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17 **UNITED STATES DISTRICT COURT**  
18 **SOUTHERN DISTRICT OF CALIFORNIA**  
19 **SAN DIEGO DIVISION**

20 IN RE: BANK OF AMERICA  
21 CALIFORNIA UNEMPLOYMENT  
22 BENEFITS LITIGATION

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

**REPLY IN SUPPORT OF  
DEFENDANT'S MOTION FOR A  
PROTECTIVE ORDER**

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

FILED PROVISIONALLY UNDER SEAL  
PURSUANT TO STIPULATED PROTECTIVE  
ORDER

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1 Plaintiffs’ opposition to BANA’s Motion for Protective Order (“Motion” or  
2 “Mot.”) does not seriously engage with BANA’s Motion, and simply fails on the law  
3 and the facts.

4 On the law, Plaintiffs all but ignore the law governing apex depositions,  
5 instead citing general discovery principles to suggest that BANA bears the burden to  
6 show that these depositions should not proceed. Plaintiffs’ Memorandum of Points  
7 and Authorities in Opposition to Defendant’s Motion for a Protective Order  
8 (“Opposition” or “Opp.”) 4. That is wrong. As BANA explained at length (Mot. 8-  
9 9), it is *Plaintiffs* that must show (1) that Messrs. Moynihan and Montag have “unique  
10 first-hand, non-repetitive knowledge of the facts at issue in the case,” and (2) that  
11 Plaintiffs have “exhausted other less intrusive discovery methods.” *In re Google*  
12 *Litig.*, 2011 WL 4985279, at \*2 (N.D. Cal. Oct. 19, 2011); *see also Greer v. Cnty. Of*  
13 *San Diego*, 2022 WL 2134601, at \*3 (S.D. Cal. June 14, 2022) (making clear that  
14 Plaintiffs bear the burden). Plaintiffs also repeatedly argue that these depositions  
15 should proceed because other BANA employees *might* have communicated relevant  
16 information to Messrs. Moynihan and Montag. That argument fails under any  
17 conception of the apex doctrine. Information that the executives received from others  
18 is *by definition* information that is not unique, first-hand, or non-repetitive, and it  
19 therefore provides no basis for proceeding with these depositions.

20 Plaintiffs fare no better on the facts. To start, Plaintiffs’ suggestion that “the  
21 Bank relies solely on Moynihan and Montag’s executive status” is simply not  
22 credible. Opp. 4. Beyond that, the crux of Plaintiffs’ argument is that Mr. Moynihan  
23 (or Mr. Montag, at Mr. Moynihan’s direction) is the most likely candidate to have

24 [REDACTED]  
25 [REDACTED]. The evidence shows that Cathy Bessant, [REDACTED]  
26 [REDACTED]  
27 [REDACTED]. Yet Plaintiffs never  
28 even sought to depose Ms. Bessant. *See infra* at 3. Instead, Plaintiffs prefer to

1 speculate that Mr. Moynihan [REDACTED]

2 [REDACTED].  
3 That comes nowhere near satisfying Plaintiffs' burden—particularly because BANA  
4 has direct testimony from Mr. Ahmad (the person Plaintiffs claim Mr. Moynihan  
5 spoke with) that [REDACTED]  
6 [REDACTED]. Mot. 7, 16.

7 Against this backdrop, Plaintiffs' speculation about what might have been  
8 discussed with Messrs. Moynihan and Montag is plainly lacking. Plaintiffs'  
9 remaining arguments fare no better, as their cited evidence suggests at most that  
10 Messrs. Moynihan and Montag had information that was irrelevant, repetitive, or  
11 both. That should be the end of the fishing expedition, which Plaintiffs long ago  
12 confessed stems not from fact, but a desire to push settlement via executive  
13 discovery. Despite the extensive record available, Plaintiffs still have provided  
14 absolutely no basis for pushing ahead with yet another round of intrusive discovery  
15 in the hopes that this time it might turn up something relevant, all evidence to the  
16 contrary. BANA therefore respectfully requests that the Court grant its Motion.

17 **ARGUMENT**

18 **I. There Is No Basis For Deposing Mr. Moynihan.**

19 Plaintiffs' request to depose Mr. Moynihan turns primarily on their assertions  
20 that he was "a key driver" of the development of the fraud filter and the  
21 "decisionmaker who gave approval for the implementation of the fraud filter." Opp.  
22 7, 12-15. Both statements are wrong. Plaintiffs juxtapose (at 7, 12-15) a string of  
23 communications from September 27-28, 2020—*none of which include Mr.*  
24 *Moynihan*—to argue that Mr. Moynihan approved the fraud filter, but none of  
25 Plaintiffs' exhibits support their assumption. The evidence confirms the opposite:  
26 Mr. Moynihan was not involved in the development or approval of the fraud filter.

27 BANA presented direct evidence that Mr. Moynihan was *not* involved in the  
28 decision to approve the fraud filter. Faiz Ahmad, [REDACTED]

1 [REDACTED]  
2 [REDACTED] (Opp. 7, 13), [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED] Riffie Decl. Ex. 5, Ahmad Tr. 244:18-22, 93:25-  
6 94:20. Mr. Ahmad did not “resist[] confirming” (Opp. 7) that Mr. Moynihan  
7 approved the fraud filter; he expressly testified that [REDACTED] The  
8 testimony from other BANA witnesses confirmed as much. Mot. 16-18. It would be  
9 nonsensical if Mr. Moynihan approved the fraud filter without ever meeting or  
10 discussing it with the relevant members of BANA management. *See id.*

11 Plaintiffs otherwise posit that Mr. Moynihan must have been involved because  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED] Opp. 12. But as testimony and emails  
15 show, [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 Hoyle Ex. 18; *id.* Ex. 20, Ahmad Tr. at 193:8-196:8 (testifying that [REDACTED]  
20 [REDACTED] . [REDACTED]  
21 [REDACTED] Hoyle Ex. 18. Notwithstanding Plaintiffs’  
22 failure even to seek Ms. Bessant’s deposition (Hoyle Decl. ¶ 13), this evidence (and  
23 Mr. Ahmad’s conclusive testimony) wholly refutes the speculation that  
24 Mr. Moynihan [REDACTED] . Opp. 12. Likewise, Plaintiffs  
25 have no evidence that Mr. Moynihan [REDACTED]  
26 [REDACTED] . Opp. 12 (citing Danitz

27 1  
28 [REDACTED]

1 Ex. 51). Indeed, Plaintiffs have not identified *any* communications sent to or from  
2 Mr. Moynihan concerning [REDACTED] (because none exist). And as the evidence  
3 concerning the purported [REDACTED]  
4 [REDACTED]. See Riffie Decl. Ex. 5, Ahmad Tr. at  
5 244:18-22, 93:25-94:20.<sup>2</sup>

6 Plaintiffs raise a handful of additional arguments to support their requested  
7 deposition of Mr. Moynihan but none are persuasive. Much of the information  
8 Plaintiffs seek to obtain is irrelevant and/or based on more rank speculation. See Mot.  
9 11-19. The remainder was [REDACTED] *see id.*, and  
10 therefore cannot justify an apex deposition. *Jet Blast, Inc. v. Blue Lake Serv., LLC*,  
11 2025 WL 254066, at \*3 (N.D. Fla. Jan. 21, 2025). With respect to this information,  
12 Mr. Moynihan “can contribute nothing more than a lower level employee,” meaning  
13 “good cause is shown to not take the deposition.” *Harris v. Computer Assocs. Int’l,*  
14 *Inc.*, 204 F.R.D. 44, 46 (E.D.N.Y. 2001); *see also Keatley v. Union P. Railroad Co.*,  
15 2024 WL 4906135, at \*2 (D. Neb. Nov. 27, 2024) (refusing apex deposition where  
16 information “was passed on to [the executive] second hand and limited to the  
17 information told to him by others”). To the extent Plaintiffs continue to speculate that  
18 there may have been a conversation between Messrs. Moynihan and Montag  
19 regarding [REDACTED], it still rests on a  
20 [REDACTED]

21 [REDACTED]  
22 <sup>2</sup> Further information regarding the [REDACTED] was properly  
23 [REDACTED] Judge Berg uph [REDACTED] m regarding [REDACTED]  
24 [REDACTED] referenced in Plaintiffs’ Opposition (at 7, 12 citing  
25 [REDACTED] n *in camera* review. Hoyle Decl. ¶¶ 7-11. Plaintiffs did not  
26 challenge that determination. *Id.* BANA’s privilege logs, [REDACTED] d  
27 July 2024, identify privileged communication [REDACTED]  
28 [REDACTED] lect, [REDACTED]  
[REDACTED]. See [REDACTED]  
deposition based on pure speculation about  
what the privileged information might be [REDACTED]  
(that Mr. Moynihan or Mr. Montag [REDACTED]  
[REDACTED]  
[REDACTED]

1 wholly speculative statement [REDACTED]  
2 [REDACTED]. See Mot. 20-21 [REDACTED]  
3 [REDACTED]).<sup>3</sup> Even if a conversation did take place between Messrs. Montag and  
4 Moynihan, that still does nothing to establish their unique knowledge about the fraud  
5 filter, or that they directed, approved, or ratified its use with ill-intent.

6 *Directives to Reduce Fraud Loss* (Opp. 8-11): Plaintiffs argue that [REDACTED]  
7 [REDACTED]. But  
8 there is simply no evidence this was the case, and Mr. Moynihan's own testimony  
9 would not shed any light on whether [REDACTED]  
10 [REDACTED] even if it were true (and it is not).  
11 Riffie Decl. Ex. 5, Ahmad Tr. at 93:25-94:9. Nor would [REDACTED]  
12 [REDACTED], be relevant to Plaintiffs' punitive damages claims.

13 Plaintiffs otherwise rely entirely on communications from other BANA  
14 executives discussing [REDACTED]  
15 [REDACTED]. See Opp. 8-11; Mot. 11-15. Plaintiffs cannot justify an apex deposition  
16 based on information provided entirely by other witnesses. See *Jet Blast*, 2025 WL  
17 254066, at \*3. Moreover, the fact that Mr. Moynihan may have received information  
18 about [REDACTED] cannot satisfy Plaintiffs' "burden to show that [Mr. Moynihan]  
19 had 'unique' and 'non-repetitive knowledge' regarding any relevant topic." *Affinity*  
20 *Labs of Tex. v. Apple, Inc.*, 2011 WL 1753982, at \*16 (N.D. Cal. May 9, 2011).

21 Plaintiffs cite, for example, emails suggesting that [REDACTED]  
22 [REDACTED]. Opp. 9 (discussing  
23 Danitz Ex. 7). Likewise, Plaintiffs point to an email from Paul Simpson to  
24 Ms. Bessant noting [REDACTED]  
25 [REDACTED]. Opp.  
26 9-10 (discussing Danitz Ex. 8). Even if that information was communicated to Mr.  
27 Moynihan, it merely underscores that he has no *unique* knowledge of the information

28 <sup>3</sup> Plaintiffs never sought to depose Mr. Firpi. Mot. 14; Riffie Decl. ¶ 22.

1 that may have been presented (much less the fraud filter). In other words, the only  
2 evidence Plaintiffs can muster is communications from others with information that  
3 may or may not have been communicated to Mr. Moynihan. Mot. 12-13.

4 *Ongoing Monitoring of CFF Policies* (Opp. 15-16): Plaintiffs argue that  
5 Mr. Moynihan [REDACTED] Opp. 15. Again, their  
6 evidence consists almost entirely of communication to Mr. Moynihan with  
7 information regarding [REDACTED], and his receipt of information from others is  
8 plainly insufficient to support an apex deposition. *See supra* at 5; *see also* Mot. 11.  
9 The only evidence Plaintiffs identify regarding Mr. Moynihan's views is irrelevant  
10 to their punitive damages claim. Plaintiffs point to a single statement that was  
11 purportedly communicated from Mr. Moynihan—namely, that [REDACTED]  
12 [REDACTED] Opp. 15 (quoting Danitz Ex. 19). But  
13 Mr. Moynihan's [REDACTED]  
14 [REDACTED] let alone whether Mr. Moynihan implemented BANA's  
15 policies with the ill-intent needed to support a claim for punitive damages.

16 *Communications with the Board* (Opp. 16-17): Plaintiffs next suggest that  
17 even if Mr. Moynihan only conveyed updates from others to BANA's Board of  
18 Directors, he nevertheless "had ultimate decision-making authority and his  
19 knowledge is imputable to the Bank and of paramount relevance." Opp. 16. It is  
20 always the case that a company's CEO reports to its Board of Directors. *See* Mot. 12,  
21 24. If Plaintiffs' bald speculation that someone might have said something relevant  
22 at a Board meeting were sufficient to depose a chief executive, the apex doctrine  
23 would evaporate. *Cf. Affinity Labs*, 2011 WL 1753982, at \*16 ("Courts have  
24 repeatedly denied apex depositions even on a showing that the executive made public  
25 statements on relevant issues."). That is particularly true here as Plaintiffs have all of  
26 the relevant [REDACTED]  
27 [REDACTED]. Mot. 12 & n.8.

28 *Awareness of Customer Complaints* (Opp. 17): Grasping at straws, Plaintiffs

1 note that Mr. Moynihan received [REDACTED]  
2 [REDACTED], and that because Mr. “Moynihan is the only person who  
3 can speak to what he knew and what, if anything he did in response to these,”  
4 Plaintiffs should be permitted to subject him to a wide-ranging deposition. Opp. 8,  
5 17. As BANA explained, there is no evidence that Mr. Moynihan took any action or  
6 had any role in [REDACTED]  
7 [REDACTED]. Mot. 15. And Plaintiffs make no attempt  
8 to address why this apex deposition “is warranted by the fact that he [REDACTED]  
9 [REDACTED], when  
10 courts have previously held the opposite. *Davis v. Pinterest, Inc.*, 2021 WL  
11 11117688, at \*1 (N.D. Cal. May 27, 2021) (cited at Mot. 15).

12 *Call Center and EMV Chip Knowledge* (Opp. 17-19): Finally, Plaintiffs  
13 suggest that Mr. Moynihan has “personal knowledge about matters relevant to the  
14 claims of the proposed Customer Service and EMV Chip classes.” Opp. 17. Once  
15 again, their argument rests on statements by other employees suggesting that they  
16 would provide updates to Mr. Moynihan. The only action Plaintiffs identify that  
17 might have involved Mr. Moynihan himself is [REDACTED]  
18 [REDACTED] Opp. 18  
19 (discussing Danitz Ex. 13). As discussed above, [REDACTED]  
20 [REDACTED], *see supra* at n.1, and there is no indication that  
21 Mr. Moynihan was involved in this decision. Even if Mr. Moynihan were involved,  
22 [REDACTED] does not show that he has any unique, non-  
23 repetitive knowledge regarding [REDACTED]—particularly because the remainder of  
24 Plaintiffs’ evidence shows that other BANA employees had direct involvement.

25 **II. There Is No Basis For Deposing Mr. Montag.**

26 Plaintiffs’ arguments with respect to Mr. Montag fail for the same reasons as  
27 their arguments for Mr. Moynihan. Plaintiffs have not identified any unique  
28 information possessed by Mr. Montag that would separately justify his deposition,

1 much less the deposition of two apex witnesses.<sup>4</sup>

2 First, Plaintiffs cannot obtain an apex deposition because Mr. Montag  
3 [REDACTED]  
4 [REDACTED] Opp. 19 (discussing Danitz Ex. 50, Ahmad Tr. at 131:7-14). At most that  
5 would show he possessed whatever information Mr. Ahmad communicated to him.  
6 Absent a showing that Mr. Montag can “contribute ... more” than Mr. Ahmad, there  
7 is no basis to take Mr. Montag’s deposition in addition to Mr. Ahmad’s deposition.  
8 *Harris*, 204 F.R.D. at 46. Mr. Montag’s testimony will not “add to the testimony of  
9 other witnesses whose knowledge of the facts at issue is both more granular and more  
10 relevant than” his is likely to be. *Kormylo v. Forever Resorts, LLC*, 2015 WL  
11 5311484, at \*4 (S.D. Cal. Sept. 11, 2015) (precluding apex deposition).

12 Next, as discussed above, Plaintiffs speculate that a deposition will reveal non-  
13 repetitive information from either a [REDACTED]  
14 [REDACTED]  
15 [REDACTED]. Opp. 19. But there is no evidence to support that. *See* Mot. 12-  
16 14, 16-18; *supra* at 4-5. If Mr. Moynihan and Mr. Montag did meet to discuss [REDACTED]  
17 [REDACTED] there is nothing at all in the record to substantiate  
18 Plaintiffs’ contention that [REDACTED]

19 <sup>4</sup> If the Court is inclined to permit the deposition of any apex executive (and it should  
20 not), the Court should limit its approval to a single one- or two-hour deposition of a  
21 senior [REDACTED] reporting line from and direct oversight of  
22 the [REDACTED] (which clearly was not Mr. Moynihan  
23 – *see* [REDACTED] position should be solely about Plaintiffs’  
24 claims for punitive damages. Under Plaintiffs’ own theory, any unique knowledge  
25 BANA’s apex executives have on the relevant topics would be shared between them,  
26 and there is no reason to allow burdensome depositions to proceed with respect to  
27 both executives—particularly when the basis for those depositions is so speculative  
28 and unsupported (or refuted) by the record (Mot. 12-14, 16-18; *supra* at 3-7). *See*  
*Cochran v. Brinkmann Corp.*, 2009 WL 10668460, at \*1, 3 (N.D. Ga. 2009) (limiting  
apex deposition “to those topics for which [the executive] can give unique, personal  
testimony”). Moreover, since Plaintiffs only seek apex depositions for the limited  
purpose of punitive damages, which only would be relevant if Plaintiffs can first  
prove liability and entitlement to compensatory damages, any deposition that may be  
permitted should be limited in scope and time, and can be deferred at least until after  
the Court considers dispositive motions. *See* Fed. R. Civ. P. 42(b); *Schmitz v. Asman*,  
2023 WL 3224474, at \*3 (E.D. Cal. May 3, 2023) (staying “discovery on issues  
solely pertaining to punitive damages ... pending resolution of dispositive motions”).

1 [REDACTED]. If Messrs. Moynihan or Montag took or directed any action based on  
2 their purported discussions with each other or others, there would be evidence  
3 revealing as much. There simply is not. *See* Mot. 12-14, 16-18; *supra* at 2-5, 8.

4 Nor do Plaintiffs identify any testimony supporting any such meetings or  
5 directives. *See* Mot. 12-14, 16-18; *supra* at 2-5, 8. Plaintiffs again assert that other  
6 executives [REDACTED] Opp. 19. In fact,

7 executives repeatedly explained that [REDACTED]  
8 [REDACTED]. Mot. 21-22.<sup>5</sup> Mr. Ahmad, for example,  
9 testified that [REDACTED]

10 [REDACTED]  
11 [REDACTED] Riffie Ex. 5, Ahmad Tr. 109:10-111:10. Mr. Garfield likewise  
12 testified that [REDACTED]

13 [REDACTED]  
14 [REDACTED] Riffie Ex. 10, Garfield Tr. 228:6-231:16.

15 At most, Plaintiffs have established Mr. Montag may have [REDACTED]  
16 [REDACTED]. Plaintiffs argue he was therefore involved in approving the  
17 fraud filter, but the same is true for [REDACTED]. Allowing  
18 Plaintiffs to depose Mr. Montag on that basis would turn the apex doctrine on its  
19 head—particularly because Plaintiffs already deposed other executives [REDACTED]  
20 [REDACTED]. *See* Mot. 16-18.<sup>6</sup>

21 Plaintiffs' other subject-specific arguments are similarly unavailing.  
22

23 <sup>5</sup> Plaintiffs revisit this argument at the end of their brief, suggesting that the recent  
24 depositions ordered by Judge Berg support the apex depositions because, according  
25 to Plaintiffs, BANA's witnesses were non-responsive. Opp. 23-24. As explained in  
26 detail [REDACTED]

26 <sup>6</sup> Plaintiffs' discussion of the [REDACTED] (Opp. 22  
27 n.5) [REDACTED]  
28 [REDACTED]

*Directives to Reduce Fraud Losses* (Opp. 20-21): According to Plaintiffs, Mr. Montag was [REDACTED] [REDACTED] Opp. 21. An apex deposition is not available merely because an executive was “involved in the discussions” regarding a general topic area relevant to Plaintiffs’ claims. Plaintiffs still must show that Mr. Montag had unique information that could not be obtained through the BANA executives that Plaintiffs deposed (or had the opportunity to depose). *See Patagonia, Inc. v. Anheuser Busch, LLC*, 2020 WL 12048987, at \*2 (C.D. Cal. Nov. 23, 2020) (granting protective order on topic that was “the subject of deposition testimony by others more knowledgeable”). All the evidence points in the opposite direction—namely, that Mr. Montag was provided information by other employees. *See supra* at 7-8; Mot. 12-13.

Plaintiffs further speculate that Mr. Montag [REDACTED]  
[REDACTED] Opp. 20, but  
Mr. Ahmad testified that [REDACTED]  
Riffie Ex. 5, Ahmad Tr. 109:10-111:10. Regardless, [REDACTED]  
[REDACTED]  
[REDACTED] (Opp. 20)—let alone intent to cause harm. *See also* Mot. 20.

*Call Center Understaffing* (Opp. 22-23): Plaintiffs argue that Mr. Montag should be deposed because he was not [REDACTED]. If Plaintiffs propose to support their punitive damages claim because Mr. Montag [REDACTED], then their theory for punitive damages is not just wrong but frivolous. And, as is plain from the face of the document Plaintiffs cite, Mr. Montag [REDACTED], further undermining Plaintiffs' claims that [REDACTED] were made with ill intent. Mot. 19-20.

## CONCLUSION

For the foregoing reasons, BANA respectfully requests that the Court grant BANA's request for a protective order.

1 Dated: May 2, 2025

2 Respectfully submitted,

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**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 May 2, 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: May 2, 2025

s/ Matthew L. Riffie