

PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC**

**Before the Honorable David P. Shaw
Administrative Law Judge**

In the Matter of

**CERTAIN AUDIOVISUAL COMPONENTS
AND PRODUCTS CONTAINING THE SAME**

Investigation No. 337-TA-837

**FUNAI RESPONDENTS'¹ REPLY TO COMPLAINANTS' STATEMENT
REGARDING REMEDY, PUBLIC INTEREST AND BOND AND
COMPLAINANTS' INITIAL RESPONSE TO THE COMMISSION'S
OCTOBER 17, 2013 NOTICE ON REMEDY AND THE PUBLIC INTEREST**

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| | LSI's Initial Brief on Remedy | Comp. Brf. Rem. |
| | Funai's Initial Brief on Liability | Init. Brf. |
| | Funai's Initial Brief on Remedy | Init. Brf. Rem. |
| | Judge Shaw's Final Initial Determination on Liability | ID |
| | Judge Shaw's Recommendation on Remedy | RD |
| | Hearing Transcript from this Investigation | Hg. Tr. (Witness) |
| | Complainants' Demonstrative Exhibit | CDX |
| | Complainants' Physical Exhibit | CPX |
| | Complainants' Exhibit | CX |
| | Joint Exhibit | JX |
| | Respondents' Demonstrative Exhibit | RDX |
| | Respondents' Physical Exhibits | RPX |
| | Respondents' Exhibit | RX |
| | Question and Answer | QA |
| JX-0001 | U.S. Patent No. 5,870,087 | '087 patent |
| JX-0003 | U.S. Patent No. 6,452,958 | '958 patent |
| JX-0005 | U.S. Patent No. 6,707,867 | '867 patent |
| JX-0007 | U.S. Patent No. 6,982,663 | '663 patent |

I. INTRODUCTION

The United States Trade Representative’s August 3, 2010 letter disapproving of the limited exclusion order issued by the Commission in Investigation No. 337-TA-794 sets out specific conditions under which he expects that the public interest will permit the issuance of an exclusion order in the event a violation of Section 337 is found on the basis of infringing patents declared to be standard-essential (SEPs) (as the ‘663, ‘867 and ‘958 patents have in this investigation). Either there must be a refusal to pay a rate previously determined to be RAND, a constructive refusal to negotiate on the part of the proposed licensee, or the proposed licensee must not be subject to the jurisdiction of a district court in which a royalty can be awarded. Aug. 3, 2010 Letter from Amb. Michael Forman to The Hon. Irving A. Williamson (hereafter “Disapproval Notice) at 2 fn.3. Not a single one of these threshold qualifications exists here. Even in the event the Commission should find that a violation of Section 337 is found with respect to one or more of the SEPs, the public interest dictates that no exclusion order should issue.

The record and supporting documents make clear that Funai and LSI [REDACTED]
[REDACTED], [REDACTED]
[REDACTED]. As late as [REDACTED], the parties [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] improper under applicable case law. For the ‘867 and ‘958 patents, the record shows that [REDACTED]
[REDACTED]. Far from showing a constructive refusal to negotiate on the part of Funai, the history of negotiations reveals an attempt by Complainants to use its standard-essential patents to hold up Funai for far more than those patents were actually worth.

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Complainants also cannot claim that Funai has refused to pay a rate that has been previously determined to be RAND. Currently, other than the evidence set forth in this investigation, there has been no attempt to determine a RAND rate for any of the SEPs in this investigation, let alone a demonstration by Complainants that Funai is unwilling to pay a RAND rate should one be determined. Indeed, based on the initial briefs on remedy and prior determinations of RAND rates for 802.11 and H.264 patents, it is far more likely that Funai would be willing to pay a RAND rate than it is that Complainants would be willing to accept one.

Finally, Complainants cannot claim that Funai is not subject to district court jurisdiction. On the same day this investigation was filed, Complainants filed suit alleging infringement of the same patents at issue here in the Central District of California, where Funai Electric's subsidiary Funai Corporation has an office. Funai has not contested jurisdiction, and there is no claim that Complainants would be unable to collect any royalty that the district court might impose, assuming infringement is found.

The record evidence also demonstrates that, even if a violation is found for the only non-SEP at issue in this case (the '087 patent), an exclusion order still should not issue. Under the *EPROMs* factors, the accused component covered by the technology allegedly disclosed in the '087 patent constitutes a miniscule portion of the value of the Funai downstream products at issue, LSI would receive no incremental benefit from an exclusion order, and an exclusion order would have the potential to severely damage third parties.

Finally, if an exclusion order is issued for any of the patents, no bond should be required during the Presidential Review Period. Complainants put forward no evidence on the issue of bond, which is its burden, and cites to no evidence in its briefs. To the extent evidence was placed in the record by Funai, Complainants should not be able to rely on this evidence to meet its burden.

II. THE PUBLIC INTEREST DOES NOT SUPPORT THE ISSUANCE OF AN EXCLUSION ORDER

A. Question 1: Complainants Position That Its Ability To Seek Injunctive Relief is Unbounded Is Not Tenable

In its brief on Remedy, Bonding and the Public Interest, Complainants state (as they must) that the ‘663, ‘867 and ‘958 patents have been (self) declared to be standard-essential. Comp. Brf. Rem. at 16. Complainants also acknowledges that they have committed to the IEEE to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 16-17. Complainants’ corporate witness, [REDACTED], also acknowledged that Complainants did not have the right to refuse to license a company that requests a license to these patents. JX-0043C at 193:24-196:7. Thus, regardless of whether any of these three patents are, as a *factual* matter, necessary to practice the applicable standard, (*i.e.*, standard essential patents (SEPs)) Complainants, as a *contractual* matter, have agreed that they are obligated to license these patents under FRAND terms.

Complainants, however, then proceed to articulate the rather suspect and anomalous position that notwithstanding its obligations to the IEEE and ITU, they are not obligated to enter into negotiations with a potential licensee instead of (or even prior to) seeking injunctive relief, and that the IEEE and ITU “do[] not impose any restrictions on a patent holder’s right to redress infringement of its patents.” Comp. Brf. Rem. at 17. Such a position borders on absurd. The entire purpose of a standard-setting organization (SSO) setting a standard, and requiring members of its standard-setting committee to commit to licensing their patents on RAND terms, is to avoid “patent hold-up” by the owners of standard-essential patents (SEPs). Disapproval Notice at 2. If, as Complainants avers, their declarations and contractual undertakings to the IEEE and ITU place “no restrictions on the

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timing and manner of license offers or negotiations,” the farcical result is that Complainants would be comfortably within their rights to declare their patents to be SEPs, contractually undertake FRAND obligations, proceed to file suit alleging infringement of their SEPs seeking an injunction, and (if successful) offer a license only after an injunction has issued, notwithstanding a request by the accused infringer to begin negotiations. A more obvious hold up strategy could hardly be imagined. Complainants’ position effectively renders their contractual obligations to the ITU and IEEE to provide licenses on “fair and reasonable” terms a nullity.

Complainants’ position also makes no sense as a matter of law. As the Supreme Court has acknowledged, injunctive relief is not an automatic right of a patentee whose patents are infringed. *eBay, Inc. v. MercExchange LLC*, 547 U.S. 388, 391-92 (2006). Rather, the patentee must show, *inter alia*, that it would be irreparably harmed in the absence of an injunction, and that monetary damages are insufficient to compensate for that harm. *Id.* at 391. By stating to both the IEEE and ITU that it is prepared to grant an unrestricted number of licenses on RAND terms, Complainants have agreed that they can be compensated for any infringement of the three SEPs asserted in this investigation through monetary damages. This is not a case where Funai is not subject to the jurisdiction of a district court that can provide damages, or has refused to pay such damages. *See* Disapproval Notice at 2 fn.1. Indeed, Complainants have filed suit in district court in the Central District of California, presumably to attempt to collect the money damages which are not available to it before the Commission. *LSI Corp. et al. v. Funai Electric Co., Ltd. et al.*, Case No. 2:12-cv-2047-AG-AJW (C.D. Cal.). That Complainants have chosen to try and end-run their obligations by additionally seeking relief before the Commission, where monetary damages if and when it can prove infringement are not available, changes nothing. The Commission should reject Complainants’ attempt to re-write (indeed nullify) their agreements with the ITU and IEEE, and recognize that those agreements compel LSI, in the absence of a constructive refusal to deal or inability to collect damages, to accept a royalty instead of injunctive relief for the ‘663, ‘867 and ‘958 patents.

B. Complainants' Recital of LSI's Negotiations with Funai Distorts the Record

Complainants' recital of LSI's negotiations with Funai (Comp. Brf. Rem. at 19-28) distorts and confuses the record in an effort to conceal the fact that good faith negotiations did take place, at least on the side of Funai. Complainants cannot, however, escape the fact that [REDACTED]

[REDACTED]

[REDACTED]

As an initial matter, while Complainants state that negotiations concerning the patents at issue took place [REDACTED],² this is true only for the (video decoder)'663 patent. For the (WiFi) '867 and '958 patents, both parties agree that these patents [REDACTED]. Bell Decl., Exh. 30. Thus, considering that Complainants allege that negotiations between the parties [REDACTED], negotiations for these two patents lasted [REDACTED]. Because, by Complainants' own admission, licensing negotiations [REDACTED] (Comp. Brf. Rem. at 44), Complainants' filing of suit [REDACTED] is a strong indicator that it was not seriously interested in reaching a license agreement through a give-and-take process.

Second, Complainants' allege that Funai [REDACTED] is unsupported by anything except Complainants' own self-serving statements, which were made well after the fact. In contrast, Funai's responses in its rebuttal documents make clear that LSI's positions during the licensing negotiations was at best mistaken, or at worst an attempt to pressure Funai into taking a license that LSI had yet to prove was necessary.

For example, Complainants [REDACTED] [REDACTED] [REDACTED] Comp. Brf. Rem. at 22-23. However, this [REDACTED]

² There appears to be a dispute between the parties as to [REDACTED] negotiations between the parties, but in any event the parties agree that discussions concerning the '663 patent [REDACTED].

in LSI's [REDACTED]

[REDACTED]

[REDACTED]. Comp. Brf. Rem. at 23-24; Init. Brf. Rem. at 10-11.

Similarly, while Complainants claim that [REDACTED]

[REDACTED],³ the record demonstrates that [REDACTED].

CX-1288C.

Third, much (indeed most) of the negotiations that took place between LSI and Funai [REDACTED]

[REDACTED]. Rather, [REDACTED]

[REDACTED]

[REDACTED]. See CX-0333C.0007-0008, 0042-0047; CX-0337C.0006, 0041-0058.

Finally, Complainants completely gloss over the negotiations that took place between Funai and LSI [REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]. See

Init. Brf. Rem., Exhs. 35-42. When negotiations [REDACTED], the

parties appeared to have [REDACTED]

[REDACTED]

[REDACTED].⁴

Far from a constructive refusal to negotiate, the record shows that Funai bent over backwards to reach a negotiated solution that would [REDACTED]

³ Given that LSI proclaimed, after its [REDACTED], [REDACTED] (see CX-0355C.0077) (stating [REDACTED]), [REDACTED].

⁴ [REDACTED] (see, e.g., CX-1006C.0009; CX-0394C), it is unclear why [REDACTED] LSI.

but for [REDACTED]
[REDACTED].
[REDACTED], Complainants chose to file this investigation before the Commission in an attempt to maximize the leverage of its negotiating position. Such behavior reeks of an attempt to use the “lock-in” effects of its SEPs; the precise behavior decried on multiple occasions in the past (see U.S. DEP’T OF JUSTICE AND U.S. PATENT AND TRADEMARK OFFICE POLICY STATEMENT ON REMEDIES FOR STANDARD ESSENCIAL PATENTS SUBJECT TO VOLUNTARY FRAND COMMITMENTS (2013) *available at* <http://www.justice.gov/atr/public/guidelines/290994.pdf>), and the Commission should not permit Complainants to profit from such behavior here.

C. Question 3: Summary of LSI’s Licenses to the Patents in Suit

Despite acknowledging that LSI at one time had a license with [REDACTED] (*see* Comp. Brf. at 66-68), and that LSI has continuing obligations to [REDACTED], Complainants completely fail to acknowledge this license in the list it provides in response to Commission Question 3. This is unsurprising – Complainants failed to list this license in either its original or amended complaint, as it was required to do under Commission rules (*see* 19 C.F.R. § 210.12(a)(9)(iii)), and never listed this license in its testimony responsive to Funai’s 30(b)(6) notice on this issue. *See* RX-1103 at A-6 (“2. The facts and circumstances surrounding LSI’s activities related to each of the patents-in-suit, and Related Patents and Applications, and any portfolio of patents which includes or may include the patents-in-suit, including: a. License Agreements and covenants-not-to-sue that may include rights under any of the patents-in-suit;...”); JX-0043C at 52:23-53:17, 85:5-18, 95:5-20, 97:3-25, 116:6-118:19, 119:12-121:2, 123:7-124:12, 125:8-22, 126:10-127:1. However, the [REDACTED] license is the most directly applicable to the questions which the Commission must consider: [REDACTED]

[REDACTED],⁵ and it has been determined by several district courts to be highly indicative of a RAND rate for H.264 standard-essential patents. *Microsoft v. Motorola*, 2013 U.S. Dist. LEXIS 60233 at *239-242. [REDACTED]

[REDACTED] See JX-0043C at 157:9-160:15. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1. LSI's So-Called "Value Considerations" are Unsupported

As part of the description of its licenses, Complainants' purports to provide evidence of the value of the SEPs in issue in this investigation to LSI's licenses through an examination of its self-described "value considerations" for each of the three patents. However, on closer examination, it is clear that Complainants' assertions concerning the value of the asserted patents are unsupported.

First, Complainants asserts that [REDACTED] Comp. Brf. Rem. at 36. Under the circumstances, [REDACTED] qualifies as something of a gross understatement. Testimony by LSI's corporate witness established that, [REDACTED] [REDACTED]. JX-0043C at 131:19-21. Instead, [REDACTED] [REDACTED]. Init. Brf. Rem. at Exh. 1; CX-0387C; CX-1143C; CX-1193C. Complainants also reference a table prepared by their economic expert, Dr. Kerr, which purports to show that the '663, '867 and '958 patents [REDACTED] [REDACTED] CDX-1008C.

⁵ LSI seems to argue that [REDACTED] and/or that [REDACTED] [REDACTED]. Init. Brf. at 67. However, LSI has admitted, indeed urged and advocated that the '663 patent is H.264 standard essential. Comp. Brf. at 61-68. There is nothing [REDACTED] – the terms of the [REDACTED] license apply.

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However, Dr. Kerr's testimony at the hearing made clear that, far from being special, these three patents are simply [REDACTED]. Hg. Tr. (Kerr) at 805:15-19. For example, [REDACTED] [REDACTED], LSI also [REDACTED]. CX-1595C at QA 269. [REDACTED] [REDACTED]. See, e.g., CX-0770C ([REDACTED]); CX-1155C ([REDACTED] [REDACTED]); CX-1156C ([REDACTED] [REDACTED]). [REDACTED] [REDACTED] undercuts any claim by LSI that the three patents in issue here are somehow more valuable [REDACTED] [REDACTED].

With respect to the '867 and '958 patents, Complainants now introduce a belated and unexamined declaration from Dr. Kevin Negus, LSI's technical expert on these patents at trial, which states that these patents "describe and claim a highly valuable technological advancement...within any product that is compliant with any or all of the IEEE802.11" standards. Declaration of Expert Kevin J. Negus in Support of Complainants' Statement on Public Interest, Remedy and Bond, ¶¶ 5-6. Of course, Dr. Negus has not been cross-examined on this freshly minted declaration and it is notable that the ALJ found Dr. Negus' testimony concerning the two Wi-Fi patents at the hearing to be less than persuasive, useful or candid. Hg. Tr. (Negus) at 389:16-390:2 ("Either the witness isn't answering your question or he is not doing a good job of explaining it to me because it seems to me that it is unresponsive. So if you are being responsive, to the witness, you have to make it more clear how you are answering this question because, frankly, I agree with counsel that, you know, if you can try to answer his question more succinctly, I think we would all appreciate it because I don't understand the answer you are giving him as responsive to the question."); ID at 183 ("When describing CCK modulation, Dr. Negus avoided use of the term "complex codes," but instead insisted that CCK modulation involved a code set of 64 codes of "8 phase-modulation chips" in length. In stark contrast, his own paper on CCK, described CCK as pick[ing] one of 64 complex codes."). Indeed, in examining whether there were any secondary considerations that supported a

finding of nonobviousness for both patents, the ALJ’s Final ID found that “[t]he evidence cited by Complainants, however, consists primarily of expert testimony from Dr. Negus, and fails to establish the requisite nexus between the alleged secondary considerations and the ‘958 patent” and that “[t]he evidence adduced by Complainants, however, fails to establish the requisite nexus between the secondary considerations and the ‘867 patent.” ID at 217, 313. As such, Dr. Negus’ new (unexamined) opinions regarding the “value considerations” of the ‘867 and ‘958 patents should be disregarded or given no weight.

With respect to the ‘663 patent, LSI self-servingly alleges that the patent holds “tremendous” value, because “the disclosure of the ‘663 patent – in particular the process of UEGk binarization and its reverse process – was incorporated into the H.264 standard.” Comp. Brf. at 39. However, the ALJ found as part of his Final ID that the H.264.2 Reference Software, on which LSI based its infringement analysis for the ‘663 patent, was “optional, and there is no evidence that any Funai product incorporates the reference software.” ID at 138. Indeed, there is no evidence that the H.264 reference software (the entire basis of LSI assertion that the ‘663 patent is standard essential) was ever used in any product by anyone. As explained in Funai’s initial brief to the Commission, (Init. Brf. at 45-46) the ALJ’s determination was correct and should be adopted by the Commission. Without any link tying the ‘663 patent to the H.264 standard, LSI’s self-evaluation of “tremendous” value simply cannot stand.

2. LSI’s Offers to Funai [REDACTED] Were Not FRAND Compliant

Complainants’ position throughout this investigation has been that [REDACTED]

[REDACTED]

[REDACTED] – Complainants have satisfied their obligation to be reasonable and non-discriminatory.

Comp. Brf. Rem. at 42. However, [REDACTED] [REDACTED], it has

[REDACTED], in part, the three

patents at issue here. Init. Brf. Rem. at 15-18. Yet in all this time, the only [REDACTED]

[REDACTED]. Init. Brf. Rem. at 17. And [REDACTED] [REDACTED] [REDACTED]

[REDACTED]. RX-0009C at QA 219, 223, 225. [REDACTED]

[REDACTED]. Init. Brf. Rem. at 17.

D. Question 4: Complainants Make Several Unsupported and Legally Unsustainable Arguments Concerning Industry Licensing Practices

Funai and Complainants are largely in agreement concerning standard industry practice for licensing patents. Both Funai and Complainants believe that extended negotiations, in which there is discussion between the parties concerning whether a license is needed, and if so, the proper terms, is the norm. Comp. Brf. Rem. at 42-50; Init. Brf. Rem. at 19-20. Both Complainants and Funai agree that generally (but not always) patents are licensed as part of a portfolio if an agreement can be reached as to terms. *Id.* Funai and Complainants agree that the time period of a license can be variable, and that licenses can be either lump sum or running royalty. *Id.* Thus, in those instances where the parties are able to agree, industry practice provides for a great deal of flexibility in structuring the final terms of a license.

However, other than in the case of LSI's own less than exemplary behavior (which for obvious reasons should not be considered an exemplar of normal licensing practices), there is no evidence that [REDACTED]

⁶ [REDACTED], a misnomer coined by LSI to provide some prosaic fig leaf of cover by which it apparently hoped to articulate compliance with its FRAND obligations.

[REDACTED]⁷ Indeed, the record demonstrates [REDACTED] –
[REDACTED]. CX-
0349C; CX-1094C.0029; CX-0151C. Complainants’ misleading claim that [REDACTED]
[REDACTED] is belied by the very next sentence,
in which it admits that [REDACTED]
[REDACTED]. Comp.’s Init. Brf. at 47. For example, [REDACTED]
[REDACTED]. ID at 37-38; CX-1594C at QA 311-
312, 345-346. [REDACTED]
[REDACTED].
CX-0038C.0003-0004, 0014-0015. Thus, while [REDACTED]
[REDACTED], [REDACTED] [REDACTED]
[REDACTED]. CX-0035C; CX-0032C-CX-0034C; CX-0025C-CX-0026C.
Further, [REDACTED] licenses were [REDACTED]
[REDACTED]. CX-0025C.0003; CX-0668C.0002. As such, these cannot be
considered licenses that reflect “industry practice.”

Finally, Complainants insinuate that licenses in which [REDACTED]
[REDACTED] are standard within the industry, and that its [REDACTED]
[REDACTED]
[REDACTED]

⁷ [REDACTED], notwithstanding the “smallest
saleable unit” rule. RX-1121C at RX-1121C.0018-19

[REDACTED]

Init. Brf. at 49. This is incorrect.

First, courts looking at this issue have consistently rejected such claims in the context of setting a RAND royalty. *Microsoft Corp. v. Motorola, Inc.*, 2013 U.S. Dist. LEXIS 60233 at *212-16 (W.D. Wash. Apr. 25, 2013); *In re Innovatio IP Ventures, LLC*, 2013 U.S. Dist. LEXIS 144061 at *73-83 (N.D. Ill. Sept. 27, 2013). Second, [REDACTED] is exactly the sort of “modification” to the entire market value that the Federal Circuit soundly rejected. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1320 (Fed. Cir. 2011) (“The Supreme Court and this court’s precedents do not allow consideration of the entire market value of accused products for minor patent improvements simply by asserting a low enough royalty rate.”); *see also LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67-68 (Fed. Cir. 2012) (“We reaffirm that in any case involving multi-component products, patentees may not calculate damages based on sales of the entire product, as opposed to the smallest salable patent-practicing unit, without showing that the demand for the entire product is attributable to the patented feature.”) Given that the parties to a licensing negotiation negotiate in the shadow of what damages might be imposed by a court of law if there was a finding of infringement, it is absurd for Complainants to argue that use of an end product royalty base, which the Federal Circuit has repeatedly stated is grounds for a new trial on damages, should be considered an “industry norm.”⁸

E. Question 5: LSI’s “Fair, Reasonable and Non-Discriminatory” Licensing Terms are Neither Fair Nor Reasonable

As its “fair, reasonable and non-discriminatory” license offer, LSI [REDACTED]

[REDACTED]

⁸ Complainants’ position is particularly egregious in the context of a patent owner, like LSI, who voluntarily agreed to a contractual FRAND obligation, declared its patents to be SEPs, and then attempted to use the self-pronounced SEP designation to leverage royalties beyond those permitted by law. See Part E *infra*.

[REDACTED]

Compare Comp. Brf. Rem.at App. D with CX-0334C. Frankly, Complainants have little choice at this juncture but to “double down” on their initial position. On the one hand, the number of district court decisions finding a RAND rate for patents that have been declared standard-essential for both the H.264 and 802.11 standards is no more than pennies (or even fractions of a penny) per unit make plain that LSI’s offers to Funai were not even in the ballpark of “fair and reasonable.” *Microsoft Corp. v. Motorola, Inc.*, 2013 U.S. Dist. LEXIS 60233 at *303 (W.D. Wash. Apr. 25, 2013); *In re Innovatio IP Ventures, LLC*, 2013 U.S. Dist. LEXIS 144061 at *43-44 (N.D. Ill. Sept. 27, 2013); *Ericsson Inc. v. D-Link Sys.*, 2013 U.S. Dist. LEXIS 110585 at *83-89 (E.D. Tex. Aug. 6, 2013). Yet if Complainants came forward now, during Commission review, with a radically different proposal, it would merely underscore the unreasonableness of the offers made to Funai to date.

It bears noting that Complainants’ presentation to the Commission on Question 5 essentially ignores the question posed, and instead answers the question Complainants wished the Commission had asked. The Commission requested that the parties “submit specific licensing terms for the ‘663, the ‘958, and the ‘867 patents that each believes are reasonable and non-discriminatory.” Notice of Commission Determination to Review a Final Initial Determination Finding a Violation of Section 337 in its Entirety; Schedule for Filing Written Submissions on Certain Issues Under Review and on Remedy, Bonding and the Public Interest (hereafter “Review Notice”) at 5. Instead of responding to the Commission’s clear mandate for licensing terms [REDACTED], Complainants

[REDACTED]

[REDACTED]

[REDACTED]

Complainants [REDACTED]

[REDACTED]; indeed, it is unclear from LSI’s offer [REDACTED]

[REDACTED]

[REDACTED]. By [REDACTED]
[REDACTED] Complainants' attempt to conceal the information the Commission requested and which it needs in order to determine whether LSI is prepared to satisfy its RAND obligations. This is a strong indication that Complainants know they cannot justify the non-RAND license terms that LSI has sought to impose on Funai to date.

With respect to [REDACTED], Complainants state that [REDACTED]
[REDACTED]
[REDACTED] App. D at 2. LSI's proposed [REDACTED] has no basis in reality. Based on questioning at the hearing, LSI [REDACTED]
[REDACTED]. CX-1257C; Hg. Tr. (Leonard) 1351:7-19. However, as Dr. Leonard testified at the hearing, [REDACTED]
[REDACTED]
[REDACTED]. Hg. Tr. (Leonard) at 1406:15-1407:16. Further, even if Complainants could prove that [REDACTED]
[REDACTED], there is no evidence that the features claimed by the '867 and/or '958 patent drive consumer demand for Funai's products. Indeed, there is ample evidence that substantial numbers of Funai's customers do not desire Wi-Fi communication in their digital televisions, DVD players, or Blu-Ray players. RX-0008C at QA 91-94; RX-2815C at QA 104. As such, any attempt by LSI to claim that a RAND rate [REDACTED]
[REDACTED] is doomed to failure.⁹

⁹ While LSI confusingly alleges that [REDACTED]
[REDACTED] (see CX-0389C.0019), as explained above, it provided no evidence, either at the hearing or in its initial brief, supporting the claim that, *e.g.*, optical disc players/recorders [REDACTED] value from the patents in LSI's WLAN-related portfolio, and in any case, [REDACTED]

Finally, LSI's offer to [REDACTED] [REDACTED] [REDACTED] is clearly irrelevant to both the '867 and '958 patents. Complainants' [REDACTED] [REDACTED]. Comp.'s Brf. Rem., App. E. However, Complainants accuse both Funai and Realtek of infringing the exact same claims of the '867 and '958 patent based on use of the exact same component. Further, there is no evidence that any unasserted claims of those patents would be infringed only at the system level, but not at the integrated circuit level. As such, there is no basis for Complainants to assert that [REDACTED] [REDACTED] [REDACTED] [REDACTED], especially given that the alleged infringement is caused by the exact same component (i.e., [REDACTED] [REDACTED]).

F. Complainants' Attempt to Use Their Patents to Gain Undue Leverage Should Disqualify Them From Obtaining An Exclusion Order

Complainants cannot candidly argue that Funai has constructively refused to negotiate a license, and expends a minimal amount of effort even trying in its papers. In a single paragraph, Complainants argue that Funai's refusal to negotiate is shown by "dragging out the parties' discussions [REDACTED] [REDACTED]." Comp.'s Init. Brf. at 52. In essence, Complainants argue that simply because Funai did not succumb to LSI's pressure tactics and agree to onerous terms is, by definition, a constructive refusal to negotiate. Aside from the fact that such a silly position effectively negates any possibility that the parties could have a good faith dispute over the value of the three patents at issue, Complainants' position is not even factually correct. LSI and Funai [REDACTED] [REDACTED] before this investigation began. [REDACTED] [REDACTED]

[REDACTED] exactly the sort of analysis prohibited by Federal Circuit case law. *Uniloc*, 632 F.3d at 1320; *LaserDynamics*, 694 F.3d at 67-68.

[REDACTED]

[REDACTED] See Init. Brf., Exhs. 37-42.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] . [REDACTED] despite its belief that the patents in LSI's portfolio that had been raised to date (such as the '663 patent) were not infringed by Funai, were invalid, or both. Init. Brf., Exh. 39. Thus, Complainants' claim that they "could not elicit a reasonable proposal from Funai" (Comp. Brf. at 52) is objectively false. And with respect to the '867 and '958 WiFi patents, [REDACTED]

[REDACTED] . In an industry in which [REDACTED] (Comp. Brf. Rem. at 44), Complainants' filing of suit [REDACTED], and [REDACTED], clearly suggests a lack of good faith on the part of LSI, not Funai.

In contrast to Funai's negotiating posture, [REDACTED]

[REDACTED]

[REDACTED] . LSI's reason for doing so is [REDACTED]

[REDACTED]

[REDACTED]

integrated end product, which includes of scores, if not hundreds, of other components and which can run [REDACTED]. If Complainants ever attempted to offer a theory of damages as part of an infringement case in federal district court (as it proffers here as an industry standard licensing practice), its expert would likely be stricken. *LaserDynamics*, 694 F.3d at 67-68 ("We reaffirm that in any case involving multi-component products, patentees may not calculate damages

based on sales of the entire product, as opposed to the smallest salable patent-practicing unit, without showing that the demand for the entire product is attributable to the patented feature.”); *Network Prot. Sciences, LLC v. Fortinet, Inc.*, 2013 U.S. Dist. LEXIS 138890 at *17-26 (N.D. Cal. Sept. 26, 2013); *Multimedia Patent Trust v. Apple Inc.*, 2012 U.S. Dist. LEXIS 165928 at *16-25 (S.D. Cal. Nov. 20, 2012); *In re Innovatio IP Ventures, LLC*, 2013 U.S. Dist. LEXIS 144061, 76-77 (N.D. Ill. Sept. 27, 2013) (“The Federal Circuit has explained that “[w]here small elements of multi-component products are accused of infringement, calculating a royalty on the entire product carries a considerable risk that the patentee will be improperly compensated for non-infringing components of that product.’ Accordingly, the court must calculate royalties ‘not on the entire product,’ but instead on the ‘smallest salable patent-practicing unit.’”). LSI’s [REDACTED] [REDACTED] a “fair and reasonable” license should be considered a blatant hold up and attempt to use its SEPs to exert undue leverage. An exclusion order should be denied for the ‘663, ‘867 and ‘958 patents on that basis above.

III. NO REMEDY SHOULD BE ENTERED AGAINST FUNAI’S DOWNSTREAM PRODUCTS

A. No Limited Exclusion Order Should Issue

Complainants argue that “an *EPROMs* analysis is not required in light of *Kyocera*.” Init. Brf. at 5. This is wrong. As the ALJ recognized, *Kyocera* does not reach the question of whether the Commission should consider the *EPROMs* factors when deciding whether or not to include the downstream products of a respondent in a limited exclusion order (RD at 5), and no court has ruled that the *Kyocera* case abrogated the Commission decision in *EPROMs*. The Commission should decline to make that determination in this investigation. Indeed, as explained in Funai’s initial brief, numerous cases have applied the *EPROMs* factors post-*Kyocera*, and the Commission has declined in each instance to rule that the *EPROMs* factors may be ignored. *See, e.g., Certain Liquid Crystal Display Modules, Products Containing Same, and Methods Using the Same*, ITC Inv. No. 337-TA-

634, Comm'n Op. at 4 (Nov. 25, 2009); (adopting the ALJ's analysis of whether an exclusion order should extend to respondents' downstream products based on the *EPROMs* factors); *Certain Microprocessors, Components Thereof, and Products Containing Same*, ITC Inv. No. 337-TA-781, Init. Determ., 2012 ITC LEXIS 6258, at *493-504 (Dec. 14, 2012) (applying *EPROMs* factors and determining that the LEO should not extend to downstream products manufactured by respondents); *Certain Light-Emitting Diodes and Products Containing Same*, ITC Inv. No., 337-TA-784, 2012 ITC LEXIS 1785, at *3-12 (July 23, 2012) (applying *EPROMs* factors and finding that "extending an exclusion order to cover any downstream products is not warranted"). The point of the *EPROMs* factors – to ensure that an exclusion order does not ensnare products in which the accused infringing component is a minor portion of the product's value – is just as important now as it was prior to the ruling in *Kyocera*.

Examination of the *EPROMs* factors demonstrates that the ALJ clearly erred in his recommendation that a limited exclusion order issue should a violation of Section 337 be found. Nothing in Complainants' brief changes that conclusion.

1. The Value of the Infringing Articles Compared to the Value of the Downstream Products Into Which They Are Incorporated

a. Quantitative Analysis

Complainants' arguments against Funai's quantitative analysis are 1) that Dr. Vander veen's quantitative analysis should be disregarded because it is based on RX-1867C, which it claims is a rejected exhibit, and 2) that values [REDACTED] are objectively quantitatively significant, and 3) that there is no minimum percentage at which an accused products value becomes "significant." Init. Brf. at 6-7. Dr. Kerr admits that he performed no quantitative analysis. Hg. Tr. (Kerr) 813:7-814:18.

With respect to point 1, Complainants' claim that RX-1867C was rejected, is demonstrably false. Hg. Tr. 1560:23-1564:14 (admitting RX-1867C).

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With respect to point 2, Complainants' cite to *Certain Electrical Connectors and Products Containing Same*, ITC Inv. No. 337-TA-374, 1996 ITC LEXIS 547 (July 1996), is inapposite. While the Commission did issue a limited exclusion order against downstream motherboards incorporating the accused connectors in that investigation, it did so because of uncontroverted proof that the value of the connectors to the infringing product was high. *Id.* at *30; *see also Certain Baseband Processors Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, Including Cellular Telephone Handsets*, ITC Inv. No. 337-TA-543, 2007 ITC LEXIS 621 at *60-61 (June 19, 2007) ("A significant part of the value of a telephone handset is derived from the value of the chip. Qualcomm conceded that the technology of the '983 patent cannot be disabled or turned off without creating serious functionality issues for handsets."). As explained below, to the extent that the patents at issue are not even standard-essential, that is not the case here.¹⁰

Finally, with respect to point 3, the Commission has consistently found that factor one weighs against the imposition of an exclusion orders covering downstream products when the value of the infringing component is low, as it is here, and the qualitative factors do not suggest otherwise. *See Certain Nor and Nand Flash Memory Devices and Products Containing Same*, ITC Inv. No. 337-TA-560, Initial Determination (June 1, 2007), 2007 ITC Lexis 691 at *233-34 (finding EPROMs factor 1 weighs against exclusion of downstream cell phones when the accused flash chips only account for 4-5% of the value and provide only a small amount of the overall functionality); *Certain HSP Modems, Software and Hardware Components Thereof, and Products Containing Same*, ITC Inv. No. 337-TA-439, Initial Determination (October 18, 2001), 2001 ITC Lexis 797 at *140 (finding

¹⁰ To the extent the Commission finds that the three alleged SEPs asserted in this investigation are standard-essential, then for the reasons stated in the public remedy Section II *supra*, a limited exclusion order should not issue based on the public interest.

an exclusion order covering downstream PCs was not warranted when, inter alia, the comparative value of the PC to the infringing component was extremely high).

b. Qualitative Analysis

Complainants make no attempt to rebut Dr. Vander veen’s statement that the accused integrated circuits are not critical to the function of the downstream products. *See* RX-0008C at QA 86. Nor do Complainants attempt to rebut the uncontroverted evidence that [REDACTED], [REDACTED], and [REDACTED], comes from products that have WLAN capability.

While Complainants claim that the Recommended Determination finds that the asserted patents are of great value, for the ‘SEPs in issue, the ALJ clearly states that this value applies if and only if these patents are found to be both infringed and standard-essential, (*see* RD at 6), in which case the public interest demands that an exclusion order not issue. *See* Section II. *supra*. With respect to the ALJ’s statement that the ‘087 patent is of great value because the patent simplifies video decoder systems, the ALJ completely and erroneously ignores the statements of Dr. Schonfeld regarding the value of this patent. While the ‘087 patent explicitly states that “it is desired to reduce the memory requirements of the decoder system as much as possible to reduce its size and cost” (JX-0001 at JX-0001.0020), at this time (*i.e.* in 2013) the cost of memory is so cheap that the techniques described in the ‘087 patent essentially add no value to a video decoder. Dr. Kerr’s analysis is based entirely on Complainants’ technical expert’s claims concerning the technological value of the patents at issue; he admitted on the stand that he had no independent basis for making such an analysis. Hg. Tr. (Kerr) 810:3-813:2.

2. The Identity of the Manufacturer of the Downstream Products

As explained in Funai’s opening brief, under Commission precedent this factor is not relevant to the downstream products at issue in this investigation, and the single case cited by Complainants to argue in favor of excluding Funai’s downstream products is inapposite. Init. Brf. Rem. at 33-34

(citing *Certain Microprocessors, Components Thereof, and Products Containing Same*, 337-TA-781, Init. Determin., 2012 ITC LEXIS 2658 at *497 (Dec. 14, 2012)). For the reasons explained in Funai’s initial brief to the Commission and post-hearing briefs, the ALJs statement that under factor 2 “there is no impediment to excluding downstream products through a limited exclusion order,” is in error. RD at 7; Init. Brf. Rem. at 24-26.¹¹

3. The Incremental Value to the Complainants of the Exclusion of the Downstream Products

Complainants do not dispute that they do not manufacture products that are competitive with any of Funai’s downstream products. Nor do they dispute that [REDACTED] that could provide any incremental benefit to LSI if an exclusion order issued, and that the impact of Funai’s absence from the market [REDACTED], given the multiple other suppliers and overall competitiveness of the consumer electronics market. Instead, Complainants argue that an exclusion order is necessary for Complainants to receive any value from relief in this investigation, and that [REDACTED] issuance of remedial orders. However, even for this argument, Complainants offer no evidentiary support. *Id.* Dr. Kerr’s rebuttal witness statement includes nothing more than generalized, unsupported statements, such as: [REDACTED] [REDACTED] CX-1642C at QA 41. In support of this statement, Dr. Kerr cites no documents, no testimony, no records. Nothing. Compounding the evidentiary issues, Dr. Kerr makes no effort to quantify this supposed “indirect gain” that would result from excluding downstream products.

¹¹ Funai’s initial brief on remedy states that there is no dispute between the parties that the products at issue are manufactured by Funai. This was an error. As explained in multiple places in Funai’s initial brief on remedy (Init. Brf. Rem. at 36-39) [REDACTED]

Moreover, to the extent that Complainants assert that [REDACTED], this argument stands in stark conflict with Complainants' position that they are in compliance with their RAND obligations for the '663, '958, and '867 patents. Complainants' [REDACTED] is inconsistent with their obligation to offer fair, reasonable, and nondiscriminatory licensing terms, consistent with their obligations to the standards-setting organizations as discussed herein. *See Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, ITC Inv. No. 337-TA-794, Notice of Commission Determination to Extend the Target Date; Requesting Additional Submissions on Remedy and the Public Interest at 3, Question 7 (requiring Samsung to explain how any changes it intends to make to its license offer once a remedial order is entered would comport with its requirement to offer a fair, reasonable and nondiscriminatory license). This factor should be found to weigh heavily against the issuance of an exclusion order.

4. The Incremental Detriment to Respondents of Exclusion

In response to the clear detriment impact on Funai's sales of [REDACTED] accessories explained by Dr. Vander veen, LSI argues that "the Commission generally gives little if any weight to detriment occurring as to respondents' sales of infringing articles, absent unusual circumstance." Init. Brf. at 10. However, the clear testimony of Mr. Dale Luengen demonstrates that the accessories at issue are *not* infringing articles, as LSI claims. Rather, they are products such [REDACTED]. JX-0037C at 15:19-16:1. As such, Complainants citation of *Certain Baseband Processors* does not apply to this case. Complainants also do not dispute that the vast majority of the value of the Funai downstream products comes from non-infringing components, or that exclusion would be grossly disproportionate given the value generated by non-infringing components. RX-0008C at QA 122-127. The Commission should therefore find that this factor weighs against excluding downstream products as well.

5. The Burden on Third Parties Resulting From Exclusion

With respect to factor five, the ALJ correctly found that, if an exclusion order is to be entered, the Commission may allow importation for purposes of warranty and repair so as to hold third parties harmless. RD at 8. Such an exception would allow innocent consumers who have already purchased the Accused Products to obtain replacement parts or products, thus holding them harmless. Complainants' expert does not disagree. Hg. Tr. (Kerr) at 829:13-830:16. Thus, to the extent that this factor is held not to weight against an exclusion order, it at minimum weighs in favor of a repair and replacement exception.

6. The Availability of Alternative Downstream Products That Do Not Contain the Infringing Articles

As explained in Funai's initial brief (Init. Brf. Rem. at 38), while there are alternative downstream products that do not contain the allegedly infringing components available in the market in the United States, an order excluding the Funai Accused Products would reduce consumer choice of digital televisions, Blu-ray disc players, home theater systems, and other audiovisual devices. *See* RX-0008C at QA 146.

7. The Likelihood That the Downstream Products Actually Contain the Infringing Articles and are Thereby Subject to Exclusion

Complainants' attempt to argue that there is some dispute concerning whether or not products are manufactured by third parties are wrong. As Complainants know, both Funai Corporation and P&F USA import products on behalf of Funai Electric Co., Ltd. However, as explained by Mr. Luengen during his first deposition, [REDACTED] [REDACTED]. JX-0037C at 15:19-18:15. Complainants are well aware of this dual importation structure; indeed, at Mr. Luengen's second deposition Complainants asked about a series of product models [REDACTED] JX-0037C at 62:20-66:7. These products numbers [REDACTED] [REDACTED]. CX-0555C.

8. The Opportunity for Evasion of an Exclusion Order That Does Not Include Downstream Products

The parties, and the ALJ, agree that factor 8 does not weigh in favor of an exclusion order. Recommended Determination at 9; Comp.’s Init. Brf. at 12; Resp.’s Init. Brf. at 39.

9. The Enforceability of an Order by Customs

Finally, Complainants argue that Factor 9 is not relevant because “Funai admits it manufactures all of the accused downstream products,” “can readily identify which of its products contain the accused chips and can provide a list of those model numbers to Customs,” and can certify that products are non-infringing to Customs. Comp.’s Init. Brf. at 12. As explained above, and as Complainants well know, Funai [REDACTED] [REDACTED]; rather, some of these products ([REDACTED] [REDACTED]) are [REDACTED]. JX-0037C at 15:19-18:15. The Funai Respondents [REDACTED] in the manufacture of its products, and Funai [REDACTED] [REDACTED]. Thus, Funai cannot readily identify which of these products contain the accused chips. Further, as explained in Funai’s initial briefing, the Accused Products are classified under several headings and subheadings of the Harmonized Tariff Schedule (“HTS”) including: 8521, 8522, 8525, 8527, 8528, 8529 and 8542. RX-0008C at QA 166; *See* also 2d Am. Compl. ¶ 142. The large number of products and HTS numbers covered by an order would likely impose a burden on Customs. Further, the same model of the Accused Products may incorporate an integrated circuit which is sourced from multiple suppliers. RX-0008C at QA 166. As such, the enforcement of an order would be burdensome for Customs and this factor weighs against exclusion of the Funai Downstream Products should the Commission find a violation of Section 337.

B. No Cease and Desist Order Should Issue

Complainants' argument against a cease and desist order is based on the fallacy that every product imported by Funai infringes the patents at issue. Complainants claim that they established

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]" Init. Brf. at 13. This is patently false, as the testimony Complainants rely upon in their initial brief makes clear. The series of questions and answers asked by Complainants of Yoichi Kanazawa, Funai Corporation's corporate witness, were not directed at just accused products. Rather, Complainants inquired about the total units of *all* products, both accused and non-accused, in Funai's warehouses. JX-0030C (Jan. 16, 2013 Kanazawa Dep.) at 41:11-42:24. Complainants have never claimed that every product imported by Funai into the United States infringes the patents in this case; indeed, the uncontroverted evidence is that Funai imports (and stores as inventory) many products (*e.g.*, [REDACTED]) that have nothing whatsoever to do with any of the patents at issue. Luengen Dep. Tr. at JX-0037C.0008 at 15:19-16:10, 17:6-11; JX-0037C.0010 at 23:3-9.

As a fallback position, Complainants argue that "Commission precedent does not require a precise accounting of inventories to justify issuance of a [cease and desist order]" and that "a single infringing product may constitute 'sufficient inventory' for the purposes of a cease and desist order." Init. Brf. at 14. The cases cited for these propositions are inapposite. In *Certain Hardware Logic Emulation Systems and Components Thereof*, ITC Inv. No. 337-TA-383, Comm'n Op. on Temporary Relief, 1996 ITC LEXIS 377 (Oct. 15, 1996), it appears that the Commission found that, due to the expense of even one of the accused articles, that one article could be "commercially significant inventory." *Id.* at *12-13. This is a far cry from the Funai downstream products accused by Complainants in this investigation, whose retail prices are [REDACTED]

█. And while a precise accounting may not be required, the complainant must come forward with particularized evidence relating to the accused products, rather than generalized inventory information about the total product line of the respondent. *Certain Electronic Devices With Multi-Touch Enabled Touchpads And Touchscreens*, ITC Inv. No. 337-TA-714, ID at 36 (Apr. 29, 2011) (“While each of the decisions cited by complainant include a statement that precise accounting is not necessary, the administrative law judge finds that none of these decisions support complainant’s conclusion that complainant need not provide an accounting of expenditures to show substantial investment in the current investigation.”).

The ALJ properly found that Complainants had failed to carry their burden with respect to a cease and desist order, and the Commission should decline to issue such an order in this investigation.

C. Complainants’ Failure to Offer Any Evidence for Some Products Contained in the Joint Statement of Accused Products Should Exclude These Products From Any Exclusion Order

Finally, any exclusion order that issues should not reach the █ products that Complainants placed on the Joint Statement of Accused Products, took full discovery on, and then declined to offer any factual or expert testimony on infringement.¹² Complainants’ briefs and the ALJ’s Recommended Determination simply ignore the ALJ’s Ground Rule 12, which requires the parties to provide a list of all products that are accused of infringement. “By listing a product in the joint filing, a respondent does not admit infringement. Nevertheless, the joint filing indicates the final extent of Complainants’ accusations in this investigation.” Order No. 67 at 2-3 fn.5. Complainants placed █ Funai products on its Joint Statement of Accused Products. Complainants understood that it would not be allowed to demonstrate infringement against any products not on that list. Indeed, Complainants made multiple attempts to amend the list after the deadline for fact discovery, which

¹² The full list of products which Complainants placed on the Joint Statement of Accused Products and then failed to offer any evidence of infringement is contained in Funai’s initial brief on remedy at page 43, fn.12.

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the ALJ denied. *See e.g., Certain Audiovisual Components and Products Containing The Same*, ITC Inv. No. 337-TA-837, Order 83 (Mar. 28, 2013). Similarly, to the extent Complainants identified specific products in the investigation as being accused of infringement, it was under an obligation to either prove infringement with respect to those products, or accept that a non-infringement finding is appropriate.

Complainants argue that “Commission practice is to direct remedial orders to all products ‘covered by’ the asserted claims as to which a violation has been found, not to limit the orders to only those specific models selected for the infringement analysis.” Init. Brf. at 3. However, at no time did Complainants claim that the products for which they chose to offer evidence of infringement in this investigation were somehow “representative” of other products on the Joint Statement. In contrast, the ALJ in *Certain Mobile Telephone Handsets*, upon which Complainants rely, explicitly found that certain accused products were representative of all 117 products accused of infringement by the complainant. *Certain Mobile Telephone Handsets, Wireless Communication Devices, and Components Thereof*, ITC Inv. No. 337-TA-578, Final Init. and Recommended Det., 2007 ITC LEXIS 1451 at *310 (Dec. 12, 2007); *see also Certain Erasable Programmable Read Only Memories, Components Thereof, Products Containing Such Memories, and Processes for Making Such Memories*, ITC Inv. No. 337-TA-276, 1991 ITC LEXIS 1311 at *13-14 (noting that Section 337 violation was based on finding of infringement for products “designated by the parties as representative”). With the exception of products that contained the same integrated circuit, which were grouped together for the purposes of Complainants’ infringement analysis, each product stand or fell (on infringement) on its own. CX-1594C at CX1594C.0028-0029 QA 130-132, CX-1594C.0060 QA 231-232, CX-1594C.0075-0076 QA 276, CX-1594C.0090 QA 311-312, CX1549C.0098 QA 345-346; CX-1597C at CX-1597C.0070-0071 QA 214; CX-1596C at CX-1596C.0048 QA 177, CX-1596C.0092 QA 303. Funai does not argue that any limited exclusion order, should one issue, would be limited to the products which Complainants accused of

infringement. *Cf. Certain Erasable Programmable Read Only Memories*, ITC Inv. No. 337-TA-282, 1991 ITC LEXIS 1311 at *8 (Aug. 1, 1991) (“Atmel has taken the position that only those EPROMs designated in the reporting section of the cease and desist order were specifically determined by the Commission to infringe, and that therefore the proscriptions of the limited exclusion and cease and desist orders apply only to those EPROMs”). However, it would be a strange result for products that a complainant was under a specific obligation to accuse of infringement, and for which the complainant failed to do so, to be included in an exclusion order. Rather than promoting the efficiency and early understanding of the scope of the hearing which Ground Rule 12 attempts to provide, such a rule would encourage complainants to obfuscate concerning which products it actually intended to accuse of infringement (as Complainants did here). Thus, the Commission should decline to extend any limited exclusion or cease and desist order to the [REDACTED] models which Complainants placed in the Joint Statement of Accused Products, but for which they provided no evidence of infringement.

IV. COMPLAINANTS CITE TO NO EVIDENCE CONCERNING BOND

Finally, Complainants’ brief cites to absolutely no evidence concerning bond. As noted in Funai’s initial brief, it is Complainants’ burden to produce evidence on bond, and in the absence of such evidence, the recommended bond must be zero. *Certain Polyimide Films, Products Containing Same, and Related Methods*, ITC Inv. No. 337-TA-772, Final Init. Det., 2012 ITC LEXIS 1376 at *505-506 (May 10, 2012) (citing *Certain Rubber Antidegradants, Components Thereof, and Products Containing Same*, ITC Inv. No. 337-TA-533, Comm’n Op., 2006 ITC LEXIS 591, at *59 (July 21, 2006)); *Certain Imaging and Printing Devices and Components Thereof*, ITC Inv. No. 337-TA-690, Final Init. Det., 2010 ITC LEXIS 2190 at *730-731 (Sept. 23, 2010) (same). If, however, the Commission feels some bond is appropriate, then for the reasons stated in Funai’s initial brief, such a bond should be limited to [REDACTED] of the value of the integrated circuit which is the accused infringing article contained in Funai’s downstream products. Init. Brf. Rem. at 46-50.

V. CONCLUSION

For the reasons stated in Funai's initial brief on remedy and herein, Respondent Funai requests that, in the event the Commission finds a violation of Section 337 with respect to any of the patents asserted by Complainants, the Commission decline to enter either a limited exclusion order or a cease and desist order. Funai further requests that, in the event the Commission chooses to issue either a limited exclusion order or a cease and desist order, that either no bond be required during the Presidential Review Period, or that the bond be no more than [REDACTED] of the entered value of the integrated circuit accused of infringement.

Dated: November 12, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carlos Goldie, certify that, on November 22, 2013, I caused the foregoing **PUBLIC VERSION OF FUNAI RESPONDENTS' REPLY TO COMPLAINANTS' STATEMENT REGARDING REMEDY, PUBLIC INTEREST AND BOND AND COMPLAINANTS' INITIAL RESPONSE TO THE COMMISSION'S OCTOBER 17, 2013 NOTICE ON REMEDY AND THE PUBLIC INTEREST** to be filed through EDIS and served upon the following parties in the manner indicated below:

The Honorable Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112-A
Washington, D.C. 20436
202-205-2000

- Via Electronic Filing
- Via First Class Mail
- Via Hand Delivery
- Via Federal Express
- Via Electronic Mail

The Honorable David P. Shaw
Administrative Law Judge
U.S. International Trade Commission
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