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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 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTIONS TO SEAL DOCUMENTS [ECF 328 and ECF 337]** Judge: Hon. Gonzalo P. Curiel Ctrm: 2D (2nd Floor)
This Document Relates to All Actions	

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I. INTRODUCTION

In plain derogation of the Court's Protective Order, which expressly prohibits "[m]ass, indiscriminate, or routinized designations" and requires parties to "designate for [confidential] protection only those parts of material" that genuinely qualify for protection, ECF 82 at 5 (§5.1), Defendant Bank of America, N.A. (the "Bank") has indiscriminately designated as "Confidential" or "Highly Confidential" almost every page of every document it produced and nearly all of its deposition testimony and discovery responses. As a result, Plaintiffs were required to file provisionally under seal key portions of their Motion for Class Certification (including part of the definition of the classes Plaintiffs seek to certify), the supporting Memorandum of Points and Authorities, Trial Plan, Expert Reports, and the vast majority of supporting evidence. *See* ECF 322, 334. Plaintiffs did so even though they dispute that any compelling reasons exist to seal any of their class certification papers and have challenged the Bank's overbroad confidentiality designations pursuant to the Protective Order's procedures. *See Cohen v. Trump*, No. 13-cv-2519-GPC-WVG, 2016 WL 3036302, at *3 (S.D. Cal. May 27, 2016) ("compelling reasons" standard applies to requests to seal class certification motions) (citing *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016)).

The Bank continues to indiscriminately assert that nearly all of its documents, testimony, and discovery responses that Plaintiffs submitted in support of class certification should be filed under seal and shielded from public view (ECF 328, 337), but it submits *zero* evidence that disclosure of any specific information would cause actual harm, impermissibly relying instead entirely on "blanket assertion[s]" and speculation. *See Cohen*, 2016 WL 3036302, at *5. In stark contrast, the public has an unusually strong interest in access to court records in this class action, which seeks to hold the Bank accountable for its misconduct in denying tens of thousands of vulnerable Californians access to their constitutionally protected public benefits at the height of the pandemic, and which raises issues of great "importan[ce] to the public." *Id.* at *6 (quoting *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424 n.5 (9th Cir. 2011)).

Granting the Bank's motion to seal such broad swaths of Plaintiffs' class certification motion and supporting evidence would substantially undermine the ability of the public (including members of the putative classes) to understand the basis for Plaintiffs' motion and the Court's ruling thereon. *See In re Cendant Corp.*, 260 F.3d 183, 193 (3d Cir. 2001) (right of public access particularly compelling in class actions "because many members of the 'public' are also [absent] plaintiffs in the class action"). The Bank has not satisfied its heavy burden of establishing that compelling reasons overcome the public's presumptive right of access. Accordingly, its motion should be denied in substantial part as set forth in Plaintiffs' accompanying proposed order.[1]

II. ARGUMENT

In the Ninth Circuit, there is a longstanding and "strong presumption in favor of access to court records." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). This presumption is particularly strong when those court records relate to a motion that is "more than tangentially related to the merits of a case," such as a class certification motion. *Cohen*, 2016 WL 3036302, at *3 (quoting *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016)). To overcome the strong presumption in favor of public access to documents relating to a class certification motion, the moving party "bears the burden of … 'articulat[ing] compelling reasons *supported by specific factual findings*' … that outweigh the general history of access and the public policies favoring disclosure, such as the 'public interest in understanding the judicial process.'" *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006)

[1] For the reasons explained herein, Plaintiffs do not oppose the sealing of Ex. 60 (identifying the Plaintiffs' unique Card Alias IDs); and although Plaintiffs *do* oppose the sealing of Exs. 74 and 147 (copies of the Remediation Plan that the Bank was required to implement pursuant to the CFPB and OCC Consent Orders (*see* Exs. 72-73)), because the Bank has not presented any *evidence* that the CFPB and OCC are actually asserting that these exhibits should be sealed pursuant to the bank examination privilege or otherwise (or that such sealing would be proper), we recognize that the Court has the authority to request the CFPB and OCC to make their positions known, even if the Bank has failed to meet its burden. All references herein to "Ex." refer to the exhibits to the [Corrected] Declaration of Connie K. Chan in Support of Plaintiffs' Motion for Class Certification (ECF 336-2), lodged at ECF 323 and 335.

(citations omitted; emphasis added). Even if the moving party substantiates compelling reasons to seal, "the court must 'conscientiously balance[] the competing interests' of the public and the party who seeks to keep certain judicial records secret." *Id.* at 1179 (quoting *Foltz*, 331 F.3d at 1135).

Here, the Bank offered no evidence of any kind in support of its motion, requiring denial of its motion on that threshold basis. Even if the Bank had submitted supporting declarations, though, the majority of documents on their face do not satisfy the Ninth Circuit's "compelling reasons" standard. Finally, any potential interest the Bank may have in secrecy with respect to documents and policies that were for the most part implemented four years ago and that have long since been enjoined or superseded is far outweighed by the public's extraordinarily strong interest in access to the judicial records at issue here, given the public interest nature of this class action.

A. The Bank Has Not Established Compelling Reasons to Deprive the Public of Access to the Material It Seeks to Seal, Nor Could It.

1. The Bank Has Submitted No Evidence Establishing a Likelihood of Harm from Disclosure.

The law is well established in the Ninth Circuit that documents may not be sealed from public view based on mere conclusory assertions of harm. Rather, "for each particular document it seeks to protect," the moving party must submit an affidavit, declaration, or other evidence establishing "that *specific prejudice or harm* will result if no protective order is granted." *Foltz,* 331 F.3d at 1130-31 (emphasis added) (quoting *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653 (D. Md. 1987), for the proposition that a "party requesting a protective order [must] provide 'specific demonstrations of fact, supported where possible by affidavits and concrete examples'"); *Kamakana*, 447 F.3d at 1178 (moving party must provide "specific factual findings" in support of its motion to seal) (quoting *Foltz*, 331 F.3d at 1135); *see also* Hon. Gonzalo P. Curiel Civil Pre-Trial & Trial Procedures at 5 (party seeking sealing order must submit "affidavits showing good cause to protect those documents from disclosure").

In clear violation of this Court's Civil Pre-Trial & Trial Procedures, the Bank failed to provide an affidavit—or factual evidence of any kind—in support of its sealing motion. Instead, the Bank relies on generalized blanket assertions that the documents "could be used by fraudsters" and "contain sensitive business information." Mot. (ECF 328) at 6-7. But "conclusory statements about the content of the documents—that they are confidential and that, in general, their production would [harm the defendant] . . . do not rise to the level of 'compelling reasons' sufficiently specific to bar the public access to the documents." *Foltz,* 331 F.3d. at 1182; *accord A.B. v. Pac. Fertility Ctr.*, 441 F. Supp. 3d 902, 908 (N.D. Cal. 2020) ("[B]oilerplate assertion of competitive harm or trade secrets [is not] sufficient to meet its burden."). Without evidence, the Court cannot "articulate the factual basis" for an order to seal "without relying on hypothesis or conjecture." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). For that reason, the Bank's motion to seal should be denied. *See Hilsley v. Gen. Mills, Inc.*, No. 3:18-cv-00395-L-BLM, 2020 WL 5656687, at *1 (S.D. Cal. Sept. 23, 2020) (denying motion to seal because, among other factors, "no declaration [wa]s provided in support of Defendants' contention" that "prejudice or harm . . . would result from disclosure"); *Aevoe Corp. v. AE Tech Co.*, No. 2:12-cv-00053-GMN, 2014 WL 6065812, at *2 (D. Nev. Nov. 12, 2014) (same).

The Bank suggests in a footnote that it *could* "submit additional briefing and declarations in support of sealing." Mot. at 1 n.1. There is no reason the Bank should be given yet another opportunity to substantiate its overbroad confidentiality claims.[2] Like the defendant in *Kamakana*, the Bank "ha[d] a chance to show 'compelling reasons' and squandered it." 447 F.3d at 1181. The Bank's motion should be denied.

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[2] *See* Civ. Local Rule 7.1(f)(2) ("[C]opies of all documentary evidence which the movant intends to submit in support of the motion, or other request for ruling by the Court, must be served and filed with the motion . . . A movant's failure to file any papers required under the local rules may be deemed as a waiver of the motion.").

2. The Bank Cannot Establish Any Compelling Reason to Seal Plaintiffs' Class Certification Brief or the Vast Majority of Plaintiffs' Supporting Documents.

a. There Is No Reason to Seal Plaintiffs' Motion, Memorandum of Points and Authorities, Trial Plan (Ex. 157), or Supporting Expert Reports (Exs. 1-4).

The Bank insists that portions of Plaintiffs' Notice of Motion, MPA, Trial Plan, and supporting expert reports must be filed under seal simply because they "reference[]" documents, discovery responses, and deposition testimony that the Bank has designated as Confidential or Highly Confidential. Mot. at 2 n.2. For the reasons explained *infra* at 9-16, the Bank has not established compelling reasons to file the underlying exhibits under seal. For those same reasons, Plaintiffs' brief and other supporting papers that reference those exhibits should not be sealed. Even if the Bank could justify sealing any of the underlying exhibits, there would still be no justification for sealing Plaintiffs' Motion, MPA, Trial Plan, or supporting Expert Reports, which merely quote or discuss excerpts from the exhibits.

<u>Motion</u>. The Bank seeks to seal Plaintiffs' Notice of Motion and Motion because it contains a short quote from the Bank's Remediation Plan (created in response to the Consent Decree the Bank entered into with the CFPB and OCC), which defines the categories of cardholders who are *ineligible* for compensation under that Remediation Plan. The Motion quotes the Remediation Plan exclusion language because those same ineligible individuals are also excluded from Plaintiffs' proposed class definitions ("Excluded Cardholders"). The public (including absent class members) has a paramount interest in understanding the scope of the proposed classes, and the class definition should not be sealed. Moreover, notwithstanding that the Bank claims the regulators have asserted the bank examination privilege over the Remediation Plan itself, no such assertion has ever been submitted to the Court (or shared with Plaintiffs); the definition of Excluded Cardholder is "not particularly unique or surprising"; and the sealing of that language would make it "impossible to understand the fundamentals of [the Court's] Order—and by

extension, the scope of the class." *Maldonado v. Apple, Inc.*, No. 3:16-cv-04067-WHO, 2021 WL 134579, at *5 (N.D. Cal. Jan. 14, 2021). Plaintiffs' Motion should not be sealed.

MPA and Trial Plan. The Bank cannot establish compelling reasons to seal Plaintiffs' MPA or Trial Plan. First, although Plaintiffs' MPA quotes and summarizes provisionally sealed exhibits, much of that redacted information is already in the public record. *Compare, e.g.*, MPA at 7:12-8:5, *with* ECF 287 at 20:4-21:4; *compare* MPA at 7:25-27, *with* ECF 300 at 4:20-22; *compare* MPA at 8 n.6, *with* ECF 300 at 8:21-27. Courts consistently hold that "[e]ven a single public disclosure of information" is sufficient to preclude sealing. *Cohen*, 2016 WL 3036302, at *4; *see also Settrini v. City of San Diego*, No. 3:20-cv-02273, 2022 WL 6785755, at *2 (S.D. Cal. Oct. 11, 2022) (declining to seal documents, in part because their contents were already on the public docket); *Nia v. Bank of Am., N.A.*, No. 21-cv-1799-BAS-BGS, 2024 WL 171659, at *6 (S.D. Cal. Jan. 12, 2024) (denying Bank of America's motion to seal because the relevant information was "already stated" in public filings); *Yates v. Cheeseburger Restaurants, Inc.*, No. 2:22-cv-01081, 2023 WL 4747431, at *2 (E.D. Cal. July 25, 2023) (denying motion to seal because briefing on the public docket "quoted portions of defendant's sealed exhibits—without redactions").

Second, the Bank points to nothing in Plaintiffs' MPA or Trial Plan that, on its own, could give rise to future fraud risks or unfair competitive harm. Even if the Bank had some basis for sealing the underlying exhibits—and it does not—the short quotations and general descriptions in Plaintiffs' MPA and Trial Plan from documents created for the most part in mid- to late-2020 do not provide enough detail to harm the Bank's competitive standing or enable future fraud. This is particularly so given that: (1) EDD and the Bank have terminated their contractual relationship; (2) the Bank is no longer the state contractor responsible for the distribution of EDD benefits; (3) many of the Bank's challenged policies as reflected in those documents were enjoined in June 2021; and (4) all previously Bank-issued EDD debit cards and associated accounts were closed as of April 30, 2024. ECF 225-1 at 4:3-10. For example, the Bank does not even try to explain how its discussions about EMV chips in 2020 could enable future fraud (*see, e.g.*, MPA at 5:15-18, 6 n.4); how information about caller wait times in 2020 for a program it no longer operates could risk competitive harm (*see id.* at 12:7-20); or how general discussions of the financial impacts of a program it no longer operates could affect its competitive standing (*see, e.g.*, *id.* at 7:12-8:3). Nor does the Bank explain why basic information about class sizes or damages should be sealed (*see* MPA at 3:7-8, 10:1, 10:16-17, 11:17-18; Ex. 157 at 1:9, 2:17), or why the public should be precluded from seeing statements by the Bank's own employees acknowledging the vulnerability of, and harms suffered by, EDD cardholders as a result of the Bank's policies and practices (*see, e.g.*, MPA 5:1-2, 9:21-22, 10:14-15, 11:13, 13:10-19; Ex. 157 at 5:9-10, 14:3-4, 16:8-9).

Notably, the Bank does not bother to redact its own briefs when quoting from its so-called "Confidential" documents—which constitutes a waiver of such confidentiality and an implicit acknowledgment that disclosure of isolated excerpts poses no actual risk of harm. For example, in the Bank's opposition to Plaintiffs' motion to compel additional ESI custodians, the Bank freely quoted from and described in detail many of the documents it now insists must remain under seal. *See* ECF 287 at 20:4-9 (quoting and describing Ex. 40); *id.* at 22:23-26 (quoting and describing Ex. 41); *id* at 23:2-14 (quoting and describing Ex. 153). The public is entitled to see both sides' full briefing on class certification, not just the Bank's. *See Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 306 (6th Cir. 2016) (heightened justification needed to seal a "brief in support of [a] Motion for Class Certification—arguably the most important filing in any putative class action"). The MPA and Trial Plan should not be sealed.

<u>Expert Reports.</u> The Bank's expansive request to seal substantial portions of Plaintiffs' four expert reports (Exs. 1-4) would preclude the public from understanding the grounds supporting Plaintiffs' Class Certification Motion, including, for example, facts pertaining to: general principles of claim investigation, *see, e.g.*, Ex. 1 at ¶¶30-34; the average wait time and abandonment rates of EDD cardholders calling the Bank regarding unauthorized transactions in 2020, *see, e.g.*, Ex. 3 at ¶¶42-50; and the size of and scope of

injury to the proposed classes, *see, e.g.*, Ex. 4 at ¶¶35-36, 82-84. As with Plaintiffs' MPA and Trial Plan, the Bank does not identify any specific information in Plaintiffs' expert reports that would harm its competitive standing or facilitate future fraudulent conduct. *See GoDaddy.com LLC v. RPost Commc'ns Ltd.*, No. CV-14-00126-PHX-JAT, 2016 WL 1158851, at *4 (D. Ariz. Mar. 24, 2016), revised in part on reconsideration, No. CV-14-00126-PHX-JAT, 2016 WL 1274120 (D. Ariz. Mar. 31, 2016) (denying motion to seal an expert report because the movant failed to "provide a 'particularized showing' that 'specific prejudice or harm will result' if the excerpts from [the expert] report are publicly disclosed" (quoting *Foltz*, 331 F.3d at 1130)). No portion of Plaintiffs' expert reports (Exs. 1-4) should be sealed, including the portions of the Regan Report on damages that quote the same exclusion language set forth in Plaintiffs' class definitions (Ex. 4, ¶¶ 4 n.11, 31) and the portions that otherwise quote from or discuss the Bank's Remediation Plan (*id.*, ¶¶ 51 n.54, 53 n.56, 69-75, 98 n.127, and 105). As discussed *infra* at 15, the Bank has asserted a bank examination privilege on behalf of federal regulators with respect to the Remediation Plan and any documents referencing it, but it has submitted no evidence in support of its assertion. Unless the Bank documents an ongoing and valid assertion of privilege by the CFPB or OCC, there is no basis to seal any portion of Plaintiffs' expert reports.

b. There Is No Reason to Seal the Designated Excerpts of Testimony of Bank Witnesses (Exs. 14-20).

The Bank asserts in a footnote that its deposition "witnesses testif[ied] to the same categories of confidential information described above," but fails to connect any specific lines of testimony to any specific harm. Mot. at 5 n.4. This is insufficient. *See Ashcraft v. Welk Resort Grp.*, No. 2:16-cv-02978-JAD-NJK, 2017 WL 4038397, at *2 n.1 (D. Nev. Sept. 13, 2017) (finding the movant's argument for sealing deposition testimony "not persuasive" because it focused on "the sensitive nature of the underlying documents without indicating [how] the specific deposition testimony now in dispute" would itself be harmful). The Bank would have the court seal, for example, testimony about the Bank's understanding of its obligations under Regulation E, *see* Ex. 14 (Daniels Tr.) 124:24-125:6;

the fact, already in the public record, that the Claim Fraud Filter applied to claims of unauthorized ATM transactions, *see* Ex. 17 (Letson. Tr.) 92:19-23; and how EDD cardholders could reach a customer service representative, *see* Ex. 18 (Golden Tr.) 100:2-21. As with Plaintiffs' MPA, Trial Plan, and Expert Reports, the cited deposition testimony discusses issues that are core to the case, while revealing no current (or even historic) information that could be used to harm the Bank or its customers. There is no justification for sealing the cited portions of Bank testimony.

c. There Is No Reason to Seal Most of Plaintiffs' Remaining Evidence in Support of Class Certification.

The Bank asks the Court to seal an additional 118 of Plaintiffs' 157 exhibits based on broad and unsupported assertions that disclosure of these documents could risk either (1) misuse by fraudsters, (2) competitive harm to the Bank, (3) disclosure of class members' personal information, or (4) disclosure of privileged bank examiner communications. The Court should deny this sweeping request as well. Although the stated reasons can sometimes be justifications for sealing documents in particular circumstances when substantiated by a specific evidentiary showing, the Bank makes no showing here that these reasons actually apply to any of the documents at issue. Nor could the Bank make such a showing.

Many of the documents the Bank seeks to seal are merely internal Bank communications from 2020 and 2021 that confirm Plaintiffs' allegations that the Bank implemented its Claim Fraud Filter policies, deliberately understaffed its Claims call center, and chose to delay issuance of EMV chip-enabled cards to EDD cardholders, all to protect the Bank's own profits, despite knowing that these policies and practices would harm innocent cardholders. "The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records." *Kamakana*, 447 F.3d at 1179 (citing *Foltz*, 331 F.3d at 1136). To the extent any portions of any exhibits genuinely implicate fraud or competitive risks, the Bank should have narrowly tailored its sealing request to only those portions, rather than indiscriminately seeking to seal the entirety of all 136 exhibits. *See* Hon. Curiel Civil Pre-Trial & Trial Procedures at 5.[3]

__Fraud Risk__. The Bank seeks to seal 91 of Plaintiffs' exhibits based on a blanket assertion that they "could be used by fraudsters to perpetrate future fraud." *See* Mot. 6:21-7:22. Similar arguments by Bank of America have been rejected by federal courts in California. In *Jacques v. Bank of America Corp.*, the Bank similarly sought to seal documents based on blanket assertions that they "relate to [the Bank's] confidential investigation practices" and its "internal fraud policies" and procedures. No. 1:12-cv-00821-SAB, 2016 WL 10933080, at *1-2 (E.D. Cal. July 28, 2016). The court denied Bank of America's motion to seal because, although the Bank argued such documents could be "misused by third parties," it failed to articulate specific ways the documents at issue would facilitate fraud or harm the Bank's competitive standing. *Id.* Likewise here, the Bank does not articulate with any specificity how the documents it seeks to seal "could be used by fraudsters to perpetrate future fraud," Mot. at 6-8, and its request to seal sweeps in many documents only tangentially related to fraud prevention. *See, e.g.*, Ex. 46; Ex. 51; Ex. 54; Ex. 124.[4]

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[3] The Bank's indiscriminate over-designation in violation of the Protective Order is illustrated by the Bank's designation of Ex. 76 (the EDD Cardholder Agreement, the terms of which can be found at www.visaprepaidprocessing.com/EddCard/Program/Terms) and Ex. 115 (the Bank's contract with EDD, a public record) as "Confidential"—documents the Bank now concedes should not be sealed. *See* Mot. at 3 n.3. Courts have found such mass over-designations to warrant awarding fees and costs pursuant to Rule 37(b)(2)(C). *See, e.g.*, *Humphreys v. Regents of Univ. of California*, No. 04-cv-03808-SIE-DL, 2006 WL 3020902, at *2-4 (N.D. Cal. Oct. 23, 2006) (granting motion for sanctions for defendant's over-designation of documents as confidential); *Del Campo v. Am. Corrective Counseling Servs., Inc.*, No. C-01-21151JWPVT, 2007 WL 3306496, at *4 (N.D. Cal. Nov. 6, 2007) (awarding plaintiffs reasonable attorney's fees and costs because defendant's practice of "indiscriminately designating documents had the result of improperly shifting the cost of review of confidentiality to Plaintiffs"); *Broadspring, Inc. v. Congoo, LLC*, No. 13-CV-1866-JMF, 2014 WL 4100615, at *22 (S.D.N.Y. Aug. 20, 2014) (same).

[4] The cases relied upon by the Bank are not to the contrary. Although the succinct orders in *Jasso v. Wells Fargo Bank, N.A.*, No. 2:20-cv-00858-CDS-BW, 2022 WL 2665979 (D. Nev. July 8, 2022) and *Soria v. U.S. Bank N.A.*, No. SACV 17-00603-CJC-KESx, 2019 WL 8167925 (C.D. Cal. Apr. 25, 2019), seal fraud-prevention policy documents, the courts do not address any of the factors present here that weigh against sealing: the Bank's wholesale request to seal dozens of documents and thousands of pages, the lack of

The court in *Nia v. Bank of America N.A.* similarly rejected the Bank's argument that its OFAC and Economic Sanctions Job Aid should be sealed because it described "BANA's internal economic sanctions requirements and procedures implementing BANA's residency monitoring policy, and serve[d] as a guide to BANA associates on how to implement policy and how [to] communicate with BANA customer[s] regarding the same." 2024 WL 171659 at *8. The Bank's arguments for sealing Plaintiffs' exhibits, such as Exs. 36, 47, 80, 83, and 84, are virtually identical to its unsuccessful arguments for sealing its OFAC and Economic Sanctions Job Aid in *Nia* but are *even less* availing because the policies and job aids at issue here are four years old and pertain to a program the Bank no longer operates.

Nor can the Bank take cover under a claim of "communications with EDD regarding fraud strategies utilized in the EDD program." Mot. at 7:12-15. Exhibits 24-26, 31, 45, 69, and 108 do not contain any sensitive discussion of fraud strategies; rather, they reflect the Bank's communications with EDD about converting EDD cards to EMV chip cards, internal commentary on the Bank's relationship with EDD, and historical information about fraud rates and the benefits of EMV chips that is already in the public domain. *See, e.g.*, Ex. 25 at -167021 (citing public sources).

There is also no compelling reason to seal outdated discussions regarding fraud prevention in a program the Bank no longer operates. *See Cohen*, 2016 WL 3036302, at *5 (holding that outdated policy documents cannot be sealed based on speculative assertions about future use of information). The Bank asserts that "analyses of fraud and possible strategies to combat fraud . . . could provide insight into BANA's fraud detection and prevention measures," which could be "used by fraudsters to perpetrate future fraud and to circumvent BANA's security and fraud prevention procedures," but the Bank does not explain how. Mot. at 6:23-7:2. For example, Exs. 27, 28, and 29 reflect the Bank's analysis

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evidentiary support for the Bank's request, the age and generality of the documents, the fact that the Bank no longer operates the only programs for which these fraud strategies were used, and the particularly compelling public interest in the Bank's mishandling of public benefits that harmed tens of thousands of Californians.

regarding whether to issue EMV chip cards to EDD cardholders *in early 2020*. Even if the information in this document could have been used to facilitate fraud at some point—and the Bank has failed to explain how that would be the case—it is now entirely outdated. After Exs. 27, 28, and 29 were drafted, the Bank added EMV chips to EDD prepaid debit cards and then it stopped administering government prepaid debit cards altogether. To the extent that this information might have been useful to fraudsters in 2020 or 2021, that usefulness has long since passed.

The Bank likewise has no reason to seal information related to the Claim Fraud Filter ("CFF"). The Bank has been enjoined from considering the results of the CFF in decisioning unauthorized transaction claims or freezing accounts, *see* Ex. 71 (Preliminary Injunction), has been fined more than $225 million by federal regulators for its previous use of the CFF, *see* Exs. 72-73, and no longer operates the EDD program or any of the other state UI programs in which the CFF was used, *see* ECF 225-2 ¶¶ 5-7. Nonetheless, the Bank suggests that information about the CFF that was in effect in 2020-21, before its use was enjoined in this case, is still sensitive information "because different indicators, features or components of those strategies *could be used now or in the future*." Mot. at 7 n.7 (emphasis added). Such baseless speculation is inadequate to overcome the public's right to access court documents. *Hagestad*, 49 F.3d at 1434 (sealing may not be predicated on "hypothesis or conjecture"). Accordingly, documents and discovery responses focused on the Bank's CFF and its CFF Policies should not be sealed. *See, e.g.*, Exs. 47, 49 (Interrogatory Response No. 28), 50.[5]

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[5] To the extent that the Bank had been able to (1) substantiate a present or imminent use of fraud prevention strategies described in these exhibits, and (2) establish how specific pages or lines of those documents could be misused by third parties to enable fraud, it could have sought to redact certain sensitive information from the exhibits. That was the approach taken by the court in *East West Bank v. Shanker*, No. 20-cv-07364-WHO, 2021 WL 3112452, at *17-19 (N.D. Cal. July 22, 2021), one of the key cases on which the Bank relies. There, unlike the Bank here, the party seeking a sealing order identified *specific* paragraphs of declarations, lines of briefing, and portions of certain exhibits that would harm competitive standing or risk future fraud; they did not seek wholesale sealing of virtually all filed materials. *Id.*

<u>*Competitive Disadvantage.*</u> The Bank seeks to seal 75 of Plaintiffs' exhibits on the ground that they could be used or replicated "by a competitor financial institution to BANA's competitive disadvantage." *See* Mot. at 7:23-8:23.[6] But a "blanket assertion" of competitive harm is insufficient to meet the Bank's burden. *Cohen*, 2016 WL 3036302, at *5 (citing other cases); *see, e.g.*, *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)).

The Bank has not explained how these four-year-old documents could risk competitive harm, particularly given that they concern a program the Bank no longer operates. For example, Exs. 39, 40, 41, and 90 are short email exchanges from 2020 containing only general discussions about the Bank's prepaid debit card program. The Bank offers no explanation of how such outdated information about a program it no longer operates could be used to harm its competitive standing. *See Pac. Marine Propellers, Inc. v. Wartsila Def., Inc.*, No. 17-CV-555-L-NLS, 2018 WL 6601671, at *2 (S.D. Cal. Dec. 14, 2018) (declining to seal "financial information" that was "several years old" because defendants failed to show "why this outdated information would have any effect on [their] competitive standing at the present"); *California ex rel. Lockyer v. Safeway, Inc.*, 355 F. Supp. 2d 1111, 1116 (C.D. Cal. 2005) (holding that defendants must "at the very least,

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[6] Courts sometimes find compelling reasons to seal or redact business contracts containing sensitive business information that is likely to harm a litigant's or third-party's competitive standing. *See Xifin, Inc. v. Sunshine Pathways, LLC*, No. 16-CV-01218-GPC-DHB, 2016 WL 5930313, at *3 (S.D. Cal. Oct. 12, 2016). But again, it is the Bank's burden to narrowly tailor its sealing request and substantiate its claim that the documents contain sensitive business information, which it has not done. *See Del Campo*, 2007 WL 3306496, at *2 (denying motion to seal business proposal and financial information because the movant provided "no specifics as to how a competitor could benefit" from the disclosure nor any "information about how it has tried to keep this [exhibit] confidential").

make a specific factual showing of" a document's "continuing usefulness" to seal outdated documents based on alleged competitive harm).[7]

Moreover, the Bank is a publicly traded company, and much of the information it seeks to seal has already been disclosed in public filings. *See Young v. Actions Semiconductor Co.*, No. 06-cv-1667-L-AJB, 2007 WL 2177028, at *3 (S.D. Cal. July 27, 2007) (denying motion to seal information about investors, officers, and directors of a publicly traded company because the "names of many individuals [movant] seeks to conceal, particularly its officers and directors, have been made public" in SEC filings and reports). For example, the Bank seeks to seal Ex. 150, which contains excerpts of the Bank's organizational chart. Mot. at 8:7-13. But the titles and positions of many of the Bank's individual employees, particularly its senior leaders, is already disclosed in the Bank's annual reports and is widely available on the internet.[8]

Personal Information of Class Members. The Bank requests that seven of Plaintiffs' exhibits be sealed because they contain "personal transaction details and claims information" or "personal, sensitive information" of absent class members. *See* Mot. at 9:9-28. Plaintiffs do not disagree that their and class members' sensitive personal and financial information should not be disclosed. However, with the exception of Ex. 60, none of the documents submitted in support of class certification actually reveal any such personally identifiable information.[9] Exhibit 140 is a summary report that appears to contain no

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[7] The decisions on which the Bank relies are inapposite because they involved detailed, actionable financial and business information of private companies and individuals. *See Brady v. Grendene USA, Inc.*, No. 3:12-cv-0604-GPC-KSC, 2015 WL 6828400, at *3 (S.D. Cal. Nov. 6, 2015) (sealing tax returns, profit and loss statements, third-party contracts, and invoices of individuals and privately held companies); *Xifin, Inc.*, 2016 WL 5930313, at *3 (sealing third-party contract that contained detailed pricing and security information). The situation here is readily distinguishable because the business information in Plaintiffs' exhibits is years old and relevant only to a program the Bank has since stopped operating.

[8] *See, e.g.*, Bank of America, *Investor Relations: Annual Reports & Proxy Statements* (accessed Sept. 17, 2024), https://investor.bankofamerica.com/annual-reports-and-proxy-statements (2020 report at 13, listing senior executives); Jennifer Ehresman, LinkedIn (accessed Sept. 17, 2024), https://www.linkedin.com/in/jennifer-ehresman-5477916.

[9] Plaintiffs agree that Ex. 60, which contains the names of class plaintiffs and their unique "Card Alias IDs" should be sealed because these Card Alias IDs, when paired with

personally identifiable information about any particular individual. Exhibits 49, 59, 98, 114, and 146 are the Bank's interrogatory responses and accompanying exhibits that compile ***anonymized data*** about Californians impacted by the Bank's CFF Policies, 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).[10]

Remediation Plan-Related Documents. Finally, the Bank argues that seven of Plaintiffs' exhibits should be sealed because they "contain confidential information belonging to [the CFPB and OCC] that is subject to 12 C.F.R. § 4.32(b)(1)-(2) and 12 C.F.R. § 1070.47(b)." *See* Mot. 5-12. Whether there are compelling reasons to seal the Remediation Plan itself (Exs. 74 and 147) hinges on the Bank or those governing agencies substantiating the Bank's claim that the CFPB and OCC are actually and validly seeking sealing based on a proper assertion of the bank examination privilege. Without such evidence, the Court should deny the Bank's request to seal Exs. 74 and 147.

Even then, there is no basis for sealing the Bank's interrogatory responses and accompanying exhibits, which contain only ***anonymized data*** about the amount of compensation individuals were paid after the Bank implemented the Remediation Plan, as well as other critical data—***all of which is anonymized***—including: the amounts of automatically denied claims and rescinded credits pursuant to the CFF, the lengths of time

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individuals' actual names, are financial account numbers that can be used to de-anonymize personal financial information in other exhibits. *See Nia*, 2024 WL 171659, at *6 (sealing plaintiffs' personal financial information).

[10] The decisions cited by the Bank provide no support for its position. In *Pryor v. City of Clearlake*, No. C 11-0954 CW, 2012 WL 3276992, at *2-3 (N.D. Cal. Aug. 9, 2012), the court sealed documents containing the name, date of birth, personal contact information, and arrest information of non-litigants. In *Castillon v. Corrections Corp. of Am.*, No. 1:12-cv-00559-EJL-CWD, 2015 WL 3948459, at *3-4 (D. Idaho June 29, 2015), the court approved of redacting the names and home addresses of non-litigants. Neither case addressed the sealing of compilations of anonymized class data.

(anonymized) class member accounts were frozen, and anonymized data about the number of individuals who have been excluded from receiving payment under the Remediation Plan—who are the same individuals excluded from Plaintiffs' proposed class definitions. *See* ECF 324 (Notice of Motion for Class Certification) at 2:5-12; *supra* at 5. Exhibits 49, 59, 98, and 146 are not records created, obtained, or compiled by the regulators but rather are discovery responses created for purposes of this litigation and pertaining to Plaintiffs' proposed classes. The Bank's cited regulations provide no basis for sealing them.[11]

B. The Public's Unusually Strong Interest in Access to Court Records in This Case Far Outweighs Any Purported Bank Interest in Secrecy.

Even if the Bank had established an interest in maintaining the secrecy of any of the documents filed in support of Plaintiffs' class certification motion, such interest would be far outweighed by the public's overwhelming interest in understanding the Bank actions that gave rise to this lawsuit, in which Plaintiffs allege that the Bank denied many tens of thousands of vulnerable Californians access to their public benefits at the height of the Covid-19 pandemic, in violation of their constitutional, statutory, and common law rights.

While "there is always a public interest in understanding the judicial process, which always weighs in favor of unsealing," *In re Google Location Hist. Litig.*, 514 F. Supp. 3d 1147, 1164 (N.D. Cal. 2021), "the interest in access to court proceedings in general may be asserted more forcefully when the litigation involves matters of significant public concern," *Cohen*, 2016 WL 3036302, at *6 (quoting *In re Coord. Pretrial Proceedings in Petroleum Prods. Antitrust Litg.*, 101 F.R.D. 34, 38 (C.D. Cal. 1984)). Here, the public's

[11] As noted above, Plaintiffs' objections to sealing Exhibits 74 and 147 (as well as to sealing specific substantive references to the Remediation Plan in Ex. 4 (Regan Rpt.) (¶¶ 51 n.54, 53 n.56, 69-75, 98 n.127, and 105) and Ex. 19 (Lennon Tr.) (75-76, 144-45)) is conditional, subject to whether the Bank and/or the CFPB and OCC submit actual *evidence* establishing a proper basis for sealing those materials. *See Kamakana*, 447 F.3d at 1183-84 (finding insufficient "general categories of privileged" proffered by the U.S. Department of Justice, a non-litigant, for justifying sealing of the DOJ's testimony because "without any further elaboration or any specific linkage with the documents" such general arguments do not meet the "compelling reasons" standard). Regardless of any assertion of privilege, the definition of Excluded Cardholders in Plaintiffs' Motion for Class Certification should not be sealed because the public interest in understanding the scope of the class—including the interests of absent class members—outweighs any interest in secrecy.

interest in accessing and understanding court records is particularly strong because Plaintiffs challenge the Bank's conduct as a state actor in denying tens of thousands of Californians access to their public benefits without due process, among other claims. Bank of America's mismanagement of unemployed Californians' public benefits during the pandemic, and this resulting litigation, have been the subject of sustained public interest and media coverage.[12] The Court should not preclude such public scrutiny by sealing Plaintiffs' evidence as the Bank requests.

The right of public access is particularly compelling in the class action context "because many members of the 'public' are also [absent] plaintiffs in the class action." *In re Cendant Corp.*, 260 F.3d at 193. As courts have emphasized, protecting public access "in class actions promotes class members' confidence in the administration of the case," "diminishes the possibility that injustice, incompetence, perjury, or fraud will be perpetrated against" absent class members, and "provides class members with a more complete understanding of the class action process and a better perception of its fairness." *Id.* (internal citations, quotations, and brackets omitted); *see also Shane Grp.*, 825 F.3d at 305 ("[I]n class actions—where by definition 'some members of the public are also parties to the [case]'—the standards for denying public access to the record 'should be applied ...

[12] *See, e.g.*, Lauren Hepler and Stephen Council, *How Bank of America Helped Fuel California's Unemployment Meltdown*, CalMatters (Nov. 20, 2020), https://calmatters.org/economy/2020/11/how-bank-of-america-helped-fuel-californias-unemployment-meltdown/; Lauren Helper, *Bank of America Sued over EDD Unemployment Debit Card Fraud*, CalMatters (Jan. 15, 2021), https://calmatters.org/economy/2021/01/bank-of-america-sued-over-edd-unemployment-debit-card-fraud/; Simone Chavoor, *Bank of America Addresses Freezing Accounts, Fraud in State Assembly Hearing*, ABC7 News (Jan. 27, 2021), https://abc7news.com/edd-suspended-bank-of-america-card-closed-verify-identity-california-unemployment/10043061/; Lauren Helper, *How EDD and Bank of America Make Millions on California Unemployment*, CalMatters (Feb. 3, 2021), https://calmatters.org/economy/2021/02/how-edd-and-bank-of-america-make-millions-on-california-unemployment/; Patrick McGreevy, *Bank of America Must Provide More Proof of Fraud before Freezing EDD Accounts, Court Orders*, Los Angeles Times (June 1, 2021), https://www.latimes.com/california/story/2021-06-01/bank-of-america-ordered-to-unfreeze-unemployment-benefit-cards-in-california; Carolyn Said, *California EDD Lets Go of Bank of America for Unemployment Payments, Will Soon Start Direct Deposits*, San Francisco Chronicle (Dec. 4, 2023), https://www.sfchronicle.com/california/article/california-edd-dumps-bank-america-state-s-18532785.php.

with particular strictness.'" (quoting *In re Cendant Corp.*, 260 F.3d at 194) (alterations and omissions in original)). Here, public access to Plaintiffs' class certification papers is crucial to ensuring absent class members are able to understand their rights and interests in this litigation.

III. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court deny the Bank's motion to seal, except as to Exhibit 60, and make any sealing of Exhibits 74 and 147 (Remediation Plan)—and specific substantive discussion of those exhibits in Ex. 4 (Regan Rpt.) (¶¶ 51 n.54, 53 n.56, 69-75, 98 n.127, and 105) and Ex. 19 (Lennon Tr.) (75-76, 144-45)—contingent upon a sufficient evidentiary showing by the CFPB or OCC, either independently or through the Bank.

Respectfully submitted,

Dated: September 19, 2024

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SIGNATURE CERTIFICATION

Pursuant to Section 2(f)(4) of this Court's Electronic Case Filing Administrative Policies and Procedures Manual, I, Connie K. Chan, hereby certify that the content of this document is acceptable to all the signatories herein and that I have obtained counsel's authorization to affix their electronic signatures to this document.

/s/ Connie K. Chan
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