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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 KENNETH J. MOSER, individually, and
12 on behalf of all others similarly situated,

13 Plaintiff,

14 v.

15 HEALTH INSURANCE INNOVA-
16 TIONS, INC., a Delaware corporation; et
17 al.

18 Defendants.
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20
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Case No.: 17cv1127-WQH(KSC)

**ORDER GRANTING THE PARTIES'
JOINT MOTION FOR A
PROTECTIVE ORDER;**

**ORDER REQUIRING IMMEDIATE
PRODUCTION OF ANY
OUTSTANDING DISCOVERY
AWAITING THE ENTRY OF THE
PROTECTIVE ORDER**

[Doc. No. 75.]

22 Before the Court is the parties' Joint Motion for a Protective Order to govern the
23 exchange of confidential documents and information between the parties. [Doc. No. 75.]
24 In this Joint Motion, the parties agree on the need for the Court to enter a confidentiality
25 Protective Order that is based on the Model Protective Order made available to the public
26 on the Court's website. However, they disagree as to whether it is necessary to add a
27 paragraph proposed by plaintiff. Plaintiff believes it is necessary to add a paragraph from
28 a Model Protective Order made available to the public by the Northern District of

1 California to prevent “overuse” of confidentiality designations by defendants. Defendants
2 contend it is unnecessary to add plaintiff’s proposed paragraph, because it is redundant and
3 confusing. [Doc. No. 75, at pp. 2-5.]

4 For the reasons outlined more fully below, the Court finds that the parties’ joint
5 request to enter a confidentiality protective order must be GRANTED. [Doc. No. 75.] The
6 Court will enter defendants’ proposed Protective Order. In this Court’s view, it is
7 unnecessary to add the paragraph proposed by plaintiff.

8 **Background**

9 Under defendants’ proposed Protective Order, which is essentially the same as this
10 Court’s Model Protective Order, a party “may designate information as
11 ‘CONFIDENTIAL’ only if, in the good faith belief of such party and its counsel, the
12 unrestricted disclosure of such information could be potentially prejudicial to the business
13 or operations of such party.” [Doc. No. 75-1, at p. 4 (Exhibit 1).] Defendants’ proposed
14 Protective Order also provides that a party “may designate information as
15 ‘CONFIDENTIAL – FOR COUNSEL ONLY’ only if, in the good faith belief of such party
16 and its counsel, the information is among that considered to be most sensitive by the party,
17 including but not limited to trade secret or other confidential research, development,
18 financial or other commercial information.” [Doc. No. 75-1, at p. 4 (Exhibit 1).]

19 Plaintiff’s proposed confidentiality Protective Order is mostly the same as
20 defendants’ proposed Protective Order, but it includes the following paragraph from a
21 Model Protective Order made available to the public by the U.S. District Court for the
22 Northern District of California:

23
24 Exercise of Restraint and Care in Designating Material for Protection: Each
25 party that designates information or items for protection under this Order must
26 take care to limit any such designation to specific material that qualifies under
27 the appropriate standards. The designating party must designate for protection
28 only those parts of material, documents, items, or oral or written
communications that qualify – so that other portions of the material,
documents, items, or communications for which protection is not warranted

1 are not swept unjustifiably within the ambit of this Order. Mass,
2 indiscriminate, or routinized designations are prohibited. Designations that
3 are shown to be clearly unjustified or that have been made for an improper
4 purpose (e.g., to unnecessarily encumber or retard the case development
5 process or to impose unnecessary expenses and burdens on other parties)
6 expose the designating party to sanctions.

7 [Doc. No. 75, at p. 3, 6; Doc. No. 75-2, at p. 4 (Exhibit 2).]

8 Discussion

9 Under Federal Rule of Civil Procedure 26(c)(1), “[a] party or any person from whom
10 discovery is sought may move for a protective order. . . . The court may, for good cause,
11 issue an order to protect a party or person from annoyance, embarrassment, oppression, or
12 undue burden or expense, including one or more of the following: (A) forbidding the
13 disclosure or discovery; (B) specifying terms . . . for the disclosure or discovery; (C)
14 prescribing a discovery method other than the one selected by the party seeking discovery;
15 (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery
16 to certain matters; (E) designating the persons who may be present while the discovery is
17 conducted; . . . (G) *requiring that a trade secret or other confidential research,*
18 *development, or commercial information not be revealed or be revealed only in a*
19 *specified way. . . .*” Fed.R.Civ.P. (c)(1) (emphasis added). “Among the goals furthered by
20 protective orders is reducing conflict over discovery and facilitating the flow of
21 information through discovery.” 8A Charles Alan Wright & Arthur R. Miller, Federal
22 Practice and Procedure § 2044.1 (3d ed.).

23 In the Joint Motion, plaintiff argues that the Court should enter his proposed
24 Protective Order, which includes the above-quoted paragraph from the Northern District’s
25 Model Protective Order, to prevent defendants’ “overuse” of the confidentiality
26 designations that plaintiff believes would be permitted by defendants’ proposed Protective
27 Order. Plaintiff believes this additional paragraph will prevent “overuse” or “blanket mass
28 or indiscriminate” use of confidentiality designations. [Doc. No. 75, at pp. 6-8.] According
to plaintiff, defendants intend to designate “a broad swath of documents as confidential”

1 even though plaintiff believes this case “does not revolve around any highly protected
2 information.” [Doc. No. 75, at p. 6.] In plaintiff’s view, defendants’ ability to designate
3 documents as “confidential” should be “very limited” to “highly protected information”
4 that meets “exacting standards.” [Doc. No. 75, at p. 7.] Otherwise, plaintiff believes
5 numerous confidentiality designations “will hamper the parties in submitting relevant
6 documents to the Court.” [Doc. No. 75, at p. 6.] According to plaintiff, the “practical
7 effect of designating material confidential under any protective order is to bar use in public
8 filings without first having a designation dispute resolution, either informally or formally.”
9 [Doc. No. 75, at p. 6.] Plaintiff also believes disputes over confidentiality designations will
10 “waste time and resources,” because it will be necessary for him to “initiate a designation
11 dispute process” in order to use documents designated “confidential” as “evidence” when
12 filing motions. [Doc. No. 75, at pp. 6-7.] In short, plaintiff contends the addition of the
13 above-quoted paragraph “better serves efficient and economical litigation by limiting the
14 number of designation dispute resolutions that will have to be performed” [Doc. No.
15 75, at pp. 7-8.]

16 Defendants explain that plaintiff seeks to discover “broad categories” of documents
17 and information they consider commercially sensitive. Because they operate in an
18 “incredibly competitive environment,” they believe competitors may obtain an unfair
19 advantage if their confidential commercial information is produced in this case without any
20 protection. [Doc. No. 75, at pp. 3-4.] Defendants believe plaintiff’s proposed paragraph
21 is redundant, unnecessary, and confusing. According to defendants, plaintiff’s proposed
22 paragraph “decreases the clarity that already exists within the Southern District Model
23 Form with respect to the designation of information, and creates inconsistency and
24 confusion as to the standard to be applied in the event of a dispute over the designation of
25 information.” [Doc. No. 75, at p. 5.] As a result, they argue there is no reason to depart
26 from the Southern District’s Model Protective Order. As worded, defendants believe their
27 draft Protective Order, which allows confidential designations based on a “good faith
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1 belief” standard, will more effectively promote resolution of the case “without imposing
2 commercial harm on defendants.” [Doc. No. 75, at p. 4.]

3 In this Court’s view, plaintiff’s concerns about defendants’ potential “overuse” of
4 confidentiality designations and “designation dispute resolutions” are overstated and
5 appear to be based on misconceptions about: (1) the need for an overinclusive, blanket
6 protective order to facilitate the exchange of confidential documents and information
7 between the parties; and (2) the level of process necessary for using documents designated
8 “confidential” as “evidence” when filing motions with the Court.

9 Blanket protective orders are meant to expedite “the flow of pretrial discovery
10 materials” by extending “broad protection” to the parties without the need for a showing
11 of good cause or compelling reasons as to any individual document. *Pub. Citizen v. Liggett*
12 *Grp., Inc.*, 858 F.2d 775, 790 (1st Cir. 1988). *See also Foltz v. State Farm Mut. Auto. Ins.*
13 *Co.*, 331 F.3d 1122, 1133 (9th Cir. 2003); *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d
14 470, 476 (9th Cir. 1992). Thus, by their very nature, blanket protective orders are
15 “overinclusive” and “peculiarly subject to later modification.” *Pub. Citizen v. Liggett*, 858
16 F.2d at 790.

17 As noted above, the proposed Protective Orders submitted by both plaintiff and
18 defendants require a party to have a “good faith belief” in order to designate any document
19 as “confidential.” [Doc. No. 75-1, at p. 4; Doc. No. 75-2, at pp. 3-4.] This “good faith
20 belief” standard is consistent with the purpose of a blanket protective order governing the
21 exchange of confidential documents and information between the parties.

22 As this Court reads the language of plaintiff’s proposed paragraph and plaintiff’s
23 arguments in the Joint Motion, it is apparent that the proposed paragraph could be
24 interpreted to require more than a “good faith basis” for designating documents
25 “confidential.” Therefore, in this Court’s view, the apparent inconsistency and resulting
26 confusion that could result from the addition of plaintiff’s proposed paragraph has the
27 potential to increase conflict over discovery. If defendants’ ability to designate documents
28 as “confidential” is “very limited” and must meet “exacting standards,” as plaintiff

1 proposes [Doc. No. 75, at p. 7], defendants will be reluctant to produce any documents they
2 consider to be commercially sensitive. In other words, imposing “exacting standards” at
3 this stage of the litigation has the potential to defeat the purpose of a blanket protective
4 order that is specifically intended to expedite and facilitate the exchange of confidential
5 documents and information between the parties during the discovery process. As
6 defendants contend, an “exacting standard” fails to take account of defendants’ desire and
7 ability to resolve the litigation while maintaining the confidentiality of sensitive
8 commercial information from its competitors.

9 Without more, the Court also has no reason to believe plaintiff would be
10 “hamper[ed]” [Doc. No. 75, at pp. 6-8] in any significant way by excessive process when
11 submitting documents designated by defendants as “confidential” for consideration by the
12 Court as “evidence” in connection with a motion. First, at the discovery stage of litigation,
13 the public does not have a strong or compelling interest in access to “documents produced
14 between private litigants.” *Pintos v. Pacific Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir.
15 2010). Therefore, a “particularized showing” of “good cause” is enough to justify filing
16 documents under seal that are submitted in connection with a non-dispositive motion, such
17 a discovery motion or a motion to amend the scheduling order. *Kamakana v. City & Cty.*
18 *of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006). “For good cause to exist, the party
19 seeking protection bears the burden of showing specific prejudice or harm will result if no
20 protective order is granted.” *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307
21 F.3d 1206, 1210–1211 (9th Cir. 2002).

22 To the extent it becomes necessary for plaintiff to submit documents as exhibits to a
23 non-dispositive motion that have been designated by the defendants as “confidential,” all
24 that is required is a simple Motion to File Documents Under Seal which explains that the
25 request is being made because defendants designated the documents as “confidential.”
26 Instructions for this process are available on the Court’s website in a document entitled
27 User’s Manual for Civil Sealed Documents for Attorneys. When documents designated
28 “confidential” are submitted as exhibits to a non-dispositive motion, the Court routinely

1 grants motions to file those documents under seal, unless there is reason to believe good
2 cause to maintain confidentiality is lacking (*i.e.*, because the party who designated the
3 document as “confidential” did not have a “good faith basis” for doing so as required under
4 the Protective Order). *See, e.g., Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307
5 F.3d 1206, 1213 (9th Cir. 2002) (stating as follows: “When a court grants a protective
6 order for information produced during discovery, it already has determined that ‘good
7 cause’ exists to protect this information from being disclosed to the public by balancing
8 the needs for discovery against the need for confidentiality.”). In any event, if plaintiff
9 filed a motion in this case seeking to file documents designated by defendants as
10 “confidential,” and the Court had reason to question whether there was good cause to file
11 those documents under seal, the burden would be on defendants, not plaintiff, to make a
12 showing of good cause.

13 Second, when a dispositive matter is before the Court for consideration, there is
14 controlling case law that acts to protect any interest the public *might* have in accessing
15 litigation documents. To the extent parties seek to maintain the confidentiality of
16 documents or information throughout an entire judicial proceeding, including the time of
17 trial, a higher showing of “compelling reasons” is required. *See, e.g., Kamakana v.*
18 *Honolulu*, 447 at 1180 (stating that “records attached to dispositive motions [are treated]
19 differently from records attached to non-dispositive motions. Those who seek to maintain
20 the secrecy of documents attached to dispositive motions must meet the high threshold of
21 showing that ‘compelling reasons’ support secrecy. . . .”). As the parties seeking to
22 maintain confidentiality, defendants would have the burden of establishing “compelling
23 reasons” for filing documents designated “confidential” under seal. *Id.* at 1178-1181.
24 More specifically, defendants would be required to “articulate compelling reasons
25 supported by specific factual findings that outweigh the general history of access and the
26 public policies favoring disclosure.” *Id.* at 1178-1179 (internal quotation omitted). *See*
27 *also Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135-1138 (9th Cir. 2003).

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1 If plaintiff seeks to submit documents designated by defendants as “confidential” for
2 consideration as “evidence” in connection with a dispositive matter (*e.g.*, a summary
3 judgment motion), he would simply submit those documents with a Motion to File
4 Documents Under Seal explaining that the request is being made because defendants
5 designated the documents as “confidential.” To the extent required by the District Court,
6 it would be defendants’ burden to establish compelling reasons to file those documents
7 under seal. Accordingly, without more, the Court rejects plaintiff’s contention that he will
8 be “hamper[ed]” by defendants’ confidentiality designations, because he would be required
9 to “initiate a designation dispute process” in order to use documents designated
10 “confidential” as “evidence” when filing motions. [Doc. No. 75, at pp. 6-8.]

11 In addition, the Court notes that defendants’ proposed Protective Order includes a
12 remedy in the event a non-designating party contends that a designating party designated
13 documents or information as “confidential” without a “good faith belief” that “the
14 unrestricted disclosure of such information could be potentially prejudicial to the business
15 or operations of such party.” [Doc. No. 75-1, at p. 7.] In this regard, paragraph 13 of
16 defendants’ proposed Protective Order states as follows:

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18 13. At any stage of these proceedings, any party may object to a
19 designation of the materials as confidential information. The party objecting
20 to confidentiality must notify, in writing, counsel for the designating party of
21 the objected-to materials and the grounds for the objection. If the dispute is
22 not resolved consensually between the parties within seven (7) days of
23 receipt of such a notice of objections, the objecting party may move the
24 Court for a ruling on the objection. The materials at issue must be treated as
25 confidential information, as designated by the designating party, until the
26 Court has ruled on the objection or the matter has been otherwise resolved.

27 [Doc. No. 75-1, at pp. 7-8.]

28 This remedy is a reasonable one under the circumstances, and the Court has no
reason to believe that plaintiff or any other party would be materially “hamper[ed]” by

1 the process that is required under defendants' proposed Protective Order to challenge
2 confidentiality designations that appear baseless. Accordingly, based on the facts and
3 circumstances presented, the Court finds that the proposed Protective Order submitted by
4 defendants is sufficient to protect the interests of all parties and to facilitate the exchange
5 of confidential documents and information between the parties, so it is unnecessary for
6 the Protective Order to include the additional paragraph proposed by plaintiff.

7 Conclusion

8 Based on the foregoing, IT IS HEREBY ORDERED that the parties' joint request
9 to enter a confidentiality Protective Order is GRANTED. [Doc. No. 75.] The Court will
10 enter defendants' proposed Protective Order. To the extent any party has been withholding
11 documents or information from production in response to another party's discovery
12 requests while awaiting the entry of a confidentiality Protective Order, that party must
13 produce any such documents or information no later than ten (10) days after this Order is
14 entered.

15 IT IS SO ORDERED.

16 Dated: October 25, 2018



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18 Hon. Karen S. Crawford
19 United States Magistrate Judge
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