

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

**In the Matter of**

**CERTAIN CONSUMER ELECTRONICS  
WITH DISPLAY AND PROCESSING  
CAPABILITIES**

**Inv. No. 337-TA-884**

**ORDER NO. 78: DENYING COMPLAINANT’S FIRST MOTION FOR SUMMARY  
DETERMINATION AS TO DOMESTIC INDUSTRY; AND  
  
MAKING CERTAIN UNDISPUTED FACT FINDINGS PURSUANT  
TO COMMISSION RULE 210.18(e)**

(April 18, 2014)

On November 7, 2013, Complainant filed a motion seeking a summary determination that the domestic industry requirement is satisfied based on Complainant’s licensing activities. (Motion Docket No. 884-038.) Complainant relies on two sets of activities for purposes of its motion: investments in its licensing program and litigation-related licensing expenditures. (Mot. Mem. at 4-12.) It is noted that Complainant did not limit the scope of its motion to the economic prong of the domestic industry requirement. (*See, e.g., id.* at 14.)

On November 18, 2013, Respondents Toshiba Corporation, Toshiba America, Inc., and Toshiba American Information Systems, Inc. (collectively, “Toshiba”), and Respondent Vizio, Inc. (“Vizio”) opposed the motion, arguing that the “Commission . . . is considering, in light of two recent Federal Circuit decisions, whether complainants, like GPH, asserting a licensing-based domestic industry must satisfy the technical prong.” (Opp. at 3.) Respondents also identify material facts in dispute which they say prevent a grant of summary determination. (*Id.* at 4-12.) In addition, they say that Complainant failed to produce certain discovery regarding its alleged litigation expenses. (*Id.* at 19.) Respondents sought an extension of time to respond to

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the motion and filed a motion to compel the discovery at issue (Motion Docket Nos. 884-039, 884-040), and the Administrative Law Judge denied the extension with the understanding that Respondents would be permitted to supplement if appropriate. (Order No. 36.) Respondents later withdrew their motion to compel after Complainant produced the requested discovery. (Order No. 47.)

On November 18, 2013, the Commission Investigative Staff (“Staff”) opposed the motion on the basis that genuine issues of material fact remain. (Staff Resp. at 10, 12.)

On December 17, 2013, Respondents supplemented their opposition pursuant to Order Nos. 36 and 47. Respondents argue that the discovery produced by Complainant bolsters their argument that Complainant’s alleged litigation-related licensing expenditures are not substantial. (Suppl. Resp at 2.) They say the invoices “create disputed issues of material fact” that preclude summary determination. (*Id.* at 6.)

On December 20, 2013, Respondents also filed a notice of supplemental authority in support of their opposition. In their notice, Respondents say that the Commission has found that complainants must now demonstrate the existence of an article protected by the asserted patent in every investigation. (Resp. Notice at 2 (citing *Certain Computers & Computer Peripheral Devices, & Components Thereof, & Prods. Containing Same* (“*Certain Computers*”), Inv. No. 337-TA-841, Notice of Comm’n Deter. at 3 (U.S.I.T.C., Dec. 19, 2013)).)

On December 30, 2013, Complainant sought leave to file a reply in support of its motion. (Motion Docket No. 884-054.) Respondents opposed the reply. Complainant’s reply motion is GRANTED IN PART to the extent that Complainant discusses the change in law in *Certain Computers*. (*See, e.g.* Reply at 4, n. 3 (seeking in the alternative a grant of the original motion as

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to the economic prong of the domestic industry requirement).) Complainant's discussion of the 650 Investigation in the proposed reply will be disregarded.

Vizio has since been terminated by initial determination and is awaiting final action by the Commission. (Order No. 75.) Any issues relating to Vizio with respect to this motion for summary determination are therefore moot and will not be considered in this Order. Likewise, the '881 patent was found to be indefinite in Order No. 53 on February 27, 2014, an initial determination that was not reviewed by the Commission. Accordingly, the portions of the motion pertaining to the '881 patent will also not be considered in this Order.

The Commission Rules permit a party to "move with any necessary supporting affidavits for a summary determination in its favor upon all or any part of the issues to be determined in the investigation." 19 C.F.R. § 210.18(a). Summary determination "shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law." 19 C.F.R. § 210.18(b). Summary determination under Commission Rule 210.18 is analogous to summary judgment under Federal Rule of Civil Procedure 56. *See Certain Asian-Style Kamaboko Fish Cakes*, Inv. No. 337-TA-378, Order No. 15 at 3 (U.S.I.T.C., May 21, 1996) (unreviewed initial determination).

The moving party bears the initial burden of establishing that there is an absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When such an initial showing is established, the burden shifts to the opposing party, who "must set forth specific facts showing that there is a genuine

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issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). To avoid summary judgment, the non-moving party must produce evidence of sufficient caliber to support judgment in its favor. *See Anderson*, 477 U.S. at 252. Such evidence must be real and substantial, not merely colorable. *Id.* at 249-50; *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (“[The non-moving party] must do more than simply show that there is some metaphysical doubt as to the material facts.”). If the responding party fails to make such a showing, the moving party is then entitled to judgment as a matter of law. *See Celotex*, 477 U.S. at 325.

When ruling on a motion for summary judgment, courts must examine all the evidence in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255. All “justifiable inferences” are to be drawn in the non-moving party’s favor. *Id.*

Here, Complainant alleges it is entitled to a summary determination based on its investments in a licensing program and in litigation-related license expenditures. To show a violation of Section 337, Complainant must prove, among other things, that there exists, or there is in the process of being established, “an industry in the United States, relating to the articles protected by the patent . . . concerned.” 19 U.S.C. § 1337(a)(2); *Certain Ammonium Octamolybdate Isomers*, Inv. No. 337-TA-477, Comm’n Op. at 55 (U.S.I.T.C., Jan. 2004). The domestic industry requirement consists of both an economic prong (*i.e.*, there must be an industry in the United States) and a technical prong (*i.e.*, the industry must relate to articles protected by the patent-at-issue). *Certain Ammonium Octamolybdate Isomers*, at 55.

To satisfy the economic prong, Complainant must prove, with respect to the articles it alleges are protected by the patent-at-issue: “(A) significant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in its exploitation,

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including engineering, research and development, or licensing.” 19 U.S.C. § 1337(a)(3) (internal formatting removed). Whether a complainant’s investments or activities are “significant” or “substantial” depends on a case-by-case examination of their nature and how they are significant or substantial to the articles protected by the intellectual property right; this is not a measurement “in the abstract or in an absolute sense.” *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Publ. 4289, Comm’n Op. at 26, 33 n.11 (U.S.I.T.C., Feb., 2011) (“*Printing Devices*”). Because the statute uses the disjunctive term “or,” Complainant bears the burden of establishing that the domestic industry requirement is satisfied based on any one of the three subsections (A) through (C). 19 U.S.C. § 1337(a)(3).

Here, Complainant says it is relying on subsection (C) in order to demonstrate the domestic industry requirement with respect substantial investments in licensing. (Mot. Mem. at 14-16.) However, Complainant does not appear to acknowledge in its original motion<sup>1</sup> that such a showing, if made, would apply solely to the economic prong of the domestic industry requirement in light of recent changes in Federal Circuit law. *InterDigital Communications, LLC v. ITC*, 707 F.3d 1295 (Fed. Cir. 2013); *Microsoft Corp. v. ITC*, 731 F.3d 1354 (Fed. Cir. 2013). These new cases appear to require, with respect to subsection (C), proof of articles protected by the patent—a showing that Complainant did not know it must make in its motion. As Respondents point out, the Commission has recently held that a complainant failed to demonstrate a domestic industry under subsection (C) as to its licensing activities because the complainant made no technical domestic industry showing. (Resp. Notice at 2; *Certain Computers*, Commission Op., at 27-32.) Thus, to the extent that Complainant seeks to meet the domestic industry requirement in its entirety, the Administrative Law Judge finds that this

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<sup>1</sup> (Mot. Mem. at 14, 16. See also Staff Resp. at 6.)

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portion of Complainants motion must be DENIED because Complainant has not met its new burden with respect to technical domestic industry. As noted above, in its Reply Complainant requests an alternative of summary determination with respect to the economic prong alone.

With respect to the economic prong, there are certain standards for licensing expenditures and litigation costs. Regarding licensing, the Commission says that

[t]o be considered ‘exploitation’ though licensing within the meaning of the statute, the complainant must demonstrate that a particular activity: (1) relates to the asserted patent; (2) relates to licensing; and (3) occurred in the United States. *Certain Liquid Crystal Display Devices, Including Monitors, Televisions, and Modules, and Components Thereof*, Inv. No. 337-TA-741/749 (“*Liquid Crystal Display Devices*”), Comm’n Op. at 109 (June 14, 2012); *see also Certain Multimedia Display and Navigation Devices and Systems, Components Thereof and Products Containing Same*, Inv. No. 337-TA-694, Commission[] Op. at 7-8 (August 8, 2011) (“*Navigation Devices*”). Activities meeting these requirements may be considered in an evaluation of whether the domestic industry requirement has been satisfied. *Liquid Crystal Display Devices*, Comm’n Op. at 109. However, a complainant must also show that the qualifying investments are substantial. *Id.*

*Certain Wireless Consumer Electronics Devices and Components Thereof*, Inv. No. 337-TA-853, Comm’n Op. at 51 (U.S.I.T.C., March 21, 2014) (internal quotations omitted).

In addition, the Commission says litigation costs taken alone do not constitute investment in exploitation. *Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-650, Comm’n Op. at 50 (U.S.I.T.C., 2010) (“*Coaxial Cable*”). Litigation costs related to licensing, however, may constitute investment in exploitation. (*Id.*) In order to establish that a substantial investment in exploitation of the patent has occurred through licensing, a complainant must prove that each asserted activity is related to licensing and also show that these licensing activities pertain to the particular patent at issue. (*Id.*) According to the Commission—

Depending on the circumstances, such activities may include, among other things, drafting and sending cease and desist letters, filing and conducting a patent

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infringement litigation, conducting settlement negotiations, and negotiating, drafting, and executing a license. The mere fact, however, that a license is executed does not mean that a complainant can necessarily capture all prior expenditures to establish a substantial investment in the exploitation of the patent. A complainant must clearly link each activity to licensing efforts concerning the asserted patent.

(*Id.* at 50-51.) Whether litigation-related licensing expenditures are substantial is a “fact intensive inquiry.” *John Mezzalingua Associates, Inc. v. ITC*, 660 F.3d 1322, 1326 (Fed. Cir. 2011). Some of the considerations for a determination of whether a domestic industry exists for the asserted patents based on a complainant’s licensing activities include the presence and number of licenses, the presence of activities soliciting licenses, and documentation of the costs for these activities. (*Coaxial Cable*, at 54-56.)

Here, the Administrative Law Judge finds that disputed issues of material fact prevent a summary determination with respect to economic domestic industry based on Complainant’s alleged licensing activities. For example, Respondents and Staff identify material issues of disputed fact with respect to the degree that certain salaries and payments may be attributed to Complainant’s licensing program, particularly in view of Complainant’s practice of {  
} thereby impacting the potential significance of these expenditures. (*See, e.g.*, Opp. at 23-30; Staff Resp. at 12.) Likewise, there are disputed issues of material fact with respect to the scope and significance of Complainant’s alleged litigation-related licensing activities. (*See, e.g.*, Opp. at 31-40; Staff Resp. at 10; Resp. RSMF 31.) Accordingly, the remainder of Motion Docket No. 884-038 is DENIED.

However, this does not end the inquiry. In Section 337 proceedings, in the event that a summary determination is not rendered for all the requested relief, the Commission Rules permit the Administrative Law Judge to “ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted” and to “make an

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order specifying the facts that appear without substantial controversy” that shall be deemed established. Commission Rule 210.18(e). The Administrative Law Judge finds that the following facts are undisputed<sup>2</sup> and are established:

1. **SMF 5:** GPH was previously named Silicon Graphics Inc. (“SGI”).
2. **SMF 10:** During fiscal years 2008, 2007, and 2006, SGI’s research and development expenses were approximately \$59 million, \$60 million, and \$84 million, respectively.
3. **SMF 13:** SGI entered into license, cross-license and technology agreements with numerous companies, including, among others, IBM, Intel, { }, Microsoft, NVIDIA, { }.
4. **SMF 17:** SGI asserted the '327 patent against ATI Technologies, Inc. (“ATI”) (later purchased by Advanced Micro Devices, Inc. (“AMD”)).
5. **SMF 21:** SGI filed for Chapter 11 bankruptcy protection on April 1, 2009.
6. **SMF 22:** { }  
  
{ }.
7. **SMF 24:** SGI changed its name to Graphics Properties Holdings, Inc. (“GPH”).
8. **SMF 25:** Since emerging from bankruptcy in May 2009, GPH has devoted resources to { }  
  
{ }.
9. **SMF 28:** { }.
10. **SMF 29:** { }  
  
{ }.
11. **SMF 32-33:** GPH engaged { }  
  
{ }.
12. **SMF 34:** { }  
  
{ }.
13. **SMF 35:** { }

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<sup>2</sup> See Ground Rule 2.4 (material facts not specifically controverted may be deemed admitted). See also *Certain Electronic Devices with Image Processing Systems, Components Thereof, and Associated Software*, Inv. No. 337-TA-724, Order No. 29, Initial Determination Granting Complainants’ Summary Determination Motion with Respect to the Economic Domestic Industry Requirement, at 12 (U.S.I.T.C., March, 2011) (unreviewed).



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14. SMF/RSMF 37: {  
}.
15. SMF 39: In May 2010, GPH hired Bradley Scher to be the president, assistant secretary,  
and corporate treasurer of GPH. {  
}.
16. SMF 40: Mr. Scher is {  
}.
17. SMF 42: In early 2011, GPH engaged GKM Advisors LLC ("GKM") {  
}.
18. SMF 43: A Management and Services Agreement between GPH and GKM {  
}.
19. SMF 44: GKM agreed to provide certain services to assist GPH {  
}
20. SMF 47: GKM agreed to provide these services in exchange for {  
}.
21. SMF 49: Between June of 2011 and March 2013, GPH paid {  
}.
22. SMF 50: {  
}.
23. SMF 54: {  
}.
24. SMF 56: {  
}.
25. SMF 65: {  
}.
26. SMF 66: {  
}.
27. SMF 67: {  
}.
28. SMF 69: {  
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29. SMF 70: {  
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30. SMF 71: {

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31. SMF 72: {

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32. SMF 73: {

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33. **SMF 74:** In mid-November of 2011, GPH filed a complaint at the International Trade Commission against Motorola and respondents (i) Apple Inc. ("Apple"), (ii) HTC Corporation and HTC America, Inc. (collectively, "HTC"), (iii) LG Electronics Inc. and LG Electronics USA, Inc. (collectively, "LG"), (iv) Research in Motion Ltd. and Research in Motion Corporation (collectively, "RIM"), (v) Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC (collectively, "Samsung"), and (vi) Sony Corporation, Sony Corporation of America, Sony Electronics, Inc., Sony Ericsson Mobile Communications AB, and Sony Ericsson Mobile Communications (USA) Inc. (collectively, "Sony") (collectively, the "836 Respondents").

34. **SMF 75:** The complaint alleged unfair importation of products that infringed the '327 and other patents.

35. **SMF 76:** Concurrently with its filing of the ITC complaint, GPH also filed co-pending cases against the same parties, asserting the same patents, in the District Court for the District of Delaware.

36. **SMF 78:** In February 2012, GPH, through outside counsel Dechert LLP ("Dechert"), filed several enforcement actions in the District of Delaware against (i) Acer America Corporation and Acer, Inc. (together, "Acer"); (ii) Asus Computer International, Inc., Asus Technology PTE Ltd., and ASUSTek Computer Inc. (collectively, "Asus"); (iii) Sharp Electronics Corporation and Sharp Corporation (together, "Sharp"); (iv) Toshiba America Information Systems, Inc., Toshiba America, Inc., and Toshiba Corporation (collectively, "Toshiba"); and (v) Vizio, Inc. ("Vizio") (collectively, the "Dechert Actions").

37. **SMF 79:** These complaints alleged, among a handful of other patents, infringement of the '327 patent.

38. **SMF 80:** GPH did not seek an injunction in any Dechert Action.

39. **SMF 81:** Once the Motorola license was executed in March 2012, GPH withdrew the pending ITC complaint and filed another complaint at the ITC against all the same respondents except for Motorola.

40. **SMF 83:** After the '158 patent issued from the '650 application on March 27, 2012, GPH added the '158 patent to its complaint in the 836 Investigation.

41. SMF 84: {

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42. **SMF 85:** {  
}.  
43. **SMF 87:** Apple was subsequently terminated from the 836 Investigation.  
44. **SMF 88:** During the course of the 836 Investigation, GKM and attorneys from both Pepper Hamilton and Mintz Levin were involved in numerous conversations and meetings with the {  
}.  
45. **SMF 89:** {  
}.  
46. **SMF 90:** On June 29, 2012, {  
}.  
47. **SMF 91:** On May 15, 2012, {  
}.  
48. **SMF 93:** On May 23, 2012, {  
}.  
49. **SMF 94:** On September 4, 2012, {  
}.  
50. **SMF 95:** On July 2, 2012, {  
}.  
51. **SMF 96:** On October 3, 2012, {  
}.  
52. **SMF 97:** On June 29, 2012, {  
}.  
53. **SMF 98:** On October 17, 2012, {  
}.  
54. **SMF 99:** On July 3, 2012, {  
}  
55. **SMF 100:** On September 6, 2012, {  
}.  
56. **SMF 101:** In November 2012, GPH filed additional district court actions in the District of Delaware (the “November Delaware Actions”) asserting one or more of the Asserted Patents as shown below:

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Defendant (November Delaware Actions)	Asserted Patents
Amazon	'327 patent; '158 patent; '881 patent; '145 patent
Barnes and Noble	'327 patent; '158 patent; '145 patent
Google	'327 patent; '158 patent; '145 patent
Huawei	'327 patent; '158 patent; '881 patent; '145 patent
Lenovo	'327 patent; '158 patent; '881 patent; '145 patent
Pantech	'327 patent; '158 patent; '881 patent; '145 patent
ZTE	'327 patent; '158 patent; '881 patent; '145 patent

57. **SMF 102:** The November Delaware Actions included lawsuits against (i) Amazon.com, Inc. and Amazon Services LLC (“Amazon”); (ii) Barnes and Noble Inc., BarnesandNoble.Com LLC, and BarnesandNoble.Com Inc. (“Barnes and Noble”); (iii) Google Inc. (“Google”); (iv) Huawei Technologies Co., Ltd., Huawei Technologies USA Inc., Huawei Device USA Inc., Huawei Network USA, Inc., and Futurewei Technologies, Inc. (“Huawei”); (v) Lenovo Group Ltd., Lenovo Holding Company, Inc., and Lenovo (United States), Inc. (“Lenovo”); (vi) Pantech Corporation f/k/a Pantech Co. Ltd. and Pantech Wireless, Inc. (“Pantech”); and (vii) ZTE Corporation, ZTE (USA) Inc., and ZTE Solutions, Inc. (“ZTE”).

58. **SMF 103:** GPH did not seek an injunction in the November Delaware Actions.

59. **SMF 105:** {

}

60. **SMF 107:** {

}

61. **SMF 108:** {

}

62. **SMF 109:** {

}

63. **SMF 110:** {

}

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64. SMF 111: {

}.  
}

65. SMF 112: {

}.  
}

66. SMF 113: {

}.  
}

67. SMF 114: In May 2013, GPH filed five new district court cases (the “May 2013 Actions”) against Acer, Asus, Panasonic, Toshiba, and Vizio in the District of Delaware.

68. SMF 115: GPH asserted one or more of the Asserted Patents in each case.

69. SMF 116: GPH did not seek an injunction in any of the May 2013 Actions.

70. SMF 117: GKM personnel traveled to Asia in May of 2013, and met with representatives of { }, none of which were defendants or respondents in any GPH litigation, to discuss taking a license to the GPH portfolio.

71. SMF 118: {

}.  
}

72. SMF 119: {

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}

73. SMF 120: {

}.  
}

74. SMF 121: {

}.  
}

75. SMF 124: {

}.  
}

76. SMF 125: {

}.  
}

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<sup>3</sup> Respondents object that there is no “independent” support for { } but provide no actual evidence to create a disputed issue of fact with respect to { } sworn declaration. (Resp. RSMF Nos. 118, 119, et seq.) “[The non-moving party] must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

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77. **SMF 126:** { }.
78. **SMF 127:** { } are organized under the laws of the State of Delaware, and the personnel at each entity involved in the { } reside within the United States.
79. **SMF 128:** Other than foreign travel to meet with potential licensees, all of the { } occurred, and continues to occur, within the United States.
80. **SMF 129:** All of the law firms that GPH has engaged for purposes of the Licensing Program are United States law firms. Apart from licensing meetings and specific litigation events (such as depositions) that occurs overseas, all of the work of GPH's outside counsel occurs within the United States.

(SMF; Respondents' RSMF; Staff RSMF.)

Within four (4) business 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<sup>4</sup> it seeks to have any confidential portion of this document deleted from the public version. Any party seeking redactions to the public version must submit to this office two (2) copies of a proposed public version of this document pursuant to Ground Rule 1.11 with red brackets clearly indicating any portion asserted to contain confidential business information.

The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date. In addition, an electronic courtesy copy is required pursuant to Ground Rule 1.3.2. 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

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<sup>4</sup> This means that parties that do not seek to have any portion redacted are still required to submit a statement to this effect.

**CERTAIN CONSUMER ELECTRONICS  
WITH DISPLAY AND PROCESSING  
CAPABILITIES**

337-TA-884

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served upon the Commission Investigative Attorney, Matthew Bathon, Esq., and upon the following parties as indicated on May 9, 2014.



Lisa R. Barton  
Secretary to the Commission  
U.S. International Trade Commission  
500 E Street, SW, Room 112A  
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**ON BEHALF OF COMPLAINANT GRAPHICS PROPERTIES HOLDINGS, INC.:**

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( ) Via Hand Delivery  
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( ) Other: \_\_\_\_\_

**ON BEHALF OF RESPONDENTS TOSHIBA CORPORATION, TOSHIBA AMERICA,  
INC., AND TOSHIBA AMERICA INFORMATION SYSTEMS, INC.:**

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