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VIA ELECTRONIC DELIVERY

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**Re: *TQ Delta, LLC v. ADTRAN, Inc.*
C.A. Nos. 14-954-RGA, 15-121-RGA**

Dear Counsel:

This letter shall serve as my decision and order concerning Plaintiff's Motion to Compel Inspection of Defendant's Source Code (the "Motion").

BACKGROUND

On July 17, 2014, Plaintiff TQ Delta, LLC ("Plaintiff" or "TQ Delta") filed suit against Defendant ADTRAN, Inc. ("Defendant" or "Adtran") in the United States District Court for the District of Delaware [D.I. #1] (the "Complaint"). TQ Delta seeks an award of declaratory relief and monetary damages arising out of Adtran's alleged infringement of a number of patents relating to digital subscriber line technology (collectively, the "Patents").

On April 14, 2015, the Court entered an order approving the proposed protective order (the “Protective Order”).¹ The Protective Order regulates the parties access to and use of, *inter alia*, source code.² It states that the source code “shall be made available ... on advance notice of two (2) business days until the close of discovery in this action.”³ The word, discovery,’ is not a defined term,⁴ and its meaning lies at the heart of this dispute.

TQ Delta seeks the entry of an order compelling Adtran to provide additional access to its source code.⁵ Adtran previously provided TQ Delta with access,⁶ in which the Protective Order outlined the terms and conditions under which TQ Delta was permitted to conduct its review. Following the close of fact discovery, Adtran indicated that its expert, Bruce McNair, reviewed portions of the source code which TQ Delta did not choose to print.⁷ Although its expert has already issued her report, TQ Delta asserts that it needs additional access to the source code.⁸ In support of its request, TQ Delta argued that the Protective Order imposed an ongoing obligation on Adtran to provide access to its source code through the close of expert discovery.⁹ TQ Delta asserts that its position is consistent with the Court’s decision in a parallel action.¹⁰ Further, TQ Delta contends that Adtran’s decision to withhold access to the source code is unreasonable.¹¹

¹ See D.I. #50. The Protective Order was jointly submitted. See D.I. #50, p. 1.

² See D.I. #50, ¶ 3.

³ D.I. #50, ¶ 7.4(e).

⁴ See D.I. #50, ¶¶ 2, 7.4(e).

⁵ See Motion, p. 1.

⁶ See *id.*

⁷ See Motion, Ex. A.

⁸ See Motion, pp. 1-3.

⁹ See Motion, p. 2.

¹⁰ See Motion, pp. 2-3.

¹¹ See Motion, p. 3.

Adtran opposes TQ Delta's request for relief (the "Response"). First, it maintains that "TQ Delta has no continuing right to inspect source code under the parties' stipulated protective order or otherwise."¹² The Protective Order states that access must be given through the close of discovery, which means fact discovery in Adtran's opinion.¹³ Further, Adtran disputes the relevance of the Court's ruling regarding the Broadcom source code to this Action.¹⁴ Finally, Adtran argues that the requested information lies outside of the scope of TQ Delta's expert opinion, in which case, the information is unnecessary.¹⁵

On May 11, 2020, the Special Master heard oral argument.¹⁶ At the conclusion of oral argument, the Special Master took the matter under advisement. The following day, Adtran submitted additional materials in support of its position (the "Supplement").

ANALYSIS

Adtran Shall Provide TQ Delta With Access To Its Source Code.

The Court will interpret its orders in a manner similar to the construction of a contract or statute.¹⁷ The rules of construction under Delaware law are well settled,¹⁸ in which the Court will give effect to

¹² See Response, p. 1.

¹³ See Response, pp. 1-2.

¹⁴ See Response, p. 2.

¹⁵ See Response, p. 3.

¹⁶ See Transcript of Oral Argument on Plaintiff's Motion to Compel Source Code, *TQ Delta, LLC v. ADTRAN, Inc.*, Civil Action Nos. 14-954-RGA, 15-121-RGA (D. Del. May 11, 2020), White, S.M. ("Transcript").

¹⁷ See *MobileMedia Ideas LLC v. Apple Inc.*, 2013 WL 5314709, at *1 (D. Del. Sept. 16, 2013); *Rotex Global, LLC v. Gerard Daniel Worldwide, Inc.*, 2019 WL 5102165, at *6 (M.D. Pa. Oct. 11, 2019).

¹⁸ See *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust*, 28 A.3d 1059, 1070 (Del. 2011).

the intent of the parties.¹⁹ Where an order is unambiguous, the Court will apply its plain language meaning.²⁰ To the extent that the Court finds an order ambiguous, it may consider extrinsic evidence.²¹

The parties' dispute focuses on Paragraph 7.4(e) of the Protective Order, which states that the source code "shall be made available ... upon reasonable request on advance notice of two (2) business days until the close of discovery in this action."²² The parties disagree on the meaning of 'discovery,' which is not a defined term.²³ Despite the parties' failure to define the word, the Special Master finds that 'discovery' is unambiguous in light of the parties' use of the word throughout the Protective Order.²⁴ Accordingly, in this context, 'discovery' encompasses both fact and expert discovery.

The Special Master's finding is based on the language of the Protective Order. First, the Protective Order does not make use of the words 'fact discovery' or 'expert discovery.'²⁵ The omission was likely deliberate in light of the parties' intent to cast a wide net of confidentiality. Second, the Protective Order makes use of the word, 'discovery,' in a broad manner. By way of example²⁶ –

¹⁹ See *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010).

²⁰ See *AT&T Corp. v. Lillis, et al.*, 953 A.2d 241, 252 (Del. 2008).

²¹ See *id.*

²² D.I. #50, ¶ 7.4(e).

²³ See D.I. #50, ¶ 2.

²⁴ See *Estate of Osborn*, 991 A.2d at 1160 ("The determination of ambiguity lies within the sole province of the court.").

²⁵ See D.I. #50.

²⁶ See *Estate of Osborn*, 991 A.2d at 1160; 17A AM. JUR. 2D, *Contracts* § 331.

- Paragraph 1 states that the Protective Order “governs the production or exchange of documents and other *discovery* materials ... through the formal *discovery* process ...”²⁷
- Paragraph 1 further states that “[i]f *discovery* is sought from third parties in connection with this Action, and this *discovery* would require a third party to disclose and/or produce Confidential or Highly Confidential information, that third party may gain the protections of this Order ...”
- Paragraph 2.2 defines ‘Discovery Materials’ as “all items or information ... that are produced in *discovery* in this Action.”²⁸
- Paragraph 2.9 defines ‘Designating Party’ as “a Party or non-party that designates information or items that is produced in disclosures or in responses to *discovery* ...”²⁹
- Paragraph 3 states that the Protective Order “shall [not] alter or change in any way the *discovery* provisions of the Federal Rules of Civil Procedure. Identification of any individual pursuant to this Protective Order does not subject that individual to deposition or any other form of *discovery* ...”³⁰
- Paragraph 11.1 states that “[a]n expert who will testify in this Action ... and who is used for any purpose other than an advice-of-counsel defense shall not be subject to *discovery* on any draft of his or her reports in this Action ... and such draft reports, notes or outlines for draft reports ... are also exempt from *discovery*.”³¹

These references clearly demonstrate an intent by the parties to use the word, ‘discovery,’ in a broad manner, in which case, ‘discovery’

²⁷ D.I. #50, ¶ 1 (emphasis added).

²⁸ D.I. #50, ¶ 2.2 (emphasis added).

²⁹ D.I. #50, ¶ 2.9 (emphasis added).

³⁰ D.I. #50, ¶ 3 (emphasis added).

³¹ D.I. #50, ¶ 11.1 (emphasis added).

encompasses both fact discovery and expert discovery. A more narrow construction of the word would limit the Protective Order to only those materials exchanged during the fact discovery period. The parties could not have intended such an absurd result.³² Finally, a broad understanding of ‘discovery’ comports with the intent of the parties concerning access to and review of source code. Section 7.4(n) of the Protective Order states that “[a]ccess to and review of the Source Code shall be strictly for the purpose of investigating the claims and defenses at issue in this Action and prosecuting or defending this Action.”³³ The parties did not limit access to expert-specific issues or otherwise qualify access to source code “based on scientific, technical, or other specialized knowledge ...”³⁴ To the contrary, experts and non-experts alike are permitted to access and review the source code.³⁵ Consequently, the Special Master construes ‘discovery’ to require Adtran to grant TQ Delta access to the source code through the close of expert discovery.

The Special Master further finds that Adtran’s interpretation of the Protective Order is unreasonable.³⁶ The parties failed to modify discovery in Paragraph 7.4(e) of the Protective Order by inserting the words, ‘fact’ or ‘expert’, in front of ‘discovery.’ The Special Master is not willing to revise the Protective Order after the fact.³⁷ Further, as

³² See *Estate of Osborn*, 991 A.2d at 1159.

³³ See D.I. #50, ¶ 7.4(n).

³⁴ F.R.E. 701(c). See also F.R.E. 702.

³⁵ See D.I. #50, ¶ 7.4(g). See also D.I. #50, ¶¶ 2.11-2.14.

³⁶ The Special Master characterizes Adtran’s interpretation of the Protective Order as ‘unreasonable’ in light of Delaware case law, which provides that the test for determining ambiguity is whether “a reasonable person in the position of the parties would have thought [the contractual language] to mean.” *AT&T Corp.*, 953 A.2d at 252. As explained below, neither Adtran nor its attorneys have litigated this dispute in an unreasonable manner.

³⁷ See *Nemec*, 991 A.2d at 1126; *Allied Cap. Corp. v. GC-Sun Holdings, LP, et al.*, 910 A.2d 1020, 1022 (Del. Ch. 2006) (“[C]ourts will not

explained above, the parties' use of 'discovery' throughout the Protective Order was intended to provide broad protections to the parties' confidential materials.³⁸ A narrow understanding of 'discovery' would not serve this purpose; rather, a narrow construction of the order would provide a backdoor exception, which the parties could not possibly have intended.³⁹

Further, the Special Master finds that TQ Delta is entitled to inspect Adtran's source code based on the inherent authority afforded the Court to manage discovery in a fair and just manner.⁴⁰ TQ Delta relies on the Court's decision in a parallel action regarding its attorneys' access to the Broadcom source code for legal support. The Court, however, did not provide TQ Delta with access to the Broadcom source code.⁴¹

rewrite contractual language covering particular topics just because one party failed to extract as complete a range of protections as it, after the fact, claims to have desired during the negotiation process.”).

³⁸ The Special Master finds that its construction of the Protective Order is the only reasonable interpretation, and thus, the Protective Order is unambiguous. As a result, the Special Master may not consider extrinsic evidence, such as the Supplement. *See Estate of Osborn*, 991 A.2d at 1160. Even so, the Supplement requires the Special Master to consider evidence of TQ Delta's interpretation of a different document in a different case in an entirely different context. *See Supplement*. The Special Master finds the extrinsic evidence distinguishable. Moreover, based on the respective positions taken by TQ Delta and Broadcom in the joint report, *see Supplement*, and the Court's ultimate decision to maintain the ethical wall in some respect, *see Motion, Ex. E*, one could argue that the Court disagreed with TQ Delta's interpretation of its order.

³⁹ *See id.* at 1161 (“We cannot countenance such an absurd interpretation of the contract.”).

⁴⁰ *See* FED. R. CIV. P. 1.

⁴¹ *See TQ Delta, LLC v. 2Wire, Inc.*, Civil Action No. 13-01835-RGA (D. Del. Mar. 5, 2019), Andrews, J. (regulating interactions between plaintiff's counsel and conflict counsel concerning expert discovery).

Broadcom offered to provide continued access to its source code through the end of expert discovery as a courtesy.⁴² Thus, the Court's order regarding the Broadcom source code is not persuasive.⁴³

The Court's decision in a related contested matter, however, is relevant. In *TQ Delta, LLC v. 2Wire, Inc.*, the Court granted the defendant leave to serve a supplemental expert report based on, *inter alia*, the defendant's limited access to source code.⁴⁴ As part of its analysis of the *Pennypacker* factors, the Court explained that "it was ... logical for [d]efendant to believe that it could undertake a more streamlined review of the specific source code identified in the initial reports at a later date."⁴⁵ This limited finding provides insight into the Court's thought process, in which the Court clearly contemplated that the defendant in

⁴² *See id.* at *2. *See also* Transcript of Discovery Dispute Conference at 10:25 – 11:2, *TQ Delta, LLC v. 2Wire, Inc.*, Civil Action No. 13-01835-RGA (D. Del. Feb. 15, 2019), Andrews, J. ("And fact discovery has closed at this point for all families, and Broadcom is sort of just doing this as a courtesy to make it available still.").

⁴³ *See* Transcript, p. 20:13-18. The Special Master also fails to find Adtran's reliance on the Court's decision in another related matter persuasive. *See* Supplement. The Court previously denied TQ Delta's motion to compel Broadcom's compliance with a subpoena. *See TQ Delta, LLC v. 2Wire, Inc.*, Civil Action No. 13-01835-RGA (D. Del. June 13, 2017), Andrews J. (denying plaintiff's motion to compel). The Court based its decision on jurisdictional grounds. *See id.* at *3.

⁴⁴ *See TQ Delta, LLC v. 2Wire, Inc.*, 2019 WL 1529952, at *2 (D. Del. Apr. 9, 2019) ("Given the factual circumstances, and [d]efendant's inability to access the source code for a significant period of time during expert discovery, I do not find that [d]efendant's failure to disclose the information during the scheduled period for expert reports was in bad faith, and thus, the fourth *Pennypacker* factor weighs against exclusion.").

⁴⁵ *Id.*

that action would be – and should have been – afforded access to source code following the close of fact discovery.⁴⁶

Finally, Adtran’s claims of prejudice do not fall on deaf ears. It is possible that TQ Delta could modify or enlarge the scope of its existing claims against Adtran based on its continued access to source code. In such instance, Adtran possesses an adequate remedy—a motion to strike or motion *in limine*. Adtran is well familiar with the process, and it has employed this remedy with some success.⁴⁷ To the extent that TQ Delta oversteps, the Special Master is confident that Adtran will take appropriate action.

The Parties Shall Meet And Confer To Coordinate Access To Adtran Source Code.

Although the Special Master finds that TQ Delta shall be provided access to the Adtran source code, it is not willing to compel Adtran to send its source code to TQ Delta for the latter’s review absent special circumstance. The Protective Order goes to great lengths to protect source code, and TQ Delta’s proposal would appear to violate both the letter and spirit of the order. The COVID-19 pandemic presents numerous challenges, and thus, the parties must meet and confer regarding the conditions under which TQ Delta may view the source code. To the extent that the parties are unable to reach an agreement by the close of business on Tuesday, May 19, 2020, they shall submit competing proposals for the Special Master’s review by noon on Wednesday, May 20, 2020.

TQ Delta Is Not Entitled To Attorneys’ Fees.

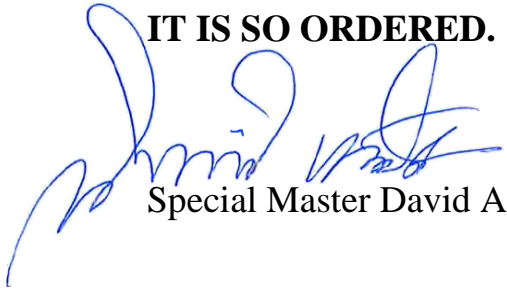
The Motion includes a request for attorneys’ fees under Rule 37 of the Federal Rules of Civil Procedure. Based on a review of the parties’ submissions, the Special Master finds that Adtran possessed

⁴⁶ *See id.*

⁴⁷ *See* Response, Ex. G-J.

justification for its litigation position.⁴⁸ While Adtran's argument was ultimately unsuccessful, the Special Master fails to find that circumstances surrounding the parties' dispute compel an award of sanctions.⁴⁹ Accordingly, TQ Delta's request for attorneys' fees is denied.

IT IS SO ORDERED.



Special Master David A. White

⁴⁸ See FED. R. CIV. P. 37(a)(5)(A)(ii).

⁴⁹ See FED. R. CIV. P. 37(a)(5)(A)(iii).