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13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**
15 **SAN DIEGO DIVISION**

16 IN RE: BANK OF AMERICA
17 CALIFORNIA UNEMPLOYMENT
18 BENEFITS LITIGATION

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

19 **REPLY BRIEF IN SUPPORT OF**
20 **DEFENDANT'S MOTION TO**
21 **RECONSIDER MAY 29, 2025**
22 **ORDER GRANTING IN PART**
23 **AND DENYING IN PART**
24 **DEFENDANT'S MOTION FOR**
25 **PROTECTIVE ORDER**

26 Date: September 16, 2025
27 Time: 1:30 PM
28 Ctrm: 12-A – 12th Floor
Judge: Hon. Gonzalo P. Curiel

FILED PROVISIONALLY UNDER SEAL
PURSUANT TO STIPULATED PROTECTIVE
ORDER

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1 Plaintiffs’ opposition (Dkt. 525, “Recon. Opp.”) fails to refute the multiple
2 clear errors identified in BANA’s motion (Dkt. 502, “Recon. Mot.”) that individually
3 and collectively merit reconsideration of the Court’s Order. It ignores the procedural
4 history of this case and relies on distinguishable and non-binding precedent to
5 support the burdens that were improperly placed on BANA. Plaintiffs then seek to
6 re-write history, incorrectly arguing that BANA waived Plaintiffs’ need to exhaust
7 less burdensome discovery methods while nonetheless conceding that they failed to
8 do so. Regarding the Order’s factual errors, Plaintiffs’ opposition simply restates
9 their speculative inferences, arguing that they should win now because they won
10 before. None of this undermines the clear and pervasive errors that BANA identified
11 in the Order that resulted in the Court’s erroneous conclusion that Messrs. Moynihan
12 and Montag likely possessed sufficient unique, first-hand knowledge to be deposed.
13 For the reasons stated in BANA’s motion and herein, BANA respectfully requests
14 that the Court reconsider its Order and deny Plaintiffs’ request for the depositions of
15 its top two executives.¹

16 **I. The Order Includes Multiple Clear Legal Errors.**

17 **A. The Order improperly placed the burden on BANA.**

18 The Court’s misallocation of burden is but one clear error contained in the
19 Order. After the parties met and conferred, it was Plaintiffs that initially raised this
20 issue before both Magistrate Judge Berg (where the issue was simultaneously
21 briefed) and this Court (through the joint status report). *See* Recon. Mot. at 3-4. Given
22 this history, it makes no sense that the burden-allocation and potential disposition of
23 this dispute should turn on the formality of the vehicle by which the dispute was
24 raised. Plaintiffs offer no response to this. Indeed, the Order’s burden-allocation
25 would incentivize parties to refuse to engage on discovery matters and force the
26 seeking party to move to compel—which cannot be the desired result. *See id.*

27
28 ¹ Alternatively, for the reasons stated in BANA’s motion and herein, the Court should
certify the Order for an interlocutory appeal and stay the depositions.

1 The cases Plaintiffs cite do not compel a different outcome. *See* Recon. Opp.
2 at 5-7. Many of them are distinguishable. For example, *Weinstein v. Katapult Grp.*
3 *Inc.* is not an apex case at all. 2022 WL 4548798 (N.D. Cal. Sept. 29, 2022).
4 Similarly, the language Plaintiffs quote from *K.C.R. v. Cnty. of Los Angeles* (Recon.
5 Opp. at 5) is from that court’s discussion of discovery in general, not the apex
6 standard. 2014 WL 3434257, at *2 (C.D. Cal. July 11, 2024). Plaintiffs also quote
7 language from *In re Google Litig.* (Recon. Opp. at 7), but that case *supports BANA’s*
8 *position*, as that court held that the resisting party need only establish that the witness
9 qualifies for apex protection before *shifting the burden to the seeking party*. *See*
10 Recon. Mot. at 6 (citing *In re Google Litig.*, 2011 WL 4985279, at *2 (N.D. Cal. Oct.
11 19, 2011)). The only potentially precedential case among the nearly 20 citations in
12 Plaintiffs’ brief on this point is *Blankenship v. Hearst Corp.*, 519 F.2d 418 (9th Cir.
13 1975). *See* Recon. Opp. at 5-7. And as BANA explained, that 60-year old opinion’s
14 discussion of a high-ranking executive deposition was brief and did not reference or
15 claim to address the burden or standards to be applied under the apex doctrine. *See*
16 Recon. Mot. at 4, n.1. Therefore, Plaintiffs’ (and the Order’s) reliance on *Blankenship*
17 as a definitive answer to the burden question is misplaced. To the extent some district
18 courts have answered the burden question in Plaintiffs’ favor, those decisions reflect
19 the disagreement and confusion among courts in this Circuit that further warrants
20 interlocutory review. *See infra* Section III.²

21
22 ² Plaintiffs do not dispute that courts are even more inclined to impose burden-
23 shifting where the purpose of the deposition is harassment. Recon. Mot. at 4 (citing
24 *Mansourian v. Board of Regents of Univ. of Cal. at Davis*, 2007 WL 4557104, at *3,
25 n.2 (E.D. Cal. Dec. 21, 2007)). Plaintiffs simply deny having “confessed” a desire to
26 abuse the discovery process. Recon. Opp. at 20. But their own words betray them.
27 Having told Judge Berg from the outset that they needed executive discovery because
28 it “settle[s] cases,” the motive behind Plaintiffs’ continued push for this discovery
has always been clear. Dkt. 209-1 ¶ 10. Moreover, the *sole* stated purpose of the apex
depositions is *not* to support Plaintiffs’ primary claims in this case. Rather they claim
they need the evidence to try to meet the standard for punitive damages on their

1 Plaintiffs’ suggestion that burden-shifting only applies to “the deposition of a
2 high-ranking *government official*” is wrong. *See* Recon. Opp. at 7. In *Smith v. City of*
3 *Stockton*, the court held that the apex doctrine’s burden-shifting also applies to high-
4 level *executives*: in the context of “corporate officials,” “the apex doctrine shifts the
5 initial Rule 26(c) burden from the person resisting discovery to the person seeking
6 it.” 2017 WL 11435161, at *2 (E.D. Cal. Mar. 27, 2017). Numerous courts in this
7 Circuit, and others, have reached the same conclusion.³

8 Finally, Plaintiffs say that BANA “completely ignores” the Order’s alternative
9 holding that even if the burden is shifted, Plaintiffs made the requisite showing.
10 Recon. Opp. at 3. Not so. BANA’s brief obviously argued at length that the Order’s
11 holding that Plaintiffs satisfied the apex doctrine is clear error. *See* Recon. Mot. at 6-
12 14. All Plaintiffs have to offer is speculation and smoke and mirrors, supported only
13 by second- or third-hand emails and chats from lower-level employees, not a single
14 one of whom testified that either Mr. Moynihan or Mr. Montag had unique
15 knowledge about the CFF or call center staffing. *Id.* Where courts have allowed CEO
16 depositions, it has been on a far more robust showing. For example, the plaintiffs in
17 *In re Google Litig.* proffered evidence that the witness was the named inventor of the
18 patent at issue in the case. 2011 WL 4985279, at *1. Similarly, in *Kennedy v. Jackson*
19 *Nat’l Life Ins. Co.*, the CEO’s deposition was allowed only after the Rule 30(b)(6)
20 witness testified multiple times that the CEO was the “main decision-maker” on
21 relevant issues. 2010 WL 1644944, *2 (N.D. Cal. Apr. 22, 2010). Conversely, here,
22 BANA’s motion (at Sections I.C. & II) showed there was clear error not only in how

23 _____
24 ancillary (and dubious) due process, fiduciary duty, and implied covenant of good
25 faith claims—further demonstrating the pretextual request.

26 ³ *See, e.g., Bicek v. C & S Wholesale Grocers, Inc.*, 2013 WL 5425345, at *5 (E.D.
27 Cal. Sept. 27, 2013); *Pilot, Inc. v. Cub Elecparts, Inc.*, 2015 WL 13918235, at *2
28 (C.D. Cal. Dec. 7, 2015); *Kanter v. Cont'l Airlines, Inc.*, 2010 WL 11601555, at *1
(S.D. Fla. Apr. 16, 2010); *EchoStar Satellite, LLC v. Splash Media Partners, L.P.*,
2009 WL 1328226, at *2 (D. Colo. May 11, 2009).

1 the apex standard was applied, but also in the Court’s interpretation and analysis of
2 the facts, separate and apart from the allocation of burden. *See also infra* Section II.

3 **B. The Order improperly applied the apex doctrine.**

4 Plaintiffs do not meaningfully respond to BANA’s argument that the Order
5 improperly imposed a prerequisite burden on BANA to show prejudice, another clear
6 error. Recon. Mot. at 5-6. Courts in this Circuit consistently hold that a specific
7 showing of prejudice is not required because the prejudice to an apex executive is
8 self-evident. *See id.* (citing cases). Indeed, requiring this additional showing could
9 subject apex witnesses to the “tremendous potential for abuse or harassment” courts
10 have found is “*inherent* in such a deposition.” *Apple Inc. v. Samsung Electronics Co.,*
11 *Ltd.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012); *Greer v. Cnty. of San Diego*, 2022 WL
12 2134601, at *1 (S.D. Cal. June 14, 2022) (emphasis added).

13 Plaintiffs also offer no real response to BANA’s argument that the Order
14 misstated the standard for an apex deposition, suggesting that “some knowledge”
15 may be enough. *See* Recon. Mot. at 7. Plaintiffs simply cite *In re Uber Technologies,*
16 *Inc. Passenger Sexual Assault Litig*, 2025 WL 896412, at *2 (N.D. Cal. Mar. 24,
17 2025), in which another district court readily acknowledged that other courts have
18 applied a more rigorous standard and barred apex depositions, but “respectfully
19 disagree[d]” and rejected the idea of “hard and fast rules for when [apex] depositions
20 are permissible.” *See* Recon. Opp. at 8.⁴ The Order’s reference to a lesser standard is
21 clear error irrespective of who has the burden, and the record further does not show
22 that either Mr. Moynihan or Mr. Montag had the requisite level of unique, non-
23 repetitive knowledge.

24 _____
25 ⁴ *In re Uber* is further distinguishable because there the court found (and defendants
26 did not contest) that the heart of plaintiffs’ claims concerned “important aspects” of
27 Uber’s overall “business model that are plainly the result of high-level executive
28 decisions.” *Id.* at *3. In contrast, here, Plaintiffs challenge a specific fraud strategy
(the CFF) and [REDACTED]

[REDACTED]. *See generally* Mot., Reply, Recon. Mot.

C. The Order ignored Plaintiffs’ failure to exhaust.

Plaintiffs do not dispute that the Order failed to consider the exhaustion prong of the apex doctrine. *See* Recon. Opp. at 8-11. Instead, Plaintiffs disingenuously argue that BANA “expressly waived” the argument. *Id.* at 9. But as the language Plaintiffs quote in their brief makes clear, all BANA agreed to waive was its right to object to the apex depositions on the ground that Plaintiffs did not depose “*other individuals identified in response to Interrogatory No. 11.*” *Id.* (emphasis added). That is, BANA agreed not to argue that Plaintiffs failed to satisfy the exhaustion requirement because they did not depose four additional individuals that were identified in that interrogatory. Dkt. 454-8 (“Riffée Decl.”), Ex. 7.

BANA never waived, and has consistently maintained that the apex doctrine protects its top executives from deposition unless Plaintiffs first exhaust other less burdensome means of discovery. *See* Dkt. 452 (“Mot.”) at 12-15, 22-23; Dkt. 471 (“Reply”) at 1, 3-5. Plaintiffs still have not done so. Indeed, Plaintiffs do not dispute that they never sought to depose relevant individuals *not* identified in Interrogatory No. 11, including Cathy Bessant or any of the other MTM members [REDACTED]

[REDACTED]. *See* Recon. Mot. at 8. The opposition attempts to undermine the relevance of these individuals, but the undisputed record makes plain that these individuals are *far more likely* to have relevant discoverable information than the top two executives.

To the extent Plaintiffs complain that Ms. Bessant and the other MTM members were not identified in BANA’s initial disclosures or in response to Interrogatory No. 11 (Recon. Opp. at 11), this is a red herring. Plaintiffs have known about these potential witnesses for *years*. Ms. Bessant and Dean Athanasia—and their relevant reporting lines—were each disclosed in a detailed organizational chart in October 2023, and were among the first BANA executives whose ESI was produced to Plaintiffs more than a year ago. Declaration of Lindsay E. Hoyle

1 (“Recon. Hoyle Decl.”), ¶¶ 4-5.

2 Plaintiffs also claim they did not need to depose Jose Firpi because he “appears
3 only on two relevant emails.” Recon. Opp. at 10. But it is *Plaintiffs* who contend
4 these are key emails providing the basis for Plaintiffs’ belief that the apex executives
5 have unique knowledge, and the *sole basis* for Plaintiffs’ contention that they had
6 relevant one-on-one conversations. *See* Dkt. 464 (“Opp.”) at 10-11. To the extent
7 Plaintiffs now seek to disavow Mr. Firpi’s importance or knowledge of relevant facts,
8 that disavowal only further shows why it was clear error for the Court to give any
9 credence to Mr. Firpi’s speculation. *See* Mot. at 13-14, 20; Reply at 5.

10 BANA did not waive these arguments. [REDACTED] and
11 the relevance of other MTM members were raised *in response to arguments and*
12 *theories Plaintiffs raised in their opposition* to BANA’s motion as a basis for taking
13 Mr. Moynihan’s deposition. *See* Opp. at 13 [REDACTED]

14 [REDACTED]
15 [REDACTED] Such arguments and evidence are plainly
16 permissible for a reply. *Shriners v. United States*, 2017 WL 3412299, at *5, n.6 (S.D.
17 Cal. Aug. 8, 2017) (“Court may properly consider evidence and arguments submitted
18 with a reply that is responsive to points raised in the non-moving party’s opposition”).
19 Moreover, Plaintiffs’ claim of waiver (Recon. Opp. at 11) further underscores why
20 the Order’s erroneous placement of the burden on BANA matters. By negotiated
21 agreement, BANA had to brief this issue without knowing precisely the arguments
22 that Plaintiffs would raise to seek to compel apex depositions. Once it became clear
23 that Plaintiffs’ theory was primarily focused on a [REDACTED]
24 [REDACTED], BANA responded with evidence
25 to rebut Plaintiffs’ speculation. It would be fundamentally unfair if BANA were
26 found to have “waived” a response to an argument it had yet to see.

27 Finally, Plaintiffs say that BANA’s “quibbles with Plaintiffs’ deposition
28 questions” do not constitute a challenge to Plaintiffs’ failure to exhaust. Recon. Opp.

1 at 10. This, too, is incorrect. In *Affinity Labs of Tex. v. Apple, Inc.*, the court found
2 that Affinity failed to exhaust less burdensome means of discovery precisely because
3 it “did not ask Apple’s Rule 30(b)(6) witness on financial topics a single question
4 about” statements by Apple’s CEO that it claimed supported the need to depose the
5 CEO. 2011 WL 1753982, at *14 (N.D. Cal. May 9, 2011). Similarly, in *Ceiva Logic,*
6 *Inc. v. Amazon, Inc.*, the court denied the apex deposition because the plaintiff had
7 “not demonstrated [] exhaustion” where he failed to ask sufficient questions of other
8 witnesses on the topic plaintiff claimed required apex testimony. 2021 WL
9 12349625, at *21 (C.D. Cal. Nov. 10, 2021). Moreover, Plaintiffs do not offer a single
10 supporting case for their argument that failure to ask questions (or avoiding entirely
11 asking about particular documents) is not a failure to exhaust.

12 Plaintiffs suggest that they should be excused from the exhaustion requirement
13 because depositions were taken on an expedited schedule without the benefit of
14 documents. *See Recon. Opp.* at 10, n.5. This is both disingenuous and wrong.
15 Plaintiffs chose to wait until the very end of fact discovery to take all but one fact
16 deposition in this case even though document discovery was substantially complete
17 by July 2024, with most ESI having been produced by April 2024. *Recon. Hoyle*
18 *Decl.* ¶ 6. Prior to noticing the apex depositions, Plaintiffs had taken a Rule 30(b)(6)
19 deposition and *one fact deposition*. *Riffee Decl.* ¶¶ 9-14. At that point, there were
20 only two months remaining in the fact discovery period, and Plaintiffs noticed six
21 remaining depositions to take place during the last several weeks of fact discovery in
22 December 2024. *Recon. Hoyle Decl.* ¶¶ 7-9. At any point prior, Plaintiffs could have
23 noticed other depositions, but they chose not to.⁵ And the only reason Plaintiffs took
24 the four additional depositions of individuals identified in response to Interrogatory
25 No. 11—who Plaintiffs must concede had far more unique relevant knowledge than
26

27 ⁵ Plaintiffs also grumble that “discovery has been an uphill battle” (*Recon. Opp.* at
28 10, n.6), but this does not excuse Plaintiffs’ failure to *even seek* relevant discovery
from less burdensome sources before jumping right to BANA’s top executives.

1 Messrs. Moynihan and Montag—was because Judge Berg *forced* them to before he
2 would consider their request to depose the top executives. Riffie Decl. ¶¶ 25-26.⁶

3 **II. The Order Misinterpreted and/or Ignored Key Relevant Evidence.**

4 The Order’s conclusion that Messrs. Moynihan and Montag likely possessed
5 unique non-repetitive knowledge is also clearly erroneous because it is not supported
6 by the factual record. Plaintiffs’ opposition simply reiterates the inferences they
7 prefer the Court to draw, and says that the Court agreed with them the first time so
8 should agree with them again. *See* Recon. Opp. at 12-17. However, BANA’s motion
9 explained that the inferences Plaintiffs advocate for, and the conclusions reached in
10 the Order, are not supported by facts. *See* Recon. Mot. at Section II. Plaintiffs’
11 opposition responds to very few of BANA’s arguments, and even the responses
12 offered are unpersuasive. For example:

13 • Plaintiffs ignore BANA’s argument that because the Court relied on
14 purported discussions or meetings that Messrs. Moynihan and Montag had with other
15 BANA employees, it by definition relied on information that is neither unique nor
16 non-repetitive, which does not satisfy the apex standard. *See* Recon. Mot. at 9.

17 • Plaintiffs *highlight* a critical factual inconsistency in the Order’s analysis
18 that *exposes* the untenability of their theory of CFF approval, and demonstrates why
19 the Order’s conclusion warrants reconsideration. *See* Recon. Opp. at 13. The Order
20 acknowledges that the evidence shows that “[REDACTED]
21 [REDACTED].” Order at 13.

22 ⁶ At a minimum, if the Court is not inclined to preclude Plaintiffs from taking
23 depositions of Messrs. Moynihan and Montag, it should reduce the time for each
24 deposition, as Judge Berg initially proposed. *See* Recon. Mot. at 14. Plaintiffs took
25 only two-hour depositions of Bill Fox (the head of GFC who oversaw the
26 development of and presented the CFF), Paul Simpson (the head of GBAM whose
27 group oversaw call centers), and Jenn Ehresman (the head of Claims who oversaw
28 the implementation of the CFF). Mot. at 6. It would make no sense to allow Plaintiffs
to take *twice as much time* with Mr. Moynihan, and the same amount of time with
[REDACTED].

1 Plaintiffs attempt to get around this by speculating that Mr. Moynihan (or one of his
2 direct reports) then approved the CFF *again* on September 28, 2020. *See* Recon. Opp.
3 at 14. But the problem with Plaintiffs’ theory—and the Court’s analysis—is that Mr.
4 Ahmad, the person who Plaintiffs say [REDACTED]
5 [REDACTED]. Recon. Mot. at 9-10. The Court
6 posited that Mr. Ahmad [REDACTED]
7 [REDACTED] (Order at 15), but there is no evidence in the record that
8 [REDACTED], and that is not the basis on which Plaintiffs seek
9 Mr. Moynihan’s deposition. Opp. at 13 [REDACTED]
10 [REDACTED]
11 [REDACTED]). Even now, Plaintiffs’ theory is *still* that it was Mr.
12 Ahmad—not someone else—[REDACTED]
13 [REDACTED]. *See* Recon. Opp. at 14. [REDACTED]
14 [REDACTED], and that should be the death knell for Plaintiffs’ theory.

15 • Plaintiffs continue to reference [REDACTED]
16 [REDACTED] to support their theory. *See* Recon. Opp. at
17 12-13. But they have no response to the affirmative evidence that BANA put forward
18 that Mr. Moynihan [REDACTED]. *See* Recon. Mot. at 11.

19 • Plaintiffs—and the Order—rely on hearsay communications from
20 [REDACTED]
21 [REDACTED] to conclude that the record supports the
22 inference that Mr. Moynihan or his direct reports [REDACTED]. *See* Recon. Opp.
23 at 13. This inference is not warranted given the absence of any evidence to confirm
24 the so-called “inference,” and given that the only direct evidence on this point *refutes*
25 Mr. Moynihan’s involvement. *See* Recon. Mot. at 9-10.

26 BANA’s brief set forth why these and other inferences drawn by the Court’s
27 Order are not supported. Plaintiffs’ opposition simply repeats those inferences,
28 without addressing BANA’s arguments for why they should be reconsidered given

1 the undisputed facts. Thus, Plaintiffs' request for the depositions should be denied.

2 **III. Alternatively, The Court Should Certify The Order For Appeal.**

3 Plaintiffs concede that there is no clear precedent in the Ninth Circuit for
4 district courts' treatment of apex deposition requests. Indeed, Plaintiffs cite *In re*
5 *Uber* for exactly this point. *See* Recon. Opp. at 8; *supra* at 4. As BANA's brief
6 explained, while there is disagreement among district courts about how precisely to
7 treat requests for apex depositions, there is nonetheless widespread agreement that
8 they should not be treated the same as other deposition requests given the tremendous
9 potential for harassment. Recon. Mot. at 15-16. Presumably for this reason, Plaintiffs
10 offer no response to BANA's argument that the confusion within the Circuit weighs
11 in favor of interlocutory review. *See* Recon. Mot. at 15-17. Plaintiffs further offer no
12 response to the fact that the Order may allow for executive depositions every time a
13 plaintiff seeks punitive damages under California law, which even the *Uber* court
14 cautioned against. *See* Recon. Mot. at 17; *see also Uber*, 2025 WL 896412, *3
15 (warning that decision does "not [] suggest that any claim for punitive damages, or
16 even any MDL involving punitive damages, always warrants an 'apex' deposition").

17 Plaintiffs' other arguments against interlocutory review and prejudice
18 associated with delay of the depositions are also unpersuasive. Plaintiffs agree that
19 the depositions are limited solely to punitive damages. These issues are (1)
20 completely irrelevant now because Plaintiffs have yet to prove liability for any claim,
21 and (2) relevant to only a small and dubious aspect of Plaintiffs' remaining common
22 law claims. *See* Recon. Mot. at 19; *see also* Reply at 8, n.4.

23 * * *

24 For the foregoing reasons, and the reasons stated in BANA's opening brief,
25 BANA respectfully requests that the Court reconsider the Order or, in the alternative,
26 certify the Order for interlocutory appeal, and stay the depositions.

27 Dated: August 8, 2025

Respectfully submitted,

28 By: s/ Matthew L. Riffie

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