

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

**VISTO CORPORATION,
d/b/a Good Technology,**

Plaintiff,

v.

3:11-CV-2273-M-BK

**LITTLE RED WAGON TECHNOLOGIES,
INC. and FIXMO U.S., INC.,**

Defendants.

ORDER

Pursuant to the District Judges's *Order of Referral* (Doc. 78), the undersigned now considers the parties' *Joint Motion for Entry of a Supplemental Protective Order* (Doc. 75). The parties note that they have conferred and largely agree on the substance of the protective order with the exception of Paragraph 9, and they request that the Court resolve that limited dispute. (Doc. 75 at 1). In this case, Plaintiff contends that Defendants are infringing several of its patents. (Doc. 37 at 6-18).

Paragraph 9 of the Supplemental Protective Order reads as follows:

To the extent a producing party believes that certain Protected Materials containing sensitive technical and business information are so sensitive that their dissemination deserves even further limitation, the producing party may designate such Protected Materials "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY." Protected Materials designated "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY" shall only be made available to members and employees of outside counsel identified in Paragraph 7(A), outside experts and consultants identified in Paragraph 7(C) but only after compliance with Paragraph 8 above, and persons identified in Paragraphs 7(D)-(I). Materials designated "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY" shall not be made available to persons identified in Paragraph 7(B) without the written consent of the producing party. However, to the extent a producing party designates as "HIGHLY

CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” any settlement or license agreements relating to any of the patents-in-suit or are alleged to be comparable to any of the patents-in-suit, the receiving party may show such agreements to up to one individual identified in Paragraph 7(B) without prior written consent of the producing party.

(Doc. 75 at Exh. C at 7). Defendants wish to include the underlined language, while Plaintiff wishes to exclude it. The effect of the underscored language would be to allow one of Defendants’ employees (who would be required to keep the matter confidential) to review Plaintiff’s settlement and license agreements without obtaining Plaintiff’s prior written consent.

Defendants argue that including the disputed language will help them manage and resolve this suit because they are small companies and do not have any in-house attorneys to assist with the litigation. (Doc. 75, Exh. E at 2-3). They maintain that allowing one of each of their employees to have access to information about Plaintiff’s (1) lawsuit settlements with other companies it sued and (2) prior licensing activities involving the same family of patents, will help the parties frame settlement negotiations in this case. *Id.* at 4.

Plaintiff contends that its version of the proposed protective order is necessary to preserve its highly confidential licensing information from direct competitors. (Doc. 75, Exh. D at 3-4). Plaintiff also argues that Defendants’ employees do not need access to Plaintiff’s settlement agreements in other lawsuits because those cases involved significant monetary damages, whereas the focus of this suit is injunctive relief given Defendants’ *de minimus* sales of infringing products. *Id.* at 4-5. Plaintiff also points out that Defendants’ claim that they have no in-house counsel is irrelevant because neither side’s employees (whether attorneys or not) will have access to Protected Materials designated “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY.” *Id.* at 5. (emphasis supplied). Nevertheless, Plaintiff argues

Defendants’ outside counsel will have access to the agreements, and will be able to advise their clients with respect to settlement without disclosing the specifics of Plaintiff’s prior settlements.

Id. at 5-6.

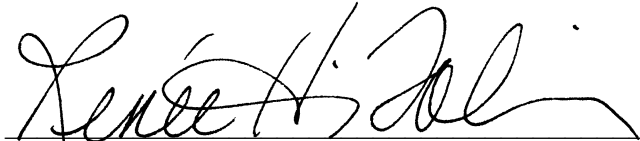
The Northern District of Texas’ default protective order in patent cases prohibits disclosure of a party’s “Confidential Attorney Eyes Only Information” to an opposing party’s employees. (*See* N.D. Tex. Amended Misc. Order No. 62, Appendix A at ¶ 8). Accordingly, Defendants’ employees normally would not be entitled to have access to Plaintiff’s settlement and license agreements under the agreed-upon language in the stipulated protective order. Additionally, the Court agrees with Plaintiff that Defendants’ lack of in-house counsel is immaterial because neither Plaintiff’s nor Defendants’ employees will have access to Protected Materials designated “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY.”¹ Thus, the parties are on equal footing in this regard. Defendants’ counsel will have access to all of the Protected Materials in question, which may ultimately prove to be sufficient under the circumstances of this case.

[INTENTIONALLY LEFT BLANK]

¹ The Court notes that Defendants repeatedly quote the applicable language as: “Highly Confidential—Attorneys’ Eyes Only” rather than “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY.” *See* Doc. 75, Exh. E at 3. This is a critical difference, however.

Finally, Plaintiff has agreed to consider in good faith any individual requests made by Defendants that their employees have access to particular Protected Materials in question. (Doc. 75, Exh. D at 6, n.3). Under these circumstances, the Court finds that Plaintiffs' version of the *Protective Order* is preferable and it will be entered separately.

SO ORDERED on May 14, 2012.

A handwritten signature in black ink, appearing to read 'Renée H. Toliver', written over a horizontal line.

RENÉE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE