

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN ELECTRONIC DEVICES,
INCLUDING MOBILE PHONES, PORTABLE
MUSIC PLAYERS, AND COMPUTERS**

Inv. No. 337-TA-701

**ORDER NO. 37: DENYING COMPLAINANTS' THIRD MOTION FOR ORDER TO
SHOW CAUSE**

(August 13, 2010)

On June 15, 2010, Complainants Nokia Corp. and Nokia, Inc. (collectively "Nokia") filed a motion seeking an order requiring Respondent Apple, Inc. ("Apple") to show cause why it should not be sanctioned for failing to comply with Order Nos. 4 and 6 with respect to Apple's production of source code files and other documentation that relate to Nokia's infringement claims under U.S. Patent No. 6,073,036 ("the '036 patent"). (Motion Docket No. 701-016.) In particular, Nokia argues that Apple failed to produce the design notebook of Mr. Kocienda, the lead Apple keyboard designer, until the night before his deposition on June 3, 2010, even though the notebook had been turned over to counsel for Apple in March 2010 as part of Apple's document-collection efforts. (Mot. Mem. at 4.) Nokia also argues that Apple failed to produce the iPad source code until after Mr. Kocienda's deposition. (*Id.* at 5.) Nokia further argues that Apple failed to produce certain of Mr. Kocienda's emails prior to the start of Mr. Kocienda's deposition, even though they too had been turned over earlier as part of Apple's document-collection efforts. (*Id.* at 5, 6, 14.)

Nokia argues that the documents Apple failed to timely produce bear directly on its claims of infringement of the '036 patent and that it has been unduly prejudiced by Apple's pattern of late

PUBLIC VERSION

production. (*Id.* at 7,11, 12.) Nokia argues that due to Apple's discovery failings and the prejudice it suffered as a result, sanctions are appropriate. Specifically, Nokia argues that as a result of Apple's behavior, Apple should be precluded from arguing that its iPad, iPhone 3G, iPhone 3GS, and iPod Touch products do not practice certain limitations of claim 1 and 8 of the '036 Patent. (*Id.* at 1.) Nokia also argues that monetary sanctions should be imposed against Apple, including attorneys' fees and all related expenses incurred by Nokia in pursuing the present motion. (*Id.* at 15.) Further, Nokia argues that Apple should be ordered to pay Nokia's attorneys' fees and expenses to revisit Apple to review the iPad's source code and to re-take the deposition of Mr. Kocienda. (*Id.*)

On June 25, 2010, Apple filed an opposition to the present motion, arguing that Nokia's motion suffers from three fatal defects. (*See Opp.* at 1-2.) First, Apple argues that Nokia has made no showing that Apple acted in bad faith. (*Id.* at 9.) In fact, Apple argues that it has always acted in good faith as evidenced in part by the fact that it agreed to each of Nokia's post-deposition requests, including making Mr. Kocienda available for a third day of deposition. (*Id.*) Apple also notes that it has processed in excess of 560,000 pages belonging to Mr. Kocienda and has produced nearly 129,000 pages from Mr. Kocienda's files. (*Id.*) Second, Apple argues that Nokia has failed to point to any specific evidence of prejudice, let alone the type of prejudice that would be required to support its extreme sanctions. (*Id.* at 9, 13-14.) Third, Apple argues that Nokia provides no supporting evidence for the variety of assertions it makes in its motion because it relies only on unsworn attorney argument for support. (*Id.* at 9, 14.)

PUBLIC VERSION

On June 25, 2010, the Commission Investigative Staff (“Staff”) filed its response in opposition to Nokia’s motion for an order to show cause. The Staff argues that Apple’s conduct does not warrant sanctions. (Staff Resp. at 3.) The Staff argues that, given the massive amount of materials produced in this multiple-patent investigation, it is understandable that some relevant information may fail to be produced until such failure is pointed out by the opposing party. (*Id.*) The Staff argues that in its view Apple has made a good faith effort to comply with Order Nos. 4 and 6 with regard to the discovery in question. (*Id.*) The Staff also argues that Nokia has not suffered any significant prejudice as a result of the late production, because Nokia had sufficient time to review the documents at issue prior to Mr. Kocienda’s third day of deposition on June 22, 2010. (*Id.*)

Based upon the motion papers and responses thereto, the Administrative Law Judge finds that Nokia has failed to show that sanctions are warranted.

Commission Rule 210.33 gives the Administrative Law Judge discretion to issue monetary and non-monetary sanctions for a failure to comply with a discovery-related order. *See* 19 C.F.R. § 210.33. Here, Nokia alleges that Apple violated Order Nos. 4 and 6 by not timely producing Mr. Kocienda’s design notebook, the iPad source code, and certain of Mr. Kocienda’s emails. However, with the exception of the iPad source code, which Nokia argues was requested in Request for Production (“RFP”) No. 1, Nokia makes no showing of any violation. (*See* Mot. Mem. at 2, 11.) Nokia does not point to any specific RFP at issue in Order Nos. 4 and 6 that the design notebook or emails fall under. Thus, it is unclear from Nokia’s motion whether in fact Apple’s

PUBLIC VERSION

alleged late production of the design notebook and emails violates Order Nos. 4 and 6.

With regard to the iPad source code, while Nokia argues that the source code was requested in its RFP No.1, a review of the actual RFP reveals otherwise.¹ RFP No. 1 requests:

All documents concerning the design, operation and/or development of any Accused Product, including but not limited to Reference Guides, Technical Guides and/or equivalent documentation, schematics, engineering drawings, documents that refer or relate to design, configuration, structure, product specifications, performance specifications, teardown specifications, operational manuals, source code and/or service manuals.

(Mot. Mem., Ex. 1.) The term “Accused Products” is defined as:

The Apple products identified in Paragraph 3 of the Complaint, including at least the iPhone 3G and iPhone 3GS mobile phones, iPod Nano, iPod Touch, and iPod Classic portable music players, and iMac, Mac Mini, Mac Pro, MacBook, MacBook Pro, and MacBook Air computers and all other mobile phones, portable music players, and computers with functionality that come within the scope of the Asserted Patents’ claims identified in Paragraph 3 of the Complaint.

(*Id.*) The iPad is not identified in the definition of “Accused Products” and thus, contrary to Nokia’s argument, the source code for the iPad was not “clearly requested in Nokia’s RFP No. 1.”

(*See id.* at 11.)

Nokia also fails to show that it has suffered any particularized harm as a result of Apple’s alleged late production. Nokia only argues in generalities. For example, Nokia argues that “Apple’s delay in producing the source code and other relevant documentation . . . is prejudicial to Nokia and severely constrains Nokia’s ability to prepare for the evidentiary hearing in this investigation.” (*Id.*; *see also id.* at 12 (“Nokia’s ability to complete discovery is severely hampered

¹ Nokia also asserts that it requested the source code for the iPad in its “Second Set of Request For Production, RFP No. 2.” (Mot. Mem. at 2.) There is, however, no “RFP No. 2” in Nokia’s Second Set of Requests For Production. (*See id.*, Ex. 2.)

PUBLIC VERSION

by Apple's belated production, and further by its large production just prior to, or even after, the relevant depositions. . . . The delay in production is harming Nokia's ability to complete discovery under the timeframes established in this investigation.".) Moreover, Nokia's assertions of harm are speculative. The items complained of in Nokia's present motion were produced with nearly a month remaining before the close of fact discovery, more than three months before the exchange of expert reports, and notably, weeks before Nokia was scheduled to take Mr. Kocienda's deposition for a third day.

Nokia brought its present motion seeking an order requiring Apple to show cause why it should not be sanctioned under Commission Rule 210.33, and as such, has the burden to show a violation of a discovery-related order. *See* 19 C.F.R. § 210.33. For the reasons discussed above, the Administrative Law Judge finds that Nokia has not met its burden.² Accordingly, Motion Docket No. 701-016 is DENIED.

Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date.


Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets indicating any portion

² It is worth also noting that Nokia relies on little more than attorney argument to support its entire motion. Nokia provides no declarations or other sworn testimony to support the myriad of facts that form the basis of its request for sanctions. "Unsworn attorney argument is not evidence." *Perfect Web Technologies, Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1332 (Fed. Cir. 2009).

PUBLIC VERSION

asserted to contain confidential business information. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.


E. James Gildea
Administrative Law Judge


**IN THE MATTER OF CERTAIN
ELECTRONIC DEVICES, INCLUDING
MOBILE PHONES, PORTABLE MUSIC
PLAYERS, AND COMPUTERS**

337-TA-701

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** has been served by hand upon, the Commission Investigative Attorney, **Rett Snottherly, Esq.**, and the following parties as indicated on

AUG 26 2010


Marilyn R. Abbott, Secretary *JWG*
U.S. International Trade Commission
500 E Street, SW, Room 112A
Washington, D.C. 20436

FOR COMPLAINANTS NOKIA CORPORATION AND NOKIA, INC.:

Paul Brinkman, Esq.
ALSTON & BIRD LLP
The Atlantic Building
950 F Street, NW
Washington, DC 20004
P: 202-756-3300

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

FOR RESPONDENT APPLE, INC.:

Nina S. Tallon, Esq.
**WILMER CUTLER PICKERING HALE
AND DORR LLP**
1875 Pennsylvania Ave., NW
Washington, DC 20006
P: 202-663-6000

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

**IN THE MATTER OF CERTAIN
ELECTRONIC DEVICES, INCLUDING
MOBILE PHONES, PORTABLE MUSIC
PLAYERS, AND COMPUTERS**

337-TA-701

PUBLIC MAILING LIST

Heather Hall
LEXIS - NEXIS
9443 Springboro Pike
Miamisburg, OH 45342

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

Kenneth Clair
THOMSON WEST
1100 13th Street, NW, Suite 200
Washington, DC 20005

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____