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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

STACY LUCAS, an individual, TAREK ALBABA, an individual, RIGOBERTO VINDIOLA, and individual, DAVID GAMMA, an individual, SARAH FISHER, an individual, on behalf of themselves and all other similarly situated consumers,

Plaintiffs,

v.

BREG, INC., a California corporation; GARY LOSSE, an individual; MARK HOWARD, an individual; and DOES 1 through 50, inclusive,

Defendants.

Case No.: 3:15-CV-00258-BAS-NLS

ORDER ON JOINT MOTION FOR DETERMINATION OF DISCOVERY DISPUTE NO. 1 RE: PROTECTIVE ORDER FOR PROTECTION OF CONFIDENTIAL INFORMATION

(Dkt. No. 30)

Before the Court is the parties’ Joint Motion for determination of a discovery dispute regarding the terms of a protective order for Defendant Breg’s confidential information. (Dkt. No. 30.) The parties reached an impasse as to the procedure for filing confidential documents under seal. (Id.) For the reasons set forth below, the Court **ORDERS** that the parties must comply with the procedures for filing confidential documents under seal as set forth in the Court’s Chamber Rules, Civil Local Rule 79.2,

1 and ECF Administrative Policies and Procedures, Section II.j.

2 **I. RELEVANT BACKGROUND**

3 Plaintiff Stacy Lucas first filed this action in state court on June 13, 2011. (Dkt. No.
4 1 at 2.) Lucas was joined by other plaintiffs and filed an amended complaint, asserting
5 claims on behalf of a putative nationwide class. The third amended complaint is currently
6 Plaintiffs' operative pleading. (Id.)

7 While the case was pending in state court, the parties entered into a stipulated
8 protective order, which was approved by the assigned superior court judge on February 14,
9 2014. (Dkt. No. 30 at 2.) During discovery, Defendant Breg produced numerous
10 documents. Defendant Breg contends it designated "some of [the documents] – not all" as
11 confidential under the protective order. (Id.) Plaintiffs contend the "vast majority of all
12 documents" produced by Breg were designated as confidential. (Id. at 5.)

13 This case was removed to federal court on February 6, 2015. (Dkt. No. 1.) On July
14 10, 2015, the Court ordered the parties to file their proposed stipulated protective order by
15 July 24, 2015, and at the parties' request the Court extended the deadline to August 7, 2015.
16 (Dkt. No. 28.)

17 The parties met and conferred regarding the terms of a proposed stipulated protective
18 order. Defendant Breg proposed the parties file the same protective order in this Court as
19 was previously entered in state court, with the following modifications: "(1) specific
20 references to California rules would be removed or replaced with references to applicable
21 federal rules and rules of Court; (2) the two provisions required by this Court's chamber
22 rules be added; and (3) the exhibit to the protective order be revised to reference the
23 appropriate court." (Dkt. No. 30 at 2.)

24 Plaintiffs objected to Defendants' proposal to include in the protective order one of
25 the provisions required by this Court's chamber rules. Specifically, Plaintiffs objected to
26 including this Court's required provision regarding the procedures for filing documents
27 under seal. (Dkt. No. 30 at 5-6.) The provision at issue states:

28 Nothing shall be filed under seal, and the Court shall not be required to take

1 any action without separate prior order by the Judge before whom the hearing
2 or proceeding will take place, after application by the affected party with
3 appropriate notice to opposing counsel. The parties shall follow and abide by
4 applicable law, including Civ. L.R. 79.2, ECF Administrative Policies and
5 Procedures, Section II.j, and the chambers' rules, with respect to filing
6 documents under seal.¹

7 Chmb. Rule VII.A.

8 The parties could not reach an agreement concerning the language to include in the
9 protective order, and thus filed their joint motion concerning this dispute on August 7,
10 2015.

11 **II. SUMMARY OF THE PARTIES' DISPUTE**

12 Plaintiffs contend Defendant Breg has the burden to selectively designate documents
13 it believes in good faith are confidential and subject to a protective order, as well as provide
14 a basis for that designation. (Dkt. No. 30 at 5-6.) In support, Plaintiffs cite to the
15 undersigned's Chamber Rules, including Chambers Rule VIII, which states that a request
16 to seal "must be narrowly tailored to seek sealing only of sealable material." (Dkt. 30.)
17 Plaintiffs aver that Breg has the burden to establish the documents it produced are sealable
18 material, and has the burden of establishing the confidentiality of its records. (Id.) As
19 such, Plaintiffs do not want to include the provision at issue because it would obligate them
20 to move to seal documents before filing them with their motions.

21 Defendants Breg and Mark Howard contend Plaintiffs cannot file documents that
22 have already been designated as confidential without moving to seal them first because it
23 would violate the state court protective order and this Court's rules. Breg contends
24 Plaintiffs should be required to follow the Court's procedures for filing documents under
25 seal. (Dkt. No. 30 at 4-5.) Defendant Gary Losse agrees with Defendant Breg's and

26 ¹ The Court's Civil Local Rule 79.2 states that "[d]ocuments that are to be filed under seal
27 must be accompanied by an order sealing them. If the order is also to be filed under seal,
28 it must so state." The ECF Administrative Policies and Procedures, Section II.j provides
the procedures for how to e-file sealed documents in civil cases.

1 Howard's position. (*See id.* at 5.)

2 **III. DISCUSSION**

3 Plaintiffs' contention, that Breg has the burden to first demonstrate the material it
4 designated is confidential, is misplaced. Although this Court's rules require that a request
5 to seal documents "be narrowly tailored to seek sealing only of sealable material," the rules
6 do not shift the burden to the party who initially designated the documents as confidential
7 to demonstrate the content of the material is sealable when filing them. Rather, the party
8 who seeks to file documents containing confidential information under seal is responsible
9 for moving to seal those documents. *See* Chmb. Rule VIII.A ("The party seeking to file
10 under seal must electronically file a 'Motion to File Documents Under Seal'").

11 Moreover, when the parties initially entered into their Agreed Protective Order in
12 state court, they agreed that Breg may designate as confidential "any material trade secrets
13 or other confidential or proprietary research, development, manufacturing, complaint,
14 marketing sales or commercial information...." (Dkt. No. 30-3 at ¶ 5.) Breg therefore
15 already identified and designated the documents it believes warrant protection from
16 disclosure when it marked them as confidential. Thus, contrary to Plaintiffs' contentions,
17 it is not Defendant Breg's burden to first demonstrate the documents it designated as
18 confidential constitute sealable material. Rather, it is the party who seeks to file documents
19 designated as confidential to move to seal them from inspection by the public.

20 Plaintiffs raised the concern that if they are required to move to seal documents
21 designated as confidential, they would need to disclose the documents they intend to file
22 to support their motion for class certification. (Dkt. No. 30 at 4.) Plaintiffs, however, need
23 not preview to Defendants the confidential documents they intend to use because they may
24 file their motions to seal documents on the same date they file their motion for class
25 certification.

26 To the extent Plaintiffs contend some of the documents Breg designated as
27 confidential should not be marked as such, and contend the documents therefore do not
28 contain sealable material, Plaintiffs may challenge those designations before they file their

1 motions. Indeed, when the parties entered into the Agreed Protective Order in state court,
2 they agreed that if a party wishes to dispute the designation of confidential material, the
3 party must notify the designating party, and specify the materials in dispute and the nature
4 of the dispute. (Dkt. No. 30-3 at ¶ 8.a.) Plaintiffs therefore had the obligation to object to
5 any designations Breg made regarding whether the documents contained confidential
6 material. Plaintiffs do not provide a persuasive basis for departing from this standard
7 procedure now that the case is pending in this Court. This is particularly so in light of the
8 Court's own model protective order that likewise contains this standard procedure.
9 Namely, that a party designates documents as confidential, and then a party who wishes to
10 dispute the designation of confidential may object. (*See* Model Protect. Ord., sub. Patent
11 L.R., p.97.)

12 Lastly, the Court addresses the timing of challenges to documents designated as
13 confidential. If Plaintiffs elect to challenge certain documents that were already produced
14 as not containing confidential information, Plaintiffs must notify the designating party of
15 the dispute in writing, specifying the material in dispute and the nature of the dispute, by
16 **October 9, 2015**. The Court expects the parties to meet and confer in good faith to agree
17 upon whether the designations should remain or be removed, so that any future process by
18 Plaintiffs to move to seal documents will be efficient for both the parties and the Court. If
19 the parties are unable to resolve the dispute, they may prepare and file a joint motion for
20 determination of discovery dispute, as outlined in Chambers Rules, by **November 6, 2015**.
21 For any additional documents produced during the course of discovery while this case
22 proceeds in this Court, any challenges to material designated as confidential must be
23 brought in accordance with the timetable the Court will set forth in the protective order at
24 paragraph 8.a.

25 **IV. CONCLUSION**


26 In sum, Plaintiffs have not provided sufficient grounds for departing from the
27 Court's required procedures for seeking to file documents under seal.

28 /

1 Accordingly, the Court will concurrently enter a protective order governing the use and
2 protection of confidential information in this case, which will contain the Court's required
3 provision regarding filing documents under seal.

4 **IT IS SO ORDERED.**

5 Dated: September 16, 2015

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7 Hon. Nita L. Stormes
8 United States Magistrate Judge
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