

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN WIRELESS COMMUNICATIONS  
SYSTEM SERVER SOFTWARE, WIRELESS  
HANDHELD DEVICES AND BATTERY PACKS

Inv. No. 337-TA-706

**ORDER NO. 4: DENYING MOTION FOR ADDENDUM TO GROUND RULES  
WITH RESPECT TO INADVERTENT PRODUCTION;**

**GRANTING MOTION FOR ADDENDUM TO PROTECTIVE  
ORDER WITH RESPECT TO SOURCE CODE**


(April 20, 2010)

On April 7, 2010, the parties jointly submitted a motion for entry of an addendum to the Ground Rules with respect to inadvertently produced privileged documents. (Motion Docket No. 706-002.) The proposed addendum contains provisions permitting a “clawback” of inadvertently disclosed privileged documents or materials. (Mot., Ex. A at 1-2.) The parties should note that the Federal Circuit has held en banc that “[t]he attorney-client privilege evaporates upon any voluntary disclosure of confidential information to a third party” and that it “is irrelevant whether the [disclosure] was inadvertent. . . .” *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990) (superseded by statute in non-relevant part). Therefore, the Administrative Law Judge does not incorporate “claw back” procedures into the ground rules or protective order of an investigation. In the past, when presented with similar requests from parties, *see e.g. Certain Ceramic Capacitors and Products Containing Same*, Inv. No. 337-TA-692, Order No. 3 (U.S.I.T.C., December 11, 2009), the Administrative Law Judge has taken no position as to the freedom of the

parties to enter into a private stipulation. However, the Administrative Law Judge has noted that when the parties do so stipulate, they are responsible for resolving disputes relating to inadvertent production on their own. Where a dispute cannot be resolved by the parties, it is the Administrative Law Judge's view that a claw-back agreement may not shield the inadvertent production of an attorney-client privileged document to an adversary absent some showing that a party used a reasonable effort to protect the confidences it contains. *See e.g., Certain Cold Cathode Fluorescent Lamp ("CCFL") Inverter Circuits and Products Containing the Same*, Inv. No. 337-TA-666, Order No. 17 at 4 (U.S.I.T.C., August 5, 2009). Accordingly, Motion Docket No. 706-002 is DENIED.

On April 9, 2010, the parties jointly filed a motion for entry of an addendum to the Protective Order in order to address the production of highly confidential source code. (Motion Docket No. 706-003.) The Administrative Law Judge finds that this addendum should be GRANTED as noted in the attached Addendum to the Protective Order.

**SO ORDERED.**

  
E. James Gildea  
Administrative Law Judge

## ATTACHMENT A

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, D.C.**

**In the Matter of**

**CERTAIN WIRELESS COMMUNICATIONS  
SYSTEM SERVER SOFTWARE, WIRELESS  
HANDHELD DEVICES AND BATTERY PACKS**

**Inv. No. 337-TA-706**

**ADDENDUM TO PROTECTIVE ORDER**

(April 20, 2010)

18. All source code produced in this Investigation will be designated as “[supplier’s name] HIGHLY CONFIDENTIAL INFORMATION – COMPUTER SOURCE CODE & CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER,” will be treated as “Confidential” under the Protective Order and must at all times be maintained at the highest level of confidentiality.
19. Unless otherwise agreed to in writing between the supplier and the recipient, a recipient may only review source code on “stand alone” computers (i.e., computers that may be networked together by a private wired network, but that are not connected to any other network, internet or peripheral device except that the stand-alone computers may be connected to printer or printers), at (i) for RIM-produced source code, at the offices of Sidley Austin LLP in Washington, D.C.; (ii) for Motorola-produced source code, at the offices of Ropes & Gray LLP in New York; and (iii) for third-party-produced source code, at a reasonably accessible location in the United States as designated by the third party or

as otherwise agreed. Access is to be made available during regular business hours (8:00 a.m. to 6:00 p.m. local time) on 48 hours' notice. The recipient shall make its best efforts to restrict access to regular business hours, but should circumstances require, access will also be provided from 8:00 a.m. to 6:00 p.m. on Saturdays and Sundays, and/or from 6:00 p.m. through 12:00 midnight on weekdays, provided, however, that the recipient reimburse the supplier for reasonable expenses incurred in connection with such evening and weekend access, including but not limited to, overtime wages and expenses (such as, for example, meals and transportation) for supervisory support staff to monitor and assist with printing/labeling.

20. The parties will produce source code in computer searchable format, and, if maintained in native format in the ordinary course of business, in native format. The supplier must allow and provide support for printing of paper copies of the source code at the time of inspection by the recipient, which the recipient may take when completing an inspection. Any paper copies of the source code that are printed at the time of inspection will be printed on yellow paper with pre-printed sequential production numbers and the legend “[supplier’s name] HIGHLY CONFIDENTIAL INFORMATION – COMPUTER SOURCE CODE & CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER.” The recipient of such source code must keep that code in a secured container or location at all times. Paper copies of source code may not be copied and may not be removed from a secured container or location unless in a secured, private area.

Notwithstanding the foregoing sentence, outside counsel may maintain a single work-set

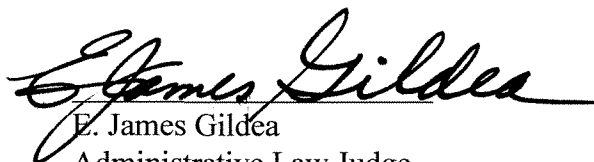
paper copy of the paper copies and may make such additional copies of the paper copies as are necessary for use as exhibits in court proceedings and at depositions. The recipient of the single work-set must keep that code in a secured container or location at all times. The recipient shall maintain a complete log of pages printed, by production number, and shall produce such a log at the time its first expert reports are delivered. For security purposes, this log must be produced to the supplier regardless of any other stipulation limiting expert discovery. Further, the log will be supplemented with each new expert report and 10 days after trial. The supplier shall not videotape or otherwise monitor review of code by the recipient. The parties will maintain a review log, identifying by date, name, employer and address, each person that accessed the code on behalf of the recipient.

21. Diagnostic software may be installed by the recipient on the supplier's standalone computer and may be used to perform searches of the source code. A back-up copy of the source code may be created on the supplier's stand-alone computer identified in Paragraph 19 and searching tools may also be installed on the supplier's standalone computer, to be used to inspect the code, to annotate, number the lines of, and to append headers and footers to the pages of, the back-up copy of the code. Any back-up copy will remain on a stand-alone computer and be subject to all the provisions of the Protective Order that govern source code.
22. To the extent necessary, the recipient may leave work product or other materials to which it claims privilege stored on the standalone computer on which the source code has been provided for a period not to exceed fourteen (14) calendar days. After notification by the

recipient that such work product or other materials to which it claims privilege are stored on such computer, personnel of the supplier may not examine the contents of the machine on which the source code has been provided, except for administrative reasons upon 48 hours notice explaining the reason for the necessity to examine the machine. At the expiration of this fourteen (14) calendar day period, the recipient will remove any such work product or other materials to which it claims privilege and the supplier will no longer be restricted in its access to the machine. This clause does not restrict a party's right to continue its review of the source code for longer than 14 days.

23. Upon final termination of this Investigation, each recipient will immediately destroy all printed pages of the source code and certify destruction thereof to the supplier.
24. Only persons who have complied with Paragraph 4 of the Protective Order, subject to the procedures of Paragraph 11 of the Protective Order, may have access to the supplier's source code. No employee of the recipient will be approved to view the supplier's source code (whether in electronic form or otherwise).

**SO ORDERED.**

  
E. James Gildea  
Administrative Law Judge

**IN THE MATTER OF CERTAIN  
WIRELESS COMMUNICATIONS SYSTEM  
SERVER SOFTWARE, WIRELESS HANDHELD  
DEVICES AND BATTERY PACKS**

337-TA-706

**PUBLIC CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** has been served by hand upon, the Commission Investigative Attorney, **Kevin G. Baer, Esq.**, and the following parties as indicated on April 20, 2010.



Marilyn R. Abbott, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112A  
Washington, D.C. 20436

**FOR COMPLAINANTS MOTOROLA, INC.:**

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( ) Other: \_\_\_\_\_

**FOR RESPONDENTS RESEARCH IN MOTION, LTD., RESEARCH IN MOTION,  
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