

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN FLASH MEMORY AND
PRODUCT CONTAINING SAME**

Inv. No. 337-TA-685

Order No. 10: INITIAL DETERMINATION Setting Target Date

Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), this investigation was instituted on September 2, 2009, pursuant to a complaint filed on July 31, 2009, by Samsung Electronics Co., Ltd. (“Samsung”) of Korea. 74 Fed. Reg. 45468 (2009). The investigation was instituted “to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain flash memory or products containing same by reason of infringement of one or more of claims 1, 19, 31, and 35 of U.S. Patent No. 6,930,050 and claims 1-8, 11, and 12 of U.S. Patent No. 5,740,065, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.” *Id.*

Samsung is the named complainant in this investigation. *Id.* The named respondents are Spansion, Inc. and Spansion LLC (both of Sunnyvale, California), as well as Spansion Japan Limited of Japan (collectively, “Spansion”); Alpine Electronics, Inc. of Japan and Alpine Electronics of America, Inc. of Torrance, California (collectively, “Alpine”); D-Link Corporation of Taiwan and D-Link Systems, Inc. of Fountain View, California (collectively, “D-Link”); Slacker Inc. of San Diego, California; Synology Inc. of Taiwan and Synology North America Corp. of Redmond, Washington (collectively, “Synology”); Shenzhen Egreat Co., Ltd. of China;

and Appro International, Inc. (“Appro”) of Milpitas, California. The Commission Investigative Staff of the Office of Unfair Import Investigations (“Staff”) is also a party. *Id.*

On September 14, 2009, Order No. 2 issued extending the time for Spansion to respond to certain Samsung discovery requests to September 25, 2009. Thereafter, on September 17, 2009, Samsung and the respondents jointly moved for an extension of time of all pending deadlines. The parties sought an extension until October 5, 2009. The joint motion noted that “[o]n or about March 1, 2009, Spansion, Inc., and its subsidiaries and affiliated entities that are engaged in the business of manufacturing and selling flash memory chips commenced a proceeding in the United States Bankruptcy Court for the District of Delaware (the ‘Bankruptcy Court’), Case No. 09-10690-KJC, under Chapter 11 of the Bankruptcy Code.” Mot. No. 685-2 at 1-2.

The parties’ joint motion further stated that on or about August 25, 2009, an *Ad Hoc* Consortium of Floating Rate Noteholders moved the Bankruptcy Court for a temporary restraining order and a preliminary injunction, pursuant to sections 362 and 105 of title 11 of the United States Code, §§ 101-1532, for a stay of the patent infringement claims asserted by Samsung in this ITC investigation against “the Spansion Entities and Downstream Respondents.” *Id.* at 2. The parties also stated that at the conclusion of a hearing on September 10, 2009, the Bankruptcy Court expressed its intention to rule on the motion for stay. Accordingly, Samsung and the Spansion Entities informed the Bankruptcy Court that they would be seeking an extension of the deadlines in this ITC investigation pending the Bankruptcy Court’s ruling. *Id.* The Staff did not oppose the parties’ joint motion for an extension of all deadlines.

By Order dated September 21, 2009, the parties’ joint motion to extend all deadlines until

October 5, 2009, was granted. Order No. 3. Subsequently, the deadlines were further extended to October 19, 2009, upon motion of the parties. Order No. 6.

On October 1, 2009, Order No. 5 issued in this investigation. Order No. 5 is a standard procedural order titled, "Request for Discovery Statements." The Order required each party to submit a Discovery Statement that, among other things, identifies the issues to be tried, and proposes a procedural schedule and a target date for completion of the investigation. Order No. 5 directed the parties to file their Discovery Statements by October 8, 2009.

None of the parties complied with Order No. 5. Accordingly, a telephone conference with the parties was held on November 4, 2009, to discuss their failure to file Discovery Statements. During the conference, the undersigned was informed by the parties that the United States Bankruptcy Court for the District of Delaware (Case Nos. 09-10690 and 09-11480) by its Order of October 15, 2009, stayed the present ITC investigation against respondents Spansion, Inc., Spansion LLC, and Spansion Japan Limited, as well as against the remaining respondents in this investigation who are Spansion's customers.¹

On November 5, 2009, the undersigned issued a Notice. The Notice provided the parties with the opportunity to file a report, in light of the Bankruptcy Court proceeding, "concerning the current status of the investigation, and their suggestions concerning the conduct of the investigation." Reports were to be filed by November 12, 2009. Reports were filed by Samsung, Spansion, Alpine and the Staff. The reports indicated that all parties agreed that the Bankruptcy Court's Order applied to Samsung and all respondents in the ITC investigation. Thus, discovery

¹ Apparently in an effort to comply with the Bankruptcy Court's stay order, the parties did not procure a court reporter, as directed, to transcribe the telephonic conference.

had come to a halt. *See, e.g.*, Rpt. of Respondents Spansion Inc. and Spansion LLC at 4-5; Staff's Status Rpt. at 1.

On November 24, 2009, Order No. 7 issued in this investigation. Order No. 7 directed that “[o]n or before December 14, 2009, the parties shall jointly file a report on the status of Samsung Electronics Co. Ltd.’s Emergency Motion To Expedite Proceedings And/Or For Other Relief filed with the United States District Court for the District of Delaware (1:09-CV-00836-RBK (D. Del.)), as well as the status of any appeal in this matter filed by the United States International Trade Commission (1:09-CV-00835-RBK (D. Del.)).”

The parties filed a joint status report on December 14, 2009. The parties stated that the District Court had not yet acted on Samsung’s Emergency Motion to Expedite Appeal. The parties further stated that pursuant to a standing order of the District of Delaware, the appeals of Samsung and the International Trade Commission were referred to mediation. *Jt. Rep.* at 1. The report added that “Samsung is preparing and will propose a joint stipulation for the parties to the appeal to submit to the District Court to terminate mediation and reinstate the briefing of the appeals.” *Id.* at 2.

On February 1, 2010, counsel for respondents Spansion, Inc. and Spansion LLC submitted a pleading styled, “Notice of Order Continuing Stay.” The Notice stated that its purpose was to file with the Commission the Order of the Bankruptcy Court in Case No. 09-10690, granting a motion by Spansion, Inc., Spansion Technology LLC, Spansion LLC, Cerium Laboratories LLC, and Spansion International, Inc. for entry of an Amended Stipulation. The Bankruptcy Court’s Order provides in part:

The Amended Stipulation is approved in all respects; provided,

however, that the Samsung ITC Action shall remain stayed in its entirety, pursuant to the Order Enforcing Automatic Stay entered by the Court on October 15, 2009 in the chapter 15 case of Spansion Japan Limited with respect to each of the respondents named therein until the earliest to occur of the following: (a) a further order of this Court entered in Spansion Japan Limited's chapter 15 case allowing the Samsung ITC Action to proceed, (b) the final approval of Spansion Japan Limited's plan of reorganization in its Japanese insolvency proceeding, and (c) April 30, 2010

Notice at 1 (quoting Bankruptcy Court Order attached thereto).²

Pursuant to Order No. 9, a telephone conference was held on February 17, 2010, to discuss the status of the investigation and, in particular, the Bankruptcy Court Order filed with the Spansion Notice of February 1, 2010.³ As required by Order No. 9, the conference was transcribed by a court reporter. The following parties were represented during the conference: Samsung, Spansion (*i.e.*, all three Spansion-related respondents), Alpine, Synology, Appro, D-Link, and the Staff. Counsel for Samsung, Spansion and the Staff stated their position that under the recent Bankruptcy Court Order, all parties will be able to participate in this investigation by no later than April 30, 2010. Conf. Tr. 7, 10, 12, 20-21. No report has been made to the undersigned of any intervening event that could lift the Bankruptcy Court's stay prior to April 30, 2010, or extend it.

Consequently, on April 30, 2010, all parties will be able to participate fully in this

² This order, as well as all other stay-related orders, applies solely to the parties in the bankruptcy proceeding. While the effect of the Court's orders may have halted Commission proceedings in this investigation, they did not stay Commission proceedings.

³ An earlier telephone conference was scheduled, pursuant to Order No. 8. That conference was canceled due to inclement weather that closed Federal government offices in the Washington, D.C. region, including the Commission, as well as many private offices on the East coast of the United States.

investigation. To assist the parties in preparing for the future conduct of the investigation, the undersigned has determined to issue a target date for its completion. Although the target date is over 21 months in length, it provides approximately only 14 months between the lifting of the stay and the target date (*i.e.*, the Commission's final action). Thus, by operation of the Commission's Rule (19 C.F.R. § 210.42(a)(1)(i)), the target date provides for less than 10 months from the lifting of the Bankruptcy Court's stay to the due date for the initial determination on the question of violation of section 337.

It is expected that the target date established herein will provide the parties sufficient opportunity to try their cases. Nevertheless, given the scope of the Commission's Notice of Investigation, the target date will require the parties to work efficiently to obtain adequate discovery, and to prepare for the evidentiary hearing. A procedural schedule based upon the target date will issue shortly.

Accordingly, it is the initial determination of the undersigned that the target date for completion of the investigation is June 28, 2011, and thus the initial determination on the question of violation of section 337 is due on February 28, 2011. *See* 19 C.F.R. § 210.51(a); 19 C.F.R. § 210.42(a)(1)(i).

Pursuant to 19 C.F.R. § 210.42(h), this initial determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the initial determination or certain issues

contained herein.

So Ordered.

Carl C. Charneski

Carl C. Charneski
Administrative Law Judge

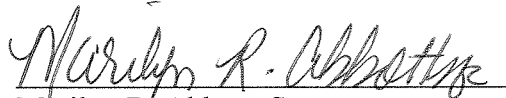
Issued: March 17, 2010

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PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **INITIAL DETERMINATION** has been served by hand upon the Commission Investigative Attorney, Rett Snotherly, Esq., and the following parties as indicated, on March 17, 2010.


Marilyn R. Abbott, Secretary
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