

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

**In the Matter of**

**CERTAIN HYBRID ELECTRIC  
VEHICLES AND COMPONENTS  
THEREOF**

**Inv. No. 337-TA-688**

**ORDER NO. 14: DENYING TOYOTA'S MOTION FOR LEAVE TO FILE  
APPLICATION FOR INTERLOCUTORY APPEAL**

(June 16, 2010)

On June 1, 2010, respondents Toyota Motor Corporation, Toyota Motor North America, Inc., and Toyota Motor Sales USA, Inc. (collectively "Toyota") filed a motion for leave to file an application for interlocutory review of Order No. 12. (Motion Docket No. 688-025.) On June 8, 2010, complainant Paice LLC ("Paice") filed a response opposing the motion. On June 9, 2010, the Commission Investigative Staff ("Staff") also filed a response opposing the motion.

On May 21, 2010, the ALJ issued Order No. 12 where he denied Toyota's renewed motion for summary determination terminating this investigation on the basis of claim preclusion. (*See* Order No. 12.) In that order, the ALJ found that an exception to claim preclusion applied in this investigation because Paice was unable to seek a certain remedy or form of relief in the district court, *e.g.* the ITC's exclusion orders. (*Id.* at 9.) Toyota argues that this decision "touches upon unique aspects of Commission practice and policy, and involves controlling questions of law and policy regarding which there are substantial grounds for differing opinions, including (i) whether the Commission is required to terminate this investigation under claim preclusion principles as a matter of law, and (ii) whether, as a matter of policy, the ITC should automatically be made available as a second forum to patentees who fail to secure an injunction in district court." (Mot. at 2.)

In determining whether interlocutory appeal is appropriate, the ALJ must determine whether (1) the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion, and that (2) either an immediate appeal from the ruling may materially advance the ultimate completion of the investigation or subsequent review will be an inadequate remedy. *Certain 3G Mobile Handsets and Components*, Inv. No. 337-TA-613, Order No. 13 at 1-2 (February 5, 2009). The “moving party bears the heavy burden of meeting both of the [se] criteria.” *Id.* (citing *Certain Bearings and Packaging Thereof*, Inv. No. 337-TA-469, Order No. 16, 2002 ITC LEXIS 358, at \*3 (July 10, 2002).) However, “[i]nterlocutory review is generally not favored at the Commission” and there are numerous investigations in which interlocutory review has been denied. *Id.* at 3-5 (internal citations omitted.)

Toyota argues that the issues addressed in Order No. 12 involve controlling questions of law, including: “(1) whether the availability of exclusion orders provides a blanket exception to claim preclusion in ITC investigations following district court action; (2) whether the statutory language of Section 1337(a) that violations be dealt with ‘in addition to any other provision of law’ justifies a blanket exception to claim preclusion in ITC investigations; and (3) whether any differences between legal standards applied by the Commission for issuing exclusion orders and legal standards applied by district courts for issuing permanent injunctions pursuant to the Supreme Court decision in *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006), require a blanket exception to claim preclusion in ITC investigations.” (Mot. at 3-4.) Toyota further argues that the order also involves a controlling question of policy as to which there is a substantial ground for difference of opinion, namely “whether a patentee that fails to secure an injunction in district court should automatically be permitted to try to secure that same relief at

the ITC for the same claim” and that an immediate appeal of these issues would advance the ultimate completion of this investigation since, if the matter is resolved in Toyota’s favor, it would result in termination of the investigation. (*Id.* at 11-12.)

In response, Paice argues that Toyota has failed to show that the ruling in Order No. 12 involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal would materially advance the ultimate completion of the investigation. (Opp. at 1.) Specifically, Paice argues that the law regarding claim preclusion is well-settled and consistent and that the ALJ correctly determined that an exception to claim preclusion applies. Paice further argues that Toyota failed to establish that there is a controlling question of policy regarding whether complainant may seek relief at the ITC after failing to obtain an injunction in district court because it is established that a patentee can bring both a federal court action and an ITC investigation against an alleged infringer. (Opp. at 8-9.) Finally, Paice argues that Toyota failed to establish that an immediate appeal of the order would materially advance the ultimate completion of the investigation given the current procedural schedule. (Opp. at 11.)

Staff also filed a response opposing the motion arguing that Toyota has failed to meet its heavy burden of demonstrating that Order No. 12 involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that either an immediate appeal from the ruling may materially advance the ultimate completion of the investigation or subsequent review will be an inadequate remedy. (Staff Resp. at 2-3.) As argued by Paice, Staff also submits that the standard for claim preclusion in this investigation is clear and Toyota’s arguments regarding questions of policy are unsupported. Similarly, Staff submits that Toyota

has failed to show that an immediate appeal from the ruling would materially advance the ultimate completion of this investigation given the current procedural schedule. (*Id.*)

As set forth *surpa*, in determining whether interlocutory appeal is appropriate, the ALJ must determine whether (1) the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion, and that (2) either an immediate appeal from the ruling may materially advance the ultimate completion of the investigation or subsequent review will be an inadequate remedy. The ALJ finds that Toyota has failed to meet its burden of showing that interlocutory appeal is appropriate.

As Staff and Paice have noted, the procedural schedule in this investigation weighs heavily against the second factor. The evidentiary hearing for this investigation is weeks away and it seems highly unlikely that the parties, the Commission, and the ALJ will have adequate time to address this issue prior to the start of the hearing such that granting the appeal would “materially advance the ultimate completion of the investigation.” Even assuming the ALJ were to grant the interlocutory appeal, the immediate appeal of Order No. 12 would only advance the ultimate completion of the investigation if the Commission were to permit the appeal, rule in Toyota’s favor and terminate the investigation. (*See* 19 C.F.R. § 21.24 (b).) In other words, the second factor is only satisfied based on three contingencies: the timing of the interlocutory appeal, *i.e.* whether the parties, the ALJ, and the Commission can complete the entire interlocutory review process; the Commission’s decision to permit the appeal; and the Commission’s decision on review, *i.e.* the Commission rules in favor of Toyota.<sup>1</sup> Furthermore, Toyota fails to present any evidence that a subsequent review of the ALJ’s decision would be inadequate. Indeed, given the stage of the investigation (merely five weeks from the start of the

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<sup>1</sup> The timing of the appeals process can be eliminated as a factor by extending the target date. However, the ALJ finds that the late stage of the investigation and the fact that the target date has already been extended combined with the uncertainty as to whether the Commission will actually permit the appeal weigh against such a decision.

evidentiary investigation), the ALJ finds the most efficient use of resource would be permitting the parties to proceed with the investigation as set forth in the current procedural schedule, especially since the investigation has already been extended once. The ALJ finds no advantage at this late stage in the investigation in granting the interlocutory appeal and further notes that subsequent review of the ALJ's decision by the Commission, should Toyota choose to appeal the decision, is not an inadequate remedy.

As for the other factor, whether the ALJ's ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion, the ALJ finds that Toyota also failed to meet its burden. Toyota argues that the ALJ's ruling creates a "blanket exception to claim preclusion" and creates an "automatic" alternative at the ITC to patentees that have failed to obtain an injunction in district court. Toyota reads too much into the ALJ's decision and improperly attempts to broaden the scope of the decision. As set forth in Order No. 12, the ALJ based his decision on an analysis of the facts of the instant investigation in light of the statutory language and Commission and Federal Circuit precedents. Such an analysis does not rise to "controlling question[s] of law or policy" as asserted by Toyota.

Therefore, the ALJ finds that Toyota has failed to meet the heavy burden of meeting the criteria for interlocutory appeal and hereby DENIES Toyota's request for leave to file an application for interlocutory appeal.

**SO ORDERED.**

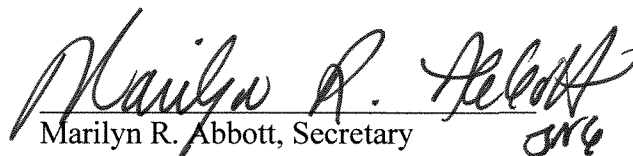


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Theodore R. Essex  
Administrative Law Judge

**PUBLIC CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **ORDER 14** has been served by hand upon the Commission Investigative Attorney, **Erin D.E. Joffre, Esq.**, and the following parties as indicated, on **June 16, 2010**.



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