

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. 8: DENYING COMPLAINANTS' MOTION TO RECONSIDER
ORDER SETTING MARKMAN HEARING AND REVISED
PROCEDURAL SCHEDULE**

(April 26, 2010)

On March 30, 2010, the parties submitted their comments as to the utility of a Markman hearing and claim construction order prior to the hearing in this Investigation. Complainants Nokia Corporation and Nokia Inc. (collectively, "Nokia") expressed concern that the current fast-paced procedural schedule would not afford them time to take advantage of an early claim construction ruling. (Nokia's Comments Regarding a *Markman* Hearing at 1.) Commission Investigative Staff ("Staff") agreed. (Commission Investigative Staff's Statement Regarding a Markman (Or "Claim Construction") Hearing at 1.) However, the Administrative Law Judge noted that Complainants asserted over fifty claims of seven patents in this Investigation and determined that an early Markman hearing would assist in streamlining the issues for the evidentiary hearing and final initial determination in this Investigation. (Order No. 7.) To accommodate the parties' concerns about scheduling, the target date and schedule were extended by two months. (*Id.*) The Commission determined not to review this decision. (*See* Notice of

Commission Determination Not to Review an Initial Determination Extending the Target Date of the Investigation, dated April 22, 2010.)

On April 13, 2010, Nokia filed a motion for reconsideration of the schedule set forth in Order No. 7. (Motion Docket No. 701-004.) Nokia expressed concern that it will be prejudiced because there will be “two more months for Apple to continue to infringe upon Nokia’s technology in the marketplace. . . Nokia is being prejudiced daily by Apple’s use of its technology, and is entitled to expeditious resolution of its claims.” (*Id.* at 1, 4.) Nokia argues that a Markman hearing can be accommodated within the 16 month procedural schedule originally set in Order No. 3, and attaches a proposed schedule. (Mot. Mem. at 1, Ex. A.) Nokia is of the view that this Investigation must be resolved prior to Investigation No. 337-TA-704. (*Id.* at 4.)

On April 21, 2010, Respondent Apple, Inc. (“Apple”) opposed Nokia’s motion. Apple argues that Nokia’s motion contradicts the position Nokia held in its comments regarding a Markman hearing. (Opp. at 1.) Apple believes Nokia has not demonstrated specific harm by the two month extension of the Investigation, and argues that if Nokia were truly concerned about daily prejudice, it would not have delayed 1.5-5 years after the asserted patents issued to file its Complaint against Apple. (*Id.* at 2, 4-5.) Apple argues that “[i]t is in the interest of both parties and the Commission to have a Markman process that streamlines the issues for the evidentiary hearing and final determination, and the ALJ’s schedule as set forth in Order No.7 will achieve a fair and efficient resolution of the issues in this investigation.” (*Id.* at 4.) Apple argues that it would be prejudiced if Nokia’s motion were granted. (*Id.* at 7-8.)

On April 23, 2010, Staff also opposed Nokia’s motion. Staff submits that Nokia’s proposed revised schedule is unworkable and could put Apple at a disadvantage. (Staff Resp. at

2.)

After reviewing the motion papers and responses thereto, the Administrative Law Judge finds as follows.

Nokia has raised a valid concern, which is that this Investigation should be conducted expeditiously. Nokia is correct. *See* Commission Rule 210.2 (providing for expeditious proceedings “to the extent practicable”). However, when Nokia availed itself of this agency by filing its Complaint and asking that the Commission institute an investigation against Apple, it chose to assert quite a large number of patent claims. Thus Nokia determined the scope and complexity of this Investigation. The Administrative Law Judge has the discretion to shape the direction of the proceedings, and here has determined that an early resolution of claim construction issues would reduce the likelihood of further delays toward the end of the Investigation. The Administrative Law Judge sought to address the specifically stated scheduling concerns by the parties, as noted above, by extending the target date. Furthermore, the extended schedule provides some time for Commission review of a Markman decision, if any, prior to the hearing.

The Administrative Law Judge further notes, with respect to Nokia’s argument that it will be prejudiced by a two month extension, that Nokia has not attached any evidence to support its assertion. “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). While the Administrative Law Judge finds that Nokia may have had a reasonable basis for the delay between the issuance of the asserted patents and the filing of the Complaint, Nokia did not choose to seek temporary relief in its Complaint, as a party generally does when facing severe prejudice from

infringing activity.

In addition, the Administrative Law Judge agrees with Respondent and Staff that they would be prejudiced by any reversal of Order No. 7.

The Administrative Law Judge finds that that the above considerations outweigh Nokia's concerns. Accordingly, Nokia's motion to reconsider Order No. 7 (Motion Docket No. 701-004) is DENIED.

SO ORDERED.

A handwritten signature in black ink that reads "E. James Gildea". The signature is written in a cursive style with a large initial "E" and "G".

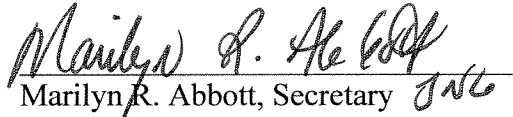
E. James Gildea
Administrative Law Judge

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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 **April 26, 2010.**


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