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ITC Clarifies Duty Of Respondents After Corporate Restructure

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(December 3, 2018, 1:35 PM EST)

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In its recent order in Certain Subsea Telecommunications Systems and Components Thereof, the U.S. International Trade Commission clarified the duties of parties when a corporate restructure takes place after a complaint is filed but before an investigation is instituted.[1] According to the ITC, the respondents have a duty to act reasonably and must update the complainant and the commission as to the change of status of any of the respondents. Any new entities formed due to the merger of named respondents inherit the named respondents' position as a respondent to the investigation. Moreover, the respondents have a duty to provide discovery responses consistent with the new identities.

In December 2017, the complainants filed a complaint in the ITC, naming a parent company and a U.S. subsidiary as respondents. The complaint, however, did not name another subsidiary. With respect to the accused products, the complaint specifically named "systems utilizing the Photonic Service Engine 2 Super Coherent Technology" as forming the basis of the Section 337 violations.[2] At the time the complaint was filed, neither the parent company nor the named subsidiary imported any products containing PSE-2 technology. The unnamed subsidiary, however, did import a small number of products that included PSE-2 technology. Moreover, the parent company was aware, when the complaint was filed, that the unnamed subsidiary imported products containing PSE-2 technology.

On Jan. 1, 2018, the named subsidiary and the unnamed subsidiary merged to form a new entity. On Jan. 26, the ITC instituted the investigation and defined the scope of the investigation as "certain subsea telecommunication systems and components thereof,"[3] which included the PSE-2 technology identified in the complaint.

The respondents sought to have the named subsidiary dismissed from the investigation following the merger. According to the respondents, the named subsidiary "was never responsible for" the products that included PSE-2 technology.[4] Further, the respondents stated numerous times in response to discovery requests that the named subsidiary did not import any accused products.[5] Based on these representations, the complainant entered a stipulation to withdraw the complaint against the named subsidiary.[6]

At no point did the respondents clarify to the complainant or to the commission that the unnamed subsidiary or the new subsidiary, in fact, did import products that fell within the scope of the investigation, as set forth in the notice of the investigation. Specifically, the respondents did not identify the new subsidiary in any discovery responses, despite the complainant asking the respondents to identify each subsea telecommunications system and components thereof imported into the United States and all entities involved in the importation of those products. Respondents even went so far as to state, "[Respondent] does not import or sell for importation into the United States any accused subsea telecommunications systems or components thereof."[7] According to the ITC, this was unreasonable.

All of the parties agreed that, following the merger, the new subsidiary assumed the position of importer of products that included PSE-2 technology by virtue of absorbing the unnamed subsidiary. The respondents, however, contended that the new subsidiary did not assume the role of the named subsidiary as a respondent in the investigation. Specifically, the respondents stated that they "did not view the [new subsidiary] as a Respondent by virtue of the merger of the [named subsidiary] into that entity."[8] Thus, the respondents sought to draw a distinction between the named subsidiary and the new entity based on who was actually named as a respondent to the investigation. According to the respondents, the new subsidiary "in its capacity as the successor to [the named subsidiary], had no involvement in the alleged violations."[9]

The ITC disagreed. According to the ITC, "there is no basis to distinguish [the new subsidiary] 'in its capacity as the successor to [the named subsidiary] from ... its capacity as the successor of the [unnamed subsidiary]."[10] "[The new subsidiary] became a singular company on Jan. 1, 2018, and assumed the status of respondent in this investigation and the status of the importer of the [accused products]."[11] This is because "by operation of law, the survivor inherits the rights and obligations of the extinguished entity."[12] According to the ITC, the respondents should have known this, and it was unreasonable to assert otherwise. The administrative law judge stated, "I do not give any credit to the assertion that ... a company can escape its status as a named respondent in an investigation simply by merging into another company and changing its name after the complaint is filed."[13] As a result, the ALJ imposed sanctions on the respondents.[14]

This decision is a cautionary tale. It appears to illustrate that the ITC will place the onus on the respondent that reorganized its corporate structure to inform the commission and the complainant to the investigation of the reorganization and how that reorganization impacts the respondents (or who should be a respondent) in the investigation. The ITC appears unwilling to place the burden on the complainant to divine the effect of the reorganization on its own, particularly when discovery requests have already been served that attempt to determine who the appropriate respondents should be. This decision illustrates the importance of assessing the impact of corporate reorganizations that take place during an investigation. Failure to do so may result in undesirable repercussions from the commission. It will be interesting to see how this decision may impact future conduct at the ITC as corporate mergers and reorganizations of respondents and potential respondents continue to become the norm.

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[1] Certain Subsea Telecommunications Systems and Components Thereof, Order No. 40, (U.S.I.T.C. Oct. 19, 2018).

[2] Id. at 3.

[3] Id. at 4.

[4] Id. at 9.

[5] Id. at 8.

[6] Id. at 9.

[7] Id. at 8.

[8] Id. at n. 3.

[9] Id. at 10.

[10] Id. at 10-11.

[11] Id. at 11.

[12] Id.

[13] Id. at n. 3.

[14] Id. at 13.