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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

HTI IP, LLC; NETWORK FLEET, INC.,)	Civil No. 10cv1783 DMS (NLS)
)	
Plaintiffs,)	ORDER REGARDING JOINT MOTION
v.)	FOR DETERMINATION OF
)	DISCOVERY DISPUTE NO. 1,
WEBTECH WIRELESS INC.; WEBTECH)	DENYING DEFENDANT’S REQUEST
WIRELESS USA LTD.; XIRGO)	FOR CLARIFICATION
TECHNOLOGIES, LLC; PROCON, INC.,)	
)	[Doc. No. 150]
Defendants.)	
_____)	
AND ALL RELATED COUNTERCLAIMS.)	
_____)	

Plaintiffs HTI IP, LLC and Networkfleet, Inc. (Plaintiffs) filed this patent infringement suit in the Eastern District of Texas against Procon, Inc., Xirgo Technologies, LLC, and WebTech Wireless, Inc. and WebTech Wireless USA, LTD (WebTech). The four patents asserted relate to a wireless appliance placed in a car and a host computer that analyzes the data received from that appliance. On February 5, 2010, the district judge in Texas signed a stipulated protective order negotiated by all parties. The case was then transferred to this district on August 26, 2010. On October 8, 2010, Plaintiffs and WebTech filed a joint motion asking this court to interpret paragraph 21(h) of the protective order. WebTech seeks clarification of paragraph 21(h) while Plaintiff disagrees that any clarification is needed. For the following reasons, the court **GRANTS** the joint motion to determine the discovery dispute and denies WebTech’s request for clarification of paragraph 21(h).

1 **Background.**

2 In response to discovery requests, on May 14, 2010 WebTech made available a limited set of
3 source code relevant to Plaintiffs' requests for source code and documents relating to that source code.
4 Quinn Decl. ¶ 4. Those files were made available to Plaintiffs' consultant, Stephen Gray, for him to
5 review at the Los Angeles office of WebTech's outside counsel, Fullbright & Jaworski. The files are on
6 a non-networked Fullbright & Jaworski computer and Gray can make printouts of any files that he
7 selects.

8 Gray signed the "Undertaking Concerning Confidentiality," attesting that he had read the
9 protective order and agreed to use the confidential information provided to him under the protective
10 order only for the purposes of the litigation. Quinn Decl. Ex. J. After his first visit to Fullbright &
11 Jaworski, WebTech did not ask for, and Gray did not provide to WebTech's counsel, a log or copy of
12 the files that he printed out. Quinn Decl. ¶ 6.

13 In response to other discovery requests, WebTech eventually made available for inspection by
14 Gray the entirety of its source code. Gray visited the office of Fullbright & Jaworski on July 28, 2010
15 and reviewed the source code. Again, WebTech did not ask for, and Gray did not provide to WebTech's
16 counsel, a log or copy of the files that he printed out. Quinn Decl. ¶ 12.

17 Plaintiffs requested that Gray again have access to review the source code. WebTech replied
18 that the inspection could go forward but that Gray would have to provide a log or copies of any printouts
19 he made. Plaintiffs refused, alleging that the protective order does not require Plaintiffs to provide
20 WebTech with a log or printouts, and that Gray's selected printouts are protected as work-product. The
21 parties agreed that no further printouts would be made, and then sought this court's intervention to
22 determine what, if anything, Plaintiffs are required to do under the protective order in terms of providing
23 a log or printouts of the source code that its consultant has selected for review.

24 Paragraph 21(h) of the protective order reads:

25 The Receiving Party shall be permitted to make printouts and photocopies
26 of Source Code Material, all of which shall be designated and clearly
27 labeled "CONFIDENTIAL-OUTSIDE ATTORNEY'S EYES ONLY" and
28 **the Receiving Party shall maintain a log** of all such files that are printed
or photocopied.

Quinn Decl. Ex. A, p.7 (emphasis added).

1 WebTech argues that the words “maintain a log” mean that “Plaintiffs are required to prepare” a
2 log. Jt. Mtn., p.4. It asks this court to clarify paragraph 21(h) so that it be read to require Plaintiffs to
3 produce the source code log at the time of the inspection in order to achieve the purpose of the
4 protective order to protect the producing party’s confidential and trade secret information. WebTech
5 argues that Gray’s selection of documents is not protectable as opinion work product because it is only
6 ordinary work product. It also asserts that Plaintiffs have been careless with WebTech’s highly
7 confidential source code because in Plaintiffs’ infringement contentions, Plaintiffs describe in detail the
8 source code but did not designate those contentions as highly confidential.

9 Plaintiffs argue that the word “maintain” only requires them to maintain their own log of files
10 that are printed out or photocopied. They argue that the protective order already protects the
11 confidentiality of the source code and provides a remedy in case of disclosure of that code. Further,
12 Plaintiffs have agreed to provide WebTech with a copy of their log if they designate Stephen Gray as a
13 testifying expert, at the conclusion of the litigation, or if WebTech has a reasonable suspicion that
14 Plaintiffs or their representatives have violated the protective order.

15 **Order.**

16 The court finds that the plain language of paragraph 21(h) only requires Plaintiffs to maintain
17 their own log of files that are printed out or photocopied from the source code. The parties negotiated
18 the terms of this detailed protective order, and if they had intended that a log or copies of printouts be
19 provided to the producing party at the time of the inspection, they would have included the specifics of
20 that procedure in the protective order. The court, therefore, denies WebTech’s request to clarify and
21 consequently modify the protective order.

22 While the protective order appears clear on its face, to avoid any further confusion regarding the
23 confidentiality of the source code produced, the court amends paragraphs 21(i) and 21(j), and adds 21(l),
24 so that it is clear that any log produced and maintained is also protected by the protective order. The
25 changes are noted in bold:

26 (i) Should such **log**, printouts or photocopies be transferred back to
27 electronic media, such media shall be labeled “CONFIDENTIAL-
28 OUTSIDE ATTORNEYS’ EYES ONLY” and shall continue to be treated
as such;

1 (j) If the Receiving Party's outside counsel, consultants, or experts obtain
2 the **log**, printouts or photocopies of Source Code Material, the Receiving
3 Party shall ensure that such outside counsel, consultants, or experts keep
4 the **log**, printouts or photocopies in a secured locked area in the offices of
5 such outside counsel, consultants, or expert. The Receiving Party may also
6 temporarily keep the **log**, printouts or photocopies at: (i) the Court for any
7 proceedings(s) relating to the Source Code Material, for the dates
8 associated with the proceeding(s); (ii) the sites where any deposition(s)
9 relating to the Source Code Material are taken, for the dates associated
10 with the deposition(s); and (iii) any intermediate location reasonably
11 necessary to transport the **log**, printouts or photocopies (e.g., a hotel prior
12 to a Court proceeding or deposition);


13 ***

14 **(l) The Receiving Party shall produce the log, printouts or photocopies**
15 **of Source Code Material to the Producing Party either at the time of**
16 **expert witness designation, if that designated witness's testimony will**
17 **involve the Producing Party's Source Code, or at the conclusion of the**
18 **litigation.**

19 Finally, regarding WebTech's concerns about maintaining the confidentiality of its source code,
20 the outside reviewing consultant at issue here has already executed an agreement to be bound by the
21 protective order, and WebTech has remedies through the protective order should it reasonably suspect
22 that the consultant has violated the terms of the protective order. Regarding the lack of confidential
23 designation of Plaintiffs' infringement contentions, paragraph 21(f) provides that documents containing
24 quoted source code shall be stamped and treated as "CONFIDENTIAL-OUTSIDE ATTORNEYS'
25 EYES ONLY," and paragraph 4 of the protective order provides a procedure for WebTech to challenge
26 the confidential designation (or lack thereof) of the documents produced.

27 **IT IS SO ORDERED.**

28 DATED: October 20, 2010


Hon. Nita L. Stormes
U.S. Magistrate Judge
United States District Court