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

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

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

20 **DEFENDANT BANK OF**
21 **AMERICA, N.A.'S**
22 **MEMORANDUM OF POINTS**
23 **AND AUTHORITIES IN**
24 **SUPPORT OF DEFENDANT'S**
25 **MOTION TO RECONSIDER MAY**
26 **29, 2025 ORDER GRANTING IN**
27 **PART AND DENYING IN PART**
28 **DEFENDANT'S MOTION FOR**
PROTECTIVE ORDER

Ctrm: 12A – 12th Floor
Judge: Hon. Gonzalo P. Curiel
Date: September 19, 2025
Time: 1:30 P.M.

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1 Bank of America, N.A. (“BANA”) respectfully moves for reconsideration of
2 the Court’s May 29, 2025 Order Granting in Part and Denying in Part Defendant’s
3 Motion for Protective Order, filed under seal at Dkt. 487 (the “Order”). The Court
4 should reconsider the Order because it includes multiple clear errors, both legal and
5 factual. The legal errors include improper shifting of the burden to BANA,
6 imposition of the erroneous requirement that BANA show prejudice to the apex
7 deponents, and an erroneous analysis and application of the apex doctrine’s two
8 prongs. *See* Section I. The factual errors allowed the Court wrongly to conclude that
9 Mr. Moynihan and Mr. Montag “likely” or “may” have “unique first-hand, non-
10 repetitive knowledge” regarding Plaintiffs’ claim for punitive damages when that
11 inference cannot reasonably be drawn from the evidence presented. *See* Section II.
12 BANA respectfully believes that each and all of these errors merit reconsideration,
13 and that accounting for these errors would result in the denial of Plaintiffs’ request
14 for depositions of BANA’s top two executives.

15 Additionally, and in the alternative, if the Court were to deny BANA’s motion
16 for reconsideration, BANA respectfully requests that the Court certify the Order for
17 an interlocutory appeal. An interlocutory appeal would be merited because BANA
18 has identified issues related to controlling law pertaining to the burdens, requisite
19 showing, and general applicability of the apex doctrine in this Circuit. Further, an
20 appeal would allow the Ninth Circuit to potentially state and clarify its position on
21 the apex doctrine, which this Court acknowledged has not been definitively stated.
22 *See* Section III.

23 **RELEVANT BACKGROUND**

24 On October 11, 2024, Plaintiffs served notices of deposition for Messrs.
25 Moynihan and Montag. Dkt. 454 (“Riffie Decl.”) ¶ 14. BANA objected to the
26 depositions, in part, because they were prohibited by the apex doctrine. *Id.* Plaintiffs
27 notified Magistrate Judge Berg of the dispute on December 5, 2024, and Judge Berg
28 ordered simultaneous informal briefing on the issue. *Id.* ¶ 23. On December 23, 2024,

1 Judge Berg issued a tentative ruling precluding Plaintiffs from taking Messrs.
2 Moynihan's and Montag's depositions because they had not exhausted efforts to take
3 discovery through less burdensome means. *Id.* ¶ 25. After taking additional
4 depositions, Plaintiffs again brought the issue before Judge Berg, and Judge Berg
5 ordered a second round of informal simultaneous briefing. *Id.* ¶ 28. Following the
6 informal discovery conference, Judge Berg granted Plaintiffs limited depositions on
7 March 12, 2025, which would have permitted Plaintiffs to take a two-hour deposition
8 of Mr. Moynihan and a one-hour deposition of Mr. Montag. *Id.* ¶ 30. Plaintiffs
9 unilaterally rejected the tentative ruling, bringing the issue to this Court. *Id.* ¶ 31.

10 To prevent the imminent abuse and harassment of its top two executives,
11 BANA agreed to a briefing schedule whereby it would move for a protective order
12 precluding the depositions of Messrs. Moynihan and Montag. The motion was fully
13 briefed by May 2, 2025. *See* Dkt. 471 ("Reply"). On May 29, 2025, the Court issued
14 the Order Granting in Part and Denying in Part BANA's motion, finding that: (1)
15 BANA had the burden to show that the depositions should not go forward, Order at
16 7-8; (2) BANA had a threshold obligation to demonstrate prejudice to Messrs.
17 Moynihan and Montag from allowing the depositions, *id.* at 8-9; (3) there was no
18 dispute as to the apex doctrine's "exhaustion" requirement, *id.* at 9 n.4; and (4)
19 Messrs. Moynihan and Montag likely had unique, non-repetitive information
20 regarding Plaintiffs' claims for punitive damages, *id.* at 14, 16, 18. In so finding, the
21 Order relied on the Court's prior determination, based on its interpretation of
22 California's punitive damages statute (which is relevant only to Plaintiffs' common
23 law claims, which are dubious at best), that information about "the motive, intent or
24 knowledge to support punitive damages concerning the development,
25 implementation, and authorization of the CFF can only be obtained by [Messrs.
26 Moynihan and Montag] and not from sources already designated." *Id.* at 3 (citing
27 Dkt. 298 at 11).

ARGUMENT

A motion for reconsideration can be granted where an order demonstrates that “the district court . . . committed clear error” *Kona Enters, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). While a motion for reconsideration is “not a way to reargue a previous position,” it provides an opportunity for the district court to revisit a prior decision that either applied the wrong legal standard or applied the correct legal standard inconsistently or erroneously to the facts of the case. *Marsh v. Cnty. of San Diego*, 2008 WL 11411591, at *1 (S.D. Cal. Sept. 23, 2008).

I. The Court Should Reconsider the Order Because It Includes Multiple Clear Legal Errors.

A. The Order improperly placed the burden on BANA to show why the depositions should not go forward.

The Order placed the burden on BANA to show why the depositions should not go forward solely because BANA had filed the specific motion before the Court. *See* Order at 7. But, as the cases cited by BANA show, once the party resisting the deposition shows that the deponent is a high-level executive subject to the apex doctrine, the burden is on the party seeking the deposition to show that the apex doctrine’s requirements are satisfied. *See* Dkt. 452 (“Mot.”) at 8-9 (citing *Greer v. Cnty. of San Diego*, 2022 WL 2134601 (S.D. Cal. June 14, 2022); *Ramirez v. Zimmerman*, 2019 WL 2106594 (S.D. Cal. May 14, 2019)). Other cases from this Circuit confirm that the burden shifts to the seeking party once it is plain that the target deponent is “entitled to invoke the privilege” by being “sufficiently high-ranking to merit protection.” *See, e.g., Myles v. Cnty. of San Diego*, 2016 WL 4366543, at *3 (S.D. Cal. Aug. 15, 2016); *Thomas v. Cate*, 2010 WL 1343789, at *1 (E.D. Cal. Apr. 5, 2010). Moreover, as explained, at 1-2, it was *Plaintiffs* that first sought Court intervention on the apex issue, including at the first two IDCs before Judge Berg (where the issue was simultaneously briefed), and then through the joint status report before the Court. Further, the Order’s assignment of burden would have

1 the unintended effects of penalizing a party for seeking a protective order and
2 incentivizing litigants to force the other party to move to compel.

3 To the extent the Order relies on cases that articulate a different burden, those
4 cases are outliers that demonstrate the disagreement and confusion among district
5 courts in the Ninth Circuit on this issue. For example, the Order cites a footnote in *In*
6 *re Nat'l W. Life Ins. Deferred Annuities Litigation*, 2011 WL 1304587, at *4 n.2 (S.D.
7 Cal. Apr. 6, 2011), for the proposition that BANA should bear the burden. Order at
8 8. But the court in that case ordered the requested depositions only upon a “find[ing]
9 that *Plaintiffs* have made a sufficient showing to establish their need to depose [the
10 executives].” *In re Nat'l W. Life*, 2011 WL 1304587, at *4 (emphasis added). And in
11 *Mansourian v. Board of Regents of University of California at Davis*, the court
12 acknowledged “the burden-shifting approach applied by some courts,” including that
13 “it may indeed be appropriate where a party truly seeks to depose” an apex witness
14 “for no purpose other than harassment,” even as it reached the opposite result. 2007
15 WL 4557104, at *3, n.2 (E.D. Cal. Dec. 21, 2007).¹

16 As the Order acknowledges, there is “no[] dispute that Mr. Moynihan . . . and Mr.
17 Montag . . . are high-level executives subject to the apex deposition doctrine.” Order
18 at 7. Therefore, the Order improperly shifted the burden to BANA.

19
20 ¹ The Order’s reliance on *Blankenship v. Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975)
21 is misplaced. See Order at 8. In that case, the Ninth Circuit’s discussion of the legal
22 standard for deposing high-level executives was high-level and brief, and it should
23 not be read as a definitive statement on the burden of proof. *Blankenship*, 519 F. 2d
24 at 429. Moreover, the defendant in *Blankenship* only argued that the executive
25 deposition would be *duplicative* of other discovery, and plaintiffs countered with
26 information that he might have that others did not. *Id.* (“Defendants’ sole objection
27 to the deposition is that what George Hearst had to offer would be repetitious with
28 what plaintiff had learned from other sources.”). Here, BANA argued that Mr.
Moynihan has *no* relevant knowledge, and in any event, Plaintiffs have not
established that either Mr. Moynihan or Mr. Montag actually *have* unique and
relevant knowledge that others do not. See Mot. at 11-19 (Mr. Moynihan), 19-22 (Mr.
Montag); Reply at 2-7 (Mr. Moynihan), 7-10 (Mr. Montag).

B. The Order improperly required BANA to demonstrate prejudice.

The Order also contained clear error because it improperly relied on general (*i.e.*, non-apex) Rule 26(c) caselaw to penalize BANA for not articulating any “specific prejudice or harm” from the potential depositions. *See* Order at 9. As a threshold matter, the prejudice to BANA and the executive witnesses is self-evident for all the reasons explained in BANA’s briefing. *See* Mot. at 9-24; Reply at 2-10. High-ranking executives are incredibly busy and litigants often seek their depositions for abusive purposes or to try to force settlement. *See Apple Inc. v. Samsung Electronics Co., Ltd.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012) (depositions of high-level executives “create[] a tremendous potential for abuse or harassment”); *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007) (same); *Cannavan v. Cnty. of Ventura*, 2021 WL 4945186, at *6 (C.D. Cal. July 16, 2021) (same). Indeed, Plaintiffs’ counsel candidly told Judge Berg long ago that such was their precise litigation strategy here. Mot. at 2; Dkt. 209-1 ¶ 10 (top executive emails “settle cases”).

Requiring an additional showing of prejudice would lead to further abuse and burden, and render the apex doctrine a nullity—effectively treating an apex witness like any other witness. But the apex doctrine exists precisely to protect high-ranking executives and officials from the aggregate burden associated with constant litigation-related demands on their time, and the “‘potential for abuse or harassment’ *inherent* in such a deposition.” *Greer v. Cnty. of San Diego*, 2022 WL 2134601, at *1 (emphasis added). That is precisely why district courts in this circuit have held that the apex doctrine does not require a showing of prejudice or harm once the party resisting the deposition establishes that the deponent is a sufficiently high-ranking executive to be subject to the apex doctrine’s protections.² *See* Mot. at 8 (citing *In re*

² While the Ninth Circuit has not weighed in on the prejudice issue yet, at least one Court of Appeals has adopted the presumptive view that an apex deposition will interfere with a high-ranking official’s duty, even absent a specific showing of harm.

1 *Google Litig.*, 2011 WL 4985279, at *2 (N.D. Cal. Oct. 19, 2011) (the resisting party
2 need only establish that the apex executive is sufficiently senior to warrant protection
3 before shifting the burden to the seeking party to demonstrate that the two prongs of
4 the apex doctrine are satisfied)); *see also Affinity Labs. of Texas v. Apple, Inc.*, 2011
5 WL 1753982, at *17 (N.D. Cal. May 9, 2011) (denying apex deposition because
6 plaintiff “fail[ed] to show that Steve Jobs has unique and personal knowledge of facts
7 relevant to this litigation, which cannot be obtained through less intrusive
8 discovery”). Requiring an additional showing could subject apex witnesses to serial
9 harassment due to the difficulty of establishing burden in any one case, even where
10 the cumulative impact and threats are significant.

11 Therefore, the Order improperly required BANA to demonstrate prejudice to
12 preclude the depositions.

13 **C. The Order’s interpretation and application of the apex doctrine was**
14 **erroneous.**

15 The apex doctrine requires the party seeking to depose a high-level executive
16 to show that (1) the deponent “has unique first-hand, non-repetitive knowledge of the
17 facts at issue in the case,” and (2) the party has “exhausted other less intrusive
18 discovery methods.” *See* Mot. at 8 (quoting *In re Google Litig.*, 2011 WL 4985279,
19 at *2). The Order’s interpretation and application of the doctrine is clearly erroneous.

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21
22

See In re Paxton, 60 F.4th 252, 258 (5th Cir. 2023). According to the Fifth Circuit,
23 “[b]efore requiring such ‘apex’ testimony, courts must consider: (1) the deponent’s
24 high-ranking status; (2) the substantive reasons for the deposition; and (3) the
25 potential burden the deposition would impose on the deponent.” *Id.* at 258. Harm is
26 one of the factors in this analysis, but it is ultimately an abuse of discretion for the
27 district court to “compel[] apex testimony absent extraordinary circumstances.” *Id.*
28 And in situations where the information at issue can be obtained from other sources,
“apex testimony is justified only in the ‘rarest of cases.’” *Id.* Under this analysis, the
target deponent does not need to make a separate showing of harm (beyond what is
already presumed based on his or her position) so long as the information at issue
could be obtained from another source. *See id.*

1 With respect to prong (1), the Order invoked the correct standard (at 6), but
2 nonetheless applied it inconsistently and placed either too low a burden on Plaintiffs
3 to show or too high a burden on BANA to refute that BANA’s top two executives
4 possessed the requisite knowledge. *First*, the Order stated—relying on the Ninth
5 Circuit’s decision in *Blankenship*—that “[a]s long as the apex executive has some
6 first-hand knowledge of relevant facts, the deposition should be allowed.” Order at
7 11 (citing *Blankenship*, 519 F.2d at 429). That is a far more permissive standard that
8 would have the effect of gutting the apex doctrine entirely, and *Blankenship* does not
9 support it. *Compare In re Google Litig.*, 2011 WL 4985279, at *2 (apex prong (1)
10 requires that deponent “has unique first-hand, non-repetitive knowledge”).
11 *Blankenship* included very little reasoning on the apex issue, but the Ninth Circuit
12 nonetheless found that the plaintiff there argued that George Hearst “might have” had
13 “possible information . . . that others did not,” 519 F.2d at 429, suggesting that the
14 purported knowledge of the executive deponent must be *unique* (*i.e.*, “some”
15 knowledge is not enough).

16 *Second*, the Order cites the Ninth Circuit’s decision in *Anderson* for the
17 proposition that “some knowledge” might be enough to justify an apex deposition.
18 Order at 7 (quoting *Anderson v. Air W., Inc.*, 542 F.2d 1090, 1093 (9th Cir. 1976)).
19 But the Ninth Circuit’s decision in *Anderson* is not instructive because it did not
20 include any assessment of the apex doctrine or the record in that case because the
21 appellants did not challenge the district court’s denial of a protective order. *Anderson*,
22 542 F.2d at 1093.

23 With respect to prong (2), the Order erroneously concluded that the parties “do
24 not dispute” exhaustion, and therefore the Order did not address this factor. Order at
25 9 n.4. BANA’s briefing made clear that, despite taking certain additional depositions
26 ordered by Judge Berg, Plaintiffs did not use the less intrusive means at their disposal.
27 *See, e.g.*, Mot. at 12-15, 22-23; Reply at 1, 3-5.

1 *First*, Plaintiffs made no effort to take several potentially important
2 depositions. For example, Plaintiffs never sought to depose Cathy Bessant, the
3 executive [REDACTED]

4 [REDACTED] *See* Reply at 3; *see also* Dkt. 471 (“Hoyle Decl.”) ¶ 13. Plaintiffs also never
5 sought to depose any of the other members of the MTM, including the MTM
6 members who [REDACTED]

7 *See* Reply at 4; Hoyle Decl. ¶¶ 4-6, 13. Nor did Plaintiffs make any effort to depose
8 Jose Firpi, even though [REDACTED]

9 [REDACTED]
10 [REDACTED] *See* Mot. at 14; Reply at 5; *see also* Riffie Decl. ¶ 22.

11 *Second*, at the depositions they did take, Plaintiffs elected not to ask about
12 many of the documents they now rely on, and generally avoided asking questions
13 that would expose their theory about executive involvement as unfounded. For
14 example, they did not ask Renee Johnson any questions about [REDACTED]
15 [REDACTED] that the Order (at 13) heavily relied on and identified as [REDACTED]
16 [REDACTED] *See* Mot. at 15.³ The same is true for
17 many of the other documents Plaintiffs now rely upon. *See, e.g.*, Mot. at 11, 12, 13,
18 15, 16, 21; *see also* Riffie Decl. ¶¶ 9-31.

19 Based on this record, BANA plainly challenged Plaintiffs’ failure to seek
20 information from lower level BANA employees. *See, e.g.*, Mot. at 11-16, 21-23;
21 Reply at 1, 3-5. The Order’s determination to the contrary, and resulting lack of
22 analysis of prong (2) of the apex doctrine, also constitutes clear error.

23
24
25 ³ The other chat participant’s testimony also did not support the Court’s finding that
26 the CFF was approved by Mr. Moynihan. Mr. Garfield testified that [REDACTED]

27 [REDACTED] and that [REDACTED]
28 [REDACTED] Mot. at 15 (citing Dkt. 452-11, Riffie Decl. Ex. 10,
Garfield Tr. 36:4–19, 228:6–231:16).

1 **II. The Court Should Reconsider the Order Because It Misinterpreted**
2 **and/or Ignored Key Relevant Facts and Testimony.**

3 Even if the Order ostensibly applied the correct standard for prong (1) of the
4 apex doctrine, its conclusion that Messrs. Moynihan and Montag “likely have” or
5 “may have” relevant, unique first-hand knowledge based on the limited record
6 Plaintiffs put before the Court constitutes clear error. *See* Order at 11, 17.

7 As an instant matter, the Order repeatedly relied on Mr. Moynihan or Mr.
8 Montag’s purported discussions or meetings with other BANA employees, so it by
9 definition relied on information that is neither unique nor non-repetitive. *See, e.g.,*
10 Order at 12 (finding that [REDACTED])

11 [REDACTED]
12 [REDACTED] *id.* at 15 (relying on the fact that “[REDACTED]”
13 [REDACTED]
14 [REDACTED] *id.* at 18 (relying on “[REDACTED]”
15 [REDACTED])).

16 Moreover, the Order relied on email records to conclude that “the record
17 suggests” that Mr. Moynihan approved the CFF. *See* Order at 12-14. But the record
18 actually does the opposite. Plaintiffs’ own theory is that [REDACTED]

19 [REDACTED]
20 [REDACTED].⁴ *See* Dkt. 464 (“Opp.”) at 12-15 ([REDACTED])
21 [REDACTED] Yet Mr. Ahmad himself
22 testified [REDACTED]

23 ⁴ The Order allows that [REDACTED]
24 [REDACTED] Order at 15. That of course
25 could be true, but Plaintiffs’ own theory was that [REDACTED]
26 [REDACTED] *See*
27 Opp. at 13 [REDACTED]
28 [REDACTED] *see also* Order at 13-14 (citing Dkt. 464-16, 464-62, Danitz
Exs. 14 & 60).

1 [REDACTED]
2 [REDACTED]. *See* Mot. 7, 16 and Reply 1-3; *see also* Dkt. 452-6, Riffie Decl. Ex.
3 5, Ahmad Tr. 244:18-22, 93:25-94:20. Thus, Plaintiffs’ theory—and the primary
4 basis on which they seek Mr. Moynihan’s deposition—simply cannot be reconciled
5 with the factual record.

6 Additionally, the Order relied heavily on [REDACTED]
7 [REDACTED]
8 [REDACTED]. *See* Order
9 at 12. Plaintiffs offered no *testimony* to support the inferences that the Order draws
10 from [REDACTED]. *See* Mot. at 15. As noted above (at 8), Plaintiffs elected to not even
11 ask Ms. Johnson about [REDACTED]. *See id.* Mr. Garfield was shown [REDACTED] at his
12 deposition, and testified that [REDACTED]
13 [REDACTED]
14 [REDACTED]. *See* Mot. at 15;
15 *see also* Dkt. 452-11, Riffie Decl. Ex. 10, Garfield Tr. 36:4-19, 228:6-231:16. Thus,
16 [REDACTED] cannot support Plaintiffs’ claim that [REDACTED]
17 [REDACTED] because it is speculative hearsay, and refuted by
18 the record before the Court—particularly Mr. Ahmad’s own testimony.

19 Additional specific errors that appear to have impacted the Order’s analysis of
20 the factual record include, for example:

- 21 • The Order incorrectly stated that [REDACTED]
22 [REDACTED]
23 [REDACTED] Order at 12.⁵ There is no
24

25 ⁵ This finding appears to be inconsistent with the Court’s conclusion in footnote 12
26 of its Order that “[t]here is no evidence about the relationship between Mr. Moynihan
27 and the MTM and how decisions were made amongst them and directed to the mid-
28 level executives.” Order at 14. Even if that were true, that would further show that
Plaintiffs failed to exhaust efforts to take discovery through less burdensome
means—*e.g.*, by [REDACTED]

1 evidence to support this statement, notwithstanding the miscited testimony.⁶ When
2 asked whether [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED] Dkt. 464-53, Danitz Decl. Ex. 51, Fox Tr. 71:11-20. Mr. Fox did *not* say
6 that only Mr. Moynihan [REDACTED] had the authority to provide
7 approval, or that [REDACTED] was required for any particular action (such as the
8 implementation of the CFF). And in any event, the record shows [REDACTED]
9 [REDACTED]
10 [REDACTED] See Reply at 3; Dkt. 471-
11 2, Hoyle Ex. 18.

12 • The Order further relied on evidence regarding [REDACTED]
13 [REDACTED], and improperly concluded that this evidence
14 “suggests” that Mr. Moynihan or his direct reports approved the CFF. See Order at
15 12-13. But the Court’s conclusion ignored both that (1) there is *no evidence* that Mr.
16 Moynihan participated in or had any involvement in [REDACTED] and (2) BANA put
17 forward affirmative evidence indicating that [REDACTED]. See
18 Reply at 4; Hoyle Decl. ¶¶ 4-6 (privilege log entries demonstrate that [REDACTED]
19 [REDACTED]
20
21
22

23 ([REDACTED]) or other executives who interacted with [REDACTED] See *supra*
24 at 8. That Plaintiffs failed to obtain such discovery should not entitle them to attempt
25 to obtain it from the very top and through the most burdensome means.

26 ⁶ In support of this conclusion, the Order purports to cite testimony from Mr. Ahmad.
27 Order at 12 (citing “Dkt. No. 468-5, Riffie Decl. Ex. 5, Ahmad Depo. at 70:8-14;
28 71:2-23”). However, these pages from Mr. Ahmad’s deposition transcript were not
included in Riffie Decl. Ex. 5, and Mr. Ahmad never provided such testimony. It
appears the Court intended to cite the equivalent pages from Mr. Fox’s deposition
transcript. See Dkt. 464-53, Danitz Decl. Ex. 51, Fox Tr. 70:8-14, 71:2-23.

1 [REDACTED]⁷ Plaintiffs did not put forth *any* testimony or records indicating that [REDACTED]
2 [REDACTED]
3 [REDACTED] Nor could they, because he did not, and BANA demonstrated that [REDACTED]
4 [REDACTED]
5 [REDACTED]. See Reply at 3-4. While the Order acknowledged
6 that [REDACTED]
7 [REDACTED] it incorrectly stated that Mr. Ahmad testified that he [REDACTED]
8 [REDACTED] Order at 13. In fact, Mr.
9 Ahmad's testimony was that, while he did not have an independent recollection of
10 the subject matter of [REDACTED], after having his recollection
11 refreshed by the documents, he understood [REDACTED]
12 [REDACTED]
13 [REDACTED] Reply at 3; Dkt. 471-4, Hoyle Decl. Ex. 20, Ahmad Tr. 195:15-25; *see*
14 *also* Dkt. 471-2, Hoyle Decl. Ex. 18.

15 • The Order cites *Gen. Star. Indem. Co. v. Platinum Indem. Ltd.*, 210
16 F.R.D. 80 (S.D.N.Y. 2002), for the proposition that a deposition of an apex executive
17 is appropriate where the top executive "issues a corporate policy." Order at 15. This
18 reliance is misplaced. There is no evidence that the CFF was a "corporate policy" of
19 BANA. Rather the evidence indicates that it was simply a targeted fraud strategy
20 designed to prevent a particular type of claims fraud that originated from the prepaid
21 business based on investigations and analyses conducted by [REDACTED]
22 [REDACTED] See Mot. at 17. Moreover,
23 the *Gen. Star* case is plainly distinguishable from this one. There, a lower level
24 executive testified that an apex witness personally "issued the [company] guidelines"

25
26 ⁷ The Order stated that [REDACTED]
27 [REDACTED] (Order at 13), but this is incorrect. In fact, Mr. Fox testified that [REDACTED]
28 [REDACTED]. See Dkt. 464-53, Danitz Decl. Ex. 51, Fox Tr. 55:7-23 [REDACTED]

—i.e., the “corporate policy” at issue in that case—and there was evidence in the record that the apex witnesses personally authored memoranda regarding the guidelines. 210 F.R.D. 81, 82. There is no evidence here that either Mr. Moynihan or Mr. Montag ever issued or authored a single document regarding the CFF, or that they were involved in the creation or development of the fraud strategy.

• Finally, relying on a single email, the Order infers that BANA [REDACTED] [REDACTED] Order at 16. Setting aside whether this inference is a reasonable one (it is not—multiple BANA witnesses testified that BANA had no such strategy), the evidence that the Order relies on as a basis for its conclusion that Messrs. Moynihan and Montag had unique knowledge of this purported strategy supports no such conclusion. Plaintiffs offered no evidence that Mr. Moynihan or Mr. Montag were aware of [REDACTED] or long wait times prior to or during the Customer Service Class period, much less that they [REDACTED], and neither the Order nor Plaintiffs point to any. Rather, the Order cobbles together (1) a single email chain in which [REDACTED] [REDACTED] [REDACTED] [REDACTED], and (3) the fact that waiting time for the call center may have been long when the emails were sent to reach the completely unwarranted and clearly erroneous conclusion that somehow Mr. Moynihan made a “decision” to extend a vendor contract. *See* Order at 16. Similarly, the Order concludes that Mr. Montag [REDACTED] *Id.* at 17. But the only document the Order relies on for this conclusion shows on its face that [REDACTED] [REDACTED] Mot. at 19-20; Dkt. 464-45, Danitz Decl. Ex. 43. The Order’s reliance on Messrs. Moynihan’s or Montag’s presence at Board meetings is also erroneous (Order at 17-

1 18) because the record contains no evidence of [REDACTED]

2 [REDACTED]

3 These errors, individually and collectively, constitute clear error in the Court's
4 analysis and application of the apex doctrine's requirement that the executives are
5 subject to deposition only if they have "unique firsthand, non-repetitive knowledge
6 of the facts at issue in the case," and its conclusion that Mr. Moynihan and Mr.
7 Montag likely do. *In re Google*, 2011 WL 4985279, at *2. As the record
8 demonstrates, Plaintiffs have not established that Mr. Moynihan or Mr. Montag likely
9 or may have such knowledge (as they must). Rather, the record refutes that they
10 possessed the knowledge that Plaintiffs and the Court's Order inferred. BANA,
11 therefore, respectfully requests that the Court reconsider the findings in its Order and
12 hold that Plaintiffs should not be permitted to take the depositions of Mr. Moynihan
13 or Mr. Montag.

14 Alternatively, if the Court is not inclined to preclude Plaintiffs from taking the
15 depositions of both Mr. Moynihan and Mr. Montag (which it should do for the
16 reasons discussed above), the Court should at least reconsider its ruling and reduce
17 the number of depositions from two to one. The record shows that BANA's top
18 executive, Mr. Moynihan, had no direct oversight or reporting lines, and
19 comparatively less knowledge than [REDACTED] concerning the two
20 relevant issues. And, at a minimum, the Court should reduce the time for each
21 deposition by half, allowing no more than two hours for Mr. Moynihan and no more
22 than one hour for Mr. Montag, as Judge Berg initially proposed. *See* Riffie Decl.
23 ¶ 30.

24 **III. In the Alternative, If the Court Denies BANA's Motion, It Should**
25 **Certify the Order for Interlocutory Appeal Under Section 1292(b).**

26 Certification of an order for appeal is appropriate when (1) the order "involves
27 a controlling question of law"; (2) there is "substantial ground for difference of
28 opinion" on this question; and (3) "an immediate appeal may materially advance the

ultimate termination of the litigation.” 28 U.S.C. § 1292(b). Here, all three prerequisites are satisfied. Certification will allow the Ninth Circuit to review controlling questions of law about the standard required for an apex deposition—particularly where plaintiffs seek punitive damages under California law. There is a substantial debate over those questions among district courts in this Circuit, and among other circuits; allowing this appeal would enable the Ninth Circuit to provide much-needed guidance to courts and litigants alike. Reversal of the Order’s determination on these questions may also advance the termination of this litigation to the extent it would allow 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. Further, the Supreme Court has recognized that “district courts should not hesitate to certify an interlocutory appeal” of a discovery issue where the “ruling [below] involves a new legal question or is of special consequence.” *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 111 (2009). This is such a case.

A. The Order involves controlling questions of law on the standard for an apex deposition and courts are divided on those questions.

As demonstrated above (at 3-8), BANA has identified multiple controlling questions of law—including but not limited to (1) which party bears the burden when a party seeks an apex deposition; (2) whether an apex deposition requires that the apex deponent possess uniquely relevant information; (3) whether seeking punitive damages under California law suffices for an apex deposition; and (4) whether the party seeking to preclude the deposition must show specific prejudice to the witness. At a minimum, as this Court has acknowledged, the Ninth Circuit has not spoken directly to or provided clear guidance on the apex doctrine. Certifying these issues, and others, would provide the Ninth Circuit with the opportunity to articulate its view of the apex doctrine.

As the Order recognized, “the Ninth Circuit has not yet endorsed the [apex] doctrine.” Order at 6. But there is widespread agreement among the district courts of

1 this Circuit that apex depositions require special justification, even as those district
2 courts—and other circuits—disagree on some of the relevant particulars of the
3 doctrine. For example, district courts in this Circuit are divided among who bears the
4 burden on an apex deposition dispute. The majority of courts agree that once the
5 resisting party establishes that the witness is sufficiently senior to warrant apex
6 protection, the burden shifts to the requesting party to establish that the apex
7 doctrine’s two prongs have been satisfied. At the same time, other district courts—
8 including this Court—use the default burden allocation under Fed. R. Civ. P. 26(c)
9 even in the apex context, and place the burden on the moving party. *See supra* at 3-
10 4. The most recent articulations from the Ninth Circuit on the issue of executive
11 depositions come from *Blankenship* and *Anderson*, which were decided in 1975 and
12 1976, respectively, and do not articulate any meaningful standard for district courts
13 to apply. *See supra* at 7. The Ninth Circuit should have the opportunity to articulate
14 its view on the doctrine, particularly given its interaction with the Order’s
15 interpretation of California’s punitive damages statute, and the differing views of
16 other Courts of Appeals on the doctrine, as explained below.

17 Whether or not a high-level executive is subject to deposition should not
18 depend on the jurisdiction where the plaintiff elects to bring suit. But that is exactly
19 the current state of the law, with certain courts applying a “rebuttable presumption”
20 that the deposition should not be allowed absent a clear showing of necessity, and
21 others first requiring the party resisting the deposition to make a specific showing of
22 hardship. For example, the Fourth Circuit recently noted that the “‘apex doctrine’ has
23 been cited for supporting a ‘rebuttable presumption that the deposition of a high-
24 ranking corporate executive . . . constitutes good cause for a protective order as an
25 annoyance or undue burden within the meaning of Federal Rule of Civil Procedure
26 26(c)(1).’” *Kendrick v. Carter Bank & Tr., Inc.*, 2025 WL 879703, at *3 n.5 (4th Cir.
27 Mar. 21, 2025) (unpublished) (quoting *Trs. of Purdue Univ. v. Wolfsped, Inc.*, 2023
28 WL 4564558, at *4 (M.D.N.C. July 17, 2023)). Similarly, the Fifth Circuit has held

1 that it is an abuse of discretion for a district court to “compel[] apex testimony absent
2 extraordinary circumstances,” and that “apex testimony is justified only in the ‘rarest
3 of cases.’” *In re Paxton*, 60 F.4th 252, 258 (5th Cir. 2023). On the other end of the
4 spectrum, the Sixth Circuit requires a resistant apex deponent to show “one of the
5 harms listed in Rule 26(c)(1)(A) . . . in order to warrant a protective order.” *Serrano*
6 *v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2012). The Ninth Circuit should be
7 afforded the opportunity to weigh in on this issue and provide clear guidance to
8 litigants in this Circuit.

9 Further, Plaintiffs claim they need deposition testimony from Messrs.
10 Moynihan and Montag “to support an award of punitive damages.” Order at 10.
11 Plaintiffs’ request is based on the Court’s earlier determination that evidence
12 regarding “the motive, intent or knowledge to support punitive damages . . . can only
13 be obtained by [the executives],” because of the California statute’s requirement that
14 a corporate defendant is liable for punitive damages only where the “oppression,
15 fraud, or malice” at issue is “perpetrated, authorized, or knowingly ratified by *an*
16 *officer, director, or managing agent* of the corporation.” Order at 3, 10 (citing Dkt.
17 298 at 11 & Cal. Civ. Code § 3294(b)) (emphasis added). Thus, the Order could allow
18 for executive deposition testimony every time a plaintiff seeks punitive damages
19 from a corporation. This cannot be the case, and the Ninth Circuit should have the
20 opportunity to clarify.

21 **B. An immediate appeal of the Order may materially advance the**
22 **ultimate termination of this litigation.**

23 By Plaintiffs’ own acknowledgement, resolution of this dispute could
24 materially advance termination of this litigation. As the Court is aware, during an
25 informal discovery conference, Plaintiffs’ counsel candidly told Judge Berg that top
26 executive emails were necessary because “they resolve cases,” “they settle cases.”
27 Mot. at 2 (quoting Dkt. 209-1 ¶ 10). This is all the more true for the apex depositions,
28 which Plaintiffs mean to use to push BANA into a settlement of this case. The

1 Supreme Court has held that “district courts should not hesitate to certify” appeals of
2 discovery orders of this sort even though the orders are not themselves dispositive.
3 *See Mohawk*, 558 U.S. at 111.

4 Indeed, Courts of Appeals have specifically demonstrated the importance of
5 appellate review of apex deposition disputes by granting mandamus petitions even
6 when district courts have not certified the issues for appeal. *See, e.g., In re U.S. Dep’t*
7 *of Educ.*, 25 F.4th 692, 705 (9th Cir. 2022) (granting mandamus petition, and noting
8 that harm from having to sit for the deposition is not remediable on appeal from final
9 judgment, even if the evidence is excluded); *see also In re F.D.I.C.*, 58 F.3d 1055,
10 1060 (5th Cir. 1995) (granting mandamus petition to relieve apex deposition); *In re*
11 *Off. of the Utah Att’y Gen.*, 56 F.4th 1254, 1264 (10th Cir. 2022) (same).

12 **IV. The Court Should Stay the Depositions Pending Resolution of This**
13 **Motion and BANA’s Efforts to Seek Appellate Review, If Permitted.**

14 In addition to the relief sought above, BANA respectfully requests that the
15 Court stay the depositions pending resolution of this Motion and appellate review of
16 this issue, if permitted. BANA would be irreparably prejudiced if the depositions
17 proceed before the Order is ultimately reversed or modified, either on reconsideration
18 or by the Ninth Circuit. Once the depositions are taken, the prejudice to BANA and
19 the executive deponents cannot be undone, and any relief would be moot. *See In re*
20 *U.S. Dep’t of Educ.*, 25 F.4th at 705. There is no recourse, and no way to “unring the
21 bell of disclosure” after the fact. *Forrest v. Facebook, Inc.*, 2023 WL 1931356, at *2
22 (N.D. Cal. Jan. 18, 2023) (granting stay pending appeal of discovery order to district
23 court); *Skillz Platform Inc. v. AviaGames Inc.*, 2023 WL 7283886, at *2 (N.D. Cal.
24 Nov. 2, 2023) (same). If these depositions go forward, BANA would be “effectively
25 deprived of its ability to seek review of the Discovery Order” and “effectively denied
26 the relief sought in [this] motion” or appellate review. *Canchola v. Allstate Ins. Co.*,
27 2025 WL 1377817, at *3 (C.D. Cal. Apr. 17, 2025) (staying enforcement of discovery
28 order pending appeal to district court); *Jones v. PGA Tour, Inc.*, 2023 WL 2541326,

1 at *2 (N.D. Cal. Mar. 15, 2023) (same).

2 Against the plain irreparable prejudice to BANA, Plaintiffs have shown no
3 imminent need for this deposition testimony. The depositions, should they take place,
4 “shall be limited to punitive damages.” Order at 19. Plaintiffs seek punitive damages
5 for common law claims (*see* Opp. at 1) that are unlikely to survive summary
6 judgment, and are ancillary to their primary cause of action, for violation of EFTA,
7 for which punitive damages are *not* available. The issue of punitive damages and any
8 deposition testimony Plaintiffs obtain regarding those damages has nothing to do
9 with Plaintiffs’ primary claim, and is only potentially relevant *if* the applicable claims
10 survive summary judgment, and *if* Plaintiffs prove liability, which they have not yet
11 done and may never do. It is for this very reason that courts in this Circuit have stayed
12 “discovery on issues solely pertaining to punitive damages,” even longer, including
13 “pending resolution of dispositive motions.” *See Schmitz v. Asman*, 2023 WL
14 3224474, at *3 (E.D. Cal. May 3, 2023); *see also Wood v. McEwen*, 644 F.2d 797,
15 802 (9th Cir. 1981) (finding a stay an appropriate exercise of discretion absent
16 articulation of prejudice by opposing party). The Court should thus exercise its
17 discretion and stay enforcement of the Order pending resolution of this Motion or
18 appellate review of this issue.

19 CONCLUSION

20 For the foregoing reasons, and with good cause shown, BANA respectfully
21 requests that the Court reconsider its Order Granting In Part and Denying In Part
22 Defendant’s Motion for Protective Order, and issue a revised order precluding
23 Plaintiffs from taking the depositions of Messrs. Moynihan and Montag. In the
24 alternative, if the Court were to deny BANA’s motion for reconsideration, BANA
25 respectfully requests that the Court certify its Order for appeal, and stay the
26 depositions pending resolution of this Motion and any appellate review thereof.

27 Dated: June 26, 2025

Respectfully submitted,

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