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March 29, 2013

**VIA OVERNIGHT COURIER**

The Honorable E. James Gildea  
Administrative Law Judge  
U.S. International Trade Commission  
500 E Street, S.W., Room 317  
Washington, DC 20436

**Re:** *Certain Wireless Consumer Electronics Devices and Components Thereof*  
*Inv. No. 337-TA-853*

Dear Judge Gildea:

Enclosed please find an **OPPOSITION TO RESPONDENTS GARMIN INTERNATIONAL, INC., AND GARMIN U.S.A., INC.'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF THEIR MOTION TO COMPEL DOMESTIC INDUSTRY DOCUMENTS FROM COMPLAINANTS [MOT. #853-025]** for filing in the above-referenced investigation.

Respectfully submitted,

AGILITY IP LAW  
Limited Liability Partnership

Thomas T. Carmack

Enclosure

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

**Before the Honorable E. James Gildea  
Administrative Law Judge**

**In the Matter of**

**CERTAIN WIRELESS CONSUMER  
ELECTRONICS DEVICES AND  
COMPONENTS THEREOF**

**Investigation No. 337-TA-853**

**OPPOSITION TO RESPONDENTS GARMIN INTERNATIONAL, INC.,  
AND GARMIN U.S.A., INC.'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT  
OF THEIR MOTION TO COMPEL DOMESTIC INDUSTRY DOCUMENTS FROM  
COMPLAINANTS [MOT. # 853-025]**

**Introduction**

Garmin's "Reply" is nothing more than an attempt to re-write its poorly-drafted opening brief. Telling is the fact that Garmin's proposed "Reply" is nearly as long as its original motion – just a single page shorter. Further, where it does not merely re-state Garmin's opening brief, the Reply presents facts and arguments that Garmin could have included in its motion but did not. Moreover, in some cases, the Reply argues issues that have been resolved. In essence, Garmin's reply "serves more to delay the adjudicative process than to advance it." *See* U.S.I.T.C. Inv. No. 337-TA-519, Order No. 7, 2004 WL 2341491 (quoting U.S.I.T.C. Inv. No. 337-TA-468, Order No. 28, 2002 WL 1586956).

All this is unnecessary because Complainants have already provided overwhelming evidence supporting their domestic industry assertions, and explained in their opposition how each of the requested documents (1) have already been produced, (2) do not exist, (3) contain

material of no relevance to this investigation or (4) are voluminous material that add nothing to this investigation. Garmin's motion for leave to file a reply should therefore be denied.

### **Argument**

In order to avoid subjecting the Court to yet another rehash of the substantive arguments, Complainants briefly summarize below why each section of Garmin's Reply is unwarranted.

#### **I. GARMIN'S INTRODUCTION**

Nearly half of Garmin's Reply is a 6-page "Introduction" section. Within this section, Garmin tries to repair the flaws in its opening brief by giving the text of specific discovery requests Garmin claims cover the documents it seeks. Garmin also restates the legal requirements for proving domestic industry. This material, to the extent it is even helpful, should have been included in Garmin's opening brief.

The remainder of Garmin's Introduction is a revised draft of Garmin's argument for why it supposedly needs the requested documents. Specifically, Garmin claims that it needs all of the documents in its motion because of allegations of commingling made in other cases. This point was alluded to in Garmin's opening brief. (Mot. at Section III.A.). In support, Garmin cites to the depositions of Dan Leckrone and Dwayne Hannah, both of which were available to Garmin before it filed its original motion. Garmin's other supporting citations are to exhibits that were part of its initial motion as well. Thus, all of this information could—and should—have been presented in the opening brief.

#### **II. MONTHLY, YEAR-END AND COMBINED FINANCIAL STATEMENTS**

Garmin requested in its opening brief "[t]he individual and combined monthly profit and loss reports, and quarterly and year-end financial statements." As stated in their opposition, Complainants have produced this information, along with other documents that support their domestic industry assertions. While Garmin states that it "strains credulity" that these are all the

documents that exist, Garmin fails to identify anything missing from Complainants' production. Complainants are at a loss as to what more can be done.

### **III. CHART OF ACCOUNTS**

Garmin's argument continues to insist that the chart of accounts is necessary to identify the project codes and cost centers. This is the same argument that Garmin made in its Opening Brief. However, as explained in Complainant's Opposition, the chart of accounts is nothing more than a list of bank accounts and will not provide this information. Garmin's Reply misquotes Mr. Hannah's deposition testimony. Mr. Hannah testified that TPL has cost centers, but never stated that these cost centers are on the chart of accounts. Further, Garmin already has TPL's project codes. Thus, Garmin raises nothing new in this section.

### **IV. "PAYMENTS" FROM PDS TO ALLIACENSE**

While Complainants still do not understand Garmin's request, this section offers nothing new. The facts, as explained by Complainants in their opposition, is simple – the only payments made from PDS to Alliacense were the result of invoices. All of the invoices occurred after this Investigation began. Thus, all of the payments occurred after the start of this Investigation and are thus not relevant. Thus, leave for Garmin's Reply should be denied.

### **V. CASH FLOW FORECASTS**

Garmin acknowledges that "Complainants confirm in the opposition that such reports are not regularly generated." Complainants assume that with this statement that Garmin acknowledges the request is moot and no longer at issue. However, Garmin goes on to complain that Complainants did not respond its request for written confirmation regarding this request before the motion was originally brought. While this is a moot point, Complainants had informed Garmin that these documents were not regularly generated, as acknowledged in Garmin's opening brief where it stated, "Complainants counsel argued in a meet and confer that

cash flow forecasts are only produced on an ad hoc basis ....” Once again, Garmin’s Reply presents absolutely nothing new and should be rejected.

## **VI. TIME REPORTING DOCUMENTATION**

While Garmin attempts to categorize the Hannah Declaration submitted in support of Complainants’ Opposition as new evidence, it merely distilled information Garmin already knew into a single declaration. Mr. Hannah testified in detail at his deposition about TPL and Alliacense’s time keeping practices. Counsel also conveyed the information in Mr. Hannah’s declaration to Garmin during the meet and confer process. This is confirmed by the fact that none of Garmin’s reply arguments about the emails are new.

Garmin does not—and cannot—dispute that Complainants produced all of the information in TPL’s employee time allocation database for all projects (not only those related to the patent portfolio at issue in this investigation) for all employees for a time period spanning 2007 through 2012. *See* Garmin Exs. 18, 19, 21; Hannah Decl., ¶ 4. Garmin’s latest claims that this is somehow insufficient have nothing to do with Mr. Hannah’s declaration, as the declaration merely contains information already known to Garmin before the filing of its motion. Specifically, Garmin argues that the database report may not be as accurate as the underlying emails. But Garmin presents no new information to support this reiterated claim. As explained in Complainants’ Opposition, TPL’s database administrator contemporaneously works with individual employees to correct errors in their time reporting, whereas the emails themselves are not corrected. Accordingly, the already produced database information—*not the emails*—is the

most accurate record of employee time allocation. Because Garmin's Reply sheds no new light on this issue it should be rejected.<sup>1</sup>

## VII. MOORE LITIGATION

Garmin merely repeats its request for the time reporting documentation in Section VI above here, but with respect to the Moore litigation. In its opening brief Garmin conceded that information relating to the Moore litigation "is not relevant." Motion, § III.A.7. As its Reply says nothing to change that, leave to file should be denied.

Complainants have explained to Garmin many times that all of the relevant information Garmin seeks relating to *all* time entry matters is contained in the documents produced. The documents list each employee and show the percentage of their time for various projects. The documents further show the project codes relating to the MMP Portfolio, which is the family of patents containing the '336 patent. Because Garmin has failed to advance any new arguments for the production of voluminous archived emails, leave to file its reply should be denied.

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<sup>1</sup> Garmin argues Order No. 15 from the EEPROMs investigation for a second time. However, the facts in EEPROMs bear no resemblance to the present situation. In EEPROMs, the respondent argued that it had not received all documents regarding the complainant's research and development efforts. One of the respondent's arguments was that only summary documents had been produced. However, the complainant responded that the incorporation of the patented technology into its products was "in the final phases of the development, and Atmel has only recently reached the point where it feasibly can embark on this effort, that few documents have been created to date that address the specific issue of the '565 technology; that Atmel has produced all of those documents in this investigation" and that Atmel had already supplemented its production and intended to do so again as the development efforts continued. *EEPROM, Flash Memory, & Flash Microcontroller Semiconductor Devices & Prods. Containing Same*, Inv. No. 337-TA-395, Order No. 15, at 2 (Aug. 7, 1997) at 3-4. Based on this response by the complainant, the ALJ asked for an affidavit confirming that Atmel had "produced all technical documents" relating to the incorporation of the patented technology into its products. In that investigation there was no argument that the summary documents were as good as—or better than—the underlying research and development materials. Further, the underlying documents, which were recent in nature, had not been archived for years. Finally, the number of underlying documents was small and the burden of producing them was slight.

## **VIII. PRODUCT PURCHASES**

Garmin cites no documents and makes no argument in this section that could not have been made in its opening brief. Indeed, Garmin does not dispute that Complainants produced a chart reflecting all purchase information for each of the products purchased in relation to Complainants' licensing efforts. Garmin does not dispute that the chart includes even more information than would be on a receipt, including the date requested, the project involved (which is the product brand/company), the patent portfolio involved, the product name, the product line, the product model, status of the item, price, and shipping costs. Garmin does not even dispute that this chart was used during the deposition of Mr. Hannah, as Garmin cites to parts of his deposition relating to this chart. Despite all of this, Garmin attempts to categorize the Hannah Declaration as making a new argument that the chart is a business record. However, the Hannah Declaration says nothing that Garmin did not already know before filing its motion and nothing Garmin could not have asked about during Mr. Hannah's deposition.

Furthermore, Garmin now tries to justify its request for the receipts by claiming that neither the chart nor Mr. Hannah were able to answer a few questions regarding these products – such as whether the products were purchased under the litigation code or the MMP general code or whether the products were used to license other portfolios. However, Garmin fails to explain (and Complainants do not understand) how any of this information will be gathered from the receipts themselves. Accordingly, leave to file a reply should be denied.

## **IX. TRIP REPORTS**

Complainants are at a loss as to what Garmin now seeks. Garmin requested trip reports. Complainants pointed out that all of the information from the trip reports may be derived from the licensee communications files Complainants produced months ago. Nevertheless, Complainants produced the trip reports in their entirety. Now, it appears that Garmin is

requesting something different. But there is simply nothing more to produce. Garmin's motion should be denied.

#### **X. DOMESTIC INDUSTRY DOCUMENTS FROM PRIOR INVESTIGATIONS**

Garmin concedes that "Complainants' production of the requested materials is nearly complete with the limited exception of certain hearing testimony." Complainants assume that this means that this category is no longer at issue.

Despite the resolution of this issue, Garmin's Reply wastes the Court's and Complainants' time arguing about why these documents were not produced earlier, while at the same time ignoring what Complainants explained in their opposition (again). These documents—which relate entirely to patents not at issue in this Investigation—contain respondent CBI from other investigations that was governed by separate protective orders. Regardless, Complainants repeatedly reached out to the respondents in those investigations (who initially objected to the production of this material) to obtain their permission to produce all the domestic industry documents Garmin requested. Accordingly, Garmin's Reply is a prime example of why good cause is required for leave to reply to be granted. Their motion should be denied.

#### **Conclusion**

For the foregoing reasons, Complainants respectfully request that Garmin's motion be denied in its entirety.

Dated: March 29, 2013

Respectfully submitted,

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

Before the Honorable E. James Gildea  
Administrative Law Judge

**In the Matter of**

**CERTAIN WIRELESS CONSUMER  
ELECTRONICS DEVICES AND  
COMPONENTS THEREOF**

**Investigation No. 337-TA-853**

**CERTIFICATE OF SERVICE**

I, Tracey Nero, hereby certify that on March 29, 2013, a copy of the foregoing documents was served upon each of the following parties or their counsel in the manner indicated:

1. OPPOSITION TO RESPONDENTS GARMIN INTERNATIONAL, INC., AND GARMIN U.S.A., INC.'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF THEIR MOTION TO COMPEL DOMESTIC INDUSTRY DOCUMENTS FROM COMPLAINANTS [MOT. #853-025]

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<b><i>Administrative Law Judge</i></b>	
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**CERTAIN WIRELESS CONSUMER ELECTRONICS  
DEVICES AND COMPONENTS THEREOF**

**Inv. No. 337-TA-853**

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**CERTAIN WIRELESS CONSUMER ELECTRONICS  
DEVICES AND COMPONENTS THEREOF**

**Inv. No. 337-TA-853**

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**CERTAIN WIRELESS CONSUMER ELECTRONICS  
DEVICES AND COMPONENTS THEREOF**

**Inv. No. 337-TA-853**

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**CERTAIN WIRELESS CONSUMER ELECTRONICS  
DEVICES AND COMPONENTS THEREOF**

**Inv. No. 337-TA-853**

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