UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RICKY B. PERRITT, et al.,	§	
	§	
Plaintiffs,	§	Civil Action No. 4:11-CV-23
	§	
v.	§	
	§	
PAMELA F. JENKINS, et al.,	§	
	§	
Defendants.	§	

PLAINTIFFS' SURREPLY IN OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER REGARDING CONFIDENTIAL INFORMATION

Plaintiffs file their Surreply Brief in Opposition to Defendants' Motion For Entry of Protective Order Regarding Confidential Information (Docket No. 64). Defendants filed their Motion on May 9, 2011 (Docket No. 64). Thereafter, Plaintiffs timely filed their Response in Opposition on May 26, 2011.[1] (Docket No. 71). Defendants filed their Reply Brief on June 2, 2011 (Docket No. 79). Thereafter, on June 6, 2011 the Court ordered the parties to submit a proposed joint protective order and if agreement cannot be reached to submit the portions that are agreed and note the sections that are contested. In accordance with the Court's order the parties forwarded a proposed protective order to the Court before noon on June 10, 2011 which notes the respective positions of Plaintiffs and Defendants. A copy of that proposed protective order is attached hereto as Exhibit A. The black colored text contained in Exhibit A is agreeable to both Plaintiffs and Defendants. The red colored text contained in Exhibit A is agreeable only to Plaintiffs. The blue colored text contained in Exhibit A is agreeable only to Defendants.

The primary point of contention between Plaintiffs and Defendants is whether or not a protective order entered by the Court can have a retroactive effect and protect information

[1] Defendants erroneously implied in their Reply Brief (Docket No. 79) that Plaintiffs filed their response to Defendants' Motion for Entry of Protective Order pursuant to an extension of time. Plaintiffs timely filed their response brief, in accordance with the local rules, and not in reliance on any extension of time.

previously disclosed without agreement of the parties. In other words, whether the Court can enter an order which designates material as confidential after it has already been publicly disclosed. All agreed at the Scheduling Conference held on May 11, 2011 that no Protective Order was in place, a point made the basis of Defendants refusal to produce certain documents requested by Plaintiffs, and that testimony and/or exhibits were not designated confidential at Defendant Pamela Jenkins deposition held on April 12, 2011. Now, after the fact, Defendants want to put the spilled milk back in the bottle. Absent an agreement, Defendants cannot un-ring the bell regardless of the entry of a protective order entered at this time.

This is a sticking point for two reasons. First, Defendants have asserted as confidential substantial information which Plaintiffs believe is not confidential. Secondly, and more importantly, Defendants have alleged in their counterclaims in this case that Plaintiffs are liable to Defendants for releasing much of the same information that Defendants publicly disclosed at the April 12, 2011 deposition in this case. It seems elementary that damages, if any, that Defendants may have suffered from any disclosure of the information by Plaintiffs would be limited at most to the time period between when Plaintiffs allegedly disclosed it and when Defendants disclosed it at the deposition. Having played a game of "I gotcha" by alleging that Plaintiffs disclosed confidential information in the filing of this lawsuit, Defendants did the same in the giving so-called/alleged confidential testimony in an open deposition. For this reason, Plaintiffs can't reasonably agree to allow the Protective Order to have any retroactive effect.

Defendants' proposed language (in blue colored text in the attached Exhibit A) is overbroad, inherently inconsistent, establishes cumbersome procedures, is vague and would have a retroactive effect without the consent or agreement of Plaintiffs.

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

Defendants incorrectly seek a retroactive effect. For example, the procedure Defendants propose in Paragraph 3 the proposed order does not expressly state that material shall be designated as confidential before it is disclosed. 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.

Additionally, Defendants' proposed language for Paragraph 4 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 counsel objects to disclosure and/or noted the testimony as confidential on the record at the deposition. In fact, Defendants expressly seek the inclusion of a provision that expressly states "The April 12, 2011 deposition of Pamela Jenkins is hereby designated "Confidential." Waiver occurs by virtue of disclosing confidential information and not timely objecting to the same. There was no protective order or agreement in place at the time of Pamela Jenkins' deposition on April 12, 2011. In fact, no request was made at the deposition that the information be maintained as confidential and no arrangements were made with the court reporter or videographer to maintain certain portions of the transcript as confidential. Defendants and their counsel failed to properly and timely object. Even if the parties had not agreed on the issue of confidentiality at the deposition, the Eastern District of Texas hotline would have been available to address the issue. The fact of the matter is that the information is not sensitive and the only true concern about its confidentiality relates to its use as part of Defendants' counterclaims. Objections and protective orders concerning deposition testimony must be raised prior to or at the taking of the deposition or they are waived. *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); Fed. R. Civ. P. 32 (d)(3)(B). Thus, in order to protect against any impermissible retroactive application, the Court should include Plaintiffs' proposed language (in red colored text in the attached Exhibit A) including without limitation the language Plaintiffs propose in Paragraphs 2, 3, 4, 15, and exclude Defendants' proposed language (in blue colored text in the attached Exhibit A) including without limitation the language Defendants propose in Paragraphs 3, 4, and 17.[2]

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

Defendants' proposed language in Paragraph 3 regarding inadvertent disclosure should not be included in any protective order entered by the Court. The inadvertent disclosures and production of information should be addressed according to the applicable rules and case law. There is simply no reason to alter the default rules by court order regarding these issues; therefore, the second paragraph under number Paragraph 3 that Defendants propose should not be included in any order entered by the Court.

C. Other Practical Problems with Defendants' Proposed Language.

Defendants' proposed language leads to other practical problems. For example, Defendants propose adding language to Paragraph 6(f) which is simply unworkable and unreasonable from a practical standpoint. Adding the language Defendants propose to Paragraph 6(f) would allow third-party witnesses to avoid deposition by simply refusing to sign the Certificate of Acknowledgment relating to the protective order. The Court has the authority to compel the deposition of a third-party witness through subpoena or otherwise; however, the Court likely does not have the power to force a third-party to sign an agreement regarding a

[2] Specifically, Defendants' proposed Paragraph 17 should not be included in any protective order entered by the Court as it is overbroad, ambiguous and expressly contradictory to proposed Paragraph 3.

protective order while be compelled to testify. Thus, the addition of this provision would prejudice the parties as it would disallow an efficient and effective discovery process in this case.

Moreover, the language Defendants propose adding at the end of Paragraph 7 is confusing, unclear and ambiguous. This language simply does not add anything to the substance of the protective order and will ultimately lead to disagreements among the parties. Furthermore, Defendants' proposed addition to the end of Paragraph 17 of Plaintiffs' version and Paragraph 18 of Defendants' version should not be included. Specifically, Plaintiffs seek the inclusion of the sentence "Otherwise, attendance at depositions shall not be limited." Defendants seek to qualify this sentence by adding the phrase "in accordance with the Federal Rules of Civil Procedure." Defendants' proposed addition to this paragraph is inconsistent and contradictory. The ultimate intent and purpose of the sentence Plaintiffs seek to include is to not put any restrictions on attendance at depositions other than the restrictions expressly discussed in that paragraph of the protective order. Under the Federal Rules of Civil Procedure (the default rules absent agreement or Court order) the Court may restrict attendance at depositions beyond the express restrictions of this paragraph. *See* Fed. R. Civ. P. 26(c)(1)(E). Thus, Defendants' proposed additional phrase causes the sentence to be inconsistent and contradictory. Clearly, these provisions Defendants' propose including in a protective order are ambiguous and inconsistent and will lead to disagreement between the parties. Thus, they should not be included.

The Court should deny Defendants' Motion for Protective Order (Docket No. 64) in its entirety. If, however, the Court finds the entry of a protective order appropriate, then it should enter a protective order containing all of the language proposed by Plaintiffs (in red colored text in the attached Exhibit A) and not include any of the language proposed by Defendants (in the blue colored text in the attached Exhibit A).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 10th day of June, 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