

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

Before the Honorable
Administrative Law Judge David P. Shaw

In the Matter of

CERTAIN POINT-TO-POINT NETWORK
COMMUNICATION DEVICES AND
PRODUCTS CONTAINING SAME

Investigation No. 337-TA-892

**MOTION FOR LEAVE TO REPLY TO RESPONDENTS' RESPONSE TO STRAIGHT
PATH'S MOTION TO TERMINATE THE INVESTIGATION BASED ON
WITHDRAWAL OF THE COMPLAINT**

Pursuant to Ground Rule 5 and 19 C.F.R. § 210.15, Complainant Straight Path IP Group, Inc. ("Straight Path") hereby respectfully submits this Motion for Leave to Reply to Respondents' Response to Straight Path's Motion to Terminate the Investigation Based on Withdrawal of the Complaint. (Motion Docket No. 892-045). The present Reply is submitted to address certain mischaracterizations with respect to Straight Path's reasons for moving to terminate the present Investigation made in Respondents' Response to Straight Path's Motion to Terminate.

Pursuant to Ground Rule 5.e., Straight Path contacted Respondents and the Staff on May 9, 2014 regarding their position on the instant motion for leave and whether they would waive the 2 business day rule. Neither Respondents nor Staff responded to Straight Path's request.

PUBLIC VERSION

May 9, 2014

Respectfully Submitted,

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In the Matter of

CERTAIN POINT-TO-POINT NETWORK
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**COMPLAINANT STRAIGHT PATH'S REPLY TO RESPONDENTS' RESPONSE TO
STRAIGHT PATH'S MOTION TO TERMINATE THE INVESTIGATION BASED ON
WITHDRAWAL OF THE COMPLAINT**

Complainant Straight Path IP Group, Inc. ("Straight Path") respectfully submits this reply brief to address certain statements in Respondents' Response to Straight Path's Motion to Terminate the Investigation Based on Withdrawal of the Complaint. (Motion Docket No. 892-045) [the "Response"].

The unprofessional tone and unnecessary hyperbole in the Response, demands a brief response. Respondents' claim of vexatious litigation tactics is entirely misplaced, as the various settlements with certain respondents and Google, alone, demonstrate. To the contrary, it is Netflix's and the remaining Respondents' intentional discovery misconduct that led to Straight Path's decision to withdraw its complaint, and request that the Investigation be terminated. Respondents also incorrectly accuse Straight Path of withdrawing the complaint to avoid seeing the OUII Staff Attorney's pre-hearing submission. Straight Path was confident that the Staff's brief would have forecasted that the administrative record would support a finding that the asserted patents were valid. What Staff's brief may likely have identified is certain failure of proof issues concerning infringement as to the Netflix application running on the accused devices. Any such proof issue would be the direct and sole result of Netflix's intentionally

evasive and dilatory discovery tactics, on its own accord and in collaboration with Respondents' counsel.

Straight Path has every right to pursue these claims in district court; and, precisely to this point, Straight Path will do so with confidence that Netflix and the Respondents, as district court defendants, will not be able to manipulate further the discovery process, and will all too late but finally meet their longstanding obligation to provide complete and comprehensive discovery. From that discovery, Straight Path is equally confident that it will prove infringement.

Accordingly, moving forward, if the ALJ and Commission need to address the issues arising from the present request to terminate, they should focus on preventing evasive and dilatory discovery tactics, which materially impair the Commission from serving its statutory function in adjudicating these disputes on a full and fair administrative record.

I. Straight Path Diligently Sought Relevant Discovery Regarding the Netflix Application But was Thwarted in its Efforts by Underhanded Delay Tactics

Straight Path diligently sought discovery regarding the Netflix application from the inception of this Investigation, but Straight Path's efforts to seek discovery regarding the structure, function, and operation of the Netflix application, including server side related information, were blocked by Netflix and Respondents' subversive delay tactics.

Straight Path served written discovery on Respondents seeking information regarding the Netflix application immediately after the institution of this Investigation, but none of the Respondents provided the requested information in their discovery responses. *See* Order No. 22 (denying Straight Path's motion requesting certification to the Commission of a request for judicial enforcement of the Google subpoena); Order No. 25 (denying Straight Path's motion to compel

discovery from the Sony Respondents). Indeed, even the AmTRAN Respondents,¹ who were represented by Netflix's own counsel, Perkins Coie, provided no responsive information and instead directed Straight Path to Netflix for the required discovery.

Straight Path subpoenaed Netflix on October 25, 2013, but Netflix, as part of its defense strategy, did everything possible to delay responding to the subpoena in an effort to run out the clock on the fact discovery period. On November 8, 2013, Netflix filed a motion for an extension of time to respond to the subpoena to November 22, 2013, which was granted. Netflix finally filed its motion to quash on December 2, 2013, well over a month after service of the subpoena.² Even worse, Netflix's motion to quash argued that the subpoena should be quashed because Straight Path could obtain the needed discovery from the Respondents, including AmTRAN. This is disingenuous because, as mentioned above, the Respondents, including AmTRAN, which is represented by Netflix's counsel, refused to provide the requested discovery and directed Straight Path to obtain the discovery from Netflix.

On January 9, 2014, only two weeks before the close of fact discovery, the ALJ denied Netflix's motion to quash in its entirety. *See* Order No. 16. But, despite the ALJ's order, Netflix continued to refuse to produce the requested discovery, and especially server side related information even though it was specifically requested in the subpoena. Immediately after the ALJ denied Netflix's motion to quash, Straight Path contacted Netflix to request the immediate production of the code, documents, and deposition witness requested by the subpoena. Incredibly, Netflix still tried to evade production of the requested discovery, and in fact continued to argue that Straight Path should seek the discovery from Respondents, an argument that was specifically denied by the ALJ. For example, on January 15, Netflix responded to a

¹ The AmTRAN Respondents are AmTRAN Technology Co., Ltd. and AmTRAN Logistics, Inc.

² Netflix initially filed its motion to quash on November 22, 2013, but the motion was denied by the ALJ for failure to comply with Ground Rule 5.1. *See* Order No. 11.

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