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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 NOTICE AND MOTION TO SEAL DOCUMENTS FILED IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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 Notice and Motion to Seal certain documents and portions of other documents submitted in support of Plaintiffs' Motion for Class Certification (ECF No. 324).[1]

A. 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 referenced in Plaintiffs' Motion 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 have held that a party seeking to seal documents filed in support of a motion for class certification must show "compelling reasons" supporting the sealing. *See, e.g.*, *McMorrow v. Mondelez Int'l, Inc.*, No. 17-CV-2327-BAS-JLB, 2021 WL 488337, at *2-3 (S.D. Cal. Feb. 10, 2021) (finding compelling reasons to seal documents filed under seal in support of and in opposition to motion for class certification); *McCurley v. Royal Seas Cruises, Inc.*, No. 17-CV-00986-BAS-AGS, 2018 WL 3629945, at *2 (S.D. Cal. July 31, 2018) (finding compelling reasons to seal document filed in support of class certification). This

[1] Plaintiffs filed a Motion to Seal (ECF No. 322) the same documents submitted with their Motion for Class Certification (ECF No. 324), but Plaintiffs improperly filed a proposed order *denying* that same motion (ECF No. 322) contrary to the Parties' Protective Order (ECF No. 82) and the Local Rules. Accordingly, Defendant is filing this Motion to Seal and a separate Proposed Order. This Motion is based on Defendant's Notice of Motion and Motion to Seal, the documents filed in support of Plaintiffs' Motion for Class Certification (ECF No. 324), 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 in order to decide Defendant's Motion to Seal, BANA respectfully requests the opportunity to submit additional briefing and declarations in support of sealing.

standard requires courts to "'consciously balance[ ] the competing interests' of the public and the party who seeks to keep certain judicial records secret." *In re: Bofi Holding, Inc. Sec. Litig.*, No. 3:15-CV-02324-GPC-KSC, 2016 WL 5390533, at *16 (S.D. Cal. Sept. 27, 2016) (J. Curiel) (citation omitted) (finding compelling reasons to grant motion to seal to protect confidential witnesses). Courts have found that compelling reasons exist to seal when disclosure of the "'confidential information . . . is potentially prejudicial to the business or operations' of Defendants" or risks "potential misuse by competitors." *McCurley*, 2018 WL 3629945, at *2; *see East West Bank v. Shanker*, No. 20-CV-07364-WHO, 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"). Additionally, "compelling reasons" outweigh the public's interest in disclosure when such disclosure could potentially enable future fraud. *See, e.g.*, *Soria v. U.S. Bank N.A.*, No. SACV 17-00603-CJC(KESx), 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").

B. COMPELLING REASONS EXIST TO SEAL THE CONFIDENTIAL DOCUMENTS

There are compelling reasons to file under seal each of the confidential documents, discovery responses and testimony referenced in Plaintiffs' Motion to Seal (or portions thereof), and any substantive discussion of those documents contained in Plaintiffs' Motion for Class Certification.[2] Each of those documents

[2] Any references to BANA's confidential documents, discovery responses or testimony within Plaintiffs' Notice of Motion, Memorandum of Points and Authorities in Support of Motion for Class Certification, or any exhibits submitted therewith, including Plaintiffs' expert reports (Exs. 1-4) and Plaintiffs' Proposed Trial Plan (Ex. 157) should remain redacted because disclosure could harm BANA's competitive standard or risk future fraud, for the reasons discussed below.

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. Both 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, fraud management techniques, and verification of customer identities, which if made public would harm EWB'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 U.S. Bank's procedures concerning its fraud investigations, public disclosure of this information may impede U.S. Bank's ability to identify and combat 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.

Similar compelling reasons exist here.[3] Specifically, the Confidential and Highly Confidential – Attorneys' Eyes Only documents and testimony that BANA seeks to seal, include but are not limited to, the following categories of documents and information:

- BANA's fraud detection and prevention policies and strategies, including the Claim Fraud Filter, and other current and former fraud strategies (*see* Exs. 27, 38, 44, 48, 49, 50, 56, 57, 59, 64, 65, 67, 81, 88,

[3] Although BANA appropriately designated its cardholder agreement with EDD cardholders (Ex. 76) and its contract with EDD (Ex. 115) as Confidential under the Protective Order, BANA does not seek to seal those documents on the public docket.

91-92, 94-101, 106, 113-114, 141-143, 145, 153 and 156);

- BANA's claims review policies and strategies and the implementation thereof, including reviewing complaint escalations and issuing provisional credits in compliance with regulations (*see* Exs. 35-36, 47, 77, 79, 80, 82-87, 93, 96, 102, 104, 116-118, 141-143 and 156);
- BANA's analyses of transactional fraud, including card skimming, and potential fraud prevention and detection strategies to combat that fraud, including EMV chip technology (*see* Exs. 27-29, 32-34, 55, 89 and 144);
- BANA's analyses of claims fraud and potential strategies to combat that fraud, including the use of the Claim Fraud Filter (*see* Exs. 42-43, 46, 51, 54, 58, 68, 75, 78, 105 and 106);
- BANA's call center operations and strategies, including its authentication procedures, trainings, business controls and processes and performance assessments (*see* Exs. 30, 66, 77, 96, 114, 119-122, 124-125, 133-134, 136-138, 140 and 151);
- BANA's general services agreements and statements of work between BANA and its call center vendors (*see* Exs. 123, 126-130, 132, 135 and 152);
- 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* Exs. 24-26, 31, 45, 69 and 108);
- BANA's analyses of its state prepaid unemployment program operations, including but not limited to, contractual negotiations, card volume, fraud volume, claims and call center operations, and operational risks and losses (*see* Exs. 93, 96, 109-110, 116, 118-119, 139-140, 148 and 154);
- BANA's fraud and operational losses in connection with the

unemployment insurance prepaid programs (*see* Exs. 37, 39-41, 90, 107, 111, 119, 148, 153 and 155);

- BANA's organizational charts reflecting the Bank's divisions responsible for fraud strategies and prevention, among others (Ex. 150);
- 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* Exs. 49, 74, 98, 146 and 147);
- 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* Exs. 49, 59-60, 98, 114, and 146); and
- non-plaintiff customers' complaints or claim information, which often include personal, sensitive information (*see* Exs. 49, 59-60, 98, 114, 140 and 146).[4]

Documents, discovery responses and testimony just like these, including some of the exhibits re-submitted with Plaintiffs' Motion for Class Certification[5], were previously submitted under seal in connection with Plaintiffs' motion to compel ESI discovery. *See* ECF No. 212. Upon review of the parties' motion to seal, Magistrate

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[4] Plaintiffs submit excerpted deposition testimony from six BANA witnesses (Exs. 14-20), which BANA designated as Confidential or Highly Confidential – Attorneys' Eyes Only because those witnesses testify 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 and blocking of accounts; BANA's call center procedures and complaint escalation intake channels; and BANA's implementation of its remediation plans with regulators.

[5] Judge Berg already found "compelling reasons" to seal Exhibits 58, 106, 111, 134 and 150, which were previously filed in connection with Plaintiffs' motion to compel briefing. *See* ECF No. 266.

Judge Berg agreed that each of the documents should be kept under seal because "there are ***compelling reasons*** that overcome the presumption of public access, pursuant to Civil Local Rule 79.2." (Apr. 24, 2024 Order (ECF 266)) (emphasis added). The sealed documents included, but were not limited to, those related to discussions of: the Claim Fraud Filter and other fraud strategies, claims strategies (including issuing provisional credits), call center operations, fraud losses, state contract issues, prepaid updates and trackers, Board meeting minutes, cardholder complaints and escalations, BANA's organizational charts, and certain of BANA's responses and objections to Plaintiffs' interrogatories. Additionally, the Court found "good cause shown" in permitting the sealing of documents and testimony filed in connection with Plaintiffs' Objections to and Motion to Reverse in Part Magistrate Judge's April 24, 2024 Discovery Order (ECF Nos. 278-279). (June 14, 2024 Sealing Order (ECF No. 293)). Those exhibits similarly pertain to the Claims Fraud Filter and other fraud strategies, operational fraud losses, and trainings for claims investigations. *See id.*[6] The Court should find the same here, and grant Defendant's Motion to Seal, because the documents identified in Defendant's Motion to Seal concern the very topics and issues that this Court and Judge Berg have already found should be sealed, and that Judge Berg notably found "***compelling reasons*** that overcome the presumption of public access" to seal. ECF Nos. 266 at 1 (emphasis added); *see also* ECF No. 293.

Indeed, public access to BANA's fraud and claims review strategies (*see* Exs. 7, 35-36, 38, 44, 47-50, 56-57, 59, 64-65, 67, 77, 79- 88, 91-102, 104, 106, 113-114, 116-118, 141-143, 145, 153 and 156), and any analyses of fraud and possible strategies to combat fraud (*see* Exs. 27-29, 32-34, 42-43, 46, 51, 54-55, 58, 68, 75, 78, 89, 105-106, and 144) could provide insight into BANA's fraud detection and prevention measures. That insight could be used by fraudsters to perpetrate future

[6] The Court already found "good cause" to seal Exhibits 39, 44, 45, 47 and 101, which were previously filed with Plaintiffs' Objections to and Motion to Reverse in Part Magistrate Judge's April 24, 2024 Discovery Order. *See* ECF No. 293.

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. *See, e.g.*, *Soria*, 2019 WL 8167925, at *4 (granting motion to seal because, "[a]lthough there is a public interest in U.S. Bank's procedures concerning its fraud investigations, public disclosure of this information may impede U.S. Bank's ability to identify and combat future instances of fraud" and "[t]here is a significant danger that someone could improperly use this 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"). 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* Exs. 24-26, 31, 45, 69 and 108) could also be misused by fraudsters to perpetrate future fraud and avoid detection. *See, e.g.*, *Soria*, 2019 WL 8167925, at *4; *Jasso*, 2022 WL 2665979, at *2. Similarly, public access to information regarding BANA's call center operations and strategies, including its authentication procedures, trainings, business controls and processes and performance assessments (*see* Exs. 30, 66, 77, 96, 114, 119-122, 124-125, 133-134, 136-138, 140 and 151) could be used by fraudsters to perpetrate future fraud and to circumvent BANA's call center authentication and fraud prevention procedures. *See, e.g.*, *Soria*, 2019 WL 8167925, at *4.[7]

Moreover, the aforementioned categories of documents and testimony also contain sensitive business information that could be used to BANA's competitive or

[7] 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. *See, e.g.*, *Soria*, 2019 WL 8167925, at *4.

commercial disadvantage, which is yet another compelling reason to seal the documents. *See, e.g.*, *East West 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"); *Brady v. Grendene USA, Inc.*, No. 3:12-CV-0604-GPC-KSC, 2015 WL 6828400, at *3 (S.D. Cal. Nov. 6, 2015) (J. Curiel) (permitting sealing of confidential business information including profit and loss data as well as contractual agreements). For example, documents, testimony or discovery responses demonstrating how BANA structures its claims and fraud teams (*see* Ex. 150), and the review procedures, protocols, and systems used and implemented by those teams (*see* Exs. 7, 35-36, 38, 44, 47-50, 56-57, 59, 64-65, 67, 77, 79-88, 91-102, 104, 106, 113-114, 116-118, 141-143, 145, 153 and 156) is sensitive business information that, if disclosed to the public, could be replicated by a competitor financial institution to BANA's competitive disadvantage. *See, e.g.*, *East West Bank*, 2021 WL 3112452, at *18-19 (permitting sealing of confidential onboarding processes, digital banking platform, fraud management techniques, and verification of customer identities).

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* Exs. 37, 39-41, 90, 93, 96, 107, 109, 110-111, 116, 118-119, 123, 126-130, 132, 135, 139, 140, 148 and 152-155) could similarly be used by a competitor financial institution to BANA's competitive disadvantage. *See, e.g.*, *Adtrader, Inc. v. Google LLC*, No. 17-CV-07082-BLF, 2020 WL 6391210, at *2 (N.D. Cal. Mar. 24, 2020) (finding compelling reasons to seal portions of order referencing Google's internal strategic decisions, policies, and processes related to detecting and responding to advertising fraud on its platforms); *Xifin, Inc. v. Sunshine Pathways, LLC*, No. 16-CV-01218-GPC-DHB, 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*, 2015 WL 6828400, at *3 (sealing confidential business information that might harm the litigants' competitive standing including profit and loss data and contractual agreements); *Zest IP Holdings, LLC v. Implant Direct Mfg. LLC*, No. 3:10-CV-0541-GPC-WVG, 2015 WL 11201172, at *3 (S.D. Cal. Oct. 28, 2015) (J. Curiel) (sealing Board minutes).

Additional compelling reasons exist to seal Exhibits 49, 59, 60, 98, 114, 140 and 146 because they reflect non-plaintiff customers' complaints, which often include personal, sensitive information that the customers did not intend to appear on a public docket. *See, e.g.*, *Pryor v. City of Clearlake*, No. C 11-0954 CW, 2012 WL 3276992, at *2 (N.D. Cal. Aug. 9, 2012) (granting in part motion to seal documents not relevant to the litigation, including the prior arrest record of a non-litigant finding that "three factors-irrelevance, personal identification information and likely embarrassing information about the arrest of a non-litigant—outweigh the public's interest in disclosure"); *Castillon v. Corr. Corp. of Am., Inc.*, No. 1:12-CV-00559-EJL, 2015 WL 3948459, at *2 (D. Idaho June 29, 2015) ("With regard to non-litigants, while there is no presumption that their privacy requires sealing, the balancing test may reach that result, especially if the non-litigants are not involved in the litigation and their sensitive and confidential information has been involuntarily provided pursuant to a subpoena."). For example, BANA's responses and objections to Plaintiffs' interrogatories (and the exhibits thereto), including Exhibits 49, 59, 60, 98, 114 and 146, contain personal transaction details and claims information, including their Alias IDs, that is both confidential as to the non-plaintiff cardholders, and confidential, proprietary business information for BANA. *See, e.g.*, *Pryor*, 2012 WL 3276992, at *2; *East West Bank*, 2021 WL 3112452, at *18-19. Moreover, Plaintiffs themselves designated their own claim correspondence as Confidential in many instances. *See* Ex. 62. Accordingly, non-plaintiff customer complaints contain sensitive, personal information that overcomes the presumption of public access and warrants sealing.

Finally, compelling reasons exist to seal Exhibits 49, 59, 60, 74, 98, 146 and 147, which contain documents and information regarding BANA's implementation of its Remediation Plans and Addenda with the OCC and CFPB. These documents have been designated as Highly Confidential – Attorneys' Eyes Only per the direction of the regulators because they contain confidential information belonging to each regulator that is subject to 12 C.F.R. § 4.32(b)(1)-(2) and 12 C.F.R. § 1070.47(b), because the implementation of those plans are ongoing and subject to change, and because the release of such information could permit persons to potentially take advantage of the Remediation Plans' review processes and procedures. Accordingly, Plaintiffs agreed in this case to accept this information as Attorneys' Eyes Only as a condition to receiving it. *See* ECF No. 82.

II. CONCLUSION

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

Dated: September 5, 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 September 5, 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: September 5, 2024 *s/ James W. McGarry*