

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

**CERTAIN OPTOELECTRONIC
DEVICES, COMPONENTS THEREOF,
AND PRODUCTS CONTAINING THE
SAME**

Inv. No. 337-TA-669

LIMITED EXCLUSION ORDER

The Commission has determined that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the unlawful importation and sale by Respondent Emcore Corporation (“Respondent”) of optoelectronic devices, components thereof, and products containing the same that are covered by one or more of claims 1, 2, 3, and 5 of U.S. Patent No. 5,359,447.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry of infringing optoelectronic devices, components thereof, or products containing the same manufactured by or on behalf of, or imported by or on behalf of, Respondent. The Commission has also determined that the appropriate form of relief includes a cease and desist order against Respondent.

The Commission has determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude issuance of the limited exclusion order or cease and desist order, and that the bond during the Presidential review period shall be in the amount of three (3) percent of the entered value of the optoelectronic devices, components thereof, or products containing the same that are subject to this order.

Accordingly, the Commission hereby **ORDERS** that:

1. Optoelectronic devices, components thereof, and products containing same that are covered by one or more of claims 1, 2, 3, and 5 of U.S. Patent No. 5,359,447 and that are manufactured abroad by or on behalf of, or are imported by or on behalf of Emcore Corporation or any of its affiliated companies, parents, subsidiaries, or other related business entities, or its successors or assigns are excluded from entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, for the remaining term of the patent, except under license of the patent owner or as provided by law.

2. Products that are excluded by paragraph 1 of this Order are entitled to entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, under bond in the amount of three (3) percent of the entered value pursuant to subsection (j) of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337(j), and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (70 *Fed. Reg.* 43251), from the day after this Order is received by the United States Trade Representative and until such time as the United States Trade Representative notifies the Commission that this action is approved or disapproved but, in any event, not later than sixty (60) days after the date of receipt of this action.

3. At the discretion of U.S. Customs and Border Protection ("CBP") and pursuant to procedures it establishes, persons seeking to import optoelectronic devices, components thereof, or products containing same that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraphs 1 through 7 of this Order. At its discretion, CBP may also require persons who have provided the certification described in this paragraph to furnish such records or analyses as it deems necessary to substantiate the certification.

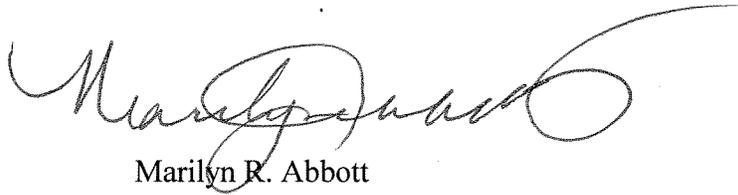
4. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to optoelectronic devices, components thereof, or products containing same that are imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

5. The Commission may modify this Order in accordance with the procedures described in Rule 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

6. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and U.S. Customs and Border Protection.

7. Notice of this Order shall be published in the *Federal Register*.

By Order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott", with a large, decorative flourish extending to the right.

Marilyn R. Abbott
Secretary to the Commission

Issued: July 12, 2010

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of

**CERTAIN OPTOELECTRONIC
DEVICES, COMPONENTS THEREOF,
AND PRODUCTS CONTAINING THE
SAME**

Inv. No. 337-TA-669

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT Emcore Corporation of Albuquerque, New Mexico cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for, optoelectronic devices, components thereof, or products containing the same that are covered by one or more of claims 1, 2, 3, and 5 of U.S. Patent No. 5,359,447, in violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337.

I.

Definitions

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Complainants" shall mean Avago Technology Fiber IP Pte., Ltd., Avago Technologies General IP Pte., Ltd., and Avago Technologies, Ltd. of Singapore.

(C) "Respondent" shall mean Emcore Corporation of 10420 Research Road SE,

Albuquerque, New Mexico 87123.

(D) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, successors, or assigns.

(E) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(F) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.

(G) The term "covered products" shall mean optoelectronic devices, components thereof, and products containing the same that are covered by one or more of claims 1, 2, 3, and 5 of U.S. Patent No. 5,359,447.

II.

Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

Conduct Prohibited

The following conduct by Respondent in the United States is prohibited by the Order.

For the remaining term of the patent, Respondent shall not:

(A) import or sell for importation into the United States covered products;

(B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;

(C) advertise imported covered products;

(D) solicit U.S. agents or distributors for imported covered products; or

(E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV.

Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of U.S. Patent No. 5,359,447 licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V.

Reporting

For purposes of this reporting requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. However, the first report required under this section shall cover the period from the date of issuance of this Order through

December 31, 2010. This reporting requirement shall continue in force until such time as Respondent will have truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of (i) covered products that the Respondent has imported and/or (ii) covered products that the Respondent has sold in the United States after importation during the reporting period; and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period. A Respondent filing written submissions must file the original document and two copies with the Office of the Secretary. Any Respondent desiring to submit a document to the Commission in confidence must file the original and a public version of the original with the Office of the Secretary and serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

VI.

Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States

¹ Complainant must file a letter with the Secretary identifying the attorney to receive the reports or bond information. The designated attorney must be on the protective order entered in the investigation.

of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

VII.

Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order,

together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the date of expiration of U.S. Patent No. 5,359,447.

VIII.

Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

XI.

Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the United States Trade Representative as delegated by the President, 70 *Fed Reg* 43251 (July 21,2005), subject to Respondent posting a bond of in the amount of three (3) percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported during the review period are subject to the entry bond as set forth in the limited exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order. Upon acceptance of the bond by the Secretary: (a) the Secretary will serve an acceptance letter on all parties; and (b) the Respondent must serve a copy of the bond and any accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves, or does not disapprove within the review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products

² *See* fn. 1.

subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.

A handwritten signature in black ink, appearing to read 'Marilyn R. Abbott', with a large, stylized flourish at the end.

Marilyn R. Abbott
Secretary to the Commission

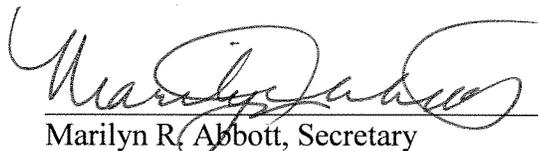
Issued: July 12, 2010

**CERTAIN OPTOELECTRONIC DEVICES, COMPONENTS
THEREOF, AND PRODUCTS CONTAINING THE SAME**

337-TA-669

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ISSUANCE OF A LIMITED EXCLUSION ORDER AND CEASE AND DESIST ORDER; AND TERMINATION OF THE INVESTIGATION** has been served by hand upon the Commission Investigative Attorney, Christopher G. Paulraj, Esq., and the following parties as indicated, on July 12, 2010.



Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

**On Behalf of Complainants Avago Technologies Fiber
IP (Singapore) PTE. Ltd.; Avago Technologies General
IP (SINGAPORE) PTE. Ltd.; and, Avago Technologies
Ltd.:**

Jerold I. Schneider, Esq.
NOVAK DRUCE & QUIGG LLP
525 Okeechobee Boulevard - 15th Floor
West Palm Beach, FL 33401

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

On Behalf of Respondent Emcore Corporation:

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ADDUCI MASTRIANI & SCHAUMBERG LLP
1200 Seventeenth Street, NW - Fifth Floor
Washington, DC 20036

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U.S. Bureau of Customs and Border Protection
Intellectual Property Rights Branch
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