

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN DIGITAL MEDIA DEVICES,
INCLUDING TELEVISIONS, BLU-RAY
DISC PLAYERS, HOME THEATER
SYSTEMS, TABLETS AND MOBILE
PHONES, COMPONENTS THEREOF
AND ASSOCIATED SOFTWARE

Inv. No. 337-TA-882

Order No. 17: INITIAL DETERMINATION
Granting Google Inc.'s Motion to Intervene

Non-party Google Inc. ("Google") filed a motion to intervene in this investigation, and a memorandum in support thereof. Motion Docket No. 882-18. Complainant Black Hills Media, LLC ("BHM") opposed the motion. Respondents Samsung,¹ LG,² and Panasonic³ each filed a response supporting Google's motion. The Commission Investigative Staff ("Staff") filed a response opposing Google's motion.⁴

A prehearing conference was held on August 6, 2013, and the undersigned heard arguments from the private parties,⁵ the Staff, and Google regarding the motion to intervene.⁶

¹ "Samsung" refers collectively to Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC.

² "LG" refers collectively to LG Electronics, Inc., LG Electronics U.S.A., Inc., and LG Electronics MobileComm U.S.A., Inc.

³ "Panasonic" refers collectively to Panasonic Corporation and Panasonic Corporation of North America.

⁴ The Staff later supported Google's motion. *See* Prehearing Tr. 37-40.

⁵ The private parties to this investigation include BHM, Samsung, LG, Panasonic, respondent Toshiba (*i.e.*, Toshiba Corporation and Toshiba America Information Systems, Inc.), and respondent Sharp (*i.e.*, Sharp Corporation and Sharp Electronics Corporation).

Leave was granted for Google to file a reply brief, and leave was also granted for BHM to file a sur-reply. Google and BHM subsequently filed a reply and sur-reply, respectively.

Commission Rule 210.19 addresses intervention, and provides in relevant part:

Any person desiring to intervene in an investigation or a related proceeding under this part shall make a written motion. . . . The Commission, or the administrative law judge by initial determination, may grant the motion to the extent and upon such terms as may be proper under the circumstances.

19 C.F.R. § 210.19.

The Commission looks to Federal Rule of Civil Procedure 24 for guidance in determining whether intervention in a particular matter is appropriate. *See Certain Electronic Devices With Image Processing Systems, Components Thereof, and Associated Software*, Inv. No. 337-TA-724, Comm’n Op. at 57 (Dec. 1, 2011). Based on the factors found in Federal Rule 24, a party’s motion to intervene is most persuasive where (1) the motion is timely, (2) the movant has an interest relating to the property or transaction which is the subject of the action, (3) the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant’s ability to protect that interest, (4) the movant is not adequately represented by existing parties, and (5) the intervention will not unduly delay or prejudice the adjudication of the original parties’ rights. *Id.* (citing Fed. R. Civ. P. 24; *Certain Baseband Processor Chips and Chipsets*, Inv. No. 337-TA-543, Order No. 27 (Feb. 15, 2006)).⁷

⁶ Although Toshiba did not file a written response to Google’s motion, counsel for Toshiba indicated during the prehearing conference that Toshiba supports the motion. Prehearing Tr. 44-46.

⁷ A heightened standard applies when a party seeks to intervene as a respondent. *See Certain Network Interface Cards and Access Points*, Inv. No. 337-TA-455, Comm’n Op. at 10 (July 17, 2001). “In order to be accorded respondent status, the moving party must produce relevant evidence sufficient to show that articles supplied by the moving party could, in fact, be found in violation of section 337 and could therefore be excluded from entry into the United States if the

With respect to the first factor, Google argues that its motion is timely, as this investigation was instituted on June 18, 2013, and Google filed its motion a little more than five weeks later on July 26, 2013. *See* Mot. at 4, 7. In opposition, BHM argues that “Google could and should have moved to intervene in this action at least one month [earlier]. The Complaint and its attachments have been public since May 2013 and Google was issued a subpoena in June 2013 for information in its possession related to the Respondents’ devices. Google provides no explanation for why it waited so long to file its motion to intervene.” Opp’n at 7.⁸

With respect to the second and third factors, Google argues that it “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.” Mot. at 5. It is argued that “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.” *Id.* at 6. In opposition, BHM argues that Google is one of twenty third party software and hardware providers that received subpoenas in this investigation, and that Google “offers no facts to compel elevating Google above the other third parties who also happen to possess information relating to Respondents’ devices.” Opp’n at 8. It is further argued that Google “has failed to identify a single point or fact upon which its interests diverge from any of the Respondents,” and that “Google does not

remedy sought by the complainant were granted.” *Id.* Google does not request that it be granted respondent status in this investigation. *See* Reply at 11.

⁸ The Staff agrees with Google that the motion is timely. Staff Resp. at 4.

attempt to address how the disposition of these proceedings will impair Google's interests in any way." *Id.* at 9.⁹

With respect to the fourth factor, Google argues that "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." Mot. at 7. In opposition, BHM argues that "[t]he Respondents share the same ultimate objective as Google—to establish that Respondents' devices do not infringe the asserted patents and/or to establish that the asserted patents are invalid." Opp'n at 9. It is argued that "Respondents are no less than five large manufacturers represented by highly qualified and reputable counsel," and that "Google nowhere suggests that the Respondents will fail to make all necessary arguments, are incapable or unwilling to make such arguments, or that Google would offer any necessary additions to the proceedings that the Respondents would neglect." *Id.* at 9-10.¹⁰

Having considered the arguments of the parties, the administrative law judge finds that Google has demonstrated that it should be granted intervenor status in this investigation. With respect to the first factor, the administrative law judge finds that the motion to intervene was timely filed within weeks of institution of the investigation. With respect to the second and third factors, the administrative law judge finds that Google has an interest in the subject matter of this investigation, and that disposition of this investigation may as a practical matter impair or

⁹ Based on information available at the time it filed its response, the Staff originally argued that Google does not have a compelling interest in the subject matter of the investigation. *See* Staff Resp. at 4-7. The Staff later took the position that Google does have a compelling interest in the subject matter of the investigation. *See* Prehearing Tr. 37-40.

¹⁰ In its written response, the Staff argues that "to the extent the Complainant directly implicates the Google products to prove direct or indirect infringement by the Respondents' accused products, the Staff would likely support Google's intervention because Respondents may not adequately represent its interests." Staff Resp. at 8.

impede Google's ability to protect that interest. In particular, it is determined that Google has a compelling interest in this investigation because its software is accused with respect to all six accused patents and all respondents. *See* Reply at 16. Moreover, inasmuch as [

], and inasmuch as [

], it is determined that disposition of this investigation may impair or impede Google's ability to protect its interests. *See id.* at 17. With respect to the fourth factor, the administrative law judge finds that Google's interests are not adequately represented by the existing parties, inasmuch as [

]. *See id.* Finally, with respect to the fifth factor, the administrative law judge finds that, inasmuch as the investigation is in the early stages of discovery, Google's intervention at this time will not unduly delay or prejudice the adjudication of the original parties' rights.

Motion No. 882-18 is therefore granted. It is the initial determination of the administrative law judge that Google is granted intervenor status in this investigation, which includes full participation rights as a party with respect to all asserted patents, including discovery, motions practice, prehearing conferences, evidentiary hearings, and pre-hearing and post-hearing briefing.¹¹

Pursuant to 19 C.F.R. § 210.42(h), this initial determination shall become the determination of the Commission unless a party files a petition for review of the initial

¹¹ BHM argues that, in the event the administrative law judge determines that Google should be allowed to intervene in this investigation, Google's participation should be "limited to infringement issues that concern Google software and providing limited discovery on that issue." *See* Sur-Reply at 2. The administrative law judge sees no reason to limit Google's participation to only the issue of infringement. It is therefore determined that Google may participate fully as to all issues litigated in this investigation.

determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the initial determination or certain issues contained herein.

A handwritten signature in dark ink, appearing to read 'D. Shaw', is positioned above a horizontal line.

David P. Shaw
Administrative Law Judge

Issued: August 19, 2013

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PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER NO. 17** has been served by hand upon the Commission Investigative Attorney, **Monisha Deka, Esq.**, and the following parties as indicated, on AUG 19 2013.



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