

ENTERED

August 07, 2020

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**FISHER-ROSEMOUNT SYSTEMS, INC.
and
EMERSON PROCESS MANAGEMENT
LLLP,**

Plaintiffs,

v.

**ABB LTD, ABB, INC., ABB AB, and ABB
AUTOMATION GMBH,**

Defendants.

Case No. 4:18-cv-00178-KPE

AGREED COVID-19 REMOTE SOURCE CODE REVIEW PROTECTIVE ORDER

As a result of the COVID-19 public health emergency, and the related Federal, State, and local travel restrictions and shelter-in-place orders, which make in-person source code review unworkable, the parties agree to replace Section 7.2 Review of Source Code in the original Protective Order entered in this case (ECF No. 44) with the following COVID-19 Remote Source Code Review Protective Order (“COVID Review Protocol”). This COVID Review Protocol shall supersede the entirety of Section 7.2 Review of Source Code, but all other Sections of the original Protective Order shall remain in full force and effect.

The Parties’ acknowledge that the terms below do not reflect the Producing Party’s normal security protocols, but instead are an accommodation in the interest of moving the case forward during the unprecedented COVID-19 public health emergency. A Party’s agreement to make Source Code available pursuant to the COVID Review Protocol shall not be construed as an admission that these provisions are appropriate in any other case or that these provisions provide an acceptable level of security for the Producing Party’s Source Code at any other time not affected by the exigencies of the ongoing COVID-19 public health emergency. The COVID Review

Protocol may not be cited as an appropriate practice in this or any other case after Federal, State, and local travel restrictions, personal health safety concerns related to COVID, and shelter-in-place orders no longer exist.

NOW THEREFORE, the Parties hereby stipulate, and the Court may enter this COVID-19 Remote Source Code Review Protective Order, that:

1. Source Code shall be loaded to a securely hosted virtual machine (the “Source Code Virtual Machine”) with remote access through a secure Virtual Network Computing or Software Defined Perimeter Network (the “Network”), which shall be maintained by the Producing Party or its outside counsel.

2. The Producing Party shall, at its election, either:

(a) set up a Network Server with a publicly-facing API and set up the required User Name and Password credentials for the Receiving Party to access the Source Code Virtual Machine through the Network Server and provide download information for installation of a Network Client on a personal computer system to be used for the Receiving Party’s review of the source code; or

(b) provide the Receiving Party’s designated Source Code review expert(s) (“Authorized Reviewer(s)”) a Source Code Review Laptop wherein the only functionality on said Source Code Review Laptop(s) is to access the Source Code Virtual Machine through the Network Server. The Source Code Review Laptop(s) shall not be accessed by anyone other than the Authorized Reviewer, shall have USB and other peripherals disabled, and the Network Server shall not be accessed with any device other than the Source Code Review Laptop(s).

3. The Source Code Virtual Machine shall be set up using a hosting method of the Producing Party’s choosing, in a secure hosting service such as Microsoft Azure or the like.

4. The Source Code Virtual Machine shall be a Windows-based operating system.

5. If technically feasible, and upon request, up to two Network sessions will be allowed at the same time.

6. The Source Code Virtual Machine shall be password protected and only accessible through the secure Network. The Source Code Virtual Machine will not allow data to be transmitted through any peripheral device connections of the local environment.

7. The use or possession of any electronic input/output device (*e.g.*, USB memory stick, mobile phone, tablet, personal digital assistants (PDAs), Blackberries, Dictaphones, voice recorders, external or portable telephone jack, camera or any camera-enabled device, CD, floppy disk, portable hard drive, laptop, or any device that can access the Internet or any other network or external system, etc.) is strictly prohibited while accessing Source Code on the Source Code Virtual Machine via the Network Server and Network Client.

8. The Producing Party may take appropriate measures through modification of software on the Source Code Virtual Machine to prevent the use of such electronic input/output devices in conjunction with the Source Code Virtual Machine and to prevent copying, duplicating, pasting, printing or any other duplication of the source code.

9. The Producing Party may log all connections to the Source Code Virtual Machine. The Producing Party may also terminate the secure connection to the Source Code Virtual Machine after 30 minutes of inactivity.

10. The Authorized Reviewer shall, upon the Producing Party's request, provide the Producing Party with details regarding the physical location where the Source Code review will occur. The Authorized Reviewer shall not access the Source Code in public or when any other person is present in the same room.

11. The Producing Party may remotely monitor any individuals from the Authorized Reviewer accessing the Source Code Virtual Machine during their review through a camera associated with the local environment being used to access the Virtual Machine. The Authorized Reviewer who intends to review the Source Code shall provide, via an agreed email distribution list, at least two hours prior notice to the Producing Party that they are beginning a review session at a specific time. For purposes of monitoring, the Authorized Review shall only access the Source Code during normal business hours, Monday through Friday between 9AM EST and 5PM PST.

12. The Receiving Party shall provide to the Producing Party a list of any individuals who access Source Code via the Source Code Virtual Machine and the date and approximate time(s) of such review.

13. The Producing Party is under no obligation to produce compilable Source Code and the Receiving Party shall not attempt to compile any produced Source Code.

14. The Producing Party shall install tools on the Source Code Virtual Machine that are sufficient for viewing and searching Source Code produced, if such tools exist and are presently used in the ordinary course of the Producing Party's business.

15. The Receiving Party, at its own expense, may request that the Producing Party install software tools on the Source Code Virtual Machine to review and search the Producing Party's Source Code, provided that such software tools are reasonably necessary for the Receiving Party to perform its review of the Source Code and are consistent with all of the protections provided herein.

16. Requests for software tools must be made at least five (5) days in advance of the date upon which the Producing Party provides access to the Source Code Virtual Machine. Timely requests for the installation of such software tools will not be unreasonably denied so long as the

requested software tool is compatible with the operating system, and other software necessary to make the Source Code available for inspection. The Receiving Party must provide the Producing Party with a licensed copy of the relevant software, whether using a CD, DVD, or in the case of software accessible over the internet, relevant keys or information to legally access reasonably in advance of any scheduled Source Code Review.

17. At the conclusion of Source Code review, any Authorized Reviewer in possession of a Source Code Review Laptop(s) under the terms of this Addendum shall return such computer to the Producing Party.

18. To the extent portions of Source Code Material are quoted in a Source Code Document, either (a) the entire Source Code Document will be stamped and treated as HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY SOURCE CODE or (b) those pages containing quoted Source Code Material will be separately stamped and treated as HIGHLY CONFIDENTIAL-ATTORNEYS’ EYES ONLY SOURCE CODE.

19. The Receiving Party may request paper copies (“Source Code Printouts”) of limited portions of the Source Code, not to exceed a continuous block of more than 50 pages or more than 500 pages total. The Receiving Party may request to increase either or both limits, if needed. The printing of directory paths or structures and file names shall not count toward the consecutive or aggregate page count. To ensure the proper pages requested by the Receiving Party are printed, the Producing Party shall provide the ability for the Receiving Party to save relevant files for printing as PDFs (preserving the line numbers and formatting using a program such as Notepad++) to a folder located on the Source Code Virtual Machine.

20. At the conclusion of any Source Code Review, the Receiving Party shall notify the Producing Party of the existence of Source Code Printouts that it requests to be produced.

Thereafter, Source Code Printouts shall be produced in accordance with the provisions of the Protective Order. Any request for Source Code Printouts must be made within seven (7) days of the conclusion of Source Code Review.

21. The Receiving Party shall only request printing of those limited portions of the Source Code specifically necessary for a case activity (e.g., as evidence for trial or an exhibit for an expert's report). Counsel for the Producing Party will keep the originals of all printed Source Code. Producing Party will produce a Bates-numbered copy of the originals of all printed Source Code Printouts to Receiving Party within ten (10) business days of the request for printing. The Parties will cooperate in good faith if a different timeframe for production is required. The Producing Party shall print every page of Source Code in 12-point font and with information necessary to later identify that Source Code, such as, but not limited to, a header or footer, that identifies the file name and directory path.

22. The Receiving Party shall make no more than three (3) paper copies of the Source Code Printouts and shall only transmit the Source Code Printouts via a secure transport carrier. Source Code Printouts shall not be copied or transferred to any electronic media.

23. Receiving Party's Outside Counsel shall keep log(s) recording the identity of each individual to whom each hard copy of each Producing Party's Source Code is provided and when it was provided to that person in the first instance. Within thirty (30) days after the issuance of a final, non-appealable decision resolving all issues in this action, the Receiving Party must serve the log(s) upon the Producing Party together with all three (3) complete copies of the Source Code Printouts and must confirm in writing that all materials marked "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY SOURCE CODE" have been destroyed.

24. A Receiving Party may include excerpts of Source Code from the Source Code Printouts in a pleading, expert report, discovery document, deposition transcript, other Court document (“Source Code Documents”) provided that the Source Code Documents include excerpts of no more than 25 consecutive lines of Source Code, are appropriately marked under this Order, restricted to those who are entitled to have access to them as specified herein and in the Protective Order (ECF No. 44), and, if filed with the Court, are filed under seal in accordance with the Court's rules, procedures and orders. The Receiving Party may request to include an excerpt of more than 25 consecutive lines of Source Code in Source Code Documents, if needed. Source Code shall not be disclosed to mock jurors. Prior to trial, the Parties will meet and confer to determine how Source Code will be handled at trial and will set forth an agreed Trial Source Code Protocol in the Pretrial Order, if needed. Nothing in this Paragraph shall limit the number of lines that a Source Code Reviewer may capture in Source Code Printouts.

25. The Receiving Party shall ensure that such Outside Counsel and Outside Consultants keep Source Code Printouts in a secured locked area in the offices of such Outside Counsel or Outside Consultants. A person authorized to receive Source Code Printouts for the Receiving Party may also temporarily keep the Source Code Printouts at: (i) the Court for any proceedings(s) relating to the Source Code, for the dates associated with the proceeding(s); (ii) the sites where any deposition(s) relating to the Source Code are taken, for the dates associated with the deposition(s); and (iii) any intermediate location reasonably necessary to transport the Source Code Printouts (e.g., a hotel prior to a Court proceeding or deposition). Source Code Printouts shall not be given to Court Reporters.

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A handwritten signature in black ink, appearing to read "Theodore P. Stevenson". The signature is written in a cursive style with a large, stylized initial "T".

U.S. DISTRICT JUDGE

Signed on: August 6, 2020