

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 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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Exh. A	Plaintiff Realtek Semiconductor Corporation's Third Set of Interrogatories to Defendants LSI Corporation and Agere Systems, Inc.
Exh. B	Defendants LSI Corporation and Agere Systems LLC's Responses to Plaintiff's Third Set of Interrogatories
Exh. C	Letter Dated June 7, 2013 from S. Herring
Exh. D	Supplemental Joint Case Management Statement
Exh. E	Email Chain between Realtek and LSI

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<sup>1</sup> 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.

**I. INTRODUCTION**

Complainants' opening brief on public interest recognized their RAND obligations, but sought to excuse their non-compliance by rewriting not only their own RAND commitment but also much of the parties' negotiation history. Despite the RAND-encumbered nature of the '867 and '958 patents, Complainants unilaterally converted their commitment into an offer-only requirement, without imposing any reasonableness or fairness for the offers it made.

Complainants seek to rewrite the meaning of RAND because [REDACTED]

[REDACTED]

[REDACTED]. Rather than address their own inexcusable failure in meeting their RAND obligations, Complainants attempted to shift the burden to Realtek, falsely accusing Realtek of refusing to negotiate. Complainants, however, cannot explain how their own tactics, including their initial proposal [REDACTED]

[REDACTED], [REDACTED]

[REDACTED], could possibly be anything other than a constructive refusal to negotiate. Given Complainants' inexcusable non-compliance with their RAND commitments and their tactics meant to prevent Realtek from obtaining a reasonable and fair license that should have been freely available, the Commission should find that Complainants have failed to meet their RAND obligation. Therefore, even if the Commission overturns the Initial Determination of no violation as to Realtek, the Commission should still decline to issue any remedial order as contrary to the public interest.

**II. PUBLIC INTEREST**

**A. 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)? . . . .

Complainants admit they made commitments to the IEEE but characterize those commitments as merely agreeing to “negotiate in good faith with potential licensees.” Comp. Resp. at 16. Complainants, however, suggest good faith negotiations require nothing more than making any offer to Realtek, no matter how unreasonable and discriminatory. Complainants’ letters of commitment impose a much higher burden than Complainants suggest. Not only were Complainants required to negotiate in good faith with potential licensees, but Complainants also promised to the IEEE that that they were [REDACTED]

[REDACTED]  
[REDACTED] Comp. Resp. at 16, citing CX-1261C. As discussed in Realtek’s initial brief on the public interest and later in this Reply, the history of negotiations between the parties and the record evidence clearly demonstrate that Complainants have never been willing to grant Realtek a license to the patents at issue in this investigation on RAND terms. Moreover, even when Complainants “negotiated” with Realtek, they have failed to do so in good faith, thus failing to meet even the commitment that they admit they made.

Complainants also argue that “[t]here are no contractual limits in LSI’s Letters of Assurance that prevent a patent holder from seeking injunctive relief...the IEEE only requires that a patentee make available a license, not that it do so before seeking injunctive relief.” Comp. Resp. at 17. Courts and Federal agencies, including the United States Trade Representative (USTR), have all recognized that RAND terms exist to prevent patent hold-up. *See e.g.*, August 3, 2013 Letter from USTR to Irving A. Williamson, Chairman of USITC, at 2 (voicing 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.”). Seeking injunctive relief before even making a license proposal, however, as LSI did, creates an unacceptable recipe for “patent hold-up.”

Though neither Complainants’ letters of assurance nor the IEEE bylaws explicitly preclude Complainants from seeking injunctive relief, Courts have consistently found that seeking injunctive relief is inconsistent with RAND commitments, particularly when the patent holder had not even made a license proposal. *See e.g., Realtek Semiconductor Corp. v. LSI Corp.*, No. C-12-03451-RMW, 2013 WL 2181717, at \*7 (N.D. Cal. May 20, 2013) (holding that Complainants’ pursuit of an ITC exclusion order against Realtek was “inherently inconsistent and a breach of defendants’ promise to license the patents on RAND terms.”); *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884-85 (9<sup>th</sup> Cir. 2012) (recognizing that a holder of a standard essential patent seeking “injunctive relief against infringement is arguably a remedy inconsistent with the licensing commitment.”); *Apple, Inc. v. Motorola, Inc.*, 869 F.Supp.2d 901, 913-14, 923 (N.D. Ill. 2012) (denying injunctive relief to Motorola, which had committed to license its patents on RAND terms). LSI cites no authority to the contrary. Indeed, when the shoe was on the other foot and Complainants were the ones *threatened* with an exclusion order in ITC Investigation No. 337-TA-753, Complainants took a position consistent with Realtek's position here. In Investigation No. 337-TA-753, Rambus made promises to European antitrust officials that it would accept royalties for the use of the patents at issue, but later sought an exclusion order against LSI. There, LSI argued that “injunctive relief is antithetical to [Rambus's]

promises.” *Realtek Semiconductor Corp. v. LSI Corp.*, 2013 WL 2181717, \*6 fn. 4 (N.D. Cal. May 20, 2013). Complainants’ position in this Investigation flies in the face of the law developed by federal courts the policies adopted by the federal government, and Complainants’ own prior positions.

Given Complainants’ failure to make a license offer before initiating this investigation, and their continued failure to negotiate with Realtek in good faith, Complainants have breached their RAND commitments and are therefore not entitled to an exclusion order. This was exactly what Judge Whyte in the related case in the Northern District of California held in granting a preliminary injunction preventing LSI from enforcing any exclusion order that the ITC may issue, *Realtek*, 2013 WL 2181717 at \*9, and there is no reason for the Commission to find otherwise.

**B. 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.

The evidence of record shows Complainants have refused to engage in “serious” licensing negotiation. Yet Complainants falsely assert in their brief that “Realtek has yet to engage in serious licensing negotiations.” Comp. Resp. at 28. It was Complainants that made and maintained a licensing proposal [REDACTED], and then stalled Realtek’s attempts to negotiate by making empty promises and refusing to provide information that Realtek requested in a timely manner.

Complainants have a clear motive for refusing to negotiate with Realtek—they make more money licensing end consumer products and [REDACTED]. *See, e.g.*, RX-0010C (Carmichael WS) at QA 136, 146-147; CX-1599C (Waskiewicz WS) at QA 223 [REDACTED] [REDACTED], 230-31; JX-0055C ([REDACTED] Dep. Tr.) at 220:3-25 [REDACTED] [REDACTED], 231:25-232:9; JX-0022C ([REDACTED] Dep. Tr.) at 164:22-165:16, 183:18-184:2; JX-0021C ([REDACTED] Dep. Tr.) at 101:19-24, 172:25-5. Despite their refusal to license Realtek, Complainants nevertheless sued Realtek and sought injunctive relief, in clear violation of their pre-existing RAND obligation.

Indeed, [REDACTED]

[REDACTED]

[REDACTED]

Exh. 1 to Realtek Resp. (Email Chain between Realtek and LSI, emphasis added).

Complainants attempt to deflect their refusal to license Realtek by noting that [REDACTED]

[REDACTED] Comp.

Resp. at 47. [REDACTED]

[REDACTED] *See, e.g.*, RX-0010C (Carmichael WS) at QAs 136, 146-147; CX-1599C (Waskiewicz Direct WS) at QA 231; Hg. Tr. (Waskiewicz) 181:18-182:6. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] k. Hg. Tr.

(Waskiewicz) at 163:12-21. Instead, [REDACTED]

[REDACTED]

[REDACTED] See e.g., RX-1135C ([REDACTED] Agreement); RX-1316C

([REDACTED] Agreement); RX-1411C ([REDACTED] Agreement); RX-1321C ([REDACTED] Agreement).

Indeed, Complainants license to [REDACTED] expressly [REDACTED]

[REDACTED] Hg. Tr. (Kerr) at 2051:6-2054:10; RX-1321C.004. Moreover, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Such

[REDACTED] requirement would be practically impossible to meet and is another example of the

unreasonable and discriminatory nature of Complainants' proposal. RX-0010C (Carmichael WS)

at QAs 187-188.

**1. Discussions Between Realtek and Agere [REDACTED] Did Not Amount to a RAND Offer**

Complainants' account of the history of negotiations with Realtek contains a number of misstatements and mischaracterizations. Complainants alleged that "[REDACTED]

[REDACTED] Agere wrote multiple letters to Realtek offering a license to the essential claims of Agere's patents relevant to the IEEE 802.11b standard." Comp. Resp. at 30. Those letters, however, do not constitute an offer. [REDACTED]

[REDACTED] d, CX-1007C ([REDACTED] Letter from Agere to Realtek) at

LSIAgere837-00054178-179, [REDACTED]

[REDACTED]. See RX-1358C (Agere Letters of Assurance) at LSIAgere837-00426155-63, -

00426181-86. Second, regardless of whether it was Realtek or Agere that sent the last communication, the fact remains that the patent holder, Agere, did not pursue any further action for more than nine years. [REDACTED]

when they filed their complaint in this investigation, because they sent a [REDACTED] letter just days before filing the complaint. *See* RX-1326C (Notice letter to Realtek regarding LSI patents). As the Northern District of California court found, there was no offer on the table at the time Complainants filed their Complaint:

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.

Complainants' accusation that Realtek failed to respond to their [REDACTED] correspondence is also false. Upon receiving a copy of Complainants' initial letter [REDACTED], Realtek requested [REDACTED]. 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 contact Realtek [REDACTED]

[REDACTED] (Hg. Tr. (Chen) at 1281:13-20), but there is no evidence Realtek received any [REDACTED] letter from Agere. It is not disputed, though, that Agere never provided [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.

[REDACTED]  
[REDACTED]  
[REDACTED] See JX-0043C ([REDACTED] [REDACTED] Dep. Tr.) at 99:4-13; CX-1642C (Kerr WS) at QA 136. Additionally, Realtek's request [REDACTED] was neither unusual nor unexpected, as [REDACTED]. See e.g., JX-0021C ([REDACTED] Dep. 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 and no longer had any interest in continuing discussions with Realtek.

**2. The History of Negotiations Between Realtek and Complainants [REDACTED] Shows That Complainants, Not Realtek, Refused to Negotiate**

In an effort to re-write the history of negotiations between itself and Realtek since this investigation began, Complainants resort to ignoring many of the parties' discussions and correspondence, mischaracterizing others, and pointing to red-herrings. In particular, Complainants complain that Realtek did not respond to their [REDACTED] proposal, other than to file lawsuits against Complainants. Comp. Resp. at 33. But this is clearly not the case. In fact, the parties engaged in numerous discussions after Complainants provided their [REDACTED] proposal, including three settlement conferences held on July 19, 2012, September 6, 2012, and March 11, 2013, pursuant to the procedural schedule in this investigation, as well as a settlement

conference in [REDACTED] for the related district court case. *See* First, Second, and Third Settlement Conference Reports (Doc. IDs 486609, 490962, 505889); Comp. Resp. at Waskiewicz Decl. ¶5. Additionally, as acknowledged by Complainants themselves, Realtek’s counsel in the district court case sent Complainants’ counsel a letter on [REDACTED]. *See* Comp. Resp. at 33, fn 7. In that letter, Realtek’s counsel requested, among other things, the following information:

[REDACTED]

Exh. A (Plaintiff Realtek Semiconductor Corporation’s Third Set of Interrogatories to Defendants LSI Corporation and Agere Systems, Inc.). Complainants again, [REDACTED]

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[REDACTED]

[REDACTED] [REDACTED]. *See* Exh. B (Defendants LSI Corporation and Agere Systems LLC's Responses to Plaintiff's Third Set of Interrogatories).

[REDACTED]  
[REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED] Exh. C (Letter Dated June 7, 2013 from S. Herring). [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] Exh. 1 to Realtek Resp. (Email Chain between Realtek and LSI).

[REDACTED]  
[REDACTED], Complainants also refused to submit to mediation requested by the Court of Appeals for the Ninth Circuit in the related district court case, even though Realtek was willing to participate. *See* Exh. D (Supplemental Joint Case Management Statement) at 7. In the face of such refusal to provide basic information and to engage in negotiations, LSI cannot be heard to argue that they negotiated in good faith and that Realtek did not.

Furthermore, Complainants also prevented meaningful negotiations [REDACTED]  
[REDACTED]. *See* Realtek Resp. at 42. Complainants insisted [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]. Exh. 4 to Realtek Resp. (Rebuttal Report of Dr. Anne Layne-Farrar in the N.D. California case) at 84. Dr. Layne-Farrar's opinion further shows that Complainants'

[REDACTED]. But even with the opinion of Complainants' own expert setting a royalty rate [REDACTED]

[REDACTED], in a following settlement conference in [REDACTED], Complainants

[REDACTED]

[REDACTED] Comp. Resp. at Waskiewicz Decl. ¶ 9. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Moreover, LSI's accusations against Realtek are not limited to those chips [REDACTED]

[REDACTED]. Thus, any proposal limited to Realtek chips [REDACTED] is not actually an offer to license

Realtek—who should be free to sell its products on the open market—it is instead a desperate

grab to avoid the district court litigation Complainants instigated, while remaining free to sue

Realtek another day.

Complainants have also made empty promises to Realtek. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See, e.g.*, Exh. 1 to Realtek Resp. (Email Chain between Realtek and LSI). [REDACTED]

[REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Exh. E (Email Chain between Realtek and LSI).  
[REDACTED]

[REDACTED]

[REDACTED] *Id.*

In view of the above, Complainants’ assertion that Realtek refused to negotiate is plainly false. It is Complainants that have refused to negotiate in good faith, and instead, engaged in sham “negotiations” with Realtek that they never intended to result in a license.

**3. The Lawsuits that Realtek Filed are Irrelevant**

Realtek’s filing of lawsuits against LSI/Agere has no relevance to whether or not Realtek was willing to negotiate in good faith. Complainants argue Realtek’s lawsuits against LSI/Agere during the ten month period leading up to the April 2013 hearing, suggest that Realtek refused to negotiate. Comp. Resp. at 33. Yet as the history of negotiations show, Realtek initiated the license discussions in 2012 and has continued to try to negotiate with Complainants, despite Complainants’ constant efforts to derail those discussions.

As part of its continuing efforts to resolve its disputes with Complainants, Realtek

[REDACTED].

Complainants twist [REDACTED]

[REDACTED]

Comp. Resp. at 33-34. This argument is misleading at best. The other actions Realtek filed include infringement by LSI/Agere of Realtek’s patents (ITC Investigation No. 337-TA-859, a related Northern District of California action, and a patent lawsuit in China), and a district court case in which Judge Whyte already found that LSI/Agere breached their RAND obligations to Realtek. Thus, Realtek’s [REDACTED]

[REDACTED]

[REDACTED] Given the potential liability LSI/Agere is facing in these lawsuits, Realtek's offer is a more than reasonable resolution all outstanding issues between the parties.

**C. 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.

Complainants' response to this issue includes summary chart of all licenses to the '663, '958, and '867 patents. *See* Appendix B and C to Comp. Resp. Realtek will not address the summaries in detail here, as it has provided a summary in its initial brief, other than to point out that Complainants' summary confirms that [REDACTED]

[REDACTED] *See* Appendix B and C to Comp. Resp.

**1. Value Considerations for the '958 and '867 Patents**

Complainants assert that the '958 and '867 patents have substantial value, because [REDACTED]

[REDACTED]

[REDACTED] Comp. Resp. at 35-37. However, the [REDACTED] analysis by

Complainants' own expert witness, Dr. Anne Layne-Farrar, in the District Court case shows that

[REDACTED]

[REDACTED]

[REDACTED] *See* Exh. 5 to Realtek Resp. (Deposition Transcript of Dr. Anne Layne-Farrar in the

N.D. California case) at 88-89, 96, and 100. The '958 and '867 patents at issue in this investigation [REDACTED] of the value. *Id.* Thus, Complainants reliance on such an analysis to suggest that the patents at issue are important is misplaced.

Moreover, only Realtek has requested a license to [REDACTED]. RX-1330C (Realtek's Request for RAND License Terms from LSI). [REDACTED]  
[REDACTED] [REDACTED]. RX-1323C (LSI Licensing Presentation to Realtek). [REDACTED]  
[REDACTED]

As addressed in Realtek's Response to Commission Notice to Review Initial Determination, the value of patented technology in a standard cannot be greater than its relative contribution, and the *ex-ante* value of those patents is [REDACTED]. Realtek Resp. at 26-28. 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. Realtek Resp. at 29-30. 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. Realtek Resp. at 30-32. Complainants declaration from Dr. Kevin Negus, one of their proposed experts in this investigation, ignores the *ex ante* value of the asserted patents and alleges the '958 and '867 patents describe and claim a highly valuable technical advancement. Comp. Resp. at 37-39. Dr. Negus, however, provides nothing but his own, biased speculation to reach this conclusion.

**2. LSI's Initial Offers to Entities Currently Licensed Do Not Show that Complainants' Offer to Realtek is Reasonable**

Complainants also provided a summary of LSI's initial offers to entities currently licensed to the '663, '958, and '867 patents. *See* Appendix C to Comp. Resp. Complainants

asserted that [REDACTED]  
[REDACTED] Comp. Resp. at 41.

These offers, however, are irrelevant, because as explained above, the correspondence between the Complainants and Realtek [REDACTED], nine years before Complainants filed their Complaint in this investigation, do not amount to an offer. *See supra* Part II.B.1.

Complainants also asserted that [REDACTED]  
[REDACTED]  
[REDACTED] Comp. Resp. at 41. Yet out of the approximately [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] and they were made outside the confines of Section 337 investigation, in which the threat of an exclusion order hangs over Realtek's head. *See* Appendix C to Comp. Resp.

**D. 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.

Complainants' Response buries this issue among a number of tangential issues, including how Complainants allege license negotiations typically proceed, whether licensees prefer to license at the system level or component level, duration of licenses, form of payment, and allocation of value. Comp. Resp. at 43-50. The Commission did not request briefing on these other issues, nor are they relevant to the Commission's public interest considerations.

Nevertheless, in the event the Commission considers Complainants' arguments on these issues, Realtek addresses them briefly below.

First, Complainants assert that "licenses are arrived at through a process of negotiation," and that there is not a "one size fit all" approach. Comp. Resp. at 43-45. Complainants' observations here are of course not ground-breaking. There is no dispute that negotiating licenses typically involves multiple discussions taking into account the needs and constraints of both sides. Realtek has never contended that RAND licenses are not the result of negotiation. But as Complainants recognize, negotiations require good faith on the part of both parties and a "take-it-or-leave-it approach is typically unworkable." Comp. Resp. at 43. This is where Complainants' own conduct falls short. As explained above, [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. *See Supra*, Part II.B. Indeed, such a [REDACTED] is not even a starting point for good faith negotiations. RX-0010C at QA 130. Making matters worse, Complainants initiated this investigation against Realtek [REDACTED] [REDACTED], thereby creating an impermissible patent hold-up situation.

Second, Complainants acknowledge, as Realtek did in its brief, that licensing typically occurs across portfolio. Comp. Resp. at 45. Nevertheless, in this investigation, only two patents are at issue for Realtek. Thus, the only relevant issue is that [REDACTED]

[REDACTED]

[REDACTED] *See* RX-1323C.

Third, Complainants argue that "[m]ost licensors, [REDACTED] [] prefer to focus on licensing at the end-consumer product." Comp. Resp. at 46. Complainants essentially admit that

[REDACTED]  
[REDACTED]. This may be allowed for non-RAND encumbered patents, but when a patentee has committed to [REDACTED]

[REDACTED] RX-1358C at LSI Agere 837-00426155-63, -00426181-86, it should not be allowed to discriminate against a certain class of licensees, let alone seek injunctive relief against them at the same time.

Fourth, Complainants discuss how the duration of licenses and form of payment affect license negotiations. Realtek will not address these issues other than to point out that Complainants cite no authority or evidence to support any of their statements. There is no evidence of record to determine how the duration of a patent or form of payment would factor into the industry practice for license negotiations, nor how they affect RAND license terms for the patents in this investigation.

Finally, Complainants discuss the allocation of value for patents. Comp. Resp. at 49. In particular, Complainants argue that their [REDACTED] [REDACTED] ([REDACTED] [REDACTED]) [REDACTED]. Comp. Resp. at 49-50.

Complainants however, misconstrue the applicability of [REDACTED] is a narrow exception, and only “[i]f it can be shown that the patented feature drives the demand for an entire multi-component product, [can] a patentee may be awarded damages as a percentage of revenues or profits attributable to the entire product.” *LaserDynamics Inc. v. Quanta Computer Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012). Putting the cart before the horse, Complainants contend that it is reasonable for them to seek royalties from Realtek and others [REDACTED]  
[REDACTED]

[REDACTED]. At least for the patents at issue in this investigation, the testimony of Complainants' own expert suggests that the '958 and '867 patents [REDACTED]

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

**E. 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.

In response to Question No. 5, Complainants provide the Commission with a hypothetical proposal to Realtek in Appendix E.<sup>4</sup> See Comp. Resp. at 51, App. E. Complainants' proposal falls well short of their RAND obligations, however, because [REDACTED]

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

---

<sup>4</sup> Complainants' statement that terms for Realtek are included in Appendix D appears to be a typo; the terms are listed in Appendix E.

**1. Complainants [REDACTED] To Submit Specific Licensing Terms For The '958 And '867 Patents And [REDACTED] Violates Their RAND Commitments**

As it relates to Realtek, Question No. 5 asks the parties to identify specific licensing terms for the '958 and '867 patents that each believes are reasonable and non-discriminatory.

Complainants, however, ignore the call of the question and instead [REDACTED]  
[REDACTED]:

[REDACTED]  
[REDACTED] Comp. Resp. at App. E.

Complainants' [REDACTED] is a transparent attempt to improperly

[REDACTED]

[REDACTED]

[REDACTED]. Under

Complainants' proposal, [REDACTED]

[REDACTED] dard. In

addition, [REDACTED]

[REDACTED]

Moreover, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>5</sup> Thus, under Complainants' proposal,  
[REDACTED]  
[REDACTED]  
[REDACTED]

Complainants' [REDACTED] violates their RAND commitments to  
license the '958 and 67 patents because [REDACTED]  
[REDACTED]; indeed, Complainants  
themselves are careful [REDACTED]

[REDACTED]. In addition, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**2. Complainants' Appendix E [REDACTED] Position on  
RAND Terms Since the Beginning of This Investigation**

In Appendix E, Complainants propose a [REDACTED] royalty rate for [REDACTED]  
[REDACTED] Complainants claim that this  
[REDACTED] is based on their [REDACTED] license with [REDACTED]  
[REDACTED] and satisfies their RAND licensing commitments.  
Since the beginning of this Investigation, however, Complainants [REDACTED]  
[REDACTED] on what terms satisfy their RAND licensing commitments:

---

[REDACTED]



[REDACTED]

[REDACTED].<sup>6</sup> *See* Exh. 4 to Realtek Resp. (Rebuttal Report of Dr. Anne Layne-Farrar in the N.D. California) at 82-83. [REDACTED]

[REDACTED]

[REDACTED]

- Fourth, during the [REDACTED] settlement conference in the Northern District of California litigation, Complainants demanded that Realtek pay them [REDACTED]

[REDACTED]

[REDACTED]

*See* 11/1/13 Decl. of W. Waskiewicz in support of Complainants' Statement, ¶ 9.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- Fifth, Complainants' most recent proposal is, as stated in Appendix E, a [REDACTED]

[REDACTED]

[REDACTED] Complainants' license with

[REDACTED]. As set forth in Realtek's November 1, 2013 Response to the

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<sup>6</sup> [REDACTED]

Commission's Notice, the [REDACTED] license reflects patent hold-up because it was negotiated [REDACTED] [REDACTED] [REDACTED] were purportedly incorporated into the 802.11 standard, among other reasons why the [REDACTED] license is not applicable to the hypothetical negotiation between Complainants and Realtek.

The fact that Complainants' have [REDACTED] satisfies their RAND licensing commitments with respect to Realtek demonstrates how Complainants' proposed [REDACTED]s are unreliable and arbitrary. They also show that Complainants' positions are subject to change on a whim, depending on their litigation strategy at the moment.

**3. Complainants Make No Effort To Account For Royalty Stacking With Other Alleged Standard Essential Patents And Patent Portfolios**

Complainants' approach to RAND terms also fails to account for any third party alleged IEEE 802.11 standard essential patents, even though a district court that recently considered the issue concluded that there are approximately 3,000 different patents that are essential to the IEEE 802.11 standard. *In re Innovatio IP Ventures, LLC Patent Litigation*, 2013 WL 5593609, 41-43 (Oct. 3, 2013). Moreover, at least 92 entities have submitted letters of assurance to the IEEE indicating that they would license their over 350 patents at a RAND rate, and at least another 59 companies have filed blanket letters of assurance covering an undisclosed number of patents. *Id.*; *citing Microsoft Corp. v. Motorola, Inc.*, 2013 WL 2111217, 52 (W.D. Wash., Apr. 25, 2013). Although some these patents may have more than average value to the standard (and others may have less than average value), there is no reasonable question that other 802.11 standard essential patents must be accounted for in determining reasonable and non-discriminatory licensing terms for specific patents. *In re Innovatio IP Ventures, LLC Patent Litigation, supra*, 2013 WL 5593609 at 41-4; *Microsoft Corp., supra*, 2013 WL 2111217 at 52.

Complainants' terms in Appendix E does not even pretend to account for any of these other alleged standard essential patents. At its most basic level, if Complainants' proposed [REDACTED] [REDACTED] was truly a RAND term, and the Commission were to generously assume that Complainants' [REDACTED] of average value to the IEEE 802.11 standard, [REDACTED] [REDACTED] [REDACTED] standard essential patents out of the potential hundreds or thousands of alleged standards essential patents. Ignoring the fact that Realtek's profit margins would be completely eviscerated by taking such a license to even four or five such patents, this result would force Realtek to exist this business—a result that is completely anathema to purpose of RAND obligations.

**4. Complainants' Appendix E [REDACTED]**

Having proposed [REDACTED] [REDACTED] Complainants

[REDACTED]

[REDACTED]

[REDACTED] See Complainants' Statement at 51, App. E. This term [REDACTED]

[REDACTED] and is also not RAND.

Patent exhaustion “provides that the initial authorized sale of a patented item terminates all patent rights to that item.” *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625 (2008); see also *TransCore, LP v. Elec. Transaction Consultants Corp.*, 563 F.3d 1271, 1274 (Fed. Cir. 2009) (affirming summary judgment of exhaustion). Exhaustion is triggered by the authorized sale of a product substantially embodying the patent. *Quanta*, 553 U.S. at 636; citing *United States v. Univis Lens Co.*, 316 U.S. 241, 249 (1942). A RAND license granted by Complainants to Realtek must broadly permit Realtek “to ‘make, use [or] sell’

products free” of Complainants’ patents claims, because Complainants’ RAND licensing commitments bar them from any condition that limit Realtek’s authority to sell products substantially embodying the patents. *Quanta*, 553 U.S. at 636-37. A product substantially embodies a patent for the purposes of patent exhaustion if it “embodie[s] essential features of [the] patented invention” and its “only reasonable and intended use [is] to practice the patent.” *Id.* at 631. A product may substantially embody an invention even if additional components are necessary to practice the patent. *Id.* at 633-34. The Wi-Fi functionality of downstream products is provided by the Wi-Fi-compatible chip that Realtek sells. Accordingly (and assuming for the purpose of this discussion that Complainants’ asserted patents are standard essential), a complete RAND patent license cannot [REDACTED]

**F. 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.

As explained in Realtek’s initial brief and in section II(B) above, Realtek not only initiated the licensing discussions with Complainants after they initiated this investigation, but Realtek has also continued to try to negotiate with Complainants by asking for additional information and seeking further opportunities for the parties to talk. In an effort to draw attention away from that evidence and from facts that show [REDACTED]

[REDACTED] constructively refused to negotiate with Realtek, Complainants argue that Realtek “has consistently and deliberately refused to engage in licensing negotiations Realtek did not

refuse to negotiate....” Comp. Resp. at 53. It is Complainants, not Realtek, that have stalled those discussions and made it difficult, if not impossible, for the parties to have meaningful negotiations. Complainants point to Realtek’s filing of lawsuits against LSI/Agere (to rightfully enforce its own patent rights and also to seek a remedy for LSI/Agere’s breach of their RAND commitments) and alleged refusal to answer loaded discovery requests (which essentially sought admissions of infringement by Realtek), to show that Realtek refused to negotiate. Comp. Resp. at 54. But none of these facts even come close to establishing that Realtek was ever not willing to negotiate, particularly in light of the evidence that shows Realtek was consistently reaching out to Complainants. If anything, they merely show that Realtek was doing everything it could to protect its own rights and address the patent hold-up situation that Complainants had created.

At the end of the day, these supposed indicators of Realtek’s alleged refusal to negotiate pale in comparison to the overwhelming uncontested facts showing that it was Complainants that constructively refused to negotiate:

- [REDACTED]  
[REDACTED] 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.
- Instead of making [REDACTED]  
[REDACTED] RX-1326C.
- Even after initiating this investigation to seek injunctive relief against Realtek,  
[REDACTED]  
[REDACTED] RX-1330C.

- When Complainants [REDACTED]  
[REDACTED]  
[REDACTED] y [REDACTED]  
[REDACTED] RX-1323C at 7; *see* Hg. Tr. (Kerr) 2072:2-17;  
Hg. Tr. (Tsai) at 1312:15-22; RX-0010C (Carmichael WS) at QA 148, 158-66.
- [REDACTED]  
[REDACTED]  
[REDACTED] *See* Exh. 4 to Realtek Resp. (Rebuttal Report  
of Dr. Anne Layne-Farrar in the N.D. California case) at 84; Hg. Tr.  
(Waskiewicz) at 163:12-21; Realtek Resp. at 42.
- Complainants [REDACTED]  
[REDACTED]  
[REDACTED]
- Even with [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Comp. Resp. Waskiewicz Decl. ¶ 9.

These facts clearly show that Complainants have never intended to negotiate, and still have no intention of ever negotiating, with Realtek in good faith and truly granting Realtek a license to the '958 and '867 patents under RAND terms.

Finally, Complainants state that “Realtek would have the Commission create a rule that exclusion orders could never be available in cases involving SEPs.” Comp. Resp. at 55. But Realtek has never taken such a position. Rather, Realtek’s position is that the Commission

should not issue an exclusion order against Realtek, given Complainants' disregard and breach of their RAND commitments.

**III. REALTEK'S RESPONSE TO "COMPLAINANTS' STATEMENT REGARDING PUBLIC INTEREST"**

At the conclusion of their brief regarding the Commission's questions, Complainants raised four issues, which do not appear to fit into any category, but which Complainants' captioned, "Complainants' Statement Regarding the Public Interest." Complainants' statements, however, to the extent they relate to Realtek, simply misrepresent the record.

First, Complainants allege, again, that Realtek asserts an exclusion order is categorically barred because Complainants' declared their patents standard essential. On the contrary, and as explained above, Realtek has never taken that position. Realtek's position from Day 1 has been that an exclusion order against Realtek is against the public interest because Complainants have repeatedly violated their RAND obligations. Realtek's position is entirely consistent with the position of all governmental and international agencies who have issued an opinion on this important issue.

Second, Complainants oppose a repair and replacement exception. As this argument appears to relate solely to Funai, Realtek takes no position.

Third, Complainants attempt to re-argue that they have met their RAND obligations despite all evidence to the contrary. For example, the Northern District of California expressly found that Complainants failed to offer Realtek a license before filing their complaint with the ITC. *Realtek*, 2013 WL 2181717, at \*7. Complainants argue that the finding by a federal district court judge to the contrary should simply be ignored and that they [REDACTED], even though there was no pending offer that Realtek could have accepted at the time Complainants filed their complaint. As such, Complainants arguments to the contrary should be rejected. As a

further example, the record reflects that Complainants' [REDACTED] [REDACTED] (CX-1006C)

[REDACTED] Hg. Tr. (Tsai) 1318:6-15; RX-0012C (Tsai

WS) at QAs 48, 52, and 53. Importantly, Complainants insisted that [REDACTED]

[REDACTED]. CX-1006C; Hg. Tr. (Waskiewicz) 174:4-19.

Complainants argue the starting offer need not be RAND, yet [REDACTED]

[REDACTED]

[REDACTED] RX-0012C (Tsai WS) at QA 52-53 Consequently, Complainants [REDACTED]

[REDACTED] failed to comply with their RAND obligations. Indeed, even Complainants [REDACTED]

[REDACTED] [REDACTED]

[REDACTED], because [REDACTED] [REDACTED] and yet

Complainants action is against Realtek's products regardless of the customer.

Finally, Complainants argue against non-party Philips's submissions regarding public interest. Since Philips's comments relate solely to the '663 patent, which is not asserted against Reatek, Realtek takes no position.

#### **IV. REMEDY**

For the reasons stated in Realtek's opening brief, any remedial order should be limited to a limited exclusion order directed to the Realtek products found to infringe, no bond should be set, and no cease-and-desist order should issue against Realtek.

##### **A. Any Exclusion Order Should Be Limited to Those Realtek Products Found to Infringe**

Any exclusion order should be limited to those Realtek products specifically found to infringe. *See* Realtek Resp. at 48-49. Complainants' strenuously argue that no models should be named and cover products regardless of whether they were specifically adjudged to infringe.

Comp. Resp. at 3. Yet Complainants prevented Realtek from obtaining specific rulings of

noninfringement for numerous products by withdrawing their allegations against those products at the hearing. *See* Order No. 89 and the associated briefing. Realtek had prepared and introduced specific evidence of noninfringement, but that evidence was excluded at the last minute at Complainants' insistence. It would be entirely improper to deny Realtek the opportunity to obtain a finding of noninfringement under these circumstances and then exclude those products from the U.S. market. Complainants should not be permitted on the one hand to preclude Realtek from obtaining findings of noninfringement at the evidentiary hearing and then argue for a broad remedial order to recapture those products.

**B. No Bond Should Be Set**

A bond is appropriate to protect the patentee from injury during the Presidential review period. 19 U.S.C. § 1337(e). Complainants, however, are in the business of licensing. They make no products that compete against Realtek's accused products [REDACTED]

[REDACTED]

[REDACTED] As such, a bond of 0% is appropriate. *See* Realtek Resp. at 44-47. In the alternative, any bond should be set at a RAND rate of [REDACTED]

[REDACTED]. *Id.* at 47.

**C. No Cease-and-Desist Order Should Issue Against Realtek**

No cease-and-desist order against Realtek is appropriate, nor does Complainants' opening brief on remedy seek such relief against Realtek. *See* Realtek Resp. at 50.

**V. CONCLUSION**

For the reasons set forth in the Final ID, Realtek's Response to the Notice of Commission Determination to Review a Final Initial Determination in Its Entirety and Realtek's Reply to LSI's Brief in Response to Commission Notice, the Commission should find no violation. If the Commission nevertheless finds a violation, as set forth in Respondent Realtek Semiconductor

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Corporation's Response to the Notice of Commission for Filing Written Submissions on Remedy, Bonding, the Public Interest and for the reasons given above, any remedy would be contrary to the public interest. However, should the Commission order a Remedy against Realtek, it should be limited to a limited exclusion order directed to those Realtek products specifically found to infringe, a bond of 0% during the presidential review period, and no cease-and-desist order directed to Realtek.

Dated: November 12, 2013

Respectfully submitted,

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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 22, 2013, copies of the foregoing were filed with and served upon the following as indicated:

<p><b>The Honorable Lisa R. Barton</b> 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</p>	<p><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</p>
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