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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ALVIN TODD, et al.,  
Plaintiffs,

v.

TEMPUR-SEALY INTERNATIONAL,  
INC., et al.,  
Defendants.

Case No. [13-cv-04984-JST](#) (MEJ)

**ORDER RE: MOTION TO RETAIN  
CONFIDENTIALITY**

Re: Dkt. No. 102

**INTRODUCTION**

Pending before the Court is Defendant Tempur-Sealy International, Inc.’s (“Defendant”) Motion to Retain Confidentiality, in which Defendant moves to retain the confidentiality of certain documents produced in the course of litigation. Dkt. No. 102. Plaintiffs<sup>1</sup> oppose the motion. Dkt. No. 104. The Court has reviewed each of the disputed documents in camera. Having considered the parties’ positions, relevant legal authority, and the record in this case, the Court issues the following order.

**BACKGROUND**

In this putative class action, Plaintiffs bring claims against Defendant arising out of its marketing and sale of mattresses, pillows, and other bedding products containing TEMPUR® material. Specifically, Plaintiffs allege that Defendant’s representation of its Tempur products as

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<sup>1</sup> On August 29, 2014, Plaintiffs filed a Second Amended Complaint which named 24 class representatives representing 11 states. Dkt. No. 63. Since that filing, several plaintiffs have been voluntarily dismissed, and 18 plaintiffs representing 10 states remain. The remaining plaintiffs are Alvin Todd, Robbie Simmons, Tina White, Keith Hawkins, Thomas Comiskey, Patricia Kaufman, Johnny Martinez, Toni Kibbee, Alan Kaufman, Sara Stone, Jerry Kucharski, Julie Davidoff, Ericka Anderson, Kurt Anderson, Melody Todd, Diane Kuckarski, Tracey Palmer, and Brian Stone.

1 “formaldehyde free,” “free of harmful (volatile organic compounds) VOCs,” “allergen resistant,”  
2 and “hypoallergenic” are false and misleading because “reliable testing of Tempur-pedic products  
3 reveals that formaldehyde and other potentially harmful VOCs, that can trigger allergy and asthma  
4 symptoms, are present in Tempur-pedic products and in the chemicals off-gassing from Tempur-  
5 pedic products.” Sec. Am. Compl. ¶ 11.

6 The Court entered a Stipulated Protective Order in this case on September 16, 2014. Dkt.  
7 No. 68. The protective order allows the parties and non-parties to designate information or items  
8 for protection by marking them as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –  
9 ATTORNEYS’ EYES ONLY.” *Id.* ¶¶ 2.2, 2.8. The protective order defines “CONFIDENTIAL”  
10 information or items as “information (regardless of how it is generated, stored or maintained) or  
11 tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c)” and highly  
12 confidential-attorneys’ eyes only as information or items that are “extremely sensitive  
13 ‘Confidential Information or Items.’” *Id.* ¶¶ 2.2, 2.8. The scope of the protection is broad  
14 including not only the protected material but also “(1) any information copied or extracted from  
15 Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and  
16 (3) any testimony, conversations, or presentations by Parties or their Counsel that might reveal  
17 Protected Material.” *Id.* ¶ 3. According to the protective order, “the protections conferred . . . do  
18 not cover . . . (a) any information that is in the public domain at the time of disclosure to a  
19 Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a  
20 result of publication not involving a violation of this Order . . . ; and (b) any information known to  
21 the Receiving Party prior to the disclosure . . . .” *Id.* ¶ 3.

22 A party may challenge a confidentiality designation by providing written notice of each  
23 challenged designation and describing the basis for each challenge. *Id.* ¶ 6.2. If the dispute  
24 regarding the designation cannot be resolved informally, the Designating Party must file a motion  
25 to retain confidentiality. *Id.* ¶¶ 6.2-6.3.

26 On January 2, 2015, Defendant produced approximately 83,581 pages with every page  
27 designated for protection under the protective order. Adams Decl. ¶ 44, Dkt. No. 104-2. After  
28 receipt of this production, on January 14, 2015 Plaintiffs initiated a challenge to Defendant’s

1 designation of 213 documents totaling 4,583 pages. *Id.* ¶ 46. Counsel for the parties met in  
2 person to attempt to resolve the dispute informally on January 28, 2015, but were unable to reach a  
3 resolution. Cerrone Decl. ¶ 3, Dkt. No. 102-4.

4 **LEGAL STANDARD**

5 “It is well-established that the fruits of pretrial discovery are, in the absence of a court  
6 order to the contrary, presumptively public.” *Phillips ex rel. Estates of Byrd v. Gen. Motors*  
7 *Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002). Under Federal Rule of Civil Procedure 26, “[t]he  
8 court may, for good cause, issue an order to protect a party or person from annoyance,  
9 embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c)(1). Information  
10 the court may protect includes “trade secret[s] or other confidential research, development, or  
11 commercial information.” Fed. R. Civ. P. 26(c)(1)(G). “A party asserting good cause bears the  
12 burden, for each particular document it seeks to protect, of showing that specific prejudice or harm  
13 will result” if a protective order is lifted. *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122,  
14 1130 (9th Cir. 2003) (citations omitted).

15 When the confidentiality of information under a protective order is challenged, the court  
16 must conduct a two-step analysis. “First, it must determine whether particularized harm will result  
17 from disclosure of information to the public.” *In re Roman Catholic Archbishop of Portland in*  
18 *Ore.*, 661 F.3d 417, 424 (9th Cir. 2011) (quotation omitted). “Broad allegations of harm,  
19 unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.”  
20 *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (citing *Seattle Times Co.*  
21 *v. Rhinehart*, 467 U.S. 20, 36 (1984)). Instead, the party seeking to maintain confidentiality must  
22 “allege specific prejudice or harm.” *Id.* “Where a business is the party seeking protection, it will  
23 have to show that disclosure would cause significant harm to its competitive and financial  
24 position. That showing requires specific demonstrations of fact, supported where possible by  
25 affidavits and concrete examples, rather than broad, conclusory allegations of harm.” *Contratto v.*  
26 *Ethicon, Inc.*, 227 F.R.D. 304, 307 (N.D. Cal. 2005) (citation and internal quotations omitted).

27 “Second, if the court concludes that such harm will result from disclosure of the discovery  
28 documents, then it must proceed to balance the public and private interests to decide whether

1 maintaining a protective order is necessary.” *In re Roman Catholic Archbishop*, 661 F.3d at 424.  
2 In doing this balancing, the court must consider the following list of non-exhaustive factors: “(1)  
3 whether disclosure will violate any privacy interests; (2) whether the information is being sought  
4 for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will  
5 cause a party embarrassment; (4) whether confidentiality is being sought over information  
6 important to public health and safety; (5) whether the sharing of information among litigants will  
7 promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is  
8 a public entity or official; and (7) whether the case involves issues important to the public.” *Id.* at  
9 424 n.5 (quoting *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995)).

10 **DISCUSSION**

11 **A. Whether Defendant Will Suffer Particularized Harm from Disclosure**

12 1. Research Documents

13 The designated materials at issue include documents marked as “Gallup Study Reports,”  
14 which contain research performed on behalf of Defendant by Multi-sponsor Surveys, Inc. *See*  
15 Appendix of Challenged Designations (“Appendix”) Docs. 1-8, Dkt. No. 102-1. These research  
16 reports are related to information about prospective mattress buyers, current mattress owners, and  
17 the consumer mattress market. Defendant submitted the Declaration of Kelly Faerber,  
18 Defendant’s Director of Internal Audit, attesting to the commercially sensitive nature of the facts  
19 and data in the designated documents. Faerber Decl. ¶¶ 2-6, 9-10, Dkt. No. 103-1. Faerber  
20 explains that the designated materials are for the guidance of company executives only and have  
21 not been made available to the public. *Id.* ¶¶ 9-10. Faerber further explains that Defendant has  
22 taken measures to prevent the public disclosure of these reports. *Id.* ¶¶ 2-6, 9-10.

23 Defendant argues that the information contained in the reports is highly sensitive as it is  
24 part of its business strategy and marketing information, which if revealed to a competitor, would  
25 put Defendant at a competitive disadvantage. Mot. at 3. Defendant maintains that disclosure  
26 would create a substantial risk of serious harm, such as by providing competitors with access to  
27 Defendant’s confidential research and a means to target their competing marketing strategies  
28 based on any weaknesses or strengths revealed by the reports. *Id.*

1           Plaintiffs concede that the Gallup Study Reports could be considered confidential under  
2 Rule 26(c)(1)(G). Opp'n at 11-12. However, they argue that there are significant differences  
3 among the dates and content of some of these documents, and "certainly every page is not possibly  
4 worthy of protection from disclosure." *Id.* at 12.

5           Having reviewed the reports in camera, the Court finds that they are related to Defendant's  
6 confidential business strategy and marketing information. The Court notes that most of the  
7 documents themselves are marked: "This report, the literary property therein and the common law  
8 copyright thereto, are the exclusive property of Multi-sponsor Surveys, Inc. This report is a  
9 privileged, confidential communication. The material herein is available to and is for the guidance  
10 of your executives only and is not to be copied, quoted from, published or divulged to others."  
11 *See* Appendix Docs. 1, 3, and 5-8. Defendant has also shown the harm that could result from  
12 disclosure, including the potential for competitors with access to the reports to target their  
13 competing marketing strategies based on any weaknesses or strengths revealed therein. Defendant  
14 specifically argues that "[d]eveloping a protocol for a market survey is no small task, and to  
15 develop such a protocol costs money. Possession of market research can give a market participant  
16 an advantage over competitors, but only if they can possess the information exclusively." Reply at  
17 7, Dkt. No. 105. The Court agrees that the value of Defendant's market research—including both  
18 the protocol and the results—could be significantly diminished if it was freely disclosed to the  
19 public.

20           Thus, based on the information before it, the Court finds that Defendant has shown a  
21 particularized harm that can result from disclosure of the challenged materials to the public—  
22 namely, that competitors would be able to see Defendant's strengths and weaknesses, and use its  
23 business strategies to their own benefit or to Defendant's detriment. *See Muench Photography,*  
24 *Inc. v. Pearson Educ., Inc.*, 2013 WL 4475900, at \*4 (N.D. Cal. Aug. 15, 2013) (permitting a  
25 party to retain confidentiality where the information at issue could reveal product development  
26 efforts and business strategies to competitors, who could then use those strategies themselves).

27           The designated materials also include a document identified by Defendant as "Internal  
28 Market Research." Appendix Doc. 9. This document is entitled "2010 Tempur-Pedic Product

1 Descriptions” and contains general descriptions of Defendant’s products. Plaintiffs argue that the  
2 information in this document was already provided to the public. Opp’n at 11 (citing Adams Decl.  
3 ¶ 65). They also argue that it fails to contain information that qualifies for protection under Rule  
4 26(c). *Id.* Having reviewed the document in camera, the Court agrees with Plaintiffs and finds  
5 that the Internal Market Research document does not contain trade secret or confidential  
6 information; rather, it contains general descriptions of Defendant’s products. Defendant maintains  
7 that it “is obvious from the content that the document was intended for internal use only, as each  
8 description begins with a short statement of whether a particular model is ‘entry-level priced,’  
9 ‘mid-priced,’ ‘higher-priced,’ etc.” Reply at 8. However, Defendant’s pricing is available to the  
10 general public, and the document contains no confidential information regarding how Defendant  
11 determines these prices. Further, Defendant concedes that the final public versions of documents  
12 describing the products have been produced without restriction. *Id.* In short, Defendant has failed  
13 to show that specific harm would result from de-designating a document that contains information  
14 already available to the public. Thus, the Court finds that Defendant has not met its burden to  
15 show that the Internal Market Research document should be designated confidential. Defendant’s  
16 Motion is therefore DENIED as to Appendix Doc. 9.

17 2. Product Training Guides

18 Plaintiffs also challenge the designation of 50 of Defendant’s “Product Training Guides,”  
19 which were attached to several internal employee emails. Appendix Docs. 10, 12, 14-16, 104-10,  
20 119, 121-22, 131-47, 151-57, 160, 163, 174, 177, 186, 190, 201-02, 204, 207, and 211. According  
21 to Faerber, the Product Training Guides are internal documents distributed to employees and  
22 authorized distributors. Faerber Decl. ¶ 11. She explains that they are not meant for public  
23 dissemination and marked “Employee Use Only.” *Id.* Faerber further explains that Defendant has  
24 spent significant resources developing the brand, marketing, artwork and employee training  
25 information contained in the guides, and they are provided to third-party retailers on the condition  
26 that the retailers agree to hold them in confidence. *Id.* Defendant argues that public disclosure of  
27 these documents would cause harm to it in that competitors could “free-ride on Defendant’s  
28 investment of resources in developing the product training guides,” thus giving Defendant’s

1 competitors an unfair strategic advantage. Mot. at 3.

2 Plaintiffs argue that the Product Training Guides consist of information about Defendant  
3 and its products, not trade secrets or other confidential research, development, or commercial  
4 information, which is required for protection. Opp'n at 6. They maintain that the "fact that  
5 Defendants may have spent significant resources developing the guides does not change the  
6 subject matter contained in the guides, which subject matter and contents is not worth of  
7 protection from disclosure." *Id.*

8 The Court agrees with Plaintiffs. First, the Court notes that Defendant has already  
9 produced at least one version of the Product Training Guide without designating it as confidential.  
10 Specifically, on October 9, 2014, Defendant produced 6,543 pages of documents, which included  
11 documents bates-numbered TCL 1-6508. Adams Decl. ¶ 30. Included in the October 9  
12 production was Defendant's Summer 2009 Product Training Guide, marked at TCL 5821-5839,  
13 which was not designated as confidential. *Id.*, Ex. C. This document is very similar to the  
14 challenged Product Training Guide documents marked as TPTG 33-51, TWC 3105-3123, and  
15 TWC 3722-3757. *See* Appendix, Docs. 105, 155, and 160.

16 Second, Plaintiffs state that they had in their possession both the Winter 2010 Product  
17 Training Guide and October 2012 Product Training Guide prior to their production by Defendant.  
18 Adams Decl. ¶¶ 9-10, 15-16, Exs. A-B. They state that these documents have been in the public  
19 domain for at least six months. *Id.* ¶¶ 9, 15. According to the protective order, "the protections  
20 conferred . . . do not cover . . . (a) any information that is in the public domain at the time of  
21 disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a  
22 Receiving Party as a result of publication not involving a violation of this Order" or (b) was  
23 "known to the Receiving Party prior to the disclosure." Protective Order ¶ 3. Further, Rule 26  
24 does not govern their use since Plaintiffs obtained these documents outside of discovery in this  
25 litigation. *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1079-81 (9th Cir. 1988). Moreover,  
26 ten of the challenged product training guides are identical and/or similar to the Winter 2010  
27 Product Training and October 2012 Product Training Guide. *See* Appendix, Docs. 10, 110, 136,  
28 147, 151-153, 156, 186, and 188.

1 Defendant has not provided any authority for designating information as confidential when  
2 it is available in the public domain. Defendant cites *DVD Copy Control Ass'n Inc. v. Bunner*, 116  
3 Cal. App. 4th 241, 251 (2004), which holds that, with respect to trade secrets, “[p]ublication on  
4 the Internet does not necessarily destroy the secret if the publication is sufficiently obscure or  
5 transient or otherwise limited so that it does not become generally known to the relevant people,  
6 i.e., potential competitors or other persons to whom the information would have some economic  
7 value.” Defendant states that it has “actively policed the internet for publication of its confidential  
8 information, and when product training guides have been posted wrongfully Defendant has made  
9 reasonable efforts to take them down.” Hajjar Decl. ¶¶ 1-5, Dkt. No. 102-2. However, as of the  
10 date of this Order, the brochure remains available on websites that sell Defendant’s and  
11 competitors’ products to the general public. *See, e.g.*,  
12 [http://www.sdmattress.com/media/wysiwyg/TempurPedic\\_Brochure.pdf](http://www.sdmattress.com/media/wysiwyg/TempurPedic_Brochure.pdf) (Winter 2010 Product  
13 Training Guide); <http://cantoni.com/images/tempur-pedic.pdf> (October 2012 Product Training  
14 Guide). Publication of this information has not been transient or otherwise limited; instead,  
15 Defendant provides these documents to retailers, who then post them online for customers’ and the  
16 general public’s use. Accordingly, because the information in the Product Training Guides is  
17 already available to the public and competitors, Defendant has failed to show that any  
18 particularized harm will result from disclosure of the information. The Court therefore DENIES  
19 Defendant’s motion as to the Product Training Guides (Appendix Docs. 10, 12, 14-16, 104-10,  
20 119, 121-22, 131-47, 151-57, 160, 163, 174, 177, 186, 190, 201-02, 204, 207, and 211).

21 3. Internal Emails

22 Finally, Plaintiffs challenge Defendant’s designation of (1) internal employee emails and  
23 (2) attachments to internal employee emails.

24 a. *Internal Employee Emails*

25 The following documents in the Appendix are marked as “Confidential Internal Employee  
26 Email”: 19,<sup>2</sup> 23-25, 27, 29-37, 41-44, 48-50, 59-68, 70-82, 86, 88-90, 92-95, 102-03, 111, 113,

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28 <sup>2</sup> Mistakenly identified in the Appendix as an attachment, Document 19 is an internal email relating to marketing materials.



1 115, 161, 168, and 170.

2 In its Motion, Defendant maintains that these documents fall within the protection for  
3 “confidential research, development, or commercial information” covered by the protective order.  
4 Mot. at 5. Because Defendant sells products that come in close physical contact with consumers,  
5 testing is an essential element of the business. *Id.* Defendant argues that information regarding its  
6 research, testing, product development, market studies, and business strategy would be highly  
7 valuable to Defendant’s competitors, who would be able to use that information to advance their  
8 own research, testing, product development, market studies, and business strategy. *Id.* Defendant  
9 further argues that access to such documents would permit competitors to identify the strengths  
10 and weaknesses in Defendant’s products, giving them an unfair advantage in marketing and the  
11 ability gain insight into Defendant’s confidential business strategies. *Id.*

12 Defendant notes that many of the challenged emails relate to discussions regarding  
13 Defendant’s marketing strategies, including their marketing plans, product descriptions, and  
14 advertisements. It contends that marketing strategies “are among the most closely guarded secrets  
15 in any competitive industry, and the market for mattresses and pillows is no exception.” *Id.* at 6.  
16 Defendant argues that disclosure of these documents would reveal the marketing strategies that it  
17 determined to be effective, and would give competitors an unfair advantage in forming their own  
18 strategies. *Id.*

19 In response, Plaintiffs argue that “[j]ust because an email may be tangentially connected to  
20 research, testing and/or any of these other categories, in and of itself, would not qualify these  
21 documents as Confidential.” Opp’n at 8. Plaintiffs contend that Defendant makes only  
22 generalizations about the harm that would result from disclosure, yet Plaintiffs are unable “to  
23 identify any challenged email that not only contains confidential material, but for which disclosure  
24 would result in prejudice or harm to the Defendants.” *Id.* at 9.

25 Having reviewed the documents in camera, the Court finds that Defendant has failed to  
26 meet its burden of showing the specific prejudice of harm that will result from disclosure of each  
27 email. As a preliminary matter, many of the emails contain no text at all, and the subject lines  
28 contain generalized terms such as “Direct Response Weekly Mattress Returns,” “Odor Returns

1 and Exchanges by Month 2009,” and “Accepted: Tempur Allergen Results,” with nothing more.  
2 See Appendix Docs. 23-25, 29, 31, 33-35, 42, 44, 49-50, 60-61, 63, 65, 67-68, 71, 74, 76-77, 79-  
3 82, 90, and 93. Defendant admits: “The fact that Defendants track information regarding returns is  
4 not secret.” Reply at 3. However, because these pages include the names of the senders and  
5 recipients, Defendant argues that “[d]isclosure of this information could lead to harassment of  
6 Defendants’ employees. Or, if third parties contact those employees for information regarding  
7 returns, Defendants’ ability to direct its public communications through the proper channels will  
8 be compromised.” *Id.* Defendant makes this blanket argument with no legal support and without  
9 specific demonstrations of fact or concrete examples. Further, even if the emails contain any  
10 information identifying specific customers, Defendant may redact it.

11 As to the remaining emails, they contain only generalized entries such as “Odor Log –  
12 Daily Summary” or brief communications among employees and/or customers. See Appendix  
13 Docs. 27, 30, 32, 36-37, 41, 43, 48, 59, 62, 64, 66, 70, 72-73, 75, 78, 86, 88-89, 92, 94-95, 102-03,  
14 111, 113, 115, 161, 168, and 170. Nowhere does Defendant identify any specific secret or  
15 otherwise show the specific harm that will result from disclosure of any of the documents. See  
16 *Contratto*, 227 F.R.D. at 309; *Foltz*, 331 F.3d at 1130. Defendant’s broad allegations of harm with  
17 respect to either the documents as a whole, or categories of documents, do not satisfy the standard  
18 set forth in *Foltz*. See *Foltz*, 331 F.3d at 1130; *Beckman*, 966 F.2d at 476. Again, if any of the  
19 emails contain information identifying specific customers, Defendant may redact it. Accordingly,  
20 Defendant’s Motion is also DENIED as to Appendix Docs. 19, 23-25, 27, 29-37, 41-44, 48-50,  
21 59-68, 70-82, 86, 88-90, 92-95, 102-03, 111, 113, 115, 161, 168, and 170.

22 *b. Attachments*

23 The following documents in the Appendix are marked as “Attachment to Confidential  
24 Email”: 11, 13, 17-18, 20-22, 39-40, 45, 69, 83-85, 87, 91, 96-101, 112, 114, 116-18, 120, 123-30,  
25 148-50, 158-59, 162, 164-67, 169, 171-73, 175-76, 178-85, 187-89, 191-200, 203, 205-06, 208-10,  
26 and 212-13. In its Reply, Defendant identifies six documents that it mistakenly designated as  
27 confidential: Docs. 40, 45, 69, 100-01, and 165. Reply at 4 n.3. Accordingly, Defendant’s Motion  
28 is DENIED as to these documents.

1           As to the remaining documents, Defendant notes that public versions of many of the  
2 attachments at issue have been previously produced independently of the emails, without  
3 restriction, but maintains that nonpublic drafts of these documents were properly designated as  
4 confidential. Mot. at 4-5. Defendant argues that publication of unfinished drafts could lead to  
5 consumer confusion. Reply at 5. Defendant further argues that if competitors are given the  
6 opportunity to analyze early drafts of marketing materials in comparison with published versions,  
7 they could identify language that Defendant has determined to be more or less effective, and could  
8 adjust their own marketing materials accordingly. *Id.*

9           Upon review of these documents, the Court finds that Defendant has not met its burden to  
10 show particularized harm that may result from their disclosure. The documents are largely draft  
11 versions of Product Training Guides and other materials that contain the same or similar  
12 information that has been made available for public viewing. As noted above, Defendant’s broad  
13 allegations of harm with respect to either the documents as a whole, or categories of documents,  
14 do not satisfy its burden to show that disclosure should be prevented. “[C]ourts have consistently  
15 granted protective orders that prevent disclosure of many types of information, such as letters  
16 protected under attorney-client privilege which revealed the weaknesses in a party’s position,”  
17 “medical and psychiatric records,” “federal and grand jury secrecy provisions,” and “confidential  
18 settlement agreements.” *Phillips*, 307 F.3d at 1212 (citations omitted). By contrast, courts have  
19 held that documents similar to those sought to be protected in this case were not subject to  
20 protection under Rule 26(c). *See, e.g., Contratto*, 227 F.R.D. at 310 (holding that defendant had  
21 not established that internal memoranda regarding its product, including statistical information and  
22 assessments of the consequences of the problems complainants had faced, was not protectable);  
23 *Verizon Cal., Inc. v. Ronald A. Katz Tech. Licensing*, 214 F.R.D. 583, 586 (C.D. Cal. 2003)  
24 (holding that defendants had not established that three memoranda from counsel to the company  
25 and a letter regarding an investigation of certain patents were protectable under Rule 26(c));  
26 *Grundberg v. Upjohn Co.*, 137 F.R.D. 372, 395-96 (D. Utah 1991) (holding that defendant drug  
27 company failed to establish good cause for maintaining confidential designation of drug  
28 experience reports, internal memoranda regarding adverse reactions, a letter from a third party,

1 and other documents related to the drug Halcion).

2 Defendant's general allegations of harm do not meet the Rule 26(c) standard, and as a  
3 result, Defendant has not established good cause to uphold the confidential designation of the  
4 documents. *See Foltz*, 331 F.3d at 1130; *see also Medtronic Vascular, Inc. v. Abbott*  
5 *Cardiovascular Sys., Inc.*, 2007 WL 4169628, at \*2 (N.D. Cal. Nov. 20, 2007) ("Plaintiff's  
6 general assertion that disclosure of business communications would chill business relations is not  
7 a sufficient allegation of specific harm. This general blanket argument would apply to all non-  
8 public communications. Plaintiff has not demonstrated any specific harm will ensue from  
9 disclosure of the documents at issue.").

10 Accordingly, Defendant's Motion is DENIED as to Appendix Docs. 11, 13, 17-18, 21-22,  
11 39, 83-85, 87, 91, 96-99, 112, 114, 116-18, 120, 123-30, 148-50, 158-59,162, 164, 166-67, 169,  
12 171-73, 175-76, 178-85, 187-89, 191-200, 203, 205-06, 208-10, and 212-13.

13 4. Summary

14 Based on the analysis above, the Court finds that Defendant has failed to meet its burden as  
15 to the following documents: (1) Internal Market Research document (Appendix Doc. 9); (2)  
16 Product Training Guides (Docs. 10, 12, 14-16, 104-10, 119, 121-22, 131-47, 151-57, 160, 163,  
17 174, 177, 186, 190, 201-02, 204, 207, and 211); and (3) Internal Emails/Attachments (Docs. 11,  
18 13, 17-19, 21-25, 27, 29-37, 39-45, 48-50, 59-103, 111-18, 120, 123-30, 148-50, 158-59,161-62,  
19 164-67, 168-73, 175-76, 178-85, 187-89, 191-200, 203, 205-06, 208-10, and 212-13).

20 Accordingly, Defendant's Motion is DENIED as to those documents, although Defendant may  
21 redact any information about specific customers.

22 However, Defendant has met its burden as to the Gallup Study Reports (Docs. 1-8).  
23 Accordingly, the Court next considers whether the public interest in disclosure is outweighed by  
24 Defendant's private interest in confidentiality.

25 **B. Public Interest In Disclosure vs. Defendant's Confidentiality Interest**

26 As the Ninth Circuit has instructed, the Court must look to the seven factors listed in  
27 *Glenmede Trust* to balance the public and private interests in deciding whether maintaining a  
28 protective order is necessary. *In re Roman Catholic Archbishop*, 661 F.3d at 424. Having already

1 discussed the first factor (privacy) above, the Court will address the other relevant *Glenmede Trust*  
2 factors.

3 Factor 2 requires consideration of “whether the information is being sought for a  
4 legitimate purpose or for an improper purpose.” While Plaintiffs’ brief argues extensively about  
5 whether Defendant has good cause to maintain confidentiality, nowhere have they identified a  
6 legitimate purpose for disclosing the challenged materials other than the public’s right to know.  
7 The Ninth Circuit has said that “a litigant is not entitled to the court’s protection” from “additional  
8 liability and litigation” due to the disclosure of confidential information. *Foltz*, 331 F.3d at 1137.  
9 But Defendant has met its burden to show that the reports should remain confidential at this time.  
10 The Court is unaware of any legitimate purpose for disclosing to the public the “confidential  
11 research, development, [and] commercial information” of a company before that information  
12 becomes material to the case. *See* Fed. R. Civ. P. 26(c)(1)(G). The relevant question under this  
13 factor is whether there is a legitimate purpose for disclosing the information now. Plaintiffs did  
14 not answer that question. Until the challenged materials are proffered on an issue relevant to  
15 Defendant’s liability or some other relevant issue in this litigation, Plaintiffs’ desire for disclosure  
16 is, at best, premature.

17 Factors 4 and 7 require consideration of whether confidentiality is being sought over  
18 information important to public health and safety, and whether the case involves issues important  
19 to the public, respectively. As noted above, this case involves allegations that Defendant’s  
20 representation of its Tempur products as “formaldehyde free,” “free of harmful (volatile organic  
21 compounds) VOCs,” “allergen resistant,” and “hypoallergenic” are false and misleading. Sec.  
22 Am. Compl. ¶ 11. Although these allegations involve matters related to public health and safety,  
23 the reports do not address any such issues. Plaintiffs have not even alleged that the challenged  
24 reports are material to their case. If there was a relevant public interest in the challenged  
25 materials, “the mere allegation of misconduct in the discovery documents . . . without more, does  
26 not create a public interest sufficiently large enough to outweigh [ ] private interests in  
27 confidentiality.” *Id.* at 427 (noting that there has been “no judicial determination” regarding the  
28 challenged materials).

