

THE HONORABLE JAMES L. ROBERT

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ATIGEO LLC, a Washington limited liability company, and MICHAEL SANDOVAL, an individual; and)
)
Plaintiffs,)
)
vs.)
)
OFFSHORE LIMITED D, a California partnership; DENNIS MONTGOMERY, individually and as a partner of Offshore Limited D; ISTVAN BURGYN, individually and as a partner of Offshore Limited D; DEMARATECH, LLC, a California limited liability company; and DOES 1-25, inclusive;)
)
Defendants.)

Civil Action No. 2:13-cv-1694-JLR

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR MUTUAL PROTECTIVE ORDER GOVERNING DISCOVERY

NOTED ON MOTION CALENDAR:
March 28, 2014

1 Plaintiffs Atigeo LLC and Michael Sandoval respectfully submit this reply in support of
 2 their motion for a mutual protective order governing the discovery and use of confidential
 3 information in this action. The proposed protective order was previously submitted at Dkt # 53-1.

4 1. Introduction:¹ The only issue before the Court on this motion is whether there is
 5 “good cause” for a protective order to guard against “annoyance, embarrassment, oppression, or
 6 undue burden or expense.” Fed. R. Civ. P. 26(c). An Attorneys' Eyes Only (AEO) designation
 7 protects information of a highly sensitive nature. The information sought by Defendants through
 8 broad discovery is highly sensitive (*e.g.*, trade secrets, competitive strategy, business/marketing
 9 plans, and private financial information). Like the disclosure of privileged information, the
 10 improper disclosure of highly sensitive information is a harm that cannot be completely remedied.

11 2. Competitor Access to AEO Information: While an employee of *Opspring LLC/*
 12 *Blxware LLC*, Mr. Montgomery (a highly skilled software developer in, *inter alia*, the same
 13 specialized pattern recognition and analytical software field as Atigeo) was an actual competitor
 14 of Atigeo's. Mr. Montgomery has the sophistication and skill to again compete against Atigeo,
 15 especially if provided with a “roadmap” about how to do so via discovery. Beyond just Mr.
 16 Montgomery, if others in competition with Atigeo gained access to Plaintiffs' highly sensitive
 17 information, the irreparable harm discussed in the *Sandoval Declaration* (Dkt # 51 ¶¶ 4-6) would
 18 be compounded. Mr. Montgomery has a track record of publicizing information about Plaintiffs.
 19 Irrespective of Mr. Montgomery himself, if Plaintiffs highly sensitive information were disclosed
 20 publicly (whether intentionally or inadvertently) the harm to Plaintiffs from competitors accessing
 21 the information would be impossible to fully quantify or address. The proverbial genie could
 22 never be placed back in the bottle. The proposed order (¶ 13) and the applicable law address the
 23 Individual Defendants' stated concerns, by allowing parties to challenge AEO designations
 24 believed to be overly broad and unwarranted.

25 ¹ Since the filing of the opening brief and opposition, the parties' counsel have met-and-conferred to
 26 reconfirm their mutual desire to focus on the merits and avoid undue rhetoric. Accordingly, this reply
 addresses those issues central to the relief sought.

1 3. Balancing: The fundamental question Plaintiffs have asked since this issue first
2 arose is: Why must the Individual Defendants themselves have direct access to Plaintiffs' highly
3 sensitive competitive and private information? Defendants' opposition provides no answer other
4 than (1) a general need for Mr. Montgomery to defend the action, and (2) Mr. Montgomery's role
5 as "an investigative reporter." Neither of these points overrides Plaintiffs' reasons for seeking a
6 protective order with an AEO tier of protection. Mr. Montgomery's counsel will be able to
7 analyze all materials and provide a full and vigorous defense. Mr. Montgomery's claim to be an
8 investigative reporter and his previous Internet publications only reinforce Plaintiffs' good cause
9 for concern about improper disclosure. Moreover, the actual classes of highly sensitive
10 information that would be designated as AEO are narrow and specific, and they would not cover
11 the vast majority of information exchanged in discovery, to which Mr. Montgomery would have
12 full access. In such situations, the balancing of harm tips strongly in Plaintiffs' favor as held in
the *Cabell* and *Tully's* cases discussed below in Section 5.

13 4. Challenges to AEO Designations: The AEO protective order proposed by Plaintiffs
14 addresses Defendants' concerns about over-designation of information by providing a standard
15 mechanism for challenging and resolving designations "at any stage of these proceedings." See
16 Dkt # 53-1 ¶ 13. The parties would meet-and-confer and, if necessary, seek the Court's guidance.

17 5. Legal Authority: This action concerns Defendants' bad faith intent to profit in
18 violation of the federal Anti-Cybersquatting Protection Act (ACPA). In determining whether bad
19 faith exists, courts consider nine non-exclusive factors enumerated in the ACPA. 15 U.S.C. §
20 1125(d)(1)(B)(i)(I)-(IX). The statutory factors "are not exhaustive. Instead, 'the most important
21 grounds for finding bad faith are the unique circumstances of the case, which do not fit neatly into
22 the specific factors' that Congress enumerated." *Lahoti v. Vericheck, Inc.*, 2007 WL 2570247, at *
23 6 (W.D. Wash. Aug. 30, 2007), *aff'd*, 586 F.3d 1190 (9th Cir. 2009) (quoting *Interstellar Starship*
24 *Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 946-47 (9th Cir. 2002)).

25 Given the broad reach of websites, the harm these ACPA factors were designed to address
26 is greater (both quantitatively and qualitatively) than one-to-one competition. That concern is

1 compounded when the cybersquatting is part of an extortion scheme, complete with fictitious
2 *aliases*, as pleaded in the *Complaint* ¶¶ 31, 48-49, and 53 — additional elements of good cause
3 that none of the cases relied on by Defendants addresses.

4 The opposition acknowledges that AEO protective orders are common in trademark cases.
5 Dkt # 53, at 3:3 and 9:23. This is a trademark case, brought under the Lanham Act, 15 U.S.C. §
6 1125(d)(1)(A) (“A person shall be liable in a civil action by the owner of a mark, ... “). Further,
7 insofar as the opposition seeks to distinguish Plaintiffs’ legal authority on the grounds that many
8 of those case involved competitors, the purpose of the protective order is to prevent disclosure of
9 highly sensitive information to *all* unauthorized parties — whether current competitors, past
10 competitors (Mr. Montgomery), or potential future competitors (Mr. Montgomery).

11 If Mr. Montgomery (or anyone else) is granted access to Plaintiffs’ highly sensitive
12 competitive and business information, he will have a blueprint on how to compete against Atigeo,
13 as he did previously on behalf of Opspring/Blxware LLC. He will also be in a position to help
14 others compete against Atigeo. Thus, Plaintiffs are concerned not only about the access of current
15 competitors to this highly sensitive information, but also that highly sensitive information may be
16 published to everyone (competitors and non-competitors alike) for any purpose. That is the harm
17 Rule 26(c) AEO protective orders prevent.

18 The opposition attempts to distinguish the cases cited in the opening brief based on a narrow
19 competitor-to-competitor relationship. Those cases deal with the harm that would occur if highly
20 sensitive information got out to the *wrong parties*. As discussed above, Mr. Montgomery’s status as
21 a former and potential future competitor of Plaintiffs and status as a self-designated “investigative
22 reporter” creates good cause for concern about the handling of highly sensitive “AEO” information,
23 as defined by *Avocent v. Rose Electronics, Inc.*, 242 F.R.D. 574, 576 (W.D. Wash. 2007).

24 In another trademark case, *Cabell v. Zorro Prods., Inc.*, 294 F.R.D. 604, 607 (W.D. Wash.
25 2013), the party opposing an AEO tier of protection in a protective order (like Mr. Montgomery),
26 “allege[d] that he will suffer ‘extreme prejudice’ if he is unable to personally view the designated
material.” *Id.* at 610. The Court rejected the same type of conclusory statements as those asserted

1 by Mr. Montgomery and held that the concerned party's interests would be protected because his
 2 attorneys would have full access to the AEO information. *Id.* (entering two-tiered AEO/
 3 Confidential protective order).

4 Defendants rely on a breach of contract case, *UCC Ueshima Coffee Co. v. Tully's Coffee*
 5 *Corp.*, 2007 U.S. Dist. LEXIS 98157, at *2 (W.D. Wash. 2007), in which the defendant made the
 6 same argument as Mr. Montgomery regarding "extreme prejudice" if the defendant were not
 7 allowed access to an AEO customer list. The plaintiff, however, claimed that the customer list
 8 could serve as a "roadmap" about how to expand one's sales territories. *Id.* The Court held:

9 defendant contends it will suffer extreme prejudice if the list is not disclosed,
 10 because its attorneys are not experts in the foreign specialty coffee industry.
 11 Defendant believes that it will be denied the opportunity to prepare its defense if it
 12 is unable to discuss the contact list with its attorneys. The Court finds defendant
 13 has not established that restricting the list's disclosure to defendant's attorneys and
 14 experts will prejudice its case. Even if its lawyers are not experts in the foreign
 15 coffee industry, defendant may hire outside experts to analyze the information.
 16 For these reasons, the Court concludes that the risk of harm and prejudice to
 17 plaintiff outweighs defendant's need to use the information in preparing its case.

18 *Id.* at *5-6 (entering two-tiered AEO/Confidential protective order) (emphasis added); *Nutratech,*
 19 *Inc. v. Syntech Int'l Inc.*, 242 F.R.D. 552, 555-56 (C. D. Cal. 2007) (same). The same analysis
 20 applies with greater force here, where the discovery sought by Mr. Montgomery — and the risk of
 21 irreversible competitive harm to Plaintiffs — is substantially broader. This reasoning is consistent
 22 with the holdings of the cases² relied on in Defendants' opposition brief.

23 6. Inconsistent Denials of Involvement and Accountability. Each party's individual
 24 accountability (on both sides) is essential to the proper handling of documents containing highly
 25 sensitive information in compliance with a court's protective order, whether there is one tier or
 26 two tiers of protection. In this action, each Defendant has denied involvement and accountability
 as to the basic facts underlying the subject matter of this action, despite the compelling evidence
 from Defendants' own documents to the contrary. For example:

² The *Nixon, Kamp, Tully's, Nutratech, Avocent, DeFreitas, and DeFazio* cases all restricted disclosure of highly sensitive information to address the disclosing party's concerns about improper access. The *DeFazio v. Hollister*, 2007 WL 2580633, at *1 n.1 (E.D. Cal. 2007) case also rejected the same RPC 1.4 informed client argument Defendants make in the opposition brief (p. 10:12-23).

Defendant	Contention re Lack of Involvement and Accountability	Rebuttal Evidence
Dennis Montgomery	No knowledge of Offshore Ltd D	Network Solutions records listing Offshore Ltd D as the registrant of <atigeo.co> and providing, <i>inter alia</i> , Dennis Montgomery's name, User ID, and e-mail as contact information (Dkt # 56-2, at 8; 56-3 at 2-4); State Farm's defense coverage letter (Dkt # 47, at 40)
Istvan Burgyan	No involvement whatsoever	Pls.' <i>SJ Opp'n</i> (Dkt # 55, at 3-8)
Offshore Ltd D	Never existed	Notice of appearance (Dkt # 27), insurance claim (Dkt # 47, at 40), and Pls.' <i>SJ Opp'n</i> (Dkt # 55, at 3-8)
Demaratech	No involvement	Pls.' <i>SJ Opp'n</i> (Dkt # 55, at 3-8)

The contradiction between Defendants' representations and the facts established by the Network Solutions records regarding their account and other materials amplifies Plaintiffs' concerns about accountability. The need for accountability is heightened where access is granted to highly sensitive information pursuant to the terms of a protective order, when even inadvertent lapses can cause irreparable (and sometimes undiscovered) competitive harm. This highlights the balancing of harms discussed in the cases cited in Section 5 above and further supports good cause under Rule 26(c) for the two-tiered protective order plaintiffs propose.

7. Concerns Raised by Mr. Montgomery's Prior Litigation. Mr. Montgomery appears to have misinterpreted Plaintiffs' discussion of his prior litigation history as an attempted character assassination, which Plaintiffs regret. That was not Plaintiffs' purpose or intent. The issue is whether there is good cause for concern that Plaintiffs may be subjected to "annoyance, embarrassment, oppression, or undue burden or expense" in light of Mr. Montgomery's prior litigation history and the sensitive nature of the broad discovery sought by Defendants, such that the requested protective order should be entered under Rule 26(c).³

Mr. Montgomery's declaration (¶ 5) appears to confuse two different cases. Respectfully,

³ The opposition suggests that Plaintiffs' own prior litigation history against some of Mr. Montgomery's associates (including the former competitors of Atigeo known as Opspring LLC and Blxware LLC, for whom Mr. Montgomery worked) justifies denial of the motion for protective order. The allegations in the opposition and declaration are not sufficiently specific for Plaintiffs to respond. Plaintiffs will rely on the dockets from those actions and the Court rulings in Plaintiffs' favor to speak for themselves.

1 Plaintiffs submit that the Court dockets speak for themselves. See 3/16/2010 judgment in
2 *Montgomery v. eTrepid*, No. 3:06-cv-691 (D. Nev. 2006), at Dkt # 28 (“Decision by Court. This
3 action came to hearing before the Court. The issues have been heard and a decision has been
4 rendered. IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the
5 Defendants. This case is DISMISSED without prejudice.”) (original emphasis omitted). This case
6 and judgment are different than those referenced in the opposition.

7 On the issue of the judgments entered pursuant to confessions of judgment (as well as the
8 FBI search warrant), the point is not how the monetary judgments were entered (or how a warrant
9 was handled), but whether Plaintiffs in this case have good cause for a two-tiered protective order
10 in light of the specific concerns raised by that procedural history.⁴

11 8. Types of Proposed AEO Information. The opposition asserts that “[Plaintiffs] were
12 unable to explain exactly what confidential materials they were seeking to designate AEO.
13 Furthermore, [Defendants] suggested that a temporary injunction would obviate the need for AEO
14 designations in this matter.” *McGaughey Decl.* (Dkt # 59) ¶ 6:11-14. As detailed in Plaintiffs’
15 opening brief, declarations and exhibits, Plaintiffs articulated their concerns during the Rule 26(c)
16 conference about several specific categories of highly sensitive information called for by
17 Defendants’ broad discovery requests. Dkt # 50, at 5, Dkt # 51 ¶ 4, and Dkt # 52-10, Ex. 8 (p. 60
18 of 73), ¶¶ 2-3. While the Defendants’ admitted that certain such categories can be trade secrets
and appeared to be confidential, the parties were not able to agree on AEO protection. *Id.* (all).

19 As to the “temporary injunction” mentioned by Defendants, no such proposal has been
20 sent to Plaintiffs yet. Without seeing the proposal, Plaintiffs cannot evaluate how it might
21 alleviate Plaintiffs’ concerns regarding the improper disclosure of highly sensitive information or
22 obviate the need for a two-tiered protective order. Thus, the absence of the temporary injunction
23 alternative does not diminish the good cause or concern over the protective order issues.

24 _____
25 ⁴ Plaintiffs’ counsel in this case was not closely involved in the *eTrepid* litigation as they withdrew (No.
26 3:06-cv-00056, Dkt # 607) on May 15, 2008, shortly after appearing in the action. And, of course,
Plaintiffs and their counsel were not privy to the settlement discussions and agreement between Mr.
Montgomery and his former company.

1 DATED this 28th day of March, 2014.

2 Respectfully Submitted,

3 STOEL RIVES LLP

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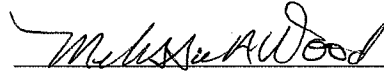
24 Counsel for Plaintiffs
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CERTIFICATE OF SERVICE

I hereby certify that on March 28 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record in the above case.

STOEL RIVES LLP



Melissa Wood, Practice Assistant
Dated at Seattle, WA on March 28, 2014