UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of	
CERTAIN MOBILE ELECTRONIC DEVICES AND RADIO FREQUENCY AND PROCESSING COMPONENTS THEREOF (II)	**Inv. No. 337-TA-1093**

ORDER NO. 2: **PROPOSED SCHEDULING ORDER AND NOTICE OF GROUND RULES**

(January 19, 2018)

On January 2, 2018, 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 mobile electronic devices and radio frequency and processing components thereof by reason of infringement of one or more of claims 1, 7, 8, 10, 11, 17, and 18 of the '356 patent; claim 4 of the '336 patent; claims 1, 5–8, 12, 16–18, and 21–22 of the '674 patent; claims 1–4, 7–9, 11, 17, 20–23, 31–33 and 36 of the '002 patent; and claims 1–3, 10–12, 18, and 22–24 of the '633 patent;[1] and whether an industry in the United States exists as required by subsection (a)(2) of section 337[.]

83 Fed. Reg. 834-35 (Jan. 8, 2018). Moreover, pursuant to Commission Rule 210.50(b)(1), the presiding Administrative Law Judge shall:

> take evidence or other information and hear arguments from the parties or other interested persons with respect to the public interest in this investigation, as

[1] The asserted utility patent numbers are: U.S. Patent No. 9,154,356 ("the '356 patent"); U.S. Patent No. 9,473,336 ("the '336 patent"); U.S. Patent No. 8,063,674 ("the '674 patent"); U.S. Patent No. 7,693,002 ("the '002 patent"); and U.S. Patent No. 9,552,633 ("the '633 patent"). *See, e.g.*, 83 Fed. Reg. 834 (Jan. 8, 2018).

> appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors set forth in 19 U.S.C. 1337(d)(1), (f)(1), (g)(1)[.]

Id. at 835.

The Notice of Investigation ("NOI") names as complainant: Qualcomm Inc. of San Diego, California ("Complainant" or "Qualcomm"). *Id.* at 835. The NOI names as respondent: Apple Inc. of Cupertino, California ("Respondent" or "Apple"). *Id.* The NOI also names the Office of Unfair Import Investigations ("Staff") as a party. *Id.*

Target Date

Pursuant to Commission Rule 210.51(a), a target date for completion of the Investigation in the above-captioned matter must be set. *See* 19 C.F.R. 210.51(a). Upon a review of the Complaint and the NOI, and taking into account my commitments in other already instituted investigations, and staffing constraints, I have determined that a target date of sixteen-and-a-half (16.5) months is appropriate. The target date is therefore set for **May 22, 2019**. Based on this target date, the final initial determination on violation ("ID") in this Investigation will be due no later than **January 22, 2019**. The proposed Procedural Schedule is set forth in **Attachment A** hereto. Ground Rules for this Investigation are set forth in **Attachment B**.

Procedural Schedule

The Parties shall file jointly by **February 2, 2018** their own proposed procedural schedule that includes dates for each of the events in the attached proposed Procedural Schedule (as set forth in Ground Rule 1.13) that have not been identified.

If the Parties wish to deviate from the proposed Procedural Schedule in **Attachment A** when proposing other dates, they should explain their rationale for the proposed changes in their submission. The Parties should have extraordinary reasons for proposing scheduling changes.

However, certain dates such as the evidentiary hearing dates, the target date and the date for submission for the initial determination on violation may not be changed at this time.

When the Parties submit their proposed dates to fill in those dates left blank, or if the Parties wish to propose different dates for certain scheduled items, it would be helpful for the Parties to use the chart in **Attachment A**, below, and to add a third column, or, alternatively, to use color to identify/highlight the new or changed dates the Parties propose.

Ground Rules and Changes

The conduct of this Investigation before me shall be governed by the Commission Rules and Ground Rules attached hereto as **Attachment B**. The Parties should pay particular attention to the Ground Rules governing this Investigation as they may differ from the Ground Rules issued by me in other investigations. For example, here are some recent changes of which Parties should be aware:

(1) Exhibits attached to motions or memoranda, in addition to all post-hearing exhibits, must contain exhibit descriptions of the content in addition to an alpha or numerical identification.

(2) All documents submitted as exhibits should be dated. If there are multiple iterations of the same documents, those multiple iterations should be dated. If, for example, screen shots of web sites are used, then the dates the screen shots were taken along with the https://address should be provided.

(3) Moot issues (and issues that will not be pursued), such as withdrawn claims that will be dropped, contentions that will no longer be advocated, witnesses who will be dropped, documents that will not be used that were previously relied upon, etc., should be identified at the earliest practicable time via an EDIS filing, with the Party responsible for the change doing the

filing.

(4) The parties must jointly create and maintain a single chart of substantive legal issues being litigated in the Investigation. The chart shall be jointly filed as a separate docket entry simultaneously with the pre-hearing and the post-hearing briefs. The parties' pre-hearing and initial post-hearing briefs will follow the order of the issues set forth in the chart. The leftmost column of the chart will list the issues being litigated, including all infringement and invalidity theories and defenses. The parties will create subsequent columns for each of their briefs, grouped by party (i.e., the chart accompanying the post-hearing reply briefs will include columns for Complainant(s)'s pre-hearing brief, initial post-hearing brief, and post-hearing reply brief, followed by columns for Respondent(s)'s pre-hearing brief, initial post-hearing brief, and post-hearing reply brief). The cells of the columns will contain page numbers of the particular sections of the briefs where those issues are addressed. If issues, contentions, arguments, or defenses have dropped out from the pre-hearing briefs, that should be noted explicitly in the chart accompanying the initial post-hearing briefs. That same principle should carry through to the outline accompanying the post-hearing reply briefs.

(5) Initial post-hearing briefs are now limited to issues on which each party bears the burden of proof.

(6) Post-hearing reply briefs are now limited to the issues and evidence discussed in the initial post-hearing brief of each opposing party.

(7) Parties should notify Chambers of any stipulations to which they have agreed whenever they occur during this Investigation.

(8) All motions are now limited to 25 pages, and all attachments to motions may not exceed a total of 100 pages without requesting leave for good cause.

(9) Unopposed motions and joint motions shall contain a proposed order. On the same day the motion is filed, a version of the motion including the proposed order in MS Word for Windows shall be submitted to the Administrative Law Judge's Attorney Advisor via e-mail.

(10) A party may file a stipulation to extend the deadline to respond to a subpoena only once as a matter of course. For any additional extensions, the party must file a motion for leave and show good cause. The same applies to third-party subpoenas.

(11) With regard to deadlines in general, Parties may not jointly stipulate to extend deadlines without leave. Parties must file a motion and show good cause.

(12) Any informal communication with the Administrative Law Judge's Attorney Advisors via email or telephone shall not be referenced in any briefs, documents, or papers filed on EDIS. If a party references such a communication in a document filed on EDIS, the party will no longer be permitted to informally contact the Attorney Advisors on any matter. All correspondence with Chambers will be conducted formally via EDIS.

Discovery

Discovery should proceed expeditiously. Any discovery disputes should be brought to the Court's attention as soon as practicable. Because discovery statements are generally vague early in the Investigation, they are no longer required. However, the Parties should file on EDIS by **February 2, 2018** a list/notice of any proceedings in the United States Patent and Trademark Office ("USPTO"), including those before the Patent Trial and Appeal Board ("PTAB"), in addition to the identification and the status of any concurrent federal or state litigation that may affect the issues in this Investigation.

The Parties should make intensive good faith efforts ***to commence and respond to discovery promptly***. This includes early and diligent applications for nonparty subpoenas, and

quick action to enforce said subpoenas if third-parties delay. 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. The Parties should note that the deadlines in the proposed Procedural Schedule are considered to be the last day to complete a task.

Motions/Briefs /Confidentiality

All documents filed on EDIS, including motions, memoranda in support of motions, oppositions to motions, and responses to motions, must contain at the bottom of each page, the title of the filed document and the party filing it.

Within seven (7) business days of the submission of a motion, a memorandum in support of a motion, an opposition to a motion, and a response to a motion that a party contends contains Confidential Business Information ("CBI"), the party should submit a copy to Chambers (ALJ's attorney) identifying the proposed CBI redacted with red brackets.

Patent Priority Dates, Prior Art and Technology

The Parties are expected to identify patent priority dates and prior art, and to solidify their positions with respect to claim construction for the asserted patents early in the Investigation.

Claim Construction

The proposed Procedural Schedule in **Attachment A** identifies dates by which the Parties should meet and confer to resolve claim terms, and a date of May 11, 2018 by which Parties should submit a joint claim construction chart. The Parties should submit proposals on or before May 18, 2018 with their comments as to whether a *Markman* hearing would be useful in resolving disputed claims. The Parties' claim construction *Markman* briefs are also due on May 18, 2018. A proposed timeframe for a *Markman* hearing is offered that is almost three months before the evidentiary hearing, or sometime during the week of June 11-15, 2018 on a day and at

a time to be determined. If the Parties would like to change that timeframe, they should provide a five (5) day date range before and at least a ten (10) day date range after.

If a party contends that one or more disputed claim term(s) is/are indefinite, that party must provide an explanation of its reasoning in its Initial Claim Construction Brief, due May 18, 2018. Simply claiming a term is indefinite, or providing no rationale or a conclusory statement without support, will not be sufficient. The failure to provide a rationale may weigh against that proposal of claim term indefiniteness. Additionally, if a party proposes that one or more of the disputed claim terms should be construed to have its/their plain and ordinary meaning(s), that party must provide a proposed construction for each term so identified.

Absent a showing of good cause, the Parties will be bound by their proposed constructions for disputed claim terms on the date the joint submission of disputed claim terms is due.

Pre-Hearing and Evidentiary Hearing

The evidentiary hearing is scheduled for **September 17-21, 2018**, if necessary, at a location to be announced closer to the hearing date. The pre-hearing conference and hearing will commence in the same location on **September 17, 2018**. The hearing days will start at 9:30 a.m. and conclude at 5:30 p.m. each day, barring unforeseen circumstances (severely inclement weather, etc.). Additionally, at my discretion, I may hold one or more telephone conferences over a period of ten (10) days or so before the pre-hearing conference in order to resolve Motions *in Limine* and High Priority Objections.

Direct testimony will be taken during the evidentiary hearing. Whether all of the testimony will be direct will be determined later. Basic background information about a witness or the issues may be considered as part of an acceptable witness statement.

As the Investigation proceeds closer to the evidentiary hearing dates, the Parties will be asked if they need additional days or fewer days for the evidentiary hearing. While the Parties are encouraged to reduce the number of evidentiary hearing days as they winnow down issues and disputes, exigencies do occur. If the Parties need additional days, we may adjust the schedule, most likely to include days the week before the dates now scheduled, if possible.

Settlement and Mediation

The proposed Procedural Schedule includes a date for one settlement meeting and a one-day mediation session (none of which will include me) at a time, date, and location of the Parties' choosing for the good faith exploration of settlement, by persons who have significant or requisite settlement authority, over the issues in the case. Unless the Parties obtain my permission, for good cause shown, the settlement meeting should not occur by video-conferencing or by teleconferencing. The Commission Investigative Staff, designated as a party to the Investigation (*see* 82 F.R. at 18311), may be present at the settlement meeting to facilitate, but not mediate, the process without my prior approval. The mediation has been scheduled close to the evidentiary hearing. The Parties should include dates in their proposed schedule for filing the joint settlement conference report.[3]

Conclusion

To recapitulate: because these are fast-paced proceedings, the Parties are expected to exert diligence and file motions earlier than the stated deadline, such as motions to compel discovery or to enforce subpoenas, Motions for Summary Determination, and even Motions *in Limine*.

[3] Settlement conference reports, at a minimum, should state what meeting(s) took place, who attended, and what result, if any, was obtained in each meeting. *See 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. Nov. 21, 2011).

The Parties should not tactically seek to withhold or delay motions, as every party is expected to proceed expeditiously. Commission Rule 210.2.

Please note that in the event a party needs to contact Chambers, they should contact Mr. Michael Buckler, michael.buckler@usitc.gov.

SO ORDERED.

MaryJoan McNamara
Administrative Law Judge

ATTACHMENT A

Inv. No. 337-TA-1093

PROPOSED PROCEDURAL SCHEDULE & DATES

Event	Date
Parties File a Proposed Procedural Schedule and Identify USPTO/PTO proceedings as well as state and federal litigation that is relevant to this Investigation	February 2, 2018
Deadline for Propounding First Set of Interrogatories	February 14, 2018
Deadline for Propounding First Request for Production of Documents	February 14, 2018
Deadline for Complainant's Objections and Responses to Respondent's First Set of Interrogatories and Request for Production	
Deadline for Respondent's Objections and Responses to Complainant's First Set of Interrogatories and Request for Production	
Deadline for Initial Contention Interrogatories	
Deadline for Initial Contention Deadline Interrogatory Responses	
File Identification of Expert Witnesses, Including Their Expertise and Curriculum Vitae	March 2, 2018
Complainants File Notice of Patent Priority Dates/Dates of Conception and Curriculum Vitae	March 9, 2018
Parties Exchange List of Patent Claim Terms for Construction	March 23, 2018
Respondents File Notice of Prior Art	April 9, 2018
Deadline for Disclosure of Invalidity Contentions	April 16, 2018
Deadline for Disclosure of Infringement Contentions	April 16, 2018
Complainants and Respondents provide Staff with	April 27, 2018

Event	Date
Their Proposed Construction of Disputed Claim Terms	
Parties Meet and Confer (including Staff) to Attempt to Limit Claim Terms and Claim Term Disputes	May 2, 2018
File Joint Claim Construction Chart	May 11, 2018
Parties File a Joint List Showing Each Party's Proposed Construction of Disputed Claim Terms, with Initial Briefs by All Parties Explaining Their Initial Claim Constructions	May 18, 2018
Deadline to File *Markman* Hearing Proposals	May 18, 2018
Deadline for Disclosure of Domestic Industry Contentions	May 25, 2018
Last Day to File Motions to Compel Discovery	May 29, 2018
Fact Discovery Cutoff and Completion	May 29, 2018
Technology Stipulation Deadline	June 1, 2018
Markman Hearing (if Ordered) (Parties should provide thumb drive or CD ROMS of tutorials if included in *Markman* Hearing)	Week of June 11-15, 2018
File Tentative List of Witnesses a Party Will Call to Testify at the Evidentiary Hearing, with an Identification of Each Witness's Relationship to the Party	
Exchange of Initial Expert Reports (Identify Tests/Surveys/Data)	
Exchange of Rebuttal Expert Reports	
Expert Discovery Cutoff and Completion	June 8, 2018
Last Day to File Summary Determination Motions	June 22, 2018[1]

[1] This date can be later if the Parties do not need extra hearing dates. Given that Commission Rule 210.18 requires at least 60 days between summary determination motions and the evidentiary hearing, the proposed date may be moved to a later date if the proposed hearing dates do not change.

Event	Date
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	
Parties Exchange Exhibit Lists	June 29, 2018
Submit and Serve Direct Exhibits (Including Witness Statements, if Appropriate), with Physical and Demonstrative Exhibits Available – Complainants and Respondents	
Submit and Serve Direct Exhibits (Including Witness Statements), with Physical and Demonstrative Exhibits Available – Staff	
File Pre-hearing Statements and Briefs (Briefs should contain no more than 100 pages of text, each side, unless there is no identity of interests, or different interests. To be discussed)	July 13, 2018
Staff files Pre-hearing Statement and Brief (No more than 100 pages of text)	July 20, 2018
File Requests for Receipt of Evidence Without a Witness	
Attendance at One-day Mediation Session[2]	By August 10, 2018
Submission of Mediation Report	(Within 7 days of Mediation)
File Objections to Direct Exhibits (including Witness Statements)	
Submit and Serve Rebuttal Exhibits (including Witness Statements), with Rebuttal Physical and Demonstrative Exhibits Available	
Last day to file Motions *in Limine*	August 10, 2018
File Responses to Objections to Direct Exhibits	

[2] 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.

Event	Date
(Including witness statements)	
File Objections to Rebuttal Exhibits (Including Witness Statements)	
File High Priority Objections	August 10, 2018
File Response to Objections to Rebuttal Exhibits (including witness statements)	
File Responses to Motions *in Limine*	August 17, 2018
File Responses to High Priority Objections	August 17, 2018
Submission of Declarations justifying Confidentiality of Exhibits	
Pre-Hearing Conference	**September 17, 2018 (location TBA)**
Evidentiary Hearing (Starting with Tutorials, as Parties Propose)	**9:30 a.m., September 17-21, 2018 (location TBA)**
Last day to submit Final Exhibits, by Appointment. All Exhibits Should be Properly Labeled. (Follow the Ground Rules)	No more than four (4) business days after hearing
File Initial Post-Hearing Briefs and Final Exhibit Lists (Briefs should contain no more than 75 pages of text)	October 5, 2018
Submit Final JOINT Direct and Rebuttal Exhibits (CDROM or Flash Drive)	October 5, 2018
File Reply Post-Hearing Briefs on Issues on Which The Party Bears the Burden of Proof (Briefs should contain no more than 50 pages of text)[3]	October 12, 2018
Final ID due	**January 22, 2019**
Target Date	**May 22, 2019**

[3] Any party may weigh in on matters on which they do not have the burden of proof. Staff is expected to file a Post-Hearing Reply Brief, but may choose which issues to address.