

PUBLIC VERSION

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

In the Matter of

**CERTAIN SEMICONDUCTOR
INTEGRATED CIRCUITS USING
TUNGSTEN METALLIZATION AND
PRODUCTS CONTAINING SAME**

Inv. No. 337-TA-648

**Order No. 86: Granting Respondents' Motion To Strike
Supplementation Of Appendices, Exhibits And Documents
Considered By Dr. William Kerr**

Respondents Micronas GmbH, Microchip Technology Inc., ProMOS Technologies Inc., Dongbu HiTek Semiconductor Business, Grace Semiconductor Manufacturing Corporation, National Semiconductor Corporation, Jazz Semiconductor Inc., Tower Semiconductor Inc., Nanya Technology Corporation, Powerchip Semiconductor Corporation, and Qimonda AG (collectively, "respondents") move for an order striking complainants LSI Corporation and Agere Systems Inc.'s (collectively, "LSI") supplementation of documents considered by LSI's expert Dr. William Kerr, as well as supplementation of appendices and exhibits to Dr. Kerr's Expert Report, served on April 20, 2009. (Motion No. 648-112). The Commission Investigative Staff ("Staff") supports respondents' motion to strike. LSI has filed an opposition to the motion.¹ Respondents' motion to strike is granted.

¹ Respondents' motion to file a reply (no motion number provided) and LSI's motion to file a surreply (Motion No. 648-136) are granted.

Initial expert reports in this investigation were due to be filed by March 20, 2009. Order No. 22. LSI's expert, Dr. William Kerr, timely submitted his Initial Expert Report on March 20. Thereafter, on April 20, 2009, LSI served on respondents in this investigation "supplemented Confidential Exhibits 6 and 12 and added supplemental Confidential Appendix D to Dr. Kerr's report, as well as supplemented Appendix B (documents considered)." *See* Opp. at 1; *see also* Mot. at 6. Although served on the respondents on April 20, these supplemental documents were not filed with the U.S. International Trade Commission until May 7, 2009, when LSI also filed its opposition to respondents' present motion to strike. Opp. at 1, n.2. Except for a belated reference in this opposition to "good cause" to supplement the Kerr Report, discussed, *infra*, LSI has not moved to supplement Dr. Kerr's Expert Report.

Ground Rule 2(s) controls here. Ground Rule 2(s) provides: "Experts shall submit their reports in accordance with the due dates set in the prehearing schedule. Expert reports may be supplemented only upon motion and for good cause shown." The procedural Ground Rules were issued in this investigation on May 21, 2008, as Order No. 2.

Ground Rule 2(s) is a simple rule that is far more important to the orderly conduct of a Section 337 investigation than one might think would be the case if reading these few words in isolation. This ground rule allows the parties to develop the "expert" portion of their case with the knowledge that each side will have the same opportunity to do so though the submission of initial and rebuttal expert reports, without fear that their opponent will obtain an unfair advantage through later-filed expert report "revisions" and "updates." Such unfair advantage comes to fruition at the hearing, where the expert witness is then able to offer opinions restricted only by the scope of his most recent, late-filed expert submission. The result of this unfortunate event is

chaos at the hearing.

Ground Rule 2(s) seeks to prevent an expert report feeding frenzy fueled by a series of late-filed supplemental expert reports, that as past Section 337 investigations have shown, otherwise might result without this rule. The fact that all parties must meet the same filing deadlines minimizes the opportunity for one side's experts to gain unfair advantage over the other side's. As noted, most importantly, the benefits of Ground Rule 2(s) extend to the hearing on the merits by setting out the parameters of the expert witness's allowable testimony. Counsel and the court are, therefore, better positioned to understand the scope of an expert's permissible testimony, as well as the basis for the expert's opinions.

Finally, and particularly relevant to the present motion to strike, Ground Rule 2(s) is not an inflexible rule. By its very terms, it allows for the supplementation of expert reports by motion and for "good cause shown."

Here, complainant LSI utterly fails to show that its attempted supplementation of Dr. Kerr's report is proper under the circumstances. First, LSI has not timely moved to supplement Dr. Kerr's Report as required by Ground Rule 2(s). Second, complainants have, in any event, failed to satisfy the ground rule's "good cause shown" standard.

In that regard, the very first sentence of its opposition reads, "Respondents' motion to strike is based on a false premise." Opp. at 1. Apparently, the false premise is revealed in the next sentence which in turn reads, "Complainants' expert, Dr. Kerr, has not changed his expert report." *Id.* While that point is certainly disputed by respondents, the fact of the matter is that, even if true, LSI must still comply with Ground Rule 2(s) if it seeks to supplement or otherwise amend an expert report out-of-time. It did not do so here and that failure is fatal to its attempted

supplementation of Dr. Kerr's Expert Report.

Similarly unpersuasive is LSI's argument that the supplementation should be allowed because it does not prejudice respondents, and that actually (in complainants' view) a "benefit inures to Respondents" by pulling out details "from documents previously disclosed in Dr. Kerr's initial report, including from Respondents' own documents." Opp. at 2-3. Respondents strenuously disagree that they are not prejudiced by LSI's supplemental filing and that this out-of-time supplementation somehow works to their benefit.²

Finally, toward the conclusion of its opposition to respondents' motion to strike, LSI states, "Should the ALJ deem otherwise, however, Complainants request that this submission be considered to include a motion to amend pursuant to Ground Rule 2(s)." Opp. at 4. Complainants' request is too little, too late.

First, this reference is simply not a motion. It is nothing more than an attempt by complainants, should the undersigned agree with respondents and the Staff that Ground Rule 2(s) applies here, to address the fact that they never did move to supplement the Kerr Report after the close of the expert report filing deadline. Indeed, LSI did not even seek to file the disputed supplemental documents with the Commission until May 7, 2009, even though the documents

² For example, respondents note, "[t]ogether, these supplemental documents cover nearly 90 pages of new material. LSI's service also included a list of over 75 documents considered by Dr. Kerr *after* his March 20, 2009 report and a production of documents spanning hundreds of pages." Mot. at 3 (Resps. emphasis), citing Mot. Ex. C. Respondents consider complainants' supplementation as an attempt "to significantly expand the content and bolster the foundation of Dr. Kerr's report." Mot. at 6. They argue that supplemental Exhibit 6 "radically changes the scope and content of the exhibit;" supplemental Appendix D "includes a vast quantity of completely new information," adding thousands of new data points; and supplemental Appendix B "seeks to add 75 new references (totaling hundreds of pages)." Mot. at 6-7. This dispute between the parties need not be resolved for purposes of the present motion to strike.

were served on respondents and the Staff on April 20, 2009. Under these circumstances, it is too much of a stretch to consider LSI's submission as a motion.

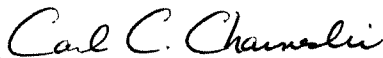
Second, even if LSI's submission could somehow be construed as a motion pursuant to Ground Rule 2(s), complainants simply do not identify the "good cause" warranting acceptance of its out-of-time submission. Indeed, complainants offer little more than a string of citations to previous investigations in an attempt to persuade this court that its supplementation is proper. The citations relied upon by LSI are not apposite here.

In sum, LSI's failure to comply with Ground Rule 2(s) cannot be cured at this late stage simply by a last-minute invocation of the ground rule, just in case this court agrees with respondents and the Staff that Ground Rule 2(s) precludes the supplementation of Dr. Kerr's Expert Report.

Accordingly, for the foregoing reasons, respondents Motion To Strike LSI's Untimely Supplementation of Appendices, Exhibits and Documents Considered by Dr. William Kerr is granted. (Motion No. 648-112).

Within seven days of the date of this document, each party shall submit to the Office of Administrative Law Judges a statement as to whether or not it seeks to have any portion of the document redacted from the public version. The parties' submissions may be made by facsimile and, or, by hard copy. Any party seeking to have a portion of this document redacted from the public version must submit to this office a copy of this document with red brackets indicating the portion, or portions, asserted to contain confidential business information.

So Ordered.



Carl C. Charneski
Administrative Law Judge

Issued: June 2, 2009

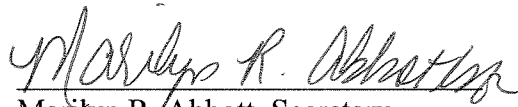
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PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** has been served upon the Commission Investigative Attorney, Ret Snotherly, Esq., and the following parties as indicated, on

JUL 2 2010



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