

January 27, 2022

Honorable Magistrate Judge Nathaniel M. Cousins  
United States District Court Northern District of California  
San Jose Courthouse, Courtroom 7, 4th Floor  
280 South 1st Street, San Jose, CA 95113

Re: *Applied Materials, Inc. v. Demaray LLC*, 20-cv-09341-EJD (N.D. Cal.)

Dear Judge Cousins,

Applied Materials, Inc. (“Applied”) and Demaray LLC (“Demaray”) submit this joint letter to resolve a disputed provision in the parties’ proposed protective order. Yesterday, the parties filed a joint motion for entry of the proposed protective order subject to Your Honor resolving one disputed provision. Dkt. No. 123. The parties met and conferred, were unable to resolve their dispute, and are available for a hearing on February 3 or at the Court’s earliest convenience

### **Applied’s Statement**

The parties dispute whether the categories of material a party may designate for heightened protections provided in the protective order should include design files (*e.g.*, files that show the design of Applied’s proprietary equipment for the manufacturing of semiconductor products), such as schematics. *See* Dkt. No. 123, Ex. A at ¶ 5. Those heightened protections include, for example, requiring review on a secure stand-alone or remote review computer and additional safeguards on number of produced copies and how they must be stored. For a semiconductor manufacturing equipment company like Applied, design files such as schematics are akin to a software company’s proprietary source code that requires heightened protections that are regularly permitted in protective orders in patent cases.

Indeed, the disputed language was already agreed to by Demaray in both of its lawsuits in the Western District of Texas against Applied’s customers, Intel and Samsung, (“WDTX PO”) over a year ago, and Demaray has not provided any reasonable justification why the same should not be adopted in this Court.

#### **A. Applied’s Proposed Language in ¶ 5 Should be Adopted**

Demaray *now* refuses heightened protections for: “design files (schematics, netlists, and layout files), or schematics (i.e., representations of any silicon mask or circuit design, diagram, or blueprint containing specific gate-level circuit design representations)”. *Id.* Applied requests the Court include this proposed language in ¶ 5 for the following reasons:

*First*, as indicated above, Demaray had previously agreed to the *exact* proposed language that it is now refusing to include here. The proposed protective order is nearly identical to the WDTX PO.<sup>1</sup>

*Second*, Applied, as a non-party to those customers suits, already produced hundreds of documents in response to multiple subpoenas from Demaray under the WDTX PO. Only a small number of those documents were produced under the heightened designation. Applied and Demaray further agreed that all of those documents could be cross-used in this case. In other words, the parties

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<sup>1</sup> The only substantive difference between the WDTX PO and what Applied proposes in this Court is the increase of the number of Litigation Managers a party may designate to see confidential information from one to two. Demaray agreed to this change.

have already agreed that the provisions in the WDTX PO govern the documents Applied has produced in this case.

*Third*, Demaray already sought to remove design files and schematics from the categories of material that may be designated with heightened protections in the customer suits, including with respect to non-party Applied's documents, and the WDTX Court DENIED Demaray's request. On June 21, 2021, a discovery dispute was submitted in the customer suits where Demaray argued:

[D]efendants/Applied are improperly designating general schematics as Source Code under the Protective Order. While the Protective Order agreed to by the parties allows good faith designation of certain design materials as "Source Code," the heightened designation is not a default and requires the need for heightened security (*e.g.*, a new semiconductor product that has not been announced publicly). Defendants'/Applied's use of the heightened designation as a default is overly burdensome and unnecessary.

The Texas Court heard argument on June 22, 2021 and on June 25, 2021 issued the following order by e-mail: "the Court denies plaintiff's request No. 2 in light of the relevant language in the parties' agreed protective order."

*Finally*, Demaray's arguments below about practicality for depositions and trial are unavailing. Demaray fails to identify any undue burden associated with treating Applied's design files and schematics under the same protections that a party would treat source code in a software case, or which Demaray has agreed to treat process recipe information in the customer suits and in this case. Dkt. No. 123, Ex. A at ¶¶ 6, 32-39 ("OUTSIDE COUNSEL EYES ONLY – PROCESS RECIPE" provisions). In the customer suits, Applied has produced both certain schematics and process recipe information with heightened protections and Demaray has not once raised these allegedly undue burdens with handling process recipe information—which have the same protections. Applied has also produced hundreds of other technical documents under the OUTSIDE COUNSEL EYES ONLY designation. Demaray's contention that Applied has abused the protective order designation is improper and not well-taken. Moreover, to the extent Demaray believes certain design files or schematics should be afforded a lower confidentiality designation, the Protective Order provides a process to address those disputes.

#### B. Demaray's Proposal Should Be Rejected

In an attempt to resolve this dispute without Court intervention, Demaray proposed yesterday maintaining the same language from the WDTX PO, but adding the following "for avoidance of doubt" language: "For the avoidance of doubt, design files and schematics will only be designated as subject to Source Code protections for materials that the Designating Party has a good faith and reasonable belief require the added protections. Less restrictive protections will be used for all other design files and schematics."

Demaray, however, provided no justification for singling out "design files or schematics" in a manner that presumes that these materials should not be afforded heightened protections if a designating party makes such designation. Demaray's proposal suggests some ulterior motive, including to create inconsistencies with the WDTX PO and undermine the designations made in those cases or the Texas Court's June 25, 2021 order denying the same relief requested here. Moreover, Demaray's proposal yesterday acknowledges that design files such as schematics may warrant heightened protections if a Designating Party has a good faith and reasonable belief that the added protections are appropriate.

Applied does not believe such “for avoidance of doubt” language is necessary because the Protective Order already requires that a designating party have a good faith and reasonable belief that protections (at whichever level under the Protective Order) are appropriate, and provides a process to challenge a designating party’s confidentiality designation if necessary.

### **Applied’s Proposal**

Consistent with the parties’ agreed-to protective order in the Texas customer cases, and for the reasons stated above, Applied respectfully requests that the Court include the following proposed language in ¶ 5: “design files (schematics, netlists, and layout files), or schematics (i.e., representations of any silicon mask or circuit design, diagram, or blueprint containing specific gate-level circuit design representations)”.

Applied does not believe Demaray’s proposed “for avoidance of doubt” language is necessary and contrary to the parties previous agreement in the Texas cases for the reasons stated above. However, if the Court believes such “avoidance of doubt” language is necessary, Applied proposes the Court adopt language that applies to *all designated material*, not just the specific types of material Demaray takes issue with, such as: “For the avoidance of doubt, Material will only be designated “OUTSIDE COUNSEL EYES ONLY – SOURCE CODE” if the Designating Party has a good faith and reasonable belief that the Material requires the added protections provided by said designation.” Applied offered this language in the parties’ final meet and confer, but Demaray did not agree, insisting on singling out design files and schematics.

### **Demaray’s Statement**

Applied’s attempt to classify its reactor “design files” and “schematics” as “Source Code” requiring review on stand-alone remote computers, among other limitations in the proposed Protective Order (Dkt. 123-01), is unnecessarily burdensome and should be rejected. The Demaray patents address particular configurations of reactors for PVD processes and have claim elements requiring, among other limitations, the use of “a narrow band-rejection filter,” for example, to protect the DC power source from damaging feedback from the RF bias. *See, e.g.*, ’276 Patent, claim 1. Determination of whether such filter details are present in Applied’s reactors requires access to circuit-level information in the reactors and such information is likely to be central to this case. The proposed Protective Order contains less burdensome designations (*e.g.*, “OUTSIDE COUNSEL EYES ONLY Material” (*id.*, ¶ 4)) that should provide sufficient safeguards for such design files and schematics while still allowing Demaray’s counsel reasonable access to and use of such information. If Applied desires to designate certain design files or schematics as particularly sensitive (*e.g.*, for unreleased products), it should meet and confer with Demaray and the parties can approach the Court, if necessary. But, the default should not be to require the burdensome restrictions associated with Source Code.

#### **A. Background**

In the proposed Protective Order, Applied seeks to define “Source Code” as including “design files (schematics, netlists, and layout files)” and “schematics (i.e., representations of any silicon mask or circuit design, diagram, or blueprint containing specific gate-level circuit design representations),” including “copies, summaries, and abstracts of the foregoing.” Proposed Protective Order, ¶ 5. There are various restrictions on the use of Source Code materials, including requiring stand-alone computers, monitoring review, prohibition of electronic copies, keeping hard copies under lock & key, and limited use at depositions and trial. *Id.*, ¶¶ 24-31.

Schematics are not source code in the normal sense, which Oxford defines as “a text listing of commands to be compiled or assembled into an executable computer program.”

It is undisputed that one of the issues likely to be central to this case is Applied’s inclusion and use of a narrow band-rejection filter in its reactors. Demaray will thus need reasonable access to and to reference circuit-level information in Applied’s reactors in discovery, including at depositions, expert reports, and at trial and the ability to discuss the details in such documents describing such filters freely among its outside counsel and experts. This includes both general design files and schematics of the type Applied shares with its customers as well as design files and schematics internal to Applied that Applied maintains in electronic form.

Applied’s proposed language is a vestige from the Protective Order adopted in the Texas cases. In those cases, at the defendants’ insistence, the parties agreed to use a lengthy, 47-page Protective Order that Intel had insisted on in other cases. Under the Texas Protective Orders, a party may designate “design files ... or schematics” as “Source Code” in certain circumstances. It was Demaray’s understanding that the parties contemplated that schematics for certain products (e.g., unreleased semiconductor products) may require such heightened protections. The Texas defendants and Applied on the other hand have taken the position that heightened source code protections are the default and can be applied to any schematics. The Texas defendants’/Applied’s over-use of heightened “Source Code” designations as a default has created significant obstacles for review and coordination among the Demaray team.

#### B. Argument

Applied has not shown that applying Source Code restrictions to schematics and design documents that are likely to be central to this case is necessary. Source code provisions in protective orders are often entered in this Court. *See, e.g., Novitaz, Inc. v. Shopkick, Inc.*, No. 14-cv-05077-WHO, 2015 U.S. Dist. LEXIS 189114, at \*5-6 (N.D. Cal. Mar. 18, 2015). When applying such restrictions to technical documents, such protections are typically balanced with the need for reasonable access. For example, the “Model Protective Order for Litigation Involving Patents, Highly Sensitive Confidential Information and/or Trade Secrets” limits such added to protections to “***extremely sensitive ‘Confidential Information or Items’*** representing computer code and associated comments and revision histories, formulas, engineering specifications, or schematics that define or otherwise describe in detail the algorithms or structure of software or hardware designs, ***disclosure of which to another Party or Non-Party would create a substantial risk of serious harm that could not be avoided by less restrictive means.***” Model Protective Order, Section 2.9. Rather than limiting designation of technical documents as Source Code, Applied’s proposed language suggests the default should be treating such documents as Source Code.

First, Applied has not explained why less restrictive designations like “OUTSIDE COUNSEL EYES ONLY Material” (proposed Protective Order), ¶ 4) are insufficient to protect documents containing schematics (e.g., manuals and schematic compendiums). This designation level applies to “information that constitutes ***proprietary ... technical ... sensitive competitive information*** that the Designating Party maintains as ***highly confidential in its business***” (*id.*) and provides significant restrictions on access and dissemination (*id.*, ¶ 17). For example, many Applied manuals provided to customers contain schematics potentially subject to Source Code designation under Applied’s proposed language. It is unclear why Source Code restrictions in the proposed Protective Order (e.g., no electronic copies, hard copies under lock and key, no creation or exchange of electronic “summaries” or “abstracts”) should apply to such documents when Applied

maintains, uses, and disseminates electronic versions of such schematics. As another example, Applied maintains certain electrical schematics for its reactors in digital form in a schematic compendium allegedly for use internally. It is unclear why such documents cannot be treated as “OUTSIDE COUNSEL EYES ONLY Material,” when Applied maintains and uses such documents in electronic form.

Second, limiting Demaray’s access and use of design documents and schematics in this case is unnecessarily burdensome. To address the issues raised in Applied’s DJ Complaint, Demaray will need reasonable access to and the ability to reference circuit-level information in Applied’s reactors in discovery, including at depositions, expert reports, and at trial. In preparing for trial, Demaray will also need to discuss the details in such documents (including summaries and abstracts thereof) among its outside counsel and experts. It is undisputed that the Demaray patents address particular configurations of reactors for PVD processes and have, among other limitations, “a narrow band-rejection filter.” *See, e.g.*, ’276 Patent, claim 1. It is also undisputed that one of the likely central issues in this case will be whether such filter details are present in Applied’s reactors. This requires circuit-level information on the filters—indeed, the parties have already raised issues before the Court regarding the need for circuit-level filter details. Dkt. 118 (Joint Letter re: Targeted Discovery). This is hardly an “ulterior motive” as Applied insinuates.

Applied points to the parties’ discussions during the meet and confer process. To try to resolve the dispute Demaray proposed language that made it clear that the default designation for schematics and design documents was not that they are “Source Code” subject to heightened restrictions. First, Applied rejected this proposal and it is improper for Applied to now rely on Demaray’s good faith attempt to resolve the issue without the need for judicial intervention. Applied’s approach would inhibit reasonable efforts to resolve disputes during the meet and confer process if those efforts are later going to be used to undermine a party’s position. Second, Applied’s rejection of such clarifying language confirms that their use of the “Source Code” designation for design documents and schematics is a real issue that needs to be resolved.

### C. Demaray’s Proposal

If Applied desires to designate certain design files or schematics as particularly sensitive (*e.g.*, for unreleased products) and subject to the Source Code provisions, it should meet and confer with Demaray when producing such materials and the parties can approach the Court, if necessary. But, the default should not be to require the burdensome restrictions associated with Source Code.

Respectfully submitted,

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