

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

ELLIPSIS, INC.,)
)
 Plaintiff,)
)
 vs.) No. 03-2939-B/V
)
 THE COLOR WORKS, INC.,)
 Defendants.)

ORDER GRANTING DEFENDANT'S MOTION FOR PROTECTIVE ORDER

Before the court is the November 16, 2004 motion of the defendant, The Color Works, Inc. ("TCW"), pursuant to Rule 26(c) of the Federal Rules of Civil Procedure requesting that the court enter a protective order which would limit access to and use of certain confidential documents responsive to Plaintiff's First Request for Production of Documents and Tangible Things. This motion was referred to the United States Magistrate Judge for determination. For the following reasons, the motion is granted.

Pursuant to Federal Rule of Civil Procedure 26(c), a court may, at its discretion, enter any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. *Rolex Watch U.S.A., Inc., v. Crowley*, 74 F.3d 716, 721-22 (6th Cir. 1996) (finding no abuse of discretion when district court prohibited discovery deposition). The party requesting a protective order must make a specific

demonstration of fact in support of the request, as opposed to stereotyped or conclusory statements, in order to establish good cause. *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981); 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2035 (2d ed. 1994). The good cause requirement encompasses a standard of reasonableness under which annoyance, embarrassment or other harm is evaluated. *Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (E.D. Ark. 1985).

The plaintiff, Ellipsis, and TCW do not dispute that a protective order should be entered in this case. In fact, both parties have submitted draft protective orders to the court. From a review of these drafts, it appears to the court that the parties disagree on the form that the protective order should take and the exact limitations that are appropriate.

Counsel for Ellipsis objects to TCW's draft order because it does not permit their client access to a licensing agreement between TCW and Nokia and a second document that the court had previously ruled was "for attorneys' eyes only."¹ Counsel for TCW objects to the draft order presented by Ellipsis on the grounds

1. In its response to TCW's motion, Ellipsis states that the court ordered TCW to produce a second document, aside from the licensing agreement, "for attorney's eyes only." The court has reviewed its order and finds no reference to this "second document." The only item that the court ordered TCW to produce was the licensing agreement between TCW and Nokia. Nevertheless, Ellipsis states that TCW has already produced this document "for attorney's eyes only."

that it would permit Ellipsis full access to its confidential documents. Because of this disagreement the court must fashion a protective order that strikes the proper balance between Ellipsis's need for information sufficient to prosecute its case and the protection of TCW's confidential information.

The basis for TCW's draft protective order is that Ellipsis is its direct market competitor. As a direct market competitor, TCW contends that Ellipsis should not be allowed unfettered access to TCW's confidential information, particularly the licensing agreement it has with Nokia regarding Realtree patterns. If Ellipsis employees are allowed access to such information, TCW claims that Ellipsis would be able to misappropriate TCW's proprietary technologies and confidential business practices, or that Ellipsis could jeopardize TCW's relationship with its customers and suppliers. To avoid this potential misuse, TCW asks the court to issue a protective order limiting access to certain documents to "attorneys eyes only."

Ellipsis contends that it is not a direct market competitor with TCW; therefore, both Ellipsis and its counsel should be able to review the licensing agreement and the second document. Ellipsis claims that it is in the business of selling and marketing camouflage faceplates for cellular telephones while TCW is a manufacturer of these telephone faceplates. To prove this claim, Elizabeth Wade, owner of Ellipsis, contends that before a contract

agreement was established between TCW and Ellipsis, Lamie Haga of TCW told her that TCW would not compete with Ellipsis in the sale of camouflage faceplates and that Ellipsis would be the "go-to company" for sales of Realtree pattern faceplates.

The assertions made by Lamie Haga provide insight into the relationship between the two parties, but they do not control the issue of whether the parties are direct market competitors. Despite Elizabeth Wade's characterization of Ellipsis' relationship with TCW, the complaint indicates that TCW's sales force would be utilized to sell Realtree patterned faceplates if TWC was selected as the manufacturer of Ellipsis' products. The complaint also states that TCW agreed that Ellipsis would handle the marketing of the faceplates to all Ellipsis' existing customers while TCW would market and sell to new customers. Moreover, Ellipsis asserts in the complaint that TCW sought a license from Realtree to exclusively manufacture and sell faceplates bearing the Realtree camouflage pattern.

It is clear to the court from the statements made by Ellipsis in its own complaint that TCW is more than just a manufacturer of faceplates. According to the complaint, TCW employs its own sales force. This surely would put TCW in the business of marketing and selling products which it manufactures. Elizabeth Wade's supplemental declaration is the most telling. Wade states that it is possible "that Ellipsis' and TCW's market overlap to a remote

extent" and that "it is [her] understanding that TCW is in the business of manufacturing, decorating, and selling product[s] it has manufactured." (Supp. Decl. of Elizabeth Wade at ¶ 5.)

From the foregoing, the court finds that both TCW and Ellipsis are in the business of selling cellular telephone faceplates. The fact that TCW manufactures these faceplates as well does not change the fact that TCW and Ellipsis are direct market competitors with regard to the selling of faceplates. Accordingly, in order to protect TCW's trade secrets, confidential information, and proprietary information while balancing Ellipsis' need for certain documents, the court will enter the protective order proposed by TCW simultaneous with the entry of this order.

IT IS SO ORDERED this 17th day of December, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE