2023-1509, 2023-1553

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ALIVECOR, INC.,
Appellant

v.

INTERNATIONAL TRADE COMMISSION,
Appellee

APPLE INC.,
Intervenor
(Caption Continued on Inside Cover)

Appeals from the United States International Trade Commission
In Investigation No. 337-TA-1266

[corrected] BRIEF OF UNIFIED PATENTS, LLC AS *AMICUS CURIAE* IN SUPPORT OF INTERVENOR–CROSS-APPELLANT APPLE INC. IN SUPPORT OF REVERSAL OF THE COMMISSION'S EXCLUSION ORDER

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APPLE INC.,
Appellant

v.

INTERNATIONAL TRADE COMMISSION,
Appellee

ALIVECOR, INC.,
Intervenor

FORM 9. Certificate of Interest

Form 9 (p. 1)
March 2023

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2023-1509, -1553

Short Case Caption AliveCor,Inc.v.International Trade Commission,Apple Inc.

Filing Party/Entity Unified Patents, LLC

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.

2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.

3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.

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5. Counsel must file an amended Certificate of Interest within seven days after any information on this form changes. Fed. Cir. R. 47.4(c).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 09/29/2023

Signature: /s/ William G. Jenks

Name: William G. Jenks

FORM 9. Certificate of Interest **Form 9 (p. 2)**
March 2023

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
Unified Patents, LLC		Parents:
		UP HOLDCO INC.
		Unified Patents Holdings, LLC
		Unified Patents Acquisition, LLC
		Unified Patents Management, LLC
		No such public companies

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below) ☐ No ☑ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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INTEREST OF *AMICUS CURIAE*[1]

Unified Patents, LLC is a membership organization dedicated to deterring non-practicing entities ("NPEs"), particularly patent assertion entities ("PAEs"), from extracting nuisance settlements from operating companies based on patents that are likely invalid. Unified's 3,000-plus members are Fortune 500 companies, start-ups, automakers, industry groups, cable companies, banks, credit card companies, technology companies, open source software developers, manufacturers, and others dedicated to reducing the drain on the U.S. economy of now-routine baseless litigations asserting infringement of patents of dubious validity.

Unified and its counsel study the ever-evolving business models, financial backings, and practices of PAEs. *See, e.g.*, Jonathan Stroud, *Pulling Back the Curtain on Complex Funding of Patent Assertion Entities*, 12.2 Landslide 20 (Nov./Dec. 2019) ("Landslide"), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2019-20/november-december/; *see also* Sean Keller and Jonathan Stroud,

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[1] Counsel for Apple and the ITC have consented to the filing of this brief; counsel for AliveCor has refused consent. No parties' counsel authored this brief in whole or in part; neither party nor party counsel contributed money that was intended to fund preparing or submitting the brief; no person other than the *amicus curiae* or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(2), (a)(4).

Litigation Financing Disclosure and Patent Litigation, 33 Fed. Cir. Bar. J. (2023, forthcoming), https://ssrn.com/abstract =4527378.

Unified monitors ownership data, secondary-market patent sales, demand letters, post-issuance proceedings, and patent litigation to track PAE activity. *See, e.g.*, Unified Patents, *Litigation Annual Report* ("Unified Litigation Annual Report"), https://portal.unifiedpatents.com/litigation/annual-report.

Unified also files post-issuance administrative challenges—including inter partes review ("IPR") petitions with the Patent Office's Patent Trial and Appeal Board ("PTAB" or "Board")—against PAE patents it believes are unpatentable or invalid. This includes both international and domestic administrative challenges. Thus, Unified seeks to deter the assertion of poor-quality patents. Unified acts and litigates independently from its members. *See*, *e.g.*, *Unified Patents, LLC. v. Uniloc USA, Inc., et al.*, IPR2018-00199, Paper No. 33, 10 (PTAB May 31, 2019) (Unified members not real parties in interest to petitions filed by Unified); *id.* (collecting PTAB decisions). In 2022, Unified was the fourth most frequent inter partes review petitioner, and it was by far the leading third-party filer. Unified Patents, *2022 Patent Dispute Report*, Fig. 22, https://www.unifiedpatents.com/insights/2023/1/4/2022-patent-dispute-report.

ARGUMENT

The federal district courts have general jurisdiction over patent infringement disputes. 28 U.S.C. § 1338. When appropriate, the district courts have the power to grant a successful patent holder "injunctions in accordance with the principles of equity" or "damages adequate to compensate for the infringement." 35 U.S.C. §§ 283, 284.

But the district courts typically limit a successful NPE to "reasonable royalty" damages. *Id.* at § 284. Further, when the patented innovation covers only some aspect of the infringing product, damages are subject to apportionment. *See Garretson v. Clark*, 111 U.S. 120 (1884). NPEs, and particularly PAEs, typically cannot get an injunction in a district court because it is incredibly difficult to show that an injunction is equitable when a patent holder does not produce a product. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (the traditional four-factor test for an injunction applies in patent disputes).

These limits encourage patent holders that don't produce products to seek remedies elsewhere. The International Trade Commission ("ITC") has been too accommodating of patent holders who do not produce products.

I. The International Trade Commission Fails to Enforce the Domestic Industry Requirement

A. Congress granted the ITC its Section 337 power to protect American industry from unfair trade practices

The ITC's patent enforcement power is codified in 19 U.S.C. § 1337, entitled "Unfair practices in import trade." The ITC has limited jurisdiction over patent infringement disputes involving imports. *See* 19 U.S.C. § 1337(b)(1). The agency's primary remedy is an exclusion order that bars respondents from importing infringing goods. 19 U.S.C. § 1337(d)(1). The focus of that power should be preventing the damage caused by unfair trade practices.

The domestic industry requirement was enacted to prevent mere patent holders from using the ITC as a general patent enforcement forum. Under Section 1337(a)(2), the ITC may exclude the imports of an accused product "only if an industry in the United States, relating to the articles protected by the patent … concerned, exists or is in the process of being established." 19 U.S.C. § 1337(a)(2).

An industry in the United States exists if the following is made in the United States, with respect to the articles protected by the patent:

(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).

Congress enacted the present form of the domestic industry requirement, adding paragraph (C) in 1988. At the time, it understood that:

> The purpose of the Commission is to adjudicate trade disputes between U.S. industries and those who seek to import goods from abroad. Retention of the requirement that the statute be utilized on behalf of an industry in the United States retains that essential nexus.

H.R.Rep. 100-40, at 157 (1987).

Other portions of Section 337 also show the statute is designed to protect domestic industry from unfair trade practices, not patent holders from infringement. For example, the statute allows for general exclusion orders, which provide authority to exclude infringing goods when district court jurisdiction over foreign infringers cannot be had. 19 U.S.C. § 1337(d)(2)(A). Further, its focus on infringement and an exclusionary remedy allows for the statutory expeditious adjudication of unfair trade complaints. 19 U.S.C. § 1337(b)(1). Other relief, damages, domestic injunctions, counterclaims, and even final resolution of patentability are left for the district courts. *See id.* § 1337(c) ("Immediately after a counterclaim is received by the Commission, the respondent raising such counterclaim shall file a notice of removal with a United States district court.").

B. The agency's relaxed enforcement of the domestic industry requirement has caused NPEs to flock to the ITC

Despite the domestic industry requirement, NPEs are ensconced within the ITC. Prior to the Supreme Court's 2006 decision in *eBay*, most district courts granted nearly automatic injunctions against patent infringers. *See eBay*, 547 U.S. at 393–94. At that time, NPEs and PAEs were not particularly active at the ITC. But soon after, they recognized that the ITC's nearly automatic exclusion orders could benefit them greatly. Not as a way to remedy unfair trade or to benefit from a market free from infringing imports—most NPEs and all PAEs don't care about the marketplace—but as a way to leverage a larger settlement out of respondents than they could get damages in a district court action. The threat of exclusion means that an accused infringer has an incentive to pay money—more money than the law of patent damages would afford the patent holder—to avoid the order. An accused infringer that relies on imports may prefer settlement over risking its entire business, even when the settlement exceeds what a district court could award in damages under the patent law.

Following *eBay*, the ITC began tracking NPE activity on a per-investigation basis. Between 2007 and 2022 inclusive, nearly 20% of all ITC investigations have been at the behest of non-practicing entities. *See* International Trade Commission, *Section 337 Statistics: Number of Section 337 Investigations Brought by NPEs*, https://www.usitc.gov/intellectual_property/337_statistics_number_section_337_in vestigations.htm ("ITC Tracking Stats"). Specifically, 18.2% (138 of 758) of the investigations in that time have been instituted on behalf of NPEs. Nearly half of those, or 8.7% of all investigations, have been instituted at the behest of PAEs. *Id.*[2]

In 2022, NPEs appeared in record numbers at the ITC. According to the ITC's Tracking Stats, NPEs were the complainant in 19 of the 59 investigations instituted last year. Thus, one-third of all ITC complainants last year were NPEs, i.e., they did not practice their asserted patents. PAEs also set a record in 2022; the ITC instituted 11 of its 59 investigations—nearly one-fifth of all cases—at the behest of PAEs. *Id.*

Even these record numbers likely undercount the effect of NPEs at the ITC. The America Invents Act of 2011 raised the standard for joinder only with respect to "any civil action." *See* 35 U.S.C. § 299. That change in joinder practice did not apply to the ITC. Thus, unlike district court actions, ITC investigations can be against any number of unrelated respondents. For example, in *Certain Digital Set-Top Boxes and Systems and Services Including the Same*, the PAE complainant,

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[2] Note, the ITC Tracking Stats classify universities, start-ups, and other potentially productive NPEs as "category-1" NPEs. The ITC classifies PAEs—companies whose "business model primarily focuses on purchasing and asserting patents"—as "category-2" NPEs. ITC Tracking Stats.

Broadband iTV, Inc., instituted an ITC investigation against 10 American companies and zero foreign entities. Inv. No. 337-TA-1315. It based its domestic industry on a "license" resulting from the settlement of litigation three weeks prior to filing the complaint. *See id.* Proposed Respondents' Request For Entry Into 100-Day Early Disposition Program On Domestic Industry Issues, Inv. No. 337-TA-1315 (May 6, 2022).

Non-practicing entities, by definition, do not practice their patent, so how do they survive and even thrive in the ITC? A few may demonstrate a productive licensing model. In theory, including licensing in paragraph 1337(a)(3)(C) allows the ITC to protect small inventors, start-ups, and universities that partner with private entities to bring new products to market.

But far more popular is domestic-industry-by-subpoena:

> [P]atent assertion entities … sue a company, settle, provide a license to the company, and then subpoena the company to provide documentation in the Section 337 proceeding to show the patent assertion entity satisfies the domestic industry requirement.

Linda Sun, *The ITC Is Here to Stay: A Defense of the International Trade Commission's Role in Patent Law*, 17 Nw. J. Tech. & Intell. Prop. 137, 152 (2019).

In most NPE cases, the purported licensee is typically a previously accused infringer who settled its case and is not interested in participating in the patent owner's follow-on cases at the ITC. The NPE uses the settlement/license to claim the unwilling licensee's investment and employment as their own under Sections 337(a)(3)(A) and (B).

The domestic-industry-by-subpoena approach constitutes an end-run around this court's decision in *Mezzalingua*, which limited when NPEs could count patent assertion expenses as licensing under Section 337(a)(3)(C). *See John Mezzalingua Assocs., Inc. v. Int'l Trade Comm'n*, 660 F.3d 1322, 1328 (Fed. Cir. 2011) ("We agree with the Commission that expenditures on patent litigation do not automatically constitute evidence of the existence of an industry in the United States established by substantial investment in the exploitation of a patent."); *see also Motiva, LLC v. Int'l Trade Comm'n*, 716 F.3d 596, 601 (Fed. Cir. 2013) ("Motiva's litigation was targeted at financial gains, not at encouraging adoption of Motiva's patented technology. The inventors looked forward to financial gains through Motiva's litigation, not hopes of stimulating investment or partnerships with manufacturers.").

Instead of parsing its litigation expenses into licensing vs. litigation under paragraph (C), the NPE simply concludes the license and then relies on the licensees' activities under paragraphs (A), (B). The licensee, who may have settled the suit for any number of reasons, is dragged to the ITC to "prove" the patent holder's domestic industry.

C. Today, the ITC is close to a general patent enforcement venue; it's just as likely to impair American industry as protect it from harm

This case shows that even among complainants with some domestic activity, the model of protecting American industry from elusive foreign infringers has broken down.

1. This case is between two American companies that import (or imported) the goods in question

Section 337 cases are rarely brought against purely foreign defendants. Professor Chien's empirical study of two decades of ITC cases (1995-2007) showed that just 14% of investigations are brought against purely foreign defendants. Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 Wm. & Mary L. Rev. 63, 87 (2008). Most ITC investigations, 72%, involve foreign and domestic defendants. *Id.* And surprisingly, 15% of investigations—like the case here—involve purely domestic defendants. "Thus, U.S. companies are just as likely to be named in ITC actions as defendants as are foreigners." Chien at 63; *see also* Bill Watson, *Preserving the Role of the Courts Through ITC Patent Reform*, 57 R Street Shorts (Mar. 2018), https://www.rstreet.org/wp-content/uploads/2018/04/Final-Short-57-1.pdf.

Cases like this belong, if anywhere, in district court. In this case, there are two American companies. The respondent imports products manufactured overseas. The complainant once imported products manufactured overseas, and it hopes to do so again. All the complainant's accused products are imported; all the respondent's domestic industry products were imported or will be imported.

2. The patent holder has exhausted all rights in the "articles protected by the patent"

Per the ITC, an exclusion order is still appropriate despite the fact that the protected article was produced overseas and only in the past. That cannot be the law.

In *InterDigital*, this court decided—over a vigorous dissent—that no domestically manufactured product was required in a Section 337 action. *See InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 707 F.3d 1295, 1303–04 (Fed. Cir. 2013) ("It is not necessary that the [complainant] manufacture the product that is protected by the patent, and it is not necessary that any other domestic party manufacture the protected article."). The ITC has now gone further. At the time of the complainant, it is not necessary that the complainant manufacture the protected article, it is not necessary that any other domestic party manufacture the protected article, and it is not necessary that any foreign party manufacture the protected article.

The ITC considers domestic industry issues as of the complaint's filing date. *Motiva*, 716 F.3d at 601 n.6; *Bally/Midway Mfg. Co. v. U.S. Int'l Trade Comm'n*, 714 F.2d 1117, 1123 (Fed. Cir. 1983). As of that date, AliveCor did not manufacture any product. AliveCor's original "domestic product" was the KardiaBand; per the record, it was previously manufactured overseas. Appx273, Appx 285. The ITC did not credit AliveCor's theory of an industry being developed, and AliveCor's potential product line is confidential. Appx11; Appx259. Regardless, there is no indication in the record that it will be produced domestically if it ever comes to exist. On the contrary, the plan is to also produce that product overseas. Appx291.

Statutorily, at the time of the complaint, there have to be some "articles protected by the patent." *See* 19 U.S.C. § 1337(a)(2) (requiring the existence of an industry "relating to the articles protected by the patent"); § 1337(a)(3) (providing factors showing industry exists "with respect to the articles protected by the patent").

With no manufacture anywhere in the world and all substantial inventory of past articles apparently sold before the filing of the complaint, there are no "articles protected by the patent."

Any sales prior to the complaint exhausted the patent holders' rights in the articles sold. *See Impression Prod., Inc. v. Lexmark Int'l, Inc.*, 581 U.S. 360, 370 (2017) ("When a patentee chooses to sell an item, that product is no longer within the limits of the monopoly and instead becomes the private, individual property of the purchaser, with the rights and benefits that come along with ownership.")

(cleaned up); *see also Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 629 (2008) ("[T]his Court has repeatedly held that method patents were exhausted by the sale of an item that embodied the method."). Where the patent holder's rights are exhausted, the patent affords the article no protection. Repair and service may support the existence of an industry that continues to produce and sell "articles protected by the patent." They cannot support an industry "relating to" or "with respect to" "articles protected by the patent," when every such article has been sold and the patent rights exhausted. 19 U.S.C. § 1337(a)(2),(3).

As a practical matter, if Congress was trying to protect an existing domestic industry relating to the protected articles from unfair imports, the ITC's conclusion makes no sense. If the imports do not replace or undermine the market for the protected article and the complainant has no product available to replace the infringing article, importation is no more "unfair" than general patent infringement.

II. The Public Interest Weighs Against an Exclusion Order when the Patent Covers One Small Aspect of the Imported Article

Apple properly points out that the public interest is ill-served when innovative products with dozens of health functions and hundreds (if not thousands) of other features are to be excluded based on the infringement of a patent that covers only one feature. Apple Br. at 87; *see also* Appx70. In these cases, the issuance of automatic exclusion orders aids in patent "holdup," allowing the "patentee to extract settlements that exceed the economic value of the patent." *See* Colleen V. Chien & Mark A. Lemley, *Patent Holdup, The ITC, And The Public Interest*, 98 Cornell L. Rev. 1 (2012).

This form of holdup is a recurring theme at the ITC. Complainants using a patent covering some minor component or feature of a larger product seek to exclude the entire product. Some have dubbed this issue the "little-to-big problem." *See, e.g.*, William Jenks, *The Little-to-Big Problem, Part I*, R Street ITC Policy Project Series, https://www.rstreet.org/commentary/itc-policy-project-series-the-little-to-big-problem-part-i/; *see also* Chien & Lemley at 39 ("Holdup is likely when the defendant sells a multicomponent product and the novel feature of the patent covers only a small part of that product.").

A district court typically limits an NPE's damages to a reasonable royalty. And, when the patentee's innovation covers only a component of a device or machine, the district court will limit that reasonable royalty through apportionment. *See, e.g.*, *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1337 (Fed. Cir. 2009). Thus, courts typically award damages based on the incremental value attributable to the invention.

The ITC cannot apportion an exclusion order. Because of that institutional weakness, NPEs that own a patent on a feature or component will continue to come to the ITC and try to exclude entire devices or machines from import. *See, e.g.*, Notice of Institution, *Certain Semiconductors and Devices and Products Containing the Same, Including Printed Circuit Boards, Automotive Parts, and Automobiles*, Inv. No. 337-TA-1332, 87 Fed. Reg. 62454 (Oct. 14, 2022) (instituting an investigation that sought to exclude entire automobiles based on the chips used in their infotainment systems).

But the ITC could and should consider the public interest in access to the entire product before excluding it from import. Section 337(d)(1) requires the ITC to examine certain public-interest factors and decide whether an exclusion order would be in the public interest. The public-interest factors the ITC must consider include the effect of an exclusion order on [1] public health and welfare, [2] competitive conditions in the United States economy, [3] the production of like or directly competitive articles in the United States, and [4] United States consumers. The ITC should weigh the effect of an exclusion order limiting a many-featured product against the public interest in enforcing a patent on just one feature. Understanding this, the relative harm to competitive conditions and U.S. consumers is much greater—and the public interest in enforcing even valid IP rights is relatively smaller—than in cases where an excluded article or device embodies the patent holder's innovation. And the public interest is at its apex when the additional features are health-related functions not replaced by alternative products. As Apple explained below, and the ITC rejected, Apple Watches provide numerous health functions such as fall detection, on-demand measures of blood-oxygen saturation, and crash detection that should weigh in favor of the public interest. Appx56-57.

The ITC does not adopt this approach, and the public suffers. Appx72. The ITC gave great weight to products that do not offer both non-infringing and infringing features and focused on devices that might replace the infringing features. Apple explains the ITC's mistake concerning those substitutes. Apple Br. at 89-94. But more broadly, the ITC cannot simultaneously hold that there is no evidence that the non-infringing health features save lives and reject Apple's testimonial evidence as not specific to the infringing features. Appx72-73.

Another tell that the public interest does not favor an exclusion order is the bond amount the ITC ordered during the presidential review period. The presidential review bond is set "in an amount determined by the Commission to be sufficient to protect the complainant from any injury." *See id.* § 1337 (j) (emphasis added). Apple Watches retail for several hundred dollars. Even the "non-accused Apple Watch SE," the most affordable Apple Watch, retails for roughly $250. *See* Appx68; Shop Apple Watch, https://www.apple.com/shop/buy-watch.

In the ALJ's view, the appropriate bond was zero dollars. Appx82. Zero dollars was appropriate because it was "entirely unclear what competitive harm ALC will face during this time as the KBS product has not been sold for some time." Appx300. The Commission raised that amount to $2/watch or less than 1% of the watch's retail price. Appx84. The reasons behind the Commission's decision are redacted. But even crediting the Commission's view, the small amount of injury reflects the imbalance between the public interest in having Apple watches competing in the marketplace and being available for health and other functions not covered by the patents and the public interest in protecting the intellectual property that covers the cardio feature.

III. Lax Policing of the Domestic Industry Requirement and the Public Interest Benefits Unknown Patent Holders and Litigation Funders

There may be a place for PAEs in the patent ecosystem, but it is not the ITC. The less robustly the ITC enforces domestic industry and public interest, the more it benefits PAEs. The public mostly does not know who is behind PAEs operating at the ITC. There is little transparency for entities that hold patents through shell companies. And even less transparency in the funding that drives much of the litigation.

What little is publicly known demonstrates that these companies have no actual interest in an exclusion order—the essential remedy at the ITC—and simply use the ITC to leverage larger settlements than are likely in district court litigation where they would be limited to damages.

For example, "Controversial Irish patent-holding company Neodrón" successfully "brought claims before the US International Trade Commission (ITC) seeking an exclusion order barring the importation of smartphones, tablets and laptops" sufficient to "have blocked more than 90 percent of the smartphones and tablets that consumers buy from the US market." Charlie Taylor, *Irish Patent Firm in Multimillion Dollar Settlement with Tech Giants*, Irish Times (Jan. 8, 2021), https://www.irishtimes.com/business/technology/irish-patent-firm-in-multimillion-dollar-settlement-withtech-giants-1.4452627. Success for the Irish NPE and its backers, was a "multimillion dollar settlement," of course, not an exclusion order. *Id.* Neither the NPE nor its majority owner, "Realta Investments Ireland, an affiliate of US fund Magnetar, which has more than $13 billion in assets under management," could benefit from an exclusion order. *See id.*

Realta Investments Ireland and Neodrón had no interest in actually excluding smartphones and tablets from the U.S. market. Magnetar is unlikely to begin making laptops. The ITC was merely a forum where the primary remedy could be leveraged into additional return on investment. That has little to do with stopping unfair trade practices.

CONCLUSION

The court should reverse the portion of the ITC decision challenged by Apple.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. Cir. R. 35(g)(3). It contains __**3,880**___ words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

2. This amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in Times New Roman 14-point font.

/s/ William G. Jenks
William G. Jenks