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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' OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER MAY 29, 2025 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR PROTECTIVE ORDER**
This Document Relates to All Actions	Crtm: 12A – 12th Floor Judge: Hon. Gonzalo P. Curiel Date: September 16, 2025 Time: 1:30 P.M.

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I. INTRODUCTION

Defendant Bank of America, N.A. (the "Bank") seeks reconsideration of the Court's May 29, 2025 Order Granting in Part and Denying in Part Defendant's Motion for Protective Order (the "Order"). The Bank's request for the extraordinary remedy of reconsideration should be denied. The Bank has not demonstrated any error, let alone "clear error," in the Court's order requiring the depositions of CEO Brian Moynihan and former COO Thomas Montag to proceed subject to the Court's specified limitations. Nor has the Bank asserted any argument or evidence that the Court did not already consider and reject in its 19-page memorandum opinion, which thoroughly addressed the legal arguments and evidence presented by the parties' substantial briefing.[1]

In its Motion,[2] the Bank persists in its efforts to improperly shift the burden of showing "good cause" for issuing its requested protective order onto Plaintiffs. This is the same argument the Bank repeatedly asserted before, which the Court considered and rejected based on extensive precedent, including Ninth Circuit authority. *See, e.g.*, Order at 8 ("Even when a party seeks a protective order barring an apex deposition, it retains the 'heavy' burden to show 'good cause' for a protective order.") (quoting *Blankenship v. Hearst Corp*., 519 F.2d 418, 429 (9th Cir. 1975)). A multitude of district court decisions consistent with this precedent, and with the Court's Order here, refute any assertion of a "clear error" sufficient to justify reconsideration.

Moreover, the Bank completely ignores the Court's alternative holding that: "Even if the burden is switched, Class Plaintiffs have shown that the deponents have 'unique first-hand, non-repetitive knowledge of the facts at issue in the case.'" Order at 9 n.5.

The Bank's other criticisms of the Order, including how the Court weighed the evidence and the basis for its determination under Rule 26(c)(1) that the Bank will not suffer specific prejudice or harm if its protective order is denied, again simply rehash the

[1] The parties submitted 878 pages of exhibits and 59 pages of briefing (not counting the sur-reply request and opposition) in connection with the MPO.

[2] "Motion" refers to the Bank's Motion for Reconsideration; "MPO" refers the underlying motion for protective order; and "Reply" to the Bank's reply brief.

same facts and arguments as before. Because the Bank's re-argument fails to meet the standard for reconsideration, its Motion should be denied.

The Bank's alternative motions for certification for an interlocutory appeal and a stay pending any appeal should also be denied. The Court's discovery Order does not involve a "controlling question of law" the resolution of which "may materially advance the termination of the litigation." 28 U.S.C. § 1292(b). An interlocutory appeal would multiply proceedings on a matter of pre-trial discovery which is committed to the discretion of this Court and would needlessly delay resolution of this case. The Bank has not made a strong showing that it is likely to succeed on the merits or that it would suffer irreparable harm absent a stay and the balance of the equities and public interest favor expeditiously resolving this case.

II. LEGAL STANDARD

A court has discretion to reconsider and vacate a prior order. *Barber v. Hawaii*, 42 F.3d 1185, 1198 (9th Cir. 1994). However, "motions for reconsideration are disfavored." *Camran v. San Diego Youth Servs*., 2025 WL 1150717, at *1 (S.D. Cal. Apr. 17, 2025) (citing *NW. Acceptance Corp. v. Lynnwood Equip., Inc*., 841 F.2d 918, 925-26 (9th Cir. 1988)). Reconsideration is an "extraordinary remedy, to be used sparingly." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003); *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

A motion for reconsideration "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.'" *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (per curiam) (internal quotation and citation omitted); *see also* Civ LR 7.1(i)(1) (the party seeking reconsideration must present "what new or different facts and circumstances are claimed to exist which did not exist, or were not shown, upon such prior application").

A motion for reconsideration "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (citation and internal quotation marks omitted). "Neither disagreements with a decision nor recapitulations of rejected arguments are adequate bases for reconsideration." *Slama v. City of Madera*, 2012 WL 1292501, at *2 (E.D. Cal. Apr. 16, 2012) (citing *United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111, 1131 (E.D. Cal. 2001) ("A motion for reconsideration is not a vehicle to reargue the motion or to present evidence which should have been raised before.")); *see also Coleman v. Evergreen Pub. Sch.*, 2018 WL 5886452, at *1 (W.D. Wash. Nov. 9, 2018) (denying reconsideration because such a motion is not "intended to provide litigants with a second bite at the apple"); *Brown v. Deputy*, 2014 WL 4961189, at *1 (S.D. Cal. Oct. 3, 2014) ("motions for reconsideration are not to be used to simply 'rehash' arguments and facts previously considered by the Court in making its ruling"); *Kilbourne v. Coca-Cola Co.*, 2015 WL 10943610, at *3 (S.D. Cal. Sept. 11, 2015) (same; collecting cases).

III. ARGUMENT

The Bank has not met its burden of establishing grounds for reconsideration under the governing standard. There has been no intervening change in the controlling law or any new evidence that was unavailable during the prior briefing. Instead, the Bank merely re-argues the points made in its original MPO and insists that the Court's rejection of those points was "clear error." There was no error.

A. The Court Did Not Misapply the Apex Doctrine.

The Court applied the proper legal standard for determining whether to issue a protective order to preclude or limit an "apex" deposition. As the Court recognized, after extensive briefing, on a motion for protective order the moving party bears the burden of showing "good cause" why a deposition should not proceed. Moreover, the Bank completely ignores the Court's alternative holding that: "Even if the burden is switched, Class Plaintiffs have shown that the deponents have 'unique first-hand, non-repetitive knowledge of the facts at issue in the case.'" Order at 9 n.5.

The Order specifically addressed the parties' contentions. *See* Order at 7 ("As a threshold matter, the parties disagree on who bears the burden on a motion for protective order concerning an apex deposition."). In doing so, the Court considered Ninth Circuit authority discussing the "good cause" requirement under Rule 26(c)(1). *See* Order at 5, 8 (quoting *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp*., 307 F.3d 1206, 1210-11 (9th Cir. 2002) ("For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted.")).

The Court then addressed the contours of the "apex doctrine" as articulated by the district courts. *See* Order at 5-6. Correctly noting that "the Ninth Circuit has not yet endorsed the doctrine," the Court considered two Ninth Circuit cases that analyzed "the deposition of high-level executives under a Rule 26(c) motion for protective order." Order at 6-8 (discussing *Blankenship v. Hearst Corp*., 519 F.2d 418, 429 (9th Cir. 1975) (permitting the deposition of publisher Hearst under Rule 26(c), finding that the defendants failed to carry the "heavy burden" demonstrating good cause why the deposition should be precluded), and *Anderson v. Air W., Inc*., 542 F.2d 1090, 1092-93 (9th Cir. 1976) (district court properly denied the defendant's motion for a protective order because sole shareholder Howard "Hughes probably had some knowledge of the 1970 acquisition, which finding is supported by the record.")). In light of this appellate authority and district court cases applying the apex doctrine, the Court correctly found that "[e]ven when a party seeks a protective order barring an apex deposition, it retains the 'heavy' burden to show 'good cause' for a protective order." Order at 8 (quoting *Blankenship*, 519 F.2d at 429).

The Court found that, here, "the absence of prejudice weighs against Defendant's motion for a protective order." Order at 9. The Court then proceeded to analyze the factual record to determine whether it was "sufficient to create an inference that the apex deponent has 'unique first-hand, non-repetitive knowledge." Order at 10 (citing cases). After conducting a rigorous point-by-point analysis of the relevant evidence (Order at 11-18), the Court concluded: "This is not the case where Mr. Moynihan and Mr. Montag were far removed from any of the conduct at issue in this case concerning the CFF and the call centers. Class Plaintiffs should be provided an opportunity to depose them as to their knowledge, motive and intent concerning these topics which are relevant on the issue of punitive damages." Order at 18.

Defendants disagree with that conclusion. But that is not a sufficient basis for reconsideration, which is an "extraordinary remedy, to be used sparingly." *Carroll*, 342 F.3d at 945; *Kona Enters., Inc.*, 229 F.3d at 890. Far from "clear error," the Court's application of Rule 26(c)(1) and the apex doctrine in this case is fully consistent with a multitude of well-reasoned cases in this Circuit.

In the Ninth Circuit, it is well-established that "a strong showing is required before a party will be denied entirely the right to take a deposition." *Blankenship*, 519 F.2d at 429. 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 WL 205067 at *3 (N.D. Cal. Jan. 25, 2007) (citation omitted); *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); *K.C.R. v. Cnty. of Los Angeles*, 2014 WL 3434257, at *2 (C.D. Cal. July 11, 2014) ("The party resisting discovery bears the burden of demonstrating that its objections should be sustained."); *Apple Inc. v. Samsung Elecs. Co., Ltd*, 282 F.R.D. 259, 263 (N.D. Cal. 2012) ("[A] party seeking to prevent a deposition carries a heavy burden to show why discovery should be denied."); *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, 2006 WL 2578277, at *3 (N.D. Cal. Sept. 6, 2006) (same).

As explained in *In re Transpacific Passenger Air Transportation Antitrust Litig.*, 2014 WL 939287 (N.D. Cal. Mar. 6, 2014):

> [C]ourts have rejected burden-shifting for high level business executive or so-called "apex" depositions, holding that "'[t]he burden under the apex principle is supplied by the general rule applicable to a party that seeks to avoid discovery in general.'" *Powertech Tech., Inc. v. Tessera, Inc.*, No. C 11–6121

CW, 2013 WL 3884254, at *1 (N.D. Cal. July 26, 2013) (quoting *In Re Nat'l W. Life Ins. Deferred Annuities Litig*., No. 05–CV–1018–AJB WVG, 2011 WL 1304587, at *4 n.2 (S.D. Cal. Apr. 6, 2011) (rejecting argument that party seeking discovery through an apex deposition bears the burden to show good cause for the deposition)); *see also Mansourian v. Bd. of Regents of Univ. of Cal. at Davis*, No. CIVS 03–2591 FCD EFB, 2007 WL 4557104, at *3 (E.D. Cal. Dec. 21, 2007) (noting that there is "no binding Ninth Circuit or Supreme Court precedent requiring th[e] result" that the burden be shifted to the party seeking discovery by deposition of a high level business executive). In other words, the party opposing discovery … bears the burden of showing that the deposition should not be allowed. *See La. Pac. Corp. v. Money Mkt. 1 Institutional Inv. Dealer*, 285 F.R.D. 481, 485 (N.D.Cal. 2012); *see also Groupion, LLC v. Groupon, Inc*., No. 11–0870 MEJ, 2012 WL 359699, at *2 (N.D. Cal. Feb. 2, 2012) ("[a] party seeking to prevent a deposition carries a heavy burden to show why discovery should be denied").

Id. at *2; *see also Monster Energy Co. v. Vital Pharms., Inc*., 2021 WL 3524128, at *4 (C.D. Cal. May 26, 2021) ("The burden remains with the party seeking the protective order, in this case Plaintiff, to prevent the taking of the deposition."; permitting deposition of CEO); *Bos. Ret. Sys. v. Uber Techs., Inc*., 2023 WL 6132961, at *2 (N.D. Cal. Sept. 19, 2023) ("The party seeking to avoid an apex deposition bears the burden of showing good cause for why the deposition should not be allowed"; permitting 16 apex depositions); *WebSideStory, Inc. v. NetRatings, Inc*., 2007 WL 1120567, at *4 (S.D. Cal. Apr. 6, 2007) ("the Court finds that WebSideStory has not met its burden for the issuance of a protective order, as they have failed to show good cause by demonstrating a specific harm or prejudice that will result from Mr. Lunsford's deposition"; permitting deposition of former CEO); *Perez v. Genoptix, Inc*., 2019 WL 12517081, at *1 (S.D. Cal. Jan. 11, 2019) ("The party seeking a protective order bears the burden of showing good cause for the order by 'demonstrating harm or prejudice that will result from the discovery.'"; permitting deposition of Chairman of the Board); *Waymo LLC v. Uber Techs., Inc.*, 2017 WL 11917905, at *1 (N.D. Cal. July 7, 2017) ("Even when the apex doctrine is at issue, however, 'the burden remains on the party' seeking to avoid the deposition"; permitting deposition of Google CEO Larry Page); *In re Google Litig.*, 2011 WL 4985279, at *2 (N.D. Cal. Oct. 19, 2011 ("A party seeking to prevent a deposition carries a heavy burden to show why discovery should be denied"; permitting deposition of CEO Larry Page); *Finisar Corp. v. Nistica, Inc.*, 2015 WL 3988132, at *2 (N.D. Cal. June 30, 2015) ("Even when the apex doctrine is at issue, however, 'the burden remains on the party' seeking to avoid the deposition.") (citing *Hunt v. Continental Cas. Co.*, 2015 WL 1518067, at *1 n.1 (N.D. Cal. Apr. 3, 2015) ("cases in this district make clear that the burden remains on the party seeking a protective order when the 'apex doctrine' is asserted as a basis for limiting discovery").

These and many other well-reasoned cases in this Circuit place the burden where it belongs, on the party seeking to prevent the deposition. This plethora of cases demonstrates that the Court's application of the apex doctrine under Rule 26(c)(1) was appropriate and cannot constitute "clear error."

The Bank's cases (Motion at 3) are distinguishable. First, unlike here, each of the Bank's cases concerned the deposition of a high-ranking government official, not a corporate executive. *Greer v. Cnty. of San Diego*, 2022 WL 2134601, at *1 (S.D. Cal. June 14, 2022) (San Diego County Sheriff Gore); *Ramirez v. Zimmerman*, 2019 WL 2106594 (S.D. Cal. May 14, 2019) (Sheriff Gore); *Myles v. Cnty. of San Diego*, 2016 WL 4366543, at *1 (S.D. Cal. Aug. 15, 2016) (Sheriff Gore); *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1048 (E.D. Cal. 2010) (Governor Schwarzenegger and former Governor Davis). The last of these cases, *Thomas v. Cate*, was not even decided under the apex doctrine, but under the "deposition privilege" uniquely applicable to "[h]igh-ranking government officials," as set forth in *United States v. Morgan*, 313 U.S. 409, 422 (1941) ("[T]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions."). Because this case does not involve the deposition of a government official, *Morgan*'s "extraordinary circumstances" requirement is inapposite and the Bank's cited cases are irrelevant.[3] Those cases are also procedurally distinguishable, as each concerned a motion to compel discovery, not a motion for protective order. *See Thomas*, 715 F. Supp. 2d at 1018; *Greer*, 2022 WL 2134601, at *1; *Ramirez*, 2019 WL 2106594, at *1; *Myles*, 2016 WL 4366543, at *1.

In any event, that different district courts might take slightly different approaches based on the facts and circumstances before them could hardly justify reconsideration. *See, infra,* § III.C. As recently stated in *In re Uber Techs., Inc., Passenger Sexual Assault Litig*., 2025 WL 896412 (N.D. Cal March 24, 2025): "In the absence of binding precedent or a clear instruction in Rule 26, this Court declines to treat specific circumstances that courts have found appropriate to allow or bar 'apex' depositions in particular cases as establishing hard and fast rules for when such depositions are permissible, including requirements of 'unique' knowledge or exhaustion of other remedies. The Court respectfully disagrees with other district court decisions that have presented such tests as rules required by law." *Id.* at *1-2 (treating the "apex doctrine as a sliding scale of relevance and burden, where unique knowledge and alternative methods of discovery 'form only part of a more nuanced equation'" to be "more persuasive and consistent with Rule 26"; noting "that an overemphasis on *unique* knowledge is inconsistent with otherwise common approaches to discovery and trial advocacy, where corroborating evidence and testing credibility through the testimony of more than one witness is often appropriate") (citation omitted).

In sum, the Court did not commit "clear error" in applying the apex doctrine. The Motion for Reconsideration should be denied.

B. The Court Did Not Commit Clear Error Regarding Exhaustion

The Bank's exhaustion argument does not warrant reconsideration either. First,

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[3] *In re Paxton* (Motion at 6 n.2) is similarly inapposite. 60 F.4th 252 (5th Cir. 2023) (quashing subpoena to Attorney General; citing cases relying on the *Morgan* rule). The Bank also cites *In re Google Litig*. 2011 WL 4985279, at *2 (Motion at 6) for the proposition that the apex doctrine "requires the party seeking to depose a high-level executive to show" the two prongs of the doctrine. Motion at 6. But in denying in part a protective order as to Google's CEO, that court specifically recognized the "heavy burden" to show why discovery should be denied" and that the apex doctrine is a matter of "discretion under the federal rules" with factors that "courts consider." Motion at 6.

formal exhaustion is not "viewed as an absolute requirement" under the apex doctrine. *McNamara v. Wells Fargo & Co*., 2023 WL 11955307, at *4 (S.D. Cal. May 10, 2023) (citing *Monster Energy Co.*, 2021 WL 3524128, at *3); *see also Kadrey v. Meta Platforms, Inc*., 2024 WL 4293910, at *1 (N.D. Cal. Sept. 24, 2024) (same) (citing *Hunt*, 2015 WL 1518067, *2; *In re Transpacific*, 2014 WL 939287, *5)).

Second, the Bank expressly waived any such objection. Plaintiffs' Interrogatory No. 11 specifically asked the Bank to: "IDENTIFY all individuals involved in the decision-making process concerning YOUR decision to develop the CLAIM FRAUD FILTER and/or apply the CLAIM FRAUD FILTER to EDD DEBIT CARDHOLDERS." Dkt. No. 454-8, Riffee Decl., Ex. 7. In its response, served on September 5, 2023, the Bank identified 13 mid-level employees: Faiz Ahmad, Jennifer Boussuge, Christine Channels, John Denning, Jennifer Ehresman, William Fox, Bradley Garfield, Melissa Gargagliano, Ruchira Ghosh, Anne Holt, John Lawlor, Michael Letson, and Paul Simpson."[4] *Id.* At the December 2024 discovery conference, the Bank argued the exhaustion prong based solely on its response to Interrogatory No. 11 ("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"). Dkt. No. 454-2, Riffee Decl., Ex. 1. In response, 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 of the individuals disclosed by the Bank in response to Interrogatory No. 11. The parties then agreed that Plaintiffs would take the depositions of four of these mid-level executives and the Bank expressly represented in that agreement 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**." Dkt. No. 454-4, Riffee Decl., Ex. 4. Plaintiffs proceeded with this understanding. Upon completing these depositions, Plaintiffs had deposed a total of 16 fact witnesses,

[4] Five of these employees were not included in the Bank's initial disclosures, served June 9, 2021, which disclosed only 16 individuals, all mid-level employees.

including the Bank's corporate representatives and 9 of the 13 individuals identified in response to Interrogatory No. 11.

In its MPO, the Bank included a section titled: "Plaintiffs chose to forgo less intrusive discovery methods," with the primary argument focused on questions the Bank asserted that Plaintiffs "elected not to ask." MPO at 22. These quibbles with Plaintiffs' deposition questions do not demonstrate a failure to exhaust other avenues and the Bank cites no case so holding.[5] The Bank had argued that "[i]n some instances, Plaintiffs elected not to seek the depositions," but it pointed only to **Jose Firpi** who appears only on two relevant emails,[6] and who did not appear in either the Bank's initial disclosures or its Response to Interrogatory No. 11. MPO at 22-23 (citing Dkt. 454, Riffee Decl. at ¶ 22).[7] The Bank's Reply brief did not directly address exhaustion; but for the first time, added a passing reference to Plaintiffs' "failure even to seek Ms. Bessant's deposition." To the extent this was a new exhaustion argument, the Court was free to disregard it. *See, e.g., Banga v. Experian Info. Sols., Inc.*, 2013 WL 1209946, at *3 (N.D. Cal. Mar. 25, 2013) ("Because this argument was not raised in Plaintiff's opening brief, the Court disregards it."); *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) ("arguments not raised by a party in an opening brief are waived"); *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief.").

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[5] The Bank's argument also ignores that the depositions were taken on an expedited schedule, often without the benefit of the Bank's complete production, with the Bank producing over 120,000 documents at the close of written discovery, and with employee witnesses who often did not recall or otherwise did not provide substantive responses to the questions posed. *See, e.g.,* Dkt. Nos. 465-49 to 54, Danitz Decl., Exs. 49-54.

[6] The Bank's argument that Plaintiffs should have taken the depositions of individuals who had a very limited role ignores that discovery has been an uphill battle in this case with the Bank resisting discovery at each turn (which is why Judge Berg had to preside over 15 contested discovery conferences and five additional status conferences).

[7] A few other individuals appear in the Riffee declaration (not in the brief); but these are the remaining individuals identified in response to Interrogatory No. 11 as to whom the Bank stipulated it "would not object" on exhaustion grounds.

The Motion now names Ms. Bessant and unidentified "other members of the MTM" as potential deponents – but they were conspicuously absent from the Bank's opening brief on the MPO, and from its initial disclosures and its Response to Interrogatory No. 11. Motion at 8. These arguments are waived and are not properly raised on a motion for reconsideration. *See, e.g., Marlyn Nutraceuticals, Inc.*, 571 F.3d at 880 (motion for reconsideration "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.").

Moreover, while there is a substantial record before the Court containing material communications by and concerning Moynihan and Montag, Ms. Bessant's communications demonstrate far less involvement. The evidence Plaintiffs submitted by the parties was considered by the Court, and the specific evidence and the "totality of the record" strongly supports the Court's conclusion that the depositions should be permitted to proceed subject to the Court's time and subject-matter limitations. *Ahlman v. Barnes*, 2021 WL 1570838, at *4 (C.D. Cal. Mar. 9, 2021) ("A district court has broad discretion to determine whether, on the totality of the record, a party seeking a protective order has met its burden of showing good cause to block an apex deposition.") (citing *Apple v. Samsung,* 282 F.R.D. at 262–263).

C. The Court Did Not Commit a Clear Error of Fact.

The Bank argues that the Court committed clear error in concluding that Moynihan and Montag likely have relevant, unique first-hand knowledge. Motion at 9. However, the Court did not make any error, let alone clear error, in construing the evidence. The Bank does not argue, because it cannot, that the Court failed to consider the evidentiary record or any piece of it—the Court's analysis was detailed and thorough, incorporating the documents and testimony submitted by both parties. Instead, the Bank disagrees with the Court's *conclusions*, arguing again that the Court should have adopted the Bank's characterizations of the evidence. *See, e.g.,* Motion at 9 (disagreeing with the Court's conclusions based on consideration of: "[redacted]" to Moynihan, the fact that Montag "[redacted]"; the "[redacted]" in which Moynihan [redacted]; and the various "email records" considered by the Court). Such re-argument based on the record considered by the Court fails to meet the standard for reconsideration. *Spates-Moore v. Henderson*, 2010 WL 11655443, at *1 (C.D. Cal. Aug. 3, 2010) (reconsideration not warranted where the motion "repeats the same arguments" concerning "the same evidence…which is prohibited").

The Court found that "the evidence supports an inference that Mr. Moynihan and Mr. Montag were involved in meetings and/or discussions about authorization or implementation of the CFF." Order at 15. Support for this finding includes evidence that "[redacted]" that "[redacted]" that "Montag was [redacted], second in command, the former head of [GBAM which] headed the prepaid UI card program, and part of the MTM." Order at 12 (citations omitted).

The Court further found that "[o]ther communications in the record also raise an inference that Mr. Moynihan may have been more than a mere recipient of information as BANA contends and may have been involved in the decision to approve and implement the CFF." *Id.* The Court then meticulously considered the record of events leading up to the Bank's implementation of the Claim Fraud Filter (CFF) on September 28, 2020, including:

<u>September 27, 2020</u>

- [redacted] Order at 12 (citing Dkt. No. 469-5, Danitz Decl., Ex. 5).
- William Fox's testimony "[redacted]" Order at 12-13 (citing Dkt. No. 469-51, Danitz Decl., Ex. 51, Fox Depo. at 12:15-21; 55:7-23).
- [redacted]

Order at 13 (citing Dkt. No. 478-2, Hoyle Decl., Ex. 18; Dkt. No. 478-4, Hoyle Decl., Ex. 20, Ahmad Depo. at 193:19-196:8).

- [redacted] Order at 13 (citing Dkt. No. 478-2, Hoyle Decl., Ex. 18). The Court aptly found that "[redacted]" Order at 13.

<u>September 28, 2020</u>

- [redacted] Bradley Garfield, [redacted]. Order at 13.
- [redacted]. ("[redacted]") Order at 13 (citing Dkt. No. 469-14, Danitz Decl., Ex. 14).
- [redacted] Order at 13 (citing Dkt. No. 469-14, Danitz Decl., Ex. 14).
- [redacted] Brad Garfield [redacted]. Order at 13 (citing Dkt. No. 469-14, Danitz Decl., Ex. 14).

Other communications considered by the Court include an email sent by [redacted], Managing Director of Business Executive Operations on **September 28, 2020,** [redacted] Order at 14 (citing Dkt. No. 469-60, Danitz Decl., Ex. 60) According to William Fox, [redacted] Order at 14 (citing Dkt. No. 469-60, Danitz Decl., Ex. 51, Fox Depo. at 65:6-66:13). When asked about this email, [redacted]. Order at 14 (citing Dkt. No. 469-51, Danitz Deel., Ex. 51, Fox Depo. at 71:2-10). Ahmad also testified [redacted]. Order at 14 (citing Dkt. No. 469-50, Danitz Decl., Ex. 50, Ahmad Depo. at 365:15-366:10). When further prompted, [redacted]. Order at 14. (citing Dkt. No. 469-50, Danitz Decl., Ex. 50, Ahmad Depo. at 366:11-20). At 8:02 p.m. on September 28, 2020, an email was sent stating [redacted]' Order at 14 (citing Dkt. No. 469-65, Danitz Decl., Ex. 65).

Based on this record, the Court found that "[i]t is unclear who, Mr. Moynihan or someone in the MTM, approved the implementation of the CFF on September 28, 2020. Order at 14. But because Mr. Moynihan was head of the MTM, even if a member of MTM approved the use of the CFF, an inference arises that the direction, or ratification could have come from Mr. Moynihan. Thus, Mr. Moynihan may have personal unique knowledge about who approved the CFF and the intent, and motive behind approving it." Order at 14.

The Bank argues the Court's conclusion was clear error, repeating its assertion in its Reply brief that: "the record shows [redacted]" Motion at 11. However, the Court *expressly considered* this argument and aptly found: "[redacted]" Order at 13, The Court also accurately noted that "[redacted]" *Id.*

The Bank also re-asserts its argument (from the MPO and Reply briefs) that Ahmad testified that "[redacted]" Motion at 9-10. Again, however, the Court *expressly considered* and rejected this argument. *See* Order at 14 ("BANA argues that Mr. Moynihan did not approve the CFF because [redacted]"). Contrary to the inference urged by the Bank, the Court aptly found that "Faiz Ahmad [redacted]" Order at 15 (citing Dkt. No. 468-5, Riffee Decl., Ex. 5, Ahmad Depo, at 244:18-245:4).[8]

The Bank reasserts its argument that the September 28, 2020 chat between Johnson and Garfield is somehow undermined because Garfield testified that he [redacted] Motion at 10.[9] However, [redacted] whether Moynihan had approved the use of CFF-1.

The Bank argues, for the first time, that the chat is hearsay. Motion at 10. However, this argument is improper as it "could reasonably have been raised earlier," but was not. *Marlyn Nutraceuticals, Inc.*, 571 F.3d at 880. Further, the statements in this chat are not hearsay, *see, e.g.,* F.R.E. 801(d)(2)(D), 803(6), and in any event, discovery motions are not subject to strict evidentiary requirements. *See, e.g.*, *Johnson v. U.S. Bancorp*, 2012 WL 6726523, at *1 (W.D. Wash. Dec. 27, 2012) ("The court may consider hearsay on a motion

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[8] Ahmad [redacted]. Dkt. No. 465-52, Danitz Decl. Ex. 50 (Ahmad Tr.) 366:11-20; 382:24-383:18.

[9] The Bank also states that Garfield testified that "[redacted]" (Motion at 10); but there is no such testimony.

for protective order."); *Phillips v. Netblue, Inc.*, 2006 WL 3545002, at *4 (N.D. Cal. Dec. 8, 2006) ("The Court overrules Defendants' objections. This is a discovery motion, not a motion for summary judgment with strict evidentiary requirements.").

The Bank next faults the Order's citation to *Gen. Star. Indem. Co. v. Platinum Indem. Ltd.*, 210 F.R.D. 80 (S.D.N.Y. 2002), for the proposition that a deposition of an apex executive is appropriate where the top executive "issues a corporate policy" (Order at 15), arguing "[t]here is no evidence that the CFF was a "corporate policy" of BANA." Motion at 12. Merriam Webster defines "policy" as, *inter alia*, "management or procedure based primarily on material interest" or "a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions." https://www.merriam-webster.com/dictionary/policy. Both definitions apply here, where the Bank's CFF polices changed long-standing [redacted] procedures for handling EDD cardholder claims to comply with federal law, and this change was of sufficient corporate significance to warrant discussions at the board level.

The Bank next takes issue with the Order relying "on a single email" to "infer[] that BANA '[redacted].'" Motion at 13 (citing Order at 16). However, in discussing the customer service claim, the Order simply states what the Bank's email said: "[redacted]" Order at 16 (citing Dkt. No. 469-62, Danitz Decl., Ex. 62). In concluding "that Mr. Moynihan may have been more actively involved than merely being a recipient of information about the customer call center as BANA claims," (Order at 16) the Court also relied on other communications in the record, including:

- The **August 31, 2020** email re: "Unemployment Call Center Next Steps" among Ahmad and other mid-level executives stating: "[redacted]

[redacted]" Order at 16 (citing Dkt. No. 469-4, Danitz Decl., Ex. 4 at 4-5).

- The **September 28, 2020** email from [redacted]" Order at 16 (citing Dkt. No. 469-13, Danitz Decl., Ex. 13 at 3). The Court correctly noted that "This was at a time when the waiting time for the call center was at its longest. *Id.* (citing Dkt. No. 386-1).
- The **July 27, 2020** email chain re: "[redacted]" to Ahmad's request for [redacted] (Order at 16 (citing Dkt. No. 469-43, Danitz Decl. Ex. 43 at 4-5)), stating: [redacted]" *Id.* at 3.

The Bank asserts it was "clearly erroneous" for the Court to conclude that Moynihan made a "decision" to extend a vender contract or that Montag [redacted]. Motion at 13. However, the record fully supports the Court's finding "after consideration of the overall record presented" that "Mr. Moynihan and Mr. Montag appear to have been more involved directing policies than BANA claims" and that "[t]his is not the case where Mr. Moynihan and Mr. Montag were far removed from any of the conduct at issue in this case concerning the CFF and the call centers." Order at 18; *see Ahlman*, 2021 WL 1570838, at *4 ("A district court has broad discretion to determine whether, on the totality of the record, a party seeking a protective order has met its burden of showing good cause to block an apex deposition.") (citing *Apple v. Samsung,* 282 F.R.D. at 262–263).

* * *

The Bank does not establish any error, much less a "clear error" regarding the Court's application of the apex doctrine in permitting the depositions of CEO Brian Moynihan and former COO Thomas Montag to proceed subject to the Court's specified limitations. Nor does the Bank raise any argument or evidence that the Court did not already consider. Accordingly, the "extraordinary remedy" of reconsideration should be denied.[10]

D. The Bank's Alternative Motion for an Interlocutory Appeal Lacks Merit.

"Discovery orders are not final, appealable orders under 28 U.S.C. § 1291, and courts have typically refused interlocutory review of such orders under the collateral order doctrine." *Brooks v. Motsenbocker Advanced Devs., Inc*., 2009 WL 10671993, at *3 (S.D. Cal. May 15, 2009) (citing *United States v. Zone*, 403 F.3d 1101, 1106–07 (9th Cir. 2005); *see also In re Baxter Healthcare Corp*., 151 F.3d 1148, 1149 (9th Cir. 1998) ("The supervision of pre-trial discovery generally is left to the discretion of the trial court.").

A district court may only certify an order for interlocutory appeal under Section 1292(b) if it turns on (1) a controlling question of law about which (2) there is substantial grounds for a difference in opinion and (3) resolution of which may materially advance the termination of the litigation. *Couch v. Telescope Inc*., 611 F.3d 629, 633 (9th Cir. 2010) (citing 28 U.S.C. § 1292(b)). Section 1292(b) is to be used "only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *Id.*; *accord Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978); *James v. Price Stern Sloan, Inc*., 283 F.3d 1064, 1067 n.6 (9th Cir. 2002) (section 1292(b) is available only "[i]n rare circumstances."). A district court has discretion to deny certification and its decision is unreviewable. *Exec. Software N. Am., Inc. v. U.S. Dist. Ct. C.D. Cal*., 24 F.3d 1545, 1550 (9th Cir. 1994), overruled on other grounds by *Cal. Dept. of Water Res. v. Powerex Corp*., 533 F.3d 1087 (9th Cir. 2008).

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[10] In the alternative, the Bank asks the Court to reduce the time for both depositions by half. Motion at 14. However, the Order already provided that: "Even though BANA did not articulate any burdens on Mr. Moynihan and Mr. Montag for sitting for a deposition, the Court recognizes the burdens it may cause, and limits them" to four hours and two hours, respectively, with the scope of the deposition "limited to punitive damages." Order at 18. The Motion still fails to articulate any particular burden and presents no basis for the Court to reconsider its ruling.

The Bank cannot show that the Order concerns any "controlling question of law." The Order involves at most a mixed question, as the Court made clear in stating that: "Even if the burden is switched, Class Plaintiffs have shown that the deponents have 'unique first-hand, non-repetitive knowledge of the facts at issue in the case.'" Order at 9 n.5. Such mixed questions of law and fact are well within the Court's discretion under Rule 26 and do not raise a "controlling question of law." *See Doe v. Meta Platforms, Inc.*, 2024 WL 4375776, at *1 (N.D. Cal. Oct. 2, 2024) (denying certification under § 1292(b) in part because "[t]he question that Meta wants the Ninth Circuit to address is not a controlling question of law, but a mixed question of law and fact"); *United States v. Woodbury*, 263 F.2d 784, 788 (9th Cir. 1959) (discovery issues are seldom controlling to a case unless they present exceptional circumstances); *see also White v. Nix*, 43 F.3d 374, 377 (8th Cir. 1994) ("A legal question of the type referred to in § 1292(b) contrasts with a 'matter for the discretion of the trial court.'") (citing *Garner v. Wolfinbarger*, 430 F.2d 1093, 1096–97 (5th Cir.1970), cert. denied, 401 U.S. 974, 91 (1971)).

Nor can the Bank show that an interlocutory appeal "may materially advance the termination of the litigation." To the contrary, allowing an interlocutory appeal would likely result in delaying the resolution of this litigation, which has been pending for more than 4 1/2 years, as discovery is otherwise complete. *See Shurance v. Planning Control Int'l, Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988) ("allow[ing] interlocutory appeal ... would not materially advance the ultimate termination of the litigation," in part because "an interlocutory appeal might well have the effect of delaying the resolution of this litigation, for an appeal probably could not be completed before [the date] when trial is currently scheduled."); *see also Woodbury*, 263 F.2d at 787 ("Section 1292(b) was intended primarily as a means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal issues which, if decided in favor of the appellant, would end the lawsuit."); *Monster Energy Co. v. Integrated Supply Network, LLC*, 2018 WL 6136144, at *4 (C.D. Cal. Sept. 21, 2018) (same).

Without citation, the Bank argues that an interlocutory appeal would materially advance the termination of the litigation by "allow[ing] the parties to focus on the relevant facts and law at issue in the case, rather than Plaintiffs' confessed desire to use executive discovery to push settlement." The argument lacks merit. Plaintiffs have never "confessed" a "desire" to abuse the discovery process. To the contrary, Plaintiffs noticed these depositions because Moynihan and Montag are key witnesses at the center of this case and their testimony is needed. Moreover, the parties have always been extremely focused on the "relevant facts and law in the case." If "focus" were the standard, every collateral order would be subject to an interlocutory appeal.

In sum, the Bank cannot show that "an interlocutory appeal would avoid protracted and expensive litigation." *Couch*, 611 F.3d at 633. To the contrary, an interlocutory appeal would multiply proceedings on a matter of pre-trial discovery which is committed to the discretion of this court and would needlessly delay the resolution of this case. Accordingly, Plaintiffs respectfully request that the Court deny the Bank's alternative Motion to certify the Order for interlocutory review.

E. A Stay Pending Appellate Review Is Unwarranted.

The Bank asks the Court to stay the Moynihan and Montag depositions—which the Court on July 18 ordered to be completed no later than September 30, 2025—pending resolution of any appellate review of the Court's discovery Order. No stay is warranted.

In considering whether to grant a stay pending appeal, a court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotes and citation omitted). The first two factors are the most critical. *See id*. The moving party bears the burden of showing that a stay is warranted. *See id.* at 433-34.

As to the first factor, for all of the reasons stated above, the Bank has failed to make the required strong showing that it is likely to succeed on the merits of an interlocutory appeal of the Court's discovery Order. *See supra* § II.D; *see also Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955, 959 (9th Cir. 2005) (interlocutory review is a "rare occurrence" that the Ninth Circuit grants "sparingly"); *Brooks*, 2009 WL 10671993, at *3 ("[C]ourts have typically refused interlocutory review of such orders under the collateral order doctrine.") (citing *Zone*, 403 F.3d at 1106–07; *see also In re Baxter Healthcare Corp.*, 151 F.3d at 1149 ("The supervision of pre-trial discovery generally is left to the discretion of the trial court.").

As to the second factor, the Bank has not articulated how it will be harmed, let alone irreparably injured absent a stay, other than Moynihan and Montag sitting for a four-hour and a two-hour deposition, respectively. The Bank argues that a stay is needed because there is "no way to 'unring the bell of disclosure.'" Motion at 18 (quoting *Skillz Platform Inc. v. AviaGames Inc.*, 2023 WL 7283886, at *2 (N.D. Cal. Nov. 2, 2023)). However, in *Skillz,* the district court issued the stay because the magistrate judge's order compelled the disclosure of attorney-client privileged communications under the crime-fraud exception. *See id.* ("Because there is no way to unring the bell of disclosure of privileged communications, AviaGames would be irreparably harmed absent a stay."). The Court's Order in this case does not involve a privilege or any other form of protected communications. Moreover, all of the Bank's other arguments rest on the assertion that Montag and Moynihan were entirely uninvolved and thus have nothing to disclose—not that the subject of their testimony would be prejudicial to the Bank. The Bank's other cases are distinguishable on similar grounds.[11] Moreover, the Bank's cases involve district court

[11] *Forrest v. Facebook, Inc.*, 2023 WL 1931356, at *2 (N.D. Cal. Jan. 18, 2023) (staying magistrate judge's order where the plaintiff was also the prosecutor in a parallel criminal case in Australia and the court found that Facebook's rights as a criminal defendant may be undermined if the plaintiff/prosecutor received information that he was not entitled to under Australian criminal law); *Jones v. PGA Tour, Inc.*, 2023 WL 2541326, at *2 (N.D. Cal. Mar. 15, 2023) (staying magistrate judge's order which implicated issues of personal jurisdiction and sovereign immunity); *Canchola v. Allstate Insurance Company*, 2025 WL 1377817 (C.D. Cal. April 17, 2025) (staying magistrate judge's order where district court found a likelihood of success and the stay would be for one month). *In re U.S. Dep't of Educ.*, 25 F.4th 692 (9th Cir. 2022) did not involve a motion to stay. *See id.* at 701 (granting

review of magistrate judge orders, which are likely to take less time to resolve than an interlocutory appeal to the Ninth Circuit.[12]

Unlike the Bank's cited cases, here there is no claim that the disclosures that will be made in Moynihan and Montag's depositions would cause the Bank irreparable harm. Moreover, "[t]he Supreme Court has held that a stay pending appeal may not be granted, regardless of the other factors of the test, unless the moving party makes a threshold showing that irreparable harm is *probable* absent a stay." *Morse v. Servicemaster Glob. Holdings, Inc*., 2013 WL 123610, at *4 (N.D. Cal. Jan. 8, 2013) (citing *Nken*, 556 U.S. at 434); *see also Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011) (moving party's "burden with regard to irreparable harm is higher than it is on the likelihood of success prong, as she must show that an irreparable injury is the more probable or likely outcome."). Given the Bank's failure to carry its burden on the first prong, its claim that it would be harmed "is no more than a possibility." *Morse*, 2013 WL 14 123610, at *4; *see also Ambrosio v. Cogent Commc'ns, Inc*., 2016 WL 7888024, at *3 (N.D. Cal. Sept. 21, 2016) (finding that the "limited likelihood that Cogent will succeed on appeal" factored against finding irreparable harm); *Fam. Mortg. Corp. No. 15 v. Greiner*, 2006 WL 1766949, at *1 (N.D. Cal. June 26, 2006) (denying stay where "the court believe[d] Greiner's appeal to be without merit."). Even if the Court determines that the Bank would suffer harm if a stay were denied, here all other factors favor denying the Bank's motion. Accordingly, a stay is not warranted. *Nken*, 556 U.S. at 433 (finding no absolute right to a stay "even if irreparable injury might otherwise result").

In contrast to the absence of prejudice to the Bank, a stay pending appellate review would substantially prejudice Plaintiffs and absent class members. This case has been pending for more than 4 1/2 years. *See* 1/17/25 Hrg. Tr. at 54:5-7 ("[G]iven that this is a

mandamus and quashing subpoena under the *Morgan* rule for high level government officials, not applicable here (see *supra* at 7)).

[12] According to the Ninth Circuit's website, a civil appeal will take six months to a year from the notice of appeal until oral argument and most cases are decided three months to a year thereafter, although "there is no time limit." *See* Frequently Asked Questions, Court of Appeals for the Ninth Circuit (available at www.ca9. uscourts.gov/general/faq/)

2021 case, I'm eager to move this forward as quickly, as practical … as is prudent."). The cumulative delays are prejudicing Plaintiffs, as witness memories fade, and class members—many of whom are economically vulnerable and face housing instability—become more difficult to contact over long lengths of time.

Finally, "[t]he public interest lies in expeditiously resolving this case" and "a stay will merely cause delay." *Vallabhapurapu v. Burger King Corp*., 2011 WL 5036705, at *2 (N.D. Cal. Oct. 21, 2011); *see also Sweet v. Cardona*, 657 F. Supp. 3d 1260, 1279 (N.D. Cal. 2023) ("[r]esolution of a lawsuit concerning monumental delay should not be delayed any longer"); *Lopez v. Liberty Mut. Ins. Co*., 2019 WL 1452906, at *5 (C.D. Cal. Jan. 9, 2019) (public interest did not favor a stay in case that was nearly four years old because the public "has an interest in 'efficient prosecution of ... laws and seeking to hold alleged corporate wrongdoers accountable.'") (quoting *Mauss v. NuVasive, Inc*., 2017 WL 4838826, at *2 (S.D. Cal. Apr. 27, 2017)).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Motion for Reconsideration in its entirety, deny the Bank's alternative motion to certify an interlocutory appeal, and deny the Bank's motion for a stay pending appeal.

Respectfully submitted,

Dated: July 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: July 25, 2025

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