

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN WIRELESS DEVICES,
INCLUDING MOBILE PHONES AND
TABLETS II**

Inv. No. 337-TA-905

**ORDER NO. 12: DENYING RESPONDENTS' MOTION TO TERMINATE THE
INVESTIGATION FOR LACK OF STANDING AND LACK OF
DOMESTIC INDUSTRY**

(May 1, 2014)

On March 21, 2014, Respondents Samsung Electronics Co. Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC (collectively, "Samsung"); Sony Corp., Sony Mobile Communications AB and Sony Mobile Communications (USA), Inc. (collectively, "Sony"); Nokia Corp. and Nokia Inc. (collectively, "Nokia"); and ZTE Corp. and ZTE (USA) Inc. (collectively, "ZTE") (collectively, "Respondents") filed a motion to terminate this Investigation for lack of standing and lack of domestic industry. (Motion Docket No. 905-005). On April 2, 2014, Complainant Pragmatix Mobile, LLC ("Complainant" or "Pragmatix Mobile") filed an opposition to the motion. The Office of Unfair Import Investigations Commission Investigative Staff ("Staff") also filed a response opposing the motion. On April 9, 2014, Respondents filed a motion for leave to reply to Complainant's and Staff's responses. (Motion Dkt. No. 905-008). On April 11, 2014, Complainant filed a motion opposing the motion for leave to reply. On April 16, 2014, Respondents submitted an additional letter related to the motion. On April 17, 2014, Complainant submitted a letter in response.

Because of the complexity of the issues raised in Respondents' motion and the responses

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thereto, Respondents' motion for leave to reply is granted. The parties' April 16 and April 17 letters have also been considered for this Order.

I. BACKGROUND

Pragmatus Mobile filed the Complaint in this Investigation on December 18, 2013, asserting ownership of U.S. Patent Nos. 8,149,124 and 8,466,795 (the "Asserted Patents"). (Complaint Docket No. 2992). The Complaint alleged, *inter alia*, that Pragmatus Mobile holds all rights, title and interest to the Asserted Patents by way of assignment. (Complaint at ¶¶ 25-26, 35-36). Attached to the Complaint were public assignment records purporting to show that patent applications for the Asserted Patents were assigned from Hoffman Resources LLC to Pragmatus Mobile on December 29, 2011. (Complaint Exhibit 3, Exhibit 6). Another document attached to the Complaint appeared to contradict the public assignment records, however: [

] (Complaint Confidential Exhibit 9H). On January 8, 2014, after an inquiry by Staff during review of the Complaint, Pragmatus Mobile submitted a supplemental assignment, dated January 7, 2014, assigning "all right, title, and interest that exist today and may exist in the future" in the relevant patent applications from Pragmatus LLC to Pragmatus Mobile. (EDIS Doc. No. 525383). Subsequently, on January 17, 2014, the Commission instituted this Investigation. 79 Fed. Reg. 4173-4 (January 24, 2014).

In their motion, Respondents contend that ownership of the Asserted Patents was not properly assigned to Pragmatus Mobile at the time the Complaint was filed. Respondents thus argue that the Investigation must be terminated for lack of standing or, in the alternative, for lack

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of domestic industry. Complainant and Staff dispute Respondents' contentions.

II. LEGAL STANDARD

Respondents filed their motion pursuant to Commission Rule 210.21(a)(1), which provides, *inter alia*, that “[a]ny party may move at any time prior to the issuance of an initial determination on violation ... to terminate an investigation in whole or in part ... for good cause” 19 C.F.R. § 210.21(a)(1). Commission Rule 210.12 requires that intellectual property-based complaints filed by a private complainant “include a showing that at least one complainant is the owner or exclusive licensee of the subject intellectual property.” 19 C.F.R. § 210.12(a)(7). In determining whether this requirement is met, the Commission has applied the standing requirement established by courts in patent infringement cases. *See Certain Catalyst Components and Catalysts for the Polymerization of Olefins*, Inv. No. 337-TA-307, Commission Opinion (June 18, 1990) (“[W]e see little basis for inferring a different standing requirement under section 337 than the courts have established in patent infringement cases.”).

The Staff argues that this motion should be decided pursuant to Commission Rule 210.18 because Respondents are effectively seeking summary determination on their ownership defense. But prior determinations of standing have not relied upon the summary determination standard, even where ownership issues are disputed. *See Certain Electronic Devices with Communication Capabilities, Components Thereof, and Related Software*, Inv. No. 337-TA-808, Order No. 15 (June 8, 2012) (terminating an Investigation due to lack of standing); *Certain Devices with Secure Communication Capabilities, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-818, Order No. 15 (July 18, 2012) (terminating an Investigation due to lack of standing). I find that it is appropriate to apply the legal standards of earlier orders following Commission

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Rule 210.21, which is similar to the treatment of motions to dismiss for lack of standing in Federal District Courts pursuant to Federal Rule of Civil Procedure 12(b)(1). In both Federal courts and before the Commission, “[t]he question of standing to assert a patent claim is jurisdictional.” *SiRF Technology*, 601 F.3d at 1325. An investigation may thus be terminated for lacking of standing where there is good cause pursuant to Commission Rule 210.21(a)(1). A complainant bears the burden to prove it has standing. *Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same*, Inv. No. 337-TA-605, Initial Determination at 14 (December 1, 2008). But where there is a recording of an assignment with the USPTO, “it creates a presumption of validity as to the assignment and places the burden to rebut such a showing on one challenging the assignment.” *Certain Optoelectronic Devices for Fiber Optic Communications, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-860, Initial Determination at 13 (December 13, 2013) (citing 37 CFR § 3.54; *SiRF Technology, Inc. v. International Trade Commission*, 601 F.3d 1319, 1327-28 (Fed. Cir. 2010)).

Respondents also move to dismiss the complaint for lack of domestic industry, however, and unlike questions of standing, the domestic industry requirement is routinely decided by summary determination. *See Certain Opaque Polymers*, Order No. 14 (January 23, 2014) (granting summary determination that Complainant has satisfied the economic prong of the domestic industry requirement); *Certain Drill Bits and Products Containing Same*, Order No. 9 (July 9, 2012) (granting summary determination that the domestic industry requirement is not satisfied and terminating the investigation). The existence of a domestic industry falls within the scope of Commission Rule 210.18, which states that summary determination is appropriate to decide “all or any part of the issues to be determined in the investigation.” 19 C.F.R. § 210.18(a).

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The “issues to be determined” are explicitly identified in the Notice of Institution of Investigation, including “whether an industry in the United States exists as required by subsection (a)(2) of section 337.” (Notice of Institution of Investigation at 2). *See also* 79 Fed. Reg. at 4173 (January 24, 2014). In accordance with the standard for summary determination, Respondents thus have the burden to “show that there is no genuine issue as to any material fact” regarding domestic industry. 19 C.F.R. § 210.18(b). The evidence “must be viewed in the light most favorable to the party opposing the motion ... with doubt resolved in favor of the nonmovant.” *Crown Operations Int’l, Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002); *see also Xerox Corp. v. 3Com Corp.*, 267 F.3d 1361, 1364 (Fed. Cir. 2001) (“When ruling on a motion for summary judgment, all of the nonmovant’s evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant’s favor.”).

III. DISCUSSION

Respondents’ motion raises several distinct questions of law and fact: (1) Whether standing in a 337 investigation must be evaluated at the time of the filing of the complaint or at the time of institution; (2) Whether ownership rights for the Asserted Patents were assigned in 2011 from Hoffman Resources LLC to Pragmatius Mobile; and (3) Whether Complainant’s license agreements regarding the Asserted Patents are valid for establishing a domestic industry. Each of these issues is discussed below.

A. Timeframe for Establishing Standing in 337 Investigations

After filing the Complaint but prior to Institution of this Investigation, Complainant executed a supplemental assignment from Pragmatius LLC to Pragmatius Mobile. Respondents’ motion does not dispute the legitimacy of this assignment but argues that Complainant cannot rely

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on this assignment because standing must exist at the time of the filing of the Complaint.

Complainant and Staff contend that standing should be evaluated at the time of institution and therefore, regardless of the status of prior assignments [

] the supplemental assignment confers standing by perfecting Pragmatus Mobile's ownership of the Asserted Patents prior to Institution.

Respondents cite Federal Circuit case law holding that "[a] court may exercise jurisdiction only if a plaintiff has standing to sue on the date it files suit." *Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1364 (Fed. Cir. 2010). Respondents argue that this requirement is consistent with Commission Rule 210.12, which requires that a complaint contain "a showing that at least one complainant is the owner or exclusive licensee of the subject intellectual property." 19 C.F.R. § 210.12(a)(7); *see also* 19 C.F.R. § 210.12(a)(9)(ii) (requiring a complaint based on a U.S. patent to include "[t]he identification of the ownership of each involved U.S. patent and a certified copy of each assignment of each such patent"). Respondents acknowledge that in certain prior 337 investigations, complainants were allowed to cure defects in standing when the complainant only had limited rights in the asserted patents at the time of the complaint. *See Point of Sale Terminals & Components Thereof*, Inv. No. 337-TA-524, Order No. 31 (Feb. 7, 2005) (allowing complainant to join a necessary party that retained some rights in the asserted patents); *Catalyst Components & Catalysts for the Polymerization of Olefins*, Inv. No. 337-TA-307, Order No. 12 (June 25, 1990) (upholding the ALJ's finding that a necessary party may be allowed to join as a complainant to cure a defect in standing but terminating the investigation when the party refused to join). But Respondents distinguish these cases by stressing that the complainants held partial rights in the asserted patents and thus had a cognizable injury at the time of the complaint, unlike Pragmatus

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Mobile here, which allegedly had no rights in the Asserted Patents at the time the complaint was filed. Respondents rely on *Paradise Creations, Inc. v. UV Sales, Inc.*, where the Federal Circuit held that when a plaintiff has no rights in the asserted patents, “[s]uch a defect in standing cannot be cured after the inception of the lawsuit.” 315 F.3d 1304, 1310 (Fed. Cir. 2003).

Complainant argues in response that a 337 investigation does not begin with the complaint. In contrast to federal district court where, “[a] civil action is commenced by filing a complaint,” Fed. R. Civ. P. 3, filing a complaint at the Commission only commences a “preinstitution proceeding.” 19 C.F.R. § 210.8. The Commission is then required to “examine the complaint for sufficiency and compliance with the applicable sections of this chapter,” 19 C.F.R. § 210.9(a), and the Commission determines “whether the complaint is properly filed and whether an investigation should be instituted on the basis of the complaint.” 19 C.F.R. § 210.10(a)(1). Complainant cites *Certain Woodworking Accessories* as an investigation where the ALJ considered activities affecting standing between the filing of the complaint and institution. Inv. No. 337-TA-333, Order No. 34 at 17-21 (September 30, 1992) (*aff’d* by Comm’n Op., January 4, 1993) (terminating the investigation as to a respondent that was not a proper party at the time of institution due to a consent order entered between the filing of the complaint and institution of the investigation). And in *Catalyst Components*, as discussed above, the Commission upheld a finding that a lack of standing may be cured by joining a necessary party later in the Investigation. Inv. No. 337-TA-307, Order No. 12 (June 25, 1990).

Complainant and Staff also cite *Certain Display Controllers & Products Containing Same*, where the ALJ relied on *Catalyst Components* to hold that “[a]lthough the same standing requirements apply before the Commission and before Article III courts, unlike Article III courts,

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the Commission applies the rule that a lack of standing may be cured during the pendency of an investigation.” Inv. No. 337-TA-491, Initial Determination at 31-32 (April 14, 2004) (*aff’d* by Comm’n Op., February 4, 2005). In *Display Controllers*, a dispute regarding a prior assignment of patent rights was cured by a supplemental assignment after the investigation had been instituted, and the ALJ allowed the complainant to file an amended complaint relying on this assignment and denied a subsequent motion to terminate. *Id.* at 30-32. In their Reply Brief, Respondents distinguish *Woodworking Accessories* but do not address *Display Controllers*, which I find to have facts similar to those in the present Investigation. Like the complainant in *Display Controllers*, Pragmatus Mobile executed a supplemental assignment after the complaint had been filed to cure an alleged lack of standing.

Despite the Commission precedent allowing complainants to cure a lack of standing in *Point of Sale Terminals*, *Catalyst Components*, and *Display Controllers*, Respondents insist that the Federal Circuit precedent in *Paradise Creations* precludes Complainant from curing a lack of standing here. But *Paradise Creations*, like the other Federal Circuit cases, evaluates standing at the time of filing in the context of a District Court action, which is “the inception of the lawsuit.” 315 F.3d at 1310; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n. 5 (1992) (plurality opinion) (“[S]tanding is to be determined as of the commencement of suit.”). The filing of a complaint before the Commission is not necessarily the “inception of the lawsuit.” I agree with Complainant and Staff that for the purpose of establishing standing, the inception of a 337 investigation occurs at the time of institution.

Evaluating standing at institution is consistent with the preinstitution proceedings described in Commission Rule 210.8 and the standards for institution of an investigation

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described in Commission Rule 210.10. Moreover, the complaint is not served upon the respondents until the institution of the investigation. 19 C.F.R. § 210.11(a). And the timing of a response from respondents is based on the date of service of the complaint and notice of investigation after institution. 19 C.F.R. § 210.13(a). While Respondents cite Commission rules requiring a complaint to contain a showing that the complainant is the owner or exclusive licensee of asserted patents, 19 C.F.R. § 210.12(a), the Commission can enforce these rules by requiring complainants to supplement their complaint during the preinstitution phase, as happened here when Complainants filed a supplemental assignment. Commission Rule 210.12(j) imposes a duty on the complainant to “supplement the complaint prior to institution of an investigation if complainant obtains information upon the basis of which he knows or reasonably should know that a material legal or factual assertion in the complaint is false or misleading.” 19 C.F.R. § 210.12(j). And Commission Rules treat amendments to the complaint differently when made preinstitution, when complainants may make amendments as of right, and postinstitution, when amendments require leave of the Commission. 19 C.F.R. § 210.14(a)-(b). Here, the Notice of Investigation specifically noted that “[l]etters supplementing the complaint were filed on January 2 and 8, 2014.” 79 Fed. Reg. at 4173. The Staff interprets the Commission Rules to allow such supplementation to cure defects in standing, and I give particular weight to the Staff’s position because of the role of the Office of Unfair Import Investigations during the preinstitution phase. (Staff Response at 14-17).

In a letter dated April 16, 2014, Respondents informed the Court that Complainant withdrew and refiled related District Court complaints in response to motions to dismiss for lack of standing in those cases. *See, e.g. Pragmatus Mobile LLC v. ZTE Corporation et al.*, Civ. No.

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1:13-cv-01684, Dkt. 13-14 (D. Del. March 27, 2014) (motion to dismiss with non-opposition); *Pragmatus Mobile LLC v. ZTE Corporation et al.*, Civ. No. 1:14-cv-00443, Dkt. 1 (D. Del. April 7, 2014) (new complaint filed). Complainant responded in a letter dated April 17, 2014, arguing that these withdrawals should have no bearing on the present motion because the legal precedent for curing lack of standing differs between District Courts and the Commission. Complainant also argues that there was little prejudice in delaying the District Court actions, some of which were already stayed. As discussed above, I agree with Complainant that there are differences between the legal standards for the present motion and those that govern standing in District Court, and Complainant's actions in District Court do not influence my opinion here.

I thus find that the Commission Rules are consistent with a preinstitution process that allows complainants to correct defects in standing after the complaint is filed (but before the Commission institutes the investigation). And therefore, the proper timeframe to determine standing in a 337 investigation is at the institution of the investigation by the Commission. Since the parties do not dispute that the January 7, 2014, supplemental assignment cured any defects in Complainant's ownership of the Asserted Patents prior to the Institution of the Investigation on January 17, 2014, I find that Complainant had standing to enforce the Asserted Patents at the time of Institution, and I therefore deny Respondents' motion to dismiss for lack of standing.

B. []

Because I find that the proper timeframe for evaluating standing is the Institution of the Investigation, the earlier 2011 assignment documents are not relevant to the issue of lack of standing in this Investigation. But Respondents further argue that Complainant does not have the requisite domestic industry because Pragmatus Mobile did not own the Asserted Patents at the

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time of the licensing activities and license agreements cited in the Complaint. (Respondents' Motion at 16-18; *see* Complaint ¶¶ 105-121). As discussed above, I will decide the domestic industry issue as a motion for summary determination.

Respondents argue that the 2011 assignment documents [] assigned all rights in the Asserted Patents to Pragmatus LLC and not to Pragmatus Mobile. []

(Confidential Exhibit 9H to Complaint). []

] (*Id.* at 1). []

] (*Id.* at 11). []

] (*Id.* at Exhibit B). []

[]

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[
]
(*Id.* at 3-4). [
] (Exhibit M5 to Respondents'
Motion). [
] (*See* Respondents' Motion at 8-10,
Exhibit M6; Complainant's Response at 5-6, Declaration of Anthony Grillo at ¶¶ 24-27, Exhibit
19, Exhibit 20, Exhibit 20). [
]
Complainant disputes this interpretation, pointing to the fact that [
] and relying on a
declaration from Anthony Grillo, Chief Operating Officer and co-owner of both Pragmatus
Mobile and Pragmatus LLC. (Complainant's Response at 4-7). Mr. Grillo explains that [
]
(Grillo Declaration at ¶ 27, Exhibit 22). [
] (*Id.* at ¶ 29, Exhibit 25). [

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] (*Id.* at ¶¶ 29-31). [

] (Complainant's Response at 6-7). Complainant further argues that all parties to the transaction intended to assign the patents to Pragmatix Mobile, and that Pragmatix Mobile acted as if it owned all rights in the Asserted Patents, entering into various licenses between December 2011 and October 2013. (Complainant's Response at 7-8; Grillo Declaration at ¶¶ 32-33).

In reply, Respondents argue that under New York law, it is irrelevant whether the payment [] (Respondents' Motion at 11-12; Respondents' Reply at 4-5). And Respondents further argue that there is no legal distinction between [

] (Respondents' Reply at 5-6). Respondents thus insist that [

]

The Staff argues that there are genuine issues of material fact regarding these 2011 assignment documents. (Staff Response at 7-14). In particular, the Staff does not believe it is clear whether [

] (*Id.* at 10-11). The Staff also finds it likely that [

] (*Id.*) The Staff takes Mr. Grillo at his word that he changed

[

] (*Id.* at 11-13). The Staff also argues that the assignments recorded at the USPTO *prima facie* support Pragmatus Mobile's ownership of the Asserted Patents, and pursuant to 35 U.S.C. § 261, later recorded assignments may take priority over unrecorded assignments. (*Id.* at 13-14).

I agree with the Staff that there are genuine issues of material fact that preclude summary determination regarding Pragmatus Mobile's ownership of the Asserted Patents prior to January 7, 2014. When the evidence is viewed in the light most favorable to Complainant, I find that it would be reasonable to interpret the facts to find that [

] Specifically, I find that there is at least a genuine dispute regarding [

]

C. Existence of a Domestic Industry

Respondents argue that Complainant cannot prove a domestic industry because Pragmatus Mobile did not have rights in the Asserted Patents at the time of filing of the Complaint. (Respondents' Motion at 17). But both Complainant and Staff point out that there is no *per se* requirement that a complainant own the asserted patents to establish a domestic industry. (Complainant's Response at 16-17; Staff Response at 17-18). See *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, Comm'n Op. at 7 (October 28, 1997) (citing *Certain Static Random Access Memories*, Inv. No. 337-TA-341, Order No. 5 at 2 (December 30, 1992) ("The question of whether complainant or its parent company owns the

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patent right may be in issue, but it is not relevant to the domestic industry. The owner of a patent is not the only possible complainant. A licensed domestic producer of an article that is protected by a U.S. patent may be the complainant.”).

Respondents further argue that if Pragmatius Mobile did not own the Asserted Patents when it entered into license agreements with third parties, then these licensing activities may not be relied upon to establish a domestic industry. (Respondents’ Motion at 17-18). Moreover, the license agreements may not have actually conveyed rights in any of the Asserted Patents. (*Id.*) As discussed above, however, I find that there are genuine disputed issues regarding Pragmatius Mobile’s ownership of the Asserted Patents at the time of the licensing activity, and this precludes summary determination regarding domestic industry. But even if Pragmatius Mobile did not acquire ownership of the Asserted Patents until January 7, 2014, Complainant argues that its licensing activities may still support a domestic industry. (Complainant’s Response at 17-19). Specifically, Complainant argues that its licensing activities could be interpreted as performed on behalf of Pragmatius LLC, [] (*Id.* at 17-18). In addition, Complainant cites certain [] provisions in the license agreements that would grant the licensees rights to practice the Asserted Patents even if Pragmatius Mobile did not acquire ownership until January 7, 2014. (*Id.* at 18-19). I find that these are additional issues of material fact that preclude summary determination of no domestic industry on this motion.

IV. CONCLUSION

For the reasons discussed above, Respondents’ motion to terminate the Investigation is DENIED. I find that standing in a 337 Investigation is evaluated at the time of institution, and Complainant in this Investigation established its ownership of the Asserted Patents at that time. In

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addition, I find that there are genuine issues of material fact that preclude summary determination of no domestic industry.

This order is being issued as confidential, and a public version will be issued pursuant to Commission Rule 210.5(f). Within 7 days of the date of this order, the parties shall jointly submit: (1) a proposed public version of this order with any proposed redactions bracketed in red; and (2) a written justification for any proposed redactions specifically explaining why the piece of information sought to be redacted is confidential and why disclosure of the information would be likely to cause substantial harm or likely to have the effect of impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions.¹

SO ORDERED.



Thomas B. Pender
Administrative Law Judge

¹ Under Commission Rules 210.5 and 201.6(a), confidential business information includes:

information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information.

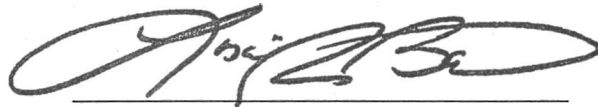
See 19 C.F.R. § 201.6(a). Thus, to constitute confidential business information the disclosure of the information sought to be designated confidential must *likely have the effect of* either: (1) impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions; or (2) *causing substantial harm* to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained.

**IN THE MATTER OF CERTAIN WIRELESS DEVICES,
INCLUDING MOBILE PHONES AND TABLETS II**

337-TA-905

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 12** has been served upon the **Commission Investigative Attorney, John Shin, Esq.**, and the following parties as indicated on May 15, 2014.



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U.S. International Trade Commission
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**IN THE MATTER OF CERTAIN WIRELESS DEVICES,
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