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December 12, 2012

VIA ELECTRONIC FILING

The Honorable Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

Re: ***Certain Electronic Devices, Including Wireless Communication Devices,
Portable Music and Data Processing Devices, and Tablet Computers;
Inv. No. 337-TA-794***

Dear Acting Secretary Barton:

On behalf of Complainants Samsung Electronics Co., Ltd. and Samsung
Telecommunications America, LLC, enclosed please find a public version of Samsung's
Corrected Response to Apple's Submission in Response to Commission Notice of Review.

Please contact me with any questions you may have regarding this filing.

Respectfully submitted,

/s/ S. Alex Lasher

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Electronics Co., Ltd. and Samsung
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**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

**CERTAIN ELECTRONIC DEVICES,
INCLUDING WIRELESS
COMMUNICATION DEVICES,
PORTABLE MUSIC AND DATA
PROCESSING DEVICES, AND TABLET
COMPUTERS**

Investigation No. 337-TA-794

**COMPLAINANT SAMSUNG'S CORRECTED RESPONSE TO APPLE'S SUBMISSION
IN RESPONSE TO COMMISSION NOTICE OF REVIEW**

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TABLE OF ABBREVIATIONS

Abbreviation	Full Citation
ID	Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond
Tr	Hearing Transcript
CPet	Complainant Samsung's Petition for Review of the Initial Determination
RPet	Respondent Apple's Petition for Review of the Initial Determination
SPet	Commission Investigation Staff's Petition for Review of the Initial Determination
CRPet	Complainant Samsung's Reply Petition for Review of the Initial Determination
RRPet	Respondent Apple's Reply Petition for Review of the Initial Determination
SRPet	Commission Investigation Staff's Reply to Petition for Review of the Initial Determination
CPost	Complainant Samsung's Initial Post-Hearing Brief
CRPost	Complainant Samsung's Reply Post-Hearing Brief
RPost	Respondent Apple Inc.'s Post-Hearing Brief
RRPost	Respondent Apple Inc.'s Post-Hearing Reply Brief
SPost	Commission Investigation Staff's Posthearing Brief
SRPost	Commission Investigation Staff's Reply Brief
CPet	Complainant's Petition for Review
RPet	Respondent's Petition for Review
SPet	Commission Investigation Staff's Petition for Review
CRPet	Complainant's Reply Petition for Review
RRPet	Respondent's Reply Petition for Review
SRPet	Commission Investigation Staff's Reply Petition for Review
CIB	Complainant's Initial Brief in Response to the Notice of Review
RIB	Respondent's Initial Brief in Response to the Notice of Review
SIB	Commission Investigation Staff's Response to the Notice of Review
CMarkman	Complainant's Opening Claim Construction Brief
CRMarkman	Complainant Samsung's Claim Construction Brief in Response to Respondent Apple Inc.'s Opening <i>Markman</i> Brief
RMarkman	Respondent Apple Inc.'s Opening <i>Markman</i> Brief
RRMarkman	Respondent Apple Inc.'s Responsive <i>Markman</i> Brief
'348 patent	U.S. Patent No. 7,706,348
'644 patent	U.S. Patent No. 7,486,644
'980 patent	U.S. Patent No. 6,771,980
'114 patent	U.S. Patent No. 7,450,114

INTRODUCTION

Apple's approach to the Commission's questions was to avoid addressing them and instead to respond with a regurgitation of the same positions it has taken throughout the investigation. For its response to the Commission's questions regarding FRAND, Apple reargues its failed FRAND defenses in an effort to justify its refusal to pay any royalty for use of technologies essential to the wireless telecommunications standards that have helped make Apple's products so successful. For the '348 and '644 patents, Apple makes the same misrepresentations regarding expert testimony it has throughout this investigation. For the '644 patent, the Commission requested the parties brief the construction of "extracting," and discuss where in the source code the "60-bit rate matched block" is stored. Apple spent less than a page answering the first part of the question, and instead focused on re-arguing its attorney-based soft bits argument. With regard to the '980 patent, rather than address the Commission's limited question regarding waiver of claims 5 and 9, Apple instead raised its misguided argument that Samsung somehow waived all of its infringement and domestic industry arguments.

For the reasons stated herein, and in Samsung's Petition for Review, Samsung respectfully requests that the Commission find a violation of Section 337 by Apple.

RESPONSES TO FRAND RELATED QUESTIONS

Apple seeks an unfair competitive advantage in the market for smartphones and tablet computers by waging a multinational campaign to enjoin competitors from selling smartphones alleged to infringe Apple's non-essential patents, while refusing to pay *any royalty* for use of the technologies essential to telecommunications standards that have helped make Apple's products so successful. Accordingly, Apple asks that the Commission adopt a blanket rule effectively limiting its jurisdiction by restricting its own authority to remedy violations of Section 337. Yet the categorical rule that Apple and its supporters propose lacks any statutory or precedential basis, is fundamentally at odds with ETSI's own rules and procedures, and would ultimately undermine what has otherwise been a very successful chapter in the history of wireless

telecommunications standardization efforts. The Commission should not undermine its own authority by adopting such a rule.

As a fellow member of ETSI and an implementer of products utilizing the 3G UMTS standard, Apple knew that it was expected to seek licenses from patent holders, like Samsung, whose contributions have helped make UMTS and other wireless 3G standards possible.¹ But Apple failed to seek any such licenses from Samsung when it entered the smartphone market in 2007 and before it introduced its first 3G phone in 2008, and has repeatedly chosen to litigate rather than voluntarily take licenses to standard essential technologies.²

Samsung is well aware of its obligations as a member of standards bodies like ETSI and has lived up to those obligations by timely disclosing potentially relevant IPRs during the standardization process and offering and being willing to negotiate in good faith licenses to its declared-essential patents on fair, reasonable, and non-discriminatory ("FRAND") terms and conditions. (CX-0546C.) Samsung, like other members of ETSI, has entered into numerous cross-licenses that include its declared-essential UMTS patents³ and Samsung offered such a

¹ For example, the following information is provided by the ETSI IPR FAQs: "Question 6: Does one have to take permission from ETSI for using the patents as listed by ETSI in the Standards? Answer 6: It is necessary to obtain permission to use patents declared as essential to ETSI's STANDARDS. To this end, each STANDARD user should seek directly a license from a patent holder. In order to obtain the contact details of a patent holder, please make your request to the ETSI Legal Service." http://www.etsi.org/website/aboutetsi/iprsinetsi/IPR_Policy_FAQ.aspx.

² In the *Apple Inc. v. Motorola Mobility* case in the Western District of Wisconsin, Apple asked Judge Crabb to set the FRAND rate, but then declared that it would not be bound by any royalty higher than \$1. Judge Crabb subsequently dismissed Apple's entire FRAND case for this reason. Order and Opinion, *Apple Inc. v. Motorola Mobility Inc.*, No. 3:11-cv-00178-bbc, Dkt. 503 at 5 (W.D. Wis. 2012) ("[Apple] added, however, that it would be willing to pay a rate of no more than \$1 for each Apple device going forward, while it retained the right to appeal any award higher than \$1, as well as to refuse any such rate and proceed to further infringement litigation.").

³ As the evidence showed, Samsung has cross-licensed its UMTS portfolio broadly. [REDACTED]

license to Apple before initiating this investigation. (CX-0769.000.) Apple, in contrast, failed to seek a license from Samsung before entering the market, refused the cross-license that Samsung offered, and then rejected a later offer for a FRAND license limited to Samsung's UMTS patents. (CX-1589C.) Throughout this process, Apple has refused to negotiate in any meaningful way with Samsung for a FRAND license to Samsung's UMTS patents (*see id.*).

To provide cover for its ongoing infringement, and to pressure its competitors into accepting nothing or, at the very least, far less than a FRAND rate for their SEPs, Apple has led a public campaign to address the so-called patent "hold up" problem. But there is no empirical evidence that this alleged problem exists. Apple's own expert, the former Chairman of the Board of ETSI, expressly rejected the notion that patent hold up has ever been a problem at ETSI. To the contrary, it is Apple that has been engaging in what some experts have identified as the real problem of "reverse hold up," by refusing to come to the negotiating table or present a meaningful counteroffer for what it believes to be a FRAND rate.

TOPIC 1. Does the mere existence of a FRAND undertaking with respect to a particular patent preclude issuance of an exclusion order based on infringement of that patent? Please discuss theories in law, equity, and the public interest, and identify which (if any) of the 337(d)(1) public interest factors preclude issuance of such an order.

i. The Commission Should Not Adopt a Categorical Rule Precluding Exclusion Orders Where a FRAND Undertaking Exists

Neither Apple nor any third party submitting a public interest statement stated a compelling reason why a categorical rule precluding exclusion orders for declared-essential patents should be adopted. Apple itself identifies scenarios in which exclusions orders *would be* appropriate, for example, "where a potential licensee has refused to pay a royalty *after a U.S. court has determined that royalty to be FRAND.*" (RIB at 2 (emphasis added).) But Apple provides no legitimate legal basis for requiring a court to determine a FRAND rate before the

patent holder can seek relief under Section 337, and none exists. Indeed, such a requirement would render enforcement of SEPs at the ITC virtually impossible, since the patent holder would need to first file a lawsuit in a federal district court (assuming jurisdiction exists) and have the court determine an appropriate FRAND rate, which the Court might not be willing to do. If the court did set a rate, which might be years later, the patent holder would then need to persuade the accused infringer to accept that rate. If the accuser refuses and all other steps in this process have been exhausted, then, and apparently only then, does Apple suggest the patent holder is permitted to *begin* the process of seeking relief at the ITC—a time when the infringing products might no longer be on the market. The complex process Apple proposes would make it difficult for holders of standard essential patents to license their patents and would encourage the sort of free riding in which Apple is currently engaged.

If owners of SEPs are deprived of effective means of enforcing their patents against companies like Apple that have not indicated they are even willing to negotiate a FRAND license, then the patent holders are likely to question whether it makes sense to continue voluntarily undertaking the risk and R&D investments associated with full participation in the standard-setting process and the need for innovation as standards evolve. And companies that merely implement standards would have every incentive, as rational actors, to litigate rather than voluntarily enter into licenses for standard essential patents since the outcome of lawsuits are uncertain and the only downside might be an order to pay damages in the amount of the FRAND license rate that would otherwise have been negotiated. Apple has now tried the issue of the alleged inappropriateness of Samsung's FRAND license offers to the ALJ in this investigation and to a jury in the Northern District of California. Although both the ALJ and the jury rejected Apple's claim that Samsung breached any obligations it might owe to ETSI or Apple, Apple still

has not accepted any of Samsung's offers for a license to its UMTS portfolio. *Verdict, Apple Inc. v. Samsung Elecs. Co. Ltd.*, No. 11-cv-1846-LHK, Dkt. No. 1931 (N.D. Cal. 2012).

Apple's refusal to enter into FRAND licenses is not limited to Samsung. In a recent lawsuit against Motorola, Apple asked a Western District of Wisconsin court to determine a FRAND rate for Motorola's SEPs, but then informed the court shortly before trial that Apple would not consider itself bound by the rate determined by the Court, if it was set at more than \$1 per unit. The court then cancelled the trial and dismissed Apple's case in order to avoid issuing a purely advisory opinion. *See Order and Opinion, Apple Inc. v. Motorola Mobility Inc.*, No. 3:11-cv-00178-bbc, Dkt. 503 at 5 (W.D. Wis. 2012). This obviously undermines Apple's assertion that rejection of a court-determined rate should be a predicate to relief in the ITC, since courts are unlikely to invest the time and effort required to determine such a rate if companies like Apple are free to reject a license at the court-determined rate.

The Commission should not create a bright-line rule preventing it from issuing the only relief it can grant, solely because an asserted patent may be subject to a FRAND obligation. There is no statutory or other precedential basis for a distinction between declared-essential patents and the allegedly "product-differentiating" feature patents that Apple has asserted (*e.g.*, rectangles with rounded edges). ETSI expects its members to voluntarily negotiate FRAND licenses at arm's length, and no requirement beyond that should be imposed in the absence of an express change by Congress to the ITC's statutory authority.

ii. Patent Hold Up Has Not Been a Problem in Practice

Apple's assertion that SEPs create a risk of "hold up" is purely theoretical. Apple's expert, Dr. Walker, testified that patent hold up has never been a problem at any time from 1988 to the present and he was not aware of any situation in which an ETSI standard had been blocked by an essential patent or in which a patent owner had refused to license on FRAND terms. (Tr.

at 1440:21-1442:5.) In fact, Samsung offered a FRAND license to Apple before (*see* CX-0769.0006) and after (*see* CX-1589C) this Investigation was initiated.⁴ At the hearing, Apple failed to introduce any evidence of actual hold up or intent to hold up Apple on Samsung's part. Apple asserts that a hold up problem manifests itself when the patent owner demands "exorbitant compensation" (RIB at 1), but there is no evidence that Samsung asked for anything but a FRAND rate and Apple did not prove otherwise. Indeed, both the ALJ and a Northern District of California jury have now rejected Apple's FRAND-based defenses. In any event, throughout this investigation, Samsung has sought to negotiate a resolution to the dispute and remains open to discussing other royalty terms and bases with Apple.

Apple insists that part of the FRAND "bargain" is that a patent holder gives up the right to do anything but license its IPR for FRAND royalties. (CIB at 5.) But Apple does not—and cannot—cite to any ETSI rule or protocol supporting that assertion. As Apple's own expert Dr. Walker confirmed, nothing in the ETSI IPR Policy or any related rule or document precludes an innovator from seeking the remedy of injunctions under certain circumstances. (Tr. at 1448:17-1149:1.) Indeed, there is strong evidence that ETSI members affirmatively rejected a categorical waiver of injunctive relief (including exclusion orders) for declared-essential patents.⁵ Moreover, as Samsung demonstrated in its initial submission, the actual words of the undertaking that Samsung made did not in any way suggest that Samsung had given up the right to do anything but license its IPR for FRAND royalties, particularly where an implementer, like

⁵ See Roger G. Brooks & Damien Geradin, *Taking Contracts Seriously: The Meaning of the Voluntary Commitment to License Essential Patents on "Fair and Reasonable" Terms*, in *Intellectual Property and Competition Law: New Frontiers* 389, 395-401 (Steven Anderman & Ariel Ezrachi, eds., 2011) [hereinafter Brooks & Geradin, *Taking Contracts Seriously*]; Roger G. Brooks & Damien Geradin, *Interpreting and Enforcing the Voluntary FRAND Commitment*, 9 Int'l J. IT Standards & Standardization Research, Jan.-June 2011, at 1,5-10, available at ssrn.com/abstract=1645878.

Apple, contends the IPR is not essential and does not meaningfully engage in the arm's length negotiation for a FRAND license. (CIB at 9.)

Apple contends that, "if FRAND patent holders could obtain ITC exclusion orders," then every holder of any standard essential patent could threaten standards implementers with hold up. (RIB at 7.) But if that were truly a problem in practice, it would have manifested itself by now. The fact is, it has not, and Apple cannot point to any evidence of coordinated behavior among SEP holders to hold up implementers of standards. As highlighted in Innovation Alliance's comments with respect to the Commission's questions in this Investigation, the FTC's Statement merely refers to a "potential" for harm to U.S. competition and "the possibility of patent hold up" and does not suggest that actual hold up is currently or has ever been a problem. Innovation Alliance's public interest submission in Inv. No. 337-TA-794 (Dec. 3, 2012), citing the FTC's Public Interest Statement in Inv. No. 337-TA-745; *see also*, Brief of Amicus Curiae FTC Supporting Neither Party, Appeal in *Apple v. Motorola*, 12-1548 (Fed. Cir. 2012). Indeed, the letter the FTC submitted in the 745 Investigation does not assert that the ITC should be stripped of jurisdiction solely because a declared-essential patent is at issue, but, rather, simply recommends that the ITC consider denying an exclusion order where the patent holder has *not* made a reasonable royalty offer—a situation that does not apply here.

iii. FRAND Commitments Vary

Due to the varied FRAND commitments made by SEP holders, the Commission should evaluate the facts and circumstances of each commitment individually in view of the specific IPR policy or rules of the standard-setting organization ("SSO") at issue. Specifically, the language and intent of the undertaking must be considered to ascertain whether any legal doctrine precludes the assertion of particular patent rights. Here, despite Apple's assertions to the contrary, none of the undertakings made by Samsung disclaimed the right to seek injunctive

relief or an exclusion order.⁶ Indeed, the district court in the Western District of Wisconsin specifically addressed this issue in Apple's lawsuit against Motorola involving standards-essential patents. The court wrote:

There is no language in either the ETSI or IEEE contracts suggesting that . . . the standards-setting organizations intended or agreed to prohibit Motorola from seeking injunctive relief. In fact, both policies are silent on the question of injunctive relief. Moreover, in light of the fact that patent owners generally have the right to seek injunctive relief both in district courts, 35 U.S.C. § 283, and in the International Trade Commission, 19 U.S.C. § 1337(d), I conclude that any contract purportedly depriving a patent owner of that right should clearly do so. The contracts at issue are not clear.

Apple Inc. v. Motorola Mobility, Inc., No. 11-cv-178, 2012 WL 5416941, at *15 (W.D. Wis. Oct. 29, 2012).⁷ Thus, Samsung never disclaimed the right to injunctive relief or an exclusion order.

Review of the particular language used in a FRAND commitment is important. In the undertakings at issue here, Samsung agreed that it would be prepared to license the identified IPRs on FRAND terms and conditions to the extent an IPR actually remains essential to the standard at issue. Samsung submitted a general IPR declaration in 1998⁸, long before the standards proposals or patent applications at issue existed, that it was "prepared to grant licenses to its *essential IPRs* on a fair, reasonable and non-discriminatory basis in accordance with the terms and conditions set forth in Clause 6.1 of the ETSI IPR Policy" to any patents that might become essential to UMTS. (Tr. at 1406:25-1407:4.) Samsung followed this with specific

⁶ Samsung's declarations to ETSI regarding IPR believed to be essential, including declarations relating to the '348 and '644 patents, are publically available at <http://ipr.etsi.org>.

⁷ Samsung agrees with Qualcomm's comments regarding the decision in *Apple, Inc. v. Motorola, Inc.*: "The recent district court decision in *Apple, Inc. v. Motorola, Inc.*, No. 11-cv-08540, 2012 WL 2376664 (N.D. Ill. June 22, 2012) (J. Posner), neither refers to nor takes into account this history, *id.* at *12-22, and therefore is of little persuasive value on the question of whether a FRAND undertaking pursuant to the ETSI IPR Policy precludes the availability of injunctive relief. As the Court in the Western District of Wisconsin observed, Judge Posner 'never refer[red] to the ETSI or IEEE policies as 'contracts,' and cited only 'policy and economic arguments, not contract provisions' when addressing the availability of injunctive relief after making a FRAND commitment. *Apple*, 2012 WL 5416941, at *14."

⁸ Available at http://ipr.etsi.org/GdDetails.aspx?IPRD_ID=899&IPRD_TYPE_ID=1&MODE=2

declarations for the 348 and '644 patent families, and other IPRs, stating that it was “prepared to grant irrevocable licenses under the IPRs on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy, in respect of the STANDARD, *to the extent that the IPRs remain ESSENTIAL.*” (RX-0164C; RX-0133. (emphasis added).)

Thus, as the Office of Unfair Import Investigations (“OUII”) noted, Samsung’s declarations to ETSI merely establish that “Samsung may have FRAND obligations” here to the extent the IPRs are currently essential. (ID at 460.) Yet Apple repeatedly and unequivocally argued that Samsung’s patents are not in fact essential.⁹ (Tr. at 76:17-25; Apple’s Resp. to Samsung’s First Set of Reqs. for Admis. at Resps. to Req. Nos. 120-125 (Feb. 20, 2011); Apple’s Mot. for Summ. Determination as to the '644 and '348 Patents Based On Samsung’s Agreements With Chip Suppliers and FRAND Commitments at 3 (Mar. 5, 2012).) Although Samsung disagrees and remains willing to license these patents to Apple on FRAND terms and conditions, whether or not the Commission or any other tribunal determines them to be truly essential to the standard, any public interest challenge to Samsung’s proposed FRAND license offer for those patents must necessarily fail if the Commission merely finds the patents infringed without reaching the issue of their essentiality, which is likely since neither Apple’s nor Samsung’s petition requires the Commission to reach the separate issue of essentiality.

iv. Arguing Public Interest Is Apple’s Last Resort Due To Its Failed FRAND Defenses

The Commission should not establish a rule prohibiting the issuance of an exclusion order in cases involving declared-essential patents since there are already well established affirmative defenses that a respondent who claims to have been injured as a result of standards-

⁹ Accordingly, Samsung proved infringement through analysis of both the standard, if the patents are essential, and on an element-by-element, claim-by-claim basis through analysis of source code and other evidence, if the patents are not essential. (*See generally*, Min Tr.)

related misconduct may assert (*e.g.*, unenforceability due to waiver, equitable estoppel, and unclean hands). Apple asserted these affirmative defenses in this Investigation and bore the burden of proving them at the hearing. But as the ALJ concluded, Apple failed to meet “its evidentiary or legal burden for establishing” that the ’348 and ’644 patents “should be held unenforceable by reason of Samsung’s ETSI activities.” (*See* ID at 487.) The Staff also agreed that Apple failed to prove its defenses. (SIB at 18.)

The fact that Apple failed to prove these defenses in this investigation is not a basis for adopting a broad rule prohibiting the assertion of declared-essential patents. Given Apple’s failure to establish any of its standards-based defenses, absolutely no reason exists for the Commission to nevertheless bar Samsung or other holders of standard essential patents from seeking relief in the ITC. Indeed, as Samsung argued in its initial submission, none of the five statutorily enumerated public interest factors preclude issuance of an exclusion order based on Samsung’s FRAND commitments; nor should they automatically preclude exclusion orders in general for standard essential patents. Instead, the facts and circumstances of each case should be analyzed, including whether—as was the case here—the infringer was not a interested in negotiating a license in good faith. (*See also*, CX-0908C, ETSI IPR Policy at § 6.1, stating that, “The above undertaking may be made subject to the condition that those who seek licences agree to reciprocate.”)

TOPIC 2. Where a patent owner has offered to license a patent to an accused infringer, what framework should be used for determining whether the offer complies with a FRAND undertaking? How would a rejection of the offer by an accused infringer influence the analysis, if at all?

As Samsung argued in its initial submission, a “one size fits all approach” to this question should not apply, particularly in light of the wide range of standards and applicable rules that may be impacted by the assertion of declared-essential patents. Each SSO may have different

requirements for the undertakings that IPR owners must make; the body of rules and accepted industry practice governing the FRAND undertaking should therefore always be considered.

If an SSO specifies a particular analytic framework that its members must apply in licensing declared-essential patents, then it may be appropriate for the ITC to employ that framework in deciding whether a respondent has met its burden with respect to an applicable defense, based on an alleged failure to license in accordance with a FRAND undertaking. *See, e.g., Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1019-1024 (Fed. Cir. 2008). On the other hand, if, as is the case with ETSI, the standards body does not define what FRAND means (Tr. at 1442:17-1443:14), but rather specifies that the patent holder and the implementer of the standard must negotiate to arrive at appropriate terms and conditions, then no single framework will exist. (*Id.*; ID at 459-60; CX-1503 at FAQ #7; Brooks *et. al*, Taking Contracts Seriously: The Meaning of the Voluntary Commitment to Licence Essential Patents on “Fair and Reasonable” Terms 8 n. 17 (Mar. 12, 2010).¹⁰)

Importantly, ETSI recognizes that the back and forth of the negotiation process is critical to arriving at a FRAND license. (CX-441 ETSI Guide on IPRs (Nov. 27, 2008) § 4.1 (“Specific licensing terms and negotiations are commercial issues between the companies and shall not be addressed within ETSI.”).) As Apple’s only FRAND-related expert, Dr. Walker, explained, ETSI does not define FRAND, and FRAND terms are subject to commercial negotiation between the parties. (Tr. at 1442:17-1443:14.) Walker testified that it was the obligation of the party seeking such a license to enter into negotiation with the patent owners. (Tr. at 1446:4-1447:5.) For this reason, it is improper to consider a patent holder’s opening offer alone in

¹⁰ Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569498

determining whether the patent holder has complied with its FRAND undertaking. Samsung's opening offer was in line with other published headline FRAND rates in the industry.¹¹

Even if the Commission were to adopt a framework for analyzing whether a license offer complies with FRAND obligations, Apple failed to meet its burden of proving that Samsung's offer failed to comply with any FRAND obligation to ETSI. Apple asserted in its prehearing brief that "to the extent that Samsung argues it can seek an exclusion order because Apple has refused Samsung's license offer, Apple will prove that this offer was neither fair, nor reasonable, nor non-discriminatory." (Apple's PHB at 164.) Samsung made precisely this argument in its opening statement at the hearing, namely that Apple had refused Samsung's offer to license the asserted patents on FRAND terms. (Tr. at 42:4-24.) But despite Apple's promise, Apple made no attempt to rebut the argument, failing to call a single witness to testify on any aspect of Samsung's FRAND offer, even though it had every opportunity to do so. Despite Apple's attempt to shift the burden to Samsung (RIB at 13-14), it was Apple's burden to prove that the ITC is not permitted to issue relief in this Investigation and, although Apple acknowledged that Samsung had "open[ed] up the question of FRAND offers," Apple failed to meet that burden. (Tr. at 42:18-24.)

Apple now contends that Samsung's license offer was not FRAND because Apple would have had to pay Samsung more than the price of a baseband processor chip itself. (RIB at 15-17.) Apple's argument is baseless. As the evidence introduced at the hearing demonstrated: (1) licenses in the telecommunications industry typically use the net sales price of a handset as the royalty base, not the price of the baseband processor chip (*see, e.g.*, RX-0174C at 2; RX-205C at 2; RX-206C at 19-20; RX-0201C at 5; RX-0194C at 6; CX-0395C at 9) and (2) Apple derives

¹¹ *Royalty Rates and Licensing Strategies For Essential Patents On LTE (4G) Telecommunication Standards*, les Nouvelles, 114-119, 116 Sep. 2010, available at

significant value far exceeding the cost of the baseband chip from the 3G technology that is the subject of Samsung's SEPs.¹² It is widely agreed in the telecommunications industry that a fair royalty should at the very least reflect the expected incremental value of the final product including the patented technology over the value of the product without the patented technology. *See, e.g., Lemley & Shapiro (2007) and Shapiro, C., 2010. Injunctions, hold-up, and patent royalties, American Law and Economic Review.*

Apple fails to identify a single industry license that uses the price of a baseband chip as a royalty base. The fact is, royalties based on the price of the end product are consistent with industry practice. (*See, e.g.,* RX-0174C at 2; RX-205C at 2; RX-206C at 19-20; RX-0194C at 6.) And there is no economic reason why the value of IPRs contained in a physical product should be dependent on the sale price of that physical product. If the converse were true, IPR would be continually devalued as manufacturing processes continually improve and become more efficient and components become cheaper to produce.

Apple's contention that Samsung's license offer was not FRAND because [REDACTED]

[REDACTED]

[REDACTED]

<http://www.investorvillage.com/uploads/82827/files/LESI-Royalty-Rates.pdf>.

¹² For example, Apple's iPhone utilizes 3G UMTS wireless technology (which practices the '348 and '644 patents) that allows Apple to charge a \$350-\$550 premium for the iPhone (unsubsidized) as compared with a virtually identical, but non-3G enabled iPod touch. (Tr. at 986:13-987:11.)

¹³ [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. To the contrary, it simply reflects Samsung's desire to promote patent peace rather than to compete via litigation.

Apple also contends that Samsung's proposed rate is out of line with other licenses to which Samsung is a party. (RPost at 139-40.) Again, Apple is incorrect. Samsung has entered into numerous cross-licenses with other companies that include Samsung's UMTS patents (*see, e.g.*, RX-0189C; RX-0191C; RX-0193C; RX-0178C; RX-0194C; RX-0195C; RX-0196C; RX-0197C; RX-0198C; RX-0199C; RX-0200C; RX-0202C; RX-0203C; RX-0204C; RX-0205C; RX-0206C; RX-0207C; RX-0208C; RX-0209C; RX-0421C; RX-0423C) and Samsung offered Apple such a license before initiating this investigation. The fact that no other company before Apple was interested in a unilateral license limited to Samsung's declared-essential UMTS patents hardly means that the terms Samsung offered to Apple in response to its request for such a license are not FRAND. To the contrary, it suggests that Apple's litigation-inspired demand for a license on such terms is at odds with the typical practice in the industry. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

TOPIC 3. Would there be substantial cost or delay to design around the technology covered by the '348 and '644 patents asserted in this investigation? Could such a design-around still comply with the relevant ETSI standard?

i. Apple Infringes the '348 and '644 Patents

Apple's allegations that it does not infringe the '348 and '644 patents are based on errors in the ID that Samsung identified in its Petition for Review. Apple argues that it does not infringe either patent for the reasons the ID found non-infringement. But, as explained in Samsung's petition for review, the ID is replete with errors that must be reversed.

ii. Apple's Alleged "Possible" Technical Design Arounds are Not Design Arounds

Apple's design arounds are either (1) not feasible, or (2) infringing implementations. First, Apple identifies its own implementations as design arounds and claims "design around is not necessary." (RIB at 19-21.) As discussed in Samsung's petition for review, these are still infringing implementations. Apple also identifies a Nokia proposal as an alternative. But, Apple fails to report that the 3GPP already found this proposal to be insufficient, hence adoption of Samsung's proposal. (Kang Tr. 202:1-204:4.) Moreover, the Nokia proposal is the same 1999 standard that Apple claims anticipates the '348 patent. Apple cannot claim that the proposal both anticipates and designs around the claims at the same time.

For the '644 patent, Apple proposes Motorola's tailbiting proposal. The use of tailbiting in an HSUPA system is not feasible. The technology would require a complete redesign of *each and every* device that operates on the network, including all base stations and every device operating on the network. (Kim Tr. 299:19-300:19.) That means installing a completely new infrastructure and requiring all users to get new phones. Although Apple failed to identify the cost, it would be significant. Moreover, there is no evidence that this implementation *would not* infringe the '644 patent, as the proposal fails to identify all the details of the implementation.

Finally, implementation of a different rate-matching pattern would not be technically feasible. Dr. Stark's allegations were based on theory. Using a different rate-matching pattern would cause unpredictable and unwanted results.

iii. Apple has Alternate Options

As outlined in Samsung's opening brief, because the claims do infringe, Apple has other options, such as, most prominently, agreeing to take a license from Samsung, and choosing to sell devices that practice standards other than HSUPA.

TOPIC 4. What portion of the accused devices is allegedly covered by the asserted claims of each of the '348 and '644 patents? Do the patents cover relatively minor features of the accused devices?

Apple's attempt to trivialize the technology in the '348 and '644 patents is self-serving and incorrect. Just because the '348 and '644 patents are two of many patents that cover the UMTS technology does not marginalize their importance. Without the '348 and '644 patents, the systems would not work reliably, and user satisfaction with 3G-compatible devices would be significantly compromised.

i. The '348 Patent is Critical to Ensuring the Products Communicate at the Right Data Rate

Mobile device users today send different types of data, such as voice, image, and text. These different forms of data are sent at different data rates. In order for the receiver to process the data, the receiver has to know what data rate to use. This data rate information is included in a field called the "Transport Format Combination Indicator" (TFCI). If there are errors in the data rate portion of the TFCI field, then the receiver cannot process the incoming data correctly. Therefore, any unreliable transmission of TFCI information leads to an incorrect interpretation of the received data frames. To avoid transmission errors, the transmitter encodes the TFCI bits with an error correcting code prior to transmission, so that the receiver can correct any errors that

might occur in the transmission of the TFCI. The '348 patent covers an apparatus for encoding and decoding this TFCI that improves the error correction capabilities. It ensures the reliable transmission of data.

ii. The '644 Patent Ensures Reliable Communications

Mobile devices users want reliable mobile communication services. To manage all of the mobile devices on a network, the network uses control information to communicate with the devices. This control information can tell a mobile how to communicate on the network along with many other devices. The '644 patent is concerned with a very important piece of control information called the Absolute Grant. The Absolute Grant indicates the maximum data rate for a mobile device. It is important that a device transmit only at certain data rates to ensure all devices can communicate on the network together. The '644 patent covers a novel way of ensuring the small-sized absolute grant information is correctly received by the user equipment.

TOPIC 5. What evidence in the record explains the legal significance of Samsung's FRAND undertakings under French law?

Following the ALJ's rejection of Apple's motion for summary determination that, as a matter of French law, it was automatically licensed to the '348 and '644 patents by virtue of Samsung's undertakings to ETSI, Apple admits that it did not pursue this argument further and failed to present any evidence on the issue at the hearing. (RIB at 28.) Apple's French law expert, Professor Molfessis, was on the witness list, but Apple chose not to call him or present any other evidence on the issue. Accordingly, in light of Apple's waiver of this argument, Samsung did not call its own expert, Professor Remy Libchaber as a rebuttal witness at the hearing.

Apple now contends that it presented the testimony of Dr. Walker regarding the *meaning* of the ETSI IPR policy. (RIB at 28.) But at the hearing, Samsung objected to his testimony as

an expert even before he took the stand because under the section 8.2 of the ground rules, “legal experts may only testify as to procedures of the U.S. Patent and Trademark Office.” (Tr. at 1309:1-1311:25.) When asked by the ALJ, Apple insisted that Walker would not testify as to any legal opinions since he had no legal training whatsoever and is not an attorney. (Tr. at 1314:10-17; 1315:2-18.) Now Apple is attempting to backtrack, in order to use Walker’s testimony as legal opinion to mislead the Commission as to the “legal significance of Samsung’s FRAND undertakings under French law.” Samsung respectfully submits that the Commission not consider Walker’s testimony with respect to French law.

TOPIC 6. Does Samsung’s offer to license the ’348 and ’644 patents to Apple satisfy any obligation that may arise from Samsung’s FRAND undertaking? Why or why not?

Apple contends that Samsung did not satisfy its FRAND commitment because its 2.4% license offer came after this investigation was initiated. But Apple wholly ignores Samsung’s pre-litigation offer of a cross-license on FRAND terms and conditions that would have covered Samsung’s UMTS patents. And Apple did not seek a license from Samsung before it entered the smartphone market in 2007 and introduced its first 3G smartphone in 2008.¹⁴

Before this Investigation was initiated, Samsung offered Apple a cross-license that would have included the patents at issue here and then, over one year ago, at Apple’s request, offered Apple a one-way license limited to Samsung’s portfolio of UMTS-essential patents, and Samsung has unsuccessfully attempted to engage Apple in negotiations ever since. (CX-0769.0006; CX-1589C.) Samsung proposed 2.4% as a fair, reasonable, and non-discriminatory

¹⁴ The following is listed under ETSI’s IPR FAQs: “Question 6: Does one have to take permission from ETSI for using the patents as listed by ETSI in the Standards? Answer 6: It is necessary to obtain permission to use patents declared as essential to ETSI’s STANDARDS. To this end, each STANDARD user should seek directly a license from a patent holder. In order to obtain the contact details of a patent holder, please make your request to the ETSI Legal Service.” http://www.etsi.org/website/aboutetsi/iprsinetsi/IPR_Policy_FAQ.aspx.

headline rate for its portfolio of UMTS essential patents. (CX-1589.0001.) Since then, Samsung had repeatedly invited Apple to meet in person to negotiate such a license, but Apple had not shown any willingness to conclude such a license.¹⁵

Indeed, Judge Robart in the Western District of Washington recently found that to satisfy its RAND obligation to an SSO, “Motorola need not make initial offers on [F]RAND terms.” *Microsoft Corp. v. Motorola, Inc.*, 864 F. Supp. 2d 1023, 1038 (W.D. Wash. 2012). Like the IEEE and ITU, the SSOs represented in that case, the language of ETSI’s IPR Policy and Samsung’s declarations to ETSI do not require the initial offer to be FRAND. (CX-0908C.) As such, even if it is assumed that Samsung’s initial offer might have been negotiated down, Samsung never breached any obligation it might have owed to ETSI or anyone else by failing to license its declared-essential patents on FRAND terms, particularly given the ALJ’s finding that Apple did not establish that it was willing to negotiate with Samsung. (ID at 470.)

TOPIC 7. Does the fact that Apple has not accepted Samsung’s offer to license the ’348 and ’644 patents influence a determination as to whether Samsung has satisfied any obligation that may arise from a FRAND undertaking? Why or why not.

That Apple rejected Samsung’s offer to license its UMTS portfolio is not itself dispositive of this question; it is that failure coupled with Apple’s unwillingness to negotiate in any meaningful way that should influence a determination that Samsung had not violated any obligation it might have owed to Apple or anyone else arising from a FRAND commitment. Apple attempts to skirt this issue by listing certain litigation outcomes, but the list does not bear in any way on this issue. Apple fails to mention that a relevant litigation result involving the same facts and the same FRAND defenses presented here, resulted in a victory for Samsung with the Northern District of California jury rejecting Apple’s FRAND defenses and antitrust claims

¹⁵ [REDACTED]

in their entirety. (Verdict, *Apple Inc. v. Samsung Elecs. Co. Ltd.*, No. 11-cv-1846-LHK, Dkt. No. 1931 (N.D. Cal. 2012).)

As the ALJ concluded, Apple failed to meet its burden of proving that it was willing to negotiate a FRAND license from Samsung. Although Apple focused on theoretical concerns like the possibility of hold up, Apple failed to show it had been harmed by any standards-related conduct of Samsung or even that it would have been willing to make a serious counteroffer or engage in meaningful negotiations for such a license. [REDACTED]

RESPONSES TO QUESTIONS RELATED TO U.S. PATENT NO. 7,706,348

TOPIC 8. With respect to the asserted claims of the '348 patent, what record evidence shows that a person of ordinary skill in the art would understand the phrase "10 bit TFCI information" to allow or preclude the use of padding bits? What is the difference between the "10 bit TFCI information" in the portion of Table 1a shown in columns 13 and 14 of '348 patent and the TFCI information with padding zeroes allegedly used in the alleged domestic industry devices? Is the Patent's discussion of padding zeroes at col. 3, lines 27-34 of any relevance? What consequence would construing "10 bit TFCI information" to allow padding bits have on the issues of infringement, validity, and the technical prong of the domestic industry requirement?

As has been the case in Apple's prior papers to the Court, Apple's Written Submission Regarding the Commission's Questions ("Apple's Initial Submission") especially demonstrates the lengths Apple will take to manipulate the record evidence. To argue that the DI Qualcomm Products do not satisfy the "10 bit TFCI information" limitation, Apple must attribute opinions to its expert that its expert never made and ignore the opinions he did make, misrepresent Samsung's expert's clear testimony, and misrepresent the technology of the '348 patent. It is no surprise Apple resorts to such tactics; when the DI Qualcomm Products utilize the *identical* input and output the *identical* codeword using the *identical* 10 coding sequences as disclosed in the '348 patent, Apple *must* distort the facts to save itself from a violation.

i. Apple's and the Staff's Record Evidence Does Not Prove that a Person of Ordinary Skill in the Art Would Not Understand the Phrase "10 Bit TFCI Information" to Include Padding Bits

The evidence Apple and the Staff identify in their Initial Written Submission Regarding the Commission's Questions fails for numerous reasons.

First, none of Apple's citations to the patent specification demonstrate that padding bits *cannot* be included in the 10 bit TFCI information. These cites merely disclose that information bits are encoded. However, the question posed by the Commission was whether information bits can include padding bits. These cites do not provide an answer to the Commission's question. Apple cites col. 34, lines 11-14 and 28-32 (RIB at 35), however, at this citation, the patent merely states that an encoder can utilize 7 or 10 information bits. This citation does not restrict the number of information bits from also including padding bits. Apple also points to embodiments that utilize, for example, a (32, 9) encoder. These embodiments are *unrelated* to the asserted claims. The asserted claims all require a 10 bit TFCI information input because they utilize an encoder that only accepts 10 bits, such as a (30, 10) or (32, 10) encoder. In the embodiments identified by Apple, padding bits are unnecessary because the sequences themselves are blocked from coding the additional bits and do not require a full 10 bit input. (JXM-1 at 33:25-34:32.) These unrelated encoders are designed to utilize 9 input information bits. (JXM-1 at 34:19-22.) This design choice says nothing about the case for when an encoder utilizes a 10 bit TFCI information input as set forth by the claims. Therefore, Apple's cited evidence fails to demonstrate that a "10 bit TFCI information" cannot include padding bits.

Second, Apple and the Staff continue to incorrectly rely on the unasserted claims. Simply because the unasserted claims require the TFCI information bits to be input as a 10 bit unit, does not say anything about the TFCI information bits in the asserted claims. There are many reasons for why the Applicants may have chose to use the term "10 bit," none of which

could have had to do with allowing for padding bits. For example, the Applicants could have used the term “10 bit unit” in the unasserted claims to mean that these information bits must be saved in memory as a contiguous set of 10 bits. During *Markman*, Apple argued that a “unit” means “contiguous bits.” (RRMarkman at 99; RXM-53 at 1755). If this was the Applicants’ intent in adding the phrase “10 bit unit,” the 10 bit unit would not inform the reader whether the information bits could or could not include padding bits, but instead was included to inform the reader about how the bits are stored in memory. In this example, claim differentiation teaches that as opposed to the unasserted claims that require a 10 bit unit, the asserted claims do not require the 10 bits be contiguously stored in memory.

Apple and the Staff argue that the dependent claims of the unasserted claims specifically disclose padding “0” bits when the TFCI information bits are less than 10 bits. However, simply because the Applicants chose to include dependent claims to point out the use of padding bits in the unasserted claims does not automatically preclude the asserted claims from being broad enough to also include padding bits. In fact, the opposite is true. *Mycogen Plant Science v. Monsanto Co.*, 243 F.3d 1316, 1329 (Fed. Cir. 2001) (refusing to apply claim differentiation to limit an independent claim based on a different independent claim showing that patentee knew how to add limitation when desired).

Third, Apple’s argument that there must be 1024 different values of the 10 bit TFCI information implicitly adds limitations to the asserted claims where such limitations would be improper. *Falana v. Kent State University*, 669 F.3d 1349, 1354-55 (Fed. Cir. 2012) (refusing to limit claims to a temperature independent embodiment despite the specification touting its benefits because “the claims here do not contain express limitations”). There is even more reason to avoid limiting the claims here than in *Falana* because nothing in the specification

requires or promotes the benefits of *1024 different values* of the 10 bit TFCI information.

Instead, the claim language only requires that there be “a plurality of possible 10 bit TFCI information.” (JXM-1 at 45:57-58, 46:46-47.) For Apple’s argument to apply, the claims would have to read “a 10 bit TFCI information input to the controller from one out of 1024 possible 10 bit TFCI information.”

Adding padding bits to TFCI bits to create a TFCI information input satisfies the language of the claim.¹⁶ For example, when there are 7 TFCI bits and three padding bits, there will still be “a plurality of possible 10 bit TFCI information” because there will still be 128 possible 10 bit TFCI information inputs. (RIB at 36; Min Tr. 1257:6-15.) This is consistent with the Technology Stipulation that states that the extended TFCI be 1 of 128, 1 of 256, 1 of 516, or 1 of 1024 different values. (Joint Technology Stipulation at 3.) An input with 7 TFCI bits and three padding bits is 1 of 128 possible values.

Fourth, Apple has to misrepresent the Hearing testimony to find support for its argument. Dr. Davis, Apple’s expert, gave no opinion at the Hearing on whether the term “TFCI information” could include padding bits. Apple cites to Dr. Davis’ testimony at 2085:2-4 (RIB at 37), but this is testimony where Dr. Davis conceded that the Accused Apple Products satisfy the limitation “from a plurality of possible 10 bit TFCI information.” (Davis Tr. at 2084:2 – 2085:11.) Similarly, Dr. Min never conceded that the 10 bit TFCI information does not include padding bits. In fact, Dr. Min asserted the *opposite* proposition—that the term “10 bit TFCI

¹⁶ Apple audaciously accuses Samsung of improperly raising the argument that “padding” bits are TFCI information at its expert’s deposition, and therefore, according to Apple, Samsung’s argument is “newfounded.” (RIB at 36.) In fact, it was *Apple*, not Samsung, that improperly raised this contention in direct violation of the Ground Rules and the ALJ’s Scheduling Order. Apple failed to disclose this contention in its contention interrogatories and waited until its expert’s rebuttal report to disclose this contention to Samsung. Since this was disclosed in Apple’s *rebuttal* expert report, the first time Samsung could put forth expert testimony on this argument was during its expert’s deposition. The ALJ found that

information” can include padding bits. (Min Tr. at 1248:19-1249:8.) Instead of arguing on the merits, Apple resorts to misrepresenting the clear and unambiguous testimony of an expert. Such “evidence” is without merit.

Fifth, as described in Samsung’s Initial Submission in Response to the Commission Notice of Review (“Samsung’s Initial Submission”), the 3GPP standard supports the argument that the 10 bit TFCI information can include padding bits. (CIB at 37-38.) What Apple conveniently fails to disclose is that the 3GPP specification calls the TFCI bits plus padding bits “TFCI information bits.” (CX-1099.47-48.) Therefore, the 3GPP standard demonstrates that a person of ordinary skill in the art would understand the phrase “10 bit TFCI information” to include padding bits.

ii. Apple and the Staff’s Argument that the TFCI Information in Table 1a is Different from the DI Qualcomm Products is Hypothetical

Both Apple’s and the Staff’s discussion of padding bits does not relate to how padding bits are utilized in the ’348 patent’s technology. (RIB at 34; SIB at 21.) It is self-serving attorney argument that does not demonstrate how padding is actually utilized in the art. Instead, to understand “padding,” a person of ordinary skill in the art would first look to the intrinsic evidence with an understanding of the extrinsic evidence that discloses the state of the art at the time of the invention. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1317 (Fed. Cir. 2005). Samsung’s evidence comes directly from the language in the ’348 patent and the related 3GPP specification.

Without referencing the patent or relevant extrinsic evidence, Apple and the Staff argue that because padding bits can be a “1” bit, the TFCI information bits in the DI Qualcomm Products cannot correspond to the 10 bit TFCI information set forth in Table 1a because a “1” bit

Apple’s violation was so prejudicial to Samsung, that it struck Apple’s expert report and precluded its expert from testifying on the 10 bit input in the domestic industry products. (Order No. 65.)

will change the value of the TFCI information. (RIB at 34; SIB at 21.) However, the '348 patent and the 3GPP specification state in no uncertain terms, that padding with respect to the '348 technology is always done using "0" bits. (JXM-1 at 3:29-31; 4:9-12; CX-1099.47.) The DI Qualcomm Products operate [REDACTED] (Min Tr. at 1255:8-11, 1256:7-1257:5.) Therefore, Apple's and the Staff's entire argument that adding "1" bits to pad the TFCI information would change the meaning of the TFCI information, is a hypothetical [REDACTED]

[REDACTED]

[REDACTED] padding with "0" bits does not change the meaning of the TFCI information, the TFCI utilized in the DI Qualcomm Products is *identical* to the TFCI utilized in Table 1a. (CIB at 38-39.)

iii. The Discussion of Padding Zeroes at Col. 3, Lines 27-34 Is Relevant to Show that a "10 Bit TFCI Information" Can Include Padding

Apple again argues that because the TFCI information bits can be 7, 8, 9 or 10 bits, these bits cannot include padding. (RIB at 39) However, Apple once again fails to disclose *any* evidence for why these information bits cannot include both the TFCI bits and padding bits. The evidence Apple cites fails to rebut Dr. Min's expert testimony that when padding "0" bits are added to the original TFCI information bits, the padding bits and the TFCI information together become the TFCI information input. (Min Tr. at 1248:19-1249:8.) As explained at col. 3, lines 27-34, when the padded bits are added to the 6-bits, the padding bits plus TFCI bits collectively "increase the number of the basic TFCI bits to 6." (JXM-1, 3:27-34.) There is no discussion that the 6-bits be input as a "unit," as Apple claims is required when utilizing padding bits, to hold the TFCI bits plus padding bits; instead, the padding bits and TFCI bits altogether become TFCI bits. (*Id.*)

The Staff's argument that the patent's discussion of padding zeroes is irrelevant because it describes the prior art instead of the asserted claims is also incorrect. Rather, a court must "accord a claim the meaning it would have to a person of ordinary skill in the art *at the time of the invention.*" *Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc.*, 381 F.3d 1111, 1116–17 (Fed. Cir. 2004) (emphasis added). It is common practice to reach into the prior art to help construe terms. *Novartis Pharmaceuticals Corp. v. Abbott Laboratories*, 375 F.3d 1328, 1334 (Fed. Cir. 2004) (looking to "previous meaning to those of ordinary skill in the prior art" to define claim terms).

iv. Construing "10 Bit TFCI Information" to Allow Padding Bits means the Patent is Infringed, Valid, and Practiced by the DI Products

1. Construing "10 Bit TFCI Information" to Allow Padding Bits Would Not Disturb the ALJ's Determination that the Accused Apple Products Infringe this Limitation

Knowing that if the proper construction of "puncturing" is applied to claim 82, there is no dispute that the Accused Apple Products infringe asserted claims 82-84; Apple concocts a last-minute theory that the Accused Apple Products now input a 10 bit TFCI [REDACTED] save itself from a violation. However, Apple's newfound argument, put forth for the first time *after* trial, requires Apple to contradict its own prior admissions to the Court, disregard its own expert's clear admissions during the Hearing, and is unsupported by source code and Intel-related evidence. (CRPost at 11-13.)

First, as detailed in Samsung's Initial Submission, computer science principles dictate that memory, such as registers, be built in sizes that are powers of two, such as 8-bits, 16-bits, or 32 bits. (CIB at 44-45.) Because 10 bits are stored in a 16-bit register does not mean that the remaining 6-bits are filled with padding bits; these 6-bits are just free storage space. Padding bits are not free space because a "0" bit occupies the space. (CIB 44-46.)

Second, Apple and Dr. Davis do not point to the source code to support their argument. Nor can they: the source code demonstrates that the [REDACTED]

Unlike Dr. Davis' unsupported and contradictory testimony, Dr. Min traversed the source code during his testimony. He demonstrated that [REDACTED]

[REDACTED]" to 10. (CX-5C at 593DOC000124-125.; Min Tr. 545:15-21; JX-63C Intel [Schiele] Dep. 79:15-18.) [REDACTED]

[REDACTED] because a 10 bit register does not exist. (CX-5C at 593DOC000128; CIB 44-46.) [REDACTED]

[REDACTED]

Apple's argument contradicts Dr. Davis and Apple's own statement that a general property of linear codes is that "the number of basis sequences used to generate the code will be equal to the number of input bits that are encoded." (RPost at 29; Davis Tr. 2023:1-10.) As discussed in Samsung's Opening Post-Hearing Brief, the Intel source code utilizes [REDACTED]

[REDACTED] to code the TFCI information into a 32 bit codeword. (CPost at 28-29.) Since there are [REDACTED], according to Apple and Dr. Davis, there must be 10 bits of TFCI information.

Third, the Intel documentation and Intel corporate representative's testimony both confirm that the input to the encoding function is only 10 bits. The Intel specification that describes the Intel code responsible for coding the TFCI input states that the encoder takes a 10 bit input and encodes the input into a 32 bit codeword. (CX-8C at 9.) The Intel corporate representative also confirmed that the input to the TFCI encoder is in fact 10 bits. (JX-63C at 82:5-14; 72:22-24; 75:12-16.)

Fourth, Apple’s new argument is a direct contradiction to its Prehearing Brief, Post Hearing Brief, and its expert’s own testimony. *Prior to the Hearing*, Apple agreed with Samsung that “the products’ [REDACTED] – receives a 10 bit input and outputs a 32 bit codeword” (RPre at 9.) *During the Hearing*, Dr. Davis confirmed this same understanding. (Davis Tr. 2080:22-25.) *Immediately after the Hearing*, Apple continued to agree that the input is 10 bits: “[a]s explained above, the [REDACTED] in the Intel source code outputs a 32 bit codeword that *corresponds to 10 bits of TFCI information input to that function.*” (RPost at 37; *id.* at 36.) Apple’s new argument cannot be reconciled with its previous admissions.

2. Construing “10 Bit TFCI Information” to Allow Padding Bits Would Not Disturb the ALJ’s Determination that the Asserted Claims are Valid

As detailed in Samsung’s Initial Submission, construing the “10 bit TFCI information” to allow padding bits will have no affect on the validity of the ’348 patent because MacWilliams and the June 1999 Standard, the only two references Apple cites to support its invalidity defense, fail to disclose, alone or in combination, many of the limitations of the asserted claims. (CIB at 41-43.)

3. Construing “10 Bit TFCI Information” to Allow Padding Bits Would Result in a Finding of Domestic Industry

It is no surprise that Apple is silent on the affect of construing a “10 bit TFCI information” to allow padding bits on the DI ST-Ericsson products. (RIB at 41.) This is because Apple failed to put forth *any* evidence at trial to contest Dr. Min’s testimony regarding these products. Therefore, it is undisputed between the Parties that the DI ST-Ericsson Products practice the “10 bit TFCI information” limitation under a construction that allows or precludes padding bits. (CIB at 43.)

As detailed in Samsung’s Initial Submission, under a construction of “10 bit TFCI information” that allows padding bits, the Parties all agree that the DI Qualcomm Products satisfy this limitation. (CIB 44-47, RIB 41, SIB 22.) Apple’s additional reasons for why the DI Qualcomm Products do not practice the asserted claims are incorrect. *First*, if a “10 bit TFCI information input” allows for padding, then the 32 bit codeword in the DI Qualcomm Products correspond to a 10 bit input in the same way the 32 bit codeword in Table 1a corresponds to a 10 bit input. (CIB at 45.) *Second*, the evidence clearly supports that the input to the encoder is 10 bits and not [REDACTED]. (CIB at 44-47.) *Third*, as detailed in Samsung’s Post Hearing Briefs and Petition for Review, the DI Qualcomm Products all contain a “puncturer for puncturing” in claim 82 and satisfy the controller limitation in claim 75 (CPost at 45-48, 52-53, 57-59, 61-62; CPet at 19-22.)

TOPIC 9. With respect to the asserted claims of the ’348 patent, what claim language, if any, limits the claim to the use of a look-up table and precludes the claim from covering the embodiment of the invention shown in Figures 8 and 14 of the ’348 patent?

i. The Asserted Claim Language “From Among a Plurality of [30 or 32] Bit Codewords” Is Satisfied by Both a Look-Up Table and a Generator

Apple’s entire argument for why an embodiment should be read out of the claim scope is that, according to Apple, the generator embodiment cannot satisfy the limitation “from among a plurality of [30 or 32] bit codewords.” This is the *only* language in the asserted claims that Apple points to support its argument that the claims must be limited to a single embodiment. However, this same claim language *applies equally* to both the generator and the look-up table embodiments. Therefore, limiting the scope of the claims to only one of these two embodiments violates the basic canons of claim construction. (CIB at 49.)

First, Apple’s description of why only a look-up table satisfies the asserted claims requires interpreting the phrase “from among a plurality of [30 or 32] bit codewords” to mean that each 30 or 32 bit codeword is saved in memory for access by the controller. Nothing in the claim language or the specification, discloses that all codewords must be stored. The claim language as drafted by the Applicants only requires that the controller output one out of a plurality of codewords. (CIB at 47-49.) For Apple’s construction to apply, the claims should recite “a 32 bit codeword selected from among a plurality” Accordingly, Apple’s analysis is based entirely on its own beliefs as opposed to evidence drawn from the patent specification or claims.

Second, Apple incorrectly argues that the asserted claims would have the same meaning with or without the phrase “from among a plurality of . . . codewords” under the ALJ’s construction. However, this phrase has meaning under *both* Apple’s and the ALJ’s construction of the asserted claims. When read along with the phrase “from a plurality of possible 10 bit TFCI information,” these phrases change the claim’s scope to encompass an apparatus allowing for the input and output to be from a plurality of TFCI information inputs and codewords respectively. (JXM-1 at 45:55-58, 46:43-46.) Removing the phrase “from among a plurality of [30 or 32] bit codewords” potentially limits the claims to apparatuses that are only capable of coding a single 10 bit input and outputting a single 30 or 32 bit codeword, no matter whether the claim is read on the look-up table or codeword generator embodiment. Furthermore, Apple’s cite to *Texas Instruments v. Int’l Trade Comm’n* is inapposite. In *Texas Instruments*, the gate location was inseparable from the location of injection, so Texas Instruments’ construction that the gate could be anywhere, read out a claim limitation that the injection occur at a defined location. *Texas Instruments v. Int’l Trade Comm’n*, 988 F.2d 1165, 1171 (Fed. Cir. 1993). By

contrast, the phrase “from among a plurality of [30 or 32] bit codewords” is *not* inseparable from the look-up table embodiment; this phrase can be used equally with the look-up table and the generator embodiments.

Third, the asserted claims all disclose a “TFCI encoding apparatus.” The specification defines both Figures 8 and 14, the generator embodiments, as “embodiment[s] of the *TFCI encoding apparatus*.” (JXM-1 at 6:8-10, 6:25-27 (emphasis added).) Yet, Apple argues that these same two figures are inexplicably precluded from the scope of the asserted claims. The claim language tracks *identical* language in the specification describing Figures 8 and 14. Therefore, the patent specification clearly demonstrates that the generator embodiments are within the scope of the asserted claims.

Fourth, Apple repeatedly states that the patent specification associates a look-up table embodiment with the language “from among a plurality of [30 or 32] bit codewords.” (*See, e.g.*, RIB at 43.) However, the ’348 patent never discloses such an association. (JXM-1 at 14:22-24.) This is because, as with the generator embodiment, “from among a plurality of [30 or 32] bit codewords” is a characteristic of an effective encoder.

Fifth, the claims that depend from asserted independent claims 75 and 82 demonstrate that the independent claims must be broad enough to cover the generator embodiment. For example, claims 76 and 83 state that “each of the plurality of possible 10 bit TFCI information and each of the plurality of [30 or 32] bit codewords correspond to each other based on a combination of a basis orthogonal sequences, a basis mask sequences, and an all “1” sequence.” As demonstrated in Apple’s mark up of Figure 8 and similarly Figure 14, the generator embodiments illustrate this exact correspondence in the green and blue boxes:

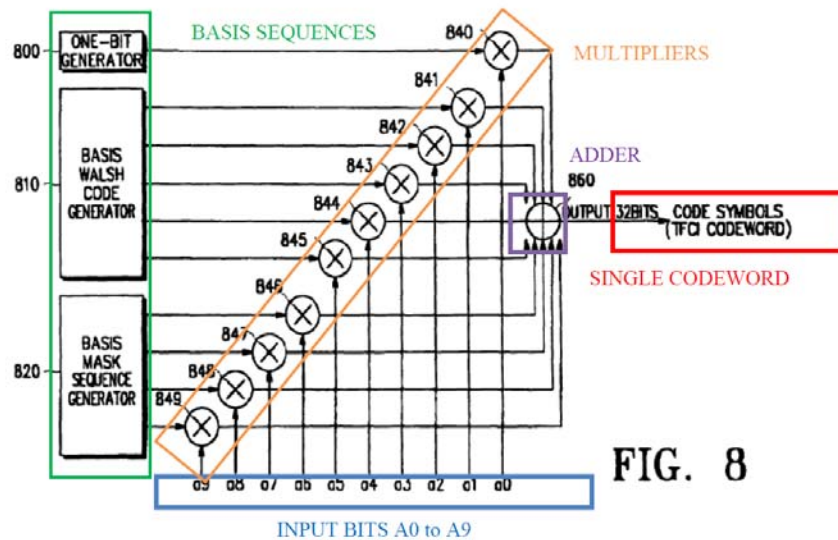


FIG. 8

(RIB at 43.) Similarly, claim 84 further narrows the scope of the claims by claiming that the “total number of the basis orthogonal sequences, the basis mask sequences and the all “1” sequence are identical to a number of bits of each TFCI information.” As shown above, the generator requires ten sequences, one sequence for each bit in the 10 bit TFCI information, a_9 to a_0 . Since the independent claims must be broad enough to include the scope of the dependent claims, the asserted independent claims 75 and 82 must be broad enough to include both the look-up table embodiment and the generator embodiment. *Dow Chem. Co. v. United States*, 226 F.3d 1334, 1341–42 (Fed. Cir. 2000) (“an independent claim should be given broader scope than a dependent claim . . . as a general rule claims of a patent are not limited to [a single] embodiment”).

ii. The Language of the Unasserted Claims Does not Limit the Asserted Claims From Covering a Generator and a Look-Up Table

The fact that unasserted claims cover a generator embodiment does not limit the asserted claims to a specific embodiment. (CIB at 49.) In sharp contrast to Apple’s argument, the Federal Circuit is clear that (1) there is no such rule that each claim cover a different

embodiment and (2) it is improper to restrict a claim to only one embodiment where the claim language is broader. (*Id.*)

TOPIC 10. With respect to asserted claims 82-84 of the '348 patent, identify any support in the patent specification or the record generally for construing the term “puncturing” in asserted claims 82-84 to encompass “excluding” bits (see, e.g., '348 patent at 32:10-17). What consequence would such a construction have on the issues of infringement, validity, and the technical prong of the domestic industry requirement?

i. “Excluding” Means Not Including Two bits

Based on Apple’s Initial Submission, it is clear that Apple agrees with Samsung that in the modified second embodiment of the '348 patent, two bits are excluded from the coding sequences to code the TFCI information input directly into a 30 bit codeword. (JXM-1 at 32:10-17; RIB at 47.) By excluding two bits from the coding sequences, the '348 patent specification defines “excluding” as not including two bits. (JXM-1 at 32:10-17.) Apple agrees that the modified second embodiment does not use the term “puncturing,” because “puncturing” is used to shorten an already generated codeword. (CIB at 50-51; RIB 47; JXM-1 at 32:10-17.) Since the modified second embodiment does not first generate 32 bit sequences and then reduce these sequences to 30 bits each, but instead directly generates 30 bit sequences by excluding two bits, this embodiment does not “puncture.” This understanding is consistent with the Applicants’ use of the term “excluding” in the patent claims, where the claims disclose excluding bits to generate 30 bit coding sequences and use of the term “puncturing” to reduce the size of a generated 32 bit codeword into a 30 bit codeword. (*Compare* JXM-1 at 45:11-15 *with id.* at 46:48-52.)

However, what Apple fails to appreciate is that simply because “excluding” is used to not include two bits from the coding sequences does not mean the term “puncturing” cannot also encompass excluding to not include two bits from an already generated 32 bit codeword to shorten the codeword to 30 bits. This does not mean that “puncturing” and “excluding” are the

same. Rather, “puncturing,” can include within its definition excluding bits when the bits are not included in a codeword to fit the codeword to a transmission frame. *Inverness Medical Switzerland GmbH v. Warner Lambert Co.*, 309 F.3d 1373, 1378-79 (Fed. Cir. 2002) (construing a claim term to overlap with another claim term so as to “encompass [its] meaning” even though the terms do not mean exactly the same thing). By not including two bits, *i.e.*, excluding two bits, from a 32 bit codeword to shorten the codeword to 30 bits to fit the transmission size, two bits are punctured from the final transmitted codeword. (JXM-1 at 32:6-9.)

ii. Construing “Puncturing” to Encompass Excluding Bits Would Mean Claims 82-84 are Infringed, Valid, and Practiced by the DI Products

1. Construing “Puncturing” to Encompass “Excluding” Will Result in Infringement and a Violation of the ’348 Patent

When the proper construction of “puncturing” is applied to claims 82-84, the Accused Apple Products meet every limitation of the asserted claims.

First, Apple’s argument that Samsung has not proved that the Accused Apple Products have a “puncturer,” is without merit and requires ignoring the mass of evidence Samsung has put forth in this case. In Samsung’s Opening Post Hearing Brief, Samsung detailed the source code responsible for writing 30 bits out of the 32 bit codeword into a frame for transmission to the base station. (CPost at 27-29, 33-34.) This source code is responsible for puncturing 2 bits out of the 32 bits and only outputting 30 codeword bits. (*Id.*)

Second, merely because the 32 bit codeword may be stored in memory, does not eviscerate that a 30 bit codeword is created out of a 32 bit codeword by puncturing 2 bits to create the finally transmitted codeword. The Staff agrees that one of ordinary skill in the art would understand that data can be punctured simply by rendering it irretrievable, regardless of whether a copy of the data is still physically present on a storage device. (SIB at 29.) Apple’s argument that “there is not enough room on the radio frame to transmit all 32 bits” in fact

supports Samsung's position that the Accused Apple Products must “puncture” because “puncturing” is a means by which a codeword is shortened to fit the desired transmission size. (RIB at 51; CIB at 50.)

Third, Apple once again chooses to ignore its own expert's testimony to now argue that the Accused Apple Products do not transmit a 30 bit codeword. Dr. Davis agreed with Dr. Min and Samsung that the Accused Apple Products transmits 30 bits out of the 32 bit codeword:



(Davis Tr. 2095:11-16.) Apple incorrectly argues, in contradiction to its expert, that the Accused Apple Products transmit 150 bits, not 30 bits. After confirming that the Accused Apple Products transmit 30 bits, Dr. Davis iterated multiple times that because the Accused Apple Products transmit 30 bits *plus additional bits*, the Accused Apple Products do not infringe. (Davis Tr. 2093:3-7.) However, it is black letter law that the inclusion of additional elements, such as transmitting pilot bits in addition to the 30 bit codeword, does not prevent the Accused Apple Products from infringing the claims.¹⁷ (CPost at 38.)

2. Construing “Puncturing” to Encompass “Excluding” Would Not Disturb the ALJ’s Determination that the Asserted Claims are Valid

As detailed in Samsung's Initial Submission, construing “puncturing” to encompass “excluding” has no affect on the validity of the '348 patent. (CIB at 53-54.) Neither MacWilliams nor the June 1999 Standard disclose the puncturer limitation. Therefore,

¹⁷ These pilot bits are not codeword bits. Pilot bits are a predefined bit pattern that are sent in each transmission frame so that the receiver can model the wireless channel. (CPre at FN 6; JX-63C at 105:6-106:18.)

regardless of whether puncturing encompasses excluding, neither of these references teach the “puncturer” limitation. (*Id.*)

3. Construing “Puncturing” to Encompass “Excluding” Will Result in a Finding of the Technical Prong of Domestic Industry and a Violation of the ’348 Patent

Instead of setting forth why it believes the DI Qualcomm Products would not satisfy the “puncturing” limitation if the term encompassed “excluding,” Apple eludes the question posed by the Commission in arguing why the DI Qualcomm Products do not satisfy the “10 bit TFCI information input.” As established above, if the term “10 bit TFCI information” allows for padding bits, the DI Qualcomm Products satisfy this limitation.

Similar to its argument that Samsung failed to identify a “puncturer” in the Accused Apple Products, Apple makes the same argument with respect to the DI Qualcomm Products and the DI ST-Ericsson Products. Apple turns a blind eye towards the evidence Samsung put forth to show that both of these products contain a “puncturer.” Dr. Min explained how both of these products have source code that is responsible for writing 30 bits out of the 32 bit codeword into a frame, thereby puncturing 2 bits from the generated 32 bit codeword. (CPost at 45-48, 52-53, 57-59, 61-62.) Therefore, when the proper construction of “puncturing” is applied to claim 82, the Domestic Industry Products satisfy this limitation.

RESPONSES TO QUESTIONS RELATED TO U.S. PATENT NO. 7,486,644

TOPIC 11. With respect to the asserted claims of the ’644 patent, what is the proper construction of “extracting”? What variable, if any, in the source code relied upon by Samsung to prove infringement and domestic industry represents a “60-bit rate-matched block” that has been extracted from a received signal?

Apple’s proposed construction is both confusing and unhelpful. Although Apple purports to propose construe “extracting” as “removing for separate processing,” it fails to explain what precisely that means. However, Apple *does* claim extracting should be construed to require

“hard decision decoding,” (RIB at 54.) should mean extracting “exactly” 60 bits, (*Id.* at 55),¹⁸ and that it means making a “final decision.” (*Id.*) Apple did not include any of these ideas in its proposed construction because there is absolutely no intrinsic or extrinsic evidence in the record to support these constructions. (CIB at 59-60.) Instead, Apple proposed a construction that gives no meaning to the term “extracting,” but that Apple is plainly treating as yet another means to improperly exclude soft decision decoding from the ’644 patent. This is apparent from Apple’s failure to answer the Commission’s second question regarding the ’644 patent. Rather than answer the question, Apple repeated its [REDACTED] that it has made repeatedly throughout this litigation once it was confident Samsung would not be able to rebut it with expert testimony. (*See generally*, CPost, CPet.)

i. Apple’s Construction Is Not Supported by the Intrinsic and Extrinsic Record

Samsung agrees with Apple that that “extracting” requires “processing.” But it is completely unclear what Apple means by “separate” processing. Processing must necessarily occur to extract bits from an incoming analog signal. As Apple fails to explain its proposed construction, one can only interpret Apple’s construction in such a way as to [REDACTED] Apple is separating the necessary processing identified in the intrinsic and extrinsic record from the extraction process. Apple’s construction is therefore completely divorced from the intrinsic and extrinsic record. Moreover, it appears that Apple is treating the term “removed” as “removing intact.” This is also not supported by the intrinsic and extrinsic record.

¹⁸ Apple repeatedly states that the claim requires *exactly* 60 “1s” and “0s.” This is not true. Nowhere in the claim does it say *exactly*.

1. The Commission Should Disregard Apple's Dictionary Definitions

Apple begins by citing new dictionary definitions that are not in the record. This is improper as the Commission, on review of an Initial Determination, cannot consider any evidence on the merits not already in the record before the ALJ. “The Commission does not have authority to expand the record” when reviewing an initial determination. *Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334, Comm’n Op. at 27 (Aug. 5, 1993) (holding that while a Commission rule “authorizes the ALJ to reopen the record for receipt of additional evidence before the ID issues” there is no comparable provision “that would allow the Commission to receive new evidence while the ID is pending before it.”); *see* 19 C.F.R. §210.42(g); *see also* 19 C.F.R. §210.45 (“The Commission also may make any findings or conclusion that in its judgment are proper *based on the record in the processing.*”) (emphasis added). Therefore, the Commission should disregard this evidence.

But, even considering Apple's improper attempt to introduce new evidence at this stage of the Investigation, Apple's dictionary definitions do not support its claimed “plain meaning” construction. Apple's dictionary definitions do not once include the word “removed.” Moreover, both of these dictionary definitions do not relate to the process of extracting a bits from a wireless signal. The Computer dictionary addresses extracting bits from a separate word already stored in a computer. The Longman dictionary is a general purpose English language dictionary that is defining the term extracting in ordinary day to day use, instead of in the appropriate field of art. It is improper to use dictionary definitions that do not define the term as would be understood in the field of the invention. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1318 (Fed. Cir. 2005) (finding that dictionaries and treatises may be consulted so long as they do not contradict the specification.) On the other hand, as explained in Samsung's opening

response, the extrinsic evidence in the record, including both experts' testimony supports Samsung's construction. (CIB at 55-65.)

2. The Claims and Specification do not Support Apple's Construction

Apple does not explain how the claim language supports its construction because it cannot. The claim in fact shows why Apple's construction is wrong. As Apple admits, the claim recites separate processing – rate-dematching is one example. *See* JXM-003 at col. 27:36-39. Therefore, the type of processing described *later* in the claim should not be part of the construction of “extracting.” Instead, to breathe life into the term extracting, a proper construction should explain what *extracting* means, not what the rest of the claim terms require. The claim indicates what is being extracted – and that is the 60-bit rate matched block. Samsung's construction properly explains how the receiver obtains the rate-matched block from an analog signal that is potentially damaged by noise and interference. (CIB at 55-65.)

Apple's rationale for citing to the specification is similarly flawed. It is obvious that the *reason* something is extracted is to perform subsequent processing – that is what the patent is about. But, that is not what extract means. Extracting means “processing to obtain and derive.” Once the information is derived, the specification describes other events that occur in the receiver.

ii. **It is Improper to Exclude Soft Decision Decoding from the “Extracting” Limitation**¹⁹

The “extracting” limitation should not preclude [REDACTED], and should not be limited to extracting “exactly” 60 bits, or making a “final decision” on what the extracted bit is.²⁰

¹⁹ Apple's brief suggests that the [REDACTED] This is not true. The device is [REDACTED] No data can be created over the air, and because the base station sends 60 bits, the receiver can extract only 60 bits.

²⁰ Apple tries to point to the parties' agreed construction of “bit” to argue that [REDACTED] is not included in the '644 patent. Apple is misinterpreting the parties construction. Indeed, soft bits also

Apple wants to read a negative limitation into the claims of the '644 patent. This is improper both under the canons of claim construction and the laws regarding infringement. When the claims are broad enough to encompass certain subject matter, that subject matter is covered by the claims, unless the specification or file history include a clear disavowal of that subject matter. *See Teleflex, Inc. v. Ficos N. Am. Corp.*, 299 F.3d 1313, 1325 (Fed. Cir. 2002); *See also Diagnostics, Inc. v. LifeScan, Inc.*, 381 F.3d 1352, 1358 (Fed. Cir. 2004) (“Absent a clear disavowal in the specification or the prosecution history, the patentee is entitled to the full scope of its claim language.”). There is no disavowal here.

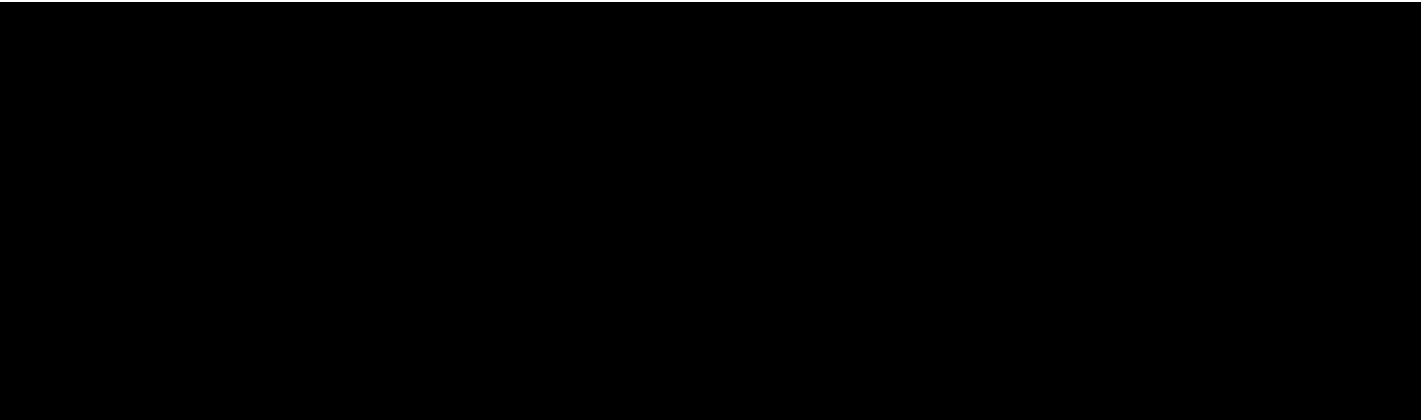
Apple’s attempts to make the Commission commit these reversible legal errors are blatantly litigation based. Since the claims and specification are agnostic as to the type of decoding, if Apple’s products used hard-decision decoding, then Apple would equally be arguing to exclude hard-decision decoding. There is nothing in the claims or the specification that disclaim soft decision decoding. Apple’s attempt to disclaim [REDACTED] is nothing more than an attempt to read a negative limitation into the claims. The claims and specification discuss “decoding.” *See JXM-003, generally*. They do not discuss soft decision decoding, but they also do not discuss hard decision decoding. Therefore, they are necessarily directed to both hard and soft decision decoding, and any other types of decoding that may otherwise meet the limitations of the claims. Apple’s attempt to *exclude* [REDACTED] is nothing more than a disguised attempt to improperly import a negative limitation into the claims. *Omega Eng’g, Inc. v. Raytek Corp.*, 344 F.3d 1314, 1332-33 (Fed. Cir. 2003) (reversing the district court, when it found that a negative limitation imposed by the district court found no anchor in the claim

include binary digits. To the extent the Commission agrees that the construction of “bit” excludes “soft decision decoding,” then the parties’ agreed construction is incorrect. As evidenced by the intrinsic and extrinsic record described here, Samsung would not have agreed to a construction that is contradicted by the very invention it is supposed to construe.

language, the plain and ordinary meaning of the phrase, or in any express disclaimer in the specification.)

The same is true for restricting the claims to extracting “exactly” 60 bits or making a “final decision.” There is nothing in the intrinsic record that restricts the claims to extracting “exactly” 60 bits. In fact, that would be preposterous. The devices necessarily need to extract more than 60 bits for functions other than retrieving the Absolute Grant data, such as other control information or data. Limiting the claims to a “final decision” is equally preposterous. Mobile device developers recognize that potential noise and interference can cause errors. (Min Tr. at 655:9-19.) Therefore, they employ a number of different error correcting techniques. (Min Tr. at 655:25-657:6.) In fact, the claims list one – a CRC. JXM-0003 at col. 27:40-41. The fact that the mobile devices all employ a number of error correction techniques means that it will be correcting for transmission errors at various points in the processing chain. Apple’s desire to read a “final decision” limitation into the claims would improperly exclude all of these known and necessary techniques.

The extrinsic evidence also supports the fact that soft-decision decoding is part of the “extracting” limitations. When the inventors were developing the ’644 invention, they undertook to conduct [REDACTED] [REDACTED] (RX-880C at S-794-ITC-005511814; *see also* YB Kim Tr. 288:1-16.) While the ’644 inventors were conducting these [REDACTED]



(RX-880C at S-794-ITC-005511814.) Therefore, Apple is seeking to exclude the precise embodiment that led to the '644 invention.

iii. The Staff's Suggested Construction Is not Supported by the Intrinsic Record

The Staff suggests that the 60-bit rate matched block should mean “taking,” but this ignores the nature of processing taking place in the physical channel demapper. One cannot “take” a 60 bit-rate-matched block. In order to obtain or derive the 60-bit rate-matched block from the signal received from a node B, the signal has to be processed (i.e., amplified, demodulated, filtered, and other processing.) The Staff follows Apple's argument that the claim excludes soft decision decoding, but as discussed above, this cannot be a proper construction.

iv. Apple Failed to Answer the Commission's Question Regarding what Variable Represents the 60-bit Rate-Matched Block

Apple did not answer the Commission's question. Instead, Apple repeated the same argument that, because its products use [REDACTED] it does not infringe. Samsung, on the other hand, identified precisely where in the source code in the record the variable where the 60-bit rate-matched block is stored. (CIB at 61-65.) Samsung has already responded to this argument in its post-hearing briefs and in its Commission review brief. (CPost at 79-118; CRPost at 39-62. CPet at 34-57.) As explained in Samsung's briefs, the entirety of Apple's

argument is unsupported by evidence, and generally unrebutted because of Apple's failure to properly disclose its arguments during discovery. *Id.*

The Commission has one decision to make: do the '644 claims include [REDACTED]

[REDACTED] The answer is "yes." All of the evidence points to such:

- The claims discuss "decoding" and "bits" generally. They do not specify "hard" or "soft" decision decoding, or "hard" or "soft" bits.
- The specification discusses "decoding" and "bits" generally. It does not specify "hard" or "soft" decision decoding, or "hard" or "soft" bits.
- There is no disclaimer of "soft decision decoding," "soft bits," or "symbols" in the prosecution history.
- The extrinsic evidence demonstrates that the inventors developed the invention using soft decision decoding. Therefore proving that soft decision decoding is part of the invention.

The case law is clear that in a case like this, where the claims broadly cover decoding, and where there is no disavowal (let alone a *clear* disavowal) of claim scope, the claims must encompass all claimed embodiments. *Home Diagnostic, Inc. v. LifeScan, Inc.*, 381 F.3d 1352, 1358 (Fed. Cir. 2004) ("Absent a clear disavowal in the specification or the prosecution history, the patentee is entitled to the full scope of its claim language"); *Omega Eng'g. Inc. v. Raytek Corp.*, 334 F.3d 1314, 1332-33 (Fed. Cir. 2003) (importing negative limitations into a claim absent an explicit disavowal is disfavored.) To find that Samsung disavowed [REDACTED] without any evidence is reversible error.

RESPONSES TO QUESTIONS RELATED TO U.S. PATENT NO. 6,771,980

TOPIC 12. With respect to the '980 patent, has Samsung waived all infringement and domestic industry allegations except for those based on claim 10?

Identify by source code file name or other specific record designation the precise “dialing program” that Samsung relies upon to prove infringement and domestic industry with respect to claim 10. Also identify, using record evidence, the conditions that trigger execution of the “dialing program” in the relevant devices.

Rather than address the Commission’s specific waiver question regarding claims other than 10 and 13, Apple instead again raises its misguided argument that Samsung somehow waived “*all*” of its infringement and domestic industry arguments. (RIB at 64-65.) The first time Samsung identified the software that makes up the dialing program was not “midway through trial” as Apple wrongly alleges. (RIB at 65.) Samsung has consistently disclosed the software that makes up the “dialing program” in its pretrial papers, expert reports, and contentions.” (See, e.g., CRPost at 95-97, 104-115 (showing Samsung’s consistent position with respect to the “phone/dialing program” and citing Samsung’s contentions, expert reports, and pre-hearing brief).)²¹

Contrary to Apple’s assertions, the only element of the “dialing program” the ALJ even suggested may not have been disclosed before trial was the PDA function. (See ID at 159 (suggesting that only the PDA function was not previously disclosed).) But as explained in detail in Samsung’s response to Apple’s belated post-hearing motion to strike, Samsung consistently identified the PDA function as part of the “dialing program,” including in its infringement contentions, expert reports, and prehearing brief. (See, e.g., CRPost at 105-106 (identifying “Mail” and “Safari” applications in the accused products and “Mail” and “Web” applications in the domestic industry products as part of the phone program).)

Apple’s argument that a “program” cannot be a combination of different software modules is another attempt to reargue claim construction. (See RIB at 67.) The ALJ properly construed “dialing program” to have its plain and ordinary meaning. (CPost at 137.) As Mr. Cole testified, and contrary to Apple’s claim that Dr. Ingers’ testimony was undisputed, one of ordinary skill in the art understands that

²¹ Apple also argues that Samsung somehow even waived claim 13, a claim that depends from claim 10. Samsung never waived claim 13 when it sought review for claim 10, especially when the ALJ found that the accused products infringed the additional limitation of claim 13. (ID at 169.) The only dispute with respect to claim 13 was with the underlying independent claim 10, for which Samsung appropriately

a “program” can have many different software modules. (Cole Tr. 2381:16-2382:23.) And even Apple’s expert admitted that as construed, the “dialing program” can include both phone functions and PDA functions, and therefore necessarily can include different components. (Ingers Tr. 2922:22-2925:22.)

Samsung has also identified and demonstrated when the “dialing program” is executed. (CIB at 66-68.) When properly construed, the “executing” step is met in the accused and domestic industry products because, as demonstrated at the hearing, a user can dial and edit a phone number selected in a PDA function, a fact Apple does not dispute. (*Id.*; CPost 149-51, 165-66.)

Apple also argues that Samsung should not be permitted to respond to the Commission’s specific request to cite record evidence identifying the “dialing program” or the conditions that trigger it. (RIB at 66.) Apple’s arguments are baseless for three reasons. First, the Commission granted review of the entire ID. (Nov. 19, 2012 Comm’n Notice.) Second, the Commission has the authority to review any portion of the ID and specifically asked Samsung to cite record evidence identifying the “dialing program” and the conditions that trigger it. (*Id.* at 4.) Third, Samsung did request review of the ID’s findings that the “dialing program” and “executing” steps of claim 10 were not met. Specifically, Samsung requested review of the ID’s improper construction of “dialing program” and the improper importing of a temporal limitation into the “executing” step. (CIB at 64, 69-70.)

TOPIC 13. With respect to the ’980 patent, if the Commission were to construe “dialing icon” to require a pictorial element,” what record evidence demonstrates that Samsung’s alleged domestic industry products meet that limitation?

For the first time, Apple now argues that Samsung waived the ability to rely on the Messaging application menu item because Samsung did not include it in its pre-hearing brief. (RIB at 69 (citing Ground Rule 7.2).) Notably, in making this new waiver argument, Apple does not dispute that the green call icon in the Messaging application menu is a “dialing icon” with a pictorial element. (*Id.* (arguing waiver only.)) Apple is right not to dispute that Messaging application call icon is a “dialing icon” with a

sought review. (RPost at 171 fn. 55 (not disputing that the accused products perform the additional limitation of claim 13.))

pictorial element much like the green call icon in the domestic industry products the ALJ found to have pictorial elements (ID at 569). Apple is wrong, however, that Samsung waived the ability to rely on the green call icon in the Messaging application menu. Samsung's expert testified at the hearing that the green call icon in the Messaging application menu is a "dialing icon," and Samsung included that icon in its post-hearing brief. (Cole Tr. at 2437:18-2438:5; CDX-131C; CPost at 172 (identifying the "green phone icon in the Messaging application" as a "dialing icon").) Apple failed to object to both Samsung's hearing evidence and its post-hearing brief arguments that the green call icon in the Messaging application menu is a "dialing icon," and is therefore precluded from doing so now. (*See* Cole Tr. at 2437:18-2438:5.)²² Finally, contrary to Apple's assertion, the "Dial..." button in the domestic industry products has pictorial elements – it is an image that appears in a popup menu and stands out from the surrounding text. (Cole. Tr. 2437:18-2438:5; CDX-03.131C.)

REMEDY, THE PUBLIC INTEREST, AND BONDING

I. REMEDY

Apple and the Staff agree that the appropriate remedy in the event a violation is found is a limited exclusion order and a cease and desist order. (RIB at 70; SIB at 40-42). Apple asks that any remedial order should include an exemption for service and repair. (*See* RIB at 70-71). While Apple opposes such an exemption for Samsung if a violation is found in the 796 investigation,²³ Samsung believes that a repair and service exemption is appropriate and urges the Commission to take a consistent approach in both the 794 and 796 investigations.

²² Samsung's hearing testimony that the green call button in the Messaging application is a "dialing icon" is consistent with Samsung's "dialing icon" arguments and theories disclosed in its prehearing brief, including the position that the domestic industry products have a green call button that is a "dialing icon." (CPre at 89.) Samsung complied with G.R. 7.2 by setting forth with particularity its contentions regarding the "dialing icons" in the domestic industry products. (*See, e.g., id.*) The fact that additional evidence was introduced at trial to support the theories disclosed in the pre-hearing brief is not a violation of G.R. 7.2.

²³ *See, e.g., Certain Electronic Digital Media Devices and Components Thereof*, Inv. No. 337-TA-796, Complainant [*sic*] Apple Inc.'s Statement Regarding the Public Interest (EDIS Doc No. 498338) (Dec.

II. PUBLIC INTEREST

Apple does not contend that, outside the context of FRAND-related issues, the public interest factors enumerated in Section 337(d)(1) or (f)(1) warrant preclusion of a remedy in this investigation. Apple has therefore waived any such argument. *See Certain Display Controllers and Products Containing Same and Certain Display Controllers with Upscaling Functionality and Products Containing Same*, Inv. No. 337-TA-491/481 (Consolidated), Comm’n Op. at 37-38 (Feb. 4, 2005) (deeming argument not raised in response to Commission’s review notice or in posthearing briefing waived). The Staff agrees that “the exclusion of Respondent’s accused products is unlikely to have any significant impact on the public interest considerations identified in Section 337(d).” (SIB at 44). But while the Staff contends that any theoretical harm to consumers could be mitigated by a delay in the effective date of an exclusion order (*id.*), neither Apple nor any third party has introduced evidence suggesting that such a delay is necessary to serve the public interest.

III. BOND

Apple and the Staff contend that no bond should be set if a violation is found because the average selling price of Apple’s products exceed those of Samsung’s domestic industry products. (RIB at 71-72; SIB at 46-47). Even if true – which it is not for certain products (*see, e.g.*, CIB at 78) – this fact does not justify the absence of a bond during the Presidential review period. The Commission has held that the importation of an infringing product is inherently injurious and has set a bond even when the respondent’s products are priced equally to or higher than the complainant’s products. *See, e.g., Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing the Same*,

3, 2012) (encouraging the adoption of the ALJ’s recommended orders, where the recommended determination rejected a requested repair and service exemption).

Including Cellular Telephone Handsets, Inv. No. 337-TA-543, Comm’n Op. at 137, n.487 (June 19, 2007) (“The importation of any infringing merchandise derogates from the statutory right, diminishes the value of the intellectual property, and thus indirectly harms the public interest.”); *Certain Automated Mechanical Transmission Systems for Medium-Duty and Heavy-Duty Trucks and Components Thereof*, Inv. No. 337-TA-503, Comm’n Op. at 8-9 (May 9, 2005) (setting a bond, despite “Respondents’ generally higher prices”); *Certain Abrasive Products Made Using a Process for Powder Preforms, and Products Containing Same*, Inv. No. 337-TA-449, USITC Pub. No. 3530, Comm’n Op. at 9-10 (Aug. 2002) (setting a bond, despite respondents’ products overselling complainant’s products). For the reasons set forth in Samsung’s initial brief, Samsung requests that the Commission impose a bond of 4.25% of the entered value of Apple’s infringing products during the pendency of the Presidential review period. (See CIB at 76-79).

CONCLUSION

For all of the reasons cited herein, Samsung respectfully requests that the Commission reverse the ID and find a violation.

Dated: December 12, 2012

Respectfully submitted,

/s/ S. Alex Lasher

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**In the Matter of Certain Electronic Devices, Including Wireless Communication Devices,
Portable Music and Data Processing Devices, and Table Computers**

Inv. No. 337-TA-794

CERTIFICATE OF SERVICE

I, Jon Tap, hereby certify that on this 12th day of December, 2012, copies of the foregoing document were served upon the following parties as indicated:

The Honorable Lisa R. Barton Acting Secretary U.S. International Trade Commission 500 E Street, SW Washington, D.C. 20436	<input type="checkbox"/> Via First Class Mail <input checked="" type="checkbox"/> Via Hand Delivery (8 copies) <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via Electronic Mail <input checked="" type="checkbox"/> Via EDIS
The Honorable E. James Gildea Administrative Law Judge U.S. International Trade Commission 500 E Street, SW Washington, D.C. 20436 Email: sarah.zimmerman@usitc.gov	<input type="checkbox"/> Via First Class Mail <input checked="" type="checkbox"/> Via Hand Delivery (2 copies) <input type="checkbox"/> Via Overnight Courier <input checked="" type="checkbox"/> Via Electronic Mail
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/s/ Jon Tap
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