PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

2009 SEP -1 PM 1:19
OFC OF THE SECRETARY
US INT'L TRADE COMM

In the Matter of

CERTAIN COLD CATHODE FLUORESCENT LAMP ("CCFL") INVERTER CIRCUITS AND PRODUCTS CONTAINING THE SAME

Inv. No. 337-TA-666

ORDER NO. 21: DENYING NON-PARTIES' MOTION TO QUASH SUBPOENAS AND FOR SANCTIONS; AND ORDERING MEET & CONFER TO LIMIT SUBPOENA *DUCES TECUM*

(August 18, 2009)

On August 3, 2009, non-parties WorldGate Communications, Inc. ("WorldGate") and Whitney Blackmon[1] (collectively, "Non-Parties") filed a motion to quash or limit the subpoenas served on Non-Parties by Respondent Monolithic Power Systems, Inc. ("MPS"). (Motion Docket No. 666-025.) Non-Parties further request "attorney's fees and costs pursuant to 19 C.F.R. § 210.27, 28 U.S.C. § 1927, and Fed. R. Civ. P. 45 and 26(c)." (Mot. at 1.) Non-Parties argue that the subpoena *duces tecum* and *ad testificandum* directed to WorldGate and the subpoena *ad testificandum* directed to Mr. Blackmon (collectively, the "Subpoenas") (i) fail to provide Non-Parties with sufficient time to comply; (ii) exceed the scope of permissible discovery because they request information and documents protected by the attorney-client privilege and work product doctrine; (iii) are "vague, ambiguous, overly broad, and unduly burdensome" on

1. Senior Vice President of Engineering for WorldGate.

Non-Parties; and (iv) seek documents that can be obtained from parties to this Investigation. (Mot. Mem. at 2.) Non-Parties further argue that they have already produced approximately 12,000 pages in response to a subpoena by Complainants O2 Micro International, Ltd. and O2 Micro, Inc.[2] (collectively, "O2 Micro"), that they should not have to produce a privilege log, and that MPS has "refused to make reasonable, good-faith efforts to narrow the extremely broad scope" of the Subpoenas "or reduce the burden they impose on WorldGate." (*Id.* at 2-3, 12.) Non-Parties telephonically sought permission to electronically file their public motion on August 3, 2009 and send their confidential exhibits by overnight courier on August 4, 2009, which the Administrative Law Judge granted.

On August 13, 2009, the Commission Investigative Staff ("Staff") filed a response to Non-Parties' motion. Staff notes that Non-Parties should have been given until August 5, 2009 to respond to the Subpoenas, but submits that "it is appropriate to deal with the merits of the dispute over the [S]ubpoenas." (Staff Resp. at 2.) Staff argues that (i) it is not unreasonable for Non-Parties to create a privilege log for the notes and communications relating to Mr. Blackmon's affidavit, (ii) the deposition of Mr. Blackmon should take place in a manner agreed to by MPS and Non-Parties, (iii) MPS and Non-Parties should confer to reach a compromise as to the scope of searches for further document production, (iv) MPS should assume the reasonable costs for any unusually burdensome searches for documents, and (v) Non-Parties' requests for sanctions should be denied. (*Id.* at 3-4.)

---

2. O2 Micro served a subpoena *duces tecum* and *ad testificandum* on WorldGate on May 19, 2009 (the "O2 Micro Subpoena"). (Mot., Ex. 3.)

On August 14, 2009, MPS opposed Non-Parties' motion. MPS argues that discovery from Non-Parties is necessary because WorldGate, as part of its document production in response to the O2 Micro Subpoena, produced an unsolicited declaration by Mr. Blackmon[3] (the "Blackmon Declaration") "purporting to describe the functionality of a product that has been accused in this Investigation: the MP1026." (Opp. at 3, 6.) MPS submits that it has not had an opportunity to obtain discovery relating to the Blackmon Declaration, because O2 Micro cancelled and has not rescheduled the deposition of WorldGate's designated representative, Mr. Blackmon. (*Id.*) As a result, MPS argues that it propounded discovery on Non-Parties to determine what basis they have "for [their] purported understanding of an accused product[.]" (*Id.* at 4.) MPS argues that counsel for MPS had discussed a compromise limiting any privilege log requirements, and thus "there is no evidence of a discovery 'impasse' regarding privilege issues[.]" (*Id.*)

With respect to the requests that Non-Parties argue are overbroad, MPS responds that the requests are directed to the documents and things underlying the Blackmon Declaration and Non-Parties are only required to engage in a reasonable search. (Opp. at 5.) MPS objects to Non-Parties' prior document production because it was only limited to a search for e-mail, and did not include paper documents. (*Id.* at 6.) MPS argues that even if some searches for paper would be difficult, Non-Parties are not absolved from searching for <u>any</u> paper documents. (*Id.* at 6-8.) MPS argues that the paper documents it seeks were used three months ago in connection with the Blackmon Declaration, and thus are "clearly fresh in everyone's mind." (*Id.* at 7.)

Finally, MPS explains that the discovery requests relating to Non-Parties' business

3. See Mot. Ex. E, WGATE 000001-2.

relationships with O2 Micro, entities affiliated with O2 Micro, and with WorldGate's manufacturer MotoTech, Inc. stem from Non-Parties' request for indemnification from MPS. (*Id.* at 9-11.) According to MPS, this is relevant because MPS had previously agreed to indemnify Taiwan Sumida Electronics, Inc. ("Sumida"), a company which subsequently lost an infringement action brought by O2 Micro (the "Texas Action"). (*Id.*) When O2 Micro then sought collateral estoppel against MPS in another case in the Northern District of California based upon Sumida's loss in the Texas Action, MPS argues, the court found that Sumida had ties to O2 Micro preventing it from properly representing MPS' interests in the Texas Action. (*Id.*) As a result of MPS's convoluted history with O2 Micro and companies seeking indemnification, MPS argues that its discovery requests are relevant to whether O2 Micro has been engaging in patent misuse. (*Id.*)

On August 18, 2009, O2 Micro filed an opposition to MPS's response. O2 Micro states in its opposition that it "takes no position as to the motion to quash." (O2 Micro Opp. at 4.)

Based upon the motion papers and responses thereto, the Administrative Law Judge finds as follows.

The Administrative Law Judge has discretion to issue subpoenas when warranted. *See* Commission Rule 210.32(a)-(c). The Ground Rules provide that parties submitting a subpoena application should take into account the deadlines for filing a motion to quash, which is ten days after receipt of the subpoena. *See* Ground Rule 4.6.1. While the Administrative Law Judge often will not execute a subpoena if there is not enough time provided for a motion to quash, the Administrative Law Judge will occasionally sign such a subpoena with the expectation that the requesting party and subpoenaed non-party will work together to adjust deadlines as needed. Here,

although Non-Parties did in fact have ten days after receipt to file a motion to quash, they received the Subpoenas on a Friday. Under Commission Rule 201.14, the Non-Parties' deadline to file a motion to quash was therefore extended from August 3 to August 5. Non-Parties argue that because the WorldGate subpoena *duces tecum* ordered production of documents on August 3, the subpoena should be quashed.

The Administrative Law Judge notes, however, that Non-Parties telephoned the Attorney Advisor for the Administrative Law Judge on August 3, requesting and receiving permission from the Administrative Law Judge to electronically file their public motion on that day and send their confidential exhibits by overnight courier on August 4, 2009. At that time Non-Parties did not indicate that there was any dispute with MPS with respect to the deadline for the motion to quash. Furthermore, Non-Parties did not request an extension beyond August 4 or otherwise suggest they had a right to file their motion to quash on August 5. As a result, the Administrative Law Judge declines to quash the WorldGate subpoena *duces tecum* on procedural grounds.

With respect to the merits of the motion to quash, Non-Parties have a particularly heavy burden to show that the Subpoenas are unreasonable and oppressive. *See Certain Hardware Logic Emulation Systems and Components Thereof*, Inv. No. 337-TA-383, Order No. 42 at 15 (U.S.I.T.C., September 6, 1996); *Truswal Sys. Corp. v. Hydro-Air Eng'g. Inc.*, 813 F.2d 1207, 1210 (Fed.Cir.1987). The Administrative Law Judge finds that the requested discovery relating to the Blackmon Declaration, the MPS part no. MP 1026, and Non-Parties' ties to O2 Micro, entities directly related to O2 Micro, and MotoTech, Inc. is relevant to the Investigation. The Administrative Law Judge finds that the Subpoenas are not unreasonable and oppressive, and

therefore Non-Parties' motion to quash the Subpoenas is DENIED. The Administrative Law Judge further finds that Non-Parties' request for sanctions is DENIED. The deposition(s) noticed in the Subpoenas should occur no later than September 4, 2009.

However, the Administrative Law Judge finds that MPS could do more to accommodate WorldGate's concerns with respect to drafting a privilege log and the scope and difficulty of a search for responsive, non-privileged documents and things within its possession or control. For example, MPS could narrow the scope of its requests, particularly document request nos. 6-9, in light of the declarations Non-Parties submitted in support of this motion. Both WorldGate and MPS have discussed their willingness and prior attempts to compromise. Therefore, the Administrative Law Judge declines to rule on the motion to limit the subpoena *duces tecum* at this time.

The Administrative Law Judge recommends that WorldGate, MPS, and Staff, if Staff so chooses, engage in intensive, good faith efforts to resolve this dispute within ten (10) days of the date of this Order. During these negotiations, the Administrative Law Judge further recommends that WorldGate and MPS keep in mind the following:

- production of e-mail without conducting a reasonable search for responsive, non-privileged paper documents is generally not a sufficient response to a subpoena *duces tecum*;
- requesting parties generally reimburse non-parties their reasonable costs for expensive or disruptive discovery;
- where a discovery request may be interpreted to require an unwieldy number of documents, a responding non-party will often negotiate to produce non-privileged documents sufficient to respond to the request (in lieu of all responsive non-privileged documents) to avoid unnecessary and expensive production of duplicative materials;
- it is unreasonable to expect a requesting party to obtain requested materials from other sources impracticably near to, or after the close of, fact discovery.

PUBLIC VERSION

On August 31, 2009, WorldGate and MPS should each report back to the Administrative Law Judge in writing, advising of whether a ruling on the remaining portion of Motion Docket No. 666-025 is necessary.

Accordingly, the Administrative Law Judge withholds any ruling with respect to Non-Parties' motion to limit the subpoena *duces tecum*. All other portions of Non-Parties' motion (Motion Docket No. 666-025) are DENIED.

Within seven (7) 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.

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

IN THE MATTER OF CERTAIN COLD CATHODE ("CCFL") INVERTER CIRCUITS AND PRODUCTS CONTAINING SAME

Inv. No. 337-TA-666

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** has been served by hand upon, the Commission Investigative Attorney, **David O. Lloyd, Esq.**, and the following parties as indicated on September 1, **2009**.

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

COMPLAINANTS 02 MIRCO INTERNATIONAL LTD AND 02 MICRO INC.:

Margaret D. Macdonald, Esq.
HOWREY, LLP
1299 Pennsylvania Ave NW
Washington, DC 20004
P-202-783-0800

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

FOR RESPONDENTS MONOLITHIC POWER SYSTEMS INC:

Mark A. Flagel, Esq.
LATHAM & WATKINS LLP
355 South Grand Avenue
Los Angeles, CA 90071-1560
P-213-485-1234

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

IN THE MATTER OF CERTAIN COLD CATHODE ("CCFL") INVERTER CIRCUITS AND PRODUCTS CONTAINING SAME **Inv. No. 337-TA-666**

CERTIFICATE OF SERVICE - PAGE 2

FOR RESPONDENTS MONOLITHIC POWER SYSTEMS, INC., ASUS COMPUTER, INC., ASUS COMPUTER INTERNATIONAL

Smith R. Brittingham IV, Esq.
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
901 New York Avenue NW
Washington, DC 20001
P-202-408-4000

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

FOR RESPONDENTS LG ELECTRONICS, LG ELECTRONICS U.S.A., INC., LG DISPLAY CO., LG DISPLAY AMERICA, INC.

Anthony C. Roth, Esq.
MORGAN, LEWIS AND BOCKIUS, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
P-202-739-3000

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

FOR RESPONDENT MICROSEMI CORPORATION

Fred T. Grasso, Esq.
GRASSO PLLC
1818 Library Street, Suite 500
Reston, VA 20190
P-703-956-3020

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

Joel D. Covelman, Esq.
THE YOCCA LAW FIRM LLP
19900 MacArthur Blvd., Suite 650
Irvine, CA 92612
P-949-253-0800

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

IN THE MATTER OF CERTAIN COLD CATHODE ("CCFL") INVERTER CIRCUITS AND PRODUCTS CONTAINING SAME

Inv. No. 337-TA-666

FOR NON-PARTY WORLDGATE COMMUNICATION, INC.

Jeffrey S. Feldman, Esq.
MONTGOMERY, MCCRACKEN, WALKER AND RHOADS LLP
123 South Broad Street
Avenue of the Arts
Philadelphia, PA 19109-1029
P: 215-772-1500

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

IN THE MATTER OF CERTAIN COLD CATHODE ("CCFL") INVERTER CIRCUITS AND PRODUCTS CONTAINING SAME

Inv. No. 337-TA-666

PUBLIC MAILING LIST

Heather Hall **LEXIS - NEXIS** 9443 Springboro Pike Miamisburg, OH 45342	( ) Via Hand Delivery ( ) Via Overnight Mail (✓) Via First Class Mail ( ) Other: _____
Kenneth Clair **THOMSON WEST** 1100 Thirteen Street, NW, Suite 200 Washington, D.C. 20005	( ) Via Hand Delivery ( ) Via Overnight Mail (✓) Via First Class Mail ( ) Other: _____