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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

) Civil No. 09-CV-2094-AJB(WVG)
)
In re: EASYSAYER REWARDS) ORDER GRANTING IN PART AND
LITIGATION) DENYING IN PART <i>EX PARTE</i> MOTION
) FOR RECONSIDERATION
)
) [Doc. No. 159]
)
)
_____)

On June 30, 2011, the Court ruled on numerous discovery disputes between Plaintiffs and both Defendants. Plaintiffs now seek the Court's reconsideration of the portion of the Order that involves Defendant Regent Group, Inc. ("EMI"). The Court opts to reevaluate its previous rulings because class certification is a major milestone in this case and the interests of many individuals may be at stake. In the Court's estimation, the significance of this process outweighs any technical rule violation, and the Court wishes to afford Plaintiffs every opportunity to be heard. After due consideration, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' motion.

/ / /

1 I. DISCUSSION

2 A. Failure to Comply With Local Rules or Legal Standard

3 EMI points out Plaintiffs' apparent failure to comply with
4 the Local Rules. However, because the issues here are important to
5 the class certification phase, the Court wishes to leave no doubt
6 that it considered every argument made. As a result, the Court
7 excuses Plaintiffs' transgression and considers their motion.
8 However, all parties are henceforth on notice that a similar
9 violation in the future may result in the summary denial of their
10 motion if appropriate.

11 Moreover, EMI argues that Plaintiffs have not presented new
12 evidence or arguments that could not have been presented in the
13 original briefing. However, the Court limited the number of pages
14 the parties could use in the original briefing, and that limitation
15 partially cabined how in-depth Plaintiffs could flesh out their
16 arguments.^{1/}

17 In the end, the Court always has discretion to reconsider its
18 own rulings. Rodgers v. Watt, 722 F.2d 456, 460 (9th Cir. 1983) (*en*
19 *banc*), *superseded on other grounds as recognized by* In re: Alexan-
20 der, 197 F.3d 421, 426 (9th Cir. 1999). The Court does so at this
21 time only because the class certification process is a major step in
22 the life of cases such as the case at bar. Given that the Court
23 will allow full briefing in the future, as explained in footnote 1,

24
25 _____
26 ^{1/} The informal discovery dispute resolution procedure in the Court's Chambers
27 Rules has worked well in the past in nearly every case the Court has handled to
28 date. However, based on the Court's experience with, and observations of, this
case, in the future, the Court will require full briefing of all written discovery
disputes (*i.e.*, disputes over SROGs, RFPs, RFAs, and other similar discovery
tools). The parties shall continue to comply with the Chambers Rules' requirement
to call chambers regarding disputes. The Court will provide further guidance at
that time.

1 the Court will be far less inclined to be so accommodating or
2 permissive in the future.

3 **B. RFP Nos. 7, 18, 29, 31, and 40**

4 Plaintiffs argue that the RFPs above are relevant to class
5 certification because they bear on Rule 23(b)(3)'s predominance and
6 superiority prongs. They note that "[c]ourts have generally found
7 the predominance and superiority standards met in certifying common
8 law fraud classes where there was a showing that class representa-
9 tives and absent members were victims of a common design or scheme
10 that the defendant was liable for." (Doc. No. 159 at 6.)^{2/} They go
11 on to discuss four cases that they claim establish that "discovery
12 related to EMI's 'centrally orchestrated' scheme to defraud the
13 class is directly relevant to Plaintiffs' class certification motion
14 because it would demonstrate that 'each plaintiff [was] similarly
15 situated with respect to it' therefore justifying class treatment."
16 (Id. at 8 (alteration in original; citation omitted).)

17 In response, EMI points out that (1) the only claim in the
18 Third Amended Complaint ("TAC") that involves common law fraud is
19 brought against co-defendant Provide Commerce only, not EMI, and (2)
20 the four cases Plaintiffs discuss involve either common law fraud or
21 federal securities fraud claims. (Doc. No. 166 at 6.) They
22 conclude: "Plaintiffs' entire argument for reconsideration is based
23 on the faulty premise that the requested discovery is needed to
24 certify a claim that they have not even brought against EMI." (Id.)
25 Upon review of the arguments, case law cited, and the Third Amended
26 Complaint, the Court agrees with EMI.

28 ^{2/} All page references to documents on the Court's docket are to the CM/ECF page numbers, not to the document's original pagination.

1 Plaintiffs' motion states that they will face a "robust
2 factual showing" when they seek to certify their common law fraud
3 claims. (Doc. No. 159 at 11.) However, while Plaintiffs reference
4 multiple such claims, the only instance in the entire 58-page TAC
5 where "common law fraud" is mentioned is in Claim Seven, which is
6 for "Fraudulent Misrepresentations/Omissions . . . Against Defendant
7 Provide-Commerce." (Doc. No. 164 at 32, 33 at ¶ 111.) Relying on
8 the case law cited, this section of Plaintiffs' motion contends that
9 (1) they need the discovery in the disputed RFPs (2) because this
10 case, like the cited cases, involves "certifying common law fraud
11 classes," (3) which requires them to show that they were "victims of
12 a common design or scheme." (Doc. No. 159 at 6.) Plaintiffs'
13 moving papers focus exclusively on EMI. However, none of the at-
14 issue RFPs propounded to EMI bear on certification of common law
15 fraud class against EMI because that claim does not involve EMI.
16 The only Defendant named in Claim Seven is Provide Commerce. These
17 RFPs therefore are not relevant for certifying a class against EMI
18 because they are directed to, and seek information from, a defendant
19 that is not named in that claim.

20 The four cases Plaintiffs cite are inapposite. While the
21 Court's review of the cases revealed that they are distinguishable
22 and inapplicable here on various grounds, the Court will forgo an
23 at-length discussion because, in the end, EMI is correct that all of
24 these cases involve securities fraud and common law fraud, which are
25 not claims brought against EMI. This distinction alone is suffi-
26 cient basis to render these cases inapplicable here.

27 Moreover, although Plaintiffs' TAC alleges throughout that
28 Provide Commerce and EMI conspired together and ran the EasySaver

1 Rewards "scheme" or "scam" together, it is unclear why Plaintiffs
 2 need evidence of a "common design or scheme," which only applies to
 3 the common law fraud claim, to certify the proposed classes and sub-
 4 classes against each individual defendant for any claim other than
 5 Claim Seven. In other words, Plaintiffs have not shown how or why
 6 these RFPs are relevant to any claim other than Claim 7. Moreover,
 7 this case cannot be correctly characterized as a common law fraud
 8 case--and thus bring it within Plaintiffs' cases--when only 1 of 17
 9 claims involves common law fraud.

10 Based on the foregoing, the documents in the RFPs at issue
 11 are not discoverable for class certification purposes and are
 12 outside the scope of discovery at this stage. Whether these
 13 documents are discoverable during merits discovery is a question for
 14 another day. The Court denies the motion for reconsideration with
 15 respect to RFP Nos. 7, 18, 29, 31, and 40.

16 **C. Rulings on RFPs 4, 11, 12, and 13**

RFP	Produce	Do Not Produce	Comments
4		x	Objections sustained. Plaintiffs cite no case law whatsoever, but importantly none that supports the bald assertion that use of the Kroll reports during the confidential ENE for settlement discussions constitutes waiver of the work-product doctrine. (<u>See</u> Doc. No. 159 at 12:12-25.)
11-13	See Comments		Subject to Rule 11, EMI states in detail that it has produced all code versions that exist. EMI states in no uncertain terms that it has produced whatever it has and cannot further comply because additional responsive documents do not exist. As a result, the Court cannot compel EMI to produce what it does not have. The Court can only accept at face value what parties represent to it. So long as EMI

		states it has complied with the date-related orders on page 9 of the Court's June 30, 2011, Order, the Court will not order further production. However, if EMI has not complied with the date-related orders on page 9 of the June 30, 2011, Order, EMI shall so comply.
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6 **D. Request For Reconsideration In Section 4 Is Denied**

7 The combination of Parts B and C, above, renders moot
8 portions of Section 4 of Plaintiffs' motion, which relies on
9 arguments previously made and herein not accepted. The remaining
10 portion, specifically the RFPs at the top of page 14, are simply
11 much too broad for the Court to allow. The Court realizes that
12 Plaintiffs will never realize this or admit as much, but these RFPs
13 go far beyond matters that bear on class certification, such that
14 they are primarily focused on the merits of the case. Contrary to
15 Plaintiffs' belief, they are not absolutely entitled to a response
16 to every RFP simply because it somehow or may relate(s) to certifi-
17 cation. When an RFP far oversteps the bounds of bifurcated
18 discovery, tangentially touches certification, and places a heavy
19 burden on EMI, the Court is fully within its authority to limit such
20 obtrusive discovery. Plaintiffs cannot draft such expansively
21 worded RFPs, knowing full well the limits of bifurcated discovery,
22 and then protest that they need it all. If the Court compels EMI to
23 respond to these expansive RFPs, the Court is certain that Plain-
24 tiffs will once again object that EMI has not fully responded to the
25 RFP as broadly phrased when EMI limits its response to certification
26 issues. However, the Court will use this opportunity to clarify an
27 issue Plaintiffs raise.

1 With regard to Plaintiffs' statements on page 14, lines 15
2 through 25, EMI should be mindful that it should have produced
3 whatever code that was the basis for the Easysaver Rewards program,
4 regardless of whether such code was exclusive to that program.
5 Footnote 5 in EMI's opposition appears to take the position that
6 shared codes infringe on business relationships with third parties.
7 However, any shared codes are discoverable if they were the basis
8 for the Easysaver program even if those codes were also used to
9 develop programs for third party partners. Codes exclusive to third
10 parties need not be produced, but codes must be produced if they
11 were the basis for the Easysaver program regardless of whether they
12 were also the basis for programs created for third parties. The
13 protective order in place in this case expressly protects third
14 party interests.

15 The foregoing is consistent with the Court's June 30, 2011,
16 Order. Shared codes used to implement the Easysaver program were
17 certainly used in EMI's "association or partnership with Provide
18 Commerce, Inc., only." If EMI interprets the word "only" at the end
19 of the quoted sentence to mean that codes must have been used
20 "exclusively" to implement the Easysaver program, this interpreta-
21 tion is off base. As the Court understood the previous dispute, EMI
22 objected to production of information that was exclusive to third
23 parties and not related to Provide Commerce or the Easysaver program
24 in any way. Such information is not discoverable because codes
25 written exclusively for other EMI partners are not relevant to this
26 case. However, insofar as EMI developed code for other partners and
27 Provide Commerce, such code certainly is relevant. Therefore, if
28 EMI has heretofore withheld any code on this basis, it shall produce
the withheld code.

1 **RFPs That Bear on Usage of Easysaver Benefits**

2 Plaintiffs next seek reconsideration of the Court's rulings
3 on RFP Nos. 24(j), 24(k), 26, and 27. They argue they need this
4 information to "test EMI's thesis" that "the fact that some people
5 redeemed EasySaver Rewards benefits is conclusive evidence that they
6 intentionally enrolled, which somehow undermines the class." (Doc.
7 No. 159 at 14-15.) EMI does not deny Plaintiffs' representation
8 that certification may be opposed partly on this basis. Regardless
9 of whether this argument is sound, Plaintiffs' may potentially face
10 it. Because Plaintiffs had limited space in their original briefing
11 to flesh out their need for the above RFPs, this point did not come
12 across well at that time. Therefore, with the limitation of
13 bifurcated discovery in mind, the Court now reevaluates each RFP.

14 Plaintiffs' motion is granted as to RFP Nos. 24(j) and 24(k).
15 If EMI's anticipated argument is that Easysaver enrollees were not
16 enrolled against their will because they used the program's
17 benefits, then the "number" and "percentage" of enrollees who
18 actually used benefits may be relevant. This information has the
19 potential to rebut the idea that class members used the benefits and
20 would have willingly registered for Easysaver as a result.

21 Plaintiffs' motion is denied as to RFP 26. RFP 26 seeks the
22 physical copy of each document that shows a putative class member
23 made a request for benefits. The Court again denies Plaintiffs'
24 request for the additional reasons that it is duplicative and
25 imposes an undue burden on EMI. First, the information EMI will
26 produce in response to RFP 24(j) and 24(k) will be the total number
27 of persons who sought benefits, while RFP No. 26 will produce only
28 a subset of that number (*i.e.*, registrants who sought benefits
solely through the EMI website as opposed to via the telephone and

1 the website). Second, searching its records for physical copies of
2 each request, the aggregate of which represents only a portion of
3 the number or percentage provided for RFP Nos. 24(j) and 24(k),
4 places and undue burden on EMI when weighed against the utility of
5 the information sought. The entire purpose of bifurcating discovery
6 is to minimize unnecessary costs and fees, and RFP 26 accomplishes
7 exactly the opposite result.

8 Plaintiffs' motion is granted in part as to RFP 27(a)-(c),
9 but denied in part as to RFP 27(d)-(f). If the purpose of this
10 information is to rebut EMI's "defense," that Easysaver enrollees
11 were not enrolled against their will because they used Easysaver
12 benefits, EMI's variable cost of the discounts and coupons are
13 irrelevant to that analysis.

14 **F. EMI Shall Not Redact Complainants' Contact Information**

15 In their original briefing, Plaintiffs sought identifying
16 information both for all class members in general and for persons
17 who complained to EMI. (Doc. No. 117 at 2-3.) Now, they seek that
18 information only for those persons who complained to EMI. (Doc. No.
19 159 at 15-16.) While this distinction was not drawn well in
20 original briefing and their argument was not developed, the Court
21 grants Plaintiffs' motion insofar as it requests that contact
22 information for complainants not be redacted.

23 Plaintiffs' cases certainly do not support their request for
24 absent class members' contact information at this stage of the
25 proceedings. However, insofar as Plaintiffs seek the contact
26 information of Easysaver registrants who complained to EMI, the
27 Court concludes that their contact information should not be
28 redacted. Although Plaintiffs did not make the following argument
in original briefing, and superficially fleshed it out in the

1 instant motion, the Court is aware that Defendants may argue that
2 Easysaver registrants were not enrolled against their will by
3 clicking the "X" that closed the registration window. In light of
4 this argument, persons who clicked the "X," who were nonetheless
5 registered, and who complained to EMI afterwards certainly are
6 percipient witnesses that may be able to provide facts that bear on
7 certifying their particular subclass. The Court reiterates that EMI
8 shall un-redact the contact information of only those persons who
9 complained to EMI. EMI need not produce the contact information for
10 every person who registered for the Easysaver program. Finally,
11 this Order applies to EMI only, not Provide Commerce. Provide
12 Commerce was not a target of the reconsideration motion, and the
13 Court will not now accept such an untimely motion as to Provide
14 Commerce.

15 **G. EMI Has Produced Documents Beyond March 2007**

16 EMI's representations on page 12 of its opposition render
17 Section 7 of Plaintiffs' motion moot, and this portion of the motion
18 is denied accordingly.

19 **III. CONCLUSION**

20 Where EMI is ordered to produce documents or information, it
21 shall do so by September 30, 2011.

22 IT IS SO ORDERED.

23 DATED: September 1, 2011

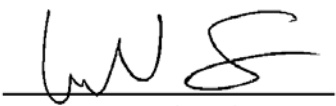
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Hon. William V. Gallo
U.S. Magistrate Judge