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January 31, 2014

The Honorable Irving A. Williamson
Chairman
U.S. International Trade Commission
500 E Street, S.W.
Washington, D.C. 20436

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

Dear Chairman Williamson:

We are writing on behalf of Respondents¹ in Investigation No. 337-TA-853, to address Complainants' letter submitted on January 27, 2014.

Once again, Complainants seek to challenge ALJ Gildea's thorough and well-supported Initial Determination of no violation ("ID") by improperly relying on events in a collateral proceeding that involves a different record and different facts. In doing so, Complainants admit that the rulings in the California action are "not dispositive in this Investigation" and thus acknowledge that they are not binding on the Commission. [Jan. 27, 2014 Complainants' Ltr. at 5.] This admission alone should end the inquiry, because it demonstrates Complainants' recognition that the Northern District of California's January 21, 2014 Order Denying Plaintiff's Renewed Motion for Entry of Judgment as a Matter of Law ("January 21 Order") is irrelevant to the soundness of the factual findings and conclusions of law detailed in the ID. Indeed, the California action does not affect the Commission's pending review of the ID for at least the following four reasons.

First, although Complainants assert that there are factual similarities between the proceedings, the record of the California action and the record in the present Investigation are substantially different. In fact, Complainants emphasized these notable differences in their motion *in limine* to preclude HTC from presenting in the California action any evidence or argument regarding the 853 Investigation to the California jury. [Aug. 15, 2013 (N.D. Cal. Dkt. 488) TPL's Motion *in Limine* No. 1 Regarding Prior Litigations, at 1.] In this motion

¹ "Respondents" refers to Barnes & Noble, Inc.; HTC Corporation and HTC America, Inc.; Huawei Technologies Co., Ltd., Huawei Device Co., Ltd., Huawei Device USA Inc., and Futurewei Technologies, Inc.; LG Electronics, Inc. and LG Electronics U.S.A., Inc.; Novatel Wireless, Inc.; Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. and ZTE Corporation and ZTE (USA) Inc.



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in limine, Complainants argued that "[w]hile the [853] investigation is centered on infringement of the '336 patent, one of the patents-in-suit here, it involves **different products** and **different claim constructions**." [*Id.* at 3 (emphases added).] Complainants further contended that the "position of the Staff Attorney and the initial determination of the Administrative Law Judge ('ALJ') are **irrelevant to this litigation**," and that the "prejudicial impact of any evidence regarding the ITC investigation overwhelmingly outweighs any potential probative value." [*Id.* at 4 (emphases added).] Based on these representations, Judge Grewal, who is presiding over the California action, adopted Complainants' argument that "the ITC investigation involves different products and different claim constructions" and ruled that "TPL's motion to exclude evidence of the co-pending ITC investigation is GRANTED." [Sept. 6, 2013 (N.D. Cal. Dkt. 564) Order on Motions *in Limine*, at 4-5.]

These differences are significant. HTC is the only Respondent from the 853 Investigation that was involved in the California action, and the jury heard evidence with respect to only HTC's now obsolete products (which vastly differ from HTC's products accused in this Investigation and which are no longer being sold by HTC). Critically, Respondents Barnes & Noble, Garmin, Huawei, LG, Nintendo, Novatel, Samsung and ZTE were never parties to the California action, and their products were never at issue in the California trial. In this regard, the evidentiary record in the 853 Investigation – which forms the basis for ALJ Gildea's exhaustive analysis in the ID – includes evidence, testimony, and argument with respect to more than one hundred products that were never at issue in the California action. As explained in more detail in Respondents' response to Complainants' Petition for Review, these products incorporated dozens of different microprocessors that were not at issue in the California action. The Commission's Notice of Review in this Investigation recognized that many of these microprocessors do not infringe by declining to review the ALJ's findings on this issue. [Nov. 25, 2013 Notice of Part. Review at 3-4 ("As to the accused products listed at page 88 of the ID and products containing these chips, the Commission has determined not to review the ID's finding that Complainants have failed to satisfy their burden of proof with respect to infringement of claims 6 and 13.")]

Moreover, the California trial involved additional, and different, witnesses from the ITC Investigation. Indeed, at least the following fact witnesses in the California trial did not testify live at the 853 Investigation's hearing:

- Mr. Moore (the first named inventor),
- Mr. Fichter (HTC's corporate witness),
- Mr. Liang (an HTC engineer),
- Mr. Dena (a third party witness from Qualcomm).

Furthermore, and perhaps most importantly, there were different technical experts in the two proceedings on the question of noninfringement. Complainants relied on Dr. Oklobdzija as their sole technical expert in both the California action and the 853 Investigation. But Respondents' technical expert in the 853 Investigation, Dr. Vivek Subramanian, did not testify in the California action, as HTC retained Mr. Gafford as its expert for that action. This difference was significant. Throughout the ID, ALJ Gildea repeatedly credited Dr. Subramanian's testimony as more

credible, and more supported by the evidence, than Dr. Oklobdzija's conclusory testimony. These factual and credibility determinations are one of the many reasons why the Commission should affirm the ID.

In short, the California court did not have before it any of the noninfringement evidence from the 853 Investigation that led the ALJ to find noninfringement.

Second, the jury in the California trial did not hear the testimony presented to the ALJ about current-starved technology, which was central to his noninfringement finding with respect to the "entire oscillator" limitation. As discussed in Respondents' initial submission pursuant to the Notice of Partial Review, Complainants distorted the meaning of the word "generate" in the ALJ's construction of the "entire oscillator" limitation in an attempt to avoid the noninfringement outcome required by this construction. [Dec. 23, 2013 Respondents' Subm. In Response to Comm'n Notice of Part. Review, at 4-6.] In this regard, Complainants posited that a ring oscillator can run with power supply alone without relying on an external crystal or control signal to generate a clock signal. [*Id.* at 6.] This argument, however, rested on a simplified hypothetical version of a ring oscillator that is divorced from a PLL and unconnected to any tangible product, much less to any of the accused products. [*Id.* at 7.] As the evidence in this Investigation showed, and the ALJ found, the current-starved oscillators in all of the products still at issue in this proceeding require other PLL circuitry to oscillate. [*Id.* at 7-12.] Absent control signals from the PLL, the oscillators will not oscillate and no clock signals will be generated. [*Id.*] Dr. Subramanian and Dr. Haroun (Texas Instruments' witness subpoenaed by Complainants) unambiguously established this fact at the hearing in the ITC. [*Id.*] Even Complainants' expert, Dr. Oklobdzija, effectively confirmed, through his attempts at evasion during the hearing, that a current-starved delay cell cannot oscillate without a bias signal. [*Id.* at 7-15.] This evidence about current-starved technology, which was central to rebutting Complainants' misguided infringement theory, was not before the California jury, and thus not part of Judge Grewal's consideration in his January 21 Order.

Third, because of the significantly different constraints and the additional issues involved in a jury trial (such as damages and willfulness), HTC only had the opportunity to dispute two of the limitations – the "entire oscillator" limitation and the "varying" limitation – in asserted independent claims 6 and 13. While the ALJ found noninfringement of these two limitations in his ID, Judge Gildea also found that the accused products in the 853 Investigation did not meet two additional limitations: (i) the "external clock is operative at a frequency independent of a clock frequency of said oscillator" of claims 6 and 13, and (ii) the "wherein ... asynchronous" limitation of claim 13. [*See* ID at 245-259.] Judge Gildea's findings of noninfringement on these two additional limitations involve a straight application of undisputed claim constructions to the evidence presented at the hearing, as well as specific credibility findings based on the ALJ's observation of the live witnesses. [*Id.*] As discussed in Respondents' opposition to Complainants' petition, the ALJ correctly found noninfringement of these limitations. [Oct. 17, 2013 Respondents' Response to Complainants' Petition for Review, at 77-96.] The noninfringement findings on these two additional limitations form an independent basis for affirming the ALJ's ID that none of the Respondents violated Section 337 in this Investigation.

Finally, given the significant differences in the records between the two proceedings, the Commission should reject Complainants' use of statements in the California action – that are not part of the ITC record – to buttress their arguments in this Investigation.² To the extent that the Commission considers these arguments, Respondents respectfully request that the Commission also consider the evidence and precedent, as presented in Respondents' initial and reply briefs on review, that undercut Complainants' arguments. For the Commission's convenience, the table below identifies relevant sections rebutting these arguments:

Complainants' arguments in their January 27 Letter	Section of Respondents' submissions addressing Complainants' arguments
1. A ring oscillator allegedly does not rely on an external crystal to generate clock signal.	Dec. 23, 2013 Respondents' Subm. re Comm'n Notice of Part. Review, at 4-15.
2. Generating a clock signal is allegedly different from adjusting frequency.	Jan. 6, 2014 Respondents' Reply re Comm'n Notice of Part. Review, at 5-7.
3. A ring oscillator allegedly can generate a clock signal without an external crystal.	<i>Id.</i> at 8-14; <i>see also id.</i> at 15-17.
4. Binning is allegedly evidence satisfying the "varying" limitation.	Oct. 17, 2013 Respondents' Response to Complainants' Petition for Review, at 57-77.

For the reasons summarized above, Respondents respectfully submit that the California action need not be considered by the Commission, as it is predicated on different claim constructions applied to different products based on a completely different evidentiary record, and in which no Respondents, other than HTC, participated in the trial.

Very truly yours,



Christian A. Chu

cc: R. Whitney Winston, Esq.
all counsel of record

² Complainants' January 27 Letter is, ultimately, an improper reply brief that tries to circumvent the Commission's strict page limits and restrictions on briefing. Most notably, they challenge the ALJ's correct finding of noninfringement of the "varying" limitation, despite the Commission's clear order that "[t]he parties are not to brief other issues on review." [*Compare* Jan. 27, 2014 Complainants' Ltr. at 4, *with* Nov. 25, 2013 Notice of Part. Review at 5.] As such, the letter should be stricken for failing to comply with the Commission's rules and Notice.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing document,

**RESPONDENTS' LETTER TO CHAIRMAN WILLIAMSON REGARDING TPL'S
JANUARY 27, 2014 LETTER (PUBLIC VERSION)**

have been served on this 12th day of February, 2014, on the following:

<p>Lisa R. Barton Acting Secretary U.S. International Trade Commission 500 E Street, S.W. Washington, D.C. 20436</p>	<p><input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Federal Express <input checked="" type="checkbox"/> Via Electronic Filing</p>
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<p>R. Whitney Winston, Esq. Office of Unfair Import Investigations U.S. International Trade Commission 500 E Street, S.W., Suite 401 Washington, D.C. 20436 whitney.winston@usitc.gov</p>	<p><input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Federal Express <input checked="" type="checkbox"/> Via Electronic Mail</p>
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