



July 7, 2014

Lisa R. Barton  
Secretary to the Commission  
United States International Trade Commission  
500 E Street, S.W.  
Washington, DC 20436

**Re: The Innovation Alliance's Response to the Commission's Request for Written Submissions in *Certain Wireless Devices with 3G and/or 4G Capabilities and Components Thereof*, Inv. No. 337-TA-868**

Dear Secretary Barton:

The Innovation Alliance (“IA”) respectfully submits these comments in response to the Notice of Request for Statements on the Public Interest issued by the United States International Trade Commission in the matter of *Certain Wireless Devices with 3G and/or 4G Capabilities and Components Thereof*, Inv. No. 337-TA-868, on June 16, 2014 (the “Commission Request”).

### **Introduction to the Innovation Alliance**

The IA is a coalition of companies seeking to enhance America's innovation environment by improving the quality of patents and protecting the integrity of the U.S. patent system. The IA represents innovators, patent owners, and stakeholders from a diverse range of industries that believe in the critical importance of maintaining a strong patent system. Many of the IA’s members also manufacture and/or sell products and services that utilize not only their own patents, but those of third parties as well. The IA believes in the pro-innovation and pro-competitive benefits of voluntary standardization efforts and in good faith bilateral negotiation of licenses and cross-licenses among developers and users of standardized technologies, which is necessary to continue incentivizing voluntary participation in standard-setting organizations.

The IA’s members include several cellular technology pioneers that have contributed key essential technologies to the development of current wireless standards and that are longstanding participants in standard setting efforts by the European Telecommunications Standards Institute (“ETSI”) and other standard setting bodies, such as the Telecommunications Industry Association (“TIA”). IA companies therefore care deeply about the legal landscape surrounding patents that are relevant to technical standards and that may be encumbered by a commitment to license on certain terms, such as fair, reasonable and nondiscriminatory (“FRAND”).

## **Innovation Alliance Response**

The administrative law judge (“ALJ”) in the 868 investigation has initially determined that a violation of 19 USC § 1337 has not occurred. However, the ALJ advised the Commission in his Recommended Determination to issue a limited exclusion order in the event the Commission determines that at least one of the asserted patents is both valid and infringed given that “the public interest does not support using ‘FRAND’ to deny an exclusion order.” The IA commends the ALJ for developing a comprehensive record with respect to the FRAND issues in this investigation and for making explicit findings related to the presence or absence of patent hold-up or reverse hold-up with respect to patents that are subject to a FRAND licensing requirement.

The IA has long believed that exclusionary remedies may be the most appropriate remedy in circumstances where, for example, an IPR owner has attempted in good faith to negotiate FRAND terms with an implementer, but the implementer has failed to reciprocate or has made offers outside of the FRAND range that would show a constructive refusal to take a FRAND license. Without the possibility of exclusionary relief in such situations, implementers would be incentivized to continue infringing valid patents while seeking to indefinitely delay taking licenses under the pretext that the terms offered are not FRAND. Accordingly, implementers would be incentivized to engage in “reverse hold up,” where the sunk costs in R&D and technology development incurred by the IPR owner cannot be recovered due to implementers who are emboldened in avoiding or refusing to take licenses. In addition, by refusing to negotiate in good faith and forcing the IPR owner to commence legal proceedings to obtain compensation for the use of its technology, an implementer could delay taking a license for years while the IPR owner’s case proceeds through the relevant proceedings. In the meantime, the implementer would be able to continue manufacturing and importing infringing products without paying any royalties for the use of the IPR owner’s technology, giving itself a competitive advantage against other licensed implementers. As expressly recognized by the ALJ in the 868 investigation, these are not mere hypothetical risks.

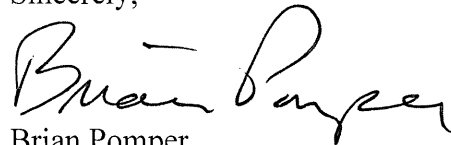
As part of his FRAND analysis, the ALJ held that the evidence demonstrated that InterDigital did not engage in “hold-up”, negotiate in bad faith, or otherwise violate any of its FRAND obligations. Rather, the ALJ explicitly noted that the “respondents have attempted to put pressure on InterDigital by using the IPR without a license” and that such pressure may be used “to try to make the agreement in the lower range of FRAND, or perhaps even lower than a reasonable FRAND rate.” Moreover, when forced to take legal action under such circumstances, the IPR owner runs the risk of losing its IPR, but if the IPR owner’s patents are determined to be valid and infringed the IPR owner “gets no more than a FRAND solution, that is, what [it] should have gotten under the agreement in the first place.” Accordingly, the ALJ acknowledged that “[t]here is no risk to the exploiter of the technology in not taking a license before they exhaust their litigation options if the only risk to them for violating the agreement is to pay a FRAND based royalty or fee.” The exploiter of the technology can simply choose to infringe “and then demand FRAND status when caught.” It is IA’s view that such tactics constitute patent hold-out and undermine a critical element of ETSI’s IPR Policy, i.e., that IPR owners be “adequately and fairly rewarded for the use of their IPRs.” The public interest favors upholding the Commission’s exclusion order determinations as the appropriate means of ensuring the

protection and enforcement of valid and infringed intellectual property rights for innovative companies, and that this is true even for infringed patents that are determined to be standard-essential, where the patent holder has negotiated in good faith and acted consistently with its FRAND obligations.

### **Conclusion**

Accordingly, when considering the ALJ's Recommended Determination in this investigation, the IA respectfully urges the Commission to fully consider the significant pro-economic and pro-consumer benefits that derive from vigorous patent protection and from robust participation in standards.

Sincerely,

A handwritten signature in black ink that reads "Brian Pomper". The signature is written in a cursive style with a horizontal line above the first name.

Brian Pomper  
Executive Director  
The Innovation Alliance