

No Good Cause, No Dispute, No Protective Order

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It seemed like many other breach of contract and patent infringement cases. In *AgJunction LLC v. Ag Leader Tech., Inc.*, No. CV-20-02204-PHX-SPL (D. Ariz. March 9, 2021), the two plaintiffs alleged that they provided the defendant with precision technology for use in agricultural applications. The lone defendant did not file an answer before the case was stayed for settlement discussions. The situation in the Federal Court case in the Phoenix Division seemed to be excellent for an agreed protective order.

The parties were discussing settlement. Together, they asked for a stay. Since they were discussing settlement, they got their stay. It makes sense to stay a case that is heading toward settlement. If the case settles, there is no need to waste anyone's time and resources to proceed with the case.

The parties also asked for a protective order. They did more than ask for a protective order; they wrote a proposed order. As if to show their settlement bona fides, they all agreed to propose it to the U.S. District Judge to sign.

Their proposed order was comprehensive. They made "any information, document, or thing" or part of any document or thing "confidential," meaning that the public would not have access to any of it, so long as it contained any of the following: they listed trade secrets and more; they kept some contracts a secret; they even included protections in their order for materials already kept "confidential" by law, such as PII or Personal Identifying Information, and PHI or Personal Health Information already protected from public disclosure by HIPAA.

The situation contained a lot that would be likely to make a proposed, agreed protective order attractive to a U.S. District Judge. One of two things that the parties lacked in this situation, however, was the ability to show good cause for their protective order. They just did not have any specific harm that they could show would result if the material in question were to be disclosed.

Since their protective order was not particularized, i.e., it was not directed to particular material (and in this case, it could not be), they failed to show good cause for Court-ordered protection of that particular material. That was the first reason, the Court held, that they failed to meet the requirements for Court-ordered protection within the Ninth Circuit.

The Local Rules of Civil Procedure for the District of Arizona address sealing of court records in LR Civ 5.6. This Rule was not cited as the source of the "good cause" failure here. Instead, the Court relied on

Ninth Circuit caselaw that requires good cause for such a protective order as the parties proposed here.

The absence of good cause was only one of two items missing in this situation and, as things turned out, it was not the most important one. The agreed protective order proposed in this case presented an even greater problem. The other missing building block in the construction of the proposed protective order, if you will, was actually the cornerstone: The parties did not have a basis for the Court either to approve or to monitor their private agreement to exchange materials.

In short, said the Court, the parties and their lawyers may have agreed on the text of their proposed order, but "no party has shown that there is an actual dispute that commands Court intervention and protection" under the governing rules of law. The parties were not without their remedies, however. One remedy was within their private powers, and another remedy lay in the opportunity to petition the Court in the future for protection of particular documents that the parties specifically identified:

The parties remain free to mutually enter into a written agreement to facilitate the exchange of confidential disclosures without court approval or supervision. And, in the event discovery mandates disclosure of specific, harmful, confidential material, the parties will not be precluded from presenting a request to the Court at that time in a manner tailored to

protect the particular interests at hand.

The lesson for practitioners in the U.S. District Court for the District of Arizona is clear: Agreed protective orders are not likely to attract Court approval or supervision simply because the parties agree to propose them. To borrow language from the District Judge in the *AgJunction* case, the parties remain free at all stages of the litigation to exchange confidential information without involving the Court's approval or supervision of the parties' private contract. In the event that the parties require judicial intervention in a future dispute, they and their counsel can present the Court with legally sufficient motions at that time, "tailored to protect the particular interests at hand." ■

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