

EXHIBIT B



Laura G. Brys
+1 213 426 2584
LBrys@goodwinlaw.com

Goodwin Procter LLP
601 South Figueroa Street
Suite 4100
Los Angeles, CA 90017

goodwinlaw.com
+1 213 426 2500

August 16, 2024

VIA EMAIL (efile berg@casd.uscourts.gov)

Hon. Michael S. Berg
Edward J. Schwartz U.S. Courthouse
221 West Broadway
San Diego, CA 92101

Re: In re Bank of America Calif. Unemployment Benefits Litig., 3:21-md-02992-LAB-MSB

Dear Judge Berg:

BANA writes in advance of the IDC on August 20, 2024. Plaintiffs' request that their depositions take place via videoconference should be denied because BANA would be hampered in challenging Plaintiffs' credibility, a key issue in these cases, and by the logistical challenges of sorting through voluminous exhibits remotely. Plaintiffs—who each chose to sue BANA in their individual capacity in San Diego or Los Angeles—have failed to show that the burden associated with appearing for an in-person deposition is “undue.” Accordingly, BANA seeks an informal order directing Plaintiffs to appear for their depositions in person.

Despite that BANA has the right to take depositions in San Diego and Los Angeles where Plaintiffs sued, in an effort at compromise, BANA has noticed depositions at a central location in the judicial district in California closest to each Plaintiff's current residence, proposing deposition locations in San Diego, Los Angeles, San Francisco, and Bakersfield. Plaintiffs rejected BANA's proposal, and insist that all depositions take place via videoconference based on unspecified, collective allegations that it would be too burdensome for each of the 128 remaining Individual Plaintiffs to attend their depositions in person.¹

BANA is entitled to take Plaintiffs' depositions in person. Generally, a “plaintiff will be required to make himself available for examination in the district in which he has brought suit.” *Detweiler Bros., Inc. v. John Graham & Co.*, 412 F. Supp. 416, 422 (E.D. Wash. 1976) (citing 8 Wright & Miller § 2112 at 404-406). Here, each Plaintiff brought their action in California. Of the 133 Individual Plaintiffs in the Second Amended Master Consolidated Complaint (ECF 304), 129

¹ Notwithstanding its compromise offer, BANA maintains that it is entitled to take Plaintiffs' depositions at any location within California, including in the district where Plaintiffs initiated this litigation, and expressly reserves its right to do so. See Fed. R. Civ. P. 45(c). BANA remains willing to further meet and confer with Plaintiffs' counsel on the precise locations and times of each deposition, but continues to reserve its right to take those depositions in person. See Ex. A, BANA's Amended Notice of Deposition to Individual Plaintiffs.

By agreement of the parties, the *timing* of Plaintiffs' depositions is not ripe for the Court's decision at the IDC. Earlier this week, Plaintiffs filed a motion to stay their cases, which motion is set for hearing before Judge Curiel on September 9, 2024. ECF 315. In the event a decision on the stay motion is not issued on or before September 9, the parties will request a further IDC on the issue of whether depositions can proceed beginning the week of September 16, 2024 pending disposition of the stay motion.



Hon. Michael S. Berg
August 16, 2024

Plaintiffs filed suit in San Diego, and 4 filed suit in Los Angeles.²

Courts typically reject plaintiffs' requests to be deposed remotely, and the Court should do the same here. For example, in *Natural-Immunogenics Corp. v. Newport Trial Grp.*, the court denied the plaintiffs' request to appear for depositions via videoconference, finding that "[v]ideo conference depositions are not suitable" for certain key witnesses, including the plaintiffs, who "decided to bring this litigation." 2017 WL 10562990, at *6 (C.D. Cal. Aug. 14, 2017); *see also Williams v. Camden USA, Inc.*, 2021 WL 3022675, at *3 (S.D. Cal. July 15, 2021) (denying plaintiff's request to have deposition taken remotely where she "[had] not refuted Defendant's concerns regarding disadvantages of videoconference depositions of key witnesses, such as the possibility of someone off-camera providing verbal and non-verbal cues to the deponent, the possibility to referring to other materials during the deposition, and limitations on counsel's ability to assess demeanor and credibility."). This is true even post-pandemic. *See Pruco Life Ins. Co. v. California Energy Dev. Inc.*, 2021 WL 5043289, *5 (S.D. Cal. Oct. 29, 2021) (ordering in-person deposition of plaintiff's representatives in October 2021, over expressed COVID-related concerns); *Williams*, 2021 WL 3022675, at *3 (ordering in-person deposition of plaintiff in July 2021).

In requiring plaintiffs to appear for in-person depositions, courts have recognized that videoconference depositions unfairly prejudice the deposing party. Virtual depositions do not allow the deposing party to fully examine the credibility of the witness, which consideration can be dispositive where "[t]he credibility of the parties is . . . a key substantive issue in th[e] case." *Pruco Life Ins. Co. v. California Energy Dev. Inc.*, 2021 WL 5043289, *3 (S.D. Cal. Oct. 29, 2021); *Clinton v. California Dep't of Corr.*, 2008 WL 5068586, at *2 (E.D. Cal. Nov. 25, 2008), *aff'd*, 2009 WL 210459 (E.D. Cal. Jan. 20, 2009) (denying plaintiff's request for remote deposition because it would "place [defendant] at a disadvantage by not allowing defense counsel to adequately observe plaintiff's demeanor to prepare for trial").

A key aspect of the defense of this case is whether Plaintiffs are being truthful in claiming that certain transactions on their EDD prepaid debit card accounts were unauthorized. Discovery has already revealed that issues of Plaintiffs' credibility with respect to these claims "are central to the case." *Pruco*, 2021 WL 5043289, at *3. For example, during the deposition of Plaintiff Elizabeth Giddens, the witness was confronted with ATM footage of herself making a withdrawal that she had reported to BANA was unauthorized. Similarly, during the deposition of Plaintiff Jennifer Meza, the witness conceded that certain ATM transactions that she disputed as unauthorized were, in fact, made by her. Due to the nature of the allegations in this case, BANA anticipates that similar issues may occur during the remaining Individual Plaintiffs' depositions. Requiring BANA to conduct these depositions via videoconference would be unduly prejudicial.

In addition to the credibility issues, conducting depositions remotely would hinder BANA's ability to question Plaintiffs as to specific documents, not only due to the complex formatting of certain of the relevant documents, but also due to the large number of documents at issue. *See United States v. Approximately \$53,378 in U.S. Currency*, 2010 WL 4347889, at *1 (N.D. Cal. Oct. 27, 2010) (denying request for video deposition as "impracticable" given large number of documents at issue); *see also Music Grp. Macao Com. Offshore Ltd. v. Foote*, 2015 WL 13423886 (N.D. Cal. Aug. 11,

² BANA has already taken in-person depositions of five Individual Plaintiffs, so 128 depositions remain.



Hon. Michael S. Berg
August 16, 2024

2015) (“courts in this District have found video depositions inappropriate” where there are a “copious number of documents”). In the ten Plaintiff depositions taken to date, the witnesses have each been shown, on average, 19 documents per deposition, including pleadings and discovery responses that span dozens, and in some cases hundreds, of pages. Discovery and other proceedings in this case have been wrought with disputes. The potential for technological issues, sound issues, and interruptions—particularly if Plaintiffs take their depositions from their homes—will only exacerbate those problems.

Plaintiffs have failed to show they face an “undue” burden. Against the prejudice to BANA of remote depositions, Plaintiffs have failed to show that in-person depositions would subject them to “undue” burden. As the *Purco* court stated: “Maintaining . . . claims in a lawsuit will necessarily entail certain costs and expenses. The question under Rule 26(c)(1) is not whether there is *any* cost to travel to appear for a deposition noticed by an opposing party in litigation, but whether the burden of the cost is *undue*.” *Purco*, 2021 WL 5043289, at *3 (emphasis in original). “Discovery always entails some burden or expense,” but Plaintiffs have the burden of proving that “undue hardship or exceptional or compelling circumstances justify [their] refusal to travel to [their] chosen forum.” *Clinton*, 2008 WL 5068586, at *1–2; see also *Matthews v. Watson*, 123 F.R.D. 522, 523 (E.D. Pa. 1989); *Clem v. Allied Van Lines Int’l Corp.*, 102 F.R.D. 938, 939–40 (S.D.N.Y. 1984); *Hart v. Simons*, 29 F.R.D. 146, 147 (E.D. Pa. 1961); *Slade v. Transatlantic Fin. Corp.*, 21 F.R.D. 147 (S.D.N.Y. 1957).

Plaintiffs have shown no individual burden at all, merely stating, in the aggregate, that all 128 remaining Individual Plaintiffs’ financial circumstances justify the exception of videoconference depositions. This is insufficient. As courts have held, “summary allegations” that a Plaintiff is indigent, and other unspecified, unverified statements concerning financial situations do not constitute the “degree of [undue] hardship which would warrant departure from the application of th[e] general rule” requiring in-person deposition in the plaintiff’s chosen forum, here San Diego. *Clinton*, 2008 WL 5068586, at *2. Allegations that “are unsupported by documents or affidavit” do not “meet [a plaintiff’s] burden” to prove “undue hardship.” *Id.*

Furthermore, Plaintiffs’ summary, collective arguments on this point overstate the cost associated with the travel required for many of the Plaintiffs to attend in-person depositions as noticed. For example, BANA’s records indicate that Plaintiff Nehemiah Rima-Fleurimah lives approximately 2.8 miles from the proposed deposition location in San Francisco. Further, BANA’s records similarly indicate that Plaintiffs Angelica Gutierrez and Patricia Castillo live approximately 1.8 miles and 3.6 miles, respectively, from the proposed deposition location in Bakersfield. Plaintiffs fail to articulate how sitting for a deposition at a location only a few miles from their homes presents an undue burden. In fact, as a compromise position, Plaintiffs’ counsel agreed on August 6, 2024 to provide the names of ten Plaintiffs willing to sit for depositions in the Los Angeles area; to date, counsel has already provided the names of seven such Plaintiffs, underscoring that Plaintiffs’ collective objections to in-person appearances cannot possibly apply universally to all 128 remaining Individual Plaintiffs. Where Plaintiffs have not met their burden to show undue hardship, the “general rule” should apply, requiring Plaintiffs to appear in person.

*

*

*



Hon. Michael S. Berg
August 16, 2024

For these reasons, BANA is entitled to take Plaintiffs' depositions in person, and would be prejudiced if required to take the depositions via videoconference. Plaintiffs should be required to appear for in-person depositions as noticed in BANA's Amended Notice of Deposition to Individual Plaintiffs, Ex. A, absent sufficient individual showing of undue hardship.

Respectfully submitted,

/s/ Laura G. Brys

Laura G. Brys

Cc: via email to:
Matthew B. Nazareth (mnazareth@meyersnave.com)
Brian Danitz (bdanitz@cpmlegal.com)
Karin Swope (kswope@cpmlegal.com)
Andrew F. Kirtley (akirtley@cpmlegal.com)
Michael Rubin (mrubin@altshulerberzon.com)
Connie K. Chan (cchan@altshulerberzon.com)
Stacey M. Leyton (sleyton@altshulerberzon.com)
Gayle M. Blatt (gmb@cglaw.com)
David S. Casey (dcasey@cglaw.com)
Joshua Swigart (josh@swigartlawgroup.com)
Thomas Hefferon (thefferon@goodwinlaw.com)
James W. McGarry (jmcgarry@goodwinlaw.com)
Sabrina Rose-Smith (SRoseSmith@goodwinlaw.com)
Lindsay E. Hoyle (lhoyle@goodwinlaw.com)
Yvonne W. Chan (ychan@jonesday.com)