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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HONEY McEWAN, et al., Plaintiffs, v. OSP GROUP, L.P., et al., Defendants.

Case No.: 14-cv-2823-BEN (WVG)

**ORDER ON JOINT MOTION
FOR DETERMINATION OF
DISCOVERY DISPUTES**

Plaintiffs Honey McEwan and Susan Cameron (“plaintiffs”) bring this putative class action against OSP Group, L.P., OSP Group Merchant, Inc., OSP Group, Inc., and OSP Group, LLC (“OSP”) seeking damages for alleged violations of the California Invasion of Privacy Act (“the Privacy Act”), Cal. Pen. Code § 630 *et seq.* Now before the Court is a joint motion for the determination of several discovery disputes bearing on the scope of precertification discovery. For the reasons that follow, the Court grants each of plaintiffs’ requests to compel discovery and orders OSP to comply with the discovery requests no later than April 22, 2016.

I. BACKGROUND

McEwan commenced this case on October 17, 2014 by filing a class action complaint in California state court alleging violations of California Penal Code Sections 632 and 632.7. Complaint, attached as Exh. A to OSP’s Notice of Removal, ECF No. 1.

1 OSP removed the action to this Court on diversity grounds on November 26, 2014. Notice
2 of Removal, ECF No. 1.

3 On July 2, 2015, District Judge Roger Benitez granted in part and denied in part
4 OSP's motion to dismiss McEwan's First Amended Complaint. Order Granting in Part
5 Motion to Dismiss for Failure to State a Claim and Denying Motion to Strike, ECF No. 37.
6 Judge Benitez also denied OSP's motion to strike the class allegations. *Id.*

7 On December 4, 2015, this Court entered a Scheduling Order, which, at the joint
8 request of the parties, required that all fact discovery on both class certification and merits
9 issues be completed by July 1, 2016. Scheduling Order, ¶2, ECF No. 56.

10 McEwan filed a Second Amended Complaint ("SAC") on December 30, 2015.
11 Second Amend. Compl., ECF No. 60. The SAC added a second named plaintiff, Susan
12 Cameron, who allegedly communicated with OSP using a traditional landline telephone.

13 On March 29, 2016, plaintiffs filed a Third Amended Complaint ("TAC"). Third
14 Amend. Compl., ECF No. 74. The TAC adds a third named plaintiff, Lillian Gilden, who
15 allegedly communicated with OSP via a mobile phone.

16 Both the SAC and the TAC define the putative class as:

17 All natural persons who, while residing in and physically present in the
18 State of California, and during the applicable statute of limitations: (1)
19 participated in at least one telephone communication with a live
20 representative of defendants that was recorded by defendants; (2) were
21 not notified by defendants that their telephone communication was
being recorded; and (3) are identifiable through records held by
defendants and/or third parties.

22 Second Amend. Compl., ¶14, ECF No. 60; Third Amend. Compl., ¶16, ECF No. 68-3.

23 **II. THE DISCOVERY DISPUTES**

24 At issue on this motion are OSP's objections to the following discovery requests: (1)
25 plaintiffs' request that OSP identify and provide contact information for putative class
26 members; (2) plaintiffs' request that OSP identify calls to putative class members that are
27 associated with orders that were shipped to California addresses; and (3) plaintiffs' request
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1 that OSP identify current and former employees who participated in calls with putative
2 class members and provide contact information for former employees.

3 Counsel met and conferred concerning these disputes on February 8, 2016. OSP
4 served supplemental and amended responses on February 12, 2016. The joint motion was
5 filed on February 25, 2016.

6 **III. DISCUSSION**

7 **A. Disclosure of Caller Information**

8 Although OSP acknowledges that fact discovery on class certification and merits
9 issues has not been bifurcated, OSP nevertheless argues that disclosure of caller
10 information is premature because plaintiffs have not shown that the information will assist
11 plaintiffs in certifying a class under Rule 23 and disclosure of caller information may
12 violate its customers' privacy rights under California's constitution. Joint Mot. 11-19, ECF
13 No. 67. This Court disagrees.

14 "The decision to bifurcate discovery in putative class actions prior to certification is
15 committed to the discretion of the trial court." *True Health Chiropractic Inc. v. McKesson*
16 *Corp.*, 2015 WL 273188, at *1 (N.D. Cal. Jan. 20, 2015); *see also Vinole v. Countrywide*
17 *Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009) ("District courts have broad discretion
18 to control the class certification process, and '[w]hether or not discovery will be permitted
19 ... lies within the sound discretion of the trial court.'" (quoting *Kamm v. Cal. City Dev.*
20 *Co.*, 509 F.2d 205, 209 (9th Cir. 1975))). Even where discovery is bifurcated, the Ninth
21 Circuit has instructed that "the better and more advisable practice" is to "afford the litigants
22 an opportunity to present evidence as to whether a class action [is] maintainable." *Vinole*,
23 571 F.3d at 942 (quoting *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir.
24 1977)). "[F]ailing to allow precertification discovery where it is necessary to determine the
25 existence of a class is an abuse of discretion." *Perez v. Safelite Group Inc.*, 553 Fed. App'x
26 667, 669 (9th Cir. 2014) (citing *Kamm*, 509 F.2d at 210).

27 Here, at the specific request of the parties, the Court elected to combine fact
28 discovery on class certification and expert issues and ordered the parties to complete all

1 such discovery by July 1, 2016. Scheduling Order, ¶2, ECF No. 56. The Court reached this
2 decision after considering the statements of counsel for both parties at the Case
3 Management Conference that class and merits issues were closely linked and that
4 combined discovery would promote the efficient resolution of this litigation. OSP has
5 presented no persuasive arguments why the Court should reconsider that decision or delay
6 the disclosure of caller information.

7 First, the Court finds that plaintiffs' class allegations are sufficiently plausible so as
8 to entitle plaintiffs to some discovery on the issue of class certification.¹ Judge Benitez's
9 order denying OSP's motion to strike the class allegations has undeniable relevance here.
10 Order Granting in Part Motion to Dismiss for Failure to State a Claim and Denying Motion
11 to Strike at 11, ECF No. 37. And the Court's own independent review of the TAC indicates
12 that plaintiffs' class allegations make out a *prima facie* case under Rule 23. Plaintiffs allege
13 that the class meets the numerosity requirement. Third Amend. Compl., ¶19, ECF No. 75.
14 Plaintiffs also plausibly allege that there are several common question of fact and law that
15 predominate over individual issues, including whether OSP notified its customers that
16 telephone calls were recorded. *Id.* ¶18. Plaintiffs also allege, and OSP has provided no
17 reason to doubt, that their claims are typical of the claims of the putative class members
18 and that they will fairly and adequately protect the interests of the class members. *Id.* ¶20.
19 Finally, plaintiffs allege that the class action is superior to other methods for resolving this
20 controversy because the damages suffered by each putative class member are low and the
21 burden of litigating each claim on an individual basis would make obtaining redress for
22 members of the class impracticable. *Id.* ¶21.

23 Second, the Court finds that caller information has clear relevance to class
24 certification.² OSP has signaled that it will oppose class certification on the grounds that
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26 ¹ The Court's focus is solely on whether plaintiffs have shown that the class allegations are
27 sufficiently plausible as to entitle plaintiffs to discovery on the issue of class certification. The Court
28 makes no finding regarding plaintiffs' entitlement to class certification.

² The Court disagrees with plaintiffs' contention that OSP has waived its relevance objection by
asserting it in the first instance as a boilerplate objection.

1 consent and confidentiality are individualized issues that cannot be resolved through class-
2 wide proof. Joint Mot. 16-17, ECF No. 67. In this regard, the Supreme Court had directed
3 courts considering class certification motions to engage in a “rigorous analysis” to
4 determine whether Rule 23’s prerequisites have been satisfied, an analysis that will
5 frequently “overlap with the merits of plaintiff’s underlying claim. *Wal-Mart Stores, Inc.*
6 *v. Dukes*, 131 S.Ct. 2541, 2551 (2011). Recent class certification decisions in Privacy Act
7 cases also make clear that plaintiffs’ success or failure on class certification will depend in
8 large part on plaintiffs’ ability to assemble a detailed record addressing the nature and
9 content of the calls. *See, e.g., NEI Contracting and Engineering, Inc.*, 2015 WL 4923510,
10 at *4 (S.D. Cal. Aug. 18, 2015); *Ades v. Omni Hotels Mgmt. Corp.*, 2014 WL 4627271, at
11 *10-13 (C.D. Cal. Sept. 8, 2014); *Quesada v. Banc of America Inv. Servs. Inc.*, 2013 WL
12 623288, at *5-7 (N.D. Cal. Feb. 19, 2013). Communication with putative class members
13 may or may not assist plaintiffs in this regard, but plaintiffs are entitled to try.³

14 Third, the Court is unpersuaded by OSP’s perfunctory argument that disclosure of
15 caller information here would violate the right to privacy found in Article I, Section 1 of
16 California’s constitution. The California Supreme Court has explained that the privacy
17 right protects only an “individual’s *reasonable* expectation of privacy against a *serious*
18 invasion.” *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal.4th 360, 370 (2007)
19 (emphasis in original). A “serious” invasion of privacy is one that “in nature, scope, and
20 actual or potential impact [would] constitute an egregious breach of social norms.” *Id.* at
21 371. If the court finds that these criteria are met, then it must balance the privacy interest
22 against competing interests, including the discovery rights of civil litigants. *Id.*

23 *Pioneer* itself involved a request for precertification disclosure of contact
24 information for putative class members. Granting the request, the court cautioned that
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28 ³ Although not an issue to be resolved on this motion, plaintiffs allege that, subsequent to service
of the complaint in this matter, OSP destroyed, or allowed to be purged from its system, recorded
conversations between customers and OSP’s representatives. Plaintiffs argue that the approximately
150,000 missing phone records make it all the more important to obtain customer contact information.

1 “[c]ontact information regarding the identity of potential class members is generally
2 discoverable, so that the lead plaintiff may learn the names of other persons who might
3 assist in prosecuting the case.” *Id.* at 373. “Such disclosure involves no revelation of
4 personal or business secrets, intimate activities, or similar private information, and
5 threatens no undue intrusion into one’s personal life, such as mass-marketing efforts or
6 unsolicited sales pitches.” *Id.* Where necessary, the court may employ “[p]rotective
7 measures, safeguards and other alternatives [to] minimize the privacy invasion.” *Id.* at 371.

8 While *Pioneer* held that the trial court did not abuse its discretion by requiring
9 plaintiffs to mail notice to putative class members prior to disclosure of their contact
10 information, *id.* at 373, the court “did not impose a notice requirement.” *Tierno v. Rite Aid*
11 *Corp.*, 2008 WL 3287035, at *3 (N.D. Cal. July 31, 2008); *see also Reed v. 1-800 Contacts,*
12 *Inc.*, 12-cv-2359-JM (BGS), ECF No. 22 (S.D. Cal. March 29, 2013) (ordering defendant
13 to produce contact information for putative class members without opt-out notice); *Algee*
14 *v. Nordstrom, Inc.*, 2012 WL 1575314, at *5-6 (N.D. Cal. May 3, 2012) (same);
15 *Khalilpour*, 2010 WL 1267749, at *3 (same).

16 Here, OSP has failed to demonstrate that disclosure of the names and contact
17 information of putative class members to plaintiffs’ counsel would infringe on its’
18 customers’ privacy rights. Consumers may reasonably expect that businesses to which they
19 have provided their names and contact information will not disseminate that information
20 to third parties. However, the disclosure of contact information during discovery in civil
21 litigation generally does not constitute a serious invasion of that privacy interest, let alone
22 an egregious breach of social norms. Any remaining confidentiality concerns are
23 sufficiently addressed by the protective order already in place in this case. *See Pioneer*, 40
24 Cal.4th at 373 (“[I]f intrusion is limited and confidential information is carefully shielded
25 from disclosure except to those who have a legitimate need to know, privacy concerns are
26 assuaged.”). OSP has not argued for the use of a notice procedure in this case, and the
27 Court does not find that such notice is required.

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1 Finally, the Court rejects OSP's argument that plaintiffs have an untoward
2 motivation for seeking caller information, namely, "to solicit additional named plaintiffs."
3 Joint Mot. 19, ECF No. 67. As an initial matter, there is no reason to believe that solicitation
4 of further named plaintiffs is a pressing concern. The named plaintiffs in this case already
5 include a landline user, a cordless phone user and a mobile phone user. Moreover, the fact
6 that information that is relevant and discoverable may also be used for a purpose that, on
7 its own, would not justify disclosure of that information, is not a reason to deny or delay
8 disclosure. Here, the identification of potential class members is relevant to class
9 certification and to the merits, and is not disproportionate to the needs of the case, or
10 otherwise prohibited by law. Nothing more is required.

11 **B. Identification of Calls Associated with Shipments to California**

12 OSP also objects to plaintiffs' second interrogatory, which requires OSP to identify
13 calls involving putative class members that are "associated with or resulted in an order
14 shipped to a California mailing address." Joint Mot. 12-13, ECF No. 67. OSP's objection
15 is unavailing.

16 As an initial matter, the Court finds that OSP has failed to preserve its undue burden
17 objection to this interrogatory. Under chambers rules, "[w]here the responding party
18 provides boilerplate or generalized objections, the 'objections are inadequate and
19 tantamount to not making any objection at all.'" Chambers Rules, App'x B, section A, part
20 1 (quoting *Walker v. Lakewood Condominium Owners Assocs.*, 186 F.R.D. 584, 587 (C.D.
21 Cal. 1999)); *cf.* Fed. R. Civ. P. 33(b)(4) ("The grounds for objecting to an interrogatory
22 must be stated with specificity. Any ground not stated in a timely objection is waived unless
23 the court, for good cause, excuses the failure."). Here, OSP's undue burden objection
24 consists of nothing more than boilerplate assertions that the requested discovery would be
25 "unduly burdensome and harassing." ECF 67-2 at 7. OSP has waived the objection.

26 Even had OSP preserved this argument, the Court would have rejected the objection
27 on the merits. In deciding whether a request is unduly burdensome, a court must balance
28 the burden to the responding party against the benefit to the party seeking the discovery.

1 *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1032 (E.D. Cal. 2010). “The party seeking to
2 compel discovery has the burden of establishing that its request satisfies the relevancy
3 requirements of Rule 26(b)(1).” *La. Pac. Corp. v. Money Mkt. 1 Institutional Inv. Dealer*,
4 2012 WL 5519199, at *3 (N.D. Cal. 2012). “[T]he party opposing discovery [then] has the
5 burden of showing that discovery should not be allowed, and also has the burden of
6 clarifying, explaining and supporting its objections with competent evidence.” *Id.* (citing
7 *DirectTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 2002)). The party opposing
8 discovery is “required to carry a heavy burden of showing” why discovery should be
9 denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975); *see also Brady v.*
10 *Grendene USA, Inc.*, 2014 WL 4925578, at *3 (S.D. Cal. Sept. 26, 2014).

11 Here, plaintiffs have met their burden of showing that the discovery is relevant to
12 both class certification and the merits. OSP argues that the information sought has only
13 limited relevance because “[t]here is no direct relationship between a shipping destination
14 and a caller’s location or residence at the time of the call.” Joint Mot. 13, ECF 67. But
15 evidence is not without relevance simply because it is circumstantial or does not constitute
16 proof beyond a reasonable doubt. *See Fed. R. Civ. P.* 401 (“Evidence is relevant if it has
17 any tendency to make a fact more or less probable than it would be without the evidence
18 and the fact is of consequence in determining the action.”). The information sought by
19 plaintiffs may tend to show that a caller was a California resident and was physically
20 present in the state at the time of the call, both of which are elements that plaintiffs may be
21 required to prove in this action. *See Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95,
22 119 (2006). The requested discovery is therefore relevant.

23 OSP has failed to convincingly demonstrate in response that the burden of answering
24 the interrogatory outweighs the likely relevance of the information. OSP’s objection is
25 supported on this motion by a declaration in which David McInnis, its Vice President of
26 Customer Care, states that:

27 [t]here were over 611,000 calls recorded with California area codes
28 during the class period. The process necessary to create a table

1 identifying which recorded telephone calls are associated with an order
2 that was shipped to a California address would be incredibly time-
3 consuming and burdensome, if not impossible. To create such a table,
4 or gather such information, I would need to have our IT team first run
5 a search to find all orders shipped to a California zip code during the
6 class period. Once I had this information, I would need to individually
7 check each order, one by one, to determine whether the order was
8 associated with a California telephone number, and to determine
9 whether the order was placed via a call that was recorded (assuming
that Plaintiffs are requesting this information for orders that were
completed via a recorded telephone call and not near in time to a
recorded call). This process would take months to complete, if not a
year or more.

10 McInnis Decl., ECF No. 67-9. The declaration is insufficient to support OPS's contention
11 that compliance with the discovery request would be unduly burdensome. Mr. McInnis
12 fails to lay a foundation for his opinion that each order would need to be manually cross-
13 checked against the table of calls with a California area code. Mr. McInnis does not
14 represent that he has a technical background or any particular knowledge of OSP's
15 information technology capabilities. Without such a foundation, the declaration is not
16 competent evidence and cannot meet OSP's burden.

17 **C. Identification of Employees is Warranted**

18 The last area of dispute concerns the identification of employees. The requests at
19 issue seek: (1) the names of OSP's current call center agents who participated in calls to
20 putative class members; and (2) the names and contact information of former OSP call
21 center agents who participated in calls to putative class members. OSP argues that, under
22 Section 1985.6 of the California Code of Civil Procedure, its employees must be given
23 notice of the discovery request and an opportunity to object. This Court disagrees.⁴

24 Section 1985.6 provides that “[p]rior to the date called for in the subpoena duces
25 tecum for the production of employment records, the subpoenaing party shall serve or
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27 ⁴ During oral argument, plaintiffs asserted that Section 1985.6 does not apply in federal court.
28 Because plaintiffs did not raise this argument in the joint motion, and because the Court finds the argument
that plaintiffs did make dispositive, the Court does not address this issue.

1 cause to be served on the employee whose records are being sought a copy of [the
2 subpoena].” Cal. Code Civ. Proc. § 1985.6(b). The statute defines “employment records”
3 as “the original or any copy of books, documents, other writings, or electronically stored
4 information pertaining to the employment of any employee maintained by the current of
5 former employer of the employee, or by any labor organization that has represented or
6 currently represents the employee.” Cal. Code Civ. Proc. § 1985.6(a)(3). Thus, by its plain
7 terms, Section 1985.6 only applies to the use of a subpoena duces tecum for the production
8 of employment records. Because the instant dispute involves neither a subpoena duces
9 tecum, nor employment records, Section 1985.6 is inapposite.

10 OSP relies on *Life Technologies Corporation v. Superior Court*, 197 Cal.4th 640
11 (2011), a decision of the California Court of Appeal, First District. In *Life Technologies*,
12 the appellate court reviewed a trial court order requiring a defendant employer to answer
13 interrogatories requesting extensive and sensitive employee information—including the
14 identity and contact information employees, the reasons for the termination of certain
15 employees, and whether those employees were offered and/or accepted severance
16 payments. *Id.* at 647-56. The court of appeal held that the trial court abused its discretion
17 by requiring the defendant to respond to the interrogatory without first weighing the
18 plaintiff’s need for each individual category of information against the privacy interest. *Id.*
19 at 655-56. The court also found that, to the extent disclosures were warranted, the trial
20 court should have required that the plaintiff provide employees with notice and an
21 opportunity to object in line with Section 1985.6. *Id.* In this regard, the court noted that a
22 nonparty employee “should not be deprived of the protections [of Section 1985.6] simply
23 because the discovery vehicle used is a set of special interrogatories, rather than a subpoena
24 duces tecum.” *Id.*

25 *Life Technologies* does not stand for the proposition that Section 1985.6 applies to
26 interrogatories—a reading that would flatly contradict the plain text of the statute. Rather,
27 *Life Technologies* stands for the proposition that the California Constitution may require
28 the use of an opt-out procedure analogous to that found in Section 1985.6 when a litigant

1 requests highly sensitive employment records. But OSP does not, on this motion, raise a
2 privacy argument under the California Constitution, and it is at least doubtful whether the
3 privacy right found in that document protects OSP's employees based in El Paso, Texas.
4 Nor is the basic contact information sought in this case comparable to the sensitive
5 information sought in *Life Technologies*. As with the disclosure of putative class members'
6 contact information, no serious invasion of the constitutional privacy interest occurs when
7 the information is disclosed subject to a protective order during civil litigation. *See Puerto*
8 *v. Superior Court*, 158 Cal.App.4th 1242, 1253-54 (2008)

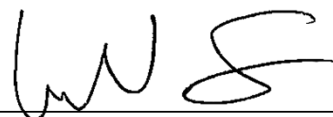
9 **IV. CONCLUSION**

10 For the reasons stated herein, the Court grants each of plaintiffs' requests to compel
11 discovery and orders that on or before April 22, 2016, OSP shall:

- 12 1. Provide plaintiffs with call detail information (the originating and receiving
13 telephone numbers, and the date, time and duration of the call) for California
14 Callers, as defined in Plaintiffs First Set of Interrogatories, recorded during
15 the class period and identifying information (originating and receiving
16 telephone numbers, name, address, and email address) for California Callers;
- 17 2. Identify calls to California Callers that are associate with or resulted in an
18 order shipped to a California mailing address;
- 19 3. Disclose to plaintiffs the names of OSP's current call center agents who
20 participated in calls to California Callers and the names and contact
21 information of former OSP call center agents who participated in calls to
22 California Callers.

23 **IT IS SO ORDERED.**

24 Dated: March 30, 2016



25
26 Hon. William V. Gallo
27 United States Magistrate Judge
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