

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN LIGHT-BASED
PHYSIOLOGICAL MEASUREMENT
DEVICES AND COMPONENTS
THEREOF**

Inv. No. 337-TA-1276

**ORDER NO. 13: GRANTING JOINT MOTION TO AMEND THE PROTECTIVE
ORDER TO ADD PROVISIONS REGARDING PRODUCTION
AND REVIEW OF SOURCE CODE**

(January 10, 2022)

On January 5, 2021, Complainants Masimo Corporation and Cercacor Laboratories, Inc. (collectively, “Masimo”) and Respondent Apple Inc. (“Apple”) filed a joint motion (1276-014) to amend the Protective Order (Order No. 1) to establish procedures for enhanced confidentiality protections regarding the production and review of source code and to implement a prosecution and development bar. The motion is jointly filed by all parties in the investigation.

Additional provisions may be added to the protective order pursuant to Commission Rule 210.34(a)(7), which states:

Upon motion by a party or by the person from whom discovery is sought or by the administrative law judge on his own initiative, and for good cause shown, the administrative law judge may make any order that may appear necessary and appropriate for the protection of the public interest or that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

....

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way[.]

19 C.F.R. § 210.34(a)(7). The parties submit that there is a need for enhanced confidentiality protections for source code in this investigation, and the parties also seek to adopt a prosecution and development bar to address certain objections regarding expert witnesses. Motion at 2; *see* Complainants’ Contingent Notice of Withdrawal of Motions for Protective Orders, EDIS Doc. ID 760064 (Jan. 7, 2022).¹ Based on the parties’ representations, the undersigned finds that there is good cause to amend the protective order. *See, e.g., Certain Power Inverters and Converters, Vehicles Containing the Same, and Components Thereof*, Inv. No. 337-TA-1267, Order No. 18, EDIS Doc. ID 757403 (Nov. 29, 2021) (amending protective order for source code); *Certain Non-Invasive Aesthetic Body Contouring Devices, Components Thereof, and Methods of Using the Same*, Inv. No. 337-TA-1219, Order No. 7, EDIS Doc. ID 728703 (Dec. 22, 2020) (amending protective order for prosecution bar); *Certain Wearable Electronic Devices With ECG Functionality and Components Thereof*, Inv. No. 337-TA-1266, Order No. 7, EDIS Doc. ID 749871 (Aug. 18, 2021) (amending protective order to include provisions regarding source code and a prosecution and development bar).

Accordingly, the motion (1276-014) is hereby GRANTED, and the Protective Order (Order No. 1) shall be supplemented with the addendum set forth in paragraphs 18 and 19 below:²

18. **Source Code.** A supplier may designate non-public Source Code as “HIGHLY CONFIDENTIAL SOURCE CODE – ATTORNEYS’ EYES ONLY.”

A. “Source Code” shall mean source code, source code listings (e.g., file names and path structures), object code (e.g., computer instructions and data definitions

¹ The Notice indicates that Complainants’ previously filed objections to Apple’s experts (Motion Docket Nos. 1276-004, 1276-005, 1276-006) will be mooted by the adoption of the proposed prosecution and development bar and that these objections will be withdrawn.

² An updated certification for expert witnesses and consultants is attached hereto as Exhibit A.

expressed in a form suitable for input to an assembler, compiler, or other translator), object code listings and descriptions of object code, scripts, assemblies, binaries, descriptions of source code (e.g., descriptions of declarations, functions, and parameters), microcode, register transfer level (“RTL”) files that describe the hardware design of any ASIC or other chip, and hardware description language (“HDL”), as well as any and all programmer notes, annotations, and other comments of any type related thereto and contained within a file also containing the code. For avoidance of doubt, Source Code includes source files, make files, intermediate output files, executable files, header files, resource files, library files, module definition files, map files, object files, linker files, browse info files, and debug files. Computer aided design (CAD) files may be designated pursuant to this Paragraph, provided that any printouts of CAD files shall be designated “CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER.”

- B. “Party” shall mean (i) Complainants Masimo Corporation and Cercacor Laboratories, Inc. collectively on the one hand, and (ii) Respondent Apple Inc. on the other hand.
- C. “Supplying Party” with respect to particular Source Code or other discovery shall mean the Party that supplies that Source Code or other discovery.
- D. “Receiving Party” with respect to particular Source Code or other discovery shall mean the Party that received (e.g., through production or inspection) that Source Code or other discovery from the Supplying Party.

- E. Materials designated as “HIGHLY CONFIDENTIAL SOURCE CODE – ATTORNEYS’ EYES ONLY,” shall only be reviewable by SOURCE CODE-QUALIFIED PERSONS. SOURCE CODE QUALIFIED PERSONS include the following:
- (i) outside litigation counsel for Complainants and Respondent in this Investigation who have subscribed to the Administrative Protective Order in this Investigation, and necessary secretarial and support personnel assisting such counsel;
 - (ii) the Commission, the Administrative Law Judge (“ALJ”), Commission personnel and contract personnel who are acting in the capacity of Commission employees as indicated in paragraph 3 of this Protective Order;
 - (iii) court reporters, stenographers and videographers transcribing or recording testimony at depositions, hearings or trial in this Investigation; and
 - (iv) Qualified Consultants and/or Qualified Experts in this Investigation (under Paragraph 11 of the Protective Order in this Investigation) to whom disclosure is reasonably necessary for this Investigation, provided that each Qualified Consultant and/or Qualified Expert complies with the requirements of Paragraph 11 of the Protective Order and completes the “CERTIFICATION OF EXPERT/CONSULTANT REGARDING PROTECTIVE ORDER” (Exhibit A) which shall be served upon the supplier.
- F. Source Code shall be provided with the following additional protections:

- (i) Nothing in this Protective Order shall obligate the parties to produce any Source Code, nor act as an admission that any particular Source Code is discoverable.
- (ii) Access to Source Code will be given only to SOURCE CODE QUALIFIED PERSONS.
- (iii) Access to Source Code shall be made available for inspection, in a format allowing it to be reasonably reviewed and searched, during normal business hours or at other mutually agreeable times, at an office of the Producing Party's outside litigation counsel WilmerHale (Los Angeles office) or Knobbe Martens (New York office) or another mutually agreed upon location on a "stand-alone secure computer" (*i.e.*, the computer(s) may not be linked to any network, including a local area network ("LAN"), an intranet, or the Internet, and may not be connected to any printer or storage device other than the internal hard disk drive of the computer). The stand-alone secure computer(s) may be provided in a secured room without Internet access or network access to other computers ("Source Code Review Room") at the offices of the supplier's outside litigation counsel, or at such other location as the Supplying Party and Receiving Party mutually agree. No recordable media or recordable devices, including without limitation sound recorders, computers, cellular telephones, peripheral equipment, cameras, CDs, DVDs, or drives of any kind, shall be permitted into the Source Code Review Room.

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