

Exhibit 1

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

In the Matter of CERTAIN ELECTRONIC DEVICES WITH MULTI-TOUCH ENABLED TOUCHPADS AND TOUCHSCREENS	Inv. No. 337-TA-714
In the Matter of CERTAIN WIRELESS COMMUNICATION DEVICES, PORTABLE MUSIC AND DATA PROCESSING DEVICES, COMPUTERS AND COMPONENTS THEREOF	Inv. No. 337-TA-745
In the Matter of CERTAIN MOBILE DEVICES AND RELATED SOFTWARE	Inv. No. 337-TA-750
In the Matter of CERTAIN PORTABLE ELECTRONIC DEVICES AND RELATED SOFTWARE	Inv. No. 337-TA-797

**RESPONSE OF THE OFFICE OF UNFAIR IMPORT INVESTIGATIONS
TO APPLE’S MOTION TO PRODUCE CONFIDENTIAL INFORMATION
IN DISTRICT COURT PROCEEDINGS**

The Office of Unfair Import Investigations (“OUII”) respectfully submits this response to the Motion Pursuant to Commission Protective Orders for Authorization to Produce Confidential Information in District Court Proceedings (“Motion”), filed by Apple, Inc. (“Apple”) on April 26, 2012. Apple alleges that in a U.S. District Court proceeding between Apple and Samsung Electronics Co., Ltd. (“Samsung”), Apple has been ordered to produce various documents designated as “confidential business information” in four Commission Investigations: Inv. No.

337-TA-714; Inv. No. 337-TA-745; Inv. No. 337-TA-750; and Inv. No. 337-TA- 797.¹ Apple alleges that it has attempted to, but has been unable to, obtain consent from the parties to those investigations to produce the requested documents. Apple therefore seeks permission from the Commission to produce the documents. OUII recognizes that Apple is “between a rock and a hard place” with respect to this issue. Nevertheless, Section 337, by its terms, appears to prohibit disclosing other entities’ confidential information (i.e., confidential information of entities other than Apple and Samsung) in the manner requested by Apple. OUII therefore opposes the motion.

More specifically, Section 337 states that: “Information submitted to the Commission or exchanged among the parties in connection with proceedings under this section which is properly designated as confidential pursuant to Commission rules may not be disclosed (except under a protective order issued under regulations of the Commission which authorizes limited disclosure of such information) to any person (other than a person described in paragraph (2)) without the consent of the person submitting it.” 19 U.S.C. § 1337(n)(1). The exceptions in Section 337(n)(2) do not apply to this situation (because the disclosure would not be to an employee of the Commission, an employee of the U.S. government, or an employee of Customs and Border Protection). 19 U.S.C. § 1337(n)(2). Similarly, this situation does not fall into the exception which authorizes the Commission to transmit the record of an investigation to U.S. District Court in certain circumstances. 28 U.S.C. § 1659. OUII is therefore of the view that disclosure of the documents by Apple is not permitted by Section 337.

¹ Inv. No. 337-TA-745 has been designated for non-participation by OUII under the the Commission’s Supplement to the Strategic Human Capital Plan 2009-2013 (issued Jan. 2011). OUII is a party to the other three investigations.

Turning to the Protective Orders in place in the four investigations at issue, OUII is of the view that these Orders similarly do not authorize the relief sought by Apple. Each of the Protective Orders states that “[i] the absence of written permission from the supplier or an order by the Commission or the administrative law judge, any confidential documents or business information submitted in accordance with the provisions of paragraph 2 above shall not be disclosed to any person” other than those specifically listed in the Order (i.e., outside counsel and experts, Commission employees, etc.). Inv. No. 337-TA-714, Order No. 2, ¶ 3 (April 26, 2010); Inv. No. 337-TA-745, Order No. 1, ¶ 3 (Nov. 3, 2010); Inv. No. 337-TA-750, Order No. 1, ¶ 3 (Nov. 30, 2010); Inv. No. 337-TA-797, Order No. 1, ¶ 3 (Aug. 12, 2011). Moreover, two of the Protective Orders specifically state that “[i]nformation obtained pursuant to the Commission’s protective order, however, may be produced to the district court under the district court protective order only with the consent of the suppliers of that information.” Inv. No. 337-TA-714, Order No. 2, ¶ 6; Inv. No. 337-TA-745, Order No. 1, ¶ 6. Here, Apple has apparently been unable obtain the permission from all of the involved parties. OUII is therefore of the view that the Protective Orders in the four investigations at issue do not allow disclosure of confidential business information from those investigations in the District Court proceeding. *Cf. Viscofan S.A. v. United States Int’l Trade Comm’n*, 787 F.2d 544, 547-48(Fed. Cir. 1986) (describing Commission’s refusal to declassify confidential information for use in a foreign court proceeding, noting the Commission’s statement that “[e]vidence in a section 337 is gathered solely for the purposes of that proceeding.”).

OUII further notes that the present situation is clearly distinguishable from the situation at issue in *In re International Trade Commission*, 444 Fed. Appx. 480 (Fed. Cir. Aug. 2, 2002),

wherein the Federal Circuit authorized the use of confidential information in a parallel district court proceeding. In that case, the parties were the same in both proceedings, and the decision “did nothing more than allow a few attorneys, who are bound by protective orders, to review documents that the vast majority of attorneys involved in the case already may review.” *Id.* at 482. Here, however, the District Court action does not involve the same parties or (apparently) the same attorneys as the Commission investigations, and thus it is not simply a matter of allowing a few additional attorneys to view the information. Moreover, the District Court protective order, even assuming that the information is designated as “highly confidential – attorneys’ eyes only,” does not offer the same protections as the Commission Protective Order (for example, at least jurors, mediators, and other any person designated by the court, would be able to see the confidential information). (Motion, Ex. 4, ¶ 9). Simply put, the Commission has always viewed its ability to gather and protect confidential business information as crucial to its ability to perform its mission. *See generally Akzo N.V. v. United States Int’l Trade Comm’n*, 808 F.2d 1471, 1482-85 (Fed. Cir. 1986). When it was conducting the four investigations at issue in this Motion, the Commission represented to the entities that submitted confidential business information that, unless they gave permission, it would only be used for purposes of that specific investigation. Information has been submitted in reliance on that guarantee, and the Commission should not now allow that information to be used for other purposes.

Finally, OUII is not unsympathetic to Apple’s problem – the District Court has apparently directed Apple to produce information that the Commission (through the Protective Orders) has directed it not to produce. Nevertheless, this same information may be available to the District Court through alternative methods (e.g., by subpoena directly from the entities that

originally supplied the information (who are free to disclose their own information regardless of the Protective Orders)). In addition, OUII notes that three of the four investigations at issue are still pending,² and it would be possible for the Commission to order the parties in those investigations to set forth any objections they may have to allowing their confidential information to be used in the District Court proceeding (although there would still potentially be questions about third party CBI). At base, however, OUII submits that the Commission should not, without more, allow Apple to use confidential information gathered solely for purposes of a Commission investigation in a U.S. District Court case involving different parties.

For all of the above reasons, Apple's motion should be denied.

Respectfully submitted,

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² Inv. No. 337-TA-714 has been terminated. Under the terms of the protective order, all confidential information from that investigation should have been returned or destroyed. *See* 337-TA-714, Order No. 2, ¶ 18.

Investigation No. 337-TA-797
Investigation No. 337-TA-714
Investigation No. 337-TA-750
Investigation No. 337-TA-745

CERTIFICATE OF SERVICE

The undersigned certifies that on May 7, 2012, he caused the foregoing **RESPONSE OF THE OFFICE OF UNFAIR IMPORT INVESTIGATIONS TO APPLE'S MOTION TO PRODUCE CONFIDENTIAL INFORMATION IN DISTRICT COURT PROCEEDINGS** to be filed with the Secretary (in electronic format), served by hand upon Chief Administrative Law Judge Charles E. Bullock and Administrative Law Judge E. James Gildea (2 copies each), and served upon the parties (1 copy each) in the manner indicated below:

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