

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

TriQuint Semiconductor, Inc., a Delaware corporation,

Plaintiff/Counterdefendant,

v.

Avago Technologies Limited, a Singapore corporation; Avago Technologies U.S., Inc., a Delaware corporation, Avago Technologies Wireless IP (Singapore) Pte., Ltd., a Singapore corporation,

Defendants/Counterclaimants.

CIVIL ACTION NO. 11-91114

**TRIQUINT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL  
SKYWORKS' COMPLIANCE WITH SUBPOENA**

**I. INTRODUCTION**

Plaintiff TriQuint Semiconductor, Inc. ("TriQuint"), by and through undersigned counsel and pursuant to Rules 37 and 45 of the Federal Rules of Civil Procedure and LR 7.1(a)(2), respectfully moves this Court for an order compelling non-party Skyworks Solutions, Inc. ("Skyworks") to produce documents requested in the subpoena *duces tecum* served on September 15, 2010. This motion is supported by the authorities set forth below and the attached Affidavit of Laura Ewbank ("Ewbank Aff."). A proposed order also accompanies this motion.

The Federal Rules of Civil Procedure promote liberal discovery by permitting parties to obtain relevant, nonprivileged documents from parties and nonparties alike. TriQuint has subpoenaed a narrow range of documents that are highly relevant to its claims and unobtainable from sources other than Skyworks. Skyworks has confirmed that it is in possession of at least some documents responsive to TriQuint's subpoena, but to date has not produced these documents. Skyworks has objected to searching for other responsive documents on grounds of confidentiality, undue burden and relevance. Over the past seven months TriQuint and

Skyworks have engaged in numerous meet and confer conversations and correspondence in an attempt to reach agreement without the need for court intervention, but to no avail. TriQuint has advised Skyworks that the comprehensive protective order entered in this action will protect Skyworks' sensitive or confidential information, has offered to narrow the scope of the subpoena considerably to address Skyworks' concerns, and has offered to pay for the reasonable costs of the production. In response, Skyworks initially offered to produce nothing more than two redacted documents relating to one Board of Directors meeting, a spreadsheet summarizing its sales of BAW products over the relevant time period, and a Declaration as "evidence" that it has no responsive documents. Notably, Skyworks has not even produced these few documents. At the eleventh hour, with the threat of this Motion to Compel looming, Skyworks finally offered to search for a limited set of documents from one custodian. This is simply not sufficient. TriQuint believes, based on documents already produced by Avago in discovery, that Skyworks has additional documents relevant to TriQuint's antitrust claims in the underlying litigation, and that are not available from any other source. Skyworks' unsupported assertion that it has no relevant documents, in light of evidence that exists, cannot be accepted. TriQuint is entitled to have Skyworks conduct a search for relevant and responsive documents and comply with the subpoena.

## **II. STATEMENT OF FACTS**

The subpoena arises out of a case pending in the United States District Court for the District of Arizona, *TriQuint Semiconductor, Inc. v. Avago Technologies Ltd., et al.*, Case No. 09-cv-1531 PHX JAT ("the Arizona action"). TriQuint's First Amended Complaint in the underlying litigation is attached as Exhibit A to the Ewbank Affidavit ("Compl."). The parties are subject to a comprehensive protective order that limits confidential documents to outside counsel "attorney's eyes only." A copy of this protective order is attached as Exhibit B to the Ewbank Affidavit.

The facts underlying this litigation are complex, and a detailed explanation is not necessary for resolution of the present issue.<sup>1</sup> In short, TriQuint Semiconductor, Inc. ("TriQuint") has filed a complaint against Avago Technologies, Ltd. ("Avago") asserting claims of patent infringement and violation of antitrust laws in regard to a particular technology sold by both parties, namely BAW filters used in wireless communications products such as mobile handsets. Compl. ¶¶ 8, 19. In return, Avago has asserted counterclaims of patent infringement and misappropriation of trade secrets against TriQuint. Compl. ¶ 18. TriQuint asserts that Avago engaged in illegal, predatory and anticompetitive conduct in the BAW technology market and in the markets for BAW-related products, including the market for PCS CDMA Duplexers.<sup>2</sup> Compl. ¶ 9.

TriQuint first entered the PCS CDMA Duplexer market in 2006 by purchasing BAW filters from a third party, Infineon Technologies, Inc. ("Infineon"), packaging these BAW filters into PCS CDMA Duplexers and selling them in competition with Avago. Compl. ¶ 10. Infineon and Avago were the only two producers of BAW filters for PCS CDMA Duplexers at the time TriQuint entered the market. Compl. ¶ 10. Shortly thereafter, Avago began acquiring intellectual property rights in BAW technology from third parties. Compl. ¶¶ 9, 11. In 2008 Avago consolidated its monopoly position further by purchasing the Infineon BAW products line and immediately discontinuing it, thereby cutting off TriQuint's supply of BAW filters. Compl. ¶¶ 9, 12. TriQuint proceeded with its efforts to manufacture its own BAW filters in order to continue to compete in the PCS CDMA Duplexer market. Compl. ¶ 13. In response, in late 2008-early 2009 Avago began issuing thinly veiled threats to competitors and customers in the industry, advising recipients that Avago is the only company with the necessary patents to make

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<sup>1</sup> TriQuint is precluded by the Protective Order from disclosing documents and information that support its assertions and is limited to presenting what is in the public record—however, TriQuint believes that the allegations in the Complaint clearly support that the information sought from Skyworks is relevant. Indeed, TriQuint has filed a separate Motion for Leave to File Under Seal certain documents produced by Avago reflecting relevant communications with Skyworks. If that motion is granted, TriQuint will supplement this motion with those documents.

<sup>2</sup> PCS CDMA Duplexers are made by packaging BAW filters together. These Duplexers are designed for wireless handsets used in the United States.

BAW technology and that anyone who used other BAW filters would be at risk of patent infringement. Compl. ¶ 14. Avago also refused to license its patents to competitors unless those competitors agreed not to compete in the PCS CDMA Duplexer market. Compl. ¶ 14. This has made it possible for Avago to acquire and maintain an illegal monopoly in these markets and to use its dominant market power to exclude potential competitors and foreclose potential competition to the detriment of handset manufacturers, purchasers, consumers, and TriQuint. Compl. ¶ 19.

Skyworks is a Massachusetts-based corporation that manufactures and sells wireless filters and related integrated products. Skyworks began developing its own BAW filter technology around the time that TriQuint began manufacturing PCS CDMA Duplexers. Skyworks manufactured and sold BAW filters in 2008 and early 2009, the crucial time period in which a) Avago purchased the Infineon BAW line and announced it would be shutting down production, cutting off TriQuint's supply of BAW filters; and b) Avago began sending threatening letters to customers and competitors regarding its BAW patent portfolio. Compl. ¶¶ 9-14. While these events were unfolding, in early 2009 Skyworks abruptly announced that it was ceasing production of BAW filters. Compl. ¶ 51. On September 10, 2009, Avago acquired from Skyworks five patents and six pending published patent applications, all related to BAW technology. Compl. ¶ 51. Skyworks does not now manufacture or sell its own BAW filters, and has informed TriQuint that it does not have plans to reenter this market. Ewbank Aff. ¶ 9.

On September 15, 2010, TriQuint served a subpoena requesting Skyworks to produce certain documents no later than October 18, 2010. A copy of the subpoena is attached as Exhibit C to the Ewbank Affidavit. TriQuint requested that Skyworks produce documents relevant to its claims against Avago, including (but not limited to): a) evidence of competition and barriers to entry in relevant markets; b) market share in the relevant markets; c) the sale or license of BAW technology; d) anticompetitive conduct by Avago; and e) BAW patents and/or products of the parties. *Id.* Skyworks' internal communications and analysis regarding its dealings with Avago are clearly relevant to these issues and TriQuint's allegations. On October 5, 2010, Robert Terry

of Skyworks responded and confirmed that Skyworks possessed certain responsive documents, and counsel for TriQuint agreed to extend the production deadline to November 5, 2010.

Ewbank Aff. ¶ 6. Counsel for TriQuint and Skyworks conferred on October 15, October 21 and November 2 regarding the contents of the responsive documents, but Skyworks failed to produce any documents by the agreed November 5 deadline. Ewbank Aff. ¶ 6.

Counsel for Skyworks and TriQuint have engaged in negotiations repeatedly since this November 5 deadline passed, including on December 7, 2010, February 25, 2011, March 10, 2011, April 15, 2011 and April 19, 2011, and again by email on April 26-29, to attempt to resolve Skyworks' concerns regarding production of these documents. Ewbank Aff. ¶¶ 6, 8. Skyworks has asserted that it objects to production on the grounds that Avago and TriQuint are current competitors of Skyworks in other wireless products and the requested documents reveal sensitive business information. Ewbank Aff. ¶ 9. Skyworks also claims that its decision to leave the BAW market was based on economic concerns not related to Avago's anticompetitive acts, and, therefore, it has no relevant documents. Ewbank Aff. ¶ 9. Skyworks further has asserted, without support, that a search for responsive documents will cost hundreds of thousands of dollars and thus refuses to search for and produce responsive documents. Ewbank Aff. ¶ 9. TriQuint has attempted to negotiate in good faith to narrow the scope of its subpoena and has offered to pay the reasonable costs of production. Ewbank Aff. ¶¶ 10-11. In return Skyworks initially offered to produce a total of two documents: a redacted report from a Board of Directors meeting in which Skyworks announced its decision to leave the BAW filter market and a summary of Skyworks' sales of BAW over the life of the product line. Ewbank Aff. ¶ 11. In lieu of searching for and producing responsive documents, Skyworks has offered to provide a Declaration presumably setting forth its version of relevant facts. Ewbank Aff. ¶ 11. On May 3, 2011, TriQuint and Skyworks met via telephone one final time to attempt to reach a compromise. Ewbank Aff. ¶ 10. Skyworks reiterated its position as stated above. Ewbank Aff. ¶ 10. TriQuint again offered to limit the scope of the subpoena by subject area and by custodian. Ewbank Aff. ¶¶ 10-11. Following this call, TriQuint submitted this offer to Skyworks by formal email and

provided a specific list of documents requested, identified one custodian to search by name and three others by job description, and offered to work out search terms or search strategies in an effort to focus the inquiry and refine the universe of potentially responsive data. Ewbank Aff. ¶ 10. Skyworks has refused this offer, but offered to search for a much more limited set of documents from the one identified custodian. Ewbank Aff. ¶ 10. Skyworks' proposal falls short, and it is inadequate to search and locate the relevant and responsive information that may be in Skyworks' possession. Accordingly, TriQuint now files this motion to compel Skyworks to comply with the subpoena.

### III. ARGUMENT

#### A. TriQuint is Entitled to an Order Compelling Production of Responsive Documents.

##### 1. Rule 45 Permits TriQuint to Discover Any Documents Falling Within the Scope of Rule 26(b).

Rule 45 permits a party to order a non-party to produce all documents within its control that are not privileged, relevant, and admissible or reasonably calculated to lead to the discovery of admissible evidence. *See Shea v. McGovern*, No. 1:08-12148-MLW, 2011 WL 322652, at \*3 (D. Mass. Jan. 31, 2011) (citing Fed. R. Civ. P. 26(b)(1), 45); 9A Charles Wright & Arthur Miller, *Federal Practice & Procedure* § 2452 (3d ed. 2008) (Rule 45 "subject[s] a nonparty witness to the same scope of discovery as that person would be as a party to whom a request for documents and other materials is addressed pursuant to Rule 34."). Skyworks has failed to search for and produce documents that are discoverable pursuant to Rule 45. Accordingly, the Court should grant TriQuint's request for an order compelling production of the responsive documents. *See* Fed. R. Civ. P. 45(c)(2)(B).

##### 2. The Subpoena Seeks Documents that Are Relevant to TriQuint's Case and Unobtainable from Other Sources.

A party "may obtain discovery *regarding any matter*, not privileged, *that is relevant to the claim or defense* of any party...For good cause, the court may order discovery of any matter *relevant to the subject matter* involved in the action." *In re Public Offering PLE Antitrust Litig.*, 233 F.R.D. 70, 78 (D. Mass. 2006) (citing Fed. R. Civ. P. 26(b)(1)) (emphasis in original). In the

context of an antitrust claim, relevant materials include those that speak to issues such as the defendant's market share, the number and strength of other competitors, market trends, and barriers to entry in the market. *See CCBN.com v. Thomson Fin., Inc.*, 270 F. Supp. 2d 146, 157 (D. Mass. 2003) (quoting *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Profl Publ'ns., Inc.*, 63 F.3d 1540, 1554 (10th Cir. 1995)).

TriQuint seeks from Skyworks a limited range of documents concerning matters that are clearly relevant to TriQuint's antitrust claims against Avago, including evidence of competition within, barriers to entry, and market share in the BAW technology and product markets which would be reflected in Skyworks' internal communications and documents. *See id.* Skyworks has acknowledged that it possesses documents that are responsive to the subpoena, including its decision to enter the relevant market in 2006 and to abruptly exit the market in 2009, and discussions with Avago regarding purchasing or licensing of BAW intellectual property rights. *See Ewbank Aff.* ¶ 6. Such documents are highly relevant to TriQuint's claims in the underlying action. *See, e.g., R.J. Reynolds Tobacco v. Philip Morris, Inc.*, 29 Fed.Appx. 880, 882 (3d Cir. 2002) (documents relating to non-party's business and dealings with defendant are relevant to underlying antitrust action); *U.S. v. Dean Foods Co.*, No. 10-CV-59, 2011 WL 9161, at \*2 (E.D.Wis. Jan. 3, 2011) (request for third party documents regarding market power of defendant, including analyses of competition and customers, relevant to antitrust claims). *Spartanburg Reg'l, Healthcare Sys. v. Hillenbrand Indus., Inc.*, No. 1:05MC060, 7:03-2141-26, 2005 WL 2211163, at \*3 (N.D.Ohio Sept. 9, 2005) (documents relating to competitor in market relevant to underlying antitrust claim).

Skyworks suggests that its documents are not relevant because its market share was small and its decision to leave the market was due to economic concerns, not Avago's actions. *Ewbank Aff.* ¶ 9. TriQuint seeks these documents for multiple reasons, however, not just Avago's anticompetitive acts towards Skyworks. Skyworks' documents regarding barriers to entry, market share and analysis of Avago's IP portfolio are relevant to a number of TriQuint's claims. *See Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 2:06-MC-0034, 2006 WL

2871834, at \*2 n.1 (S.D. Ohio Sept. 25, 2006) (subpoenaed party cannot argue that the documents requested are not relevant by attacking the legal sufficiency of underlying arguments). Indeed, rather than demonstrating the irrelevance of the documents, these factors actually support a finding of relevance. Evidence of market conditions, including Skyworks' allegedly small market share and its decision to abandon the market entirely are highly relevant to TriQuint's claims. Skyworks' negotiations with Avago regarding its BAW patent portfolio are also relevant to its antitrust and patent claims regardless of whether Avago acted anticompetitively against Skyworks. These materials undoubtedly meet the threshold for "relevance" required by Rule 26. Skyworks' offer of a "Declaration" setting forth its version of certain facts and the very limited data it offered at the eleventh hour is simply not an adequate response to the subpoena and TriQuint is entitled to the relevant and responsive documents in Skyworks' possession.

TriQuint's inability to obtain the requested information from another source is another factor weighing in favor of production. *See W.E. Aubuchon Co. v. Benefirst, LLC*, 245 F.R.D. 38, 43-44 (D. Mass 2007). Information from Skyworks, a non-party participant in the market, "can present [tactical] advantages not easily realized from parties or experts." *See Columbus Drywall & Insulation*, 2006 WL 2871834, at \*2. Here, Skyworks is the only party that possesses or controls documents concerning its assessment of the relevant market and its relevant business activities, including its decisions to enter and exit the BAW technology market and decisions regarding the potential sale, licensing or purchase of BAW intellectual property rights. Such documents are relevant to TriQuint's antitrust claims and not available from any other source – discovery provided thus far by Avago, as noted above, provides further support for TriQuint's belief that Skyworks has such relevant and responsive information.



**B. Skyworks' Objections Do Not Justify Its Failure to Produce Relevant Documents.**

**1. Skyworks' Objections to Production on the Grounds that the Documents are Sensitive or Confidential Are Not Well Founded.**

Skyworks' attempt to justify its non-production of responsive documents on the grounds that they contain sensitive or confidential business information must fail. A party's confidential or sensitive business information is not exempt from production requests. *See Ares-Serono, Inc. v. Organon Int'l B.V.*, 151 F.R.D. 215, 219 (D. Mass. 1993). Instead, the right of a party to examine relevant evidence is weighed against the right of the other party to protect confidential data. *Id.* at 220. Relevant to this analysis is whether a protective order exists or could be obtained; often a pre-existing protective order is adequate to safeguard the interests of a subpoenaed party. *See id.* at 219-20 (granting motion to compel because defendant failed to demonstrate that harm resulting from disclosure under protective order outweighed party's need for relevant information); *see also Dean Foods Co.*, 2011 WL 9161, at \*2 (existing protective order sufficient to protect nonparty's alleged trade secrets); *R.J. Reynolds Tobacco*, 29 Fed.Appx. at 882 (same).

Thus, Skyworks provides no basis for its assertion that compliance with the subpoena would jeopardize sensitive business information. The protective order in this case, which extends to productions by third parties like Skyworks, limits the disclosure of highly confidential documents to outside counsel's eyes only. *See Ewbank Aff. Exhibit C.* As such, neither Avago nor TriQuint will have direct access to these materials. Additionally, the documents at issue pertain to a line of production (BAW) that Skyworks claims it did not do much work in, that it abandoned in 2009, and that it does not plan to enter again. *Ewbank Aff.* ¶ 9. Hence, Skyworks does not compete against TriQuint or Avago in the BAW market. The risk of competitive injury is low when the disclosure of confidential information is to a non-competitor. *Ares-Serono*, 151 F.R.D. at 219-20. Even if Skyworks could demonstrate that these documents would reveal sensitive information regarding markets in which it currently competes with Avago and TriQuint, the protective order in this case is sufficient to protect Skyworks' confidential information. *See Columbus Drywall & Insulation.*, 2006 WL 2871834, at \*2 (court held that

protective order limiting disclosure to "attorney's eyes only" was sufficient to protect competitor's confidential trade secret and business information).

Skyworks' documents are highly relevant to TriQuint's antitrust claims, and the protective order protects Skyworks' confidential business information from disclosure. As such, TriQuint's right to examine this relevant evidence outweighs Skyworks' confidentiality concerns.

**2. Any Alleged Burden on Skyworks is Outweighed by the Relevance of the Responsive Information.**

"Compliance with a subpoena inevitably involves some measure of burden to the producing party." *Martinelli v. Petland, Inc.*, Nos. 10-407-RDR, 09-529-PHX-DGC, 2010 WL 3947526, at \*6 (D. Kan. Oct. 7, 2010). Courts do not deny a party access to relevant evidence merely because production would inconvenience a non-party or subject it to some expense. *Id.* To demonstrate that a subpoena imposes an undue burden, the subpoenaed party must show that compliance would "seriously disrupt its normal business operations." *Id.*; *see also EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993) (respondent must show "substantial hardship" resulting from compliance with the request). As such, inconvenience is relative to size. *U.S. v. International Business Machines Corp.*, 83 F.R.D. 97, 109 (D.C.N.Y.1979) (While a subpoena may impose a burden on a responding party, "this inconvenience ... is part of the price we pay to secure the effective administration of justice and enforcement of our laws.") (citing *In re Radio Corp. of Am.*, 13 F.R.D. 167, 172 (S.D.N.Y. 1952)). In assessing a claim of undue burden, courts consider factors such as the relevance of the documents sought, the breadth of the request, and the expense and inconvenience to the nonparty. *Behrend v. Comcast Corp.*, 248 F.R.D. 84, 86 (D. Mass. 2008) (granting antitrust plaintiffs' motion to compel production of sensitive documents relating to acquisition of subpoenaed party by defendant where plaintiffs had taken reasonable steps to avoid undue burden, including narrowing scope of subpoena, stipulating to review subject to existing protective order, and offering to pay reasonable copying costs).

In this case, TriQuint seeks a limited number of documents from a discrete (and recent) period of time. *See* Ewbank Aff. Exhibit C. Skyworks has acknowledged that it has already identified several responsive documents in its possession. Ewbank Aff. ¶ 6. Additionally, TriQuint has offered to narrow the scope of the subpoena to particular custodians and informed Skyworks that it is willing to pay for the reasonable costs of production. Ewbank Aff. ¶¶ 10-11. In response, Skyworks merely claims, without any support, that the search could involve potentially millions of pages and cost hundreds of thousands of dollars. Ewbank Aff. ¶ 9. There is simply no evidence that this would be the case and counsel's bald assertions are not enough. *See Martinelli*, 2010 WL 3947526, at \*6 (a court will not excuse compliance "simply upon the cry of unduly burdensome"); *see also Sterling Merch. Inc. v. Nestle, S.A.*, No. 06-1015(SEC), 2008 WL 1767092, at \*1 (D. Puerto Rico Apr. 15, 2008) (the party seeking to demonstrate undue burden "cannot rely on a mere assertion that compliance would be burdensome and onerous without showing the manner and extent of the burden and the injurious consequences of insisting upon compliance") (citing Wright & Miller, *Federal Practice & Procedure*, § 2459)). Further, this is especially true where TriQuint has offered to work with Skyworks to develop search terms and search strategies to focus the inquiry. Under the circumstances, Skyworks has not demonstrated that it would suffer substantial hardship if it complied with the subpoena. Indeed, Skyworks is a public company with nearly a billion dollars in revenues. *See* Skyworks 2010 Annual Report, attached as Exhibit D to the Ewbank Affidavit.

TriQuint has demonstrated a significant need for the relevant documents Skyworks refuses to search for and produce. As such, TriQuint is entitled to a court order compelling compliance with the subpoena at least as narrowed by TriQuint.

#### IV. CONCLUSION

For the reasons set forth above, the Court should enter an order compelling Skyworks to produce all documents subject to this subpoena.

Dated: May 5, 2011

Respectfully submitted,

TRIQUINT SEMICONDUCTOR, INC.,

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#### **CERTIFICATE OF SERVICE**

I certify that, on May 5, 2011, a copy of the foregoing document was filed through the electronic filing system and served by email and first class mail to counsel for Skyworks and counsel for Avago Technologies.

/s/ Allison D. Burroughs  
Allison D. Burroughs

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