

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

AUTODESK, INC.,

Plaintiff,

v.

ZWCAD SOFTWARE CO. LTD., ZWCAD
DESIGN CO., LTD., HK ZWCAD SOFTWARE
LTD. and GLOBAL FORCE DIRECT, LLC.
d/b/a ZWCADUSA,

Defendants.

Case No. 5:14-cv-01409-EJD

**ORDER DENYING MOTION TO
ADOPT THE HAGUE CONVENTION
OR IN THE ALTERNATIVE TO
MODIFY THE PROTECTIVE ORDER**

(Re: Docket No. 52)

Not happy with what it says is the wholesale theft of its proprietary source code, Plaintiff Autodesk, Inc. brought this suit against Defendants ZWCAD Software Co., Ltd. and ZWCAD Design Co., Ltd.¹ for copyright infringement and misappropriation of trade secrets.² That much is not all that unusual; this district is no stranger to such claims. What is a bit unusual is that much of the evidence relevant to the plaintiff's claims is located in the People's Republic of China. To mitigate the risk that discovery of its data and documents outside of China may subject it to liability under Chinese state secret and privacy laws, ZWSoft moves for a protective order directing that discovery be conducted under the Hague Convention on Taking Evidence Abroad in

¹ The court will refer to these defendants collectively as ZWSoft.

² See Docket No. 62 at ¶¶ 2-3, 24, 33.

1 Civil or Commercial Matters.³ ZWSoft alternatively seeks an order that ZWSoft's source code
 2 already deposited in Beijing be made available for inspection only in China and the parties adopt
 3 ZWSoft's amended protective order.⁴

4 Because the court agrees with Autodesk that ZWSoft has not shown that a genuine risk of
 5 liability under Chinese law or other factors justify the additional protective measures it seeks,
 6 ZWSoft's motion is DENIED.

7 **I.**

8 Fed. R. Civ. P. 26(c)(1) provides that "[a] party or any person from whom discovery is
 9 sought may move for a protective order in the court where the action is pending." "The court may,
 10 for good cause," issue an order "requiring that a trade secret or other confidential research,
 11 development, or commercial information not be revealed or be revealed only in a specified way."⁵

12 The Supreme Court has "long recognized the demands of comity in suits involving foreign
 13 states, either as parties or as sovereigns with a coordinate interest in the litigation."⁶ American
 14 courts considering whether to order discovery from a foreign litigant should therefore "take care to
 15 demonstrate due respect for any special problem confronted by the foreign litigant on account of its
 16 nationality or the location of its operations, and for any sovereign interest expressed by a foreign
 17 state."⁷

18 When a conflict exists between the discovery authorized under the Federal Rules of Civil
 19 Procedure and sovereign interests implicated by such discovery, a court may direct parties to

21 ³ See Docket No. 52 at 1-2; see also Hague Convention on the Taking of Evidence Abroad in Civil
 22 or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

23 ⁴ See Docket No. 52 at 1.

24 ⁵ Fed. R. Civ. P. 26(c)(1)(G).

25 ⁶ See *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct. for the S. Dist. of Iowa*,
 26 482 U.S. 522, 546 (1987) (citing *Hilton v. Guyot*, 159 U.S. 113 (1895)).

27 ⁷ See *id.*

1 conduct discovery under the Hague Convention on Taking of Evidence Abroad in Civil and
 2 Commercial Matters.⁸ However, the Hague Convention does not deprive the court of its ordinary
 3 powers to compel a foreign litigant to produce evidence⁹ or require “the use of its procedures to the
 4 exclusion of the Federal Rules procedures whenever evidence located abroad is sought for use in
 5 an American court.”¹⁰

6 Rather, a party seeking to apply the Hague Convention procedures has the burden to
 7 “demonstrate appropriate reasons for employing Convention procedures.”¹¹ Although the Supreme
 8 Court has not “articulate[d] specific rules to guide” whether adoption of the Hague Convention
 9 procedures is proper, a court may consider “the particular facts, sovereign interests and likelihood
 10 that resort to [Hague Convention] procedures will prove effective.”¹²

11 Autodesk provides computer-aided design software which “create[s] digital models and
 12 workflows that allow visualization, simulation and analysis of designs before implementation.”¹³
 13 AutoCAD is Autodesk’s “flagship product” and largest revenue-generating product.¹⁴ Autodesk
 14

15 ⁸ See, e.g., *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 356 (D. Conn. 1991) (ordering
 16 “plaintiffs to employ the procedures set forth in the Hague Evidence Convention in pursuing any
 17 discovery from [the defendant], or of materials or information otherwise located in France”); *Husa*
 18 *v. Laboratoires Servier SA*, 740 A.2d 1092, 1096-97 (N.J. 1999) (requiring use of Hague
 Convention procedures in part because a French “blocking statute” is a “cogent expression” of
 French interests which “should be accommodated, when possible”).

19 ⁹ See *Aérospatiale*, 482 U.S. at 539-40 (holding that “the Hague Convention did not deprive the
 20 District Court of the jurisdiction it would otherwise possess to order a foreign national party before
 it to produce evidence physically located within a signatory nation”).

21 ¹⁰ See *In re Perrier*, 138 F.R.D. at 353 (citing *Aérospatiale*, 482 U.S. at 533).

22 ¹¹ See *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 305 (3d Cir. 2004) (citing
 23 *Aérospatiale*, 482 U.S. at 547).

24 ¹² See *Aérospatiale*, 482 U.S. at 544-46; see also *Valois of Am., Inc. v. Risdon Corp.*, 183 F.R.D.
 25 344, 346 (D. Conn. 1997).

26 ¹³ See Docket No. 62 at ¶ 1.

27 ¹⁴ See *id.* at ¶¶ 12, 15.

1 alleges that ZWSOft engaged in wholesale copying of “large portions of Autodesk source code” in
2 order to create its software program ZWCAD+. ¹⁵

3 In 2014, Autodesk filed suit against ZWSOft and its United States-based distributor Global
4 Force Direct, LLC in the Northern District of California, San Francisco Division for copyright
5 infringement and trade secret misappropriation. ¹⁶ Autodesk later amended its complaint to add
6 Hong Kong-based corporation HK ZWCAD Software Ltd. as a defendant. ¹⁷

7 Autodesk also initiated summary proceedings against ZWSOft before the Hague District
8 Court in the Netherlands. ¹⁸ ZWSOft opposed discovery of its source code outside of China, and the
9 parties ultimately agreed that ZWSOft could produce its source code in China for the purposes of
10 the Dutch action. ¹⁹ The Dutch court then ordered ZWSOft to produce its source code to a custodian
11 in China. ²⁰

12 Meanwhile, in the Northern District of California, GFD answered the complaint, and the
13 parties entered into a stipulated protective order. ²¹ After ZWSOft appeared in the case, ²² the case
14 was reassigned to the San Jose division for all further proceedings. ²³ ZWSOft then moved to

15 ¹⁵ See *id.* at ¶¶ 21-24.

16 ¹⁶ See Docket No. 1 at ¶¶ 4, 32-48.

17 ¹⁷ See Docket No. 62 at ¶ 4.

18 ¹⁸ See Docket No. 68-3 at ¶ 9.

19 ¹⁹ See *id.* at ¶ 10.

20 ²⁰ See Docket No. 68-7 at §§ 4.15, 4.16; Docket No. 68-8 at §§ 3.2, 3.3.

21 ²¹ See Docket Nos. 22, 34.

22 ²² Autodesk contends that ZWSOft refused to accept service in China in order to delay the process
23 of the case. See Docket No. 68 at 3-4. ZWSOft, in turn, claims that its refusal of service was
24 unintentional and is not an indication that it is unwilling to proceed with the case. See Docket No.
25 71 at 7. The court does not address this dispute because ZWSOft has not established that it is
26 entitled to the requested protective measures regardless of whether denial of service was
27 intentional.

28 ²³ See Docket Nos. 40, 44.

1 dismiss the case²⁴ and also asked Autodesk to stipulate to follow Hague Convention procedures
 2 with regard to the data being sought from China or to amend the protective order to allow for
 3 examination of ZWSOFT's data in China.²⁵ Autodesk declined to consent to adoption of Hague
 4 Convention procedures and the parties could not reach a compromise on how to amend the
 5 protective order.²⁶

6 ZWSOFT then filed this motion, seeking that the court order the parties to conduct discovery
 7 under the Hague Convention, or in the alternative, that the court order ZWSOFT's source code to be
 8 made available for inspection in China and order adoption of ZWSOFT's amended protective
 9 order.²⁷

10 II.

11 This court has jurisdiction under 28 U.S.C. § 1332. This motion was referred to the
 12 undersigned pursuant to Civ. L. R. 72-1.²⁸

13 III.

14 At issue is whether the court should order the adoption of the Hague Convention procedures
 15 or in the alternative order adoption of ZWSOFT's amended protective order. Because ZWSOFT has
 16 not shown that application of the Hague Convention procedures here is justified under
 17 *Aérospatiale*, the court denies ZWSOFT's request to order its adoption.²⁹ Because ZWSOFT has not

18 ²⁴ See Docket No. 48. This motion is noticed for hearing before the court on April 30, 2015. See
 19 *id.* at 1.

20 ²⁵ See Docket No. 52-1 at ¶¶ 6-9.

21 ²⁶ See *id.* at ¶¶ 10-16.

22 ²⁷ See Docket No. 52 at 1.

23 ²⁸ See Docket No. 53.

24 ²⁹ ZWSOFT claims that the court should use a five-factor comity analysis that New York district
 25 courts have employed in "cases involving whether or not to abide by the Hague Convention" to
 26 determine whether application of the Hague Convention is proper here. See Docket No. 52 at 13.
 27 Autodesk, in turn, contends that the court should consider the factors set forth in *Aérospatiale*. See
 28 Docket No. 52 at 13; see also *Aérospatiale*, 482 U.S. at 544 (noting that courts may consider "the
 particular facts, sovereign interests and likelihood that resort to [Hague Convention] procedures

1 shown that good cause exists for the additional procedures outlined in its amended protective order,
 2 the court also denies ZWSOft's request that the court amend the protective order and require
 3 examination of its source code and related documents in China.

4 *First*, ZWSOft has not established that genuine sovereign interests pertain to production of
 5 the source code and related documents at issue here. As both parties acknowledge, Chinese law
 6 prohibits exporting state secrets from China without the government's permission.³⁰ However,
 7 ZWSOft has not shown that production of its source code and related documents necessarily
 8 implicates this prohibition. In particular, ZWSOft does not adequately support its contention that
 9 China "may" consider its source code to be or contain state secret information.³¹ While ZWSOft

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 11 will prove effective"). The comity analysis requires courts to consider "(1) the importance of the
 12 documents or information requested to the litigation; (2) the degree of specificity of the request; (3)
 13 whether the information originated in the United States; (4) the availability of alternative means of
 14 retrieving the information; and (5) the extent to which noncompliance with the request would
 15 undermine important interests of the United States or compliance with the request would
 16 undermine the important interests of the state where the information is located." *See Tiffany (NJ)*
LLC v. Qi Andrew, 276 F.R.D. 143, 151 (S.D.N.Y. 2011) (internal citations omitted). As stated
 17 above, because ZWSOft does not show that production of its source code pertains to a sovereign
 18 interest, ZWSOft has not established that adoption of the Hague Convention procedures is
 19 warranted under either analysis.

20 However, as Autodesk notes, whereas this motion does not address a particular request for ZWSOft
 21 to produce documents, in the cases to which ZWSOft cites, the foreign litigants seeking application
 22 of Hague Convention procedures had already been requested to produce certain categories of
 23 documents or other items. *See* Docket No. 52 at 13; Docket No. 68 at 5-6; *see also Tiffany*, 276
 24 F.R.D. at 146 (noting objection to plaintiff's motion to compel production of "all documents called
 25 for by the subpoenas"); *Strauss v. Credit Lyonnais*, 249 F.R.D. 429, 435 (E.D.N.Y. 2008) (noting
 26 defendant's objection to plaintiff's discovery requests); *Gucci America, Inc. v. Weixing Li*, 768
 27 F.3d 122, 125 (2d Cir. 2014) (noting appeal from district court's order granting plaintiff's motion
 28 to compel compliance with a subpoena and an asset freeze injunction). Since the several factors of
 the five-factor analysis such as the "degree of specificity of the request" cannot be readily analyzed
 in the absence of a specific request for ZWSOft to produce documents, the court analyzes whether
 adoption of the Hague Convention is proper under the three factors set forth in *Aérospatiale* rather
 than the five-factor comity analysis used by the New York district courts.

³⁰ *See* Docket No. 52 at 7; Docket No. 68 at 7.

³¹ *See* Docket No. 52 at 9.

1 may be right that information that could be considered “ordinary business information in the
2 United States” may constitute a state secret under Chinese law, ZWSOFT offers nothing specific to
3 the materials at issue here.³²

4 ZWSOFT also do not adequately support its claim that it is “reasonable” to believe that the
5 Chinese government could consider its source code to contain state secrets.³³ Article 2 of China’s
6 State Secrets Law defines state secrets as “matters that have a vital bearing on state security and
7 national interests and, as specified by legal procedure, are entrusted to a limited number of people
8 for a given period of time.”³⁴ Article 8 expands this definition to include, among other materials,
9 matters that involve “national economic and social development” and “science and technology.”³⁵
10 ZWSOFT claims that because government interpretation of these “broad” categories is “lacking,” it
11 is “reasonable” to believe that China could find that ZWSOFT’s source code is a secret state because
12 it constitutes “technology” the exportation of which from a “successful and growing PRC
13 corporation” would impact China’s “national and economic development.”³⁶

14 However, ZWSOFT not only does not cite to authority or expert declarations that support this
15 belief, but also fails to respond to testimony from Autodesk’s expert Hui Zhang, a former
16 intellectual property judge on the Supreme People’s Court of the People’s Republic of China and
17 an intellectual property attorney, who challenges ZWSOFT’s assertions about Chinese secrecy law.³⁷
18 In particular, Zhang contends that contrary to ZWSOFT’s claims, “Chinese law does not prohibit the
19 disclosure of source code developed by Chinese companies outside of China” and that “there is no
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21 ³² *See id.* at 7-8.

22 ³³ *See* Docket No. 52 at 9.

23 ³⁴ *See id.* at 8.

24 ³⁵ *See id.* at 8-9.

25 ³⁶ *See id.* at 9.

26 ³⁷ *See* Docket No. 68 at 7-8; Docket No. 68-1 at ¶¶ 1-2; Docket No. 68-2.
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1 broad prohibition against exporting documents relating to ‘science and technology.’”³⁸ Rather, the
 2 Chinese government “[n]ormally” considers documents to contain state secrets only if they are
 3 “prepared by government agencies or are related to a government-funded project.”³⁹ Further,
 4 Zhang contends that in order to be a state secret, ZWSoft’s source code must be designated as such
 5 by the Chinese government.⁴⁰ Because ZWSoft’s source code was developed by “a private
 6 company, for private business purposes,” Zhang opines that “it is highly unlikely that the source
 7 code contains state secrets.”⁴¹

8 Rather than presenting expert testimony or other authority that contradicts Zhang’s
 9 assertions about Chinese law, ZWSoft claims that Autodesk disregards the “very real and
 10 potentially [severe] consequences” ZWSoft could face under Chinese law.⁴² In particular, ZWSoft
 11 contends that the court must “gloss” over Zhang’s qualification that the Chinese government
 12 “[n]ormally” considers only documents prepared by government agencies or in relation to a
 13 government-fund project to be state secrets and Zhang’s acknowledgment that she is not “aware”
 14 of any cases in which the CAD software or documents relating to CAD software were found to
 15 contain state secrets in order to conclude that there is no real risk of liability here.⁴³ ZWSoft is
 16 correct that Zhang’s declaration is not equivalent to a “guarantee” that ZWSoft will not “face stiff
 17 and severe government penalties for cross-border production.”⁴⁴ However, in light of ZWSoft’s
 18 failure to respond with expert testimony or other authority that contradicts Zhang’s assertions, the
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20 ³⁸ See Docket No. 68-1 at ¶¶ 10-11.

21 ³⁹ See *id.* at ¶ 14.

22 ⁴⁰ See *id.* at ¶ 13.

23 ⁴¹ See *id.* at ¶ 15.

24 ⁴² See Docket No. 71 at 8.

25 ⁴³ See *id.*; see also Docket No. 68-1 at ¶¶ 14-15.

26 ⁴⁴ See Docket No. 71 at 5.

1 court cannot credit ZWSoft's unsubstantiated claims that production of its source code and related
2 document would subject it to genuine risk of violating Chinese state secrecy laws.

3 Further, ZWSoft's reliance on the *Xue Feng* case for the proposition that China's
4 willingness to designate information as a state secret years after it is removed from China presents
5 a risk of liability here is misplaced.⁴⁵ A Beijing court sentenced American geologist Xue Feng to
6 eight years in prison after he was found guilty of "spying and collecting state secrets."⁴⁶ The
7 Beijing court found that he had sold documents "on geological conditions of onshore oil wells and
8 a database that gave the coordinates of more than 30,000 oil and gas wells" that belonged to a
9 government-owned company and its subsidiary to a United States energy company.⁴⁷ In contrast,
10 as Autodesk notes, here there is no indication that ZWSoft's source code and related documents
11 contain information about government-owned companies or that ZWSoft would be required to
12 produce its source code for any other purpose than in connection with this litigation under a
13 protective order.⁴⁸

14 ZWSoft also does not adequately support its claim that exporting its source code and related
15 documents outside of China presents a legitimate risk of violating China's "amorphous" privacy
16 laws.⁴⁹ ZWSoft claims that China's Ministry of Industry and Information Technology issued non-
17 binding data privacy guidelines that do not clearly define "sensitive data" and "suggest" that the
18 Chinese government must consent to transfers of information outside of China's borders.⁵⁰

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20 ⁴⁵ See Docket No. 52 at 8.

21 ⁴⁶ See *id.* at 8 (citing Charles Hutzler, "Xue Feng, U.S. Geologist, Gets 8-Year Sentence, Was
22 Tortured in China," The Huffington Post, May 25, 2011,
http://www.huffingtonpost.com/2010/07/05/xue-feng-us-geologist-get_n_635534.html).

23 ⁴⁷ See *id.*; see also Docket No. 68-1 at ¶¶ 17-18.

24 ⁴⁸ See Docket No. 68 at 8.

25 ⁴⁹ See Docket No. 52 at 9.

26 ⁵⁰ See *id.*

1 However, even if ZWSOFT is correct that Chinese privacy laws are not clear, a generalized assertion
 2 that production of ZWSOFT's source code *may* violate Chinese privacy laws is not sufficient to
 3 establish that a genuine sovereign interest is at issue.

4 ZWSOFT's reliance on the *Peter Humphrey* case is similarly insufficient to show that
 5 production of ZWSOFT's source code presents a genuine risk of violating Chinese privacy laws.⁵¹
 6 There, a Shanghai court sentenced antifraud specialists Peter Humphrey and Yu Yingzeng to fines
 7 and over two years of prison for misusing Chinese citizens' personal information.⁵² The
 8 defendants acknowledged that they had "purchased personal information about Chinese citizens on
 9 behalf of clients."⁵³ In contrast, here there is no indication that ZWSOFT's source code and other
 10 related documents contain personal information about Chinese citizens.

11 ZWSOFT may be correct that ZWSOFT cannot allege precisely what information within its
 12 source code and related documents the Chinese government might consider to be a state secret
 13 because "the ambiguity in the PRC's state secrecy laws" makes it "unclear when and how they can
 14 be applied."⁵⁴ However, Chinese companies may not avoid producing documents in United States
 15 litigation by citing to broad concerns that liability may be imposed under "unclear" or
 16 "amorphous" Chinese laws.⁵⁵ Because ZWSOFT has not cited to expert testimony or other
 17 authorities that support its characterizations of Chinese state secrecy and privacy laws, ZWSOFT's

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 19 ⁵¹ See Docket No. 52 at 9-10 (citing James T. Areddy & Laurie Burkitt, "Chinese Privacy Case
 20 Raises Risks of Doing Business in Country," *The Wall Street Journal*, Aug. 12, 2014,
 21 <http://www.wsj.com/articles/chinese-privacy-case-raises-risks-of-doing-business-in-country-1407860680>).

22 ⁵² See *id.*

23 ⁵³ See *id.*; Docket No. 68-1 at ¶¶ 22-23 (noting that this case involved "tactics used to obtain
 24 personal information, such as household records and cell phone usage information" and that
 25 defendants were "accused of illegally purchasing, selling and providing personal information about
 26 citizens").

27 ⁵⁴ See Docket No. 71 at 7.

28 ⁵⁵ See Docket No. 52 at 7, 9.

1 generalized allegations that production of its source code and related documents may subject it to
2 liability under Chinese laws are insufficient to establish that a genuine sovereign interest is at issue
3 here.

4 *Second*, the “likelihood that “resort to [Hague Convention] procedures will [not] prove
5 effective” weighs against use of the Hague Convention here.⁵⁶ In particular, the Hague Convention
6 procedures are not an effective alternative because these procedures may limit discovery to exclude
7 relevant source code and related documents. To obtain discovery under the Hague Convention, the
8 district court must submit a Letter of Request to the Central Authority in China, which will forward
9 the letter to the Supreme People’s Court.⁵⁷ The Supreme People’s Court will “only execute pre-
10 trial discovery requests for documents which...are of direct and close connection to the subject
11 matter of the litigation.”⁵⁸

12 Although “there is evidence that China has honored many judicial requests for
13 documents,”⁵⁹ this evidence does not negate the risk the “direct and close connection” limitation
14 may not allow for broad enough discovery here. In particular, the Supreme People’s Court may
15 limit ZWSoft’s production to portions of its source code that directly relate to “common bugs,
16 errors and idiosyncrasies” which Autodesk stated in the complaint even though Autodesk contends
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19 ⁵⁶ See *Aérospatiale*, 482 U.S. at 544.

20 ⁵⁷ See Hague Evidence Convention, art. 2; see also Docket No. 68-1 at ¶¶ 7-9.

21 ⁵⁸ See *Tiffany*, 276 F.R.D. at 155; see also Docket No. 68-1 at ¶ 7 (“Pursuant to Article 23 of the
22 Hague Evidence Convention, China has declared that it will execute Letters of Request issued for
23 the purpose of obtaining pre-trial discovery of documents from common law countries, but it may
require production of only such documents as are directly and closely related to the subject matter
of the litigation.”).

24 ⁵⁹ See *Tiffany*, 276 F.R.D. at 156 (noting that “in the first half of 2010, the Chinese Judicial
25 Assistance Center reported that it provided assistance to the Foreign Affairs Department of the
26 Ministry of Justice in respect of judicial assistance requests for civil and commercial cases
including ... investigation and evidence collection for 37 cases and 11 other cases.”) (internal
27 citations omitted); see also Docket No. 52, Exhibit D.

1 that ZWSOft engaged in “wholesale copying of the underlying source code” rather than merely
2 copying the bugs.⁶⁰

3 Further, discovery under the Hague Convention is too slow to be an effective alternative to
4 the Federal Rules of Civil Procedure. “[I]t is generally recognized that procedures under the Hague
5 Convention are far more cumbersome than under the Federal Rules of Civil Procedure.”⁶¹ As
6 ZWSOft notes, the court in *Tiffany* rejected the plaintiff’s assertion that “China’s Hague
7 Convention procedures ‘do not offer a meaningful avenue to discovery’ because the process is
8 likely to be ‘unduly time consuming and expensive, as well as less certain to produce needed
9 evidence than direct use of the Federal Rules.’”⁶² However, in *Tiffany* the court ultimately
10 concluded that application of Hague Convention procedures was proper in part because the
11 discovery requests at issue implicated China’s “significant interest in enforcing its bank secrecy
12 laws.”⁶³ In contrast, here ZWSOft has not shown that production of its source code and related
13 documents presents a genuine risk of liability under Chinese law such that “the benefits of
14 compliance with PRC laws” justify the costs imposed by application of the Hague Convention.⁶⁴

15 **Third**, ZWSOft has not shown that the “particular facts” of this case warrant application of
16 Hague Convention procedures.⁶⁵ ZWSOft’s assertion that Autodesk has “propounded extensive
17 and largely unnecessary discovery” lacks merit because at the time ZWSOft took this position,
18 Autodesk had not even served discovery on ZWSOft.⁶⁶ Despite this lack of discovery, ZWSOft

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20 ⁶⁰ See Docket No. 68 at 9.

21 ⁶¹ See *Valois of Am.*, 183 F.R.D. at 349; see also Docket No. 52 at 11 (acknowledging that
22 discovery under the Hague Convention “typically takes longer than conducting discovery under the
23 Federal Rules of Civil Procedure.”).

24 ⁶² See Docket No. 52 at 15; see also *Tiffany*, 276 F.R.D. at 152-53, 156.

25 ⁶³ See *id.* at 156-57, 160-61.

26 ⁶⁴ See Docket No. 52 at 11.

27 ⁶⁵ See *Aérospatiale*, 482 U.S. at 544.

28 ⁶⁶ See Docket No. 52 at 14.

1 argues that Autodesk has propounded discovery requests on its United States distributor GFD
2 which are “overly broad as to both time and geographic location and not rationally limited to the
3 needs of the case” and which indicate that ZWSOft “will also receive overly broad written
4 discovery.”⁶⁷ However, Autodesk’s assertion that it propounded these discovery requests on GFD
5 because Autodesk believed that GFD is a small entity with “only three known employees” whose
6 entire business “appears to be directed to the subject matter of this lawsuit” suggests that Autodesk
7 is unlikely to propound similarly broad discovery requests on ZWSOft.⁶⁸

8 Further, even if the requests Autodesk propounded on GFD did indicate that ZWSOft “will
9 be served with substantially the same requests,” ZWSOft’s belief that these “anticipated” discovery
10 requests will be overly broad is not sufficient to justify imposition of Hague Convention
11 procedures.⁶⁹ Likewise, ZWSOft’s citation to its motion to dismiss in support of its assertion that
12 Autodesk is trying to use overly broad discovery requests as a “fishing license” to make up for its
13 failure to put ZWSOft on notice of “what specific software source code is at issue” and to state a
14 claim upon which relief can be granted is unavailing.⁷⁰ Regardless of merits of these claims,
15 ZWSOft’s concerns about the potentially overly broad nature of discovery Autodesk may make in
16 the future are not sufficient to justify imposition of the Hague Convention procedures here.

17 ZWSOft also has not established that inspection of the source code in China is more
18 efficient than production of the source code in the United States. ZWSOft contends that inspection
19 of the source code in China will serve “judicial economy” and avoid duplicative production
20 because ZWSOft has already made the source code available in Beijing under an order of the Dutch
21 court.⁷¹ However, as Autodesk notes, the source code in China was deposited for the use of a

22 ⁶⁷ *See id.* at 5.

23 ⁶⁸ *See* Docket No. 68 at 10.

24 ⁶⁹ *See* Docket No. 52 at 5.

25 ⁷⁰ *See* Docket No. 71 at 1-3.

26 ⁷¹ *See* Docket No. 71 at 5-6.

1 neutral expert which the Dutch court had not yet appointed and which Autodesk had not yet
2 analyzed at the time Autodesk's opposition was filed.⁷²

3 ZWSOFT's argument that having the data examined by a "native speaker" in China is less
4 expensive than bringing the data to the United States and translating it before production similarly
5 lacks merit.⁷³ Autodesk asserts that it intends to use local attorneys and experts to examine the
6 source code in the United States and that multiple rounds of source code examination as well as
7 motion practice related to the adequacy of the initial deposit of source code are likely.⁷⁴ Requiring
8 Autodesk's attorneys and experts to travel to Beijing every time they need to examine the source
9 code would be more burdensome and expensive than sending the source code to the United States.

10 ZWSOFT is correct that as a large multinational company with multiple offices in China,
11 Autodesk is more able than ZWSOFT to shoulder burdens imposed by onerous or expensive
12 discovery.⁷⁵ But, as explained above, ZWSOFT has not shown that a sovereign interest or other
13 factor justifies the additional expense and burden that examination of the source code in China
14 imposes on Autodesk.

15 *Fourth*, ZWSOFT has not met its burden to show that good cause exists under Rule 26(c) to
16 amend the protective order to require ZWSOFT to collect and make available its source code and
17 related documents for inspection in China rather than to produce this data in the United States. "A party
18 asserting good cause [under Rule 26(c)] bears the burden, for each particular document it seeks to
19 protect, of showing that specific prejudice or harm will result if no protective order is granted."⁷⁶

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21 _____
⁷² See Docket No. 68 at 11.

22 ⁷³ See Docket No. 52 at 6.

23 ⁷⁴ See Docket No. 68 at 11.

24 ⁷⁵ See Docket No. 52 at 6.

25 ⁷⁶ See *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003) (internal
26 citations omitted).

1 ZWSOft's claim the process outlined in the amended order "is authorized under the Federal
2 Rules of Civil Procedure" lacks merit because this assertion does not establish that production and
3 examination of ZWSOft's source code and related documents in United States will cause a specific
4 prejudice or harm.⁷⁷ For instance, ZWSOft claims that Rule 26 authorizes examination of the
5 source code in China because Rule 26 allows courts to limit discovery to promote international
6 comity and because the factors described in proposed amendments to the Federal Rules of Civil
7 Procedure favor adoption of ZWSOft's suggested procedures.⁷⁸ ZWSOft also contends that the
8 court may properly order adoption of its amended protective order because Rule 34 allows a party
9 to make documents available "as they are kept in the usual course of business" and because the
10 timelines provided in the amended protective order are consistent with the Federal Rules of Civil
11 Procedure.⁷⁹

12 However, even if ZWSOft is correct that the Federal Rules of Civil Procedure authorize the
13 production process outlined in its amended order, this compliance is not sufficient to show that
14 good cause exists for amending the order under Rule 26(c). To the contrary, "[b]road allegations
15 of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule
16 26(c) test."⁸⁰ Further, although ZWSOft is that correct that production of trade secrets and source
17 code presents inherent risks that the information produced may lose its trade secret status or value
18 because it can be "copied or stolen without proper security measures," this risk does not justify

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20 ⁷⁷ See Docket No. 52 at 16.

21 ⁷⁸ See *id.* at 16-19.

22 ⁷⁹ See *id.* at 19-21; see also Fed. R. Civ. P. 34(b)(2)(E)(i) ("A party must produce documents as
23 they are kept in the usual course of business or must organize and label them to correspond to the
categories in the request.").

24 ⁸⁰ See *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (internal citations
25 omitted); see also *Foltz*, 331 F.3d at 1130-31 (citing *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648,
26 653 (D. Md. 1987) (requiring party seeking a protective order to provide "specific demonstrations
of fact, supported where possible by affidavits and concrete examples, rather than broad,
27 conclusory allegations of potential harm").

1 amendment of the order.⁸¹ As Autodesk notes, ZWSOft does not state why the existing protective
2 order does not sufficiently protect ZWSOft's information or how the amended order will provide
3 more protection against these risks.⁸² ZWSOft itself acknowledges that these risks are "inherent in
4 the production of source code even in the PRC."⁸³ Similarly, ZWSOft's contentions that it was not
5 meaningfully involved in the current protective order because it was not in the case when the order
6 was entered and that this case allows Autodesk access into the "highly proprietary data of a
7 competitor" do not identify specific prejudice or harm that will result if the current protective order
8 is not amended.⁸⁴

9 ZWSOft also does not show that there is a genuine risk that production of its source code
10 and related documents under the current protective order could subject ZWSOft to liability under
11 Chinese state secret and privacy laws. ZWSOft is correct that China has imposed "severe"
12 penalties upon people who have violated its state secrecy or privacy laws.⁸⁵ But once again,
13 ZWSOft's generalized, unsubstantiated claims about Chinese law do not establish that there is a
14 "present danger that application of the PRC blocking statutes" could subject ZWSOft to liability if
15 it produces its source code and related documents in the United States.⁸⁶

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17 ⁸¹ See Docket No. 52 at 18.

18 ⁸² See Docket No. 68 at 12.

19 ⁸³ See Docket No. 52 at 18.

20 ⁸⁴ See Docket No. 71 at 7-8.

21 ⁸⁵ See Docket No. 71 at 6 n.4 (citing Erik Echholm, "China 'State Secret': Daily Newspapers,"
22 Chicago Tribune, April 27, 2000, [http://articles.chicagotribune.com/2000-04-
27/news/0004270268_1_xinjiang-radio-free-asia-rebiya-kadeer](http://articles.chicagotribune.com/2000-04-27/news/0004270268_1_xinjiang-radio-free-asia-rebiya-kadeer)) (describing how Chinese court
23 sentenced woman to eight years in prison in 2000 for sending local newspapers on which she had
24 marked "official speeches and articles" relating to "the government's fight against ethnic
separatism" to her husband in the United States).

25 ⁸⁶ See Docket No. 71 at 6; *see also Beckman Indus., Inc.*, 966 F.2d at 476. Autodesk requests that
26 the court admonish ZWSOft not to delay producing the accused source code according to the terms
of the existing protective order if it denies ZWSOft's motion. *See* Docket No. 68 at 12-13.
27 However, as ZWSOft notes, because Autodesk had not propounded discovery upon ZWSOft at the

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IV.

Because ZWSoft has not shown that good cause exists for the application of the Hague Convention or amendment of the protective order, ZWSoft’s motion is DENIED.

SO ORDERED.

Dated: March 27, 2015



PAUL S. GREWAL
United States Magistrate Judge

United States District Court
For the Northern District of California

time it made this request, Autodesk has “no evidence” to establish that ZWSoft will not timely produce its source code. *See* Docket No. 71 at 8. The court therefore denies this request.