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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASCADE YARNS, INC., a Washington
corporation,

Plaintiff,

v.

KNITTING FEVER, INC., a New York
corporation, et al.,

Defendant.

CASE NO. C10-861RSM
ORDER

This matter is before the Court for consideration of defendants’ motion for a protective order. Dkt. # 280. Defendants have presented a proposed protective order for the designation and handling of confidential materials during discovery. Plaintiff has opposed the motion, contending that the motion is late with respect to discovery requests, and that no protective order is appropriate. Plaintiff also asserts that the proposed protective order is overbroad, and impermissibly restricts public access to court records. Plaintiff has not presented an alternative proposal for a protective order. For the reasons set forth below, the Court shall grant in part, and deny in part, defendants’ motion.

DISCUSSION

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2 The Court, upon motion and a showing that the parties have met and conferred in good
3 faith, the Court may issue a protective order specifying the terms of discovery. Fed.R.Civ.Proc.
4 26(c). Defendants have detailed counsel's several conferences in the motion. Dkt. # 280, pp. 3-
5 5. Details of the conferences were also presented to the Court in the briefing related to plaintiff's
6 several motions to compel. *See, e.g.*, Declaration of Joshua Slavitt, Dkt. # 251, Exhibit 3. This
7 and other documents satisfy the Court that defendants have met their meet-and-confer burden
8 with respect to this motion.

9 The parties agreed in their Joint Status Report, filed April 26, 2011, that "[g]iven that this
10 action is between direct competitors in the marketplace and the likelihood of the need to
11 exchange confidential pricing information and other sensitive business information, [they]
12 anticipate that some form of stipulated protective order may be necessary, . . . and they have
13 agreed to confer concerning the form of such stipulated protective order. Joint Status Report,
14 Dkt. # 236, p. 5. It appears the parties exchanged several proposals for a protective order in early
15 May, but did not reach agreement. Declaration of Robert Guite, Dkt. # 240, Exhibits K, L.
16 The Court held a telephonic conference on May 16, 2011 to discuss issues presented in the Joint
17 Status Report, including the trial date and discovery issues. Dkt. # 244. At that conference, the
18 Court addressed the parties' anticipated protective order and directed them to continue their
19 attempt to produce a stipulated protective order for the Court's signature. The parties were
20 unable to reach agreement on the language of the protective order, and this motion is the result of
21 that failure.

22 It appears that the central issue in the dispute is the designation of "highly confidential"
23 documents and whether they should be shielded from view by in-house counsel. The dispute
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1 arises because plaintiff's in-house counsel, Robert Dunbabin, Jr., is a member of the family that
2 owns plaintiff Cascade, Inc.; is involved in the operations of the business; and has been named
3 a counter-claim defendant in this action. For this reason, defendants propose a "two-tiered"
4 approach, in which documents may be designated as either "confidential" or, if necessary to
5 protect trade secrets and other proprietary business information, "highly confidential." The latter
6 would not be seen by in-house counsel.

7 The standard for determining the scope of in-house counsel's access to confidential
8 information is set forth in *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir.1992);
9 and *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed.Cir.1984). In *Brown Bag*, the Ninth
10 Circuit balanced the interests of the parties in determining whether in-house counsel should have
11 access to confidential information. On the one hand, a party seeking discovery is entitled to all
12 information that is "reasonably calculated to lead to the discovery of admissible evidence."
13 *Brown Bag*, 960 F.2d at 1470. On the other hand, the responding party is entitled to be free from
14 an "undue burden" in discovery, including protection from misuse of trade secrets by
15 competitors." *Id.* (citing Fed.R.Civ.P. 26(c)).

16 The *Brown Bag* court, adopting the analysis put forward in *U.S. Steel*, held that the
17 proper review of protective orders in cases such as this requires the district court to examine
18 factually all the risks and safeguards surrounding inadvertent disclosure by any counsel, whether
19 in-house or retained. The *U.S. Steel* court cautioned against arbitrary distinctions based on type
20 of counsel employed, noting that in practice the risk of inadvertent disclosure of trade secrets
21 obtains equally for both in-house and retained counsel. Thus, to evaluate the risk of inadvertent
22 disclosure, a court should examine the factual circumstances of any counsel's relationship to the
23 party demanding access. A crucial factor in the *U.S. Steel* and *Brown Bag* cases was whether in-

1 house counsel was involved in “competitive decision-making” that is, “advising on decisions
2 about pricing or design made in light of similar or corresponding information about a competitor.
3 *Brown Bag*, 960 F.2d at 1470 (citing *U.S. Steel*, 730 at 1468 n. 3).

4 Here, there is no question that Cascade’s in-house counsel, as a member of the family
5 that owns Cascade, is involved in the kind of “competitive decision-making” that counsels
6 against disclosure under the *U.S. Steel* analysis. *Brown Bag*, 960 F.2d at 1471. Knowledge of
7 the opposition's trade secrets would place him in the “untenable position” of having to refuse his
8 employer (his parents and his wife) legal advice on a host of contract and competitive marketing
9 decisions, lest he improperly or indirectly reveal the opposition's trade secrets. *Id.* As noted in
10 *Brown Bag*, he cannot “unlearn” defendants’ trade secrets while acting in his role as in-house
11 counsel to plaintiff. *Id.* at 1470. It is appropriate to shield defendants’ trade secrets and other
12 highly sensitive and proprietary business information from his eyes.

13 While the Court agrees with defendants that a two-tiered approach is appropriate, the
14 parties should take a narrow approach to designation of “highly confidential” documents,
15 reserving that category for trade secrets and other similarly sensitive material. Further, the Court
16 will not approve the procedure described in Paragraph 11 of defendants’ proposed protective
17 order for resolving disputes between the parties regarding the designation of documents, in part
18 because the proposed procedure amounts to a license to seal. The Court will not sign protective
19 orders, even stipulated ones, that allow for the blanket sealing of documents that the parties
20 expect to claim as confidential. Local Rule 26(c)(1). Nor will the Court agree to become
21 involved in the parties’ disputes regarding such designations, except under very limited
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1 | circumstances.¹ Any motion brought to resolve a dispute concerning the designation of
2 | documents shall be subject to the meet and confer requirements of Local Rule CR 26, as well as
3 | the fee award provisions of Fed.R.Civ.P. 26(c)(3).

4 | The Court also declines to approve the procedure for resolving disputes regarding experts
5 | and consultants, set forth in Paragraph 8 of the proposed protective order. The Court simply will
6 | not allow itself to be involved in this type of dispute. The parties' interests are equally at stake in
7 | this area, and it is expected that they can come to agreement among themselves for qualifying
8 | experts and consultants.

9 | Finally, the Court addresses plaintiff's objection that "no compelling reasons exist to
10 | justify sealing documents attached to dispositive motions." Cascade Yarn's Response, Dkt. #
11 | 301, p. 6. The protective order proposed by defendants does not actually contain a provision for
12 | sealing of documents filed with dispositive motions; the sealing provision in Paragraph 11
13 | (which the Court has rejected above) applies to disputes regarding the designation of documents
14 | as confidential or "highly confidential." Further, as noted above, the Court will not grant broad
15 | authority to file documents under seal simply because the parties have designated them as
16 | confidential in the course of discovery. "There is a strong presumption of public access to the
17 | court's files. With regard to dispositive motions, this presumption may be overcome only on a
18 | compelling showing that the public's right of access is outweighed by the interests of the public
19 | and the parties in protecting the court's files from public review. With regard to nondispositive
20 | motions, this presumption may be overcome by a showing of good cause under Rule 26(c)."

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23 | ¹ The parties are directed to the stipulated protective order filed in *Shah v. Microsoft*,
24 | C10-653RSM, Dkt. # 43, Paragraph 9, for the type of language that will be approved by the
Court in this area.

1 Local Rule CR 5(g)(2). In other words, sealing is always under the control of the Court, not the
2 parties. Plaintiff’s objection on this basis is unfounded.

3 CONCLUSION

4 Defendants’ motion for a protective order (Dkt. # 280) is GRANTED IN PART.

5 Specifically, the Court approves the two-tiered structure for designation of documents, and the
6 shielding of “highly confidential” documents from in-house counsel. However, the Court
7 declines to adopt Paragraphs 8 and 11 of the proposed protective order.

8 Defendants shall file a revised proposed order consistent with the directives in this Order
9 within twenty (20) days of this date for the Court’s consideration. If the proposed protective
10 order includes provisions which the Court has already deemed unacceptable, the Court will
11 reform it accordingly. Plaintiff may expedite the discovery process by agreeing to a stipulated
12 protective order consistent with this directive.

13 The Court expects that defendants will fully and completely respond to plaintiff’s
14 outstanding discovery requests within twenty (20) days after defendants’ proposed protective
15 order is adopted by the Court, or the parties have signed and filed a stipulated protective order,
16 whichever date comes first.

17 Dated this 14th day of July 2011.

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20 RICARDO S. MARTINEZ
21 UNITED STATES DISTRICT JUDGE
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