

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C. 20436

**In the Matter of
CERTAIN SEMICONDUCTOR CHIPS WITH
MINIMIZED CHIP PACKAGE SIZE AND PRODUCTS
CONTAINING SAME**

Inv. No. 337-TA-605

COMMISSION OPINION

I. PROCEDURAL BACKGROUND

On May 21, 2007, the Commission instituted an investigation under section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, based on a complaint filed by Tessera, Inc. of San Jose, California ("Tessera"), alleging a violation of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain semiconductor chips with minimized chip package size or products containing same by reason of infringement of one or more of claims 1, 2, 6, 12, 16-19, 21, 24-26, and 29 of U.S. Patent No. 5,852,326 ("the '326 patent") and claims 1-11, 14, 15, 19, and 22-24 of U.S. Patent No. 6,433,419 ("the '419 patent"). 72 *Fed. Reg.* 28522 (May 21, 2007). The complainant named Spansion, Inc. and Spansion, LLC, both of Sunnyvale, California; QUALCOMM, Inc. of San Diego, California; ATI Technologies of Thornhill, Ontario, Canada; Motorola, Inc. of Schaumburg, Illinois; STMicroelectronics N.V. of Geneva, Switzerland; and Freescale Semiconductor, Inc. of Austin, Texas, as respondents.

On February 22, 2008, respondents filed a joint motion to stay these proceedings pending reexamination of the '326 and '419 patents by the United States Patent and Trademark Office

OFFICE OF THE SECRETARY
U.S. INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436
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(“PTO”).¹ Reexamination of the asserted patents before the PTO was requested on February 9, 2007, by Siliconware Precision Industries Co., Ltd. (“Siliconware”), which is not a party to this investigation but is a party in a related litigation with Tessera in the United States District Court for the Northern District of California. In particular, Siliconware requested *ex parte* reexamination of claims 1-3, 6, 11, 12, 16-19, 21, 24-26, and 29 of the ‘326 patent and *inter partes* reexamination of claims 1-19, 22-24, and 27 of the ‘419 patent. On April 20, 2007, the petition for *ex parte* reexamination of the ‘326 patent was granted stating that a “substantial new question of patentability” exists with respect to all of the claims for which the requester seeks reexamination. On May 4, 2007, the petition for *inter partes* reexamination of the ‘419 patent was granted.

The hearing in this investigation was scheduled to begin on February 25, 2008. On February 25, 2008, the presiding administrative law judge (“ALJ”) held oral argument on respondents’ motion to stay rather than start the hearing. On the same day, Tessera filed an opposition to the motion for stay. On February 26, 2008, respondents filed a motion for leave to file a reply in further support of their motion to stay.

On February 26, 2008, the ALJ issued “Order No. 52: Initial Determination Granting Respondents’ Motion for Stay Pending Examination” in which the ALJ granted respondents’ motions for stay and for leave to file a reply. On March 4, 2008, Tessera and the Commission investigative attorney (“IA”) each filed a petition for review of Order No. 52. On March 11,

¹ Respondents’ motion is a renewal of an earlier motion filed in June 2007. Respondents ultimately abandoned the earlier motion, stating that it was no longer ripe for adjudication. *See* Parties’ Joint Report of Meet and Confer Regarding Outstanding Motions, Pursuant to Order No. 28 (filed on Jan. 18, 2008).

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2008, respondents filed their opposition to the petitions for review.

II. INTERLOCUTORY APPEALS

Order No. 52 does not fall within the scope of Commission Rule 210.42 enumerating initial determinations. *See* 19 C.F.R. § 210.42. We note, however, that Commission Rule 210.24(b) provides for interlocutory appeals where, *inter alia*, “an immediate appeal from the [ALJ] ruling may materially advance the ultimate completion of the investigation or subsequent review will be an inadequate remedy.” 19 C.F.R. § 210.24(b). In the present case, we consider the petitions for review filed by the IA and Tessera as applications for review of a ruling by the ALJ, and the ALJ’s styling of Order No. 52 as an “initial determination” and certification as leave of the ALJ for an immediate appeal of Order No. 52 to the Commission. *See id.* Accordingly, we determine to treat Order No. 52 as subject to an immediate appeal and to review it.

III. DISCUSSION

In determining whether to stay an investigation when there are ongoing reexamination proceedings at the PTO, Commission ALJs have weighed the following factors: (1) the state of discovery and the hearing date; (2) whether a stay will simplify the issues and hearing of the case; (3) the undue prejudice or clear tactical disadvantage to any party; (4) the stage of the PTO proceedings; and (5) the efficient use of Commission resources.^{2,3} *See, e.g., Personal*

² The presiding ALJ correctly noted that the Commission has considered a sixth factor – the availability of alternative remedies in Federal Court – in some past investigations. *ID* at 4; *Certain Personal Computer/Consumer Electronic Convergent Devices, Components Thereof, and Products Containing Same*, 337-TA-558, Order No. 6 (unreviewed) (Feb. 7, 2006); and *Certain High-Voltage Circuit Interruptors and Components Thereof*, 337-TA-64, Comm’n. Op., 204 USPQ 50; 54-55 (1979). Despite those past examples, we give no weight to that

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Computer/Consumer Electronic Convergent Devices, Components Thereof, and Products Containing Same, Inv. No. 337-TA-558, Order No. 6 at 11-12 (Feb. 7, 2006) (“*Personal Computers*”); accord, *In re Laughlin Prods., Inc.*, 265 F. Supp. 2d 525, 530 (E.D. Pa. 2003); *Xerox Corp. v. 3Com Corp.*, 69 F. Supp. 2d 404, 406 (W.D.N.Y. 1999).

In the present investigation, the ALJ granted the stay as a result of his consideration of the factors listed above.⁴ For the reasons discussed below, we determine, however, that the balance of the factors weighs against granting a stay. This is particularly true in the present case because a stay effectively terminates the investigation, in light of the fact that the patents at issue are virtually certain to expire before the PTO’s reexamination is completed. Accordingly, we

consideration in determining whether to grant the stay motion here. The statute provides that the remedies available for violation of section 337 are “in addition to any other provision of law” 19 U.S.C. § 1337(a)(1). Because section 337 remedies are in addition to, and not instead of, other remedies at law, we believe that remedies potentially available in the courts are irrelevant to our analysis of whether to stay this proceeding. In addition, we consider that it is the right of the aggrieved party to select the forum (with its attendant remedies) in which to pursue relief. *Compare Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, Including Cellular Telephone Handsets*, 337-TA-543, Comm’n Op. (Majority) on Remedy, the Public Interest, and Bonding at 47 n.175 (rejecting contention that the Commission should decline to grant certain relief in a section 337 investigation because alternative remedies were available in the courts).

³ Commissioner Pinkert would not eliminate the sixth factor for purposes of considering whether to stay an investigation and therefore does not join in footnote 2. Nevertheless, Commissioner Pinkert agrees that the sixth factor should be given no weight here given the facts of this case. Complainant’s patents are currently under reexamination and will likely expire prior to the completion of those proceedings. Thus, a stay of this investigation will, in essence, serve as its termination. As the statute provides that the remedies available for violation of section 337 are “in addition to any other provision of law,” 19 U.S.C. § 1337(a)(1), limiting Tessera to district court remedies is inconsistent with the statute.

⁴ The ALJ determined that all of the relevant factors weigh in favor of granting a stay. *See* Order No. 52.

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determine to reverse Order No. 52 and deny respondents' motion for a stay. In reaching our determination, we consider each factor in turn, as follows.

A. Factor 1: The State of Discovery and the Hearing Date

We note that the present investigation has reached an advanced stage. The ALJ entertained argument on respondents' renewed motion at 10:00 a.m. on February 25, 2008, the morning of the hearing. At that point, the parties had expended significant resources preparing for the hearing, which Tessera relates as follows:

After Respondents filed their initial, unsuccessful stay motion, and in the eight months leading up to the February 25, 2008 Hearing, the parties conducted fact and witness discovery, exchanging tens of millions of pages of documents (cumulatively, more than a terabyte of information), taking scores of depositions, and preparing over 2400 pages of expert reports (not including exhibits). The parties filed dozens of motions, including multiple motions for summary determination, and the assigned ALJ issued over 50 orders. During the final weeks before the Hearing, the parties lodged thousands of exhibits, and the parties, including the Staff, submitted Prehearing Briefs totaling over 800 pages. Shortly before the Hearing, Judge Essex ordered that direct testimony be submitted in the form of written witness statements. Consequently, the parties submitted witness statements for nearly 40 opening and rebuttal witnesses, and the parties also submitted written objections to this testimony.

In monetary terms, Tessera spent many millions of dollars preparing this case for trial, and the parties cumulatively spent tens of millions of dollars with the expectation that the case would proceed to a trial on the merits on February 25, 2008. The Investigative Staff also invested substantial time and resources preparing for the February 25 Hearing.

Tessera's Petition at 10. Respondents do not disagree. *See* Respondents' Opposition.

A decision to deny a stay pending reexamination in *Certain Microsphere Adhesives, Process For Making Same, and Products Containing Same, Including Self-Stick Repositionable*

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Notes, Inv. No. 337-TA-366, Order No. 16 (November 1994) (“*Microsphere Adhesives*”)

provides support for our evaluation of this factor. In denying the motion for stay in *Microsphere Adhesives*, Judge Saxon stated:

The hearing in the Section 337 case is scheduled to commence on Monday November 7, less than a week from today. The parties already have spent a large amount of time and money in discovery and preparing the case for hearing. Experts have been retained and are prepared to testify. There is no good reason for the case not to be heard now.

Microsphere Adhesives at 1. This reasoning similarly applies under the facts of the present investigation and supports our conclusion that the first factor weighs against the stay.

Importantly, this conclusion is consistent with Congress’s mandate that section 337 investigations be expeditiously adjudicated, 19 U.S.C. § 1337(b), and the Commission policy that, to the extent practicable and consistent with requirements of law, investigations be conducted expeditiously to avoid delay. 19 C.F.R. § 210.2; *accord, Certain Organizer Racks and Products Containing Same*, Inv. No. 337-TA-466, Commission Opinion at 3-4 (Feb. 8, 2002); *Certain High-Brightness Light Emitting Diodes and Products Containing Same*, Inv. No. 337-TA-556, Commission Opinion at 18-19 (Sep. 11, 2007); *Certain EPROM, EEPROM, Flash Memory, and Flash Microcontroller Semiconductor Devices and Products Containing Same*, Inv. No. 337-TA-395, Commission Opinion at 90 (Dec. 11, 2000). This provides additional support for finding that the first factor weighs against granting a stay.

In sum, we determine that the first factor weighs against granting a stay in this investigation.

B. Factor 2: Whether a Stay Will Simplify the Issues and Hearing of the Case

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We agree with the ALJ and respondents that the second factor weighs in favor of a stay. The ALJ stated that “regardless of the final outcome of the reexamination process, the record created during reexam will be of considerable worth in construing the claim terms at issue in this investigation.” Order No. 52. The ALJ also noted that “[i]n considering the issue of patent validity, th[e] Commission would certainly benefit in being able to consider the Patent and Trademark Office’s ultimate determination on the patentability of the claims involved in the reissue proceeding . . .” Order No. 52 at 6 *citing Certain High-Voltage Circuit Interrupters and Components Thereof*, Inv. No. 337-TA-64, Commission Notice and Order of Suspension of Investigation at 7, 204 USPQ 50, 53 (Nov. 16, 1979). *See also* Respondents’ Opposition at 29-30.

We disagree, however, with the ALJ’s conclusion that “[t]hus, this factor weighs *highly* in favor of granting a stay.” Order No. 52 at 6 (emphasis added). The above considerations are, to a great extent, of a general nature and may apply in virtually any dispute over whether the stay pending reexamination is appropriate. The weight of this factor is limited here because the ALJ’s analysis of the potential further developments in this investigation is based substantially on the general considerations rather than on the particular facts specific to the present case. *See, e.g.*, Order No. 52 at 6 (“While Tessera has a right to comment on the ‘419 patent action, and to present matters in the ‘326 patent action, it appears unlikely that the claims in either will survive intact. If the patents are determined in the end to be valid, it is probable that some or all of the claims would be narrowed in scope. If this were the case, even if the claims survived, this investigation would have to begin again, because if the claims change in a substantive manner,

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they must be reinterpreted and the infringement allegations based on those claims reinvestigated.”). *See also* Tessera’s Petition at 35.

Moreover, we take into account Tessera’s argument that the issue of whether a stay would simplify the issues and hearing of the case may become moot if the reexamination proceedings are not completed in time for Tessera to obtain any relief from the Commission. Tessera’s Petition at 37. As discussed in greater detail *infra*, there is a reasonable likelihood that this may happen, which further reduces the weight of this factor under the facts of this investigation.

Accordingly, we find that, while the second factor weighs to some extent in favor of granting a stay, its weight is substantially limited and is not determinative under the facts of this case.

C. Factor 3: The Undue Prejudice or Clear Tactical Disadvantage to Any Party

We determine that this factor weighs heavily against granting a stay. In light of the fact that both the ‘326 and ‘419 patents are due to expire in September 2010, and the known backlog at the PTO, staying this investigation pending the completion of both reexaminations will likely deprive Tessera of any opportunity to obtain relief from the Commission based upon its still valid patents.⁵ As the IA notes, “if the reexaminations continue at the current pace, they will likely not reach ‘completion . . . by the PTO’ prior to the expiration of the patent term for both the ‘326 and ‘419 patents.” IA’s Petition at 10 (citations omitted). *See also* Manbeck Declaration ¶51.

⁵ As the IA points out, “[s]tatistics show that the time frame for completing an *ex parte* reexamination is on average 30 months, even under special dispatch,” and “[l]ikewise, the time frame for completing an *inter partes* reexamination is on average 30 months.” IA’s Petition at 9. Importantly, the facts of the present case appear to be consistent with these averages. *See, e.g., id.* at 10.

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Respondents' motion has brought to light the possibility of a situation in which a respondent may attempt effectively to reduce the life of an asserted patent by requesting reexamination of patents at the PTO, and then seeking to stay a section 337 investigation involving those patents. The temptation would be especially great in cases, such as the one at hand, in which the patents at issue are relatively close to their expiration date. As the effect of such actions could be to override the statutory mandate to presume the patents are valid, we caution the presiding ALJ to carefully weigh the possibility of such manipulation in order to avoid undue prejudice to patent holders seeking to enforce their rights. Such consideration may also prevent unjustified limitations on the Commission's ability to complete section 337 investigations as soon as practicable according to its mandate.

Furthermore, the facts of the present case are similar to *Microsphere Adhesives* with respect to this factor. In that investigation, the ALJ recognized that staying an investigation pending reexamination was disfavored if the patent was near its expiration date. Because, *inter alia*, the patents were due to expire before reexamination could be completed, the ALJ denied the motion to stay. *See Microsphere Adhesives*.

Moreover, according to Craig Mitchell, Tessera's Senior Vice President of Advanced Packaging and Interconnect, Tessera has invested over \$100 million in the research, development, and commercialization of technology related to the asserted patents since Tessera's inception in 1990. Presently, Tessera continues to make substantial investments in the further research and development of that technology. At its San Jose headquarters alone, more than 50 Tessera employees (*e.g.*, engineers, technicians and assembly line workers) work in research and

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development activities related to the asserted patents. *See* Declaration of Craig Mitchell in Support of Tessera’s Opposition to Respondents’ Joint Motion to Stay Commission Proceedings, Exhibit C, ¶¶ 16-18. *See also* Tessera’s Petition at 39. Tessera’s substantial investments could be lost irrespective of the merits of the patent dispute in question if the stay is granted.

Based on the foregoing, we find that this factor weighs heavily against a stay.

D. Factor 4: The Stage of the PTO Proceedings

We find that this factor weighs against granting a stay. The record demonstrates that the ‘326 patent is at one of the initial stages of the reexamination process, *see* Manbeck Declaration ¶20, and that the ‘419 patent reexamination proceedings also are at a relatively early stage of a lengthy process that “almost certainly will not be completed until well after the patent’s expiration,” Tessera’s Petition at 43-44.⁶ Moreover, in both reexamination proceedings, the patentee has maintained that the asserted claims are patentable as issued.

The IA notes that an adverse office action in the reexamination process is fairly routine and is not an indication that the patent claims are going to be rejected or amended. Furthermore, as the IA argues, once a request for reexamination is granted, a first office action generally issues repeating the arguments in the third party’s request. IA’s Petition at 8 *citing* 37 C.F.R. § 1.935; MPEP § 2660. Likewise, a second office action will issue later addressing the remarks of the patentee and third party requester. “This second office action is not a final office action and is only an ‘Action Closing Prosecution’ if no new issues were raised by the patentee’s remarks.” IA’s Petition at 8 *citing* 37 C.F.R. § 1.949; MPEP § 2671.01.

⁶ Importantly, the ALJ has not found that any of the office actions relied on by respondents to request a stay is final. *See* Order No. 52.

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With respect to the present investigation, the IA points out that in the ‘326 reexamination proceeding, a first office action issued repeating the arguments of the third-party requester, which “was routine,” whereas with respect to the ‘419 patent, a second office action, an Action Closing Prosecution, issued, “which is normal if no new issues are raised since the first office action.” IA’s Petition at 8-9 (citations omitted). The IA further points out that Tessera did not submit substantive comments or amend the claims, but amended the specification, and the amendments were not entered by the examiner, “so it was not surprising that this second Office Action[] adopt[s] the comments of the third-party requester.” IA’s Petition at 9 *citing* Appendix A to Order No. 52 at 13. The IA further notes that the second office action is not a final office action, and that when Tessera attempted to submit supplemental remarks addressing the third-party requester’s comments, the PTO stated that “the patent owner will have ample opportunity to overcome such rejections as prosecution of the present *inter partes* proceeding continues.” IA’s Petition at 9 (citations omitted).

The ALJ found that the reexamination proceedings were at an advanced stage and weighed this factor heavily in favor of a stay. We agree with the IA and Tessera, however, that the proceedings are still at initial phases. We find the IA’s and Tessera’s arguments persuasive. Furthermore, we disagree with respondents’ contention that the present investigation is akin to the *Personal Computers* investigation with respect to the factor in question. *See* Respondents’ Opposition at 34 (“At such a stage of the reexamination proceeding, precedent supports staying an investigation. *See Personal Computers*, Inv. No. 337-TA-558, Order No. 6, 2006 ITC LEXIS 52 (Judge Barton ordered a stay when only an initial Office Action had issued and a response

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made to that Office Action).”). While by the time Order No. 6 issued in *Personal Computers* the final office action had not issued, Judge Barton reasonably anticipated that it would issue shortly after the issuance of his Order No. 6. See *Personal Computers*, Inv. No. 337-TA-558, Order No. 6 at 12 (“While I do not know when the PTO will issue a final action, there is every indication that it will be issued in a timely manner.”). In fact, by the time Order No. 6 reached the Commission, the final office action issued. Furthermore, in *Personal Computers*, the patentee had already amended the claims making it nearly impossible for the original claims to reissue. These facts distinguish *Personal Computers* from the present investigation and support the conclusion that factor 4 weighs in favor of denying respondents’ motion for a stay in the present investigation.

In sum, we determine that the subject factor weighs against a stay.

E. Factor 5: The Efficient Use of Commission Resources

We agree with the ALJ and respondents that this factor weighs in favor of a stay, but we find that it does not overcome the other factors. The IA does not address this factor in her petition. As for Tessera, we believe that its petition has failed to adequately challenge the ALJ’s determination regarding this factor. See Tessera’s Petition at 44-47.

If the claims are canceled in whole or in part as a result of the reexamination, the stay granted by the ALJ may conserve public and private resources by enabling the Commission to avoid duplicative work and, potentially, obviate the necessity of any hearing at all. Furthermore, if the PTO Board upholds the examiner’s rejection of the claims in light of the prior art, all efforts and resources expended at this stage would be wasted. Moreover, even if the claims were

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only moderately changed or if there were new prosecution history that changes the meaning of the claims, the Commission might be able to save resources by implementing a stay. *See, e.g., Certain Cryogenic Ultramicrotome Apparatus*, Inv. No. 337-TA-256, Order No. 14, ID Suspending Inv. at 3 (Mar. 12, 1987) (“Should the [PTO] give complainant the relief requested in the reexamination proceeding, or modify the patent, it might result in a second proceeding before the Commission on similar, but modified issues. Such a result would be an undue imposition on the Commission and the parties to this investigation.”).

In determining how much weight to assign this factor, we bear in mind that the proceedings before the ALJ have reached a relatively advanced stage, which diminishes the extent of Commission resources needed to complete the investigation. We also note that the ALJ has not made any findings that rely on the specific facts pertinent to the subject investigation that would affect the weighing of this factor, as opposed to general considerations that may apply to any investigation with parallel reexamination proceedings. Accordingly, while we agree with the ALJ that a stay will save the Commission resources and avoid duplicative proceedings, we do not find this factor to be determinative.

F. Conclusion

Having considered each of the above listed factors, we determine that the balance of the equities in this investigation mandates a denial of respondents’ motion for a stay. Based on the

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foregoing, we determine to reverse Order No. 52 and deny respondents' motion to stay.

By Order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Marilyn R. Abbott
Secretary to the Commission

Issued: May 27, 2008

**CERTAIN SEMICONDUCTOR CHIPS WITH MINIMIZED
CHIP PACKAGE SIZE AND PRODUCTS CONTAINING
SAME**

337-TA-605

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **PUBLIC OPINION** has been served by hand upon the Commission Investigative Attorney, Kecia J. Reynolds, Esq., and the following parties as indicated, on May 27, 2008.


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