

UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.

In the Matter of

CERTAIN ELECTRONIC IMAGING  
DEVICES

Inv. No. 337-TA-726

Order No. 35: Initial Determination Terminating The Investigation As To  
Respondents Nokia And RIM

On March 22, 2011, complainant Flashpoint Technology, Inc. (FlashPoint) and respondents Nokia Corp. and Nokia Inc. (Nokia) filed a joint motion for an initial determination terminating the investigation as to the Nokia respondents on the basis of a Patent License and Settlement Agreement (Nokia Agreement) between the Nokia respondents and complainant FlashPoint. (Motion Docket No. 726-64). On March 30, 2011, complainant FlashPoint and respondents Research in Motion Limited and Research in Motion Corporation (RIM) filed a joint motion for an initial determination terminating the investigation as to the RIM respondents on the basis of a Patent License and Settlement Agreement (RIM Agreement) between the RIM respondents and complainant FlashPoint. (Motion Docket No. 726-77).

In a filing dated March 31, 2011, pursuant to Commission rules 210.15(c), 210.21 and 210.50(b)(2) and Order No. 33, respondents HTC Corporation and HTC America, Inc. (HTC) and LG Electronic, Inc. LG Electronics U.S.A., Inc. and LG Electronics MobileComm U.S.A., Inc. (LG) opposed a request of complainant Flashpoint and respondents Nokia and RIM to keep the "Settlement and Licensing Agreements" confidential between the parties to those agreements by redacting sections relating to Licensed Products and License Fees, because those sections were alleged to be "highly relevant" to matters of bonding, non-infringement and the public interest that are still in the investigation. Hence the non-settling respondents requested that they

be provided with unredacted versions of the “settlement/license agreements pursuant to the Protective Order (Order No. 1) in this investigation and thereafter be afforded the opportunity to comment on its impact on the public interest.”

Complainant FlashPoint, responding to Order No. 34, in a non-confidential filing dated April 1, 2011 argued that the non-settling respondents have proffered no legitimate need to obtain the confidential settlement terms extended to the other respondents; that as none of the redacted information of said agreements is germane to any issues in genuine dispute in this investigation, the needs for the non-settling respondents to have the information are far outweighed by the harm caused to FlashPoint by requiring disclosure of the confidential terms of said agreements; and that thus, the non-settling respondents’ request should be denied. It is also argued that because settlement discussions are scheduled to occur between FlashPoint and the non-settling respondents, prior to the start of the hearing on April 7, and because litigation counsel will likely advise the non-settling respondents as to settlement, the disclosure of the confidential terms is particularly inappropriate.

The Nokia respondents, responding to Order No. 34, in a filing dated April 1, 2011 stated that Nokia “takes no position on the issue presented therein.”

The Commission Investigation Staff (staff), responding to Order No. 34, in non-confidential filings dated April 1, 2011, does not oppose either Motion No. 726-64 or Motion No. 726-77. It was further argued that because the confidential terms of the “settlement agreements” will not be relevant to any remaining issues to be litigated in the investigation, the confidential terms of the settlement agreements should not be disclosed to the non-settling respondents because disclosing the redacted terms to counsel to other respondents could

adversely affect FlashPoint's ongoing or prospective efforts to reach additional settlements in this investigation.

The RIM respondents, responding to Order No. 34, maintain that their settlement with FlashPoint is confidential and takes no position regarding the balancing test that the administrative law judge has applied previously.

A. Motion Nos. 726-64 and 726-77

Commission rule 210.21(a)(2) states that “[a]ny party may move at any time for an order to terminate an investigation in whole or in part as to any or all respondents on the basis of a settlement, a licensing or other agreement, including an agreement to present the matter for arbitration, or a consent order, as provided in paragraphs (b), (c), and (d) of this section.”

Commission rule 210.21(b), in turn, governs termination of an investigation by settlement or license. Commission rule 210.21(b)(1) states:

An investigation before the Commission may be terminated as to one or more respondents pursuant to section 337(c) of the Tariff Act of 1930 on the basis of a licensing or other settlement agreement. A motion for termination by settlement shall contain copies of the licensing or other settlement agreement, any supplemental agreements, and a statement that there are no other agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation. If the licensing or other settlement agreement contains confidential business information within the meaning of § 201.6(a) of this chapter, a copy of the agreement with such information deleted shall accompany the motion.

The Administrative Procedure Act states that agencies should consider termination of disputes by the involved parties where “the public interest permit[s].” 5 U.S.C. § 554(c)(1).

Commission rule 210.50(b)(2) also provides that in considering a motion to terminate based upon a settlement, the administrative law judge shall “consider and make appropriate findings in

the initial determination regarding the effect of the proposed settlement on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers.”

With regard to Motion No. 726-64, the parties have separately filed public and confidential versions of the Nokia Agreement. Also Motion No. 726-64 stated that “[t]here are no other agreements, written or oral, express or implied between FlashPoint and Nokia regarding the subject matter of this Investigation.” (Mot. at 1-2). The administrative law judge further finds that the Nokia Agreement resolves the entire dispute between FlashPoint and the Nokia respondents in this investigation.

With respect to Motion No. 726-77, the parties have separately filed public and confidential versions of the RIM Agreement. Also Motion No. 726-77 stated that “[t]here are currently no other agreements, written or oral, express or implied, between FlashPoint and RIM regarding the subject matter of this investigation” (Mot. at 1.) The administrative law judge finds that the RIM Agreement resolves the entire dispute between FlashPoint and RIM respondents in this investigation.

The administrative law judge, in ruling on a motion to terminate an investigation based on a settlement agreement:

shall consider and make appropriate findings in the initial determination regarding the effect of the proposed settlement on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States and U.S. consumers.

See Commission rule § 210.50(b)(2). The administrative law judge has reviewed both the confidential and the proposed public versions of each of the Nokia Agreement and RIM

Agreement. He finds that the available information does not indicate that said settlement agreements will harm the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, or U.S. consumers. Moreover, the public interest generally favors settlement in order to avoid needless litigation and to conserve public resources. See, e.g., Certain Semiconductor Chips with Minimized Chip Package Size & Products Containing Same (III), Inv. No. 337-TA-630, Order No. 25, at 4 (Sept. 4, 2008) (“the termination of a respondent, such as that proposed by the motion, is generally in the public interest”); Certain Laser Imageable Lithographic Printing Plates, Order No. 7, at 4 (May 16, 2008); Certain Compact Disc and DVD Holders, Inv. No. 337-TA-482, Order No. 11, at 3 (Mar. 7, 2003); Certain Gel-Filled Wrist Rests and Products Containing Same, Inv. No. 337-TA-456, Order No. 16, at 5 (May 21, 2002). See Administrative Procedure Act, 5 U.S.C. § 554(c)(1), Certain Enhanced DRAM Devices Containing Embedded Cache Memory Registers, Components Thereof, and Products Containing Same, Inv. No. 337-TA-421, 1999 ITC LEXIS 380, at \*5, Order No. 8, (Unreviewed) Initial Determination Terminating the Investigation on the Basis of Settlement and License Agreements (Dec. 20, 1999). Moreover said agreements end all disputes between the movants regarding the subject matter of this investigation. Finally, the public interest favors the recognition of presumptively valid patents and their exclusive rights. See Certain Recombinantly Produced Hepatitis B Vaccines and Products Containing Same, Inv. No. 337-TA-408, 1998 ITC LEXIS 194, at \*7, Order No. 7, (Unreviewed) Initial Determination Terminating the Investigation Based on Settlement (Aug. 17, 1998).

B. Confidentiality Of Nokia Agreement And RIM Agreement

The certificates of service for the Motion Nos. 726-64 and 726-77 indicate that counsel for the remaining respondents HTC and LG have only been served with the public versions of the Nokia Agreement and RIM Agreement. Regarding the request of HTC and LG opposing the request of FlashPoint, Nokia, and RIM to keep the said agreements confidential between the parties to those agreements, there is Commission precedent that prevents counsel for the non-settling respondents from having access to the confidential financial terms of a settlement agreement. See Certain Bulk Welding Wire Containers and Components Thereof and Welding Wire, Inv. No. 337-TA-686, Order No. 18 (public version Dec. 1, 2009) (finding that “public policy in favor of settlement outweighs Non-Settling Respondents’ need for the information in the settlement agreement that moving parties seek to withhold”); Certain Semiconductor Timing Signal Generator Devices, Components Thereof, and Products Containing Same, Inv. No. 337-TA-465, Order No. 7 (Oct. 16, 2002) (same).<sup>1</sup>

The administrative law judge having reviewed the terms of the Nokia Agreement and RIM Agreement do not find them relevant to any issues to be litigated in this investigation as to the remaining non-settling respondents. While respondents HTC and LG have argued that the redacted “sections are highly relevant to matters of bonding, non-infringement and the public interest that are still at issue in this case” (HTC/LG Opposition at 1), with respect to the issue of bonding, FlashPoint has not argued for a bond amount based on a reasonable royalty rate. As the

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<sup>1</sup> In said Order No. 7, this administrative law judge found that “[i]n light of the fact that ICS has copies of the license agreements with the filing of the complaint in 337-TA-465, the administrative law judge finds that movant had not satisfied its burden in establishing that it is in need of the highly sensitive confidential information at issue.” *Id.* at p. 2. It appears that the non-settling respondents in this investigation have also had copies of FlashPoint’s other license agreements since the filing of the complaint in the investigation.

staff noted in its pre-hearing statement, the Commission should decline to set any bond amount in this investigation because FlashPoint failed to present any evidence concerning either a price differential or a reasonable royalty rate for the asserted patents. (Staff PHB at 200). Moreover the non-settling respondents themselves have argued that “no bond should issue because FlashPoint has neither advocated for a bond amount based on a royalty rate comparison or identified which of its licenses support its blanket request for a 100% bond rate.” (Respondents’ PHB at 330; HTC PHB at 434). Additionally, the administrative law judge does not believe that any of the redacted terms in these settlement agreements will implicate any non-infringement or other affirmative defenses raised by HTC or LG in this investigation. Finally, as found supra, the administrative law judge does not believe that any of the terms in the agreements in issue will implicate the public interest.


Based on the foregoing Motion Nos. 726-64 and 726-77 are granted.<sup>2</sup>

This initial determination, pursuant to Commission rule 210.42(c), is hereby CERTIFIED to the Commission. Pursuant to Commission rule 210.42(h)(3), this initial determination shall become the determination of the Commission within thirty (30) days after the date of service hereof unless the Commission grants a petition for review of this initial determination pursuant to Commission rule 210.43, or orders on its own motion a review of the initial determination or certain issues therein pursuant to Commission rule 210.44.

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<sup>2</sup> Any outstanding due dates in this investigation for the Nokia respondents and RIM respondents are hereby suspended as of the issuance date of this order.

On April 4, 2011, each of the parties received a copy of this order.

  
Paul J. Luckern  
Chief Administrative Law Judge

Issued: April 4, 2011

CERTIFICATE OF SERVICE

I, James R. Holbein, hereby certify that the attached Order has been served by hand upon the Commission Investigative Attorney, Christopher G. Paulraj, Esq., and the following parties as indicated, on April 4, 2011.

[Signature]
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**CERTAIN ELECTRONIC IMAGING DEVICES**

**337-TA-726**

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