

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

In the Matter of

**CERTAIN WIRELESS DEVICES WITH
3G AND/OR 4G CAPABILITIES,
INCLUDING COMPONENTS THEREOF**

Investigation No. 337-TA-2929

COMPLAINANTS' REPLY REGARDING THE PUBLIC INTEREST

Complainants InterDigital Communications, Inc., InterDigital Technology Corporation, IPR Licensing, Inc., and InterDigital Holdings, Inc. (collectively, "InterDigital") hereby submit this Reply pursuant to Commission Rule 210.8(c)(2), 19 C.F.R. § 210.8(c)(2), to comments submitted by proposed respondents.¹

Respondents request that the issue of the public interest be delegated to the ALJ, with Nokia requesting that the Commission decline to institute an investigation. These requests should be denied. Respondents ask the Commission to break with its established practice. Only one submission even attempts to address the statutory public interest factors or the issues enumerated in the Commission's Request for Comment, but it does not raise any valid concerns. All of the submissions prematurely raise affirmative defenses or the issue of domestic industry, issues to be substantively developed and decided in the requested investigation. As with each of the three preceding complaints filed by InterDigital, the instant complaint does not raise any issues that would warrant delegating the issue of

¹ The following proposed respondents (hereafter collectively "Respondents") submitted comments: Nokia Corporation and Nokia Inc. (collectively "Nokia"), ZTE Corporation and ZTE (USA), Inc. (collectively "ZTE"), Samsung Electronics Co. Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC (collectively, "Samsung"), and Huawei Technologies Co. Ltd., Huawei Device USA, Inc. and Futurewei Technologies, Inc. d/b/a/ Huawei Technologies (USA) (collectively "Huawei").

public interest to the ALJ or that would preclude institution.²

Each submission argues that alleged FRAND obligations make the filing of InterDigital's complaint contrary to the public interest (Huawei at 1; ZTE at 1; Samsung at 5; Nokia throughout). With these arguments Respondents necessarily do two things. First, they advocate a *per se* rule that relief at the ITC is not available for allegedly standards essential patents subject to alleged FRAND obligations. This argument has been rejected repeatedly and is not even supported by the authority Respondents cite.³ Second, Respondents' arguments necessarily rely on disputed facts which are to be decided in the first instance by the ALJ.⁴ Respondents assume and unilaterally declare to be true, without support, that InterDigital has FRAND obligations for the asserted patents, that Respondents have "unequivocally demonstrated that [they] are willing to license the asserted patents on FRAND

² In the three previous investigations involving Complainant InterDigital and patents pertaining to wireless devices (Inv. Nos. 601, 613, and 800), the Commission did not direct the ALJ to consider the public interest for purposes of an initial determination. Indeed, in the pre-institution phase of the 800 investigation, Respondents made the same arguments made here.

³ *Certain Semiconductor Chips and Products Containing Same*, Inv. No. 337-TA-753, ("Certain Semiconductor Chips"), Order No. 55, at 3 (Oct. 6, 2011) ("good cause does not exist to terminate" based on "alleged FRAND obligations"); *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music And Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA 794, Order No. 47 (March 30, 2012) (denying motion to terminate based on "commitments . . . that [Complainant] would license the asserted patents on . . . ('FRAND') terms."). Indeed, proposed respondent Samsung has argued that "[t]he Commission should not create a bright-line rule preventing it from using the only relief it can grant, solely because an asserted patent may be subject to a FRAND obligation." *Certain Wireless Communication Devices*, Inv. No. 337-TA-745, Samsung's Statement on the Public Interest, at 5 (Jul. 9, 2012). *See also* Department of Justice and United States Patent and Trademark Office Policy Statement for Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, at 7 (Jan. 8, 2013) ("An exclusion order may still be an appropriate remedy in some circumstances, such as where the putative licensee is unable or refuses to take a F/RAND license and is acting outside the scope of the patent holder's commitment to license on F/RAND terms."); *Wireless Communication Devices*, Inv. No. 337-TA-745, Federal Trade Commission's Statement on the Public Interest, at 4 (Jun. 6, 2012) (acknowledging that an exclusion order may still issue where the patentee has "made a reasonable royalty offer.").

⁴ In this regard, Respondents address substantive allegations, which are not invited by Rule 210.8(c). All of Respondents' submissions also violate the five page limit set forth in the rule.

terms,” that they have not refused FRAND offers, and that InterDigital has “renege[d] on its FRAND commitments.” InterDigital strongly contests these allegations and cannot address them all here.⁵ Even if true, these allegations can form the basis of affirmative defenses allowing Respondents to argue that no exclusion order should issue, making the analysis of the public interest unnecessary. Defenses based on alleged FRAND commitments routinely arise in investigations without special provision to devote judicial resources to the discovery and analysis of the public interest.⁶ The consideration of any defenses based on any alleged FRAND undertakings are just that: affirmative defenses to be considered on a case-by-case basis in the context of the investigation.⁷

Three of the submissions focus on InterDigital’s status as a non-practicing entity, alleging that InterDigital is merely a “patent assertion entity” (“PAE”) “whose primary business is litigating against some of the world’s most innovative and productive companies to extract royalty payments” and “to impose a toll on productive and innovative companies,” contrary to the public interest.⁸ InterDigital is

⁵ Huawei wrongly argues that InterDigital violated FRAND commitments by opposing a lawsuit Huawei filed in the Delaware Court of Chancery seeking determination of a “FRAND rate,” when that court lacked declaratory judgment jurisdiction, *inter alia* due to Huawei’s failure to accept any obligation to actually pay FRAND compensation for license. *See Apple, Inc. v. Motorola Mobility, Inc.*, 2012 WL 5943791 (W.D. Wis. Nov. 28, 2012) (dismissing suit seeking a “FRAND license” where Apple did not agree it would pay for a license on terms set by the court). Huawei’s failed efforts at forum-shopping do not weigh against institution, or for delegation of the public interest.

⁶ *See e.g. Certain Wireless Communications Equip.*, Inv. No. 337-TA-577; *Certain Mobile Telephone Handsets, Wireless Communication Devices, and Components Thereof*, Inv. No. 337-TA-578; *Certain 3G Wideband Code Division Multiple Access Handsets*, Inv. No. 337-TA-601; *Certain Semiconductor Chips*, Inv. No. 337-TA-753; *Certain Digital Televisions and Components Thereof*, Inv. No. 337-TA-764; *Certain Electronics Devices Having a Blu-Ray Disc Player and Components Thereof*, Inv. No. 337-TA-765.

⁷ *See Certain Electronic Devices*, Inv. No. 337-TA-794, Reply Brief of the Office of Unfair Import Investigations on Issues Under Review and on Remedy, the Public Interest and Bonding, at 5 (Public Version December 20, 2012) (“FRAND-related issues are likely to arise as part of an affirmative defense rather than as part of the consideration of the statutory public interest factors”).

⁸ Nokia separately contends that “InterDigital will be unable to demonstrate a domestic industry” based on its licensing of the asserted patents (Nokia at 5). But as the Federal Circuit recently

not a PAE. InterDigital employs researchers and engineers in the United States in the development of advanced wireless technologies and related solutions, many of which form the backbone of modern-day digital wireless communication. As detailed in the complaint, InterDigital invested more than \$130 million in research and development in the last two years alone. InterDigital has also established R&D relationships with other technology leaders and collaborates with a wide range of innovative companies on integrating its technologies into products and services. Indeed, the Federal Circuit recently acknowledged that it is clear that InterDigital is the type of complainant Congress intended to bring within the purview of Section 337 with the 1988 amendments. *InterDigital Communications, LLC v. U.S. Int'l Trade Comm'n*, Appeal No. 2010-1093, slip. op. at 8 (Jan. 10, 2013).

There is also no issue here of public health, safety, or welfare. Samsung argues that consumers and health and safety professionals rely on mobile phones to access medical information, respond to emergencies, and stay in contact (Samsung at 2). This, of course, is true of all mobile devices, including those alternatives that would be available should an exclusion order issue. Samsung's arguments do not identify any specific health, safety, or welfare features of Respondents' specific products and do not rise to the level of public safety concerns that would warrant reviewing or precluding relief based on the public interest.

Only Samsung and Huawei address the availability of like or directly competitive articles that could replace the subject articles if excluded (Samsung at 2-3; Huawei at 1, 4). Samsung argues that Respondents are significant sources of low-end mobile phones, all while failing to note that it itself is

recognized, InterDigital represents "a classic case for the application of [19 U.S.C. § 1337(a)(3)] subparagraph (C)." *InterDigital Communications*, Appeal No. 2010-1093, slip. op. at 5 (Jan. 10, 2013). Nokia also ignores the complaint's other independent grounds for a domestic industry, namely InterDigital's substantial investment in the exploitation of the asserted patents through research and development. In any event, Nokia will have full opportunity to argue the merits of domestic industry before the ALJ.

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2013 a copy of the foregoing:

COMPLAINANTS' REPLY REGARDING THE PUBLIC INTEREST
was filed with the Secretary and served upon the following parties as indicated below:

For the U.S. International Trade Commission	
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/s/ Nicole Childress

Nicole Childress