WL 833085, at *1 (fact that "responsive documents will necessarily be found in other custodians' records is not sufficient to defeat" a request for senior executive documents); *Mt. Hawley*, 269 F.R.D. at 620 (compelling additional custodians because, although the manager/owners sought as custodians "will produce documents and ESI which are duplicates of previously produced materials, it is reasonable to believe that they will have additional, highly relevant materials . . . which were not shared with" existing custodians).

other senior executives who are not existing custodians—about the Bank's strategies for managing operational losses in the Bank's EDD debit card program. For example, an email dated S[redacted]. Supp. Decl. Ex. 27. A September 23, 2020 email discussing the Bank's [redacted]" on these issues. Supp. Decl. Ex. 28. Communications exchanged directly between Moynihan and other senior executives would not be in the possession of any existing custodians. *Cf. In re Facebook*, 2021 WL 10282213, at *2, 5-6 (compelling Facebook to produce CEO and COO documents).

Other Bank documents show that Moynihan, as a member of the Bank's "MTM" (i.e. management team), personally approved the CFF. Those documents show that [redacted]. Supp. Decl. Exs. 29-33. Another document indicates that Moynihan personally approved the Bank's use of the CFF to auto-freeze EDD cardholder accounts. In a chat between two managers the day after the CFF was implemented, one manager relayed [redacted] for a "5:30 meeting w BTM [Brian T. Moynihan]." Chan Decl. Ex. 7. At 7:40 p.m., the manager asked, "Any word if Brian approved us moving forward?" to which the other replied, "[W]e are freezing all the atm/combo cards but that's all we have approval for … 46k cards being frozen tonight that make up $282MM of our claims." *Id.* In other words, they were awaiting CEO Moynihan's approval before proceeding with the proposal to use the new CFF to freeze 46,000 cardholders' access to their public benefits. Judge Berg stated that this document does not establish Moynihan approved those freezes (ECF 268 at 8), but that misstated Plaintiffs' burden under Rule 26 and, indeed, required Plaintiffs to meet a burden even *more* onerous than the already heightened apex deposition standard. *See Henriquez*, 2024 WL 1600663, at *3 (moving party's "initial threshold" under apex standard is "not a high bar," whereas resisting party "has a heavy burden"). Even under the apex doctrine, "[t]he party seeking to take such a deposition does not need to prove *conclusively* in advance that the deponent *definitely* has unique, non-repetitive information.'" *Hunt v. Continental Cas. Co.*, No. 13-5966, 2015 WL 1518067, at *2 (N.D. Cal. Apr. 3, 2015) (citations omitted; emphases added); *see Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 102-06 (S.D.N.Y. 2001) (CEO deposition allowed where can "infer" his unique knowledge).

Plaintiffs also presented evidence showing that Moynihan personally prepared memoranda and personally made presentations to the Bank's board of directors on key issues in this litigation (e.g., the Bank's anti-fraud strategies). *See* Chan Decl. Exs. 10-12. Judge Berg found this evidence insufficient, relying on the Bank's unsupported assertion that "if any of these [Exhibits] resulted in relevant Board materials, *Plaintiffs already have them*." ECF 268 at 8 (alteration and emphasis in original). But communications, memoranda, and notes on key issues (e.g., the CFF, account freezes, customer service, EMV chips) that Moynihan prepared or reviewed for board meetings are highly relevant, regardless of whether they were formally incorporated into "Board materials." After all, Moynihan's notes and memoranda are evidence of what was told to the Board, separate and distinct from formal meeting minutes, and, they are inherently uniquely relevant, because they show what the Bank's CEO knew. *See Shenwick*, 2018 WL 833085, at *1 (holding CEO was proper custodian when he may "have a document or documents that other custodians have not retained, or even . . . have created a document, such as handwritten notes, that no other custodian possesses"). Again, Judge Berg imposed a standard more onerous than even the heightened apex deposition standard, which recognizes that the term "unique" information means *personal* knowledge, not *exclusive* knowledge. *See In re Nat'l W. Life Ins. Deferred Annuities Litig.*, No. 05-CV-1018-AJB (WVG), 2011 WL 1304587, at *1 (S.D. Cal. Apr. 6, 2011) (ordering deposition of CEO and COO because "when a witness has personal knowledge of facts relevant to the lawsuit, even a corporate president or CEO is subject to deposition"). Even under the apex doctrine, "[i]t is very unusual … for a court to prohibit the taking of a deposition altogether absent extraordinary circumstances, as such an order would likely be in error." *Id.* at *1 (quoting *Salter v. Upjohn*, 593 F.2d 649, 651 (5th Cir.1979)). Courts routinely compel the deposition of CEOs and other high-level executives where, as here, there is evidence they attended key meetings, were members of decision-making committees, or otherwise had percipient knowledge of relevant issues.[13]

Moynihan's critical role in directing and approving the Bank's CFF policy is now clearer than ever, based on additional documents Plaintiffs found among the 90,000 documents the Bank produced in the final days of its Court-ordered December 4 production deadline, which Plaintiffs had not fully reviewed before their motion to compel was due. Supp. Decl. ¶¶23-25; *see supra* n.1. These documents demonstrate that, even under an "apex deposition" standard or the Bank's "decision-maker on key issues" standard, Moynihan meets the test. His electronic and other files likely contain highly relevant and unique documents not in the possession of any other custodian, and his CEO title does not shield the Bank from having to search them.[14]

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[13] *See, e.g.*, *Moyle v. Liberty Mut. Retirement Bene. Plan*, No. 10-cv-2179-DMS (MDD), 2012 WL 5373421, at *4 (S.D. Cal. Oct. 30, 2012) (allowing deposition of executive who "was a member of [the] Committee that approved the benefits plan at issue"); *Perez v. Genoptix, Inc.,* No. 18-cv-2545-LAB-MDD, 2019 WL 12517081, at *2 (S.D. Cal. Jan. 11, 2019) (allowing deposition of board chairman where email suggested chairman "may have unique, personal knowledge" of material issues); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C-07-5634 CRB (DMR), 2014 WL 939287, at *1, 3 (N.D. Cal. Mar. 6, 2014) (compelling deposition of CEO who attended key meetings); *Powertech Tech., Inc. v. Tessera, Inc.*, No. C 11-6121 CW, 2013 WL 3884254, at *2 (N.D. Cal. July 26, 2013) (compelling deposition of board member because he "considered and voted on matters relevant to this case").

[14] *See, e.g.*, *Blankenship*, 2021 WL 2345972, at *3-5 (compelling discovery from six

2. Montag not only has relevant information, he was a *key decision-maker* with *unique* information not available from other sources.

As the Bank's COO and head of Global Banking and Markets ("GBAM"), which oversaw the EDD debit card program and directed development of the CFF and the Bank's policy of "[redacted]" of unauthorized transaction claims, Montag is also a key figure who possesses critical information at the very core of this case. *See* Chan Decl. Exs. 3, 5, 14, 20; Supp. Decl. Ex. 33 at 247:7-9. Many key documents confirming Montag's role as a driving force behind the Bank's development of its CFF policy were among the 94,000 documents the Bank produced in early December 2023. *See supra* n.1.

For example, documents show that in September 2020, Montag was alerted to t[redacted], and on September 21, 2020, he [redacted] Supp. Decl. Ex. 25. The next day, Lawlor stated in an email that he is "[redacted]." He noted that "[redacted]" Supp. Decl. Ex. 26. Based on these documents, it is highly likely Montag had many other communications with "[redacted]" relating to [redacted]" which apparently spurred development of the CFF. Those documents are unique to Montag.

On September 23, another email discussing these issues noted that [redacted]

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senior executives, in addition to 16 other executives or directors); *Shenwick*, 2018 WL 833085, at *1 (compelling CEO custodial files); *In re Envision Healthcare Corp. Sec. Litig.*, No. 3:17-cv-01112, 2020 WL 6750397, at *4 (M.D. Tenn. Nov. 16, 2020) (adding senior executives); *In re EpiPen Mktg. Sales Pracs. & Antitrust Litig.*, No. 17-md-2785-DDC-TJJ, 2018 WL 1440923, at *3-4 (D. Kan. Mar. 15, 2018) (adding former CEOs); *MariCal*, 2016 WL 9459260, at *2-3 (adding CEO custodian); *Dyson*, 2016 WL 1613489, at *1 (ordering "global leader" to produce emails).

[redacted] Supp. Decl. Ex. 28. From this document, it is apparent that Montag was often the intermediary between mid-level executives and Moynihan. It is thus highly likely that Montag and Moynihan regularly communicated directly with one another; those communications are not in the possession of any existing custodian or the custodians Judge Berg designated in his Discovery Order.

Documents also show Montag was a member of the Bank's Global Banking Risk Committee and its Global Markets Risk Committee, which [redacted] at which both committees "[redacted] Supp. Decl. Ex. 34. [redacted] *Id.* The minutes from that meeting state that the committee "[redacted]" including [redacted]" and reviewed "[redacted]" *Id.* Other documents indicate that after implementation of the CFF, the committees [redacted] Supp. Decl. Ex. 35.

These documents amply demonstrate that Montag was at the center of the Bank's development of its CFF policy. It is highly likely that he communicated with others, including senior executives, about the Bank's reasons for developing its CFF policy, and he [redacted] Even under an "apex deposition" standard or the Bank's improper "decision-maker on key issues" standard, Montag should be a designated custodian.

3. The Bank did not and cannot show that producing Moynihan and Montag's documents is unduly burdensome or disproportionate to the needs of the case.

The Discovery Order must also be reversed because it entirely failed to address the proportionality factors under Rule 26(b)(1). *See generally* ECF 268. As Plaintiffs demonstrated, adding Montag and Moynihan as custodians is proportional to the needs of the case. *See* ECF 212 at 6-7. Each of the Rule 26(b)(1) factors weighs in Plaintiffs' favor.

First, the issues at stake are critically important, and the amount in controversy is considerable. The proposed class includes more than 100,000 vulnerable Californians who were deprived of, and denied access to, hundreds of millions of dollars in desperately needed public benefits. The amount in controversy remains in the hundreds of millions of dollars, even after offsetting the amounts the Bank pursuant to the *Yick* PI and CFPB/OCC Consent Orders.

Second, the requested discovery is critical to resolving core disputed issues. If the documents confirm—as Plaintiffs have shown is likely (*see* Chan Decl. Exs. 3, 11, 13-14; Supp. Decl. Exs. 24-28)—that top Bank executives directed the CFF policy *to protect the Bank at the expense of innocent cardholders*, that would support Plaintiffs' claims for breach of fiduciary duty, breach of the implied covenant, and entitlement to treble and punitive damages. Likewise, if the documents confirm—as Plaintiffs have shown is likely (*see* Chan Decl. Exs. 7, 11-12, 15-16; Supp. Decl. Exs. 29-31, 33-35)—that top executives authorized the CFF policy and its continued use despite knowing it was wrongfully depriving tens of thousands of innocent Californians of critical funds for weeks and months on end, that would further demonstrate the Bank's knowledge and willfulness, and thus Plaintiffs' entitlement to treble and punitive damages. *See supra* at 7-9. *See In re Facebook, Inc. Consumer Priv. User Profile Litig.*, 2021 WL 10282213, at *3, *7 (compelling document production from CEO where plaintiff argued "his files will shed light on [defendant's] knowledge and intent . . . [which] are central to … punitive damages"); *Blankenship*, 2021 WL 2345972, at *2 (affirming magistrate judge's decision to compel production from 22 executive custodians "in order to explore further evidence of actual malice").

Third, the burden of "having to produce relevant emails is low." *Dyson*, 2016 WL 1613489, at *1; *Blankenship*, 2021 WL 2345972, at *3 n.5. BANA offered eight additional ESI custodians in December 2023 and admitted its incremental per-custodian cost is the same for executives and non-executives. *See* ECF 209-2, Decl. of Dustin Anderson ¶¶9-11. Producing documents from five executive custodians—Moynihan, Montag, Bessant, Athanasia, and Channels—would be *less* burdensome than the Bank's own proposal for an additional eight non-executives.

Finally, Plaintiffs' document requests are narrowly tailored to seek only documents not held by existing custodians, as RFPs 76-79 are limited to documents exchanged between and among executives and/or board members. Moreover, to the extent some of Moynihan's and Montag's documents duplicate those already produced from other custodians, any "burden can be substantially mitigated by application of appropriately narrow search terms and de-duplication of ESI across custodians." *Williams v. Apple, Inc.*, No. No. 19-cv-04700-LHK, 2020 WL 5107639, *2 (N.D. Cal. Aug. 31, 2020); *accord SPS Techs.*, 2019 WL 13108021, at *1 ("Plaintiff may use de-duplicating software to limit any burden of reviewing and producing duplicative documents."). Given the narrow scope of RFPs 76-79 and the Bank's ability to de-duplicate before reviewing, the Bank's vendor's cost estimate, which assumes that every new custodial search would involve the same level of document collection, review, and production as the first 20 custodians, is grossly inflated. In any event, the Bank is exceptionally profitable and well-resourced, reporting $94 billion in annual revenue and over $3 trillion in assets in its 2022 Form 10-K. *See* Chan Decl. ¶¶38-39. Given the importance of the requested discovery to the issues, any burden or expense is far outweighed by the likely benefit of the discovery. *See* Fed. R. Civ. P. 26(b)(1).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court modify the Discovery Order and compel the Bank to add Moynihan and Montag as additional ESI custodians in responding to RFPs 76-79, or alternatively, to remand to Judge Berg for reconsideration under the correct Rule 26 legal standard and in light of Plaintiffs' supplemental evidence.

/ / /

Respectfully submitted,

Dated: May 8, 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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