**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

No. 5:21-CV-251-BO

BERINGER COMMERCE, INC., d/b/a BLUE ACORN iCi, Plaintiff, v. FIN CAP, INC. d/b/a "BLUEACORN.CO," BLUE ACORN PPP, LLC, and BLUE OAK FOREST, LLC, Defendants.	))))))))))))	**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PROTECTIVE ORDER WITH "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" DESIGNATION**

Pursuant to Federal Rule of Civil Procedure 26(c), the Court should enter the protective order proposed by Plaintiff Beringer Commerce, Inc., d/b/a Blue Acorn iCi ("Plaintiff"), which appropriately sets forth a protocol for ensuring the confidentiality of commercially sensitive information via "Highly Confidential – Attorneys' Eyes Only" Designations.

STATEMENT OF THE CASE

Plaintiff brought this suit on June 10, 2021, alleging claims for trademark infringement, unfair competition, cybersquatting, copyright infringement, and unfair and deceptive trade practices. (Dkt. 1, Complaint.) Each party has served a set of written discovery, including interrogatories and requests for production, and Plaintiff has served its responses to Defendants' discovery requests and produced its first set of documents to Defendants. The parties agree that a protective order is needed but disagree as to certain provisions.

On January 12, 2022, counsel for Plaintiff sent a proposed protective order to Defendants' counsel, which provided for two-tiers of confidentiality ("Confidential" and "Highly Confidential – Attorneys' Eyes Only") in light of Defendants' requests for highly sensitive and confidential commercial information. (*See* Plaintiff's Motion for Protective Order with "Highly Confidential – Attorneys' Eyes Only" Designation, Ex. A[1] (Plaintiff's Proposed Protective Order); Ex. C at 2.)

The next day, Defendants' counsel responded that Defendants do not agree that a two-tier protective order is necessary based on their view that the parties conduct business in different spaces and are not direct competitors. (*See* Ex. C at 1.) Defendants' counsel also indicated that the "Highly Confidential – Attorneys' Eyes Only" designation would hamper its ability to review Plaintiff's documents with its client in order to defend this case. (*Id.*) On January 19, Defendants provided a copy of their proposed protective order, which eliminates the "Highly Confidential – Attorneys' Eyes Only" designation. (*See* Ex. B.) The parties met and conferred on January 20 but were unable to reach an agreement.

[1] All exhibits referenced herein are attached to Plaintiff's Motion for Protective Order with "Highly Confidential – Attorneys' Eyes Only" Designation which is filed contemporaneously with this Memorandum.

As demonstrated below, the Court should enter Plaintiff's proposed protective order because it best protects its confidential business and financial information from harmful disclosure without unduly hampering Defendants' ability to litigate this case.

STATEMENT OF THE FACTS

This case arises out of Defendants' blatant infringement of Plaintiff's Blue Acorn intellectual property. Plaintiff is a leading digital technology consulting company that assists businesses with planning and developing online digital consumer experiences for its clients. (Compl. ¶ 14.) Plaintiff also offers payment processing services to its clients. (*Id.* ¶ 15.) Plaintiff offers these services through various internet channels of commerce, including its website located at https://www.blueacornici.com/. (*Id.* ¶ 16)

Plaintiff, through its predecessors in interest, has used the Blue Acorn brand (consisting of the Blue Acorn name and stylized blue acorn) since at least as early as 2007 in connection with its services. (*Id.* ¶¶ 21, 25-26.) Plaintiff also owns U.S. Registration No. 6,272,484 for the mark BLUE ACORN ICI for, among other things, "[a]ssistance, advisory services and consultancy with regard to business planning [and] business management." (*Id.* ¶ 30.) Additionally, Plaintiff owns the copyright to its Blue Acorn Logo:

(*Id.* ¶ 46.)

In 2020, Defendants established a business purporting to assist small businesses and contractors in obtaining loans through the Paycheck Protection Program ("PPP"). (*Id.* ¶ 58.) In doing so, Defendants registered multiple websites which utilize Plaintiff's Blue Acorn name, including https://blueacorn.co/ and https://getblueacorn.com/. (*Id.* ¶ 62.) Defendants also began deliberately infringing Plaintiff's intellectual property by using a nearly identical Blue Acorn mark and an exact replica of Plaintiff's Blue Acorn Logo in its marketing materials. (*Id.* ¶¶ 66-84.)

Defendants' egregious misconduct has caused consumers to mistakenly believe that Plaintiff is associated with Defendants or is providing Defendants' PPP loan services. (*Id*. ¶¶ 85-86.) Defendants, nevertheless, continue to use Plaintiff's Blue Acorn intellectual property in marketing its services to new potential clients and have also indicated they do not intend to stop using Plaintiff's Blue Acorn marks and brand once the PPP program ends—apparently leaving the door open for an expansion of their service offerings. (Geaslen Decl., ¶ 8.)

On November 16, 2021, Defendants served on Plaintiff their first set of interrogatories and first set of requests for production. (Exs. D and E.) Defendants' discovery requests seek confidential and highly sensitive business and financial information including:

- The identity of the "'the over 169' clients of BCI and the average revenue for BCI per client" (Ex. D, Interrogatory No. 1);
- Copies of "BCI's financial statements (including balance sheets, and income statements) and state and federal income tax returns, including all schedules and forms from 2018 to present" (Ex. E, RFP No. 19);

- Copies of "all business plans relating to BCI's services" (*Id.*, RFP No. 24);
- Copies of "all marketing plans relating to BCI's services" (*Id.*, RFP No. 25); and
- "[A] customer list and any and all documents evidencing, referring, or relating to the type or class of purchaser of the [sic] BCI's services" (*Id.*, RFP No. 27).

Because Defendants' discovery requests will require production of confidential and highly sensitive information, Plaintiff seeks a two-tier protective order to prevent disclosure of such information to Defendants directly. Permitting Defendants to have access to such confidential information—especially when Defendants' infringing conduct is ongoing and Defendants have indicated they do not intend to stop using Plaintiff's Blue Acorn intellectual property once the PPP program ends—will cause competitive harm to Plaintiff by allowing Defendants to have access to Plaintiff's client lists and marketing and business plans. The potential for harm is further escalated given the serious allegations concerning Defendants' processing of fraudulent and ineligible PPP loan applications. (*See* Ex. F.)

Accordingly, Plaintiff respectfully requests the Court enter a two-tier protective order permitting the parties to identify such confidential and highly sensitive information as "Highly Confidential – Attorneys' Eyes Only."

ARGUMENT

Rule 26(c) provides that any party "from whom discovery is sought may move for a protective order" and that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). This includes requiring that "confidential . . . commercial information not be revealed or be revealed only in a specified way." Fed. R. Civ. P. 26(c)(1)(G). "The party seeking the protective order must make a particularized request with specific facts in support of the request." *Country Vintner of N.C. v. E.&J. Gallo Winery*, 2010 U.S. Dist. LEXIS 160937, at *3 (E.D.N.C. Jan. 20, 2010). Where the party seeking protection under Rule 26 is a business, "it must show that disclosure would cause significant harm to its competitive and financial position." *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653 (D. Md. 1987).

Courts have routinely held that commercial information, such as that contained in financial records and customer lists are subject to protection under a protective order. *See Country Vintner of N.C.*, 2010 U.S. Dist. LEXIS 160937, at *4 (granting motion for protective order where discovery requests sought, among other things, business strategies and contract and business arrangements); *Massey Coal Servs., Inc. v. Victaulic Co. of Am.*, 249 F.R.D. 477, 483 (S.D. W. Va. 2008) (collecting cases that grant protective orders to keep such commercial information confidential); *Chesa Int'l, Ltd. v. Fashion Assocs., Inc.*, 425 F. Supp. 234, 237 (S.D.N.Y. 1977) (customer list); *Vollert v. Summa Corp.*, 389 F. Supp. 1348, 1351 (D. Hawaii 1975) (financial records detailing capitalization, net worth, and annual income); *Corbett v. Free Press Assoc.*, 50 F.R.D. 179, 180 (D. Vt. 1970) (profit and gross income data).

I. Producing the Requested Confidential Information Without an "Attorney's Eyes Only" Designation Would Significantly Harm Plaintiff's Competitive and Financial Position.

The information sought by Defendants in this case would require disclosure of sensitive, confidential, and proprietary information and records related to Plaintiff's business. Defendants' discovery requests seek Plaintiff's complete customer list and the revenue for each of Plaintiff's customers. (Ex. D, Interrogatory No. 1; Ex. E, RFP No. 27.) Such information is not only highly confidential, but Plaintiff would also need the permission of each of its clients to disclose such information absent a protective order with the appropriate confidentiality designations. (Geaslen Decl., ¶¶ 4-5.)

Additionally, Defendants' requests require Plaintiff to produce highly confidential and sensitive commercial information, including all of Plaintiff's marketing and business plans. (Ex. E, RFP Nos. 24 and 25.) Defendants' requests even go so far as to seek Plaintiff's highly confidential financial statements, including balance sheets, income statements, and state and federal income tax returns from 2018 to the present. (Ex. E, RFP No. 19.) Except as authorized by its parent company, Infosys Limited, Plaintiff does not make public filings disclosing such information and considers this information and considers its marketing and business plans to be highly sensitive and confidential. (Geaslen Decl., ¶¶ 6-7.)

Requiring Plaintiff to disclose such information absent a sufficient protective order would harm Plaintiff competitively as Defendants expand their service offerings under Plaintiff's intellectual property. (Geaslen Decl., ¶ 8.) Moreover, unless the Court enters a protective order with a "Highly Confidential – Attorneys' Eyes Only" designation, there is an inherent risk that the highly sensitive commercial information Plaintiff provides may be disseminated in the event Defendants' officers and employees leave and join Plaintiff's competitors. These risks are amplified given the serious fraud allegations being lodged against Defendants. (*See* Ex. F.) As a result, Plaintiff's motion for a protective order should be granted.

II. Defendants Will Not Be Unfairly Prejudiced by a "Highly Confidential – Attorneys' Eyes Only" Designation Protocol.

Defendants' counsel has argued that it will need to review and evaluate the information Plaintiff provides in discovery with its client and that a two-tier protective order with a "Highly Confidential – Attorneys' Eyes Only" designation will hamper Defendants' ability to defend the claims in this case. (Ex. C at 1.) But that is simply untrue. Indeed, Plaintiff's proposed protective order provides counsel the ability to discuss protected documents with its client in a general way, as long as the advice rendered does not disclose the specific contents of any protected documents produced under the protective order. (Ex. A, ¶ 32.) Moreover, the protective order provides an opportunity to challenge the designation of discovery materials if a party feels the information has been incorrectly designated. (*Id.* ¶12.) Finally, as courts in this District have noted, "[c]ounsel for Defendant and Plaintiff [are] bound by the Rules of Professional Responsibility [and] must act reasonably in engaging in discovery. Therefore, the Court assumes that [the designating party] will categorize as "Attorneys' Eyes Only," only those documents that require such limited review." *Country Vintner of N.C.*, 2010 U.S. Dist. LEXIS 160937, at *7. The same obligation applies to counsel here. Accordingly, any assertion that a "Highly Confidential – Attorneys' Eyes Only" designation will harm Defendants is unfounded.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court grant its motion and enter its proposed protective order with a "Highly Confidential – Attorneys' Eyes Only" confidentiality designation protocol.

Respectfully submitted this 24th day of January, 2022.

By: */s/ John C. Scheller*

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PROTECTIVE ORDER has been filed with the Clerk for the United States District Court, Eastern District of North Carolina, using the electronic filing system of the Court. The electronic case filing system will send a "Notice of Electronic Filing" to all attorneys of record who have consented to accept service by electronic means.

This 24th day of January, 2022.

/s/ John C. Scheller
John C. Scheller
Counsel for Plaintiff