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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CASCADE YARNS, INC.,

Plaintiff,

v.

CRAFTS AMERICANA GROUP, INC.,  
doing business as KNIT PICKS,

Defendant.

Case No. C09-5800RJB

ORDER ON PLAINTIFF  
CASCADE YARNS,  
INC.'S MOTION TO  
COMPEL AND MOTION  
FOR ENTRY OF  
PROTECTIVE ORDER  
AND FOR ATTORNEYS'  
FEES AND ON  
DEFENDANT'S MOTION  
FOR PROTECTIVE  
ORDER

This matter comes before the court on Plaintiff Cascade Yarns, Inc.'s Motion to Compel and Motion for Entry of Protective Order and for Attorney's Fees (Dkt. 21) and on Defendant's Motion for Protective Order (Dkt. 27). The court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

On April 1, 2010, Cascade Yarns (Cascade) propounded its first set of interrogatories. Dkt. 22-5. The following interrogatories are at issue in this motion:

(4) Identify all adwords you purchased in connection with the advertising of your products since 2005.

(5) Identify all meta tags used in connection with your website since 2005.

Dkt. 22-5.

On April 1, 2010, Cascade propounded requests for production. Dkt. 22-6. The following requests for production are at issue in this motion, identified by number of the request: (Request No. 1) All documents that refer to Cascade; (Request No. 2) All communications that refer to Cascade; (Request No.

1 3) All documents that refer to any of the Cascade marks; (Request No. 4) All communications that refer to  
2 any of the Cascade marks; (Request No. 5) all documents related to [Knit Picks'] purchase of any  
3 advertising; (Request No. 6) All communications related to [Knit Picks'] purchase of any advertising;  
4 (Request No. 7) All documents related to the marketing of [Knit Picks'] products; (Request No. 8) All  
5 communications related to the marketing of [Knit Picks'] products; (Request No. 9) All documents  
6 related to internet users visiting [Knit Picks'] website as a result of clicking on a sponsored link; (Request  
7 No. 10) All documents related to any sales made by an internet user who visited [Knit Picks'] website as a  
8 result of clicking on a sponsored link; (Request No.12) All documents related to [Knit Picks'] knowledge  
9 of yarn products in the knitting industry that are advertised based on their width; and (Request No. 15) All  
10 document and communications related to [SLI Systems]. Dkt. 22-6.

11 On May 3, 2010, Crafts Americana Group, Inc., doing business as Knit Picks (Knit Picks)  
12 responded to that request for production, objecting that some of the requests are overly broad, unduly  
13 burdensome, and seek information not relevant to this action and not reasonably calculated to lead to  
14 admissible evidence; and responding to most of the requests as agreeing to produce the documents once  
15 "a protective order has been negotiated by the parties and entered by the Court." See Dkt. 22-8. The  
16 parties have been unable to agree on the terms of the protective order to be submitted to the court.  
17 Cascade requests that the court enter the protective order filed as Dkt. 23.

18 On May 4, 2010, Knit Picks provided initial disclosures to Cascade. Dkt. 22-3. In connection with  
19 their initial disclosures, on May 5, 2010, Cascade requested that defendant Knit Picks produce all  
20 categories of documents identified by Knit Picks in its initial disclosures as "available for inspection."  
21 Dkt. 22-3. On May 25, 2010, Knit Picks produced 318 documents. Dkt. 22-4.

22 On June 16, 2010, plaintiff Cascade filed a motion to compel and a motion for entry of the  
23 protective order that was filed as Dkt. 23. Dkt. 21. Cascade also requests \$5820 in attorney's fees  
24 incurred in connection with this motion. Dkt. 21. On June 28, 2010, Knit Picks filed a response, opposing  
25 Cascade's motion to compel. Dkt. 31.

26 On June 24, 2010, Knit Picks filed a motion for protective order (Dkt. 27), requesting that the  
27 court enter the protective order that was filed s Dkt. 27-2.

28

1           **1. Cascade’s Motion to Compel (Dkt. 21)**

2           Pursuant to Fed.R.Civ.P. 37(a)(1), a party may move for an order compelling disclosure or  
3 discovery.

4           Cascade has moved for an order compelling Knit Picks to respond to the interrogatories and  
5 requests for production identified above.

6           Defendants oppose the motion to compel, arguing that (1) Dkt. 22-2 (Exhibit A to declaration of  
7 Robert J. Guite) should be stricken because it relates to settlement negotiations; (2) Cascade failed to  
8 meet and confer, as is required by Fed.R.Civ.P. 37(a)(1); (3) some of Cascade’s discovery requests  
9 (Requests for Production 4, 5, 6, 7, 8, 9, 10, and 15) are overbroad and unduly burdensome; and Cascade  
10 refused to narrow the issues for the court; (4) Cascade’s proposed protective order does not offer adequate  
11 protection from the risk of damage to Knit Picks’ business; and (5) Cascade is not entitled to an award of  
12 fees and costs. Dkt. 31.

13           Fed.R.Civ.P. 26(b)(1) provides as follows:

14           ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows:  
15 Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s  
16 claim or defense—including the existence, description, nature, custody, condition, and location of  
17 any documents or other tangible things and the identity and location of persons who know of any  
18 discoverable matter. For good cause, the court may order discovery of any matter relevant to the  
19 subject matter involved in the action. Relevant information need not be admissible at the trial if  
20 the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All  
21 discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

22           The interrogatories and requests for production identified by Cascade and set forth above appear  
23 to be relevant to Cascade’s claims and likely to lead to admissible evidence. However, some of those  
24 requests are overbroad. For example, it is unclear how Knit Picks’ purchase of “any advertising” is likely  
25 to lead to admissible evidence, given that the issues involved in this case involve internet advertising.  
26 The court should grant Cascade’s request that Knit Picks respond to Requests for Production No. 1, 2, 3,  
27 4, 9,10, 12, and 15. The court should grant Cascade’s request that Knit Picks respond to Interrogatories 4  
28 and 5. The court should deny without prejudice Cascade’s request that Knit Picks respond to Requests  
No. 5, 6, 7, and 8.

1           **2. Motions for Entry of Protective Order (Dkt. 21 and 27)**

2           Cascade requests that the court enter the protective order filed as Dkt. 23. The protective order  
3 proposed by Cascade purports to designate as confidential the following information: (1) Product cost  
4 information and the identification of the sources of products; (2) Advertising and marketing information,  
5 including but not limited to, a party's internet advertising sales conversion data, click through data, traffic  
6 and transaction data, but not ad-words and/or keywords; except that the conversion data, click through  
7 data and traffic and transaction data related to those ad-words or keywords may be designated as  
8 confidential; and (3) Non-public documents maintained that would qualify for protection under the UTSA  
9 or Fed.R.Civ.P. 26(c). Dkt. 23, at 4-5.

10           Knit Picks requests that the court enter the protective order filed as Dkt. 27-2. The protective  
11 order proposed by Knit Picks purports to designate as "Confidential Information" or "Restricted  
12 Information" the following:

13           The Parties may designate Discovery Material as "Confidential Information" or "Restricted  
14 Information" so long as the Designating Party believes in good faith the Discovery Material  
15 contains trade secret or other confidential, competitive or proprietary business information used by  
16 it in, or pertaining to, its business which the party takes appropriate efforts to keep confidential or  
17 which the party is otherwise required to keep confidential by agreement or law. For a designation  
18 of Discovery Material as "Restricted Information," the party must additionally believe in good  
19 faith that the Discovery Material must be protected from disclosure to the parties themselves in  
20 this litigation and must be subject to the restricted disclosure provided for below. Confidential  
21 Information and Restricted Information shall be used solely for the purpose of conducting this  
22 litigation and not for any other purpose. Stamping or otherwise marking Discovery Material as  
23 "Confidential Information" or "Restricted Information" shall constitute certification by the  
24 Producing Party that it reasonably believes that good cause exists to designate the Discovery  
25 Material as Confidential Information or Restricted Information pursuant to this Agreement and  
26 consistent with applicable law. Electronic or native documents or data shall be similarly marked  
27 where practicable, and where not practicable, written notification by a Producing Party that it is  
28 producing Discovery Material as Confidential Information or Restricted Information shall suffice  
to require confidential treatment.

Dkt. 27-2, at 2.

*Legal Standard.* Fed.R.Civ.P. 26(c) provides as follows:

**(c) Protective Orders.**

**(1) In General.** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- 1 (A) forbidding the disclosure or discovery;  
2 (B) specifying terms, including time and place, for the disclosure or discovery;  
3 (C) prescribing a discovery method other than the one selected by the party seeking  
4 discovery;  
5 (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or  
6 discovery to certain matters;  
7 (E) designating the persons who may be present while the discovery is conducted;  
8 (F) requiring that a deposition be sealed and opened only on court order;  
9 (G) requiring that a trade secret or other confidential research, development, or  
10 commercial information not be revealed or be revealed only in a specified way;  
11 and  
12 (H) requiring that the parties simultaneously file specified documents or  
13 information in sealed envelopes, to be opened as the court directs.

14 (2) **Ordering Discovery.** If a motion for a protective order is wholly or partly  
15 denied, the court may, on just terms, order that any party or person provide or  
16 permit discovery.

17 (3) **Awarding Expenses.** Rule 37(a)(5) applies to the award of expenses.

18 *Court Involvement in Discovery Process.* Federal Rules of Civil Procedure 26 through 36 are  
19 designed to guide the parties through the discovery process. The parties should enlist the court to assist  
20 them only when necessary. The court may issue protective orders if the parties show good cause.  
21 However, a protective order should not be used to involve the court in the discovery process, except under  
22 narrow circumstances. A protective order should not be used to rubber stamp a procedure that the parties  
23 have developed for disclosing documents and disposing of those documents; parties should be able to  
24 agree among themselves on the procedures they will follow during discovery. The proposed protective  
25 orders, purporting to be orders governing how discovery is to proceed with regard to sensitive  
26 information, is overbroad, unnecessary and inappropriate.

27 *Documents to be Protected.* It is also inappropriate for the court to “protect” broad classes of  
28 documents, without compelling justification. There are instances when a document, or a narrow class of  
documents, may warrant an order of the court to protect those documents from further disclosure.  
Fed.R.Civ.P. 26(c)(1)(G) permits courts to require that a trade secret or other confidential research,  
development, or commercial information not be revealed or be revealed only in a specified way. The  
burden is on the party seeking the protective order to show good cause by demonstrating harm or  
prejudice that will result from discovery. *Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1063 (9<sup>th</sup> Cir. 2004). In  
the case of trade secrets, the moving party must show that the information is a trade secret or other  
confidential research, development, or commercial information, under Fed.R.Civ.P. 26(c)(1)(G); and that

1 its disclosure would be harmful to the party's interest in the property. *NutraTech, Inc. v. Syntech Int'l,*  
2 *Inc.*, 242 F.R.D. 552, 554-55 (C.D. Cal. 2007). Where trade secret and/or confidential information is at  
3 issue, in determining who has access to such information, courts balance the risk of disclosure to  
4 competitors against the risk that a protective order will impair prosecution or defense of the claims. *See*  
5 *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9<sup>th</sup> Cir. 1992). However, a request to  
6 protect any such documents must clearly identify the document or class of documents, and set forth the  
7 reason that the court's intervention is necessary to protect those documents from further disclosure. Knit  
8 Picks' proposed protective order identifies broad classes of documents, not specific documents or narrow  
9 classes of documents. Cascade's proposed protective order is more narrowly drawn, but Cascade has not  
10 identified how disclosure of the particular items purported to be confidential would prejudice Knit Picks.

11 Knit Picks states the way in which it would be harmed if the court does not issue the protective  
12 order it has proposed:

13 [D]isclosure of the information without adequate protections will damage Knit Picks and its  
14 business. If competitors had access to Knit Picks' PPC advertising strategies Knit Picks would  
15 immediately lose the competitive advantage that it has developed at great expense in that  
16 competitors would instantly have data and strategy documents relating to the products to sell  
17 online, the product categories to target these products against, the specific word combinations to  
18 target to maximize profitable clicks, the specific 95-100 character headlines and body text  
19 advertising phrases to deliver, and finally the landing pages to serve the consumer to begin their  
20 shopping experience....If competitors had access to information related to SLI Systems, Knit Picks  
21 would be harmed in at least the following ways: competitors would know which products to  
22 develop and bring to market; which products to sell on their websites; which search results to  
23 provide to a consumer asking for the information; what order search results should be displayed  
24 for a particular item; which products to show on which days, adjusting for seasonality; which  
25 search engine search phrases to target in a websites' [sic] copy; which search engines to target;  
26 and what performance metrics goals to set.

27 Dkt. 27-11.

28 The court understands that certain marketing and advertising information may warrant protection,  
to protect Knit Picks' from competitors. However, this does not absolve Knit Picks from narrowly  
identifying those documents or classes of documents would result in the alleged prejudice.

Accordingly, the proposed protective orders do not comply with the requirements to narrowly  
identify documents or classes of documents/items, and to offer good cause for protecting those  
documents/items.

*Filing Documents with the Court.* It is unnecessary for the court to issue a protective order  
governing filing of documents with the court. Counsel may pursue appropriate remedies with regard to

1 sensitive information filed with the court, including sealing under Local Rule CR5(g); filing motions *in*  
2 *limine*; and employing motions or objections at trial. This provision may be negotiated between the  
3 parties.

4 *Amendment of the Protective Order.* Any protective order issued by the court must contain a  
5 provision that the court may change the terms of the protective order either on motion of the parties or *sua*  
6 *sponte* after notice to the parties and an opportunity to be heard.

7 *Retention of Jurisdiction.* The parties should be aware that, once a case is concluded, this court  
8 ordinarily chooses not to retain jurisdiction over a collateral matter such as a protective order.

9 *Agreement by Parties.* As reflected above, the parties are free to agree on discovery matters and  
10 confidentiality. When the court is involved, however, the necessary showing under the rules must be  
11 made.

### 12 **3. Meet and Confer**

13 Each party disputes whether the other party attempted resolve these discovery issues in a  
14 reasonable manner. The parties are advised that they should make their best efforts to resolve the  
15 discovery disputes, or at least narrow the issues, before bringing the issues to the court.

### 16 **4. Motion to Strike (Dkt. 27)**

17 Cascade moves to strike Dkt. 22-2 (Exhibit A to declaration of Robert J. Guite) because this  
18 document relates to settlement negotiations and is therefore inadmissible under F.R.E. 408. This  
19 document appears to relate to settlement negotiations and is not relevant to the issues in these motions.  
20 Accordingly, the motion to strike should be granted.

### 21 **5. Attorney's Fees**

22 Cascade requests that the court award \$5820 in attorney's fees incurred in connection with this  
23 motion. Dkt. 21.

24 Fed.R.Civ.P. 37(a)(5)(A) provides as follows:

25 (A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the  
26 motion is granted — or if the disclosure or requested discovery is provided after the  
27 motion was filed — the court must, after giving an opportunity to be heard, require the  
28 party or deponent whose conduct necessitated the motion, the party or attorney advising  
that conduct, or both to pay the movant's reasonable expenses incurred in making the  
motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the

- 1 disclosure or discovery without court action;
- 2 (ii) the opposing party's nondisclosure, response, or objection was substantially  
3 justified; or
- 4 (iii) other circumstances make an award of expenses unjust.

5 It appears that these motions were the result of bona fide disagreements between the parties over  
6 the manner in which the discoverable matters should be produced, not in whether those items should be  
7 produced. Accordingly, attorney's fees are not appropriate.

8 **6. Comment.**

9 The court is not pleased with the tone of the most recent filings (Dkts. 38 & 41), and recommends  
10 that counsel take a deep breath and then review the fundamental Principles, Preamble and Rule 3.4(a) of  
11 the Rules of Professional Conduct. The hatchet should be buried in the interests of the "just, speedy and  
12 inexpensive determination" of this case.

13 Therefore, it is hereby

14 **ORDERED** that Plaintiff Cascade Yarns, Inc.'s Motion to Compel and Motion for Entry of  
15 Protective Order and for Attorney's Fees (Dkt. 21) is **GRANTED IN PART AND DENIED IN PART**  
16 as follows: (1) Cascade's motion to compel responses to the discovery requests identified herein is  
17 **GRANTED** with regard to Interrogatories No. 4 and 5; and to Requests for Production No. 1, 2, 3, 4, 9,  
18 10,12, and 15, and Knit Picks is **ORDERED** to respond to these Interrogatories and Requests for  
19 Production within twenty days of the date of this order; (2) Cascade's motion to compel responses to  
20 Requests for Production No. 5, 6, 7, and 8 is **DENIED** without prejudice; and (3) Cascade's motion to  
21 enter the protective order filed as Dkt. 23 is **DENIED WITHOUT PREJUDICE**. Defendant's Motion  
22 for Protective Order (Dkt. 27), requesting that the court enter the protective order filed as Dkt. 27-2, is  
23 **DENIED WITHOUT PREJUDICE**. Knit Picks' motion to strike Dkt. 22-2 (Exhibit A to declaration of  
24 Robert J. Guite) (Dkt. 27) is **GRANTED**, and the document is **STRICKEN**.

25 The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any  
26 party appearing *pro se* at said party's last known address.

27 DATED this 6<sup>th</sup> day of July, 2010.

28   
Robert J. Bryan  
United States District Judge