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March 11, 2014

**VIA CM/ECF SYSTEM**

Ms. Molly Dwyer, Clerk  
U.S. Court of Appeals for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103

**Re: *Realtek Semiconductor Corp. v. LSI Corp., et al.*, No. 13-16070  
To Be Submitted Without Oral Argument On March 13, 2014  
Panel: Judges Farris, Reinhardt, & Tashima**

Dear Ms. Dwyer:

We represent appellee Realtek Semiconductor Corporation in this preliminary injunction appeal.

The panel issued an order on March 7, 2014, stating that it will submit the case without oral argument on March 13, 2014, but that the parties may file supplemental letter briefs by 4 p.m. today limited to the question of whether the preliminary injunction from which defendants have appealed “has by its own terms become moot as a result of the March 4, 2014, decision of the United States International Trade Commission.”

The answer to the question posed is “no”—the ITC’s March 4 decision has *not* rendered the preliminary injunction moot. The ITC’s final determination is not final for all purposes because defendants still have the option of appealing that determination to the United States Court of Appeals for the Federal Circuit, pursuant to 19 U.S.C. section 1337(c). *See id.* (“Any person adversely affected by a final determination of the Commission under subsection (d), (e), (f), or (g) of this section may appeal such determination, within 60 days after the determination becomes final, to the United States Court of Appeals for the Federal Circuit for review in accordance with chapter 7 of title 5.”). There is thus still a theoretical possibility, ever diminishing in Realtek’s view, that there will be a Section

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337 violation found against Realtek. That possibility, although small, should cause this Court to conclude that “by its terms,” the district court’s preliminary injunction is not yet moot.

This appeal is from the district court’s May 20, 2013 order. (ER/1-15) In that order, the district court granted Realtek’s motion for partial summary judgment, finding that defendants had breached their contractual obligations by failing to make Realtek a licensing offer that satisfied defendants’ RAND obligations. (*Id.*) Additionally, characterizing Realtek’s motion for partial summary judgment as a request for preliminary injunctive relief, the court found that Realtek had satisfied the preliminary injunction prerequisites. (ER/13) Based on those findings, the court enjoined defendants “from enforcing any exclusion order or injunction order by the ITC that they might obtain against Realtek with respect to the ‘958 and ‘867 declared standard essential patents.” (ER/14) In a footnote, however, the court stated that the preliminary injunction would not take effect immediately; rather, it would spring into effect *only* if the ITC issued an exclusion order or injunctive relief:

This preliminary injunction will only go into effect in the event that the [ITC] grants an exclusion order or injunctive relief in favor of defendants. The ITC may, of course, still analyze Realtek’s claims and defenses independently, and may find no Section 337 violation in any event. In that instance, this preliminary injunction will become moot.

(ER/14 n.6)

The first sentence of this footnote specifies a condition that has not yet occurred—the ITC has not granted an exclusion order or injunctive relief in defendants’ favor. Thus, no preliminary injunction is currently in effect—a circumstance that deprived defendants of the right to appeal and that deprives this Court of jurisdiction under 28 U.S.C. section 1291(a)(2). Realtek made this point in its motion to dismiss this appeal for lack of jurisdiction (Dkt. No. 6 (May 31, 2013)), its Answer Brief (Dkt. No. 28

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(Oct. 28, 2013)), and its December 3, 2013, January 31, 2014, 2014, and March 4, 2014 letters (Dkt. Nos. 45, 52, and 53.) (See discussion in Answ. Brief at 21-30)

For this reason, whether or not defendants appeal to the Federal Circuit, this Court lacks jurisdiction over defendants' appeal. The Court should therefore dismiss the appeal for lack of jurisdiction.

Realtek notes, moreover, that rather than stating in the footnote quoted above that "this preliminary injunction will become moot" if the ITC "find[s] no Section 337 violation," the district court likely intended to state that, in the event the ITC finds no such violation, there will be no *need* for a preliminary injunction. Just as the first sentence of the footnote outlines the condition required to make the preliminary injunction go into "effect," the second sentence specifies by when that possibility will be extinguished—when it has finally been determined that there is no Section 337 violation. When that occurs, it will be certain that the ITC will not have issued an exclusion order or injunctive relief in defendants' favor, thereby rendering a preliminary injunction unnecessary. Because there is no preliminary injunction presently in effect, it is only the *need* for the injunction, rather than the injunction itself, that would be rendered "moot."

Respectfully submitted,

REED SMITH LLP

By /s/ Paul D. Fogel

Paul D. Fogel

Attorneys for Appellee

Realtek Semiconductor Corp.

PDF:pf

cc: See attached service list

**CERTIFICATE OF SERVICE**

***Realtek Semiconductor Corporation v. LSI Corporation, et al.***

9th Cir. No. 13-16070

USDC-Northern District of California No. 5:12-cv-03451

All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 11, 2014.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

/s/ Paul D. Fogel

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Paul D. Fogel