

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.**

**In the Matter of**

**CERTAIN ELECTRONIC DEVICES,  
INCLUDING WIRELESS COMMUNICATION  
DEVICES, PORTABLE MUSIC AND DATA  
PROCESSING DEVICES, AND TABLET  
COMPUTERS**

**Investigation No. 337-TA-794**

**THIRD PARTY SPRINT SPECTRUM, L.P.'S  
STATEMENT REGARDING THE PUBLIC INTEREST**

Third party Sprint Spectrum, L.P.<sup>1</sup> (“Sprint”) respectfully submits this Statement Regarding the Public Interest in response to the Commission’s November 19, 2012 Notice of Commission Determination to Review the Final Initial Determination; Schedule for Filing Written Submissions on the Issues Under Review and on Remedy, Public Interest, and Bonding in Investigation No. 337-TA-794 (Doc. ID 497444) (hereinafter, “Notice for Comment on Public Interest”). For the reasons set forth below, the Commission should not preside over a case involving FRAND<sup>2</sup>-encumbered patents.

## **I. BACKGROUND AND SPRINT’S INTEREST**

Sprint is a national provider of wireless voice, messaging, and data services and together with other entities in the Sprint Nextel family of companies serves nearly 56 million customers throughout the nation. Sprint’s customers use a variety of multi-functional devices with Sprint’s voice and data services, including devices manufactured by both Apple and Samsung, as well as other strategic partners. The devices in Sprint’s current handset and device portfolio include the Apple iPhone and iPad products that are subject to the 794 Investigation.

Sprint respects intellectual property rights and takes no position on the merits of the dispute between Apple and Samsung.<sup>3</sup> Sprint would take the same position in this Public Interest Statement if the litigants were reversed or replaced by other handset manufacturers. Indeed, Sprint filed an Amicus Brief in the Federal Circuit just months ago in another patent dispute between Apple and Samsung, and Sprint’s position there happened to support the relief Samsung

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<sup>1</sup> Sprint Spectrum L.P. is owned by Sprint Nextel Corporation. Sprint Spectrum, L.P. is the primary Sprint-related entity that sells various smartphone devices and corresponding services to end users in the United States, including smartphones manufactured by Apple and Samsung.

<sup>2</sup> Several articles discuss the relationship of FRAND and RAND (fair, reasonable, and non-discriminatory) licensing terms to standard-setting organizations. *See, e.g.*, Doug Lichtman, *Understanding the RAND Commitment*, 47 HOUS. L. REV. 1023, 1025 (2010).

<sup>3</sup> Sprint does not comment on whether Samsung is required to license the asserted patents on FRAND terms, nor does Sprint comment on whether any licensing offers between Apple and Samsung comply with FRAND requirements.

sought.<sup>4</sup> Here, patent merits aside, Sprint’s position is that FRAND-encumbered patents generally are not appropriate for adjudication in the ITC.<sup>5</sup>

Respondent Apple aptly set forth many of the difficulties presented when FRAND patents are asserted in the ITC.<sup>6</sup> Sprint agrees that it harms the public when FRAND-committed patentees renege on their FRAND obligations and seek exclusionary remedies on their patents, and that the public, the courts, and Congress have appropriately expressed concerns about this practice.<sup>7</sup> Sprint writes here to adopt these general points and to provide additional reasons that an exclusion or cease-and-desist order (collectively, “Exclusion Order”) generally should not issue in cases dealing with FRAND-encumbered patents. Such orders harm U.S. customers and wireless carriers such as Sprint, are adverse to the public interest, and impede U.S. policy underlying the adoption of various wireless standards that was designed to foster competition in the marketplace.

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<sup>4</sup> See Sprint Spectrum, L.P.’s Amicus Curiae Brief in Support of Reversal of Preliminary Injunction, *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 695 F.3d 1370 (Fed. Cir. 2012) (filed July 23, 2012).

<sup>5</sup> The Notice for Comment on Public Interest requests input from interested third-parties on several topics, including the below issue:

1. Does the mere existence of a FRAND undertaking with respect to a particular patent preclude issuance of an exclusion order based on infringement of that patent? Please discuss theories in law, equity, and the public interest, and identify which (if any) of the 337(d)(1) public interest factors preclude issuance of such an order.

Notice for Comment on Public Interest at 3. Sprint believes that, at a minimum, the § 337(d)(1) considerations of the competition conditions in the relevant industry, and the interests of consumers, preclude the issuance of an Exclusion Order.

<sup>6</sup> See Resp. Apple Inc.’s Submission Pursuant to the Commission’s Request for Statements on the Public Interest, Inv. No. 337-TA-794 (Oct. 22, 2012) (hereinafter, “Apple’s Public Interest Statement”).

<sup>7</sup> See *id.* at 1-3.

## **II. WHERE AN ASSERTED PATENT IS ENCUMBERED BY FRAND AND WHERE THE ACCUSED ACTIVITY FALLS WITHIN THE RELEVANT INDUSTRY STANDARD, IT IS IN THE PUBLIC INTEREST FOR THE ITC TO END ITS INVESTIGATION OR OTHERWISE DECLINE TO HEAR THE CASE**

The creation and maintenance of industry standards serves the public interest. But the threat of injunctive-style relief effectively denies the public the benefit of FRAND safeguards implemented in connection with those industry standards. The appropriate remedy in FRAND cases is to impose a reasonable royalty. Because the ITC cannot do so, it should not investigate FRAND cases. Thus, for the reasons set forth below, FRAND patents should not be subject to an Exclusion Order, unless the patent owner can reasonably demonstrate no effective means to obtain FRAND compensation through district courts, such as where an accused infringer has taken steps designed to frustrate or avoid FRAND licensing.<sup>8</sup>

### **A. The Smartphone Industry and the Public at Large Depend on the Creation and Maintenance of Industry Standards and the Corresponding FRAND Safeguards**

It is widely recognized that smartphone industry “[s]tandards provide many benefits for technology consumers, including not just interoperability but also lower product costs and increased price competition.”<sup>9</sup> Further, the creation of industry standards serves the public interest by helping patent law to “promote innovation.”<sup>10</sup> And when accompanied by FRAND safeguards, industry standard-setting also allows the fruits of that innovation to be enjoyed by the public more quickly since “RAND allows technological implementation to move forward while

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<sup>8</sup> Such steps designed to avoid or frustrate FRAND licensing might include: (1) importation by foreign counterfeiters; (2) distribution schemes purposefully dispersed among various international distribution points to render negotiations on FRAND terms with each entity impractical; or (3) instances in which a Respondent is insolvent and cannot pay on FRAND terms under any circumstance. Even where such limited exceptions are present, however, district courts have additional remedies available and often will be better positioned than the ITC to determine whether injunctive-type relief is appropriate under the circumstances.

<sup>9</sup> *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 876 (9th Cir. 2012).

<sup>10</sup> Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1972 (2002).

the parties in parallel work out legal and financial details.”<sup>11</sup> As explained elsewhere, industry standards are especially beneficial to the public in the cell-phone industry.<sup>12</sup>

Industry standards in the smartphone industry are also among the most difficult to create. For example, when a European standard setting organization (SSO) tried to establish an industry standard for the 3G wireless protocol<sup>13</sup> used in the telecom industry, the industry initially identified 6,000 “essential” patents resulting in a cumulative royalty rate of 130%.<sup>14</sup> Thus, the industry’s success in creating a standard for the type of technology at suit here is a substantial investment and a worthy achievement. Any action by the ITC that disrupts this delicate balance harms the public by: (1) putting to waste the significant resources devoted to creating the industry standard; (2) depriving the public of the benefits and safeguards, such as FRAND, negotiated as part of the established standard, and (3) dissuading companies from working to create industry standards to benefit the public going forward. Disrupting the FRAND commitment disturbs the ecosystem necessary to preserve and further industry standards.

**B. The Threat of an Exclusion Order or Similar Injunctive Relief Negates the Benefit of Industry Standards and Harms the Public by Unnecessarily Driving Up Royalty Rates and Creating “Hold-Up” Problems**

Justice Kennedy recognized in *Ebay* that a threat of an injunction can have a coercive effect on the potential licensee and “can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.”<sup>15</sup> He further observed that injunctions for patent infringement “may not serve the public interest” in cases where “the

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<sup>11</sup> See Douglas Lichtman, *Understanding the RAND Commitment*, 47 HOUS. L. REV. 1023, 1028 (2010).

<sup>12</sup> Apple’s Public Interest Statement at 3.

<sup>13</sup> For additional discussion of third generation (3G) cellular technology and its origins, see Goodman & Meyers, *infra* note 19 at 2.

<sup>14</sup> Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (And One Not To)*, 48 B.C. L. REV. 149, 152 (2007) (hereinafter, “*Ten Things*”).

<sup>15</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring) (internal citations omitted).

patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations.”<sup>16</sup>

The risks of harm to the public interest identified by Justice Kennedy are particularly applicable to the smartphone industry. Smartphones are such highly technical, complex devices that it has been estimated that over 250,000 patents are relevant to smartphones.<sup>17</sup> Thus, the smartphone industry is unlike some other patent-oriented industries, such as pharmaceuticals, where a single or a very limited number of patents are the focus of, and create demand for, the entire product. Modern telecom devices, such as smartphones, can “encompass thousands of useful technologies, each of which may be covered by a patent claim.”<sup>18</sup> Professor Mark Lemley reports that “literally thousands of patents have been identified as essential to the proposed new standards for 3G cellular telephone systems.”<sup>19</sup> Nevertheless, injunctive relief and Exclusion Orders typically apply to the entire device, not just to the patented features. With thousands of industry essential patents overlapping each other to cover an entire industry, yet often individually covering only minute details of phones, there is a risk that allowing Exclusion Orders on FRAND-encumbered patents could bring the entire industry to a grinding halt.

Exclusion orders are antithetical to basic FRAND principles. As Judge Posner explained, “[t]he purpose of the FRAND requirements . . . is to confine the patentee’s royalty demand to the value conferred by the patent itself as distinct from the additional value—the hold-up value—

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<sup>16</sup> *Id.* at 396-97 (Kennedy, J., concurring).

<sup>17</sup> See Steve Lohr, *A Bull Market in Tech Patents*, N.Y. TIMES (Aug. 16, 2011), available at <http://www.nytimes.com/2011/08/17/technology/a-bull-market-in-tech-patents.html?pagewanted=all> (last visited Nov. 30, 2012).

<sup>18</sup> See *Hynix Semiconductor Inc. v. Rambus Inc.*, 609 F. Supp. 2d 951, 866 (N.D. Cal. 2009).

<sup>19</sup> Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 1992 (2007) (citing David J. Goodman & Robert A. Meyers, *3G Cellular Standards and Patents*, IEEE WIRELESSCOM 2005 2 (2005), available at <http://eeweb.poly.edu/dgoodman/wirelesscom2005.pdf>).

conferred by the patent's being designated as standard-essential.”<sup>20</sup> These FRAND requirements are a bargained-for solution<sup>21</sup> designed both to bolster competition and to ensure that the value of participating patents has some relationship to the patented feature, all by largely removing injunctive relief from the equation.<sup>22</sup> The promise that FRAND licensing terms will supplant exclusionary type relief is an essential carrot that drives the community to adopt a standard, thereby lowering costs to the public. Indeed, industry standards actually have an *anticompetitive* effect when their corresponding FRAND obligations are not properly enforced.<sup>23</sup> Thus, the threat of an Exclusion Order artificially inflates the patents’ value,<sup>24</sup> resulting in “unreasonable,” as opposed to fair, reasonable, and nondiscriminatory licensing terms.<sup>25</sup> The Ninth Circuit agrees: “Denying [injunctive] relief is the most powerful way to prevent patent holdup[.]”<sup>26</sup>

**C. Because the ITC Can Only Grant Exclusionary Remedies and Cannot Grant Reasonable Royalties, The ITC Should Cease Investigations Once it is Clear that FRAND Terms Apply**

The Commission is fundamentally ill-suited to address FRAND-encumbered patents. Once it is clear that FRAND applies, the only remaining issue is to determine a reasonable royalty. Calculating such a royalty is outside the ITC’s core expertise, and granting such a royalty is outside its statutory authority. Nevertheless, presiding over a case involving FRAND-

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<sup>20</sup> *Apple Inc. v. Motorola, Inc.*, No. 1:11-cv-08540, 2012 WL 2376664, at \*11 (N.D. Ill. June 22, 2012) (Posner, J., sitting by designation) (citing *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 313–14 (3d Cir. 2007)).

<sup>21</sup> See Douglas Lichtman, *Understanding the RAND Commitment*, 47 *Houston L. Rev.* 1023, 1039-43 (2010).

<sup>22</sup> See *Apple*, 2012 WL 2376664, at \*11 (“The proper method of computing a FRAND royalty starts with what the cost to license would have been of obtaining, just before the patented invention was declared essential to compliance with the industry standard, a license for the function performed by the patent.”).

<sup>23</sup> Apple’s Public Interest Statement at 3.

<sup>24</sup> See Lemley, *Ten Things* at 153-54.

<sup>25</sup> *Apple, Inc. v. Motorola, Inc.*, No. 1:11-cv-08540, 2012 WL 2376664 at \*12 (N.D. Ill. June 22, 2012) (Posner, J., sitting by designation) (quoting Third Party United States Federal Trade Commission’s Statement on the Public Interest, Inv. No. 337-TA-745 (June 6, 2012) at 3-4.

<sup>26</sup> *Microsoft Corp. v. Motorola Inc.*, 696 F.3d 872, 877 (9th Cir. 2012) (quoting Mark A. Lemley, *Ten Things* at 167 (alterations in original)) *id.* at 885 (finding no abuse of discretion in allowing claim that RAND commitment precludes injunctive relief to proceed).

encumbered patents ordinarily requires the Commission to make damages-related findings as a prerequisite to determining whether an Exclusion Order is appropriate. By way of example, the Initial Determination in this Investigation devoted several pages of analysis to whether a FRAND offer was made in the first instance to determine whether FRAND-encumbered patents were foreclosed from enforcement under Section 337.<sup>27</sup> Notwithstanding the Commission's recognition of its inability to award damages (i.e., the authority to conduct a binding reasonable royalty analysis),<sup>28</sup> the ALJ proceeded to determine whether the royalty offered in this case was reasonable as a prerequisite to its analysis.

Without opining on any factual issue determined by the ALJ, Sprint respectfully suggests that determining royalty rates is better left to private negotiations or, failing that, to the district courts for three reasons. First, the ITC is neither accustomed nor equipped to weigh evidence to determine what constitutes a fair patent royalty. Even district courts that routinely enter judgments of patent damages rely on jurors (absent agreement of the parties) to determine the amount of patent damages.<sup>29</sup> Second, the threat of an importation ban necessarily increases the patentee's bargaining power, thereby affecting the amount a potential licensee is willing to pay to avoid an Exclusion Order. Stated differently, there is a risk that the act of attempting to measure a reasonable royalty in this forum skews the measurement itself or otherwise renders it unreliable. Third, even assuming the Commission could determine FRAND licensing terms, the Commission is not authorized to order a payment equal to FRAND terms.

The Commission's limited mandate further hampers its ability, relative to district courts, to efficiently resolve disputes concerning FRAND-encumbered patents. In *eBay*, Justice

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<sup>27</sup> See Initial Determination at 463-470.

<sup>28</sup> See *id.* at 461.

<sup>29</sup> See, e.g., *Minks v. Polaris Indus.*, 546 F.3d 1364, 1372 (Fed Cir. 2008) (vacating district court's reduction of the jury's compensatory damages because judge "substituted its conclusion for that of the jury on the factual issue of compensatory damages").

Kennedy specifically noted that a district court’s ability to exercise “equitable discretion over injunctions” in patent actions is “well suited to allow courts to adapt to the rapid technological and legal developments in the patent system.”<sup>30</sup> The “shall” in section 1337(d)(1) means that, as compared to district courts, the ITC has a diminished capacity to exercise discretion over whether to issue injunctive-type relief in the first instance, and that inflexibility is further undermined because the range of remedies simply is not as broad as in district courts.

**D. Sprint, Its Customers, and the Public at Large End Up Paying the Price For a Patentee’s Forum Shopping and Selection of the ITC as the Venue to Assert FRAND-Encumbered Patents**

Allowing the ITC to preside over FRAND-encumbered patents harms American consumers, wireless carriers such as Sprint and their customers, and the broader public interest. In the event the Commission finds FRAND-encumbered patents infringed, not invalid, and enforceable, its only remedy is to issue an Exclusion Order that prevents the flow of goods to numerous, law-abiding third parties. But an Exclusion Order hurts American consumers and disrupts American businesses, including Sprint’s. The ripple effects permeate an entire industry and leave a void in Sprint’s handset portfolio that cannot be filled for about 9-12 months.<sup>31</sup> This, in turn, stops the flow of an entire distribution chain, and impacts the inventory of thousands of distribution points, including national retailers, company-owned facilities, and franchisees.<sup>32</sup> It encumbers Sprint’s ability to provide replacement handsets pursuant to contractual agreements with customers.<sup>33</sup> It wastes millions of advertising dollars and corresponding media planning

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<sup>30</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring).

<sup>31</sup> See Sprint Spectrum, L.P.’s Amicus Curiae Brief in Support of Reversal of Preliminary Injunction at 2, 5-9, *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 695 F.3d 1370 (Fed. Cir. 2012) (filed July 23, 2012).

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.* at 9. Customers often do not delineate between the manufacturer and the wireless carrier when they have device problems. *Id.* The purchase cost for a smartphone is often rolled up into or otherwise accounted for by the end user’s contractual obligation to pay for Sprint

that Sprint spent to promote and launch a product, and it can irreparably tarnish Sprint's reputation for a perceived failure to deliver the advertized goods or to meet publicly announced sales dates for the devices.<sup>34</sup> All of these ill effects constitute a particularly harsh and inappropriate remedy when an entire industry has been implored to adopt and has relied on standards that incorporate the patents-in-suit subject to the patent owner's FRAND commitment, which disclaims the very type of exclusionary remedy that an Exclusion Order represents.

Conversely, if cases involving FRAND-encumbered patents were not allowed to proceed in the ITC, then another body—whether through district court action, arbitration proceeding, or mediation—could determine a license offer that satisfies FRAND. This would result in a payment to the aggrieved party, and the public would not be forced to bear the costs associated with preparing for or dealing with an Exclusion Order. Indeed, exclusionary relief likely would not be available at all. In district courts, injunctive relief in patent cases is subject to normal equity standards.<sup>35</sup> And “the inadequacy of one's damages remedy is normally a prerequisite to injunctive relief” in district courts.<sup>36</sup> But the bargain to license on FRAND terms in exchange for participating in standards setting organizations presupposes and serves as an admission that monetary relief is sufficient. Thus, allowing FRAND-encumbered patents to proceed in the ITC presents an asymmetry that is fundamentally unfair. It allows for forum shopping that guts the FRAND licensing bargain, which was designed to attract numerous entities to a standard, thereby serving the public by promoting competition.

Recognizing the inequity of this asymmetry, the FTC issued a statement just last week declaring that a “suit for injunctive relief against implementers of its standard essential patents

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service over a fixed term, which drives users' perceptions that a particular phone is a Sprint phone. *Id.*

<sup>34</sup> *Id.* at 7.

<sup>35</sup> *eBay*, 547 U.S. at 391-92.

<sup>36</sup> *See, e.g., Hoard v. Reddy*, 175 F.3d 531, 533 (7th Cir. 1999).

. . . under the FRAND terms . . . is an unfair method of competition actionable under Section 5 of the FTC Act.”<sup>37</sup> The FTC reasoned that “[s]eeking injunctions against willing licensees of FRAND-encumbered standard essential patents . . . is a form of FRAND evasion and can reinstate the risk of patent hold-up that FRAND commitments are intended to ameliorate.”<sup>38</sup> The FTC’s finding is important and should be given effect by this body. By statute, the ITC shall consult with and seek advice and information from the FTC during the course of each ITC investigation, as appropriate.<sup>39</sup> The ITC should heed the advice of its sister organization and refuse to adjudicate FRAND-encumbered patents.

### **III. THE REMEDY THAT BEST SERVES THE PUBLIC INTEREST FOR FRAND-ENCUMBERED PATENTS IS A REASONABLE LICENSING FEE DETERMINED AND ENFORCED BY A DISTRICT COURT**

Sprint agrees with FTC Commissioner Rosch that “if the ITC concludes that Respondent (or its predecessor in interest) made a RAND commitment with respect to a standard essential patent, an exclusion order should be denied for that patent as inconsistent with the public interest, *see* 19 U.S.C. § 1337(d)(1), or as a matter of equity.”<sup>40</sup> Here, the remedy that best serves the public interest is a reasonable licensing fee determined and enforced by a court. Judge Posner agrees.<sup>41</sup> Allowing injunctive relief to proceed violates the bargain the patentee struck in the first instance.<sup>42</sup> The Ninth Circuit likewise explained that a royalty payment, as opposed to

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<sup>37</sup> Analysis of Agreement Containing Consent Order to Aid Public Comment at 4, *In re Robert Bosch GmbH*, F.T.C. File No. 121-0081 (F.T.C. Nov. 26, 2012), *available at* <http://www.ftc.gov/os/caselist/1210081/121126boschanalysis.pdf>.

<sup>38</sup> *Id.*

<sup>39</sup> 19 U.S.C. § 1337(b)(2).

<sup>40</sup> Third Party United States Federal Trade Commission’s Statement on the Public Interest, Inv. No. 337-TA-745 (June 6, 2012) at 1 n.3 (Doc. ID 482234); *see also id.* at 1 n.2.

<sup>41</sup> *Apple, Inc.*, 2012 WL 2376664, at \*11.

<sup>42</sup> *Id.*

injunctive-type relief, is the “only remedy consistent with the contractual commitment to license users of ITU standard-essential patents.”<sup>43</sup>

Similarly, multiple commentators have argued that where a patentee has agreed to license its patent under FRAND terms in exchange for use of its patents in a standard, courts should view this as an implied license to anyone who uses the resulting standard since “others will assume that they are free to use that standard on reasonable and nondiscriminatory terms.”<sup>44</sup> In that case, “the only remaining questions concern the scope of the license and the royalty rate.”<sup>45</sup> This would be no different conceptually from implying a license to practice patents that the patentee failed to disclose to an SSO (despite a patentee’s contractual obligation to do so), which courts have shown a willingness to do.<sup>46</sup> Imposing a reasonable licensing fee also restores a competitive outcome as closely as possible by approximating licensing fees at the level they would have been if “bindingly negotiated ex ante.”<sup>47</sup> A license is a complete defense to patent infringement.<sup>48</sup> Thus, before devoting limited resources to an infringement analysis, the ITC should initially determine whether FRAND commitments apply and, if so, should cease Investigation in deference to an entity that can adjudicate and enforce the license amount.

For all of the reasons above, adjudicating FRAND-encumbered patents in the ITC is contrary to public policy and inconsistent with the public interest factors of § 337(d)(1).<sup>49</sup>

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<sup>43</sup> *Microsoft Corp. v. Motorola Inc.*, 696 F.3d 872, 885 (9th Cir. 2012).

<sup>44</sup> Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1924 (2002); *see also* Douglas Lichtman, *Understanding the RAND Commitment*, 47 HOUS. L. REV. 1023, 1043 (2010).

<sup>45</sup> *Id.*

<sup>46</sup> *See Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1023-24 (Fed. Cir. 2008); *see also Barnes & Noble, Inc. v. LSI Corp.*, 849 F. Supp. 2d 925, 943 (N.D. Cal. 2012).

<sup>47</sup> Joseph Farrell, et al., *Standard Setting, Patents, and Hold-up*, 74 ANTITRUST L.J. 603, 660 (2007).

<sup>48</sup> *Radar Indus., Inc. v. Cleveland Die & Mfg. Co.*, 424 Fed. Appx. 931, 933 (Fed. Cir. 2011); *Carborundum Co. v. Molten Metal Equip. Innovations, Inc.*, 72 F.3d 872, 878 (Fed. Cir. 1995).

<sup>49</sup> At minimum, any Exclusion Order issued in this case must include a transition period to attempt to limit in some way the harm to third parties, such as carriers like Sprint, and the public

December 3, 2012

Respectfully submitted,



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at large. *See, e.g., In the Matter of Certain Personal Data and Mobile Communications Devices and Related Software*, Inv. No. 337-TA-710 (Dec. 29, 2011) at 67-86. There, the Commission found a four-month delay of the import ban was appropriate to protect the public interest and minimize the impact on third parties. *Id.* at 69-71, 79, 83. The Commission further conditioned the import ban on its not applying for two years to refurbished handsets to be provided to customers as replacements under warranty or insurance contracts. *Id.* at 83.

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Investigation No. 337-TA-794

U.S. International Trade Commission; Before the Honorable Lisa R. Barton

**CERTIFICATE OF SERVICE**

I hereby certify that on December 3, 2012, I caused copies of the foregoing document to be served upon the following parties as indicated:

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