

FILED

15 APR 23 PM 4:02

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

*np*  
DEPUTY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

JAMES W. BRADY and PATRICIA  
M. BRADY,  
  
Plaintiff,  
  
vs.  
  
GRENDENE USA, INC., *a Delaware  
corporation*, and GRENDENE S.A., *a  
Brazil corporation*,  
  
Defendant.

CASE NO. 12cv604-GPC(KSC)  
**ORDER DENYING DEFENDANTS'  
REQUEST TO COMPEL  
COMPLIANCE WITH  
PROTECTIVE ORDER**  
  
[Doc. 161]

Before the Court is the parties' Joint Motion for Determination of Discovery Dispute, filed November 13, 2014, in which the defendants seek an Order compelling counsel for the plaintiffs to submit declarations attesting to the method and manner in which they designated materials produced in discovery as "Confidential" or "Confidential – Attorneys Eyes Only" under the Protective Order. [Doc. 161] They also seek attorneys' fees. *Id.* For the reasons stated below, this Court DENIES both requests.

**I. FACTUAL BACKGROUND**

On September 20, 2012, the parties jointly moved this Court for issuance of a Protective Order governing, *inter alia*, confidentiality designations. [Doc. 37] The Court signed the parties' proposed Protective Order one week later. [Doc. 38] The

1 Protective Order states that “[d]esignations under the Order shall be made with care  
2 and shall not be made absent a good faith belief that the designated material satisfies  
3 the [applicable] criteria.” *Id.* at 2. The Protective Order also sets forth the procedure  
4 for challenging such designations. If a party believes that specific discovery materials  
5 have been designated in error, that party must confer with the producing party in a good  
6 faith effort to resolve the dispute. *Id.* at 10. Failing agreement, the objecting party may  
7 then bring a Joint Motion to the Court specifying the particular material it believes is  
8 not entitled to the status and protection of the producing party’s designation. *Id.* at 10-  
9 11. The procedures of the Protective Order operate in tandem with this Court’s  
10 Chambers Rules, which dictate the format of Joint Motions for Determination of  
11 Discovery Dispute. CRAWFORD CHAMBERS RULE V.D. Any disputes over a party’s  
12 confidentiality designations should be presented to the Court in the following format:  
13 1) the specific pages in dispute; 2) the producing party’s statement in support of the  
14 designations; and 3) the challenging party’s statement as to why the documents should  
15 not be designated confidential.

16 The plaintiffs made three substantial document productions in this case, totaling  
17 over 35,000 pages of documents. [Doc. 74-2, p. 7] On February 3, 2014, the plaintiffs  
18 served their initial disclosures. *Id.* at 8. On May 9, 2014, the plaintiffs produced a disc  
19 containing more than 20,000 pages of documents. *Id.* On May 14, 2014, the plaintiffs  
20 produced a second disc, containing an additional 900 pages of documents. *Id.* at 10.  
21 On or about May 20, 2014, the plaintiffs made available 10 boxes of documents for  
22 copying and inspection, containing a total of 16,000 pages. *Id.* at 7, 12. The majority  
23 of all documents produced were designated “Confidential” or “Confidential –  
24 Attorneys Eyes Only.” [Doc. 161-1, p. 2]

25 On June 11, 2014, the parties filed a Joint Motion in which the defendants  
26 asserted that the plaintiffs’ confidentiality designations were overbroad. [Doc. 74] The  
27 defendants requested that this Court compel the plaintiffs to re-review their document  
28 productions and remove any improper designations. *Id.* In an Order dated September

1 26, 2014, this Court denied the defendants' request, noting that the dispute "[was] not  
2 ripe for the Court's determination" because the defendants had failed to follow the  
3 procedures set forth in the Protective Order for challenging confidentiality  
4 designations. [Doc. 138, pp. 17-18] The defendants were not permitted to broadly  
5 assert that the plaintiffs had not made their designations with care and good faith. *Id.*  
6 Rather, they were required to 1) identify the specific documents they believed to be  
7 erroneously designated; 2) attempt to informally resolve the disagreement with  
8 opposing counsel through the meet and confer process; and 3) failing agreement,  
9 present the Court with a Joint Motion in which they list the specific disputed  
10 documents. *Id.*

11 Following the Court's September 26, 2014, Order, defense counsel apparently  
12 made some efforts to follow the procedures in the Protective Order. On October 22,  
13 2014, defense counsel set an email to plaintiffs' counsel listing by Bates number  
14 approximately 5,000 pages that the defendants believed had been improperly  
15 designated. [Doc. 163-3, Ex. 2; Doc. 161, p. 11] The parties met and conferred  
16 telephonically about the dispute on October 27, 2014. [Doc. 161, p. 8; Doc. 163, p. 3]  
17 On November 7, 2014, plaintiffs' counsel sent defense counsel a 44-page list of  
18 documents for which the plaintiffs were removing or modifying the confidentiality  
19 designation. [Doc. 163, p. 5; Doc. 163-5, Ex. 4] Because the defendants have not  
20 presented this Court with a list of specifically disputed documents, this Court cannot  
21 determine whether the plaintiffs' de-designation of the challenged documents resolved  
22 the defendants' challenge to the 5,000 disputed pages.<sup>1</sup> In the absence of evidence to  
23 the contrary, this Court presumes that it did.

24 //

25 //

26

27

---

28 <sup>1</sup> This issue underscores the importance of presenting disputes to the Court in the  
format dictated by Crawford Chambers Rule V.D. See *supra*, p. 2 ¶ 1.

## II. DISCUSSION

1  
2 Despite the apparent success of the Protective Order's procedures for resolving  
3 the defendants' challenges, they have presented this Court with the instant Joint  
4 Motion. Though styled as a request to compel counsel to submit a declaration, the  
5 instant Joint Motion is, at heart, a second improper challenge to the plaintiffs'  
6 confidentiality designations. For the reasons stated below, this Court denies the  
7 defendants' request.

8 First, based on plaintiffs' counsel's Declaration, the Court is satisfied that the  
9 plaintiffs made their confidentiality designations with the good faith and care required  
10 by the Protective Order.<sup>2</sup> The plaintiffs represent that they reviewed all documents "at  
11 least twice" to ensure the appropriateness of their confidentiality designations. [Doc.  
12 161, p. 5] Plaintiffs' counsel testified in a Declaration that "[m]y colleagues and I  
13 reviewed the Bradys' documents prior to producing them to Defendants in this case,  
14 and in good faith we designated certain materials as 'confidential' or 'confidential-  
15 attorneys eyes only.'" *Id.* Plaintiffs' counsel has further testified that following  
16 defense counsel's email dated October 22, 2014, they re-reviewed the 5,000 pages of  
17 specifically challenged materials, as evidenced by their de-designation of a number of  
18 documents in a 44-page list dated November 7, 2014. *Id.* at 5. This Court accepts the  
19 plaintiffs' representations, and finds that further testimony is unnecessary.

20 Second, the information sought by defense counsel is potentially protected by  
21 the attorney work product doctrine and attorney-client privilege. The defendants seek:

22 [D]eclarations from each person involved in making the designations  
23 setting forth what Bates ranges he or she reviewed, how long he or she  
24 took to make the designations, whether he or she reviewed the documents  
25 on a page-by-page basis, what standards he or she used for each type of  
26 designation, whether he or she took into account how old the information  
was or whether its disclosure could now harm the plaintiffs in any way,

---

27 <sup>2</sup>This Court presumes that counsel, as officers of the Court, will testify truthfully  
28 in any Declaration submitted under penalty of perjury and in any other filing presented  
to this Court.

1 whether he or she relied on designations that had been made in other  
2 litigation, and state who had the first say in making the designation  
3 decisions.

4 [Doc. 161, p. 4]

5 The attorney work-product doctrine, which is codified in Rule 26(b)(3)(A) of the  
6 Federal Rules of Civil Procedure, prevents discovery of “documents and tangible  
7 things that are prepared in anticipation of litigation or for trial.” *In re Grand Jury*  
8 *Subpoena*, 357 F.3d 900, 906 (9<sup>th</sup> Cir. 2004). “At its core, the work-product doctrine  
9 shelters the mental processes of the attorney, providing a privileged area within which  
10 he can analyze and prepare his client’s case.” *United States v. Nobles*, 422 U.S. 225,  
11 239 (1975). The defendants request that plaintiffs’ counsel memorialize in writing the  
12 “standards he or she used for each type of designation” and the factors that “he or she  
13 took into account” and “relied on” when making confidentiality designations. [Doc.  
14 161, p. 4] A written declaration of this nature would fall squarely within the work  
15 product doctrine’s protections.

16 Similarly, Rule 26 of the Federal Rules of Civil Procedure anticipates the  
17 attorney-client privilege. FED. R. CIV. P. 26 (b)(1) (“Parties may obtain discovery  
18 regarding any unprivileged matter”). “The rules of evidence of the various states  
19 uniformly recognize the protection that surrounds confidential communications  
20 between attorney and client,” and “[c]ommunications within the scope of the privilege  
21 are zealously protected.” 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice*  
22 *and Procedure* § 2017 (3<sup>rd</sup> Ed. 2014). *See* Fed. R. Evid. 501 (directing federal courts  
23 to look to the common law, as interpreted by U.S. Courts in the light of reason and  
24 experience, to govern a claim of privilege). The defendants seek to learn “who had the  
25 first say in making the designation decisions.” [Doc. 161, p. 4] This question implicates  
26 the privilege to the extent it calls for the content of discussions between counsel and  
27 their clients in the preparation and production of documents.


1 Third, for the reasons previously articulated in the Court's September 26, 2014,  
2 Order, the issue is still not ripe for the Court's determination. [Doc. 138, p. 17] This  
3 is the second time that the defendants have failed to follow the procedures set forth in  
4 the Protective Order prior to presenting such challenges to the Court. The defendants'  
5 request to compel testimony is DENIED, and they are cautioned that if they seek  
6 further recourse, they must follow the procedures to which they agreed in the Protective  
7 Order.

### 8 III. CONCLUSION

9 For the above-stated reasons, the defendants' request is DENIED. Because the  
10 defendants are not the prevailing party, the Court also declines to award attorneys fees.  
11 *See* FED. R. CIV. P. 37(a)(5).

12 IT IS SO ORDERED.

13 Date: April 22, 2015

  
KAREN S. CRAWFORD  
United States Magistrate Judge