

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN AUDIO PROCESSING
HARDWARE AND SOFTWARE AND
PRODUCTS CONTAINING SAME**

Inv. No. 337-TA-949

**ORDER NO. 17: (1) DENYING RESPONDENTS' MOTION FOR STAY PENDING
APPEAL; AND (2) ORDERING RESPONDENTS' TO SHOW CAUSE WHY THEY
SHOULD NOT BE SACTIONED FOR FILING THE MOTION FOR STAY**

(August 27, 2015)

On August 6, 2015, Respondents Hewlett-Packard Company, Dell Inc., Toshiba Corp., Toshiba America Information Systems, Inc., Lenovo Holding Co., Inc., Lenovo (United States) Inc., Acer, Inc., Acer America Corp., ASUSTeK Computer, Inc., and ASUS Computer International ("Respondents") filed a motion seeking a stay of this investigation pending appeal to the U.S. Court of Appeals for the Federal Circuit of the Commission's July 13, 2015 Notice of Commission Determination Not to Review an Initial Determination finding that Complainant Andrea Electronics Corp. ("Andrea") has standing. (Motion Docket No. 949-018) On August 17, 2015, both Andrea and the Commission Investigative Staff filed responses opposing Respondents' request for a stay.

Motion For A Stay

The Commission placed this investigation in the Pilot Program when it instituted the investigation on March 12, 2015. 80 Fed. Reg. 14,159 (Mar. 18, 2015) (notice of investigation). In its notice of investigation, the Commission directed me to "hold an early evidentiary hearing, find facts, and issue an early decision, as to whether the complainant has standing to assert each of the asserted patents." *Id.* at 14,160. The Commission explained that "[a]ny such decision shall be in the form of an initial determination (ID)" and that "[t]he ID will become the Commission's final

determination 30 days after the date of service of the ID unless the Commission determines to review the ID.” *Id.* On April 30, 2015, I held an evidentiary hearing on the standing issue and on June 11, 2015, I issued an initial determination finding that Andrea has standing to assert the patents-in-suit. *See* Order No. 8 (June 11, 2015). The Commission subsequently determined not to review the initial determination. *See* Comm’n Notice (July 13, 2015).

In the notice of investigation, the Commission explicitly stated that “[t]he issuance of an early ID finding complainant does not have standing to assert the asserted patents shall stay the investigation unless the Commission orders otherwise; *any other decision shall not stay the investigation or delay the issuance of a final ID covering the other issues of the investigation.*” 80 Fed. Reg. at 14,160 (emphasis added). Accordingly, On August 7, 2015, I issued Order No. 16 setting a new procedural schedule that would facilitate moving the investigation to an evidentiary hearing on the merits. However, Respondents ignored the Commission’s clear instructions that an initial determination finding that standing exists “shall not stay the investigation[,]” and filed a motion for a stay pending the outcome of their attempt to appeal the Commission’s standing determination to the Federal Circuit. In light of the Commission’s clear and unequivocal directive in the Notice of Investigation, Respondents’ motion is denied.

Even if the Commission had not provided such a clear directive, I would still deny Respondents’ motion for a stay because the case law upon which Respondents rely in support of their motion is inapposite, and the arguments Respondents present are contrary to precedent established by the Commission and by the Court of Appeals for the Federal Circuit.

The line of authorities upon which Respondents rely pertains to investigations in which there is a final determination that a violation of Section 337 exists and the Commission has already

issued one or more remedial orders. The question then presented to the Commission is whether to stay the effective date of those remedial orders pending judicial review of the final determination on violation. *See Certain Digital Models, Digital Data, and Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances, the Appliances Made Therefrom, and Methods of Making Same*, Inv. No. 337-TA-833, Comm'n Op. at 4-5 (June 11, 2014); *Certain Digital Television Products and Certain Products Containing Same and Methods of Using Same*, Inv. No. 337-TA-617, Comm'n Op. at 3-4 (Aug. 21, 2009); *Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same*, Inv. No. 337-TA-605, Comm'n Op. at 3-4 (Jul. 29, 2009); *Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*, Inv. No. 337-TA-380, Comm'n Op. at 9-10 (Apr. 24, 1997). In such cases, the Commission has applied the four-prong test used by courts in determining whether to grant a preliminary injunction, namely: (1) whether the movant is likely to succeed on the merits of the appeal; (2) whether the movant will be irreparably harmed absent a stay; (3) whether the issuance of a stay would substantially harm other parties; and (4) whether the public interest favors the issuance of a stay. *Digital Models*, Comm'n Op. at 4-5; *Digital Televisions*, Comm'n Op. at 3-4; *Semiconductor Chips with Minimized Chip Package Size II*, Comm'n Op. at 3-4; *Agricultural Tractors*, Comm'n Op. at 9-10.

Respondents' motion is based entirely on an analysis of this four-prong test. (Motion at 5-13.) Here, however, there is no final determination on violation, and no remedial order has issued. Thus, the law upon which Respondents rely is not applicable to the facts of this case.

Moreover, the Federal Circuit's authority to review administrative decisions excluding or refusing to exclude articles from entry is limited to "the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337

of the Tariff Act of 1930 (19 U.S.C. 1337).” 28 U.S.C. § 1295(a)(6); *see also* 5 U.S.C. § 704 (“final agency action”). The “final determinations” that may be appealed to the Federal Circuit are specified in section 1337(c), which states in relevant part: “Any person adversely affected by a final determination of the Commission under subsection (d), (e), (f), or (g) of this section may appeal such determination, within 60 days after the determination becomes final, to the United States Court of Appeals for the Federal Circuit for review in accordance with chapter 7 of Title 5.” 19 U.S.C. § 1337(c). Subsections (d), (e), (f), and (g) provide for permanent exclusion orders, temporary relief orders, cease and desist orders, and orders granting relief when a respondent defaults, respectively. By its terms, the Federal Circuit has held that section 1337(c) requires that the Commission render “a final administrative decision on the merits, excluding or refusing to exclude articles from entry.” *Block v. U.S. Int’l Trade Comm’n*, 777 F.2d 1568, 1571 (Fed. Cir. 1985) (quoting *Import Motors Ltd. v. U.S. Int’l Trade Comm’n*, 530 F.2d 940, 944 (C.C.P.A. 1976)); *see also A&J Mfg., LLC v. U.S. Int’l Trade Comm’n*, No. 2014-1742, 584 Fed. Appx. 933, 934 (Fed. Cir. Nov. 25, 2014). There can be no dispute that the Commission’s determination appealed by Respondents was not made under subsections (d), (e), (f), or (g) of section 1337. The Commission did not issue an order excluding or refusing to exclude articles from entry into the United States. The Commission merely adopted my finding that Andrea has standing to assert the patents in the underlying investigation. Further proceedings are ongoing in this investigation concerning all of the asserted patents and accused articles, which may or may not lead to a future exclusion order. *See A&J Mfg.*, 584 Fed. Appx. at 934. Thus, the Commission’s July 13, 2015 determination is not a “final determination” under section 1337(c) and is not appealable to the

Federal Circuit. Accordingly, Respondents' request for a stay is baseless and Respondents' argument in support of a stay collapses under the weight of the law.

On August 18, 2015, Respondents filed a motion with the Court of Appeals for the Federal Circuit asking for the exact same relief they seek from me -- a stay of this investigation.

Respondents filed their motion at the Federal Circuit one day after the deadline for responses to the motion stay, effectively giving me no opportunity to rule on their motion. In Respondents' motion to the Federal Circuit, Respondents state:

Pursuant to Federal Circuit Rule 18(d), Appellants' initial motion for a stay pending review was filed at the Commission on August 6, 2015, and remains pending. Appellants further state that it is not practicable to await ruling by the Commission on the initial motion in view of the harm that further delay would impose on Appellants, as described in greater detail below at Section VI.B.

Respondents say it is not practicable to await my ruling on their motion to stay because of the alleged harm that further delay would cause. That alleged harm, however, could not have changed in the 10 days since Respondents filed their motion to stay at the Commission. Thus, in light of Respondents' explanation, it is unclear why Respondents filed their motion to stay at the Commission in the first instance and why Respondents waited until after responses were due to their motion to stay before filing the same motion at the Federal Circuit. It would appear that the only reason for filing the motion to stay at the Commission was to delay these proceedings and/or cause Andrea and the Staff the unnecessary added expense of responding to the motion to stay.

Order to Show Cause

Commission Rule 210.4(c) states in relevant part:

By presenting to the presiding administrative law judge or the Commission (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party or proposed party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances—

(1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the investigation or related proceeding;

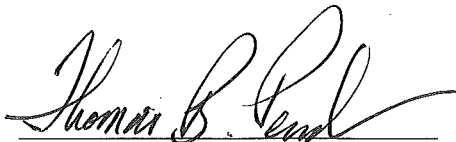
(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

19 C.F.R. 210.4(c). Commission Rule 210.4(d) states in relevant part:

If, after notice and a reasonable opportunity to respond (see paragraphs (d)(1) (i) and (ii) of this section and § 210.25), the presiding administrative law judge or the Commission determines that paragraph (c) of this section has been violated, the administrative law judge or the Commission may, subject to the conditions stated below and in § 210.25, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated paragraph (c) or are responsible for the violation. A representation need not be frivolous in its entirety in order for the administrative law judge or the Commission to determine that paragraph (c) has been violated. If any portion of a representation is found to be false, frivolous, misleading, or otherwise in violation of paragraph (c), a sanction may be imposed. In determining whether paragraph (c) has been violated, the administrative law judge or the Commission will consider whether the representation or disputed portion thereof was objectively reasonable under the circumstances.

19 C.F.R. 210.4(d). In light of what appears to be the frivolous nature of Respondents' motion for a stay, I herewith Order Respondents to show cause why they (and their attorneys) should not be sanctioned pursuant to Commission Rule 210.4 for filing a motion that appears to have been filed for no other purpose than to cause Complainant and the Staff needless expense and/or to cause unnecessary delay in these proceedings. Respondents shall file their response to this Order to show cause by COB on September 3, 2015. Andrea and the Staff may file a reply to Respondents' response by COB on September 11, 2015.

SO ORDERED.



Thomas B. Pender
Administrative Law Judge

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SAME

337-TA-949

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 17** has been served upon the **Commission Investigative Attorney, Lisa Murray, Esq.**, and the following parties as indicated on _____.

AUG 28 2015



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