

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

**In the Matter of:**

**CERTAIN COMPOSITE AEROGEL  
INSULATION MATERIALS AND  
METHODS FOR MANUFACTURING  
THE SAME**

**Investigation No. 337-TA-1003**

**ORDER NO. 22**

**GRANTING COMPLAINANT'S MOTION TO STRIKE AND  
TO PRECLUDE THE USE OF INFORMATION UNTIMELY  
DISCLOSED**

(December 20, 2016)

**I. Introduction and Parties' Positions**

Pursuant to Commission Rule 210.15, on November 14, 2016, Complainant Aspen Aerogels, Inc. ("Complainant") moved to strike, and preclude the use of, information that it alleges was untimely disclosed by Respondents Guangdong Alison Hi-Tech Co., Ltd. ("Respondent Alison") and Nano Tech Co., Ltd. ("Respondent Nano") (collectively, "Respondents"). (Motion Docket No. 1003-014; Aspen Aerogels, Inc.'s Notice of Motion to Strike Respondents' Untimely Invalidity Contentions and to Preclude Respondents' Reliance Thereon, and to Preclude Respondents' Reliance on Related Evidence ("Motion to Strike") and Aspen Aerogels, Inc.'s Memorandum in Support of its Motion to Strike Respondents' Untimely Invalidity Contentions and to Preclude Respondents' Reliance Thereon, and to Preclude Respondents' Reliance on Related Evidence ("Memorandum")).).

In its Memorandum, Complainant contends that Respondent Alison offered "a whole host of new prior art and invalidity theories" on October 31, 2016, more than a month after the contention deadline of September 26, 2016 and within ten (10) days of the close of fact

discovery on November 10, 2016, without seeking leave or informing Complainant of their intention to file additional prior art and invalidity contentions. (Mem. at 1-2.). Specifically, Complainant says that Respondent Alison submitted new obviousness combinations in some eleven (11) new, supplemental claim charts comprising some 130 pages, while acknowledging that the eleven (11) new claim charts “were not included” in Respondent Alison’s September 26, 2016 invalidity contentions. (*Id.* at 2-3 (citing Ex. 3 (10-31-2016 E-mail from Battaglia to Su), and Exs. A-L, and Exs. M-W).). According to Complainant, in response to its request to Respondent Alison to explain the basis for the untimely contentions, Respondent Alison noted that it had “reserved the right to supplement our contentions as appropriate” and that, effectively, it regarded the deadline for the invalidity contentions as not so fixed as to preclude the development of additional arguments and positions. (*Id.* at 4 (citing Ex. 4 (11-06-2016 Email from Hnath to Su))).

Additionally, Complainant says that on November 2, 2016, once more well past the September 26, 2016 contention deadline, Respondent Alison disclosed for the first time that it has “samples of third party fibrous materials.” (*Id.* (citing Ex. 8 (11-2-2016 Email from Hnath to Aspen Counsel))). Then, on November 8, 2016, Respondent Nano disclosed that it had another physical sample of a material dated “no later than 2000.” (*Id.* (citing Ex. 5 (11-08-2016 Email from Bathon to Aspen Counsel))). According to Complainant, in response to its query about the basis for Respondent Nano’s late disclosure, Respondent Nano mentioned that the glass fiber it disclosed “is mentioned in several prior art references that Nano listed on its prior art notice and in its contentions.” (*Id.* (citing Ex. 6 (11-10-2016 Email from Bathon to Campbell))). Complainant contends that neither Respondent Nano nor Respondent Alison had disclosed the existence of the samples in their Prior Art Notices, or in keeping with the September 26, 2016

contention deadline. (*Id.*). Complainant says that it had no opportunity to actually have the samples independently tested within the deadlines for discovery. (*Id.* at 6). Generally, Complainant argues it would be prejudiced, and that Respondents had no good cause to submit such late contentions or to make samples available so late, thereby violating Order No. 2, Ground Rule 1.9 or Ground Rule 1.13 (“G.R.”). (*Id.* at 9-10.).

On November 25, 2016, Respondent Nano and Respondent Alison each filed their opposition to Complainant’s Motion to Strike, albeit with different positions. (Doc. ID. No. 595833 (Respondent Nano Tech Co., Ltd.’s Response To Complainant’s Motion to Strike (“Nano’s Opposition”)); Doc. ID No. 595906 (Guangdong Alison Hi-Tech Co., LTD.’s Memorandum In Response to Aspen Aerogel Inc.’s Motion to Strike (“Alison’s Opposition”))).

Respondent Alison claims that the supplemental contentions merely “elaborate on and update Respondents’ originally served contentions.” (Alison’s Opp’n at 2; *see also id.* at 4 (citing Ex. 1, Appendix A at 1-4).). However, Respondent Alison also acknowledges that three (3) of its supplemental charts use “Ramamurthi” as a “lead reference.” (*Id.* at 1 (emphasis in original)). Respondent also acknowledges that five (5) of its supplemental charts use Complainant’s own prior art manufacturing process and prior art product, and that Complainant did not need discovery with regard to these processes. (*Id.*). Finally, according to Respondent Alison, three (3) of the supplemental charts use the prior art “Uchida” reference, which was disclosed only by Respondent Nano in its invalidity contentions, but now is combined with other references. (*Id.*; *see also id.* at 8.). In other words, one can conclude that Respondent Alison admits there are “new combinations” of prior art references, some of which it did not disclose. (*Id.* at 5-6.). With regard to the physical samples, the fact of the existences of “many of the samples” were referenced in Respondent Alison’s original invalidity samples, and “any

remaining samples” are referenced in the asserted patents, in Aspen’s own documents, or in prior art that was appropriately disclosed. (*Id.* at 2.). Respondent Alison contends that Complainant could not have been prejudiced because the supplemental contention theories were not “new” and expert discovery did not begin until three (3) weeks after Respondent Alison served its supplemental contentions. (*Id.*). Respondent Alison claims that Complainant would have an opportunity to test the theories in expert discovery. (*Id.* at 9.). Finally, Respondent Alison argues that the Ground Rules 1.9 and 1.13 cited by Complainant in support of its argument that Respondents failed to show “good cause” for their supplemental contentions do not apply to interrogatories. (*Id.* at 11.). Rather, Respondent Alison suggests that Complainant could have moved to compel additional responses if they thought the interrogatories were incomplete, citing G.R. 3.4.2. (*Id.*).

In its Opposition, Respondent Nano says that the primary issue that pertains to its position is a sample of glass fiber that it disclosed in prior art references, but which came into its possession, apparently late. (Nano Opp’n at 1.). Respondent Nano argues that its disclosures of the existence of the samples was not “untimely” and cites to a reference contained in U.S. Patent Nos. 7,078,359 (“the ’359 patent”) and 6,087,407 (to Coronado at Abstract). (*Id.* at 2.). Respondent Nano argues that its invalidity contentions are neither altered nor changed by providing samples or exemplars, and that Complainant and its experts had ample time to test the samples, or obtain their own. (*Id.* at 5.). Respondent Nano also contends that its samples are merely exemplars of glass fiber that is a tool to “illustrate” prior art references (Coronado, Frank and Ramamurthi), and discloses the invention of the ’359 patent. (*Id.* at 3-4.). Respondent Nano took no position on whether Respondent Alison’s supplemental contentions should be stricken. (*Id.* at 1.).

On November 25, 2016, Commission Investigative Staff (“Staff” and collectively, with Respondents, the “Parties”) filed its response in support of Complainant’s Motion to Strike with a qualification. (Doc. ID No. 595885; Commission Investigative Staff’s Response to Aspen Aerogels, Inc.’s Motion to Strike Respondents’ Untimely Invalidity Contentions and to Preclude Respondents’ Reliance Thereon and to Preclude Respondents’ Reliance on Related Evidence (“Staff’s Response”).). Staff agrees with Complainant that on October 31, 2016, some five (5) weeks after the deadline for serving invalidity contentions, Respondent Alison served some 130 pages in 11 claim charts of supplemental invalidity contentions, and similarly, that Respondent Nano also disclosed the existence of physical samples late. (Staff Resp. at 2.). Staff notes, contrary to both Respondents’ positions, that neither of the Respondents disclosed the existence of the physical samples in their Prior Art Notices. (Staff Resp. at 4.). Moreover, Staff observes that neither Respondent filed a timely motion to explain the reason for their late filings, or that they had “good cause” for such late filings. (*Id.* at 4-5.). Moreover, Staff observes the strict requirements of the Ground Rules, and specifically, of Ground Rules 3.4.2 and 4, that respectively require full disclosure of contentions and of prior art by the respective deadline dates set forth in the procedural schedule. (*Id.* at 3.). However, Staff suggests that to the extent that Respondent Alison’s supplemental invalidity contentions were intended to adopt invalidity positions timely disclosed by Respondent Nano, then there is no prejudice to Complainant with respect to that issue alone. (*Id.* at 4 n.1.).

## **II. Discussion and Order**

Ground Rule 4 that governs this Investigation states that if prior art and related evidence is not disclosed in the Notice of Prior Art on or before the date set forth in the procedural schedule, which in this case for Respondents was August 12, 2016 based on an agreement of the

Parties, that evidence would not be admitted absent a timely written motion showing good cause. (Order No. 2 at 22; *see also* Order No. 5, Procedural Schedule at Appendix A (July 7, 2016).). In this case, Respondent Nano did not submit a motion that would explain its “good cause” for submitting the physical exemplars so late, particularly since fact discovery was due to close on November 10, 2016, only (2) days after Respondent Nano revealed the existence of one of the physical exemplars and only eight (8) days after the first set of exemplars was disclosed.

This timing was a problem for at least two (2) reasons. First, disclosing Notices of Prior Art, and disclosing exemplars that purportedly represent or illustrate one or more embodiments in prior art are two (2) different types of disclosures and different forms of evidence. Whether or not the samples or exemplars that Respondent Nano disclosed so late in November 2016 reflect specifications or embodiments in prior art is an open question since Complainant had no opportunity to actually test the samples and compare them against patent specifications and embodiments. There is a second problem as well. Respondent Nano ties its production of physical samples or exemplars to its invalidity contentions, and says the exemplars did not change these. (Nano Opp’n at 1-4.). Respondent Nano also says that the physical samples or exemplars were referenced in its Notices of Prior Art. (*Id.*). However, if Respondent Nano wishes to tie its physical samples exemplars to its invalidity contentions, then the deadline for their submission was September 26, 2016—the deadline for the invalidity contentions. (Order No. 5 at Appendix A.). If Respondent Nano wishes to tie its physical samples or exemplars to its Notice of Prior Art, then the exemplars arguably should have been provided with the Notice of Prior Art that was due by August 12, 2016. (*Id.*). Regardless, Respondent Nano’s disclosure of, and offer to provide, the physical samples or exemplars by November 2 and November 8, 2016 were late and violated Ground Rule 4. (Order No. 2 at 22.).

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Pursuant to Ground Rule 3.4.2 that governs this Investigation, the Parties are required to provide their contentions both affirmatively and timely. (Staff Resp. at 3 (citing Order No. 2: Notice of Ground Rules at 18 (June 17, 2016))). Respondent Alison's 11 new claim charts comprising some 130 pages of supplemental contentions, in fact, contained new contentions and obviousness theories that, contrary to argument, were not mere explanations of Respondent Alison's previously filed contentions. (*See* Mem. at 2-3.). Accordingly, the supplemental invalidity contentions served by Respondent Alison on October 31, 2016, that is, Exhibits M-W, were late by more than a month. (*Id.*). The Parties were required to provide their full contentions by the deadline date of September 26, 2016. (Order No. 2 at 18; *see also* Order No. 5 at Appendix A.). Respondent Alison did not file a motion requesting leave to supplement its contentions, or provide a reason that its 130 additional pages of contentions were served on Complainant five (5) weeks late. The argument that Complainant could have filed a motion to compel more complete answers is not a strong one since it was not the Complainant's task to move to compel Respondent Alison to inform of it of supplemental contentions or new combinations of its previous obviousness positions. The deadline for all invalidity contentions was September 26, 2016. (Order No. 5 at Appendix A.). Moreover, if Respondent Alison intended to "piggyback" on Respondent Alison's contentions, it should have informed Complainant timely. In this case, both good cause (and lack thereof) and the balancing of possible harm to Complainant were weighed and considered. *Certain Silicon- on- Insulator Wafers*, Inv. No. 337-TA-966, Order No. 15 at 15 (May 9, 2016)(Doc. ID No. 594088.).

For the foregoing reasons, that part of Complainant's Motion to Strike Respondent Nano's late filed physical samples or exemplars, that is, Motion Docket No. 1003-014, is hereby *granted*. Moreover, that part of Complainant's Motion to Strike Respondent Alison's late-filed,

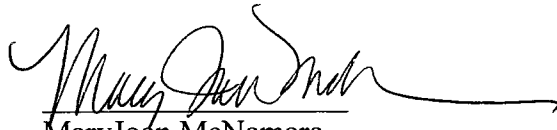
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11 pages of supplemental contentions comprising some 130 pages as described in Motion Docket No. 1003-014, *is also granted*. Respondent Alison is also precluded from using those late-filed, supplemental contentions for any purpose. However, to the extent that Respondent Nano timely filed those same contentions, Respondent Nano is not precluded from using them as evidence.

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 not<sup>1</sup> it seeks to have any confidential portion of this document deleted from the public version. Any party seeking redactions to the public version(s) 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. The Parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

**SO ORDERED.**

  
MaryJoan McNamara  
Administrative Law Judge

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<sup>1</sup> This means that parties that do not seek to have any portion redacted are still required to submit a statement to this effect.




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**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, Yoncha Kundupoglu, Esq., and upon the following parties as indicated on

**JAN 10 2017**



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

**On Behalf of Complainant Aspen Aerogels, Inc.:**

Kevin K. Su, Esq.  
**FISH & RICHARDSON P.C.**  
1 Marina Park Drive  
Boston, MA 02210

- ☐ Via Hand Delivery  
☐ Via Express Delivery  
☒ Via First Class Mail  
☐ Other: \_\_\_\_\_

**On Behalf of Respondent Guangdong Alison  
Hi-Tech Co., Ltd.:**

Gary M. Hnath, Esq.  
**MAYER BROWN LLP**  
1999 K Street, N.W.  
Washington, DC 20006-1101

- ☐ Via Hand Delivery  
☐ Via Express Delivery  
☒ Via First Class Mail  
☐ Other: \_\_\_\_\_

**On Behalf of Respondent Nano Tech Co., Ltd.:**

Steven E. Adkins, Esq.  
**STEPTOE & JOHNSON LLP**  
1330 Connecticut Avenue, N.W.  
Washington, DC 20036

- ☐ Via Hand Delivery  
☐ Via Express Delivery  
☒ Via First Class Mail  
☐ Other: \_\_\_\_\_