

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN WEARABLE ELECTRONIC
DEVICES WITH ECG FUNCTIONALITY
AND COMPONENTS THEREOF

Inv. No. 337-TA-1266

ORDER NO. 7: AMENDING THE PROTECTIVE ORDER

(August 18, 2021)

Complainant AliveCor, Inc. and Respondent Apple Inc. (collectively, “the Private Parties”) moved (1266-002) to amend the Protective Order (Order No. 1) that issued on May 26, 2021, to include enhanced confidentiality provisions for source code. The Private Parties submit that the Commission Office of Import Investigations Staff does not oppose the proposed amendments. Mot. at 3.

The Private Parties’ joint motion (1266-002) is hereby granted. The provisions set forth in Appendix A to this order shall be incorporated as Paragraph Nos. 18-28 of the Protective Order in this investigation.

SO ORDERED.



Cameron Elliot
Administrative Law Judge

APPENDIX A

18. **Source Code.** A Producing Party may designate documents, information, or things that constitute or contain non-public Source Code as “HIGHLY CONFIDENTIAL SOURCE CODE SUBJECT TO PROTECTIVE ORDER.” Nothing in this Order shall be construed as a representation or admission that Source Code is properly discoverable in this action, or to obligate any Party to produce any Source Code.

19. **Definitions.**

- A. “Producing Party” shall mean any Private Party or non-party that makes Source Code available for review.
- B. “Receiving Party” shall mean any Party or non-party other than the Producing Party that reviews Source Code provided by the Producing party.
- C. “Source Code” shall mean computer code, scripts, assembly, binaries, object code, source code listings (e.g., file names and path structure), descriptions of source code (e.g., descriptions of declarations, functions, and parameters), object code listings and descriptions of object code, Hardware Description Language (HDL) or Register Transfer Level (RTL) files that describe the hardware design of any ASIC or other chip, and Computer Aided Design (CAD) files that describe the hardware design of any component.

20. **Source Code Qualified Persons.** Unless otherwise ordered by the Administrative Law Judge or permitted in writing by a Producing Party, materials designated “HIGHLY CONFIDENTIAL SOURCE CODE SUBJECT TO PROTECTIVE ORDER” shall not be disclosed to anyone except the following persons (“SOURCE CODE QUALIFIED PERSONS”):

- A. Outside Counsel of Record who have signed the Agreement to be bound by the Protective Order in this Investigation, and staff assisting such counsel who are necessarily incident to the litigation of this Investigation;
- B. The Commission, the Administrative Law Judge, the Commission Investigative Staff, Commission personnel and contract personnel who are acting in the capacity of Commission employees as indicated in Paragraphs 3 and 4 of this Protective Order;

- C. Court reporters, stenographers and videographers transcribing or recording testimony at depositions, hearings, or trial in this Investigation, who have signed an acknowledgment to be bound by the Protective Order, as indicated in Paragraph 6 of this Protective Order;
- D. Qualified experts or consultants retained by a Private Party for purposes of this Investigation under Paragraphs 11 and 21 of this Protective Order (hereinafter, “Qualified Experts”);
- E. Any third parties who are witnesses during a deposition, court hearing, or trial where specific documentary or testimonial evidence establishes that the Highly Confidential Source Code portion of the Highly Confidential Source Code was authored or received by the witness without any violation of any confidentiality obligation owed to any Party in this Investigation; and
- F. Anyone else to whom the Producing Party consents, as long as such individual signs an acknowledgment to be bound by the Protective Order, and, if applicable, the “Certification of Consultant Regarding Protective Order” attached hereto as Exhibit A, and such consent is expressly provided in writing by Outside Counsel of Record for the Producing Party.
- G. Nothing in this paragraph shall prevent a Producing Party from disclosing its Source Code to the Producing Party’s own employees or Qualified Experts.

21. **Qualified Experts.** A Qualified Expert may only review HIGHLY CONFIDENTIAL SOURCE CODE SUBJECT TO PROTECTIVE ORDER after:

- A. Being expressly identified to the Producing Party as seeking access to HIGHLY CONFIDENTIAL SOURCE CODE SUBJECT TO PROTECTIVE ORDER at least five (5) business days prior to said Qualified Expert’s first inspection of HIGHLY CONFIDENTIAL SOURCE CODE SUBJECT TO PROTECTIVE ORDER;
- B. Providing the Producing Party with signed copies of acknowledgments to be bound by the Protective Order, and the “Certification of Consultant Regarding Protective Order” attached hereto as Exhibit A;
- C. Complying with the notice provisions of Paragraphs 11 and 22; and
- D. Disclosing the proposed expert’s educational and detailed employment history to the Producing Party, which shall include at least
 - i. an up-to-date curriculum vitae of the Qualified Expert (including the Qualified Expert’s business/professional title and business address);
 - ii. any previous or current relationship with any of the Private Parties to this Investigation, including direct relationships and relationships through entities owned or controlled by the

Qualified Expert;

- iii. a list of other cases in which the Qualified Expert has testified (at trial or deposition) within the last five (5) years;
 - iv. a list of all companies by which the proposed Qualified Expert has consulted or by which the proposed Qualified Expert has been employed within the last five (5) years, the dates of the consultancy or employment, a brief description of the subject matter of the consultancy or employment; and
 - v. an identification of all pending patent applications on which the Qualified Expert is named as an inventor, in which the Qualified Expert has any ownership interest, or as to which the Qualified Expert has had or presently anticipates in the future any involvement in advising on, consulting on, preparing, prosecuting, drafting, editing, amending, or otherwise affecting the scope of the claims.
- E. Further, the Party seeking to disclose protected material shall provide such other information regarding the Qualified Expert's professional activities reasonably requested by the Producing Party for it to evaluate whether good cause exists to object to the disclosure of protected material to the Qualified Expert, including but not limited to an identification of any individual or entity with or for whom the Qualified Expert is employed or provides consulting services relating to the functionality, operation, and design of wearable electronic devices with ECG and PPG functionalities for purposes of detecting atrial fibrillation (generally or as described in any patent in suit).
- F. This paragraph does not require the disclosing party to disclose aspects of any expert's business or profession or companies with which the proposed expert has consulted or by which the proposed expert has been employed to the extent such information is confidential or subject to a non-disclosure agreement; in any such instance, the disclosing party will describe the confidential experience in such a manner so as to enable the other parties to determine that no valid concerns exist regarding the disclosing party's retention of that expert.

22. **Notice.** In accordance with Paragraph 21 of this Protective Order, and if the Producing Party objects to the disclosure of such HIGHLY CONFIDENTIAL SOURCE CODE SUBJECT TO PROTECTIVE ORDER to a Qualified Expert as inconsistent with the language or intent of this order or on other grounds, it shall notify the Receiving Party in writing of its objection and the grounds therefore no more than 10 business days after the above-described written submission of the Qualified Expert by the Receiving Party, or no less than 3 business days prior

to the initial disclosure of HIGHLY CONFIDENTIAL SOURCE CODE SUBJECT TO PROTECTIVE ORDER to the Qualified Expert (whichever of the two periods is shorter as measured from the date that the Receiving Party's identification of the Qualified Expert under Paragraph 21). If the dispute is not resolved on an informal basis within five days of receipt of such notice of objections, the Producing Party shall submit immediately each objection to the Administrative Law Judge for a ruling. If the investigation is before the Commission, the matter shall be submitted to the Commission for resolution. The submission of such HIGHLY CONFIDENTIAL SOURCE CODE SUBJECT TO PROTECTIVE ORDER to Qualified Expert shall be withheld pending the ruling of the Commission or the Administrative Law Judge. The terms of this paragraph shall be inapplicable to experts within the Commission or to experts from other governmental agencies who are consulted with or used by the Commission.

23. Production of HIGHLY CONFIDENTIAL SOURCE CODE SUBJECT TO PROTECTIVE ORDER. Source code shall be provided with the following additional protections:

- A. Any Source Code that is produced by Complainant shall be made available for inspection in electronic format at the [[_____]] office of its outside counsel, Quinn Emanuel Urquhart & Sullivan, LLP, or any other location mutually agreed by the Parties. Any Source Code that is produced by Apple Inc. will be made available for inspection at the [[_____]] office of its outside counsel, Fish & Richardson, P.C., or any other location mutually agreed by the Parties. Source Code will be made available for inspection between the hours of 9 a.m. and 6 p.m. local time on business days (i.e., weekdays that are not Federal holidays), although the Parties will be reasonable in accommodating reasonable requests to conduct inspections at other times. Unless otherwise requested or agreed to by the Parties in advance of any inspection of Source Code, all Source Code produced by the Producing Party shall be made available simultaneously at the same review location, and if possible on the same Source Code Computer. For the avoidance of doubt, this does not require all Parties' Source Code to be made available at a single, same location or on a single, same Source Code Computer.
- B. Prior to the first inspection of Source Code, the Receiving Party shall

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