UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RICKY B. PERRITT, Individually; THE CUPCAKERY, LLC, a Texas Limited Liability Company; BUSTER BAKING, LLC, a Texas Limited Liability Company; THE WOODLANDS BAKING, LLC, a Texas Limited Liability Company; CUSTOM VERSION CORPORATION, a Texas Corporation	§	
Plaintiffs,	§	Civil Action No. 4:11-CV-23
v.	§	
PAMELA F. JENKINS, Individually; and THE CUPCAKERY LLC, a Nevada Limited Liability Company	§	
Defendants.	§	

PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR ENTRY OF PROTECTIVE ORDER REGARDING CONFIDENTIAL INFORMATION

Plaintiffs RICKY B. PERRITT, Individually, THE CUPCAKERY, LLC, a Texas Limited Liability Company, BUSTER BAKING, LLC, a Texas Limited Liability Company, THE WOODLANDS BAKING, LLC, a Texas Limited Liability Company, and CUSTOM VERSION CORPORATION, a Texas Corporation (collectively "Plaintiffs") file this their Response Brief in Opposition to Defendants' PAMELA F. JENKINS Individually and THE CUPCAKERY LLC, a Nevada Limited Liability Company (collectively "Defendants") Motion For Entry of Protective Order Regarding Confidential Information (Docket No. 64). Plaintiffs oppose the entry of the Protective Order proposed by Defendants and move the Court to enter the Protective Order proposed by Plaintiffs which is being submitted as a Proposed Order along with this Response pursuant to Rule CV-7(d) of the Local Civil Rules of this Court.

I. INTRODUCTION

Plaintiffs do not oppose the entry of a limited protective order in this case effective upon entry by the Court; however, Plaintiffs oppose the entry of the protective order proposed by Defendants for the reason that it is overbroad, establishes cumbersome procedures, is vague and ambiguous and could have impermissible retroactive effect.

First, Defendants' proposed protective order is inherently inconsistent, vague and would incorrectly have a retroactive effect. For example, Defendants' proposed order provides that deposition transcripts can be designated confidential for up to twenty (20) days after the deposition transcript is received by the deponent or their counsel regardless of whether counsel object to disclosure and/or noted the testimony as confidential on the record at the deposition. (Docket No. 64-3 at ¶ 4). It is hornbook law that once confidential information is disclosed any confidential status it may have previously had is extinguished by public disclosure. It is Plaintiffs' position that all information deemed "confidential" should be so designated before it is disclosed and not after the fact. Second, Defendants' proposed order contains provisions regarding the manner to deal with inadvertently produced information and/or documents. (Docket No. 64-3 at ¶ 3, p. 3-4). It is Plaintiffs' position that inadvertent disclosures should be addressed according to the applicable rules and case law. If provisions pertaining to inadvertent disclosure are to be included, the level of detail required would need to be vastly expanded beyond the terms and conditions of Defendant's proposed order. Third, Defendants' proposed protective order contains provisions which create numerous practical problems; therefore they should not be included in any protective order entered by the Court.

Plaintiffs have made revisions to Defendants' proposed protective order (filed with their motion as a proposed order, Docket No. 64-3) which address these concerns.[1] **A copy of Plaintiffs' alternative proposed protective order is attached to this Response as a proposed order.**

II. ARGUMENT AND CITATION OF AUTHORITY

A. Any Protective Order Entered by the Court Should Not Have a Retroactive Effect.

Defendants' proposed protective order could be read to incorrectly have a retroactive effect. For example, the procedure in Paragraph three (3) of Defendants' proposed order does not expressly state that material shall be designated as confidential before it is disclosed. (Docket No. 64-3 at ¶ 3). Additionally, Paragraph four (4) of Defendants' proposed protective order provides that deposition transcripts can be designated confidential for up to twenty (20) days after the deposition transcript is received by the deponent or their counsel and that deposition transcripts shall be treated as confidential regardless of whether they are so designated. (Docket No. 64-3 at ¶ 4). Any protective order entered by the Court should provide that all information deemed "confidential" should be so designated in some clearly prescribed procedure before it is disclosed and not after the fact. Such order should also make clear that failure to follow the

[1] In their Motion Defendants request that the terms and provisions of the draft Protective Order, which is attached in both Exhibits A and B to their Motion be entered in this case; however, Defendants also submitted a proposed order with their Motion which contains different terms and conditions than Defendants' Exhibits A and B. Specifically, Plaintiffs note that Defendants' proposed protective orders contained in their Exhibits A and B contain the following sentence in Paragraph 3 on page 2-3: "The parties hereby designate the Settlement Agreement executed by Jenkins and Perritt, dated October 28, 2009, and all documents it incorporates, the Assignment and Assumption of Limited Liability Company Interest executed by Jenkins and Laura Santo Pietro, dated March 14, 2007, the Assignment and Assumption of Limited Liability Interest executed by Jenkins and Dawn Kalman, dated April 20, 2007, the Assignment and Assumption of Limited Liability Interest executed by Jenkins and Perritt, dated April 20, 2007, as "Confidential." This sentence is not included in Defendants' proposed order. *Compare* Docket No. 64-1, 64-2, ¶3, p. 2-3 and Docket No. 64-3 ¶3, p. 2-3. Plaintiffs specifically object to the inclusion of this sentence in any protective order entered by the Court.

prescribed procedures forfeits any protection that might otherwise have existed if the prescribed procedures had been followed. It also seems inappropriate to have the default position being that everything in a deposition is confidential unless it is marked. Such seems calculated in a manner to create an argument that a party can recapture alleged confidential information even if willfully disclosed at Defendant Jenkins deposition without the protection of a protective order or agreement between the parties.

It is black letter law that objections and protective orders concerning deposition testimony must be raised prior to or at the taking of the deposition or they are waived. A motion for protective order should be filed before the time to respond to the discovery request. For example, a party should secure a protective order before the date of a deposition. *See Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc*., 200 F.R.D. 255, 259 (M.D.N.C. 2001); *In re Coordinated Pretrial Proceedings in Pet. Prods. Antitrust Litigation,* 669 F.2d 620, 622 n.2 (10th Cir. 1982). Additionally, "an objection to an error or irregularity at an oral examination is waived if: (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and (ii) it is not timely made during the deposition." Fed. R. Civ. P. 32 (d)(3)(B).

Accordingly, if a party is going to take the position that something said in a deposition or some exhibit to a deposition is confidential, that party should state such on the record at the deposition and either gain entry of a protective order or agreement of the parties to protect its confidential nature, so that the parties, the deponent, counsel, the court reporter, and the videographer will know contemporaneously with the disclosure of the confidential information that it is protected by a protective order. Of course, a protective order must be in place at the time. In the instant case, no protective order is currently in existence.

Defendants' proposed Paragraph seventeen (17) should not be included in any protective order entered by the Court as it is overbroad, ambiguous and expressly contradictory to Defendants' proposed Paragraph three (3), which sets out the proposed manner for marking protected material including deposition transcripts and materials. (Docket No. 64-3 at ¶ 17). If a document not previously protected as confidential under the protective order is disclosed at a deposition, it should not be protected and should not be subject to a protective order. If a confidential document is presented at a deposition it should be marked as required in the protective order and notation made on the record that the portion of the deposition discussing it is being given pursuant to a protective order. Of course, a protective order must be in place at the time. In the instant case, no protective order is currently in existence.

B. Inadvertent Disclosure Provisions of Applicable Law Should Apply, NOT Defendants' Proposed Order.

Inadvertent disclosures should be addressed according to applicable law. Specifically, the Federal Rules of Evidence include provisions regarding inadvertent disclosures. *See e.g.* Fed. R. Evid. 502. There is simply no reason to alter the default rules by court order regarding these issues; therefore, the second Paragraph under number three (3) on page three through four of Defendants' proposed protective order should not be included in any order entered by the Court. (Docket No. 64-3 ¶ 3, p. 3-4) (the paragraph beginning "All information and/or documents that are inadvertently produced by either of the parties in connection with discovery proceedings in the lawsuit . . ."). Necessary procedures to implementing a proper inadvertent disclosure provision are not included in Defendants' proposed order. If provisions pertaining to inadvertent disclosure are to be included, the level of detail required would need to be vastly expanded beyond the terms and conditions of Defendant's proposed order. Issues such as the definition of inadvertence, the standard required to show inadvertence as contrasted with

knowing disclosure and whether negligence associated with the disclosure defeats any protection afforded by the protective order are but a few examples.

C. Other Practical Problems with Defendants' Proposed Protective Order.

Oddly, even though Defendants have insisted that certain information in this case must be filed under seal, Defendants' proposed protective order does not contain any provision to facilitate filing information designated as confidential pursuant to any protective order under seal. Including language regarding procedures for filing pleadings under seal in a protective order conserves resources and reduces expenses for the parties. It also reduces the burden on the Court's docket. Therefore, Plaintiffs have added such language to their proposed order.

Moreover, the provisions contained in Paragraph nine (9) of Defendants' proposed protective order are cumbersome and simply unworkable. Defendants propose that a party desiring to file any information designated as confidential must give written notice of their intent to do so seven (7) days before filing the information. (Docket No. 64-3 ¶ 9). Such a provision would unreasonably require the preparation of pleadings including without limitation amended complaints or answers, motions, briefs, responses, replies, etc. far in advance of the actual filing deadline in order to identify any alleged confidential material about which to give advance notice. This is simply unworkable and unreasonable from a practical standpoint. Defendants' proposed protective order invites motion practice by putting the burden on the party seeking to protect the confidential information to seek a "sealing order." The provisions contained in Paragraph nine (9) of Defendants' proposed protective order should not be included in any order entered by the Court. The parties should not be burdened with the obligation of identifying confidential information to be filed a week in advance. Rather, a provision allowing any alleged

confidential information to be filed under seal should be incorporated in any protective order the Court desires to enter such furthers judicial economy and the interests of justice.

III. CONCLUSION

Based upon the foregoing, the Court should deny Defendants' Motion for Entry of Protective Order Regarding Confidential Information (Docket No. 64) in its entirety and enter the Protective Order proposed by Plaintiffs which is being submitted as a Proposed Order along with this Response pursuant to Rule CV-7(d) of the Local Civil Rules of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 26th day of May, 2011, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document through the Court's CM/ECF system under Local Rule CV-5(a)(3). Any other counsel of record will be served by a facsimile transmission and/or first class mail.

/s/ Clyde M. Siebman