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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-GPC-MSB

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' OBJECTIONS TO AND MOTION TO REVERSE IN PART MAGISTRATE JUDGE'S APRIL 24, 2024 DISCOVERY ORDER

Date: July 19, 2024
Time: 1:30 p.m.

Ctrm: 2D
Judge: Hon. Gonzalo P. Curiel

Filed/Lodged Concurrently with:
1. Declaration of Michelle L. Briggs
2. Declaration of Dustin Anderson

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I. INTRODUCTION

This motion is Plaintiffs' latest attempt to harass Bank of America, N.A. ("BANA") with unnecessary, duplicative and burdensome discovery demands to push settlement of this case. Magistrate Judge Berg, who has been intimately involved in managing discovery in this action since its inception, already considered and rejected Plaintiffs' arguments in a detailed twelve-page order. *See* April 24, 2024 Discovery Order, Dkt. 268 ("Order"). Plaintiffs nonetheless seek to thwart the Magistrate Judge's well-reasoned determination by escalating their pursuit of ESI discovery from BANA's top executives—CEO Brian Moynihan and former President of Global Banking and Markets and COO Thomas Montag—to this Court. They bring this motion even though Moynihan's and Montag's involvement in the underlying events was superficial at best, and even though Plaintiffs have received or will receive discovery from 23 custodians, many of whom were actually involved in the decisions and actions that give rise to this litigation, which discovery has resulted in the production of more than 275,000 documents to date and already cost BANA more than $7 million in vendor costs alone.

In this lawsuit, Plaintiffs challenge a short-lived BANA anti-fraud strategy that was used in connection with prepaid debit cards they received from BANA. They also complain about the lack of EMV chip technology on their cards and about BANA's customer service of their cards during the pandemic. Plaintiffs already have ESI from BANA's key decision makers on the relevant fraud strategy, EMV chip, and customer service issues that remain in their case, and data, metrics, and reports regarding the same. They also have all the information BANA's board and board committees received on these issues. They even have documents provided to BANA's regulators in response to regulatory investigations of these same issues. Plaintiffs have tried and failed to show that the ESI they seek from BANA's top two executives is likely to contain "uniquely relevant information that is not available from the sources already designated." Order at 7, quoting *In re Facebook, Inc.*

Consumer Priv. User Profile Litig., No. 3:18-MD-02843-VC-JSC, 2021 WL 10282213, at *1 (N.D. Cal. Nov. 14, 2021). Instead, the documents they have assembled show, as one would expect given their roles, that Moynihan and Montag were sometimes briefed by others (custodians whose ESI Plaintiffs already have), and others (again, custodians whose ESI Plaintiffs already have) occasionally prepared talking points or materials (that Plaintiffs already have) for the top executives to read at board or board committee meetings (minutes of which Plaintiffs already have).

Plaintiffs' motivation in seeking discovery from Moynihan and Montag is transparent—they hope that the prospect of reviewing and producing emails from the company's top executives will place pressure on BANA to settle. Indeed, Plaintiffs' counsel has already stated that such emails "resolve cases. They settle cases."[1] This is why Plaintiffs claim to be unsatisfied with the discovery they already have from the custodians who briefed or prepared materials for Moynihan or Montag. This is why they challenge Magistrate Judge Berg's Order allowing them ESI from three other senior executives who were more involved than Moynihan and Montag, while simultaneously admitting that they would *not* have challenged a ruling that allowed three executives of their choosing. It is clear that Plaintiffs would have made their choice not based on a custodian's level of involvement, but rather on their level of seniority.

Plaintiffs do not come close to showing that Magistrate Judge Berg committed "clear error" in denying this discovery, as Federal Rule of Civil Procedure 72(a) requires. The Magistrate Judge properly recognized that where, as here, Plaintiffs have already received voluminous discovery, "district courts have broad discretion" to deny requests for more, including where the additional discovery sought is "unreasonably cumulative or duplicative." Order at 6, quoting Fed. R. Civ. P.

[1] Declaration of James W. McGarry ISO BANA's Motion to Preclude Additional ESI Discovery, Dkt. 209-1, ("McGarry Decl."), ¶ 10.

26(b)(2)(C). The decision to limit discovery in these circumstances was correct, especially given the massive amount of discovery Plaintiffs have already received at great expense to BANA. The decision is plainly within the broad discretion provided by the federal rules. Plaintiffs' motion to reverse should be denied.

II. PROCEDURAL BACKGROUND

A. The "Background" and "History of Discovery Dispute" Sections of Plaintiffs' Brief Are Largely Irrelevant and Woefully Incomplete.

Plaintiffs' 25-page brief is made up of nearly 10 pages of purported "background" and a section titled "history of discovery dispute," in order to, according to Plaintiffs, "place the current discovery dispute in context." 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, Filed Under Seal at Dkt. 278-1 ("Pls. Br."), at 3 n.2.[2]

Despite being mostly irrelevant to the instant discovery dispute, Plaintiffs' recital is also incomplete. BANA will provide a full explanation of the true "context," Pls. Br. at 3 n.2, of this case at the appropriate time. For purposes of responding to Plaintiffs' motion, BANA includes the following information to correct some of the most glaring misstatements and omissions in Plaintiffs' brief.

1. Plaintiffs Ignore the Explosion of Pandemic Fraud That Precipitated the Development of the Fraud Filter.

Plaintiffs' brief neglects even to *mention*, let alone explain, the explosion of fraud that precipitated the development of the fraud filter that is the focus of this

[2] As stated, Plaintiffs' instant brief is referred to herein as "Pls. Br." The parties' prior briefs filed before Magistrate Judge Berg are referred to herein as follows: Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Preclude Additional ESI Discovery, Dkt. 209, is "BANA Prior Br."; Plaintiffs' Opening Brief in Support of Motion to Compel Additional ESI Custodians, Filed Under Seal at Dkt. 212, is "Pls. Prior Br."; Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion to Compel Additional ESI Custodians, Dkt. 214, is "BANA Prior Opp."; and Plaintiffs' Opposition to Defendant's Motion to Preclude Additional ESI Discovery, Filed Under Seal at Dkt. 215, is "Pls. Prior Opp."

lawsuit. This multi-district litigation arises from a massive surge in fraud targeting California's unemployment benefits program during the COVID-19 pandemic.[3]

In March 2020, the sudden onset of the pandemic drove the national economy from expansion to deep recession in the course of a single month. The economic collapse required the federal and state governments to quickly make unemployment benefits available to large numbers of workers who were not previously eligible for benefits. *See* Declaration of Yvonne Chan ISO BANA's Opp. to Pls. Mot. for Prelim. Inj. (*Yick v. Bank of America, N.A. et al.*, Case No. 3:21-cv-00376-VC (N.D. Cal.)) (Dkt. 72-1) ("Chan PI Opp. Decl."), Ex. 1, at 1 (EDD News Release No. 21-05); *id.*, Ex. 2, at 10 (PUA benefits available to "individuals who are ineligible under regular unemployment insurance, such as self-employed workers, or individuals who have exhausted regular unemployment benefits"). The rapid and unexpected explosion of benefits claims exposed the system to massive fraud, and quickly overwhelmed the state agencies responsible for distributing benefits, including California's Employment Development Department ("EDD"). *See, e.g.*, Chan PI Opp. Decl., Ex. 4 (U.S. Dep't of Labor UI Program Letter No. 28-20, dated August 31, 2020), at 1-2; *id.*, Ex. 5 (U.S. Secret Service Media Release on Cyber Fraud Task Force, dated July 9, 2020). For example, as of January 2021, California estimated that its unemployment insurance program had incurred between $11.4 and $31 *billion* in fraud losses during the pandemic, and attributed 95% of it to the Pandemic Unemployment Assistance ("PUA") program—"due to federal policymakers' decision to prioritize immediate assistance," and thus require a "lower standard of identity and wage information" from applicants.[4]

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[3] *See* Patrick McGreevy, *California unemployment fraud could top $9 billion, double previous estimate, expert warns*, L.A. TIMES (Jan. 15, 2021), https://www.latimes.com/california/story/2021-01-15/unemployment-benefit-fraud-california-billions-edd (citing California State Auditor description of the "criminal assault on the benefits system").

[4] California Legislative Analyst's Office, Legislative Oversight of Ongoing Challenges at EDD, presented to California Assembly Budget Subcommittee No. 4 on State Administration, at 5 (Jan. 26, 2021), available at

Since 2010, BANA has been the issuer of prepaid cards that most EDD benefits recipients elected to use to receive their benefits. *See* Declaration of Robert Chestnut ISO BANA's Opp. to Pls. Mot. for Prelim. Inj. (*Yick v. Bank of America, N.A. et al.*, Case No. 3:21-cv-00376-VC (N.D. Cal.)) (Dkt. 72-25) ("Chestnut Decl.") ¶¶ 3; 5. Once a benefits applicant was approved by EDD—a process conducted by EDD alone in which BANA had no input or involvement—BANA issued that EDD-approved applicant a prepaid debit card through which EDD would distribute benefits. *Id.* Unfortunately, with the influx of millions of new applicants during the pandemic—many of whom self-certified their employment status and wages pursuant to the PUA—fraudsters quickly learned how to game EDD's approval process. *See, e.g.*, Chan PI Opp. Decl., Ex. 4 at 1-2; *id.*, Ex. 5. So, in addition to the millions of legitimate benefits recipients that EDD rightly approved, BANA was forced to enroll and service prepaid debit cards for the well over one million fraudsters EDD wrongly approved and presented to BANA as legitimate benefits recipients. *See* Declaration of Michael Letson ISO BANA's Opp. to Pls. Mot. for Prelim. Inj. (*Yick v. Bank of America, N.A. et al.*, Case No. 3:21-cv-00376-VC (N.D. Cal.)) (Dkt. 72-13) ("Letson Decl.") ¶¶ 9–10. Those illegitimate cardholders, whom BANA did not (and could not) independently verify, wreaked havoc: Once they had absconded with EDD-supplied benefits to which they were not entitled, legions of fraudsters then falsely claimed to BANA that *they themselves* had been defrauded and their cards had been stolen or accounts taken over. *Id.* ¶ 11.

To address the increasing fraud, BANA took a number of significant steps. One of those steps was the creation and the implementation of the fraud filter that is the subject of this lawsuit. The fraud filter was developed to investigate the barrage of account error claims that BANA received from prepaid cardholders in the early

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https://lao.ca.gov/handouts/state_admin/2021/EDD-Challenges-012621.pdf; *see also* Chan PI Opp. Decl., Ex. 1, at 2.

pandemic period.[5] Based on the knowledge of its fraud experts and observed patterns, BANA used the fraud filter to classify error claims based on indicators believed to correlate with an extremely high probability that the error claim involved a fraudulent card or cardholder, and then took actions, including the denial of the error claim as well as freezing or blocking the account, to prevent those suspicious accounts from being used to commit further fraud. The fraud filter was used for less than a year—from late September 2020 until early June 2021. *See* First Amended Master Consolidated Complaint, Dkt. 136 ("FAMCC"), ¶¶ 89-110.

2. Plaintiffs Ignore That Little Remains of Their Case.

Plaintiffs primarily allege that BANA should not have used the fraud filter to deny error claims or to freeze or block EDD prepaid accounts. FAMCC, ¶¶ 89-96. Plaintiffs also allege that BANA's failure to use EMV chip technology for EDD prepaid cards exposed their accounts to fraud and that BANA's customer service was inadequate over the pandemic time period. *See id.* ¶ 2. Judge Burns' May 25, 2023 Order dismissed several of Plaintiffs' causes of action. *See* Dkt. 126 ("MTD Order"). And all legitimate Plaintiffs and putative class members, and likely many illegitimate Plaintiffs and putative class members, have *already been compensated* for the causes of action that remain pursuant to regulatory consent orders regarding the same issues. *See* Consent Order, *In the Matter of Bank of Am., N.A.*, Consumer Financial Protection Bureau, No. 2022-CFPB-0004 (Jul. 14, 2022) ("CFPB Consent Order"), Consent Order, *In the Matter of Bank of Am., N.A.*, Office of the Comptroller of Currency, No. AA-ENF-2022-21 (Jul. 14, 2022) ("OCC Consent Order"). For example, *all* legitimate, and likely many illegitimate, error claims denied after triggering the fraud filter have either been paid automatically without review, or were paid after a manual re-review by BANA. Plaintiffs have also received additional compensation pursuant to the regulatory consent orders, and have been afforded the

[5] Error claims are reports from cardholders of account errors, such as an allegedly unauthorized ATM transaction.

opportunity to seek even further additional compensation based on their individualized circumstances. *See* CFPB Consent Order at ¶¶ 87-89, OCC Consent Order at Art. IX. Finally, Plaintiffs' brief discusses at length the preliminary injunction entered in *Yick v. Bank of America, N.A.*, No. 21-cv-00376-VC, but fails to explain how that injunction is remotely relevant to the demand for emails from BANA's top executives, and further neglects to mention that the injunction will be *dissolved* by the time this motion is heard, at which point every single one of the EDD prepaid cards will be closed. *See* Order Granting Motion to Dissolve Preliminary Injunction, Dkt. 255, (Apr. 3, 2024).

B. BANA's Discovery Efforts Have Been Substantial and Comprehensive.

As Plaintiffs correctly note, Judge Burns ordered the parties to complete discovery pursuant to an expedited schedule. Pls. Br. at 9. In order to facilitate the compressed discovery schedule, Magistrate Judge Berg has been working closely with the parties over the past year to negotiate and resolve various discovery disputes, including disputes regarding written discovery, ESI custodians and search terms, and deposition scheduling, among other issues. Declaration of Michelle L. Briggs ISO BANA's Opp. to Objs. and Mot. to Rev. Discovery Order ("Briggs Decl.") ¶¶ 4-5. Indeed, the parties have had 26 Informal Discovery Conferences ("IDCs") and/or status conferences with Magistrate Judge Berg, occurring approximately every two weeks since the MTD Order was issued on May 25, 2023, many of which have lasted several hours. *Id.* ¶ 5.

BANA has expended enormous resources to provide Plaintiffs with discovery pursuant to the expedited schedule set by Judge Burns. On top of substantial pre-motion-to-dismiss discovery, data compilations, targeted collections, board materials and materials provided to BANA's regulators, ESI discovery has already been extensive. With the assistance of Magistrate Judge Berg, the parties agreed that BANA would review and produce ESI from 20 custodians, spanning 9 functional groups within BANA, and including the key decision makers on each of the fraud filter (9 custodians), EMV (8 custodians) and customer service and claims processing (4 custodians) issues in the case. McGarry Decl. ¶ 4. BANA reviewed more than 765,000 documents and produced nearly 200,000 documents in two months, and more than 275,000 documents to date. *Id.* ¶ 5; Briggs Decl. ¶¶ 6. To do so, BANA enlisted more than 400 contract reviewers at a cost of more than $7 million, to say nothing of outside counsel expenses. *See* Declaration of Dustin Anderson ISO BANA's Motion to Preclude Additional ESI Discovery, Dkt. 209-2 ¶ 6; *see also* Declaration of Dustin Anderson ISO BANA's Opp. to Objs. and Mot. to Rev. Discovery Order ("Anderson Decl.") ¶ 5.

Pursuant to Magistrate Judge Berg's Order, BANA is also in the process of reviewing and producing ESI from three additional senior executive custodians, including BANA's former Chief Operations and Technology Officer, Catherine Bessant, BANA's President of Regional Banking, Dean Athanasia, and BANA's Head of Client Services and Credit Assistance, Christine Channels. *See* Order at 12. BANA estimates that vendor costs alone associated with Bessant, Athanasia, and Channels' emails will be between $150,000 and $210,000, and that Moynihan and Montag's emails would impose an additional $135,000 to $170,000 in vendor costs. Anderson Decl. ¶¶ 11-12. These costs will vary greatly depending on how reasonably targeted the search parameters are, how responsive the documents are, how many documents require redactions, and how many documents will need to be logged for privilege. Briggs Decl. ¶ 9. Based on BANA's preliminary review of Bessant, Athanasia, and Channels' ESI identified by BANA's reasonable search terms, BANA anticipates a smaller review population than for prior custodians—both due to de-duplication and fewer documents identified by search terms—and fewer documents to redact and log for privilege than for prior custodians. *Id.* ¶ 9. BANA anticipates that the vast majority of ESI identified for review from these three executives is not relevant to the issues in this case. *Id.* ¶ 10. Accordingly, forcing BANA to review tens of thousands of additional documents that are likely irrelevant to the allegations in this case is not proportionate to the needs of the case, especially considering the more than $7 million that BANA has already expended in discovery vendor costs alone. *See* Anderson Decl. ¶ 11.

Indeed, Plaintiffs seem to have realized that they asked for too much, and have resorted to interrogatories asking BANA to do their job for them and identify the documents in the production that are actually relevant to Plaintiffs' case. *See* McGarry Decl. ¶ 7 (Plaintiffs' Interrogatory No. 24 asks BANA, among other things, to "IDENTIFY all DOCUMENTS" in its productions "that reference, reflect, or otherwise evidence any actions" or that "expressly reference" BANA's "failure to take any actions . . . to test, ascertain, measure, or estimate the actual or likely accuracy, inaccuracy, effectiveness, or ineffectiveness of the CLAIM FRAUD FILTER and/or any [of] its criteria").

C. The Instant Discovery Dispute

This is not Plaintiffs' first attempt to get ESI discovery from Moynihan and Montag. First, Plaintiffs filed an informal letter brief before Magistrate Judge Berg, and argued their request at an IDC on January 3, 2024. Order at 1. Plaintiffs' informal letter brief sought ESI from Moynihan and Montag, as well as from six other custodians, including other executive custodians Bessant, Athanasia, and Channels. *Id.* At the IDC, Magistrate Judge Berg indicated the Court would tentatively allow three more ESI custodians of Plaintiffs' choosing. *Id.* Knowing that Plaintiffs would simply choose BANA's top three executives, with no regard for whether or not those executives had any meaningful involvement in the issues of the case, BANA asked Magistrate Judge Berg for permission to formally brief the issue. *See id.* at 2.

Plaintiffs' next attempt to get these emails was via a formal brief before Magistrate Judge Berg, *see generally* Pls. Prior Br., and a formal opposition to BANA's corresponding formal brief, *see generally* Pls. Prior Opp. *See also* Order at 2. In the formal briefing, Plaintiffs put forward their best evidence to justify ESI collection from BANA's top executives, including Moynihan and Montag. BANA also filed formal briefing. *See generally*, BANA Prior Br. and BANA Prior Opp. After considering the briefing and exhibits provided by the parties, Magistrate Judge Berg denied Plaintiffs' request for ESI discovery from Moynihan and Montag, finding Plaintiffs had no persuasive response to BANA's objections that relevant documents in these executives' emails (if any) were highly likely to be cumulative of discovery Plaintiffs already have or will soon get. Order at 2. In contrast, Magistrate Judge Berg granted Plaintiffs' request for ESI discovery from Bessant, Athanasia, and Channels, finding that—*in contrast to Moynihan and Montag*—the documents Plaintiffs identified regarding these three senior executives "support adding [them] as [] ESI custodian[s]." Order at 10.

Plaintiffs' statement that they "would have accepted the tentative [IDC] ruling as a compromise," and that they only "insisted on formally briefing the matter," because BANA did as well, Pls. Br. at 12, belies their intent to use discovery as a means to harass. Indeed, as stated, BANA's insistence on formal briefing was exactly for this reason—given the option to choose ESI custodians, Plaintiffs would simply choose BANA's highest level executives, regardless of their involvement (or lack thereof) in the issues of the case. And Magistrate Judge Berg's decision after formal briefing—which allowed Plaintiffs to add three executive ESI custodians—only confirms that neither Moynihan nor Montag are appropriate custodians here. Plaintiffs do not seek ESI from Moynihan or Montag because they likely have uniquely relevant information (they do not). Plaintiffs want this discovery because, as Plaintiffs' counsel told Magistrate Judge Berg, emails from top executives "resolve cases. They settle cases." McGarry Decl. ¶ 10.

III. <u>LEGAL STANDARD</u>

A district court's review of a magistrate judge's non-dispositive discovery order under Federal Rule of Civil Procedure 72(a) is "significantly deferential," and such a decision should be reversed only where the district court has a "definite and firm conviction that a mistake has been committed." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 623 (1993). Indeed, a non-dispositive discovery order should only be "modif[ied] or set aside" to the extent that it "'is clearly erroneous or is contrary to law.'" *McAdam v. State Nat. Ins. Co., Inc.*, 15 F. Supp. 3d 1009, 1013 (S.D. Cal. 2014) (citing *Computer Economics, Inc. v. Gartner Group, Inc.*, 50 F. Supp. 2d 980, 983 (S.D. Cal. 1999)). The "contrary to law" standard applies to a magistrate judge's "purely legal determinations." *Id.* The "clearly erroneous" standard applies to "factual determinations and discretionary decisions." *Id.*, citing *Concrete Pipe*, 508 U.S. at 623.

Federal Rule of Civil Procedure 26 contemplates "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," provided that such discovery is *"proportional to the needs of the case*, considering [among other things] whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Regardless of its broad nature, the relevance standard is not without "ultimate and necessary boundaries." *In re Grant*, No. 20-cv-02465-DMS (JLB), 2021 WL 2895729, at *3 (S.D. Cal. July 9, 2021) (quoting *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). Indeed, the 2015 amendments to Rule 26 specifically added proportionality as a requirement for permissible discovery, in that relevancy alone is no longer sufficient—discovery must be *proportional* to the needs of the case. *See Loftis v. Ramos*, No. 16-cv-2300-MMA (DHB), 2018 WL 1444859, at *1 (S.D. Cal. Mar. 20, 2018). Rule 26 further provides courts with broad discretion to limit even relevant discovery where "the discovery sought is unreasonably cumulative or duplicative." Fed. R. Civ. P. 26(b)(2)(C)(i); *see also Laryngeal Mask Co. Ltd. v. Ambu A/S*, No. 3:07-cv-01988 DMS NLS, 2009 WL 10672436, at *4 (S.D. Cal. July 17, 2009) (Rule 26(b)(2) "requires that the court apply a benefits versus burden approach and ensure that the discovery is not unreasonably cumulative or duplicative."); *Coleman v. Dep't of Healthcare Serv.*, No. 2:18-cv-02497 MCE AC, 2020 WL 589194, at *6 (E.D. Cal. Feb. 6, 2020) (same).

Plaintiffs wrongly suggest that the "contrary to law" standard applies here. Pls. Br. at 13, citing *In re Qualcomm Litig.*, No. 17-cv-00108-GPC-MDD, 2018 WL 6617294, at *3 (S.D. Cal. Dec. 18, 2018). Nothing about the Order below is a "purely legal determination[]," *id.*, such as was reviewed by this Court in *Qualcomm*. Here, Plaintiffs challenge Magistrate Judge Berg's determination that the additional discovery they want is not "proportional to the needs of the case," because it is "unreasonably cumulative or duplicative," a determination that is plainly within the "broad discretion" afforded to the Court. Order at 6. Therefore, this Court must affirm Magistrate Judge Berg's Order unless it is "clearly erroneous," which, of course, it is not. *See McAdam*, 15 F. Supp. 3d at 1013.

IV. <u>ARGUMENT</u>

A. Magistrate Judge Berg Applied the Correct Legal Standard.

1. The "General Principles" Applied By Magistrate Judge Berg and the "Rule 26 Framework" Proffered by Plaintiffs Are the Same.

As Magistrate Judge Berg noted, "[t]here is relatively limited legal authority on the standard a court should apply when addressing disputes about the designation of *additional* ESI custodians." Order at 7 (emphasis added), citing *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, No. 17-md-2785-DDC-TJJ, 2018 WL 1440923, at *2 (D. Kan. Mar. 15, 2018). Thus, courts that have been confronted with this question have applied the "general principles" underlying Rule 26's proportionality standard to hold that "the party seeking . . . additional custodians must show 'that the disputed custodians possess uniquely relevant information that is not available from the sources already designated.'" Order at 7, quoting *Facebook*, 2021 WL 1282213, at *1.

Plaintiffs argue that this is somehow different than the "framework" prescribed by Rule 26, Pls. Br. at 15, but it is not. Plaintiffs argue that the standard applied by

Magistrate Judge Berg improperly imposed on them "the initial burden" of showing that a proposed custodian has uniquely relevant information. *Id*. But Plaintiffs agree that Rule 26 itself places the "initial burden" on the party seeking discovery to "satisf[y] the relevancy requirements of Rule 26(b)(1)." *Id.* at 14, quoting *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). And it is beyond dispute that *every* Rule 26 analysis necessarily includes a proportionality assessment—i.e., one of the "the relevancy requirements of Rule 26(b)(1)" is proportionality. *See* Fed. R. Civ. P. 26(b)(1). Magistrate Judge Berg was therefore exactly correct to determine, as did the district court in *In re Facebook*, that in cases (like this one) where discovery has already been extensive, proportionality requires consideration of whether the *additional* requested discovery is likely to be "uniquely relevant information" compared to what has already been produced. Order at 7, quoting *In re Facebook Litig.*, 2021 WL 10282213, at *1.

In any event, Plaintiffs' complaint that Magistrate Judge Berg failed to hold BANA to its burden is easily dismissed. Plaintiffs say that if they show the information they seek is relevant, BANA then has the "burden to show discovery should not be allowed [by] clarifying, explaining, and supporting its objections." Pls. Br. at 14, quoting *Williams & Cochrane*, 2020 WL 274246, at *1. Here, Plaintiffs sought ESI discovery from Moynihan and Montag, and had the initial burden of showing why these custodians were likely to have information relevant to the case. BANA objected, "clarifying" and "explaining" that *even if* Moynihan or Montag have relevant documents, their ESI discovery is *not proportional* to the needs of this case because it is highly likely to be cumulative and duplicative of what Plaintiffs already have, which objections BANA "support[ed]" by explaining why Plaintiffs' proffered documents do not justify the ESI they seek. *See generally* BANA Prior Br. and BANA Prior Opp. The fact that Magistrate Judge Berg found BANA's objections compelling is in no way evidence that he applied the wrong standard. *See*

Order at 8 (finding "BANA has sufficiently explained and supported its objections to adding Moynihan as an ESI custodian"); *id.* at 9 (same for Montag).

Plaintiffs' argument that other courts "grant requests to compel additional ESI custodians—including CEOs and other senior executives—under this well-established Rule 26 standard," Pls. Br. at 14, is inapposite. The fact that other courts have found that other litigants have satisfied the standard, while Magistrate Judge Berg found Plaintiffs here failed to overcome BANA's objections, is totally irrelevant to whether Magistrate Judge Berg applied the correct standard. (He did.) And each of Plaintiffs' cases is easily distinguishable from this one. For example, in *Henriquez v. Cemez, Inc.*, No. 22-cv-1645-JGB-SP, 2024 WL 1600663 (C.D. Cal. Jan. 18, 2024), the defendant had made "no showing" to support its objections that the requested custodians would be cumulative of ESI already provided. *Id.* at *4. Likewise, in *Rosales v. FitFlop USA*, No. 11-cv-0973-W(KSC), 2012 WL 13176110 (S.D. Cal. Dec. 10, 2012), the defendant's objection was limited to the unsupported statement that it "[did] not believe the [additional ESI discovery] is reasonably calculated to lead to the discovery of admissible evidence." *Id.* at *7. And in *SPS Techs., LLC v. Briles Aerospace, Inc.*, No. 18-cv-9536-MWF (ASx), 2019 WL 13108021 (C.D. Cal. June 25, 2019), there was an insufficient showing that the discovery sought was cumulative or duplicative, and no evidence at all regarding the burden associated with collection. *Id.* at *1.

Plaintiffs' out-of-circuit cases, from district courts in Tennessee, Maine, and West Virginia, are likewise inapposite. In *In re Envision Healthcare Corp. Sec. Litig.*, No. 17-cv-1112, 2020 WL 6750397 (M.D. Tenn. Nov. 16, 2020), the defendants failed to provide *any* estimates of time or cost associated with the proposed additional discovery, so they failed to substantiate their burden objections. *Id.* at *6. In *MariCal, Inc. v. Cooke Aquaculture, Inc.*, No. 14-cv-0366-JDL, 2016 WL 9459260 (D. Me. Aug. 9, 2016), the court allowed discovery because the plaintiffs *did show* that the CEO's ESI likely contained uniquely relevant information. *Id.* at *2. Likewise, in *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 269 F.R.D. 609 (S.D. W. Va. 2010), the court was persuaded by the plaintiff's evidence that the requested executive custodians were "intimately involved" in relevant decision making and "significantly involved" in the litigation. *Id.* at 617.

In contrast to Plaintiffs' cited cases, BANA has substantiated its objection that relevant documents from Moynihan and Montag (if any) are highly likely to be duplicative by demonstrating that Moynihan and Montag only had "basic" or "general awareness" of the prepaid card program and were not decision makers on key issues related to the program, and that Plaintiffs already have ESI from several other custodians who *were* involved and *were* key decision makers. Order at 5, 8, 9; *see also generally* BANA Prior Br., BANA Prior Opp. and § IV.B. *infra*. Also unlike the cases Plaintiffs rely on, BANA has substantiated its burden objections by providing evidence of the discovery costs incurred so far, and an estimate that vendor costs alone for the additional executive custodians would be between $135,000 and $170,000. *See* Order at 5; *see also* Anderson Decl. ¶ 12. Magistrate Judge Berg was correct in assessing the evidence and determining that Moynihan and Montag did not have *uniquely relevant* information not available from already-designated sources, such that there was good cause to exclude both as additional custodians.

2. The "Apex Doctrine" Was Not Applied.

Related to Plaintiffs' argument that Magistrate Judge Berg somehow required them to satisfy a "heightened" standard (he did not, for the reasons stated above), is Plaintiffs' even more easily rejected argument that Magistrate Judge Berg "effectively" applied the "apex doctrine standard" in denying their requests. Pls. Br. at 15. As an instant matter, Magistrate Judge Berg explicitly stated that he was not applying the apex doctrine, and that cases relying on it were inapplicable to his determination. Order at 5 n.3.

Plaintiffs' contention that Magistrate Judge Berg *said* the apex doctrine was inapplicable, but nonetheless applied a standard "indistinguishable from the apex doctrine standard," Ps. Br. at 16, also fails. As Plaintiffs themselves state, the apex doctrine protects high-level executives from deposition unless the party seeking the deposition can show 1) that the executive "has unique first-hand, non-repetitive knowledge of the facts at issue in the case," *and* 2) that the party seeking the deposition "has exhausted less intrusive discovery methods." Pls. Br. at 15. Nowhere in the Order does Magistrate Judge Berg consider whether Plaintiffs made any showing regarding their efforts to procure less intrusive discovery, which he would have had to have done if he was applying the apex doctrine. Indeed, the court in *In re Facebook* applied the correct proportionality standard used here—i.e., that "the party seeking additional custodians [must] show that the disputed custodians possess uniquely relevant information that is not available from the sources already designated" while also holding the that apex doctrine was inapt. *See In re Facebook Litig.*, 2021 WL 10282213, at *10 ("The apex doctrine does not apply to this dispute, which concerns whether senior executives . . . should be added as document custodians."). This underscores that the standard applied here is governed by the "Rule 26 framework" Plaintiffs agree should be applied, and Plaintiffs' repeated references to the apex doctrine and cases applying it are an obvious smokescreen.[6]

Finally, Plaintiffs argue that "[t]he Court should review the evidence *de novo*" because Magistrate Judge Berg's "application" of the apex doctrine is "contrary to law." Pls. Br. at 17. This argument fails. As explained above, Magistrate Judge Berg applied the appropriate legal standard prescribed by Rule 26, not the apex doctrine standard, and not some other "heightened" standard. Therefore, this Court should affirm Magistrate Judge Berg's Order unless his factual determinations were "clearly erroneous." As explained below, they were not.

[6] Indeed, Plaintiffs' observation that Magistrate Judge Berg applied the same analysis not only to "apex" custodians, but to *all* custodians, Pls. Br. at 17, further confirms that Magistrate Judge Berg was *not* applying the apex doctrine.

B. Magistrate Judge Berg Correctly Found that Neither Moynihan Nor Montag is Likely to Possess Uniquely Relevant Information.

Plaintiffs' brief relies on three dozen documents that they say justify ESI collection from Moynihan and Montag. Pls. Br. at 2, 9 n.8. At most, Plaintiffs' documents show that Moynihan and Montag could have some *relevant* documents. But this is not enough. As Magistrate Judge Berg recognized, Plaintiffs already have extensive discovery. They will also soon receive ESI discovery from three additional high-level executives, bringing the total number of custodians to 23, including numerous senior executives. In order to overcome BANA's objections and justify more, they must show that the additional discovery they seek is likely to be *unique* as compared to the hundreds of thousands of documents that they already have or will soon get. Order at 8–9, citing *In re Facebook Litig.*, 2021 WL 10282213, at *1. They cannot do it.[7]

1. Magistrate Judge Berg Correctly Denied Plaintiffs' Request for ESI from Moynihan.

Magistrate Judge Berg correctly found that the documents cited in Plaintiffs' original brief do not show that Moynihan is likely to have unique documents

[7] Plaintiffs' instant brief relies primarily on a dozen documents that *were not* presented to Magistrate Judge Berg. *See* Pls. Br. at 2, Index of Exhibits to Supp. Decl. of Connie K. Chan ("Supp. Index") (identifying Exs. 24-36). Each of these "new" documents were produced more than a month before Plaintiffs filed their prior opening brief, and more than six weeks before Plaintiffs filed their prior opposition brief. *See* Supp. Index ("Date Produced" for each of Exs. 24-36 ranges from October 23, 2023 through December 22, 2023, with the vast majority of documents produced before the first week of December). As Magistrate Judge Berg correctly noted, Plaintiffs waited until briefing had been "closed for nearly three weeks" to ask the Court to consider the additional materials without providing any reason for the delay. *See* Supp. Index, Ex. 37. Even now, Plaintiffs say only that they "filed their motion to compel before they could review" the proffered documents. Pls. Br. at 2. As such, it was entirely appropriate for Magistrate Judge Berg to decline to consider Plaintiffs' late evidence. *See Cusano v. Klein*, 264 F.3d 936, 950-51 (9th Cir. 2001) (the court, in its discretion, may refuse to consider matters not timely filed). In any event, the additional documents Plaintiffs focus their current arguments on are no different in kind than the documents that Magistrate Judge Berg considered, and rejected, as supporting Plaintiffs' entitlement to the ESI they seek. *See* §§ IV.B.1 and IV.B.2, *infra*.

compared to what Plaintiffs already have. Order at 8. This finding is buttressed by the fact that Plaintiffs will soon receive ESI discovery from executive custodians Bessant, Athanasia, and Channels. Order at 12. With respect to these documents, Plaintiffs' current brief makes the same arguments considered and rejected by Magistrate Judge Berg, and their arguments to reverse the prior decision are unavailing.

First, relying on Exs. 1 (-6092), 10 (-6000), 11 (-6010), and 12 (-6058), Plaintiffs argued to Magistrate Judge Berg that Moynihan has relevant and unique knowledge about the issues in this case because he prepared memoranda and presented on key issues at board meetings. Order at 7, citing Pls. Prior Br. at 4-6 and Pls. Prior Opp. at 2. Plaintiffs make the same argument about these documents again here. *See* Pls. Br. at 20-21. Magistrate Judge Berg correctly rejected this argument. Plaintiffs already have all board and board committee materials related to the fraud filter, EMV and customer services issues in this case. Order at 8. The fact that Moynihan presented to the board on these issues is insufficient to justify collection of his ESI when the board materials have already been produced. Plaintiffs say that Magistrate Judge Berg imposed an inappropriately "onerous" standard on them in rejecting these arguments. *See* Pls. Br. at 20. Not so. Plaintiffs say that Magistrate Judge Berg erred because "Moynihan's notes and memoranda are evidence of what was told to the Board," Pls. Br. at 20, but this argument falls flat where Plaintiffs already have all the relevant board materials, which plainly reflect "what was told to the Board" about the issues Plaintiffs are concerned about. Moreover, Plaintiffs' reliance on *Shenwick v. Twitter, Inc.* in support of their argument here is misplaced. *See* Pls. Br. at 20. *Shenwick* is a securities class action in which the executive *personally* made the corrective public disclosure, so of course his knowledge was relevant to falsity. 2018 WL 833085, at *1 (N.D. Cal. Feb. 7, 2018). Conversely, here, Plaintiffs challenge a product overseen by and decisions made by *existing custodians*. Moynihan's involvement—at best—is limited to the receipt of information from others.

Second, relying on Exs. 4 (-8379), 7 (-3818), and 12 (-6058), Plaintiffs argued that Moynihan personally authorized freezing EDD prepaid cards, and that Moynihan and other executives directed changes to BANA's claims-processing procedures. Order at 7-8, citing Pls. Prior Br. at 4-6 and Pls. Prior Opp. at 2. Here, Magistrate Judge Berg correctly held that Plaintiffs mischaracterized these documents, particularly Ex. 7. Contrary to Plaintiffs' claims, this document "merely reveals that a BANA employee asked whether Moynihan approved moving forward" with freezing cards, and the response "does not indicate *who* approved the freezing, let alone if Moynihan did so." Order at 8. Plaintiffs already have ESI from *nine* custodians involved in account freezing. *Id.* This document does not support anything more. Plaintiffs' instant brief makes the same arguments about this document that were considered and rejected by Magistrate Judge Berg. *See* Pls. Br. at 19. Again, Plaintiffs' suggestion that the Magistrate Judge's analysis of this document imposed on them "a burden even *more* onerous than the already heightened apex deposition standard," Pls. Br. at 20, fails. Plaintiffs suggest that Magistrate Judge Berg denied them ESI from Moynihan simply because Ex. 7 does not establish that Moynihan approved the referenced freezes. Pls. Br. at 19-20. But that is not what the Order says: the Order plainly states that where 1) Exhibit 7 does not show that Moynihan approved freezes, *and* 2) Plaintiffs already have ESI from *nine* custodians on the issue of account freezing, *based on those two facts together*, Plaintiffs cannot show, as they must, that the discovery they seek from Moynihan is not highly likely to be cumulative of what they already have. *See* Order at 8.

The "new" documents that Plaintiffs cite in their instant motion are no different, and do not help them. First, Plaintiffs' Ex. 24 (-9896) is a request by *an existing custodian* (Garfield) for prepaid fraud data that another *other existing* *custodian* (Ahmad) wanted in order to prepare a presentation for Moynihan.[8] At most, this email shows that Moynihan received updates on the prepaid fraud situation, which is not enough to support collection of his ESI, particularly where the update was prepared and provided by existing custodians. Plaintiffs' Exs. 27 and 28 (-2012, -1247) are the same, reflecting only that Moynihan was "briefed" on (Ex. 27) and "socialized" on (Ex. 28) prepaid fraud and the losses associated with that fraud by a host of *existing custodians*. Ex. 27 reflects involvement by an existing custodian (Ahmad), and two additional executive custodians whose ESI Plaintiffs will soon receive (Athanasia, Channels). Ex. 28 reflects involvement by *five* existing custodians (Ahmad, Fox, Letson, Garfield, and Simpson). These documents make clear that all substantive information about the issues in this case originated with custodians whose ESI Plaintiffs already have. Nothing in these documents suggests that Moynihan has "uniquely relevant information" that is "not [already] available [to Plaintiffs] from the sources already designated." *In re Facebook Litig.*, 2021 WL 10282213, at *1.

Finally, Plaintiffs point to Exs. 29-33 (-0516, -5863, -0351, -8602, and excerpt from Letson deposition), which they say indicate that BANA's management team (i.e., the "MTM") met to discuss the fraud filter. Pls. Br. at 19. But Plaintiffs offer zero evidence that Moynihan attended the meeting. Rather, Plaintiffs' documents, again, show that they *already have* ESI for the people responsible for developing and implementing the fraud filter *and* that they *already have* ESI for multiple members of the MTM. *See, e.g.*, Ex. 29 (existing custodians Letson, Holt, and Garfield involved in development of filter indicators and presentation of same to MTM); Ex. 30 (same, for Letson and Holt); Ex. 31 (same, for Letson and Fox), Ex. 32

[8] Ex. 24 further demonstrates that Plaintiffs' claims that Moynihan has uniquely relevant information are specious. Ex. 24 indicates that another BANA executive, Paul Donofrio, intended to brief Moynihan on prepaid fraud statistics. But Plaintiffs *do not seek Donofrio's emails* (the purported brief-er), just Moynihan's (the purported brief-ee). Again, this reveals that their goal here is not discovery of relevant documents; rather, it is the harassment of BANA's most senior executives.

(agenda and materials for MTM meeting sent to agreed custodians and MTM members Bessant and Athanasia, and existing custodian and MTM member O'Neill), and Ex. 33 (deposition testimony from existing custodian Letson that fraud filter was approved by MTM). These documents in no way indicate that Moynihan is likely to have "uniquely relevant" information about Plaintiffs' case.

2. Magistrate Judge Berg Correctly Denied Plaintiffs' Request for ESI from Montag.

Magistrate Judge Berg also correctly rejected Plaintiffs' request for ESI from Montag because Plaintiffs' purported "evidence" here also showed that "Montag is unlikely to possess unique information that cannot be found from existing ESI custodians." Order at 9, citing *In re Facebook Litig.*, 2021 WL 10282213, at *1. Again, this is all the more true in light of the fact that Plaintiffs will soon receive ESI from Bessant, Athanasia, and Channels.

Plaintiffs previously said Exs. 3 (-8366), 5 (-1860), and 14 (-1972)—"emails that were either sent to Montag or mention him directly," Order at 9—show that Montag was "'not merely aware of but [was] *driving* the key issues' involved in this case." *Id.*, quoting Pls. Prior Opp. at 2. But, as with the Moynihan documents, Magistrate Judge Berg correctly found Plaintiffs' characterization of these documents to be misleading, and that "BANA has sufficiently explained and supported its objections to adding Montag as an ESI custodian." Order at 9, citing *Superior Commc'ns v. Earhugger, Inc.*, 257 F.R.D. 215, 217 (C.D. Cal. 2009). Indeed, Plaintiffs' instant brief makes no argument at all with respect to these documents, let alone a compelling argument for why Magistrate Judge Berg's analysis was "clearly erroneous."

First, Magistrate Judge Berg found that Ex. 3 (-8366) shows that "when a question was raised about the amount of potential operational losses related to prepaid claims fraud, Montag and Athanasia reached out to another offered custodian, Christine Channels, and an existing custodian, Jennifer Ehresman, to obtain the relevant information." Order at 9, citing BANA Prior Br. at 10. Plaintiffs' prior argument that this document suggests Montag has unique knowledge is further undermined by the fact that they will soon receive ESI from both Athanasia *and* Channels. Second, Magistrate Judge Berg found that Ex. 5 (-1860) shows that while "Montag's approval may have been required for a new contract related to call center services," nothing in this document suggests he was involved in negotiating the details of the contract to indicate he would have unique knowledge. Order at 9. Finally, Magistrate Judge Berg found that Ex. 14 (-1972) shows only that "Montag asked questions" about "'pre-paid fraud losses,'" which "does not demonstrate Montag possesses uniquely relevant information that cannot be obtained from existing sources." Order at 9. In the absence of any serious challenge from Plaintiffs as to Magistrate Judge Berg's analysis of these documents, the Order below should stand.

As with Moynihan, the "new" documents that Plaintiffs rely on for Montag do not help them. First, Plaintiffs say Exs. 25 (-1977) and 26 (-4889) show that "Montag had [] communications" that "are unique to Montag." Pls. Br. at 22. But both of these emails show that Montag's communications about the issues in this case involved *multiple existing custodians*. For example, Ex. 25 involves two managers who were responsible for the prepaid business (Ahmad and Lawlor), who are both existing custodians. It also reflects that, as of the date of the email, September 21, 2020—only one week before the fraud filter was implemented—Montag was not involved, and had only high level awareness of the prepaid issues in this case. Ex. 26 is even less helpful to Plaintiffs. This email shows only that an existing custodian (Lawlor) said "[a] lot of people are talking to Tom." But it does not identify 1) who "Tom" is, 2) who the "people" are that are supposedly talking to "Tom," or 3) what they are saying. Without more, this email does nothing to support Plaintiffs' argument that Montag has unique information about this case.

Next, Plaintiffs say Ex. 28 (-1427) makes it "apparent that Montag was often the intermediary between mid-level executives and Moynihan." Pls. Br. at 23. But Plaintiffs mislead again. That the top executives were only involved in the issues of this case at the highest level is plain from the face of this document. The email, as explained above, was sent to *five* existing custodians (Ahmad, Fox, Letson, Garfield, and Simpson). It states that prepaid fraud was continuing to grow and identifies several individuals involved in scoping the problem, including *three* existing custodians (Garfield, Simpson, Ahmad). It then states—about the scoping issue only—that Simpson and Ahmad had met with Montag who had "socialized" the fraud impact with Moynihan. The document then contains several detailed paragraphs explaining the work that internal BANA teams (many led by existing custodians) were doing to work with the state benefits agencies, as well as different fraud strategies being considered to slow the fraud. There is *no mention* of either Montag or Moynihan in this detailed section of the document, and no reason to believe either was aware of anything other than the volume of fraud losses at the highest level. It certainly does not show that Montag has "uniquely relevant information that cannot be obtained from existing sources." Order at 9.

Finally, Plaintiffs point to Exs. 34 (-7802) and 35 (-0141), saying that these documents "show Montag was a member" of certain committees involved in the approval and implementation of the fraud filter. Pls. Br. at 23. But Plaintiffs already have or will soon have ESI from *more than a half-dozen* members of the two committees at issue or other attendees of the meetings these documents reference (Ahmad, Simpon, Channels, Ehresman, Fox, Garfield, Lawlor). Ex. 34, minutes from a committee meeting, clearly indicates that the only two people to make presentations at this meeting (Ahmad and Fox) are custodians whose ESI Plaintiffs already have, and there is nothing in the minutes to suggest that Montag said or did anything. And Ex. 35 is Plaintiffs' weakest connection yet between the executives whose ESI they seek and the issues of this case. It is an email string that neither involves Montag, nor mentions him by name, and clearly states that custodians whose

ESI Plaintiffs already have (Gargaliano, Ehresman) and their teams "have been the principal inputs into the deck." Indeed, the only purported connection to the executives is a reference to an unspecified "set of items for MTM members to decision." Nothing here suggests Montag has unique information.

C. Magistrate Judge Berg Correctly Rejected Plaintiffs' Proportionality Arguments.

Finally, Plaintiffs contend the Order failed to address the proportionality factors under Rule 26(b)(1). Pls. Br. at 23-24. This is plainly incorrect. The *entirety* of Magistrate Judge Berg's Order is an analysis of whether the ESI Plaintiffs seek is proportional to the needs of the case. *See, e.g.*, Order at 4, 6, 12. Moreover, Plaintiffs' instant brief makes the same arguments that have already been presented to, and rejected by, Magistrate Judge Berg. Plaintiffs again raise that the requested discovery is proportional given the importance of the issues and amount in controversy, and that BANA is "well-resourced" and is the only one that has access to the documents requested. *Compare* Pls. Br. at 23-25 *with* Pls. Prior Br. at 6-7 and Pls. Prior Opp. at 3. But yet again, Plaintiffs cited nothing to support their claim that the ESI sought 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" or that the requested custodians have information that would bear on the "reasons" for the fraud filter or "knowledge of [its] impact." *See* BANA Prior Opp. at 3. In the absence of any new arguments there is no basis for this Court to conclude that Magistrate Judge Berg's resolution was "clearly erroneous."

V. CONCLUSION

For the foregoing reasons, BANA respectfully requests that the Court deny Plaintiffs' motion to reverse in part Magistrate Judge Berg's April 24, 2024 Discovery Order.

Dated: May 31, 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 May 31, 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: May 31, 2024 *_/s/ James W. McGarry_*