

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

VISX INCORPORATED, :
 :
 Plaintiff, :
 :
 v. : Civil Action No. 99-789 JJF
 :
 LASERSIGHT INCORPORATED, :
 LASERSIGHT TECHNOLOGIES, :
 INC., and LASERSIGHT :
 CENTERS INCORPORATED, :
 :
 Defendants. :

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Attorneys for Defendants.

MEMORANDUM OPINION

January 30, 2001
Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is a dispute between the parties, Visx, Incorporated ("Plaintiff") and LaserSight Incorporated, LaserSight Technologies, Inc., and LaserSight Centers Incorporated (collectively "Defendants"), concerning a provision in a proposed stipulated protective order. Counsel for the parties are in the process of drafting the proposed order which is to be used in the discovery phase of this matter. However, the parties cannot reach agreement concerning the disclosure of certain information designated "Confidential" in the proposed order. Pursuant to the Court's directive, counsel have submitted letters setting forth their respective positions on the dispute and presenting alternate proposals to resolve it. (D.I. 102, 103).

BACKGROUND

In drafting the proposed stipulated protective order, the parties agree that certain information to be exchanged in the discovery process requires a "Confidential" designation. However, the instant dispute arises because Defendants want to be able to disclose information marked "Confidential" to one non-lawyer representative of Defendants, Michael Farris, the Chief Executive Officer of LaserSight, Incorporated. Defendants contend that it is necessary for litigation counsel

to be able to share "Confidential" information with a client representative like Mr. Farris, so that they can discuss litigation strategy and options, as well as other issues concerning the litigation.

In response, Plaintiff objects to any disclosure that would allow Mr. Farris, the CEO of a direct competitor, to access "Confidential" information. Plaintiff contends that such disclosures are particularly dangerous where, as here, the businesses are single product companies and the information sought is allegedly highly proprietary and of substantial commercial value.

LEGAL STANDARD

Federal Rule of Civil Procedure 26(c) provides various means for the federal courts to protect parties and witnesses during the discovery process. The rule requires parties to confer in good faith to resolve any dispute; and if not successful, any party may apply to the court for relief concerning the present dispute. In pertinent part, Rule 26 (c) provides:

[F]or good cause shown, ... the court ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following . . .

(7) that a trade secret or other confidential research, development, or

commercial information not be revealed or be revealed only in a designated way . . .

Fed. R. Civ. P. 26(c).

A determination of what constitutes "good cause" is committed to the discretion of the court. Caver v. City of Trenton, 192 F.R.D. 154, 162 (3d Cir. 2000). In exercising this discretion, courts balance the need of the party seeking the discovery against the burden or harm on the party responding to the discovery request. Id. (citing Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3d Cir. 1994)).

DISCUSSION

In this dispute, both parties have conceded that the information sought is relevant and needed, and both parties have been able to agree upon the first step of protection, i.e. the designation "Confidential." With regard to the next level of protection, a limitation or restriction on disclosure, counsel for the parties have likewise reached agreement, except on the issue of disclosure to a representative of the parties. In resolving this discrete issue, the Court first examines the nature of the "Confidential" information. The parties agree that the information Plaintiff seeks to protect from disclosure is fairly characterized as proprietary, sensitive, or competitive in nature. It is not the type of business information

generally available to those not employed by the parties. In these circumstances, the Court finds that any disclosure, even restricted disclosure, may be harmful to the party producing the information.

The second consideration for the Court is whether the proposed disclosure of the subject information to the CEO of the opposing party is necessary or required for the reasons proffered. Here, Defendants contend that litigation counsel have a need to fully inform their client, so that the client has the information to make decisions about the litigation, including whether the litigation should settle or continue. Essentially, Defendants position is premised on the argument that it is prejudicial and unfair for a party or client to be denied access to the same information its counsel is utilizing to handle their litigation. As for the concerns raised by Plaintiff, Defendants contend that Plaintiff's interests can be adequately addressed and protected by the restrictions and sanctions contained in the proposed protective order. Further, Defendants offer to create sub-categories of "Confidential" information, so that information contained in certain sub-categories will not be disclosed to Defendants' CEO because the parties agree to the competitive nature of that information.

Based on the Court's understanding of the type of information the parties have agreed to designate "Confidential," and after balancing the need for disclosure against the potential harm of disclosure, the Court concludes that Defendants' CEO should not be Defendants' representative for purposes of the protective order to be entered in this matter. The parties' businesses are involved with a single product and the parties directly compete in the marketplace for sales. Certainly, no business, by virtue of being involved in litigation, should be required to relinquish to the CEO of a direct competitor information that is truly proprietary and critical to its success in the marketplace. This having been said, the Court likewise understands the legitimate role of a party or client representative in assisting counsel. To this effect, Defendants are free to designate a party representative to whom disclosure may be made who is as helpful to counsel and the client as Mr. Farris, but who is more neutral to the competitive concerns expressed by Plaintiff.

In sum, the Court concludes that information properly designated "Confidential" by a party should not be disclosed to a highly placed business person of a direct competitor. In reaching this conclusion, the Court trusts that the parties

will make every effort to find a more neutral party representative, and to classify as "Confidential" only that information which is deserving of the disclosure restrictions typically afforded such a designation.

CONCLUSION

For the reasons discussed, the Court will direct the parties to submit a protective order for entry in this case, which does not permit the disclosure of "Confidential" information to highly placed business persons of either party.

An appropriate Order will be entered.