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

In the Matter of

**CERTAIN PERSONAL DATA AND
MOBILE COMMUNICATIONS DEVICES
AND RELATED SOFTWARE**

Inv. No. 337-TA-710

Order 61

Complainants Apple Inc. and NeXT Software Inc. (collectively, “Apple”) move to compel respondents HTC Corp., HTC America, Inc., and Exedea, Inc. (collectively, “HTC”) to produce certain outstanding discovery. (Motion No. 710-51).¹ HTC has filed an opposition. The motion to compel is granted as to Deposition Topic Nos. 51-54, 70, 73, 80-94, 138-160; Deposition Topic Nos. 59 and 69; and denied as to Deposition Topic Nos. 16-18, 42, 43, and Request for Production Nos. 2, 48, 96, 97, 103, 105.

Deposition Topic Nos. 51-54, 70-73, 80-94, 138-160

Apple submits that Android 2.2 (Froyo) is highly relevant to its infringement allegations. Complainants argue that HTC should be compelled to provide witness testimony in the United States on Android 2.2, in view of HTC’s “belated production” of Android 2.2 source code. Mem. at 6.

In that regard, Apple states that Android 2.2 is the latest version of Android, which was released on June 23, 2010. Apple further states that Android 2.2 is the code running on a number of accused HTC products, including HTC Evo 4G, HTC Incredible,

¹ Apple has since informed the court that its motion to compel is moot with respect to Sections IV(C), (D), and (E) of its supporting memorandum.

PUBLIC VERSION

and HTC Vision. Mem. at 6, citing Exs. 17, 18, & 19.

Apple submits that when it learned that Android 2.2 was being installed on HTC phones, it requested that HTC make this code available for inspection. Mem. at 7, citing Exs. 4-7. Apple continues, “[n]evertheless, HTC waited **five weeks** to load the requested source code for the infringing Android 2.2 platform until October 11.” *Id.*, citing Ex. 8. (Apple’s emphasis). According to Apple, the Android 2.2 source code was not loaded until after the depositions of HTC’s key technical witnesses were underway in Taiwan. As a result, complainant maintains that it was forced to examine HTC’s witnesses on an older version of Android, Android 2.1. *Id.*

Accordingly, Apple proposes that either HTC stipulate that there are no meaningful differences between Android 2.1 and Android 2.2 with respect to the accused functionalities, or that certain HTC individuals be deposed on Android 2.2. Mem. at 7-8.

In its opposition, HTC argues that Apple falsely charges that it delayed in producing the source code for its Android 2.2-based products. Opp. at 2. HTC submits that it “promptly produced the Android 2.2 source code for the HTC EVO 4G and Incredible phones as it became available after those products were upgraded to Android 2.2.” *Id.*

While that might be so, it is not disputed by respondent that Apple did not receive the subject Android 2.2 source code until after the completion of certain depositions. Thus, the issue here is whether Apple is entitled to additionally depose HTC software engineers [] as well as a corporate designee on the Android 2.2. It is clear that Apple is entitled to take depositions on the Android 2.2 (or for HTC to stipulate as requested). In that regard, under the discovery production

PUBLIC VERSION

circumstances, HTC's objections to the deposing of these individuals is less than persuasive. Opp. at 3-5.

Accordingly, the motion to compel is granted as to Deposition Topic Nos. 51-54, 70-73, 80-94, and 138-160. HTC shall make available for deposition [] and a corporate designee. Also, the depositions shall take place in Taiwan. The parties are to agree on the logistics involving the depositions within three days of the date of this order.

Deposition Topic Nos. 59 And 69

Apple argues that HTC has failed to make knowledgeable witnesses available for deposition in response to Deposition Topics 59 and 69 regarding the components in the Accused HTC Android Products that infringe the '983 patent. Mem. at 9. Topic Nos. 59 and 69 concern certain software components and functionalities in the Android Platform. Specifically, Topic No. 59 relates to "the structure, functionality, and operation of the [] implementation, including but not limited to the [] and the []" Topic No. 69 relates to "the use of operating system services, including thread and task management services, by or in any Java applications Installed By Default."

HTC argues that the testimony provided by its witnesses about these topics shows that they were knowledgeable, "to the extent that HTC has knowledge." Opp. at 6.

In support of its motion to compel, Apple states that HTC designated [] as its corporate representative on Topic Nos. 59 and 69. Mme. at 10. Apple submits that, with respect to Topic 59, [] admitted that he did not have any knowledge regarding the structure, functionality, and operation of the [] implementation including

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the [] “[

] Complainants add, “[m]oreover,

[

] *Id.*, citing Ex. 9 ([] Tr. at 113-116).

The motion to compel is granted as to Deposition Topic Nos. 59 and 69. HTC is to designate a knowledgeable witness within two days of the date of this order.

Deposition Topic Nos. 16-18, 42, 43; Request For Production Nos. 2, 48, 96, 97, 103, 105

These discovery requests concern the use of the accused products. Apple submits, “[d]ata on the use, testing, marketing, customer complaints, and other dealings with customers is relevant to, *inter alia*, direct infringement and induced infringement.” Mem. at 16. Complainants further submit that they “should have the ability to investigate the use of these products, as well as how HTC intends customers to use these products, in order to prove direct and indirect infringement.” Opp. at 17.

With respect to Deposition Topics 16-18, 42, and 43, HTC argues that they are not relevant to the present investigation. In that regard, respondents submit that Topic 16 involves marketing, planning and strategy, focus group information, press releases, market analyses, analyst reports, and competitive analyses; and that Topics 42 and 43 involve customer complaints and customer service. Opp. at 16.

HTC is correct. Apple has failed to show that the involved deposition topics are

PUBLIC VERSION

relevant to this investigation. Indeed, complainants provide little argument with respect to these deposition topics. Accordingly, the motion to compel is denied as to Deposition Topics 16, 42, and 43.

Deposition Topic Nos. 17 and 18 relate to “the amount and value of sales from January 1, 2007 to the present,” with respect to each identified accused product, and “the identities of Entities involved in the sales of that Product, the locations and types of Documents and files Relating To such sales, and the identity of each custodian of such Documents and files,” respectively. HTC’s response is that these topics “relate to the U.S. sales and importation of the accused products and are moot in light of HTC’s production of its sales and revenue data.” Opp. at 16 n.18. In view of this uncontested representation, and Apple’s overall lack of a persuasive argument to support its motion to compel, the motion is denied as to Deposition Topics 17 and 18.


With respect to Apple’s RFPs, HTC cites to numerous documents that it has produced. These document fall under the categories “User guides/manuals, quick start guides, getting started guides and service manuals,” “Press releases,” “Materials from HTC’s website,” “Documents relating to customer correspondence and feedback,” “Sales guides,” “Advertisements,” and “Testing documents.” Opp. at 14-15. HTC’s discovery production recitation stands in stark contrast to Apple’s supporting memorandum, which is quite short on such detail. Apple has not shown that HTC has failed to produce the documents sought in subject Requests for Production.

Accordingly, Motion No. 710-51 is granted in part and denied in part consistent with the above.

Within seven days of the date of this document, each party shall submit to the

Office of Administrative Law Judges a statement as to whether or not it seeks to have any portion of the document redacted from the public version. The parties' submissions may be made by facsimile and, or, by hard copy. Any party seeking to have a portion of this document redacted from the public version must submit to this office a copy of this document with red brackets indicating the portion, or portions, asserted to contain confidential business information.

So ordered.



Carl C. Charneski
Administrative Law Judge

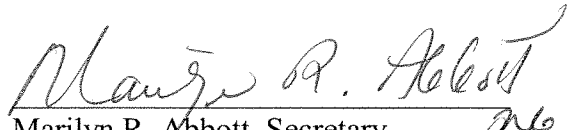
Issued: December 7, 2010

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337-TA-710

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER 61** has been served by hand upon the Commission Investigative Attorney Erin D. E. Joffre, Esq, and the following parties as indicated, on JAN 24 2011.


Marilyn R. Abbott, Secretary
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