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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 IN RE: BofI HOLDING, INC.
12 SECURITIES LITIGATION.,

Case No.: 3:15-CV-02324-GPC-KSC

13
14 **ORDER:**

15 **DENYING LEAD PLAINTIFF'S**
16 **OBJECTIONS TO THE MAGISTRATE**
17 **JUDGE'S ORDER ON JOINT MOTION**
18 **FOR DETERMINATION OF**
19 **DISCOVERY DISPUTE No. 2**

20 [Dkt. No. 100-1]
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22 Before the Court are Objections, Dkt. No. 100, to Magistrate Judge Karen
23 Crawford's March 23, 2017 order, Dkt. No. 97, ruling on the parties' Joint Motion for
24 Determination of Discovery Dispute No. 2, Dkt. No. 90. In the March 23 order, the
25 magistrate judge denied Lead Plaintiff's "request for an order permitting it to review and
26 use documents provided by a former employee of defendant subject to a Protective Order
27 and defendant's privilege review" and granted "defendant's request for a Court Order
28 requiring plaintiff to return the documents provided by a former employee of BofI and to

1 destroy any copies in its possession.” Dkt. No. 97 (the “March 23 order” or “the order”).
2 Lead Plaintiff filed objections to the magistrate judge’s order on April 6, 2017. Dkt. No.
3 100. The objections have been fully briefed. Defendants filed an opposition on April 17,
4 2017. Dkt. No. 105. Lead Plaintiff filed its reply on April 28, 2017. Dkt. No. 108.

5 Upon consideration of the moving papers and the applicable law, and for the
6 reasons set forth below, the Court **DENIES** Lead Plaintiff’s Objections to Magistrate
7 Judge Crawford’s March 23, 2017 Order Regarding Joint Motion for Determination of
8 Discovery Dispute No. 2. Dkt. No. 100-1.

9 **BACKGROUND**

10 This discovery dispute arises from Lead Plaintiff’s informal investigations into the
11 facts bearing on its securities fraud suit against Defendants.

12 As part of its pre-discovery informal investigations into its claims, Lead Plaintiff
13 has interviewed a number of BofI’s former employees. One of these employees, upon
14 being approached by Lead Plaintiff’s investigator, provided Lead Plaintiff with 1,189
15 pages of documents associated with her employment at BofI. Dkt. No. 97 at 2. Once
16 received, a contract attorney working for Lead Plaintiff reviewed the documents to
17 determine whether the documents contained privileged or protected information. *Id.* at 3.
18 The contract attorney concluded that the documents did contain such information. *Id.* As
19 a result, Lead Plaintiff shipped the documents to outside legal ethics counsel and
20 screened the contract attorney from any future participation in the litigation against BofI.
21 *Id.* A copy of the documents have remained with outside legal ethics counsel pending the
22 resolution of this dispute. *Id.*

23 On October 20, 2016, Lead Plaintiff’s outside legal ethics counsel contacted
24 Defendants about the documents. Outside counsel requested that Defendants perform a
25 privilege review of the documents and complete a privilege log of any documents that
26 should be withheld or redacted. *Id.* After reviewing the documents, Defendants
27 objected, on October 28, 2016, to the release of any of the documents and sought their
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1 immediate return. *Id.* According to Defendants, the documents contain “highly
2 confidential, non-public banking documents” that include customer loan files; sensitive
3 financial information about BofI’s customers, such as federal tax forms, social security
4 numbers, account numbers, financial information and balances; BofI’s code of conduct;
5 various internal lending guidelines marked “Confidential – Internal Use Only”; and
6 internal emails sent and received at BofI.¹ Dkt. No. 90 at 13. On November 4, 2016,
7 Lead Plaintiff informed Defendants that it would not destroy or return the documents
8 until the dispute was settled. *Id.*

9 On December 5 and 8, 2016, the parties conferred regarding the documents. *Id.*
10 During the meetings, the parties discussed having the documents remain in the sole
11 custody of outside legal counsel until the Fed. R. Civ. P 16 (“Rule 16”) conference took
12 place. *Id.* Ultimately, however, the parties were unable to reach an accord and the Joint
13 Motion for Determination of Discovery Dispute No. 2 soon followed. Dkt. No. 90 (filed
14 January 18, 2017).

15 On March 23, 2017, Magistrate Judge Karen Crawford denied Lead Plaintiff
16 permission to review the documents subject to a protective order. Dkt. No. 97. The
17 magistrate judge concluded (1) that the court did not have authority under Rule 26(c) to
18 issue the requested protective order because formal discovery had yet to begin and (2)
19 that Lead Plaintiff’s position was not persuasive under the legal authority cited, most
20 notably the district court opinion in *Brado v. Vocera Comms., Inc.*, 14 F. Supp. 3d 1316
21 (N.D. Cal. 2014). Accordingly and in light of the fact that formal discovery had not yet
22 begun, the magistrate judge ordered that Lead Plaintiff return the documents to
23 Defendants and “destroy any copies in its possession.” Dkt. No. 97 at 10.

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27 ¹ Lead Plaintiff is not in a position to make a statement about the content of the documents given that the
28 sole copy is in the hands of outside legal ethics counsel. *See* Dkt. No. 90 at 20 (explaining that Lead
Plaintiff cannot verify contents of the documents given the protections afforded to the documents).

1 **LEGAL STANDARD**

2 Under Federal Rule of Civil Procedure 72(a), aggrieved parties may file objections
3 to the rulings of a magistrate judge in non-dispositive matters within fourteen days.
4 Fed. R. Civ. P. 72(a). In reviewing a magistrate judge’s order, the district judge “must
5 consider timely objections and modify or set aside any part of the order that is clearly
6 erroneous or is contrary to law.” Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A); *see*
7 *also U.S. v. Raddatz*, 447 U.S. 667, 673 (1980); *Osband v. Woodford*, 290 F.3d 1036,
8 1041 (9th Cir. 2002).

9 Under the “clearly erroneous standard,” a court should overturn a magistrate
10 judge’s ruling when it is “left with the definite and firm conviction that a mistake has
11 been committed.” *See Concrete Pipe & Prods. of Cal., Inc. v. Constrs. Laborers Pension*
12 *Trust*, 508 U.S. 602, 622 (1993). A magistrate judge’s legal conclusions as to non-
13 dispositive matters are reviewable for clear error. *Grimes v. City & Cnty. of San*
14 *Francisco*, 951 F.2d 236, 240-41 (9th Cir. 1991) (citing *Maisonville v. F2 America, Inc.*,
15 902 F.2d 746, 747-48 (9th Cir. 1990)). “An order is contrary to law when it fails to apply
16 or misapplies relevant statutes, case law, or rules of procedure.” *DeFazio v. Wallis*, 459
17 F. Supp. 2d 159, 163 (E.D.N.Y. 2006) (internal citations omitted).

18 Nondispositive decisions issued by magistrate judges under 28 U.S.C.
19 § 636(b)(1)(A) are entitled to “great deference by the district court.” *U.S. v. Abonce-*
20 *Barrera*, 257 F.3d 959, 969 (9th Cir. 2002). As such and in making its determination, the
21 “reviewing court may not simply substitute its judgment for that of the deciding court.”
22 *Grimes*, 951 F.2d at 240-41.

23 **DISCUSSION**

24 Lead Plaintiff argues that the Magistrate Judge’s March 23, 2017 order should be
25 reversed because it is “contrary to law” and suffers from a number of legal errors. Dkt.
26 No. 100-1.

1 Lead Plaintiff argues that the first legal error arises from the order’s conclusion
2 that the court lacked authority to enter a pre-discovery protective order. Citing to this
3 Court’s opinion in *In re Bofl Holding, Inc. Sec. Litig.*, 318 F.R.D. 129, 135-36 (S.D. Cal.
4 2016), Lead Plaintiff argues that the magistrate judge erred by failing to invoke its
5 “inherent authority” to issue the requested protective order. Dkt. No. 100-1 at 6.

6 Next, Lead Plaintiff faults the magistrate judge for misapplying the standard
7 introduced in *Brado*. Lead Plaintiff argues that the five factors articulated in *Brado* —
8 namely, (1) the impropriety of counsel’s conduct in obtaining the documents; (2) the
9 incentives and disincentives for employees to wrongfully take the documents; (3)
10 prejudice to the opposing party; (4) the truth-seeking function of the court; and (5) the
11 public policy of the Sarbanes-Oxley Act of 2002 — all weigh in favor of Lead Plaintiff’s
12 request to review the documents subject to a protective order.

13 Third and finally, Lead Plaintiff asserts that the magistrate judge’s reliance on a
14 handful of “additional factors” in denying Lead Plaintiff’s protective order was also
15 “contrary to law.” Specifically, Lead Plaintiff challenges the magistrate judge’s
16 treatment of (1) the presence of “highly sensitive confidential information” among the
17 misappropriated documents; (2) the “significant additional costs” to Defendants
18 “associated with, at a minimum, conducting a privilege review and redacting” privileged
19 and third-party information; and (3) the magistrate judge’s conclusion that the use of the
20 documents “go well beyond” informal investigations. Dkt. No. 90 at 9-10. The Court
21 will address each of these arguments in turn.

22 **1. *Brado v. Vocera***

23 Although Lead Plaintiff contends that the magistrate judge made multiple legal
24 errors in issuing its March 23, 2017 order, Lead Plaintiff’s objections are grounded in the
25 magistrate judge’s treatment of Lead Plaintiff’s primary authority, *Brado v. Vocera*. In
26 the Joint Motion originally submitted to the magistrate judge, Dkt. No. 90, Lead Plaintiff
27 relied heavily on the *Brado* decision as precedent for the permission and protective order
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1 that it sought. The March 23 order, however and as explained in further detail below, did
2 not find that it was appropriate to follow *Brado*, here. As such, and before addressing
3 each of Lead Plaintiff’s “contrary to law” contentions, the Court will first turn to the
4 *Brado* decision.

5 The circumstances in *Brado* were substantially similar to the circumstances here.
6 As part of plaintiff Brado’s informal, pre-discovery investigations into its securities fraud
7 claims against Defendant Vocera, Plaintiff interviewed a former Vocera employee. 14
8 F. Supp. 3d at 1318. That employee, in turn, provided Brado with documents that
9 contained proprietary and confidential Vocera information. *Id.* Upon learning that Brado
10 had such confidential documents in its possession, Vocera argued that the documents
11 should be returned both because the former employee had misappropriated the documents
12 and because he had breached his confidentiality obligations to Vocera by handing them
13 over. *Id.* Brado countered by arguing that it should be permitted to use the non-
14 privileged documents subject to a protective order. *Id.*

15 Ultimately, the *Brado* court held that it was proper for the plaintiff to review the
16 documents provided by the former employee, subject to a protective order.² *Id.* at 1323.
17 In reaching that decision, *Brado* weighed the parties’ positions under five factors: namely
18 (1) whether plaintiff’s counsel had engaged in any improper conduct to retrieve the
19 documents; (2) whether the employee who misappropriated the documents had any
20 incentives to taking the documents (or, relatedly, adequate disincentives to taking them);
21 (3) whether defendant would be prejudiced by the disclosure; (4) the court’s imperative
22 to pursue the truth in resolving the dispute; and (5) public policy considerations favoring
23 whistleblowers. *Id.* at 1321-23.

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27 ² The *Brado* order left it up to the parties to spell out the contents of the protective order. *Id.* at 1323.
28 The *Brado* court also did not specify under what legal authority it had authorized the pre-discovery
protective order. *See id.*

1 The *Brado* court found that each of these factors weighed in favor of granting the
2 plaintiff permission to use the documents pursuant to a protective order. First, there was
3 no reason, the *Brado* court explained, to prohibit counsel from using the documents
4 because there was no dispute that plaintiff’s counsel had any role in the former
5 employee’s misappropriation of the documents. *Id.* at 1320-21. Second, the former
6 employee was not a named plaintiff and therefore had “no direct interest in th[e] suit.”
7 *Id.* at 1321. Moreover, the court concluded, because the former employee was “not
8 immune to claims for breach of contract or conversion,” there was no need to further
9 disincentivize such theft by restricting the use of the documents in unrelated litigation.
10 *Id.* Third, the *Brado* court concluded that the defendants would not be meaningfully
11 prejudiced by any disclosure of the documents because both parties agreed that “the issue
12 was largely one of timing rather than substance” and because Vocera assured the Court
13 that it would eventually produce the documents in discovery notwithstanding the
14 confidentiality agreements.³ *Id.* at 1321-22. Finally and as to the last factor, the *Brado*
15 court concluded that the public policy in favor of whistleblowers weighed in favor of the
16 plaintiff. *Id.* at 1323. In reaching that conclusion, the *Brado* court emphasized that just
17 as the public policy in favor of whistleblowers, as codified in Sarbanes-Oxley Act,
18 promotes the enforcement of the securities laws, so too does private securities litigation.
19 *Id.*

20 **2. Legal Authority for Protective Order**

21 Turning now to Lead Plaintiff’s specific objections, Lead Plaintiff first argues that
22 the magistrate judge erred by “failing to consider” the Court’s “inherent authority” to
23 issue a protective order in this circumstance. Dkt. No. 100-1.

24 The Order states (at 4) “plaintiff cited to no such authority in seeking a protective
25 order,” but that is wrong. The order contradicts this Court’s prior ruling [in

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27 ³ The *Brado* court did not directly analyze the fourth factor. Nonetheless, it implicitly recognized that
28 the fourth factor weighed in favor of the plaintiff when it stated that the documents had weighty “truth-
seeking value.” *See id.* at 1323.

1 *Bofl*]—which is the law of the case—and *Brado*, where the court *issued a*
2 *protective order* governing the use of documents provided by a former employee
3 of the defendant company to an investigator hired by plaintiff’s lead counsel in
connection with plaintiff’s informal investigation of the facts.

4 Dkt. No. 101-1 at 12 (footnotes omitted & brackets added).

5 The Court disagrees that such a “failure” was “contrary to law.” Lead Plaintiff’s
6 argument faults the magistrate judge for not invoking the court’s “inherent authority” to
7 issue a pre-discovery protective order as laid out in the Court’s previous decision in *Bofl*.
8 *See generally* 318 F.R.D. 129. Lead Plaintiff, however, never asked the magistrate judge
9 to issue the requested protective order pursuant to the court’s “inherent authority.” In the
10 Joint Motion originally submitted to the magistrate judge, Lead Plaintiff did not identify
11 what binding legal authority it was invoking for the requested protective order. There
12 was no mention of the court’s “inherent authority” to issue a protective order or any
13 reference to this Court’s previous decision in *Bofl*. The proposed protective order
14 submitted to the magistrate judge, in fact, only cited to Fed. R. Civ. P. 26(c)(7) as
15 authority and also did not mention the court’s “inherent authority” to issue a protective
16 order.⁴ As such and given that Lead Plaintiff did not even clarify what authority it had
17 invoked for the requested protective order, the Court will not conclude that the magistrate
18 judge erred by failing to supply legal authority for it.⁵

19 The Court further concludes that even if Lead Plaintiff had asked the magistrate
20 judge to exercise its “inherent authority,” the failure to do so would not have been legal
21 error. This is so because a district court’s “inherent authority” to issue protective orders
22 is discretionary, not mandatory. *See Wharton v. Calderon*, 127 F.3d 1201, 1207 (9th Cir.
23 1997) (reviewing district court’s issuance of a protective order pursuant to its inherent
24 authority for abuse of discretion). Accordingly and absent some argument that the
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27 ⁴ The Court observes that there is no Rule 26(c)(7).

28 ⁵ The Court further observes that the *Brado* decision approved the requested, pre-discovery protective order without invoking any legal authority in support of it. *See generally Brado*, 14 F. Supp. 3d.

1 magistrate judge’s failure to exercise its discretion was “contrary to law,” this Court
2 would not have concluded that the magistrate judge’s conclusion warranted reversal.

3 **3. The *Brado* Factors**

4 Lead Plaintiff’s next complaint is that the magistrate judge erred by misapplying
5 the standard articulated in *Brado*. Dkt. No. 100-1 at 12. Lead Plaintiff argues that,
6 contrary to what the magistrate judge concluded, all of the *Brado* factors weigh in favor
7 of Lead Plaintiff.

8 As an initial matter, the Court observes that the magistrate judge had no legal
9 obligation to follow *Brado*. In its objections to the March 23 order, Lead Plaintiff states
10 that the “Defendants and the magistrate judge agree” that *Brado* “governs this dispute.”
11 Dkt. No. 100-1. The reality is, however, that the *Brado* decision is not binding authority
12 on this Court and, therefore, cannot “govern” this dispute. What is more, it is hardly
13 accurate to characterize the March 23 order as conceding that *Brado* “governs this
14 dispute” when the order specifically rejected Lead Plaintiff’s reliance on *Brado*.
15 Accordingly, Lead Plaintiff does not stand on solid ground when it asserts that the
16 magistrate judge committed legal error by declining to follow non-binding precedent in
17 this circuit.

18 Yet even assuming that non-binding precedent can serve as the basis for a
19 “contrary to law” finding, Lead Plaintiff has not demonstrated that such a conclusion is
20 appropriate here. The March 23 order gave due consideration to the *Brado* decision and
21 the factors that it reiterated. As to the first and second *Brado* factors, the magistrate
22 judge concluded that it was “unclear” whether Lead Plaintiff’s counsel had acted
23 improperly or whether the former employee stood to benefit from the misappropriation of
24 the documents because of the minimal facts before the court. Dkt. No. 97 at 8. With
25 regard to prejudice, the magistrate judge concluded that this case differed from *Brado*
26 because here, unlike in *Brado*, there was a dispute about whether the misappropriated
27 documents would be produced in formal discovery. The *Brado* defendants, the
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1 magistrate judge explained, had assured the court that the disputed documents would,
2 eventually, be produced in formal discovery. Defendants, however and as noted by the
3 magistrate judge, gave no such assurances because their position was that many of the
4 misappropriated documents would not be produced in formal discovery on relevance
5 grounds. *Id.* Finally and with regard to the last *Brado* factor, the magistrate judge
6 concluded that it, too, did not weigh in favor of Lead Plaintiff because “plaintiff had
7 produced no evidence that the former employee at issue was a “whistleblower” under
8 Sarbanes-Oxley.⁶ *Id.* at 8.

9 In sum, the Court finds that the magistrate judge’s application of the *Brado* factors
10 was not “contrary to law.” The magistrate judge compared and contrasted this case with
11 the *Brado* facts and evaluated Lead Plaintiff’s position under the five-factor rubric laid
12 out by that court. That the magistrate judge ultimately concluded that the *Brado* factors
13 did not weigh in Lead Plaintiff’s favor does not mean that the magistrate judge’s decision
14 was “contrary to law.” Lead Plaintiff’s order does not identify any statute, procedural
15 rule, or binding case law that the March 23 order failed to apply or applied incorrectly.
16 Absent such a showing and given that the magistrate judge fulsomely engaged with Lead
17 Plaintiff’s authority, this Court finds that Lead Plaintiff has failed to demonstrate that the
18 March 23 Order was “contrary to law” for misapplying the *Brado* factors.

19 **4. “Additional Factors” in March 23 Order**

20 Lead Plaintiff’s objections also take aim at the “additional factors” that the
21 magistrate judge relied upon in denying Lead Plaintiff permission to use the documents
22 subject to a protective order. *See* Dkt. No. 100-1 (“Nor do the three ‘other factors’ the
23 magistrate judge considered weigh against affording Plaintiff access to the documents).
24 Those factors were: (1) the presence of “highly sensitive confidential information”
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27 ⁶ The Court observes that while Lead Plaintiff characterizes this factor, in its objections, as the “public
28 policy favoring enforcement of the securities laws,” the fifth factor, as stated in *Brado*, is the “public
policy in favor of whistleblowers.” *See* 14 F. Supp. 3d 1316 at 1323.

1 among the misappropriated documents; (2) the “significant additional costs” to
2 Defendants “associated with, at a minimum, conducting a privilege review and redacting”
3 privileged and third-party information; and (3) the fact that the use of the documents “go
4 well beyond” informal investigations. Dkt. No. 90 at 9-10.

5 Lead Plaintiff first argues that the magistrate judge’s order was “contrary to law”
6 because it denied Lead Plaintiff access to all of the documents “on the ground that 12%
7 of them purportedly contain ‘highly confidential information.’” Dkt. No. 100-1 at 8.
8 “The purported presence of Sensitive Customer Information in 150 pages of the 1,189
9 total pages of Documents,” Lead Plaintiff argues, “does not warrant precluding Plaintiff
10 from obtaining that subset of the Document, as the Sensitive Customer Information can
11 be redacted.” *Id.* at 24-25 (parenthetical omitted).

12 The Court, however, rejects this argument as enough to demonstrate that the
13 magistrate judge’s conclusion was “contrary to law.” The magistrate judge did not make
14 an independent determination that the presence of some confidential information in the
15 misappropriated documents justified denying Lead Plaintiff access to all of them.
16 Instead, the magistrate judge emphasized that the presence of such alleged, private third-
17 party information distinguished this case from *Brado*. Dkt. No. 97 (“First, in *Brado*, the
18 documents at issue were largely what defendants purported to be “confidential and
19 proprietary information.” By contrast, the Documents in this case contain a more
20 significant breadth of customer information”) (citation omitted). Accordingly and
21 since the documents at issue here are, in fact, different in kind from those in *Brado*, this
22 Court will not conclude that the distinction drawn between this case and *Brado* was
23 “contrary to law.”

24 Second, Lead Plaintiff contends that the magistrate judge was wrong when it
25 concluded that the Defendants, here, would suffer “significant additional costs” that the
26 defendants in *Brado* did not face. Dkt. No. 100-1 at 24. “The Order suggests Defendants
27 would thus incur a greater burden [associated with privilege review or redaction] than
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1 defendants in *Brado* faced. Not so: this is, in fact, the exact procedure approved in
2 *Brado.*” *Id.*

3 The Court, however, disagrees that such a conclusion was “contrary to law.” The
4 magistrate judge’s conclusion that issuing a protective order, here, would impose
5 significant additional discovery costs on Defendants flowed directly from the magistrate
6 judge’s decision that the presence of confidential, sensitive third-party information
7 distinguishes this case from *Brado*. Dkt. No. 97 at 9. “[T]he defendants in this case
8 would be subject to significant additional costs associated with . . . redacting any . . .
9 personally identifying information of third parties, and contacting the identified
10 customers to determine whether they object to the disclosure of their private financial
11 information.” *Id.* Lead Plaintiff, moreover, does not dispute the magistrate judge’s
12 conclusion that the Defendants would face additional costs associated with protecting the
13 privacy of the third party information contained within the documents. *See* Dkt. No. 100-
14 1 at 24. Accordingly, the Court declines to conclude that the magistrate judge’s reliance
15 on this additional factor was “contrary to law.”

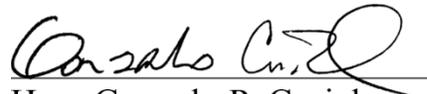
16 Third and finally, Lead Plaintiff argues that the relevance of the disputed
17 documents to Lead Plaintiff’s claims and defenses “does not warrant disregarding those
18 documents and, in doing so, disallowing Plaintiff access to information voluntarily
19 provided in the course of Lead Counsel’s investigation.” Dkt. No. 100-1 at 24. Lead
20 Plaintiff, however, cites to no authority other than *Brado* to support its argument that this
21 additional determination was “contrary to law.” *Id.* at 24-25. What is more, the
22 magistrate judge’s conclusion that the documents at issue “go well beyond ‘informal
23 investigations’” was not the court’s primary conclusion, but rather an additional factor
24 weighing against applying the reasoning of *Brado* to the facts of this case. Accordingly
25 and to the extent that magistrate judge was free to distinguish this case from *Brado*, a
26 non-persuasive authority, this Court declines to find that reliance on this additional factor
27 was “contrary to law.”
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1 **CONCLUSION**

2 The magistrate judge’s order was not “contrary to law” for the reasons cited by
3 Lead Plaintiff. Accordingly, the Court **DENIES** Lead Plaintiff’s Objections to
4 Magistrate Judge Crawford’s March 23, 2017 Order Regarding Joint Motion for
5 Determination of Discovery Dispute No. 2. Dkt. No. 100-1 at 1. In reaching this
6 decision, however, the Court does not preclude the parties from revisiting this dispute
7 with the magistrate judge once discovery has begun.⁷ As such and in the interest of
8 ensuring the fair and proper adjudication of any future dispute over the production of
9 these documents, the Court further **ORDERS** that Defendants submit a hard copy of the
10 documents with the Court.

11 **IT IS SO ORDERED.**

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13 Dated: July 21, 2017

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15 Hon. Gonzalo P. Curiel
16 United States District Judge
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28 ⁷ An ENE is currently scheduled for August 9, 2017. Dkt. No. 117.