

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSUMER ELECTRONICS ASSOCIATION,
INFORMATION TECHNOLOGY INDUSTRY
COUNCIL, and ITAC SYSTEMS, INC.,

Plaintiffs,

v.

CITY OF NEW YORK, MICHAEL R. BLOOMBERG,
in his official capacity as Mayor of the City of New
York, NEW YORK CITY DEPARTMENT OF
SANITATION, JOHN J. DOHERTY, in his official
capacity as the Commissioner of the Department of
Sanitation, and ROBERT LANGE, in his official
capacity as Director of Waste Prevention, Reuse and
Recycling of the Department of Sanitation,

Defendants.

09 Civ. 6583 (WHP)

**DECLARATION OF JOHN
ERNSBERGER OF ITAC SYSTEMS,
INC. IN SUPPORT OF PLAINTIFFS'
MOTION FOR A PRELIMINARY
INJUNCTION**

DECLARATION OF JOHN ERNSBERGER OF ITAC SYSTEMS, INC.

1. The following facts are true to my own personal knowledge and if called as a witness I could so testify.
2. I am Chairman of ITAC Systems, Inc. (ITAC), a small electronics company based in Garland, Texas. I have held that position for 15 years and have been associated with ITAC for over 20 years.
3. My declaration addresses the severe impacts that New York City's "Electronic Equipment Collection, Recycling and Reuse" law ("E-waste Law") and the regulations promulgated thereunder ("E-waste Rules") will impose on ITAC and its

continuing viability. I understand that my declaration will be used in support of the plaintiffs' application for a preliminary injunction to delay the implementation of the E-waste Rules.

4. ITAC is not a member of the Consumer Electronics Association or Information Technology Industry Council and is suing individually as a co-plaintiff because of the importance of this issue to ITAC.

5. ITAC manufactures high-quality standard and custom trackballs and other input devices that it sells world-wide primarily to electronics distributors, other original equipment manufacturers in the industrial, commercial and medical process control systems market, to large end users who incorporate the devices into their manufacturing and enterprise systems, and to military and governmental organizations.

6. ITAC does not sell through retail stores. It does sell, however, a very small quantity of its products to companies and individuals online, primarily in the United States and Canada.

7. ITAC is committed to safe, responsible and realistic waste disposal and recycling. What little scrap results from the manufacturing and assembly processes, estimated at less than 500 pounds per year, is handled through a legitimate recycling company, or some components, particularly the plastics, are returned to the vendor who grinds and recycles the material into new components.

8. ITAC has only seven employees. ITAC ships approximately 10,000 to 12,000 units per year worldwide, with annual sales of approximately \$1.5M. ITAC manufactures and ships these products from its sole location in Garland, Texas.

9. ITAC has been hit particularly hard by the current recession, and we have been forced to cut our employees back to a four-day work week.

10. ITAC was so concerned about the impact of New York's new E-waste Rules that our company submitted comments when the New York City Department of Sanitation released proposed rules to implement the E-waste program last September. Those comments were submitted by Donald P. Bynum, who recently retired as President of the company. I helped Mr. Bynum prepare those comments and I have personal knowledge of each fact contained therein independent of his comments as a source of my understanding.

11. In our comments, we explained to the Department that ITAC is a small company with very limited resources and personnel. We simply cannot afford to devote the necessary funds and time to meet the onerous requirements of New York City's new program. For the Court's convenience, a copy of ITAC's comments is attached as an exhibit to my declaration.

12. As we explained in our comments, while we cannot say for certain that none of our products have been sold or reached end customers in New York City, we believe, based on the nature of how our products are distributed, sold and incorporated into other systems, the number of ITAC products that might reach New York City is

miniscule and likely less than 1% of the 10,000 to 12,000 units we ship each year worldwide. The costs of complying with New York City's law will easily exceed any revenue ITAC derives from New York City sales.

13. Because of this and the relatively small amount of revenue we generate annually, in our comments, we requested that the Department of Sanitation incorporate an exemption for very small domestic manufacturers (less than \$5 million in revenue annually) in its final rules. This exemption would have helped ITAC and many other domestic small businesses who manufacturer electronics goods to survive.

14. To our great disappointment, the Department did not include the requested exemption in its final rules. The Department never explained why our request was not granted. It simply ignored our request, which we believed was very reasonable.

15. ITAC was not seeking a wholesale exemption from the program. Rather, we asked the Department to create less onerous requirements for small manufacturers. Among other things, ITAC proposed that small manufacturers only be required to accept returns of their own products and not another manufacturer's products, provide labeling to that effect, certify that any "scrap" created from those returns would be handled in accordance with state and federal law, provide general sales data instead of New York City specific data, and pay a smaller fee of \$50.00.

16. It is difficult to comprehend why the City could not consider such a reasonable provision in its final rules.

17. When we learned of the final rules, we began to assess how to mitigate the economically harmful effects of the program's requirements on our company. One possibility we explored was to "reject" any sales orders we receive from New York City. However, this could require us to amend our distributor agreements and is a time consuming effort that ultimately may not work. Moreover, we are extremely reluctant to reject any sales orders at anytime but particularly under current economic conditions when ITAC is suffering low sales volumes.

18. Even if such an approach could work, it would only delay the inevitable, as other states and municipalities around the country would likely follow New York City's example if its program is allowed to stand. ITAC cannot simply "reject" orders from everywhere and remain economically viable.

19. Furthermore, because the law is retroactive and reaches even those manufacturers that sold their products in New York City in the past, our proposal to "reject" New York City sales orders probably would not remove us from the law's requirements anyway since ITAC products that we sell in other jurisdictions could eventually be generated as waste in the City. The combination of the retroactivity of the Rules and the potential for goods sold anywhere in the world to end up in New York makes it impossible for ITAC to avoid crippling liability.

20. The law's retroactivity is particularly troubling. ITAC operates in a highly competitive market. When we sold products five, ten, or fifteen years ago, there was no expectation that we would be required to take back those products years later at our own

expense. The retroactive take back requirement effectively destroys any profit margin we might have enjoyed at the time and compromises our current economic situation.

21. Complying with New York City's program will be crippling. ITAC cannot afford to prepare the detailed E-waste management plan. ITAC cannot possibly afford to collect and provide all of the required information, such as identifying the specific means it will use, including third party contract details, to collect, manage, and recycle or reuse E-waste that will be due under the plan if no preliminary injunction is granted. Quite frankly, ITAC may never be able to do so. Even the \$1500.00 plan filing fee is far too excessive for a small company like ITAC. Further, if ITAC cannot submit a fully compliant E-waste plan, which given ITAC's limited resources is very likely, it will be subject to a fine of \$1000.00 for each day it is non-compliant.

22. The law's labeling, notification, product management requirements are of great concern to us as well. At a minimum, this would interfere with our current business practices and require us to revise our internal Returned Material Authorization procedures and maintain an additional inventory of containers to send to anyone who wishes to return a product to ITAC.

23. ITAC cannot afford the \$1250.00 filing fee that must accompany each annual report filed with the Department of Sanitation.

24. ITAC cannot afford to accept and manage competitor's equipment or orphan waste.

25. Finally, ITAC has no cost effective means of demonstrating how it can meet the City's collection performance standards because ITAC has no means of generating credible data on its New York City sales, and determining whether ITAC meets the standards based on national or global sales will be completely arbitrary and inaccurate. Yet, if ITAC cannot demonstrate compliance with these performance standards, the City's law would subject it to a \$50,000.00 penalty for each percentage point it falls below a standard.

26. Even if we could accurately determine our sales into New York City, the requirement to take back a specified percentage of those sales is, from any practical standpoint, not achievable. This is because, unlike some high volume consumer electronics products that may have a generally determinable or generally predictable group life span, ITAC's small volume, high quality and reliable products do not have any sort of determinable life span. Similarly, many of our products are highly adaptable, sometimes integrated into larger devices manufactured by other companies, but also compatible for use with desktop and laptop computers at home. Therefore, to base a take back requirement on a presumed product life span or speculation regarding where our products come to be located is, in ITAC's case, absolutely inaccurate and not achievable. ITAC should not be subject to potentially massive penalties based on requirements that it has no control over.

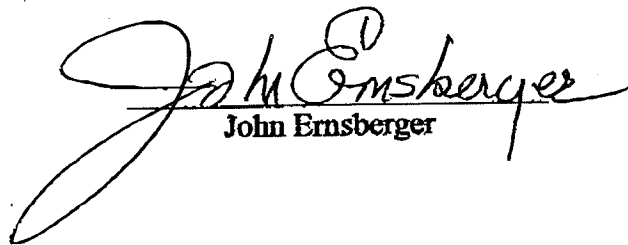
27. ITAC's very existence is threatened by New York City's excessively onerous law. It is difficult to fathom how a New York City law could be allowed to put

ITAC, a small company operating out of Texas, out of business simply because a minuscule amount of the company's products might reach the New York City market each year.

28. ITAC respectfully requests that the Court grant it and other manufacturers relief from New York City's E-waste program, and prohibit the City from enforcing the E-waste management plans submission requirement of the E-waste Rules.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of August 2009 at Cascade, Idaho.


John Ernsberger

ITAC Systems, Inc.

27 October 2007

Deputy Commissioner for Legal Affairs
New York City Department of Sanitation
125 Worth Street, Room 710
New York, New York 10013

RE: Written Comments to Proposed Chapter 17 to Title 16 Rules of the City of New York – Electronic Equipment Collection, Recycling and Reuse

Deputy Commissioner:

The following Written Comments are submitted.

Background

ITAC Systems, Inc., a Texas corporation in good standing, is a small manufacturer of high quality and reliability standard and custom trackballs and other input devices that it sells world wide primarily to Electronics Distributors, Original Equipment Manufacturers in the industrial and commercial process control systems market, to large end users who incorporate the devices into their manufacturing and enterprise systems and to military and governmental organizations. ITAC does not sell through retail stores but does sell a very small amount to companies and individuals online, primarily in the US and Canada.

ITAC has 7 employees, annual sales of approximately \$1.5M and ships approximately 10,000 to 12,000 units per year world wide. Products are manufactured in and shipped from ITACs sole location in Garland, Texas.

OEM and systems development customers of ITAC and its Distributors incorporate ITAC devices into large environmental, process control, military and commercial enterprise systems some quantity of which may be sold into New York City. During this manufacturing process, ITACs products may pass through several successive companies. Further, ITAC believes that the vast majority of these devices would be excluded from "Covered Equipment" as per Paragraph 17-01 Definitions which exclude from Covered Equipment, "Covered electronic equipment" shall not include --- equipment that is functionally or physically part of a larger piece of equipment intended for use in an industrial, research, and development or commercial setting -- "

ITAC believes that there may be a very small quantity of its products that could be classified as "Covered Equipment" as defined in Chapter 17 paragraph 17-01 but is believed to be very small and probably less than 1% of its 10,000 to 12,000 units per year shipped world wide.

Comments on the Proposed Title 16, Chapter 17 Rules of the City of New York

DEPT. OF SANITATION
COMMUNITY DEVELOPMENT AFFAIRS
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Electronic Equipment Collection, Recycling and Reuse

ITAC suggests, that an exemption should be granted for "Very Small Domestic Manufacturers", defined as a Domestic (U.S) manufacturer shipping less than \$5 million annually world wide, from the requirement to prepare a Plan as proposed by Paragraph 17-03 of the Proposed Rules.

Instead, the "Very Small Domestic Manufacturer would file a "Very Small Domestic Manufacturers" Plan addressing the items below:"

1. The "Very Small Domestic Manufacturer" will affix a label to all its product shipped containing information consistent with the definition of "Label" as defined by Paragraph 17-01 Definitions.
2. The "Very Small Domestic Manufacturer" would voluntarily accept returns of its own products, upon request by any resident of the City of New York, and in the manner prescribed by Paragraph 17-02(c) and Paragraph 17-02(h)(2)(i).
3. The "Very Small Domestic Manufacturer" would certify that its scrap and waste disposal program is in compliance with all U.S, and state and local recycling and disposal laws and regulations for the U.S. location(s) in which it has manufacturing facilities. It is simply not possible for a small company such as ITAC with its limited resources to be aware of and understand all collection, handling, recycle and reuse laws world wide and thus be able to certify compliance.
4. The "Very Small Domestic Manufacturer" would furnish its world wide shipment data for the past three years. ITAC has reviewed its sales and shipments for the past 3 years in an attempt to determine the quantity of its product that ITAC its Distributors and other customers may have shipped to New York City and has determined that it is not possible to certify to any reasonable degree of accuracy the quantity of "Covered Product" shipped to New York City. As stated above, any amount of "Covered Product" is believed to be very small.
5. The "Very Small Domestic Manufacturer" would enclose a \$50 fee with the above statement.
6. Annually, the "Very Small Domestic Manufacturer" would file a statement with the DSNY attesting to the compliance with its Plan.

ITAC believes, that for itself, and for similar electronics manufactures with very low sales of Covered Product into New York City, that the costs involved in complying with the proposed rules and obtaining the proposed certifications regarding compliance with all recycle and reuse laws world-wide could easily exceed the value of its sales into New York City and that the suggested "Very Small Domestic Manufacturer" exemption and Plan with its labeling, voluntary product return provision, certification of compliance with its local and U S recycle and reuse laws and sales data submission complies with the spirit and intent of the Law and its proposed Rules.

Respectfully submitted,



Donald P. Bynum
President, ITAC Systems, Inc.