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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

STEPHANIE MLEJNECKY; GREG
CLAYTOR,

Plaintiffs,

No. 2:10-cv-02630 JAM KJN

v.

OLYMPUS IMAGING AMERICA INC.,

Defendant.

ORDER

Presently before the court¹ is plaintiffs’ motion to compel the disclosure of the names and contact information of defendant’s customers who complained about the Olympus Stylus 1030SW cameras that are, among other models of cameras, at issue in this case (Dkt. No. 42).² The court heard this matter on its civil law and motion calendar on August 4, 2011. (Minutes, Dkt. No. 47.) Attorney Beth E. Terrell appeared on behalf of plaintiffs. Attorney Ryan T. Hansen appeared on behalf of defendant.

At the hearing, the undersigned outlined a compromise proposal regarding a

¹ This case was referred to the undersigned pursuant to Eastern District of California Local Rule 302(c)(1) and 28 U.S.C. § 636(b)(1).

² The phrase “complaining customers” is used throughout this order for the sake of convenience, but is not intended to characterize the nature of the complaints or the merits of the underlying case.

1 method of disclosing the complaining customers' names and contact information to plaintiffs'
2 counsel that would balance plaintiffs' counsel's need for the customers' information with those
3 customers' privacy rights provided by Article I, Section 1 of the California Constitution. See
4 generally Pioneer Elecs. (USA), Inc. v. Superior Court, 40 Cal. 4th 360, 150 P.3d 198 (2007). At
5 the hearing, the parties' counsel provisionally agreed to the proposal, which includes an
6 opportunity for the relevant complaining customers to "opt out" of further contact by counsel for
7 plaintiffs or defendant in this case. This proposal also required that the parties agree, if possible,
8 on proposed language to be used in an initial e-mail communication to the complaining
9 customers. On August 5, 2011, the parties timely submitted to the court agreed-upon language to
10 be used in the proposed e-mail to the complaining customers.³ (See Letter, Aug. 5, 2011, Dkt.
11 No. 49.) The parties' proposed language is approved by the court and shall serve as the basis for
12 the initial communication with the complaining customers.

13 In light of the parties' agreement regarding the proposed communication with the
14 complaining customers and the potential, subsequent disclosure of those customers' names and
15 contact information, IT IS HEREBY ORDERED that:

16 1. Plaintiffs' motion to compel (Dkt. No. 42) is granted in part and denied in
17 part. No reasonable expenses incurred in connection with the motion to compel will be awarded
18 because other circumstances make an award of expenses unjust. Fed. R. Civ. P. 37(a)(5)(A)(iii).

19 2. Defendant's counsel shall provide plaintiffs' counsel with the names and
20 e-mail addresses for the relevant list of defendant's complaining customers no later than
21 5:30 p.m. on Tuesday, August 9, 2011, unless the parties agree to a different deadline.⁴

22 _____
23 ³ The undersigned appreciates the parties' respective attorneys' diligent efforts to meet and
24 confer prior to the filing of the motion to compel, as well as the attorneys' professionalism,
cooperation, and civility during and following the hearing.

25 ⁴ At the August 4, 2011 hearing, defendant's counsel represented to the court and plaintiffs'
26 counsel that he would be able to gather the relevant e-mail addresses without substantial delay, and
that the e-mail addresses could be provided to plaintiffs' counsel within one day. The court advised

1 Disclosures of these e-mail addresses shall be pursuant to the parties' existing Stipulated
2 Protective Agreement Regarding Treatment of Confidential Information.

3 3. Plaintiffs' counsel shall send the initial e-mail message to the complaining
4 customers and copy defendant's counsel on the e-mail transmission. The proposed e-mail
5 language contains two bracketed sections in the second paragraph that require the insertion of
6 additional information (i.e., a date and an electronic "button"). Unless otherwise agreed to by the
7 parties, plaintiffs' counsel shall complete those sections and permit defendant's counsel to
8 review a proposed, final e-mail prior to transmission.

9 4. As agreed upon by the parties' counsel, the complaining customers shall
10 have seven calendar days to "opt out" of being contacted regarding this litigation (by either party
11 or counsel), as explained in more detail in the e-mail language agreed to and provided by the
12 parties. Defendant's counsel shall be given equal and prompt access to the responses of the
13 complaining customers.

14 5. If any complaining customer that is the subject of the e-mail transmission
15 fails to respond to the e-mail or to opt out of further contact by the end of the seven-day "opt-
16 out" period referenced above, defendant shall provide to plaintiffs' counsel, no later than three
17 calendar days after the expiration of the completed seven-day "opt-out" period, that complaining
18 customer's name, address, telephone number, and e-mail address.⁵ Disclosure of this
19 information shall be pursuant to the parties' existing Stipulated Protective Agreement Regarding
20 Treatment of Confidential Information.

21 6. Counsel for the parties shall create a mutually agreeable log that tracks the
22 "opt-out" e-mail contact made with complaining customers and those customers' responses, with
23 _____
24 defendant's counsel to begin the process of gathering the e-mail addresses immediately after the
25 hearing to facilitate the prompt disclosure of those e-mail addresses.

26 ⁵ Counsel agreed at the hearing that the delivery of such information would likely take the
form of the un-redacted database entries entitled "EPNY Case Details."


1 the goal of clearly identifying those customers who are not to be contacted by the parties or
2 counsel regarding this litigation. The court leaves it to the parties to reach an agreement
3 regarding the particular features of such a tracking log.

4 7. As previously ordered by the court, effective August 4, 2011, plaintiffs'
5 counsel and defendant's counsel shall not contact any of the subject complaining customers
6 regarding this litigation during the "opt-out" contact period, except for those respective
7 complaining customers who had already affirmatively contacted either plaintiffs' counsel or
8 defendant or defendant's counsel regarding the litigation. In order to avoid confusion, counsel
9 for plaintiffs and defendant shall share the names of those complaining customers who have
10 already made affirmative contact with them; counsel shall make mutual disclosures no later than
11 the expiration of the seven-day "opt-out" period referenced above. Defendant may, however,
12 continue to contact its customers in the ordinary course of business.

13 8. This order governs the pre-certification period only and is without
14 prejudice to reconsideration upon the formal request of plaintiffs, defendant, or both sets of
15 parties. If plaintiffs and defendant agree that they require clarification of any part of this order,
16 they may contact the undersigned's Courtroom Deputy, Matt Caspar, at (916) 930-4187, to
17 arrange a telephone conference with the undersigned, which will take place off of the record.

18 IT IS SO ORDERED.

19 DATED: August 8, 2011

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21 
22 KENDALL J. NEWMAN
23 UNITED STATES MAGISTRATE JUDGE
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