

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. §

**DEFENDANTS’ REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR ENTRY OF PROTECTIVE ORDER REGARDING CONFIDENTIAL INFORMATION**

Defendant Pamela F. Jenkins (“Jenkins”) and Defendant The Cupcakery, LLC, a Nevada Limited Liability Company (“Nevada Cupcakery”) (collectively, Jenkins and The Nevada Cupcakery are the “Defendants”) hereby file this, their Reply Brief in Support of Their Motion for Entry of Protective Order Regarding Confidential Information, and would show the Court as follows:

**ARGUMENT**

As detailed in Defendants’ opening motion, counsel for Defendants gave counsel for Plaintiffs numerous opportunities to work together on an agreed protective order, but counsel for

Plaintiffs never responded.<sup>1</sup> After the status conference on May 11, 2011, when the Court specifically requested that the parties work together to submit an agreed protective order, counsel for Plaintiffs still did not provide any comments or suggested changes to the draft Protective Order. Instead of reaching out to Defendants to discuss the terms of an agreed order, and despite being granted an extension to respond, Plaintiffs elected to file their Response Brief in Opposition to Defendants' Motion for Entry of Protective Order Regarding Confidential Information on May 26, 2011 (the "Response"). None of the complaints or requested changes in Plaintiff's Response was raised until the Response was filed.

Plaintiffs' biggest complaint regarding the draft Protective Order is that it should not have a retroactive effect. The hypocrisy is stunning. The very parties who have refused to cooperate, who have refused to engage in a dialogue regarding the draft Protective Order, who have delayed the entry of an agreed protective order, and who moved to compel the deposition of Pamela Jenkins when there was not a protective order in place, now claim a protective order cannot be retroactive.<sup>2</sup> First, it is standard to have a time period following a deposition to review

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<sup>1</sup> On February 4, 2011, counsel for Plaintiffs requested that counsel for Defendants draft and circulate a proposed Protective Order. Counsel for Defendants circulated a draft Protective Order to counsel for Plaintiffs on February 14, 2011. Having received no response thereafter, counsel for Defendants re-circulated the draft Protective Order to counsel for Plaintiffs on March 8, 2011. Counsel for Defendants followed up with counsel for Plaintiffs on April 20, 2011 regarding the draft Protective Order, and counsel for Plaintiffs indicated he would review the Protective Order and respond with comments. Having received no response, on April 27, 2011, counsel for Defendants requested counsel for Plaintiffs respond regarding the draft Protective Order by close of business on April 29, 2011, or counsel for Defendants would submit a motion for entry of the Protective Order as an opposed motion. On May 9, 2011, when counsel for Plaintiffs had not provided any input or comments to the draft Protective Order, Defendants filed the instant motion.

<sup>2</sup> Plaintiffs try to argue some "gotcha" point by stating that a protective order must be in place for any testimony or deposition exhibit to be treated as confidential while pointing out that "[i]n the instant case, no protective order is currently in existence." *See Resp. p. 4.* It is worth noting that at the status conference on May 11, 2011, counsel for Plaintiffs represented to the Court that it was his understanding that a protective order actually was in place in this case.

and assess whether deposition testimony is confidential. Alternatively, the Standing Protective Order in the Eastern District of Texas protects confidential materials automatically:

To the extent that Protected Documents or information contained therein are used in depositions, at hearings, or at trial, such documents or information shall remain subject to the provisions of this Order, along with the transcript pages of the deposition testimony and/or trial testimony referring to the Protected Documents or information contained therein.

In the Standing Protective Order for the Eastern District of Texas, testimony referring to Protected Documents or information contained in those Protected Documents is deemed confidential. The Defendants' proposed Protective Order simply creates a timeline for spelling out those portions of a transcript that a party considers confidential.

With regard to inadvertent disclosure, the draft Protective Order simply expands on Fed. R. Evid. 502 and Fed. R. Civ. P. 26(b)(5)(B) by spelling out how to proceed in the event of inadvertent production (including deadlines for returning inadvertently produced documents, for example). If Plaintiffs' counsel would like to discuss concerns with "the level of detail" in the draft Protective Order, Defendants are willing to engage in that dialogue.

Last, Plaintiffs are mistaken that the draft Protective Order does not include provisions for filing documents under seal. Paragraph 9 specifically addresses the filing of confidential materials. Defendants would not oppose adding a provision to the draft Protective Order that provides that all parties consent to filings under seal. As drafted, however, Plaintiffs' proposed language leaves the decision regarding filing under seal to the filing party only. Defendants are willing to rework the section on filing and use of confidential materials in court proceedings to the agreement of both parties.

## CONCLUSION

There is no dispute that the Settlement Agreement at the heart of this contract dispute is a confidential agreement, nor is there any dispute that the parties' trade secrets and other business materials are confidential. The need for a protective order is apparent. Plaintiffs' counsel requested counsel for Defendants draft and circulate a protective order on February 4, 2011, yet Plaintiffs' counsel never responded with comments. Plaintiffs' counsel has never conferred with counsel for Defendants regarding any of the complaints or requested changes presented in Plaintiffs' Response. To enter Plaintiffs' proposed protective order would only reward Plaintiffs for their inaction. Additionally, it is troubling that the very parties opposing a protective order that allows deposition transcripts to be designated confidential after the conclusion of the deposition are the same parties who compelled a deposition in a dispute centered around a confidential agreement when no protective order was in place. Plaintiffs' proposed protective order should not be entered, the parties should work together on the terms of the protective order, or the Court should enter the Defendants' proposed Protective Order. Defendants pray for any further relief to which they are entitled.

Respectfully submitted,

/s/Jodie A. Slater

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 2nd day of June, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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/s/Jodie A. Slater

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