

COVINGTON

BEIJING BRUSSELS LONDON NEW YORK
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Covington & Burling LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
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January 21, 2015

VIA OVERNIGHT MAIL

The Apache Software Foundation
c/o Jim Jagelski
1901 Munsey Drive
Forest Hill, MD 21050-2747

Re: Certain Communications or Computing Devices, and Components Thereof;
ITC Inv. No. 337-TA-925

Dear Sir or Madam:

On behalf of Intervenor Google Inc. and Respondents Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc., in Investigation No. 337-TA-925, currently pending before Administrative Law Judge Dee Lord in the United States International Trade Commission, enclosed please find a subpoena *duces tecum* and subpoena *ad testificandum* issued by Judge Lord to the Apache Software Foundation.

We would appreciate it if you would contact me (hgong@cov.com, 212.841.1016) once you have had an opportunity to review the subpoena.

Respectfully submitted,

/s/ Heng Gong
Heng Gong

cc: All Counsel of Record

Enclosure

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

Before the Honorable Dee Lord
Administrative Law Judge

In the Matter of

CERTAIN COMMUNICATIONS OR
COMPUTING DEVICES, AND
COMPONENTS THEREOF

Investigation No. 337-TA-925

APPLICATION FOR ISSUANCE OF SUBPOENA *DUCES TECUM*
AND SUBPOENA *AD TESTIFICANDUM* TO THE APACHE SOFTWARE
FOUNDATION

Pursuant to 19 C.F.R. § 210.32 and Ground Rule 4.6, Intervenor Google Inc. and Respondents Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively “Respondents”) apply to the Administrative Law Judge for issuance of the attached subpoena *duces tecum* and *ad testificandum* to The Apache Software Foundation, 1901 Munsey Drive, Forest Hill, MD 21050-2747 (“Apache Foundation”). The attached subpoena requires Apache Foundation to produce the documents, materials, and things described in Attachment A to the accompanying subpoena at the time and place indicated on the subpoena. The subpoena also requires Apache Foundation to produce a witness to testify on the topics identified in Attachment B to the subpoena on the requested date at the location specified. Respondents will coordinate with Apache Foundation and the other parties to schedule the deposition.

Complainant Enterprise Systems Technologies, S.a.r.l. in the above-captioned investigation contends that certain claims of U.S. Patent No. 6,691,302 (“the ‘302 Patent”) are

infringed. The '302 Patent was filed May 31, 2000. Prior to the filing of the '302 Patent, Apache Foundation created and disclosed to the public source code including Apache 1.3.4, Apache 1.3.12, mod_perl 1.17, mod_perl 1.21, Apache JServ 1.0b3 (the "Apache Source Code"). Respondents believe the Apache Source Code anticipates or renders obvious one or more of the asserted claims of the '302 patent.

The documents and testimony requested from Apache Foundation are narrowly focused on documents sufficient to show that the Apache Source Code were created, described in printed publications or otherwise disclosed to the public before May 31, 2000. Respondents respectfully request that the Administrative Law Judge therefore issue the requested subpoena *duces tecum* and *ad testificandum* to Apache Foundation.

DATED: January 20, 2015

Respectfully submitted,

/s/ John Scheibeler
Shamita D. Etienne-Cummings
Jack Lever
Sonia Williams Murphy
Jaxon Xu
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Counsel for Intervenor Google Inc.

/s/ Heng Gong
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*Counsel for Respondents Samsun
Electronics Co. Ltd. and Samsung
Electronics America, Inc.*

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.**

**Before the Honorable Dee Lord
Administrative Law Judge**

In the Matter of

**CERTAIN COMMUNICATIONS OR
COMPUTING DEVICES, AND
COMPONENTS THEREOF**

Investigation No. 337-TA-925

SUBPOENA DUCES TECUM AND SUBPOENA AD TESTIFICANDUM

**TO: The Apache Software Foundation
1901 Munsey Drive
Forest Hill, MD 21050-2747
U.S.A.**

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 Intervenor Google, Inc. and Respondents Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.(collectively “Respondents”).

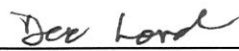
YOU ARE HEREBY ORDERED to produce at the offices of Covington & Burling LLP, One City Center, 850 Tenth Street, N.W., Washington, DC 20004, on January 29, 2015 at 9:00 a.m., or at such other time and place agreed upon, all of the documents in your possession, custody or control which are listed and described in Attachment A hereto. Such production will be for the purpose of inspection and copying, as desired. If production of any document listed and described in Attachment A hereto is withheld on the basis of a claim of privilege, each withheld document shall be separately identified in a privileged document list. The privileged document list must identify each document separately, specifying for each document at least: (1)

the date; (2) author(s)/sender(s); (3) recipient(s), including copy recipients; and (4) general subject matter of the document. The sender(s) and recipient(s) shall be identified by position and entity (corporation or firm, etc.) with which they are employed or associated. If the sender or the recipient is an attorney or a foreign patent agent, he or she shall be so identified. The type of privilege claimed must also be stated, together with a certification that all elements of the claimed privilege have been met and have not been waived with respect to each document. If any of the documents or things listed in described in Attachment A hereto are considered “confidential business information,” as that term is defined in Order No. 1 attached hereto (“Corrected Protective Order”) as Attachment C, such documents or things shall be provided subject to the terms and provisions of Order No. 1.

YOU ARE HEREBY FURTHER ORDERED to be present the offices of Covington & Burling LLP, One City Center, 850 Tenth Street, N.W., Washington, DC 20004, on January 30, 2015 at 9:00 a.m., or at such other date, time and location agreed upon, to testify regarding the topics identified in Attachment B 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 Corrected Protective Order attached hereto, such testimony shall be so designated and treated according to the terms and provisions of the Corrected Protective Order.

Any motion to limit or quash this subpoena shall be filed within ten (10) days after the receipt hereof. The subpoena will be served by overnight delivery, if not sooner.

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 20th day of January, 2015.



Dee Lord
Administrative Law Judge
United States International Trade
Commission

ATTACHMENT A

DEFINITIONS

1. “Apache Foundation” means the Apache Software Foundation, its predecessors, successors, and subsidiaries.
2. “Apache Source Code” means source code created and distributed under the names Apache 1.3.4, Apache 1.3.12, mod_perl 1.17, mod_perl 1.21, or Apache JServ 1.0b3.
3. “Document(s)” has the same meaning as used in Commission Rule 210.30, and includes writings, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained (including paper documents and electronically stored information).

REQUESTS FOR PRODUCTION

Documents sufficient to show publications or public disclosures of Apache Source Code before May 31, 2000.

ATTACHMENT B

DEFINITIONS

The definitions set forth in Attachment A are incorporated by reference.

TOPICS

Facts and circumstances concerning publications or public disclosures of Apache Source Code before May 31, 2000.

ATTACHMENT C

Corrected Protective Order No. 1

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN COMMUNICATIONS OR
COMPUTING DEVICES AND
COMPONENTS THEREOF

Inv. No. 337-TA-925

ORDER NO. 1: [CORRECTED] PROTECTIVE ORDER

(August 28, 2014)

WHEREAS, documents and information may be sought, produced or exhibited by and among the parties to the above captioned proceeding, which materials relate to trade secrets or other confidential research, development or commercial information, as such terms are used in the Commission's Rules, 19 C.F.R. § 210.5;

IT IS HEREBY ORDERED THAT:

1. Confidential business information is information which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either (i) impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions; or (ii) causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such

information. The term "confidential business information" includes "proprietary information" within the meaning of section 777(b) of the Tariff Act of 1930 (19 U.S.C. § 1677f(b)).

2(a). Any information submitted, in pre hearing discovery or in a pleading, motion, or response to a motion either voluntarily or pursuant to order, in this investigation, which is asserted by a supplier to contain or constitute confidential business information shall be so designated by such supplier in writing, or orally at a deposition, conference or hearing, and shall be segregated from other information being submitted. Documents shall be clearly and prominently marked on their face with the legend: "CONFIDENTIAL BUSINESS INFORMATION SUBJECT TO PROTECTIVE ORDER" or a comparable notice. Such information, whether submitted in writing or in oral testimony, shall be treated in accordance with the terms of this protective order.

(b). The Administrative Law Judge or the Commission may determine that information alleged to be confidential is not confidential, or that its disclosure is necessary for the proper disposition of the proceeding, before, during or after the close of a hearing herein. If such a determination is made by the Administrative Law Judge or the Commission, opportunity shall be provided to the supplier of such information to argue its confidentiality prior to the time of such ruling.

3. In the absence of written permission from the supplier or an order by the Commission or the Administrative Law Judge, any confidential documents or business information submitted in accordance with the provisions of paragraph 2 above shall not be disclosed to any person other than: (i) outside counsel for parties to this investigation, including necessary secretarial and support personnel assisting such counsel; (ii) qualified persons taking testimony involving such documents or information and necessary stenographic and clerical

personnel thereof; (iii) technical experts and their staff who are employed for the purposes of this litigation (unless they are otherwise employed by, consultants to, or otherwise affiliated with a non-governmental party, or are employees of any domestic or foreign manufacturer, wholesaler, retailer, or distributor of the products, devices or component parts which are the subject of this investigation); (iv) the Commission, the Administrative Law Judge, the Commission staff, and personnel of any governmental agency as authorized by the Commission; and (v) the

Commission, its employees, and contract personnel who are acting in the capacity of Commission employees, for developing or maintaining the records of this investigation or related proceedings for which this information is submitted, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.¹

4. Confidential business information submitted in accordance with the provisions of paragraph 2 above shall not be made available to any person designated in paragraph 3(i)² and (iii) unless he or she shall have first read this order and shall have agreed, by letter filed with the Secretary of this Commission: (i) to be bound by the terms thereof; (ii) not to reveal such confidential business information to anyone other than another person designated in paragraph 3; and (iii) to utilize such confidential business information solely for purposes of this investigation.

5. If the Commission or the Administrative Law Judge orders, or if the supplier and all parties to the investigation agree, that access to, or dissemination of information submitted as confidential business information shall be made to persons not included in paragraph 3 above, such matter shall only be accessible to, or disseminated to, such persons based upon the conditions pertaining to, and obligations arising from this order, and such persons shall be

¹See Commission Administrative Order 97-06 (Feb. 4, 1997).

²Necessary secretarial and support personnel assisting counsel need not sign onto the protective order themselves because they are covered by counsel's signing onto the protective order.

considered subject to it, unless the Commission or the Administrative Law Judge finds that the information is not confidential business information as defined in paragraph 1 hereof.

6. Any confidential business information submitted to the Commission or the Administrative Law Judge in connection with a motion or other proceeding within the purview of this investigation shall be submitted under seal pursuant to paragraph 2 above. Any portion of a transcript in connection with this investigation containing any confidential business information submitted pursuant to paragraph 2 above shall be bound separately and filed under seal. When any confidential business information submitted in accordance with paragraph 2 above is included in an authorized transcript of a deposition or exhibits thereto, arrangements shall be made with the court reporter taking the deposition to bind such confidential portions and separately label them "CONFIDENTIAL BUSINESS INFORMATION SUBJECT TO PROTECTIVE ORDER." Before a court reporter or translator receives any such information, he or she shall have first read this order and shall have agreed in writing to be bound by the terms thereof. Alternatively, he or she shall sign the agreement included as Attachment A hereto. Copies of each such signed agreement shall be provided to the supplier of such confidential business information and the Secretary of the Commission.

7. The restrictions upon, and obligations accruing to, persons who become subject to this order shall not apply to any information submitted in accordance with paragraph 2 above to which the person asserting the confidential status thereof agrees in writing, or the Commission or the Administrative Law Judge rules, after an opportunity for hearing, was publicly known at the time it was supplied to the receiving party or has since become publicly known through no fault of the receiving party.

8. The Commission, the Administrative Law Judge, and the Commission investigative attorney acknowledge that any document or information submitted as confidential business information pursuant to paragraph 2 above is to be treated as such within the meaning of 5 U.S.C. § 552(b)(4) and 18 U.S.C. § 1905, subject to a contrary ruling, after hearing, by the Commission or its Freedom of Information Act Officer, or the Administrative Law Judge. When such information is made part of a pleading or is offered into the evidentiary record, the data set forth in 19 C.F.R. § 201.6 must be provided except during the time that the proceeding is pending before the Administrative Law Judge. During that time, the party offering the confidential business information must, upon request, provide a statement as to the claimed basis for its confidentiality.

9. Unless a designation of confidentiality has been withdrawn, or a determination has been made by the Commission or the Administrative Law Judge that information designated as confidential, is no longer confidential, the Commission, the Administrative Law Judge, and the Commission investigative attorney shall take all necessary and proper steps to preserve the confidentiality of, and to protect each supplier's rights with respect to, any confidential business information designated by the supplier in accordance with paragraph 2 above, including, without limitation: (a) notifying the supplier promptly of (i) any inquiry or request by anyone for the substance of or access to such confidential business information, other than those authorized pursuant to this order, under the Freedom of Information Act, as amended (5 U.S.C. § 552) and (ii) any proposal to redesignate or make public any such confidential business information; and (b) providing the supplier at least seven days after receipt of such inquiry or request within which to take action before the Commission, its Freedom of Information Act Officer, or the

Administrative Law Judge, or otherwise to preserve the confidentiality of and to protect its rights in, and to, such confidential business information.

10. If while an investigation is before the Administrative Law Judge, a party to this order who is to be a recipient of any business information designated as confidential and submitted in accordance with paragraph 2 disagrees with respect to such a designation, in full or in part, it shall notify the supplier in writing, and they will thereupon confer as to the status of the subject information proffered within the context of this order. If prior to, or at the time of such a conference, the supplier withdraws its designation of such information as being subject to this order, but nonetheless submits such information for purposes of the investigation, such supplier shall express the withdrawal, in writing, and serve such withdrawal upon all parties and the Administrative Law Judge. If the recipient and supplier are unable to concur upon the status of the subject information submitted as confidential business information within ten days from the date of notification of such disagreement, any party to this order may raise the issue of the designation of such a status to the Administrative Law Judge who will rule upon the matter. The Administrative Law Judge may *sua sponte* question the designation of the confidential status of any information and, after opportunity for hearing, may remove the confidentiality designation.

11. No less than 10 days (or any other period of time designated by the Administrative Law Judge) prior to the initial disclosure to a proposed expert of any confidential information submitted in accordance with paragraph 2, the party proposing to use such expert shall submit in writing the name of such proposed expert and his or her educational and detailed employment history to the supplier. If the supplier objects to the disclosure of such confidential business information to such proposed expert as inconsistent with the language or intent of this order or on other grounds, it shall notify the recipient in writing of its objection and the grounds

therefore prior to the initial disclosure. If the dispute is not resolved on an informal basis within ten days of receipt of such notice of objections, the supplier shall submit immediately each objection to the Administrative Law Judge for a ruling. If the investigation is before the Commission the matter shall be submitted to the Commission for resolution. The submission of such confidential business information to such proposed expert shall be withheld pending the ruling of the Commission or the Administrative Law Judge. The terms of this paragraph shall be inapplicable to experts within the Commission or to experts from other governmental agencies who are consulted with or used by the Commission.

12. If confidential business information submitted in accordance with paragraph 2 is disclosed to any person other than in the manner authorized by this protective order, the party responsible for the disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of the supplier and the Administrative Law Judge and, without prejudice to other rights and remedies of the supplier, make every effort to prevent further disclosure by it or by the person who was the recipient of such information.

13. Nothing in this order shall abridge the right of any person to seek judicial review or to pursue other appropriate judicial action with respect to any ruling made by the Commission, its Freedom of Information Act Officer, or the Administrative Law Judge concerning the issue of the status of confidential business information.

14. Upon final termination of this investigation, each recipient of confidential business information that is subject to this order shall assemble and return to the supplier all items containing such information submitted in accordance with paragraph 2 above, including all copies of such matter which may have been made. Alternatively, the parties subject to this order may, with the written consent of the supplier, destroy all items containing confidential business

information and certify to the supplier (or his counsel) that such destruction has taken place. This paragraph shall not apply to the Commission, including its investigative attorney, and the Administrative Law Judge, which shall retain such material pursuant to statutory requirements and for other recordkeeping purposes, but may destroy those additional copies in its possession which it regards as surplusage.

Notwithstanding the above paragraph, confidential business information may be transmitted to a district court pursuant to Commission Rule 210.5(c).

15. If any confidential business information which is supplied in accordance with paragraph 2 above is supplied by a nonparty to this investigation, such a nonparty shall be considered a "supplier" as that term is used in the context of this order.

16. Each nonparty supplier shall be provided a copy of this order by the party seeking information from said supplier.

17. The Secretary shall serve a copy of this order upon all parties.

SO ORDERED.

Dee Lord

Dee Lord
Administrative Law Judge

Attachment A

NONDISCLOSURE AGREEMENT FOR REPORTER/STENOGRAPHER/TRANSLATOR

I, _____, do solemnly swear or affirm that I will not divulge any information communicated to me in any confidential portion of the investigation or hearing in the matter of *Certain Communications or Computing Devices and Components Thereof*, Investigation No. 337-TA-925, except as permitted in the protective order issued in this case. I will not directly or indirectly use, or allow the use of such information for any purpose other than that directly associated with my official duties in this case.

Further, I will not by direct action, discussion, recommendation, or suggestion to any person reveal the nature or content of any information communicated during any confidential portion of the investigation or hearing in this case.

I also affirm that I do not hold any position or official relationship with any of the participants in said investigation.

I am aware that the unauthorized use or conveyance of information as specified above is a violation of the Federal Criminal Code and punishable by a fine of up to \$10,000, imprisonment of up to ten (10) years, or both.

Signed

Dated

Firm or affiliation

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **CORRECTED PROTECTIVE ORDER** has been served by hand upon the Commission Investigative Attorney, Lisa M. Kattan, Esq., and the following parties as indicated, on 8/28/2014



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

**On Behalf of Complainant Enterprise Systems Technologies
S.a.r.l.:**

James M. Wodarski, Esq.
MINTZ LEVIN
One Financial Center
Boston, MA 02111

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

On Behalf of Respondent Apple Inc.:

Mark Fowler
DLA PIPER LLP (US)
401 B Street, Suite 1700
2000 University Avenue
East Palo Alto, CA 94303

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

**On Behalf of Respondents LG Electronics, Inc., LG
Electronics U.S.A., Inc., and LG Electronics MobileComm
U.S.A., Inc.:**

Doris Johnson Hines
FINNEGAN, HENDERSON, FARABOW, GARRETT &
DUNNER
901 New York Avenue, N.W.
Washington, DC 20001

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

**CERTAIN COMMUNICATIONS OR COMPUTING
DEVICES, AND COMPONENTS THEREOF**

Inv. No. 337-TA-925

Certificate of Service – Page 2

**On Behalf of Respondents HTC Corporation and HTC
America Inc.:**

Eric C. Rusnak
K&L GATES LLP
1601 K Street, N.W.
Washington DC 20006

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

On Behalf of Respondent Cirrus Logic Inc.:

Mark L. Whitaker
BAKER BOTTS L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

**On Behalf of Respondents Samsung Electronics Co. Ltd.,
Samsung Electronics America, Inc., and Samsung
Telecommunications America, LLC:**

Sturgis M. Sobin
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

CERTIFICATE OF SERVICE

I, Danute Abrishami, certify that on January 21, 2015, copies of the foregoing SUBPOENA *DUCES TECUM* AND SUBPOENA *AD TESTIFICANDUM* were delivered, pursuant to Commission regulations, to the following interested parties as indicated:

The Apache Software Foundation c/o Jim Jagelski 1901 Munsey Drive Forest Hill, MD 21050-2747	<i>Via Overnight Mail</i>
The Honorable Dee Lord Administrative Law Judge US International Trade Commission 500 E Street, SW Washington, DC 20436	<i>Via Hand Delivery (2 copies)</i> <i>Via E-mail: Edward.Jou@usitc.gov</i>
Lisa M. Kattan Investigative Attorney Office of Unfair Imports Investigations US International Trade Commission 500 E Street, SW Washington, DC 20436	<i>Counsel for OUII</i> <i>Via E-mail:</i> <i>Lisa.Kattan@usitc.gov</i>
James M. Wodarski MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C. One Financial Center Boston, MA 02111	<i>Counsel for Complainant Enterprise Systems Technologies S.a.r.l.</i> <i>Via E- mail:</i> <i>EnterpriseITC925@mintz.com</i>
Shamita D. Etienne-Cummings WHITE & CASE LLP 701 13th Street NW Washington, DC 20005	<i>Counsel for Intervenor Google Inc.</i> <i>Via E- mail:</i> <i>WCGoogleEntepriseITC@whitecase.com</i>
Doris Johnson Hines FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP 901 New York Avenue, NW Washington, DC 20001	<i>Counsel for Respondents LG Electronics, Inc., LG Electronics U.S.A., Inc., and LG Electronics MobileComm U.S.A., Inc.</i> <i>Via E-mail:</i> <i>925-lg@finnegan.com</i>

<p>Eric C. Rusnak K&L GATES 1601 K Street, NW Washington, DC 20006</p>	<p><i>Counsel for Respondents HTC Corporation and HTC America, Inc.</i></p> <p>Via E-mail: HTC-Enterprise-ITC@klgates.com</p>
<p>Mark L. Whitaker BAKER BOTTS LLP 1299 Pennsylvania Ave., NW Washington, DC 20004</p>	<p><i>Counsel for Respondent Cirrus Logic, Inc.</i></p> <p>Via E-mail: Cirrus-Enterprise-ITC@bakerbotts.com</p>
<p>Mark Fowler DLA PIPER LLP (US) 2000 University Avenue East Palo Alto, CA 94303</p>	<p><i>Counsel for Respondent Apple Inc.</i></p> <p>Via E-mail: Apple-Enterprise-ITC@dlapiper.com</p>

/s/ Danute Abrishami
Danute Abrishami
Senior IP Litigation Specialist
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