PUBLIC VERSION

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

RESPONDENT APPLE INC.'S SUBMISSION PURSUANT TO
THE COMMISSION'S REQUEST FOR STATEMENTS ON THE PUBLIC INTEREST
(77 Fed. Reg. 60720 (Oct. 4, 2012))

As the ALJ correctly determined, Samsung's claims based on U.S. Patent No. 7,706,348 ("the '348 patent") and U.S. Patent No. 7,486,644 ("the '644 patent") fail on the patent merits. But as explained in Apple's Contingent Petition for Review, the ALJ should have held that Samsung was barred from even asserting these claims for three reasons: (i) Samsung's commitments to license these patents on fair, reasonable, and non-discriminatory ("FRAND") monetary terms preclude Samsung from seeking exclusionary remedies in the ITC; (ii) the patents are unenforceable because Samsung failed to timely disclose them to the European Telecommunications Standards Institute ("ETSI"); and (iii) Samsung's claims are barred by patent exhaustion arising from Samsung's agreements with Apple's baseband processor suppliers, Intel and Qualcomm. If the Commission reviews the determination of noninfringement for the '348 or '644 patents, the Commission should also address whether the public interest factors enumerated in Section 337(d)(1) preclude the Commission from issuing exclusionary remedies on FRAND-committed, untimely disclosed, exhausted patents.

As background, when the interplay between FRAND and exclusionary remedies was presented in Investigation No. 745, *Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof*, the Federal Trade Commission, elected officials, companies, and industry associations filed submissions. For example:

- The FTC stated: "ITC issuance of an exclusion or cease and desist order in matters involving RAND-encumbered [standard-essential patents] . . . has the potential to cause substantial harm to U.S. competition, consumers and innovation." Third Party United States Federal Trade Commission's Statement on the Public Interest at 1, Inv. No. 337-TA-745, June 6, 2012, Doc. ID 482234 ("FTC 745 Statement").

- Six Senators—including the Chairman and the Ranking Member of the Subcommittee on Antitrust, Competition Policy and Consumer Rights—observed "enabl[ing] or encourag[ing] companies to . . . commit to license . . . patents on RAND terms, and then seek to secure an exclusion order despite a breach of that commitment would . . . implicate significant policy concerns." Letter from Sen. Kohl *et al.*, June 19, 2012, Doc. ID 484039.

Since then, Congress has continued to focus on these same issues, as reflected by a July 11 Senate Committee on the Judiciary hearing regarding "Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents," and a July 18 House Committee on the Judiciary hearing

on "The International Trade Commission and Patent Disputes" that addressed whether exclusion orders are appropriate for declared-essential patents. Regulators likewise have continued to scrutinize these problems, including in the specific context of Samsung's conduct: the Department of Justice has opened an investigation into the manner in which Samsung has used—or misused—its declared-essential patents, as has the European Commission. *See* "Commission opens proceedings against Samsung," Jan. 31, 2012, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/89.

Here, at the hearing before the ALJ, Apple introduced extensive evidence—including the testimony of the former Chairman of the Board of ETSI, Dr. Michael Walker—demonstrating that Samsung's assertion of declared-essential patents was incompatible with Samsung's FRAND commitments and the public interest, for several reasons.

First, Samsung disclaimed the right to seek exclusionary remedies based on these patents when it promised to license the patents on FRAND terms to any firm implementing the UMTS standard. The ETSI IPR Policy itself recognizes that an "investment in the preparation, adoption and application of STANDARDS could be wasted as a result of an ESSENTIAL IPR for a STANDARD being unavailable." (RX-0710, Clause 3.1; Tr. [Walker] at 1346:25-1348:5.) Clause 6.1 of the Policy dictates that members make an "irrevocable" commitment to license their patents on FRAND terms. (RX-0710, Clause 6.1.)

As Dr. Walker explained at the hearing, the FRAND commitment involves a tradeoff by the IPR holder. The IPR holder benefits from having its IPR incorporated in the standard and, with it, the opportunity to receive FRAND royalties from all implementers of the standard. That opportunity can instantly transform the value of IPR, providing access to a mass global market and potential high-volume royalties. (Tr. [Walker] at 1349:3-22.) What the IPR holder gives up for this commercial opportunity is the right to do anything but license its IPR. (Tr. [Walker] at 1349:23-1350:8.) Although the ETSI IPR Policy does not expressly forbid injunctions, it makes clear that such a step is incompatible with making the FRAND bargain to license to all interested parties. (Tr. [Walker] at 1350:9-20.)

Second, courts share this view. On June 22, Judge Richard Posner, sitting in a district court, rejected Motorola's claim that it could seek an injunction on a FRAND-committed patent, concluding: "A

FRAND royalty would provide all the relief to which Motorola would be entitled . . . and thus it is not entitled to an injunction." *Apple, Inc. v. Motorola, Inc.*, No. 1:11-cv-08540, 2012 WL 2376664, at *13 (N.D. Ill. June 22, 2012). Just weeks ago, the Ninth Circuit stressed that "[c]ourts should give effect to" RAND commitments, and that "[i]mplicit in such a sweeping promise is, at least arguably, a guarantee that the patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction, but will instead proffer licenses consistent with the commitment made." *Microsoft Corp. v. Motorola, Inc.*, No. 12-35352, 2012 WL 4477215 at *9-10 (9th Cir. Sept. 28, 2012).

Third, allowing Samsung to renege on its FRAND commitments through the issuance of an exclusion order would have consequences extending beyond this case, and the harm to the public interest would be severe. Absent proper safeguards—including FRAND—standard-setting has serious potential for anticompetitive harm. *Research in Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 796 (N.D. Tex 2008) ("[S]tandards, without the proper safeguards, are inherently anticompetitive."). This is because standards "lock in" technologies selected for standards, and holders of patents covering the standardized technologies gain the power to "hold up" standard implementers by demanding supracompetitive prices or refusing to license their standard essential patents altogether. "[O]nce a patent becomes essential to a standard, the patentee's bargaining power surges because a prospective licensee has no alternative to licensing the patent; he is at the patentee's mercy." *Apple*, 2012 WL 2376664, at *11.

This is particularly true in the cellular industry, where standards are critically important. As Dr. Walker explained, standards allow the various aspects of a cellular network—network base stations and cellular phones—to interoperate without regard to the manufacturer. (Tr. [Walker] at 1326:9-25.) This ability to interoperate on a common network creates a platform for competition—but also creates the risk of bad actors holding up companies that introduce products, using declared-essential patents as weapons.

The hold-up problem is exacerbated when declared-essential patent-holders seek exclusionary remedies. *See* FTC 745 Statement at 3-4. The targets may need to absorb dead-weight losses from paying exorbitant royalties as "ransom" to escape market exclusion—reducing their resources for efficient investments in research, design, and supply of products. By increasing barriers to entry, hold-up can lead

some device makers to forego these innovative activities entirely. All this would affect the production of like or directly competitive articles. Facing fewer choices, lower quality, and higher prices, consumers—and the public interest—would suffer.

Fourth, although the foregoing considerations apply without regard to Apple's willingness to negotiate a license, in fact Apple has always been willing to pay Samsung a FRAND royalty for any valid, infringed, and enforceable patent that Samsung has declared essential to the UMTS standard. As just one example of the communications expressing Apple's willingness to execute a truly FRAND-compliant license or cross-license, in an April 30, 2012 letter introduced into evidence at the hearing in this investigation, Apple made a licensing proposal to Samsung under which each party would take a license to the other's declared-essential patents using the same methodology. (RX-1659C.) This methodology involved deriving a FRAND royalty rate based on each party's proportion of patents declared essential to UMTS, and then applying this royalty rate to a proper royalty base; namely, the price of the baseband processor that houses cellular standardized features/functionalities. (RX-1659C.)

Fifth, in contrast, Samsung has not been a "willing licensor" on FRAND terms. Samsung demanded a royalty of 2.4% of the full price of each Apple device—which is not remotely close to FRAND. (*Id*.; CX-1589C; JX-0010C [Chung] at 57:22-58:4.) Samsung is demanding payment for value in the iPhone and iPad—including features such as the industrial design, the user interface, the camera, and the operating system—that is wholly unrelated to any contribution Samsung may have made to the UMTS standard.[1] Samsung's demand is not only unfair and unreasonable, it also discriminates against

[1] "Where small elements of multi-component products are accused of infringement, calculating a royalty on the entire product carries a considerable risk that the patentee will be improperly compensated for non-infringing components of that product." *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012); *id.* at 68 ("It is not enough to merely show that [the patented technology] is viewed as valuable, important, ***or even essential*** to the use of the [accused product]") (emphasis added).

Apple for developing sophisticated products with higher value and cost than more basic phones.[2] As an example of the basic flaws in Samsung's logic, in August a federal jury in California found that Apple had conceived of important intellectual property embodied in the iPhone and iPad—covered by Apple patents and Apple trade dress that Samsung was found to infringe—yet under its license demand, Samsung remarkably seeks to tax the value of Apple's innovations as if they were Samsung's.

The consequences of Samsung's non-FRAND demand are stark. Samsung's 2.4% demand seeks a payment of about $15.00 per iPhone. Apple purchases the baseband processor that allows the iPhone to communicate with the cellular network—and which contains the hardware that Samsung alleges infringes the '348 and '644 patents—[ ]. (Tr. [Blevins] at 960:22-961:2, 969:12-971:13; RX-1236C, RX-1237C.) Samsung is therefore demanding more than Apple pays for the hardware that Samsung accuses of infringement. And Samsung is only one of the dozens of companies that claim to hold cellular essential patents—if other companies adopted the same approach, it would become economically infeasible to make products capable of practicing the standards.

Sixth, the public interest against issuance of an exclusion order on FRAND-committed patents is even stronger where—as with the '644 and '348 patents—the patents were not timely disclosed to ETSI and are exhausted pursuant to license agreements. *See* Respondent Apple Inc.'s Contingent Petition for Review at § IV-C.

In sum, if the Commission decides to review the Initial Determination of noninfringement of '644 and '348 patents, the Commission should also address the statutory public interest factors that preclude issuance of an exclusionary remedy for these FRAND-committed, untimely disclosed, exhausted patents.

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[2] Samsung's 2.4% demand has no support in Samsung's other licenses. Samsung's top licensing executive, Dr. Seung-Ho Ahn, conceded "there is nothing I know" to support that demand. (JX-0006C [Ahn] at 23:25-24:2, 117:21-118:2.) Samsung has never demanded a 2.4% royalty from any company except Apple. (JX-0023C [Lee] at 61:15-19; JX-0010C [Chung] at 106:15-25.) In fact,

]. (JX-0023C [Lee] 64:9-14; JX-0006C [Ahn] 83:4-15.) This history underscores that Samsung's demand is discriminatory—[ ].

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Respectfully submitted,
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By its counsel,

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U.S. International Trade Commission; Before the Honorable E. James Gildea

CERTIFICATE OF SERVICE

I, Lanta M. Chase, herby certify that copies of the foregoing document, **Apple Inc.'s Submission on Public Interest (Public Version)**, were served upon the following parties as indicated below on this 22nd day of October, 2012.

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