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E-FILED: January 26, 2012

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DAVID BABA and RAY RITZ, individually
and on behalf of all others similarly situated,

No. C09-05946 RS (HRL)

Plaintiffs,

**ORDER DENYING PLAINTIFFS’
MOTION FOR ENTRY OF A
PROTECTIVE ORDER**

v.

HEWLETT-PACKARD COMPANY,

[Re: Docket No. 71]

Defendant.

Plaintiffs sue for themselves and on behalf of a putative class of consumers who purchased allegedly defective TX 2000 and TX 2500 series computers manufactured by defendant Hewlett-Packard Company (HP). Briefly stated, the alleged defect causes the cursor to randomly jump to the lower right corner of the computer screen.

Now before this court is plaintiffs’ motion for entry of a protective order. Although no one disputes the need for such an order, the parties disagree whether certain limitations should be placed on the disclosure of “Highly Confidential–Attorneys’ Eyes Only” (AEO) information to retained experts. The matter is deemed suitable for determination without oral argument. Civ. L.R. 7-1(b). Upon consideration of the moving and responding papers, the court denies plaintiffs’ motion and will enter the form of order proposed by defendant, but with some modification.

Federal Rule of Civil Procedure 26(c) says that the court may, for good cause shown,

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For the Northern District of California

1 issue an order to protect a party against “annoyance, embarrassment, oppression, or undue
2 burden or expense” by denying or limiting access to “a trade secret or other confidential
3 research, development, or commercial information.” FED. R. CIV. P. 26(c)(1)(G). The party
4 seeking protection bears the burden of showing “good cause.” “Good cause” requires a
5 showing that specific prejudice or particularized harm will result from disclosure of the
6 information. In re Roman Catholic Archbishop of Portland, 661 F.3d 417, 424 (9th Cir. 2011).

7 In essence, the instant dispute concerns HP’s desire to have some means of vetting
8 plaintiffs’ retained experts before any of the company’s AEO information is disclosed to them.
9 Defendant apparently anticipates that its AEO information produced in discovery may include
10 “computer code and associated comments and revision histories, formulas, engineering
11 specifications, or schematics that define or otherwise describe in detail the algorithms or
12 structure of software or hardware designs.” (Dkt. 76-2 at 4). HP argues that any protective
13 order to be entered should therefore be patterned after the court’s “Model Stipulated Protective
14 Order for Litigation Involving Patents, Highly Sensitive Confidential Information and/or Trade
15 Secrets.” During meet-and-confer negotiations, HP says that it originally proposed that any
16 protective order include that model order’s Section 7.4, which essentially requires a party to
17 disclose certain information about its retained expert (e.g., background and employment
18 information) before disclosing the opposing party’s AEO materials to that expert. Plaintiffs
19 disputed the need for such procedures. HP says that it then proposed, as a compromise, a
20 provision that precludes the disclosure of AEO information to anyone who, in the past five
21 years, was (1) employed by HP; (2) employed by HP’s competitors; or (3) retained as an expert
22 or consultant by HP’s competitors. Pointing out that this court has issued such protective orders
23 in the past in other matters, HP argues that this court should do so again here.

24 In plaintiffs’ view, HP’s concerns will be sufficiently addressed by a protective order
25 patterned after the court’s model order for “Standard Litigation,” modified to allow for two tiers
26 of confidentiality designations. They agree that AEO information should not be disclosed to
27 any current employees of HP’s competitors, but contend that no other restrictions on expert
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1 disclosure are necessary. Here, plaintiffs express concern that HP's "compromise" proposal
2 will, in effect, hamper their ability to find a suitable expert.

3 This court agrees that HP has a legitimate interest in knowing who might be accessing
4 the company's AEO information, even if, for example, such person(s) no longer work for HP or
5 for HP's competitors. But, defendant has shown no cause to include a "catch-all" definition of
6 "competitor" in a protective order. Nor has HP satisfactorily explained why persons formerly
7 associated with the company or its competitors should be automatically excluded from the pool
8 of potential experts who might be retained. This court is also unpersuaded by HP's call for
9 slavish consistency with prior orders issued in other matters. Inasmuch as each side claims that
10 the other's concerns are speculative, this court finds that having an advance-notice procedure in
11 place strikes the best balance between legitimate competing interests and possible prejudice. In
12 the event of a disclosure dispute, plaintiffs can say why they need to disclose defendant's AEO
13 information to a particular expert, and HP can explain why the risk of harm of disclosure to that
14 individual, under proposed safeguards, outweighs plaintiffs' need for disclosure. Additionally,
15 the court will place a temporal limit on the advance-notice requirement—i.e., the advance-
16 notice procedures need not be followed for any expert who, within the preceding five years, has
17 not been affiliated in any way with defendant or any of defendant's competitors.

18 Accordingly, the court will adopt defendant's proposed order, but will modify it (1) as
19 described above; (2) to set a temporal limit on this court's jurisdiction to enforce the terms of
20 the order; and (3) to reflect that any disclosure or discovery disputes may only be brought to
21 this court's attention in compliance with the undersigned's Standing Order re Civil Discovery
22 Disputes.

23 A protective order will be entered concurrently with this one.

24 SO ORDERED.

25 Dated: January 26, 2012

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HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

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5:09-cv-05946-RS Notice has been electronically mailed to:
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