

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN FLASH MEMORY CHIPS AND
PRODUCTS CONTAINING THE SAME**

Inv. No. 337-TA-664

**ORDER NO. 48: GRANTING COMPLAINANTS' MOTION TO COMPEL DISCOVERY
RELATED TO SAMSUNG'S 27 NM TECHNOLOGY**

(March 23, 2010)

On February 25, 2010, Complainants Spansion, Inc. and Spansion LLC (collectively, "Spansion") moved (664-042) for an order compelling Respondents Samsung Electronics Corporation, Ltd., Samsung Electronics America, Inc., Samsung International, Inc., Samsung Semiconductor, Inc., and Samsung Telecommunications America, LLC (collectively, "Samsung") to produce certain documents and other information relating to Samsung's 27 nm technology. On March 8, 2010, the Commission Investigative Staff ("Staff") served its response on all parties, wherein Staff supported Spansion's motion. On March 9, 2010, the Commission Investigative Staff filed a motion for leave (664-062) to file its response to Complainants' motion to compel discovery relating to additional Samsung products one day late. In its motion for leave, the Staff states that while its response was served on the undersigned and the parties on time, the EDIS copy was inadvertently not filed. The Staff's motion for leave (664-062) is hereby granted. On March 12, 2010, Spansion filed a motion for leave (664-065) to file a reply in support of their Motion to Compel Discovery Related to Samsung's 27 nm Technology, which is hereby denied.

Spansion seeks to compel Samsung to supplement its responses to Spansion's discovery requests related to the 27 nm technology node, "including without limitation all documents, interrogatory responses, sample chips, and deposition testimony relating to the design, manufacture, structure, and programming of the 27 nm technology node." (Spansion Mem. at 5.) Spansion claims that it has "repeatedly requested" that Samsung supplement its discovery responses. According to Spansion, Samsung has "consistently denied" said request, "claiming that the 27 nm chips are too early in their development to be subject to discovery in this case." (*Id.*) Spansion argues that deposition testimony from Samsung's own witness, however, establishes that the 27 nm technology is, in fact, [

] In particular, Spansion asserts that [

] (*Id.* at 4.) Spansion further

asserts that this testimony is consistent with documents produced by Samsung that [

]

Spansion argues that Samsung, by failing to produce the requested information and documents, is denying Spansion evidence it requires to "develop a complete remedy case and prove infringement of all relevant technologies, impeding the fact-finding function of the Commission, and preventing the creation of a complete record." (*Id.* at 5.)

In opposition, Samsung asserts that Spansion's motion should be denied "as it is without

merit and moot.” (Opp. at 1.) Samsung argues that:

Where the Commission has permitted discovery into products while those products are under development, it has only done so where (1) prototypes or samples of those products have been imported into the United States, (2) prototypes or samples of those products have been shown to customers, or (3) there is reason to believe that the products will be made or imported into the United States before the close of the evidentiary record None of those circumstances are present here

(*Id.* at 2.) Nevertheless, Samsung states that it is providing Spansion with the discovery relating to its 27 nm products in an effort to avoid disputes and conserve resources. Because Samsung is producing, or has produced, all of the discovery Complainants seek, Samsung asserts that Spansion’s motion is moot and as such, should be denied.

Staff, in its response, states that “ITC and Federal Circuit precedent support discovery relating to products in development.” (Staff Resp. at 2.) Because the 27 nm products are sufficiently “close to completion” to be “relevant to a finding of violation,” the Staff is of the view that documents relating to the 27 nm products are discoverable. (*Id.* at 3.)

Having reviewed the pleadings and exhibits attached thereto, the undersigned finds Spansion’s and Staff’s arguments persuasive. At least one Samsung witness has testified that the

[

] In light of the fact that the design of

the 27 nm product is [] the undersigned is of the opinion that said product is sufficiently advanced such that production of information regarding these products is reasonably calculated to lead to the discovery of admissible evidence.¹ While it appears that since the filing

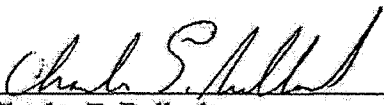
¹ As Samsung itself conceded, the relevant question is “whether the 27 nm products are at a sufficiently advanced stage of development that information regarding them would lead to the discovery of admissible information.” (Opp. at 4.)

Spansion's motion, Samsung has produced some responsive documents relating to its 27 nm products, as well as made two of its engineers available for 30(b)(6) depositions regarding the 27 nm products, it is unclear whether Samsung has completed its production. Thus, to the extent Samsung has not yet produced all of the discovery that Spansion seeks in its motion to compel, Spansion's motion is hereby granted, and Samsung must accordingly complete its production of the requested discovery within ten days.

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.

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.

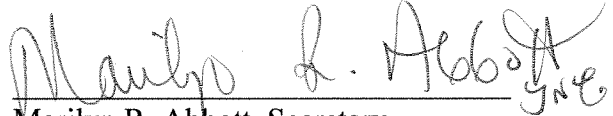


Charles E. Bullock
Administrative Law Judge

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CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER NO. 48** has been served upon, **Bryan F. Moore, Esq.**, Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on Apr 07 2010, 2010.



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