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23 PATRIOT SCIENTIFIC CORPORATION

24 UNITED STATES DISTRICT COURT  
25 NORTHERN DISTRICT OF CALIFORNIA  
26 SAN JOSE DIVISION

27 \_\_\_\_\_ )  
28 HTC CORPORATION and HTC )  
AMERICA, INC., )  
 )  
 ) Plaintiffs, )  
 )  
 ) v. )  
 )  
 ) TECHNOLOGY PROPERTIES LIMITED, )  
29 ) PATRIOT SCIENTIFIC CORPORATION )  
30 ) and ALLIACENSE LIMITED, )  
31 ) )  
32 ) Defendants. )  
33 \_\_\_\_\_ )

Case No. 5:08-cv-00882 PSG  
**DEFENDANTS' EMERGENCY  
MOTION TO STRIKE HTC'S  
IMPROPER EX PARTE  
COMMUNICATION TO THE COURT,  
AND FOR SANCTIONS;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**  
Judge: Hon. Paul S. Grewal

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## Notice of Motion

PLEASE TAKE NOTICE that Defendants Technology Properties Ltd., Patriot Scientific Corporation, and Alliacense Ltd. (collectively, “Defendants”) move – on an emergency basis, pursuant to Civil Local Rules 6-3 and 7-11 – to strike HTC’s improper *ex parte* communication to the Court, and for appropriate sanctions. In particular, Defendants move to strike the correspondence and enclosed document that HTC submitted to the Court by letter on September 10, 2013. This Motion is based on the following Memorandum of Points and Authorities, the accompanying Declarations of James C. Otteson, the entire record in this matter, and such evidence as may be presented at any hearing of this Motion.

Defendants notified HTC’s counsel on September 11, 2013 that Defendants intended to file this motion. Although HTC’s counsel asked to discuss the issue by telephone the next day, Defendants informed HTC that this motion was too urgent to delay its filing another day.

## Introduction

As this Court knows, the parties have been engaged in related litigation before the ITC. At the outset of that matter, the Administrative Law Judge (“ALJ”) entered a standard protective order that restricted the dissemination of confidential business information. HTC has violated the ITC’s protective order by submitting to this Court a copy of the ALJ’s Initial Determination (“ID”), which – by HTC’s own admission – included confidential business information of non-parties Texas Instruments and Qualcomm. In addition to violating its obligations under the ITC’s protective order, HTC’s letter and enclosures submitted to the Court violated: (1) this Court’s own Protective Order (Doc. 161); (2) this Court’s Supplemental Protective Order re: Qualcomm (Doc. 313); and (3) Civil Local Rule 79-5, which states that “[n]o document may be filed under seal . . . except pursuant to a Court order . . .”

Indeed, HTC’s improper submission of confidential business information in the ID comes directly on the heels of the Court’s admonishment of counsel to work together to meet the sealing requirements of Civil Local Rule 79-5 (Aug. 13, 2013 Tr. at 10:15-21):

So if you sense a bit of frustration in my voice, I will be explicit about it, this is entirely broken. And the challenge I have if that weren’t enough, the Local Rules lay out a very specific procedure for submitting declarations for articulating a basis in light of *Kamakana*

1 and the other Ninth Circuit cases for why the particular excerpt and entirety of documents  
2 need to be submitted.

3 Had HTC contacted Defendants in advance regarding HTC's proposed submission of the ID, the  
4 current motion likely could have been avoided altogether.

5 Finally, HTC's submission of its letter and the ID to the Court, as well as its telephone calls  
6 to the Court's courtroom deputy, constitute impermissible *ex parte* communications that violate  
7 Civil Local Rule 11-4(c). Indeed, HTC's improper *ex parte* communications actually led to and  
8 exacerbated its violation of three different protective orders and Local Rule 79-5. For these  
9 reasons, Defendants ask the Court to strike HTC's letter and enclosure, and to levy sanctions  
10 against HTC in the amount Defendants were forced to expend on this motion while trying to  
11 prepare for trial.

### 12 Factual Background

13 HTC filed this case in 2008, seeking a declaratory judgment that it does not infringe any  
14 valid claim of the '336 patent, among others. The Court entered a Protective Order ("PO") on  
15 April 21, 2010 (Doc. 161), and a Supplemental Protective Order Governing Discovery from Non-  
16 Party Qualcomm, Inc. ("Supplemental Qualcomm PO") on May 17, 2011 (Doc. 313). The PO  
17 specifically states that "[a] Party that seeks to file under seal any Protected Material must comply  
18 with Civil Local Rule 79-5." PO (Doc. 161), p. 12 (§ 10).

19 On August 24, 2012, ALJ James Gildea entered a protective order in ITC Investigation  
20 No. 337-TA-853 (the "853 Investigation"), which involves TPL and Patriot's assertion of the '336  
21 patent against HTC and others. *See* Declaration of J. Otteson ("Otteson Decl."), at Ex. 1 (ITC  
22 Protective Order). Pursuant to the ITC Protective Order, documents with "confidential business  
23 information" ("CBI") must be treated in accordance with the terms of the order. *Id.*, ¶ 2. In the  
24 absence of a separate order from the ITC or written permission from the supplier of the  
25 confidential information **and** consent of all parties in the 853 Investigation, CBI may only be  
26 disclosed to certain people. *Id.*, ¶¶ 3-5. Such people generally include outside counsel, qualified  
27 persons taking testimony (such as stenographers), technical experts and their personnel, and ITC  
28 personnel. *Id.* Even if CBI is otherwise properly disclosed to persons **not** designated under the  
ITC Protective Order, such disclosure shall be "based upon the conditions pertaining to, and

1 obligations arising from [the ITC Protective Order], and such persons shall be considered subject  
2 to it . . .” *Id.* at ¶ 5.

3 On September 6, 2013, the ALJ issued an “Initial Determination on Violation of Section  
4 337 and Recommended Determination on Remedy and Bond.” *See* Otteson Decl. at ¶ 3.  
5 Pursuant to the ITC Protective Order, the document stated “**CONTAINS CONFIDENTIAL**  
6 **BUSINESS INFORMATION SUBJECT TO PROTECTIVE ORDER**” on the header of each  
7 page of the document. *Id.*

8 On September 10, 2013, HTC hand delivered a letter to this Court, which included the  
9 ALJ’s ID with HTC’s unilateral redactions. *See* Otteson Decl. at Ex. 2 (Sept. 10, 2013 Letter  
10 from Mark R. Weinstein to the Hon. Paul S. Grewal). Although HTC’s counsel e-mailed  
11 Defendants a copy of the letter, they did not immediately provide HTC’s redacted copy of the ID.  
12 Rather, HTC provided Defendants with an FTP link from which Defendants were later able to  
13 download the redacted ID. In its letter, HTC stated that it “obtained permission from Qualcomm  
14 Inc. and Texas Instruments, Inc. to not redact their CBI from the enclosed Initial Determination,  
15 provided that it is furnished to this Court on a confidential basis and not publicly filed.” Otteson  
16 Decl., Ex. 2. Prior to HTC’s submission of the redacted ID to the Court, HTC did not consult  
17 with Defendants, gave Defendants no notice, and did not provide Defendants with any  
18 opportunity to review HTC’s proposed redactions. Otteson Decl., ¶ 5. Moreover, HTC ignored  
19 the Court’s requirements for filing documents under seal, pursuant to Civil Local Rule 79-5.

## 20 Argument

### 21 **I. HTC’S SUBMISSION OF THE INITIAL DETERMINATION TO THIS COURT** 22 **VIOLATED THE ITC PROTECTIVE ORDER, THIS COURT’S PROTECTIVE** 23 **ORDERS, AND CIVIL LOCAL RULE 79-5.**

#### 24 **A. HTC Has Violated the ITC Protective Order.**

25 The ITC Protective Order states that documents with material containing CBI are subject  
26 to the provisions of the order. *See* Otteson Decl. at Ex. 1, ¶ 2. The ALJ designated the ID as  
27 “confidential business information,” which means that it is subject to the provisions of the ITC  
28 Protective Order. *See* Otteson Decl. at ¶ 3. The ALJ also set forth a procedure for the parties in

1 the 853 Investigation to submit their proposed redactions of the ID to the ALJ within seven days,  
2 so that a public version could be prepared and issued by the ITC.

3 Ignoring the ALJ's prescribed process, HTC made its own unilateral redactions to the ID  
4 and submitted it to this Court in violation of the ITC Protective Order. The ITC Protective Order  
5 prohibits dissemination of CBI to those not permitted under the order unless "the Commission or  
6 the Administrative Law Judge orders, or if the supplier and all parties to the investigation agree."  
7 *See* Otteson Decl. at Ex. 1, ¶¶ 3, 5. Neither the Commission nor the ALJ have issued an order  
8 permitting dissemination of the ID. *See* Otteson Decl. at ¶ 3. In addition, HTC has not provided  
9 written permission from the suppliers of CBI to disclose documents containing their CBI.  
10 Without reviewing such written permission, it is impossible to determine the scope of  
11 dissemination permitted by the parties who have allegedly consented to the disclosure of their  
12 CBI. *See* Otteson Decl. at ¶ 5. Moreover, "all parties to the investigation" have not agreed to the  
13 dissemination of any CBI in the ID, which is *another* requirement of the ITC Protective Order.  
14 Otteson Decl., Ex. 1, ¶ 5.

15 The ITC Protective Order does not permit HTC's unilateral redaction and submission of  
16 the ID. HTC's redactions are simply HTC's guess at what information other parties (and third  
17 parties) might consider confidential. These redactions – which have not been approved by the  
18 ALJ, TPL, Patriot, the suppliers of the CBI, or any non-party – cannot supplant HTC's obligation  
19 to abide by the ITC Protective Order and the ALJ's procedure for the preparation of a public  
20 version of the ID.

21 This Court has previously addressed the importance of abiding by one's obligations under  
22 an ITC Protective Order. In *Apple Inc. v. Samsung Electronics Co., Ltd.*, this Court confirmed  
23 that Apple should not produce documents containing confidential business information, where  
24 production would violate an ITC Protective Order. *Apple Inc. v. Samsung Electronics Co., Ltd.*,  
25 Case No. 11-1846 LHK (PSG), 2012 WL 2862613 \*4 (N.D. Cal. July 11, 2012). In that case,  
26 Samsung alternatively sought production of *redacted* versions of the documents. *Id.* This Court  
27 declined Samsung's request, noting that "Apple need not guess at what redactions might be  
28 required by the third-parties." *Id.*

1 HTC violated the ITC Protective Order by submitting the ALJ's confidential ID to this  
 2 Court. HTC's attempt to guess at what redactions were required – while *not* redacting CBI of  
 3 Texas Instruments and Qualcomm – does not offset this violation. The letter submitted by Mr.  
 4 Weinstein, as well as the “redacted” version of the ALJ's ID, should be stricken.

5 **B. HTC Has Violated this Court's Protective Orders and Civil Local Rule 79-5.**

6 HTC's improper *ex parte* submission of its own redacted version of the ID – which  
 7 admittedly contains highly confidential information of third parties Qualcomm and Texas  
 8 Instruments – also violates *this* Court's protective orders. Section 10 of the Court's April 21,  
 9 2010 PO states (Doc. 161):

10 Without written permission from the Designating Party or a court order secured after  
 11 appropriate notice to all interested persons, a Party may not file in the public record in this  
 12 action any Protected Material. ***A Party that seeks to file under seal any Protected  
 Material must comply with Civil Local Rule 79-5.***

13 PO at p. 12 (§ 10) (emphasis added). Clearly, HTC has violated both the PO and Civil Local Rule  
 14 79-5 by submitting an *ex parte* letter to the Court with highly confidential information of third  
 15 parties without filing a proper motion to seal.

16 It is curious that HTC would engage in such a clear breach of the PO and Rule 79-5 so  
 17 soon after the Court specifically instructed the parties to cooperate on the submission of proper  
 18 motions to seal:

19 At a minimum, the rule requires that the party which has designated the document offer a  
 20 proposed order for the court so I do not have to go through line by line over thousands of  
 21 pages and make these calls. I understand the reality of how this may work in other Courts.  
 22 It doesn't work here. I have to apply the standards set by the Ninth Circuit and I have to  
 respect the public's right to come in and understand what's going on with this taxpayer  
 funded institution.

23 Aug. 13, 2013 Tr. at 11:3-11. Yet, in the submission of a 300 plus page document, HTC has  
 24 made its own determination – without consulting or providing any notice to Defendants – about  
 25 what should be redacted and what should not. In fact, HTC made no attempt to seek an order to  
 26 file certain material under seal, as required by Rule 79-5.

27 Moreover, HTC may well have “*over*-redacted” substantial material in the ID, because it  
 28 did not consult with TPL, Patriot or (apparently) any other party in the ITC case regarding which

1 of their confidential information should be redacted. This is a direct violation of Rule 79-5 and  
 2 the Court's PO, which states:

3 Mass, indiscriminate, or routinized designations are prohibited. *Designations that are*  
 4 *shown to be clearly unjustified*, or that have been made for an improper purpose (e.g., to  
 5 unnecessarily encumber or retard the case development process, or to impose unnecessary  
 expenses and burdens on other parties), *expose the Designating Party to sanctions.*

6 PO (Doc. 161) at p. 4 (§ 5.1) (emphasis added). HTC's highly improper submission of its own  
 7 redacted version of the ID is worthy of sanctions – especially at a time when Defendants are  
 8 trying to prepare for trial. *See also* Civ. L.R. 1-4.

9 HTC's submission of the ID is also a clear violation of the Supplemental Qualcomm PO,  
 10 which requires the parties to file any Qualcomm confidential information under seal according to  
 11 the requirements of Civil Local Rule 79-5(d). *See* Supp. Qualcomm PO (Doc. 313), pp. 18-19 (¶  
 12 33). Indeed, Qualcomm's counsel – also from Cooley LLP – recently appeared at the August 13,  
 13 2013 hearing in this case, and asked the Court to strictly apply the requirements of Rule 79-5:

14 So we didn't get notice before the administrative motions were filed, so we haven't  
 15 received copies of the confidential materials that are supposed to have been looked at yet  
 16 so we have been working with counsel for HTC and TPL to look at the documents. We  
 17 would propose that we have seven days under the standard rules to lodge a declaration.  
 We filed a declaration with as much stuff as we could this morning. That would be our  
 proposed procedure.

18 Aug. 13, 2013 Tr. at 9:1-10. HTC's violation of the Qualcomm Supplemental PO is yet another  
 19 reason to strike HTC's submission of the ID and sanction HTC. *See also* Civ. L.R. 1-4.

20 **II. HTC'S LETTER SUBMISSION OF THE ID AND TELEPHONE CALLS TO THE**  
 21 **COURT'S STAFF ARE IMPROPER EX PARTE COMMUNICATIONS THAT**  
 22 **VIOLATE CIVIL LOCAL RULE .**

23 Pursuant to the Local Rules for the Northern District of California, "*ex parte*" means  
 24 contact with the Court without the advance knowledge or contemporaneous participation of all  
 25 other parties. *See* Civ. L.R. 11-4(c). An attorney or party to an action must refrain from making  
 26 telephone calls or writing letters or sending copies of communications between counsel to the  
 27 assigned Judge or the Judge's law clerks or otherwise communicating with a Judge or the Judge's  
 28 staff regarding a pending matter, without prior notice to opposing counsel. Civ. L.R. 11-4(c).



1 Here, HTC's attorneys from the Cooley law firm have engaged in improper *ex parte*  
 2 communications. Defendants were not given any notice of Mr. Weinstein's letter and attached  
 3 enclosure before Mr. Weinstein submitted those materials to this Court. *See* Otteson Decl. at ¶ 5.  
 4 In addition, Defendants learned that attorney Heidi Keefe from the law firm Cooley LLP, as well  
 5 as potentially other attorneys at Cooley, had telephone calls with the Court's courtroom deputy  
 6 regarding the issuance of the ALJ's ID without prior notice to Defendants' counsel. *See* Otteson  
 7 Decl. at ¶ 6. Such communications are prohibited under Local Rule 11-4(c). Indeed, because  
 8 Defendants' counsel was not involved in Cooley's telephone conversations with the Court's  
 9 courtroom deputy, Defendants have no idea how HTC may have characterized the ID to the  
 10 Court's staff. This type of communication goes to the heart of the policy that underlies the  
 11 prohibition against such *ex parte* contact. Such conduct by HTC is sanctionable. Civ. L.R. 1-4.

### Conclusion

12  
 13 For the foregoing reasons, Defendants respectfully ask the Court to strike HTC's improper  
 14 *ex parte* letter and enclosure, and to impose appropriate sanctions.

15  
 16 Dated: September 11, 2013

Respectfully submitted,

AGILITY IP LAW, LLP

17  
 18  
 19 By: /s/ James C. Otteson  
 James C. Otteson

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 21 Attorneys for Defendants  
 TECHNOLOGY PROPERTIES LIMITED  
 and ALLIACENSE LIMITED

22  
 23 KIRBY NOONAN LANCE & HOGE

24  
 25 By: /s/ Charles T. Hoge  
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26  
 27 Attorneys for Defendant  
 PATRIOT SCIENTIFIC CORPORATION



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 14

15  
 16 UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 17 SAN JOSE DIVISION

18 HTC CORPORATION and HTC )  
 19 AMERICA, INC., )  
 20 Plaintiffs, )  
 21 v. )  
 22 TECHNOLOGY PROPERTIES LIMITED, )  
 PATRIOT SCIENTIFIC CORPORATION )  
 23 and ALLIACENSE LIMITED, )  
 24 Defendants. )

Case No. 5:08-cv-00882 PSG

**DECLARATION OF JAMES C.  
 OTTESON IN SUPPORT OF  
 DEFENDANTS' MOTION TO STRIKE  
 HTC'S IMPROPER *EX PARTE*  
 COMMUNICATIONS, AND FOR  
 SANCTIONS**

Judge: Hon. Paul S. Grewal

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1 I, James C. Otteson, declare:

2 1. I am a partner of Agility IP Law, LLP. I am licensed to practice law before all  
3 courts in the state of California and before the United States District Court for the Northern  
4 District of California. I am an attorney of record for Defendants and Counterclaimants  
5 Technology Properties Limited, Patriot Scientific Corporation and Alliacense Limited. I submit  
6 this Declaration in support of Defendants' Emergency Motion to Strike HTC's improper *ex parte*  
7 communications. I have personal knowledge of the matters set forth herein and could and would  
8 competently testify thereto.

9 2. Attached as **Exhibit 1** is a true and correct copy of the Protective Order entered in  
10 U.S. International Trade Commission Investigation No. 337-TA-853 (the "853 Investigation").

11 3. On September 6, 2013, the ALJ in the 853 Investigation issued an Initial  
12 Determination on Violation of Section 337 and Recommended Determination on Remedy and  
13 Bond (the "ID"). Pursuant to the ITC Protective Order, the ID states "**CONTAINS**  
14 **CONFIDENTIAL BUSINESS INFORMATION SUBJECT TO PROTECTIVE ORDER**" on  
15 the header of each page of the document. The ID contains confidential business information of all  
16 of the parties to the 853 Investigation, as well as the confidential business information of third  
17 parties like Qualcomm and Texas Instruments. Neither the ALJ nor the Commission has issued an  
18 order permitting public dissemination of the ID.

19 4. Attached hereto as **Exhibit 2** is a true and correct copy of a letter from Mark R.  
20 Weinstein to the Honorable Paul S. Grewal dated September 10, 2013. Exhibit 2 does *not* include  
21 Mr. Weinstein's enclosure that accompanied the letter to the Court, which was HTC's unilaterally  
22 redacted version of the ID.

23 5. Prior to submitting its September 10, 2013 letter (Exhibit 2) to the Court (as well as  
24 HTC's redacted version of the ID), HTC did not provide TPL with any advance notice of its  
25 intention to submit the ID the Court, nor did HTC give TPL any opportunity to review HTC's  
26 proposed redactions to the ID. In addition, HTC has never provided TPL with any written  
27 communications from Texas Instruments or Qualcomm that would shed any light on the scope of

1 their alleged permission for HTC to provide the Court with their confidential business information  
2 in the ID.

3 6. In a telephone conversation with HTC's counsel Heidi Keefe of Cooley LLP on  
4 September 9, 2013, she informed me that she had had at least one telephone conversation with the  
5 Court's courtroom deputy about the issuance of the ID. Ms. Keefe also told me that, based on her  
6 conversation with the courtroom deputy, the Court was anxious to get a copy of the ID. She did  
7 not tell me whether or how she may have characterized the ID to the Court's staff during those  
8 conversations. Defendants' counsel had no prior notice that HTC's counsel would discuss the  
9 issuance of the ID with the Court's staff.

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11 I declare under penalty of perjury under the laws of the United States of America that the  
12 foregoing is true and correct. Executed this 11<sup>th</sup> day of September 2013 at Menlo Park California.

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14 /s/ James C. Otteson  
15 James C. Otteson  
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**EXHIBIT 1**

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, D.C.**

**In the Matter of**

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

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

**ORDER NO. 1: PROTECTIVE ORDER**

(August 24, 2012)

WHEREAS, documents and information may be sought, produced or exhibited by and among the parties to the above captioned proceeding, which materials relate to trade secrets or other confidential research, development or commercial information, as such terms are used in the Commission's Rules, 19 C.F.R. § 210.5;

IT IS HEREBY ORDERED THAT:

1. Confidential business information is information which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either (i) impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions; or (ii) causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such

information. The term “confidential business information” includes “proprietary information” within the meaning of section 777(b) of the Tariff Act of 1930 (19 U.S.C. § 1677f(b)).

2(a). Any information submitted, in pre hearing discovery or in a pleading, motion, or response to a motion either voluntarily or pursuant to order, in this investigation, which is asserted by a supplier to contain or constitute confidential business information shall be so designated by such supplier in writing, or orally at a deposition, conference or hearing, and shall be segregated from other information being submitted. Documents shall be clearly and prominently marked on their face with the legend: "CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER," or a comparable notice. Such information, whether submitted in writing or in oral testimony, shall be treated in accordance with the terms of this protective order.

(b). The Administrative Law Judge or the Commission may determine that information alleged to be confidential is not confidential, or that its disclosure is necessary for the proper disposition of the proceeding, before, during or after the close of a hearing herein. If such a determination is made by the Administrative Law Judge or the Commission, opportunity shall be provided to the supplier of such information to argue its confidentiality prior to the time of such ruling.

3. In the absence of written permission from the supplier or an order by the Commission or the Administrative Law Judge, any confidential documents or business information submitted in accordance with the provisions of paragraph 2 above shall not be disclosed to any person other than: (i) outside counsel for parties to this investigation, including necessary secretarial and support personnel assisting such counsel; (ii) qualified persons taking testimony involving such documents or information and necessary stenographic and clerical personnel thereof; (iii)

technical experts and their staff who are employed for the purposes of this litigation (unless they are otherwise employed by, consultants to, or otherwise affiliated with a non-governmental party, or are employees of any domestic or foreign manufacturer, wholesaler, retailer, or distributor of the products, devices or component parts which are the subject of this investigation); (iv) the Commission, the Administrative Law Judge, the Commission staff, and personnel of any governmental agency as authorized by the Commission; and (v) the Commission, its employees, and contract personnel who are acting in the capacity of Commission employees, for developing or maintaining the records of this investigation or related proceedings for which this information is submitted, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.<sup>1</sup>

4. Confidential business information submitted in accordance with the provisions of paragraph 2 above shall not be made available to any person designated in paragraph 3(i)<sup>2</sup> and (iii) unless he or she shall have first read this order and shall have agreed, by letter filed with the Secretary of this Commission: (i) to be bound by the terms thereof; (ii) not to reveal such confidential business information to anyone other than another person designated in paragraph 3; and (iii) to utilize such confidential business information solely for purposes of this investigation.

5. If the Commission or the Administrative Law Judge orders, or if the supplier and all parties to the investigation agree, that access to, or dissemination of information submitted as confidential business information shall be made to persons not included in paragraph 3 above, such matter shall only be accessible to, or disseminated to, such persons based upon the conditions pertaining to, and obligations arising from this order, and such persons shall be

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<sup>1</sup> See Commission Administrative Order 97-06 (Feb. 4, 1997).

<sup>2</sup> Necessary secretarial and support personnel assisting counsel need not sign onto the protective order themselves because they are covered by counsel's signing onto the protective order.



considered subject to it, unless the Commission or the Administrative Law Judge finds that the information is not confidential business information as defined in paragraph 1 thereof.

6. Any confidential business information submitted to the Commission or the Administrative Law Judge in connection with a motion or other proceeding within the purview of this investigation shall be submitted under seal pursuant to paragraph 2 above. Any portion of a transcript in connection with this investigation containing any confidential business information submitted pursuant to paragraph 2 above shall be bound separately and filed under seal. When any confidential business information submitted in accordance with paragraph 2 above is included in an authorized transcript of a deposition or exhibits thereto, arrangements shall be made with the court reporter taking the deposition to bind such confidential portions and separately label them "CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER." Before a court reporter or translator receives any such information, he or she shall have first read this order and shall have agreed in writing to be bound by the terms thereof. Alternatively, he or she shall sign the agreement included as Attachment A hereto. Copies of each such signed agreement shall be provided to the supplier of such confidential business information and the Secretary of the Commission.

7. The restrictions upon, and obligations accruing to, persons who become subject to this order shall not apply to any information submitted in accordance with paragraph 2 above to which the person asserting the confidential status thereof agrees in writing, or the Commission or the Administrative Law Judge rules, after an opportunity for hearing, was publicly known at the time it was supplied to the receiving party or has since become publicly known through no fault of the receiving party.

8. The Commission, the Administrative Law Judge, and the Commission investigative attorney acknowledge that any document or information submitted as confidential business information pursuant to paragraph 2 above is to be treated as such within the meaning of 5 U.S.C. § 552(b)(4) and 18 U.S.C. § 1905, subject to a contrary ruling, after hearing, by the Commission or its Freedom of Information Act Officer, or the Administrative Law Judge. When such information is made part of a pleading or is offered into the evidentiary record, the data set forth in 19 C.F.R. § 201.6 must be provided except during the time that the proceeding is pending before the Administrative Law Judge. During that time, the party offering the confidential business information must, upon request, provide a statement as to the claimed basis for its confidentiality.

9. Unless a designation of confidentiality has been withdrawn, or a determination has been made by the Commission or the Administrative Law Judge that information designated as confidential, is no longer confidential, the Commission, the Administrative Law Judge, and the Commission investigative attorney shall take all necessary and proper steps to preserve the confidentiality of, and to protect each supplier's rights with respect to, any confidential business information designated by the supplier in accordance with paragraph 2 above, including, without limitation: (a) notifying the supplier promptly of (i) any inquiry or request by anyone for the substance of or access to such confidential business information, other than those authorized pursuant to this order, under the Freedom of Information Act, as amended (5 U.S.C. § 552) and (ii) any proposal to redesignate or make public any such confidential business information; and (b) providing the supplier at least seven days after receipt of such inquiry or request within which to take action before the Commission, its Freedom of Information Act Officer, or the

Administrative Law Judge, or otherwise to preserve the confidentiality of and to protect its rights in, and to, such confidential business information.

10. If while an investigation is before the Administrative Law Judge, a party to this order who is to be a recipient of any business information designated as confidential and submitted in accordance with paragraph 2 disagrees with respect to such a designation, in full or in part, it shall notify the supplier in writing, and they will thereupon confer as to the status of the subject information proffered within the context of this order. If prior to, or at the time of such a conference, the supplier withdraws its designation of such information as being subject to this order, but nonetheless submits such information for purposes of the investigation; such supplier shall express the withdrawal, in writing, and serve such withdrawal upon all parties and the Administrative Law Judge. If the recipient and supplier are unable to concur upon the status of the subject information submitted as confidential business information within ten days from the date of notification of such disagreement, any party to this order may raise the issue of the designation of such a status to the Administrative Law Judge who will rule upon the matter. The Administrative Law Judge may sua sponte question the designation of the confidential status of any information and, after opportunity for hearing, may remove the confidentiality designation.

11. No less than 10 days (or any other period of time designated by the Administrative Law Judge) prior to the initial disclosure to a proposed expert of any confidential information submitted in accordance with paragraph 2, the party proposing to use such expert shall submit in writing the name of such proposed expert and his or her educational and detailed employment history to the supplier. If the supplier objects to the disclosure of such confidential business information to such proposed expert as inconsistent with the language or intent of this order or on other grounds, it shall notify the recipient in writing of its objection and the grounds therefore

prior to the initial disclosure. If the dispute is not resolved on an informal basis within ten days of receipt of such notice of objections, the supplier shall submit immediately each objection to the Administrative Law Judge for a ruling. If the investigation is before the Commission the matter shall be submitted to the Commission for resolution. The submission of such confidential business information to such proposed expert shall be withheld pending the ruling of the Commission or the Administrative Law Judge. The terms of this paragraph shall be inapplicable to experts within the Commission or to experts from other governmental agencies who are consulted with or used by the Commission.

12. If confidential business information submitted in accordance with paragraph 2 is disclosed to any person other than in the manner authorized by this protective order, the party responsible for the disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of the supplier and the Administrative Law Judge and, without prejudice to other rights and remedies of the supplier, make every effort to prevent further disclosure by it or by the person who was the recipient of such information.

13. Nothing in this order shall abridge the right of any person to seek judicial review or to pursue other appropriate judicial action with respect to any ruling made by the Commission, its Freedom of Information Act Officer, or the Administrative Law Judge concerning the issue of the status of confidential business information.

14. Upon final termination of this investigation, each recipient of confidential business information that is subject to this order shall assemble and return to the supplier all items containing such information submitted in accordance with paragraph 2 above, including all copies of such matter which may have been made. Alternatively, the parties subject to this order may, with the written consent of the supplier, destroy all items containing confidential business

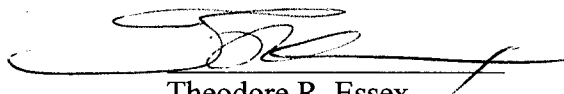
information and certify to the supplier (or his counsel) that such destruction has taken place. This paragraph shall not apply to the Commission, including its investigative attorney, and the Administrative Law Judge, which shall retain such material pursuant to statutory requirements and for other recordkeeping purposes, but may destroy those additional copies in its possession which it regards as surplusage.

Notwithstanding the above paragraph, confidential business information may be transmitted to a district court pursuant to Commission Rule 210.5(c).

15. If any confidential business information which is supplied in accordance with paragraph 2 above is supplied by a nonparty to this investigation, such a nonparty shall be considered a "supplier" as that term is used in the context of this order.

16. Each nonparty supplier shall be provided a copy of this order by the party seeking information from said supplier.

17. The Secretary shall serve a copy of this order upon all parties.

A handwritten signature in black ink, appearing to read 'Theodore R. Essex', is written over a horizontal line.

Theodore R. Essex  
Administrative Law Judge

Attachment A

NONDISCLOSURE AGREEMENT FOR REPORTER/STENOGRAPHER/TRANSLATOR

I, \_\_\_\_\_, do solemnly swear or affirm that I will not divulge any information communicated to me in any confidential portion of the investigation or hearing in the matter of *Certain Wireless Consumer Electronics Devices and Components Thereof*, Investigation No. 337-TA-853, except as permitted in the protective order issued in this case. I will not directly or indirectly use, or allow the use of such information for any purpose other than that directly associated with my official duties in this case.

Further, I will not by direct action, discussion, recommendation, or suggestion to any person reveal the nature or content of any information communicated during any confidential portion of the investigation or hearing in this case.

I also affirm that I do not hold any position or official relationship with any of the participants in said investigation.

I am aware that the unauthorized use or conveyance of information as specified above is a violation of the Federal Criminal Code and punishable by a fine of up to \$10,000, imprisonment of up to ten (10) years, or both.

Signed \_\_\_\_\_

Dated \_\_\_\_\_

Firm or affiliation \_\_\_\_\_

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

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

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon, the Commission Investigative Attorney, Matthew N. Bathon, Esq., and the following parties as indicated on **August 24, 2012**.



Lisa R. Barton, Acting Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

**On Behalf of Complainants Technology Properties Limited  
LLC, Phoenix Digital Solutions LLC and Patriot Scientific  
Corporation :**

James C. Otteson, Esq.  
**AGILITY IP LAW, LLP**  
149 Commonwealth Drive  
Menlo Park, CA 94025

- ( ) Via Hand Delivery
- ( ) Via Overnight Delivery
- (  ) Via First Class Mail
- ( ) Other: \_\_\_\_\_

**On Behalf of Respondents Acer Inc., Acer America  
Corporation, Amazon.com Inc. and Novatel, Inc.:**

Eric C. Rusnak, Esq.  
**K&L GATES LLP**  
1601 K Street, NW  
Washington, DC 20006-1600

- ( ) Via Hand Delivery
- ( ) Via Overnight Delivery
- (  ) Via First Class Mail
- ( ) Other: \_\_\_\_\_

**On Behalf of Respondents Garmin Ltd., Garmin  
International, Inc. and Garmin USA, Inc. :**

Louis S. Mastriani, Esq.  
**ADDUCI, MASTRIANI & SCHAUMBERG LLP**  
1133 Connecticut Avenue, NW, 12<sup>th</sup> Floor  
Washington, DC 20036

- ( ) Via Hand Delivery
- ( ) Via Overnight Delivery
- (  ) Via First Class Mail
- ( ) Other: \_\_\_\_\_

**On Behalf of Respondent Barnes & Noble, Inc.:**

Paul F. Brinkman, Esq.  
**QUINN EMANUEL URQUHART & SULLIVAN LLP**  
1299 Pennsylvania Avenue NW, Suite 825  
Washington, DC 20004

- ( ) Via Hand Delivery
- ( ) Via Overnight Delivery
- (  ) Via First Class Mail
- ( ) Other: \_\_\_\_\_



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

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

Certificate of Service – Page 2

**On Behalf of Respondent Huawei Technologies Co., Ltd.:**

Timothy C. Bickham, Esq.  
**STEPTOE & JOHNSON LLP**  
1330 Connecticut Avenue, N.W.  
Washington, DC 20036

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

**On Behalf of ZTE Corporation and ZTE (USA) Inc.:**

Jay H. Reiziss, Esq.  
**BRINKS, HOFER, GILSON & LIONE**  
1850 K Street, NW  
Washington, DC 20006-2219

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

**Respondents:**

HTC Corporation  
23 Xinghua Road  
Taoyuan 330, Taiwan

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

HTC America  
13920 SE Eastgate Way, Suite 200  
Bellevue, WA 98005

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

Huawei North America  
5700 Tennyson Parkway, Suite 500  
Plano, TX 75024

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

Kyocera Corporation  
6 Takeda Tobadono-cho, Fushmi-ku  
Kyoto 612-8501, Japan

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

Kyocera Communications, Inc.  
9520 Towne Centre Drive  
San Diego, CA 92121

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

LG Electronics, Inc.  
LG Twin Towers, 20 Yeouido-dong  
Yeongdeungpo-gu  
Seoul 150-721, Republic of Korea

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

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

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

Certificate of Service – Page 3

**Respondents (cont.):**

LG Electronics U.S.A., Inc.  
1000 Sylvan Avenue  
Englewood Cliffs, NJ 07632

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

Nintendo Co., Ltd.  
11-1 Kamitoba Hokotate-Cho, Minami-Ku  
Kyoto 601-8501, Japan

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

Nintendo of America, Inc.  
4600 150<sup>th</sup> Avenue, NE  
Redmond, WA 98052

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

Samsung Electronics Co., Ltd.  
Samsung Main Building  
250, Taepyeongno 2-ga, Jung-gu  
Seoul 100-742, Republic of Korea

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

Samsung Electronics America, Inc.  
105 Challenger Road  
Ridgefield Park, NJ 07660

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

Sierra Wireless, Inc.  
13811 Wireless Way, Richmond  
British Columbia V6V 3A4  
Canada

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

Sierra Wireless America, Inc.  
2200 Faraday Avenue, Suite 150  
Carlsbad, CA 92008

- Via Hand Delivery
- Via Overnight Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

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

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

Certificate of Service – Page 4

**Public:**

Heather Hall  
**LEXIS-NEXIS**  
9443 Springboro Pike  
Miamisburg, OH 45342

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- ( ) Via Overnight Delivery
- (  ) Via First Class Mail
- ( ) Other: \_\_\_\_\_

Kenneth Clair  
**THOMSON WEST**  
1100 13<sup>th</sup> Street, NW, Suite 200  
Washington, DC 20005

- ( ) Via Hand Delivery
- ( ) Via Overnight Delivery
- (  ) Via First Class Mail
- ( ) Other: \_\_\_\_\_

# **EXHIBIT 2**



Mark R. Weinstein  
T: +1 650 843 5007  
mweinstein@cooley.com

**CONFIDENTIAL**  
BY HAND DELIVERY

September 10, 2013

The Honorable Paul S. Grewal  
United States District Court  
Northern District of California  
280 South First Street, Courtroom 5, 4th Floor  
San Jose, CA 95113

**RE: HTC Corp. v. Technology Properties Limited, et al., Case No. 5:08-cv-00882 PSG**

Dear Judge Grewal:

Pursuant to Federal Rule of Evidence 201, plaintiffs HTC Corporation and HTC America, Inc. (collectively "HTC") respectfully submit a copy of the "Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond," issued on September 6, 2013 by E. James Gildea, Administrative Law Judge, International Trade Commission ("ITC ID"). On September 9, 2013, HTC received a copy of the ITC ID, a redacted copy of which is enclosed herewith.

Under the procedures governing the dissemination of the Initial Determination, the parties to the ITC proceeding are provided a period of time to identify portions of the decision that contain their alleged Confidential Business Information ("CBI"). HTC has nonetheless obtained permission from Qualcomm Inc. and Texas Instruments, Inc. to not redact their CBI from the enclosed Initial Determination, provided that it is furnished to this Court on a confidential basis and not filed publicly. The redactions in the enclosed decision, therefore, reflect the alleged CBI of other chip suppliers and other unrelated respondents in the ITC proceeding. HTC will file a public version of the Initial Determination with this Court after the procedures at the ITC have been satisfied.

Sincerely,

A handwritten signature in cursive script that reads "Mark R. Weinstein".

Mark R. Weinstein

Enclosure

cc: James C. Otteson  
Charles T. Hoge  
Michael Bettinger

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