

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH DURDIN and
RICHARD J. DIOTTE,

Plaintiffs,

ORDER

06-C-039-C

v.

KURYAKYN HOLDINGS, INC.,

Defendant.

This case presents a dispute over plaintiff's '470 patent for a motorcycle break or clutch lever. Currently before the court is plaintiffs' motion to redesignate Kuryakyn documents (dkt. 36). Defendant opposes this motion. With one exception I am denying this motion without prejudice.

On July 28, 2006, this court entered the parties' jointly submitted protective order. (Dkt. 35). As is common in patent cases, the parties provided two tiers of protection, with the higher level ("Attorneys' Eyes Only" or AEO) walling off information from the opposing party but not the opposing party's attorneys and experts. The parties—with the court's input, *see* dkt. 24 at 7—agreed that this higher level of protection was to be used "only for highly sensitive business information that if disclosed to the opposing party likely will cause immediate and irreparable harm." Dkt 35 at 2.

In response to plaintiffs' discovery requests for financial information regarding profits, defendants turned over their numbers under AEO protection. Further, although plaintiffs'

expert was able to prepare a damages report with a range of potential damages, defendant insisted that plaintiffs not be allowed to learn the upper number in this range. According to plaintiffs' attorney, the disclosed materials contain only historical summaries for a product that defendant no longer markets, manufactures or sells; defendant has offered only conclusory reasons why its information actually is entitled to AEO protection at this time; and plaintiffs' ability to make necessary tactical decisions in this lawsuit has been hindered by their inability to review defendant's financial data.

Defendant disagrees, asserting that the disputed information still is sensitive and valuable to a competitor intent on deducing the financial arrangements between defendant and its suppliers in the highly competitive environment in which defendant operates. *See* Hinton Decl., dkt. 39, ¶¶ 4-8. Defendant has softened its stance on one point: it no longer opposes disclosure of plaintiffs' expert's range of damages. *Id.* at ¶ 9.

I conclude that defendant sufficiently has established the confidentiality of its data justifying continued AEO protection at this juncture, . There is no good reason for plaintiffs personally to review this information during this phase of the case so long as their attorneys and expert have access to it. If, however, this case progresses to trial and the jury must determine damages, then all bets are off: not only will plaintiffs have access to defendant's financial materials, so will the public.

Right now, plaintiffs are entitled to learn only their own expert's opinion as to the upper level of their potential damages. As plaintiffs correctly observe, they need this number

in order properly to evaluate the worth of this case and to make necessary tactical decisions. Prudently, defendant has backed off on this point.

Notwithstanding my warning to the attorneys not to quibble over such matters, I am not shifting costs on this motion because both sides prevailed in part.

ORDER

Plaintiff's motion to redesignate documents is GRANTED IN PART and DENIED IN PART for the reasons and in the fashion stated above.

Entered this 11th day of September, 2006.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge