

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC,	)	
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	)	
	)	
Complainant,	)	
	)	Docket No. NOR 42179
v.	)	
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

Dated: August 28, 2023

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**NAVAJO TRANSITIONAL ENERGY COMPANY, LLC’S
CONSOLIDATED RESPONSE TO BNSF RAILWAY COMPANY’S MOTIONS
SEEKING RECOMMENDATION TO ISSUE LETTERS ROGATORY**

Pursuant to 49 C.F.R. § 1104.13, the Navajo Transitional Energy Company, LLC (“NTEC”) hereby submits this consolidated response to BNSF Railway Company’s (“BNSF”) separate Motions Seeking Recommendation to Issue Letters Rogatory to (1) JERA Trading Pte Ltd. (“JERA”) in Japan (“BNSF JERA Motion”) and (2) Westshore Terminals Ltd. (“Westshore”) in Canada (“BNSF Westshore Motion”). BNSF’s JERA and Westshore Motions are collectively referred to herein as “BNSF’s Motions.”¹

¹ BNSF has filed a separate Petition for Subpoena directed to JERA Global Markets North America, LLC (“JERA Global NA”) seeking production of documents and deposition testimony from an entity that has no business relationship with NTEC and, by BNSF’s own admission, may not have actual possession of the documents that BNSF seeks. Contemporaneously herewith, NTEC is submitting a Reply in Opposition to BNSF’s Petition for Subpoena in a separate filing.

I. INTRODUCTION

BNSF's Motions seek to inject unnecessary complication, delay, and harassment into a proceeding that raises issues and factual questions that can be addressed through the ongoing discovery production between the parties themselves. Indeed, many of the documents that BNSF seeks through its international fishing expedition reside within the possession, custody, and control of NTEC, *BNSF*, or *both*. The information that BNSF seeks through its Motions thus is available through alternative means, is cumulative, and does not justify the unprecedented action of a federal agency, federal court, the State Department, and two foreign governments that BNSF requests.

BNSF, of course, knows that its requests for letters rogatory are unnecessary. The big fish BNSF seemingly hopes to catch through this expedition/distraction are delay and obfuscation.² The Board should not countenance this action and BNSF's Motions should be denied in their entirety.

II. BNSF'S LONG DELAY

The record shows that BNSF has dragged its feet with respect to seeking third-party discovery. Specifically, BNSF waited 2.5 months from the date on which it first raised the subject of a supposed need for third-party discovery (*i.e.*, May 23, 2023) before

² As the Board noted in its Response to BNSF's Motion for an Expedited Schedule in the United States Court of Appeals for the Fifth Circuit, BNSF is seeking to expedite its appeal of the Board's issuance of an injunction in NOR 42178 in the hopes it can obtain an expedited ruling from the Fifth Circuit in advance of the Board's ruling in NOR 42179. BNSF's present Motions, by contrast, constitute transparent efforts to slow down NOR 42179 in the hopes that a Fifth Circuit ruling somehow will undermine the relief the Board has granted to NTEC through the preliminary injunction ruling.

filing its subject Motions Seeking Letters Rogatory and its contemporaneously filed Petition for Subpoena (*i.e.*, August 8, 2023).

The record also shows that the Board was unpersuaded by BNSF's effort to use the threat of such international non-party discovery as a justification for significantly extending the procedural schedule in this case. As noted, BNSF first raised the subject of a supposed need for third-party discovery in its May 23, 2023 Motion for Procedural Schedule. BNSF argued that "[t]he allegations in the complaint in this proceeding present complex questions of capacity allocation on BNSF's rail network and potentially implicate claims of damages as a result of lost sales in Asia" and that "[a]s such, *third-party and foreign discovery* may be necessary and expert testimony is likely." BNSF May 23, 2023 Motion at 1 (emphasis added). Despite its awareness of BNSF's stated intention to pursue extensive third-party and foreign discovery, the Director of the Board's Office of Proceedings declined to grant BNSF's Motion for extended discovery and for an extended procedural schedule, but instead, adopted the schedule that NTEC had proposed with only minor modifications, setting August 14, 2023 as the close of discovery. *See NTEC v. BNSF Ry.*, NOR 42179, 1-2 (STB served June 30, 2023).

On July 10, 2023, BNSF filed a motion appealing the June 30 Scheduling Order. BNSF asked the Board to vacate the procedural schedule so that BNSF could seek discovery from entities in Asia and Canada. *See BNSF July 10, 2023 Appeal of Director's June 30, 2023 Order Adopting a Procedural Schedule*, at 5-6. The Board rejected BNSF's motion and instead made only minor modifications to the schedule NTEC suggested. *See NTEC v. BNSF Ry.*, NOR 42179, at 4-5 (STB served Aug. 7,

2023). The Board noted that BNSF's claims regarding the supposed need for third-party and foreign discovery had shifted over time, and the Board at least implicitly faulted BNSF for failing to initiate discovery at an earlier point in time. *Id.* at 3-4. More importantly, the August 7 Decision confirms that the Board was aware of BNSF's claims regarding the need for time-consuming foreign and third-party discovery but did not grant BNSF's request to extend the schedule.

Meanwhile, BNSF waited until *the day after* the Board ruled against its Appeal from the Director's Scheduling Order before filing its long-contemplated Motions Seeking Letters Rogatory (and its Petition for Subpoena), all while BNSF was aware of the deadline for the conclusion of discovery.

III. THE PARTIES

Plaintiff NTEC was created by the Navajo Nation in 2013. It is a single-member limited liability company, organized under the laws of the Navajo Nation. The Navajo Nation, itself, is NTEC's sole shareholder. As such, NTEC is an entity of the Navajo Nation. NTEC's corporate offices are located at 385 Interlocken Crescent, Suite 400, Broomfield, Colorado 80021.

Defendant BNSF is a Class I rail carrier. It is a Delaware corporation with its principal place of business at 2650 Lou Menk Drive, Fort Worth, Texas 76131. BNSF operates a rail network of 32,500 route miles in twenty-eight states and three Canadian provinces. BNSF is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, which in turn is wholly-owned by Berkshire Hathaway, Inc.

JERA Trading Pte. Ltd. – which since April 1, 2019 has been known as JERA Global Markets Pte Ltd. – is the subject of BNSF’s JERA Motion. JERA Global Markets Pte Ltd. is headquartered in Singapore and is a seaborne energy trader specializing in liquified natural gas (“LNG”), coal, and other freight with a platform to trade across the North American, European, Middle Eastern, African, and Asian markets.³

JERA Trading Pte Ltd., in turn, is a joint venture between JERA Trading International Pte. Ltd (67% ownership) and EDF Trading Limited, the trading arm of a leading European power producer (Électricité de France) (33% ownership). JERA Trading International Pte Ltd., in turn, is a wholly owned subsidiary of JERA Co., Inc., which operates a large number of electric generating stations in Japan.⁴

From late 2019 through early 2023, JERA Trading Pte Ltd. purchased export coal from NTEC for use as boiler fuel in an electric generating station in Japan.

Contrary to BNSF’s assertions, JERA Global Markets Pte Ltd. is *not* a Japanese company. However, BNSF definition of “JERA” does extend to JERA Co., Inc., which is a Japanese company. BNSF JERA Motion, App. B, Attach. A at 1.

Westshore Terminals Ltd. operates the Westshore Terminal at Roberts Bank in British Columbia, Canada. All of NTEC’s export coal shipments move through Westshore, after having traveled roughly 1,500 miles from the Spring Creek Mine to the

³ <https://jeratrading.com/about-us>.

⁴ JERA Co., Inc. is a joint venture between Tokyo Electric Power group and the Chubu Electric Power Group. See <https://www.jera.co.jp/en/corporate/about/origin>.

Port. At Westshore, NTEC's coal is loaded onto ocean-going vessels at which point title to the coal transfers from NTEC to its customers.

IV. BACKGROUND

In 2019, NTEC purchased substantially all of the assets of Cloud Peak Energy, Inc., a public company that had filed for bankruptcy protection. The primary assets included three coal mines located in the Powder River Basin of Montana and Wyoming: the Spring Creek Mine, the Antelope Mine, and the Cordero Rojo Mine. Each of those three mines produces substantial quantities of sub-bituminous coal. NTEC sells coal from Cordero Rojo and Antelope for domestic use. NTEC sells thermal coal from Spring Creek both for domestic use and for export to Japan and Korea. NTEC produces several million tons of coal per year for export sale and expected to ship approximately 5.5 million tons, in common carrier service, for export in 2023.

Over the past 15+ years, BNSF has provided rail transportation service for the movement of export coal shipments from Spring Creek to Westshore Terminals. BNSF is the only rail carrier that serves Spring Creek and therefore is the only rail carrier capable of providing single-line service to the port. At Westshore, coal from Spring Creek is loaded onto vessels for transportation to Asia (Japan and Korea).

As noted above, NTEC began supplying coal to JERA Trading Pte Ltd./JERA Global Markets Pte Ltd. in late 2019 pursuant to a multi-year coal sales agreement. The point of sale for this coal supply was Westshore. Under the coal sales agreement, NTEC was responsible for arranging the transportation of coal to Westshore via BNSF rail service. BNSF transports export coal to Westshore on behalf of what is a limited set of

coal producers, historically including only (1) NTEC; (2) Global Coal Sales Group, LLC; and (3) Arch Coal Sales Company, Inc.

The quality of BNSF's contract-based coal transportation service to NTEC began to deteriorate appreciably in the Spring of 2022. While BNSF increased its overall volume of export coal movements to Westshore through the first eight months of 2022 (relative to the first eight months of 2021), BNSF's movement of NTEC coal to Westshore nevertheless fell by thirty percent on a year-over-year basis during that same time period. *See* NTEC Ex Parte Application for Section 11123 Emergency Service Order, STB Docket No. NOR 42178, Verified Statement of Matthew D. Babcock at ¶¶ 24-26 (April 14, 2023).

The principal coal transportation agreement between NTEC and BNSF expired on December 31, 2022. That agreement governed the movement (to Westshore) of all coal other than coal to be sold to JERA. NTEC and BNSF also were parties to a separate coal transportation agreement governing the movement (to Westshore) of JERA-bound coal. That agreement expired on March 31, 2023. However, all shipments under the transportation contract for JERA-bound coal were completed within the first two to three weeks of 2023.

BNSF's poor transportation service continued in the initial months of 2023. In addition, BNSF warned NTEC that it would substantially reduce the number of June train loadings that it would provide to NTEC relative to NTEC's needs (*i.e.*, sixteen June train loadings rather than the twenty-nine train loadings per month that NTEC had requested for 2023).

Faced with the risk of substantially reduced rail service in the key Spring and Summer months, NTEC initiated two actions before the STB on April 14, 2023. In Docket No. NOR 42178, NTEC sought an emergency service order pursuant to 49 U.S.C. § 11123 (or a preliminary injunction) requiring BNSF to transport twenty-nine trains per month for NTEC. In Docket No. NOR 42179, NTEC filed a Complaint and Petition for Declaratory Order asking the Board to define BNSF's common carrier service obligation and to award damages to NTEC as a result of BNSF's failure to comply with its common carrier obligation.

By decision served June 23, 2023, the Board granted NTEC's request for a preliminary injunction. *See Navajo Transitional Energy Company, LLC – Ex Parte Petition for Emergency Service Order*, Docket No. NOR 42178 (STB served June 23, 2023). On July 28, 2023, BNSF filed a Petition for Review of the STB's decision in the United States Court of Appeals for the Fifth Circuit. *See BNSF Ry. v. STB and United States of America*, Case No. 23-60402 (5th Cir.) (Doc. 1). On July 17, 2023, BNSF filed a petition for partial stay (at the STB) of the June 23 Decision. On August 3, 2023, in the Fifth Circuit, BNSF filed a Petition for Partial Stay of the Board's June 23 Decision and a Motion to Expedite Briefing and Decision (Docs. 19 and 20). On August 14, 2023, the Board denied BNSF's petition for partial stay. In addition, on the same August 14, 2023, the Board and the U.S. Department of Justice filed their opposition in the Fifth Circuit to BNSF's petition for partial stay and to BNSF's Motion to Expedite Briefing and Decision (Docs. 59 and 60).

The schedule in STB Docket No. NOR 42179 includes the following deadlines: (1) Discovery ends September 28, 2023; (2) NTEC's Opening is due on November 6, 2023; (3) BNSF's Reply is due on December 18, 2023; and (4) NTEC's Rebuttal is due on January 16, 2024.⁵

V. ARGUMENT

A. BNSF's Motions are Unprecedented and Improper

BNSF's Motions seeking Letters Rogatory are unprecedented at the STB or the Interstate Commerce Commission. BNSF purports to base its Motions on 49 U.S.C. § 1321 and 49 C.F.R. § 1113.2 (*see* BNSF Motions at 1), but neither the statute nor the regulation provides a basis for BNSF's requested relief. First, 49 U.S.C. § 1321 enumerates the Board's powers but makes no mention of letters rogatory.⁶ Second, Section 1113.2 of the Board's regulations pertains to "Subpoenas" and falls within the Part of the Board's regulations pertaining to "Oral Hearings," not discovery. *See Asphalt Supply & Service, Inc. v. Union Pac. R.R.*, NOR 40121, 1987 WL 98155, at *1 (ICC served March 27, 1987). Accordingly, BNSF's own failure to premise its Motions on

⁵ As noted above, the Board's August 7 Decision rejected BNSF's July 10 request for an extended discovery period (which BNSF expressly had sought in order to allow time for foreign discovery), and the Board also rejected BNSF's request for the separate scheduling of preliminary expert reports.

⁶ Moreover, as BNSF itself admits, neither Japanese nor Canadian companies are subject to the Board subpoena power that BNSF itself invokes in its Motions. BNSF JERA Motion at 3; BNSF Westshore Motion at 2-3. As expressly stated in the applicable code section, the subpoena power is limited to witnesses and documents "from any place *in the United States*, to the designated place of the proceeding." 49 U.S.C. § 1321(c) (emphasis added).

actual authority for granting letters rogatory is sufficient, in and of itself, to justify denial of BNSF's Motions.

BNSF nevertheless cavalierly suggests that parties may “use letters rogatory to take evidence from a specific person within the foreign jurisdiction,” and suggests that the issuance of the same are mere formalities. BNSF Motions at 3 (citing *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 775 (S.D.N.Y. 2012) (citing *Black's Law Dictionary*)).

Ultimately, BNSF refers to 28 U.S.C. § 1781 as a source of authority for the State Department to issue letters rogatory, but BNSF identifies only one case in which any agency granted relief of the nature that BNSF seeks,⁷ and BNSF omits that the request was unopposed by the other parties to the proceeding.⁸ Unlike the present situation, however, the facts at issue in *Broadcom* showed that the information possessed by the target of the letter was far more integral to the patent infringement case at issue. In particular, the target of the letter (Realtek Semiconductor Corp.) had designed and manufactured the system-on-chip processors included within the LG Electronics-manufactured products (DVD players, etc.) that the complainant alleged to have violated its patents. That degree of involvement in the conduct at issue in the subject complaint justified the letter rogatory against Realtek. JERA and Westshore, on the other hand, are

⁷ See BNSF JERA Motion at 3-4 (citing an unpublished “Request for International Judicial Assistance” in *Broadcom Corp. v. LG Elec., Inc.*, No. 17-mc-1811-JDB, ECF No. 3 (D.D.C. Aug. 15, 2017) (*see* Exhibit No. 1 hereto).

⁸ *Broadcom*, ECF No. 1, Doc. 1-2 at 2 (D.D.C. July 17, 2017) (*see* Exhibit No. 2 hereto).

not integral to the subject STB litigation. Indeed, they are merely tangential entities – one a customer and the other a transloader of coal.

B. The Use of Letters Rogatory is an Extraordinary Process that is Not to be Used Cavalierly

BNSF suggests that involving the Board, a federal court, the State Department, and three (or more) foreign nations in an STB proceeding is necessary in this case simply because JERA and Westshore “posses[] documents and information that [are] *relevant* to these proceedings.” BNSF Motions at 4 (emphasis added). Even assuming *arguendo* that this self-serving characterization of JERA and Westshore’s possession of “relevant” documents is true, possession of relevant documents by a foreign non-party entity is not the standard for exposing them to letters rogatory. On the contrary, the use of letters rogatory is an extraordinary process that should not be used in the first instance and should not be invoked absent a clear demonstration that the existing processes for discovery at the Board are insufficient, that the requested documents cannot be obtained by alternative means, and/or that the requested documents will not constitute cumulative discovery. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the Southern District of Iowa*, 482 U.S. 522, 542-543 (1987) (“*Aerospatiale*”).

In *Aerospatiale*, the Supreme Court explained that in deciding whether the issuance of letters rogatory is appropriate, a court should “exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.” *Id.* at 522, 546. Rather than cavalierly issue letters rogatory as BNSF suggests, the reviewing body must consider

principles of international comity, which require analysis of five factors identified in *Aerospatiale*:

- (1) The importance to the litigation of the documents or other information requested;
- (2) The degree of specificity of the request;
- (3) Whether the information originated in the United States;
- (4) The availability of alternative means of securing the information; and
- (5) The extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where information is located.

Id. at 544 n.28. The party seeking the letters rogatory, not the party opposing them, bears the burden of proving the necessity of such extraordinary action. *Tulip Computers International B.V. v. Dell Computer Corporation*, 254 F. Supp. 2d 469, 474 (D. Del. 2003); *Madanes v. Madanes*, 199 F.R.D. 135, 141 (S.D.N.Y. 2001). BNSF's Motions fail under this standard.

C. BNSF's Motions Fail to Satisfy the *Aerospatiale* Factors

To overcome the Supreme Court's *Aerospatiale* factors, BNSF must demonstrate that its requests are aimed at discovery that is material to the litigation and that is not duplicative, burdensome, or available through other means. *See Aerospatiale*, 482 U.S. at 546; *In re Letters Rogatory from Canada*, No. 08-MC-50465-DT, 2008 WL 2760963, at *2 (E.D. Mich. July 15, 2009). The consideration of these factors involves more than a cursory evaluation of whether the discovery could lead to relevant documents, but instead

(and more importantly), requires careful evaluation of the importance of the requested discovery to the litigation. Indeed, “where the relevancy or materiality is doubtful, the court should not grant the application for letters rogatory.” *United States v. Rosen*, 240 F.R.D. 204, 215 (E.D. Va. 2007) (“*Rosen*”). As *Rosen* further held, letters rogatory seeking cumulative documents, even if relevant, can be denied. *Id.* at 213, 215. The documents and information that BNSF seeks through its Motions are not sufficiently material to the litigation to justify the extraordinary process that BNSF seeks to invoke, particularly since the requests are duplicative and cumulative of the discovery that is available within NTEC and/or BNSF’s own files.

As explained above, BNSF seeks documents (and information) from both JERA and Westshore that, in large part, can be obtained from NTEC’s and BNSF’s files. Requiring JERA and/or Westshore to produce the same documents out of their foreign files would be duplicative, burdensome, and inconsistent with the comity principles established in *Aerospatiale*. *Id.* at 543-44; *see also Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1262 (11th Cir. 2015) (“*Yellow Pages*”) (affirming denial of letters rogatory because the requested information was available through domestic sources).

To the extent that BNSF seeks documents that exist *only* outside the United States (*i.e.*, documents that *may* exist only in JERA’s files in Singapore or Japan or in Westshore’s files in Canada), BNSF’s effort is similarly improper.⁹ BNSF’s effort

⁹ Perhaps in recognition of the fact that Letters Rogatory are not appropriate in this proceeding, BNSF is seeking to end-run the limitations on its ability to obtain documents that are in the possession, custody, and control of non-party, foreign entities by seeking to subpoena a separate United States-based corporate entity in the hopes that it can require

represents a speculative fishing expedition for documents and information that BNSF hopes may support one of BNSF's existing defenses, or perhaps support a new defense. Courts have made clear that fishing expeditions for discovery of this kind through letters rogatory are inappropriate and should be denied. *Yellow Pages*, 795 F.3d at 1273-1274 (citing *United States v. El-Mezain*, 664 F.3d 467, 518 (5th Cir. 2011) (denying "fishing expedition" in search of allegedly favorable evidence that was merely speculative)). It is appropriate to deny a request for letters rogatory where the proposed discovery is, "at best, an attempt to search for information that may lead to the addition of a new defense in this case." *Merck Sharp & Dohme Corp. v. Sandoz, Inc.*, Civil Action Nos. 12-3289 and 12-3324 (PGS), 2013 WL 12203112 at *4 (D. N.J. June 7, 2013) ("*Merck*") (noting that "[u]nder the heightened standard for discovery under the Hague Convention, the Court will not permit such a fishing expedition").

1. BNSF's JERA Motion Seeks Documents that are Not Material, Even if Relevant, and are Duplicative, Cumulative, and Unnecessary to the Proceeding

First, the documents that BNSF requests in its JERA Motion fall substantially short of the materiality standard. Docket No. NOR 42179 pertains to BNSF's failure to provide adequate common carrier service for NTEC in moving export coal (in 2023) from the Spring Creek Mine to Westshore. NTEC alleges that BNSF failed to provide the

the United States affiliate to produce documents that are located in Japan. As NTEC explains in its separately filed Reply to BNSF's Petition for Subpoena, the STB's subpoena powers do not authorize subpoenas that command production of witnesses or documents that are not located within the United States. NTEC also explains that BNSF's effort asks the Board to violate international conventions.

required service and that NTEC suffered damages as a result (principally in the form of lost sales and increased demurrage expenses associated with ocean-going vessels being forced to wait extended periods of time in order to complete their loadings). The documents that BNSF seeks do not pertain directly or even indirectly to those questions. And while NTEC also claims that BNSF's poor service has harmed NTEC's reputation in the export coal market, there is no material need for discovery from foreign customers who did not receive coal supplies or a foreign port that did not see anticipated NTEC volumes. In both instances, NTEC and BNSF have substantial documents within their respective possession, custody and control that are material to the issues and BNSF has made no showing that additional third-party and foreign documents will be essential or material to any of those issues.

BNSF has requested four (4) categories of documents relating to JERA. BNSF JERA Motion at Attachment A, p. 7. None of these categories pertains to documents that will be material or essential to the issues in NOR 42179.

a. Contracts

BNSF's first request seeks contracts between JERA, Cloud Peak Energy, or NTEC relating to Spring Creek export coal. This request is not material to the litigation because there simply is no need for contracts that are clearly duplicative of (and readily available through) NTEC's files. Since BNSF is requesting nothing here that it has not already

requested from NTEC – and that NTEC has confirmed it will provide – there is no additional value to the information and it is not essential to the litigation.

b. The Decision Not to Renew

Similarly, BNSF's second request seeks communications relating to JERA's decision not to renew the NTEC/JERA coal supply contract. NTEC has represented to BNSF that it will produce any communications with JERA that are responsive to this request. Again, no additional, material value is obtained by seeking the same information through letters rogatory. Moreover, there is no need to permit a BNSF fishing expedition to explore whether JERA may have expressed some view privately that it declined to share with NTEC or that was inconsistent with what JERA may have shared with NTEC.

c. Communications regarding Rail Service

Third, BNSF requests communications related to the rail service that NTEC received from BNSF for the shipment of coal from the Spring Creek Mine to Japan. This request encompasses documents that BNSF also requested from NTEC and that will be, or already have been, included in NTEC's production and fails on the materiality factor for the same reasons. Once again, BNSF has failed to demonstrate any need for testing whether JERA may have held (or expressed internally) different views about BNSF rail service than JERA may have shared with NTEC.

d. The Percentage of Coal Purchased

The fourth category of documents that BNSF seeks relates to the amount of coal that JERA purchased from NTEC as a percentage of the total coal that JERA purchased each year in 2020, 2021, and 2022. BNSF fails to explain the relevance or materiality of

this fourth category of information to the instant STB proceeding. As noted above, NTEC's Complaint alleges, *inter alia*, that NTEC's reputation has been harmed (and that it therefore will be more difficult for NTEC to secure purchase agreements) because of BNSF's poor rail transportation service. There is no basis for concluding that NTEC's allegation would be any more or less valid in situations in which JERA previously purchased 1%, 10%, or 100% of its annual coal from NTEC. If JERA had purchased all of its coal from NTEC, then the poor service likely would have had a greater adverse effect upon JERA. If JERA had purchased only 1% of its coal from NTEC, then JERA presumably would have had an easier time finding alternative coal suppliers to replace the limited volume of NTEC-produced coal that it previously had purchased. The information is thus not material.

In any event, BNSF certainly has information in its own files as to how much coal was supplied through Westshore for JERA – both as it relates to NTEC export coal shipments and the other export coal shippers that BNSF serves through Westshore.

Similarly, BNSF's requests for deposition testimony on the six topics that it has identified suffer from the same lack of materiality. *See* BNSF JERA Motion at Attachment B. Again, BNSF already has requested documents from NTEC that will provide great detail on the business relationship between NTEC and JERA. Those existing BNSF discovery requests to NTEC overlap with the following BNSF Attachment B topics, which seek testimony regarding any communications between the two entities where JERA explained:

- why it was choosing not to renew its contract with NTEC (Deposition Topic 2);
- whether it was satisfied/dissatisfied with the shipment of coal under NTEC or Cloud Peak contracts (Deposition Topic 3);
- concerns that JERA may have had with NTEC's ability to perform as a supplier (Deposition Topic 4);
- failures by NTEC to comply with its contractual obligations to JERA (Deposition Topic 5); and
- any problems or delays in NTEC's shipment of coal to JERA that JERA believed were the result of rail transportation service interruptions (Deposition Topic 6).

The only proposed BNSF deposition topic not already addressed in BNSF's discovery requests to NTEC is Deposition Topic 1, which addresses "the process by which JERA decides which foreign companies from which to purchase coal." The speculative relevance of this last topic simply does not rise to the level of materiality needed to justify letters rogatory.

2. BNSF's Westshore Motion Seeks Documents that are Not Material, Even if Relevant, and are Duplicative, Cumulative, and Unnecessary to the Proceeding

BNSF's Westshore Motion similarly seeks the discovery of documents and information that is available from NTEC and from BNSF itself (and that both parties are seeking through the STB discovery process that is already underway). Significantly, much of the information that BNSF requests is information that it should possess in its

own files given its substantial operations in serving the Westshore terminal. BNSF is one of two railroads capable of delivering coal to Westshore. BNSF has provided coal service to this terminal for many years, and BNSF has delivered export coal shipments to Westshore for a variety of different export coal producers, including NTEC. It is inconceivable that BNSF does not already have most of the information that it now seeks through the complicated and time-consuming process of letters rogatory.

For example, BNSF's Document Request 1 asks for documents relating to Westshore's capacity to receive coal deliveries for NTEC and relating to the timing of such deliveries. Document Request 2 seeks the same information as it relates to all coal deliveries that BNSF makes to Westshore. BNSF is the party making those deliveries and its own records will have detailed information on the timing of such deliveries. As to capacity, BNSF is a sophisticated rail carrier that has highly skilled and competent operations. BNSF has failed to demonstrate that there is any material information about Westshore's capacity to receive coal deliveries, or regarding the timing of those deliveries, that BNSF does not already have in its own possession.

With respect to Document Request 3, BNSF similarly has failed to show that it needs letters rogatory to determine the number of train loads of coal allocated to NTEC in relation to other shippers or receivers of coal. BNSF is the party that delivers those trains and knows full well (i) how many trains were delivered to Westshore for each coal shipper, and (ii) what percentage of the shipments to Westshore were delivered to each coal shipper. For example, record evidence existed in Docket No. NOR 42178 showing that, during the first eight months of 2022, total train deliveries to Westshore increased

relative to those same eight months of 2021, but NTEC's volumes (both in absolute numbers and as a share of those train deliveries) substantially decreased. While Westshore may have "relevant" information as to this request, the information is not material to the proceeding as it is totally cumulative and unnecessary.

Similarly, BNSF's requests for: forecasts of vessels to be loaded in 2023 (Document Request 4), information relating to storage capabilities at Westshore (Document Request 5), and documents relating to a labor strike at Westshore (Document Request 6), all relate to topics that BNSF undoubtedly monitors and discusses with its customers, with Westshore, and internally. BNSF has failed to establish that there is anything responsive to the proposed requests to Westshore that it does not already possess and that would be material to this proceeding. Instead, BNSF simply declares that the evidence will be "relevant" without offering any attempt to explain why the burden of pursuing the letters rogatory is necessary or material to any substantive issue in this case.

None of the information requested from Westshore is material or essential to the proceeding, as BNSF can and should be able to address each of these topics with information that should exist within its own files or from those documents that NTEC produces.

**D. The Timeliness Factor Also Counsels
Against Issuance of Letters Rogatory**

Courts have also rejected the issuance of letters rogatory where, as here, there was little likelihood that the letters rogatory could be processed within the time constraints of the subject proceeding. As several courts have noted, "the letters rogatory process can be

complicated, dilatory, and expensive, and such factors thereby ‘counsel against issuance.’” *Merck*, 2013 WL 12203112, at *4 (citing *U.S. v. Rosen*, 240 F.R.D. at 215, *Aerospatiale*, 482 U.S. at 531). In *Merck*, the District Court ultimately concluded that “the timeliness factor also counsels against issuance of the letters rogatory” based on its recognition that the letters rogatory: (1) were filed less than two months before the close of discovery; (2) would require an extension of discovery; and (3) the case schedule called for dispositive motions within six months from the request for the letters rogatory. *Id.*

The same conclusion is warranted in the instant case. As noted above, BNSF waited nearly four months after the start of this case to initiate its effort to obtain foreign discovery. Specifically, BNSF filed its Motions on August 8, 2023. The Board’s schedule in Docket No. 42179 calls for all discovery to be completed by September 28, 2023, which is only 51 days from the filing of BNSF’s Motions. Given the usual delays, complications, and likely opposition that relate to BNSF’s Motions, it is extremely unlikely that (absent an unwarranted and lengthy extension of discovery) BNSF will obtain any of the unnecessary, cumulative documents it seeks prior to the conclusion of discovery in Docket No. 42179.

In addition, the Board’s schedule calls for the filing of NTEC’s Opening Evidence and Argument on November 6, 2023, BNSF’s Reply Evidence and Argument on December 18, 2023, and NTEC’s Rebuttal Evidence and Argument on January 16, 2024. Under this schedule, the record will close in roughly 4.5 months. Thus, as in *Merck*, it is a virtual certainty that the case will be fully submitted to the Board prior to the letters

rogatory being fully processed. Under these circumstances, the timeliness factor confirms that issuance of the letters rogatory should be denied.

E. BNSF Ignores International Treaty, International Comity, and Restrictions on Discovery

To the extent that BNSF thought it was, or indirectly still is, seeking discovery from Japan for JERA, BNSF omits reference to the U.S.-Japan Bilateral Consular Convention of 1963 (“Consular Convention”) (15 U.S.T. 768), which as a treaty between the United States and Japan is the first avenue for seeking discovery based in Japan versus Letters Rogatory.¹⁰ Critically, the Consular Convention has no provision for the document discovery sought here.¹¹ Indeed, Section 17(e)(i) of the Consular Convention covers the serving of documents, taking of *voluntary* depositions and administering of oaths, but does not provide for document discovery. The only provision addressing document discovery, Section 17(f), provides only for the production of “copies of or extracts from documents of public registry.” Likewise, there is no means through Letters Rogatory to a Japanese Court to compel the production of documents because Japan does

¹⁰ *Accord Fujikura Ltd. v. Finisar Corp.*, Case No. 15-mc-80110-HRL (JSC), 2015 WL 5782351, at *7 (N.D. Cal. May 14, 2015) (“*Fujikura*”) (noting the provisions and restrictions of the Consular Convention and that a party is “obligated to proceed through consular officials to obtain documentary discovery,” and then that a party *also* has the option to seek letters rogatory).

¹¹ Section 17(e)(i) covers the serving of documents, taking of *voluntary* depositions, and administering of oaths, but does not provide for document discovery. Instead, Section 17(f) provides only for the production of “copies of or extracts from documents of public registry.”

not use pretrial document discovery,¹² and, according to a State Department notice, “Japan has advised the United States that Japanese law does not include any provision for compulsion of documents or other physical evidence except in criminal cases.”
https://web.archive.loc.gov/all/20030404084704/http://travel.state.gov/japan_obtaining_evidence.html.

CONCLUSION

For all the foregoing reasons, BNSF’s Motions should be denied in their entirety.

Respectfully submitted,

NAVAJO TRANSITIONAL ENERGY COMPANY,
LLC

By: /s/ Daniel M. Jaffe
Daniel M. Jaffe
Frank J. Pergolizzi
Andrew B. Kolesar III
SLOVER & LOFTUS LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: August 28, 2023

¹² Yoshio Ohara, *Judicial Assistance to Be Afforded by Japan for Proceedings in the United States*, International Lawyer, Vol. 23, No. 1, Art. 6, at 19 (1989).

CERTIFICATE OF SERVICE

I hereby certify that this 28th day of August, 2023, I have caused copies of the foregoing to be served via email upon counsel of record for BNSF Railway Company.

/s/ Daniel M. Jaffe

Daniel M. Jaffe

NTEC Exhibit No. 1

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Broadcom Corporation,

Plaintiff (Complainant),

v.

LG Electronics, Inc., et al.,

Defendants (Respondents).

Misc. Civil Case No.: 17-1811 (JDB)

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE (LETTER ROGATORY)

TO THE APPROPRIATE JUDICIAL AUTHORITY OF TAIWAN:

The United States District Court for the District of Columbia presents its compliments to the Appropriate Judicial Authority of Taiwan, and requests international judicial assistance to obtain the production of documents and deposition testimony to be used in an administrative proceeding before this Court in the above-captioned matter.

The Court requests the assistance described herein in the interests of justice.

I. REQUEST

The Court requests that the Appropriate Judicial Authority of Taiwan compel production of documents from the following corporate entity:

Realtek Semiconductor Corp.
No. 2, Innovation Road II
Hsinchu Science Park
Hsinchu 300
Taiwan

Realtek Semiconductor Corp. is referred to herein as "Realtek."

Exhibit B

Specifically, the Court requests that Realtek produce the documents and things set forth in **Attachment A** to this Request. The Court further requests that the Appropriate Judicial Authority of Taiwan compel Realtek to provide testimony as to the topics and questions set forth in **Attachment B** to this Request. With respect to the methods and procedures to be followed in connection with the requested deposition, the Court respectfully requests that, to the extent possible under Taiwanese law:

- a) Realtek be required to designate one or more officers, directors, managing agents, or other person(s) who consent to testify on its behalf as to the topics set forth in **Attachment B**;
- b) an appropriate judicial officer of Taiwan direct that the Realtek witness or witnesses be duly sworn-in in accordance with the applicable laws and procedures of Taiwan;
- c) the examination be conducted orally;
- d) the parties' legal representatives, their interpreters, and a stenographer be permitted to be present during the examination; and
- e) the stenographer be permitted to record verbatim the examination, and a full transcript of the examination, in translation from Mandarin Chinese to English through a qualified interpreter, be made at the time of the examination.

The Court understands that the documents and information requested may be of a confidential nature. As such, the Court understands that such documents may be designated under and treated pursuant to the Protective Order entered in this matter, which can be found in **Attachment C**.

Based on the representations made by Complainant Broadcom Corporation ("Broadcom"), this Court believes that Realtek is in possession of documents and has knowledge

regarding material facts that are relevant for the proper prosecution of the above-referenced administrative proceeding.

II. FACTS

Plaintiff/Complainant Broadcom filed a Complaint with the International Trade Commission (“Commission”) on March 7, 2017. In the Complaint, Broadcom requested that the Commission commence an Investigation pursuant to Section 337 of the Tariff Act of 1930, as amended, into alleged patent infringement by the following Defendants/Respondents:

MediaTek Inc.
No. 1, Dusing 1st Road
Hsinchu Science Park
Hsinchu City 30078
Taiwan

MediaTek USA Inc.
2840 Junction Avenue
San Jose, CA 95134

MStar Semiconductor Inc.
4F-1, No. 26, Tai-Yuan Street
ChuPei Hsinchu Hsien 302
Taiwan

Sigma Designs, Inc.
47467 Fremont Boulevard
Fremont, CA 94538

LG Electronics Inc.
Twin Tower 128
Yeoui-daero, Yeongdeungpo-gu
Seoul, Korea 150-721

LG Electronics U.S.A., Inc.
1000 Sylvan Avenue
Englewood Cliffs, New Jersey 07632

Funai Electric Company, Ltd.
7-7-1 Nakagaito, Daito City
Osaka 574-0013, Japan

Funai Corporation, Inc.
201 Route 17 North, Suite 903
Rutherford, NJ 07070

P&F USA, Inc.
2555 Marconi Drive, Suite 300
Alpharetta, GA 30005

Vizio, Inc.
39 Tesla
Irvine, CA 92618

The above-named Defendants/Respondents design, manufacture, sell for importation, import, and/or sell after importation semiconductor devices, including systems on a chip (“SoC”), and consumer audiovisual products containing such SoCs, which Broadcom alleges infringe five of its patents. *See* Attachment E (Broadcom’s Complaint), ¶77. The patents that Broadcom asserts in its Complaint are U.S. Patent Nos.: 8,284,844; 7,590,059; 8,068,171; 7,310,104; and 7,342,967 (collectively, the “Asserted Patents”). *Id.*

The Commission instituted proceedings on April 6, 2017. The name of the investigation for which assistance is requested is *In the Matter of Certain Semiconductor Devices and Consumer Audiovisual Products Containing the Same*, Investigation No. 337-TA-1047 (the “Investigation”). The Honorable David P. Shaw, Administrative Law Judge, has been assigned to the case. His eventual initial determination will be subject to possible review by the Commission. Any decision by the Commission may be appealed to the United States Court of Appeals for the Federal Circuit.

The request for judicial assistance stems from facts relating to two of the above-mentioned Defendants/Respondents. Specifically, LG Electronics Inc.’s (“LG Korea”) Home Entertainment business unit produces and sells flat panel TVs, Complaint, ¶ 26, and LG Electronics U.S.A., Inc. (“LG USA”) is a wholly owned subsidiary of LG Korea, *id.*, ¶27. LG

Korea and LG USA (collectively, “LG”) design, manufacture, sell for importation, import, and/or sell after importation semiconductor devices, including SoCs, and consumer audiovisual products containing such SoCs. *Id.*, ¶29. Broadcom alleges that certain LG SoCs and audiovisual products containing them infringe the Asserted Patents. *Id.*

Broadcom has determined that Realtek is the source of certain SoCs that are included in accused LG products and/or that carry LG’s brand name. In its complaint, Broadcom accuses of infringement various LG SoCs and audiovisual products. *See, e.g.*, Complaint, ¶82.a.iii. Through its investigation, Broadcom has determined that Realtek supplies SoCs to LG. The Realtek SoCs are, accordingly, relevant to the Investigation.

Realtek is believed to possess unique documents and information concerning the manufacture, design, testing, assembly, and/or function of products that are relevant to the Investigation. Realtek is also likely knowledgeable about, and has documents in its possession, custody, and control, concerning LG’s infringement of the Asserted Patents.

III. EVIDENCE

The documents requested to be produced are identified in **Attachment A**. The deposition questions to which Realtek’s testimony is requested are set forth in **Attachment B**. And the Commission-entered Protective Order is contained in **Attachment C**. Finally, the Commission’s “Ground Rules” that govern the Investigation are reproduced in **Attachment D**.

IV. URGENCY

A response is requested as soon as practicable. The reason for such urgency is that under Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, investigations in the Commission must be completed “at the earliest practicable time.” Expedient treatment of this request will allow the parties and the witnesses to arrange a mutually agreeable date for testimony and avoid disruption of the witnesses’ business or personal plans.

V. OFFER OF RECIPROCAL ASSISTANCE

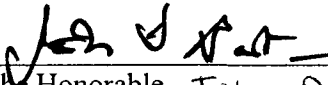
The United States District Court for the District of Columbia is willing to provide similar assistance to the Appropriate Judicial Authority of Taiwan.

VI. REIMBURSEMENT FOR COSTS

Broadcom's counsel is willing to reimburse the Appropriate Judicial Authority of Taiwan for costs and expenses incurred in executing this Letter Rogatory. Broadcom's counsel may be contacted at the following address:

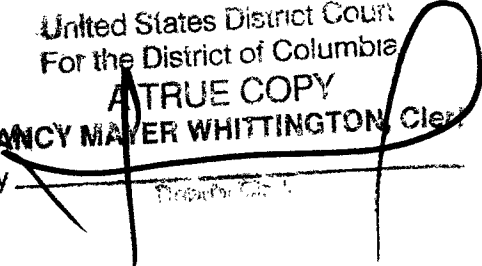
Matthew C. Holohan
KILPATRICK TOWNSEND & STOCKTON LLP
1400 Wewatta Street, Suite 600
Denver, CO 80202
Telephone: (303) 405-1488
Facsimile: (303) 379-5676
Email: mholohan@kilpatricktownsend.com

Signed by:


The Honorable John D. Bates
United States District Judge
United States District Court for the District of Columbia
333 Constitution Ave., N.W.
Washington, D.C. 20001
United States of America

Signed in Washington, D.C., this 14th day of August, 20 17

[Affix seal of court below:]

United States District Court
For the District of Columbia
A TRUE COPY
NANCY MAYER WHITTINGTON, Clerk
By 
Clerk of Court

ATTACHMENT A

DOCUMENTS REQUESTED

DEFINITIONS AND INSTRUCTIONS

DEFINITIONS

1. The term “accused products” refers to “products,” as defined below, that are manufactured, designed, imported, planned to be imported, sold, or planned to be sold by any Respondent identified in the Complaint (as defined below) that fall within the scope of the Notice of Institution for this Investigation.

2. “Respondents” shall mean and refer to MediaTek Inc.; MediaTek USA Inc.; MStar Semiconductor Inc.; Sigma Designs, Inc.; LG Electronics Inc.; LG Electronics U.S.A., Inc.; Funai Electric Company, Ltd.; Funai Corporation, Inc.; P&F USA, Inc.; Vizio, Inc.; and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by any of the Respondents, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of these same entities.

3. “LG” shall refer to LG Electronics Inc., and LG Electronics U.S.A., Inc., collectively.

4. “Source Code” means computer source code and/or object code, whether in printed or electronic form.

5. The term “any” shall be construed as one or more whenever necessary to bring within the scope of the request all responses that might otherwise be construed as outside its scope.

6. The phrase “patents at issue” or “asserted patents” refers to any and all of U.S. Patent No. 8,284,844 (“the ’844 patent”); U.S. Patent No. 7,590,059 (“the ’059 patent”); U.S. Patent No. 8,068,171 (“the ’171 patent”); U.S. Patent No. 7,310,104 (“the ’104 patent”); and U.S. Patent No. 7,342,967 (“the ’967 patent”).

7. The term “communication” shall mean every manner or method of disclosure, transfer, or exchange of information, whether orally or by document (as defined herein), and whether face-to-face, by telephone, mail, email, facsimile, personal delivery, or other method.

8. The term “Complainant” means Broadcom Corporation (“Broadcom”) and any domestic or foreign divisions, departments, subsidiaries, or parents, or current or former officers, directors, employees or agents thereof.

9. “Third Party” means anyone other than Broadcom or Respondents.

10. The term “Complaint” shall mean the complaint styled “In the Matter of Certain Semiconductor Devices and Consumer Audiovisual Products Containing the Same,” filed on behalf of Complainant on or about March 7, 2017, with the U.S. International Trade Commission and listing as proposed respondents, among others, LG Electronics Inc., and LG Electronics U.S.A., Inc.

11. The term “component” refers to a constituent part of a device, including, but not limited to, assemblies, subassemblies, modules, individual integrated devices, software, hardware, firmware, processors, and/or application-specific integrated circuits.

12. “Concerning,” “relating to,” “relate to,” “relates to,” “related to,” “referring or relating to,” “referring to,” “regarding,” and “refer or relate to” shall mean, in whole or in any part, responding to, concerning, relating to, connected with, involving, commenting on, in respect of, about, associated with, discussing, evidencing, showing, describing, reflecting,

analyzing, summarizing, memorializing, consisting of, constituting, identifying, stating, tending to support, tending to discredit, referring to, or in any way touching upon.

13. “Date” as used herein shall mean the exact day, month, and year, if ascertainable, or, if not, the best approximation (including any relationship to other events) thereof.

14. “Describe” shall mean to set out in detail every act, event, fact, or occurrence of any kind whatsoever that explains the answer to the question.

15. The terms “distribute” and “distributor” in all forms refer to all distributions, including those for free, to any person.

16. The term “document” shall include, without limitation, any written, typed, printed, recorded or graphically portrayed matter in any form or embodiment, that is produced, reproduced, or stored by photographic, magnetic, electronic, mechanical or any other means, and that is in your actual or constructive custody or control, and all copies of the foregoing on which any mark, alteration, writing, or other change from the original has been made.

17. The term “domestic products” means “products,” as defined below, that Complainant manufactures, designs, or develops, or that are manufactured, designed, or developed on Complainant’s behalf, or that are manufactured, designed, or developed under license from Complainant; and that Complainant contends practice one or more claims of the patents at issue; and on which Complainant is relying to satisfy the domestic industry requirement of Section 337 with respect to those patents.

18. The terms “each” and “any” shall mean any and all.

19. The term “exporter” means any person engaged, directly or indirectly, in sending goods to the United States from another country.

20. The term “identify,” when used with respect to a person, means to state the person’s full name, present or last known address, and when referring to a natural person, additionally, the occupation or business in which the person is engaged, and the person’s present or last employer and title or position.

21. The term “identify,” when used with respect to a document, means to state, to the extent known, the (i) type of document, (ii) general subject matter, (iii) date of the document, (iv) authors, addressees, and recipients, and (v) when applicable, the Bates range for the document.

22. The term “identify,” when used with respect to a communication, means to state, to the extent known, the (i) means of communication (*e.g.*, telephone call, meeting, etc.), (ii) date of the communication, (iii) general subject matter of the communication, and (iv) originator, recipient, and any other party to the communication.

23. The terms “import” and “importation” refer to any and all shipments to the United States, including shipments into bonded warehouses, shipments for transshipping under bond, and shipments intended for the official use of foreign embassies or consulates.

24. The term “importer” means any person engaged in bringing or receiving, directly or indirectly, goods from another country into the United States for the purpose of sale, display, or transshipment.

25. The word “including” shall be without limitation.

26. “Infringement” as used herein shall be defined broadly to include direct, contributory, and induced infringement under the applicable laws.

27. “Investigation” shall mean and refer to ITC Investigation No. 337-TA-1047.

28. “ITC” or “Commission” shall mean and refer to the United States International Trade Commission.

29. The terms “market,” “marketing,” or “marketed” refer to the sale, offer for sale, oral or written agreement or contract for sale, solicitation, negotiation for sale, promotion or advertisement of a product or service, or instruction in any form for use of a product or service.

30. The terms “person” or “persons” refer to any individual, corporation, partnership, sole proprietorship, firm, board, joint venture, association, agency, authority, commission or other entity.

31. The term “products,” as used in the terms “accused products” and “domestic products” defined above, refers to semiconductor components (such as, for example, various SoCs, as defined below, and similar processing components and circuits) and consumer audiovisual products containing the same, including, without limitation, digital televisions (“DTVs”), set-top boxes, Blu-ray disc players, DVD players/recorders, DTV/DVD combinations, DTV/Blu-Ray combinations, multimedia streaming players, home theater systems, and other similar audiovisual devices and systems.

32. “PTO” shall mean and refer to the United States Patent and Trademark Office.

33. The terms “Realtek,” “you,” and “your” refer to Realtek Semiconductor Corp., with an address at No. 2, Innovation Road II, Hsinchu Science Park, Hsinchu 300, Taiwan, and to any domestic or foreign divisions, departments, subsidiaries, or parents, or current or former officers, directors, employees or agents thereof.

34. The terms “sale,” “sell,” and “sold” refer to any and all commercial transactions, including transactions which result in shipments into bonded warehouses, shipments for transshipping under bond, and shipments intended for the official use of foreign embassies or

consulates. The terms “sale,” “sell,” and “sold” also refer to all transactions conducted through the Internet.

35. The term “Section 337” refers to 19 U.S.C. § 1337.

36. The term “SoC” refers to a system on a chip.

37. The term “United States” refers to the fifty states, the District of Columbia, and Puerto Rico, and includes any and all customs warehouses, bonded warehouses, duty-free establishments, and free trade zones located therein.

38. The term “Thing” or “thing” means any tangible object other than a Document including, without limitation, objects of every kind and nature, as well as prototypes, models, drafts, or specimens thereof.

39. The use of the plural form of a word herein shall be interpreted to include the singular form so as not to exclude any information that may otherwise be within the scope of any discovery request.

40. The terms “and” and “or” shall be interpreted both conjunctively and disjunctively so as not to exclude any information otherwise within the scope of any request.

41. “Realtek SoCs” and “Realtek SoC” mean any SoCs that Realtek manufactures, provides, sells, imports, and/or exports to/for LG, and any SoCs that Realtek intends to manufacture, provide, sell, import, and/or export to/for LG but has not yet done so.

INSTRUCTIONS

1. In responding to the following document requests, furnish all available documents in Realtek’s possession, custody, or control.

2. If you lack the ability to comply with a particular document request, specify whether the inability to comply is because the particular document or category of documents requested never existed; has been destroyed; has been lost or misplaced; has been stolen; or has never been or is no longer in your possession, custody, or control. If the particular document or category of documents is no longer in your possession, custody, or control, identify the name and address of any person or entity known or believed by you to have possession, custody, or control of that document or category of documents.

3. If you contend that a particular document or category of documents contains trade secret or other confidential research, development, or commercial information, please mark the document or documents as such, as required by the Protective Order attached to this Letter Rogatory as Attachment C.

4. In answering the following document requests, furnish all available information, including information in the possession, custody, or control of any of your attorneys, directors, officers, agents, employees, representatives, associates, investigators, divisions, affiliates, partnerships, parents or subsidiaries, and persons under your control, who have knowledge.

5. In the event that you object to any document request on the ground that it is allegedly overbroad and/or unduly burdensome for any reason, respond to that request as narrowed to the least extent necessary, in your judgment, to render it not overbroad/unduly burdensome and state specifically the extent to which you have narrowed that request for purposes of your response.

6. In the event that you object to any document request on the ground that it is purportedly vague and/or ambiguous, identify the particular words, terms or phrases that are

asserted to make such request vague and/or ambiguous and specify the meaning actually attributed to you by such words for purposes of your response thereto.

7. For any information requested that is not readily available from your records in exactly the form requested, furnish carefully prepared estimates, designated as such. Attach a statement of the basis for such estimates and identify the person or persons making them.

8. If any information called for by one of these document requests is withheld on the grounds of privilege or any other claim of immunity from discovery, then for each document or communication containing withheld information, state the following: (1) the type of document (*e.g.*, letter, memorandum, contract, etc.); (2) its title; (3) its date; (4) its subject matter; (5) the name, address, and employer at the time of preparation of the individual who authored, drafted, or prepared it; (6) the name, address, and employer at the time of dissemination of the individual to whom it was directed, circulated, copied, or who otherwise had access thereto; (7) its number of pages; (8) the nature of the privilege claimed and the facts upon which you rely to support the claim of privilege; and (9) the identification of each discovery request to which the withheld information is responsive.

9. Where an identified document is in a language other than English, state whether an English translation of such document exists. If a document is in a language other than English and an English translation exists, identify and provide both documents.

10. If possible and unless otherwise indicated, supply all financial data requested on a calendar year basis. If fiscal year data is provided, specify the dates on which the fiscal years begin and end.

11. These discovery requests shall be deemed continuing so as to require prompt supplementation if additional information is obtained, discovered or created subsequent to the original responses.

DOCUMENT REQUESTS

1. Documents sufficient to determine the names of all entities involved in the manufacture of the Realtek SoCs, including the manufacture of the wafers for the Realtek SoCs.
2. Documents sufficient to determine the locations or facilities where the Realtek SoCs are manufactured.
3. Documents sufficient to determine all exporters and importers of the Realtek SoCs.
4. Documents sufficient to determine whether any Realtek SoCs are imported into or otherwise enter the United States.
5. Documents sufficient to determine the process by which the Realtek SoCs are exported (from anywhere, including Taiwan), including, but not limited to, the destinations to which those products are exported, the carriers used to export them, and the terms on which those products are exported.
6. Documents sufficient to determine all SoCs that Realtek has sold or otherwise provided to LG since January 1, 2015.
7. Documents sufficient to determine all SoCs that Realtek intends to sell or otherwise provide to LG, but has not yet done so.
8. Documents sufficient to determine the actual production volume for the Realtek SoCs.

9. Documents sufficient to determine the estimated production volume for all SoCs that Realtek intends to sell or otherwise provide to LG, but has not yet done so.

10. Documents sufficient to identify all brand names, marketing names, part numbers, internal designations, and other unique designations for the Realtek SoCs.

11. Documents sufficient to determine whether Realtek provides SoCs directly to LG, or whether it does so through a third party.

12. Documents sufficient to identify the product name, model and revision number, and product family for all Realtek SoCs.

13. Documents sufficient to show the supply, manufacturing, and distribution chain for each Realtek SoC, from their point of manufacture to their point of incorporation into any LG product.

14. All Source Code designed, written, compiled, produced, and/or used by Realtek concerning any Realtek SoC, product, or component used in any product sold by or for the benefit of LG, and all documents concerning such Source Code.

15. All documents and communications with LG concerning the Realtek SoCs, Broadcom, the Investigation, the asserted patents, and/or Broadcom's Letter Rogatory to Realtek.

16. All documents and communications concerning any and all agreements, including negotiations for agreements, between Realtek and LG for the design, manufacture, use, sale, offer for sale, and/or importation of the Realtek SoCs.

17. All agreements between Realtek and LG for the design, manufacture, use, sale, offer for sale, and/or importation of the Realtek SoCs.

18. Documents sufficient to determine Realtek's costs, revenue, profit, and/or pricing for the Realtek SoCs.

19. To the extent that they are in your possession, custody, or control, documents sufficient to determine LG's costs, revenue, profit, and/or pricing for the Realtek SoCs.

20. Documents sufficient to determine, on a monthly basis, SoCs sold, shipped, or otherwise provided to LG.

21. Documents sufficient to identify each LG product into which any Realtek SoCs are incorporated.

22. Documents sufficient to show Realtek's imports of Realtek SoCs into the United States, sales of Realtek SoCs for importation into the United States, or sales of Realtek SoCs after importation into the United States.

23. Documents sufficient to determine whether Realtek has any United States subsidiaries and, if so, the full legal name, address, and place of incorporation of the subsidiaries.

24. Documents sufficient to identify all sales representatives, retailers, resellers, and distributors of Realtek who do business in the United States relating to, in any way, the Realtek SoCs.

25. Documents sufficient to determine the design, layout, operation, and/or function of all Realtek SoCs, including, but not limited to, manufacturing drawings, datasheets, blueprints, technical diagrams, design and engineering specifications, computer modeling information, Source Code, development information, and testing information.

26. All drawings, specifications, Source Code, or other documents describing the design, development, structure, function, operation, fabrication, manufacturing, assembly, and testing of each Realtek SoC, including the following:

- a. System-level software (*e.g.*, C code) and firmware dealing with any aspect of video operations, graphics operations, and display;
- b. software and firmware for all Realtek SoCs dealing with any aspect of video operations, graphics operations, and display;
- c. Application Programming Interface (“API”) specifications for the Realtek SoCs and for the modules of the Realtek SoCs dealing with any aspect of video operations, graphics operations, and display;
- d. block diagrams of all Realtek SoCs dealing with any aspect of video operations, graphics operations, and display;
- e. detailed circuit descriptions for all Realtek SoCs dealing with any aspect of video operations, graphics operations, and display;
- f. schematics of all Realtek SoCs dealing with any aspect of video operations, graphics operations, and display in their native format;
- g. interface specification of all Realtek SoCs dealing with any aspect of video operations, graphics operations, and display;
- h. service manuals for all Realtek SoCs and any components dealing with any aspect of video operations, graphics operations, and display;
- i. Hardware Description Language (such as VHDL or Verilog source code) for all Realtek SoCs dealing with any aspect of any video operations, graphics operations, and display;
- j. datasheets for all Realtek SoCs and any components dealing with any aspect of video operations, graphics operations, and display; and

- k. any system-level software and firmware outside the Realtek SoC dealing with the video operations, graphics operations, and display.

27. Documents sufficient to identify the address of each facility in the United States where any Realtek SoCs are currently being held in inventory by Realtek or on its behalf.

28. All agreements under which Realtek has agreed to indemnify any company, including LG, that incorporates Realtek SoCs into that company's products.

29. Two physical samples of each Realtek SoC.

30. To the extent that Realtek designates a witness to answer the deposition questions listed in Attachment B, documents sufficient to identify: the titles the witness has had and currently has at Realtek; the length of time that the witness has worked for Realtek; the witness's supervisors and direct reports; the witness's role with respect to the Realtek SoCs; the witness's role with respect to Realtek's business relationship with LG; the witness's knowledge of the design, manufacture, fabrication, operation, sales, and marketing of the Realtek SoCs; and the information relevant to this Investigation known by the witness. To the extent that Realtek designates more than one witness to provide the requested testimony, documents sufficient to identify the above-mentioned topics for each witness are requested to be produced.

31. All documents relied upon, identified, referred to, referenced, consulted, or examined in preparing to answer the deposition questions listed in Attachment B.

ATTACHMENT B

TOPICS AND WRITTEN DEPOSITION QUESTIONS

DEFINITIONS AND INSTRUCTIONS

1. The definitions and instructions in Attachment A are incorporated by reference.

TOPICS AND QUESTIONS

1. What are the names of all entities involved in the manufacture of the Realtek SoCs, including the manufacture of the wafers for the Realtek SoCs?
2. Where are the Realtek SoCs manufactured?
3. Who are the exporters and importers of the Realtek SoCs?
4. Are Realtek SoCs imported into, or do they otherwise enter, the United States and, if so, what is Realtek's involvement in this importation?
5. Please describe in detail the process by which the Realtek SoCs are exported (from anywhere, including Taiwan), including, but not limited to, the destinations to which those products are exported, the carriers used to export them, and the terms on which those products are exported.
6. Please identify all SoCs that Realtek has sold or otherwise provided to LG since January 1, 2015.
7. Please identify all SoCs that Realtek intends to sell or otherwise provide to LG, but has not yet done so.
8. What is the actual production volume for the Realtek SoCs?
9. What is the estimated production volume for all SoCs that Realtek intends to sell or otherwise provide to LG, but has not yet done so?

10. What are the brand names, marketing names, part numbers, internal designations, and other unique designations for the Realtek SoCs?

11. Does Realtek provide SoCs directly to LG, or does LG obtain the Realtek SoCs from a third party?

12. What are the product names, model and revision numbers, and product family for all Realtek SoCs?

13. Please describe the supply, manufacturing, and distribution chain for each Realtek SoC, from their point of manufacture to their point of incorporation into any LG product.

14. Please identify and describe all Source Code designed, written, compiled, produced, and/or used by Realtek concerning any Realtek SoC, product, or component used in any product sold by or for the benefit of LG, and all documents concerning such Source Code.

15. What communications have taken place between Realtek and LG concerning the Realtek SoCs, Broadcom, the Investigation, the asserted patents, and/or Broadcom's Letter Rogatory to Realtek?

16. What agreements (including negotiations for agreements) exist between Realtek and LG for the design, manufacture, use, sale, offer for sale, and/or importation of the Realtek SoCs?

17. Please identify and describe all agreements between Realtek and LG for the design, manufacture, use, sale, offer for sale, and/or importation of the Realtek SoCs.

18. What are Realtek's costs, revenue, profit, and/or pricing for the Realtek SoCs?

19. What are LG's costs, revenue, profit, and/or pricing for the Realtek SoCs?

20. On a monthly basis (since whenever Realtek began providing SoCs to LG), how many SoCs has Realtek sold, shipped, or otherwise provided to LG?

21. Please identify each LG product into which any Realtek SoCs are incorporated.
22. Please identify and describe each instance of Realtek's importation of Realtek SoCs into the United States, sales of Realtek SoCs for importation into the United States, or sales of Realtek SoCs after importation into the United States.
23. What, if any, United States subsidiaries does Realtek have and, if it has any, what are the full legal names, addresses, and places of incorporation of the subsidiaries?
24. Please identify all sales representatives, retailers, resellers, and distributors of Realtek who do business in the United States relating to, in any way, the Realtek SoCs.
25. Please describe the design, layout, operation, and/or function of all Realtek SoCs. Your answer to this question may rely on, among other things, the following information: manufacturing drawings, datasheets, blueprints, technical diagrams, design and engineering specifications, computer modeling information, Source Code, development information, and testing information of the Realtek SoCs.
26. Please describe the design, development, structure, function, operation, fabrication, manufacturing, assembly, and testing of each Realtek SoC.
27. With respect to the Realtek SoCs, please identify and describe any and all system-level software (*e.g.*, C code) and firmware dealing with any aspect of video operations, graphics operations, and display.
28. Please identify and describe any and all software and firmware for all Realtek SoCs dealing with any aspect of video operations, graphics operations, and display.
29. Please identify and describe any and all Application Programming Interface ("API") specifications for the Realtek SoCs and for the modules of the Realtek SoCs dealing with any aspect of video operations, graphics operations, and display.

30. Please identify and describe any and all block diagrams of all Realtek SoCs dealing with any aspect of video operations, graphics operations, and display.

31. Please identify and describe any and all detailed circuit descriptions for all Realtek SoCs dealing with any aspect of video operations, graphics operations, and display.

32. Please identify and describe any and all schematics of all Realtek SoCs dealing with any aspect of video operations, graphics operations, and display in their native format.

33. Please identify and describe any and all interface specifications of all Realtek SoCs dealing with any aspect of video operations, graphics operations, and display.

34. Please identify and describe any and all service manuals for all Realtek SoCs and any components dealing with any aspect of video operations, graphics operations, and display.

35. Please identify and describe any and all Hardware Description Language (such as VHDL or Verilog source code) for all Realtek SoCs dealing with any aspect of any video operations, graphics operations, and display.

36. Please identify and describe any and all datasheets for all Realtek SoCs and any components dealing with any aspect of video operations, graphics operations, and display.

37. Please identify and describe any and all any system-level software and firmware outside the Realtek SoC dealing with the video operations, graphics operations, and display.

38. What is the address of each facility in the United States where any Realtek SoCs are currently being held in inventory by Realtek or on its behalf?

39. Has Realtek agreed to indemnify any company, including LG, that incorporates Realtek SoCs into that company's products?

40. If Realtek has agreed to indemnify any company, including LG, that incorporates Realtek SoCs into that company's products, please describe in as much detail as possible the nature of that agreement.

41. What is your title at Realtek?

42. What other titles have you held at Realtek?

43. How long have you worked for Realtek?

44. Who are your supervisors?

45. Who are your direct reports?

46. What is your role with respect to the Realtek SoCs?

47. What is your role with respect to Realtek's business relationship with LG?

48. What do you know about the design, manufacture, fabrication, operation, sales, and marketing of the Realtek SoCs?

49. What information do you have that is relevant to this Investigation?

50. How long did you prepare before being able to answer the questions included in this Attachment B?

51. Who did you speak with to prepare to answer the questions included in this Attachment B?

52. Did you speak to any LG representatives, including any in-house or outside counsel of LG, to help you prepare to answer the questions included in this Attachment B?

53. Please identify and describe in detail all documents that you relied upon, identified, referred to, referenced, consulted, or examined in preparing to answer the questions listed in this Attachment B.

54. What documents, if any, were you provided by LG's in-house or outside counsel?

Exhibit A

NTEC Exhibit No. 2

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN SEMICONDUCTOR
DEVICES AND CONSUMER
AUDIOVISUAL PRODUCTS
CONTAINING THE SAME**

Inv. No. 337-TA-1047

Order No. 18

On July 20, 2017, complainant Broadcom Corporation (“Broadcom”) filed a motion requesting that the administrative law judge recommend that the United States District Court for the District of Columbia issue a Letter Rogatory pursuant to Federal Rule of Civil Procedure 28(b), on behalf of Broadcom, to obtain documents and deposition testimony from the following foreign third party:

Realtek Semiconductor Corp. (“Realtek”)
No. 2, Innovation Road II
Hsinchu Science Park
Hsinchu 300
Taiwan

Motion Docket No. 1047-023. Broadcom argues that Realtek possesses unique documents and information concerning the manufacture, design, testing, assembly, and/or function of LG’s accused products.¹ Mot. at 2. Broadcom further argues that Realtek is knowledgeable about, and has documents in its possession, custody, and control concerning, LG’s alleged infringement of the asserted patents. *Id.* No respondent opposed the motion.²

¹ The “LG” respondents are LG Electronics, Inc. and LG Electronics USA, Inc.

² The other respondents are Funai, MediaTek, MStar, and VIZIO. The “Funai” respondents are Funai Electric Company, Ltd. and Funai Corporation, Inc. and P&F USA, Inc.; the “MediaTek”

Motion No. 1047-023 is granted.

Accordingly, it is respectfully recommended that the District Court issue Broadcom's Letter Rogatory Requesting International Judicial Assistance to the appropriate judicial authority of Taiwan.



David P. Shaw
Administrative Law Judge

Issued: July 25, 2017

respondents are MediaTek Inc. and MediaTek USA Inc.; "MStar" is respondent MStar Semiconductor, Inc.; and "VIZIO" is respondent VIZIO, Inc.

**CERTAIN SEMICONDUCTOR DEVICES AND CONSUMER AUDIOVISUAL
PRODUCTS CONTAINING THE SAME**

INV. NO. 337-TA-1047

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **Order No. 18** has been served upon the following parties as indicated, on _____

JUL 25 2017


Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street SW, Room 112A
Washington, DC 20436

FOR COMPLAINANT BROADCOM CORP.:

John M. Caracappa, Esq.
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW

() Via Hand Delivery
() Express Delivery
(X) Via First Class Mail
() Other: _____

**FOR RESPONDENTS FUNAI ELECTRIC CO., LTD., FUNAI CORP., INC., AND
P&F USA, INC.:**

T. Cy Walker, Esq.
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, NW
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() Express Delivery
(X) Via First Class Mail
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FOR RESPONDENT SIGMA DESIGNS, INC.:

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PILLSBURY WINTHROP SHAW PITTMAN LLP
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() Via Hand Delivery
() Express Delivery
(X) Via First Class Mail
() Other: _____

**CERTAIN SEMICONDUCTOR DEVICES AND CONSUMER AUDIOVISUAL
PRODUCTS CONTAINING THE SAME****INV. NO. 337-TA-1047**

FOR RESPONDENT VIZIO, INC.:	
Cono A. Carrano, Esq. AKIN GUMP STRAUSS HAUER & FELD LLP Robert S. Strauss Building 1333 New Hampshire Avenue, N.W. Washington, DC 20036-1564	☐ Via Hand Delivery ☐ Express Delivery ☒ Via First Class Mail ☐ Other: _____
FOR RESPONDENTS MSTAR SEMICONDUCTOR INC., MEDIATEK INC. AND MEDIATEK USA INC.:	
Joseph V. Colaianni, Esq. FISH & RICHARDSON P.C., 901 15th Street, N.W. 7th Floor Washington, D.C. 20005	☐ Via Hand Delivery ☐ Express Delivery ☒ Via First Class Mail ☐ Other: _____
FOR RESPONDENTS LG ELECTRONICS, INC., AND LG ELECTRONICS U.S.A., INC. :	
Doris Johnson Hines, Esq. FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP 901 New York Avenue, N.W. Washington, D.C. 20001-4413	☐ Via Hand Delivery ☐ Express Delivery ☒ Via First Class Mail ☐ Other: _____