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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' *EX PARTE* MOTION FOR LEAVE TO FILE SURREPLY TO DEFENDANT'S MOTION FOR A PROTECTIVE ORDER, AND PROPOSED SURREPLY**
This Document Relates to All Actions	Judge: Hon. Gonzalo P. Curiel Ctrm: 2D (2nd Floor)

REDACTED PUBLIC VERSION

I. MOTION FOR LEAVE

Plaintiffs respectfully move for leave to file this short surreply brief in opposition to Defendant Bank of America, N.A.'s (the "Bank") Motion for Protective Order, for the sole purpose of responding to new evidence and argument submitted by the Bank for the first time in its Reply, *see* Hoyle Reply Decl. Exs. 18-21, and specifically to clarify for the Court a key factual issue that the Bank's Reply distorts regarding approval of the Claim Fraud Filter. Courts often grant leave to file a surreply for good cause shown where, as here, the party seeks to address evidence or argument raised "for the first time in [a] reply brief." *See Int'l Gamco, Inc. v. Multimedia Games, Inc.*, 732 F.Supp.2d 1082, 1099 n.20 (S.D. Cal. 2010); *Cash v. AMCO Ins. Co.*, 2018 WL 3434885, at *2 (S.D. Cal. July 17, 2018); *Ruiz v. XPO Last Mile, Inc.*, 2017 WL 1421996, at *3 (S.D. Cal. Apr. 20, 2017).

II. PROPOSED SURREPLY

Plaintiffs' Opposition explains why, as a matter of logical inference, it must have been either CEO Brian Moynihan or former COO Thomas Montag, acting at Moynihan's direction, who gave Faiz Ahmad the actual "[redacted]" i.e. "[redacted]" just shortly before 6:07 p.m. on September 28, 2020. *See* Opp'n at 7 (citing Danitz Decl. Exs. 5, 14, 60, 51).

In its recent reply brief, the Bank attempts to block the noticed depositions of Moynihan and Montag by asserting *for the first time* in this years-long litigation that "the evidence shows" it was actually Cathy Bessant, the Bank's then-Global Head of Technology and Operations who reported to Brian Moynihan, who gave the "[redacted]" for the Bank's use of the automated Claim Fraud Filter to deny claims, rescind credits, and freeze [redacted] accounts "[redacted]." Hoyle Decl. Ex. 15 (Ramirez Tr. 4:7-13); Reply at 1, 3.[1] The Bank now claims that its eleventh-hour reveal "wholly refutes the speculation that Mr. Moynihan "[redacted]." *Id.* at 3.

[1] The Bank does not actually state that Bessant was the final decisionmaker, only that the "evidence shows" she was. Reply at 1. Notably, the Bank *did not disclose* Bessant in response to Plaintiffs' interrogatory asking the Bank to "[redacted]

The Bank's citations to the record prove nothing of the sort—in fact, just the opposite. The Bank points to an email Bessant sent Faiz Ahmad on September 27, 2020 at 9:38 p.m. stating that she had "[redacted]" *Id.* (quoting Hoyle Reply Decl. Ex. 18). But if Bessant's *September 27* e-mail actually provided the necessary final approval to implement the Claim Fraud Filter, the Bank's employees would not have still been "[redacted]" and "[redacted]" *on September 28*. Danitz Decl. Ex. 52 (Ehresman Tr. 78:3-79:23).[2] Nor would the Bank's employees have been asking at 7:33 p.m. on September 28, "[redacted]" if Bessant had given the final approval the previous evening. Danitz Decl. Ex. 14. And Ahmad would not have emailed Bill Fox and Paul Simpson at 6:07 p.m. on September 28, reporting, "[redacted]" if that [redacted] had been provided a full day earlier. Danitz Decl. Ex. 60 (emphasis added); *see id.* Ex. 51 (Fox Tr.) 65:6-66:13 (explaining that, when Ahmad said [redacted] that meant [redacted]. Similarly, Bill Fox would not have responded, "[redacted]" if Bessant had given the necessary approval the day before. Danitz Decl. Ex. 60.

The Bank's seemingly dramatic disclosure raises more questions than it answers—questions that only Moynihan or Montag can answer—and it does *nothing* to undermine the likelihood that it must have been the more senior Moynihan (or Montag, acting at Moynihan's direction) who gave the "[redacted]" or "[redacted]" to begin actually implementing the Claim Fraud Filter on September 28. Indeed, the fact that Ahmad felt the

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[redacted]" ECF 211 Ex. 18 (Responses to Rog 11) at 16-17, and the Bank later refused to produce any of Bessant's custodial documents, forcing Plaintiffs to move to compel them. ECF 212.

[2] The underlying Bank document about which Ehresman is testifying (Ehresman Dep. Ex. 372, BANA_EDD_MDL-00426935) shows that this chat exchange occurred at 12:37 p.m. and 1:52 p.m. on September 28.

need to obtain Bessant's preliminary approval before seeking final approval from an even higher-ranking officer on September 28 only *strengthens* the probability that it was the CEO himself who unilaterally authorized the freezing of "[redacted]." Danitz Decl. Ex. 14. Plaintiffs should be allowed to depose Moynihan and Montag to determine once and for all what they knew about the Claim Fraud Filter and the impacts it would have on legitimate cardholders, and whether they approved the use of the Claim Fraud Filter to summarily deny claims without investigation, rescind permanent credits, and freeze the accounts of tens of thousands of EDD UI beneficiaries.

Respectfully submitted,

Dated: May 7, 2025 **COTCHETT, PITRE & McCARTHY, LLP**

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SIGNATURE ATTESTATION

Pursuant to section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I, Michael Rubin, 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: May 7, 2025

/s/ Michael Rubin
Michael Rubin