

PUBLIC VERSION

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

**RESPONDENT APPLE INC.'S MOTION FOR STAY
OF REMEDIAL ORDERS PENDING APPEAL**

PUBLIC VERSION

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	PROCEDURAL BACKGROUND.....	3
III.	LEGAL STANDARD.....	4
IV.	ARGUMENT	5
A.	Apple Has a Substantial Case on the Merits and Is Likely To Succeed on Appeal.....	6
1.	The Federal Circuit is likely to reverse the Commission’s determination of a violation with respect to the ’348 patent.	6
2.	The Federal Circuit is likely to vacate the remedies imposed by the Commission.	11
B.	Apple Will Suffer Irreparable Harm Absent a Stay.....	12
C.	The Balance of Hardships Favors Apple.	14
D.	The Public Interest Strongly Favors Granting a Stay.	17
1.	Immediate implementation of the Orders risks serious harm to U.S. business and patent policy and should not be undertaken before appellate review is completed.....	18
2.	Immediate implementation of the Orders will frustrate consumer preference and have adverse competitive effects.....	21
3.	Immediate implementation of the Orders will harm innovation.....	24
V.	CONCLUSION.....	24

PUBLIC VERSION

TABLE OF AUTHORITIES

CASES

Apple, Inc. v. Motorola, Inc.,
869 F. Supp. 2d 901 (N.D. Ill. 2012) 16, 19, 21

Broadcom Corp. v. International Trade Commission,
No. 07-1164 (Fed. Cir. Sept. 12, 2007) 6

Certain Agricultural Tractors Under 50 Power Take-Off Horsepower, Inv. No. 337-TA-
380, Comm’n Op. (Apr. 24, 1997)..... 5

*Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio)
Chips, Power Control Chips, and Products Containing Same, Including Cellular
Telephone Handsets*, Inv. No. 337-TA-543, Comm’n Op. (June 21, 2007)..... 2, 5

Cybor Corp. v. FAS Techs., Inc.,
138 F.3d 1448 (Fed. Cir. 1998) (*en banc*) 7

Dynatec International, Inc. v. International Trade Commission,
No. 99-1504, 1999 U.S. App. LEXIS 38842 (Fed. Cir. Sept. 24, 1999) 6

Heckler v. Turner,
468 U.S. 1305 (1984)..... 17

In re Princo Corp.,
486 F.3d 1365 (Fed. Cir. 2007)..... 15

Jazz Photo Corp. v. International Trade Commission,
No. 99-1431 (Fed. Cir. July 6, 1999) 6

Kirtsaeng v. John Wiley & Sons, Inc.,
133 S. Ct. 1351 (2013)..... 1, 10

Mayo Collaboration Services v. Prometheus Labs, Inc.,
132 S. Ct. 1289 (2012)..... 11

MEMC Electronic Materials, Inc. v. Mitsubishi Materials Silicon Corp.,
420 F.3d 1369 (Fed. Cir. 2005)..... 10-11

Microsoft Corp. v. Motorola, Inc.,
No. C10-1823JLR, 2012 WL 5993202 (W.D. Wash. Nov. 30, 2012) 15, 16

North America Philips Corp. v. American Vending Sales, Inc.,
35 F.3d 1576 (Fed. Cir. 1994)..... 10

PUBLIC VERSION

Parker v. Flook,
437 U.S. 584 (1978)..... 11

Realtek Semiconductor Corp. v. LSI Corp.,
No. C-12-03451-RMW, 2013 WL 2181717 (N.D. Cal. May 20, 2013) 16

Sampson v. Murray,
415 U.S. 61 (1974)..... 16

Samsung Electronics Co. v. Apple Inc.,
No. 11-00573 (D. Del.)..... 15

Standard Havens Prods. Inc. v. Gencor Indus, Inc.,
897 F.2d 511 (Fed. Cir. 1990)..... 5

SRI International v. Matsushita Electronics Corp. of America,
775 F.2d 1107 (Fed. Cir. 1985) (*en banc*) 8

Virginia Petroleum Jobbers Association v. Federal Power Commission,
259 F.2d 921 (D.C. Cir. 1958)..... 16

Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.,
559 F.2d 841 (D.C. Cir. 1977)..... 5

STATUTES

5 U.S.C.
§ 705.....4-5

35 U.S.C.
§ 101..... 11
§ 102..... 11
§ 103..... 11

28 U.S.C.
§ 1659(a)..... 15

OTHER AUTHORITIES

Brief of Amicus Curiae Federal Trade Commission Supporting Neither Party, Apple Inc. v. Motorola, Inc., Nos. 2012-1548, 2012-1549 (Fed. Cir. Dec. 4, 2012) 24

Corrected Statement Regarding the Public Interest by Non-Party Intel Corp. (Dec. 3, 2012) 24

Hewlett-Packard Co. Comments in Response to the Commission’s Request for Written Submissions on Remedy and Public Interest (Dec. 3, 2012) 19

PUBLIC VERSION

Letter from Senator Kohl et al. to Hon. Deanna Okun, Inv. No 337-TA-745 (June 19, 2012) 21

Letter from Senators Mike Lee et al. to Hon. Irving Williamson, International Trade Commission (May 21, 2013).....20-21

Letter from Thomas A. Restaino, Chief Intellectual Property Counsel, AT&T, to Ambassador Michael Froman Regarding USTR Review of the Commission’s Final Determination in Inv. No. 337-TA-794 (June 21, 2013)..... 17, 23

Third Party United States Federal Trade Commission’s Statement on the Public Interest, Inv. No. 337-TA-752 (June 6, 2012) 12, 21

U.S. Dep’t. of Justice and U.S. Patent & Trademark Office, Joint Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013)..... 21

PUBLIC VERSION

I. INTRODUCTION

Respondent Apple Inc. (“Apple”) respectfully requests that the Commission stay enforcement of the limited exclusion order and the cease-and-desist order (collectively, “the Orders”) issued in this investigation pending Apple’s appeal to the U.S. Court of Appeals for the Federal Circuit. In an investigation involving what Commissioner Pinkert described as “highly contested matters of first impression for this agency” (Comm’n Op. at D1), the Commission has issued injunctive relief with respect to a patent that Samsung declared essential to an industry standard and promised to license on fair, reasonable, and non-discriminatory (“FRAND”) terms. Under the unique circumstances presented in this case, a stay of the Orders is warranted to maintain the status quo until the Federal Circuit decides Apple’s appeal.

Apple can demonstrate a likelihood of success on appeal and, at a minimum, has shown that it has a substantial case on the merits with respect to both the Commission’s finding of a Section 337 violation and the Commission’s imposition of remedies. As explained below, Apple respectfully believes that the Commission erred in reversing the ALJ’s determinations that Apple’s accused products do not infringe U.S. Patent No. 7,706,348 (“the ’348 patent”) and that Samsung’s own products do not satisfy the technical prong of the domestic industry requirement for that patent. The Commission also erred in failing to find Samsung’s patent rights exhausted, especially in light of the U.S. Supreme Court’s recent ruling in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (Mar. 19, 2013), regarding exhaustion arising from authorized, extra-territorial sales of goods manufactured abroad. Apple submits that the Commission further erred by imposing an exclusion order and a cease-and-desist order—remedies that are contrary to the public interest factors in this case, where Samsung has declared the ’348 patent essential to the Universal Mobile Telecommunications System (“UMTS”) standard and has irrevocably promised to license the patent on FRAND terms. Not

PUBLIC VERSION

only do these issues present “admittedly difficult legal question[s]”¹—as demonstrated by the differing opinions offered by Commissioner Pinkert, the ALJ, the Commission Investigative Attorney, and many other entities that provided comments—but Apple submits that the Federal Circuit is likely to reverse the finding of a Section 337 violation and to vacate the Orders.

Given the limited nature of Apple’s product offerings, Apple will suffer irreparable harm in the absence of a stay pending appeal. If the Orders go into effect, Apple will lose not only sales of its iPhone 4 (GSM) and iPad 2 3G (GSM) products but also the opportunity to gain new smartphone and tablet customers who otherwise would have purchased these entry-level Apple devices. Should the Commission’s decision be reversed or modified on appeal, Apple will have no recourse to redress this harm. Conversely, the issuance of a stay would not impose a substantial harm on Samsung or any other party. Because Samsung declared the ’348 patent to be standard-essential, Samsung could not reasonably expect to exclude others from practicing its claimed invention. If the stay is granted and the Commission’s Final Determination is affirmed on appeal, Samsung can seek redress for any lost FRAND royalties by pursuing the patent infringement suit that it has already initiated in the District of Delaware.

The public interest strongly favors the issuance of a stay in light of the serious legal and policy implications of the Commission’s Final Determination, which have been acknowledged by every branch of the federal government in recent months. Before enforcing remedial orders that will create chaos in standard-dependent industries—both in the United States and throughout the world—the Commission should allow the Federal Circuit to review its decision. Furthermore, immediate enforcement of the Orders will frustrate consumer choice, increase

¹ *Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, Including Cellular Telephone Handsets*, Inv. No. 337-TA-543, Comm’n Op. at 5-6 (June 21, 2007).

PUBLIC VERSION

prices, and decrease incentives for innovation. Finally, while Apple recognizes the importance of protecting intellectual property rights, Samsung cannot fairly expect to protect its patents by excluding Apple or any other manufacturer from practicing the claimed invention after it has declared the invention to be standard-essential and thereby invited others to practice the claimed invention in exchange for a FRAND royalty.

For these reasons, the Commission should stay the enforcement of the Orders pending Apple's appeal of the Commission's Final Determination.

II. PROCEDURAL BACKGROUND

Because the Commission is familiar with the procedural background of this investigation, Apple will not repeat the full procedural history here. Rather, Apple offers a brief summary of the investigation.

Complainants Samsung Electronics Co., Ltd., and Samsung Telecommunications America, LLC (collectively, "Samsung") alleged that Apple's iPhones, iPads, and iPod touches infringed five Samsung patents: the '348 patent; U.S. Patent No. 7,486,644 ("the '644 patent"); U.S. Patent No. 7,450,114 ("the '114 patent"); U.S. Patent No. 6,771,980 ("the '980 patent"); and U.S. Patent No. 6,879,843 ("the '843 patent"). Comm'n Op. at 1.

Administrative Law Judge Gildea held a two-day Markman hearing and issued a Markman Order construing the patent claim terms at issue in this investigation. ID at 2; Order Nos. 63, 67. Just one week before the hearing, Samsung sought and obtained termination of this investigation with respect to the '843 patent. On September 14, 2012—after presiding over a two-week evidentiary hearing consisting of live and deposition testimony from 80 witnesses and more than 1,000 admitted exhibits—ALJ Gildea issued a 611-page Initial Determination ("ID") making extensive findings and concluding that Samsung had failed to prove a Section 337 violation with respect to any of Samsung's patents. Comm'n Op. at 1. More specifically,

PUBLIC VERSION

ALJ Gildea found that Apple did not infringe any of the four patents, that the '114 patent was invalid, and that Samsung failed to satisfy the technical prong of the domestic industry requirement for any of the four patents. *Id.*

Samsung, Apple, and the Commission Investigative Attorney each filed petitions for review of the ID. On November 19, 2012, the Commission determined to review the ID in its entirety. As part of its review, the Commission issued several notices seeking written submissions from both the parties and the public, with the Commission focusing its questions on the '348 and '644 patents. At the conclusion of its review, the Commission confirmed that Samsung had not proven a violation with respect to any of the '644, '114, and '980 patents. Comm'n Op. at 3. Going beyond the ALJ's fact findings, however, the Commission overturned the ALJ's decision with respect to the '348 patent. The Commission "determined that Samsung has proven a violation of section 337 with respect to the '348 patent" (*id.*) and—over the dissent of Commissioner Pinkert—issued a limited exclusion order and a cease-and-desist order to block the importation and sale of two current Apple products: the iPhone 4 (GSM model), and the iPad 2 3G (GSM model). *Id.* The Orders are presently scheduled to take effect on August 5, 2013, following the close of the Presidential review period.

III. LEGAL STANDARD

Under Section 705 of the Administrative Procedure Act, the Commission may stay the effective date of its orders pending judicial review:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

PUBLIC VERSION

5 U.S.C. § 705; see *Certain Baseband Processor Chips*, Inv. No. 337-TA-543, Comm'n Op. at 5 (citing *Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*, Inv. No. 337-TA-380, Comm'n Op. at 9-10 (Apr. 24, 1997)).

In determining whether to grant a stay, the Commission considers four factors: (1) the appeal's likelihood of success on the merits; (2) whether the movant would suffer irreparable harm absent a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether the public interest favors a stay. *Certain Baseband Processor Chips*, Inv. No. 337-TA-543, Comm'n Op. at 5-6 (citing *Standard Havens Prods. Inc. v. Gencor Indus, Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990)).

In applying this standard, the Commission need not conclude that its own determination is likely to be overturned on appeal in order to grant a stay. *Standard Havens*, 897 F.3d at 512 (“[L]ikelihood of success in the appeal is not a rigid concept ...”). Instead, it is sufficient for a movant to show that the Commission ruled on “an admittedly difficult legal question.” *Certain Baseband Processor Chips*, Inv. No. 337-TA-543, Comm'n Op. at 5-6 (citation omitted). This approach properly reflects that a stay pending appeal “is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit.” *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

IV. ARGUMENT

All four factors strongly favor a stay. Apple has a strong likelihood of success on the merits of its appeal, which will present novel questions of law. Apple will suffer irreparable harm if the Orders go into immediate effect, whereas Samsung and any other interested parties will suffer little or no harm if the Orders are stayed. Finally, the public interest counsels strongly in favor of the requested stay.

PUBLIC VERSION

Although Apple is not aware of any investigation in which the Commission has stayed enforcement of an exclusion order, the Federal Circuit has stayed enforcement of the Commission's exclusionary remedies upon finding a substantial question concerning the Commission's determination that a violation of Section 337 had occurred. *E.g., Broadcom Corp. v. Int'l Trade Comm'n*, No. 2007-1164 (Fed. Cir. Sept. 12, 2007) (granting stay requested by wireless carriers and handset manufacturers); *Dynatec Int'l, Inc. v. Int'l Trade Comm'n*, No. 99-1504, 1999 U.S. App. LEXIS 38842 (Fed. Cir. Sept. 24, 1999); *Jazz Photo Corp. v. Int'l Trade Comm'n*, No. 99-1431 (Fed. Cir. July 6, 1999). Moreover, the Orders in this case differ substantially from the remedial orders in other investigations because they arise from a declared-essential patent that the patent owner has promised to license on FRAND terms. For this additional reason, the Commission should stay enforcement of the Orders while the Federal Circuit considers the novel issues that will be raised on appeal.

- A. Apple Has a Substantial Case on the Merits and Is Likely To Succeed on Appeal.²**
- 1. The Federal Circuit is likely to reverse the Commission's determination of a violation with respect to the '348 patent.**

The ALJ correctly determined that Samsung failed to prove a violation of Section 337 with respect to the '348 patent. Apple respectfully submits that, in reversing that determination, the Commission made several factual and legal errors—including many relating to claim construction, which is subject to *de novo* review on appeal. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448 (Fed. Cir. 1998) (*en banc*). In addition, recent Supreme Court precedent is inconsistent with the ALJ's and the Commission's finding that Samsung's patent rights are not

² This motion addresses only some of the errors that Apple believes underlie the Orders. Apple reserves the right to raise other factual and legal errors on appeal as well.

PUBLIC VERSION

exhausted. Apple has thus raised substantial questions and is likely to prevail on its appeal of the Commission’s finding of a Section 337 violation for multiple reasons.

First, Apple is likely to succeed on its appeal of the Commission’s finding of infringement of claims 82-84 of the ’348 patent. As Apple demonstrated at the evidentiary hearing and the ALJ correctly determined, none of Apple’s accused products contains “a puncturer for puncturing two bits from the 32 bit codeword output by the controller” as required by claims 82-84. ID at 55. After construing “puncturer” according to its plain meaning as “hardware or software for puncturing” (ID at 17, 52), the ALJ correctly found—based on the testimony of an Intel engineer, Apple’s expert, and Samsung’s own expert—that the Intel baseband processor chip in the accused products does not perform any “puncturing.” ID at 52-55. The Commission, however, reversed the ALJ’s non-infringement finding by erroneously altering the claim construction. The Commission declined to adopt any of the constructions proposed by Samsung, Apple, the Staff, or the ALJ (Comm’n Op. at 7-12), and instead defined “puncturer” to mean “hardware or software used for excluding, suppressing, ignoring, or skipping bits” (Comm’n Op. at 12). That new construction was improperly based on a single statement in the specification that does not refer to “puncturing” (’348 patent, 32:11-14) and extrinsic evidence. Comm’n Op. at 9-12. Even under the Commission’s revised claim construction, Apple’s accused products do not infringe. [REDACTED]

[REDACTED] There was no substantial evidence to support the Commission’s finding that Apple’s accused products contain the claimed “puncturer.” Rather, as the ALJ observed, Samsung’s expert based his infringement opinion not on “puncturing,” but on the fact that [REDACTED]

[REDACTED] ID at 54.

PUBLIC VERSION

Second, Apple is likely to prevail with respect to non-infringement of claims 75-76 of the '348 patent. As Apple demonstrated at the evidentiary hearing, the Staff agreed (ID at 67), and the ALJ correctly determined, none of Apple's accused products contains "a controller for outputting a 30 bit codeword ... that corresponds to a 10 bit TFCI information input to the controller" as required by claims 75-76. ID at 71. After ruling that the term "controller for outputting" requires no construction (ID at 16), the ALJ correctly found that the Intel baseband processor chip in the accused products contains [REDACTED] [REDACTED] not a "controller" for outputting a 30-bit codeword as required by claims 75-76. ID at 62-71. The Commission, however, reversed that finding after re-construing the claims based on an improper comparison to the accused products. *See SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1118 (Fed. Cir. 1985) (*en banc*) ("A claim is construed in the light of the claim language, the other claims, the prior art, the prosecution history, and the specification, *not* in light of the accused device."). Specifically, after reviewing Samsung's infringement contentions and the accused products (Comm'n Op. at 12-15), the Commission interpreted the claims to mean that "the specific controller defined in claim 75 is not identical to the specific controller defined in claim 82." *Id.* at 16. The Commission then adopted the conclusory infringement opinion of Samsung's expert, without considering the non-infringement evidence identified by Apple and the Staff. Comm'n Op. at 32-34. But as the ALJ correctly found, "Samsung's protean description of 'controller,' morphing from one claim to another, is not supported by the evidence." ID at 69.

Third, Apple is likely to succeed on appeal with respect to the technical prong of the domestic industry requirement. As Apple demonstrated at the hearing, the Staff agreed (ID at 545-545), and the ALJ found, none of Samsung's domestic industry products containing a

PUBLIC VERSION

Qualcomm baseband processor chip practices claim 75 or 82 of the '348 patent. Because the Qualcomm-based products are capable of encoding only [REDACTED] they are incapable of “outputting a ... codeword ... that corresponds to a 10 bit TFCI information input” as required by the asserted claims. ID at 541-547. Nor do any of the Qualcomm-based products practice claim 82 because they do not contain a “puncturer.” ID at 541-547. The ALJ also found, supported by the Staff’s views (ID at 555-556), that Samsung’s domestic industry products containing an ST-Ericsson baseband processor chip do not practice claim 75 because they do not contain “a controller for outputting a 30 bit codeword.” ID at 554-557. Nor do those products practice claim 82 because there is no evidence that they contain a “puncturer.” ID at 556-557.

Again, the Commission reversed all the ALJ’s findings on these issues by improperly revising the claim constructions in light of the accused products and the domestic industry products. Comm’n Op. at 68. In addition to the “puncturer” and “controller” claim terms discussed above, the Commission also provided a new construction of “10 bit TFCI information input”—a term that no party asked to have construed. Comm’n Op. at 18. Here, the Commission improperly looked to the [REDACTED] to conclude that “‘10 bit TFCI information’ can include padding zeros.” Comm’n Op. at 17-18. Applying these erroneous claim constructions for the “puncturer,” “controller,” and “10 bit TFCI information” limitations, the Commission concluded that Samsung’s domestic industry products satisfied the technical prong. Comm’n Op. at 71-73. Had the Commission applied proper claim constructions, however, it could not have found that any of those products practice claim 75 or 82.

PUBLIC VERSION

Fourth, even if the infringement finding is affirmed, Apple is likely to prevail on its appeal of the Commission’s denial of Apple’s exhaustion defense. There is no dispute that Samsung has licensed Intel to practice the ’348 patent and that the accused functionality in Apple’s products is contained in a baseband processor chip that Apple purchases from Intel. The Commission’s rejection of Apple’s exhaustion defense was based on its conclusion that sales of the baseband chips from Intel to Apple were not shown to take place in the United States. ID at 498-528; Comm’n Op. at 85-86. That reasoning is at odds with the March 19, 2013, holding of the U.S. Supreme Court that, if authorized, extra-territorial sales of goods manufactured abroad exhaust intellectual property rights. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013) (holding copyright first sale rule applicable to exhaust intellectual property rights in foreign-made copies of copyrighted textbooks); *id.* at 1363 (“The common-law doctrine [of exhaustion] makes no geographical distinctions.”).

Moreover, even under pre-*Kirtsaeng* Federal Circuit precedent, the ALJ’s and the Commission’s finding of no exhaustion was erroneous. Specifically, the ALJ stated that there was no evidence that [REDACTED]

[REDACTED] ID at 509. The ALJ and the Commission applied the wrong legal standard, since [REDACTED]

[REDACTED] *See, e.g., North Am. Philips Corp. v. American Vending Sales, Inc.*, 35 F.3d 1576, 1579 (Fed. Cir. 1994); *MEMC Elec. Materials, Inc. v. Mitsubishi Materials Silicon Corp.*, 420 F.3d 1369, 1377 (Fed. Cir. 2005). There is a strong likelihood that the Federal Circuit will reverse this legal error.

Finally, Apple is likely to prevail on the issue of invalidity. As construed, the asserted

PUBLIC VERSION

claims are not directed to patent-eligible subject matter under 35 U.S.C. § 101, because they merely claim an abstract mathematical relationship without any claim limitations that add anything inventive. *See Mayo Collaboration Servs. v. Prometheus Labs, Inc.*, 132 S. Ct. 1289, 1294 (2012) (to be patentable, a claim must do more than simply state a law of nature or abstract idea and add the words “apply it”); *Parker v. Flook*, 437 U.S. 584, 594 (1978) (patent claim including a mathematical algorithm was not patent-eligible “because, once that algorithm is assumed to be within the prior art, the application, considered as a whole, contains no patentable invention”). As construed, the asserted claims are also invalid under 35 U.S.C. §§ 102 and/or 103 as anticipated by or obvious in view of the prior art. [REDACTED]

[REDACTED] But as the Commission recognized, “the ’348 patent indeed describes the use of well-known Reed-Muller codes to encode TFCI information.” Comm’n Op. at 40. Indeed, the 1977 MacWilliams and Sloane textbook described in detail the claimed error correcting codes, as well as prior TFCI encoding apparatuses from the 3GPP standard. *See RX-367*. Apple is thus likely to prevail on appeal because the clear and convincing evidence shows that the asserted claims, as construed by the Commission, are invalid for multiple reasons.

2. The Federal Circuit is likely to vacate the remedies imposed by the Commission.

In addition to its arguments that no Section 337 violation occurred, Apple is also likely to prevail on—and certainly has raised substantial questions concerning—the appropriateness of the Orders. As Commissioner Pinkert stated in dissent, “the relief in question is not consistent with the public interest and should not issue.” Comm’n Op. at D1.

PUBLIC VERSION

To begin with, the Commission's decision to order injunctive relief on a patent subject to a FRAND commitment is contrary to the public interest factors that must be considered before any exclusionary or cease-and-desist order may issue. Samsung declared the '348 patent essential to the UMTS standard and committed to license the patent on FRAND terms. Absent extraordinary circumstances not present here, granting injunctive relief with respect to such FRAND-committed patents would inappropriately empower holders of patents declared essential to industry standards to "hold up" others that want to use the standardized technology by demanding supracompetitive prices or refusing to license their declared-essential patents altogether. For this reason, the Federal Trade Commission has observed that the issuance of an exclusion order or cease-and-desist order for infringement of a FRAND-committed patent, such as the '348 patent, "has the potential to cause substantial harm to U.S. competition, consumers and innovation." ID at 456 (quoting *Third Party United States Federal Trade Commission's Statement on the Public Interest*, Inv. No. 337-TA-752 (June 6, 2012) ("*FTC 752 Statement*") at 1).

The Orders are also contrary to the public interest factors because Samsung has failed to honor its commitment to license the '348 patent on FRAND terms. As Commissioner Pinkert observed, "the weight of the evidence before the Commission in this remedial phase indicates that Samsung has thus far been unable or unwilling to make a FRAND licensing offer to Apple in relation to the '348 patent." Comm'n Op. at D2. For this additional reason, the Orders are likely to be vacated on appeal. At a minimum, these are "highly contested matters of first impression." *Id.* at D1.

B. Apple Will Suffer Irreparable Harm Absent a Stay.

If the Orders take effect at the conclusion of the Presidential review period, they will block the importation, distribution, and sale of the iPhone 4 (GSM) and iPad 2 3G (GSM). That

PUBLIC VERSION

remedy would be imposed as the result of the Commission's finding of infringement for the '348 patent. But because Samsung declared that patent essential to the UMTS standard and committed to license it on FRAND terms, the maximum remedy that Samsung could have reasonably expected to obtain—or that Apple could have reasonably expected to pay when it chose to implement the UMTS standard as it did in its products—was the payment of a FRAND royalty. The Commission's Orders, however, go well beyond such relief by banning the importation, distribution, and sale of the affected Apple products. The harm to Apple if the Orders take effect thus far outweighs any harm that should be imposed with respect to a FRAND-committed patent.

Absent a stay, Apple would lose sales of the iPhone 4 (GSM) and iPad 2 3G (GSM), which are entry-level devices from among Apple's limited product offerings. This would be especially damaging to Apple given its particular business model. Whereas other major handset and tablet manufacturers create, introduce, and market a large number of new devices each year, Apple typically introduces only one new phone and one new tablet (and at most only a few new phones or tablets) in any given year. This release schedule, and the nature of the mobile products market, means that Apple has very few product types on sale at any given time, with each available Apple product representing a unique price point within its representative product market. Given this business model, the Orders will exclude Apple's entry-level GSM phone and entry-level GSM tablet from the market. Unlike the exclusion of one product from a wide spectrum of marginally differentiated products, the Orders—despite only having an impact on two current Apple products—will sweep away an entire segment of Apple's product offerings.

PUBLIC VERSION

Blocking the importation and sale of these successful and popular entry-level Apple products will impose a hardship on Apple that cannot be remedied should the Commission be reversed on appeal. If the Commission's Final Determination is reversed, or if the Orders are vacated and a less onerous remedy is implemented, Apple will have no obvious way to restore the status quo. Despite having obtained vindication on appeal, Apple will already have lost the opportunity to gain new smartphone and tablet customers who would have purchased entry-level Apple devices but for the Orders. This irreparable harm supports a stay.³

C. The Balance of Hardships Favors Apple.

In contrast to the harm that Apple will suffer if the requested stay is not granted, a stay will cause no direct or immediate harm to other parties, least of all Samsung. As the Commission noted with respect to iPads, "Samsung has presented no evidence of a competing product that needs protection from injury during the Presidential review period." Comm'n Op. at 119. There is no indication in the record, or elsewhere, that the competitive situation would change between the end of the sixty-day Presidential review period and the completion of the expected Federal Circuit appeal.

Thus, any hardship that Samsung would suffer during the pendency of the requested stay would be indirect and minimal. Samsung has not used the '348 patent to exclude others from the market; on the contrary, Samsung has committed to *license* it on FRAND terms to all UMTS implementers, including competitors, as a condition of declaring the '348 patent

³ On September 14, 2012, the ALJ ruled that Apple did not infringe any patent asserted by Samsung. It was not until June 4, 2013 that the Commission issued new claim constructions and reversed the ALJ's findings of no infringement and no Section 337 violation for the '348 patent. [REDACTED]

PUBLIC VERSION

essential to the UMTS standard. Accordingly, Samsung could not fairly expect to exclude Apple or any other competitor from the market and cannot reasonably claim that it will suffer any irreparable harm from a stay. *See Microsoft Corp. v. Motorola, Inc.*, 2012 WL 5993202, at *6 (W.D. Wash. Nov. 30, 2012) (dismissing Motorola’s claim for an injunction on patents for which it had made a FRAND declaration because that commitment meant “Motorola cannot demonstrate irreparable harm”).

Moreover, if the Commission’s decision were affirmed on appeal, Samsung would have an obvious remedy: the pending, but currently stayed, District of Delaware action that Samsung filed in parallel to the present investigation. *See Samsung Elecs. Co. v. Apple Inc.*, No. 11-00573 (D. Del.). Samsung has asserted the ’348 patent in that case, which was stayed under Section 1659 precisely because it “involves the same issues involved in [this] proceeding before the Commission.” 28 U.S.C § 1659(a). The Delaware action is stayed “until [this] Commission proceeding[] [is] no longer subject to judicial review.” *In re Princo Corp.*, 486 F.3d 1365, 1369 (Fed. Cir. 2007) (“We conclude that § 1337 is not designed to define finality for purposes of § 1659 and that finality in the latter section has a different meaning, namely that a Commission proceeding does not ‘become final’ until all appeals are exhausted.”). Therefore, upon completion of all available appeals, Samsung may seek FRAND royalties for any product sales during the period in which the Orders are stayed.⁴ The availability of this relief

⁴ Seeking redress in the district court is an especially appropriate avenue for relief for Samsung in light of the fact that the Orders address a FRAND-committed patent; by definition, any harm caused through infringement of a FRAND-committed patent is remediable through the award of a FRAND royalty to the patent holder. *See, e.g., Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 914 (N.D. Ill. 2012) (Posner, J., sitting by designation) (“By committing to license its patents on FRAND terms, Motorola committed to license the ’898 to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent.”).

PUBLIC VERSION

demonstrates that any harm Samsung might suffer from a grant of the stay would be easily reparable through monetary damages. *See, e.g., Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” (quoting *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958))); *Realtek Semiconductor Corp. v. LSI Corp.*, 2013 WL 2181717, at *6 (N.D. Cal. May 20, 2013) (“In promising to license on RAND terms, [patentees] here admit that monetary damages, namely a RAND royalty, would be adequate compensation for any injury it has suffered as a result of ... infringing conduct.”); *Microsoft*, 2012 WL 5993202, at *6 (FRAND royalty would constitute adequate remedy for infringement of a FRAND-committed patent).

There is no reason to think that a stay pending appeal would cause any harm to any party other than Samsung (which, as described above, is fully protected by a possible damages remedy). If anything, a stay pending appeal would *benefit* the entities whose business interests would be directly, adversely, and disproportionately affected by the Orders: AT&T, T-Mobile, General Communication Inc., CT Cube, L.P., America Movil S.A.B. de C.V. (collectively, “the GSM carriers”) and Intel.⁵ Granting the requested stay will ensure that the GSM carriers maintain access to popular Apple products carried by their CDMA competitors, providing them

⁵ In its Final Determination, the Commission noted that AT&T did not submit comments to the Commission. Comm’n Op. at 2. AT&T, however, submitted written comments to the U.S. Trade Representative explaining the substantial harm to the public interest from exclusion orders on FRAND-committed patents, including harm to the competitive marketplace, service providers such as AT&T, and consumers. *Letter from Thomas A. Restaino, Chief Intellectual Property Counsel, AT&T, to Ambassador Michael Froman Regarding USTR Review of the Commission’s Final Determination in Inv. No. 337-TA-794 at 1-2* (June 21, 2013).

PUBLIC VERSION

the ability to compete fully and fairly in the handset and tablet markets while awaiting a decision on appeal as to the merits of this investigation.⁶

In light of these relative hardships, a stay should be granted as Apple would bear certain, irreparable harm if the stay is denied, and Samsung would bear only uncertain, repairable harm if the stay is granted. *See Heckler v. Turner*, 468 U.S. 1305, 1307-1308 (1984) (granting stay where party seeking stay, if ultimately victorious, would be unlikely to recover losses resulting from the stay, and where stay respondent, if ultimately victorious, could be compensated for any losses resulting from the stay).

D. The Public Interest Strongly Favors Granting a Stay.

Apple recognizes that the Commission concluded in its Final Determination that the statutory public interest factors did not preclude the issuance of the Orders. However, the analysis at this stage is directed to the public interest implications of a *stay* pending Apple's appeal, and the public interest strongly counsels in favor of a stay to maintain the status quo during the appeal. This case implicates important and novel questions of law and policy that will have a large impact on major standard-reliant industries both in the United States and throughout the world. Furthermore, implementation of the Orders would harm competitive conditions in the cellular market by disproportionately affecting GSM carriers while other large national and regional carriers continue to sell CDMA versions of the iPhone 4 and iPad 2 3G

⁶ As explained more fully in Apple's April 3, 2013 submission to the Commission, mobile carriers typically structure their available portfolios of mobile devices in a way that offers customers a variety of models, with a variety of features, at a range of price points. Losing access to the products covered by the Orders will prevent the GSM carriers from offering a full portfolio of products operating with Apple's operating system (iOS), and its proprietary programs and applications (*e.g.*, iTunes, iPhoto, etc.). This will put the GSM carriers at a distinct disadvantage in the competitive world of mobile product sales and cause them to lose customer goodwill as customers defect and seek out CDMA providers offering a full portfolio of iOS products.

PUBLIC VERSION

containing a Qualcomm baseband processor. The Orders would also eliminate an important entry-level device for GSM consumers who prefer Apple devices. Indeed, as Commissioner Pinkert observed, “elimination of the infringing articles from competition in the U.S. market would in all likelihood impose substantial costs on consumers while undermining the standards setting process and thus public welfare and competitive conditions in the U.S. economy.”

Comm’n Op. at D6.

1. Immediate implementation of the Orders risks serious harm to U.S. business and patent policy and should not be undertaken before appellate review is completed.

Apple’s briefing in response to the Commission’s questions describes the problems that will be created by allowing and enforcing injunctive relief for patents, such as the ’348 patent here, that have been declared essential to industry standards. *See Respondent Apple Inc.’s Written Submission Regarding The Commission’s Questions On The Issues Under Review, And On Remedy, Bonding, And The Public Interest* at 6-10 (Dec. 3, 2012); *Respondent Apple Inc.’s Reply Submission Regarding The Commission’s Questions On The Issues Under Review, And On Remedy, Bonding, And The Public Interest* at 1-14 (Dec. 10, 2012); *Respondent Apple Inc.’s Submission In Response To The Commission’s Request For Additional Written Submissions On Remedy And The Public Interest* (“*Apple’s Submission Concerning Remedy and Public Interest*”) at 11-19 (Apr. 3, 2013).

Nor are exclusion orders necessary to force standard implementers to come to the negotiating table, and thereby prevent the purported problem of “reverse hold up.” As Judge Richard Posner explained in rejecting this premise—and as corroborated by Hewlett-Packard’s public interest submission in the 745 Investigation—even without the threat of exclusionary remedies, an implementer has strong incentives to negotiate a compromise: to avoid litigation costs and the risks of a court-determined FRAND rate that is higher than what the implementer

PUBLIC VERSION

could have negotiated. *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 915 (N.D. Ill. 2012) (“Of course litigation would also be costly for Apple, and this might induce it to pay the [maximum reasonable FRAND royalty] rather than fight.”); Ex. A to *Hewlett-Packard Co. Comments in Response to the Commission’s Request for Written Submissions on Remedy and Public Interest* at 14 (Dec. 3, 2012) (“Potential licensees have ample incentive to enter into licensing agreements on reasonable terms to avoid uncertainty in business planning and litigation costs,” including that the average patent trial costs \$6.25 million). Thus, exclusion orders are not necessary for bringing parties together to negotiate. The real effect of exclusion orders is to distort the negotiations that occur by artificially enhancing the leverage of the patent holder to demand greater-than-FRAND royalties; this is an improper justification for allowing exclusion orders on FRAND patents. *See, e.g., Motorola*, 869 F. Supp. 2d at 915 (“You can’t obtain an injunction for a simple breach of contract on the ground that you need the injunction to pressure the defendant to settle your damages claim on terms more advantageous to you than if there were no such pressure.”).

Moreover, as a factual matter, Apple has unquestionably demonstrated its willingness to negotiate—the Commission’s recitation of the parties’ extensive negotiations spans pages 53 to 59 of the Commission’s Final Determination. As this recitation makes clear, Apple has repeatedly made licensing proposals to Samsung and has provided the Commission with a specific per-patent rate that Apple would pay for the ’348 patent if it were held valid and infringed. Comm’n Op. at 58-59 (“*Apple appears willing to pay this royalty* [REDACTED] [REDACTED] if Samsung obtains a section 337 determination from the Commission and prevails on an appeal of that determination to the Federal Circuit.” (emphasis added)). Where the

PUBLIC VERSION

Commission has found Apple willing to license, Apple clearly has not engaged in “reverse hold up”—and further negotiations should not be conducted under the shadow of an exclusion order.

Recognizing the importance of standards regimes to the American and global economy, every branch of the United States government has recently expressed concern about the implications of the injunctive relief that the Commission has granted Samsung in this investigation. Acknowledging the significance of standards-setting to domestic industry, four U.S. Senators recently wrote that:

Any precedent [from the Commission] that would enable or encourage companies to include their patented technology in a standard, commit to license patents on FRAND terms, and then seek to secure an exclusion order despite a breach of that commitment would [] implicate significant policy concerns. Such an outcome would severely undermine broad participation in the standards-setting process, which would in turn threaten the meaningful benefits these standards provide for both industries and consumers.

Letter from Senators Mike Lee et al. to Hon. Irving Williamson, International Trade

Commission (May 21, 2013).⁷ The Department of Justice and the U.S. Patent and Trademark Office issued a joint statement in January in which they “recommend caution in granting injunctions or exclusion orders based on infringement of voluntarily F/RAND-encumbered patents essential to a standard.” U.S. Dep’t. of Justice and U.S. Patent & Trademark Office, *Joint Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* at *8 (Jan. 8, 2013). They specifically noted that “[t]he approach the [Commission] adopts in cases involving voluntarily F/RAND-encumbered patents that are essential to a standard will be important to the continued vitality of the voluntary consensus

⁷ See also *Letter from Senator Kohl et al. to Hon. Deanna Okun*, Inv. No 337-TA-745 (June 19, 2012) (“Any precedent that would enable or encourage companies to ... commit to license ... patents on RAND terms, and then seek to secure an exclusion order despite a breach of that commitment would ... implicate significant policy concerns.”).

PUBLIC VERSION

standards-setting process and thus to competitive conditions and consumers in the United States.” *Id.* at *9. Similarly, the FTC has recently stated that “ITC issuance of an exclusion or cease and desist order in matters involving RAND-encumbered SEPs [standards-essential patents] ... has the potential to cause substantial harm to U.S. competition, consumers and innovation.” *FTC 752 Statement* at 1. In the federal courts, Judge Posner has recognized that “once a patent becomes essential to a standard, the patentee’s bargaining power surges because a prospective licensee has no alternative to licensing the patent; he is at the patentee’s mercy.” *Motorola*, 869 F. Supp. 2d at 913. Judge Posner further noted the significant “potential economic and competitive impact of injunctive relief on disputes involving SEPs.” *Id.* at 914.

This significant interest in the issue of injunctive relief for declared-essential patents generally, and in this case specifically, from all branches of the federal government underscores the important legal and policy issues raised by the parties and the Commission’s investigation here. The public interest strongly favors allowing the Federal Circuit to weigh in on these novel and important issues of law and policy before the Orders take effect.

2. Immediate implementation of the Orders will frustrate consumer preference and have adverse competitive effects.

The products subject to the Commission’s orders have been purchased by [REDACTED] [REDACTED] *Apple’s Submission on Remedy and Public Interest*, Ex. H [Buckley Decl.] ¶ 7. They remain very popular and are strong sellers for the GSM carriers. As noted above, the GSM carriers will be placed at a competitive disadvantage against their CDMA competitors because the Orders will prevent them from offering these popular, entry-level devices.

The iPhone 4 was the fourth best-selling smartphone model in the United States in 2012 (*Apple’s Submission on Remedy and Public Interest*, Tallon Decl. Ex. C-14 [NPD Group, “iPhone Still Leading U.S. Consumer Sales,” Feb. 1, 2013]); and consumers purchased more

PUBLIC VERSION

than [REDACTED] GSM iPhone 4's in 2012, which represented [REDACTED] of the total smartphone market (*id.*, Ex. H. [Buckley Decl.] ¶¶ 4, 7; *id.*, Tallon Decl. Ex. C-12 [IDC data]). In 2012, [REDACTED] 3G-enabled tablets were sold in the United States, [REDACTED] of which were GSM models of the iPad 2 3G. *Id.*, Ex. H [Buckley Decl.] ¶¶ 5, 7; *id.*, Tallon Decl. Ex. C-13 [IDC data]. Also in 2012, [REDACTED] 3G- or 4G-enabled tablets were sold in the United States, [REDACTED] were GSM models of the iPad 2 3G. *Id.*

Accordingly, immediately enforcing the Orders will likely prevent many consumers who seek a moderately-priced, entry-level model from buying the smartphone or tablet of their choice, despite Samsung's promise to license the '348 patent to all UMTS implementers on FRAND terms. In its recent written comments to the U.S. Trade Representative, AT&T explained:

[E]xclusion orders of this type are entirely inconsistent with the President's goal of ubiquitous broadband deployment, especially for low income citizens. The model of the iPhone that is subject to the exclusion order in this case is available to consumers at very low cost. The exclusion order would eliminate a future supply of this popular mobile broadband option for existing and potential AT&T customers.

Letter from Thomas A. Restaino, Chief Intellectual Property Counsel, AT&T, to Ambassador Michael Froman Regarding USTR Review of the Commission's Final Determination in Inv. No. 337-TA-794 at 1 (June 21, 2013). And as Commissioner Pinkert noted, "[e]limination from competition of the iPhone 4 and iPad 2 3G would adversely affect U.S. consumers by denying entry-level devices to those who rely on the GSM network, which enable them to access the large and diverse library of popular software applications that are uniquely available on Apple platforms." *Comm'n Op. at D7.*

For customers who rely on the GSM network, the affected products have no adequate substitute at the same price point. Other devices available to consumers at comparable price

PUBLIC VERSION

market power through Exclusion Orders,” as Samsung seeks to do here. *Corrected Statement Regarding the Public Interest by Non-Party Intel Corp.* at 6 (Dec. 3, 2012).

3. Immediate implementation of the Orders will harm innovation.

While Apple recognizes the public interest in protecting intellectual property rights, Samsung has voluntarily limited its intellectual property rights by declaring the '348 patent to be standard-essential and taking on the concomitant FRAND obligation. By declaring the patent standard-essential, Samsung invited new and existing firms to practice the claimed invention in exchange for a royalty, thereby fostering innovation through a theory of inclusion. It is well-recognized that allowing the holder of such a declared-essential patent subsequently to obtain injunctive relief *will actually harm innovation*. Such tactics remove the incentive for any firms to invest in the research and development of standard-compliant products.

The public interest is not served by allowing patent holders like Samsung simultaneously to seek both inclusion and exclusion. Finding the appropriate balance between these two theories of innovation is a complex question that has garnered significant attention from governmental, academic, and industry actors because of its importance to the modern economy, in which standards-reliant technology plays a major role. Here, the public interest would be best served by a measured approach that maintains the status quo while the Federal Circuit reviews the Commission's Final Determination.

V. CONCLUSION

Apple respectfully requests that the Commission stay enforcement of the Orders until the conclusion of all appeals from this investigation.

PUBLIC VERSION

Dated: July 8, 2013

Respectfully submitted,

Respondent Apple Inc.

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In the Matter of CERTAIN MOBILE ELECTRONIC DEVICES, INCLUDING WIRELESS COMMUNICATION DEVICES, PORTABLE MUSIC AND DATA PROCESSING DEVICES, AND TABLET COMPUTERS

Inv. No. 337-TA-794

U.S. International Trade Commission; Before the Honorable E. James Gildea

CERTIFICATE OF SERVICE

I, Lanta M. Chase, hereby certify that copies of the foregoing document, **Respondent Apple Inc.'s Motion for Stay of Remedial Orders Pending Appeal (Public Version)**, were served upon the following parties as indicated below on this 8th day of July, 2013.

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 /s/ Lanta M. Chase
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