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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION
17

18 SARAH ANDERSEN, ET AL.,
19 Plaintiffs,
20 v.
21 STABILITY AI LTD., ET AL.,
22 Defendants.

Case No. 3:23-cv-00201-WHO

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR RELIEF
FROM NONDISPOSITIVE PRETRIAL
ORDER OF MAGISTRATE JUDGE
(ECF NO. 316) PURSUANT TO CIVIL
L.R. 72-2**

Judge: Hon. William H. Orrick

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I. INTRODUCTION

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2 Plaintiffs’ proposed expert, Dr. Ben Zhao, is the lead developer of “Nightshade” and other
3 software tools whose stated purpose is to “poison” and “disrupt” the very AI image models at the
4 heart of this litigation. This is not a theoretical or past endeavor, but an ongoing, escalating threat
5 against Defendants’ models. While this dispute has been pending, Dr. Zhao co-authored a new
6 paper on his latest data poisoning tool, “Hemlock,” and announced plans for its public release
7 “for potential use by visual artists.” Zhao et al., “On the Feasibility of Poisoning Text-to-Image
8 AI Models via Adversarial Mislabeling” at 12 (June 27, 2025), <https://arxiv.org/pdf/2506.21874>
9 (Gratz Decl. Ex. A). This newest project squarely implicates the very confidential information at
10 issue here: Dr. Zhao complains that “[w]e are unable to obtain any concrete information about
11 training data or source of image captions for” the SDXL model, one of the Stability AI models
12 whose training data Plaintiffs seek to allow Dr. Zhao to inspect. *Id.* at 3. Dr. Zhao says that his
13 results “suggest[] a cat-and-mouse game that is likely to reduce the quality of training data and
14 increase the cost of text-to-image model development.” *Id.* at 1. Dr. Zhao is the cat, Defendants
15 are the mice, and Plaintiffs’ proposal is that the cat gets to view the confidential information of
16 the mice while leading a project to build better mousetraps.

17 Magistrate Judge Cisneros correctly rejected this proposal, finding that giving Dr. Zhao
18 access to Defendants’ most sensitive trade secrets—their source code and training data—would
19 create an unacceptable risk of harm. The court’s order properly applied the law to the facts and
20 should be affirmed. Magistrate Judge Cisneros rightly focused on the substance of Dr. Zhao’s
21 adversarial work, not on formalistic labels, and found that his mission to sabotage Defendants’
22 technologies created a clear conflict. The court further found that Plaintiffs had failed to show
23 that Dr. Zhao was uniquely qualified, such that Plaintiffs’ choice of expert should override this
24 conflict. And the court appropriately tailored its ruling to that conflict, imposing no impediment
25 to Dr. Zhao serving as an expert for Plaintiffs so long as he is precluded from viewing
26 Defendants’ most sensitive information. Plaintiffs have failed to show that this balanced and
27 well-supported decision was clearly erroneous or contrary to law, and it should be affirmed.

II. LEGAL STANDARD

A magistrate judge’s nondispositive pretrial order must be affirmed unless it is “clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a). “The reviewing court may not simply substitute its judgment for that of the deciding court.” *Grimes v. City and Cnty. of S.F.*, 951 F.2d 236, 241 (9th Cir. 1991). A factual determination is clearly erroneous when the reviewing court is “left with the definite and firm conviction that a mistake has been committed.” *Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 622 (1993) (citation omitted). “A decision may be contrary to law if it fails to apply or misapplies relevant statutes, case law, or rules of procedure.” *Tremblay v. OpenAI, Inc.*, No. 23-CV-03223-AMO, 2025 WL 445793, at *1 (N.D. Cal. Feb. 10, 2025) (citation omitted).

III. THE COURT CORRECTLY FOUND THAT DR. ZHAO’S ADVERSARIAL WORK POSES AN UNACCEPTABLE RISK OF HARM.

A. The Court Applied the Proper Legal Standard by Focusing on the Substance of the Conflict.

There is “no bright-line rule for expert disqualification.” Order at 2 (quoting *Kane v. Chobani, Inc.*, No. 12-CV-02425, 2013 WL 3991107, at *5 (N.D. Cal. Aug. 2, 2013)). Instead, courts must weigh the “risk of competitive harm arising from disclosure . . . against the showing made as to the need for the particular expert or consultant to access the confidential information.” *Id.* The Parties expressly adopted this framework in the Protective Order. See ECF No. 276 ¶ 4. This is the precise analysis Magistrate Judge Cisneros performed.

Plaintiffs propose a rigid, bright-line rule that permits any expert to obtain a party’s highly confidential materials so long as they do not have a for-profit competitor relationship. First, no court has ever suggested that disqualification is limited to such narrow circumstances. Second, such a rule would undermine the very purpose of the standard, which is to protect against the risk of harmful use of sensitive information, regardless of an expert’s title or affiliation. The focus is on the nature of the harm, not how the expert describes the nature of their work. This flexibility is especially crucial in unprecedented situations like this, where an academic leads a project dedicated to creating “offensive tool[s]”—with millions of downloads—to sabotage Defendants’

1 core technologies. ECF No. 300 at 4. Plaintiffs’ rule elevates form over function.

2 Plaintiffs attempt to distinguish *Voice Domain Techs., LLC v. Apple, Inc.* by labeling the
3 parties there “corporate competitors.” No. 13-40138-TSH, 2014 WL 5106413, at *4 (D. Mass.
4 Oct. 8, 2014) (collecting cases). But the court ruled not based on the expert’s formal affiliation,
5 but whether the individual was “especially situated to take positions that are directly harmful and
6 antagonistic” to the other parties. Order at 3 (quoting *Voice Domain*, 2014 WL 5106413, at *4);
7 *see also, e.g., R.R. Donnelley & Sons Co. v. Quark, Inc.*, No. CIVA 06-032 JJF, 2007 WL 61885,
8 at *2 n.2 (D. Del. Jan. 4, 2007) (barring expert’s access to non-direct competitor’s “trade secrets
9 and other sensitive information” because they “could potentially be of value to Plaintiff”).
10 Plaintiffs essentially ask for an unsupported carve-out for academics from this analysis, no matter
11 the harm that may come from the disclosure. But the standard is concerned with the risk an
12 expert poses, not their profession. Dr. Zhao’s mission to sabotage Defendants’ technology places
13 him squarely within this principle, and Magistrate Judge Cisneros’s application of it was correct.

14 **B. The Finding of Potential Harm Is Clearly Supported by the Record.**

15 Magistrate Judge Cisneros’s factual finding that disclosing Defendants’ highly
16 confidential source code and training data information to Dr. Zhao poses a significant risk of
17 harm is amply supported by the record and is therefore not clearly erroneous. Dr. Zhao’s own
18 work is the most compelling evidence of this risk. He is the public face and lead developer of
19 Nightshade, which he and his team market as an “offensive tool” designed to “disrupt models” by
20 “poisoning” data that can be used to train Defendants’ technologies. ECF No. 300 at 4. The
21 court rightly found, crediting Dr. Zhao’s own declaration, that his work aims to make Defendants’
22 models “less reliable.” Order at 3. His tools are at “cross-purposes with Defendants’ models,”
23 which “puts him in an ‘adversarial posture’ vis-à-vis Defendants.” *Id.* at 4.

24 Given this context, Dr. Zhao’s attestation that access to Defendants’ closely guarded
25 training data and proprietary code would provide no benefit to his research strains credulity. ECF
26 No. 300-1 ¶ 12. Magistrate Judge Cisneros correctly recognized the inherent and unavoidable
27 conflict, finding that, even with the best intentions, the risk of inadvertent disclosure was too
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1 high, as the information could “‘become intertwined with his other knowledge such that’ it may
2 be disclosed ‘in the course of his future work.’” Order at 4 (quoting *GPNE Corp. v. Apple Inc.*,
3 No. 5:12-cv-2885-LHK (PSG), 2014 WL 1027948, at *2 (N.D. Cal. Mar. 13, 2014); *Symantec*
4 *Corp. v. Acronis Corp.*, No. 11-5310, 2012 WL 3582974, at *2 (N.D. Cal. Aug. 20, 2012)).

5 The court’s conclusion was further supported by the fact that Dr. Zhao “has not agreed to
6 cease developing other so-called ‘data-poisoning tools’ during the course of this litigation”—
7 indeed, his most recent Hemlock project only confirms this point and the ongoing risk he poses.
8 Order at 4. In response, Plaintiffs complain that any voluntary, temporary research restrictions
9 would violate Dr. Zhao’s First Amendment rights. ECF No. 325 at 4 n.2. Under Plaintiffs’ logic,
10 the Protective Order *that Plaintiffs agreed to*, which requires individuals receiving highly
11 confidential information to accept a similar limitation on their First Amendment right to petition
12 the government by agreeing to a two-year patent prosecution bar, would be unconstitutional.

13 **IV. THE COURT CORRECTLY FOUND THAT PLAINTIFFS FAILED TO**
14 **JUSTIFY THEIR NEED FOR A CONFLICTED EXPERT.**

15 Given the court’s finding that Defendants had demonstrated that disclosure to Dr. Zhao
16 “poses a risk of harm,” it was proper to shift the burden to Plaintiffs to justify their insistence on
17 using him by showing he possesses “‘unique knowledge within’ the field of AI image
18 generation.” Order at 4 (quoting *Symantec*, 2012 WL 3582974, at *2); *accord GPNE*, 2014 WL
19 1027948, at *1–2. Plaintiffs’ attempt to narrowly cabin this legal principle to the specific facts of
20 *Symantec* is unavailing. In *Symantec*, the court barred an expert who merely *worked with* a
21 competitor. 2012 WL 3582974, at *2–3. Here, Dr. Zhao *himself* is engaged in activity designed
22 to harm Defendants. The risk he poses is far more direct. The principle from *Symantec* is not so
23 rigid: it applies to situations like this one where the expert’s work creates a significant and
24 ongoing risk of misuse of an opposing party’s secrets.

25 Magistrate Judge Cisneros’s factual findings that Plaintiffs failed to meet their burden are
26 not clearly erroneous and should be affirmed. *First*, the conclusion that Dr. Zhao is not uniquely
27 qualified was based on specific, undisputed evidence that, while AI image generation is a
28 specialized field, it is not so niche that there is only one qualified expert. Order at 5. The court

1 correctly pointed to three key pieces of evidence: the “numerous academic papers addressing
2 text-to-image generation” written by “hundreds of authors” (Order at 5 (citing ECF No. 303 at
3 2)); that Plaintiffs’ counsel already retained another expert in a parallel case (*id.*); and Plaintiffs’
4 concession that Dr. Zhao is merely “*one of*” the preeminent researchers in the field (*id.* n.4 (citing
5 ECF No. 302 at 2, 3 (emphasis in order))). These findings are well supported and do not evoke
6 the “definite and firm conviction that a mistake has been committed” required to overturn them.

7 **Second**, Magistrate Judge Cisneros correctly found Plaintiffs failed to make a
8 particularized showing that “other experts could not provide” Dr. Zhao’s expertise. Order at 5
9 (quoting and citing ECF No. 303 at 1; *GPNE*, 2014 WL 1027948, at *1). As Defendants pointed
10 out, Plaintiffs provided no account of any diligence they conducted—no literature review, no
11 search of faculty at computer science departments, no outreach to professional organizations—
12 before concluding that Dr. Zhao was “virtually irreplaceable.” ECF No. 303 at 1–2. Bizarrely,
13 Plaintiffs try again now to flip this burden, arguing that **Defendants** have failed to identify a
14 suitable alternative expert for them. This is improper. It falls to Plaintiffs, if they choose to
15 present expert testimony in support of their claims, to identify and retain a qualified, non-
16 conflicted expert to support their case. Plaintiffs’ failure to meet their burden, combined with
17 their attempt to shift it, confirms that Magistrate Judge Cisneros’s finding was correct.

18 V. CONCLUSION

19 Magistrate Judge Cisneros’s order was a careful and correct application of law to fact.
20 The care the court took is evidenced by the fact that it requested multiple supplemental filings on
21 the issue and heard oral argument before ruling. ECF Nos. 300, 301, 302, 303, 305, 308, 309.
22 The court correctly focused on the substance of the conflict—that Dr. Zhao’s work is dedicated to
23 sabotaging the very technology at issue in this case—and properly found an unacceptable risk of
24 harm. The court also correctly found that Plaintiffs failed to show a compelling need for this
25 conflicted expert, especially given their own concessions that other qualified experts exist.

26 Because Plaintiffs have not shown the order was contrary to law or clearly erroneous,
27 Defendants respectfully request this Court affirm the order and deny Plaintiffs’ motion.

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