

**PUBLIC VERSION**

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C. 20436**

**In the Matter of**

**CERTAIN DIGITAL MEDIA DEVICES,  
INCLUDING TELEVISIONS, BLU-RAY  
DISC PLAYERS, HOME THEATER  
SYSTEMS, TABLETS AND MOBILE  
PHONES, COMPONENTS THEREOF AND  
ASSOCIATED SOFTWARE**

**Investigation No. 337-TA-882**

**RECOMMENDED DETERMINATION**

**Administrative Law Judge David P. Shaw**

**I. Background and Recommendation**

This is the recommended determination (“RD”) of the administrative law judge on remedy and bonding in *Certain Digital Media Devices, Including Televisions, Blu-Ray Disc Players, Home Theater Systems, Tablets and Mobile Phones, Components Thereof and Associated Software*, United States International Trade Commission Investigation No. 337-TA-882. As indicated in the Final Initial Determination (“ID”) on violation, the administrative law judge found no violation of section 337 of the Tariff Act, as amended (19 U.S.C. § 1337) as to all respondents. Yet, the administrative law judge must issue a recommended determination concerning the appropriate remedy in the event that the Commission finds a violation as to each respondent. *See* 19 C.F.R. § 210.42(a)(1)(ii). That recommendation is contained herein below.

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The Commission did not authorize the administrative law judge to take public interest evidence or to provide findings and recommendations concerning the public interest. Thus, in accordance with the usual Commission practice and the applicable Commission Rule, only the Commission can determine the role that public interest factors may play in this investigation. *See* 19 C.F.R. § 210.50(b)(1).

### **II. Limited Exclusion Orders**

The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a section 337 proceeding. *Viscofan, S.A. v. U.S. Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986). A limited exclusion order directed to respondents' infringing products is among the remedies that the Commission may impose. *See* 19 U.S.C. § 1337(d).

BHM argues that the Commission should issue a limited exclusion order directed to infringing products in the event a violation of section 337 is found. *See* Compl. Br. at 568-69.

Respondents do not deny that a limited exclusion order would be an appropriate remedy in the event the Commission finds a violation of section 337, but argue that the boundaries of any exclusion order should be defined to include only "products containing, at the time of importation, the entire functionality or combination of functionalities accused by BHM and found to infringe," inasmuch as the accused products by themselves were not accused of infringing the asserted patents, but rather the accused products in combination with certain software applications. *See* Resps. Br. at 344-45. Respondents further argue that "if at the time of importation the Respondents' Accused Devices contain only different, un-accused applications and not the applications that were the subject of BHM's hearing proofs, Respondents should be expressly authorized to certify them as entitled to entry." *Id.*

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The Commission Investigative Staff (“Staff”) takes the position that the scope of any limited exclusion order issued in this investigation should be directed to specific combinations of accused products with applications, as they exist at the time of importation and that are found to infringe the asserted patents. *See* Staff Br. at 192-94. The Staff further argues that “the evidence supports the inclusion of a certification provision in any limited exclusion order because the evidence shows that the accused products can be combined with various versions of the accused applications, and the evidence does not support a finding that all versions infringe.” *Id.* at 194-95.

Having considered the arguments of the parties and the evidence of record, the administrative law judge recommends that in the event the Commission determines that a violation of section 337 has occurred, and if consideration of the statutory public interest factors does not require that remedies be set aside or modified, the Commission should issue a limited exclusion order covering specific combinations of accused products and software functionality found to infringe the asserted patents. As discussed in detail in the ID, the accused products standing alone cannot infringe the asserted patents; it is only when the accused products are combined with certain software programs and/or functionalities that a colorable allegation of infringement can be made. If the accused products are not imported with the accused software and/or functionalities, they cannot serve as the basis for a finding of violation of section 337 and should not be subject to an exclusion order. *See Certain Products Containing Interactive Program Guide and Parental Control Technology* (“*Interactive Program Guide*”), Inv. No.

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337-TA-845, Initial Determination at 39 (July 2, 2013), *aff'd in relevant part*, Comm'n Op. at 12-15 (Dec. 11, 2013).<sup>1</sup>

Further, in the event the Commission does issue a limited exclusion order in this investigation, the exclusion order should include a provision that allows the respondents to certify, pursuant to procedures to be specified by U.S. Customs and Border Protection, that they are familiar with the terms of the order, that they have made appropriate inquiry, and that, to the best of their knowledge and belief, the products being imported are not excluded from entry under the order. This would allow for the efficient administration and enforcement of the exclusion order, inasmuch as only certain combinations of accused products with infringing software and/or functionalities will be subject to the exclusion order, and it will likely be difficult to determine upon visual inspection whether or not an accused product is subject to exclusion.

### III. Cease and Desist Orders

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 a violation of section 337.

19 U.S.C. § 1337(f)(1). The Commission may issue a cease and desist order when it has

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<sup>1</sup> *Interactive Program Guide* held that accused devices that do not meet specific limitations of system or apparatus claims upon importation cannot directly infringe those claims. Similarly, Commission precedent holds that accused devices cannot directly infringe a method claim at the time of importation. *Certain Electronic Devices with Image Processing Systems, Components Thereof, and Associated Software* (“*Electronic Devices*”), Inv. No. 337-TA-724, Comm’n Op. at 17 (Dec. 21, 2011). With respect to indirect infringement, the parties to this investigation briefed arguments for and against findings of induced infringement and contributory infringement pursuant to the Federal Circuit’s opinion in *Suprema, Inc. v. Int’l Trade Comm’n*, No. 2012-1170 (Fed. Cir. Dec. 13, 2013), *reh’g en banc granted and vacated*, 2014 WL 3036241 (Fed. Cir. May 13, 2014). Although the *Suprema* opinion was subsequently vacated, the ID addresses the parties’ *Suprema* arguments, and also contains findings of no induced infringement and no contributory infringement separate and apart from the *Suprema* analysis.

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personal jurisdiction over the party against whom the order is directed. *Gamut Trading Co. v. U.S. Int'l Trade Comm'n*, 200 F.3d 775, 784 (Fed. Cir. 1999).

The Commission “generally issues a cease and desist order only when a respondent maintains a commercially significant inventory of infringing products in the United States.” *Certain Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 24 (Mar. 26, 2009). Indeed, cease and desist orders are usually issued “when there is a commercially significant amount of infringing imported product in the United States that could be sold so as to undercut the remedy provided by an exclusion order.” *Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, Comm’n Op. at 28 (Nov. 19, 2012) (quoting *Certain Laser Bar Code Scanners and Scan Engines, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-551, Comm’n Op. (Pub. Version) at 22 (June 14, 2007)).

BHM takes the position that, in the event a violation of section 337 is found, the Commission should “issue a Cease and Desist Order pursuant to 19 U.S.C. § 1337(f) prohibiting any named Respondent from engaging in the unlawful importation or sale within the United States of any articles that infringe one or more claims of any Asserted Patent.” *See* Compl. Br. at 569. BHM argues that “[a]t the hearing, BHM presented evidence that the domestic Respondents currently maintain commercially significant inventories of infringing products within the United States.” *Id.* The specific evidence presented by BHM with respect to each respondent is discussed in separate sections below.

Respondents argue that “BHM has not met its affirmative burden of proving that a cease and desist (‘C&D’) order is a necessary and justified remedy in this investigation,” and that, “[i]n fact, BHM has not even attempted to do so.” *Resps. Br.* at 347. It is argued that “BHM has

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made no effort to establish that any Respondent has engaged in stockpiling products in the United States or that BHM would be harmed in such a situation.” *Id.* It is further argued that “[a]bsent evidence that there would be some harm to complainant or some displacement of complainant’s sales—which cannot be the case here as BHM is an NPE—there is neither a remedial nor a policy need for the Commission to issue a C&D order.”<sup>2</sup> *Id.* at 348. Respondents also argue that, “[e]ven if the Commission were inclined to issue C&D Orders,” “the evidence in this investigation does not show that any of the Respondents maintain commercially significant inventories, and no such remedy should issue.” *Id.* at 348-49.

The Staff takes the position that, “[w]hile BHM has not affirmatively presented evidence of commercially significant inventory, the evidentiary record includes the importation stipulations for all but the LG respondents.” Staff Br. at 195 (citing JX-108 (Samsung); JX-109 (Toshiba)). The Staff argues:

In the Staff’s view, the evidence shows commercially significant amounts of inventory of certain models of Respondents’ products. *Id.* While Respondents may customize or pre-designate its inventory in the United States for customers, the Staff is of the view that this inventory may be considered “commercially significant.” *Certain Optoelectronic Devices, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-669, Comm’n Op. at 5-6 (July 26, 2010) (“evidence of final testing of the accused products in the United States, just prior to delivery to U.S. customers, as equivalent to evidence of the quantity and value of accused products, and it therefore supports a finding of a “commercially significant” inventory of accused goods in the United States in accordance with Commission precedent... Thus, a cease and desist order is appropriate even if Emcore’s products in the United States have been pre-sold.”). With respect to the LG respondents, the Staff notes that the evidentiary record does not appear[] to include any inventory volumes, and according[ly], BHM has not met its burden of proving commercially significant volumes of inventory.

*Id.* at 195-96.

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<sup>2</sup> “NPE” stands for “non-practicing entity.”

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The Staff further argues:

For all Respondents, the Staff notes that the inventory evidence in the record has no correlation to accused software applications/functionalities. *Id.* (only listing volume by model number). Accordingly, to the extent there is a determination of infringement based on a specific product model as imported, and that model is listed in the inventory stipulations as having inventory in the United States, the Staff is of the view that the evidence will show that a cease and desist order should issue. Yet, where a determination of infringement is reliant upon a product model being configured with an accused software application/functionality, in the Staff's view there is insufficient evidence of commercially significant inventory in the United States to support the issuance of a cease and desist order. *See* JX-108, JX-109, JX-111.

Staff Br. at 196.

### A. Samsung

BHM argues that “[t]he domestic Samsung Respondents<sup>3</sup> maintain commercially significant inventory of accused products in the U.S., as evidenced in the party admission made in their Response to the Complaint in this Investigation, filed on July 12, 2013 (Doc. ID 513356).” Compl. Br. at 570. It is argued that “[Samsung] admitted that the [

], with [ ] for cellular phones in the [ ]. For the period [ ], the declared value at importation of accused devices, including phones, tablets, media players, TVs, Blu-ray players, and home theater systems was [ ].” *Id.*

BHM also argues that “record evidence shows that Samsung maintains commercially significant inventory of accused products valued in the [ ] in the U.S.” Compl.

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<sup>3</sup> The “domestic Samsung Respondents” are Samsung Electronics America, Inc. and Samsung Telecommunications America, LLC. BHM is not pursuing a cease and desist order against Samsung Electronics Co., Ltd., a Korean entity. *See* Compl. Br. at 571.

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Br. at 570. In particular, BHM cites to the following information provided in JX-0108C, which is joint importation and inventory stipulation entered into between BHM and Samsung:

Device	5/31/13	9/30/13
Mobile Phones	[ ]	[ ]
Tablets	[ ]	[ ]
TVs	[ ]	[ ]
Blu-Rays	[ ]	[ ]
Home Theater Systems	[ ]	[ ]
<b>TOTALS</b>	[ ]	[ ]

*Id.*

BHM further argues that it “entered evidence showing the identity of Samsung goods imported into the United States.” Compl. Br. at 570 (citing CX-1174C (Samsung Respondents’ Responses to Complainant’s First Set of Interrogatories)).

Assuming *arguendo* that the record evidence demonstrates commercially significant inventory levels of Samsung products in the United States, the evidence nevertheless does not identify whether or not the products were imported with the software and/or functionalities BHM accused of infringing the asserted patents.<sup>4</sup> BHM has failed to demonstrate that Samsung maintains in the United States commercially significant inventories of accused products that were imported with the accused software and/or functionalities.

Therefore, it is recommended that in the event the Commission determines that a violation of section 337 has occurred, and if consideration of the statutory public interest factors does not require that remedies be set aside or modified, a cease and desist order should not be issued as to Samsung Electronics America, Inc. or Samsung Telecommunications America, LLC.

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<sup>4</sup> As discussed above in the context of a limited exclusion order, the accused products standing alone cannot infringe the asserted patents; it is only when the accused products are combined with certain software programs and/or functionalities that a colorable allegation of infringement can be made.

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B. LG

BHM takes the position that “LG admitted that LG Electronics USA, Inc. and LG Electronics MobileComm U.S.A., Inc. maintain commercially significant inventories of infringing products within the United States.” Compl. Br. at 572. In particular, BHM argues, “[a]s evidenced in its Response to the Complaint in this Investigation filed on July 12, 2013 (Doc. ID 513364), [ ].” *Id.*

BHM provides the following table summarizing LG’s response to the complaint and notice of investigation:

[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]

*Id.*

BHM argues that it “also entered evidence showing the identity of LG goods imported into the United States.” Compl. Br. at 572 (citing CX-1117 (LG Respondents’ Second Supplemental Responses to Complainant’s First Set of Interrogatories)). BHM further argues that it “also entered evidence showing photographs of the identity of specific products imported into the United States.” *Id.* (citing Complaint (EDIS Doc. No. 509005) (May 13, 2013) (photos of LG BP-620 Blu-ray player, LG 47” LA6200 TV, and LG BH6730S home theater system)).

Assuming *arguendo* that the record evidence demonstrates commercially significant inventory levels of LG products in the United States, the evidence nevertheless does not identify whether or not the products were imported with the software and/or functionalities BHM accused

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of infringing the asserted patents.<sup>5</sup> BHM has failed to demonstrate that LG maintains in the United States commercially significant inventories of accused products that were imported with the accused software and/or functionalities.

Therefore, it is recommended that in the event the Commission determines that a violation of section 337 has occurred, and if consideration of the statutory public interest factors does not require that remedies be set aside or modified, a cease and desist order should not be issued as to LG Electronics USA, Inc. or LG Electronics MobileComm U.S.A., Inc.

### C. Toshiba

BHM takes the position that “Toshiba admitted that it maintains commercially significant inventories of infringing products within the United States.” Compl. Br. at 574. In particular, BHM argues, “[a]s evidenced in its Response to the Complaint in this Investigation filed on July 12, 2013 (Doc. ID 513367), Toshiba made the party admission that the U.S. market is an important market to its operations.” *Id.* BHM cites to Toshiba’s interrogatory responses to show that, from January 2013 to June 2013, Toshiba imported [ ] accused products into the United States worth approximately [ ]. *Id.* (citing JX-1198 (Toshiba’s Responses to BHM’s First Set of Interrogatories)).

BHM also argues that “record evidence shows that Toshiba maintains a commercially significant inventory of accused products in the United States.” Compl. Br. at 574. In particular, BHM cites to the following information provided in JX-109C, which is a joint stipulation

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<sup>5</sup> As discussed above in the context of a limited exclusion order, the accused products standing alone cannot infringe the asserted patents; it is only when the accused products are combined with certain software programs and/or functionalities that a colorable allegation of infringement can be made.

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between BHM and Toshiba regarding importation and inventory in the United States as of June 30, 2013:

[ ]	[ ]
[ ]	[ ]
[ ]	[ ]
[ ]	[ ]
[ ]	[ ]

*Id.*

BHM further argues that it “also entered evidence showing the identity of Toshiba goods imported into the United States.” Compl. Br. at 574 (citing CX-1198 (Toshiba Respondents’ Responses to Complainant’s First Set of Interrogatories)).

Assuming *arguendo* that the record evidence demonstrates commercially significant inventory levels of Toshiba products in the United States, the evidence nevertheless does not identify whether or not the products were imported with the software and/or functionalities BHM accused of infringing the asserted patents.<sup>6</sup> BHM has failed to demonstrate that Toshiba maintains in the United States commercially significant inventories of accused products that were imported with the accused software and/or functionalities.

Therefore, it is recommended that in the event the Commission determines that a violation of section 337 has occurred, and if consideration of the statutory public interest factors does not require that remedies be set aside or modified, a cease and desist order should not be issued as to Toshiba America Information Systems, Inc.

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<sup>6</sup> As discussed above in the context of a limited exclusion order, the accused products standing alone cannot infringe the asserted patents; it is only when the accused products are combined with certain software programs and/or functionalities that a colorable allegation of infringement can be made.

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### IV. Bond

Pursuant to section 337(j)(3), the administrative law judge and the Commission must determine the amount of bond to be required of a respondent, during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. The purpose of the bond is to protect the complainant from any injury. 19 U.S.C. § 1337(j)(3); 19 C.F.R. §§ 210.42(a)(1)(ii), 210.50(a)(3).

When reliable price information is available, the Commission has often set bond by eliminating the differential in sales prices between the domestic product and the imported, infringing product. *Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. No. 2949, Comm'n Op. at 24 (1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, USITC Pub. No. 2670, Comm'n Op. at 41-43 (1995). A 100 percent bond has been required when no effective alternative existed. *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).

With respect to the amount of bond appropriate in this investigation, BHM argues that “[h]ere, there is no price differential upon which to base a bond rate,” and that “[t]hus, the Commission should set a bond of 100 percent on any and all products subject to an exclusion order in this Investigation.” Compl. Br. at 575.

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Respondents argue that, “[g]iven BHM’s non-practicing status, no bond should be required in this investigation, as there is no harm from any lost sales by BHM that needs to be remedied.” Resps. Br. at 349 (citing *Certain Abrasive Products Made Using a Process for Powder Preforms, and Products Containing Same*, Inv. No. 337-TA-449, USITC Pub. No. 3530, Comm’n Op. at 9 (July 2002) (“The bond is to be set at a level sufficient to ‘protect complainant from any injury’ during the Presidential review period.”)). As for BHM’s position that the Commission should require Respondents to post a bond of 100% on the basis that there is no price differential upon which to base a bond rate, Respondents characterize this argument as “disingenuous.” *Id.* Respondents argue:

Despite bearing the burden to prove the need for a bond, *see Certain Cast Steel Railways Wheels, Processes for Manufacturing or Relating to Same and Certain Prods. Containing Same*, Inv. No. 337-TA-655, Comm’n Op. at 12 (Mar. 2010), BHM made no effort to introduce evidence of such a price differential. It could potentially have done so, as it relies on a domestic industry licensee that sells products of the same type as are accused, and as it obtained sales data for that licensee in discovery. CX-0903 ([ ] U.S. TV sales data). BHM also failed to offer any evidence that might lead to the calculation of a reasonable royalty, even though it claims to have entered into multiple licenses to the asserted patents. CX-0013C (WS Svendsen) Q/A 47-54, 62.

*Id.*

Respondents therefore take the position that, inasmuch as “BHM did not attempt to ascertain a price differential before determining that a calculation is impractical, no bond should be imposed.” Resps. Br. at 350 (citing *Certain Wireless Consumer Electronics Devices and Components Thereof*, Inv. No. 337-TA-853, Initial Determination, 2013 WL 5821012, at \*210 (Sep. 6, 2013) (no bond recommended where Complainant failed to cite any evidence in the record to support imposition of a bond)).

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The Staff also disagrees with BHM's proposal of a 100% bond, arguing that "there is no evidence on the record that BHM attempted to ascertain a price differential before determining that a calculation is impractical." Staff Br. at 197. The Staff also argues that "the evidence shows that the accused products and the licensee's domestic industry products are available for sale, and accordingly, BHM may have attempted to prove at least a MSRP price differential from publicly available information." *Id.* The Staff further argues that "any finding of infringement in this investigation will be based on the combination of a Respondents' product model with an accused software application/functionality," and that "there is insufficient evidence to demonstrate harm to BHM by the importation of the Respondents' product that sets the entered value that is the basis of the bond amount, independent of the accused application/functionality." *Id.* The Staff therefore takes the position that, "based on the lack of effort to ascertain a price differential or reasonable royalty, or to articulate injury to the BHM by the importation of a Respondent product independent of the accused software applications/functionalities, in the Staff's view, the evidence supports a bond of zero percent of the entered value during the presidential review period." *Id.*

Having considered the arguments of the parties and the evidence of record, the administrative law judge finds that BHM has not shown that its proposed bond amount of 100% is warranted under the circumstances of this investigation. In particular, BHM did not adduce evidence showing that calculation of a price differential between domestic products and the imported accused products is impractical. Accordingly, it is recommended that in the event the Commission determines that a violation of section 337 has occurred, and if consideration of the statutory public interest factors does not require that remedies be set aside or modified, the bond

for any importations of infringing products during the Presidential review period should be zero percent of entered value.

## **V. Conclusion and Order**

It is recommended that, unless the public interest requires that remedies be set aside or modified, if a violation of section 337 is found in this investigation, the Commission should (1) issue a limited exclusion order covering specific combinations of accused products and software functionality found to infringe the asserted patents and (2) require a zero percent importation bond during the Presidential review period.

It is ordered that each party shall file with the Commission Secretary no later than July 25, 2014, a copy of this recommended determination with brackets to show any portion considered by the party (or its suppliers of information) to be confidential, accompanied by a list indicating each page on which such a bracket is to be found.<sup>7</sup> At least one copy of such a filing shall be served upon the office of the undersigned, and the brackets shall be marked in red. If a party (and its suppliers of information) considers nothing in the recommended determination to be confidential, and thus makes no request that any portion be redacted from the public version, then a statement to that effect shall be filed.



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David P. Shaw  
Administrative Law Judge

Issued: July 16, 2014

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<sup>7</sup> Confidential business information ("CBI") is defined in accordance with 19 C.F.R. § 201.6(a) and § 210.5(a). When redacting CBI or bracketing portions of documents to indicate CBI, a high level of care must be exercised in order to ensure that non-CBI portions are not redacted or indicated. Other than in extremely rare circumstances, block-redaction and block-bracketing are prohibited. In most cases, redaction or bracketing of only discrete CBI words and phrases will be permitted.

**CERTAIN DIGITAL MEDIA DEVICES, INCLUDING TELEVISIONS, BLU-RAY DISC PLAYERS, HOME THEATER SYSTEMS, TABLETS AND MOBILE PHONES, COMPONENTS THEREOF AND ASSOCIATED SOFTWARE**

**INV. NO. 337-TA-882**

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **RECOMMENDED DETERMINATION (PUBLIC VERSION)** has been served by hand upon the Commission Investigative Attorney, **Monisha Deka, Esq.**, and the following parties as indicated, on

**AUG 07 2014**



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**CERTAIN DIGITAL MEDIA DEVICES, INCLUDING TELEVISIONS, BLU-RAY DISC PLAYERS, HOME THEATER SYSTEMS, TABLETS AND MOBILE PHONES, COMPONENTS THEREOF AND ASSOCIATED SOFTWARE**

**INV. NO. 337-TA-882**

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