

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. 38: CONSTRUING CERTAIN TERMS OF THE ASSERTED
CLAIMS OF THE PATENTS AT ISSUE (*MARKMAN*
CLAIM CONSTRUCTION)

(August 28, 2018)

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I. BACKGROUND

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).

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

On January 19, 2018, a Proposed Scheduling Order issued to guide the timing and conduct of this Investigation. (Order No. 2 (Jan. 19, 2018).). Also on January 19, 2018, an initial determination (“ID”) issued setting January 21, 2019 as the target date in this Investigation. (Order No. 3 (Jan. 21, 2018).). On February 14, 2018, an initial procedural schedule (“Procedural Schedule”) issued, (Order No. 4 (Feb. 14, 2018)), that “accepted certain changes and adapted others” from the Parties’ Joint Submission Regarding Procedural Schedule, filed on February 2, 2018 (Doc. ID No. 635535 (Feb. 2, 2018)).

¹ The numbers of the asserted utility patents 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).

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On March 27, 2018, in response to the Parties' Joint Motion to Amend the Procedural Schedule, (Motion Docket No. 1093-003 (Mar. 23, 2018)), a Revised Procedural Schedule issued, (Order No. 7 (Mar. 27, 2018)). The Revised Procedural Schedule "extend[ed] expert discovery and avoid[ed] scheduling conflicts with other investigations without affecting scheduling of the hearing, Initial Determination, or Target Date in this Investigation." (*Id.*). Although it contained a deadline for Initial Briefs by All Parties Explaining Their Initial Claim Constructions, the Revised Procedural Schedule omitted a deadline for reply *Markman* briefs. (*Id.*; see also Order No. 2 at 11 ("compulsory reply *Markman* briefs have been eliminated.")).

On May 7, 2018, Staff filed an Unopposed Motion to Amend the Date for Its Initial Claim Construction Brief. (Motion Docket No. 1093-007 (May 7, 2018)). That motion was granted on May 8, 2018, giving Staff a one-week extension, until May 25, 2018, to file its claim construction brief. (Order No. 10 (May 8, 2018)).

On May 16, 2018, one day late, the Parties filed a Joint Claim Construction Chart ("Joint CC Chart"). (Doc. ID No. 645195 (May 16, 2018)). The Joint CC Chart lays out the claim terms for which a meaning remains in dispute. (*Id.*). With their Joint CC Chart, the Parties filed a Joint Motion for Leave to File Joint Claim Construction Chart Out of Time. (Motion Docket No. 1093-008 (May 16, 2018)). That motion was granted on June 4, 2018. (Order No. 13 (June 4, 2018)).

On May 18, 2018, the Private Parties each filed a claim construction brief. (Respondent Apple Inc.'s Initial Claim Construction Brief ("RMBr."), Doc. ID No. 645527 (May 18, 2018); Complainant Qualcomm's Claim Construction Brief ("CMBr."), Doc. ID No. 645526 (May 18, 2018)). Also on May 18, 2018, the Private Parties filed separate *Markman* Hearing Proposals requesting the scheduling of a one-day *Markman* hearing to occur during the week of June 4,

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2018. (Complainant's *Markman* Hearing Proposal, Doc. ID No. 645497 (May 18, 2018); Respondent Apple Inc.'s *Markman* Hearing Proposal, Doc. ID No. 645499 (May 18, 2018).). Staff filed its claim construction brief on May 25, 2018. (Claim Construction Brief of the Commission Investigative Staff ("SMBr."), Doc. ID No. 646022 (May 25, 2018).).

On May 30, 2018, an order issued setting June 7, 2018, as the date of the *Markman* hearing. (Order No. 12 (May 30, 2018).). Qualcomm filed a Pre-*Markman* Hearing Statement on June 6, 2018. (Doc. ID No. 647012 (June 6, 2018).). Apple filed a *Markman* Pre-Hearing Statement on June 7, 2018. (Doc. ID No. 647034 (June 7, 2018).). Qualcomm and Apple filed amended versions of these Statements on June 7, 2018. (Doc. ID Nos. 647035 and 647036 (June 7, 2018).). The *Markman* hearing took place on June 7, 2018. (*Markman* Hearing Transcript ("Markman Tr."), Doc. ID No. 647253 (June 8, 2018).).

On June 19, 2018, the Parties filed a Statement Regarding *Markman* Meet and Confer. (Doc. ID No. 648172 (June 19, 2018).). The Statement reported on results of the Parties' post-*Markman* Hearing meeting on June 14, 2018 that addressed disputed claim constructions. (*Id.* at 1.). The Statement also referenced another such meeting that was documented in an unfiled Joint Claim Construction Statement provided to Chambers on June 15, 2018. (*Id.*).

On August 7, 2018, Qualcomm filed its first Unopposed Motion for Partial Termination by Withdrawal of Certain Claims. (Doc. ID No. 652282 (Aug. 7, 2018).). On August 22, 2018, Qualcomm filed its second Unopposed Motion for Partial Termination by Withdrawal of Certain Claims. (Doc. ID No. 653609 (Aug. 22, 2018).). An Initial Determination issued on August 27, 2018, granting Qualcomm's motions for partial termination. (Order No. 37 (Aug. 27, 2018).).

II. PATENTS AND CLAIMS AT ISSUE

The complaint (“Complaint”) and NOI identify five (5) asserted patents and approximately forty-six (46) asserted claims: claims 1, 7, 8, 10, 11, 17, and 18 of the ’356 patent; claim 4 of the ’336 patent; claims 1, 5, 6, 7, 8, 12, 16, 17, 18, 21, and 22 of the ’674 patent; claims 1, 2, 3, 4, 7, 8, 9, 11, 17, 20, 21, 22, 23, 31, 32, 33 and 36 of the ’002 patent; and claims 1, 2, 3, 10, 11, 12, 18, and 22, 23, and 24 of the ’633 patent. (*See, e.g.*, Compl. ¶ 5 (Nov. 30, 2017)). Patents and claims that remain after Qualcomm’s motions for partial termination and Order No. 37 are: (1) claim 4 of the ’336 patent; (2) claims 1 and 17 of the ’356 patent; and (3) claims 1, 5, and 8 of the ’674 patent.² (Order No. 37 at 3.). As set forth below in Chart 1, each remaining asserted patent claim has one or more disputed claim terms.

Chart 1: Disputed Claim Terms of Asserted Patent Claims Remaining in This Investigation

Asserted Patents/Claims	Disputed Terms
’336 patent, cl. 4	first stage carrier group
’336 patent, cl. 4	first portion of the carrier signals second portion of the carrier signals
’356 patent, cls. 1 and 17	carrier aggregation
’356 patent, cls. 1 and 17	a second carrier of the multiple carriers
’674 patent, cls. 1, 5 ³ and 8	up/down detector

² On August 20, 2018, the Private Parties filed pre-hearing briefs. (Complainant’s Pre-Hearing Brief (“CPBr.”), Doc. ID No. 653441 (Aug. 20, 2018); Respondent Apple Inc.’s Pre-Hearing Brief (“RPBr.”), Doc. ID No. 653442 (Aug. 20, 2018)). On the same date, the Private Parties filed a Joint Chart of Substantive Legal Issues Being Litigated (“Joint Chart”). (Doc. ID No. 653442 (Aug. 20, 2018)). On August 22, 2018, in response to Order No. 33, the Parties filed a Joint Statement of Terminated Claims and Prior Art Statements (“Joint Statement”). (Doc. ID No. 653669 (Aug. 22, 2018)). With respect to asserted patents and patent claims remaining in the Investigation, the Joint Chart, Pre-Hearing Briefs, and Joint Statement are consistent with Qualcomm’s motions to terminate. (*See, e.g.*, CPBr. at 9-69.).

³ Claim 5 of the ’674 patent is the only remaining asserted dependent claim, as it depends from claim 1. The term “up/down detector” appears only in claim 1 and is inherited by dependent claim 5.

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