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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

Coordination Proceeding Special Title (Rule 1550(b))	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4095
FIREARMS CASE	San Francisco Superior Court No. 303753
Including actions:	Los Angeles Superior Court No. BC210894 Los Angeles Superior Court No. BC214794
People, et al. v. Arcadia Machine & Tool, Inc., et al.	**DEFENDANT MANUFACTURERS' EX PARTE MOTION TO ADOPT PROTECTIVE ORDER**
People, et al. v. Arcadia Machine & Tool, Inc., et al.	
People, et al. v. Arcadia Machine & Tool, Inc., et al.	Hon. Vincent P. DiFiglia Dept: 65

The defendant manufacturers move to adopt the proposed Protective Order attached hereto. Plaintiffs' counsel have reviewed the proposed Protective Order and agree that, with one exception, the proposed Protective Order reflects the Court's rulings made at the October 13, 2000 hearing. The one exception is a notice provision the defendant manufacturers propose to add to paragraph 12(c). Plaintiffs have reviewed and object to this proposed additional term.

11-13-00

Defendants propose the addition to paragraph 12(c) to address a situation of grave concern to the manufacturers: the likelihood that, despite the protections incorporated in the Protective Order, discovery will result in the disclosure by plaintiffs of "Highly Confidential" design or business secrets of one manufacturer to a competing manufacturer. This problem was raised by the defendant manufacturers at the October 13, 2000 hearing, and the Court rejected the manufacturers' request that plaintiffs be precluded from sharing any Highly Confidential Information with any expert witness who is employed by or under contract with a competing manufacturer. The defendant manufacturers now propose a more limited solution not advanced at the hearing: that plaintiffs be required to give ten days' notice of their intent to disclose Highly Confidential Information to an expert affiliated with a competing manufacturer. Such notice will give the affected defendant an opportunity to assess the actual risk posed by the disclosure in the specific context in which it arises and, if necessary, to seek additional protection of the information from the Court as warranted by the specific circumstances.

Based on the Court's rulings at the October 13, 2000 hearing, paragraph 12(c) of the Protective Order would permit plaintiffs' counsel to disclose information designated as "Highly Confidential" to an expert witness retained by plaintiffs even if that expert is an employee of or is under contract with a competitor of the party producing the information. The only restriction in the Protective Order directed specifically to this issue is the exhortation that "counsel for plaintiffs will use reasonable efforts to find Experts who are not competitors of the Producing Party." Protective Order ¶ 12(c). The defendant manufacturers propose to add the following notice procedure to paragraph 12(c):

> Plaintiffs will provide 10 days' written notice to the Producing Party of plaintiffs' intent to provide Highly Confidential Information to an Expert employed by or under contract with a competitor of the Producing Party. Written notice shall include a description of the Highly Confidential Information to be produced by Bates number. The Producing Party shall file any motion within the 10-day period to preclude access to the Highly Confidential Information by the competitor Expert. The Highly Confidential Information shall not be provided to the competitor Expert until such time as the Court rules on the motion.

The risk of injury to one or more of the defendant manufacturers in these circumstances is neither abstract nor hypothetical. The manufacturers are members of a highly competitive industry in which there is a premium on the development of new technologies in the design and manufacture of firearms. Although the Protective Order requires plaintiffs to attempt to use experts not affiliated with any manufacturer, plaintiffs' counsel indicated at the October 13, 2000 hearing that plaintiffs expect they will seek experts from within the industry: "Given the nature of this industry, it has been very difficult for us, in our efforts to obtain legitimate experts, to get people from outside the industry. Just the way it is." Hearing Transcript at p. 167 (statement of Robert J. Nelson, Esq.).

The Protective Order would limit the uses to which any "competitor-affiliated expert" could put the information, but in this specific context the practical effect of that protection is illusory. Once a design engineer employed by Manufacturer A learns the innovative and proprietary design solutions developed by Manufacturer B, that engineer, even acting with full good faith to comply with the Protective Order, could not be expected to erase that information and all its implications from his knowledge base when he returns to the task of trying to solve Manufacturer A's similar design problems.

The notice provision defendants propose offers a pragmatic and limited solution to this problem. The defendant manufacturers do not propose that the Court preclude plaintiffs from retaining an expert employed by or under contract with a competitor, nor do they ask the Court to prejudge the need to prevent such an expert from having access to particular information. Rather, the manufacturers ask only that they be given notice and an opportunity to bring the particular problem to the attention of the Court for a ruling limited to a specific set of circumstances. Indeed, defendants do not even ask that plaintiffs be required to identify the competitor-affiliated expert they have retained. All plaintiffs would have to disclose is that they have retained such an expert and that they intend to share certain Highly Confidential Information with that unidentified expert. The identification of the information at issue

will permit the affected defendant producing the information to assess the likelihood of that specific information causing competitive harm.[1] If the defendant files a motion, the Court will then be in a position to evaluate the issues in a concrete context and, if appropriate, to fashion relief appropriate to that context.

This notice mechanism is not subject to abuse. First, of course, if plaintiffs never retain any competitor-affiliated experts, no issue will ever arise. Second, the Protective Order already limits the designation of Highly Confidential Information and provides a mechanism for any party to contest the designation. Protective Order ¶¶ 1(c), 17. Third, the notice procedure still requires a defendant to make a particularized showing that additional protection of certain material is warranted. If notice is given, the affected defendant will have to decide whether the intended disclosure poses an actual threat to its competitive interests. Finally, the Court retains full discretion to deny additional protection or to fashion protection that is appropriate to the particular circumstances.

For all these reasons, the defendant manufacturers respectfully request that the Court enter the Protective Order in the form attached hereto, with the additional notice provision proposed in paragraph 12(c).

Respectfully Submitted,

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

Dated: November 13, 2000

By: _____ For
Lawrence J. Kouns
Liaison Counsel for Defendant Manufacturers

WILDMAN, HARROLD, ALLEN & DIXON

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[1] Defendants submit that requiring plaintiffs to give notice of the specific documents or information they propose to disclose to a competitor-affiliated expert serves the valuable purposes of enabling first the affected manufacturer and then the Court to evaluate the potential impact of the proposed disclosure with specificity. But if the Court believes that provision would require plaintiffs to reveal too much information, defendants ask that the Court at least require plaintiffs to provide a general notice of intended disclosure. The Court could then determine in each situation whether to require plaintiffs to identify further the information they propose to disclose.

Dated: November 13, 2000

By: _____ FOR
James B. Vogts
Liaison Counsel for Defendant Manufacturers