Exhibit E

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BONA FIDE CONGLOMERATE, INC., Plaintiff, v. SOURCEAMERICA; PRIDE INDUSTRIES, INC.; KENT, CAMPA & KATE, INC.; SERVICESOURCE, INC.; JOB OPTIONS, INC.; GOODWILL INDUSTRIES OF SOUTHERN CALIFORNIA; LAKEVIEW CENTER, INC.; THE GINN GROUP, INC.; CORPORATE SOURCE, INC.; CW RESOURCES; NATIONAL COUNCIL OF SOURCEAMERICA EMPLOYERS; and OPPORTUNITY VILLAGE, INC., Defendants.	Case No.: 3:14-cv-00751-GPC-AGS **ORDER DEFERRING RULINGS ON MOTIONS TO FILE DOCUMENTS UNDER SEAL [ECF Nos. 544, 547, 551, 556, 577, 580]**
SOURCEAMERICA Counterclaimant, v. BONA FIDE CONGLOMERATE, INC.; and RUBEN LOPEZ, Counterdefendants.	

Before the Court are six Motions to Seal filed by SourceAmerica and BonaFide in connection with the parties' motions for summary judgment and motions to exclude expert testimony, and the responses thereto. (ECF Nos. 544, 547, 551, 556, 577, and 580.) These motions are just the most recent in the parties' lengthy litigation. For the reasons set forth below, the Court defers ruling on the motions in order to provide SourceAmerica with one final opportunity to articulate detailed and particularized bases to justify its requests to withhold such large amount of court filings from the public.

I. BACKGROUND

During the four-year pendency of this case, the parties have sought to protect substantial portions of information from disclosure. Consistent with that motive, the parties have submitted, and Magistrate Judge Andrew Schopler had approved, an amended protective order specifying that the parties may designate items produced in discovery as confidential. (ECF No. 483) The terms of that protective order also provide that no materials bearing a confidential designation can be publicly filed to the docket; the party seeking to file any such material must seek permission from the Court to file the material under seal, and "abide by applicable law" in making its request for sealing. (ECF No. 482-1, at 10–11.)

On July 18, 2018, the Court issued an order granting the parties' requests to file redacted versions of their summary judgment motions, materials offered in support of *Daubert* motions, and various related exhibits. (ECF No. 533.) At that time, the Court found compelling reasons to seal information related to a confidential settlement agreement, information related to allegedly surreptitiously recorded conversations, and procurement/source-selection materials ostensibly protected by federal procurement regulations.

On August 3, 2018, Bona Fide filed two motions (ECF Nos. 544 and 547), one seeking to file under seal portions of Bona Fide's Opposition to SourceAmerica's motion, (ECF No. 543), and the other seeking to file under seal portions of its Opposition to SourceAmerica's Motion to Exclude Expert Testimony of Kevin M. Jans (ECF No. 546). On the same day, SourceAmerica filed its own motion, (ECF No. 551) seeking to file under seal portions of its Opposition to Bona Fide's Motion to Exclude Expert Testimony of Mary Karen Wills, (ECF No. 550), and portions of its Opposition to Bona Fide's Motion for Summary Judgment (ECF. No 549). On August 5, 2018, Bona Fide filed another motion (ECF No. 556), seeking to seal portions of its Opposition to SourceAmerica's Motion for Summary Judgment (ECF Nos. 555 and 557).

The only basis Bona Fide offered for sealing was SourceAmerica's designation of the information as confidential pursuant to the protective order (ECF No. 544, at 3; ECF No. 547, at 2; ECF No. 556, at 2.) Thus, although Bona Fide technically moved to seal, the real proponent for sealing was SourceAmerica. SourceAmerica's own motions to file information under seal relied on the California Invasion of Privacy Act ("CIPA") and the Procurement Integrity Act ("PIA"), including its implementing regulations, as compelling reasons for sealing information. (ECF No. 551, at 12–15.) In response to those motions, Bona Fide, on August 6, 2018, in an apparent break with its previous requests for sealing, raised the argument that neither the PIA, the Federal Acquisition Regulations (the "FAR"), nor the Trade Secrets Act require sealing post-award proposal, bid, or source-selection information. (ECF No. 562, at 7–11.)

On August 14, 2018, the Court deferred ruling on the four aforementioned motions to seal. (ECF No. 570, at 9.) Specifically, the Court found that SourceAmerica's designation of certain materials as "confidential," standing alone, was not a compelling reason for sealing. (*Id.* at 6.) The Court explained that it had reviewed the documents marked for sealing and was skeptical that all of the redacted materials actually pertained to confidential information; rather, it was of the belief that the proffered redactions/sealing requested was overbroad. The Court also took note of Bona Fide's position that there was no basis to justify sealing post-award procurement information. (*Id.* at 7.) Rather than denying sealing outright, the Court ordered SourceAmerica to explain, in further briefing, the specific need to seal the information and to respond to Bona Fide's arguments against sealing. (*Id.* at 9.) Further, the Court instructed that any future sealing motions based on an opposing party's designation of information as confidential must be accompanied by a written explanation from the opposing party of why that information should be sealed. (*Id.* at 8.)

On August 24, 2018, Bona Fide filed a fifth motion to seal based on SourceAmerica's designation of the information as confidential and included the necessary written explanation by SourceAmerica. (ECF No. 577.) In its written explanation, SourceAmerica asserted that some redacted portions should be sealed because they disclosed terms and information from a confidential settlement agreement between SourceAmerica and its former counsel, Jean Robinson. (ECF No. 577-1, at 16–18.) SourceAmerica asserted that other portions should be sealed because they contained information obtained through surreptitious recordings in violation of CIPA. (*Id.* at 14–15.) Bona Fide, however, disputed that these bases were compelling reasons. (ECF No. 577, at 3.) Bona Fide contended that CIPA was not a ground for sealing because CIPA does not protect subsequent dissemination of the contents. (*Id.* at 4.) Bona Fide also disputed sealing the boilerplate terms and public statements of a confidential settlement agreement. (*Id.* at 5–6.)

On August 24, 2018, SourceAmerica filed its sixth motion to seal, wherein SourceAmerica sought to seal additional post-award procurement information and information relating to conversations recorded in violation of CIPA. (ECF No. 580.)

On August 28, 2018, SourceAmerica filed its further briefing in support of sealing, pursuant to this Court's order. (ECF No. 584.) In its briefing, SourceAmerica responded to Bona Fide's legal assertion that the PIA does not protect post-award procurement information. (*Id.* at 5–9.) SourceAmerica then explained generally what portions were protected procurement information and what portions were protected on a separate basis. (*Id.* at 9–16.) Critically, SourceAmerica did not contend that all of the procurement information at issue was confidential nor did it explain any specific harm that would result from the disclosure of the relevant terms of the settlement agreement.

II. LEGAL STANDARD

Under common law and the First Amendment, there is a presumptive right of public access to court records. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597

(1978). "Unless a particular court record is one traditionally kept secret, a strong presumption in favor of access is the starting point." *Kamakana v. City & Cnty of Honolulu*, 447 F.3d 1172, 1178–80 (9th Cir. 2006) (citing *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)). The public's right of access is paramount, and can be overcome "only by an overriding right or interest 'based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1985)).

The party seeking to seal a judicial record bears the burden of articulating justifications that outweigh the historical right of access and the public policies favoring disclosure. *Kamakana*, 447 F.3d at 1178–79. Providing only "generalized reasons" for sealing without giving a "particularized reason as to why any particular [document] should be sealed" will not satisfy this high burden. *See United States ex. rel. Kelly v. Serco, Inc.*, No. 11-cv-2975, 2014 WL 4988462, at *17 (S.D. Cal. Oct. 6, 2014). Consistent with the Supreme Court's directive that restrictions on public disclosure must be minimized, courts have counseled that "counsel should not attempt to seal entire pleadings or declarations without a particularized showing explaining why the request could not be more narrowly tailored." *Pabst v. Maxtor Corp.*, No. C. 05-80042 JSW, 2005 WL 578107, at *1 (N.D. Cal. Mar. 10, 2005).

In non-dispositive motions, or where the motion is only tangentially related to the merits of the case, only a "good cause" showing is needed to seal information. *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1099 (9th Cir. 2016). However, parties seeking to seal documents in a dispositive motion must meet the high threshold requiring "compelling reasons supported by specific factual findings that outweigh . . . the public policies favoring disclosure." *Kamakana*, 447 F.3d at 1178–80.

The mandatory balancing test is fact-specific, but "[i]n general, 'compelling reasons' . . . exist when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." *Kamakana*, 447 F.3d at 1179 (citing *Nixon*, 435 U.S. at 598). The Ninth Circuit has adopted the definition of 'trade secrets' set forth in the Restatement of Torts, i.e., that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972) (quoting RESTATEMENT (FIRST) OF TORTS § 757, cmt. b (1939)).

This higher threshold for dispositive motions supports the "long held interest 'in ensuring the public's understanding of the judicial process and of significant public events.'" *See Ctr. For Auto Safety*, 809 F.3d at 1098 (citation omitted). Consequently, the Court will not permit overbroad redactions which would result in a "nearly incomprehensible public document." *See Allied Technology Group, Inc. v. United States*, 94 Fed. Cl. 16, 23 n.1 (2010).

III. DISCUSSION

The Court has reviewed the supplemental brief by SourceAmerica in defense of sealing and finds it insufficient to warrant sealing. Rather than denying the sealing requests outright, however, the Court will afford SourceAmerica one last opportunity to address the deficiencies outlined in this order.

SourceAmerica offers four reasons for filing substantial portions of information under seal, and states in general terms why those rationales extend to the many documents which are lodged under seal on the docket. First, SourceAmerica contends that the Court's previous decisions on sealing should inform the current requests to seal. Second, SourceAmerica contends that the PIA prohibits post-award disclosure of its source selection information. Third, SourceAmerica contends that CIPA protects the contents of surreptitiously-recorded conversations from public disclosure. Finally, SourceAmerica contends that the terms of its confidential settlement agreement with its former counsel, Jean Robinson, are protected because of the agreement's inherent confidentiality.

Not all of these rationales present "compelling reasons" for sealing. As detailed below, the Court is not persuaded that the applicable regulations mandate nondisclosure of procurement/source-selection materials once the government has made its award selection. Nor is it convinced that CIPA can justify the wholesale exclusion of conversations, even if surreptitiously recorded. And, irrespective of whether SourceAmerica's rationales for sealing are viable, it has not narrowly-tailored its requests to those compelling reasons and demonstrated that its interests outweigh the public's right of access.

For these reasons and more, the Court will not be granting the pending requests to seal at this juncture; it will instead defer ruling. Given the centrality of the information submitted under seal to the substantive motions pending before the Court, and the fact that the Court has *already given* SourceAmerica a second chance to justify its sealing requests (*see* ECF No. 570), the Court is prepared to publish the materials currently lodged under seal directly to the docket. Recognizing, however, that at least some of the materials might contain sealable information, the Court will provide SourceAmerica with one final opportunity to specify, with particularity, which portions of which documents must be withheld from the public view, and under what rationale.

In light of the parties' disagreements, the Court finds it expedient to provide some guidance on which of the four proffered rationales provide compelling reason for sealing.

A. Prior Decisions to Seal Do Not Present Compelling Justifications to Seal

SourceAmerica relies on this Court's prior orders, which have granted motions to seal some of the information presently proffered under seal, as a compelling reason to seal such information again. This argument is unavailing.

The Court is not precluded from requiring SourceAmerica to demonstrate compelling need anew, since there are changed circumstances, and because sealing the large number of documents implicated in the six sealing motions may result in manifest injustice to the public's right of access. *See Kamakana*, 447 F.3d at 1186 (courts are not precluded from exercising comprehensive review of previously-sealed information);

United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) ("A court may have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result.")

The Court previously found that sealing was appropriate based upon SourceAmerica's representation that applicable federal regulations, CIPA, and confidential nature of the settlement agreement cited by the parties. (ECF No. 533.) The Court finds it necessary to revisit its previous holding in light of the changed circumstances presented by Bona Fide's August 6, 2018 arguments against sealing (ECF No. 562.) Bona Fide had not opposed the previous requests for sealing. Thus, the Court did not have the benefit of adversarial briefing at the earlier juncture when it ruled on the sealing requests in that order. Here, however, the Court is presented with Bona Fide's persuasive arguments against sealing information post-award and must take them into account in evaluating the pending requests.

Moreover, the need for a closer scrutiny and a narrowly-tailored approach to sealing is especially crucial given the breadth of the parties' redactions and the nature of the motions implicated. *See, e.g.*, *Fujitsu Ltd. v. Belkin Int'l*, No. 10-CV-03972-LHK, 2012 WL 6019754, at *3 (N.D. Cal. Dec 3, 2012) (declining to seal an expert report and deposition which were crucial to a party's "allegations of patent infringement," since "the subject of th[o]se exhibits [were] highly relevant to the merits of the case").

The Court is being asked to rely, in large part, on sealed or heavily-redacted information for its dispositive rulings. The Court has already agreed to withhold from the public include large blocks of the parties' summary judgment motions, their separate statements of material facts, and the expert reports that their *Daubert* motions are based on. (ECF No. 533.) The Court is loath to proceed on an even more pockmarked record, and is wary of issuing orders on substantive motions that—by virtue of the extensive redactions requested—would effectively cripple the public's right of access to the judicial proceedings. The Ninth Circuit has emphasized that "the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the public's understanding of the judicial process and of significant public events," *Kamakana*, 447 F.3d at 1179 (citation and quotation marks omitted), and this Court will not shirk its duty to ensure the people's First Amendment right of access.

The Court holds that SourceAmerica cannot rely on the Court's previous orders to justify its present sealing requests.

B. Contractor Bids, Proposals, and Source Selection Information are Protected from Disclosure to the Extent that they Contain Trade Secrets.

Bona Fide contends that neither the PIA nor the FAR prohibit SourceAmerica from publicly disclosing contractor bid, proposal, or source selection information once the contract has been awarded. That is, Bona Fide argues that no applicable regulations require that post-award procurement information must be kept secret. SourceAmerica counters that the FAR prohibit disclosure of contractor bids, proposals, and source selection information after an award unless expressly authorized by the FAR. (ECF No. 580 at 9:14-10:6.) Noting the absence of any authorization of post-award disclosures in FAR § 3.104-4, SourceAmerica seeks to seal all post-award procurement information.

For the reasons set forth below, the Court finds compelling reasons to seal post-award contractor bids, proposals and source selection information, but only to the extent that the information contains trade secrets or confidential business information.

1. The PIA Expressly Prohibits Only Pre-award Disclosure.

The relevant PIA provision provides: "Except as provided by law, a person described in paragraph (3) shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." 41 U.S.C. § 2102(a)(1). This provision broadly prohibits pre-award disclosures by any government official, person acting on behalf of the government, or anyone who discovers the protected information in the course of their office, employment, or contractual relationship. *See id.* § 2102(a)(3).

2. FAR §§ 3.104-2 and 3.104-4 Prohibit Post-award Disclosure of Trade Secrets and Procurement Information Pertaining to Another Procurement.

As Bona Fide points out and SourceAmerica concedes, PIA does not similarly prohibit the disclosure of post-award disclosures. It is, in fact, silent with respect to post-award disclosures.

Under the authority of 41 U.S.C. § 1303, however, the FAR provide additional regulations governing pre-award and post-award disclosures. These prohibitions are codified at FAR § 3.104, which governs procurement integrity. FAR § 3.104-4(a) contains a prohibition similar to that in the PIA: "Except as specifically provided for in this subsection, no person or other entity may disclose contractor bid or proposal information or source selection information to any person other than a person authorized . . . by the agency head or the contracting officer to receive such information." Unlike the PIA, however, FAR § 3.104-4(a) does not expressly limit this prohibition to pre-award disclosures.

SourceAmerica contends that the absence of any distinction between pre-award or post-award disclosures in section 3.104-4 results in a general prohibition on all disclosures, including post-award disclosures. However, the remainder of section 3.104-4 suggests otherwise. Subsection (e) enumerates the specific exceptions to the general prohibition against disclosure in (a) as follows:

> This section does not restrict or prohibit –
>
> (1) A contractor from disclosing its own bid or proposal information or the recipient from receiving that information;
>
> (2) The disclosure or receipt of information, not otherwise protected, relating to a Federal agency procurement after it has been canceled by the

> Federal agency, before contract award, unless the Federal agency plans to resume the procurement;
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> (3) Individual meetings between a Federal agency official and an offeror or potential offeror for, or a recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal information or source selection information does not occur; or
>
> (4) The Government's use of technical data in a manner consistent with the Government's rights in the data.

FAR § 3.104-4(e).

If post-award disclosures could only be made where specifically provided in subsection (e), post-award protection would be broader than pre-award protection. While (e)(1), (e)(3), and (e)(4) contain general permissions for disclosures, subsection (e)(2) provides one additional pre-award exception permitting disclosure of information where a procurement has been cancelled with no plans for renewal. Subsection (e)(2) permits the disclosure of information, not otherwise protected, on a cancelled procurement. Like a cancelled procurement, the procurement terminates when a contract is awarded. Thus, applying a general prohibition on post-award information would result in unjustifiably broader post-award protection.

Subsection (f) dispels any remaining doubt whether post-award disclosures are included in the general prohibition of subsection (a), by clarifying that section 3.104-4 does not authorize the following:

> (1) The withholding of any information pursuant to a proper request from the Congress, any committee or subcommittee thereof, a Federal agency, the Comptroller General, or an Inspector General of a Federal agency, except as otherwise authorized by law or regulation. Any release containing contractor bid or proposal information or source selection information must clearly identify the information as contractor bid or proposal information or source selection information related to the conduct of a Federal agency procurement and notify the recipient that the disclosure of the information is restricted by 41 U.S.C. chapter 21;
>
> (2) The withholding of information from, or restricting its receipt by, the

> Comptroller General in the course of a protest against the award or proposed award of a Federal agency procurement contract;
>
> (3) The release of information after award of a contract or cancellation of a procurement ***if such information is contractor bid or proposal information or source selection information that pertains to another procurement***; or
>
> (4) The disclosure, solicitation, or receipt of bid or proposal information or source selection information after award ***if disclosure, solicitation, or receipt is prohibited by law***. (See 3.104-2(b)(5) and subpart 24.2.)

FAR § 3.104-4(f) (emphasis added).

Thus, subsection (f) compels the conclusion that section 3.104-4, like its statutory parent, generally prohibits only pre-award disclosures. Subsection (f)(3) and (f)(4) specifically provide that section 3.104-4 does not authorize post-award disclosures that pertain to another procurement or post-award disclosures that are prohibited by law. Reading section 3.104-4(a) to include post-award disclosures would render subsections (f)(3) and (f)(4) superfluous, since the starting point would be that all post-award disclosures are prohibited unless specifically permitted by the subsection and no such permission exists. Instead, a more sensible reading is that section 3.104-4 generally *prohibits pre-award disclosures*, subject to limited exceptions articulated in 3.104-4(f)(1-2), and *generally allows post-award disclosure* except when either subsection (f)(3) or (f)(4) applies.

This is not to say that a party who seeks to protect information post-award is without recourse to do so. As referenced in section 3.104-4(f)(4), section 3.104-2 places general restrictions on the release of trade secrets at any time. *See* FAR § 3.104-2(b)(5) ("Release of information both before and after award (see 3.104–4) may be prohibited by the Privacy Act (5 U.S.C. 552a), the Trade Secrets Act (18 U.S.C. 1905), and other laws."). Thus, pursuant to section 3.104-2 (and pursuant to the Ninth Circuit's definition of trade secrets in *Bunker*, 453 F.2d at 1009), SourceAmerica can seek to seal any post-award information so long as such information contains trade secrets. But, unless prohibited by law (whether a trade secret or not) or pertaining to another on-going procurement, FAR § 3.104-4 does not protect post-award disclosure of procurement information.

While the parties debate the provisions of Part 15 of the FAR in support of their respective positions, the Court does not find Part 15 relevant to the case at hand. Part 15 governs only the process of contracting by negotiation. Subpart 15.5 addresses specific contexts, inapplicable to this litigation, in which disclosure issues concerning contractor bid, proposal, or source selection may arise. Specifically, FAR § 15.503(b) governs post-award notices to unsuccessful offerors, requiring certain disclosures be made to the offerors and prohibiting others.[1] Other provisions in Subpart 15.5 require more limited disclosures in the pre-award context. *See* FAR § 15.503(a); *id.* § 15.505. However, these provisions concern only discussions between SourceAmerica and an unsuccessful offeror. Indeed, Subpart 15.5 provides detailed procedures for the negotiation process applying the general disclosure safeguards of section 3.104-4 and offers no additional protection beyond section 3.104-4. Thus, the disclosure requirements and prohibitions contained in Subpart 15.5 are inapplicable to the Court's decision to seal.

3. The Court takes a Narrow View of Post-award Disclosure Protection.

Bona Fide contends that SourceAmerica's arguments lack merit because the Court of Federal Claims does not seal or redact information for NPAs' proposals or SourceAmerica's evaluations in its post-award decisions. Bona Fide's reliance on that court's case law proves only that there is a general proclivity toward disclosure, but does not indicate that disclosure should apply where trade secrets are implicated.

As the Court of Federal Claims has made clear, "the Act prohibits not *all* disclosure of procurement-related information, but rather, disclosure '*other than as provided by law*.'" *Pikes Peak Family Housing, LLC v. U.S.*, 40 Fed. Cl. 673, 680

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[1] SourceAmerica relies on section 15.503(b)(v), which provides: "In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror."

(1998). As noted above, post-award procurement information is subject to less protection than pre-award procurement information. The cases Bona Fide cite do not appear to include any trade secrets and instead disclose only general procurement information. *See Bona Fide Conglomerate, Inc. v. United States*, 96 Fed. Cl. 233, 241–42 (2010); *Akima Intra-Data, LLC v. United States*, 119 Fed. Cl. 520, 526 (2014) (disclosing general conclusions about offerors' qualifications); *Sys. Application & Techs., Inc. v. United States*, 107 Fed. Cl. 795, 804-06 (2012) (disclosing questions asked of offerors in assessing the offerors' suitability). The only case that might have involved the disclosure of an NPA's trade secrets revealed only the protesting bidder's information. *Nat'l Telecommuting Inst., Inc. v. United States*, 123 Fed. Cl. 595, 604–10 (2015). And even that case does not stand for the broader proposition that the Federal Court of Claims is in the business of unsealing source-selection information containing trade secrets. Pursuant to § 3.104-4(e)(1), a contractor is permitted to disclose its own protected information. FAR § 3.104-4(e)(1). Thus, the fact that *National Telecommunicating* referenced, without redaction, information pertaining to the protestor's own bidding submissions, is unremarkable.

Thus, the foregoing cases undermine SourceAmerica's position that post-award procurement information is generally protected, but do not support disclosure of procurement information constituting trade secrets.

4. Trade Secrets Disclosed in Discovery may be Sealed from the Public.

Bona Fide also contends that the Trade Secrets Act does not apply to information discoverable under Rule 26. However, the cases upon which Bona Fide relies are inapposite. In *Pleasant Hill Bank v. United States*, 58 F.R.D. 97, 101 (W.D. Mo. 1973), the court compelled production of certain documents for which the defendant claimed a privilege under the Trade Secrets Act. The court, however, made no determination as to whether the information could be made public. In *Exchange Nat'l Bank of Chicago v. Abramson*, 295 F. Supp. 87, 92 (D. Minn. 1969), the court declined to disqualify a former government agent from prosecuting an action simply because he may have knowledge of protected trade secrets. The court, however, noted that its decision did not prevent the movant from seeking to suppress any particular evidence that might be offered in the future. *See id.* In sum, Bona Fide presents no authority which suggests that discoverable trade secrets are not protected from public access.

For these foregoing reasons, the Court concludes that compelling reasons exist to protect post-award disclosure of any contractor bids, proposals, or source selection information, but only to the extent that they contain trade secrets or pertain to another ongoing procurement.

C. CIPA Alone Does Not Present a Compelling Reason for Sealing the Contents of a Conversation.

Confidentiality, for the purposes of CIPA, does not turn on the contents of the communication. *Flanagan v. Flanagan*, 117 Cal.4th 766, 774–75 (2002). Rather, a party is protected "from unconsented-to eavesdropping or recording of conversations regardless of whether the party expects that the content of the conversation may later be conveyed to a third party." *See id.* (emphasis omitted). Put differently, CIPA recognizes an expectation of privacy that one's phone calls will not be recorded, but does not provide that the contents of such a call will be protected by law. *See Ribas v. Clark*, 38 Cal.3d 355, 360–61 (1985) ("While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or mechanical device.")

This Court previously ruled that a number of transcripts of conversations between Ruben Lopez and Jean Robinson were protected by attorney-client privilege. (ECF No. 336, at 14). This decision was not made because the conversations may have been surreptitiously recorded under CIPA, but because the content of the conversations concerned privileged information "such as termination of an employee, internal investigations, legal issues related to the Board of Directors, certain litigation against

SourceAmerica, SourceAmerica's obligations in response to subpoenas from the GSA OIG, as well as legal advice received from SourceAmerica's outside counsel." (*Id.* at 14.)

Because CIPA alone does not present a compelling reason for sealing information, SourceAmerica must establish another basis for sealing these allegedly surreptitiously recorded conversations. To the extent that SourceAmerica is arguing that the transcripts at issue encompass materials subject to attorney client privilege, or that are otherwise confidential, it must make a specific showing that the need to seal outweighs the public's right of access.

D. A Proponent Seeking to Seal Confidential Settlement Agreement Terms in a Dispositive Motion Must Show Specific Harm That Would Result from Publication.

SourceAmerica contends that compelling reasons exist to seal confidential settlement information because the confidential settlement agreement is sensitive in nature, covering issues related to confidential and privileged information. (ECF No. 577-1, at 17:2–-24.) Additionally, SourceAmerica asserts that the public has a lowered interest in the settlement terms because the settlement is only tangentially related to the claims asserted between SourceAmerica and Bona Fide. (*Id.* at 18:1-4.)

According to Bona Fide, SourceAmerica demonstrates only that the Ninth Circuit has recognized "good cause" for sealing confidential settlement information based on its intended confidentiality. (ECF No. 577, at 6:15-17.) Bona Fide argues that SourceAmerica fails to establish a "compelling reason" for sealing the settlement terms because the only terms Bona Fide filed were boilerplate contract language and an agreement to make a public statement. (ECF No. 577 at 6:3-14.)

In the context of non-dispositive motions, the Ninth Circuit recognizes "good cause" for sealing confidential settlement agreement. *See, e.g., Phillips v. GMC,* 307 F.3d 1206, 1212 (9th Cir. 2002). However, where a "compelling reason" is required to seal, courts have held that "a settlement agreement cannot be sealed simply because the parties agreed to keep its terms confidential." *See UCP International Co., Ltd. v. Balsam Brands, Inc.*, 252 F.Supp.3d 828, 835 (N.D. Cal. 2017); *Select Portfolio Servicing v. Valentino,* No. 12-cv-0334-SI, 2013 WL 1800039, at *3 (N.D. Cal. Apr. 29, 2013). Instead, the party seeking to seal the settlement terms must show the specific harm or prejudice that will result from publication of those terms. *See UCP International Co.*, 252 F.Supp.3d at 836; *Valentino*, 2013 WL 1800039, at *3.

SourceAmerica appears to argue that it need only establish "good cause" for sealing because the settlement terms are only tangentially related to the parties' underlying claims.[2] This is an incorrect understanding of the law. In determining the appropriate sealing standard, the Ninth Circuit's "focus . . . is on whether the ***motion*** at issue is more than tangentially related to the underlying cause of action." *See Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d at 1099 (citations omitted) (emphasis added). The inquiry is not whether the redacted information itself is tangentially related to the underlying claims. Rather, the Court must ascertain whether the motions implicated by the sealing are significantly related to the underlying case. Here, the motions at issue are summary judgment motions going to the only two causes of action still in play between the parties, as well as *Daubert* motions that, in turn, significantly bear on the viability of those motions to dismiss. Consequently, SourceAmerica must show a compelling reason for sealing the settlement terms.

E. SourceAmerica Fails to Provide Compelling Reasons for Sealing Substantial Portions of Information in the Parties' Dispositive Motions.

Having considered SourceAmerica's four proffered reasons for sealing, the Court turns to the six motions to seal currently before the Court.

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[2] *See* ECF No. 577-1, at 18:8-13 ("Thus, Defendants have demonstrated "good cause" why the Court should seal the unredacted version of Counterdefendants' reply brief and separate statement that quote or summarize the Confidential Settlement Agreement between SourceAmerica and Jean Robinson, as well as portions of Jean Robinson's transcript, taken in the instant action, that discuss the terms and/or negotiation of such agreement.").

As alluded to previously, "a balancing of interests is required whenever a party seeks to overcome the presumption of open proceedings in American courts, whether by protective order, assertion of privilege, or other means." *Pikes Peak Family Housing*, 40 Fed. Cl. at 683 (citing *United States v. Nixon*, 418 U.S. 683, 703–13 (1974)). Rather than engaging in this balancing test, SourceAmerica relies on generalized reasons to support sealing. Because SourceAmerica fails to offer particularized reasons for sealing each portion of each document sought to be withheld, SourceAmerica fails to establish compelling reasons for sealing the redacted information. Particularized reasons are especially necessary here, where SourceAmerica seeks to seal substantial portions that would render the publicly filed documents incomprehensible. *See Allied Technology*, 94 Fed. Cl. at 23 n.1.

While compelling reasons exist to seal post-award procurement information that constitutes a trade secret, SourceAmerica does not allege that all the information it seeks to seal are trade secrets. Instead, SourceAmerica seeks to seal substantial portions of memoranda and exhibits merely because these portions reference or discuss the topic of NPA's responses to past Opportunity Notices and Sources Sought Notices.[3] Again, given the lack of specific analysis in SourceAmerica's response brief, the Court must again question whether all of this information amounts to trade secrets and confidential business. Some of the information speaks only of a generalized unfairness in SourceAmerica's selections. (*See e.g.*, ECF No. 579-6, at 110:22-25, 171:19-24.) Other redacted information states only whether or not a party has security clearances or licensures or has failed to fill out a required form.[4] (*See e.g.*, *id.* at 3:8–10, 31, 54:15-17.) Still, other information involves whether SourceAmerica completed certain evaluations or whether Bona Fide responded to an SSN. (*See e.g.*, *id.* at 67:24–28, 54:24–28.) These

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[3] *See, e.g.*, ECF No. 584 at 9:24–28, 15:12–16.

[4] *Cf. Akima Intra-Data, LLC v. United States*, 119 Fed. Cl. At 526 ("Regarding ServiceSource, NGA found that [ServiceSource] . . . '[c]urrently holds a Top Secret (TS) Facility Clearance[.]'").

are just a few examples of the types of material information that appear to be unnecessarily redacted.

To be clear, the Court agrees that some portions of the post-award procurement information SourceAmerica seeks to seal include protectable trade secrets. But the Court is in no position to sift through these multitudinous and heavily-redacted documents to make such determinations. *See Independent Towers of Wash. v. Wash*, 350 F.3d 925, 929 (9th Cir. 2003) ("Judges are not like pigs, hunting for truffles buried in briefs." (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)). Instead, it is SourceAmerica's responsibility to identify why each portion it seeks to seal constitutes a protectable trade secret or confidential business information.

Further, SourceAmerica must establish a compelling reason, independent of CIPA, for sealing the alleged surreptitiously recorded conversations.[5] CIPA does not protect the content of conversations even if the conversations themselves were surreptitiously recorded. An independent basis for sealing must lie over and above any claims of confidentiality pursuant to CIPA. As previously mentioned, SourceAmerica raises attorney-client privilege as to some, though not all, of the portions alleged to be related to the surreptitiously-recorded conversations. (ECF No. 577-1, at 14:19-23.) However, SourceAmerica does not identify what particular information is covered by the attorney-client privilege or provide any grounds supporting the privilege. It is possible that portions of the conversations are protectable under a separate basis, whether attorney-client privilege, trade secret, or otherwise. However, SourceAmerica must establish particularized reasons for sealing each portion.

Finally, SourceAmerica fails to indicate any specific harm that will result from the disclosure of certain terms of its confidential settlement agreement with Jean Robinson.

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[5] Additionally, SourceAmerica does not even definitively state that all of the conversations were surreptitiously recorded, but asks the court to seal in the abundance of caution. *See* ECF No. 584 at 10:16-18.

The Court does not doubt that the entire agreement dealt with highly confidential issues as SourceAmerica contends. However, Bona Fide has only filed information related to or summarizing a few particular terms. The filed information does not appear to contain any privileged information that might otherwise exist elsewhere in the settlement agreement. SourceAmerica cannot rely on the inherently confidential nature of the settlement without offering some explanation of how publication of the particular terms at issue would harm SourceAmerica. To its detriment, SourceAmerica fails to indicate what specific harm would result from the publication of the particular terms referenced by Bona Fide. As such, the Court concludes SourceAmerica has not met its burden of establishing a compelling reason for sealing the terms of its confidential settlement agreement, sufficient to overcome the public's right of access.

IV. CONCLUSION

Because the Court believes that some—but not all—of the information should be filed under seal, the Court defers ruling on these motions to allow SourceAmerica one final opportunity to explain the need for sealing the information. SourceAmerica must provide further briefing within seven (7) days of the date of this Order, stating with particularity the factual basis for sealing each portion it intends to seal. If SourceAmerica does not file further briefing by that time, the Court will deny the Motions to Seal and order the documents unsealed and published to the docket.

IT IS SO ORDERED.

Dated: October 29, 2018

Gonzalo Curiel

Hon. Gonzalo P. Curiel
United States District Judge