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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CARL KRAWITT, et al.,
Plaintiffs,
v.
INFOSYS TECHNOLOGIES LIMITED,
INCORPORATED, et al.,
Defendants.

Case No.16-cv-04141-LHK (VKD)

**ORDER DENYING WITHOUT
PREJUDICE PROPOSED
PROTECTIVE ORDER**

Re: Dkt. No. 88

On December 19, 2018, the parties filed a stipulation and proposed protective order, which was referred to the undersigned magistrate judge for review. Dkt. Nos. 88, 39.

The Court appreciates that the parties have cooperated on a proposed form of order to govern the use and exchange of confidential information in this case. However, several of the proposed protective order provisions appear to be inconsistent with the Federal Rules of Civil Procedure and the Civil Local Rules, guidelines, and other policies of this Court. Other proposed provisions are ambiguous and require clarification.

The Court denies the proposed protective order without prejudice. The Court outlines its concerns below and invites the parties to submit a revised proposed protective order.

1. Definitions:

a. The proposed order’s definition of “Court” in paragraph 1.b does not clearly include any judge to whom motions or discrete proceedings (such as discovery disputes or settlement conferences) may be referred, short of assignment of the entire “Proceeding” (as that term has been defined by the parties). An appropriate definition of “Court” would be: “the United States District Court for the Northern District of California and its personnel.” *See, e.g.,* Model

1 Order ¶ 7.2(d).¹

2 b. In addition to their shaky grammar,² the proposed order’s definitions of
3 “Confidential” in paragraph 1.c and “Highly Confidential” in paragraph 1.e include
4 inconsistencies that the Court expects the parties did not intend. The parties define “Confidential”
5 [Material] as encompassing “Documents, Testimony, or Information which is in the possession of
6 a Designating Party,” but they define “Highly Confidential” [Material] as encompassing only
7 “Information which belongs to a Designating Party.”

8 c. The term “Receiving Party(ies)” is used in paragraphs 11 and 32 of the proposed
9 order as if it were a defined term, but the parties provide no definition of it.

10 d. The term “Protected Material” is used in paragraph 15 of the proposed order as if it
11 were a defined term, but the parties provide no definition of it.

12 2. Treatment of confidential information:

13 The proposed order’s discussion of materials that may be designated “Confidential” or
14 “Highly Confidential” suggests that the parties expect the Court to adopt criteria for shielding such
15 materials from public disclosure that are inconsistent with the Federal Rules of Civil Procedure,
16 the Civil Local Rules, and applicable caselaw. First, while the parties are expected to make
17 designations under the protective order in good faith, a party’s “good faith belief” that information
18 is confidential or highly confidential is not sufficient for the Court to order material sealed. *See*
19 Dkt. No. 88 ¶¶ 1.d, 1.e, and 2 (“shall have the right to designate”). Rather, the Court will only
20 permit material to be filed under seal if the material actually meets the criteria of Rule 26(c) and
21 Civil Local Rule 79-5. *See, e.g.,* Model Order ¶¶ 2.2, 14.4. The parties may wish to revise their
22 definitions of “Confidential” / “Confidential Material” and “Highly Confidential” / “Highly
23 Confidential Material” to address this concern before asking the Court to sign the proposed order.

24 Second, the parties’ definition of “Highly Confidential Material” includes an extended list

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26 ¹ All references to the Model Order are to the “Stipulated Protective Order for Litigation
27 Involving Patents, Highly Sensitive Confidential Information and/or Trade Secrets,” available on
28 the Court’s website at <https://cand.uscourts.gov/model-protective-orders>.

² “Confidential” and “Highly Confidential” are adjectives, but the proposed order defines them as if they were nouns.

1 of categories of information and subjects the parties say contain their “trade secrets and other
2 commercially sensitive Information.” Dkt. No.88 ¶ 1.e. As discussed above, the Court evaluates
3 requests to seal material on a case-by-case basis and is reluctant to adopt a definition that suggests
4 that it will forego such case-by-case assessments in favor of the categorical protection described in
5 this proposed provision.

6 Third, the parties should take note of paragraph 5.1 of the Model Order, which prohibits
7 mass, indiscriminate, or routinized designations of information and documents as “Confidential”
8 or “Highly Confidential.” This model provision is consistent with this Court’s policy on filing
9 documents under seal pursuant to Civil Local Rule 79-5, particularly those that have been
10 designated as confidential or subject to a protective order under Local Rule 79-5(e). *See* Civ. L.R.
11 79-5(b) commentary (“As a public forum, the Court has a policy of providing to the public full
12 access to documents filed with the Court. . . . Proposed protective orders, in which parties
13 establish a procedure for designating and exchanging confidential information, must incorporate
14 the procedures set forth in this rule if, in the course of proceedings in the case, a party proposes to
15 submit sealable information to the Judge.”). The mere designation of documents as “Confidential”
16 or “Highly Confidential” pursuant to a protective order alone does not support sealing those
17 documents. Civ. L.R. 79-5(d)(1)(A) (“Reference to a stipulation or protective order that allows a
18 party to designate certain documents as confidential is not sufficient to establish that a document,
19 or portions thereof, are sealable.”); *San Jose Mercury News v. United States Dist. Ct.*, 187 F.3d
20 1096, 1103 (9th Cir. 1999) (“It is well-established that the fruits of pretrial discovery are, in the
21 absence of a court order to the contrary, presumptively public.”). The Court expects the parties to
22 include this provision, or a similar provision in their proposed order.

23 3. Inconsistent provisions:

24 a. Paragraph 16.d permits access to and/or disclosure of materials designated
25 “Confidential” to “court reporters, stenographers, and videographers,” but paragraph 17.d permits
26 access to and/or disclosure of materials designated “Highly Confidential” to “court reporters”
27 only. The Court expects the parties did not intend to require stenographers and videographers
28 charged with recording a testimony involving Highly Confidential material to leave the room

1 while such testimony is transcribed solely by a court reporter.

2 b. Paragraph 15 is inconsistent with paragraph 18, in that paragraph 18 appears to
3 exclude the use of designated information for appeals.

4 c. Paragraph 22 refers to the use of “Document, *Material* or Information,” which is
5 inconsistent with the use of “Document, *Testimony*, or Information” used elsewhere in the
6 proposed order.

7 4. Ambiguous provisions:

8 a. Paragraph 7, which addresses the treatment of designated material used in
9 deposition, states that “the court reporter shall be informed of this Confidential Material or Highly
10 Confidential Material and shall be required to operate in a manner consistent with this Protective
11 Order.” This provision does not specify which party has the obligation to inform the court
12 reporter of his or her obligations and which specific provisions of the Protective Order govern how
13 the court reporter is supposed to “operate” in preparing the transcript of the deposition. *Compare*
14 Model Order ¶¶ 5.2(a)-(b), 7.2(f).

15 b. Paragraph 32, which addresses the inadvertent production of privileged materials,
16 states: “Where the Designating and Receiving Parties agree in writing with regard to particular
17 requested materials, a Designating Party may provide those requested materials for initial
18 examination by the Receiving Party in connection with this Proceeding without waiving any
19 privilege or protection in this case or any other Federal or State proceeding.” The Court assumes
20 that the parties intend here to invoke the protections of Federal Rule of Evidence 502(d) in
21 circumstances where the Designating Party produces information without prior privilege review.
22 The parties should clarify this provision.

23 5. Dispute resolution provisions:

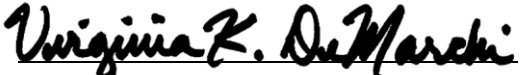
24 Any challenges to confidentiality designations or to the clawback of inadvertently
25 produced privileged material are subject to the Court’s discovery dispute procedures described in
26 Judge DeMarchi’s Standing Order for Civil Cases, available at
27 <https://cand.uscourts.gov/vkdorders>. The proposed protective should so state.

28 The parties may either submit a revised proposed protective order that addresses the

1 concerns noted above, or they may submit a joint discovery dispute letter in accordance with
2 Judge DeMarchi's Standing Order for Civil Cases (in lieu of a noticed motion) that explains why
3 the current proposed provisions should be adopted, notwithstanding the Court's concerns.

4 **IT IS SO ORDERED.**

5 Dated: January 4, 2019

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8 VIRGINIA K. DEMARCHI
9 United States Magistrate Judge
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