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October 28, 2013

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 Devices and Components Thereof*  
ITC Inv. No. 337-TA-853**

Dear Chairman Williamson:

We are writing on behalf of Respondents<sup>1</sup> in Investigation No. 337-TA-853, to address Complainants' letter submitted on October 21, 2013 (and their "corrected" letter submitted on October 22, 2013).

By way of background, Judge Gildea found in his thorough and well-supported Initial Determination in the 853 Investigation ("ID") that none of the Respondents violated Section 337. In his ID, the ALJ meticulously analyzed the evidence and arguments presented at the hearing with respect to U.S. Patent No. 5,809,336 ("the '336 patent"), made specific credibility findings based on his observation of the witnesses' live testimony, and correctly concluded that Respondents' accused products do not meet multiple separate and independent limitations of each asserted claim. Complainants petitioned for review on only two of the ten claims asserted at the hearing, and both Respondents and the Commission Investigative Attorney have opposed the petition. (Doc. ID: 519688 (Resps.' Oppo.); Doc. ID 519647 (IA's Oppo.)) Hoping to overcome the weight of the evidence, Complainants submitted a letter last week that included a copy of a jury verdict from a recently completed trial in the Northern District of California ("NDCA action"), and urged the Commission to consider the jury verdict in considering their pending Petition. But the NDCA jury verdict is irrelevant to the soundness of the factual findings and conclusions of law detailed in the ID because of the following reasons.

First, the accused products are different between the two proceedings, as shown in Complainants' own argument to the NDCA judge to exclude evidence regarding the 853 Investigation from that case: "While the [853] investigation is centered on infringement of the '336 patent, one of the patents-in-suit here, it involves *different products* ...." (*Id.* at 3

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<sup>1</sup> "Respondents" refers to Barnes & Noble, Inc.; HTC Corporation & 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.; Nintendo Co., Ltd., and Nintendo of America Inc.; Novatel Wireless, Inc.; Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. and ZTE Corporation and ZTE (USA) Inc.



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(emphasis added). Complainants further stated that the “position of the Staff Attorney and the initial determination of the Administrative Law Judge (‘ALJ’) are *irrelevant to this litigation.*” *Id.* at 4 (emphasis added). Complainants’ distinctions are well taken because HTC is the only Respondent from the 853 Investigation that was involved in the NDCA action, and the jury only heard evidence with respect to HTC’s now obsolete products. Notably, Respondents Barnes & Noble, Garmin, Huawei, LG, Nintendo, Novatel, Samsung and ZTE were not parties to the NDCA action, and their products were not at issue at trial. In this regard, the evidentiary record in the 853 Investigation includes evidence with respect to more than one hundred products that were never at issue in the NDCA action. These products incorporated multiple dozens of different microprocessors that were not at issue in the NDCA action.

Second, because of the severe time 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” limitation and the “varying” limitation – in asserted independent claims 6 and 13. While the ALJ found noninfringement of these two terms 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.*; see also Respondents’ Resp. to Complainants’ Petition, Doc. ID 519688 at 77-96 (discussing ruling and reasons why there were no clear error).)

Third, the NDCA trial involved seven additional witnesses who did not testify live at the 853 Investigation’s hearing. Furthermore, there were different technical experts on the question of noninfringement. While Complainants relied on Dr. Oklobdzija as their technical expert in both proceedings, Respondents’ technical expert in the 853 Investigation was Dr. Vivek Subramanian, while HTC retained Mr. Gafford as its expert in the NDCA action.

Finally, the NDCA action is also far from final, as the parties in that case have not yet even filed post-trial motions. It is therefore premature to consider the impact of the NDCA action until the district court addresses the post-trial motions that are forthcoming.



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For these reasons, Respondents respectfully submit that the jury verdict in the NDCA action need not be considered by the Commission, as it is predicated on different products based on a completely different evidentiary record, and for which no Respondents, other than HTC, participated in the trial.

Very truly yours,

DLA Piper LLP (US)

A handwritten signature in blue ink, appearing to read 'Aaron Wainscoat', written over the typed name.

Aaron Wainscoat

cc: All Counsel of Record

**CERTIFICATE OF SERVICE**

I, Matthew Salcedo, hereby certify that on October 28, 2013, a copy of the **LETTER FROM AARON WAINSCOAT TO HONORABLE IRVING A. WILLIAMSON** was served on the following as indicated:

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*/s/ Matthew Salcedo*

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