

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

BAILEY INDUSTRIES, INC.,

Plaintiff

vs.

Case No.: 3:10-mc-0064

CLJP, INC.,

Defendant.

_____ /

RESPONSE TO MOTION TO COMPEL AND MOTION TO
REQUIRE PAYMENT OF COPY COSTS FILED BY DEFENDANT, CLJP, INC.,
WITH INCORPORATED MEMORANDUM OF LAW

COMES NOW the Defendant, CLJP, Inc., by and through counsel, and files this, its Response to Motion to Compel and Motion to Require Payment of Copy Costs, with Incorporated Memorandum of Law, as follows:

1. This case arises out of a case pending between Legacy Cabinets, Inc. (hereinafter “Legacy”) and Bailey Industries, Inc. (hereinafter “Bailey”), which is currently pending in the United States District Court for the Northern District of Alabama, Southern Division, bearing case number 2:09-cv-1574-VEH (hereinafter referred to as “the Alabama litigation.”). CLJP is not now, nor has it ever been, a party to that suit.

2. On or about June 24, 2010, Bailey served a non-party subpoena to CLJP seeking the production of numerous documents. A copy of the subpoena is attached as Exhibit “A” to Bailey’s Motion to Compel. In response, on July 19, 2010, CLJP produced over 130 pages of documents responsive to the subpoena. In that document production, CLJP redacted information it objected to producing as proprietary information. On August 26, 2010, pursuant to the conference of counsel

described below, a supplemental production was made by e-mail.

3. As shown by the affidavit of Maribeth Wollard, CFO of CLJP, Inc. (attached as Exhibit "1" to this document), Bailey is a competitor of CLJP and the two business are directly engaged in the same business in a similar market area. These companies regularly compete against one another for business and for employees. CLJP has made its best efforts to comply with the subpoena and, as set forth in Wollard's affidavit, has spent approximately \$1,000.00 worth of time and more than \$5,000.00 in attorney's fees in responding to this subpoena.

4. CLJP has fully complied with the subpoena and its objections and redactions of documents are well founded. As such, the motion to compel filed by Bailey should be denied.

5. Additionally, as allowed by the Federal Rules of Civil Procedure, CLJP sent an invoice to Bailey for the documents produced in response to the subpoena. *See, generally, Cantaline v. Raymark Indus., Inc.*, 103 F.R.D. 447, 453 (S.D. Fla. 1984). A copy of the invoice is attached hereto as Exhibit "2." Despite repeated requests, Bailey has not given any indication of when it intends to pay this invoice. CLJP hereby moves this Court for an order requiring Bailey to pay the invoice for copies and also requests that the Court order Bailey to pay for the time spent by CLJP in responding to this subpoena.

6. As required by the Court's order dated August 23, 2010, undersigned counsel personally spoke by telephone with Tom Wood, attorney for Bailey, on the morning of August 24, 2010. Undersigned counsel participated in a follow-up telephone conference with Mr. Wood and Jay Long, another attorney for Bailey, later that same day. In that conversation, counsel discussed the information requested by the subpoena and the need for this information in the Alabama litigation. In the course of these discussions, CLJP agreed to provide the amount of its total sales in Louisiana

and to clarify its efforts to locate additional e-mails. On August 25, 2010, CLJP made a supplemental production of documents by e-mail and also provided the requested clarification of the scope of the search for e-mails. On August 26, 2010, undersigned counsel again conferred by telephone with counsel for Bailey prior to filing this response. Despite these efforts, a legitimate dispute remains for the Court's consideration.

7. By this response, CLJP requests that the Court deny the relief requested by Bailey. CLJP further requests that this Court enter an order requiring Bailey to pay the invoice for copies and for an Order requiring Bailey to pay the attorney fees and costs incurred by CLJP in responding to this motion. In support of this response, CLJP submits the following Incorporated Memorandum of Law:

MEMORANDUM OF LAW

There are essentially two remaining issues for the Court to determine. First, the Court must determine whether or not the redactions made on invoices produced by CLJP are proper. Second, the Court must determine if CLJP has complied with the subpoena as it relates to the production of e-mails. These issues will be addressed separately.

1. Production of Invoices with Redaction

As to the invoices, CLJP has produced the invoices with its proprietary information redacted to preserve its confidentiality. These invoices and corresponding spreadsheet constitute the only documents in CLJP's possession which are responsive to the subpoena. The information redacted includes information that would identify the name of the customer and information that would identify CLJP's pricing structure. Bailey has acknowledged that redaction of the customer name is proper. The issue for the Court's determination is whether or not the redaction of the pricing structure is appropriate.

When determining whether or not a non-party is required to produce trade secret and proprietary information, the Court is directed to a two-prong analysis. *Fadella v. Life Auto. Products*, 258 F.R.D. 501, 506 (M.D. Fla. 2007). Under that analysis, the Court must first determine whether or not the information sought is, in fact, a trade secret. Then, the Court must determine if disclosure of the information would be harmful to the non-party. If so, then the burden shifts to the party seeking disclosure to show that the necessary information cannot be determined in any other manner. *Duracell, Inc. v. SW Consultants, Inc.*, 126 F.R.D. 576, 578-79 (N.D. Ga. 1989).

Under Florida law, CLJP's pricing structure is a trade secret. Section 688.002, Fla. Stat., sets forth the definition of a trade secret. There, "trade secret" is defined as follows:

"Trade secret" means information including a formula, pattern, compilation, program, device, method, technique or process that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Fla. Stat. §688.002(4). Here, the pricing information at issue fits the definition. As shown by the affidavit of Maribeth Wollard, attached as Exhibit "1," CLJP negotiates prices with its customers in an effort to offer competitive pricing. These prices are not publicly published and, in fact, they are not made known to any CLJP employees who are involved in the transaction. The steps taken by CLJP to maintain the confidentiality of this information is outlined more specifically in Wollard's affidavit. Thus, reasonable efforts are certainly made to maintain the secrecy of the pricing structure. Also, Knowledge of CLJP's pricing would allow a competitor, such as Bailey, to underbid CLJP where both companies are competing for business. Thus, a competitor, such as Bailey, could easily

gain economic value from the disclosure of CLJP's pricing. Given that, CLJP's pricing meets the statutory definition of a trade secret and is entitled to protection from competitors.

Having determined that the pricing information is a trade secret, the Court must next determine if the disclosure of this information is detrimental to the non-party seeking protection. As Bailey is a fierce competitor of CLJP, disclosure of the trade secret would be detrimental to CLJP. In fact, disclosure of confidential information to a competitor, with nothing more, is deemed to be harmful. *American Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 740-41 (Fed. Cir. 1987). Further, even if this was not deemed to be harmful, it is a matter of common sense to recognize that knowledge of a competitor's prices would allow a party to underbid its competitor. This is why CLJP takes the measures it does to keep pricing information secret from all but its own employees who absolutely need to know the information. As such, the analysis the Court is required to undertake shows that CLJP would be harmed if its trade secrets were revealed and the redactions made by CLJP are proper under the law. Accordingly, the burden now falls on Bailey to show to the Court why production of the redacted information should be ordered.

Bailey has not, and cannot, provide any rational argument for why the redacted information should be produced. In its motion to compel, Bailey has incorrectly characterized the invoices produced as "useless." Even though Bailey has wholly failed to describe the reasons it needs the requested information, it is believed that the information is needed for Bailey to determine the damages it is seeking in the Alabama litigation. That information is provided. These invoices, as they were produced, show the number of transactions that took place in the State of Louisiana, show the City in Louisiana where the product was sold, give a general description of the products sold and give the total amount of sales. It should also be noted that Bailey knows its own pricing structure

and, presumably, it knows Legacy's pricing structure. Bailey can use the information from the invoices to calculate what its own costs would have been. This would be a more accurate measure of damages and would run no risk of damage to a non-party's business. If the redacted information was provided, then Bailey would be able to use this information to calculate CLJP's pricing structure and would risk damage to CLJP's business.¹ By producing the documents with redactions, CLJP has produced the information Bailey claims that it needs without producing any information that could potentially harm CLJP. There is nothing in the record which would allow Bailey to make a showing of why the redacted information is needed. Thus, the redactions are appropriate under the law and Bailey's motion to compel should be denied.

In sum, CLJP has fully complied with the subpoena and Bailey's motion should be denied. The documents, which were produced with redactions, strike a reasonable balance between providing Bailey the information it is seeking through discovery and protecting CLJP's confidential trade secrets from a competitor. As such, the Court should deny Bailey's motion to compel.

2. Production of e-mails

The second primary issue in the motion to compel is the production of e-mail messages. As shown in the affidavit of Brian Keith Schultz, attached hereto as Exhibit "3," CLJP has made a thorough search of its e-mail system and has produced all the e-mails that it has been able to locate. Here, it should be reiterated that CLJP is not now, nor has it ever been, a party to the Alabama litigation. If CLJP ever had additional e-mails sought by Bailey (which is questionable), those e-mails have since been deleted. As shown by the Schultz affidavit, these e-mails cannot be recovered.

¹ In a public filing such as this, CLJP is hesitant to go into detail regarding how the pricing structure could be determined. Counsel for CLJP would be willing to provide this information to the Court for an *in camera* review if the Court believes that would be helpful.

The only thing that could be done would be to attempt an expensive (\$5,000.00) forensic analysis of the CLJP computer system which would have a dubious likelihood of success. Under Fed. R. Civ. P. 45(d)(1)(D), these deleted e-mails, if they ever existed, are categorized as inaccessible electronically stored information and further efforts to locate those e-mails can only be ordered upon a showing of good cause. Here, CLJP, as a non-party, should not be required to expend these significant amount of additional resources for something that could likely be a fruitless exercise. CLJP has produced the documents it could locate in response to the subpoena and it has explained, by way of affidavit, why no additional documents can be found. As such, this production constitutes full compliance with the subpoena and Bailey's motion on this point should be denied.

CONCLUSION

CLJP has fully complied with the subpoena that was served upon it in this case. The redactions made are consistent with Florida law and strike a fair and reasonable balance between protecting the proprietary interests of CLJP and the need for Bailey to discover information needed in its defense of this case. Further, Bailey has failed to pay the invoice for complying with this subpoena. As such, CLJP requests that this Court enter an order denying Bailey's Motion to Compel and requiring Bailey to pay the invoice for copies produced in response to the subpoena and to reimburse CLJP for the lost productivity and fees incurred in responding to this subpoena. Additionally, CLJP requests that this Court enter an order requiring Bailey to pay CLJP's attorney fees and costs for the response to Bailey's motion.

This, the 26th day of August, 2010.

KUBICKI DRAPER, P.A.
125 W. Romana Street
Suite 550
Pensacola, Florida 32502
(850) 434-0003

By: /s/ Stephen M. Cozart
Stephen M. Cozart, Esq.
Fla. Bar No. 148873

Of counsel:

Stephen W. Drummer, Esq.
ALLEN, COBB, HOOD & ATKINSON, P.A.
One Hancock Plaza, Suite 1212
Post Office Drawer 4108
Gulfport, Mississippi 39502

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed this document with the Clerk of the Court by using the CM/ECF system which will provide an electronic notice of filing to the following:

Thomas M. Wood, Esq.
Burr & Forman, LLP
Post Office Box 2287
Mobile, Alabama 36652-2287

A copy of this document has been provided via U.S. Mail to the following:

None.

This the 26th day of August, 2010.

/s/ Stephen M. Cozart
Stephen M. Cozart