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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 MOTION TO FILE DOCUMENTS UNDER SEAL IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER** 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") hereby submits this Motion to File Documents Under Seal (the "Motion") in connection with Defendant's Motion for a Protective Order ("Motion for Protective Order"). In particular, BANA seeks to seal Riffee Declaration Exhibits 5–9, 11–14 and 16–17 in their entirety and portions of Riffee Declaration Exhibits 1–4, 10 and 15[1] because good cause supports sealing of the identified documents, as well as any references to the contents of those exhibits in BANA's Motion for Protective Order and the Parties' prior briefing on apex depositions.[2]

As previously stated in BANA's motions to seal submitted in connection with class certification briefing and argument (ECF 328, 337, 344, 347, 383, 418), 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). A party

[1] The exhibits submitted in support of BANA's Motion for Protective Order are appended to the Declaration of Matthew L. Riffee ("Riffee Decl.") and are referred to herein as the "Riffee Declaration Exhibits."

[2] In support of BANA's Motion for Protective Order, BANA appends as Riffee Declaration Exhibits 1-4 the Parties' prior informal letter briefs regarding apex depositions submitted to Judge Berg, including:

1) BANA's initial informal letter brief, submitted December 16, 2024, is "BANA Apex IDC Letter 1," which is attached as Exhibit 1 to the Riffee Decl.;
2) Plaintiffs' initial informal letter brief, submitted December 16, 2024, is "Pls. Apex IDC Letter 1," which is attached as Exhibit 2 to the Riffee Decl.;
3) BANA's second informal letter brief, submitted March 7, 2025, is "BANA Apex IDC Letter 2," which is attached as Exhibit 3 to the Riffee Decl. The 11 exhibits attached to BANA Apex IDC Letter 2 are included in Exhibit 3 to the Riffee Decl., and referred to herein as "BANA's Exhibits"; and
4) Plaintiffs' second informal letter brief, submitted March 7, 2025, is "Pls. Apex IDC Letter 2," which is attached as Exhibit 4 to the Riffee Decl. The 53 exhibits attached to Pls. Apex IDC Letter 2 are included in Exhibit 4 to the Riffee Decl., and referred to herein as "Plaintiffs' Exhibits."

seeking to seal documents filed in connection with a discovery dispute must show "good cause" to seal documents. Courts in this district have held that the good cause standard applies even where the underlying dispute concerns so-called "apex" depositions of high-level executives, as is the case here. *See, e.g.*, *BAE Sys. San Diego Ship Repair Inc. v. United States*, 670 F. Supp. 3d 1064, 1069 (S.D. Cal. 2023) (hereinafter "*BAE Systems*") (finding "good cause" to seal exhibits filed with motion for protective order).

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."). Indeed, this Court largely granted the Parties' prior motions to seal, finding good cause or compelling reasons to seal documents concerning the same topics that BANA now seeks to seal, including BANA's fraud detection and prevention policies and strategies (including the fraud filter), call center operations, prepaid fraud losses, state contract issues, cardholder complaints and escalations, and certain of BANA's interrogatory responses. *See* ECF 266, 293, 365, 381, 390, 391, 397, 421 (the "Sealing Orders"). Notably, this Court has previously sealed 13 of the exact same documents at issue here (sealing Pls. Exs. 1, 14, 18, 19, 20, 25 at ECF 266; Pls. Exs. 10, 11, 45, 46, 47, 48 at ECF 293; Pls. Exs. 7, 10, 11, 46, 14, 45, 47 and 48 at ECF 365), as well as portions of the deposition transcripts at issue here (sealing portions of Daniels Dep. Tr. (PX 14, DX 98) at ECF 365, 381; Johnson Dep. Tr. (PX 20, DX 29) at ECF 365, 381; Letson Dep. Tr. (PX 17, DX 97) at ECF 365, 381; Martin Dep. Tr. (PX 16, DX

122) at ECF 365, 381). *See Lundstrom v. Young*, 2022 WL 15524624, at *17 (S.D. Cal. Oct. 27, 2022) (J. Curiel) (considering prior sealing of exhibits when granting motion to seal).

Consistent with this Court's Sealing Orders, there is good cause to seal each of the confidential documents, discovery responses and testimony (or portions thereof) filed in connection with BANA's Motion for Protective Order, and any substantive discussion of those documents contained in BANA's Memorandum of Points and Authorities in Support of its Motion for Protective Order and the Parties' prior informal briefing of this issue before Judge Berg because each reflects topics that are likely to cause particularized competitive harm to BANA and which could potentially enable future fraud, and thus pose a danger to BANA's business and the public. *See, e.g.*, *EWB*, 2021 WL 3112452, at *18–19 (finding compelling reasons to seal where public disclosure of EWB's confidential onboarding processes, verification of customer identities and fraud prevention measures would "harm [the bank's] competitive standing"); *Soria*, 2019 WL 8167925, at *4 (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"). Each document was also properly designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under the Protective Order entered by this Court. *See BAE Systems*, 670 F. Supp. 3d at 1069 (finding good cause to seal certain exhibits filed in connection with an apex discovery dispute because "information in the exhibits fits within 'confidential information' in the protective order").

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:

- Riffee Declaration Exhibits 1–17, Plaintiffs' Exhibits 3, 11, 15, 20, 41, 44, 46, 49 and 51–53, and BANA's Exhibits 1–4, 6, 8–9 and 11 reflect confidential BANA fraud prevention strategies and policies that could be misused by fraudsters to perpetrate future fraud or could be used by another financial institution to BANA's competitive disadvantage. *See* Amended Sealing Order (ECF 365) at 5–6, 12; Robart Decl. (ECF 347-2) ¶¶ 3–5; Martin Decl. (ECF 347-1) ¶¶ 4–6; *see also Cowan v. GE Cap. Retail Bank*, 2015 WL 1324848, at *2–3 (N.D. Cal. Mar. 24, 2015) (compelling reasons to seal bank's internal procedures for investigating fraud and addressing cardholder fraud notifications);

- Riffee Declaration Exhibits 3–4, 9, 11 and 16, Plaintiffs' Exhibits 7–9, 14, 21, 31, 47–48 and 50, and BANA's Exhibit 7 reflect confidential BANA analyses pertaining to fraud on prepaid unemployment cards that similarly could be misused by fraudsters to perpetrate future fraud or could be used by another financial institution to BANA's competitive disadvantage. *See* Amended Sealing Order (ECF 365) at 5–9, 12; Robart Decl. (ECF 347-2) ¶¶ 3–5; Martin Decl. (ECF 347-1) ¶¶ 4–6; *see also Cowan*, 2015 WL 1324848, at *2–3 (compelling reasons to seal bank's internal procedures for investigating fraud and addressing cardholder fraud notifications);
- Riffee Declaration Exhibits 2–5 and 13, Plaintiffs' Exhibits 1, 2, 4–6, 10, 12–13, 16–19 and 43–45, and BANA's Exhibits 5 and 10 reflect BANA's confidential analyses of its state prepaid unemployment program operations, including but not limited to, contractual negotiations, fraud volume, claims and call center operations, and operational risks and losses. *See* Amended Sealing Order (ECF 365) at 10–13, n. 14; Martin Decl. (ECF 344-1) ¶¶ 5, 7–10; Martin Decl. (ECF 347-1) ¶¶ 10–12; Robart Decl. (ECF 344-2) ¶ 4; *see Brady v. Grendene USA, Inc.*, 2015 WL 6828400, at *3 (S.D. Cal. Nov. 6, 2015) (J. Curiel) (sealing confidential business information that might harm the litigants'

competitive standing including profit and loss data and contractual agreements);

- Riffee Declaration Exhibit 4 and Plaintiffs' Exhibit 40 reflects confidential BANA testimony pertaining to BANA's Remediation Plans with the Office of the Comptroller of the Currency ("OCC") and the Consumer Financial Protection Bureau ("CFPB")—which were designated Highly Confidential – Attorneys' Eyes Only at those regulators' requests—which this Court has found compelling reasons to seal. Amended Sealing Order (ECF 365) at 14–16; *see also* Lennon Decl. (ECF 344-3) ¶¶ 3–6; *see also Erhart v. BofI Fed. Bank*, 2019 WL 4534701, at *3 (S.D. Cal. Sept. 19, 2019) (sealing information that the OCC asserted bank examination privilege over but permitted to be produced subject to confidentiality protections); and
- Riffee Declaration Exhibit 4 and Plaintiffs' Exhibits 22-30 and 32-39 reflect confidential EDD cardholder account or personal information, including personal identifying information, the disclosure of which could expose those cardholders to harm or identity theft. *See* Amended Sealing Order (ECF 365) at 16; Sealing Order (ECF 381) at 1; *see also* Robart Decl. (ECF 347-2) ¶¶ 3–8; *see also Stiner v. Brookdale Senior Living, Inc.*, 2022 WL 1180216, at *2 (N.D. Cal. Mar. 30, 2022) (sealing documents containing employees' personally identifying information like names, email addresses, and phone numbers). Those exhibits also reflect the types of claims files or information that BANA considers in connection with investigating and processing unauthorized transaction and error claims. *See* Robart Decl. (ECF 347-2) ¶¶ 3–8. Further compelling reasons exist to seal that information because the disclosure of that information could provide potential fraudsters with insight into BANA's confidential claims processes or procedures, thereby enabling

fraudsters to circumvent them and perpetrate future fraud, and disclosure could also enable other financial institutions to use that information to BANA's competitive disadvantage. *See id*.

BANA has also provisionally redacted and sealed portions of the Parties' briefing (*see* Motion for Protective Order; Riffee Decl. Exs. 1–4) and excerpted deposition testimony in whole or in part (*see* Riffee Decl. Exs. 5–6, 8–17) that quote or describe the confidential documents, testimony and topics identified above, including BANA's fraud analyses and strategies and BANA's analyses of its state prepaid unemployment program operations, including contractual negotiations, fraud volume, claims and call center operations, and operational risks and losses, among other topics. *See supra* at 3-6. This is consistent with the terms of the Stipulated Protective Order (ECF 82, § 3), with this Court's prior Sealing Orders (ECF 365, 381, 390), and with rulings in this Circuit. *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). For the reasons discussed above, there is good cause to seal discussions of those topics, testimony and documents discussed in the Parties' briefing. *See supra* at 1–3.

* * *

For the foregoing reasons and for the reasons set forth in the Court's Sealing Orders in connection with class certification briefing and argument (ECF Nos. 365, 381, 390, 391, 397, 421), Plaintiffs' Motions to Seal (ECF Nos. 376, 384, 394), BANA's prior Motions to Seal (ECF Nos. 328, 337, 344, 347, 383, 418) and accompanying declarations submitted in support thereof (ECF Nos. 344-1, 344-2, 344-3, 347-1, 347-2), all of which are incorporated herein by reference, BANA respectfully requests that the Court grant Defendant's Motion to Seal Documents Filed In Support of its Motion for Protective Order because good cause supports sealing thereof.

Dated: April 11, 2025

Respectfully submitted,

By: *s/ Matthew L. Riffee*

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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 April 11, 2025. 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: April 11, 2025 *s/ Matthew L. Riffee*