

June 6, 2012

By Electronic Filing

The Honorable James R. Holbein
Secretary
U.S. International Trade Commission
500 E Street, S.W.
Washington, DC 20436

Re: ***In the Matter of Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof, Investigation No. 337-TA-745***

Dear Secretary Holbein:

The Retail Industry Leaders Association (RILA) submits these comments for consideration by the Commission pursuant to 19 U.S.C. §1337(d)(1). RILA urges the Commission to carefully consider how granting owners of standard-essential patents exclusion orders pursuant to section 337 investigations could undermine the process to license such patents on fair, reasonable and non-discriminatory terms and standard setting more generally.

By way of background, RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

With a membership that invests millions of dollars in the design, manufacture and branding of products, RILA is a strong supporter of enforceable intellectual property rights (“IPR”), and generally supports the ability of IPR holders to enforce such rights at the ITC. However, given the nature of the limited remedies available under section 337, the public interest factor in 337 is particularly important when considering cases involving standard-essential patents. Where a patent is essential to implementation of a standard, there is an inherent tension between the rights of the patent holder and the public interest in the benefits (*e.g.*, interoperability) of broad usage of industry standards. The ITC should recognize that standard-setting organizations strike a delicate balance between patent rights and the public interest by establishing commitments that standard-essential patents will be licensed on “fair, reasonable, and non-discriminatory” (“FRAND”) terms. At the time the standard was established that included Motorola's intellectual property, Motorola made a written commitment to license the IP on FRAND terms.

Patents protect investments in innovative technologies and RILA supports the patent holder's right to compensation for the use of standard-essential patents on FRAND terms. The concern is that, in the case of standard-essential patents in particular, complainants could transform 337

exclusion orders from shields into swords, and use the process to undermine the balance between compensation for use of the technology and the public interest that the FRAND regime seeks to achieve.

It would be antithetical to the public interest, consumer choice and affordability to permit the use of exclusion orders to force companies selling standard-compliant products to license asserted patents on non-FRAND terms (*e.g.*, artificially high royalties) in order to sell those products in the U.S. market. Such a result is exactly what the FRAND regime is intended to prevent. *See, e.g., Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 313 (3d Cir. 2007) (“To guard against anticompetitive patent hold-up, most SDOs require firms supplying essential technologies for inclusion in a prospective standard to commit to licensing their technologies on FRAND terms.”). Exploitation of 337 exclusion orders in this manner to obtain artificially high royalties will inevitably result in reduced competition, stymied innovation of standard-complaint products and artificially inflated prices of products for consumers. Moreover, failure to grant an exclusion order would not leave the patent holder without adequate recourse. The appropriate remedy for infringement of a patent subject to a FRAND commitment is the collection of FRAND royalties, which the patent holder can obtain through negotiation or in district court.

In sum, it is undeniably in the public interest to maintain policies and practices, such as the FRAND regime, that promote innovation and robust, fair competition. The standard setting process and FRAND regime benefit patent holders and also help to promote interoperability, affordability and consumer choice. RILA therefore strongly urges the Commission to avoid any measures that would destroy that regime and undermine the standard-setting process.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephanie Lester". The signature is fluid and cursive, with a horizontal line extending from the end.

Stephanie Lester
Vice President, International Trade