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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION

Case No. 21-MD-02992-GPC-MSB

DEFENDANT BANK OF AMERICA, N.A.'S NOTICE AND MOTION TO SEAL DOCUMENTS FILED IN SUPPORT OF ITS MOTION TO EXCLUDE THE EXPERT TESTIMONY OF DAVID I. LEVINE

Ctrm: 12A – 12th 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 Notice and Motion to Seal (the "Motion to Seal") certain documents and portions of other documents submitted in connection with BANA's Motion to Exclude the Expert Testimony of David I. Levine (the "Motion to Exclude").[1]

I. 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 that BANA seeks 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 82).

Courts in this district have held that a party seeking to seal documents filed in connection with a motion to exclude expert testimony must show "compelling reasons" to seal, as such motions may be effectively "dispositive of a motion for summary judgment." *Lust ex rel. Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 597 (9th Cir. 1996) (noting that Daubert ruling was dispositive); *see Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1288 (11th Cir. 2005) (affirming a grant of summary judgment on grounds that plaintiff failed to prove causation after the plaintiff's expert was excluded under *Daubert*).

In applying the "compelling reasons" standard, courts, including this Court,

[1] This Motion is based on Defendant's Notice of Motion and Motion to Seal, the documents filed in support of Defendant's Motion to Exclude, including the Declaration of Lindsay E. Hoyle ("Hoyle Decl.") submitted herewith, 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 to decide Defendant's Motion to Seal, BANA respectfully requests the opportunity to submit additional briefing in support of sealing.

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."); *see also* ECF 266, 293, 365, 381, 390, 391, 397, 421, 466, 467, 548 (the "Sealing Orders").

II. COMPELLING REASONS EXIST TO SEAL THE CONFIDENTIAL DOCUMENTS.

Compelling reasons exist to file under seal each of the confidential documents (or portions thereof) filed in connection with BANA's Motion to Exclude, and any substantive discussion of those documents contained in BANA's Motion to Exclude or the declarations or testimony filed in support thereof. Each of those documents 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. Many of the documents were also designated Confidential pursuant to the terms of BANA's contract and confidentiality agreement with the EDD (*see infra* at 5-6), because BANA was explicitly instructed by its regulators to keep the documents confidential because they implicate regulatory protections and concern ongoing remediation efforts (*see infra* at 7), and/or because their disclosure could implicate or interfere with potential or ongoing law enforcement investigations (*see infra* at 3).

All 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[s], fraud management techniques, and verification of customer identities, which if made public would harm [the bank'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 [the b]ank's procedures concerning its fraud investigations, public disclosure of this information may impede [the b]ank'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. Further, in *Shelley v. Cnty. of San Joaquin*, yet another California district court protected materials where "the public release of those documents could negatively impact" law enforcement investigations. 2015 WL 2082370, at *7 (E.D. Cal. May 4, 2015).

Similar compelling reasons exist here. Indeed, this court has already found, compelling reasons to seal documents just like those at issue here, 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. Earlier in this litigation, Judge Berg determined that there are "compelling reasons" to seal a number of exhibits previously submitted with Plaintiffs' motion to compel discovery that concern the very same categories of confidential information that BANA seeks to seal here. *See* ECF 266. 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, prepaid fraud losses, state contract issues, prepaid updates and trackers, cardholder complaints and escalations, and certain of BANA's interrogatory responses—which are *precisely* the types of documents BANA seeks to seal here.

This Court also found compelling reasons to seal the same or similar documents related to analyses of claims fraud and potential strategies to combat that fraud including the Claim Fraud Filter and other fraud strategies, operational fraud losses, trainings for claims investigations, fraud detection and prevention policies and strategies, claims review policies and strategies and their implementation, BANA's analyses of transactional fraud, risk of competitor advantage concerning how BANA structures its claims and frauds teams and the review procedures, protocols and systems therein, its analyses of state prepaid unemployment program operations and contractual negotiations with vendors, fraud prevention programs, organizational charts, confidential regulator materials, and quotes or summary descriptions from sealed exhibits. *See* ECF 365, 381, 390. 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 exhibits when granting motion to seal); *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).

Specifically, the Confidential and Highly Confidential – Attorneys' Eyes Only documents, testimony and declarations that BANA seeks to seal, include but are not limited to, the following categories of documents and information, which this Court has already found compelling reasons to seal:

- BANA's Remediation Plan 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* HX 30, 31) (*see* ECF 365 at 14–16 (finding compelling reasons to seal));
- Testimony concerning aggregated statistics related to EDD benefit recipients account balances, activity, and fraud claims that BANA is

obligated to maintain as confidential pursuant to its agreement with EDD (ECF 324-106 at 5), and otherwise would keep as confidential because its disclosure could cause competitive harm to BANA or its customers (*see* HX 30) (*see* ECF 365, 381 (finding compelling reasons to seal));

- Individual EDD cardholder account, transactions, and claim information, which often include personal, sensitive, or financial information (*see* HX 36, 37, 38) (*see* ECF 365, 381 (finding compelling reasons to seal));
- Expert reports and excerpts of experts' deposition testimony, which include discussions of BANA's confidential documents, many of which contain the confidential information described above, including but not limited to: BANA's handling of unauthorized transaction 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; and BANA's call center procedures and complaint escalation intake channels (*see* HX 34, 35, 36) (*see* ECF 365, 381 (finding compelling reasons to seal));[2] and
- Excerpt of a 30(b)(6) fact witness's deposition testimony, which include discussions of BANA's confidential documents, many of which contain the confidential information described above, including but not limited to: BANA's handling of unauthorized transaction claims and reconsiderations; BANA's contract with EDD and the responsibilities

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[2] BANA submits excerpted deposition testimony from an expert (HX 36), which BANA designated as Confidential or Highly Confidential – Attorneys' Eyes Only because those witnesses' testified regarding BANA's confidential documents and to the same categories of confidential information described above.

thereunder; BANA's communications with EDD regarding fraud-related measures; (*see* HX 30) (*see* ECF 365, 381 (finding compelling reasons to seal)).

Cardholders' personal account, transaction and claim information. Additional compelling reasons and good cause exist to seal HX 36, 37, and 38 because they reflect EDD cardholder account, transaction and claim information, which often include personal, sensitive and financial information that the customers did not intend to appear on a public docket. *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); *see also McAfee v. Experian Info. Sols.*, 2023 WL 8237364, at *2 (S.D. Ohio Nov. 28, 2023) (finding compelling reasons to seal documents in order to "protect Plaintiff's credit history and financial account information from public disclosure to maintain Plaintiff's privacy . . . [and] guard against the threat of identi[t]y theft…").[3] Moreover, BANA is obligated to keep such information confidential pursuant to the terms of its contract and confidentiality agreement with EDD. *See* ECF 324-106 at 5 (prohibiting "disclosure of the EDD's confidential information to the public"); Robart Decl. ¶ 5.

Finally, Plaintiffs themselves designated their own interrogatory responses as Confidential (HX 37, 38), and under the Protective Order, BANA is required to file under seal testimony that Plaintiffs designated confidential (ECF 82 § 12.5). Accordingly, cardholder claim and account details contain sensitive, personal information that overcomes the presumption of public access and warrants sealing.

Confidential regulator materials. Compelling reasons exist to seal HX 30 and 31, which contain documents and testimony regarding BANA's implementation

[3] BANA is provisionally sealing sensitive financial information of both named Plaintiffs and absent class members. If Plaintiffs request that their personal and financial information be made public, BANA can remove sealing over Plaintiffs' account, transactions and claims information, but not with respect to non-plaintiffs.

of its Remediation Plan and Addenda with the OCC and CFPB. 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. 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). *See also* ECF 344-3 (Lennon Decl.) ¶¶ 3–4, 6. This Court has previously found compelling reasons to limit public access to such documents because they contain highly sensitive, and confidential information that would subject any disclosure to potential fraud. ECF 381, 498.

BANA's Motion to Exclude, expert reports and appendix of exhibits that quote and summarize confidential exhibits. BANA has provisionally redacted and sealed portions of its Motion to Exclude, expert reports appended in support thereof, and the appendix of exhibits to the Motion to Exclude that quote or describe the confidential documents, testimony and topics identified above, including BANA's fraud, claims and call center policies, strategies and practices, as well as BANA's implementation of the Remediation Plan and Addenda (*see* HX 34, 35). *See supra*, pgs. 5–14. This is consistent with the terms of the Stipulated Protective Order (ECF 82, § 3), and with rulings in this circuit including by this Court. *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); ECF 365, 381.

For example, portions of the Motion to Exclude reference confidential deposition testimony of BANA's expert witnesses and provisionally sealed portions of Plaintiffs' expert reports pertaining to the details of the Claim Fraud Filter and other BANA claim investigation processes, as well as the Remediation Plan and Addenda; reference confidential documents and testimony related to the Claim Fraud Filter, the Remediation Plan and Addenda, and provisionally sealed portions of Plaintiffs' expert reports, among other confidential topics; and quote from or describe the Highly Confidential – Attorneys' Eyes Only Remediation Plan and Addenda summarize BANA's implementation of the Plans.

For the reasons discussed above, there are compelling reasons to seal discussions of those topics, testimony and documents, as well as others discussed in BANA's Motion to Exclude and the expert reports appended in support thereof. *See supra*, pgs. 5–15.

III. CONCLUSION

For the foregoing reasons and for the reasons set forth in the Court's Sealing Orders (ECF 365, 381, 390, 391, 397, 421, 431, 460, 466, 467, 477, 498, 507, 516, 531, 532, 547, 548), Plaintiffs' Motions to Seal (ECF 322, 334, 376, 384, 394, 463), BANA's prior Motions to Seal (ECF 328, 337, 344, 347, 383, 418, 451, 457, 470, 481, 495, 501, 511, 539, 542) and accompanying declarations submitted in support thereof (ECF 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 because compelling reasons support sealing of the identified documents or portions thereof. Defendant has lodged a Proposed Order separately with the Court.

Dated: October 17, 2025 Respectfully submitted,

By: *s/ Lindsay E. Hoyle*

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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 17, 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: October 17, 2025 *s/ Lindsay E. Hoyle*