

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. 30

On August 14, 2015, complainants Ericsson Inc. and Telefonaktiebolaget LM Ericsson (collectively, “Ericsson”) filed a motion to compel respondent Apple Inc. (“Apple”) to produce its “agreements with the carriers in response to Ericsson Requests for Production Nos. 10, 13, 114, 118, 119, 121, 147, 152, 170, and 173.” Motion Docket No. 952-49.

On August 26, 2015, Apple, and the Commission Investigative Staff (“Staff”) filed responses opposing the pending motion.¹

For the reasons discussed below, Motion No. 952-49 is denied.

Arguments

Ericsson argues that it “has been unable to reach agreement with Apple with respect to the agreements it has with certain third-party carriers subject to certain of Ericsson’s discovery requests.” Mem. at 1.

Ericsson argues:

¹ On September 10, 2015, the administrative law judge’s attorney advisor contacted the parties requesting status update of the disputed issues. On September 11, 2015, Ericsson filed a letter to the undersigned stating that the pending motion remains ripe for a ruling.

Apple has refused to produce documents within its possession that relate to third parties that are relevant to the issues in this Investigation. Additionally, Apple has deliberately thwarted Ericsson's attempts to obtain the same relevant discovery from third parties. Apple claims these agreements are not relevant to any issues in this Investigation, but this is simply not true. And given Apple's conduct Ericsson cannot be expected to take Apple's word that the agreements are irrelevant. Indeed, the two agreements that Ericsson was able to obtain (due to the forthrightness of third party counsel) unequivocally demonstrate their relevance to issues in this Investigation. For example, in sworn Interrogatory responses, Apple has stated [

]. See Exs. 11, 12, and 20 at § 5.2. This provision has direct bearing on the scope of cease and desist orders and the enforcement of any remedy resulting from this Investigation. Indeed, the Commission must be made aware of these provisions, and the existence of any others, to understand the proper enforcement of any exclusion order. Accordingly, Ericsson is entitled to know this information and Apple must produce the outstanding carrier agreements as Ericsson is entitled to review whether any other agreements contain such provisions.

Similarly, the agreements produced by Chariton Valley contain []. See *id.* at § 3.4. These provisions are relevant to market share and other issues related to Apple's public interest allegations. Apple also generally alleges that an exclusion order would have an adverse impact on the public interest *and certain third-party carriers*. Apple's agreements with these carriers are directly relevant to that allegation as, at a minimum, they will show what [] the third parties are required to make.

Finally, there may well be other provisions in the agreements that bear relevance to this Investigation. Ericsson cannot simply take Apple at its word that these agreements are not relevant to any issue given Apple's disingenuous representations made to Ericsson and to the third parties with respect to these agreements and the clear relevance of the two agreements Ericsson was able to obtain.

Id. at 7-8 (emphasis in original).

In response, Apple argues:

Apple's agreements with wireless carriers are irrelevant. First, none of Ericsson's requests for production actually called for the agreements. Second, the parties have entered into a stipulation regarding importation that moots Ericsson's alleged need. Third, these agreements have nothing to do with market share.

Finally, there is no time remaining to re-open discovery on this issue. For all these reasons, Ericsson's Motion should be denied.

Opp'n at 7; *see id.* at 7-13.

The Staff argues:

The thrust of Ericsson's motion appears to be that it is entitled access to the carrier agreements because of Apple's alleged misconduct during discovery and, therefore, "Ericsson cannot take it on faith that the carrier agreements are not relevant" Compl. Memo. at 1-7. But these arguments do not satisfy Ericsson's required showing. Instead, such protestations are more pertinent to a motion for sanctions—not a motion to compel.

Ericsson also suggests that the carrier agreements are relevant to remedy and Apple's public interest allegations. *Id.* at 7-8. As to remedy, Ericsson argues that any provision in the agreements that [] has a direct bearing on the scope of cease and desist orders and enforcement of any remedy. *Id.* at 8. But this argument is not persuasive. Cease and desist orders are directed to inventory in the United States. Moreover, Ericsson has not explained how discovery of the agreements would impact enforcement of any remedial orders issued against Apple, particularly since Ericsson is not seeking a GEO or other relief against potential third-party importers.

As to public interest, Ericsson argues that any provision in the carrier agreements that [] is relevant. *Id.* Specifically, Ericsson simply argues that such "provisions are relevant to market share and other issues related to Apple's public interest allegations. *Id.* Without more information, it is unclear how [] are relevant to market share. And Ericsson has not identified with any specificity the "other issues" that somehow show that the carrier agreements are relevant to Apple's public interest allegations. Ericsson's inability to articulate a sufficient basis for the production of all carrier agreements (not already produced), even after the close of fact discovery, reveals the spurious relevance of these documents.

Staff at 2-3.

Ericsson's Requests for Production

In the pending motion, Ericsson identifies the following requests for production as allegedly calling for Apple's agreements with wireless carriers: 10, 13, 114, 118, 119, 121, 147,

152, 170, and 173. Mot. at 1. Ericsson never actually discusses any of these requests in its memorandum, however, and it never explains how Apple's agreements fall under any of them. *See* Mem. 1-9.

A review of the text of these requests demonstrates that they have nothing to do with carrier agreements. Ericsson's Request No. 10 calls for, "all organizational charts and/or departmental rosters for any Apple employees or others acting on Apple's behalf who are involved in" a list of activities. *See* Mem. Ex. 1 (Ericsson's First Set of Requests for Production (Nos. 1-192) (Apr. 6, 2015)) at 13-14. Apple's carrier agreements are not "organizational charts" or "departmental rosters."

Ericsson's Request No. 13 calls for "all versions of all documents that are made available or provided to third-party engineering, product design, manufacturing, testing, sales, marketing, and support companies ... including but not limited to developer guides, programmer guides, design specifications, support documentation, and source code." *Id.* at 14-15. Carrier agreements are not "developer guides, programmer guides, design specifications, support documentation, or source code."

Ericsson's Request No. 114 seeks "[d]ocuments and things ... sufficient to show all distribution and/or sales channels, including but not limited to documents and things that identify each entity in the chain of custody between manufacture and retail sale, and documents and things that describe the relationship between each entity involved in the sales and distribution of the product." *Id.* at 41. While wireless carriers may be "involved in the sales and distribution of the product," this request is for documents "sufficient" to identify those participants, not for agreements with them. The evidence shows that Apple has provided discovery on the wireless carriers that have purchased its products. *See e.g.* Opp'n Exs. 14-17.

Ericsson's Request Nos. 118, 119 and 121 seek financial information such as "gross and net sales," "units sold," and "cost of goods sold:"

- "118. All financial documents related to the sale of any Accused Product identified in documents or things responsive to Request Nos. 6 and 7 by any entity, including but not limited to documents showing gross and net sales (in dollars or other currency), units sold, customers, cost of sales, cost of goods sold, fixed costs, variable costs, balance sheets, income statements, earnings statements, cash flow statements, and ledgers."
- "119. For each model and version of the Accused Products identified in documents or things responsive to Request Nos. 6 and 7, documents sufficient to determine on a quarterly basis Apple's unit volume sales, average selling price, total revenues, and gross and net profit margins for the product."
- "121. For each model and version of the Accused Products identified in documents or things responsive to Request Nos. 6 and 7, all documents and things relating to forecasts or projections concerning sales of the product."

Mem. Ex. 1 (Ericsson's First Set of Requests for Production (Nos. 1-192) (Apr. 6, 2015)) at 42.

Apple has produced financial documents in this investigation. *See e.g.* Opp'n Exs. 18, 19.

Ericsson does not explain how agreements with carriers are called for by requests seeking Apple financial records.

Ericsson's Request Nos. 147, 170 and 173 seek documents concerning Apple's public interest contentions:

- "147. All documents and things that support any contention by you that the remedies sought in this Investigation have an effect on public health and welfare or the public interest."
- "170. All documents and things related to your public interest contentions, including but not limited to any market surveys commissioned or received, trade articles, and/or communications with any Third Party."
- "173. All documents you relied on in support of your public interest defense in Investigation No. 337-TA-794 filed by Samsung."

Mem. Ex. 1 (Ericsson's First Set of Requests for Production (Nos. 1-192) (Apr. 6, 2015)) at 46, 49. While Apple contends that wireless carriers and their customers would be irrevocably harmed by any exclusion order, the agreements between Apple and its carriers have nothing to do with that contention. The harm would come from a lack of access to Apple devices and the particular circumstances. [

] *See*

Opp'n Ex. 20 (Cordes Dep. Tr.) at 10-11. Some customers, such as [

] *See* Opp'n Ex. 21. There is

no apparent connection between this harm and any contractual provisions between Apple and its wireless carriers.

Ericsson's Request No. 152 states, "[i]f Apple has made any statements to any third party, either orally or in writing, about (1) any alleged infringement of any of the Asserted Patents or any other patent owned by Ericsson; (2) the Ericsson ITC Complaint in this Investigation; or (3) this Investigation, all documents and things that relate to, refer to, or include any such statement." Mem. Ex. 1 (Ericsson's First Set of Requests for Production (Nos. 1-192) (Apr. 6, 2015)) at 47. Apple states that the carrier agreements say nothing about this investigation. *See* Opp'n at 10; Mem. Exs. 11, 12. The pending motion does not suggest otherwise.

Additionally, Ericsson's motion is overbroad to the extent it requests the production of "all carrier agreements." *See* Mem. at 8 n.3. The only agreements that Ericsson specifically raised in its meet and confer letters were for those carriers that Apple had subpoenaed. *See* Mem. Ex. 15 ("Accordingly, please immediately produce all written agreements or sales contracts ***between Apple and the carriers it subpoenaed*** by this Thursday, July 23, 2015.") (emphasis added).

Stipulation Regarding Importation and Inventory

Ericsson argues that Apple's agreements with carriers are relevant because they may contain provisions [

]. *See* Mem. at 7-8. This argument is unpersuasive.

Indeed, Apple and Ericsson have entered into a stipulation regarding importation and, in response to that stipulation, Ericsson agreed that it “[

].” *See* Joint Stipulation Regarding Importation and Inventory (EDIS Doc. ID No. 562672) (Aug. 7, 2015).

Additionally, Apple has previously produced a list of its top customers, providing unit volume sales information. *See* Opp'n Exs. 14, 15. Apple identified [

]. *Id.* Enforcement of exclusion orders does not require the production of the terms of any wireless carriers' agreements with Apple.

Market Share

Ericsson argues that “the agreements produced by Chariton Valley contain [

].” Mem. at 8. Ericsson does not say what these “other issues” are.

No connection between [] and market share has been established. Apple has produced information on actual purchases. Apple has produced unit sales information []. *See* Opp'n Exs. 14-15.

Apple has also produced third-party market research reports regarding wireless carriers. *See*

Opp'n Exs. 16-17. The carriers themselves have produced information about actual []
[]. *See e.g.* Opp'n Exs. 22, 23. Ericsson does not explain why []
[] are relevant to market share, particularly in the presence of
evidence regarding actual sales.

Motion No. 952-49 is denied.

So ordered.



David P. Shaw
Administrative Law Judge

Issued: September 17, 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. 30** has been served by hand upon the Commission Investigative Attorney, **Todd Taylor, Esq.**, and the following parties as indicated, on SEP 30 2015



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

FOR COMPLAINANTS ERICSSON INC.; AND TELEFONAKTIEBOLAGET LM ERICSSON:	
Thomas L. Jarvis, Esq. WINSTON & STRAWN LLP 1700 K Street, NW Washington, DC 20006	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____
FOR RESPONDENT APPLE INC.:	
Joseph V. Colaianni, Esq. FISH & RICHARDSON P.C. 1425 K Street, NW, 11th Floor Washington, DC 20005	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____