

2013-1129

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**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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APPLE INC.,

*Plaintiff-Appellant,*

v.

SAMSUNG ELECTRONICS CO., LTD.,  
SAMSUNG ELECTRONICS AMERICA, INC., and  
SAMSUNG TELECOMMUNICATIONS AMERICA, LLC,

*Defendants-Appellees,*

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*Appeal from the United States District Court for the Northern District  
of California in Case no. 11-CV-1846, Judge Lucy H. Koh*

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**BRIEF FOR NOKIA CORPORATION AND NOKIA INC. AS  
AMICI CURIAE IN SUPPORT OF NEITHER PARTY AND IN  
FAVOR OF REVERSAL BASED ON APPLICATION OF THE  
WRONG LEGAL STANDARD**

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March 5, 2013

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## CERTIFICATE OF INTEREST

Counsel for *amicus curiae* Nokia Corporation and Nokia Inc. certifies the following:

**1. The full name of every party or amicus represented by me is:**

Nokia Corporation and Nokia Incorporated.

**2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:**

N/A.

**3. All parent corporations and any publicly held companies that own ten percent or more of the stock of the party or amicus curiae represented by me are:**

Nokia Corporation has no parent corporation and no publicly held company owns 10 percent or more of its stock.

Nokia Inc.'s parent corporation is Nokia Holding Inc. Nokia Holding Inc. owns 100 percent of the stock in Nokia Inc. Nokia Holding Inc.'s parent corporation is Nokia Corporation. Nokia Corporation owns 100 percent of the stock in Nokia Holding Inc.

**4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:**

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Dated: March 5, 2013

/s/ Keith E. Broyles

## TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	ii
STATEMENT OF IDENTITY AND INTEREST OF <i>AMICI CURIAE</i> .....	1
SOURCE OF AUTHORITY TO FILE .....	2
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	4
I. THE DISTRICT COURT IMPROPERLY IMPORTED AN ADDITIONAL “CAUSAL NEXUS” REQUIREMENT INTO THE PERMANENT INJUNCTION ANALYSIS. ....	4
A. Requiring a Patent Holder to Prove a “Causal Nexus” in Order to Obtain a Permanent Injunction Is Not Supported by Supreme Court or Federal Circuit Precedent. ....	5
B. The District Court’s “Causal Nexus” Requirement May, If Applied Similarly In Future Cases, Render It Virtually Impossible to Obtain Injunctive Relief Against Direct Competitors. ....	7
II. INCLUSION OF A “CAUSAL NEXUS” REQUIREMENT INTO THE PERMANENT INJUNCTION ANALYSIS COULD HAVE WIDE-RANGING, UNINTENDED EFFECTS.....	9
CONCLUSION.....	14
CERTIFICATE OF SERVICE .....	16
CERTIFICATE OF COMPLIANCE.....	19

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>ActiveVideo Networks, Inc. v. Verizon Communications, Inc.</i> , 694 F.3d 1312 (Fed. Cir. 2012) .....	6
<i>Apple, Inc. v. Motorola, Inc.</i> , 869 F. Supp. 2d 901 (N.D. Ill. 2012).....	10
<i>Apple, Inc. v. Samsung Elecs. Co.</i> , No. 11-cv-1846, 2012 U.S. Dist. LEXIS 179532 (N.D. Cal. Dec. 17, 2012) .....	6
<i>eBay v. MercExchange, L.L.C.</i> , 547 U.S. 388 (2006).....	<i>passim</i>
<i>Ecolab, Inc. v. FMC Corp.</i> , 569 F.3d 1335 (Fed. Cir. 2009) .....	6
<i>Fresenius USA, Inc. v. Baxter Intern., Inc.</i> , 582 F.3d 1288 (Fed. Cir. 2009) .....	6
<i>i4i Ltd. Partnership v. Microsoft Corp.</i> , 598 F.3d 831 (Fed. Cir. 2012) .....	6
<i>Microsoft Corp. v. Motorola, Inc.</i> , 696 F.3d 872 (9th Cir. 2012) .....	10
<i>Presidio Components, Inc. v. American Technical Ceramics Corp.</i> , 702 F.3d 1351 (Fed. Cir. 2012) .....	5
<i>Robert Bosch LLC v. Pylon Mfg. Corp.</i> , 659 F.3d 1142 (Fed. Cir. 2011) .....	7, 8
<i>Sanofi-Synthelabo v. Apotex, Inc.</i> , 470 F.3d 1368 (Fed. Cir. 2006) .....	12
<b>OTHER AUTHORITIES</b>	
Fed. R. App. P. 29(c)(5)(A)-(C) .....	1
Fed. R. App. P. 32(a)(7)(B) .....	19

**STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE**

Nokia Corporation (“Nokia”) is one of the largest manufacturers of wireless telecommunications equipment in the world.<sup>1</sup> Nokia employs approximately 38,000 people worldwide. Nokia has cumulatively invested over \$50 billion in research and development relating to mobile communications. As a result of this substantial commitment to technological progress, Nokia currently owns more than 10,000 patent families.

Nokia has recently been involved in numerous U.S. patent lawsuits, as both a plaintiff and defendant. Nokia is thus both a significant patent owner that might seek an injunction to protect its patent rights, and a manufacturer in an industry in which patent owners routinely issue threats of injunctions for patent infringement.

Nokia’s interest in this case is to advocate for patent laws that (i) protect patent rights as a means for promoting the constitutional goal of developing technology for public benefit; and (ii) foster and encourage innovation by allowing patent holders to obtain permanent injunctions against infringing competitors in appropriate circumstances. Nokia therefore supports the Appellant’s request for reversal of the District Court’s denial of

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<sup>1</sup> No counsel for any of the parties authored any portion of this brief. No entity other than amici curiae Nokia Corporation and Nokia Inc. monetarily contributed to the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5)(A)-(C).

a permanent injunction based on application of the wrong legal standard. Nokia takes no position on any of the other substantive issues on appeal in this matter.

### **SOURCE OF AUTHORITY TO FILE**

*Amici* have attached this brief to a motion for leave of the Court to file as *amici*.

### **SUMMARY OF ARGUMENT**

By requiring a patent holder to establish an additional evidentiary burden, namely a “causal nexus” between the patented feature and the source of consumer demand for a competing product, before it may obtain a permanent injunction against an infringing competitor, the district court imposed an overly-strict and undue burden on the patent holder and invented new law out of whole cloth, which threatens to turn the traditional purpose of patent law on its head.

In its decision in *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006), the United States Supreme Court laid out a four-factor test for courts to follow when determining whether to grant a permanent injunction following a finding of infringement. This Court has recognized that while *eBay* eliminated any presumption that the holder of an infringed patent is entitled to a permanent injunction, it by no means eliminated the right of a patent holder to obtain an injunction altogether.

The district court's additional "causal nexus" requirement may effectively do just that. Rather than allow a party to show irreparable harm through, for example, the loss of market share to an infringing competitor, the district court added a new requirement, further demanding that a patent holder demonstrate a "causal nexus" between the patented feature found to be infringed and consumers' purchase of the infringing, and competing, products. This additional requirement as applied by the district court is sufficiently strict and burdensome that it may be incapable of being satisfied in the vast majority of situations. The district court's novel permanent injunction analysis finds no support in either United States Supreme Court or United States Court of Appeals for the Federal Circuit precedent. Moreover, requiring strict proof of such a "causal nexus" in order to obtain a permanent injunction against direct competitors may result in a compulsory-licensing regime, where holders of otherwise differentiating patented inventions (having essentially no injunctive recourse) are effectively forced to grant licenses to their competitors, thereby undermining traditional incentives to innovate.

## ARGUMENT

### **I. THE DISTRICT COURT IMPROPERLY IMPORTED AN ADDITIONAL “CAUSAL NEXUS” REQUIREMENT INTO THE PERMANENT INJUNCTION ANALYSIS.**

The District Court wrongly based its denial of Apple’s Motion for Permanent Injunction on the grounds that Apple failed to adequately show that consumers were purchasing competing products specifically because the products practiced the patented features. In other words, the District Court wrongly concluded that in order to meet its burden of showing irreparable harm resulting from, for example, the loss of market share, a patent holder must also prove a “causal nexus” between the patented features and the consumers’ purchase of the infringing and competing products.

The inclusion of this additional “causal nexus” requirement in the permanent injunction analysis was improper because (i) it finds no support in Supreme Court or Federal Circuit precedent; (ii) it imposes an overly-strict and undue burden on patent holders, when the traditional analysis of the factors set forth in *eBay v. MercExchange*, 547 U.S. 388, 393 (2006) are more than sufficient to assess the availability of a permanent injunction in situations like those at issue here; and (iii) if strictly applied, it may have the unintended consequence of making it virtually impossible for any patentee to obtain injunctive relief against direct competitors in the vast majority of situations.



**A. Requiring a Patent Holder to Prove a “Causal Nexus” in Order to Obtain a Permanent Injunction Is Not Supported by Supreme Court or Federal Circuit Precedent.**

In determining whether to grant a patentee’s motion for a permanent injunction under the Patent Act, a federal district court must follow the test enunciated by the Supreme Court in *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006). This test requires the patentee to establish four factors:

- (1) That it has suffered an irreparable injury;
- (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
- (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and
- (4) that the public interest would not be disserved by a permanent injunction.

*Id.* at 391. The Supreme Court considers this four-factor test to be “well-established” among the principles of equity, and has long recognized that “a major departure from the long tradition of equity practice should not be lightly implied.” *Id.*

This Court has routinely held that these four factors are the appropriate and exclusive factors to be considered when assessing whether to grant a permanent injunction. *See Presidio Components, Inc. v. American Technical Ceramics Corp.*, 702 F.3d 1351, 1362 (Fed. Cir. 2012) (“Equity sets forth the four-factor test for removal of a trespasser from

property infringement.”); *ActiveVideo Networks, Inc. v. Verizon Communications, Inc.*, 694 F.3d 1312, 1337 (Fed. Cir. 2012); *i4i Ltd. Partnership v. Microsoft Corp.*, 598 F.3d 831, 861 (Fed. Cir. 2012). *Fresenius USA, Inc. v. Baxter Intern., Inc.*, 582 F.3d 1288 (Fed. Cir. 2009); *Ecolab, Inc. v. FMC Corp.*, 569 F.3d 1335 (Fed. Cir. 2009).

The district court’s articulation of its additional “causal nexus” requirement in the context of the irreparable harm factor constitutes an entirely new and separate evidentiary burden in the permanent injunction legal framework. The ruling below would require a patentee seeking a permanent injunction to establish both “(1) that absent an injunction, it will suffer irreparable harm and (2) that a sufficiently strong causal nexus relates the alleged harm to the alleged infringement.” *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-cv-1846, 2012 U.S. Dist. LEXIS 179532 at \*31 (N.D. Cal. Dec. 17, 2012) (quoting *Apple Inc. v. Samsung Elecs. Co.*, 695 F.3d 1370, 1374 (Fed. Cir. 2012)). In the context of Apple’s legal injury, the district court required a showing by Apple that consumers purchased “the infringing product ‘because it is equipped with the [feature] claimed in the . . . patent,’ and not merely because it includes a feature of the type covered by the patent.” *Id.* at \*31 (quoting *Apple*, 695 F.3d at 1376).

This additional burden is not supported by this Court's prior precedents. And district courts may not, and should not, simply invent new evidentiary burdens out of whole cloth and then use them to deny a permanent injunction that would otherwise be appropriate under the *eBay* framework.

**B. The District Court's "Causal Nexus" Requirement May, If Applied Similarly In Future Cases, Render It Virtually Impossible to Obtain Injunctive Relief Against Direct Competitors.**

The incorporation of a "causal nexus" requirement into the irreparable harm analysis would likely make it extraordinarily burdensome for patentees to obtain permanent injunctions against infringing direct competitors. As this Court has explained, such a result is contrary to the fundamental purpose of the American patent system. In *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142 (Fed. Cir. 2011) this court noted that following *eBay*:

[E]ven though a successful patent infringement plaintiff can no longer rely on presumptions or other short-cuts to support a request for a permanent injunction, it does not follow that courts should entirely ignore the fundamental nature of patents as property rights granting the owner the right to exclude. Indeed, this right has its roots in the Constitution, as the Intellectual Property Clause of the Constitution itself refers to inventors' *exclusive* Right to their respective discoveries.

*Robert Bosch*, 659 F.3d at 1149. This Court continued by noting that such considerations should especially be kept in mind "in traditional cases, such

as this, where the patentee and adjudged infringer both practice the patented technology.” *Id.* at 1150. Indeed, *eBay* itself makes clear that permanent injunctions are in no way foreclosed simply by virtue of its new test. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 394 (2006) (“[W]e take no position on whether permanent injunctive relief should or should not issue in this particular case, or indeed in any number of other disputes arising under the Patent Act.”). Put simply: “[a]lthough *eBay* abolishes our general rule that an injunction normally will issue when a patent is found to have been valid and infringed, *it does not swing the pendulum in the opposite direction.*” *Robert Bosch*, 659 F.3d at 1149 (emphasis added).

But the district court’s inclusion and application of a “causal nexus” requirement does just that – it unnecessarily and dramatically moves the analysis away from a reasoned and balanced four-factor test. If applied in future cases, especially as it was strictly applied below, the “causal nexus” requirement could essentially preclude any patent holder from obtaining an injunction against an infringing competitor in the vast majority of situations. As this Court acknowledged, *eBay* was designed to eliminate the *presumption* that a patent holder would automatically obtain an injunction against an infringing competitor, not eliminate the *possibility* that it could ever obtain one.

By holding that a competitor can only show irreparable harm through additional proof that each infringing feature also drives consumer demand, the district court has created an impossibly-high evidentiary bar. Not only is this standard unsupported by existing precedent, it is unnecessary where the parties are direct competitors and the irreparable harm alleged and proven is, for example, loss of market share resulting from the infringing products. The traditional analysis of the *eBay* factors is more than sufficient in such a situation to determine whether a permanent injunction is appropriate, and the district court's inappropriate application of those factors and denial of a permanent injunction on that basis should be reversed.

**II. INCLUSION OF A “CAUSAL NEXUS” REQUIREMENT INTO THE PERMANENT INJUNCTION ANALYSIS COULD HAVE WIDE-RANGING, UNINTENDED EFFECTS.**

Not only does the district court's “causal nexus” requirement find no basis in legal precedent, it also finds no basis in policy. Requiring a patent holder to additionally prove the existence of a “causal nexus” in order to obtain a permanent injunction against a demonstrably-infringing competitor could radically alter the U.S. patent protection landscape and have far-reaching, unintended consequences.

As an initial matter, if the Court were to adopt the “causal nexus” requirement and the district court's application in this case as part of the future irreparable harm analysis for permanent injunctions, it likely would

dramatically limit the ability of patent holders to obtain such injunctions against direct competitors, essentially creating a compulsory-licensing regime in the U.S. In industries where products are heavily standardized (such as the wireless industry), patented inventions that have not been declared essential to any standard (i.e., “non-standard essential” patents), such as those at issue in this appeal, allow manufacturers to differentiate their products from those of their competitors in important ways. But inclusion of a “causal nexus” evidentiary burden in the permanent injunction analysis may very well *compel* a patent holder to effectively grant a license (i) to its competitors in the industry; and (ii) for precisely the types of patents that are intended to permit differentiation of the patent holder’s products from others in the market.<sup>2</sup> This is doubly true because patents

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<sup>2</sup> This analysis differs somewhat where the patents at issue have been declared as essential to a Standard Setting Organization (Standard Essential Patents, or “SEPs”). In the case of SEPs, the rules of the Standard Setting Organization to which they were declared may require a patent holder to grant licenses to SEPs on terms that are fair, reasonable, and non-discriminatory (“FRAND”). Where the infringing party is willing to take a license to the SEPs and pay FRAND compensation, the patent holder is precluded from obtaining an injunction based on at least its licensing commitments covering the SEPs. But as courts and the United States government have recently acknowledged, injunctions against infringement of SEPs may be permissible where the infringer is an unwilling licensee. *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 885 (9th Cir. 2012) (“Implicit in such a sweeping promise is, at least arguably, a guarantee that the patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction, but will instead proffer licenses consistent with the commitment made.”); *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913-14 (N.D. Ill. 2012) (Posner, J., sitting by designation) (“I don’t see how, given FRAND, I would be justified in

may provide differentiating features which contribute to distinctive brand equity, though such distinctive features may not drive consumer demand in the way or to the extent required by application of a strict “causal nexus” evidentiary standard.<sup>3</sup>

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enjoining Apple from infringing the ‘898 unless Apple refuses to pay a royalty that meets the FRAND requirement. By committing to license its patents on FRAND terms, Motorola committed to license the ‘898 to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent. How could it do otherwise? How could it be permitted to enjoin Apple from using an invention that it contends Apple *must* use if it wants to make a cell phone with UMTS telecommunications capability – without which it would not be a cell *phone*.”) (emphasis in original). In such a situation, if applied, the inclusion of an additional “causal nexus” requirement in the permanent injunction analysis could also unnecessarily and improperly burden the ability of a patent holder to obtain an injunction against a competitor for essential patents that have been found to be valid and infringed by a party unwilling to pay FRAND compensation for the use of such essential patents.

<sup>3</sup> For example, there could be combinations of multiple patented features that would together meet such a “causal nexus” requirement where perhaps none could do so individually, at least under a strict requirement. Similarly, a patented invention might enable a manufacturer to lower costs rather than provide a different consumer experience, enabling the patent holder to increase value to the customer by including additional non-patented features in the product without raising the price. The magnitude of such cost advantages could change over time and could be difficult to assess using compulsory license-type remedies. In addition, a patented technology could create the possibility for “add-on” inventions only usable together with that patent, and a compulsory license to the underlying patent would enable infringing direct competitors to develop further improvements without licensing them back to the original inventor. These examples could all be addressed in applications of the *eBay* test concerning irreparable harm, but would not likely meet a strict “causal nexus” standard because the patented features in question would not necessarily be visible to end-users.

Second, inclusion of a strict “causal nexus” requirement could make permanent injunctions against infringing competitors so difficult to obtain that companies’ U.S. patent portfolios may be perceived as less valuable. If there is effectively a lesser or even no threat of an injunction from a district court for infringing a competitor’s patented features, then companies will have no serious concern about copying those differentiating features, knowing that they will be able to continue using them to attract customers and steal market share, with the knowledge that they would only need to pay a reasonable royalty after a ruling that they have infringed a competitor’s valid patents. The end result could be a perceived devaluation of patent portfolios and a significant disincentive to innovate, precisely the *opposite* goals of patent law. *Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368 (Fed. Cir. 2006) (“We have long acknowledged the importance of the patent system in encouraging innovation.”).<sup>4</sup>

Companies routinely engage in research and development and apply for patents in reliance on (i) the knowledge that their inventions will be

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<sup>4</sup> In addition to discouraging innovation, creating an unnecessarily high bar for obtaining permanent injunctions in U.S. district courts may invariably compel more parties to file actions in the International Trade Commission, where *eBay* factors do not apply under current rules and precedent. Such a trend would be doubly problematic given the fact that abusive practices regarding assertion of SEPs in the ITC are currently under increased regulatory scrutiny.



protectable; (ii) the knowledge that their patented inventions can be used to differentiate their products in the marketplace; and (iii) the understanding that they need not grant a license to their competitors for their “non-standard essential” patents. The district court’s inclusion of a strict “causal nexus” requirement turns these patent law fundamentals on their head, potentially eliminating the ability of companies to protect innovation by enjoining infringing competitors. The end result could well be an austere sea of nearly-identical products, a massive diminution of consumer choice, and a regime that punishes, rather than incentivizes, innovation.

Third, the severe dampening of a company’s ability to obtain a permanent injunction against an infringing competitor would be a giant leap backwards for U.S. patent enforcement. Were the Court to affirm the district court’s analysis, patent holders would have little recourse, other than perhaps a compulsory license, to redress infringement by competitors. The end result could be a U.S. patent jurisprudence similar to countries with less developed patent enforcement policies. This, in turn, could significantly hamper the ability of the U.S. to influence other countries to improve their patent enforcement policies. There is simply no need for such a retrograde approach to enforcing patent rights, especially given the propriety of the existing analysis under the *eBay* factors.

Nor can there be any valid policy argument that a “causal nexus” requirement is necessary to ensure that a complex, multi-functional product is not enjoined simply because one out of many features infringes a competitor’s patent. District courts remain free to use their discretion when appropriate, for example to craft a permanent injunction in a way that allows time for an infringing party to design around an infringed patent, thereby eliminating any such concerns. Instead, the real danger lies in incorporating a new and overly-burdensome evidentiary standard into the irreparable harm analysis that could well make obtaining an otherwise-appropriate permanent injunction against direct competitors all but impossible.

### **CONCLUSION**

For the reasons set forth above, *amici* urge this Court to reverse the district court’s ruling concerning the appropriate standard to be applied to determine the availability of permanent injunctive relief between direct competitors for infringement of “non-standard essential” patents.

DATED: March 5, 2013

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**  
*Apple Inc. v. Samsung Electronics Co., Ltd.*, 2013-1129

**CERTIFICATE OF SERVICE**

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by ALSTON & BIRD LLP, Counsel for Amici Curiae to print this document. I am an employee of Counsel Press.

On March 5, 2013, I electronically filed in searchable Portable Document Format the foregoing **Brief of Amici Curiae** with the U.S. Court of Appeals for the Federal Circuit by using the CM/ECF system, thereby affecting service on the following counsel of record, all of whom are registered for electronic filing:

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March 5, 2013

/s/ John C. Kruesi, Jr.  
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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

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DATED: March 5, 2013

/s/ Keith E. Broyles

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