

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN MOBILE PHONES, TABLET
COMPUTERS, SMART WATCHES,
SMART SPEAKERS, AND DIGITAL
MEDIA PLAYERS, AND PRODUCTS
CONTAINING SAME

Inv. No. 337-TA-1300

ORDER NO. 5: PROPOSED SCHEDULING ORDER

(March 11, 2022)

On February 24, 2022, the Commission instituted this Investigation pursuant to subsection (b) of Section 337 of the Tariff Act of 1930, as amended, to determine:

whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 2, 3, 5–8, and 11–18 of the '430 patent; claims 1–3, 7, 12, and 18 of the '273 patent; claims 1, 9, 10, 12–14, 18, and 20 of the '621 patent; claims 1, 2, 4, 7–10, 12, 15, and 16 of the '770 patent; and claims 1, 2, 8, 10, 13, and 15 of the '400 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337[.]¹

87 Fed. Reg. 10385 (Feb. 24, 2022).

The Notice of Investigation (“NOI”) names as complainants: Ericsson Inc. of Plano, TX; and Telefonaktiebolaget LM Ericsson of Stockholm, Sweden (“Complainants”). *Id.* at 10386.

The NOI names as respondent: Apple Inc. at Cupertino, CA (“Respondent”). *Id.* The Office of Unfair Import Investigations (“Staff,” and with Complainants and Respondent, the “Parties”) is

¹ The asserted patents are: U.S. Patent No. 7,151,430 (“the '430 patent”); U.S. Patent No. 9,509,273 (“the '273 patent”); U.S. Patent No. 9,853,621 (“the '621 patent”); U.S. Patent No. 7,957,770 (“the '770 patent”); and U.S. Patent No. 9,705,400 (“the '400 patent”). 87 Fed. Reg. 10385 (Feb. 24, 2022).

also a party in this Investigation. *Id.*

Target Date

Pursuant to Commission Rule 210.51(a), a target date for completion of the Investigation in the above-captioned matter must be set. *See* 19 C.F.R. 210.51(a). Order No. 4 sets an **18-month** target date. The target date is therefore **August 24, 2023**. Based on the target date, the final initial determination on violation (“ID”) in this Investigation is due no later than **April 24, 2023**. The proposed Procedural Schedule is set forth in **Attachment A** hereto.

Pandemic Evacuation

The Commission is operating under a Pandemic Evacuation plan that has been published in the Federal Register and on the Commission’s website. Commission Staff, including the Office of Administrative Law Judges (“OALJ”), are working remotely. The Commission offices are in the process of re-opening.

The OALJ is not accepting paper filings/copies, CD’s, flash drives, and the like. Applications for Subpoenas should be filed exclusively on McNamara337@usitc.gov. Courtesy copies of documents filed on EDIS should be sent to McNamara337@usitc.gov. Please contact Dockets Staff for procedures for filing documents on EDIS during this period until the Evacuation is lifted. Filing instructions on EDIS are also available on the Commission’s website.

As explained in the Ground Rules, the Commission is using WEBEX as its secure video platform. Until the Commission issues notice that the Commission courtrooms and building will be open, evidentiary hearings and possibly other hearings will be conducted virtually on WEBEX. Some management conferences may be scheduled for telephone conference only.

Pre-Hearing and Evidentiary Hearing

The evidentiary hearing (“Hearing”) is scheduled for **January 5-6, 9-12, 2023**, at a location to be announced closer to the Hearing date. At my discretion, a Pre-Hearing Conference (or more than one) to resolve outstanding Motions *in Limine* (“MIL”) and High Priority Objections (“HPO”) and other outstanding Motions and issues is likely to be held by telephone within two (2) to three (3) weeks before the Hearing, if possible. A final Pre-Hearing Conference will commence in the same location as the Hearing and on the first day of the Hearing, **January 5, 2023**.

The Hearing is likely to be held in one of the Commission Courtrooms, with some possibility of remote participants, which is yet to be determined. The Hearing days will start at 9:30 a.m. and conclude at 5:30 p.m. each day, barring unforeseen circumstances (severely inclement weather, etc.). If the Hearing is held by video on WEBEX, we will be issuing other instructions.

Complainants as a group are limited to two (2) total MILs and/or HPOs in combination. Respondent is also limited to two (2) total MILs and/or HPOs in combination. MILs and/or HPOs styled as a single motion but are in fact omnibus in nature may be denied automatically without prejudice with a request for refile. Motions for Receipt of Evidence without a Sponsoring Witness will be treated separately.

Direct testimony will be taken during the Hearing. Basic background information about a witness or the issues (no other substance) may be considered as part of an acceptable witness statement if leave is granted. Whether other testimony may be provided in a witness statement will be determined later but it is not likely unless exigent circumstances exist, and then, with leave. Witness Statements are allowed rarely, even for experts located outside the United States.

Pandemic constraints may change this.

As discussed in Ground Rule 1.14.4.1, opening and closing statements are optional. However, they are helpful and encouraged. Some parties are using closing statements in addition to openings, to their advantage.

Changes to Ground Rules

Please read the Ground Rules and follow them. The procedure for discovery disputes has been clarified. (*See* G.R. 2.5.). However, the Parties should bring discovery problems to the attention of Chambers as soon as possible in addition to the scheduled Management Conferences that are designed to deal with problems as they occur.

There is a more complete explanation of the expectations for pre-hearing briefs. (G.R. 7.2.). Service of paper copies of the proposed exhibits to Chambers prior to the Hearing are no longer required, and during the Pandemic Evacuation, are prohibited. (*See* G.R. 8.7.2.).

The document filing requirement of Ground Rule 1.2 has been amended. All pleadings must contain the name of the party that filed the document along with the title of the document.

When arranged in advance, Chambers may accept certain submissions, in certain circumstances (e.g., before a *Markman* hearing) on BOX, which the Commission has approved.

In addition to pertinent Ground Rules regarding expert reports, the Parties shall file on EDIS *all* expert reports upon which they intend to rely. (*See, e.g.*, G.R. 8.5.).

Any submission that exceeds the page limitations set forth in the Ground Rules may be denied provisionally. Likewise, an opposition or response to a motion that exceeds the relevant page limitations may be denied provisionally and returned for re-filing. If there is not a re-filing, the response may not be considered for the ruling. A party must show good cause and receive permission for leave to file any submission that exceeds the page limitations for that type of

submission.

Other Instructions/Contact

For Case/Discovery Management Conferences that will be held by telephone, the Parties should jointly submit one e-mail to Chambers through McNamara337@usitc.gov at least 24 hours before containing: (1) the names of the speaker and listener for each party with the identity of the party they represent;² (2) the name of the court reporter; and (3) the call-in telephone number and passcode. As is implied, for telephone conferences, one of the Parties is responsible for the court reporter.

For WEBEX conferences, several days before, the Parties will be invited to submit: (1) the names of the speaker and listener for each party with the identity of the party they represent; and (2) their e-mail addresses and telephone numbers where they can be reached if necessary. The Parties will then be sent an invitation, that will include a dial-in number, which they must accept if they wish to participate. Other procedural suggestions or directions will be sent before a WEBEX proceeding.

The Parties should notify Chambers of the names of all non-parties or third-parties that are known to have discoverable information in this Investigation by a filing a Notice on EDIS before the first Discovery Management Teleconference, or as soon as can be determined. A copy of the same should be sent to Chambers through McNamara337@usitc.gov.

As the Investigation proceeds closer to the Hearing, the Parties will be asked if they need additional days or fewer days for the Hearing. The Parties also may request a change at least two (2) months before the Hearing. The Parties are urged to think about the amount of time that they may need as soon as the case starts to narrow and eliminate patents/claims or prior art references.

² Each party is limited to one (1) speaker and one (1) listener unless otherwise permitted.

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