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January 15, 2013

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

Re: *In the Matter of Certain Wireless Devices with 3G and/or 4G Capabilities, Including Components Thereof,* Investigation No. 337-TA-2929

Dear Secretary Barton:

On behalf of Nokia Corporation and Nokia Inc., I write to submit comments on the public interest factors that the Commission should consider in determining whether to initiate an investigation in the above-referenced matter, pursuant to the Commission's Solicitation of Comments. Nokia hereby requests confidential treatment for these comments pursuant to this Commission's Solicitation of Comments. Confidential treatment is appropriate because these comments discuss confidential licensing negotiations between the parties as well as InterDigital's arguments concerning its domestic industry requirement. In short, the proposed investigation would be a part of InterDigital's campaign to abuse the exclusionary relief granted by this Commission in order to force Nokia, a demonstrably willing licensee, and other companies to accept unreasonable licensing terms which violate binding commitments that InterDigital has made to ETSI. [redacted] [REDACTED] Finally, InterDigital will be unable to demonstrate a domestic industry in this proposed investigation. As such, the commencement of a full investigation would be both ill-advised and unnecessary.

1. **This Commission should not permit InterDigital to use it to circumvent its own contractual obligations and to violate the FTC Act.**

InterDigital's business model centers around its obligation to license patents on fair, reasonable, and non-discriminatory ("FRAND") terms. These obligations arise from binding and enforceable commitments that InterDigital has made to standards-setting organizations like ETSI which require InterDigital to grant FRAND licenses to willing licensees. InterDigital derives over

97% of its revenue from patent licensing. *See* 2011 InterDigital Form 10-K, *available at* http://www.sec.gov/Archives/edgar/data/1405495/000140549512000009/idcc-20111231xk.htm.

It is telling that InterDigital attempts to enforce its patent rights before this Commission against willing licensees such as Nokia instead of pursuing arbitration over license terms or a district court action that could establish the value of a subset of InterDigital's patents and assist with negotiations over the remainder of its essential patent portfolio or could review the value of InterDigital's entire portfolio.[1] Since InterDigital's revenue comes primarily from patent licensing, exclusionary relief does not grant it any direct benefits; it has no products which suffer due to competition from allegedly infringing products. Indeed, InterDigital's course of conduct indicates that InterDigital does not want FRAND terms for a license with Respondents; it wants hold-up value.

2. Enforcement of FRAND commitments is necessary to the standard-setting process.

In order to ensure that consumers may choose phones from different manufacturers, cellular technology must be defined with sufficient precision so that phones from different manufacturers can communicate with one another each time a call is made. In order to do this, these industry participants take part in the standard-setting process. Thus, there are recognizable, pro-competitive benefits arising from the conduct of SSOs. *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007).

However, if developers have the ability obtain patents on their contributions to these standards, there arises a risk that the patents could be used for anti-competitive purposes. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988). If competitors cooperate to define a standard, they could then use their patents to exclude later entrants from the market. In the standard-setting context, this has the potential to create cartels that stifle competition and innovation.

The United States Department of Justice ("DOJ") and the United States Patent and Trademark Office ("PTO") recently confirmed the importance of enforcing the FRAND commitment and preventing patent holders from doing precisely what InterDigital is attempting to do here. *See* January 8, 2013 DOJ USPTO Policy Statement at 4 (warning that "the owner of a patented technology may gain market power...by engaging in patent hold-up, which entails asserting the patent to exclude a competitor from a market or obtain a higher price for its use than would have been possible before the standard was set, when alternative technologies could have been chosen"), *available at* http:// www.uspto.gov/about/offices/ogc/Final_DOJ-PTO_Policy_Statement_on_FRAND_SEPs_1-8-13.pdf.

The importance of enforcing FRAND commitments is antithetical to a patent holder such as InterDigital's attempts to leverage an exclusion order based on its declared-essential patents. The Justice Department and the PTO have spoken clearly and directly on this point, noting that "[a] decision maker could conclude that the holder of a F/RAND-encumbered, standards-essential patent had attempted to use an exclusion order to pressure an implementer of a standard to accept more onerous licensing terms than the patent holder would be entitled to receive consistent with the

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1 [redacted] [REDACTED]

F/RAND commitment." January 8, 2013 DOJ USPTO Policy Statement at 6 This admonition is consistent with concerns raised by various federal courts. *See Broadcom Corp.*, 501 F.3d at 310.

The Federal Trade Commission has also found that seeking such relief on FRAND-encumbered patents constitutes unfair competition that violates Section 5 of the FTC Act on at least two occasions. *See In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081, Statement of the Federal Trade Commission at 2 (Nov. 26, 2012); *see also In the Matter of Motorola Mobility LLC & Google Inc.*, FTC File No. 121-0120, Decision and Order (Jan. 3, 2013).

Further, as previously noted, the federal courts have also come to recognize importance of giving meaning to, and enforcing, the FRAND commitment. *See Microsoft Corp. v. Motorola, Inc.*, 864 F. Supp. 2d 1023, 1030-33 (W.D. Wash. 2012); *see also Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012) (holding that the "district court's conclusions that Motorola's RAND declarations to the ITU created a contract enforceable by Microsoft as a third-party beneficiary ...and that this contract governs in some way what actions Motorola may take to enforce its ITU standard-essential patents ... were not legally erroneous"); *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178bbc, 2012 WL 3289835, at *21-22 (W.D. Wis. Aug. 10, 2012).

In considering whether to commence an investigation based upon this Complaint, the Commission should consider that standards-setting in mobile communication is a relatively recent development and that risks to competition and to consumers from abuse of that process present new policy issues. InterDigital must not obtain an exclusion order based upon the use of its declared-essential patents against willing licensees because if FRAND is not enforced, the multitude of benefits that society has reaped from the collaboration of erstwhile competitors will be lost. InterDigital's argument that this concern is ameliorated by the fact that "InterDigital's licensees and other manufacturers" produce articles that could replace the proposed respondents' products in the event of an exclusion order is misdirected since the unwarranted exclusion of willing licensees from the US market would be a disruption of the entire standard-essential ecosystem. *See* Complaint at 4-5.

IPR Policies such as ETSI's are intended to preserve the balance between the rights of patent holders and those of parties seeking to implement standards by giving essential patent holders the right to adequate and fair compensation for their IPR, but also by ensuring that standard-essential patents are available to potential users. This protects against wasted investments in standards-compliant products only to have those products taken off the market because a standard-essential patent holder obtains an exclusionary remedy.

For the standard setting regime to function properly and for this balance to be preserved, a FRAND undertaking must have meaning. Indeed, courts around the country now agree that a FRAND commitment creates a binding and enforceable undertaking for the benefit of third party manufacturers of standards-compliant products. *See Microsoft Corp. v. Motorola, Inc.*, 10-cv-1823, Order No. 188 at 10 (W.D. Wash. Feb. 27, 2012). Likewise, another federal court ruled that, in the context of denying a motion to dismiss, "[t]he combination of the [ETSI IPR Policy] and Motorola's assurances to the Institute that it would grant fair, reasonable and non-discriminatory licenses to the [patents in suit] constitute a contractual agreement between Motorola and the European Telecommunications Standards Institute." *Apple Inc. v. Motorola Mobility, Inc.*, 11-cv-178, Order at 19 (W.D. Wisc. June 7, 2011).

If this balance is upset, competitive conditions and United States consumers will suffer. The DOJ could not be clearer that an exclusion order "may harm competition and consumers by degrading one of the tools SDOs employ to mitigate the threat of such opportunistic actions by the holders of F/RAND-encumbered patents that are essential to their standards." January 8, 2013 DOJ USPTO Policy Statement at 6. *See also Broadcom Corp.*, 501 F.3d at 313.

A party making a FRAND undertaking is obligated to grant a FRAND license to any willing party, and not simply to negotiate with potential licensees. Indeed, the United States District Court for the Western District of Washington has expressly rejected the assertion that a RAND undertaking is simply an agreement to negotiate in good faith. *See Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2012 U.S. Dist. LEXIS 146517 (W.D. Wash. Oct. 10, 2012).

As courts have increasingly recognized, where a potential licensee agrees to pay FRAND compensation and makes an offer that is FRAND-compliant, an exclusion order is not a proper remedy for alleged infringement of declared-essential patents. *See Apple, Inc. v. Motorola, Inc.,* No.1:11-cv-08540, 2012 U.S. Dist. LEXIS 89960, at *45 (N.D. Ill. June 22, 2012) (writing "[h]ow could [Motorola] be permitted to enjoin Apple from using an invention that it contends Apple *must* use if it wants to make a cell phone with UMTS telecommunications capability— without which it would not be a cell *phone*."); *see also Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 885 (9th Cir. 2012).

~~3.~~ [redacted]

[redacted]

[REDACTED]

As federal courts and agencies continue to deny injunctive relief and to bring enforcement actions against companies that improperly seek such relief, the failure by this Commission to enforce uniformity of treatment in this area will harm the public welfare, competitive conditions in the United States, and U.S. consumers. *See, e.g., Apple, Inc. v. Motorola, Inc.,* 2012 U.S. Dist. LEXIS 89960; *Google Inc.*, FTC File No. 121-0120. The FTC has already begun enforcing FRAND commitments in certain situations. Allowing InterDigital access to this forum to enforce its standard-essential patents against willing licensees creates an uneven playing field for businesses that will harm competitive conditions in the United States by injecting unpredictability and destabilizing the entire standard-setting process. If device manufacturers elect to avoid standard-setting in order to prevent their products from being held up by declared-essential patent holders, or if they adopt standards and are forced to pay supracompetitive royalties by patent holders who choose to exploit the switching costs, innovations which could benefit U.S. consumers may be rendered unavailable or available only at significantly higher costs to a lower number of people, thus damaging the public welfare.

~~4.~~3. InterDigital will be unable to demonstrate a domestic industry.

The Commission's opinion in *Certain Multimedia Display & Navigation Devices & Systems, Components Thereof, & Products Containing Same*, Inv. No. 337-TA-694, Comm'n Op. at 7-8 (Aug. 8, 2011) recently clarified that a fact-focused and case-specific inquiry is necessary to demonstrate a nexus between an individual asserted patent and licensing activities or investments that relate to a larger portfolio containing that patent.

InterDigital's position in this proposed investigation is likely to be the same as its wholly inadequate argument in the currently pending 613 and 800 investigations. As such, InterDigital will be unable to show that a domestic industry exists with respect to the asserted patent, as required by Section 337 and Commission precedent. [redacted]~~.~~[REDACTED]

For the reasons discussed herein, the commencement of a full investigation against Nokia based on this Complaint is thoroughly unnecessary.

Sincerely,

/s/ Patrick J. Flinn

Patrick J. Flinn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day, a true and correct copy of the foregoing document was served by the indicated means to the persons at the addresses below:

The Honorable Lisa R. Barton Acting Secretary U.S. INTERNATIONAL TRADE COMMISSION 500 E Street, S.W., Room 112 Washington, DC 20436	Via Electronic Filing (EDIS)
Lynn I. Levine Director, Office of Unfair Import Investigations U.S. International Trade Commission 500 E Street, S.W., Room 317 Washington, DC 20436	Via Hand Delivery (8 copies)
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Dated: January 15, 2013

/s/Emily S. Healy

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Emily S. Healy