No. 13-796

In the Supreme Court of the United States

LG ELECTRONICS, INC., ET AL., PETITIONERS

v.

INTERDIGITAL COMMUNICATIONS, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE INTERNATIONAL TRADE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Circuit has jurisdiction to review an order of the International Trade Commission (ITC) terminating certain parties from an investigation instituted under Section 337 of the Tariff Act of 1930 based on an arbitration agreement.

2. Whether the court of appeals erred in deeming "wholly groundless" petitioners' argument that the dispute that was the subject of the ITC investigation was subject to arbitration.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 718 F.3d 1336. The order of the administrative law judge (Pet. App. 33a-44a) and the International Trade Commission's notice declining to review that order (Pet. App. 29a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2013. A petition for rehearing was denied on October 3, 2013 (Pet. App. 45a-46a). The petition for a writ of certiorari was filed on December 31, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 337 of the Tariff Act of 1930 prohibits "[t]he importation into the United States, the sale for importation, or the sale within the United States after importation" of articles that "infringe a valid and enforceable United States patent" or are made "under, or by means of, a process covered by the claims of a valid and enforceable United States patent." 19 U.S.C. 1337(a)(1)(B). Section 337 further provides that the International Trade Commission (ITC or Commission) "shall investigate any alleged violation" of that prohibition, either on the agency's own "initiative" or based on a complaint filed by an interested party, and "shall determine * * * whether or not there is a violation." 19 U.S.C. 1337(b)(1) and (c). If the "private parties to the investigation" have entered into "an agreement to present the matter for arbitration," however, the ITC may "terminate any such investigation, in whole or in part, without making such a determination." 19 U.S.C. 1337(c); see 19 C.F.R. 210.21(d).

2. In 2011, respondents InterDigital Communications, Inc.; InterDigital Technology Corporation; and IPR Licensing, Inc. (collectively InterDigital) filed a complaint with the ITC. Pet. App. 6a. InterDigital claimed ownership of various patents relating to third-generation (3G) wireless technology. *Ibid.* InterDigital asserted that several companies, including petitioners, had violated Section 337 by importing wireless devices that infringed those patents. *Ibid.*

In 2012, petitioners moved to terminate the investigation into their conduct, arguing that InterDigital's infringement claims were subject to arbitration. Pet. App. 6a. Petitioners pointed to a 2006 agreement

granting them a license to certain InterDigital patents and stating that any party could (if other dispute-resolution measures failed) submit to arbitration "a dispute arising under" the agreement. *Id.* at 5a-6a. InterDigital argued that petitioners' "claim to an arbitrable dispute under the [a]greement was 'wholly groundless'" because petitioners "did not have an ongoing license for 3G products." *Id.* at 6a-7a (quoting *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006)).

The ITC granted the motion to terminate. In an initial determination, the Administrative Law Judge (ALJ) assigned to the investigation concluded that termination was appropriate because "the parties clearly intended to delegate the question of arbitrability to an arbitrator" and petitioners' "request for arbitration" was not "'wholly groundless.'" Pet. App. 7a. While acknowledging InterDigital's argument that the dispute did not arise from the parties' agreement, the ALJ described the contested question of whether petitioners actually had "a continuing license for the accused products" as a "merits" issue not encompassed within the "limited" scope of the groundlessness inquiry. *Id.* at 43a. The ITC declined to review the ALJ's decision, which therefore became "the determination of the Commission." 19 C.F.R. 210.42(h); see Pet. App. 7a.

3. InterDigital sought judicial review in the Federal Circuit. The court of appeals reversed the termination order and remanded for further proceedings. Pet. App. 1a-28a.

As a threshold matter, the court of appeals held that it had jurisdiction to review the ITC's decision. Pet. App. 8a-18a. Pursuant to 28 U.S.C. 1295(a)(6),

the Federal Circuit has exclusive jurisdiction of appeals of "final determinations of the United States International Trade Commission * * * made under section 337 of the Tariff Act of 1930." Section 337, in turn, states that "[a]ny person adversely affected by a final determination of the Commission under subsection (d), (e), (f), or (g) of this section"—provisions that allow for cease and desist orders and exclusion orders—"may appeal such determination, within 60 days after the determination becomes final, to the United States Court of Appeals for the Federal Circuit." 19 U.S.C. 1337(c); see 19 U.S.C. 1337(d)-(g); see also Pet. App. 8a-9a.

Although the ITC order in this case was issued pursuant to Subsection (c) of Section 337, see 19 U.S.C. 1337(c) (permitting termination of an investigation based on an arbitration agreement without a "determination" of "whether or not there is a violation"), the court of appeals concluded that it had jurisdiction to review the order. The court relied on its own precedents "establish[ing] that a party may appeal an ITC order that is not a final decision on the merits if 'its effect upon appellants is the equivalent of a final determination.'" Pet. App. 13a-14a (quoting *Import Motors Ltd.* v. *United States Int'l Trade Comm'n*, 530 F.2d 940, 944 (C.C.P.A. 1976)). The court concluded that the ITC order in this case had the effect of a final determination because it ended the investigation as to petitioners, did not bar continued importation of allegedly infringing devices, and allowed InterDigital to file a new complaint against petitioners only if an arbitrator concluded that the claims at issue were not subject to arbitration. See *id.* at 16a. In support of its jurisdictional holding, the

court also pointed to the presumption favoring judicial review of administrative action, see *id.* at 14a-15a, and to the rule applied by various courts of appeals that dismissal of an action without prejudice in favor of arbitration is an appealable "final decision" under the Federal Arbitration Act, *id.* at 17a (quoting 9 U.S.C. 16(a)(3)) (internal quotation marks omitted).

On the merits, the court of appeals held that the ITC should not have terminated the investigation because the arbitration agreement clearly did not encompass the dispute at issue. Pet. App. 18a-22a; see *id.* at 20a n.11 (noting that the court assumed that the "wholly groundless" standard applied because the parties did not argue otherwise); *id.* at 19a (noting that the parties did not challenge the ITC's conclusion that they unmistakably intended to delegate arbitrability questions to an arbitrator). The court stated that the ALJ had erred by failing "to assess the text of the parties' [a]greement" to "the limited extent necessary to assess whether [petitioners'] arguments" about the applicability of the arbitration clause "were plausible." *Id.* at 20a, 21a; see *id.* at 20a (citing *Agere Sys., Inc.* v. *Samsung Elecs. Co.*, 560 F.3d 337, 340 (5th Cir. 2009)).

Examining the agreement's text, the court concluded that petitioners "no longer hold[] a license to InterDigital's patents for 3G products" because the agreement terminated in 2010. Pet. App. 21a-22a. The court stated that "the only surviving portion of the grant clause is that portion providing [petitioners] with a 'fully paid up' license for the life of InterDigital's patents for 2G products"—not the 3G products that were the subject of InterDigital's ITC complaint. *Id.* at 22a (interpreting statement in agreement that,

"provided Licensee is not in default under this [a]greement at the end of the Term, Licensee shall be fully paid-up under and for the life of the Licensed Patents as to GSM Licensed Terminal Units only at the end of the Term").

Judge Lourie dissented from the court of appeals' jurisdictional holding. Pet. App. 23a-28a. In his view, a "termination due to an arbitrability agreement" under Subsection (c) of Section 337 is not a "final determination" under 28 U.S.C. 1295(a)(6) and does not fall within the scope of the appeal right defined in Section 337. Pet. App. 24a-25a. He found it inappropriate to analyze whether the ITC's ruling in this case was "equivalent to a final determination under subsections (d), (e), (f), or (g) [of Section 337]," because the "statute is clear on its face" that "arbitrability terminations" are "premised on subsection (c)." *Id.* at 25a. He also explained that the ITC's ruling was not equivalent to a final determination in any event because InterDigital retained the right to "refile its complaint" unless the arbitrator decided that the parties "should not have been before the Commission at all." *Id.* at 26a. On the merits, however, Judge Lourie agreed with the majority that petitioners' position on arbitrability was wholly groundless. *Id.* at 23a, 28a.

4. The petition for a writ of certiorari was filed on December 31, 2013. On January 13, 2014, in the remand proceedings at the ITC, InterDigital filed a motion to withdraw its complaint as to petitioners. App., *infra*, 1a-12a; see 19 C.F.R. 210.21(a)(1). The motion recited that there were no relevant "agreements, written or oral, express or implied, between the parties." App., *infra*, 2a, 10a. On February 12,

2014, the ITC granted the motion, *id.* at 13a-18a, and the investigation of petitioners ended.

ARGUMENT

1. After the petition for a writ of certiorari was filed, this case became moot as a result of actions taken by InterDigital. The parties disputed whether petitioners had violated Section 337 of the Tariff Act of 1930 (as InterDigital claimed) and whether the ITC's investigation of petitioners should be terminated in favor of arbitration (as petitioners urged). InterDigital prevailed on the termination issue in the court of appeals, which ruled that the investigation should continue. Subsequently, however, InterDigital withdrew the complaint of a Section 337 violation that had initiated the ITC investigation against petitioners, and that investigation terminated at InterDigital's own request. Accordingly, it is now "impossible for a court to grant any effectual relief whatever" in this case, *Knox* v. *Service Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012) (citation and internal quotation marks omitted), and further review of the merits is barred.

The question remains whether this Court should simply deny the petition or should instead order that the judgment below be vacated. See generally *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). When a case becomes moot before a court of appeals has rendered its judgment or after this Court has granted certiorari, a litigant has a right to further review that should not be frustrated by the "vagaries of circumstance." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). When mootness arises at such a juncture, the "decree below" should be "set aside," *Duke Power Co.* v. *Greenwood Cnty.*, 299

U.S. 259, 267 (1936) (per curiam); see, *e.g.*, *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71-72 (1997), so long as the mootness does not result from the voluntary act of the party seeking review, see *Bonner Mall*, 513 U.S. at 25-27.

That rationale for the "extraordinary remedy" of vacatur, *Bonner Mall*, 513 U.S. at 26, does not apply, however, when a case becomes moot after the court of appeals has entered final judgment and while a petition for certiorari is pending. A losing party has no right to this Court's review, which is discretionary and exercised circumspectly. See Sup. Ct. R. 10. Accordingly, beginning with the brief in opposition filed in *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-900), the Solicitor General generally has taken the position on behalf of the United States that, when a case has become moot after the court of appeals' ruling, this Court ordinarily should decline to vacate the decision below if the case would not have warranted review on the merits. Stephen M. Shapiro et al., *Supreme Court Practice* 358, 968 & n.33 (10th ed. 2013). Although this Court has never expressly endorsed that approach, the Court has denied certiorari in a number of such cases. See *id.* at 968 n.33; cf. *Camreta* v. *Greene*, 131 S. Ct. 2020, 2035 n.10 (2011) (explaining that the Court has "left lower court decisions intact when mootness did not deprive the appealing party of any review to which he was entitled").

A reasonable argument could be made that this ordinary rule should not apply where, as here, mootness was caused by the unilateral act of the party that prevailed in the court of appeals. Vacatur is fundamentally an "equitable remedy." *Bonner Mall*, 513 U.S. at 25. A respondent that voluntarily abandons

the field, thus preventing any possibility that this Court will grant a writ of certiorari and reverse, arguably should not be allowed to retain the potential future benefits of a favorable appellate decision, whether or not the Court would have granted the petition if the dispute had remained live.

On balance, however, we believe that denial of the petition (rather than vacatur) is the appropriate disposition when a case that would not otherwise have warranted this Court's review becomes moot at this stage of the proceedings, even if the mootness is produced by the respondent's unilateral abandonment of its initial request for relief. From the standpoint of a party petitioning for certiorari, mootness caused by a respondent's unilateral action is not meaningfully different from mootness caused by mere "happenstance." *Bonner Mall*, 513 U.S. at 23, 25 (quoting *Munsingwear*, 340 U.S. at 40). In either circumstance, the petitioner is deprived of the right to seek further review, through no fault of its own, as a result of events beyond its control. Because in the latter situation the propriety of vacatur at the certiorari stage ought to hinge on whether this Court would have granted review in the absence of mootness, the former situation should be treated the same way.

If the judgment below would not otherwise have been reviewed by this Court, a respondent's action in rendering the case moot does not give it any advantage that it would not have obtained if the controversy had remained live. And so long as the Court performs the same certworthiness analysis it would have performed in the absence of the mooting event, and vacates the court of appeals' judgment if it concludes that certiorari would have been granted, the

respondent will have no meaningful incentive to moot the case strategically in order to evade this Court's review. In a case where review would not otherwise have been granted, moreover, vacatur disserves the public interest by eliminating a "presumptively correct" judicial precedent. *Bonner Mall*, 513 U.S. at 26 (citation omitted).[1]

For these reasons, despite the fact that this case was rendered moot by InterDigital's withdrawal of its ITC complaint after obtaining a favorable decision in the Federal Circuit, vacatur is appropriate only if this Court would have granted review had the case not become moot.

2. Applying that rule here, the petition should be denied. Although the court below erred in both its jurisdictional and merits holdings, those rulings would not have warranted this Court's review if InterDigital had not withdrawn its complaint seeking relief from the ITC.

a. i. The court of appeals lacked jurisdiction to review the ITC's termination order in this case. The Federal Circuit is authorized to review "final determinations of the United States International Trade Commission * * * made under section 337 of the Tariff Act of 1930," 28 U.S.C. 1295(a)(6), and Section 337 specifies that the final determinations in question are those made "under subsection (d), (e), (f), or (g) of this section," 19 U.S.C. 1337(c). Subsections (d), (e), (f), and (g) of Section 337 all address final ITC rulings

[1] To be sure, the government's view in the present case is that the court of appeals' decision is erroneous. See pp. 10-12, *infra*. The Court can and should take those arguments into account in determining whether certiorari would have been granted if the dispute had remained live.

on whether to exclude imports or to order that a party cease and desist from unfair acts. In this case, however, the ITC terminated its investigation of petitioners pursuant to Subsection (c) of Section 337, which permits termination based on an arbitration agreement without any "determination" of "whether or not there is a violation." 19 U.S.C. 1337(c).

Such a termination is not made "under" any of the subsections enumerated in the applicable judicial-review provision. Nor is it a "final determination" of the sort that the Federal Circuit has power to review. The Federal Circuit had previously recognized that, while terminations with prejudice are arguably final determinations, terminations without prejudice are not. See *Block* v. *United States Int'l Trade Comm'n*, 777 F.2d 1568, 1571 (Fed. Cir. 1985); *Import Motors, Ltd.* v. *United States Int'l Trade Comm'n*, 530 F.2d 940, 946-947 (C.C.P.A. 1976); see also *Farrel Corp.* v. *United States Int'l Trade Comm'n*, 949 F.2d 1147, 1151 n.4 (Fed. Cir. 1991), cert. denied, 504 U.S. 913 (1992). In this case, the termination is best characterized as one without prejudice. If the ITC order terminating the investigation had not been set aside, and the arbitrator had ultimately concluded that the parties' dispute was not arbitrable, InterDigital would have been entitled to refile a complaint against petitioners at the Commission. See Pet. App. 26a (Lourie, J., dissenting).[2]

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[2] The sequence of statutory amendments that produced current Section 337 bolsters that conclusion. When Congress amended Section 337 in 1988 to add Subsection (g), which permits the ITC to exclude imports in the event of a party's failure to respond to a complaint, Congress also added determinations under Subsection (g) to the list of reviewable "final determination[s]" set forth in

ii. The court of appeals also erred in holding that petitioners' arbitrability argument was "wholly groundless." In *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006), the court stated that the "wholly groundless" inquiry was intended to "prevent[] a party from asserting any claim at all, no matter how divorced from the parties' agreement, to force an arbitration," and should not be used to "invade the province of the arbitrator." *Id.* at 1373-1374 & n.5. In this case, however, the court of appeals did not view petitioners' argument in favor of arbitrability, which was based on an interpretation of the language of the relevant contract, to be "divorced from the parties' agreement." *Id.* at 1373 n.5. Rather, the court rejected petitioners' interpretation of the agreement as not "plausible." Pet. App. 21a. In so holding, the court misapplied the "wholly groundless" standard and invaded the province of the arbitrator.

b. Although the Federal Circuit erred both in asserting jurisdiction and in its decision on the merits, those errors were not of sufficient legal or practical importance to warrant this Court's review. Based on that conclusion, the ITC did not file its own petition for a writ of certiorari.

i. The jurisdictional question presented here is a narrow one of little practical significance. The ITC has had only a handful of proceedings involving a

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Section 337. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342(a)(2) and (b)(2)(B), 102 Stat. 1213, 1215. But when Congress amended Section 337(c) in 1994 to permit termination of an investigation on the basis of an arbitration agreement, it did not provide for any right of appeal. See Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4943-4944.

request for termination of an investigation in favor of arbitration under Section 337. Whether the Federal Circuit has jurisdiction over an appeal from such a termination is not a sufficiently important issue to warrant this Court's review.

Petitioners attempt (Pet. 9-21) to characterize the court of appeals' jurisdictional ruling as reflecting a broad misunderstanding of the presumption favoring judicial review of administrative action. But the presumption in question was hardly central to the court of appeals' analysis. See Pet. App. 14a & nn.9-10. Rather, that analysis turned on whether a termination for arbitration is a "final determination" within the meaning of Section 337(c) (even though it is not a "determination" of a "violation" of Section 337), 19 U.S.C. 1337(c); see Pet. App. 12a-15a & n.8; whether a termination for arbitration under Section 337(c) is "equivalent" to such a "final determination," *id.* at 15a-17a; and whether an analogy to dismissals in favor of arbitration in the Federal Arbitration Act context is instructive, see *id.* at 17a-18a. Those questions are unique to cases involving terminations for arbitration under Section 337(c), and they are unlikely to arise with any frequency in the future.[3]

ii. The question whether petitioners' arbitrability argument was "wholly groundless" is narrow and case-specific. For the reasons stated above, Section

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[3] The authorities to which petitioners point (*e.g.*, Pet. 13-16) confirm that determining the scope of a statutory scheme for judicial review depends on a close examination of the language and purpose of the statute at issue, and not merely on the application of a general canon of interpretation. See, *e.g.*, *Elgin* v. *Department of Treasury*, 132 S. Ct. 2126, 2133-2136 (2012); *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 678 (1986).

337(c) cases presenting such an issue are unlikely to arise frequently. And petitioners do not challenge the Federal Circuit's use of the "wholly groundless" standard in this context, or even the description of that standard in *Qualcomm*, the Federal Circuit decision that first adopted it. See, *e.g.*, Pet. 26-30, 32. Indeed, they agreed below that *Qualcomm* supplied the proper test, and the court of appeals "assume[d]" its applicability on that basis. See Pet. App. 20a n.11.[4]

Rather, petitioners simply challenge the court of appeals' application of the "wholly groundless" standard to the facts of this case. The court of appeals appears to have looked somewhat more closely at the contract at issue, and to have given somewhat less leeway to the arbitrator, than it had previously suggested was appropriate. See *Qualcomm*, 466 F.3d at 1374 ("On remand, in undertaking the 'wholly groundless' inquiry, the district court should look to the scope of the arbitration clause and the precise issues that the moving party asserts are subject to arbitration."). That error, however, involves no important and recurring question of law appropriate for this Court's resolution. See Sup. Ct. R. 10.

Petitioners assert (Pet. 29) that the Federal Circuit's decision conflicts with the Fifth Circuit's discus-

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[4] The petition cites various decisions from other courts that (petitioners say) require arbitration, regardless of the merits of an arbitrability argument, so long as the parties intended to leave the arbitrability question to an arbitrator. See Pet. 31-32 (citing, *inter alia*, *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63 (2010)). Petitioners did not advocate that approach below, however, and they do not appear to endorse it even in this Court, arguing instead for a "proper, deferential form of the 'wholly groundless' test." Pet. 35.

sion of the "wholly groundless" standard in *Agere Systems, Inc.* v. *Samsung Electronics Co.*, 560 F.3d 337 (5th Cir. 2009). But while the two courts reached inconsistent outcomes on the facts before them, their respective opinions did not articulate conflicting legal standards. See Pet. App. 20a (citing *Agere* with approval). In *Agere*, the Fifth Circuit—applying *Qualcomm*—examined the language of the contract at issue and decided that "there is a legitimate argument that this arbitration clause covers the present dispute." 560 F.3d at 340. It did not make general pronouncements about the manner in which a court should analyze whether an arbitrability argument is "wholly groundless." See *ibid.* ("We adopt no new standards of Fifth Circuit analysis of arbitration provisions today."). Nor is there any sound reason to suppose that the Fifth Circuit's reference to a "legitimate argument" in favor of arbitrability, *ibid.*, meant something different from the Federal Circuit's reference to a "plausible argument[]," Pet. App. 20a. Although the court below erred in holding that no colorable argument favoring arbitrability existed, that case-specific error does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the judgment of the court of appeals should be vacated on the ground that the case is moot.

Respectfully submitted.

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MARCH 2014

APPENDIX A

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

Investigation No. 337-TA-800

IN THE MATTER OF CERTAIN WIRELESS DEVICES WITH 3G CAPABILITIES AND COMPONENTS THEREOF

Jan. 13, 2014

COMPLAINANT INTERDIGITAL'S MOTION TO TERMINATE THIS INVESTIGATION AS TO THE LG RESPONDENTS BY WITHDRAWAL OF THE COMPLAINT

Pursuant to Commission Rule 19 C.F.R. §§ 210.21(a)(1) and 210.15(a)(2), Complainants InterDigital Communications, Inc., InterDigital Technology Corporation, and IPR Licensing, Inc. (collectively "InterDigital") respectfully move to terminate this Investigation based on withdrawal of the complaint as to the remaining respondents, LG Electronics, Inc., LG Electronics USA, Inc., and LG Electronics Mobilecomm USA, Inc. (collectively "LG").

No initial determination on violation of section 337 has issued as to LG due to LG's prior and erroneous termination from the investigation based on its wholly groundless assertion of arbitration, and no extraordinary cir-

cumstances exist that would prevent termination of this Investigation as to LG based on the withdrawal of the complaint. Further, termination as to LG will conserve the resources of the Commission and the parties. InterDigital hereby represents that there are no agreements, written or oral, express or implied, between the parties concerning the subject matter of this Investigation.

For the reasons set forth in the Memorandum of Points and Authorities submitted herewith, InterDigital respectfully requests that the Commission issue a Determination granting this Motion to Terminate the above captioned Investigation as to LG in accordance with 19 C.F.R. §§ 210.21(a)(1) based on the withdrawal of the complaint.

Respectfully Submitted,

Dated: January 13, 2014

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UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

Investigation No. 337-TA-800

IN THE MATTER OF CERTAIN WIRELESS DEVICES WITH 3G CAPABILITIES AND COMPONENTS THEREOF

Jan. 13, 2014

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF COMPLAINANT INTERDIGITAL'S MOTION TO TERMINATE THIS INVESTIGATION AS TO THE LG RESPONDENTS BY WITHDRAWAL OF THE COMPLAINT

Pursuant to Commission Rule 19 C.F.R. §§ 210.21(a)(1) and 210.15(a)(2), Complainants InterDigital Communications, Inc., InterDigital Technology Corporation, and IPR Licensing, Inc. (collectively "InterDigital") respectfully move to terminate this Investigation based on withdrawal of the complaint as to the remaining respondents, LG Electronics, Inc., LG Electronics USA, Inc., and LG Electronics Mobilecomm USA, Inc. (collectively "LG").[1]

[1] On December 20, 2013, InterDigital filed a petition for review in the United States Court of Appeals for the Federal Circuit, seeking an appeal of the Commission's Final Determination in this Investigation as to Nokia, Huawei, and ZTE. InterDigital will continue to pursue that appeal.

I. BACKGROUND

The Commission instituted Investigation No. 337-TA-800 (the "Investigation") in August 2011, naming Nokia Corporation and Nokia Inc. (collectively "Nokia"), Huawei Technologies Co., Ltd., FutureWei Technologies, Inc., and Huawei Device USA (collectively "Huawei"), and ZTE Corporation and ZTE (USA) (collectively "ZTE") as respondents. In October 2011, InterDigital moved (i) to amend the complaint to add U.S. Patent No. 8,009,636 and (ii) to add LG as respondents, asserting the same patents against LG as it asserted against Nokia, Huawei, and ZTE. (Mot. Dkt. 800-006.) The ALJ granted InterDigital's motion by an Initial Determination dated December 5, 2011 (Order No. 5) that became final on December 21, 2011. In January 2012, LG moved to terminate the Commission proceedings against it, asserting that InterDigital's infringement claim raises an arbitrable dispute under a 2006 license agreement. (Mot. Dkt. 800-040.) In June 2012, the Administrative Law Judge ("ALJ") granted LG's motion to terminate the investigation in favor of arbitration. (Order No. 30.) The Commission declined to review the Order and it became final on July 6, 2012.

InterDigital appealed the termination of LG from the investigation and on June 7, 2013, the Federal Circuit reversed. The Court found that "[i]t was legal error for the ALJ to terminate the investigation without assessing whether LG's license defense was at least plausible." *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 718 F.3d 1336, 1347 (Fed. Cir. 2013). In reversing termination of LG from the investigation, the Court found that the license at issue is "unambiguous" and that LG's as-

sertions of arbitrability and license were "wholly groundless." *Id.* Even the dissent, which was directed solely to whether the Court had jurisdiction over InterDigital's appeal, went out of its way to note that "there is no plausible argument that LG could prevail under its patent license agreement, and hence [] LG's position is 'wholly groundless.'" *Id.* at 1347-48. On October 3, 2013, nearly fifteen months after the Commission terminated LG from the investigation, and nearly four months after the Court issued its opinion reversing that termination, the Federal Circuit denied LG's petition for rehearing and rehearing en banc and remanded LG to the Commission for further proceedings.

Meanwhile, the 800 Investigation proceeded on InterDigital's claims against Nokia, Huawei, and ZTE. Fact and expert discovery was completed, an evidentiary hearing was held, and in June 2013, ALJ Shaw issued an Initial Determination on InterDigital's claims against Nokia, Huawei, and ZTE. The Commission issued its notice with respect to the Nokia, Huawei, and ZTE respondents on December 19, 2013, and its accompanying opinion on December 20, 2013.

The ALJ's initial determination and the Commission's final determination addressed infringement and invalidity issues related to U.S. Patent Nos. 7,502,406; 7,706,332; 7,706,830; 8,009,636; 7,536,013; 7,970,127; and 7,616,970 as they relate to the Nokia, Huawei, and ZTE accused products. Notably, neither the ALJ nor the Commission addressed any LG accused products, due to LG's wholly groundless assertion of arbitration and subsequent termination.

This Investigation, as it pertains to the LG respondents, remains before the Commission and is still in its early, prehearing stage. As LG itself noted in its January 10, 2014 Additional Comments Regarding Further Proceedings, fact discovery had not yet closed, depositions had just commenced, and expert discovery had not yet started when the ALJ granted LG's motion to terminate. Further, LG did not participate in the evidentiary hearing in February 2013, did not present witnesses, did cross-examine adverse witnesses, and did not submit posthearing briefs. InterDigital agrees with LG that this Investigation, with respect to the dispute between InterDigital and LG, is still in the prehearing discovery stage.

II. LEGAL STANDARD

Commission Rule 210.21(a)(1), which governs termination of an investigation based upon withdrawal of a complaint or certain allegations contained therein, states:

> Any party may move at any time prior to the issuance of an initial determination on violation of section 337 of the Tariff Act of 1930 to terminate an investigation in whole or in part as to any or all respondents, on the basis of withdrawal of the complaint or certain allegations contained therein . . . A motion for termination of an investigation based on withdrawal of the complaint, or for good cause, shall contain a statement that there are no agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation, or if there are any agreements concerning the subject matter of the investigation, all such agreements shall be identified, and if

> written, a copy shall be filed with the Commission along with the motion . . .

19 C.F.R. § 210.21(a)(1).

Termination of an investigation will be "readily granted to a complainant during the prehearing stage of an investigation" in the "absence of extraordinary circumstances." *E.g., Certain Ultrafiltration Membrane Sys. and Components Thereof*, Inv. No. 337-TA-107, Commission Action and Order, at 2 (Mar. 11, 1982).

The Commission routinely recognizes that a complainant can seek termination of an investigation as to certain respondents by withdrawing the complaint pursuant to Commission Rule 210.21(a)(1). See *Certain Consumer Electronics With Display And Processing Capabilities*, Inv. No. 337-TA-884, Notice of Commission Determination (Dec. 20, 2013); *Certain Consumer Electronics With Display And Processing Capabilities*, Inv. No. 337-TA-884, Notice of Commission Determination (Aug. 16, 2013); *Certain Sintered Rare Earth Magnets, Method Of Making Same And Products Containing Same*, Inv. No. 337-TA-855, Notice of Commission Determination (Jul. 12, 2013); *Certain Blu-Ray Disc Players, Components Thereof and Products Containing The Same*, Inv. No. 337-TA-824, Notice of Commission Determination (Jan. 14, 2013); *Certain Kinesiotherapy Devices And Components Thereof*, Inv. No. 337-TA-823, Notice of Commission Determination (Oct. 31, 2012).

III. ARGUMENT

Because of the delay in the disposition of InterDigital's claims against LG caused by LG's wholly groundless assertion of arbitration, and in light of the December 20, 2013 Commission Determination as to the other respondents, InterDigital hereby withdraws its complaint as to LG, and respectfully requests the Commission terminate the investigation pursuant to Commission Rule § 201.21(a)(1).[2]

As noted above, this Investigation, as to the LG respondents, is still in its early, prehearing stages. LG recognized as much in its January 10, 2014 Additional Comments Regarding Further Proceedings, that fact discovery had not yet closed, depositions had just commenced, and expert discovery had not yet started when the ALJ granted LG's motion to terminate. Further, LG did not participate in the evidentiary hearing in February 2013, did not present witnesses, did cross-examine adverse witnesses, and did not submit post-hearing briefs.

Because this Investigation is still in the prehearing stage as to LG, and because there are no extraordinary circumstances that prevent termination of this Investigation as to LG, termination of this Investigation as to LG should be "readily granted." *E.g., Certain Ultrafiltration Membrane Sys. and Components Thereof*, Inv.

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[2] As noted above, InterDigital is pursuing its appeal of the Commission's determination in the 800 Investigation and reserves all rights, should the Federal Circuit reverse the Commission's determination or any portion thereof, to pursue any and all claims against LG in a subsequent investigation.

No. 337-TA-107, Commission Action and Order, at 2 (Mar. 11, 1982). Such a termination as to LG will conserve the resources of the Commission and the parties. In addition, termination of this Investigation as to LG will not adversely affect the public interest because such termination will not affect 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.

As required under Commission Rule 210.21(a)(1), InterDigital hereby represents that there are no agreements, written or oral, express or implied, between the parties concerning the subject matter of this Investigation.

For the reasons set forth above, InterDigital respectfully requests that the Commission issue a Determination granting this Motion to Terminate the above captioned Investigation in accordance with 19 C.F.R. §§ 210.21(a)(1) based on the withdrawal of the complaint as to the last remaining respondents.

Respectfully Submitted,

Dated: January 13, 2014

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Inc., InterDigital Technology Corporation, and IPR Licensing, Inc.

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APPENDIX B

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

Investigation No. 337-TA-800

IN THE MATTER OF CERTAIN WIRELESS DEVICES WITH 3G CAPABILITIES AND COMPONENTS THEREOF

Feb. 12, 2014

NOTICE OF COMMISSION DETERMINATION TO GRANT AN UNOPPOSED MOTION BY COMPLAINANTS TO WITHDRAW THE COMPLAINT AS TO THE REMAINING RESPONDENTS; TERMINATION OF THE INVESTIGATION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to grant an unopposed motion by complainants to withdraw the investigation as to the following remaining respondents: LG Electronics, Inc. of Seoul, Republic of Korea; LG Electronics U.S.A., Inc. of Englewood Cliffs, New Jersey; and LG Electronics Mobilecomm U.S.A., Inc. of San Diego, California (collectively, "LG"). The investigation is terminated in its entirety.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3042. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on August 31, 2011, based on a complaint filed by InterDigital Communications, LLC of King of Prussia, Pennsylvania; InterDigital Technology Corporation of Wilmington, Delaware; and IPR Licensing, Inc. of Wilmington, Delaware (collectively, "InterDigital"). 76 *Fed. Reg.* 54252 (Aug. 31, 2011). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain wireless devices with 3G capabilities and components thereof by reason of infringement of certain claims of United States Patent Nos. 7,349,540 (terminated from

the investigation); 7,502,406 (the '406 patent); 7,536,013 (the '013 patent); 7,616,970 (the '970 patent); 7,706,332 (the '332 patent); 7,706,830 (the '830 patent); and 7,970,127 (the '127 patent). The notice of investigation named several respondents. The complaint and notice of investigation were subsequently amended to allege infringement of certain claims of United States Patent No. 8,009,636 (the '636 patent) and to add the LG entities as respondents. 76 *Fed. Reg.* 81527 (Dec. 28, 2011). The complaint and notice of investigation were further amended to include an additional respondent. 77 *Fed. Reg.* 26788 (May 7, 2012).

InterDigital Communications, LLC subsequently moved for leave to amend the Complaint and Notice of Investigation to reflect the fact that it converted from a Pennsylvania limited liability company to a Delaware corporation, and changed its name to InterDigital Communications, Inc. The ALJ issued an ID granting the motion and the Commission determined not to review. *See* Order No. 91 (Jan. 17, 2013); Notice of Commission Determination Not to Review an Initial Determination Granting Complainants' Motion for Leave to Amend the Complaint and Notice of Investigation (Feb. 4, 2013).

On June 4, 2012, the ALJ granted a motion by LG under 19 C.F.R § 210.21(a)(2) to terminate the investigation as to LG based on an arbitration agreement. *See* Order No. 30 (June 4, 2012). The Commission determined not to review. InterDigital appealed LG's termination from this investigation, and the Federal Circuit reversed the Commission's determination. *InterDigital Commc'ns, LLC v Int'l Trade Comm'n,*

718 F.3d 1336 (Fed. Cir. 2013). The mandate issued on October 10, 2013, returning jurisdiction to the Commission.

On June 28, 2013, the ALJ issued his final initial determination ("ID"), finding no violation of section 337 by respondents whose products were adjudicated ("Adjudicated Respondents"). On December 19, 2013, the Commission determined to affirm the ALJ's finding of no violation of section 337 as to those respondents with the modifications set forth in a Commission opinion that issued on December 20, 2013. The Commission adopted the ALJ's findings that the '970, '013, and '127 patents are invalid in light of the prior art. However, due to the LG remand, the Commission noted that all other issues, namely, validity of the '830, '636, '406, and '332 patents, domestic industry, and FRAND continue to remain under review.

On January 13, 2014, InterDigital moved to withdraw the complaint as to LG. On January 23, 2014, the Commission investigative attorney filed a response in support of the motion. That same day, LG filed a response stating that it does not oppose the motion.

Having reviewed the motion and responses, the Commission has determined to grant the motion. The motion complies with the requirements of Commission Rule 210.21 (19 C.F.R § 210.21) and includes the required statement that there are no agreements, written or oral, express or implied, between the parties concerning the subject matter of this investigation. In addition, there appear to be no extraordinary circumstances that would compel denying the motion.

Certain Ultrafiltration Membrane Sys. and Components Thereof, Inv. No. 337-TA-107, Commission Action and Order, at 2 (Mar. 11, 1982). As all the parties observe, terminating the investigation as to LG will conserve substantial public and private resources. Under these circumstances, termination of LG will not adversely affect 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.

In its December 19, 2013, notice terminating the Adjudicated Respondents, the Commission noted that due to the LG remand, issues pertaining to the validity of the Power Ramp Up (the '830 and '636 patents) and Power Control (the '406 and '332 patents) patents as well as domestic industry and FRAND remained under review. The Commission has determined to adopt the ALJ's finding in the final ID that the Adjudicated Respondents failed to establish by clear and convincing evidence that the '830, '636, '406, and '332 patents are invalid. The Commission has determined to take no position on whether InterDigital established a domestic industry as required by 19 U.S.C. § 1337(a)(2). In view of its finding that Adjudicated Respondents did not violate section 337 because of non-infringement and the withdrawal of the remaining respondents, the Commission has also determined to take no position on the FRAND issues. *See Beloit Corp. v. Valmet Oy,* 742 F.2d 1421, 1423 (Fed. Cir. 1984) ("The Commission . . . is at perfect liberty to reach a 'no violation' determination on a single dispositive issue. That

approach may often save the Commission, the parties, and this court substantial unnecessary effort.").

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.21, 210.42-46 and 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.21, 210.42-46 and 210.50).

By order of the Commission.

/s/ LISA R. BARTON
LISA R. BARTON
Acting Secretary to the
Commission

Issued: February 12, 2014

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