EXHIBIT 1

FILED PROVISIONALLY UNDER SEAL WITH REDACTIONS PURSUANT TO STIPULATED PROTECTIVE ORDER

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VIA EMAIL (efile_berg@casd.uscourts.gov)

Re: In re Bank of America Calif. Unemployment Benefits Litig., 3:21-md-02992-GPC-MSB

Dear Judge Berg:

BANA seeks a protective order precluding Plaintiffs from deposing BANA's two top executives—current CEO Brian Moynihan and former COO Thomas Montag. BANA objects to Plaintiffs' deposition notices, which are not proportionate to the needs of this case and reflect Plaintiffs' confessed desire to push settlement via executive discovery.

"Virtually every court that has addressed deposition notices directed at an official at the highest level or 'apex' of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment." *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007). To curb such abuse, courts place the burden on the party seeking an apex deposition to show that (1) the deponent has "unique first-hand, non-repetitive knowledge of the facts at issue in the case," and (2) the party has "exhausted other less intrusive discovery methods." *In re Google Litig.*, 2011 WL 4985279, at *2 (N.D. Cal. Oct. 19, 2011) (citations omitted). There is no dispute that Messrs. Moynihan and Montag are "clearly high-level executives whose depositions must satisfy the 'apex' requirements." *Id.*[1] Plaintiffs cannot satisfy either prong of the apex standard with respect to either executive, and therefore neither deposition should be allowed.

First, "where a high-level decision maker 'removed from the daily subjects of the litigation' has no unique personal knowledge of the facts at issue, a deposition of the official is improper." *Affinity Labs of Texas v. Apple, Inc.*, 2011 WL 1753982, at *15 (N.D. Cal. May 9, 2011) (citations omitted). The apex standard for depositions is *different* and *higher* than the one that applies to disputes about ESI discovery—a distinction which Plaintiffs concede. *See* Pls. Dist. Ct. ESI Br., Filed Under Seal at Dkt. 278-1, at 17 (referring to "heightened apex doctrine standard"). Plaintiffs were able to obtain ESI from Messrs. Moynihan and Montag by arguing that these executives *might* have unique information relevant to their claim for punitive damages. But the apex doctrine requires Plaintiffs to demonstrate far more to take the depositions they now seek. Plaintiffs cannot do so. Indeed, the parties have spent more than 18 months engaged in expansive and burdensome discovery that has confirmed what BANA has been saying from the beginning: Messrs. Moynihan and Montag have no *unique and non-repetitive* knowledge concerning the relevant issues in this case.

In ruling on Plaintiffs' request for ESI from Messrs. Moynihan and Montag, Judge Curiel found that BANA's executives *may* have "uniquely relevant information" concerning Plaintiffs' punitive damages claim under Cal. Civ. Code § 3294(b). ESI Order, Dkt. 298, 2024 WL 3174874, at *6 (Jun. 25, 2024). Judge Curiel, therefore, granted Plaintiffs' request for limited ESI so that they could explore what, at the time, was a wholly unsubstantiated claim that BANA's top two executives "knew about the [Claim Fraud Filter], its impact on legitimate EDD cardholders, when they knew it, what

[1] Mr. Montag was BANA's second-in-line executive until December 2021, and is now the Chief Executive Officer of Rubicon Carbon. *See K.C.R. v. County of Los Angeles*, 2014 WL 3434257, at *3 (C.D. Cal. July 11, 2014) (apex doctrine protects executives "even after leaving office").

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action they directed, authorized, or ratified, and why." *Id.*, quoting Pls. Dist. Ct. ESI Br. at 15–16.

Ultimately, Messrs. Moynihan and Montag's ESI generated very few responsive documents.[2] None of their ESI, nor the extensive Board materials and other documents that Plaintiffs have received, indicates that BANA's two top executives have unique knowledge concerning the Claim Fraud Filter, much less that they *knowingly* and *personally* directed, authorized, or ratified its use with the understanding that it would harm large numbers of legitimate cardholders as Plaintiffs suggested. *See* Pls. Dist. Ct. ESI Br. at 8–9. Moreover, the limited number of responsive documents in Messrs. Moynihan's and Montag's files did not: include any new, non-cumulative information; suggest that either apex executive possessed unique knowledge about the Claim Fraud Filter or any other key issue in this case; reflect any decision making by the two executives about those issues; or include *even a single document* suggesting that they communicated about the issues in this case "among themselves" as Plaintiffs long suggested. *See* Pls. MJ ESI Br., Filed Under Seal at Dkt. 212, at 3.

This, of course, was as expected. In response to written discovery served by Plaintiffs in August 2023, BANA identified the individuals who were directly involved in or responsible for the development, approval, and implementation of the Claim Fraud Filter. Messrs. Moynihan and Montag were not identified because they were not involved. Rather, BANA identified 13 other executives and managers. *See* Ex. 1, BANA's Response Plaintiffs' ROG No. 11. Prior to noticing Messrs. Moynihan's and Montag's depositions, *Plaintiffs took no depositions of any of those 13 individuals in their personal capacities*. As of today, Plaintiffs still have taken only one deposition of the 13 individuals identified, scheduled two more, and deposed a fourth but only in his capacity as BANA's corporate representative designated to cover certain topics concerning the Claim Fraud Filter. None of the depositions taken so far elicited testimony demonstrating that Messrs. Moynihan or Montag have unique knowledge of the issues in this case—much less that they directed, approved, or ratified a fraud strategy that they believed or knew would harm many innocent cardholders. In fact, in the rare instances in which BANA witnesses were asked about BANA's top two executives, they testified to the executives' *lack of involvement*. *See, e.g.*, Ex. 2, excerpt of Letson Dep. Tr. at 280:12-16 [redacted]; Ex. 3, excerpt of Martin Dep. Tr. at 156:7-21 ([redacted]).

In sum, *none* of the evidence to date shows that either Mr. Moynihan or Mr. Montag have the uniquely relevant information Plaintiffs hoped to find. Rather, Plaintiffs' belief that BANA's two top executives have unique information about their case is based on nothing more than speculation—which is exactly what the apex doctrine is designed to protect against. *See, e.g.*, *Pilot, Inc. v. Cub Elecparts, Inc.*, 2015 WL 13918235, at *3 (C.D. Cal. Dec. 7, 2015) (granting protective order where plaintiff provided only "unsupported, conclusory, and largely speculative statements" that failed to demonstrate that apex deponent had "'unique first-hand, non-repetitive knowledge'").

Second, even if Plaintiffs could show that Messrs. Moynihan or Montag have unique personal knowledge relating to this litigation (and they cannot), Plaintiffs still would not be entitled to depose them because Plaintiffs cannot show that they have exhausted less intrusive means of obtaining

[2] Of the more than 278,000 documents BANA has produced to Plaintiffs in this action, only 556 documents from Messrs. Moynihan's or Montag's custodial files were responsive to Plaintiffs' requests and produced. Indeed, as BANA predicted and explained to Plaintiffs, the responsiveness rate for the Moynihan and Montag ESI was extraordinarily low—only approximately 3% of Mr. Moynihan's reviewed documents and less than 1% of Mr. Montag's reviewed documents were responsive to Plaintiffs' requests.

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the information they seek. Courts repeatedly hold that apex depositions are "especially" improper "where the information sought in the deposition can be obtained through less intrusive discovery methods (such as interrogatories) or from depositions of lower-level employees with more direct knowledge of the facts at issue." *Affinity*, 2011 WL 1753982, at *15 (denying request for deposition of Apple CEO); *Mehmet v. PayPal, Inc.*, 2009 WL 921637, at *2–3 (N.D. Cal. Apr. 3, 2009) (granting motion for protective order precluding deposition of PayPal CEO); *Celerity*, 2007 WL 205067, at *4–5 (granting motion for protective order of company's top executives).

As discussed above, Plaintiffs have not come close to exhausting less intrusive means of discovery. Although discovery has been ongoing for over 18 months, prior to noticing the depositions of Messrs. Moynihan and Montag, Plaintiffs took *only one deposition of a single BANA fact witness*, plus a 30(b)(6) deposition (which required BANA to designate six witnesses to cover its various topics).[3] And as of today, Plaintiffs still have taken the deposition of *only one* of the 13 individuals identified by BANA (Brad Garfield), and have sought only two more (Anne Holt and Faiz Ahmad, to be scheduled for January).[4] The fact that Plaintiffs unilaterally noticed Messrs. Moynihan's and Montag's depositions before even asking to depose the individuals involved in the decision-making or approval process concerning the central issue in their case underscores that Plaintiffs have not attempted to obtain relevant information from other, more convenient sources, such as lower-level executives or employees. *See March v. ABM Sec. Serv., Inc.*, 2010 WL 11684788, at *3 (S.D. Cal. Nov. 5, 2010) (citing *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 682 (7th Cir. 2002)) (denying request to depose company president, and noting that failure to take advantage of less expensive, more convenient method of discovery "casts serious doubt" over claim that deponent possessed information "that was more than marginally relevant"); *Celerity*, 2007 WL 205067, at *5 (less intrusive discovery not exhausted merely by scheduling apex depositions "after the depositions of the lower level employees"). Moreover, Plaintiffs' attempt to bypass nearly every individual who BANA identified as having relevant knowledge, and jump directly to BANA's most senior executives, underscores Plaintiffs' true intent here—which is not to obtain discoverable information, but to further harass BANA and its two current or former top executives. Plaintiffs have conceded as much, previously representing to the Court that seeking discovery from BANA's top executives will pressure BANA to settle. *See* Dkt. 209-1 ¶ 10.

Finally, the Court should deny Plaintiffs' request to depose Messrs. Moynihan and Montag because if the apex depositions were to go forward, they would undeniably cause hardship to both executives personally, as well as disruptions to the operations of BANA and of Montag's current company. *See Davis v. Pinterest, Inc.*, 2021 WL 11117688, at *1 (N.D. Cal. May 27, 2021) (apex depositions are an "undue burden for the company, the witnesses, and counsel" absent showing of unique knowledge). Moreover, if BANA's apex executives were to be deposed every time BANA was sued simply because of their positions, they would be subjected to dozens of depositions every year. These distractions and impositions on their time are not insubstantial, given the size of BANA's operations. This is precisely why the apex doctrine was developed, as executives require "freedom to perform their tasks without the constant interference of the discovery process." *See K.C.R.*, 2014 WL 3434257, at *3, citing *Warzon v. Drew*, 155 F.R.D. 183, 185 (E.D. Wis. 1994). If Plaintiffs were permitted to proceed here, on this record, it would turn the apex doctrine on its head.

[3] That single fact witness (Renee Johnson) was not identified by BANA as one of the 13 individuals directly involved in the Claim Fraud Filter, and did not testify that BANA's apex executives had any unique knowledge.

[4] Plaintiffs took one additional deposition of a fraud analyst (Ryan Schwartz) who worked on certain aspects of the Claim Fraud Filter, and who did not testify that BANA's apex executives had any unique knowledge.

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Respectfully submitted,

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