

# In the United States Court of Federal Claims

SCIENCE APPLICATIONS  
INTERNATIONAL CORP.,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

MICROSOFT CORPORATION,

Intervenor-Defendant,

and

L3 TECHNOLOGIES, INC.,

Third-Party Defendant.

No. 17-cv-825

Filed Under Seal: September 8, 2022

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*Thomas L. Halkowski*, Fish & Richardson P.C., Washington, District of Columbia for Intervenor-Defendant. With him on the briefs are *Ahmed J. Davis*, and *Kenton W. Freeman, Jr.*, Fish & Richardson P.C., Washington, District of Columbia.

<sup>1</sup> This Memorandum and Order was filed under seal in accordance with the Protective Order entered in this case (ECF No. 34) and was publicly reissued after incorporating all redactions proposed by the parties. (ECF No. 317.) The sealed and public versions of this Memorandum and Order are identical, except for the addition of the publication date and this footnote.

## MEMORANDUM AND ORDER

Plaintiff Science Applications International Corporation (Plaintiff or SAIC) accuses Defendant the United States (Government or Defendant) of infringing Plaintiff's patent, which relates to heads-up displays, "by entering into contracts with Plaintiff's competitors for the manufacture and subsequent use of night vision goggle weapon systems with specialized heads up displays that allegedly use Plaintiff's patented technology." *Sci. Applications Int'l Corp. v. United States*, 148 Fed. Cl. 268, 269 (2020); *see also* Complaint (ECF No. 1) (Compl.) ¶¶ 2, 37. Intervenor-Defendant Microsoft Corporation (Microsoft) is a contractor that provides such products to the Government. *See* Microsoft Corporation's Unopposed Motions to: Intervene Pursuant to Rule 24 and Modify Schedule (ECF No. 59). The parties agree that Microsoft's source code relating to the Rapid Target Acquisition (RTA) feature is key evidence that may establish whether Microsoft's product infringes Plaintiff's patent. *See* Transcript of December 9, 2021 Hearing (ECF No. 238) (Dec. 9, 2021 Tr.) at 7:3-11, 22:5-14, 40:5-7. Unsurprisingly, issues concerning this source code have caused conflict throughout discovery.

Pending before the Court is Plaintiff's Motion for Costs and Sanctions Under Rule 37 (ECF No. 272) (Pl.'s Mot.). Plaintiff alleges that Microsoft produced deficient code in September 2021 and provided inaccurate responses to Plaintiff's interrogatories. *Id.* at 5-6.<sup>2</sup> Plaintiff asserts that it relied on these purportedly deficient discovery responses in crafting its January 6, 2021 supplemental infringement contentions. *Id.* Subsequently, Microsoft revised its interrogatory responses several times and, in March 2022, produced additional source code, even after certifying on September 18, 2021, that it had "substantially completed" its source code and document production. *Id.* at 6. Plaintiff states that Microsoft's 2022 production and interrogatory revisions

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<sup>2</sup> Citations throughout this Memorandum and Order refer to the ECF-assigned page numbers, which do not always correspond to the pagination within the document.

necessitated a second source code review, for which Plaintiff now moves for reimbursement. *Id.* at 6-7. Plaintiff further seeks to prevent Microsoft “from relying on documents and source code produced after SAIC’s January 6, 2021 supplemental contentions to support its non-infringement arguments.” *Id.* at 7. Microsoft opposes on the grounds that it “timely produced substantially all of the relevant code,” and that the source code it produced in March 2022 is “ancillary code.” Microsoft’s Opposition to Plaintiff’s Rule 37 Motion (ECF No. 279) (MSFT’s Response) at 4-5. For the reasons explained below, Plaintiff’s Motion for Costs and Sanctions Under Rule 37 is **DENIED**.

### BACKGROUND

Familiarity with prior proceedings in this action is presumed. *See, e.g., Sci. Applications Int’l Corp. v. United States*, 135 Fed. Cl. 661 (2018); *Sci. Applications Int’l Corp. v. United States*, 154 Fed. Cl. 594 (2021); *Sci. Applications Int’l Corp. v. United States*, 156 Fed. Cl. 486 (2021); *Sci. Applications Int’l Corp. v. United States*, No. 17-cv-825, 2022 WL 3147518 (Fed. Cl. July 28, 2018). Relevant here, Plaintiff alleges that “Microsoft is providing systems to the Government, with the Government’s authorization and consent,” that infringe one or more claims of U.S. Patent No. 9,229,230 (the ’230 patent). Pl.’s Mot. at 7. The ’230 patent is directed to a method and system for video image registration in a heads-up display. *See* Pl.’s Mot., Exhibit 3 (ECF No. 273) (’230 patent) at Abstract. The following claim elements are common to all of the ’230 patent’s claims:<sup>3</sup>

- (a) receive video images from the first video source and from the second video source,
- (b) receive motion data indicative of motion of the first and second video sources,

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<sup>3</sup> Independent claims 15 and 29 — method and computer-readable medium claims, respectively — rephrase operations (a)-(e) using gerunds. *See* ’230 patent at 26:27-47 (Claim 15), 28:16-38 (Claim 29).

(c) identify, based on the received motion data, a part of a first video source image that potentially represents a portion of the external environment represented in a part of a second video source image;

(d) evaluate, based on a comparison of data from the first and second video source images, the identification performed in operation (c); and

(e) display at least a portion of the first video source image and at least a portion of the second video source image such that the second video source image portion overlays a corresponding region of the first video source image portion, wherein the corresponding region represents a portion of the external environment represented in the second video source portion.

'230 patent at 24:25-51 (Claim 1); *see also id.* at 26:27-30:42 (Claims 15-41).

### **I. Plaintiff's Discovery Requests**

The present dispute centers on one request for production and two interrogatories. *See* Pl.'s Mot. at 7-8. On February 19, 2021, Plaintiff served Request for Production 51 on Microsoft, seeking the following:

Source Code sufficient to demonstrate [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

MSFT's Response, Exhibit E (ECF No. 279-7) (Ex. E) at 3; *see* Pl.'s Mot. at 7 n.1.

At the same time, Plaintiff "served interrogatories asking Microsoft to identify what source code is used by the accused Rapid Target Acquisition ('RTA') feature (No. 13) and to provide a list of all source code that has been produced and state whether that code has been on a device delivered to the Government (No. 14)." Pl.'s Mot. at 7-8. Interrogatory 13 states, "[f]or each Accused Product, including past and planned versions of Accused products, identify what Source Code is compiled, linked, and loaded on that Accused Product when the Rapid Target Acquisition ('RTA') feature is used." Pl.'s Mot., Exhibit 11 (ECF No. 272-10) (Ex. 11) at 3. Relatedly, Interrogatory 14 states, "[f]or each Accused Product, including past and planned versions of

Accused Products, identify what Source Code has been produced in response to any Request for Production served in this case and indicate whether that code has been compiled on a device delivered to the Government.” *Id.* at 4.

On May 28, 2021, Plaintiff then committed to providing supplemental infringement contentions to Microsoft 90 days after Microsoft certifies “that it has substantially completed production (source code and non-source code) for that prototype/product.” Plaintiff’s Motion to Move Agreed-On Contentions Date and Compel Discovery Under Court of Federal Claims Rules 26 and 30 (Pl.’s Mot. to Move Contentions Date) (ECF No. 230), Exhibit 1 (ECF No. 230-1) at 3.

## **II. Microsoft’s Initial Production and Responses**

On September 18, 2021, Microsoft produced the first set of source code for two of the accused products in this case, the [REDACTED] and [REDACTED] prototypes. *See* Pl.’s Mot. to Move Contentions Date at 2; Pl.’s Mot. to Move Contentions Date, Exhibit 2 (ECF No. 230-2) at 44. This production included “the repository of code responsible for implementing the RTA feature.” MSFT’s Response, Exhibit A (ECF No. 279-1) (Ex. A) ¶ 2. On September 27, 2021, Microsoft served supplemental responses to Plaintiff’s Interrogatories 13-14. *See* Ex. 11 at 4-6. Microsoft answered Interrogatory 13 by referencing its answer for Interrogatory 14. *Id.* at 4. In response to Plaintiff’s Interrogatory 14, Microsoft stated, *inter alia*:

Microsoft has produced for inspection source code for software corresponding to the [REDACTED] and [REDACTED] prototype versions of Microsoft’s [REDACTED], which include the source code directories identified in MSFT-0019467-MSFT-00194731 and MSFT-00194623-MSFT-00194678, respectively. The source code produced for inspection can be compiled, when put in the proper environment, and can then be loaded on to a device to allow the [REDACTED] and [REDACTED] prototype versions to function, including to perform a prototype version of the Rapid Target Acquisition function. Microsoft further indicates that the source code for the software corresponding to the [REDACTED] and [REDACTED] prototype version of Microsoft’s [REDACTED] has been compiled and delivered on a device to the Government.

*Id.* at 6.

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