

1 VICTORIA K. HALL (SBN 240702)
LAW OFFICE OF VICTORIA K. HALL
2 3 Bethesda Metro Suite 700
Bethesda MD 20814
3 Victoria@vkhall-law.com
Telephone: 301-280-5925
4 Facsimile: 240-536-9142

5 Attorney for Plaintiff
ROBERT JACOBSEN
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10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 ROBERT JACOBSEN, an individual,) No. C06-1905-JSW
14)
Plaintiff,)
15 v.) **OPPOSITION TO DEFENDANTS’**
16) **ADMINISTRATIVE MOTION TO FILE**
MATTHEW KATZER, an individual, and) **PORTIONS OF DECLARATION OF**
17 KAMIND ASSOCIATES, INC., an Oregon) **MATTHEW KATZER IN OPPOSITION**
corporation dba KAM Industries,) **TO PLAINTIFF’S MOTION FOR**
18) **PRELIMINARY INJUNCTION UNDER**
Defendants.) **SEAL**
19) Courtroom: 2, 17th Floor
Judge: Hon. Jeffrey S. White
20)

21 Plaintiff Robert Jacobsen respectfully submits this Opposition to response to Defendants’
22 administrative motion to file Defendant Katzer’s declaration under seal.

23 **I. INTRODUCTION**

24 Defendants ask to be able to seal their filings, but they did not (1) identify the information
25 they intend to seal and explain specifically why making that information available to the public
26 would be harmful to Defendants, (2) serve Jacobsen’s counsel with the redacted and unredacted
27 filings, nor (3) lodge those filings with the court clerk. Because they did not meet fundamental
28

1 requirements for a sealing order to issue, this Court should deny their motion to seal.

2 **II. RELEVANT FACTS**

3 Defendants plan to file a declaration from Matthew Katzer in support of their opposition to
4 Jacobsen's motion for preliminary injunction. They now seek to seal a portion of that
5 declaration—not only from the public, but from the Plaintiff, Robert Jacobsen, as well, who will
6 respond to that declaration in his reply, due November 21, 2008.¹

7 Defendants filed an administrative motion and proposed order as required by Civil Local
8 Rule 79-5, but filed nothing else. They did not:

- 9 • provide a declaration from counsel certifying why the information needed to be sealed
- 10 • provide to Jacobsen's counsel a copy of the original and the redacted versions of the
11 declaration to be sealed.
- 12 • lodge the original and redacted versions with the court clerk.
- 13 • explain why the information is so sensitive that this Court should issue an order that would
14 interfere with communication between Jacobsen and his attorney.
- 15 • give any explanation that would allow this Court to make particularized findings of fact that
16 good cause exists to issue a sealing order.

17 Defendants instead stated:

- 18 1.) The proposed to-be-sealed portion of the declaration contains confidential
19 commercial information relating to Defendants' proprietary software development
20 activity and Defendants' confidential business partners;
- 21 2.) The disclosure of this information is necessary to demonstrate the harm that
22 entry of an injunction would cause Defendants;
- 23 3.) The disclosure of this information to Plaintiff and the public would be harmful to
24 Defendants' commercial interests.

25 Defs.' Admin. Mot. to File Portions of Decl. of Matthew Katzer in Opp'n to Pl.'s Mot. for a
26 Prelim. Inj. Under Seal [Docket # 247] [hereinafter Defs.' Admin. Mot. to Seal], at 2.

27 **III. ARGUMENT**

28 Defendants' motion to seal is deficient because it fails to specifically demonstrate how

¹ In 2½ years of litigation, Defendants have not sought a protective order under Federal Rules of Civil Procedure Rule 26(c), nor discussed such a protective order with Jacobsen.

1 public disclosure would harm Defendants, and because Defendants have failed to provide the
2 original and redacted declaration to this Court, and to Jacobsen and his counsel. Even if the Court
3 grants the motion, the Court should permit Jacobsen to review the unredacted filings so that he and
4 his counsel can discuss how to address the filings in their Reply, due November 21, 2008.

5 **A. Defendants Do Not Identify Any Relevant Information that Warrants**
6 **Protection Under Seal.**

7 In making vague and generalized assertions of confidentiality and harm, Defendants fail to
8 meet their burden of showing particularized harm that would result from public disclosure of
9 Katzer's declaration.

10 Where a business is the party seeking protection, it will have to show that disclosure
11 would cause significant harm to its competitive and financial position. That showing
12 requires specific demonstrations of fact, supported where possible by affidavits and
13 concrete examples, rather than broad, conclusory allegations of harm.

14 Contratto v. Ethicon, Inc., 227 F.R.D. 304, 307-08 (N.D. Cal. 2005). Here, Defendants state, "The
15 proposed to-be-sealed portion of the declaration contains confidential commercial information
16 relating to Defendants' proprietary software development activity and Defendants' confidential
17 business partners. [...] The disclosure of this information to Plaintiff and the public would be
18 harmful to Defendants' commercial interests." Defs.' Admin. Mot. to Seal, at 2. Defendants do
19 not provide any "specific demonstrations of fact". Instead, Defendants vaguely refer to
20 "confidential commercial information" and "confidential business partners". These "broad
21 allegations of harm [are] unsubstantiated by specific examples or articulated reasoning...."
22 Contratto, 227 F.R.D. at 308. Similar broad statements were insufficient to warrant an order to seal
23 in Contratto, where, unlike here, Defendant Ethicon had obtained a protective order. 227 F.R.D. at
24 310-312. See also SuccessFactors, Inc. v. Softscape, Inc., No. C08-1376 CW (BZ), 2008 WL
25 3876472 at *1-3 (denying motion to seal for failure to describe how public disclosure of purported
26 "confidential internal marketing information and competitive strategies" would harm defendants)
27 (N.D. Cal. Aug. 19, 2008); Phillips v. Netblue, Inc., No. C-05-4401 SC, 2007 WL 420214 at *1
28 (N.D. Cal. Feb. 5, 2007) (denying a motion to seal information relating to business affiliates after a
determination that this information did not warrant protection). Thus, Defendants' "broad,

1 conclusory allegations of harm” cannot support an order to seal portions of Katzer’s declaration.
2 Accordingly, the Court should deny Defendants’ motion to seal.

3 In addition, Katzer’s information relating to his software development is irrelevant.
4 Defendants state that “[t]he disclosure of this information is necessary to demonstrate the harm that
5 entry of an injunction would cause Defendants[.]” Defs.’ Admin. Mot. to Seal at 2. Katzer has
6 repeatedly stated that he no longer uses JMRI materials. If so, then he will make no changes once
7 the Court enters an injunction. If he does not have to change his activities, then he suffers no
8 hardship or harm. If, despite his previous assertions, Katzer is in fact using JMRI materials, then
9 he will have to change his ways. However, “[Defendants] cannot complain of the harm that will
10 befall [them] when properly forced to desist from [their] infringing activities.” Triad Sys. Corp. v.
11 Southeastern Express Co., 64 F.3d 1330, 1338 (9th Cir. 1995). This harm is not factored into the
12 irreparable harm analysis. See id. Thus, again, it would be irrelevant. For these reasons, the
13 information is not necessary for Defendants’ opposition. This forms another basis for this Court to
14 deny the motion to seal.

15 **B. Defendants Failed to Comply with Requirements for a Motion to Seal**

16 Defendants’ motion to seal should be denied because they did not comply with important
17 requirements for obtaining an order to seal.

18 Setting aside Defendants’ failure to include a declaration establishing that the information
19 was sealable, Civil Local Rule 79-5(c)(3) & (5) requires that Defendants serve the entire document
20 and the redacted version of the document on Jacobsen. They have not. Defendants have also not
21 lodged the documents with the court clerk.

22 This Court needs the documents to determine if Defendants have met their burden of
23 showing particularized harm that would result from public disclosure. Jacobsen and his counsel
24 must also have the documents. Without the documents, Jacobsen, his counsel, and the Court can
25 only guess as to the contents of the Katzer declaration and the information that Defendants seek to
26 redact. Even if the Court granted the motion to seal, Defendants have no reason for failing provide
27 at least the redacted version now, which Jacobsen and the public will eventually see anyway. For

