

1 QUINN EMANUEL URQUHART
& SULLIVAN, LLP
2 Kevin P.B. Johnson (Bar No. 177129)
kevinjohnson@quinnemanuel.com
3 Todd M. Briggs (Bar No. 209282)
toddbriggs@quinnemanuel.com
4 Brice C. Lynch (Bar No. 288567)
bricelynch@quinnemanuel.com
5 555 Twin Dolphin Drive, 5th Floor
Redwood Shores, California 94065
6 Telephone: (650) 801-5000
Facsimile: (650) 801-5100

QUINN EMANUEL URQUHART
& SULLIVAN, LLP
James R. Asperger (Bar No. 83188)
jimasperger@quinnemanuel.com
Rachael McCracken
rachaelmccracken@quinnemanuel.com
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017-2543
Telephone: (213) 443-3000
Facsimile: (213) 443-3100

7 QUINN EMANUEL URQUHART
& SULLIVAN, LLP
8 Eric Huang (*pro hac vice*)
erichuang@quinnemanuel.com
9 51 Madison Avenue, 22nd Floor
New York, New York 10010
10 Telephone: (212) 849-7000
11 Facsimile: (212) 849-7100

12 Attorneys for Plaintiffs

13 NANTWORKS, LLC and NANT HOLDINGS IP, LLC

14
15 UNITED STATES DISTRICT COURT
16 FOR THE CENTRAL DISTRICT OF CALIFORNIA
17

18 NANTWORKS, LLC, a Delaware
limited liability company, and NANT
19 HOLDINGS IP, LLC, a Delaware
limited liability company,

20 Plaintiffs,

21 vs.

22 BANK OF AMERICA
23 CORPORATION, a Delaware
corporation, and BANK OF
24 AMERICA, N.A., a national banking
association,

25 Defendants.
26

CASE NO. 2:20-cv-7872-GW-PVC

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' REQUEST FOR
EVIDENTIARY RULING ON
SPECIFIC OBJECTIONS**

Hon. George H. Wu

Hearing Date: June 20, 2024
Hearing Time: 8:30 a.m.
Courtroom: 9D

28

1 Plaintiffs submit the following response to Defendants’ “specific objections”
 2 to the evidence Plaintiffs submitted in support of the Opposition to Defendants’
 3 Corrected Motion for Summary Judgment as to Plaintiffs’ Breach of Contract Claim
 4 and Plaintiffs’ Opposition to Defendants’ Consolidated Motion for Partial Summary
 5 Judgment of Noninfringement and No Willfulness.

6 When faced with an objection to evidence on summary judgment, the court
 7 “does not focus on the admissibility of the evidence’s form” but instead “on the
 8 admissibility of its contents.” *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir.
 9 2003). Thus, “the nonmoving party need not produce evidence in a form that would
 10 be admissible at trial in order to avoid summary judgment.” *Id.* (citing *Fed. Deposit*
 11 *Ins. Corp. v. N.H. Ins. Co.*, 953 F.2d 478, 485 (9th Cir. 1991) (permitting
 12 consideration of contents in a diary given that they “could be admitted into evidence
 13 at trial in a variety of ways,” including refreshing recollection or as reading it in as a
 14 recorded recollection). Because the vast majority of Bank of America’s objections
 15 relate to the admissibility of the evidence’s *form* rather than *substance*, they should
 16 be rejected.

<u>Evidence Objected To</u>	<u>Grounds for Objection</u>
18 Exhibit N to Declaration of 19 Brice Lynch in Support of 20 Plaintiffs’ Opposition to 21 Defendants’ Corrected 22 Motion for Summary 23 Judgment as to Plaintiffs’ 24 Breach of Contract Claim 25 (Dkt. 495-14) (not cited in 26 Plaintiffs’ Opp’n). 27 28	Lacks Foundation/Authentication (FRE 901 and 902): Plaintiffs have not laid a proper foundation for admission of the document they claim is a Seeking Alpha document purporting to be a transcript of an earnings call for Bank of America Corporation on April 16, 2019, including establishing its authenticity. The document on its face does not appear to be from a Seeking Alpha website. There is no indication of how the transcript was created or certification by the third party the transcription is true and accurate.

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A party offering documentary evidence may establish its foundation by attaching an affidavit by a custodian of records or anyone qualified to speak from personal knowledge that the documents are what they purport to be (e.g., business records). *See Orr v. Bank of America, NT & SA*, 285 F3d 764, 777-778 (9th Cir. 2002). Plaintiffs did not do that here. The Lynch Declaration does not satisfy FRE 602 because Mr. Lynch does not have personal knowledge of the documentary evidence.

Inadmissible Hearsay (FRE 802): In addition, even if authenticated, the document constitutes inadmissible hearsay, and plaintiffs have not demonstrated that any exception to the rule against hearsay applies.

“[H]earsay evidence in Rule 56 affidavits is entitled to no weight.” *Scosche Indus., Inc. v. Visor Gear Inc.*, 121 F3d 675, 681 (9th Cir. 1997); *Martin v. John W. Stone Oil Distributor, Inc.*, 819 F.2d 547, 549 (5th Cir. 1987) (hearsay evidence in depositions or discovery materials are not proper items for consideration by the court when ruling on a summary judgment motion); *Macuba v. Deboer*, 193 F.3d 1316, 1322–25, (11th Cir. 1999) (trial court erred by considering inadmissible hearsay when deciding a motion for summary judgment).

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Plaintiffs' Response

Exhibit N is the transcript of a Bank of America earnings call from 2019 that contains party admissions from Bank of America and was authenticated by its Rule 30(b)(6) designee. Bank of America objected on authenticity and hearsay grounds. Both objections should be denied.

First, to the extent Bank of America contests the authenticity of the earnings call, it should produce a version from its files. Bank of America failed to produce a copy in discovery despite it being a statement about the cost savings Bank of America attributed to mobile check deposit. The same document was introduced as Exhibit 242 at the deposition of Bank of America's Rule 30(b)(6) designee, Jeffrey Eisenhuth, who did not dispute its authenticity. Eisenhuth Tr. at 161:22-162:2 ("Q: Is this the transcript from Bank of America's quarter one 2019 earnings call? ... THE WITNESS: The heading says that. So I assume it is."). Critically, Bank of America has not actually contested that the contents of the document reflect statements made by its executives on its public earnings call. *See Hardy v. 3 Unknown Agents*, 690 F. Supp. 2d 1074, 1088 (C.D. Cal. 2010) (noting that courts "criticiz[e] authentication objections on summary judgment motions 'where the objecting party does not contest the authenticity of the evidence submitted but nevertheless makes an evidentiary objection based on purely procedural grounds.'") (internal citation omitted). Regardless, "transcripts of [a company's] earnings calls . . . are proper subjects of judicial notice." *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045, 1058 (N.D. Cal. 2012); *see also Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1064 n.7 (9th Cir. 2008) (holding that it "was proper" for the district court to take judicial notice of publicly available financial documents and SEC filings); *Waterford Twp. Police v. Mattel*,

1 *Inc.*, 321 F. Supp. 3d 1133, 1143 (C.D. Cal. 2018), *aff'd sub nom. Castro v. Mattel,*
 2 *Inc.*, 794 F. App'x 669 (9th Cir. 2020) (granting request for judicial notice of
 3 transcripts from earnings calls and SEC filings and noting “[i]t is appropriate for the
 4 Court to take judicial notice of such documents”); *Shenwick v. Twitter, Inc.*, 282 F.
 5 Supp. 3d 1115, 1124 (N.D. Cal. 2017) (granting judicial notice of a transcript of
 6 Twitter’s quarterly earnings call and other publicly available financial documents).

7
 8 **Second**, the earnings call transcript qualifies as an admission of a party opponent.
 9 Fed. R. Evid. 801(d). The transcript clearly attributes statements to Bank of
 10 America executives, including its Chief Executive Officer and Chief Financial
 11 Officer. There is also an additional indicia of reliability for the statements in this
 12 earnings call transcript because Bank of America’s Rule 30(b)(6) designee provided
 13 testimony that he had no reason to dispute statements therein. *Id.* at 164:18-20
 14 (testifying Bank of America sought to make accurate statements to investors),
 15 166:9-11 (testifying has never seen a retraction or correction from Bank of
 16 America’s CEO). Given that the contents of the evidence are clearly admissible, the
 17 court may properly consider it when evaluating a motion for summary judgment.
 18 *See Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003).

20 Exhibit O to Declaration of 21 Brice Lynch in Support of 22 Plaintiffs’ Opposition to 23 Defendants’ Corrected 24 Motion for Summary 25 Judgment as to Plaintiffs’ 26 Breach of Contract Claim 27 28	Lacks Foundation/Authentication (FRE 901 and 902): Plaintiffs have not laid a proper foundation for admission of the document they claim is a Seeking Alpha document purporting to be Bank of America Corporation’s 2015 Annual Report, including establishing its authenticity. There is no indication on the face of the document that it was obtained through Seeking Alpha. A party offering documentary
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