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UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN ELECTRONIC DEVICES,
INCLUDING MOBILE PHONES, PORTABLE
MUSIC PLAYERS, AND COMPUTERS**

Inv. No. 337-TA-701

**ORDER NO. 58: INITIAL DETERMINATION GRANTING NOKIA'S MOTION FOR
SUMMARY DETERMINATION THAT IT HAS SATISFIED THE
ECONOMIC PRONG OF THE DOMESTIC INDUSTRY
REQUIREMENT**

(November 18, 2010)

On September 28, 2010, Complainants Nokia Corporation and Nokia Inc. (collectively, "Nokia") moved for summary determination that they have satisfied the economic prong of the domestic industry requirement of Section 337(a)(3)(C) based on "substantial investments in the United States in activities that exploit the asserted patents, including engineering, research and development, repair and service, and testing of Nokia mobile phones that practice the asserted patents." (Motion Docket No. 701-066; Mot. Mem. at 1.) Nokia alleges that

Hundreds of Nokia employees in San Diego, California, Mountain View, California, San Francisco, California, Irving, Texas, Burlington, Massachusetts, Kirkland, Washington, and Parsippany, New Jersey conduct research and development relating to the Domestic Industry Phones, and hundreds more repair and service and test the Domestic Industry Phones in the United States (SUF ¶¶ 9-14, 19, 25, 30, 34, 41, 47, 52, 60, 66, 74, 81, 88, 100).

(Mot. Mem. at 2.) Nokia is currently asserting six patents in this Investigation: U.S. Patent Nos. 6,714,091 (the "091 patent"), 6,834,181 (the "181 patent"), 6,895,256 (the "256 patent"), 6,518,957 (the "957 patent"), 6,073,036 (the "036 patent"), and 6,924,789 (the "789 patent").

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Nokia argues that a number of demonstrative products, Model Nos. E62, E6li, N900, N78, N81, N85, 5800, and 7205 (the “Nokia Products”), practice the asserted patents. (Mot. Mem. at 1.) According to Nokia, the E62 and E6li practice the ‘181 patent, the N900 practices the ‘256 and ‘957 patents, the N78, N81 and N85 practice the ‘789 patent, the 5800 practices the ‘036 patent, and the 7205 practices the ‘091 patent. (*Id.* at 1, n.1; Statement of Undisputed Facts (“SOF”) at ¶¶105, 108, 110, 113, 116.)

On October 8, 2010, Respondent Apple, Inc. (“Apple”) filed an opposition to the present motion. Apple argues that there is a fundamental flaw in Nokia’s claims that a domestic industry exists, because for at least three of the six asserted patents, Nokia has discontinued sales of the Nokia Products and is no longer carrying on any substantial domestic activities related to such products. (Opp. at 12-18.) Apple also argues that there exist genuine issues of material fact, a failure of evidence, or credibility concerns regarding each of the domestic investments claimed by Nokia for each of the patents-in-suit. (*Id.* at 19-51.) In addition, Apple alleges that Nokia is asserting new contentions regarding previously undisclosed research and development expenditures for the N85 mobile phone and the number of units held in inventory. (*Id.* at 18-19.) Apple further argues that Nokia’s claimed expenditures on the payment of warranty claims, including service and repair, are without merit because it alleges that Nokia’s research and development expenditures must be disregarded. (*Id.* at 9-12.) Without the underlying research and development claims, Apple argues, the warranty related service and repair expenses cannot qualify under Section 337(a)(3)(C). (*Id.*)

On October 8, 2010, the Commission Investigative Staff (“Staff”) filed a response in support of Nokia’s motion. Staff disagrees that “swap” costs incurred to replace a phone under

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warranty by purchasing a new unit (manufactured overseas) are attributable to the domestic industry requirement. (*Id.* at 6.) However, according to Staff, the remainder of Nokia's claimed expenditures constitute a substantial investment in the exploitation of the patents-in-suit. (Staff Resp. at 8.)

On October 14, 2010, Nokia sought leave, which is hereby GRANTED, to file a reply in support of its motion. (Motion Docket No. 701-070.) Apple filed an opposition to Nokia's motion for leave to file a reply.

Upon review of the motion papers, proposed findings of facts, and responses thereto, the Administrative Law Judge finds as follows.

The Commission Rules permit a party to "move with any necessary supporting affidavits for a summary determination in its favor upon all or any part of the issues to be determined in the investigation." 19 C.F.R. § 210.18(a). Summary determination "shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law." 19 C.F.R. § 210.18(b). Summary determination under Commission Rule 210.18 is analogous to summary judgment under Federal Rule of Civil Procedure 56. *See Certain Asian-Style Kamaboko Fish Cakes*, Inv. No. 337-TA-378, Order No. 15 at 3 (U.S.I.T.C., May 21, 1996) (unreviewed initial determination).

The moving party bears the initial burden of establishing that there is an absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When such an initial showing is established, the burden shifts to the opposing party, who "must set forth specific facts showing that there is a genuine issue

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for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). To avoid summary judgment, the non-moving party must produce evidence of sufficient caliber to support judgment in its favor. *See Anderson*, 477 U.S. at 252. Such evidence must be real and substantial, not merely colorable. *Id.* at 249-50; *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (“[The non-moving party] must do more than simply show that there is some metaphysical doubt as to the material facts.”). If the responding party fails to make such a showing, the moving party is then entitled to judgment as a matter of law. *See Celotex*, 477 U.S. at 325.

When ruling on a motion for summary judgment, courts must examine all the evidence in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255. All “justifiable inferences” are to be drawn in the non-moving party’s favor. *Id.*

To show a violation of Section 337, Nokia must prove, among other things, that there exists, or there is in the process of being established, “an industry in the United States, relating to the articles protected by the patent . . . concerned.” 19 U.S.C. § 1337(a)(2); *Certain Ammonium Octamolybdate Isomers*, Inv. No. 337-TA-477, Comm’n Op. at 55 (U.S.I.T.C., Jan. 2004). The domestic industry requirement consists of both an economic prong (i.e., there must be an industry in the United States) and a technical prong (i.e., the industry must relate to articles protected by the patent-at-issue). *Certain Ammonium Octamolybdate Isomers*, at 55. To satisfy the economic prong, Nokia must prove, with respect to the articles it alleges are protected by the patent-at-issue: “(A) significant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in its exploitation, including engineering, research and development, or licensing.” 19 U.S.C. § 1337(a)(3) (internal formatting removed). Although the statute uses the disjunctive term “or,” Nokia has made a binding representation that it will rely solely on Section

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337(a)(3)(C) in order to demonstrate the economic prong of the domestic industry requirement. (See Order No. 42 at 3-4.) Nokia bears the burden of establishing that the domestic industry requirement is satisfied based on substantial investment in exploitation of the patents at issue, including substantial investments in engineering, research and development, or licensing.

Establishment of an economic domestic industry is not dependent on any “minimum monetary expenditure”; nor is there a “need to define or quantify the industry itself in absolute mathematical terms.” *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 25-26 (U.S.I.T.C., December 2009) (“*Stringed Instruments*”). In the same vein, there is no need to show that large quantities of representative products must be involved to show an investment is “substantial.” *Certain Video Displays, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-687, Order No. 20 at 5 (U.S.I.T.C., May 20, 2010) (unreviewed) (“*Video Displays*”). “A precise accounting is not necessary, as most people do not document their daily affairs in contemplation of possible litigation.” *Stringed Instruments* at 26. Rather, a complainant must demonstrate a sufficiently focused and concentrated effort to lend support to a finding of a ‘substantial investment.’ *Id.* For these reasons, the Administrative Law Judge declines as a matter of law to give credence to Apple’s pro forma objections that Nokia has failed to give a precise accounting or failed to provide underlying documentation for sworn witness testimony. (See e.g., Opp. at 21-25; Apple Resp. to SMF (“RSMF”) Nos. 7-14, 19-22, etc.) Some, but not all, of these objections will be addressed with more specificity below.

Furthermore, the Administrative Law Judge rejects (i) Apple’s objections and arguments concerning the point in time when a domestic industry must be measured, and (ii) Apple’s related and untenable conclusion that the Administrative Law Judge should disregard Nokia’s research

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and development investments. (Opp. at 1, 13-18.) There are no hard and fast rules with respect to domestic industry, and the threshold for meeting the economic prong is relatively low. *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Initial Determination at 421 (U.S.I.T.C., September 23, 2010) (“*Imaging Devices*”). The International Trade Commission typically looks to the time a complaint is filed,¹ but there have been a number of instances when it has been acceptable to look later in the investigation, either because of the development of new, relevant and timely disclosed evidence² or because there is evidence that a complainant’s domestic industry is dwindling.³ In those instances, the Administrative Law Judge considered the totality of evidence with respect to domestic industry. This is because the examination of domestic industry is not solely jurisdictional, as the parties argue. Instead, the Administrative Law Judge must also look toward whether the Commission may provide a remedy. *See e.g., Imaging Devices* at 451; *Certain Variable Speed Wind Turbines & Components Thereof*, Inv. No. 337-TA-376, Comm’n Op. at 20-21, 26 (U.S.I.T.C., Sept. 23, 1996) (“*Wind Turbines*”); 19 U.S.C. § 1337(k)(1). Jurisdiction must be established one time, so that it is clear the Commission has authority to act: a party does not need to continue to establish jurisdiction after the litigation is resolved, as Apple seems to suggest (Opp. at 17). However, the role of an exclusion order is to protect a domestic industry in the infringed patent, and therefore in cases where it is shown that a domestic industry is waning, this may affect the period of effectiveness of an exclusion order.

1 *See e.g., Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-650, Comm’n Op. at 51, n.17.

2 *See e.g.,* discussion in *Certain Laser Imageable Lithographic Printing Plates*, Inv. No. 337-TA-636, Initial Determination at 93-94 (U.S.I.T.C., July 24, 2009) (unreviewed in relevant part).

3 *Imaging Devices*, at 422; *Certain Semiconductor Integrated Circuits and Products Containing Same*, Inv. No. 337-TA-665, Initial Determination at 230-233 (U.S.I.T.C., October 14, 2009) (unreviewed in relevant part)

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For example, in *Wind Turbines*, even though it was found in the case of a bankrupt complainant that there was sufficient domestic industry to establish jurisdiction, the Commission set a reporting requirement to monitor complainant's domestic practice of the infringed claim of the asserted patent. *Wind Turbines* at 24-26. *See also Imaging Devices* at 451. Here, as Nokia points out (Reply at 4), the Nokia Products have a brief commercial lifespan, and it is impractical, not to mention unduly burdensome, in light of the Commission's mandate to conduct expeditious proceedings (*see* Commission Rule 210.2), to continually introduce and disclose newer and newer products during the course of an investigation in order to maintain that Nokia has a domestic industry in the asserted patents. *Accord, Video Displays* at 5-6. Here, the Administrative Law Judge finds that Nokia has, based on the undisputed facts, met the economic domestic industry requirement. (*See* discussion *infra*.) Apple's concerns that the Nokia Products will shortly be obsolete would be more appropriately raised as a remedial issue, in which case, should a violation be found, it is possible that a periodic reporting requirement that Nokia still maintains a domestic industry with respect to those patents found to be infringed *may*⁴ be recommended and imposed. If this were to happen, it is assumed that Nokia would not necessarily need to rely on the Nokia Products, provided that there are other grounds for a domestic industry such that an exclusion order may remain in effect.

The Administrative Law Judge rejects Apple's arguments that Nokia's expenditures with respect to the N-Gage gaming application, Photo Sharing application, Maemo 5's optional features,

("Integrated Circuits").

⁴ It is noted that in *Wind Turbines* the Commission imposed a reporting requirement with respect to a bankrupt complainant. *Wind Turbines* at 26. The Commission has not yet issued its final opinion with respect to the reporting requirement recommended in *Imaging Devices*, which concerns a waning industry with respect to specific products. *Imaging Devices* at 451. Thus the Commission's position as to reporting requirements with respect to a complainant that is not bankrupt is not yet known.

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and Files on Ovi application for the Nokia Products are too attenuated to satisfy the economic domestic industry requirement. (Opp. at 28, 31, 33, 36.) As Staff points out, research and development expenditures directed to products that incorporate the patented technologies at issue, including optional features, may “count” towards meeting the domestic industry requirement. (SBr. at 5-6 (citing *Certain NOR and NAND Flash Memory Devices and Products Containing Same*, Inv. No. 337-TA-560, Order No. 37 at 6 (U.S.I.T.C., November 17, 2006) (unreviewed); *Certain Microlithographic Machines and Components Thereof*, Inv. No. 337-TA-468, Initial Determination at 366 (U.S.I.T.C., January 29, 2003)).)

With respect to the N85 program costs (Opp. at 43⁵) and swap inventory figures (*id.* at 18-19), Apple argues that Nokia’s evidence relating to these should be disregarded because they were not disclosed in discovery and appear for the first time in this summary determination motion. The Administrative Law Judge had specifically ordered Nokia to disclose its contentions with respect to economic domestic industry. (*See* Order No. 19.) Nokia did disclose its intent to rely on the N85 product to Apple well in advance of Nokia’s motion for summary determination and provided a number of documents relating to this product in June of 2010. (*See e.g.*, Opposition to Motion Docket No. 701-053, Ex. A at 55; Mot. Ex. 7.) Therefore, the Administrative Law Judge will consider some evidence relating to the N85 product. It is not clear, however, that the evidence that Nokia relies on in the declaration of Mr. Goertz (Mot. Ex. 13) for the N85 model was timely disclosed. Nokia fails to address this specific point in its reply. (Reply at 8; *id.* at n.5.) Therefore Administrative Law Judge finds that for purposes of this summary determination motion, this evidence (Mot. Ex. 13) should not be considered. However, the Administrative Law Judge notes

⁵ It is not clear what Apple is referring to as the page in Nokia’s brief that Apple cites (Mot. Mem. at 19) relates to the

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that this finding does not affect the outcome of Nokia's motion.

With respect to the swap inventory figures, Nokia counters that Apple was on notice as early as the date of Mr. Deaton's deposition on May 28, 2010 that Nokia has a warehouse that maintains a swap inventory (Reply at 8; *id.*, Ex. C) and that Apple had an opportunity, but failed, to question Mr. Deaton more thoroughly about this inventory. In view of Staff's arguments that the swap phones were imported (Staff Resp. at 6-7), the number of swap phones and the cost of their purchase are not critical questions. However, the Administrative Law Judge finds that the existence of a domestic warehouse that maintains a swap inventory of the Nokia Products is relevant to prove on-going warranty repair activity, was timely disclosed, and should be credited.

Turning to the evidence presented by Nokia in support of its motion, it is concluded that there are no material issues of disputed fact with respect to the following:

1. Nokia employs more than 3,000 people in the U.S., including people working on software development. (SMF No. 4 (undisputed in material part⁶));
2. Nokia's research and development expenditures in the U.S. include funding for a staff of { } individuals who worked on the N900 in 2008. (RSMF No. 4);
3. Nokia's web browser development group consisted of approximately { } square feet of office space in the U.S. (RSMF Nos. 9-10, 12-14, 16-17; SSMF at 1);
4. Nokia spent approximately { } in the U.S. on web browser development for the S60 mobile phones, some portion of which can be attributed to the Nokia Products. (SMF No. 8 (undisputed in material part); RSMF No. 8);

E62 model, not the N85 model.

6 Apple fails to present facts that directly dispute that Nokia currently has 3,000 U.S. employees working on software development and service offerings. Apple's citations to evidence relating to the completion of various research and development projects do not specifically address SMF No. 4. Furthermore, Apple's assertion that { } if true (Apple failed to attach pages 239-240 of Mr. Harris's deposition to Opp. Ex. H), does not directly counter Nokia's assertion that it currently has U.S. employees working on software development. It is noted, however, that SMF No. 4 does not attempt to allocate what number, if any, of these U.S. employees have spent time on the Nokia Products.

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5. Apple's expert finds, at a minimum, that an appropriate allocation of Nokia's economic domestic industry expenses is one based on the ratio of the number of Nokia Products to the total number of products that employ the technology.⁸ "For example, for the S60 3.2 Platform, the allocation would be 2/32 or 6.25% of the total expenses claimed." (RSMF No. 23; SSMF at 1);
6. Nokia incurred U.S. development costs for the S60 3.0 web browser version, including in 2005. (RSMF No. 18; SSMF at 1);
7. At least { } of Nokia's employees in Burlington, Massachusetts⁹ contributed to the development of the S60 web browser version 3.0. (RSMF No. 19; SSMF at 1);
8. Estimates of the costs for U.S. development of the S60 web browser version 3.0 range between { }¹⁰ with a final estimate of { }¹¹ (RSMF No. 20; SSMF at 1);
9. The E62 and E6li mobile phones shipped with the web browser version 3.0. (RSMF No. 22¹²; SSMF at 1);

7 Apple objects that Mr. Harris provided differing estimates of these expenditures. (RSMF No. 8. *See also e.g.*, RSMF Nos. 20, 26, 30, 33.) However, the evidence cited by Apple explains these differing estimates: there is no conflict. In particular, the total figures in Mot. Ex. 5 have been adjusted to account for foreign expenditures, as explained by Mr. Harris in ¶¶16-22. The underlying data, for example, the { } figure for S60 web browser development in Burlington, Massachusetts in 2005, precisely matches the figures in the column of Exhibit 15 referred to in Mr. Harris' deposition. (Opp., Exs. H at 179, J; Mot. Ex. 5 at ¶¶16-22.) Furthermore, Apple does not contend or provide specific supporting facts to show that the underlying data in the Harris Deposition Exhibit 15 (matched by Mot. Ex. 5 at ¶¶16-22) is incorrect. With respect to Apple's objection that Mr. Harris's sworn testimony estimating the foreign expenditures that must be deducted has "no foundation in the evidence," Apple fails to cite to any actual evidence to show these estimates are incorrect. *Stringed Instruments* at 26 (precise accounting not necessary); *Matsushita*, 475 U.S. at 586 (party must "do more than simply show that there is some metaphysical doubt as to the material facts.")

8 As Apple admits that this is its own expert's allocation methodology, Apple's current objections that this allocation methodology "is fundamentally flawed" (*see e.g.*, RSMF Nos. 24, 28, 32, 35, etc.) cannot be credited. Furthermore, as noted above, "[a] precise accounting is not necessary, as most people do not document their daily affairs in contemplation of possible litigation." *Stringed Instruments* at 26. It is further noted that for the U.S. research and development figures adduced by Nokia, the investments described (*supra*) are significant enough that any reasonable allocation would satisfy the economic prong. *Imaging Devices*, at 415.

9 Apple counters Nokia's figure of { } employees with a figure of { } employees found in Mr. Harris's earlier declaration, but does not dispute the figure's accuracy in Mr. Harris's earlier declaration. (RSMF No. 19.)

10 Apple suggests that because there are different interpretations of the same underlying document, none of the interpretations is credible. (*See e.g.*, RSMF Nos. 20, 26, 30, etc.) However, Apple presents no evidence to show that the underlying document is factually inaccurate, and the Administrative Law Judge notes that even the lowest provided estimates are sufficient to establish an economic domestic industry in this Investigation. Apple admits (*see e.g.* RSMF No. 30) that Nokia's documentation of its costs is in the form of total monthly and yearly costs for U.S. web browser development, and therefore the precise accounting that Apple demands is not in keeping with the Commission precedent (*see above*) or with the manner of record keeping that Nokia maintained during the course of business. *See also* discussion re RSMF No. 8 above.

11 For the reasons discussed above, the Administrative Law Judge rejects Apple's successive arguments that because a particular version of the web browser is no longer in use, the expenses attributable to it are irrelevant.

12 It is noted that Apple cites to a passage of Mr. Harris's deposition to refute SMF No. 22, however, the passage cited relates to version 7 of the browser and appears to be taken out of context. (*Compare* RSMF No. 22, Opp., Ex. H at 214:12-215:10 with Opp., Ex. H at 96-97, 209-210.) As a result, Apple has failed to provide factual support for its

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10. Using Apple's methodology, approximately { } of Nokia's U.S. research and development costs may be allocated to each of the 18 models using the web browser version 3.0, including the E62 and E6li models. (RSMF No. 24; SSMF at 1);
11. Estimates of the number of U.S. employees responsible for Nokia's S60 web browser version 3.1 range between { }¹³ and the U.S. development cost estimates range between { } and { }¹⁴ (RSMF No. 26; SSMF at 1);
12. Nokia's N81 product was one of 18 models that shipped with the web browser version 3.1. (SMF. No. 27 (undisputed in relevant part¹⁵);
13. Using Apple's methodology, Nokia invested approximately { } in each of the 18 models using the web browser version 3.1, including the N81 model. (RSMF No. 28; SSMF at 1);
14. Estimates of the number of U.S. employees responsible for Nokia's web browser version 3.2 range between { } and development cost estimates range between { } and { }¹⁶ (RSMF No. 30; SSMF at 1);
15. Based on Apple's allocation methodology, Nokia invested at least { } per model in developing the web browser version 3.2 in the U.S., including the N78 and N85 models. (RSMF Nos. 23, 32; SSMF at 1);
16. Estimates of the U.S. development costs of the web browser version 7.0 range between { } and { } with a final estimate of { }¹⁷ (RSMF No. 33; SSMF at 1);
17. Estimates of the number of U.S. employees who developed the web browser version 7.0 range between { } (RSMF No. 34; SSMF at 1.)

objection or show that this material fact is in genuine dispute.

13 Apple, in an attempt to question his credibility, claims that Mr. Harris testified that { } employees worked on the project. However the portion of the transcript cited by Apple, Opp. Ex. H at 204:14-22 (RSMF No. 26) refers to expenses and dates, not { } employees.

14 See discussion re RSMF No. 8 above.

15 It is noted that Apple cites to a passage of Mr. Harris's deposition to refute SMF No. 27; however, the passage cited relates to version 7 of the browser and is taken out of context. (*Compare* RSMF No. 27, Opp., Ex. H at 214:12-215:10 with Opp., Ex. H at 96-97, 209-210.) As a result, Apple has failed to provide factual support for its objection or show that this material fact is in genuine dispute.

16 See discussion re RSMF No. 8 above. Furthermore, the passage relied on by Apple to show that Mr. Harris "testified that this cost totaled { } (RSMF No. 30 (citing Opp. Ex. H at 206:9-21) does not support Apple's assertion because Mr. Harris was discussing { } in Nokia's total investment in web browser development and various release dates.

17 See discussion re RSMF No. 8 above. It is also noted that the passage to Mr. Harris's deposition cited by Apple (RSMF No. 33 (citing Opp. Ex. H at 207:4-208:12) does not support Apple's contention that the differing figures are unreliable, but instead serves to explain that Mr. Harris identified a transposition error in his first declaration. Furthermore, Apple is incorrect that Mr. Harris testified in that passage that "this cost totaled { } (Opp. Ex. H at 207:4-208:12.) Instead Mr. Harris discussed why the initial estimate was in error and what the total browser development costs in Burlington were. He did not discuss the amount allocable to the 7.0 version. (*Id.*)

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18. Eight or fewer models¹⁸ shipped with the web browser version 7.0, including the 5800 product. (RSMF No. 34; SSMF at 1);
19. Under Apple's allocation methodology, approximately { } of Nokia's U.S. development costs in the web browser version 7.0 may be allocated to the 5800 model. (RSMF Nos. 34¹⁹-35; SSMF at 1);
20. An average of { } of Nokia's U.S. employees developed and tested Nokia's N-Gage software for the S60 platform at an approximate cost of { }, an optional feature which either shipped with or was downloaded onto the N78, N81, and N85 Nokia models. (RSMF No. 41-42, 44; SSMF at 1);
21. Under Apple's allocation method, approximately { } of Nokia's U.S. development costs for the N-Gage software is allocable to the respective N78, N81, and N85 models. (RSMF No. 46; SSMF at 1);
22. Approximately { } of Nokia's U.S. employees developed the Files on Ovi application for Nokia's S60 mobile phones. (SMF No. 47 (undisputed²¹));
23. Nokia invested approximately { } in the U.S. on the Files on Ovi application, which under Apple's allocation methodology would result in an approximate allocation of { } for each of the E62, E6li, N78, N81, N85 and 5800 mobile phones. (RSMF Nos. 50-51²²; SSMF at 1);
24. Nokia invested approximately between { } in the U.S. on the development of the Photo Sharing application, which under Apple's allocation methodology would result in an approximate allocation of between

18 Apple attempts to create a dispute by citing to Mr. Harris's deposition but a review of the cited portion of the transcript shows that even if the total number of products that shipped with the browser were a subset of the list of eight, the 5800 model was the { } and thus had to ship with the 7.0 version. (RSMF No. 34; Opp., Ex. H at 209.) Thus if the facts are to be viewed in the light most favorable to Apple, this would *increase* the allocable amount of Nokia's U.S. expenditures on the 7.0 version attributable to the 5800 model under Apple's methodology on the basis that even fewer phones would have shipped with the 7.0 version.

19 Under the facts adduced by Apple (*see* RSMF No. 34), the allocable amount may actually be significantly higher because only a subset of the models listed as having the 7.0 version shipped with the 5800 model. (Opp., Ex. H at 209.)

20 Apple's aspersions on the witness' credibility because he had doubts about how the exchange rate from euros to dollars was calculated do not create a material factual dispute. (RSMF No. 44.) Nor do Apple's objections that the witness was unable to provide a precise accounting of e.g., particular tasks by the employees: this is not required as a matter of law. (*See* discussion above.)

21 Apple's statement that "Nokia has not provided any evidence to show that { } Nokia employees in Burlington and Mountain View worked on the development of the Files on Ovi application" (RSMF No. 47) is unsupported attorney argument, and is further incorrect in light of Mr. Haverstock's sworn declaration (Mot. Ex. 7 at ¶8). Furthermore, Apple's objections with respect to the costs for the Files on Ovi application (RSMF No. 47 (citing Opp. Ex. K at 190-191)) are irrelevant to SMF No. 47 and will be disregarded. (*See* Order No. 39, Ground Rule 2.4.)

22 In order to create a dispute as to his credibility, Apple cites to Mr. Haverstock's testimony (Opp. Ex. K at 127) to suggest that he "could not identify all S60 devices." (RSMF No. 51) However, Mr. Haverstock stated on the very same page of his transcript that a list of such devices would be easy to obtain. (Opp. Ex. K at 127-28.) When viewed in its proper context, even taken in the light most favorable to Apple, Apple's citation fails to support its assertion. *See also* discussion re RSMF No. 23 above.

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- { } for the respective N78, N85, and 5800 mobile phones. (RSMF Nos. 55-56²³; SSMF at 1);
25. Nokia invested { } in personnel costs and expenses for N900 development work in the U.S. (RSMF No. 62-63²⁴; SSMF at 1);
26. About { } of Nokia's U.S. employees were on the team responsible for research and development of the { } for the 7205 model. (RSMF No. 65-66; SSMF at 1; SMF 67 (undisputed));
27. Nokia's U.S. employees also performed product-level spot checking and quality control testing on the 7205 models. (RSMF No. 68);
28. Nokia devoted approximately { } square feet of its facility in San Diego and { } square feet of its facility in Parsippany to 7205 model development activities. (SMF No. 69 (undisputed in material part²⁵);
29. Nokia invested approximately { } on U.S. testing, tooling, and developing and building prototypes of the 7205 model, and approximately { } on U.S. personnel costs for development and testing of the 7205 model. (RSMF No. 70²⁶; SSMF at 1);
30. Development for the E62 model occurred in, *inter alia*,²⁷ Irving, Texas and some prototypes were manufactured until 2005 at the Nokia factory in Dallas, Texas. (RSMF No. 73);

23 Apple's arguments and evidence with respect to which Nokia phones shipped with the Photo Sharing application (RSMF No. 55) are irrelevant to SMF No. 55, which concerns development costs, and therefore will be disregarded. (See Order No. 39, Ground Rule 2.4.) With respect to RSMF No. 56 which refers back to RSMF No. 55, Apple claims that "Nokia has not provided evidence to show that any of the claimed 36 models—let alone the N78, N85 and 5800—have actually shipped with the Photo Sharing application." However, in light of Mr. Haverstock's sworn declaration, this statement seems to unnecessarily require additional proof from Nokia. Furthermore, the evidence on which Apple relies, Mr. Haverstock's testimony, only shows that the spreadsheet does not state the models shipped with the application. (Opp., Ex. K at 153.) It is noted that Nokia's investments for the Photo Sharing application are so high, that any reasonable allocation would satisfy the economic prong. *Imaging Devices*, at 415.

24 Apple cites to Mr. Loughney's entire deposition (RSMF Nos. 62-63) for the proposition that there is insufficient detail with respect to the U.S. N900 development expenditures; however, a review of the cited transcript shows that it does not create an issue of disputed material fact. (See e.g., Opp., Ex. O at 103-104, 106-108.) For example, Apple claims there is no support for the fact that the Mountain View team dedicated to the N900 has increased to { } employees, and yet the deposition on which Apple relies to refute SMF No. 63 expressly confirms this number. (*Id.* at 103.) It is further noted that Nokia could not be expected to provide Apple's desired cost breakdowns when it does not maintain such records in the regular course of business. (*Id.* at 107-108.) See also *Stringed Instruments* at 26.

25 Apple's argument that a sworn affidavit by a witness should be discredited because Nokia does not cite to any documentation lacks merit as a matter of law. *Anderson*, 477 U.S. at 249-50; *Matsushita*, 475 U.S. at 586. It is further noted that Apple presents no evidence of disputed fact, merely unsupported attorney argument.

26 Apple's statement that some testing was performed by { } is irrelevant to SMF No. 70 and does not create a disputed issue of material fact. (*Compare* Opp., Ex. Q. at 92 with *id.* at 81.) See also discussion re RSMF No. 69.

27 Apple's statement that research and development for the E62 model occurred both inside and outside the United States, even if viewed in the light most favorable to Apple, does not create a dispute of material fact with respect to SMF No. 73. There is no requirement that all development must have occurred in Irving, Texas, or that all prototypes must have been manufactured in Dallas. It is further noted that SMF No. 73 does not refer to or rely on Exhibit No.

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31. Nokia employees spent at least { }²⁸ man-months in the United States designing, developing, building, and testing the E62 model, resulting in at least \$10 million²⁹ invested in personnel costs. (RSMF No. 74-75; SSMF at 1);
32. Nokia spent between approximately { } in the United States in direct costs for the E62. (RSMF No. 76³⁰; SSMF at 1);
33. In 2006, approximately { } percent of Nokia's Irving, Texas research and development facility was devoted to developing the E62 mobile phone. (SMF No. 77 (undisputed in relevant part³¹));
34. Nokia sold a significant volume of the E62 model in 2008 and sold at least { } units of the E62 model in the United States thereafter. (RSMF No. 80);
35. Each Nokia phone sold in the U.S. comes with a twelve month warranty, which allows for repair or replacement of damaged phones. (SMF Nos. 84-85 (undisputed in material part³²));
36. Nokia { } in the U.S. to perform repair work on the Nokia Products. (SMF No. 86 (undisputed); RSMF No. 87; SSMF at 1);
37. Nokia has a team of { } employees that occupy approximately { } feet of office space in Irving, Texas focused on repair activity and supply chain management, including managing Nokia's outside repair vendors. The personnel costs for the team are

11A, and Apple's perfunctory objections with respect to this exhibit are therefore improper. (See Order No. 39, Ground Rule 2.4.)

28 It is noted that Apple does not suggest that Mr. Niemela's figures are inaccurate, and that even { } man-months are a significant investment.

29 The Administrative Law Judge declines to calculate what precise portion of { } man-months results in the personnel expenditures; however, this is likely to be more than half of the { } million figure presented for { } man-months in SMF No. 75.

30 Apple argues that Mr. Stark was unable to explain why Mr. Niemela's { } calculation of direct costs (Opp., Ex. S at 48 (citing Complaint Ex. 55)) were inaccurate; however, a review of the portion of Mr. Stark's deposition cited by Apple shows that he believed Mr. Niemela's figures were too low. Significantly, Apple does not argue that Mr. Niemela's figures were in some way inaccurate, and even { } in direct costs would be considered a substantial investment. Furthermore, Mr. Stark did not testify, as Apple suggests in RSMF No. 76, that any of the prototypes made in Salo were included in the U.S. direct cost figures for the E62. (Opp., Ex. S at 51-57.) It is further noted that any expenditures on lab equipment or outside consultants would be appropriately considered U.S. investments in research and development unless it were shown that such expenditures were foreign—and Apple's citation to Mr. Stark's transcript does not support such an assertion.

31 The passage of Mr. Stark's deposition, even if read in the light most favorable to Apple, does not serve to create a disputed issue of fact but rather confirms Mr. Stark's statement. (Opp., Ex. S at 61 ("Q. And about what percent of the employees in Irvine, Texas were working on the E62 project? {

}
32 Apple's objection that Nokia has not provided an actual warranty is irrelevant. Nokia has provided the sworn testimony of Mr. Deaton, which, counter to Apple's assertions (RSMF Nos. 84-85), does not require "corroborative evidence."

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- approximately { } (SMF No. 88 (undisputed in material part³³); SMF No. 89 (undisputed); SMF No. 90 (undisputed in material part³⁴));
38. “From January 2009 through April 2010, Nokia’s sub-contractors in the United States repaired { } units of Nokia’s N900 mobile phone at a cost of { } units of Nokia’s N85 mobile phone at a cost of { } units of Nokia’s N81 mobile phone at a cost of { } units of Nokia’s N78 mobile phone at a cost of { } units of Nokia’s E62 mobile phone at a cost of { } units of Nokia’s E61i mobile phone at a cost of { } units of Nokia’s 5800 mobile phone at a cost of { } units of Nokia’s 7205 mobile phone at a cost of { } (see Exh. 14A).” (SMF No. 91 (undisputed in material part³⁵));
39. “In 2007 and 2008, Nokia’s sub-contractors in the United States repaired { } units of Nokia’s N85 mobile phone at a cost of approximately { } units of Nokia’s N81 mobile phone at a cost of approximately { } units of Nokia’s N78 mobile phone at a cost of approximately { } units of Nokia’s E62 mobile phone at a cost of approximately { } of Nokia’s E61i mobile phone at a cost of approximately { } (see Exh. 15, Matejka Declaration ¶¶ 5-6).” (SMF No. 94 (undisputed in material part³⁶));
40. Nokia currently maintains an inventory of “swap” phones in a { } warehouse in order to replace the Nokia Product models that have been damaged and

33 Apple argues that because Mr. Matejka declared in December of 2009 that there were { } employees on the team, that Mr. Deaton’s declaration in September of 2010 that there were { } employees is allegedly unreliable. However, Apple does not provide any evidence to show that the two declarants’ figures were inaccurate on the dates of their respective declarations. Furthermore, Apple’s assertions that Mr. Matejka’s calculations were allegedly unreliable, based on Apple’s citation to Mr. Matejka’s deposition transcript, appear to be based on statements that have been taken out of context. (See Opp., Ex. T at 210-211 (“Q. Do you—and so you looked at the dimensions and you just made your own calculations? A. Yeah.”).) Viewing the evidence in the light most favorable to Apple for purposes of a summary determination motion does not mean that a passage in a transcript should be removed from its surrounding statements.

34 Apple alleges that because Mr. Matejka provided a conservative estimate on personnel costs without consulting finance, that this estimate is unreliable. (See Opp., Ex. T at 214-215.) However, in the passage Apple cites, Mr. Matejka said he based his estimate on his “knowledge of what the salaries are, since most of them I had hired.” (*Id.*) Apple must “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586.

35 It is noted that Apple does not argue that the figures from Nokia’s SAP database shown in Exhibit 14A are inaccurate. Instead, Apple argues that the difference between the repair costs created from the average across all phone models in 2009 (Matejka) and the actual 2009 repair costs calculated from the ECH system linked to the SAP database (Deaton) allegedly create “inherent unreliability.” Apple is comparing apples to oranges, which is insufficient to create a genuine issue of disputed fact. Once again, Apple must “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586.

36 Apple alleges that because Mr. Matejka did not review “any of the documents purportedly supporting these average repair costs” that his estimates are unreliable. (See RSMF No 94 (citing Opp., Ex. T at 177-178.) However, this by itself is insufficient to create a dispute as to the accuracy of Mr. Matejka’s data, particularly when in the same passage of the transcript cited by Apple, Mr. Matejka said he formed his estimate after consulting the knowledge of the planner, Mr. Greer. (*Id.* at 176-78.) As noted above, viewing the evidence in the light most favorable to Apple for purposes of a summary determination motion does not mean that a passage in a transcript should be removed from context.

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cannot be repaired. (SMF No. 95 (undisputed); SMF No. 96 (undisputed³⁷); SMF No. 98 (undisputed in relevant part³⁸));

41. Nokia's employees and subcontractors at its Irving, Texas facility handle field testing. (RSMF No. 100; SSMF at 1);
42. "Nokia has invested approximately { } in testing the E62 mobile phone in the United States, { } in testing the E61i mobile phone in the United States, { } in testing the N78 mobile phone in the United States, { } in testing the N81 mobile phone in the United States, { } in testing the N85 mobile phone in the United States, { } in testing the 5800 mobile phone in the United States, and { } in testing the N900 mobile phone in the United States (see Exh. 16 Ochoa Decl. ¶¶ 8-10; Exh. 17 at 283)." (SMF No. 102 (undisputed in material part³⁹));
43. "As of the filing date of the Complaint in this investigation, each of the Domestic Industry Phones was being developed, sold, repaired/under warranty, and/or maintained in inventory in the United States (see Exh. 9, Loughney Decl. ¶¶ 3-5; Exh. 12 at NOFF-02368509-NOFF-02368550; Exh. 14, Deaton Decl. ¶¶ 4, 10-13; Exh. 14A; Exh. 14B)." (SMF No. 104 (undisputed⁴⁰)).

Taken as a whole, these research and development expenditures for the 5800, E62, E61i, N900, N78, N81, N85, and 7205 models of the Nokia Products demonstrate a sufficiently focused and concentrated effort to lend support to a finding of a 'substantial investment' in exploitation of

37 Apple argues, without any supporting evidence, that Mr. Deaton's sworn testimony is unreliable because he does not cite to any agreements or other documents. This is insufficient to create a disputed material fact as a matter of law. Furthermore, Apple states that it "does not dispute that Nokia's 'swap' phones may be maintained in a warehouse managed by { } in direct contradiction to its objection. (RSMF No. 96.)

38 Apple provides no supporting evidence for its argument that SMF No. 98 and Mr. Deaton's sworn testimony is unreliable. Furthermore, Apple's argument that Nokia's swap purchases include purchases for swap in Canada, even if viewed in the light most favorable to Apple, does not refute the fact that the warehouse containing the swap phones for the Nokia Products is currently maintaining inventory in the United States. While the Administrative Law Judge declined to apply the swap cost amounts, as discussed above, the fact that the swap phones are currently warehoused in the U.S. shows that Nokia's domestic industry in these products has not yet been exhausted.

39 Apple cites to no actual evidence that Mr. Ochoa's sworn declaration is inaccurate or that he lacked knowledge on the subject of testing in Irving, Texas. (RSMF No. 102.) See also *Matsushita*, 475 U.S. at 586 (party must do more show there is some metaphysical doubt); *Perfect Web Technologies, Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1332 (Fed. Cir. 2009) ("Unsworn attorney argument is not evidence.") (quoting *Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1372, 1380 (Fed. Cir. 2009)) (internal formatting omitted).

40 Apple fails to directly address SMF No. 104 in its attempt to show this fact is in dispute. (See Order No. 39, Ground Rule 2.4.) That Nokia may have later discontinued sales, even if viewed in the light most favorable to Apple, such a fact does not address whether Nokia was selling the Nokia Products at the time the Complaint was filed. (RSMF No. 104.) See also discussion re RSMF No. 102 above and discussion re jurisdiction and remedy above.

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the patents at issue.⁴¹ Furthermore, the undisputed facts show that the Nokia Products were being developed, sold, repaired/under warranty, and/or maintained in inventory in the United States at the time the Complaint was filed, and that while Nokia's domestic industry in said products may be waning, it currently maintains at least some of said activities. It should be noted, however, that the Administrative Law Judge makes no finding at this time as to whether the Nokia Products practice the asserted patents.

Based on the foregoing, it is the Initial Determination of the Administrative Law Judge that Nokia's motion for summary determination with respect to an economic domestic industry for the asserted patents (Motion Docket No. 701-066) should be GRANTED.

This Initial Determination is hereby certified to the Commission. Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the Initial Determination or certain issues herein.

Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date.

41 While the Administrative Law Judge declines to make precise calculations, based on the above undisputed material facts, rough total expenditures using the lower estimates for the 5800 are approximately { } the E62 are approximately { }, the E61i are approximately { } the N900 are approximately { } the N78 are approximately { } the N81 are approximately { } the N85 are approximately { } and the 7205 are approximately { } This results in a conservative estimate of about { } (E62 and E61i) for the '181 patent, { } (N900) for the '256 and '957 patents, { } (N78, N81 and N85) for the '789 patent, { } (5800) for the '036 patent, and { } (7205) for the '091 patent. *Assuming arguendo* that a portion of these expenditures were to be discounted by the Commission, the Administrative Law Judge is of the opinion that

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SO ORDERED.


E. James Gildea
Administrative Law Judge


Nokia's total efforts would still be sufficiently significant to meet the economic domestic industry requirement.

**IN THE MATTER OF CERTAIN
ELECTRONIC DEVICES, INCLUDING
MOBILE PHONES, PORTABLE MUSIC
PLAYERS, AND COMPUTERS**

337-TA-701

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **INITIAL DETERMINATION** has been served by hand upon, the Commission Investigative Attorney, **Rett Snotherly, Esq.**, and the following parties as indicated on December 1, 2010.


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**IN THE MATTER OF CERTAIN
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