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28UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FOSTER RICH,

Plaintiff,

v.

RALPH W. SHRADER, *et al.*,

Defendant.

Civil No. 09-CV-0652-AJB (BGS)

**ORDER DETERMINING
DISCOVERY DISPUTE**

On April 8, 2013, counsel for all parties contacted the Court regarding a discovery dispute concerning documents designated as confidential pursuant to the Stipulated Protective Order (“Protective Order”) entered by the Court on February 1, 2013. (Doc. No. 89.) In this dispute, Plaintiff seeks to challenge Defendants’ designation of two documents as confidential, and, if the documents remain confidential, requests that this Court modify the Protective Order’s procedure for sharing confidential documents with potential lay witnesses. On April 17, 2013, the parties submitted a joint motion requesting the Court to settle the discovery dispute and lodged the disputed documents with the Court. (Doc. No. 92.) After reviewing the parties’ motion, the Court finds that there is no need for a hearing, and for the reasons below, the Court DENIES Plaintiff’s requests to remove the confidential designation from the documents and to modify the protective order.

1 **Introduction**

2 In the instant discovery dispute, Plaintiff seeks to both challenge Defendants’
3 designation of the confidentiality of two documents and modify the Protective Order’s
4 procedure for sharing confidential documents with potential witnesses. Plaintiff and
5 Defendants jointly submitted the proposed protective order to the Court on January 31,
6 2013, after they had “met and conferred and reached an agreement on the terms.” (Doc.
7 No. 87.) The proposed order was adopted with minor modifications and entered by the
8 Court. (Doc. No. 89.) Plaintiff now challenges Defendants’ confidential designation
9 of two document as allowed by Paragraph 7 of the Protective Order. (*Id.* at 3-4.) If the
10 Court determines the documents should remain confidential, Plaintiff then requests that
11 this Court modify the Protective Order as allowed under Paragraph 25. (*Id.* at 10.)

12 **Confidentiality Designation**

13 The Court will not remove Defendants’ confidentiality designation of the
14 documents Bates-stamped BAH RICH-000089 and BAH RICH-000091 through
15 000101. Under the Protective Order, parties may designate a document as confidential
16 when the document contains “(i) personal, proprietary, or financial information that is
17 confidential; (ii) trade secret information; (iii) business confidential information or
18 competitively sensitive information; or (iv) other information the Disclosure of which
19 would, in the good faith judgement of the party designating the material as confidential,
20 be detrimental to the conduct of that party’s business, the business of any of that party’s
21 customers or clients, or the party’s economic interests.” (*Id.* at 2.) Plaintiff claims that
22 nothing in the two documents, if disclosed, could affect Defendants’ business as the
23 document contains no algorithms or formulae. (Doc. No. 92 at 1.) Plaintiff refers to
24 the documents as generic, a summary of the interviews of fifteen co-workers with
25 passing reference to old projects and broad-based and non-specific ways for improving
26 Mr. Rich’s performance. (*Id.*)

27 After reviewing the documents, the Court finds that the documents contain
28 confidential information as defined by the Protective Order and will not remove

1 Defendant's designation. Both the performance evaluation and the ten-page appraisal
2 contain strategies Booz Allen Hamilton Inc. ("BAH") utilizes to improve its
3 employees' performance and experience. This information, if disseminated, could be
4 used to piece together portions of BAH's proprietary review system and employee
5 development system, which could then be used by competitors to the detriment of BAH
6 in the future. While there is not likely to be anyone who will take an interest in Mr.
7 Rich's performance, there may be those who are interested to find out what projects a
8 BAH employee undertakes, what co-workers an employee is told to interact with, what
9 committees exist within BAH, and how BAH passes on its institutional knowledge to
10 the next generation. Therefore, the documents contain proprietary information and
11 business confidential information or competitively sensitive information as defined
12 under categories (i) and (iii) of Paragraph 3 of the Protective Order.¹

13 Further, under category (iv), Defendants do not have to demonstrate that there
14 will be harm before marking a document confidential; they only must make a good faith
15 judgment that Disclosure would be detrimental. Plaintiff suggests that the documents
16 would not be harmful, and while Plaintiff may believe that in good faith, Plaintiff's
17 good faith belief is not sufficient to overcome Defendants' good faith designation.
18 There is no evidence to suggest Defendants acted without good faith.

19 Additionally, Plaintiff has not offered any evidence or made any argument that
20 suggests Defendant designated the documents as confidential in order to prevent
21 Plaintiff from using the documents for the purposes of litigation. Such an argument
22 would nevertheless fail, however, as Plaintiff's only stated purpose for the documents
23 is to show them to potential witnesses, a use the Protective Order contemplates and
24 allows. Accordingly, the Court agrees with Defendants that the designation of these
25 documents as confidential is proper, and therefore denies Plaintiff's request to de-

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28 ¹The Court finds no need, at this time, to determine whether the information contains trade secrets under category (ii).

1 designate the documents as confidential.

2 **Protective Order Procedure**

3 The Court does not find good cause to modify the Protective Order to allow
4 Plaintiff to show confidential documents to potential witnesses without first providing
5 the witnesses with a copy of the Protective Order and having Plaintiff’s counsel explain
6 to the potential witnesses the obligations of the Protective Order. The Protective Order
7 allows the Court to modify the terms and conditions of the Order for good cause, in the
8 interest of justice, or on its own order. (Doc. No. 89 at 10.) Plaintiff claims that the
9 Protective Order’s requirements for sharing confidential documents with potential
10 witnesses is “of no use unless the third party is a lawyer” because the Protective Order
11 consists of legalese. (Doc. 92 at 2.) Plaintiff, however, appears to confuse the
12 procedure for disclosing documents to expert witnesses with the procedure for
13 disclosing documents to potential lay witnesses.

14 The Protective Order procedure Plaintiff challenges is the same procedure
15 Plaintiff and Defendant agreed upon and submitted to the Court in their proposed
16 protective order. Plaintiff’s motion demonstrates that Plaintiff now misreads the
17 Protective Order. Plaintiff argues that the Protective Order requires potential witnesses
18 to attest that they have read and understood the Protective Order. (Doc. No. 92 at 2.)
19 This procedure, however, is only for expert witnesses and consultants as defined in
20 Paragraph 8(c) of the Protective Order. (Doc. No. 89 at 4.) Paragraph 9 requires expert
21 witnesses or consultants to sign the written agreement, attached to the Protective Order
22 as Exhibit A, before receiving confidential information. (*Id.* at 5.)

23 Plaintiff, on the other hand, intends to show the confidential documents to lay
24 witnesses. In the motion, Plaintiff states that he wishes to use the documents to
25 “refresh the recollection of any of the 11 former colleagues who are said to have
26 recommended his retirement” in order to allow him to “informally discover material
27 information about his claims.” (Doc. No. 92 at 2.) Plaintiff’s attempt to gain fact
28 discovery from these witnesses does not demonstrate any intent to designate these

1 potentially witnesses as expert witnesses or consultants. Therefore, the procedure in
2 Paragraph 9 of the Protective Order does not apply to these witnesses.

3 Instead, Plaintiff should follow the procedure for the disclosure of confidential
4 documents to potential lay witnesses. Under Paragraph 8(f) of the Protective Order, an
5 attorney may show trial and deposition witnesses, as well as potential witnesses,
6 documents designated as confidential as long as the attorney furnishes the witnesses
7 with a copy of the Protective Order and explains the obligations of the Order. (Doc.
8 No. 89 at 4-5.) Under Paragraph 10, the **attorney** must then execute an affirmation for
9 each witness stating that the attorney provided the witness with a copy of the order and
10 explained the witness's obligations. (*Id.* at 5-6.) A copy of the affirmation of counsel
11 is attached to the Protective Order as Exhibit B. (*Id.* at 13.) The procedure Plaintiff
12 must follow with the witnesses, then, is not the procedure Plaintiff outlined in the
13 motion. Plaintiff has not provided any reason why Plaintiff's counsel would be unable
14 to advise the potential witnesses of their responsibilities under the Protective Order.
15 Plaintiff has not provided any reason why Plaintiff's counsel cannot be present when
16 Mr. Rich approaches his former colleagues, or why Mr. Rich cannot request that his
17 colleagues meet with his attorney after an initial meeting without the documents. In
18 sum, Plaintiff has not shown good cause why the Protective Order needs to be
19 modified.

20 Even if Plaintiff attempted to designate the potential witnesses as experts or
21 consultants, Plaintiff could still not establish good cause for modifying the Protective
22 Order. Although Plaintiff insists that "the time for Mr. Rich to approach his former
23 colleagues is closing quickly," Plaintiff has not shown any effort to actually follow the
24 procedure of the Protective Order under either Paragraphs 9 or 10, or to see if the
25 potential witnesses would understand the language of the Protective Order. (Doc. 92
26 at 2.) Additionally, if Plaintiff believes that the Protective Order is full of "legalese"
27 to the point where only attorneys could understand it, then Plaintiff should have written
28 the Proposed Order in simpler terms before it was submitted to the Court. Plaintiff,

1 who certified to this Court that he agreed with the terms of Protective Order, was fully
2 aware that the Protective Order's procedures called for providing a copy of the
3 Protective Order to experts or consultants and explaining the terms of the Protective
4 Order to lay persons. Without any attempt to follow these procedures, Plaintiff cannot
5 demonstrated good cause and cannot show how circumstances have changed since the
6 Protective Order was originally submitted to justify a modification of the Protective
7 Order.

8 The Court **DENIES** Plaintiff's request to de-designate the documents Bates-
9 stamped BAH RICH-000089 and BAH RICH-000091 through 000101. These
10 documents shall remain designated as confidential. The Court **DENIES** Plaintiff's
11 request to modify the Protective Order.

12 **IT IS SO ORDERED.**

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14 DATED: April 29, 2013



BERNARD G. SKOMAL
United States Magistrate Judge