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

**Before The Honorable David P. Shaw**
**Administrative Law Judge**

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| **In the Matter of**<br><br>**CERTAIN DIGITAL MEDIA DEVICES, INCLUDING TELEVISIONS, BLU-RAY DISC PLAYERS, HOME THEATER SYSTEMS, TABLETS AND MOBILE PHONES, COMPONENTS THEREOF AND ASSOCIATED SOFTWARE** | **Investigation No. 337-TA-882** |

**MOTION TO INTERVENE IN INVESTIGATION**
**AND SUPPORTING MEMORANDUM OF GOOGLE INC.**

## MOTION

Pursuant to Commission Rule 210.19, Google Inc. ("Google") moves to intervene in this investigation. Google seeks to intervene to protect its significant interests and to defend the Google and YouTube, LLC ("YouTube") proprietary products and services that are identified in the Complaint and the accompanying claim charts or that are otherwise within the scope of this investigation. YouTube is a wholly-owned subsidiary of Google. As set forth in more detail in the following memorandum, Google respectfully requests that its motion to intervene ("Motion") be granted.[1]

[1] Google presently seeks to intervene only as an intervenor and not as a respondent. Should its motion be granted, however, Google reserves the right to file a motion to change its status to that of a respondent if additional facts come to light in the investigation that would support such a request.

As required by Ground Rule 5(e), Google has made a reasonable and good-faith effort to contact and seek to resolve the subject matter of this Motion two days prior to filing this Motion. Respondents Samsung Electronics Co., Inc., Samsung Electronics America, Inc., Samsung Telecommunications America, L.L.C., LG Electronics, Inc., LG Electronics, Inc., LG Electronics, U.S.A., Inc., LG Electronics MobileComm U.S.A., Inc., Panasonic Corporation, Panasonic Corporation of America, Toshiba Corporation, Toshiba Corporation America Information Systems, Inc., Sharp Corporation, and Sharp Electronics Corporation ("Respondents") indicated they do not oppose the Motion. Complainant Black Hills Media, LLC ("Black Hills" or "Complainant") indicated that it will oppose the Motion. The Commission Investigative Staff has indicated that it will take a position after it reviews the Motion.

## MEMORANDUM

### I. STATEMENT OF FACTS

This investigation was instituted on June 18, 2013, as a result of a Complaint that was filed by Black Hills on May 13, 2013, alleging infringement of six patents by one or more of twelve Respondents, including OEMS for Android devices, Samsung Electronics Co., Inc., Samsung Electronics America, Inc., Samsung Telecommunications America, L.L.C., LG Electronics, Inc., LG Electronics, Inc., LG Electronics, U.S.A., Inc., LG Electronics MobileComm U.S.A., Inc., Panasonic Corporation, Panasonic Corporation of America, Toshiba Corporation, Toshiba Corporation America Information Systems, Inc., Sharp Corporation, and Sharp Electronics Corporation.

The claim charts that accompanied the Complaint specifically identify certain proprietary Google and YouTube products and services operating on Android devices

manufactured by each of the Respondents as allegedly infringing or allegedly providing a portion of the infringing functionality of various patent claims. Specifically, Google Maps and Google Latitude were identified in the claim charts for U.S. Patent 6,618,593. Google Play Music was expressly identified in the claim charts for U.S. Patent Nos. 8,045,952 and 8,050,652. YouTube was expressly identified in claim charts for U.S. Patent Nos. 8,028,323, 8,214,873, and 8,230,099.

In addition, Black Hills has served subpoenas on both Google and its wholly-owned subsidiary YouTube, copies of which are attached as Exhibits 1 and 2. The subpoena to Google defines "Google Device Locator Applications" as "software applications that enable device users to identify and locate on a map, via global positioning system data, other wireless communication devices. Device Locator Applications include, without limitation, Google Latitude, AT&T Family Map, and all other reasonably similar applications." Ex. 1 at 4. The subpoena defines "Google Media Sharing Applications" as "YouTube and applications for managing and sharing digital media and other network connected devices including music sharing applications, such as Google Play Music and reasonably similar applications, as well as, second screen and DIAL video sharing applications, and other reasonably similar applications." *Id*. The subpoena to YouTube, Google's wholly owned subsidiary, defines "YouTube Products" as "YouTube software used in conjunction with respondents' devices including, but not limited to, YouTube applications and services and YouTube discovery and launch ('DIAL'), second screen, or remote control functionality." Ex. 2 at 5.

## II. ARGUMENT

### A. Legal Standard

The Commission's rules expressly provide for a third party to intervene in a pending investigation. Rule 210.19; *Certain Sucralose, Sweeteners Containing Sucralose, and Related Intermediate Compounds Thereof,* Inv. No. 337-TA-604, Order No. 7 (July 25, 2007) ("The Commission generally follows the Federal Rules of Civil Procedure in determining whether intervention in a particular matter is appropriate.")[2] The Commission evaluates the following factors in determining whether intervention is appropriate: (1) was the motion timely; (2) does the moving party have "an interest relating to the property or transaction which is the subject of the action;" (3) is the moving party "so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest;" and (4) is the moving party "not adequately represented by existing parties." *Id.*

### B. GOOGLE SATISFIES THE STANDARD FOR INTERVENTION

#### 1. Google's Motion is Timely

A motion to intervene is timely if filed at a "relatively early" stage of the investigation. *Id*. Google's motion is timely, as this investigation was only instituted on June 18, 2013, a little more than five weeks ago, and the preliminary hearing before the ALJ will not occur until August 6, 2013. *See Certain Portable Electronic Communication Devices, Including Mobile Phones and Components Thereof,* Inv.

[2] Federal Rule of Civil Procedure 24 provides: "On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

No. 337-TA-885, Order No. 5 (July 16, 2013) (motion timely when filed "within weeks of the institution of the investigation"); *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-424, Order No. 15 (Nov. 19, 1999) (granting motion to intervene filed less than ninety days after publication of the notice of investigation and prior to the initial conference).

**2. Google Has a Compelling Interest in This Investigation**

Google has a compelling interest in this investigation as a result of Complainant's assertion that the alleged infringement is based, in part, on Respondents' devices and their use of proprietary Google products and services, including Google Play Music, Google Maps/Latitude, and YouTube. *See Certain Portable Electronic Communication Devices, Including Mobile Phones and Components Thereof*, Inv. No. 337-TA-885, Order No. 5 (finding Google established that it has a substantial interest due to the alleged infringement of HTC devices that run Google products or services); *Certain Electronic Devices, Including Mobile Phones and Tablet Computers, and Components Thereof*, Inv. No. 337-TA-847, Order No. 3 (Aug. 3, 2012) (finding Google established that it has a substantial interest because "proprietary Android applications developed by Google and imbedded [*sic*] in the accused HTC devices form the basis of Nokia's infringement allegations"); *see also, Ancora Tech., Inc. v. Toshiba Am. Info. Sys., Inc.*, 2008 WL 4326788 at *1 (C.D. Cal. Sept. 22, 2008) (granting motion to intervene where "[a]pplicant has a significantly protectable interest because the Defendants are important OEM customers who make and sell computer products equipped with Applicant's software, and Plaintiff alleges patent infringement based on the Defendants' use of

Applicant's software and technology in connection with making and selling computer products").

Google also has a business interest in the continued importation and sale of Respondents' accused products that utilize Google proprietary products and services. Google has invested substantial resources in developing and supporting these products and services and has a strong interest in assuring that Respondents can continue to utilize these products and services by importing their products into the United States. *See Certain Garage Door Operators,* Inv. No. 337-TA-459, Order No. 5 (Oct. 1, 2001) (party's status as "a designer, manufacturer and supplier" of a principal component of "the accused device renders its interest in this investigation substantial").

### 3. Google's Substantial Interests Are Not Adequately Protected by the Respondents

In two prior investigations involving Google's proprietary products and services, with closely analogous facts, the Commission found that the respondents could not adequately protect Google's interests. *See Certain Electronic Devices, Including Mobile Phones and Tablet Computers, and Components Thereof,* Inv. No. 337-TA-847, Order No. 3 (Aug. 3, 2012) ("I find that HTC, as the accused device manufacturer, but not the developer of the Android applications embedded in those devices, does not adequately represent Google's interests."); *Certain Portable Electronic Communication Devices, Including Mobile Phones and Components Thereof,* Inv. No. 337-TA-885, Order No. 5 ("The ALJ finds that Google's interests are not adequately protected by existing parties"). The same holds true in this investigation.

Moreover, Google's products and services are not the only third-party products and services that are alleged to infringe the asserted patents, and Respondents' interests will be more focused on their own accused products as opposed to Google's proprietary products and services. *See Certain Personal Computer with Memory Management Information Storied in External Memory*, Inv. No. 337-TA-352, (July 15, 1993) ("Cyrix will not be adequately represented by the other parties in this investigation. The Twinhead respondents have an interest in selling personal computers, not necessarily those with Cyrix microprocessors. . . . Cyrix should not be forced to depend on the other parties to litigate issues which will have a very substantial effect on Cyrix's interests.").

## III. CONCLUSION

For all these reasons, Google respectfully requests that its Motion to Intervene in Investigation as a party with full participation rights under Rule 210.19 be granted.

Dated: July 26, 2013

Respectfully submitted,

/s/ *Stefani E. Shanberg*

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