

UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.

**DOCKET**

In the Matter of )  
)  
CERTAIN MEMORY DEVICES WITH )  
INCREASED CAPACITANCE AND )  
PRODUCTS CONTAINING SAME )

Investigation No. 337-TA-3

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ORDER NO. 19

On April 21, 1995, respondents Mitsubishi Electric Corporation and Mitsubishi Electronics America, Inc. filed a motion regarding subscription of Dr. John Caywood to the amended protective order (Motion No. 371-22). The motion is opposed by complainants.

Dr. Caywood is still working in areas closely related to Mr. Hazani's current research. For that reason, Dr. Caywood should not have access to confidential business information under the protective order.

There may be some misunderstanding as to what information should be protected under the protective order. In discovery, before the hearing begins, I usually allow the parties to designate almost anything as confidential business information because it is simpler to do this and it speeds up discovery. This assumes that all of the experts are under the protective order and can see all of the information. When there is a dispute about whether an expert can be present at the deposition of a witness of an opposing party, however, the question of what is really confidential business information can be raised.

Without getting access to all the confidential business information of complainants and the other parties under the protective order, Dr. Caywood generally would be able to hear testimony and to see documents relating to the

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validity and enforceability of the '904 patent. He also should be able to hear testimony and see documents relating to the Mitsubishi infringement issues, because he is Mitsubishi's expert witness. He would not be able to hear testimony or see documents relating to Mr. Hazani's current research or any research done by Mr. Hazani after about a year after the '904 patent was issued. Documents published within a year or so after the patent was issued could be relevant to what one with ordinary skill in the art at the time of the invention would have known. He would not have access to information relating only to the domestic industry.

This has been a consistent ruling in my cases on this issue. If Dr. Caywood were the only expert witness available in this technology, and both sides needed his expertise, a different ruling might be warranted.

The key to getting under the protective order usually is not whether you are an expert in the technology but whether you will learn something under the protective order that you cannot forget, and that you may use to your benefit in the future, regardless of whether you intend to use it. Some information that an expert learns simply cannot be forgotten. This information may be used by the expert in his own work inadvertently, simply because he is aware of certain facts that he otherwise would not have known, and even though he does not intend to violate the protective order.

If an expert witness is willing, for example, to state that he has retired, and that he agrees not to work in this area ever again, or for the next 10 years, or something like that, then he might get access to confidential information under the protective order.

Or, if a district court hearing a parallel case puts this witness under that court's protective order, then the expert witness could get under the protective order here because he already had access to the same information.

Dr. Caywood should be able to testify on the validity and enforceability issues and on any issues relating to Mitsubishi's infringement of the '904 patent. He should not have access to current research of complainants or the

other respondents (unless they agree to give him access to it), or to the evidence relating to the domestic industry if it is confidential business information.

Motion No. 371-22 is denied.

Janet D. Saxon  
Janet D. Saxon  
Administrative Law Judge

Issued: April 27, 1995

CERTIFICATE OF SERVICE

I, Donna R. Koehnke, hereby certify that the attached Order was served by hand upon John M. Whealan, Esq., and upon the following parties via first class mail, and air mail where necessary, on April 27, 1995.

*Donna R. Koehnke*

Donna R. Koehnke, Secretary  
U.S. International Trade Commission  
500 E Street, S.W.  
Washington, D.C. 20436

**For Complainants Emanuel Hazani and Patent Enforcement Fund, Inc.:**

James R. Myers, Esq.  
Gary M. Hnath, Esq.  
Royal W. Craig, Esq.  
John Bettino, Esq.  
VENABLE, BAETJER, HOWARD &  
CIVILETTI  
1201 New York Avenue, N.W.  
Suite 1000  
Washington, D.C. 20005

**For Respondents Samsung Electronics Co., Ltd., Samsung Electronics  
America Inc. and Samsung Semiconductors, Inc.:**

Cecilia H. Gonzalez, Esq.  
Robert F. Ruyak, Esq.  
Thomas J. Scott, Esq.  
HOWREY & SIMON  
1299 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

CERTIFICATE OF SERVICE - p. 2

**For Respondents OKI Electric Industry Co., Ltd. and OKI America, Inc.:**

Matthew D. Powers, Esq.  
Jared B. Bobrow, Esq.  
Ann E. Dibble, Esq.  
Laura Handley, Esq.  
WEIL, GOTSHAL & MANGES  
Silicon Valley Office  
2882 Sand Hill Road  
Suite 280  
Menlo Park, CA 94025

M. Jean Anderson, Esq.  
David W. Oliver, Esq.  
WEIL, GOTSHAL & MANGES  
1615 L Street, N.W.  
Suite 700  
Washington, D.C. 20036

**For Respondents NEC CORPORATION AND NEC ELECTRONICS, INC.:**

J. Frank Osha, Esq.  
Darryl Mexic, Esq.  
Howard L. Bernstein, Esq.  
Alan J. Kasper, Esq.  
Scott M. Daniels, Esq.  
SUGHRUE, MION, ZINN, MACPEAK & SEAS  
2100 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037

Italo H. Ablondi, Esq.  
David Foster, Esq.  
ABLONDI, FOSTER, SOBIN & DAVIDOW  
1130 Connecticut Avenue, N.W.  
Suite 500  
Washington, D.C. 20036

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