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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 3:21-md-02992-GPC-MSB **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR A PROTECTIVE ORDER**
This Document Relates to All Actions	Judge: Hon. Gonzalo P. Curiel Ctrm: 2D (2nd Floor)

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I. INTRODUCTION

Plaintiffs respectfully submit this Opposition to Defendant Bank of America, N.A.'s Motion for Protective Order ("Motion"), which seeks to completely preclude the depositions of the Bank's CEO Brian T. Moynihan and its former COO Thomas Montag. The record shows that in addition to being fact witnesses who played an active and central role in the events at issue, Moynihan and Montag each have unique "evidence of motive, intent, or knowledge and ratification by an officer, director or managing agent to support an award of punitive damages." ECF 298 at 11. Accordingly, the Bank's motion should be denied.

These coordinated MDL proceedings challenge unlawful policies and practices that the Bank implemented at the height of the Covid pandemic in 2020-21 to protect itself from financial losses at the expense of some of its most vulnerable customers—Californians who received unemployment insurance and other public benefits from California's Employment Development Department ("EDD") through Bank-issued "EDD debit cards." The five proposed classes consist of more than 100,000 of these public benefits recipients whom the Bank deprived of their benefits, often for months on end, in violation of their constitutional, statutory, and common law rights.

Because Plaintiffs seek, *inter alia*, punitive damages for violations of due process, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing, issues about the Bank's knowledge, motive, and intent in adopting its challenged policies are central to the case. Plaintiffs will be entitled to punitive damages if they can show that the Bank's conduct was either (1) "malicious," (2) "oppressive," or (3) "in reckless disregard of the plaintiff's rights," meaning either done with "'complete indifference to the plaintiff's safety, rights, or the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law.'" *Dang v. Cross*, 422 F.3d 800, 809-10 (9th Cir. 2005) (quoting 9th Cir. Model Civ. Jury Instr. 7.5 (2002)); *see also Smith v. Wade*, 461 U.S. 30, 56 (1983) (punitive damages available under §1983 when defendant's conduct "involves reckless or callous indifference to the federally protected rights of others"); Cal.

Civ. Code §3294(a), (c) (punitive damages available for California tort claims where defendant acted with "oppression, fraud, or malice," including where defendant "subjects a person to cruel and unjust hardship in conscious disregard of that person's rights"); *Colonial Life & Accident Ins. Co. v. Superior Court*, 31 Cal.3d 785, 792 (1982) (punitive damages appropriate where defendant acted "with a conscious disregard of the plaintiff's rights," which "may be proven directly or by implication" (citations omitted)). The availability of punitive damages thus largely turns on the defendant's "motive and intent." *Neal v. Farmers Ins. Exch.*, 21 Cal.3d 910, 922 (1978). For a corporate defendant like the Bank, that means the motives and intent of an "officer, director, or managing agent," which can be imputed to the corporation. Cal. Civ. Code §3294(b); *White v. Ultramar, Inc.*, 21 Cal.4th 563, 576-77 (1999) ("managing agents" are those who "exercise substantial discretionary authority over decisions that ultimately determine corporate policy"). Testimony concerning what the Bank's senior executives knew, when they knew it, and what policies they personally directed or authorized is highly relevant and potentially dispositive. Precluding access to such crucial testimony—particularly where the Bank has done nothing more than assert a blanket objection to the deposition of "apex" witnesses—would be highly prejudicial.

Judge Berg necessarily recognized in recommending that Plaintiffs be allowed to take the depositions of Moynihan and Montag (although with too little time for either deposition) that these two witnesses have unique, highly relevant information about several disputed issues that the Bank's other employees and executives do not have. In particular, Moynihan and Montag will be able to provide otherwise unavailable evidence about their own and other senior executives' and Board members' motives and reasons for: (1) developing the Bank's Claim Fraud Filter ("CFF") in September 2020; (2) relying on the Bank's CFF as the sole basis for automatically denying EDD debit cardholders' unauthorized-transaction claims, rescinding those cardholders' previously issued permanent credits, and freezing those cardholders' accounts; (3) adopting a deliberate policy of understaffing the Bank's EDD debit card customer service call centers, causing cardholders to be subjected to hours-long wait times; and (4) keeping these policies long in effect despite knowing they were harming large numbers of legitimate cardholders.

Moynihan's and Montag's testimony will principally be relevant to Plaintiffs' state and federal punitive claims. *See* ECF 298 at 11 ("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."). But because the record shows they are likely to have unique information about the development and implementation of the Bank's automated CFF (including the decision to deny or rescind the credit of more than 109,000 class members' unauthorized-transaction claims based *solely* upon Indicator 1 ("CFF-1"), which required the automatic denial of or credit rescission for every such claim alleging an unauthorized ATM transaction), their testimony will also likely be highly relevant to the "good faith" and "reasonable[ness]" elements of Plaintiffs' treble damages claims under EFTA. *See* 15 U.S.C. § 1693f(e).

As discussed further below, the evidence that Plaintiffs have been able to obtain through discovery demonstrates that Moynihan and Montag were personally involved in some of the most critical decisions and communications in this case (many of which were verbal, and according to the Bank's deponents, never commemorated in writing). Because both witnesses have unique "evidence of motive, intent, or knowledge and ratification by an officer, director or managing agent," ECF 298 at 11, the Bank's motion for Protective Order should be denied.

II. PROCEDURAL BACKGROUND

On October 11, 2024, Plaintiffs noticed the depositions of Moynihan and Montag. Defendant objected under the apex doctrine. At the December 23, 2024 discovery conference, Magistrate Judge Berg deferred ruling on the Bank's request for a protective order and proposed that, before he ruled, Plaintiffs should depose up to six additional mid-level executives (for two hours each), in addition to the depositions Plaintiffs had already noticed and taken. The parties then agreed that Plaintiffs would take Zoom depositions, of four mid-level executives: 1) Paul Simpson, 2) William Fox, 3) Jennifer Ehresman, and 4)

Melissa Ramirez (formerly Gargagliano). As part of the agreement, the Bank represented that it "would not object to the depositions of Mr. Moynihan or Mr. Montag on the basis that Plaintiffs failed to take the deposition of other individuals identified in response to Interrogatory No. 11."

After Plaintiffs completed those four additional depositions, Judge Berg on March 12, 2025 held a second discovery conference and tentatively ruled that both depositions should proceed, but that Plaintiffs' deposition of Moynihan should be limited to two hours and that Plaintiffs' deposition of Montag should be limited to one hour. Because those time constraints would not give Plaintiffs sufficient time to depose Moynihan and Montag about the topics within their unique personal knowledge relevant to the five proposed classes in this case, Plaintiffs requested formal briefing and, at this Court's request, the matter was transferred to this Court for decision.

III. ARGUMENT

A. The Bank Has Not Demonstrated Good Cause for a Protective Order.

It is well established that "a strong showing is required before a party will be denied entirely the right to take a deposition." *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). As the "party seeking to prevent a deposition[, the Bank] carries a heavy burden to show why discovery should be denied." *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 2007 WL205067 at *3 (N.D. Cal. Jan. 25, 2007); *see also Weinstein v. Katapult Grp., Inc.*, 2022 WL 4548798, at *1 (N.D. Cal. Sept. 29, 2022) (the party resisting discovery "has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections.") (cleaned up).

Here, the Bank has made no showing of any "particular and specific need" for a protective order. *Blankenship*, 519 F.2d at 429. Instead, the Bank relies solely on Moynihan and Montag's executive status to justify its motion. But such "broad allegations of harm unsubstantiated by specific examples or articulate reasoning, do not satisfy the Rule 26(c) test." *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

Indeed, even under the "apex deposition" doctrine, "[i]t is very unusual … for a court to prohibit the taking of a deposition altogether absent extraordinary circumstances, as such an order would likely be in error." *WebSideStory, Inc. v. NetRatings, Inc.*, No. 06-cv-408-WQH(AJB), 2007 WL 1120567 at *4 (S.D. Cal. Apr. 6, 2007) (denying protective order where former CEO had relevant personal knowledge); *accord Powertech Technology, Inc., Tessera, Inc.*, 2013 WL 3884254 (N.D. Cal. July 26, 2013). "[T]he fact that the apex witness has a busy schedule is simply not a basis for foreclosing otherwise proper discovery." *WebSideStory*, 2007 WL 1120567, at *2 (quotation marks omitted).

"In determining whether to allow an apex deposition, courts consider (1) whether the deponent has unique first-hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods." *Finisar Corporation v. Nistica, Inc.*, 2015 WL 3988132, *1 (N.D. Cal. June 30, 2015) (cleaned up). "With respect to the first consideration, the party seeking to take the deposition need not prove conclusively that the deponent has unique non-repetitive information; rather, *where a corporate officer may have any first-hand knowledge of relevant facts*, the deposition should be allowed." *Id.* *2 (cleaned up; emphasis added). With respect to the second consideration, formal exhaustion is not "viewed as an absolute requirement." *Hunt v. Continental Casualty Co.*, 2015 WL 1518067, *2 (N.D. Cal. April 3, 2015); *see also In re Transpacific Passenger Air Transp. Antitrust Litig.*, 2014 WL 939287, *5 (N.D. Cal. March 6, 2014) (noting that exhaustion is a consideration, not a requirement).

Courts routinely compel the deposition of CEOs and other high-level executives where, as here, there is evidence that 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 the plan at issue, noting: "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]

Here, "Plaintiffs do not generically argue" that because Moynihan is the CEO and Montag the former COO "of the company that [they are] therefore in charge of everything. Rather, [Plaintiffs] have submitted evidence of [those executives'] specific involvement" in the company's CFF Policies. *Kadrey v. Meta Platforms, Inc*., 2024 WL 4293910, at *1 (N.D. Cal. Sept. 24, 2024), at *1; *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: "When a witness has personal knowledge of facts relevant to the lawsuit, even a corporate president or CEO is subject to deposition."); *In Re Nat''l Western Life Ins. Deferred Annuities Litig*., No. 05-CV-1018-AJB WVG, 2011 WL 1304587, at *1 (S.D. Cal. Apr. 6, 2011) (same); *WebSideStory*, 2007 WL 1120567 at *4 (same, denying protective order where apex witness had relevant personal knowledge). As discussed further below, the evidence establishes that Moynihan and Montag were intimately involved in the key communications and decisions related to the Bank's CFF polices. The Bank has not met "its burden of showing that extraordinary circumstances are present here which warrant an order precluding" these depositions. *Meta Platforms*, 2024 WL 4293910, at *1 (N.D. Cal. Sept. 24, 2024) (permitting deposition of CEO Zuckerberg).

1. Brian Moynihan Possesses Unique, Nonrepetitive Knowledge.

In its effort to distance Moynihan from the key events at the heart of this case, the Bank distorts the evidence. Far from showing Moynihan's "lack of involvement," Mot. at

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[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").

11, the documents point to Moynihan being a key driver of the Bank's frenzied development of the Claim Fraud Filter ("CFF") over the span of a mere few days, and to Moynihan being the decisionmaker who gave approval for the Bank's implementation of the CFF on September 28, 2020. *See, e.g.*, Ex. 5 at -00706496[2] (September 27, 2020 email re: "[redacted]");[3] Ex. 14 at -293818 (September 28, 2020 chat at 5:15 p.m. relaying "[redacted]" from Faiz Ahmad regarding Bank's "[redacted]" for "[redacted]"); Ex. 60 (September 28, 2020 email at 6:07 p.m. from Ahmad to Fox and Simpson, reporting, "[redacted]," to which Fox responds, "[redacted]"); Ex. 14 at -293819–20 (September 20, 2020 chat at 7:33 p.m., asking, "[redacted]," with the response, "[redacted]"); Ex. 51 (Fox Tr.) 65:6-66:13 (explaining that, when Ahmad said "[redacted]" that meant "[redacted]"); *id.* (Fox Tr.) 68:10-71:1 (explaining that the Bank's formal Global Banking and Global Risk committees did not [redacted]; *id.* (Fox Tr. 71:2-72:4) (unable to [redacted]).

Though the Bank's lower-level executives and managers generally resisted confirming in their depositions what the Bank's documents strongly imply—[redacted]

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[2] "Ex." or "Exhibit" refers to exhibits to the accompanying Declaration of Brian Danitz in support of this Opposition.

[3] Brian T. Moynihan is often referred to as "BTM" or "Brian" in the Bank's internal emails. "MTM" refers to "Management Team Meeting" which were held by Moynihan and his direct reports.

on September 28, 2020—*none* of them could [redacted] CFF-1 on that day.

The documents further show that Moynihan [redacted] (members of the "Management Team," or "MTM") about the CFF, to which lower-level executives and managers were not party, and that Moynihan uniquely [redacted]. They also show that he personally received [redacted], and that he has relevant knowledge about matters material to the claims of the Customer Service and EMV Chip classes.

Moynihan's testimony is needed to show what he and the Board knew when they authorized and ratified the Bank's implementation and continued use of the CFF despite the known consequences to Plaintiffs and class members. As CEO and Chairman, Moynihan's actions, knowledge, and intent are imputable to the Bank. This evidence is critical to a number of core issues in this case, including the reasonableness of the Bank's unprecedented decision to abandon its previous claims-investigation protocol in favor of automatically denying all unauthorized ATM transaction claims submitted by UI cardholders, to claw back tens of millions of dollars in previously paid permanent credits on EDD cardholders' unauthorized ATM transaction claims, and to freeze the UI accounts of these denied claimants, thereby depriving more than 100,000 unemployed Californians of their UI benefits. Moynihan's central role in driving the CFF Policies is evidenced by scores of documents, as further detailed below.

Directives to Reduce Fraud Losses.

The documents show that, in response to reports of rising financial losses due to unauthorized-transaction claims by UI cardholders ("fraud losses"), Moynihan [redacted] CFF Policies.

For example, emails in early to mid-September 2020 show Moynihan making [redacted]. In an email dated September 10, 2020 re: "[redacted] (Ex. 6 at 00293067), Kavanaugh asked for "[redacted]" Ex. 6 at 00293066. The "[redacted]. Moynihan's reasons for [redacted] two weeks before the CFF was implemented are clearly material to Plaintiffs' case.

In an email dated Saturday, September 19, 2020 re "[redacted]," Ryan Schwartz (an analyst in the Bank's Global Financial Crimes group) told his supervisors Anne Holt and Michael Letson about a "[redacted]" adding: "[redacted]" Ex. 7 (emphases added). Schwartz described the "[redacted]" noting: "[redacted] *Id.* Schwartz, Holt, Letson and Brad Garfield are the core team that created the CFF just *one week later*. This email demonstrates Moynihan's direct involvement in the decision to develop the CFF on a highly compressed timeline.

In an email sent Monday, September 21, 2020 at 5:50 am re: "[redacted]," Paul Simpson provided Cathy Bessant an "[redacted]" discussing, *inter alia,* "[redacted]," "[redacted]," "[redacted]," [redacted]" and "[redacted]" Ex. 8. Simpson then wrote: "[redacted]

[redacted]" Ex. 8 at 00371949-50. Both Ahmad and Simpson confirmed [redacted]. Ex. 50 (Ahmad Tr.) 100:22-24 and Ex. 49 (Simpson Tr.) 45:13-15.

In an email sent Monday, September 21, 2020, William Fox emailed Jose Firpi and Michael Letson asking [redacted]" Ex. 9 at -00450221-22. That evening at 10:48 pm, Firpi emailed an "[redacted]" response stating "[redacted]" **Ex. 9** at -00450219. Two days later, on September 23, 2020 ([redacted]" Ex. 11 at -00421427. Firpi's email also noted that "[redacted]" *Id.*

The Bank argues that Fox's testimony "debunked" Firpi's contemporaneous reference to [redacted]. Motion at 13. To the contrary, Fox confirmed that [redacted]" and when asked whether [redacted], Fox testified, "[redacted]" Ex. 51 (Fox Tr.) at 34:3-15.

The Bank attempts to undermine this contemporaneous evidence through a selective reading of Ahmad's testimony. Although Ahmad testified that [redacted], he also confirmed that he [redacted]" Ex. 50 (Ahmad Tr.) 131:2-14. When asked [redacted], Ahmad [redacted]. *Id.* at 131:7-132:22. Ahmad also testified that [redacted]. *Id.* at 132:23-133:5. Fox's and Ahmad's testimony supports Plaintiffs' need to depose Moynihan and Montag as it shows that only Moynihan and Montag [redacted].

In an email dated September 22, 2020, less than a week before the CFF was implemented, with the subject line "[redacted]" the Bank's Chief Financial Officer, Paul Donofrio, emailed Montag and Dean Athanasia asking [redacted]. Ex. 10 at -00372013 (emphasis added). Montag then added Faiz Ahmad to the email chain and asked him to "[redacted]" *Id.* CFO Donofrio then emailed Ahmad stating "[redacted]" *Id.* at 00372012. It is clear from this email chain that the Bank's senior executives, including CFO Donofrio, COO Montag and CEO Moynihan, [redacted] which the CFF, built and launched just six days later, was designed to address.

When deposed about these emails, Ahmad admitted that "[redacted]. Ex. 50 (Ahmad Tr.) 119:17-122:8. Plaintiffs are again left in a position where no deponent knows about a key discussion with Moynihan that led to the decision to build and deploy CFF-1 on September 28, 2020. Only Moynihan will be able to testify about what he was briefed on, what questions he asked, and what he did based on that information.

Approval of CFF.

As summarized above (*supra* at 7), the documents further show that not only was Moynihan [redacted]. As Global Financial Crimes head William Fox confirmed in his deposition, [redacted]. *See* Ex. 51 (Fox Tr.) 68:10-72:4. The documents indicate that it was Moynihan or one of his direct reports (such as Montag) acting at his direction [redacted]. Although none of the Bank's other deponents were [redacted], and as detailed below, William Fox testified that Moynihan "[redacted]" Ex. 51 (Fox Tr.) 71:11-22. Moynihan's testimony is needed to confirm what actions he directed and why he directed them.

For example, in an email dated Sunday, September 27, 2020, the day before CFF-1 was implemented (during a hectic weekend in which teams scrambled to design, build and obtain approvals for the CFF), Kavanaugh asked Ahmad and others for help "[redacted]" Ex. 5 at -00706496 (emphasis added). Fox likewise confirmed that, as of 12:09 pm on September 27, 2020 (the day before the CFF was implemented), he and other lower-level executives were [redacted]" that afternoon. Ex. 51 (Fox Tr.) 55:7-23. Fox confirmed that "[redacted]" refers to the Bank's [redacted]" *Id.* (Fox Tr.) 22:4-10. Nevertheless, when asked about the [redacted]

September 27, 2020, Ahmad testified that [redacted]. Ex. 50 (Ahmad Tr.) 181:20-182:3. Again, Moynihan is the only witness who can testify about [redacted] what actions he took the evening before CFF-1 was launched.

In a chat between Renee Johnson (Head of Claims Processing) and Brad Garfield on September 29, 2020 (the day after CFF-1 deployed), Garfield relayed an "[redacted]" from Faiz Ahmad regarding the Bank's "[redacted]." Ex. 14 at -00293818. Garfield explained that "[redacted]" *Id.* It is of obvious relevance that the Bank was considering [redacted]. In this same chat, at 7:33 p.m. Johnson inquired: "[redacted]." Seven minutes later (at 7:40 p.m.) Johnson again asked: "[redacted]" to which Garfield replied at 7:42 p.m.: "[redacted]" *Id.* (emphases added). This chat shows that [redacted]. Moynihan's knowledge, motive and intent are squarely at issue.

Other documents further corroborate that, during Ahmad's "[redacted]" (Moynihan) [redacted]. At 6:07 p.m. on September 28, Ahmad sent an email to Fox and Simpson, reporting, "[redacted]" Ex. 60. Fox confirmed in his deposition that when Ahmad said, "[redacted]," that meant "[redacted]" Ex. 51 (Fox Tr. 65:6-66:13). Fox further confirmed that this "[redacted]" to begin [redacted]. *Id.* (Fox Tr. 68:10-71:1). Fox's testimony gives rise to a very strong inference that [redacted]

[redacted]. Indeed, Fox testified that [redacted]:

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

Ex. 51 (Fox Tr.) 71:11-23 (emphases added).

Despite all signs pointing to Moynihan (or Montag, acting at Moynihan's direction) having been the one [redacted]. In Brad Garfield's deposition, in response to a straightforward question, Garfield attempted to [redacted]:

Q. [redacted]

A. [redacted]

Ex. 54 (Garfield Tr.) 296:9-22. Similarly, in Ahmad's deposition, when asked: "[redacted]" Ahmad responded:

"[redacted]" Ex. 50 (Ahmad Tr. at 366:11-15). When asked: "[redacted]" Ahmad again responded: [redacted]" *Id.* at 366:16-20.[4]

As discussed below, the Bank's witnesses [redacted] involving Moynihan, claiming that [redacted]. As a practical matter, this information can only be obtained from Moynihan himself.

Ongoing Monitoring of CFF Policies.

The Bank's documents also show that in the months following the deployment of the CFF, [redacted]. For example, in an email dated October 31, 2020 re: [redacted], Dean Athanasia provided Moynihan [redacted]" Ex. 15 at -00106173. Given that the Bank's use of CFF-1 continued unabated for eight months until enjoined by Judge Chhabria in June 2021, testimony about Moynihan's ongoing awareness about the impacts of CFF-1 is also relevant to the issue of punitive damages.

Other documents also indicate that [redacted]. In an email dated December 16, 2020, Ehresman discussed "[redacted]," writing, "[redacted]. Ehresman then states: "[redacted]" Ex. 19. When

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[4] Ahmad also testified that [redacted]" Ex. 50 (Ahmad Tr.) 31:2-8.

asked at deposition about this email, Ehresman like the other Bank witnesses, tried to [redacted]:

Q. [redacted]

A. [redacted]

Ex. 52 (Ehresman Tr.) 104:16-105:4. Once again, Moynihan is the only witness who can testify about exactly what claims processing policy changes he did or did not consider, did or did not direct others to implement, and the reasons for his decisions.

Communications with the Board.

Moynihan also possesses unique, non-repetitive, and highly relevant knowledge because he reported to the Bank's Board of Directors about the Bank's UI program and CFF Policies, and he is therefore uniquely knowledgeable about what information he conveyed, what information the Board requested, and what decisions the Board made. The minutes of those meetings show that [redacted], including about "[redacted]," the "[redacted]," "[redacted]," and the "[redacted]" Exs. 1-3. The Bank makes the conclusory assertion that Moynihan "simply reported on prepaid card problem" and has no unique knowledge because the reports he made were "general, and based on information he received from others." Motion at 12. Even if that were true (contrary to what the existing record already shows), as CEO and Board Chair, Moynihan had ultimate decision-making authority and his knowledge is imputable to the Bank and of paramount relevance. Moynihan's knowledge and reports to the Board throughout the eight-month class period are relevant to whether the Bank's decision to continue to deploy the CFF despite the consequences was done in reckless disregard of UI cardholders' rights. No other witness can testify to these matters.

Awareness of Customer Complaints.

Exhibits 22-39 are examples of just some of the many complaints [redacted]. These emails put [redacted], and Plaintiffs should be permitted to examine Moynihan on [redacted]. *See, e.g.*, Ex. 42 (Letter from Assemblymember Philip Y. Ting and 56 Other California Legislators to Brian T. Moynihan (Nov. 24, 2020)). Despite these [redacted] and other reports and indicators of the significant harm the Bank's policies and practices were causing EDD cardholders,, the Bank nevertheless persisted in its CFF policies until enjoined by the district court. Once again, Moynihan is the only person who can speak to what he knew and what, if anything, he did in response to [redacted].

Call Center and EMV Chip Knowledge.

The documents also show that Moynihan has personal knowledge about matters relevant to the claims of the proposed Customer Service and EMV Chip classes. In an email dated August 31, 2020 re: "[redacted]" William Lorenz [redacted] Faiz Ahmad "[redacted]" and stated, while, cc'ing other mid-level executives, "[redacted]" Ex. 4 at -00371492. On September 1, 2020, Bill Golden, managing director in the Bank's Global Markets Operations group, responded: "T[redacted]" Ex. 4 at -00371493. The ensuing slides include several topics of importance to this case, including under "[redacted]": "[redacted]" and "[redacted]" Ex. 4 at -00371492. This slide demonstrates that Moynihan was likely aware [redacted]" and other sophisticated identity validation measures that the Bank abandoned when a claim triggered the CFF.

In an email dated Monday, September 28, 2020, the day CFF-1 deployed, Simpson conveyed to Bessant and others that the Bank needed to "[redacted]" Ex. 13 at -00496585. TTEC is the contractor that provided call center staffing and services for the Bank's UI card program. Simpson's email, however, explained that "[redacted]" *Id.* (emphasis added). Moynihan's direct involvement in and [redacted] are relevant to Plaintiffs' Customer Service Class claims, which include evidence of the Bank's deliberate decision to understaff its call centers to cause "[redacted]" for UI cardholders seeking to make unauthorized-transaction claims.

In an email string dated December 2, 2020 re: [redacted], Paul Simpson noted that the [redacted]" Ex. 16 at -00106174. Lorenz then asked for [redacted]" and Simpson likewise asked William Golden to respond [redacted]" *Id.*

In an email dated December 15, 2020 with the subject line "[redacted]" Ehresmann emailed Head of Claims Processing Renee Johnson with bullet points for Moynihan, noting that [redacted]" and that "[redacted]" **Ex. 17.** In an email sent to Moynihan dated December 15, 2020, re: "[redacted]," Holly O'Neill provided [redacted]" including the information contained in the [redacted] (Ex. 17) in advance of a [redacted]" Ex. 18. The information contained in these [redacted] and the [redacted] is material to Plaintiffs' customer service claims and to their claim that the Bank's continued use of the CFF throughout the class period was unreasonable, in part because there were alternative measures to flag suspicious transactions that did not recklessly disregard the rights of UI cardholders.

2. Thomas Montag Possesses Unique, Nonrepetitive Knowledge.

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" at issue), Thomas Montag likewise possesses critical information that goes to the very core of this case. (Exs. 43-48). In addition to the contemporaneous records discussed below, Montag's knowledge is confirmed by Faiz Ahmad's testimony of [redacted]" **Ex. 50** (Ahmad Tr.) 131:7-14.

Montag headed and ran Global Banking and Markets ("GBAM"), the group that [redacted] (**Ex. 61** at -00416823) and [redacted]. *See, e,g.,* Ex. 11 at -00421427. There is no written record and there are no other witnesses who could testify about what was said by Moynihan or Montag about the UI program and the CFF [redacted]. Further, as discussed below, the mid-level executive deponents who [redacted]. Accordingly, the only way to discover what Moynihan and Montag [redacted], is to ask them at their depositions.

Directives to Reduce Fraud Losses.

The documents show that Montag [redacted].

For example, in an email without a subject line dated September 21, 2020, one week before CFF-1 was built and deployed, Montag asked Ahmad and Lawlor, "[redacted]" Ex. 45 (emphasis added). Lawlor responded, "[redacted]" *Id.* Montag then [redacted]*" Id.* (emphasis added). Consistent with Montag's other communications, this demonstrates, just one week prior to the creation and implementation of CFF-1, Montag's singular focus [redacted]. [redacted]. All of these issues are relevant to punitive and treble damages.

As discussed above, in an email dated September 21, 2020, one week before CFF-1 was built and launched, re: "[redacted]," Jose Firpi stated that "[redacted]. [redacted]" Ex. 9 at -00450219 (emphasis added). Two days later, he added that "[redacted]" Ex. 46 at -00421427. These emails demonstrate the need to depose Moynihan and Montag, as only they can confirm [redacted].

In an email without a subject line, dated September 22, 2020, six days before CFF-1 was launched, Lawlor (Head of Global Municipal Banking and Markets) noted that he and others were "[redacted]" and concluded that "[redacted]" Ex. 47 at -00694890. This email again shows that Montag was [redacted]. The only way to discover [redacted] is by asking Montag about them in his deposition.

Approval of the CFF.

The documents also show [redacted].

Exhibit 48 contains the minutes from a "[redacted]" 2020 of the GBRC and GMRC—the day *after* CFF-1 was implemented (after thousands of UI cardholder claims had already been auto-denied and their UI accounts frozen based solely on CFF-1). Ex. 48 at -00497802. Montag was a [redacted]. *Id.* The minutes state that the committees "[redacted]" *Id*. at -00497803. "[redacted]"

As reflected in the minutes, [redacted]. Yet when deposed, both witnesses claimed to have had [redacted][5] [redacted], the day before the GBRC/GMRC meeting.

Ahmad, who reported directly to Montag, "[redacted]" Ex. 51 (Fox Tr.) 67:2-7. However, when asked: "[redacted] Ahmad responded: [redacted]" Ex. 50 (Ahmad Tr.) 110:19-23. Nevertheless, Fox testified that it was [redacted]" Ex. 51 (Fox Tr.) 71:11-22 ([redacted]).

<u>*Call Center Understaffing.*</u>

The documents show that Montag was also a key decision-maker and has highly relevant information with respect to the Bank's call center staffing, issues which are central to the proposed Customer Service class's claims. For example, in an email string from late-

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[5] E.g., When asked: "[redacted]" Ahmad responded: "[redacted]" Ex. 50 (Ahmad Tr.) 219:12-16. When asked whether "[redacted]" Ahmad responded: "[redacted]" *Id.* 219:17-24. When asked [redacted]" Ahmad responded: "[redacted]" *Id.* 226:8-14. When asked again: "[redacted]" Ahmad responded: "[redacted]" These [redacted]. Ex. 64 at -00592326 and Ex. 50 (Ahmad Tr.) 245:15-246:13. There is a significant disconnect between that [redacted] at minimum evidences reckless confusion at the Bank about what the CFF was built to do. Montag's testimony could also clear up these important unresolved questions.

July/early-August 2020, re: "[redacted], Ahmad forwarded Montag a request [redacted]" "[redacted]" The forwarded email noted that the [redacted]" Ex. 43 at -00881847. Ahmad wrote to Montag: "[redacted]" Ex. 43 at -00881846. Montag responded [redacted]" (*id.*) and then: "[redacted]" *Id.* at -00881845 (emphasis added). Ahmad responded, "[redacted]" noting, inter alia, that "[redacted]" *Id.* Montag responded "[redacted]" *Id.* Montag's reluctance to [redacted] are relevant to all of Plaintiffs' claims, especially the Customer Service Class claims that include evidence [redacted]. *See, e.g.,* Ex. 62 at -00876476 ("[redacted]").

3. The Recent Depositions Underscore the Need to Depose Brian Moynihan and Tom Montag.

Excerpts from the four two-hour depositions of mid-level executives taken pursuant to the December 23, 2024 IDC only strengthen the case for deposing Moynihan and Montag. Putting aside the issue of [redacted], and taking these witnesses at their word, none [redacted] understood with respect to the [redacted]. The witnesses repeatedly [redacted]" ECF 298 at 11; *see, e.g.*, Ex. 49 (Simpson, who reported to Montag and [redacted]); Ex. 51 (Fox, who [redacted]); Ex. 52 (Ehresman, head of Consumer Client Protection, who [redacted] who sent an email on September 28, 2020 at 8:02 pm (Ex. 65) stating: "[redacted]" but who testified, "[redacted]" "[redacted]" "[redacted]" "I[redacted]"); Ex. 53 (Melissa Ramirez, a banking operations executive in Global Commercial Card Fulfillment Service and Operations who reported to an executive, who reported to Paul Simpson, who reported to Montag, who reported to Moynihan, and testified that [redacted]).

Because the evidence shows that Moynihan and Montag have unique, personal knowledge of issues central to Plaintiffs' and the putative classes' claims, and because Plaintiffs cannot obtain that evidence through any other discovery method despite their diligent efforts to do so, the Bank's motion for a protective order should be denied, and the noticed depositions of Moynihan and Montag should be allowed to proceed.

IV. CONCLUSION

In sum, the documents and testimony in this case show that:

- CEO Moynihan and former COO Montag were [redacted];
- Moynihan and Montag had [redacted];
- The witnesses deposed to date either [redacted] involving Montag and/or Moynihan;
- Moynihan affirmatively [redacted];
- Moynihan approved [redacted];
- Moynihan received [redacted];
- Both Moynihan and Montag were aware of the [redacted];
- There is a significant gap in the existing evidentiary record regarding who provided the approval to implement CFF-1 on September 28 2020, prior to the GBRC and GMRC meeting. Faiz Ahmad, who reported to Montag and [redacted]. William Fox testified [redacted].
- Moynihan continued to [redacted], after the CFF was implemented yet the Bank nevertheless persisted in these policies until enjoined by the district court in this case.

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Motion for a Protective Order and allow the noticed depositions to proceed.

Respectfully submitted,

Dated: April 25, 2025

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SIGNATURE ATTESTATION

Pursuant to section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I, Brian Danitz, attest that the other signatories listed, and on whose behalf this filing is submitted, concur in the filing content and have authorized this filing.

Dated: April 25, 2025

/s/ Brian Danitz
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