

PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

**CERTAIN ELECTRONIC DEVICES,
INCLUDING WIRELESS COMMUNICATION
DEVICES, COMPUTERS, TABLET
COMPUTERS, DIGITAL MEDIA PLAYERS,
AND CAMERAS**

Inv. No. 337-TA-952

Order No. 21

On June 30, 2015, complainants Ericsson Inc. and Telefonaktiebolaget LM Ericsson (collectively, “Ericsson”) filed a motion to compel respondent Apple, Inc. (“Apple”) to supplement its responses and document production with respect to certain categories of documents. Motion Docket No. 952-34.

On July 10, 2015, respondent Apple, Inc. (“Apple”) filed a response opposing the pending motion. No other response was filed.¹

Ericsson requests Apple be compelled to supplement its responses and document production with respect to the following categories:

- Apple’s failure to provide an answer regarding the status of products under development and selection of components therein (Ericsson Interrogatory No. 111) (Mem. at Section III.B)
- Apple’s failure to provide answers and produce documents regarding battery functionality in the Accused Products (Ericsson Interrogatory Nos.

¹ On July 15, 2015, Ericsson filed a motion for leave to file a reply. Motion Docket No. 952-40. On July 21, 2015, Apple filed a response opposing the motion. No other response was filed. Motion No. 952-40 for leave is granted.

39–45 and 110, and Ericsson Request for Production Nos. 86–95 and 193) (Mem. at Section III.C)

- Apple’s failure to produce “Product Documents” and “Procedures” expressly referenced in the produced bills of materials for the Accused Products (Ericsson Request for Production No. 15) (Mem. at Section III.D)
- Apple’s failure to provide answers and produce documents regarding touch screen functionality for the Accused Products (Ericsson Interrogatory No. 109, and Ericsson Request for Production Nos. 13 and 74–78) (Mem. at Section III.E)
- Apple’s failure to provide answers and produce documents relating to “Wi-Fi plus Cellular” functionality of the Accused products (Ericsson Interrogatory No. 53 and Ericsson Request for Production Nos. 110 and 111) (Mem. at Section III.F)
- Apple’s failure to produce organizational charts (Ericsson Request for Production No. 10) (Mem. at Section III.G)

Mot. at 1-2.

On August 18, 2015, Ericsson filed a letter to the undersigned stating that the issues addressed in sections III.C, III.D, III.E, and III.G of the pending motion are moot. *See* EDIS Doc. ID No. 563318 (Letter to Administrative Law Judge Shaw on Behalf of Complainants Regarding Complainants’ Pending Motion to Compel Answers to Interrogatories and Production of Documents).² Thus, discovery concerning Apple’s products under development (Mem. at Section III.B), and the alleged “Wi-Fi plus Cellular” functionality (Mem. at Section III.F), remain in dispute.

Ericsson argues:

The discovery at issue has been the subject of extended correspondence and repeated meet and confers between the parties, but has remained unresolved, despite Ericsson’s extensive good faith efforts. Up to this date,

² On August 17, 2015, the administrative law judge’s attorney advisor contacted the parties requesting status update of the disputed issues. In the future, the parties should inform the undersigned when certain disputed issues have been resolved.

Ericsson has in good faith accepted Apple's representations that it will supplement its deficient responses to a number of discovery requests. However, Apple's continued delaying tactics, including failing to respond to Ericsson correspondence requesting a date certain by which Apple will supplement its deficient responses, but then asserting that such issues are not ripe for a motion because the parties have not met and conferred has unfairly and extensively delayed discovery in this Investigation.

Mem. at 1.

Apple Products Under Development

Ericsson argues: "Ericsson served its third set of discovery requests on June 11, 2015, which contained a narrowly tailored request for Apple to identify any components that have been selected for inclusion on any next generation iPhones or iPads, or developmental prototypes thereof, along with the status and testing of next generation iPhones or iPads." Mem. at 9-10.

Interrogatory No. 111 reads:

Identify and describe the development status of the next generation iPhone and the next generation iPad, including, but not limited to, identifying any anticipated release date(s), and stating whether any next generation iPhones or iPads, or developmental prototype thereof, have been assembled, manufactured, and/or tested, where such assembly, manufacture, and/or testing has been performed, whether any next generation iPhones or iPads, or developmental prototypes thereof, have been imported into the United States, the identification of what operating system(s) has been selected for use on any next generation iPhones or iPads or developmental prototypes thereof, and the identification of any components that have been selected for inclusion on any next generation iPhones or iPads, or developmental prototypes thereof, including, but not limited to: baseband processor(s); modem(s); application processor(s); display and/or graphics processor(s) and controller(s); radio-frequency ("RF") transceiver(s), amplifier(s), filter(s), antenna switch(es), antenna(e), and frequency generator(s); audio CODEC(s); audio amplifier(s); voice processor(s); Wi-Fi module(s); Bluetooth module(s); USB or other serial interface modules; battery and/or battery pack; module or component that monitors the battery information, sometimes referred to as a "gas gauge" or "fuel gauge"; speaker(s); microphone(s); proximity sensor(s); circuitry or software for configuring the product to communicate CODEC input/output from/to a cellular radio-frequency transceiver or from/to a Wi-Fi transceiver; circuitry or software for configuring the product to share an Internet connection with another Accused Product; touchscreen

panel; and touch-screen controller(s).

Id. at 10.

Ericsson argues: “the ALJ should order Apple to fully respond to Interrogatory No. 111 as required. And if such discovery demonstrates that the relevant components have been selected, prototypes tested, or a product will be released in the near future, *then Apple should be further compelled to provide complete discovery for each such product.*” *Id.* at 12 (emphasis in original).

Apple argues:

Despite these facts, Apple has offered to compromise with Ericsson once again on this issue—a compromise Ericsson accepted in the 337-TA-953 Investigation—but for unknown reasons refuses to accept here. (*Compare* Ex. DD, Ltr fr Goulet to Tallon (July 1, 2015) *with* Ex. EE, E-mail fr Chen to Brothers re motion to compel (July 7, 2015); *see also* Ex. FF, Ltr fr Tallon to Goulet (June 29, 2015).) Such a compromise would give Ericsson discovery into components that have been selected for inclusion in a product under development that will be released prior to the hearing, as well as discovery into beta version source code. (Ex. GG, E-mail fr Chen to Goulet re motion to compel (July 2, 2015).) Not only has Ericsson rejected this proposal, a proposal which Apple contends moots the Motion on this issue, but Ericsson has countered that in order to take this issue off the table Apple would have to provide discovery into products under development released after the hearing date as well as prototypes of the same. (Ex. HH, E-mail fr Brothers to Chen re motion to compel (July 6, 2015); *see also* Ex. EE, E-mail fr Chen to Brothers re motion to compel (July 7, 2015) *and* Ex. II, E-mail fr Chen to Goulet (July 8, 2015).) Ericsson’s delay in filing the instant motion and refusal to compromise is proof that this is nothing more than a fishing expedition, as well as an overt attempt to unnecessarily burden Apple during the final weeks of discovery.

Opp’n at 18.

On August 14, 2015, Ericsson filed correspondence to the undersigned, updating the status of the dispute concerning Apple’s products under development. *See* Correspondence to Administrative Law Judge Shaw from Thomas L. Jarvis Regarding Pending Motion to Compel Answers to Interrogatories and Production of Documents relating to Motion No. 952-034 (EDIS

Doc. ID No. 563181). Ericsson argues that completed depositions of certain Apple employees suggest that certain Apple products under development are “[

]” Ericsson’s August 14, 2015 Letter at 2-3.

Citing certain portions of deposition transcripts, Ericsson argues: “[

]”

In response, Apple filed correspondence to the undersigned on August 18, 2015. *See* Letter to Administrative Law Judge Shaw on Behalf of Apple Inc. in Response to Ericsson’s Aug. 14 Letter (EDIS Doc. ID No. 563315). Apple argues:

As to products under development, the parties agreed that the scope of discovery in this Investigation was limited to those “products under development that (a) will have a sufficiently complete design by the close of fact discovery in this Investigation, and (b) are likely to be imported.” [See Joint Statement Regarding Identification of Accused Products (May 21, 2015).] Ericsson’s letter fails to show that [

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Apple's August 18, 2015 Letter at 1-2.

According to the procedural schedule, fact discovery closed on August 7, 2015. *See* Order No. 5 (Apr. 16, 2015). The parties agreed to "include in the Identification of Accused Products all products under development that (a) will have a sufficiently complete design by the close of fact discovery in this Investigation, and (b) are likely to be imported." *See* Joint Statement Regarding Identification of Accused Products (May 21, 2015) (EDIS Doc. ID No. 557520) at 1. In view of this agreement, the administrative law judge cannot grant the pending motion with respect to the disputed Apple products under development. Ericsson has not shown that those products under development "will have a sufficiently complete design by the close of fact discovery" in this investigation. Indeed, [

discovery]. *See* Apple's August 18, 2015 Letter at 1-2.

"Wi-Fi plus Cellular" Functionality

Ericsson argues that Apple has failed to provide answers and produce documents concerning the "Wi-Fi plus Cellular" functionality in its Accused Products. Mem. at 34.

Ericsson's first set of discovery requests included the following:

Discovery Request	Requested Information
Interrogatory No. 53	Identify and describe in detail the purpose, modes, technical specifications, flow charts, state diagrams, components, circuitry, and software for any functionality to provide, support, or enable Apple's "Wi-Fi Plus Cellular" option, as well as features or capabilities similar to "Wi-Fi Plus Cellular", and identify any persons knowledgeable about and any documents or things relating to the subject matter of this Interrogatory.

Discovery Request	Requested Information
Request for Production No. 110	All documents and things (including source code, flow charts, state diagrams, and technical specifications), for any Accused Product identified in documents or things responsive to Request Nos. 6 and 7, related to the functionality, configuration, operation, and features of Apple’s “Wi-Fi Plus Cellular” option.
Request for Production No. 111	All documents and things (including source code, flow charts, state diagrams, and technical specifications), for any Accused Product identified in documents or things responsive to Request Nos. 6 and 7, related to the functionality, configuration, operation, and features of any options and/or capabilities similar to Apple’s “Wi-Fi Plus Cellular” option, including spin-offs and/or later versions of Apple’s “Wi-Fi Plus Cellular” option, whether called “Wi-Fi Plus Cellular” or not.

Id.

Ericsson argues:

Discovery requests concerning Apple’s “Wi-Fi plus Cellular” features and functionality relate directly to infringement of the ‘263 patent.

[

]. Without the information that Apple is withholding, Ericsson will be (and has been) handicapped in making its infringement case because it is far more time consuming to guess, for instance, [

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Id. at 38.

Apple argues:

Ericsson’s Interrogatory No. 53 and RFP Nos. 110 and 111 seek information and documents regarding Apple’s “[

]”).) In fact, Ericsson’s Motion even acknowledges that Apple’s

responses to Ericsson's RFAs [

States].

Ericsson's only support for alleging that [] is a third party internet forum indicating that the option was a proposed feature in an non-final software version. . Such a source is unreliable and cannot serve as a basis for requesting Apple to produce documents that simply may not exist and would nonetheless be irrelevant. In any case, Apple has agreed to produce non-privileged documents and information responsive to Interrogatory No. 53 and RFP Nos. 110 and 111, to the extent any exist, and to separately produce relevant, non-privileged documents related to the accused products' capabilities to communicate over wireless networks as well as cellular networks.[] Indeed, Apple has already made source code related to that these capabilities available for inspection, including [

]. And, Apple has collected and will soon produce documents located following a reasonable investigation that are relevant to the above-described wireless/cellular capabilities. The documents and source code modules [

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Therefore, Ericsson's requested relief as to Interrogatory No. 53 and RFP Nos. 110 and 111 should be denied as moot.

Opp'n at 14-16.

On August 18, 2015, Ericsson filed correspondence to the undersigned, updating the status of the dispute concerning the alleged "WiFi plus Cellular" features of Apple products. *See* Letter to Administrative Law Judge Shaw on Behalf of Complainants Regarding Complainants' Pending Motion to Compel Answers to Interrogatories and Production of Documents) (EDIS Doc. ID No. 563318). Ericsson argues:

Ericsson's Motion seeks the production of documents relating to "Wi-Fi plus Cellular" functionality of the Accused Products. *See* Ericsson's Mot. at 34-39. This issue is still ripe. Indeed, out of the over seven million pages produced by Apple in this Investigation, [

] As was outlined in Ericsson's Motion, [

] This is highly relevant to infringement of the asserted claims of the '263 patent. For instance, claim 39 involves selecting between radio interfaces (e.g., Wi-Fi and Cellular) based on control information. [

] is still highly relevant and Ericsson is entitled to discovery on that functionality as well as documents that outline the development and testing of the "Wi-Fi plus Cellular" feature.

Ericsson's August 18, 2015 Letter at 1-2.

In response, Apple filed correspondence to the undersigned on August 19, 2015. *See* Letter to Administrative Law Judge Shaw on Behalf of Apple Inc. Regarding Pending Motion to Compel Answers to Interrogatories and Production of Documents (EDIS Doc. ID No. 563474).

Apple argues:

[

I.

Apple's August 19, 2015 Letter at 1-2 (emphasis in original).³

As noted above, fact discovery closed on August 7, 2015. *See* Order No. 5 (Apr. 16, 2015). The parties agreed to “include in the Identification of Accused Products all products under development that (a) will have a sufficiently complete design by the close of fact discovery in this Investigation, and (b) are likely to be imported.” *See* Joint Statement Regarding Identification of Accused Products (May 21, 2015) (EDIS Doc. ID No. 557520) at 1.

Having reviewed the parties' arguments, the administrative law judge cannot grant the pending motion with respect to the dispute concerning the alleged “WiFi plus Cellular” features of Apple products. As noted above, Apple represents that [

³ Ericsson and Apple each filed two additional correspondences with respect to the dispute concerning “Wi-Fi plus Cellular” functionality. *See* Letter to Administrative Law Judge Shaw on Behalf of Complainants Regarding Complainants' Pending Motion to Compel Answers to Interrogatories and Production of Documents (August 20, 2015) (EDIS Doc. ID No. 563639); Letter to Judge Shaw Regarding the Inaccuracies in Ericsson's August 20, 2015 Letter Concerning the Pending Motion to Compel Answers to Interrogatories and Production of Document (August 21, 2015) (EDIS Doc. ID No. 563824); Letter to Administrative Law Judge Shaw on Behalf of Complainants Regarding Complainants' Pending Motion to Compel Answers to Interrogatories and Production of Documents (August 24, 2015) (EDIS Doc. ID No. 563870); Letter to Judge Shaw Regarding the Pending the Motion to Compel Concerning WiFi Assist (August 25, 2015) (EDIS Doc. ID No. 563995).

] Apple's August 19, 2015 Letter at 1. Apple

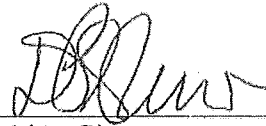
explains that [

]”

Id.

Accordingly, Motion No. 952-34 is denied.

So ordered.



David P. Shaw
Administrative Law Judge

Issued: August 28, 2015

CERTAIN ELECTRONIC DEVICES, INCLUDING WIRELESS COMMUNICATION DEVICES, COMPUTERS, TABLET COMPUTERS, DIGITAL MEDIA PLAYERS, AND CAMERAS

INV. NO. 337-TA-952

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **Order No. 21** has been served by hand upon the Commission Investigative Attorney, **Todd Taylor, Esq.**, and the following parties as indicated, on **SEP 11 2015**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
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