

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN GRAPHICS PROCESSING
CHIPS, SYSTEMS ON A CHIP, AND
PRODUCTS CONTAINING THE SAME

Inv. No. 337-TA-941

Order No. 8

Pursuant to 19 C.F.R. §§ 210.27, 210.32, 210.34¹ and Ground Rules 1(i)-(k), non-party Taiwan Semiconductor Manufacturing Company North America (“TSMC NA”) filed a Motion to Quash Subpoena *Duces Tecum* and *ad Testificandum*, and a memorandum in support thereof. Motion Docket No. 941-20. The motion was opposed by Samsung Electronics Co., Ltd. and Samsung Austin Semiconductor, LLC (collectively, “Samsung”) and by the Commission Investigative Staff (“Staff”).²

The Commission Rules do not attempt to set forth all the reasons why a subpoena may be proper, or may be quashed. Yet, the Rules do provide that, in general, parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party, and further that discoverable subject matter includes information that is reasonably calculated to lead to the discovery of admissible evidence. 19 C.F.R. 210.27(b). Thus, in determining whether or not to quash a subpoena, administrative law judges have considered factors such as

¹ Although the pending motion cites to 19 C.F.R. § 210.34, the relief requested is consistent with the request to quash pursuant to § 210.32.

² TSMC filed a motion for leave to reply (Motion Docket No. 941-22), and a reply. Motion No. 941-22 is granted.

(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. *See, e.g., Certain Opaque Polymers*, Inv. No. 337-TA-883, Order No. 15 at 3 (Feb. 4, 2014); *Certain Light-Emitting Diodes and Prods. Containing Same*, Inv. No. 337-TA-798, Order No. 20 at 3 (Mar. 1, 2012).

The subpoena at issue (a copy of which is contained in Mot. Ex. A) was served on TSMC NA in the United States, and it seeks information in TSMC NA's possession custody or control, including information from others, including TSMC NA's parents and affiliates. *See* Subpoena, "Definitions and Instructions, 1." Samsung confirms in its opposition to the motion to quash that through the subpoena at issue it seeks information from non-party Taiwan Semiconductor Manufacturing Co., Ltd. ("TSMC"), which is represented to be the foreign parent of TSMC NA. *See* Opp'n at 14-16.

The potential involvement of TSMC with this investigation, and the effect that any potential remedy might have on TSMC's interests, were already the subject of a motion filed by TSMC (Motion Docket No. 941-5) in which TSMC requested entry of an order granting it limited intervention in this proceeding for the sole purpose of moving to disqualify Samsung counsel, Kirkland & Ellis LLP ("Kirkland"), and for an order disqualifying Kirkland from representing Samsung in this investigation. In particular, TSMC argued that that two of the four patents asserted in this investigation (*i.e.* U.S. Patent No. 6,147,385 ("the '385 patent"), and U.S. Patent No. 7,056,776 ("the '776 patent")) are asserted against certain TSMC-manufactured NVIDIA³ products, and the two patents contain subject matter that relates to issues raised in Inv. No. 337-TA-906, an investigation in which TSMC was represented by Kirkland (with the same individual serving as Kirkland lead counsel in both the 906 investigation and the present

³ The respondents in this investigation include NVIDIA Corporation.

investigation). *See* Order No. 7 at 2, 3-4. On April 13, 2015, the administrative law judge issued Order No. 7, which contained an (unreviewed) initial determination granting the request of TSMC to intervene for the sole purpose of seeking disqualification of Samsung's counsel, and denied TSMC's request for disqualification of Kirkland.⁴ *See* Order No. 7 at 4; Notice of a Commission Determination Not to Review an Initial Determination Granting Intervention by Taiwan Semiconductor Manufacturing Co., Ltd., for a Limited Purpose (May 13, 2015).

In denying TSMC's request to disqualify, the administrative law judge found that the fact that Samsung chose to accuse products TSMC makes for NVIDIA does not establish that Kirkland's representation of Samsung is directly adverse. The administrative law judge relied on Samsung's representation that the '385 and '776 patents are not directed to wafer manufacturing technology, and further that the issue is only whether the specific NVIDIA-designed chips infringe the asserted patents. *See* Order No. 7 at 5 (citing, Samsung Opp'n to Mot. No. 941-5 at 24-25; Staff Resp. to Mot. No. 941-5 at 8-10). Indeed, Samsung has made several representations in this investigation to oppose the disqualification of Kirkland that bear upon the question of whether or not the subpoena at issue in the pending motion should be quashed.

Samsung began its opposition to TSMC's motion for disqualification by clearly and unequivocally representing, "This is a case about NVIDIA chips that NVIDIA and its customers import. Nothing turns on who manufactures the chips for NVIDIA or how they manufacture those chips." Samsung Opp'n to Mot. No. 941-5 at 1.

Samsung further represented in general, but emphatic, terms, "Again, Samsung does not accuse TSMC's standard cell libraries or wafer-manufacturing processes of infringement *at all*. Rather, Samsung accuses NVIDIA's chips—designed by NVIDIA—of infringement. TSMC has

⁴ The subpoena at issue, as well as the opposition to the pending motion to quash, were served by the firm of O'Melveny & Myers, LLP.

the burden of proving that these matters are substantially related and has failed to do so.” *Id.* at 2-3 (emphasis in original).

Samsung represented more specifically, “Whether a particular NVIDIA chip infringes the asserted claims depends entirely on the structure of the product—not the process used for making it. Thus, whereas the 906 Investigation involved a particular type of TSMC cell library that TSMC customers could use to design their chips for fabrication by TSMC, this case is about **products** with certain accused features, regardless of how they are made (or who helps NVIDIA make them). Indeed, the accused chips can be made using a variety of different processes.” *Id.* at 3 (emphasis in original). Thus, in opposing TSMA’s motion to disqualify, Samsung explicitly represented that the focus of its case would be on NVIDIA products, “**regardless of how they are made**” or who helps to make them.⁵

Further minimizing the possibility that particular actions performed or not performed by TSMC could be relevant in this investigation, Samsung represented, “This is in no way, shape, or form a case against TSMC. Nor is this action somehow a proxy for an action against TSMC. Rather, this is a case about a variety of NVIDIA chips—**regardless of the process by which they are manufactured or which suppliers NVIDIA turns to in manufacturing them.**” *Id.* at 12 (emphasis added).

To drive home the point that the ‘385 patent and the ‘776 patent will not be asserted in any way that could cause a conflict between TSMC and Kirkland as Kirkland represents Samsung in this investigation, Samsung represented, “The case here is about **the end-product**

⁵ Specifically addressing the ‘385 patent and the ‘776 patent, as well as the use of tools, Samsung represented, “The asserted claims of the ‘385 patent do not require particular tools to design the claimed SRAM cell or semiconductor device, or a particular process to make them. * * * As with the ‘385 patent, the ‘776 patent does require particular tools to design the semiconductor device having the claimed gate layout or a particular process to make the semiconductor device with the claimed layout.” Samsung Opp’n to Mot. No. 941-5 at 6.

that NVIDIA designed, not the process—let alone any TSMC electronic libraries—used to make those products.”⁶ *Id.* at 25 (emphasis in original).

Samsung represented that nothing turns on who manufactures the chips for NVIDIA or how the chips are manufactured. Samsung represented that its case turns on “the end-product that NVIDIA designed,” not any design or manufacturing choices made by others. Yet, the subpoena at issue seeks documentary information, as well as deposition testimony, on topics ranging from design and layout, through process information and testing, to material composition and work processes for numerous NVIDIA products. There is not a single Topic of the subpoena at issue that conforms to the representations that Samsung made in order to avoid having the Kirkland firm disqualified.

Even with respect to Topics that clearly call for process information,⁷ Samsung argues that its subpoena is consistent with its prior representations because it does not, in fact, accuse

⁶ Similarly, in opposing certain respondents’ motion for leave to reply in connection with TSMC’s motion to disqualify, Samsung represented:

And NVIDIA’s only claim to alleged prejudice is its illogical supposition that Kirkland must have used “insider information” (NVIDIA Proposed Reply at 4) to determine infringement of its products because it has not subpoenaed TSMC for process documents—a spurious position flatly at odds with (i) the unchallenged evidence and expert testimony that *infringement of Samsung’s claims can be (and was) readily determined by simply looking at NVIDIA’s product itself*; and (ii) the uncontested facts that the products at issue in this case were not at issue in the earlier case involving Kirkland. For these reasons, the Administrative Law Judge should deny NVIDIA’s motion for leave to file a “reply.”

Opp’n to Certain Respondents’ Mot. for Leave to File a Reply (Motion Docket No. 941-12) at 2 (emphasis added).

⁷ For example, Samsung requests the following testimony:

2. For each Accused ‘385 Product, a description of how each Metal 1 Layer and Common Gate Electrode Layer is formed within each 6T SRAM cell, including whether each Common Gate Electrode Layer is “formed by one first deposition and patterning process” and each Metal 1 Layer is “formed by one second disposition and patterning process different from said first disposition and patterning process.”

those processes of patent infringement. *See* Opp'n at 9. That argument is based on a grossly erroneous interpretation of Samsung's prior representations. At issue in the motion for disqualification was not merely whether Samsung accuses specific processes or steps performed by TSMC. Rather, Samsung made it clear that its case is directed solely toward end-products designed by NVIDIA "***regardless of the process by which they are manufactured.***"

Samsung argues that it drafted certain Topics in response to NVIDIA's proposed claim constructions. *See id.* Yet, Samsung presumably considered its whole case, including its responses to the defenses of other parties, when it opposed the motion to disqualify.

The administrative law judge accepted Samsung's representations and adopted many of Samsung's arguments in issuing Order No. 7, and in determining not to disqualify Kirkland. Applying the same expectations about this investigation to the pending motion to quash, it is found that the documentary information and deposition testimony sought is not relevant to this investigation, and should not be needed by Samsung. Thus, the pending motion to quash should be granted.

If it were found that Samsung's case under the '385 patent and the '776 patent did in fact turn on how TSMC makes NVIDIA products, it is not clear that the disposition of the motion to disqualify would be the same as that contained in Order No. 7.

Accordingly, Motion No. 941-20 to quash is granted.



David P. Shaw
Administrative Law Judge

Issued: May 13, 2015

Subpoena, Attach. B, Topics of Testimony Requested.

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PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **Order No. 8** has been served by hand upon the Commission Investigative Attorney, **Yoncha Kundupoglu, Esq.**, and the following parties as indicated, on _____.

MAY 26 2015



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