

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**

**Inv. No. 337-TA-794**

**ORDER NO. 65: GRANTING IN PART MOTION TO STRIKE PORTIONS OF  
DAVIS REBUTTAL REPORT**

(May 11, 2012)

On April 23, 2012, Complainants filed a motion seeking “to strike paragraphs 47 through 56 and 240 through 252 of the Rebuttal Expert Report of Dr. James A. Davis Regarding Non-Infringement and Lack of Domestic Industry for U.S. Patent No. 7,706,348 (Ex. 1) [(the “Davis Report”)] and preclude Apple’s expert, Dr. Davis, from offering these opinions at the hearing.” (Motion Docket No. 794-062.) According to Complainants, the Davis Report contains arguments that Respondent failed to disclose in response to contention interrogatories. (Mot. at 1.) Complainants argue that they have been prejudiced because the untimely arguments prevent Samsung’s infringement and domestic industry expert, Dr. Min, from addressing them. (*Id.* at 1-2.)

Specifically, Complainants argue that Respondent amended or supplemented its interrogatory responses several times, but never disclosed more than “boilerplate arguments that the limitations of the asserted claims were not met” with respect to technical domestic industry. (Mot. Mem. at 2-3 (citing ‘348 patent claim 75; Mot., Exs. 5-6).) Complainants explain that after late discovery from nonparty Qualcomm, Respondent should have supplemented its contentions

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pursuant to Commission Rule 201.27. (*Id.* at 4-7.) Instead, Respondent “contended for the first time in the rebuttal report of its expert Dr. James A. Davis that Samsung had not shown domestic industry for the ‘348 patent because the {

} (*Id.* at 1, 5.) Complainants argue that Respondent objected when their expert attempted to respond in deposition to this new opinion in the Davis Report, which they argue emphasizes Respondent’s gamesmanship. (*Id.* at 1, 6, 8.)

On May 3, 2012, Respondent opposed the motion, arguing that Dr. Davis’s opinion regarding { } was not new because “Apple’s February 2, 2012 contention interrogatory responses expressly identified that Samsung failed to put forth evidence that the domestic industry products input a 10 bit TFCI information into the controller and output a codeword corresponding to a 10 bit TFCI input information[.]” (Opp. at 1, 5.) Respondent argues, *inter alia*, that Complainants have also engaged in discovery gamesmanship, that the Qualcomm deposition in issue occurred after Dr. Min’s initial report, and that the Administrative Law Judge approved this late deposition. (*See, e.g., id.* at 6, n.1.)

On May 8, 2012, Complainants sought leave, which is hereby DENIED, to file a reply in support of their motion. (Motion Docket No. 794-067.)

No other responses have been received.

After a careful review of the motion papers and responses thereto, the Administrative Law Judge finds as follows.

A review of the attached discovery responses and the Davis Report shows that Respondent did not disclose a theory related to { } with respect to claim 75 of the ‘348 patent in its discovery responses. (*See e.g., Opp., Ex. 2* at 4-5.) This { } opinion is not an elaboration of a previous disclosed theory, as Apple terms it, and thus the orders Apple cites are inapposite. (Opp.

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at 9.) An argument that Complainants failed to show certain evidence is not the same as, or a seed of, an affirmative argument that Complainants' products operate in a particular way.

It is further noted that the private parties jointly represented to the Administrative Law Judge that the Qualcomm discovery extension would not affect any deadlines. (Motion Docket No. 794-047 at 2.) Apparently this was a half-truth, because this discovery directly impacted the expert reports and was poorly timed, as outlined by the parties in their respective papers.

Furthermore, the { } in issue had already been available to Respondent in February (Opp. at 8), and the Administrative Law Judge is not persuaded that Respondent could not have disclosed more detailed contentions with respect to domestic industry related to claim 75 of the '348 patent prior to Dr. Min's initial expert report on the topic. By waiting until Dr. Davis's rebuttal report to fully disclose this contention, Complainants could do little more than speculate based on the questions Respondent was asking at the pertinent Qualcomm deposition. (Opp. at 6.)

Consequently, the Administrative Law Judge finds that a grant of some relief is appropriate here. *See e.g. Certain Electronic Devices With Image Processing Systems, Components Thereof, and Associated Software*, Inv. No. 337-TA-724, Order No. 24 (U.S.I.T.C., 2011).

However, the Administrative Law Judge finds that Complainants seek to strike more than is necessary to remedy the situation. For example, Paragraph 46 of the Davis Report does not contain this previously undisclosed argument { }; Dr. Davis only provides the opinion that Dr. Min has failed to identify certain things in his initial report. (Mot., Ex. 1 at ¶46.)

Paragraph 47 is a restatement of Dr. Min's opinion, and thus striking this paragraph is also unnecessary. (*Id.* at ¶47.) Complainants' motion with respect to Davis Report ¶¶ 46-47 is DENIED. Also, the Administrative Law Judge notes that not all of the sentences in the paragraphs in the Davis Report containing new opinions need be stricken. The material in the Davis Report should be stricken as follows:

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}

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(*Id.* at ¶¶48-56; 240-52.)

The Administrative Law Judge finds that Complainants' motion to strike portions of the Davis Report (Motion Docket No. 794-062) should be GRANTED IN PART as outlined above. Likewise, the Administrative Law Judge strikes those portions of Dr. Davis's deposition(s) that refer to or imply the opinion that the {

} However, Dr. Davis is permitted to testify at the hearing regarding his opinion that he disagrees with Dr. Min's opinion { }—without elaborating. Furthermore, it is noted that the underlying Qualcomm evidence is not stricken, and Respondent is free to explore this evidence with Dr. Min on cross-examination. Should Respondent choose to do so, however, Dr. Min will be permitted to offer responsive opinions.

Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date.

Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets clearly indicating any portion asserted to contain confidential business information. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

**SO ORDERED.**



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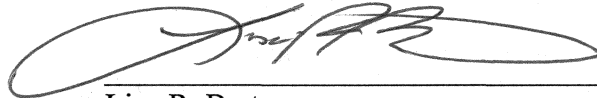
E. James Gildea  
Administrative Law Judge

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**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, **Lisa Murray, Esq.**, and the following parties as indicated on June 4, 2012.



Lisa R. Barton  
Acting Secretary to the Commission  
U.S. International Trade Commission  
500 E Street, SW, Room 112A  
Washington, D.C. 20436

**ON BEHALF OF COMPLAINANTS SAMSUNG ELECTRONICS CO., LTD. AND  
SAMSUNG TELECOMMUNICATIONS AMERICA, LLC:**

S. Alex Lasher, Esq.  
**QUINN EMANUEL URQUHART &  
SULLIVAN, LLP**  
1299 Pennsylvania Ave., NW  
Suite 825  
Washington, DC 20004  
(202) 538-8104

( ) Via Hand Delivery  
() Via Overnight Mail  
( ) Via First Class Mail  
( ) Other: \_\_\_\_\_

**ON BEHALF OF RESPONDENT APPLE INC.:**

Nina S. Tallon, Esq.  
**WILMER CUTLER PICKERING  
HALE AND DORR LLP**  
1875 Pennsylvania Ave. NW  
Washington, DC 20006  
(202) 663-6000

( ) Via Hand Delivery  
() Via Overnight Mail  
( ) Via First Class Mail  
( ) Other: \_\_\_\_\_



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**PUBLIC MAILING LIST**

Heather Hall  
**LEXIS – NEXIS**  
9443 Springboro Pike  
Miamisburg, OH 45342

Via Hand Delivery  
 Via Overnight Mail  
 Via First Class Mail  
 Other: \_\_\_\_\_

Kenneth Clair  
**THOMSON WEST**  
1100 13th Street, NW, Suite 200  
Washington, DC 20005

Via Hand Delivery  
 Via Overnight Mail  
 Via First Class Mail  
 Other: \_\_\_\_\_