

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

**In the Matter of**

**CERTAIN COMMUNICATION  
EQUIPMENT, COMPONENTS  
THEREOF, AND PRODUCTS  
CONTAINING THE SAME, INCLUDING  
POWER OVER ETHERNET  
TELEPHONES, SWITCHES, WIRELESS  
ACCESS POINTS, ROUTERS AND  
OTHER DEVICES USED IN LANS, AND  
CAMERAS**

**Inv. No. 337-TA-817**

**ORDER NO. 13: GRANTING-IN-PART AND DENYING-IN-PART NON-PARTY  
BROADCOM CORPORATION'S MOTION TO QUASH AND/OR  
LIMIT COMPLAINANT'S SUBPOENA *DUCES TECUM* AND *AD  
TESTIFICANDUM***

(May 29, 2012)

On March 19, 2012, non-party Broadcom Corporation ("Broadcom") filed a motion to quash and/or limit the subpoena *duces tecum* and *ad testificandum* issued on February 21, 2012, and served by complainant ChriMar Systems, Inc. d/b/a CMS Technologies ("ChriMar"). (Motion Docket No. 817-010.) Broadcom also seeks compensation for the costs associated with responding to ChriMar's subpoena. On March 21, 2012, non-party NVIDIA filed a notice of joinder with Broadcom's motion. On March 28, 2012, the Commission Investigative Staff ("Staff") filed a response opposing the motion. On March 29, 2012, ChriMar filed an opposition.

On April 6, 2012, Broadcom filed a motion for leave to file a reply in support of its motion. (Motion Docket No. 817-015.) On April 9, 2012, ChriMar filed an opposition to

Broadcom's motion for leave to file a reply. On April 10, 2012, Broadcom filed a corrected Ground Rule 3.2 statement. As of the date of this order, no other responses have been received. Motion No. 817-015 is DENIED.

This investigation is based on a complaint filed by ChriMar on November 1, 2011. In accordance with recent changes to the Commission Rules, the Commission published a notice entitled "Solicitation of Comments Relating to the Public Interest" in the Federal Register on November 7, 2011, inviting ChriMar, respondents, other interested parties, and members of the public to file comments addressing so-called "public interest factors" outlined in Section 337, *i.e.*, whether issuance of an exclusion order and/or cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers. (*See* 76 Fed. Reg. 68785 (November 7, 2011).) On November 15, 2011, Broadcom and NVIDIA jointly submitted public interest statement primarily arguing that the public interest disfavors investigations (1) by licensing driven entities and (2) implicating standard-compliant products. As discussed in Order No. 12, Google also filed a five-page public interest submission in response to this request. Broadcom's submission cites only to the complaint and several legal journal articles dealing with the issues raised in its submission. Broadcom and NVIDIA are also chip suppliers to the named respondents in this investigation.

On February 21, 2012, ChriMar served a subpoena on Broadcom seeking documents and deposition testimony that ChriMar contended pertained to matters related to Broadcom's public interest statement and to the products Broadcom supplies the respondents. Broadcom filed

objections arguing, *inter alia*, that the requests were overly broad and unduly burdensome and sought privileged information. Broadcom has not yet produced any documents or a deponent.

Broadcom argues that this subpoena is simply to punish it for submitting a public interest statement. Broadcom asserts that even for document requests purportedly directed to the accused products in the investigation, ChriMar's subpoena is substantially overbroad because it seeks "all documents" and "all communications." If the subpoena is not quashed, Broadcom suggests that the subpoena be narrowed in accordance with Broadcom's response to the subpoena, which Broadcom asserts sets forth a reasonable scope for discovery of all non-privileged materials referred to or relied upon for Broadcom's submission on the public interest. Specifically, Broadcom suggests:

1. Quash Document Request Nos. 1-2, 14, 17-23, 25, 27-33, as not sought for an appropriate purpose, relevant or reasonable scope.
2. Quash Document Request Nos. 3, 7-12, 24, and 26 as seeking documents in the possession, custody, or control of respondents.
3. Limit the scope of Document Request Nos. 3-6 as follows: Broadcom will produce responsive, non-privileged documents in its possession, custody or control located after a reasonable search that (i) discuss ChriMar in connection with this investigation; (ii) discuss the '250 Patent; (iii) discuss any ChriMar patent known to Broadcom in connection with this investigation; or (iv) discuss Investigation No. 337-TA-817.
4. Limit the scope of Document Request Nos. 13, 15-16 as follows: Broadcom will produce responsive, non-privileged documents in its possession custody, or control located after a reasonable search that were referred to or relied upon for the November 15, 2011 Submission of Non-Party Broadcom Corporation and NVIDIA Corporation in Response to the Commission's Request for Submissions on the Public Interest (Docket No. 2853).
5. Quash the subpoena *ad testificandum* as duplicative, cumulative, and unduly burdensome unless the Complainant can identify unique, relevant topics reasonable in scope on which deposition testimony is required after production of the above-described documents.

NVIDIA also urges that the subpoena (and the subpoena served on it) be quashed. NVIDIA argues that the subpoena is only to punish the non-parties who submitted public interest statements in this investigation. NVIDIA notes that 12 of the 15 document requests seek “all documents” and the deposition subpoena includes 12 deposition topics. NVIDIA argues that it is identically situated to Broadcom and Google and urges that the same logic also applies to it.

ChriMar argues that it is entitled to take discovery from Broadcom because Broadcom is a supplier of important components in the respondents’ accused products. ChriMar does not object to some of the limitations Broadcom seeks to impose on the subpoena. Specifically, ChriMar does not oppose Broadcom’s proposal to limit the scope of Document Requests 3-6, 13, and 15-16. ChriMar does oppose Broadcom’s efforts to quash (1) Document Request Nos. 1-2, 7-12, 14, 17-23, and 24-33; and (2) ChriMar’s efforts to obtain deposition testimony.

ChriMar also argues that the subpoena seeks relevant information because Broadcom’s chips are incorporated into many of the accused products. ChriMar also argues that the requests are not unduly broad and overly burdensome because some of the requests only seek documents “sufficient” to show certain information and others are directed to the accused products. ChriMar also argues that the IEEE discovery is related to respondents’ affirmative defenses. ChriMar asserts that the deposition topics would not be duplicative and seek legitimate discovery. ChriMar argues that discovery into the public interest statement is necessary to “ensure that the parties and the ALJ can properly assess the basis for those arguments as well as the third-party’s objectivity and credibility.” ChriMar asserts that “Broadcom’s business and commercial relationship with Respondents establish that vested interest.” ChriMar also argues that Broadcom is not entitled to costs should the ALJ not quash the subpoena.

Staff suggests that the motion should be denied. Staff agrees that Broadcom's submission of a public interest statement alone should not automatically subject it to discovery. However, Staff asserts that Broadcom is in a different position than Google. Staff argues that unlike Google, the subpoena served on Broadcom is more narrowly tailored to seek information relevant to ChriMar, ChriMar's '250 patent, the 802.3 standard at issue in this investigation, and Broadcom's 802.3 compliant chips which have been sold to the Respondents and are allegedly incorporated into at least some of the accused products. Staff contends that Broadcom's alleged participation in the 802.3 standard and its sale of Power over Ethernet chips to the respondents makes the discovery sought relevant. As for Broadcom's suggestion to limit the subpoena, Staff argues that this suggestion would quash the more relevant document requests directed to Broadcom's chips while allowing discovery only regarding ChriMar and the public interest. Thus, Staff opposes the motion.

A non-party moving to quash or limit a subpoena has the burden of showing that the subpoena is unreasonable or oppressive. *Truswal Sys. Corp. v. Hydro-Air Eng'g, Inc.*, 813 F.2d 1207, 1210 (Fed. Cir. 1987). "The test for determining whether a subpoena should be quashed balances: (1) the relevance of the discovery sought; (2) the need of the requesting party; and (3) the potential hardship to the party responding to the subpoena." *Certain Muzzle-Loading Firearms and Components Thereof*, Inv. No. 337-TA-777, Order No. 25 (December 1, 2011). "In assessing the burden of complying with a subpoena, a court may consider as one factor that a deponent is not a party." *Truswal*, 813 F.2d at 1210.

The ALJ finds that Broadcom has not shown that the subpoena should be quashed in its entirety. Unlike the subpoena ChriMar served on Google, this subpoena is not directed only at obtaining information related to the public interest statement, it also seeks information related to

components that Broadcom supplies for the accused products. As Staff rightly suggests, this difference is dispositive as to whether the subpoena should be quashed in its entirety.

As for Broadcom's efforts to limit the document subpoena, the ALJ discerns three main issues. *First*, ChriMar apparently consents to the limitations suggested in Broadcom's brief regarding Document Requests 3-6, 13, and 15-16. Accordingly, the ALJ limits those requests as suggested by Broadcom.

*Second*, the ALJ agrees with Broadcom that a number of the document requests cannot be justified merely by Broadcom's status as a supplier. Thus, they fall into the same category as the subpoena ChriMar served on Google. Contrary to ChriMar's suggestion, extensive discovery is not necessary to determine potential sources of bias for a supplier to respondents, such as Broadcom. For example, ChriMar's requests for all written agreements between Broadcom and any respondent, or patents and documents concerning unrelated litigations that Broadcom has been involved in, are so far removed from the subject matter of this investigation to be irrelevant. More importantly, the burden on the non-party far outweighs the mere possibility of relevancy. Accordingly, the ALJ grants Broadcom's motion to quash the subpoena with respect to Document Request Nos. 24-30.

*Third*, as for the remaining requests, the ALJ is inclined to agree with Broadcom that many of them are vague, overly broad, and unduly burdensome. In particular, the requests seeking "all documents" and "all communications" are substantially overbroad. The ALJ finds that this is even the case with respect to the requests seeking technical aspects of components of the accused products –the most relevant category of documents sought by the subpoena. As such, these requests (as currently written) are unduly burdensome for a third party to be required to respond.

However, the ALJ believes that many of the problems with the requests can be worked out between the parties. Accordingly, the ALJ hereby ORDERS the parties to meet and confer to agree on a reasonable scope of the requests and a reasonable scope for any search for documents that Broadcom should perform. In this meet and confer process, ChriMar shall identify with specificity the products and specific information (*e.g.*, what information about volumes, what information about the IEEE task forces) for which it seeks documents. The identity of the products that Respondents purchased should have been identified through discovery from Respondents. It is unfair to impose the burden of identifying specific products on a non-party. Moreover, a third party subpoena is not a fishing expedition. To the extent that ChriMar believes that specific aspects of Broadcom's participation in the IEEE working groups related to 802.3 are relevant to Respondents' defenses, it should identify those aspects. Accordingly, the ALJ declines to grant Broadcom's motion to quash the remaining of the document requests and directs the parties to meet and confer regarding the scope of those requests in their entirety and the search that Broadcom shall be required to perform.

As for Broadcom's request for cost shifting, the ALJ denies it without prejudice. Many of the document requests, as drafted, are exceedingly broad to the extent that they seek "all documents" and "all communications" for a wide variety of topics. Without a specific demonstration of need, the ALJ believes that such broad requests are unwarranted and, if unrestricted, may warrant cost shifting. However, the ALJ is unwilling to award cost-sharing in the abstract and without an actual demonstration of the costs involved. Should a renewed effort for cost-shifting be made by any third party, the ALJ will look closely at the reasonableness of the conduct of the parties in their meet and confer process in determining if cost-shifting is warranted.

Finally, as for the deposition subpoena, the ALJ declines to quash it in its entirety. Because Broadcom is a supplier of components for accused products, ChriMar is entitled to obtain testimony regarding those components that is relevant to its claims and defenses. However, the ALJ finds that many of the topics are overly broad and unduly burdensome and many seek information irrelevant to this investigation. The ALJ grants Broadcom's motion to quash with respect to topics 5, 6, 7, 11, 16 and 17. These topics seek information that is irrelevant for the reasons stated above with respect to Document Request Nos. 24-30. The ALJ directs the parties to meet and confer regarding the scope of the deposition on the remaining topics. ChriMar shall identify with specificity the products for which it seeks testimony.<sup>1</sup>

Accordingly, Motion No. 817-010 is GRANTED-IN-PART and DENIED-IN-PART.

The ALJ declines to quash the subpoenas in their entirety. The ALJ orders as follows:

1. Document Request Nos. 3-6 are limited in scope as follows: Broadcom will produce responsive, non-privileged documents in its possession, custody or control located after a reasonable search that (i) discuss ChriMar in connection with this investigation; (ii) discuss the '250 Patent; (iii) discuss any ChriMar patent known to Broadcom in connection with this investigation; or (iv) discuss Investigation No. 337-TA-817.
2. Document Request Nos. 13, 15-16 are limited in scope as follows: Broadcom will produce responsive, non-privileged documents in its possession, custody, or control located after a reasonable search that were referred to or relied upon for the November 15, 2011 Submission of Non-Party Broadcom Corporation and NVIDIA Corporation in Response to the Commission's Request for Submissions on the Public Interest (Docket No. 2853).
3. Document Request Nos. 24-30 are quashed.
4. The parties are directed to meet and confer regarding the remaining document requests as directed above.


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<sup>1</sup> With respect to NVIDIA, the ALJ declines to quash the subpoenas directed to it at this time without specific briefing on the requests directed to NVIDIA. However, the ALJ directs the parties to meet and confer regarding the NVIDIA subpoenas in light of the rulings set forth in this order and to limit those subpoenas in a manner consistent with this order.



5. Broadcom's request for cost shifting is denied without prejudice.
6. The deposition subpoena is quashed with respect to Topics 5, 6, 7, 11, 16 and 17.
7. The parties are directed to meet and confer regarding the remaining deposition topics as directed above.

**SO ORDERED.**



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Theodore R. Essex  
Administrative Law Judge

**CERTAIN COMMUNICATION  
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ETHERNET TELEPHONES, SWITCHES, WIRELESS ACCESS POINTS,  
ROUTERS, AND OTHER DEVICES USED IN WLANS AND CAMERAS**

337-TA-817

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER 13** has been served by hand upon the Commission Investigative Attorney, **Daniel E. Valencia, Esq.**, and the following parties as indicated on **May 29, 2012**.



Lisa R. Barton, Acting Secretary  
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337-TA-817

**PUBLIC CERTIFICATE OF SERVICE-PAGE TWO**

**On Behalf of Respondents CISCO SYSTEMS, INC., CISCO CONSUMER PRODUCTS,  
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