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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 3:21-MD-02992-GPC-MSB **DEFENDANT'S NOTICE AND MOTION TO SEAL DOCUMENTS FILED IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** Ctrm: 2D – 2nd Floor Judge: Hon. Gonzalo P. Curiel

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PLEASE TAKE NOTICE that, pursuant to Local Civil Rule 79.2(c), Defendant Bank of America, N.A. ("Defendant" or "BANA") submits this Notice and Motion to Seal certain documents and portions of other documents[1] submitted in its Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Class Certification (the "Opposition").[2]

I. STANDARD TO SEAL DOCUMENTS

The public's right to inspect and copy judicial records is not absolute, and a party faced with the disclosure of confidential or proprietary information may seek to file the documents under seal to avoid disclosure of business information that might result in competitive harm or be used for improper purposes. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) (denying disclosure); Local Civ. R. 79.2(c). The documents that BANA seeks to seal each contain information that qualifies as "Protected Material" pursuant to the Parties' Stipulated Protective Order ("Protective Order"), entered by the Court on September 24, 2021 (ECF No. 82).

Courts in this district, including this Court, have held that a party seeking to seal documents filed in connection with a motion for class certification must show "good cause" to seal documents in connection with class certification "[u]nless the

[1] Defendants' Exhibits to the Declaration of Laura Brys in Support of Defendant's Memorandum in Opposition to Plaintiffs' Motion for Class Certification shall be referred to as "DX" in this Motion and the forthcoming Memorandum and supporting documents. Plaintiffs' Exhibits to the Declaration of Connie K. Chan in Support of Plaintiffs' Motion for Class certification shall be referred to as "PX" in this Motion and the forthcoming Memorandum and supporting documents.

[2] This Motion is based on Defendant's Notice of Motion and Motion to Seal, the Declarations of William Martin ("Martin Decl.") and Don Robart ("Robart Decl.") submitted herewith, the documents filed in support of Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Class Certification, certain documents filed in support of Plaintiffs' Motion for Class Certification (ECF 324, 336), Defendant's sealing motions filed in connection with Plaintiffs' Motion For Class Certification (ECF 328, 337, 344), all pleadings and papers on file in this action, oral argument if requested by the Court, and any such other matters that the Court deems appropriate. Should the Court desire more detailed briefing to decide Defendant's Motion to Seal, BANA respectfully requests the opportunity to submit additional briefing in support of sealing.

denial of a motion for class certification would constitute the death knell of the case." *See Makaeff v. Trump Univ., LLC*, No. 10-cv-0940-GPC (WVG), ECF 416 (S.D. Cal. June 29, 2015) (J. Curiel) (quoting *Algarin v. Maybelline, LLC*, 2014 WL 690410, at *2 (S.D. Cal. Feb. 21, 2014) (ECF 344-5); *see also Andren v. Alere Inc.*, No. 3:16-cv-01255-GPC (AGS), ECF 112 (S.D. Cal. Sept. 11, 2017) (J. Curiel) (finding "good cause" to seal portions of opposition to class certification) (ECF 344–6). Here, where nearly 400 Individual Plaintiffs filed suit against BANA and alleged more than *de minimis* damages, it is likely the case would proceed should class certification be denied (*see* ECF 304, 311, 325), and thus the good cause standard applies. *See Algarin*, 2014 WL 690410, at *2.

Even applying the "compelling reasons" standard, however, courts consistently seal documents where—as here—disclosure of the confidential business information risks competitive harm to the litigant or improper use of the information such as to commit fraud. *E.g., E.W. Bank v. Shanker*, 2021 WL 3112452, at *18–19 (N.D. Cal. July 22, 2021) (finding compelling reasons to seal confidential onboarding processes, verification of customer identities, and fraud prevention measures); *Soria v. U.S. Bank N.A.*, 2019 WL 8167925, at *4 (C.D. Cal. Apr. 25, 2019) (finding compelling reasons to seal internal fraud investigation procedures because there was a "significant danger that someone could improperly use this information to commit fraud and avoid detection.").

II. <u>GOOD CAUSE AND COMPELLING REASONS EXIST TO SEAL THE CONFIDENTIAL DOCUMENTS</u>

Good cause and compelling reasons exist to file under seal each of the confidential documents, discovery responses and testimony (or portions thereof) filed in connection with BANA's Opposition, and any substantive discussion of those documents contained in BANA's Opposition or the declarations filed in support thereof.[3] Each of those documents and testimony were properly designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under the Protective Order entered by this Court because each pertains to topics that are likely to cause particularized competitive harm to BANA and which could potentially enable future fraud, which poses a danger to BANA's business and the public. Many of the documents were also designated as confidential pursuant to the terms of BANA's contract and confidentiality agreement with the EDD (*see infra* at 10-12), because BANA was explicitly instructed by its regulators to keep the documents confidential because they implicate regulatory protections and concern ongoing remediation efforts (*see infra* at 13-14), and/or because their disclosure could implicate or interfere with potential or ongoing law enforcement investigations (*see infra* at 5, 12-13).

All are compelling reasons which outweigh the public disclosure factors, and thus permit sealing of those documents. For example, in *East West Bank v. Shanker*, a California district court granted a motion to seal portions of exhibits concerning "confidential onboarding processes, digital banking platform[s], fraud management techniques, and verification of customer identities, which if made public would harm [the bank's] business," and found that public disclosure of EWB's confidential fraud prevention measures would "harm EWB's business." 2021 WL 3112452, at *18-19. Similarly, in *Soria v. U.S. Bank, N.A.*, another California district court found compelling reasons to file under seal information related to a bank's internal procedures for investigating incidents of fraud, explaining that "[a]lthough there is a public interest in [the b]ank's procedures concerning its fraud investigations, public disclosure of this information may impede [the b]ank's ability to identify and combat

[3] In its Opposition, BANA refers to certain of Plaintiffs' exhibits, including documents, testimony and expert reports, that Plaintiffs provisionally filed under seal in connection with their Motion for Class Certification. ECF 324, 336. Those exhibits should remain sealed for the reasons set forth in BANA's previously filed motions to seal and the declarations submitted therewith. ECF 328, 337, 344.

future instances of fraud" and that "[t]here is a significant danger that someone could improperly use this information to commit fraud and avoid detection." 2019 WL 8167925, at *4. Further, in *Shelley v. County of San Joaquin*, yet another California district court protected materials where "the public release of those documents could negatively impact" law enforcement investigations. 2015 WL 2082370, at *7 (E.D. Cal. May 4, 2015).

Similar compelling reasons exist here. Indeed, this court has already found, good cause and compelling reasons to seal documents just like those at issue here based on the plain language of the exhibits and testimony at issue—which each relate to confidential business practices and fraud prevention measures that could be misused to commit future fraud or used by competitor banks to BANA's disadvantage. Earlier this year, Judge Berg determined that there are "compelling reasons" to seal a number of exhibits previously submitted with Plaintiffs' motion to compel discovery that concern the very same categories of confidential information that BANA seeks to seal here. *See* ECF 266. In doing so, Judge Berg found that compelling reasons existed to seal information concerning: the Claim Fraud Filter, other fraud and claims strategies, call center operations, prepaid fraud losses, state contract issues, prepaid updates and trackers, cardholder complaints and escalations, and certain of BANA's interrogatory responses—which are *precisely* the types of documents BANA seeks to seal here. This Court also found good cause to seal the same or similar documents related to the Claim Fraud Filter and other fraud strategies, operational fraud losses, and trainings for claims investigations. *See* ECF 212, 293. Those prior rulings are sufficient grounds alone to grant sealing here. *See Lundstrom v. Young*, 2022 WL 15524624, at *17 (S.D. Cal. Oct. 27, 2022) (J. Curiel) (considering prior sealing of exhibits when granting motion to seal); *Workplace Techs. Rsch., Inc. v. Project Mgmt. Inst., Inc.*, 2021 WL 6091272, at *3 (S.D. Cal. Oct. 20, 2021) (sealing references to document that court already granted sealing of).

Specifically, the Confidential and Highly Confidential – Attorneys' Eyes Only documents, testimony and declarations that BANA seeks to seal, include but are not limited to, the following categories of documents and information:

- BANA's analyses of transactional and claims fraud and BANA's fraud detection and prevention policies and strategies designed to combat fraud, including the Claim Fraud Filter and EMV chips (*see* DX 1, 2, 3, 4, 5, 6, 7, 9, 23, 24, 25, 26, 27, 29, 41, 43, 85, 97, 98, 100, 102, 103, 112, 113, 114, 115, 121, 122);
- BANA's claims review policies and strategies and the implementation thereof, including with respect to BANA's additional fraud review process that seeks to identify fraudulent claims already paid in connection with the remediation process – which separately must be protected because they also have the potential to implicate or impact future or ongoing law enforcement investigations[4] (*see* DX 1, 2, 6, 7, 9, 23, 24, 41, 43, 85, 98, 112, 122);
- BANA's call center operations and strategies, including its authentication procedures, trainings, business controls and processes, and general services agreements and statements of work between BANA and its call center vendors (*see* DX 1, 5, 9, 18, 104, 116, 117, 118);
- BANA's communications with EDD regarding BANA's and/or EDD's fraud strategies, including the use of EMV chip technology and freezing and blocking of accounts (*see* DX 2, 5, 6, 24, 27, 28, 29, 97, 122);
- BANA's analyses of its state prepaid unemployment program operations, including but not limited to, contractual negotiations, card

[4] *See*, *e.g.*, *Shelley*, 2015 WL 2082370, at *7 (protecting materials where "the public release of those documents could negatively impact" law enforcement investigations); *Hill v. City of Chicago*, 2011 WL 320204, at *2 (N.D. Ill. Jan. 31, 2011) (denying motion to compel to keep "ongoing, active criminal investigation confidential to prevent any harm from public disclosure of the content of the investigation").

volume, fraud volume, claims and call center operations, and operational risks and losses (*see* DX 1, 2, 3, 4, 5, 6, 18, 19, 20, 21, 24, 85, 97, 98, 99, 100);

- BANA's Remediation Plans and Addenda with the OCC and CFPB, and its implementation of those Plans, which both agencies themselves designated as "Highly Confidential – Attorneys' Eyes Only" (*see* DX 1, 2, 3, 5, 7, 8);
- BANA's interrogatory responses and data provided therein reflecting BANA's use of the Claim Fraud Filter to decision unauthorized transaction claims and to freeze or block EDD cardholder accounts, and any reconsideration by BANA of those claims and any compensation paid as a result (*see* DX 1, 3, 5, 23, 43, 85, 86, 104, 105);
- Aggregated statistics related to EDD benefit recipients account balances, activity, and fraud claims that BANA is obligated to maintain as confidential pursuant to its agreement with EDD (ECF 324-106 at 5), and otherwise would keep as confidential because its disclosure could cause competitive harm to BANA or its customers (DX 1, 4, 5, 6, 8, 12, 41, 42, 86, 99, 101, 102, 105, 115, 120); and
- Individual EDD cardholder account, transactions, and claim information, which often include personal, sensitive, or financial information (*see* DX 1, 9, 30, 31, 32, 33, 35, 36, 38, 40, 45, 46, 47, 51, 58, 59, 60, 61, 62, 64, 66, 67, 68, 69, 70, 71, 72, 73, 77, 78, 80, 81, 82, 84).[5]

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[5] BANA submits excerpted deposition testimony from six BANA witnesses (DX 18, 24, 29, 97, 98, 112), which BANA designated as Confidential or Highly Confidential – Attorneys' Eyes Only because those witnesses testify to BANA's confidential documents and to the same categories of confidential information described above, including but not limited to: BANA's handling of unauthorized transactions claims and reconsiderations; BANA's contract with EDD and the responsibilities thereunder; BANA's communications with EDD regarding fraud-related measures; BANA's fraud strategies, including the use of EMV chip technology and the freezing

Documents that risk future fraud. BANA moves to seal BANA's fraud and claims review policies, practices and strategies and any analyses thereof (*see* DX 1, 2, 6, 7, 9, 23, 24, 41, 43, 85, 98, 112, 121, 122) because they could be misused to perpetrate future fraud against BANA and the public. As courts routinely find, and this court has previously found in this case (*see* ECF 266, 293), there is good cause and compelling reasons to limit public access to such documents because their disclosure could lead to future fraud that poses a harm not only to the Bank, but also the public. *See Soria*, 2019 WL 8167925, at *4 (granting sealing of bank's fraud investigations procedures); *see also Bohannon v Facebook, Inc.*, 2019 WL 188671, at *6 (N.D. Cal. Jan. 14, 2019) (finding compelling reasons to seal references to policies and methods used for refunds and to confirm identities because disclosure "might allow a third party to…undermine… protections against fraud, in turn causing harm to both Facebook and its users").

Public access to BANA's fraud and claims review strategies and any analyses of fraud and possible strategies to combat fraud (*see* DX 1, 2, 3, 4, 5, 6, 7, 9, 23, 24, 25, 26, 27, 29, 41, 43, 85, 97, 98, 100, 102, 103, 112, 113, 114, 115, 121, 122) could provide insight into BANA's fraud detection and prevention measures. ECF 344-2 (Robart Decl.) ¶¶ 4-5; ECF 344-1 (Martin Decl.) ¶¶ 7-10. That insight could be used by fraudsters to perpetrate future fraud and to circumvent BANA's security and fraud prevention procedures, and to otherwise cause harm to the Bank and its customers, which are compelling reasons to seal these documents. ECF 344-2 (Robart Decl.) ¶¶ 4-5; ECF 344-1 (Martin Decl.) ¶¶ 7-10. *See, e.g.*, *Soria*, 2019 WL 8167925, at *4 (granting motion to seal because, "[a]lthough there is a public interest in [the b]ank's procedures concerning its fraud investigations, public disclosure of this information may impede [the b]ank's ability to identify and combat future instances of fraud" and that "[t]here is a significant danger that someone could improperly use this

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and blocking of accounts; and BANA's call center procedures and complaint escalation intake channels.

information to commit fraud and avoid detection"); *see also Jasso v. Wells Fargo Bank, N.A.*, 2022 WL 2665979, at *2 (D. Nev. July 8, 2022) (granting motion to seal documents that "contain sensitive information . . . regarding Wells Fargo's business practices and procedures that could be used for an improper purpose if allowed into the public record").

Similarly, BANA's communications with EDD regarding fraud strategies utilized in the EDD program, including the use of EMV chip technology and the freezing and blocking of accounts (*see* DX 2, 5, 6, 24, 27, 28, 29, 97, 122) could also be misused by fraudsters to perpetrate future fraud and avoid detection. ECF 344-1 (Martin Decl.) ¶ 8. *See, e.g.*, *Soria*, 2019 WL 8167925, at *4; *Jasso*, 2022 WL 2665979, at *2. For example, BANA's internal analyses concerning the costs associated with and types of fraud that EMV chips may or may not prevent are not public knowledge (*see* DX 24, 25, 26, 27, 41, 112, 114, 115), and could still be misused by fraudsters to perpetrate fraud on cards with or without EMV chips. *See* ECF 344-1 (Martin Decl.) ¶ 8.

Additionally, public access to information regarding BANA's call center operations and strategies, including its authentication procedures, trainings, and business controls and processes (*see* DX 1, 5, 9, 18, 104, 116, 117, 118) could be used by fraudsters to perpetrate future fraud and to circumvent BANA's call center authentication and fraud prevention procedures. ECF 344-1 (Martin Decl.) ¶ 10. *See, e.g.*, *Soria*, 2019 WL 8167925, at *4.[6]

Documents that risk competitive harm. The aforementioned categories of

[6] There are compelling reasons to seal discontinued fraud and claim strategies, like the Claim Fraud Filter, because different indicators, features or components of those strategies could be used now or in the future, as part of BANA's many fraud prevention strategies. Moreover, BANA's past and present fraud strategies, and related rationales or analysis, could be misused by fraudsters and criminals to gain insight into BANA's inner workings to circumvent future fraud strategies to perpetrate future fraud or crimes. ECF 344-3 (Lennon Dec.) ¶¶ 3-4; ECF 344-1 (Martin Decl.) ¶¶ 4–5, 7. *See, e.g.*, *Soria*, 2019 WL 8167925, at *4.

documents and testimony also contain sensitive business information that could be used to BANA's competitive or commercial disadvantage, which is yet another compelling reason to seal the documents. *See, e.g.*, *E.W. Bank*, 2021 WL 3112452, at *18-19 (granting motion to seal where public disclosure of EWB's confidential fraud prevention measures would "harm EWB's competitive standing"); *Adtrader, Inc. v. Google LLC*, 2020 WL 6391210, at *2 (N.D. Cal. Mar. 24, 2020) (sealing references to internal strategic decisions, policies, and processes related to detecting and responding to advertising fraud).

For example, documents, testimony or discovery responses demonstrating how BANA structures its claims and fraud teams (*see* DX 24, 26, 85, 97, 98, 99, 100, 122), and the review procedures, protocols, and systems used and implemented by those teams (*see* DX 23, 24, 25, 26, 27, 41, 43, 85, 97, 98, 102, 104, 112, 114, 115) is sensitive business information that, if disclosed to the public, could be replicated by a competitor financial institution to BANA's competitive disadvantage (ECF 344-1 (Martin Decl.) ¶¶ 5, 7-10; ECF 344-2 (Robart Decl.) ¶¶ 4-5), and accordingly, good cause and compelling reasons exist to seal that information. *See, e.g.*, *E.W. Bank*, 2021 WL 3112452, at *18-19 (permitting sealing of confidential onboarding processes, digital banking platform, fraud management techniques, and verification of customer identities); *Medimpact Healthcare Sys., Inc. v. IQVIA Holdings, Inc.*, No. 3:19-cv-01865-GPC (DEB), ECF 875 (S.D. Cal. Jan. 10, 2023) (J. Curiel) (finding compelling reasons to seal testimony on "policies and procedures regarding the preservation of electronic information" where party "d[id] business in an industry where the preservation and confidentiality of information is highly regulated") (ECF 344-7). Notably, certain claims review processes and trainings (*e.g.*, DX 24, 43, 97, 98, 99) are utilized in the same or similar fashion for many of BANA's lines of business, not simply prepaid, and are still being utilized today. *See* ECF 344-2 (Robart Decl.) ¶ 3. Thus, good cause and compelling reasons exist to seal those procedures because their disclosure to other financial institutions or potential fraudsters could place BANA at a competitive disadvantage or risk future fraud. *See, e.g.*, *Cowan v. GE Cap. Retail Bank*, 2015 WL 1324848, at *2-3 (N.D. Cal. Mar. 24, 2015) (compelling reasons to seal bank's internal procedures for investigating fraud and addressing cardholder fraud notifications).

Additionally, documents or testimony reflecting BANA's analyses of its state prepaid unemployment program operations, including but not limited to, contractual negotiations with the states, contracts with call center vendors, card and fraud volumes, and operational risks and losses (*see* DX 1, 2, 3, 4, 5, 6, 18, 19, 20, 21, 24, 85, 97, 98, 99, 100), which this court has already sealed (ECF 266, 293), could similarly be used by a competitor financial institution to BANA's competitive disadvantage (Martin Decl. ¶¶ 10-12; ECF 344-1 (Martin Decl.) ¶¶ 5, 7–10; ECF 344-2 (Robart Decl.) ¶ 4), and thus require sealing. *See, e.g.*, *Xifin, Inc. v. Sunshine Pathways, LLC*, 2016 WL 5930313, at *3 (S.D. Cal. Oct. 12, 2016) (J. Curiel) (finding compelling reasons to seal services agreement that contained detailed information about pricing structure, nature of services, system security requirements, and how to use the cloud-based billing system "that could expose Plaintiff to a competitive disadvantage if revealed"); *Brady v. Grendene USA, Inc.*, 2015 WL 6828400, at *3 (S.D. Cal. Nov. 6, 2015) (J. Curiel) (sealing confidential business information that might harm the litigants' competitive standing including profit and loss data and contractual agreements).

As another example, BANA continues to operate call centers to answer cardholders' calls, both within prepaid and other lines of business (ECF 344-1 (Martin) ¶ 10), and thus details regarding BANA's call center operations and strategies, including the different types of call centers utilized by BANA, the roles and responsibilities of each, BANA's call center authentication procedures, and call center metrics (DX 1, 5, 9, 18, 19, 20, 104, 116, 117, 118), are still commercially sensitive and warrant sealing. *See Xifin, Inc.*, 2016 WL 5930313, at *3.

Moreover, aggregated account statistics regarding the number of active EDD accounts, the balances on those cards, the fraud claims filed by EDD cardholders, and the combined monetary amounts of fraud associated therewith (DX 1, 4, 5, 6, 8, 12, 41, 42, 86, 99, 101, 102, 105, 115, 120, 121) are proprietary, confidential business information of EDD and/or BANA. Martin Decl. ¶¶ 10-12. Public disclosure of the number of active EDD accounts, account balances and first party fraud could violate BANA's confidentiality agreement with EDD. *Id.*; *see also* ECF 324-106 (PX 103) at 5. Additionally, aggregated account statistics related to customer account balances, activity, and fraud claims is also commercially sensitive information, from which certain of BANA's revenues and fraud losses could be derived, and if disclosed, could be used by another financial institution to compete against BANA (Martin Decl.¶¶ 10-12), which warrants sealing. *See, e.g.*, *Brady*, 2015 WL 6828400, at *3.

<u>Cardholders' personal account, transaction and claim information.</u> Additional compelling reasons and good cause exist to seal Exhibits 1, 9, 30, 31, 32, 33, 35, 36, 38, 40, 45, 46, 47, 51, 58, 59, 60, 61, 62, 64, 66, 67, 68, 69, 70, 71, 72, 73, 77, 78, 80, 81, 82, and 84 because they reflect EDD cardholder account, transaction and claim information, which often include personal, sensitive and financial information that the customers did not intend to appear on a public docket. *See Nia v. Bank of Am., N.A.*, 2024 WL 171659, at *6 (S.D. Cal. Jan. 12, 2024) (permitting sealing of exhibit reflecting customer data such as internal deposit account and credit account closure data); *see also McAfee v. Experian Info. Sols.*, 2023 WL 8237364, at *2 (S.D. Ohio Nov. 28, 2023) (finding compelling reasons to seal documents in order to "protect Plaintiff's credit history and financial account information from public disclosure to maintain Plaintiff's privacy . . . [and] guard against the threat of identi[t]y theft…").[7] Moreover, BANA is obligated to keep such

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[7] BANA is provisionally sealing sensitive financial information of both named Plaintiffs and absent class members. If Plaintiffs request that their personal and financial information be made public, BANA can remove sealing over Plaintiffs' account, transactions and claims information, but not with respect to non-plaintiffs.

information confidential pursuant to the terms of its contract and confidentiality agreement with EDD. *See* ECF 324-106 at 5 (prohibiting "disclosure of the EDD's confidential information to the public"); Robart Decl. ¶ 5.

For example, EDD cardholders' claim details and correspondence, account and transaction histories, ATM footage and call recordings (DX 30, 31, 32, 33, 35, 36, 38, 40, 45, 46, 64, 66, 67, 68, 69, 70, 71, 72, 73) reflect not only personal identifying information, but also personal, transactional and claims information, such as cardholders' personal purchases, their telephone discussions with customer service, their receipt of unemployment benefits, the denial of their claims, suspicion of fraudulent behavior, repossession of property, foreclosure and eviction (Robart Decl., ¶¶ 3-8), which is sensitive, personal information that warrants sealing. *See, e.g.*, *Pryor v. City of Clearlake*, 2012 WL 3276992, at *2 (N.D. Cal. Aug. 9, 2012) (sealing non-litigant's prior arrest record). Similarly, BANA's responses and objections to Plaintiffs' interrogatories (and the exhibits thereto), including Exhibits 85 and 86, also reflect highly sensitive, personal and financial information of EDD cardholders. ECF 344-3 (Lennon Decl.) ¶¶ 4-5.

Additionally, Exhibits 58, 59, 60, 61, and 62 are PowerPoint presentations that identify certain EDD cardholders and unauthorized transactions claims that BANA previously paid, but that BANA has subsequently reviewed and now believes may be fraudulent based on its additional fraud review process. Martin Decl. ¶¶ 7-9. Those exhibits reflect highly sensitive personal, account, and claims details of those cardholders, including photographs of those individuals and details regarding their transactions. *Id.* Disclosure of these exhibits could reveal the identities of certain cardholders engaging in fraud, which is highly sensitive and potentially embarrassing information that warrants sealing. *Id.* *See, e.g.*, *Pryor*, 2012 WL 3276992, at *2. Disclosure of these exhibits could also reveal details regarding BANA's additional fraud review process, including the identities of individuals who may be the subject of ongoing internal and/or law enforcement investigations and proceedings, which could enable fraudsters to circumvent BANA's fraud detection processes, and which could also provide competitor financial institutions with access to and the ability to replicate BANA's confidential fraud processes. Martin Decl. ¶¶ 7-9. Thus, compelling reasons exist to seal those presentations. *See Soria*, 2019 WL 8167925, at *4 (granting sealing of bank's fraud investigations procedures); *E.W. Bank*, 2021 WL 3112452, at *18-19 (granting sealing where public disclosure of confidential fraud prevention measures would "harm [bank's] competitive standing"); *Shelley v. Cnty. of San Joaquin*, 2015 WL 2082370, at *7 (protecting materials where "the public release of those documents could negatively impact" law enforcement investigations).

Finally, Plaintiffs themselves designated their own claim files and correspondence and deposition testimony as Confidential in many instances (*see* DX 47, 51, 80, 84), and under the Protective Order, BANA is required to file under seal documents or testimony that Plaintiffs designated confidential (ECF 82 § 12.5). Accordingly, cardholder claim and account details contain sensitive, personal information that overcomes the presumption of public access and warrants sealing.

Confidential regulator materials. Compelling reasons exist to seal Exhibits 1, 2, 6, 7, 9, 23, 24, 41, 43, 85, 98, 112, and 122, which contain documents and information regarding BANA's implementation of its Remediation Plans and Addenda with the OCC and CFPB. The regulators designated the Plans "Highly Confidential – Attorneys' Eyes Only" as a condition to BANA producing them to Plaintiffs, and they contain information the OCC deemed privileged and confidential under its statutes and regulations. Standing alone, the regulators' determination and designation—which Plaintiffs readily agreed to when they accepted the documents last year—should be a sufficient, compelling reason to seal the Plans and any documents quoting from or referencing those Plans. *See, e.g.*, *Erhart v. BofI Fed. Bank*, 2019 WL 4534701, at *3 (S.D. Cal. Sept. 19, 2019) (sealing information that the OCC asserted bank examination privilege over but permitted to be produced subject to confidentiality protections). *See also* ECF 344-3 (Lennon Decl.) ¶¶ 3–4, 6.

Moreover, notwithstanding the regulators' views, the details within the Plans and how BANA continues to implement the Plans are highly sensitive because they could provide fraudsters with a roadmap for how to fraudulently seek additional payments under the Plans. ECF 344-3 (Lennon) ¶ 3. Similarly, the data that BANA compiled to respond to Plaintiffs' discovery requests regarding BANA's implementation of the Remediation Plans (DX 86, 105) should also be sealed because BANA's efforts to implement the Plans is ongoing, and such data could be used to potentially back into the confidential formulas in the Plans, and because they contain sensitive personal information regarding cardholders. ECF 344-3 (Lennon Decl.) ¶¶ 4-5.

<u>BANA's Opposition, expert and fact declarations quote and summarize confidential exhibits.</u> BANA has provisionally redacted and sealed portions of its Opposition and expert and fact declarations (*see* DX 1–9) that quote or describe the confidential documents, testimony and topics identified above, including BANA's fraud, claims and call center policies, strategies and practices, as well as BANA's implementation of the Remediation Plans. *See supra*, pgs. 6-14. This is consistent with the terms of the Stipulated Protective Order (ECF 82, § 3), and with rulings in this circuit. *See, e.g.*, *Darisse v. Nest Labs, Inc.*, 2016 WL 11474174, at *2 (N.D. Cal. June 2, 2016) (sealing class certification motion and declarations that quote or reference confidential exhibits). For example, portions of the Declaration of Russell Cronan (DX 3) reference confidential deposition testimony of BANA's witnesses (DX 6, 7) and provisionally sealed portions of Plaintiffs' expert reports (PX 1, 4) pertaining to the details of the Claim Fraud Filter and other BANA claim investigation processes, as well as the Remediation Plan (PX 74). Similarly, portions of the Declaration of Professor Victor Stango (DX 1) reference confidential documents and testimony related to the Claim Fraud Filter (DX 7), the Remediation

Plans (DX 8; PX 74), and provisionally sealed portions of Plaintiffs' expert report of Greg J. Regan (PX 4), among other confidential topics. As yet another example, the majority of Jennifer Lennon's declaration (DX 8) quotes from or describes the Highly Confidential-Attorneys' Eyes Only Remediation Plan (PX 74) and summarizes BANA's implementation of the Plan. For the reasons discussed above, there are good cause and compelling reasons to seal discussions of those topics, testimony and documents, as well as others discussed in BANA's Opposition and expert and fact declarations. *See supra*, pgs. 6-14.

III. CONCLUSION

For the foregoing reasons, BANA respectfully requests that the Court grant Defendant's Motion to Seal because good cause and compelling reasons support sealing of the identified documents or portions thereof. Defendant has lodged a Proposed Order separately with the Court.

Dated: October 24, 2024 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on October 24, 2024. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify under penalty of perjury that the foregoing is true and correct.

Executed: October 24, 2024 *s/ James W. McGarry*