

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN DIGITAL CAMERAS,
SOFTWARE, AND COMPONENTS
THEREOF

Inv. No. 337-TA-1059

**ORDER NO. 52: DENYING RESPONDENTS' MOTION *IN LIMINE* NO. 1,
TO PRECLUDE COMPLAINANTS FROM RELYING ON
AND TO PRECLUDE EVIDENCE ON POST-COMPLAINT
DOMESTIC INDUSTRY ACTIVITIES [MOTION DOCKET
NO. 1059-045]**

(February 20, 2018)

I. INTRODUCTION

A. Respondents' Position in Brief

On February 9, 2018, Respondents Nikon Corporation, Sendai Nikon Corporation, Nikon Inc., Nikon (Thailand) Co., Ltd., Nikon Inc., and Nikon Imaging (China) Co., Ltd. (collectively, "Respondents"), filed their Motion *in Limine* No. 1 ("MIL No. 1") with a memorandum of law in support ("Memorandum") to preclude Complainants Carl Zeiss AG and ASML Netherlands B.V. (collectively, "Complainants") (and with Respondents, "the Parties") from introducing any argument, testimony and documents with respect to post-complaint information on Complainants' economic domestic industry. ("Motion Docket No. 1059-045; MIL No. 1 at 1.).¹ Respondents contend that Complainants failed to provide support for an "unusual development"

¹ Respondents certify pursuant to Ground Rule 2.2 that they attempted to resolve their disputes that are the subject of this Order with Complainants at least two days before filing their MIL No.1 but were unable to do so. (Mot. at 1.).

that would justify “departure from the rule that the domestic industry requirement is measured as of the filing of the complaint.” (Mem. at 1 (citing *Motiva LLC v. Int’l Trade Commission*, 716 F.3d 596, 601 n.6 (Fed. Cir. 2013)(“*Motiva*”).). To that end, Respondents seek to preclude:

- Testimony during the evidentiary hearing from Zeiss fact witnesses Michael Kaschke, Ulrich Wagemann, Han-Jürgen Mann, REDACTED, and Zeiss expert witnesses Dr. Putnam, Dr. Etienne-Cummings, Dr. Schonfeld, Dr. Carley, and Dr. Villasenor.
- Portions of deposition transcript designations submitted by either party from REDACTED
- Portions of deposition transcript designations submitted by either party from Zeiss witnesses Michael Kasckhe, Ulrich Wagemann, Hans-Jürgen Mann, and Wolfgang Singer.
- Domestic industry prototypes created and produced after the filing of the complaint, including the REDACTED
- Source code created and produced after the filing of the complaint, including REDACTED
- Documentary evidence listed in Appendix A, including invoices, statements of work, reports, presentations, and other, similar documents.

B. Complainants’ Position in Brief

In their Opposition filed on February 16, 2018, Complainants suggest that Respondents neglect to mention in their MIL No. 1 that by the time of the filing of the complaint, Complainants had invested more than REDACTED dollars in their domestic industry. (Opp’n at 1.). Complainants state that they are in the process of developing “ REDACTED

.” (*Id.*). Complainants say that “in the process of being established” with respect to a domestic industry in this case is based upon their investments before the filing of the

complaint and Complainants' development of prototypes after the filing of their complaint that will demonstrate that they have been establishing a domestic industry. (*Id.*).

Moreover, Complainants suggest that the time of the establishment of the domestic industry is not necessarily at the time of the complaint. Complainants note that the Commission will consider post-complaint evidence in "appropriate circumstances" including when "new, relevant and timely disclosed evidence" bears upon the domestic industry. (Opp'n at 3 (citing *Certain Video Game Systems*, Inv. No. 337-TA-743, Comm'n Op. at 5-6 (Jan. 20, 2012)(other citations omitted)). Complainants note that Respondents' reliance on *Motiva* is misplaced. (*Id.* at 4.). In *Motiva*, the complainant had stopped its domestic investments three (3) years before it filed its ITC complaint, so consequently, the analysis and outcome were different than would apply here. (*Id.*). Complainants also argue that Respondents' statement that a "threshold finding" must be made that there was an "unusual development" is wrong as a matter of law and "misses the mark." (*Id.* at 5 (citing to *Certain Video Game Systems*, Comm'n Op. at 5 (Jan. 12, 2012)). Complainants note that the Commission has recognized a host of "appropriate situations" in which post-complaint evidence is considered, including when a domestic industry is expanding post-complaint. (*Id.* at 6.).

II. DISCUSSION AND ORDER

Respondents' argument fails, in part because it misapplies *Motiva*, in addition to other case precedent, including but not limited to *Certain Silicon-on-Insulator Wafers*, 377-TA-1025, Order No. 13 at 20, 21 (April 11, 2016). There is no rigid rule that the Commission must consider *only* at the investments in a domestic industry at the time of the filing of a complaint. The date of the filing of the complaint may be the bench mark, but there are other circumstances

PUBLIC VERSION

that will be considered. If there is any area of law in which the Commission is scrupulous in its efforts to give some flexibility to ensure that patentees have protection while trying to exploit their patents, it is in the area of domestic industry. The two-part test requires that: (1) the complainant must “demonstrate that he is taking the necessary tangible steps to establish an industry in the United States;” and (2) there must be “significant likelihood that the industry will be satisfied in the future.” (Opp’n at 7 (quoting *Certain Stringed Musical Instruments*, Inv. No. 337-TA-586, Comm’n Op. at 13 (May 16, 2008).)

Complainants have provided sufficient facts with respect to investments they have made in the process of establishing their domestic industry, and the amount of money they have invested in readying for a REDACTED at the time of the filing of the Complaint and thereafter. (Opp’n at 7.). It is equally evident that Complainants informed Respondents in the Complaint of the timing and nature of the development of a domestic industry, and continued to notify Respondents of the changing, developing nature of Complainants’ domestic industry throughout the course of discovery in this Investigation. (See Opp’n at 9-11.).

For those reasons, Respondents’ MIL No. 1 is *denied in its entirety*.

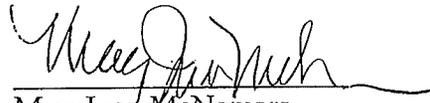
Complainants will be permitted to offer into evidence during the evidentiary hearing the evidence that they have marshalled with respect to their domestic industry case, including the evidence that Respondents have sought to exclude. All such information will be subject to appropriate evidentiary objections during the evidentiary hearing.

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Within seven (7) business days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not² it seeks to have any confidential portion of this document deleted from the public version. Any party seeking redactions to the public version must submit to this Office two (2) copies of a proposed public version of this document pursuant to Ground Rule 1.10 with red brackets clearly indicating any portion asserted to contain confidential business information.

The Parties' submissions may be made by facsimile and/or hard copy by the aforementioned date. In addition, an electronic courtesy copy is required pursuant to Ground Rule 1.3.2.

SO ORDERED.


MaryJoan McNamara
Administrative Law Judge

²This means that parties that do not seek to have any portion of this Order redacted are still required to submit a statement to this effect.

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served to the following parties as indicated, on **April 5, 2018**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
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