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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 MOTION TO SEAL ITS NOTICE OF NEW EVIDENCE AND THE DECLARATION OF JENNIFER LENNON IN SUPPORT THEREOF

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. ("BANA") hereby submits this Motion to Seal Portions of Its Notice of New Evidence Concerning Class Members Relevant to Its Pending Motion for Summary Judgment, Its Motions to Exclude Experts, and the Certification of the Classes ("Notice") and the Declaration of Jennifer Lennon ("Lennon Decl.") in Support Thereof ("Motion to Seal").

I. STANDARD TO SEAL DOCUMENTS

The public's "right to inspect and copy judicial records is not absolute." *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). Discussions of information relating to an ongoing law enforcement investigation may be sealed where, as here, disclosure would result in "the ends of justice [] be[ing] frustrated, not served, if the public were allowed access" to them. *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989). Additionally, a party faced with the disclosure of confidential or proprietary information may seek to file references to such documents under seal to avoid disclosure of business information that might result in competitive harm or be used for improper purposes. *See Nixon*, 435 U.S. 589 at 608, 611 (denying disclosure); Local Civ. R. 79.2(c). Further, the references that BANA seeks to seal all reveal 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).

It is acknowledged by courts, including many courts in this district, that a party seeking to seal documents containing references made in connection with a motion for class certification or a motion for summary judgment (i.e., a dispositive motion) must show "compelling reasons" to seal. *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006); *see Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665, 678-79 (9th Cir. 2010) (determining "compelling reasons" standard applies to motion to seal documents relating to cross-motion for summary judgment); *see also EpicentRx, Inc. v. Carter*, 2023 WL 4336695, at 1 (S.D. Cal. May 16, 2023) (applying "compelling reasons" standard to request to seal certain exhibits associated with motions for summary judgment).

In applying the "compelling reasons" standard, courts, including this Court, consistently seal documents and references thereto where—as here—disclosure of confidential information pertains to an active ongoing investigation, risks competitive harm to the litigant, or improper use of the information such as to commit fraud. *See e.g., Forbes Media LLC v. United States*, 2021 WL 3674516 (N.D. Cal. Apr. 26, 2021), *report and recommendation adopted*, 548 F. Supp. 3d 872 (N.D. Cal. 2021), *aff'd*, 61 F.4th 1072 (9th Cir. 2023) (finding compelling reasons to seal materials relating to an ongoing investigation); *E.W. Bank v. Shanker*, 2021 WL 3112452, at *18–19 (N.D. Cal. July 22, 2021) (finding compelling reasons to seal 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 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, 598, 599, 600, 601, 602, 603, 638, 639, 640, 641, 642, 654, 662, 668, 695, 697, 699, 701, 703, 705, 707, 710, 713 (the "Sealing Orders").

II. COMPELLING REASONS EXIST TO SEAL THE CONFIDENTIAL DOCUMENTS.

Compelling reasons exist to file under seal substantive references made to discussions of confidential documents and data in the Notice and in the Lennon Declaration. As reflected in the Lennon Declaration, these discussions relate to a law enforcement investigation that is currently active, and unsealing these materials could alert targets to the existence of the investigation and reveal steps the Government takes to recover ill-gotten funds and to potentially take further actions against fraudulent actors. The DOL OIG has further designated this information as confidential investigative information, and disclosing that information to the public could disrupt ongoing investigations. Further, disclosure of these materials also risks revealing sensitive fraud information concerning cardholder's accounts, and include discussions 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.

All are compelling reasons which outweigh the public disclosure factors, and thus permit sealing of those documents. Similar compelling reasons exist here. The Ninth Circuit has excluded materials analogous to the references made in the Notice and Lennon Declaration "that are part of an ongoing criminal investigation from public disclosure under the First Amendment." *See Forbes Media LLC*, 2021 WL 3674516 at *4. For example, in *Times Mirror Co.*, the court held that disclosure of materials relating to an ongoing law enforcement investigation would pose an "obvious risk that the subject of [a] search warrant would learn of its existence and destroy evidence of criminal activity before the warrant could be executed." 873 F.2d at 1215. Further, in *Forbes Media LLC*, the court held that:

> Unsealing this type of material could jeopardize the Government's ongoing efforts to investigate and prosecute the crimes … [and enable] perusal by both the public and targets of the investigation while it remains underway. Significant negative consequences could follow from public disclosure, including alerting subjects to the existence of the warrant, revealing steps that the Government and others might take to effectuate the subjects' arrest including securing a third party's assistance in the execution of a sealed federal arrest warrant, and by revealing the names of individuals who may or may not have charges eventually brought against them. Opening that information to the public could prompt any remaining subjects or associates to flee, conceal or destroy evidence, or take other steps to evade responsibility for their crimes. 2021 WL 3674516 at *9.

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).

Indeed, this court has already found compelling reasons to seal discussions of 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 this year, Judge Berg determined that there are "compelling reasons" to seal a number of exhibits, and any discussions thereof, 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, among other things, fraud and claims analysis and strategies, which are *precisely* the types of discussions BANA seeks to seal here.

This Court also found compelling reasons to seal similar discussions related to analyses of claims fraud and potential strategies to combat that fraud including the

Claim Fraud Filter and other fraud strategies, BANA's analyses of state prepaid unemployment program operations and contractual negotiations with vendors, fraud prevention programs, confidential regulator materials, and quotes or summary descriptions from such sealed exhibits. *See, e.g.*, 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, BANA seeks to seal references made to documents that fit into the following Confidential and Highly Confidential – Attorneys' Eyes Only categories, which this Court has already found compelling reasons to seal:

- BANA's communications with EDD regarding BANA's and/or EDD's fraud strategies, including freezing and blocking of accounts which 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);
- BANA's confidential analyses of its state prepaid unemployment program operations, including but not limited to, fraud volume (*see* Amended Sealing Order (ECF 365) at 10–13, n. 14);
- BANA's fraud detection and prevention strategies and policies, including current and former fraud strategies 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); and
- BANA's confidential analyses pertaining to fraud and claims review policies and strategies and the implementation thereof, including reviewing complaint escalations and issuing provisional credits in

compliance with regulations that could also be misused by fraudsters to perpetrate fraud or could be used by another financial institution to BANA's competitive disadvantage (*see* Amended Sealing Order (ECF 365) at 5–9, 12).

Confidential regulator materials. Compelling reasons exist to seal discussions relating to BANA's discussions with regulators and other government investigative entities: the details of these conversations, as well as discussions of the implementation of BANA's review and the data underlying such a review, are highly sensitive because they pertain to an active ongoing investigation and could provide fraudsters with a roadmap for how to circumvent accountability for acting fraudulently. ECF 344-3 (Lennon) ¶ 3. This Court has previously sealed references to regulator materials, which were designated by the regulators themselves as "Highly Confidential – Attorneys' Eyes Only" as a condition to BANA producing them to Plaintiffs, and which 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 Notice and Lennon Declaration. *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 has provisionally redacted and sealed portions of the Notice and the Lennon Declaration that quote or describe these confidential categories identified above. 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.

Documents that risk future fraud. BANA's communications with state regulators, EDD, and other government investigative entities regarding fraud strategies utilized in the EDD program could also be misused by fraudsters to perpetrate future fraud and avoid detection. ECF 344-1 (Martin Decl.) ¶ 8; *see, e.g.*, *Soria*, 2019 WL 8167925, at *4; *Jasso*, 2022 WL 2665979, at *2. This Court has previously found 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* ECF 365, 381.

Documents that risk competitive harm. The aforementioned categories also contain sensitive business information that could be used to BANA's competitive or commercial disadvantage, which is yet another compelling reason to seal the documents. *See, e.g.*, *E.W. Bank*, 2021 WL 3112452, at *18-19 (granting motion to seal where public disclosure of EWB's confidential fraud prevention measures would "harm EWB's competitive standing"); *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). Aggregated account statistics regarding the number of EDD accounts, the balances on those cards, the fraud claims filed by EDD cardholders, and the combined monetary amounts of fraud associated therewith are proprietary, confidential business information of EDD and/or BANA. ECF 344-1 (Martin Decl.) ¶¶ 10-12. Public disclosure of the number of active EDD accounts, account balances and first party fraud could violate BANA's confidentiality agreement with EDD. Additionally, aggregated account statistics related to customer account balances, activity, and fraud claims is also commercially sensitive information, from which certain of BANA's revenues and fraud losses could be derived, and if disclosed, could be used by another financial institution to compete against BANA, which warrants sealing. *See, e.g.*, *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). This Court has previously found compelling reasons to limit public access to such documents because their disclosure could harm BANA's competitive advantage. *See* ECF 381.

For the reasons discussed above, there are compelling reasons to seal discussions of those topics. *See supra*, pgs. 2–8.

III. CONCLUSION

For the foregoing reasons and for the reasons set forth in the Court's Sealing Orders, Plaintiffs' Motions to Seal (ECF 376, 384, 394, 463, 524, 527), BANA's prior Motions to Seal (ECF 328, 337, 344, 347, 383, 418, 451, 470, 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 exist that support the sealing of the designated portions of the Notice and in the Lennon Declaration.

Dated: May 19, 2026

Respectfully submitted,

By: *s/ James W. McGarry*

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on May 19, 2026. 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: May 19, 2026 *s/ James W. McGarry*