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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 BROOKE NOBLE,

12 Plaintiff,

13 vs.

14 WELLS FARGO BANK, N.A., *et al.*,

15 Defendants.
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Case No. 1:14-cv-01963-DAD-EPG

ORDER DENYING
MOTION FOR PROTECTIVE ORDER

(ECF No. 119)

ORDER DENYING
MOTION TO STRIKE

(ECF No. 121)

18 **I. BACKGROUND**

19 Plaintiff initiated this action on December 10, 2014. (ECF No. 1) A First Amended
20 Complaint was filed on October 15, 2015. (ECF No. 25.) After a ruling on the Defendants'
21 motions to strike and/or dismiss on July 5, 2016, three claims remain against Defendant Wells
22 Fargo Bank, N.A. ("Wells Fargo"). (ECF No. 86.) Specifically, this case is proceeding on
23 Plaintiff's wrongful death, negligent infliction of emotional distress and intentional infliction of
24 emotional distress claims against Wells Fargo. (*Id.*) Plaintiff's allegations stem from the
25 manner that Wells Fargo evicted Plaintiff's mother, Marsha Kilgore, who was on oxygen and
26 died shortly after the eviction due to respiratory failure.

27 The Court held a hearing on the motions to compel on January 12, 2017. (ECF No.
28 110.) Plaintiff's counsel Lenore Albert and Defendant's counsel Kamran Javandel

1 telephonically appeared on behalf of their clients. (*Id.*) For the reasons stated on the record and
2 in a follow-up order issued January 7, 2016 (ECF Nos. 111-12), the motions to compel (ECF
3 Nos. 107, 019) were granted, in part, and denied, in part.

4 A Wells Fargo request for entry of a confidential protective order was denied at the
5 January 12, 2017, hearing for failure abide by the specific requirements of Local Rule 141.1(c).
6 (ECF No. 111 at 4.) However, the Court granted leave for Wells Fargo to file a proposed
7 confidential protective order that complies with the Local Rule. (*Id.*)

8 At the January 12, 2017, hearing and in the January 13, 2017, order, the issue of
9 whether or not Wells Fargo's policies and procedures are confidential and should only be
10 produced pursuant to a confidential protective order was discussed. (ECF No. 111 at 7.) The
11 Court permitted further briefing on the issue as follows:

12 Wells Fargo may submit a brief of no more than 5 pages by January 25, 2017.
13 Plaintiff may submit a response by January 31, 2017. To the extent that the
14 parties need to file confidential information to fully explain their position, those
exhibits may be filed separately and under seal.

15 (*Id.*) To facilitate a tight discovery schedule, the Court permitted temporary designation of the
16 policies and procedures as confidential until the issue could be fully resolved. (*Id.*)

17 On January 25, 2017, Wells Fargo filed a motion for protective order, notice of hearing,
18 and memorandum of points and authorities, as well as two supporting affidavits. (ECF Nos.
19 119 – 119-2.) The pages 3-7 of the memorandum of points and authorities contained argument
20 as to why Wells Fargo's policies and procedures are confidential and should only be produced
21 pursuant to a confidential protective order. (ECF No. 119 at 3-7.) The motion also included a
22 request for sanctions requesting the Court to order Plaintiff to pay for Wells Fargo's expenses
23 in making the motion for protective order, including attorney fees. (*Id.* at 7.) Wells Fargo also
24 filed a proposed protective order on January 25, 2017. (ECF No. 120.)

25 In response to Wells Fargo's January 25, 2017, filings, Plaintiff filed, on the following
26 day, a motion to strike the motion for protective order. (ECF No. 121.) On January 30, 2017,
27 Plaintiff filed a self-titled supplemental brief on whether the policies and procedures are
28 confidential. (ECF Nos. 122 – 122-1.)

1 **II. PLAINTIFF’S MOTION TO STRIKE**

2 Plaintiff requests that the Court strike Wells Fargo’s January 25, 2017, filings for failure
3 to follow the Court’s briefing directives. (ECF No. 121 at 2-4.) Specifically, Plaintiff argues
4 that Wells Fargo did not comply with Court’s page limitation of 5 pages; instead, Wells Fargo
5 filed a 7-page brief. (*Id.* at 2.) Next, Plaintiff argues that Wells Fargo improperly requested
6 sanctions and “focused [the motion] on a request for sanctions.” (*Id.* at 4.)

7 The motion to strike (ECF No. 121) is denied. The argument submitted to the Court in
8 the motion for protective order was timely (filed on January 25, 2017) and does not exceed 5
9 pages. (ECF No. 119 at 3-7.) Therefore, Wells Fargo complied with the Court’s briefing
10 directives. As discussed in Part C, below, the Court agrees that Wells Fargo should not have
11 included a request for sanctions in the motion for protective order. The Court will deny the
12 request on the merits. Accordingly, the portion of the motion to strike requesting that the
13 request for sanctions be stricken is denied as moot.

14 **III. WELLS FARGO REQUEST FOR PROTECTIVE ORDER**

15 Wells Fargo requests entry of a protective order to protect from public disclosure 19
16 different procedures concerning the eviction of defaulting borrowers. (ECF No. 119 at 5.) The
17 Court previously found that all policies and procedures regarding evictions in place from
18 January 1, 2012 to December 31, 2013, were discoverable under Rule 26(b)(1) of the Federal
19 Rules of Civil Procedure, and ordered Wells Fargo to produce the documents. (ECF No. 111 at
20 6.) Defendant has thus far provided those procedures to Plaintiff for use in the litigation, but
21 subject to confidentiality restrictions.

22 **A. Legal Standards**

23 “In the federal judicial system trial and pretrial proceedings are ordinarily to be
24 conducted in public.” *Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th Cir. 1964) (“The
25 purpose of the federal discovery rules, as pointed out in *Hickman v. Taylor*, 329 U.S. 495, 501,
26 67 S.Ct. 385, 91 L.Ed. 451, is to force a full disclosure.”) “As a general rule, the public is
27 permitted ‘access to litigation documents and information produced during discovery.’” *In re*
28 *Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011) (quoting

1 *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir.2002) and citing *San Jose Mercury*
2 *News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir.1999) (“It is well-established that
3 the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively
4 public.”)).

5 As an exception to the general rule of public access to pretrial litigation discovery, a
6 party may move for a court order “to protect a party or person from annoyance, embarrassment,
7 oppression, or undue burden or expense, including ... requiring that a trade secret or other
8 confidential research, development, or commercial information not be revealed or be revealed
9 only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G).

10 The burden is on the moving party to demonstrate “good cause” for the entry of such an
11 order. *See* Fed. R. Civ. P. 26(c)(1); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122,
12 1130 (9th Cir. 2003) (“A party asserting good cause bears the burden, for each particular
13 document it seeks to protect, of showing that specific prejudice or harm will result if no
14 protective order is granted.” (citations omitted)).

15 “A party asserting good cause bears the burden, for each particular document it seeks to
16 protect, of showing that specific prejudice or harm will result if no protective order is granted.”
17 *Foltz*, 331 F.3d at 1130–31 (citing *Phillips v. Gen. Motors*, 307 F.3d 1206, 1210-11 (9th Cir.
18 2002)). Broad allegations of harm, unsubstantiated by specific examples or articulated
19 reasoning, will not suffice. *Id.* (citations omitted). Instead, the moving party must provide
20 specific demonstrations of fact, supported where possible by affidavits and concrete examples,
21 rather than broad, conclusory allegations of potential harm. *Id.* at 1130-31 (citations omitted);
22 *see also Culligan v. Yamaha Motor Corp., USA*, 110 F.R.D. 122, 125 (S.D.N.Y. 1986)
23 (“[W]hen a party asserts that discovery will cause competitive injury because of the revelation
24 of trade secrets, it cannot generally rely upon conclusory statements, but must present evidence
25 of specific damage likely to result from disclosure.” (citations omitted)).

26 **B. The Parties’ Positions**

27 In its motion for protective order, Wells Fargo argues that good cause for entry of
28 protective order exists to protect its policies and procedures and procedures concerning

1 evictions because the documents at issue constitute a trade secret or other confidential research,
2 development, or commercial information” within the meaning of Rule 26(c)(1)(G) of the
3 Federal Rules of Civil Procedure. (ECF No. 119 at 5.)

4 Wells Fargo states the eviction procedures were developed “at significant effort and
5 expense,” allow Wells Fargo to collect on debts efficiently, “provide a competitive advantage
6 against competitors who have not gone to the time and expense of developing such
7 procedures,” and that “Wells Fargo takes all reasonable steps to safeguard this information and
8 protect against its disclosure.” (*Id.*) In support of these statements, Wells Fargo provides the
9 declaration of Nathan Miller, a Wells Fargo Vice President of Loan Documentation in the Real
10 Estate Owned department. (ECF No. 119-1 ¶¶ 2-4.)

11 Next, Wells Fargo asserts that disclosure the relevant eviction procedures would cause
12 Wells Fargo significant harm. (ECF No. 119 at 6.) Wells Fargo argues that if its competitors
13 obtained the procedures, they could “implement the procedures Wells Fargo developed at
14 significant expense, without the competitors incurring any expenses, developing any expertise
15 or experience within the field, or undergoing any independent legal review and revision, thus
16 putting Wells Fargo at a significant competitive disadvantage.” (*Id.*) Mr. Miller again provides
17 an attestation to this statement in his declaration. (ECF No. 119-1 ¶ 5.)

18 Plaintiff’s response challenges the procedure Defendant used to bring this issue to the
19 attention of the Court, and also argues that “policies and procedures followed by national banks
20 are in place for the purpose of provide safe and sound banking to the protection of the
21 consumer/public and that federal agencies routinely inspect their procedures.” (ECF No. 121 at
22 4).

23 Plaintiff also filed a supplement in opposition to the motion for protective order. (ECF
24 No. 123). Plaintiff argues that the policies and procedures at issue are subject to federal agency
25 review, and thus should not be considered confidential. In support, Plaintiff submitted the
26 Declaration of Walter Hacket, who purports to be “an expert in all areas of banking associated
27 with the origination, documentation and servicing of loans including mortgage loans.” (ECF
28 No. 122-1 at 2.) Mr. Hacket states in part:

1 [I]t is my opinion both based upon my over 25 years in the financial services
2 industry and my knowledge of the Federal Rules of Evidence that the claims of
3 Wells offered to justify its refusal to produce the evidence demanded are without
4 merit or basis in fact. Indeed, a review of documents issued by the Office of the
5 Comptroller of the Currency (“OCC”) particularly its documents relative to the
6 examination of large banks (of which Wells is one) make clear that the
7 requested materials would have to be made available on demand to the OCC, a
8 public, federal agency. Wells misrepresents the function of the OCC which is
9 charged with, primarily, ensuring the safety and soundness of the financial
10 institutions for which it is responsible.

11 Further, I am aware of no legal privilege that does or could attach to documents
12 required to be presented upon demand to the OCC as a matter of ensuring the
13 safety and soundness of America’s financial services institutions. The OCC
14 documents which I reviewed as part of my analysis of Wells responses to
15 discovery are several hundred pages long however they can be found online at . .
16 ..

17 Wells Fargo Bank’s objections are wholly baseless and, indeed, are grossly
18 misleading and constitute a misrepresentation of fact to the Court. The
19 documents requested are in most cases documents relevant to third party
20 systems as Wells Fargo Bank uses virtually no systems that were entirely
21 developed in-house. Additionally, even if any systems were developed in house
22 the very notion that the manuals would constitute some form of attorney-client
23 communication or attorney work product would also necessarily imply that they
24 could be kept from Wells Fargo Bank’s federal regulators, an implication that is
25 patently false.

26 (ECF No. 122-1 at 3-4). Mr. Hackett includes links to OCC regulations describing its role in
27 supervision, and also attached certain Wells Fargo policies and procedures that it deemed not
28 confidential including its Foreclosure Attorney Procedure Manual.

29 **C. Application of Law to Defendant’s Requested Protective Order**

30 Wells Fargo has not met its burden for entry of the protective order. The Court is not
31 convinced that the procedures constitute a trade secret or other confidential research,
32 development, or commercial information” within the meaning of Rule 26(c)(1)(G).

33 Wells Fargo argues that the eviction procedures constitute trade secrets under the
34 definition that a “trade secret may consist of any formula, pattern, device or compilation of
35 information which is used in one's business, and which gives him an opportunity to obtain an
36 advantage over competitors who do not know or use it.” *Restatement of Torts* § 757, cmt. b;

1 *endorsed* by *In re Elec. Arts, Inc.*, 298 F. App'x 568, 569–70 (9th Cir. 2008). However, Wells
2 Fargo does not describe how its eviction procedures give it a competitive advantage over other
3 eviction procedures. For example, Wells Fargo does not describe how it makes more money by
4 using its eviction procedures in contrast to a competitor's procedures, or how it would be at a
5 competitive disadvantage if every bank used the same eviction procedures. Indeed, it is
6 difficult to envision what a more competitive eviction procedure means in this context.

7 Rather than arguing that the procedures themselves provide a competitive advantage
8 over banks with other eviction procedures, Wells Fargo argues that other competitors who have
9 not yet written any such procedures could avoid the work of compiling such procedures
10 themselves. This argument appears based on the unwarranted speculation that competitors
11 have no such eviction procedures already. Moreover, if such an argument justified
12 confidentiality protection, it could be used to keep confidential any internal procedure without
13 regard to whether such a procedure conferred any competitive advantage to the party. *See*
14 *Travelers Property Cas. Co. of America v. Centex Homes*, 2013 WL 707918, at *1 (N.D. Cal.
15 Feb. 26, 2013) (“Plaintiff argues that the Guidelines are trade secrets, regardless of whether
16 they are outdated, because they were never disclosed to Plaintiff's competitors. This argument
17 conflates trade secrets with ordinary secrets. Information does not have value to a competitor
18 merely because the competitor does not have access to it.”) (internal citations omitted); *Braack*
19 *v. Home Depot U.S.A., Inc.*, 2007 WL 2156371, at *4 (W.D. Wash. Jul. 23, 2007) (“Home
20 Depot has made a generalized claim that disclosure of its policies and procedures will result in
21 harm if the public obtains access to them. That harm could apply to all businesses that develop
22 policies and procedures. If the court were to issue a protective order based upon such a
23 generalized showing, the general principle of open access that underlies the judicial system
24 would be eviscerated.”).

25 Furthermore, the Court finds the statements within the declaration far too broad and
26 conclusory to establish good cause for protection under Rule 26(c)(1)(G). For example, Wells
27 Fargo does not provide any detail or specific example in paragraph three of declaration as to the
28 effort and expense invested to develop the procedures. *See GoDaddy.com LLC v. RPost*

1 *Commc'ns Ltd.*, 2016 WL 1158851, at *4 (D. Ariz. Mar. 24, 2016), *on reconsideration in part*,
2 2016 WL 1274120 (D. Ariz. Mar. 31, 2016) (“[T]he Court is not persuaded that the ‘very
3 sensitive nature’ of GoDaddy's marketing survey or generic financial information constitutes a
4 compelling reason that justifies redaction. Aside from its blanket statement that the survey and
5 financial data constitutes ‘very sensitive’ information which, if revealed publicly, could
6 potentially cause harm, GoDaddy has not demonstrated what ‘specific prejudice or harm will
7 result’ if the information is not redacted.”); *Hodges v. Apple Inc.*, 2013 WL 6070408, at *2
8 (N.D. Cal. Nov. 18, 2013) (“An unsupported assertion of ‘unfair advantage’ to competitors
9 without explaining ‘how a competitor would use th[e] information to obtain an unfair
10 advantage’ is insufficient.”); *Ingram v. Pacific Gas & Electric Company*, 2013 WL 5340697, at
11 *3 (N.D. Cal. Sep. 24, 2013) (“It is not apparent, and PG & E does not explain, how public
12 disclosure of its discipline guidelines could disadvantage PG & E competitively. PG & E's
13 ‘conclusory arguments’ and ‘blanket’ assertions that Exhibit A is ‘confidential and proprietary’
14 are insufficient to overcome the presumption against sealing.”).

15 Wells Fargo cites to an unreported case from the Northern District of West Virginia in
16 support of its argument that “Court’s routinely hold that such harms justify issuance of a
17 protective order allowing discovery but prohibiting public disclosure.” (ECF No. 119, at p. 6),
18 *citing Sheets v. Caliber Home Loans, Inc.*, 2015 U.S. Dist. LEXIS 160616, *6, *18 (N.D. W.
19 Va. Dec. 1, 2015). Setting aside the fact that the case has no precedential value to this Court, it
20 is also distinguishable in that the Court rested its decision on the fact that the policies and
21 procedures at issue were “‘the results of years of labor’ in fine-tuning its own interpretations of
22 the WVCCPA, they are economically valuable.” *Sheets*, 2015 U.S. Dist. LEXIS at *6.
23 Moreover, defendants had demonstrated that “if Defendant’s competitors obtain its internal
24 policies and procedures, they will be able to collect upon debts more profitably and
25 competitively, causing harm to Defendant.” *Id.* Wells Fargo has made no such particularized
26 showing in this case.

27 Next, the fact that Wells Fargo does not ordinarily release the document to third-parties,
28 as indicated in paragraph four of the declaration, does not by itself render the policies “trade

1 secret or other confidential research, development, or commercial information” within the
2 meaning of Rule 26(c)(1)(G). By that rationale, any internal document, such as an email
3 between two employees, would garner such protection, which is clearly not the intent of Rule
4 26(c).

5 Wells Fargo also argues that the Court should keep the procedures confidential because
6 “such disclosure could lead to legal expense for Wells Fargo in defending against meritless
7 [sic], opportunistic litigation is would not otherwise face.” (ECF No. 119, at p. 6:15-17).
8 Wells Fargo does not explain or support this statement. Nor is there any support in the Federal
9 Rules or case law for keeping a document confidential because disclosure could result in
10 litigation. To the extent Wells Fargo is arguing that disclosure of its own procedures would
11 cause litigation by revealing that Wells Fargo violates its own procedures, such a consequence
12 is a legitimate consequence of the public nature of litigation. After all, Plaintiff is seeking the
13 procedures to challenge Wells Fargo’s compliance with them in her mother’s eviction, and the
14 issue will certainly be part of any public trial against Wells Fargo. Put another way, it would
15 be wholly improper and against the goals of a public court system to issue a protective order in
16 order to shield a party from public knowledge of improper behavior. *See GoDaddy.com*, 2016
17 WL 1158851, at *4 (refusing to redact party’s proposed royalty rate because “Mr. Smith’s
18 proposed royalty rate is the element of his report that GoDaddy predominantly challenges as
19 unreliable under *Daubert*, thereby ensuring public interest in the information, . . . GoDaddy is
20 undoubtedly aware that the royalty rate will be brought to the jury’s attention at trial—in
21 unsealed format. For these reasons, the proposed royalty rate does not overcome the strong
22 presumption of public access . . .).

23 In conclusion, the Court has previously determined that the procedures are discoverable
24 under Rule 26(b)(1), and Wells Fargo has not met its burden for entry of a protective order
25 Rule 26(c). Accordingly, the motion for protective order (ECF No. 119) is denied.

26 The Court acknowledges that Wells Fargo may want to exercise its right to object to
27 this order pursuant to Rule 72 of the Federal Rules of Civil Procedure. Therefore, the
28 documents at issue shall remain designated as confidential until the expiration of the time to

1 object under Rule 72 (i.e. if no objection is filed) or until the objection is finally resolved by the
2 District Judge.

3 **IV. WELLS FARGO'S REQUEST FOR SANCTIONS**

4 Wells Fargo requests sanctions in the form of a Court to order Plaintiff to pay for Wells
5 Fargo's expenses in making the motion for protective order, including attorney fees. (ECF No.
6 119 at 7.) Wells Fargo argues that "Rule 37(a)(5)(A) and (C) provide that a court must award a
7 party's expenses, including attorney fees, in making a successful motion to compel or for
8 protective order..." (*Id.*)

9 The request for sanctions is without merit and procedurally improper. Rule 37(a)(5)(A)
10 provides that a successful movant for a motion to compel may receive expenses in limited
11 circumstances. *See* Fed. R. Civ. P. 37(a)(5)(A). Rule 37(a)(5)(B)-(C) then speaks to when a
12 Rule 26(c) protective order may be entered if the motion to compel is denied in whole or in
13 part. *See* Fed. R. Civ. P. 37(a)(5)(B)-(C). Nowhere does Rule 37(a)(5) does provide that a
14 successful movant for entry of protective order can receive expenses, including attorney fees,
15 as Wells Fargo suggests. Thus, the request for sanctions is denied.

16 **V. CONCLUSION**

17 Wells Fargo's motion for protective order (ECF No. 119) is DENIED.

18 Plaintiff's motion to strike (ECF No. 121) is DENIED.

19 The noticed hearing dates for these motions are VACATED.

20 The documents at issue shall remain designated as confidential until the expiration of
21 the time to object under Rule 72 (i.e. if no objection is filed) or until the objection is finally
22 resolved by the District Judge.

23 IT IS SO ORDERED.

24 Dated: February 7, 2017

25 /s/ Eric P. Grogan
26 UNITED STATES MAGISTRATE JUDGE
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