

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN ELECTRONIC DEVICES,
INCLUDING MOBILE PHONES, PORTABLE
MUSIC PLAYERS, AND COMPUTERS**

Inv. No. 337-TA-701

**ORDER NO. 17: GRANTING RESPONDENT'S MOTION TO COMPEL
COMPLAINANTS' CORPORATE DESIGNEE**

(June 17, 2010)

On June 3, 2010, Respondent Apple, Inc. ("Apple") filed a motion to compel production of a corporate designee with knowledge relating to Complainants' alleged domestic industry practicing U.S. Patent No. 6,714,091 (the "'091 patent"). (Motion Docket No. 701-015.) Apple asserts that Complainants, despite their assertions in the Complaint that they satisfy the domestic industry requirement with respect to the '091 patent, have not produced a corporate representative able to provide meaningful testimony regarding their alleged practice of the '091 patent. (Mot. at 1.) Apple argues that Complainants' designated witness, Jesse Khatam, was not knowledgeable about the factual bases for Complainants' domestic industry assertions in the Complaint for the '091 patent. (Mot. Mem. at 1-3.) In particular, Mr. Khatam was unable to answer questions relating to the products Complainants allege practice the '091 patent, and was unable to identify a single employee other than himself who had any knowledge regarding the product design. (*Id.* at 4-11.) Apple further argues that Mr. Khatam made no effort to prepare himself on, or make an investigation of, the topics for which he was designated to testify. (*Id.* at 13.) Apple asserts that

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Complainants had a duty to “prepare the [corporate] designees so that they may give knowledgeable and binding answers’ . . . even if [they] do not have personal knowledge of the matter.” (*Id.* at 14.) Therefore, Apple requests that Complainants be compelled to provide a witness with sufficient knowledge of the designated topics, and if Complainants do not comply, that they be precluded from offering domestic industry evidence with respect to the ‘091 patent. (*Id.* at 14-15.) Apple attaches, *inter alia*, excerpts of Mr. Khatam’s deposition, as well as its notices of deposition to Complainants, in support of its motion. (Mot. Exs. 1-4.)

On June 14, 2010, Complainants Nokia Corp. and Nokia, Inc. (collectively “Nokia”) filed an opposition to Apple’s motion. Nokia argues that Apple is seeking to compel testimony regarding facts outside of Nokia’s knowledge. (Opp. at 1-2.) According to Nokia, it is without knowledge of the technical details of the phone model it alleges practices the ‘091 patent, and that Apple must obtain that information from its outside vendor or third party manufacturers. (*Id.*) Nokia further argues that Apple attempted to seek sales-related testimony from the wrong witness, and had ample opportunity to question Anna Solaranta “on all financial topics.” (*Id.* at 4.) Nokia attaches correspondence to counsel for Apple identifying Ms. Solaranta as a designee on topic 14 of Apple’s first deposition notice, and topics 10-11, 13-14, 16-17, and 19-20 of Apple’s second deposition notice. (Opp., Ex. A.) Nokia, however, did not attach Ms. Solaranta’s deposition and other than to say that “Apple had sufficient opportunity to question Ms. Solaranta” regarding specific sales in some spreadsheets (*see* Opp. at 4), does not provide information as to Ms. Solaranta’s level of preparation on the economic domestic industry as it relates to the ‘091 patent.

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On June 17, 2010, Apple sought leave, which is hereby DENIED as moot, to file a reply.
(Motion Docket No. 701-020.)

Based upon the motion papers and responses thereto, the Administrative Law Judge finds as follows.

Any party may obtain discovery regarding “any matter, not privileged,” that is relevant to the “claim or defense of any other party[.]” Commission Rule 210.27(b)(1). Furthermore, a party may obtain discovery regarding “the identity and location of persons having knowledge of any discoverable matter[.]” Commission Rule 210.27(b)(2). Nokia does not dispute that Apple is entitled to discovery into Nokia’s claims that it has a domestic industry practicing the ‘091 patent. Indeed, Nokia does not even dispute that the corporate witness it designated on the topics noticed by Apple had little or no knowledge with respect to those topics. At issue here is whether Nokia’s corporate representative *should be expected* to have knowledge with respect to those topics.

The Administrative Law Judge rejects Nokia’s argument that Apple must apply solely to nonparty sources for information relating to Nokia’s assertions that it has a domestic industry practicing the ‘091 patent. For the purpose of having an investigation against Apple instituted, Nokia brought a Complaint in front of this agency and made certain assertions under oath with respect to whether it has a domestic industry practicing the ‘091 patent. *See* Commission Rule 210.12; Verification of Complaint executed by Paul Melin, dated December 23, 2009. Nokia is presumed to have information in its possession, custody, or control¹ to support its allegations described in Paragraphs 158-160 and 165-176 of the Complaint, as well as those exhibits

¹ The parties should further take note that such information is rarely shielded by privilege. *See e.g., Certain Ceramic*

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referenced therein. *See* Complaint under Section 337 of the Tariff Act of 1930, as Amended, dated December 29, 2009, at 33-38. Apple is entitled to testimony by Nokia's corporate designee(s) with respect to the same.

The Administrative Law Judge further rejects Nokia's assertion that Apple was able to obtain some of the information at issue from Ms. Solaranta. "Unsworn attorney argument is not evidence." *Perfect Web Technologies, Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1332 (Fed. Cir. 2009) (quoting *Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1372, 1380 (Fed. Cir. 2009)) (internal formatting omitted). As noted above, Nokia did not provide any information to show that Ms. Solaranta's level of preparation on economic domestic industry as it relates to the '091 patent was adequate.


Accordingly, the Administrative Law Judge finds that Apple's motion (Motion Docket No 701-015) should be GRANTED as follows. Nokia is required to prepare and provide at least one knowledgeable corporate witness for deposition by June 25, 2010, or at such time as the parties may agree. The topics for said deposition(s) shall be limited to topic nos. 42 and 94-96 from Apple's first deposition notice, topic no. 4 from Apple's second deposition notice, and topic no. 9 from Apple's third deposition notice.

Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date.

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Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.

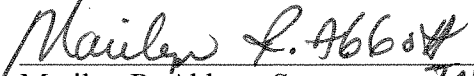

E. James Gildea
Administrative Law Judge

**IN THE MATTER OF CERTAIN
ELECTRONIC DEVICES, INCLUDING
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337-TA-701

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** has been served by hand upon, the Commission Investigative Attorney, **Rett Snotherly, Esq.**, and the following parties as indicated on July 6, 2010.


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