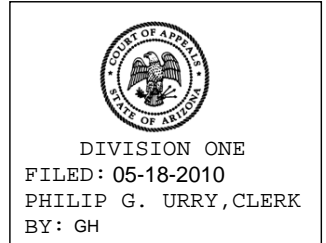


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

COMTECH EF DATA CORP., a)	1 CA-SA 10-0072
Delaware corporation,)	
)	DEPARTMENT A
Petitioner,)	
)	Maricopa County
v.)	Superior Court
)	No. CV 2008-0248049
THE HONORABLE BETHANY G. HICKS,)	
Judge of the SUPERIOR COURT OF)	DECISION ORDER
THE STATE OF ARIZONA, in and for)	
the County of MARICOPA,)	
)	
Respondent Judge,)	
)	
PARADISE DATACOM, L.L.C., a)	
Pennsylvania limited liability)	
corporation; MARK CARLIN and)	
LISA CARLIN, husband and wife,)	
)	
Real Parties in Interest.)	
_____)	

Comtech EF Data Corp. (Comtech) petitions this Court for special action review of the trial court's order excluding Real Parties in Interest, Mark Carlin and Lisa Carlin, husband and wife (collectively, Carlin), from the trial court's November 12, 2009 stipulated protective order (Protective Order). Judges Patricia A. Orozco, Daniel A. Barker and Lawrence F. Winthrop have considered the petition for special action and the

memoranda presented by the parties. For the following reasons, we accept jurisdiction and grant relief.

FACTS AND PROCEDURAL HISTORY

Comtech filed suit against Real Parties in Interest, Carlin and Paradise Datacom, L.L.C. (Paradise), for claims alleging, among other things, the misappropriation of trade secrets. On November 12, 2009, the trial court signed the Protective Order binding all parties.¹ The Protective Order was filed pursuant to Arizona Rule of Civil Procedure 26(c).² Under the Protective Order, each party is permitted to designate certain discovery material as "confidential" and further designate some confidential material as "attorneys' eyes only" (AEO).

Material designated as "confidential" may be disclosed only to: the court; counsel for the parties; the parties; experts or consultants; court reporters; certain witnesses; and any other person the parties agree to in writing. Material designated as AEO may be disclosed only to: the court; counsel for the

¹ Only Comtech and Paradise stipulated to the Protective Order. Even though Carlin's attorney did not sign the Protective Order, he concedes that he is bound by the order.

² Unless otherwise specified, hereafter, an Arizona Rule of Civil Procedure is referred to as "Rule ____."

parties; experts or consultants; court reporters; and any other person the parties agree to in writing. Thus, material designated as AEO may not be disclosed to the actual parties.

In reliance on the Protective Order, Comtech designated certain material as AEO and disclosed it to attorneys for Carlin and Paradise. Subsequently, at a telephonic conference on April 8, 2010, Carlin's counsel made an oral motion requesting the trial court exclude Carlin from the Protective Order's AEO limitation. Carlin's counsel argued that the AEO limitation should not apply to Carlin because Mr. Carlin needs to review the AEO material to fully understand the claims against him. Comtech responded that disclosure would be highly injurious and Carlin had not utilized a consultant, which, if employed, would satisfy the need to understand the claims.

The trial court agreed with Carlin, stating: "I don't see how a lawyer can ethically defend his client without being able to discuss with his client the allegations brought against his client." Comtech then asked the court to allow time for

briefing, which the court denied³ and thereafter ordered that Carlin be excluded from the Protective Order.

Later the same day, Comtech requested the trial court hold a stay hearing pending Comtech's filing of a petition for special action with this Court. The trial court denied that request. Comtech then filed an emergency request for a temporary stay pending its filing of a petition for special action with this Court. On April 12, 2010, we granted a temporary stay of the proceedings until further order.

JURISDICTION

We have jurisdiction to hear and determine this special action pursuant to Arizona Revised Statutes (A.R.S.) section 12-120.21.A.4 (2003) and Arizona Rule of Procedure for Special Actions 8(a). Special action jurisdiction is highly discretionary and is appropriate when there is "no equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 8(a); *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, 262, ¶ 4, 165 P.3d 238, 240 (App. 2007). Additionally, special action

³ The trial court further ordered a special master be appointed for discovery purposes. Comtech then asked the trial court to allow the special master to consider Carlin's original motion to review AEO material. The trial court denied Comtech's request.

jurisdiction is appropriate to review a trial court's order requiring disclosure of confidential information because the disclosing party would have no adequate remedy by appeal. See *Cervantes v. Cates*, 206 Ariz. 178, 181, ¶ 8, 76 P.3d 449, 452 (App. 2003). Because Comtech would have no adequate remedy by appeal if it is required to disclose its trade secrets, we accept special action jurisdiction.

DISCUSSION

We review a discovery-related ruling for an abuse of discretion. *Id.* at ¶ 11. "[A] trial court abuses its discretion when it misapplies the law." *Id.* In Arizona, discovery matters relating to protective orders and disclosure of confidential information are governed by Rule 26(c). Typically, before entering a protective order, a trial court shall direct "[a] party seeking confidentiality to show why a confidentiality order should be entered." Ariz. R. Civ. P. 26(c)(2). Additionally, "[t]he burden of showing good cause for an order shall remain with the party seeking confidentiality. The court shall then make findings of fact concerning any

relevant factors.”⁴ *Id.* Furthermore, “[t]rial judges should look to federal case law to determine what factors . . . should be weighed in deciding whether to grant or *modify* a confidentiality order.” Ariz. R. Civ. P. 26(c) cmt. (emphasis added).

We recognize that “Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (discussing Washington Superior Court Civil Rule 26, modeled after the Federal Rules of Civil Procedure, similar to Arizona’s Rule 26). However, “proper safeguards should attend the disclosure of trade secrets.” *Safe Flight Instrument Corp. v. Sundstrand Data Control Inc.*, 682 F.Supp. 20, 22 (D.Del. 1988). Indeed, “[c]ourts dress technical information with a heavy cloak of

⁴ “No such findings of fact are needed where the parties have stipulated to such an order.” Ariz. R. Civ. P. 26(c)(2). In this case, Comtech and Paradise stipulated to the Protective Order. Moreover, Rule 26(c) does not require the court make findings of fact when considering a motion to *modify* an existing protective order. However, the comment to Rule 26(c) does recommend weighing the same factors listed in Rule 26(c)(2), if relevant, when considering a motion to modify an existing protective order.

judicial protection because of the threat of serious economic injury to the discloser of [confidential] information." *Id.*

"[U]nder Rule 26(c), the appropriateness of protective relief from discovery depends upon a balancing of the litigation needs of the discovering party and any countervailing protectible [sic] interests of the party from whom discovery is sought." *Apex Oil Co. v. DiMauro*, 110 F.R.D. 490, 496 (S.D.N.Y. 1985) (referring to Federal Rule of Civil Procedure 26(c)). A review of federal case law indicates limiting disclosure of confidential information in cases such as this is heavily favored. See *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 300 (D.Del. 1985) (suggesting a prospective protective order may limit disclosure to trial counsel and independent experts); *Natta v. Zletz*, 405 F.2d 99, 101-02 (7th Cir. 1968) (trade secret divulged only to trial counsel). Additionally, there is ample precedent for limiting disclosure to attorneys and experts, particularly if there is a risk that a party may use the material or disseminate it to others who would use it to gain a competitive advantage over the disclosing party. See *GTE Prods. Corp. v. Gee*, 112 F.R.D. 169, 171 (D.Mass. 1986); *Doe v. District of Columbia*, 697 F.2d 1115, 1120

n.8 (D.C. Cir. 1983); *Liberty Folder v. Curtiss Anthony Corp.*, 90 F.R.D. 80, 83-84 (S.D. Ohio 1981); *Chesa Int'l, Ltd. v. Fashion Assocs., Inc.*, 425 F.Supp. 234, 237 (S.D.N.Y. 1977), *aff'd*, 573 F.2d 1288 (2d Cir. 1977).

In this case, we cannot assume the trial court's order was made in consideration of Rule 26(c) or in contemplation of federal case law, as the rule directs. The trial court did not make findings of fact concerning any relevant factors the court may have examined.⁵ The court merely stated: "I don't see how a lawyer can ethically defend his client without being able to discuss with his client the allegations brought against his client." Based on this statement, and the absence of any findings, we conclude the trial court did not perform a balancing test weighing the risk of disclosure against Carlin's need to prepare for the case. We note, however, that modifying a protective order is appropriate only when the protective order "actually prejudice[s] presentation of the moving party's case, not [when it] merely increase[s] the difficulty of managing the

⁵ Furthermore, the trial court denied Comtech's request to brief the issue, effectively precluding the trial court's opportunity to "look to federal case law to determine what factors . . . should be weighed in deciding whether to grant or *modify* a confidentiality order." Ariz. R. Civ. P. 26(c) cmt. (emphasis added).

litigation." *Intel Corp. v. VIA Techs., Inc.*, 198 F.R.D. 525, 528 (N.D. Cal. 2000). Accordingly, we hold that the trial court abused its discretion in denying Comtech's request to brief the issue and in not conducting a balancing test.

CONCLUSION

For the reasons previously stated, we accept jurisdiction and grant relief. We order the temporary stay granted by this Court on April 12, 2010 lifted. Further, we remand this matter to the trial court for proceedings consistent with this decision.⁶

/S/

PATRICIA A. OROZCO, Presiding Judge

⁶ We express no opinion as to the resolution of whether this information should be disclosed to Carlin. We further observe that the trial court's order lifted *all* restrictions provided by the Protective Order, relative to Carlin. We doubt this was the court's intent; however, our decision does not preclude this outcome should the trial court find it to be an appropriate resolution after conducting a proper balancing test.