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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

Dear Secretary Barton:

Pursuant to Commission's request, Non-party Dell, Inc. ("Dell") 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, Dell timely filed its original public interest statement. On November 26, 2019, the Commission requested that Dell reformat its submission. With the corrected formatting, Dell's corrected submission contains the same text as in Dell's original public interest statement.

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

Respectfully submitted,

/s/ Anthony Peterman

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ATTACHMENT A:

DELL 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 DELL TECHNOLOGIES

Dell Technologies ("Dell") respectfully submits comments in response to the Commission's request for submissions on the public interest in the above-captioned investigation. In Dell'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, Dell understands 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. Dell relies on the enforceability of such licensing commitments when it invests to implement JEDEC-established standards and other similar standards setting bodies in products like LRDIMMs. An LEO would harm the public interest to the extent that it relies upon the Chief Administrative Law Judge's finding that RAND commitments like the ones made by Netlist to JEDEC and its members are not enforceable.

Second, Dell understands that the Patent Trial & Appeal Board ("PTAB") of the United States Patent & Trademark Office ("USPTO") found all of the asserted claims of the patent the CALJ has found to be infringed to be unpatentable in a Final Written Decision ("FWD") in *Inter Partes* Review ("IPR") proceedings. In these circumstances, the public interest would be disserved by attributing exclusionary power to invalid patent claims. At a minimum, Dell believes that Commission should hold any exclusion order in abeyance until the validity of the asserted patent has been conclusively resolved.

I. The Public Interest Would Be Disserved by an LEO Predicated on the Unenforceability of RAND Commitments.

JEDEC is an independent, non-profit semiconductor engineering trade association that develops standards for the memory chips and modules implemented in SK hynix's accused products. As a condition of participating in the standard-setting process, JEDEC requires members to disclose potentially essential patents and to commit to licensing them to all standard implementers on RAND terms. As a business decision, we understand Netlist made RAND commitments to JEDEC and its members on both of the patents asserted in this investigation. In Dell's view, an LEO would be contrary to the public interest to the extent that it relies upon the CALJ's conclusion that Netlist's RAND commitments are not enforceable.

As a participant in JEDEC and other standard-setting organizations, Dell recognizes the value of patent disclosures, RAND licensing commitments, and other intellectual property policies that make standard-setting effective and pro-competitive. Standardization is valuable, and that value is threatened when SEP holders engage in anticompetitive behavior. As stated in the January 8, 2013 Joint Statement from the U.S. Department of Justice and U.S. Patent and Trademark Office:

> In some circumstances, the remedy of an injunction or exclusion order may be inconsistent with the public interest. This concern is particularly acute in cases where an exclusion order based on a F/RAND-encumbered patent appears to be incompatible with the terms of a patent holder's existing F/RAND licensing commitment to an SDO. A decision maker could conclude that the holder of a F/RAND-encumbered, standards-essential patent had attempted to use an exclusion order to pressure an implementer of a standard to accept more onerous licensing terms than the patent holder would be entitled to receive consistent with the F/RAND commitment—in essence concluding that the patent holder had sought to reclaim some of its enhanced market power over firms that relied on the assurance that F/RAND-encumbered patents included in the standard would be available on reasonable licensing terms under the SDO's policy.13 Such an order may harm competition and consumers by degrading one of the tools SDOs employ to mitigate the threat of such opportunistic actions by the holders of F/RAND-encumbered patents that are essential to their standards. (p. 6.)

The effects of this behavior are not limited to the manufacturers of standard-compliant products, but also extend to downstream customers like Dell when the excessive royalty costs are passed on to them.

To prevent these harms, SSOs like JEDEC require patent holders to commit to offer to license any standard-essential patents they may have on RAND terms. Dell relies on the enforceability of these RAND commitments when it chooses to invest in the use of JEDEC standardized products like the accused LRDIMMs in connection with its own business. This reliance is justified by the decisions of courts across the country that have uniformly found RAND commitments nearly identical to those made my Netlist to be enforceable contracts. *See, e.g.*, *Microsoft Corp. v. Motorola, Inc.* 696 F.3d 872, 876, 884-85 (9th Cir. 2012); *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, 2019 WL 4734950, *5-6 (E.D. Tex. May 22, 2019); *FTC v. Qualcomm Inc.*, 2018 WL 5848999, *9 (N.D. Cal. Nov. 6, 2018); *TCL Commc'ns Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, 2018 WL 4488286, *5 (C.D. Cal. Sept. 14, 2018); *In re Innovatio IP Ventures, LLC*, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013); *Realtek Semiconductor Corp. v. LSI Corp.*, 2012 WL 4845628, *4 (N.D. Cal. Oct. 10, 2012); *Apple, Inc. v. Motorola Mobility, Inc.*, 886 F.Supp.2d 1061, 1083-87 (W.D. Wis. 2012); *Research in Motion Ltd. v. Motorola, Inc.*, 644 F.Supp.2d 788 (N.D. Tex. 2008). The CALJ's contrary conclusion that Netlist's RAND commitments are unenforceable departs from this precedent, and it threatens to undermine standardization efforts in the semiconductor industry by leaving implementers and their customers vulnerable to being held up by SEP holders. Justifying an LEO on the basis that the RAND licensing commitments of the holders of patents essential to JEDEC standards are not enforceable would harm U.S. consumers and competitive conditions in the United States economy.

II. The Public Interest Would Be Disserved by an LEO Predicated on Patents Found Invalid by the PTAB in Final Written Decisions.

Dell understands that, on June 27, 2019, the PTAB found that all claims of the patent found to be infringed by the CALJ were unpatentable in an FWD. In these circumstances, Dell believes that an LEO would be contrary to the public interest, even if a violation were otherwise to be found.

No public interest can be served by issuing an LEO to enforce a patent that is invalid. Nor would the public interest be served by issuing an LEO before SK hynix's invalidity challenges against the Netlist patent found by the CALJ to be infringed are conclusively resolved. This is especially true here, given that it appears that SK hynix was precluded from presenting to the CALJ the invalidity grounds on which it prevailed before the USPTO.

Thus, if the Commission were to find that SK hynix's products infringe Netlist's asserted patent and that an LEO should be issued despite the RAND commitment above, Dell believes that the Commission should decline to impose that remedy until after SK hynix's IPR challenge to the validity of the asserted patent is finally resolved.

Date: November 25, 2019

Respectfully submitted,

/s/ Anthony Peterman

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Vice President, Intellectual Property
Dell Inc.