UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of **CERTAIN IOT DEVICES AND COMPONENTS THEREOF (IOT, THE INTERNET OF THINGS) – WEB APPLICATIONS DISPLAYED ON A WEB BROWSER**	**Inv. No. 337-TA-1094**

ORDER NO. 7: GRANTING RESPONDENTS' EMERGENCY MOTION TO STAY THE PROCEDURAL SCHEDULE PENDING RESOLUTION OF MOTION DOCKET NO. 1094-001

(February 6, 2018)

On January 29, 2018, Respondents Apple Inc., Facebook, Inc., Samsung Electronics America, Inc., and Samsung Electronics Co., Ltd. (collectively, "Respondents") moved to stay (1094-002) these proceedings pending disposition of their Emergency Motion to Terminate the Investigation. On February 5, 2018, Complainants opposed the motion. The Commission Investigative Staff filed a response in support of Respondents' motion.

Respondents explain that the only patent asserted in this investigation – U.S. Patent No. 7,930,340 ("the '340 patent") – will expire on March 5, 2018. (Mot. at 1.) They assert that pursuant to the schedule set by Order No. 3, "there is no scenario under which a remedy can be issued in this investigation prior to the patent's expiration." (*Id.* (noting that under the proposed 100-day schedule, there will not be hearing on domestic industry until after the patent has expired and that the domestic industry requirement cannot be satisfied if the patent is expired).) Respondents submit that a stay pending resolution of their dispositive motion would conserve the resources of the parties and the Commission. (*Id.*) In particular, they contend that "proceeding with discovery and all of the other activities set forth in the 100-day schedule of Order No. 3

would be an enormous waste of resources . . . given the '340 patent's imminent expiration in 35 days." (Mem. at 2.)

Complainants state:

> Complainants hereby oppose Respondents' Apple Inc., Facebook, Inc., Samsung Electronics America, Inc., and Samsung Electronics Co., Ltd. ("Respondents")'s Emergency Motion to stay the procedural schedule pending disposition of Respondents' Emergency Motion to Terminate the Investigation for **NO** good cause on the basis that "there is no scenario under which a remedy can be issued in this investigation prior to the patent's expiration" and false factors propounded by Respondents, because (1) no discovery is required to prove an obvious result, where the infringement and the existence of the domestic industry are as *patently* and *(prima facie)* obvious as their antitrust impact for the same finding of the Court in *U.S. v Microsoft*, as asking to litigate issues where the answers are obvious, consistent with the ruling in *U.S. v. Microsoft,* is a waste, fraud and abuse. **The Commission can and should provide relief by removing all interim superfluous steps that are delay tactics by Respondents and going straight to Markman Hearing on February 9, 2018**. The ITC must carry out its mission to protect the public from infringing imports that are not licensed [Or 'Infringently' Licensed.']. There is no reason to wait 12 months, as Staff has proposed. [Why.]. The ITC and Staff are not to act as attorneys for Respondents. (2) A stay will ***not*** simplify the issues and hearing of the case; (3) there would be undue prejudice and clear tactical disadvantage to Complainants by granting Respondents Motion to Stay the Procedural Schedule in aiding and abetting antitrust violations by Respondents and civil rights' discrimination against a minority woman-owned small business that has been abused by the Government and Respondents; and (4) a stay would ***not*** be an efficient use of Commission resources. Each of the Respondents' falsely propounded factors compels, ***not*** a stay as falsely propounded by Respondents, but the Commission and the CALJ **providing immediate relief by removing all interim superfluous steps that are delay tactics by Respondents and going straight to Markman Hearing on February 9, 2018. Furthermore, Respondents seeking a limited Stay of Discovery is *moot*, given that Discovery is not needed** to prove an obvious result, where the infringement and the existence of the domestic industry are as *patently* and *(prima facie)* obvious as their antitrust impact for the same finding of the Court in *U.S. v Microsoft*.

(Opp. at 1-2.) Complainants further argue:

> While it is not clear the '340 patent expires on March 5, 2018, and particularly so, given all the *(extrinsic and intrinsic)* fraud(s), obstruction(s) of justice, antitrust violations, civil rights' violations and civil RICO that has gone on by multiple players, including Judges, lawyers, PTAB Judges, USPTO Re-Exam Examiners, and multiple large enterprises, it is not true that it will expire "well before any

> relief could be granted"; where, equitable legal and factual finding and conclusion is swiftly made in the public's interest upon the obvious domestic (and global) industry and Government use of the patent at issue. Strict adherence to the recently issued Procedural Schedule (Order No. 3), propounding the '340 patent will expire nine days before the start of the evidentiary hearing on the domestic industry issue is obviously moot since the Federal Court found anti-trust predicated upon the patent at issue impinging domestic industry; warranting, immediate Markman Hearing [predicated on the patent's obvious universal infringements continuing by import by Respondents.] for timely determination by the Commission. The overwhelming impact of strictly requiring evidentiary hearing on domestic industry issue with an ID to issue within 100 days of institution (USITC INV. NO. 337-TA-1094, Notice of Investigation) in the instant case would be; **a)** oppressive, respecting the obvious court and government actions predicated upon the infringed patent; **b)** compromising, respecting the public interest objective of the Commission; and, **c)** chilling regarding the public's confidence and genuine expectation that a complaint filed will be heard instead of technically quashed. Respondents allege there can be no domestic industry in an expired patent, therefore it makes sense to continue this investigation and proceed to Markman Hearing immediately and force the parties and Commission to equitably and expeditiously expend the necessary resources adjudicating the imported patent infringements, the issue [for which there is no defense for the infringement imports into the United States.] in the public's interest, before the case allegedly becomes moot on March 5, 2018, when the patent allegedly expires.

(*Id.* at 3-4.) A copy of Complainants' entire opposition is attached hereto as Exhibit A.

Staff contends that it "is not aware of any realistic procedure, or procedural schedule, for this investigation under which the Commission could find a violation and issue relief for the alleged violations pled in Complainants' Amended Complaint, and which were instituted by Notice." (Staff Resp. at 10.) Thus, in Staff's view, "it would be an inefficient use of Commission resources to make an early determination on the domestic industry requirement, let alone attempt to fit all of the necessary events in a procedural schedule that need to be decided under Section 337 (generally requiring 16 months), before March 5, 2018." (*Id.* at 11.)

There can be no dispute that the expiration date for the '340 patent is imminent. The '340 patent issued from a continuation-in-part application that claims priority to

three earlier filed non-provisional patent applications. The earliest of these applications was filed on August 5, 1996. (*See* Ex. B (U.S. Patent No. 7,930,340).) Under 35 U.S.C. § 154(a)(2), the '340 patent is entitled to a 20-year term. The patent's 20-year term was extended by 577 days under 35 U.S.C. § 154(b), resulting in an expiration date of March 5, 2018. Furthermore, as Staff correctly noted in its response:

> [T]he procedure for determining a patent term adjustment ("PTA") is set forth under 35 U.S.C. §§ 154(b)(3), (4), and such adjustments are determined by the U.S. Patent and Trademark Office, or can be appealed to the United States District Court for the Eastern District of Virginia. Accordingly, the Commission does not have the authority to alter the March 5, 2018 expiration date for the '340 patent.

(Staff Resp. at 4 n.1.)

Given the structure of section 337 investigations, there is not sufficient time for the undersigned to issue an initial determination on violation, let alone an early determination on domestic industry before the March 5, 2018 expiration of the '340 patent. Even if the undersigned had all of the necessary evidence before him to issue a final initial determination, the Commission would still be unable to reach a final determination or issue any relief before the March 5, 2018 expiration date. The undersigned therefore agrees with Respondents and Staff that a stay pending resolution of Respondents' dispositive motion will conserve the resources of the Commission and the private parties.[1]

[1] The Commission has set forth the following factors to address in a determination to stay an investigation: "(1) the state of discovery and the hearing date; (2) whether a stay will simplify the issues and hearing of the case; (3) the undue prejudice or clear tactical disadvantage to any party; (4) the stage of the PTO proceedings; and (5) the efficient use of Commission resources." *Certain Semiconductor Chips with Minimized Chip Package Size and Prods. Containing Same*, Inv. No. 337-TA-605, Comm'n Op., 2008 ITC LEXIS 888, at *4 (May 27, 2008). Given the imminent expiration of the '340 patent, the undersigned does not believe it necessary to apply these factors to the circumstances of this Investigation. Even if they were applied, the first and second factors weigh in favor of a stay because the expiration date for the asserted patent moots the need for discovery and a hearing. In addition, the fifth factors – conservation of Commission resources – also weighs in favor of a stay.

Accordingly, Respondents' motion (1094-002) is hereby granted and this Investigation is stayed pending resolution of Respondents' Emergency Motion to Terminate the Investigation Pursuant to Commission Rule 210.21(A) (Motion No. 1094-001).

SO ORDERED.

Charles E. Bullock
Chief Administrative Law Judge

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