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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SHASTA LINEN SUPPLY, INC.,
Plaintiff,
v.
APPLIED UNDERWRITERS INC., et al.,
Defendants.

No. 2:16-cv-00158 WBS AC

ORDER

PET FOOD EXPRESS LTD., et al.,
Plaintiffs,
v.
APPLIED UNDERWRITERS, INC., et al.,
Defendants.

No. 2:16-cv-01211 WBS AC

These two putative class actions, Pet Food Express Ltd. v. Applied Underwriters Inc., et al., 16-cv-01211 WBS AC (“Pet Food”) and Shasta Linen Supply, Inc. v. Applied Underwriters, et al., 16-cv-00158-WBS-AC (“Shasta”) were consolidated for pre-trial purposes and set to the same pre-trial schedule. Shasta at ECF No. 59 at 2-4. This matter is before the court on defendants’

1 motion for a protective order. Pet Food at ECF No. 75, Shasta at ECF No. 78. This discovery
2 motion was referred to the undersigned pursuant to E.D. Cal. R. 302(c)(1). For simplicity and
3 because the motions are identical, unless otherwise noted, the court will reference the filings in
4 the Pet Food case.

5 Plaintiffs and defendants appeared at a hearing on January 10, 2018 at 10:00 a.m. For the
6 reasons stated below, the court GRANTS defendants' motion in part and DENIES it in part.

7 **I. Relevant Background**

8 On January 26, 2016, the Shasta Linen case was filed as a putative class action "seeking
9 restitution/disgorgement for Plaintiff and the putative class as a result of Defendants' unlawful
10 business practices, including the use of an unfiled, void and illegal 'collateral agreement' in the
11 collection of excessive fees and expenses for the workers' compensation insurance arrangements
12 between Defendants and Plaintiffs." Shasta ECF No. 1 at 2. The Pet Food case, also filed as a
13 putative class action and making similar allegations, was removed to this court from Alameda
14 Superior Court on March 29, 2016. Pet Food ECF No. 1.

15 On November 7, 2016, the parties submitted a joint status report in which defendants
16 argued that the court should bifurcate class and merits discovery. ECF No. 38 at 12. The matter
17 was fully briefed by both sides. ECF No. 38. On November 14, 2016, the Honorable Judge
18 William B. Shubb issued a scheduling order in which he declined to bifurcate class and merits
19 discovery. ECF No. 41 at 3. Judge Shubb ordered that defendants "may seek a protective order
20 before the assigned magistrate judge if they believe plaintiff is propounding discovery not
21 reasonably tied to class issues." Id. On July 6, 2017, pursuant to the parties' stipulation, the
22 related actions were consolidated for pre-trial purposes. Shasta at ECF No. 58.

23 **II. Motion**

24 Defendants ask for a protective order regarding a number of requests for production
25 ("RFPs") and Interrogatories to which they have common objections. ECF No. 83. Defendants
26 seek protection from discovery as follows:

- 27 • Interrogatory No. 1, RFP Nos. 6, 8, 19, 25: Disputing the "degree to which Plaintiffs may
28 seek discovery into the programs of absent class members." ECF No. 83 at 10;

- 1 • As to all pending discovery requests: Whether plaintiffs’ may demand that discovery
2 responses include “SolutionOne” program related responses or if production/responses
3 must be limited to the EquityComp Program. Id. at 23;
- 4 • RFP Nos. 30, 31, 33, 34: Whether plaintiffs are entitled to documents regarding
5 regulatory filings in states other than California. Id. at 25;
- 6 • RFP No. 34: Whether, in response to Request No. 34, Defendants must produce
7 documents concerning the submission of the RPA in 2016 to the California Department of
8 Insurance, even though the form RPA was not the same form at issue in this case and the
9 documents were submitted after Defendants and the California Department of Insurance
10 already were in a dispute about the RPA’s legality. Id. at 31;
- 11 • RFP No. 8: Whether plaintiffs are entitled to segregated cell account information. Id. at
12 34; and
- 13 • RFP No. 10: Whether plaintiffs are entitled to documents reflecting defendants’ total
14 revenues. Id. at 36.

15 **III. Analysis**

16 **A. Legal Standard**

17 Under the Federal Rules of Civil Procedure, the method available to limit the breadth or
18 use of a discovery request is a motion for a protective order under Fed. R. Civ. P. 26(c). This rule
19 states in relevant part:

20 A party or any person from whom discovery is sought may move
21 for a protective order in the court where the action is pending[.]
22 The motion must include a certification that the movant has in good
23 faith conferred or attempted to confer with other affected parties in
24 an effort to resolve the dispute without court action. The court may,
for good cause, issue an order to protect a party or person from
annoyance, embarrassment, oppression, or undue burden or
expense[.]

25 Fed. R. Civ. P. 26(c). Options available to the court include, in part, “forbidding the disclosure or
26 discovery; [] forbidding inquiry into certain matters, or limiting the scope of disclosure or
27 discovery to certain matters.” Id. District courts have broad discretion to determine whether a
28 protective order is appropriate and, if so, what degree of protection is warranted. Seattle Times

1 Co. v. Rhinehart, 467 U.S. 20, 36 (1984); see also Phillips ex rel. Estates of Byrd v. Gen. Motors
2 Corp., 307 F.3d 1206, 1211–12 (9th Cir.2002). The party seeking to limit discovery has the
3 burden of proving “good cause,” which requires a showing “that specific prejudice or harm will
4 result” if the protective order is not granted. In re Roman Catholic Archbishop of Portland in Or.,
5 661 F.3d 417, 424 (9th Cir.2011) (citing Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122,
6 1130 (9th Cir.2003)).

7 The scope of discovery in federal cases is governed by Federal Rule of Civil Procedure
8 26(b)(1). The current Rule states:

9 Unless otherwise limited by court order, the scope of discovery is
10 as follows: Parties may obtain discovery regarding any
11 nonprivileged matter that is relevant to any party’s claim or defense
12 and proportional to the needs of the case, considering the
13 importance of the issues at stake in the action, the amount in
14 controversy, the parties’ relative access to relevant information, the
15 parties’ resources, the importance of the discovery in resolving the
16 issues, and whether the burden or expense of the proposed
17 discovery outweighs its likely benefit. Information within this
18 scope of discovery need not be admissible in evidence to be
19 discoverable.

20 Fed. R. Civ. P. 26(b)(1). Evidence is relevant if: (a) it has any tendency to make a fact more or
21 less probable than it would be without the evidence; and (b) the fact is of consequence in
22 determining the action.” Fed. R. Evid. 401. Relevance to the subject matter of the litigation “has
23 been construed broadly to encompass any matter that bears on, or that reasonably could lead to
24 other matter that could bear on, any issue that is or may be in the case.” Oppenheimer Fund, Inc.
25 v. Sanders, 437 U.S. 340, 351 (1978).

26 Relevance, however, does not establish discoverability; in 2015, a proportionality
27 requirement was added to Rule 26. “Under the amended Rule 26, relevancy alone is no longer
28 sufficient . . . the discovery requested must also be proportional to the needs of the case.” Martin
v. Sysco Corp., No. 1:16-cv-00990-DAD-SAB, 2017 WL 4517819, at *2 (E.D. Cal. Oct. 10,
2017).

Discovery in the class action context can be particularly complex. To proceed with a class
action, the Ninth Circuit has held that a plaintiff bears the burden of either making a prima facie
showing that Federal Rule of Civil Procedure 23 class action requirements are satisfied or that

1 discovery is likely to produce substantiation of the class allegations. Manolete v. Bolger, 767
2 F.2d 1416, 1424 (9th Cir. 1985). To make a prima facie showing under Rule 23(a), a plaintiff
3 must meet the prerequisites of numerosity, commonality, typicality, and adequacy of
4 representation. Plaintiff must show “(1) that the class is so numerous that joinder of all members
5 is impracticable; (2) that there are questions of law or fact common to the class; (3) that the
6 claims or defenses of the representative parties are typical of the claims or defenses of the class;
7 and (4) that the representative parties will fairly and adequately protect the interests of the class.”
8 Ogden v. Bumble Bee Foods, LLC, 292 F.R.D. 620, 622 (N.D. Cal. 2013) (internal punctuation
9 and citation omitted).

10 In a putative class action, it is within a court’s discretion to set either a bifurcated
11 discovery schedule (creating separate “pre-certification discovery” and “class discovery”
12 deadlines) or non-bifurcated discovery schedule. See Mbazomo v. ETourandTravel, Inc., No.
13 2:16-CV-02229-SB, 2017 WL 2346981, at *2 (E.D. Cal. May 30, 2017). In bifurcated discovery,
14 pre-certification discovery is generally initially limited to “certification issues such as the number
15 of class members, the existence of common questions, typicality of claims, and the
16 representative’s ability to represent the class,” Gusman v. Comcast Corp., 298 F.R.D. 592, 595
17 (S.D. Cal. 2014) (citing Oppenheimer Fund, 437 U.S. at 359). Even in the context of bifurcated
18 discovery, the scope of pre-certification discovery lies entirely within the discretion of the court.
19 Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 942 (9th Cir. 2009). “Especially when
20 the material is in the possession of the defendant, the court should allow the plaintiff enough
21 discovery to obtain evidence as to whether a class action is maintainable.” Mora v. Zeta
22 Interactive Corp., No. 1:16-cv-00198-DAD-SAB, 2017 WL 1187710, at *4 (E.D. Cal. Feb. 10,
23 2017) citing Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1313 (9th Cir. 1977). If a plaintiff
24 cannot make an initial showing that the requirements of Fed. R. Civ. P. 26(a) can be met, the
25 court may refuse to allow class discovery. Manolete v. Bolger, 767 F.2d 1416, 1424 (9th Cir.
26 1985).

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1 B. Issue Analysis

2 1. Defendants are not entitled to discovery regarding absent class members
3 (Interrogatory No. 1, RFP No. 6, 8, 19, 25).

4 Defendants' motion for a protective order with respect to Interrogatory No. 1 and RFP
5 Nos. 6, 8, 19, 25 involves a dispute as to "the degree to which Plaintiffs may seek discovery into
6 the programs of absent class members." ECF No. 83 at 10. Defendants argue that plaintiffs'
7 requests for discovery into information regarding absent class members is improper at this
8 juncture because plaintiffs have not made a prima facie showing that they are entitled to this type
9 of discovery before class certification, and that such discovery is not proportional to the issues in
10 dispute. ECF No. 83 at 10. Defendants further contend that there are privacy concerns regarding
11 production of the sensitive information of third parties. Id. at 15. Defendants also assert that
12 during the meet and confer process, plaintiffs agreed that defendants could produce account
13 documents for only the active plaintiffs and produce a summary chart for putative class members
14 as a whole, but after the chart was produced, plaintiffs retracted their agreement to this
15 compromise and demanded full productions. Id. at 13-14.

16 Plaintiffs argue in response that any argument related to what discovery is relevant now,
17 as opposed to later in the litigation, has been mooted by Judge Shubb's decision not to bifurcate
18 discovery and, in fact, to allow class discovery. Id. at 17. Plaintiffs note that the contact
19 information they seek does not implicate privacy concerns, and even if privacy concerns were at
20 issue, such concerns are preemptively addressed by the stipulated protective order already in
21 place. Id. at 83, ECF Nos. 47, 48. Finally, plaintiffs assert that, although they did agree to the
22 compromise summary production referenced by defendants, they did so "without waiving the
23 right to seek additional information at a later time[.]" ECF No. 83 at 20-21, Plaintiff's Exhibit 1
24 at 1.

25 Plaintiffs are entitled to full class discovery at this juncture, including requested personal
26 and contact information. "In Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), the Supreme Court
27 held that class counsel in Rule 23 class actions must be permitted to communicate with potential
28 class members prior to class certification for the purpose of notification and information

1 gathering. Id. at 101-02. Disclosure of contact information for putative class members is a
2 common practice in the class action context.” Martin, 2017 WL 4517819, at *3. Plaintiffs are
3 correct that discovery is not bifurcated in this case, and Judge Shubb has already decided that
4 plaintiffs are entitled to class discovery even before class certification has been adjudicated. ECF
5 No. 41 at 3.

6 In terms of proportionality, it is true that discovery must be proportional to the needs of
7 the case. Martin, No. 2017 WL 4517819, at *2. At oral argument, defendants made the valid
8 point that, even when discovery is not bifurcated, the court must consider proportionality when
9 evaluating how much discovery burden and expense is justified prior to class certification.
10 However, in the protective order context, defendant has “the burden of proving ‘good cause,’
11 which requires a showing ‘that specific prejudice or harm will result’” from requiring discovery
12 responses. In re Roman Catholic, 661 F.3d at 424. Defendants have not articulated any “specific
13 prejudice or harm” beyond general allegations of burden. ECF No. 83 at 15. Moreover, plaintiffs
14 make a persuasive argument that the discovery sought into non-class members is not only
15 relevant to both pre- and post-certification class issues. Privacy concerns do not require an order
16 protecting defendant from discovery, because confidential information is already protected from
17 disclosure by the stipulated protective. ECF No. 41. For all these reasons, the court denies
18 defendants’ motion for a protective order with respect to this issue.

19 2. Defendants are not entitled to a protective order with respect to “SolutionOne”
20 documents.

21 Defendants contend that plaintiffs’ discovery requests should be limited to EquityComp
22 documents, which was the program in which Shasta and Pet Food, the original named plaintiffs in
23 this case, participated. ECF No. 83 at 23. Originally, because none of the plaintiffs participated
24 in defendants’ separate program known as SolutionOne, plaintiffs agreed to limit the production
25 of documents to those related to EquityComp. Id. However, in June 2017, plaintiffs filed an
26 amended complaint to add Alpha Polishing as a plaintiff. Id., ECF No. 54. Unlike the other
27 plaintiffs, Alpha Polishing was a SolutionOne participant. ECF No. 83 at 23. Plaintiffs later
28 demanded that all prior discovery responses be expanded to include SolutionOne. Defendants

1 argue that inclusion of SolutionOne documents would improperly increase the discovery’s scope
2 and burden.

3 This dispute is moot. Plaintiff Alpha Polishing served separate Requests for Production
4 and Interrogatories on Defendants that are identical to the requests served by Shasta and Pet Food
5 Express. Id. at 25. The parties confirmed at hearing that defendants have complied with those
6 requests. Even if the issue were not moot, defendants would not be entitled to a protective order
7 with respect to SolutionOne documents. Defendants have articulated no reasons other than a
8 general allegation of “burden” to justify the prevention of discovery as to SolutionOne. Further,
9 plaintiffs did not make any binding or court-approved agreement to limit the scope of their
10 requests. The protective order is denied as to this issue.

11 3. Defendants are entitled to a protective order regarding non-California regulatory
12 filings (RFP Nos. 30, 31, 33, 34).

13 Defendants seek to prevent plaintiffs from obtaining discovery into various
14 communications with regulators in states outside of California. ECF No. 83 at 31. Defendants
15 argue that such discovery is overbroad and irrelevant because plaintiffs seek only to represent a
16 California class. Id. at 30-31. Plaintiffs argue that discovery beyond California is relevant
17 because the programs at issue are sold not only in California but in other states, and the programs
18 sold in other states are apparently identical to the California programs. ECF No. 83 at 32.
19 Plaintiffs assert that because defendants “are characterizing the exact same program to different
20 state regulators” that plaintiffs are entitled to discovery on the non-California communications.
21 Id. at 32-33.

22 Plaintiffs’ argument is unpersuasive. Insurance law and regulation, including the
23 definition of basic terms, varies so much from state to state that communications with non-
24 California regulators are not the equivalent of communications regarding California compliance.
25 Accordingly, any relevance is slight at most. While it is possible that defendants may have made
26 purely factual representations to non-California regulators on issues related to the disputes
27 between the parties, plaintiffs acknowledged at hearing that they have no specific factual basis for
28 believing this to be so. Accordingly, to the extent the hypothetical information might have any

1 relevance, discovery is merely a fishing expedition. Plaintiffs have not made a persuasive
2 argument that such discovery would be of consequence in determining the outcome of this action
3 or make any pertinent fact more or less probable. FRE 401. Allowing discovery on a subject of
4 such speculative and tenuous relevance would be disproportionate to the needs of the case and
5 would place an undue burden on defendants. The protective order is granted with respect to this
6 issue.

7 4. Defendants are not entitled to a protective order regarding submission of the RPA in
8 2016 with the California Department of Insurance (RFP No. 34).

9 Plaintiffs' seek discovery into a submission of the Reinsurance Participation Agreement
10 ("RPA") in 2016 for approval by the California Department of Insurance ("CDI"), after the CDI
11 and Defendants were already in a dispute about the RPA's legality. Defendants contend this
12 filing and the CDI's response have no potential relevance to any issue in this case because
13 documents have no bearing on the RPA's legality or enforceability. ECF No. 83 at 32. Plaintiffs
14 contend that because the 2016 RPA submission was rejected, there is an inference that if
15 defendants had filed the RPA originally (as plaintiffs allege is required by the Insurance Code),
16 then "(1) it would have been rejected (as it was in 2016); (2) Defendants would not have sold it;
17 (3) Plaintiffs would not have bought it; and, ipso facto, (4) Plaintiffs would not have paid
18 Defendants the same amount as they did when Defendants sold them the illegal, unfiled, unfair,
19 and fraudulent Program." ECF No. 83 at 34. Plaintiffs argue that the 2015 RPA is therefore
20 relevant to their theory of the case and particularly defendants' previously asserted position that
21 whether or not an RPA was filed, plaintiff would have incurred the same costs. Id.

22 The court agrees with plaintiff that the 2016 RPA discovery is relevant. The requested
23 discovery appears calculated to lead to facts which will impact the claims and defenses in this
24 case. FRE 401. Defendants have made no argument that production with respect to these
25 documents would result in harm or prejudice, as is their burden. In re Roman Catholic, 661 F.3d
26 at 424. The protective order with respect to this issue is denied.

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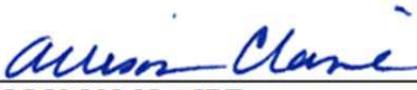
1 Defendants' revenues are relevant to central themes of the case, whether or not they are directly
2 relevant to the calculation of damages. Defendants have not pointed to any particular harm or
3 burden that would result from having to divulge their revenues, which is their burden as the
4 moving party. The protective order with respect to this issue is denied.

5 **IV. Conclusion**

6 Defendants' motion for a protective order is GRANTED with regard to discovery into
7 non-California regulatory filings and communications (RFP Nos. 30, 31, 33, 34), and is
8 OTHERWISE DENIED.

9 IT IS SO ORDERED.

10 DATED: January 12, 2018

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12 ALLISON CLAIRE
13 UNITED STATES MAGISTRATE JUDGE
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