UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of	
CERTAIN COMPOSITE AEROGEL INSULATION MATERIALS AND METHODS FOR MANUFACTURING THE SAME	**Inv. No. 337-TA-1003**

ORDER NO. 2: NOTICE OF GROUND RULES

(June 17, 2016)

The Commission instituted this Investigation pursuant to subsection (b) of Section 337 of the Tariff Act of 1930, as amended, 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 composite aerogel insulation materials and methods for manufacturing the same by reason of infringement of one or more of claims 15-17 and 19 of the '123 patent; claims 1-3, 5-7, 9, 10, 12-18, 49 and 50 of the '359 patent; claims 1-4, 6-9, 15, 16, and 18-21 of the '439 patent; claims 11-13, 15-, 17-19 and 21 of the '890 patent; and claims 1, 2 and 11 of the '486 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

81 F.R. 36955 (June 8, 2016).

The Notice of Investigation names as Complainant: Aspen Aerogels, Inc. The Notice of Investigation names as Respondents: Nano Tech Co., Ltd. And Guangdong Alison Hi-Tech Co., Ltd. (collectively "Respondents.").

The conduct of this Investigation before me shall be governed by the Commission Rules and the Ground Rules attached hereto as **Attachment A**. The parties should pay particular

attention to the Ground Rules governing this Investigation as they may differ from the Ground Rules I have issued in other investigations.

In the event the parties need to reach me, as guided by the attached Ground Rules, the point of contact for this Investigation will be my Attorney-Advisor, Stephanie Nagel at Stephanie.Nagel@usitc.gov. If a back-up contact is needed, one will be provided.

SO ORDERED.

MaryJoan McNamara
Administrative Law Judge

ATTACHMENT A

ALJ MARY JOAN MCNAMARA's GROUND RULES

ALJ MARY JOAN MCNAMARA'S GROUND RULES FOR THIS SECTION 337 INVESTIGATION (5/31/2016)

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 this Section 337 Investigation.

These Ground Rules govern a U.S. patent-based investigation. In the case of an investigation based upon a registered copyright, registered trademark, or registered mask work, additional Ground Rules may also govern. In addition, in a case involving a motion for temporary relief, Ground Rules in addition to Ground Rule 1.8 may also govern.

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JUDGE MCNAMARA'S GROUND RULES (5/31/2016)

1. General Procedures and Information.

1.1. Address of Administrative Law Judge.

The Administrative Law Judge's address is as follows:

The Honorable MaryJoan McNamara
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. *See* the Handbook on Filing Procedures at www.usitc.gov/secretary/documents/handbook_on_filing_procedures.pdf[1] for further details. The parties should be aware that the close of business for the agency is 5:15 pm. *See* Commission Rule 201.3(c).

1.3. Service Copy Requirement.

1.3.1. Paper Copies.

Copies of the papers filed with the Secretary shall be served concurrently on all other parties, including the Commission Investigative Attorney (if named as a party). Also, two (2) double-sided courtesy paper copies shall be served on the Administrative Law Judge at her office the next business day[2] after the papers are electronically filed with the Secretary. *See* Ground Rule 7 regarding courtesy copies of pre-hearing statements, pre- and post-hearing briefs, and motions *in limine*.

1.3.2. Electronic Copies.

In addition to that which is required in Ground Rule 1.3.1, while the Investigation is pending before the Administrative Law Judge, any party submitting a motion or any response to a motion, as well as any other paper submitted in this Investigation, shall on the same business day as the electronic filing, send one: (1) courtesy electronic copy of said document in Microsoft Word or PDF format (preferred), excluding exhibits, to the Administrative Law Judge's Attorney Advisor who is named in the Scheduling Order.

The electronic courtesy copy should be sent either (i) via e-mail (preferred) to my designated Attorney-Advisor or (ii) on disc. Copies submitted on disc must be clearly labeled

[1] *See also* http://www.usitc.gov/docket_services/index.htm

[2] Parties need not serve courtesy paper copes of subscriptions to the protective order that have been filed on EDIS, although electronic courtesy copies are still required.

with the Investigation number, party name, document title, and whether the files it contains are public or confidential. Copies sent via e-mail should include the number of this Investigation as the first item in the subject line, *and must be followed by a very brief summary of the contents.* For example, the subject line may[3] read: "Inv. No. 337-TA-9##, Motion for Summary Determination."

1.4. Submission by Fax Disfavored.

Submissions to the Administrative Law Judge by fax are **strongly** disfavored and are not to be made without her prior approval.

1.5. Concurrent Service.

The parties are encouraged to confer and stipulate in writing to acceptable forms and terms of service. Service on opposing counsel may be made by hand, facsimile, e-mail, or overnight courier. Any foreign respondent who is not represented by counsel may be served by first class mail. A motion served by overnight courier must be received by the other parties no later than the close of business on the day after the day it was filed.

1.6. Confidential Submissions.

Any document containing confidential business information shall be prominently marked on at least its first page with the legend "confidential business information," or equivalent wording.[4] Documents filed with confidential attachments shall similarly contain a prominent marking on at least the first page of the document indicating that there are confidential attachments and at least the first page of each of the confidential attachments shall be marked pursuant to Commission Rules. A party who mistakenly files a document without a confidential designation thereon shall immediately contact the Office of the Secretary and the Administrative Law Judge's Attorney Advisor.

1.7. Unreported Court Decisions.

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

1.8. 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") if Staff is a party, by telephone on the day the paper is served about the substance of the paper, and must arrange for the other parties to receive the paper the next business day.

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[3] The investigation number followed by the word "service" is not adequate.

[4] *See* Commission Rules 210.6 and 210.34. It is recommended that every confidential page be so marked.

1.9. Deadlines and Extensions.

All due dates for any paper necessitate that the paper be received by the intended recipient no later than the close of business on the due date. For this reason, electronic service on the other parties is encouraged. *See* Commission Rule 201.16(f).

Motions seeking an extension of time with respect to a deadline must be filed on EDIS no later than **two (2) days** before the due date and must set forth good cause for such extension.

Urgent matters should be brought to the attention of the Administrative Law Judge as follows. First, motions, responses, or other filings that are urgent or that should receive expedited treatment should be **clearly noted** in the document's caption. Second, on the date of said filing, the Administrative Law Judge's Attorney Advisor must be notified by e-mail, with a copy to all parties, that the matter is of pressing importance or urgency. The parties should note, however, that the Administrative Law Judge has many ongoing investigations. All pending matters will be addressed with as much dispatch as time and circumstances allow.

It is the responsibility of the other parties to promptly notify the Administrative Law Judge in writing if a party has filed or served a document after the deadline set in the procedural schedule or Commission Rules. A party may correct an untimely filing or submission by promptly moving to have the document accepted out of time by the Administrative Law Judge and explaining the good cause for late consideration. *See* Commission Rule 201.3(c). The two-day meet and confer requirement is waived for such motions, although movants should attempt to determine the other parties' position with respect to the motion. If no prompt[5] motion is brought, the Administrative Law Judge may in her discretion order that an untimely filed or served[6] document be disregarded.

1.10. Redaction Requirements for Public Versions of Orders.

Orders issued by the Administrative Law Judge may contain the confidential business information of the parties (or in some cases nonparties), in which case the orders will be designated confidential. The Administrative Law Judge has the discretion, pursuant to Commission Rule 210.5(e), to determine whether the information designated confidential by the supplier is entitled to confidential treatment in orders, initial determinations, and other documents issued by the Administrative Law Judge. The parties will receive instructions in said orders as to the submission of proposed redactions of confidential business information so that a public version of the order may be prepared. Parties who do not intend to submit proposed redactions must notify the Administrative Law Judge in writing. Due to changes to Commission Rule 210.5, the Administrative Law Judge has a limited time to make a confidential order or initial determination available to the public. Therefore the parties are expected to use their best efforts to facilitate timely issuance of public versions.

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[5] The Administrative Law Judge suggests, but does not require, that this occur within two (2) business days of the late filing.

[6] The procedural schedule provides for certain documents to be submitted or served rather than filed on EDIS. This rule shall apply equally to all due dates set forth in the procedural schedule, regardless of whether service or filing is required.

Two (2) copies of a proposed public version of an issued order or initial determination must be submitted to the Administrative Law Judge at the time specified in the issued confidential order or initial determination. Proposed redactions of information subject to the protective order should be bracketed clearly in red.

A party's proposed public version must be served on all parties at least one (1) business day before submission to the Administrative Law Judge. Any party with comments regarding another party's proposed public version must submit them to the Administrative Law Judge on the same date as specified for the submission of the proposed public version.

If no proposed public version is received by the date set in an order requiring such submission, the totality of the order will be made public. Parties shall not file the proposed public version with the Secretary. The Administrative Law Judge will issue the final public version of the order once all appropriate redactions are made.

The parties should take careful note, however, that it is the Administrative Law Judge's firm policy that the public has a right to know the substantive outcome of the Investigation. Therefore for any order resolving a matter of substance (such as a *Markman* order, grant of summary determination, or final initial determination), the parties must pay particular attention to their proposed redactions. Only confidential business information may be redacted, even if this means redacting a portion of a sentence.

1.11. Electronic Filing (EDIS).

Commission Rule 210.4(f) governs the electronic filing of certain documents in Section 337 Investigations with the Office of the Secretary via the Commission's Electronic Document Information System (EDIS). Filing through EDIS, however, does not remove the requirement that parties also submit two (2) double-sided paper copies and an electronic copy of such filing with the office of the Administrative Law Judges. *See* Ground Rules 1.3.1, 1.3.2.

For additional information regarding EDIS, the parties may contact the EDIS Helpdesk at (202) 205-3347, review the Docket Services webpage,[7] or access the EDIS 3 User Guide currently found at the following Internet address:

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

1.12. Computation of Time.

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 for making a submission falls on a day on which weather or other conditions have made EDIS and the Office of the Secretary of the Commission inaccessible, the cut off shall be extended to the end of the next business day.

The first day of the ten (10) calendar days for responding to a motion shall be the first business day following the date that said motion was filed on EDIS. In addition to the requirements of Commission Rules 201.16 and 210.15(c) governing the period for a nonmoving

[7] http://www.usitc.gov/docket_services/index.htm

party's response to a written motion, the date of service of a motion on a nonmoving party by electronic mail, personal delivery, express-type mail or courier service is the date of delivery. The additional times provided under Commission Rules 201.16(d) and (e) after service by non-electronic means do not apply in such instances, unless service to a nonmoving party is effected in a foreign country.

1.13. Procedural Schedule.

The Administrative Law Judge will establish a procedural schedule for this Investigation. Modifications of the procedural schedule by any party shall ***be regulated by written motion showing good cause. However, the parties should not expect to be able to modify the hearing dates absent exigent circumstances***. The event and deadline dates in the procedural schedule will generally adhere (but may vary) to the following chronological order:

Deadline for proposed Procedural Schedule and Discovery Statement
Initial Case Management Conference (if needed)
Deadline for Propounding Interrogatories
File identification of expert witnesses, including their expertise and Curriculum Vitae
Complainant files notice of patent priority dates/dates of conception/reduction to practice
Respondent files notice of Prior Art
Complainant(s) and Respondent(s) provide Staff[8] with their proposed list of claim terms for construction
Exchange proposed Claim Constructions
File Joint Claim Construction Chart
Parties submit a joint list showing each party's proposed construction of the disputed claim terms with briefs by all parties with regard to their initial claim constructions
Parties meet and confer (including Staff, if applicable) in an attempt to reconcile or otherwise limit disputed claim terms
File replies to initial claim construction briefs
Deadline to file *Markman* hearing proposals
Deadline for Disclosure of Domestic Industry Products
Deadline for Disclosure of Domestic Industry Contentions

[8] If Staff is not a party to the Investigation, the private parties should exchange their proposed constructions.

Deadline for first settlement conference
Submission of first settlement conference joint report
Deadline for Disclosure of Invalidity Contentions
Deadline for Disclosure of Infringement Contentions
Deadline for initial contention interrogatories
Deadline for initial contention interrogatory responses
Technology Stipulation deadline
***Markman* Hearing (if ordered)**
Deadline for post- *Markman* Hearing claim construction
Deadline for second settlement conference
Submission of second settlement conference joint report
File tentative list of witnesses a party will call to testify at the hearing, with an identification of each witness' relationship to the party
Fact discovery cutoff and completion
Last day for filing motions to compel discovery
Attendance at one-day mediation session[9]
Submission of joint report on mediation
Exchange of initial expert reports (identify tests/surveys/data)
Exchange of rebuttal expert reports
File expert reports
File expert report rebuttals
Deadline for third settlement conference
Submission of third settlement conference joint report
Last day for filing summary determination motions
Expert discovery cutoff and completion

[9] For any questions regarding the mediation program, the parties should refer to the Revised Users' Manual for Commission Mediation Program, available at http://www.usitc.gov.

Submission of statements regarding the use of witness statements in lieu of live direct testimony, and statements regarding whether any party intends to offer expert reports into evidence
Exchange of exhibit lists among the parties
Submit and serve direct exhibits (including witness statements, if any), with physical and demonstrative exhibits available -- Complainant(s) and Respondent(s)
Submit and serve direct exhibits (including witness statements, if any), with physical and demonstrative exhibits available -- Staff (if applicable)
File Pre-hearing statements and briefs -- Complainant(s) and Respondent(s)
File Pre-hearing statement and brief -- Staff (if applicable)
File requests for receipt of evidence without a witness
File objections to direct exhibits[10] (including witness statements)
Submit and serve rebuttal exhibits (including witness statements), with rebuttal physical and demonstrative exhibits available -- all parties
Last day for filing motions *in limine*[11]
File responses to objections to direct exhibits (including witness statements)
File objections to rebuttal exhibits (including witness statements)
File statement of high priority objections
File response to objections to rebuttal exhibits (including witness statements)
File responses to statement of high priority objections
Submission of declarations justifying confidentiality of exhibits
Last day for filing responses to motions *in limine*

[10] The parties should note that the use of codes for exhibit objections is strongly discouraged. In addition, the Administrative Law Judge would prefer that parties include the exhibit title (or summary) in addition to the exhibit number, and, where practicable, a brief explanation of the rationale for the objection(s).

[11] *See* Ground Rule 7 regarding format of courtesy copies.

Tutorial on technology
Pre-hearing conference
Hearing
File initial post-hearing briefs, proposed findings of fact and conclusions of law,[12] and final exhibit lists
Parties jointly submit electronic copy of combined exhibit lists
File reply post-hearing briefs, objections and rebuttals to proposed findings of fact and conclusions of law
Initial Determination on Violation Target Date
Target Date for completion of Investigation

Where the procedural schedule indicates the "last day to file," the parties should note that motions are expected on a rolling basis when issues are ripe for determination.

1.14. Early Claim Construction

At the start of an Investigation involving patent litigation, the Administrative Law Judge may order early claim construction, or alternatively, may provide the parties with an opportunity to submit proposals requesting early claim construction. Regardless of whether an early claim construction hearing is ordered, the parties are expected to disclose and solidify their claim construction positions early in the Investigation. Thus, the procedural schedule includes dates for identifying patent claim terms that need construction, for exchanging initial proposed constructions, for meeting and conferring to attempt to resolve disputed claim language, and for identifying a final joint list of disputed claim terms and including each party's final proposed constructions.

At the time that the parties first exchange their initial proposed constructions, any party who fails to set forth a specific proposed construction or who relies on the plain and ordinary meaning of the patent language at issue (without elaboration) may not subsequently elaborate or rely on a different proposed construction absent advance approval from the Administrative Law Judge.[13] In other words, the private parties are expected to make a near-simultaneous show of their "hands." Regardless of what claim construction a party proposed initially, during the meet and confer period, a party may shift position in order to "join" in proposing the claim construction position set forth by another party and also may shift position in order to reach

[12] In accordance with Commission Rule 210.40, a party may elect to file proposed findings of fact and conclusions of law; however, the other side is not required to respond to the proposed findings of fact and conclusions of law. The lack of a response does not mean that the proposed findings of fact and conclusions of law are admitted, unless specifically stated as such.

[13] The Administrative Law Judge takes no position here as to the merits of proposing the plain and ordinary meaning (as understood by one of skill in the art) of a disputed term, which may be quite reasonable under the circumstances. *See, e.g., Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005). What is of concern is when a party makes a tactical decision to shift to a new, detailed disclosure after seeing what the other side has to offer.

agreement with all parties in order to resolve a disputed claim term in whole or in part. The parties will be bound by their claim construction positions set forth on the date they are required to submit a joint list showing each party's final proposed construction of the disputed claim terms and will not be permitted to alter these absent a timely showing of good cause.

If a *Markman* hearing in advance of the evidentiary hearing is ordered, the parties are required to confer and set a logical order for briefing the disputed claim terms of the asserted patents, and then follow that pre-set order in all *Markman*-related submissions and filings. *See*, for example, the relevant portions of **Appendix B**. Expert reports related to early claim construction may be required to be filed on EDIS. The procedural schedule will state whether the reports should be filed or submitted.

The parties should also understand that, because of the tight schedule needed for expeditious proceedings, a *Markman* order may sometimes issue late in the Investigation, such as shortly before the hearing. The parties should not assume that a *Markman* order will issue before expert report deadlines or that there will be a seasonable opportunity to supplement expert reports after a claim construction ruling. *See* Ground Rule 5. Therefore the parties are advised, but not required, to account for the proposed constructions of the other parties in their expert reports. When a *Markman* order issues, the Administrative Law Judge will explain what expert report supplementation is permitted. This typically will only be an opportunity for limited expert report supplementation and only with respect to final claim constructions that substantively differ from those proposed by any party.

The parties and Commission Investigative Staff shall meet and confer on disputed claim construction 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, Complainant(s), Respondent(s) (if there is more than one Respondent, they are required to file a joint brief), and Staff shall file with the Administrative Law Judge, 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. 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. After the Administrative Law Judge issues an order construing the disputed claims for the purposes of the Investigation, discovery and briefing in the Investigation shall be limited to that claim construction.

1.14.1. *Markman* Briefing.

Absent prior approval of the Administrative Law Judge, initial *Markman* briefs shall not exceed 150 pages. Responsive *Markman* briefs shall not exceed 100 pages. The parties should use their best efforts to attempt to resolve disputed claim language up to and throughout the *Markman* hearing and promptly notify the Administrative Law Judge in writing if any agreements are reached. If the parties designate a large number of claim terms for construction, the Administrative Law Judge may set limits on the number of claim terms to be construed. It is also noted that if the parties designate a large number of claim terms for construction, this may delay the issuance of any *Markman* order.

If the parties have agreed to the construction of any claim terms, the Administrative Law Judge considers those terms to be "in controversy"[14] and expects the parties to include a section in their *Markman* briefs setting forth in detail their rationale and support for their agreed upon constructions so that the Administrative Law Judge may make an independent evaluation. *See Certain Reduced Ignition Proclivity Cigarette Wrappers and Products Containing Same,* Inv. No. 337-TA-756, Comm'n Op. at 43-44 (U.S.I.T.C., June 15, 2012).

Arguments that do not appear in the initial and responsive *Markman* briefs shall be deemed waived. As noted above, the parties will be bound by their final claim construction positions set forth on the date they are required to submit a joint list to the Administrative Law Judge.

If the parties have exhibits or attachments they wish to submit with their *Markman* briefing, these must correspond to the proposed exhibits that the parties intend to have entered into the record during the *Markman* hearing. Citations to these attachments in the briefing should correspond to the proposed exhibit numbers. This means the parties should meet and confer with respect to joint exhibits prior to the deadline for the initial *Markman* briefs. For example, if Complainants intend to attach a copy of a dictionary definition, Complainants should mark that attachment as a proposed (four-digit) exhibit (*e.g.*, CXM-0003) and refer to that attachment by the proposed exhibit designation in the briefing (*e.g.*, *see* proposed CXM-0003 at 14). The Administrative Law Judge may disregard any attachments to the *Markman* briefs that have not been admitted into the record during the *Markman* hearing.

The parties are expected to use extrinsic evidence only for the purposes set forth in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) and *General Protecht Group, Inc. v. International Trade Comm'n*, 619 F.3d 1303, 1310-11 (Fed. Cir. 2010). "[A]n expert's subjective understanding of a patent term is irrelevant." *General Protecht*, 619 F.3d at 1310-11. The Administrative Law Judge may, in her discretion, strike or disregard improperly advanced extrinsic evidence.

1.14.2. Pre-Hearing Statement.

Each party who intends to take part in the *Markman* hearing in this Investigation must file on or before the date set forth in the procedural schedule a brief statement containing the following information:

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[14] *Wellman, Inc. v. Eastman Chem. Co.*, 642 F.3d 1355, 1361 (Fed. Cir. 2011); *Vanderlande Indus. Nederland BV v. Int'l Trade Comm.*, 366 F.3d 1311, 1323 (Fed. Cir. 2004); *Vivid Tech., Inc. v. American Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

(a) The names of all known speakers or witnesses, including an identification of whether the speaker is counsel, a fact witness, or an expert witness. If a party intends to use witnesses, the pre-hearing statement should include a very brief outline of the testimony of each witness.

(b) A list, by title and number, of all exhibits which the parties will seek to introduce at the *Markman* hearing. The list shall include five columns. In the first four columns, the party shall include the number of the exhibit, a brief description and the title of the exhibit, the purpose for which it is being offered, and each sponsoring witness. The last column shall be labeled "Received" and need only include sufficient space for a date.

(c) A list of any stipulations to which the parties have agreed.

(d) A proposed schedule/allocation of time for the *Markman* hearing, including the estimated length for the appearance of each speaker or witness. (The parties shall confer on estimated dates and approximate length prior to submission of their pre-hearing statements).

1.14.3. *Markman* Hearing Evidence.

1.14.3.1. Exchange of Proposed Exhibits.

As noted above, the parties should meet and confer in an effort to identify and number joint exhibits prior to submission of the *Markman* briefs. Copies of proposed exhibit lists shall be served on the opposing parties by no later than the date set forth in the procedural schedule. Once the parties have exchanged their proposed exhibit lists, they shall further eliminate any inadvertent duplicate exhibits or renumber such exhibits as joint exhibits and update their exhibit lists. Any exhibits that have been cited to in the *Markman* briefing that have been consolidated or renumbered must remain on the exhibit lists with a clear indication of what the new proposed exhibit number is. For example, if Respondents, in Respondents' *Markman* brief, had cited to some dictionary definitions marked as RXM-0003 and this exhibit was later renumbered as JXM-0056 to remove duplication, the entry on Respondents' proposed exhibit list would reflect this change.

RXM-0003	Excerpts from Oxford English Dictionary, 2nd Ed.	Extrinsic evidence as to common meaning of disputed terms "coextensive" and "adjacent"	Respondents' presentation	**Renumbered to JXM-0056**

Copies of proposed exhibits, if any, including all demonstratives, along with an updated proposed exhibit list, shall be served on the opposing parties by no later than the date set forth in the procedural schedule. Proposed exhibits shall not be filed with the Office of the Secretary of the Commission or served on the Administrative Law Judge in advance of the *Markman* hearing.

Final proposed exhibit lists should be filed as part of the *Markman* pre-hearing statement.

1.14.3.2. Service of Proposed Exhibits upon Administrative Law Judge.

Prior to the start of the *Markman* hearing, the parties must bring to the hearing room a full set of double-sided proposed exhibit copies in loose-leaf binders, which will be used by the Administrative Law Judge during and after the hearing (the "ALJ Set"), along with a proposed exhibit list. Clear photocopies may be used instead of original documents.

1.14.3.3. Format and Submission of Admitted Exhibits.

The parties should refer to the procedures in Ground Rule 8 below with respect to the format and submission of admitted and rejected *Markman* hearing exhibits, as well as the format and submission of the ALJ Set. *See* Ground Rule 8. Written exhibits shall be marked in order beginning with the four-digit number "0001" and preceded by the prefix "CXM" for Complainants' *Markman* exhibits, "RXM" for Respondents' exhibits, "SXM" for the Staff's *Markman* exhibits (if applicable), and "JXM" for any joint exhibits.

1.14.4. *Markman* Hearing.

The parties have the discretion to determine the order of presentation and allocation of time for the *Markman* proceedings. For example, the parties may have Complainants discuss all of the patents before moving on to Respondents and then Staff (if applicable), or the parties may each present their arguments with respect to one patent before moving on to the next patent. The parties may also determine what, if any, time will be allocated for rebuttal. The parties should keep in mind that the total time allocated for one *Markman* hearing day is 6.5 hours.

1.14.4.1. Opening Statement and Closing Argument.

No opening statements and closing arguments are necessary. They are however helpful. The options are left to the parties. Technology tutorials for each asserted patent are recommended, but not required.

1.14.4.2. *Markman* Hearing Hours.

Normal hearing hours are 9:30 a.m. to 5:30 p.m., with a one (1) hour luncheon recess beginning at approximately 12:00 p.m. and two (2) fifteen (15) minute breaks.

1.14.4.3. Admission of Exhibits.

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

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

1.14.4.4. Transcript.

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

1.15. Technology Stipulations.

If the Administrative Law Judge has set a deadline for submission of a technology stipulation in the procedural schedule, the private parties are required to meet and confer in good faith and then, after consultation with Staff (if applicable), shall submit to the Administrative Law Judge two copies of a joint stipulation regarding the patent technology at issue in this Investigation. The parties shall further state the position of the Staff (if applicable) on the joint technology stipulation.

Said stipulation shall have one section for each asserted patent or family of patents, if it would be more appropriate, and, if applicable, a general technology section should be included that discusses technology common to all of the patents at issue. At a minimum, said stipulation should provide sufficient background information to understand the disputed claim constructions of each of the asserted claims in issue and should not include any facts upon which the parties are not in agreement.

It is expected that any facts listed in said stipulation may be used and relied upon throughout the remainder of the Investigation, including, *inter alia*, in the Administrative Law Judge's final initial determination on violation. Also, said stipulation should not be a vehicle for presenting legal arguments.

It is expected that the parties will use their best efforts to jointly create the technology stipulation. The joint technology stipulation to be submitted should have substance and should not be a list of quotations or paraphrases from the patents at issue (although discussion of the patents is expected to be a component part). *See Certain Electronic Devices, Including Mobile Phones, Portable Music Players, and Computers*, Inv. No. 337-TA-701, Order No. 26 at 1 (U.S.I.T.C., July 29, 2010).

1.16. Protective Orders and Patent Prosecution Bars

In certain investigations, the private parties or nonparties have highly confidential materials that are relevant and discoverable and which may warrant heightened protections beyond those ordered[15] at the outset of the case. Parties in need of such heightened protections are promptly expected to begin negotiations for a protective order addendum, *i.e.*, within five (5) business days of the issuance of these Ground Rules. A party that has subpoenaed a nonparty for discovery is expected to immediately inquire, *i.e.*, within two (2) business days of subpoena service, whether nonparty intends to seek such protections and begin negotiations in good faith if

[15] This is usually Order No. 1, Protective Order.

source code or other highly confidential materials are identified in the subpoena. If a protective order addendum is sought by motion, rather than by private stipulation, such motion must be brought as soon as practicable to avoid discovery delays and should include evidence, such as a declaration, setting forth good cause for heightened protections under the circumstances. Parties and nonparties may not use the need for a protective order addendum as a basis to withhold other discovery that is non-confidential or that may be produced under the already governing protective order.

The Administrative Law Judge orders that any party bringing a motion for a protective order addendum containing provisions for a proposed patent prosecution bar should review *Certain Consumer Electronics, Including Mobile Phones and Tablets,* Inv. No. 337-TA-839, Order No. 28 (U.S.I.T.C., 2013). It is further recommended, but not required, that rather than seek a patent prosecution bar in advance, the parties instead incorporate a notification provision requiring any individual seeking to view highly confidential materials subject to a protective order addendum to certify in writing whether or not they have recently, are, or in the near future intend to be engaged in patent prosecution or competitive decision making. This would allow the supplier to promptly seek an individually tailored patent prosecution bar (by stipulation or motion) prior to access, and would improve the chances of meeting the criteria set forth in *In re Deutsche Bank Trust Co. Americas*, 605 F.3d 1373 (Fed. Cir. 2010).

2. Motions.

Parties with similar interests should coordinate and consolidate motion practice to the extent practicable.

2.1. Contents.

All written motions shall consist of (i) the motion; (ii) a separate memorandum of points and authorities in support of the motion;[16] (iii) an appendix of declarations, affidavits, exhibits, or other attachments in support of the memorandum of points and authorities; and (iv) a Certificate of Service as required by Commission Rule 201.16(c). It is recommended that a moving party clearly articulate what relief is requested in the motion, as well as the law and facts supporting said request(s).

All motion responses shall consist of: (i) a memorandum of points and authorities in response to the motion; (ii) an appendix of declarations, affidavits, exhibits, or other attachments in support of the memorandum of points and authorities; and (iii) a Certificate of Service as required by Commission Rule 201.16(c). All responses to motions shall also 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. EDIS discloses what docket number has been assigned to a motion.

[16] A separate memorandum of points and authority is not necessary for motions shorter than five (5) pages.

2.2. Certification.

All motions shall include a certification that the moving party has made a reasonable, good-faith effort to contact and resolve[17] the matter with the other parties at least two (2) business days before filing the motion, and shall state, if known, the position of the other parties regarding the motion. Non-moving parties shall make an effort to timely and substantively respond in good faith to moving party's efforts to resolve a motion.

2.3. Summary Determination Motions.

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

2.4. Responses to Motions for Summary Determination.

In addition to the foregoing requirements, each party responding to a motion for summary determination shall include in the response separate statements directed to each of the numbered paragraphs in the moving party's SMF, with specific references to supporting declarations, affidavits or other materials. The responsive statement shall include a recitation of each of the material facts alleged to be disputed that are included in moving party's SMF, followed separately by the nonmoving party's response. Parties should avoid boilerplate rebuttals, and particularly should avoid rebuttals or objections that are not directly relevant to the material fact at issue. If a material fact, or a portion of a material fact, is undisputed, the responding party should so state. All material facts set forth in the moving party's SMF may be deemed admitted by a nonmoving party unless specifically controverted in the nonmoving party's responsive statement.

2.5. Discovery-Related Motions.

Any discovery-related motion must have appended to it the pertinent parts of the discovery request and all objections and answers thereto. Additionally, if the party subject to the motion to compel serves supplemental discovery responses while the motion is pending, then the response to the motion must include copies of the supplemental responses, or, where documents are produced, a detailed accounting of what additional documents were produced.

2.6. Request for Shortened Time to Respond to Motion.

If a party seeks expedited treatment pursuant to Ground Rule 1.9, such motion shall include any request to shorten the time for 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.

[17] Emailing the other parties to inquire as to their position on the proposed motion does not constitute a good faith effort to resolve the matter.

2.7. No Motion Stops Discovery Except Motion to Quash Subpoena.

The submission of a motion does not stop discovery except in the case of a timely motion to quash a subpoena.

2.8. Motion Deadlines in the Procedural Schedule.

Although the procedural schedule contains several cut-off points for bringing motions (motions to compel discovery, summary determination motions, and motions *in limine*), parties are expected to bring their motions on a rolling basis. Parties who fail to diligently bring issues to the attention of the Administrative Law Judge as close to the time of the dispute as practicable may find that their arguments have lost persuasive value. *See e.g.*, *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794, Order No. 52 at 2 (U.S.I.T.C., 2012).

2.9. Mootness.

If a change in circumstances renders all or any portion of a motion moot, the moving party is expected to promptly file notice (with the pertinent motion number in the document title) as to whether all or a specific portion of said motion is being withdrawn. In addition, movant is expected to notify my Attorney Advisors via email within 24 hours.

3. Discovery.

The parties should make intensive good faith efforts promptly commence and respond to discovery. Lack of diligence may affect a party's showing of good cause for motions to enforce discovery, particularly if such motions are adjacent to the close of fact discovery. In the same vein, failure to promptly seek a protective order in the face of highly objectionable or inappropriate discovery requests may undermine the opposition of a party responding to a motion to compel. The parties should also note that the deadlines in the procedural schedule are considered to be the last day to complete a task. Because these are fast-paced proceedings, parties are expected to exert diligence and file motions earlier than the stated deadline, such as motions to compel discovery or to enforce subpoenas. Parties should not tactically seek to withhold or delay motions or discovery, as every party is expected to proceed expeditiously. Commission Rule 210.2.

The Commission has recently affirmed that the notice of investigation, not a complaint, defines the scope of an investigation. 78 F.R. 23476 (April 19, 2013). "The scope of discovery is necessarily commensurate with the scope of the investigation." *Certain Rechargeable Lithium-Ion Batteries, Components Thereof, and Prods. Containing Same*, 337-TA-600, Order No. 8 (July 25, 2007). Thus it is unacceptable for a party to unilaterally limit the scope of discovery to solely those products specifically accused in the complaint, and a party refusing to respond to discovery requests on this ground may be subject to sanctions in light of the Commission's clear guidance on this issue. Should a party have serious concerns about the scope of the notice of investigation or about the scope of requested discovery, it has a responsibility to promptly take appropriate action.

3.1. Resolution of Disputes; Coordinated Discovery.

The parties shall make reasonable efforts to resolve between or among themselves disputes that arise during discovery. Parties with similar interests must coordinate and consolidate depositions and all other discovery.

3.1.1. Discovery Committee.

Starting the first full week after these Ground Rules are issued, a discovery conference committee (the "Discovery Committee") consisting of the lead counsel for each party and Staff, if Staff is a party, shall confer at least once every two (2) 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 dispute in a timely manner within the deadlines set forth in the procedural schedule.

Within ten (10) calendar days after the end of each 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 about 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 trying to resolve it. It is recommended, but not required, that within twenty-four (24) hours of each meeting the Discovery Committee members exchange[18] written confirmation of what disputes have reached an impasse.

3.2. Stipulations Regarding Discovery Procedure.

Unless otherwise directed by the Administrative Law Judge, the parties may, by written stipulation, modify procedures for, or limitations placed upon, discovery. The parties may not stipulate to change any Commission Rule with respect to discovery, unless the Rule expressly permits it. *See, e.g.*, Commission Rules 210.28(a), 210.29(a). Furthermore, stipulations extending the time provided in Ground Rule 3.4.2 and Commission Rules 210.30(b)(2) and 210.31(b) for responses to discovery, if they would interfere with (i) the target date of this Investigation, (ii) any time set in the procedural schedule or other order related to completion of discovery,[19] or (iii) the evidentiary hearing or hearing of a motion, may only be made with the advance approval of the Administrative Law Judge upon a timely written motion showing good cause.

3.3. Service of Discovery Requests and Responses.

Discovery requests and responses must be served on all parties, including Staff (if applicable), but are not to be served on the Administrative Law Judge, or her Attorney Advisors, or filed on EDIS unless they are appended to a motion.

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[18] Such exchange should not be served on the Administrative Law Judge or filed on EDIS, unless it is appended as a necessary component to a discovery motion or response thereto.

[19] *See, e.g., Certain Dynamic Random Access Memory and NAND Flash Memory Devices and Products Containing Same*, Inv. No. 337-TA-803, Order No. 42 at 3, n.1 (U.S.I.T.C., 2012).

3.4. Timing of Discovery Requests, Responses and Objections.

3.4.1. Depositions.

In addition to the requirements of Commission Rule 210.28(c), unless otherwise ordered or stipulated pursuant to Ground Rule 3.2, any party desiring to take a deposition shall give **at least ten (10) days'** written notice to every other party if the deposition is to be taken of a person located in the United States, or at least **fifteen (15) business days'** written notice 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 Staff, if Staff is a party, regarding the availability of witnesses and counsel for the deposition. Opposing party (and Staff) shall make a good faith effort to timely consult with the party requesting said deposition.

3.4.1.1. Depositions in Japan.

If an application for a recommendation to the U.S. District Court requiring depositions of a party in Japan is necessary, it should be titled as an "application" but filed on EDIS as a "motion." The application should include a statement as to the other parties' positions regarding the application as well as any relevant supportive material.

If the Administrative Law Judge determines that the application should be granted, an order and recommendation will issue. A copy will then be served on all parties. It is the responsibility of the applicant to determine whether the U.S. District Court requires a certified original. If so, the applicant should include in a cover letter, or include in the application itself, clear instructions explaining the requirement, and if the applicant prefers to pick up the certified original, the manner of pick up and the individual to be contacted. Absent these instructions, only the service copy will be sent to the applicant.

3.4.2. Interrogatories.

In addition to the requirements of Commission Rule 210.29(b), unless otherwise ordered, the party on 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.

With respect to contention interrogatories, answering parties are expected to affirmatively and timely provide their full contentions. Parties that fail to do so risk having their untimely disclosed opinions excluded from the Investigation. *See, e.g., Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794, Order No. 86 (U.S.I.T.C., 2012). However, as with any other type of discovery request, requesting parties also have a duty to timely compel responses that they believe are incomplete. The Administrative Law Judge expects that the parties will use their best efforts to avoid delay or concealment with respect to contention interrogatories.

3.4.3. Requests for Production of Documents or Things or for Entry upon Land.

See Commission Rule 210.30.

3.4.4. Request for Admission.

In addition to the requirements of Commission Rule 210.31(a) and (b), a request for admission may be served at any time **twenty (20) days** after the date of service of the Complaint and Notice of Investigation.

3.4.5. Discovery Cutoff and Completion.

All discovery requests, including requests for admissions, must be initiated long enough before the fact discovery cutoff and completion date to allow responses by that date without curtailing the response times prescribed in the Commission Rules and Ground Rules. 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.

3.5. Subpoenas.

Subpoenas may be requested to compel third parties to testify or produce documents. The Administrative Law Judge expects the parties to diligently seek third party subpoenas as early as practicable in the Investigation, and to take quick action to enforce said subpoenas if third parties delay. *See* Ground Rule 3.5.3. Hearing subpoenas will be issued only if the subpoenaed party refuses to testify.

3.5.1. Issuance and Service.

Pursuant to Commission Rule 210.32, applications for subpoenas may be made ex parte to the Administrative Law Judge. An application shall be in writing with the proposed subpoena attached. One (1) original and one (1) copy thereof shall be submitted to the office of the Administrative Law Judges.

The subpoena application shall set forth: (i) the relevancy of the information sought and the reasonableness of the scope of the inquiry; and (ii) shall state that the subpoena will be served (on the individual or entity subject to subpoena) by overnight delivery, if not sooner. The subpoena should: (i) set forth a time limit for a motion to quash; and (ii) should refer to and also have a copy of the Protective Order in this Investigation as an attachment. At a minimum, the subpoenaed party shall be given ten (10) days after receipt of the subpoena to file a motion to quash.

Any dates in a subpoena for appearance of a deponent or production of documents shall accommodate the time allowed for the filing of any motions to quash, and shall accommodate for the time needed for the Office of Administrative Law Judges to process the subpoena

application.[20] *See* Commission Rule 201.14(a); Ground Rule 1.12. A copy of the issued subpoena and the application shall be served by the applicant on the subpoenaed party by overnight delivery, if not sooner, and on all other parties to this Investigation on the next business day, at the latest, after the subpoena is issued.

A sample of a subpoena application is attached as **Appendix A**. In addition, two forms of subpoenas, which the parties must follow precisely, are attached as **Appendix A**. The parties must seek advance leave if they wish to make substantive changes to the subpoena forms. The application and subpoena shall not be filed on EDIS or served on the Office of the Secretary of the Commission unless they are appended to a motion.

3.5.2. Pick-Up of Signed Subpoenas.

Parties typically arrange for pick-up of signed subpoenas. The Administrative Law Judge's office will contact the party's designated individual when subpoenas are ready for pick-up, and then will deliver the package to the U.S. International Trade Commission's mail room to await a courier. If a party is requesting an alternate form of delivery of the signed subpoenas, the party should contact the Administrative Law Judge's Attorney Advisor in advance.

3.5.3. Extensions and Enforcement.

Any stipulated extensions to the time set forth for discovery in a subpoena must be made in writing and signed by the requesting party and the nonparty. Private extensions may not extend past the deadline for close of fact discovery without advance leave of the Administrative Law Judge.

The Administrative Law Judge expects that good faith efforts to rapidly negotiate with a nonparty to gain subpoena compliance should be made and documented. *See also* Ground Rule 1.16. However, these are expeditious proceedings and a nonparty's failure to cooperate or respond to a subpoena should be brought promptly to the attention of the Administrative Law Judge by way of a supported motion for judicial enforcement. Lack of diligence may affect a party's showing of good cause for motions to enforce (or defend against) discovery, particularly if such motions are adjacent to the close of fact discovery.

If a motion to enforce or quash a subpoena, or a response to such a motion, contains confidential business information, a public version with confidential materials redacted must accompany the confidential filing. *See* Commission Rule 210.32(g).[21] If movant, nonparty, or other responding parties fail to timely file non-confidential versions of their pertinent papers on EDIS, then the Administrative Law Judge will exercise discretion as to what portions of a final order may be treated as confidential. Commission Rule 210.5(e)(1). In addition, in the event of a failure to timely file non-confidential version when another party or a nonparty is not permitted to view the confidential business information contained therein, the Administrative Law Judge may consider whether such failure was effected for an improper purpose.

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[20] This is typically 24-48 hours, depending in part on whether the application is delivered by mail or by courier. Parties with urgent subpoena requests should contact the Administrative Law Judge's Attorney Advisor.

[21] This is necessary because a certification to the Commission requires simultaneous public and confidential orders to issue. *Id.* Therefore proposed redactions submitted after an order issues are not feasible.

3.6. Bates Numbering.

Documents produced in response to a document request which are copies of original documents, shall be numbered sequentially by a unique number (commonly known as a "Bates number"). The Bates number shall appear stamped on the lower right-hand corner of the page. The parties are encouraged to use Bates numbers without long prefixes. For example, the short Bates number XYZ-00001 is preferable over LONGPARTYNAME-ITCNUMBER-00001.

3.7. Translations.

A document produced in response to a document request shall be either the original or a legible and complete copy. If an English translation of any document produced exists, the English translation must also 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.

3.8. Privileged Matter.

In addition to the requirements set forth in Commission Rule 210.27(e) with respect to privilege logs, each privilege log shall contain a certification that all elements of the claimed privilege are met and have not been waived with respect to each document. The parties should not provide a "key" at the end of a privilege log with the position and entity of each sender and recipient, or otherwise require cross-referencing.

4. Notice of Patent Priority Dates and Notice of Prior Art.

Patent Priority Dates.

Complainant(s) must file on or before the date set in the procedural schedule, a notice setting forth the alleged priority date[22] for each asserted patent, and if applicable because of differences in priority dates, for each asserted patent claim. Such notice will be binding on Complainant(s) and may not be amended absent a timely written motion showing good cause.

Prior Art.

The purpose of the prior art identification is to notify all parties (early in the Investigation) of the prior art likely to be raised during the hearing on the question of violation of section 337, and thus to allow the parties to formulate their contentions, and to allow the experts to provide meaningful reports and deposition testimony.

[22] This disclosure should make clear what date(s) Complainant(s) intend to rely on for asserting priority of invention, if at all, as Complainant(s) are presumed to be in possession of dates of conception and reduction to practice for the asserted patent claim(s). Likewise, if Complainant(s) intend to rely on an earlier related or foreign application to the asserted patent claim(s), the priority disclosure should also make this clear. The purpose of this notice in light of the expeditious nature of these proceedings is to help delineate the boundaries of the search for prior art.

Parties must file on or before the date set in the procedural schedule, notices of any prior art containing of the following information: issuing 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 evidence of invalidity of the patent in suit; 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 file 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.

Prior art, as well as related evidence, that is not disclosed in the Notice of Prior Art on or before the date set forth in the procedural schedule will not be admitted at the hearing absent a timely written motion showing good cause. Notices of prior art with excessive disclosures have been stricken in the past on the basis that they thwart the purpose of this Ground Rule 4. *See, e.g., Certain Wireless Communications System Server Software, Wireless Handheld Devices and Battery Packs*, Inv. No. 337-TA-706, Order No. 10 (U.S.I.T.C., 2010); *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794, Order Nos. 40, 56 (U.S.I.T.C., 2012).

5. Expert Witnesses and Reports.

On or before the dates set forth in the procedural schedule, a party shall disclose to all other parties the identity of any person who is retained or employed to provide expert testimony at the hearing and shall provide the other parties a written report prepared and signed by that witness. Experts who are not disclosed on or before the date set forth in the procedural schedule must be approved in advance by the Administrative Law Judge upon a showing of compelling circumstances.

An electronic courtesy copy of the expert report shall be served on the Administrative Law Judge's Attorney Advisors, excluding exhibits, as noted in Ground Rule 1.3.2. Two (2) double-sided courtesy copies of the expert report shall be served on the Administrative Law Judge no later than the next business day after 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 (4) years. The parties shall supplement these disclosures as needed in the manner provided in Commission Rule 210.27(c). The parties should note, however, that unseasonable,[23]

[23] For example, if a party wishes to supplement an initial expert report after the deadline for rebuttal reports has passed.

substantive supplementation of an expert report requires agreement from the other parties or prior approval from the Administrative Law Judge.

6. Settlement; Settlement Reports.

All parties, throughout 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 (2) double-sided copies of a joint report signed by all the parties setting forth any stipulations on which the parties have agreed. The report must also disclose what meeting(s) took place, who attended, and what result, if any, was obtained in each meeting. *See e.g., Certain Dynamic Random Access Memory and NAND Flash Memory Devices and Products Containing Same*, Inv. No. 337-TA-803, Order No. 16 (U.S.I.T.C., 2011). 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.

7. Pre-Hearing Submissions.

Courtesy copies of all pre-hearing submissions shall be 3-hole punched in addition to being double-sided. All filings exceeding 100 pages in length must be placed in binders, preferably not exceeding 3" in width. Courtesy copies of all motions *in limine* should also meet this format requirement. Ground Rule 2.9 regarding mootness applies to all motions *in limine* and high priority objections.

7.1. Pre-Hearing Statement.

Each party who intends to take part in the hearing in this Investigation must file on or before the date set forth in the procedural schedule a pre-hearing statement containing the following information:

(a) The names of all known witnesses, their addresses, whether they are fact or expert witnesses (and their fields of expertise), and a brief outline of the testimony of each witness. In the case of expert witnesses, a copy of the expert's curriculum vitae shall accompany this submission.

(b) A list, by title and number, of all exhibits which the parties will seek to introduce at the trial. The list shall include five columns. In the first four columns, the party shall include the four-digit number of the exhibit, a brief description and the title of the exhibit, the purpose for which it is being offered, and each sponsoring witness. The last column shall be labeled "Received" and need only include sufficient space for a date.

(c) A list of any stipulations on which the parties have agreed. It is expected that all stipulations other than discovery stipulations will be marked as joint exhibits. For example, the technology stipulation (*see* Ground Rule 1.15) should be marked as a joint exhibit.

(d) A proposed agenda for the pre-trial conference.

(e) Estimated date and approximate length for appearance of each witness. (The parties must confer on this prior to submission of the pre-hearing statements).

(f) Certification regarding good faith efforts to settle. *See* Ground Rule 6 *infra*.

Additional Submission, Complainant(s).

In addition to the above, in patent Investigations, Complainant(s) shall attach a chart or table to the pre-hearing statement specifically matching all asserted patent claims to each accused article. If there are nuances, *e.g.*, with respect to model number or particular components, these should be identified. Furthermore, Complainant(s) should identify representative accused articles, if any. The chart should further identify the asserted type(s) of infringement. For example, if there are three asserted claims and five accused articles, a sample chart might appear as follows.

'##1 Patent, claim 5	'##1 Patent, claim 7	'##2 Patent, claim 12
P Product family: Accused Product AA (7MA config. only) Accused Product BB	P Product family: Accused Product BB	P Product family: n/a
Q Product family: Accused Product CC Accused Product EE	Q Product family: Accused Product DD Accused Product EE	Q Product family: Accused Product CC (T6 config. only) Accused Product DD Accused Product EE
Representative Products: Accused Product BB Accused Product CC	Representative Products: Accused Product BB Accused Product EE	Representative Products: Accused Product CC (T6 config. only) Accused Product EE
Infringement: Literal Direct, induced, contributory	Infringement: Literal Direct, induced, contributory	Infringement: Literal, Doctrine of Equivalents (Accused Product CC, T6 config. only) Direct

Complainant(s) shall be bound by the identification of asserted claims as matched to the accused products in this submission.

Additional Submission, Respondent(s).

In addition to the above, in patent Investigations, Respondent(s) asserting any Section 102 or 103 invalidity defenses shall attach a chart or table to the pre-hearing statement listing all asserted prior art references, or combinations of references, and specifically matching these to each asserted patent claim. For example, if there are four prior art references and five asserted patent claims, a sample chart might appear as follows.

Cheng (§102)	Davis (§103)	Davis, Scott,	Davis, Maxwell,

		Maxwell (§103)	Aguilar (§103)
'##1 Patent, claim 5	'##1 Patent, claim 12	'##1 Patent, claim 12	'##1 Patent, claim 12
'##2 Patent, n/a	'##2 Patent, claims 12, 16, 17	'##2 Patent, claim 17	'##2 Patent, claim 12, 16

If Respondent(s) use a single chart, each entry must clearly state whether Section 102 or 103 is applicable. (*See* above sample.) Respondent(s) may alternatively separate the Section 102 and 103 invalidity defenses into two charts in the same submission.

Respondent(s) shall be bound by the identification of asserted prior art as matched to the asserted patent claims in this submission.

7.2. Pre-Hearing Brief.

On or before the date set in the procedural schedule, each party shall file a pre-hearing brief. Absent prior approval of the Administrative Law Judge, said brief shall consist of no more than one hundred seventy-five (175) pages and shall have no more than fifty (50) pages of relevant attachments. The parties should not use attachments to bypass the page limits of the pre-hearing brief, but may use them to attach critical charts, figures, or other pertinent material.

The pre-hearing brief shall be prefaced with a table of contents and a table of authorities, which do not count toward the page limits. The brief shall set forth with particularity the authoring party's contentions on each of the proposed issues, including citations to legal authorities in support thereof, and shall conform to the sample outline set forth in **Appendix B** hereto. All issues, including issues not specifically named in the general outline set forth in said appendix that any party seeks to address, shall be added where appropriate. The parties need not use precious space on lengthy introductory arguments.

The parties shall meet and confer as needed prior to filing the pre-hearing briefs in order to determine appropriate common locations for each issue. *See* **Appendix B**. For example, in an Investigation involving patent litigation, this conference should, *inter alia*, determine the order of patents to be set forth in the pre-hearing (and post-hearing) briefing. The parties are expected to adhere to this negotiated order in all subsequent written analyses.

If claim construction issues have not been resolved in a *Markman* order prior to the hearing, the parties shall provide complete proposed claim constructions for all patent claims at issue, consistent with the claim constructions provided in the joint list of proposed claim constructions for disputed claim terms submitted in accordance with the procedural schedule.

Any contentions not set forth in detail as required herein shall be deemed abandoned or withdrawn,[24] 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 brief. However, the parties are advised to select their best, well-reasoned and persuasive arguments, and abandon extraneous or far-fetched contentions at this time.

[24] *Certain Automated Media Library Devices*, Inv. No. 337-TA-746, Comm'n Op. at 14-16 (U.S.I.T.C., 2013).

8. Hearing Exhibits.

8.1. 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.

8.2. Legal Experts.

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

8.3. Witness Testimony.

Unless ordered otherwise, all witness testimony shall be live testimony. In the event I order witness statements, the following rules will apply.

8.3.1. Witness Statements in Lieu of Direct Testimony.

Witnesses will not read their prepared testimony into the record. Staff may, however, ask the witness supplemental direct testimony on the witness stand. Witness statements shall be marked with exhibit numbers and offered into evidence as exhibits, and witnesses shall be available for cross-examination on the witness stand unless waived by the parties entitled to conduct cross-examination. If the testimony in the witness statement will be used to sponsor the admission of any exhibits, a list of all such exhibits shall be attached to the witness statement

8.3.2. Format of Witness Statements.

A witness statement shall be in the form of consecutively numbered questions from counsel, with each question followed by the witness's own answer to that question. The final question from counsel should ask the witness whether or not the witness statement contains the witness's independent answers to the questions from counsel, and should be followed by the witness's answer to this question and the witness's signature. The questions shall be in the form of a direct examination and the answers shall be in the form of verbal testimony, although the witness statement may be organized (e.g. headings, table of contents, and bulleted or numbered lists) to facilitate an understanding of the issues and may include illustrative excerpts from admissible exhibits. For evidentiary support, witness statements shall cite to exhibit numbers and brief descriptions of the exhibits (e.g., JX-0002 ('123 Patent File History)) that will be introduced at the hearing. A witness statement must contain the entirety of the witness's direct testimony; attachments or incorporation of other documents by reference is not allowed.

A witness statement shall be in the language of the witness, and a foreign language witness statement shall be accompanied by a certified English translation thereof.

Except upon a timely written motion and for good cause shown, fact witnesses shall not review the witness statements of other witnesses and shall be excluded from the hearing prior to their testimony. Subject to restrictions imposed by any protective order entered in an

investigation, this rule does not apply to exclude a party who is a natural person or an officer or employee of a party designated as the party's representative by its attorney.

Witness statements may not be withdrawn, in whole or in part, without leave. Witness statements may not be amended. If witnesses desire to correct typographical or clerical errors in their testimony, they should prepare errata sheets. Counsel should mark the errata sheets as exhibits, and should give them as quickly as possible to the other parties and to the Administrative Law Judge. During the hearing, a motion may be made to have the errata sheets accepted into the record.

Absent leave granted by the Administrative Law Judge, the total number of witness statement pages offered by the complainants (collectively) may not exceed 900. Similarly, absent leave granted by the Administrative Law Judge, the respondents (collectively) may not offer more than 900 pages of witness statements. Tables of contents and certified translations are not counted toward the page limits. The text of the questions and answers in the witness statements may be single spaced, provided that at least double spacing is used between questions and answers, and at least a 12-point font is used. Illustrations may be included in the witness statements, but they will be counted among the aggregate number of pages that may be offered.

On the date set forth in the procedural schedule, the parties shall provide one set of witness statements in binders (without exhibits). Each binder shall be labeled on its spine to indicate the witness and the party providing the binder. Additionally, the parties shall provide a single hard drive or a single flash drive containing the witness statements in searchable PDF format. Each expert witness statement shall include a detailed table of contents. The witness statements in PDF format must include a file name with a brief description of the exhibit, e.g., CX-0005C (Smith Witness Statement).pdf. If the PDF witness statements are submitted on the same electronic medium as other trial exhibits, the witness statements shall be placed in a separate folder.

8.4. Expert Reports.

Pursuant to the procedural schedule, each party, including the Staff (if Staff is a party), shall submit to the Administrative Law Judge, after conferring with each other, two (2) double-sided copies of a statement stating its position on whether or not it intends to offer into evidence[25] any expert reports, and identifying any such expert reports. The statement shall not be filed with the Office of the Secretary of the Commission.

8.5. Foreign Language Exhibits.

No foreign language exhibit will be received in evidence for substantive purposes unless a complete English translation of it is provided at the time set for exchange of exhibits. ***Translations of only a part or a section of a document will not be permitted.*** The entirety of any document must be translated. 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.

[25] It should be noted that the Administrative Law Judge rarely allows expert reports into the record. On occasion a chart or diagram from an expert report that would be difficult to explain on the hearing transcript has been admitted.

8.6. Exhibits.

8.6.1. Exchange of Proposed Exhibits.

Copies of proposed documentary exhibits, along with a proposed exhibit list, shall be served on the opposing parties (including the Staff, if applicable) by the date set in the procedural schedule. After the proposed exhibit list exchange, the parties shall eliminate any duplicate exhibits or renumber such exhibits as joint exhibits and update their exhibit lists before they are submitted to the Administrative Law Judge.

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.

8.6.2. Service of Proposed Exhibits upon Administrative Law Judge.

On the date set forth in the procedural schedule for service of proposed hearing exhibits, the Administrative Law Judge shall receive an electronic PDF version[26] of all proposed exhibits, along with a proposed exhibit list.

Prior to the start of the hearing, the parties must bring to the hearing room a proposed exhibit list and a full set of double-sided proposed exhibit copies in loose-leaf binders, which will be used by the Administrative Law Judge during and after the hearing (the "ALJ Set").

8.6.3. Format of ALJ Exhibit Set.

The exhibits in the ALJ Set shall be individually tabbed, with each tab reflecting the number of the corresponding exhibit, *e.g.,* CX-0003C. Each binder must be labeled on its spine with the name and number of this Investigation and the nature of the contents of the binder, *e.g.* Complainant's Exhibits CX-0001 through CX-0018C. The Administrative Law Judge requires double-sided copies for the ALJ Set, in binders no wider than 3".

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

Each party must submit a final exhibit list in conformity with Ground Rule 8.6.7, reflecting the status of all exhibits, including those admitted and rejected during the hearing. Any withdrawn exhibit shall be identified on the final exhibit list only, by exhibit number, and shall indicate that it has been withdrawn. Withdrawn exhibits are not to be submitted; however, the rejected exhibits will be retained with the official record.

The parties are responsible throughout the course of the hearing for updating the exhibit lists and for maintaining and updating the ALJ Set, as well as for confirming that all admitted

[26] Parties preferring to submit a paper copy should contact the Attorney Advisor in advance.

and rejected exhibits are included in this Set and in the final exhibit list at the conclusion of the hearing.

The ALJ Set, as well as the final exhibit list, should be submitted on paper no later than 5 p.m. on the second business day after the last day of the hearing. On the same day, the parties shall further submit a complete set of all admitted and rejected exhibits (organized as: (i) Admitted Confidential; (ii) Admitted Public; (iii) Rejected Confidential; and (iv) Rejected Public) to be filed with the Commission on EDIS ("the Commission Set"). These two sets should be submitted to the Administrative Law Judge's assistant by appointment. The Administrative Law Judge's assistant will review the exhibits with the parties and notify them of any necessary corrections. It is advisable to leave time between the appointment with the Administrative Law Judge's assistant and the submission deadline in order to make any needed corrections. Please be timely and courteous when working with the Administrative Law Judge's assistant on the submission of these exhibit sets.

The parties are responsible for confirming that all admitted and rejected exhibits are included in the Commission set. Any exhibits that are not included in the Commission Set and the final exhibit list will not be considered as part of the record to be certified to the Commission when the final initial determination issues.

The Commission Set shall be submitted on electronic media[27] pursuant to Ground Rule 8.7 unless prior permission has been received pursuant to Commission Rule 19 C.F.R. § 210.4(f)(8) and The Handbook of Filing Procedures § II.C(3)(a). All confidential exhibits and public exhibits shall be submitted on separate discs. Each disc shall have a table of contents, and the parties are required to verify the accuracy of the table of contents. For example, if an exhibit on the public exhibit disc is labeled CX-0022, it should not contain any confidential designations. "Each type of exhibit (i.e., CX, CDX, CPX, RX, RDX, RPX, JX, JDX, JPX, SX, SDX, SPX, CX-{four digit number}C, CDX-{four digit number}C, RX-{four digit number}C, RDX-{four digit number}C, JX-{four digit number}C, JDX-{four digit number}C, SX-{four digit number}C, and SDX-{four digit number}C) must be submitted on a different [disc] or set of [disc]s so they may be uploaded and labeled more reliably by Docket[]" Services. Each disc "must have a label with the investigation name and number, and the range of exhibits contained thereon."

If the appropriate permission is received pursuant to Commission Rule 19 C.F.R. § 210.4(f)(8) and The Handbook of Filing Procedures § II.C(3)(a) to submit the Commission Set on paper, the following shall apply. 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-0014C. In each box of the Commission Set, the folders containing the exhibits shall be placed in numerical order. Confidential exhibits and public exhibits shall be placed in separate boxes which are clearly marked as containing either confidential or public exhibits. *See* Ground Rule 8.6.5. Because public and confidential exhibits are to be placed in separate boxes, numerical gaps may appear in each box, e.g., the public box may contain exhibits CX-0001, CX-0002 and CX-0004, while the confidential box may contain CX-0003C and CX-0005C.

[27] The Commission Set "may not be submitted on a hard drive or flash drive."

8.6.5. Numbering and Labeling of Exhibits; Confidential Exhibits.

All exhibits or copies of exhibits shall be clear and legible. Each exhibit shall be identified by placing a label bearing the exhibit's **four digit**[28] number (*e.g.*, CX-0003C or RX-0005) in the upper right portion of the exhibit's first page. Each exhibit may be assigned no more than one number. Further, the pages of each exhibit must be sequentially numbered in a consistent location on the pages and in a manner that will not permanently conceal information that is included in the exhibit. Except for good cause shown, each exhibit shall consist of no more than one (1) document and every page of every document shall be Bates numbered in accordance with Ground Rule 3.6. Exceptions to this "one document per exhibit" rule include instances when it would be appropriate to group certain documents together as a single exhibit, such as a group of invoices or related e-mails.

Respondent(s) shall coordinate their numbering to avoid duplication. Additionally, all parties shall coordinate exhibits to avoid unnecessary duplication (*e.g.*, patents; file wrappers).

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.

If an exhibit (including physical or demonstrative exhibits) contains confidential business information, a "C" shall be placed after the exhibit number. Furthermore, exhibits containing confidential business information shall also be marked according to the Protective Order requirements, preferably on every page. Exhibit lists must also reflect whether exhibits contain confidential business information by placing a "C" after the exhibit number in the listing. No exhibit list shall contain confidential information; all exhibit lists shall be public documents.

For exhibits submitted electronically, in accordance with Ground Rule 8.7, public and confidential exhibits must be placed on separate discs. Each disc must have an accurate table of contents. Exhibits submitted in the ALJ or OGC binder sets shall be in numerical order, and shall not be separated according to confidential or public status.

8.6.5.1. Documentary Exhibits.

Written exhibits shall be marked in order beginning 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 (if applicable), and "JX" for any joint exhibits. The parties shall not "reserve" numbers, but instead must assign all numbers to the exhibits in their proper order.

8.6.5.2. Physical Exhibits.

[28] All exhibits submitted to the Commission are now required to have "a four-digit exhibit number, with leading zeros as necessary."

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 (if applicable), and joint exhibits, respectively. For the Commission Set, physical exhibits should be boxed and provided to the Administrative Law Judge's assistant no later than the second day after the close of the evidentiary hearing, by appointment. *See* Ground Rule 8.6.4 above. Physical exhibits that have been admitted into evidence are retained by the Commission. A party may request permission from the Administrative Law Judge to substitute a photograph for an admitted physical exhibit prior to the deadline for submission of exhibits.

8.6.5.3. 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 (if applicable), respectively. Additionally, the parties shall provide the Administrative Law Judge with two (2) double-sided copies of key demonstrative exhibits (*e.g.*, charts, drawings, etc.) reduced to 8 ½ inches x 11 inches for use during the hearing. If applicable, demonstrative exhibits shall indicate what documentary or physical exhibit was the source for its creation.

The parties may seek to have demonstrative exhibits admitted into evidence, for substantive or solely for demonstrative purposes. Such designation must be made clear on the record at the time of admission. Admitted demonstrative exhibits must be submitted with the ALJ and Commission Sets pursuant to Ground Rules 8.6.4 and 8.7.

8.6.5.4. Joint Exhibits.

If agreed to by parties, they 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, those 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.

8.6.6. Exhibit Lists.

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

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

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

Exhibit lists shall include public and confidential exhibits, and shall list all exhibits together in (four-digit) numerical order, *e.g.*, CX-0001, CX-0002, CX-0003C, CX-0004, CX-0005C, etc. Exhibit lists are public documents and should not contain confidential business information.

Two days after the deadline for the exhibit lists, the parties shall jointly submit to the Administrative Law Judge an electronic copy of a combined exhibit list, which has all parties' exhibit lists in a single document.

8.6.7. Witness Exhibit Binder.

In questioning a witness on direct examination, cross-examination, or examination of an adverse witness during the hearing, counsel shall provide the witness, the Administrative Law Judge, and other counsel, before the commencement of the examination, with a binder (or binders) containing all the exhibits that the examining attorney intends to use with that witness. The binder should contain double-sided exhibits, in numerical order and individually tabbed. Each witness binder must be labeled on its spine with the name and number of this Investigation and the nature of the contents of the binder, *e.g.*, Cross-Examination of Witness - Volume 1 of 1. In addition, the front of the witness binder must include a table of contents.

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 those exhibits may be omitted from the individual witness binders.

8.6.8. Authenticity.

All documents that appear to be regular on their face shall be deemed authentic, unless it is shown by other evidence that the document is not genuine.

8.6.9. Sponsoring Witness.

Each exhibit that is offered into evidence shall have a "sponsoring witness." One of the purposes for a sponsoring witness is to establish a foundation for the exhibit and to prevent exhibits from entering the record that have not been adequately explained. Sponsoring witness testimony does not have to be in the form of oral testimony if all parties are in agreement to allow otherwise. For example, if the parties are willing to stipulate and agree to designate portions of deposition testimony into the record in lieu of oral 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 the deposition pages discussing the exhibit are included in the designation.

Except for investigations without a participating respondent, if a party believes evidence to be non-controversial and appropriate for admission into 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 (i) an affidavit or declaration that the declarant prepared or someone under the declarant's direction prepared the exhibit; (ii) a request that the exhibit be received in evidence without a witness at the hearing; and (iii) 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 being shown, the Administrative Law Judge may in her discretion admit the exhibit in evidence without a witness.

8.6.10. High Priority Objections for Hearing.

The procedural schedule provides a date for filing a document listing and providing a narrative explanation of the ten (10) objections to exhibits which the party believes to be of high priority for discussion or ruling at the hearing. The 10 objections placed on the high priority list may be taken from the party's objections to direct, rebuttal or supplemental exhibits.

8.7. Filing of Exhibits by CD/DVD Media.

The procedure for submitting exhibits on electronic media is set forth in the Docket Services section of the U.S.I.T.C. website. Currently the procedure may be found at the following Internet address:

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

An accurate Table of Contents (TOC) file which lists the names of all files on the disc should be created and included **on each** disc. "Each [disc] must have a label with the investigation name and number, and the range of exhibits contained thereon." "Each type of exhibit (i.e., CX, CDX, CPX, RX, RDX, RPX, JX, JDX, JPX, SX, SDX, SPX, CX-{four digit number}C, CDX-{four digit number}C, RX-{four digit number}C, RDX-{four digit number}C, JX-{four digit number}C, JDX-{four digit number}C, SX-{four digit number}C, and SDX-{four digit number}C) must be submitted on a different [disc] or set of [disc]s so they may be uploaded and labeled more reliably by Docket[] [Services]."

9. Hearing Procedure.

9.1. Order of Examination.

Unless altered at the Pre-hearing conference, the order of examination at the hearing is as follows:

(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 should avoid unnecessary repetition of testimony or other evidence.

(3) Staff's Case-in-Chief (if applicable).

(4) Complainant's Rebuttal. Complainant's rebuttal, absent prior approval, shall be limited to the scope of Respondent's defense case.

(5) Respondent's Rebuttal. Respondent's rebuttal, absent prior approval, shall be limited to the issues for which Respondent carries ultimate burden of proof.

9.2. Opening Statement and Closing Argument.

The Administrative Law Judge does not require opening statements and closing arguments. The parties may present opening statements. Opening statements are limited to one (1) hour for the complainant, one (1) hour for respondent(s), and thirty (30) minutes for Staff (if applicable). The parties may make a request to present closing arguments, which, if granted, would be held after all post-hearing briefs have been submitted.

9.3. Hearing Hours.

Normal hearing hours are 9:30 a.m. to 5:30 p.m., with a one (1) hour luncheon recess beginning each day at approximately 12:15-12:30 p.m. Also, there will be a morning and an afternoon break of approximately fifteen (15) minutes each.

9.4. Hearing Decorum.

9.4.1. Conversations at Hearing.

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

9.4.2. Cell Phones and Beepers; Food and Beverages.

Audible cell phone and beeper signals shall be turned off in the courtroom during hearing, and all cell phone conversations must occur outside the courtroom. No food or drink other than water is permitted in the courtroom during hearing.

9.4.3. Swearing of Witnesses.

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

9.4.4. 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. The basis for the objection must be stated; general objections are not acceptable.

9.5. Examination of Witnesses.

9.5.1. Scope of Examination.

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.

9.5.2. 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.

9.5.3. Scope of Redirect and Re-Cross Examination.

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

9.5.4. Coordination of Witnesses.

The parties are expected to conduct their witness examination in a matter that will adhere to the total time allotted for the hearing.

9.5.5. Documents Presented to Witnesses.

Any document that an attorney wishes to show a witness must first be shown to opposing counsel.

9.5.6. Scope of Expert Witness Testimony.

Expert witness testimony at the hearing shall be confined to the scope of the expert's report(s), and deposition testimony. The proponent of the witness is expected to be prepared to demonstrate promptly where in that witness's reports or deposition may be found each element of testimony sought to be elicited at the hearing.

9.5.7. Coordination of Respondents' Cross-Examination.

Respondents are expected to coordinate cross-examination through one attorney as far as practicable to avoid duplication. If that is not possible, counsel who intend 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.

9.5.8. Requests for Clarification of a Question.

Requests for clarification of a question may only be made by the witness or the Administrative Law Judge.

9.5.9. Use of Translators.

If a translator will be used at the hearing, the parties are responsible for obtaining a qualified, neutral translator on whom they can agree. It is suggested that the translator be chosen from a list of approved translators, such as the ones maintained by various federal courts and federal agencies. Translators will be administered an oath or affirmation.

9.5.10. Conferring with Witness During a Break in Testimony.

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

9.6. Transcript.

The parties have the option of arranging for the hearing transcript in real time. The Administrative Law Judge prefers to have hearing transcripts in real time. The parties should monitor the admission of exhibits on the transcript as it comes out, and promptly bring any errors or omissions to the Administrative Law Judge's attention at the hearing.

9.7. Bench Briefs.

Bench briefs, if they are permitted by the Administrative Law Judge during the hearing, must be filed on EDIS as motions and must comport with the Commission Rules and Ground Rules relating to motions.

10. Post-Hearing Submissions.

10.1. Initial Post-hearing Briefs.

On or before the date set forth in the procedural schedule, the parties shall file a post-hearing brief. Absent prior approval of the Administrative Law Judge, said brief shall consist of no more than one hundred seventy-five (175) pages and shall have no more than fifty (50) pages of relevant attachments. In addition, each party shall file a copy of its final exhibit list. Courtesy copies of all post-hearing briefs and final exhibit lists shall be submitted in binders, preferably not exceeding 3" in width.

The post-hearing brief shall discuss the issues and evidence tried (through, *e.g.*, citations to specific supporting evidence) 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-hearing brief and any permitted amendments thereto. All other issues shall be deemed waived.[29] The parties should discuss the issues in the post-hearing briefing in the order negotiated pursuant to Ground Rule 7.2 above.

The parties should not attempt to bypass the page limits by attaching[30] dense appendices, incorporating other documents by reference, such as a pre-hearing brief, or cross-referencing other sections of the post-hearing brief. In the same vein, the parties should set forth a clear, concise analysis of fact and law for each issue, and should not substitute their discussion of supporting facts with long string cites to the evidence. For example, a heading with a single sentence beneath it, followed by cites to thirty-five evidentiary citations is not likely to be a sufficient analysis of fact and law, particularly if an issue is disputed. Furthermore, arguments should not be hidden in footnotes, but should instead be presented in a straightforward and visible manner. The initial post-hearing brief is the most critical brief in the Investigation, and parties that do not set forth an articulate analysis may find they have failed to carry their burden on a particular issue.

The parties should make sure they understand the law for each issue and touch upon all the elements for an issue. For example, an analysis relating to a 35 U.S.C. § 103 obviousness defense should encompass a discussion of the scope and content of the prior art, the level of ordinary skill in the art, a comparison of the claimed invention and the prior art, and any secondary considerations of non-obviousness—not just a comparison of the claimed invention and the prior art. A discussion of whether a domestic industry product, accused product, or prior art reference does *or does not* meet an asserted patent claim should prominently identify what elements are disputed. If an element is not in dispute, each party must identify it with equal clarity or risk waiver of any opposition.

The parties are further advised to carefully select their best arguments, and set them forth in a logical, reasoned, persuasive manner. The method of spilling out every possible permutation

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[29] *Certain Automated Media Library Devices*, Inv. No. 337-TA-746, Comm'n Op. at 14-16 (U.S.I.T.C., 2013).

[30] The parties are likewise barred from attaching evidence that is not on the record and that should have been offered during the hearing. For example, if an exhibit containing an expert report was not admitted at the hearing then it should not be attached to a post-hearing brief. To the extent such an exhibit might be necessary to argue that another party's argument was waived or should be stricken, this must be introduced by way of separate motion papers and must not be submitted with any post-hearing briefing.

of evidence in an unordered series of one sentence arguments until the allotted space is exhausted is not likely to be effective. The Administrative Law Judge may in her discretion treat only a few of the strongest arguments in such a case and ignore the remainder.

10.2. Post-hearing Reply Briefs.

On or before the date set in the procedural schedule, the parties shall file a post-hearing reply brief. Absent prior approval of the Administrative Law Judge, said brief shall consist of no more than one hundred twenty-five (125) pages and shall have no more than twenty (20) pages of relevant attachments. The post-hearing reply brief shall discuss the issues and evidence raised in the initial post-hearing briefs of each opposing party, following the general outline of the briefs as set forth in **Appendix B** and the guidelines and restrictions set forth in Ground Rule 10.1.

10.3. Proposed Findings of Fact

In accordance with Commission Rule 210.40, a party may elect to file proposed findings of fact and conclusions of law; however, the other side is not required to respond to the proposed findings of fact and conclusions of law. The lack of a response does not mean that the proposed findings of fact and conclusions of law are admitted, unless specifically stated as such. 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.

The proposed findings of fact shall be in the form of numbered paragraphs. The findings shall 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 brief). Each proposed finding of fact must be followed with citations to supporting authority in the evidence.

11. Citation of Cases.

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. 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. Citations to unreported cases or those without precedential authority should be clearly marked with a parenthetical in the brief or pleading. For example, such a citation might read:

Case Name, ### F.3d ###, at ## (Fed. Cir. ####) (nonprecedential).

A copy of any cited decision or order that is not available on EDIS, LEXIS, or WESTLAW shall be provided in an appendix to the brief or pleading.

12. Cooperation among Parties.

Because of the time limitations imposed by Section 337, all counsel shall attempt to resolve, by stipulation or negotiated agreement, any procedural disputes 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.

13. *Ex Parte* Contacts.

There shall be no *ex parte* communication with the Administrative Law Judge. Any questions of a technical or procedural nature shall be directed to the Administrative Law Judge's Attorney Advisors. Except for service of electronic copies pursuant to Ground Rule 1.3.2, the parties should take care not to copy the Attorney Advisors on email communications not specifically directed to them.

The parties should further note that the Docket Manager for this Investigation, as well as other staff in Docket Services and the Administrative Law Judge's Secretary, should not be contacted relating to such issues as whether an order has been signed, when an order posted on EDIS will be processed, whether an order posted on EDIS will go out by overnight courier or U.S. Mail (as opposed to an issue of non-receipt several days later). This is not to say that Docket Services may never be contacted with respect to this Investigation. If the parties have generic questions relating, e.g., to a party filing, such an inquiry would be appropriate. However, Docket Services' staff members are not allowed to give out information relating to the status of the Administrative Law Judge's orders. The Docket Manager for this Investigation and the Administrative Law Judge's Secretary may log any inappropriate calls made in this Investigation and bring them to the attention of the Administrative Law Judge if necessary.

14. Mediation.

The Commission has approved the initiation of a voluntary mediation program for investigations under Section 337 of the Tariff Act of 1930 as amended, to facilitate the settlement of disputes. Parties who wish to participate in the mediation program should notify the Administrative Law Judge's Attorney Advisor.

APPENDIX A

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

Before the Honorable MaryJoan McNamara
Administrative Law Judge

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

[SAMPLE] APPLICATION FOR ISSUANCE OF SUBPOENA AD TESTIFICANDUM

[Party name], pursuant to 19 C.F.R. § 210.32(a)(1), hereby applies to the Administrative Law Judge for the issuance of the attached subpoena *ad testificandum* to:

[Name]
[Address]

The subpoena *ad testificandum* requires [Name] to appear and testify at the taking of a deposition on [date], at [location], or at such other date and location as is mutually agreed upon.

[Party name] believes that [Name] may be in possession of substantial information relevant to this Investigation. [Insert explanation re relevance, *see* Ground Rule 3.5.1.] Furthermore, the topics identified in Attachment A of the subpoena are narrowly tailored to address only the aforementioned subjects. [Insert explanation re reasonableness of the scope of inquiry, *see* Ground Rule 3.5.1.]

[Name] will receive the application and subpoena by overnight delivery, if not sooner, and all other parties to this Investigation will receive them on the next business day, at the latest, after the subpoena has issued. For the reasons set forth above, [Party name] respectfully requests that its application for issuance of a subpoena *ad testificandum* be granted and the attached

subpoena be issued.

Dated: _____, 20__

Respectfully submitted,

_____
[Counsel]
[Address]

Counsel for [Party Name]

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

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

[SAMPLE] 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: (i) the date the information was created or communicated; (ii) author(s)/sender(s); (iii) all recipient(s); and (iv) the general subject matter contained in 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 (2) double-sided courtesy copies shall be served concurrently on the Administrative Law Judge at her office.

IN WITNESS WHEREOF the undersigned of the United States International Trade Commission has hereunto set her hand and caused the seal of said United States International Trade Commission to be affixed at Washington, D.C. on this ___ day of _____, 20__.

_____

MaryJoan McNamara
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 upon, 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 (2) double-sided courtesy copies shall be served concurrently on the Administrative Law Judge at her office.

IN WITNESS WHEREOF the undersigned of the United States International Trade Commission has hereunto set her hand and caused the seal of said United States International Trade Commission to be affixed at Washington, D.C. on this ___ day of _____, 20__.

_____
MaryJoan McNamara
Administrative Law Judge
United States International Trade Commission

APPENDIX B

EXAMPLE OF 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 AND IMPORTATION

III. PATENT "A" [31]
- **A. Claim Construction**
  - **1. Define Level of Skill of a Person of Ordinary Skill in the Art**
  - **2. First Disputed Claim Term (Claims 1, 2, 3, . . .)**
  - **3. Second Disputed Claim Term (Claims 1, 2, 3, . . .)**
- **B. Infringement**
  - **1. Claim 1**
  - **2. Claim 2**
- **C. Technical Domestic Industry**
- **D. Validity**
  - **1. Anticipation Under 35 U.S.C. § 102(a)**
  - **2. Obviousness Under 35 U.S.C. § 103(a)**
    - **a. The scope and content of the prior art**
    - **b. The level of ordinary skill in the art**
    - **c. Comparison of the claimed invention and the prior art**
    - **d. Secondary considerations of non-obviousness**
- **E. Unenforceability**
- **F. Other Defenses**

IV. PATENT "B" ...

V. ECONOMIC DOMESTIC INDUSTRY (all patents)
- **A. Significant Investment in Plant and Equipment**
- **B. Significant Employment of Labor or Capital**
- **C. ...**

VI. REMEDY AND BONDING

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[31] The parties are required to confer and follow the same order of patents for all briefing.

CERTAIN COMPOSITE AEROGEL INSULATION MATERIALS AND METHODS FOR MANUFACTURING THE SAME

Inv. No. 337-TA-1003

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, Jeffrey Hsu, Esq., and upon the following parties as indicated on June 17, 2016.

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

On Behalf of Complainant Aspen Aerogels, Inc.

Kevin K. Su
FISH & RICHARDSON P.C.
1 Marina Park Drive
Boston, MA 02210

☐ Via Hand Delivery
☐ Via Express Delivery
☑ Via First Class Mail
☐ Other:_____

On Behalf of Respondent Guangdong Alison Hi-Tech Co., Ltd.

Gary M. Hnath
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006-1101

☐ Via Hand Delivery
☐ Via Express Delivery
☑ Via First Class Mail
☐ Other:_____

On Behalf of Respondent Nano Tech Co., Ltd.

Steve E. Adkins
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington DC 20036

☐ Via Hand Delivery
☐ Via Express Delivery
☑ Via First Class Mail
☐ Other:_____