

**STATE OF WASHINGTON
SNOHOMISH COUNTY DISTRICT COURT**

CASCADE EVERGREEN EVERETT SOUTH

STATE OF WASHINGTON

Plaintiff,

vs.

MARK FLANIGAN, ET AL.

Defendants.

No. 5303A – 15D

MEMORANDUM OPINION

**WSP MOTION TO MODIFY
SUBPOENA DUCES TECUM**

I. INTRODUCTION

The Court has previously designated the above-captioned matter as the 'lead case' for purposes of these consolidated motions involving the Draeger Alcotest 9510. Cases from all four of the Snohomish County District Court Divisions have been consolidated in this motion. Defendants' Exhibits 7 is the calendars for all four Divisions containing a listing of the consolidated cases.

II. FACTS

The State of Washington has commenced the process of replacing Datamaster breath test machines with the Draeger Alcotest 9510. The parent company for the manufacturer is Draeger Safety AG and Co., a foreign corporation with its principle place of business in Germany. Draeger Safety Diagnostics, Inc., (Draeger) is a Delaware corporation with its principle place of business in Texas. Draeger and the State of Washington entered in a contract for the purchase of Alcotest 9510 Instruments.

Defendants served Washington State Patrol (WSP) with a number of Subpoenas Duces Tecum (Subpoenas) seeking information related to the Draeger Alcotest 9510. The subpoenas each seek access to Draeger Alcotest 9510 instruments and other software and related items. A subpoena from one of the consolidated cases directed to WSP is attached hereto.

Under the terms of the contract and subject to a protective order, Draeger is required to provide the instrument software for the Draeger Alcotest 9510 for discovery and litigation purposes. The term 'instrument software' is language in the contract that was suggested by Draeger and approved by the State of Washington. However, that term is not defined within the contract.

Defense witness Felton testified that, within the software industry, a generally accepted definition of the term 'instrument software' is the instructions and data necessary to operate a piece of equipment and includes those items from the Subpoena in sections numbered 2, 3, 8, 9 and 11. WSP asserts that the intention of the parties was to limit the Draeger's disclosure to the Source Code for the Alcotest 9510 and directs the Court to the declaration of Dr. Fiona Couper

with the State Toxicology Lab. Similar to the absence of a definition of 'instrument software,' the term 'source code' is not defined and also does not appear in the contract.

All parties agree that the items sought in the Subpoena contain proprietary information and that a protective order is appropriate. All parties also agree that an appropriate protective order is a predicate requirement to non-party Draeger providing any of the software related items identified by the subpoena.

Not everything sought in the Subpoena is disputed. WSP has agreed to provide access to two Draeger Alcotest 9510 instruments for a period of 60 days as requested by defendants. What remains in dispute is the scope of the Alcotest 9510 software and architecture to be produced by WSP, the specifics of a protective order, and the costs for re-certification and/or repair of the instruments after defense testing.

III. ISSUES

- 3.1 What is WSP obligated to provide in response to the subpoena?
- 3.2 Should a protective order apply to Draeger Alcotest 9510 materials?
- 3.3 Which party should pay the costs of recertification and/or repair after defense investigation of the Draeger Alcotest 9510?

IV. ANALYSIS

Scope of WSP's Obligation under the Subpoena

Defendants asserts that WSP's Motion to Modify Subpoena should be denied and that WSP should be ordered to provide all of the items identified in the subpoena, regardless of whether WSP currently possess those items or is entitled to them under the terms of the contract between Draeger and the State of Washington (Contract). In support of that position, Defendants cite to *State v. Sipin*, 130 Wn. App. 403 (2005).

In *Sipin*, the trial court admitted evidence of computer modeling from a motor vehicle crash using a program called PC-CRASH. The Court conducted a hearing pursuant to *Frye v. United States*, 293 F. 1013 (1923), and determined that the scientific reliability of the computer program at issue was sufficiently established. The *Sipin* Court disagreed and remanded for a new trial.

The issue raised by defendants in this matter is not addressed by the *Sipin* Court. No Washington appellate decision supports the defense position that this Court has the authority to compel WSP to obtain information it does not possess or have the right to possess under Contract. Accordingly, the scope of WSP's compliance with the Subpoena is limited to those items which WSP possesses and those items which WSP has the right to possess under the contract between the State and Draeger.

Defendants argue that, under the terms of the Contract, WSP is entitled to the 'instrument software' for the Draeger Alcotest 9510. Defendants further assert that 'instrument software' should mean those items identified by defense witness Felton. WSP argues for a narrower reading of the scope of the requirement and relies on the declaration of Dr. Fiona Couper for the

position that the parties to the Contract only intended Draeger to provide the software source code.

The scope of WSP's obligation to provide items identified in the subpoena which WSP has a contractual right to possess turns on the meaning of the term 'instrument software.' As indicated *infra*, that term is not defined in the contract. Under Washington contract law, when a term is undefined, the court may look to extrinsic evidence of the intent of the parties to the contract for guidance as to that term. *Brogan v. Lamphiear*, 165 Wn.2d 773 (2009).

Dr. Fiona Couper's declaration submitted in this matter states that she is employed as the State Toxicologist since 2008 and was involved in the process to solicit bids for an evidentiary breath testing machine. In order to avoid litigation similar to that occurring in New Jersey, Washington placed a requirement in the bid that the software source code be made available in response to a discovery demand in a criminal case.

Dr. Couper specifically asserts that WSP did not intend to require the vendor to produce items other than the source code, such as architectural items used to design or develop the software at issue. According to her declaration, the source code would allow defense experts reasonable access to determine the Alcotest 9510's fitness for purpose. Dr. Couper's declaration is extrinsic evidence of the intention of the parties regarding the definition of the term 'instrument software.'

While the term 'instrument software' is not defined, extrinsic evidence from a party to the Contract persuades this Court that the intention of the parties was to limit definition of that term to the software source code and does not include architectural materials used to design or develop the software at issue. Under the terms of the contract, WSP is entitled to the software source code for the Draeger Alcotest 9510

Accordingly, upon this Court's approval of an appropriate protection order, WSP's obligation under the Subpoena is limited to those items from the subpoena currently within WSP's possession or control, permitting reasonable defense access to two Draeger Alcotest 9510 instruments for a reasonable period of time, and the software source code for the Alcotest 9510 provided for by the terms of the contract between the State and Draeger, subject to a protective order.

Protective Order

Both WSP and Defendants indicated a willingness to work toward a mutually agreed upon protective order. The Snohomish County Prosecuting Attorney requested a deadline for that protective order and that request is reasonable. If an agreement can be reached, the parties shall present that agreed protective order to Judge Jeffrey Goodwin for approval not later than January 11, 2016.

In the event that an agreement is not possible, this matter will be heard on the January 11, 2016 criminal motions calendar at 9:00 am at the South Division before Judge Jeffrey D. Goodwin. Briefing shall be filed and served by January 4, 2016. Responsive pleadings shall be filed and served by January 7, 2016.

Costs for RE-Certification of the Instruments

WSP asserts that, once the Alcotest 9510 instruments are returned to them after the defense investigation, there will be recertification and potentially repair costs that should be borne by Defendants. WSP advised the Court at hearing that costs would be limited to approximately \$10,500.00, which is the actual cost to the State of each instrument. Defendants object.

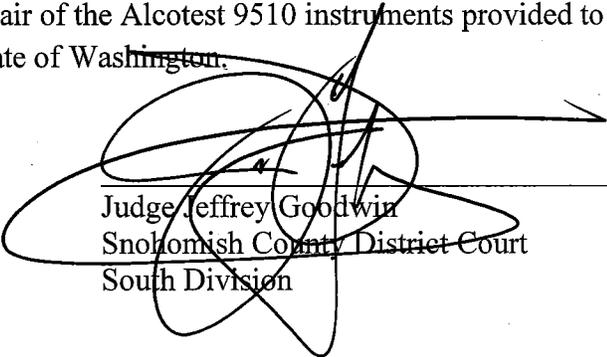
Neither Ms. Williams representing WSP or Defendants were able to identify any independent fit for purpose assessment of the Alcotest 9510. Under the terms of the contract, the State had the opportunity to contract for an independent assessment of the instrument at a cost of \$78,000.00, but opted out. During argument on this matter, Ms. Williams argued that one of the reasons for opting out of the assessment was to allow defense attorneys to select their own evaluator.

Considering that this Court is unaware of any independent fit-for-purpose assessment of the Alcotest 9510, that such an assessment would have cost the State \$78,000.00 under the contract, that Counsel for WSP argues it is better for the defense bar to select their own expert for such an evaluation and that Defendants are bearing the costs of their assessment, any costs resulting from recertification or repair of the Alcotest 9510 instruments subsequent to the Defense possession of the two instruments shall be borne by the State of Washington.

V. ORDER

- 5.1 WSP's Motion to Modify Subpoena is granted.
- 5.2 This Court grants WSP's request for a protective order. The process for issuance of that order is outlined *infra*.
- 5.3 Upon request, WSP's shall make available two Draeger Alcotest 9510 instruments to defense experts for a period of 60 days, or such other time as determined by the Court;
- 5.4 WSP shall provide items identified in the Subpoena which are within the possession or control of WSP.
- 5.5 Subsequent to the issuance of a protective order, WSP shall provide the software source code for the Alcotest 9510 to defendants' experts, subject to a protective order.
- 5.6 Costs incurred for re-certification or repair of the Alcotest 9510 instruments provided to defendants' experts shall be borne by the State of Washington.

DATED this 17th day of December, 2015.



Judge Jeffrey Goodwin
Snohomish County District Court
South Division

We Concur:

Judge Anthony Howard
Everett Division

Commissioner Rick Leo
Cascade Division

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WSP asserts that, once the Alcotest 9510 instruments are returned to them after the defense investigation, there will be recertification and potentially repair costs that should be borne by Defendants. WSP advised the Court at hearing that costs would be limited to approximately \$10,500.00, which is the actual cost to the State of each instrument. Defendants object.

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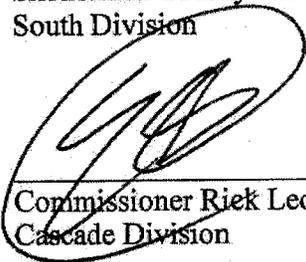
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Judge Jeffrey Goodwin
Snohomish County District Court
South Division



Commissioner Riek Leo
Cascade Division

- 1 2. A complete set of tagged and labeled build-tree snapshots, as one would find on a Draeger
2 developer's workstation or build machine, of all sources including any and all of the
3 following:
- 3 a. Textual (Human-Readable) objects, to include but not limited to:
 - 4 i. files of source code, written in high-level languages such as C++, C#, mid-level
5 languages such as IL or JVM, and/or assembler languages such as Renesas M16;
 - 6 ii. Makefiles (files used to command the compilers and linkers in the build/compile/link
7 process), script files used to link executable code objects, Platform Builder files used
8 to direct the process of image creation for Windows CE, and/or layout files to
9 provide memory mapping/allocation for the created image.
 - 7 b. Binary objects, to include but not limited to:
 - 8 i. Pictorial images, such as icons, photographs, pictographs, background/desktop
9 patterns, logos, scanned documents, video clips;
 - 10 ii. Pre-compiled binaries (as often provided by third-party Independent Software
11 Vendors), such as device drivers, encryption keys, BLOBs, data store files, digital
12 signatures, font files;
 - 13 iii. Sample data for calibration or sensor pre-compensation.
 - 14 c. The aforementioned Textual and Binary objects are to include all components necessary
15 to build, compile and/or assemble all of the following software images or their functionally
16 equivalent current versions:
 - 17 i. Windows CE 5.5 8322797
 - 18 ii. Measurement System Software 8322798 0.7 (aka Renesas M16 Binary)
 - 19 iii. Configuration File Software 8322796 2.3
 - 20 iv. Bootloader 1.5 8323536
- 21 All of the aforementioned items are to be the same items as used to build the released
22 software as provided to the State of Washington or any sub-entity thereof, in computer
23 readable, high level language on CD ROM media for DOS/Windows or Linux based
24 systems or in any computer readable form, if it exists in such a form, or may be converted to
25 such a form, otherwise in such form as it currently exists, together with any instructions on
the method for building the system to produce the images as required to use the software in
the Draeger 9510.
3. A labeled, loadable, executable copy of the software as provided to the State of Washington
or any sub-entity thereof in the form and on the medium used to load or install it into a
Draeger 9510 device (e.g., USB stick, flash drive, etc.), along with instructions on the
methods of use, analysis, verification, upgrading, and installation as well as the system
requirements to use that software outside the Draeger 9510 device.
4. The brand and model of the device used to create, build, compile, and assemble the source
code into machine language deployable images and the brand, title and revision level of the
software used to create, compile, and assemble the source code into a machine executable
binaries.
5. The functional specifications of the software program (to include but not limited to, the
architecture, diagrams, user interface, specifications, error identification, handling
specifications and hardware requirements).

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3 6. Written design specifications for the software, to include but not limited to Software Requirement Specification, Software Design Specification, User Stories, Task Lists, Traceability Matrices
- 4 7. Written critical design reviews for the software to include but not limited to results of code reviews and/or formal Fagan inspections, Pair Reviews/Pair Programming changelogs.
- 5 8. Draeger-created and/or implemented acceptance testing scripts and results for the software, to include but not limited to Unit Test modules and/or Mock modules
- 6 a. Draeger-created and/or implemented system test scripts and results for software and
- 7 hardware error codes, such as but not limited to those described in the document
- 8 "Draeger Alcotest 9510 Software Status and Hardware Error Codes"
- 9 b. Draeger-created and/or implemented system test scripts and results for any and all error
- 10 codes which may not appear in official company documentation, along with any
- 11 description of said codes' significance with respect to system function and/or
- 12 dysfunction
- 13 9. Any and all written information regarding the design, construction and testing of the
- 14 software.
- 15 10. Any and all information/documentation on standards as it relates to acceptance procedures
- 16 for Draeger 9510s before shipping said devices to customers to include but not limited to
- 17 any and all information and/or documentation of traceability of acceptance standards to the
- 18 National Bureau of Standards, compliance testing as per international requirements for
- 19 diagnostic equipment, physiometric standards.
- 20 11. Any and all documentation detailing or including algorithms and/or formulas submitted to
- 21 the software engineer or persons responsible for the development of the source code that
- 22 were implemented into the current software versions operating within the Draeger 9510.
- 23 12. Any and all design, implementation and/or specification documents pertaining to the
- 24 following, at the current revision level to match the devices currently in use by the State of
- 25 Washington or any sub-entity thereof, in computer-readable format (such as DXF, DWG, SCH, SCM files), or in human-readable format (e.g., hard copy printout), to include but not limited to:
 - a. Electrical schematics, parts lists, printed circuit board diagrams and/or bills of materials, for all electronic circuitry.
 - b. Detailed specifications for all third-party componentry or sub-systems to include but not limited to fuel-cell modules, electrochemical detectors, spectrographic modules, sample pumps, flow meters, barometric pressure sensors, sample chamber temperature sensors, and/or infrared pyroelectric detectors in either computer readable format (e.g., PDF) or human-readable format (e.g. hard copy printout).
 - c. Certification documentation for any/all third party components as to Infrared, UV, R/F, ionizing or magnetic radiation levels associated with both static- and dynamic-state characteristics of all third-party componentry which may emanate any of the

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aforementioned radiation types. Said documentation to be delivered in either computer readable (e.g., PDF) or human readable (e.g., hard copy printout) format.

- d. Documented and certified results of independent testing of the following, but not limited to:
 - i. Effects, measurement and content of sample contaminants taken from tests with both positive and negative internal standards-type samples
 - ii. Effects, measurement and type of RF interference on the individual sensors and the 9510 device as a whole
 - iii. Test results as but not limited to those required by other State and/or Government agencies, e.g. Department of Transportation Testing Guidelines.

13. Copies of any and all independent testing of the Draeger Alcotest 9510 software and/or source code, to include, but not limited to:

- a. Testing by TUV;
- b. Testing by Germany's National Institute of Metrology (PTB);
- c. Testing by the European Technical Monitoring Association according to IEC 61508;
- d. Testing for compliance with WELMEC standards;
- e. Testing by OIML;
- f. Testing by Volpe National Transportation System Center (VNTSC); and
- g. Testing by the National Highway Traffic Safety Administration (NHTSA).

14. A list of the specific design issues and work-product related to the Draeger Alcotest 9510 which Draeger considers to be trade-secret.

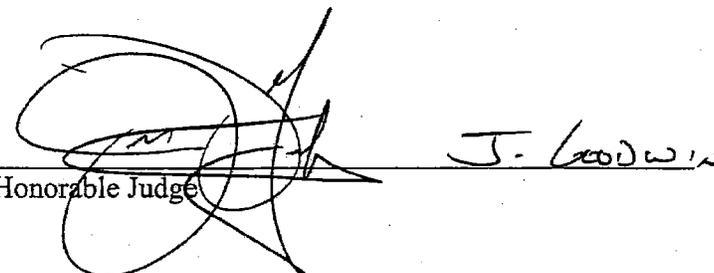
And to remain in attendance at said Court until discharged.

FAILURE TO RESPOND AS REQUIRED TO THIS SUBPOENA SHALL BE CONSIDERED A CONTEMPT OF COURT AS PROVIDED IN CHAPTER 7.21 RCW.

THIS SUBPOENA MAY BE COMPLIED WITH BY SUPPLYING ALL OF THE ABOVE ITEMS TO DEFENSE COUNSEL PRIOR TO THE ABOVE-NOTED COURT DATE.

HEREIN FAIL NOT AT YOUR PERIL.

GIVEN UNDER MY HAND this ___ day of 05 NOV 2015 2015.



 The Honorable Judge