

1 JAMES W. MCGARRY (pro hac vice)
2 *JMcGarry@goodwinlaw.com*
3 **GOODWIN PROCTER LLP**
4 100 Northern Avenue
Boston, MA 02210
Tel.: +1 617 570 1000
Fax: +1 617 523 1231

5 SABRINA M. ROSE-SMITH (pro hac vice)
6 *SRoseSmith@goodwinlaw.com*
7 MATTHEW L. RIFFEE (pro hac vice)
8 *MRiffee@goodwinlaw.com*
9 **GOODWIN PROCTER LLP**
10 1900 N Street, NW
Washington, DC 20036
Tel.: +1 202 346 4000
Fax: +1 202 346 4444

11 Attorneys for Defendant
12 BANK OF AMERICA, N.A.

13 [ADDITIONAL COUNSEL LISTED IN SIGNATURE BLOCK]

14 **UNITED STATES DISTRICT COURT**
15 **SOUTHERN DISTRICT OF CALIFORNIA**
16 **SAN DIEGO DIVISION**

17 IN RE: BANK OF AMERICA
18 CALIFORNIA UNEMPLOYMENT
19 BENEFITS LITIGATION

Case No. 21-MD-02992-GPC-MSB

20 **DEFENDANT BANK OF**
21 **AMERICA, N.A.'S**
22 **MEMORANDUM OF POINTS**
23 **AND AUTHORITIES IN**
24 **SUPPORT OF DEFENDANT'S**
25 **MOTION FOR A PROTECTIVE**
26 **ORDER**

27 Ctrm: 2D – 2nd Floor
28 Judge: Hon. Gonzalo P. Curiel

FILED PROVISIONALLY UNDER SEAL
PURSUANT TO STIPULATED PROTECTIVE
ORDER

TABLE OF CONTENTS

BACKGROUND	2
I. Plaintiffs' Efforts to Secure ESI Discovery from the Apex Executives.	2
II. Plaintiffs' Efforts to Secure Depositions of the Apex Executives.	5
LEGAL STANDARD	8
ARGUMENT	9
I. Mr. Moynihan Has No Unique Knowledge of the Issues in This Case.	11
II. Mr. Montag Has No Unique Knowledge of the Issues in This Case.	19
III. Plaintiffs Chose to Forgo Less Intrusive Discovery Methods.....	22
CONCLUSION	24

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>Affinity Labs of Texas v. Apple</i> , 2011 WL 1753982 (N.D. Cal. May 9, 2011)	9, 22
<i>Apple Inc. v. Samsung Electronics Co., Ltd.</i> , 282 F.R.D. 259 (N.D. Cal. 2012)	8
<i>Celerity, Inc. v. Ultra Clean Holding, Inc.</i> , 2007 WL 205067 (N.D. Cal. Jan. 25, 2007)	1, 8, 22
<i>Davis v. Pinterest, Inc.</i> , 2021 WL 11117688 (N.D. Cal. May 27, 2021)	15
<i>In re Google Litig.</i> , 2011 WL 4985279 (N.D. Cal. Oct. 19, 2011)	1, 9, 23
<i>Greer v. Cnty. of San Diego</i> , 2022 WL 2134601 (S.D. Cal. June 14, 2022)	9
<i>K.C.R. v. County of Los Angeles</i> , 2014 WL 3434257 (C.D. Cal. July 11, 2014)	9, 24
<i>Kadrey v. Meta</i> , 2024 WL 4293910 (N.D. Cal. Sept. 24, 2024)	23
<i>Mehmet v. PayPal, Inc.</i> , 2009 WL 921637 (N.D. Cal. Apr. 3, 2009)	22
<i>Metabyte, Inc. v. Meta Platforms, Inc.</i> , 2025 WL 799040 (N.D. Cal. Mar. 13, 2025)	23
<i>Pilot, Inc. v. Cub Elecparts, Inc.</i> , 2015 WL 13918235 (C.D. Cal. Dec. 7, 2015)	24

Court Rules

Federal Rules of Civil Procedure Rule 26(c)(1)	8
--	---

1 Bank of America, N.A. (“BANA”) requests a protective order precluding the
2 depositions of its two top executives—current Chief Executive Officer (“CEO”)
3 Brian Moynihan and former Chief Operating Officer (“COO”) Thomas Montag.

4 The “tremendous potential for abuse or harassment” associated with
5 deposition notices to executives at “the highest level or ‘apex’ of corporate
6 management” is undisputed. *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 2007 WL
7 205067, at *3 (N.D. Cal. Jan. 25, 2007). The deposition notices of Messrs. Moynihan
8 and Montag are no exception, particularly given Plaintiffs’ confessed desire to push
9 settlement via executive discovery. To prevent such abuse or harassment, in order to
10 satisfy the “apex doctrine,” courts have held that a party seeking such a deposition
11 must show—with evidence—that the executives have “*unique firsthand, non-*
12 *repetitive knowledge* of the facts at issue in the case.” *In re Google Litig.*, 2011 WL
13 4985279, at *2 (N.D. Cal. Oct. 19, 2011) (emphasis added). Despite the extensive
14 record available to Plaintiffs here, they cannot do so.

15 Plaintiffs argue that the apex depositions are necessary because they believe
16 the executives purportedly “dr[ove] and ultimately made” and “w[ere] at the center
17 of the Bank’s” decisions and policies regarding the fraud filter and customer service
18 issues underlying Plaintiffs’ claims, and because the executives purportedly have
19 unique knowledge about these issues relevant to Plaintiffs’ punitive damages claim
20 that Plaintiffs can only ascertain by taking their depositions. Plaintiffs previously
21 were able to secure *ESI* discovery from Messrs. Moynihan and Montag based on this
22 same speculation—that the documents would show that Mr. Moynihan and/or
23 Mr. Montag approved, directed, or ratified the use of the fraud filter or the staffing
24 of the prepaid claims call center with the requisite ill-intent necessary to satisfy the
25 standard for punitive damages.

26 But the two top executives’ ESI revealed what BANA has been saying all
27 along: Messrs. Moynihan and Montag did not drive or ultimately make any decisions
28 regarding the fraud filter or the call center, and neither Mr. Moynihan nor Mr. Montag

1 has any unique or non-repetitive knowledge concerning any facts at issue in this case,
2 including those relevant to Plaintiffs' request for punitive damages. Indeed, after
3 almost two years of discovery, receiving nearly 270,000 documents, and taking 15
4 depositions, Plaintiffs still cannot support, with *evidence*, their claims that Messrs.
5 Moynihan and Montag were uniquely involved in the issues of this case. If Plaintiffs
6 are allowed to proceed on this record, it would essentially write the apex doctrine out
7 of existence every time a plaintiff seeks punitive damages from a corporate
8 defendant. That is not—and cannot be—the law. Plaintiffs must show more to
9 satisfy the apex doctrine's requirements. They have not—and cannot—do so here.

10 **BACKGROUND**

11 **I. Plaintiffs' Efforts to Secure ESI Discovery from the Apex Executives.**

12 The parties' dispute with respect to discovery from Messrs. Moynihan and
13 Montag began in the fall of 2023, when Plaintiffs first indicated they intended to seek
14 ESI documents from their custodial files. Declaration of Matthew L. Riffie ("Riffie
15 Decl."), Ex. No. 1, BANA Apex IDC Ltr. 1. The issue was discussed over the course
16 of several informal discovery conferences, including one during which Plaintiffs'
17 counsel candidly told Magistrate Judge Berg that top executive emails were
18 necessary because "they resolve cases," "they settle cases." McGarry Decl. ISO
19 BANA Dis. Ct. ESI Br., Dkt. 209-1 ¶ 10.

20 On January 23, 2024, Plaintiffs filed a motion to compel ESI discovery from
21 Messrs. Moynihan and Montag. *See* Pls. MJ ESI Br.¹ On April 24, 2024, Judge Berg

22
23 ¹ The parties collectively filed seven formal briefs and the Court issued two orders
24 regarding Plaintiffs' request for ESI discovery from Messrs. Moynihan and Montag.
With respect to the parties' briefing of the ESI issue before Judge Berg:

- 25 1) BANA's Mem. of Points and Authorities in Support of Defendant's Motion to
Preclude Additional ESI Discovery, Dkt. 209, is "BANA MJ ESI Br.";
- 26 2) Plaintiffs' Opening Brief in Support of Mot. to Compel Additional ESI
27 Custodians, Filed Under Seal at Dkt. 212, is "Pls. MJ ESI Br.";
- 28 3) BANA's Mem. of Points and Authorities in Opposition to Plaintiffs' Motion to
Compel Additional ESI Custodians, Dkt. 214, is "BANA MJ ESI Opp.";

1 issued an order denying Plaintiffs' request, finding that Plaintiffs had not
2 demonstrated that either Mr. Moynihan or Mr. Montag were likely to have uniquely
3 relevant information that was not available from sources already designated. MJ ESI
4 Order at 8–9. In that order, Judge Berg explicitly disagreed with Plaintiffs'
5 characterizations of the documents they presented in support of their motion
6 (characterizations Plaintiffs continue to make today). *Id.* For example, with respect
7 to an exhibit that Plaintiffs said shows that [REDACTED]
8 [REDACTED] Pls. MJ ESI Opp. at 2, Judge Berg noted that “the document
9 merely reveals that a BANA employee asked whether Moynihan approved moving
10 forward, to which an existing custodian responded, ‘we are freezing all the
11 atm/combo cards but that’s all we have approval for.’” MJ ESI Order at 8. Judge
12 Berg concluded that the document “does not indicate *who* approved the freezing, let
13 alone if Moynihan did so.” *Id.* (emphasis in original). And with respect to documents
14 Plaintiffs cited that they said showed Mr. Moynihan presented on “key issues” at
15 Board meetings, Judge Berg concluded that Mr. Moynihan did not possess any
16 unique information because Plaintiffs already had all relevant Board materials. *Id.*
17 Judge Berg found Plaintiffs' arguments about Mr. Montag's documents similarly
18 unpersuasive. *See id.* at 8–9.

-
- 20 4) Plaintiffs' Opp. to Defendant's Mot. to Preclude Additional ESI Discovery,
21 Filed Under Seal at Dkt. 215, is “Pls. MJ ESI Opp.”; and
22 5) Magistrate Judge Berg's Discovery Order, Dkt. 268 is “MJ ESI Order.”
With respect to Plaintiffs' appeal of Judge Berg's ESI Order to this Court:
23 6) Plaintiffs' Mem. of Points and Authorities in Support of Plaintiffs' Objections
24 to and Motion to Reverse in Part Magistrate Judge's April 24, 2024 Discovery
Order, Filed Under Seal at Dkt. 278-1, is “Pls. Dist. Ct. ESI Br.”;
25 7) BANA's Mem. of Points and Authorities in Opposition to Plaintiffs' Objections,
26 Dkt. 287, is “BANA Dist. Ct. ESI Br.”;
27 8) Plaintiffs' Reply in Support of Plaintiffs' Objections, Filed Under Seal at Dkt.
28 292, is “Pls. Dist. Ct. ESI Reply”; and
9) The Court's Order Sustaining Plaintiffs' Objections and Granting Plaintiffs'
Motion, Dkt. 298, 2024 WL 3174874 (Jun. 25, 2024) is “Dist. Ct. ESI Order.”

1 On May 8, 2024, Plaintiffs filed a motion to reverse Judge Berg’s order on
2 grounds that he incorrectly applied the more stringent “apex doctrine” rather than the
3 lesser Rule 26 proportionality standard, and that Messrs. Moynihan and Montag’s
4 ESI was likely to be uniquely relevant to Plaintiffs’ claim for punitive damages. Pls.
5 Dist. Ct. ESI Br. at 3. BANA opposed on numerous grounds, including because
6 Plaintiffs acknowledged they were seeking discovery from Messrs. Moynihan and
7 Montag not because the executives were actually involved in the issues in the case,
8 but to try to pressure BANA to settle. *See* BANA Dist. Ct. ESI Br. at 2; *see also*
9 McGarry Decl. ISO BANA Dis. Ct. ESI Br., Dkt. 209-1 ¶ 10.

10 On June 25, 2024, the Court reversed Judge Berg’s ESI order. Dist. Ct. ESI
11 Order, at *1. The Court’s Order contained no specific findings about Plaintiffs’
12 proffered exhibits, noting only that the Court “exercises its discretion and considers
13 them.” *Id.* at *5. The Court further explained that it granted Plaintiffs’ motion for
14 the *limited* reason that “ESI from Moynihan and Montag *concerning [Plaintiffs’*
15 *claim for] punitive damages* can only be obtained by them, and not from sources
16 already designated.” *Id.* at *11 (emphasis added). In particular, the Court found that
17 “[a]t trial, Plaintiffs will need evidence of motive, intent, or knowledge and
18 ratification by an officer, director, or managing agent to support an award of punitive
19 damages,” and therefore “important for [Plaintiffs’ claim for] punitive damages is
20 what Moynihan and Montag ‘knew about the [fraud filter], its impact on legitimate
21 EDD cardholders, when they knew it, what action they directed, authorized, or
22 ratified, and why.” *Id.* (quoting Pls. Dist. Ct. ESI Br. At 15–16).

23 A few weeks later, BANA produced ESI from Messrs. Moynihan’s and
24 Montag’s custodial files. Riffie Decl. ¶ 6. Far from substantiating Plaintiffs’
25 speculation, the ESI discovery confirmed that it was unnecessary in the first place.
26 The collection of Messrs. Moynihan’s and Montag’s custodial files only resulted in
27 the production of 556 of the nearly 270,000 documents BANA has produced to
28 Plaintiffs. *Id.* ¶¶ 5–6. And, as BANA predicted and explained to Plaintiffs, the

1 responsiveness rates were extraordinarily low—only approximately 3% of Mr.
2 Moynihan’s reviewed documents were responsive to Plaintiffs’ requests, and less
3 than 1% of Mr. Montag’s reviewed documents were responsive. *Id.* ¶ 7. Moreover,
4 the limited number of responsive documents: (i) did not include any new, non-
5 cumulative information; (ii) did not suggest that either executive possesses unique
6 knowledge about the fraud filter or any other key issue in this case; (iii) did not reflect
7 any direction or decision making by the executives about those issues; and (iv) did
8 not include even a single document showing that Messrs. Moynihan and Montag
9 communicated about the issues in this case “among themselves” or “1:1” as Plaintiffs
10 have long suggested. *See* Pls. MJ ESI Br. at 5; Pls. Apex IDC Letter 2 at 3. Indeed,
11 almost one-third of Mr. Moynihan’s ESI documents were so-called “executive
12 escalations”—*i.e.*, unsolicited complaints from individuals that were merely
13 redirected to the right business personnel for proper handling.² Riffée Decl. ¶ 8.

14 **II. Plaintiffs’ Efforts to Secure Depositions of the Apex Executives.**

15 On October 11, 2024, having served only two other deposition notices³,
16 Plaintiffs served notices of deposition for Messrs. Moynihan and Montag. Riffée
17 Decl. ¶ 14. Shortly after receiving the notice, BANA requested a protective order,
18

19 ² Riffée Decl. Ex. 5, Ahmad Tr. 366:25-376:13 [REDACTED]
20 [REDACTED] ; Riffée Decl. Ex. 6, Daniels
21 Tr. 278:5-281:13 ([REDACTED])
22 [REDACTED]; *see also* Plaintiffs’ Exhibits 22-41 ([REDACTED]).

23 ³ Plaintiffs served a Rule 30(b)(6) deposition notice on December 8, 2023 (later
24 revised and re-noticed on February 4, 2024) that required testimony from six different
25 BANA witnesses, and a notice of deposition on April 22, 2024 for Renee Johnson, a
26 BANA employee that led the Consumer Claims Resolution and Recovery group.
27 Riffée Decl. ¶¶ 12–13; Ruiz Decl. ¶ 13. Ms. Johnson was not one of the 13
28 individuals identified by BANA as having relevant knowledge of the fraud filter, *see*
Riffée Decl. Ex. 7, BANA’s Interrog. Resp. No. 11, and [REDACTED]
[REDACTED], *see infra* footnote 9.

1 and the parties engaged in informal briefing before Judge Berg.⁴ *Id.* ¶¶ 23–24. On
2 December 23, 2024, Judge Berg issued a tentative ruling granting BANA’s request
3 because Plaintiffs had not satisfied the apex doctrine’s requirement to exhaust efforts
4 to take discovery through less burdensome means. *Id.* ¶ 25. Judge Berg ruled that
5 Plaintiffs must take depositions of certain witnesses that BANA identified as
6 involved in the development, approval, and implementation of the fraud filter before
7 he would reconsider Plaintiffs’ request to depose BANA’s two top executives. *Id.*
8 Plaintiffs thereafter deposed six additional witnesses—each of whom was involved
9 in the development, approval, and/or implementation of the fraud filter. Riffée Decl.
10 ¶ 26; *see also id.* Ex. 7, BANA’s Interrog. Resp. No. 11. Specifically, Plaintiffs
11 deposed Faiz Ahmad (Head of Global Transaction Services (“GTS”), ultimately
12 responsible for the prepaid card business, and who reported up to Mr. Montag),
13 Jennifer Ehresman (Head of Consumer Client Protection, the group responsible for
14 overseeing claims), William Fox (former Director of the Financial Crimes
15 Enforcement Network (“FinCEN”) and Global Head of Global Financial Crimes
16 (“GFC”), the group primarily responsible for the development of the fraud filter),
17 Anne Holt (Director of GFC), Melissa (Gargagliano) Ramirez (a business banking
18 operations executive in Commercial Card Fulfillment, Service, & Operations), and
19 Paul Simpson (Managing Director of Global Operations). Riffée Decl. ¶¶ 10–11;

20
21 ⁴ The parties collectively filed four informal letter briefs regarding the apex
depositions:

- 22 1) BANA’s initial informal letter brief, submitted December 16, 2024, is “BANA
23 Apex IDC Letter 1,” which is attached as Exhibit 1 to the Riffée Decl.;
- 24 2) Plaintiffs’ initial informal letter brief, submitted December 16, 2024, is “Pls.
25 Apex IDC Letter 1,” which is attached as Exhibit 2 to the Riffée Decl.;
- 26 3) BANA’s second informal letter brief, submitted March 7, 2025, is “BANA Apex
27 IDC Letter 2,” which is attached as Exhibit 3 to the Riffée Decl.; and
- 28 4) Plaintiffs’ second informal letter brief, submitted March 7, 2025, is “Pls. Apex
IDC Letter 2,” which is attached as Exhibit 4 to the Riffée Decl. The 53 exhibits
attached to Pls. Apex IDC Letter 2 are included in Exhibit 4 to Riffée Decl., and
referred to herein as “Plaintiffs’ Exhibits.”

1 Ruiz Decl. ¶¶ 16–21.⁵ During these depositions, Plaintiffs made strategic choices
2 about which documents to show the witnesses and which questions to ask. Not a
3 single witness provided testimony supporting Plaintiffs’ assertion that Messrs.
4 Moynihan and Montag have the uniquely relevant information required by the apex
5 doctrine, much less that they were at the center of, drove, or ultimately made any
6 decisions regarding the fraud filter or call center policies. To the contrary, Mr.
7 Ahmad definitively told Plaintiffs that [REDACTED]
8 [REDACTED]. *See infra*
9 at 16–17. Having made choices about who to depose and what to ask, Plaintiffs
10 cannot not use the holes in their own discovery record—caused by their own strategic
11 decisions—to justify these depositions.

12 Upon renewal of BANA’s request for a protective order, the parties engaged
13 in a second round of informal briefing for a discovery conference before Judge Berg
14 on March 12, 2025. Riffie Decl. ¶ 30. Despite lacking evidence, Plaintiffs continued
15 to argue that the executives “dr[ove] and ultimately made” and “w[ere] at the center
16 of the Bank’s” decisions and policies regarding the fraud filter and call centers. Pls.
17 Apex IDC Letter 2 at 2, 3. In support of their arguments, Plaintiffs cited 53 exhibits,
18 recycling the 46 ESI documents they cited in their first apex IDC letter brief, and
19 including excerpts from the transcripts of seven depositions. *See generally id.* Many
20 of the 46 ESI documents were also the same or similar as those previously cited in
21 Plaintiffs’ ESI brief. *Compare* Plaintiffs’ Exhibits 1–48 *with* Pls. Dist. Ct. ESI Br.
22 Exs. 2, 7, 11, 13, 15, 25–28, 34. At the March 12, 2025 discovery conference, Judge
23 Berg issued a second tentative ruling allowing Plaintiffs to depose Mr. Moynihan for
24 two hours and Mr. Montag for one hour, with both depositions limited to the issue of

25 ⁵ The depositions of the Head of Commercial Cards Product Management, Bradley
26 Garfield, and a GFC specialist, Ryan Schwartz, (Ruiz Decl. ¶¶ 14–15) occurred
27 during the time period between Plaintiffs’ October 11, 2024 apex deposition notice
28 and Judge Berg’s December 23, 2024 tentative ruling, for a total of 15 depositions
taken by Plaintiffs. Riffie Decl. ¶¶ 10–11.

1 punitive damages (Riffée Decl. ¶ 30)—which this Court previously said would
2 include discovery as to “what Moynihan and Montag ‘knew about the [fraud filter],
3 its impact on legitimate cardholders, when they knew it, what action they directed,
4 authorized, or ratified, and why.” Dist. Ct. ESI Order at *11 (quoting Pls. Dist. Ct.
5 ESI Br. at 15–16). In so ruling, Judge Berg found no reason for either executive to
6 sit for a lengthy deposition given the dearth of evidence in the record concerning any
7 unique, non-repetitive knowledge they may have. Riffée Decl. ¶ 30. Plaintiffs
8 unilaterally rejected the tentative ruling. Riffée Decl. ¶ 31.

9 Previously, this Court directed that should either party wish to challenge Judge
10 Berg’s tentative ruling, the dispute regarding apex depositions may be raised directly
11 to the District Court, rather than through formal briefing before the Magistrate Judge.
12 Riffée Decl. ¶ 27. On March 28, 2025, the District Court accepted the parties’
13 proposed briefing schedule for this motion. *See* Dkt. 417.

14 LEGAL STANDARD

15 “Virtually every court that has addressed deposition notices directed at an
16 official at the highest level or ‘apex’ of corporate management has observed that such
17 discovery creates a tremendous potential for abuse or harassment.” *Celerity, Inc.*
18 2007 WL 205067, at *3; *see also Apple Inc. v. Samsung Electronics Co., Ltd.*, 282
19 F.R.D. 259, 263 (N.D. Cal. 2012). To curb the potential for abuse, courts have
20 developed the so-called “apex doctrine,” pursuant to which courts routinely exercise
21 the discretion afforded by Rule 26(c)(1) of the Federal Rules of Civil Procedure to
22 forbid an executive deposition or limit its scope. *See Apple*, 282 F.R.D. at 262–63.
23 Courts have accordingly required the party seeking an apex deposition to show that
24 (1) the deponent has “unique first-hand, non-repetitive knowledge of the facts at issue
25 in the case,” and (2) the party has “exhausted other less intrusive discovery methods.”
26 *In re Google Litig.*, 2011 WL 4985279, at *2; *see also Greer v. Cnty. of San Diego*,
27 2022 WL 2134601, at *3 (S.D. Cal. June 14, 2022) (precluding apex depositions
28 because “*Plaintiff* has not *shown* that [the witness] has any unique, first-hand

1 knowledge of the specific circumstances at issue”) (emphasis added); *Ramirez v.*
2 *Zimmerman*, WL 2106594, at *6 (S.D. Cal. May 14, 2019) (party seeking deposition
3 “must *show*” that requirements of the apex doctrine are met) (emphasis added), *aff’d*
4 *sub nom. Cervantes v. San Diego Police Chief Zimmerman*, 2019 WL 3072307 (S.D.
5 Cal. July 15, 2019), *aff’d sub nom. Ramirez v. Zimmerman*, 2021 WL 5104371 (9th
6 Cir. Nov. 3, 2021).

7 ARGUMENT

8 There is no dispute that Messrs. Moynihan and Montag are “clearly high-level
9 executives whose depositions must satisfy the ‘apex’ requirements.” *In re Google*
10 *Litig.*, 2011 WL 4985279, at *2. Mr. Moynihan has been BANA’s CEO since
11 January 2010, and the Chairman of its Board of Directors since October 2014.⁶ Ruiz
12 Decl. ¶ 5. Mr. Montag was BANA’s second-in-line executive, with the title of COO
13 and President of Global Banking and Markets, until December 2021,⁷ and is now the
14 CEO of Rubicon Carbon. Ruiz Decl. ¶ 6. “Where a high-level decision maker
15 removed from the daily subjects of the litigation has no unique personal knowledge
16 of the facts at issue, a deposition of the official is improper.” *Affinity Labs of Tex. v.*
17 *Apple*, 2011 WL 1753982, at *15 (N.D. Cal. May 9, 2011) (internal quotations
18 omitted). The apex standard for depositions is *different* and *higher* than the one that
19 applies to disputes about ESI discovery—a distinction that Plaintiffs concede. *See*
20 *Pls. Dist. Ct. ESI Br.*, at 15–17 (referring to “heightened apex doctrine standard” for
21 depositions). Plaintiffs were able to obtain ESI discovery from Messrs. Moynihan
22 and Montag by arguing that their documents *might* reveal unique information
23 relevant to Plaintiffs’ claim for punitive damages. *See Pls. Dist. Ct. ESI Br.* at 2. But
24
25

26 ⁶ BANA is a wholly owed subsidiary of Bank of America Corporation (“BAC”).
27 Ruiz Decl. ¶ 4.

28 ⁷ The apex doctrine protects executives “even after leaving office.” *K.C.R. v. County*
of Los Angeles, 2014 WL 3434257, at *3 (C.D. Cal. July 11, 2014).

1 speculation that an apex executive *might* have unique information is insufficient to
2 satisfy the apex doctrine’s more stringent requirements.

3 Under the lesser standard for ESI discovery, the Court found that Plaintiffs had
4 sufficiently alleged for ESI purposes that Messrs. Moynihan and Montag *may* have
5 “uniquely relevant information that is not available from the sources already
6 designated” *only* “concerning punitive damages.” Dist. Ct. ESI Order at *11.
7 Specifically, the Court allowed Plaintiffs to pursue documentary support for their
8 unsubstantiated claims that Messrs. Moynihan and Montag would possess unique
9 documents that show the executives “knew about the [fraud filter], its impact on
10 legitimate EDD cardholders, when they knew it, what action they directed,
11 authorized, or ratified, and why.” *Id.*, quoting Pls. Dist. Ct. ESI Br. at 15–16.

12 Ultimately, the top executives’ ESI failed to support Plaintiffs’ speculative
13 claims. Indeed, despite the receipt of nearly 270,000 documents, significant written
14 discovery, and testimony from 15 BANA witnesses (Riffee Decl. ¶ 10–11), Plaintiffs
15 still have not offered any evidence suggesting that either Mr. Moynihan or Mr.
16 Montag has the uniquely relevant information Plaintiffs hoped to find. BANA told
17 Plaintiffs via written discovery responses that other BANA personnel (not Messrs.
18 Moynihan and Montag) developed, implemented, and approved the policies Plaintiffs
19 challenge. Riffee Decl. Ex. 7, BANA’s Interrog. Resp. No. 11. The witnesses
20 Plaintiffs have deposed have told Plaintiffs the same, and the documentary record—
21 including ESI discovery from the top executives themselves—confirms as much.
22 And there is certainly no evidence in the vast record suggesting that either executive
23 “directed, authorized, or ratified” the policies Plaintiffs challenge with the requisite
24 ill-intent—as Plaintiffs must show to be entitled to punitive damages, which is the
25 *sole* purpose for which Plaintiffs were permitted ESI discovery and currently seek
26 these depositions. *See* Dist. Ct. ESI Order at *11; Pls’ Apex IDC Letter 2.

27 At this point, Plaintiffs’ purported belief that Messrs. Moynihan and Montag
28 have unique information about their case is based on nothing more than unfounded

speculation that has been refuted by documents and testimony, and an effort to push the Bank into a settlement. There is nothing in the documents or testimony that suggests these depositions are warranted. The apex doctrine exists to protect high level executives against this very type of speculative inquiry.

I. Mr. Moynihan Has No Unique Knowledge of the Issues in This Case.

The documents submitted with Plaintiffs' latest IDC letter brief—*i.e.*, their best evidence—underscore Mr. Moynihan's lack of involvement, and make clear that Plaintiffs cannot meet the apex doctrine's requirement that they show Mr. Moynihan has unique knowledge about the fraud filter or call center staffing, let alone that he provided any direction or approval on these issues with the requisite ill-intent to support Plaintiffs' claim for punitive damages. Plaintiffs submitted 46 ESI exhibits, 40 of which related to Mr. Moynihan. *See* Pls. IDC Ltr. Br. Only *one* was Mr. Moynihan's custodial document (Plaintiffs' Exhibit 15). Riffée Decl. ¶ 29e. Exhibit 15 is [REDACTED]

[REDACTED]. At most, this document shows that [REDACTED]

[REDACTED] *See* Pls. IDC Ltr. Ex. 15. [REDACTED]

[REDACTED] *See id.* And it certainly does not indicate that Mr. Moynihan possesses unique knowledge or approved, directed, or ratified any actions with the requisite intent for punitive damages. Further, Plaintiffs deposed Ms. Ehresman, yet elected not to ask her a single question about [REDACTED]. Riffée Decl. ¶¶ 29f–g. Having made strategic choices during Ms. Ehresman's deposition, Plaintiffs cannot now use this document as the basis to seek Mr. Moynihan's deposition. This does not meet the heightened apex standard.

1 The remaining ESI exhibits Plaintiffs cited fare no better. Plaintiffs' Exhibits
2 1–3 are [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]—*i.e.*, his knowledge was not unique. Notably, each of these documents [REDACTED]
6 [REDACTED] Nor is there any
7 indication that Mr. Moynihan or the Board approved or ratified the continued use of
8 the fraud filter—much less that they did so with ill-intent. Plaintiffs cannot speculate
9 unique knowledge of Board involvement into existence.⁸

10 Plaintiffs' Exhibits 4–21 do not reflect any direct conversations or emails with
11 Mr. Moynihan, and therefore say nothing about his knowledge. Many are [REDACTED]
12 [REDACTED]
13 [REDACTED] Plaintiffs had the opportunity to
14 depose and ask the individuals who prepared or sent these documents whether they
15 were provided to Mr. Moynihan, or whether they ever had any discussions with Mr.
16 Moynihan regarding the documents. In most cases, Plaintiffs either chose not to ask
17 the questions, or chose not to depose the individual altogether. *See, e.g.*, Riffie Decl.
18 ¶¶ 29a–d & f–h, 20–22; *supra* at 11; *infra* at 21–23. When Plaintiffs did ask about
19 several of these documents, witnesses testified that [REDACTED]
20 [REDACTED] *See, e.g.*, Riffie Decl. Ex. 8, Ehresman Tr.
21 94:9–95:9 ([REDACTED]
22 [REDACTED]); *id.* Ex. 16, Holt Tr. 107:24–
23 109:25 ([REDACTED] [REDACTED])

24
25
26 ⁸ As Judge Berg found in connection with Plaintiffs' ESI requests, Plaintiffs have
27 long had all of the relevant Board materials. MJ ESI Order at 8. Plaintiffs cannot
28 identify any evidence in those materials that could prove, much less suggest, that Mr.
Moynihan or the Board possess unique knowledge concerning the fraud filter or any
other issues relevant to their punitive damages claim.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

[REDACTED] [REDACTED]
[REDACTED]).

These documents do not show that Mr. Moynihan had any unique relevant knowledge. For example, Plaintiffs' Exhibit 7 [REDACTED]

[REDACTED] Plaintiffs had the opportunity to (and did) depose both Mr. Schwartz and Mr. Garfield ([REDACTED]). Riffie Decl. ¶ 11. Among the numerous questions Plaintiffs posed about this document, they did not even ask Mr. Schwartz whether [REDACTED]

[REDACTED] See Riffie Decl. Ex. 11; see Schwartz Tr. 120:22–126:21. Plaintiffs likewise elected not to ask Mr. Garfield [REDACTED]

[REDACTED] Riffie Decl. Ex. 10, Garfield Tr. 221:16–231:16. Plaintiffs also did not ask other individuals referenced in this email (including Mr. Ahmad and Mr. Simpson) [REDACTED]

Riffie Decl. ¶¶ 29a–b. However, when asked generally, the witnesses testified that [REDACTED]

[REDACTED] (Riffie Decl. Ex. 10, Garfield Tr. 221:16–231:16; *id.* Ex. 13, Simpson Tr. 31:21–24, 45:16–46:17), and that [REDACTED]

[REDACTED] (Riffie Decl. 5, Ahmad Tr. at 93:25–94:9).

As another example, the *only* document Plaintiffs have identified that *speculates* about any purported one-on-one conversation between Messrs. Moynihan and Montag about prepaid issues is hearsay that has been debunked. This document, Plaintiffs' Exhibit 11, [REDACTED]

[REDACTED] (Riffie Decl. Ex. 9, Fox Decl. 30:2–6), [REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Deposition testimony from Mr. Ahmad

Riffie Decl. Ex. 5, Ahmad Tr.

125:15–127:4, 134:5–135:11. Moreover, Mr. Fox, the former Head of GFC (the group responsible for the development of the fraud filter),

Riffie Decl. Ex. 9, Fox Tr. 33:24–34:1, 32:12–15. Despite having knowledge of this document since early 2024, as evidenced by the fact that they cited it in their ESI brief (*see* Pls. MJ ESI Br., Dkt. 212-13), Plaintiffs never sought to depose Mr. Firpi, or otherwise verify his claim. And even if

that would not show unique knowledge of issues relevant to Plaintiffs’ claim for punitive damages because there is no evidence whatsoever that

As yet another example, Plaintiffs’ Exhibit 14 merely shows

1 [REDACTED] As Judge Berg held, this “does not indicate *who* approved
2 the alleged action, let alone if Moynihan did so.” MJ ESI Order at 8 (emphasis in
3 original). And Plaintiffs had the opportunity to depose both Mr. Garfield and
4 Ms. Johnson about this chat. Mr. Garfield testified that [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED] Riffie Decl. Ex. 10, Garfield Tr. 36:4–19, 228:6–231:16. Despite
8 Plaintiffs’ possession and knowledge of this document in advance of Ms. Johnson’s
9 May 7, 2024 deposition, as evidenced by the fact that they cited it in their ESI brief
10 before Judge Berg on January 23, 2024 (Pls. MJ ESI Br. at 5), Ms. Johnson was not
11 asked a single question about the chat (Riffie Decl. ¶ 14) or her knowledge of Mr.
12 Moynihan’s involvement (or lack thereof) with prepaid or the fraud filter.⁹

13 Plaintiffs’ Exhibits 22–39 are [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 See Plaintiffs’ Exhibits. 22–39.¹⁰ Such emails cannot support a deposition of a
18 company’s top executive. See *Davis v. Pinterest, Inc.*, 2021 WL 11117688, at *1
19 (N.D. Cal. May 27, 2021) (precluding apex deposition where plaintiff sought
20 deposition based, in part, on unsolicited complaints sent to and forwarded on by
21 executive). Indeed, executives often receive emails like these from consumers, and
22 there is no evidence that Mr. Moynihan had any role in assessing the validity of or
23

24 ⁹ See Riffie Decl. Ex. 12, Johnson Tr. 185:12–186:19 [REDACTED]
25 [REDACTED]
26 [REDACTED]).

27 ¹⁰ See also Riffie Decl. Ex. 5, Ahmad Tr. 366:25–376:13; Riffie Decl. Ex. 6, Daniels
28 Tr. 278:5–281:13.

1 resolving any complaints. *See* Plaintiffs’ Exhibits 22–39 ([REDACTED]
2 [REDACTED]); Riffée Decl. Ex. 5, Ahmad Tr. at 366:25–370:16 ([REDACTED]
3 [REDACTED]).¹¹

4 Plaintiffs’ failure to show that Mr. Moynihan possesses uniquely relevant
5 information comes as no surprise. In response to written discovery requests, BANA
6 identified 13 executives and managers who were primarily responsible for making
7 decisions regarding the issues in this case—Messrs. Moynihan and Montag were not
8 among them. Riffée Decl. Ex. 7, BANA’s Interrog. Resp. No. 11. Plaintiffs deposed
9 eight of the 13 executives and managers identified by BANA, and had an opportunity
10 to ask them about the documents Plaintiffs say support their apex requests. *Compare*
11 *id.* with Riffée Decl. ¶¶ 10–11, 16–20. Not a single witness’ testimony suggests that
12 Mr. Moynihan *actually* possesses unique, non-repetitive knowledge, much less the
13 “evidence of motive, intent, or knowledge and ratification” that Plaintiffs would need
14 “to support an award of punitive damages.” Dist. Ct. ESI Order at *11.

15 Rather, these witnesses—who were extensively involved in decisions at the
16 core of Plaintiffs’ claims—consistently testified that [REDACTED]
17 [REDACTED]
18 [REDACTED]:

- 19 • Faiz Ahmad, Head of GTS (Ruiz Decl. ¶ 17), and the executive primarily
20 responsible for the prepaid card business, testified that [REDACTED]
21 [REDACTED] (Riffée Decl. Ex. 5, Ahmad Tr. 244:18–22), [REDACTED]
22 [REDACTED]
23 [REDACTED] (*id.*

24
25 ¹¹ Plaintiffs’ final ESI document regarding Mr. Moynihan (Plaintiffs’ Exhibit 42) is
26 a public letter from the California state legislature, and says nothing about whether
27 Mr. Moynihan has unique knowledge about this case. (Plaintiffs’ Exhibits 40–41 and
28 50–53 are deposition transcripts; Plaintiffs’ Exhibits 43–48 are ESI documents
regarding Mr. Montag, and are discussed in Section II, *infra*.)

1 93:25–94:9), and [REDACTED]
2 [REDACTED] (*id.*
3 94:10–20).

- 4 • Paul Simpson, Managing Director of Global Operations (Ruiz Decl. ¶ 21),
5 testified, [REDACTED]
6 [REDACTED]
7 (Riffie Decl. Ex. 13, Simpson Tr. 88:8–19), [REDACTED]
8 [REDACTED]
9 [REDACTED] (*id.* 106:16–107:12), and—indeed— [REDACTED]
10 [REDACTED] (*id.*
11 46:1–17).

- 12 • William Fox, the FinCEN Director and Head of GFC (Ruiz Decl. ¶ 19),
13 testified that [REDACTED]
14 [REDACTED] (*see*
15 Riffie Decl. Ex. 9, Fox Tr. 43:13–44:11), [REDACTED]
16 [REDACTED] (*see id.*), and that [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] (Riffie Decl. Ex. 9, Fox Tr. 27:20–23). He also testified that [REDACTED]
20 [REDACTED]
21 [REDACTED] (*id.* 34:10–15).

- 22 • Michael Letson, Managing Director for GFC (Ruiz Decl. ¶ 10), testified [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED] (Riffie Decl. Ex. 14, Letson Tr. 280:12–16).

- 26 • Brad Garfield, Head of Commercial Cards Product Management (which
27 included EDD prepaid cards at the time) (Ruiz Decl. ¶ 15), testified [REDACTED]
28 [REDACTED]

1 [REDACTED] (Riffee Decl.
2 Ex. 10, Garfield Tr. 228:6–231:16), and that [REDACTED]
3 [REDACTED] (*id.* 36:4–19).

- 4 • Melissa Ramirez, a business banking operations executive in Commercial
5 Card Fulfillment, Service, & Operations (Ruiz Decl. ¶ 18), when asked [REDACTED]
6 [REDACTED]
7 [REDACTED] testified that [REDACTED] (Riffee
8 Decl. Ex. 15, Ramirez Tr. 58:20–25), and further testified that [REDACTED]
9 [REDACTED] (*id.* 24:17–19).
- 10 • Jennifer Ehresman, Head of Consumer Client Protection (Ruiz Decl. ¶ 20),
11 similarly testified that [REDACTED]
12 [REDACTED] (Riffee Decl. Ex. 8, Ehresman Tr. 52:10–12).
- 13 • Anne Holt, Director of GFC (Ruiz Decl. ¶ 16), when asked [REDACTED]
14 [REDACTED]
15 [REDACTED] (Riffee Decl. Ex. 16, Holt Tr. at Tr. 217:20–
16 218:9).
- 17 • W. Matthew Martin, Senior Vice President in Fraud Management (Ruiz Decl.
18 ¶ 9), testified that [REDACTED]
19 [REDACTED] (Riffee Decl. Ex. 17, Martin Tr. 156:3–21), [REDACTED]
20 [REDACTED]

21 Frustrated that they continue to come up empty in their search for the evidence
22 that BANA has long maintained does not exist, Plaintiffs argue—with no basis
23 whatsoever—that the reason they lack evidence to sustain their burden under the apex
24 doctrine is because BANA’s witnesses have provided “willfully evasive and
25 obstructionist testimony” to build a “wall of silence surrounding Moynihan and
26

27 ¹² [REDACTED]
28 [REDACTED] See Riffee Decl. Ex. 14, Letson Tr. 139:2–144:6.

1 Montag.” Pls. Apex IDC Letter Brief 2 at 3. The Court should reject this argument
2 entirely. Plaintiffs have not proffered a single fact to support this outrageous
3 allegation. Instead, as the documents show, the CEO of one of the world’s largest
4 financial institutions was not involved in decisions about the fraud filter, call center
5 staffing, or anything else relevant to Plaintiffs’ punitive damages claim.

6 Plaintiffs’ contention that the *absence* of deposition testimony supporting their
7 argument somehow is evidence that Mr. Moynihan has unique, non-repetitive
8 knowledge of Plaintiffs’ claims is circular, and also easily dispensed with. *See* Pls.
9 Apex IDC Letter Brief 2 at 3. Plaintiffs focus on the fact that the Court allowed them
10 executive ESI discovery to attempt to prove what Messrs. Moynihan and Montag
11 “knew about the [fraud filter], its impact on legitimate EDD cardholders, when they
12 knew it, what action they directed, authorized, or ratified, and why,” (*id.*, quoting
13 Dist. Ct. ESI Order at *11). But the executive ESI (and all the other evidence) shows
14 that Mr. Moynihan “knew” nothing unique about the fraud filter or any other key
15 issue, and “directed, authorized, or ratified” nothing with respect to the same. What
16 Plaintiffs seem to fail to appreciate is that the apex doctrine requires them to show
17 *more* than the speculative possibility that an executive deposition may shed light on
18 these questions. They cannot do it, so their request to depose Mr. Moynihan should
19 be denied.

20 **II. Mr. Montag Has No Unique Knowledge of the Issues in This Case.**

21 Discovery has likewise confirmed that Mr. Montag has no unique, non-
22 repetitive knowledge that would support Plaintiffs’ claim for punitive damages. The
23 lack of such evidence is underscored by the fact that Plaintiffs point to only six ESI
24 exhibits that they claim show Mr. Montag possesses the requisite knowledge for a
25 deposition. Pls. Apex IDC Letter 2, at 2–3. But none of these documents satisfy the
26 apex doctrine.

27 Plaintiffs’ Exhibit 43, which Plaintiffs say [REDACTED]

28 [REDACTED] (*id.* at 2), on its face shows that [REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

[REDACTED]

[REDACTED] Plaintiffs' Exhibit 44 is [REDACTED]

[REDACTED]

[REDACTED] Plaintiffs' Exhibit 45 [REDACTED]

[REDACTED] Plaintiffs claim that this document shows that [REDACTED]

[REDACTED] Pls. Apex IDC Letter 2 at 3. Taken in context, it does no such thing, and merely [REDACTED]

[REDACTED]

[REDACTED] Indeed, Mr. Ahmad, the executive responsible for the prepaid card business, one of the recipients of [REDACTED] Plaintiffs' Exhibit 45, and his direct report, testified that [REDACTED]

[REDACTED] Riffie Decl. Ex. 5, Ahmad Tr. 109:10–111:10. And in any event, [REDACTED]

[REDACTED] *see* Dkt. 225-2, ¶¶ 3–4), is irrelevant to Plaintiffs' punitive damages claim, as it cannot show that Mr. Montag (or anyone else) took any action regarding the fraud filter or the call center with intent or knowledge of harm.

Plaintiffs' Exhibits 46 and 47 are [REDACTED]

[REDACTED]

[REDACTED] Plaintiffs' Exhibit 46 is another iteration of Plaintiffs' Exhibit 11, discussed *supra* at 13, and suffers from the same flaws: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] the fact that Mr. Montag or Mr. Moynihan may have discussed [REDACTED] does not mean they have unique knowledge about the fraud filter (which is not discussed in either Exhibit 11 or 46), or that they directed, approved, or ratified its use with the requisite ill-intent. Similarly, Plaintiffs' Exhibit 47 is [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED] Plaintiffs did not notice depositions for
5 Mr. Lawlor or Mr. DeMare to seek further information. *See* Riffée Decl. ¶¶ 20–21.

6 Finally, Plaintiffs' Exhibit 48 is [REDACTED]
7 [REDACTED] All it
8 shows is that [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] Mr.
12 Montag was [REDACTED]
13 that he possessed any unique knowledge of the fraud strategies. Surely, Mr. Montag
14 does not possess unique, non-repetitive knowledge regarding that meeting,
15 particularly where Plaintiffs have had every opportunity to take depositions of the
16 presenters and other attendees.

17 As with Mr. Moynihan, *none* of the deposition testimony has suggested that
18 Mr. Montag has uniquely relevant information of scienter to support Plaintiffs' claim
19 for punitive damages. Plaintiffs have already had the opportunity to depose [REDACTED]
20 [REDACTED] and were directly involved in the
21 development of the fraud filter. *See* Riffée Decl. Ex. 13, Simpson Tr. 67:10–70:5
22 ([REDACTED]); Riffée Decl. Ex. 9, Fox Tr. 70:19–78:4
23 (same); Riffée Decl. Ex. 5, Ahmad Tr. 216:16–234:13 (same).¹³ To the extent they
24 were asked, [REDACTED]
25 [REDACTED]

26 _____
27 ¹³ Plaintiffs did not ask a single question about Plaintiffs' Exhibit 48 to other
28 attendees Ms. Ehresman or Mr. Garfield during their depositions. Riffée Decl.
¶¶ 29g–h.

1 [REDACTED] (much less that he did so with intent or
2 knowledge of harm). *See* Riffie Decl. Ex. 13, Simpson Tr. 67:10–70:5; Riffie Decl.
3 Ex. 9, Fox Tr. 70:19–78:4; Riffie Decl. Ex. 5, Ahmad Tr. 216:16–234:13.

4 Further, to the extent Plaintiffs claim that Mr. Montag “approved” the fraud
5 filter [REDACTED] deposition testimony indicates otherwise. *See*
6 Pls. Apex IDC Letter 2 at 3. Mr. Ahmad testified that [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED] Riffie Decl. Ex. 5,
10 Ahmad Tr. 109:10–111:10. Other BANA witnesses directly involved in the
11 development of the fraud filter also confirmed Mr. Montag’s general lack of
12 involvement with the issues relevant to Plaintiffs’ claims. Mr. Garfield, for example,
13 testified that [REDACTED]

14 [REDACTED] *See, e.g.*, Riffie
15 Decl. Ex. 10, Garfield Tr. 228:6–231:16. None of this satisfies the apex doctrine.

16 **III. Plaintiffs Chose to Forgo Less Intrusive Discovery Methods.**

17 Plaintiffs are not entitled to depose these apex witnesses unless they can also
18 show that they have exhausted less intrusive means of obtaining the information they
19 seek. Courts have repeatedly held that apex depositions are “especially” improper
20 “where the information sought in the deposition can be obtained through less
21 intrusive discovery methods (such as interrogatories) or from depositions of lower-
22 level employees with more direct knowledge of the facts at issue.” *Affinity*, 2011 WL
23 1753982, at *15; *see also Mehmet v. PayPal, Inc.*, 2009 WL 921637, at *2 (N.D. Cal.
24 Apr. 3, 2009); *Celerity, Inc.*, 2007 WL 205067, at *4.

25 Plaintiffs had the opportunity to seek depositions and depose the individuals
26 who authored the emails or reports or supposedly had the meetings with Messrs.
27 Moynihan or Montag that Plaintiffs believe show the executives may possess unique
28 knowledge relevant to punitive damages. In some instances, Plaintiffs elected not to

1 seek the depositions. *See, e.g.*, Riffie Decl. ¶ 22. In others, Plaintiffs chose to avoid
2 asking witnesses questions about the exhibits they now rely on (*see, e.g., supra* at
3 11–12; 21–22). When witnesses were asked about specific documents or their
4 general interactions with Messrs. Moynihan and Montag (or lack thereof) with
5 respect to the issues relevant to this case, their testimony universally reflects that
6 BANA’s two top executives do not possess unique knowledge necessary to require
7 their deposition. *See supra* at 16–18; 20–22. Rather, Messrs. Moynihan and Montag
8 had limited roles, or in Mr. Moynihan’s case *no* role, in decision-making with respect
9 to the fraud filter or staffing of the claims call center. *See id.*

10 * * *

11 Based on this record, Plaintiffs cannot meet either prong of the apex doctrine.
12 Unlike in the handful of cases Plaintiffs have cited to Judge Berg where apex
13 depositions have been allowed, neither Messrs. Moynihan or Montag were the chief
14 or principal decisionmakers or policy setters for the Bank’s prepaid card program or
15 the specific issues at hand. *Cf. Kadrey v. Meta*, 2024 WL 4293910, at *1 (N.D. Cal.
16 Sept. 24, 2024) (permitting deposition of Mark Zuckerberg because evidence showed
17 he was the “chief decision maker and policy setter” concerning division and facts at
18 issue). Nor did they create or develop the fraud rule at issue (the fraud filter) or set
19 call center strategies. *Cf. In re Google Litig.*, 2011 WL 4985279, at *1 (permitting
20 deposition of one of Google’s two executives because he “undisputedly created and
21 developed a version of the ... algorithm at issue in [the] case,” but denying deposition
22 of the other executive even though he coauthored a paper with the deposed
23 executive). Rather, this case is much more akin to cases precluding apex depositions
24 because speculative assertions that an executive made or participated in key decisions
25 are not enough to show they have the firsthand, non-repetitive knowledge necessary
26 to satisfy the apex doctrine. *See, e.g., Metabyte, Inc. v. Meta Platforms, Inc.*, 2025
27 WL 799040, at *1 (N.D. Cal. Mar. 13, 2025) (precluding CEO deposition where
28 Plaintiff’s assertions were “unsubstantiated and speculative, such that they are

1 unpersuasive regarding the question of whether [the CEO], in fact, has unique first-
2 hand, non-repetitive knowledge of the facts at issue in the case”); *Pilot, Inc. v. Cub*
3 *Elecparts, Inc.*, 2015 WL 13918235, at *3 (C.D. Cal. Dec. 7, 2015) (granting
4 protective order where plaintiff’s “unsupported, conclusory, and largely speculative
5 statements” failed to demonstrate that apex deponent had ““unique first-hand, non-
6 repetitive knowledge””).

7 Plaintiffs’ position here would write the apex doctrine out of the law any time
8 punitive damages are sought against a corporate defendant, and, for that reason alone,
9 it cannot be correct. Plaintiffs cannot sidestep the apex doctrine’s careful and well-
10 developed requirement that they *show* that Messrs. Moynihan and Montag have
11 unique, non-repetitive knowledge *about their case* by pointing out that their punitive
12 damages claim is dead in the water without it. Of course senior executives are going
13 to be briefed on important issues pertaining to their companies ([REDACTED]), and
14 will subsequently brief the Board. But high-level briefing—which is *all* Plaintiffs
15 have *shown* here—does not mean that they possess the uniquely relevant information
16 necessary to satisfy the apex doctrine—much less the requisite *intent* necessary to
17 satisfy the punitive damages standard. Moreover, if Messrs. Moynihan and Montag
18 were to be deposed every time BANA was sued for the longshot potential of punitive
19 damages, they would be subjected to dozens of depositions every year. The apex
20 doctrine has developed because executives require “freedom to perform their tasks
21 without the constant interference of the discovery process.” *See K.C.R.*, 2014 WL
22 3434257, at *3 (citing *Warzon v. Drew*, 155 F.R.D. 183, 185 (E.D. Wis. 1994)). If
23 Plaintiffs were permitted to proceed here, on this record, it would turn the apex
24 doctrine on its head.

25 CONCLUSION

26 For the foregoing reasons, and with good cause shown, BANA respectfully
27 requests the Court enter a protective order precluding Plaintiffs from taking the
28 depositions of Messrs. Moynihan and Montag.

1 Dated: April 11, 2025

2 Respectfully submitted,

3 By: s/ Matthew L. Riffie

4 MATTHEW L. RIFFEE (pro hac vice)
5 *MRiffie@goodwinlaw.com*
6 THOMAS M. HEFFERON (pro hac vice)
7 *THefferon@goodwinlaw.com*
8 SABRINA M. ROSE-SMITH (pro hac vice)
9 *SRoseSmith@goodwinlaw.com*
10 **GOODWIN PROCTER LLP**
11 1900 N St. NW
12 Washington, DC 20036
13 Tel: +1 202 346 4000
14 Fax: +1 202 346 4444

15 JAMES W. MCGARRY (pro hac vice)
16 *JMcGarry@goodwinlaw.com*
17 **GOODWIN PROCTER LLP**
18 100 Northern Avenue
19 Boston, MA 02210
20 Tel.: +1 617 570 1000
21 Fax: +1 617 523 1231

22 LAURA G. BRYs (SBN 242100)
23 *LBrys@goodwinlaw.com*
24 **GOODWIN PROCTER LLP**
25 601 S Figueroa St., Suite 4100
26 Los Angeles, CA 90017
27 Tel.: +1 213 426 2500
28 Fax: +1 617 346 4444

VALERIE A. HAGGANS (pro hac vice)
VHaggans@goodwinlaw.com
LINDSAY E. HOYLE (pro hac vice)
LHoyle@goodwinlaw.com
GOODWIN PROCTER LLP
620 Eighth Avenue
New York, NY 10018
Tel: +1 212 813-8800
Fax: +1 212 355-3333

YVONNE W. CHAN (pro hac vice)
YChan@jonesday.com
JONES DAY
100 High Street
Boston, MA 02110
Tel.: +1 617 960 3939
Fax: +1 617 449 6999

JANICE P. BROWN (SBN 114433)
jbrown@myersnave.com
MATTHEW B. NAZARETH (SBN
278405)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

mnazareth@myersnave.com
MEYERS NAVE
600 B Street, Suite 1650
San Diego, CA 92101

Attorneys for Defendant
BANK OF AMERICA, N.A.

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 April 11, 2025. 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: April 11, 2025

s/ Matthew L. Riffie