

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

**CERTAIN ELECTRONIC DEVICES,
INCLUDING WIRELESS
COMMUNICATION DEVICES,
PORTABLE MUSIC AND DATA
PROCESSING DEVICES, AND TABLET
COMPUTERS**

Investigation No. 337-TA-794

**SAMSUNG'S REPLY TO APPLE AND THE STAFF'S SUBMISSIONS IN
RESPONSE TO THE COMMISSION'S MARCH 13, 2013 NOTICE ON REMEDY
AND THE PUBLIC INTEREST
[PUBLIC VERSION]**

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[REDACTED]

[REDACTED]

[REDACTED]

Exhibit P – Jury Verdict Form, Apple Inc. v. Samsung Elecs. Co., Ltd., Case No. 11-cv-01846-HK (N.D. Cal. 2012), Dkt. 1931 (Excerpted)

Exhibit Q – Order, Apple Inc. v. Samsung Elecs. Co., Ltd., Case No. 11-cv-01846-HK (N.D. Cal. 2012), Dkt. 2219

[REDACTED]

[REDACTED]

INTRODUCTION

“Apple should not have to pay any royalty at all.” That is how Apple ends its submission. And that is why the parties have been unable to negotiate a license to Samsung’s declared essential UMTS patents. Two and a half years have now passed since Samsung and Apple first met to discuss a license to their respective patent portfolios and Apple’s fundamental position remains unchanged. Apple is unwilling to commit to pay any royalties to Samsung for rights to Samsung’s declared essential UMTS patents. As Samsung’s initial response to the Commission’s Questions demonstrated, Samsung has worked ceaselessly to offer terms to Apple that beneficial to both parties, but Apple has rebuffed those efforts, [REDACTED] [REDACTED]. (Samsung Br. at 21.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In these unfortunate circumstances, Samsung must continue pressing forward with this case.

Apple’s responses to the Commission’s questions confirm that no public interest considerations exist warranting preclusion of remedial relief in this investigation. Apple addresses only two of the four public interest factors: competitive conditions and impact on U.S. consumers. First, Apple makes the unsupported claim that the proposed remedial orders would threaten the “competitive balance” of the U.S. cellular market. The facts do not support such hyperbole. [REDACTED]

[REDACTED]

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Apple’s argument with respect to U.S. consumers is even less compelling. Focusing on a nebulous and unquantifiable group of supposedly “GSM-reliant” consumers, Apple claims that this subset of U.S. consumers would be harmed because devices offered by other manufacturers are not “adequate substitutes” for the iPhone 4, thus leaving them without access to suitable entry-level devices. But even under its own paradigm, Apple could lower the prices of later generation devices to benefit consumers. Apple’s unwillingness even to consider foregoing some profit to alleviate this alleged consumer impact speaks volumes about the merits of its argument.

RESPONSES TO COMMISSION QUESTIONS

Complainants Samsung Electronics Co., Ltd. and Samsung Telecommunications America, LLC (collectively, “Samsung”) respectfully submit their reply to Respondent Apple Inc. (“Apple”) and the Office of Unfair Import Investigations’ (“Staff”) submissions.¹

I. QUESTION 1: QUANTITATIVE AND QUALITATIVE IMPACT

The parties agree that the proposed remedial relief would affect only a small number of devices – [REDACTED]. The parties disagree, however, as to the potential *qualitative* impact of exclusion. As discussed below, Apple fails to cite any evidence that the proposed remedial relief would have a significant impact on public health and welfare, competitive conditions or U.S. consumers.

A. The Parties Agree The Quantitative Impact Of Remedial Relief Would Be Small

In its initial response to Question 1, Samsung relied on the most-recent data in its possession as well as publicly available sources in estimating that an exclusion order and cease and desist order currently would impact approximately 1.4 percent of smartphones and 2.7

¹ The parties’ initial submissions will be referenced herein as follows: “Samsung Br.” (Doc. ID 506951), “Apple Br.” (Doc. ID 506954) and “Staff Br.” (Doc. ID 506927).

percent of tablets imported and sold in the United States. (Samsung Br. at 5-7). [REDACTED]



[REDACTED]

B. Apple Fails To Cite Any Evidence That Remedial Relief Would Have A Significant Qualitative Impact

Apple contends that any remedial order affecting the iPhone 4 (UMTS) and iPad 2 (UMTS) “would adversely affect both competitive conditions in the U.S. cellular market and U.S. consumers.” (Apple Br. at 13).³ In particular, Apple claims that the “immediate exclusion of the iPhone 4 (AT&T) and iPad 2 (AT&T) would reduce the number of popular models that GSM carriers can sell” (Apple Br. at 13), thereby “threatening the competitive balance among the ‘Big Four’ nationwide carriers.” (*Id.* at 14). Apple further claims that U.S. consumers would be harmed because “[o]ther devices available to consumers at comparable price points for the GSM network, such as certain Samsung smartphones, are not substitutes for the ‘348 Accused Products’” (Apple Br. at 15).

Apple fails to cite any evidence to support these claims, choosing instead to rest on attorney argument and the mistaken view that it can avoid remedial relief simply because of its brand popularity. Despite Apple’s efforts to suggest otherwise, this investigation does not raise

significant concerns for the U.S. cellular market or U.S. consumers that would justify precluding remedial relief. In reality, the proposed remedial relief would cover a small number of legacy devices that could be replaced by later generations of devices from Apple or other companies.

1. Competitive Conditions In The U.S. Cellular Market

There is no dispute that competition among carriers fosters innovation, lower prices and expanded network coverage. *See Certain Personal Data and Mobile Communications Devices*, Inv. No. 337-TA-710, Comm'n Op. at 80-81 (Dec. 29, 2011) ("*Mobile Communications Devices*"). Nor is there any dispute that the Commission should carefully evaluate the potential impact of its remedial orders on relevant markets (e.g., the U.S. cellular market). But Apple's attempt to apply these general principles here is unavailing and should be rejected.

Apple relies on the Commission's Opinion in *Mobile Communications Devices* to suggest that if carriers such as AT&T, T-Mobile, GCI and CT Cube are unable to offer iPhone 4 (UMTS) and iPad 2 (UMTS) devices, the competitive conditions in the U.S. cellular market will be threatened. (Apple Br. at 14). This reliance on *Mobile Communications Devices* is misplaced. In that investigation, the Commission considered whether an exclusion order covering all HTC Android devices, including nascent 4G devices, would have an adverse impact on competitive conditions in the cellular market. *See Mobile Communications Devices*, Comm'n Op. at 78-83. Relying on comments from T-Mobile and statements from the Department of Justice and other governmental bodies, the Commission found that because of T-Mobile's role within the cellular market as a pioneer in the roll out and marketing of 4G services,⁴ immediate exclusion of HTC

³ Apple does not contend that such remedial relief would adversely affect public health or welfare. (Apple Br. at 13).

⁴ The iPhone 4 (UMTS) and iPad 2 (UMTS) are 3G devices.

Android devices would have a substantial impact on T-Mobile's competitiveness and would not be in the public interest. *Id.* at 80-81.

Here, unlike *Mobile Communications Devices*, Apple has not established that immediate exclusion of the iPhone 4 (UMTS) or iPad 2 (UMTS) devices would significantly impact the competitiveness of any of the four carriers selling these devices or the roll out of new cellular technology.⁵ (Staff Br. at 5-6). [REDACTED]

[REDACTED]

Apple's current position directly contradicts the competitive conditions arguments its made in *Mobile Communications Devices*. Previously, Apple argued that because HTC's infringing products "comprise only a small portion of the mobile communications industry, their exclusion will have no material impact on competitive conditions." (Doc. ID 462640 at 12). There, the devices at issue accounted for approximately 14 percent of postpaid U.S. smartphone sales. (Doc. ID 461742 at 14). [REDACTED]

⁵ [REDACTED]

⁶ Neither GCI nor CT Cube offer tablets. *See Phones & Devices*, GCI, <http://www.gci.com/wireless/phones-devices> (last visited April 9, 2013); *Phones*, WEST CENTRAL WIRELESS, <http://www.westcentral.com/phones.html> (last visited April 9, 2013).

⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. U.S. Consumers

Apple offers two arguments to support its claim that U.S. consumers would be adversely affected by the proposed remedial relief: (1) consumers “reliant on GSM technology” would be denied access to an entry-level iPhone device;⁸ and (2) consumers would be denied access to repair services. (Apple Br. at 15-16). Both of these arguments are without merit and should be rejected.

(i) Consumers “reliant on GSM technology”

Apple’s first argument focuses solely on U.S. consumers who are seeking a new entry-level iPhone⁹ and who do not have access to CDMA networks. (Apple Br. at 15, 18). Specifically, Apple states that “[a] consumer may be dependent on a particular network based on the available quality of reception, or because of contractual service term requirements.” (Apple Br. at 18). While Apple does not attempt to quantify the number of consumers who would fall into this narrow category, the evidence suggests that if such a group exists, it is very small.

CDMA networks cover most of the United States, with Verizon and Sprint offering cellular service to 290 million and 273 million people, respectively. *See Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including*

⁸ Apple does not contend that U.S. consumers would be adversely impacted if iPad 2 (UMTS) devices are excluded. (Apple Br. at 15).

⁹ Current iPhone customers would not be affected by the proposed remedial relief.

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Commercial Mobile Services, Sixteenth Report, Fed. Comm. Commission at 7-8 (Mar. 21, 2013).

Both carriers offer the CDMA version of the iPhone 4. (Samsung Br., Ex. H ¶¶ 9-10). In addition, several other smaller CDMA carriers offer the CDMA version of the iPhone 4. (*Id.*) Inasmuch as Apple concedes that the iPhone 4 (CDMA) is “identical” to its UMTS counterpart but for its baseband processor and network (Apple Br. at 14-15), U.S. consumers would have the option to purchase the iPhone 4 (CDMA) if the proposed remedial relief is issued.

For the AT&T, T-Mobile, GCI and CT Cube customers Apple dubs as “GSM-reliant” (i.e., do not have access to CDMA networks), all four carriers offer, or will soon offer, UMTS versions of the iPhone 4S and iPhone 5 that incorporate a Qualcomm baseband processor for cellular connectivity. (Samsung Br., Ex. H ¶ 9). Apple contends that because of their “ease of interoperability with other Apple devices,” these two devices are the *only* adequate substitutes for the iPhone 4 (UMTS). (Apple Br. at 15-16, 18). As currently configured, these two devices would not be subject to an exclusion order or cease and desist order and would be available to U.S. consumers seeking to purchase a new iPhone device.

Apple attempts to counter this fact by claiming that “consumers cannot buy these devices [iPhone 4S and iPhone 5] at the same low price point [as the iPhone 4].” (Apple Br. at 16, 18). However, Apple controls the price for each of its devices and has the ability to lower the prices of the iPhone 4S and iPhone 5 if the proposed remedial relief is issued.¹⁰ (JX-0037C at 61-62 (stating that Apple sets the minimum advertised price for its devices)). If the Commission finds a violation and issues an exclusion order and cease and desist order, any adverse impact caused by the “elimination of an entry-level device . . . for consumers reliant on GSM technology”

¹⁰ If the iPhone 4 (UMTS) is excluded, Apple can lower the price of its iPhone 4S (UMTS), which is consistent with [REDACTED]. (JX-0037C at 25-27; Samsung Br., Ex. H ¶ 9).

would be due to Apple's desire to maintain high profit margins on its iPhone 4S and iPhone 5 devices.

(ii) Repair and service exemption

Although Apple argued against a repair and service exemption under similar circumstances in *Mobile Communications Devices* and *Certain Electronic Digital Media Devices and Components Thereof*, Samsung agrees that a limited exemption would be appropriate in this investigation. See Inv. No. 337-TA-710, Comm'n Op. at 72; Inv. No. 337-TA-796, Recommended Determination on Remedy and Bond at 2-3 (Nov. 7, 2012). Consistent with the Commission's Opinion in *Mobile Communications Devices*, Apple should be permitted to import and distribute refurbished devices to consumers as replacements under warranty or an insurance contract. Comm'n Op. at 73. However, Apple should not be permitted to "call new devices 'refurbished' and to import them as replacements." *Id.*

II. QUESTION 2: AVAILABLE 3G AND 4G ALTERNATIVES

All three parties agree that in the event the Commission issues remedial orders, numerous 3G and 4G devices will remain available for U.S. consumers. (Samsung Br. at 8-10; Apple Br. at 17-18; Staff Br. at 7-10).

Notwithstanding the admitted availability of alternative 3G and 4G devices, Apple argues that the *only* potential substitutes for the iPhone 4 (UMTS) and iPad 2 (UMTS) are the later generation Apple devices. (Apple Br. at 18-19 ("A Samsung phone or tablet would not be an acceptable substitute for those customers.")). As explained above in regard to Question 1, the current configurations of Apple's later generation devices will not be impacted by the proposed remedial relief.

III. QUESTION 3: TAILORING A REMEDY

Apple requests that the Commission tailor any remedial relief to: (1) exempt Apple iPhones and iPads containing a Qualcomm baseband processor; (2) delay the effective date by five months; and (3) exempt repair, service and replacement devices. (Apple Br. at 19). Each of these requests is addressed below.

A. An Express Exemption For Devices Containing Qualcomm Baseband Processors Is Unnecessary And Subject To Abuse

Prior to filing its brief on April 3, Apple argued that a certification provision was sufficient to assist Customs in enforcing any remedial order. (Staff Br. at 13 n.13). Samsung agreed that a certification provision would be appropriate. (Samsung Br. at 11). Now, Apple simply declares that products containing [REDACTED] . . . [and, therefore] any remedy should expressly carve out Apple products containing a Qualcomm baseband processor.” (Apple Br. at 19). This type of carve-out is unnecessary and is inconsistent with long-standing Commission practice. (Staff Br. at 11-13).

Apple contends that “[a]ny confusion over the applicability of a remedial order . . . has the potential for causing a significant adverse impact on consumers and competition.” (Apple Br. at 19). This statement is likely true for any exclusion order. Apple offers no explanation why this case presents any special concerns, particularly where Apple imports a limited number of mobile phone models. Rather, it refers to *Certain Power Supply Controllers and Products Containing Same*, in which the complainant withdrew its allegations with respect to particular products, which were subsequently carved-out of the exclusion order. Inv. No. 337-TA-541, Comm’n Op. at 4-5 (Aug. 29, 2006) (“*Power Supply Controllers*”). Unlike *Power Supply Controllers*, Samsung has not moved to terminate the investigation with respect to any particular products.

Moreover, as discussed in regard to Question 4, Apple’s requested carve-out is overly broad in that it is technically possible in so-called “world phones” for a mobile device to contain more than one baseband processor. Thus, a particular device could incorporate both a Qualcomm baseband processor as well as a non-Qualcomm baseband processor, and still be subject to the proposed remedial orders.

B. A Delay Is Unwarranted In This Investigation

Apple devotes less than one page of its brief to explain why any remedial orders issued in this investigation should be delayed. The reason for this brevity is simple – [REDACTED]

[REDACTED]

It provides no factual justification for a delay and its statements concerning the availability of substitutes directly refute its argument favoring a delay.

Apple’s request is premised on the unsubstantiated claim that delaying the effective date of an exclusion order would allow the affected wireless carriers to transition to alternative devices and mitigate the negative impact on the competitive conditions in the cellular market. (Apple Br. at 20-21). The Staff also suggests that a “delayed effective date could also allow Apple or other manufacturers time to develop comparable noninfringing products before the exclusion order takes effect.” (Staff Br. at 7). But Apple has consistently taken the position that the *only* substitutes for the iPhone 4 (UMTS) and iPad 2 (UMTS) are later generation Apple devices that each of the affected carriers already sells or will imminently sell. (Apple Br. at 15-16, 18). Accordingly, if Apple is correct, there would be no need for carriers to test, qualify and “transition to” new devices, because the only devices that can truly replace the iPhone 4 and iPad 2 are already being offered.

[REDACTED]

[REDACTED]

██████████ (Apple Br., Ex. A ¶ 14; Ex. B ¶ 13). Again, this contradicts Apple’s position regarding available substitutes and cuts against the carriers’ claim that the iPhone devices

██████████ (Apple Br., Ex. A ¶ 11-12; Ex. B ¶ 8-10). Moreover, both carriers omit the fact that they each offer numerous smartphone devices, including various devices at the same price point as the iPhone 4.¹¹ (Samsung Br., Ex. H ¶¶ 22-30; *Phones & Devices*, GCI, <http://www.gci.com/wireless/phones-devices> (last visited April 9, 2013); *Phones*, WEST CENTRAL WIRELESS, <http://www.westcentral.com/phones.html> (last visited April 9, 2013)). And, neither GCI nor CT Cube contend that the manufacturers of these alternative smartphones would be unable to replace the ██████████ quantities of iPhone 4 devices they sell.¹²

For these reasons, Apple’s requested delay is not warranted.

C. Any Repair And Service Exemption Should Be Limited To Refurbished Devices

As detailed above with regard to Question 1, consistent with the Commission’s Opinion in *Mobile Communications Devices*, Apple should be permitted to import and distribute refurbished devices to consumers as replacements under warranty or an insurance contract. Comm’n Op. at 73. However, Apple should not be permitted to “call new devices ‘refurbished’ and to import them as replacements.” *Id.*

IV. QUESTION 4: COVERED DEVICES AND NETWORKS

Question 4 is simple and straightforward: would a remedial order issued by the Commission cover (a) Apple products that operate on other wireless networks in the United

¹¹ GCI offers a “refreshed” version of the iPhone 4S for free with a two-year contract. See *Phones & Devices*, GCI, <http://www.gci.com/wireless/phones-devices> (last visited April 9, 2013)

¹² In *Mobile Communications Devices*, T-Mobile affirmatively stated that its other suppliers could not meet demand for comparable smartphones. (Doc. ID 460918 at 5-6 (“Due to

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States, and (b) later generation Apple products. *See* Commission Notice at 3. Rather than answer the question posed, Apple devotes numerous pages to make an inapplicable waiver argument (Apple Br. at 4-8), re-argue its failed license and exhaustion defenses (*id.* at 2-3) and offer a new non-infringement argument (*id.* at 4). Stripped of these extraneous arguments, Apple’s response to Question 4 is that a remedial order should not extend to “Apple products that are designed to operate on CDMA wireless networks in the U.S.” or “any later generation Apple products.” (Apple Br. at 2). Samsung disagrees that Apple’s response to Question 4 accurately describes the scope of any potential remedial order. In particular, to the extent any Apple devices (including later generations) are altered or imported to incorporate a non-Qualcomm baseband processor with UMTS functionality, they would be subject to the proposed orders.

On April 9, 2013, Apple contacted Samsung and requested that Samsung agree to the following language:

Samsung, Apple, [and the Staff] agree that Apple products (1) containing a Qualcomm baseband processor or (2) not containing a baseband processor were not accused of infringing the ‘348 patent in Inv. No. 337-TA-794, and will be not be subject to any remedial order that issues solely based on that patent. Such Apple products include (a) iPad2 3G (CDMA version), (b) iPhone 4 (CDMA version), (c) iPhone 4S, (d) iPad third generation, (e) iPhone 5, (f) iPad fourth generation, (g) iPad mini, and (h) the WiFi-only versions of all iPads and the iPad mini.

Given the timing of Apple’s request, Samsung was unable to fully consider Apple’s proposal prior to the filing of this brief.

Apple’s proposed language suffers from the same defects as its proposed carve-out. The language is overly broad because it states that any Apple product that merely contains a Qualcomm baseband processor “will not be subject to any remedial order that issues solely based

the volume of devices that HTC currently supplies for T-Mobile, it would be nearly impossible for other suppliers to fulfill the demand in the short term . . .”).

on that patent.” Samsung’s position is that Apple devices that *exclusively* contain Qualcomm baseband processors were not accused of infringing the ‘348 patent. A device could incorporate multiple baseband processors, including a Qualcomm baseband processor. Apple’s language is also overly broad because it would exempt device models, regardless of configuration.

V. QUESTION 5: NEGOTIATION HISTORY

Apple’s characterization of the parties’ license negotiations cannot be reconciled with the actual evidence of the parties’ correspondence and meetings. Apple asserts, among other things:

a) that “Samsung filed its complaint before making *any* offer specific to its declared essential patent portfolio or the ‘348 patent” (Apple Br. at 1-2); (b) that “Apple has put forward empirically-based and transparent FRAND proposals that Samsung has largely ignored” (*Id.* at 24.); (c) [REDACTED]

[REDACTED] . at 23); and (d) that “Samsung deprived Apple and the Staff of the opportunity to take discovery and present evidence on these new developments.” (*Id.*) Each of every one of these assertions is contradicted by the record.

Samsung offered Apple a license to its declared essential patents long before Apple chose to initiate litigation between the parties and has since repeatedly offered Apple newer and increasingly more favorable terms. Whereas Samsung has tried to bring the parties together,

[REDACTED]

[REDACTED] Two-and-a-half years after negotiations began, Apple continues to insist that “*Apple should not have to pay any royalty at all*” for unilateral

[REDACTED]

B. Apple Has Never Been Willing To Take a License On Any Terms

[REDACTED]

[REDACTED]

[REDACTED]

C. [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

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Apple also criticizes Samsung for “changing positions” with respect to its license terms while simultaneously asserting that Samsung “refused to budge” on the initial terms it offered for a unilateral license limited to its declared essential UMTS patents. (Apple Br. at 23, 25.) The fact is, Samsung has modified its proposed terms over time in the hope of reaching agreement with Apple. Apple fails to grasp that ETSI encourages its members to negotiate licenses and that “negotiation” typically involves each party modifying its position to reach consensus on FRAND license terms. (*See, e.g.* CX-0441.0012 at §§ 4.1, 4.4 (“ETSI expects its Members (as well as non-ETSI Members) to engage in an impartial and honest Essential IPR licensing negotiation process for FRAND terms and conditions.”); CX-1503C at Q&A Nos. 4, 7 (“Any firm interested in obtaining patents declared essential . . . has to enter into negotiation with the companies holding patents in order to obtain licenses for the use of the patented technology included in, and essential for the implementation of an ETSI STANDARD.”); Tr. at 1442:17-1443:14.)

Whereas Samsung has continually proposed different deal structures with progressively better overall terms for Apple in an attempt to make such a license more attractive ([REDACTED]), [REDACTED], [REDACTED]

[REDACTED] (Samsung Br. at 14-21; *see* Sections VII-VIII, below.) This is hardly the FRAND negotiation process that ETSI expects of its members and thus it is easy to see why the parties have not agreed on terms and conditions that are fair, reasonable, and nondiscriminatory within the meaning of Clause 6.1 of the ETSI IPR Policy.

D. Samsung’s Proposals Did Not Deprive Apple or the Staff of Discovery

Apple’s assertion that Samsung, by continuing to offer new and improved terms, somehow deprived Apple and the Staff of the opportunity to take discovery and present relevant evidence is astonishing. Is it truly Apple’s position that Samsung should not have attempted to

parallel litigation in the Northern District of California” (Apple PreHB at 164), Apple’s plan backfired because the Northern District of California jury rejected each and every one of Apple’s FRAND defenses and counterclaims. (See Ex. P (NDCA Jury Verdict).) Apple’s attempt to resurrect this aspect of its case at this belated stage through the very same experts who testified in California (*i.e.* Donaldson) and through new, undisclosed experts is highly unfair. (See *e.g.* Apple Br. at 30-39.) Apple waived its right to present these arguments and should not be permitted to rely on new evidence in support of them now.

VI. QUESTION 6: LICENSE SUMMARY

In challenging the merits of Samsung’s outstanding offer, as well as characterizing Samsung’s attempts to engage Apple in the negotiation process over the past two years, Apple relies almost exclusively on a declaration from Richard Donaldson, an expert Apple had previously retained for the Northern District of California case that was tried in August 2012, and who Apple could have retained and asked to opine in this co-pending case. As noted in the response to Question 5 above and Question 7 below, Apple has waived its right to assert these positions and should not be permitted to rely on his report now. Apple voluntarily chose to make Samsung’s proposed license terms the exclusive focus of the Northern District of California trial (Apple’s PreHB at 164) and should not be allowed to now undo that decision simply because the California jury rejected Apple’s defenses. (Ex. P (NDCA Jury Verdict).)

Samsung’s longstanding practice, consistent with industry practice, has been to license its declared essential patents as part of broad cross-licenses. (Samsung Ex. I.) Samsung has not refused to license its declared essential patents on a unilateral portfolio basis or refused to license the ‘348 patent individually. Rather, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Such portfolio licenses provide the licensee with all the rights it needs to manufacture and sell devices that implement the covered standard.

Samsung does not dispute that it has entered into numerous license agreements [REDACTED] that extend to the '348 patent. These agreements, [REDACTED], provide Samsung with rights to the other party's corresponding declared essential patent portfolio(s), further ensuring that healthy competition in the marketplace is not held up by the threat of litigation.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

If the Commission is inclined to consider Mr. Donaldson's declaration, despite Apple's conscious decision not to submit evidence from him or any other witness on the very same issues during the pendency of the case, [REDACTED]

[REDACTED]

[REDACTED]

VII. QUESTION 7: LICENSING TERMS

[REDACTED]

[REDACTED] Apple has no legitimate justification for its continuing refusal to take a license to Samsung’s declared essential UMTS patents on the terms that Samsung has made available. Consistent with the approach it has adopted since litigation between the parties first began, Apple has ignored that offer and has not taken any steps to meaningfully engage with Samsung to negotiate an actual license. As Apple’s own submission demonstrates (“Apple should not have to pay any royalty at all”), unless Samsung is willing to license Apple to its UMTS patent for free, Apple is not interested in such a license. (Apple Br. at 49.) This is hardly the good faith approach to license negotiations that ETSI requires of its members and underscores why the parties have been unable to resolve this dispute despite Samsung’s ongoing efforts to bring the parties together.

As for Apple’s constant criticism of Samsung’s prior negotiation positions, that line of attack is off the mark. In the litigation between Samsung and Apple in the Northern District of

California, Apple contended that Samsung's course of conduct in offering a license to its declared-essential patents, including its quotation of a percentage headline rate at Apple's request, was a breach of the ETSI IPR Policy. The jury rejected Apple's positions in their entirety and found that Samsung had *not* breached its obligations to negotiate FRAND licenses in good faith. (Ex. P (NDCA Jury Verdict).) The district court rejected Apple's contention that the jury erred as a matter of law. (Ex. Q at 29-30 (NDCA Order on Apple's JMOL Motion).) Similarly, ALJ Gildea rejected Apple's related unenforceability defenses, such as waiver, which were based on the same set of operative facts. ID at 469-70 ("The Administrative Law Judge concludes that the evidence does not support Apple's allegation that Samsung failed to offer Apple licenses to Samsung's declared-essential patents on FRAND terms. . . . Apple's evidence does not demonstrate that Apple put forth a sincere, bona fide effort to bargain with Samsung.")

A. The Issue Here Is Whether Samsung's Current Offer is Consistent With Its Obligation to ETSI and the Meaning of the ETSI IPR Policy

The issue before the Commission in the context of the public interest questions it framed is not whether Samsung breached its obligations to ETSI at some point in the negotiation process. As discussed above, the ALJ has already resolved that against Apple, just as the Northern District of California jury did, and those findings are not the specific subject of any of the Commission's questions. ID at 469-70; Ex. P. Rather, the issues that are the subject of Question 7 are what specific licensing terms are currently available to Apple and whether those terms are consistent with Samsung's obligations to offer terms that are fair, reasonable, and non-discriminatory within the meaning of ETSI's licensing policy. As Samsung demonstrated in its opening brief, and as Apple effectively concedes, those terms are FRAND.

[REDACTED]

C. Apple Should Not Be Permitted to Present New Arguments Regarding Issues That Ought to Have Been Raised During the Merits Phase of These Proceedings

By not raising at the hearing certain arguments and evidence that Apple now presents for the first time, Apple has waived its right to present those arguments. Although the Commission stated that the parties could submit sworn testimony or expert declarations if necessary, its request for additional submissions was narrowly focused on the issues of public interest, remedy and FRAND. *See* Comm'n Notice at 3. The Commission did not seek additional information on any other issues, stating that it "has invited briefing on only the discrete issues enumerated above. Other issues on review are adequately presented in the existing filings." *Id.*

Notwithstanding this clear directive, Apple took the Commission's request for written submissions as an invitation to reopen the record and inject new evidence and arguments on a wide range of issues including non-infringement and the alleged availability of alternatives to Samsung's patented technology. (*See e.g.* Apple Br. at 33-34.) This is improper and Apple's new arguments and evidence should be stricken. *See* Rule 210.45(c).

The rules governing ITC investigations require all evidence and arguments that are to be considered by the Commission to be disclosed well in advance of trial or they are waived. *See Certain Self-Cleaning Litter Boxes and Components Thereof*, 337-TA-625, Notice of Comm'n

13 [REDACTED]
[REDACTED]
[REDACTED] (Samsung Br. at 21-
22.) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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Determination to Review a Final Initial Determination In Part; Grant a Motion to Strike; And Set a Schedule for Filing Written Submissions on the Issues Under Review and on Remedy, the Public Interest, and Bonding (Feb. 9, 2009) at 3; *Certain Flash Memory Circuits and Products Containing Same*, 337-TA-382, Comm'n Op. (June 2, 1997) at 21 (“Even though our rules permit us to receive ‘submissions’ from the parties and other interested persons on remedy, the public interest, and bonding, our rules also make very clear that it is the ALJ who takes evidence or other information from the parties and other interested persons on questions of remedy and bonding, and to prepare ‘findings of fact’ to support his recommendations.”); Comm'n Rules § 210.13(b), §210.43(b)(2), §210.43(b)(3); §210.45(c); ALJ G.R. 7.2, 10.1.

Yet Apple now submits 15 declarations including purported evidence and arguments never before raised and only tangentially, if at all, connected to the topics at issue in the Commission's request, or rehashing arguments, such as invalidity, that have nothing to do with the Commission's questions. For example, Apple now submits a twenty-six page long expert declaration of Dr. James A. Davis to argue that the '348 patent is allegedly invalid over a certain Nokia proposal and that ETSI could allegedly have adopted that proposal on a royalty-free basis. (Apple Br. Ex. O, Expert Declaration of Dr. James A. Davis). But in his Initial Determination, the ALJ concluded that “there is no empirical support for Dr. Davis's conclusions” of invalidity regarding the 1998 Nokia Proposal.¹⁴ ID at 312. Instead, the Initial Determination found that the “countervailing testimony of Mr. Kang,” the '348 Patent inventor who testified that Nokia failed to set forth a viable TFCI codeword, was more persuasive than Dr. Davis' conclusions. ID at 281, 312.

¹⁴ The 1998 Nokia Proposal identified in Dr. Davis' Declaration is the precursor to the June 1999 Standard that Apple unsuccessfully argued at the Hearing invalidates the '348 Patent.

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Similarly, Apple now submits a declaration from a new expert, Wayne Stark, which also adds new opinions concerning the Nokia proposal as prior art, discussed a new method of valuation for the '348 patent, and included new expert testimony not subject to cross-examination about the relative benefits of TFCI encoding. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Apple's only witness on that topic at trial was Mr. Walker, whose testimony on that topic was limited and contradictory to this new testimony. (*See, e.g.*, Apple's PreHB at 32-33; Tr. at 1404-1451). Raising these issues at this late stage of the investigation after the record is closed is a violation of the rules, misleading, and the declarations should therefore be stricken.

Apple had a full and fair opportunity to present evidence that Samsung had not complied with its obligations to ETSI by failing to make available a license to the '348 Patent on FRAND terms and conditions. But Apple contended that "the Administrative Law Judge need not reach the issue of an appropriate FRAND royalty for Samsung's patents—which is a central subject in the parties' parallel litigation in the Northern District of California." (Apple's PreHB at 164.) Accordingly, Apple decided not to raise arguments regarding the merits of Samsung's license offers at the hearing, and the record on these issues is now closed.

Apple's attempt to belatedly supplement the record with new testimony regarding non-infringing alternatives to the '348 patent and the value of the '348 patent is particularly egregious. During the merits portion of this case, Apple identified a single expert on FRAND-related issues, Dr. Michael Walker, the former Chairman of the Board of ETSI. (Ex. R (Apple's

Expert Witness Identifications.) [REDACTED]

D. Even When Considered on the Merits, Apple’s Arguments Regarding the Ex Ante Value of the ‘348 Patent Are Flawed

Although Apple offers pages of new testimony to support its contention that Samsung’s declared-essential patent portfolio is of low value, its analysis does not in any way suggest that Samsung’s outstanding offer is inconsistent with its obligations to ETSI

[REDACTED]

15 [REDACTED]

also Section VII.C, *supra*. Apple's presumption that it would pay nothing for a substitute is based on the flawed and unproven presumption that there were cost-free alternatives available.

But Apple's own expert has [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Apple provides no actual evidence here that any of the proposed alternatives were royalty free. There is no analysis of the costs of implementing the alleged alternatives. The alternatives identified only deal with the patent in suit and not Samsung's other patents. There is also no economic analysis of potential changes in demand that would result from the substitution of one technology for another.

Further, Apple arrives at the unreasonable position that it should pay nothing for the simple reason that it would not have taken a license because it did not have to, obscuring the inquiry instead of applying it. (Apple Br. at 44-45). But as discussed above, Apple's position is waived. Indeed, Apple's arguments related to the appropriate royalty base are wholly irrelevant. As discussed above and in Samsung's initial submission, the royalty that Apple would pay based on Samsung's offer falls [REDACTED]

[REDACTED]¹⁶

Apple's contention that Samsung has taken inconsistent positions in different litigations on FRAND issues is meritless. (Apple Br. at 41-42). Ericsson is using the threat of an exclusion

¹⁶ Apple's argument that Apple products that use [REDACTED] are not being accused does not extend to Samsung's entire portfolio of SEPs.

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order to *avoid* good faith negotiations and thereby extract unreasonable terms (and there are two prior agreements between the parties). Whereas, here, Samsung has worked diligently to license its declared-essential patents to Apple despite its refusal to pay anything for that portfolio.

Apple has not shown any genuine interest in obtaining a license to Samsung's declared essential UMTS patents on any terms or conditions, other than for free. Apple actually asserts that under its analysis of the Georgia-Pacific factors, [REDACTED]

[REDACTED] Apple Br. at 45). Yet if there is one thing that the ETSI FRAND process requires, it is that members of ETSI are expected to work together in good faith to negotiate licenses to declared essential patents on fair, reasonable, and non-discriminatory terms and conditions. (*See, e.g.* CX-0899.0061 at 4.1, 4.4) ; Apple's absurd contention is that it is fair and reasonable to value Samsung's entire portfolio of declared essential UMTS at zero and refuse to pay a dime for rights to those patents. Apple's position is unsurprising as it has previously refused to be bound by the determination of a FRAND rate to be rendered by the District Court in the District of Wisconsin. Indeed, after insisting that the Wisconsin court expend the time and resources needed to set a FRAND rate, Apple announced in open court that it would only abide by that rate if it was below \$1. This caused the court to dismiss the case. *Apple Inc. v. Motorola Mobility, Inc.*, No. 3:11-cv-178-bbc , Doc. No 498 (Nov. 5, 2012 Minute Order). Apple raised its FRAND defenses in this Investigation and again in the Northern District of California trial and in both cases, Apple has lost on each and every such issue it tried to raise.

Given Apple's steadfast refusal to negotiate a license under Samsung's declared essential UMTS patents on any terms, Samsung respectfully submits that an exclusion order is warranted.

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CONCLUSION

For the foregoing reasons, and for the reasons detailed in Samsung's prior submissions, the Commission should issue an exclusion order and cease and desist order in this investigation because such remedial relief will not negatively affect the public interest.

Dated: April 10, 2013

Respectfully submitted,

/s/ S. Alex Lasher

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CERTIFICATE OF SERVICE

I, Carol Clark, hereby certify that on this 12th day of April, 2013, copies of the foregoing document were served upon the following parties as indicated:

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