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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 REPLY IN SUPPORT OF MOTIONS TO SEAL DOCUMENTS FILED IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** Ctrm: 2D – 2nd Floor Judge: Hon. Gonzalo P. Curiel

Plaintiffs' attempt to challenge BANA's well-founded confidentiality designations by filing an opposition contrary to their *own* initial motions to seal (ECF 322 and 334) is procedurally improper, and violates the Stipulated Protective Order, which requires a party seeking to file Protected Material to "file the redacted document(s) simultaneously with a joint motion or ex parte application requesting that the confidential portions of the document(s) be filed under seal and setting forth good cause for the request." ECF 82, § 12.5. Prior to filing the Protected Material with their Motion for Class Certification, Plaintiffs failed to confer with BANA as required to file a joint motion to seal, and instead improperly filed their own motion to seal (along with a Proposed Order *denying* that motion). ECF 322, 334.[1] Because Plaintiffs have violated the Protective Order, their opposition should be ignored.

In any event, as BANA demonstrated in its Motion to Seal (ECF 328, "Motion") and this court has already found, good cause and compelling reasons to seal exist 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. Indeed, the Opposition fails to address the fact that *this court has already sealed* some of the exhibits at issue (and many others like them) based on compelling reasons and good cause. Earlier this year, Judge Berg determined that there are "compelling reasons" to seal a number of the exact same exhibits previously submitted with Plaintiffs' motion to compel discovery, as well as others that concern the very same confidential information that BANA seeks to seal here. *See* ECF 266 (sealing Exs. 58, 106, 111, 134 and 150). 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, fraud losses, state contract issues, prepaid updates and trackers, Board meeting minutes, cardholder complaints

[1] Plaintiffs then filed additional portions of documents in support of their Motion for Class Certification 15 days after it was due, and again failed to confer with BANA, thereby requiring BANA to file yet another Motion to Seal. *See* ECF 333, 336, 337.

and escalations, BANA's organizational charts, and certain of BANA's interrogatory responses—which are *precisely* the types of documents BANA seeks to seal here. *See* Mot. at 5-6; *infra* at 5-9. This Court also found good cause to seal the same or similar documents, including other exhibits at issue, related to the Claim Fraud Filter and other fraud strategies, operational fraud losses, and trainings for claims investigations. *See* ECF 212, 293 (sealing Exs. 39, 44, 45, 47 & 101).[2] 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 identical exhibits when granting motion to seal).

Moreover, as BANA demonstrated in its Motion, the documents it seeks to seal relate to fraud and claims strategies, call center operations, prepaid fraud losses, BANA's remediation efforts, and other sensitive and proprietary commercial information described above. *See* Mot. at 5-10. As this court and others have regularly found, good cause and compelling reasons exist to seal such materials because their disclosure is likely to cause particularized competitive harm to BANA and could potentially enable future fraud. BANA respectfully asks that the Court do the same again here, and grant its Motion.

A. <u>STANDARD TO SEAL DOCUMENTS</u>

Neither Party disputes that the public's right to inspect and copy judicial records can be outweighed by the risk that the disclosed information could result in competitive harm or be used for improper purposes. Mot. at 1-2; Opp. at 2-3, 9. The

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[2] Plaintiffs' argument that BANA should be sanctioned for over-designating documents confidential (Opp. at 10 n.3) should be ignored given the Court's prior findings of both good cause and compelling reasons to seal *the same or similar documents* (*see* ECF 266, 293). *See Berdan Cole LLC v. Technicolor USA, Inc.*, 2022 WL 18142507, at *5 (C.D. Cal. Nov. 29, 2022) (denying sanctions absent bad faith). To the contrary, Plaintiffs' continued challenges to the sealing of documents *already sealed by the court* are themselves grounds for sanctions under the Protective Order. *See* ECF 82, § 6.3 ("Frivolous challenges [to confidentiality designations], and those made for an improper purpose (e.g., to harass or impose unnecessary expenses and burdens on other parties), may expose the Challenging party to sanctions."). Moreover, ignore that Class Representative Plaintiffs designated *all* of the documents they produced as Confidential, and have yet to de-designate *any* documents.

Parties disagree, however, on the standard that should be applied here to Defendants' Motions to Seal certain confidential documents (or portions thereof) that Plaintiffs filed in support of class certification.

Plaintiffs wrongly suggest that BANA must show heightened compelling reasons to protect the documents given the class action context. Opp. at 16-18. While BANA has demonstrated that compelling reasons exist to seal the documents at issue, courts in this Circuit, including this Court, have applied the "good cause" standard to sealing motions in connection with class certification "[u]nless the 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) (appended as Ex. A); *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) (appended as Ex. B). 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."). Moreover, courts, including this Court, have done so without requiring declarations or affidavits in support—particularly where, as here, the court has already held compelling reasons exist to seal the same or similar documents, and it is clear from the face of the documents that they contain highly sensitive information that could open up the Bank to risk of fraud or cause competitive harm. *See, e.g., 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); *In re ConAgra Foods, Inc.,* 2014 WL 12577133, at *4 (C.D. Cal. Dec. 29, 2014) (same).[3]

B. GOOD CAUSE AND COMPELLING REASONS EXIST

As BANA demonstrated in its Motion (at 2-10), there is good cause and compelling reasons to file under seal each of the confidential documents, discovery responses, and testimony referenced in Plaintiffs' and BANA's Motions to Seal, and any substantive discussion of those documents contained in Plaintiffs' Motion for Class Certification. Thus, the information should remain sealed.

Documents that risk future fraud. BANA moved to seal BANA's fraud and

[3] This Court has also permitted sealing of exhibits and documents in this matter, and others, based on briefing alone. *See* ECF No. 293 (finding good cause to seal documents absent supporting declaration by either Party); *IQVIA Holdings, Inc. v. Medimpact Healthcare Sys., Inc.*, No. 3:21-cv-02081-GPC-DEB, ECF 112 (S.D. Cal. Nov. 29, 2022) (J. Curiel) (finding compelling reasons to seal documents similar to ones previously sealed absent declaration) (appended as Ex. C). Moreover, where the Court requires further briefing or evidence to decide a motion to seal, it has permitted supplemental briefing and deferred ruling on sealing until briefing on the underlying motion was complete (here, Plaintiffs' motion for class certification). *See, e.g., Vuz v. DCSS III, Inc.*, No. 3:20-cv-000246-GPC-AGS, ECF No. 127 (S.D. Cal. June 16, 2021) (J. Curiel) (permitting renewed motion to seal with further arguments supporting good cause) (appended as Ex. D); *see also Bona Fide Conglomerate, Inc. v. SourceAmerica,* No. 3:14-cv-00751-GPC-AGS, ECF No. 589 (S.D. Cal. Oct. 29, 2018) (J. Curiel) (finding compelling reasons to seal portions of documents after deferring ruling on motion to seal and permitting supplemental briefs) (appended as Ex. E). *See also Hilsley v. Gen. Mills, Inc.*, 2020 WL 5656687, at *2 (S.D. Cal. Sept. 23, 2020) (cited at Opp. 4) (permitting defendants to file another motion to seal). Thus, BANA maintains that its Motion and this court's prior orders clearly demonstrate good cause and compelling reasons to seal the documents and information at issue here— particularly where, as here, Plaintiffs failed to confer with BANA to submit a joint motion to seal as required under the Protective Order. However, to the extent the Court may desire supporting declarations concerning any documents or redactions at issue, BANA includes those with this reply. *See* Declarations of William Martin ("Martin"), Don Robart ("Robart") and Jennifer Lennon ("Lennon").

claims review strategies and any analyses thereof because they could be misused to perpetrate future fraud against BANA and the public. Mot. at 2-7; Martin ¶¶ 7-10; Robart ¶¶ 4-5. 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").[4]

Plaintiffs challenge the sealing of some these documents, arguing that the Claim Fraud Filter or other fraud strategies utilized by BANA in 2020 and 2021 are no longer used. Opp. at 12. But as a preliminary matter, this court has already found that good cause and compelling reasons exists to seal documents concerning the Claim Fraud Filter. *See* ECF 266, 293. Moreover, the Claim Fraud Filter and BANA's other fraud strategies were comprised of various elements, some of which BANA may still use today or in the future as part of or in conjunction with its many strategies and algorithms utilized to prevent fraud across its many products and services. *See* Mot. at 6-7, n.7; Martin ¶¶ 5, 7-9. Further, simply because a fraud strategy is no longer in use today does not mean that disclosure of that strategy would not provide a potential fraudster with insight into BANA's fraud prevention measures that could be used to decipher active fraud strategies. *See, e.g.*, *Soria*, 2019 WL 8167925, at *4; Martin ¶¶ 7-8.

[4] Contrary to Plaintiffs' contention (Opp. at 10-11), the court in *Jacques v. Bank of Am. Corp.* merely denied sealing of the bank's investigation files for plaintiff *without prejudice*, not its fraud investigation policies and procedures generally. 2016 WL 10933080, at *2 (E.D. Cal. July 28, 2016). And the court in *Nia v. Bank of Am., N.A.* permitted the bank to propose redactions of its consumer residency monitoring policies and only denied sealing of policies or practices that are easily discoverable, which is not the case here. 2024 WL 171659, at *3 (S.D. Cal. Jan. 12, 2024).

To the extent Plaintiff argues there cannot be compelling reasons to seal prior discussions concerning EMV chips on EDD cards because BANA has since added EMV chips and exited the EDD program (Opp. at 6-7, 11), Plaintiffs ignore that BANA operated many other prepaid programs, as well as many other consumer and commercial programs. *See* Martin ¶ 8; Ex. 16 (Martin Tr.) at 61:19-23. 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, and could still be misused by fraudsters to perpetrate fraud on cards with or without EMV chips. *See* Martin ¶ 8. Thus, they too should remain sealed. *See* Mot. at 7.

Documents that risk competitive harm. As BANA further demonstrated in its Motion (at 3-5, 7-9) and this Court previously found (ECF 266, 293), many of the documents BANA seeks to seal also contain sensitive business information. The disclosure of such information risks competitive harm to BANA (Mot. at 3-5, 6-9), which is another compelling reason to seal those documents. *See, e.g.*, *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"); *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).[5]

Most basically, Plaintiffs incorrectly assume that public disclosure of certain prepaid fraud prevention, claims review, or other measures would only potentially cause competitive harm or fraud to BANA's EDD prepaid program. *See* Opp. at 6-7, 11-13, 14 n.7. This myopic view has no support. BANA, of course, operates many other prepaid, consumer, and commercial programs, and those programs utilize many of the same or similar policies, procedures, or strategies regarding fraud prevention,

[5] *See also Bohannon*, 2019 WL 188671, at *7 (compelling reasons to seal factors used to assess refunds or identify users because it would cause competitive harm and exploitation by users); *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).

cardholder authentication, and claims review, among other topics. *See* Martin ¶¶ 7-8; Robart ¶ 3.[6] If disclosed, this information could be used by other financial institutions to BANA's competitive disadvantage (and by criminals to potentially perpetrate fraud), Martin ¶¶ 5, 7-10; Robart ¶¶ 4-5, and therefore courts often hold it should remain sealed. *See, e.g., Adtrader, Inc.*, 2020 WL 6391210, at *2 (finding compelling reasons to seal references to policies related to advertising fraud); *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") (appended as Ex. F).[7]

To the extent Plaintiffs oppose the sealing of Exhibit 150, the document is a compilation of organizational charts that Judge Berg *already sealed* based on

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[6] For example, aspects of BANA's Adequate Investigation Standard Operating Procedures (Exs. 35 & 82; *see also* Exs. 1, 14, 36, 47, 80, 84, 85, 86) are utilized in the same or similar fashion for many of BANA's lines of business, not simply prepaid. *See* Robart Decl. ¶ 3; Ex. 14 (Daniels Tr.) at 135:9-20**.** Similarly, updated versions of certain claims review processes and trainings (*e.g.*, Exs. 14, 79, 83, 87, 113) are still being utilized by BANA today. Robart Decl. ¶ 3**.** And BANA continues to operate call centers to answer cardholders' calls, both within prepaid and other lines of business (Martin ¶ 10), and thus details regarding BANA's call center operations, including the different types of call centers utilized by BANA, the roles and responsibilities of each (Exs. 66, 119, 114), and BANA's contracts with its vendors (Exs. 123, 126-130, 132), are still commercially sensitive. *See 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 could expose [party] to a competitive disadvantage if revealed").

[7] Contrary to Plaintiffs' assertion that Exhibits 39, 40, 41 and 90 contain "only general discussions about the Bank's prepaid debit card program" (Opp. at 13), those emails include estimated prepaid fraud losses, overall expenses of BANA's Global Transaction Services business, and BANA's assessments of contractual responsibility for prepaid benefits eligibility fraud. *See* Exs. 39-41, 90. As this court previously found (ECF 266, 293), such information is commercially sensitive information and, if revealed, could impact BANA's business in other prepaid programs or beyond. *See also Brady v. Grendene USA, Inc.*, 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); *Nia v. Bank of Am., N.A.*, 2024 WL 171659, at *6 (S.D. Cal. Jan. 12, 2024) (compelling reasons to seal "knowledge of the exact number of customers who use various documents as proof of residency" which "may give competitors an edge").

"compelling reasons." ECF 266. Moreover, contrary to Plaintiffs' claim (Opp. at 14), Exhibit 150 on its face relays more than the names of BANA leaders that are available publicly. Rather, it includes 48 pages depicting how BANA structures the groups responsible for highly sensitive claim review and decisioning and its fraud detection and monitoring strategies, among other banking responsibilities. *See* Ex. 150; Robart ¶ 5. These details are commercially sensitive, and if disclosed, there is a risk a competitor banking institution could try to replicate BANA's organizational structures designed to combat fraud. *See, e.g.*, *E.W. Bank*, 2021 WL 3112452, at *18-19 (sealing confidential onboarding processes, digital banking platform, fraud management techniques, and verification of customer identities).

Personal details and transaction information. Plaintiffs concede that there are compelling reasons to seal documents referencing sensitive personal and financial information of EDD cardholders. Opp. at 14. However, Plaintiffs contend that cardholder transaction details and other personal information can be made public so long as their information is anonymized. *Id.* at 14-15. Such data should be sealed here, however, because there is a risk that personal, sensitive information could be linked to the cardholders should their Alias IDs—which are unique identifiers used by BANA for each individual's account (*see, e.g.,* Exs. 49, 59, 60, 98, 114, 146)—become known. *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).[8]

Additionally, non-plaintiff customer complaints contain sensitive, personal

[8] This is especially true for BANA's interrogatory responses (Exs. 49, 59, 98, 140, 146), which contain highly personal information such as the receipt of unemployment benefits, the denial of claims, suspicion of fraudulent behavior, repossession of property, foreclosure and eviction—which many cardholders likely do not want reflected on the public docket. Additionally, BANA's interrogatory responses in Exhibit 49 identify cardholders who may be eligible for compensation under the consent orders, Remediation Plans or individualized review process. But not all of those cardholders have received compensation and compensation decisions are subject to change. Ex. 49 at 10-13. And that data reflects precise claims amounts and personal information that cardholders could use to identify their own claims despite those compensation decisions not being final. *See id.;* Lennon ¶ 6.

information that courts have held overcomes the presumption of public access and warrants sealing. *See* Mot. at 9-10; *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).

Confidential regulator materials. Finally, compelling reasons exist to seal BANA's Remediation Plans and Addenda with the OCC and CFPB (Exs. 74 & 147), and documents showing BANA's implementation of those Plans (Exs. 49, 59, 60, 98 & 146). Plaintiffs' contention (Opp. at 5, 8, 15-16) that they do not know whether the regulators have asserted the bank examination privilege over the Plans is simply false. As Plaintiffs are more than well aware, 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. This determination and condition is clearly articulated in the regulators' letters to BANA, which were provided to Plaintiffs at their request.[9] 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).

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. Lennon ¶ 3. Similarly, the data that BANA compiled to respond to Plaintiffs' discovery requests regarding BANA's implementation of the Remediation Plans (Exs. 49, 59, 98, 146) should also be sealed because BANA's

[9] If the Court desires, BANA can submit these letters to the Court for *in camera* review or under seal as they too are Highly Confidential – Attorneys' Eyes Only.

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. Lennon ¶¶ 4-5.

Quotes and summaries of confidential exhibits. Plaintiffs' contention (Opp. at 5-9) that they need not redact quotations or descriptions of confidential documents that remain under seal is inconsistent with the terms of the Stipulated Protective Order (ECF 82, § 3), and otherwise should be rejected. *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). Plaintiffs do not offer merely "short quotations and general descriptions." *See* Opp. at 6. Rather, in many instances, Plaintiffs provide lengthy, detailed quotes excised from the confidential exhibits. *E.g.,* ECF 324-1 at 11-12, 15, 33, 39; Exs. 1-4, 157. To the extent Plaintiffs complain that they were required to seal certain portions of their proposed class definitions, it is *Plaintiffs* that chose to define certain classes by quoting privileged documents *the regulators* designated Highly Confidential. As a consequence, portions of those class definitions should be sealed. *Supra* at 9-10.

Finally, Plaintiffs' claim (Opp. at 6, 8-9, 11) that much of the provisionally sealed portions of their papers are already in the public record is inaccurate.[10] Indeed, the vast majority of Plaintiffs' references to the confidential exhibits are not in the public record, including references to the 10 exhibits that have already been sealed in this matter based on good cause or compelling reasons. ECF 266, 293.

CONCLUSION

For the foregoing reasons and the reasons set forth in BANA's opening briefs (ECF Nos. 328, 337), BANA respectfully requests that the Court grant Defendant's Motions to Seal because compelling reasons support sealing.

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[10] Plaintiffs cite to a limited number of phrases that are purportedly in the public record from the Parties' briefing in connection with Plaintiffs' motion to compel executive ESI (ECF 287 at 20:4-21:4, 22:22-26, 2:28-23:14; ECF 300 at 4:20-22, 8:21-27) out of more than 250 pages of their MPA, expert reports and trial plan.

Dated: October 3, 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 3, 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 3, 2024 *s/ James W. McGarry*