

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTONIO MEDINA,
Plaintiff,
v.
MICROSOFT CORPORATION, et al.,
Defendants.

Case No. 14-cv-00143-RS (JSC)

**ORDER RE: DEFENDANT'S MOTION
FOR ENTRY OF A PROTECTIVE
ORDER**

Re: Dkt. No. 53

Plaintiff Antonio Medina, an inventor and doctor of optometry with two federal bank fraud convictions, has sued Microsoft and an individual, Cyrus Bamji, for patent infringement and unfair competition. Microsoft seeks a protective order which restricts disclosure of its “confidential”—not just “highly confidential”—information to Plaintiff’s attorneys and qualified experts. The catch, however, is that Dr. Medina is not represented by counsel and claims that he cannot afford to retain an expert. After carefully considering the parties’ submissions, and having had the benefit of oral argument on August 7, 2014, the Court concludes that Microsoft is entitled to the protective order it seeks, so long as there is a process in effect to prevent unilateral over-designation.

BACKGROUND**A. Allegations of the Second Amended Complaint**

In 1992, Dr. Medina was issued Patent No. 5,081,530 (“the 530”) “for invention of the ‘three dimensional camera and range finder.’” (Dkt. No. 59 ¶ D.1). Dr. Medina still owns the ‘530. Dr. Medina owned Multivision Research, a company “involved in the development, manufacture and sale of the three dimensional camera and range finder” embodied in the ‘530. (*Id.* ¶ D.7).

1 Prior to 1998, Dr. Medina advised 3DV that its 3D cameras and chips infringed the ‘530.
2 The parties engaged in numerous meetings and communications to discuss Dr. Medina assigning
3 the ‘530 to 3DV, but no agreement ever materialized. In 2008, Dr. Medina became aware that
4 another company, Canasta, was infringing the ‘530. And from January 2008 through the present
5 “Microsoft used infringing cameras in its project Natal and in its second generation Kinect for
6 Xbox One and for Windows.” (*Id.* ¶ D.4). Finally, in 2008 and 2009 defendant Cyrus Bamji
7 infringed the’531 “by building and demonstrating cameras in public scientific meetings and trade
8 shows.” Microsoft purchased 3DV and Canesta in 2009 and 2010 respectively.

9 Microsoft unfairly competed with Multivision by virtue of its agreements with 3DV and
10 Canesta. “On or about September 2013 Microsoft destroyed Multivision’s competition and
11 impeded commercialization and sale of Dr. Medina’s 3D camera due to sales of Microsoft 3D
12 camera at a subsidized, below cost price despite Dr. Medina’s camera being of superior
13 performance and design.” (*Id.* ¶ E.14.) Once Microsoft acquired dominant control of the 3D
14 camera market, it increased the price of the camera.

15 Dr. Medina makes claims for patent infringement as well as unfair competition and
16 practices in violation of California Business and Professions Code sections 17200 and 17043. He
17 demands monetary damages of at least \$15,500,000 trebled, punitive damages, interest, and
18 attorney fees and costs, as well as an injunction preventing Microsoft from selling 3D cameras
19 below cost.

20 **B. Dr. Medina’s Criminal History**

21 Dr. Medina has twice been convicted of criminal bank fraud. Following a jury trial in
22 1993, Dr. Medina was convicted of fraudulently altering a check for \$365 to \$365,000, depositing
23 the check for the higher amount, and then wiring \$350,000 to an account in his name in England.
24 *United States v. Puerta*, 38 F.3d 34, 36 (1st Cir. 1994). The trial judge sentenced him to 18
25 months imprisonment and ordered restitution. *Id.* at 37-38. Then, just two years ago, a jury again
26 found Dr. Medina guilty of criminal bank fraud. *United States v. Puerta*, 11-cr-00055, Dkt. Nos.
27 70 (C.D. Cal. Sept. 12, 2012). This time he was charged with a deceptive scheme of having
28 deposited a check in the amount of \$157,000 when he knew the account had insufficient funds.
He then arranged for an international wire transfer of \$100,000 to himself before the bank

1 realized there were insufficient funds to cover the deposit. *Id.* at Dkt. No. 106. In October 2013,
2 the trial judge sentenced Dr. Medina to restitution and 15 months imprisonment. *Id.* at Dkt. No.
3 130. The case is on appeal.

4 **C. The Pending Motion**

5 Microsoft asks the Court to enter the District’s standard protective order for trade secrets
6 with one significant modification. In the normal case, “highly confidential” information is
7 designated as “attorneys eyes only” and can only be shared with outside counsel and qualified
8 experts. Microsoft wants that restriction to apply to “confidential” information as well. Dr.
9 Medina insists he should be permitted to review all discovery—non-confidential, confidential, and
10 even highly confidential—because he is representing himself and cannot afford to hire an expert.

11 **DISCUSSION**

12 Northern District Patent Local Rule 2-2 provides that the Northern District’s Model
13 Protective Order (“the Model Order”) governs a case unless and until the presiding judge enters a
14 different protective order. The Model Order divides confidential information into two categories:
15 (1) confidential information, and (2) highly confidential information. *See* ¶¶ 2.2, 2.8, 2.9, 7.2,
16 7.3. Highly confidential information is “extremely sensitive” information, the “disclosure of
17 which to another Party or Non-Party would create a substantial risk of serious harm that could not
18 be avoided by less restrictive means.” ¶ 2.8. Such information may be disclosed only to a party’s
19 outside counsel, in-house counsel “who has no involvement in competitive decision-making,” and
20 experts with a need-to-know, along with certain court personnel. ¶ 7.3. Thus, under the plain
21 language of the governing protective order, Dr. Medina—the sole decisionmaker for Plaintiff;
indeed, he is Plaintiff—may not have access to highly confidential information.

22 Dr. Medina’s lament that this restriction should not apply because he does not have an
23 attorney is unpersuasive. The rule would lack any teeth if all a person had to do to get access to a
24 company’s highly confidential information is to bring suit without being represented by an
25 attorney. While Dr. Medina is correct that he has the right to proceed without the assistance of an
26 attorney, he is incorrect to the extent he asserts that he does not have to abide by the rules simply
27 because he is not represented by counsel. In the civil context, the same rules apply to the
28 represented and unrepresented alike. *See Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995) (“pro

1 se litigants are bound by the rules of procedure”); *Howell v. Holland America Line Inc.*, No. 13-
2 730, 2014 WL 3752112, at *4 (W.D. Wash. July 30, 2014) (Pro se litigant “elected to bring this
3 action, and even though he is now proceeding pro se, he is still bound by the rules governing
4 litigation”).

5 Dr. Medina’s complaint that he cannot afford to retain an expert is equally unavailing.
6 First, he has not come close to establishing that he does not have the financial resources to retain
7 an expert. Second, even if he does not, he has no right to have a different set of rules apply to him.
8 In *Bender v. Maxim Integrated Products*, 2010 WL 1135762 (N.D. Cal. March 22, 2010), for
9 example, the plaintiff argued, in effect, that he should not have to satisfy the Northern District’s
10 requirements for infringement contentions because to do so would require reverse engineering
11 which would be prohibitively expensive. *Id.* at *6. The court responded that “[w]hile the Court is
12 sensitive to plaintiff’s concerns about the expense of reverse engineering . . . it is also sensitive to
13 the desire of defendant not to be forced to produce proprietary schematics unnecessarily.” *Id.*
14 Similarly, here, while Dr. Medina may not be able to afford to retain an expert, that does not mean
15 Microsoft’s undeniable interest in keeping its highly confidential information out of the hands of
16 competitors or potential competitors must be overridden.

17 Next, Dr. Medina asserts that there is no harm to Microsoft in disclosing its highly
18 confidential information to him because he is not a competitor. This assertion is belied by the
19 allegations of the various iterations of his complaint, including the most recent version. Dr.
20 Medina alleges that Microsoft engaged in unfair competition with his company and, as a result,
21 less than one year ago drove the company out of business. That the company is purportedly not
22 operating today is of no moment. This whole lawsuit is based on Dr. Medina’s assertion that he
23 developed a superior product that Microsoft is unfairly competing with by infringing the ‘530 and
24 other unlawful tactics.

25 In sum, just as every other patent litigant in this District, Dr. Medina must comply with the
26 Model Protective Order which prohibits the disclosure of highly confidential information to the
27 opposing litigant. As Dr. Medina is the opposing litigant, he may not view Microsoft’s highly
28 confidential information. At oral argument, Dr. Medina appeared to concede that the Model
Protective Order should apply with respect to highly confidential information, but expressed

1 concern over Microsoft’s suggestion that even its “confidential” information should be subject to
2 the same protections and only produced to outside counsel or an expert.

3 Indeed, Microsoft proposes that Dr. Medina also not be given access to information which
4 is merely “confidential information,” that is, information that qualifies as confidential under
5 Federal Rule of Civil Procedure 26(c), but apparently does not qualify as “highly confidential”
6 under the Model Protective Order. Recall that “highly confidential” information is “extremely
7 sensitive” information, the “disclosure of which to another Party or Non-Party would create a
8 substantial risk of serious harm that could not be avoided by less restrictive means.” ¶ 2.8.
9 Microsoft suggests that merely “confidential” information might include outdated marketing
10 plans, internal emails, and development documents, but that there is a risk of harm from disclosure
11 of this information under the unique circumstances of this case.

12 At the moment, however, the only discovery at issue is initial disclosures. At oral
13 argument Microsoft shared its view that all of the initial disclosures it is required to produce
14 qualify as “highly confidential.” Accordingly, under the Model Protective Order, Dr. Medina
15 cannot have access to the information. And, since he does not have an attorney or expert, there is
16 no person to whom the information can be produced. To avoid a risk of over-designation,
17 however, Microsoft must produce to Dr. Medina a log which identifies the categories of initial
18 disclosure documents that are being designated as highly confidential. To the extent that Dr.
19 Medina contends that any particular document(s) identified on the log should not in fact be
20 designated as highly confidential based on the description provided by Microsoft, the parties may
21 file a joint discovery letter brief addressing the issue. Upon review of the letter brief, the Court
22 may order certain documents produced for *in camera* review.

23 When and if Microsoft is obligated to produce documents which it believes are not “highly
24 confidential,” but should nonetheless not be shared with Dr. Medina, Microsoft should bring the
25 issue to the Court’s attention by seeking a discovery status conference. As stated at oral argument,
26 the Court is available by telephone to work with the parties on discovery issues as they arise.

27 CONCLUSION

28 For the reasons explained above, Microsoft’s Motion for a Protective Order (Dkt. No. 53)
is GRANTED in part. The District’s Model Protective Order governs this action and Dr. Medina

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

may not view any material Microsoft designates as “highly confidential.” Microsoft, must, however, provide Dr. Medina with a log of the withheld documents with sufficient description to enable him to decide whether to challenge the highly confidential designation. Any such challenge must be made through a joint discovery letter brief as set forth in the Court’s Standing Order. When Microsoft is confronted with an obligation to produce documents that it believes are not highly confidential but nonetheless should not be shared with Dr. Medina, it should contact the Court’s Courtroom Deputy to arrange for a discovery case management conference as appropriate. Indeed, either party may request a discovery case management conference if the party believes such conference would be helpful.

This Order disposes of Docket No. 53.

IT IS SO ORDERED.

Dated: August 7, 2014



JACQUELINE SCOTT CORLEY
United States Magistrate Judge