

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN COMPONENTS FOR
INSTALLATION OF MARINE
AUTOPILOTS WITH GPS OR IMU

Inv. No. 337-TA-738

Order No. 12: Granting Complainant's AGNC Motion No. 738-16 To Compel

In a filing dated January 24, 2011, pursuant to Commission rule 10.15 and ground rule 3, complainant AGNC Corporation (AGNC) moved to compel respondents Navico Holding AS, Navico UK, Ltd. and Navico Inc. (Navico) to compel responses to interrogatories and to produce files relating to and including source code for the accused products as requested in Interrogations Nos. 60-62 Request for Productions Nos. 42-43. (Motion Docket No. 738-16.)

The Commission Investigative Staff, in a filing dated February 3, 2011, argued that respondents Navico should produce its source code under the existing Protective Order, which protects confidential business information including source code.

The Navico respondents, in response to Motion No. 738-16, argued that the addendum to the Protective Order included with their response proposed by respondents Navico and negotiated "in large measure" by the parties should be entered, and that AGNC should be directed to conduct an inspection of the relevant source code, and to otherwise proceed in accordance with such software addendum.

The scope of discovery is broad, encompassing any matter, not privileged, that is relevant to the claims or defenses of the parties, including information appearing reasonably calculated to

lead to the discovery of admissible evidence. See Commission rule 210.27(b). Further, due to the breadth of discovery, the burden of proving that an issue is beyond discovery rests with the party resisting discovery. See, e.g., Certain Encapsulated Integrated Circuit Devices and Products Containing Same, Inv. No. 337-TA-501, Order No. 50 at 3 (May 18, 2004).

Complainant, in support of Motion No. 738-16, argued that it is asserting infringement of U.S. patent No. 6,596,976 ('976 patent) by Navico who manufactures autopilots under the Simrad and B&G brands; that claim 10 of the '976 patent is directed to a system that comprises (in brief) an attitude producer, a target coordinate producer, a pointing controller, and a visual/voice device; that the accused Navico autopilots are capable of operating several modes, one of which is NAV mode, which points a boat so that the boat can reach a certain target; that its investigation of a "NAV mode" leads it to believe that the operation of the accused Navico autopilots in this mode is relevant to the "computing rotation commands" element recited in asserted claim 2 and the "pointing controller for computing rotation commands" element recited in asserted claim 10; that the infringing autopilot installations as it relates to the Simrad products manufactured by Navico include the "RC" line of compasses in combination with their AP line of autopilots; that the combination of RC and an "AP" can be seen in an attached Exhibit A, which is a Simrad Order Form; {

} that similar products sold by Navico are believed to include the BGH260000, Halcyon 2000, Gimbaled Rate Compass, Halcyon Gyro Stabilized Compass, RC25, RC36, and RC37; that claim 10 includes the element "attitude producer" which complainant and respondents has construed to on some base level require knowledge of the device's position in multi-dimensions (e.g. pitch, roll and yaw); that complainant believes that the attitude producer is

processed in the accused products by either the above noted compasses alone or in combination with the autopilots; that although complainant believes that it can likely prove its case without the need to resort to source code, source code may be necessary to verify the operation of the autopilots in NAV mode, and to verify the use and/or processing of the attitude information from the compass and/or autopilot; that the information also may be needed to impeach the respondents; that the Furuno Electric Company, Ltd., Furuno U.S.A., Inc., Flir Systems Inc., Raymarine UK Ltd. and Raymarine Inc. respondents have taken the position that despite advertising the ability to measure pitch, roll and yaw, and/or attitude, the products really do not work as advertised; and that Navico has not attempted to back away from its claims to account for pitch, roll and yaw but Navico has also not provided non-infringement contentions as of yet.

With respect to complainant and all of the respondents attempting to work out a mutually acceptable source code addendum to the Protective Order to facilitate disclosure of this information, complainant argued that after months of trying, no agreement could be reached and therefore, on January 24, 2011, it produced its source code under the existing protective order and requested that Navico do the same; and that Navico has refused and has failed to move for a protective order,¹ necessitating Motion No. 738-16; that the attempts at resolution and/or discussions relating to the production of source code include at least the following:

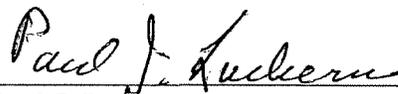
- 10.7.2010 Mutual exchange of proposed source code addendums
- 10.8.2010 Telephone conference with Respondents and Staff
- 10.29.2010 Submission of proposed source code addendums with discovery statements
- 12.10.2010 Respondents' sent over a source code addendum proposal

¹ Respondents Navico, in their response to Motion No. 758-16 does request entry of an addendum to the present Protective Order. However neither complainant nor the staff has had an opportunity to respond to Navico's request.

- 12.13.2010 AGNC responds that 12.10 source code addendum was same addendum already rejected
- 12.21.2010 AGNC provides red-line of Respondents' source code addendum
- 12.22.2010 Preliminary conference at which topic was discussed
- 12.30.2010 AGNC emails asking for update on 12.21 proposal
- 12.30.2010 Respondents indicate that they will respond shortly
- 1.5.2011 AGNC asks for status of red-line to provide update to CAJ Luckem
- 1.5.2011 Respondents indicate that no update to CALJ Luckem should be provided
- 1.5.2011 Respondents set a telephone conference for 1.7.2011
- 1.6.2011 AGNC asks for comments on 12.21 proposal
- 1.7.2011 Telephone conference with Respondents and Staff
- 1.11.2011 AGNC asks for an update on the issues discussed in the 1.7 teleconference
- 1.12.2011 Respondents' redline AGNC's redline Respondents' redline
- 1.12.2011 AGNC indicates that no agreement is possible. The proposed redline is inconsistent in its protection (e.g. limiting all source code to Washington D.C. while not limiting source code deposition to Washington D.C.) and provides protection greater than Respondents require internally. AGNC requests another meet-and-confer.
- 1.12.2011 Respondents promise a response
- 1.13.2011 Respondents respond but provide no documents evidencing what level of protection their respective companies actually require of others (e.g. consultants).
- 1.24.2011 AGNC produces AGNC source code under the existing Protective Order.
- 1.26.2011 Telephone conference with Respondents and Staff AGNC request Respondents let AGNC know if they will be moving for a protective order or if AGNC needs to move to compel.
- 1.31.2011 AGNC requests a response to issue discussed and/or meet and-confer for filing of the motion to compel.
- 2.1.2011 AGNC, Respondents and Staff discuss Furuno deposition issues and AGNC requests a time to talk.
- 2.1.2011 AGNC requests pre-motion telephone conference with CALJ Luckern. Robert Hall informed AGNC, who informed Respondents and Staff that pre-motion teleconference was waived and that motion was due February 2 and opposition February 3rd.

It is uncontroverted that complainant AGNC has produced its source code under the existing protective order. Moreover the existing protective order, which has been in existence for many years, has been adequate for past investigations. In addition this investigation was instituted on September 28, 2011 and the identification of any prior art is due on April 4, 2011. As indicated, supra, the attempts at resolution relating to the production of source code, has been going on for months without any success. Thus Motion No. 738-16 is granted and responses to interrogatories and production of files relating to and including source code for the accused products, as requested in Interrogations Nos. 60-62 Request for Productions Nos. 42-43, should be made by Navico no later than the close of business on February 16, 2011.

This order will be made public unless a bracketed confidential version is received no later than the close of business on February 16, 2011.


Paul J. Luckern
Chief Administrative Law Judge

Issued: February 9, 2011

CERTIFICATE OF SERVICE

I, James R. Holbein, hereby certify that the attached **Public Version Order** has been served by hand upon the Commission Investigative Attorney, Vu Q. Bui, Esq., and the following parties as indicated, on MAR 01 2011


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