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

BERINGER COMMERCE, INC., d/b/a BLUE ACORN, iCi, Plaintiff, vs. FIN CAP, INC., d/b/a "BLUEACORN.CO," BLUE ACORN PPP, LLC, BLUE OAK FOREST, LLC, MICHAEL S. COTA, JAMES FLORES, STEPHANIE HOCKRIDGE REIS, and NATHAN REIS, Defendants.	Civil Action No. 5:21-cv-251-BO

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER WITH "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" DESIGNATION

Defendants Fin Cap, Inc., Blueacorn PPP, LLC and Blue Oak Forest, LLC (collectively, "Blueacorn PPP"), pursuant to Local Rule 7.2, hereby file their Memorandum in Opposition to Plaintiff's Motion for Protective Order with "Highly Confidential – Attorneys' Eyes Only" Designation. (Dkt. #70).

INTRODUCTION

Blueacorn PPP *does not* oppose the entry of a protective order in this case to protect the proprietary and confidential business information of Plaintiff Beringer Commerce, Inc. d/b/a Blue Acorn iCi ("Plaintiff"). The single issue Blueacorn PPP is contesting is whether it is necessary for the protective order to include a "Highly Confidential – Attorneys' Eyes Only" designation. Blueacorn PPP opposes the inclusion of such a designation in the protective order: (a) because such a designation is typically permitted to prevent disclosure of confidential information to a competitor, and Plaintiff has made no showing that Plaintiff and Blueacorn PPP are in competition with each other; and (b) so that Blueacorn PPP and its counsel will have an adequate and sufficient opportunity to discuss and evaluate the merits of Plaintiffs' claims, assess potential settlement, and be fully prepared for trial.

ARGUMENT

The issue of whether to include an "attorneys' eyes only" provision in a protective order came before this court in *Progress Solar Solutions, LLC v. Fire Protection, Inc.*, No. 5:17-CV-00152-D, 2018 WL 11281543 (E.D.N.C. Sep. 24, 2018). That case involved allegations that the defendants unfairly competed with the plaintiff by misappropriating and taking advantage of plaintiff's proprietary information and trade secrets. In considering the appropriateness of an "attorneys' eyes only" provision, Magistrate Judge Gates noted that the inclusion of such a provision is not uncommon in cases involving the "exchange of highly sensitive proprietary information." *Id*. at *2. Referring to a test outlined by the Federal Circuit in *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), Magistrate Judge Gates also noted that the court should conduct an individualized factual assessment with the "crucial factor" being "whether the information would be disclosed to someone involved in competitive decision-making." *Id., quoting Parker Compound Bows, Inc. v. Hunter's Mfg. Co., Inc.*, No. 5:15-mc-00064, 2014 WL 12462305 at *2 (W.D. Va. Dec. 8, 2014). Importantly, this Court recognized that the burden is on the moving party to support the particularized need for the higher level of protection. *Progress Solar*, 2018 WL 11281543, at *2. Blueacorn PPP cannot meet that burden in this case.

This case does not involve allegations of misappropriation of any trade secrets or proprietary information between competitors as was the case in *Progress Solar Solutions*. As Plaintiff's filings in this case have made clear, Plaintiff is a "digital technology consulting company that assists businesses with planning and developing online digital consumer experiences for its clients." (Dkt. #73, p. 3) Plaintiff also avers that it "offers payment processing services to its clients," and offers its services through various internet channels of commerce, including its website. *Id.*

Blueacorn PPP does not compete with Plaintiff. Instead, Blueacorn is a lender service provider that helped small business customers prepare and submit loan application paperwork for Paycheck Protection Program ("PPP") loans. As set forth in the Declaration of Noah Spirakus previously filed with the Court (Dkt. #32): (1) Blueacorn PPP is not a lender; it is a service provider utilizing technology to work with community lenders as their online processing and support platform, (*Id.*, ¶ 2); (2) as of June 2021, Blueacorn PPP had processed over $15 billion in loans for 966,000 small businesses (such as barbers, hair stylists, and Uber drivers) which had an average annual gross income of $41,000, an average PPP loan amount of approximately $16,000, and approximately 86% of them are non-caucasian owned businesses or contractors, who historically have had limited access to traditional banking (*Id.*, ¶¶ 2 – 3); and (3) as of July 2021, Blueacorn PPP transitioned into the into the loan forgiveness stage, during which Blueacorn PPP began working exclusively with current customers in assisting them in applying for loan forgiveness, and will not be seeking any new PPP loan customers. (*Id.* ¶ 16). The business conducted by Blueacorn PPP, and the customers served by Blueacorn PPP, bear no relation whatsoever Plaintiff's business and customers, and the parties are simply not in competition with each other.

The gravamen of Plaintiff's Complaint is that Blueacorn PPP has infringed on Plaintiff's intellectual property, including alleged trademarks and a copyright to a tilted blue acorn logo. (Dkt. #71, p. 3). As to Plaintiff's alleged claim of ownership of a copyright to the titled blue acorn logo, (*see* Dkt. # 71, p. 3), Blueacorn PPP notes that the US Copyright Office denied reconsideration of Plaintiff's request for a copyright to the tilted blue acorn logo stating that the Copyright Office was:

"unable to register a copyright claim in this work, however, as it does not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration." *See* letter dated October 7, 2021attached as Ex. A.

On the issue of whether the parties are in competition, the Court previously noted in denying Plaintiff's Motion for Preliminary Injunction that, "significantly, plaintiff has not demonstrated through its filings that it has lost any existing or potential customers to defendants' business because of defendants' alleged infringement." (Dkt. #39 at 4). Plaintiff's Motion for Protective Order and supporting materials make no different showing that Plaintiff and Blueacorn PPP are in actual competition with each other. Instead, in recognition that some showing of competition is required to support their request to include an "attorneys' eyes only" provision, Plaintiff instead engages in rank speculation of some perceived threat of future competition between the parties. In a declaration filed in support of Plaintiff's Motion, Plaintiff's Chief Financial Officer Judy Geaslen states: (a) "Defendants have indicated they intend to continue using Blue Acorn iCi's intellectual property after the PPP loan program ends;" and (b) that if Plaintiff was "required to publicly disclose its financial information, customer list, marketing strategies and business plans to Defendants, then Blue Acorn iCi would be harmed in ***future competition*** with Defendants as Defendants expand their use of Blue Acorn iCi's intellectual property, as well as with other customers." (Dec. of Judy Geaslen, Dkt. #72, ¶ 8)(emphasis added). Plaintiff's memorandum in support of its Motion further speculates, without supporting evidence, that without an "attorneys' eyes only" provision "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)." (Dkt. #71, p. 8)(emphasis added). This level of speculation particularly falls short of warranting a higher level of confidentiality because it could exist in any dispute involving two potential employers, anywhere, and would overshadow any discernable test.

With regard to Ms. Geaslen's conclusory assertion that BlueacornPPP has indicated an intent to use Plaintiff's intellectual property after the PPP loan program ends, Blueacorn PPP has not made such an assertion, nor could it have since Blueacorn PPP has made no decisions on the conduct of its business beyond the conclusion of the PPP loan program. For this reason, Ms. Geaslen's assertion that Plaintiff may be harmed by future competition is pure speculation. The assertions in Plaintiff's supporting memorandum are even further removed from any evidentiary basis. As an initial matter, Plaintiff's attachment of a newspaper article concerning a Congressional investigation into the PPP loan program is not relevant in any way to Plaintiff's claims of alleged infringement of their intellectual property. The speculative notion that the newspaper article provides support for some motivation for by Blueacorn's officers and employees to leave their employment and join Plaintiff's competitors simply defies logic.

Blueacorn PPP would also stress that even without an "attorneys' eyes only" designation, none of the information Plaintiff designates as "confidential" will ever be publicly disclosed. Blueacorn's proposed protective order makes clear that documents and information that Plaintiff designates as "confidential": (a) shall only be used for purposes of this litigation and not for any other purpose; and (b) shall not be disclosed or discussed with anyone who has not agreed to be bound by the protective order and subject to the enforcement powers of the Court for violations of the protective order. (Dkt. # 71-3). Blueacorn PPP's proposed protective order without an "attorneys' eyes only" designation will provide adequate protection for Plaintiff's confidential business information in this case.

Finally, Blueacorn PPP submits that the inclusion of an "attorneys' eyes only" designation will unnecessarily burden Blueacorn PPP, and possibly the Court. A two-tier protective order as proposed by Plaintiff will unnecessarily burden Blueacorn PPP's ability to discuss this case fully with its counsel, to evaluate the case and settlement possibilities, and to be fully prepared for trial. Moreover, while Blueacorn PPP does not doubt that Plaintiff and its counsel would only use an "attorneys' eyes only" designation in good faith, such designations are subject to being challenged by Blueacorn PPP, and only increase the chances of future disputes that will require the involvement of the Court to resolve.

CONCLUSION

For the foregoing reasons, Defendants Fin Cap, Inc., Blueacorn PPP, LLC and Blue Oak Forest, LLC respectfully request that the Court enter the proposed Protective Order at Docket # 71-3 that does not include an "attorneys' eyes only" provision.

Respectfully submitted, this the 7th day of February 2022.

NELSON MULLINS RILEY & SCARBOROUGH LLP

/s/ *Christopher J. Blake*
Christopher J. Blake
N.C. State Bar No. 16933
chris.blake@nelsonmullins.com
D. Martin Warf
N.C. State Bar No. 32982
martin.warf@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612
Phone: (919) 329-3800
Fax: (919) 329-3799

Counsel for Defendants Fin Cap, Inc., Blueacorn PPP, LLC and Blue Oak Forest, LLC

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

NELSON MULLINS RILEY & SCARBOROUGH LLP

/s/ *Christopher J. Blake*
Christopher J. Blake
N.C. State Bar No. 16933
chris.blake@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612