

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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AVERY OUTDOORS LLC, f/k/a	)	
BANDED FINANCE LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 16-cv-2229-SHL-tmp
	)	
OUTDOORS ACQUISITION CO., LLC,	)	
	)	
Defendant.	)	

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ORDER DENYING BANDED'S MOTION FOR A PROTECTIVE ORDER

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Before the court by order of reference (ECF No. 55) is Plaintiff Avery Outdoors LLC f/k/a Banded LLC's ("Banded") Motion for a Protective Order to Prevent Discovery of Confidential Business Information Sought by Defendant's First Request for Production of Documents (ECF No. 49). Banded seeks a protective order pursuant to Federal Rule of Civil Procedure 26(c) to prevent any discovery of the schedules of an Asset Purchase Agreement between Banded and Avery Outdoors, Inc. ("Avery"), which Banded claims contains confidential business information. Banded also seeks to prevent Defendant Outdoor Acquisition Co., LLC ("OAC") from requesting additional confidential business information from Banded, and from seeking discovery from or contacting any of Banded's suppliers, vendors, customers, or manufacturers regarding their business

relationships with Banded. Banded's request for a protective order stems from what it alleges was an improper contact by one of OAC's managers with one of Banded's vendors. In response, OAC argues that the entire Asset Purchase Agreement is relevant, and thus discoverable. It contends that Banded has not met its burden of establishing the existence of good cause for the order it seeks because the communication with Banded's vendor was not improper, and Banded's allegations of harm are insubstantial and speculative. For the reasons described below, Banded's motion is denied.

#### **I. BACKGROUND**

On June 8, 2016, OAC propounded its first request for the production of documents upon Banded. OAC sought, among other documents, the "Asset Purchase Agreement referred to by Banded in paragraph 38 of the Complaint." (See ECF No. 59-1 at 6.) This Asset Purchase Agreement memorializes Banded's purchase of certain assets of Avery as part of a state court receivership action involving Avery. On June 20, 2016, Banded produced the first eighteen pages of the Asset Purchase Agreement. These pages include the terms of the agreement between Banded and Avery, but not the agreement schedules referenced in the text of the agreement. (See ECF No. 27-3.) The schedules contain detailed descriptions of the assets which Banded purchased, such

as accounts receivable, inventory, assumed contracts, and intangible assets.

Banded offered to produce the schedules if the parties could agree to a Stipulated Protective Order to protect the confidential information Banded claims the schedules contain. OAC disputes that the schedules contain confidential information, and maintains that while it agreed to consider any Stipulated Protective Order proposed by Banded, it never agreed to condition the production of the schedules on the entry of such an order. Although Banded submitted a proposed Stipulated Protective Order to OAC, there was no further discussion between the parties on the matter, and the schedules were not produced.<sup>1</sup>

On September 2, 2016, Banded received an e-mail from Don Lake, a senior vice president at Dunavant Logistics Group, LLC ("Dunavant"), regarding a phone call Dunavant received from Spencer Moore, one of OAC's managers. (See ECF No. 54-2.) According to Lake's e-mail, Moore left a voicemail with Dunavant "regarding outstanding payments from Avery and wondering whether or not we were having payment issues with Avery." Moore did not identify his affiliation in the message. Lake's e-mail stated

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<sup>1</sup>On September 2, 2016, Banded produced written responses to OAC's first request for the production of documents, but maintained its position that it would not produce the schedules without a Stipulated Protective Order. (See ECF No. 59-2.)

that, although Dunavant was not having payment issues with Banded:

with all that is going on right now and the past receivership we went thru [sic] with Avery, this phone call has made people around here a bit anxious. Per our conversation, please share with us where you think these phone calls may be coming from and the financial condition of Avery/Banded today. Sorry to bother you with this but we for sure thought you needed to know that somebody out there is making these calls.

(Id. at 1.)<sup>2</sup>

On September 6, 2016, Banded's counsel e-mailed OAC's counsel seeking to discuss Lake's e-mail. OAC's counsel called Banded's counsel on September 7. Banded's counsel claimed Moore's call to Dunavant was improper, because Moore could only have learned that Dunavant was one of Banded's vendors by using confidential information obtained by OAC or Peak Rock<sup>3</sup> while performing due diligence relating to potential purchases of Avery during the receivership. Banded's counsel again requested OAC agree to enter into a Stipulated Protective Order to prevent OAC from contacting any other parties with whom Banded had a contractual relationship, and requiring OAC to inform Banded of

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<sup>2</sup>Lake's e-mail stated that, in addition to Moore's call, Dunavant received another phone call regarding outstanding payments from Avery. The e-mail indicated that Dunavant had been unable to retrieve this call, and could not determine the identity of the caller or the incoming phone number.

<sup>3</sup>Peak Rock, which is affiliated with OAC, was originally named as a defendant in this case. Banded's claim against Peak Rock was dismissed without prejudice on August 3, 2016. (See ECF No. 41.) Moore holds positions in both OAC and Peak Rock.

any other parties that OAC had contacted regarding Banded's financial condition. OAC's counsel responded that Moore's call was not improper, and she could not agree to such an order without consulting her client. Banded filed the instant motion on September 9, 2016.

On November 7, 2016, the undersigned magistrate judge held a hearing on Banded's motion. At the hearing, the parties indicated their continued disagreement as to whether or not Moore's call to Dunavent was improper. However, the parties also indicated their willingness to attempt to craft a Stipulated Protective Order addressing the issue of future contacts between OAC and Banded's business associates. The court therefore continued the hearing until November 9, 2016, to give the parties an opportunity to agree on a Stipulated Protective Order. However, on November 9, the parties reported that they were unable to agree on such an order.

## **II. ANALYSIS**

Federal Rule of Civil Procedure 26(b)(1), as amended in 2015, provides that

[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or

expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1). Under Federal Rule of Civil Procedure 26(c)(1):

A party or any person from whom discovery is sought may move for a protective order . . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (A) forbidding the disclosure or discovery;
- (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
- (C) prescribing a discovery method other than the one selected by the party seeking discovery;
- (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
- (E) designating the persons who may be present while the discovery is conducted;
- (F) requiring that a deposition be sealed and opened only on court order;
- (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
- (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

Fed. R. Civ. P. 26(c)(1)(A)-(H).

"The burden of establishing good cause for a protective order rests with the movant." Thomas v. Briggs, No. CV 15-10210, 2016 WL 5405349, at \*3 (E.D. Mich. Sept. 28, 2016) (quoting Nix v. Sword, 11 F. App'x 498, 500 (6th Cir. 2001)). "To show good cause, a movant for a protective order must articulate specific facts showing clearly defined and serious injury resulting from the discovery sought and cannot rely on mere conclusory statements." Id. (quoting Nix, 11 F. App'x at 500).

The court finds that Banded has not established good cause for entry of the expansive protective order it seeks. Banded argues that unless the court enters the requested protective order, it will be harmed by OAC's use of confidential information, obtained through discovery, to interfere with Banded's business relationships. However, Banded does not point to any purported wrongful use by OAC of documents or information *obtained through discovery in this case*. Rather, Banded claims that OAC wrongfully used information obtained via a confidentiality agreement in connection with the receivership action. Regardless of the propriety of OAC's actions, those actions do not themselves involve an abuse of the discovery process in this case.

Banded argues that OAC's alleged wrongful use of confidential business information in the past is probative of

OAC's intent to wrongfully use confidential business information it receives in discovery. The call to Dunavant, however, is insufficient to establish good cause for the overly-broad protective order Banded seeks. At the November 7 hearing, OAC's counsel expressly represented to the court that this call was an isolated incident that will not happen again while this case remains pending. Banded has not presented any other evidence to suggest that OAC is likely to make similar contacts with Banded's vendors in the future. Given the speculative nature of any potential wrongful action by OAC relating to the discovery process, Banded has not carried its burden of showing that its requested protective order is warranted.

### III. CONCLUSION

For the reasons above, Banded's Motion for a Protective Order is DENIED.

IT IS SO ORDERED.

s/ Tu M. Pham

TU M. PHAM

United States Magistrate Judge

November 17, 2016

Date