IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SANDISK CORPORATION,

Plaintiff,

v.

KINGSTON TECHNOLOGY CO., INC., and
KINGSTON TECHNOLOGY CORP.,

Defendants.

OPINION AND ORDER

07-cv-605-bbc
07-cv-607-bbc

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These cases were closed by stipulation of the parties on February 17, 2011. Former party PNY Technologies, Inc., has filed a motion to intervene in 07-cv-605, dkt. #1106, for the limited purpose of modifying the stipulated protective order, which was entered in both cases on December 11, 2009, dkt. #395 (07-cv-605); #373 (07-cv-607). Because PNY has not shown that it has standing to intervene in closed case 07-cv-605, its motion will be denied.

PNY has also filed a motion for leave to file a reply brief. Dkt. #1113 (07-cv-605). That motion will be granted.

BACKGROUND

Plaintiff SanDisk Corporation sued Kingston Technology Co., Inc. and Kingston

Technology Corp. (the Kingston defendants) along with many other companies, including PNY Technologies, Inc., in the flash memory product market, alleging infringement of some of plaintiff's patents. Like most of the defendants, PNY settled with plaintiff and was dismissed from the cases in January 2008, after taking a license from plaintiff. In December 2009, the defendants still in the case entered into a stipulated discovery order with plaintiff, dkt. #395, governing the use of all discovery produced or submitted during the course of the action "either by a party or by a non-party to or for either [sic] of the parties." The parties could designate qualifying discovery as "confidential business information," in which case certain restrictions on disclosure would apply. Id. at 2-10. The agreement provided that within 90 days of the conclusion of the action, all copies of the discovery would be returned to the producing party or destroyed, with the exception of specific enumerated items such as court exhibits or transcripts. Id. at 10. It also provided that any party might seek a modification of the order for good cause. Id. at 11.

Despite their settlement, PNY and plaintiff's license agreement ran into headwinds that sent them back into court within two years, this time in California. Plaintiff sued PNY in state court for breach of the license; PNY responded with a suit in federal court for antitrust violations. In connection with the latter case, PNY has brought this motion for intervention.

DISCUSSION

PNY has sought and obtained extensive information about plaintiff's licensing and

litigation activities from plaintiff, but it wants to seek information from other parties in the case, particularly the Kingston defendants, in order to verify that plaintiff's discovery responses are complete and also because it deems this the most efficient way to obtain the information it needs. Its motion to intervene for the purpose of modifying the protective order has three parts to it. It wants the court to (1) add it as a party to the 2009 protective order; (2) add a provision allowing any party to the SanDisk litigation in this court to produce confidential business information in response to a subpoena or discovery request issued in connection with the federal case in California and (3) modify paragraph 19 of the order to provide that any party subject to an outstanding discovery request or subpoena is not to destroy any document subject to such a request or subpoena.

Under Fed. R. Civ. P. 24(b), the court may permit anyone to intervene in a suit who

> (A) is given a conditional right to intervene by a federal statute; or
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.

PNY contends that it is both a proper intervenor under Fed. R. Civ. P. 24(b) and a "party" by virtue of its having been sued in the two cases in which the order was entered, albeit not a party in either case at the time the order was agreed to.

Citing Bond v. Ultreras, 585 F.3d 1061 (7th Cir. 2009), plaintiff denies that PNY has standing to seek a modification of the protective order, pointing out that it was not a party to the suit when the order was negotiated. In Bond, the proposed intervenor was not a party to the suit against the city for police misconduct, but a journalist who sued after the entry

of judgment to obtain records of citizen complaints against Chicago police officers. The district judge granted the motion to intervene, but the court of appeals reversed on the ground that the journalist had no standing to bring his motion. As the court noted, the parties had settled; the case had been dismissed with prejudice; and no party had asked the court to revisit the terms of the protective order. Id. at 1065. In such a situation, the court held, a prospective intervenor must establish an actual or imminent invasion of a legally protected interest. Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 55, 560 (1992)). The journalist could not meet this requirement. He alleged a presumption of public access that he derived from Fed. R. Civ. P. 26(c), which allows the court to issue an order protecting a party or person from "annoyance, embarrassment, oppression, or undue burden or expense," id., but, as the court of appeals held, no presumption of public access attaches to discovery that is not part of the court file. Id.

PNY has not shown that its motion differs in any material respect from the motion at issue in Bond. The fact that PNY was a party at one time does not give it standing to intervene to modify a stipulation negotiated long after it had left the suit. As a non-party, it has no constitutional or legally protected right to discovery materials that never become part of the public court record. It contends that it faces an injury-in-fact if it is denied intervention because its discovery efforts in the California litigation will be impeded by the provisions of the protective order, but that contention is unfounded. Plaintiff has already produced to PNY more than 3.5 million pages of the documents plaintiff produced in this litigation, so the only "injury" PNY can identify is the loss of the opportunity to "cross-

check" plaintiff's disclosures by learning what the disclosing party turned over to plaintiff. This is hardly an injury.

On the other hand, if the court were to grant PNY's request to have the Kingston defendants turn over all documents produced to it during this litigation, PNY would gain access to confidential information turned over by parties and third parties who never contemplated that their disclosures would be available to PNY. Allowing this to happen would undercut the settled expectations of the signatories to the stipulation and reduce the chances that parties would enter into similar agreements in the future.

Finally, plaintiff has objected to PNY's motion as untimely, but it is not necessary to reach that issue.

ORDER

IT IS ORDERED that the motion of PNY Technologies, Inc. for leave to file a reply brief in case 07-cv-605, dkt. #1113, is GRANTED. Its motion for leave to intervene in this case for the purpose of modifying the protective order, dkt. #1106, is DENIED.

Entered this 5th day of April, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge