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6 TECHNOLOGIES LIMITED

7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 NOMADIX, INC.,

12 Plaintiff and Counter
13 Defendant,

14 v.

15 SOLUTIONINC TECHNOLOGIES
16 LIMITED,

17 Defendant and Counter
18 Claimant.
19

Case No. 2:10-cv-00381-DDP-VBK

**SOLUTIONINC TECHNOLOGIES
LIMITED'S OPPOSITION TO
NOMADIX'S *EX PARTE*
APPLICATION RE DISCLOSURE
OF CONFIDENTIAL MATERIAL**

**(DKT NUMBER 888 IN THE
CONSOLIDATED COMPANION
CASE NUMBER 2:09-CV-08441-
DDP-VBK)**

1 Defendant SolutionInc Technologies Limited (“SolutionInc”) hereby opposes
2 Nomadix Inc.’s *ex parte* Application re Trial Exhibit Exchange (“Nomadix’s
3 motion”), Dkt Number 888 in the consolidated companion case number 2:09-cv-
4 08441-DDP-VBK.

5 **I. INTRODUCTION**

6 Nomadix Inc.’s *ex parte* Application re Trial Exhibit Exchange (“Nomadix’s
7 motion”), Dkt Number 888 in the consolidated companion case number 2:09-cv-
8 08441-DDP-VBK, is procedurally improper and substantively unjustified.

9 Procedurally, Nomadix failed to show good cause justifying a request for *ex parte*
10 relief and, even if good cause had existed, Nomadix’s own blame for causing the
11 present situation bars it from receiving *ex parte* relief. Substantively, Nomadix
12 should not be permitted to disclose SolutionInc’s highly confidential documents
13 and information to counsel for their competitors, which would be in direct
14 contradiction to the protective orders negotiated by the parties and entered by the
15 Court. Accordingly, SolutionInc respectfully requests that Nomadix’s motion be
16 denied, or if the Court is inclined to consider it on the merits, that the Court set a
17 normal briefing schedule pursuant to this Court’s Local Rules.

18 Additionally, while our case, number 2:10-cv-00381-DDP-VBK, and case
19 number 2:09-cv-08441-DDP-VBK have been consolidated for pre-trial purposes,
20 Plaintiff’s *ex parte* application was only filed in the 2:09-cv-08441 case. Counsel
21 for SolutionInc does not receive ECF notifications for the 2:09-cv-08441 case for
22 some reason. As such, the *ex parte* application was never properly served on
23 Defendant SolutionInc.

24 **II. THIS COURT SHOULD DENY NOMADIX’S MOTION FOR
25 FAILING TO FOLLOW PROPER PROCEDURE**

26 Nomadix attempts to shortcut this Court’s standard briefing schedule to
27 compensate for its own delay. Instead of a regularly noticed motion, Nomadix
28 improperly categorized its motion as *ex parte*. Nomadix’s motion is deficient in

1 many ways. First, Nomadix should have filed two motions: an *ex parte* motion for
2 a shortened briefing schedule and a substantive motion addressing the disclosure of
3 documents to HP's counsel. See, e.g., *Mission Power Eng'g Co. v. Continental*
4 *Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995). The failure to separate the
5 motion into two parts prejudices SolutionInc. If Nomadix had followed the proper
6 procedure, this opposition (for which SolutionInc had merely 24 hours to prepare)
7 would have addressed solely the *ex parte* application. If the *ex parte* motion were
8 granted, then the Court would set the deadline for the opposition to the substantive
9 motion. By improperly combining the two motions into one, Nomadix has
10 prejudiced SolutionInc by forcing it to address the deficiencies of both motions, as
11 discussed below.

12 Second, Nomadix failed to provide an adequate showing of good cause or
13 irreparable injury, which is required for *ex parte* relief. *Id.*; *Fernandez v. City of*
14 *Los Angeles*, No. 08-05044, 2009 U.S. Dist. LEXIS 67996, at *3–4 (C.D. Cal. Jul.
15 16, 2009). The documents Nomadix seeks to disclose are, for the most part,
16 irrelevant to any claim against HP. Regarding irreparable injury, Nomadix has
17 failed to show how it could not postpone the exchange of trial exhibits or rework
18 Mr. Tregillis's deposition.

19 Third, Nomadix's own delay is the only real reason that Nomadix seeks *ex*
20 *parte* relief. This same delay bars Nomadix from the relief sought:

21 To show that the moving party is without fault, or guilty only of
22 excusable neglect, requires more than a showing that the other party is
23 the sole wrongdoer. It is the creation of the crisis—the necessity for
24 bypassing regular motion procedures—that requires explanation. . . .
25 The moving party must also show that it used the entire discovery
26 period efficiently and could not have, with due diligence, sought to
27 obtain the discovery earlier in the discovery period. As Judge Rymer
28 warned, “*Ex parte* applications are not intended to save the day for
parties who have failed to present requests when they should have . . .”

26 *Mission Power*, 883 F. Supp. at 493. As discussed below, Nomadix's failure to
27 move for a modification to the protective order before the close of fact discovery
28

1 has led to the present situation.¹

2 Because Nomadix's improper noticing of its motion prejudices SolutionInc,
3 this Court should deny Nomadix's motion for failing to comply with the standing
4 procedures for *ex parte* motions. At the very least, this Court should recategorize
5 Nomadix's motion as a regularly noticed motion, and set a regular briefing schedule
6 in accord with L.R. 7-9 and 7-10.

7 **A. Nomadix's Dalliance Does Not Constitute Good Cause and,**
8 **Instead, Bars Nomadix from *Ex parte* Relief**

9 Nomadix's procrastination in determining which fact documents its experts
10 will rely upon does not constitute good cause. Fact discovery closed on December
11 2, 2011. Amended Scheduling Order, Dkt. No. 470, case number 2:09-cv-08441-
12 DDP-VBK.

13 Nomadix claims that good cause exists because trial is looming. Nomadix,
14 Inc.'s *Ex Parte* Application re Trial Exhibit Exchange, Dkt. No. 888 at 14–16, case
15 number 2:09-cv-08441-DDP-VBK. Essentially, Nomadix claims that it should be
16 entitled to extraordinary relief because Nomadix waited so long. Nomadix put
17 itself in this situation. Nomadix could have followed the rules, as thousands of
18 parties do every year, and done the following:

- 19 • Move, during fact discovery, to modify the protective order for
20 permission to disclose the documents;
- 21 • If the protective order was modified, produce the documents during
22 regular fact discovery; and
- 23 • Serve unredacted expert reports.

24 Nothing prevented Nomadix from doing these things. Instead, Nomadix chose to
25 wait until after the close of fact discovery, after the service of expert reports, and

26 _____
27 ¹ While SolutionInc cannot know for certain, perhaps another reason Nomadix
28 chose to seek *ex parte* relief is to skirt this Court's meet and confer requirements.
A regularly noticed motion would require an in-person meet and confer with trial
counsel, while an *ex parte* request merely requires a telephonic conference. Meet &
Confer Order, Dkt. No. 745 at 2. Nomadix only conferred telephonically.

1 until pre-trial disclosures are almost due. Nomadix's dawdling does not constitute
2 good cause for the extraordinary relief of an *ex parte* motion. Instead, Nomadix's
3 blame in creating the present situation bars it from *ex parte* relief. *Mission Power*,
4 883 F.Supp. at 493.

5 **III. THE PROTECTIVE ORDER SPECIFICALLY PRECLUDES**
6 **NOMADIX FROM REVEALING SOLUTIONINC'S CONFIDENTIAL**
7 **INFORMATION**

8 Nomadix would violate the protective order were it to disclose SolutionInc's
9 confidential information to HP's counsel or any of the other Defendants' counsel.
10 Nomadix is seeking a modification to numerous protective orders through an
11 improper *ex parte* application. Protective orders are granted for good cause.
12 *Nutratch, Inc. v. Syntech (SSPF) Intern., Inc.*, 242 F.R.D. 552, 555 (C.D. Cal.
13 2007). Similarly, Nomadix bears the burden of showing good cause for their
14 modification. *Intel Corp. v. VIA Technologies, Inc.*, 198 F.R.D. 525, 528 (N.D.
15 Cal. 2000). Courts craft protective orders by carefully balancing the competing
16 interests of allowing a party to present its case against the harm of disclosure to the
17 producing party. *See, e.g., Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465,
18 1472 (9th Cir.1992) (holding that courts must balance the risk of inadvertent
19 disclosure of confidential information to competitors against the risk that the
20 protection of such information will impair prosecution of plaintiff's claims).

21 The protective order in place in this case specifically precludes Nomadix
22 from revealing SolutionInc's confidential information to anyone not authorized by
23 the protective order to see the confidential documents. The parties negotiated the
24 categories of individuals to whom produced confidential documents could be
25 disclosed. Counsel for other Defendants are not included in the list of authorized
26 individuals. Paragraph 17 of docket 205 (incorporated by reference in dockets 210
27 and 254) lays out these categories:

- 28 a) The receiving parties' "own 'Outside Counsel'";
b) The receiving parties' in-house counsel;

- 1 c) Experts;
- 2 d) Jury consultants;
- 3 e) Translators;
- 4 f) Interpreters and court reporters;
- 5 g) Authors and recipients of the documents;
- 6 h) Producing parties' experts and employees;
- 7 i) The Court;
- 8 j) Jurors; and
- 9 k) "[A]ny other person agreed to by the Producing Party in writing."

10 Protective Order, Dkt. No. 205 at 7–10, case number 2:09-cv-08441-DDP-VBK.

11 It is clear from the protective order itself, that Nomadix cannot reveal
12 SolutionInc's confidential information to HP's counsel or counsel for any of the
13 other Defendants without SolutionInc's written permission. SolutionInc has not
14 and will not grant that permission. The protective order specifically precludes
15 Defendants from seeing confidential information of other Defendants. *See, e.g., id.*
16 at ¶ 27 (when filing papers under seal that contain Protected Materials, "[t]he
17 Receiving Party shall not serve the other Parties with such non-redacted copies of
18 the papers"); and ¶ 48 (stating that "[n]othing in this Protective Order obligates a
19 defendant in this Action to produce its Protected Material to other defendants in this
20 Action").

21 Nomadix has provided no reason for the need to reveal SolutionInc's
22 confidential information. Nomadix claims that the documents they wish to reveal
23 have been known for months. In that case, Nomadix has had months to bring a
24 proper motion to this Court. Instead, Nomadix has chosen to sit by the wayside and
25 bring this *ex parte* motion at the last minute. Nomadix has not shown good cause
26 for the modification of the protective order. In fact, Nomadix has not provided any
27 information as to why SolutionInc's confidential information is relevant to the case
28 against HP or needs to be revealed to HP.

1 **IV. CONCLUSION**

2 Nomadix's *ex parte* application should be denied in its entirety. Nomadix
3 has failed to follow proper procedures and has not made a showing of good cause
4 necessitating a modification of the protective order. Nomadix is specifically
5 precluded from revealing SolutionInc's confidential information to HP's counsel or
6 counsel for any of the other Defendants. As such, Nomadix's improper *ex parte*
7 application should be denied. In the alternative SolutionInc requests leave to file an
8 opposition in accord with the schedule set forth in L.R. 7-9.

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Respectfully submitted,
JAFARI LAW GROUP, INC
By: /s/ David V. Jafari
David V. Jafari,
Attorney for Defendant
SOLUTIONINC TECHNOLOGIES LTD.