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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

REPLY 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 (2nd floor)

UNREDACTED VERSION FILED UNDER SEAL

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I. INTRODUCTION

This dispute over two ESI custodians, Moynihan and Montag ("Custodians"), is governed by Rule 26(b)(1)'s dual requirements of relevance and proportionality. Judge Berg found that these Custodians likely possess relevant documents. But then, instead of conducting the required proportionality analysis, he turned to the irrelevant issue of whether there was sufficient evidence that the Custodians possess "'*uniquely* relevant information that is *not available from the sources already designated.*'" ECF 268 at 8-9. That is the "apex" standard for determining whether to compel an executive's deposition; it has no application to the far less burdensome task of collecting relevant documents in response to a request for production. Because Judge Berg failed to conduct the required Rule 26 analysis, and because the Custodians' documents are not just proportional but critical to the needs of the case, the Discovery Order should be reversed and the Bank should be ordered to produce the Custodians' ESI.

The Bank's factual exegesis entirely ignores *why* the Custodians' documents are likely to prove critical—a key consideration in assessing proportionality. At this point in the case, following the Preliminary Injunction and the Bank's payment of restitution under the Remediation Plan, many of the basic facts and the Bank's EFTA liability are not seriously in dispute. The real question now is whether the Bank is subject to hundreds of millions of dollars in *treble* damages under EFTA—a valuation the Bank does not dispute—and potentially even more in *punitive* damages under several other claims. Because one basis for EFTA treble damages turns on whether the Bank's conduct was knowing and willful, 15 U.S.C. §1693f(e)(2), and because punitive damages turn on the motives and intent of an "officer, director, or managing agent," Cal. Civ. Code §3294(b), evidence showing what the Custodians knew about the Claim Fraud Filter ("CFF") and its actual and foreseeable impacts on legitimate EDD cardholders, and which of the challenged Bank policies they directed, authorized, or ratified and why, are critical to that inquiry. That is why documents they prepared, reviewed, and approved are not just proportionate, but essential to the needs of the case. Those needs dwarf the Bank's minimal incremental costs of production, which the Bank now admits are likely only 25% of what it estimated to Judge Berg.

II. ARGUMENT

A. The Discovery Order Fails to Apply or Misapplies Rule 26.

The Bank now concedes that Rule 26 sets forth the applicable standard (Opp. 12), despite having previously advocated for a heightened "key decision maker" standard for executive custodians (ECF 209 at 3-4). Because the Discovery Order failed to apply or misapplied Rule 26 to Plaintiffs' motion to compel, it is "contrary to law" and must be reviewed de novo. *See* Mot. 12:27-18:1; *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).

The Bank tries to avoid de novo review by asserting that the Order actually applied the relevance-and-proportionality standard rather than the heightened apex-deposition standard. That assertion is easily refuted. Under Rule 26, once the moving party shows that the requested discovery is "relevant to any party's claim or defense," Fed. R. Civ. P. 26(b)(1), the "heavy burden" shifts to the resisting party to show that the requested discovery is disproportionate or unduly burdensome under the Rule 26(b)(1) factors. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).[1]

In stark contrast to Rule 26's allocation of burdens, the Order imposes a heightened burden on the moving party at step 1 of the analysis, stating: "First, 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 7:6-8 (emphases added; citations omitted). Only

[1] When the 2015 amendments to the Federal Rules reincorporated a proportionality requirement into Rule 26, the Committee Notes made clear the change "does not place on the party seeking discovery the burden of addressing all proportionality considerations." Fed. R. Civ. P. 26, 2015 Cmte. Notes.

then does the burden shift to the resisting party to substantiate its objections. In all but name, this *is* the apex doctrine that all parties now agree is inapposite. A distinctive feature of the apex doctrine is that it places a heightened burden on the party seeking discovery to show that the requested deponent has "*unique* first-hand, *non-repetitive* knowledge of the facts at issue," not obtainable from other sources. *Apple Inc. v. Samsung Elecs. Co.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012) (emphases added). That is the precise burden the Order imposes on Plaintiffs. *See* ECF 268 at 7-9. An "argument that a party's senior executives are protected from being designated as custodians unless the party seeking such designation shows they possess unique, personal knowledge … appears to call for application of the so-called 'apex doctrine.'" *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).

While the Order does recognize that requiring Plaintiffs to show the Custodians' files include uniquely relevant documents not available from other sources is akin to the apex deposition standard and nominally rejects that standard, the Order then applies it anyway. Specifically, the Order nominally rejects the Bank's reliance on *Lutzeier* and *Harris*, finding them "generally inapplicable because they relied on the 'apex deposition doctrine,' whereas the instant dispute concerns document discovery." ECF 268 at 5 n.3; *cf. Lutzeier v. Citigroup Inc.*, No. 14-cv-00183-RLW, 2015 WL 430196, at *7 (E.D. Mo. Feb. 2, 2015) (denying request to add executives as ESI custodians where movant did not show executives had "unique or personal knowledge of the subject matter"); *Harris v. Union Pac. R.R. Co.*, No. 8:16-cv-381, 2018 WL 2729131, at *4 (D. Neb. June 6, 2018) (same). Despite this, the Order then applies a standard that is indistinguishable from those applied in *Lutzeier* and *Harris*.

The Bank contends that it was appropriate for the Order to inject proportionality considerations in assessing Plaintiffs' "initial burden." Opp. 13:1-14. But, in addition to being wrong as a matter of law, this argument ignores that "proportionality" analysis under Rule 26 requires far more than what occurred here. Plaintiffs addressed all the proportionality factors in its prior briefing, while the Bank ignored them. *See* ECF 209, 212 at 7:19-8:22. The Order does not address Rule 26's proportionality factors either. *See* ECF 268. For these reasons, the Order's reliance on an incorrect legal standard requires de novo review. *See Cohen*, 2015 WL 3966140, at *7.

B. The Portion of the Discovery Order Denying Plaintiffs' Motion to Compel Moynihan's and Montag's Documents Must Be Reversed.

Even without de novo review, reversal would be required because it is clear "that a mistake has been made." *Id.* at *1. This mistake is highlighted by the significant additional evidence buried in the Bank's voluminous eleventh-hour production that Judge Berg declined to consider. This Court should either consider that evidence itself, or remand for Judge Berg to review upon reconsideration. *See* Mot. 2:21-28, 12:6-24.

1. Moynihan and Montag Are Key Decision-Makers Likely to Have Highly Relevant and Unique Documents Bearing on the Bank's Reasons for Implementing the Claim Fraud Filter.

There is no dispute the Custodians have relevant documents. *See* ECF 268 at 8-9. Beyond this, Plaintiffs presented compelling evidence that both Custodians had *personal* knowledge and were directly involved in directing subordinates to develop an aggressive claim-denial strategy that prioritized the Bank's economic self-interest over the needs of EDD cardholders—i.e., the CFF policies. *See* Mot. 17-23; Chan Decl. Exs. 1-24 (ECF 212-2 to -25); Supp. Chan Decl. Exs. 25-36 (ECF 279 to 279-14).

Moynihan. The evidence demonstrates that CEO Brian Moynihan played a hands-on role in the Bank's development and implementation of the CFF, "a less conservative screen" than the Bank had previously used. *See* Exs. 24, 27-33. That lower-level employees prepared materials to "present to Brian M" regarding such aggressive strategies to stem the Bank's growing EFTA-related losses establishes his knowledge and participation and reinforces the likelihood that his files contain additional relevant documents. Responsive documents reviewed and prepared by Moynihan, even if also seen by others, are not unreasonably cumulative or duplicative, because they uniquely show *what the Bank's CEO himself knew and did*, which is critical to the punitive damages inquiry. *See* Mot. 7:10-9:4, 18:18-22. *Cf. 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) (court will not limit discovery under Rule 26(b)(2) because it is "somewhat" cumulative and duplicative, only if it is "unreasonably" so).

Moynihan was also likely involved in the Bank's decision to freeze the cards and accounts of EDD benefits recipients whose claims triggered the CFF. *See* Ex. 7. While the Bank suggests that Plaintiffs, to gain access to his documents, must *conclusively* demonstrate that Moynihan made the ultimate decision, that would turn the discovery process upside down, requiring proof of what the evidence will show before allowing discovery into its existence. *See Blankenship*, 519 F.2d at 429 (vacating protective order because plaintiff's "suggesti[on]" of "possible information that [executive] might have" defeated argument that everything from the executive "would be repetitious with what plaintiff had learned from other sources"); *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 one could "infer" his unique knowledge).

The evidence also shows that Moynihan "prepared memoranda and presented on key issues at Board meetings." ECF 268 at 8; *see* Exs. 10-12. The Bank asserts that Plaintiffs are entitled to nothing more, because "the relevant board materials … plainly reflect 'what was told to the Board' about the issues Plaintiffs are concerned about." Opp. 18:21-22. That assertion is contrary to common sense and case law. There is no basis for assuming that every relevant document in Moynihan's possession was translated into board materials—and the Bank provides no evidence of such. *See Goro v. Flowers Foods Inc.*, 334 F.R.D. 275, 286 (S.D. Cal. 2018) (overruling defendants' objection where they "fail[ed] to attach the referenced document or explain why this document would provide Plaintiffs with the information they seek"). In any event, that "responsive documents will necessarily be found in other custodians' records is not sufficient to defeat a search of [a CEO's] files." *Shenwick v. Twitter, Inc.*, No. 16-cv-

05214, 2018 WL 833085, at *1 (N.D. Cal. Feb. 7, 2018); *see* also Mot. 18:24-28 (citing cases).

Montag. The evidence shows that Montag likewise has critically important documents. In addition to being COO, Montag led the Bank's Global Banking and Markets (GBAM) division, which operated the EDD card program, conceived of and implemented the CFF policy, and set customer service staffing levels. He played an active role in these issues, personally directing subordinates to develop strategies to stem the Bank's losses from paying EFTA-required credits, which resulted in creation of the CFF and the policy of subjecting EDD cardholder claims to "GBAM/systemic denials." *See* Mot. 22:1-23:23; Ex. 25. He communicated with "[a] lot of people," including Moynihan, about UI prepaid fraud claims and the Bank's strategies to mitigate the Bank's EFTA-related losses. *See* Exs. 3, 14, 26, 28. He was also a member of the management committees that approved the CFF policy and were tasked with monitoring its "effectiveness" and impact on "additional losses." Exs. 29-35. The Bank's assertion that Montag "only had 'basic' or 'general awareness' of the prepaid card program and [was] not [a] decision maker[] on key issues related to the program" (Opp. 15:7-9) is contrary to the evidence.[2]

Resorting to *ad hominem* attacks, the Bank charges that Plaintiffs' counsel designated the Custodians only to "harass" the Bank's "top two" executives. Opp. 1. That is both untrue and makes no sense. ESI custodians are rarely involved in the collection or review of their ESI, and the Bank will only be required to produce responsive documents. Executive ESI searches are no different than any other

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[2] For example, the Bank responds to Ex. 26, a document in which senior manager John Lawlor, who had been emailing with Tom Montag the prior day about prepaid fraud losses, stated: "A lot of people are talking to Tom," by pretending not to know "1) who 'Tom' is, 2) who the 'people' are that are supposedly talking to 'Tom,' or 3) what they are saying." Opp. 22. In context, "Tom" could only be Tom Montag; the "people" talking to Tom and the details of what they are saying are precisely what Plaintiffs' RFPs 76-79 seek to establish; and the topic of those discussions is likely the same topic that was the subject of Lawlor's and others' emails during that short time period: the Bank's losses from paying EFTA-required credits and its efforts to stem those losses.

custodian's ESI search. The Bank's attack also ignores that Montag ***is not even a current Bank employee***, having left the Bank in December 2021, according to his LinkedIn profile.[3]

While the Bank faults Plaintiffs for not seeking to compel CFO Paul Donofrio's documents (Opp. 20:25-28), it omits that Plaintiffs did initially seek his and Chief Risk Officer Geoffrey Greener's documents but, in an effort to compromise, later dropped both to focus on those Plaintiffs thought were likely to have the *most* relevant, non-duplicative documents. Montag was an obvious priority because he was the head of GBAM, the division responsible for the Bank's EDD card program and for creating and implementing the CFF. *See* Mot. 22:3-7; Exs. 14-20. So was Moynihan, the *only* officer who is on the Board of Directors, and who presented to the Board on several key issues. *See* Mot. 20:12-23; Exs. 10-12. Documents show that both Custodians communicated with other executives (custodians and non-custodians alike) about the EDD card program and the need to curtail the Bank's losses from paying EFTA-required credits. S*ee* Exs. 1, 3, 14, 25-28. Communications between Moynihan or Montag and other non-custodian executives (such as Donofrio and Greener) about the CFF and the Bank's reasons for implementing it are not obtainable from any existing custodians.

2. The Maximal Relevance of Moynihan's and Montag's Documents to the Central Issues in the Case Far Outweighs the Minimal Burden of Producing Their Non-Duplicative Documents.

Despite the critical importance of proportionality to the Rule 26 analysis, the Bank devotes a mere half page to the issue. Opp. 24:5-22. Neither that analysis, nor anything in the Discovery Order, addresses how proportionality analysis should be applied in this case, given the core disputes over treble and punitive damages, and the minimal incremental burden of searching for and producing responsive, non-duplicative documents from these two Custodians. *See* Mot. 23:24-25:21.

[3] https://www.linkedin.com/in/tom-montag-68772b9/.

(a) The importance of the issues at stake and (b) the amount in controversy. The Bank starts with the surprising argument that its damages exposure is minimal because its use of the CFF was "short-lived" and because "[l]ittle [r]emains" of Plaintiffs' claims now that it has reimbursed EDD cardholders for many millions of dollars that it wrongfully withheld from them under its CFF policy. *See* Opp. 1:17, 6:9-19. This ignores that the only reason the Bank's CFF policy was "short-lived" is because Plaintiffs obtained a ***preliminary injunction*** that enjoined the Bank from using it and required the Bank to reconsider previously denied claims. FAMCC, Ex. A ("PI Order"), Ex. B ("PI"). The Bank also ignores that neither the preliminary injunction nor the CFPB/OCC Consent Decrees (*see* Mot. 5:17-9:4) preclude Plaintiffs' claims for treble and punitive damages, which the Bank does not dispute could be in the "hundreds of millions of dollars." *See* Mot. 7:10-9:4, 24:3-8; *cf. Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 7-8 (D.D.C. 2017) (amount in controversy of over $150 million in treble damages weighed in favor of compelling CEO's documents). The Order did not address these highly important proportionality factors.

(c) The importance of the discovery in resolving the issues. Documentary evidence establishing the Custodians' knowledge, participation, and approval of the Bank's challenged conduct goes to the heart of Plaintiffs' punitive and treble damages claims. *See* Mot. 7:10-9:4. The Bank's principal objection to producing the Custodians' documents is that Plaintiffs already have evidence about the Bank's CFF policy from lower-level custodians. It is true Plaintiffs already have considerable evidence establishing what the Bank *did* in hastily designing and implementing the CFF's crude and untested indicators, and then using the CFF for nine months until the June 2021 preliminary injunction as the sole basis for automatically: (1) denying every claim of an unauthorized ATM withdrawal, (2) freezing the account of any EDD cardholder who submitted such a claim, and (3) rescinding permanent credits the Bank had previously issued. *See* Mot. 4:18-5:16. But Moynihan and Montag's documents are uniquely relevant, non-cumulative, and non-duplicative because they will show

why the Bank's decision-makers directed their subordinates to develop and implement the CFF policy, and whether they did so in reckless disregard of the known or foreseeable harms it would have on tens of thousands of innocent Californians who relied on their UI benefits. *See Dang v. Cross*, 422 F.3d 800, 809-10 (9th Cir. 2005); Cal. Civ. Code §3294(b). Such documents are critical to resolving whether the Bank's challenged conduct was "knowing[] and willful[]," thus triggering EFTA treble damages, 15 U.S.C. §1693f(e)(2), and sufficiently egregious to trigger punitive damages under Plaintiffs' due process and common law claims. *See* Mot. 7:10-9:4.

(d) The parties' relative access to relevant information and (e) the parties' resources. These factors, too, weigh in Plaintiffs' favor, and are not disputed by the Bank. *See* Mot. 24:26-25:21; *see generally* Opp.

(f) Whether the burden or expense of the proposed discovery outweighs its likely benefit. The incremental burden to the Bank of producing documents from these two custodians—which the Bank now admits will cost a small fraction of what it told Judge Berg—is minimal in relation to Plaintiffs' established need. *Compare* ECF 209-2 ¶9 (estimating "$290,000 per additional custodian collected and reviewed"), *with* ECF 287-2 ¶12 (estimating combined cost for Moynihan and Montag of "between $135,000 and $170,000").[4] The Bank's ability to de-duplicate any copies of documents already produced from existing custodians will further reduce the cost burden (and defeats the Bank's argument that the requested discovery is "unreasonably cumulative or duplicative" (*see, e.g.*, Opp. 2:26)). *See Williams v. Apple, Inc.*, No. 19-cv-04700-LHK-VKD, 2020 WL 5107639, at *2 (N.D. Cal. Aug. 31, 2020); *SPS Techs., LLC v. Briles Aerospace, Inc.*, No. 18-cv-9536-MWF, 2019 WL 13108021, at *1 (C.D. Cal.

[4] The Bank's principal burden argument that it already incurred substantial costs in producing other documents (Opp. 1:15-16) is not compelling. Plaintiffs should not be penalized simply because the Bank failed to respond to its prior discovery obligations in a cost-effective manner. *Compare id.* at 7:27-8:7 (claiming Bank spent "more than $7 million" to review and produce approximately 275,000 documents from 20 custodians), *with Oxbow Carbon*, 322 F.R.D. at 9 (party spent $1.391 million to review and produce approximately 584,000 documents from 19 custodians).

June 25, 2019). In the context of this case, the incremental cost of reviewing these two custodians' documents is not disproportionate. *See Oxbow Carbon*, 322 F.R.D. at 9 (estimated cost of $142,000 to produce CEO's estimated 65,000 documents—"a fraction of the cost of discovery to date"—not unduly burdensome or disproportionate, especially considering amount in controversy was "tens of millions of dollars").[5]

The Bank insists Moynihan and Montag are unlikely to have many responsive, non-duplicative documents. If that proves to be true, the burden on the Bank will be even less. But if even a handful of responsive documents demonstrate that Moynihan or Montag *knew*, for example, that the CFF would have a significant false positive rate and wrongfully deprive legitimate EDD cardholders of access to desperately needed funds, they would be hugely significant to Plaintiffs' treble and punitive damages claims. To deprive Plaintiffs of those documents would be unduly prejudicial and a miscarriage of justice for the tens of thousands of Californians who "depend[ed] on unemployment benefits to get through the pandemic" and to "feed their families and keep a roof over their heads," PI Order at 2, whose benefits the Bank withheld for weeks and months without reasonable basis.

III. CONCLUSION

For all these reasons and those stated in the opening brief, Plaintiffs respectfully request the Court modify the Discovery Order and compel the Bank to add Moynihan and Montag as ESI custodians, or alternatively, to remand to Judge Berg for reconsideration under the correct Rule 26 legal standard and in light of Plaintiffs' supplemental evidence.

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[5] The Bank tries to defend Judge Berg's order by invoking Rule 26(b)(2)(C)(i), but as the Bank acknowledges, Rule 26(b)(2) also "requires that the court apply a benefits versus burden approach" in ensuring discovery is not "unreasonably cumulative or duplicative." *Laryngeal Mask Co.*, 2009 WL 10672436, at *4; *see* Opp. 11:24-12:1. Neither the Bank nor the Discovery Order makes any attempt to engage in a balancing of the benefits versus burdens of compelling the Custodians' documents.

Respectfully submitted,

Dated: June 7, 2024 **COTCHETT, PITRE & McCARTHY, LLP**

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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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