

HONORABLE JAMES P. DONOHUE

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHIHULY, INC., a Washington corporation
and PORTLAND PRESS, INC., a Washington
corporation,

Plaintiffs,

vs.

ROBERT KAINDL, an individual; BRYAN
RUBINO, individually and on behalf of his
marital community; ART GLASS
PRODUCTION, a Washington company; et al.,

Defendants.

ROBERT KAINDL, an individual; and ART
GLASS PRODUCTION, a Washington
company,

Counter-Claimants,

vs.

CHIHULY, INC., a Washington corporation;
PORTLAND PRESS, INC. a Washington
corporation, and DALE CHIHULY, an
individual,

Counter-Defendants.

NO. C05-1801JPD

DEFENDANTS BRYAN RUBINO'S,
ROBERT KAINDL'S AND ART GLASS
PRODUCTION'S MEMORANDUM IN
OPPOSITION TO MOTION FOR
BLANKET PROTECTIVE ORDER

**NOTED ON MOTION CALENDAR:
July 20, 2006**

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I. INTRODUCTION

Having chosen to settle their differences with defendants by very publicly filing the present lawsuit, plaintiffs and Dale Chihuly now seek to litigate in secret because “as a celebrity Mr. Chihuly’s personal privacy is extremely important.” (Declaration of Billy O’Neill in Support of Plaintiffs’ and Counter-Defendants’ Motion for Protective Order dated July 10, 2006 (“O’Neill Declaration”) at p. 3, ¶ 6, ll. 33-35.) Mr. Chihuly seems to think his “celebrity” status makes the requirements of federal case law and Local Rule CR 5(g)(1) inapplicable to him. Local Rule CR 5(g)(1) embodies federal law on access to court records and states in pertinent part:

There is a strong presumption of public access to the court’s files and records which may be overcome only on a compelling showing that the public’s right of access is outweighed by the interest of the public and the parties in protecting files, records, or documents from public review.

Local Rule CR 5(g)(1). What is particularly distressing about plaintiffs’/counter-defendants’ current motion to defendants is that the plaintiffs have no compunction about impugning Mr. Rubino’s and Mr. Kaindl’s originality, artistic abilities and personal integrity, but seem to think that they should somehow be granted perpetual immunity from having to disclose information in a lawsuit they started in the first place. See, e.g., Complaint, ¶¶ 6-8, 84-95.

Plaintiffs’/counter-defendants’ position is contrary to Ninth Circuit law and indeed is contrary to recent expressions of the need for more, not less, public access to the important business done by our judicial system in cases involving issues of public interest. (See “Your Courts, Their Secrets – Seattle Times Special Report,” *The Seattle Times* (March 5, 2006), attached to the accompanying Declaration of Scott C. Wakefield in Opposition to Motion for Protective Order, dated July 17, 2006 (“Wakefield Declaration”) as Exhibit B.) This case involves important issues of whether and to what extent the use of colors, shapes and patterns in fine art are protectable under copyright and other statutes. Public interest about this case is

1 due to the unique issues involved, not because the defendants, or their counsel, have sought
2 to generate publicity about it.¹ Wakefield Declaration at ¶¶ 4 and 6 and Exhibits A and C
3 thereto. This is a case, due to the unique issues involved, which calls out for more public
4 access not less.

5 Finally, the plaintiffs/counter-defendants have not met their burden of demonstrating
6 good cause for the needlessly complicated and over-reaching protective order they seek to
7 impose in this matter. Other than some vague and conclusory statements in Billy O'Neill's
8 declaration, plaintiffs/counter-defendants do not explain how their business will be
9 threatened where: (1) the techniques of glass blowing plaintiffs seek to protect are well-
10 known and, indeed, have been taught for many years at the Pilchuck School, as well as
11 several other schools, institutions and workshops both in the United States and
12 internationally (Declaration of Bryan Rubino in Opposition to Motion for Protective Order,
13 dated July 17, 2006 ("Rubino Declaration")); (2) the galleries/museums Dale Chihuly
14 exhibits his work at are widely advertised in the general news media, art publications and
15 other public domains Wakefield Declaration at ¶ 3; (3) the financial information about the
16 businesses is directly relevant to plaintiffs' claim that their business was harmed by the
17 actions of the defendants and will certainly have to be disclosed when this matter is tried in
18 any event; and, (4) marketing and price information about plaintiffs'/counter-defendants' art
19 is also widely available in the news media, advertising and other public domains. Wakefield
20 Declaration at ¶ 3.

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24 ¹ Mr. Wakefield has labored in near anonymity in the Seattle legal community for over 25 years. As soon as
25 this matter is concluded, he will undoubtedly return to obscurity.

1 Defendants therefore respectfully request that the Court deny plaintiffs'/counter-
2 defendants' motion for a needlessly complicated, cumbersome and overly broad 13 page
3 protective order.

4 **II. STATEMENT OF FACTS RELEVANT TO**
5 **MOTION**

6 **A. Defendants Did Not Say They Would Not Agree to Treat Any Documents as**
7 **Confidential; They Said that Issues of Confidentiality Should Be Decided on a**
8 **Category by Category Basis.**

9 Defendants are certainly willing to discuss specific categories of documents which
10 may be designated and treated as confidential (as plaintiffs'/counter-defendants' counsel
11 have acknowledged). Indeed, defendants agreed that there are at least two categories of
12 documents (unpublished designs/design sketches and employment/independent contractor
13 agreements between plaintiffs'/counter-defendants and other glassblowers) that defendants
14 would agree to treat as confidential and not publicly disclose. Wakefield Declaration at ¶ 3.
15 But defendants cannot agree to a blanket protective order that would prevent the defendants
16 from even discussing documents produced in discovery with their own clients, one of whom
17 (Mr. Rubino) was an employee and/or independent contractor for plaintiffs'/counter-
18 defendants for years.

19 **B. The Proposed Protective Order Is Overly-Complicated, Cumbersome and**
20 **Violates the Attorney-Client Privilege and Work Product Doctrine.**

21 In addition, the Protective Order that plaintiffs'/counterdefendants propose is an
22 overly-complicated, unworkable document that virtually guarantees mistakes will be made in
23 how documents designated as confidential are handled during depositions and when court
24 filings are required. The proposed Protective Order even goes so far as to prohibit lawyers
25 for the parties from showing certain documents to their own clients without getting
permission form the party making the "Confidential/Restricted" designation on the

1 document. See, Proposed Protective Order at p. 4, ¶4 [Docket #92]. This will cause the
2 parties to bear further unnecessary expense and will create a logistical nightmare in keeping
3 track of which documents have been approved for client review, and which have not. It will
4 also create a burdensome process (which could easily be subject to abuse by a producing
5 party) when it becomes necessary for a lawyer to show a “Confidential/Restricted” document
6 to a client, which the producing party will not agree to allow the client to see. The parties
7 must then run to court to get the issue resolved.

8 That aspect of the proposed Protective Order also violates the attorney-client
9 privilege and work-product doctrine as it would require the lawyer who wanted to show a
10 “Confidential/Restricted” document to a client to disclose to opposing counsel the document
11 in question. That necessarily invades the attorney-client privilege and work product doctrine
12 because a lawyer’s selection of what documents should be shown/discussed with a client
13 represents the lawyer’s work product by definition. To further require that the lawyer ask
14 permission from opposing counsel before discussing a document with a client violates the
15 attorney-client privilege and work product doctrine, because it identifies exactly what
16 materials the lawyer believes he or she needs to discuss with the client, thereby indicating
17 what issues or documents the lawyer has identified as being potentially significant in the
18 case. *See, Sporck v. Peil*, 759 F.2d 312, 315-19 (3rd Cir.), *cert. denied*, 474 U.S. 903 (1985).

19 Consequently, defendants respectfully requests that the court deny plaintiff’s motion
20 for protective order.

21 **C. This Is Not A Case About “Trade Secrets.”**

22 Much of the plaintiffs’/counter-defendants’ memorandum in support of the motion for
23 protective order relies on case law where an extremely technical and/or proprietary process,
24 design or formula was at issue. That is not what this case is about. This case involves a
25 dispute about whether the defendants are deliberately copying glass artwork for which

1 Chihuly, Inc. and Portland Press, Inc. have purportedly obtained copyrights. This is not a
2 case where one competitor is unlawfully using a highly technical, complicated process,
3 formula or design, allegedly developed by another competitor. Rather, plaintiffs contend that
4 defendants are improperly infringing plaintiffs' "copyrights" by making glass art that looks
5 too much like the plaintiffs' allegedly copyrighted work.

6 The plaintiffs do not really care about the "techniques" or "processes" that the
7 defendants are using to create defendants' glass artwork. The plaintiffs' claims are based
8 upon the contention that some of the defendants' glass artwork looks too much like the
9 plaintiffs' allegedly copyrighted glass artwork, regardless of how defendants' glass artwork
10 was made. The "trade secrets"- protective order case law that the plaintiffs rely on is,
11 accordingly, simply not applicable to the facts involved in this matter.

12 **III. STATEMENT OF EVIDENCE RELIED UPON**

13 Declaration of Bryan Rubino in Opposition to Motion for Protective Order, dated
14 July 17, 2006; and

15 Declaration of Scott C. Wakefield in Opposition to Motion for Protective Order,
16 dated July 17, 2006, and Exhibits thereto.

17 **IV. STATEMENT OF LEGAL AUTHORITIES**

18 **A. There is A Strong Presumption Against Protective Orders In the Ninth Circuit.**

19 There is a long-established common law right to "inspect and copy public records and
20 documents, including judicial records and documents." *Nixon v. Warner Communications*,
21 435 U.S. 589, 597 (1978). In the Ninth Circuit "we start with a strong presumption in favor
22 of access to court records." *Foltz v. State Farm Mutual Automobile Ins. Co.*, 331 F.3d 1122,
23 1135 (9th Cir. 2003) *quoting Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995).
24 The Federal Rules of Civil Procedure embody this presumptive right in the "good cause"
25 standard of Fed. R. Civ. P. 26(c) for the granting of protective orders, ensuring that

1 documents remain public unless a party makes an affirmative showing of “good cause” to
2 seal. *Accord, Kamakana v. City of Honolulu*, 447 F.3d 1172, 1178-81 (9th Cir. 2006).

3 “Good cause” requires that a party provide “articulable facts” supporting closure, and
4 the party cannot rely on an “unsupported hypothesis or conjecture.” *Hagestad v. Tragesser*,
5 49 F.3d 1430, 1434 (9th Cir. 1995). Similarly, the Court must rest its decision on specific
6 findings. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10-14 (1986); *Foltz*,
7 331 F.3d at 1134-35. Embarrassment or inconvenience from the dissemination of the
8 materials cannot justify a protective order. *Foltz*, 331 F.3d at 1136. Even where it is
9 established that the disclosure of information may be harmful to a party, the public and
10 private interests must be weighed to determine whether a protective order is appropriate.
11 *Glenmede Trust Co. v. Thompson*. 56 F.3d 476, 483-85 (3rd Cir. 1995). Where a case
12 involves issues of public interest, the balance militates in favor of public access and against
13 the issuance of a broad, blanket protective order where the litigants get to choose what the
14 public is entitled to see. *See, Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3^d Cir. 1994).

15 **B. The Burden of Establishing the Need For A Protective Order is on the Party**
16 **Requesting it and Plaintiffs/Counterdefendants Have Not Met Their Burden on**
17 **the Record Before the Court.**

18 F. R. Civ. P. 26 (c) governs protective orders. It states in pertinent part:

19 (c) **Protective Orders.** Upon motion by a party or by the person from
20 whom discovery is sought, accompanied by a certification that the movant has
21 in good faith conferred or attempted to confer with other affected parties in an
22 effort to resolve the dispute without court action, and for good cause shown,
23 the court in which the action is pending or alternatively, on matters relating to
24 a deposition, the court in the district where the deposition is to be taken may
25 make any order which justice requires to protect a party or person from
annoyance, embarrassment, oppression, or undue burden or expense,
including one or more of the following:

* * *

1 (7) that a trade secret or other confidential research, development,
2 or commercial information not be revealed or be revealed only in a
3 designated way; and

4 The burden of demonstrating “good cause” lies with the party seeking the protective order.
5 *Glenmede Trust Co. v. Thompson*. 56 F.3d 476, 483-84 (3rd Cir. 1995). To establish good
6 cause a party must demonstrate that disclosure of information or materials will result in
7 particularized harm, not just that the party requesting the Protective Order would prefer not
8 to have the information publicly available or that the information might be distressing or
9 potentially embarrassing. *Id.* The showing of good cause must be made for each particular
10 document a party seeks to protect. *Foltz*, 331 F.3d at 1130.

11 Here the plaintiffs/counterdefendants have failed to establish even the first prong of
12 the test for entering a protective order. There is no showing on the record before the court
13 that the disclosure of any of the allegedly confidential information discussed in the Billy
14 O’Neill Declaration will result in any particularized harm to Chihuly, Inc. (“CI”), Portland
15 Press, Inc. (“PPI”), Dale Chihuly or anyone else. While the O’Neill Declaration goes
16 through a great deal of effort to establish Mr. Chihuly’s status as a celebrity artist, it offers
17 only vague generalities when it comes to the alleged harm that would be done to CI, PPI
18 and/or Mr. Chihuly if CI/PPI/Mr. Chihuly’s financial, marketing and sales, and operational
19 information were disclosed. For example, Mr. O’Neill² opines that “as a celebrity, Mr.
20 Chihuly’s personal privacy is extremely important to preserving a normal family life,
21 ensuring his good health and ensuring his ability to produce further Artworks.” O’Neill
22 Declaration at p. 3, ¶ 6, ll.33-37. Certainly everybody enjoys a reasonable degree of
23 “personal privacy,” and no doubt “personal privacy” contributes in some generalized way to

24 ² Mr. O’Neill’s foundation for his opinions about the alleged adverse effects of loss of “personal privacy” on
25 health is unclear. He does not appear to be a health care provider.

1 a “normal family life” and “good health.” But that kind of amorphous, folk-wisdom does
2 not establish a showing of the kind of particularized harm required by Ninth Circuit case law,
3 that will result to CI/PPI/Mr. Chihuly if no protective order is entered in this matter. Even if
4 some of the information that the plaintiffs/counterdefendants must produce in discovery is
5 potentially embarrassing there is no automatic right to a protective order. *See, Glenmede*
6 *Trust Co. v. Thompson*, 56 F.3d at 484.

7 Similarly Mr. O’Neill’s protestations that the “widespread disclosure” of unspecified
8 confidential information “could not only affect the market for information about Mr.
9 Chihuly” and would “distract attention away from the core business as we seek to respond to
10 inquiries from the press, our galleries collectors and others” seems a bit disingenuous given
11 the skill with which Mr. Chihuly and his organizations have orchestrated the public relations
12 aspects of Mr. Chihuly’s businesses for years. Indeed, Mr. Chihuly recently gave an
13 extensive interview to Seattle Post-Intelligencer art critic Regina Hackett which covered in
14 explicit detail Mr. Chihuly’s personal struggles with bipolar disorder. Ms. Hackett’s article
15 was prominently featured on the front page of the April 17, 2006 edition of the Post-
16 Intelligencer. Declaration of Scott C. Wakefield in Opposition to Motion for Protective
17 Order, dated July 17, 2006 (Wakefield Declaration”) at ¶ 6 and Exhibit C thereto. Mr.
18 Chihuly’s candor in publicly disclosing this information is commendable, but the voluntary
19 disclosure of this kind of sensitive, personal information to a newspaper reporter does not
20 suggest that either he or his businesses were overly concerned about his “personal privacy”
21 or that the disclosure of the information would have an adverse affect on Mr. Chihuly’s
22 “family life” or health, or his businesses’ ability to produce artworks.

23 In summary, the vague and speculative reasons the plaintiffs/counterdefendants offer
24 in support of their motion for a protective order on such mundane matters as CI/PPI’s
25 financial records, marketing and sales information and operational materials, do not rise to

1 the showing of “particularized harm” necessary to establish the need for a protective order
2 under Ninth Circuit case law. Defendants respectfully request that the Court deny the motion
3 for protective order.

4 **C. Even if the Information That Plaintiffs/Counterdefendants Seek to Hide Would**
5 **Cause Some “Particularized Harm,” the Public’s Interest in Disclosure of The**
6 **Information In this Case Outweighs Interests of the Plaintiffs/**
7 **Counterdefendants, Where They Brought This Action In the First Place.**

8 Even if plaintiffs/counterdefendants are correct that they would suffer some sort of
9 “particularized harm” (which they have yet to articulate with the degree of specificity
10 required for the overly broad blanket protective order they propose), the inquiry does not end
11 there. Next the courts examine whether the public interest in the matter is sufficient to
12 outweigh the plaintiffs’/counterdefendants’ interests in the issuance of a protective order.
13 This case does involve important issues of the extent to which one fine artist can restrict
14 another from using colors, shapes and patterns by use of copyright and other statutory and
15 common law mechanisms. It has already engendered a substantial amount of interest in local
16 and national media. Wakefield Declaration at ¶¶ 4 and 6 and Exhibits A and C, thereto. It
17 would be one thing if, as is often the case, the attention was not sought by the party who is
18 being requested to turn over information in the discovery process - - i.e. usually a defendant.
19 That is not the case here. Mr. Chihuly and his businesses decided to litigate this matter in a
20 federal district court, and did not exactly act discreetly when they filed the case back in
21 October 2005. Wakefield Declaration at ¶ 7 and Exhibit D thereto.

22 It sometimes appeared that plaintiffs’/counterdefendants’ objective was to create
23 more, not less interest in the case. They may have succeeded. At any rate there is no
24 question that whatever the source, there is significant public interest in this matter. Given
25 that interest, it is not appropriate to place artificial restrictions on the dissemination of
information to be produced in discovery. That is particularly true where Mr. Chihuly’s status

1 as a celebrity automatically makes him a public figure and therefore with some expectation
2 that his privacy will be diminished as a result of his very public career as a fine artist. As
3 stated in *Pansy v. Borough of Stroudsburg*, “[P]rivacy interests are diminished when the
4 party seeking protection is a public person subject to legitimate public scrutiny.” *Id.* at 787.

5 Here, the public interest in the case outweighs whatever privacy interest CI/PPI /Mr.
6 Chihuly may have in keeping discoverable information out of the public eye.
7 Plaintiffs/counterdefendants have failed to provide any “articulable facts” showing that they
8 will suffer any “particularized harm” as a result of disclosing any of the categories of
9 documents discussed in the O’Neill Declaration. Consequently defendants respectfully
10 request that the court deny plaintiffs’/counterdefendants’ motion for protective order.

11 **V. CONCLUSION**

12 Plaintiffs/counterdefendants have failed to establish any particularized harm that
13 would result from the disclosure of financial information, marketing and sales information or
14 operational information by Chihuly, Inc. and/or Portland Press, Inc.
15 Plaintiffs/counterdefendants have further failed to demonstrate why their privacy interests are
16 paramount to the public interest in this matter, given Mr. Chihuly’s admitted celebrity status.
17 Accordingly, defendants respectfully request that the court deny the
18 plaintiffs’/counterdefendants’ motion for protective order.

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DATED this 17th day of July, 2006.

Respectfully submitted,

TODD & WAKEFIELD

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2006, I electronically filed the following documents:

1. DEFENDANTS BRYAN RUBINO'S, ROBERT KAINDL'S AND ART GLASS PRODUCTION'S MEMORANDUM IN OPPOSITION TO MOTION FOR BLANKET PROTECTIVE ORDER;

2. DECLARATION OF BRYAN RUBINO IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER;

3. DECLARATION OF SCOTT C. WAKEFIELD IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER; and,

4. PROPOSED ORDER DENYING PLAINTIFFS' AND COUNTER-DEFENDANTS' MOTION FOR PROTECTIVE ORDER;

with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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