"asynchronously" limitation. Based on these claim constructions, the ID finds that the Accused Products do not satisfy the "external clock" limitations of claims 6 and 13. ID at 245-259.

The ALJ summarized Dr. Oklobdzija's infringement testimony regarding the "external clock" limitations as follows: "'We have identified or established [the] independence [of the "first" and "second" clocks], basically, by coming from two independent PLLs or ring oscillators within those PLLs.'" *Id.* at 245 (citing Oklobdzija Tr., 702). The ALJ found "that is not sufficient proof that the frequency of either the external clock or oscillator does not affect the frequency of the other" as required by his construction of the claim limitation "independent." *Id.* The ALJ found that "[g]iven the lack of particulars and specificity in Dr. Oklobdzija's summary conclusions, Respondents' expert witness, Dr. Subramanian, responded accordingly by pointing out that the I/O interface signals that Complainants rely on are neither independent nor asynchronous, illustrating this by focusing on the two most common I/O interfaces – the USB and camera interfaces – as well as the LSI Logic B5503A chip." *Id.* at 249-50 (citing Subramanian Tr., 1351-67). In particular, the ALJ noted that:

> Dr. Subramanian testified that the clock signals for the USB interfaces in the accused [ ] are neither independent nor asynchronous. Furthermore, Dr. Subramanian went to the extent of reviewing source code to confirm some of the findings he testified about. (*id.* at 1357). Dr. Subramanian's testimony includes sufficient details showing not only that he examined relevant technical documents, as Dr. Oklobdzija testified he had, but also his reasoning for arriving at his non-infringement conclusions, which is lacking in Dr. Oklobdzija's infringement testimony.

Id. at 250. The ALJ specifically noted Dr. Subramanian's testimony with respect to the accused [ ] chips that all of the PLLs used to clock the internal oscillator and the

I/O interface "use the same [external] crystal reference signal." *Id.*

The ALJ also rejected Complainants' argument that Respondents improperly ignored "both the claim language and the adopted construction [of the 'independent' limitation, which] require[s] a comparison of the frequency of the external (second) clock to the frequency of the oscillator (first clock)" and how a change in the frequencies of those two clocks affect each other. *Id.* at 252-253. Specifically, the ALJ noted that Complainants' argument "raises the specter of Dr. Oklobdzija's and Complainants' own failure, since they did not provide evidence sufficient to demonstrate that a change in the frequency of the second (external) clock or the first clock does not affect the frequency of the other[.]" *Id.* at 253.

With respect to the "asynchronous" limitation of claim 13, Respondents argued that Complainants failed to address the requirement that the CPU clock not be "derived from the timing control of the [I/O] interface." *Id.* at 255. Respondents asserted that, in discussing the "asynchronous" limitation, Dr. Oklobdzija incorrectly "addresse[d] the phase relationship between the phase of the received external reference clock signal and the phase of the PLL's output signal[,] which is provided back to the [ ] by the PLL's feedback loop[.]" *Id.* (citing Oklobdzija Tr., 1026-27) (opining that the unpredictability of the phase relationship of the external reference signal and the output of the PLL's output signal is the entire reason the PLL is required in the first place). Respondents argued that the correct comparison is the "phase relationship[] between the CPU's timing interface and the I/O interface's timing interface].]" *Id.* (citing Markman Order No. 31 at 74). Complainants responded that "the chip documentation" clearly states that the clock relationships in the accused chips are "asynchronous." *Id.* at 257 (discussing the accused [ ] chips).

The ALJ agreed with Respondents' argument that Dr. Oklobdzija's testimony regarding "the phase relationship between the PLL and the external clock" was inapposite. *Id.* at 258. The ALJ also found that "[t]he fact that the technical documents that Complainants cite in their reply brief mention the word 'asynchronous' does not means that those documents are applying the term in the same way as expressed in the adopted construction" of that claim limitation. *Id.* Rather, the ALJ found, "Complainants [improperly] rely on a conclusory statement of Dr. Oklobdzija in which he read the word 'asynchronous' in the user manual for an accused [ ] and made the conclusory assertion that this is enough to meet the claim language." *Id.* (citing Oklobdzija Tr., 1061-62). The ALJ noted that Dr. Oklobdzija also failed to discuss how the use of the word "asynchronous" in the technical documents relates to "the other requirements in the construction of the 'asynchronous' limitations, including (1) timing controls, (2) independence, (3) no derivation, and (4) no readily predictable phase relationship." *Id.* at 259.

In their petition for review, Complainants limited their arguments concerning the "external clock" limitation to only "***external*** second clocks[,]" where the source of the external clock signal derives from peripheral devices that can be connected to the Accused Products using, for example, HDMI or USB cables. Respondents argued before the ALJ that Complainants may not rely on external USB connections for direct infringement because the Accused Products are not connected to USB peripherals as imported, relying on *Certain Elec. Devices with Image Processing Sys., Components Thereof, & Associated Software* ("*Image Processing Sys.*"), Inv. No. 337-TA-724, (U.S.I.T.C. Dec. 21, 2011). *Id.* at 236. Complainants countered that the Commission's holding in *Image Processing Systems* was limited to method claims and does not apply to apparatus claims like claims 6 and 13 of the '336 patent.[17] *Id.* (citing *Certain Video Game Systems & Wireless Controllers & Components Thereof*, Inv. No. 337-TA-770, 2012 WL [4480570], at *10 (U.S.I.T.C. Aug. 31, 2012)).[18] The ALJ did not address this issue because he found that other limitations of claims 6 and 13 are not satisfied by the Accused Products. *Id.*

b. Analysis

Complainants have not proven direct infringement with regard to the external clock limitation of claims 6 and 13 (*see* ID at 252-53 (discussing the "independent" limitation), 257-259 (discussing the "asynchronous" limitation of claim 13)), nor have Complainants proven infringement of the "entire oscillator" limitation, as discussed above. We, therefore, affirm the ID and further find that Complainants, in addition to not showing that the Accused Products practice the "external clock" limitation for the reasons discussed in the final ID, have also failed to prove that all of the required elements of the asserted claims were met. *See* 19 U.S.C. § 1337(a)(1)(B).

C. Indirect Infringement

"Whoever actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. § 271(b).[19] A patentee asserting a claim of inducement must show (i) that there has been

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[17] Although Complainants cite the ID as referring to claims 6 and 13 as apparatus claims, the ID, in fact, mistakenly refers to claims 6 and 13 as method claims. *See* ID at 253. We believe this error may have led to some confusion on the ALJ's part.

[18] The citation in the ID for this case is incorrect. We have made the necessary edits.

[19] The Federal Circuit recently addressed under what circumstances a section 337 violation may be based on induced infringement. *Suprema*, 2013 WL 6510929, at *5-12.

direct infringement and (ii) that the alleged infringer "knowingly induced infringement and possessed specific intent to encourage another's infringement." *Minnesota Mining & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1304-05 (Fed. Cir. 2002). With respect to the direct infringement requirement, the patentee "must either point to specific instances of direct infringement or show that the, accused device necessarily infringes the patent in suit." *ACCO Brands, Inc. v. ABA Locks Mfrs. Co., Ltd.*, 501 F.3d 1307, 1313 (Fed. Cir. 2007) (citation omitted). This requirement may be shown by circumstantial evidence. *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1326 (Fed. Cir. 2009). "[A] finding of infringement can rest on as little as one instance of the claimed method being performed during the pertinent time period." *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301 , 1317 (Fed. Cir. 2009).

The specific intent requirement for inducement necessitates a showing that the alleged infringer was aware of the patent, induced direct infringement, and that he knew or should have known that his actions would induce actual direct infringement. *DSU Medical Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1305 (Fed. Cir. 2006) (en banc in relevant part); *Global-Tech Appliances, Inc. v. SEB S A.*, 131 S. Ct. 2060, 2068-70 (2011) (holding that willful blindness may be sufficient to meet specific intent requirement). The intent to induce infringement may be proven with circumstantial or direct evidence and may be inferred from all the circumstances. *DSU*, 471 F.3d at 1306; *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 699 (Fed. Cir. 2008).

The ALJ found that there is insufficient evidence to support a finding of indirect infringement by Respondents because "there is not a preponderance of evidence showing that any of the Accused Products directly infringes any of the asserted claims of the '336 patent[.]" *Id.* at 280. In particular, the ALJ found no direct infringement because he concluded the

Accused Products do not satisfy the "entire oscillator," "varying," and "external clock" limitations of claims 6 and 13. *See* ID at 118-132, 189-213, 245-259. As discussed above, the ALJ correctly found that the Accused Products do not satisfy any of these limitations. It is undisputed that "[i]nduced infringement requires proof of direct infringement." ID at 276 (citing *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301, 1308 (Fed. Cir. 2012) (en banc)). The ALJ's conclusion on the law is, therefore, undoubtedly correct. We, therefore, affirm the ID's finding that Complainants failed to prove indirect infringement because they failed to prove direct infringement. ID at 80.

D. Domestic Industry

In order to establish a violation of Section 337 in a patent-based action, a complainant must demonstrate that a domestic industry either exists in the United States or is in the process of being established. *See* 19 U.S.C. § 1337(a)(2). Sections 337(a)(2) and (3) set forth the domestic industry requirement in its entirety:

> (2) Subparagraphs (B), (C), (D), and (E) of paragraph (1) apply only if an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.
>
> (3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned—
>
> (A) significant investment in plant and equipment;
>
> (B) significant employment of labor or capital; or
>
> (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. §§ 1337(a)(2) and (3).

"To be considered 'exploitation' though licensing within the meaning of the statute, the complainant must demonstrate that a particular activity: (1) relates to the asserted patent; (2) relates to licensing; and (3) occurred in the United States." *Certain Liquid Crystal Display Devices, Including Monitors, Televisions, and Modules, and Components Thereof*, Inv. No. 337-TA-741/749 ("*Liquid Crystal Display Devices*"), Comm'n Op. at 109 (June 14, 2012); *see also Certain Multimedia Display and Navigation Devices and Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-694, Commission. Op. at 7-8 (August 8, 2011) ("*Navigation Devices*"). Activities meeting these requirements may be considered in an evaluation of whether the domestic industry requirement has been satisfied. *Liquid Crystal Display Devices*, Comm'n Op. at 109. However, a complainant must also show that the qualifying investments are substantial. *Id.*

1. Economic Prong

a. Proceedings Before the ALJ

Complainants argued that they have a domestic industry under section 337(a)(3)(C) based on their "substantial domestic investments relating to the exploitation of the '336 patent through their [Moore Microprocessor Patent] MMP Portfolio licensing program." *Id.* at 296. Complainants relied on the activities of Alliacense, a California-based vendor of Complainants TPL and PDS, which carries out Complainants' licensing program. *Id.*

Concerning the amount of the Complainants' investment in licensing the MMP Portfolio, the ALJ took into account TPL's investment in Alliacense. *Id.* at 308-9. The ALJ noted that "Alliacense's employees are required to account for all of their activities and provide monthly reports allocating time based on project codes . . . [and] from these reports, the percentage of time that each employee spends on the MMP Portfolio can be calculated." *Id.* at 309 (citing Leckrone Tr., 1566-67, 1605; Hannah Tr., 1745). The ALJ also took into account "summary documents showing the percentages of each employee's time spent on projects within the MMP Portfolio." *Id.* at 309-10 (citing RX-1794C; RX-1795C; RX-1796C). The ALJ noted that "[b]ased on these summaries, TPL's [Chief Financial Officer] CFO, Mr. Hannah, calculated . . . the total burden costs for these employees based on the hours worked on the MMP Portfolio, salary, benefits, and taxes paid," and concluded that "Alliacense's labor costs related to licensing the MMP Portfolio totaled over [ ]." *Id.* at 310 (citing Hannah Tr., 1742-51; CX-705C; RX-1773C). The ALJ further noted that "Mr. Hannah testified that approximately [ ] was spent on product purchases related to the MMP licensing program" and that the monthly leasing and facility costs for the shared TPL and Alliacense facility are [ ], "allocated to all of TPL's patent portfolios." *Id.* (citing Hannah Tr., 1738, 1756-57; JX-253C). The ALJ also found that "[o]verall, Alliacense's MMP Portfolio licensing activities have resulted in executed licenses with approximately 100 companies resulting in approximately [ ] in revenue." *Id.* (citing Leckrone Tr., 1538-39; Hannah Tr., 1740-41; CX-708C). The ALJ also noted that "[a]dditionally, Complainants rely on TPL's alleged investment of [ ] in PDS. *Id.* at 311.

The ALJ found that Complainants "waived their right to rely on TPL's alleged investment in PDS because Complainants failed to raise [the issue] in their pre-hearing brief." *Id.* (citing Complainants' Pre-Hearing Brief at 216-19; Ground Rule 7.2). The ALJ also found that "Complainants have not shown that PDS does not engage in ineligible activities, such as patent prosecution, or that this investment does not relate to activities that Complainants are precluded from relying on this in this Investigation, *e.g.*, attorney fees." *Id.* (citing Tr. at 1630; *see also* Order Nos. 38, 61). The ALJ, therefore, "decline[d] to consider TPL's alleged investment of [ ] in PDS[.]" *Id.*

The ALJ, however, "reject[ed] Respondents' argument that Complainants cannot establish a domestic industry because TPL rescinded its ability to license the asserted patent before the Complaint was filed." *Id.* The ALJ found "it immaterial whether it was TPL or another Complainant that had the ability to license the asserted patent at the time the Complaint was filed[,]" and that "there is no dispute that PDS [has] had the right to license the asserted patent . . . throughout this Investigation." *Id.* at 311-12. The ALJ noted that his finding was not affected by Order Nos. 28 and 61, which forbid Complainants from relying on TPL's investments in PDS. *Id.* at 312. The ALJ also disagreed with Respondents regarding the reliability of the testimony of Complainants' witness, Mr. Leckrone. *Id.* The ALJ also disregarded Respondents' argument concerning the reimbursements PDS paid to TPL. *Id.* at 312-13. Specifically, the ALJ found that "[r]egardless of whether the relied upon investments were actually reimbursed, a point that Complainants dispute at least in part . . . there is no dispute that such domestic investments were ultimately paid by a Complainant in this Investigation." *Id.* at 313. With respect to the specific investments, the ALJ found that the [ ] per month investment in the facilities shared by TPL and Alliacense "should be given little weight" because "Complainants acknowledge that that amount should be allocated to each of TPL's patent portfolios . . . [and] neither attempt to determine how much of this investment should be allocated to the MMP Portfolio . . . [or] even argue that a significant or substantial portion should be allocated to the MMP Portfolio." *Id.*

Regarding a nexus between the licensing of the MMP Portfolio and the '336 patent, the ALJ noted the testimony of Alliacense's president, Mr. Leckrone, that there are "approximately 15 patents in the portfolio, including five patents of interest and that the '336 patent is the 'lead patent' in the portfolio." *Id.* at 308 (citing Leckrone Tr., 1534-35). Mr. Leckrone also testified that a claim chart for the '336 patent is always included in product reports presented to potential licensees. *Id.* (citing Leckrone Tr., 1558-59; CX-81C; RX-1762C; CX-22; CX-731C; CX-719C; RX-1759C; CX-1126C). The ALJ found that "based on the small number of patents in the MMP and the testimony and evidence provided," Complainants showed that their activities are "sufficiently related to the asserted patent that they may fully be relied upon in the domestic industry analysis, with the exception of Complainants' alleged facilities costs[.]" *Id.* at 314. The ALJ further found that "a substantial portion of the expenses relied upon by Complainants have the necessary relationship to licensing[,]" noting the testimony of Mr. Hannah that "all of the activities under the one project code" used by Alliacense employees "were considered to be licensing related." *Id.* at 315 (citing Hannah Tr., 1770-71). The ALJ also found that "a substantial majority of the alleged MMP licensing investment" occurred in the United States, though acknowledging that some of the expenses incurred by Alliacense employees involved foreign travel, and costs relating to three employees working overseas. *Id.* (citing Hannah Tr., 1783-95; RX-1784C).

The ALJ also found that Complainants' licensing investments are substantial. The ALJ stated that "[m]ost significantly . . . the amount invested in the MMP Portfolio as a whole (approximately [ ] including labor and product acquisition costs), the small number of patents in that portfolio, and the relative importance of the '336 patent in licensing negotiations, weighs heavily in favor of finding that Complainants' investments are substantial." *Id.* at 316 (citing *Liquid Crystal Display Devices*, Comm'n Op. at 123). The ALJ also stated that his finding is supported "[t]o a lesser extent . . . [by] the fact that Complainants engaged in ancillary activities after licenses were executed including monitoring licensees' compliance, M&A activities, and transfers of relevant business divisions (*see* Tr. at 1565-66); the fact that Complainants' licensing activities are ongoing (*see* Tr. at 1565-66, 1568,69); and the fact that Complainants' licensing efforts related to the MMP Portfolio have generated over [ ] in revenue (*see* CX-708C; Tr. at 1538-39)." *Id.* at 316-17 (citing *Liquid Crystal Display Devices*, Comm'n Op. at 123-24).

The ALJ weighed these findings against the fact that "Complainants made no attempt to determine the actual value of their investments in the asserted patent, instead relying on the alleged total investment in the MMP Portfolio." *Id.* at 317. The ALJ noted in particular that "[w]hile the Commission does not require an exact allocation of investments to the asserted patents . . . Complainants' failure to set forth any allocation somewhat undermines the weight of the evidence they did provide, particularly because . . . the investments relied upon include portions unrelated to the asserted patent, licensing, or the United States." *Id.* The ALJ also found that "Complainant' licensing activities are revenue-driven and target existing production[,]" as opposed to supporting the production of products covered by the patent. *Id.* Lastly, the ALJ noted that "Complainants do not invest in other activities to exploit the '336 patent[.]" *Id.* (citing *Liquid Crystal Display Devices*, Comm'n Op. at 124).[20]

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[20] The ALJ also rejected respondent Garmin's argument that TPL's investments should be rejected because they have a potential nexus only to the version of the '336 patent that was

Respondents argued in their petition for review that TPL's revenue-driven licensing activities, which seek licenses from entities that already produce and sell products that allegedly infringe the patents in the MMP Portfolio, are not the type of licensing program that Congress sought to protect when it amended section 337 to include license-based domestic industries. Respondents noted that the ALJ identified TPL's revenue-driven licensing model as a factor weighing against a finding of substantiality (ID at 317), but argue that, as a policy matter, the Commission should give this factor greater weight in the context of the substantiality analysis – particularly given the paucity of documentary evidence produced by TPL to support its claimed investments. Respondents further argued that Complainants' lack of direct investment in activities to exploit the '336 patent should also receive greater weight in the overall analysis. Respondents also asserted that Complainants' failure to allocate the actual value of their investments in the asserted patent, as opposed to relying on the alleged total investment in the MMP Portfolio, should strongly weigh against a finding of domestic industry.

Respondents also questioned the factors which the ALJ found weigh in favor of a conclusion that Complainants' investments in the MMP Portfolio are substantial. Specifically, Respondents argued that some of Complainants' license agreements include licenses to other patent portfolios, in addition to the MMP Portfolio, and that Complainants' failure to offer its licenses into evidence means that there is no record from which to determine the percentage of the approximately 100 licenses that also include other patent portfolios. Respondents also asserted that none of the ancillary activities the ALJ credited is the type of ancillary activity that

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surrendered during reexamination. *Id.* at 317-19. Respondents did not raise this argument in their contingent petition for review.

the Commission has held supports a finding of substantiality, noting that all of Complainants' ancillary, post-license activities are directed to obtaining additional revenue. *Id.* (citing Leckrone Tr., 1565:23-1566:22).

We note that Respondents do not challenge the ALJ's determination of whether each factor the ALJ weighed favored Complainants or Respondents. In particular, the ALJ specifically considered Complainants' failure to otherwise invest in exploiting the '336 patent as weighing against a finding of substantiality. ID at 317. Respondents failed to point to any particular Commission or Federal Circuit precedent which would require the Commission to afford even greater negative weight to these facts than the ALJ already applied.

Respondents also asked the Commission to give greater negative weight to Complainants' failure to allocate its investments in the asserted patent. However, we find that the "[ ]" investment the ALJ credits is exclusively directed toward the MMP Portfolio and that the '336 patent is the lead patent in this portfolio. *See* ID at 310; CX-705C, Hannah Tr., 1751-52 (testifying that the expenses listed in CX-705C are only for the MMP Portfolio); Leckrone, Tr. at 1534-35. Similarly, concerning Respondents' arguments that Complainants did not specify what portion of its expenses were accrued overseas, TPL's CFO, Mr. Hannah, testified that "for overseas patents, [licenses] are handled for the most part by outside counsel. . . we haven't included any outside counsel costs here." Hannah Tr., 1758:19-1759:25.

Respondents raised two additional issues in their contingent petition for review with respect to the economic prong that do, however, warrant further consideration. First, Respondents argued that complainant TPL cannot establish a licensed-based domestic industry because it "did not have the right to license the MMP Portfolio at the time the complaint was filed, or anytime thereafter[.]" Respondents noted that "Complainants' domestic industry assertions are properly limited only to TPL's licensing investments, and not those of [] [Patriot] or PDS[.]" In particular, Respondents noted that Order Nos. 28 and 61 preclude Complainants from relying on investments by Patriot or PDS, and argue that "the record is therefore limited to TPL's investment."

We agree with the ALJ that "it is immaterial whether it was TPL or another Complainant that had the ability to license the asserted patent at the time the Complaint was filed." ID at 311. The statute requires that "an industry in the United States, relating to the articles protected by the patent . . . concerned, exists or is in the process of being established" without reference to the necessity of segregating the investments specifically to each intellectual property right owner. 19 U.S.C. § 1337(a)(2). Only three weeks passed between the recission of TPL's right to license the '336 patent and the filing of the complaint, distinguishing this case from *Motiva, LLC. v. Int'l Trade Comm'n*, where the complainant had abandoned its industry three-and-a-half years prior to filing its section 337 complaint. 716 F.3d 596, 601, n.6 (Fed. Cir. 2013) (affirming the "Commission's use of the date of the filing of the complaint as the relevant date at which to determine if the domestic industry requirement . . . was satisfied")).

We acknowledge, however, that PDS's investments were not the basis of the ID's finding that the economic prong has been satisfied. The Commission, therefore, addresses whether the alleged industry still exists even though TPL is no longer actively involved in licensing the '336 patent. *See Certain Electronic Devices, Including Mobile Phones, Portable Music Players, and Computers*, Inv. No. 337-TA-701, Order No. 58, at 6 (Nov. 18, 2010) (unreviewed) (finding that the Commission should consider whether post-complaint activity indicates that an alleged industry is "dwindling.").

Second, Respondents argued that Complainants failed to demonstrate how their investments in litigation and in prosecution are related to licensing." TPL's CFO, Mr. Hannah testified that the project code TPL used to account for activities concerning the MMP Portfolio included "litigation, prosecution activities, reexamination activities, and other licensing activities." Hannah Tr., 1765:16-1766:18. The ALJ addressed TPL's possible investments in "litigation and prosecution" in the context of nexus. Specifically, he noted Mr. Hannah's testimony that "in his view, 'management decided to have [litigation and prosecution] categories when the activity was significant enough to include those categories[.]'" ID at 314-15 (citing Hannah Tr., 1783). The ALJ did not address, however, what Mr. Hannah meant by this. Furthermore, with respect to substantiality, the ALJ did not specifically address how Complainants' failure to account for the proportion of its asserted investments that concerned the problematic categories of "litigation and prosecution." The Commission determined to review this issue. In connection with its review, the Commission posed the following questions to the parties:

1. With respect to Complainants' alleged licensed-based domestic industry, is there a continuing revenue stream from the existing licenses and is the licensing program ongoing? If the licensing program is ongoing, which complainant(s) is/are investing in the program and what is the nature (not amounts) of those investments?

2. Please describe the claimed expenditures for patent prosecution and litigation and explain how they relate to Complainants' domestic industry in licensing the '336 patent. Please provide an estimate of the proportion of the total claimed investments in licensing the '336 patent accounted for by the claimed patent prosecution and litigation expenditures.

78 *Fed. Reg.* at 71645.

b. Analysis

i. On-Going Licensing Program

The question of whether Complainants had satisfied the economic prong of the domestic industry requirement through licensing at the time they filed the complaint is distinct from the question of whether the domestic industry licensing program has ceased to exist. We address the latter question raised by the respondents here.

Complainants argue that their licensing program is ongoing, noting that as of the date the Complaint was filed, there were roughly 100 licensees to the MMP patent portfolio, which includes the '336 patent and that they executed several licenses subsequent to the filing of the Complaint, including licenses to [ ]. *See* CX-708C; CX-1332C at 19; Leckrone Tr., 120:21-121:15. Complainants further note that revenue from these licenses have totaled over [ ]. Complainants admit, however, that most of the license agreements include a [ ], although they assert that certain licensees . . . [ ]. *See* CX-1332C at 5, 10, 14 ([ ]). Complainants further assert that they have an agreement with [ ] that provides for multiple payments continuing through [ ].

Respondents note that Complainants identify only three licensees that allegedly made [ ] in connection with their licenses, and that each of those licensees made a total of [ ] prior to the filing of the complaint. Respondents further note that Complainants failed to provide evidentiary support with respect to the alleged [ ] license, which was neither admitted nor introduced as evidence, and failed state how much is due from [ ], the number of expected payments, when those payments are due, or whether any allegedly future payment is contingent and thus may not actually be made. The IA likewise contends that the evidence does not show that there is a continuing revenue stream from Complainants existing licenses, asserting that the evidence shows that each licensee made a single lump-sum payment, with the exception of [ ]. *See* CX-708C; JX-177C; Leckrone Tr., 1538:14-25. The IA further notes, however, that Complainants do not receive any continuing revenue stream from [ ]. *See* CX-1124C at §§ 3.1 and 3.2.[21]

Complainants filed their complaint in this investigation on July 24, 2012. Complainants received payments from [ ]. CX-1332C at 19. There is no evidence concerning Complainants' licensing revenue beyond December 2012. The evidence shows that, at the time the complaint was filed, Complainants were not receiving revenue from licenses entered into before they filed the complaint. However, Complainants are clearly still involved in licensing the MMP Portfolio and have received payments for licenses entered into subsequent to the complaint being filed. This fact supports finding that Complainants domestic licensing industry was ongoing at the time of the complaint.[22]

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[21] From our review, the evidence shows that Complainants also received multiple payments from the three licensees Complainants mention – [ ]. CX-1332C at 5, 10, 14. We find no evidence that Complainants received multiple payments from [ ].

[22] Complainants offered to produce the [ ] license upon Commission request. However, the Commission declines to consider the alleged [ ] license. Complainants do not state when the license was executed, but considering that it was a proposed, yet ultimately rejected, exhibit (RX-1561C), we assume it existed prior to the evidentiary hearing. The Commission declines to second-guess the ALJ's rationale for excluding the exhibit or to give Complainants another

Complainants assert that they made significant investments in their licensing program prior to the initiation of the instant investigation, and continue to do so. Complainants rely primarily on the [ ] that TPL invested in labor costs for TPL and Alliacense personnel involved with the MMP licensing program and [ ] in product purchases made prior to the complaint being filed. *See* ID at 311, 316.[23] Complainants admit that these investments were made from June 2005 through May 2012. Without further support or explanation, Complainants have not shown this evidence of its investments prior to the complaint to be indicative as to the question raised by respondents of whether Complainants' licensing program is ongoing.

Complainants also assert that Alliacense currently provides its licensing services relating to the MMP Portfolio to PDS. *See* Leckrone Tr., 1568:25-1569:4, 1576:7-20, 1577:22-25. Complainants further contend that TPL still participates in the licensing program. *See id.* at 93:6-9, 144:16-145:1. Complainants do not, however, point to any evidence concerning PDS's payments to Alliacense subsequent to when the complaint was filed, not even in the July to December, 2012 time frame through which Complainants' licensing evidence extends.[24] Instead, Complainants note only their pre- and post-complaint expenditures related to the purchase of products for tear-down analysis. *Id.* (citing JX-253C).[25] While the IA asserts that Complainants' licensing program is ongoing, he merely points to conclusory statements by Complainant's

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opportunity to present the license as evidence.

[23] Complainants also mention expenses that the ALJ rejected. *See* ID at 311 (declining to consider "TPL's alleged investment of [ ] in PDS[.]").

[24] We note that CX-1332C shows various expenses for this time frame; however, Complainants do not rely on this evidence and do not explain how it should be interpreted.

[25] We calculate that Complainants, presumably PDS, spent [ ] on product purchases from July 25, 2012, through January 22, 2013.

witness, Mr. Leckrone, without specifying the amount of PDS's continuing investment.

The evidence does support the conclusion that Complainants' licensing program appears to be ongoing under PDS's control, with TPL's participation, although the record does not identify a way to definitively determine the amount of PDS's pre- or post-complaint investment. The Commission determines, however, that the filing of TPL's complaint in this matter is sufficiently contemporaneous with its activities with respect to the licensing of the '336 patent and that those activities should be examined for purposes of the economic prong domestic industry analysis.

Such action is supported by Commission precedent. Indeed, in *Certain Semiconductor Integrated Circuits and Products Containing the Same*, Inv. No. 337-TA-665, ID at 233 (Oct. 19, 2009) (unreviewed in relevant part) ("*Integrated Circuits*"), the ALJ found that a complainant satisfied the economic prong of the domestic industry requirement where it had "been less than one year since [the complainant's] activities [had] diminished" and "prior to entering bankruptcy, [the complainant's] activities in the United States clearly met the standard required to establish the economic prong[.]"[26] In particular, the presiding ALJ in *Integrated Circuits* noted several cases where the Commission found the economic prong satisfied based on "both the complainant's past investment and current domestic activities when the complainant has stopped manufacturing the patented product." *Id.* at 232 (citing *Certain Variable Speed Wind Turbines and Components Thereof,* Inv. No. 337-TA-376, USITC Pub. No. 3003, Comm'n Op. at 25-26 (Nov. 1996); *Certain Battery-Powered Ride-On Toy Vehicles and Components Thereof,*

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[26] It is unclear whether TPL lost its rights to license the '336 patent as the result of its Chapter 11 bankruptcy filing. *See* Comp. Review Br. at 34; Leckrone Tr., 140:3-141:17.

Inv. No. 337-TA-314, Order No. 6 at 19-20 (Dec. 5, 1990) (unreviewed); *Certain Video Graphics Display Controllers and Prods. Containing the Same,* Inv. No. 337-TA-412, USITC Pub. 3224, ID at 13 (Aug. 1999) (unreviewed in relevant part)). Although this investigation involves licensing rather than manufacturing, we believe considering TPL's prior licensing investments and Complainants' post-complaint licensing activities is analogous. We, therefore, only need be concerned with the amount TPL invested prior to the complaint filing and which the ALJ found sufficiently tied to Complainants' licensing program. ID at 316.

For purposes of determining whether the economic prong of the domestic industry requirement is met, the ALJ properly limited Complainants to TPL's pre-complaint expenditures through his evidentiary findings. Specifically, in Orders 28 and 61, the ALJ rejected Complainants' belated attempt to rely on the investments of either PDS or Patriot, instead limiting Complainants to TPL's investments. *See* Order No. 28 at 3-4; Order No. 61 at 4-5. We note that PDS, not TPL, is responsible for all post-complaint investment. By considering the transfer of licensing activity from TPL to PDS as an unbroken chain of events concerning the MMP licensing program, we also rely only on TPL's pre-complaint expenditures and avoid and have not considered evidence concerning PDS's post-complaint investments in connection with that activity. *See Motiva*, 716 F.3d at 601, n.6 (affirming the "Commission's use of the date of the filing of the complaint as the relevant date at which to determine if the domestic industry requirement . . . was satisfied").

Based on the precedent discussed above, we find that the evidence concerning Complainants' licensing activity that occurred following the complaint supports finding that Complainants' licensing activities are ongoing, even though the investment in that activity was made by a different complainant than TPL. The appropriate investments to be examined for the economic prong analysis are the pre-complaint investments of TPL.

ii. Propriety and Significance of Complainants' Investments

Complainants assert that their [ ] in licensing-related expenses do not include significant costs related to patent prosecution or litigation. Specifically, Complainants note the testimony of TPL's CFO, Mr. Hannah, that the expenses listed in CX-705C do not include litigation and lawyers' costs. *See* Hannah Tr., 1759:23-25 (discussing costs for outside counsel).[27] Mr. Hannah further testified that the expenses submitted into evidence relate to licensing and that the term "litigation" in those documents "was broadly defined[.]" *See id.* at 1749:1-12 ("It's licensing, but there may be some involvement as a result [of] questions answered or dealt with as a result of litigation."). Complainants assert that none of the TPL or Alliacense employees acted as legal counsel in patent litigation on behalf of TPL or Alliacense. *See id.* at 1816:8-1817:13.

Complainants note in particular that, starting in 2008, true litigation-related expenses were specifically broken out in a separate product code [ ]. *Id.* at 1765:21-1766:14. Prior to that time, however, TPL and Alliacense employees recorded their times in a single project code [ ], which included everything involved in the process of licensing, *e.g.* expenditures for litigation and reexam proceeding. *See* Leckrone Tr., 1548:3-1550:23, 1552:7-1553:13 (testifying that "as part of the licensing process, Alliacense routinely reverse-engineered products organized the data into claim charts, and presented the information to potential licensees along with data

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[27] Mr. Hannah testified that CX-705C's header entitled "Monthly Litigation Hours By Employee" is merely a mislabel. Hannah Tr.,1753:8-13, 177:19-1800:9.

compiled by the IP R&D group and other Alliacense employees"). Complainants argue that, prior to 2008, litigation expenses were not significant enough to warrant a separate category. *See* Hannah Tr., 1783:2-6. Complainants assert that Respondents failed to present any evidence that Complainants' patent prosecution or litigation-related expenses included under project code [ ] prior to 2008 were anything but *de minimis*. Rather, Complainants contend that Respondents, at most, established that Complainants' pre-2008 expenses relating to litigation or patent prosecution was uncertain. *See* Hannah Tr., 1770:12-1773:11. Complainants further note that even with respect to the few potential licensees with which TPL was in litigation, Complainants typically produced product reports well in advance of any litigation, and licensing discussions began prior to litigation and continued after litigation commenced. *See* Hannah Tr. 1776:10-13, 1787:13-1788:7.

Respondents argue that Complainants provided no evidence with which the Commission can determine which of TPL's employee expenses related to licensing as opposed to irrelevant litigation, patent prosecution, and patent re-examination activities for the first three years of expenses relied upon by TPL. Respondents allege that even after TPL ostensibly started to implement sub-codes for litigation and prosecution/re-examination costs at the end of 2008, expenses related to patent prosecution and litigation nevertheless infect the overall total claimed. *See* JX-354 (claiming expenses from 2006 to June 2012)). Respondents call out, in particular, Mr. Hannah's testimony regarding the [ ] TPL spent on personnel conducting IP research and development and IP legal work, arguing that these individuals were largely involved in ineligible patent prosecution and patent work unrelated to licensing. *See* Hannah Tr., 1771:24-1774:1. Respondents further note the [ ] TPL spent on business analysts, some of whom Respondents claim were communicating with companies involved in litigation with TPL (*id.* at 1774:10-1775:7), the [ ] expenditure for reverse-engineering specialists, who Respondents allege may have been partially involved in litigation-related activities (*id.* at 1781:17-1782:9), and the [ ] cost for operations analysts, who Respondents assert may have been involved in making claim charts for products for purposes of litigation (*id.* at 1782:10-1783:11). Respondents argue that there is no way to determine what portion of the licensing executives' employee costs related to license negotiations with companies with which TPL was in litigation. *Id.* at 1787:23-1788:14). Respondents also challenged Complainants' [ ] in expenditures relating to the acquisition of products for tear down, asserting that some of those acquired products were purchased in anticipation of litigation against various Respondents in connection with the present investigation. *Id.* at 1775:20-1776:1, 1776:24-1778:18.

The IA argues that Complainants' expenditures are significant and that any prosecution and litigation expenditures represent a relatively small portion of Complainants' total claimed investment. In particular, the IA notes that Complainants' [ ] investment in employee expenditures does not include fees paid to outside litigation counsel. *See* Leckrone Tr., 132:5-16. The IA also notes Mr. Hannah's testimony that litigation and patent prosecution expenses were not separately tracked prior to late-2008 because management did not consider those expenses sufficiently significant before that time. *See* Hannah Tr., 1783:4-6. The IA also relied on Mr. Hannah's testimony that the activities of the IP R&D /IP Legal group include preparing claim charts and product reports for potential licensees, and answering questions about non-infringement and prior art related to those claim charts and product reports. *Id.* at Hannah Tr., 1816:25-1817:13. Lastly, the IA notes that, in 2006 and 2007, Complainants were involved in litigation with only five companies, in comparison with the over [ ] Complainants have contacted and the over 100 license agreements Complainants have entered into.

The Commission's primary consideration is whether the there is sufficient evidence in the record that TPL's [ ] investment ([ ] in employee expenditures for TPL and Alliacense and [ ] for product acquisitions, *see* ID at 311, 316) that the ALJ credited as applying to Complainants' licensed-based domestic industry does not include irrelevant expenditures. In *John Mezzalingua Associates, Inc. v. International Trade Commission*, the Federal Circuit held that litigation expenses do not automatically constitute evidence of the existence of a domestic industry. 660 F.3d 1322, 1328 (Fed. Cir. 2011) ("We agree with the Commission that expenditures on patent litigation do not automatically constitute evidence of the existence of an industry in the United States established by substantial investment in the exploitation of a patent. "). In *Coaxial Cable Connectors Components Thereof and Products Containing Same*, Inv. No. 337-TA-650, Comm'n Op. at 50-51 (Apr. 14, 2010), the Commission further held that litigation costs may be considered in determining whether a domestic industry exists, but only if they are directly related to licensing. Furthermore, the Commission has never considered expenditures relating to patent prosecution to be relevant to a licensing-based domestic industry.

We cannot dismiss Respondents' concerns regarding Complainants' failure to support is contention that its claimed investments that are attributable to ineligible patent prosecution and litigation activity are *de minimis*. Complainants presented insufficient evidence that the lack of breakout was because TPL's management did not consider its litigation expenses to be sufficiently significant to warrant accounting for them separately. Complainants offer no indication of what TPL's management considered to be "significant" litigation expenses that suddenly required separate tracking beginning at the end of 2008. Exhibit RX-1795C shows the expense breakout by project code. The product code [ ], which TPL allegedly used to breakout "true litigation-related expenses," first shows an entry on January 31, 2009, where two employees recorded that they reportedly spent [ ]. *See* RX-1795C at 31. The percentages in this project category range from [ ] (RX-1795C at 36) to [ ] (RX-1795C at 39). From this, we might conclude that TPL's management didn't consider anything under [ ] of litigation-related time to be worth identifying, and such a decision may be reasonable. However, the complaint states that TPL initiated litigation with various companies in the 2005 to mid-2008 time frame. *See* Compl. at ¶¶ 149, 151, 152, 153. Complainants fail to offer any explanation as to why TPL's expenses with respect to these litigations were considered *de minimis* in comparison to later matters.

The evidence supports considering the entire time period of 2006-2012 encompassed by Complainants' exhibits, but excluding the [ ] the ALJ attributed to Complainants' "IP Legal and IP R&D" expenditures. ID at 310. Of all the categories the ALJ considered, this is the most troublesome. Mr. Hannah testified that the IP R&D and IP Legal team evaluates the patents in the MMP portfolio and analyzes the disclosed technology, as well as "continually work[ing] toward strengthening the portfolio by filing additional patent applications." JX-354C, ¶ 13. We find that Mr. Hannah's description of this activity comes uncomfortably close to the improper territory of patent prosecution, rather than licensing.

By contrast, all of the other categories of work Mr. Hannah discusses are arguably genuinely related to licensing activity. *Id.*, ¶¶ 14-22. We note in particular Respondents' argument that the Commission cannot determine what portion of TPL's licensing executives' employee costs related to license negotiations with companies with which TPL was in litigation. As the Federal Circuit held in *Mezzalingua*, "expenses associated with ordinary patent litigation should not automatically be considered a 'substantial investment in ... licensing,' even if the lawsuit happens to culminate in a license." 660 F.3d at 1328. Unlike the facts in *Mezzalingua*, however, there is no indication that Complainants merely received a license as the result of litigation and otherwise has no licensing program. *Id.* at 1329. To the contrary, there is no question that Complainants have a robust licensing program. Moreover, as Mr. Hannah testified, TPL's licensing executives engaged in negotiations prior to, as well as on the point of, litigation. Hannah Tr., 1787:23-1788:14. The Commission, therefore, rejects Respondents' argument that TPL's licensing executive employee costs should not be considered.

Excluding Complainants' expenditures for IP Legal and IP R&D, Complainants are left with an investment of [ ] in employee costs and [ ] in product acquisition expenses, for a total investment of [ ] from 2006 through 2012. While we note that the pre-2008 expenditures were not tracked using the litigation project code, given Mr. Hannah's description of the remaining employee categories, we find that this analysis sufficiently excludes any improper non-licensing activity.

In finding that TPL's [ ] investment was substantial, the ALJ gave particular weight to certain facts beyond the monetary amount, including "the small number of patents in [the MMP Portfolio] and the relative importance of the '336 patent in licensing negotiations[.]" ID at 316 (citing *Liquid Crystal Display Devices* at 122). The ALJ also found that

Complainants' "investments are substantial in relation to certain industries in light of the large number of executed licenses covering a large percentage of the market (*e.g.*, the mobile phone market (*see* Tr. at 1860-1861) and the number of companies that Complainants have engaged in licensing negotiations." *Id.* (citing *Liquid Crystal Display Devices* at 123). For the first scenario, taking a look at a smaller window of time – 2009 through 2012 instead of 2006 through 2012 – doesn't change the fact that, during that time, TPL's investment was largely focused on the MMP Portfolio and Complainants had a large number of executed licenses during that time period. *See* CX-708C (indicating 41 executed licenses between February, 2009 and June, 2012). Similarly, for the second scenario, excluding all potential expenses related to patent prosecution only bolsters the already strong nexus between TPL's expenditures and the MMP Portfolio. Nor does a more limited view of TPL's investment change the fact that Complainants' licensing program was clearly ongoing through three weeks before the complaint was filed and, as discussed above, was ongoing at the time the complaint was filed through the present.

Based on the preceding discussion, we affirm the ALJ's finding that Complainants have satisfied the economic prong of the domestic industry requirement. Specifically, we find that Complainants' licensing program was ongoing at the time the complaint was filed and that TPL's investment of either $5.5 million from 2009 through 2012 or of [ ] from 2006 through 2012 was substantial.

2. Technical Prong

In his summary of the law concerning the domestic industry requirement, the ALJ stated that "where a complainant is relying on licensing activities, the domestic industry determination does not require a separate technical prong analysis and the complainant need not show that it or one of its licensees practices the patents-in-suit." ID at 296 (citing *Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same*, Inv. No. 337-TA-605, Initial Determination at 112 (February 9, 2009) (unreviewed in relevant part)). The Commission determined to review and requested that the parties brief the issue in light the statutory language, legislative history, the Commission's prior decisions, and relevant court decisions, including *InterDigital Communications, LLC v. ITC*, 690 F.3d 1318 (Fed. Cir. 2012), 707 F.3d 1295 (Fed. Cir. 2013) and *Microsoft Corp. v. ITC*, 731 F.3d 1354 (Fed. Cir. 2013). 78 *Fed. Reg.* at 71645.

Subsequent to the issuance of the Notice of Review in this case, the Commission issued its decision in *Computer Peripheral Devices*, Inv. No. 337-TA-841, definitively holding that there is a technical prong requirement with respect to "articles protected by the patent" for a domestic industry asserted under section 337(a)(3)(C). Comm'n Op. at 24-40, 44 (Dec. 20, 2013).

After issuance of the ID in this case, the Commission noted that, under its prior precedent, a complainant was not historically required "to demonstrate for purposes of a licensing-based domestic industry the existence of protected articles practicing the asserted patents." Comm'n Op. at 27-28. However, the Commission decided in *Computer Peripheral Devices* that a complainant must show that there are "articles protected by the patent" when asserting a licensed-based domestic industry under section 337(a)(3)(C). Due to the posture of this case, the Commission takes no position on whether the requirement is met here in light of its findings of non-infringement. *See Beloit Corp. v. Valmet Oy, TVW*, 742 F.2d 1421 (Fed. Cir. 1984).

IV. CONCLUSION

For the reasons discussed above, the Commission finds no violation of section 337 with respect to the '336 patent.

By order of the Commission.

Lisa R. Barton
Acting Secretary to the Commission

Issued: March 21, 2014

CONFIDENTIAL CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **OPINION** has been served by hand upon, the Commission Investigative Attorney, Whitney Winston, Esq., and the following parties as indicated on **March 21, 2014.**

Lisa R. Barton, Acting Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants Technology Properties Limited LLC and Phoenix Digital Solutions LLC:

James C. Otteson, Esq.	( ) Via Hand Delivery
AGILITY IP LAW, LLP	(x) Via Express Delivery
149 Commonwealth Drive	( ) Via First Class Mail
Menlo Park, CA 94025	( ) Other:____________

On Behalf of Complainant Patriot Scientific Corporation:

Charles T. Hoge	( ) Via Hand Delivery
KIRBY NOONAN LANCE & HOGE LLP	(x) Via Express Delivery
350 Tenth Avenue, Suite 1300	( ) Via First Class Mail
San Diego, CA 92101	( ) Other:____________

On Behalf of Respondents Acer Inc., Acer America Corporation, Amazon.com Inc. and Novatel, Inc.:

Eric C. Rusnak, Esq.	( ) Via Hand Delivery
K&L GATES LLP	(x) Via Express Delivery
1601 K Street, NW	( ) Via First Class Mail
Washington, DC 20006-1600	( ) Other:____________

On Behalf of Respondents Garmin Ltd., Garmin International, Inc. and Garmin USA, Inc.:

Louis S. Mastriani, Esq.	( ) Via Hand Delivery
ADDUCI, MASTRIANI & SCHAUMBERG LLP	(x) Via Express Delivery
1133 Connecticut Avenue, NW, 12th Floor	( ) Via First Class Mail
Washington, DC 20036	( ) Other:____________

On Behalf of Respondent Barnes & Noble, Inc.:

Paul F. Brinkman, Esq. **Quinn Emanuel Urquhart & Sullivan, LLP** 777 6th Street, N.W., 11th Floor Washington, D.C. 20001	( ) Via Hand Delivery (x) Via Express Delivery ( ) Via First Class Mail ( ) Other:_____________

On Behalf of Respondent Huawei Technologies Co., Ltd., Huawei Device Co., Ltd., Huawei Device USA Inc., and Futurewei Technologies, Inc.:

Timothy C. Bickham, Esq. **STEPTOE & JOHNSON LLP** 1330 Connecticut Avenue, NW Washington, DC 20036	( ) Via Hand Delivery (x) Via Express Delivery ( ) Via First Class Mail ( ) Other:_____________

On Behalf of Respondents ZTE Corporation and ZTE (USA) Inc.:

Jay H. Reiziss, Esq. **BRINKS GILSON & LIONE** 1775 Pennsylvania Avenue, NW Suite 900 Washington, DC 20006	( ) Via Hand Delivery (x) Via Express Delivery ( ) Via First Class Mail ( ) Other:_____________

On Behalf of Respondents LG Electronics, Inc. and LG Electronics U.S.A., Inc.:

Scott A. Elengold, Esq. **FISH & RICHARDSON PC** 1425 K Street, NW, Suite 1100 Washington, DC 20005	( ) Via Hand Delivery (x) Via Express Delivery ( ) Via First Class Mail ( ) Other:_____________

On Behalf of Respondents Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.:

Aaron Wainscoat, Esq. **DLA PIPER LLP (US)** 2000 University Avenue East Palo Alto, CA 94303	( ) Via Hand Delivery (x) Via Express Delivery ( ) Via First Class Mail ( ) Other:_____________

On Behalf of Respondents Nintendo Co., Ltd., Nintendo of America, Inc., HTC Corporation and HTC America:

Stephen R. Smith, Esq.	( ) Via Hand Delivery
COOLEY LLP	(x) Via Express Delivery
11951 Freedom Drive	( ) Via First Class Mail
Reston, VA 20190	( ) Other:_____________