

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC

In the Matter of

CERTAIN AUDIOVISUAL COMPONENTS
AND PRODUCTS CONTAINING THE
SAME

Investigation No. 337-TA-837

RESPONDENT REALTEK SEMICONDUCTOR CORPORATION'S RESPONSE TO
THE NOTICE OF COMMISSION FOR FILING WRITTEN SUBMISSIONS ON
REMEDY, BONDING, THE PUBLIC INTEREST

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¹ The parties agreed that certain materials from the Northern District of California case could be provided in this investigation under the ITC protective order without violation of the Northern District of California protective order.

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I. INTRODUCTION

As requested by the Commission's October 17, 2013 notice seeking briefing on certain issues, respondent Realtek Semiconductor Corporation submits the following to address: 1) the RAND-encumbered nature of the two patents asserted against Realtek, 2) the parties' negotiations and Realtek's efforts to seek a reasonable license, 3) Complainants' "hold-up" by insisting on a [REDACTED] license that deviates from its own prior licenses, 4) the industry practice for licensing similar technologies on a portfolio basis and Complainants' refusal to do so [REDACTED], 5) Realtek's ongoing efforts to seek a RAND-rate determination in a district court, which included a summary judgment ruling that Complainants breached their RAND obligations and are thus precluded from enforcing any exclusion order from the ITC, and 6) Complainants' use of RAND patents to "hold-up" Realtek, to the detriment of the U.S. economy and public interest.

II. PUBLIC INTEREST

The Commission notice sought briefing on public interest, and specifically sought briefing on six specific issues. As set forth below, if the Commission finds infringement by Realtek of the '958 or '867 patents, it would be contrary to the public interest to issue a remedy in view of Complainants' violation of their RAND obligations under each of those patents.

As noted in Respondent Realtek Semiconductor Corporation's Response to the Notice of Commission Determination to Review a Final Initial Determination in Its Entirety, Complainants did not assert U.S. Patents 6,982,663 or 5,870,087 against Realtek in this proceeding. Consequently, Realtek does not address any issue pertaining to those patents.

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A. The Commission's Traditional Factors for Considering the Public Interest

The Commission traditionally considers the following four factors when assessing the potential impact of any remedial order on the public interest: (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. Factors 1, 2, and 4 are generally addressed through the six issues identified by the Commission for briefing. Regarding Factor 3, however, Complainants [REDACTED]

[REDACTED] Hg. Tr. (Kerr) at 824:11-22.

B. Issue 1

Commission Issue 1 states in relevant part for Realtek as follows:

Please discuss and cite any record evidence of the allegedly RAND-encumbered nature of the declared standard essential [] '958, and '867 patents. With regard to the '958 patent and the '867 patent, what specific contract rights and/or obligations exist between the patentee and the applicable standard-setting organization, i.e., the Institute of Electrical and Electronic Engineers, Inc. (IEEE)?

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As a result of those declarations and the conveyance of those obligations to Complainants, Complainants have a contract with the IEEE, which obligates them to offer Realtek licenses to both the '867 and '967 patents on reasonable, and non-discriminatory

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(RAND) terms and conditions. Moreover, Complainants have a duty to negotiate in good faith with Realtek.

As recognized by the United States Trade Representative (USTR)², Department of Justice and United States Patent and Trademark Office³, the use of patents in standards may allow patent holders to gain undue leverage and engage in patent hold-up to extract excessive royalties from implementers of standards or exclude them altogether. USTR Letter at 2; USPTO Policy Statement at 3-4. Such conduct harms competition and consumers by ultimately raising prices for products. USPTO Policy Statement at 4. To address the concerns over patent hold-ups, standards organizations such as the IEEE, require that patent holders commit to license patents essential to a standard on RAND terms.

The IEEE 802.11 standards at issue in this investigation require such a commitment and [REDACTED] binds the Complainants in a contract with the IEEE that obligates them to license the '958 and '867 patents on RAND terms. RX-1358C

([REDACTED]) at LSI Agere 837-00426155-63, -00426181-86. [REDACTED]

[REDACTED]

[REDACTED] *Id.*; see also RX-0010C

(Carmichael WS) at QAs 60-68. [REDACTED]

[REDACTED] the IEEE-SA Standards Board Bylaws, which states the following with respect to patents:

IEEE standards may include the known use of patent(s), including patent applications, provided the IEEE receives assurance from the patent holder or applicant with respect to patents essential for

² August 3, 2013 Letter from USTR to Irving A. Williamson, Chairman of USITC ("USTR Letter").

³ Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (January 8, 2013) ("USPTO Policy Statement").

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compliance with both mandatory and optional portions of the standard. The assurance shall be provided without coercion and prior to the approval of the standard The assurance shall be a letter that is in the form of either

- a) A general disclaimer to the effect that the patentee will not enforce any of its present or future patent(s) whose use would be required to implement the IEEE standard against any person or entity using the patent(s) to comply with the standard or
- b) A statement that a license will be made available without compensation or under reasonable rates, with reasonable terms and conditions that are demonstrably free of any unfair discrimination.

The standard shall apply, at a minimum, from the date of the standard's approval to the date of the standard's withdrawal and is irrevocable during that period.

RX-1331, IEEE-SA Standards Board Bylaws, at 12 (Sep. 2002) (REA837ITC00064360). In essence, the IEEE bylaws allow standards to include the use of patents, so long as the holders of the patents declared to be essential commit either to disclaim their rights to enforce the patents or to license such patents on RAND terms.

Courts have consistently found that a patent holder's commitments made in assurance letters to the IEEE constitute binding contracts that exist through the life of the standard. *See, e.g., Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012) (holding that Motorola's declarations to the ITU clearly created a contract); *Microsoft Corp. v. Motorola, Inc.*, 854 F. Supp. 2d 993, 999 (W.D. Wash. 2012) (noting that "through Motorola's letters to . . . the IEEE . . . , Motorola has entered into binding contractual commitments to license its essential patents on RAND terms"); *In re Innovatio IP Ventures, LLC Patent Litigation*, 2013 WL 3874042, at *4 (N.D. Ill. July 26, 2013) ("the letters of Innovatio's predecessors in interest to the IEEE constitute binding contractual commitments to the IEEE and its members."); *Ericsson Inc. v. Samsung Elecs. Co.*, No. 2:06-CV-63, 2007 WL 1202728, at *1 (E.D. Tex. Apr. 20, 2007)

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(stating “the FRAND obligation is contractual and binds all members” of the SSO); *see also* RX-1331 (IEEE-SA Standards Board Bylaws) at 12.

The Commission should follow that precedent. Like those district court cases, all of the elements of an enforceable contract exist between Complainants and the IEEE. Specifically, the IEEE offered Agere the opportunity to have its technology incorporated into standards in exchange for participation in developing the standard. *See Microsoft*, 854 F. Supp. 2d at 1032-33. Agere accepted that offer [REDACTED]

[REDACTED] RX-1358C ([REDACTED]) at LSI Agere 837-00426155-63, -00426181-86; *see also Microsoft*, 854 F. Supp. 2d at 1032. Consideration exists [REDACTED]

[REDACTED]

[REDACTED]

Microsoft, 854 F. Supp. 2d at 1032. The definite terms of the contract are set forth in the undertakings, as well as the IEEE bylaws. *See* RX-1331 (IEEE-SA Standards Board Bylaws) at 12.

Complainants have never contested that they are contractually obligated to license the '958 and '867 patents on RAND terms. *See* Comp. PostHB at 444-52; Comp. PostHRB at 157-70 (not raising any question as to the existence of a binding contract). And in related litigation between Realtek and Complainants in the Northern District of California, Judge Whyte expressly confirmed the existence of a contract, along with Realtek's ability to enforce it as a third-party beneficiary. *Realtek Semiconductor Corp. v. LSI Corp.*, No. C-12-03451-RMW, 2013 WL 2181717, at *6 (N.D. Cal. May 20, 2013) (“Similar to the situation in *Motorola*, here, defendants are contractually obligated under their Letters of Assurance to the IEEE to license the '958 and

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'867 patents on RAND terms and Realtek is a third-party beneficiary to that contract (this is not disputed).”).

The Commission and district courts have also held that a patent holder’s obligation to offer a license on RAND terms also carries with it a duty to negotiate in good faith. *See Certain Dynamic Random Access Memories, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-242, Comm’n Op., USITC Pub. No. 2034, 1987 WL 450856, at *38 (Sept. 21, 1987) (estopping complainant from exclusion order because of failure to negotiate in good faith); *Microsoft*, 854 F. Supp. 2d at 1038 (“Thus, although the language of Motorola’s agreements do not require it to make offers on RAND terms, any offer by Motorola (be it an initial offer or an offer during a back-and forth negotiation) must comport with the implied duty of good faith and fair dealing inherent in every contract.”). Thus, a patent holder cannot satisfy its RAND obligation simply by making any offer. It must be a good faith offer that is not unreasonable, because an unreasonable offer violates a patent holder’s RAND obligations. *Microsoft*, 854 F. Supp. 2d at 1001 (“It seems unlikely to the court that either the IEEE or the ITU would deem a patent essential for a certain standard only to permit that patent holder to turn around and abuse that power by seeking outrageously high royalty rates.”).

C. Issue 2

Commission Issue 2 states:

Please summarize the history to date of negotiations between LSI and Funai and between LSI and Realtek concerning any potential license to the '663, the '958, and the '867 patents, either alone, in conjunction with each other and/or the '087 patent, and/or in conjunction with non-asserted patents. Please provide copies of, or cite to their location in the record evidence, all offers and communications related to the negotiations including any offer or counteroffer made by Funai and Realtek.

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Realtek summarizes the history to date of negotiations between LSI and Realtek concerning any potential license to the '958 and '867 patents as follows.

Nine years before Complainants filed their request for this Investigation, Complainant

Agere sent a letter to Realtek, stating [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CX-1007C ([REDACTED] Letter from Agere to Realtek) at LSI Agere837-00054178-179; JX-0043C ([REDACTED] Tr.) at 520:19-521:1. Agere [REDACTED]

[REDACTED]

[REDACTED] CX-1007C at LSI Agere837-00054179; RX-0011C (Chen WS) at QAs 39-43. Agere also demanded a response by [REDACTED]. CX-1007C at LSI Agere837-00054178.

Agere sent a follow-up letter to Realtek on [REDACTED], [REDACTED]

[REDACTED]

[REDACTED] RX-

1158C (Jan. 2003 Letters between Agere and Realtek) at REA837ITC00000001.

Realtek replied [REDACTED]

[REDACTED]. See RX-1158C at REA837ITC00000002. [REDACTED] Agere

sent a fax to Realtek forwarding a FedEx tracking document for the initial letter, a copy of the initial letter and an attachment [REDACTED]

[REDACTED] RX-1158C at REA837ITC00000003-09.

The list [REDACTED]. *Id.* at REA837ITC00000005.

Realtek replied [REDACTED]

[REDACTED]

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RX-1159C ([REDACTED] Letter from Realtek to Agere); *See* also RX-1158C. Agere responded

[REDACTED] *See* RX-1313C ([REDACTED]
Letter from Agere to Realtek). Agere may have attempted to [REDACTED]

[REDACTED]
[REDACTED] It
[REDACTED] is not disputed, though, that [REDACTED]

See RX-0011C (Chen WS) at QAs 39-43; Hg. Tr. (Chen) at 1286:22-1287:1. Instead, Agere
ceased its assertion, demanded nothing further from Realtek, and remained silent for over nine
years. *See* RX-0011C (Chen WS) at QA 43.

Agere's silence was not accidental, but intentional. According to Complainants' own
corporate witness, Complainants [REDACTED]
[REDACTED] *See* JX-0043C ([REDACTED] Tr.) at 99:4-13; CX-1642C (Kerr WS) at QA 136.

Additionally, Realtek's request for detailed claim analysis was neither unusual nor unexpected,
[REDACTED]

See e.g., JX-0021C ([REDACTED] Tr.) at 62:5-12; Hg. Tr. (Waskiewicz) at 183:3-11. Thus, there
was no reason for Agere to suddenly terminate discussions with Realtek other than Agere
abandoned its assertions against Realtek.

After the 2002-2003 discussions, there was no further contact between Complainants and
Realtek until March 12, 2012, the day Complainants filed their Complaint in this Investigation,
when Realtek received a [REDACTED] letter from Complainants. *See* RX-1326C (Notice letter
to Realtek regarding LSI patents). On [REDACTED] Realtek responded to the letter, and
[REDACTED]

[REDACTED] *See* RX-1330C (Realtek's Request for RAND License Terms

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from LSI). Realtek asked for a response by [REDACTED]

[REDACTED]

[REDACTED]

On [REDACTED], Realtek received a PowerPoint presentation containing terms of a proposed patent-license agreement. *See* RX-1323C (LSI Licensing Presentation to Realtek). The proposal, however, [REDACTED]. Instead, it proposed a license [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 7. Additionally, the proposal [REDACTED], but rather, [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 11. In response to this proposal, Realtek's counsel sent Complainants' counsel a letter on [REDACTED]

[REDACTED]

Complainants never responded to this letter.

Pursuant to the ALJ's procedural schedule in this investigation, the parties held three settlement conferences on July 19, 2012, September 6, 2012, and March 11, 2013, respectively, to discuss various proposals for solving their disputes in this investigation, but were unable to reach settlement. *See* First, Second, and Third Settlement Conference Reports (Doc. IDs 486609, 490962, 505889). The parties also held a settlement conference in the N.D. California case in October 2013.

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In addition to the correspondence and settlement discussions described above, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See, e.g., Exh. 1 (email chain between

Realtek and LSI). In particular, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Exh. 1 at 1 (emphasis added).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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Complainants' made its most recent settlement demand on [REDACTED], during a settlement conference in the Northern District of California proceeding. Initially, Realtek

Subsequently, Realtek offered to

Complainants

Complainants also

[REDACTED]. Complainants' most recent offer is not a RAND offer for at least the following reasons: [REDACTED]

With regard to the royalty rate, it does not comport with Complainants' RAND obligations because [REDACTED]

[REDACTED] Exh. 4 (Rebuttal Report of Dr. Anne Layne-Farrar in the N.D. California case) at 84. Thus, Complainants remain indifferent to their RAND obligations to Realtek up to and including their most recent licensing demand.

D. Issue 3

Commission Issue 3 states:

Please summarize all licenses to the '663, the '958, and the '867 patents granted by LSI to any entity including evidence of the value of each patent if such patent was licensed as part of a patent portfolio. Please provide copies of, or cite to their location in the record evidence, all agreements wherein LSI grants any entity a license to these patents. Please also provide a comparison of the offers made to Funai and/or Realtek with offers made to these other entities.

1. Summary of Licenses to the '958 and '867 Patents Granted by LSI

Realtek's expert, Mr. Paul Carmichael, prepared a detailed summary of all identified licenses to the '958 and '867 patents granted by LSI/Agere and also by AT&T and Lucent. (RX-0010C) at QAs 69-113. That summary is generally repeated below. Although the Commission notice specifically sought briefing regarding licenses "granted by LSI," Realtek also provides information regarding any licenses granted by AT&T and Lucent, as predecessors in interest to the asserted patents.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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76. *Journal of the American Medical Association*, 2000; 283: 2639-2644.

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[REDACTED]

[REDACTED]

[REDACTED]

2. Comparison of Offers Made to Realtek with Offers Made to Other LSI Licensees

As discussed above, the [REDACTED] PowerPoint presentation that LSI provided to Realtek did not, even propose a license directed to the Wi-Fi ICs that Realtek sells, but rather, a license [REDACTED] *Id.* at 7; RX-0010C (Carmichael WS) at QAs 154-155. The royalty under the proposal is determined by [REDACTED]

[REDACTED]

[REDACTED] RX-1323C at 7. [REDACTED]

[REDACTED]

[REDACTED] RX-1323C at 7; RX-0981C

(Licensing Correspondence) at 3. According to Complainants, [REDACTED]

[REDACTED] (Hg. Tr. (Waskiewicz) 159:9–13), the evidence shows that [REDACTED]

[REDACTED]

In fact, when Complainants' offer to Realtek is compared to the licenses described above that Complainants have actually successfully negotiated, the unreasonableness of Complainants' offer becomes even more apparent. [REDACTED]

[REDACTED]

[REDACTED] RX-0010C-1 at QAs 69-110. For example, Complainants License Agreement [REDACTED]

[REDACTED] RX-0010C-1 at QAs 206-207.

[REDACTED]

[REDACTED]

[REDACTED] RX-0010C (Carmichael WS) at QA 98. Moreover,

[REDACTED]

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98, 213-215. Indeed, the normal practice for a patent license agreement with a component manufacturer is to apply the royalty rate to the sales price of the components, which are sold by the manufacturer. RX-0010C-1 at QA 194. Complainants' attempts to license by [REDACTED] is clearly not standard industry practice in the semiconductor components industry. *Id.*

E. Issue 4

Commission Issue 4 states as follows:

If applicable, please discuss the industry practice for licensing patents involving technologies similar to the technologies in the '663, the '958, and the '867 patents individually or as part of a patent portfolio.

The record does not include sufficient information to establish whether there is an “industry practice” for licensing patents “involving technologies similar to the technologies in the ’958 and ’867 patents” individually or as a portfolio. Nevertheless, the evidence that is in the record indicates that parties may negotiate [REDACTED]. RX-0010C (Carmichael WS) at QA 190. Moreover, all of the licenses discussed above that Complainants and their predecessors entered into related to the ’958 and ’867 patents, [REDACTED]

The Court in *In re Innovatio IP Ventures, LLC*, however, set a royalty rate of less than a dime for each Wi-Fi chip sold for the patentee's entire Wi-Fi portfolio for patents that were of moderate to moderate-high importance to the standard. MDL Docket No. 2303, Case No. 11 C 9308 at 4 (N.D. Ill. Oct. 3, 2013). And the Court in *Microsoft Corp. v. Motorola Inc.*, set a royalty of 3.471 cents per unit on Motorola's entire 802.11 standard essential portfolio for patents that were of very minimal value to the standard. *Microsoft*, Case 2:10-cv-01823-JLR

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(W.D. Wash.) April 25, 2013 Order at 207. Any royalty rate on an individual patent within the portfolio would presumably be far less and would need to factor in, among other things, the value of the patent to the standard.

F. Issue 5

Commission Issue 5 seeks briefing on the following issue:

Please identify the forums in which you have sought and/or obtained a determination of a RAND rate for the '663, the '958, and the '867 patents. LSI, Funai and Realtek are each requested to submit specific licensing terms for the '663, the '958, and the '867 patents that each believes are reasonable and non-discriminatory.

Realtek seeks a determination of a RAND rate for the '958 and '867 patents (i.e., the patents Complainants assert against Realtek) in the Northern District of California (Case No. 12-cv-03451-RMW). In that proceeding, Judge Whyte has already found Complainants breached their binding RAND commitments to make Realtek an offer to license the '958 and '867 patents before filing this ITC complaint against Realtek. A trial to determine the RAND rate for the asserted patents is currently set for February 10, 2014.

1. **A RAND royalty licensing rate for the '958 and '867 patents is no greater than [REDACTED] of the average selling price of the accused Realtek products.**

The specific RAND royalty rate for a full license to the '958 and '867 patents should not exceed approximately [REDACTED] of the average selling price of the accused Realtek products, based on the following facts and principles developed in the Northern District of California proceeding between Realtek and Complainants.

- a. **The value of patented technology in a standard cannot be greater than its relative contribution, and the *ex-ante* value of these patents is close to zero.**

The overall value of the 802.11 standard must be divided among all standard essential patent holders resulting in a necessarily low value of the *average* standard essential patent. This

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has important implications for the determination of a RAND royalty rate. Unless it is shown that a patented technology made significant technical contributions that had no reasonable or viable alternatives, the presumption should be that the value of that patent is low. *See Microsoft Corporation v. Motorola, Inc.*, 2013 WL 2111217, ** 13-14 (W.D. Wash. Apr. 25, 2013) (“*Microsoft*”); *In re Innovatio IP Ventures, LLC Patent Litigation*, 2013 WL 5593609 (N.D. Ill., Oct. 3, 2013, MDL 2303) (“...the presence of equally effective alternatives to the patented technology that could have been adopted into the standard will drive down the royalty that the patent holder could reasonably demand.”)

A RAND royalty that reflects the *ex-ante* value of the patents should be based on the incremental value added by use of the technology relative to alternative technologies that could have been adopted. Such an incremental-value approach, along with a modified *Georgia-Pacific analysis*, was recently used by Judge Robart in *Microsoft*. Judge Robart noted that, while certain practical issues arise in its application, an “*ex ante* examination of the incremental contribution of the patented technology to the standard can be helpful in determining a RAND rate in the context of a dispute over a RAND royalty rate.” *Microsoft*, at *13. In particular, Judge Robart found that:

[A] reasonable royalty rate for an SEP committed to a RAND obligation must value the patented technology itself, which necessarily requires considering the importance and contribution of the patent to the standard. If alternatives available to the patented technology would have provided the same or similar technical contribution to the standard, the actual value provided by the patented technology is its incremental contribution. Thus, comparison of the patented technology to the alternatives that the SSO could have written into the standard is a consideration in determining a RAND royalty.

Id.

The economic assessment of the *ex-ante* value of a patent requires two steps. It first requires evaluating the technical benefits brought by the patented technology to the standard, if any, over non-infringing alternatives. The second step of the assessment requires translating the technical benefits, if any, of the '867 and '958 patents into the incremental economic value, if any, that was created by their purported inclusion into the 802.11 standard.

Here, as a threshold matter, a quantitative analysis shows that the '958 and '867 patents necessarily comprise, at best, a small fraction of the overall value of the 802.11 standard. As noted, there are estimated to be over 3,000 patents related to the 802.11 standard. Moreover, the IEEE 802.11–2012 specification (the first complete version of the standard to incorporate the IEEE 802.11n amendment, which includes the backwards-compatible sections on CCK and power save technologies that Complainants claim are covered by the '958 and '867 patents, respectively) includes very little discussion of either of those technologies.⁶ Finally, based on the number of letters of assurance (LOAs) submitted to the IEEE for the 802.11 standard, a conservative estimate is that there are at least 203 declared standard essential patents and 46 then pending patent applications for the 802.11 standard. Thus, at best, Complainants' patents represent only a tiny fraction of the 802.11 standard essential patents and do not represent a significant portion of the overall value of the 802.11 standard.

⁶ Indeed, even assuming that all aspects of CCK functionality are attributable to the '958 patent, only 2.1 of 2,793 pages (or 0.075 percent) of the specification include any discussion of CCK functionality. Further, assuming that all synchronization functionality (broadly speaking, the aspect of power save technology purportedly related to the '867 patent) is attributable to the '867 patent, only 2.7 of 2,793 pages (or 0.10 percent) of the specification actually includes discussion of that functionality.

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- i. **The ex-ante value of the '958 patent is low because many alternatives, including at least one with better performance, were available at the time 802.11b was being developed.**

Complainants have accused implementation of the CCK modulation technique as infringing the '958 patent. However, the CCK modulation technique was adopted in the 802.11b specification only as a compromise, over five alternative technologies, for market-related reasons. Exh. 2 (Expert Report of Matthew B. Shoemake in the N.D. California case) at 28-30 and 42. Alternative technologies not only existed, but they were the subject of specific proposals to the IEEE. Had the 802.11 Working Group known that Complainants would threaten adopters of infringing with injunctions, excessive royalty demands, and discriminatory preferences in licenses practices, it could have adopted alternative technologies to the alleged invention of the '958 patent.

Each of these other technologies would be non-infringing alternatives, including because they were not based on grouping information bits and/or did not use complimentary codes.⁷ QAM modulation, with its binary convolutional codes, and which was included in the 802.11a specification, also does not practice the '958 patent.

Moreover, CCK was not the highest performance technology adopted into the IEEE 802.11b specification. A commenter in March 1999 proposed making PBCC a mandatory modulation mode because "CCK modulation is inherently very weak by today's communications standards." Exh. 2 at 30, citing IEEE 802.11-99/087, Sponsor Ballot report to excom. Instead, the 802.11b task group adopted PBCC as a high performance option for the 802.11b specification. QAM modulation was also considered a more advanced technology.

⁷ The binary convolutional coding of PBCC does not use complimentary codes and is not based on the grouping of information bits that appear to be required by the '958 patent. The other techniques did not use complimentary codes.

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Even when considering the accused CCK functionality, there are numerous technologies that contribute to CCK. For example, bit mapping, bias suppression, differential coding, symbol mapping, modulation indication, rate indication, and packet size (MPDU) calculation are all technologies that contribute to CCK. The '958 patent relates to a claimed method of code selection, which, at most, is only one aspect of CCK technology.

Additionally, it should be noted that implementing a receiver for CCK requires an equalizer. Such an equalizer is difficult to build but is key to the performance of CCK. The equalizer must be present to deal with the negative effects of multipath in the channel. Given the elementary nature of CCK as a modulation technique, it is likely that development of channel equalizers independently by each Wi-Fi chip manufacturer to correct for multipath was a more important contributor to the performance of CCK than the CCK technology itself.

ii. The ex-ante value of the '867 patent is low because alternatives existed at the time 802.11b was being developed and it related to an optional feature relevant only to certain Wi-Fi products.

Like the '958 patent, the value of the '867 patent is low because alternatives could have been implemented in its place. The '867 patent centers on the synchronization of the receiver and a transmitter so as to save power. As a preliminary matter, the value of the '867 patent is low because it relates to a peripheral feature that would be relevant to only a subset of devices. The importance of synchronization for power saving features is limited to devices with small batteries such as mobile phones.

Power savings features are also not core functionalities. Power savings mode in the 802.11 standard is in fact optional, in that the implementer is not mandated to include them. Weighed against core functionalities of the 802.11 standard, power saving features are inherently of lesser value and in some cases of no value at all.

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In addition, based on alternative non-infringing technologies that could have been adopted, the technical benefits associated with the '867 patent are low. All of the asserted independent claims of the '867 patent require "a timestamp having a value m for synchronizing a timer with a transmit timer." The power saving mechanism of the '867 patent is dependent upon synchronization of the receiver with the transmitter and on the receiver "waking up" at specific times to receive traffic indication messages (TIM). Therefore, one non-infringing alternative could be achieved by allowing the power saving device to determine its own time to wake. Upon waking, the device could poll the access point to determine if traffic is available.

Another non-infringing alternative is to use certain implementations of a time division multiple access (TDMA) MAC protocol. TDMA technology was well-known at the time of development of the 802.11 standard, e.g., widely used in cellular networks. By using certain implementations of TDMA, the device could sleep during time periods that are not allocated to it. Certain implementations of TDMA avoids the use a TIM, thereby avoiding infringement of the '867 patent.

Finally, another non-infringing alternative is to not use power save mode at all, because power save mode is not necessary for communication between 802.11-compatible products.

The 802.11 Working Group could have adopted any of these alternative technologies to the alleged invention of the '867 patent, had it known that Complainants would threaten injunctions, excessive royalty demands and discriminatory license practices based upon a purely optional feature.

Moreover, various other technologies contribute to the power save mode, aside from what is allegedly claimed by the '867 patent. For example, the standard itself contains beacon structure, network topology, and scanning technologies that are key to power saving and

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synchronization but are not topics of the '867 patent. Further, the standard is silent on certain power saving related technologies that in practice are more important than the synchronization technology of the '867 patent and the 802.11 standard itself. Namely, achieving low power operation is left to the implementer. Thus, companies such as Realtek must develop or use low power CMOS, clocking architectures, oscillator and crystal, data buffering and queuing, power amplifier, and regulator technologies to enable their Wi-Fi chips to actually consume little power while in low power states, as the 802.11 standard is silent on the topic. The '867 patent relates to a claimed method of improved synchronization, which, at most, is only one aspect of power saving and synchronization technology as used in the 802.11 products. Exh. 2 at 46; *see also* RX-0006C (Heegard WS) at QA 845.

b. The [REDACTED] License Provides the Most Reliable Benchmark For a RAND Royalty for the '958 and '867 Patents.

On [REDACTED] entered into a license agreement with [REDACTED]
[REDACTED] for wireless networking technologies. The license
included [REDACTED]
[REDACTED] Exh. 3 (Expert Report of Dr. Gregory K. Leonard in the N.D. California case) at
43-44. As set forth below, [REDACTED]
[REDACTED] The license also granted [REDACTED]
[REDACTED]
[REDACTED] The license gave [REDACTED]
[REDACTED] Because this
agreement shows [REDACTED]
[REDACTED]
[REDACTED]

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[REDACTED], it is the most reliable benchmark license for a RAND royalty for the '958 and '867 patents. (*Id.*)

Under this agreement, [REDACTED]

[REDACTED] Although Complainants' expert in the Northern District of California proceeding, Dr. Anne Layne-Farrar, takes issue with the fact that this license was signed as part of the

[REDACTED]

[REDACTED]

[REDACTED]. In particular, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Realtek's damages expert in the Northern District of California proceeding, Dr. Gregory Leonard, prepared a conservative calculation of the effective royalty rate that [REDACTED]

[REDACTED]

[REDACTED] The appropriate royalty base in this case would be Realtek's aggregate past and future sales of products that are compatible with these standards.

[REDACTED]

[REDACTED]

[REDACTED] The term of the license was defined as [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Notably, this license agreement included [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A RAND royalty at this level is further supported by Judge Robart's RAND findings in *Microsoft v. Motorola*. After adjusting for the difference between the number of patents-in-suit and the number of Motorola patents, the implied RAND royalties for the '958 and '867 patents together would be [REDACTED] cents per unit ([REDACTED]) and [REDACTED] cents per unit (for [REDACTED]). The evidence in this case is consistent with the use of the lower rate set by Judge Robart.

Consideration of the *Georgia-Pacific* factors indicates that the outcome of the hypothetical negotiation would have been pushed toward the lower end of the bargaining range. In particular, neither the '867 nor the '958 patent represented significant technical contributions to the 802.11 standard, and alternative technologies were considered at the time the 802.11b standard was being developed. The availability of such alternatives means that the *ex-ante* value

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of the '867 and '958 patents was low and that a licensee would not pay more than a nominal amount for these patents.

2. Complainants' position on licensing of the '958 and '867 patents is not RAND.

Complainants' damages expert, Dr. Anne Layne-Farrar, has opined on a purported RAND rate for the '958 and '867 patents of [REDACTED] per Realtek product. [Exh. 4 (Rebuttal Report of Dr. Anne Layne-Farrar in the N.D. California case) at 84. To arrive at these purported RAND rates, Dr. Layne-Farrar relies primarily on two sources: (1) a license [REDACTED]; and (2) [REDACTED]

[REDACTED] Notably, Dr. Layne-Farrar's opinion refutes Complainants' indefensible licensing structure from their [REDACTED] proposal to Realtek. The [REDACTED] license, however, is not comparable, and Complainants' and Dr. Layne-Farrar's reliance on and application of the Via Pool is flawed. Thus, even the [REDACTED] rate per Realtek product is not supported.

a. The [REDACTED] license likely reflects hold-up.

A [REDACTED]

[REDACTED] See RX-1321C. In addition, [REDACTED]

[REDACTED] Exh. 4 (Rebuttal

Report of Dr. Anne Layne-Farrar in the N.D. California case) at 56-57.

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The agreement also includes [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Because the [REDACTED] license was [REDACTED]

[REDACTED]

[REDACTED] any royalties paid reflect holdup and not an arms-length transaction reflecting a RAND royalty. It does, however, show that Complainants have licensed to companies at the chipset and module level.

b. The Via pool is a poor benchmark and Complainants' expert's methodology in relying in it is unsound.

In the *Microsoft* case, Judge Robart's opinion setting a RAND rate discussed numerous flaws inherent in the Via Pool. Via Licensing formed its 802.11-essential patent pool between 2003 and 2005. *See Microsoft*, 2013 WL 2111217, at *87. Participation in the pool is substantially lower than other patent pools, as it includes only five licensors and 35 worldwide patents allegedly essential to the 802.11 standard. *Id.* The Via Pool has rates that vary from \$0.05 to \$0.55 per unit, depending on volume. *Id.* at *88.

Among other things, Judge Robart emphasized that the Via Pool had not been very successful in attracting licensors or licensees. *Id.*, at *89. The vast majority of companies that own patents allegedly essential to the 802.11 standard, such as Motorola and Microsoft, have not joined the Via Pool as licensors. *Id.* Given the poor participation in the pool, it has not achieved a primary purpose of RAND commitments – to encourage widespread adoption of the 802.11 standard – and thus has lower relevance as an indicator of a RAND rate. *Id.* As Dr. Layne-Farrar

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acknowledged in her report, the Via Pool serves as a “particularly poor” benchmark for a RAND rate for the patents in dispute in this case.

Dr. Layne-Farrar engages in a three-part analysis to rely on the Via Pool. First, she purports to determine the value of Complainants’ entire portfolio [REDACTED] [REDACTED] Although her expert report fails to mention it, Dr. Layne-Farrar’s own [REDACTED] analysis shows that [REDACTED] of the “value” of Complainants’ portfolio actually comes from [REDACTED]

[REDACTED] Exh. 5 (Deposition Transcript of Dr. Anne Layne-Farrar in the N.D. California case) at 88-89, 96, and 100.

Second, Dr. Layne-Farrar then compares the inflated value of Complainants’ entire portfolio to the estimated value of patents in the Via Pool based on how often those patents are cited by later patents. In making this determination, [REDACTED]

[REDACTED] Based on this inherently unreliable speculation, she concludes that [REDACTED] and she thus [REDACTED]

Third, having improperly inflated the value of Complainants’ entire portfolio using her [REDACTED] analysis, Dr. Layne-Farrar then ignores the results of that analysis when trying to calculate a royalty rate for the individual ’958 and ’867 patents. Specifically, although her own citation analysis shows that those two patents account for [REDACTED] of the value of the entire portfolio, [REDACTED]. Exh. 5 at 72-73.

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By doing so, she arrives at a purported royalty rate for the '958 and '867 patents that is [REDACTED]

3. Complainants' settlement demands continue to far exceed even their own expert's idea of RAND licensing terms.

As set forth above in response to Public Interest Question No. 2, above, Complainants' most recent settlement demand to Realtek during the [REDACTED] settlement conference in the Northern District of California proceeding is still far outside the boundaries of a RAND royalty rate for the '958 and '867 patents. Complainants demanded that [REDACTED]

[REDACTED] Complainants also "proposed" that [REDACTED]

[REDACTED] Complainants' licensing demand was far greater than even the already unreasonable [REDACTED] royalty rate calculated by Complainants' own expert witness, Dr. Layne-Farrar. In 2013, the average selling price of Realtek's products range from [REDACTED]. At a rate of [REDACTED] [REDACTED] Complainants' licensing demands during settlement negotiations are [REDACTED] [REDACTED] the royalty term calculated by Complainants' *own* expert witness. Complainants remain indifferent to their RAND obligations to Realtek up to and including their most recent licensing demand.

G. Issue 6

Commission Issue 6 states as follows:

Please discuss and cite any record evidence of any party attempting to gain undue leverage, or constructively refusing to negotiate a license, with respect to the '663, the '958, and the '867 patents. Please specify how that evidence is relevant to whether section 337 remedies with respect to such patents would be detrimental to

competitive conditions in the U.S. economy and any other statutory public interest factor.

Complainants attempted to gain undue leverage and engaged in patent hold up against Realtek by failing to offer Realtek licenses to '958 and '867 patents on RAND terms before initiating this investigation and to negotiate a license in good faith with Realtek even after this investigation began. Instead, Complainants sought exorbitant royalty rates from Realtek [REDACTED] while seeking an exclusion order against Realtek's products. Complainants' conduct is the very definition of seeking undue leverage and reveals that they constructively refused to negotiate with Realtek. If the Commission were to reverse the ALJ's findings of non-infringement with respect to Realtek and issue an exclusion order against Realtek's products under these circumstances, then RAND obligations would be rendered meaningless. Owners of patents declared to be standards-essential need not even make an offer before initiating an investigation, and after initiating an investigation only need to offer outrageous terms that the named respondent could not accept. Patent owners would, therefore, be free to extract higher royalty rates with the threat of an exclusion order, or discriminate against certain licensees by never granting a license before their products are excluded from the United States. Such a result would harm the public by suppressing competition and ultimately raise prices for consumer products.

1. Complainants' attempt to gain undue leverage

When Complainants filed their ITC Complaint, there was no standing offer that Realtek could have accepted. Complainants corresponded with Realtek almost a decade before filing their complaint against Realtek, but, as articulated by the district court of the Northern District of California, there was no pending offer:

The 2002 and 2003 correspondences regarding the IEEE 802.11b standard do not amount to a RAND offer for a variety of reasons,

including that: (1) the 802.11b standard is neither the standard at issue in the ITC litigation nor is it the subject of the RAND commitments in Agere's Letters of Assurance to the IEEE in the record before the court; (2) the parties ceased communications before any specific offer was ever actually made; and (3) Realtek continued to sell its Wi-Fi/802.11 component parts for almost nine years thereafter without hearing from defendants, implying that defendants were no longer seeking to license their declared standard essential patents to Realtek. Moreover, LSI's March 7, 2012 letter did not offer a license, but rather asked Realtek to immediately cease and desist from the allegedly infringing activities. Instead of offering a license, or even waiting for a response, defendants filed the ITC action naming Realtek as a respondent less than a week later.

Realtek, 2013 WL 2181717, at *7. By initiating this investigation and seeking injunctive relief before even making a license offer to Realtek, Complainants imposed undue pressure on Realtek before the parties even started license negotiations. This is exactly the kind of undue leverage that RAND terms were created to prevent and that the USTR, DOJ, USPTO, and district courts around the country have warned of. As the District Court for the Northern District of California observed after considering the exact same set of facts of record in this investigation, “[Complainants’] conduct [against Realtek] is a clear attempt to gain leverage in future licensing negotiations and is improper.” *Realtek*, 2013 WL 2181717, at *7.

2. Complainants constructively refused to negotiate

Complainants never intended to give Realtek *any* legitimate offer to license the '958 and '867 patents, let alone an offer that reflects a true RAND royalty rate for the '958 and '867 patents, nor have they offered a RAND royalty for the '958 and '867 patents to date.

Complainants [REDACTED] See, e.g., RX-0010C (Carmichael WS) at QA 136, 146-147; CX-1599C (Waskiewicz WS) at QA 231; Hg. Tr. (Waskiewicz) 181:18-182:6; Hg. Tr. (Carmichael) 1480:19-1481:9. Complainants' only communication with Realtek in the nine years before they filed their March 12, 2012 complaint

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in this ITC was a [REDACTED] letter dated March 7, 2012, which Realtek received the same day Complainants filed the ITC complaint. RX-1326C (Letter to Realtek). It was *Realtek*, not Complainants, who [REDACTED] [REDACTED]. RX-1330C (Letter from Realtek to LSI). On [REDACTED] [REDACTED] after filing its Complaint in this Investigation, Complainants provided a presentation that included [REDACTED] RX-1323C (LSI Presentation).

Complainants' proposal, however, [REDACTED] as Realtek had requested. RX-1323C. Instead, Complainants' proposal was directed to [REDACTED]

[REDACTED] *Id.* Complainants' proposal also unreasonably demanded royalties from Realtek based on [REDACTED]

[REDACTED] *Id.* at 7; RX-0010C (Carmichael WS) at QA 154-55. More specifically, Complainants proposed a royalty based on [REDACTED]

[REDACTED]. RX-1323C (LSI Presentation) at LSI Agere 837-00535219. For example, if a Realtek Wi-Fi IC were incorporated in a [REDACTED] television, Realtek would have to pay a [REDACTED] royalty for a chip that they sell for around that amount. Hg. Tr. (Kerr) at 2072:2-24.

Complainants' proposal based on [REDACTED] [REDACTED] was manifestly unreasonable because such a rate would far exceed the revenues Realtek receives from the sale of its products. *See* Hg. Tr. (Tsai) at 1312:15-22; RX-0010C

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(Carmichael WS) at QAs 148, 158-66; *see also Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 750 F.2d 1552, 1568 (Fed. Cir. 1984) (“A reasonable royalty is the amount that ‘a person, desiring to manufacture [, use, or] sell a patented article, as a business proposition, would be willing to pay as a royalty and yet be able to make [, use, or] sell the patented article, in the market, at a reasonable profit.’”). Realtek [REDACTED] [REDACTED] RX-0010C (Carmichael WS) at QA 167; RX-0012C (Tsai WS) at QAs 52-53; Hg. Tr. (Kerr) at 2072:22-24. Even a slight increase in the price of Realtek’s Wi-Fi ICs would reduce customers and sales. Hg. Tr. (Tsai) 1318:6-15. The significant increase in costs from Complainants’ proposal would end Realtek’s business altogether. *See id.* In short, there was no possible way Realtek could accept the license terms that Complainants offered.

Complainants knew the royalty rate they offered to Realtek was not acceptable. LSI’s

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Exh. 6 (Supplemental Expert Report of Dr. Gregory K. Leonard in the N.D. California case) at 2-3. Additionally, [REDACTED]
[REDACTED]

[REDACTED] Hg. Tr. (Waskiewicz) at 163:12-21. In fact, Complainants themselves previously believed that a royalty rate of [REDACTED] of the price of the Wi-Fi ICs that Realtek sells was a reasonable rate. Hg. Tr. (Waskiewicz) 177:9-17. There is no explanation for such a dramatic change of proposals
[REDACTED]

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[REDACTED]

[REDACTED]

Complainants' issuance of a [REDACTED] letter, failure to offer any license before initiating this investigation, and unreasonable license proposal made only after Realtek asked for them, all demonstrate that they had no intention of granting a license to Realtek or negotiating in good faith with Realtek. RX-0010C (Carmichael WS) at QA 133. In fact, Indeed, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Exh. 1 (emphasis added).

[REDACTED] further demonstrates that Complainants had no intention of licensing its patents to Realtek on RAND terms, and therefore constructively refused to negotiate with Realtek.

3. Granting relief given Complainants' conduct with respect to Realtek would be detrimental to competitive conditions in the US economy

RAND terms are meant to "help to ensure that standard do not allow essential patent owners to extort their competitors or prevent competitors from entering the marketplace." *Microsoft*, 2013 WL 2111217, at *6. The United States Trade Representative has similarly voiced concerns that holders of standards-essential patents may "gain[] undue leverage and

engag[e] in ‘patent hold-up’, *i.e.*, asserting the patent to exclude an implementer of the standard from a market to obtain a higher price for use of the patent than would have been possible before the standard was set, when alternative technologies could have been chosen.” August 3, 2013 Letter from USTR to Irving A. Williamson, Chairman of USITC, at 2 (disapproving the USITC’s determination to issue an exclusion order in Inv. No. 337-TA-794).

Issuing an exclusion order against Realtek where Complainants have disregarded their RAND obligations and created a patent hold-up situation would realize the very concerns the USPTO, the DOJ, and USTR voiced. It would also allow Complainants to circumvent their contractual obligations by making an offer they know the potential licensee could not accept, and engage in sham “negotiations,” while seeking an exclusion order against the potential licensee at the ITC. This would harm the public welfare, competitive conditions, and consumers in the United States, by unjustifiably driving companies like Realtek out of the market, and ultimately increasing the price of consumer products. *See* USPTO Policy Statement at 4.

III. REMEDY

Through its Notice, the Commission sought briefing on remedy, and specifically requested briefing on the appropriate bond. As set forth below, the appropriate remedy, if one were to issue, is a bond of 0% and a limited exclusion directed to Realtek’s Wi-Fi chips specifically found to infringe. Moreover, since Realtek maintains no domestic inventory, no cease-and-desist order is appropriate.

A. The Appropriate Bond is 0%

The Commission should set zero bond during the Presidential review period. No bond is necessary to protect Complainants from injury, and no bond should be required.

Section 337(j)(3) provides for the entry of infringing articles upon the payment of a bond during the 60-day Presidential review period. 19 U.S.C. § 1337 (j)(3). The bond must be

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“sufficient to protect the complainant from any injury.” 19 U.S.C. § 1337(e). The bond is to be set at a level sufficient to “offset any competitive advantage resulting from the unfair method of competition or unfair act enjoyed by persons benefiting from the importation.” *Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same*, Inv. No. 337-TA-242, Commission Opinion on Violation, Remedy, Bonding and the Public Interest, USITC Pub. No. 2034, 1987 WL 450856 at 38 (1987). Often the Commission attempts to set the bond to eliminate any sales price differences between the patented domestic product and the infringing product. *Certain Microsphere Adhesives, Process for Making Same, and Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. 2949, Comm’n. Op. at 24 (January 1996). In this instance, however, there is no price differential as Complainants do not make any product that competes with Realtek’s. The complainant “has the burden of supporting any proposition it advances, including the amount of the bond.” *Certain Silicon Microphone Packages and Products Containing the Same*, Inv. No. 337-TA-629, Comm’n Op., 2010 WL 4788911, at *13 (Sept. 1, 2010) No bond is required where there is “no evidence in the record to support any bond to offset any competitive advantage resulting from the unfair acts of [respondents] from their importations.” *Certain Rubber Antidegradants, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-533, Comm’n Op., 2006 ITC LEXIS 591, at *59 (July 21, 2006).

1. No Bond Is Needed in This Investigation.

Complainants offered no evidence and have not established that Realtek’s acts have caused Complainants any injury, or that Realtek enjoys any competitive advantage resulting from any alleged unfair acts. Complainants do not make or sell any products that compete with accused Realtek products nor did Complainants identify any domestic licensed product that competes with any accused Realtek products. Consequently, because of Complainants own

failure of proof, there is no price comparison that can be conducted for purposes of assessing bond.

Complainants' claimed domestic industry is based on licensing activities. A bond, however, is not necessary when there is no evidence of any potential harm to the patentee's licensing business. *Certain Integrated Circuits, Chipsets, and Products Containing Same Including Televisions*, Inv. No. 337-TA-786, Initial Determination, 2012 WL 3610787, at *91 (July 12, 2012). Complainants have failed to demonstrate that their licensing business would suffer any harm if Respondents are allowed to sell the accused products during the Presidential Review period.

To the extent Complainants argue bond should be set at 100%, Complainants' argument must be rejected. Complainants have only asserted against Realtek patents that they declared standard essential and committed to licensing on RAND terms. For Complainants to have a self-avowed RAND obligation and to fail to enter any evidence of a reasonable royalty or to claim they are unable to determine a reasonable royalty is disingenuous, at best. Indeed, it further undercuts any argument they may make that they have negotiated with Realtek on a good faith basis or that they have offered Realtek RAND terms.

Moreover, Complainants' offered no evidence that address the issue of bonding, much less evidence that would support a bond of 100%. Complainants stated in their interrogatory responses that the economic expert, William Kerr, would provide testimony on this issue. *See* RX-2233 (LSI's & Agere's 5th Supp'l Resp. Funai's 1st Set Interrs.) at 142 (directing Funai to Dr. Kerr's expert reports and deposition testimony). Dr. Kerr, however, never addressed bonding. *See* CX-1595C (Kerr Direct WS.) at QAs 1–116. Thus, the only evidence Complainants stated they would rely on for purposes of bonding is nonexistent. *Certain Silicon*

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Microphone Packages & Prods. Containing the Same, Inv. No. 337-TA-629, Comm'n Op., 2010 WL 4788911, at *13 (Sept. 2010).

Because Complainants will suffer no competitive harm during the Presidential review period and because Complainants willfully refuse to provide evidence of a reasonable royalty, the Commission should not require a bond in this Investigation.

2. If a Bond Is Imposed, Any Bond Should Not Exceed a RAND rate of the Price of the Allegedly Infringing Component.

If a bond is to be set in this investigation, the rate should be no more than [REDACTED] of the average selling price of the accused Realtek products. During the proceeding below, Realtek advocated a rate of [REDACTED] of the Realtek Wi-Fi chip based on LSI's agreement with [REDACTED] (RX-1321 ([REDACTED] license) at RX-1321.0004), although even that agreement was inapposite to Realtek's situation. Since then, however, parties have further developed their positions and the record on this issue, and for the reasons set forth above in connection with Section II.F.1, any bond should be no more than [REDACTED] of the average selling price of the accused Realtek products.

Further, any request by Complainants for a bond of 100% merely reflects Complainants' failure to comply with their RAND obligations. In particular, it is not reasonable that Complainants can claim to have a domestic industry based on licensing activities of standard essential declared patents and also claim to be unable to determine a reasonable royalty. Moreover, Complainants should not receive a windfall simply because they make no products that compete with Realtek's and would experience no harm from any continued importation of Realtek's products.

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B. Any Remedial Order Should be Limited to Realtek's Wi-Fi chips Specifically Found to Infringe

If a violation is found, the Commission should issue a limited exclusion order limited to the specific models found to infringe. In particular, any limited exclusion order should expressly not cover those products for which Realtek sought and attempted to introduce evidence of non-infringement but were precluded from doing so.

The scope of an exclusion order should be commensurate with the supporting evidence. *See, e.g., Certain Audio Digital-to-Analog Converters and Prods. Containing Same*, Inv. No. 337-TA-499, Comm'n Op. at 24 (Mar. 3, 2005) (limiting any exclusion order to the accused components and no downstream products); *Certain Neodymium-Iron-Boron Magnets*, Inv. No. 337-TA-372, 1995 WL 1049833, Final Initial and Recommended Determinations at *12-16 (Dec. 11, 1995) (declining to exclude certain downstream products due to lack of evidence of importation of allegedly infringing products).

1. Accused Realtek Wi-Fi Components

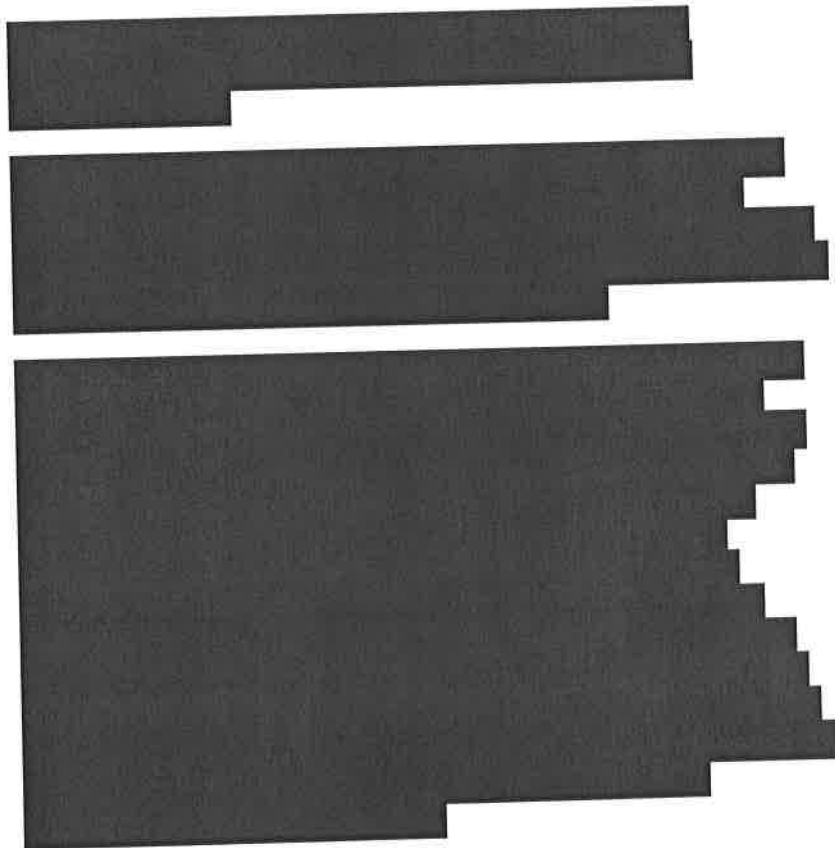
If the Commission finds a violation of Section 337 by Realtek with respect to any valid and enforceable asserted claim, a limited exclusion order should issue directed only to the specific accused Realtek Wi-Fi components found to infringe that claim. Such a limited exclusion order should not be directed to any Realtek product other than such specific models of accused Realtek Wi-Fi components, as there is no evidence that any other Realtek products both infringe an asserted claim and are sold for importation, imported, or sold after importation into the United States. This remedy would cause the least detriment to Realtek by permitting importation of the accused products that do not contain whatever infringing capability is ultimately determined to apply, if any. Further, as Complainants have not identified any Realtek

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“downstream” products that it may seek to exclude, no exclusion should extend to any downstream Realtek products.

2. Realtek’s Non-Accused Products

If a remedial order issues, it should expressly not include those Realtek products Complainants chose not to accuse and that the ALJ refused to rule do not infringe the patents asserted against Realtek (see Order No. 89 and the associated briefing). At a minimum, any remedial order it should state that the following products are not covered and may be freely imported:

The text in this section is completely redacted with three large black rectangular boxes. The first box is a single line. The second box is approximately four lines high. The third box is the largest, spanning approximately ten lines.

Realtek sought a specific ruling that these unaccused products do not infringe but were denied improperly precluded from obtaining such a ruling. As such, they should not be included in any remedial order.

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C. No Cease-and-Desist Order Should Issue

No cease-and-desist order (CDO) should issue as to Realtek. The Commission may choose to issue a CDO when there is “commercially significant” inventory of infringing products in the United States. *Certain Crystalline Cefadroxial Monohydrate*, Inv. No. 337-TA-293, Comm’n Op., 0091 WL 11732562, at *27 (June 21, 1991); *Certain Hardware Logic Emulators*, Inv. No. 337-TA-383, Comm’n Op. at 25. The Commission has explained that a CDO is issued when “necessary to prevent stockpiling of unsold products to bypass an exclusion order.” *Id.*

There is, however, no evidence of a commercially significant inventory of accused Realtek Wi-Fi components in the United States, nor do Complainants seek a cease and desist order against Realtek. (Comp. PrHB at 838-839.) The complainant bears the burden of proving that a respondent has commercially significant inventory. *Certain Baseband Process Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, Including Telephone Handsets*, Inv. No. 337-TA-543, Comm’n Det., 2011 WL 6121182, at *68 (Oct. 1, 2011). In view of the lack of any evidence of a commercially significant domestic inventory and the lack of any request from the Complainant for a CDO, no CDO should issue.

IV. CONCLUSION

At least in view of the foregoing, the public interest weighs against issuance of any remedial order against Realtek. If the Commission nevertheless determines to issue a remedial order, it should be limited to the Realtek products found to infringe, exclude those products for Realtek tried to seek a determination of noninfringement, and set a bond of \$0 during the Presidential review period.

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Dated: November 1, 2013

Respectfully submitted,

/s/ E. Niemeyer

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**CERTAIN AUDIOVISUAL COMPONENTS AND
PRODUCTS CONTAINING SAME**

Inv. No. 337-TA-837

CERTIFICATE OF SERVICE


I, Bilal Iddinn, hereby certify that on November 14, 2013, copies of the foregoing were filed with and served upon the following as indicated:

| | |
|---|--|
| The Honorable Lisa R. Barton Acting Secretary, Office of the Secretary U.S. INTERNATIONAL TRADE COMMISSION 500 E Street, S.W., Room 112-F Washington, DC 20436 (202) 205-2000 | <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Courier (FedEx) <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Email (PDF File) <input checked="" type="checkbox"/> Via EDIS |
| The Honorable David P. Shaw Administrative Law Judge U.S. INTERNATIONAL TRADE COMMISSION 500 E Street, S.W. Room 317-O Washington, DC 20436 Patricia.Chow@usitc.gov | <input type="checkbox"/> Via First Class Mail <input checked="" type="checkbox"/> Via Courier (FedEx) <input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Email (PDF File) |
| <i>COUNSEL FOR COMPLAINANTS LSI CORP. AND AGERE SYSTEMS LLC</i> Jordan Trent Jones KILPATRICK TOWNSEND & STOCKTON LLP 1080 Marsh Road Menlo Park, CA 94025 AgereLSI-837@kilpatricktownsend.com David F. Nickel FOSTER MURPHY ALTMAN & NICKEL, PC 1899 L Street, N.W., Suite 1150 Washington, DC 20036 FM-LSI-837@fostermurphy.com | <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Courier (FedEx) <input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Email (PDF File) <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Courier (FedEx) <input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Email (PDF File) |

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