

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF TEXAS
 AUSTIN DIVISION

YETI COOLERS, LLC,

Plaintiff

v.

RTIC COOLERS, LLC, et al.,

Defendants.

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1:15-CV-00597-RP

ORDER

Before the Court is the motion of RTIC Coolers, LLC, to enforce the protective order entered on January 11, 2016. (Dkt. 391). By way of its motion, RTIC complains that counsel for YETI Coolers, LLC, has retained one set of RTIC’s entire document production consisting of nearly 340,000 documents in violation of the terms of the protective order. The parties disagree whether the protective order allows YETI to do so.

Section 6(C) of the protective order requires the parties to return or destroy all documents designated as “Confidential Information” or “Confidential Attorneys Eyes Only Information”¹ within sixty days of the resolution of the case. (Protective Order § 6(C), Dkt. 37). An exception to this allows outside counsel for the parties to retain copies of certain categories of documents, provided, however, that these copies are retained only for internal use and subject to the terms of the protective order. (*Id.*). Under Section 8, information designated as confidential is to be used only for the purposes of preparation and trial of the action in which the order was entered and the recipient of any confidential information must maintain its secrecy. (*Id.* § 8(A)). Additionally, Section 9 provides that the protective order would not “preclude another court from finding that

¹ The Court will refer to these designated categories of information as “confidential information.” Additionally, the Court’s use of the term “document” refers to any relevant information, whether a physical document, data file, photograph, or other item.

information may be relevant and subject to disclosure in another case,” and allows the parties to comply with any court order requiring disclosure of confidential information. (*Id.* § 9).

The Court finds the parties’ obligations under these provisions to be as follows. The protective order does not require the return or destruction of documents that have not been designated confidential. YETI may therefore retain any non-confidential portion of RTIC’s production. For documents marked confidential, the protective order requires the parties (though not necessarily outside counsel) to return or destroy those documents, unless there is an agreement to the contrary. (*Id.* § 6(C)). While the protective order allows outside counsel (though not the client) to retain some categories of confidential information, the Court agrees with RTIC that this allowance encompasses only a subset of the opposing party’s production. The allowable categories are “court filings, discovery responses, deposition and hearing transcripts, and documents provided pursuant to the Court’s scheduling orders.” (*Id.*). To the extent there is any ambiguity, the Court clarifies that discovery *responses* are those produced in response to a particular discovery request, not documents produced pursuant to a mandatory disclosure provision of the Federal Rules, unless those required disclosures were specifically incorporated into one of the Court’s scheduling orders. (*See, e.g.*, Sched. Order, Dkt. 35 (setting time for exchange of Rule 26(a)(1)(A) disclosures)). The categories enumerated in section 6(C) are broad and overlapping, and it is possible that very few documents fall outside their scope. But, for documents that do, Section 6(C) does not allow outside counsel to retain them.

Having clarified the class of information that outside counsel may retain, the Court next considers the appropriate scope of its use. Section 6(C) states that any information retained by outside counsel “will be held for their internal use only, subject to the continuing obligations imposed by this Protective Order.” (Protective Order § 6(C), Dkt. 37). These obligations include a restriction that the information “shall be used by the recipient only for purposes of preparation and

trial of this action and no other purpose.” (*Id.* § 8). The plain language of the protective order therefore rules out the use of the confidential material in subsequent litigation. Nothing in Section 9 changes this—at least absent a court order. That section merely provides that the protective order neither prevents other courts from compelling production of covered documents nor impairs the ability of any party to comply with a court order. (*See id.* § 9). It relieves the parties of the choice between risking contempt of this Court by disclosing information and risking contempt of another court by withholding it. It does not, however, relieve the parties of their obligations under Rule 6(C).

In sum, the protective order allows YETI to retain any information not designated confidential. Additionally, YETI’s outside counsel may retain confidential disclosures that fall within the categories enumerated in section 6(C), but only if that information is “held for their internal use” in *this* action. (*Id.* §§ 6(C), 8). The protective order does not allow YETI’s outside counsel to retain any confidential information for use in any other action.² (*See id.*).

YETI has not disputed that it has retained nearly 340,000 documents produced by RTIC. While many of those documents may not have been designated as confidential, the Court finds it likely that many are so designated and thus fall within the restrictions of the protective order. Additionally, YETI suggests that it is retaining the documents “in view of its other enforcement efforts,” which, as explained above, the protective order does not permit. Accordingly, the Court finds that RTIC’s motion to enforce the protective order should be **GRANTED**. YETI must return or destroy and confidential information that either (1) falls outside of the categories enumerated in Section 6(C), as herein clarified; or (2) is being retained for a purpose other than its use in this

² YETI asserts that it may have a duty to preserve some of the documents, and relies on a Ninth Circuit case to argue that this Court may rewrite the protective order to allow it to do so. *See Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1131–32 (9th Cir. 2003). YETI does not expand on this duty or explain its source. Additionally, *Foltz* held that “a court should not grant a collateral litigant’s request for such modification automatically. . . . [T]he collateral litigant must demonstrate the relevance of the protected discovery to the collateral proceedings and its general discoverability therein.” *Id.* at 1132. YETI has not made this showing and the Court therefore declines to modify the protective order.

action, including covered documents retained for use in other enforcement efforts, whether or not the information falls within a category enumerated in Section 6(C). It must do so no later than twenty-one days from the issuance of this order.

Finally, the Court recognizes that YETI would like RTIC to retain the documents upon their return in case YETI wishes to subpoena them in the future. This issue will be left for the parties to work out.

SIGNED on July 26, 2017.

A handwritten signature in blue ink, appearing to read "R. Pitman", is written above a horizontal line.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE