

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

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FEDERAL EXPRESS CORPORATION,)	
)	
Plaintiff,)	
)	
vs.)	01-2503 B/P
)	
ACCU-SORT SYSTEMS, INC.,)	
)	
Defendant.)	

ORDER GRANTING PLAINTIFF'S MOTION TO ALLOW IN-HOUSE ATTORNEY
CYNTHIA J. COLLINS ACCESS TO "ATTORNEY EYES ONLY" DOCUMENTS

Presently before the court, by Order of Reference, is a motion by the plaintiff, Federal Express Corporation ("FedEx"), to allow in-house attorney Cynthia J. Collins access to "Attorney Eyes Only" documents produced in the present litigation. The motion is an off-shoot of the plaintiff's June 3, 2003 motion to enforce the District Court's March 28, 2003 Order Granting In Part and Denying in Part Defendant's Motion For Protective Order and Granting United Parcel Service, Inc.'s Motion To Intervene.¹ The District Court resolved that motion, concluding that because FedEx in-house

¹In various pleadings filed with the court, both parties have also referred to this motion as Accu-Sort's Motion to Protect Third Party Information, even though it appears that no such motion exists and that FedEx is the party bringing the motion.

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attorney Stephen Cochell was not involved in "competitive decision making" at FedEx, he could have access to the "Attorney Eyes Only" documents produced subject to the parties' Stipulated Protective Order. The District Court, however, cautioned that the court would have to make a "counsel by counsel" determination as to which, if any, other FedEx in-house attorneys could have access to these protected documents. On that basis, the District Court referred to this court the question of whether FedEx in-house counsel Cynthia Collins may have access to the protected documents.

FedEx contends that Ms. Collins, like Stephen Cochell, is not involved in competitive decision making, and that she needs to have access to these documents in order to participate meaningfully in this litigation. In support of this position, Ms. Collins filed two affidavits, the first on April 29, 2003 and the second (at this court's direction) on June 27, 2003. Also, this court held a telephonic hearing on June 26, 2003 with counsel for FedEx, Accu-Sort, and intervenor United Parcel Service, Inc. ("UPS"). During this hearing, Ms. Collins described to opposing counsel and to the court the scope of her duties at FedEx. FedEx also asserts that Ms. Collins needs access to the documents at issue. As counsel of record, Ms. Collins says that these documents will permit her to formulate strategy and actively litigate this case, as well as allow her to make settlement decisions on behalf of FedEx.

Accu-Sort and UPS argue that Ms. Collins should not have

access to the protected documents. They argue that Ms. Collins has failed to demonstrate that she is not involved in competitive decision making at FedEx. Accu-Sort and UPS point to the fact that at the May 22, 2003 settlement conference before this court, Ms. Collins appeared at this conference as FedEx's representative with "full settlement authority." They further argue that Ms. Collins is one of several attorneys representing FedEx on this case, and that she has not demonstrated that she has an adequate 'need-to-know' with respect to the protected documents. Neither Accu-Sort nor UPS challenge the veracity of the statements made by Ms. Collins in her affidavits or at the June 26 hearing. Instead, they argue that the information provided by Ms. Collins is incomplete and does not alleviate their concerns.

In its March 28, 2003 Order, the District Court set forth a framework for determining whether FedEx in-house counsel should have access to "Attorney Eyes Only" documents. See Order Granting in Part and Denying in Part Defendant's Motion for Protective Order, Federal Express Corporation v. Accu-Sort Systems, Inc., Case No. 01-02503 (W.D. Tenn. Mar. 28, 2003) (under seal). The District Court employed the analysis in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984) and Brown Bag Software v. Symantec Corp., 960 F.2d 1465 (9th Cir. 1992), focusing on whether the in-house attorney seeking access to the protected documents is involved in competitive decision making.

Applying this same analysis, this court concludes that based on the entire record before the court, Ms. Collins is not involved in competitive decision making at FedEx. Ms. Collins has made the following statements in her affidavits, which the court credits: Ms. Collins is one of four Managing Directors within FedEx's Litigation Group. The Litigation Group is separate and distinct from FedEx's business units, and competitive business decisions are made within the various business units at FedEx. The Litigation Group provides litigation support to FedEx's business units, and does not participate in making competitive business decisions involving intellectual property or other matters unless such involvement occurs in the context of litigation, or due diligence regarding litigation matters against companies that may be acquired by FedEx.

As a Managing Director, Ms. Collins is responsible for overseeing all litigation involving FedEx, which includes supervising the day-to-day administrative management of attorneys and support staff within the Litigation Group. There are no business employees within the Litigation Group, nor does Ms. Collins manage any other group within FedEx. In addition to supervising attorneys, Ms. Collins actively litigates cases for FedEx, including the present case. She is not involved in making competitive business decisions involving intellectual property matters, and is not involved in providing advice or participating in FedEx's decisions made in light of similar or corresponding

information about a competitor.

Also, at the June 26 telephonic hearing, Ms. Collins further stated to this court that she currently supervises attorney Stephen Cochell, and reports to the Vice President of the Litigation Group. She makes only litigation-related decisions, does not report to any of the business units, and no one in any of FedEx's business units reports to her. Ms. Collins stated that she has no involvement in competitive decision making, and is not involved in the day-to-day business decisions at FedEx, such as matters relating to pricing or suppliers. Ms. Collins stated that she has been with FedEx's Litigation Group for ten years, and has never been involved with any business decisions. In fact, she had never heard of "MSDS" (the FedEx technology at issue in this litigation) prior to her involvement in this case. Ms. Collins stated she is aware that the court will impose sanctions even for inadvertent disclosure of the protected documents.

Ms. Collins has also adequately explained her attendance at the May 22, 2003 settlement conference before this court. According to Ms. Collins' June 27 affidavit and her statements at the June 26 hearing, which the court credits, at FedEx settlement authority rests with the litigation department, and that she did, in fact, have full settlement authority at the settlement conference. Finally, Ms. Collins is co-counsel of record in this case, and is assigned to and is responsible for the litigation of this case, including strategy, discovery, motions practice, and

trial. Denying her access to the protected documents would hamper her ability to fully participate in formulating litigation strategy, depositions, and to assess settlement options and make settlement decisions.

For the foregoing reasons, the plaintiff's motion to allow in-house counsel Cynthia J. Collins access to "Attorneys Eyes Only" documents is GRANTED, in accordance with the parties' Stipulated Protective Order.

IT IS SO ORDERED. Entered this 16th day of July, 2003.



TU M. PHAM
U.S. MAGISTRATE JUDGE



Notice of Distribution

This notice confirms a copy of the document docketed as number 189 in case 2:01-CV-02503 was distributed by fax, mail, or direct printing on July 17, 2003 to the parties listed.

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