

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

**In the Matter of**

**CERTAIN ELECTRONIC DEVICES WITH  
IMAGE PROCESSING SYSTEMS,  
COMPONENTS THEREOF, AND ASSOCIATED  
SOFTWARE**

**Inv. No. 337-TA-724**

**ORDER NO. 5:      SETTING MARKMAN HEARING; AND  
ORDERING REVISED PROCEDURAL SCHEDULE**

(September 7, 2010)

The parties were asked to submit proposals with their comments as to whether a Markman hearing at least two months in advance of the hearing would be useful in resolving disputed claim terms. (Order No. 2 at 3.) Having reviewed the proposals the Administrative Law Judge has determined that an early Markman hearing will assist in streamlining the issues for the evidentiary hearing and final initial determination in this Investigation. Complainants' argument that claim construction should be performed within the "meaningful context" obtained from further development of the Investigation, *see* Complainants' Statement Regarding Claim Construction Procedure at 3-4, is not persuasive as extrinsic evidence plays a minor, if any, role in claim construction. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1318-19 (Fed. Cir. 2005); *Symantec Corp. v. Computer Associates International, Inc.*, 522 F.3d 1279, 1290-91 (Fed. Cir. 2008). However, the Administrative Law Judge notes Complainants' concerns with respect to prior art, and finds that Respondent will not be permitted to produce previously undisclosed prior art after the claim construction hearing absent a showing of compelling circumstances.<sup>1</sup> A technology stipulation,

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<sup>1</sup> Prior art that is identified after the deadline set forth in the procedural schedule shall be governed by Ground Rule

*see* Order No. 6, will also serve to alleviate some of Complainants' concerns.

Furthermore, as the schedule proposed by Complainants and the Commission Investigative Staff requires rapid preparation, it will be necessary for the parties to significantly reduce the number of claim terms at issue. Only a discrete number of key disputed terms will be considered during the Markman hearing. The parties should meet and confer in an effort to resolve the meaning of as much of the claim language at issue as possible, as the number of disputed patent claim terms to be addressed at the Markman hearing will not exceed **16 terms**. Following the Markman order, all other claim terms shall be deemed undisputed.

A revised procedural schedule is appended as Attachment A below.

The rules set forth in Attachment B below shall govern the Markman Hearing set for November 9, 2010.

**SO ORDERED.**

  
E. James Gildea  
Administrative Law Judge

**ATTACHMENT A**

**FORM OF PROCEDURAL SCHEDULE & DATES**

<b>Submission of first settlement conference joint report</b>	<b>September 9, 2010</b>
<b>File identification of expert witnesses, including their expertise and curriculum vitae</b>	<b>September 9, 2010</b>
<b>File notice of prior art</b>	<b>September 14, 2010</b>
<b>Complainant(s) and Respondent(s) provide Staff with their proposed construction of the disputed claim terms</b>	<b>September 22, 2010</b>
<b>Deadline for parties to meet and confer (including Staff) in an attempt to reconcile or otherwise limit disputed claim terms</b>	<b>September 29, 2010</b>
<b>Parties submit a joint list showing each party's proposed construction of the 16 (or fewer) disputed claim terms</b>	<b>October 4, 2010</b>
<b>Deadline for initial Markman briefs—Complainants and Respondent</b>	<b>October 12, 2010</b>
<b>Deadline for initial Markman brief—Staff</b>	<b>October 15, 2010</b>
<b>Deadline for Markman response briefs—all parties</b>	<b>October 22, 2010</b>
<b>Second settlement conference</b>	<b>October 24, 2010</b>
<b>Submission of second settlement conference joint report</b>	<b>October 29, 2010</b>
<b>File tentative list of witnesses a party will call to testify at the evidentiary hearing, with an identification of each witness' relationship to the party</b>	<b>November 1, 2010</b>
<b>Technology Stipulation Deadline</b>	<b>November 1, 2010</b>
<b>Markman Statement</b>	<b>November 3, 2010</b>
<b>Parties exchange proposed Markman exhibits and exhibit lists, if any</b>	<b>November 5, 2010</b>

<b>Parties file final exhibit lists, if any</b>	<b>November 8, 2010</b> <b>Electronic courtesy copies due by 3 p.m.</b>
<b>Markman hearing</b>	<b>9:00 a.m.-5 p.m., November 9, 2010, Hearing Room B</b>
<b>Deadline for submission of Markman exhibits, by appointment to Ms. Vu</b>	<b>5 p.m., November 11, 2010</b>
<b>Deadline for contention interrogatory responses</b>	<b>November 16, 2010</b>
<b>Fact discovery cutoff and completion</b>	<b>November 30, 2010</b>
<b>Exchange of initial expert reports (identify tests/surveys/data)</b>	<b>December 9, 2010</b>
<b>Exchange of rebuttal expert reports</b>	<b>December 29, 2010</b>
<b>Expert discovery cutoff and completion</b>	<b>January 14, 2010</b>
<b>Deadline for motions to compel discovery</b>	<b>January 18, 2010</b>
<b>Deadline for filing summary determination motions</b>	<b>January 20, 2011<sup>2</sup></b>
<b>Estimated date for issuance of Markman order</b>	<b>February 4, 2011</b>
<b>Submission of statements regarding the use of witness statements in lieu of live direct testimony, and statements regarding whether any party intends to offer expert reports into evidence</b>	<b>February 9, 2011</b>
<b>Third settlement conference</b>	<b>February 11, 2011</b>
<b>Submission of third settlement conference joint report</b>	<b>February 16, 2011</b>
<b>Exchange of exhibit lists among the parties</b>	<b>February 18, 2011</b>
<b>Submit and serve direct exhibits (including witness statements), with physical and demonstrative exhibits available -- Complainant(s) and Respondent(s)</b>	<b>February 23, 2011</b>

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2 The Administrative Law Judge will consider whether this deadline should be adjusted in relation to the estimated date for the issuance of the Markman order.

<b>Submit and serve direct exhibits (including witness statements), with physical and demonstrative exhibits available -- Staff</b>	<b>February 25, 2011</b>
<b>File objections to direct exhibits (including witness statements)</b>	<b>March 1, 2011</b>
<b>Deadline for motions <i>in limine</i></b>	<b>March 1, 2011</b>
<b>File Pre-hearing statements and briefs -- Complainant(s) and Respondent(s)</b>	<b>March 8, 2011</b>
<b>File responses to objections to direct exhibits (including witness statements)</b>	<b>March 8, 2011</b>
<b>Submit and serve rebuttal exhibits (including witness statements), with rebuttal physical and demonstrative exhibits available -- all parties</b>	<b>March 8, 2011</b>
<b>File Pre-hearing statement and brief -- Staff</b>	<b>March 11, 2011</b>
<b>File objections to rebuttal exhibits (including witness statements)</b>	<b>March 11, 2011</b>
<b>File statement of high priority objections</b>	<b>March 11, 2011</b>
<b>File requests for receipt of evidence without a witness</b>	<b>March 15, 2011</b>
<b>Submission of declarations justifying confidentiality of exhibits</b>	<b>March 16, 2011</b>
<b>File responses to motions <i>in limine</i></b>	<b>March 16, 2011</b>
<b>File response to objections to rebuttal exhibits (including witness statements)</b>	<b>March 18, 2011</b>
<b>File responses to statement of high priority objections</b>	<b>March 18, 2011</b>
<b>Tutorial on technology</b>	<b>9:00 a.m., March 29, 2011, Hearing Room B</b>
<b>Pre-hearing conference</b>	<b>March 29, 2011, Hearing Room B (following tutorials)</b>
<b>Hearing</b>	<b>March 29-April 7, 2011, Hearing Room B</b>

<b>Deadline for submission of all evidentiary exhibits, by appointment to Ms. Vu</b>	<b>5 p.m., 2<sup>nd</sup> business day after last hearing day (est. April 11, 2011)</b>
<b>File initial post-hearing briefs, proposed findings of fact and conclusions of law, and final exhibit lists</b>	<b>April 19, 2011</b>
<b>File reply post-hearing briefs, objections and rebuttals to proposed findings of fact</b>	<b>April 29, 2011</b>
<b>Final ID due</b>	<b>July 1, 2011</b>
<b>Target Date</b>	<b>November 1, 2011</b>

## ATTACHMENT B

### MARKMAN HEARING PROCEDURES

#### 1. Pre-Hearing Submissions.

##### 1.1. Markman Briefing, Page Limits.

Initial Markman briefs shall not exceed 125 pages. Responsive Markman briefs shall not exceed 80 pages. Arguments that do not appear in the initial and responsive Markman briefs shall be deemed waived. The parties are bound by their claim construction positions set forth on October 4, 2010, and will not be permitted to alter these absent a showing of good cause. *See* Order No. 2 at 3.

##### 1.2. Pre-Hearing Statement.

Each party who intends to take part in the Markman hearing in this Investigation must file on or before November 3, 2010 a brief statement containing the following information:

- (a) The names of all known speakers or witnesses, including an identification of whether the speaker is counsel, a fact witness, or an expert witness. If a party intends to use witnesses, the prehearing statement should include a very brief outline of the testimony of each witness.
- (b) A list, by title and number, of all exhibits which the parties will seek to introduce at the Markman hearing. The list shall include five columns. In the first four columns, the party shall include the number of the exhibit, a brief description and the title of the exhibit, the purpose for which it is being offered, and each sponsoring witness. The last column shall be labeled "Received" and need only include sufficient space for a date.
- (c) A list of any stipulations to which the parties have agreed.
- (d) A proposed schedule/allocation of time for the Markman hearing, including the estimated length for the appearance of each speaker or witness. (The parties shall confer on estimated dates and approximate length prior to submission of their pre-trial statements).

#### 2. Markman Hearing Evidence.

##### 2.1. Exhibits.

##### 2.1.1. Exchange of Proposed Exhibits.

Copies of proposed exhibits, if any, including all demonstratives, along with a proposed exhibit list, shall be served on the opposing parties (including the Staff) by November 5, 2010. Once the parties have exchanged their proposed exhibit lists, they shall eliminate any duplicate

exhibits or renumber such exhibits as joint exhibits and update their exhibit lists before the exhibit lists are submitted to the Administrative Law Judge on November 8, 2010 (electronic courtesy copies due by 3 p.m.). Proposed exhibits shall not be filed with the Office of the Secretary of the Commission.

### **2.1.2. Service of Proposed Exhibits upon Administrative Law Judge.**

Prior to the start of the Markman hearing, the parties must bring two sets of proposed exhibits to the hearing room, along with a proposed exhibit list: (i) a set containing each proposed exhibit in an individual folder (which will be used for scanning purposes) (the “Dockets Set”), (ii) another full set of double-sided proposed exhibit copies in loose-leaf binders, which will be used by the Administrative Law Judge during and after the hearing (the “ALJ Set”). Clear photocopies may be used instead of original documents.

### **2.1.3. Format of Original and Binder Exhibit Sets.**

In order to facilitate optical scanning of the exhibits, the exhibits in the original Dockets Set shall be single-sided loose sheets (which may be clipped but not stapled) in folders (file folders, accordion folders, etc.) that are provided in sequentially-numbered boxes. Each folder must be labeled to reflect the number of the exhibit therein, *e.g.*, RXM-14C. Likewise, each box should be labeled properly to indicate which specific exhibits are contained therein. Box labels should bear the same format as the exhibit lists and be attached to each box lid. In each of the boxes of the original Dockets Set, the folders containing the exhibits shall be placed in sequential order.

The exhibits in the ALJ Set shall be double-sided and individually tabbed, with each tab reflecting the number of the corresponding exhibit, *e.g.*, CXM-3C. Each binder must be labeled on its spine with the name and number of this Investigation and the nature of the contents of the binder, *e.g.* Complainants’ Exhibits CXM-1 through CXM-18C. The Administrative Law Judge would prefer binders no wider than 3”.

### **2.1.4. Maintenance and Filing of Final Exhibits and Final Exhibit List.**

Each party must submit a final exhibit list reflecting the status of all exhibits, including those admitted and rejected during the Markman hearing. Any withdrawn exhibit shall be identified on the final exhibit list only, by exhibit number, and shall indicate that it has been withdrawn.

The parties are responsible for updating the exhibit lists and for maintaining and updating the original Docket Set and the ALJ Set, as well as for confirming that all admitted and rejected exhibits are included in these sets and in the final exhibit list at the conclusion of the hearing. The exhibits shall be separated into the following groups: (i) Admitted Confidential; (ii) Admitted Public; (iii) Rejected Confidential; and (iv) Rejected Public. Withdrawn exhibits are not to be submitted, however, the rejected exhibits will be retained with the official record. The Docket Set shall become the set that is filed with the Commission after the record is closed.

Any exhibits that are not included in the Docket Set and the final exhibit list at the conclusion of the Markman hearing will not be considered as part of the record to be certified to the Commission when the final initial determination issues.

The Docket Set and ALJ Set (including any admitted demonstrative exhibits), as well as the final exhibit list, should be submitted on paper no later than 5 p.m. on the second day following the Markman hearing. These two sets should be submitted to the Administrative Law Judge's assistant, Danielle Vu, by appointment. Ms. Vu will review the exhibits with the parties, notify them of any necessary corrections, and ensure that the Docket Set will be appropriately transferred to Docket Services. It is advisable to leave time between the appointment with Ms. Vu and the submission deadline in order to make any needed corrections. Please be timely and courteous when working with Ms. Vu on the submission of these exhibit sets.

### **2.1.5. Numbering and Labeling of Exhibits.**

#### **2.1.5.1. Documentary Exhibits.**

Written exhibits shall be marked in order beginning with the number "1" and preceded by the prefix "CXM" for Complainants' Markman exhibits, "RXM" for Respondent's exhibits, "SXM" for the Commission Investigative Attorney's exhibits, and "JXM" for any joint exhibits. The parties shall not "reserve" numbers, but instead must assign all numbers to the exhibits in their proper order.

#### **2.1.5.2. Confidential Exhibits.**

If an exhibit contains confidential business information a "C" (e.g., CXM-12C) shall be placed after the exhibit number. Furthermore, exhibits containing confidential business information shall be so designated pursuant to the Protective Order. In addition, on any exhibit list submitted, exhibits which contain confidential business information shall be denoted by placing a "C" after the exhibit number in the listing. No exhibit list shall contain confidential information; all exhibit lists shall be public documents.

#### **2.1.5.3. Numbering; Labeling.**

Each exhibit shall be identified by placing a label bearing the exhibit's number (e.g., CXM-3C or RXM-5) in the upper right portion of the exhibit's first page. Further, the pages of each exhibit must be sequentially numbered in a consistent location on the pages and in a manner that will not permanently conceal information that is included in the exhibit.

The parties shall coordinate exhibits to avoid unnecessary duplication (e.g., patents; file wrappers). All exhibits or copies of exhibits shall be clear and legible. Each exhibit may be assigned no more than one number.

### **2.1.6. Exhibit Lists.**

Every exhibit list shall include a table enumerating all exhibits consecutively by exhibit number and identify each exhibit by a descriptive title, a brief statement of the purpose for which the exhibit is being offered in evidence, the name of the sponsoring witness, and the status of receipt of the exhibit into evidence.

Every joint exhibit list shall identify each exhibit, and the parties shall meet and confer before submitting the lists for the purpose of seeking an agreement on a common descriptive title, statement of purpose, and sponsoring witnesses that shall appear on every list for each joint exhibit.

In any exhibit list submitted before the offer of an included exhibit into evidence, the entry in the column for the status of receipt shall be left blank. In any exhibit list submitted after the exhibit is offered into evidence or withdrawn, the entry in that column shall show the date of admission into evidence or rejection of the exhibit or shall indicate its withdrawal.

Exhibit lists shall include public and confidential exhibits, and shall list all exhibits together in numerical order, *e.g.*, CXM-1, CXM-2, CXM-3C, CXM-4, CXM-5C, etc.

### **2.1.7. One Document Per Exhibit; All Pages Bates-numbered.**

Except for good cause shown, each exhibit shall consist of no more than one (1) document and every page of every document shall be Bates numbered in accordance with Ground Rule 3.7. Exceptions to this “one document per exhibit” rule include instances when it would be appropriate to group certain documents together as a single exhibit, such as a group of invoices or related e-mails.

### **2.1.8. Presentation or Witness Binders.**

Counsel shall provide a binder of any materials to be shown as slides or visual aids (such as Power Point slides) to the Administrative Law Judge, the Administrative Law Judge’s Attorney Advisor, and the other parties **before** the commencement of a presentation by counsel. Furthermore, double-sided copies (in binders) of materials/proposed exhibits to be shown to witnesses, if any, should also be distributed **in advance** to the Administrative Law Judge, the Administrative Law Judge’s Attorney Advisor, and the other parties.

Each binder must be labeled on its spine with the name and number of this Investigation and the nature of the contents of the binder, *e.g.*, Complainants’ Markman Presentation.

## **3. Markman Hearing**

The parties have the discretion to determine the order of presentation and allocation of time for the Markman proceedings. For example, the parties may have Complainants discuss all of the patents before moving on to Respondent and then Staff, or all the parties may present their

arguments with respect to one patent before moving on to the next patent. The parties may also determine what, if any, time will be allocated for rebuttal. The parties should keep in mind that the total time allocated for the Markman hearing is 6.5 hours.

**3.1. Opening Statement and Closing Argument.**

No opening statements and closing arguments are necessary.

**3.2. Markman Hearing Hours.**

Normal hearing hours are 9:00 a.m. to 5:00 p.m., with a one (1) hour luncheon recess beginning at approximately 12:00 p.m. and two (2) fifteen (15) minute breaks.

**3.3. Markman Hearing Decorum.**

No audible discourse between opposing counsel will be permitted while the Markman hearing is in session. If an attorney has anything to address to opposing counsel, it must be done through the Administrative Law Judge.

Audible portable electronic devices such as cell phones or beepers shall be turned off in the courtroom during the Markman hearing, and all cell phone conversations must occur outside the courtroom. No food or drink (other than water) is permitted in the courtroom during the Markman hearing.

Each witness, if any, shall stand while being administered the oath of affirmation. All others in the hearing room should remain seated and quiet

**3.4. Admission of Exhibits.**

The parties are responsible for moving their exhibits into the record, and should initiate admission of exhibits with the Administrative Law Judge well in advance of the 5 p.m. hearing deadline. If the Administrative Law Judge approves admission of the requested exhibits, the parties should be prepared to submit a list of admitted exhibits to the hearing reporter for entry into the record.

The parties may seek to have demonstrative exhibits admitted into evidence for substantive or solely for demonstrative purposes. Such designation should be made clear on the record at the time of submission.

**3.5. Transcript.**

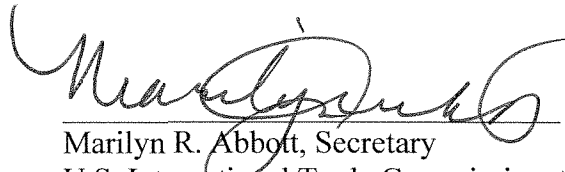
The parties have the option of arranging for the Markman hearing transcript in real time. The Administrative Law Judge prefers to have hearing transcripts in real time.

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337-TA-724

**PUBLIC CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** has been served by hand upon, the Commission Investigative Attorney, **Kecia J. Reynolds, Esq.**, and the following parties as indicated on **September 7, 2010.**



Marilyn R. Abbott, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112A  
Washington, D.C. 20436

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