EXHIBIT 2

FILED PROVISIONALLY UNDER SEAL WITH REDACTIONS PURSUANT TO STIPULATED PROTECTIVE ORDER

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December 16, 2024

__Sent via email to__:
Hon. Michael S. Berg
efile_berg@casd.uscourts.gov

Re: **Zoom Discovery Conference on Dec. 23, 2024, 9:00 a.m.** –*In re Bank of America California Unemployment Benefits Litig.,* No. 3:21-md-02992-GPC-MSB (S.D. Cal.)

Dear Judge Berg:

Plaintiffs submit this letter brief regarding the Bank's refusal to produce for deposition its CEO Brian T. Moynihan ("BTM") and former COO Thomas Montag, based on the apex doctrine. The objection lacks merit. As Judge Curiel already ruled in compelling the Bank's production of Moynihan and Montag's documents, both witnesses possess unique knowledge that is central to Plaintiffs' claims, including for punitive damages. Dkt. No. 298 at 11. Plaintiffs have at this point at the close of fact discovery adequately exhausted other avenues of inquiry, including interrogatories and the testimony of multiple 30(b)(6) and other Bank witnesses. No other Bank witnesses were party to discussions between Moynihan and Montag or between Moynihan and the Board of Directors about the Bank's decisions to *implement* and *continue to use* the Claim Fraud Filter (CFF) that harmed over [redacted] class members. The evidence shows that these decisions were driven and ultimately made by Moynihan, who uniquely reported to the Board on [redacted], and by Montag, who ran the Global Banking and Markets ("GBAM") group that "owned" the UI card program, directed development of the CFF [redacted]. That the apex doctrine cannot bar these depositions is made clear by Judge Curiel's findings in ruling on Plaintiffs' prior motion to compel ESI custodians, in which the Bank relied on an argument based on the apex doctrine to resist document discovery from these witnesses. In rejecting that argument, the Court found:

> The FAMCC seeks punitive damages. (Dkt. No. 136, FAMCC, Prayer ¶¶ 3-4.) . . . At trial, Plaintiffs will need evidence of motive, intent, or knowledge and ratification by an officer, director or managing agent to support an award of punitive damages. . . . **[I]mportant for punitive damages is what Moynihan and Montag 'knew about the CFF, its impact on legitimate EDD cardholders, when they knew it, what action they directed, authorized, or ratified, and why.' (Dkt. No. 278-1 at 15-16). The Court agrees with Plaintiffs that ESI from Moynihan and Montag concerning punitive damages can only be obtained by them, and not from sources already designated**.

Dkt. No. 298 at 11 (emphasis added); *In re Bank of America California Unemployment Benefits Litigation*, 2024 WL 3174874, at *6 (S.D. Cal. June 25, 2024) (emphasis added). Accordingly, the

Court found that Plaintiffs had demonstrated "that **Moynihan and Montag possess 'uniquely relevant information that is not available from the sources already designated' as it concerned punitive damages**." *Id.* (emphasis added). The Court's reasoning applies equally to the noticed depositions. Based on their specific roles *vis a vis* the CFF Policy, both witnesses have unique "evidence of motive, intent, or knowledge and ratification by an officer, director or managing agent to support an award of punitive damages." *Id.*

The evidence shows that the [redacted] (Exs. 1-3). Information regarding what was communicated between Moynihan and the Board, separate and distinct from [redacted], cannot reasonably be obtained from any other source. Moynihan's testimony will show *what* he and the Board *knew* when they allowed the Bank to *implement* and *continue to use* the CFF despite the consequences. This information is central to many of Plaintiffs' claims relating to issues of willfulness, knowledge, intent, notice and, as recognized in Judge Curiel's prior Order, punitive damages. Courts routinely compel the deposition of CEOs and other high-level executives where, as here, there is evidence they attended key meetings, were members of decision-making committees, or otherwise had percipient knowledge of relevant issues. *See In re Nat'l W. Life Ins. Deferred Annuities Litig.*, No. 05-CV-1018-AJB (WVG), 2011 WL 1304587, at *1 (S.D. Cal. Apr. 6, 2011) (ordering deposition of CEO and COO because "when a witness has personal knowledge of facts relevant to the lawsuit, even a corporate president or CEO is subject to deposition"); *Moyle v. Liberty Mut. Ret. Bene. Plan*, No. 10-cv-2179-DMS (MDD), 2012 WL 5373421, at *4 (S.D. Cal. Oct. 30, 2012) (ordering deposition of executive on committee that approved plan at issue: "Even when seeking the deposition of an apex official, it is very unusual for a court to prohibit the taking of a deposition altogether absent extraordinary circumstances.") (citing *Apple Inc. v. Samsung Elecs. Co., Ltd*, 282 F.R.D. 259, 263 (N.D. Cal. 2012)) (cleaned up).[1]

Moynihan's central role in driving the CFF Policies is evidenced by scores of documents, including [redacted] (Exs. 1-3), [redacted] (Exs. 4-21), [redacted] (Exs. 22-41), and communications by the media and legislators (Ex. 42). In addition to [redacted], just a few illustrative examples include [redacted] (Ex. 7); [redacted] (Ex. 10); [redacted] (Ex. 11); [redacted]

[1] *See also Perez v. Genoptix, Inc.,* No. 18-cv-2545-LAB-MDD, 2019 WL 12517081, at *2 (S.D. Cal. Jan. 11, 2019) (allowing deposition of board chairman where email suggested chairman "may have unique, personal knowledge" of material issues); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C-07-5634 CRB (DMR), 2014 WL 939287, at *1, 3 (N.D. Cal. Mar. 6, 2014) (compelling deposition of CEO who attended key meetings); *Powertech Tech., Inc. v. Tessera, Inc.*, No. C 11-6121 CW, 2013 WL 3884254, at *2 (N.D. Cal. July 26, 2013) (compelling deposition where board "considered and voted on matters relevant to this case").

[redacted] (Ex. 14). [redacted] Moynihan's knowledge, motive and intent is squarely at issue, and the apex doctrine does not shield him from deposition. *Henriquez v. Cemex, Inc.*, 2024 WL 1600663, at *3 (C.D. Cal. Jan. 18, 2024) (moving party's "initial threshold" under apex standard is "not a high bar," whereas resisting party "has a heavy burden"); *Hunt v. Continental Cas. Co.*, 2015 WL 1518067, at *2 (N.D. Cal. Apr. 3, 2015) ("The party seeking to take such a deposition does not need to prove conclusively in advance that the deponent definitely has unique, non-repetitive information.'") (citations omitted).

Judge Curiel's prior ruling (and its reasoning) applies equally to Tom Montag. As the Bank's former COO and former head of GBAM, the group responsible for the prepaid UI card program and the CFF "GBAM/systemic denials" of unauthorized transaction claims at issue in this case, Montag possesses critical information at the very core of this case. (Exs. 43-48). For example, [redacted] (Ex. 43); [redacted] (Ex. 44); [redacted] (Ex. 45); [redacted] (Ex. 47); [redacted] (Ex. 46). [redacted] (Ex. 48). [redacted] *Id.* These documents amply demonstrate that [redacted].

In sum, the Bank cannot meet "its burden of showing that extraordinary circumstances are present here which warrant an order precluding [these depositions] altogether." *Kadrey v. Meta Platforms, Inc.*, 2024 WL 4293910, at *1 (N.D. Cal. Sept. 24, 2024) (permitting deposition of CEO Zuckerberg) ("*Meta*"). As in *Meta*, "Plaintiffs do not generically argue" that because Moynihan is the CEO and Montag the COO "of the company that [they are] therefore in charge of everything. Rather, they have submitted evidence of [their] specific involvement" in the company's CFF Policies. *Id.* (noting that exhaustion is a consideration, not a requirement of the apex doctrine)*; see also In re Google Litig.*, 2011 WL 4985279, at *2 (N.D. Cal. Oct. 19, 2011) (permitting deposition of Google CEO/founder Larry Page, noting "A party seeking to prevent a deposition carries a heavy burden to show why discovery should be denied."). Both Moynihan and Montag possess uniquely relevant information that is central to Plaintiffs' claims and that is not otherwise available from other sources. Accordingly, the apex doctrine does not preclude these depositions.

Respectfully submitted,

/s/ Brian Danitz
Counsel for Class Plaintiffs

cc: All Counsel