

Gartman, Cody A.

From: Hannah Santasawatkul <Hannah_Santasawatkul@txwd.uscourts.gov>
Sent: Wednesday, December 23, 2020 11:53 AM
To: Ari Rafilson
Cc: Nash, Brian C.; Acharya, Ranjini; Bjurstrom, Callie A.; Finkel, Evan; Michael Shore; Alfonso Chan; Paul Beeler; Will Ellerman; Mark Siegmund; Corey Lipschutz; Price Ainsworth
Subject: RE: FG SRC, LLC v. Intel Corporation (1:20-cv-00834-ADA) Request for Hearing

Good morning Counsel,

Thank you for your efficient delineation of the issues. The Court has reviewed your chart and provides the following:

1. Source Code Review/Amendment of Infringement Contentions:
 - a. Amendment of Infringement Contentions – The Court does not understand what the issue is here. Is plaintiff asking the Court to preemptively rule on the timeliness of hypothetical amendments to its infringement contentions when the Court does not know what the amendments might be (which is relevant to determining whether they were seasonably served) or when they might be served? If so, the Court agrees with Intel and finds that such an issue is not ripe for ruling on by the Court.
 - b. Source Code Review – Again, the Court does not understand what the issue is here. Intel has agreed to provide FG SRC’s expert access to the source code for the requested period. The Court will require FG SRC to comply with the provisions of the protective order. The Court understands the difficulties posed by the expert’s schedule but does not see why those difficulties would necessitate deviating from the protective order entered by the Court. Intel is already agreeing to allow FG SRC’s expert to retain the laptop for an extended period of time to accommodate his busy academic schedule and his backpacking trip. If Dr. Kastner is too busy during the extended period that Intel has agreed to give him access, then FG SRC has the option of finding another expert who is available. The Court does not see the need for creating extra steps and overcomplicating a simple issue of scheduling.
2. Sales Information for Top 10 Customers and Service of Foreign Defendants
 - a. The Court’s Order already addresses the information that is necessary for Plaintiff to have at this stage of the case. The Court actually recently directly addressed this issue at its recent working group meeting (which I note several of counsel on this case attended), and stated that requiring production of such in depth information is inappropriate prior to Markman and that the Court finds its current Order sufficient.
 - b. Service of Foreign Defendants - FG SRC may initiate service of subpoenas on each of the identified foreign entities but may not begin actual discovery until after the Markman hearing. The Parties should confer to make sure they are on the same page so that the foreign entities understand that they need not participate in discovery until after the Markman hearing.

Please let me know if you have any other questions. As always, we thank you for promptly coming to the Court. As you know, Judge has an enthusiastic open door policy and we strive to embody that on his behalf.

Have a great rest of your week and Merry Christmas!

Best,
Hannah

From: Ari Rafilson <arafilson@shorechan.com>
Sent: Wednesday, December 23, 2020 10:28 AM
To: Hannah Santasawatkul <Hannah_Santasawatkul@txwd.uscourts.gov>
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Subject: FG SRC, LLC v. Intel Corporation (1:20-cv-00834-ADA) Request for Hearing

CAUTION - EXTERNAL:

Hannah,

FG SRC requests a telephonic hearing on the issues identified below. The parties have conferred fully on each of these issues and have been unable to come to a mutually agreeable resolution. The parties request that the Court advise the parties of the hearing at least one hour before it occurs to ensure availability.

ISSUE: Source Code Review/Amendment of Infringement Contentions	RELIEF
<p>Plaintiff’s Position: On December 13, 2020, FG SRC requested that Intel provide a Remote Review Laptop to its expert pursuant to the COVID-19 Addendum to Protective Order (Dkt. 40) and Protective Order (Dkt. 39), which were entered on October 26, 2020, and that, consistent with a discussion several days earlier with Intel’s lead counsel, FG SRC’s expert be permitted to keep the laptop through the end of his Spring Break, which is March 29. The Addendum allows for an Authorized Reviewer to keep a Remote Review Laptop for one month, and additionally states that Intel “agrees to reasonably cooperate with requests for extension of this time period if additional time is necessary for the Authorized Reviewer to complete the review.”</p> <p>On December 18, Intel responded stating that its source code has been available since September 17, and it “reserve[s] the right to object to any amended infringement contentions served after January 17, 2021 as not being seasonably made.” (emphasis added).</p> <p>Intel’s source code has not been reasonably available to FG SRC and its expert since September 17. Intel’s September 17 correspondence stated that it would “(1) make the source code available for remote source code review now, under Intel’s proposed terms in the draft Protective Order and Addendum to the PO . . . ; or (2) make the source code available for remote source code review once the PO and Addendum are entered . . .” In other words, Intel was only willing to make its source code available at that time if FG SRC agreed to Intel’s</p>	<p>Plaintiff’s Position: Intel will provide FG SRC’s expert with a Remote Review Laptop through March 29, 2021. FG SRC requests that this Court order that amended infringement contentions made seasonably after its expert has reviewed said code are presumptively timely.</p> <p>FG SRC also requests that its expert is permitted to remotely review source code during this time period on any business day so long as it or its expert provides, by the Wednesday preceding a review week, a schedule of days and times during which its expert intends to review code remotely during said review week.</p>

limitations, which FG SRC viewed as overly restrictive. For example, Intel took the position that source code printouts, which FG SRC's expert would need to amend its infringement contentions, would only be provided to FG SRC's counsel. Intel's proposal also included obtrusive logging requirements, and severe limitations on how much contiguous code could be printed. It also required that video of review sessions be recorded, something Intel later agreed was not required.

Following a hearing on disputed provisions, the Protective Order and Addendum were entered on October 26, 2021. On October 30, FG SRC's counsel emailed Intel's counsel to ask how large the production was in lines or megabytes, stating it would be helpful in scheduling the review. Intel did not provide the number of lines and instead stated that the code was 18 megabytes. Based on FG SRC's estimate, Intel's source code is approximately **360,000 lines long**. Due to the nature of the source of code, FG SRC needs to rely on review by its expert, Dr. Kastner.

Dr. Kastner reviewed the PO and Addendum as entered, and signed both on November 11. He wanted to ensure that he had adequate time to review Intel's source code. He has a busy academic schedule and was assisting FG SRC with its opening claim construction brief, for which he submitted a supporting declaration. He also had a preplanned backpacking trip, scheduled for December 12 through December 20.

Given the volume of Intel's source code, and so that he could fulfil his academic obligations, and assist FG SRC with its claim construction briefing and technical tutorial, he requested that FG SRC's counsel check with Intel to see if it would agree to allow him to keep the source code computer through his Spring Break, which ends on March 29.

Intel responded that, while it could agree to allow Dr. Kastner to keep the laptop through March 29, any infringement contentions served based on that code are unseasonably made and objectionable if served after January 17, 2021. This is only five days after FG SRC's reply claim construction brief, and Dr. Kastner is assisting with that brief. Moreover, despite Intel's commitment in the Addendum to agree to additional review time if needed, it stated that Dr. Kastner can only "review source code on four blocks of up to five consecutive business days." The Addendum contains no requirements regarding review on consecutive days, and simply requires that three hours notice be provided before a review session. Addendum § 3(b)(ix). Moreover, based on FG SRC's estimates, reviewing all of Intel's source code in twenty days would require Dr. Kastner to review approximately 18,000 lines of code per day.

Finally, requiring Dr. Kastner to review code solely during four blocks of five business days is impracticable for Dr. Kastner. Dr. Kastner takes care of his daughter on Monday mornings and Friday afternoons, teaches several classes a week, and has frequent required departmental and University meetings. He will rarely be able to review code during an entire day, and is instead more likely to review it during the morning or afternoon.

Response to Defendant's Position (Below) Regarding Source

Code Review: Intel argues that Plaintiff's request triples the costs of source code review. This makes no sense. The Addendum explicitly states that Plaintiff may request up to three Remote Review Laptops, and that each laptop may be retained by an Authorized Reviewer for one month. Addendum §§ 2; 3(b)(xv). Thus far, Plaintiff has only requested one Remote Review Laptop, and it intends to rely primarily on its expert for remote review.

Regarding the structure of review sessions, FG SRC has attempted to allay those concerns. While conferring with Intel's counsel, after FG SRC advised that the § 3(b)(i)(ix) of the Addendum, which it drafted, requires only three hours notice, Intel advised that its vendor required 48 hours notice. FG SRC readily agreed, and stated that it could in fact, by the Wednesday preceding a review week, provide a proposed review schedule for that review week. Dr. Kastner will primarily be able to review code only in half day sessions, and as discussed previously he has regular childcare and other responsibilities. This renders Intel's proposal of four review periods of five contiguous business days unworkable, particularly considering the volume of source code.

Response to Defendant's Position (Below) Regarding

Amendment of Infringement Contentions: Intel did not state, as it argues in its position that "inspection of its code would be done according to Intel's version of the disputed provisions *until the Court had an opportunity to rule on the dispute.*" Rather, as discussed above it said it could either produce its code in September, subject to its requirements, or it could wait to produce its code until this Court entered the PO and Addendum. Moreover, despite Intel's contention that there were only a "few disputed provisions on code inspection" in Intel's version, those provisions presented major concerns for FG SRC that impeded its expert's ability to review code, and it did not want to weaken its arguments by acquiescing to them.

Defendant's Position:

There are two issues. **First**, with respect to source code review, Plaintiff requested that its expert be able to receive and keep the source code laptop from December 21 to March 29, i.e., a 98-day period versus the protective order's 30-day period. This

Defendant's Position:

Intel agrees to allow Plaintiff's expert to keep the laptop for the requested period. Intel asks that the Court otherwise maintain the provisions

proposal nearly triples the costs of the source code review and expands it beyond what would normally be permitted during physical review. Even so, Intel agreed to allow the expert to keep the laptop for that entire time period but asked that the expert otherwise follow the protective order provisions, which limit source code access to a total of 20 business days. Thus, Intel proposed as a compromise that Plaintiff's expert identify which weeks during the 98-day period that the source code would be accessed. That allows the parties to structure the review sessions within the 98-day period in a manner that allows Intel and its vendor to meet the other requirements of the Addendum. As the PO states, and Intel has affirmed to the Court, Intel will agree to a reasonable extension of that time if, after reviewing the code, there is a reasonable need for an extension. To date, no one from Plaintiff or Plaintiff's expert has accessed the code despite its availability since September 17, 2020.

Second, regarding amendment of infringement contentions, consistent with the scheduling order and the Court's rules, Intel produced documents sufficient to show the operation of the accused devices on September 17, 2020. Intel also informed plaintiff that its source code was available for inspection at the same time. At the time, the parties had largely agreed on a proposed protective order except for a few disputed provisions on code inspection. Thus, Intel stated that inspection of its code would be done according to Intel's version of the disputed provisions until the Court had an opportunity to rule on the dispute. The Court held a hearing on the disputed PO provisions on September 22, 2020 and made its rulings during that hearing. No one from Plaintiff or Plaintiff's expert has accessed the code despite its availability for over three months. While Plaintiff notes that its expert signed the required undertakings to the PO and Addendum on November 11, 2020, it did not serve those undertakings until December 18, 2020. Intel's technical documentation has also been available for over three months. Because the Court's order requires that contentions be "seasonably amended" after receiving new information, and because one purpose of the contentions is to better inform claim construction, Intel has noted to Plaintiff that Intel reserves its right to object to amended contentions based on the technical document production and source code if served after January 17, 2021—i.e., four months since those documents were provided to Plaintiff and the source code was made available. It is unclear what relief Plaintiff requests with respect to this issue; Intel simply reserves its right to object to amended contentions based on Plaintiff's lack of diligence. Plaintiff's disagreement with Intel's reservation of rights does not impact its ability to move forward with the review. Thus, this "issue" appears to be premature and/or speculative.

of the Protective Order, which the parties negotiated, and the Court ruled on. The PO provides for a specified number of days of access, which can be extended based on reasonable need.

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