

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

PERFECT BARRIER, L.L.C., )  
 Plaintiff )  
 v. )  
 WOODSMART SOLUTIONS, INC. )  
 Defendant )  
 \_\_\_\_\_ )  
 WOODSMART SOLUTIONS, INC., )  
 Counter-Plaintiff and )  
 Third Party Plaintiff )  
 v. )  
 PERFECT BARRIER, L.L.C., )  
 Counter-Defendant )  
 )  
 And JOHN K. BANKS and )  
 WILLIAM P. BANKS, )  
 Third Party Defendants )  
 \_\_\_\_\_ )

Case No.: 3:07CV0103

**WOODSMART SOLUTIONS, INC'S MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL COMPLIANCE WITH PROTECTIVE ORDER AND FOR SANCTIONS**

Defendant, Counter-Plaintiff, and Third-Party Plaintiff, WoodSmart Solutions, Inc. ("WoodSmart"), by and through its undersigned attorneys, hereby files its Opposition to Plaintiff's Motion to Compel Compliance with Protective Order and for Sanctions [Dkt. 51]("Motion to Compel").

Plaintiff's motion unfortunately seeks to involve the Court in a matter that has either been resolved by WoodSmart or otherwise decided by the parties. WoodSmart has resolved the issue by voluntarily re-designating hundreds of previously produced documents to greatly reduce the frequency of the "Attorneys' Eyes Only " designation. Plaintiff nonetheless insists on pursuing its motion with respect to a second group of documents it has not yet even reviewed. This

second group was gathered from WoodSmart's email server as a result of key word searching by Plaintiff. Due to Plaintiff's exhaustive and overly broad key words, over 75,000 pages of emails were recovered. A large percentage of these emails are completely irrelevant to the issues in this litigation. WoodSmart categorically designated these emails as "Attorneys' Eyes Only" as expressly contemplated by Section XIII of the parties' stipulated Protective Order. WoodSmart made this designation to give Plaintiff an opportunity to inspect the emails and select those it wished to obtain. Although the key word searching was performed over two and a half months ago, Plaintiff has thus far refused to even so much as review these emails or otherwise narrow the scope of its search. Until it chooses to do so, its motion is premature and should be denied.

## **I. BACKGROUND**

### **a. Plaintiff's Key Word Search**

In response to Plaintiff's First Set of Requests for Production, WoodSmart made available several thousand responsive documents. These documents were produced as hard copies and were Bates labeled W001-W04745. WoodSmart also permitted Plaintiff to conduct key word searches on its email servers in an effort to locate additional responsive emails. In order to accomplish this, Plaintiff provided a list of key words to be searched. See Ex. A, Ltr. from P. Peralta to S. Stein, 11/29/2007. The list was long. Many of the key words were so broad they ensured the recovery of thousands of irrelevant and non-responsive emails. The list included ubiquitous words like "license"<sup>1</sup>, "exclusive," "agreement."<sup>2</sup> Plaintiff also insisted on searching for the terms "WoodSmart" and "wood coating." Obviously, for a company named WoodSmart in the wood coating business, these terms returned nearly the entirety of

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<sup>1</sup> Plaintiff included a wildcard operator after the "s" to ensure that all variants of this word were recovered. Wild cards were used for several words on the list.

<sup>2</sup> Plaintiff originally requested a search for "restated license and purchase agreement," but later broadened the search to just "agreement."

WoodSmart's email server. WoodSmart warned Plaintiff about the breadth of its search and suggested narrowing the list. See Ex. B, Email from S. Stein to P. Peralta of 12/5/2007. Plaintiff ignored this advice and a third party vendor proceeded to run the key words on WoodSmart's email server. As expected, the search recovered nearly 6 Gigabytes of largely irrelevant and non-responsive emails.

**b. WoodSmart's Categorical Designation**

WoodSmart nonetheless tendered the emails to Plaintiff on January 30, 2008. See Ex. C, Email from S. Stein to P. Peralta, 1/30/2008. Pursuant to Section XIII of the Protective Order the emails were categorically designated as "Attorneys Eyes Only." [Dkt. 50]. Plaintiff, however, objected to the emails being produced in their native format. See Ex. D, Ltr. from P. Peralta to S. Stein of 1/30/2008. Instead of native format, Plaintiff demanded -- for the first time-- that the emails be produced as .tiff images. Plaintiff made this request despite the fact that: a) its document requests did not specify a format for the production of electronic documents; and b) the parties specifically agreed to produce their respective electronic documents in native format. See Ex. E, Report of the Parties' Planning Meeting under Fed. R. Civ. P. 26(f) at ¶ 3(c). Only later did Plaintiff object to the categorical "Attorneys' Eyes Only" designation. See Ex. F, Ltr. from P. Peralta to S. Stein of 2/14/2008. At that time Plaintiff also objected to the confidentiality designations of the hard copy documents produced as Bates nos. Bates labeled W001-W04745.

WoodSmart subsequently re-designated as "confidential" hundreds of its hard copy documents. See Ex. G, Ltr. from M. Colitz to P. Peralta of 4/3/2008; Ex. H, Ltr. From M. Colitz to P. Peralta of 4/15/2008. WoodSmart also offered to re-designate the previously provided emails on the condition that Plaintiff first inspect the emails for relevance so as to

generate a more manageable volume of documents. Woodsmart rejected this offer. Furthermore, in investigating the matter, it became apparent that Plaintiff had never even accepted the electronic documents previously tendered by Woodsmart. See Ex. I, Email from L. Holder to M. Colitz of 4/11/2008.

## II. LEGAL STANDARD

In support of its Motion to Compel, Plaintiff cites to a number of cases for the proposition that the producing party has the burden of showing that documents have been properly designated pursuant to a protective order. See, e.g., THK America, Inc. v. NSK Co., 157 F.R.D. 637 (N.D. Ill); Team Play, Inc. v. Boyer, 2005 WL 256476 (N.D. Ill); Quotron Systems, Inc. v. Automatic Data Processing, Inc., 141 F.R.D. 37 (S.D.N.Y.). These cases, however, are simply not relevant as none deal with the situation where, as here, the protective order specifically allows categorical confidentiality designations. These cases are also of marginal insight because none address the production of large amounts of electronically stored information.

Rather, WoodSmart directs the Court's attention to any of the number of cases permitting categorical designations. See, e.g., Fraternity Fund, Ltd. v. Beacon Hill Asset Mgmt., 2005 WL 3070532, \*2 (S.D.N.Y.)(permitting categorical designation for "large volumes of files"); In re Zyprexa Prods. Liab. Lit., 2004 WL 3520247, \*2 (allowing producing party to designate and redact document after designation by the requesting party); In re Rezulin Prods. Liab. Lit., 2000 WL 1839744, \*2 (same). As in these cases, the parties here specifically agreed to the entry of a Protective Order allowing for categorical designations for large volumes of documents.

### III. ARGUMENT

#### a. WoodSmart has Complied with the Protective Order

WoodSmart fully complied with the parties' stipulated Protective Order by making a categorical confidentiality designation to a vast group of documents that were gathered by the Plaintiff. Because Plaintiff is alone responsible for the impossibly large volume of documents recovered, it should bear the burden of having to review the documents for relevance.

Section XIII of the Protective Order provides that:

**XIII. Notwithstanding any provision of the contrary herein, a party producing documents may designate a group of documents by category as being "confidential" under category "B" and/or "C"<sup>3</sup> as specified in Section II herein. After allowing the other party to inspect such documents for which such categorical designation has been made, individual documents of the group that are requested for copying by the inspection party shall then be individually marked by the producing party with the appropriate designation specified in Section II hereof.**

Thus, the procedure being invoked by WoodSmart is precisely the type of procedure agreed to by the parties. Although Plaintiff's Motion to Compel fails to address this provision, it is nonetheless an important part of this Court's Protective Order. The provision is especially important in a situation where, as here, an overly broad discovery request ensnares a mountain of documents. This provision puts the onus of an initial document review on the requesting party. The Court should enforce this provision and Plaintiff should be required to make an initial review the 6 Gigabytes of data returned by its all-encompassing key word search. After reviewing these documents, Plaintiff will undoubtedly come to the same conclusion reached by WoodSmart; namely, that a large percentage of the documents are unimportant and totally irrelevant to the issues in this litigation. Plaintiff would then be free to either select a smaller

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<sup>3</sup> Category "B" corresponds to "Confidential" documents and Category "C" corresponds to "Attorneys Eyes Only" documents.

subset of the documents or otherwise limit its key word search. To date, Plaintiff has done neither and has steadfastly refused to even so much as look at the documents.

Requiring WoodSmart to review of all 75,000 pages of emails for confidentiality would be unduly burdensome and would reward Plaintiff's overly broad discovery requests. By contrast, requiring Plaintiff to make an initial review for relevance would be in keeping with both this Court's Protective Order and with recent changes to the Federal Rules of Civil Procedure which shift the burden of overly broad discovery requests to the requesting party. See, e.g., Zubulake v. USB Warburg LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003)(setting forth "the extent to which the request is specifically tailored to discover relevant information" as one of the factors to be taken into account in burden shifting); see also 2006 Advisory Committee Notes to Fed. R. Civ. P. 26(b)(2) (same).

Moreover, it has been over two and a half months since WoodSmart's counsel instructed Plaintiff to obtain the emails from its third party vendor. To date, Plaintiff is still refusing to accept the emails. This complete refusal on Plaintiff's part is telling. Plaintiff's unwillingness to accept these emails is a tacit admission that the recovered data is largely irrelevant and worthless. If Plaintiff really believed that its search had recovered a focused group of relevant emails, it would have jumped at the chance to review them.

**b. WoodSmart's Electronic Documents Cannot be Individually Marked in the Current Format.**

Plaintiff is well aware of the fact that native format emails do not permit individual confidentiality designations. Namely, in order to be labeled, all the emails would first have to be converted into individual .tiff images. Thus, even if WoodSmart was willing to undertake a confidentially review, all 75,000 pages would have to be converted into individual .tiff images.

The cost for his conversion is estimated to be at least \$8,500, and thus far, Plaintiff is completely unwilling to shoulder any of this cost.

During the Fed. R. Civ. P. 26(f) Planning Meeting, the parties specifically discussed the preferred format for the production of electronically stored information. The parties agreed that any electronic documents would be produced in their native format and this fact was reflected in the Report of the Parties Planning Meeting. See Ex. E at ¶ 3(c). Because Plaintiff's subsequent discovery request did not specify a format (as contemplated by Fed.R.Civ.P. 34(b)(1)(C)), WoodSmart produced its emails in native format in accordance with the parties' prior agreement. Woodsmart's native production is also in accordance with Fed.R.Civ.P.34(b)(2)(E)(i) which requires electronic documents to be produced as they are kept in the usual course of business. Only after WoodSmart tendered the emails in native format did Plaintiff change course and instead seek production of individual .tiff images. See Ex. D, Ltr. from P. Peralta to S. Stein of 1/30/2008.

Plaintiff rightfully objected to paying for converting the documents, as Fed. R. Civ. P. 34(b)(2)(E)(iii) provides that "A party need not produce the same electronically stored information in more than one form." But this is exactly what Plaintiff is seeking to have WoodSmart do by way of the present motion. Namely, Plaintiff's motion would require WoodSmart to convert all 75,000 pages into .tiff images so that appropriate confidentiality designations could be made on a document by document basis. Leaving aside the huge expense associated with such a review, Woodsmart would be incurring at least \$8,500 in expense so that Plaintiff could receive the same emails in two different formats.

Accordingly, in the event this Court compels a review of the subject emails by WoodSmart, Plaintiff should be ordered to pay for all costs associated with converting the emails into .tiff images and applying the necessary labels.

**c. Sanctions are not Warranted.**

Far from sanctionable conduct, WoodSmart's conduct here is commendable and shows a willingness to avoid court intervention both by re-designating documents where necessary and by making good faith offers for a reasonable resolution. WoodSmart voluntarily re-designated hundreds of hard copy documents to substantially reduce the "Attorneys Eyes Only" designation. It also readily made available for inspection tens of thousands of emails. With regard to its categorical designations, Woodsmart offered to withdraw the designation provided that Plaintiff merely review the documents for relevance. WoodSmart also generously offered to split the cost associated with converting the documents despite the parties previous agreement on native production. These sensible offers on the part of WoodSmart do not reflect the type of abusive conduct that warrants a sanction.

**IV. CONCLUSION**

WHEREFORE, WoodSmart Solutions, Inc. respectfully submits that for the forgoing reasons, Plaintiff's Motion to Compel Compliance with Protective Order should be denied.



Respectfully submitted,

WOODSMART SOLUTIONS, INC.

By: /s/ Michael J. Colitz, III  
Stefan V. Stein PHV  
Florida Bar No. 300527  
Michael J. Colitz, III PHV  
Florida Bar No. 164348  
100 North Tampa Street  
Suite 4100  
Tampa, FL 33602-3644  
Telephone: 813-227-8500  
Facsimile: 813-229-0134  
Stefan.stein@hklaw.com  
Michael.colitz@hklaw.com  
ATTORNEYS FOR DEFENDANT

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, states that he caused a copy of the foregoing to be served upon the following, by electronically filing a copy of same on this 16th day of April 2008 with the United States District Court for the Northern District of Indiana electronic filing system:

Paul J. Peralta

MOORE & VAN ALLEN, PLLC

100 N. Tryon Street, Floor 47

Charlotte, NC 28202-4003

/s/ Michael J. Colitz, III  
Michael J. Colitz, III

# 5272263\_v2

# **EXHIBIT A**

**Moore&VanAllen**

November 29, 2007

**VIA E-MAIL ([Stefan.stein@hklaw.com](mailto:Stefan.stein@hklaw.com)) and FIRST CLASS MAIL**

Stefan V. Stein, Esq.  
Holland & Knight LLP  
100 N. Tampa Street, Suite 4100  
Tampa, FL 33602-3644

**Paul J. Peralta**  
Attorney at Law

T 704 331 1024  
F 704 339 5869  
[paulperalta@mvalaw.com](mailto:paulperalta@mvalaw.com)

**Moore & Van Allen PLLC**

Suite 4700  
100 North Tryon Street  
Charlotte, NC 28202-4003

**Re: Perfect Barrier v. Woodsmart, et al.**  
**Cause No.: 3:07-CV-0103 RL-CAN**

Dear Mr. Stein:

Thanks for the reproduction quotes you forwarded. We have decided to have our regular vendor, Document Technologies (DTI), scan and bates-stamp the four boxes of documents being made available by Woodsmart in the above-referenced case. It will take approximately a week to get all the documents scanned and the originals returned. Please contact my paralegal, Lynn Holder, to schedule a convenient time for DTI to pick up the documents and to provide the address and a name and telephone number of the person at Woodsmart whom DTI should contact. Lynn can be reached by telephone at 704-331-2428 or by email at [lynnholder@mvalaw.com](mailto:lynnholder@mvalaw.com).

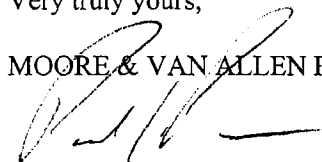
Since we are having the documents scanned for bates-stamping, DTI can provide you with a hard copy of the bates-stamped documents at a cost of \$0.06 per page. If you would like a copy of these documents, Lynn will be happy to provide you with a contact name and telephone number for you to make those arrangements directly with DTI.

Pursuant to our discussion with regard to Woodsmart's email server, I have enclosed a list of search terms to identify relevant documents contained in Woodsmart's emails. I am aware that some search engines will search for terms contained in emails, but not the attachments to emails. Please confirm for me that the search engine you will be using is searching both the emails as well as all attachments to emails for the terms contained on the enclosed list.

Please call me if you have any questions.

Very truly yours,

MOORE & VAN ALLEN PLLC



Paul J. Peralta  
PJP/lh

Enclosure

cc: Tonya Mitchell

CHAR2\1057995v1

Research Triangle, NC  
Charleston, SC

Search Terms for  
Woodsmart Email

[terms are not cap sensitive]

Lundy  
Dugger  
Pratt  
Knight  
Walls  
Banks  
Morando<sup>1</sup>  
Adolph<sup>2</sup>  
Holley  
Shane  
Baldwin  
Auger  
Walker  
Hicks  
Dillman  
Reed<sup>3</sup>  
Reid  
"Greg Smith"  
"Greg Price"  
Whitaker  
Knight  
Conex  
Lane Waterman  
Miller  
Noyes  
Perfect Barrier  
Woodsmart  
Enviroguard  
Protectacoat  
Formulation Technolog\*  
Adorn  
Bethel Engineer\*  
TLX  
Automated Lumber  
Perfect Barrier  
Bluwood  
Orlando  
Grand Prairie  
Totes  
Walz  
Restated license and purchasing agreement  
Restated

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<sup>1</sup> Do not use this term when searching the files of Adolph, Charles, Robert or Michael Morando.

<sup>2</sup> Do not use this term when searching the files of Adolph Morando.

<sup>3</sup> Do not use this term when searching the files of Michael Reed.

Invoice  
Bill of lading  
Formula\*  
License  
Royalty  
Exclusive  
Territory  
Technical support  
Application equipment  
Vacuum  
ISO 9000  
ISO 9001  
Wood coating  
Nate  
Holmes  
Conrad Forest Products  
Fixed asset  
Lease offer  
Test\*  
Breach  
Default  
Minimum purchase  
Purchase requirement  
Litigation  
Letter of agreement  
Prepaid inventory agreement  
licensee  
merge  
quality control  
quality procedure\*  
quality manual  
Hostetler  
Hostedtler  
testif\*  
testim\*

# **EXHIBIT B**

**From:** stefan.stein@hklaw.com [mailto:stefan.stein@hklaw.com]  
**Sent:** Wednesday, December 05, 2007 5:21 PM  
**To:** jparker@digitallegal.net; paulperalta@mvalaw.com  
**Cc:** dwilkens@digitallegal.net  
**Subject:** RE: Digital Legal Estimate

Dear Paul:

I met with Digital Legal and gave them the 2 DVDs that we had discussed. The following is their estimate of their charges for the processing. Please confirm that you are agreeable to paying their charges and that you are authorizing them to proceed.

When we reviewed the large number of keywords that you provided to us, there was some concern that the list was so large that it may result in the retrieval of the great majority of the data. Hence, you may want to talk to them beforehand proceeding to narrow your keyword list.

Please keep me in the loop - we will want to review the data for privilege issues before it is tendered to you.

Thank you.

**Holland + Knight**

Stefan V. Stein  
Intellectual Property Law  
Holland & Knight LLP  
Suite 4100  
100 North Tampa Street  
Tampa, Florida 33602-3644  
PHONE (813) 227-8500  
FAX (813) 229-0134  
DIRECT LINE (813) 227-6578  
Please respond to: [stefan.stein@hklaw.com](mailto:stefan.stein@hklaw.com)  
[www.hklaw.com](http://www.hklaw.com)

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4/15/2008

# **EXHIBIT C**



**Colitz, Michael J (TPA - X36598)**

**From:** Stein, Stefan (TPA - X36578)  
**Sent:** Wednesday, January 30, 2008 1:48 PM  
**To:** 'Paul Peralta'  
**Cc:** Tonya Mitchell; Lynn Holder; dwilkens@digitallegal.net; Franz, Shelley (TPA - X36562); Pitts, Sheila K (TPA - X36697)  
**Subject:** RE: Status  
**Categories:** 106272.00001  
**Attachments:** Digital Legal Inv.PDF; w2634.PDF

Dear Paul:

Thank you for your patience. The data has now been loaded into our Summation. By copy of this email to David Wilkens of Digital Legal, I'm asking him to burn you a DVD marked Confidential - Attorney Eyes Only including all of the emails except for the attorney-client privileged emails listed below. Of course, we reserve the right to claw-back any other privileged emails that may be inadvertently previously produced or produced herein. Please note that in this regard, we are clawing back the Ken Pollock document previously produced. See attached.

Before he burns the DVD, please let David know ASAP what data format would you prefer for whatever document management program you intend to use. Also, a copy of their invoice is attached. Please remit payment directly to Digital Legal.

The Protective Order modifications are acceptable - please proceed with filing with the court.

Steve

CMOR0000715 eDoc	Kristina	
CMOR0011531 Attachment	KM	
CMOR0008484 Email	stefan.stein@hklaw.com	camorando@perfectbarrier.com
CMOR0008492 Email	stefan.stein@hklaw.com	camorando@perfectbarrier.com
CMOR0011530 Email	Charles A. Morando	'camorando@bluwood.net'
CMOR0011560 Email	Charles A. Morando	'stefan.stein@hklaw.com'
CMOR0011588 Email	Kristina McPherson	'stefan.stein@hklaw.com'
CMOR0011651 Email	Charles A. Morando	'stefan.stein@hklaw.com'
CMOR0011653 Email	Charles A. Morando	'stefan.stein@hklaw.com'
CMOR0011655 Email	Charles A. Morando	'stefan.stein@hklaw.com'
CMOR0011657 Email	Charles A. Morando	'stefan.stein@hklaw.com'
CMOR0011659 Email	Charles A. Morando	'stefan.stein@hklaw.com'
CMOR0011729 Email	Charles A. Morando	'stefan.stein@hklaw.com'
CMOR0011740 Email	Charles A. Morando	'stefan.stein@hklaw.com'
CMOR0011909 Email	Charles A. Morando	'stefan.stein@hklaw.com'
CMOR0011922 Email	Charles A. Morando	'stefan.stein@hklaw.com'
CMOR0011947 Email	Charles A. Morando	'stefan.stein@hklaw.com'
CMOR0012104 Email	Charles A. Morando	
CMOR0007011 Attachment		
CMOR0019443 Attachment		
CMOR0005490 Email	Kristina McPherson	jfischer@iplawfl.com
CMOR0007002 Email	Joe Fischer	CAMorando; kristina@perfectbarrier.com

CMOR0007004 Email	Joe Fischer	CAMorando; kristina@perfectbarrier.com
CMOR0007010 Email	Joe Fischer	CAMorando
CMOR0007012 Email	Joe Fischer	CAMorando
CMOR0007013 Email	Joe Fischer	CAMorando
CMOR0007014 Email	Joe Fischer	CAMorando
CMOR0007015 Email	Joe Fischer	camorando@perfectbarrier.com
CMOR0007016 Email	Joe Fischer	Charles A. Morando
CMOR0007017 Email	Joe Fischer	Charles A. Morando
CMOR0016642 Email	Kristina McPherson	jfisher@iplawfl.com
CMOR0019414 Email	Joe Fischer	CAMorando; kristina@perfectbarrier.com
CMOR0019416 Email	Joe Fischer	CAMorando; kristina@perfectbarrier.com
CMOR0019442 Email	Joe Fischer	CAMorando
CMOR0019444 Email	Joe Fischer	CAMorando
CMOR0019445 Email	Joe Fischer	CAMorando
CMOR0019446 Email	Joe Fischer	CAMorando
CMOR0019447 Email	Joe Fischer	camorando@perfectbarrier.com
CMOR0019448 Email	Joe Fischer	Charles A. Morando
CMOR0019449 Email	Joe Fischer	Charles A. Morando

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**From:** Paul Peralta [mailto:paulperalta@mvalaw.com]

**Sent:** Wednesday, January 30, 2008 9:55 AM

**To:** Stein, Stefan (TPA - X36578)

**Cc:** Tonya Mitchell; Lynn Holder

**Subject:** Status

Stefan,

Please advise when we can expect to receive the completed production from Woodsmart. The last word we had received was that your vendor was compiling the e-mails. We have no indication when those are to be produced. Please advise.

As well, we have not received a response from you regarding the revised protective order. We need to re-submit to the court. Let us know if we are authorized to proceed.

Thanks.

Paul

**Paul J. Peralta**

Attorney at Law

Suite 4700

100 North Tryon Street

Charlotte, NC 28202-4003

W 704 331 1024

F 704 339 5869

4/15/2008

paulperalta@mvalaw.com

[www.mvalaw.com](http://www.mvalaw.com)

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4/15/2008

# **EXHIBIT D**

**Moore&VanAllen**

January 30, 2008

**VIA E-MAIL (Stefan.stein@hklaw.com; michael.colitz@hklaw.com)  
and FIRST CLASS MAIL**

Stefan V. Stein, Esq.  
Michael J. Colitz, Esq.  
Holland & Knight LLP  
100 N. Tampa Street, Suite 4100  
Tampa, FL 33602-3644

**Paul J. Peralta**  
Attorney at Law

T 704 331 1024  
F 704 339 5869  
paulperalta@mvalaw.com

**Moore & Van Allen PLLC**

Suite 4700  
100 North Tryon Street  
Charlotte, NC 28202-4003

**Re: Perfect Barrier v. Woodsmart, et al.  
Cause No.: 3:07-CV-0103 RL-CAN**

Dear Messrs. Stein and Colitz:

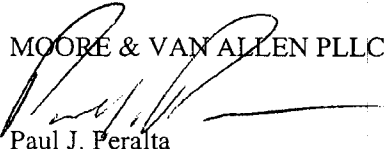
According to an email from David Wilkens this afternoon, the electronic data to be produced by Woodsmart is currently in native file format. While I do not object to receiving native files, it is important that you produce an unalterable copy of each document. Therefore, please have the electronic documents converted to .tif images, bates-stamped and, where appropriate, marked confidential, prior to the production of the documents on CD by Mr. Wilkens' firm.

If the Woodsmart documents are produced in native file format only, there are several inherent problems. First, documents in native files can be altered after production, even inadvertently. Second, the pages of electronic documents cannot be bates-stamped. Without bates-stamp numbers, it is difficult to uniformly identify a particular document or specific page of a document and to prove or refute that an exact document was produced during discovery. Finally, and probably most importantly, electronic documents which are produced subject to the protective order will not be individually marked confidential when printed, which will lead to the very real probability of an inadvertent violation of the protective order. All of these problems can lead to unnecessary confusion and disagreement over the documents. These problems can be avoided easily by providing bates-stamped .tif images of electronic documents.

Once the documents have been tiffed and bates-stamped, we will provide Mr. Wilkens with the details as to the format of the data for our software. I am copying Mr. Wilkens on this letter so he will not expect a response from us today regarding the data format. If you have any questions, please do not hesitate to call me.

Very truly yours,

MOORE & VAN ALLEN PLLC

  
Paul J. Peralta  
PJP/lh

cc: Tonya Mitchell  
David Wilkins (via email)

# **EXHIBIT E**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

PERFECT BARRIER, L.L.C., )  
 )  
 Plaintiff )  
 v. )  
 )  
 WOODSMART SOLUTIONS, INC. )  
 )  
 Defendant )  
 \_\_\_\_\_ )  
 )  
 WOODSMART SOLUTIONS, INC., )  
 )  
 Counter-Plaintiff and )  
 Third Party Plaintiff )  
 v. )  
 )  
 PERFECT BARRIER, L.L.C., )  
 )  
 Counter-Defendant )  
 )  
 And JOHN K. BANKS and )  
 WILLIAM P. BANKS, )  
 )  
 Third Party Defendants )

Case No.: 3:07CV0103

**REPORT OF PARTIES' PLANNING MEETING**

1. In accordance with Fed. R. Civ. P. 26(f), a meeting was held on June 5, 2007 via teleconference and was attended by:

Paul J. Peralta for Plaintiff Perfect Barrier, L.L.C.

Leah Wardak, and Michael J. Colitz, III (*Pro Hac Vice* pending) for Defendant WoodSmart Solutions, Inc.

2. **Pre-Discovery Disclosures.** The parties will exchange by July 1, 2007 the information required by Fed. R. Civ. P. 26(a)(1).

3. **Discovery Plan.** The parties jointly propose to the court the following discovery plan:

a) Discovery will be needed on the following subjects:

- Perfect Barrier's claims for breach of contract, breach of express and implied warranties, and declaratory judgment.
  - WoodSmart Solutions, Inc. counterclaims for breach of contract, breach of implied covenant of good faith and fair dealing, misrepresentations, and fraud.
  - The facts and circumstances surrounding the drafting and execution of the License, Purchase and Services Agreement between the parties.
  - The facts and circumstances surrounding the drafting and execution of the Restated License, Purchase and Services Agreement between the parties.
  - The minimum purchase requirements under the relevant contracts between the parties and Perfect Barrier LLC's failure to meet the minimum purchase requirements.
  - WoodSmart, non-performance of its obligations under the agreement at issue.
  - Perfect Barrier LLC's efforts to sell the Bluwood™ product.
  - WoodSmart's breaches of contract and warranties.
  - WoodSmart's negotiations and dealings and agreement with third parties granting territorial rights to purchase BluWood products.
  - Damages suffered by WoodSmart Solutions, Inc. as a result of Perfect Barrier LLC's breaches, misrepresentations, and fraud.
  - Perfect Barrier LLC's intentions regarding forming a new licensing agreement with WoodSmart Solutions, Inc.
  - Representations made by Perfect Barrier LLC, William P. Banks and/or John K. Banks regarding a new agreement between the parties.
- b) Disclosure or discovery of electronically stored information should be handled as follows:
- c) In response to a properly tailored discovery request, and subject to the limitations of Fed. R. Civ. P. 26 (b)(2)(B), the parties agree to produce responsive electronically stored information ("ESI"). Unless otherwise provided for in the discovery request, the ESI shall be produced in its native format, provided that such format is reasonably useable by the receiving party.
- d) The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production as follows:



e) The parties will adhere to Fed. R. Civ. P. 26 (b)(5)(B) regarding the inadvertent production of privileged or trial preparation materials.

f) The last date for the completion of all discovery is February 15, 2008.

g) The maximum number of interrogatories by each party to any other party shall be as provided for in the Federal Rules of Civil Procedure. The maximum number of requests for admission by each party to any other party shall be 25.

h) Maximum of ten (10) depositions by plaintiff and ten (10) by defendant. Each deposition shall be limited to a maximum of seven (7) hours unless extended by agreement of the parties.

i) The Fed. R. Civ. P. 30 (b)(6) deposition of a party shall be counted as a single deposition regardless of the number of individuals testifying on behalf of the entity. The time limit for each Fed. R. Civ. P. 30(b)(6) witness shall be seven (7) hours unless extended by agreement of parties.

j) The filing of reports from retained experts under Rule 26(a)(2) due:

from plaintiff by March 1, 2008

from defendant by March 1, 2008

k) Any evidentiary objections to another party's expert witness, whether directed to the witness's qualifications or to the foundation for the anticipated testimony, shall be filed by May 1, 2008. Counsel stipulate that a failure to file such objections is waiver of any objection to opinion testimony outlined in the statement filed by the witness's proponent.

l) Supplementations under Rule 26(e) are due February 1, 2008.

#### **4. Other Items.**

a) As of the date of this conference, service has not been effected on third party defendant William P. Banks or John Banks.

b) The last date for the plaintiff(s) to seek leave of court to join additional parties and to amend the pleadings is August 1, 2007.

c) The last date for the Defendant(s) to seek leave of court to join additional parties and to amend the pleadings is August 1, 2007.

d) The last date for the completed briefing of all potentially dispositive motions is March 30, 2008.

e) The timing of filing pretrial disclosures under Fed. R. Civ. P. 26 (a)(3) shall be governed by separate order.

f) The parties will work to decide upon a mutually acceptable mediator. This matter shall be mediated no later than January 15, 2008. Thirty (30) days before the final pretrial conference counsel will provide a written status report to the Court regarding the mediation outcome.

g) The case should be ready for jury trial by June 1, 2008 and at this time is expected to take approximately one week.

h) Counsel are aware that the Court has various audio/visual and evidence presentation equipment available for use at trial at no cost to the Bar. Counsel know that this includes an evidence presentation system, which consists of a document camera, digital projector, and screen. Counsel know the projector may be used to display images which originate from a variety of sources, including television, VCR, and personal computer. The document camera may be used to display documents, photographs, charts, transparencies, and small objects. Counsel acknowledges they can contact one of the Court's courtroom deputy clerks for information or training.

Date: July 6, 2007

Respectfully submitted,

/s/ Paul J. Peralta

Paul J. Peralta  
Indiana Bar No. 15524-71  
MOORE & VAN ALLEN, PLLC  
100 N. Tryon Street, Floor 47  
Charlotte, NC 28202-4003  
Telephone: 704-331-1000  
Facsimile: 704-331-1159  
ATTORNEY FOR PLAINTIFF

/s/ Leah Wardak

Eric Dorkin  
Illinois Bar No. 6256930  
Steffanie Garrett  
Illinois Bar No. 6206951  
Leah Wardak  
Illinois Bar No. 6285246  
Holland & Knight LLP  
131 S. Dearborn, 30<sup>th</sup> Fl.  
Chicago, Illinois 60603  
Telephone: 312-263-3600  
Facsimile: 312-578-6666  
Eric.dorkin@hklaw.com  
Steffanie.garrett@hklaw.com  
Leah.wardak@hklaw.com

ATTORNEYS FOR DEFENDANT

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Report of Parties' Planning Meeting was furnished by U.S. Mail to Paul J. Peralta, MOORE & VAN ALLEN, PLLC, 100 N. Tryon Street, Floor 47, Charlotte, NC 28202-4003 this 6th day of June, 2007.

s./Leah Wardak

# 4591241\_v1

# **EXHIBIT F**

**Moore & Van Allen**

February 14, 2008

**VIA E-MAIL ([Stefan.stein@hklaw.com](mailto:Stefan.stein@hklaw.com)) and FAX**

Stefan V. Stein, Esq.  
Holland & Knight LLP  
100 N. Tampa Street, Suite 4100  
Tampa, FL 33602-3644

**Paul J. Peralta**  
Attorney at Law

T 704 331 1024  
F 704 339 5869  
[paulperalta@mvalaw.com](mailto:paulperalta@mvalaw.com)

**Moore & Van Allen PLLC**

Suite 4700  
100 North Tryon Street  
Charlotte, NC 28202-4003

**Re: Perfect Barrier v. Woodsmart, et al.**  
**Cause No.: 3:07-CV-0103 RL-CAN**

Dear Mr. Stein:

This confirms receipt of Woodsmart Solutions' hard copy documents from its third party vendor in response to the outstanding Perfect Barrier Request for Production of Documents and your e-mail of February 7, 2008.

**Documents Identified Attorneys Eyes Only**

The hard copy documents produced with Bates numbers W001 through W4745 have been designated "Confidential" all the hard copy documents produced with Bates numbers W2567 through W4745 have been designated as "Attorneys-Eyes-Only", with reference to the recently-entered Protective Order.

Woodsmart's designation of many of the documents designated "Attorneys-Eyes-Only" is dubious since many documents reflect transactions or communications with third parties or with Perfect Barrier on obviously non-privileged/non-trade secret topics. For instance, the following have no apparent basis for preventing counsel review with our clients as to the content of the referenced documents:

- Perfect Barrier purchase orders [e.g., W4437, W4544, W4698];
- Woodsmart invoices issued to Perfect Barrier [e.g., W4435, W4539, W4697, W4745];
- Copies of Perfect Barrier check stubs for payment of Woodsmart invoices [e.g., W4434, W4538];
- Bills of Lading from various shippers for product sent to Perfect Barrier [e.g., W4433, W4444, W4523];
- Woodsmart packing slips for shipments to Perfect Barrier [e.g., W4431, W4524];
- E-mail communication between Charles Marando and individuals at Perfect Barrier [e.g., W2567, W2573, W2577, W2666 through W2700];
- Correspondence from Perfect Barrier to Woodsmart or other companies and copied to Woodsmart [e.g., W2590, W2642];
- Hard copy correspondence from Woodsmart to Perfect Barrier [e.g., W2701, W2704-W2705];
- Bank's Corporation invoice to Woodsmart [e.g., W2664];
- Signed copies of agreements between Woodsmart and Banks Corporation [e.g., W2710, W2744-W2761].

Stefan Stein, Esq.  
February 14, 2008  
Page 2

Woodsmart has simply made blanket "Attorneys-Eyes-Only" designations without considering the fundamental basis for such designation. I also understand from your email that you intend to designate all of Woodsmart's electronic production as "Attorneys Eyes Only." Woodsmart, not Perfect Barrier, has the burden of making careful, considered designations.

In an effort to resolve this matter short of court involvement and consistent with local Rule 37.1, we ask that you revisit the "Attorneys-Eyes-Only" designation as soon as possible. Please respond to this notice no later than Monday, February 18<sup>th</sup> so that we can proceed with the scheduling of Mr. Shane Holley's deposition. Mr. Holley has advised that he is available on February 25, 26, or 27 in Charlotte to conclude his deposition so please let us know of your availability. If it is Woodsmart's position that no change will be made to the designations, kindly contact us as soon as possible so that we may file the appropriate papers before the Court.

#### **Production Format and Identification**

The format you and your data vendor have proposed for production of documents responsive to our Request for Production of Documents creates concerns regarding the integrity of the original content as well as the importance of maintaining consistency in identifying those documents.

First as to identification, we have indicated our strong preference that the documents be identified by Bates number rather than "hash marks". While hash marks may be commonly used to check the integrity and authenticity of a native file and for de-duping electronic files, the use of hash marks in lieu of Bates-stamping is hardly "common" practice. We have in fact confirmed this with several vendors, including DTT's local office as well as their processing center in Atlanta. While the author of your article certainly advocates the use of hash marks, there are an equal number of critics who have published concerns about relying on that format for identification.

What is clear from the article you provided is that to verify authenticity of a document using a hash mark, a party must have a hash tool. Do you intend to provide us with a hash tool (via software) to verify the hash values your client provides in the load file to the actual native files? Further, because there is no defined standard yet as to native file production and how hash marks are used, how do you propose to:

- Manage the native files throughout discovery and refer to them in reports, depositions, hearings, and at trial? (Even the article on which you rely highlights the difficulty of using a hash mark as an identifying number due to its length and complexity.)
- Produce documents that require redactions?
- Designate confidentiality? (Thus, while you can populate a field as "confidential" in Summation, when the document is printed in hard copy for use in depositions, we have been told by Summation that it is possible that this type of field could be printed on a native file document

Stefan Stein, Esq.  
February 14, 2008  
Page 3

like a Docid can be printed, but it will require some work in configurations to do so.)

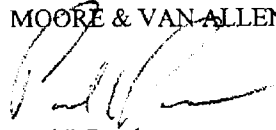
- Identify how the documents were kept in the usual course of business? Is Woodsmart prepared to include in the load file for the documents the information as to the location of the data on Woodsmart's computer when the file was harvested?

Finally, you should provide us with a hash value log that records all of the files produced and identifies them by hash value in order to insure continuity of identification. Indeed, the author of the article on which you rely recommends that such a log accompany native file production.

We would appreciate hearing from you at your earliest opportunity on these issues. Let's schedule a conference call to work through these problems.

Very truly yours,

MOORE & VAN ALLEN PLLC



Paul J. Peralta  
PJP/abb

cc: Michael J. Colitz ([michael.colitz@hklaw.com](mailto:michael.colitz@hklaw.com))  
Stephanie N. Garrett ([steffanie.garrett@hklaw.com](mailto:steffanie.garrett@hklaw.com))  
Tonya Mitchell  
Lynn Holder

# **EXHIBIT G**



# Holland+Knight

Tel 813 227 8530  
Fax 813 229 0134

Holland & Knight LLP  
100 North Tampa Street, Suite 4100  
Tampa, FL 33602-3644  
www.hklaw.com

April 3, 2008

**MICHAEL J. COLITZ, III**  
813 227 6598

[michael.colitz@hklaw.com](mailto:michael.colitz@hklaw.com)

## VIA FACSIMILE

Paul J. Peralta  
MOORE & VAN ALLEN, PLLC  
100 N. Tryon Street, Floor 47  
Charlotte, NC 28202-4003

Re: Perfect Barrier LLC vs. Woodsmart Solutions, Inc.  
Case No. 3:07-CV-00103-RL-CAN  
Our File No. 106272.00001

Dear Paul:

This is a follow up to our previous discussions regarding Plaintiff's outstanding Motion for Compliance with Protective Order [Dkt. 50]. As an initial matter, I appreciate your cooperation in agreeing to an extension of time for our opposition. My hope is that this extra time will allow us to resolve this issue without court intervention.

The issue at hand is the designation of our documents pursuant to the Protective Order. My review of the documents produced to date indicates that they fall into two groups. The first group has been Bates labeled W001-W04745 and has been given various confidentiality designations. You have objected to some of these designations and to the purported overly broad use of the "Attorneys' Eyes Only" designation. On the basis of the specific examples cited in your motion, we are willing to reevaluate our previous designations and make changes where appropriate. In light of the number of documents involved, I estimate that our re-designation will take approximately two weeks to complete.

In the meantime, we are willing to re-designate as "Confidential" the examples cited in your brief (i.e. W4437, W4544, W4698, W4435, W4539, W4697, W4745, W4434, W4538, W4433, W4444, W4523, W4431, W4524, W2567, W2573, W2577, W2666, W2700, W2590, W2642, W2701, W2704-2705, W2664, W2710, W2744-2761). If there are other specific designations you wish to challenge, we are willing to consider these on a case-by-case basis. Otherwise, we will review and re-designate the balance of these documents within the next two weeks.

The second group of documents are electronic documents that have been previously produced in their native format. Pursuant to Section XIII of the Protective Order, these documents have been given a blanket "Attorneys' Eyes Only Designation." This blanket designation was made due to the large number of documents involved and the tremendously

Paul Peralta, Esq.

Page 2

April 3, 2008

broad nature of your requests. There are over 22,000 individual documents in this second group, constituting approximately 75,000 pages. Applying the necessary confidentiality legend to these documents is complicated by the fact that they were produced in their native format. Namely, our outside vendor informs me that these documents must first be converted into a .TIFF format before a designation can be made. The cost for converting all 22,000 documents is approximately \$8,500. At Monday's deposition of Mr. Holley, you stated that Perfect Barrier is unwilling to split this conversion cost. As a compromise, Woodsmart is willing to bear the conversion cost and apply the necessary confidentiality designations, but only if Perfect Barrier first inspects the documents to come up with a reasonable subset of documents. Indeed, I believe this is precisely the procedure envisioned by Section XIII of the parties' stipulated Protective Order.

Please let me know if the foregoing proposal is acceptable and whether Perfect Barrier is willing to withdraw its motion on this basis.

Very truly yours,

HOLLAND & KNIGHT LLP



Michael J. Colitz, III

MJC:ld

cc: Stefan V. Stein (H&K)  
WoodSmart Solutions, Inc.

# 5226245\_v1

# **EXHIBIT H**

# Holland Knight

Tel 813 227 8500  
Fax 813 229 0134

Holland & Knight LLP  
100 North Tampa Street, Suite 4100  
Tampa, FL 33602-3644  
www.hklaw.com

April 15, 2008

**MICHAEL J. COLITZ, III**  
813 227 6598

[michael.colitz@hklaw.com](mailto:michael.colitz@hklaw.com)

## VIA FACSIMILE

Paul J. Peralta  
MOORE & VAN ALLEN, PLLC  
100 N. Tryon Street, Floor 47  
Charlotte, NC 28202-4003

Re: Perfect Barrier LLC vs. Woodsmart Solutions, Inc.  
Case No. 3:07-CV-00103-RL-CAN  
Our File No. 106272.00001

Dear Paul:

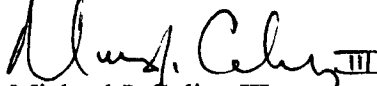
Pursuant to my previous letter of April 3, 2008, I have now completed a review of the documents Bates labeled W001-W04745. The enclosed list reflects documents previously designated "Attorneys Eyes Only" that are now being re-designating as "Confidential." Please let me know if you have a question regarding the confidentiality of any other document within this range.

As for the remaining documents, I was surprised to learn from your paralegal that you have not yet received any electronic documents. Indeed, I was operating under the assumption that you had, in fact, reviewed these emails inasmuch as they are addressed in your Motion to Compel Compliance with Protective Order. As you know, our vendor, Digital Legal, made those documents available to you over two and a half months ago. I would suggest contacting them in order to obtain these documents. We are also resending a copy of the invoice from Digital Legal, which apparently has yet to be paid.

Feel free to contact me with any questions.

Very truly yours,

HOLLAND & KNIGHT LLP



Michael J. Colitz, III

MJC:jng

cc: Stefan V. Stein (H&K)  
WoodSmart Solutions, Inc.# 5270934\_v1

## Bate Range

W2567-2583  
W2585-2586  
W2589-2596  
W2598-2601  
W2606-2610  
W2612-2624  
W2630-2633  
W2638-2954  
W2956-2959  
W2961-2962  
W2964-2968  
W2970  
W2972-3015  
W3018-3035  
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W4390-W4745

Digital Legal Tampa, LLC  
 100 North Tampa Street  
 Suite 2660  
 Tampa, FL 33602  
 813-222-1322

# Invoice

**Date** 12/31/2007  
**Invoice #** 549

**Bill To**

Holland & Knight  
 Stefan Stein, Esq.  
 100 North Tampa Street  
 Suite 4100  
 Tampa FL 33602-3644

**Ship To**

**P.O. #**  
**Terms** Net 15

**Ship Date** 12/31/2007  
**Due Date** 1/15/2008  
**Work Order** HK005

Description	Qty	Rate	Amount
EDD Processing - Data de-duplication and filtering with keywords	6.9	800.00	5,520.00T
Creation of CD - Master CD	1	35.00	35.00T
Woodsmart Case; Digital Legal Tax ID 56-2592484			
<b>Subtotal</b>			\$5,555.00
<b>Sales Tax (7.0%)</b>			\$388.85
<b>Total</b>			\$5,943.85
jparker@digitallegal.net			
813-222-1322			
<b>Payments/Credits</b>			\$0.00
<b>Balance Due</b>			\$5,943.85

# **EXHIBIT I**

**Colitz, Michael J (TPA - X36598)**

---

**From:** Lynn Holder [lynnholder@mvalaw.com]  
**Sent:** Friday, April 11, 2008 4:38 PM  
**To:** Colitz, Michael J (TPA - X36598)  
**Cc:** Paul Peralta; Tonya Mitchell  
**Subject:** Perfect Barrier v. Woodsmart

Mr. Colitz,

Mr. Peralta asked that I contact you regarding Woodsmart's production to Perfect Barrier. We have not yet received any electronic documents from Woodsmart due to the outstanding issue of the production of native files vs. tiff images. To date, we have received only the hard copy Woodsmart documents that were scanned as tiff images for Summation.

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