UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NEWMARK REALTY CAPITAL, INC.,	Case No. 16-cv-01702-BLF
Plaintiff,	
v.	**OMNIBUS ORDER DENYING WITHOUT PREJUDICE SEALING MOTIONS IN CONNECTION WITH THE PARTIES' DAUBERT BRIEFING AND EXHIBITS**
BGC PARTNERS, INC., et al.,	
Defendants.	[Re: ECF 593, 598, 609, 615, 620]

Before the Court are Plaintiff and Defendants' administrative motions to file under seal portions of their briefing and exhibits in connection with each side's respective *Daubert* motions. ECF 593, 598, 609, 615, 620. For the reasons stated below, the sealing motions are DENIED without prejudice.

I. LEGAL STANDARD

"Historically, courts have recognized a 'general right to inspect and copy public records and documents, including judicial records and documents.'" *Kamakana v. City & Cty. Of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 & n. 7 (1978)). Accordingly, when considering a sealing request, "a 'strong presumption in favor of access' is the starting point." *Id.* (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)). Parties seeking to seal judicial records relating to motions that are "more than tangentially related to the underlying cause of action" bear the burden of overcoming the presumption with "compelling reasons" that outweigh the general history of access and the public policies favoring disclosure. *Ctr. for Auto Safety v. Chrysler Grp.*, 809 F.3d 1092, 1099 (9th Cir. 2016); *Kamakana*, 447 F.3d at 1178–79.

However, "while protecting the public's interest in access to the courts, we must remain

1   mindful of the parties' right to access those same courts upon terms which will not unduly harm

2   their competitive interest." *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 727 F.3d 1214, 1228–29 (Fed.

3   Cir. 2013). Records attached to motions that are "not related, or only tangentially related, to the

4   merits of a case" therefore are not subject to the strong presumption of access. *Ctr. for Auto*

5   *Safety*, 809 F.3d at 1099; *see also Kamakana*, 447 F.3d at 1179 ("[T]he public has less of a need

6   for access to court records attached only to non-dispositive motions because those documents are

7   often unrelated, or only tangentially related, to the underlying cause of action."). Parties moving

8   to seal the documents attached to such motions must meet the lower "good cause" standard of

9   Rule 26(c). *Kamakana*, 447 F.3d at 1179 (internal quotations and citations omitted). This

10   standard requires a "particularized showing," *id.*, that "specific prejudice or harm will result" if the

11   information is disclosed. *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206,

12   1210–11 (9th Cir. 2002); *see* Fed. R. Civ. P. 26(c). "Broad allegations of harm, unsubstantiated by

13   specific examples of articulated reasoning" will not suffice. *Beckman Indus., Inc. v. Int'l Ins. Co.*,

14   966 F.2d 470, 476 (9th Cir. 1992). A protective order sealing the documents during discovery

15   may reflect the court's previous determination that good cause exists to keep the documents

16   sealed, *see Kamakana,* 447 F.3d at 1179–80, but a blanket protective order that allows the parties

17   to designate confidential documents does not provide sufficient judicial scrutiny to determine

18   whether each particular document should remain sealed. *See* Civ. L.R. 79-5(d)(1)(A) ("Reference

19   to a stipulation or protective order that allows a party to designate certain documents as

20   confidential is not sufficient to establish that a document, or portions thereof, are sealable.").

21   In addition to making particularized showings of good cause, parties moving to seal

22   documents must comply with the procedures established by Civ. L.R. 79-5. Pursuant to Civ. L.R.

23   79-5(b), a sealing order is appropriate only upon a request that establishes the document is

24   "sealable," or "privileged or protectable as a trade secret or otherwise entitled to protection under

25   the law." "The request must be narrowly tailored to seek sealing only of sealable material, and

26   must conform with Civil L.R. 79-5(d)." Civ. L.R. 79-5(b). In part, Civ. L.R. 79-5(d) requires the

27   submitting party to attach a "proposed order that is narrowly tailored to seal only the sealable

28   material" which "lists in table format each document or portion thereof that is sought to be

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1 sealed," Civ. L.R. 79-5(d)(1)(b), and an "unredacted version of the document" that indicates "by

2 highlighting or other clear method, the portions of the document that have been omitted from the

3 redacted version." Civ. L.R. 79-5(d)(1)(d). "Within 4 days of the filing of the Administrative

4 Motion to File Under Seal, the Designating Party must file a declaration as required by subsection

5 79-5(d)(1)(A) establishing that all of the designated material is sealable." Civ. L.R. 79-5(e)(1).

6 **II.   DISCUSSION**

7   The Court has reviewed Defendants' sealing motions at ECF 593 and 620; Plaintiff's

8 sealing motions at ECF 598, 609, and 615; and the declarations of the designating parties

9 submitted in support thereof. Each sealing motion is in connection with a *Daubert* motion,

10 opposition brief, or reply brief. In general, the Court finds that the parties have failed to articulate

11 compelling reasons to seal the submitted documents or have failed to narrowly tailor the proposed

12 redactions.

13   For example, Defendants request to seal portions of Defendants' *Daubert* Motion To

14 Exclude Evidence or Testimony from Jeffrey Kinrich and Plaintiff's Alleged Damages Theories

15 (ECF 593-4). ECF 593. However, even a cursory review of the portions requested to be sealed

16 reveals numerous instances of sealing overreach. *See, e.g.*, ECF 593-4 at 1–10 (highlighted

17 portions throughout the motion that appear untethered to sealable material or overbroad). As

18 another example, Plaintiff requests to seal wholesale Exhibit 1 (Kinrich Report appendices and

19 exhibits) to the Declaration of Yasamin Parsafar in Support of Plaintiff's Opposition to

20 Defendants' *Daubert* Motion to exclude evidence or testimony from Kinrich (ECF 609-3). ECF

21 609. Here too, the request to seal is not narrowly tailored to *only* the sensitive material that

22 Plaintiff claims public disclosure of which would cause harm to Plaintiff. *See* Parsafar Decl. ¶ 2,

23 ECF 609-1 (identifying the types of "sensitive material" the public disclosure of which would

24 cause harm to Plaintiff).

25   It is not the Court's function to wade through overbroad sealing motions in search of

26 sealable portions that may be contained within a sweeping request. All sealing requests must be

27 narrowly tailored to seek sealing only of sealable material, and a blanket protective order that

28 allows the parties to designate confidential documents does not provide sufficient judicial scrutiny

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to determine whether each particular document should remain sealed. *See* Civ. L.R. 79-5. The parties are advised to consider the Court's statements above—which pertain to examples only and are not to be considered comprehensive review—with respect to each specific document/portion for which sealing is requested. Sealing will not be permitted to run amok.

III. CONCLUSION

For the foregoing reasons, Plaintiff and Defendants' sealing motions at ECF 593, 598, 609, 615, and 620 are denied without prejudice to narrowly tailored and properly justified requests. Any renewed request must be filed **on or before December 5, 2018**. If no renewed request is filed by that date, the sealing request will be denied with prejudice.

IT IS SO ORDERED.

Dated: November 28, 2018

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BETH LABSON FREEMAN
United States District Judge