

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
For the Northern District of California

UNITED STATES DISTRICT COURT
Northern District of California

LINEX TECH INC, No. C 13-00159 CW (MEJ)

Plaintiff, **DISCOVERY ORDER RE:**
v. **PROTECTIVE ORDER**
(Dkt. No. 142)
HEWLETT PACKARD CO, *et al.*,

Defendants.

I. INTRODUCTION

On April 11, 2013, pursuant to Judge Claudia Wilken’s Standing Order, the parties in this matter filed a joint discovery letter detailing a dispute over the terms of the protective order that will govern discovery and source code in this action.¹ Dkt. No. 142. On April 16, 2013, Judge Wilken referred the matter to the undersigned for discovery purposes. Dkt. No. 143. After considering the parties’ positions, the Court **ORDERS** that Defendants’ proposed Protective Order is adopted and will govern in this matter.

II. OVERVIEW

In the letter, Linex states that since December 2012, the parties have been attempting to agree on the terms of a protective order. Letter at 1. Linex proposed – and at some point thereafter, Defendants agreed – that the protective order entered in a related International Trade Commission investigation involving the same parties and non-parties, under which both parties and non-parties produced documents and/or source code, should serve as the model for drafting the protective order

¹ On April 29, 2013, Qualcomm Atheros, Inc., filed a letter raising its concerns regarding the parties proposed protective orders. Dkt. No. 166. Atheros explains that Linex has served it with a subpoena for documents, source code, and deposition testimony. *Id.* at 1. The Court has reviewed Atheros’ letter, but finds its concerns sufficiently addressed by Defendants in the parties’ joint letter.

1 in this action. *Id.* While the parties have agreed to certain modifications to the protective order, they
2 disagree as to seven substantive modifications that Linex seeks to implement. Defendants oppose
3 Linex’s proposed protective order, arguing that it weakens key provisions aimed at ensuring the
4 confidentiality and security of source code. *Id.* at 5. Defendants also contend that Linex has failed to
5 involve the third parties whose confidential information is at stake. *Id.* at 6. Thus, Defendants urge
6 the Court to adopt their protective order which mirrors that entered in the ITC investigation.
7 Defendants advance that, “[b]y using source code provisions in Defendants PO that the third-party
8 suppliers have previously agreed to, Defendants seek to avoid burdening this Court with needless
9 third-party motion practice and protective order disputes.” *Id.*

10 The Court will review each of the seven areas of contention in turn.

11 III. ANALYSIS

12 First, Linex seeks a finding from the Court that the discovery from the ITC investigation shall
13 be treated as produced or disclosed in this action. *Id.* at 2. Linex represents that “[t]he parties agree
14 that the ITC discovery is relevant in this case, and Linex submits that such discovery should be
15 deemed as produced or disclosed here.” *Id.* Defendants, however, argue that, “[u]nder the terms of
16 the ITC PO, the parties to the ITC investigation cannot consent to reusing in this case confidential
17 information produced by third parties at the ITC – only those third parties may consent to re-use.” *Id.*
18 at 6. Rather, Defendants contend that there is no dispute that discovery that *the parties* previously
19 produced in the ITC investigation should be deemed produced in this action. *Id.* The Court has
20 considered the parties’ arguments and agrees with Defendants that the ITC protective order does not
21 allow third-party discovery to be deemed produced or disclosed in this lawsuit. However, because it
22 is undisputed that the ITC protective order does not impose the same limitation on discovery
23 produced by the parties, such discovery may be deemed as produced in this case. Accordingly, the
24 Court rejects Linex’s proposed language and adopts Defendants’ proposed provisions for the section
25 entitled “Information Produced in ITC Action.” *See* Letter, Ex. 1 at 4.

26 Second, Linex seeks to include a provision increasing the number of individuals who may
27 review source code from four to ten. *Id.* at 2; Ex. 1 at ¶ 17(a). Linex submits that because many
28

1 additional products and relevant chipsets are at issue in this case, it expects that at least four of its
2 outside counsel will need to review the relevant source code and the prior cap of four individuals will
3 hinder its ability to have its outside counsel and experts effectively review the code. Defendants
4 oppose increasing the number of individuals who may review the code, arguing that in the ITC
5 investigation, Linex was able to manage the review of source code with four individuals and none of
6 the chip suppliers objected to this limit. *Id.* at 6-7. At this juncture, the Court agrees with Defendants
7 that Linex has failed to present a persuasive basis for its proposed modification, particularly in light
8 of the fact that this cap did not inhibit Linex from effectively completing its source code review in the
9 ITC investigation. If the cap later proves unworkable in this case, Linex may move for
10 reconsideration of this ruling. Accordingly, the Court rejects Linex's proposed language in ¶ 17(a).

11 Third, Linex seeks to include language increasing the pages of source code that can be
12 printed. *Id.* at 2. The ITC protective order stated that printed portions that exceed 50 continuous
13 pages or 1,000 total pages shall be rebuttably presumed excessive and not done for a permitted
14 purpose. *Id.* Linex proposes modifying those numbers to 100 and 1,500 pages, respectively. *Id.* In
15 support, it argues that during the ITC investigation, it reviewed source code related to hundreds of
16 accused products and relevant chipsets and printed thousand of pages of code. *Id.* Because of the
17 page limitations, Linex argues that it will only be able to print limited portions of the code. *Id.* It
18 also argues that because additional products and relevant chipsets are at issue in this case, it will need
19 to print additional source code to present its case for those new products. *Id.* Defendants, however,
20 contend that by increasing the limits on printed pages, Linex is simply attempting to bypass the
21 protective order restrictions that prevent a party from reviewing source code outside the secure source
22 code room. *Id.* at 7. They argue that this both frustrates the confidentiality provisions in the
23 protective order and increases the risk of a security breach. *Id.* The Court has carefully considered
24 the parties' positions and agrees with Defendants that Linex's proposed modification undermines the
25 protective order's restrictions preventing a party from reviewing source code outside the secure room
26 and weaken confidentiality protections. The Court therefore rejects Linex's proposed numbers and
27 adopts the caps previously used in the ITC protective order, as submitted by Defendants in ¶ 17(g).

28

1 Fourth, Linex seeks to insert language excluding copies of source code made for use at trial
2 from the five-copy limit on printed source code. *Id.* at 3. It argues that the five-copy limit “strains”
3 its ability to utilize source code during discovery and hinders its ability to present evidence at trial
4 because it must provide copies of trial exhibits to the Court, counsel, and relevant witnesses. *Id.*
5 Defendants argue that trial exception is unreasonable because it provides no limit on the number of
6 copies that can be made at trial and removing the restriction jeopardizes the security of the
7 confidential source code. *Id.* at 7. Defendants also argue that Linex did not object to using five
8 copies of source code at the ITC hearing, which it contends does not differ significantly from trial.
9 *Id.* After considering the parties’ arguments, the Court agrees with Defendants that Linex has not
10 presented a persuasive reason to exclude the cap on printed copies of source code for purposes of
11 trial. The cap previously proved workable in the ITC hearing and increasing the number of copies of
12 printed source code increases the potential for unwarranted disclosure. The Court therefore strikes
13 the phrase “or trial” from ¶ 17(h).

14 Fifth, Linex seeks to insert language allowing a receiving party to create electronic images or
15 copies of source code for presentation at trial in the form of demonstrative exhibits without first
16 receiving express written permission from the producing party. *Id.* at 3; Ex. 1 at ¶ 17(j). Linex
17 contends that by creating demonstrative exhibits, parties can present discrete and relevant portions of
18 the code to efficiently and more effectively discuss the function and relevance of the code. *Id.* at 3.
19 Its proposed language allows parties to do this without seeking permissions from the producing party
20 for purposes of presenting evidence at trial for the benefit of the fact finder. Defendants argue that
21 this is just another attempt by Linex to bypass the five-copy limit, which also increases the risk of
22 inadvertent exposure of confidential source code, especially given that the copy would be electronic
23 in form and easily transmittable. *Id.* at 7-8. The Court agrees with Defendants and strikes Linex’s
24 proposed language in ¶ 17(j).

25 Sixth, Linex seeks to modify the ITC protective order with respect to use of source code
26 during depositions. *Id.* at 3-4; Ex 1 at ¶ 17(k). Its proposed provision indicates that “the party taking
27 the deposition will retain one hard copy of the exhibit and will serve other parties as required.” *Id.* at
28

1 4. It also provides that “the Producing Party shall make available a laptop, for use by the deponent,
2 containing the CSC and having tools that are sufficient for viewing and searching the CSC.
3 Depositions that require use of a laptop containing the CSC shall take place at the office of the
4 Producing Party or another location agreed to by the Producing Party.” *Id.* In support of this
5 language, Linex argues that requiring the receiving party to identify the source code it wishes to use
6 in advance of the deposition invades work product and its proposed modification remedies this by
7 allowing the receiving party to bring copies of the code for use during a deposition. *Id.* at 4. It also
8 argues that a witness will often refer to several source code modules to understand and provide
9 context regarding other modules. *Id.* By requiring a producing party-provided laptop with the source
10 code for the witnesses’ use at depositions, it ensures that the witness will be able to testify as to the
11 relevance of that portion of code even if those portions have not been printed and made available to
12 the witness. *Id.* Defendants object to Linex’s proposal to allow the party taking the deposition to
13 retain a hard copy of any deposition exhibit containing source code. *Id.* at 8. They argue that the
14 producing party has more incentive than the receiving party to protect its own source code and should
15 therefore have control over the source code at all times. *Id.* Defendants do not address Linex’s
16 proposed language requiring the producing party to provide a laptop with source code and search
17 tools for the deponent’s use. With respect to the language allowing the receiving party to retain one
18 hard copy of the exhibit, the Court agrees with Defendants that concerns regarding preserving
19 confidentiality weigh against this procedure. As to the language regarding use of the laptop, while
20 Defendant has not raised any specific objection to this provision, the Court is unpersuaded by Linex’s
21 proffered justification for this requirement. Linex did not indicate that it was a recurring problem
22 during the ITC investigation. The Court therefore rejects Linex’s proposed provision and adopts
23 Defendants’ language for ¶ 17(k) regarding depositions.

24 Finally, Linex seeks to modify the procedure for monitoring review of source code. *Id.* at 4.
25 The ITC protective order and Supplement allow a producing party to monitor source code review by
26 sitting in with the reviewing party during the source code review or by observing the review through
27 a glass window. *Id.* Linex contends that to preserve work product conversations, any monitoring of
28

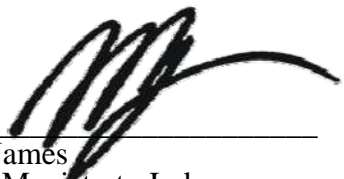
1 the source code review should be limited to observing the review through a glass window. *See* Ex. 1
2 at ¶ 17(1). Defendants object to the modification on the grounds that the ITC protective order
3 provides that the producing party, not the receiving party, dictates where the review occurs, and
4 because some of the parties require that the source code be kept in a windowless room for security
5 purposes. *Id.* at 8. As to Defendants’ first ground for objection, the Court does not see anything in
6 Linex’s proposed language modifying that the producing party dictates where the review occurs.
7 However, as to Defendants’ second ground, because some of the parties require their source code to
8 be kept in a windowless room, the option of having a person sit in the room during the review allows
9 the review to occur without interfering with the producing party’s security measures. The Court
10 therefore rejects Linex’s proposal to limit the method of monitoring review to a glass window.

11 **IV. CONCLUSION**

12 For the reasons set forth above, the Court **ORDERS** that Defendants’ proposed Protective
13 Order shall be entered in this matter.

14 **IT IS SO ORDERED.**

15
16 Dated: April 30, 2013

17 
18 _____
19 Maria-Elena James
20 United States Magistrate Judge
21
22
23
24
25
26
27
28