

PUBLIC VERSION

**THE 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**

**RESPONDENTS' JOINT REPLY  
TO THE SUBMISSION OF COMPLAINANTS  
AND THE INVESTIGATIVE ATTORNEY  
PURSUANT TO THE COMMISSION'S NOTICE OF PARTIAL REVIEW**

TABLE OF CONTENTS

	<u>Page</u>
I. REPLY TO COMPLAINANTS' SUBMISSION ON QUESTION NO. 1 .....	1
A. Complainants' Response Improperly Addresses Issues Beyond The Scope of The Commission's Question No. 1 .....	1
1. The ALJ properly construed the claim term "entire oscillator" .....	1
2. Complainants' discussion of the "varying" limitation is specious .....	2
a. Complainants waived their new, but belated, argument .....	2
b. Complainants' discussion of the "varying" limitation is contrary to the evidence .....	3
c. Complainants' discussion of the "varying" limitation confuses supply voltage/current with control voltage/current .....	3
3. Complainants' "regulate vs. generate" argument is a distinction without a difference .....	5
4. Complainants' Table 2 is beyond the scope of Question No. 1 .....	7
B. Complainants' Attempt to Show A Lack of Reliance on A Control Signal Misrepresents The Evidence .....	8
1. [REDACTED] PLL is not representative of other PLLs .....	8
2. Complainants incorrectly argue that the [REDACTED] [REDACTED] [REDACTED] .....	9
a. Complainants misrepresent the operation of the [REDACTED] PLL .....	9
b. Complainants improperly characterize another configuration of the [REDACTED] PLL .....	11
3. Complainants mischaracterize RX-621C's discussion of the [REDACTED] [REDACTED] .....	12
4. Dr. Oklobdzija's testimony about the [REDACTED] [REDACTED] does not support Complainants' argument .....	14
C. Complainants' Attempt to Avoid Evidence of Reliance Regarding The External Crystal/Clock Generator Lacks Merit .....	15
1. The PLLs rely on an external crystal/clock generator to generate a frequency that is a multiple of the crystal's frequency .....	15
2. Complainants misrepresent the [REDACTED] PLL .....	17

**TABLE OF CONTENTS (cont'd)**

	<u>Page</u>
II. REPLY TO COMPLAINANTS' SUBMISSION ON QUESTION NO. 2.....	17
A. There Is No Continuing Revenue Stream from Existing Licenses .....	17
B. TPL Is Not Engaged In An Ongoing Licensing Program and The Nature of PDS' Investments Is Uncertain .....	18
C. Most of Complainants' Response to this Question is Unresponsive.....	19
III. REPLY TO COMPLAINANTS' SUBMISSION ON QUESTION NO. 3.....	19
IV. REPLY TO COMPLAINANTS' SUBMISSION ON QUESTION NO. 4.....	21
A. The Commission Correctly Determined That Establishing A Domestic Industry Based on Licensing under 19 U.S.C. § 1337(a)(3)(C) Requires Proof of "Articles Protected By The Patent" .....	22
B. The Record Evidence Is Insufficient To Establish The Existence of "Articles Protected By The Patent" And A Remand Is Not Warranted .....	24
V. REMEDY AND BONDING.....	25
VI. PUBLIC INTEREST .....	32
VII. CONCLUSION.....	34

**TABLE OF AUTHORITIES**

	<b><u>Page(s)</u></b>
<b>Cases</b>	
<i>Broadcom Corp. v. Int'l Trade Comm'n</i> , 542 F.3d 894 (Fed. Cir. 2008) .....	2
<i>Certain Audiovisual Components and Prods, Containing Same</i> , Inv. No. 337-TA-837, Order No. 67 (Feb. 27, 2013) .....	27
<i>Certain Automated Media Library Devices</i> , Inv. No. 337-TA-746, Comm'n Op. (Jan. 9, 2013).....	28, 31, 32
<i>Certain Bulk Welding Wire Containers and Components Thereof and Welding Wire</i> , Inv. No. 337-TA-686, Rec. Determin., 2011 WL 7464368 (Nov. 2011) .....	29
<i>Certain Computers and Computer Peripheral Devices</i> , Inv. No. 337-TA-841, Comm'n Notice (Oct. 19, 2013).....	21, 23
<i>Certain Elec. Digital Media Devices &amp; Components Thereof</i> , Inv. No. 337-TA-796, Rec. Determin., 2012 WL 6831408 (Nov. 7, 2012) .....	29
<i>Certain Ground Fault Circuit Interrupters</i> , Inv. No. 337-TA-739, Comm'n Op., 2012 WL 2394435 (June 8, 2012).....	2
<i>Certain Integrated Circuits, Chipsets &amp; Prods. Containing Same Including Televisions</i> , Inv. No. 337-TA-786, Comm'n Op. (Oct. 10, 2012).....	19
<i>Certain Mobile Devices, Associated Software, &amp; Components Thereof</i> , Inv. No. 337-TA-744, Comm'n Op. (June 5, 2012).....	28
<i>Certain Rubber Antidegradants, Components Thereof, and Prods. Containing Same</i> , Inv. No. 337-TA-533, Init. Determin. (Apr. 2008).....	32
<i>Certain Semiconductor Chips &amp; Prods. Containing Same</i> , Inv. No. 337-TA-753, Comm'n Op. (Aug. 17, 2012).....	20
<i>Certain Unified Commc'ns. Sys., Prods. Used With Such Sys., and Components Thereof</i> , Inv. No. 337-TA-598, USITC Pub. 4136, Init. Determin. (Mar. 2010).....	27
<i>Hazani v. U.S. Int'l Trade Comm'n</i> , 126 F.3d 1473 (Fed. Cir. 1997) .....	2

**TABLE OF AUTHORITIES (cont'd)**

	<b><u>Page(s)</u></b>
<i>InterDigital Commc'ns, LLC v. Int'l Trade Comm'n</i> , 707 F.3d 1295 (Fed. Cir. 2013) .....	23
<i>John Mezzalingua Assoc., Inc. v. Int'l Trade Comm'n</i> , 660 F.3d 1322 (Fed. Cir. 2011) .....	20
<i>Microsoft Corp. v. Int'l Trade Comm'n</i> , 731 F.3d 1354 (Fed. Cir. 2013) .....	22, 23
 <b>Statutes</b>	
19 U.S.C. § 1337 .....	32
 <b>Rules</b>	
19 C.F.R. § 210.43 .....	1, 2
19 C.F.R. § 210.45 .....	1, 19

TABLE OF ABBREVIATIONS

<b>'336 patent</b>	U.S. Patent No. 5,809,336, entitled "High Performance Microprocessor Having Variable Speed Clock"
<b>ALJ</b>	Administrative Law Judge
<b>C&amp;D</b>	Cease & Desist
<b>CPre.</b>	Complainants' Corrected Initial Pre-Hearing Brief
<b>CBr.</b>	Complainants' Initial Post-Hearing Brief
<b>CRBr.</b>	Complainants' Reply Post-Hearing Brief
<b>CDX</b>	Complainant's Demonstrative Exhibit
<b>Complainants</b>	Complainants Phoenix Digital Solutions, Patriot Scientific Corporation and Technology Properties Limited
<b>CSub.</b>	Complainants' Opening Brief on Commission Review of Initial Determination, filed on December 23, 2013
<b>CX</b>	Complainants' Exhibit
<b>CXM</b>	Complainants' <i>Markman</i> Exhibit
<b>IA</b>	Commission Investigative Attorney from the Office of Unfair Imports Investigations (the Staff)
<b>ID</b>	Final Initial Determination, issued on September 6, 2013
<b>JX</b>	Joint Exhibit
<b>JXM</b>	Joint <i>Markman</i> Exhibit
<b>MTr.</b>	Transcript of <i>Markman</i> Hearing
<b>██████████</b>	██████████ Incorporated
<b>Pet.</b>	Complainants' Petition for Review of ID, filed on September 23, 2013
<b>Pet. Oppo.</b>	Respondents' Opposition to Complainants' Petition for Review, filed on October 17, 2013
<b>RBr.</b>	Respondents' Initial Post-Hearing Brief
<b>RRBr.</b>	Respondents' Reply Post-Hearing Brief
<b>RRem.</b>	Respondents' Joint Brief on Remedy, Bonding, and the Public Interest, filed on December 23, 2013
<b>RSub.</b>	Respondents' Joint Submission in Response to the Commission's Notice of Partial Review, filed on December 23, 2013
<b>RDX</b>	Respondents' Demonstrative Exhibit

PUBLIC VERSION

<b>RD</b>	Recommended Determination, issued on September 6, 2013
<b>Respondents<sup>1</sup></b>	Barnes & Noble, Inc. ("Barnes & Noble"); Garmin Ltd., Garmin International, Inc. and Garmin USA, Inc. (collectively, "Garmin"); HTC Corporation & HTC America, Inc. (collectively, "HTC"); Huawei Technologies Co., Ltd., Huawei Device Co., Ltd., Huawei Device USA Inc., and Futurewei Technologies, Inc. (collectively, "Huawei"); LG Electronics, Inc. and LG Electronics U.S.A., Inc. (collectively, "LG"); Nintendo Co., Ltd., and Nintendo of America Inc. (collectively, "Nintendo"); Novatel Wireless, Inc. ("Novatel Wireless"); Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively, "Samsung"); and ZTE Corporation and ZTE (USA) Inc. (collectively, "ZTE")
<b>RPX</b>	Respondents' Physical Exhibit
<b>RX</b>	Respondents' Exhibit
<b>SBr.</b>	Staff's Initial Post-Hearing Brief
<b>SRBr.</b>	Staff's Reply Post-Hearing Brief
<b>SSub.</b>	Brief of the Office of Unfair Import Investigations on Issues under Review and Remedy, filed on December 23, 2013
<b>TI</b>	Texas Instruments Inc.
<b>Tr.</b>	Transcript of Pre-Hearing Conference and Hearing

**Note: Unless otherwise noted, all emphases in this brief have been added.**

---

<sup>1</sup> For purpose of this submission, "Respondents" do not include the respondents that have recently been terminated from this investigation based on settlement. These terminated respondents are: Acer Inc. and Acer America Corporation; Amazon.com, Inc.; Kyocera Corporation and Kyocera Communications, Inc.

PUBLIC VERSION

Pursuant to 19 C.F.R. § 210.43(d)(3) and the Commission's November 25, 2013 Notice in this investigation, Respondents respectfully submit the following reply to Complainants' December 23, 2013 Opening Brief on Commission Review of Initial Determination ("CSub."), and to the Brief of the Investigative Attorney on Issues Under Review and Remedy ("SSub.).

**I. REPLY TO COMPLAINANTS' SUBMISSION ON QUESTION NO. 1**

**A. Complainants' Response Improperly Addresses Issues Beyond The Scope of The Commission's Question No. 1**

In its Notice of Partial Review, the Commission expressly instructed the parties to brief only "the discrete issues described" in the Notice. [Nov. 25, 2013 Notice of Part. Rev. at 5 ("The parties are not to brief other issues on review, which are adequately presented in the parties' existing filings.")] Disregarding this instruction, Complainants devote nearly three quarters of their response on Question No. 1 to issues beyond the scope of the Notice, such as claim construction, the "varying" limitation, their "regulate vs. generate" argument, and string citations to non-germane issues. [CSub. at 3-25.] Because their response goes well beyond the scope of Question No. 1, which narrowly focuses on the "current-starved technology," the Commission should ignore Complainants' improper arguments. *See* 19 C.F.R. § 210.45(b) ("Only the issues set forth in the notice of review, and all subsidiary issues therein, will be considered by the Commission."). Should the Commission nonetheless entertain Complainants' improper arguments, Respondents request consideration of their reply to these points below.

**1. The ALJ properly construed the claim term "entire oscillator"**

Complainants again challenge the ALJ's claim construction of the term "entire oscillator" in their response to this question. [CSub. at 3, 22-23.] As the ALJ's own analysis shows and Respondents' opposition to the petition for review discusses, the ALJ correctly construed this term and there is no basis to disturb his proper conclusion. [Corr'd Order No. 31 at 20-41; Pet.

Oppo. at 25-48.] But even if the Commission adopts Complainants' construction as they request, [CSub. at 32], the accused products nonetheless do not infringe. [Pet. Oppo. at 47-48.]

**2. Complainants' discussion of the "varying" limitation is specious**

**a. Complainants waived their new, but belated, argument**

Complainants contend that the "current-starved technology" used in [REDACTED] [REDACTED]<sup>2</sup> is evidence that the accused chips and products somehow satisfy the "varying" limitation of claims 6 and 13, because the control current used in this technology is one of the claimed "operational parameters." [CSub. at 3-4, 7-8, 19-22.]

As a threshold matter, Complainants waived this argument because they did not present this issue to the ALJ. *Certain Ground Fault Circuit Interrupters*, Inv. No. 337-TA-739, Comm'n Op., 2012 WL 2394435, at \*11 (June 8, 2012) ("First, no party argued to the ALJ that the interpretation of 'electrical conductor' requires the 'reverse wired' limitation, so at the very least such an argument has been waived."); *see also Hazani v. U.S. Int'l Trade Comm'n*, 126 F.3d 1473, 1479 (Fed. Cir. 1997) (finding argument not raised before the ALJ waived).

Complainants compounded this waiver by failing to raise the issue in their petition for review. Their petition failed to challenge the ALJ's finding that there is no variation as a function of operational parameters and instead focused solely on fabrication parameters as allegedly shown by binning. [Pet. at 26-35.] Having abandoned this issue, Complainants cannot revive it now. 19 C.F.R. § 210.43(b)(2); *Broadcom Corp. v. Int'l Trade Comm'n*, 542 F.3d 894, 900-901 (Fed. Cir. 2008).

---

<sup>2</sup> There is no dispute that [REDACTED] accused products at issue in this investigation use "current-starved technology." [CSub. at 3-4; RSub. at 2-4.]

**b. Complainants' discussion of the "varying" limitation is contrary to the evidence**

Even if the issue is properly before the Commission, Complainants cannot meet their burden of proof merely by arguing that the CPU's frequency and the PLL's clock rate satisfy the "varying" limitation by allegedly varying in the same way. [CSub. at 20-21.] This argument improperly ignores two additional, distinct claim requirements. By its plain language, the "varying" limitation also requires: (i) that the CPU's processing frequency must vary as a function of one or more fabrication or operational parameters, such as fabrication process, supply voltage or operating temperature ("PVT") parameters; and (ii) that the oscillator's clock rate must vary as a function of one or more fabrication or operational parameters. [JXM-1 at cls. 6, 13.]

The record establishes that these two express requirements are not met by any accused product. The empirical evidence presented by Dr. Subramanian at trial overwhelmingly demonstrates that the PLL's clock rate does *not* vary as a function of PVT parameters. [Pet. Oppo. at 71-77 (discussing empirical measurements); ID at 193-204 (same).] Not only did Complainants' expert fail to offer any empirical data, but Dr. Subramanian's data – which the ALJ found to be reliable – "affirmatively shows that none of the Accused Products infringes any of the asserted claims with respect to the 'varying' limitation." [ID at 196.]

**c. Complainants' discussion of the "varying" limitation confuses supply voltage/current with control voltage/current**

Complainants' belated argument that the control current used to control the current-starved delay cells is one of the claimed "operational parameters" conflates two separate and distinct concepts – *supply* voltage/current and *control* voltage/current. [CSub. at 19-22.] Contrary to Complainants' improper conflation, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This fact is apparent from a schematic of the [REDACTED] PLL's [REDACTED]<sup>3</sup> that shows the

[REDACTED]:



[ID at 128 (from RX-621C at QTPL 14891); Tr. (Subramanian) 1157:13-1158:3 (discussing examples of ICO schematics in RX-621C).] As the ALJ found, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Based on this evidence, the ALJ found that [REDACTED]

---

<sup>3</sup> The accused products' [REDACTED] differ from the inverters of the oscillator shown in Figure 18 of the '336 patent because [REDACTED] [Compare JXM-1 at Fig. 18 with RSub. at 7-12.]

[REDACTED]

[REDACTED]

This distinction exposes the error in Complainants' overall argument. The [REDACTED]

[REDACTED]

[REDACTED] [RSub. at 7-12.] This [REDACTED]

[REDACTED]

[REDACTED] [Tr. (Subramanian) 1503:7-12, 1503:22-1504:2, 1504:7-21; *see also* ID at 128.]

Separately from the [REDACTED]

[REDACTED]

[REDACTED] [ID at 128 (citing Tr. (Oklobdzija) 361:12-23; RX-621C at [REDACTED] 14891).]

As Dr. Subramanian explained, [REDACTED]

[REDACTED]. [Tr. (Subramanian)

1123:19-1125:13.] Thus, while Complainants argue that current can be converted to voltage and *vice-versa*, they cite *no* evidence of record for the proposition that a control current/voltage (as distinct from a supply current/voltage) is an operational parameter as recited in the claims. [CSub. at 19-22.] Nor could they, because control signals were correctly foreclosed by the ALJ's claim construction. Complainants' new and belated argument thus fails.<sup>4</sup>

3. **Complainants' "regulate vs. generate" argument is a distinction without a difference**

Complainants contend that the external reference is not used to generate the clock signal,

---

<sup>4</sup> For the first time, Complainants argue that the bias current applied to a gate of a current-starving transistor is not a control signal, but is instead an "operational parameter" expressly recited in claims 6 and 13 and is thus "required." [See, e.g., CSub. at 19 and 22] In addition to having waived this argument, Complainants are wrong since such a "bias current" is neither recited in the claims nor disclosed anywhere in the '336 patent's specification. [See JXM-1 *in general* and at cl. 6 and 13.]

5

but is instead used only to regulate its frequency. [CSub. at 23-25.] Complainants' attempt to separate frequency from clock signal generation draws a distinction without a difference, a point already squarely rejected by the ALJ.

The concepts of controlling a clock signal's frequency and generating a clock signal are one and the same, because a clock signal has and *must* have a frequency—indeed, the *entire purpose* of a clock signal is to provide a frequency for use in timing device operations. [Tr. (Oklobdzija) 1088:2-11 [REDACTED]]

[REDACTED] As Dr. Oklobdzija explained, [REDACTED]

[REDACTED] Setting the frequency is part and parcel of the generation of a clock signal, as the ALJ correctly found. [ID at 121-122.] Controlling the controlled oscillator's frequency is, thus, also controlling the generation of the clock signal.

Second, a PLL's controlled oscillator *relies on* a crystal's reference signal. [CSub. at 25.] As Complainants acknowledge, a PLL's phase detector receives the crystal's reference signal, uses it for comparison purposes, and then causes an analog voltage or current control signal to be sent to the controlled oscillator to control the oscillator's generation of the clock signal. [*Id.*] That is reliance on an external crystal. Further, the ALJ's claim construction of the "entire"

limitation imposes no additional claim requirement of "direct" reliance as Complainants would now have. [See Order No. 31 at 27-29, 40.] Indeed, Complainants did not argue for such a "direct" reliance restriction during the *Markman* process, [*id.* at 20-21, 30-37], and any such restriction lacks support in the intrinsic evidence. [*Id.* at 27-29.] Rather, the ALJ's construction properly excludes any oscillator that "rel[ies] on a control signal or an external crystal/clock generator to generate a clock signal." [*Id.* at 40.]

Finally, as discussed in Respondents' initial submission, the PLL's circuitry and control signals (including the control signals created based on the external crystal's signal) do more than regulate. Without them, the controlled oscillator's current-starved architecture cannot even generate oscillations. [RSub. at 7-12.] Hence, Complainants' "regulate vs. generate" argument fails.

**4. Complainants' Table 2 is beyond the scope of Question No. 1**

Complainants dedicate pages and pages of their response to a chart that supposedly lists "evidence regarding operation of chips with 'current-starved technology.'" [CSub. at 8-18 (Table 2).] Not only does the chart compile string cites with little explanation of their impact on the issue at bar, but most of Table 2's citations are irrelevant to the current-starved technology at the heart of Question No. 1. [*Id.*] For example, the location of the PLL relative to the CPU is not germane to the current-starved technology, much less to whether current-starved technology satisfies the "entire oscillator" limitation. The Commission should therefore disregard and reject this "citation dump" as beyond the scope of Question No. 1.<sup>5</sup>

---

<sup>5</sup> Further, Complainants' Table 2 also incorrectly identifies the accused products at issue for Respondent [REDACTED]. Complainants' Table 2 purports to include various [REDACTED] products as "Accused Products", but both Complainants' pre-hearing brief and post-hearing brief confirm that those [REDACTED] products were not accused of infringing

**B. Complainants' Attempt to Show A Lack of Reliance on A Control Signal Misrepresents The Evidence**

To avoid the compelling evidence that current-starved architectures rely on control signals to generate a clock signal, Complainants try to twist the evidence. [CSub. at 3-4, 7-18, 26-30.]

**1. [REDACTED] PLL is not representative of other PLLs**

There is no basis for the argument that "Dr. Subramanian also testified that the [REDACTED] PLL was representative of all of the current-starved oscillators in all of the relevant accused chips." [CSub. at 26.] Dr. Subramanian said no such thing, and Complainants fail to cite any testimony to support this point. [*Id.*] While Dr. Subramanian discussed [REDACTED]

[REDACTED] he also extensively discussed the differences between the [REDACTED] PLL and other accused PLLs, thus contradicting Complainants' contention that the [REDACTED] PLL is representative of other [REDACTED] PLLs. [*Id.* 1164:25-1178:8.]

Dr. Subramanian also discussed in detail the structure and operation of the accused [REDACTED] chips and [REDACTED] chips, and noted the distinctions between these other chip families and the [REDACTED] chips. [*Id.* 1182:24-1190:16 ([REDACTED] chips), 1195:4-1200:23 ([REDACTED] chips).]

Thus, although the evidence indicates that [REDACTED] current-starved oscillators in the accused products will not oscillate without a control signal (like the [REDACTED] PLL), Complainants incorrectly extrapolate from this fact that all of the accused products are similar to the [REDACTED] PLL in all other respects.

Complainants' argument can at best only apply to [REDACTED] PLL, and not to any other PLL. Complainants do not have any evidence to contradict the ALJ's finding and Dr.

---

either claim 6 or 13, which are the only claims currently under review. [CPre. at 48; CBr. at Ex. B, B-20].

Subramanian's testimony on any other current-starved oscillators. This dearth of evidence is apparent from their brief's myopic attack on the structure of the [REDACTED] PLL, while utterly failing to address the evidence of current-starved technology in other accused PLLs, such as the [REDACTED] PLL [Tr. (Subramanian) 1168:18-1169:2], the [REDACTED] PLL [id. 1171:15-21], the [REDACTED] PLL [id. 1173:19-1174:1], the [REDACTED] PLL [id. 1176:13-20], the [REDACTED] 203:18-205:1; Tr. (Subramanian) 1186:25-1187:19, 1189:8-1190:3], and the [REDACTED] [id. 1198:14-1199:5, 1200:15-23; Tr. (Oklobdzija) 988:18-989:15.]

2. **Complainants incorrectly argue that [REDACTED]**

a. **Complainants misrepresent the operation of the [REDACTED] PLL**

Complainants incorrectly suggest that, because the [REDACTED]

[REDACTED]  
[REDACTED] [CSub. at 26-30.] That is factually incorrect because, [REDACTED]  
[REDACTED] [ID at 125.]

First, Complainants ignore the evidence that the [REDACTED]

[REDACTED]  
[REDACTED]. As the ALJ determined, [REDACTED]  
[REDACTED]

[REDACTED] [ID at 125-126.] "There is no basis in the  
record for this assumption," the ALJ found, "because the PLL circuitry provides the [REDACTED]  
[REDACTED] [Id. at 126  
(citing Tr. (Subramanian) 1160:17-24, 1163:1-10, 1504:12-1505:8; RX-621C at [REDACTED]).]

"All are part of the control mechanism through which the PLL controls the oscillation of [REDACTED]

██████" [ID at 127 (citing Tr. (Subramanian) 1503:7-12).]

Accordingly, as the ALJ correctly found for

[ID at 125; Tr. (Subramanian) 1503:7-12, 1503:22-1504:2, 1504:7-21.] With respect to [REDACTED] the ALJ correctly concluded that [REDACTED]

[REDACTED] [ID at 125; Tr. (Subramanian) 1504:22-1505:4.] Thus,

[REDACTED] [REDACTED] [REDACTED] [ID at 125.] These

██████████ [Id. (quoting Tr. (Subramanian) 1502:14-16).] Without those control signals, "oscillation unequivocally stops." [Id. (quoting same at 1503:7-10).] Thus, the ██████████

**Second, Complainants incongruently argue that the**

in the PLL configuration shown in RX-621C, the [REDACTED] cannot be the claimed oscillator because they do not generate a clock signal to clock the CPU. This fact is fatal to Complainants' argument because the "entire oscillator" limitation, as construed, must "generate a clock signal" and "clock[] said CPU." [Order No. 31 at 40; JXM-1 at cls. 6, 13.] In this regard, Complainants explicitly concede that [REDACTED] [CSub. at

27.] Rather, [REDACTED]  
[REDACTED] [Tr. (Subramanian) 1438:4-13; *see also* 1441:10-  
16 [REDACTED] Similarly, [REDACTED]  
[REDACTED]  
[REDACTED] [*Id.* 1434:4-7, 1434:19-24, 1436:2-6.] In  
other words, this configuration [REDACTED]  
[REDACTED] [RX-618C at QTPL 13875.]  
Complainants do not dispute these facts, conceding that the [REDACTED]  
[REDACTED] [CSub. at 28 ([REDACTED] (emphasis in  
original)); *see also id.* [REDACTED]  
[REDACTED] (emphasis in original removed, italics added)).] Hence, the very testimony  
that Complainants cite as support pertains to [REDACTED] that cannot be the  
basis of an infringement finding.

**b. Complainants improperly characterize another configuration  
of the [REDACTED] PLL**

As an alternative angle of attack, Complainants point to another configuration of the  
[REDACTED] PLL (as shown on RDX-4.129C and RDX-4.118C)<sup>6</sup> to argue that the p [REDACTED]  
[REDACTED]. [CSub. at 28-29 (RDX-  
4.129C), 31-32 (RDX-4.118C).] This is yet another factual distortion.

Complainants' entire argument rests on the incorrect assumption that the s [REDACTED]  
[REDACTED]  
[REDACTED]. But Complainants provide no basis for that assumption, failing to  
show that the [REDACTED]

---

<sup>6</sup> RDX-4.129C and RDX-4.118C show the same diagram from RX-618C at [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
As Dr. Subramanian explained, [REDACTED] PLLs can operate in several modes. [*E.g., id.*

1156:12-1157:9, 1502:17-1504:2; RX-618 at [REDACTED] ([REDACTED]  
[REDACTED]  
[REDACTED]

Moreover, even in the [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [See ID at 125-126.] In other words, the [REDACTED]  
[REDACTED]  
[REDACTED] [Tr. (Subramanian) 1503:17-1504:2.]

Because the [REDACTED] [REDACTED] the "entire"  
limitations cannot be met and there is no infringement.<sup>7</sup>

**3. Complainants mischaracterize RX-621C's discussion of the [REDACTED]  
[REDACTED]**

Mischaracterizing the technical documents for [REDACTED] PLL, Complainants

---

<sup>7</sup> Complainants' argument that there is no evidence of the [REDACTED]  
[REDACTED]  
[REDACTED] Even if Complainants could somehow show that the [REDACTED]  
[REDACTED] (something for which there is no evidence),  
such a showing would further demonstrate that the [REDACTED]  
[REDACTED]  
[REDACTED] [Tr.  
(Subramanian) at 1162:18-24].

argue that the [REDACTED]  
[REDACTED]. [CSub. at 22, 29-30.] In truth, [REDACTED]  
[REDACTED] as the ALJ  
correctly found.

The ALJ already considered and correctly rejected Complainants' same exact argument.  
[ID at 129 (citing Tr. (Subramanian) 1453:10-15).] Citing Dr. Subramanian's testimony about a  
graph in RX-621C that [REDACTED]

[REDACTED] [ID at 129; Tr. (Subramanian) 1452:4-23; RX-  
621C at [REDACTED].] The graph, which the ID reproduced, [REDACTED]

[REDACTED] [ID at 129; Tr.  
(Subramanian) 1451:4-1452:3; RX-621C at [REDACTED] ([REDACTED] [REDACTED])

Although Complainants focus on the [REDACTED] the ALJ found that

[REDACTED] [ID at 129 (citing RX-621C at [REDACTED] That is, [REDACTED]

[REDACTED] [ID at 130 (quoting Tr. (Subramanian) 1454:7-22).]

Complainants offer no evidence contradicting these findings.

As a further basis to reject Complainants' argument, the ALJ also noted that, "[i]f  
Complainants were correct that the [REDACTED]  
[REDACTED] [ID at  
130.] In other words, under Complainants' theory, [REDACTED]

[REDACTED]

4. Dr. Oklobdzija's testimony about the [REDACTED] does not support Complainants' argument [REDACTED]

One of the passages is indeed irrelevant because it merely notes that the [REDACTED]  
[REDACTED] Tr. (Oklobdzija) 385:17-386:5.] The testimony does  
not mention, much less discuss, the current-starved technology at issue here.

**C. Complainants' Attempt to Avoid Evidence of Reliance Regarding The External Crystal/Clock Generator Lacks Merit**

**1. The PLLs rely on an external crystal/clock generator to generate a frequency that is a multiple of the crystal's frequency**

Complainants argue that a ring oscillator in a PLL must generate a clock signal [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [CSub. at 30-31.] Contrary to Complainants' contention, [REDACTED]

[REDACTED]

Confirming this point is Dr. Oklobdzija's own textbook on microprocessor clocking, which explains that "[c]lock generation begins on a system board, where the global system clock reference is generated from a 'crystal' oscillator." [Tr. (Oklobdzija) 251:18-253:10 (discussing importance of this book), 827:14-829:3 (confirming accuracy of book's statement); RX-2283 (textbook) at Garmin 92905.] Using the off-chip crystal's clock signal, the on-chip PLL performs frequency multiplication. [RX-2283 at Garmin 92906 ("For these reasons, the low-frequency system clock is first brought on-chip and then *frequency multiplication is performed* to achieve the desired on-chip clock rate."), Garmin 92909 ("In addition to clock alignment *PLLs can perform frequency multiplication.*"), Garmin 92909 ("Fig. 1.13. PLL frequency *multiplication.*"); Tr. (Oklobdzija) 828:4-23, 829:4-831:4.]

Leaving no doubt about the multiplicative properties of the PLL and its VCO, Dr. Oklobdzija's book provides a mathematical equation showing that the VCO's output frequency  $f_{vco}$  is equal to the multiplication of the external crystal's frequency  $f_{ext}$  by certain integer values. [RX-2283 at Garmin 92909.] As this formula shows and Dr. Oklobdzija conceded, there is a clear relationship between the VCO's output clock signal and the crystal's reference signal. [Tr. (Oklobdzija) 834:12-18, 835:20-21.] If the external crystal's frequency

goes up, the VCO's frequency will also go up by a fixed ratio. [*Id.* 836:1-8.] If the reference frequency goes down, so will the VCO's frequency. [*Id.* 836:9-19.]

Technical documents confirm that a similar mathematical relationship governs the relationship between the VCO's output signal and the crystal's reference signal in the accused chips. For example, like the formula in Dr. Oklobdzija's book, [REDACTED] technical documents for the [REDACTED] PLL provide an equation defining the PLL's output frequency [REDACTED] [REDACTED]; Tr. (Subramanian) 1305:6-18.] Other [REDACTED] documents contain similar equations. [*Id.* 1306:7-1307:10; RDX-4.119C (providing document cites); Tr. (Oklobdzija) 846:4-847:19.]

As in the [REDACTED] chips, the output signal of the [REDACTED] controlled oscillator is a multiple of the external crystal's frequency. For example, the [REDACTED] technical documents provide an equation showing that the [REDACTED] [REDACTED] Tr. (Subramanian) 1308:10-23; Tr. (Oklobdzija) 849:21-851:13.] [REDACTED] also confirmed that the PLLs for the [REDACTED] at issue in this investigation [REDACTED] [REDACTED] 182:17-183:9, 187:12-25, 196:18-198:3, 202:6-12.]

Similar mathematical relationships govern PLL operation in the [REDACTED] where the [REDACTED] [REDACTED] Tr. (Subramanian) 1313:4-9; Tr. (Oklobdzija) 966:13-967:11, 972:25-973:6.] As Dr. Oklobdzija conceded, [REDACTED] [REDACTED] [*Id.* 967:18-21; *see also id.* 953:17-25.] Hence, the evidence contradicts Complainants' argument

that frequency multiplication is not possible, and instead shows reliance on the external crystal.

**2. Complainants misrepresent the [REDACTED] PLL**

As with the control signals, Complainants point to another configuration of the [REDACTED] PLL as shown on RDX-4.118C (which reproduces the same block diagram shown on RDX-4.129C) to argue that the [REDACTED] [REDACTED] [CSub. at 31-32 (RDX-4.118C).] Complainants are wrong, as discussed above. *See* Part I.B.2.b., *supra* at pp. 11-12.

\* \* \* \* \*

For the foregoing reasons, and those set forth in Respondents' opening submission, the use of current-starved technology in [REDACTED] accused products precludes the possibility that any of them include an "entire oscillator" as required by claims 6 and 13.

**II. REPLY TO COMPLAINANTS' SUBMISSION ON QUESTION NO. 2**

**A. There Is No Continuing Revenue Stream from Existing Licenses**

Complainants largely side-step the Commission's initial inquiry, which asks whether there is a "continuing revenue stream from the existing licenses." [REDACTED]

[REDACTED]

[REDACTED] [CSub. at 32; CX-1332C.]

[REDACTED]

[REDACTED] [*Id.*] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [See CX-1332C at 5, 10 and 14.] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[CSub. at 33.] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] Complainants are uniquely situated to provide the information requested by the Commission and they had every incentive to identify and verify the existence of any continuing revenue stream from existing licenses – yet they failed to do so. The only reasonable conclusion to be drawn is that there is no continuing revenue stream from existing licenses.

**B. TPL Is Not Engaged In An Ongoing Licensing Program and The Nature of PDS' Investments Is Uncertain**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [CSub. at 34.] Moreover, Complainants fail to provide any meaningful description of the nature of any investments by PDS in any ongoing licensing program. [REDACTED]  
[REDACTED]

[REDACTED] [Id.] These unsubstantiated, conclusory statements cannot support a conclusion that there is a continuing revenue stream from the existing licenses or that a licensing program is ongoing.

**C. Most of Complainants' Response to this Question is Unresponsive**

The majority of Complainants' response to Question No. 2 concerns TPL's alleged investments that were made before the institution of this investigation. [CSub. at 33.] This discussion is not responsive to the Commission's question and should be disregarded.<sup>8</sup> [See Nov. 25, 2013 Notice of Part. Rev. at 5 (instructing parties to brief only the discrete issues described in the Notice); 19 C.F.R. § 210.45(b).] Further, while Complainants purport to describe the nature of the licensing services that Alliacense provided to TPL before the complaint was filed, this is not a substitute for directly responding to the Commission's questions as to the nature of PDS's investments today. Indeed, by all accounts, PDS appears to be incurring expenses solely related to ongoing litigation as a member of the Creditors Committee formed in the TPL bankruptcy proceedings – the details of which TPL failed to provide to the Commission.

**III. REPLY TO COMPLAINANTS' SUBMISSION ON QUESTION NO. 3**

The Commission required that Complainants identify the patent prosecution and litigation costs contained in their claimed domestic industry investment and "estimate ... the proportion of the total claimed investment in licensing the '336 patent accounted for by the claimed patent prosecution and litigation expenditures." Because they failed to answer either question and did not provide sufficiently reliable evidence as to permissible domestic industry investments, Complainants have not met their burden of proof. *See Certain Integrated Circuits, Chipsets & Prods. Containing Same Including Televisions ("Integrated Circuits")*, Inv. No. 337-TA-786, Comm'n Op. at 28-30 (Oct. 10, 2012); *Certain Semiconductor Chips &*

---

<sup>8</sup> In addition to being non-responsive, [REDACTED] is unsubstantiated and grossly overstates the actual amount of alleged investments presented during the hearing in support of TPL's alleged domestic industry. This bloated figure also includes outside counsel litigation expenses which the ALJ expressly excluded from the investigation on waiver grounds prior to the hearing. [Order Nos. 38 and 61.]

*Prods. Containing Same ("Semiconductor Chips")*, Inv. No. 337-TA-753, Comm'n Op. at 44-51 (Aug. 17, 2012).

Complainants' and the IA's focus on outside counsel should not distract from Complainants' admission that their domestic industry claim includes undifferentiated expenses, *i.e.*, expenses recorded prior to the implementation of litigation and prosecution codes for TPL and Alliacense personnel. [CSub. at 35; SSub. at 14.] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Tr. (Hannah) at 1799:9-1800:9.]

The litigation and prosecution activity included as part of the claimed domestic industry investment is not limited to outside counsel.

Even worse, Complainants continue to broadly claim, as to the expenses pled: "everything is involved in the process of licensing." [CSub. at 35.] The governing law, however, requires that Complainants must demonstrate *how* the above referenced expenses for Alliacense and TPL personnel are tied to licensing. *E.g., John Mezzalingua Assoc., Inc. v. Int'l Trade Comm'n*, 660 F.3d 1322 (Fed. Cir. 2011). [RSub. at 18-19.] Complainants' refusal to recognize this distinction calls into question their ability to reliably categorize which expenses rightfully support a licensing-based domestic industry and which do not.

In sum, while the degree of infection by ineligible expenses is unknowable on this

record, the code for at least litigation (994) was not implemented until the *end* of 2008. [Tr. (Hannah) 1769:2-7.] [REDACTED]

[REDACTED] Given the admitted inclusion of some prosecution and litigation expenses in the claimed domestic industry investments, the burden to prove the extent of ineligible expenses lies solely with Complainants – a burden they have failed to meet.<sup>9</sup>

#### IV. REPLY TO COMPLAINANTS' SUBMISSION ON QUESTION NO. 4

There is no dispute that the Commission's decision in *Peripheral Devices* requires Complainants to demonstrate the existence of "articles protected by the patent" in order to establish a domestic industry based on licensing under 19 U.S.C. § 1337(a)(3)(C). [CSub. at 36.] *Certain Computers and Computer Peripheral Devices*, Inv. No. 337-TA-841, Comm'n Notice (Oct. 19, 2013) ("*Peripheral Devices*"). Rather, Complainants "urge" the Commission to reconsider this requirement by engaging in a selective, and incomplete, reading of Federal Circuit precedent to argue that *different* standards should apply to domestic industry allegations under Section 337(a)(3)(C). The Commission's determination that a *licensing-based* domestic industry requires evidence of "articles protected by the patent" is correct, and has firm support in the plain language of Section 337, the legislative history, prior Commission decisions, and prevailing Federal Circuit authority.

Complainants also do not dispute that they had an opportunity to present evidence at the hearing to establish the existence of certain licensees' "articles protected by the patent." [CSub. at 42-43.] Complainants, however, squandered this opportunity by relying on weak and

---

<sup>9</sup> Respondents do not concede that post-2009 expenses are error-free. Complainants refused to produce documentation underlying the employee time claimed, thus preventing Respondents and the Commission from verifying those claims. [See Opp. to Resp. Garmin's MTC DI Doc.'s from Compl's (Mtn. No. 853-021).]

insufficient evidence on this point. And, now, they request a remand so that they can have another bite at the proverbial apple and submit additional evidence on this issue. Because the ALJ already took evidence on the existence of "articles protected by the patent," no remand is necessary. While the ALJ declined to issue a factual finding regarding the technical prong in the ID, the Commission can, and should, review the record evidence and conclude that Complainants failed to demonstrate the existence of any "articles protected by the patent."

**A. The Commission Correctly Determined That Establishing A Domestic Industry Based on Licensing under 19 U.S.C. § 1337(a)(3)(C) Requires Proof of "Articles Protected By The Patent"**

Complainants go to great lengths to argue that the Federal Circuit decisions in *InterDigital* and *Microsoft* do not support the Commission's determination in *Peripheral Devices* that a licensing-based domestic industry requires actual "articles protected by the patent" (*i.e.*, a technical prong). *Microsoft's* holding could not have been clearer – the Federal Circuit unambiguously held that the requirement to demonstrate "articles protected by the patent" applies to the entirety of Section 337(a)(2) and (3). *Microsoft Corp. v. Int'l Trade Comm'n*, 731 F.3d 1354, 1361-62 (Fed. Cir. 2013). Furthermore, while the factual allegations in *Microsoft* involved investments in "research and development" under Section 337(a)(3)(C), the Federal Circuit was clear that the required technical prong was applicable to all of subsection (C), as it only referenced Microsoft's "research and development" activities as exemplary. *See id.* at 1361-62 (using the abbreviation "*e.g.*" to denote that "research and development" under subsection (C) was exemplary). Thus, Complainants' attempt to dismiss the broader legal holding in *Microsoft* because the underlying case did not involve licensing-based allegations is not persuasive. The Federal Circuit established a legal requirement applicable to all of Section 337(a)(3)(C), and Complainants' suggestion that a different standard should apply between engineering, research and development and licensing – all of which are subsumed by subsection (C) – should be

disregarded.

Not surprisingly, while attempting to avoid the more recent *Microsoft* decision, Complainants instead focus on the Federal Circuit's *InterDigital* decision. Yet even in *InterDigital*, the Federal Circuit recognized that "just as the 'plant or equipment' referred to in subparagraph (A) must exist with respect to articles protected by the patent, such as by producing protected goods, the research and development *or licensing activities* referred to in subparagraph (C) must also exist with respect to articles protected by the patent, such as by licensing protected products." *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 707 F.3d 1295, 1298 (Fed. Cir. 2013). "This accords with the common description of the domestic industry requirement as having two 'prongs': the 'economic prong,' which requires that there be an industry in the United States, and the 'technical prong,' which requires that the industry relate to articles protected by the patent." *Id.*

If there was any doubt regarding the applicability of the required technical prong in a licensing-based domestic industry scenario after *InterDigital*, the Federal Circuit removed any doubt in *Microsoft*. Indeed, *Microsoft* actually cites to the rehearing decision in *InterDigital* to support the holding that there must be proof of actual "articles protected by the patent" in all cases. *Microsoft*, 731 F.3d at 1361-62 (citing *InterDigital*, 707 F.3d at 1299 & 1304).

The Commission's decision in *Peripheral Devices* correctly determined that "the Federal Circuit's decisions in *InterDigital* . . . and *Microsoft* . . . require a complainant to make such a demonstration [*i.e.*, the existence of articles protected by the patent] regardless of whether the domestic industry is alleged to exist under 19 U.S.C. § 1337(a)(3)(A), (B), or (C)." *Peripheral Devices* at 3. The Commission should apply this requirement in this investigation.

**B. The Record Evidence Is Insufficient To Establish The Existence of "Articles Protected By The Patent" And A Remand Is Not Warranted**

Complainants misleadingly assert that "the ALJ did not take evidence on the existence of 'articles protected by the patent'...." [CSub. at 42-43.] The ALJ never precluded Complainants from presenting evidence on the existence of "articles protected by the patent." To the contrary, as Complainants admit in their opening brief, Complainants did present evidence at the hearing purporting to establish that several licensees' products practiced the asserted patent for purposes of establishing a domestic industry. [CSub. at 42-43 (acknowledging that Complainants presented evidence of certain licensee products under Complainants' "theory of the case").] When Complainants offered this evidence, it prompted the following exchange between the ALJ and Complainants' counsel, Mr. Marsh:

JUDGE GILDEA: For my information, why are we delving  
into an Apple product?  
MR. MARSH: Your Honor, this has to do with domestic industry.  
JUDGE GILDEA: All right.

[Tr. (Oklobdzija) 734:10-14.] At no time did the ALJ limit, preclude, or otherwise fail to take evidence from Complainants relating to the technical prong of the domestic industry requirement. As Complainants admit and the hearing transcripts prove, Complainants did in fact present evidence on the technical prong through their expert, Dr. Oklobdzija, during his direct and cross-examination. [See Tr. (Oklobdzija) 733:2-736:7; 994:3-995:8; *see also* CSub. at 43 (identifying Tr. (Oklobdzija) 733:2-736:7 as record evidence).]

Thus, Complainants had the opportunity and ability to present evidence concerning the practice of the '336 patent by licensees' products, and in fact did present such evidence at the hearing – unimpeded by the ALJ. That Complainants now dismiss their own evidentiary showing as a "passing reference to 'articles protected by the patent'" and characterize their expert's testimony as a "brief digression" does not change the fact that they had the opportunity

to present and did in fact present this evidence (presumably because they knew it was required to satisfy the domestic industry requirement under their "theory of the case"). [See CSub. at 43.] Indeed, Complainants' acknowledgement and characterization of this evidence in their opening brief confirms that: (a) they had the opportunity, and availed themselves of this opportunity, to present evidence on the technical prong; and (b) their evidence is wholly insufficient to demonstrate the existence of "articles protected by the patent" as required for a licensing-based domestic industry. Notably, the IA also agrees that there is insufficient evidence in the record demonstrating that Complainants or their licensees practice the asserted patent. [SSub. at 16.]

Finally, Complainants are not entitled to reopen the record to present additional evidence that they could have, and should have, presented during the hearing. Respondents respectfully submit that the Commission can determine whether the technical prong has been satisfied based on the record before it, and that no remand of this investigation is necessary or warranted. As set forth in Respondents' opening brief, and generally uncontested by Complainants, the conclusory nature of Dr. Oklobdzija's testimony regarding a few licensee products based on teardown reports that he did not prepare (and which were not admitted as substantive evidence), compels a finding that Complainants have not, and cannot, satisfy the domestic industry requirement in this investigation. [RSub. at 31-32; CSub. at 42-43.]

## **V. REMEDY AND BONDING**

No remedial order should issue in this investigation because the Initial Determination correctly concluded that none of the Respondents has violated Section 337. In addition, if the Commission does determine that there has been a violation of Section 337, any remedy would be against the public interest and therefore no remedial order should issue. [RRem. at 25-36.] Nonetheless, if the Commission determines that a remedy should issue, the Commission should issue a limited exclusion order specifying the categories of "wireless consumer electronic

devices" accused for each Respondent and excluding only the specific products on which an infringement is found. [*Id.* at 3-16.] Any limited exclusion order should also include exemptions for repair, replacement, warranty and service contracts, an adjustment period before the order goes into effect and a certification provision. [*Id.* at 16-18.] No cease and desist order should issue because Complainants failed to show that the domestic inventory, if there is any, of any Respondent is commercially significant. [*Id.* at 18-22.] Complainants also failed to cite *any* evidence that would justify imposition of a bond. [*Id.* at 22-25.] Nothing in Complainants' or the IA's December 23, 2013, submissions changes these conclusions.

**A. No Exclusion Order Should Issue**

Complainants spent only two short paragraphs on the issue of a limited exclusion order. [CSub. at 43-44.] Their conclusory analysis fails to support their position that an exclusion order should issue that covers *all* wireless consumer electronic devices and components thereof. Instead, the record and circumstances of this investigation support first limiting any exclusion to the specific categories of products that were accused for each Respondent and, second, only covering products within those categories that Complainants have shown to infringe. Complainants chose to limit their infringement allegations and evidence to only certain categories of products of each Respondent, namely: e-readers and tablet computers (Barnes & Noble), navigation devices (Garmin), smartphones and tablet computers (HTC), smartphones and tablet computers (Huawei), smartphones and mobile phones (LG), wireless mobile hotspots (Novatel), smartphones (Samsung), and smartphones, mobile phones, mobile hotspots, USB modems, and wireless home phones (ZTE). [RRem. at 4.] Complainants should be bound by their chosen limitations and should not be given a windfall of excluding the vast array of product categories that Respondents produce outside of those which Complainants accused (*e.g.*,

televisions, servers, digital cameras, etc.). Such sweeping relief (*i.e.*, all wireless consumer electronic devices and components thereof) under these circumstances is not only unfair to Respondents and harmful to U.S. consumers, but it would impose substantial and undue burdens upon Customs to attempt to enforce as Customs would be required to test every consumer electronic device and component for infringement. As Complainants deliberately chose not to present evidence of infringement for numerous categories of products, they should not be rewarded with an order that effectively shifts that burden to Customs.

Similarly, Complainants should be bound by their decision not to present evidence regarding many of Respondents' accused products within the product categories that were put at issue. There were hundreds of Garmin, HTC, Huawei, LG, Nintendo, Samsung, and ZTE accused products for which Complainants offered no evidence of infringement at the hearing. Respondents, on the other hand, affirmatively addressed these products at the hearing through their noninfringement expert Dr. Subramanian. The Commission should not reward Complainants' failure of proof by extending remedial orders beyond the specific products found to infringe (if any). *Cf. Certain Audiovisual Components and Prods, Containing Same*, Inv. No. 337-TA-837, Order No. 67 (Feb. 27, 2013) (unreviewed) (initial determination granting summary determination of noninfringement for products that were accused, but where complainants failed to offer any infringement evidence); *Certain Unified Commc'ns. Sys., Prods. Used With Such Sys., and Components Thereof*, Inv. No. 337-TA-598, USITC Pub. 4136, Init. Determin. at 188-189 (Mar. 2010) (unreviewed in relevant part) (finding that respondent's accused products did not infringe where complainant's expert offered no opinion as to whether the accused products infringed and respondent's expert offered a noninfringement opinion).

## B. Complainants Are Not Entitled to Cease and Desist Orders

As the IA and ALJ correctly recognized, Complainants "failed to provide any explanation or to adduce any facts to show that these Respondents' respective inventories are commercially significant." [SSub. at 20-21; RD at 9.] Complainants bear the burden of proving that each Respondent has "commercially significant inventory" in the United States in order to justify a cease and desist order against each particular Respondent. *Certain Mobile Devices, Associated Software, & Components Thereof*, Inv. No. 337-TA-744, Comm'n Op. at 25-26 (June 5, 2012). Complainants failed to meet this burden because they cited *no evidence* in their post-hearing brief to support their conclusory, one-paragraph statement that cease and desist orders should issue. [CPre. at 223-24; CBr. at 191; CRBr. at 92.] Complainants should be precluded at this late date from trying to prove their case now when they failed to do so in their pre-hearing and post-hearing briefs. *See* ALJ Gildea Ground Rule 7.2 ("Any contentions not set forth in detail [in the pre-hearing brief] as required herein shall be deemed abandoned or withdrawn"), and Ground Rule 10.1 (all other issues not set forth in the post-hearing brief shall be deemed waived); *Certain Automated Media Library Devices*, Inv. No. 337-TA-746, Comm'n Op. at 15-16 (Jan. 9, 2013) ("any contention not specifically set forth in the pre-hearing and post-hearing briefs are abandoned").<sup>10</sup>

With respect to [REDACTED] and for the first time in this investigation, Complainants make the wholly unsupported leap that, because [REDACTED] shipped a certain quantity of accused products into the United States, [REDACTED] must have held all of those accused products in inventory in the United States, and therefore maintains a commercially significant inventory. [CSub. at 45-46.]

---

<sup>10</sup> Although this issue does not turn on what Respondents argued, Respondents did in fact assert that Complainants failed to cite any evidence as to any Respondent in their post-hearing brief, contrary to Complainants' claims. [RRBr. at 90.]

It has been held that such an assumption is insufficient evidence to demonstrate that a respondent maintains a commercially significant inventory of accused products in the United States. *See Certain Bulk Welding Wire Containers and Components Thereof and Welding Wire*, Inv. No. 337-TA-686, Rec. Determin., 2011 WL 7464368, at \*169 (Nov. 2011). For the same reason, Complainants' newly made and wholly unsupported assumption regarding [REDACTED] should also be rejected. [See *id.*; see also CSub. at 45.]

Complainants also cite to *Certain Electronic Digital Media Devices & Components Thereof* to support their argument for a cease and desist order against both [REDACTED] – yet the facts in that investigation are inapposite. [CSub. at 45-46.] In that investigation, the ALJ held that respondents, which included Samsung Telecommunications America, LLC (STA) (which is not a respondent in this investigation), maintained a commercially significant inventory based on evidence of shipments of "thousands of units" of certain smartphones and tablets *models which were not accused in this investigation*. *See Certain Elec. Digital Media Devices & Components Thereof*, Inv. No. 337-TA-796, Rec. Determin., 2012 WL 6831408, at \*4 (Nov. 7, 2012). These shipments were received by STA's U.S. distribution center, and in the case of one particular tablet device (Galaxy Tab GT-P7510) held in SEA's distribution center. There is no such evidence in the record in this case, either as to [REDACTED].

[REDACTED] never asserted that any of its shipments/sales of accused products into the United States are held in inventory in the United States; rather, in the cited stipulation paragraph [CSub. Ex. E at para. 11 (cited in CSub. at 45)], [REDACTED] indicated which entities were responsible for importation and which were responsible for sales. As the Commission is fully aware, importation is merely the process of physically bringing goods into U.S. customs territory – those goods may then be delivered directly to customers – they do not necessarily make their

way into inventory. Moreover, the facts that Complainants cite [CSub. at 45] actually support [REDACTED] position rather than Complainants' – [REDACTED] cannot, under any definition or assumption, be viewed as commercially significant. Thus, Complainants have failed to establish that [REDACTED] maintains a commercially significant inventory in the United States, and no cease and desist order should issue against [REDACTED]

With respect to [REDACTED] the data cited in the RD issued by the ALJ [REDACTED] [REDACTED] is more than a year and half old, and that RD itself was issued seven months before the hearing in the 853 Investigation. Moreover, Complainants did not seek to join [REDACTED] as a Respondent in this investigation and submitted no evidence of any inventory of any accused products in this investigation. Complainants' attempt to cite to an outdated RD from a prior investigation involving [REDACTED], with different accused products, is no substitute for presenting evidence of commercially significant inventory in this investigation. Thus, as the ALJ correctly determined, Complainants have failed to establish that [REDACTED] maintains a commercially significant inventory in the United States, and no cease and desist order should issue against [REDACTED]

For [REDACTED] Complainants cite to [REDACTED] for certain [REDACTED] products [REDACTED] [CSub. at 45.] However, Complainants failed to establish that [REDACTED] are commercially significant. [REDACTED] consistently asserted the evidence establishes that [REDACTED] [REDACTED] [REDACTED] [REDACTED] [RPre. at 235; RRB. at 90-91; Ex. 10 to Complainant's Prehearing Statement at ¶10.] [REDACTED]

[REDACTED] [Id.] Thus, a cease and desist order directed to [REDACTED] is inappropriate.

### C. No Bond Should Issue

Complainants' submissions to the ALJ have similarly failed to cite *any* evidence supporting their argument that any bond – let alone a 100% bond – should be imposed. [CBr. at 192; *see also* CRBr. at 92-94.] Again, Complainants failed to meet their burden of proof, and no bond should be issued. Recognizing the deficiencies of their argument, Complainants now attempt to completely rework their arguments in their submission to the Commission. [CSub. at 47-49.] For the first time, they cite evidence of Respondents' products' prices and attempt to put forward alleged prices of their licensees' allegedly competitive products in support of their position that a bond based on price differential is inappropriate. [*Id.*] Complainants never presented to the ALJ any evidence regarding the difficulty of determining a price differential nor cited evidence of the prices of their licensees' products in their pre-hearing or post-hearing briefs. [CPre at 224-25; CBr. at 192; *see also* CRBr. at 92-94.] Complainants cannot offer such new arguments at this late stage of the investigation in an attempt to fill the holes in their post-hearing briefs. *See* ALJ Gildea's Ground Rules 7.2 & 10.1; *Certain Automated Media Library Devices*, Inv. No. 337-TA-746, Comm'n Op. at 15-16.

Even if such evidence—which consists of one exhibit listing products that Complainants purchased within the context of their domestic industry allegations—were to be considered, it falls far short of meeting Complainants' burden. Complainants essentially argue that they are entitled to 100% bond because of the wide variety of accused products at issue in this investigation. Complainants' decision to accuse a wide range of products should not entitle them to 100% bond. Further, the prices cited in Complainants' brief are unreliable, and in a number of

cases do not match the exhibit they cite. For instance, Complainants state that the HP Pavilion "is around \$400." [CSub. at 48.] JX-155C, however, lists zero in the price column for the only HP Pavilion mentioned in the exhibit, the Pavilion zv5000-PP2200. [See JX-155C at TPL853\_01709401.] Complainants also state that "Fujitsu Lifebooks range in price from roughly \$1,000 to \$2,000" citing JX-155C. [CSub. at 48.] However, the only Fujitsu products listed in JX-155C are HDD controllers and hard drives, whose prices range from \$37 to \$91.49. [JX-155C at TPL853\_01709400.] Even with this raw price data, Complainants have still failed to meet their burden of proving that a bond is necessary, including failing to link any alleged price differential to an injury to Complainants. *Certain Rubber Antidegradants, Components Thereof, and Prods. Containing Same*, Inv. No. 337-TA-533, Init. Determin. (attached to Comm'n Op.) at 133-134 (Apr. 2008); 19 U.S.C. § 1337(j)(3) (bond amount to be determined in an amount "sufficient to protect the complainant from any injury"); see Part II, *supra* (Complainants' licenses consist of lump sum payment obligations without any continuing royalty stream).

Having made no such argument and provided no such evidence to the ALJ [CBr. at 192; see also CRBr. at 92-94], Complainants, for the first time at this late stage, present lawyer argument – in place of evidence – that there would be injury to their domestic licensees. [CSub. at 47.] Because Complainants did not include this argument in their pre-hearing or post-hearing briefs, they are precluded from making such an argument now. See ALJ Gildea's Ground Rules 7.2 & 10.1; *Certain Automated Media Library Devices*, Inv. No. 337-TA-746, Comm'n Op. at 15-16. Even if this late argument is considered, however, Complainants offer no supporting evidence that a bond—let alone a 100% bond—is necessary to prevent injury to their domestic licensees.

## **VI. PUBLIC INTEREST**

As explained in Respondents' brief on remedy, bonding and the public interest, a remedial order in this investigation would be harmful to the public interest. [RRem. at 25-36.]

Respondents offered evidence supporting the conclusion that a remedial order would be contrary to the public interest in their post-hearing briefs and their October 23, 2013, submission on the public interest. [RBr. at 191-95, RRBBr. at 92-96.] Respondents offered even more evidence supporting the conclusion that a remedial order would be contrary to the public interest in their most recent submission to the Commission. [RRem. at 25-35.] For instance, Respondents explicitly addressed the fact that excluding smartphones, tablets and e-readers that are increasingly important to U.S. consumers managing their health would be harmful to the public health and welfare. [RRem. at 34-35.] Respondents also cited numerous supporting exhibits, documents and articles demonstrating that a remedial order would have an adverse impact on competitive conditions in the U.S. economy. [RBr. at 192-195; RRBBr. at 92; RRem. at 30-34.] Similarly, Respondents offered evidence supporting the conclusion that a remedial order would have a negative impact on U.S. consumers. [RBr. at 192-195; RRBBr. at 92-96; RRem. at 26-30.] Moreover, in response to the Notice of Partial Review, three third-parties submitted statements raising concerns about the impact of an exclusion order in this investigation. [See Doc. ID Nos. 524758 (U.S. Cellular), 524720 (Sprint Spectrum) and 524716 (CTIA).] Among other things, these submissions support the conclusion that any remedial order will harm U.S. consumers and will have a negative impact on competitive conditions in the U.S. [*Id.*] Moreover, as detailed in the submission filed by Sprint and its accompanying declaration, if an exclusion order does issue Sprint "urges the Commission to grant a twelve-month transition period to ensure that Sprint and its customers are not harmed an exclusion order." [Doc. ID 524720 at 4-7.]

Both Complainants and the IA dismiss Respondents' argument that a remedial order in this case would provide Complainants with asymmetric bargaining power in licensing negotiations. While any exclusion order provides a patent holder with some additional

negotiating leverage, Complainants and the IA fail to appreciate that providing an exclusion order to the type of non-practicing entities like Complainants presents a unique situation that differs from more traditional investigations. Because Complainants do not manufacture any products nor encourage the adoption of the patented technology, an exclusion order offers them no benefits in the marketplace. Unlike a complainant that manufactures and/or sells products, Complainants have no product sales at risk when negotiating licenses. Granting an exclusion order to such a non-practicing entity gives that entity undue leverage in its attempts to extract payments from companies that manufacture goods valuable to U.S. consumers, resulting in a net loss of consumer welfare and harming the public interest.

## **VII. CONCLUSION**

For the reasons set forth above and in Respondents' Joint Submission in Response to the Commission's Notice of Partial Review, Respondents respectfully request that the Commission affirm Judge Gildea's findings that there is no violation of Section 337.

PUBLIC VERSION

Dated: January 6, 2014

/s/ Paul F. Brinkman

David Eiseman  
Paul F. Brinkman  
Michael James O'Connor  
Pamela L. Van Dort  
QUINN EMANUEL URQUHART & SULLIVAN, LLP  
1299 Pennsylvania Ave. NW, Suite 825  
Washington, DC 20004  
Tel.: (202) 538-8000

**Counsel for Respondent Barnes & Noble, Inc.**

/s/ Timothy Bickham

Charles Schill  
Timothy C. Bickham  
Alice A. Kipel  
STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036  
Telephone: (202) 429-3000

**Counsel for Respondents Huawei Technologies Co., Ltd., Huawei Device Co., Ltd., Huawei Device USA Inc., and Futurewei Technologies, Inc.**

/s/ Scott A. Elengold

Michael J. McKeon  
Richard A. Sterba  
Christian A. Chu  
Scott A. Elengold  
FISH & RICHARDSON P.C.  
1425 K Street, N.W., 11th Floor  
Washington, D.C. 20005  
Telephone: (202) 783-5070

**Attorneys for Respondents LG Electronics, Inc. and LG Electronics USA, Inc.**

Respectfully submitted,

/s/ Eric C. Rusnak

Eric C. Rusnak  
K&L GATES LLP  
1601 K Street, NW  
Washington, DC 20006-1600  
Telephone: (202) 778-9000

Michael J. Bettinger  
Timothy Walker  
Curt Holbreich  
Harold H. Davis, Jr.  
Irene I. Yang  
K&L GATES LLP  
Four Embarcadero Center, 12th Floor  
San Francisco, CA 94111  
Telephone: (415) 882-8200

Michael J. Abernathy  
Brian J. Arnold  
K&L GATES LLP  
70 West Madison Street, Suite 3100  
Chicago, IL 60602-4207  
Telephone: (312) 372-1121

**Counsel for Respondent Novatel Wireless, Inc.**

/s/ Aaron Wainscoat

Mark Fowler  
Aaron Wainscoat  
Carrie Williamson  
Erik Fuehrer  
DLA PIPER LLP (US)  
2000 University Avenue  
East Palo Alto, California 94303  
Tel: 650-833-2000

**Attorneys for Respondents Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.**

PUBLIC VERSION

/s/ Adam P. Seitz

Louis S. Mastriani  
Sarah E. Hamblin  
Daniel F. Smith  
Dana L. Watts  
Emi Ito Ortiz  
ADDUCI, MASTRIANI & SCHAUMBERG, L.L.P.  
1133 Connecticut Avenue, N.W., 12th Floor  
Washington, DC 20036  
Telephone: (202) 467-6300

Adam P. Seitz  
Eric A. Buresh  
Jason R. Mudd  
ERISE IP, P.A.  
6201 College Boulevard, Suite 300  
Overland Park, KS 66211  
Telephone: (913) 777-5600

**Counsel for Respondents Garmin Ltd., Garmin  
International, Inc. and Garmin USA, Inc.**

/s/ Jay H. Reiziss

Jay H. Reiziss  
Michelle A. Miller  
BRINKS GILSON & LIONE  
1775 Pennsylvania Avenue, NW, Suite 900  
Washington, D.C. 20006  
(202) 296-6940 (phone)

William H. Frankel  
Robert S. Mallin  
Kori Anne Bagrowski  
Hersh H. Mehta  
BRINKS GILSON & LIONE  
NBC Tower, Suite 3600  
455 North Cityfront Plaza Drive  
Chicago, IL 60611-5599  
(312) 321-4200 (phone)

**Attorneys for Respondents  
ZTE Corporation and ZTE (USA) Inc.**

/s/ Stephen R. Smith

Stephen R. Smith  
COOLEY LLP  
11951 Freedom Drive  
Reston, VA 20190  
Tel.: 703.456.8000  
Fax: 703.456.8100  
Email: HTC-TPL@cooley.com

Kyle Chen  
COOLEY LLP  
3175 Hanover Street  
Palo Alto, CA 94304  
Tel: 650.843.5000  
Fax: 650.849.7400  
Email: HTC-TPL@cooley.com

**Counsel for Respondents HTC Corp.,  
HTC America, Inc., Nintendo Co., Ltd. and  
Nintendo of America Inc.**

## CERTIFICATE OF SERVICE

I, Matthew Salcedo, hereby certify that on January 16, 2014, a copy of the **PUBLIC VERSION OF RESPONDENTS' JOINT REPLY TO THE SUBMISSION OF COMPLAINANTS AND THE INVESTIGATIVE ATTORNEY PURSUANT TO THE COMMISSION'S NOTICE OF PARTIAL REVIEW** was served on the following as indicated:

The Honorable Lisa R. Barton  
Acting Secretary  
U.S. International Trade Commission  
500 E Street, S.W.  
Washington, D.C. 20436

- ☒ **Via Hand Delivery (8 copies)**
- ☐ **Via Overnight Courier**
- ☒ **Via E-Filing**

The Honorable E. James Gildea  
Chief Administrative Law Judge  
U.S. International Trade Commission  
500 E Street, S.W., Room 317  
Washington, D.C. 20436  
Email:  
sarah.zimmerman@usitc.gov;  
kenneth.schopfer@usitc.gov

- ☒ **Via Hand Delivery (2 copies)**
- ☐ **Via Overnight Courier**
- ☒ **Via Electronic mail**

R. Whitney Winston  
OFFICE OF UNFAIR IMPORT INVESTIGATIONS  
U.S. International Trade Commission  
500 E Street, S.W., Room 401  
Washington, D.C. 20436  
Email: Whitney.Winston@usitc.gov

- ☐ **Via Hand Delivery**
- ☐ **Via Overnight Courier**
- ☒ **Via Electronic mail**

### **For Complainants Technology Properties Limited, LLC and Phoenix Digital Solutions LLC:**

James C. Otteson  
AGILITY IP LAW, LLP  
149 Commonwealth Drive  
Menlo Park, CA 94025  
Email: TPL853@agilityiplaw.com

- ☐ **Via Hand Delivery**
- ☐ **Via Overnight Courier**
- ☒ **Via Electronic mail**

Michelle G. Breit  
James R. Farmer  
OTTESON LAW GROUP  
AGILITY IP LAW, LLP  
14350 North 87th Street, Suite 190  
Scottsdale, AZ 85260

**For Complainant Patriot Scientific Corporation:**

Charles T. Hoge  
KIRBY NOONAN LANCE & HOGE LLP  
350 Tenth Avenue, Suite 1300  
San Diego, CA 92101  
Email: choge@knlh.com

- ☐ Via Hand Delivery  
☐ Via Overnight Courier  
☒ Via Electronic mail

**For Respondents Acer, Inc., Acer America Corporation, Amazon.com, and Novatel Wireless, Inc.:**

Eric C. Rusnak  
K&L GATES LLP  
1601 K Street, NW  
Washington, DC 20006-1600  
Email: AcerAmazonNovatel\_ITC853@klgates.com

- ☐ Via Hand Delivery  
☐ Via U.S. Mail  
☒ Via Electronic mail

**For Respondent Barnes & Noble, Inc.:**

Paul F. Brinkman  
QUINN EMANUEL URQUHART & SULLIVAN, LLP  
777 6th Street, N.W. / 11th Floor  
Washington, DC 20001  
Email: BN-853@quinnemanuel.com

- ☐ Via Hand Delivery  
☐ Via U.S. Mail  
☒ Via Electronic mail

**For Respondents Garmin Ltd., Garmin International, Inc., and Garmin USA, Inc.:**

Louis S. Mastriani  
ADDUCI, MASTRIANI & SCHAUMBERG, LLP  
1133 Connecticut Avenue, N.W., 12th Floor  
Washington, DC 20036  
Email: Garmin-853@adduci.com

- ☐ Via Hand Delivery  
☐ Via U.S. Mail  
☒ Via Electronic mail

Adam P. Seitz  
Eric A. Buresh  
Jason R. Mudd  
ERISE, IP, P.A.  
6201 College Boulevard, Suite 300  
Overland Park, KS 66211  
Email: Garmin\_853@eriseIP.com

- ☒ Via Electronic Mail

**For Respondents HTC Corporation, HTC America:**

Stephen R. Smith  
COOLEY LLP  
11951 Freedom Drive  
Reston, VA 20190  
Email: HTC-TPL@cooley.com

- ☐ Via Hand Delivery  
☐ Via U.S. Mail  
☒ Via Electronic mail

**For Respondents Huawei Technologies Co., Ltd.,  
Huawei DeviceCo., Ltd., Huawei Device USA Inc., and  
Futurewei Technologies, Inc.:**

Timothy C. Bickham  
STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036  
Email: Huawei853@steptoe.com

- ☐ Via Hand Delivery  
☐ Via U.S. Mail  
☒ Via Electronic mail

**For Respondents LG Electronics, Inc., LG Electronics  
U.S.A., Inc.:**

Scott Elengold  
FISH & RICHARDSON P.C.  
1425 K Street, N.W., Suite 1100  
Washington, D.C. 20005  
Email: LG-TPLITCService@fr.com

- ☐ Via Hand Delivery  
☐ Via U.S. Mail  
☒ Via Electronic mail

**For Respondents Nintendo Co., Ltd., Nintendo of  
America, Inc.:**

Stephen R. Smith  
COOLEY LLP  
11951 Freedom Drive  
Reston, VA 20190  
Email: Nintendo-TPL@cooley.com

- ☐ Via Hand Delivery  
☐ Via U.S. Mail  
☒ Via Electronic mail

**For Respondents ZTE Corporation and ZTE (USA)  
Inc.:**

Jay H. Reiziss  
BRINKS HOFER GILSON & LIONE  
1775 Pennsylvania Avenue, NW  
Suite 900  
Washington, DC 20006  
Email: Brinks-853-ZTE@brinksgilson.com

- ☐ Via Hand Delivery  
☐ Via U.S. Mail  
☒ Via Electronic mail

*/s/ Matthew Salcedo*

---

Matthew Salcedo  
Senior Paralegal  
DLA Piper LLP (US)  
2000 University Avenue  
East Palo Alto, CA 94303  
Telephone: 650-833-2000  
Facsimile: 650-833-2001