UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of **CERTAIN POLYCRYSTALLINE DIAMOND COMPACTS AND ARTICLES CONTAINING SAME**	**Inv. No. 337-TA-1236**

ORDER NO. 2: NOTICE OF GROUND RULES; ORDER SETTING DATE FOR SUBMISSION OF JOINT DISCOVERY STATEMENT

(December 22, 2020)

GROUND RULES

The conduct of this Investigation shall be governed by the Commission Rules and the Ground Rules attached hereto.

DISCOVERY STATEMENTS

In order that the proceeding in this matter may begin expeditiously, the parties are directed to file a joint discovery statement, on or before January 11, 2021, addressing the questions and answers set forth in the Attachment A.

TARGET DATE

The parties are advised that an order will issue setting the target date after I have considered the positions of the parties as set forth in their respective discovery statements.

SO ORDERED.

Cameron Elliot
Administrative Law Judge

ATTACHMENT A

GROUND RULES FOR SECTION 337 INVESTIGATIONS

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

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

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

****These Ground Rules may be modified, by the Administrative Law Judge or motion, as required to accommodate the Commission's operating status during the COVID-19 pandemic****

JUDGE ELLIOT'S GROUND RULES

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

1.1 Address of the Administrative Law Judge.

The Administrative Law Judge's address is as follows:

ALJ Cameron Elliot
U.S. International Trade Commission
500 E Street, S.W., Room 317
Washington, D.C. 20436

1.2 Filing Requirement.

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

1.3 Service Copy Requirements.

In accordance with the requirements of Commission Rules 210.4(f)(2) and (g), copies of each submission shall be served on all other parties, including the Commission Investigative Staff. On the same day that the submission is filed, an electronic copy in PDF format shall be sent to the Administrative Law Judge's attorney-advisor, Mary Jane Boswell at mary.boswell@usitc.gov. Electronic copies of confidential documents must be encrypted and the password sent in a separate email.

****The following paragraph is waived for this investigation**** A single, printed, courtesy copy of any papers filed with the Secretary's Office or submitted directly to the Administrative Law Judge shall also be served on the Administrative Law Judge at the address identified in Ground Rule 1.1 on or before the next business day. The courtesy copy shall be printed double-sided. For any filing or submission that includes an appendix of declarations, affidavits, exhibits, or other attachments in support of the filing or submission, the appendix shall be indexed and each declaration, affidavit, exhibit, or other attachment in the appendix shall be individually tabbed.

1.4 Concurrent Service.

Service on opposing counsel may be by hand, by e-mail, or by overnight courier. Parties are encouraged to agree upon a method of service so that the parties will receive all submissions at the same time the submissions are received by the Commission.

1.5 Computation of Time.

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

1.6 Request for Extension of Time.

Any request for extension of time must be made by written motion **two days before** the due date and good cause for such extension must be established. Motions filed after this date may not be ruled on prior to the expiration of the deadline and may be denied for failure to abide by this rule.

1.7 Confidential Submissions.

The confidential nature of any filing with the Office of the Secretary of the Commission or of any submission to the Administrative Law Judge shall be conspicuously noted on the top page of any filing or other submission. The parties should ensure that any confidential submission complies with Commission Rule 201.8.

If the Administrative Law Judge issues a confidential order or initial determination, the parties must **jointly** submit **within seven (7) days** of the order: (1) a proposed public version of this order with any proposed redactions indicated in red; and (2) a written justification for any proposed redactions specifically explaining why the piece of information sought to be redacted is confidential and why disclosure of the information would be likely to cause substantial harm or likely to have the effect of impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions pursuant to Commission Rules 210.5 and 201.6(a).

To the extent possible, the proposed redactions should be made electronically, in a pdf of the issued order, using the "Redact Tool" within Adobe Acrobat, wherein the proposed redactions are submitted as "marked" but not yet "applied." The parties shall have an opportunity to respond regarding any proposed redactions the Administrative Law Judge views as not meeting the Commission's standards for confidential business information.

2. Procedural Schedule

The Administrative Law Judge will promulgate a procedural schedule for the investigation. Modifications of the procedural schedule by any party shall be made by written motion showing good cause. Deadlines marked with an asterisk only apply if it is determined that a *Markman* hearing shall be held. (*See* Rule 6.) The event and deadline dates in the procedural schedule will generally adhere to the following chronological order, although the parties may agree to modify this order when proposing dates in the Joint Proposed Procedural Schedule:

File identification of expert witnesses, including their expertise and curriculum vitae
Exchange list of claim terms to be construed*
Exchange of proposed claim constructions*
Initial deadline for responses to contention interrogatories on issues for which the responding party bears the burden of proof
Meet and confer to discuss and limit number of disputed claim terms*
Initial *Markman* briefs*
Rebuttal *Markman* briefs*
Submission of joint proposed claim construction chart*
Initial deadline for responses to contention interrogatories on issues for which the responding party does not bear the burden of proof
Joint Tutorial[1] and *Markman* hearing*
Submission of updated joint proposed claim construction chart*
File notice of prior art
Cut-off date for supplements to contention interrogatories on issues for which the responding party bears the burden of proof, and on public interest issues (if applicable)
Cut-off date for supplements to contention interrogatories on issues for which the responding party does not bear the burden of proof
Fact discovery cut-off and completion
Deadlines for motions to compel fact discovery
Exchange of initial expert reports (identify tests/surveys/data)

[1] The tutorial shall be limited to a general overview of the technology and should not include any discussion of the asserted patents, the claim terms at issue, or the accused products. In addition, the tutorial should not exceed one hour and should consist of one presentation agreed upon by all parties.

File tentative lists of witnesses a party will call to testify at the hearing, with an identification of each witness' relationship to the party
Exchange of rebuttal expert reports
Expert discovery cut-off and completion
Deadline for motions to compel expert discovery
Deadline for filing motions for summary determination
Exchange of exhibit lists among the parties
Submit and serve direct exhibits, with physical exhibits available - Complainant(s) and Respondent(s)
Submit and serve direct exhibits, with physical exhibits available – Staff
Submit and serve rebuttal exhibits, with rebuttal physical exhibits available – all parties
File pre-trial statements and briefs – Complainant(s) and Respondent(s)
File pre-trial statement and brief – Staff
Deadline to file motions *in limine*
File responses to motions *in limine*
Pre-trial conference
Hearing
File initial post-trial briefs and final exhibit lists
File reply post-trial briefs
Initial Determination
Target date for completion of investigation

3. Motions; Deadlines for Responses

3.1 Contents; In General.

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

All responses to motions shall include the Motion Docket Number assigned to the motion by the Commission's Office of the Secretary in either the title or the first paragraph of any such response,[2] and shall consist of: (1) a memorandum of points and authorities in response to the motion; (2) an appendix of declarations, affidavits, exhibits, or other attachments in support of the

[2] Motion Docket Numbers may be obtained online through the Commission's Electronic Document Information System (EDIS).

memorandum of points and authorities; and (3) a Certificate of Service as required by Commission Rule 201.16(c).

If a motion or related document (*e.g.,* response or reply) contains confidential business information as defined in 19 C.F.R. § 201.6(a), the private parties must file a nonconfidential copy of the motion and/or related document **within five (5) business days from the date of filing**. For those cases where OUII is a party, OUII shall have ten (10) business days to submit a nonconfidential version of the motion and/or related document. It is incumbent on the party filing the motion to verify with opposing (or third party) counsel what information is confidential. If an exhibit to a motion or related document is not capable of redaction, this must be clearly indicated on the exhibit cover sheet. In addition, for any document a party is claiming is not capable of redaction, a declaration shall be filed justifying why the entire document must remain confidential. When redacting confidential business information, a high level of care must be exercised in order to ensure that non-confidential business information is not redacted or indicated. ****Paper copies of such nonconfidential filings need not be submitted to the ALJ.****

3.1.1 Case Citations.

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

3.2 Contents; Certification.

All motions shall include a certification that the moving party has made reasonable, good-faith efforts to resolve the matter with the other parties **at least two business days**[3] prior to filing the motion, and shall state, if known, the position of the other parties on such motion. Said certification shall be placed at the beginning of the motion under a heading entitled "Ground Rule 3.2 Certification" or similar language.

3.3 Motions for Summary Determination and Responses Thereto.

Motions for summary determination are limited to 50 pages (excluding exhibits). Responses to motions for summary determination are limited to 50 pages (excluding exhibits).

[3] Parties can agree to waive the "two business days" requirement.

3.4 Discovery-Related Motions.

3.4.1 Teleconference Requirement.

Prior to filing any motion related to a discovery dispute, the party that seeks to file such a motion must discharge its obligation to meet and confer under Ground Rule 3.2. If, after discharging its obligation under that rule, the discovery dispute persists, the party intending to file the discovery-related motion shall contact the Administrative Law Judge's attorney-advisor to schedule a telephone conference with the Administrative Law Judge in an attempt to resolve the discovery dispute. Prior to contacting the Administrative Law Judge's attorney-advisor, the party should determine the availability of the other parties for a telephone conference. The party intending to file the discovery-related motion is responsible for setting up the teleconference, ensuring that a court reporter is present for the teleconference, and filing the transcript of the teleconference on EDIS.

At least forty-eight (48) hours prior to the conference call, the party intending to file the motion shall file a written explanation of the discovery dispute. The written explanation shall be no more than three (3) pages. Any other party wishing to file an explanation of that discovery dispute may also do so provided the explanation is filed at least **twenty-four (24) hours** prior to the conference call and is also not more than three (3) pages.

Leave to file a discovery-related motion will be granted, if at all, only after the intended movant has complied with the procedure provided herein.

Note that this subsection does not apply to third-party (a.k.a. non-party) discovery disputes.

3.4.2 Contents of 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 a party serves supplemental responses subsequent to the filing of a motion to compel, that party shall file copies of the supplemental responses, or where documents are produced, a detailed accounting of what additional documents were produced.

3.5 Deadline for Filing Response to Motion.

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

3.6 Request for Shortened Time to Respond to Motion.

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

3.7 No Motion Stops Discovery Except Motion to Quash Subpoena.

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

4. Discovery

4.1 Resolution of Disputes; Coordinated Discovery.

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

4.1.1 Discovery Committee.

Commencing with the first full week after these Ground Rules are issued, a discovery conference committee (the "Discovery Committee") consisting of the lead counsel of each party and the Commission Investigative Staff shall convene at least once every two weeks during the discovery phase of this Investigation, either in person or by telephone, to resolve discovery disputes. The Discovery Committee shall confer in good faith to resolve every outstanding discovery dispute in a timely manner within the deadlines set forth in the Procedural Schedule.

4.2 Stipulations Regarding Discovery Procedure.

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

4.3 Service of Discovery Requests and Responses.

Discovery requests and responses thereto shall be served upon all parties, including the Commission Investigative Staff, but **shall not be served on the Administrative Law Judge**

unless they are pertinent to a motion. Discovery documents need not be served on the Office of the Secretary of the Commission, unless they are appended to motions.

4.4 Discovery Requests, Responses and Objections.

4.4.1 Depositions; Notice and Objections.

In addition to the requirements of Commission Rule 210.28(c), unless otherwise ordered, any party desiring to take a deposition shall give notice in writing to every other party of not less than ten (10) days if the deposition is to be taken of a person located in the United States, or of not less than fifteen (15) business days if the deposition is to be taken of a person located outside the United States.

Speaking objections during depositions are prohibited. Objections to the form of a deposition question shall be made by stating, simply, "objection as to form."

4.4.2 Contention Interrogatories.

Parties are expected to respond to contention interrogatories by the date set forth in the Procedural Schedule. A party may not introduce theories or evidence at the hearing that are outside the scope of its responses to contention interrogatories.

Conclusory statements in responses to contention interrogatories are insufficient; *e.g.*, if a party simply states: "there is also infringement under the doctrine of equivalents," the party is prohibited from later introducing evidence regarding the details of such infringement.

Amendment or supplementation of responses to contention interrogatories after the deadlines set forth in the Procedural Schedule may be made only with leave of the Administrative Law Judge and shall be entered only upon a showing of good cause.

4.4.3 Requests for Admission; Period for Service; Deadline for Responses and Objections.

In addition to the requirements of Commission Rules 210.31(a) and (b), unless otherwise ordered, 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. Commission Rules 210.31(b) and (c) will be enforced against improper objections and responses; *e.g.*, responses which read "we lack enough information to confirm or deny and so we deny" or "we object generally and therefore deny."

4.4.4 Discovery Cutoff and Completion.

Fact discovery requests by any party that would require responses after the fact discovery cutoff and completion date must be approved in advance by the Administrative Law Judge upon a showing of compelling circumstances.

4.5 Subpoenas.

4.5.1 Issuance and Service.

Pursuant to Commission Rule 210.32, application for subpoena may be made *ex parte* to the Administrative Law Judge. The original application with the proposed subpoena attached and one copy thereof must be submitted to the office of the Administrative Law Judges. Electronic copies of subpoenas will not be accepted. A cover letter must accompany the application and should clearly indicate who to contact when the subpoena application is ready. The application shall set forth with specificity the relevancy of the information sought and the reasonableness of the scope of the inquiry. In addition, the subpoena should set forth a time limit for a motion to quash and should also state that the subpoena will be served by overnight delivery, if not sooner. The signature page for the subpoena shall not be on a separate page and must include the case caption. Any dates in a subpoena set for appearance of a deponent or production of documents should not be prior to the deadline for filing of any motions to quash. Samples of subpoenas are attached in Appendix A hereto.

During the Covid 19 Pandemic the original application with the proposed subpoena attached shall be submitted, in WORD format, by email to my attorney advisor, Mary Jane Boswell at mary.boswell@usitc.gov.

A copy of the issued subpoena and the application shall be served by the applicant upon the subpoenaed party and all other parties to the investigation on the next business day, at the latest, after the subpoena is issued. The application and subpoena need not be filed with or served on the Office of the Secretary of the Commission, including EDIS, unless they are appended to a motion to quash or motion for a protective order.

4.5.2 Motion to Quash Subpoena; Deadline.

In addition to the requirements of Commission Rule 210.32(d), any motion to limit or quash a subpoena shall be filed within ten (10) days after receipt thereof, or within such other time as the Administrative Law Judge may allow. Filing of any motion to quash an issued subpoena automatically stays such subpoena pending disposition of the motion by the Administrative Law Judge.

4.5.3 Subpoenas *Ad Testificandum* for Hearings.

Applications for subpoenas *ad testificandum* to appear at the hearing must be submitted fourteen (14) days prior to the start of the hearing. Leave to subpoena a witness after this time will only be granted upon a written motion showing compelling circumstances.

4.6 Bates Numbering.

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

4.7 Translations.

All documents produced in response to a document request shall be the original or true complete copies of originals. If an English translation of any document produced exists, the English translation shall be produced.

4.8 Privileged Matter.

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

4.8.1 Claiming Privilege.

If a party objects to discovery on the basis of a claim of privilege, the party asserting the privilege shall, in the objection to the interrogatory, document request, or part thereof, identify with specificity the nature of the privilege (including work product) that is being claimed.[4] The following information shall be provided in the objection, if known or reasonably available, unless divulging such information would cause disclosure of the allegedly privileged information: (A) For oral communications: (i) the name of the person making the communication and the name(s) of persons present while the communication was made; (ii) the date and place of the communication; and (iii) the subject matter of the communication; (B) For documents: (i) the sender(s)/author(s) of the document; (ii) the recipient(s) of the document; (iii) the date of the document; and (iv) the subject matter of the document. The individuals involved in any discovery withheld on the basis of privilege shall be identified by position and entity (corporation, firm, etc.) with which they are employed or associated. If the author/sender or recipient is an attorney or foreign patent agent, he or she shall be so identified.

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[4] If a party asserts that the common interest privilege applies, the party should so note and also identify the underlying privilege (*i.e.*, attorney-client privilege or work product) that protects the discovery from disclosure.

The above information should be provided separately for each document for which privilege/protection is asserted, unless doing so would be excessively burdensome or expensive. In such instances, the party asserting privilege/protection should particularize why providing separate designations would be excessively burdensome or expensive, and then may identify by categories the voluminous documents or communications for which privilege/protection is asserted, providing the above information for each category. A party may only designate documents as privileged/protected by category if each document (A) is within the privilege/protection claimed and (B) shares common characteristics such as sender, receiver, author, or specific subject matter.

Where only part of a document or communication is privileged/protected, the unprivileged/unprotected portion should be disclosed if otherwise discoverable and within the scope of the discovery request. Emails and attachments shall be treated as separate documents. Additionally, the parties are encouraged to confer and reach agreement regarding how to assert privilege/protection claims with respect to email "chains" or "strings."

4.8.2 Motions to Compel Production of Privileged Matter.

Any party seeking production of allegedly privileged documents shall file an appropriate motion only after examining the privileged document list. In opposing any such motion, a party must demonstrate that each element of the applicable privilege(s) has been met. This may be done through the submission of affidavits or other appropriate evidence. Blanket assertions of privilege are insufficient. Failure to submit evidence to support privilege claims may result in waiver of the privilege.

4.8.3 Timing of Privilege Claims.

The privileged document list shall be supplied, unless otherwise ordered or agreed upon by the parties, within ten (10) days after objections based on privilege to the underlying discovery request are due.

5. Notice of Prior Art

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

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.

In the absence of such notice, proof of said matters may not be introduced into evidence at the hearing except upon a timely written motion showing good cause.

6. *Markman* Hearing on Claim Construction

If the Administrative Law Judge determines that a *Markman* hearing would be beneficial to the Investigation, the Administrative Law Judge may conduct a *Markman* hearing on the date set forth in the procedural schedule for the purpose of construing any disputed claim terms of the patents at issue in the Investigation. To the extent a party alleges a term is indefinite under *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014), the party should make this argument during the *Markman* phase of Investigation. The parties and the Commission Investigative Staff shall meet and confer on these issues no later than ten (10) days before the *Markman* hearing in order to reduce the number of disputed claim terms to a minimum.

Before the *Markman* hearing, Complainant(s), Respondent(s) (if there is more than one Respondent, they are required to file a joint brief), and the Commission Investigative 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.[5] If there are multiple patents at issue, the brief should be organized by patent, similar to the outline for pre-trial briefs (*see* Appendix B). Briefs are limited to 50 pages. Rebuttal briefs may also be filed by the date set forth in the procedural schedule and are limited to 25 pages. 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. Afterwards, the Administrative Law Judge will issue an order construing the disputed claims for the purposes of the Investigation. Thereafter, discovery and briefing in the Investigation shall be limited to that claim construction.

6.1 *Markman* Presentation

Parties should present all of the arguments for each term in sequence, except that similar terms may be grouped together, if agreed upon by the parties. Each side receives an opportunity for an initial presentation and a rebuttal.

7. Expert Witnesses and Reports

On or before the dates set forth in the procedural schedule, a party shall disclose to other parties the identity of any person who is retained or employed to provide expert testimony at the hearing and shall provide to the other parties a written report prepared and signed by the witness. 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;

[5] *See Phillips v. AWH Corp.,* 415 F.3d 1303 (Fed. Cir. 2005) (en banc); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979-81 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996).

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 trial or by deposition within the preceding four years. The parties shall supplement these disclosures as needed in the manner provided in Commission Rule 210.27(c).

8. Settlement/Mediation

Negotiated settlements are favored by the Commission as a matter of policy. To this end, the Commission has a mediation program described at www.usitc.gov/intellectual_property/mediation.htm. The parties shall notify the Administrative Law Judge as soon as practicable after they reach a negotiated settlement on any aspect of the proceeding.

9. Pre-trial Submissions

9.1 Pre-trial Statement.

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

(a) The names of all known witnesses, their addresses, whether they are fact or expert witnesses (and their area 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 of all exhibits which the parties will seek to introduce at the hearing.

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

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

(e) Estimated date and approximate length for appearance of each witness. The parties shall confer on estimated dates and approximate length prior to submission of their pre-trial statements.

9.2 Pre-trial Brief.

On or before the date set forth in the procedural schedule, each party shall file a pre-trial brief not exceeding 200 pages. To the extent there is more than one complainant and/or respondent in an investigation, complainants and/or respondents shall coordinate their efforts and submit a single brief. Exceptions to this rule will be made on a case-by-case basis.

The pre-trial brief shall be prefaced with a table of contents and a table of authorities. The pre-trial brief shall set forth a party's contentions on each of the proposed issues, including citations to legal authorities in support thereof, and shall conform to the general outline set forth in Appendix B hereto. With respect to the issues of infringement, validity, and the technical prong of domestic industry, the parties should present their briefing on a limitation-by-limitation basis. The parties shall meet and confer prior to filing the pre-trial briefs in order to agree on an outline, so that each of the submitted briefs addresses the issues in the same order. If any party has issues that are not specifically named in this general outline, the parties may insert these issues where appropriate.

Any contentions not set forth in detail as required herein shall be deemed abandoned or withdrawn, except for contentions of which a party is not aware and could not be aware in the exercise of reasonable diligence at the time of filing the pre-trial brief.

9.3 Motions *in Limine*.

Evidentiary objections a party wishes to raise before the start of the hearing may be made by motion *in limine*. Unless otherwise permitted by the Administrative Law Judge, each side shall be limited to a maximum of ten (10) motions *in limine*. The parties should not attempt to circumvent this limitation by including numerous subsections in a motion *in limine*. Additionally, any motion regarding an expert must be its own motion and cannot be combined with arguments relating to other exhibits or witnesses. The parties are limited to ten (10) pages per motion and any corresponding response.

Motions *in limine* and responses thereto shall include the exhibit(s) that is the subject of the motion and/or exhibit(s) that is referenced or discussed in the response. Any motion *in limine* that does not include said exhibit(s) will not be considered.

9.5 Exhibits.

9.5.1 Exhibit Lists.

Every exhibit list shall consist of a table enumerating all exhibits and identifying each exhibit by a descriptive title, a brief statement of the purpose for which the exhibit is being offered in evidence, the name of the sponsoring witness, if any, and the status of receipt of the exhibit into evidence. In any exhibit list submitted prior to the offer of any exhibit into evidence, the entry in the column for the status of receipt shall be left blank. In any exhibit list submitted after the exhibit is offered into evidence or withdrawn, the entry in that column shall show the date of admission into evidence or rejection of the exhibit or shall indicate its withdrawal. Exhibit lists shall list all exhibits together in numerical order, *e.g.*, CX-0001, CX-0002, CX-0003C, CX-0004, CX-0005C, etc. The exhibit list must be formatted in a way that it is legible when viewed in hard copy.

The parties shall meet and confer before submitting any joint exhibits to agree upon a common descriptive title, statement of purpose, and sponsoring witnesses.

9.5.2 Numbering and Labeling of Exhibits.

Written exhibits shall be marked serially and preceded by the prefix "CX-" for Complainant's exhibits, "RX-" for Respondent(s)' exhibits, "SX-" for the Commission Investigative Staff's exhibits, and "JX-" for any joint exhibits.

The pages of each exhibit must be sequentially numbered in a consistent location on the pages (*e.g.*, through Bates numbering).

If there is more than one respondent in the Investigation, Respondents shall coordinate their numbering to avoid duplication in numbering. Additionally, the parties shall coordinate exhibits to avoid unnecessary duplication (*e.g.*, patents; file wrappers).

9.5.2.1 Confidential Exhibits.

If an exhibit (or any portion of the exhibit) contains confidential business information, a "C" shall be placed after the exhibit number. For certain lengthy exhibits of which only portions are confidential, the parties may be asked to submit a public version of the exhibit.

On any exhibit list submitted, exhibits which contain confidential business information shall be denoted by placing a "C" after the exhibit number in the listing. No exhibit list shall contain confidential information; all exhibits lists shall be public documents.

9.5.2.2 Physical Exhibits.

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

9.5.2.3 Demonstrative Exhibits.

Demonstrative exhibits shall be numbered in a separate series preceded by the prefixes "CDX-", "RDX-", and "SDX-", for Complainant, Respondent(s), and the Commission Investigative Staff, respectively. Confidential demonstrative exhibits shall be denoted with the letter "C". Demonstrative exhibits shall contain citations to the substantive evidence on which they are based.

9.4.2.4 One Document Per Exhibit.

Except for good cause shown, each exhibit shall consist of no more than one document. Exceptions to this "one document per exhibit" rule include instances when it would be appropriate to group certain documents together as one exhibit, such as a group of invoices or related e-mails.

9.5.3 Inclusion on Exhibit List.

9.5.3.1 Exhibits Used for Impeachment.

Exhibits used solely for impeachment must be included on the exhibit list.

9.5.3.2 Documents Not Included on Exhibit List.

A party may not introduce a document at the hearing that was not included on the exhibit list exchanged on the date provided for in the Procedural Schedule, except for good cause.

9.5.4 Sponsoring Witness Unnecessary.

Evidence that is relevant, material, reliable, and not unduly repetitious is admissible. *See* 19 C.F.R. § 210.37(b). Thus, a party offering an exhibit generally need not lay a foundation for its admission, nor is there a need to call a sponsoring witness. A party may nonetheless lay a foundation if it desires, and doing so may enhance the exhibit's probative value. Moreover, if the parties dispute an exhibit's admissibility a sponsoring witness or sworn statement, such as deposition testimony, may be necessary.

9.5.5 Foreign Language Exhibits.

No foreign language exhibits will be received into evidence unless a translation thereof is provided at the time set for the exchange of exhibits. The translation shall be included as part of the foreign language exhibit.

9.5.6 Authenticity.

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

9.5.7 Exchange of Proposed Exhibits Among Parties.

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

9.5.7.1 Exchange of Demonstrative Exhibits.

Demonstrative exhibits must be exchanged by 9:00 p.m. the evening before the day on which the demonstrative exhibit will be used. Demonstrative exhibits may, however, be created by a witness during examination through, for example, asking the witness to draw a picture or annotate an exhibit. Such exhibits need not be exchanged in advance.

9.5.8 Service of Proposed Exhibits Upon the Administrative Law Judge.

On the date that is set forth in the procedural schedule, the Administrative Law Judge shall receive an electronic PDF version of all proposed exhibits, along with a proposed exhibit list. The electronic version of proposed exhibits may be submitted on an external hard drive, a flash drive, or the online Box designated for the case.

10. Hearing - Evidence and Exhibits

10.1 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.

10.1.1 Admission of Exhibits Into Evidence.

The parties should meet and confer and attempt to resolve any objections to exhibits prior to the pre-trial conference. At the pre-trial conference, the parties shall submit their respective exhibit lists to the Administrative Law Judge, with a copy to the court reporter. Exhibits to which no party objects will then be admitted and identified for the record.

The Administrative Law Judge will then go over each party's exhibit list, item by item. Objections to exhibits will be ruled upon, if possible. If an objection cannot be resolved at the pre-trial conference, the proponent of the corresponding exhibit should offer it in evidence during the hearing.

If parties need to submit additional exhibits after the hearing has concluded, they should do so via motion.

10.2 Witness Testimony.

All witness testimony shall be made orally.

10.2.1 Deposition Testimony in Lieu of Live Testimony.

Absent an agreement among the parties, deposition testimony can only be admitted as evidence if it falls within one of the exceptions set forth in Commission Rule 210.28(h) or is being used for impeachment purposes.

10.2.2 Witness Exhibit Binder.

Just prior to commencing a witness' examination, on direct or cross, or by Commission Investigative Staff, counsel shall provide the witness, the Administrative Law Judge, the ALJ's attorney-advisor, and other counsel with a binder. The binder shall contain (1) a table of all exhibits to be used with that witness, and (2) copies of all such exhibits. Each binder must be labeled on its spine with the name and number of the investigation and the nature of the contents of the binder, e.g., Cross-Examination of Witness - Volume 1 of 1.

If there are certain exhibits (i.e., patent, prosecution histories) that will be used frequently with more than one witness, these exhibits may be placed within a separate exhibit binder. The exhibits contained within this specific binder do not need to be included in the separate witness binder for each witness.

11. Hearing Procedure

11.1 Hearing; Order of Examination.

There are no opening statements or closing arguments. The order of examination at the hearing is as follows (subject to alteration at the pre-trial conference or other changes in the discretion of the Administrative Law Judge):

(1) Complainant's Case-in-Chief.

(2) Respondent's Case-in-Chief: In the event there is more than one respondent, the order of presentation will be determined at the pre-trial conference. Respondents, where possible, should avoid unnecessary duplication of effort.

(3) Commission Investigative Staff's Case-in-Chief.

(4) Complainant's Rebuttal

(5) Respondent's Rebuttal

11.3 Hearing Hours.

Normal hearing hours are 9:00 a.m. to 4:45 p.m. with a one-hour and fifteen minute luncheon recess, beginning each day at approximately 12:15 p.m. There will be one fifteen-minute break in the morning and one fifteen-minute break in the afternoon.

11.4 Trial Decorum.

No food, gum, or beverages other than bottled water will be permitted in the courtroom during trial.

11.5 Examination of Witnesses.

11.5.1 In General.

Except as noted below, direct examination of non-hostile witnesses shall not be conducted by leading questions, however, the Commission Investigative Staff may ask leading questions at any time.

Except in extraordinary circumstances, examination of witnesses shall be limited to direct, cross, Staff questioning, redirect, and recross. Cross examination shall be limited to the scope of direct, examination by the Staff shall not be limited in scope, redirect examination shall be limited to the scope of cross and Staff examination, and recross examination shall be limited to the scope of redirect and Staff examination.

A party may call a witness on an opposing party's witness list, however, that witness must be identified by name on the party's own witness list. In the event both Complainants and Respondents wish to call the same witness, the witness shall testify only once, and the parties shall meet and confer regarding when to call the witness..

11.5.2 Coordination of Witnesses.

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

11.5.3 Scope of Expert Witness Testimony.

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

11.5.4 Coordination of Respondents' Cross-examination.

Respondents shall coordinate cross-examination through one attorney as far as practicable to avoid duplication. If that is not possible, counsel who intends to cross-examine must be present in the trial room during the entire preceding cross-examination of the witness so as not to engage in repetitive questioning.

11.5.5 Use of Translators.

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

11.5.6 Sequestration of Witnesses.

Sequestration of fact witnesses is not required, but may be requested by the parties. Such requests should be made at the pre-trial conference. Counsel shall not confer with any witness during breaks in the witness's testimony on the witness's substantive testimony.

11.5.7 Objections

Speaking objections during hearing are prohibited. Objections shall be made by stating "objection," followed by no more than six words explaining the basis. For example, "objection – vague," "objection – asked and answered," and "objection – assumes facts not in evidence" are all acceptable forms of objection.

11.6 Timekeeping.

The parties are responsible for keeping track of the time that each party has used.

11.7 Close of Hearing Procedures.

11.7.1 Removal of Binders.

The parties shall remove any binders provided to the Administrative Law Judge and his attorney-advisors at the conclusion of the hearing.

11.7.2 Physical Exhibits.

All physical exhibits left at the Commission should be identified on a "List of Physical Exhibits." The list should include the exhibit number and a description of the exhibit. If the party intends to leave a photograph in lieu of a physical exhibit, the party should so state on the list.

Physical exhibits will not be returned to the parties until the conclusion of the investigation, including all appeals.

11.7.3 Corrections to Transcripts.

If a transcript needs to be corrected after the conclusion of the hearing, the party requesting the change shall do so through a motion. Once an order issues adopting the proposed correction, it is incumbent upon the party requesting the change to send a copy of the order to Ace-Federal Reporters, Inc. so that the corrections can be made.

12. Submission of Exhibits.

On the same day that initial post-hearing briefs are due, the parties shall each submit the following[6]: [1] the final exhibit lists; [2] the Administrative Law Judge's binder set of all the final exhibits in the format set forth in Ground Rule 12.2; [3] an electronic version of the final set of exhibits to the Administrative Law Judge for his use in drafting the final initial determination; and [4] the Commission set of exhibits, with rejected exhibits submitted under separate cover and so marked. All submissions should be delivered to the Administrative Law Judge's office. They should not be delivered directly to Docket Services.

Each side is only responsible for submitting its own exhibits. Source code (both paper and electronic copies) should be submitted in a manner jointly agreed upon by the parties.

12.1 Final Exhibit List.

Each party must submit a final exhibit list prepared in accordance with Ground Rule 9.5.1 reflecting the status of all exhibits, including those admitted or rejected during the hearing. Withdrawn exhibits do not need to be on the exhibit list.

The parties should submit three versions of the final exhibit list: (1) a list identifying all confidential exhibits: (2) a list identifying all public exhibits; and (3) a master list with all exhibits (both confidential and public). Each side is only responsible for submitting its own exhibit list, except that Complainant(s) is also responsible for submitting the three versions of the joint exhibit lists.

Each party should also submit a list of rejected exhibits. Only one version of this list is required.

12.2 Administrative Law Judge's Binder Set.

The exhibits in the Administrative Law Judge's binder set shall be individually tabbed, with each tab reflecting the number of the corresponding exhibit, *e.g.,* CX-0003C. Each binder

[6] Complainant(s) are responsible for submitting joint exhibits.

must be labeled on its spine with the name and number of the investigation and the nature of the contents of the binder, *e.g.*, Complainant's Exhibits CX-0001 through CX-0018C. The exhibits in the binder set shall be in consecutive numerical order, and shall not be separated according to confidential or public status.

Native files (such as Excel, videos) should be printed to PDF and placed in the binders. If the native file cannot be printed to PDF in a legible manner, a placeholder should be placed in the binder indicating that the file can be found in the Administrative Law Judge's Electronic Copy.

12.3 Administrative Law Judge's Electronic Copy.

The parties should provide an electronic copy of the exhibits. This electronic copy may be submitted on an external hard drive, flash drive, or the online Box designated for the case and need not be separated in the manner set forth in Ground Rule 12.4.

12.4 Commission's Copy.

The Commission set of exhibits shall be submitted in electronic format. The procedure for submitting exhibits electronically is set forth at:
http://www.usitc.gov/docket_services/documents/EDIS3UserGuide-CDSubmission.pdf.

There are twenty-four standard exhibit categories: CX, CDX, CPX, RX, RDX, RPX, JX, JDX, JPX, SX, SDX, SPX, CX-[four-digit number]C, CDX-[four-digit number]C, CPX-[four-digit number]C, RX-[four-digit number]C, RDX-[four-digit number]C, RPX-[four-digit number]C, JX-[four-digit number]C, JDX-[four-digit number]C, JPX-[four-digit number]C, SX-[four-digit number]C, SDX-[four-digit number]C, and SPX-[four-digit number]C. Each category of exhibit must be placed on a separate CD and labeled with the Investigation name, number, and the range of exhibits contained on the CD.

These CDs are used to upload the exhibits to EDIS. **It is the responsibility of the parties to make sure the CDs are correct.** The parties should therefore carefully check each CD to confirm public and confidential exhibits are separated and that source code is not placed on CDs to be uploaded to EDIS, unless agreed to by the parties.

A Table of Contents file in PDF format which lists the names of all files on the disc should be created and included on each disc.

The parties shall also submit any rejected exhibits on discs, with the rejected exhibits also separated into the twenty-four standard exhibit categories referenced above. The rejected exhibits shall be submitted under separate cover and so marked.

Any exhibits that are not included with the Commission exhibits and on the final exhibit list at the conclusion of the hearing will not be considered as part of the record to be certified to the Commission when the final initial determination issues.

12.4.1 Native Files.

Native files (such as Excel, videos) should be printed to PDF and placed on the CDs in the appropriate category. If the native file cannot be printed to PDF in a legible manner, a placeholder should be placed on the CD in the appropriate category indicating that the exhibit is a native file. Parties should submit a separate CD containing all native files.

12.4.2 Format of Commission's Exhibit Set.

The following shall apply **ONLY** if a party has received permission from the Secretary to file the Commission's exhibit set on paper:

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 of the boxes of the Commission exhibit set, the folders containing the exhibits shall be placed in numerical order.

12.5 Binder Exhibit Set for the Office of General Counsel.

No later than thirty (30) days after the submission of post-trial reply briefs, each party shall deliver one additional binder set of exhibits (except withdrawn exhibits) directly to the Office of General Counsel. This submission should be accompanied by a final exhibit list. Rejected exhibits should be submitted under separate cover and so marked. In the alternative, the parties may submit this set electronically pursuant to Ground Rule 12.4.

13. Post-trial Briefs.

13.1 Initial Post-trial Briefs; Filing and Content.

On or before the date set forth in the procedural schedule, each party shall file a post-trial brief (and submit the courtesy copy required by Ground Rule 1.3). The post-trial brief shall discuss the issues and evidence tried within the framework of the general issues determined by the Commission's Notice of Investigation and those issues that are included in the pre-trial brief and any permitted amendments thereto. All other issues shall be deemed waived.

The parties are expected to follow the outline used in pre-trial briefs in the post-trial brief, except that the parties should remove references to any issue that the parties agree is no longer in dispute.

A reasonable page limit will be imposed for all post-trial briefs, which will be determined on a case-by-case basis. Parties are required to use double-spacing (with the exception of headings, footnotes, quotations, etc.), at least 12 point font, and 1 inch margins (excluding headers for CBI

and footers, such as page numbers). If the parties have any questions regarding the acceptable formatting requirements for post-trial briefs, they should contact the Administrative Law Judge's attorney-advisor.

To the extent there is more than one complainant and/or respondent in an investigation, complainants and/or respondents shall coordinate their efforts and submit a single brief. Exceptions to this rule will be made on a case-by-case basis. This rule shall also apply to post-hearing reply briefs.

13.2 Post-trial Reply Briefs; Filing and Content.

On or before the date set forth in the procedural schedule, each party shall file a post-trial reply brief. The post-trial reply brief shall discuss the issues and evidence discussed in the initial post-trial briefs of each opposing party.

A reasonable page limit will be imposed on all post-trial reply briefs, which will be determined on a case-by-case basis. The rules relating to post-hearing briefs detailed in Ground Rule 13.1 also apply to reply briefs.

13.3 Citations to Evidence.

When citing to witness testimony, the party must include a parenthetical identifying the witness whose testimony is being cited. For example, if a party is citing to the trial testimony of their witness, Dr. Smith, the party should include the citation: Tr. (Smith) at 123:1-124:14. If citing to the direct testimony of Dr. Smith, the party should include the citation: CX-0001C (Smith) at Q/A 1-5. This rule also applies if the cited exhibit is testimony received during a deposition.

13.4 Citations to Pre-hearing Briefs.

It is preferable to cite to the evidentiary record rather than pre-hearing briefs. Parties may not incorporate any portion of their pre-hearing briefs into their post-hearing briefs by reference.

14. Cooperation Among Parties.

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

15. *Ex Parte* Contacts.

There shall be no *ex parte* contacts with the Administrative Law Judge. Any questions of a technical or procedural nature shall be directed to the Administrative Law Judge's attorney-

advisor, Mary Jane Boswell, at (202) 205-1803, or mary.boswell@usitc.gov.

APPENDIX A

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

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

SUBPOENA DUCES TECUM

TO: NAME
ADDRESS

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

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

If production of any document listed and described in Attachment A hereto is withheld on the basis of a claim of privilege, each withheld document shall be separately identified in a privileged document list. The privileged document list must identify each document separately, specifying for each document at least: (1) the date; (2) author(s)/sender(s); (3) recipient(s), including copy recipients; and (4) general subject matter of the document. The sender(s) and recipient(s) shall be identified by position and entity (corporation or firm, etc.) with which they are employed or associated. If the sender or the recipient is an attorney or a foreign patent agent,

he or she shall be so identified. The type of privilege claimed must also be stated, together with a certification that all elements of the claimed privilege have been met and have not been waived with respect to each document.

If any of the documents or things listed and described in Attachment A hereto are considered "confidential business information," as that term is defined in the Protective Order attached hereto, such documents or things shall be produced subject to the terms and provisions of the Protective Order.

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

IN WITNESS WHEREOF the undersigned of the United States International Trade Commission has hereunto set his hand and caused the seal of said United States International Trade Commission to be affixed at Washington, D.C. on this ___ day of _____, 202_.

Cameron Elliot
Administrative Law Judge
United States International Trade Commission

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

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

SUBPOENA AD TESTIFICANDUM

TO: NAME
ADDRESS

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

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

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

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

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

IN WITNESS WHEREOF the undersigned of the United States International Trade Commission has hereunto set his hand and caused the seal of said United States International Trade Commission to be affixed at Washington, D.C. on this ___ day of _____, 202_.

Cameron Elliot
Administrative Law Judge
United States International Trade Commission

APPENDIX B

GENERAL OUTLINE FOR ALL BRIEFS

I. INTRODUCTION

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

II. JURISDICTION

III. PATENT "A"

- A. Claim Construction
- B. Infringement
  - 1. Claim 1
  - 2. Claim 2
- C. Domestic Industry – "Technical Prong"
- D. Validity
  - 1. Anticipation Under 35 U.S.C. § 102(a)
  - 2. Obviousness Under 35 U.S.C. § 103(a)
- E. Unenforceability
- F. Other Defenses

IV. PATENT "B" ...

V. DOMESTIC INDUSTRY - ECONOMIC PRONG

- A. Significant Investment in Plant and Equipment

B. Significant Employment of Labor or Capital

C. Substantial Exploitation

VI. REMEDY AND BONDING

JOINT DISCOVERY STATEMENT

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

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

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

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

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

    b. Any recommendations for limiting fact depositions, whether by numbers or days of depositions (*e.g.,* maximum number of deponents, limiting depositions by agreeing on a maximum number of days a party may depose witnesses, etc.).

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

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

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

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

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

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

    i. Recommendations for limiting the number of claim terms to be presented to the ALJ for construction.

4. When the parties believe the best time is to engage in mediation. The parties should also identify what discovery should precede mediation.

EXHIBIT A

DISCOVERY STATEMENT CHECKLIST

1. Issues to be litigated

    a. Identify all issues to be litigated (*e.g.,* infringement, affirmative defenses, importation, domestic industry, remedy, bonding, and public interest (if delegated to the undersigned by the Commission))

    b. Identify specific proposals in which these issues can be narrowed to make the hearing more meaningful and efficient.

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

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

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

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

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

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

8. Proposed discovery limitations including, but not limited to:

    a. limitations on types of discovery beyond those in the Commission Rules and applicable Ground Rules (*i.e.,* limits on depositions, number of interrogatories, requests for admission);

    b. limitations on scope of discovery;

    c. limitations on timing and sequence of discovery;

    d. agreements to allow depositions of hearing witnesses named if not already deposed; and preservation depositions, foreign discovery, or other anticipated issues;

    e. agreements to exchange certain information without the use of formal discovery;

f. agreements or limitations on discovery of electronically-stored information[1];

g. limitations on restoration of electronically-stored information; and

h. limitations on discovery of expert-related hearing preparation materials.

9. Status of any settlement discussions;

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

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

12. Proposal for any modifications to the protective order now in effect for this Investigation, with the understanding that actual amendments to the protective order will only be effected through subsequent written motion;

13. Whether a *Markman* hearing is necessary and if so, a proposed date for the *Markman* hearing; and

14. Position as to target date.

[1] This should include a brief summary of any agreements reached in the Joint Electronic Discovery Submission to be submitted herewith.

EXHIBIT B

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

Before the Honorable Cameron Elliot
Administrative Law Judge

In the Matter of **CERTAIN . . . .**	**Inv. No. 337-TA-####**

JOINT ELECTRONIC DISCOVERY SUBMISSION

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

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

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

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

III. Unresolved Issues: After the meet-and-confer conference(s) taking place on the aforementioned date(s), the following issues remain outstanding and/or require judicial intervention:

A. Preservation

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

Complainant(s):

_____

_____

_____

_____

Respondent(s):

_____

_____

_____

_____

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

_____

_____

_____

_____

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

_____

_____

_____

_____

B. Search and Review

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

Complainant(s):

_____

_____

_____

_____

Respondent(s):

_____

_____

_____

_____

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

_____

_____

_____

_____

C. Production

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

Complainant(s):

_____

_____

_____

_____

Respondent(s):

_____

_____

_____

_____

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

Complainant(s):

_____

_____

_____

_____

Respondent(s):

_____

_____

_____

_____

3. Form(s) of Production:

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

Complainant(s):

_____

_____

_____

_____

Respondent(s):

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

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

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

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

a. Costs

Complainant(s):

_____

_____

_____

_____

Respondent(s):

_____

_____

_____

_____

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

_____

_____

_____

_____

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

_____

_____

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

D. Other Issues:

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

DATED: _____ Respectfully submitted,

_____

Counsel for Complainant(s)

_____

Counsel for Respondent(s)

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served upon the following parties as indicated, on **December 22, 2020**.

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

On Behalf of Complainant US Synthetic Corporation:

James R. Barney
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
901 New York Avenue, NW
Washington, DC 20001
Email: james.barney@finnegan.com

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Respondents:

SF Diamond Co., Ltd.
No. 109, No. 10 Avenue, Economic Development Zone
Zhengzhou, Henan 450016
China

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SF Diamond USA, Inc.
25519 Oakhurst Drive
Spring, TX 77386

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Element Six Abrasives Holdings Ltd.
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Element Six Limited
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Element Six Production (Pty) Limited
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Element Six Hard Materials (Wuxi) Co. Limited
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Element Six Technologies US Corporation
3901 Burton Drive
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Iljin Diamond Co., Ltd. Iljin Building, 45, Mapo-daero Mapo-gu, Seoul Korea	☐ Via Hand Delivery ☐ Via Express Delivery ☐ Via First Class Mail ☒ Other: Service to Be Completed by Complainant
Iljin Holdings Co., Ltd. Iljin Building, 45, Mapo-daero, Mapo-gu Seoul, Korea	☐ Via Hand Delivery ☐ Via Express Delivery ☐ Via First Class Mail ☒ Other: Service to Be Completed by Complainant
Iljin USA Inc. 15995 N. Barkers Landing Road, #310 Houston, TX 77079	☐ Via Hand Delivery ☐ Via Express Delivery ☐ Via First Class Mail ☒ Other: Service to Be Completed by Complainant
Iljin Europe GmbH Kölner Str. 3, 65760	☐ Via Hand Delivery ☐ Via Express Delivery

Eschborn Germany	☐ Via First Class Mail ☒ Other: Service to Be Completed by Complainant
Iljin Japan Co., Ltd. Hamamatsucho General B/L 7F, 2-2-15 Hamamatsu-cho, Minato-ku Tokyo, 105- 0013, Japan	☐ Via Hand Delivery ☐ Via Express Delivery ☐ Via First Class Mail ☒ Other: Service to Be Completed by Complainant
Iljin China Co., Ltd. 3F-C, BaoNa B/D (LP Tower), NC.25 Xianfeng St., Minhang District, Shanghai, 201103 China	☐ Via Hand Delivery ☐ Via Express Delivery ☐ Via First Class Mail ☒ Other: Service to Be Completed by Complainant
Henan Jingrui New Material Technology Co., Ltd. West Side of Xingang Road Zhengzhou City Airport Henan, 451171 China	☐ Via Hand Delivery ☐ Via Express Delivery ☐ Via First Class Mail ☒ Other: Service to Be Completed by Complainant
Zhengzhou New Asia Superhard Materials Composite Co., Ltd. No. 22, Chunlan Road, Zhengzhou Henan, 450001 China	☐ Via Hand Delivery ☐ Via Express Delivery ☐ Via First Class Mail ☒ Other: Service to Be Completed by Complainant
International Diamond Services, Inc. 283 Lockhaven Drive, Ste. 300 Houston, TX 77073	☐ Via Hand Delivery ☐ Via Express Delivery ☐ Via First Class Mail ☒ Other: Service to Be Completed by Complainant
CR Gems Superabrasives Co., Ltd. No. 3802 Shengang Road Songjiang District, Shanghai 201611 China	☐ Via Hand Delivery ☐ Via Express Delivery ☐ Via First Class Mail ☒ Other: Service to Be Completed by Complainant

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