

**PUBLIC VERSION**

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, D.C.**

**In the Matter of**

**CERTAIN ELECTRONIC DIGITAL MEDIA  
DEVICES AND COMPONENTS THEREOF**

**Inv. No. 337-TA-796**

**RECOMMENDED DETERMINATION ON REMEDY AND BOND**

**Administrative Law Judge Thomas B. Pender**

**(November 7, 2012)**

**List of Abbreviations**

CDX	Complainant's Demonstrative Exhibit
CIB	Complainant's Initial Post-Hearing Brief
CRB	Complainant's Reply Post-Hearing Brief
CX	Complainant's Exhibit
Depo.	Deposition
JX	Joint Exhibit
RDX	Respondent's Demonstrative Exhibit
RIB	Respondent's Initial Post-Hearing Brief
RRB	Respondent's Reply Post-Hearing Brief
RX	Respondent's Exhibit
SIB	Staff Initial Post-Hearing Brief
SRB	Staff Reply Post-Hearing Brief
Tr.	Transcript
DWS	Direct Witness Statement (Including Revised Direct Witness Statements)
RWS	Rebuttal Witness Statement

## **I. Remedy and Bonding**

The Commission's Rules provide that subsequent to an initial determination on the question of violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, the administrative law judge shall issue a recommended determination containing findings of fact and recommendations concerning: (1) the appropriate remedy in the event that the Commission finds a violation of section 337, and (2) the amount of bond to be posted by respondents during Presidential review of Commission action under section 337(G). *See* 19 C.F.R. § 210.42(a)(1)(ii). In this investigation, complainant Apple, Inc. ("Apple") seeks both a limited exclusion order and a cease and desist order. Additionally, Apple requests that the Commission impose a bond during the presidential review period of 88% of the entered value for mobile phones, 32.5% of the entered value for media players, and 37.6% of the entered value for tablet computers.

### **A. Limited Exclusion Order**

Under Section 337(d), the Commission may issue either a limited or a general exclusion order. *See* 19 U.S.C. § 1337(d). A limited exclusion order instructs the U.S. Customs Service to exclude from entry all articles that are covered by the patent at issue and that originate from a named respondent in the investigation. A general exclusion order instructs the U.S. Customs Service to exclude from entry all articles that are covered by the patent at issue, without regard to source. Here, Apple seeks only a limited exclusion order.

### **Parties Positions**

Apple requests that a limited exclusion order issue that prohibits the importation of all infringing products. (CIB at 274.) Apple argues that Samsung has admitted to selling for importation, importing, and selling after importation in the United States the accused products and thus "a limited exclusion order covering all of Samsung's infringing electronic digital media devices, including current and future models, should issue against SEC, SEA, STA, and each of their affiliates, successors, distributors, and assigns." (*Id.*) The Staff agrees.

Samsung argues that in the event a violation is found, the limited exclusion order should be directed solely at those product categories for which Apple has shown a violation. (RIB at 274.) Samsung argues that this request is warranted in light of the facially broad scope of the Notice of Investigation and in view of Apple's conduct during discovery. (*Id.*) Samsung argues that although Apple took discovery on variety of different types of electronic media devices that Samsung sells, including televisions, laptops, non-smartphones mobile phones, cameras and camcorders, Apple did not accuse these products of infringement. (*Id.* at 275.) Samsung argues that because Apple neither attempted to prove a violation by, nor importation of, any category of Samsung products beyond mobile phones, tablets, and media players, any exclusion order should be tailored solely to those categories of products and should, for the same reasons, not include standalone components. (*Id.* at 276.) Samsung also argues that special guidance should be provided to Customs in order to assist them in properly administering any exclusion order that issues. (*Id.* at 277.)

### Analysis

Upon finding a violation of Section 337, the Commission "shall direct that the articles concerned ... be excluded from entry into the United States," provided it finds no public interest reason not to exclude such articles. 19 U.S.C. §1337 (d)(1). "[T]he central purpose of remedial orders is to ensure complete relief to the domestic industry." *Certain Hardware Logic Emulation Sys. & Components Thereof*, Inv. No. 337-TA-383, Comm'n Op. at 16 (March 31, 1998).

The scope of this investigation as set forth in the Notice of Investigation includes electronic media devices and components thereof. In accordance with my Initial Determination, I recommend that the appropriate remedy in this investigation is a limited exclusion order directed to infringing electronic digital media devices. 19 U.S.C. § 1337(d)(1). Apple does not seek a limited exclusion order directed to components and thus I recommend that one should not issue.

Samsung's request for "special guidance" to Customs is not well received. Samsung does not provide any proposed "guidance" for consideration. Moreover, Samsung provides no support or basis for its request.

In its post-hearing reply brief, Samsung requests for the first time that any remedial order that issues include an exemption for service and repair of accused Samsung products imported prior to the effective date of the remedial order. As Samsung did not raise this issue in its initial post-hearing brief, the issue is waived. Samsung's failure to timely raise the issue prejudices Apple and the Staff who are denied an opportunity to respond to the request for exemption.

**B. Cease and Desist Order**

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for violation of section 337. *See* 19 U.S.C. § 1337(f)(1). The Commission generally issues a cease and desist order directed to a domestic respondent when there is a "commercially significant" amount of infringing, imported product in the United States that could be sold, thereby undercutting the remedy provided by an exclusion order. *See Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, USITC Pub. 2391, Comm'n Op. on Remedy, the Public Interest and Bonding at 37-42 (June 1991); *Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334, Comm'n Op. at 26-28 (Aug. 27, 1997).

**Parties Positions**

Apple argues that the record evidence shows that Samsung holds commercially significant inventories of accused products in the United States. (CIB at 275.) Apple argues that Samsung maintains distribution centers in the United States where accused products are warehoused after importation and before shipment to customers. (*Id.*) Apple asserts that the distribution centers are located in Chicago, Illinois, Los Angeles, California, and Coppel, Texas. (*Id.*) Apple argues that

although Samsung's distribution center in Coppell is located in a foreign trade zone, its Chicago distribution center is within the United States customs territory and stores accused products that have cleared customs. (*Id.*) Apple argues that Samsung documents show that Samsung's distribution centers receive significant volume of accused products. (*Id.*) Apple argues that documents show that the distribution centers receive more than 26,000 units of the accused Galaxy Tab GT-P7510 worth more than \$10.5 million and receive regular shipments of the accused Nexus 4G SGH-D720, Replenish SPH-M580, and Intercept SPH-M910, worth hundreds of thousands of dollars. (*Id.* at 276.) Apple argues that as of September 30, 2011, Samsung possessed more than \$550 million in inventory comprising such products as "wireless terminal phones." (*Id.*) Apple notes that Dr. Prowse testified that accused products account for approximately 60% of Samsung's sales and thus it would be reasonable to deduce that 60% of Samsung's \$550 million in inventory consists of accused products. (*Id.*) Apple also argues that Samsung's 2012 business plan shows actual inventory of wireless terminal phones for 2010 valued at more than \$271 million and held for nearly two weeks and forecasted inventory of wireless terminal phones for 2011 valued at more than \$220 million and held more than one week. (*Id.* at 276-277.) Apple argues that Samsung's expert Dr. Vander Veen offered no opinion rebutting Dr. Prowse's conclusion that Samsung maintains commercially significant inventory. (*Id.* at 277.) The Staff agrees with Apple that Samsung holds commercially significant inventory and that a cease and desist order should issue. (SIB at 125.)

Samsung argues that Apple has failed to provide evidence of commercial significant inventories of accused products in the United States. (RIB at 277.) Samsung argues that Dr. Prowse's reliance on sales and importation data for the accused products is misplaced and cannot satisfy the standard for imposing a cease and desist order. (*Id.* at 278.) Samsung argues that because Apple failed to quantify the amount of alleged inventory it is not entitled to a cease and

desist order. Samsung argues that the documents cited by Dr. Prowse do not quantify the amount of any particular model or product allegedly held in inventory or whether any of such products are actually accused products. (*Id.*) Samsung argues that Apple's failure to offer evidence of commercially significant inventory is not surprising given that Samsung follows the concept of "just-in-time manufacturing." (*Id.*) Samsung argues that the purpose of this sales and distribution model is to avoid any inventory during the entire sales process. (*Id.* at 278-279.)

### Analysis

The evidence shows that SEA's American Distribution Center operates warehouses in Los Angeles and Chicago that receive and hold media devices and tablet computers after importation and before shipment to customers. (CX-2434C (Prowse DWS) at Q&A 85; CX-2503C (Denison Depo.) at 138:13-141:20; CX-2553C (Sheppard Depo.) at 98:14-23, 100:25-101:15, 101:20-102:13; CX-2557C (Merrill Depo.) at 59:23-62:25, 65:19-68:15.) The evidence also shows that STA maintains two distribution facilities in the United States, one in Chicago, Illinois and another in Coppell, Texas. (CX-2553 (Sheppard Depo.) at 98:14-23, 100:25-101:15, 101:20-102:13.) While STA's Coppell distribution center is located within a foreign trade zone, the evidence shows the Chicago distribution center stores accused products that have cleared customs. (CX-2434C (Prowse DWS) at Q&A 85; CX-2553 (Sheppard Depo.) at 144:9-19.)

The evidence shows that the quantity of products held by Samsung in its distribution centers is commercially significant. For example, the evidence shows that STA's Chicago distribution center regularly receives shipments of thousands of units of the accused Nexus 4G SGH-D720, Replenish SPH-M580 and Intercept SPH-M910, with a combined value in the hundreds of thousands of dollars. (*See* CX-2553C (Sheppard Depo.) at 177:25-178:15; CX-116C; CX-117C; CX-118C.) The evidence also shows that SEA's American Distribution Center maintains "on-hand" inventory consisting of more than 26,000 units of the accused Galaxy Tab GT-P7510 worth

more than \$10.5 million. (See CX-128C at 1-2; *see also* Tr. at 1298:22-1299:16 – which addresses STA.)

Accordingly, I find that the evidence shows more likely than not that Samsung maintains a commercially significant inventory of imported infringing accused products in the United States. I find Samsung's arguments to the contrary ignore the record evidence and seek to hold Apple to an exacting standard of proof not required under Commission precedent. Additionally, I find Samsung's argument questioning the evidence presented by Apple on the basis that its business model is structured to ensure that no products are housed in inventory within the United States Customs territory not persuasive as there is no evidence that Samsung's "just in time manufacturing" concept is anything more than a business philosophy. Thus, I recommend that the Commission issue a cease and desist order.

**C. Bond During Presidential Review Period**

Section 337(j)(3) provides that if an exclusion order is issued respondents may, upon payment of a bond, continue to import products subject to exclusion until the expiration of the 60-day Presidential review period. 19 C.F.R. §1337(j)(3). I am charged with recommending whether a bond shall issue and if so, the amount of said bond. The purpose of the bond is to protect the complainant from any injury and thus any bond set should be in an amount sufficient to ensure such protection. 19 C.F.R. § 210.42(a)(1)(ii); 19 C.F.R. § 210.50(a)(3).

When reliable price information is available, the Commission has often set the bond by eliminating the differential between the domestic product and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. a 24 (1995) (The Commission "typically has considered the differential in sales price between the patented product made by the domestic industry and the lower price of the infringing imported product, and has set a



bond amount sufficient to eliminate that difference.”). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See, e.g., Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm’n Op. at 41 (1995). A 100 percent bond has been required when no effective alternative existed. *See, e.g., Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm’n Op. at 26-27 (July 1997) (a 100% bond imposed when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record).

### **Parties Positions**

Apple argues that the Commission should require a bond of 88%, 32.5%, and 37.6% of the entered value for mobile phones, media players and tablet computers, respectively. (CIB at 280.) Apple argues that its expert, Dr. Prowse calculated these percentages based on the price differentials between Apple’s covered iPhone, iPad, and iPod touch products and the accused Samsung products in the same product categories. (*Id.*) Apple argues that Dr. Prowse analyzed the average sales price for the Apple and Samsung products in each category in the most recent calendar quarter for which pricing information was produced in discovery – fourth quarter of 2011. (*Id.*) Apple argues that Dr. Prowse determined that the average sales prices for Apple’s iPhone, iPod touch, and iPod products were [ ] respectively. (*Id.*) Apple argues that Dr. Prowse then calculated the average sales prices for Samsung’s accused mobile phones, media players, and tablet computers as \$330, \$150, and \$489, respectively. (*Id.*) Apple argues that based on the calculated price differentials of [ ] between Apple’s and Samsung’s mobile phones, media players and tablets, respectively, Dr. Prowse concluded that the appropriate bond amounts for those product categories are 88%, 32.5 %, and 37.6%. (*Id.*)

Samsung argues that Apple has failed to adduce evidence sufficient to establish the existence of any competitive injury. (RIB at 280.) Samsung also argues that Apple failed to present evidence necessary to conduct a proper price comparison based on products that directly compete. (*Id.*) Samsung argues that Apple's expert did not perform any analysis to determine which accused products directly compete with the Apple iPhone products. (*Id.* at 281.) Samsung argues that Apple's expert included numerous low-end Samsung phones in his price differential as well as mobile phones that have feature sets much different from Apple's iPhone products. (*Id.*) Samsung asserts that Apple's and Samsung's products are sold at a variety of prices through a variety of sales channels, "rendering impractical any price differential analysis." (*Id.*) Additionally, Samsung argues that Apple failed to provide the sales prices of its iPhone products broken out by model or carrier and that such information is necessary to perform a true price differential. (*Id.* at 282.)

With regard to the accused tablets and media players, Samsung argues that Apple's proposed bond rates are skewed. (*Id.* at 283.) Samsung argues that Apple failed to include Samsung's WiFi-only tablets in calculating the price differential and that Apple relied solely on the iPad 2 3G and not the cheaper iPad 2 or discontinued iPad to arrive at a sales price for its domestic products. (*Id.*) Likewise, Samsung argues that Apple failed to include the first three generations of the iPod Touch in performing a price differential analysis. (*Id.* at 284.)

Samsung further argues that Apple has failed to show any typical royalty rate for the asserted patents. (*Id.* at 282.) Samsung asserts that Apple has shown neither a need nor a basis for a bond and thus argues that no bond should be required. (*Id.* at 282, 284.) Samsung argues that to the extent a bond is deemed appropriate, it should be set based on the industry median royalty rate of no more than 4.9%. (*Id.*)

The Staff agrees with the bond rates of 32.5% and 37.6% proposed by Apple for the accused tablets and media players, respectively, found to infringe the asserted patents. (SIB at 127-128.)

With regard to the accused mobile phones, however, the Staff argues that Samsung sells several mobile phones that are priced significantly less than Apple's phones but do not compete with Apple's high-end phones. (*Id.* at 127.) The Staff argues it is not fair to compare a \$200 Samsung phone with a \$600 iPhone if the products do not compete. (*Id.*) Thus, the Staff argues that the proper bond rate for Samsung's accused mobile phones should be set at 58%, which results from the exclusion of total net revenue and total net sales quantity data for Samsung's mobile phones selling at \$200 or less.

### Analysis

The evidence shows that Samsung's accused products compete head to head with Apple's domestic products. Justin Denison, STA's chief strategy officer identified Apple as STA's "primary #1 smartphone competitor for 2011." (CX-1440C at 3; Tr. at 1356:17-1357:19.) Similarly, Mr. Denison stated in a presentation to Samsung's CFO that the United States mobile phone market was "becoming a Two Horse Race Between Apple & Samsung." (CX-1610C at 8; Tr. at 1358:20-1359:25.) Moreover, a presentation titled, "IPHONE 5 COUNTER STRATEGY" shows that STA considered its smartphones as competing with Apple's iPhone products across all price tiers and sales channels. (CX-124C at 11-20; Tr. at 2186:8-2190:1.) The presentation further suggests that Samsung favored a strategy of pricing its products to undercut Apple. (*Id.*) Thus, contrary to Samsung's argument, the evidence suggests both a basis and a need for a bond. Further, I find such evidence cuts against the Staff's argument that certain lower priced accused Samsung mobile phones do not compete with Apple's domestic products.

I find that the price differential analysis conducted by Apple's expert, Dr. Prowse, to be reasonable based on the available pricing information of record and thus adopt Apple's proposed bond rates of 88%, 32.5%, and 37.6% of the entered value for mobile phones, media players and tablet computers, respectively. To the extent Samsung continues to press that any price differential

analysis based on the available pricing information of record is inadequate, I would recommend a bond rate of 100% of the entered value of Samsung's accused smartphones. *See, e.g., Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (a 100% bond imposed when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record).

Samsung's argument that the bond rate should be based on the industry median royalty rate of no more than 4.9% is not persuasive as Samsung has failed to adduce any evidence that Apple has ever offered such a royalty rate to license its asserted patents. In fact, the evidence shows that Apple has never licensed its asserted design patents. Thus, I find it inappropriate to set the bond based on Samsung's proposed 4.9% industry standard royalty rate.

I also do not find persuasive Samsung's argument that Dr. Prowse analysis is flawed because some of Apple's domestic products and Samsung's accused products are sold through different sales channels. Such an argument ignores that there is still competition between Samsung's accused products and Apple's domestic products even though the products may be sold by different carriers.

Accordingly, for the reasons set forth above, I recommend that Samsung be required to post a bond of 88%, 32.5%, and 37.6% of the entered value for mobile phones, media players and tablet computers, respectively.

## **II. Conclusion**

In accordance with the discussion of the issues contained hereinabove, it is my Recommended Determination ("RD") that should the Commission find a violation of Section 337, it should issue a limited exclusion order directed at Samsung's products found to infringe U.S. Patent No. D618,678; U.S. Patent No. 7,479,949; U.S. Patent No. RE41,922; and U.S. Patent No.

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7,912,501. It is also my recommendation that the Commission issue a cease and desist order directed toward Samsung that prohibits the sale of any commercially significant quantities of the imported infringing accused products in the United States. Further, it is my recommendation that Samsung be required to post a bond of 88%, 32.5%, and 37.6% of the entered value for mobile phones, media players and tablet computers, respectively, found to infringe the D'678, '949, '922, and '501 patents during the Presidential review period.

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

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

**SO ORDERED.**

A handwritten signature in black ink, reading "Thomas B. Pender". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

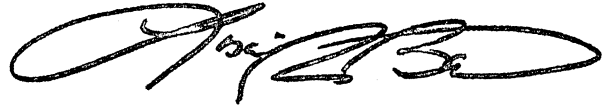
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Thomas B. Pender  
Administrative Law Judge

**IN THE MATTER OF CERTAIN ELECTRONIC DIGITAL MEDIA 337-TA-796  
DEVICES AND COMPONENTS THEREOF**

**CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER** has been served upon, **Reginald D. Lucas, Esq.**, Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on December 28, 2012.



\_\_\_\_\_  
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