



Hewlett Packard Enterprise

November 27, 2019

The Honorable Lisa R. Barton
Secretary to the Commission
U.S. International Trade Commission
500 E Street, S.W.
Washington, D.C. 20436

RE: *Certain Memory Modules and Components Thereof*, Inv. No.
337-TA-1089

Billy Alexander
Strategic Procurement Manager

Vaishali Udupa
VP, AGC IP Litigation and Policy

Jessica Stow
Senior Litigation Counsel

Dear Secretary Barton:

Pursuant to the Commission's request, Non-party Hewlett Packard Enterprise ("HPE") respectfully request that the Commission grant leave to file its Corrected Statement on the Public Interest out of time, attached as Attachment A.

Good cause to grant the motion exists. On November 25, 2019, HPE timely filed its original public interest statement. On November 26, 2019, the Commission requested that HPE reformat its submission. With the corrected formatting, HPE's corrected submission contains the same text as in HPE's original public interest statement.

Accordingly, HPE respectfully requests that the Commission grant leave to file Non-party HPE's Corrected Statement on the Public Interest.

Respectfully submitted,

/s/ Vaishali Udupa
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ATTACHMENT A:

HPE'S CORRECTED PUBLIC INTEREST STATEMENT

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

In the Matter of

**CERTAIN MEMORY MODULES AND
COMPONENTS THEREOF**

Investigation No. 337-TA-1089

**STATEMENT ON THE PUBLIC INTEREST PURSUANT TO 19 C.F.R. 210.50(A)(4) OF
NONPARTY HEWLETT PACKARD ENTERPRISE**

HPE respectfully submits comments in response to the Commission’s request for submissions on the public interest in the above-captioned investigation. In HPE’s view, if the Commission finds that an asserted patent held by Complainant Netlist, Inc. (“Netlist”) is infringed and not invalid, the issuance of a limited exclusion order (“LEO”) against the accused LRDIMMs manufactured and imported by Respondents SK hynix, Inc., SK hynix America, Inc., and SK hynix memory solutions, Inc. (collectively, “SK hynix”) would harm the U.S. economy and U.S. consumers and thus be contrary to the public interest. First, a LEO would cause severe supply constraints for HPE and other manufacturers that use the accused LRDIMMs. Second, HPE submits that the Commission should not grant exclusion orders on RAND-committed patents absent a showing of extraordinary circumstances. Finally, HPE submits that the public interest would not be served by issuing a LEO before SK hynix’s validity challenges against the Netlist patent are conclusively resolved because HPE and other manufacturers that use the accused LRDIMMs in their products would have to make costly, but possibly unnecessary, adjustments to their procurement plans.

Headquartered in San Jose, California, HPE is one of the largest and most successful information technology companies in the world. HPE provides enterprise-level information technology hardware, software, and services. HPE’s customers include businesses of all sizes, state and federal governments, municipal law enforcement agencies, and public and private entities in the health and education sectors. HPE also is committed to innovation, with a worldwide portfolio of approximately 16,000 issued and pending patents.¹ HPE participates in numerous standards setting organizations and its products must also exchange information

¹ 2018 HPE Annual Report at 6, *available at* <https://investors.hpe.com/~media/Files/H/HP-Enterprise-IR/documents/hpe-fy18-form-10-k.pdf>

seamlessly with products made by both competitors and other industry participants.

HPE's products today include servers for a variety of cloud computing and IT infrastructure applications. Many of these servers include LRDIMM memory modules. HPE primarily relies on SK hynix, Samsung, and Micron to supply these products. There are no other major suppliers in the market. Thus, exclusion of SK hynix's accused LRDIMMs would create significant hardship for HPE by depriving it of a key supplier and diminishing available supply. HPE depends on the uninterrupted availability of standardized, competitively priced memory modules.

SK hynix supplies approximately one third of all U.S. demand for LRDIMMs. If SK hynix's products were excluded, HPE's business would face significant and immediate hardship. HPE would need to obtain another source of supply, and it is unlikely that a sufficient replacement supply would be available within a commercially reasonable time. Samsung and Micron, the other two potential sources, would have to greatly increase their production of these products. Based on the quantities involved, HPE anticipates that this would be too large of a shortfall for the two other suppliers to replace in any commercially reasonable time frame. HPE and other manufacturers like it would likely face extended supply shortages that could lead to inflated manufacturing delays for mission critical servers while the industry adjusted.

Additionally, based on the allegations in the Complaint, the Micron supply of LRDIMMs might also be at risk. The Complainant identifies Samsung as the only licensee for the asserted patents, and it alleges that "every LRDIMM sold in the market is based on Netlist's patented technology." Compl. Pub. Int. Stmt. at 3-4; Compl. ¶ 10. To the extent Netlist seeks to exclude or enjoin Micron's products, it would worsen the situation by further shrinking the supply and turning Samsung into the sole significant supplier. A one-supplier market is problematic for

many reasons. Most prominently, the sole supplier would have sufficient market power to impose monopolistic pricing, and, even then, would be unable to supply the quantity of LRDIMM that HPE requires. In addition, without a second source, manufacturers like HPE would be more vulnerable to any disruptions that affected the sole supplier, including natural disasters, geopolitical issues, manufacturing difficulties, litigation, and labor strife. It is for this reason that manufacturers like HPE strive to ensure access to backup sources of supply, which is not possible in a one-supplier market. Even in a two-supplier market, these issues are mitigated but not eliminated, especially if the two suppliers cannot meet the full market demand in a timely fashion.

Moreover, it is not possible for companies like HPE to simply and immediately substitute Samsung and Micron products for those of SK hynix. Because manufacturing capacity, component and material supply, and other logistics are planned out well in advance in this industry, it would likely take many months, at a minimum, for other suppliers to ramp up to meet the full market demand.

As a participant in JEDEC and other standard-setting organizations, HPE recognizes the value of patent disclosure rules, RAND licensing commitments, and other intellectual property policies that make standard-setting effective and attractive to participants. Hewlett-Packard Company previously filed comments on the public interest of SEP patents in Investigation Nos. 337-TA-613, 337-TA-745, 337-TA-752, and 337-TA-794, among others.² In particular, those

² *Certain 3G Mobile Handsets and Components Thereof*, Inv. No. 337-TA-613, Response To The Commission's Notice To Review In Part The Final Initial Determination On Remand And Submission Regarding The Public Interest, Remedy And Bonding By Interested Parties Intel Corporation, Dell Inc., And Hewlett-Packard Company (July 10, 2015) ("7/10/2015 Written Submission"); *Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof*, Inv. No. 337-TA-745, Written Submission of Verizon Communications Inc., Cisco Systems, and Hewlett-Packard Company (July 9, 2012);

comments explain that granting an exclusion order in an investigation involving a standard-essential patent would be directly contrary to the public interest and would frustrate, rather than advance, the goals of Section 337. Netlist has disclosed the asserted patent as potentially essential to the JEDEC standards pertaining to LRDIMMs and committed to offer to license it to implementers on reasonable and non-discriminatory (“RAND”) terms. Although standardization can be tremendously valuable, that value is threatened when SEP holders are permitted to engage in strategies of opportunistic and anticompetitive behavior. The effects are not limited to standards-compliant manufacturers, but affect downstream customers for the standards-compliant products as well when excessive royalty costs are passed along to them. To permit the complainant to block respondents’ products from access to the U.S. market, through an ITC exclusion order or other means, would be harmful for both competition and consumers, and all future efforts to bring standardization to particular fields of technology. This is because exclusion orders in this context undermine the continued functioning of standard-setting organizations that play a critical role in the modern economy, threaten to create anticompetitive hold-up in industries where access to standards-essential patents is required, lead to an increase in costs to consumers, and reduce consumer choice, market efficiency, fluidity in international trade, and innovation. HPE submits that the Commission should not grant exclusion orders on RAND-committed patents absent a showing of extraordinary circumstances.

Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof, Investigation No. 337-TA-752, Written Submission of Hewlett-Packard Company (June 6, 2012); *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet*, Investigation No. 337- TA-794., Written Submission of Hewlett-Packard Company (December 3, 2012).

Finally, HPE understands that, on June 27, 2019, the PTAB found that all claims of the patent found to be infringed by the Chief Administrative Law Judge were unpatentable. The public interest is not served by issuing a LEO to enforce a patent that is invalid. Nor would the public interest be served by issuing a LEO before SK hynix's validity challenges against the Netlist patent found to be infringed are conclusively resolved. Thus, if the Commission does otherwise find that SK hynix's products infringe Netlist's asserted patent and that LEO should be issued, HPE believes that the Commission should decline to impose that remedy until at least after SK hynix's IPR challenge to the validity of the asserted patent is finally resolved. Given the time and business disruption to companies like HPE to change LRDIMM suppliers, it would be wasteful to force HPE and other manufacturers that use the accused LRDIMMs in their products to make costly, and possibly unnecessary, adjustments to their procurement plans.

Date: November 25, 2019

Respectfully submitted,

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