

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN TELEVISION SETS,
TELEVISION RECEIVERS,
TELEVISION TUNERS, AND
COMPONENTS THEREOF**

Inv. No. 337-TA-910

**ORDER NO. 48: DENYING COMPLAINANT'S MOTION TO STRIKE THE
EXPERT REPORT AND TESTIMONY OF DR. HASHEMI WITH
RESPECT TO THE MAXLINEAR RESPONDENTS**

(November 28, 2014)

On October 14, 2014, Complainant Cresta Technology Corporation ("CrestaTech") filed a motion to bar Respondents MaxLinear, Inc., Sharp Corporation, Sharp Electronics Corporation, and VIZIO, Inc. (collectively, the "MaxLinear Respondents") from using the Expert Report and testimony of Dr. Hossein Hashemi. (Motion Docket No. 910-046.) On October 21, 2014, the MaxLinear Respondents filed their opposition to CrestaTech's motion. On October 24, 2014, Commission Investigative Staff ("Staff") filed its response to CrestaTech's motion. CrestaTech avers that it has made reasonable, good faith efforts to resolve this matter with the other parties at least two business days in advance of filing this motion.

On October 29, 2014, CrestaTech filed a motion for leave to file a reply. (Motion Docket No. 910-049.) On November 5, 2014, counsel for the MaxLinear Respondents informed Chambers that they do not oppose CrestaTech's motion for leave to file a reply. Because it is unopposed, Motion Docket No. 910-049 is hereby GRANTED. For the reasons below, Motion Docket No. 910-046 is hereby DENIED.

I. POSITIONS OF THE PARTIES

A. CrestaTech's Motion

CrestaTech argues that the MaxLinear Respondents should not be allowed to rely on Dr. Hashemi's report under the guise that their co-Respondents properly identified Dr. Hashemi because they were barred from identifying Dr. Hashemi as a witness in Order No. 23. (Mot. at 6.)¹ CrestaTech observes that Dr. Hashemi's report states that he was retained by MaxLinear, MaxLinear's lawyers served his reports, MaxLinear's lawyers scheduled and defended his deposition, and MaxLinear's lawyers defended CrestaTech's prior attacks on his report. (*Id.* at 7.) CrestaTech argues that the MaxLinear Respondents are using their co-Respondents in order to advance expert reports they would otherwise be barred from using. (*Id.*)

CrestaTech argues that the MaxLinear Respondents cannot claim any unfair prejudice from an order barring Dr. Hashemi from opining on their behalf for four reasons. (*Id.* at 8.) First, CrestaTech asserts that the MaxLinear Respondents are attempting to circumvent Order No. 23 and that they are not prejudiced by that order. (*Id.*) Second, CrestaTech observes that the MaxLinear Respondents already had the opportunity to choose one or more properly disclosed experts to opine on validity and infringement, but chose not to do so. (*Id.*) Third, CrestaTech argues that the MaxLinear Respondents had the opportunity to seek clarification as to whether they would be permitted to rely on Dr. Hashemi's testimony before expert reports were served, but they withdrew their last motion on the subject before the ALJ could rule on it. (*Id.* at 8-9.) Fourth, CrestaTech argues that there is no prejudice in the timing of their motion due to their repeated objections to the MaxLinear Respondents' use of Dr. Hashemi's testimony. (*Id.* at 9.)

¹ The co-Respondents are TPV International (USA), Inc., Top Victory Investments Ltd., SIO International, Inc., Hon Hai Precision Industry Co., Ltd., Wistron Corp., and Wistron Infocomm Technology (America).

PUBLIC VERSION

B. The MaxLinear Respondents' Opposition

The MaxLinear Respondents argue that their reliance on Dr. Hashemi's expert report does not violate Order No. 23. (Opp. at 8.) MaxLinear states that Order No. 23 only precludes the MaxLinear Respondents from identifying Dr. Hashemi as an expert, but does not preclude them from relying on Dr. Hashemi's testimony if he were properly identified by another party. (*Id.*) The MaxLinear Respondents state that their co-Respondents properly identified Dr. Hashemi as an expert witness pursuant to Order No. 22 and that CrestaTech even requested the modification of the procedural schedule to allow the co-Respondents additional time to identify expert witnesses. (*Id.* at 8-9.)

The MaxLinear Respondents also argue that the law clearly allows a party to rely on expert witnesses properly identified by another party. (*Id.* at 9 (citing *SEC v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009).) The MaxLinear Respondents argue that once proper notice of an expert witness has been given by *anyone*, no further notice is necessary. (*Id.* at 10.) The MaxLinear Respondents argue that CrestaTech had sufficient notice and was able to prepare intelligently for trial, as evidenced by their ability to submit two expert reports to rebut Dr. Hashemi's report. (*Id.* at 10-11.)

The MaxLinear Respondents next argue that CrestaTech's requested relief is unintelligible, stating that the ALJ must consider Dr. Hashemi's testimony because he was properly identified by co-Respondents, and that it would be absurd to consider it for co-Respondents but not for the MaxLinear Respondents. (*Id.* at 14-15.) The MaxLinear Respondents highlight VIZIO as an example. The MaxLinear Respondents state VIZIO is a MaxLinear Respondent whose accused televisions are designed, manufactured and imported by certain co-Respondents. (*Id.* at 15.) The MaxLinear Respondents argue that considering Dr.

PUBLIC VERSION

Hashemi's testimony for the co-Respondents, but not VIZIO could lead to the inconsistent result that VIZIO televisions do not infringe the asserted patents as to the co-Respondents, but do infringe the asserted patents as to VIZIO. (*Id.*)

The MaxLinear Respondents also argue that they would be severely prejudiced by CrestaTech's seven week delay in moving to strike Dr. Hashemi's testimony. (*Id.* at 15-16.) The MaxLinear Respondents point out that CrestaTech declined to move to strike after the MaxLinear Respondents scheduled Dr. Hashemi's deposition, prepared and filed their opposition to CrestaTech's motion to strike portions of Dr. Hashemi's opening expert report, prepared Dr. Hashemi's rebuttal expert report, and defended Dr. Hashemi's deposition. (*Id.* at 16.) The MaxLinear Respondents assert that they withdrew their motion for leave to identify Dr. Hashemi as an expert witness after CrestaTech confirmed that Dr. Hashemi was in the Investigation as a result of the co-Respondents' reliance upon him. (*Id.*) The MaxLinear Respondents state that CrestaTech was silent in their objection to the MaxLinear Respondents use of Dr. Hashemi and that CrestaTech's counsel commented that there was no longer "a live dispute" as to Dr. Hashemi's status after the MaxLinear Respondents withdrew their motion. (*Id.* at 16-17.) The MaxLinear Respondents call CrestaTech's delayed motion "gamesmanship" and suggest possible motives for CrestaTech's delay. (*Id.* at 17.)

C. Staff's Response

Staff argues that Dr. Hashemi's testimony will be part of the record in the Investigation and that there is no basis for the ALJ to create different evidentiary records in a single investigation. (Staff Resp. at 1-2.) Staff also points out that dividing the evidentiary record could lead to inconsistent infringement findings with respect to similarly situated accused products incorporating accused MaxLinear tuners. (*Id.* at 2.) Staff argues that CrestaTech failed

PUBLIC VERSION

to identify any specific prejudice against CrestaTech that will result from allowing all parties to rely upon Dr. Hashemi, but that CrestaTech's delay in bringing the motion outweighs any finding of potential prejudice. (*Id.*)

D. CrestaTech's Reply

CrestaTech argues that MaxLinear Respondents misrepresent facts in characterizing their requested relief as "unintelligible." (Reply at 1.) CrestaTech argues that their requested relief is to preclude the MaxLinear Respondents from relying on Dr. Hashemi's testimony. (*Id.* at 2.)

CrestaTech also argues that the MaxLinear Respondents willfully ignored the procedural consequences of Order No. 23 in arguing that the relief CrestaTech seeks is "unintelligible." (*Id.*) CrestaTech asserts that "if the ALJ issues an order preventing the MaxLinear Respondents from relying upon Dr. Hashemi's testimony as to non-infringement, then the MaxLinear Respondents will have to rely on other evidence to prove its case." (*Id.*) CrestaTech states that the MaxLinear Respondents will similarly have to advance other evidence of invalidity. (*Id.*) CrestaTech argues that if the MaxLinear Respondents are barred from relying upon Dr. Hashemi's testimony, their co-Respondents would not be barred from using it for invalidity or non-infringement, and that the question of whether or not the MaxLinear Respondents could benefit from their co-Respondents' efforts is irrelevant to whether the MaxLinear Respondents can use this testimony. (*Id.* at 2-3.) CrestaTech repeatedly asserts that there is nothing "unintelligible" about this. (*Id.*)

II. DISCUSSION

Dr. Hashemi was properly identified by the MaxLinear Respondents' co-Respondents pursuant to Order No. 22. There is no dispute that his expert report and testimony as to those co-Respondents are a proper part of the record. Therefore, I will consider Dr. Hashemi's testimony

PUBLIC VERSION

concerning the non-infringement of the co-Respondents' products. In this particular case, however, the co-Respondents' products and the MaxLinear Respondents' products are the same. As a practical matter, I will not create two separate records of infringement for the exact same accused products. It would be absurd to find that the accused products do not infringe as to the co-Respondents, but that the same accused products infringe as to the MaxLinear Respondents as a result of a procedural irregularity.

Moreover, CrestaTech will suffer no prejudice from allowing Dr. Hashemi's testimony to stay on the record. CrestaTech belatedly sought to add co-Respondents to this Investigation and CrestaTech jointly sought with co-Respondents to extend the dates in the procedural schedule for the co-Respondents. (*See* Order Nos. 12 and 22.) Dr. Hashemi's testimony is a proper part of the record and CrestaTech has had ample opportunity to test and respond to his expert opinions.

Further, I find it troubling that CrestaTech did not seek to address this issue sooner. Dr. Hashemi served his initial expert report on behalf of the MaxLinear Respondents and co-Respondents on August 25, 2014 and counsel for the MaxLinear Respondents handled expert discovery with respect to Dr. Hashemi. (*See* Mot., Ex. B; Mot., Ex. M; Mot., Ex. L; Mot., Ex. O.) Instead of moving to strike Dr. Hashemi's report when it realized that the MaxLinear Respondents intended to rely on it, CrestaTech waited for over seven weeks to file the instant motion. By the time CrestaTech filed its motion on October 14, 2014, expert discovery had closed, the deadline for filing summary determinations had passed, and the parties had already exchanged their direct hearing exhibits. In other words, CrestaTech waited until the MaxLinear Respondents would not have time to adjust to the loss of an expert witness to file its motion to strike. CrestaTech's own delay in filing the instant motion would result in undue prejudice to the

PUBLIC VERSION

MaxLinear Respondents if CrestaTech's motion were granted. Accordingly, CrestaTech's motion is hereby DENIED.

ORDER

Motion Docket No. 910-046 is hereby DENIED. Motion Docket No. 910-049 is hereby GRANTED.

Within seven (7) days of the date of this Order, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date.

Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.

Dee Lord

Dee Lord
Administrative Law Judge

**CERTAIN TELEVISION SETS,
TELEVISION RECEIVERS, TELEVISION
TUNERS, AND COMPONENTS THEREOF**

Inv. No: 337-910

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, **Peter J. Sawert, Esq.**, and the following parties as indicated, on

NOV 28 2014



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street SW, Room 112A
Washington, D.C. 20436

FOR COMPLAINANT CRESTA TECHNOLOGY CORPORATION:

Louis S. Mastriani, Esq.
ADDUCI MASTRIANI & SCHAUMBERG LLP
1133 Connecticut Avenue NW
Washington, DC 20036

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

FOR RESPONDENT MAXLINEAR, INC.:

Gregory C. Schodde, Esq.
MCANDREWS, HELD & MALLOY, LTD.
500 West Madison Street, 34th Floor
Chicago, IL 60661

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

**FOR RESPONDENTS SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS
AMERICA, INC., and SILICON LABORATORIES, INC.:**

Aaron Wainscoat, Esq.
DLA PIPER LLP (US)
2000 University Avenue
East Palo Alto, CA 94303

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

CERTAIN TELEVISION SETS,
TELEVISION RECEIVERS, TELEVISION
TUNERS, AND COMPONENTS THEREOF

Inv. No. 337-910

PUBLIC CERTIFICATE OF SERVICE PAGE 2

FOR RESPONDENTS LG ELECTRONICS INC., and LG ELECTRONICS U.S.A. (LG):

Christian A. Chu, Esq.
FISH & RICHARDSON P.C.
1425 K Street, N.W.
11th Floor
Washington, DC 20005

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

FOR RESPONDENTS VIZIO, INC.; HON HAI PRECISION INDUSTRY CO., LTD; SIO
INTERNATIONAL; TOP VICTORY INVESTMENTS LTD. and TPV INTERNATIONAL
(USA), INC.,:

Cono A. Carrano, Esq.
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue NW
Washington, DC 20036

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

FOR RESPONDENTS SHARP CORPORATION and SHARP ELECTRONICS
CORPORATION:

Josh Krevitt, Esq.
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

FOR RESPONDENTS WISTRON CORPORATION and WISTRON INFOCOMM
TECHNOLOGY (AMERICA) CORPORATION:

Harold E. Davis, Jr. Esq.
K&L GATES LLP
Four Embarcadero Center, Suite 1200
San Francisco, CA 94111

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____