

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN SEMICONDUCTOR DEVICES,
SEMICONDUCTOR DEVICE PACKAGES,
AND PRODUCTS CONTAINING SAME**

Inv. No. 337-TA-1010

**ORDER NO. 58: DENYING BROADCOM'S MOTION TO PRECLUDE RELIANCE
ON GLOBALFOUNDRIES' PRODUCTS FOR DOMESTIC
INDUSTRY**

(January 17, 2017)

On December 2, 2016, Respondents Broadcom Limited, Broadcom Corporation, Avago Technologies Limited, and Avago Technologies U.S. Inc. ("Broadcom"), filed a motion seeking to preclude Complainant Tessera from relying upon certain representative products to satisfy the technical prong of the domestic industry requirement for U.S. Patent No. 6,133,136 (the "136 patent"). Motion Docket No. 1010-053. On December 14, 2016, Tessera Technologies, Inc., Tessera, Inc., and Invensas Corporation ("Tessera") filed a response in opposition. On December 19, 2016, Broadcom filed a reply in support of its motion. On December 21, 2016, Tessera moved for leave to file a sur-reply in opposition to Broadcom's motion. On December 28, 2016, Broadcom filed an opposition to Tessera's motion for leave.¹ For the reasons discussed below, Broadcom's motion is denied.

¹ Under the Ground Rules, a sur-reply may be filed only in extraordinary circumstances. Ground Rule 3.1.2. Tessera asserts that leave should be granted because Tessera obtained pertinent evidence in the course of an expert deposition that took place on the date its opposition was due. Tessera's Motion For Leave at 1. Because the pertinent testimony could not have been included in Tessera's opposition, I find that extraordinary circumstances exist to permit filing a sur-reply, and I grant Tessera's motion.

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In support of its motion, Broadcom argues that Tessera alleged at the outset of this investigation only one product that practiced the '136 patent, the IBM Espresso Die, and that Tessera did not indicate until October 20, 2016, "more than five months into the investigation," Memorandum in Support of Broadcom's Motion at 3, that Tessera was seeking discovery from GlobalFoundries concerning products licensed by that company that might practice the '136 patent. At that time, Tessera listed ■ GlobalFoundries products but did not explain how they practiced the patent or submit claim charts for those products. On November 25, 2016, Tessera submitted additional claim charts on the ■ products, expanding its domestic industry contentions. Broadcom asserts that this was three weeks before the close of fact discovery and one week after the date for substantial completion of production of technical documents, and that Broadcom is prejudiced from the late disclosure because of the inability to conduct additional discovery or analyze adequately the GlobalFoundries products.

In opposition, Tessera states that its complaint alleged that products manufactured by GlobalFoundries would be part of its domestic industry contentions for the '136 patent and that the IBM Espresso die was identified only as a representative product pursuant to Commission Rule 210.12(a)(9)(ix). Tessera states that it identified the ■ GlobalFoundries products by the agreed date for initial responses to burden contention interrogatories, and that Tessera seasonably supplemented its contentions as it received additional information in third-party discovery. In its sur-reply, Tessera states that on December 14, 2016, GlobalFoundries' corporate designee on technical issues, Dr. Vincent McGahay, testified that ■
■

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Tessera's Sur-Reply at 2 (quoting Exhibit 29, McGahay Tr. at 30:10-31:23, 135:11-137:7, 138:6-17).

Broadcom asserts that Tessera alleged in its amended complaint, filed on September 19, 2016, that GlobalFoundries continued to manufacture the Espresso die for IBM after acquiring the IBM microprocessor business, but that Tessera had been informed two weeks earlier that [REDACTED]. Broadcom's Reply at 9. Counsel for Tessera represents, however, that that information was only "preliminary," *see* Decl. of Katherine K. Huang in Support of Tessera's Opposition at ¶ 16, that it diligently pursued additional information from GlobalFoundries, and that on October 20, 2016, Tessera made available to Broadcom "the only information that GlobalFoundries had provided about its domestic products as of" that date, including a list of the pertinent products made by GlobalFoundries. *Id.* at ¶¶ 17-28. I do not find any evidence of deliberate delay by Tessera or substantial prejudice to Broadcom based on the facts presented.

I find that Tessera diligently conducted discovery and seasonably updated its contentions based on what it learned from third parties. In addition, in light of the [REDACTED] [REDACTED], there is no substantial prejudice to Broadcom from the disclosure of the [REDACTED] GlobalFoundries products within three weeks of the close of the discovery period.

Accordingly, Motion Docket No. 1010-053 is hereby DENIED. This Order is being issued with a confidential designation, and pursuant to Ground Rule 1.10, each party shall submit to the Administrative Law Judge a statement as to whether or not it seeks to have any portion of this order deleted from the public version within seven (7) days. *See* 19 C.F.R. § 210.5(f). A party seeking to have a portion of the order deleted from the public version thereof must attach to

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its submission a copy of the order with red brackets indicating the portion(s) asserted to contain confidential business information.² The parties' submissions under this subsection shall not be filed with the Commission Secretary but shall be submitted by paper copy to the Administrative Law Judge and by e-mail to the Administrative Law Judge's attorney advisor.

SO ORDERED.

Dee Lord

Dee Lord
Administrative Law Judge

² To avoid depriving the public of the basis for understanding the result and reasoning underlying the decision, redactions should be limited. Parties who submit excessive redactions may be required to provide an additional written statement, supported by declarations from individuals with personal knowledge, justifying each proposed redaction and specifically explaining why the information sought to be redacted meets the definition for confidential business information set forth in Commission Rule 201.6(a).

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PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the following parties as indicated, on **February 1, 2017**



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

On Behalf of Complainants Tessera Technologies, Inc., Tessera, Inc., and Invensas Corporation:

Sturgis M. Sobin, Esq.
COVINGTON & BURLING LLP
One CityCenter, 850 Tenth Street, N.W.
Washington, DC 20001

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

On Behalf of Respondents Broadcom Limited, Broadcom Corporation, Avago Technologies Limited, Avago Technologies U.S. Inc., ARRIS International plc, ARRIS Group, Inc., ARRIS Technology, Inc., ARRIS Enterprises Inc., ARRIS Solutions, Inc., Pace Ltd., Pace Americas, LLC, Pace USA, LLC, HTC Corporation, HTC America, Inc., NETGEAR, Inc., Arista Networks, Inc., Technicolor S.A., Technicolor USA, Inc. Technicolor Connected Home USA LLC, Comcast Cable Communications, LLC, Comcast Cable Communications Management, LLC, and Comcast Business Communications, LLC:

David E. Sipiora, Esq.
KILPATRICK TOWNSEND & STOCKTON LLP
1400 Wewatta Street, Suite 600
Denver, CO 80202

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

On Behalf of Respondents ASUSTeK Computer Inc. and ASUS Computer International:

Lyle B. Vander Schaaf, Esq.
BRINKS GILSON & LIONE LLP
1775 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20006

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