UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of	
CERTAIN VISION-BASED DRIVER ASSISTANCE SYSTEM CAMERAS AND COMPONENTS THEREOF	**Inv. 337-TA-907**

ORDER NO. 2: (1) NOTICE OF GROUND RULES;

(2) ORDER SETTING DATE FOR SUBMISSION OF JOINT DISCOVERY STATEMENT; AND

(3) ORDER SETTING DATE FOR PRELIMINARY CONFERENCE

(January 28, 2014)

By publication of a notice in the *Federal Register* on January 28, 2014, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, the Commission instituted this investigation to determine:

> whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain vision-based driver assistance system cameras and components thereof by reason of infringement of one or more of claims 1, 2, 4, and 5 of [U.S. Patent No. 8,116,929 ("the '929 patent")] and claims 1, 29, 35, and 39 of [U.S. Patent No. 8,593,521 ("the '521 patent")], and whether an industry in the United States exists as required by subsection (a)(2) of section 337[.]

79 Fed. Reg. 4490 (January 28, 2014).

The complainant is Magna Electronics Inc. of Auburn Hills, Michigan. (*Id.*) The respondent is TRW Automotive U.S., LLC of Livonia, Michigan. (*Id.*) The Office of Unfair Import Investigations will participate in this investigation. (*Id.*)

DISCOVERY STATEMENT

The parties are directed to file a joint discovery statement, in regards to the full investigation, on or before **February 12, 2014** addressing the questions and issues set forth in the Attachment A.

TARGET DATE AND PROPOSED PROCEDURAL SCHEDULE(S)

An order will issue setting the target date which will be set, pursuant to Commission rule 210.51(a), after considering the positions of the parties as to a target date in their discovery statements and during the preliminary conference. After issuance of said order and consistent with the target date, the parties shall submit proposed procedural schedule to the ALJ. The date for receipt will be set in the target date order. The contents of any procedural schedule are set forth in Ground Rule 2. The parties should make intensive good faith efforts to agree to a procedural schedule. It is expected that in most instances the parties should be able to submit a joint proposal on this matter. Any proposed procedural schedule should not be filed with the Secretary.

PRELIMINARY CONFERENCE

The ALJ finds that a preliminary conference would be beneficial for the ALJ and all of the parties involved. The parties should be prepared to discuss any issues with respect to the discovery statements, including the ground rules, protective order and position as to target date; how discovery is progressing, including any issues that may have arisen or issues that the parties anticipate may arise; and any other matters that may have surfaced. The ALJ does not wish to hear any substantive arguments as those should be reserved for a later date (most likely for motions practice). The preliminary conference will be held on **Friday, February 28, 2014** at

10:00AM via teleconference. Complainants shall be responsible for arranging the logistics of the teleconference, including arranging for a court reporter.

GROUND RULES

The ground rules, attached hereto as Attachment B, supplement the Commission Rules. The conduct of this investigation before the Administrative Law Judge shall be governed by the Commission Rules and the Ground Rules attached hereto.

SO ORDERED.

Theodore R. Essex /kwc

Theodore R. Essex
Administrative Law Judge

ATTACHMENT A

JOINT DISCOVERY STATEMENT

The parties shall file a Joint Discovery Statement that includes the following:

1. The parties' positions on the applicable topics of the "Discovery Statement Checklist" (*see* Exhibit A).

2. The parties' positions on the applicable topics of the "Joint Electronic Discovery Submission" and attached the proposed Order (see Exhibit B).

3. The parties' proposed limitations and procedures for fact and expert discovery including:

    a. Any recommendations for limiting the production of documents, including electronically stored information.

    b. Any recommendations for limiting fact depositions, whether by numbers or days of depositions (*e.g.,* maximum number of deponents or limited depositions by agreeing on a maximum number of days a party may depose witnesses, and the party may use those days to take two half-day or one full-day deposition per witness).

    c. A protocol for electronic discovery, including a brief description of any disputes regarding the scope of electronic discovery.

    d. Whether the parties recommend that expert discovery precede or follow any summary determination practice.

    e. Whether the parties agree to allow depositions, preceding the hearing, of hearing witnesses not already deposed.

    f. Whether the parties agree to conduct depositions in a particular location (*e.g.* bring up to five foreign witnesses to the U.S. for deposition).

    g. Whether the parties recommend that the judge set a date before which contention interrogatory responses need not be provided.

    h. Whether the parties recommend that the ALJ issue a claim construction order and, if so, recommendations for limiting the number of claim terms to be presented to the ALJ for construction.

    i. Whether the parties agree that the provisions of FRCP 26(b)(4)(B) and (C) relating to expert communications apply.

4. Whether the parties propose to engage in mediation and, if so, when would be the best time to do so. The parties should also identify what discovery should precede such discussions.

EXHIBIT A

DISCOVERY STATEMENT CHECKLIST

1. Issues to be litigated

    a. Identify all issues to be litigated (*e.g.,* infringement, affirmative defenses, importation, domestic industry, remedy, bonding, and public interest (if delegated to the ALJ by the Commission)
    b. Identify specific proposals in which these issues can be narrowed to make the hearing more meaningful and efficient.

2. A description of information and evidence that each party intends to submit to prove its own case;

3. A description of the specific information and evidence that each party will be seeking from other parties and third persons;

4. Possible limitations on document preservation (including electronically stored information);

5. Preliminary issues that are likely to arise that will require ALJ intervention;

6. Identification of dispositive issues that should be resolved early in the investigation, and specific proposals for disposition of such issues.

7. Identification of issues amenable to stipulations, *e.g.*, electronic service of discovery.

8. Proposed discovery limitations including but not limited to:

    a. limitations on types of discovery beyond those in the Commission Rules and applicable Ground Rules (*i.e.,* limits on depositions, number of interrogatories, requests for admission);
    b. limitations on scope of discovery;
    c. limitations on timing and sequence of discovery;
    d. agreements to allow depositions of hearing witnesses named if not already deposed; and preservation depositions, foreign discovery, or other anticipated issues;
    e. agreements to exchange certain information without the use of formal discovery;
    f. agreements or limitations on discovery of electronically-stored information (Note: This should include a brief summary of any agreements reached in the Joint Electronic Discovery Submission to be submitted herewith);
    g. limitations on restoration of electronically-stored information; and
    h. limitations on discovery of expert-related hearing preparation materials.

9. Status of any settlement discussions;

10. Status of any litigation that may affect any issue in this investigation;

11. Status of any proceedings (including reexams) before the Patent and Trademark Office;

12. Proposal for any modifications to the protective order (Order No. 1) now in effect for this investigation; and

13. Position as to target date.

EXHIBIT B

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

Before the Honorable Theodore R. Essex
Administrative Law Judge

In the Matter of **CERTAIN VISION-BASED DRIVER ASSISTANCE SYSTEM CAMERAS AND COMPONENTS THEREOF**	**Inv. No. 337-TA-907**

JOINT ELECTRONIC DISCOVERY SUBMISSION AND [PROPOSED] ORDER

One or more of the parties to this litigation have indicated that they believe that relevant information may exist or be stored in electronic format, and that this content is potentially responsive to current and/or anticipated discovery requests. This Joint Submission and [Proposed] Order (and any subsequent orders) shall govern the electronic discovery process in this action. The parties and the ALJ recognize that this Joint Electronic Discovery Submission and [Proposed] Order is based on facts and circumstances as they are currently known to each party, that the electronic discovery process is iterative, and that additions and modifications to this Submission may become necessary as more information becomes known to the parties.

I. Competence. Counsel certify that they are sufficiently knowledgeable in matters relating to their clients' technological systems to discuss competently issues relating to electronic discovery, or have involved someone competent to address these issues on their behalf.

II. Meet and Confer. Counsel are required to meet and confer regarding certain matters relating to electronic discovery. Counsel hereby certify that they have met and conferred to discuss these issues prior to submission of the Discovery Statement.

Date(s) of parties' meet-and-confer conference(s): _____

III. Unresolved Issues: After the meet-and-confer conference(s) taking place on the

aforementioned date(s), the following issues remain outstanding and/or require ALJ intervention:

A. Preservation

1. The parties have discussed the obligation to preserve potentially relevant electronically stored information and agree to the following scope and methods for preservation, including but not limited to: retention of electronic data and implementation of a data preservation plan; identification of potentially relevant data; disclosure of the programs and manner in which the data is maintained; identification of computer system(s) utilized; and identification of the individual(s) responsible for data preservation, etc.

Complainant(s):

_____

_____

_____

_____

Respondent(s):

_____

_____

_____

_____

2. State the extent to which the parties have disclosed or have agreed to disclose the dates, contents, and/or recipients of "litigation hold" communications.

_____

_____

_____

_____

3. The parties anticipate the need for judicial intervention regarding the following issues concerning the duty to preserve, the scope, or the method(s) of preserving electronically stored information:

_____

B. Search and Review

1. The parties have discussed methodologies or protocols for the search and review of electronically stored information, as well as the disclosure of techniques to be used. Some of the approaches that may be considered include: the use and exchange of keyword search lists, "hit reports," and/or responsiveness rates; concept search; machine learning, or other advanced analytical tools; limitations on the fields or file types to be searched; date restrictions; limitations on whether back-up, archival, legacy, or deleted electronically stored information will be searched; testing; sampling; etc. To the extent the parties have reached agreement as to search and review methods, provide details below.

Complainant(s):

Respondent(s):

2. The parties anticipate the need for judicial intervention regarding the following issues concerning the search and review of electronically stored information:

C. Production

1. Source(s) of Electronically Stored Information. The parties anticipate that discovery may occur from one or more of the following potential source(s) of electronically stored information [*e.g.,* email, word processing documents, spreadsheets, presentations, databases, web sites, etc.]:

Complainant(s):

Respondent(s):

2. Limitations on Production. The parties have discussed factors relating to the scope of production, including but not limited to: (i) number of custodians; (ii) identity of custodians; (iii) date ranges for which potentially relevant data will be drawn; (iv) locations of data; (v) timing of productions; and (vi) electronically stored information in the custody or control of non-parties. To the extent the parties have reached agreements related to any of these factors, describe below:

Complainant(s):

Respondent(s):

3. Form(s) of Production:

The parties have reached the following agreements regarding the form(s) of production:

Complainant(s):

Respondent(s):

a. Please specify any exceptions to the form(s) of production indicated above (*e.g.*, word processing documents in TIFF with load files, but spreadsheets in native form):

b. The parties anticipate the need for judicial intervention regarding the following issues concerning the form(s) of production:

4. Privileged Material Identification. The parties have agreed to the following method(s) for the identification (including the logging, if any, or alternatively, the disclosure of the number of documents withheld), and the redaction of privileged documents:

5. Cost of Production. The parties have analyzed their client's data repositories and have estimated the costs associated with the production of electronically stored information. The factors and components underlying these costs are estimated as follows:

a. Costs

Complainant(s):

Respondent(s):

b. Cost Allocation. The parties have considered cost-shifting or cost-sharing and have reached the following agreements, if any:

c. Cost Savings. The parties have considered cost-saving measures, such as the use of a common electronic discovery vendor or a shared document repository, and have reached the following agreements, if any:

6. The parties anticipate the need for judicial intervention regarding the following issues concerning the production of electronically stored information:

D. Other Issues:

The preceding constitutes the agreement(s) reached and existing disputes (if any) between the parties to certain matters concerning electronic discovery as of this date. To the extent additional agreements are reached, modifications are necessary, or disputes are identified, they will be

outlined in subsequent submissions or agreements and promptly presented to the ALJ for consideration.[1]

DATED: _____

Respectfully submitted,

_____

Counsel for Complainants

_____

Counsel for Respondents

SO ORDERED.

_____

Theodore R. Essex
Administrative Law Judge

[1] Additional written status reports in pursuant to Ground Rule 4.1.1(Discovery Committee) shall include the status of electronic discovery that identifies any issues or disputes that have arisen, including any additional agreements or modifications to the e-discovery submission, as well as any newly arisen disputes.

ATTACHMENT B

GROUND RULES FOR SECTION 337 INVESTIGATION

These Ground Rules supplement the Commission's Rules of Practice and Procedure, 19 C.F.R. Parts 201 and 210 ("Commission Rules"), in order to aid the Administrative Law Judge in the orderly conduct of the Section 337 investigation pursuant to the Administrative Procedure Act, 5 U.S.C. § 556(c).

These Ground Rules govern a U.S. patent-based investigation pursuant to 19 U.S.C. § 1337(a)(1)(B). In the case of an investigation based upon a registered copyright, registered trademark, or registered mask work pursuant to 19 U.S.C. § 1337(a)(1)(B), (C) or (D), additional Ground Rules may also govern. In addition, in a case involving a motion for temporary relief pursuant to 19 U.S.C. § 1337(e), additional Ground Rules may also govern.

In case of any conflict between these Ground Rules and any subsequent order issued by the Administrative Law Judge or the Commission in this investigation, the subsequent order shall control.

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JUDGE ESSEX'S GROUND RULES

1. Address; Requirements for Filing, Service, and Copies; Time

1.1 Address of Administrative Law Judge.

The Administrative Law Judge's address is as follows:

The Honorable Theodore R. Essex
U.S. International Trade Commission
500 E Street, S.W., Room 317
Washington, D.C. 20436

1.2 Filing Requirement.

All submissions shall be filed with the Office of the Secretary of the Commission in accordance with Commission Rule 210.4(f) unless otherwise specifically provided for in these Ground Rules or by order of the Administrative Law Judge.

1.3 Service Copy Requirement

1.3.1 Paper Copies

Copies of the papers served on the Secretary shall be served concurrently on all other parties, including the Commission Investigative Staff. Also, two (2) courtesy paper copies shall be served on the Administrative Law Judge at his office the next business day after the papers are served on the Secretary. The Administrative Law Judge's courtesy copies may be printed on double-sided pages. If the next business day is a Saturday, Sunday, Federal legal holiday, or a day on which weather or other conditions have made the Office of the Secretary of the Commission inaccessible, the two (2) courtesy paper copies shall be served on the Administrative Law Judge the next business day that is not one of the aforementioned days.

If the exhibits to any submission exceed 50 pages, the exhibits shall be submitted in electronic format only.

1.3.2 Electronic Copies

Any party submitting a motion or any response to a motion, as well as any other paper submitted in the investigation, while the investigation is pending before the Administrative Law Judge, shall send a courtesy electronic copy of said document in Microsoft Word, WordPerfect 11, or PDF format, excluding attachments such as exhibits, to the Administrative Law Judge's attorney-advisor, Kevin Cherry, at the following e-mail address: kevin.cherry@usitc.gov, on CD, or on any other electronic memory data storage devices on the same day.

1.4 Word Processor Copy.

In the case of any filing of 25 pages or more (excluding attachments), or in the case of any filing that contains lengthy quotations from a patent, transcript, treatise or other document, the courtesy paper copies delivered to the Administrative Law Judge shall be accompanied by an electronic version of the filing in Microsoft Word or WordPerfect.

1.5 Submission by Fax Disfavored.

Service of any document on the Administrative Law Judge by facsimile transmission is **strongly** disfavored. No party may serve any paper on the Administrative Law Judge by facsimile unless the party has first contacted the office of the Administrative Law Judges and has received permission to serve the paper on the Administrative Law Judge by facsimile, explaining why service of the paper by mail, overnight courier, or hand delivery is not feasible, and informing the office of the Administrative Law Judges of the number of pages to be transmitted, the exact time the transmission will take place, and whether the document to be transmitted contains any confidential business information. Service of any paper on the Administrative Law Judge by facsimile must be followed by service on the Administrative Law Judge of a hard copy of the paper within three (3) business days.

1.6 Concurrent Service.

Service on opposing counsel may be by hand, by facsimile, by e-mail, or by overnight courier. Unless otherwise agreed by counsel, service of documents of no more than fifteen (15) pages in length (exclusive of any service list) shall be effected by facsimile transmission, by e-mail, by hand delivery or by overnight courier and documents consisting of more than fifteen (15) pages shall be served by e-mail, overnight courier or by hand. Any foreign respondent who is not represented by counsel may be served by first class mail. Motions served by facsimile shall be served no later than 5:15 pm on the day said motion is filed with the Office of the Secretary. Motions served by overnight courier shall be received by the other parties no later than the close of business on the day following the day on which said motion is filed. Where documents are served on the Office of the Secretary by hand, said documents shall also be served on local counsel by hand the same day. Where service is by facsimile, the serving party must notify the other parties so served.

1.7 Confidential Submissions

Any document containing confidential business information should be prominently marked on its first page with the legend "confidential business information" or equivalent wording.[1] Documents filed with confidential attachments should similarly contain a marking on the first page of the document indicating that there are confidential attachments and the first page of each of the confidential attachments should be marked pursuant to Commission rules. A party who mistakenly

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[1] See Commission rules 210.6 and 210.34.

files a document without a confidential designation thereon should immediately contact the Office of the Secretary and the attorney advisor because when a public document is filed it will be placed on the public record and its confidential status may be lost. Filing of non-confidential versions of discovery related motions that contain confidential business information is not required. With respect to items (A), (B), and (C) of Commission rule 210.4(f)(3)(ii) and any pre-hearing and post-hearing brief and all other post-hearing submissions that contain confidential business information, each party asserting confidentiality shall serve on all parties a proposed redacted non-confidential version thereof within ten (10) calendar days after service of the Commission or Administrative Law Judge of that confidential document. No cover letter or other document shall be stapled or otherwise attached to a filing or other submission so as to obscure the confidential marking on the top page.

1.8 Unreported Court Decisions

Any submission that makes reference to an unreported court decision shall include as an exhibit the text of said decision.

1.9 Certificates of Service

Certificates of service should state the date and manner of delivery of documents filed with the Office of the Secretary.

1.10 Temporary Relief

In any aspect of an investigation which involves a pending motion for temporary relief, a party serving any paper, including any motion or discovery requests, must notify counsel for the other parties, including the Commission Investigative Staff Attorney ("Staff"), by telephone on the day the paper is served about the contents of the paper, and must arrange for the other parties to receive the paper on the next business day.

1.11 Due Dates; Requests for Extensions

All due dates for any paper means that the paper is to be received no later than the close of business on the due date. Any request for extension of time must be made by written motion no later than the day before the due date and good cause for such extension must be established.

1.12 Public Versions of Orders/IDs

A proposed public version of an issued order or ID must be submitted to the administrative law judge at the time specified in the issued confidential order or ID. To designate confidential information, the confidential information subject to the protective order should be bracketed. It is essential that the confidential matter be bracketed and not deleted in submission of the bracketed

public version (two copies) to the Administrative Law Judge. One such copy must use red brackets to designate the confidential information.

Said proposed public version must be served on all parties at least two (2) business days prior to the submission of said proposed public version to the Administrative Law Judge. Moreover, any party with comments regarding another party's proposed public version must submit said comments to the Administrative Law Judge on the same date as specified for the submission of the proposed public version to the Administrative Law Judge.

If a confidential public version (two copies) is not received by a date set in an order by the Administrative Law Judge the totality of the order will be made public by the Administrative Law Judge. No public version of an order should be filed by a party with the Secretary. Rather the Administrative Law Judge will issue the public version of his order.

1.13 Electronic Filing (EDIS)

Commission rule 201.8(f) governs the electronic filing of certain documents with the Office of the Secretary via the Commissions' Electronic Document Information System (EDIS). Presently, parties may employ the required electronic format using EDIS to file any non-confidential document that must be filed with the Secretary. Filing through EDIS, however, does not remove the requirement that parties must also submit two (2) courtesy hard copies and an electronic copy of such filing, not by facsimile transmission, with the office of the Administrative Law Judges. For additional information regarding EDIS, parties may access the EDIS User's Guide at https://edis.usitc.gov/hvweb/edisuser.pdf or contact the EDIS Helpdesk at (888) 325-6006 or (703) 758-2877.

All submissions shall be filed with the Office of the Secretary of the Commission in accordance with Commission Rules 201.15 and 210.4(f)(2) unless otherwise specifically provided for in these Ground Rules or by order of the Administrative Law Judge.

1.14 Computation of Time.

The first day of the ten (10) calendar days for responding to a motion received by the Administrative Law Judge shall be the first business day following the date that said motion was filed in the Office of the Secretary, and shall apply whether a motion is hand delivered, faxed or served by overnight courier on the other parties. In addition to the requirements of Commission Rules 201.14, 201.16(d) and 210.6 for computation of time, if the last day of the period of time for making a submission falls on a day on which weather or other conditions have made the Office of the Secretary of the Commission inaccessible, the period shall run until the end of the next business day which is not one of the aforementioned days.

2. Procedural Schedule

The Administrative Law Judge will promulgate a procedural schedule for the investigation. Modifications of the procedural schedule by any party shall be made by written motion showing good cause. The event and deadline dates in the procedural schedule will generally adhere to the following chronological order:

First settlement conference
Submission of first settlement conference joint report
File disclosure of priority date/conception and reduction to practice date
File identification of expert witnesses, including their expertise and curriculum vitae
Second settlement conference
Submission of second settlement conference joint report
File notice of prior art
Exchange of initial expert reports (identify tests/surveys/data)
File tentative list of witnesses a party will call to testify at the hearing, with an identification of each witness' relationship to the party
Exchange of rebuttal expert reports
Fact discovery cutoff and completion
Deadline for motions to compel discovery
Expert discovery cutoff and completion
Third settlement conference
Submission of third settlement conference joint report
Cut-off date for responses to contention interrogatories
Deadline for filing summary determination motions
Exchange of exhibit lists among the parties
Submit and serve direct exhibits (including witness statements), with physical and demonstrative exhibits available -- Complainant(s) and Respondent(s)

Submit and serve direct exhibits (including witness statements), with physical and demonstrative exhibits available -- Staff
File Pre-hearing statements and briefs -- Complainant(s) and Respondent(s)
File requests for receipt of evidence without a witness
File objections to direct exhibits (including witness statements)
Submit and serve rebuttal exhibits (including witness statements), with rebuttal physical and demonstrative exhibits available -- all parties
Deadline for motions *in limine*
File Pre-hearing statement and brief -- Staff
File responses to objections to direct exhibits (including witness statements)
File objections to rebuttal exhibits (including witness statements)
File high priority objections statement
File response to objections to rebuttal exhibits (including witness statements)
File responses to high priority objections statement
Submission of declarations justifying confidentiality of exhibits
File responses to motions *in limine*
Tutorial on technology (if necessary)
Pre-hearing conference
Hearing
File initial post-hearing briefs, proposed findings of fact and conclusions of law, and final exhibit lists
File reply post-hearing briefs, objections and rebuttals to proposed findings of fact

3. Motions; Deadlines for Responses

3.1 Contents; In General.

All written motions shall consist of: (1) the motion; (2) a separate memorandum of points and authorities in support of the motion;[2] (3) an appendix of declarations, affidavits, exhibits, or other attachments in support of the memorandum of points and authorities; and (4) a Certificate of Service as required by Commission Rule 201.16(c). All responses to motions shall consist of: (1) a memorandum of points and authorities in response to the motion; (2) an appendix of declarations, affidavits, exhibits, or other attachments in support of the memorandum of points and authorities; and (3) a Certificate of Service as required by Commission Rule 201.16(c).

3.2 Contents; Certification.

All motions shall include a certification that the moving party has made reasonable, good-faith efforts to contact and resolve the matter with the other parties **at least two business days** prior to filing the motion, and shall state, if known, the position of the other parties on such motion. Said certification shall be placed at the beginning of the motion under a heading entitled "Ground Rule 3.2 Certification" or similar language.

3.3 Contents; Motion for Summary Determination.

In addition to the foregoing requirements for all motions, motions for summary determination shall be further accompanied by a separate statement of the material facts as to which the moving party contends there is no genuine issue and which entitle the moving party to a summary determination as a matter of law. The statement shall consist of short numbered paragraphs with specific references to supporting declarations, affidavits or other materials.

3.4 Contents; Response to Motion for Summary Determination.

In addition to the foregoing requirements for all responses to motions, each party opposing a motion for summary determination shall append to the response a separate statement responding individually to the numbered paragraphs of the motion statement required by Ground Rule 3.3 with which the party disagrees, with specific references to supporting declarations, affidavits or other materials. The responsive statement shall also include any similarly numbered paragraphs of additional facts, similarly referenced and supported, which the opposing party believes warrant denial of summary determination. All material facts set forth in the moving party's statement may be deemed admitted by a nonmoving party unless so specifically controverted in the nonmoving party's responsive statement.

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[2] For procedural motions, such as motions for extensions of time, a separate memorandum is not necessary.

3.5 Contents; Discovery-Related Motions.

Prior to filing any written motion related to discovery, the party intending to file such motion shall meet and confer with opposing counsel and make a reasonable, good-faith effort to resolve the matter with the opposing parties, *i.e.*, the parties must comply with Ground Rule 3.2. If no resolution is reached among the parties, the party intending to file a motion shall contact the attorney advisor, as well as the other parties, to schedule a telephone conference with the administrative law judge to attempt to resolve the discovery dispute. At least one full business day prior to the conference call, the party intending to file the motion shall submit a written explanation, either via e-mail to the attorney advisor or other written correspondence, as to the nature of the discovery dispute. This written communication is not a motion or a pleading, it is simply an informational communication so that administrative law judge is aware of the nature of the discovery dispute prior to the telephone conference. Prior to contacting the attorney advisor, the party should determine the availability of the other parties for a telephone conference. The party initiating the telephone conference should arrange to have the conference transcribed. A copy of said transcript shall be filed on EDIS and a courtesy copy shall also be submitted to this office.

Any discovery-related motion must have appended to it the pertinent parts of the discovery request and all objections and answers thereto. Additionally, if a party serves supplemental responses subsequent to the filing of a motion to compel, that party must provide copies of the supplemental responses, or where documents are produced, a detailed accounting of what additional documents were produced.

3.6 Deadline for Filing Response to Motion.

The time to respond to all motions, including any motion for summary determination or any motion for termination as to any issue or party, is ten (10) calendar days after receipt of the motion in the Office of the Secretary, unless otherwise ordered by the Administrative Law Judge. A reply to responses and sur-replies may be made if the replying party so moves (with the reply and/or surreply attached thereto) and states specific reasons why a reply is needed (not merely reargument). There is no assurance that such a motion will be granted. Also said motion does not stop consideration by the Administrative Law Judge of the original motion.

In addition to the requirements of Commission Rules 201.16 and 210.15(c) governing the time period for a nonmoving party's response to a written motion, the date of service of a motion on a nonmoving party by electronic mail, hand-delivery or by an express-type mail or courier service is the date of delivery. The additional time provided under Commission Rule 201.16(d) after service by mail does not apply in such instances, unless service by electronic mail, hand-delivery or by an express-type mail or courier service is to a nonmoving party in a foreign country, in which event the additional time allowed for responses to motions shall be five (5) days.

3.7 Request for Shortened Time to Respond to Motion.

A motion shall include any request to shorten the period of time during which other parties may respond to the motion. The fact that a shortened response time is requested shall be noted in the title of the motion and the motion shall include an explanation of the grounds for such a request. A request for a shortened response time shall not be made through a separate motion.

3.8 No Motion Stops Discovery Except Motion to Quash Subpoena.

No motion stops discovery except a timely motion to quash a subpoena.

3.9 Motion Docket Number.

All responses to any motion shall include the Motion Docket Number assigned to the motion by the Commission's Office of the Secretary in either the title or the first paragraph of any such responses. Motion Docket Numbers may be obtained online through the Commission's Electronic Documents Information System known as EDIS.

4. Discovery

4.1 Resolution of Disputes; Coordinated Discovery.

All parties shall make reasonable efforts to resolve among themselves disputes arising during discovery. Parties with similar interests must coordinate and consolidate depositions and all other discovery.

4.1.1 Discovery Committee

Commencing with the first full week after these Ground Rules are issued, a discovery conference committee (the "Discovery Committee") consisting of the lead counsel of each party and the Staff shall convene at least once every two weeks during the discovery phase of this investigation, either in person or by telephone, to resolve discovery disputes. The Discovery Committee shall confer in good faith to resolve every outstanding discovery disputes in a timely manner within the deadlines set forth in the Procedural Schedule. Within ten (10) calendar days after the end of each calendar month during the discovery phase, the Discovery Committee shall report in writing to the Administrative Law Judge all disputes that were resolved during the preceding month and all disputes on which there is an impasse as of the end of that month. No motion to compel discovery may be filed unless the subject matter of the motion has first been brought to the Discovery Committee and the Committee has reached an impasse in resolving the matter.

4.2 Stipulations Regarding Discovery Procedure.

Unless otherwise directed by the Administrative Law Judge, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in **Ground Rules 4.4.2, 4.4.3 and 4.4.4** for responses to discovery may, if they would interfere with the target date of the investigation or with any time set in the procedural schedule or in an order for completion of discovery, for hearing of a motion, or for the hearing, be made only with the approval of the Administrative Law Judge upon a written motion showing good cause.

4.3 Service of Discovery Requests and Responses.

Discovery requests and responses thereto shall be served upon all parties, including the Commission Investigative Attorney, but shall not be served on the Administrative Law Judge unless they are pertinent to a motion. Discovery documents need not be served on the Office of the Secretary of the Commission unless they are appended to motions.

4.4 Timing of Discovery Requests, Responses and Objections.

4.4.1 Depositions; Notice.

In addition to the requirements of Commission Rule 210.28(c), unless otherwise ordered, any party desiring to take a deposition shall give notice in writing to every other party of not less than **ten (10) days** if the deposition is to be taken of a person located in the United States, or of not less than **fifteen (15) business days** if the deposition is to be taken of a person located outside the United States. No party shall notice the deposition of a party witness without first consulting with the opposing party and the Staff regarding the availability of witnesses and counsel for the deposition.

4.4.1.1 Live Testimony

It is urged, particularly on crucial contested issues, that the parties consider whether such testimony would better be presented at the hearing for the Administrative Law Judge's evaluation of witness demeanor, rather than by deposition transcript.

4.4.1.2 Definition of "Party"

With respect Commission rule 210.28(h)(2), which relates to the use of any deposition of a party, unless the parties agree to the contrary, the Administrative Law Judge interprets the term "party" to include depositions taken of a party under F.R.C.P. 30(b)(6).

4.4.1.3 Depositions as Evidence

Deposition transcripts may be received into evidence for substantive purposes by the Administrative Law Judge pursuant to Commission rule 210.28(g) and (h). If depositions are to be offered into evidence for substantive purposes, i.e., other than for impeachment purposes, the offering party must specifically designate the respective pages of the deposition to be relied on no later than the date set for submission of documentary exhibits. All of the designated pages shall be offered together into evidence as a single documentary exhibit and all portions of a deposition not designated shall be deleted. If objections requiring a ruling by the Administrative Law Judge were made during a deposition, such objections shall be also referenced. Any deposition offered into evidence shall have been signed by the deponent unless it is clear from the deposition that the deponent has waived the signing.

The parties may submit deposition transcripts offered as substantive evidence as joint documentary exhibits provided an agreement has been reached among all private parties and the Staff that such deposition transcripts should be submitted as joint documentary exhibits and offered as substantive evidence. If a deponent testifies at the hearing, such witness' deposition transcript is not admissible as substantive evidence, unless it meets the requirements of Commission rule 210.28(h). In addition, portions of the deposition transcript may be read into the record where the witness has testified, the witness is still on the witness stand and a party seeks to impeach such witness's direct testimony during cross-examination. See also Commission rule 210.28(h)(4).

4.4.1.4 Multiple Depositions of One Party

A party must obtain leave of the Administrative Law Judge, which shall be granted to the extent consistent with the principles stated in Commission rule 210.27, if without the written stipulation of the parties, the person to be examined already has been deposed in the investigation.

4.4.1.5 Objections During the Deposition

There shall be no speaking objections made during the course of a deposition. To prevent coaching and to prevent wasting the deponent's time, counsel shall briefly state the basis for any objection made, and either allow the deponent to answer, or instruct the witness not to answer if the answer would reveal privileged information.

4.4.2 Interrogatories; Deadline for Responses and Objections.

In addition to the requirements of Commission Rule 210.29(b), unless otherwise ordered, the party upon whom interrogatories have been served shall serve a copy of the answers, and any objections, within **ten (10) days** after the service of the interrogatories.

4.4.3 Requests for Production of Documents or Things or for Entry Upon Land; Deadline for Responses and Objections.

In addition to the requirements of Commission Rule 210.30(b)(2) with respect to a request for the production of documents or things, or to permit entry upon land, unless otherwise ordered, the party upon whom a request has been served shall serve a written response within **ten (10) days** after the service of the request.

4.4.4 Request for Admission; Period for Service; Deadline for Responses and Objections.

In addition to the requirements of Commission Rule 210.31(a) and (b), unless otherwise ordered, a request for admission may be served at anytime **twenty (20) days** after the date of service of the complaint and notice of investigation. Unless otherwise ordered, a party upon whom a request for admission has been served, shall serve an answer or objection within **ten (10) days** after the service of the request, otherwise the matter may be deemed admitted.

4.4.5 Discovery Cutoff and Completion.

All discovery requests, including without limitation requests for admissions, must be initiated in sufficient time prior to the fact discovery cutoff and completion date so that the responses will be due prior to that date within the time periods set forth above. Discovery requests by any party that would require responses after the fact discovery cutoff and completion date must be approved in advance by the Administrative Law Judge upon a showing of compelling circumstances.

4.5 Interrogatory Limitation.

Without leave of the Administrative Law Judge or written stipulation, any party may serve upon any other party written interrogatories not exceeding 175 in number including all discrete subparts. Leave to serve additional interrogatories shall be granted by the Administrative Law Judge upon a written motion showing good cause.

4.6 Subpoenas.

Subpoenas may be used to compel third parties to testify or produce documents. Hearing subpoenas may be issued only if the subpoenaed party refuses to testify.

4.6.1 Issuance and Service

Pursuant to Commission rule 210.32, application for subpoena may be made ex parte to the Administrative Law Judge. The application shall be in writing with the proposed subpoena attached, and one (1) copy thereof submitted to the office of the Administrative Law

Judges. The application shall set forth with specificity the relevancy of the information sought and the reasonableness of the scope of the inquiry. In addition, the subpoena should set forth a time limit for a motion to quash and should also state that the subpoena will be served by overnight delivery, if not sooner. Any dates in a subpoena set for appearance of a deponent or production of documents should take into account the date set for the filing of any motions to quash.[3] A copy of the issued subpoena and the application shall be served by the applicant upon the subpoenaed party and all other parties to the investigation on the next business day, at the latest, after the subpoena is issued, and all parties including the subpoenaed party shall be notified on that day about the contents of the subpoena. One (1) copy of the issued subpoena, the application, and the proof of service to the subpoenaed party shall be supplied to the Administrative Law Judge. Samples of subpoenas are attached in **Appendix A** hereto. The application and subpoena need not be filed with or served on the Office of the Secretary of the Commission, including EDIS, unless they are appended to a motion to quash or motion for a protective order.

4.6.2 Enforcement

Should enforcement of a subpoena be necessary, a motion for enforcement should be addressed to the Administrative Law Judge by motion for his certification. Upon favorable consideration by the Administrative Law Judge, the motion will be certified to the Commission for consideration.

4.6.3 Subpoenas for Hearing Testimony

Subpoenas procured by a party for hearing testimony should be procured for a time that minimizes delay to said witnesses. Moreover, before submitting any subpoena for signature, the party should check with the other parties whether the person who is being subpoenaed will be at the hearing. Hearing subpoenas for witnesses within a party's control, *e.g.* an employee, are generally not issued.

4.6.4 Motions to Quash

Filing of any motion to quash an issued subpoena automatically stays such subpoena pending disposition of the motion to quash by the Administrative Law Judge.

4.7 Bates Numbering

If documents produced by any supplier in response to a document request are furnished to the requester as copies of original documents, every page of every such document shall be numbered sequentially by a unique number (commonly known as a "Bates number"). The

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[3] In past investigations parties frequently set appearance or production dates prior to a period set for a motion to quash, which should not be done.

Bates number shall appear stamped on the lower right-hand corner of the page.

4.8 Translations

All documents produced in response to a document request shall be the original or true complete copies of originals. If an English translation of any document produced exists, the English translation shall be produced. If any of the parties dispute the translation provided by the producing party, then the translation must be certified by a qualified and neutral translator upon whom counsel can agree.

4.9 Privileged Matter.

In order to expedite discovery, the following procedure shall be followed with respect to those documents for which counsel claims privilege (attorney-client or work product).

4.9.1 Privileged Document List.

If production of any document is withheld on the basis of a claim of privilege, each withheld document must be separately identified via a privileged document list.[4] The privileged document list shall be supplied, unless otherwise ordered, within ten (10) days after objections based on privilege to the underlying document requests are due. The privileged document list must identify each document separately, specifying for each document at least the following: (1) the date; (2) the author(s)/sender(s); (3) the recipient(s), including copy recipient(s); and (4) the general subject matter of the document. The sender(s) and recipient(s) shall be identified by position and entity (corporation or firm, etc.) with which they are employed or associated. If the author/sender or recipient is an attorney or foreign patent agent, he or she shall be so identified. The type of privilege claimed must also be stated, together with certification that all elements of the claimed privilege have been met and not waived with respect to each document.

4.9.2 Motion to Compel Production of Privileged Matter.

Any party seeking production of allegedly privileged documents shall file an appropriate motion only after examining the privileged document list.

The Administrative Law Judge is aware that, often times, parties agree that production of a privilege log is not necessary. The Administrative Law Judge finds such an agreement to be acceptable; however, if such an agreement is in force, the Administrative Law Judge will not consider any motions involving privileged documents.

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[4] *See Duplan Corp. v. Deering Millikin, Inc.*, 397 F. Supp. 1146, 184 U.S.P.Q. 775 (D.S.C. 1974).

4.10 Verification

Sworn verification of the responses to interrogatories and requests for admissions must be served with the respective responses on the date said responses are due. Where necessary, such verification may be in the form of a facsimile transmission and should be followed with hard copy submissions.

5. Disclosure of Priority Date/Conception and Reduction to Practice Dates and Notice Prior Art

5.1 Disclosure of Priority Date/Conception and Reduction to Practice Dates

Complainants must file on or before the date set in the procedural schedule a "Disclosure of Priority Dates and Dates of Conception/Reduction to Practice." For each asserted patent, the Disclosure of Priority Dates and Dates of Conception/Reduction to Practice shall contain the following information:

(1) For any asserted patent that claims priority to an earlier application, the priority date to which each asserted claim allegedly is entitled; and

(2) For any patent that is allegedly entitled to a priority date before the date of application for the patent or the priority date identified pursuant to subsection (1), whichever is earlier, the dates of conception and reduction to practice to which each asserted claim of the patent is entitled.

(3) The priority date and the conception and reduction to practice dates shall be the earliest dates to which the asserted patent can claim priority, *i.e.*, a date of "no later than month date, year" will not suffice.

5.2 Notice of Prior Art

Parties must file on or before the date set in the procedural schedule, notices of any prior art consisting of the following information: country, number, date, and name of the patentee of any patent; the title, date and page numbers of any publication to be relied upon as anticipation of the patent in suit; or as showing the state of the art, and the name and address of any person who may be relied upon as the prior inventor or as having prior knowledge of or as having previously used or offered for sale the invention of the patent in suit. Such notices should include the information set out in 35 U.S.C. § 282.

If a trademark is involved, the parties must filed on or before the date set in the procedural schedule, notices of any art on which a party will rely at the hearing regarding the functionality or non-functionality of any trademarks at issue.

In the absence of such notice, proof of the said matters may not be introduced into

evidence at the hearing except upon a timely written motion showing good cause.

5A. *Markman* Hearing on Claim Construction

If the Administrative Law Judge determines that a *Markman* hearing would be beneficial to the investigation, the Administrative Law Judge may conduct a *Markman* hearing on the date set forth in the procedural schedule for the purpose of construing any disputed claim terms of the patents at issue in the investigation. The parties and the Staff shall meet and confer on these issues no later than ten (10) days before the *Markman* hearing in order to reduce the number of disputed claim terms to a minimum. Before the *Markman* hearing, each party and Staff shall file with the Administrative Law Judge, jointly or separately, by the date set forth in the procedural schedule, a short written statement of its interpretation of each of the remaining disputed claim terms together with its support for each interpretation as a matter of ordinary meaning, or as derived from the claims, specification, or prosecution history of the patent(s) at issue, or from extrinsic evidence.[5] Rebuttal briefs may also be filed by the date set forth in the procedural schedule. After the *Markman* hearing, the parties shall submit a joint chart, by the date set forth in the procedural schedule, setting forth their post-hearing constructions for those claim terms discussed at the hearing or in their *Markman* briefs. Any new claim terms are only permitted for good cause or by agreement of the parties. Afterwards, the Administrative Law Judge will issue an order construing the disputed claims for the purposes of this Investigation. Thereafter, discovery and briefing in this investigation shall be limited to that claim construction.

6. Expert Witnesses and Reports

On or before the dates set forth in the procedural schedule, a party shall disclose to other parties the identity of any person who is retained or employed to provide expert testimony at the hearing and shall provide to the other parties a written report prepared and signed by the witness. One (1) courtesy copy of the report shall be served on the Administrative Law Judge on or before the date set forth in the procedural schedule. The report shall not be filed with the Office of the Secretary of the Commission.

The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at hearing or by deposition within the preceding four years. The parties shall supplement these disclosures as needed in

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[5] *See Invitrogen Corp. v. Biocrest Mfg., L.P.*, 327 F.3d 1364, 1367 (Fed. Cir. 2003); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979-81 (Fed. Cir. 1995), *aff'd* 517 U.S. 370 (1996).

the manner provided in Commission Rule 210.27(c).

7. Settlement Conferences

All parties, throughout the duration of the proceedings, shall explore reasonable possibilities for settlement of all or any of the contested issues. All parties shall certify in their Pre-hearing statements that good faith efforts were undertaken to settle the remaining issues. Additionally, for each of the required settlement conferences provided for in the procedural schedule, the parties shall provide the Administrative Law Judge with two copies of a joint report signed by all the parties setting forth any stipulations on which the parties have agreed. These reports are due by the time designated in the procedural schedule or within such other time as the Administrative Law Judge may allow. The reports shall not be filed with the Office of the Secretary of the Commission.

For each of the required settlement conferences, persons of requisite authority are required to attend. Unless the parties obtain the permission of the Administrative Law Judge, for good cause shown, the settlement meetings should not occur by video-conferencing or by teleconferencing. The first one of these dates should be relatively early in the investigation; the second should be approximately midway through the period for discovery; while the last should be set for the period between the close of discovery and before the commencement of the hearing. The parties should also include dates in the proposed schedule for filing the joint settlement conference reports. During the settlement conference, the parties shall also consider and discuss aspects of the case, if any, that they believe may be appropriate and/or ripe for mediation. Any such issues should be included in each settlement conference report and, based on the information provided therein, the parties may be contacted by the Commission for participation in its mediation program.

8. Pre-hearing Submissions

8.1 Pre-hearing Brief

Each party who desires to participate in the final hearing in this investigation and any ultimate hearing on a motion for temporary relief must file a pre-hearing brief with the Office of the Secretary on or before the date ordered in the procedural schedule. As noted in Ground Rule 1.3.1, only the Administrative Law Judge's courtesy copies may be printed on double-sided pages. Said pre-hearing brief should contain the following information (a general outline is set forth in **Appendix B** hereto):

(a) Table of contents and, where applicable, a table for any annotated authorities.

(b) The names of all known witnesses, the order in which the witnesses are to be called for testifying, their addresses, whether

they are event witnesses or expert witnesses, the area of expertise of each witness and a synopsis of each witness' testimony.

(c) A list of all exhibits which the parties will seek to introduce at the hearing.

(d) A list of any stipulations on which the parties have agreed. For agreement there has to be some contact amongst the parties about any stipulation prior to submission of the pre-hearing statement. Parties are encouraged to stipulate to non-controversial facts.

(e) When the alleged unfair act involves a U.S. patent, a statement, as to each claim in issue, indicating how a party wants the language to be interpreted and the basis in detail for that interpretation. Moreover, if there is a dispute as to the interpretation of any language in a claim each party should state what the dispute is, and why it wants the Administrative Law Judge to accept the interpretation the party wants and not the interpretation advocated by an opposing party. If there are words in any claim which are not in dispute, the party should so represent. If a party in a pre-hearing statement does not raise an issue as to a word in each claim in issue, the Administrative Law Judge will take the position that the party will have no objection as to how said word is interpreted by the Administrative Law Judge.

(f) A statement of the issues to be considered at the hearing that sets forth with particularity a party's contentions on each of the proposed issues, including citations to legal authorities in support thereof. Any contentions not set forth in detail as required herein shall be deemed abandoned, or withdrawn, except for contentions of which a party is not aware and could not be aware in the exercise of reasonable diligence at the time of filing the pre-hearing statements. Pursuant to this requirement, each of the parties and the Staff shall take a position on the issues it is asserting no later than the filing of its pre-hearing statement. With respect to alleged infringement of every asserted claim of a U.S. patent – including, if applicable, any allegations of direct infringement, contributory infringement, active inducement of infringement, literal infringement and infringement through equivalents (if applicable) – the party should take a position as to each claim in issue with respect to why each accused product does or does not so infringe and state in detail its basis.

(g) If it is the position of the party that it may want to hear live testimony at the hearing before taking a position as to how certain words of each claim in issue should be interpreted, said position should be made clear and the reasons set forth as to why a party needs to hear live testimony before taking a position. In view of the opportunity for discovery, it is expected that it is a rare instance when a party cannot take a position on claim interpretation before a hearing. Moreover, the parties should be aware of their burdens of proof and accordingly, if a party who has a burden does not believe it can sustain its burden at the hearing, appropriate action should be taken by the party before the hearing.

(h) A discussion by any party relying on prior art of the specific applicability of each citation of prior art to each of the claims in issue, citing the specific portion of the prior art referred to, e.g., by page and column, etc. If a piece of art is not applied, it is no longer considered pertinent.

(i) A proposed agenda for the pre-hearing conference.

(j) Estimated date and approximate length for appearance of any live witnesses at the hearing (all parties who will appear at any hearing should confer on estimated dates and approximate length prior to submission of their pre-hearing statements).

(k) A statement as to the use of depositions. Deposition transcripts may be received into evidence for substantive purposes by the Administrative Law Judge pursuant to Commission rule 210.28(g) and (h). If depositions are to be offered into evidence for substantive purposes, i.e., other than for impeachment purposes, the offering party must specifically designate the respective pages of the deposition to be relied on no later than the date set for submission of documentary exhibits. The designated pages shall be offered into evidence as a documentary exhibit pursuant to ground rule 12(ii)(a), i.e., all pages designated from a given deposition shall be offered together as a single documentary exhibit and all portions of a deposition not designated shall be deleted. If objections requiring a ruling by the Administrative Law Judge were made during a deposition, such objections shall be also referenced. Any deposition offered into

evidence shall have been signed by the deponent unless it is clear from the deposition that the deponent has waived the signing.

(l) A statement as to whether a party wishes to make an opening argument and a closing argument. This should also include a statement on whether a party desires to make a closing argument at the end of the hearing or after the Administrative Law Judge has received the parties' post-hearing submissions. Whether opening and closing arguments are had is discretionary with the Administrative Law Judge.

8.2 High Priority Objections for Pre-hearing Conference.

Each party's objections to direct exhibits, rebuttal and/or supplemental exhibits shall be accompanied by another submission listing and providing a narrative explanation of the objections to exhibits which the party believes to be of high priority for discussion and/or ruling at the Pre-hearing conference. The objections placed on the high priority list may be taken from the party's objections to direct, rebuttal and/or supplemental exhibits. Each side shall place more than ten objections on the high priority list.

High priority objections and responses to high priority objections shall include the exhibit(s) that are the subject of the objection and/or exhibit(s) that are referenced or discussed in the objection or response. Any high priority objection that does not include said exhibit(s) will not be considered. Copies of said exhibits shall be submitted in electronic format.

8.3 Motions *in Limine*

Parties shall be limited to a maximum of ten (10) motions *in limine* for each side unless otherwise permitted by the Administrative Law Judge. For those investigations with multiple respondents, the number of motions *in limine* is limited to a maximum of 10 for all respondents collectively. Additional motions *in limine* may be permitted within the discretion of the Administrative Law Judge. The parties should not try to circumvent the limitation by including numerous subsections in each motion *in limine*.

Motions *in limine* and responses to motions *in limine* shall include the exhibits that are the subject of the motion and/or exhibits that are referenced or discussed in the motion or response. Any motions *in limine* that do not include said exhibits will not be considered. Copies of said exhibits shall be submitted in electronic format.

9. Hearing Exhibits

9.1 Material To Be Received Into Evidence

Only factual material and expert opinion shall be received into evidence. Legal argument shall be presented in the briefs.

9.2 In Camera Treatment of Confidential Information

Each party shall reassess the confidentiality of documents so designated prior to their offer into evidence at the hearing. Information submitted as confidential business information during discovery may be received in camera in the evidentiary record only in accordance with the following procedures:

(a) Each party, before submitting its own documents as proposed exhibits in accordance with the schedule for pre-hearing submissions set forth in the procedural schedule, shall re-evaluate the confidential nature thereof and, only where appropriate, stamp the proposed exhibit "In Camera," or equivalent language pursuant to Commission rules.

(b) Where documents of a supplying party are included among the proposed exhibits of another party, the supplying party, shall re-evaluate the confidentiality thereof and, only where appropriate, notify the party proposing use of the document as an exhibit that upon re-evaluation the document should be re-designated as "In Camera," or equivalent language, no later than the last business day before the pre-hearing conference.

(c) In each such case under (a) and (b) above where a proposed exhibit is designated "In Camera," or equivalent language, the party making such designation shall submit a written declaration from a person knowledgeable thereof giving the basis for such confidential designation. The declaration must provide facts indicative that the subject matter claimed to be confidential in the exhibit has been kept confidential and has not been disclosed to the public in form or in substance, and that the information sought to be protected as confidential is not readily ascertainable by others from public sources. The declaration shall also provide facts indicative that the information sought to be protected as confidential is of current or future significant commercial value. Confidential business information is defined in Commission rule 201.6(a).

(d) If there are categories or types of exhibits for which there rationally can be a knowledgeable, unitary statement of justification for confidential treatment, then such a unitary

statement may be made for such categories of confidential material. Parties, however, should strive to keep as much of the record public as possible. For example, a party in an attempt to justify the confidential status of certain documents, may not protect information as confidential merely by submitting a unitary statement which merely characterizes the documents as "marketing documents" or "sales documents." The declaration required shall be submitted on a date set in the procedural schedule to be issued after the preliminary conference.

(e) Where an exhibit contains both confidential and non-confidential information, the party marking such designation shall set off in brackets the specific information which is considered confidential (unless the nature and extent of the non-confidential information contained in the exhibit is such that disclosure would not meaningfully supplement the public record, in which case the party may designate the entire exhibit confidential).

(f) In the case of information from a non-party to this investigation which has been received as confidential business information under the terms of the protective order, if it is offered as a proposed exhibit by a party, it shall be stamped "In Camera," or with equivalent language.

(g) Only proposed exhibits bearing the stamp "In Camera" or equivalent language at the commencement of the hearing will be accorded confidential treatment under the terms of the Protective Order, if and when they are received into the record at the hearing. The Administrative Law Judge or the Commission may place such information on the public record upon a finding that it is not confidential business information, or that its disclosure is necessary for the proper disposition of the proceeding, as provided in paragraph 2 of the Protective Order. Any party who has supplied information designated as confidential bears the burden of proof as to the confidentiality thereof.

(h) Identification of exhibits subject to the protective order should carry a number followed by "C".

(i) During an evidentiary hearing it is imperative that the private parties monitor what should or should not be a part of the public

transcript. Failure to do so could remove the confidential designation from an exhibit.

9.3 Legal Experts.

Legal experts may only testify as to procedures of the U.S. Patent and Trademark Office.

9.4 Witness Testimony

9.4.1 Witness Statements in Lieu of Direct Testimony

All direct witness testimony, with the exception of adverse witnesses and third party witnesses,[6] shall be made by witness statements in lieu of live testimony. Staff may, however, ask the witness supplemental direct testimony on the witness stand. Witness statements shall be marked and offered into evidence as exhibits and witnesses shall be available for cross-examination on the witness stand unless waived. Witnesses will not read their prepared testimony into the record.

9.4.1.1 Cross-examination of Witnesses Relying on Witness Statements

Witnesses whose direct testimony or rebuttal testimony is in exhibit form (witness statements) shall be available for cross-examination unless waived. Such witnesses shall have available work papers used in preparing the exhibits. Witnesses should not read their prepared testimony into the record.

9.4.1.2 Witness Statements Must Reflect Witness's Testimony

A witness statement is to reflect the testimony of the witness and not that of counsel or other persons. If there appears to be good cause for belief that a witness statement does not comply with this requirement, voir dire examination may be allowed at the discretion of the Administrative Law Judge to determine whether the witness statement is based on the witness' own knowledge and testimony. Should the Administrative Law Judge determine that the witness statement is not in compliance with this requirement, the Administrative Law Judge, in his discretion, may direct testimony of the witness or portions thereof be stricken from the record.

9.4.1.3 Witness Statement Format

A witness statement shall contain separately numbered questions which are asked by counsel, with each question followed by the witness' own answer to that question, and with the final question from counsel asking the witness whether or not the witness statement contains the

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[6] Third party witnesses are not prohibited from filing a witness statement.

witness' answers to the questions from counsel, followed by the witness' answer to this question. In any witness statement, counsel should not provide the substance of an answer.

9.4.1.4 Language of Witness Statement

A witness statement may be in the language of the witness. However a foreign language witness statement shall be accompanied by a translation thereof. If any of the parties dispute the translation, then the translation must be certified by a qualified and neutral translator upon whom counsel can agree.

9.4.2 Witness Summary

With respect to witnesses who will give live direct testimony, each party offering such a witness should submit a witness summary, which summary is to be served on the parties at the same time as the exhibits and which summary should outline the topics upon which the witness intends to testify. Said summary is not to be marked as an exhibit and is not to be confused with a witness statement. The purpose of the summary is to prevent surprise at the hearing.

9.5 Technical Expert Testimony

Qualified expert opinion testimony on technical issues may be offered by the parties to the extent that such testimony is likely to assist the Administrative Law Judge in the understanding of evidence or in the determination of a fact in issue. Expert opinion testimony will not be received on the legal standards applicable to any patent and/or trademark issues.[7] A witness' ultimate conclusion should be supported by a detailed testimony of the witness' reasons for that conclusion.

9.5.1 Expert Reports

Pursuant to the procedural schedule, each party, including the Staff, should submit to the Administrative Law Judge, after conferring with each other, two copies of a statement[8] stating its position on whether or not it intends to offer into evidence any expert reports, and identifying any such expert reports. While the Administrative Law Judge does not normally admit expert reports into the record as substantive evidence,[9] he will consider such a request on a case by case basis.

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[7] Legal precedent should be argued in the post-hearing briefs.

[8] Said statement should not be filed with the Commission.

[9] Exhibits and/or attachments to the expert report may be admitted to the extent they are discussed during the expert's testimony.

9.6 Complaint and Responses to the Complaint

Complaints and responses to the complaint, as well as exhibits thereto, may be offered as evidence if marked as exhibits. Whether same is received into evidence is discretionary with the Administrative Law Judge.

9.7 Foreign Language Exhibits

No foreign language exhibit will be received into evidence for substantive purposes unless a translation thereof is provided at the time set for exchange of exhibits. If any of the parties dispute the translation, then the translation must be certified by a qualified and neutral translator upon whom counsel can agree.

9.8 Exhibits.

9.8.1 Exchange of Proposed Exhibits Among Parties.

Copies of documentary proposed exhibits, along with a proposed exhibit list shall be served on the opposing parties (including the Staff) on the date ordered in the procedural schedule. Once the parties have exchanged their proposed exhibit lists, they shall eliminate any duplicative exhibits or renumber such exhibits as joint exhibits and update their exhibit lists before they are submitted to the Administrative Law Judge by the due date in the procedural schedule. Proposed physical and demonstrative exhibits need not be served, but shall be identified in the proposed exhibit list. Proposed physical and demonstrative exhibits, however, must be made available for inspection by the other parties on the date established for the submission and service of proposed exhibits. Proposed exhibits shall not be filed with the Office of the Secretary of the Commission.

9.8.2 Service of Proposed Exhibits Upon Administrative Law Judge.

On the date that is set forth in the procedural schedule, the Administrative Law Judge shall receive an electronic PDF version of all proposed exhibits, along with a proposed exhibit list. If a party has received permission from the Secretary to file the Commission's exhibit set on paper, said party shall also submit a set containing each proposed exhibit in individual folders (which will be used for scanning purposes) as set forth in Ground Rule 9.8.2.1. Clear photocopies may be used instead of original documents.

9.8.2.1 Format of the Commission's Exhibit Set (Paper Version)

The following shall apply ONLY if a party has received permission from the Secretary to file the Commission's exhibit set on paper: in order to facilitate the optical scanning of the exhibits, the exhibits in the Commission set shall consist of 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 contained therein, *e.g.*, RX-14C. In each of the boxes of the Commission exhibit set, the folders containing the exhibits shall be placed in numerical order.

9.8.3 Format of the ALJ's Binder Exhibit Set.

The exhibits in the Administrative Law Judge's binder sets shall be individually tabbed, with each tab reflecting the number of the corresponding exhibit, *e.g.*, CX-3C. Each binder must be labeled on its spine with the name and number of the investigation and the nature of the contents of the binder, *e.g.* Complainant's Exhibits CX-1 through CX-18C.

The exhibits in the binder sets shall be in consecutive numerical order, and shall not be separated according to confidential or public status.

The exhibits in the Administrative Law Judge's binder set may be printed on double-sided pages.

9.8.4 Maintenance and Filing of Final Exhibits and Final Exhibit List.

Each party must submit a final exhibit list prepared in accordance with Ground Rule 9.8.7 reflecting the status of all exhibits, including those admitted and rejected during the hearing on the same date that the post-hearing briefs are due. Any withdrawn exhibit shall be identified on the final exhibit list only by exhibit number and shall indicate that it is withdrawn.

The parties are responsible during the course of the hearing for updating the exhibit lists and for maintaining and updating the Commission set of exhibits, which shall become the set that is filed with Docket Services after the record is closed, as well as for confirming that all admitted and rejected exhibits are included among the Commission exhibits and the final exhibit list at the conclusion of the hearing. Any exhibits that are not included with the Commission exhibits and the final exhibit list at the conclusion of the hearing will not be considered as part of the record to be certified to the Commission when the final initial determination issues.

All final Commission exhibits shall be submitted to the office of the Administrative Law Judge who will transmit the Commission exhibits to Docket Services. The Commission exhibits should not be submitted directly to Docket Services.

9.8.4.1 Submission of Final Exhibits to the Administrative Law Judge

On the same day that initial post-hearing briefs are due, the parties shall submit (1) the Administrative Law Judge's binder set of all the final exhibits as set forth in Ground Rule 9.8.3 for his use in drafting the final initial determination; (2) an electronic version of the final set of

exhibits to the Administrative Law Judge also for his use in drafting the final initial determination;[10] and (3) the Commission set of exhibits.

9.8.4.2 Binder Exhibit Set for the Office of General Counsel

In addition, no later than thirty (30) days after the submission of post-hearing reply briefs, each party shall deliver one additional binder set of copies of all except withdrawn exhibits directly to the Office of General Counsel along with a final exhibit list, with rejected exhibits submitted under separate cover and so marked. In the alternative, the parties may submit this set in electronic form.

9.8.5 Numbering and Labeling of Exhibits.

9.8.5.1 Numbering; Labeling

All Post-trial exhibits must have a four-digit exhibit number, with leading zeros as necessary (e.g., CX-0001, RX-0002C, SDX-0013).

Each type of exhibit (i.e., documentary, physical, or demonstrative) must be submitted by each of the parties on a different CD or set of CDs so they may be uploaded and labeled more reliably by Dockets (e.g. CX, CDX and CPX should be on different CDs) . The exhibits should also be separated based on their confidentiality designation, (i.e., public or confidential). Joint exhibits should also be submitted separately based on the type of exhibit. " Each CD must have a label with the investigation name and number, and the range of exhibits contained thereon

Each exhibit shall be marked by placing a label bearing the exhibit's number (*e.g.*, CX-0003C or RX-0005) 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.

Respondent(s) shall coordinate their numbering to avoid duplication in numbering. Additionally, the parties shall coordinate exhibits to avoid unnecessary duplication (*e.g.*, patents; file wrappers). Further, all exhibits or copies of exhibits shall be clear and legible. Lastly, each exhibit may be assigned no more than one number.

9.8.5.2 **Documentary Exhibits**

Written exhibits shall be marked serially commencing with the number "0001" and preceded by the prefix "CX" for Complainant's exhibits, "RX" for Respondent(s)' exhibits, "SX" for the Commission Investigative Attorney's exhibits, and "JX" for any joint exhibits. The parties shall not "reserve" numbers, but instead shall assign all numbers in consecutive sequence.

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[10] The ALJ's electronic set may be submitted on hard drive or flash drive. The Commission set must be submitted on CDs. *See* Ground Rule 9.9.

9.8.5.3 Confidential Exhibits

If an exhibit contains confidential business information a "C" 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 exhibits lists shall be public documents.

9.8.5.4 Physical Exhibits

Physical exhibits shall be numbered in a separate series commencing with "0001" preceded by the prefixes "CPX", "RPX", "SPX" and "JPX", for Complainant, Respondent, the Staff, and joint exhibits, respectively. Confidential exhibits shall be denoted with the letter "C" as in the case of documentary exhibits.

9.8.5.5 Demonstrative Exhibits

Demonstrative exhibits shall be numbered in a separate series commencing with "0001" preceded by the prefixes "CDX", "RDX", and "SDX", for Complainant, Respondent(s), and the Staff, respectively. Confidential exhibits shall be denoted with the letter "C". Additionally, the parties shall provide the Administrative Law Judge with two (2) copies of key demonstrative exhibits (*e.g.*, charts, drawings, etc.) reduced to 8 ½ inches x 11 inches. Demonstrative exhibits shall indicate what documentary and/or physical exhibit was the source for its creation, if applicable.

9.8.5.6 Joint Exhibits; Deposition Transcripts as Joint Exhibits

If agreed to by the parties, the parties may submit joint documentary exhibits, including for example, a patent in issue, prosecution history, etc.

The joint documentary exhibits shall include an index which identifies the parties that have submitted each joint exhibit and should be arranged based on the various groups offering such exhibits. For example, if complainant and respondent A have offered a series of joint documentary exhibits, said exhibits would appear as the first group of joint documentary exhibits in the joint documentary exhibit index. The index would then include all joint documentary exhibits offered by complainant and respondent B, then joint documentary exhibits offered by complainant and respondent C, etc.

The joint documentary exhibits, as to deposition transcripts, shall include an index indicating the page(s) and line number(s) for each portion of deposition transcript offered. Miniscripts (4 pages of deposition transcript that are contained on a single 8 ½ x 11" page) are permitted.

In addition to the index to the joint documentary exhibits, the parties should indicate whether there are any outstanding objections to the portions of the deposition transcript(s) offered as substantive evidence and whether the parties request that the Administrative Law Judge issue a ruling on such objections.

9.8.6 Public and Confidential Exhibits.

If any portion of an exhibit contains confidential business information, the entire exhibit shall be treated as confidential. For certain lengthy exhibits of which only portions are confidential, the parties may be asked to submit a public version of the exhibit. Confidential exhibits and public exhibits shall be placed on separate electronic media, which are clearly marked as containing either confidential or public exhibits. Because public and confidential exhibits are to be placed in separate electronic media, numerical gaps may appear on each CD.

The exhibits in the ALJ's binder sets shall be in consecutive numerical order, and shall not be separated according to confidential or public status.

9.8.7 Exhibit Lists.

Every exhibit list shall consist of a table enumerating all exhibits serially by exhibit number and identifying 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.

In the case of joint exhibits, every exhibit list shall identify such exhibits, and the parties shall meet and confer before submitting the lists to agree upon a common descriptive title, statement of purpose, and sponsoring witnesses that shall appear on every list for each joint exhibit (*see* Ground Rule 9.8.1).

In any exhibit list submitted prior to the offer of any 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.*, CX-1, CX-2, CX-3C, CX-4, CX-5C, etc.

9.8.8 One Document Per Exhibit; All Pages Paginated and/or Bates-numbered.

Except for good cause shown, each exhibit shall consist of no more than one document and every page of every document shall be paginated and/or Bates numbered in accordance with Ground Rule 4.7 above. Exceptions to this "one document per exhibit" rule include instances when it would be appropriate to group certain documents together as one exhibit, such as a group of invoices or related e-mails.

9.8.9 Witness Exhibit Binder.

In examining witnesses on direct during the hearing, counsel shall provide the witness, the Administrative Law Judge, and other counsel, just prior to the commencement of the examination of each witness, a binder (or binders) containing all the exhibits in numerical order, and individually tabbed, that the examining attorney intends to use with that witness.

In examining adverse witnesses, or cross-examining witnesses, counsel shall provide the witness, the Administrative Law Judge, and other counsel, just prior to the commencement of the examination of each witness, with a binder containing all exhibits, in numerical order, and individually tabbed, to be used in the examination of the witness.

Each witness binder must be labeled on its spine with the name and number of the investigation and the nature of the contents of the binder, e.g. Cross-Examination of Witness - Volume 1 of 1.

In addition, the front of the witness binder must include a table of all exhibits to be used in the examination of the witness with a blank column entitled "Received Into Evidence" or having similar language.

If there are certain exhibits (*i.e.* patent, prosecution histories) that will be used frequently with more than one witness, a separate exhibit binder containing those exhibits may be used with those witnesses and do not have be included in the separate witness binder for each witness.

9.8.10 References for Exhibit.

If it is appropriate, exhibits shall cite sources of information and methods employed in formulating accounting, economic or other types of data. Rebuttal exhibits, if submitted, shall refer specifically to exhibits being rebutted.

9.8.11 Authenticity.

All documents that appear to be regular on their face shall be deemed authentic, unless it is shown by particularized evidence that the document is a forgery or is not what it purports to be.

9.8.12 Sponsoring Witness.

Each exhibit that is offered into evidence shall have a "sponsoring witness." One of the purposes of having a sponsoring witness associated with an exhibit is to establish a foundation for the exhibit and to prevent exhibits from coming into the record that have no explanation regarding it. Sponsoring witness testimony does not necessarily have to be in the form of live testimony if all parties (Complainant(s), Respondent(s) and Staff) are in agreement to allow otherwise. For example, if parties are willing to stipulate and agree to designate portions of deposition testimony into the record in lieu of live testimony, along with certain exhibits that were discussed during the deposition, such request will generally be permitted, as long as the exhibit was clearly identified and discussed during the deposition and that the deposition pages discussing the exhibit are included in the designation.

Except in an investigation in which there is no participating Respondent, if a party believes evidence to be non-controversial and to be appropriate for receipt in evidence without a sponsoring witness, that party may present with each such exhibit on or before the due date set forth in the procedural schedule: (1) an affidavit or declaration that the declarant prepared or someone under the declarant's direction prepared the exhibit; (2) a request that the exhibit be received in evidence without a witness at the hearing; and (3) a statement of grounds for receiving the exhibit in evidence without a witness at the hearing. Any party who wishes to cross-examine the declarant may object in writing within three (3) days of service of the affidavit or declaration and request, specifying whom the party intends to examine. In the absence of objections, and upon good cause shown, the exhibit shall be received in evidence without a witness subject to the right of objection on other grounds.

9.9 Commission Set of Exhibits

The Commission set of exhibits shall be submitted in electronic format as set forth in 19 C.F.R. § 210.4. The procedure for submitting the exhibits electronically is set forth at the following Internet address:

http://www.usitc.gov/docket_services/documents/EDIS3UserGuide-CDSubmission.pdf

A Table of Contents (TOC) file which lists the names of all files on the disc should be created and included on each disc.

Each type of exhibit (i.e., CX, CDX, CPX, RX, RDX, RPX, JX, JDX, JPX, SX, SDX, SPX) must be submitted on a different CD or set of CDs so they may be uploaded and labeled more reliably by Dockets. The exhibits should also be separated based on their confidentiality designation, (i.e., public or confidential).

Each CD must have a label with the investigation name and number, and the range of exhibits contained thereon.

The Commission's set of exhibits may not be submitted on a hard drive or flash drive.[11]

9.9.1 Delivery to Administrative Law Judge

The electronic media containing the Commission set of exhibits should be delivered to the Administrative Law Judge's office on the same day that initial post-hearing briefs are due. It should not be delivered directly to Docket Services.

9.10 Exhibits for the Administrative Law Judge During the Hearing

For any exhibit in dispute or to be discussed at the hearing that is not included in a witness exhibit binder or subject to a motion *in limine* or high priority objection, a copy of said exhibit shall be provided for the Administrative Law Judge for his review and consideration.

10. Hearing Procedure

10.1 Hearing; Order of Examination.

The order of examination at the hearing is as follows (subject to alteration at the Pre-hearing conference or other changes in the discretion of the Administrative Law Judge):

(1) Complainant's Case-in-Chief.
(2) Respondent's Case-in-Chief (In the event there is more than one respondent, the order of presentation will be determined at the Pre-hearing conference. Respondents where possible should avoid unnecessary duplication of effort.)
(3) Commission Investigative Attorney's Case-in-Chief.
(4) Complainant's Rebuttal
(5) Respondent's Rebuttal

10.2 Opening Statement and Closing Argument.

[11] The ALJ's electronic set MAY be submitted on hard or flash drive.

The Administrative Law Judge normally does not schedule opening statements and closing arguments. Parties may request opening statements and closing arguments, which are to be held at the discretion of the Administrative Law Judge. If permitted, opening statements are brief and limited to one hour for the complainant, one hour for respondent(s), and thirty minutes for the Commission Investigative Staff and closing arguments are held after all post-hearing briefs have been submitted.

10.3 Hearing Hours.

Normal hearing hours are 9:00 a.m. to 5:00 p.m. with a one-hour luncheon recess, beginning each day at approximately 12:15 p.m.

10.4 Hearing Decorum.

10.4.1 Conversations at Hearing.

No cross conversation between opposing counsel will be permitted. Rather if counsel has anything to say to opposing counsel, such statement must be made through the Administrative Law Judge.

10.4.2 Reading Matter; Cell Phones and Beepers; Food and Beverages.

No reading of extraneous material will be permitted in the courtroom. Audible cell phone and beeper signals shall be turned off in the courtroom during hearing, and all cell phone calls must be taken outside of the courtroom. No food will be permitted in the courtroom during hearing, unless otherwise permitted by the Administrative Law Judge. Coffee and other beverages are permitted in the courtroom during the hearing.

10.4.3 Swearing of Witnesses.

When a witness is sworn, the witness shall remaining standing. All others in the hearing room must be seated and quiet.

10.4.4 Arguments on Objection.

Arguments or objections may only be made by counsel prior to a ruling. Once a ruling is made, no further discussion of the matter will be permitted.

10.5 Examination of Witnesses.

10.5.1 Scope of Examination; In General.

Except in extraordinary circumstances, examination of witnesses for Complainant's case-in-chief and Respondent(s)' case-in-chief shall be limited to direct, cross, redirect, and re-cross.

10.5.2 Scope of Cross-examination.

Cross-examination will be limited to the scope of the direct examination. For witnesses called for the purpose of giving testimony in support of a position on an issue that is the same as the position on that issue of a party desiring cross-examination of that witness, that party is precluded from asking that witness leading questions; *i.e.* "no friendly cross-examination."

When counsel is presenting a witness with a question that refers back to the witness's previous testimony, counsel shall refrain from summarizing the witness's previous testimony because this can lead to a time-consuming objection that counsel's summary was not an accurate recitation of the witness's previous testimony. If counsel wishes to refer back to a witness's previous testimony, counsel must use direct quotations.

10.5.3 Scope of Redirect and Re-cross Examination.

Redirect examination will be limited to matters brought out on cross-examination. Re-cross examination will be limited to matters brought out on redirect examination.

10.5.4 Coordination of Witnesses.

The parties are expected to coordinate examination of witnesses so as to allot appropriate time for examination of each of the witnesses within the total time allotted for the hearing.

10.5.5 Documents Presented to Witnesses.

Any document which counsel wishes to show to a witness must first be shown to opposing counsel.

10.5.6 Scope of Expert Witness Testimony.

An expert's testimony at the hearing shall be limited in accordance with the scope of his or her expert report(s), deposition testimony, or within the discretion of the Administrative Law Judge.

10.5.7 Coordination of Respondents' Cross-examination.

Respondents shall coordinate cross-examination through one attorney as far as practicable to avoid duplication. If that is not possible, counsel who intends to cross-examine must be

present in the hearing room during the entire preceding cross-examination of the witness so as not to engage in repetitive questioning.

10.5.8 Requests for Clarification of a Question.

Requests for clarification of a question only may come from the witness or the Administrative Law Judge.

10.5.9 Use of Translators.

If a translator will be used at hearing, the parties are responsible for obtaining one qualified, neutral translator upon whom counsel can agree. It is suggested that the translator be chosen from a list of approved translators, such as may be kept by various federal district courts or federal agencies. Translators will be sworn in.

10.5.10 Conferring with Witness during a Break in Testimony

Counsel shall not confer with a witness during a break in the witness's testimony on the witness's substantive testimony.

11. Post-Hearing Submissions

11.1 Initial Post-trial Briefs; Filing and Content.

On or before the date set forth in the procedural schedule, the parties shall file a post-trial brief. In addition, each party must submit a copy of its final exhibit list with its post-trial brief. The post-trial brief shall discuss the issues and evidence tried within the framework of the general issues determined by the Commission's Notice of Investigation, the general outline of the briefs as set forth in **Appendix B**, and those issues that are included in the pre-trial brief and any permitted amendments thereto. All other issues shall be deemed waived.

On the same day the initial posthearing briefs are due, the parties shall file a comprehensive joint outline of the issues to be decided in the final Initial Determination. The outline shall refer to specific sections and pages of the posthearing briefs. Moreover, the claim terms briefed by the parties must be identical. For example, if the construction of the claim term "wireless device" is disputed, the parties must brief that exact claim term. If a party briefs only a portion of the claim term such as "wireless" or "device," that section of the brief will be stricken.

Reference to supporting authority for arguments shall include reference to the evidence as illustrated in Rule 11.4.2. A reasonable page limit will be imposed for all post-trial briefs, which will be determined on a case-by-case basis.

In addition to filing the brief, each party shall submit a copy of its brief in Word format, on disc or via e-mail, to the Administrative Law Judge's Attorney-Advisor.

As noted in Ground Rule 1.3.1, only the Administrative Law Judge's courtesy copies may be printed on double-sided pages.

11.2 Final Post-Hearing Exhibit List and Maintenance of Commission Exhibits

11.2.1 Final Exhibit Lists

Each party must submit, soon after the close of the evidentiary record at a time to be set by the Administrative Law Judge during the hearing, (1) a final exhibit list reflecting the status of all exhibits, including those admitted and rejected during the hearing, (2) a separate list of all confidential exhibits, and (3) a separate list of all public exhibits. Any withdrawn exhibit shall be identified on the final exhibit list only by exhibit number and shall indicate that it is withdrawn.

11.2.2 Commission Exhibits

The parties are responsible for maintaining the Commission exhibits during the course of the hearing, as well as confirming that all admitted and rejected exhibits are included among the Commission exhibits at the conclusion of the hearing. Any exhibits that are not included with the Commission exhibits at the conclusion of the hearing will not be considered as part of the record to be certified to the Commission when the final initial determination issues or, when the exhibits relate to a hearing on any pending motion for temporary relief, when the initial determination on temporary relief issues. See also Ground Rule 9.8.4.

To facilitate the document imaging process, soon after the close of the evidentiary record, all parties will be required to segregate the Commission set of original exhibits into confidential and public exhibits. See Ground Rule 9.8.6 supra.

11.3 Development of Issues

Any issues of patent claim interpretation, including specific contentions for proposed interpretations or pertinent claim language, shall be fully developed at the hearing, in the post-hearing briefs and in the proposed findings of fact. Any economic issues to be tried – such as importation and sale, sufficiency of domestic activities, etc. – shall also be fully developed at the hearing and in the post-hearing submissions. In addition, unless the Administrative Law Judge provides otherwise by written order, the issues concerning permanent relief and bonding,

including the appropriate remedy in the event that the Commission finds a violation of section 337 and the amount of the bond to be posted during Presidential review period shall be fully developed at the hearing, in the post-hearing briefs.

11.4 Proposed Findings of Fact; Form and Content.

In accordance with Commission Rule 210.40, any party may elect to file proposed findings of fact and conclusions of law. If a party chooses to file proposed findings of fact and conclusions of law, they must be filed on the same date as the initial post-trial brief. Any facts and law addressed in proposed findings of fact and conclusions of law must also be addressed in the post-trial briefs and shall not be incorporated by reference in the post-trial briefs.

11.4.1 Form of Findings of Fact

Proposed findings of fact should be in the form of numbered paragraphs and should collectively reflect all section 337 elements, all issues set forth in the Scope of Investigation of the Notice of Investigation, and any other issues that arose during the course of the investigation. Section headings should be used to set off proposed findings that relate to particular section 337 elements and issues. Separate section headings have included, where applicable, *e.g.*, Jurisdiction, Private Parties, Products In Issue, Technical Background, Validity, Unenforceability, Infringement, Importation, the Domestic Industry, etc.. The sections and sub-sections should reflect the issues in a given investigation.

11.4.2 Content of Findings of Fact

Proposed findings of fact and proposed rebuttal findings of fact must be assertions of fact only, without argument. Argument is appropriate to the post-hearing brief and reply brief.

The findings should reflect all section 337 elements, all issues outlined in the notice of investigation, and any other issues that arose during the course of the investigation. Section headings consistent with the outline of the post-hearing brief may be used to set off paragraphs that relate to particular section 337 elements or issues. To be accepted without alteration, a proposed finding of fact must be an assertion of fact only (*i.e.*, without argument more appropriately placed in the post-hearing rief). Each proposed finding of fact must be followed with citations to supporting authority in the evidence. Examples of commonly used citations are as follows:

Transcript: Smith, Tr. 895 [Witness Name, Transcript page, Line number(s)]
Exhibits: CX 3; RX 5; SPX 2
Pleadings: Complaint ¶ 4, at 2; XYZ Corp. Response to Complaint ¶ 5, at 3.

11.4.3 Objections and Rebuttals to Proposed Findings of Fact; Form and Content.

A party is not required to respond to Findings of Fact, but may choose to do so. The lack of response to the Finding of Facts does not mean that it is admitted, unless specifically stated as such. Any responses or objections to Findings of Fact are due on the same day as post-hearing reply briefs. A party's objections and rebuttals to proposed findings of fact of an opposing party shall repeat the text and citation to the record of the proposed finding of fact being objected to or rebutted and its paragraph number. Rebuttals shall assert only facts (*i.e.*, without argument more appropriately placed in the post-hearing reply brief), and must be followed with citations to the party's own proposed findings of fact or to other supporting authority in the evidence.

11.5 Post-hearing Reply Briefs; Filing and Content.

On or before the date set forth in the procedural schedule, the parties shall file a post-hearing reply brief. The post-hearing reply brief shall discuss the issues and evidence discussed in the initial post-hearing briefs of each opposing party, following the general outline of the briefs as set forth in Appendix B.

Reference to supporting authority for arguments shall include reference to the evidence as illustrated in Rule 11.4.2. A reasonable page limit will be imposed for all post-trial briefs, which will be determined on a case-by-case basis.

In addition to filing the brief, each party shall submit a copy of its brief in Word format, on disc or via e-mail, to the Administrative Law Judge's Attorney-Advisor.

As noted in Ground Rule 1.3.1, only the Administrative Law Judge's courtesy copies may be printed on double-sided pages.

11.6 Coordination of Post-hearing Briefs

To the extent there is more than one complainant and/or respondent in an investigation, they should coordinate their efforts and submit a single brief for each side, *i.e.*, a single initial post-hearing brief for complainant(s) and a single initial post-hearing brief for respondent(s). Exceptions to this rule will be made on a case by case basis. This rule also applies to post-hearing reply briefs.

12. Citation of Cases

The official case reporter citation must be included for any published decision or order that is cited in a party's briefs or pleadings. Additionally, the docket number and the full date

of the disposition must be included in the citation of any unreported decision or order that is referenced by the parties. A copy of any cited decision or order that is not available on LEXIS shall be provided in an appendix to the brief or pleading. Further, every party must cite to the specific page(s) of the cited decision or order that includes the holding for which the authority is cited.

13. Cooperation Among Parties

Due to the time limitations imposed by section 337, counsel shall attempt to resolve, by stipulation or negotiated agreement, any procedural problems encountered, including those relating to discovery and submission of evidence. To assure the proper cooperative spirit in this investigation, continuing good faith communications between counsel for the parties is essential and is expected.

14. Ex Parte Contacts

There shall be no *ex parte* contacts with the Administrative Law Judge. Any questions of a technical or procedural nature shall be directed to the Administrative Law Judge's attorney-advisor, Kevin Cherry, at (202) 205-2692 or kevin.cherry@usitc.gov.

APPENDIX A

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **Certain . . .**	**Investigation No. 337-TA-___**

SUBPOENA DUCES TECUM

TO: NAME
ADDRESS

TAKE NOTICE: By authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), 5 U.S.C. § 556(c)(2), and pursuant to 19 C.F.R. § 210.32 of the Rules of Practice and Procedure of the United States International Trade Commission, and upon an application for subpoena made by ["Complainant(s)" / "Respondent(s)"/ etc., followed by name of company]_ _____,

YOU ARE HEREBY ORDERED to produce at _____, on_ _____, or at such other time and place agreed upon, all of the documents and things in your possession, custody or control which are listed and described in Attachment A hereto. Such production will be for the purpose of inspection and copying, as desired.

If production of any document listed and described in Attachment A hereto is withheld on the basis of a claim of privilege, each withheld document shall be separately identified in a privileged document list. The privileged document list must identify each document separately, specifying for each document at least: (1) the date; (2) author(s)/sender(s); (3) recipient(s), including copy recipients; and (4) general subject matter of the document. The sender(s) and recipient(s) shall be identified by position and entity (corporation or firm, etc.) with which they are employed or associated. If the sender or the recipient is an attorney or a foreign patent agent, he or she shall be so identified. The type of privilege claimed must also be stated, together with a certification that all elements of the claimed privilege have been met and have not been waived with respect to each document.

If any of the documents or things listed and described in Attachment A hereto are considered "confidential business information," as that term is defined in the Protective Order attached hereto, such documents or things shall be produced subject to the terms and provisions of the Protective Order. Any motion to limit or quash this subpoena shall be filed within ten (10) days after the receipt hereof. At the time of filing of any motion concerning this subpoena, two courtesy copies shall be served concurrently on the Administrative Law Judge at his office.

IN WITNESS WHEREOF the undersigned of the United States International Trade Commission has hereunto set his hand and caused the seal of said United States International Trade Commission to be affixed at Washington, D.C. on this ___ day of _____, 200_.

Theodore R. Essex
Administrative Law Judge
United States International Trade Commission

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **Certain . . .**	**Investigation No. 337-TA-___**

SUBPOENA AD TESTIFICANDUM

TO: NAME
ADDRESS

TAKE NOTICE: By authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), 5 U.S.C. § 556(c)(2), and pursuant to 19 C.F.R. § 210.32 of the Rules of Practice and Procedure of the United States International Trade Commission, and upon an application for subpoena made by ["Complainant(s)" / "Respondent(s)" / etc., followed by name of company]_ _____,

YOU ARE HEREBY ORDERED to present yourself for purposes of your deposition upon oral examination on_____, at_____, or at such other time and place agreed on, concerning the subject matter set forth in Attachment A hereto.

This deposition will be taken before a Notary Public or other person authorized to administer oaths and will continue from day to day until completed.

If any of your testimony is considered "confidential business information," as that term is defined in the Protective Order attached hereto, such testimony shall be so designated and treated according to the terms and provisions of the Protective Order.

Any motion to limit or quash this subpoena shall be filed within ten (10) days after the receipt hereof. At the time of filing of any motion concerning this subpoena, two courtesy copies shall be served concurrently on the Administrative Law Judge at his office.

IN WITNESS WHEREOF the undersigned of the United States International Trade Commission has hereunto set his hand and caused the seal of said United States International Trade Commission to be affixed at Washington, D.C. on this ___ day of _____, 200_.

_____
Theodore R. Essex
Administrative Law Judge
United States International Trade Commission

APPENDIX B

GENERAL OUTLINE FOR ALL BRIEFS

I. INTRODUCTION
- A. Procedural History
- B. The Parties
- C. Overview of the Technology
- D. The Patents at Issue
- E. The Products at Issue

II. JURISDICTION

III. PATENT "A"
- A. Claim Construction
  - 1. First Disputed Claim Term (Claims 1, 2, 3, . . .)
  - 2. Second Disputed Claim Term (Claims 1, 2, 3, . . .)
- B. Infringement
  - 1. Claim 1
  - 2. Claim 2
- C. Domestic Industry - "Technical Prong"
- D. Validity
  - 1. Anticipation Under 35 U.S.C. § 102(a)
  - 2. Obviousness Under 35 U.S.C. § 103(a)
- E. Unenforceability
- F. Other Defenses

IV. PATENT "B" ...

V. DOMESTIC INDUSTRY - ECONOMIC PRONG
- A. Significant Investment in Plant and Equipment
- B. Significant Employment of Labor or Capital

VI. REMEDY AND BONDING

APPENDIX C

Appendix C Certain Deadlines from Commision and Ground Rules*

C = complaint; NOI = notice of investigation; MTR = motion for temporary relief

SD = summary determination; PO = protective order; ALJ = administrative law judge

Document**	Due Date
All Submissions Require Electronic Copies in Word, WordPerfect® 11 or PDF Format via E-mail or on Floppy Disk or CD	served on ALJ on the same day as filing [Ground Rule 1.3.2]
Response to Complaint	20 calendar days from date of service of C and NOI [Commission Rule 210.13]
- when temporary relief sought (and investigation is not "more complicated")	10 calendar days from date of service of C, NOI, and MTR [Commission Rule 210.13]
Response to Motions	10 calendar days after receipt of motion in Office of Secretary [Ground Rule 3.6]
- for summary determination / any other termination motions	10 calendar days after receipt of motion in Office of Secretary [Ground Rule 3.6]
Response to Discovery Request	10 calendar days after service, but parties can agree to extension of time not to exceed 10 days provided no MTR is pending [Ground Rule 4.2, 4.4]
Redacted Non-Confidential Versions of Confidential Submissions [See Commission Rule 210.4(f)(3)(ii)]	10 calendar days after service on the Commission or ALJ [Ground Rule 1.7]
- for pre- or post-hearing submissions	10 calendar days after filing [Ground Rule 1.7]
Proposed Public Versions of Orders/ID	served on all parties at least 2 business days prior to submission to ALJ [Ground Rule 1.12]
- comments regarding another party's proposed public version	same date as specified for submission of proposed public version to ALJ [Ground Rule 1.12]
Privileged Matter (e.g., work product, attorney/client)	each document withheld should be identified in a privileged list to be provided to the requesting party within 10 calendar days following the day that objections based on privilege are due [Ground Rule 4.9]
Physical and Demonstrative Exhibits	must be made available for inspection by the other parties on the same day of submission and service of proposed exhibits [Ground Rule 9.8.1]
GC Binder Set	additional binder set of exhibits (whether received in evidence or rejected, but excluding withdrawn exhibits) must be submitted to GC within 30 days after conclusion of hearing [Ground Rule 9.8.4]

* Listed due dates represent the default rules, and are subject to change by order of the ALJ. This appendix is not intended to supplant the Commission Rules or Ground Rules, and as such, this appendix should not be cited to directly.

** 2 courtesy copies of all filed documents should be served upon the ALJ. [Ground Rule 1.3].

CERTAIN VISION-BASED DRIVER ASSISTANCE SYSTEM CAMERAS AND COMPONENTS THEREOF

Inv. No. 337-TA-907

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER 2** has been served by hand upon the Commission Investigative Attorney, Lisa A. Murray, Esq., and the following parties as indicated, on **January 28, 2014.**

Lisa R. Barton, Acting Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainant Magna Electronics Inc.:

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Washington, DC 20005

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( ) Via Express Delivery
(✓) Via First Class Mail
( ) Other:_____

Respondent:

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( ) Via Express Delivery
(✓) Via First Class Mail
( ) Other:_____

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