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December 23, 2013

Lisa R. Barton
Acting Secretary
United States International Trade Commission
500 E Street, S.W.
Washington, DC 20436

Re: ***Certain Wireless Consumer Electronics Devices and Components Thereof,*** **Inv. No. 337-TA-853**

Dear Secretary Barton:

Enclosed please find **Complainants' Opening Brief on Commission Review of Initial Determination (Public Version)** e-filed today in the above-referenced investigation.

Respectfully submitted,

James C. Otteson

Enclosures

[redacted]

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of Certain WIRELESS CONSUMER ELECTRONICS DEVICES AND COMPONENTS THEREOF	**Investigation No. 337-TA-853**

COMPLAINANTS' OPENING BRIEF ON COMMISSION REVIEW OF INITIAL DETERMINATION

[redacted]

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Table of Authorities

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Table of Abbreviations

’336 patent	U.S. Patent No. 5,809,336, admitted as JXM-1
Accused Products	Products listed in Table 1 in Section I.B
Complainants	Technology Properties Limited LLC, Phoenix Digital Solutions LLC and Patriot Scientific Corporation
HT	Hearing Transcript for the evidentiary hearing held in this Investigation from June 3, 2013 through June 11, 2013
Notice	Notice of Commission Determination to Review in Part a Final Initial Determination Finding No Violation of Section 337; Extension of Target Date, filed November 25, 2013
Patriot	Complainant Patriot Scientific Corporation
PDS	Complainant Phoenix Digital Solutions
Respondents	The Respondents remaining in this Investigation, including: Barnes & Noble, Inc., Garmin Ltd., Garmin International, Inc., Garmin USA, Inc., HTC Corporation, HTC America, Huawei Technologies Co., Ltd., , Huawei Device Co., Ltd., Huawei Device USA Inc., Futurewei Technologies, Inc. d/b/a Huawei Technologies (USA), LG Electronics, Inc., LG Electronics U.S.A., Inc., Nintendo Co., Ltd., Nintendo of America, Inc., Novatel Wireless, Inc., Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., ZTE Corporation, and ZTE (USA) Inc.
TPL	Complainant Technology Properties Limited
C.Pre.Br.	Complainants’ Pre-Hearing Brief (EDIS Doc. ID 508779)
R.Br.	Respondents’ Post-Hearing Brief (EDIS Doc. ID 512325)
SAC	Second Amended Complaint of Technology Properties Limited LLC Under Section 337 of the Tariff Act of 1930, As Amended

All emphasis in this brief is added, unless otherwise noted.
Emphasis is added to some figures using yellow highlighting and colored shapes.

[redacted]

Introduction

Complainants respectfully ask the Commission to find a violation of Section 337 by all Respondents, and to enter appropriate remedial orders. All of the Accused Products include a [redacted] that satisfies the "entire oscillator" limitation. Indeed, Respondents' own technical documents demonstrate that the [redacted] in all of the relevant chips oscillate and generate a clock signal as long as they have power, a fact Respondents' expert repeatedly admitted. Moreover, Respondents' argument that the current supplied to their [redacted] is a "control signal" is specious: claims 6 and 13 explicitly state that "clock speed" and "processing frequency" of the CPU "vary . . . in the same way" based on changes in "operational parameters" – of which current is a prime example. Whether or not the Commission adopts the ALJ's (incorrect) construction of "entire oscillator," it is impossible for the patentees to have disclaimed the use of current as a "control signal" – especially when the claims specifically recite "varying" based on "operational parameters" like current.

Regarding Complainants' domestic industry, the evidence shows that Complainants' licensing program is substantial and ongoing, with more than 100 licenses generating over $[redacted] at the time of the Complaint, and more after that. Complainants spent over $[redacted] in their joint efforts to license the MMP portfolio. Not counting (separately tracked) legal fees for patent litigation to enforce the MMP patents, the total investment is still around [redacted], $[redacted] of which was paid by TPL and PDS to employees of TPL and Alliacense for work on the MMP licensing program. Complainants' investment in the licensing program is ongoing, as Alliacense is under contract to now provide continuing licensing services to PDS.

Last week the Commission announced that a licensing-based domestic industry will now require a showing of the existence of an article protected by the patent. Neither *InterDigital* nor *Microsoft* compelled this change, and Complainants urge the Commission to return to the former, correct standard. Indeed, rather than overruling Commission precedent, the Federal Circuit's

[redacted]

InterDigital and *Microsoft*[1] decisions each ***affirmed*** the Commission's long-standing tests for a licensing-based domestic industry – which has not (and should not) require a "technical prong" analysis. Under decades-old Commission and Federal Circuit precedent, a licensing-based domestic industry requires showing: (1) investments relating to the exploitation of the asserted patent, (2) that relate licensing, (3) are domestic, and (4) are substantial.

In *InterDigital*, the Federal Circuit expressly found that a domestic industry existed with respect to "articles protected by the patent," "because the patents in suit protect the technology that is, according to [Complainant's] theory of the case, found in the products it has licensed and that it is attempting to exclude." The Federal Circuit did not require "technical prong" analysis to reach this conclusion, and found that InterDigital had proven a licensing-based domestic industry without analyzing products of InterDigital or its licensees. Thus, *InterDigital* did ***not*** hold that establishing a licensing-based domestic industry under 19 U.S.C. § 1337(a)(3)(C) required proof of "articles protected by the patent" (*i.e.*, a technical prong).

In this Investigation, Complainants proffered evidence based on the Commission's then existing evidentiary standard for determining the existence of a licensing-based domestic industry. Thus, Complainants only briefly noted that the patent-in-suit protects the technology found in some products of Complainants' licensees. The ALJ correctly applied that same standard to determine that Complainants had established a domestic industry in this case. If the Commission maintains its new standard (which Complainants urge the Commission to reject), Complainants respectfully ask the Commission to reopen the record and remand the case to the ALJ to allow for discovery and an evidentiary determination regarding technical prong.

Should the Commission find a violation, Complainants respectfully request that the Commission follow the ALJ's recommendation and issue a limited exclusion order against all remaining Respondents. Complainants also ask for cease and desist orders directed to the

[1] The *Microsoft* decision did not implicate the Commission's standard for determining the existence of a licensing-based domestic industry, and is inapposite.

[redacted]

domestic Barnes and Noble, Garmin, HTC, Huawei, and Samsung respondents due to their commercially significant inventories. Due to the wide variety of products, pricing variations, and distribution methods, a 100% bond during the Presidential review period is appropriate.

Finally, Respondents—who bear the burden of proving public interest—have failed to provide any relevant evidence of the existence of such exceptional circumstances that would warrant denying injunctive relief.

Argument

I. ALL RELEVANT CHIPS IN THE ACCUSED PRODUCTS SATISFY THE "ENTIRE OSCILLATOR" LIMITATION OF CLAIMS 6 AND 13.

A. The Commission Should Adopt the Claim Construction of "Entire Oscillator" Proposed by Complainants in Their Petition for Review.

For the reasons set forth in their Petition for Review (filed September 23, 2013), Complainants respectfully submit that the Commission should: (a) reject the ALJ's claim construction for "entire oscillator" in claims 6 and 13; and (b) adopt Complainants' proposed construction set forth in their Petition. As discussed below, all of the relevant chips in the Accused Products infringe under either construction.

B. All of the Relevant Microprocessor Chips in the Accused Products Use [redacted] and [redacted] of Claims 6 and 13.

The Commission has asked the parties to "specifically identify which accused chips are implicated" with respect to "current-starved technology." Notice, p. 4 (Question 1). The answer is that [redacted]

But "current starving" does not support any noninfringement argument by Respondents.

After TI's witness, Dr. Haroun testified about [redacted]," Complainants' expert, Dr. Oklobdzija, clarified [redacted]:

[redacted]

HT 383:17-384:7; *cf.* HT 1386:11-19 (Subramanian). This is how all of the [redacted] in the Accused Products work: [redacted], just as a light changes its brightness when a dimmer switch changes the power supplied to the light. Dr. Oklobdzija explained this concept as he drew a [redacted] and its components. HT 371:23-372:14, *et seq.*; CDX-82. In describing the operation of [redacted], he explained that "[redacted]" HT 386:15-19; HT 385:17-386:5 ("[redacted]").

Thus, it is no surprise that all of the chips in the Accused Products use [redacted] Table 1 below lists the relevant chips that use [redacted] organized by Respondent, as well as evidence that links each of the relevant chips to the listed products. All of this evidence was presented in Complainants' post-trial briefing.[2, 3]

[2] Table 1 does not include products from Acer, Amazon, or Kyocera (all of whom have settled). Nor does it include products from Nintendo; Nintendo was only accused of infringing claims 1 and 11, which are not part of the Commission's review.

[3] Table 1 does not include the Accused Products listed on page 88 of the ID, because the Commission has indicated that it will not review the ID's findings for those products.

[redacted]

Table 1 – Relevant Chips that Use [redacted]		
CHIP	**PRODUCTS**	**EVIDENCE**
Qualcomm Chips (incorporated in 52 products)		
MSM8960 (15 products)	[redacted]	HT 1132:23-1133:7; RX-1026C; RDX-4.19C; CX-402C; CX-409C; CX-395C; CX-399C
	[redacted]	HT 1135:22-1136:2; RX-1032C; RDX-4.25C
MSM8655 (11 products)	[redacted]	HT 1132:23-1133:7; RX-1026C; RDX-4.19C; CX-400C
	[redacted]	HT 1133:24-1134:4; RX-1027C; RDX-4.21C
	[redacted]	HT 1135:7-16; RX-1029C; RDX-4.23C; CX-521C; CX-591C; RX-598C
	[redacted]	HT 1136:3-15; RX-1033C; RDX-4-26C
MSM7627 (8 products)	[redacted]	HT 1133:24-1134:4; RX-1027C; RDX-4.21C
	[redacted]	HT 1136:20-1137:1; RX-1031C; RDX-4.28C; CX-577C
	[redacted]	HT 1136:3-15; RX-1033C; RDX-4-26C
APQ8060 (5 products)	[redacted]	HT 1135:22-1136:2; RX-1032C; RDX-4.25C

[4] [redacted] *See* CX-409C at HTCTPL_100414634.

[redacted]

CHIP	PRODUCTS	EVIDENCE
MSM8660 (4 products)	[redacted]	HT 1132:23-1133:7; RX-1026C; RDX-4.19C; CX-401C
	[redacted]	HT 1135:7-16; RX-1029C; RDX-4.23C; CX-513C; CX-522C; CX-525C
MSM8255 (4 products)	[redacted]	HT 1132:23-1133:7; RX-1026C; RDX-4.19C; CX-396C
	[redacted]	HT 1133:24-1134:4; RX-1027C; RDX-4.21C
QSC6055 (3 products)	[redacted]	HT 1133:24-1134:4; RX-1027C; RDX-4.21C
MSM8260 (2 products)	[redacted]	HT 1132:23-1133:7; RX-1026C; RDX-4.19C; CX-397C; CX-398C
Texas Instruments (TI) Chips (incorporated in 21 products)		
OMAP 3530 (12 products)	[redacted]	HT 1137:25-1138:9; RX-1025C; RDX-4.32C; CX-359C; CX-361C; CX-358C; CX-980C at 77:16-78-13
OMAP 3611 (4 products)	[redacted]	HT 1137:25-1138:9; RX-1025C; RDX-4.32C; JX-57C; RX-1871C; CX-980C at 49:22:50:6, 57:1-13
OMAP 3621 (2 products)	[redacted]	HT 1137:10-19; RX-1024C; RDX-4.30C; CX-338C; CX-541C at 71:6-17
OMAP 4470 (2 products)	[redacted]	HT 1137:10-19; RX-1024C; RDX-4.30C; CX-340C; CX-339C
OMAP 4430 (1 product)	[redacted]	HT 1135:7-16; RX-1029C; RDX-4.23C; CX-519C

[5] [redacted]

[6] [redacted] CX-980C at 50:17-51:1.

[redacted]

CHIP	PRODUCTS	EVIDENCE
Samsung Chips (incorporated in 12 products)		
SC54412 ([redacted]) (5 products)	[redacted]	HT 1135:22-1136:2; RX-1032C; RDX-4.25C
SSPC210 [redacted] (3 products)	[redacted]	HT 1135:22-1136:2; RX-1032C; RDX-4.25C
S5PC111AA0 ([redacted]) (2 products)	[redacted]	HT 1135:22-1136:2; RX-1032C; RDX-4.25C
S5PC111 ([redacted]) (1 product)	[redacted]	HT 1135:22-1136:2; RX-1032C; RDX-4.25C
S5PC111AAX ([redacted]) (1 product)	[redacted]	HT 1135:22-1136:2; RX-1032C; RDX-4.25C

Both technical experts and TI's technical witness, Dr. Haroun, testified that [redacted] HT 383:17-384:7; HT 385:17-386:5; HT 386:15-19; HT 371:23-372:14; CDX-82. Dr. Haroun confirmed that [redacted] HT 203:13-204:5. [redacted] HT 209:3-7.

Respondents' expert, Dr. Subramanian, confirmed that [redacted] HT 1168:15-1169:2 ("[redacted]"); HT 1186:25-1187:10 ([redacted]"); HT 1198:14-1199:13 ([redacted]); HT 1200:15-23 ([redacted]); HT

[redacted]

1454:10-22 [redacted]). He also confirmed Dr. Oklobdzija's dimmer analogy. HT 1385:23-1386:21.

Table 2 below shows evidence that describes the technical operation of each of the relevant chips, including citations about the [redacted]. This evidence includes technical documentation, and trial testimony from technical and expert witnesses.

Table 2 – Evidence Regarding Operation of Chips with [redacted]

CHIP	EVIDENCE
Qualcomm Chips	
MSM8960	[redacted] CX-662C at QTPL-43276; HT 351:23-352:16; HT 1174:14-1175:19; RDX-4.64C; RDX-4.65C [redacted] CX-662C at QTPL-43276, 43291, 43399; HT 352:17-25; HT 1147:9-1148:11; RDX-4.42C; HT 1174:14-1175:19; RDX-4.64C; RDX-4.65C [redacted] CX-663C at QTPL-0047361; RX-791C at 853SAMSUNG00065623; HT 1147:9-1148:11; RDX-4.42C; HT 1174:14-1175:19; RDX-4.64C; RDX-4.65C [redacted] CX-662C at QTPL-43274; CX-663C at QTPL-47262; HT 451:18-452:2; CDX-5C.22; HT 1147:9-1148:11; RDX-4.42C; HT 1174:14-1175:19; RDX-4.64C [redacted] CX-648 at QTPL-1069-70; RX-619C at .0012-13; HT 182:2-13, 183:14-186:4; HT 262:7-11; HT 439:9-440:17; 441:19-443:1; HT 1392:4-13; HT 451:4-17; CDX-5C.20-21; 1175:20-1177:6; RDX-4.66C [redacted] RX-619C at .0013 ([redacted] .”), at .0012 [redacted]); HT 383:17-384:7 ([redacted]); HT 386:15-19 [redacted]; HT 1168:22-1169:2 (“ [redacted]”); HT 385:17-386:5 ([redacted]); CDX-82

[redacted]

CHIP	EVIDENCE
MSM8655	[redacted] CX-658C at QTPL-22840; CX-659C at QTPL- 23474; HT 446:6-21; CDX-5C.15; HT 1147:9-1148:11; RDX-4.42C [redacted] CX-659C at QTPL-23677; HT 1147:9-1148:11; RDX-4.42C; HT 1172:2-14; RDX-4.61C [redacted] HT 1147:9-1148:11; RDX-4.42C; HT 1172:2-14; RDX-4.61C; CX-658C at QTPL-228890 [redacted] CX-658C at QTPL-22823; CX-659C at QTPL-23473; HT 446:6-448:17; CDX-5C.15; CX-658C at QTPL-228889-90; HT 1147:9-1148:11; RDX-4.42C; HT 1172:2-14; RDX-4.61C [redacted]: CX-1212C at QTPL-13832-33; CX-1214 at QTPL-1792; RX-1051C at 13830, 13832-33; RX-625C at QTPL-23345-52; HT 1172:15-1173:17; HT 182:2-13, 183:14-186:4; HT 262:7-11; HT 439:9-440:17; 441:19-443:1; HT 1392:4-13 [redacted] HT1173:19-20 ([redacted]"); HT 383:17-384:7 ([redacted] HT 386:15-19 ("[redacted]"); HT 1168:22-1169:2 ("[redacted]"); HT 385:17-386:5 ([redacted]); CDX-82

[redacted]

CHIP	EVIDENCE
MSM7627	[redacted] CX-0652C at QTPL- 9279; CX-472C at CX-1220C at LGE8001TC0309502; CX-472C at KYOCERA_ 853_ 0024497 [redacted] CX-472C at KYOCERA 853 0024497; HT 454:5-16; CDX-5C.35; HT 1147:9-1148:11; RDX-4.42C; HT 1164:25-1165:12; RDX-4.54C [redacted] HT 1147:9-1148:11; RDX-4.42C; HT 1164:25-1165:12; RDX-4.54C; CX-619C at QCHTCTPL0007703; 626C at QTPL-23683; RX-622C at .0189, .0232 [redacted] CX-0652C at QTPL- 9278; CX-1220C at LGE8001TC0309501, LGE8001TC0309549-50; HT 453:22-454:4; CDX-5C.34; HT 454:5-16; CDX-5C.35; HT 1147:9-1148:11; RDX-4.42C; HT 1164:25-1165:12; RDX-4.54C [redacted] CX-1220C at LGE8001TC0309550; HT 452:22-453:21; CDX-5C.26; CX-619C at QCHTCTPL0007707-09; HT 1165:17-1167:20; RDX-4.55C; RX-626C at QTPL-23687-88; HT 182:2-13, 183:14-186:4; HT 262:7-11; HT 439:9-440:17; 441:19-443:1; HT 1392:4-13 [redacted] HT 1169:3-11; CX-619C at QCHTCTPL0007709 ([redacted]); 626C at QTPL-23683 (same); HT 383:17-384:7 ([redacted]); HT 386:15-19 ([redacted]); HT 1168:22-1169:2 ([redacted].”); HT 385:17-386:5 ([redacted].”); CDX-82

[redacted]

CHIP	EVIDENCE
APQ8060	CX-238C [redacted] CX-1219C at LGE8001TC0305393; RX-1043C at QTPL-3502; HT 1147:9-1148:11; HT 1148:17-1149:3; RDX-4.42C; RDX-4.43C [redacted] HT 1147:9-1148:11; HT 1148:17-1149:3; RDX-4.42C; RDX-4.43C; RX-611C; *see also* CX-238C ([redacted]) CX-1330C at H853f0000211652 ([redacted]) [redacted] CX-1219C at LGE800ITC0305446; RX-1043C at QTPL-3555; HT 1149:4-1150:3; RDX-4.44C; HT 1147:9-1148:11; HT 1148:17-1149:3; RDX-4.42C; RDX-4.43C; RX-611C [redacted] CX-1219 at LGE8001TC0305391; RX-1043C at QTPL-3500; HT 448:18-449:4; HT 1148:17-1149:3; RDX-4.42C; RDX-4.43C; RX-611C [redacted]: CX-1207C at QTPL-13872; CX-1208C at QTPL-14890; RX-618C at QTPL-13872; HT 1157:13-19; RX-621C at QTPL-14890; HT 1155:25-1156:9; RDX-4.51C; HT 182:2-13, 183:14-186:4; HT 262:7-11; HT 439:9-440:17; 441:19-443:1; HT 1392:4-13 [redacted] HT1168:15-22 ([redacted]"); HT 383:17-384:7 ([redacted]); HT 386:15-19 ([redacted]); HT 1168:22-1169:2 ("[redacted]."); HT 385:17-386:5 ([redacted]); CDX-82

[redacted]

CHIP	EVIDENCE
MSM8660	[redacted] CX-653C at QTPL-10364; CX-1330C at 211535; RX-614C at QTPL-10364; HT 1147:9-1148:11; HT 1148:17-1149:3; RDX-4.42C; RDX-4.43C; RX-611C; [redacted] CX-1330C at 211652; HT 1147:9-1148:11; HT 1148:17-1149:3; RDX-4.42C; RDX-4.43C; RX-611C [redacted] CX-653C at 10419; RX-614C at QTPL-10419; HT 1149:4-1150:3; RDX-4.44C; HT 1147:9-1148:11; HT 1148:17-1149:3; RDX-4.42C; RDX-4.43C; RX-611C [redacted]: CX-653C at QTPL-10362; CX-1330C at 211533; RX-614C at QTPL-10362; HT 448:18-449:4; HT 1148:17-1149:3; RDX-4.42C; RDX-4.43C; RX-611C [redacted] CX-1207C at QTPL-13872; CX-1208C at QTPL-14890; RX-618C at QTPL-13872; HT 1157:13-19; RX-621C at QTPL-14890; HT 1155:25-1156:9; RDX-4.51C; HT 182:2-13, 183:14-186:4; HT 262:7-11; HT 439:9-440:17; 441:19-443:1; HT 1392:4-13 [redacted] HT1168:15-22 ([redacted]"); HT 383:17-384:7 ([redacted]); HT 386:15-19 ([redacted]); HT 1168:22-1169:2 ("[redacted]."); HT 385:17-386:5 ([redacted]); CDX-82
MSM8255	*See* [redacted] *See* CX-658C at QTPL-22809 ([redacted]); CX-659C at QTPL-23454 ([redacted]), 23660 ([redacted]); *see also* HT 623:11-624:10; CDX-12C.1. [redacted]

[redacted]

CHIP	EVIDENCE
QSC6055	[redacted] CX-649C at QTPL-5055; CX-466C at KYOCERA_853_0021366; CX-998C at 41:14-25; CX-0467C at KYOCERA_853_0022069 [redacted] CX-466C at KYOCERA 853 0021583; RX-606C at QTPL-2589, 2812, 2822; HT 1147:9-1148:11; RDX-4.42C; HT 1169:20-1170:6; RDX-4.57C; HT 1170:6-11; RDX-4.58C [redacted] CX-467C at KYOCERA 853 0022229; CX-998C at 62:3-10; RX-606C at QTPL-2604, 2606; HT 1147:9-1148:11; RDX-4.42C; HT 1169:20-1170:6; RDX-4.57C; HT 1170:6-11; RDX-4.58C [redacted] CX-649C at QTPL-5049; CX-466C at KYOCERA_853_0021359; HT 454:5-16; CDX-5C.35; CX-0467C at KYOCERA 853 0022063, 22227-29; HT 1147:9-1148:11; RDX-4.42C; HT 1169:20-1170:6; RDX-4.57C [redacted] CX-1211C at QTPL-1128-29 [redacted], 1138 ([redacted]); RX-609C at QTPL-1128-29 ([redacted]), 1138 ([redacted]); HT 1170:6-23, 1171:6-17; RDX-4.58C-4.60C; RX-606C at QTPL-2607; HT 182:2-13, 183:14-186:4; HT 262:7-11; HT 439:9-440:17; 441:19-443:1; HT 1392:4-13 [redacted] HT 1171:11-17 ([redacted]); HT 383:17-384:7 ([redacted]); HT 386:15-19 ("[redacted]"); HT 1168:22-1169:2 ("[redacted]."); HT 385:17-386:5 ([redacted]"); CDX-82
MSM8260	*See* [redacted] *See* CX-653C at QTPL-10347 ([redacted]); RX-614C (same) CX-1330C at H853f0000211517 ([redacted]), H853f0000211530 ([redacted]); *see also* HT 547:11-548:14; CDX-16C.1. [redacted]

[redacted]

CHIP	EVIDENCE
Texas Instruments (TI) Chips	
OMAP 3530	[redacted] CX-366C at GARM-N37XX-031360; CX-980C at 79:5-20, 215:13-15 [redacted] CX-366C at 031497, 31504; CX-980C at 207:11-20, 132:21-133:3; HT 199:17-20; HT 1190:4-16; RDX-4.77C; RX-1804C; *see also* RX-1817C [redacted] CX-366C at GARM-N37XX-031360, -031497; CX-980C at 79:5-20, 215:13-15 [redacted] CX-357C at GARMIN073127, GARMIN073127, GARMIN073126; HT 197:15-198:9; HT 182:2-13, 183:14-186:4; HT 262:7-11; HT 439:9-440:17; 441:19-443:1; HT 1392:4-13 [redacted] HT 203:18-24 ([redacted]); HT 1189:22-1190:3; HT 383:17-384:7 ([redacted]; HT 386:15-19 ([redacted].”); HT 385:17-386:5 ([redacted]); CDX-82
OMAP 3611	*See* [redacted] CX-353C at GARMIN068388; CX-980C at 275:15-276:9; CX-353C at GARMIN068879, GARMIN068493; CX-980C at 280:9-21. [redacted] HT 172:14-16, 175:13-24, 197:1-200:14. [redacted] *See* RDX-4.75C-4.77C; HT 1188:12-190:16 ([redacted]”). [redacted].

CHIP	EVIDENCE
OMAP 3621	*See* [redacted] *See* CX-353C ([redacted]"), CX-1188C (same); HT 199:21-200:3. [redacted] CX-353C at GARMIN068388, GARMIN068879, GARMIN068493. [redacted] HT 172:14-16, 175:13-24, 197:1-200:14. [redacted] *See* RDX-4.75C-4.77C; HT 1188:12-190:16 [redacted]"); 1183:8-15 ("[redacted]": OMAP 3 and OMAP 4). [redacted]

[redacted]

CHIP	EVIDENCE
OMAP 4470	[redacted] HT 171:17-172:10, 181:1-4, 196:18-25, 197:1-4; CX-318C at AMZ_TPL_00039975; *see also* CX-316C at AMZ_TPL_00024483; CX-321C at AMZ_TPL_00059492 [redacted] HT 181:5-18, 196:18-25, 489:16-25; CDX-6C.28; CX-1142C at 40:2-6, 43:15-44:6; HT 178:24-179:2 (referring to Fig. 3-32 of CX-318C); HT 190:1-23; CX-318C (OMAP4470 TRM) at AMZ_TPL_00040084, 85; HT:487:17-489:15; CDX-6C.24; HT 1187:20-1188:7; RDX-4.74C; RX-526; *see also* RX-528C; RX-527C [redacted] HT 171:3-5, 179:3-8, 181:5-7, 196:18-25, 489:16-25; CDX-6C.28; CX-1142C at 40:2-6, 43:15-44:6 [redacted] HT 181:19-22; HT 190:6-191:20, 197:15-198:9; HT 192:25-194:12, 1189:22-1190:3; CDX-80C; HT 196:18-25; CX-1142C at 40:2-6, 43:15-44:6; HT 474:6-485:2, 486:20-489:15; CDX-6C.18, 20, 21, 22, 23, 24; HT 182:2-13, 183:14-186:4; HT 262:7-11; HT 439:9-440:17; 441:19-443:1; HT 1392:4-13 [redacted] HT 203:18-24, 1186:25-1187:5 ([redacted]); HT 188:3-10, 189:9-14, 194:13-21, 196:7-13; CDX-79C; HT 383:17-384:7 ([redacted]); HT 386:15-19 ([redacted].”); HT 385:17-386:5 ([redacted]); CDX-82
OMAP 4430	[redacted] CX-321C at AMZ_TPL_00059492. [redacted] HT 172:14-16, 174:116-175:12, 196:18-25. [redacted] *See* RDX-4.72C-4.74C; HT 1183:13-1188:11 ([redacted]”); 1183:8-15 (“[redacted]). [redacted]

[redacted]

CHIP	EVIDENCE
Samsung Chips	
SC54412 ([redacted])	[redacted] CX-0264C at 853SAMSUNG00073745-46; RX-696C at .0044, .0046; HT 1195:14-23; RDX-4.81C [redacted] CX-0264C at 853SAMSUNG00073756; RX-696C at .0054; HT 1195:14-23; RDX-4.81C; *see* RX-0690 [redacted] CX-0264C at 853SAMSUNG00073745-46; RX-696C at .0043; 518:5-14 [redacted] RX-690C at .0005-06 (VCO); RX-789 at .0002 at .0002; JX-37; HT 519:15-520:4; HT 1195:24-1196:7, 1197:15-20, 1199:6-13; RDX-4.83C; HT 182:2-13, 183:14-186:4; HT 262:7-11; HT 439:9-440:17; 441:19-443:1; HT 1392:4-13 [redacted] HT 1198:14-19 ([redacted]); HT 383:17-384:7 ([redacted]); HT 386:15-19 ([redacted].”); HT 385:17-386:5 ([redacted]wer.”); CDX-82
SSPC210 ([redacted])	[redacted] RX-702C at .0039-40; HT 1195:14-23; RDX-4.81C [redacted] RX-702C at .0050; HT 1195:14-23; RDX-4.81C; *see* RX-0694C [redacted] RX-702C at .0039; 518:5-14 [redacted] RX-0693C at .0006 (VCO); RX-789; JX-37; HT 519:15-520:4; HT 1199:14-1200:23; RDX-4.84C; HT 182:2-13, 183:14-186:4; HT 262:7-11; HT 439:9-440:17; 441:19-443:1; HT 1392:4-13 [redacted] HT 1198:14-19, 1200:9-14 ([redacted]); HT 383:17-384:7 ([redacted]); HT 386:15-19 ([redacted].”); HT 385:17-386:5 ([redacted]”); CDX-82

CHIP	EVIDENCE
S5PC111-AA0	*See* *See* RX-699C ( ), HT 1195:14-23; RDX-4.81C
S5PC111	RX-699C at .0086-87; HT 1195:14-23; RDX-4.81C RX-699C at .0097; HT 1195:14-23; RDX-4.81C; *see* RX-0693C RX-699C at .0086; 518:5-14 RX-0693C at .0006 ( ); RX-789; JX-37; HT 519:15-520:4; HT 1199:14-1200:23; RDX-4.84C; HT 182:2-13, 183:14-186:4; HT 262:7-11; HT 439:9-440:17; 441:19-443:1; HT 1392:4-13 HT 1198:14-19, 1200:9-14 ( ); HT 383:17-384:7 ( ); HT 386:15-19 (.”); HT 385:17-386:5 (”); CDX-82
S5PC111-AAX	*See* *See* RX-699C ( ), HT 1195:14-23; RDX-4.81C

Respondents' expert, Dr. Subramanian, testified that each of the Accused Products uses HT 1168:15-1169:2 (Qualcomm chips); HT 1186:25-1187:10 (TI chips); HT 1198:14-1199:13, 1200:15-23 (Samsung chips). *See* R.Br. at 102 ( ); RX-621C; RDX-4.129C. They rely on Dr. Subramanian's testimony about the for this point. *See* HT

[redacted]

1317:20-1318:20 ([redacted]); *see also* HT 1166:8-1167:20 ([redacted]); 1173:5-1174:1 ([redacted]); HT 1176:7-1177:6 ([redacted]); RDX-4.129C. Respondents also extend their argument about the [redacted] shown in RDX-4.129C to all of the accused chips in the Investigation. R.Br. at 102-103 ([redacted]); *see* HT 1186:25-1187:19 ([redacted]).

Respondents argue that [redacted] is a "control signal" within the meaning of the ALJ's claim construction for the term "entire oscillator." But Respondents' argument is misplaced and ignores the fact that [redacted] is one of the "operational parameters" expressly recited in and ***required by*** claims 6 and 13. Specifically, claims 6 and 13 recite:

> an entire oscillator . . . connected to said [CPU], said oscillator clocking said [CPU] at a clock rate . . . thus varying the processing frequency of [the CPU] and the clock rate of [the entire oscillator] in the same way as a function of parameter variation in one or more fabrication ***or operational parameters***. . . .

Respondents argue that [redacted] is a "control signal" because the ALJ (incorrectly) construed the term "entire oscillator" to require that it "does not rely on a control signal or an external crystal/clock generator to generate a clock signal." Order No. 31 at 41. The ALJ adopted this construction excluding a "control signal" because of statements made during the prosecution of the '336 patent to distinguish over prior art, which he believed constituted a disavowal or disclaimer of claim scope. *See id.* at 39-40. However, because [redacted] is expressly recited in claims 6 and 13 as an ***operational parameter***, it is ***required*** by the claims and ***cannot*** be excluded because of statements made during prosecution about a different claim element.

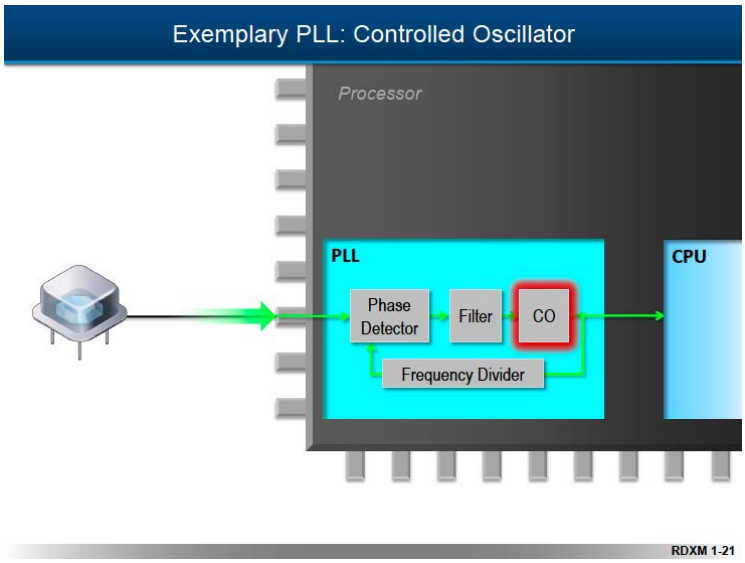
Voltage and current are "operational parameters," as recited in claims 6 and 13. Dependent claims 7 and 14 specifically claim "voltage" as an operational parameter, which Complainants' expert confirmed. HT 308:17-20, 454:24-455:19; CDX-5C.44. By the doctrine

[redacted]

of claim differentiation, the term "operational parameters" in claims 6 and 13 is not limited to just the voltage recited in the dependent claims, and therefore must be broader and encompass other operational parameters. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) ("the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim"), citing *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 910 (Fed. Cir. 2004). In particular, because the operational parameter voltage can be and is readily converted into current, current is also an operational parameter. *See* HT 383:12-19 ([redacted]r); HT 415:15-416:3 ([redacted]); HT 1386:11-21 ([redacted]). Indeed, the technical documents in evidence themselves confirm [redacted]rs. *See* HT 431:3-16 (referring to CX-1264C and CDX-5C.8); HT 552:22-553:6 (referring to CX-657C and CDX-16C.9); HT 1431:5-12 (referring to CX-621C.10).

In each Accused Product, [redacted]

[redacted] Respondents' expert, Dr. Subramanian, confirmed that the PLL's oscillator ***drives*** the CPU. [redacted] *Markman* Tr. at 49:13-24, 51:17-21 ("the PLL is going ***to drive*** some CPU unit"; "CO" or "controlled oscillator" [*e.g.*, an ICO] outputs clock signal from PLL to CPU). This relationship is shown by the green arrow from the CO/ICO to the CPU in RDXM 1-21, reproduced below, which was the demonstrative to which Dr. Subramanian was referring:



RDXM 1-21. Because the CO/[redacted] drives the CPU, any change in the rate of the CO/[redacted]'s oscillation will cause a corresponding change in the processing frequency of the CPU. In other words, the processing frequency of the CPU ***is*** the rate (or speed or frequency) of the clock signal from the "entire oscillator" ([redacted]) that drives the CPU.

The clock rate – and consequently the processing frequency of the CPU – varies "as a function of parameter variation" in [redacted] *See* claims 6 and 13. Dr. Oklobdzija confirmed that [redacted] [redacted] HT 385:17-386:5 ("[redacted]."); HT 386:15-19 ("[redacted]

[redacted]

[redacted].”); HT 383:17-384:7 ([redacted]). Respondents’ expert, Dr. Subramanian, confirmed [redacted] HT 1385:23-1386:21 ([redacted]; HT 1451:22-1453:9; 1454:10-22 referring to CX-621C.17 ([redacted]). Indeed, the document to which Dr. Subramanian was referring states that [redacted]. RX-621C.27 (“[redacted]”); RX-621C.14 (last ¶) [redacted].”). In other words, [redacted]

Even if it were the case that certain “control signals” were “disclaimed” under the ALJ’s construction of “entire oscillator” – for example, “digital control words” like the one used in the Sheets reference – one thing is certain: a variable “operational parameter” like [redacted] cannot possibly have been disclaimed. Claims 6 and 13 explicitly recite ***and require*** an “operational parameter” – like current – that is subject to “parameter variation,” which causes the “clock rate” and “processing frequency” to “vary . . . in the same way.”

C. <u>All Relevant Chips in the Accused Products Satisfy the “Entire Oscillator” Limitation of Claims 6 and 13</u>.

1. <u>All of the relevant chips in the Accused Products include at least one [redacted] that satisfies the “entire oscillator” limitation – even under the ALJ’s incorrect construction of that term</u>.

The ALJ construed the “entire oscillator” limitation of claims 6 and 13 as:

[redacted]

an oscillator that is located entirely on the same substrate as the central processing unit and does not rely on a control signal or an external crystal/clock generator to generate a clock signal

Order No. 31 at 41. As discussed in Complainants' Petition, this construction is incorrect and should be reversed. However, even if the Commission were to adopt the ALJ's construction, the relevant chips in all Accused Products include an "entire oscillator" under that construction. In each chip, this element is satisfied by [redacted] As discussed above in Section I.B, [redacted] *See, e.g.*, HT 383:17-384:7; HT 386:15-19; HT 385:17-386:5; CDX-82.

The ALJ's construction of "entire oscillator" requires that: (1) the entire oscillator must be "located entirely on the same substrate as the central processing unit" (CPU) of the chip; (2) the entire oscillator "does not rely on a control signal . . . to generate a clock signal"; and (3) the entire oscillator "does not rely on . . . an external crystal/clock generator to generate a clock signal." The [redacted] in the accused chips satisfy all three requirements for "entire oscillator."

a. All of the [redacted] in the relevant chips are [redacted]

All of the relevant chips include a [redacted] *See* Section I.B., Table 2 ([redacted]).

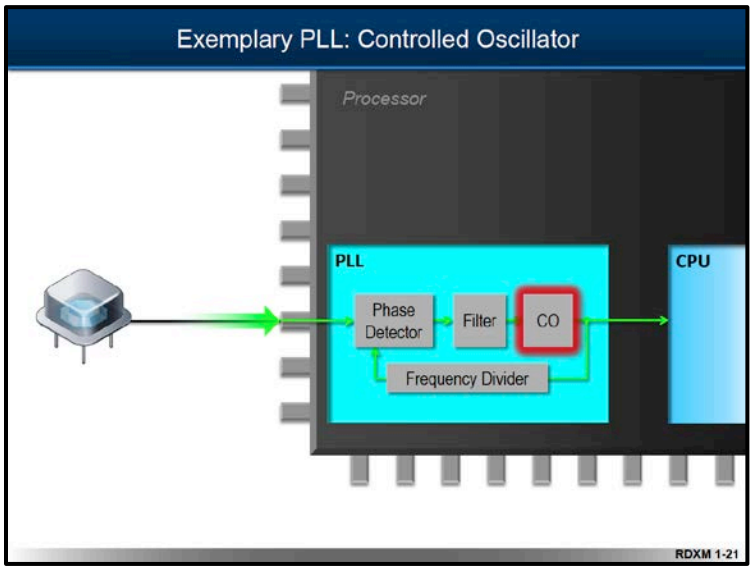
b. The [redacted] *generate* the clock signal, while the other [redacted] merely *regulates* the *frequency* of the clock signal.

All of the relevant chips include [redacted] Complainants' expert, Dr. Oklobdzija, explained tha [redacted]

[redacted] HT 389:14-390:16; CX-648C 413:6-414:14. Respondents' expert, Dr. Subramanian, agreed that [redacted] HT 1399:19-1400:12, 1401:13-1402:9; RDX-4.128.

Thus, it is the [redacted] that actually generates the clock signal that is used to clock the CPU. The only input needed by the [redacted] to generate a clock signal is a power supply (voltage/current). All of the other circuitry in [redacted] is merely used to regulate the frequency (*i.e.*, speed) of the clock signal that is generated by the [redacted] In other words, [redacted] ***generates*** the clock signal, while [redacted] ***regulates the frequency*** of the clock signal. *See, e.g.*, HT 374:18-381:1, 381:2-384:7 (re: CDX-82), 413:6-414:14, 1053:1-7, 1054:5-1055:3, 1058:3-1059:5, 1059:6-11, 1092:17-1093:19.

The following diagram (RDXM-1-21) illustrates the general operation of [redacted] within a PLL:



The [redacted] ("**CO**" in the diagram) is a ring oscillator that generates a very high frequency clock signal (*e.g.*, 2.0 GHz), which is used to clock the CPU. A sample of the high frequency clock signal from the [redacted] is also divided by the **Frequency Divider** to obtain a much lower frequency

[redacted]

clock signal (*e.g.*, 2.0 GHz ÷ 100 = 20 MHz) that can be compared to the phase of an external reference crystal, which also has a much lower frequency (*e.g.*, 20 MHz) than the [redacted] RDXM-1-21; CDX-82; HT 374:18-381:1. In the diagram, the **Phase Detector** of the PLL then compares two inputs: (1) the frequency of the off-chip crystal oscillator, which would be a digital frequency in the megahertz range (*e.g.*, 20 MHz); and (2) a divided frequency from the **Frequency Divider** that would also be a digital frequency in the megahertz range (*e.g.*, 20 MHz, which was divided down from 2.0 GHz). RDXM-1-21; HT 1381:11-1382:12, 1388:20-1389:15.

The **Phase Detector** then provides correction signals or charges that go to the **Filter**, which smooths them out before providing an analog voltage or current to adjust the speed or frequency of the [redacted]. RDXM-1-21; RDX-4.94; HT 1389:16-22; 1383:11-1384:3. The **Filter** does ***not*** pass the ***digital*** clock signal from the external crystal to the [redacted] rather, it passes on a smooth, continuous analog current or voltage. RDXM-1-21; 1384:4-1385:12-22. Dr. Subramanian confirmed that a voltage or current is always provided to the [redacted] HT 1385:23-1386:24. Thus, the slow digital frequency of the external crystal is ***never*** passed to the [redacted] which does not "rely on" the crystal "to ***generate***" the much faster clock signal of the [redacted] Similarly, the [redacted] does not "rely on" a "control signal to ***generate***" a clock signal. Rather, as long as the [redacted] has a power supply (*i.e.*, an analog voltage/current), it generates a very high frequency clock signal on its own, because the [redacted] HT 1399:19-1400:12 (Subramanian); HT 415:15-416:3 (Oklobdzija) ([redacted]).

c. <u>All of the [redacted] in the relevant chips "generate a clock signal" without reliance on a "control signal."</u>

The [redacted] in the Accused Products "generate a clock signal" without reliance on a "control signal." For the reasons discussed in detail in Complainants' Petition for Review, this is not even a proper requirement for the construction of "entire oscillator," but the Accused Products nevertheless meet this requirement. Undisputed evidence

[redacted]

proves that [redacted] in the accused chips [redacted] generate a clock signal without reliance on a "control signal" or an "external crystal/clock generator." Rather, [redacted]. HT 413:6-414:14.

At pages 8-12 of their Opposition to Complainants' Petition, Respondents discuss the circuitry for [redacted], as discussed above in Section I.B at pp. 19-20.

[redacted] discussed above in Section I.C.1.b, is shown in RX-621C.10 at Figure 2-2:

[redacted]

Specifically, [redacted] RX-621C.10; HT 1428:18-1432:3. [redacted] HT 1433:24-1434:7.

Dr. Subramanian admitted tha[redacted] HT 1435:2-1436:10; 1437:8-19.

Dr. Subramanian also recognized that [redacted]

[redacted]

HT 1438:14-1439:16; 1439:25-1441:3. [redacted]

[redacted]

HT 1441:17-22; *see also* 1440:13-1441:11 ([redacted]).

[redacted]

RDX-4.129C; HT 1317:20-1318:22; *see also* RDX-4.47C. [redacted]

[redacted]

[redacted]

On cross-examination, Dr. Subramanian admitted that [redacted] HT 1445:14-1446:24. [redacted] HT 1447:9-25; RDX-4.129C. [redacted]

[redacted]

RX-621C.14 (last 2 paras.). [redacted]

d. All of the [redacted] in the relevant chips "generate a clock signal" without reliance on an "external crystal/clock generator."

The evidence also demonstrates that [redacted] in the Accused Products "generate a clock signal" without reliance on a "an external crystal/clock generator."

[redacted]

Respondents argue that [redacted]. This is not controversial. But the fact that [redacted] is quite different from saying that the external crystal "generates" the clock signal of [redacted]. As Complainants' expert explained:

[redacted]

HT 415:15-416:3; *see also* 389:2-13 ([redacted]); 1092:17-1093:19 ("[redacted]"); 378:24-381:1 ("[redacted]").

Dr. Subramanian acknowledged that [redacted] HT 1397:22-1398:2; 1398:23-1399:4; RDX-4.115; *see also* HT 1386:25-1387:25, 1388:13-19 [redacted].

As with "control signals," Dr. Subramanian misrepresented that [redacted] supposedly rely on an external crystal ***to generate*** a clock signal. [redacted]

[redacted]

But on cross-examination, Dr. Subramanian again admitted that [redacted] RDX-4.118C; HT 1448:1-1449:13; *see also* 1447:9-25 [redacted].

Accordingly, [redacted] in all of the accused chips do not rely on a "control signal" or an "external crystal/clock generator" to generate a clock signal. Thus, all of the Accused Products satisfy the "entire oscillator" limitation even under the ALJ's construction.

2. <u>All of the relevant chips in the Accused Products satisfy the "entire oscillator" limitation under Complainants' proposed construction of that term</u>.

All relevant chips include [redacted]. *See* Section I.B., Table 2 ([redacted]). This satisfies Complainants' proposed construction of "entire oscillator," which should be adopted for the reasons set forth in Complainants' Petition for Review.

II. COMPLAINANTS CONTINUE TO INVEST IN THE ONGOING LICENSING PROGRAM.

The licensing program underlying Complainants' domestic industry is ongoing. As of the date the Complaint was filed, there were roughly 100 licensees to the MMP patent portfolio, which includes the '336 patent. CX-708C; HT 120:21-121:15. Revenue from these licenses

totaled over $[redacted]. CX-708C. Complainants continued to license the MMP portfolio subsequent to the filing of the Complaint, including licenses to United Technologies Corp., Oracle, and Sierra Wireless.[7] CX-1332C at 19. Most of the license agreements include a one-time lump sum royalty payment. *See, e.g.* CX-1332C. Certain licensees, however, made multiple payments. *See, e.g., id.* at pp. 5, 10, 14 (DMP Electronics, Phillips, and Caterpillar). Moreover, additional revenue is due in the future. For example, an agreement with Ford provides for multiple payments continuing through December 2015.

Complainants made significant investments in the licensing program prior to the initiation of the instant Investigation, and continue to do so. In their joint effort to license the MMP portfolio and the '336 patent, Complainants have expended a total of more than $[redacted]. CX-1332C; HT 1623:6-1627:6. Not counting legal fees for patent litigation to enforce the MMP patents – which were separately tracked – the total investment is still around $[redacted]. *Id*. From June 2005 through May 2012, the investment in the MMP licensing program (not counting legal fees) attributed solely to TPL is approximately $[redacted]. HT 1617:17-24; 1623:6-1627:6; CX 1332. ***In addition***, TPL has paid about $[redacted] to TPL and Alliacense personnel to work on the MMP licensing program, bringing TPL's total investment in the MMP licensing program to over $[redacted] (not counting the $[redacted] plus collectively expended by Complainants to license the MMP portfolio, including the '336 patent). *Id*.

Specifically, pursuant to a commercialization agreement entered into in 2005, TPL was granted exclusive rights to license the patents in the MMP portfolio, including '336 patent. HT 128:20-130:24. As Dan Leckrone, TPL's Chairman and CEO, summarized, the licensing process is a very complex and intensive analytical process that begins with an engineering analysis of a prospective licensees' products and a comparison of the elements of the claim to the characteristics or features of the product or structure of the product. HT 124:7-23. That is

[7] Complainants licensed the MMP portfolio to several additional licensees in 2013, after the creation of CX-1332C. Complainants can provide evidence regarding these additional licenses at the Commission's request.

[redacted]

accompanied by a business analysis of product sales and potentially relevant revenue. The resulting information is compiled and presented to potential licensees. *Id.*[8] The licensing process was developed by, and executed by, Alliacense, a vendor to the Complainants. *Id.* Alliacense was chartered for the specific purpose of launching and supporting the global licensing program. *Id.* at 125:1-7, 133:11-21. TPL funded the licensing program in connection with its licensing responsibilities, paying $[redacted] for, among other things, the salaries of the analysts, engineers, technical experts, reverse-engineering experts, licensing executives, and others employed by its vendor, Alliacense. *Id*. at 131:15-133:6, 134:8-11, 1753:19-22. TPL also paid roughly $[redacted] for the purchase of thousands of products analyzed by Alliacense. *Id*. at 133:7-10, 1753:23-1757:2. These expenses are summarized in CX-0705C and JX-0253C. Some of these expenses were reimbursed by Complainant PDS. *Id.* at 147:8-150:17.[9] TPL's March 2013 Chapter 11 filing had no effect on these expenses, which were incurred prior to the bankruptcy and prior to the filing of the 853 Investigation. *Id.* at 135:1-11.

Alliacense continues to perform services relating to licensing the MMP portfolio. *Id*. at 1568:25-1569:4. In mid 2012, the licensing rights for the MMP portfolio reverted to PDS (which is owned by Complainants Patriot and TPL). *Id*. at 131:1-5. Alliacense is currently under contract by PDS to provide licensing services relating to the MMP portfolio and, pursuant to the contract, Alliacense provides its licensing services to PDS. *Id*. at 1576:7-20, 1577:22-25. Thus, Complainants' investment in the licensing program is continuing. *See also id.*at 135:6-11 (offering uncontroverted testimony that the investments are "ongoing now.").

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[8] *See also* JX-0345C, ¶¶ 12-25, and TR. at 1537:2-1566:22 (testimony of D.M. Leckrone) for further details regarding the licensing process.

[9] In addition to TPL's investment in the MMP licensing program, Patriot also invested over $[redacted] through May 2012, excluding legal fees. HT 1623:19-1626:6 (calculating TPL and Patriot each responsible for half of $[redacted] PDS-related expenses listed in Patriot's Profit and Loss Statement).

[redacted]

III. THE EXPENDITURES RELIED ON BY COMPLAINANTS TO ESTABLISH DOMESTIC INDUSTRY DO NOT INCLUDE SIGNIFICANT PATENT PROSECUTION OR LITIGATION EXPENDITURES.

At trial, Complainants presented evidence of over $[redacted] in licensing-related expenses to establish Complainants' domestic industry. *See* CX-705C. These claimed expenditures do not include significant costs related to patent prosecution or litigation, which Complainants separately tracked. As discussed above, including litigation expenses, Complainants have expended a total of more than ***$***[redacted] in their joint effort to license the MMP portfolio and the '336 patent. CX-1332C; HT 1623:6-1627:6.

TPL's Chief Financial Officer, Dwayne Hannah, confirmed at trial that CX-705C does not contain litigation and lawyers' costs. HT 1759:23-25. Dan Leckrone, TPL's Chairman and CEO, likewise confirmed that the claimed investments in the licensing program do not include any litigation costs paid to outside counsel. HT 132:5-16. Although CX-0705C has a header of "Monthly Litigation Hours," Mr. Hannah testified that the spreadsheet was mislabeled. HT 1753:8-13 ("It's really the total hours for MMP. That's probably a mislabeling."); *id.* at 1799:19-1800:9 ("Yeah, it says that, but as I said, that's not correct.").

Likewise, while certain other documents referred to expenses categorized as "MMP Litigation," Mr. Hannah explained that the expenses, in fact, related to licensing, and that "litigation" was broadly defined: "It's licensing, but there may be some involvement as a result in questions answered or dealt with as a result of litigation." HT 1749:1-12. In the specific example discussed at trial, the individual doing work categorized as "litigation" was a technical advisor, not an attorney. *Id*. at 1749:11-12. Indeed, none of the TPL or Alliacense employees acted as legal counsel in patent litigation on behalf of TPL or Alliacense. *Id*. at 1816:8-1817:13. Such costs were similarly encompassed in project code 101 on certain pre-2008 spreadsheets, which "included everything involved in the process of licensing. So it would be answering questions with respect to perhaps a litigation, reexam, everything." *Id*. at 1765:21-1766:14. As Mr. Hannah emphasized, "litigation" was being used in a broad sense. *Id*. In 2008, however, true litigation-related expenses were specifically broken out in a separate product code (994). *Id*.

[redacted]

at 1768:19-1769:17. Prior to that, litigation expenses were not significant enough to warrant a separate category. *Id*. at 1783:2-6. Respondents did not present any evidence even suggesting that the patent prosecution or litigation-related expenses included under project code 101 prior to 2008 were anything but *de minimis*.[10] Accordingly, Complainants' expenses supporting their domestic industry did not include significant litigation or patent prosecution expenses.

IV. SECTION 337(A)(3)(C) DOES NOT REQUIRE INDEPENDENT PROOF OF "ARTICLES PROTECTED BY THE PATENT" TO ESTABLISH A LICENSING-BASED DOMESTIC INDUSTRY.

Last week, on December 19, 2013, the Commission announced a significant change to its long-established evidentiary standard for establishing a licensing-based domestic industry. *See Certain Computers & Computer Peripheral Devices, & Components Thereof, & Prods. Containing Same,* Inv. 337-TA-841, Commission Notice of Determination, p. 3 (U.S.I.T.C. Dec. 19, 2013). The Commission will now require Complainants to demonstrate the existence of an article protected by the patent. *See id*. Neither *InterDigital* nor *Microsoft* compelled this change; rather, each affirmed the Commission's standards for determining a domestic industry.

A. The Federal Circuit Affirmed the Commission's Historic Test For a Licensing-Based Domestic Industry.

Until last week, the Commission had consistently ruled that under Section 337(a)(3)(C), complainants may establish a domestic industry based on licensing activities alone. *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n,* 690 F.3d 1318, 1330 (Fed. Cir. 2012), *on reh'g,* 707 F.3d 1295 (Fed. Cir. 2013) and *cert. denied*, 134 S. Ct. 469 (U.S. 2013) (citing Commission precedent); *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n,* 707 F.3d 1295, 1298 (Fed. Cir. 2013) (citing additional Commission precedent). Under Commission precedent, proving a licensing-based domestic industry requires showing that: (1) there is investment that relates to

[10] At most, Respondents have established that the pre-2008 expenses relating to litigation or patent prosecution was uncertain. *See, e.g*. TR. at 1770:12-1773:11.

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the exploitation of the asserted patent (2) it relates to licensing (3) it is domestic and (4) it is substantial. *See id.* (citations omitted).

Recent Federal Circuit decisions, including *InterDigital Communications, LLC v. Int'l Trade Comm'n, id.*, 690 F.3d 1318, *InterDigital Communications, LLC v. Int'l Trade Comm'n, id.*, 707 F.3d 1295 . Cir. 2013), and *Microsoft Corp. v. Int'l Trade Comm'n*, 731 F.3d 1354 (Fed. Cir. 2013), each affirmed the Commission's long-standing approach to determining whether a domestic industry exists.[11]

In both the initial and rehearing panel opinions in *InterDigital*, the Federal Circuit took pains to make clear that its interpretation of the licensing-based domestic industry requirements of Section 337(a)(3)(C) was entirely consistent with the Commission's extensive current and historical interpretation. *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n, id.*, 690 F.3d at 1330 (Fed. Cir. 2012); *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n, id.*, 707 F.3d at 1298 (Fed. Cir. 2013). Removing any further doubt, the Federal Circuit also stated that "[i]f there were any ambiguity as to whether the statute could be applied to a domestic industry consisting purely of licensing activities, the Commission's consistent interpretation of the statute to reach such an industry ***would be entitled to deference*** under the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837." *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n, id.*, 690 F.3d at 1330.

In its first *InterDigital* decision, the Federal Circuit cited and endorsed the Commission's historic four-part test to establish a domestic industry based on licensing.[12] *InterDigital*

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[11] While a licensing-based domestic industry was not at issue in *Microsoft Corp. v. ITC*, the Federal Circuit affirmed the Commission's determination of a domestic industry. *Microsoft Corp. v. Int'l Trade Comm'n*, 731 F.3d 1354, 1362 (Fed. Cir. 2013).

[12] In its initial panel decision, the Federal Circuit noted that "[t]he Commission has consistently ruled that a domestic industry can be found based on licensing activities alone. *See, e.g., Certain Integrated Circuits, Chipsets, and Products Containing Same Including Televisions, Media Players, and Cameras*, Inv. No. 337–TA–709, Order No. 33 (Jan. 5, 2011); *Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same*, Inv. No. 337–TA–605, Order, at 118 (Dec. 1, 2008); *Certain Semiconductor Chips with Minimized*

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Commc'ns, LLC v. Int'l Trade Comm'n, id., 690 F.3d 1318 at 1330 (Fed. Cir. 2012). On rehearing, the Federal Circuit added to the initial *InterDigital* panel's extensive citation of Commission precedent as further evidence of the Commission's consistent application of its historic four-part test for determining the existence of a licensing-based domestic industry.[13] *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n, id.*, 707 F.3d at 1298 (Fed. Cir. 2013).

InterDigital's specific holding also supported the Commission's historic test for determining whether a licensing-based domestic industry exists. Affirming the Commission's determination that InterDigital's substantial licensing investment ***satisfied*** Section 337's domestic industry requirement ***without*** proof of articles protected by the patent, the Federal Circuit held that "the domestic industry requirement is satisfied if there is a domestic industry based on "substantial investment in [the patent's] exploitation" where the exploitation is achieved

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Chip Package Size and Products Containing Same (III), Inv. No. 337–TA–630, Order No. 31 (Sept. 16, 2008); *Certain 3G Wideband Code Division Multiple Access (WDCMA) Handsets and Components Thereof*, Inv. No. 337–TA–601, Order No. 20 (June 24, 2008); *Certain Digital Processors and Digital Processing Systems, Components Thereof, and Products Containing Same*, Inv. No. 337–TA–559, Order No. 24, at 84 (June 21, 2007)." *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 690 F.3d 1318, 1330 (Fed. Cir. 2012) *on reh'g*, 707 F.3d 1295 (Fed. Cir. 2013) and *cert. denied*, 134 S. Ct. 469 (U.S. 2013).

[13] Upon rehearing, the Federal Circuit noted: "[I]n addition to the cases cited in the panel opinion, earlier Commission decisions adopting the same statutory interpretation include *Certain Digital Processors and Digital Processing Systems, Components Thereof, and Products Containing Same*, Inv. No. 337–TA-559, Initial Determination (May 11, 2007), 2007 WL 7597610, at *53–57; *Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same*, Inv. No. 337–TA–432, Order No. 13 (Jan. 24, 2001), 2001 WL 1877710, at *6–8; *Certain Digital Satellite System (DSS) Receivers and Components Thereof*, Inv. No. 337–TA–392, USITC Pub. 3418, Initial and Final Recommended Determinations, at 8–10 (Apr. 2001); *Certain Dynamic Sequential Gradient Compression Devices and Component Parts Thereof*, Inv. No. 337–TA–335, USITC Pub. 2575, Initial Determination, at 58–61 (Nov.1992); and *Certain Microcomputer Memory Controllers, Components Thereof and Products Containing Same*, Inv. No. 337–TA–331, Order No. 6 (Jan. 8, 1992), 1992 WL 811299, at *3–4 ("Where the patented products are manufactured is not relevant to the subsection (C) issue.")." *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 707 F.3d 1295, 1298 (Fed. Cir. 2013).

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by various means, including licensing. *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n, id.*, 690 F.3d 1318, 1329.

B. The Federal Circuit's *InterDigital* Decisions Interpreting "Articles Protected By The Patent" as Related to Licensing-Based Domestic Industry are Controlling.

In both *InterDigital* opinions, the Federal Circuit explicitly addressed the meaning of the phrase "articles protected by the patent" in 19 U.S.C. § 1337(a)(3)(C), as it relates to establishing a licensing-based domestic industry. In each decision the Federal Circuit ***rejected*** arguments that the phrase "articles protected by the patent" meant that proof of licensing activities alone are insufficient to satisfy Section 337's domestic industry requirement. *See InterDigital Commc'ns, LLC v. Int'l Trade Comm'n, id.*, 690 F.3d 1318, 1329; *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n, id.*, 707 F.3d 1295, 1299.

In both *InterDigital* opinions, the Federal Circuit also held that a Complainant may establish a licensing-based domestic industry under § 1337(a)(3)(C) by demonstrating a substantial investment in licensing with respect to articles protected by the patent and expressly found this standard satisfied ***without evidence of actual production of articles protected by the patent***. *See InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 707 F.3d at 1297-99 (Fed. Cir. 2013). In neither opinion did the court consider whether InterDigital **or its licensees** produced articles protected by the patent. To the contrary, the court specifically noted that there was ***no argument*** "that the 'articles' in question [must] be manufactured in the United States," or "that the articles in question must be produced by licensees of the patentee." *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n, id.*, 707 F.3d at 1299 (Fed. Cir. 2013).

Instead, the Federal Circuit found that InterDigital had invested in licensing with respect to "articles protected by the patent," "because the patents in suit protect the technology that is, according to [Complainant's] theory of the case, found in the products it has licensed and that it is attempting to exclude." *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n, id.*, 707 F.3d at 1299 (Fed. Cir. 2013). Notably, the Federal Circuit reached this conclusion without reference to a single product produced by either InterDigital or its licensees, and confirmed that InterDigital's

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"revenue-producing licenses to its U.S. patents, including the patents at issue, with major manufacturers of wireless devices, including Samsung, LG, Matsushita, Apple, and RIM," satisfied the domestic industry requirement. *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, *id.*, 707 F.3d at 1299 (Fed. Cir. 2013).

In dismissing Respondent's arguments that establishing a licensing-based domestic industry required proof of articles protected by the patent, the *InterDigital* court stated that "licensing" meant that the licensor was working with its licensee to produce goods practicing its patents. *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 707 F.3d 1295, 1299 (Fed. Cir. 2013). Indeed, the Court stated that this was the "***very definition of licensing***." *Id.* (emphasis added). Based on this reasoning, the court found that InterDigital satisfied Section 337's domestic industry requirement without requiring proof that InterDigital's licenses covered products that actually had been manufactured, were in product development, or could be manufactured. *See, InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, *id*., 707 F.3d 1295, 1299. Indeed, after finding that InterDigital's substantial licensing activities fell within the domestic industry requirement because they ***implicitly*** covered "articles protected by the patent," the Federal Circuit noted that these activities presented a "classic case for the application of subparagraph (C)." *Id*. at 1298. No subsequent decision has disturbed this binding precedent.

C. The Federal Circuit's *Microsoft v. ITC* Decision Does Not Address the Requirements for Establishing a Licensing-Based Domestic Industry.

As in both *InterDigital* opinions, the Federal Circuit again *affirmed* the Commission's existing legal standards for determining the existence of a domestic industry under Section 337. *Microsoft Corp. v. Int'l Trade Comm'n*, 731 F.3d 1354, 1362 (Fed. Cir. 2013). The *Microsoft* court, however, ***never*** addressed the standards for establishing a licensing-based domestic industry, ***because those standards were not at issue***. *Microsoft Corp. v. Int'l Trade Comm'n*, *id.*, 731 F.3d at 1361-62 (domestic investments related to Microsoft's *investment in its operating system*, not licensing; reviewing only evidentiary sufficiency).

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Microsoft did not attempt to establish a licensing-based domestic industry. *Microsoft Corp. v. Int'l Trade Comm'n, id.*, 731 F.3d 1354, 1361-62; *see also, Certain Mobile Devices, Associated Software, & Components Thereof*, Inv. 337-TA-744, Commission Opinion, 9-10 (U.S.I.T.C. June 5, 2012) (identifying no licensing-based investments to establish domestic industry). Instead, Microsoft attempted to establish a domestic industry on every ground ***except licensing***. *Microsoft Corp. v. Int'l Trade Comm'n, id.*, 731 F.3d at 1361-62*; see also, Certain Mobile Devices, Associated Software, and Components Thereof*, Inv. 337-TA-744, Commission Opinion, 9-10 (June 5, 2012) (identifying investments to establish domestic industry). Microsoft attempted to establish a domestic industry through its investments in: (1) plant and equipment, (2) labor and capital, and (3) research and development related to its Windows Mobile 6.5 and Windows Phone 7 operating systems. *Certain Mobile Devices, Associated Software, and Components Thereof*, Inv. 337-TA-744, Commission Opinion, 9-10 (June 5, 2012). Accordingly, because Microsoft made no effort to establish a licensing-based domestic industry, those requirements were not at issue, and the *Microsoft* court did not address them. *Microsoft Corp. v. Int'l Trade Comm'n*, 731 F.3d 1354, 1361-62 (Fed. Cir. 2013).

Because a licensing-based domestic industry was not at issue in the case, any expressions the *Microsoft* court made relating to Section 337's requirement of substantial investments related to actual "articles" protected by the patent are limited to the other prongs of Section 337(a)(3)(C) that were at issue: namely, engineering and/or research and development. At most, such statements are *dicta* that is not controlling in any subsequent determination of what constitutes sufficient proof of a licensing-based domestic industry. *See, e.g., Cohens v. State of Virginia*, 19 U.S. 264, 399-400, 5 L. Ed. 257 (1821) (general expressions on question not actually before the court should not control judgment in a subsequent suit).

A comparison of the *InterDigital* and *Microsoft* decisions reveals why the latter did not disturb the former's licensing-based domestic industry holding. The *InterDigital* court's detailed analysis ***explicitly*** addressed the requirements to establish a licensing-based domestic industry because that is what InterDigial sought to prove. In *Microsoft*, the issue was whether

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Microsoft's domestic investment in its mobile operating system could satisfy Section 337(a)(3)(C) where the software was incorporated into phones produced abroad and imported into the United States. *Microsoft Corp. v. Int'l Trade Comm'n*, 731 F.3d 1354, 1361-62 (Fed. Cir. 2013). Microsoft's domestic industry claim simply did not involve the licensing prong of Section 337(a)(3)(C).

Further, the *Microsoft* court noted that it was not addressing the Commission's conclusions of law or the standard the Commission used in making its domestic industry determination, but was instead simply reviewing evidentiary sufficiency. *Microsoft Corp. v. Int'l Trade Comm'n, id.*, 731 F.3d 1354, at 1362 (reaching decision while "respect[ing] a fundamental limit on [its] role in reviewing evidentiary sufficiency *where the finder of fact has applied proper legal standards*.") (emphasis added). For these reasons the *Microsoft* decision did not affect *InterDigital's* holding that no technical prong is required to establish a domestic industry based on licensing pursuant to Section 337(a)(3)(C). *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 707 F.3d 1295, 1299 (Fed. Cir. 2013).

Accordingly, Complainants urge the Commission to return to its former law and precedent regarding the establishment of a licensing-based domestic industry, and to abandon its recent decision in the 841 investigation. Complainants respectfully submit the Commission's decision in the 841 Investigation is both incorrect and goes against all prior Commission and Federal Circuit precedent for the last 25 years.

V. THE COMMISSION SHOULD REMAND THE INVESTIGATION TO PERMIT THE ALJ TO TAKE EVIDENCE ON "ARTICLES PROTECTED BY THE PATENT" IN RELATION TO COMPLAINANTS' LICENSING-BASED DOMESTIC INDUSTRY CLAIM.

Neither the Federal Circuit's *Microsoft* decision, nor the Commission's "Notice of Determination" in the 841 Investigation had issued when the hearing in this Investigation concluded. Accordingly, the ALJ did not take evidence on the existence of "articles protected by the patent." Instead, in this Investigation the ALJ applied the Commission's existing standard to determine the existence of a licensing-based domestic industry. ID at 296 ("[W]here a

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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"). Because the standard in effect when the parties were providing evidence in this Investigation did not require a technical prong analysis to determine the existence of a licensing-based domestic industry, the record contains only passing reference to "articles protected by the patent" (excluding the accused infringing products).

Complainants briefly noted that under their theory of the case, some of their licensees' products practiced the patent-in-suit. HT 733:2-736:7; CDX-12C; CDX-1163C. Even this brief digression drew inquiry from the ALJ as to why Complainants were discussing licensee products. HT 734:10-13 ("For my information, why are we delving into an Apple product?").

Had the Commission's existing standard for determining the existence of a licensing-based domestic industry required it, Complainants would have provided significantly more analysis and evidence regarding their licensees' products that practice the patent-in-suit. If the Commission continues to maintain that Complainants shall be required to demonstrate the existence of an article protected by the patent (a new standard that Complainants urge the Commission to abandon), Complainants respectfully request that the Commission reopen the record and remand this Investigation to the ALJ to conduct an evidentiary determination under this new standard.

VI. ADDITIONAL INFORMATION REQUESTED BY THE COMMISSION.

A. Remedy And Bonding.

1. Limited exclusion orders should issue.

In the ID, the ALJ recommended that, should the Commission find a violation, the Commission "issue a limited exclusion applying to each Respondent and all of its affiliated companies, parents, subsidiaries, or other related business entities, or its successors or assigns and prohibiting the unlicensed entry of all of Respondents' accused wireless consumer

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electronics devices and components thereof that infringe the claims of the asserted patent for which a Section 337 violation is found."

Respondents do not dispute that they import the products at issue into the U.S. Because there are no public interest considerations weighing against the issuance of a limited exclusion order, as discussed below, Complainants respectfully request that the Commission follow the ALJ's recommendation and issue the proposed limited exclusion order submitted herewith as Exhibit A. The proposed limited exclusion order complies with Commission Rules and precedent.

2. The issuance of cease and desist orders is warranted.

Section 337 authorizes the Commission to issue cease and desist orders as a remedy for a violation. *See* 19 U.S.C. § 1337(f)(1). The Commission generally issues a cease and desist order directed to a domestic respondent when a "commercially significant" amount of infringing, imported product is in the United States. *See In re Certain Hardware Logic Emulation Sys. & Components Thereof*, Inv. No. 337-TA-383, U.S.I.T.C. Pub. 3089, Comm'n Op. on Remedy, the Public Interest, and Bonding at 25, 1998 WL 307240 (U.S.I.T.C. Mar. 1998) and *In re Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, Comm'n Op. on the Issue Under Review, and on Remedy, the Public Interest and Bonding at 37-42, Pub. No. 2391 (U.S.I.T.C. June 1991).

In the ID, the ALJ recommended that the Commission decline to issue any cease and desist orders because Complainants supposedly failed to show that Respondents' inventories were "commercially significant." As a threshold matter, Respondents only argued that Complainants did not introduce evidence of U.S. inventory as to certain Respondents (ZTE, Huawei, Kyocera, LG, Novatel Wireless, and Samsung). *See* R.Br. at 189-190. Accordingly, Respondents implicitly conceded that Complainants' evidence was sufficient with respect to the other Respondents, including Barnes & Noble, Garmin, and HTC.

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Indeed, a closer look at Complainants' evidence reveals that the following remaining Respondents do, in fact, maintain commercially significant inventories of the Accused Products in the United States: Barnes & Noble, Garmin, HTC, Huawei, and Samsung.

Barnes & Noble and Garmin have entered into stipulations with Complainants that expressly reveal their inventories to be in the [redacted]. *See* Exhibits B, C (C.Pre.Br. (Exs. 8 & 10)). The record shows that "[redacted]." Exhibit B at ¶ 9 (emphasis added). The Garmin stipulation similarly discloses [redacted]. Exhibit C, Attachment C at 3-5. *See In re Certain Self-Cleaning Litter Boxes & Components Thereof*, Inv. 337-TA-625, RD on Remedy and Bond (U.S.I.T.C. Dec. 1, 2008) (thousands of units in inventory was "commercially significant").

Likewise, the HTC stipulation references a spreadsheet that sets forth the "monthly U.S. import and sales volume and revenue of each of the Accused Products that are currently imported into the United States for the first three quarters of 2012." Exhibit D (C.Pre.Br. (Ex. 9)) at ¶ 6. This spreadsheet shows [redacted]. *Id.* Similarly, the Huawei stipulation admits that the [redacted]. Exhibit E (C.Pre.Br. (Ex. 11)) at ¶ 11. While the snapshot inventory for Huawei [redacted]. *Id.* (Appx. A & B). Huawei also shipped [redacted]. *Id.* (Appx. A). *See Certain Electronic Digital Media Devices & Components Thereof*, Inv. No. 337-TA-796, RD on Remedy and Bond (U.S.I.T.C. Nov. 7, 2012) (evidence of

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shipments of thousands of units of Accused Products with a combined value in the hundreds of thousands of dollars was sufficient for "commercially significant inventory").

Samsung also maintains a commercially significant inventory of wireless consumer electronics devices in the United States. *See, e.g., Certain Electronic Digital Media Devices & Components Thereof*, Inv. No. 337-TA-796, RD on Remedy and Bond (Nov. 7, 2012). In *Certain Electronic Digital Media Devices*, ALJ Pender held that both Samsung Electronics America ("SEA") and its affiliate Samsung Telecommunications America ("STA") maintain a commercially significant inventory of wireless consumer electronics devices. *Id.* at 6. Specifically, ALJ Pender held that STA's Chicago distribution center regularly receives shipments of thousands of mobile phones (*i.e.* wireless electronics devices) with a combined value in the hundreds of thousands of dollars, and that SEA's American Distribution Center maintains "on-hand" inventory of more than 26,000 units of the Galaxy Tab (another wireless electronic device) worth more than $10.5 million. *Id* at 5-6. [14]

Rather than find that these inventories are not commercially significant, however, the ID simply ignores them. This is error because the Commission has held that even "**one infringing product** is sufficient to constitute a 'sufficient inventory' for purposes of a cease and desist order." *In re Certain Unified Commc'ns Sys., Prods. Used with Such Sys., & Components Thereof*, Inv. No. 337-TA-598, Pub. No. 4136 at 147 (U.S.I.T.C. Mar. 2010) (emphasis added).

Accordingly, Complainants respectfully request that the Commission issue the proposed cease and desist orders attached hereto as Exhibits F - L against Barnes & Noble, Garmin, HTC, Huawei, and Samsung. The proposed cease and desist orders comply with Commission Rules and precedent.

[14] Samsung cites a lack of evidence of inventory in this case, but should not be rewarded for failing to produce this information in response to Complainants' discovery requests, such as request for production No. 30, which sought "[d]ocuments sufficient to show your current inventory of each of your Accused Products in the United States." Samsung also cannot explain why its admissions regarding inventory from other investigations would be insufficient to support a cease and desist order here.

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3. The Commission should set the bond at 100%.

Section 337 provides that the bond during the Presidential review period should be set at an amount "sufficient to protect the complainant from ***any*** injury . . ." 19 U.S.C. § 1337(j)(3) (emphasis added). Here, Complainants have established that the ability to enforce their intellectual property rights is critical to protecting their licensing-based domestic industry. HT 1664:16-23 (inability to license '336 patent during reexamination caused cash-flow problems). As with the reexamination period, permitting Respondents to import infringing products during the Presidential review period would similarly discourage potential licensees (including Respondents) from licensing the '336 patent and would directly harm Complainants' domestic industry. In addition, requiring a bond would protect Complainants' domestic licensees that compete with Respondents, including Apple and Motorola. *See Certain Microsphere Adhesives, Process for Making Same, & Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, 1996 WL 1056095, at *12 (U.S.I.T.C. Jan. 16, 1996) (in setting bond amount, Commission considers "the patented product made by the domestic industry"). The Commission protects Complainants' licensing-based domestic industry to the same extent it protects a manufacturing-based domestic industry. *See InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 707 F.3d 1295, 1303-1304 (Fed. Cir. 2013) (party alleging licensing based domestic industry entitled to relief under Section 337, whether or not any domestic party manufactures protected article). Accordingly, a bond sufficient to protect Complainants from any injury is appropriate.

Where, as here, there are a wide variety of products, pricing variations, and distribution methods, the Commission has set a 100% bond during the Presidential review period. *See Certain Microsphere Adhesives, Process for Making Same, & Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, 1996 WL 1056095, at *12 (U.S.I.T.C. Jan. 16, 1996) (setting bond at 100% when price comparison would be "very problematic because of the large variety of products involved, the wide variations in pricing, and the many distribution methods employed"); *see also Certain Digital Multimeters & Prods. With*

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Multimeter Functionality, Inv. No. 337-TA-588, Comm'n Op., at 12-13 (U.S.I.T.C. June 3, 2008) (finding 100 percent bond; each respondent set prices differently, preventing clear differentials between complainant's products and infringing imports).

Among the remaining Respondents, the Accused Products vary significantly and range from tablets (Barnes & Noble) to navigation devices (Garmin) to mobile hotspots (Novatel) to radar (Garmin) to phones (HTC, Huawei, LG, Samsung, and ZTE). Respondents concede that "smartphone devices . . . are priced differently and offer different features and functionality" than navigation devices. *See* Respondents' Post-Hearing Reply Brief, Doc. ID 513125; *see also* HT 1865:9-25 (market for navigation devices different than for smartphones and other devices according to Respondents' expert Dr. Vander Veen). There are even differences between the various phones. The ZTE WF720, for example, is a wireless home phone base. The ZTE Z221 is a flip cell phone. Others are smartphones or feature phones. Moreover, there are wide variations in pricing, as shown in a spreadsheet used to track Complainants' purchases of the Accused Products. For example, the Barnes & Noble Nook tablet 8GB costs $200, while a Novatel MiFi2372 3G runs for about $45. *See* JX-0155C. In contrast to both, the Garmin GMR xHD 1206 radar lists for $6,300. Even among phones, the prices differ substantially. A ZTE Score M costs $250, while the LG Lucid is $600. Huawei phones are generally around $50, while the Samsung Galaxy Note costs $750. *See* JX-0155C. This is not surprising, due to the significant discrepancies in features, screen size, and memory in today's smartphones.

Complainants' licensee products likewise differ in type of product, ranging from Apple and Blackberry phones to Pantech and Apple tablets to HP and Fujitsu laptop computers. These products also vary greatly in price. Complainants purchased an Apple iPhone 3Gs for $800, while various BlackBerry phones range from $100 to $400. *See* JX-0155C. Fujitsu Lifebooks range in price from roughly $1,000 to $2,000 while the HP Pavilion is around $400. *See id.*

Given the number and type of products at issue in this Investigation, it would be impossible to calculate a clear price differential as the basis for the Commission's bond

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determination. Thus, a bond equal to 100% of the selling price of the Accused Products should be entered.

B. The Expiration Date of the Asserted Patent.

The expiration date of the '336 Patent is September 15, 2015.

C. HTSUS Numbers for the Accused Products.

The Harmonized Tariff Schedule of the United States ("HTSUS") item number(s) under which the infringing electronic products, components thereof, and products containing same have been imported into the United States may be classified under at least 8471, 8471.30.0100, 8471.41.01, 8471.49.00 (portable computers, laptops, tablets); 8517, 8517.12.00, 8517.18.00, 8517.18.0050, 8517.62.00, 8517.62.00.0010, 8517.62.00.0050, 8517.69.00 (mobile phones, tablets, hotspot, etc); 8526, 8526.91.00 (GPS device); 9504, 9504.50.00, 9504.90.40 (portable gaming device); 8471, 8471.30.0100, 8471.41.01, 8471.41.0150, 8471.49.0000, 8471.50.01, 8471.50.0150, 8471.60, 8471.60.10, 8471.60.1050, 8471.60.7000, 8471.60.90, 8471.60.9050, 8471.80, 8471.80.10, 8471.80.40, 8471.80.9000, 8471.90.0000, 8473.30, 8473.30.11, 8473.30.1180, 8473.30.51, 8473.30.91 (hotspot/mobile broadband device). These HTSUS classifications are intended for illustration only and are not intended to be restrictive of the accused devices and products.

Conclusion

For the foregoing reasons, Complainants respectfully request that the Commission should find that Respondents have violated Section 337, and enter appropriate remedies.

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Dated: December 23, 2013

Respectfully submitted,

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APPENDIX OF EXHIBITS

	Attachment Addressing Public Interest
A	Proposed Limited Exclusion Order (all Respondents)
B	Stipulation (Barnes & Noble)
C	Stipulation (Garmin)
D	Stipulation (HTC)
E	Stipulation (Huawei)
F	Proposed Order to Cease & Desist (Barnes and Noble, Inc.)
G	Proposed Order to Cease & Desist (Garmin International, Inc.)
H	Proposed Order to Cease & Desist (Garmin USA, Inc.)
I	Proposed Order to Cease & Desist (HTC America)
J	Proposed Order to Cease & Desist (Huawei Device USA Inc.)
K	Proposed Order to Cease & Desist (Futurewei Technologies, Inc. d/b/a Huawei Technologies (USA))
L	Proposed Order to Cease & Desist (Samsung Electronics America, Inc.)

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Attachment Addressing Public Interest

A. Respondents, Not Complainants, Have The Burden Of Proving Public Interest.

Respondents, in their post-hearing briefs, have repeatedly argued that Complainants have provided no evidence showing that an exclusion order would advance the public interest:

- Complainants . . . presented no evidence as to any benefit to production facilities for like or directly competitive articles in the United States. *See* R.Br. at 192.
- Complainants have not identified any licensees that could replace the potentially excluded products, let alone that such potential licensees have the capability and/or capacity to do so. *Id*. at 193.
- [T]hey presented no evidence that Apple products are interchangeable, or that they have the infrastructure or the capacity to fill the void. *Id*. at 195.
- Complainants did not produce sufficient evidence that their licensees produce like or directly competitive products in the United States. *Id*. at 195.
- There is also no evidence in the record as to where these licensees actually manufacture their products, so there is no evidence that U.S. production of these products would be affected… *Id*.

Respondents' attempt to re-frame the question with respect to public interest is misplaced. Because it is presumed that the general public has an interest in intellectual property enforcement, the question is whether there are significant considerations that would ***override*** the public's interest in enforcing a valid patent. The statute unmistakably mandates that the Commission ***shall*** issue an exclusion order ***unless*** the public interest dictates otherwise. 19 U.S.C. § 1337(d)(1). Here, Respondents have failed to proffer evidence sufficient to show that the public interest dictates that no exclusion order issue.

B. Respondents Have Failed To Satisfy Their Burden Of Proving Public Interest.

The four public interest factors the Commission considers when determining whether to issue remedial orders are: (1) the public health and welfare; (2) competitive conditions in the U.S. economy; (3) the production of competitive articles in the U.S.; and (4) U.S. consumers. 19 U.S.C. § 1337(d). Historically, injunctive relief has been consistently granted except in exceptional circumstances of public interest relevant to critical health or welfare issues. *See Spansion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1360 (Fed. Cir. 2010) (only three investigations where Respondents met burden of proving that public interest considerations

[redacted]

outweighed need for injunctive relief). Respondents here have failed to prove the existence of such exceptional circumstances.

1. Respondents admit no impact on public health and welfare.

As an initial matter, Respondents concede that an exclusion order would not impact the public health and welfare or the production of competitive articles in the U.S. At the hearing, Respondents' expert Dr. Vander Veen [redacted]:

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

HT 1859:13-23. Likewise, Respondents' post-hearing brief is silent on this public interest factor. *See* R.Br. at 191-95.

Accordingly, Respondents have presented no evidence to show that any public health and welfare interests would override the statutory mandate that an exclusion order issue.

2. Respondents fail to provide evidence that a remedial order would adversely affect competitive conditions.

Respondents argue that remedial orders might impact competitive conditions in the U.S. and U.S. consumer interest. But Respondents provide no evidence or authority to support their position, other than irrelevant pie graphs and conclusory testimony from Dr. Vander Veen. For example, Respondents cite to a demonstrative and some underlying data showing the market share of Android vs. iOS phones. *See* RDX-6C.6 & RX-1634C. This pie graph, however, has no bearing on *Respondents'* phones, since Respondents neither claim to, nor do they in fact, monopolize the Android market. Moreover, while Respondents assert that they account for 50% of the sales of smartphones in the U.S., they present no evidence that Complainants' licensees—including Apple, Motorola and Nokia—could not replace those sales and do not have the infrastructure or capacity to fulfill those additional orders. Nor do Respondents cite to any legal

[redacted]

authority that the mere evidence of a 50% market share would, in and of itself, equate to such negative competitive conditions as to override the issuance of an exclusion order. Instead, the sole case that Respondents rely upon expressly held that "competitive conditions in the United States **do *not* weigh against the issuance of an exclusion order**, but favor providing a transition period of four months prior to the exclusion of subject articles." *Certain Personal Data & Mobile Commc'ns Devices & Related Software*, Inv. No. 337-TA-710, Comm'n Op., at 83 (Dec., 29, 2011) (emphasis added). Here, Respondents have not requested a specific transition period or provided evidence to justify any particular time frame.

Relying solely on attorney argument, Respondents also assert that a remedial order would increase Complainants' bargaining advantage. Respondents' position seems to be that the Commission, having determined that Respondents infringe Complainants' intellectual property rights, should then not exclude Respondents' infringing products because that would give Complainants an unfair advantage in licensing their intellectual property (*i.e.* practicing their domestic industry) to Respondents. There is nothing controversial about this. Parties found to infringe a valid U.S. patent—in the ITC or otherwise—are always at a disadvantage at the bargaining table, and rightly so. Respondents cite no authority to suggest that the monopoly granted by the Patent Clause of the U.S. Constitution should be supplanted so that they can negotiate a better license rate.

To the contrary, Respondents' continued unlawful importation of infringing goods would continue to harm Complainants' intellectual property rights and, by extension, the public interest. *Certain Two-Handle Centerset Faucets & Excutcheons, & Components Thereof*, Inv. No. 337-TA-422, USITC Pub. No. 3332, Comm'n Op. at 9 (U.S.I.T.C. July 2000).

3. <u>Respondents offer no evidence that a remedial order would adversely reduce the U.S. supply of products</u>.

Complainants' licensees, including Apple, RIM, Motorola, NEC, Pantech, and Sony Ericsson, are capable of supplying U.S. consumers with devices with the same or similar

[redacted]

functionality as Respondents'. Respondents' expert, Dr. Vander Veen, concedes that [redacted]:

Q. [redacted]

A. [redacted]

HT 1863:3-12. In fact, Respondent Samsung acknowledges that its products—along with Respondents HTC and LG—are directly competitive with, and provide the same or similar functionality as, products manufactured by Complainants' licensees, Apple and Research in Motion:

> Samsung and numerous third parties, including Motorola, Ericsson, Nokia, HTC, LG Electronics, and Research in Motion make directly competitive smartphone, tablet and music devices that provide the same or similar functionality. Along with these other companies, Samsung has the capacity to replace any Apple products that are subject to the requested exclusion order.

See Certain Electronic Devices, Including Wireless Communication Devices, Portable Music & Data Processing Devices, and Tablet Computers, Inv. 337-TA-794, Samsung's Statement on the Public Interest at 5 (U.S.I.T.C. Oct. 22, 2012). Dr. Vander Veen also admits that [redacted]:

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

HT 1864:20-1865:8.

[redacted]

Conceding that there are non-infringing alternatives available to U.S. consumers, Dr. Vander Veen attempts to re-frame the question: "[redacted]." HT 1863:24-1864:5. However, Dr. Vander Veen provides no evidence to answer his own question. Instead, Dr. Vander Veen admits that [redacted]. HT 1861:5-21. Dr. Vander Veen also admits that [redacted]. HT 1865:9-25.

Rather than provide evidence or analysis, Respondents offer up an unsupported argument: if an exclusion order prevents the importation of Respondents' infringing products, "[t]here would be fewer market participants selling the products. And it consequently would lead to higher prices." HT 1846:20-22. Respondents cite no evidence to suggest an increase in prices, or by how much prices might increase. Regardless, even crediting Respondents' speculation that U.S. consumers might face unidentified price increases, that does not outweigh the public interest in protecting intellectual property rights. *Certain Ink Jet Print Cartridges & Components Thereof*, Inv. No. 337-TA-446, Comm'n Op. at 14 (U.S.I.T.C. May 8, 2002) (increase in prices for retailers and consumers does not outweigh interest in protecting intellectual property rights).

4. Respondents offer no evidence that a remedial order would adversely impact U.S. consumers.

Respondents argue that a remedial order would adversely affect existing U.S. customers by precluding Respondents from importing products or components to comply with their warranty obligations. R.Br. at 194. Respondents are wrong.

Respondents provide no evidence justifying an exemption for warranty repair or replacement of Respondents' defective products. Respondents point to the bare existence of warranties covering certain Accused Products, but provide no evidence indicating any repair or

[redacted]

replacement has ever occurred. Respondents similarly provide no evidence of the numbers of U.S. consumers potentially impacted by Respondents' defective products, or the number who actually file warranty claims regarding Respondents' defective products.

Respondents' expert Dr. Vander Veen also failed to identify a ***single*** U.S. consumer that ever successfully obtained a "repair or replacement" pursuant to Respondents' various warranty policies. Indeed, Dr. Vander Veen failed to identify a ***single*** warranty claim that any Respondent ever received, much less one that resulted in Respondents providing a replacement product to any U.S. consumer. Respondents undoubtedly have this information, but for whatever reason chose not to provide it.

Finally, Respondents' argument ignores the fact that Respondents' warranty policies expressly provide for [redacted]. *See e.g.,* RX-605C.214 [redacted]); RX-997C.23 ([redacted]); RX-959C.1 [redacted]). To the extent it becomes necessary, Respondents can fully comply with their warranty obligations to U.S. customers by [redacted]. This has the added benefit of supporting U.S. intellectual property rights, as Respondents' customers may replace Respondents' defective products with noninfringing alternatives.

Accordingly, Respondents provide no authority or justification to override the issuance of an exclusion order.

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

Before the Honorable E. James Gildea
Administrative Law Judge

In the Matter of **CERTAIN WIRELESS CONSUMER ELECTRONICS DEVICES AND COMPONENTS THEREOF**	**Investigation No. 337-TA-853**

CERTIFICATE OF SERVICE

I, Tracey Nero, hereby certify that on December 23, 2013, a copy of the foregoing documents were served upon each of the following parties or their counsel in the manner indicated:

1. Complainants' Opening Brief on Commission Review of Initial Determination – *Public Version*

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