

United States District Court
For the Northern District of California

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

KIMBERLY S. SETHAVANISH, on behalf)	Case No. 12-2907-SC
of themselves and all others)	
similarly situated,)	ORDER DENYING MOTIONS TO
)	<u>SEAL</u>
Plaintiff,)	
)	
v.)	
)	
ZONEPERFECT NUTRITION COMPANY,)	
)	
Defendant.)	
)	

Now pending before the Court is Defendant's administrative motion to file under seal portions of its sur-reply in opposition to Plaintiff's motion for class certification, as well as Exhibits 18 and 19 to the Declaration of Janakan Thiagarajah in support of the sur-reply. ECF No. 85. Also pending before the Court is Plaintiff's administrative motion to file under seal portions of its opposition to Defendant's administrative motion for an evidentiary hearing on class certification and the accompanying declaration of Michael D. Braun. ECF No. 87.

1 On January 27, 2014, the Court issued an order for
2 supplemental briefing, directing the parties to explain why the
3 information at issue should be subject to sealing. ECF No. 92.
4 The Court explained that it would not grant a motion to seal merely
5 because information was marked confidential and subject to a
6 stipulated protective Order. Id. at 2. The Court further stated
7 that it would deny the pending motions if the parties declined to
8 file the requested supplemental briefing. Id.

9 Defendant has filed a supplemental brief regarding its pending
10 motion. ECF No. 93. In that brief, Defendant argues that the
11 subject information constitutes a trade secret. However, Defendant
12 states that it would consent to the information being publicly
13 filed because it relates to consumer perceptions of an advertising
14 claim that Defendant no longer makes. Id. at 2. Defendant does
15 not consent to the public disclosure of the underlying documents
16 from which this information was drawn. Id. at 3. As Defendant
17 does not object to the public filing of the sur-reply brief or the
18 exhibits filed in connection with that brief, its administrative
19 motion to seal is DENIED as moot.

20 Plaintiff has also filed a supplemental brief attempting to
21 respond to the Court's concerns. Plaintiff wants the Court to seal
22 the deposition testimony of Dr. Elizabeth Howlett, as well as
23 references to that testimony in one of Plaintiff's briefs.
24 Plaintiff claims that this information should be sealed because it
25 is protected by the deliberative process privilege. In order to
26 invoke the deliberative process privilege, Plaintiff should have
27 provided a declaration from an agency head that asserted, among
28 other things, specific facts demonstrating why the information is

1 deliberative and predecisional, and specific facts concerning the
2 degree and type of harm that would result from the public
3 disclosure of the information. In re McKesson Governmental
4 Entities Average Wholesale Price Litig., 264 F.R.D. 595, 602 (N.D.
5 Cal. 2009). Instead, Plaintiff merely invokes the privilege
6 without further explanation.

7 Plaintiff also cites to 21 C.F.R. § 20.62, which provides:
8 "All communications within the Executive Branch of the Federal
9 government which are in written form or which are subsequently
10 reduced to writing may be withheld from public disclosure except
11 that factual information which is reasonably segregable"
12 However, the subject information pertains to FDA communications
13 with Congress and non-governmental entities, not internal
14 communications. Dr. Howlett also states that she has experience
15 working with the FDA. However, she does not go into any detail,
16 other than to generally comment that the "FDA is involved in
17 regulation," that the FDA regulates certain labels that it believes
18 to be important to consumers, that the FDA conducts research before
19 promulgating such regulations, and that she has designed and
20 reviewed some of this research. Moreover, it appears that some of
21 the information discussed by Dr. Howlett is already publicly
22 available online. To the extent that this information is
23 privileged, it is unclear why that privilege was not waived when it
24 was produced through discovery. Plaintiff's supplemental briefing
25 does not address any of these issues.

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For the foregoing reasons, the parties pending motions to seal
are DENIED.

IT IS SO ORDERED.

Dated: February 5, 2014


UNITED STATES DISTRICT JUDGE