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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

AVAGO TECHNOLOGIES FIBER IP)
(SINGAPORE) PTE, LTD.,)
Plaintiff,)
v.)
IPTRONICS, INC. and IPTRONICS A/S,)
Defendants.)

Case No.: C 10-02863 EJD (PSG)
**ORDER DENYING MOTION TO
MODIFY PROTECTIVE ORDER**
(Re: Docket No. 144)

In this patent infringement suit, Plaintiff Avago Technologies Fiber IP (Singapore) PTE. Ltd. (“Avago”) moves to modify the stipulated protective order. Defendants IPtronics, Inc. and IPtronics A/S (collectively “IPtronics”) oppose the motion. Having reviewed the papers and considered the oral arguments of counsel, the court DENIES Avago’s motion.

I. BACKGROUND

In its complaint, Avago alleges that IPtronics has infringed two of Avago’s patents related to optical communications devices by manufacturing, importing and marketing certain accused products in the United States.

While this case as presently pleaded concerns patent infringement, Avago claims that discovery has revealed something more. In particular, Avago alleges that documents produced reflect a conspiracy between IPtronics and certain former Avago employees to breach the employees’ confidentiality agreements and misappropriate Avago’s trade secrets. The documents

1 were produced from two sources: (1) IPtronics' own files, in response to Rule 34 document request
2 and (2) a personal computer of a former Senior Vice President and General Manager of Avago's
3 Fiber Optics Products Division who was later was employed by Iptronics, in response to a Rule 45
4 subpoena. At least some of the documents were explicitly labeled "Avago Technologies
5 Confidential."

6 Because these documents were designated in production as "Highly Confidential-Attorneys'
7 Eyes Only," under the terms of the stipulated protective order, Avago currently is limited in how it
8 may share these documents internally, pursue a criminal investigation of the alleged conspiracy, or
9 take action against other parties. Avago therefore asks this court to modify sections 7.1, 7.2, 7.3 and
10 9 of the protective order to: (1) allow one or more Avago representative access to the documents
11 and other evidence of misappropriation without being limited by the otherwise applicable patent
12 prosecution bar; (2) permit disclosure of evidence of the alleged conspiracy with federal prosecutors
13 to determine whether a criminal investigation and/or charges are warranted; and (3) permit use of the
14 evidence in potential civil and collateral proceedings against other parties.

15 II. LEGAL STANDARDS

16 Rule 26(c) confers a district court with broad discretion to decide when a protective order is
17 appropriate and the degree of protection required.¹ A district court is in the best position to weigh
18 fairly the competing needs and interests of parties affected by discovery.²

19 A district court has inherent authority to grant a motion to modify a protective order where
20 good cause is shown.³ The party asserting good cause bears the burden of showing that specific
21 prejudice or harm will result if the motion is not granted.⁴

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24 ¹ Fed. R. Civ. P. 26(c).

25 ² *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S.Ct. 2199, 81 L.Ed.2d 17
26 (1984).

27 ³ *See Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1213 (9th
28 Cir, 2002).

⁴ *Id.* at 1210-1211.

1 **III. DISCUSSION**

2 Relying principally on *CBS Interactive, Inc. v. Etiliza, Inc.*,⁵ Avago argues that because the
3 documents at issue concern its own confidential information and trade secrets, the stipulated
4 protective order should not prevent their legitimate use outside this litigation. In *CBS Interactive*,
5 Judge Patel initially observed that the Ninth Circuit espouses a strong policy in favor of access to
6 discovery materials for purposes of collateral litigation, and that “[n]ormally, the court must also
7 weigh the countervailing reliance interest of the party opposing the modification against the
8 likelihood that the collateral action is sufficiently related to the instant action, such that a significant
9 amount of duplicative discovery may be avoided by granting the modification request.”⁶ The court
10 then held that because the party opposing modification “failed to present a significant reliance
11 interest, the court’s balancing [was] relatively straightforward . . . a modification of limited nature”
12 was appropriate.⁶

13 Iptronics responds that Avago cannot establish good cause when it has not first identified its
14 alleged trade secrets in the manner required under California Code of Civil Procedure Section
15 2019(d) or initiated any collateral litigation or request for investigation whose relation to the instant
16 action can be evaluated. Iptronics also highlights its reliance on the current protective order in
17 producing its proprietary technical, business and financial information to a competitor, and in
18 particular a competitor presently defending the patents-in-suit against a reexamination by the Patent
19 and Trademark Office.

20 The court is not yet persuaded that a Section 2019(d) statement is a prerequisite for the
21 protective order modifications sought by Avago. Nevertheless, the court is persuaded that Avago
22 has not met its burden of demonstrating good cause for those modifications. First and foremost, in
23 contrast to the plaintiff in *CBS Interactive*, Avago has not identified with any particularity the
24 specific documents it seeks to disclose. While Judge Patel had the opportunity to review the specific
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26 ⁵ 257 F.R.D. 195 (N.D. Cal. 2009).

27 ⁶ *Id.* at 206.

28 ⁶ *Id.*

1 documents at issue, in order to determine that the documents “present a rather questionable use of
2 proprietary information that the court finds satisfies the good cause standard,”⁷ no such opportunity
3 has been provided in this case. Second, unlike in *CBS Interactive*, Avago seeks disclosure to
4 individuals not bound by any patent prosecution bar, without even identifying the specific Avago
5 individuals to whom disclosure is sought and, critically, their role in patent prosecution and other
6 competitive decision-making activities. Third, to the extent that Avago believes that a criminal
7 charges may be appropriate here, federal prosecutors have resources, including the subpoena power,
8 to further any investigation. Fourth, there are no collateral proceedings pending for which the
9 relevance of the disputed information may be evaluated, and Avago has not even provided any
10 specific information regarding the collateral proceedings that it contemplates. All that the court has
11 before it to weigh against Iptronics’ legitimate reliance in producing its documents are Avago’s
12 allegations regarding what it might pursue that are supported by little more than an attorney
13 declaration.

14 As a final matter, the court notes that at the hearing on this motion, IPtronics stated that it
15 would not challenge the disclosure of documents that the former Avago employee produced in her
16 personal capacity from her own laptop computer. While the former employee may continue to assert
17 rights under the protective order regarding these documents, Avago may pursue use of these
18 documents without objection from IPtronics.

19 **IV. CONCLUSION**

20 Avago’s motion to modify the stipulated protective order is DENIED.

21 **IT IS SO ORDERED.**

22 Dated: November 29, 2011

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24 PAUL S. GREWAL
25 United States Magistrate Judge
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28 ⁷ *Id.* at 205.