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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 3:21-md-02992-GPC-MSB **OPPOSITION TO DEFENDANT'S MOTION TO SEAL DOCUMENTS FILED IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** Judge: Hon. Gonzalo P. Curiel Ctrm: 2D (2nd Floor)
This Document Relates to All Actions	

Pursuant to Local Rule 79.2 and Section 12.5 of the Stipulated Protective Order (ECF 82) in this case and the Court's Civil Pretrial & Trial Procedures, Plaintiffs hereby oppose Defendant Bank of America, N.A.'s ("Defendant" or "BANA") Motion to Seal Documents Filed in Opposition to Plaintiffs' Motion for Class Certification.

I. LEGAL STANDARD

There is a strong presumption in favor of public access to court records. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." (cleaned up)); *see also Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) ("Unless a particular court record is one 'traditionally kept secret,' a 'strong presumption in favor of access' is the starting point."). This presumption in favor of access is at its strongest when the documents sought to be sealed are "more than tangentially related to the merits of a case," such as a class certification motion. *Nia v. Bank of Am., N.A.*, No. 21-cv-1799-BAS-BGS, 2024 WL 171659, at *2 (S.D. Cal. Jan. 12, 2024).[1]

The party seeking to seal a court record has the burden of "articulat[ing] compelling reasons [to seal a document] supported by specific factual findings . . . that outweigh the

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[1] Defendant relies primarily on unreported cases that pre-date *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092 (9th Cir. 2016) for the proposition that the "compelling reasons" test only applies if "denial of a motion for class certification would constitute the death knell of the case." ECF 347 at 1 (quoting *Makaeff v. Trump Univ., LLC*, No. 10-cv-0940-GPC (WVG), ECF 416 (S.D. Cal. June 29, 2015)). That is no longer good law following *Center for Auto Safety*, which rejected such a narrow reading of "dispositive" and held that "public access will turn on whether the motion is more than tangentially related to the merits of a case." 809 F.3d at 1101. Since then, "[c]ourts within this circuit apply the compelling reasons standard to motions to seal documents relating to class certification." *Fodera v. Equinox Holdings, Inc.*, 341 F.R.D. 616, 634 (N.D. Cal. 2022); *see also, e.g.*, *Cohen v. Trump*, No. 10-cv-0940-GPC-WVG, 2016 WL 3036302, at *3 (S.D. Cal. May 27, 2016) (collecting cases holding that the "compelling reasons" test applies to motions for class certification because such motions are "more than tangentially related to the merits").

general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process." *Kamakana*, 447 F.3d at 1178-79 (cleaned up).

The moving party must show compelling reasons for sealing "even if the dispositive motion, or its attachments, were previously filed under seal or protective order." *Kamakana*, 447 F.3d at 1179. Defendant's argument that the Court's prior discovery orders sealing documents "just like those at issue here . . . are sufficient grounds alone to grant sealing here" is not supported by even the cases it cites. *See* ECF 347 at 4:7-27. In both *Lundstrom* and *Workplace Technologies*, the court granted motions to seal documents that had been previously sealed when filed with procedurally identical motions subject to the same compelling reasons standard. *See Lundstrom v. Young*, No. 18-cv-2856-GPC, 2022 WL 15524624, at *17 (S.D. Cal. Oct. 27, 2022) (granting an uncontested request to seal documents filed with a motion to dismiss because it had previously found there were compelling reasons to seal those documents when they were filed with an earlier motion to dismiss); *see also Workplace Techs. Rsch., Inc. v. Project Mgmt. Inst.*, No. 18-cv-1927-JM-MSB, 2021 WL 6091272, at *2 (S.D. Cal. Oct. 20, 2021) (sealing deposition testimony filed with a motion for summary judgment that had been previously sealed when filed with an earlier motion for summary judgment).[2] Here, the Bank attempts to rely on sealing orders that were uncontested, unsupported by any evidence, and decided under the less stringent "good cause" standard applicable to discovery disputes. *See* ECF 266 (granting uncontested motion to seal documents filed with ECF 210-212, a motion to compel discovery); ECF 293 (granting uncontested motion to seal documents filed with ECF 276-

[2] Moreover, both cases also involve subsequent requests to seal the *exact same documents* subject to a previous sealing order. *Lundstrom*, 2022 WL 15524624, at *17 ("[T]hose [previously sealed] documents are identical to the Exhibits in the present motion."); *Workplace Techs.*, 2021 WL 6091272, at *2 ("[T]he court already granted the Parties' Motions to Seal the limited portions of [deponents'] testimony at issue here."). They provide no support for the Bank's contention that prior sealing of "similar documents" has any bearing on its request to seal different documents now.

278, a motion to reverse magistrate judge's discovery order). The court's prior sealing orders under the "good cause" standard applicable to discovery disputes has no bearing on whether the Bank has met its burden to establish compelling reasons supporting its sweeping request to seal large portions of its brief, expert declarations, and evidence in opposition to class certification. As explained below, the Bank has not met its burden, and therefore its motion, with limited exceptions, should be denied.

II. <u>BANA FAILS TO ESTABLISH COMPELLING REASONS TO SEAL THE REQUESTED DOCUMENTS</u>

BANA's sealing request is grossly overbroad. BANA seeks to seal *in their entirety* 70 out of 122 defense exhibits: DX 12, 18-33, 35-36, 38, 40-43, 45-47, 51, 58-62, 64, 66-73, 77-78, 80-82, 84-86, 90, 97-105, 112-118, and 120-122. Nowhere in its motion does BANA address its obligation to narrowly tailor its sealing request through proposed redactions. BANA further requests that the Court seal large portions of its opposition brief and expert declarations simply because they graze some of the same subject matter as those exhibits, even though much of that content is not sensitive or is already in the public record. *See, e.g.*, Opp'n Br. 1:14-16, 6:10-11, 8:11-14, 15:21-16:2, 29:14-20, 32:7-9; *see Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 306 (6th Cir. 2016) (heightened justification needed to seal class certification briefs). Accordingly, the Court should deny the motion and direct BANA to file an unredacted version of its brief and to diligently redact its exhibits to address only the specific information it seeks to have sealed.

<u>Documents that risk future fraud:</u> BANA seeks to seal its fraud and claims review policies, practices and strategies, and any analyses of them based on an unsupported assertion that those documents "could be misused to perpetrate future fraud." ECF 347 at 7. However, BANA fails to show precisely which portions of DX 23, 24, 25, 26, 27, 29, 41, 43, 85, 97, 98, 100, 102, 103, 112, 113, 114, 115, 121, and 122 should be redacted to address this concern. And its claim that documents that refer to discontinued fraud mitigation strategies should be sealed in their entirety is similarly overbroad. Speculation about potential future fraud, untethered from any concrete examples, is insufficient to overcome the public's right to access court documents. *Cohen*, 2016 WL 3036302, at *5; *see also Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (sealing may not be based on "hypothesis or conjecture").

Accordingly, Plaintiffs respectfully request that the Court direct BANA to specifically identify the portions of documents that reference sensitive fraud and claims review policies and redact only those specific references. *Kamakana*, 447 F.3d at 1183.

Documents that risk competitive harm: BANA's vague and conclusory assertions that the lodged documents "contain sensitive business information that could be used to BANA's competitive or commercial disadvantage," *see* ECF 347 at 8-12, are insufficient to meet the Bank's burden. *See, e.g.*, *Cohen*, 2016 WL 3036302, at *5 (holding a "blanket assertion" of competitive harm insufficient to justify sealing); *Whitecryption Corp. v. Arxan Techs., Inc.*, No. 15-cv-00754-WHO, 2016 WL 7852471, at *2 (N.D. Cal. Mar. 9, 2016) (denying sealing motion where supporting declaration offered only "generalized, unsupported assertions of unfair advantage to competitors without explaining 'how a competitor would use the information to obtain an unfair advantage'" (citation omitted)).

For example, the Bank seeks to seal correspondence with the Employment Development Department regarding its public contract. *See* DX 21, 28. These documents are subject to public records requests—the antithesis of proprietary business information. *See* Cal. Gov't Code §§ 6250 et seq. The Bank further claims that DX 12 is "proprietary, confidential business information of EDD and/or BANA," ECF 347 at 11:1-4, but such "conclusory offerings do not rise to the level of 'compelling reasons' sufficiently specific to bar the public access to the documents." *Kamakana*, 447 F.3d at 1182. The Bank must establish that such information would be *harmful* to the Bank if made public, and it makes no effort to do so with any of the documents it seeks to seal.[3] BANA's wholesale sealing of these documents based on a conclusory assertion that they constitute "sensitive business

[3] As an example of how overbroad the Bank's sealing requests are, the Bank seeks to seal even the EDD Cardholder Agreement [DX 22].

information" is insufficient to show that there are compelling reasons to seal or that its designations are narrowly tailored.

Plaintiffs respectfully request that the Court direct BANA to specifically identify the portions of documents that would expose it to purported competitive harm that reference policies and procedures it currently employs, and specifically identify portions of those documents it seeks to seal.

Class members' personal information: Plaintiffs do not oppose sealing documents and portions of documents that disclose cardholder personal identifying information, including DX 1, 9, 30-33, 35, 36, 38, 40, 45, 46, 47, 51, 58-62, 64, 66-73, 77, 78, 80, 81, 82, and 84, which contain personal transaction details, financial information, and the Bank's fraud allegations attributable to specific individuals.

But not all of the documents the Bank describes as disclosing "personal information" actually do so. DX 85 and DX 86 contain only *anonymized data* about the Bank's Remediation Plan payments, without any personally identifiable information traceable to any particular individual. There is no cause for sealing anonymized class data. *See Pac. Fertility Ctr.*, 441 F. Supp. 3d at 907 (sealing the identities of absent class members but not other anonymized information derived from medical records, including the total number of class and sub-class members).

Regulator materials: To the extent that the Bank or the regulators can substantiate compelling reasons for sealing, Plaintiffs take no position as to the sealing of the Remediation Plan and Addenda pursuant to the Consent Orders of the Office of the Comptroller of the Currency ("OCC") and Consumer Financial Protection Bureaus ("CFPB").[4] However, those documents were not filed with the Bank's Opposition to Class

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[4] As previously stated, *see* ECF 341 at 5:15-6:2, Plaintiffs do oppose sealing the definition of Excluded Cardholders in Plaintiffs' Motion for Class Certification because the public interest in understanding the scope of the class—including the interests of absent class members—outweighs any interest in the secrecy of this brief excerpt. *See In re Cendant Corp.*, 260 F.3d 183, 193 (3d Cir. 2001) (right of public access particularly

Certification and are not the subject of this sealing motion. The Bank seeks to over-extend the regulators' privilege to seal not just records created, obtained, or compiled by the regulators but interrogatory responses, expert reports, and accompanying exhibits, which contain only *anonymized data* about the amount of compensation individuals were paid after the Bank implemented the Remediation Plan, the aggregate amounts of automatically denied claims and rescinded credits pursuant to the Claim Fraud Filter, and the lengths of time (anonymized) class member accounts were frozen [DX 1, 2, 6, 7, 9, 23, 24, 41, 43, 85, 86, 98, 105, 112, and 122].

III. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny Defendant's Motion to Seal, in part, and direct Defendant to specifically identify the portions of documents to be sealed.

Respectfully submitted,

Dated: November 7, 2024

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compelling in class actions "because many members of the 'public' are also [absent] plaintiffs in the class action"); *Maldonado v. Apple, Inc.*, No. 3:16-cv-04067-WHO, 2021 WL 134579, at *5 (N.D. Cal. Jan. 14, 2021) (denying sealing where doing so would make it "impossible to understand the fundamentals of [the Court's] Order—and by extension, the scope of the class").

Dated: November 7, 2024

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SIGNATURE ATTESTATION

Pursuant to section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I, Brian Danitz, attest that the other signatories listed, and on whose behalf this filing is submitted, concur in the filing content and have authorized this filing.

Dated: November 7, 2024

/s/ Brian Danitz
Brian Danitz