

December 5, 2022

VIA EDIS

The Honorable Katherine Hiner
Acting Secretary
U.S. International Trade Commission
500 E Street SW, Room 112-A
Washington DC 20436

Re: *Certain Location-Sharing Systems, Related Software, Components Thereof, and Products Containing Same, ITC Docket No. 337-3655*

Dear Acting Secretary Hiner:

Pursuant to the Commission's Notice of Receipt of Complaint and Solicitation of Comments Relating to the Public Interest (87 Fed Reg 72,509-10 (November 25, 2022)), I submit the following comments on behalf of proposed Respondents Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.¹ The Complaint filed by Advanced Ground Information Systems Inc. and AGIS Software Development LLC (collectively, "AGIS") requests relief that could harm public health and welfare, consumers, and competitive conditions in the United States. Accordingly, the ITC would benefit from assigning a Staff Attorney as a party to the investigation to represent the public. Should the ITC delegate public interest to the Administrative Law Judge, Samsung requests that it direct the ALJ to hear public interest independently from violation.

When amending the Rules of Procedure and Practice to accommodate early public interest statements, the ITC stated the purpose was "ensuring the completeness of the record with respect to the required analysis concerning the public interest under Sections 337(d)(1) and (f)(1)." 76 Fed Reg 64,803 (Oct. 19, 2011). Rather than ensuring a complete record, public interest delegation often produces the

¹ In addition to Samsung, AGIS also named the following as Proposed Respondents: Google LLC; OnePlus Technology (Shenzhen) Co., Ltd.; TCL Technology Group Corp.; TCL Electronics Holdings Ltd.; TCL Communication Technology Holdings Ltd.; TCT Mobile (US) Inc.; Lenovo Group Ltd.; Lenovo (United States) Inc.; Motorola Mobility LLC; HMD Global; HMD Global OY; HMD America Inc.; Sony Corp.; Sony Mobile Communications Inc.; ASUSTek Computer Inc.; ASUS Computer Int'l.; Caterpillar Inc.; BLU Products; Panasonic Corp.; Panasonic Corp. of North America; Kyocera Corp.; Xiaomi Corp.; Xiaomi H.K. Ltd.; Xiaomi Communications Co., Ltd.; and Xiaomi Inc.

opposite effect when parties are not given additional trial time or briefing pages to address it. Although Congress considered the public interest to be of paramount concern in Section 337 proceedings,² current practice treats it merely as one more burden added onto an already burdensome investigation. Without additional time or briefing, the public interest is intermingled with violation issues and subtracts from the resources parties would normally have to present their case.³ Thus, in investigations presenting significant public interest issues, the result is a record that is far from complete on either public interest or the merits of violation to the extent the parties expended their limited resources addressing public interest. Directing the ALJ to hear public interest apart from the substantive violation issues would promote development of the type of record the ITC envisioned when it amended the Rules.

In its public interest statement, AGIS repeatedly assures the Commission that AGIS, its secret licensees, and numerous unidentified third parties have the capacity to replace the volume of production of infringing products without delay and with a wide variety of unidentified mobile devices and computers. *See, e.g.*, AGIS Public Interest Statement (“APIS”) at 2, 3, 4, and 5. These assurances are nothing more than hand-waving as AGIS does not provide a scintilla of factual support for its statements. Notwithstanding its assurances, AGIS itself does not provide the U.S. market with any mobile phone, tablet, or laptop computer. Although AGIS does not publicly identify any licensed provider of mobile devices, the complaint itself states that district court cases involving these patents were “resolved” before trial with Apple, HTC, LG, Huawei and ZTE. Complaint at ¶ 225. Even assuming, for the purposes of this statement only, that these manufacturers are licensed as a result of district court resolution, these manufacturers still cannot replace the accused products. The effect of creating an Apple monopoly in the U.S. smartphone market is

² Senate Comm. On Finance, Report on the Trade Reform Act of 1974, S. Rep. No. 1298, 93rd Cong., 2d Sess. 193 (1974) (the “public interest must be paramount in the administration of this statute.”)

³ For example, see 337-ITC-1193, Order No. 5 (Apr. 7, 2020) denying a separate hearing on public interest. This Order serves as a prime example of the parties’ inability to present the public interest issues properly when the substantive merits are already overwhelming the limited briefing space and allotted trial time.

addressed later in this submission. HTC has a less than 1% share in the U.S. smartphone market.⁴ LG has left the mobile market globally.⁵ Huawei and ZTE smartphones have been banned from the U.S. market by the FCC on national security grounds.⁶ Because AGIS appears to accuse the Android operating system itself of infringement, any unidentified unlicensed third-party Android supplier would likely face the same threat of infringement from AGIS. Accordingly, the ITC should not be misled by AGIS' unsubstantiated claims regarding the impact of the requested relief.

Section 337(d) requires that the Commission consider the effect of any remedy on public health and welfare, competitive conditions, and consumers in the U.S.⁷ For mobile devices, one need look no further than market shares to see that the requested remedy would have profound negative effects on competitive conditions in the U.S. for both smartphones and operating systems. One estimate of U.S. smartphone market share in November 2022 shows: Apple at 55.76%; Samsung at 29.72%; Motorola at 5.19%; followed by Google, LG, and "unknown" with 2.26%, 1.87% and 0.95% shares, respectively.⁸ Using these figures, an Herfindahl–Hirschman Index (HHI) calculation reveals an already highly concentrated market in the U.S.⁹ Considering the current market and accounting for the facts that AGIS (i) seeks to exclude products from Samsung, Motorola, Google, and others; and (ii) AGIS accuses the Android operating system itself of infringement; it is unclear what vendor other than Apple would be likely to provide product after entry of the requested remedial orders. Excluding every Apple smartphone competitor with more

⁴ See, e.g., <https://gs.statcounter.com/vendor-market-share/mobile/united-states-of-america>; <https://www.counterpointresearch.com/us-market-smartphone-share/>

⁵ See, e.g., <https://www.forbes.com/sites/siladityaray/2021/04/05/after-years-of-losses-lg-is-shutting-down-its-smartphone-business/?sh=5cd355905e25>

⁶ See, e.g., <https://www.nextgov.com/emerging-tech/2022/11/fcc-bans-sale-new-devices-chinese-companies-huawei-zte-and-others/380214/>; <https://www.ft.com/content/efdceeca-a153-4a56-8703-799b6a4280b3>; <https://www.fcc.gov/document/fcc-bans-authorizations-devices-pose-national-security-threat>

⁷ 19 U.S.C. § 1337(d)(1). The production of directly competitive articles in the U.S. is not relevant here as Samsung is not aware of any competitive mobile devices supplier manufacturing in the U.S. As noted above, Samsung and Intel do not compete in the applications processor market for smartphones, tablets, and smartwatches.

⁸ <https://gs.statcounter.com/vendor-market-share/mobile/united-states-of-america>; for Q2 2022, see: <https://www.counterpointresearch.com/us-market-smartphone-share/>

⁹ <https://www.justice.gov/atr/herfindahl-hirschman-index#:~:text=The%20HHI%20is%20calculated%20by,%2B%20202%20%3D%20%2C600>.

than a 1% market share (and a few more manufacturers for good measure) would significantly and negatively impact the competitive conditions in the U.S. for smartphones. Indeed, issuing AGIS' requested relief would grant Apple a monopoly in the U.S. smartphone market. And even so, Apple could not double its production of U.S. mobile devices to fulfill U.S. demand in a commercially reasonable time.¹⁰ In the same manner, excluding every Android provider with more than a 1% market share would significantly and negatively impact the competitive conditions in the U.S. by reducing U.S. consumers' choices for mobile operating systems from two to one (i.e., iOS).

The U.S. market for tablets raises similar concerns. One August 2022 estimate shows the U.S. tablet market supplied by: Apple at 54%; Samsung at 20%; Amazon at 12%; followed by Unknown (11%) and Alcatel and ASUS (<1% each).¹¹ Again, a simple HHI score shows that the U.S. tablet market is already concentrated. Assuming the Proposed Respondents' sales were proportionately distributed after exclusion, the HHI would rise more than 1,400 points with Apple's U.S. tablet share exceeding 67%.¹² Again, the requested relief would significantly and negatively impact competitive conditions in the U.S. tablet market.

U.S. consumers would also be significantly and negatively impacted by the requested remedial orders. As AGIS admits, the products at issue are used by U.S. consumers "for personal, business, and communication purposes." APIS at 4. In fact, the average U.S. consumer spends 5 hours and 24 minutes a day on their phone.¹³ Some have described cell phones as a "constant companion:"

As many as 71% of us check our phones within 10 minutes of waking up. And 74% of us can't leave our cell phones at home without feeling uneasy. Nor can we imagine our little companions dying—48% of people say they feel a sense of panic or anxiety when their cell phone battery goes below 20%.¹⁴

¹⁰ See, e.g., https://www.gsmarena.com/kuo_apple_facing_shortage_of_1520_million_iphone_14_pros_ahead_of_holiday_shop_ping_season-news-56696.php

¹¹ <https://gs.statcounter.com/vendor-market-share/tablet/united-states-of-america>.

¹² See n.9 above. DOJ and FTC consider a 200 point change in the HHI to raise market power concerns in horizontal mergers.

¹³ See, e.g., <https://www.zippia.com/advice/smartphone-usage-statistics/>;

¹⁴ See, e.g., <https://www.reviews.org/mobile/cell-phone-addiction/>

Excluding more than 35% of the U.S. smartphone market would result in shortages and as described above, a lack of meaningful choice for U.S. consumers. As Samsung has explained in previous investigations, the follow-on effects would significantly and negatively impact U.S. consumers as well as the general health, welfare, and functioning of American society.¹⁵ Any argument to the contrary is disassociated from the modern realities of life, which have only become more reliant on mobile devices through the COVID years.

AGIS' requested remedy would stymie the Biden Administration's goal of universal access to high-speed internet and closing the digital divide for both students and agricultural communities.^{16,17} None of these goals can be met without a healthy competitive environment and adequate supply of mobile devices.

In conclusion, the remedy requested in this complaint raises significant concerns and the ITC must ensure careful consideration of the impact on U.S. public health and welfare, competitive conditions, and consumers.

¹⁵ During the pandemic, smartphones and tablets became the safer and more efficient way to perform the requirements of daily life such as seeing a doctor, finding and keeping a job; banking, or seeking mental health assistance. As COVID has become endemic, the centrality of mobile devices to American life have persisted. *See, e.g.*, <https://www.whitehouse.gov/ope/briefing-room/2022/03/31/broadbandtelehealth/>; <https://www.indeed.com/career-advice/finding-a-job/how-to-use-your-phone-to-search-and-apply-for-jobs>; <https://www.gobankingrates.com/money/jobs/gen-z-best-jobs-you-can-do-from-your-phone/>; <https://www.pymnts.com/digital-first-banking/2022/banks-turn-mobile-banking-into-consumers-financial-tool-of-choice/>; <https://www.cnn.com/2021/08/09/us/how-to-show-vaccination-proof-on-phone-wellness-trnd/index.html>; <https://covid19.nih.gov/news-and-stories/treating-anxiety-depression-during-pandemic-with-mobile-app>

¹⁶ *See, e.g.*, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/22/fact-sheet-biden-harris-administration-mobilizes-resources-to-connect-tribal-nations-to-reliable-high-speed-internet/>

¹⁷ *See, e.g.*, <https://townhall.com/columnists/mariolopez/2022/04/30/needless-patent-disputes-widen-the-digital-divide-for-minority-and-low-income-americans-n2606569>; <https://www.nationalgrange.org/patent-trolls-threaten-efforts-to-expand-rural-broadband-and-smart-agriculture/>; <https://www.nationalgrange.org/opinion-what-government-should-shouldnt-do-to-advance-mobile-tech-in-ag/>; <https://www.ntia.doc.gov/blog/2022/celebrating-national-digital-inclusion-week-and-efforts-close-digital-divide-0>

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