

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

IQE KC, LLC,

Plaintiff,

vs.

**AKOUSTIS, INC. AND AKOUSTIS
TECHNOLOGIES, INC.,**

Defendants.

Miscellaneous Action No.1:24-mc-91053-AK

**AKOUSTIS, INC. AND AKOUSTIS TECHNOLOGIES, INC.’S RESPONSE TO IQE KC,
LLC’S MOTION TO QUASH AKOUSTIS, INC. AND AKOUSTIS TECHNOLOGIES,
INC.’S SUBPOENA FOR DOCUMENTS, INFORMATION OR OBJECTS**

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<u>Exhibit</u> ¹	<u>Document</u>
1 (Dkt. 2-1)	Akoustis' Original Complaint, <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.) (April 20, 2023)
2 (Dkt. 2-2)	Akoustis Technologies, Inc. & Akoustis, Inc. Subpoena to IQE KC LLC, <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.), served October 19, 2023
3 (Dkt. 2-3)	Declaration of Oleg Laboutin, signed February 1, 2024 and served February 8, 2024
4 (Dkt. 2-4)	Non-Party IQE KC, LLC's Responses and Objections to Defendant's Subpoena, <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.), served November 2, 2023
5 (Dkt. 2-5)	Second Amended Complaint (Public Version), <i>Qorvo, Inc. v. Akoustis Technologies, Inc. et al.</i> , No. 1:21-cv-1417 (D. Del.) (Feb. 8, 2023)
6	<i>Locations</i> , Qorvo (n.d.), https://www.qorvo.com/about-us/locations , RETRIEVED FEBRUARY 20, 2024
7	<i>RF Micro Devices(R) to Outsource Manufacturing of Wafer Starting Material</i> , Qorvo (June 5, 2012), https://ir.qorvo.com/news-releases/news-release-details/rf-micro-devicesr-outsource-manufacturing-wafer-starting , RETRIEVED FEBRUARY 20, 2024
8	U.S. Patent No. 7,250,360
9	Cover Pleading, Akoustis' Disclosure of Asserted Claims and Infringement Contentions, <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.), served July 6, 2023 (also available, e.g., Dkt. 53-3, <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.) (Aug. 25, 2023))
10	Exhibit A, Akoustis' Disclosure of Asserted Claims and Infringement Contentions, <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.), served July 6, 2023 (also available, e.g., Dkt. 53-5, <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.) (Aug. 25, 2023))
11	Defendant Qorvo, Inc.'s Motion to Strike and Compel Supplementation of Plaintiff's P.R. 3-1 Infringement Contentions (Dkt. 49), <i>Akoustis</i>

¹ Exhibits 1-5 were attached to IQE's Motion. Akoustis begins its exhibit numbering at Exhibit 6.

	<i>Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.) (Aug. 11, 2023)
12	Plaintiffs Akoustis Technologies, Inc. and Akoustis, Inc.’s Response to Defendant Qorvo, Inc.’s Motion to Strike and Compel Supplementation of Plaintiff’s P.R. 3-1 Infringement Contentions (Dkt. 53), <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.) (Aug. 25, 2023)
13	Plaintiffs Akoustis Technologies, Inc. and Akoustis, Inc.’s Response to Defendant Qorvo, Inc.’s Motion to Strike and Compel Supplementation of Plaintiff’s P.R. 3-1 Infringement Contentions (Dkt. 60), <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.) (Sept. 15, 2023)
14	Plaintiffs Akoustis Technologies, Inc. and Akoustis, Inc.’s Motion to Compel Interrogatory Responses and Documents Relevant to All Accused Instrumentalities (Dkt. 63), <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.) (Dec. 4, 2023)
15	January 10, 2024 Hearing Transcript, <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.) (Jan. 10, 2024)
16	Minute Entry (Dkt. 70), <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.) (Jan. 10, 2024)
17	Akoustis Technologies, Inc. & Akoustis, Inc. Notice of Subpoenas and Subpoenas to Wolfsped, Inc., <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.), served December 20, 2023
18	December 7, 2023 email from George Fishback to Rob Niemeier
19	January 4, 2024 email from Rob Niemeier to Caroline Burks
20	January 5, 2024 email from James Quigley to Rob Niemeier
21	January 9, 2024 email from Rob Niemeier to James Quigley
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24	Non-Party Wolfsped, Inc.’s Responses and Objections to Akoustis’ Subpoenas, <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.), served January 3, 2024
25	Exhibit B, Akoustis’ Disclosure of Asserted Claims and Infringement Contentions, <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-

	180 (E.D. Tex.), served July 6, 2023 (also available, <i>e.g.</i> , Dkt. 53-5, <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.) (Aug. 25, 2023))
26	<i>Secondary Ion Mass Spectrometry (SIMS)</i> , EAG Laboratories (n.d.), https://www.eag.com/techniques/mass-spec/secondary-ion-mass-spectrometry-sims/ , RETRIEVED ON FEBRUARY 20, 2024
27	Joint Motion for Entry of Partially Disputed Protective Order (Dkts. 50 & 50-1), <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.) (Aug. 14, 2023)
28	Protective Order (52), <i>Akoustis Technologies, Inc. et al. v. Qorvo, Inc.</i> , No. 2:23-cv-180 (E.D. Tex.) (Aug. 17, 2023)

I. INTRODUCTION

The Court should reject IQE's efforts to quash Akoustis' subpoena seeking highly relevant information that IQE admits is uniquely in its possession but suggests is too sensitive to produce. *See* Dkt. 2 (Mot. or Motion) at 6-7 ("IQE does not share the growth recipe with others outside the company, including with the customer [Qorvo] buying the wafers."). Rather, the Court should: (1) transfer this Motion to the issuing court in the Eastern District of Texas; or (2) deny the Motion and order IQE to comply with the subpoena.

Transfer of IQE's Motion makes sense. The Eastern District of Texas court that issued the subpoena is uniquely situated to handle disputes arising out of the subpoena. A similar subpoena—to a similarly defiant third-party wafer manufacturer—was issued out of the Texas court. And similar issues of relevance and scope have been litigated between the parties to the underlying litigation in the Eastern District of Texas. Indeed, the Texas court already heard argument related to the scope of the products relevant to the Texas litigation, which is an issue that IQE raises in its Motion. Nor can IQE suggest it has no connection to the Eastern District of Texas; IQE provides wafers to Qorvo (the defendant in the underlying litigation), which has a relevant manufacturing facility in the Eastern District of Texas. Ex. 6 (Qorvo Locations (listing Richardson)).

If the Court does decide the Motion, the Court should not quash the subpoena. The subpoena seeks highly relevant information uniquely in IQE's possession—a fact IQE does not deny. Mot. at 6-7, 10. Yet IQE suggests it need not produce the requested information because it is highly confidential and (allegedly) would be burdensome to produce. Neither reason supports quashing the subpoena. First, IQE's confidentiality concerns are misplaced: (1) IQE and Akoustis are not competitors; (2) the Eastern District of Texas court entered a detailed protective order that protects IQE's information (Ex. 28 (EDTX Protective Order)); (3) under the Texas protective order, IQE's materials will only be shared with outside counsel and qualified experts (*id.* at 8-9);

and (4) Akoustis has never opposed further, reasonable additions to the protective order so long as it can obtain the evidence it needs to prove its underlying claims against IQE's customer, Qorvo. Second, the alleged unreasonable burden on IQE is a problem of IQE's making. Akoustis' subpoena seeks information that is readily accessible to IQE—another fact that IQE does not deny. Indeed, IQE admits that to produce the requested growth recipes all it would take is for someone at IQE to download and convert the recipes and then send an encrypted hard drive to the office of its outside counsel.

At bottom, if IQE is right that its “declaration regarding the QPD1000 wafer” shows IQE's materials “are not relevant” (Mot. at 10), then IQE would have produced the subpoenaed materials months ago. Instead, IQE has made every step of responding to this subpoena harder, more time consuming, and more costly for all involved. IQE's decision to delay and obstruct does not justify a finding that IQE has shown that the subpoena imposes an undue burden on IQE.

Respectfully, the Court should either transfer or deny the Motion.

II. BACKGROUND

A. The Eastern District of Texas Litigation Between Akoustis and Qorvo.

Akoustis sued Qorvo in Texas, where Qorvo has a manufacturing facility, for infringing U.S. Patent No. 7,250,360 ('360 Patent), which is directed to a method of manufacturing an epitaxial layer. *See generally* Ex. 1 (EDTX Complaint). Qorvo was formed in 2015 as a result of a merger between TriQuint and RFMD. *Id.* ¶ 8. Akoustis understands that Qorvo's RFMD predecessor was a prior exclusive licensee to the '360 Patent. *Id.* ¶ 23. In 2012, Qorvo's RFMD predecessor transferred a wafer-manufacturing facility to IQE. Ex. 7 (Qorvo News Release). The Eastern District of Texas litigation is still pending.

B. Epitaxial Wafer Manufacturing.

Epitaxial layers or “wafers” are made in a very specific way; akin to a recipe for baking a cake. Instead of using “baking” recipes with cups of sugar/flour, manufacturers use “growth” recipes including various materials, pressures, and temperatures. Here, the ’360 Patent’s patented growth process limitations (depicted at right) detail the specific order that materials are added and the temperature used. Ex. 8 (’360 Patent). This is the type of information typically found in growth recipes used to manufacture epitaxial wafers.

1. A process for growing an epitaxial layer on a lattice mismatched substrate comprising the steps of:

- a) providing a substrate;
- b) pre-treating a surface of the substrate with at least one group III reactant or at least one group II reactant at an elevated growth temperature prior to introducing a group V reactant or a group VI reactant;
- c) introducing a group V reactant or a group VI reactant to grow a nucleation layer on the surface of the substrate; and
- d) growing a buffer layer on said nucleation layer, said buffer layer providing a surface upon which said epitaxial layer is grown.

After discovery opened in Texas, Akoustis sought discovery on the manufacture of the epitaxial wafers used in Qorvo’s products. This information about the manufacture of the epitaxial wafers is information Akoustis will need to prove Qorvo’s infringement. Qorvo informed Akoustis that Qorvo does not make the epitaxial wafers used in many of its products (despite Qorvo’s website representing that Qorvo does so) and instead pointed Akoustis to a number of third parties that Qorvo buys wafers from as possessing information relevant to the Texas case.

C. Discovery in the Eastern District Of Texas.

Akoustis served its infringement contentions on Qorvo on July 6, 2023. Ex. 9 (ICs Cover Pleading) at 2. In its contentions, Akoustis made clear that it was accusing “semiconductors with epitaxial layers of AlN, AlGaN, GaN, GaP, InGaP, or InAlN on lattice mismatched substrates and made by a process that includes pre-treating a surface of the substrate with at least one group III reactant or at least one group II reactant at an elevated growth temperature prior to introducing a group V reactant or a group VI reactant” “made, used, sold, offered for sale, or imported into the United States from April 20, 2017 onwards,” which Akoustis called the “Accused Instrumentalities” and tried to identify by name. *Id.*; see also Ex. 10 (ICs Exhibit A) (listing

products). Qorvo sought to strike Akoustis' contentions because Akoustis' contentions used a product—the QPD1000—as representative of the Accused Instrumentalities. *See* Ex. 11 (Motion to Strike). Akoustis responded to Qorvo's Motion to Strike by explaining the propriety of its approach at the contention stage—where theories are to be provided before evidence is fully available. Ex. 12 (Response to Motion to Strike); Ex. 13 (Sur Reply to Motion to Strike).

While its Motion to Strike was pending, Qorvo insisted on only producing discovery information relevant to the QPD1000, which led Akoustis to file a Motion to Compel information on the other Accused Instrumentalities. *See* Ex. 14 (Motion to Compel). At a January 10, 2024 hearing, the Eastern District of Texas court orally denied Qorvo's Motion to Strike. *See* Ex. 15 at 41:2-9 (Hearing Transcript); Ex. 16 (Minute Entry). Following the Motion to Strike being denied, Qorvo agreed to produce information related to all Accused Instrumentalities. Ex. 15 at 41:15-43:7 (Hearing Transcript); Ex. 16 (Minute Entry). This mooted Akoustis' Motion to Compel.

D. The Subpoena & Correspondence Between Akoustis and IQE.

Following Qorvo's assertion that its suppliers uniquely possessed relevant information, Akoustis served IQE with a subpoena. *See* Ex. 2 (IQE Subpoena). The subpoena requests a subset of documents relevant to the manufacture of epitaxial wafers that IQE supplies to Qorvo (particularly growth recipes and technical documents, such as in requests 3-4, 6, 9, 15-16), documents relevant to Akoustis' damages analysis (such as cost and profit information for the wafers that IQE provides to Qorvo as well as information valuing the technology, such as in requests 5, 11-14, 17-18), and other documents to identify the what IQE supplies to Qorvo (requests 1, 2) and what IQE knows about the litigation and '360 Patent (requests 7, 10). Similar to the "Accused Instrumentalities" in the Eastern District of Texas, Akoustis' subpoena seeks information about IQE's "Supplied Products." Ex. 2 at 11 ("Supplied Products" means wafers, or components thereof, sold, provided, or otherwise supplied by IQE to Qorvo from April 20, 2017

onwards, including those that include epitaxial layers of GaN, AlN, InAlN, GaP, InGaP, or AlGaIn on lattice mismatched substrates made of SiC, Si, or sapphire.”). The subpoena includes a copy of the Eastern District of Texas protective order. *Compare* Ex. 2 at 22-50 (Subpoena Protective Order) *with* Ex. 28 (EDTX Protective Order). Akoustis served a similar subpoena on Wolfspeed, Inc. which is located in North Carolina. Ex. 17 (Wolfspeed Subpoena) at 3-49.

IQE responded to Akoustis’ subpoena on November 2, 2023. Ex. 4 (IQE Subpoena Response). IQE objected to the subpoena because, *inter alia*, it was allegedly unduly burdensome. *See generally id.* Subject to its objections, IQE said it would respond to some requests by “produc[ing] responsive documents related to the accused QPD1000 product”—similar to Qorvo’s position that the Texas court rejected—but IQE otherwise offered to meet and confer or refused to produce documents beyond what was produced for other requests. *See generally id.*

Following IQE’s response to the subpoena, IQE produced a single technical document and declaration from an IQE employee. However, after review of IQE’s technical document and declaration, Akoustis informed IQE that its production was insufficient to show how IQE’s wafers are manufactured. *See* Ex. 18 (Dec. 7, 2023, email from G. Fishback to R. Niemeier).

Following this correspondence and another meet and confer, IQE stated that it would permit inspection of the QPD1000’s growth recipe. *See* Ex. 19 (Jan. 4, 2024, email from R. Niemeier to C. Burks). IQE further stated that it would not permit Akoustis to print or copy any portions of the recipe. *Id.* IQE reiterated that IQE would not produce documents and information for other products as “the only accused product at this point . . . [is] the QPD1000.” *Id.*

In an attempt to assist IQE and streamline the process, Akoustis reminded IQE that the QPD1000 was not the only Accused Instrumentality and that Akoustis expected IQE to produce information as to all Supplied Products. *See* Ex. 20 (Jan. 5, 2024, email from J. Quigley to R.

Niemeier). Given the dispute about the scope of the relevant products, Akoustis never opined on IQE's proposed conditions on IQE's production of a single growth recipe. IQE disagreed with Akoustis as to the relevant products and reiterated that it would be producing a limited set of information related only to the QPD1000. *See* Ex. 21 (Jan. 9, 2024, email from R. Niemeier to J. Quigley). To show IQE that more than the QPD1000 was at issue, Akoustis responded by providing IQE with further information and the Eastern District of Texas' Order on Qorvo's Motion to Strike. *See* Ex. 22 (Jan. 11, 2024, email from J. Quigley to R. Niemeier). Again, IQE disagreed that anything but the QPD1000 was at issue. *See* Ex. 23 (Jan. 16, 2024, email from R. Niemeier to J. Quigley). IQE thereafter moved to quash the subpoena in its entirety.

III. LEGAL STANDARD

A. Subpoena Enforcement and Quashing.

Federal Rule of Civil Procedure 45 permits a party to seek discovery from a non-party. FED. R. CIV. P. 45. "Most significantly for present purposes, [t]he party resisting discovery bears the burden of showing that the subpoena imposes an undue burden, and it 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." *Green v. Cosby*, 152 F. Supp. 3d 31, 36–37 (D. Mass. Dec. 31, 2015) (denying motion to quash) (internal quotations omitted); *see also Ameritox, Ltd. v. Millennium Labs., Inc.*, No. 1:12-cv-7493, 2012 WL 6568226, at *2 (N.D. Ill. Dec. 14, 2012) ("To demonstrate undue burden, the movant must provide affirmative and compelling proof." (internal citations omitted)); *Biological Processors of Ala., Inc. v. North Ga. Env'tl. Servs., Inc.*, 2:09-MC-3673, 2009 WL 1663102, at *1 (E.D. La. June 11, 2009) (internal citation omitted) ("When the burdensomeness of a subpoena is at issue, the onus is on the party who alleges the burden to establish the burden with specificity, and assertions

of a burden without specific estimates of staff hours needed to comply are typically rejected.” (internal citations omitted)).

B. Transfer of Subpoena-Related Motions.

“A district court whose only connection with a case is supervision of discovery ancillary to an action in another district should be especially hesitant to pass judgment on what constitutes relevant evidence thereunder.” *Truswal Sys. Corp. v. Hydro-Air Eng’g, Inc.*, 813 F.2d 1207, 1211-12 (Fed. Cir. 1987) (vacating and remanding a district court’s order quashing a subpoena seeking discovery of sales information from a nonparty to a patent infringement case). Thus, Rule 45(f) permits a court where compliance with a subpoena is required to “transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances.” FED. R. CIV. P. 45(f). For example, transfer may be warranted “in order to avoid disrupting the issuing court’s management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts.” FED. R. CIV. P. 45(f) advisory committee’s note to 2013 amendment.

Courts in this District and elsewhere have granted relief under Rule 45(f). *E.g.*, *MAO-MSP Recovery II LLC, et al. v. Mercury General Corp.*, No. 1:19-MC-91176-ADB, 2020 WL 5732332, at *3 (D. Mass. Sep. 24, 2020) (denying a motion to quash and transferring the subpoena to the issuing court where the issuing court “[was] is in a unique position to resolve this discovery dispute efficiently and in a manner that ensures that similarly situated assignors are treated consistently”); *F.D.I.C. v. Everest Reinsurance Holdings*, No. 1:13-MC-381, 2014 WL 260589, at *2-3 (S.D.N.Y. Jan. 23, 2014) (transferring after weighing “considerations of judicial efficiency and comity”); *Cadence Pharm., Inc. v. Multisorb Techs., Inc.*, No. 1:16-MC-22, 2016 WL 4267567, at *4 (W.D.N.Y. Aug. 15, 2016) (requiring court to consider “the procedural posture of the underlying case, the duration of its pendency, discovery deadlines in that action, and the issuing court’s

familiarity with the underlying cases”); *Google LLC v. Uniloc USA, Inc.*, No. 1:20-MC-0243, 2020 WL 1667376, at *2 (W.D. Tex. Apr. 3, 2020) (transferring subpoena-enforcement action to Eastern District of Texas because “the underlying cases are a complicated series of patent cases involving complex relationships between parties and nonparties and their interests in the patents in issue”); *Arigna Tech. Ltd. v. Volkswagen Grp. of Am., Inc.*, No. 1:22-MC-00051, 2022 WL 229365, at *2 (W.D. Tex. Jan. 26, 2022) (transferring subpoena-enforcement action to Eastern District of Texas because it is a “complicated” patent case and “the interest in the issuing court deciding the discovery dispute outweighs [nonparty]’s interest in deciding the issue in Austin, Texas”).

IV. ARGUMENT

A. IQE’s Motion Should be Transferred to the Eastern District of Texas.

The Court should transfer this Motion to the Eastern District of Texas. Rule 45(f) allows the transfer of subpoena-related motions to the issuing court upon the enforcement court’s finding of exceptional circumstances. FED. R. CIV. P. 45(f); *see also* FED. R. CIV. P. 45(f) advisory committee’s note to 2013 amendment (stating that “transfer may be warranted in order to avoid disrupting the issuing court’s management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts.”). Exceptional circumstances exist here. The Texas issuing court has already dealt with similar issues. And the issues here are likely to arise in at least one other district where another wafer manufacturer, Wolfspeed, resides. Moreover, IQE would not be substantially burdened by dealing with this issue in the Eastern District of Texas.

First, the Eastern District of Texas has already ruled on some of the issues presented by IQE. *See* II.C, *supra*. A significant (if not the most significant) dispute between IQE and Akoustis is the scope of the Supplied Products subject to discovery. IQE believes that it only has to produce documents related to the manufacturing of the QPD1000. Ex. 23. (Jan. 16, 2024, email from R.

Niemeier to J. Quigley); *see also* Ex. 4 (IQE Subpoena Response) (arguing only the QPD1000 is relevant). The Texas court has already made findings that have rejected IQE’s position. *See* Ex. 15 at 41:2-9 (Hearing Transcript); Ex. 16 (Minute Entry); Section II.C, *supra* (discussing Texas court’s resolution of Qorvo’s Motion to Strike). For example, following the Texas court’s denial of Qorvo’s Motion to Strike, Qorvo agreed that all Accused Instrumentalities were relevant:

In light of the Court’s ruling from the bench today on the Defendant’s motion to strike and compel supplementation of Plaintiff’s PR 3-1 infringement contentions, the Plaintiffs and Qorvo have agreed that Qorvo will supplement its document production and interrogatory responses to provide the same type of information that it has already produced with respect to the QPD1000 for ***all of the products*** listed in Exhibit A of Plaintiff’s infringement contentions.

Ex. 15 (Hearing Transcript) at 41:20-42:2 (emphasis added). And the scope of Accused Instrumentalities is similar to the subpoena’s “Supplied Products.” The issue is also not likely resolved in Texas, either, because that court will likely have to decide—whether it be at trial or following expert reports—whether there is sufficient evidence to show infringement by the Accused Instrumentalities and possibly the representativeness of the QPD1000.

Second, issues presented by IQE’s Motion are likely to arise with respect to at least one other subpoena issued by Akoustis. Akoustis subpoenaed at least one other wafer manufacturer, Wolfspeed, and requested nearly identical information from Wolfspeed. *Compare* Ex. 17 (Wolfspeed Subpoena) at 4-50 *with* Ex. 2 (IQE Subpoena) at 3-50. Wolfspeed is likely to raise issues similar to IQE, such as the representativeness of the QPD1000 and whether Wolfspeed must produce the growth recipes. *See* Ex. 24 (Wolfspeed Subpoena Response) ¶ 16 (“Wolfspeed objects to Akoustis’ definition of ‘Supplied Products’ as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent it purports to seek information or documents ... which are not relevant to or at issue in the above-captioned

matter.”). Should Akoustis and other manufacturers not be able to resolve the issues, another district court—the Eastern District of North Carolina for Wolfspeed—will face this issue.

Having these discovery disputes—with Qorvo and the wafer manufacturers—resolved in the same Texas court can best serve the interests of efficiency and judicial economy. *See Vinton Steel, LLC v. Commercial Metals Co.*, No. 3:22-MC-452, 2023 WL 2518881, at *5 (W.D. Tex. Mar. 14, 2023) (transferring subpoena-enforcement action because plaintiff served similar subpoenas on other third-parties and “the risk of potentially inconsistent rulings by multiple courts presents exceptional circumstances warranting transfer”). Under these facts, the Texas court will be “in a unique position to resolve this discovery dispute efficiently and in a manner that ensures that similarly situated [entities] are treated consistently.” *MAO-MSP*, 2020 WL 5732332, at *3.

Finally, IQE’s interests in local resolution of the subpoena (to the extent they even exist) are substantially outweighed by the interests of having the Eastern District of Texas issue consistent rulings and not wasting judicial resources around the country. *See* FED. R. CIV. P. 45(f) advisory committee’s note to 2013 amendment (“Transfer is appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion. Judges in compliance districts may find it helpful to consult with the judge in the issuing court presiding over the underlying case while addressing subpoena-related motions.”). Besides residing in Massachusetts, IQE has no specific interest in complying with the subpoena in Massachusetts. IQE’s primary counsel (Sterne Kessler) is located in Washington DC, IQE hired local counsel in Massachusetts (Holland & Knight) for this Motion, and IQE may or may not even need to hire additional counsel in the Eastern District of Texas. Further, when IQE produces documents, it will produce them electronically or at the office for counsel (likely at Sterne Kessler’s Washington DC office where it previously offered the QPD1000’s growth recipe). *MAO-*

MSP Recovery, 2020 WL 5732332, at *3 (“With respect to responding to document requests, the fact Fallon has no employees or place of business in California is of little consequence as document discovery will no doubt be conducted primarily, if not exclusively, electronically.”). Thus, the interest in enforcing the subpoena in Massachusetts is minimal and substantially outweighed by the interests in enforcing the subpoena in Texas.

The Eastern District of Texas issuing court, which has already ruled on similar issues, is familiar with the patent and technology, and is likely to hear the same issue multiple times due to the issuances of subpoenas to third parties in districts across the country. Transfer will save judicial resources and provide consistent guidance.

B. Alternatively, the Court Should Not Quash the Subpoena.

If the Court decides not to transfer IQE’s Motion, the Court should deny IQE’s request to quash. IQE’s Motion separates Akoustis’ subpoena requests into two parts: (1) growth recipes; and (2) everything else. Mot. at 6-11 (growth recipes), 11-16 (everything else). Regardless of how or if Akoustis’ subpoena is separated,² IQE’s Motion fails.

Regarding the growth recipes, these are documents that IQE admits it does not share with others (Mot. at 6-7), and so Akoustis can only get this highly relevant evidence through IQE. IQE further admits that the burden of producing the recipes is minimal. In essence, an IQE employee would need to download the recipes, convert them, and send them to counsel. Mot. at 11.

² As stated earlier, the subpoena requests documents relevant to the manufacture of epitaxial wafers that IQE supplies to Qorvo (particularly growth recipes and technical documents, such as in requests 3-4, 6, 9, 15-16), documents relevant to Akoustis’ damages calculation (such as cost and profit information for the wafers that IQE provides to Qorvo as well as information valuing the technology, such as in requests 5, 11-14, 17-18), and other documents to identify the Supplied Products (requests 1, 2) or what IQE knows about the litigation and ’360 Patent (requests 7, 10).

IQE's major concern is that the growth recipes are highly confidential and would not be properly protected. But IQE's concern is misplaced. The Eastern District of Texas issued a protective order that will protect the growth recipes. Ex. 28 (EDTX Protective Order). Further, as long as Akoustis is able to collect the evidence it needs and to present it in a reasonable way in expert reports and at trial, Akoustis is more than happy to discuss further protective order provisions. Akoustis has never suggested otherwise.

Regarding the remainder of Akoustis' requests, these too are relevant. From the beginning, Akoustis has been consistent that it is seeking documents and things that are uniquely in IQE's control. This includes Akoustis' requests for technical information beyond the growth recipes and financial information such as cost and profit information for the Supplied Products as well as any information valuing the technology.

1. The growth recipes should be produced.

a) The growth recipes are relevant, vital for Akoustis to prove infringement, and limited to products at issue in the litigation.

The growth recipes are relevant and vital to Akoustis' ability to prove infringement in the litigation. IQE points to its litigation-driven and self-serving declaration as being dispositive as to relevance. Mot. 10. But the declaration is missing steps that would allow Akoustis to evaluate it and it only goes to one product—the wafer in the QPD1000. The declaration also does not address how it can be squared with the expensive and time-consuming third-party lab analysis that Akoustis obtained pre-suit (discussed below). *See* Ex. 25 (ICs Exhibit B) (charting Akoustis' theory of infringement using lab analysis and other evidence). On the other hand, the recipes explain exactly how the epitaxial wafers are manufactured and are thus highly relevant to Akoustis' infringement claim. Regardless, if IQE's materials "are not relevant" as IQE contends (Mot. at 10), then IQE would have produced the subpoenaed materials months ago to prove it.

Regarding the necessity of growth recipes, IQE points to Akoustis' pre-suit investigation. Prior to filing its Complaint, Akoustis hired a third-party lab to perform time-consuming and expensive testing of the QPD1000 to determine (as best it could) how the QPD1000 was manufactured. As just one example of the testing it did, Akoustis commissioned a Secondary Ion Mass Spectrometry (SIMS) analysis of the QPD1000 (costing more than a thousand dollars to prepare and test each chip for this single test). Correctly done, the SIMS analysis provides information about the chemical structure of the material tested. For its SIMS testing, Akoustis hired EAG, which is "the industry standard for SIMS analysis." Ex. 26 (EAG SIMS). The tests indicate the QPD1000's makeup and confirm it was likely manufactured in an infringing way.

While this SIMS analysis can provide evidence regarding the order the materials are introduced, it is not the arbiter of truth with respect to every step of the manufacturing process. For example, while Akoustis is able to infer that the "elevated growth temperature" limitation is met for Rule 11 purposes (including because Qorvo is the prior exclusive licensee of the '360 Patent and previously owned wafer manufacture facilities that it transferred to IQE in 2012), the SIMS analysis does not show the temperature used for manufacture. IQE admitted that testing would not produce the same information as found in the growth recipes: "[n]one of the growth recipes are generally known or readily ascertainable, nor can they be obtained through the public domain." Mot. at 6-7. The only document that precisely explains how to manufacture the epitaxial wafers found in Qorvo's products is the growth recipe.

Further, Akoustis' growth recipes requests are not overly broad. Akoustis seeks growth recipes for only the Supplied Products—those that correlate with what is accused of infringement. Akoustis does not control how many or how few products that encompasses. While IQE states that "only a small minority of [the] steps" in the growth recipe contain relevant information, reviewing

every growth recipe and determining where to “cut” the irrelevant information would also be much more burdensome than just producing the growth recipes—and introduces opportunities for parties to pre-determine relevance, which may only create further disputes. And again, Akoustis will not be printing or otherwise using evidence it does not need.

IQE points to *Invensas Corp. v. Renesas Elecs. Corp.*, 287 F.R.D. 273 (D. Del. 2012), Mot. at 10, but that case is not applicable here. In *Invensas*, the plaintiff failed to “articulate with greater specificity how its requests are targeted toward its existing infringement allegations.” *Invensas Corp.* 287 F.R.D. at 286. Here, Akoustis has shown how the requested information is required by its infringement allegations against Qorvo. *See* Section II, *supra*. While Akoustis can purchase a Qorvo product to test (which it did for the QPD1000), such testing can only tell Akoustis so much about the product, such as the order the materials were applied. No amount of testing can provide Akoustis with specifics order of steps or the temperature that was used for manufacture. Indeed, the *Invensas* court recognized that in such a situation, where a plaintiff is unable to obtain certain infringement evidence, such discovery is warranted: “However, in cases on the opposite end of the spectrum to *Honeywell*—where a plaintiff was previously unable to obtain information about whether unaccused products infringe—courts have considered that fact favorably in deciding to permit such discovery.” *Invensas*, 287 F.R.D. at 282.

b) The growth recipes are uniquely in IQE’s possession and Akoustis cannot get the information from any other entity.

IQE readily admits that it is the only one that possesses the growth recipes:

IQE does not share the growth recipe with others outside the company, including with the customer buying the wafers. *Id.* at ¶¶ 8–9. None of the growth recipes are generally known or readily ascertainable, nor can they be obtained through the public domain. *Id.* at ¶¶ 6, 8

Mot. at 6-7. Akoustis can thus only get this vital information from IQE.

c) IQE's alleged confidentiality concerns are unfounded.

IQE would have this Court believe that its growth recipes are so sensitive that there are no protections that this or another court could use to safeguard them. Mot. 7-9. IQE is mistaken.

Regarding the Eastern District of Texas protective order (Ex. 28 (EDTX Protective Order)), IQE's complaints are misplaced. IQE states that the printing requirements are not narrow enough. Mot. at 8. While Akoustis needs to be able to print the absolutely necessary information for expert reports and proof at trial, Akoustis will not print information it does not need. That said, Akoustis is willing to work with IQE to limit the printed pages and their handling once it is able to review the growth recipes and determine what material is required. Next, IQE complains that the experts in the Eastern District of Texas case will have access to the growth recipes and will be able to quote portions of the growth recipes in their reports and be asked about the growth recipes at their depositions—something that IQE will not be able to police. Mot. at 8. Akoustis and its expert (a highly regarded CalTech professor that IQE has already been able to vet) take their protective order obligations seriously. Regarding expert reports, if they include quotes from the growth recipes, they will be treated like source code material—designated HIGHLY CONFIDENTIAL – SOURCE CODE—and the transcript from any deposition discussing the recipes will be treated the same. Ex. 28 (EDTX Protective Order) at 12-17. Finally, IQE argues that Akoustis or Qorvo can introduce its confidential material at trial. Mot. at 9. But IQE is certainly welcome to attend trial to police the confidentiality of its materials. Moreover, Akoustis is happy to inform the Eastern District of Texas court as to the confidentiality of IQE's materials and work with IQE and the Eastern District of Texas court to make sure that those parts of the trial stay sealed.

Notably, the protective order was negotiated to protect such materials. The scope of printing was already argued and ruled on by the Texas court. *Compare* Ex. 27 (Disputed Protective Order) at 3-6 (dispute) *with* Ex. 28 (EDTX Protective Order) at 12-13 (ruling). How filings

including source code would be filed was argued and ruled on. *Compare* Ex. 27 at 9-11 (dispute) with Ex. 28 at 15-17 (ruling). Regardless, Akoustis will work with IQE to find a way that suits both Akoustis (allowing collection and limited use) and IQE (protecting confidentiality).

Moreover, IQE's position—that its materials are so sensitive they need not ever be produced—makes no sense. Such an approach would allow infringement (such as by Qorvo) without any repercussion by simply structuring the acts to involve third parties (such as IQE) who use their third-party status to avoid producing relevant and necessary evidence (such as the growth recipes here). Protective orders balance confidentiality concerns with the need for evidence to be shared, and the Texas protective order (Ex. 28 (EDTX Protective Order)) is more than adequate.

The cases that IQE cites are inapposite. For example, in both *American Standard* and *Mannington* the parties were direct competitors. *Am. Standard, Inc. v. Pfizer Inc.*, 828 F.2d 734, 741 (Fed. Cir. 1987) (“Nothing in the record rebuts Biomet's statements that discovery will divulge confidential information to its competitors. . . . We cannot conclude that the record contains no evidence to support the district court's finding that Biomet might suffer harm from disclosure because disclosure would effectively include most of Biomet's competitors.” (internal citations omitted)); *Mannington Mills, Inc. v. Armstrong World Indus., Inc.*, 206 F.R.D. 525 (D. Del. 2002) (“[I]t would be divorced from reality to believe that either party would serve as the champion of its competitor to maintain the confidentiality designation or to limit public disclosure during trial.”). Here, IQE and Akoustis are not competitors and Qorvo is a customer of IQE. Further differentiating *Mannington* is that the growth recipes are directly relevant to Akoustis' infringement case and not just “tangential.” *Mannington*, 206 F.R.D. at 532 (“Mannington has failed to carry its burden in showing some relationship between the invention claimed in the '008 patent and Congoleum's confidential financial, marketing and sales data.”). Further contrary to

American Standard, even if Akoustis, IQE, and Qorvo were direct competitors, IQE's concerns are mitigated by the protective order which will not allow any employees of Akoustis or Qorvo to see the growth recipes—only outside counsel and qualified experts will be able to do so. Ex. 28 at 8-9; *Am. Standard*, 828 F.2d at 741 (“On this record, therefore, this court cannot determine whether disclosure would be restricted to counsel.”).

Finally, IQE's commentary on an unrelated litigation between Akoustis and Qorvo is misplaced. Mot. at 7-8. The allegations in that case relate to employees taking confidential documents from their previous employer to their new employer. That is not an issue here. Only outside counsel and qualified experts for Akoustis and Qorvo will have access to IQE's documents. IQE's attempts to sow doubt about how its documents will be treated based on the unrelated litigation are misplaced and disregard the Texas protective order (Ex. 28).

d) IQE overstates the burden of producing its growth recipes.

IQE alleges that the production of the growth recipes is unduly burdensome. Mot. at 11. Not so. IQE's alleged burden can be boiled down to three routine actions: (1) downloading the growth recipes from a computer; (2) converting the files; and (3) loading them on a hard drive for shipping to counsel's office. Mot. at 11. It is hard to believe that these steps are unduly burdensome. In fact, IQE had previously agreed to produce a growth recipe for one wafer while it thought it could hide from compliance based on Qorvo's now-denied Motion to Strike. Moreover, complying with the subpoena's request for growth recipes is less burdensome than most subpoena productions that require searching for documents or emails, reviewing the documents, and then producing them. Here, IQE already knows where the materials are and knows what the materials consist of—attorneys do not need to perform a time-consuming review of the production. It is certainly less burdensome to produce the recipes than hiring two sets of counsel (lead and local),

having an employee draft a declaration, and moving to quash a subpoena. In any event, Akoustis is willing to review the growth recipes on site at IQE if it would reduce the alleged burden on IQE.

2. The remainder of the subpoenaed materials should be produced.

Moving beyond growth recipes, the subpoena seeks information such as technical and financial information that will be used in Akoustis' damages analysis. Despite IQE's complaints (Mot. at 12), Akoustis has been clear that it only wants information uniquely in IQE's possession.

a) The subpoena is not overly broad and the requests are both relevant and necessary.

IQE contends that the subpoena is sweeping in its scope and goes far beyond what is typical for non-party discovery. Mot. at 12. IQE is incorrect.

First, IQE contends that the definition of "Supplied Products" is too broad. *Id.* IQE contends that Akoustis seeks more information from IQE than Qorvo based on this misunderstanding. IQE is wrong. As Akoustis' infringement contentions make clear, the Accused Instrumentalities in the litigation "include semiconductors with epitaxial layers of AlN, AlGaIn, GaN, GaP, InGaP, or InAlN on lattice mismatched substrates and made by a process that includes pre-treating a surface of the substrate with at least one group III reactant or at least one group II reactant at an elevated growth temperature prior to introducing a group V reactant or a group VI reactant (the 'Accused Instrumentalities')" "made, used, sold, offered for sale, or imported into the United States from April 20, 2017 onwards." Ex. 9 (ICs Cover Pleading). This is in line with the subpoena's definition of "Supplied Products"—"Supplied Products' means wafers, or components thereof, sold, provided, or otherwise supplied by IQE to Qorvo from April 20, 2017 onwards, including those that include epitaxial layers of GaN, AlN, InAlN, GaP, InGaP, or AlGaIn on lattice mismatched substrates made of SiC, Si, or sapphire." Ex. 2 (IQE Subpoena) at 11.

Second, IQE contends its financial information is not relevant and/or the requests are overbroad. Mot. at 13 (discussing Request Nos. 5 and 17). Yet the financial information relating to the Supplied Products, including IQE's costs and profits for the Supplied Products, is relevant to Akoustis' underlying damages evaluation. Mot. at 13. IQE states that Akoustis can get most of the financial information from Qorvo, but Akoustis has always been clear that it seeks only information uniquely in IQE's possession. Thus, Akoustis is looking for information such as the manufacturing costs and profit of the Supplied Products that is uniquely in IQE's possession. Regarding the licenses and royalties related to the supplied products, these requests go directly to the value of the patent and will be relevant to Akoustis' damages claims. Mot. at 13 (discussing Requests 11-13). And finally, the marketing information is also important to the damages analysis as it describes the technology and highlights the products to potential customers. Mot. at 13 (discussing Requests 14, 15, and 18). Each set of these requests for the "financial" information is thus highly relevant to Akoustis underlying damages case.

b) IQE's burden is minimal.

The burden on IQE is minimal. As previously discussed, IQE has already located a significant portion of the requested materials and just needs to export them from the computer and send it to counsel. Relying on *Barclays PLC v. FX Transparency, LLC*, No. 1:22-MC-91048-PBS, 2022 WL 3227534, at *4 (D. Mass. Apr. 27, 2022), IQE argues that "Courts have granted respite from subpoenas, or at least required cost-shifting when compliance requires an expansive and laborious search and review of documents." Mot. at 16. However, IQE's reliance on *Barclays* is misplaced. There, the non-party that was subpoenaed had five employees and no data structure that organized or segregated its emails or documents:

In addition to the aforementioned relevance concern raised by producing *internal* documents, emails stored in the historical email server are neither organized nor

segregated by client, and key word searches yielded a significant number of emails for a firm employing five employees.

Barclays, 2022 WL 3227534, at *4 (D. Mass. Apr. 27, 2022). Thus, the five individuals would have to go through all the documents or emails to determine relevancy. Here IQE is a much more sophisticated entity. Per its own website, IQE has offices in multiple countries and employs thousands of people around the world. Further, as previously discussed, IQE keeps its records in a way that would make retrieving information such as the growth recipes very easy.

V. CONCLUSION

For the reasons stated above, the Court should: (1) transfer the Motion to the Eastern District of Texas issuing court; or (2) deny the Motion and order IQE to comply with the subpoena.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Shawn Lu, hereby certify that this document filed through the ECF system will be sent electronically to all registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Shawn Lu

Shawn Lu