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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION This Document Relates to All Actions	Case No. 3:21-md-02992-LAB-MSB The Honorable Michael S. Berg **Plaintiffs' Memorandum of Points and Authorities in Support of *Ex Parte* Motion to Compel Compliance with Subpoena for the Production of Documents**

INTRODUCTION

Plaintiffs' counsel properly served third-party TTEC Government Solutions, LLC, ("TTEC") with a valid subpoena for the production of documents in this multi-district litigation ("MDL"). TTEC, through counsel, initially met and conferred with Plaintiffs' counsel about responding to the subpoena, but then TTEC became non-responsive. Having complied with the applicable Chambers Rules of the assigned Magistrate Judge, Plaintiffs now bring this motion to compel TTEC's compliance with the subpoena.

Because this is an MDL case, this Court has jurisdiction to hear and decide the motion to compel under 28 U.S.C. § 1407, despite the fact that TTEC appears to be headquartered in Colorado. As the Sixth Circuit has noted, "[a] judge presiding over an MDL case … can compel production by an extra-district nonparty; enforce, modify, or quash a subpoena directed to an extra-district nonparty; and hold an extra-district nonparty deponent in contempt, notwithstanding the nonparty's physical situs in a foreign district where discovery is being conducted." *United States ex rel. Pogue v. Diabetes Treatment Centers of Am., Inc.*, 444 F.3d 462, 467-69 (6th Cir. 2006) (analyzing § 1407).

Given the valid subpoena at issue here, this Court's jurisdiction over this motion, and the discussion below, the Court should grant Plaintiffs' motion to compel compliance with the subpoena served on TTEC.

FACTUAL BACKGROUND

This MDL concerns Bank of America, N.A.'s ("BANA") administration of prepaid debit cards and related accounts through which California distributed unemployment and other public benefits on behalf of this state's Economic Development Department ("EDD"). BANA's administrative efforts were rife with glaring problems that harmed the intended beneficiaries, including (among other things) beneficiaries being blocked from accessing their accounts and benefits, and the theft of their identities and other personally identifiable information. *See generally* ECF No. 136 (First Amended Master Consolidated Complaint). During the relevant period, BANA contracted with third party TTEC to run the call centers that handled customer service calls from EDD beneficiaries about BANA's prepaid debit cards and accounts.

A number of putative class action cases were filed in multiple districts surrounding BANA's administration of EDD and related benefits. ECF No. 1 (Transfer Order). For example, on May 17, 2021, the District Court for the Northern District of California entered an Order re: Preliminary Injunction. Therein, the court found that "plaintiffs have demonstrated a strong likelihood of success on their claims that Bank of America (BofA) has violated, and continues to violate, the Electronic Fund Transfers Act by failing to conduct an adequate, good faith investigation when cardholders report unauthorized charges, and often simply freezing cardholder accounts based on a faulty screening process." *See* Declaration of Aaron P. Arnzen ("Arnzen Decl.") (submitted herewith), Ex. 5 (PI Order, *Yick v. Bank of America, N.A.*, Case No. 21CV00376-VC (N.D. Cal.), ECF No. 89).

On June 4, 2021, the United States Judicial Panel on Multidistrict Litigation issued an order pursuant to § 1407 that these various cases be "transferred to the Southern District of California and, with the consent of that court, assigned to the Honorable Larry A. Burns for coordinated or consolidated pretrial proceedings." ECF No. 1, at 2.

After discovery was underway, Class Representative Plaintiff Lindsay McClure issued a subpoena for the production of documents to TTEC Holdings, Inc. about the call centers that were ground zero for many of BANA's EDD-related shortfalls. *Id.* Ex. 1. The subpoena was served on TTEC Holding's registered agent for service of process on October 3, 2023. *Id.* The law firm of Perkins Coie, counsel for TTEC Holdings contacted Plaintiff's counsel on November 3, 2023, stating that TTEC Holdings is a holding company with no employees, TTEC Holdings does not have documents responsive to the subpoena, and responsive documents are not in the possession, custody or control of TTEC Holdings. Counsel for TTEC Holdings also stated that the "correct entity on which to serve a revised subpoena was TTEC Government Solutions, LLC" ("TTEC"), and agreed to accept service of a revised subpoena issued to TTEC. Arnzen Decl., Ex. 2. Plaintiff's counsel served a revised subpoena on TTEC by emailing the subpoena to counsel on November 9, 2023. *Id.* Ex. 3. The revised subpoena called for TTEC to produce responsive documents to Plaintiffs' counsel Bottini & Bottini, Inc.'s office location in the Southern District of California by December 8, 2023. *Id.*

TTEC continued to engage the law firm of Perkins Coie in connection with the subpoena. Plaintiffs' counsel was initially able to meet and confer with TTEC's attorneys. However, despite multiple attempts to follow up since November 29, 2023, TTEC's attorneys have been unresponsive. Arnzen Decl., Ex. 4. Although the subpoena instructed TTEC to produce documents by December 8, 2023, no documents have been produced and no objections or other explanations have been made. *Id.*

Pursuant to Civil Chambers Rule IV, Plaintiffs' counsel contacted the chambers of the Honorable Magistrate Judge Michael S. Berg, which indicated that Plaintiffs were authorized to file a motion to compel. The present motion follows.

ARGUMENT

I. The Subpoena Seeks Materials that are Relevant to Issues Central to this Litigation

This case concerns BANA's egregious failures to meet its obligations under EDD's benefits payment program. ECF No. 136, at p. 1. EDD provides unemployment insurance benefits to eligible Californians. *Id.* ¶ 1. The number of EDD beneficiaries increased dramatically during the COVID-19 pandemic. *Id.* ¶ 74. EDD did not distribute benefits directly to beneficiaries; instead, it awarded BANA a contract to distribute benefits on behalf of EDD through bank-issued and bank-administered prepaid debit cards that are linked to individual bank depository accounts. *Id.* ¶¶ 39, 45. BANA's striking failures in administering this program violated the law and harmed plaintiffs here, who were EDD beneficiaries. *Id.* ¶ 2. Among other things, BANA failed to protect beneficiaries' personally identifiable information ("PII"), failed to investigate fraud claims made by beneficiaries, and blocked beneficiaries' access to funds in their accounts. BANA's failures weren't limited to its internal processes, but instead extended to third-party customer service call centers. Specifically, BANA contracted with third party companies, including TTEC, to staff and manage call centers to handle questions, inquiries, and fraud claims from EDD beneficiaries.

The complaint alleges, among other things, that BANA:

- Failed to ensure that EDD beneficiaries' PII was appropriately handled and not, for example, misappropriated by bank subcontractors, including service representatives and other call center agents. *Id.* ¶ 2.
- Failed to implement adequate and reasonable protections to permit prompt submission of fraud claims. *Id.* ¶ *3*.
- Failed to provide provisional access to benefits while BANA investigated fraud claims. *Id.*
- Failed to reimburse beneficiaries for funds stolen from their accounts (as BANA's cardholder agreement required). *Id.* ¶ 4.
- Implemented customer service practices that frustrated and obstructed efforts to submit claims, denied fraud claims without investigation or explanation, and froze or blocked beneficiary access to accounts. *Id.*
- Implemented an automated and unreliable "claim fraud filter" to deny fraud claims and freeze accounts. *Id.* ¶¶ 89-92.

Indeed, BANA appears to have used the call centers to obstruct, rather than help, EDD beneficiaries. From the First Amended Master Consolidated Complaint:

> Calling the Bank's EDD Debit Card customer service phone lines, however, has often required Cardholders to endure hours-long wait times (with no option to receive a callback when a customer service agent becomes available), a variety of mishaps, and customer service agent incompetence. Notwithstanding the foreseeable spike in calls that the

> Bank knew or should have known would inevitably accompany the dramatic increase in unemployment benefits recipients during the pandemic, the Bank failed to appropriately staff its customer service call centers in a manner that would enable the Bank to honor its contractual commitments under the EDD–Bank Contract and to provide reasonable levels of assistance to the predictably large volume of EDD Debit Cardholders seeking assistance. As a result, Plaintiffs and Class Members attempting to report fraud or to inquire about potential fraud have been kept on hold for hours, have been disconnected without warning, have waited long periods of time to speak with someone only to be told to call back later, have been transferred to various departments with no apparent end or sent to voicemail, have had to deal with unhelpful automated agents, and have unsuccessfully attempted to reach the Bank by email.

ECF No. 136, ¶ 88.

The documents that Plaintiffs seek through their subpoena to TTEC are directly related to the allegations in the operative complaint. The subpoena includes 23 requests, which seek documents evidencing such things as the relationship between BANA and TTEC, what sorts of customer contacts were handled by TTEC, the training TTEC customer service personnel received, and whether and how BANA instructed TTEC to deal with customers and the issues they presented. Specific examples of subpoenaed documents include those concerning:

- BANA's contracts with TTEC. *Id.*, Ex. 3, Request No. 1.
- Communications between BANA and TTEC regarding the May 17, 2021 preliminary injunction. *Id.*, Request No. 2.
- TTEC's hiring, onboarding, training, and disciplining of its call center employees. *Id.*, Request No. 3.
- The materials TTEC used to train its call center employees. *Id.*, Request No. 5.
- The call center's communications with the present class representatives. *Id.*, Request No. 6.
- Security measures used by TTEC to protect beneficiaries' PII. *Id.*, Request No. 9.

- Any instances in which TTEC or its employees made any improper use of PII. *Id.*, Request No. 10.
- Wait times experienced by beneficiaries when contacting the TTEC call center(s). *Id.*, Request No. 12.
- Unsuccessful efforts to reach a call center employee. *Id.*, Request No. 13.
- How fraud claims were resolved. *Id.*, Request No. 14.
- Identification of key actors at TTEC vis-a-vis BANA. *Id.*, Request No. 20.
- The claims fraud filter. *Id.*, Request No. 22.

II. FED. R. CIV. P. 45 Obligates TTEC to Respond to the Subpoena

TTEC was obligated under FED. R. CIV. P. 45 to produce documents to Plaintiffs by December 8, 2023. The subpoena met all relevant requirements found in Rule 45. The subpoena was created by a party to this litigation, directed to a third party that likely has relevant and discoverable evidence about the subject matter of this case, commanded the production of documents to Plaintiffs' attorney, was issued from the court where the action is pending, and was properly served by delivery to the subpoenaed party's attorneys, who agreed to accept service of the subpoena on TTEC's behalf. Plaintiffs are unaware of any legal basis for TTEC to refrain from complying with the subpoena.

III. This Court Has Jurisdiction to Consider and Decide this Motion

This Court has jurisdiction to compel TTEC to comply with the subpoena under the Multidistrict Litigation statute. As described above, this Court is assigned to oversee coordinated or consolidated pretrial proceedings under § 1407. Section 1407(b) provides that "[t]he judge or judges to whom such actions are assigned … may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings." While the statute refers to "depositions," courts have "wisely" interpreted the provision to cover document subpoenas, too. "Though the statutory language refers to 'pretrial depositions,' the statute wisely has been interpreted to embrace document production subpoenas as well." 9 JAMES W. MOORE *ET AL.*, MOORE'S FEDERAL PRACTICE § 45.50[4], at 45-75 through 45-77 (Matthew Bender 3d ed. 2006).

The Fifth Circuit squarely addressed this issue in *In re Clients and Former Clients of Baron & Budd, P.C. and Occupational Med. Resources, Inc.*, 478 F.3d 670 (5th Cir. 2007). There, parties to an MDL case being overseen in the Eastern District of Pennsylvania issued a subpoena for the production of documents in the Southern District of Texas. *Id.* at 670-71. The Southern District of Texas denied motions to quash and directed that "[a]ll future pleadings in this case be filed in MDL 875," *i.e.*, in the Eastern District of Pennsylvania. *Id.* at 671.

The subpoenaed parties appealed to the Fifth Circuit, which observed that the key underlying question that required analysis was "whether the authority conferred on the MDL court by § 1407(b) extends beyond depositions so as to embrace the instant subpoenas." *Id.* The appellate court's answer — that § 1407(b) does allow enforcement of subpoenas where the case is pending — was firm and unambiguous. "Based on the ***overwhelming weight of authority***, we answer in the affirmative." *Id.* (citing MOORE'S FEDERAL PRACTICE) (emphasis added). The Fifth Circuit also noted that its "conclusion is supported by the convincing analyses of myriad district courts." *Id.* at 672 (collecting cases from the Eastern District of Pennsylvania, District Court of the District of Columbia, Southern District of New York, and Central District of California). *Barron & Budd* has since been cited with approval by additional district courts. *See, e.g.*, *Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 2012 U.S. Dist. LEXIS 205446, at *10 (E.D.N.Y. Aug. 17, 2012); *In re Avandia Mktg.*, 2021 Dist. LEXIS 172327, at **11-12 & n. 43 (E.D. Pa. Sept. 10, 2021)).

The Sixth Circuit resorted to similar logic and case law to come to the same conclusion about § 1407.

> A judge presiding over an MDL case therefore can compel production by an extra-district nonparty; enforce, modify, or quash a

> subpoena directed to an extra-district nonparty; and hold an extra-district nonparty deponent in contempt, notwithstanding the nonparty's physical situs in a foreign district where discovery is being conducted.

Pogue, 444 F.3d at 467-69.[1]

The same analysis should lead to a similar result here. Because the present MDL is overseen by the Southern District of California pursuant to § 1407, this Court has jurisdiction to hear and decide a motion to compel TTEC to produce documents in response to Plaintiffs' subpoena.

CONCLUSION

For the reasons set forth above, the Court should grant Plaintiffs' motion and enter the proposed order submitted by Plaintiffs.

Dated: February 14, 2024

Respectfully submitted,

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[1] *But see In re Packaged Seafood Prods. Antitrust Litig.*, 2018 U.S. Dist. LEXIS 7669, at **45-46 (S.D. Cal. Jan. 17, 2018) (Dembin, M.J.) (denying motion to compel out-of-district third-party compliance because "deposition," as used in § 1407, is narrower than other courts have interpreted the term).

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