

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

Before The Honorable Theodore R. Essex

Administrative Law Judge

In the Matter of:

**CERTAIN MOBILE DEVICES,
ASSOCIATED SOFTWARE, AND
COMPONENTS THEREOF**

Investigation No. 337-TA-744

**NON-PARTY GOOGLE INC.'S MOTION FOR SANCTIONS AGAINST
COMPLAINANT MICROSOFT CORP. FOR VIOLATIONS OF
ORDER NOS. 1, 5 AND 9 AND REQUEST FOR EXPEDITED CONSIDERATION**

Non-party Google Inc. (“Google”) respectfully moves under 19 C.F.R. §§ 210.25 and 210.34(c) for sanctions against Complainant Microsoft Corporation (“Microsoft”) for Microsoft’s violation of Order Nos. 1, 5 and 9 in this investigation by providing Google highly confidential source code to one of Microsoft’s experts, Dr. Robert Stevenson, without first disclosing him to Google. The protective order governing confidentiality in this investigation explicitly requires that Microsoft disclose to Google any consultant or expert seeking access to Google confidential business information or highly confidential source code *before* allowing a consultant or expert to review such information so that Google has an opportunity to object prior to disclosure. Microsoft does not dispute that it provided Google highly confidential source code to Dr. Stevenson without first disclosing Dr. Stevenson to Google as an individual seeking access to Google confidential source code and allowing Google an opportunity to object. This failure is a clear violation of several provisions of the protective order governing confidentiality in this investigation, including at least Paragraph 11 of Order No. 1, Paragraphs 19(ix) and 19(x) of Order No. 5, and Paragraph 21(ii) of Order No. 9.

In order to prevent further improper disclosure of its highly confidential information, non-party Google respectfully requests an order that Dr. Stevenson may not testify at the evidentiary hearing regarding Google's confidential source code improperly provided to Dr. Stevenson and that Microsoft provide Google a declaration under oath confirming that Microsoft has not otherwise violated Order Nos. 1, 5 and 9.

Given the late stage of the investigation and the rapidly approaching commencement of the evidentiary hearing, Google additionally requests that the ALJ order expedited consideration of this motion, with any response due on or before Monday, August 15, 2011.

Dated: August 10, 2011

Respectfully submitted,

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In the Matter of:

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**MEMORANDUM IN SUPPORT OF NON-PARTY GOOGLE INC.'S MOTION
FOR SANCTIONS AGAINST COMPLAINANT MICROSOFT CORP. FOR
VIOLATIONS OF ORDER NOS. 1, 5 AND 9 AND REQUEST FOR EXPEDITED
CONSIDERATION**

Under 19 C.F.R. §§ 210.25 and 210.34(c), non-party Google Inc. (“Google”) respectfully moves for sanctions against Complainant Microsoft Corporation (“Microsoft”) for Microsoft’s violation of Order Nos. 1, 5 and 9 in this investigation by providing Google highly confidential source code to Dr. Robert Stevenson without first disclosing him to Google. The protective order governing confidentiality in this investigation explicitly requires that Microsoft disclose to Google any consultant or expert seeking access to Google confidential business information or highly confidential source code *before* allowing a consultant or expert to review such information so that Google has an opportunity to object prior to disclosure. Microsoft does not dispute that it provided Google highly confidential source code to Dr. Stevenson without first disclosing Dr. Stevenson to Google as an individual seeking access to Google confidential source code and allowing Google an opportunity to object. This failure is a clear violation of several provisions of the protective order governing confidentiality in this investigation, including at least Paragraph 11 of Order No. 1, Paragraphs 19(ix) and 19(x) of Order No. 5, and Paragraph 21(ii) of Order No. 9.

In order to prevent further improper disclosure of its highly confidential information, non-party Google respectfully requests an order that Dr. Stevenson may not testify at the evidentiary hearing regarding Google's confidential source code improperly provided to Dr. Stevenson and that Microsoft provide Google a declaration under oath confirming that Microsoft has not otherwise violated Order Nos. 1, 5 and 9.

Factual Background

A. The ALJ's Initial Protective Order Requires Parties to Obtain Approval from the Supplier of Confidential Business Information Before Providing Such Confidential Business Information to an Outside Expert

On November 5, 2010, the ALJ entered Order No. 1 in this investigation. (Ex. 1.) Following the well-known and standard practice of this Commission, Order No. 1 provided robust protections for confidential business information, including the following requiring parties seeking to show confidential information to outside experts to obtain prior approval from the supplier of the confidential documents or information:

No less than 10 days (or any other period of time designated by the Administrative Law Judge) prior to the initial disclosure to a proposed expert of any confidential information submitted in accordance with paragraph 2, the party proposing to use such expert shall supply in writing the name of such proposed expert and his or her educational and detailed employment history to the supplier.

(*Id.* ¶ 11.)

Paragraph 11 further provided that if the supplier objects to the disclosure of confidential business information to the identified expert, and "the dispute is not resolved on an informal basis within ten days of receipt of such notice of objections, the supplier shall submit immediately each objection to the Administrative Law Judge for a ruling." (*Id.*) In short, Order No. 1 provided only two ways for a party to this Investigation to show confidential business information to an outside expert or consultant: (1) the agreement of the supplier of the information, or (2) an order from the ALJ.

B. Microsoft and Motorola Jointly Sought Entry of Additional Protections Regarding Production of Highly Confidential Source Code, Which Reiterated that Parties Seeking to Show Source Code to Outside Experts Must Obtain Prior Approval from the Supplier

On April 5, 2011, Complainant Microsoft and Respondents Motorola Solutions, Inc. and Motorola Mobility, Inc. (collectively, “Motorola”) jointly sought entry of additional protections regarding the production and review of highly confidential source code in this investigation. (Ex. 2.) In seeking the ALJ’s approval, Microsoft specifically asserted that the additional protections it sought were “appropriate” and “reasonable”:

The parties believe that such an addendum is necessary to provide appropriate additional protections for and to facilitate the prompt production of relevant source code. Accordingly, the parties hereby submit for the Administrative Law Judge’s consideration a Proposed Order, attached hereto as Exhibit A, which reflects procedures and restrictions the parties believe to be reasonable.

(Ex. 2 at 1.) On April 7, 2011, the ALJ entered the Microsoft’s and Motorola’s requested additional protections as Order No. 5. (Ex. 3.)

As requested by Microsoft and Motorola, Order No. 5 again requires that, before a party may show highly confidential source code to an outside expert or consultant, it must obtain prior approval from the supplier of that source code. Although Paragraph 11 of Order No. 1 already imposed this requirement for *all* confidential business information, (Ex. 1 ¶ 11), and Order No. 5 explicitly noted that the protections for CBI in Order No. 1 also applied to highly confidential source code covered by Order No. 5 (Ex. 3 ¶ 19(xiv)), Microsoft and Motorola evidently felt these protections were so important that they must be reiterated in the context of highly confidential source code. As a result, Order No. 5 requires that:

A party desiring to disclose information to a technical adviser shall give prior written notice to the producing party or non-party, who shall have ten (10) business days after such notice is given to object in writing. A party desiring to disclose CONFIDENTIAL SOURCE CODE information to a technical adviser must provide the following information for each technical adviser: (i) name, address, curriculum vitae, current employer, and employment (including

consulting) history for the past four (4) years; and (ii) a listing of cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. No CONFIDENTIAL SOURCE CODE information shall be disclosed to such expert(s) or consultant(s) until after the expiration of the foregoing notice period.

(*Id.* ¶ 19(x).) Thus, like Order No. 1, Order No. 5 provides only two ways for a party to show confidential source code to an outside expert or consultant: (1) the agreement of the supplier of the source code, or (2) an order from the ALJ.

C. Microsoft and Non-Party Google Negotiated Additional Protections for Google's Production in Response to Microsoft's Subpoena

On April 1, 2011, Microsoft served a subpoena *duces tecum* and *ad testificandum* on non-party Google. (Ex. 4.) The subpoena requested Google's production of information including confidential business information and highly confidential source code. (*Id.*) On April 11, 2011, Google responded and objected to Microsoft's subpoena. (Ex. 5.) Although Google agreed to produce documents in response to the subpoena, it specifically noted that the existing protective orders could not protect its rights as a non-party to this investigation, and that it would produce documents only after the entry of an amended protective order. (*Id.* at 7-29.) As Google explained in a letter to Microsoft, one of the most important additional protections that Google required was the ability to independently review and approve outside experts and consultants before any Google confidential business information or source code is disclosed to them:

We believe this is already covered by Paragraph 11 of Order No. 1, but ***we want to make clear that Google will undertake its own review of any experts wishing to review its confidential business information, and will not rely upon any clearance by any party to the investigation.*** We also believe that this disclosure requirement and review process applies not only to testifying experts or lead consulting experts, but also to anyone helping them in a substantive capacity, for example, graduate students. Please let me know if you disagree, so that we can propose revisions to Paragraph 11 regarding this issue.

(Ex. 6 at 3 (emphasis added).) On May 16, 2011, Microsoft responded to Google in an email, specifically agreeing to "Google's review of expert disclosures." (Ex. 7.)

On June 6, 2011, Google, Microsoft, and Motorola filed a joint motion seeking entry of a supplemental protective order regarding non-party Google's production in this investigation. (Ex. 8.) The joint motion justified the request to amend the protective order by stating that "[t]he existing protective order, encompassed in Order Nos. 1 and 5, would not adequately protect Google, particularly given Google's position as a non-party in the investigation." (*Id.* at 1.) On June 7, the ALJ entered Order No. 9 amending the protective order set forth in Order Nos. 1 and 5. (Ex. 9.) Order No. 9 specifically provides that "[n]on-party Google Inc. ("Google") is entitled to protection of its confidential information produced under the terms of the Protective Order in this investigation, as set forth in Order No. 1 as amended by Order No. 5, as well as the additional protections set forth below." (*Id.* ¶ 20.) Like Order Nos. 1 and 5, Order No. 9 provides that Google, as the producing party, is entitled to review and approve outside experts or consultants *before* any disclosure of Google confidential information or source code to them:

A party desiring to disclose CONFIDENTIAL SOURCE CODE produced by Google Inc. to a technical adviser shall give prior written notice to Google Inc., who shall have ten (10) business days after such notice is given to object in writing.

(*Id.* ¶ 21(ii).)

Order No. 9 thus provides Google an additional layer of protection on top of Order Nos. 1 and 5. Like those Orders, Order No. 9 provides only two ways for a party to show Google confidential business information or highly confidential source code to an outside expert or consultant: (1) the agreement of Google as the supplier of the information, or (2) an order from the ALJ.

D. Microsoft Properly Disclosed Expert Richard Goodin to Google

Demonstrating that Microsoft understood the requirements of Order Nos. 1, 5 and 9, Microsoft disclosed expert Richard Goodin to Google on May 16, 2011. In the same email in

which Microsoft specifically agreed to “Google’s review of expert disclosures,” Microsoft disclosed Richard Goodin as “an expert for Sidley Austin LLP,” whom they wanted to review Google highly confidential source code. (Ex. 7.) Later that same day, Google reminded Microsoft that its disclosure of Mr. Goodin was insufficient because it did not provide the information required by Paragraph 11 of Order No. 1, specifically: “Mr. Goodin’s curriculum vitae provides no information regarding the parties he has worked for, nor the nature of any litigation in which he has been involved.” (Ex. 10 at 1.) Microsoft agreed that additional disclosure was required, and supplemented its disclosure with information on Mr. Goodin’s “prior litigation, including the parties he has worked for and the nature of the litigation.” (Ex. 11.) In response, Google asked Microsoft to confirm that Mr. Goodin was not engaged in any undisclosed consulting activity. (Ex. 12.) When Microsoft did so (Ex. 13), Google confirmed under Paragraph 11 of Order No. 1 and Paragraph 19(x) of Order No. 5, that it had no objections to the disclosure of Google confidential business information or highly confidential source code to Mr. Goodin, subject of course to agreement on the supplemental protections required to protect non-party Google. (Ex. 14.) When the ALJ entered Order No. 9 including those protections, Google immediately produced documents containing confidential business information and provided Mr. Goodin access to its review computer containing highly confidential source code. (Ex. 15.) Mr. Goodin was Microsoft’s only visitor to Google’s review computer containing highly confidential source code. In addition to providing a highly confidential source code computer for review, Google also produced millions of pages of documents in response to Microsoft’s subpoena containing “CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER.”

E. Google Discovered that Microsoft Violated Order Nos. 1, 5 and 9 By Providing Google Highly Confidential Source Code to Dr. Robert Stevenson Without First Disclosing Him to Google

On July 15, 2011, Google discovered that Microsoft had violated the protective order at least by providing Google highly confidential source code to Dr. Robert Stevenson, a Microsoft expert, without first disclosing him to Google and providing Google with an opportunity to object as required by Order Nos. 1, 5 and 9. Google discovered Microsoft's violation when Motorola contacted Google to seek permission to use certain Google highly confidential source code printouts during the deposition of Dr. Stevenson on July 20, 2011, as required by Paragraph 21(ix) of Order No. 9. (Ex. 9.) Motorola explained that the Google highly confidential source code was analyzed in Dr. Stevenson's supplemental expert report regarding alleged infringement of U.S. Patent No. 5,664,133 ("the '133 patent"), served on Motorola on July 11, 2011. Google was surprised to learn that Dr. Stevenson's supplemental expert report explicitly analyzed and described Google highly confidential source code because Dr. Stevenson had never been disclosed to Google as someone whom Microsoft wanted to show Google confidential source code and Google's counsel had never seen Dr. Stevenson's supplemental report.

F. Instead of Admitting Its Clear Violation of Order Nos. 1, 5 and 9, Microsoft Attempts to Obfuscate Its Breach

Upon discovering Microsoft's violation of Order Nos. 1, 5 and 9, Google raised the violation with Microsoft and requested that Microsoft take immediate steps in response to its violation, including adhering to the requirements of Paragraph 12 of Order No. 1 and Commission Rule § 210.34(b), which require that any party violating a protective order "immediately bring all pertinent facts relating to such disclosure to the attention of the supplier and the Administrative Law Judge and, without prejudice to other rights and remedies of the supplier, make every effort to prevent further disclosure by it or by the person who was the

recipient of such information.” (Ex. 1 ¶ 12.) Writing Microsoft on Friday afternoon, Google requested that Microsoft comply with these requirements no later than “10:00 a.m. EDT on Monday morning, July 18, 2011.” (Ex. 16 at 2.)

Contrary to Paragraph 12 of Order No. 1, Commission Rule § 210.34(b) and Google’s specific request, Microsoft did not inform the ALJ of its breach as required. Instead, Microsoft emailed Google privately, providing a misleading chronology of events that appeared calculated to obfuscate its violation of Order Nos. 1, 5 and 9. (Ex. 17.) To begin with, Microsoft did not acknowledge its violation of these Orders, but instead indicated that it was seeking to “allay any concerns that you may have about a *perceived* violation.” (*Id.* (emphasis added).) Microsoft then presented a misleading chronology regarding its disclosure of Dr. Stevenson. For example, Microsoft stated that “Dr. Stevenson was disclosed as a technical consultant on 1/6/11,” but ignored the fact that this disclosure was *to Motorola*, not Google, and therefore could not authorize Microsoft to provide *Google* confidential business information or highly confidential source code to Dr. Stevenson. (*Id.*; *see supra.*) Microsoft admitted that “Dr. Stevenson reviewed [Google] printed code at the offices of Sidley Austin during the week of 6/20/11,” but did not explain “all pertinent facts” that led to his review of Google highly confidential source code in violation of the protective order, as required by Paragraph 12 of Order No. 1. (*Id.*) Finally, Microsoft attempted to make an entirely specious distinction between reviewing highly confidential source code on Google’s review computer and reviewing Google highly confidential source code after it had been printed out by a different Microsoft expert, Dr. Goodin, who was authorized to view Google confidential source code. (*Id.*) Of course, the protective order draws no such distinction. Paragraph 21 of Order No. 9 states that “[a]ll information produced by Google Inc. designated as CONFIDENTIAL SOURCE CODE shall be subject to” the provisions

of that paragraph, including the expert disclosure requirement. (Ex. 9 ¶ 21.) The source code printouts that Google provided to Microsoft following Mr. Goodin’s review were clearly marked as containing GOOGLE CONFIDENTIAL SOURCE CODE and, as such, could only be viewed by experts properly disclosed and approved by Google – here, only Dr. Goodin.

Google responded immediately, outlining the deficiencies of Microsoft’s response and renewing Google’s request that Microsoft make the required submission to the ALJ disclosing “all pertinent facts” related to Microsoft’s violation of Order Nos. 1, 5 and 9. (Ex. 18.) Google also requested that Microsoft confirm that it had “not further violated the protective order by disclosing Google highly confidential source code to any other technical advisor other than Mr. Goodin and Dr. Stevenson.” (*Id.* at 2.)

On July 20, 2011, Microsoft finally submitted a letter to the ALJ regarding its violation of Order Nos. 1, 5 and 9. Microsoft captioned this letter as containing confidential business information subject to the protective order, thereby preventing the details of its violation from becoming public. Google is unable to identify any confidential business information in Microsoft’s letter and asked Microsoft to identify any non-Google confidential business information in its letter. (Ex. 19.) Microsoft has not done so. Nevertheless, in an abundance of caution, Google has not attached a copy of Microsoft’s purportedly “confidential” submission to this filing.

G. Microsoft’s Disclosure of Dr. Stevenson After Its Violation of the Protective Order Is Insufficient and Incomplete

On July 18, 2011, nearly a month *after* Microsoft had unilaterally disclosed Google highly confidential source code to Dr. Stevenson in violation of Order Nos. 1, 5, and 9, Microsoft provided Dr. Stevenson’s curriculum vitae to Google. (Ex. 17.) Of course, this was also *after* Google discovered Microsoft’s violation, brought it to Microsoft’s attention, and

requested Dr. Stevenson's curriculum vitae. Upon Google's review of this information, Google informed Microsoft that "had Microsoft properly tendered Dr. Stevenson under the protective order, Google would have lodged objections regarding at least his consulting work for Microsoft and Hewlett-Packard, both direct competitors of Google." (Ex. 18 at 2.) Microsoft responded that Dr. Stevenson's prior work for Microsoft was "litigation-related" and "his only work for Microsoft (prior to the current litigation) consisted of two or three conversations with Microsoft's counsel regarding a case related to printer technology." (Ex. 20.)

Google has since undertaken its own review of Dr. Stevenson's prior work and uncovered additional and undisclosed work related to Microsoft. In publically available documents, including Dr. Stevenson's own disclosed publications, he reports that he "has received research funding" from Microsoft, a direct competitor of Google. (Exs. 21 at 218, 22 at 615.) Microsoft has never revealed to Google, a competitor, that it provided research funding to Dr. Stevenson in the past. To the contrary, Microsoft represented that its only prior contact with Dr. Stevenson was "litigation-related" and consisted of no more than "two or three conversations with Microsoft's counsel regarding a case related to printer technology." (Ex. 20.) Microsoft's failure to fully and accurately disclose its full history with Dr. Stevenson underscores Microsoft's failure to treat this violation of the protective order with the attention and concern necessary.

Argument

I. MICROSOFT VIOLATED THE PROTECTIVE ORDER IN THIS INVESTIGATION.

No dispute exists regarding the basic facts. Google has an unqualified right to independently review and approve Microsoft's proposed technical advisers seeking access to Google confidential business information. Microsoft did not provide the required disclosure to

Google regarding Dr. Stevenson. Nonetheless, Microsoft disclosed Google highly confidential source code to Dr. Stevenson. This constitutes a clear violation of the protective order, including provisions specifically requested by Google and agreed to by Microsoft. (*See supra* pp. 4-5.)

A motion for sanctions for violation of a court's protective order requires the movant to demonstrate the alleged violation of the court's order by clear and convincing evidence. *See, e.g., Certain DC-DC Controllers and Products Containing the Same*, ITC Inv. No. 337-TA-698, Order No. 55 at 8-9, 2010 WL 4786600 (August 17, 2010); *Glaxo, Inc. v. Novopharm, Ltd.*, 110 F.3d 1562, 1572 (Fed. Cir. 1997). Here, there is undisputed evidence that by providing Google highly confidential source code to Dr. Stevenson without prior disclosure to and approval by Google Microsoft violated several provisions of the protective order governing confidentiality in this investigation, including portions of Order Nos. 1, 5 and 9. (*See supra* pp. 7-9.)

II. THE ALJ SHOULD IMPOSE SANCTIONS ON MICROSOFT TO ENSURE THE INTEGRITY OF ITC INVESTIGATIONS AND TO PREVENT ANY FURTHER UNAUTHORIZED DISCLOSURE OF GOOGLE CONFIDENTIAL BUSINESS INFORMATION AND HIGHLY CONFIDENTIAL SOURCE CODE.

A. The ALJ Has Broad Discretion to Impose Sanctions

Strict adherence to protective orders in the ITC is essential to ensure the integrity of the process and to encourage timely discovery from non-parties to an investigation. In *Certain Transportation Vehicle Tires*, the ALJ found that “**any violation** of the Protective Order is **an extremely serious matter**. Every person who obtains confidential business information by agreeing to comply with the Protective Order is expected to conform to a high duty of care and treat that information with the utmost caution.” *Certain Transportation Vehicle Tires*, Inv. No. 337-TA-390, Order No. 15, 1997 WL 972956 (Jan. 30, 1997) (emphasis added). Similarly, in *Certain Excimer Laser Systems for Vision Correction Surgery*, the ALJ held that “[t]he protective order must be strictly adhered to and taken seriously by all who agree to be bound by

its terms.” *Certain Excimer Laser Systems for Vision Correction Surgery*, ITC Inv. No. 337-TA-419, Notice, 1999 WL 377261 (June 4, 1999).

Sanctions are necessary to deter violations of protective orders in the ITC and to ensure timely discovery from non-parties in future investigations. The Commission has stated that “[t]he integrity of Commission protective orders must be maintained if the Commission is to continue to enjoy the confidence of parties and nonparties who possess confidential business information which the Commission needs to carry out its statutory obligations.” *Certain Battery-Powered Smoke Detectors*, Inv. No. 337-TA-259, Reprimand of Counsel (May 29, 1987). Further, “[w]ere appropriate sanctions not imposed, parties might be deterred in the future from filing complaints with the Commission for fear that protective orders would not be enforced. Additionally, the ability to timely obtain discovery of confidential information of third parties might similarly be adversely affected.” *Certain Plasma Display Panels*, ITC Inv. No. 337-TA-445, Order 15, 2002 WL 1308183 (June 14, 2002).

The ALJ has broad discretion in the range of sanctions that may be imposed on a party that violates a protective order by improper disclosure of confidential business information or source code. Commission Rule 210.34(c) provides for a variety of possible sanctions in the event that an “individual who has agreed to be bound by the terms of a protective order . . . is determined to have violated the terms of the protective order,” including:

- (1) An official reprimand by the Commission;
- (2) Disqualification from or limitation of further participation in a pending investigation;
- (3) Temporary or permanent disqualification from practicing in any capacity before the Commission pursuant to § 201.15(a) of this chapter;
- (4) Referral of the facts underlying the violation to the appropriate licensing authority in the jurisdiction in which the individual is licensed to practice;
- (5) Sanctions of the sort enumerated in § 210.33(b), or such other action as may be appropriate.

As detailed below, sanctions are appropriate here because allowing Microsoft to violate the protective order with impunity would discourage future third parties from timely cooperating with discovery requests and would undermine the integrity of future investigations.

Despite the serious nature of the violation, Microsoft has failed to respond to this matter promptly and has repeatedly attempted to downplay the importance of its violation. Microsoft delayed its required response under Paragraph 12 of Order No. 1 and Commission Rule § 210.34(b) for *five* days. (*See supra* pp. 7-9.) When Microsoft did finally respond to Google regarding its violation of the protective order, it refused to acknowledge the violation, provided no explanation for the improper disclosure of Google highly confidential source code to Dr. Stevenson, and attempted to minimize the importance of the obvious breach by referring to it as a “perceived violation” of the protective order. (*Id.*) Microsoft’s submission to the ALJ contained similarly misleading, spurious, and irrelevant points.

B. The ALJ Should Require Microsoft to Certify that No Other Violation of the Protective Order Has Occurred

Not only did Microsoft fail to act with due care and speed after Google notified it of the violation despite repeated requests from Google, Microsoft still has not provided essential facts regarding the disclosure of Google highly confidential source code to Dr. Stevenson and has not confirmed that the disclosure to Dr. Stevenson was the only unauthorized disclosure of Google confidential business information or highly confidential source code. In its submission to the ALJ, Microsoft stated only that “Dr. Stevenson reviewed the printed Google code at the offices of Sidley Austin during the week of June 20, 2011.” Microsoft has not provided the names of the attorneys who disclosed the source code to Dr. Stevenson and has not offered any explanation for why the violation occurred. Microsoft has failed to confirm that Dr. Stevenson was not shown any other Google confidential business information beyond the printouts of

Google highly confidential source code. Moreover, Microsoft has failed to confirm that no confidential business information, including source code, has been disclosed to any other Microsoft technical adviser. Google has requested this information multiple times. (*See supra* pp. 7-9.)

Accordingly, Google requests that Microsoft be ordered to provide a sworn declaration that no further violation of the protective order was committed. Such relief is necessary because of Microsoft's prior disclosure of Google highly confidential source code to Dr. Stevenson and its subsequent delay and apparent lack of concern in addressing the issue. Indeed, Microsoft failed to comply with the specific protective order provisions requiring disclosure to the ALJ of "all pertinent facts" related to the improper disclosure of Google highly confidential source code to Dr. Stevenson. Given Microsoft's apparent disregard for the requirements of the protective order – despite clearly understanding such requirements as evidenced by Microsoft's negotiation of Order No. 9 with Google and Microsoft's disclosure of Mr. Goodin – Google remains justifiably concerned that Microsoft disclosed its sensitive and confidential information to other technical advisers. This concern can only be remedied by a sworn declaration from the Microsoft attorneys that control access to the printed copies of Google highly confidential source code.

C. The ALJ Should Prevent Dr. Stevenson From Providing Testimony Regarding the Google Highly Confidential Source Code

To prevent any additional breach of the protective order and to prevent Microsoft from gaining advantage from its improper disclosure of Google highly confidential source code to Dr. Stevenson, Dr. Stevenson should be barred from testifying regarding Google highly confidential source code at the evidentiary hearing in this investigation. The confidential source code improperly provided to Dr. Stevenson is highly proprietary source code that Google does not

even share with its partners, such as Motorola. Paragraph 12 of Order No. 1 requires Microsoft to “make every effort to prevent further disclosure by it or by the person who was the recipient of such information.” (Ex. 1.) Not only was Microsoft at a minimum negligent in disclosing Google highly confidential source code to Dr. Stevenson, Microsoft has not taken steps to “prevent further disclosure.” Thus, a necessary first step in limiting any further disclosure is to preclude Dr. Stevenson from testifying at the hearing or otherwise regarding the Google highly confidential source code to which he was improperly granted access. Further, as Dr. Stevenson only received this information because of Microsoft’s clear violation of the protective order, this sanction is necessary to ensure that Microsoft does not benefit from its breach.

Conclusion

For all of the foregoing reasons, non-party Google respectfully requests an order that: (1) Dr. Stevenson may not testify at the evidentiary hearing regarding Google confidential source code, and (2) Microsoft must provide Google a declaration under oath confirming that no consultants or experts other than Mr. Goodin and Dr. Stevenson were permitted access to Google confidential business information and that Microsoft has not otherwise violated Order Nos. 1, 5 and 9.

Dated: August 10, 2011

Respectfully submitted,

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