IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

AGIS SOFTWARE DEVELOPMENT LLC, *Plaintiff,* v. T-MOBILE USA, INC. and T-MOBILE US, INC., *Defendants.*	§ § § § § § § § § § §	Case No. 2:21-cv-00072-JRG-RSP LEAD CASE

PROTECTIVE ORDER

Before the Court is the Joint Motion For Entry of Partially Disputed Proposed Protective Order and Stipulated Federal Rules of Evidence 502(d) Order and Clawback Agreement filed by Plaintiff AGIS Software Development LLC ("AGIS") and Defendants T-Mobile USA, Inc., T-Mobile US, Inc., Lyft, Inc., Uber Technologies, Inc., d/b/a Uber, and WhatsApp, Inc. ("Defendants") (collectively, the "Parties"). **Dkt. No. 76**. The Parties' Motion seeks entry of a protective order upon resolution of two disputes and a stipulated Federal Rules of Evidence 502(d) Order and Clawback Agreement.

The Parties have disputes regarding (1) whether the Protective Order should include a so-called "acquisition bar" preventing individuals with access to designated discovery from subsequently engaging in activities related to the acquisition of patents related to the subject matter of that designated discovery, (2) whether the scope of an otherwise agreed upon "prosecution bar" should extend to designated discovery. Dkt. No. 76 at 2.

Regarding the acquisition bar, Defendants bear the burden to show the acquisition bar is appropriate because (1) the risk of inadvertent disclosure exists; and (2) the balance of interests

suggest a bar is appropriate. *In re Deutsche Bank Tr. Co. Ams.*, 605 F.3d 1373, 1378 (Fed. Cir. 2010).

Defendants argue the balance of interests suggest an acquisition bar is appropriate because "[s]uch a provision is necessary to protect against the inadvertent disclosure of Defendants' highly confidential information." Dkt. No. 76 at 4. To support this, Defendants state, "courts routinely impose acquisition bars on attorneys and experts" and cite to two cases where such acquisition bar has been imposed. *Id.* (citing *E-Contact Techs.*, 2012 WL 11924448; *Catch A Wave Techs., Inc. v. Sirius XM Radio, Inc.*, No. C 12-05791, 2013 WL 9868422, at *1 (N.D. Cal. Aug. 6, 2013)). Plaintiffs argue the balance of interests reject an acquisition bar because "imposing the bar will drastically harm both Plaintiff's counsel and other parties, including AGIS, who would be denied the counsel of their choice" and "the proposed acquisition bar is overbroad and unascertainable because the bar extends to Defendants' designated discovery, which can include documents and testimony concerning irrelevant matters." *Id.* at 3.

Balancing protection against inadvertent disclosure of Defendants' confidential information against choice of counsel, the Court finds the balance of interests disfavors an acquisition bar. Defendants have not established a need sufficient to justify the significant restriction of an acquisition bar.

Regarding the proposal that the prosecution bar extend to cover "the subject matter of any HIGHLY SENSITIVE MATERIAL disclosed in discovery," the Court agrees with Plaintiff that "[b]asing the prosecution bar on Defendants' designated documents and testimony renders the prosecution bar overbroad and unascertainable" as such scope "can include documents and testimony concerning irrelevant matters" and that "[t]he proposed breadth of the prosecution bar is harmful to Plaintiff's counsel and other parties and extends well beyond the scope of cases in

this District." *See Id.* at 14, 3. Accordingly, the Court denies Defendants' request to extend the scope of the prosecution bar to cover "the subject matter of any HIGHLY SENSITIVE MATERIAL disclosed in discovery."

After due consideration, the Court **GRANTS** the Parties' Motion, incorporating the rulings on the two disputes as described above. It is therefore **ORDERED** as follows:

1. Each Party may designate as confidential for protection under this Order, in whole or in part, any document, information or material that constitutes or includes, in whole or in part, confidential or proprietary information or trade secrets of the Party or a Third Party to whom the Party reasonably believes it owes an obligation of confidentiality with respect to such document, information or material ("Protected Material"). Protected Material shall be designated by the Party producing it by affixing a legend or stamp on such document, information or material as follows: "CONFIDENTIAL," "RESTRICTED – ATTORNEYS' EYES ONLY," or "RESTRICTED CONFIDENTIAL SOURCE CODE." The words "CONFIDENTIAL," "RESTRICTED – ATTORNEYS' EYES ONLY," or "RESTRICTED CONFIDENTIAL SOURCE CODE" shall be placed clearly on each page of the Protected Material (except deposition and hearing transcripts and natively produced documents) for which such protection is sought. For deposition and hearing transcripts, the word "CONFIDENTIAL" or other applicable designation shall be placed on the cover page of the transcript (if not already present on the cover page of the transcript when received from the court reporter) by each attorney receiving a copy of the transcript after that attorney receives notice of the designation of some or all of that transcript as Protected Material. For natively produced Protected Material, the word

"CONFIDENTIAL" or other applicable designation shall be placed in the filename of each such natively produced document. All Protected Material not reduced to documentary, tangible or physical form or which cannot be conveniently designated as set forth herein shall be designated by the producing Party by informing the receiving Party of the designation in writing. Any documents (including physical objects) made available for inspection by counsel for the receiving Party prior to producing copies of selected items shall be considered, as a whole, to constitute Protected Material (unless otherwise designated at the time of inspection) and shall be subject to this Order. Thereafter, the producing Party shall have reasonable time to review and designate the appropriate documents or things as "CONFIDENTIAL," "RESTRICTED – ATTORNEYS' EYES ONLY," or "RESTRICTED CONFIDENTIAL SOURCE CODE" prior to furnishing copies to the receiving Party.

2. Any document produced under Patent Rules 2-2, 3-2, and/or 3-4 before issuance of this Order with the designation "Confidential" or "Confidential - Outside Attorneys' Eyes Only" (or any such similar designation) shall receive the same treatment as if designated "RESTRICTED – ATTORNEYS' EYES ONLY" under this Order, unless and until such document is redesignated to have a different classification under this Order.

3. With respect to documents, information or material designated "CONFIDENTIAL, "RESTRICTED – ATTORNEYS' EYES ONLY," or "RESTRICTED

CONFIDENTIAL SOURCE CODE" ("DESIGNATED MATERIAL"),[1] subject to the provisions herein and unless otherwise stated, this Order governs, without limitation: (a) all documents, electronically stored information, and/or things as defined by the Federal Rules of Civil Procedure; (b) all pretrial, hearing or deposition testimony, or documents marked as exhibits or for identification in depositions and hearings; (c) pretrial pleadings, exhibits to pleadings and other court filings; (d) affidavits; and (e) stipulations. All copies, reproductions, extracts, digests and complete or partial summaries prepared from any DESIGNATED MATERIALS shall also be considered DESIGNATED MATERIAL and treated as such under this Order.

4. A designation of Protected Material (i.e., "CONFIDENTIAL," "RESTRICTED – ATTORNEYS' EYES ONLY," or "RESTRICTED CONFIDENTIAL SOURCE CODE") may be made at any time.[2] Inadvertent or unintentional production of documents, information or material that has not been designated as DESIGNATED MATERIAL shall not be deemed a waiver in whole or in part of a claim for confidential treatment. Any party that inadvertently or unintentionally produces Protected Material

[1] The term DESIGNATED MATERIAL is used throughout this Protective Order to refer to the class of materials designated as "CONFIDENTIAL," "RESTRICTED – ATTORNEYS' EYES ONLY," or "RESTRICTED CONFIDENTIAL SOURCE CODE," both individually and collectively.

[2] The following information is not Protected Material: (a) any information that is or, after its disclosure to a receiving Party, becomes part of the public domain as a result of publication not involving a violation of this Order or other obligation to maintain the confidentiality of such information; (b) any information that the receiving Party can show was already publicly known prior to the disclosure; and (c) any information that the receiving Party can show by written records was received by it from a source who obtained the information lawfully and under no obligation of confidentiality to the producing Party.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.