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January 15, 2013

The Honorable Lisa R. Barton
Acting Secretary to the Commission
500 E Street, SW, Room 112
Washington, DC 20436

Re: Docket No. 337-2929 – Certain Wireless Devices with 3G and/or 4G Capabilities and Components Thereof

Dear Acting Secretary Barton:

In response to the Commission's January 7, 2012, *Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest*, proposed Respondents ZTE Corporation and ZTE (USA), Inc. (collectively, "ZTE") submit the following comments on the public interest. *See* 76 Fed. Reg. 45615. For at least the reasons explained below, ZTE respectfully submits that the Commission should not institute an investigation, but if it does, it should authorize the Administrative Law Judge ("ALJ") to take evidence and make findings on the public interest, in order to develop a full evidentiary record.

The Complaint filed by InterDigital Communications, Inc., InterDigital Technology Corporation, IPR Licensing, Inc., and InterDigital Holdings, Inc. (collectively, "InterDigital") and, specifically, InterDigital's assertion of declared essential patents as the basis to request exclusion of wireless devices from U.S. commerce implicates significant public interest concerns.

Courts have refused to enter injunctive relief in cases involving standards essential patents, and governmental organizations have recognized with increasing frequency that an exclusion order based upon declared essential patents is, with few exceptions that clearly do not apply here, anticompetitive. *See, e.g. Apple Inc. v. Motorola, Inc.*, 869 F.Supp. 2d 901, 913-14 (N.D.Ill. 2012); *In the Matter of Motorola Mobility LLC & Google Inc.*, FTC File No. 121-0120, Proposed Complaint at ¶¶ 2, 25-28. Under the circumstances present here, InterDigital's assertion of its declared essential patents at the Commission is a violation of its obligation to license those patents on fair, reasonable and non-discriminatory terms ("FRAND") terms.

Quite simply, a holder of patents that have been declared essential to a standard should be precluded from obtaining an injunction in the form of an exclusion order when a proposed respondent has unequivocally demonstrated that it is willing to license the asserted patents on

FRAND terms, as ZTE has done. Specifically, ZTE was named as a Respondent in a currently pending Commission investigation, *Certain Wireless Devices with 3G Capabilities and Components Thereof*, Inv. No. 337-TA-800. In the parallel litigation in the United States District Court for the District of Delaware, ZTE (USA), Inc., moved the Court to set a FRAND rate for InterDigital's portfolio of U.S. standards essential patents. (Ex. A, Motion for Partial Lift of Stay, Case No. 11-654-RGA, (Nov. 30, 2011 D. Del.); Ex. B, Joinder of Defendant ZTE (USA), Inc. in Defendants Huawei Technologies Co. Ltd.'s and Futurewei Technologies, Inc.'s Motion for Partial Lift of Stay, Case No. 11-654-RGA, (Dec. 16, 2011 D. Del.)) In the oral argument regarding that motion, ZTE unambiguously committed to paying the FRAND rate set by the District Court for sales in the United States. (Ex. C, Hr'g on Defendants' Motion for Partial Lift of Stay, Case No. 11-654-RGA, (Mar. 2, 2012 D. Del.) at 41:11-12 Tr. at ("InterDigital has an obligation to license. ZTE (USA) stands here willing and will accept the license.)) InterDigital, in direct contravention of its FRAND obligations, opposed the motion, arguing in favor of continuing to prosecute the investigation before the Commission.

Courts, the Federal Trade Commission, the Department of Justice, and the Patent and Trademark Office have all found that the pursuit of injunctive relief based on declared essential patents against a willing licensee such as ZTE is fundamentally inconsistent with FRAND obligations. *See, e.g., Apple*, 869 F. Supp. 2d at 913-14; *In the Matter of Motorola Mobility LLC & Google Inc.*, FTC File No. 121-0120, Analysis of Proposed Consent Order at 6-7; *Department of Justice and United States Patent and Trademark Office Policy Statement for Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments*, (Jan. 8, 2013) at 5.

In filing this, its fourth, Complaint asserting declared essential patents at the Commission, InterDigital has again reneged on its FRAND commitments and leaves no room for ambivalence. InterDigital intends to harness the power of the Commission to extract supracompetitive royalties from standards implementers, including ZTE. It is contrary to the public interest for the Commission to facilitate InterDigital's scheme. Because ZTE is willing to license InterDigital's U.S. standards essential patents on FRAND terms, InterDigital's tactics inflict harm on competitive conditions in the United States, U.S. consumers, and the public welfare. *See e.g., Apple*, 869 F. Supp. 2d at 921; *In the Matter of Motorola Mobility LLC & Google Inc.*, FTC File No. 121-0120.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Jay Reiziss", is written over a horizontal line.

Jay Reiziss

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

INTERDIGITAL COMMUNICATIONS, LLC, a
Pennsylvania limited liability company,
INTERDIGITAL TECHNOLOGY
CORPORATION, a Delaware corporation, and
IPR LICENSING, INC., a Delaware corporation,

Plaintiffs,

v.

HUAWEI TECHNOLOGIES CO., LTD., a
Chinese corporation, FUTUREWEI
TECHNOLOGIES, INC. D/B/A HUAWEI
TECHNOLOGIES (USA) AMERICA, a Texas
corporation, NOKIA CORPORATION, a Finnish
corporation, NOKIA INC., a Delaware
corporation, ZTE CORPORATION, a Chinese
corporation, ZTE (USA) Inc., a New Jersey
corporation,

Defendants.

C.A. No. 11-654-MSG

MOTION FOR PARTIAL LIFT OF STAY

This motion seeks to partially lift the stay in this action that was imposed under 28 U.S.C. § 1659 for the limited purpose of (a) permitting defendants Huawei Technologies Co., Ltd. and Futurewei Technologies, Incorporated to file an answer with counterclaims, and (b) proceeding with expedited discovery and an expedited trial (to be set after the stay is partially lifted) on those counterclaims relating to Plaintiffs' commitments to license its standards-essential patents on fair, reasonable and non-discriminatory ("FRAND") terms. Huawei and Futurewei's affirmative claims for declaratory relief, including the setting of FRAND royalty rates, cannot be adjudicated in a pending U.S. International Trade Commission ("ITC") investigation. The stay would remain as to all issues other than the FRAND counterclaims. Copies of Huawei's proposed Answer with Counterclaims and Futurewei's proposed Answer with Counterclaims are

attached to the Declaration of David W. Haller, dated November 30, 2011 (Haller Decl.), as Exhibits A–B, respectively.

On July 26, 2011, Plaintiffs (together, “InterDigital”) filed a Complaint under Section 337 of the Tariff Act of 1930 (As Amended) with the ITC naming the Defendants here as respondents, alleging infringement of United States Patent Nos. 7,349,540, 7,502,406, 7,536,013, 7,616,970, 7,706,332, 7,706,830, and 7,970,127, and seeking exclusion from importation into the United States of cell phones and other 3G devices manufactured or sold by the respondents. A copy of the ITC Complaint is attached to the Haller Declaration as Exhibit C. On August 25, 2011, the ITC instituted an Investigation, No. 337-TA-800, into the matters raised by InterDigital’s Complaint. *See* Haller Decl. Exh. D (letter received by the Defendants; all parties received the same letter).

On the same day that they filed the ITC Complaint, July 26, 2011, InterDigital filed its Complaint in this case making the same infringement allegations based on the same seven patents. Because the patent claims in this case were the same as the patent claims in the ITC Complaint, and were based on the same issues, the Defendants here jointly moved on September 23, 2011, to invoke the mandatory stay provided by 28 U.S.C. § 1659. On October 10, 2011, InterDigital filed a Statement of Non-Objection notifying this Court that it did not object to imposition of the stay “in view of the parallel proceeding before the International Trade Commission . . . involving the same patents and the same defendants.”

On October 25, 2011, Huawei and Futurewei commenced an action in the Delaware Chancery Court against InterDigital, and moved for expedited discovery and an expedited trial. The Chancery Court action asserts claims for breach of contract and related equitable claims, and seeks a declaration by which that Court would set FRAND royalty rates for licenses that Huawei

and Futurewei believe they are entitled to pursuant InterDigital's commitments and declarations to certain the European Telecommunications Standards Institute ("ETSI"). A copy of the Chancery Court Complaint is attached to the Haller Declaration as Exhibit E; a copy of Huawei's and Futurewei's Memorandum in Support of Their Motion for Expedited Discovery and Proceedings Leading to a Declaration of a FRAND Royalty Rate is attached to the Haller Declaration as Exhibit F.

Huawei and Futurewei brought the Chancery Court action, and sought expedition, in order to avoid the irreparable harm to their businesses that is threatened by a potential exclusion order in the ITC. A judicial declaration of FRAND royalty rates would allow Huawei and Futurewei to avoid any exclusion order that might otherwise issue in the ITC proceeding by paying the determined FRAND royalty amounts in exchange for the license that InterDigital committed to ETSI that it would give for patents that are essential to ETSI standards compliance. *See, e.g., Carborundum Co. v. Molten Metal Equip. Innovations, Inc.*, 72 F.3d 872, 878 (Fed. Cir. 1995) (license is defense to patent infringement). Huawei and Futurewei thereby could avoid the devastating effect of such an exclusion order.

At a hearing before the Chancery Court on November 16, 2011, the Chancellor expressed concern, given the pendency of the ITC proceeding, and more importantly this federal court action, that this Court should, in the first instance, determine whether the claims Huawei and Futurewei seek to prosecute should proceed in light of the section 1659 stay, and thereafter whether they should proceed with expedition.

The Chancellor therefore requested that Huawei and Futurewei move this Court for a partial lift of the stay in order to adjudicate their proposed FRAND-related counterclaims, and report back to the Chancellor within 30 days as to the status of that motion. A copy of the

transcript of the November 16, 2011 Chancery Court hearing is attached to the Haller

Declaration as Exhibit G.

Section 1659(a) provides (emphasis added):

In a civil action involving parties that are also parties to a proceeding before the United States International Trade Commission under section 337 of the Tariff Act of 1930, at the request of a party to the civil action that is also a respondent in the proceeding before the Commission, the district court *shall stay*, until the determination of the Commission becomes final, proceedings in the civil action *with respect to any claim that involves the same issues involved in the proceeding before the Commission*, but only if such request is made within - (1) 30 days after the party is named as a respondent in the proceeding before the Commission, or (2) 30 days after the district court action is filed, whichever is later.

Importantly, courts have held that claims should be stayed only where they are based on the exact same issues as are raised in the ITC, and not merely where there are overlapping issues; this means primarily that claims for patent infringement are stayed. *See, e.g., SanDisk Corp. v.*

Phison Elecs. Corp., 538 F. Supp. 2d 1060, 1065 (W.D. Wis. 2008):

First, defendants contend that lawsuits sharing “overlapping issues” must be stayed, which would mean that the mandatory stay provision requires stay for claims that involve only *some* of the same issues. However, the statutory language does not lend itself to such a broad reading, requiring stay only for “any claim that involves *the* same issues.” Moreover, defendants’ reading extends the mandatory stay beyond its purpose. The legislative history of § 1659 shows that the law was enacted to protect importers and producers from identical parallel claims.

(emphasis of SanDisk court) (citing H.R. Rep. No. 103-826(I), at 141, *as reprinted in* 1994 U.S.C.C.A.N.N. 3773, at 3913).¹

Here, the section 1659 mandatory stay does not apply to Huawei’s and Futurewei’s requests for a declaratory judgment, including for a setting of FRAND royalty rates. Those

¹ *See also Broadcom Corp. v. Qualcomm Inc.*, 2005 WL 5925582, at *5 (C.D. Cal. Dec. 5, 2005) (contractual interpretation claims relating to breach of forum selection clause, unlike infringement claims, were not before ITC and therefore were not subject to section 1659 stay).

claims are not cognizable in the ITC and that relief is not available because the ITC cannot issue a judgment setting the FRAND rates. The ITC can only grant or deny exclusion orders and cease and desist orders. 19 U.S.C. §§ 1337(d), (e), (f); *see also Tesser, Inc. v. Int'l Trade Comm'n*, 646 F.3d 1357, 1371 (Fed. Cir. 2011) (“[T]he ITC has a limited statutory mandate and can only issue an exclusion order barring future conduct.”); *Texas Instruments, Inc. v. U.S. Int'l Trade Comm'n*, 851 F.2d 342, 343–344 (Fed. Cir. 1988) (similar). Indeed, the ITC cannot adjudicate counterclaims in any respect whatever; any counterclaim raised in an ITC proceeding must be removed to, and heard by, federal district courts. *See* 19 U.S.C. § 1337(c). Huawei’s and Futurewei’s FRAND counterclaims therefore do not “involve the same issues involved in” the ITC proceeding, and need not be stayed under section 1659.²

The propriety of lifting the section 1659 stay to allow Huawei’s and Futurewei’s proposed counterclaims to proceed is evidenced by, among other things, the fact that courts routinely adjudicate counterclaims filed in ITC proceedings that are mandatorily removed to the district courts pursuant to 19 U.S.C. § 1337(c), during the pendency of the ITC proceeding and notwithstanding the existence of a section 1659 stay of separate patent infringement litigation. *See Apple, Inc. v. Motorola Mobility, Inc.*, 11-cv-178-bbc, 2011 U.S. Dist. LEXIS 72745 at *3, *49-*50 (W.D. Wis. June 7, 2011) (adjudicating FRAND-related counterclaims that had been

² *In re Princo Corp.*, 478 F.3d 1345, 1356 (Fed. Cir. 2007), involved a different situation as the court there stayed patent infringement claims that were based on the same seven patents that were claimed to be infringed in the ITC proceeding. The court held that the patent infringement claims should be stayed, and the fact that damages were available in the district court for the alleged patent infringement but were not available in the ITC did not change the fact that those same claims should be stayed. Here, no claim for a FRAND royalty rate determination is being made in the ITC. Although certain FRAND-related defenses are asserted in the ITC, those defenses asserted a failure by InterDigital to make FRAND license offers, and do not, and cannot, constitute an affirmative claim to set a royalty rate.

removed from ITC, during pendency of ITC proceeding and while section 1659 stay was in place as to patent infringement litigation).

InterDigital should also be estopped from opposing this motion. It stated to the Chancery Court that the section 1659 stay need not prevent adjudication of Huawei's and Futurewei's counterclaims in this Court. See November 16, 2011 Transcript at 14 ("the patent issues, i.e., validity, infringement, enforceability, and equitable conduct, those are mandatorily stayed if someone requests the stay. But the nonpatent issues are not mandatorily stayed. They can be discretionarily stayed if one requests that, but they aren't mandatorily stayed."). The Chancery Court accordingly instructed Huawei and Futurewei to request that this Court lift the stay partially to adjudicate those claims. As the Chancery Court stated, "I think they're [InterDigital] very poorly positioned to argue that the stay applies to your [Huawei's and Futurewei's] claims given the arguments to me." November 16, 2011 Transcript, 23:5-7. InterDigital has since confirmed its view that the mandatory stay does not cover the FRAND counterclaims that are the subject of this motion.

Once Huawei and Futurewei receive leave to pursue those claims in this Court, expedition is both reasonable and supported by good cause, and is necessary to avoid irreparable harm. See, e.g., *Advanced Micro Devices, Inc. v. S3 Graphics Co.*, No. 11-965-LPS, 2011 WL 5402667, at *2 (D. Del. Nov. 8, 2011) (expediting discovery, case-dispositive motions and trial on one count of complaint to resolve patent ownership during pendency of ITC proceeding); *Kone Corp. v. ThyssenKrupp USA, Inc.*, No. 11-465-LPS-CJB, 2011 WL 4478477, at *6-8 (D. Del. Sept. 26, 2011) (finding good cause to expedite limited discovery). InterDigital seeks to preclude the importation and sale of Huawei's and Futurewei's products in a highly competitive and rapidly evolving market. If that effort succeeds in the face of Huawei's and Futurewei's


entitlement to a FRAND license, they would lose their competitive position including from loss of goodwill, and important customer relationships and market share. *See Kos Pharms. Inc. v. Andrx Corp.*, 369 F.3d 700, 726 (3d Cir. 2004) (losses of control of reputation, trade and good will constitute irreparable injury); *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 195 (3d Cir. 1990) (similar). Further, even if monetary damages could compensate Huawei and Futurewei, and they cannot, in any event the damages resulting from losses of customers, market share and goodwill would be difficult if not impossible to calculate. *See, e.g., Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 141 (3d Cir. 2000) (irreparable harm exists when monetary damages are difficult to ascertain or are inadequate). “Competition changes probabilities” and, if IDC’s conduct persists, Huawei and Futurewei will be irreparably damaged and unable to “identify which contracts slipped from [their] grasp.” *Hess Newmark Owens Wolf, Inc. v. Owens*, 415 F.3d 630, 632 (7th Cir. 2005); *see also id.* (“[I]t is precisely the difficulty of pinning down what business has been or will be lost that makes an injury ‘irreparable.’”) (internal citation omitted).

Huawei and Futurewei therefore respectfully seek a partial lift of the stay in order to prosecute their counterclaims on an expedited basis, with a judgment declaring a FRAND rate to issue prior to the ITC hearing in June 2012. Huawei and Futurewei respectfully request the opportunity further to brief both the issue of expedition and the merits in the event the stay is lifted so that they can pursue that relief.

In the event that this motion is denied, Huawei and Futurewei request that this Court make clear that the Chancery Court may proceed to adjudicate their claims there. Even if this case remains stayed entirely and Huawei and Futurewei are therefore prevented from pursuing any counterclaims in this Court, they may pursue such counterclaims in the Court

of Chancery, as they are non-patent, non-federal law claims of the type that are often litigated in state courts. The Chancery Court was concerned that some federal law policy might prevent its consideration of the FRAND claims. If this Court declines as a matter of discretion to consider those claims, it should make clear to the Chancery Court that no federal law policy exists that would prevent its consideration of such claims.

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*Attorneys for Defendants Huawei Technologies Co.,
Ltd. and Futurewei Technologies, Inc.*

Dated: November 30, 2011

CERTIFICATE OF SERVICE

I, Adam W. Poff, Esquire, hereby certify that on November 30, 2011, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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I further certify that on November 30, 2011, I caused a true and correct copy of the foregoing document to be served by e-mail on the above-listed counsel of record and on the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

INTERDIGITAL COMMUNICATIONS, LLC, a
Pennsylvania limited liability company,
INTERDIGITAL TECHNOLOGY
CORPORATION, a Delaware corporation, and
IPR LICENSING, INC., a Delaware corporation,

Plaintiffs,

v.

HUAWEI TECHNOLOGIES CO., LTD., a
Chinese corporation, FUTUREWEI
TECHNOLOGIES, INC. D/B/A HUAWEI
TECHNOLOGIES (USA) AMERICA, a Texas
corporation, NOKIA CORPORATION, a Finnish
corporation, NOKIA INC., a Delaware
corporation, ZTE CORPORATION, a Chinese
corporation, ZTE (USA) Inc., a New Jersey
corporation,

Defendants.

C.A. No. 11-654-MSG

PROPOSED ORDER

At Wilmington this _____ day of _____, 2011, the Court, having duly
considered the Motion for Partial Lift of Stay and the papers submitted in connection therewith;

IT IS HEREBY ORDERED that:

1. The Motion for Partial Lift of Stay in this action that was imposed under 28 U.S.C. § 1659 is GRANTED.
2. Defendants Huawei Technologies Co., Ltd. and Futurewei Technologies, Incorporated shall be permitted to: (a) file an answer with counterclaims, and (b) proceed with discovery and trial on those counterclaims relating to Plaintiffs' commitments to license its standards-essential patents on fair, reasonable and non-discriminatory ("FRAND") terms. A scheduling

conference is scheduled for _____, 201_, to set a schedule for such discovery and trial; no later than _____, 201_, the parties shall submit a joint statement setting forth their proposals for such schedule.

United States District Judge

D. DEL. LOCAL RULE 7.1.1 STATEMENT

I, Adam W. Poff, hereby certify that counsel for the movants has made a reasonable effort to reach agreement with Plaintiffs on the matters set forth in the foregoing Motion for Partial Lift of Stay.

/s/ Adam W. Poff
Adam W. Poff (No. 3990)

Dated: November 30, 2011

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

INTERDIGITAL COMMUNICATIONS,
LLC, INTERDIGITAL TECHNOLOGY
CORPORATION, and IPR LICENSING,
INC.,

Plaintiffs,

v.

HUAWEI TECHNOLOGIES CO., LTD.,
FUTUREWEI TECHNOLOGIES, INC. d/b/a
HUAWEI TECHNOLOGIES (USA)
AMERICA, LG ELECTRONICS, INC., LG
ELECTRONICS U.S.A. INC., LG
ELECTRONICS MOBILECOMM U.S.A.,
NOKIA CORPORATION, NOKIA INC.,
ZTE CORPORATION, and ZTE (USA)
INC.,

Defendants.

C.A. No. 11-654-RGA

**JOINDER OF DEFENDANT ZTE (USA) INC. IN DEFENDANTS
HUAWEI TECHNOLOGIES CO., LTD.'S AND
FUTUREWEI TECHNOLOGIES, INC.'S
MOTION FOR PARTIAL LIFT OF STAY**

Defendant ZTE (USA) Inc. ("ZTE (USA)"), through its undersigned counsel, hereby joins in and adopts the Motion for Partial Lift of Stay (the "Motion") (D.I. 26) filed by defendants Huawei Technologies Co., Ltd. and Futurewei Technologies, Inc. (collectively, "Huawei"). For the reasons set forth in the Motion, ZTE (USA) respectfully requests that the Court partially lift the current stay so that ZTE (USA) can prosecute its proposed counterclaims attached hereto as Exhibit A on an expedited basis. Like the proposed counterclaims filed by Huawei (D.I. 27 at Exs. A-B), ZTE (USA)'s proposed counterclaims seek, *inter alia*, a declaration of the appropriate fair, reasonable, and non-discriminatory ("FRAND") licensing rate

to be paid by ZTE (USA) to Plaintiffs. ZTE (USA)'s proposed counterclaims sound primarily in contract and, therefore, are not subject to the current stay. *See* D.I. 26 at pp. 4-5.

In addition to the reasons Huawei notes in its Motion, ZTE (USA) respectfully submits that the Court should lift the stay to address Huawei's and ZTE (USA)'s counterclaims because of the importance of FRAND licensing obligations, not just to Huawei and ZTE (USA), but also to consumers and the entire economic system surrounding Standard Setting Organizations ("SSOs"). Plaintiffs seek to obtain an exclusion order at the U.S. International Trade Commission ("ITC"), which would bar Huawei, ZTE (USA), and other manufacturers from importing their accused wireless devices into the United States. Meanwhile, Plaintiffs will use the threat of an exclusion order in an effort to extract artificially high patent license fees that are not fair, reasonable, nor non-discriminatory. Plaintiffs' efforts violate the delicate compromise SSOs have reached between protecting patent rights and making essential, standardized technology available to market participants and, ultimately, consumers.

Left unchecked, Plaintiffs' enforcement campaign, along with similar campaigns pursued by other owners of patent rights essential to wireless communication standards, will negatively impact the market for wireless devices and the consumers who purchase them. Plaintiffs do not produce wireless devices, but those companies that do produce devices will be forced to choose between two options, each of which would have harmful effects on the market and consumers. One option is for device manufacturers to accept Plaintiffs' artificially high, non-FRAND license fees, which must then be passed along to consumers in the form of price increases. Alternatively, device manufacturers may choose to depart from the wireless communication standards and pursue alternative technologies, which would undermine the very purpose of the

SSOs. The latter option would lead to fragmentation of wireless communication standards, reducing market efficiency and interoperability and further increasing costs for consumers.

The FRAND licensing model is designed to eliminate all of these problems, providing device manufacturers and consumers with access to standardized technology, while ensuring that intellectual property rights owners receive fair and reasonable compensation for the use of their technology. However, the system only works if owners of essential patents satisfy their obligation to make licenses available on FRAND terms. Like Huawei's proposed counterclaims, ZTE (USA)'s counterclaims seek the Court's assistance to ensure that Plaintiffs satisfy their FRAND obligations and to determine the appropriate amount of truly FRAND license fees for the asserted patents.

Consistent with the relief sought in the Motion, ZTE (USA) respectfully requests that the Court lift the stay to allow ZTE (USA) to proceed with its counterclaims on an expedited basis with a final trial on the merits to occur in or prior to October 2012. Since the filing of the Motion, the scope and schedule of the ITC proceeding have changed. On December 5, 2012, Administrative Law Judge Shaw granted Plaintiffs' request to expand the scope of the investigation by adding one more asserted patent, U.S. Patent No. 8,009,636, and three new respondents: LG Electronics, Inc.; LG Electronics U.S.A., Inc.; and LG Electronics Mobilecomm U.S.A., Inc. Administrative Law Judge Shaw also extended the investigation schedule, rescheduling the ITC hearing to begin on October 22, 2012.

ZTE (USA), therefore, joins in the Motion for all the reasons set forth therein and respectfully requests that the Court lift the stay to allow the FRAND-related counterclaims to proceed to trial on an expedited basis prior to October 22, 2012.

/s/ Kelly E. Farnan

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Dated: December 16, 2011

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

INTERDIGITAL COMMUNICATIONS,
LLC, INTERDIGITAL TECHNOLOGY
CORPORATION, and IPR LICENSING,
INC.,

Plaintiffs,

v.

HUAWEI TECHNOLOGIES CO., LTD.,
FUTUREWEI TECHNOLOGIES, INC. d/b/a
HUAWEI TECHNOLOGIES (USA)
AMERICA, LG ELECTRONICS, INC., LG
ELECTRONICS U.S.A. INC., LG
ELECTRONICS MOBILECOMM U.S.A.,
NOKIA CORPORATION, NOKIA INC.,
ZTE CORPORATION, and ZTE (USA)
INC.,

Defendants.

C.A. No. 11-654-RGA

ANSWER AND COUNTERCLAIMS OF DEFENDANT ZTE (USA) INC.

Defendant ZTE (USA) Inc. (“ZTE (USA)”) submits this Answer with Counterclaims to the Amended Complaint filed by Plaintiffs InterDigital Communications, LLC, InterDigital Technology Corporation, and IPR Licensing, Inc. (collectively “InterDigital” or “the Plaintiffs”) on October 3, 2011. ZTE (USA) responds as follows:

THE PARTIES

1. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

2. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

3. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

4. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

5. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

6. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

7. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

8. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

9. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

10. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

11. ZTE (USA) admits the allegations of this paragraph.

12. ZTE (USA) admits the allegations of this paragraph.

JURISDICTION AND VENUE

13. ZTE (USA) admits that Plaintiffs purport to bring this action under 35 U.S.C. § 271 *et seq.* ZTE (USA) further admits that this Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1338(a). All remaining allegations of this paragraph are denied.

14. ZTE (USA) does not contest venue in this District solely for the purposes of this case. ZTE (USA) further does not contest that the Court has personal jurisdiction over ZTE (USA) solely for the purposes of this case. All remaining allegations of this paragraph are denied.

15. ZTE (USA) does not contest venue in this District solely for the purposes of this case. ZTE (USA) further does not contest that the Court has personal jurisdiction over ZTE (USA) solely for the purposes of this case. All remaining allegations of this paragraph are denied.

THE PATENTS-IN-SUIT

16. ZTE (USA) admits that Plaintiffs purport that there are eight patents at issue in this action, that is, the '540, the '406, the '013, the '970, the '332, the '830, the '127, and the '636 patents. All remaining allegations of this paragraph are denied.

17. ZTE (USA) admits that the '540 patent appears to be entitled "Generation of User Equipment Identification Specific Scrambling Code for High Speed Shared Control Channel." ZTE (USA) further admits the '540 patent appears to have been issued on March 25, 2008,

naming inventors Stephen Dick, Nader Bolourchi, and Sung-Hyuk Shin. ZTE (USA) lacks knowledge or information sufficient to form a belief as to whether InterDigital owns by assignment the entire right, title, and interest in and to the '540 patent, but ZTE (USA) admits that InterDigital is listed as the assignee on the face of the '540 patent. ZTE (USA) admits that Exhibit A to the Amended Complaint appears to contain a copy of the '540 patent. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

18. ZTE (USA) admits that the '406 patent appears to be entitled "Automatic Power Control System for a Code Division Multiple Access (CDMA) Communications System." ZTE (USA) further admits the '406 patent appears to have been issued on March 10, 2009, naming inventors John Kowalski, Gary R. Lomp, and Fatih Ozluturk. ZTE (USA) lacks knowledge or information sufficient to form a belief as to whether InterDigital owns by assignment the entire right, title, and interest in and to the '406 patent, but ZTE (USA) admits that InterDigital is listed as the assignee on the face of the '406 patent. ZTE (USA) admits that Exhibit B to the Amended Complaint appears to contain a copy of the '406 patent. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

19. ZTE (USA) admits that the '013 patent appears to be entitled "User Equipment Identification Specific Scrambling." ZTE (USA) further admits the '013 patent appears to have been issued on May 19, 2009, naming inventors Stephen G. Dick, Nader Bolourchi, and Sung-Hyuk Shin. ZTE (USA) lacks knowledge or information sufficient to form a belief as to whether InterDigital owns by assignment the entire right, title, and interest in and to the '013 patent, but ZTE (USA) admits that InterDigital is listed as the assignee on the face of the '013 patent. ZTE

(USA) admits that Exhibit C to the Amended Complaint appears to contain a copy of the '013 patent. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

20. ZTE (USA) admits that the '970 patent appears to be entitled "Dual Mode Unit for Short Range, High Rate and Long Range, Lower Rate Data Communications." ZTE (USA) further admits the '970 patent appears to have been issued on November 10, 2009, naming inventor Thomas E. Gorsuch. ZTE (USA) lacks knowledge or information sufficient to form a belief as to whether InterDigital owns by assignment the entire right, title, and interest in and to the '970 patent, but ZTE (USA) admits that InterDigital is listed as the assignee on the face of the '970 patent. ZTE (USA) admits that Exhibit D to the Amended Complaint appears to contain a copy of the '970 patent. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

21. ZTE (USA) admits that the '332 patent appears to be entitled "Method and Subscriber Unit for Performing Power Control." ZTE (USA) further admits the '332 patent appears to have been issued on April 27, 2010, naming inventors Fatih Ozluturk and Gary Lomp. ZTE (USA) denies that the '332 patent names John Kowalski as an inventor. ZTE (USA) lacks knowledge or information sufficient to form a belief as to whether InterDigital owns by assignment the entire right, title, and interest in and to the '332 patent, but ZTE (USA) admits that InterDigital is listed as the assignee on the face of the '332 patent. ZTE (USA) admits that Exhibit E to the Amended Complaint appears to contain a copy of the '332 patent. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

22. ZTE (USA) admits that the '830 patent appears to be entitled "Method and Subscriber Unit for Performing an Access Procedure." ZTE (USA) further admits the '830 patent appears to have been issued on April 27, 2010, naming inventors Fatih Ozluturk and Gary Lomp. ZTE (USA) lacks knowledge or information sufficient to form a belief as to whether InterDigital owns by assignment the entire right, title, and interest in and to the '830 patent, but ZTE (USA) admits that InterDigital is listed as the assignee on the face of the '830 patent. ZTE (USA) admits that Exhibit F to the Amended Complaint appears to contain a copy of the '830 patent. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

23. ZTE (USA) admits that the '127 patent appears to be entitled "User Equipment Identification Specific Scrambling." ZTE (USA) further admits the '127 patent appears to have been issued on June 28, 2011, naming inventors Stephen Dick, Nader Bolourchi, and Sung-Hyuk Shin. ZTE (USA) lacks knowledge or information sufficient to form a belief as to whether InterDigital owns by assignment the entire right, title, and interest in and to the '127 patent, but ZTE (USA) admits that InterDigital is listed as the assignee on the face of the '127 patent. ZTE (USA) admits that Exhibit G to the Amended Complaint appears to contain a copy of the '127 patent. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

24. ZTE (USA) admits that the '636 patent appears to be entitled "Method and Apparatus for Performing an Access Procedure." ZTE (USA) further admits the '636 patent appears to have been issued on August 30, 2011, naming inventors Fatih Ozluturk and Gary Lomp. ZTE (USA) lacks knowledge or information sufficient to form a belief as to whether InterDigital owns by assignment the entire right, title, and interest in and to the '636 patent, but

ZTE (USA) admits that InterDigital is listed as the assignee on the face of the '636 patent. ZTE (USA) admits that Exhibit H to the Amended Complaint appears to contain a copy of the '636 patent. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

COUNT I
INFRINGEMENT OF THE '540 PATENT

25. ZTE (USA) reasserts its answers to paragraphs 1-24 above as if fully set forth herein.

26. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

27. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

28. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

29. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

30. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

31. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

32. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

33. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

34. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

35. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

36. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

37. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

38. ZTE (USA) denies the allegations of this paragraph.

39. ZTE (USA) admits that it had actual and/or constructive knowledge of the '540 patent since before the original Complaint in this action was filed. ZTE (USA) admits that it received notice of the '540 patent upon the service of the original Complaint by InterDigital upon ZTE (USA). ZTE (USA) admits that it received notice of the '540 patent upon service of a July 26, 2011 complaint filed in the International Trade Commission. ZTE (USA) denies the remaining allegations of this paragraph.

40. ZTE (USA) admits that at least some of the accused ZTE (USA) products identified by InterDigital to date are designed to be used in a 3G WCDMA system. The meaning of the phrase “configured to comply with the HSDPA, HSUPA, and/or HSPA+ standards” is unclear in this paragraph. For at least this reason, ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

41. ZTE (USA) denies the allegations of this paragraph.

42. ZTE (USA) denies the allegations of this paragraph.

43. ZTE (USA) denies the allegations of this paragraph.

COUNT II
INFRINGEMENT OF THE '406 PATENT

44. ZTE (USA) reasserts its answers to paragraphs 1-43 above as if fully set forth herein.

45. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

46. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

47. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

48. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

49. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

50. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

51. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

52. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

53. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

54. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

55. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

56. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

57. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

58. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

59. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

60. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

61. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

62. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

63. ZTE (USA) denies the allegations of this paragraph.

64. ZTE (USA) admits that it had actual and/or constructive knowledge of the '406 patent since before the original Complaint in this action was filed. ZTE (USA) admits that it received notice of the '406 patent upon the service of the original Complaint by InterDigital upon ZTE (USA) at the addresses referenced herein. ZTE (USA) admits that it received notice of the '406 patent upon the service of a July 26, 2011 complaint filed in the International Trade Commission. ZTE (USA) denies the remaining allegations of this paragraph.

65. ZTE (USA) admits that at least some of the accused ZTE (USA) products identified by InterDigital to date are designed to be used in 3G WCDMA and/or CDMA2000 systems.. The meanings of the phrases “configured to comply with the Release 99, Release 4, HSDPA, HSUPA, and/or HSPA+ standards,” “configured to comply with the 1xRTT standards,” and “configured to comply with the EV-DO standards” are unclear in this paragraph. For at least

this reason, ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

66. ZTE (USA) denies the allegations of this paragraph.

67. ZTE (USA) denies the allegations of this paragraph.

68. ZTE (USA) denies the allegations of this paragraph.

COUNT III
INFRINGEMENT OF THE '013 PATENT

69. ZTE (USA) reasserts its answers to paragraphs 1-68 above as if fully set forth herein.

70. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

71. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

72. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

73. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

74. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

75. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

76. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

77. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

78. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

79. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

80. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

81. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

82. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

83. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

84. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

85. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

86. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

87. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

88. ZTE (USA) denies the allegations of this paragraph.

89. ZTE (USA) admits that it had actual and/or constructive knowledge of the '013 patent since before the original Complaint in this action was filed. ZTE (USA) admits that it received notice of the '013 patent upon the service of the Complaint by InterDigital upon ZTE (USA) at the addresses referenced herein. ZTE (USA) admits that it received notice of the '013 patent upon the service of a July 26, 2011 complaint filed in the International Trade Commission. ZTE (USA) denies the remaining allegations of this paragraph.

90. ZTE (USA) admits that at least some of the accused ZTE (USA) products identified by InterDigital to date are designed to be used in 3G WCDMA systems. The meaning of the phrase "configured to comply with the HSDPA, HSUPA, and/or HSPA+ standards" is unclear in this paragraph. For at least this reason, ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

91. ZTE (USA) denies the allegations of this paragraph.

92. ZTE (USA) denies the allegations of this paragraph.

93. ZTE (USA) denies the allegations of this paragraph.

COUNT IV
INFRINGEMENT OF THE '970 PATENT

94. ZTE (USA) reasserts its answers to paragraphs 1-93 above as if fully set forth herein.

95. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

96. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

97. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

98. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

99. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

100. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

101. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

102. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

103. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

104. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

105. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

106. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

107. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

108. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

109. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

110. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

111. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

112. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

113. ZTE (USA) denies the allegations of this paragraph.

114. ZTE (USA) admits that it has had actual and/or constructive knowledge of the '970 patent since before the original Complaint in this action was filed. ZTE (USA) admits that it received notice of the '970 patent upon the service of the original Complaint by InterDigital upon ZTE (USA) at the addresses referenced herein. ZTE (USA) admits that it received notice of the '970 patent upon the service of a July 26, 2011 complaint filed in the International Trade Commission. ZTE (USA) denies the remaining allegations of this paragraph.

115. ZTE (USA) admits that at least some of the accused ZTE (USA) products are designed to be used in 3G WCDMA, CDMA2000, and/or IEEE 802 systems. The meanings of the phrases "configured to comply with the HSUPA and/or HSPA+ standards," "configured to comply with the EV-DO Revision A standard," and "configured to comply with at least IEEE 802.11" are unclear in this paragraph. For at least this reason, ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

116. ZTE (USA) denies the allegations of this paragraph.

117. ZTE (USA) denies the allegations of this paragraph.

118. ZTE (USA) denies the allegations of this paragraph.

COUNT V
INFRINGEMENT OF THE '332 PATENT

119. ZTE (USA) reasserts its answers to paragraphs 1-118 above as if fully set forth herein.

120. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

121. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

122. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

123. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

124. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

125. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

126. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

127. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

128. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

129. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

130. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

131. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

132. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

133. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

134. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

135. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

136. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

137. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

138. ZTE (USA) denies the allegations of this paragraph.

139. ZTE (USA) admits that it had actual and/or constructive knowledge of the '332 patent since before the original Complaint in this action was filed. ZTE (USA) admits that it received notice of the '332 patent upon the service of the Complaint by InterDigital upon ZTE (USA) at the addresses referenced herein. ZTE (USA) admits that it received notice of the '332 patent upon the service of a July 26, 2011 complaint filed in the International Trade Commission. ZTE (USA) denies the remaining allegations of this paragraph.

140. ZTE (USA) admits that at least some of the accused ZTE (USA) products identified by InterDigital to date are designed to be used in 3G WCDMA and/or CDMA2000 systems. The meanings of the phrases “configured to comply with the Release 99, Release 4, HSDPA, HSUPA, and/or HSPA+ standards,” “configured to comply with the 1xRTT standards,” and “configured to comply with the EV-DO standards” are unclear in this paragraph. For at least this reason, ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

141. ZTE (USA) denies the allegations of this paragraph.

142. ZTE (USA) denies the allegations of this paragraph.

143. ZTE (USA) denies the allegations of this paragraph.

COUNT VI
INFRINGEMENT OF THE '830 PATENT

144. ZTE (USA) reasserts its answers to paragraphs 1-143 above as if fully set forth herein.

145. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

146. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

147. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

148. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

149. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

150. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

151. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

152. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

153. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

154. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

155. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

156. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

157. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

158. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

159. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

160. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

161. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

162. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

163. ZTE (USA) denies the allegations of this paragraph.

164. ZTE (USA) admits that it had actual and/or constructive knowledge of the '830 patent since before the original Complaint in this action was filed. ZTE (USA) admits that it received notice of the '830 patent upon the service of the Complaint by InterDigital upon ZTE

(USA) at the addresses referenced herein. ZTE (USA) admits that it received notice of the '830 patent upon the service of a July 26, 2011 complaint filed in the International Trade Commission. ZTE (USA) denies the remaining allegations of this paragraph.

165. ZTE (USA) admits that at least some of the accused ZTE (USA) products identified by InterDigital to date are designed to be used in 3G WCDMA systems. The meaning of the phrase "configured to comply with the Release 99, Release 4, HSDPA, HSUPA, and/or HSPA+ standards" is unclear in this paragraph. For at least this reason, ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

166. ZTE (USA) denies the allegations of this paragraph.

167. ZTE (USA) denies the allegations of this paragraph.

168. ZTE (USA) denies the allegations of this paragraph.

COUNT VII
INFRINGEMENT OF THE '127 PATENT

169. ZTE (USA) reasserts its answers to paragraphs 1-168 above as if fully set forth herein.

170. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

171. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

172. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

173. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

174. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

175. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

176. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

177. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

178. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

179. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

180. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

181. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

182. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

183. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

184. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

185. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

186. ZTE (USA) denies the allegations of this paragraph.

187. ZTE (USA) admits that it received notice of the '127 patent upon the service of the original Complaint by InterDigital upon ZTE (USA) at the addresses referenced herein. ZTE (USA) admits that it received notice of the '127 patent upon the service of a July 26, 2011 complaint filed in the International Trade Commission. ZTE (USA) denies the remaining allegations of this paragraph.

188. ZTE (USA) admits that at least some of the accused ZTE (USA) products identified by InterDigital to date are designed to be used in 3G WCDMA systems. The meaning of the phrase "configured to comply with the HSDPA, HSUPA, and/or HSPA+ standards" is unclear in this paragraph. For at least this reason, ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

189. ZTE (USA) denies the allegations of this paragraph.

190. ZTE (USA) denies the allegations of this paragraph.

191. ZTE (USA) denies the allegations of this paragraph.

COUNT VIII
INFRINGEMENT OF THE '636 PATENT

192. ZTE (USA) reasserts its answers to paragraphs 1-191 above as if fully set forth herein.

193. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

194. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

195. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

196. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

197. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

198. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

199. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

200. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

201. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

202. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

203. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

204. ZTE (USA) lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore denies the same.

205. ZTE (USA) denies the allegations of this paragraph.

206. ZTE (USA) admits that it received notice of the '636 patent upon the service of this Amended Complaint. ZTE (USA) denies the remaining allegations of this paragraph.

207. ZTE (USA) admits that at least some of the accused ZTE (USA) products identified by InterDigital to date are designed to be used in 3G WCDMA systems. The meaning of the phrase "configured to comply with the Release 99, Release 4, HSDPA, HSUPA, and/or HSPA+ standards" is unclear in this paragraph. For at least this reason, ZTE (USA) lacks

knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore denies the same.

208. ZTE (USA) denies the allegations of this paragraph.

JURY DEMAND

209. ZTE (USA) denies that InterDigital is entitled to a jury trial on the issues in this action.

PRAYER FOR RELIEF

210. ZTE (USA) denies that InterDigital is entitled to any relief.

AFFIRMATIVE DEFENSES

ZTE (USA) asserts the following affirmative and other defenses listed below. ZTE (USA) reserves the right to seek to amend, modify, and/or expand these defenses and to take further positions that are consistent with the facts discovered in this case.

First Affirmative Defense:
Non-Infringement

1. ZTE (USA) does not infringe any valid and enforceable claim of the Asserted Patents. ZTE (USA) does not practice any asserted claims of the Asserted Patents.

Second Affirmative Defense:
Invalidity

2. The asserted claims of the Asserted Patents are invalid for failure to meet the conditions of patentability set forth in 35 U.S.C. §§ 101, 102, 103, and/or 112.

Third Affirmative Defense:
Prosecution Laches

3. InterDigital's claims are barred in whole or in part by delay in prosecuting the patent applications that matured into the Asserted Patents.

4. One or more of the Asserted Patents has a purported filing date of more than ten years before the date InterDigital requested this Investigation.

5. InterDigital, based on its representations that one or more of the Asserted Patents claim benefit under 35 U.S.C. § 120 to a series of continuation applications, could have claimed the subject matter now recited in the asserted claims of one or more of the Asserted Patents at any time since the respective, purported effective filing date(s) the Asserted Patent(s).

Fourth Affirmative Defense:
Prosecution History Estoppel

6. By reason of acts, admissions, and statements before the USPTO made by or on behalf of applicants for the Asserted Patents during prosecution of the patent applications that matured into the Asserted Patents, InterDigital is estopped from claiming ZTE (USA) infringes one or more of the Asserted Patents.

Fifth Affirmative Defense:
Patent Misuse

7. On information and belief, InterDigital is barred from asserting the Asserted Patents by the equitable doctrine of patent misuse. InterDigital is a member of the relevant standards-setting organizations ("SSOs"), including the European Telecommunications Standardization Institute ("ETSI"). Like other SSOs, ETSI's Intellectual Property Rights Policy ("IPR Policy") requires each ETSI member to identify all patents the member holds that may be essential to compliance with a proposed technology standard and state whether it will license such patents on fair, reasonable and non-discriminatory ("FRAND") terms. Having declared the

Asserted Patents essential to the UMTS standard in accordance with ETSI's procedures, InterDigital failed to comply with their obligations under the IPR Policy, including by failing to propose FRAND terms for the Asserted Patents it claims are essential.

Sixth Affirmative Defense:
Breach of Contract

8. InterDigital breached its undertakings and obligations to ETSI and any other SSOs responsible for the UMTS standard, as well as to ZTE (USA) as beneficiaries of such undertakings and commitments, by seeking an exclusion order on the Asserted Patents even though ZTE (USA) had not breached any provision of the ETSI IPR Policy.

Seventh Affirmative Defense:
Equitable and Promissory Estoppel

9. InterDigital's claims are barred in whole or in part based on equitable and/or promissory estoppel based on its failure to propose FRAND terms for the Asserted Patents it claims are essential as required by ETSI, ZTE (USA)'s reliance on InterDigital's obligation to adhere to ETSI's IPR policy, and ZTE (USA)'s detriment as a result of InterDigital's failure to honor its obligation.

Eighth Affirmative Defense:
Unclean Hands

10. The Asserted Patents are void and unenforceable by reason of the equitable doctrine of unclean hands based (among other things) on InterDigital's failure to comply with ETSI rules and obligations and failure to propose FRAND terms for the Asserted Patents it claims are essential.

Ninth Affirmative Defense:
Express or Implied License

11. InterDigital is barred from asserting the Asserted Patents because ZTE (USA) is licensed to practice the Asserted Patents as a result of InterDigital's disclosure of and irrevocable

offer to license the Asserted Patents according to FRAND terms in accordance with the ETSI IPR Policy.

COUNTERCLAIMS

Pursuant to Federal Rule of Civil Procedure 13, ZTE (USA) Inc. (“ZTE (USA)”) pleads the following counterclaims against Plaintiff/Counterclaim Defendants InterDigital Communications, LLS, InterDigital Technology Corporation, and IPR Licensing, Inc. (collectively “InterDigital”).

NATURE OF THE ACTION

1. ZTE (USA) brings this action to enforce contractual commitments made by InterDigital to license on Fair, Reasonable and Non-Discriminatory (“FRAND”) terms patents that InterDigital claims are essential to various 3G wireless standards. In breach of those commitments, InterDigital has failed to offer FRAND licenses to ZTE (USA).

2. In further breach, InterDigital filed a complaint which initiated an investigation before the United States International Trade Commission, Inv. No. 337-TA-800, filed on July 26, 2011 (the “ITC Proceeding”), by which InterDigital seeks to harm irreparably ZTE (USA)’s substantial business by enjoining importation of its products, and seeks to extract unfair and unreasonable license terms. Yet, by virtue of its FRAND commitments, InterDigital effectively agreed to forego injunctions against parties willing to agree to FRAND license terms with respect to valid and essential patents they use, as ZTE (USA) is willing to do.

3. ZTE (USA) seeks enforcement and specific performance of InterDigital’s contractual commitment to license its standards-essential patents on FRAND terms, and a determination of an appropriate FRAND royalty for InterDigital’s U.S. 3G patent portfolios.

THE PARTIES

4. ZTE (USA) is a Texas corporation with its principal place of business in Texas. ZTE (USA) imports and sells a range of electronic devices including mobile communication and media devices.

5. Counterclaim Defendant InterDigital Technology Corporation is a Delaware corporation with its principal place of business in Delaware, and is a complainant in the ITC Proceeding.

6. Counterclaim Defendant IPR Licensing, Inc. is a Delaware corporation with its principal place of business in Delaware, and is a complainant in the ITC Proceeding.

7. Counterclaim Defendant InterDigital Communications, LLC is a Pennsylvania limited liability company with its principal place of business in Pennsylvania, and is a complainant in the ITC Proceeding.

GENERAL ALLEGATIONS

8. In the ITC Proceeding, InterDigital alleges that various claims of eight patents are being by infringed by ZTE (USA), namely U. S. Patent Nos. 7,349,540, 7,502,406, 7,536,013, 7,706,332, 7,706,830, 7,818,970, 7,970,127 and 8,009,636 (collectively, the “Asserted Patents”).

9. Through the ITC Proceeding, InterDigital seeks exclusion and “cease and desist” orders barring ZTE (USA) and other respondents from, among other things, importing and selling Accused Products in the United States with 3G capabilities.

10. Prior to the institution of the ITC Proceeding, InterDigital participated in developing standards with various Standard Setting Organizations (“SSOs”), including the

European Telecommunications Standards Institute (“ETSI”) and the 3rd Generation Partnership Project (“3GPP”).

11. As relevant here, InterDigital declared each of the Asserted Patents to be “essential” Intellectual Property Rights (“IPR”) to 3G standards and, in accordance with the applicable rules of the SSOs, including particularly as relevant here ETSI, InterDigital committed to providing licenses on FRAND terms.

12. The SSOs and their members relied on InterDigital’s FRAND commitments when they adopted these technologies into 3G standards. SSOs require FRAND commitments to ensure that market competition is preserved once the standard is adopted, given that the adoption of the standard eliminates competitive alternatives.

13. Moreover, market participants like ZTE (USA) have made substantial investments to develop and market products designed to be compatible with these standards in reliance upon InterDigital’s explicit and implicit commitments to license its purportedly essential IPR, including the Asserted Patents, on FRAND terms.

14. InterDigital, in breach of its commitments, has failed to offer FRAND licenses for each of the Asserted Patents to ZTE (USA).

15. In further breach of its commitments, InterDigital seeks by the ITC Proceeding to exclude from the United States ZTE (USA)’s products that allegedly practice the very technologies to which InterDigital has committed but failed to license on FRAND terms.

16. ZTE (USA) brings these counterclaims to remedy InterDigital's violation of its FRAND commitments, for specific performance of these commitments, and for related declaratory relief.

The Importance of SSO-Related FRAND Commitments to the Wireless Industry

17. Mobile wireless carriers, handset manufacturers, and chipset manufacturers, among others, participate in SSOs to develop standards facilitating interoperability among cellular networks and various mobile devices. Once standards are adopted, competing manufacturers, carriers, and sellers can offer compliant products and service.

18. Standards play an important role in the development of wireless data and telecommunications technologies by facilitating product development and network creation. Market participants are generally willing to invest in the industry because, so long as their products are compliant with published standards, those products will operate effectively within the networks and be compatible with other third-party products.

19. Agreed standards reduce costs for component suppliers, product manufacturers and consumers. For suppliers, standardization can reduce the need to develop products to a particular manufacturer's specifications. Because components may be sold to multiple manufacturers, manufacturing volumes can increase and per unit costs decrease. Product manufacturers also benefit from increased price competition among suppliers. When components are made to comply with a standard, switching suppliers typically does not require a substantial redesign of the manufacturer's products. Lower switching costs increase competition among suppliers, leading to lower consumer prices.

20. The standard-setting process moves the industry towards a common standard by eliminating alternatives in favor of mandatory implementations of essential features of the standard. The process can confer significant market power to an entity claiming ownership of a technology included in a standard. That is particularly true in the telecommunications markets.

21. Before standardization, the royalty a patentee could earn from a patent license for its technology was constrained by the availability of alternative technologies to perform similar functions. However, once a standard requires employment of a patented technology as a mandatory implementation of an essential feature, alternative technologies are no longer economically practical. Left unconstrained, owners of essential IPR covering functions within the standard could demand exorbitant royalties from participants who effectively must use the IPR.

22. To address this problem, most SSOs—including those relevant to this action—have adopted IPR policies. These IPR policies generally contain requirements concerning: (a) the disclosure of IPR that may claim any portion of the specifications of the standard and (b) whether and to what extent patentees declaring purported essential IPR must commit to licensing that IPR on FRAND terms.

23. As set forth in greater detail below, the IPR policies at issue in this case require participants declaring essential IPR to commit to license that IPR on FRAND terms. Market participants rely on these commitments to ensure, among other things, that they will not be held up by patentees seeking unreasonable royalties after the industry is locked into the standard.

SSO FRAND Licensing Policies Are Designed to Prevent Anticompetitive Activities

24. InterDigital is, and was at the relevant times, a member of and has participated in development of standards by multiple SSOs, including ETSI and 3GPP.

25. ETSI is an SSO governed by French law and is responsible for the standardization of information and communication technologies for the benefit of its members and third parties. 3GPP is a collaborative activity through a group of recognized SSOs (its “Organizational Partners”), including ETSI. 3GPP develops technical specifications subsequently presented to and adopted as standards by its Organizational Partners, such as ETSI.

26. Like other SSOs, ETSI and 3GPP have developed IPR Policies designed to mitigate the risk of the anticompetitive hold-up by IPR owners inherent in any standard-setting process. In the absence of FRAND licensing obligations, an IPR owner may demand unreasonable license fees or even refuse to license altogether and seek injunctive relief against any party that uses the patented technology. SSO IPR Policies impose FRAND licensing obligations to ensure that IPR owners will not use their IPR to extract unreasonable license fees or to exclude any market participant that is willing to pay a FRAND license fee for use of the IPR.

27. SSO IPR Policies strike a delicate compromise between protecting IPR and ensuring that essential, standardized technology will remain available to market participants and, ultimately, consumers. Violation of IPR owners’ FRAND licensing obligations will negatively impact the market for wireless devices and the consumers who purchase them, with consequences ranging from increased prices to fragmentation of wireless communication

standards. Widespread violation of FRAND licensing obligations would threaten to unravel the entire SSO model for technology standardization.

28. The FRAND licensing model is designed to eliminate these problems, providing device manufacturers and consumers with access to IPR for standardized technology, while ensuring that IPR owners receive fair and reasonable compensation for the use of their IPR. However, the system only works if IPR owners satisfy their obligation to make licenses available on FRAND terms.

ETSI's IPR Policy

29. ETSI's IPR Policy is set forth in Annex 6 of its Rules of Procedure. Clause 4.1 of the ETSI IPR Policy governs disclosure of essential IPR, requiring ETSI members to declare all essential IPR in a timely manner:

[E]ach MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion. In particular, a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER's IPR which might be ESSENTIAL if that proposal is adopted.

30. Clause 15 of ETSI's IPR Policy defines IPR to mean "any intellectual property right conferred by statute law including applications therefor other than trademarks." Therefore, market participants have a reasonable expectation that all potentially essential patents or patent applications will be disclosed to ETSI.

31. Clause 6 of ETSI's IPR Policy governs the availability of licenses to essential IPR, requiring ETSI members to offer licenses to essential IPR on FRAND terms. In relevant part, Clause 6.1 states:

When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an undertaking in writing that it is prepared to grant irrevocable licenses on fair, reasonable and non-discriminatory terms and conditions under such IPR to at least the following extent: MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE; sell, lease or otherwise dispose of EQUIPMENT so MANUFACTURED; repair, use, or operate EQUIPMENT; and use METHODS.

32. Clause 8 of ETSI's IPR Policy governs situations where an owner of essential IPR refuses to undertake a FRAND commitment. In relevant part, Clause 8.1 states:

8.1.1 Where prior to the publication of a STANDARD or a TECHNICAL SPECIFICATION an IPR owner informs ETSI that it is not prepared to license an IPR in respect of a STANDARD or TECHNICAL SPECIFICATION in accordance with Clause 6.1 above, the General Assembly shall review the requirement for that STANDARD or TECHNICAL SPECIFICATION and satisfy itself that a viable alternative technology is available for the STANDARD or TECHNICAL SPECIFICATION which:

- is not blocked by that IPR; and
- satisfies ETSI's requirements.

8.1.2. Where, in the opinion of the General Assembly, no such viable alternative technology exists, work on the STANDARD or TECHNICAL SPECIFICATION shall cease, and the Director-General of ETSI shall observe the following procedure:

- a) If the IPR owner is a MEMBER,
 - i) the Director-General of ETSI shall request that MEMBER to reconsider its position.
 - ii) If that MEMBER however decides not to withdraw its refusal to license the IPR, it shall then inform the Director-General of ETSI of its decision and provide a written explanation of its reasons for refusing to license that IPR, within three months of its receipt of the Director General's request
 - iii) The Director-General of ETSI shall then send the MEMBER's explanation together with relevant extracts from the minutes of the General Assembly to the ETSI Counsellors for their consideration.

33. Thus, if an ETSI member refuses to agree to FRAND licensing of essential IPR, ETSI will select an alternative technology to incorporate into the standard, or will stop work entirely on the standard if no alternative is available.

34. ETSI's IPR Policy was designed to benefit all ETSI members, as well as nonparties complying with ETSI standards. The explicit objective of the policy, described in Clause 3.1, is to "reduce the risk" to those complying with the standards and technical specifications "that investment in the preparation, adoption and application of STANDARDS could be wasted as a result of an ESSENTIAL IPR for a STANDARD or TECHNICAL SPECIFICATION being unavailable."

3GPP's IPR Policy

35. As a collaborative activity among its Organizational Partners (including ETSI), 3GPP requires its members to declare and offer licenses to essential IPR on FRAND terms, as well as to abide by the IPR policies of their respective Organizational Partner. Article 55 of the 3GPP Working Procedures states, in relevant part:

Individual Members shall be bound by the IPR Policy of their respective Organizational Partner.

Individual Members should declare at the earliest opportunity, any IPRs which they believe to be essential, or potentially essential, to any work ongoing within 3GPP. Declarations should be made by Individual Members to their respective Organizational Partners.

Organizational Partners should encourage their respective members to grant licenses on fair, reasonable terms and conditions and on a non-discriminatory basis.

36. As a 3GPP "Individual Member," InterDigital was "bound by the IPR Policy" of ETSI, the "Organization Partner" through which InterDigital participated in 3GPP. That policy

requires InterDigital to offer a FRAND license as described in paragraphs 27-31 of these counterclaims.

InterDigital Has Binding FRAND Obligations with Respect to the Asserted Patents

37. During all relevant times, InterDigital was a member of ETSI and 3GPP. InterDigital participated in ETSI's and 3GPP's development of mobile communications standards for, among others, Global System for Mobile Communications ("GSM"), Universal Mobile Telecommunications System ("UMTS"), and 3GPP.

38. InterDigital explicitly has declared to ETSI that each of the Asserted Patents is essential to one or more 3G standards, and explicitly has undertaken "to grant irrevocable licenses under the IPRs on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy [namely, on FRAND terms]."

39. As a result of its membership and participation in the SSOs, and its declarations and concomitant commitments, InterDigital was and is bound by their policies and procedures, including IPR Policies, and is obligated to license the Asserted Patents on FRAND terms. InterDigital, however, has engaged in a course of conduct that has violated the very policies put in place by these SSOs to prevent the anticompetitive patent hold-up by which InterDigital now seeks to profit.

InterDigital Has Breached Its FRAND Obligations

40. Notwithstanding InterDigital's declarations of essentiality, and implicit and explicit FRAND commitments, InterDigital has failed to offer a FRAND license to ZTE (USA) with respect to potentially essential patents in its portfolio- including the Asserted Patents at issue in the ITC Proceeding.

41. Additionally, InterDigital initiated the ITC Proceeding, by which InterDigital seeks to harm irreparably ZTE (USA)'s substantial business by enjoining importation of its products, and seeks to extract unfair and unreasonable license terms.

COUNT I
BREACH OF CONTRACT

42. ZTE (USA) incorporates the allegations set forth in paragraphs 1-41, above.

43. The conduct of InterDigital as alleged above constitutes breach of contract.

44. As set forth above, InterDigital entered into express or implied contracts with ETSI and 3GPP, their members, and manufactures and sellers of products designed to be compliant with standards adopted by these SSOs, including ZTE (USA), to grant licenses to its purportedly essential IPR on FRAND terms.

45. InterDigital has breached and continues to breach these contracts by failing to license purportedly essential IPR, including the Asserted Patents, on FRAND terms.

46. As a result of these multiple contractual breaches, ZTE (USA) has been injured, including in its business and property. ZTE (USA) has been forced to expend resources resolving this licensing dispute, and is threatened, in particular, with irreparable loss of profits, loss of customers and potential customers, loss of goodwill and product image, and uncertainty among customers and potential customers.

COUNT II
BREACH OF CONTRACT—THIRD PARTY BENEFICIARY

47. ZTE (USA) incorporates the allegations set forth in paragraphs 1-46, above.

48. As set forth above, InterDigital entered into express or implied contracts with ETSI and 3GPP, and their members, to grant licenses to its purportedly essential IPR on FRAND terms.

49. InterDigital's contracts with these SSOs, and in particular InterDigital's commitments in the contracts to grant applicants licenses to its purportedly essential IPR on FRAND terms evince a clear intent that the contracts benefit ZTE (USA) and other third parties who might require a license to the Asserted Patents.

50. These same contractual commitments create a duty on behalf of InterDigital to license its Asserted Patents on fair, reasonable, and non-discriminatory terms.

51. It is only by InterDigital's fulfilling its promise to license the Asserted Patents on FRAND terms that ZTE (USA) will receive the intended benefit of being able to practice the implicated standards free from unreasonably high and discriminatory licensing demands.

52. InterDigital has breached and continues to breach its contracts with ETSI and 3GPP by failing to license its purportedly essential IPR, including the Asserted Patents, to the contracts' third-party beneficiary, ZTE (USA), on FRAND terms.

53. As a result of these multiple contractual breaches, ZTE (USA) has been injured, including in its business and property. ZTE (USA) has been forced to expend resources resolving this licensing dispute, and is threatened, in particular, with irreparable loss of profits, loss of customers and potential customers, loss of goodwill and product image, and uncertainty among customers and potential customers.

COUNT III
EQUITABLE ESTOPPEL

54. ZTE (USA) incorporates the allegations set forth in paragraphs 1-53, above.

55. InterDigital made clear and definite promises to potential licensees through its commitments to the various SSOs that-it would license its purportedly essential IPR, including the Asserted Patents, on FRAND terms.

56. The intended purpose of InterDigital's promises was to induce reliance. InterDigital knew or should have reasonably expected that these promises would induce manufacturers and sellers of mobile wireless devices, like ZTE (USA), to develop, manufacture, and/or market products compliant with the relevant standards.

57. ZTE (USA) invested many millions of dollars in the applicable technology to develop, manufacture, and/or sell products compliant with the relevant standards in reliance on InterDigital's promises, as described above.

58. InterDigital is estopped from repudiating these promises under the doctrine of promissory estoppel.

59. ZTE (USA) has been harmed and is threatened with irreparable harm as a result of its reasonable reliance on InterDigital's promises and the wrongful conduct of InterDigital. ZTE (USA) has been forced to expend resources resolving this licensing dispute, and is threatened, in particular, with irreparable loss of profits, loss of customers and potential customers, loss of goodwill and product image, and uncertainty among customers and potential customers.

60. ZTE (USA) lacks an adequate remedy at law.

COUNT IV
WAIVER OF RIGHT TO ENJOIN

61. ZTE (USA) incorporates the allegations set forth in paragraphs 1-60, above.

62. SSOs, including ETSI and 3GPP, each have IPR Policies that require its members and participants in the standard-setting process to grant licenses to purportedly essential IPR on FRAND terms.

63. InterDigital is and has been a member of these SSOs and has been a participant in their standards setting processes, including through participation in the promulgation of relevant mobile and wireless communication standards.

64. By doing so, and by explicitly declaring the Asserted Patents to be essential, InterDigital implicitly and explicitly committed to license its IPR, including the Asserted Patents, on FRAND terms.

65. By committing to license its purportedly essential IPR on FRAND terms, InterDigital has engaged in a course of conduct with regard to such IPR, including the Asserted Patents, that is inconsistent with an intent to enforce any injunctive or exclusionary rights that it may possess with regard to such purportedly essential IPR.

66. As a result of InterDigital's conduct, ZTE (USA) reasonably believed, and reasonably relied on the belief, that InterDigital would not seek to enforce any injunctive or exclusionary rights with respect to its purportedly essential IPR, including the Asserted Patents, but rather would seek only to license such IPR on FRAND terms.

67. ZTE (USA), in reliance upon this reasonable belief, invested many millions of dollars in the applicable technology to develop, manufacture, and/or sell products compliant with the relevant standards.

68. InterDigital has waived any rights it may have had to seek any injunctive or exclusionary relief with respect to its purportedly essential IPR, including the Asserted Patents, that it committed, but failed, to license on FRAND terms.

COUNT V
**DECLARATORY RELIEF: INTERDIGITAL
HAS NOT OFFERED LICENSES ON FRAND TERMS**

69. ZTE (USA) incorporates the allegations set forth in paragraphs 1-68, above.

70. There is an actual controversy between the parties concerning whether the terms on which InterDigital has offered to license its purported essential patents are fair, reasonable, and nondiscriminatory.

71. The controversy is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

72. ZTE (USA) is entitled to a declaratory judgment that InterDigital has not to date offered it licenses on FRAND terms.

COUNT VI
DECLARATORY RELIEF: DETERMINATION OF FRAND LICENSE

73. ZTE (USA) incorporates the allegations set forth in paragraphs 1-72, above.

74. There is an actual controversy between the parties concerning FRAND terms for InterDigital's United States patents that have been declared essential to a standard used by any Accused Products.

75. The controversy is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

76. ZTE (USA) is entitled to a declaratory judgment determining an appropriate FRAND royalty for InterDigital's United States patents that have been declared essential to a standard used by any Accused Products.

PRAYER FOR RELIEF

77. WHEREFORE, ZTE (USA) respectfully prays for relief as follows:

(a) A judgment that InterDigital has breached its contracts with ZTE (USA) by failing to offer licenses on FRAND terms to purported essential IPR, including the Asserted Patents, and ordering specific performance of these contracts and awarding appropriate damages in an amount to be proven at trial;

(b) A judgment that InterDigital has breached its contracts with the SSOs, harming ZTE (USA) as third-party beneficiary of those contracts, by failing to offer licenses on FRAND terms to purported essential IPR, including the Asserted Patents, and ordering specific performance of these contracts and awarding appropriate damages in an amount to be proven at trial;

(c) A judgment that InterDigital is equitably estopped from seeking any relief from the United States International Trade Commission in the ITC Proceeding, or in any other

forum, for ZTE (USA)'s alleged infringement of InterDigital's purported essential IPR, including the Asserted Patents;

(d) A judgment that InterDigital has waived any right it may have possessed to seek any relief from the United States International Trade Commission in the ITC Proceeding, or in any other forum, for ZTE (USA)'s alleged infringement of InterDigital's purported essential IPR, including the Asserted Patents;

(e) A declaratory judgment that InterDigital has not to date offered ZTE (USA) licenses on FRAND terms;

(f) A declaratory judgment setting an appropriate FRAND royalty to license InterDigital's United States patents that have been declared essential to a standard used by any Accused Products, including the Asserted Patents;

(g) Awarding to ZTE (USA) the costs and disbursements of the action, including reasonable attorneys' fees; and

(h) Such other relief as the Court may deem just and equitable.

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Attorneys for Defendant ZTE (USA) Inc.

Dated: December 16, 2011

EXHIBIT C

1 UNITED STATES DISTRICT COURT
 2 FOR THE DISTRICT OF DELAWARE

3
 4 INTERDIGITAL COMMUNICATIONS : CA NO. 11-654-RGA
 5 LLC : MARCH 2, 2012
 6 :
 7 Plaintiff, : 9:00 o'clock, a.m.
 8 :
 9 v. :
 10 :
 11 HUAWEI TECHNOLOGIES CO. :
 12 LTD., ET AL. :
 13 :
 14 Defendants,

15

16
 17
 18 TRANSCRIPT OF DEFENDANTS' MOTION FOR PARTIAL LIFT OF STAY
 19 BEFORE THE HONORABLE RICHARD G. ANDREWS
 20 UNITED STATES DISTRICT JUDGE

21
 22
 23
 24 Leonard A. Dibbs
 25 Official Court Reporter

1 APPEARANCES:**3 For Plaintiffs: PROCTOR HEYMAN LLP****4 KURT M. HEYMAN, ESQ****5 -and-****6 LATHAM & WATKINS****7 BY: RON E. SHULMAN, ESQ****8 -and-****9 WILSON SONSINI GOODRICH & ROSATI****10 BY: MICHAEL B. LEVIN, ESQ****13 For Defendant: YOUNG CONAWAY STARGATT & TAYLOR****14 BY: ADAM W. POFF, ESQ****15 BY: MARTIN S. LESSNER, ESQ****16 -and-****17 COVINGTON & BURLING****18 BY: STANLEY YOUNG, ESQ****19 BY: DAVID W. HALLER, ESQ****20 For Defendant Huawei Technologies****1 APPEARANCES (Continued):****3 RICHARDS, LAYTON & FINGER****4 BY: KELLY E. FARNAN, ESQ****5 -and-****6 BRINKS HOFER GILSON & LIONE****7 BY: CHARLES M. MCMAHON, ESQ****8 BY: JAY H. REIZISS, ESQ****9 For Defendant ZTE (USA)****11 FISH & RICHARDSON****12 BY: THOMAS L. HALKOWSKI, ESQ****13 BY: RICHARD A. STERBA, ESQ****14 For Defendant LG****16 MORRIS, NICHOLS, ARSHT & TUNNELL****17 BY: JACK B. BLUMENFELD, ESQ****18 For Defendant Nokia****20 - - -****1 PROCEEDINGS****3 THE COURT: Please be seated.****4 Good morning.****5 MR. HEYMAN: Good morning, your Honor. Kurt Heyman of Proctor Heyman for the Interdigital parties. It's not our motion. I'm just rising to make introductions.****8 THE COURT: I appreciate that.****9 MR. HEYMAN: We have Ron Shulman of Latham Watkins and Mike Levin of Wilson Sonsini. Mr. Shulman will be arguing for the Interdigital parties today.****12 THE COURT: Have you both come from California?****13 MR. HEYMAN: They are both admitted pro hac vice.****15 THE COURT: I assumed that.****16 Good morning. And welcome.****17 All right.****18 MR. POFF: Good morning, your Honor. Adam Poff of Young Conaway on behalf of Huawei.****20 With me from Covington & Burling is Stanley Young and David Haller. Also from my office, Martin Lessner.****23 Mr. Young will be making the argument on behalf of Huawei.****25 THE COURT: I assume you gentlemen are from****1 Washington, D.C.?****2 MR. YOUNG: No. From California and New York, actually.****4 THE COURT: Okay. Good morning, to you, too.****5 MR. YOUNG: Thank you.****6 THE COURT: Ms. Farnan.****7 MS. FARNAN: Good morning, your Honor. Kelly Farnan on behalf of ZTE (USA).****9 I have with me from Brinks Hofer, Charles McMahon and Jay Reiziss.****11 We also have from the client from ZTE (USA) Jim Wang and Ray Wood, sitting in the first row in the bench there.****14 Thank you, your Honor.****15 Mr. McMahon will be making the argument for ZTE (USA).****17 THE COURT: And you're Mr. McMahon?****18 MR. MCMAHON: Yes, your Honor.****19 THE COURT: Good morning, Mr. McMahon and Mr. Reiziss. Where are you from?****21 MR. MCMAHON: Chicago and Washington.****22 THE COURT: Mr. Halkowski, are you here more or less as an observer?****24 MR. HALKOWSKI: Yes. Good morning, Judge. I'm here along with my colleague, Rich Sterba from Washington,**

1 D.C.

2 THE COURT: Good morning. Mr. Sterba.

3 All right. Before we get started, let me just
4 say that I think I've read seven motions or briefs that
5 relate to what I think the are the issues this morning.
6 Where I think we are is that the plaintiff filed this patent
7 suit appear filed an international trade commission. I
8 gather the litigation enter that the trade commission
9 proceeding has started, I don't know too much about such
10 litigation, I gather involves discovery and other things
11 like that.

12 Meanwhile, the defendants filed motions for
13 stay. Mandatory stays under Section 1659, which I granted
14 and now some of the defendants basically Huawei and ZTE.
15 I'm sorry if I'm not getting the names of the defendants
16 right. You all want to have a partial lift of the say so
17 that you can file answers that include everything that's
18 going to be litigated in the ITC and it is sixth or seventh
19 counterclaim is FRAND fair reasonable non-discriminatory
20 licensing and that you have asked to proceed on the FRAND.
21 And for an expedited trial on the FRAND.

22 Am I right so far.

23 MR. YOUNG: Your Honor, I can address that.
24 Stand Young for Huawei.

25 You're right in most respects, your Honor.

1 I think that what we would ask to do in this
2 case is have the stay partially lifted will not that we can
3 assert everything in the ITC, but just so we can.

4 THE COURT: The FRAND.

5 MR. YOUNG: One issue.

6 THE COURT: I'm sorry, I do understand that.

7 MR. YOUNG: And the remedy cannot be granted at
8 the ITC --

9 THE COURT: Right.

10 MR. YOUNG: Which is the setting of a FRAND
11 rate, which will allow a license to be completed pursuant to
12 the ETSI commitments that Interdigital made.

13 THE COURT: What commitments?

14 MR. YOUNG: The licensing commitments that were
15 made to the European Telecommunications Standards Institute,
16 which we call fondly ETSI. It's that commitment which is
17 the key to the FRAND obligation.

18 Your Honor is correct that some of those issues
19 can be raised and have been raised in the ITC.

20 But the key part which is Count VI of our
21 Complaint is the setting of an actual rate, the payment of
22 which would then put a license into effect and allow our
23 clients to continue with their activities.

24 THE COURT: I'm sorry. I got some things out of
25 reading the briefs of the there maybe other thing in the

1 briefs that are in there that I just didn't get.

2 FRAND is a statute. Where does the come from?
3 I mean, is there a Federal statute that says that -- I
4 didn't see the actual counterclaims. Again, that may be
5 they are there, they just weren't part of the materials that
6 surfaced in the pile I had.

7 So what's the basis for bringing -- I mean, is
8 it a statute?

9 MR. YOUNG: It is not a statute, your Honor.
10 It's in the text of our proposed answer.

11 And in the counterclaims of that answer, it sets
12 forth the rules of the Europe Telecommunications Standards
13 Institute, which Interdigital has agreed to abide by by
14 being part of that.

15 THE COURT: So it is like a contract?

16 MR. YOUNG: It is a contract claim, your Honor.

17 THE COURT: Okay.

18 MR. YOUNG: It is like a contract claim.

19 So I have several items that I would like to
20 cover with your Honor this morning, first of which is that
21 this Court has solved a live problem.

22 THE COURT: And, actually, I'm sorry. There is
23 just one other thing, which is I understood that by the time
24 the briefing was finished, both side, or all of the all the
25 sides agreed that the mandatory stay did not could the FRAND

1 claim; right?

2 MR. YOUNG: I believe that's true, your Honor.

3 MR. SHULMAN: That's right, your Honor. We are
4 asking for, or as a matter of the Court's discretion --

5 THE COURT: Right. Okay. That is where I
6 thought we were, is that it has been narrowed down to a
7 discretionary stay.

8 MR. SHULMAN: Precisely, on the counterclaim.

9 THE COURT: Okay.

10 MR. YOUNG: Now, the argument that Interdigital
11 has made for a discretionary stay is founded in part on the
12 idea that there is not really a live issue before the Court.
13 And what I want to do is explain why it is a live issue, why
14 it is justiciable, why it is something where irreparable
15 injury will result if this Court does not intervene. So
16 there is a great need for this Court to lift the stay
17 partially to hear this defense, and then proceed to the
18 balancing test which is at the heart of the issue of whether
19 to lift the stay or whether to impose a discretionary stay,
20 which is that it is more efficient for this Court to proceed
21 with litigation on this issue, and to proceed to a ruling
22 which only this Court can make were, or the Chancery Court,
23 about what the FRAND rate is for the U.S. Patent that are at
24 issue.

25 THE COURT: And, I'm sorry, Mr. Young. I want

1 to hear what you have to say. There is one other thing
2 that, though, maybe background information which you are
3 assuming I know, but I don't know, which is on the stuff
4 that ITC has, what effect does their ruling, whenever it
5 occurs -- and let's assume there is a valid patent and that
6 clients are infringing it. That's something they could say;
7 right?

8 MR. YOUNG: They could say that.

9 THE COURT: What effect would that have on this
10 lawsuit, not on the FRAND business, but on the plaintiff's
11 similar allegations in the Complaint?

12 MR. YOUNG: There is some black letter law and
13 this is pretty clear. There is some that is unclear. We
14 talked about that when we were before Chancellor Strine.
15 What's clear is that the ITC's rulings on patent issues
16 infringement, invalidity inequitable conduct, those sorts of
17 things are not binding.

18 So you actually do have lots of cases where
19 someone proceeds to judgment on those patent issues in the
20 ITC, and then they litigate them later in a District Court,
21 and you are set up to find yourself in that position because
22 of the case that is here.

23 And in those cases, the District Court is free
24 to come to its own conclusions on those issues.

25 The other black letter rule is that on

1 non-patent issues, the determination of the ITC may well be
2 binding, and for that purpose, one would go to the normal
3 rules of collateral estoppel.

4 What is unclear, and I think counsel for
5 Interdigital will acknowledge this at the hearing before
6 Chancellor Strine, is that it's unclear that this particular
7 set of issues that we are seeking to have your Honor hear is
8 a patent issue or non-patent issue.

9 THE COURT: And when you say set of issues,
10 you're not talking about FRAND?

11 MR. YOUNG: I am talking about the FRAND
12 issues.

13 THE COURT: Okay. It seems to everyone is
14 saying that ITC can't decide them anyhow.

15 MR. YOUNG: Correct. And I will parse it a
16 little more finely than that.

17 The ITC cannot set the rate, so the ITC cannot
18 tell us, here's the rate, you pay this and you have a
19 license. What the ITC can do -- and this has been raised in
20 the Commission, as Interdigital has pointed out of, is the
21 issue of whether there is a FRAND obligation, whether it has
22 been breached.

23 THE COURT: So the ITC could decide FRAND
24 issues, just not the rate I remember issues?

25 MR. YOUNG: Correct.

1 THE COURT: But then you're saying whether those
2 decisions would be binding or not is not too clear?

3 MR. YOUNG: It is very unclear. Chancellor
4 Strine asked Interdigital that question in November, and
5 Interdigital said that it was unclear.

6 And one of the bases --

7 THE COURT: I take it you agree with that?

8 MR. YOUNG: I think it is unclear. And it has
9 not been decided, and the issue --

10 THE COURT: And I'm sorry, one more thing.
11 Do separate counsel represent the parties in the ITC
12 proceeding or is it essentially the same lineup that I've
13 got here?

14 MR. YOUNG: It is the same lineup, your Honor.

15 THE COURT: Okay. In the ITC proceedings on the
16 issues that are before them, do you get discovery and the
17 full, for lack of a better word -- well, full set of
18 pretrial sorts of procedures that you would get in a
19 District Court?

20 MR. YOUNG: Discovery is taking place on those
21 issues, your Honor.

22 And I think, you know, just to give you a
23 full picture, it would be the same discovery that we would
24 seek here. The difference is that the ITC cannot set a
25 rate.

1 THE COURT: No, no. I understand that.

2 MR. YOUNG: Okay.

3 THE COURT: And the point is that when the ITC
4 proceeding is done, it should be the case that all the
5 discovery for this case in the District Court has
6 essentially taken place other than on your FRAND rate
7 issue?

8 MR. YOUNG: There maybe some expert issues that
9 would be, because of the different legal issues that the two
10 tribunals have the authority to decide, but there would be
11 some expert discovery that would take place here in the
12 District Court if your Honor were to un-stay this part of
13 the case that would not be necessary in the ITC.

14 And because the ITC can't actually decide a
15 rate, I suppose it's possible in the course of discovery
16 that there would be issues, or even documents that could be
17 relevant here.

18 THE COURT: But let me ask the question --

19 MR. YOUNG: I guess that basically it would be
20 similar.

21 THE COURT: And let me ask the question
22 differently because I think maybe we didn't a hundred
23 percent understand each other.

24 Let's assume there was no FRAND rate issue, so
25 that the claims in this case in the District Court were the

1 exact same as the claims in the ITC proceeding.

2 After the ITC ruled, whatever was not precluded
3 had by their ruling, if the are parties wanted to bring it
4 to the District Court back here, and said, okay, lift the
5 stay, Judge, let's go, would the parties be saying, we're
6 ready to have a trial as soon as you can, because we've done
7 everything we did to get ready for a trial?

8 MR. YOUNG: Understood, your Honor.

9 I think the discovery would basically be the
10 same, and you could find yourself in a position after the
11 stay is lifted on the patent issues, say, where you then are
12 pretty much ready for trial.

13 THE COURT: Okay. I'm sorry. Do you agree with
14 that no.

15 MR. SHULMAN: Generally, your Honor, assuming
16 that there is complete similarity between the issues that
17 have been tried in the ITC.

18 THE COURT: Well, that seems to be what has been
19 represented in this particular case, is that other than this
20 FRAND rate thing, that they are the same issues.

21 MR. SHULMAN: Yes. I mean, one party may choose
22 to supplement the record. You're not bound by the record in
23 the ITC. The ITC record comes in as a matter of statutory
24 right under 1659, the last section of that provision. But,
25 you know, a party may choose to bring in a new expert, for

1 that one of the things that we would consider, if your Honor
2 thought it would be relevant to the issue of whether you
3 would un-stay the part of the case that we would like you to
4 un-stay is whether we would proceed on those issues in the
5 ITC, because the ITC cannot set a rate. It might be the
6 case that we would decide that we would have the FRAND
7 issues in total he litigated in this case because this is a
8 case where we're certain that final result would be binding.

9 So we wouldn't be wasting effort. And we would
10 be certain that we could get a ruling on what the rate
11 should be, which is something we know that the ITC can't
12 give us.

13 So if your Honor is concerned about a
14 duplicativeness, I think that we would have to consider
15 whether it would be to the greatest efficiency of the Court,
16 so the tribunals that are involved here, if we could --
17 whether we would decide to proceed on those defenses in the
18 ITC if we were able to proceed with those defenses in a
19 court.

20 So that's something that we would certainly
21 offer.

22 THE COURT: Let me put it to you what I am
23 thinking about, which is, what I'm wondering is, if I said,
24 because I think it's pretty unlikely that I'm going to say,
25 yeah, let's have an expedited rate on the FRAND rate issue.

1 example.

2 THE COURT: Okay. Okay. I think I see what you
3 are saying.

4 MR. SHULMAN: But you couldn't say I didn't have
5 an opportunity to discover the case just since the ITC case,
6 if that answers your question.

7 THE COURT: Okay. All right. Sorry. Go ahead,
8 Mr. Young. I think I'm ready for you to go into your
9 argument.

10 MR. YOUNG: And basically, Mr. Shulman and I are
11 basically in agreement on that. I can think of one category
12 now, having had a few seconds to think about it, which is
13 damages, which is that you don't get damages in the ITC. So
14 there would be discovery necessary on damages in the
15 District Court action, which would not have taken place in
16 the ITC.

17 So I think --

18 THE COURT: And so maybe a different way of
19 framing it, and it seems to be based on what both of you
20 said, you agree with this, is -- and in this particular case
21 leaving aside the question possibly of the FRAND rate
22 issues, on everything else, once the ITC has ruled, you
23 would be ready on the fast track to go forward here,
24 essentially; right?

25 MR. YOUNG: That might be -- now, I should say

1 But if I said, well, its discretionary, we could lift the
2 stay so that you could do whatever discovery you wanted to
3 do on the FRAND rate issue, so that when the ITC case is
4 finished, the FRAND rate issue is not holding you up in
5 terms of what happens in this Court?

6 In other words, I can't see so far that I want
7 to have a FRAND rate trial in advance of having a trial on
8 the rest of the things that are here.

9 But I appreciate that if the FRAND rate issue is
10 not at issue in the ITC, that it might be in the interests
11 of moving the litigation along to let you have the
12 discovery, or do whatever discovery is related to that to on
13 parallel track while you're doing the ITC proceeding. And
14 then if the ITC proceeding comes to an end, and whatever has
15 been bindingly decided is bindingly decided and now gone,
16 but everything that has not been bindingly decided is what
17 would be litigated here, everybody is ready to litigate it
18 here?

19 MR. YOUNG: Your Honor, I think that we need a
20 FRAND rate decision before the end of the ITC proceeding,
21 and that's why we're coming to you.

22 THE COURT: Yes. I don't think you're going to
23 get that.

24 MR. YOUNG: Well, let me try to answer your
25 question and then I'll try to go over the points that I have

<p style="text-align: center;">18</p> <p>1 as to why we should get that.</p> <p>2 The discovery is not really the key, I think. I</p> <p>3 think the discovery -- if those issues are litigated in the</p> <p>4 ITC, the discovery could take place there. But what we need</p> <p>5 in order to avoid the harm that would result if a court did</p> <p>6 not intervene is to have a decision on the FRAND rate issue</p> <p>7 prior to the ITC completion.</p> <p>8 Let me go over the calendar of that so you can</p> <p>9 have a sense of the timing. There's a hearing in front of</p> <p>10 the administrative law judge ITC in October -- late October,</p> <p>11 early November in 2012. The administrative law judge then</p> <p>12 has several months in which to issue an initial</p> <p>13 determination, which is his decision on the issues that are</p> <p>14 before him in the hearing.</p> <p>15 That initial determination will be due in late</p> <p>16 February there 2013. Then it is up to the parties to</p> <p>17 petition the commission for review of issue that have been</p> <p>18 decided by the administrative law judge.</p> <p>19 And there is then a target date for completion</p> <p>20 of the Commission's work. That's June 28th, 2013.</p> <p>21 Then there is a precedential review period</p> <p>22 during which an exclusion order could be stayed upon payment</p> <p>23 of a bond. But the exclusion order could be issued by June</p> <p>24 28th, 2013. We believe that the issue of a FRAND rate</p> <p>25 should be decided, and it won't be decided by the</p>	<p style="text-align: center;">20</p> <p>1 crucial, and avoiding the harm that would result from an</p> <p>2 exclusion order.</p> <p>3 THE COURT: I don't understand why you say</p> <p>4 it would eliminate the need for the ITC to decide any</p> <p>5 issues.</p> <p>6 I guess isn't the procedural posture in the ITC</p> <p>7 essentially the same? They filed a Complaint and you filed</p> <p>8 five or six counterclaims?</p> <p>9 MR. YOUNG: Well, let me explain that a little</p> <p>10 further.</p> <p>11 A license would be a defense. If one has a</p> <p>12 license, then one can go to the ITC and say, we have a</p> <p>13 license. We pay. We have a right to continue doing this.</p> <p>14 Hopefully, Interdigital would not object to that. And the</p> <p>15 request would be the case should be dismissed against us</p> <p>16 because we have a license. So it's a very simple defense.</p> <p>17 It's one that is contemplated by the ETSI rules that</p> <p>18 require licensing on fair, reasonable and nondiscriminatory</p> <p>19 terms.</p> <p>20 The harm to having a license rate set is that</p> <p>21 that whole balance that is set by the is ETSI rules, which</p> <p>22 Interdigital agreed to when it signed on and when it cleared</p> <p>23 its patents essential to that standard is that people who</p> <p>24 used those standards ought not to be held up, ought not to</p> <p>25 be subjected to the harm of accusations of infringement</p>
<p style="text-align: center;">19</p> <p>1 Commission, but it should be decided before June 28th, 2013.</p> <p>2 And actually, it would be our desire -- I understand the</p> <p>3 issues about expeditious and speed, and obviously the Court</p> <p>4 has kits own scheduling imperatives.</p> <p>5 From the standpoint of the harm that would take</p> <p>6 place without intervention by a court in this case, but we</p> <p>7 would need to have a decision on the FRAND issue before</p> <p>8 then. The harm that would result if we don't have that</p> <p>9 decision is that we then don't have a rate that we could</p> <p>10 pay. And, in fact, while we will pay a FRAND rate on the</p> <p>11 U.S. declared essential patents, which is what we've asked</p> <p>12 the Court, or what we plan to ask the court to do in Count</p> <p>13 VI of our proposed answer.</p> <p>14 We would pay that and that would resolve the</p> <p>15 issue in the ITC. There wouldn't be a need to litigate the</p> <p>16 issues in the ITC if there were a license that would allow</p> <p>17 the continued importation of the products.</p> <p>18 If the Court were to set individual patent rates</p> <p>19 as well, those could be paid, and for the patents that are</p> <p>20 at issue in the ITC, there would be a license, and there</p> <p>21 would no longer be a need to defend that case.</p> <p>22 So actually were the Court to reach that</p> <p>23 decision would eliminate the need for the ITC to reach a</p> <p>24 decision on those issues. And if the ITC were to reach a</p> <p>25 decision, the ability to pay that license rate would be</p>	<p style="text-align: center;">21</p> <p>1 under these declared essential patents.</p> <p>2 So there really is a tremendous harm. Number</p> <p>3 one, the practical harm from an exclusion order, which is</p> <p>4 can't import your products with a loss of good will,</p> <p>5 customers, which is really irreparable.</p> <p>6 And, two, even before --</p> <p>7 THE COURT: Isn't all that stuff that people</p> <p>8 routinely will put a dollar figure on?</p> <p>9 MR. YOUNG: Good will is hard to put a dollar</p> <p>10 figure on.</p> <p>11 THE COURT: It may be hard, but people do it,</p> <p>12 don't they?</p> <p>13 MR. YOUNG: People can, but we shouldn't be</p> <p>14 subjected to that because there is then a commitment to</p> <p>15 license. And that can be specifically enforced. It's</p> <p>16 one of the claims that we would like to assert in this</p> <p>17 Court. And it is something that has been bargained away as</p> <p>18 a result of the commitment under the ETSI rules and the</p> <p>19 declaration of these patents as being essential.</p> <p>20 So, really, the harm in our view would be</p> <p>21 irreparable and would justify this Court's intervention to</p> <p>22 set a rate to prevent that harm from taking place.</p> <p>23 Your Honor I understand has a balancing task.</p> <p>24 You have to weigh the benefits to both the parties in the</p> <p>25 case and to the public of un-staying the case and not</p>

1 discretionarily staying this matter against whatever
2 inefficiencies at least Interdigital alleges may take place
3 if that stay is lifted.

4 And I think that if you look at the fact that
5 the ITC cannot set a rate, that it will be -- it will
6 resolve the issues in the ITC with respect to these patents
7 if the rate is set. The issues are discrete and separate in
8 the sense that they are not the same as the infringement,
9 invalidity, enforceability, inequitable conduct issues in
10 the ITC.

11 Lifting the stay will actually eliminate some
12 duplication because it will be a binding decision whereas if
13 we proceed on a partial set of FRAND issues without setting
14 a rate in the ITC -- the decision, whatever decision that
15 the ITC makes on those issues will know the necessarily be
16 binding, so we might have to do them all again.

17 After the ITC stay is lifted, your Honor, the
18 case comes here. The case is already here. It's stayed.
19 The entirety of the case will come here.

20 And these issues are that your Honor would have
21 to deal with in that situation anyway. So, if your Honor
22 can rule on --

23 THE COURT: If the ITC says that you are not
24 infringing the patent, are you going -- and later on, either
25 there or later on I say you're not infringing the patent,

1 with respect to the FRAND rates for these U.S. declared
2 essential patents.

3 This is the only Court that can do that. There
4 may be other courts in other parts of the world that can
5 rule on patents relating to those countries. If you look at
6 some of the bigger battles that are going on, Samsung vs.
7 Apple goes one example, there are many countries that courts
8 are ruling on various patents that relate to those that
9 dispute. That is because both of those companies have
10 patents in those countries.

11 But that doesn't eliminate the need for a U.S.
12 court to rule on the U.S. patent issues, and nothing else
13 that happened in any other country would eliminate the
14 need for there to be a decision in this country about the
15 FRAND rates for the U.S. patents that Interdigital has.
16 And since the ITC can't do it, it really has to be a court
17 here, and that's why we have come to your Honor with this
18 issue.

19 THE COURT: The proposed answer and the
20 counterclaims, do you know which docket item that is?

21 MR. YOUNG: Yes, your Honor. What we have is a
22 Docket Item 27 filed November 30, 2011.

23 THE COURT: Okay. So Mr. Huller's declaration?

24 MR. YOUNG: Mr. Huller's declaration.

25 And Exhibit A is the proposed answer of Huawei.

1 what's going to be the effect of these FRAND rulings?

2 MR. YOUNG: The effect of the FRAND rulings
3 would be that we could then pay the license rate and the
4 litigation as to those patents, as to those issues.

5 THE COURT: Why would you patent the license
6 rates if you're not infringing the patents?

7 MR. YOUNG: Well, we would pay the rate actually
8 before a determination in the ITC. If your Honor were to
9 set a rate and were to do that before the ITC would rule, we
10 would start paying that rate on U.S. patents with respect to
11 U.S. sales, and there would not be any ground at that point
12 for excluding importation from the United States because we
13 would have a license. That's the reason, basically that we
14 need a rate determination prior to the ITC ruling. It
15 really would eliminate any potential need for the ITC to
16 rule on those issues. And we would say we have a license
17 and therefore we should no longer be in the case.

18 THE COURT: All right.

19 MR. YOUNG: I should add, by the way, that this
20 is this Court action -- we did believe earlier that the
21 Chancery Court was the right forum for this. Chancellor
22 Strine obviously is concerned about the fact that this case
23 is case is pending here even though it was stayed, so he
24 asked us to come back here.

25 We would like a Court to decide these issues

1 Exhibit B is the proposed answer of Futurewei.

2 THE COURT: And they're -- I mean, for all
3 practical purposes, if you know what 1A says, you know what
4 the other answer says; right?

5 MR. YOUNG: That's true, your Honor.

6 THE COURT: Does someone actually have a copy of
7 Exhibit A handy?

8 MR. YOUNG: I have one.

9 THE COURT: What we're really talking about here
10 is Count VI, declaratory relief. Determination of FRAND
11 license, which is on page 40 of this particular document;
12 right?

13 MR. YOUNG: Correct. That's what the ITC cannot
14 do.

15 THE COURT: All right. Why don't you take
16 another five minutes to say anything that you want to say,
17 and then I will give -- I'm assuming ZTE's arguments are
18 essentially duplicative, or are you going to want to be
19 heard separately?

20 MR. YOUNG: There is some overlap, but there
21 are a couple of additional points that we would like to
22 make.

23 THE COURT: All right. So I'll give you about
24 ten minutes after him, and then I'll give Mr. Shulman some
25 time. Okay?.

1 MR. YOUNG: Just wrapping up shortly, your
2 Honor, there are -- and we have haven't put this in our
3 papers, but it is in the public domain.

4 There are decisions that are taking place at
5 least in Europe that relate very closely to the issues here.
6 There is one of the decisions in the Hague in the Samsung
7 vs. Apple litigation from October of last year relating to
8 FRAND obligations and relating to the issue of whether it's
9 sufficient for a patentholder to require that a licensee
10 license an entire worldwide portfolio as opposed to
11 licensing a patent that is restrict to the Netherlands in
12 that case.

13 There is another issue, similar issue discussed
14 by a court in Mannheim, Germany earlier last to the year,
15 really on an antitrust issue that where the issue is, is it
16 reasonable to require a worldwide license as opposed to a
17 license for a particular patent in a particular country.

18 These are issues that would be raised this case.
19 They are issues that relate to the setting of the proper
20 rate which, as we set forth in our Count VI, would be for
21 the U.S. declared essential patents.

22 And it is the setting of that rate in that legal
23 context. And those were also cases, those European cases
24 deal with the same ETSI standard setting rules that are at
25 issue here that cause us to come to this Court.

1 So we would urge the Court to rule the same way
2 the Court did, Judge Crabb in Wisconsin in the Apple vs.
3 Motorola case which we cited to you, where she held in that
4 in a very similar it situation there was a ripe, justiciable
5 dispute.

6 And given the harm that we believe that would
7 result from a failure to intervene here, we ask the Court to
8 grant our relief.

9 THE COURT: And just to get to the underlining
10 to make sure that I have that kind of in my mind, you and
11 maybe ZTE, too, your company makes cellphones; right?

12 MR. YOUNG: Cellphone and other wireless devices
13 for tablets that are involved. Mostly cellphones.

14 THE COURT: And because of the way things are
15 right now with the plaintiff saying that you are infringing
16 their patents and the fact that you don't have a license,
17 whatever cellphones you're talking about are not being
18 brought into the United States?

19 MR. YOUNG: They are being brought into the
20 United States now. There is an existing business in these
21 products. The purpose of Interdigital's ITC case is to
22 stop the importation of those devices and stop that
23 business.

24 THE COURT: So what is it, if you are bringing
25 the cellphones in now, what is it that if you had a FRAND

1 rate that you would be doing that you are not doing?

2 MR. YOUNG: We could pay that rate and get rid
3 of the threat of the exclusion order, which would be
4 irreparably harmful, as we've stated.

5 THE COURT: But you're going to keep bringing
6 your cellphone in, I mean your tablets, whatever, and
7 presumably, if later on, it's decided that you infringe the
8 patent, then that will be part of the damages. But in terms
9 of products being made available to the American market,
10 we're getting what you have to offer?

11 MR. YOUNG: The status quo is that what's the
12 situation now is that the products are being brought in.
13 The irreparable harm would result if there were no license
14 rates set and there were no license and the ITC proceeded
15 had to exclude the products, that would create the
16 irreparable harm, which the ETSI structure, the bargain is
17 intended to prevent.

18 The purpose of that bargain is so that if you
19 have essential patents that you've told the standards
20 organization about, that you committed to license those
21 patents on fair, reasonable and nondiscriminatory terms.
22 That hasn't happened here.

23 And the harm exists because there is a threat
24 of, and perhaps next year, a reality of an exclusion order
25 that would violate that.

1 THE COURT: And it seems like the earliest
2 that the exclusion order would occur would be June 28th of
3 2013?

4 MR. YOUNG: That's the target date. Just to get
5 a little into the details here, there is an initial
6 determination by the ALJ.

7 THE COURT: Could the additional ALJ issue the
8 exclusion the order?

9 MR. YOUNG: No, but if the ALJ decided to issue
10 an order and the Commission then determined not to review
11 it, then the exclusion order could go into effect earlier
12 than June, perhaps sometime in April of 2013.

13 So our goal would be to have a decision
14 before -- well, as fast as possible, but before the February
15 date, which would --

16 THE COURT: Just on the on the other hand, if
17 the ITC says, you're not violating the patents, then there
18 is going to be no exclusion order; right?

19 MR. YOUNG: That's true. What could happen is
20 that the administrative law judge in his February decision
21 could say, there should be no exclusion order. Then, of
22 course, Interdigital would have the ability to have that
23 review by the Commission, and the Commission --

24 THE COURT: Right. You only get the exclusion
25 order, so to speak, if you lose in front of the ITC?

1 MR. YOUNG: That is correct.
 2 THE COURT: All right. Thank you. Thank you,
 3 your Honor.
 4 Mr. McMahon?
 5 THE COURT: Mr. McMahon.
 6 MR. MCMAHON: Yes, your Honor. Good morning.
 7 THE COURT: Good morning.
 8 MR. MCMAHON: I am here on behalf ZTE (USA).
 9 Like Huawei, ZTE (USA) imports and sell wireless devices
 10 here in the United States. And they have been accused by
 11 Interdigital of infringing a patent both here in the
 12 District Court and at the ITC.
 13 This case is rooted in patent law, but the
 14 counterclaims we're discussing here are fundamentally about
 15 contract issues. And the contract arises arise because of
 16 obligations that Interdigital has to the standards setting
 17 organization. By way of example, the ETSI, European
 18 Telecommunications Standards Institute, and third-party
 19 beneficiaries of those obligations, like Huawei, ZTE, and
 20 other manufacturers of wireless devices that practice the
 21 standards that are set by those organizations.
 22 When Interdigital makes its declarations to
 23 ETSI, by way of example as they would make its patents
 24 available for Huawei on FRAN terms, it undertakes an
 25 obligation to do so, and ZTE (USA) is one of the

1 beneficiaries of that obligation.
 2 THE COURT: So just as when these licensing
 3 discussions are going on, you usually start. I mean, they
 4 declared they have these eight patents. I guess they give
 5 you some kind of notice, or maybe, I don't know how it comes
 6 to the attention that you might be infringing of the
 7 patents.
 8 Do you normally say, then, we'll pay one cent a
 9 phone, or something like that, or do they say, we want you
 10 to pay ten cents a phone? How does that discussion go?
 11 MR. MCMAHON: The discussion can play out in a
 12 lot of different ways, and in a lot of ways it might be
 13 similar to a typical license negotiation, where the parties
 14 have different positions and they negotiate towards a
 15 compromise. The difference is that in this situation, there
 16 is an underlying obligation to set an objective framework
 17 around that, fair reasonable, but nondiscriminatory terms.
 18 In other words, in this situation, the rights
 19 owned, Interdigital is not free or charged whatever it wants
 20 to charge. It's subject to this objective, fair, reasonable
 21 and nondiscriminatory standard.
 22 THE COURT: Well, nondiscriminatory. I probably
 23 understand that. They charge you ten cents. They should
 24 charge Nokia ten cents a phone and, you know, whoever else
 25 makes phones. I assume that's what nondiscriminatory means,

1 the fair and reasonable. I guess that is more subject to
 2 interpretation.
 3 Mr. MCMAHON: And --
 4 THE COURT: And I take it, I thought from what I
 5 read in here, that Interdigital has proposed a rate
 6 somewhere along the way, but you all didn't think it was
 7 fair, reasonable or nondiscriminatory, or some combination,
 8 right?
 9 MR. MCMAHON: In short, yes. The parties'
 10 negotiations have been subject to confidentiality I think in
 11 a fair amount of detail.
 12 But the short answer is yes, there has been a
 13 proposal. And I believe you will hear from Interdigital
 14 that they believe it is a FRAND proposal. We certainly
 15 disagree with that, which is why we're here before your
 16 Honor, to resolve that fundamental contractual dispute.
 17 THE COURT: So I'm just, because I've never done
 18 this before, like I said, it's nondiscriminatory. I can
 19 figure out how one might know what that is.
 20 How does -- and fair and reasonable, you
 21 probably look at that when other people have patents and
 22 license them for? I mean, if it is not what is the subject
 23 of negotiation, how do you figure out what is fair and
 24 reasonable?
 25 MR. MCMAHON: There are a number different ways

1 to do it. I am not sure I can get into all the different
 2 details.
 3 THE COURT: Just one or two would help.
 4 MR. MCMAHON: Well one way, it's like buying
 5 property. You can look at comparable values to do an
 6 analysis there. Another way would be to look at the
 7 landscape of essential patents.
 8 There are a number of rights owners, including
 9 some of the parties that are defendants in this case, who
 10 own patents that have been declared essential to the
 11 standard. And you can look at that total set of patents and
 12 think about, well, what would a party who wants to practice
 13 a 3G standards be willing to pay for the entire bodies of
 14 patents, and then start apportioning that out to the
 15 individual rights owners who have sort of a share of the
 16 overall market.
 17 So those are just a couple different ways to
 18 approach the economic analysis on it. I'm certainly no
 19 expert on that, but that would be one of the subjects that
 20 we would need to explore in discovery in arriving at what
 21 the FRAND rate should be.
 22 THE COURT: I'm sorry. I interrupted from your
 23 flow.
 24 MR. MCMAHON: No problem.
 25 If you would indulge me, I would like to take a

1 step back and look at the patent side and look at the patent
2 side and the issues that come up under this.

3 You know, a patent system presents attention
4 against our traditional this case for monopoly. And it's
5 attention that we expect in this country because we get the
6 benefit of basic results in the patent system in exchange
7 for the, you know, limited monopoly.

8 There are checks and balances built into that
9 system to ensure that a patent owner doesn't have too much
10 power, doesn't get more than the limited monopoly that the
11 statute entitles him. For example, a patent owner must
12 claim their invention in the patent in sufficiently definite
13 and clear terms that companies and individuals who might
14 practice the patent know what the invention is. And they
15 can make a choice about whether they want to practice the
16 patent, or if the license is not available or its too
17 expensive, they can choose not to practice the patent and
18 pursue alternative technologies.

19 That's an important distinction because in this
20 context, that is not an option. In this context, the
21 context of standards settings organizations, the technology
22 has been adopted as part of an industry standard.

23 At that point, the choice to design around, if
24 it is truly an essential patent that is necessary to
25 practices standard, that choice has been removed. So at

1 not unreasonably withhold their rights to practice their
2 patents, that they will make those rights available by
3 license under fair, reasonable, and nondiscriminatory terms.

4
5 The policies for the ETSI organizations are set
6 forth in our proposed answer and counterclaims, and the
7 docket item for that is 35, Exhibit A. And the policies are
8 set forth at pages 37 to 40.

9 So now with that background, in mind.
10 I'll cut to the International Trade Commission and what is
11 going on there.

12 We talked a little bit about the procedure and
13 the schedule and what's going to happen. We're working
14 through discovery. We're heading for a hearing. The
15 administrative law judge will are issue an initial
16 determination, and the Commission may review that.

17 The end game, and what Interdigital seeks to
18 object taken in the way of a remedy, is an exclusion order.
19 Right now, ZTE (USA) is importing its wireless devices, and
20 that will continue such time if the ITC enters an exclusion
21 order, that that order is entered.

22 At that point, the ITC issues an order to
23 Customs, saying, stop these products at the border, and
24 customs does that. If that happens, ZTE (USA) will be
25 precluded from the U.S. market. That is a very big deal.

1 that point, the only choice that a market participant has is
2 pay a license fee or sit on the sidelines. There is no
3 alternative path to pursue.

4 THE COURT: I think I understand what you're
5 saying. If somehow or other or the patent takes up all the
6 bandwidth of a certain thing, then if you -- you can't claim
7 a bandwidth unless you have the patent?

8 MR. YOUNG: That is exactly right. And what
9 that does is it gives the patent owner an enhanced sense of
10 leverage, an enhanced power to demand higher fees. And
11 that's a problem because we're talking about an industry
12 standard now. We're talking about, you know, increased
13 licensed fees, increased barriers to entry, higher costs
14 that are incurred by the manufacturing entity who has to
15 take a license, which then also may have to be passed down
16 to consumers.

17 And the standard setting organizations recognize
18 this. They recognize the tension, and they've done
19 something about it. They set up the system with an
20 additional check and balance to offset that problem. And
21 the check and balances that the standard setting
22 organizations have adopted is IPR policies, intellectual
23 property rights policies, which, in order to play with the
24 standard organizations, patent owners have to undertake
25 certain obligations as a contractual matter that they will

1 And that gives rise to irreparable harm in a number of
2 different ways.

3 The way this market operates is that ZTE (USA)
4 sells not to the end customers, but to carriers, AT&T,
5 Verizon, all the difference carriers, Fuji, in the wireless
6 market. If those carriers can't be assured of uninterrupted
7 supplier products from a particular provider, they may well
8 walk away. They may well to ZTE (USA), we don't want to
9 work with you anymore. You can't guarantee supply of your
10 product.

11 So it's not simply a matter of -- it's not
12 something that can be repaired, that be covered, compensated
13 with just monetary damages. In addition to the good will
14 that Mr. Young mentioned, there's also the question of being
15 cut out of the market entirely, which is definitely
16 irreparable.

17 THE COURT: Presumably, if you were cut out of
18 the market, and somebody else who is making these phones and
19 tablets who is paying the FRAND, or not paying the FRAND --
20 is paying what Interdigital wants them to pay?

21 MR. MCMAHON: There are certainly others who
22 have -- there are certainly others who are competing in the
23 market.

24 THE COURT: And besides for you all and LG --
25 and I forget whether there was another defendant or not, but

1 people who are not in this case, whoever they maybe, maybe
2 it's irrelevant to any particular issue that is before me
3 now, but is it fair to infer that they have a licensing
4 arrangement with Interdigital?

5 MR. MCMAHON: I have to be careful here, your
6 Honor, because I have certain knowledge about this, but I
7 have it under a protective order.

8 THE COURT: Well, so I am asking, is it fair to
9 infer? I am not asking -- but I see what you're saying. Is
10 that logical thinking or is that not logical?

11 MR. MCMAHON: It's fair to infer that perhaps
12 they have a licenses with Interdigital or perhaps
13 Interdigital has not targeted them as an enforcement
14 target. But it's certainly fair to say that if ZTE (USA)
15 faces an exclusion order, AT&T may turn to one of several
16 other competitors and say that if ZTE (USA) can't comply,
17 will you please supply us?

18 THE COURT: I take it, I'm assuming, but I don't
19 know, that Interdigital doesn't actually make phones itself,
20 right? It just has patents?

21 MR. MCMAHON: That's correct.

22 THE COURT: So based on the ETSI claim, this
23 being essential, anybody who is selling, who is making the
24 phones of your competitors, they either have a license
25 or they are infringing to the same extent you are, only

1 MR. MCMAHON: ETSI does not track the actual
2 licensing activity. There is no automated or automated
3 license mechanism. It's -- the license has to be, you know,
4 I would say consummated between the patent owner and the
5 actual manufacturer.

6 THE COURT: So let's just assume there are some
7 other telephone companies out there besides the ones that
8 you represent being in the FRAND world.

9 If they are paying a license to Interdigital,
10 isn't that -- isn't whatever the amount they are paying
11 essentially presumptively -- certainly, if you pay the same
12 thing, nondiscriminatory, and presumably fair and
13 reasonable, because they either -- somehow or other, I
14 mean, whatever somebody else is paying would be what you
15 should be paying, right?

16 MR. MCMAHON: In theory, that has an intuitive
17 appeal. In practice, it depends on a lot of different
18 factors. For example, if there are six different licensees
19 out there and they are paying different rates, which one
20 of those is the fair, reasonable and nondiscriminatory
21 one?

22 And if those six licensees agree to enter into
23 the licenses for reasons other than just to get access to
24 the technology that was part of a broader license, cross-
25 license, other circumstances that might have influenced the

1 they aren't defendants in this case? Is that a fair
2 assumption?

3 MR. MCMAHON: That's an inference that can be
4 drawn, yes. Whether there are other possibilities that
5 could be accounted for, I'm not exactly sure.

6 THE COURT: Okay.

7 MR. MCMAHON: So that what we are facing --
8 we're on track, that the ITC is headed towards a potential
9 exclusion order. And the reason we're here is because we
10 believe is fundamentally unfair, and it poses irreparable
11 harm.

12 THE COURT: Well let me just ask, the fair,
13 reasonable and nondiscriminatory rate, let's assume
14 Interdigital -- Nokia is not a defendant in this case;
15 right?

16 MR. MCMAHON: Nokia is a defendant in this
17 case.

18 THE COURT: Oh, okay. Then I don't know anybody
19 else who makes phones.

20 But let's assume there is a company out there
21 that makes phones who is not a defendant in this case, and
22 they send in, you know, a million phones a year, tablets or
23 something to the U.S.

24 What they are paying, if they have a license --
25 is that the kind of thing that ETSI keeps track of?

1 rate, it may not be indicative a fair and reasonable rate.
2 It may or may not be.

3 THE COURT: Until we find out whether or not
4 ITC's entering an order of exclusion in terms of preventing
5 any harm from you setting a FRAND rate, the only way the
6 FRAND rate actually has any operative effect is if the ITC
7 would exclude your phones; right?

8 MR. MCMAHON: No. The FRAND rate would be the
9 final piece of the puzzle that would put -- it would
10 finalize the license.

11 Interdigital had an obligation to license.
12 ZTE (USA) stands here willing and will accept the license.

13 THE COURT: Well, I mean, I got from their
14 briefing that they don't actually think that's the case,
15 that they think the defendants sort of want to see what the
16 rate is and then they will make a business decision whether
17 or not to actually do -- take that rate.

18 I mean, are you saying that if -- you know, I
19 said and affirmed by the Federal Circuit however far it
20 went, but if I said the rate is five cents a phone, that
21 your client would immediately say, okay. We'll pay five
22 cents a phone?

23 MR. MCMAHON: Yes, your honor. We're here to
24 have you decide that issue, and ZTE (USA) is willing to be
25 bound by your decisions on the FRAND rate.

1 THE COURT: All right.

2 Is that also the case for Huawei?

3 MR. YOUNG: If your Honor gives us the rate that
4 we asked for in Count VI, yes, we would do that.

5 THE COURT: All right.

6 Sorry. Go ahead, Mr. McMahon.

7 MR. MCMAHON: Well, that touches touch on the
8 next point that I would like, which is that the license is
9 dispositive.

10 And your Honor mentioned earlier that the term
11 fast track and how we could fast track the proceeding if we
12 waited until after the ITC proceeding.

13 We view this as a fact track resolution that
14 we should engage in right now, because if we're table to
15 reach a FRAND determination, if your Honor issues an order,
16 that would complete the puzzle of the license and would
17 provide a complete defense to ZTE (USA) at the ITC, and to
18 the underlining infringement allegations that are in this
19 case.

20 THE COURT: I guess maybe that's where -- and,
21 you know, I recognize we're talking pleadings here.

22 But I'm guessing -- and, obviously, I haven't
23 read your answer, proposed answer, but I'm guessing the
24 first big chunk of it is saying how their patents are
25 invalid and that you don't infringe them.

1 actually read the complaint either, so I don't know whether
2 it's suppose to be willful, how much damages that we're
3 talking about.

4 So it's not as though -- are you saying that the
5 resolution of the FRAND resolves everything, or does it
6 just resolve the question of going forward?

7 MR. MCMAHON: Everything. Interdigital's
8 obligation to license extends into the patent as well. They
9 have always been only obligated to license these patents.
10 And so sales we've paid in the past have been subject to
11 that same obligation and should be substituted.

12 THE COURT: So does that mean -- let's turn now
13 to outstanding litigation position. You've got in your
14 files things saying, oh, yeah. You internal memos
15 infringing their patents big time.

16 Their damages are just the FRAND rate going back
17 in time?

18 MR. MCMAHON: Willfulness is only an issue if
19 there is infringement, and there cannot be infringement if
20 there is a license.

21 So the license would provide a complete defense
22 to infringement and willfulness. And I'm certainly not
23 suggesting that we would have any documents like that in our
24 possession.

25 THE COURT: No, no, no.

1 And I'm just wondering why your client wouldn't
2 want to find out whether or not those are good arguments
3 before starting to pay for the license?

4 MR. MCMAHON: Basically, it's a business
5 decision.

6 There is risk involved in all litigation. We
7 certainly have positions that we've taken here, and to a
8 greater extent, in the International Trade Commission
9 challenging the allegations that Interdigital has made.
10 But ZTE (USA) recognizes that this is litigation, that
11 there is risk. And as a business decision, if a license is
12 available under truly FRAND terms, the truly FRAND rate, not
13 one that is unilaterally set at an artificially high level
14 by Interdigital, but truly FRAND terms, ZTE (USA) is will to
15 accept take license and use that as a defense against
16 infringement.

17 THE COURT: Well, let me ask. You're making an
18 argument, as has Mr. Young, that you want to save -- you
19 didn't put it in these terms, but you want to save on
20 litigation. This is the key issue.

21 Would you say, you know what, I guess this is
22 actually not the key issue because in terms of their
23 complaint, even if you agreed to pay a license going
24 forward, there is still a question of all these phones that
25 you have imported in the past, and, you know, I haven't

1 MR. MCMAHON: But if there were, it would be
2 irrelevant, because we would be licensed to practice the
3 invention.

4 THE COURT: And it would be retroactive?

5 MR. MCMAHON: Yes.

6 THE COURT: So there is something that makes
7 mention that Mr. Shulman is probably not going to agree with
8 that, but if that were the case, then would it make sense to
9 essentially get rid of all the litigation other than
10 determining the FRAND rate and then, case resolved?

11 MR. MCMAHON: It would make perfect sense, your
12 Honor, but, unfortunately the ITC is a train that is very
13 difficult to stop.

14 THE COURT: Well, probably not that difficult if
15 Mr. Shulman wanted to stop it.

16 MR. MCMAHON: That's true. It depends on who
17 wants to stop it.

18 THE COURT: All right. Is there anything else
19 that you want to say?

20 MR. MCMAHON: The only other point is to address
21 the concern about overlap. And I think you made a comment
22 earlier about trial on these counterclaims, Count VI and
23 both of the Huawei counterclaims and the underlying issues
24 that could eventually to go to trial in this case.

25 And my point about that is there is really

1 very little overlap between the two. Here, we are talking
2 about fundamentally contractual questions, the evaluation
3 of the patents under a FRAND circumstance. And that is
4 really a very different scenario than the infringement and
5 validity issues, which would not need to address in this
6 proceeding.

7 THE COURT: Have you ever tried a FRAND case?

8 MR. MCMAHON: I have not, your Honor.

9 THE COURT: Do you have a sense -- I'm just
10 thinking about what you said. Is this something where
11 essentially -- that I could imagine a FRAND case is
12 essentially, you have an expert, they have an expert, two
13 experts say what they think a reasonable rate is. I sit and
14 think long and hard and I draw a line in the middle, and,
15 you know, is that what a FRAND trial is?

16 MR. MCMAHON: Very few truly FRAND cases have
17 been tried, in any event. But I think that is roughly on
18 point. There might be some ancillary issues that may
19 require more than one expert on one side than the other.

20 THE COURT: Yes.

21 MR. MCMAHON: Fundamentally, yes. It would be
22 some fact and expert discovery leading to evidence that
23 would enlighten the Court on the question of what is a FRAND
24 rate.

25 THE COURT: All right. Thank you, Mr. McMahon.

1 MR. MCMAHON: Thank you, your Honor.

2 MR. SHULMAN: Good morning, your Honor.

3 THE COURT: Good morning, Mr. Shulman.

4 MR. SHULMAN: I am going to -- before I get to
5 my prepared remarks, I am going to answer some of the
6 questions that you asked them.

7 One of the questions that you asked was the
8 scope of discovery in the ITC. It's actually much broader
9 than it is in federal court. I know with discovery limits,
10 which is one of the good things and bad things about ITC
11 practice. There are no limit on the interrogatories, no
12 limit on depositions, either on the number or the length of
13 the depositions. And, in fact, discovery often goes -- is
14 ongoing while the trial is ongoing.

15 So you would have a full and fair -- more than a
16 full and fair opportunity to discovery of the case on all
17 the issues that you've raised.

18 Another question that you asked was would it be
19 fair to infer that other suppliers every phones are licensed
20 by Interdigital. And your Honor has some trouble listening
21 to some other manufacturers. But let me go suggest that
22 there are some.

23 Sample summing is one such.

24 THE COURT: I've heard of them.

25 MR. SHULMAN: Apple, they are pretty big.

1 THE COURT: Okay. I've heard of them.

2 MR. SHULMAN: Makes the Blackberries. And all
3 three of those are licensees of Interdigital, the three
4 leading manufacturers in the world.

5 One of them mentioned something about six
6 different rates among six different manufacturers and which
7 of those are FRAND. I'm going to touch on that in my
8 prepared remarks. But what it really underscores, your
9 Honor, is what they are asking you told by this Count VI.
10 They claim all you need to do is fill in a number, the
11 royalty rate.

12 There is no such thing as a FRAND rate because
13 license agreements in patent cases are about yeah thick.
14 They are 20, 30, 40 pages long.

15 THE COURT: Because there are a lots of
16 collateral things. You can't make our product purple
17 because that would insult somebody. I don't know what. I
18 can imagine there are a lots of other things.

19 MR. SHULMAN: The scope of the license, whether
20 there are any granted patents, whether it is a paid-up
21 license, whether it's a running royalty.

22 There are innumerable terms that impact and are
23 fundamentally intertwined with the royalty rate that is
24 being paid. For example, if I cross-license with you, and I
25 have more patents --

1 THE COURT: But just -- I mean, the basic
2 principal that ETSI requires, that your contractually
3 required to offer licenses that are FRAND.

4 MR. SHULMAN: What it says, your Honor, is, you
5 shall be prepared, and you undertake to be prepared to grant
6 licenses on FRAND terms and conditions. There is no such
7 things as a FRAND rate. You have to look at the whole ball
8 of wax.

9 THE COURT: But the idea is that they say you're
10 not offering enough FRAND terms and conditions that does
11 provide, you know, a basis for, I guess a breach of contract
12 suit against you, that allegation, right?

13 MR. SHULMAN: Certainly, that's their theory.
14 That's correct.

15 THE COURT: Well, I mean, that's their theory.
16 Do you say no? I mean, are you saying that you can't sue
17 the --

18 MR. SHULMAN: Well, I can't say they can't sue.
19 Do I believe that there's a basis in contract? I personally
20 do not, but here we are. But let's put that aside because
21 that's not the issue today.

22 What I'm trying to illustrate, your Honor, is
23 that when they say, oh, it is a simple matter to get
24 expedited, which I know your Honor has expressed some views
25 on, but let's assume that you hadn't. The simple matter is

1 not simply to set a rate.

2 What effectively your Honor is going to have
3 to had to resolve Count IV, if we ever get to it, and
4 I will explain why we shouldn't get to at all it in that
5 moment.

6 But if your Honor does get to Count VI, you
7 are effectively going to have to act as a super negotiator
8 on both sides to come up with a fully integrated the great
9 license agreement, because all of these terms affect the
10 rate.

11 As counsel said, you could have six different
12 rates with six different parties and they may be widely
13 different, and any one of them could be FRAND.

14 Given the circumstances of that negotiation and
15 the circumstances between those parties -- and to illustrate
16 the complexity of this, just has week --

17 THE COURT: I mean, you're making me think. I
18 mean, presumably, based on what I think I heard is, you've
19 actually at some point in the past proposed -- did you -- I
20 mean, you proposed a rate to at least some of these
21 defendants; right.

22 MR. SHULMAN: Not just a rate.

23 THE COURT: I'm sorry. A licensing agreement?

24 MR. SHULMAN: Yes. We can't get into the
25 details for the reasons that he said. But, yes, we made a

1 MR. YOUNG: There are four different parties,
2 and obviously, you know, that disclosure was a matter of
3 disclosure. It doesn't necessarily represent the actual
4 witness list at trial, and my guess it probably does not
5 represent the list at trial.

6 THE COURT: All right. I got it.

7 Go ahead, Mr. Shulman.

8 MR. SHULMAN: Then, your Honor asked earlier
9 today whether the FRAND rate and discovery could go forward
10 now so that it isn't a bottleneck later on when the case
11 comes back to you and the mandatory stay is lifted.

12 And I don't believe the FRAND rate discovery is
13 going to be a logjam when the case comes back such that it
14 needs to go forward now, because as Mr. Young pointed out,
15 there is going to be discovery in any event on the damages
16 issues once this case comes back here because that is one
17 of the issues that is going to have to have to be tried, and
18 that is one of the issues which is mandatorily stayed at the
19 moment.

20 THE COURT: I take it there is some chance that
21 the ALJ ruling or ITC ruling, or somewhere along the line
22 will cause the parties to perhaps assess things differently
23 than they are assessing them today. So when you say that's
24 when it comes back, which is kind of everybody has said,
25 that's on the assumption that it doesn't get resolved

1 proposal about a licensing --

2 THE COURT: And I guess when you do the
3 proposal, do you say, here's, you know, a 50-page document,
4 this is the proposal, or do you say, you know, here's three
5 important points?

6 MR. SHULMAN: Usually, the way the negotiations
7 typically evolve, you start off by talking generalities.

8 THE COURT: Generally?

9 MR. SHULMAN: Generalities, you know. This is
10 the base approach that we use. This is what we're looking
11 for, you know, that type of 10,000 foot level. And as
12 you begin to reach some common ground, you get more specific
13 and more detailed, and eventually you get around to drafting
14 up proposed contracts.

15 THE COURT: Okay.

16 MR. SHULMAN: But the point being, your Honor,
17 simply that this is a very complicated undertaking, because
18 it's not just a number. And, indeed, as I said, just last
19 week to illustrate the complexity of this, they named 14
20 experts in the ITC on their side just to address the FRAND
21 issues. That's how complicated it is.

22 THE COURT: Is this right?

23 MR. YOUNG: There was a list. I don't have the
24 exact number.

25 THE COURT: But the ballpark was right?

1 somewhere along the way; right?

2 MR. SHULMAN: That was exactly my next point,
3 which I wanted to point out, is that I've been nothing
4 doing nothing but patent cases my entire career, which is
5 now 31 years, including many ITC cases, and 95-plus percent
6 of them settle after the ITC decision one way or the other.
7 It doesn't really matter --

8 THE COURT: I mean, it would make little sense
9 that the ITC basically is doing these things as a tryout.

10 MR. SHULMAN: Precisely.

11 And so it's a very, very, very rare case where,
12 following an ITC decision, the parties reappear in District
13 Court. Very rare.

14 One other point that I want to get to my
15 prepared remarks.

16 THE COURT: I'm interested in one of the last
17 points I brought up is, which is --

18 MR. SHULMAN: Retroactivity?

19 THE COURT: Yes, essentially that.

20 MR. SHULMAN: That was the part I was about to
21 get to.

22 THE COURT: Okay.

23 MR. SHULMAN: There is a lot of law around that
24 suggests that the FRAND rates are only future rates and
25 don't apply retroactively. So when he said oh, yeah

1 automatically, they apply retroactively, that is not true
2 according to the law. That doesn't mean the parties
3 couldn't contract it to be so, but it isn't so as a matter
4 of course.

5 And in that connection, there is one other
6 point. They say -- they said today a couple of times, both
7 of them, that if you Honor rules on the rate, they will pay
8 it. Well, that is nice to hear, but they are waffling on
9 that because in their briefs, they say something else.

10 In their briefs the said, at least Huawei said,
11 that. They will pay if the patents are essential and if
12 they use them. And that's -- we've quoted that in our
13 brief.

14 And so they are waffling on the point, and,
15 indeed, in that connection, your Honor, I think it would be
16 very useful, if you haven't already done so, to read the
17 decision in the Rembrandt vs. Harris case, which we cited.

18 And I can hand it up if your Honor would like
19 because it is an unpublished opinion. But very revealing.
20 It's from the Superior Court of Delaware.

21 And --

22 THE COURT: Oh, I saw that cited, but I didn't
23 read it.

24 Is that decided by Judge Slight's?

25 MR. SHULMAN: Exactly.

1 there is anything unusual or extraordinary about the six
2 counterclaims that requires expedition as they urge, or
3 whether, as we maintain, prompt and complete relief can be
4 afforded in the ITC case on all of their claims, including
5 the six counterclaims.

6 And let me begin by reviewing what Judge Strine
7 had to say on the issue.

8 And they tried to convince him to expedite the
9 very same six claims that they are asserting here and they
10 are identical. And he wasn't convinced. And let me explain
11 with a happened there.

12 In September of 2011, seven or eight months ago,
13 Huawei, in the ITC case, answered our complaint. And they
14 raised the breach of contract, the waiver and the estoppel
15 claims that are 1 through 4.

16 THE COURT: Basically, your complaint before the
17 chancellor was -- essentially, your counterclaim just says
18 you were the plaintiff.

19 MR. SHULMAN: No. We were the defendant in
20 Chancery Court?

21 THE COURT: I'm sorry. Yes. Sorry. Yes.
22 Right.

23 Their counterclaims in this case, or the ones
24 they would like to have the counterclaims were the complaint
25 in the Chancery case?

1 And there, one of the one of parties, Harris
2 Corporation, made the very same undertaking that we heard
3 today. And as soon as the companion case, which wasn't a,
4 ITC case, but a District Court case --

5 THE COURT: I'm sorry, I was thinking about
6 something. Could you start that sentence over again?

7 MR. SHULMAN: Sure.

8 In the Rembrandt case, the defendant Harris made
9 the representation to the Court that if they were to
10 adjudicate the rate, they would pay it. No questions asked,
11 not seek a recoupment should some later development appear
12 in the case that would otherwise give rise to a recoupment
13 right.

14 And then once the District Court made a ruling
15 that was favorable to Harris, they came back to Judge
16 Slight's and said, we've changed our minds, and as a
17 consequence of that, he stayed the case and said, I'm not
18 doing anything here until that other case finishes up,
19 because we could have inconsistent positions and you're
20 talking out of the both side of your mouth. And that's what
21 we have going on here, too.

22 So with that, let me turn to some of the
23 prepared points that I wanted to raise today. I'm not going
24 to talk about expedition in light of what your Honor has
25 already said. But let me turn to the question of whether

1 MR. SHULMAN: Absolutely. Precisely. They
2 line up 1 through 6 there, or 1 through 6 here as
3 counterclaims.

4 And -- but in the ITC case, they pleaded that
5 the determinative defenses, essentially Counts I through V
6 in this case here. Count IV is a breach of contract, but
7 Count I and 2 are breach of contract claims as well.

8 So anyway, one month after pleading these
9 defenses in the ITC, Huawei filed suit in the Delaware
10 Chancery Court, and there, in Counts I through IV, they
11 recast the affirmative claims for relief of the same breach
12 of contract, waiver and estoppel defenses as to which issue
13 had been enjoined in the ITC.

14 And before Chancellor Strine, there was
15 absolutely no dispute that absent a settlement between the
16 parties these issues, whether they are called defenses or
17 affirmative claims for relief, would be decided in the ITC
18 case. These your Counts I through IV. Indeed, at the
19 hearing on Huawei's motion to expedite, Chancellor Strine
20 observed that, "I have heard something that to suggest that
21 Huawei cannot present fully and fairly its defenses before
22 the ITC."

23 Now, we submit, your Honor that Chancellor
24 Strine's observations are equally applicable here to Counts
25 I through IV, or Counterclaims I through IV, because

<p style="text-align: center;">58</p> <p>1 Counterclaims through IV are the very same issues raised as 2 Counts I through IV before Judge Strine. 3 And, more importantly, Counterclaims I through 4 IV are also very closely related to the issues that are 5 being litigated if the ITC. As he noted, the ITC will 6 resolve those issues and they won't be harmed by permitting 7 the ITC to decide them first. 8 And here is the rub. And let me explain why 9 they are not going to be harmed. And this will apply to 10 Count VI, which I will get to in a moment as well. 11 They won't be harmed by allowing the ITC to go 12 forward for two reasons. 13 First, let's consider what happens if Huawei 14 prevails on one or more of these defenses in the ITC. 15 THE COURT: Then they are going to be okay? 16 MR. SHULMAN: Right. If they prevail on a 17 FRAND defense, typical to some Interdigital patent, then the 18 ITC will not issue an exclusion order. 19 And the issuance of an exclusion order is the 20 only harm they point on you. But that harm is not going to 21 happen if they win on one of those defenses. 22 Now let's look at the other side of the coin. 23 Let's consider what happens if we prevail on these FRAND 24 defenses that they have raised in the ITC. 25 If we prevail, the ITC will have decided that</p>	<p style="text-align: center;">60</p> <p>1 do is set the rate in Count VI. There is no irreparable 2 harm by not adjudicating that now, because if they win on 3 one of their FRAND defenses, there is no need for your Honor 4 to set a rate because they won. And they are not going to 5 be ruling the fact that your Honor didn't set the rate if 6 they won, and coming back and saying, please set that rate 7 because if had I lost, I would have paid it. 8 I mean, it makes no sense. There is no are 9 irreparable harm if they win on the FRAND defenses with 10 respect to Count VI. And if we win, likewise, there is no 11 irreparable harm because the Court will have decided 12 that we made FRAND offers in the past. They failed to 13 accept them, so there is no need for your Honor to set a 14 FRAND rate. We've already offer them FRAND rates, FRAND 15 licenses. 16 And so under any set of circumstances, 17 regardless of who wins or who loses in the ITC with respect 18 to these FRAND issues, there is no need, and certainly no 19 urgent need to set a FRAND license. 20 Now, so the fact that the ITC is not empowered 21 to adjudicate what they want you to adjudicate on Count VI 22 is irrelevant, because what the ITC will adjudicate will 23 determine whether Count VI even needs to be adjudicated 24 with respect to the patents here in suit. 25 I've covered much more speaking</p>
<p style="text-align: center;">59</p> <p>1 the FRAND defenses are without merit, in which case, those 2 defenses are no longer an impediment to any exclusion order. 3 And at that point, there is no legally recognizable harm. 4 They keep saying, well, we're going to be irreparably 5 harmed if the ITC rules against us. 6 But once you lose having had an opportunity to 7 be heard fully and fairly in a tribunal that allows more 8 discovery than Federal Court, that is not cognizable to 9 irreparable harm. You've had your chance to be heard and 10 you lost. You can take an appeal to the Federal Circuit and 11 maybe you'll win there, but that's not an irreparable harm. 12 That's, I lost. I tried and I lost. 13 THE COURT: Because essentially, Counts I and II 14 of the counterclaims here, which is what are you're talking 15 about, is essentially they are saying you've breached the 16 contract with ETSI by not offering them on FRAND terms. 17 MR. SHULMAN: Correct. 18 THE COURT: So if they lose on those in the ITC, 19 it's essentially their own fault? 20 MR. SHULMAN: For not having accepted our 21 earlier offers, right. And that is what gets us to Count 22 VI. That is why Count VI doesn't give rise to any 23 irreparable harm. By Count VI, they say, all you have to do 24 is set the rate. I've already explained why that is not so. 25 But let's assume that is so. Let's assume all you have to</p>	<p style="text-align: center;">61</p> <p>1 contemporaneously than by looking at my notes, so give me a 2 moment, your Honor. 3 THE COURT: Go ahead. I think so far, you have 4 used, considerably less time than your opponents, so you can 5 have a minute. 6 MR. SHULMAN: All right. Now, let me talk about 7 the ripeness issue, okay? 8 THE COURT: All right. 9 MR. SHULMAN: And, actually, before I turn to 10 ripeness, let me talk about one piece of information that 11 came to light last week, which is rather important. And 12 this new piece of information we submit speaks volumes about 13 whether there's an urgent needs for this Court to resolve 14 the FRAND claims. And the new piece of information is this, 15 your Honor. 16 Last week we learned for the first time 17 that on December 5th of last year, five days after they 18 filed the motion in this Court, Huawei sued Interdigital 19 in China. 20 THE COURT: The Chinese thing? 21 MR. SHULMAN: Yes. It actually occurred, but we 22 didn't learn about it until last week, even though it 23 happened way back in December. The pleadings are not 24 publicly available in China. We were served with it last 25 week.</p>

1 And in the China lawsuit, Huawei is asking the
2 Chinese court to decide substantially the same FRAND issues
3 that they say a jury is equally qualified to decide.

4 So from this simple fact, we can draw several
5 important conclusions, in my opinion.

6 First, contrary to what they are saying here,
7 there is no urgency for this Court to adjudicate the FRAND
8 issues, because were it otherwise, Huawei would have not
9 brought a duplicative suit in China.

10 Now, they will come back and say, well, that
11 concerns Chinese patents, and this suit concerns U.S.
12 patents. Maybe so, maybe not. But many of the same issues
13 transverse both. That is to say, what does it mean to be
14 essential? Are the patents essential? Are they being used?

15 There are many, many common issues between the
16 two cases, so it isn't the case that this Court is uniquely
17 and must on an urgent basis adjudicate the FRAND issues that
18 they brought to China to try and take them there.

19 THE COURT: Does the way ETSI works and the way
20 the FRAND works, does each -- in the end, is the FRAND rate
21 a rate that has to be the same all over the world, or is it,
22 you know, perhaps developed countries and nondeveloped.
23 Countries -- I mean, is that one of the things that can vary
24 from place to place?

25 MR. SHULMAN: That is a very, very complicated

1 something where Interdigital might say, well, gee, I think
2 your rate going to be this, and your rate is going to be
3 that?

4 MR. SHULMAN: I don't know the answer to that,
5 but I imagine that circumstances like that would be taken
6 into account.

7 THE COURT: All right.

8 MR. SHULMAN: But I don't know the answer.

9 THE COURT: All right.

10 MR. SHULMAN: But I was just trying to give an
11 illustration.

12 THE COURT: Okay. All right. So they sued in
13 China? Okay.

14 MR. SHULMAN: Right.

15 THE COURT: All right.

16 MR. SHULMAN: And second from these facts -- in
17 fact, something I said this morning, too. What they are
18 doing, your Honor, is engaging in the most blatant form of
19 forum shopping that I can imagine. And let's just look at
20 what has happened here.

21 THE COURT: I mean, this forum, you picked.

22 MR. SHULMAN: No. Let me go through this.

23 After placing at issue all of the FRAND defenses
24 in the ITC case, and they did that in September of this
25 year.

1 question, your Honor.

2 It's possible in certain circumstances where
3 there can be a single FRAND rate that is applicable
4 everywhere. There are circumstances where there might be a
5 single FRAND rate, but components of that single rate are
6 derived to arrive at that single rate by adding together
7 individual rates for patents in different countries.

8 For example, and just to illustrate it at a very
9 simplistic level, let's say, I have, I don't know, a
10 thousand essential patents in the United States and only one
11 in China. Well, you can tell from those numbers that the
12 rate in China might be considerably lower than the rate that
13 might apply to the U.S. patents because you've got a
14 thousand more of them.

15 There might be an overall FRAND rate that is
16 developed for a given licensee based upon what their sales
17 look like around the world. And you say, okay, well, ten
18 percent of their sales are in China.

19 THE COURT: So, I mean, and I'm talking
20 hypothetically here. You don't need to reveal anything.
21 I'm not asking you to reveal anything confidential. But if
22 you -- if your a company said we want to hit it, you know,
23 the country where the average per capita income is \$300, and
24 we want to market our phones there, and somebody else says,
25 no, I just the Sweden and Switzerland market, is that

1 THE COURT: And actually, the ITC you picked up
2 on, too.

3 MR. SHULMAN: Right. But they did not have the
4 choice of which forum they wanted to litigate these defenses
5 in. Et me get through this. I think you'll see.

6 THE COURT: All right.

7 MR. SHULMAN: So after placing at issue all of
8 the FRAND defenses in the ITC case, they then chose to stay
9 this case. They didn't have to, but they chose to.

10 Then they did an about-face. There decided that
11 the ITC was the wrong forum for the FRAND issues, for
12 whatever litigation issues arose at that point.

13 THE COURT: Actually, I'm sorry to keep
14 interrupting.

15 Once you had filed suit here and you had the
16 ITC, could you have stayed the case here?

17 MR. SHULMAN: No.

18 THE COURT: Only the respondent in the ITC
19 can --

20 MR. SHULMAN: Right.

21 THE COURT: Okay. Okay.

22 MR. SHULMAN: Well, I'll get to that point in a
23 moment. But, yes, the answer is that I could not. Only
24 they could. And any one of them could. They didn't have
25 all of join in it.

<p style="text-align: center;">66</p> <p>1 But Huawei -- the request. They didn't do 2 anything to try to advance their own cause here and say, 3 well, I have some counterclaims I would like to go forward. 4 They said, we will do it all at the ITC. Then they decided 5 the ITC was the wrong forum for their FRAND issues. Then 6 they decided to shop around for a new forum. 7 What did they do then? First they went to 8 Chancery Court, to no avail. Next, they came to your 9 Honor's Courts for the motion that we're arguing today. And 10 apparently, not entirely saying what is going to happen 11 here, they went to the Chine court five days after filing 12 the motion in this case and invoked the jurisdiction of a 13 fourth court. 14 And, third, as I pointed out earlier, the 15 preference to the Rembrandt case, there is no guarantee 16 that Huawei would even abide by a decision of this Court 17 on the FRAND issues, whenever that comes. And I'm not going 18 to belabor that point, and I've already made it, which 19 brings me to the next topic, which is whether or not a 20 decision on Claim VI, if your Honor were to get to it, 21 whenever it gets to it, is advisory, or whether Claim VI is 22 ripe for adjudication. 23 And just to reiterate, as I said, they are 24 seeking a determination of a FRAND rate, but it's not really 25 a FRAND rate. And, more importantly, it's readily apparent</p>	<p style="text-align: center;">68</p> <p>1 I'm going to skip over that portion of my outline. 2 I'll just note that I'm not aware of any case 3 where a Court has undertaken to come up with a FRAND 4 license. What Courts have done in other cases is look at a 5 given license and answer the question, is that negotiated 6 agreement a FRAND agreement? 7 THE COURT: Actually, I mean, I was thinking 8 that. That was kind of the reason why I asked somebody, 9 you know, do you hand over a 47-page document, because it 10 struck me it that would be a whole lot easier to do that 11 kind of yes-or-no sort of decision. 12 MR. SHULMAN: Right. 13 THE COURT: That if, in fact, a FRAND license 14 was -- you know, I thought you were going to say, how would 15 I like to draft a 47-page contract? I don't want to draft 16 a 47-page contract, but I could perhaps say you want a page 17 47-page contract was offered on FRAND. 18 MR. SHULMAN: Sure. 19 THE COURT: Yes. 20 So -- and I am sorry for interrupting, your 21 Honor, but there is no such thing -- there is such a thing 22 as a FRAND issue, but there isn't such thing as a one and 23 only FRAND license. 24 THE COURT: Right. You may vary over here. You 25 may vary over there?</p>
<p style="text-align: center;">67</p> <p>1 that whatever relief they are seeking is in reality an 2 advisory opinion. 3 And why is that? Because first, they 4 dispute -- and they said it repeatedly in their papers, both 5 in this case and in the ITC case, that they even need a 6 license, much less on FRAND terms. They don't need a 7 licenses if they don't infringe. They don't need a license 8 in the patents are invalid, and they don't need a licenses 9 if the patents are nonessential. 10 And they dispute each one of those predicate 11 facts. So their asking your Honor to set a FRAND rate with 12 respect to patents as to which they dispute the predicate 13 basis for license; namely, they don't infringe it, it's 14 invalid, and they were nonessential patents. 15 I can't imagine anything more advisory than 16 that. 17 Second, their request is advisory because they 18 haven't agreed, as I mentioned earlier, that they will every 19 pay Interdigital according to the FRAND terms. Today, they 20 said yes. In the past, they have said no. And Rembrandt 21 shows that parties can waffle on that issue, and nothing is 22 binding unless it is in writing. And what they say to say 23 to your Honor today is not in writing. 24 I've already told you about the FRAND terms and 25 conditions being much more complicated than simple rates.</p>	<p style="text-align: center;">69</p> <p>1 MR. SHULMAN: Precisely. 2 THE COURT: Got it. 3 MR. SHULMAN: And I just want to repeat that 4 Chancellor Strine, who presided over a FRAND dispute between 5 OCF and Qualcomm for over two years -- and I don't know if 6 your Honor had a chance to read the transcript from the 7 hearing from before Judge Strine. 8 THE COURT: I think I saw what you quoted in the 9 briefs. I got the flavor, I think. 10 MR. SHULMAN: But he expressed some of 11 exasperation at the notion that -- in fact, he called it 12 unrealistic -- that the FRAND issues in this case could be 13 expedited, decided before the ITC trial begins in October. 14 And I think, base upon his experience, those observations 15 carry some weight. 16 And now briefly let me complete me touch on 17 ripeness with respect to Claim VI. 18 As I mentioned earlier -- 19 THE COURT: I thought you just did that. 20 MR. SHULMAN: Yes. There is one other point 21 that I want to make. 22 THE COURT: Okay. 23 MR. SHULMAN: Actually, no. I believe I've 24 covered it. 25 Now let me turn to our alternative request for a</p>

1 discretionary stay and then I'll be done, your Honor.

2 THE COURT: All right.

3 MR. SHULMAN: And this shouldn't take very long
4 at all.

5 So let me begin by just reviewing the procedural
6 posture of the case.

7 We filed the complaint in this action last July.

8 On the same day, we filed the ITC complaint. And the two
9 cases asserted identical causes of action for infringement.

10 And the only significant difference between the two cases is
11 the remedy that's available. Here, we get damages. There,
12 we get an exclusion order. And the remedies available in
13 each forum are not available in the other forum.

14 Now, because the ITC actions and their parallel
15 District Court cases are largely duplicative, Congress
16 enacted the 1659 statute to deal with the overlapping
17 cases. And that statute provides for a mandatory stay of
18 all claims asserted in the District Court case that involve
19 the same issues that are presented in the ITC.

20 And so in this case, your Honor, was entitled
21 to request a mandatory stay of the claims we asserted in
22 this Court, and they chose to do so in September of last
23 year, before every answering or filing counterclaims in this
24 case.

25 Now, the counterclaims that they now want to

1 plead can only be pled if the mandatory stay is temporality
2 lifted for the limited purpose of allowing them to file the
3 answer and the counterclaims. And thereafter, they are
4 asking that the mandatory stay be reentered. In fact, it
5 must be reentered on Interdigital's infringement claims.
6 But because Section 1659 arguably does not require a
7 mandatory stay of their counterclaims, the case in theory
8 could go forward.

9 THE COURT: Does the mandatory stay -- and one
10 thing I was thinking about and looking at was, does the
11 mandatory stay actually allow me to let them file a
12 piece of that is relating to the ITC proceeding?

13 MR. SHULMAN: That's a good questions, your
14 Honor. I don't know. I mean, we're not going to be a
15 procedural stickler on this point.

16 We're willing to allow them to, or agree to have
17 your Honor lift the stay for the purpose of filing the
18 pleading. Then were going to ask your Honor to
19 discretionarily stay the entire case, or the portion of the
20 case that isn't subject to the mandatory stay.

21 And the reasons for our position are
22 straightforward. There is the four-factor test that we
23 allege in our briefs.

24 And --

25 THE COURT: Is that the Antrue (phonetic)

1 Corporation?

2 MR. SHULMAN: I don't remember the name of case.
3 That sounds familiar.

4 THE COURT: And whether a stay would unduly
5 prejudice any clear tactical advantage to the nonmovant?

6 MR. SHULMAN: Correct.

7 THE COURT: Whether a stay will simplify the
8 issues and trial of the case. Whether discovery is
9 completed and whether a trial date has been set?

10 MR. SHULMAN: Correct. Those are the four
11 factors.

12 THE COURT: No trial has been set, so that one
13 is resolved.

14 MR. SHULMAN: Correct. And there wouldn't be a
15 hardship or prejudice to Huawei from entering the stay. As
16 I mentioned earlier, the only purported harm they talk about
17 is the exclusion order. And, of course, if they win under
18 affirmatives defenses over there, there will be no order.
19 And if we win, they are not entitled to escape by virtue of
20 having had the affirmative defenses ruled against them to
21 escape the exclusion order.

22 So any harm that is stuff by virtue of an
23 exclusion order being entered after their defenses
24 adjudicated is not legally cognizable harm in the context of
25 whether a stay ought to be entered here.

1 The second factor, whether a stay would promote
2 efficiency by simply simplifying the issues, et cetera.

3 We addressed this at length in our brief, but
4 there are a couple of points I want to re-emphasize, three
5 in fact.

6 First, as readily apparent, virtually of the
7 FRAND issues that Huawei now wants to begin litigating in
8 this case are being and have been litigated for months in
9 the ITC indication.

10 Second, it would be, in our view, extremely
11 inefficient and wasteful for dual proceedings to be going on
12 in parallel on substantially overlapping, although not
13 completely overlapping, issues. And in that connection, the
14 cases we've cited in our brief, particularly, the SanDisk v.
15 Phison case and the Form Factor Micronics case granted
16 discretionary stays as to non-overlapping issues where
17 there were substantially overlapping issues as between the
18 ITC case and the District Court action. And they both took
19 into account the substantial overlap of issues in granting
20 the stay, even though admittedly there were some issues,
21 although a limited universe of issues, that were not
22 overlapping. Nevertheless, they granted the discretionary
23 stay.

24 And here, both poll the cases, ITC and this
25 case, the nearly complete overlap of the FRAND issues

1 mirrors the entire overlap of the patent issues. Thus, the
2 rationale behind the mandatory stay of our infringement
3 claims applies, in our view, with equal force to the
4 FRAND issues, and counsels in favor of discretionarily
5 staying the FRAND counterclaims.

6 And the third point, your Honor, that I want to
7 make has to do with efficiency.

8 As I mentioned a few minutes ago, there are
9 three predicate facts that must be established before your
10 Honor can every reach of the FRAND issues.

11 Our patents must be valid. They must be
12 infringed, and our patents must be found essential to one or
13 more of the industry standards.

14 All three of those issues will be addressed in
15 the ITC, and in this case as part of the infringement claims
16 that are now subject to the mandatory stay.

17 So consequently it makes no sense to adjudicate
18 the FRAND issues in this case separate from and ahead of
19 the predicate issues of validity, infringement and
20 essentiality.

21 By way of analogy, your Honor, it makes no
22 sense to try damages in a given case ahead of liability, and
23 to my knowledge, that has rarely ever been done. Rather,
24 damages, which are akin to the FRAND issues in this case,
25 are virtually tried either along with liability in the same

1 distract you with questions, please limit yourself to five
2 minutes here.

3 MR. YOUNG: Thank you very much, your Honor.

4 A couple of things on the ripeness issue.

5 And I would go to the transcript from Chancery
6 Court in case your Honor has not had the chance to read the
7 whole thing. This is Exhibit G to Mr. Haller's deposition,
8 document 27-3.

9 On page 27, Chancellor Strine said the
10 following: After saying he has been through this kind of
11 litigation before, he says at page 7, line 8 through 9, I
12 know that there is a justiciable dispute.

13 Later know on that same page, starting at page
14 18, he says, "I know the whole thing about declared
15 essential, might be essential, all kinds of great issues
16 under French law. And there is a clearly a dispute. So,
17 and you may well have the better of it on the merits."

18 Now, we do believe that under the Apple case
19 that there is a dispute. They say we haven't admitted to
20 infringement, we haven't admitted to validity. That is
21 true. But as Judge Kravetz said in the Apple v. Motorola
22 case, that does not matter. There is still a dispute.
23 There is still a need for a judicial determination.

24 And we don't have this in the paper, I could
25 give it to you after the hearing. But just this week,

1 trial, or just after the liability verdict comes in, if, in
2 fact, liability is found, but not the other way around.

3 And the same result should obtain here. The
4 patents issue of validity, infringement, and essentiality
5 should be tried either ahead of or together with the FRAND
6 count claims, and not the other way around.

7 And, finally, your Honor, your Honor has already
8 touched on it. The last two of the four factors relevant to
9 discretionary stay, status of discovery and trial date.
10 Discovery is ongoing in the ITC, has been since last July,
11 or last August rather. Nothing has happened in this case
12 relating past the pleadings date. There is no trial date,
13 no discovery. Nothing has happened.

14 And that is about it, your Honor. If I have any
15 time left, I'll reserve it to reply to whatever they have to
16 say.

17 THE COURT: I think you've had your chance. I
18 appreciate what you've said. So I'll give them a minute or
19 two, or I'll give something, but not much. But if you've
20 got anything else you want to say, you should say it now.

21 MR. SHULMAN: Okay. I will just ask you, do you
22 have any further questions, your Honor?

23 THE COURT: Very good. No, I don't. Thank you.

24 MR. SHULMAN: Thank you.

25 THE COURT: All right. Mr. Young, unless I

1 another court, a District Court in the Microsoft v. Motorola
2 case ruled on very same issues.

3 These FRAND issues are in a lot of different
4 lawsuits. Motorola has raised them, then Samsung, Apple.
5 There is a lot of this sort of this case going on.

6 In that case, the Judge said, well, the parties
7 may disagree on what a FRAND rate is. And if that's the
8 case, then they have to come to a court to obtain a
9 resolution of that issue. And that's exactly what we're
10 doing here, and that's exactly at ITC cannot resolve for us.
11 The ITC cannot set a rate.

12 THE COURT: Well, you do agree that if they can
13 rule your breach of contract claim, then they could rule
14 against you, which would in effect say they have offered you
15 a FRAND rate?

16 MR. YOUNG: They may raise that issue. And as I
17 said, earlier, your Honor, if we were to able to litigate
18 this issue in a court the way we have requested to be able
19 to do that, we about consider whether, in the interests of
20 efficiency, we would press that claim in the court and not
21 press that claim in the ITC.

22 THE COURT: Okay. But if you go forward with
23 the claim in the ITC, and the ITC says -- they offer you a
24 FRAND rate, that's your answer; right?

25 MR. YOUNG: If it got to a decision, the ITC

1 could decline to issue an exclusion order. That's, we could
2 win the ITC case based on that defense. That is true.

3 And the issue is what's the most efficient form.
4 There would be a preclusion issue, of course, because we
5 could come back and in this case, after the case is
6 unstayed, Interdigital could come and ask for an injunction
7 here. And we would be back in the same exact situation.

8 So it would be more efficient for this Court to
9 rule on this issue now, and that would have a preclusive
10 effect.

11 THE COURT: If they came back and asked for an
12 injunction, one thing that I could do pretty much, couldn't
13 I, would be to say, well, before I give you an injunction,
14 offer them what you think a FRAND rate is, you accept it.
15 And later on, if it turns out to be too high, I'll give you
16 the money back; right.

17 You get into District Court, you only get
18 excluded if you want to get excluded. Isn't your upon in
19 the ITC, that that's their remedy? That's something that
20 you could avoid in the District Court?

21 MR. YOUNG: That's correct. Your Honor has much
22 more flexibility and much more of an ability to craft an
23 equitable solution. The ITC can't do that. The ITC cannot
24 say this is the rate --

25 THE COURT: So your point is that -- so

1 won, and that also got affirmed in the Federal Circuit. So
2 all sorts of things happen.

3 A case I was in ten years ago --

4 THE COURT: I'm not asking for anecdotes.

5 MR. YOUNG: No. I don't have --

6 THE COURT: That's fair enough.

7 MR. YOUNG: It wouldn't be surprise me that Mr.
8 Shulman is right, there are many cases, maybe even a
9 majority that are resolved.

10 THE COURT: He said 95 percent?

11 MR. YOUNG: I don't know that that's right, your
12 Honor.

13 THE COURT: In any event, I am not taking that
14 as a fact; I'm taking that as his opinion.

15 MR. YOUNG: Okay. Well, a major issue -- this
16 relates to the harm, though. Your Honor alluded to the
17 possibility that the parties may resolve the issue at some
18 point or another, either before or after the ITC makes a
19 decision.

20 That's true. That happens in many cases. Part
21 of the irreparable harm, though, is negotiating a license,
22 and that is what a settlement negotiation would be. Part of
23 the harm that is irreparable would be having to negotiate a
24 settlement or a license under the threat of an injunction in
25 the ITC.

1 the point is I don't think what happens after the ITC
2 here, you face the same possibilities that you require
3 expedition?

4 MR. YOUNG: Well, we do require expedition now.
5 We don't know what is going to happen in the ITC.

6 THE COURT: Okay. Go ahead.

7 MR. YOUNG: And, by the way, I've been in cases
8 where a party loses in the ITC and they win in a District
9 Court.

10 So Mr. Shulman may be right, cases do resolve.
11 At the ITC stage, but there are many cases that come to the
12 District Court after an ITC decision has been made.

13 THE COURT: How many ITC litigations have you
14 been in?

15 MR. YOUNG: Three, I think, four.

16 THE COURT: I assume your firm and your partners
17 have been in probably many more.

18 What's your estimate as to how many cases go
19 through the ITC and then go back to -- don't resolve as a
20 result of the ITC proceedings?

21 MR. YOUNG: I don't have a count. I think the
22 Texas Instruments v. Semiconductor case, for example,
23 involved an ITC proceeding where one party one and then it
24 got affirmed on appeal by the Federal Circuit.

25 And then in the District Court, the other party

1 And it is irreparable harm because part of the
2 bargain you make when you're signing up and saying you have
3 essential patents to the standards body is that you've
4 committed to license, which is the exact opposite of an
5 exclusion.

6 Damages is a different thing. You get damages
7 and lots of discussions and negotiations about what you're
8 damages are going to be. But the injunction is an unfair,
9 and for the potential licensee, an irreparably harmful lever
10 for the patent owner to have when the patent owner has
11 committed to license the patents on FRAND terms.

12 The essence of the license is that we're not
13 going to stop you from selling and making your product. You
14 can do that, but you just have to pay us.

15 And the irreparable harm that would happen here
16 if this Court does not act is that the parties would go
17 forward in the ITC case.

18 THE COURT: I'm sorry to interrupt you.

19 Let's say the ITC excluded your products, and
20 you said then, you know what? That FRAND offer that you
21 made before that we didn't think was FRAND, we now think it
22 is FRAND. We'll pay it.

23 Does the exclusion order get lifted if you start
24 paying the license?

25 MR. YOUNG: If there is a court order, I assume

1 at that point Interdigital might say that offer is no longer
2 on the table.

3 THE COURT: Presumably, they have to do because
4 they are a member of ETSI. They say, okay. What were we
5 thinking back then? We want to add -- do that and add 50
6 percent to what the rate was and everything else stays the
7 same.

8 I mean, they still have to do something that is
9 a FRAND offer. They may differently evaluate what it is;
10 right? Don't they have sort of a continuing duty to make a
11 FRAND offer?

12 MR. YOUNG: That's certainly -- our position
13 is it is true, whether they would agree that any particular
14 number is a FRAND number at that point, and whether they
15 would agree to sign a license with any number in it at that
16 point is really up to them. I don't know what their answer
17 would be.

18 THE COURT: What you're saying, ETSI is required
19 if they offered them on FRAND terms?

20 MR. YOUNG: ETSI requires -- yes, you're right,
21 your Honor.

22 THE COURT: So if the ITC seems to be going
23 against you, can't you -- I don't mean is there a procedure
24 for you to provisionally pay the FRAND rate and then argue
25 later on that you've been extorted?

1 admitted, the patents are essential. The point is that
2 they said they are essential. And our Count VI asks for a
3 FRAND rate as to U.S. patents that have been declared
4 essential. That's up to Interdigital to decide whether to a
5 declared a patent essential. Certainly, in the litigation
6 they have alleged they are essential. That is the basis for
7 they're infringement claim. They told ETSI that they are
8 essential.

9 And we've asked this Court to -- will ask this
10 Court to set a FRAND rate for those patents. And we said
11 that we will pay that rate.

12 THE COURT: I guess there is also -- there are
13 about four of them here.

14 One of them is, Huawei is prepared to license
15 Interdigital's patents in China and elsewhere on FRAND
16 terms. And then the part that your opponent emphasizes is,
17 provided such patents are essential in Interdigital's right
18 to license is legitimate.

19 So even if they declare they are essential,
20 presumably, whether their right to license is legitimate is
21 not obvious?

22 MR. YOUNG: Well, the Chinese patents are
23 different. I want to deal with that separately. But as to
24 the U.S. declared essential patents that are the subject of
25 our proposed complaint, we do commit if this Court sets a

1 MR. YOUNG: Well, we don't have a FRAND rate
2 that's agreed at this point, your Honor. And, in fact,
3 our position is a FRAND offer has not been made at all.
4 There has not be no offer of the kind that has is
5 required.

6 I would say on the issue of ripeness or what we
7 have said in the past, I would simply point your Honor to
8 page 17 of Interdigital's brief in this case on this motion.

9 THE COURT: Which docket item is that?

10 MR. YOUNG: Actually, unfortunately, the copy I
11 have doesn't have the header on the top. 36.

12 THE COURT: Interdigital's brief. I've got
13 brief response to motions.

14 MR. YOUNG: It's number 36, your Honor.

15 THE COURT: I've got it. Page 17. What am I
16 looking at?

17 MR. YOUNG: And it says there, they quoted
18 several statements that come from our side. I can point you
19 starting at line 3, where it says, Huawei is willing to
20 agree to FRAND license terms with respect to essential
21 patents.

22 And the next line: Futurewei remains willing to
23 pay a FRAND license for essential patents in the United
24 States.

25 Now they say, well, what's essential we haven't

1 rate, that future rate, Huawei will pay that.

2 Now, the Chinese issue, the lawsuit, let me go
3 to that because Mr. Shulman has mentioned that.

4 As I mentioned --

5 THE COURT: Don't spend a lot of time on that.
6 Tell me what you need to.

7 MR. YOUNG: Okay. Well, that litigation does
8 seek to obtain a FRAND rate adjudication as to the Chinese
9 these patents. It doesn't go to the U.S. patents.

10 THE COURT: I don't think that's going to factor
11 into anything that I do.

12 MR. YOUNG: All right. There has been some
13 discussion about how a FRAND rate would be set, and I want
14 to answer some of your Honor's questions about that, at
15 least from our perspective.

16 THE COURT: I guess on the bigger point, do you
17 agree that you can't actually just decide a royalty without
18 deciding everything else, too?

19 MR. YOUNG: I think that, your Honor, a Court
20 would be able to decide the basic parameters. For example,
21 the scope of a license, which would be relevant to the
22 number, obviously. But as I mentioned earlier, in citing
23 the European cases, one of the important issues in the case,
24 in the litigation would be, well, is it sufficient to offer
25 only a worldwide portfolio and say, there it is, take it or

1 leave it, or is a more individualized country by country or
 2 even patent by patent setting of the rate essential?
 3 And that will have a very important effect
 4 obviously on the numbers that we discussed. And that's an
 5 issue that really can only be resolved by a court. The ITC
 6 is not going to set a rate. The ITC will simply say,
 7 whether we're exclude said or not and it will not set a
 8 rate. But we're coming to court for that. And we would
 9 want to do that to avoid the is harm that I mentioned
 10 earlier.

11 With respect to -- I think that's about all I
 12 have. That is one issue that I just want to flag. And I
 13 appreciate Interdigital's statement of willingness to have
 14 us file the Amended complaint.

15 Since we filed our motion, there have been
 16 additions to our affirmative defenses in the ITC that relate
 17 to the particular inequitable conduct, which is an issue
 18 that would remain stayed. But I just want it to flag it
 19 because I don't want to be stuck filing an answer here that
 20 is sort --

21 THE COURT: I take their concession to be that
 22 as long as you're not filing anything that changes the
 23 relative weights of the arguments you're making today, they
 24 don't really object; is that right?

25 MR. YOUNG: If anything that we change wouldn't

1 affect the FRAND issues.

2 THE COURT: If you file inequitable conduct,
 3 I'm in somewhere down the road, they will be moving to
 4 strike that. But that's litigation for another day;
 5 right.

6 MR. YOUNG: Correct.

7 THE COURT: Okay.

8 MR. YOUNG: Your Honor, thank you very much.

9 Oh, actually, there is one more thing.

10 If your Honor -- and we're here because
 11 Chancellor Strine asked us to come back here and see whether
 12 we could litigate these issues here.

13 THE COURT: I'm not going to give Chancellor
 14 Strine any advice.

15 MR. YOUNG: Understood. I understand that, your
 16 Honor.

17 I don't think -- if your Honor -- let me make
 18 the argument to you. If your Honor wishes to grant the
 19 discretionary stay motion that Interdigital has made, it's
 20 our position that that would not be a matter of some federal
 21 policy that would prevent a state court from acting.

22 And with that, I'll close.

23 THE COURT: Thank you.

24 MR. YOUNG: Thank you.

25 THE COURT: Mr. McMahon, do you want to take a

1 minute or two?

2 MR. MCMAHON: Yes, please, your Honor.

3 THE COURT: Go ahead.

4 MR. MCMAHON: I want to begin with the very
 5 definite statement. I don't know how to make it more
 6 definite than this.

7 We are aware of Rembrandt and we will not
 8 waffle.

9 THE COURT: All right. That's pretty definite.
 10 I'm not sure. I believe you. I don't know whether that
 11 means that -- but go ahead.

12 MR. MCMAHON: Well, to clarify, we're aware of
 13 what happened in Rembrandt. We are aware of the change in
 14 the parties' positions I don't know what more we could do to
 15 assure you that we will not change our position. If there
 16 is something that you would like us to do to provide
 17 assurance of that.

18 THE COURT: I think if we were going to having a
 19 hearing, I would want to have some kind of corporate
 20 resolution signed by your President Huawei and your client
 21 ZTE. You know, I would want to have something more than a
 22 lawyer's good-faith statement not under oath.

23 But in any event, I appreciate what you're
 24 saying. If we get to that point, we'll get to that point.
 25 But I understand you're representing that your client

1 will sign documents this way and that way, promising to
 2 comply.

3 MR. MCMAHON: Yes, that is right. We considered
 4 the issue very closely. We take this matter very seriously.
 5 And I'm here to make that representation, not just on my own
 6 thoughts, but based on consultation with my clients.

7 THE COURT: I figured as much.

8 MR. MCMAHON: The second point I would like to
 9 address is forum shopping. There has been a suggestion that
 10 defendants have been forum shopping.

11 THE COURT: You know, I appreciate why the
 12 plaintiff makes that argument. I'm not going to -- I don't
 13 think, other than, you know going to Chancery Court, going
 14 to Chinese court, that doesn't matter to me.

15 MR. MCMAHON: And my point is actually a
 16 slightly different one.

17 The plaintiff's selection of the ITC as a forum
 18 is enlightening. They chose a forum that has several very
 19 unique characteristics.

20 One is that it only issues an equitable remedy,
 21 an injunctive remedy, an exclusion order. Is this is a
 22 party that has made representations to undertake obligations
 23 to license?

24 The idea of an exclusion order and injunctive
 25 relief is inconsistent with an obligation to license. That

1 is the first point that is interesting about their choice of
2 the ITC as the place to litigate this.

3 The second point that is interesting is the ITC
4 cannot set a FRAND rate. So it's interesting that
5 Interdigital would go to the ITC to resolve a dispute that
6 comes up from their obligation to license these patents and
7 they chose the ITC.

8 THE COURT: The U.S. statute, more than one, I
9 guess, allows them to do this. In fact, I would imagine
10 kind of encourages them to do this?

11 MR. MCMAHON: The statute certainly permits
12 enforcement of patent rights on imported products. That's
13 absolutely true. But given the obligations -- choosing they
14 have a choice of forum, choosing that forum in this
15 situation is inconsistent with their obligations.

16 And I would submit that there is a reason
17 underlying that. There is a reason that chose that forum,
18 and that's because it provides leverage. The fact that they
19 can go to that forum which offers a exclusion order as a
20 remedy and no ability to set a FRAND rates puts us in an
21 extremely difficult position. And the closer we get to a
22 perspective exclusion order, the more that pressure
23 increases.

24 So the suggestion that most ITC cases settle in
25 a remedy phase or shortly after and never make it back to

1 District Court, there's a reason for that. The exclusion
2 order is an extremely powerful remedy, and one that is
3 unfair and should not be permitted when there is an
4 underlying FRAND obligation.

5 It's the equivalent of negotiating with a
6 gun to your head. You simply don't have a choice. It
7 is not an arm's length, equal position type of negotiation.
8 That is why we're trying to come back here to a court that
9 actually has the power to address the FRAND rate and to
10 make that determination, to resolve what we view as a
11 contractual dispute, and a contractual dispute that would be
12 dispositive of all the disputes between in this Court and at
13 the ITC.

14 Another point about the ITC is that its decision
15 is not binding at the end of the day. There maybe some
16 dispute about that, but as far as we can tell, the dispute,
17 the decision on FRAND issues would not be binding, and we
18 would expect that this issue will end up back here before
19 your Honor.

20 We're just trying to fast-track it and address
21 that issue with you first, because it will be dispositive of
22 the other points.

23 THE COURT: Even though you think the way -- I'm
24 going to say, you moved to stay this case; right?

25 MR. MCMAHON: We did. We moved to stay the

1 infringement and invalidity.

2 THE COURT: Right.

3 MR. MCMAHON: We moved to stay the issues that
4 are truly duplicative of what is happening at the end.
5 And we haven't change our position on that. We want the
6 issues to be stayed.

7 THE COURT: All right.

8 MR. MCMAHON: On the question of 15, Mr. Shulman
9 may be right. There are terms other than just a number.
10 It may not be simply a number. But it's not a question of
11 47 pages of terms that we would be asking your Honor to
12 decide.

13 Just by way of example, you might negotiate
14 a license agreement that has a running royalty where it's
15 just --

16 THE COURT: A running what?

17 MR. MCMAHON: A running royalty where there is a
18 monthly or quarterly or an annual payment paid made based on
19 sales during that time period at a fixed percentage,
20 whatever that percentage maybe, or you could negotiate a
21 license that is a lump sum, a paid-up license where the
22 licensee pays a fixed amount, one payment, and they are
23 licensed for the rest of the product's life.

24 So there are different ways to construct the
25 financial terms of the licensing agreement, and some of

1 those might be in play. But we're not talking about
2 fighting about every paragraph of a 47-page document to
3 decide what's fair, reasonable and nondiscriminatory.
4 It's a limited universe of issues that would be in play
5 here.

6 THE COURT: Okay.

7 MR. MCMAHON: The question came up about what
8 would happen if the ITC issued an exclusion order. Could we
9 come back to you at that point and resolve the FRAND rate at
10 that point?

11 Procedurally what happens, the ITC is not an
12 enforcement agency. Customs is the enforcement agency. The
13 ITC has a fairly narrow statutory mandate to identify
14 unfair trade practices as they apply to imports and to issue
15 orders to remedy those.

16 The issues go to Customs and Customs begins to
17 stop products at the border. That's when the irreparable
18 harm to ZTE (USA) will come into play.

19 And even if we were able to then negotiate with
20 Interdigital and change our position at that point and say,
21 you know, that rate that you offered to us before was
22 acceptable, we're willing to pay the now.

23 As Mr. Young said, who knows whether they would
24 be willing to do that. They might suddenly complaining
25 their demand. They might drag their feet. They may use all

1 types of tactics to leverage the fact that we are not
2 stuck and unable to import during that time. And Customs is
3 going to continue excluding products until told otherwise,
4 which is going to require an additional order from the
5 International Trade Commission, instructing Customs to lift
6 the exclusion order.

7 So the point of that is it is not something that
8 can happen in a day or a week. It's a process that would
9 take a lot of time. During that time --

10 THE COURT: Presumably, the ALJ's decision will
11 give you some hint as to where -- I mean, is the ALJ's
12 decisions in these things usually upheld through the review
13 process?

14 MR. MCMAHON: I think it is a statistic -- I've
15 certainly seen ALJ's decisions change in a due process.
16 It's very common for the parties to petition for review. It
17 certainly happens that the Commission will adopted part of
18 the ALJ's findings and not other parts. The Commission has
19 definitely reversed ALJ's --

20 THE COURT: It sounds like based on what I've
21 been told, that the initial determination by it ALJ will be
22 in February, a year from now, nearly a year from now.

23 And I take it that you can pretty easily keep
24 any exclusion order from being entered through June 28th of
25 2013; is that right issues?

1 has all sort of flexibility in entering injunctions and
2 crafting equitable relief. But none of that would do us
3 any good if we are subject to a an exclusion order at the
4 time that we are standing before you, arguing about what the
5 FRAND rate should be.

6 THE COURT: No. That was sort of in response to
7 Mr. Young saying, well, even if we win, somebody might be --
8 I forget exactly how it was phrased.

9 So I appreciate what you say.

10 MR. MCMAHON: The only other thing I would say
11 is that the -- we are pursuing a FRAND advance at the ITC,
12 and certainly we are challenging all sorts of aspects of
13 Interdigital's claims. The question of essentiality came
14 up.

15 We're challenging a lot of different aspects.
16 We're pursuing alternative legal theories, which is
17 certainly every party's right in litigation.

18 The focus here is a business solution that can
19 undercut and bring all of that to an end. So the fact that
20 we're challenging certain issues in the ITC does not lessen
21 the fact that we are interested in a license and willing to
22 pursue that here. And we see that as the most he efficient
23 and quickest resolution of these disputes.

24 Now, Interdigital would say that we somehow
25 need to prove essentiality here in order to establish our

1 MR. MCMAHON: That is most likely, as I believe
2 it was Mr. Young who stated that it's possible the exclusion
3 order could enter earlier if the Commission decided not to
4 review the ALJ's decision. But in most cases, the exclusion
5 order would take effect very closing to the target date,
6 which is June 28th, 2013.

7 THE COURT: Okay.

8 MR. MCMAHON: So in terms it of timing, I think
9 when this matter was presented to Judge Strine, the ITC was
10 operating under a different schedule. And the hearing at
11 that time had been schedule will for June.

12 So Chancellor Strine's comments on the record
13 about the feasibility of addressing these issues before the
14 hearing were with that context in mind, that we were looking
15 at a June hearing. That has been changed again. The
16 hearing is now set to begin in late October. And I don't
17 know that we view that necessarily as the deadline for
18 addressing these issues.

19 The real deadline, the real point where
20 irreparable harm will take effect is the target date,
21 perhaps a little bit earlier than the target date, but in
22 all likelihood, the target date. And that's the scheduling
23 objective that we're aiming for here and would like your
24 Honor to take into account.

25 One last point on that issue is that your Honor

1 right to a FRAND on license. I would say that's not true.
2 Interdigital has represented that its patents are essential.
3 And we're willing for purpose of this proceeding to take
4 that representation at its face. We're not going to
5 challenge that here. And I don't suspect that they would
6 challenge that here.

7 So that is not an issue that should be in
8 dispute before your Honor in setting a FRAND rate.

9 At the ITC, there are a lot of issues that will
10 be in dispute, and the FRAND defense is one of them that we
11 will be asking the ITC to consider. But bear in mind, the
12 ITC cannot set the rate. So at best, the ITC can look at
13 the offers, if any, that Interdigital has made at that time
14 and give it a thumbs up or a thumbs down. Say, I think that
15 might be FRAND. Close enough. It's in the ballpark.

16 That's not the way this is supposed to work. We
17 come at this as a negotiation. Each side has their
18 position. We would present evidence to you on that, and you
19 would be in a position to judge what the right terms should
20 be. Is Interdigital right? Is ZTE (USA) right? Is there
21 something in the middle that is that right?

22 And you would have the power to set that, to
23 select something that is different than what other parties
24 proposed. The ITC will not have that power. The ITC will
25 only be able to say yes or no. And that's not the way we

1 should be forced to present this issue.

2 If your Honor has no other questions, I can
3 conclude.

4 THE COURT: Okay. Thank you.

5 MR. MCMAHON: Thank you, your Honor.

6 THE COURT: All right. It seems like it's
7 narrowed down to the Court's discretionary power to grant
8 the stay. And it appears as those there is no actual
9 dispute of the four factors that are listed, the least in
10 one instance in N-Cube Corporation versus Sea Change
11 International, Inc., which is 2010 Westlaw 226 6335 from the
12 District of Delaware are the four factors that the Court
13 would consider.

14 I think three of the factors clearly favor
15 granting a discretionary stay; that is, whether -- which are
16 the last three factors, whether a stay will simplify the
17 issues of the trial in the case.

18 I think the ITC resolution of all of the -- you
19 know, the two cases overlap 98 percent. The only thing that
20 is not overlapping is this issue about a Declaratory
21 Judgment setting a FRAND royalty. At least that's what the
22 counterclaim says.

23 The questions of validity of the patents,
24 infringement of the patents, what issues are truly in
25 dispute, all of those things would be most likely simplified

1 proceedings work, or it is possibility that there will be an
2 order of exclusion would give essentially too great leverage
3 to the plaintiff to set in what I'm sure will be continuing
4 discussions between the parties as to what the FRAND rate
5 should be.

6 The combination of essentially -- of having
7 patents that, while I have no idea whether they are valid
8 patents or whether they are infringed patents, I gather are
9 essential because the plaintiff has declared them essential.

10 And while I think a stay might give the
11 plaintiff, you know, additional bargaining power, I think in
12 balancing everything together, that the most likely effect
13 of granting a stay is that the parties will resolve an ITC
14 proceeding, which I take to be one of the reasons why you
15 have ITC proceedings and the mandatory stay.

16 So I'm going to grant -- so I'm going to deny
17 the motion to lift of the stay as to the sixth counterclaim
18 based on the -- so I'm going to deny the motion. I'll enter
19 a stay.

20 I don't actually see what particularly under
21 those circumstances, what particular advantage the
22 defendants get out of filing answers now. And just as they
23 have decided to amend things since they proposed the answers
24 that they proposed, they may decide to amend things further
25 down the road.

1 and narrowed by the ITC proceedings. That's not even
2 counting the possibility the ITC proceedings would mean that
3 in the end, nobody ever came back here for anything.

4 Discovery in this case here has not started.
5 Discovery is ongoing in the ITC case. And there has been no
6 trial date set here. I mean, the defendants, ZTE and Huawei
7 moved for the stay before filing an answer. And so this
8 case is in its infancy, essentially.

9 So I think those three greatly favor entering
10 the discretionary stay. The thing that I've been trying to
11 think about is the first factor, whether a stay would unduly
12 prejudice or present a clear tactical advantage to the
13 nonmovant, but really, I think the movant the nonmovant the
14 in this case is kind of reversed.

15 It's kind of an unusual procedural posture. The
16 defendants did move for a mandatory stay. Now they are
17 moving to essentially lift the stay. But in effect, it's
18 the plaintiff who is moving to stay the one issue that
19 really wasn't covered by the mandatory stay in the first
20 place.

21 And so the only thing that I can think of that
22 is at issue about unduly prejudicing or presenting a clear
23 tactical advantage to the plaintiff is this question that
24 Mr. McMahon has -- and, to some extent, both counsel, the
25 focusing in on the possibility that the way the ITC

1 So, while I appreciate the plaintiff's
2 concessions that they are not going to be sticklers for
3 detail in terms of whether or not they can file an answer,
4 it seems to me that it is better that there just be a stay
5 and they do not file an answer. And at the point where the
6 stay is lifted, presumably you'll be ready to go with the
7 answer that at the time, the answer or answers that you
8 would want to file.

9 So I'll enter an order to this effect.

10 And I do appreciate the arguments. It has been
11 very informative. Everybody is focused in on the issues.

12 So that's what I'm going. And so we're in
13 (Counsel respond, "Thank you, your Honor.")
14 (Hearing concluded.)

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