

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. 31

On August 14, 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. 952-50.

On August 26, 2015, respondent Apple Inc. (“Apple”) filed a response opposing the pending motion. No other response was filed.¹

Ericsson argues that Apple has been deficient with respect to the following “categories of documents”:

- Apple’s failure to produce missing technical specifications as repeatedly requested by Ericsson (Ericsson’s Request for Production Nos. 13, 24, 47–63, 68–71, and 74–112)

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 with respect to “the deficiencies addressed in Sections III.C, III.D, III.E, and III.F of the accompanying Memorandum of Points and Authorities.” See EDIS Doc. ID No. 565350.

- Apple’s failure to produce documents from prior litigations concerning touch screen functionality (Ericsson’s Request for Production Nos. 195–244, 247–258, and 260–294)
- Apple’s failure to produce documents and information relating to Apple’s responses to requests from proposals from municipalities and schools, documents relating to the bidding process for education-related contracts, and documents regarding how Apple markets its products to municipalities and schools (Ericsson’s Request for Production Nos. 295–300, Interrogatory No. 112)
- Apple’s failure to produce its contracts and agreements with the contract manufacturers for the Accused Products (Ericsson’s Request for Production No. 165)
- Apple’s failure to provide any information concerning its lobbying or governmental relations efforts regarding the U.S. International Trade Commission (Ericsson’s Interrogatory No. 115)

Mot. at 1-2. Ericsson argues: “Should the ALJ grant Ericsson’s motion, Ericsson should be afforded the opportunity to take additional deposition testimony, supplement its contentions as necessary, and supplement its expert reports as needed.” *Id.* at 2.

In response, Apple argues:

Despite the number of complaints included in its Motion, Ericsson fails to make even one legally or factually supported argument for why any of its requested relief should be granted. Indeed, Ericsson’s Motion is nothing more than speculation, hyperbole and hand-waving to mask what are ultimately fatal flaws in its positions. Apple has complied with every formal and informal discovery request in this Investigation, including providing Ericsson with [

]. Apple has responded to 305 Requests for Production, 115 Interrogatories, and 186 Requests for Admission. With respect to the specific issues Ericsson raises in its Motion:

- Ericsson already moved to compel [(Motion No. 952-34) and advised the ALJ last week that those issues were moot (*see infra* Section III.B);
- Ericsson’s speculation about what specifications may or should exist does not make it so (*see, e.g., infra* Section III.B);

- the relief Ericsson's seeks regarding the bidding process for educational sales has nothing to do with the critical public interest issues actually implicated by this Investigation (*see, e.g., infra* Section III.D);
- Ericsson had every opportunity to gather information on Apple's manufacturing process, within the discovery period, and it chose not to do so (*see, e.g., infra* Section III.E); and
- Ericsson has not been able to explain how any of the prior litigation documents, lobbying documents, or contract manufacturer agreements are relevant or how they could possibly support the arguments Ericsson makes in its Motion (*see, e.g., infra* Section III.C, E, F).

Opp'n at 1-2.

For the reasons discussed below, Motion No. 952-50 is granted in part.

Documents from Prior Litigations (Mem. Section III.C)

Ericsson argues:

Ericsson has propounded a number of discovery requests regarding prior Apple litigation materials concerning related technology and touch screen functionality. Ex. 19, Ericsson's Fourth Set of Requests for Production (Nos. 195–294) (July 10, 2015). Ericsson's requests seek documents such as deposition and hearing transcripts, expert reports, prehearing briefs and post-hearing briefs from several Apple litigations that implicate the same technology at issue in this Investigation and are relevant to Apple's prior positions regarding touch screen functionality, and therefore, the '059 Patent. These previous Apple litigations include *In re Electronic Devices, Including Mobile Phones, Portable Music Players, and Computers*, Inv. No. 337-TA-701 (ITC) before the U.S. International Trade Commission, *Apple Inc. v. Samsung Electronics Co., Ltd., et al.*, C.A. No. 5:12-cv-630 in the Northern District of California, *Apple, Inc. v. Motorola Mobility, Inc.*, C.A. No. 11-cv-08540 in the Northern District of Illinois, *In re Electronic Digital Media Devices and Components Thereof*, Inv. No. 337-TA-796 (ITC) before the U.S. International Trade Commission, *In re Portable Electronic Devices and Related Software*, Inv. No. 337-TA-797 (ITC) before the U.S. International Trade Commission, *In re Certain Mobile Devices and Related Software*, Inv. No. 337-TA-750 (ITC) before the U.S. International Trade Commission, *Apple Inc. v. Samsung Electronics, Co Ltd., et. al.*, C.A. No. 5:11-cv-01846 before the United States District Court for the Northern District of California, *Motorola Mobility, Inc. v. Apple, Inc.*, C.A. No. 1:10-cv-023580 before the United States District Court for the Southern District of Florida, and

Apple Inc. v. Samsung Electronics, Co Ltd., et. al., C.A. No. 1:12-cv-20271 before the United States District Court for the Northern District of California.

Mem. at 22-23; *see id.* at 23-32 (listing Requests for Production Nos. 195-294).

Apple argues that “Ericsson’s fourth set of requests for production all suffer from the same problem: the investigations and District Court cases identified in these requests involve unrelated patents, unaccused products and functionalities, and third-party confidential materials.”

Opp’n at 18. The evidence shows that Apple, however, collected and produced all prior deposition and hearing transcripts of Apple witnesses who testified on touch-related issues, *i.e.*,

[]. *See* Opp’n, Chen Decl. ¶ 16 (identifying by Bates number prior litigation transcripts produced in this

investigation for [].

Apple represents that Ericsson never deposed any of the above-referenced witness regarding any of their prior transcripts. *See* Opp’n at 18. Thus, Ericsson’s argument that such prior litigations are relevant is not persuasive. Indeed, Ericsson’s discovery requests appear to be irrelevant, overly broad, and unduly burdensome. *See id.* at 20-22.

Documents Concerning Municipalities and Schools (Mem. Section III.D)

Ericsson argues that “Apple failed to cite or produce any documents to support its contentions” that its devices are used extensively in schools across the country. Mem. at 36.

This is incorrect. Apple produced documentation regarding [].

See e.g. Opp’n Ex. 51 (APL-ERCSN_0000197120); Opp’n Ex. 52 (APL-ERCSN_0000197012);

Opp’n Ex. 53 (APL-ERCSN_00002631630. As an example, Apple produced documents regarding [

] *See* Opp’n Ex. 54 (APL-ERCSN_0000263212). Apple

argues that it made available for deposition its Vice President of education, John Couch, to testify regarding Apple's educational initiatives. During his deposition, Mr. Couch identified

[

]. *See* Opp'n Ex. 55 (Couch Dep. Tr.). Apple also

produced [

]. *See* Opp'n Ex. 56 (APL-ERCSN_0003725673).

Ericsson served a number of discovery requests directed to the bidding process for sales to schools. *See* Mem. at 37. Ericsson has not shown how the bidding process is relevant to the usage of Apple's devices by students.

To the extent Ericsson sought additional information on usage of Apple devices for education, Apple identified Dr. Darryl Adams, a representative of the Coachella Valley Unified School District, in its original tentative witness list. *See* Respondent Apple Inc.'s Tentative Witness List (July 10, 2015) (EDIS Doc. ID No. 560484) at 6; *see also* Motion Docket No. 952-42, Ex. A (Respondent Apple Inc.'s Amended Tentative Witness List) (July 24, 2015) at 5. Yet, Apple represents that Ericsson chose not to depose Dr. Adams. *See* Opp'n at 23.

Apple Agreements with its Contract Manufacturers (Mem. Section III.E)

Ericsson has propounded a request that seeks "[d]ocuments and things *sufficient* to show your business relationships, contractual or otherwise, with any past or current manufacturer of the Accused Products." Mem. at 40, Request for Production No. 165 (emphasis added).

Ericsson argues that Apple's agreements with its contract manufacturers are relevant to Apple's contention that switching capacity from one manufacturer to another takes time. *See* Mem. at 40-42.

Apple argues:

Apple believes that in the event of an exclusion order, it would take several months (if not years) for other device manufacturers to ramp up production to attempt to replace any excluded Apple devices. There are several reasons for this. One reason is that [

]

Opp'n at 24.

Apple argues:

[

]. Since Ericsson has not articulated any other reason for why the terms of these agreements are purportedly relevant, Ericsson's Motion should be denied.

If Ericsson wanted to investigate Apple's contention that manufacturing equipment is unique and not readily transferable to others, it should have sought information on the actual machines used to manufacture Apple devices. It could have, for example, asked the contract device manufacturers what they manufacture, what tools they use, whether those tools are customized, and whether they can easily be switched to making other devices for other manufacturers. However, Ericsson never pursued this discovery, []

Id. at 24-25 (emphasis in original).

Apple has provided Ericsson a list of its contract manufacturers, along with the parts they manufacture. *See* Opp'n Ex. 60 (Apple's Supplemental Responses to Ericsson's First Set of Interrogatories, No. 7 at Ex. D (Aug. 20, 2015)). Additionally, Apple states that it made available for deposition its Director of Wireless Procurement, Aaron Shafer, who testified regarding Apple's manufacturing process. *See* Opp'n at 25.

The discovery provided by Apple does not show the "business relationships" with past or

current manufacturer of the accused products. In particular, it does not show whether Apple's agreements would facilitate or hinder Apple's ability to shift from the manufacture of accused products to substitute devices. Consequently, Apple shall supplement its document production by September 30, 2015, by producing the agreements (or portions thereof) or other documents sufficient to show Apple's ability to shift from the manufacture of accused products to substitute devices.

Interrogatory Concerning Apple's Lobbying Activities (Mem. Section III.F)

Ericsson propounded the following interrogatory: "Identify whether Apple is a member, has participated in, or contributes funds or other support to any lobbying or government relations activities regarding the U.S. International Trade Commission, including but not limited to the '337 Working Group,' and if so, describe in detail such participation, contribution, and/or support." Mem. at 43, Interrogatory No. 115. Based on that interrogatory, Ericsson argues that it is entitled to a "narrative response" that identifies "each contact by date, person involved, and a detailed summary of the communication" for all communications "(a) regarding ITC proceedings and exclusion orders, (b) referencing the electronics or telecommunications industry or products, and (c) involving contacts with the International Trade Commission, Federal Trade Commission, Department of Justice, U.S. Customs and Border Protection, or the U.S. Trade Representative (including the U.S. Trade Representative Industry Trade Advisory Committees." Mem. at 44. Despite the fact that this is an interrogatory, not a request for production, Ericsson also requests that Apple "produc[e] all non-privileged documents relating to those contacts." *Id.* Ericsson argues that "Apple's lobbying and government relations efforts concerning the U.S. International Trade Commission and Commission remedial orders are germane to the public interest issues in this investigation and the enforcement of any eventual Commission remedial order." *Id.*

Apple's public interest allegations deal with the harm to the consumers and the U.S. economy in the event Apple devices are excluded. Apple's prior lobbying activities do not change the regulations currently in force, nor do they change the facts that the administrative law judge must weigh in evaluating the remedy Ericsson has requested.

* * *

Motion No. 952-50 is granted in part.

So ordered.



David P. Shaw
Administrative Law Judge

Issued: September 22, 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. 31** has been served by hand upon the Commission Investigative Attorney, **Todd Taylor, Esq.**, and the following parties as indicated, on OCT -8 2015.



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