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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. 21-MD-02992-GPC-MSB **DEFENDANT'S JOINDER IN PLAINTIFFS' MOTION TO FILE DOCUMENTS UNDER SEAL (ECF 376)** Ctrm: 2D – 2nd Floor Judge: Hon. Gonzalo P. Curiel

PLEASE TAKE NOTICE that, pursuant to Local Civil Rule 79.2(c), Defendant Bank of America, N.A. ("Defendant" or "BANA") submits this Joinder in Plaintiffs' Motion to File Documents Under Seal (ECF 376) ("Plaintiffs' Motion to Seal") submitted in connection with Plaintiffs' Reply in Support of Motion for Class Certification (ECF 378) ("Plaintiffs' Reply").[1] In particular, BANA seeks to seal Plaintiffs' Exhibits 164-168 and 177 in their entirety and portions of Exhibits 158-162, 174, 178, 179 and 180 because compelling reasons support sealing of the identified documents or portions thereof, as well as any references to the contents of those exhibits in Plaintiffs' Index of Exhibits to the Supplemental Declaration of Connie K. Chan in Support of Plaintiffs' Motion for Class Certification (ECF 378-1) ("Plaintiffs' Index of Exhibits") and Plaintiffs' Reply.[2]

As previously stated in BANA's motions to seal submitted in connection with class certification briefing (ECF 328, 337, 344, 347), 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). There are compelling reasons to seal the documents and testimony at issue here—each of which contain information that qualifies as "Protected Material" pursuant to the Parties' Stipulated Protective Order ("Protective Order"), entered by the Court on September 24, 2021

[1] This Joinder is based on and incorporates by reference Plaintiffs' Motion to Seal (ECF 376) and the grounds stated therein for the sealing of Exhibits 158-162, 164-168, 174, 177-180 or portions thereof, the documents filed in support of Plaintiffs' Reply (ECF 378), Defendants prior sealing motions (ECF 328, 337, 344, 347) and accompanying declarations submitted in support (ECF 344-1, 344-2, 344-3, 347-1, 347-2), 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.

[2] BANA also supports the sealing of Exhibits 181-183, which are documents that Plaintiffs designated confidential under the Protective Order and which contain confidential cardholder information and personal identifying information ("PII"). *See* ECF 376 at 2-3.

(ECF No. 82)—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. *See, e.g.*, *East West Bank v. Shanker*, 2021 WL 3112452, at *18-19 (N.D. Cal. July 22, 2021) (finding compelling reasons to seal where public disclosure of EWB's confidential onboarding processes, verification of customer identities and fraud prevention measures would "harm [the bank's] competitive standing"); *Soria v. U.S. Bank N.A.*, 2019 WL 8167925, at *4 (C.D. Cal. Apr. 25, 2019) (finding compelling reasons to seal bank's internal procedures for investigating fraud because there was a "significant danger that someone could improperly use this information to commit fraud and avoid detection").

Moreover, each of the Exhibits that Plaintiffs and BANA seek to seal reflect information pertaining to BANA's confidential fraud analyses, BANA's revenue share with EDD, BANA's Remediation Plans or BANA's implementation of the Plans, or EDD cardholders' claim information, which are the same categories of information that this Court has already found compelling reasons to seal. *See* ECF 365 (Amended Sealing Order); ECF 381 (Sealing Order). In particular:

- Exhibits 164-166 reflect confidential BANA fraud analyses pertaining to ATM skimming that could be misused by criminals to perpetuate future fraud by circumventing BANA's security and fraud prevention procedures or that could cause competitive harm to BANA. *See* Amended Sealing Order (ECF 365) at 5-6, 12; Martin Decl. (ECF 344-1) ¶¶ 5-8; *see also E.W. Bank*, 2021 WL 3112452, at *18-19 (granting motion to seal where public disclosure of confidential fraud prevention measures would "harm [bank's] competitive standing");
- Exhibit 166 reflects confidential BANA fraud analyses pertaining to ATM claims data that similarly could be misused by fraudsters to perpetrate future fraud or could be used by another financial institution

to BANA's competitive disadvantage. *See* Amended Sealing Order (ECF 365) at 5-6, 12; Robart Decl. (ECF 342-2) ¶¶ 3-5; Martin Decl. (ECF 347-1) ¶¶ 10-12; *see also 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);

- Exhibit 179 reflects confidential BANA testimony related to negotiating changes to BANA's revenue share with EDD, which reflects "confidential negotiations and agreements with EDD" that this Court has already found compelling reasons to seal. Amended Sealing Order (ECF 365) at 13; *see also* ECF 347 at 10; *see also 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);
- Exhibit 180 reflects confidential BANA testimony pertaining to BANA's Remediation Plans with the Office of the Comptroller of the Currency ("OCC") and the Consumer Financial Protection Bureau ("CFPB")—which were designated Highly Confidential – Attorneys' Eyes Only at those regulators' requests—or BANA's implementation of the Remediation Plans, which this Court has found compelling reasons to seal because they "contain highly sensitive, and confidential information that would subject any disclosure to potential fraud in seeking payments under the Plans." Amended Sealing Order (ECF 365) at 14-16; *see also* Lennon Decl. (ECF 344-3) ¶¶ 3-6; *see also 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);

and

- Exhibits 167, 174, 177 and 178 reflect confidential cardholder account or personal information, including personal identifying information, the disclosure of which could expose those cardholders to harm or identity theft. *See* Amended Sealing Order (ECF 365) at 16; Sealing Order (ECF 381) at 1; *see also* Robart Decl. (ECF 347-2) ¶¶ 3-8; *see also Stiner v. Brookdale Senior Living, Inc.*, 2022 WL 1180216, at *2 (N.D. Cal. Mar. 30, 2022) (sealing documents containing employees' personally identifying information like names, email addresses, and phone numbers). Those exhibits also reflect the types of claims files or information that BANA considers in connection with investigating and processing unauthorized transaction and error claims. *See* Robart Decl. (ECF 347-2) ¶¶ 3-8. Further compelling reasons exist to seal that information because the disclosure of that information could provide potential fraudsters with insight into BANA's confidential claims processes or procedures, thereby enabling fraudsters to circumvent them and perpetrate future fraud, and disclosure could also enable other financial institutions to use that information to BANA's competitive disadvantage. *See id*.

Additionally, there are compelling reasons to seal portions of Plaintiffs' rebuttal expert reports (Exs. 158-162), Plaintiffs' Index of Exhibits and Plaintiffs' Reply that quote from or summarize the exhibits discussed above because, as this Court has held, "[q]uotes or summary descriptions from sealed exhibits should be filed under seal." Amended Sealing Order (ECF 365) at 18; *see also 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 the foregoing reasons and for the reasons set forth in the Court's sealing orders in connection with class certification briefing (ECF 365, 381), Plaintiffs'

Motion to Seal (ECF 376), and BANA's prior motions to seal (ECF 328, 337, 344, 347) and accompanying declarations submitted in support (ECF 344-1, 344-2, 344-3, 347-1, 347-2), BANA respectfully requests that the Court grant Plaintiffs' Motion to Seal Exhibits 164-168 and 177 in their entirety, portions of Exhibits 158-162, 174, 178, 179 and 180, and any references to those exhibits in Plaintiffs' Index of Exhibits (ECF 378-1) or Plaintiffs' Reply (ECF 378) because compelling reasons support sealing of the identified documents or portions thereof.

Dated: November 27, 2024 Respectfully submitted,

By: *s/ James W. McGarry*

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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 November 27, 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: November 27, 2024 *s/ James W. McGarry*