

UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.

Before The Honorable David P. Shaw  
Administrative Law Judge

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

**BLACK HILLS MEDIA, LLC'S OPPOSITION TO  
GOOGLE INC.'S MOTION TO INTERVENE**

Complainant Black Hills Media, LLC ("BHM") hereby opposes Google Inc.'s ("Google's") Motion to Intervene (the "Motion") in this investigation.

**INTRODUCTION**

The Commission is investigating Respondents' devices for infringement of the asserted BHM patents as set forth in greater detail in BHM's Complaint. Google is one of at least twenty different third parties that possess information related to the devices that are subject to this investigation. Most of those third parties have a similar connection to Respondents' infringing devices (providing applications). Their connection alone is not sufficient to establish the right to intervene in a Commission investigation:

The fact that exclusion orders might affect non-respondents does not automatically serve as the basis for a due process claim or support intervention. Such a rule would require every party potentially touched by an exclusion order to be a party to the investigation. *See In re Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and*

Samsung v. Black Hills Media

*Products Containing Same, Including Cellular Telephone Handsets*, Inv. No. 337-TA-543, Order No. 29 at 10, n.44. (March 9, 2006, Bullock, A.L.J.)

The Commission has established stringent requirements for intervening in an investigation as a Respondent. Google does not attempt to satisfy those requirements and Google must not be permitted to participate in this investigation as a Respondent *ipso facto*. The Commission should also exercise its considerable discretion to deny Google's motion to participate in a more limited fashion as an intervenor. Google has not satisfied its burden of demonstrating that it is entitled to intervene in this investigation. Google's motion does not address one of the four factors required for intervention and Google does not sufficiently distinguish its own interests from those of the Respondents to credibly establish that Google's interests are not already adequately represented by Respondents. Indeed, because Respondents and Google have the same ultimate goal, there is a presumption that Google's interests are adequately represented. Moreover, Google's proposed intervention is not practical under these circumstances where there are approximately twenty other third parties similarly situated to Google whose unfettered participation would only distract attention from Respondents' devices that are the actual focus of the Commission's investigation.

The Commission is required to conclude its investigation at the earliest practicable time in the interests of expeditious adjudication. Google's proposed intervention does not advance that goal and does not provide any countervailing benefits. BHM respectfully requests the Commission to deny Google's motion to intervene.

### **STATEMENT OF FACTS**

On May 13, 2013, BHM filed its Complaint alleging patent infringement and seeking a limited exclusion order against devices imported into the United States by Respondents Samsung

Electronics Co., Ltd., Samsung Electronics America, Inc., Samsung Telecommunications America, L.L.C., LG Electronics, Inc., LG Electronics U.S.A., Inc., LG Electronics MobileComm U.S.A., Inc., Panasonic Corporation, Panasonic Corporation of America, Toshiba Corporation, Toshiba Corporation America Information Systems, Inc., Sharp Corporation, and Sharp Electronics Corporation (the “Respondents”). A non-confidential version of the complaint and its attachments have been publicly available on EDIS since at least May 2013.

The Commission noticed the institution of this investigation against the Respondents on June 18, 2013. On June 25, 2013, Administrative Law Judge Shaw issued nineteen subpoenas to third party entities possessing information relating to Respondents’ infringing devices.<sup>1</sup> Google was one such third party. Google moved to intervene in this investigation on July 26, 2013 on behalf of itself and YouTube LLC. The briefing on Google’s motion will be completed by August 5, 2013. The preliminary hearing is set before the Commission on August 6, 2013.

## **ARGUMENT**

### **A. Legal Standard for Intervention**

Google does not have an automatic right to participate in this proceeding. Whether to permit a third party to intervene in an investigation “is a discretionary decision that involves consideration of the facts of the specific matter.” *In re Certain Garage Door Operators Including Components Thereof*, Inv. No. 337-TA-459, Order No. 7 (Nov. 20, 2001) at 3-4. (“Thus, whether to allow or deny intervention, and to what extent, is a discretionary decision that involves consideration of the facts of the specific matter.”) (hereinafter “Garage Door

---

<sup>1</sup> Administrative Law Judge Shaw issued a twentieth third party subpoena on July 22, 2013.

Operators”). Rule 210.19 calls upon the Commission to exercise its discretion to grant or deny a motion to intervene, and only “to the extent and upon such terms as may be proper under the circumstances.” *Id.*; *In re Certain Electronic Devices with Image Processing Systems, Components Thereof, and Associated Software*, Inv. No. 337-TA-724, Comm’n Op. at 57 (Dec. 21, 2011) (“As indicated by the word “may” in Rule 201.19, intervention is a matter of Commission discretion, not a matter of right.”) (hereinafter “Image Processing Systems”); *c.f.* Google’s Motion to Intervene at n.2 (wrongly implying it has an automatic right to intervention by quoting Fed. R. Civ. P. 24(a)(2) instead of ITC Rule 210.19).

The Commission permits a moving party to fully intervene as a Respondent only if it “produce[s] relevant evidence sufficient to show that articles supplied by the moving party could, in fact, be found in violation of section 337 and could therefore be excluded from entry in to the United States if the remedy sought by the complainant were granted.” *Certain Network Interface Cards and Access Points for Use in Direct Sequence Spread Spectrum Wireless Local Area Networks and Prods. Containing Same*, Inv. No. 337-TA-455, Comm’n. Op. at 10 (July 17, 2001) (hereinafter “Network Interface Cards”). Google’s motion does not even purport to make such a showing.

Absent such strong proof, the Commission may, in its discretion, permit more limited intervention guided at least in part by the four factors that are relevant to intervention under the Federal Rules of Civil Procedure Rule 24(a). *Image Processing Systems* at 57 (“Federal Rule of Civil Procedure 24 provides some guidance in determining whether intervention in a particular matter is appropriate.”). The moving party has the burden to establish at least that (1) it made a timely motion; (2) it has “an interest relating to the property or transaction which is the subject of the action;” (3) it is “so situated that the disposition of the action may as a practical matter impair

or impede its ability to protect that interest;” and (4) it is “not adequately represented by existing parties.” *Id.*

As explained below, Google should not be accorded any intervenor status. However, if the Commission determines that intervention is appropriate under the circumstances, it must also determine the extent of intervention by balancing the impact that the movants’ participation might have on the interests of the present parties in the investigation with the need for expedition in § 337 investigations. *Garage Door Operators* at 7; *Image Processing Systems* at 61-62 (“the intervention will not unduly delay or prejudice the adjudication of the original parties’ rights”). In such circumstances, only very limited intervention should be approved.

#### **B. Google is Not Entitled to Intervene in the Investigation as a Respondent**

The Commission requires a “compelling justification” to grant an intervenor the same status as a Respondent to the investigation. *Network Interface Cards* at 7 (July 17, 2001). Google thus bears the burden of “produc[ing] relevant evidence sufficient to show that articles supplied by [Google] could, in fact, be found in violation of section 337 and could therefore be excluded from entry in to the United States if the remedy sought by the [BHM] were granted.” *Id.* at 10. That burden is not met.

Google’s does not address or even attempt to satisfy the strict requirements that the Commission has placed on a party seeking to gain Respondent status.<sup>2</sup> Since it is Google’s burden to establish that it is entitled to intervention, and Google has failed to establish that it is

---

<sup>2</sup> Instead, Google “reserves the right” to become a Respondent if additional unidentified facts “come to light in the investigation that would support such a request.” Motion at n.1. But Google offers no authority demonstrating that such reservation of rights is appropriate or acceptable and further identifies no facts which could come to light which would support Google’s intervention as a Respondent.

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.