

**PUBLIC VERSION**

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.**

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**In the Matter of**

**CERTAIN LASER IMAGEABLE  
LITHOGRAPHIC PRINTING PLATES**

**Inv. No. 337-TA-636**

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**ORDER NO. 30: DENYING RESPONDENTS' MOTION TO STRIKE CERTAIN  
HEARING TESTIMONY**

(July 24, 2009)

On May 8, 2009, Respondents VIM Technologies, Ltd., Hanita Coatings RCA, Ltd., AteCe Canada, Guaranteed Service & Supplies, Inc., Recognition Systems, Inc., and Spicers Paper, Inc. (collectively, "Respondents") filed a motion to strike portions of the hearing testimony of two experts for Complainant Presstek, Inc. ("Presstek"). (Motion Docket No. 636-030.) Specifically, Respondents wish to strike (i) the re-direct testimony of Charles W. Magee, Ph.D. ("Dr. Magee") on April 24, 2009 (Hearing Transcript ("Tr.") at 631:14-638:22, 642:6-642:14) "concerning the relative speeds at which light travels through the ablative/absorptive layer and at which ablation occurs"; (ii) the direct testimony of Steven A. Carlson, Ph.D. ("Dr. Carlson") on April 27, 2009 (Tr. at 774:22-784:5, 875:23-878:5, 878:18-879:2) concerning reflection with respect to the substrate of the accused VIM plates ("Accused Plates"); and (iii) the direct testimony of Steven A. Carlson, Ph.D. ("Dr. Carlson") on April 27, 2009 (Tr. at 879:3-882:20) concerning "the relative speeds at which light travels through the ablative/absorptive layer and at which ablation occurs." (Mot. at 1.) Respondents argue that there is good cause to

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strike these portions of the experts' testimony because the opinions they expressed were not disclosed in the experts' reports. (*Id.* at 1-2.) Respondents note that the Administrative Law Judge invited both parties to file motions to strike any testimony that was not adequately disclosed in discovery. (Mot. Mem. at 2.)

On May 13, 2009, Presstek filed an opposition to Respondents' motion, arguing that Drs. Magee and Carlson provided "ample notice of their opinions on these issues in their written reports and during their depositions – before the close of expert discovery." (Opp. at 1.) With respect to Dr. Magee, Presstek argues that Dr. Magee (i) opined in his original report that the second layer of the Accused Plates is at least 10 percent transmissive, and that the substrate reflects 90 percent of the transmitted laser radiation back to the second layer; and (ii) testified in deposition that reflection occurs in the Accused Plates and Presstek's plates prior to ablation. (*Id.* at 7.) Presstek further notes that Respondents opened the issue on cross-examination as to whether Dr. Magee had tested to determine if ablation occurred on the "rebound or the second pass." Thus, Presstek explains, "Dr. Magee was well within his right on re-direct to testify as to whether such testing was necessary . . . [and that he] testified that his transmissivity and reflectivity tests were sufficient because it is well known that the laser's radiation travels . . . and is reflected . . . at about the speed of light . . ." (*Id.* at 7-8.)

With respect to Dr. Carlson, Presstek argues that Dr. Carlson unequivocally stated in his initial and supplemental expert reports on infringement that the substrate of the Accused Plates is highly reflective. (*Id.* at 2-3.) In addition, Presstek cites to Dr. Carlson's declaration, dated December 9, 2008 ("Carlson Declaration"), responding to Respondents' summary determination

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motion, in which he specifically explained that

A. The [l]aser's [e]nergy travels at the speed of light and therefore is reflected long before the much slower process of ablation

123. As discussed below, the MMO Layer of the VIM Plates cannot possibly, under the laws of physics, ablate prior to the time that partially transmitted infrared radiation reaches the substrate of the VIM Plates.

124. In this regard, Dr. Dlott, an ablation expert, has extensively studied the time that it takes to ablate absorptive layers in printing plates, including MMO Layers. In fact, during my time at James River Graphics, I was personally involved in some of these studies of ablative layers in 1992-1993 timeframe. The results of Dr. Dlott's studies, which have been published under the scrutiny of peer review, indicate that ablation of MMO layers occurs in less than 10 microseconds, and typically in 3-5 microseconds or less, with 10 microsecond or shorter laser exposure pulses.

\* \* \*

125. In fact, in 2003, Dr. Dlott tested VIM's MMO layer and found that this layer ablates in about 3-5 microseconds. (See VIM00039822; HAN00000461-475)

126. The laser's energy, by contrast, travels at the speed of light which, in a vacuum, is 299,792,458 m/sec or 299.792458 m/microsecond ( $\mu$ sec). Since the index of refraction is about 1.6 for aluminum oxide, the speed of light through the MMO Layer in the VIM Plates is about 187m/ $\mu$ sec, or 187,000,000 microns/ $\mu$ sec.

\* \* \*

The silicone and MMO layers of the VIM Plates have a combined thickness of about 1.15 microns. (*Id.* at Para. 115). Thus, the laser's energy travels through the silicone and MMO layers of the VIM Plates in about 0.0000006  $\mu$ sec. Upon reaching the substrate of the VIM Plates, the laser's energy is instantaneously reflected back into the MMO Layer. Since the VIM Plates ablate in about 3-5  $\mu$ sec, the transmission of the laser's energy through the MMO Layer reaches the substrate about 3.2 - 5.5 million times faster than the time that it takes for the MMO Layer to ablate.

(Opp. at 3; *id.*, Ex. D at 31-33.) Presstek argues that Respondents had adequate notice of the above opinions because Respondents were served with Dr. Carlson's declaration before the close of expert discovery<sup>1</sup> and before Dr. Carlson's deposition. (Opp. at 5.) Presstek points out that

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<sup>1</sup> Respondents note that expert discovery was extended by stipulation of the parties until December 11, 2008. (Mot.

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the private parties specifically negotiated and agreed on December 2, 2008 that Respondents would receive copies of any expert declarations or affidavits relating to the summary determination opposition on December 9, 2008, in advance of the expert depositions. (Opp. at 5; *id.*, Ex. G at 1.) Furthermore, Presstek cites to passages of Dr. Carlson's deposition where Respondents asked Dr. Carlson about the opinions in his declaration that are now at issue here. (*Id.* at 5-6.)

On May 13, 2009, the Commission Investigative Staff ("Staff") filed a response supporting Respondents' motion only with respect to striking portions of Dr. Magee's hearing testimony. (Staff Resp. at 2.) Staff argues that during discovery Respondents did not receive adequate notice of Dr. Magee's opinions relating to the speed at which imaging radiation travels and the speed at which ablation of the MMO layer occurs. (*Id.* at 4.) In contrast, Staff notes that Dr. Carlson did put forth this specific position, as well as his position relating to the reflectivity of the substrate, during expert discovery. (*Id.* at 4-6.) Staff does not discuss whether Respondents opened the door for rebuttal during Dr. Magee's cross-examination.

Based on a review of the motion papers and responses thereto, the Administrative Law Judge finds as follows.

Ground Rule 10.5.6 provides for the scope of expert witness testimony during the hearing:

An expert's testimony at the hearing shall be limited in accordance with the scope of his or her expert report(s), deposition testimony, or within the discretion of the

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Mem. at 3.)

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Administrative Law Judge.

Ground Rule 10.5.6. The Administrative Law Judge notes that Order No. 25, which held that new opinions raised by Dr. Carmi for the first time in deposition would not be admissible, was not an amendment to this Ground Rule. (Order No. 25 at 4.) The situation with Respondents' expert in that instance was unique because Respondents sought to substitute Dr. Carmi for Dr. Goodman at a late stage in the investigation, and the Administrative Law Judge understood that Dr. Carmi's expert opinions would be strictly limited to those opinions previously expressed by Dr. Goodman to avoid prejudice to the other parties. (*Id.*) The Administrative Law Judge made clear to the parties at the hearing that any motions to strike expert testimony relate to "questions of whether or not matters were adequately disclosed in discovery . . . ." (Tr. at 405.) Thus the inquiry here, is not restricted to whether Presstek's experts included the subject of their testimony in their expert reports (as Respondents suggest), but instead focuses on whether Respondents had adequate notice of their opinions during the expert discovery period as a whole.

Presstek does not argue that during expert discovery Dr. Magee specifically disclosed any opinions concerning the relative speeds at which light travels through the ablative/absorptive layer and at which ablation occurs, but instead argues that Dr. Magee more generally discussed that reflection occurs prior to ablation. The Administrative Law Judge finds that Dr. Magee's general statements in deposition with respect to the order in which reflectance<sup>2</sup> and ablation

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<sup>2</sup> Dr. Magee testified in deposition that "The imaging radiation passes through the PDMS layer. Some of the energy is absorbed by the mixed metal oxide layer. . . . Some of the energy passes through the mixed metal oxide layer just as in the VIM plate. It is reflected by the reflective barium sulfate-loaded PET substrate. The reflected radiation comes back into the MMO layer, resulting in further heating of the MMO layer, that results finally in ablation of the MMO layer and the PDMS layer in the spot where the laser hit the plate at high power." (Opp., Ex. K at 25:22-

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occur did not provide Respondents with any notice that Dr. Magee would testify during the hearing with respect to the relative speeds at which light travels through the second plate layer and at which ablation occurs.<sup>3</sup>

However, this does not end the inquiry, as Presstek has argued that Respondents opened the door on cross-examination “by asking [Dr. Magee] whether he performed any other ‘testing that showed that there was ablation on the rebound or the second pass as to the VIM plates.’” (Opp. at 7.) During the course of the testimony that Respondents now seek to have stricken, Respondents objected several times that Dr. Magee’s re-direct was outside the scope of cross-examination. (Tr. at 630:16-20, 635:4-6, 636:18-19, 639:15-16.) The Administrative Law Judge overruled each of those objections, permitting re-direct to continue. (Tr. at 631:7-12, 635:7-17, 636:25-637:11, 641:1-9.) The Administrative Law Judge declines to re-visit those rulings, as a review of the record confirms that Respondents opened the door to the testimony in question during cross-examination when they questioned Magee about his failure to test for whether

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26:12.)

<sup>3</sup> At the hearing, Dr. Magee testified that

What you have to do, Your Honor, is look at the speed of light and the thickness of the layer that must be traversed by the laser beam. I just did a little quick order of magnitude calculation, and light, obviously, travels very quickly, and it would take only 10 to the minus 14 seconds, that's a hundredth of a trillionth of a second, for the laser to traverse the film and go as -- and hit the substrate, and reflect back, presumably, because it's such a small distance, 10 to the minus 14 seconds. The ablation effect, the ablation event takes about 10 to the minus 6 seconds. That's a millionth of a second to happen. So what, essentially, has happened is the laser beam, the photons get shot into the sample, absorbed partially by the MMO layer and reflected back, and those are reabsorbed, and then nothing happens for a long time on the time scale of the photons. 10 to the minus 14 seconds versus 10 to the 6 seconds, so there really can't be any -- in terms of the time scale of an ablation event. There's no such thing as a first pass or a second pass. It's all the light gets absorbed instantaneously, and then a long time progresses until the material is actually ablated from the sample.

Tr. at 637:19-638:22.

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ablation occurs on the first or second (reflected) pass of light. *See* Ground Rules 10.5.3, 10.5.6. Complainants had a right to have Dr. Magee explain that, because light travels so much faster than ablation occurs, such testing as suggested by Respondents during their cross-examination was not required in order for him to reach his conclusions.

The Administrative Law Judge further finds that Dr. Carlson's direct testimony with respect to the same topic is unobjectionable. Respondents had ample notice of it in the Carlson Declaration and during Dr. Carlson's deposition. In the same vein, the Administrative Law Judge finds that Presstek has shown that Dr. Carlson's direct testimony concerning reflection with respect to the substrate of the Accused Plates was adequately disclosed during expert discovery.


Accordingly, the Administrative Law Judge finds that Respondents' motion to strike (Motion No. 636-030) should be DENIED.

Within seven days of the date of this document, 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.

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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.**

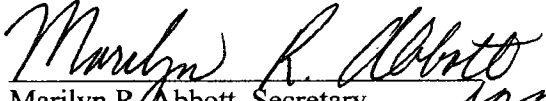
  
E. James Gildea  
Administrative Law Judge

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**PUBLIC CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **ORDER 30** has been served by hand upon, the Commission Investigative Attorney, **Aarti J. Shah, Esq.**, and the following parties as indicated on August 3, 2009.

  
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