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March 11, 2014

VIA ECF
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
Panel: Judges Farris, Reinhardt & Tashima

Dear Ms. Dwyer:

Defendants-Appellants LSI Corp. and Agere Systems LLC (collectively, "LSI") respectfully submit this letter brief pursuant to the Court's order dated March 7, 2014 (Dkt. No. 55). The Order states that the parties "may file supplemental letter briefs not to exceed 1,000 words limited to the question whether the preliminary injunction has by its own terms become moot as a result of the March 4, 2014, decision of the United States International Trade Commission."

The preliminary injunction has not become moot "by its own terms." The terms of the preliminary injunction explicitly bar LSI "from enforcing any exclusion order or injunctive relief by the ITC, which shall remain in effect until this court has determined defendants' RAND obligations and defendants have

complied therewith." ER-0015. The preliminary injunction will only expire by its terms if the district court "has determined defendants' RAND obligations and defendants have complied therewith." *Id.* There has been no such determination by the district court. While a jury verdict concerning the RAND royalty rate was entered, the parties have not yet completed post-trial motions and there has been no entry of final judgment. In any case, the ITC's March 4 decision has no bearing on this determination by the district court.

The parties have previously addressed, in motion practice and in their respective appellate briefs, the issue of whether the fact that no ITC exclusion order has issued deprives this Court of jurisdiction over the preliminary injunction. LSI has extensively explained that this Court has jurisdiction notwithstanding the absence of an exclusion order. The ITC's March 4 decision does not change that. While the ITC has declined to enter an exclusion order against Realtek at this time, the ITC's decision is subject to appellate review by the United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(6) (conferring the Federal Circuit with jurisdiction "to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930"). LSI intends to appeal the ITC's decision to the Federal Circuit in due course. If LSI's appeal is successful, an

exclusion order will issue and LSI will be prevented from enforcing it by the district court's preliminary injunction.

In the meantime, all of the factors that this Court considers in determining whether an interlocutory order is appealable remain satisfied. These factors are:

> (1) whether the order has the practical effect of entering or refusing to enter an injunction; (2) whether the order might have serious, perhaps irreparable consequences; and (3) whether an immediate appeal is the only way to effectively challenge the order.

(Realtek Br. at 30 (citing *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981).) The fact that the ITC exclusion order may issue at a time later than originally anticipated does not change the first factor, as the district court's order by its terms is a preliminary injunction.

Further, the preliminary injunction continues to cause "serious, perhaps irreparable consequences" to LSI by weakening LSI's ability *generally* to enforce its property rights. With the preliminary injunction in place, LSI is inhibited from enforcing its rights in its patents to the fullest extent of the law, and other infringers may be emboldened by the perceived unavailability of injunctive relief.

Finally, immediate appellate review is necessary to restore LSI's property

rights. While LSI will seek appeal of any final judgment entered by the district court, the timing of the final judgment is uncertain, and LSI is entitled to immediate resolution of the district court's deleterious order.

Nor are this Court's standards for mootness satisfied. A preliminary injunction is moot where "the terms of the injunction have been fully and irrevocably carried out." *Rodriguez v. City of Los Angeles*, No. 13-55467, 2014 WL 185907, at *1 (9th Cir. Jan. 17, 2014) (ellipses omitted, quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 398 (1981)). In addition, "[t]he district court's entry of final judgment and a permanent injunction moots [an] appeal of the preliminary injunction." *Planned Parenthood Arizona Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013). Neither standard is met here.

As discussed above, the terms of the district court's preliminary injunction have not been "fully and irrevocably carried out" because no final determination has been made concerning LSI's RAND obligations or their compliance therewith. Further, the district court has not yet issued a final judgment and permanent injunction. At this point it is unclear when a final judgment will issue and whether a permanent injunction will be put in place.

Accordingly, LSI's appeal of the district court's preliminary injunction is not moot, and the Court should resolve LSI's appeal on the merits.

Respectfully submitted,

/s/ David E. Sipiora
David E. Sipiora

cc: All counsel of record (via ECF)

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2014, 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.

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

/s/ Matthew C. Holohan

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