

2021-2106

**United States Court of Appeals
for the Federal Circuit**

KONINKLIJKE PHILIPS N.V.,

Plaintiff-Counter Defendant-Appellee,

PHILIPS RS NORTH AMERICA LLC,

Counter Defendant-Appellee,

(For Continuation of Caption See Inside Cover)

*On Appeal from the United States District Court for the
District of Delaware in No. 1:20-cv-01713-CFC*

**NON-CONFIDENTIAL BRIEF FOR
DEFENDANT-COUNTER CLAIMANT-APPELLANT**

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— v. —

THALES DIS AIS USA LLC, fka Gemalto IOT LLC,
fka Cinterion Wireless Modules NAFTA LLC,

Defendant-Counter Claimant,

THALES USA, INC., THALES S.A., CALAMP CORP., XIRGO
TECHNOLOGIES, LLC, LAIRD CONNECTIVITY, INC.,

Defendants,

THALES DIS AIS DEUTSCHLAND GMBH, fka Gemalto M2M GmbH,

Defendant-Counter Claimant-Appellant.

FORM 9. Certificate of Interest

Form 9 (p. 1)
July 2020

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2021-2106

Short Case Caption Koninklijke Philips N.V. v. Thales DIS AIS USA LLC

Filing Party/Entity Thales DIS AIS Deutschland GmbH

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Date: 08/30/2021

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Name: R. Paul Zeineddin

FORM 9. Certificate of Interest

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July 2020

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. <input checked="" type="checkbox"/> 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. <input type="checkbox"/> None/Not Applicable
Thales DIS AIS Deutschland GmbH		Gemalto B.V.
		Thales S.A.

☐ Additional pages attached

FORM 9. Certificate of Interest

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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).

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USITC Inv. No. 337-TA-1240		

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).

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CONFIDENTIAL MATERIAL OMITTED

The material redacted from this brief is designated confidential pursuant to District of Delaware Local Rule 26.2. The confidential information on pages 12 and 13 includes information about Thales' and Philips' licensing negotiations; the information on page 17 discloses the amount Thales has set aside towards satisfying the Delaware District Court's determination of fair, reasonable and non-discriminatory terms and conditions for Thales' license to Philips; and the information on pages 39 and 40 discloses information concerning the harm to Thales and Thales' customers from Philips' continued pursuit of an ITC exclusion order.

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STATEMENT OF RELATED CASES

This is an interlocutory appeal from a denial of a preliminary injunction in *Koninklijke Philips N.V. v. Thales DIS AIS USA LLC*, No. 20-1713 (CFC), (D. Del. Aug. 20, 2021) and no other appeal from the same civil action was previously before this or any other appellate court.

In this action, Plaintiff-Appellee Koninklijke Philips N.V. (“Philips”) has asserted four patents that it had declared as essential to the 3G and/or 4G mobile technology standards against Defendant-Appellant Thales DIS AIS Deutschland GmbH (“Thales”) and three Thales customers. *See id.* Philips also sought an exclusion order from the United States International Trade Commission (“ITC”) based on alleged infringement of the same four self-declared essential patents against Thales and its three customers in *In re Certain UMTS and LTE Cellular Communications Modules & Products Containing the Same*, No. 337-TA-1240.

Philips has also asserted the same four patents in this action against Telit, a Thales competitor, in the same ITC investigation as well as in a parallel Delaware patent infringement case in *Koninklijke Philips N.V. v Telit Wireless Sols., Inc.*, No. 20-1711 (CFC) (D. Del Aug. 20, 2021). Telit also moved the Delaware district court for a preliminary injunction in its case. The Delaware district court heard arguments on both the Thales and Telit motions, that were pending in the two separate cases, in the same combined hearing.

JURISDICTIONAL STATEMENT

The district court's subject matter jurisdiction arose under 28 U.S.C. §§ 1331 and 1338(a), and under 28 U.S.C. §1367. Subject matter jurisdiction arises under 28 U.S.C. § 1367, specifically, because Philips filed a complaint alleging (i) infringement of four U.S. patents, among a portfolio of patents Philips has declared to be standard-essential ("SEPs"), and (ii) seeking a judicial determination of the fair, reasonable, and non-discriminatory ("FRAND") licensing terms and conditions for the entirety of its self-declared SEP portfolio, and Thales filed counterclaims alleging (i) a breach of contract claim based on Philips' FRAND obligations to the European Telecommunications Standards Institute ("ETSI"), and (ii) a mirror-like declaratory claim for the judicial determination of the same FRAND terms and conditions to Philips' entire self-declared SEP portfolio, to which it unequivocally avowed to abide and to take such a license accordingly.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1292(a)(1), (c)(1). *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1189 (Fed. Cir. 2004) ("Federal Circuit jurisdiction depends on whether the plaintiff's complaint as amended raises patent law issues."). The district court denied Thales' motion seeking a preliminary injunction to prevent Philips from pursuing an ITC exclusion order against Thales, a willing licensee, on May 21, 2020. Thales filed its Notice

of Appeal of the order denying preliminary injunctive relief on June 21, 2021, in accordance with 28 U.S.C. § 2107(a) and Fed. R. App. P. 4(a)(1)(A).

INTRODUCTION

The issues presented in this appeal go to the core of the FRAND commitment to which SEP holders bind themselves in exchange for having their technologies adopted as part of a standard. This FRAND commitment, through an encumbrance on the SEP holder's rights, is designed to strike a balance: encouraging the wide adoption and implementation of the standard while also ensuring that SEP holders receive a FRAND compensation. This Court and other courts have long recognized that the FRAND compensation must be commensurate with the incremental value of the underlying patented technology, not the value of the standard itself. The district court correctly recognized that an SEP holder gets “incredible leverage” to extract higher royalties if permitted to pursue an exclusion order against a standards-adopter that is willing to take a license on FRAND terms. The court, erred, however, in viewing this as a mere policy issue for a higher court and found – wrongly – that ETSI's contractual FRAND commitment permits SEP holders to seek to exclude even willing licensees from the market, and even when the SEP holder is guaranteed to receive the entire FRAND compensation it sought, as Philips is here.

This Court should correct the district court's errors and clarify that the ETSI FRAND commitment does not permit SEP holders to use the threat of market exclusion to extract supra-FRAND compensation from willing licensees. If the

decision to permit Philips to seek an exclusion order stands, other SEP holders will see it as a nod that they too may resort to the threat of exclusion, even against willing licensees, to collect amounts far in excess of FRAND levels, up to the value of the standard itself. This would be both contrary to this Court's precedent and detrimental to the overarching goal of ensuring public access to products implementing technical interoperability standards.

STATEMENT OF THE ISSUES

1. Did the district court err in finding that Thales did not demonstrate a reasonable likelihood of success on the merits of its counterclaim requesting that the district court declare FRAND terms and conditions for Philips' worldwide SEP portfolio?
2. Did the district court err in holding that Philips' pursuit of exclusionary relief against Thales – a *willing licensee* – in the ITC was consistent with Philips' contractual FRAND obligations to ETSI and its duty of good faith to meet these obligations, and consequently that Thales failed to demonstrate a reasonable likelihood of success on the merits of Thales' claim that Philips breached its FRAND obligations?
3. Did the district court abuse its discretion in holding that Thales did not demonstrate irreparable harm through unrebutted factual declarations setting out that Philips' continued pursuit of an ITC exclusion order against Thales' products causes Thales to lose goodwill and reputation, customer opportunities, and market share?

STATEMENT OF THE CASE

A. The ETSI FRAND Obligation

Technological standards permit companies to create products that work together and build on each other, as in the cellular communications industry, where the utility and value of the technology is dependent on the interoperability of components and devices manufactured by different firms. Appx446 (¶ 26). Once a standard is published by a standard-setting organization (“SSO”), product manufacturers are likely to make substantial investments in the development and manufacture of products that implement that standard. Appx446 (¶ 29); Appx449-450 (¶ 40). As a result, the industry becomes “locked-in” to the standard. Appx446 (¶ 29). Once product manufacturers of standardized products are locked-in, SEP owners wield enormous market power and are in a position to “hold up” those manufacturers. Appx446 (¶ 29); Appx447 (¶ 31); *see also* (*Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014) “Patent hold-up exists when the holder of an SEP demands excessive royalties after companies are locked into using a standard.”).

Patent hold-up is an “obvious danger” resulting from having to develop products that comply with an industry standard. Carl Shapiro & Mark A. Lemley, The Role of Antitrust in Preventing Patent Holdup, 168 U. Pa. L. Rev. 2019, 2045 (2020). This danger is particularly acute in the Internet of Things (“IoT”) market

where a failure to remedy this problem “is likely to cause significant social welfare loss.” Jason R. Bartlett & Jorge L. Contreras, Rationalizing FRAND Royalties: Can Interpleader Save the Internet of Things?, 36 Rev. Litig. 285, 289 (2017). FRAND commitments are the antidote to hold-up. Their “primary purpose” is to prevent hold-up by enabling implementers to make and sell products that comply with a standard without the threat of being excluded from the market or paying excessive royalties to SEP holders. Shapiro & Lemley, *supra*, at 2043.

The FRAND commitment has a long judicial history in the United States and was first imposed in the early 1940s in a series of court orders intended to curtail anticompetitive practices involving patents. Appx1728-1729 (¶19) (Contreras Decl.) (citing Jorge L. Contreras, A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust through a Historical Lens, 80 Antitrust L.J. 39, 49-51 (2015)). In 1945, the Supreme Court for the first time validated such a licensing requirement. Appx1728-1729 (¶19) (Contreras Decl.) (citing *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945), *supplemented*, 324 U.S. 570 (1945)). Thereafter, from the 1940s through the 1970s, courts in the United States issued more than one hundred such FRAND licensing orders in antitrust cases. *Id.*

In 1959, prompted by that series of judicial opinions, the American Standards Association (“ASA”) adopted a policy permitting the approval of

standards covered by patents so long as the patent holder offered to license the relevant patents to “any interested and qualified party” on “reasonable terms.” Appx1731 (¶ 23) (Contreras Decl.). In 1970, the successor to ASI, the American National Standards Institute (“ANSI”), adopted a more detailed formulation for FRAND licensing requiring that the owner of a patent covering a standard must provide either an assurance that a license will be made available without compensation or on reasonable terms and conditions that are demonstrably free of any unfair discrimination. Appx1731 (¶ 24) (Contreras Decl.). ANSI was arguably the first organization to impose a formal FRAND licensing requirement on participants in standards-development and such requirements have since proliferated throughout the world. *Id.*

ETSI is an SSO formed in 1988 to serve as the locus for development of the 2G GSM mobile communication standard. Appx1732 (¶ 27) (Contreras Decl.). From the outset, patents covering the GSM standard were of concern to ETSI participants. Appx1733 (¶ 28) (Contreras Decl.). Among the principal causes of concern was the fact that GSM would become a mandatory standard across Europe. *Id.* Thus, any carrier or equipment vendor seeking to conduct business in Europe would be required to operate under such patents. Appx1733 (¶ 28) (Contreras Decl.). In a 1992 statement, the European Commission acknowledged the significance of the mandatory character of GSM as the EU-wide wireless

telecommunications standard, explaining that “[w]henver public authorities incorporate standards into legislation and thereby confer upon them a more binding character than their normal voluntary status, they must satisfy themselves that . . . the standards in question are available for use by all interested parties.” *Id.*

ETSI’s Intellectual Property Rights Policy (“ETSI IPR Policy”) is derived from the earlier U.S. FRAND policies described above, which were well known to the developers of ETSI’s policies, Appx1733 (¶ 29) (Contreras Decl.), and reflects the European Commission’s 1992 directive discussed above. ETSI’s goal is to ensure that SEPs remain available for license is specifically referenced therein:

It is ETSI's objective to create STANDARDS and TECHNICAL SPECIFICATIONS that are based on solutions which best meet the technical objectives of the European telecommunications sector, as defined by the General Assembly. In order to further this objective the ETSI IPR POLICY seeks to reduce the risk to ETSI, MEMBERS, and others applying ETSI STANDARDS and TECHNICAL SPECIFICATIONS, that investment in the preparation, adoption and application of STANDARDS could be wasted as a result of an ESSENTIAL IPR for a STANDARD or TECHNICAL SPECIFICATION being unavailable. In achieving this objective, the ETSI IPR POLICY seeks a balance between the needs of standardization for public use in the field of telecommunications and the rights of the owners of IPRs.

Appx1822 (¶ 47); Appx1298 (¶ 51). The ETSI IPR Policy thus seeks to promote the broad public adoption of standards in the telecommunications field while also accommodating the interest of intellectual property owners in being fairly compensated for the technologies they contribute to the standard. Appx1284

(¶ 24); Appx1286-1287 (¶ 29); Appx1607 (¶ 48); Appx1738-1739 (¶ 38); Appx1832 (¶ 63).

Under the ETSI IPR Policy, an ETSI member that owns patents that might be essential to a proposed ETSI standard may, and often does, voluntarily commit “to give ... an irrevocable undertaking in writing that it is prepared to grant irrevocable licenses on fair, reasonable and non-discriminatory (“FRAND”) terms and conditions” Appx448 (¶ 33) (citing ETSI IPR Policy, § 6.1). If an ETSI member refuses to commit to license its potentially essential patents on FRAND terms and conditions, ETSI may evaluate alternative technologies that would not infringe the patents or else abandon the standard. Appx448-449 (¶ 36) (citing ETSI IPR Policy, §§ 8.1.1 and 8.1.2). In other words, unless the member irrevocably binds itself to grant licenses to manufacturers of standardized products on FRAND terms, the member risks having its technology excluded from the standard, thus losing out to competing technologies. *Id.*

Philips is a member of ETSI and a self-proclaimed holder of SEPs directed to the 3G UMTS and 4G/LTE cellular communications standards. Appx265 (¶¶ 24-25). Thales is an “implementer,” *i.e.*, a developer of wireless network access modules that enable devices and machines to communicate over 3G and 4G networks to exchange data with other devices and machines, known as machine-to-machine (“M2M”) communications. Appx441 (¶¶ 8-9). M2M communication is

crucial in a range of industries including healthcare, retail services, smart energy, transportation, logistics, and automotive. Appx441 (¶ 8).

The ETSI IPR Policy includes a licensing declaration form, entitled “IPR Information Statement and Licensing Declaration,” that members use when they disclose patents potentially covering ETSI standards. Appx1322-1323 (¶¶ 94-95). Under French law, which governs the ETSI IPR Policy, this licensing declaration forms a contract between ETSI and the declaring ETSI member, such as Philips here. Appx449 (¶ 37); *see also* Appx43 (43:22-24); Appx44 (44:10-16). It is undisputed that standard implementers, like Thales here, are third-party beneficiaries entitled to enforce this contract. Appx1828-1829 (¶ 58) (Djavaherian Decl.) (third parties have the right “to be granted licenses on fair, reasonable and non-discriminatory terms and conditions in respect of a standard”) (citing ETSI IPR Guidelines, § 1.4); *see also* Appx150 (150:5-11); Appx1145 (31:4-19). Philips has submitted licensing declarations to ETSI for each of the four asserted patents, and allegedly for its entire self-declared 3G/4G portfolio, thus giving Thales the right to receive a FRAND license. Appx442 (¶¶ 14-16); D.I. 37, D.I. 45 at 9.

B. Sequence of Events

Following a licensing overture from Philips in [Date], Thales actively and diligently pursued a FRAND license to Philips’ worldwide, self-

declared SEP portfolio. Appx450-451 (¶ 42). Negotiations occurred over slightly more than [Duration]: from [Date] until Philips [Negotiation Status]

[REDACTED]. Appx450-454 (¶¶ 42-50). Thales' principal request during negotiations, which was pending [Negotiation Status]

[REDACTED]
[REDACTED].
Appx452-453 (¶¶ 46-47); Appx454 (¶ 50). Instead of providing this information, Philips filed a complaint in December 2020 in the District of Delaware, alleging infringement of four U.S. patents from its SEP portfolio and requesting declaratory judgment of FRAND license terms.¹ Appx454 (¶ 51). At the same time, Philips filed a complaint in the ITC, asserting the same four patents and seeking the exclusion of Thales modules and Thales' customers' products incorporating the same, from the United States market. *Id.*

In response, Thales filed a counterclaim in Delaware, alleging that Philips breached its contractual obligations under the ETSI IPR Policy by failing to offer a license to its worldwide SEP portfolio on FRAND terms and unlawfully seeking

¹ Philips also filed a second complaint in the District of Delaware alleging infringement of six other U.S. patents from its SEP portfolio and again requesting declaratory judgment of FRAND license terms for the same portfolio. *See Koninklijke Philips N.V. v. Thales DIS AIS Deutschland GmbH*, No. 20-1709 (D. Del.). Apart from pending motions that do not relate to the substance of this appeal, there has not been any further activity in this second district court case.

exclusionary relief against Thales, a demonstrably willing licensee, in the ITC. Appx457-460 (¶¶ 63-71). Thales also filed its own request for declaratory judgment of the same FRAND license terms that Philips sought in its complaint, together with a declaration affirming its willingness to enter into a license on such adjudicated terms. Appx456-457 (¶¶ 57-62). Because Thales has consented to the forum and process selected by Philips for adjudicating the FRAND terms for Philips' entire self-declared SEP portfolio, there is no question that Philips will receive from Thales the full compensation to which it is entitled. *See* Appx191 (19:11-12); Appx460 (a); Appx446 (¶6).

**C. Thales' Motion for Preliminary
Injunction to Enjoin Philips from
Continued Violation of its FRAND Obligations.**

After the ITC instituted an investigation, Thales filed a motion requesting the district court to preliminarily enjoin Philips from continuing to pursue exclusionary remedies at the ITC. Appx469-470. Thales presented evidence showing that all four factors for injunctive relief strongly weighed in favor of the requested preliminary injunction. *See* D.I. 21, D.I. 28 at Section IV; D.I. 62, D.I. 67 at Section III.

On the first factor (likelihood of success on the merits), Thales argued that it is likely to succeed on two separate claims, each of which is sufficient to satisfy its likelihood of success burden: (1) Thales will prevail in having the court adjudicate

the FRAND terms and conditions, and therefore obtaining a license, for Philips' worldwide SEP portfolio simply because both parties requested the same relief, *see* D.I. 21, D.I. 28 at 3-4, 14-15; D.I. 62, D.I. 67 at 2, 4; and (2) Thales will prevail on its breach of contract claim because Philips, after seeking a FRAND adjudication to which Thales acquiesced, breached its duty to fulfill its FRAND obligation in good faith by continuing to attempt to exclude Thales, a willing licensee, from the marketplace. *See* D.I. 21, D.I. 28 at 9-15; D.I. 62, D.I. 67 at 4-6.

The district court erred by failing to consider the merits of Thales' declaratory judgment claim, erroneously conflating it with the breach of contract claim. *See* Appx32-34 (32:4-34:11).

The district court also erred in finding no reasonable likelihood of success on the merits of Thales' breach of FRAND claim because it engaged in an impermissible reinterpretation of the clear and unambiguous ETSI contract. *See infra* II.B. The court further erred in disregarding legal and equitable precedent. *See infra* II.B. Despite recognizing that permitting an SEP holder to pursue an exclusion order against a willing licensee bestows enormous leverage on the SEP holder to extract supra-FRAND royalties, Appx168 (168:1-2), far in excess of the incremental value of the patents, the court incorrectly classified this concern as a mere policy issue that has no bearing on the FRAND commitment. Appx65 (65:14-19); Appx186 (186:3-6).

With respect to the irreparable harm factor, the lower court erred in summarily disregarding undisputed facts. *See infra* III. Philips did not contest the factual declarations submitted by Thales and one of its major customers, both of which demonstrate harm to Thales' reputation and customer relationships, the likely loss of customers, and potentially unrecoverable loss of market share. Nor did Philips submit any evidence countering the same. The district court nevertheless dismissed Thales' evidence as "conclusory." Appx215 (215:15-19).

The district court declined to address the remaining two factors pertaining to the issuance of a preliminary injunction: public interest and balance of equities, despite recognizing the existence of compelling policy reasons for not allowing an SEP owner to purport to offer a FRAND license while pursuing exclusionary remedies at the ITC. *See* Appx65 (65:14-16); Appx71 (71:3-71:7); Appx75 (75:9-13); Appx215-216 (215:25-216:3).

On August 20, 2021, the district court stayed and administratively closed the cases pending the resolution of the ITC proceeding.² D.I. 103. Thales did not move to stay the case.

² The district stayed the cases *sua sponte*, although two of Thales' customers and co-defendants had previously obtained stays with respect to themselves. Appx252 (D.I. 16); Appx 259 (D.I. 101).

SUMMARY OF THE ARGUMENT

There is no dispute that Philips, an ETSI member and a self-proclaimed SEP owner, is subject to an irrevocable contractual obligation to be prepared to grant a FRAND license to Thales, *see* Appx448 (¶ 33) (citing ETS IPR Policy, § 6.1), an implementer of ETSI standards, and that Thales, a third-party beneficiary of the ETSI contract, has the right to such a FRAND license. Appx1828-1829 (¶ 58) (citing ETSI IPR Guidelines, § 1.4). There is also no dispute that Philips and Thales have both requested that the district court adjudicate the FRAND terms and conditions of Thales' license to Philips' SEP portfolio, a license agreement to which Philips and Thales would be bound. *See* Appx337-338; D.I. 21, D.I. 28 at 3-4, 14-15; D.I. 62, D.I. 67 at 2, 4. Thales has formally declared to the district court that it will accept a license to Philips' SEP portfolio on the FRAND terms adjudicated by the court, which was specifically demanded by Philips. App466 (¶ 6). On these facts, Thales is unquestionably a willing licensee to whom Philips must grant a FRAND license pursuant to the adjudicated licensing terms.

The district court's decision not to enjoin Philips from seeking exclusionary remedies at the ITC upends the proper working of ETSI and standardization by permitting SEP holders to engage in a hold-up to extract super-FRAND royalties. This lurking danger and the equities at stake were not lost on the lower court. Indeed, the district court itself expressed discomfort with Philips' behavior. *See*

Appx130-131 (130:16-131:1). But it determined that such pure policy issues were outside its purview, and reasoned that it should not “decide what the policy ought to be.” Appx186 (186:3-17). The district court sought “clarity from a Court or Congress,” and further noted that “agencies and courts above my level could help weigh in on” such policy issues. Appx186 (186:3-9); Appx215 (215:11-15).

If the district court’s holding is permitted to stand, the ETSI FRAND obligation will be rendered meaningless. SEP holders will be free to use the extraordinary leverage provided by the ITC’s threat of market exclusion to extract royalties based on the value of the implementer’s access to the market, far in excess of the incremental value of their patents. *See Ericsson*, 773 F.3d at 1232 (A “patentee’s royalty must be premised on the value of the patented feature, not any value added by the standard’s adoption of the patented technology.”). This Court should provide the guidance the district court sought and leave no doubt that an owner of FRAND-encumbered patents cannot use the threat of market exclusion at the ITC to extract supra-FRAND royalties from a willing licensee.

Although the decision to grant or deny a preliminary injunction is within the discretion of the district court, such discretion is not absolute and must be measured against the standards governing the issuance of an injunction. *See Intel Corp. v. ULSI Sys. Tech., Inc.*, 995 F.2d 1566, 1568 (Fed. Cir. 1993). Here, the

district court erred in concluding that Thales was not likely to succeed on the merits. *See infra* II.

First, the court erroneously disregarded Thales' declaratory judgment counterclaim, which mirrors Philips' declaratory judgment claim, for FRAND adjudication of Philips' SEPs. *See infra* II.A. There is little doubt that Thales will "succeed on the merits" of this claim and obtain a license as Philips has requested essentially the same relief. *See* D.I. 21, D.I. 28 at 3-4, 14-15; D.I. 62, D.I. 67 at 2, 4.

Second, the court committed legal error when analyzing Thales' breach of contract claim because it sought to re-interpret the plain and clear language of the ETSI contract rather than consider whether Philips met its obligation to perform its contractual duty in good faith when it continued to seek to exclude Thales, a willing licensee, from the market. *See* Appx127 (127:4-14); Appx211 (211:25-212:20).

Third, the court abused its discretion when it disregarded Thales' uncontroverted evidence of irreparable harm demonstrating Thales' likely loss of market share and damage to customer relationships as a consequence of operating under the shadow of the impending threat of an ITC exclusion order. *See* Appx215 (215:17-19).

Finally, the district court erroneously miscast Thales' motion to enjoin Philips from pursuing its ITC action against Thales as effectively as a request to enjoin the ITC itself, thus depriving itself of the authority to grant the motion. *See* Appx213 (213:2-7).

Because the district court misapplied the law, and made clearly erroneous findings of fact on the likelihood of success and irreparable harm factors, while at the same time failing to consider the public interest and balance of equities factors, the district court's order denying the preliminary injunction must be reversed, or vacated and remanded.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the grant or denial of a preliminary injunction for abuse of discretion. *See Am. Signature, Inc. v. United States*, 598 F.3d 816, 823 (Fed. Cir. 2010) ("An abuse of discretion may be established under Federal Circuit law by showing that the court made a clear error of judgment in weighing the relevant factors or exercised its discretion based on an error of law or clearly erroneous fact finding."). A party seeking injunctive relief must establish: (1) a reasonable likelihood of success on the merits; (2) irreparable harm absent injunctive relief; (3) a balance of hardships in its favor; and (4) a public interest in favor of the injunction. *Trebro Mfg. Inc. v. Firefly Equip., LLC*, 748 F.3d 1159, 1165 (Fed.

Cir. 2014). “The purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

To the extent the court’s decision is based on an issue of law, the Court reviews that issue *de novo*. See *Endo Pharm. Inc. v. Actavis, Inc.*, 746 F.3d 1371, 1373-74 (Fed. Cir. 2014) (“interpretation of ... a contract is a question of law that we ... review *de novo*”); *Intel*, 995 F.2d at 1569 (“Interpretation of a contract is a question of law which we review *de novo*.”).

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO HOLD THAT THALES DEMONSTRATED A REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS.

Although a movant need only demonstrate a reasonable likelihood of success on the merits on a single cause of action to satisfy the first preliminary injunction factor, Thales demonstrated a reasonable likelihood of success on two separate counterclaims: its request for a declaration of the FRAND terms and conditions for Philips’ worldwide SEP portfolio to which Philips and Thales both would be bound, and its breach of contract claim based on Philips’ continued pursuit of an ITC exclusion order after Thales unequivocally pledged to license Philips’ patents on the FRAND terms declared by the district court. Showing the likelihood of success on the merits on either of these claims is sufficient, and Thales has established it for both.

A. Thales Demonstrated a Reasonable Likelihood of Success on Its Counterclaim for a Declaration of FRAND Terms and Conditions.

Thales' first counterclaim requests "a declaratory judgment that sets the FRAND terms and conditions for a worldwide license to Philips' 3G, and 4G/LTE SEPs." Appx456-457 (¶¶ 57-62).

During negotiations, the parties were unable to agree on a FRAND rate, in part because Philips refused to provide Thales with information that it requested to objectively assess whether its offers were in fact FRAND. D.I. 62, D.I. 67 at 8; Appx452-453 (¶¶ 46-47); Appx454 (¶ 50). Thales' primary concern was to be treated fairly and be provided FRAND terms. *See* Appx453 ¶ 47; *see also* Appx96 (96:23-97:2). For Thales to prevail on its declaratory judgment claim, therefore, nothing more is required than that the court adjudicate the FRAND terms based on all the relevant evidence. Regardless of the specific royalty or amount that the court may declare, Thales will know that the court's terms are FRAND, placing Thales on a level-playing field with its competitors. *See* Appx62 (62:3-15); Appx1815-1819 (¶¶ 35-40).

Thales is likely to succeed in having the District of Delaware pronounce the FRAND terms and conditions for the entirety of Philips' self-declared SEP portfolio for the simple reason that Philips also asked the district court to declare the FRAND terms and conditions for the same portfolio. Appx334-336 (¶ 205-

213); Appx337 (g) (“[I]f Thales ... do[es] commit to accept ETSI FRAND licenses as determined by this Court, then such licenses should be determined by this Court....”); *see* Appx466 (¶ 6) (“Thales will execute and abide by a worldwide license to Philips’ SEPs ... on such final FRAND terms and conditions as determined by this Court.”). It is therefore a mutual request. Thus, Philips did not, and could not, explicitly dispute that Thales is likely to succeed on its declaratory judgment claim for FRAND adjudication resulting in a binding license. *See* D.I. 37, D.I. 45 at 15-16.

Rather than consider the merits of Thales’ declaratory judgment claim, the district court erroneously conflated it with Thales’ breach of contract claim. Specifically, the district court incorrectly and improperly believed that the two claims advance the same “legal right” against Philips’ pursuit of its ITC complaint against Thales. Appx32 (32:4-9); Appx33-34 (33:11-34:9). They are distinguishable. The district court’s declaration of FRAND terms, in combination with Thales’ pledge to be bound by a license on those FRAND terms, disposes of Philips’ ITC complaint against Thales because a license is an absolute defense to an ITC infringement claim. Appx30-31 (30:22-31:18); Appx33-34 (33:20-34:3); *see also* Appx159 (159:15-19) ([T]he relief that [the court would] be rendering is a hundred percent inconsistent with the relief they are seeking in the ITC.”). By contrast, Thales’ breach of contract claim is based on Philips having given up its

ability to pursue and enforce injunctive and exclusionary relief against a *willing licensee* by virtue of Philips’ own ETSI declarations. *See Infra* II.B. There was consequently no basis for the district court to lump Thales’ two claims together.

The Court should reverse the district court’s error and find that Thales has demonstrated a reasonable likelihood of success on the merits of its declaratory judgment claim and therefore satisfied the first preliminary injunction factor.

B. Thales Demonstrated a Reasonable Likelihood of Success on Its Breach of Contract Counterclaim.

Thales also demonstrated that Philips breached its contractual obligation to perform its FRAND obligation to grant a license to a willing licensee by pursuing an exclusion order against Thales in the ITC. *See* D.I. 21, D.I. 28 at 9-15; D.I. 62, D.I. 67 at 4-6.

1. The FRAND obligation is clear: Philips must grant a FRAND license to a willing licensee.

Philips has voluntarily committed to be “prepared to grant irrevocable licenses [to its SEPs] . . . on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy.” Appx448 (¶ 33) (citing ETSI IPR Policy, § 6.1); *see TCL Commc’ns Tech. Holdings Ltd. v. Telefonaktiebolaget LM Ericsson*, 943 F.3d 1360, 1364 (Fed. Cir. 2019), *cert denied*, 141 S. Ct. 239 (2020) (the FRAND obligation under § 6.1 “imposes an obligation to license . . . on ETSI members”). Clause 6.1 requires Philips to be “prepared to grant irrevocable

licenses” on FRAND terms and conditions to willing implementers. Appx448 (¶ 33) (citing ETSI IPR Policy, § 6.1). Thus, under the plain language of the ETSI IPR Policy, Philips must license its SEPs to anyone willing to take such a license on FRAND terms and conditions.

There is no dispute that Philips’ FRAND obligation is a contract that Thales may enforce as a third-party beneficiary. *See* Appx449 (¶ 37); Appx1828-1829 (¶ 58). ETSI’s own IPR Guidelines state that third-party implementers have the right under Clause 6.1 “to be granted licenses on fair, reasonable and non-discriminatory terms and conditions in respect of a standard.” *Id.* (Djavaherian Decl.); *see TCL*, 943 F.3d at 1364. Philips’ expert Dr. Borghetti agrees that under the ETSI IPR Policy, “[t]hird parties thus have a right to be granted a license on FRAND terms. . . .” Appx1515 (¶ 36). Thales is therefore entitled to enforce Philips’ obligation to grant it a FRAND license. And Philips does not dispute this.

2. On the facts here, where Thales is unquestionably a willing licensee, Philips’ obligation to grant a FRAND license to Thales is clear and unambiguous.

On March 5, 2021, Thales filed its Answer and Counterclaims. Appx373; Appx463. Thales joined Philips in requesting that the Delaware district court declare the FRAND terms and conditions for Philips’ worldwide SEP portfolio. Appx456-457 (¶¶ 57-62). Thales also pledged to “execute and abide by a worldwide license to Philips’ SEPs to make and sell the Thales Modules . . . on

such final FRAND terms and conditions as are determined by” the Delaware district court. Appx466 (¶¶ 5-6). Thales is therefore unquestionably a willing licensee, and Philips’ contractual obligation to grant Thales a FRAND license is clear and unambiguous because both parties have agreed to the mechanics and steps needed to conclude that license. *See, e.g.*, Appx750 (¶ 708) (“[A] willing licensee must be one willing to take a FRAND license on whatever terms are in fact FRAND. Those terms might be settled ... by a court...”); Appx1738-1739 (¶ 38) (Contreras Decl.) (“[A] potential licensee that has irrevocably agreed to pay a FRAND royalty at the rate determined by a court of competent jurisdiction is necessarily a willing licensee.”).

There is also no ambiguity with respect to the license that Philips is obligated to grant to Thales under the circumstances here. Philips and Thales agree that the license should be to Philips’ worldwide portfolio of its self-declared SEPs. Appx336 (¶ 211); Appx456-457 (¶¶ 57-62); Appx92-93 (92:23-93:3). And Thales has not contended that it will only take a license to those patents for which liability is first determined by a court or a tribunal. Appx93-95 (93:9-95:13). Thus, there is clarity as to the identity and geographical scope of the patents that will be included in the license. Thales has further made it clear that it will not only take a forward-looking license, but it will also pay for past use of Philips’ entire portfolio in accordance with the district court’s FRAND adjudication. Appx92-93

(92:23-93:3). And although Thales has reserved the right to challenge the validity and infringement of Philips' patents, *see* Appx854 (¶ 6), Thales has repeatedly explained that it preserved this right in order to provide evidence as to the strength and value of Philips' SEP portfolio to inform the district court's FRAND adjudication. Appx94 (94:9-17); Appx95-97 (95:22-97:2). Contrary to Philips' half-hearted suggestion, therefore, Thales has not conditioned its willingness to enter into a license on validity and infringement determinations. Appx93 (93:22-25); Appx94 (94:9-17); Appx95-97 (95:22-97:2). Philips will thus receive full FRAND compensation for the entirety of its self-declared SEP portfolio.

Nor is there any ambiguity with respect to the procedure or venue for determining the FRAND terms and conditions themselves. Philips itself chose the District of Delaware to adjudicate the FRAND terms. *See* Appx334 (¶¶ 205-213). And Thales followed Philips' lead by joining in Philips' request for the FRAND adjudication and by pledging to take a license on such adjudicated FRAND terms. Appx444 (¶¶ 21); Appx456-457 (¶¶ 57-62); Appx466 (¶¶ 5-6). Thus, the parties have knowingly agreed on the mechanism by which the remaining licensing FRAND terms and conditions are to be determined.

Finally, there is no dispute as to Thales' ability to abide by the FRAND terms and conditions set by the district court. Thales has already set aside

[Monetary Sum] toward satisfying the court's determination, *see* Appx854 (¶ 5), and

Thales is a large and solvent company with substantial assets sufficient to satisfy any FRAND adjudication in excess of that reserve. There is no doubt that Thales is therefore willing and able to meet the court-adjudicated terms and enter into the license.

In sum, there is complete clarity and certainty as to how Philips will fulfill its obligation to grant the FRAND license to Thales and how Thales will cooperate and abide by that process. This alone renders Thales completely, utterly, and unquestionably a willing licensee.

3. By seeking to exclude Thales from the market, Philips breached its duty to perform its FRAND obligation in good faith.

It is undisputed that French law, which governs the ETSI contract, requires Philips to perform the contract in good faith. Appx1548 (citing French Civil Code Art. 1104) (“[c]ontracts must be ... performed in good faith”); *see also* Appx1516 (¶ 38). It was also accepted by the district court, and not disputed by Philips, that good faith under French law has the same meaning as under Delaware law. Appx52 (52:10-25); Appx144 (144:18-22); Appx160 (160:5-7); Appx212 (212:1-6).

Under Delaware law, it is bad faith to act in a way that “frustrate[s] the fruits of the bargain that the asserting party reasonably expected.” *Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017) (internal quotation omitted). Thus, parties

breach their duty of good faith when “their conduct frustrates the overarching purpose of the contract by taking advantage of their position to control implementation of the agreement’s terms.” *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (internal quotation omitted).

There should be no dispute that seeking to enjoin or exclude Thales, a willing licensee, “frustrates” both Thales’ reasonable expectation that its right to be granted a FRAND license be honored, as well as ETSI’s objective to achieve broad adoption of the standard through the FRAND commitment. Appx1734 (¶ 29); *see also* Appx1284 (¶ 24); Appx1286-1287 (¶ 29); Appx1607 (¶ 48); Appx1738-1739 (¶ 38); Appx1832 (¶ 63). Indeed, Philips’ pursuit of an ITC exclusion order directly contradicts its obligation to grant a patent license. *See TransCore, LP v. Elec. Transaction Consultants Corp.*, 563 F.3d 1271, 1276 (Fed. Cir. 2009) (a patent license agreement is “a promise by the licensor not to sue the licensee.”).

Moreover, because Philips will obtain the full compensation it is due upon the district court’s adjudication of FRAND terms, the only conceivable purpose for Philips’ action is to use the threat of exclusion to force Thales to settle on supra-FRAND terms before the district court can determine the FRAND terms. *See* Appx1834-1835 (¶ 68) (Djavaherian Decl.); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring) (cautioning against the use of an injunction “as a bargaining tool to charge exorbitant fees” or “simply for

undue leverage in negotiations”). This “is contrary to the ETSI policy . . . and threatens to undermine the fundamental purpose of the FRAND obligation.”

Appx1841 (¶ 81) (Djavaherian Decl.).

In *Microsoft v. Motorola*, the Ninth Circuit agreed that a patent-holder’s promise “to grant a license [on FRAND terms]” is a “guarantee that [it] will not take steps to keep would be users from using the patented materials, such as seeking an injunction.” 696 F.3d 872, 884 (9th Cir. 2012). The court explained that “injunctive relief against infringement is arguably a remedy inconsistent with the licensing commitment.” *Id.* at 885; *see also Realtek Semiconductor Corp. v. LSI Corp.*, 946 F. Supp. 2d 998, 1006-07 (N.D. Cal. 2013) (“Unless and until Realtek were to refuse a license under the court’s determined RAND terms (which Realtek indicates it will not do), then any exclusion order or injunctive relief is inconsistent with defendants’ RAND obligations.”).

European courts concur. In *Samsung Elecs. Co. v. Apple Inc.*, the Court of the Hague held that the patent owner’s use of injunctions during negotiations of a FRAND license “must be regarded as abusive or in violation of pre-contractual good faith.” Appx815 (¶ 4.31). And subsequently, in *Huawei v. ZTE*, the European Court of Justice recognized that it can be an abuse of dominant position for an SEP holder to refuse to grant a license on FRAND terms to a willing licensee. Appx1420 (¶¶ 64-66).

Philips' continued pursuit of an exclusion order against Thales frustrates the purpose of the FRAND commitment and serves only "to gain leverage in future licensing negotiations." *Realtek*, 946 F. Supp. 2d at 1005; *see also* Appx168 (168:1-4). Philips therefore breached its duty to perform the FRAND obligation in good faith under Article 1104 of the French Civil Code, which is consistent with Delaware law. The district court accordingly erred in concluding that Thales was not likely to succeed on the merits of its breach of contract claim. Appx212 (212:21-23).

4. The district court legally erred in seeking to interpret the ETSI contract, and the court's interpretation is also fatally flawed.

As discussed above, it is undisputed that good faith under French Law means the same as good faith under Delaware law (i.e., that a party to the contract must honor the other's reasonable expectations). *See supra* II.B.3. Because Philips is obligated to *perform* in good faith its unambiguous FRAND obligation to grant a license to a willing licensee pursuant to Article 1104 of the French Civil Code, *see supra* II.B.3, the district court was thus required to apply "good faith" under Delaware law to Philips' performance of its obligation. *See* D.I. 21, D.I. 28 at 13.

Instead, the district court ignored the plain words of the obligation – "to grant irrevocable licenses on [FRAND] terms and conditions" – because it did not

appreciate that this contractual term, on its face, prohibits seeking injunctions against willing licensees, and proceeded to fill what it perceived as a gap in the contract:

When you apply the implied covenant of good faith, you ... only do so with respect to terms that are not expressly taught by the contract. Then when you apply it, you try to determine what the parties would have negotiated with respect to the challenged issue. And in this case I don't think there has been any evidence and I'm not persuaded that Philips would ever have agreed or that ETSI would ever have adopted a contract that would have precluded a member from seeking a parallel injunction.

Appx212 (212:7-16). As explained above, this was error because, under the specific circumstances here, there was no question that the license that Thales is guaranteed to receive pursuant to the court's adjudication is antithetical to an injunction excluding Thales from the market. Rather, it should have instead examined whether Philips' continued pursuit of an exclusion order violated Philips' duty to carry out its FRAND obligation in good faith.

Furthermore, in addition to failing to apply good faith principles to Philips' *performance* of its ETSI obligation, the district court's attempt at interpreting that obligation was erroneous as it was based on a faulty premise and flawed evidence.

The district court embarked on the unnecessary interpretation because it accepted Philips' premise that the issue at hand was whether the ETSI contract categorically permits the seeking of injunctions. *See* D.I. 37, D.I. 45 at 9-10; Appx151 (151:18-23); Appx152 (152:14-15;19-21). Philips maintained that it is

entitled to pursue an exclusion order based on its FRAND-encumbered patents as a matter of right, and that nothing limits that right. *See* D.I. 37, D.I. 45 at 9, 10; Appx150 (150:5-12). It based that contention in large part on this Court’s statement that there is no “per se rule that injunctions are unavailable for SEPs. . . .” *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1331 (Fed. Cir. 2014), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015). This, however, miscasts both Thales’ position and this Court’s precedent.

Thales does not assert that it is *always* improper to seek injunctions based on SEPs, but rather that the ETSI FRAND obligation, and the concomitant good-faith requirement, does not permit Philips to seek such relief against a *willing licensee*. *See* D.I. 21, D.I. 28 at 7, 12. And this is even more true here, where Thales is a willing licensee that has pledged to abide by the district court’s FRAND adjudication. Appx466 (¶¶ 5, 6). Thales’ position is fully consistent with *Apple v. Motorola*, where this Court explained that “an injunction may be justified where an infringer unilaterally refuses a FRAND royalty or unreasonably delays negotiations to the same effect,” but that “this does not mean that an alleged infringer’s refusal to accept any license offer necessarily justifies issuing an injunction.” 757 F.3d at 1332. “For example, the license offered may not be on FRAND terms.” *Id.* Thus, the FRAND commitment is a bar to seeking injunctive or exclusionary relief

against *willing licensees* even though it remains available against *unwilling licensees*.

Moreover, the ETSI IPR Policy properly interpreted does indeed preclude seeking injunctions against willing licensees. *See* Appx1841 (¶ 81). And the district court's contrary interpretation, *i.e.*, that the FRAND obligation does not entail *any* limitation on seeking injunctive or exclusionary relief, was based on flawed evidence that Philips' presented. Appx212 (212:12-16). Through its expert Dr. Huber, Philips advanced the theory that the not-enacted 1993 ETSI IPR Policy had a blanket provision expressly limiting seeking injunctions against ETSI members. *See* Appx1325 (¶ 102). Philips then offered the *non sequitur* that because this express provision mentioning injunctions was dropped from the 1994 version of the ETSI IPR policy, ETSI's IPR policy "specifically allowed for SEP owners to seek injunctive relief." D.I. 37, D.I. 45 at 14; *see also* Appx142 (142:12-25). Of course, it does not follow from the omission of an unspecified, absolute limitation on injunctions that the current ETSI IPR Policy now permits the seeking of injunctions in all circumstances, even against willing licensees.

Furthermore, while failing to provide the court the actual language of the 1993 ETSI IPR Policy, during oral argument Philips conflated the pertinent language of the policy with language from a *proposal* by a single ETSI member.

Specifically, Philips presented the following language to the district court during the hearing on the preliminary injunction:

ETSI Contract Rejected Waiver that Is Advocated by Telit and Thales

- Obligation limited to declaration and referenced ETSI policy.
1708 Case, D.I. 12-1, Ex. H at p. 502; *id.*, Ex. B at pp. 43-44.

- 1993 ETSI Policy included a provision limiting injunctions, stating an IPR Owner “**will not seek an injunction against a PARTY who is negotiating in good faith without undue delay.**”
Huber Decl. (1708 case, D.I. 19) ¶104; *id.* at ¶102.

- This was rejected and excluded from the 1994 ETSI Policy.
Huber Decl. (1708 case, D.I. 19) ¶105; Borghetti Decl. (1708 case, D.I. 20) ¶¶ 78-79. See also Huber ¶104-107, 123-24; Borghetti ¶¶60-63, 78-83.

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Appx2095. As Philips’ slide would have it, the 1993 ETSI Policy specifically limited injunctions against a party “who is negotiating in good faith without undue delay,” *i.e.*, a willing licensee. *Id.* That is not true. The quoted language in the second bullet of the slide does not come from the 1993 Policy. Rather, it was a small part of a larger proposal that one ETSI member, Motorola, made in the course of discussions. *See* Appx1326 (¶ 104). Motorola’s proposal – one of many different proposals by many different companies – was never part of, nor deliberately excluded from, any ETSI policy. Because the court was not presented with the 1993 ETSI IPR Policy, it could not have known that Philips’ slide showed

information that was incorrect, nor that the 1993 policy never included a provision pertaining to status or treatment of *willing licensees*. The court may therefore have mistakenly believed that ETSI's IPR Policy at one time contained a prohibition on seeking injunctions against a willing licensee, and that prohibition was later purposefully removed.

The district court made yet another compounding factual error when it attributed Philips' misstatement to the opinion of Philips' French law expert, Dr. Borghetti. Appx211 (211:15-20) ("I think the Borghetti declaration has set forth significant analysis. I find it very compelling that there was an attempt at ETSI to add to the contract or revise the contract to address the issue before it and it was rejected."). Dr. Borghetti has claimed no ETSI expertise, and as a French law expert, he never rendered an opinion that the ETSI policy permits or endorses seeking injunctions against a willing licensee. Appx1504-1505 (¶¶ 4-8). Furthermore, Dr. Borghetti's declaration does not reference any attempt "to add to the contract or revise the contract to address the issue," as the district court thought. Appx211 (211:15-20). Rather, his opinion merely cited a limitation in the 1993 ETSI Policy regarding filing infringement actions during licensing negotiations. Appx1528-1529 (¶¶ 67-68).

Thus, aside from the fact that the district court legally erred in failing to apply the good-faith requirement to Philips' performance of the unambiguous

FRAND obligation, its interpretation based on the *formation* of the ETSI contract was based on a flawed premise and relied on factual errors. This alone warrants reversal of the district court’s incorrect ruling on the first preliminary injunction factor.

5. The district court also failed to consider this Court’s precedent that SEP holders may not collect supra-FRAND royalties.

This Court has held that royalties for FRAND-encumbered patents “must be premised on the value of the patented feature, not any value added by the standard’s adoption of the patented technology.” *Ericsson*, 773 F.3d at 1232; *see also* Appx164 (164:18-22). Here, Philips is guaranteed to receive 100% of the compensation that it is due for its FRAND-encumbered patents because the parties have jointly requested that the district court set the FRAND terms and conditions of the license, and Thales has pledged to take a license on those terms. *See* D.I. 21, D.I. 28 at 12; Appx334-336 (¶¶ 205-213); Appx337-338 (g); Appx456-457 (¶¶ 60-62); Appx466 (¶¶ 5, 6). It is thus objectively clear that the only reason Philips is nevertheless persisting with its ITC action is to force Thales to settle on supra-FRAND terms in contravention of this Court’s precedent before the district court can reach a FRAND determination.

The district court correctly recognized that “[t]he practical reality is that by using the ITC, [Philips has] incredible leverage.” Appx168 (168:1-3); *see also*

Appx185 (185:14-15, 19-20). However, it viewed this reality as merely a “compelling policy argument[],” Appx186 (186:1-2), and failed to place it in the context of relevant Federal Circuit law. Appx186 (186:4-9) (“I don’t think in the first instance I’m the one who should just decide what the policy ought to be....”). That was an error this Court should reverse. Philips should not be permitted to use a pending ITC investigation as leverage to extract a supra-FRAND royalty from Thales.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING THALES’ UNDISPUTED EVIDENCE OF IRREPARABLE HARM.

This Court has held “[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm.” *See Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012); *LEGO A/S v. ZURU Inc.*, 799 F. App’x 823, 833 (Fed. Cir. 2020). This Court has also recognized that loss of market share can serve as a ground for irreparable harm. *See Canon, Inc. v. GCC Int’l Ltd.*, 263 F. App’x 57, 62 (Fed. Cir. 2008). Despite Thales presenting detailed and undisputed evidence showing these harms were likely, the district court dismissed this evidence as “conclusory.” Appx215 (215:17-19).

Thales offered un rebutted sworn declarations describing how Thales’ business will suffer due to the current ITC action. *See* Appx857-860; Appx861-

867. Christopher Moorhead, Vice President for IoT at Thales, described how the current ITC investigation has been “highly damaging” to Thales’ reputation and goodwill as a reliable supplier of components. Appx863 (¶ 9). He explained that no fewer than [Number] current customers expressed concerns about the ability of Thales to fulfill its supply obligations as a result of the ITC action. Appx863-864 (¶¶ 10-11). For example, [Name], a Thales customer, [REDACTED]

[Statement from a Thales Customer]

[REDACTED]

[REDACTED] Appx864 (¶ 11). Mr. Moorhead further explained that based on his ten years of experience in this business, [REDACTED]

[Thales’ Business View of a Statement from a Thales Customer]

[REDACTED]

[REDACTED] Appx864 (¶ 12). Thales’ customer Xirgo provided a declaration expressing the same concern as [Name]: “The pendency of the ITC investigation casts significant doubt and uncertainty on Xirgo’s business, which depends on reliable access to Thales’ Modules.” Appx858 (¶ 7). As Mr. Moorhead explained, “unless Philips’ threat in the ITC is ended, Thales will continue to lose invaluable goodwill [Thales’ Business View of Possible Consequences]

[REDACTED]” Appx865 (¶ 16).

Not only is Thales likely to lose current customers, it also is likely to have difficulty winning new customers. *See* Appx865 (¶ 15). Mr. Moorhead explained that “[t]he uncertainty caused by Philips’ ITC Action and its requested exclusion order loom large and severely harms Thales’ ability to compete for new business in the highly competitive module market.” *Id.* He likened the situation for potential customers of Thales’ modules to potential home buyers: “buying a house with a potential lien that may cause the house to be repossessed.” *Id.* Mr. Moorhead concluded that the [Thales’ Business View of Possible Consequences]

[REDACTED] Appx865-866 (¶ 16).

Furthermore, the loss of a customer or potential customer is particularly damaging in the IoT industry. Appx864-865 (¶ 13). It can take 18 months to incorporate a network access module, such as Thales’, into a customer’s product. *Id.* And once a product using a module is produced, that product can be on the market for up to four years. *Id.* Thus, once a competing module producer wins a customer, Thales would typically have to wait upwards of five years to compete again for that customer. *Id.*

The district court failed to credit these statements and consequently failed to appreciate the obvious business reality these declarations reflect: customers have significant concerns about relying on a supplier facing the potential exclusion of its

products from the United States. As one court put it, “[t]he risk that [the petitioner] loses its customers to competitors who are not faced with the threat of an [ITC] exclusion order is more than speculative.” *Realtek*, 946 F. Supp. 2d at 1009.

The uncontested evidence demonstrates that Philips’ pursuit of its ITC action creates customer doubt and uncertainty concerning the ability of Thales to fulfill its supply obligations, damage to customer relationships, and the likely loss of market share due to current and potential future customers that cannot absorb the risk of a potential exclusion order and consequent business disruption. The district court’s finding of lack of irreparable harm in the face of such undisputed evidence is clear error. *See Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1150-55 (Fed. Cir. 2011); *Tex. Advanced Optoelectronic Sols., Inc. v. Renesas Elecs. Am., Inc.*, 895 F.3d 1304, 1331 (Fed. Cir. 2018) (“impaired goodwill” and “competitive position” are “hard-to-measure harms”).

IV. THE DISTRICT COURT FAILED TO WEIGH THE PUBLIC INTEREST AND BALANCE OF EQUITIES DESPITE RECOGNIZING IMPORTANT POLICY CONSIDERATIONS.

The district court recognized the significant public policy implications of allowing SEP owners to seek injunctive relief against willing licensees in contravention of their obligations to grant FRAND licenses. *See, e.g.*, Appx65 (65:15-16) (“[T]his is a really important policy decision to be made by

somebody.”). It nevertheless declined to address two of the four preliminary injunction factors: “[b]ecause I’ve ruled against the movant on both [likelihood of success and irreparable harm], I don’t think it’s necessary to address the two remaining factors.” Appx216 (216:1-3). The district court should have considered these factors as each weigh decisively in Thales’ favor and further demonstrate that a preliminary injunction is required in this case. *See Tex. Instruments Inc. v. Tessera, Inc.*, 231 F.3d 1325, 1329 (Fed. Cir. 2000) (“This court prefers that a district court make findings regarding each of the four factors before granting or denying a preliminary injunction motion.”).

A. The Balance of Hardships Favors the Injunction.

Philips will suffer no harm if precluded from further pursuing its ITC exclusion action. In seeking declaratory judgment on FRAND terms, Philips admits that monetary damages would be adequate compensation for any injury it has suffered as a result of Thales’ allegedly infringing conduct. *See* Appx335 (¶ 209). And Thales has agreed to pay full compensation in forward-looking royalties and past damages to be determined by the district court. Appx854 (¶¶ 4, 5). Thus, Philips will suffer no harm. *See, e.g., Microsoft*, 696 F.3d at 877 (“By committing to license its patents on FRAND terms, Motorola committed to license the [patent] to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a

royalty is adequate compensation for a license to use that patent.”) (quoting *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d. 901, 914 (N.D. Ill. 2012)).

By contrast, the harm caused to Thales in the absence of this injunction is severe and irreparable. *See supra* III. Thales is at risk of irretrievable loss of customers, market share, and good will. *See supra* III. This risk is compounded by the hardship of operating under the threat of market exclusion. *See supra* III. Furthermore, “[t]he purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be held.” *Camenisch*, 451 U.S. at 395. Here, Thales’ motion should be granted to preserve the status quo during the district court’s FRAND determination and prevent Philips from exploiting its pursuit of an ITC exclusion order to shortcut that proceeding and obtain supra-FRAND terms. As Thales pointed out, the ITC and the Delaware district court are two distinct roads and only the latter dispenses justice to both parties. Appx192 (192:3-5).

The balance of hardships favors an injunction here barring Philips from continued pursuit of its ITC action against Thales’ products.

B. Public Interest Favors the Injunction.

Granting a preliminary injunction will serve to uphold the overarching purpose of the FRAND commitment, which is to prevent patent hold-up and ensure that SEPs are accessible to all implementers on FRAND terms. *See Shapiro &*

Lemley, *supra*, at 2043. It will reinforce the fact that SEP holders cannot use an exclusion order to gain unfair leverage against a FRAND rate determination. *See Microsoft*, 696 F.3d at 877 ("More generally, Justice Kennedy has suggested that injunctions against patent infringement "may not serve the public interest" in cases where 'the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations.'") (quoting *eBay*, 547 U.S. at 396–97 (Kennedy, J., concurring)).

The alternative would empower SEP owners to engage in patent hold-up to extract supra-FRAND terms, which will harm not only implementers but negatively impact the competitive landscape, the quick and wide adoption of standards, and ultimately consumers. *See, e.g., Microsoft*, 795 F.3d at 1052 (recognizing the public interest element of a FRAND commitment). Indeed, the threat of an exclusion order or other injunctive relief against a willing licensee like Thales, "has the potential to distort competition by enabling SEP owners to negotiate high royalty rates or other favorable terms, after a standard is adopted, that they could not credibly demand before." Third-Party U.S. Fed. Trade Comm'n's Statement on the Public Interest at 2, Certain Wireless Commc'ns Devices, Inv. No. 37-TA-745 (ITC filed June 6, 2012). *See also* Letter from Michael Froman, U.S Trade Representative, to Irving Williamson, ITC Chairman,

(August 3, 2013) (disapproving of exclusion order against the implementer of a FRAND-encumbered SEP, determining that it would have negative effects on competitive conditions in the U.S. economy and on U.S. consumers); *cf. eBay*, 547 U.S. at 396 (Kennedy, J., concurring). Thus, Thales' request for a preliminary injunction serves the public interest and important public policy.

This Court should clarify that it is in the public's interest to prevent SEP owners from seeking to exclude a willing licensee from the market, whether through an ITC exclusion order or otherwise, and reverse the denial of the preliminary injunction, or at least vacate and remand it for further consideration by the lower court based on this clarification. *See Realtek*, 946 F. Supp. 2d at 1009 ("the preliminary injunction serves the public interest by making clear that commitments to make patents available on reasonable terms matter") (internal quotations and markings omitted).

Thales asks this Court to heed the district court's request for clarity from a higher court and state with certainty that an SEP holder breaches its ETSI FRAND obligation when it seeks an exclusion order against a willing licensee that has pledged to take a license on adjudicated FRAND terms. *See Appx215* (215:11-15).

V. THE DISTRICT COURT ERRED IN RECASTING THALES' MOTION AS A REQUEST TO ENJOIN THE ITC.

The district court incorrectly framed Thales' motion as "effectively enjoining an ITC proceeding," thereby limiting its authority to grant the motion given that "Congress passed a law that clearly contemplated parallel proceedings." Appx213 (213:3-7). In fact, this and other courts have enjoined a party from pursuing an ITC action when that party had given up its right to bring an ITC claim.

In *Texas Instruments*, this Court enjoined the parties from proceeding in a parallel ITC action because the action breached a "governing law" clause in the licensing agreement. 231 F.3d at 1329. In *Gen. Protecht Grp., Inc. v. Leviton Mfg. Co.*, this Court enjoined the parties from proceeding in the parallel ITC action because the action violated the forum selection clause in a prior settlement agreement. 651 F.3d 1355, 1357-58, 1366 (Fed. Cir. 2011); *see also Nokia Corp. v. InterDigital, Inc.*, 645 F.3d 553, 555 (2d Cir. 2011) (the district court ordered InterDigital to stay or terminate its proceedings against Nokia in the ITC and instead arbitrate its infringement claim). Finally, in *Realtek*, the court enjoined the patent holder from enforcing an ITC exclusion order because the patent holder's pursuit of such an exclusion order was a breach of its FRAND obligations. 946 F. Supp. 2d at 1008.

Similar to the petitioners in these cases, Thales requested that the district court enjoin Philips from continuing to seek an ITC exclusion order against Thales. *See* Appx469-470; Appx448 (¶ 33) (citing ETS IPR Policy, § 6.1). This is not an order targeting the ITC or the ITC proceeding, but Philips itself. *See Tex. Instruments*, 231 F.3d at 1332 (clarifying that enjoining a party from participating in ITC proceedings does not prohibit the ITC from continuing its proceeding). Like the respondents in the above cases, Philips has contractually given up its right to pursue an exclusion order against a willing licensee like Thales. Appx30 (30:11-12); *see Tex. Instruments*, 231 F.3d at 1329 (enjoining party from pursuing parallel ITC action because party gave up its right to bring proceeding in licensing agreement). The district court thus erred in failing to recognize its authority to grant Thales' motion.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Thales DIS AIS Deutschland GmbH respectfully requests that the Court reverse the district court's denial of preliminary injunction, or vacate and remand it with instructions to make findings on all factors and re-entertain the motion consistent with this Court's guidance and precedent.

Respectfully submitted,

Dated: August 30, 2021

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Addendum

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

- - -

KONINKLIJKE PHILIPS NV., : CIVIL ACTION
:
Plaintiff, :
:
vs. :
:
TELIT WIRELESS SOLUTIONS, :
INC.; TELIT COMMUNICATIONS, :
PLC,, :
:
Defendant. : NO. 20-1708 (CFC)

----- :
KONINKLIJKE PHILIPS NV., : CIVIL ACTION
:
Plaintiff, :
:
vs. :
:
TELIT WIRELESS SOLUTIONS, :
INC.; TELIT COMMUNICATIONS, :
PLC, CALAMP CORP., :
:
Defendant. : NO. 20-1711-CFC

- - -

Wilmington, Delaware
Friday, May 21, 2021
9:00 o'clock, a.m.

- - -

BEFORE: HONORABLE COLM F. CONNOLLY, U.S.D.C.J.

- - -

Valerie J. Gunning
Official Court Reporter

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P R O C E E D I N G S

(Proceedings commenced in the courtroom,
beginning at 9:00 a.m.)

THE COURT: All right. Good morning. Please be
seated.

Just as a procedural matter, masks are not
required in my courtroom. You're welcome to wear them. I'm
going with the science. I have from the beginning. So I
follow the CDC and everybody in my chambers has been
vaccinated. But you should absolutely feel comfortable to
wear a mask if you would like. The only exception to the
rule I have is -- I don't know if this is going to be the
case, I don't think so, but if we have witnesses testify,
because I have to assess credibility, I'm going to require
them to not wear a mask.

All right. So, welcome everybody. I see
people. Mr. Poff?

MR. POFF: Good morning, Your Honor. Adam Poff
from Young Conaway on behalf of plaintiff Philips, and with
me from Foley & Lardner, Eley Thompson and Kevin Littman.
Also from my office, Rob Vrana.

THE COURT: Good morning, everybody.
Mr. Blumenfeld?

1 MR. BLUMENFELD: Good morning, Your Honor. Jack
2 Blumenfeld from Morris Nichols for Telit Wireless, and with
3 me at counsel table is David Lowenstein from the Pearl Cohen
4 firm in New York. Thank you.

5 THE COURT: Thank you.

6 MR. EGAN: Good morning, Your Honor. Brian Egan
7 from Morris Nichols on behalf of Thales.

8 Joining me today from the Axinn law firm are
9 Paul Zeineddin, Thomas Hedemann and Michael Keeley.

10 THE COURT: All right. Did you discuss anything
11 about how you would like to proceed this morning?

12 MR. LOWENSTEIN: We have not, Your Honor.

13 MR. THOMPSON: We have not. I do have a
14 suggestion perhaps.

15 THE COURT: All right.

16 MR. THOMPSON: It seems to me for efficiency, it
17 may work well if the movants present first and then we would
18 respond. We're prepared to respond to both of them at one
19 time. That way things don't get repeated. That was my
20 thought.

21 THE COURT: Okay.

22 MR. THOMPSON: We're flexible as far as how we
23 do this.

24 THE COURT: Well, let's do this. For me, the
25 real issue is the first question, which is irreparable harm.

1 I don't know that I even need to hear argument on anything
2 else. I may.

3 You can have a seat. Let's do a couple things.
4 Let me ask you questions, get your respective positions
5 before we move forward.

6 All right. So a threshold question I have is, I
7 don't know, Mr. Blumenfeld, this is 1708?

8 MR. BLUMENFELD: That's the Telit case, Your
9 Honor.

10 THE COURT: Well, but -- oh, that's right. What
11 I meant by the 1708, I meant as opposed to the 1711 and
12 1713.

13 MR. EGAN: 1709 and 1713.

14 THE COURT: Nine? Okay. First of all, I'd
15 better make sure I have the numbers right. Well, I've got
16 1708 in my briefs, so all the briefs I have, so, for
17 instance, here's the declaration of John Sebastian Borghetti
18 and the two cases are the 1708 and the 1711. Maybe we
19 should clear all of that up. I'm probably missing something
20 really obvious here.

21 MR. LOWENSTEIN: That, Your Honor, is Telit.
22 There's one with the customer and one without. The one with
23 the customer, the 1711, is four patents that mirror the ITC
24 case.

25 THE COURT: Okay.

1 MR. LOWENSTEIN: 11 is the six patents.

2 THE COURT: So who is handling the 1708 case?

3 MR. LOWENSTEIN: I am.

4 THE COURT: Why are we here for the 1708 case?

5 Are there any overlapping patents?

6 MR. LOWENSTEIN: In the six-patent case? No.

7 THE COURT: I'm just at a loss, like, why are we
8 even here? Why are you moving for an injunction in the 1708
9 case when there are no patents in the ITC case?

10 MR. LOWENSTEIN: Well, we thought the two issues
11 overlapped. You're right, that they're different patents,
12 but ultimately, we'd like to have a FRAND rate set here
13 which would encompass the entire portfolio, the six patents
14 into four patents.

15 THE COURT: But the patents that are asserted in
16 the 1708 action aren't in the ITC action.

17 MR. LOWENSTEIN: That's true.

18 THE COURT: Am I right on that?

19 MR. LOWENSTEIN: Yes, you are.

20 THE COURT: So then how do I even have -- how do
21 I have a ripe motion before me? I mean, how are you seeking
22 to preclude the ITC proceeding from going on patents that
23 they're not even asserted in your case?

24 MR. LOWENSTEIN: Let me try to address it like
25 this. The ITC action is related to four patents. If the

1 ITC excludes our product altogether, that is obviously going
2 to affect the other patents. We won't be able to sell and
3 there won't be any opportunity for the Court to determine a
4 FRAND rate.

5 So it's kind of -- you're absolutely right, but
6 it's kind of a package. If they exclude us in the ITC,
7 we're stuck, we can't sell any product. Meanwhile, they are
8 asking mere --

9 THE COURT: Just to make it clear, then, so
10 you're admitting ahead of time that the patents, that the
11 accused products in the 1708 case are covered by the four
12 patents not asserted in that case, but that are asserted in
13 the ITC proceeding?

14 MR. LOWENSTEIN: The answer is I don't know, but
15 what I do know is that an exclusion order is going to
16 prevent us from selling whether or not the patents cover
17 those products or not.

18 We're going to be asked -- essentially out of
19 business or close to it if there's an exclusion order.
20 Whether or not the six patents cover it or whether or not,
21 you know, at least one claim of the four patents in the ITC
22 has got to be infringed obviously for them to issue the
23 exclusion. If we're excluded, it affects our sales, period,
24 regardless of, you know, the six patents in the other case
25 or the other hundreds of patents they have.

1 THE COURT: But just so I'm understanding it
2 right --

3 MR. LOWENSTEIN: Sure.

4 THE COURT: -- they are not seeking, they, being
5 the plaintiffs, are not seeking a FRAND rate in the 1708
6 case with respect to the four patents that are in the ITC
7 proceeding?

8 MR. LOWENSTEIN: No. They're seeking a FRAND
9 rate on all of their patents in both cases, 1708 and 1711.
10 The complaints are almost identical. I have it as part of
11 my presentation as well. I have one of the complaints, but
12 the complaints essentially are identical insofar as the
13 FRAND rate is concerned.

14 THE COURT: Are the four asserted patents in the
15 ITC proceeding mentioned in the 1708 complaint?

16 MR. LOWENSTEIN: No. Just 1711.

17 THE COURT: I'm probably -- again, I must be
18 missing something. It just seems to me I don't get the
19 connection between the 1708 action and the ITC action.

20 MR. LOWENSTEIN: At the risk of repeating
21 myself, it's one big package. They want a portfolio license
22 essentially on all of their FRAND patents, right, and so
23 that is in both cases, the six-patent case and the four
24 patent case.

25 If the ITC were to exclude us from selling --

1 it's in our papers -- it would effectively, divest you of
2 your jurisdiction to rule on the FRAND rates. So you
3 can't -- we can't really split apart the four patents from
4 the six patents. The ITC exclusion order is going to cover
5 the entire -- well, the 3G and 4G products that Telit sells,
6 and if that were to happen, then, you know, it doesn't
7 really matter if we're talking about four patents or six
8 patents in which case. It's going to fundamentally affect
9 our business and, you know, our business is hundreds of
10 customers as well.

11 So that's --

12 THE COURT: All right. I'm not sure I'm there
13 with you, but let's not dwell any more on this. You
14 mentioned, you used the words divest me of jurisdiction.

15 MR. LOWENSTEIN: Yes.

16 THE COURT: So that may be the answer to this
17 question, which is, why do I have authority even to
18 entertain an anti-suit injunction of an ITC proceeding?

19 MR. LOWENSTEIN: Well, I mean, the argument was
20 that, that I'm prepared to give was that it's an equitable
21 issue. It's a fairness issue.

22 They've asked for you to set a FRAND rate. They
23 filed a declaratory judgment action in this court saying
24 that you and only you should set the FRAND rate, in fact,
25 seeking an antitrust and anti-suit injunction against us

1 from proceeding anywhere else.

2 So they are saying they're entitled to an
3 anti-suit --

4 THE COURT: Who cares what they are saying?
5 I've got your motion in front of me.

6 MR. LOWENSTEIN: Okay.

7 THE COURT: What do you think?

8 MR. LOWENSTEIN: I will say that you're entitled
9 to do it and other courts have done it. It's an anti-suit
10 injunction directed at them. It's not directed at the ITC.
11 It's not a per se rule and that's sort of the arguments
12 they've made in their papers.

13 It's an injunction that's directed to a party to
14 stop them from litigating where really they ought not to be
15 litigating.

16 THE COURT: All right. We'll come back to that.
17 I will give you a chance to fully flesh that out.

18 All right. Do you think Federal Circuit law,
19 Third Circuit law, some other circuit law, what governs this
20 adjudication?

21 MR. LOWENSTEIN: That's a good question. It's
22 kind of a hodgepodge. The Federal Circuit says Federal
23 Circuit law should apply and we've got the four factors.

24 The Ninth Circuit I believe uses the preliminary
25 injunction factors that don't take --

1 THE COURT: Wait. You think that Ninth Circuit
2 law applies?

3 MR. LOWENSTEIN: Well, there are preliminary
4 injunction factors for parallel lawsuits. And --

5 THE COURT: Well, don't get there. I'm talking
6 about what law should I apply?

7 MR. LOWENSTEIN: I believe Federal Circuit law,
8 and the cases that -- the TQ Delta case that Judge Andrews
9 ruled on applied Third Circuit law, and apparently because
10 the parties briefed on Third Circuit law even though it was
11 after the pro tech case which set out the facts.

12 THE COURT: I don't understand the Protek case
13 frankly. Basically, it's one sentence, right? It's one
14 sense in the Protek case. The first sentence says we apply
15 regional circuit law and then the second sentence says
16 because what? It implicates jurisdiction of the district
17 court for a patent infringement case and the ITC, we're
18 going to apply Federal Circuit law? I mean, I don't
19 understand why I'm applying Federal Circuit law.

20 I agree there's a sentence in general, Protek,
21 whatever it's called, that seems to -- but let me ask you
22 this before we get there and then I will hear from your
23 colleagues really quickly on this threshold issue.

24 MR. LOWENSTEIN: Sure.

25 THE COURT: Do you think it matters whether I

1 apply Third Circuit or Federal Circuit law?

2 MR. LOWENSTEIN: I don't, and I have the Third
3 Circuit factors here.

4 THE COURT: So bottom line, you don't think it
5 makes a difference?

6 MR. LOWENSTEIN: I don't think so.

7 THE COURT: Okay.

8 MR. LOWENSTEIN: Because -- hold on. Because
9 the Third Circuit really -- in those cases that we cited and
10 I guess they cited about Third Circuit precedent, the focus
11 of those cases was common, and those cases all addressed an
12 really an international dispute between the U.S. and a U.K.
13 case. That's not at issue here, so I don't know whether the
14 Third Circuit standard really comes into play here, but I
15 mean we did brief it.

16 Again, it's the same issue about protecting the
17 Court's jurisdiction. And --

18 THE COURT: Well, I'm going to come back to
19 that.

20 MR. LOWENSTEIN: Okay.

21 THE COURT: When you say you briefed it, you
22 probably did. That doesn't mean I understood it.

23 MR. LOWENSTEIN: All right.

24 THE COURT: I will ask you questions.

25 MR. LOWENSTEIN: Sure.

1 THE COURT: Not because I didn't read your
2 briefs. I read your briefs pretty carefully and I got the
3 best that I could what I could out of them.

4 Do you think it makes a difference whether or
5 not it's Third Circuit or Federal Circuit law that applies?

6 MR. ZEINEDDIN: Your Honor, thank you.
7 Actually, we think that Federal Circuit law applies.

8 THE COURT: Do you think it makes a difference?

9 MR. ZEINEDDIN: We do not believe it does.

10 THE COURT: Do you think it makes a difference
11 whether I apply Federal Circuit or Third Circuit law?

12 MR. THOMPSON: Well, Your Honor, I think that
13 there are two parts as to which Federal Circuit law would
14 apply here. From a procedural standpoint, I think Third
15 Circuit law. From a substantive patent law standard, I
16 think it's Federal Circuit.

17 The claim that they've made is the breach of
18 contract claim. Now, that's not a patent -- that doesn't
19 come from the federal jurisdiction. Right? That's a breach
20 of contract. I would suggest that that is Third Circuit
21 law.

22 And does this make a difference? I think the
23 Third Circuit law is -- well, I think that the Federal
24 Circuit would try to follow Third Circuit law, so in theory,
25 they should be the same, right, if the Federal Circuit

1 follows it. But if you were looking for precedent, I think
2 the controlling precedent would be the Third Circuit Court
3 of Appeals.

4 THE COURT: And you think that with respect to
5 contract law. What about with respect to preliminary
6 injunction law or anti-suit injunction law?

7 MR. THOMPSON: The same in my view.

8 THE COURT: You don't think it makes a
9 difference?

10 MR. THOMPSON: No. I think it should be Third
11 Circuit law and the Federal Circuit should follow it, so
12 they should be the same in everything.

13 THE COURT: So do you think whether I apply
14 Federal Circuit law or Third Circuit law makes a difference?

15 MR. THOMPSON: It can, yes. So, for example, if
16 it's standard coming out of the Ninth Circuit, which, of
17 course, is very commonly different. Right?

18 And so a Ninth Circuit case ends up in the
19 Federal Circuit and they --

20 THE COURT: I'm only talking about this case,
21 not in the abstract. We're not in California. I just meant
22 in this case does it matter whether I apply Federal Circuit
23 or Third Circuit law in your opinion?

24 MR. THOMPSON: It does if the Federal Circuit
25 was applying Ninth Circuit procedural law.

1 THE COURT: Do you think Ninth Circuit
2 procedural law would be applicable in this case?

3 MR. THOMPSON: No. That's why it would make a
4 difference. So you asked me if I looked at a Federal
5 Circuit case, would that be different than if I looked at a
6 Third Circuit case. It wouldn't if the Federal Circuit were
7 applying Third Circuit procedural law, but if the Federal
8 Circuit were applying Ninth Circuit law, it could, and
9 indeed, the Ninth Circuit law, it is not the same.

10 THE COURT: Well, I agree with all of that. But
11 I am asking in this case, not the hypothetical out there
12 that potentially Federal Circuit law might differ from Third
13 Circuit law.

14 MR. THOMPSON: Oh.

15 THE COURT: I just meant as applied in this
16 case --

17 MR. THOMPSON: Indeed, Your Honor.

18 THE COURT: In other words, if I go with what
19 Judge Lynn said -- is it General Protek? What is the name
20 of that case?

21 MR. LOWENSTEIN: General Protek.

22 THE COURT: General Protek. All right. And
23 they say Federal Circuit law applies.

24 MR. ZEINEDDIN: Yes.

25 MR. THOMPSON: Yes.

1 THE COURT: Although they also say Federal
2 Circuit law applies to a preliminary injunction. But my
3 point is, like, I just want to know, is it going to make a
4 difference?

5 MR. THOMPSON: Yes. My answer would be yes.

6 THE COURT: All right.

7 MR. THOMPSON: And we actually cited it and I
8 was just looking for the case cite to give you the citation.

9 The TQ -- it's in our brief and I'm doing this
10 from memory. It's the TQ -- I will ask my colleague --

11 MR. ZEINEDDIN: Delta.

12 MR. THOMPSON: The TQ Delta case talks about the
13 standard for anti-suit injunctions, particularly in the case
14 which to a certain extent would not be applicable here. In
15 a foreign -- against a foreign action, the Third Circuit
16 specifically rejected as too loose the Ninth Circuit
17 standard.

18 THE COURT: I'm totally with you. I'm only
19 asking whether the Third Circuit versus the Federal Circuit.
20 That's all I care about.

21 MR. THOMPSON: Well, the Federal Circuit doesn't
22 have its own law.

23 THE COURT: Well, it says it does. I mean, in
24 General Protek, Judge Lynn explicitly says it does because
25 he says we're going to apply Federal Circuit law as opposed

1 to Third Circuit law.

2 MR. THOMPSON: Relative to substantive patent
3 issues.

4 THE COURT: No, he didn't say that.

5 Here's what I'm going to do. You need to,
6 throughout today, when you think it matters whether it's
7 Federal Circuit or Third Circuit law, you need to tell me.

8 MR. THOMPSON: Okay.

9 THE COURT: Because they agree it doesn't make a
10 difference. Well, maybe not now. Maybe we have a caveat.

11 MR. MR. ZEINEDDIN: Yes, Your Honor. If I may,
12 to clarify, because we are different parties. We have
13 different circumstances even in the briefing, as we have
14 noticed.

15 But I do want to address one thing and these are
16 very great questions. It is on both. Whether you're
17 looking at the anti-suit injunction or whether you're
18 looking at the rate setting, the answer really relies on how
19 the case arose.

20 For example, in the TCL case against us, the
21 case that involved the rate setting action, that was
22 appealed to the Federal Circuit. Also, in the
23 Samsung/Huawei case, which involved Samsung obtaining from
24 Judge Orrick, an anti-suit injunction against Huawei, a
25 foreign company, for enforcing injunctions in China, that

1 also was appealed to the Federal Circuit and it was heard by
2 the Federal Circuit and the case settled before there was a
3 decision.

4 On the other hand, in the Microsoft/Motorola
5 case, where both issues arose, number one, the issue of an
6 anti-suit injunction against -- by Microsoft against
7 Motorola in enjoining Motorola from enforcing the German
8 injunction that it obtained against Microsoft, that went up
9 to the Ninth Circuit. And also the rate setting action that
10 was by Judge Robart up in Washington, Seattle, that also
11 went up to the Ninth Circuit. And the reason for that was
12 because the Microsoft case was based purely on a breach of
13 contract.

14 Nonetheless, Your Honor, the two other cases,
15 the Huawei Samsung case and the TCL case also involved
16 breach of contract, but it was an auxiliary kind of question
17 that came as a supplemental jurisdiction over the patent
18 action as we have here while in the Microsoft/Motorola case,
19 if you recall, what we call Microsoft/Motorola Number One.
20 When the Ninth Circuit looked at it, the Court specifically
21 addressed how there was diversity, the fact that these were
22 two American companies and why there was jurisdiction there.
23 That's totally independent of the patent action.

24 So this is where we -- where I think the law is,
25 and obviously, it depends on the facts and how the case

1 arose.

2 In this particular case, Philips filed two suits
3 for each party, one suit with four patents that are also
4 exactly the same in the ITC and another suit on six patents.
5 All of these patents are allegedly, as far as Philips is
6 concerned, considered standard essential patents and Philips
7 has a lot more patents. And they filed infringement actions
8 on those and they also filed an ITC, and an ITC, 337,
9 actually, an infringement action, Your Honor, that goes to
10 the Federal Circuit, and that's why we also have here the
11 Federal Circuit talking about what happens when somebody
12 wants to enjoin the ITC. And as we cited in our brief, the
13 Federal Circuit told us what law applies, which is not
14 looking at the ITC as a federal entity, a federal country,
15 but actually we look at it as, you know, the four good
16 old-fashioned traditional preliminary injunction factors.

17 The reason I said to Your Honor it does not
18 matter, because in our specific case, whether you apply the
19 Third Circuit TQ Delta case even though you shouldn't
20 because the ITC is not a foreign company, based even on that
21 analysis, given our specific facts, it wouldn't matter to
22 us.

23 So I want to be very clear that I was not
24 speaking behalf of Telit because they do have different
25 situations. We do have -- we have actually followed the

1 roadmap that Philips gave us and we ourselves mirror their
2 claim of action, and we submitted an affidavit saying that
3 all of the Telit entities will actually abide by this
4 Court's rate determination for their entire portfolios
5 including patents in the ITC here, foreign patents, U.S.
6 patents not before you, and then because of that, whether,
7 regardless of what happens, this case that you will decide
8 here when you do the rate setting or the trier of fact when
9 they do the rate setting will dispose of all suits now and
10 later that would be brought because we would be licensed for
11 the entirety of the portfolio and we would do that without a
12 single judgment on infringement and validity on any of their
13 patents.

14 That's our situation and we have actually put in
15 an affidavit, sworn affidavit -- declaration, if I may --
16 it's not an affidavit, it's a declaration technically,
17 saying that we would do that, and we would do it for
18 ourselves and our customers that are using our products. My
19 understanding is nobody else has done that. So I just
20 wanted to clarify why I say in our case it doesn't make a
21 difference.

22 I'm sorry if I went too long, but I wanted to
23 make that distinction.

24 THE COURT: All right. Do you agree that the
25 Federal Circuit law and the Third Circuit law are the same

1 with respect to the factors the Court must consider to
2 determine whether to impose a preliminary injunction?

3 MR. ZEINEDDIN: For the United States, yes. I
4 mean, there's the four factors -- likelihood of success on
5 the merits, irreparable harm, balance of harms in the
6 public.

7 THE COURT: So you think they're the same?

8 MR. ZEINEDDIN: That's my understanding, that in
9 the U.S. --

10 THE COURT: I want to know.

11 MR. ZEINEDDIN: And because the ITC --

12 THE COURT: Well, hold up.

13 MR. ZEINEDDIN: -- is not a foreign country.

14 THE COURT: Okay. You agree with the four
15 factors for a preliminary injunction?

16 MR. ZEINEDDIN: Yes.

17 THE COURT: Do you agree?

18 MR. LOWENSTEIN: Unfortunately, I have the three
19 factors here and the Third Circuit has three factors. One
20 is comity.

21 THE COURT: Okay. Hold on. You're talking
22 about the anti-suit injunction factors?

23 MR. LOWENSTEIN: No, no. The Third Circuit
24 anti-suit injunction factors.

25 THE COURT: I'm only talking about the

1 preliminary injunction test.

2 MR. LOWENSTEIN: Okay. Sorry.

3 THE COURT: You think the Third Circuit and the
4 Federal Circuit differ?

5 MR. LOWENSTEIN: I don't believe so.

6 THE COURT: All right. Do you think they
7 differ?

8 MR. THOMPSON: No, Your Honor. They're the
9 same.

10 THE COURT: All right. Well, we'll at least
11 start with that. You all agree with that.

12 Now, then we have to decide do I apply those
13 four factors. Do you think I should apply those four
14 factors to make that determination here?

15 MR. THOMPSON: Yes, Your Honor.

16 THE COURT: All right. Do you think I should
17 apply those four factors?

18 MR. ZEINEDDIN: Yes, Your Honor.

19 THE COURT: Do you think I should apply those
20 four factors?

21 MR. LOWENSTEIN: Yes, Your Honor.

22 THE COURT: You all agree. I mean, don't know
23 that, in fact, Federal Circuit law and the Third Circuit law
24 line up with that on preliminary injunction factors, so
25 therefore I need to make sure I get clarity.

1 I know for sure the Third Circuit treats the
2 first two factors as "gateway factors" and that you have to
3 establish each of those two factors if you're the movant for
4 the Court to even consider the balancing of the third and
5 fourth factors.

6 Do you agree that same gateway test applies in
7 Federal Circuit law?

8 MR. THOMPSON: Your Honor, I would say that it
9 should apply under Federal Circuit law if the case is coming
10 from the Third Circuit.

11 THE COURT: Do you agree?

12 MR. LOWENSTEIN: Your Honor, I have the same
13 understanding.

14 THE COURT: Do you agree, sir.

15 MR. LOWENSTEIN: I have not studied the
16 difference. I think what you are saying is likelihood of
17 success, irreparable harm or gateway factors before you get
18 into the balancing?

19 THE COURT: Correct.

20 MR. LOWENSTEIN: I would assume that they are
21 the same.

22 THE COURT: Okay. Great. Right now I want to
23 focus on the first gateway factor and I think you all agree
24 for the movant to succeed, they have to establish a
25 likelihood of success on the merits. All right. Good.

1 Now, which movant wants to go first and address
2 that factor?

3 MR. ZEINEDDIN: May I, Your Honor?

4 THE COURT: Sure.

5 MR. ZEINEDDIN: So, Your Honor, in the case of
6 Thales --

7 THE COURT: You can come up if you want.

8 MR. ZEINEDDIN: Thank you, Your Honor.

9 In our case for Thales, Thales has asserted a
10 number of counterclaims. There are two of them that without
11 any need of discovery on their face, each one of them is
12 sufficiently in its own right, separate and distinct from
13 the other, is enough to satisfy that factor.

14 THE COURT: Well, let me just ask you this.
15 What is the question before me? You have to establish
16 likelihood of succeeding on the merits of what specific
17 question?

18 MR. ZEINEDDIN: Exactly. So on the one question
19 is the likelihood of success on the merits that Philips has
20 breached its brand commitment when Philips continued to
21 pursue the ITC action after Thales has informed Philips that
22 it will unequivocally guarantee that it will enter into a
23 license for Philips' worldwide standard essential patent
24 portfolio, including all the patents that are covered in the
25 ITC, here and elsewhere, based on the neutral adjudication

1 as carried out by this Court, this very Court, the same
2 Court that Philips --

3 THE COURT: You've got so many clauses.

4 MR. ZEINEDDIN: That's it.

5 THE COURT: I was --

6 MR. ZEINEDDIN: If we enter into a license by
7 the terms set by this Court without any qualification.

8 THE COURT: All right. And the merits question
9 is based on a breach of the -- you called it FRAND
10 commitment.

11 MR. ZEINEDDIN: That is correct.

12 THE COURT: I want to make sure I understand.
13 And the FRAND commitment -- so are you alleging then you're
14 likely to succeed in establishing a breach of a contractual
15 obligation owed to you? Is that right?

16 MR. ZEINEDDIN: That is correct.

17 THE COURT: And it's owed to you by virtue of
18 your third-party beneficiary status to the ETIS contract?
19 Is that correct?

20 MR. ZEINEDDIN: ETSI.

21 THE COURT: ETSI contract?

22 MR. ZEINEDDIN: ETSI commitment. Correct.

23 THE COURT: All right. So it is a breach of
24 contract claim that you need to establish likelihood of
25 success on the merits.

1 Do you agree on that?

2 MR. ZEINEDDIN: That is the one -- that is the
3 one point that we could agree.

4 THE COURT: All right. And you say there's a
5 second theory?

6 MR. ZEINEDDIN: That is correct, Your Honor.

7 THE COURT: And your second theory -- I'm going
8 to come back and dwell on the first, but the second theory
9 is?

10 MR. ZEINEDDIN: Sure. So the second one is we
11 have a counterclaim for declaratory judgment to set, for
12 this Court to set the fair, reasonable and
13 non-discriminatory terms, FRAND terms, for the entirety of
14 Philips' portfolio and for us to enter into a license based
15 on that. And that is, as far we are concerned, once the
16 Court pronounces that, we are happy -- and that's a very
17 important point, because we need to know and we don't know
18 now, we need to know what we're talking are the FRAND terms
19 and conditions because we want an equal level playing field
20 with everyone else because that's an essential part that we
21 must have and they've claimed the same thing.

22 THE COURT: Well, so the breach of contract is,
23 you're arguing that you have a contract with them. Right?
24 Let's go back to prong one for a second.

25 MR. ZEINEDDIN: Yes.

1 THE COURT: You brought a counterclaim for
2 breach of contract?

3 MR. ZEINEDDIN: So, Your Honor, we have the
4 defense and also a counterclaim for breach of contract.

5 THE COURT: I'm sorry. You have what?

6 MR. ZEINEDDIN: A defense and also a
7 counterclaim.

8 THE COURT: I know you have a defense. You have
9 to establish essentially a legal right to preclude them from
10 litigating in the ITC. Do you agree with that?

11 MR. ZEINEDDIN: I agree.

12 THE COURT: Okay. The source of the legal
13 right, number one, you're arguing, comes from the contract
14 that Philips entered with ETSI and to which the contract, to
15 which you are a third-party beneficiary. That's the basis
16 of the contract claim. Is that correct?

17 MR. ZEINEDDIN: That's correct.

18 THE COURT: And that contract was asserted, it
19 was actually asserted first by the plaintiffs, right,
20 because they're seeking a FRAND determination?

21 MR. ZEINEDDIN: Correct.

22 THE COURT: Right? And then you asserted as
23 well of that same contract as a defense, but you also
24 asserted as a counterclaim.

25 MR. ZEINEDDIN: Correct.

1 THE COURT: The counterclaim was filed after the
2 ITC proceeding was brought. Is that correct?

3 MR. ZEINEDDIN: That is correct.

4 THE COURT: Correct. Okay. And the defense was
5 actually asserted after the ITC proceeding was brought?

6 MR. ZEINEDDIN: Of course.

7 THE COURT: Because they brought the same, that
8 the claim and ITC were brought the same day?

9 MR. ZEINEDDIN: Exactly.

10 THE COURT: Okay. All right. So your second
11 theory -- now, to expound on your second theory, you said
12 you brought a counterclaim. You're turning it or hinging
13 it on the assertion of a counterclaim. Is that correct?

14 MR. ZEINEDDIN: So they are both counterclaims.
15 The first one was a counterclaim for breach of contract.
16 This one is a counterclaim for declaratory judgment.

17 THE COURT: Okay.

18 MR. ZEINEDDIN: Asking this Court to set the
19 FRAND terms and conditions for the entirety of Philips'
20 standard essential patent portfolio and for us in turn to
21 license.

22 THE COURT: Right.

23 MR. ZEINEDDIN: And they have claimed the same
24 thing.

25 THE COURT: Right.

1 MR. ZEINEDDIN: So if Your Honor, if this Court
2 proceeds with that, that's it, because regardless of what
3 the result is, you will set those FRAND terms and we'll have
4 a license and we would be free to practice, and we will know
5 that that license is honest to God fair, reasonable,
6 non-discriminatory based on all the evidence --

7 THE COURT: So what is your legal right under
8 the second theory, to preclude the ITC -- not preclude the
9 ITC, to preclude Philips from litigating the FRAND in the
10 ITC? What's the legal right?

11 MR. ZEINEDDIN: So the legal right is, because
12 of their FRAND commitment because they gave up the right --

13 THE COURT: But now you're back to the first
14 theory. How do the first theory and the second theory
15 differ?

16 MR. ZEINEDDIN: Well, the first theory and the
17 second theory differ in the following way, if may. And
18 thank you, Your Honor, for focusing me this way.

19 The truth is once this Court grants that
20 license, we're free.

21 THE COURT: Okay.

22 MR. ZEINEDDIN: And as we have highlighted both
23 in the statements that we made to the ITC and to Philips and
24 also in this court, the concept of having somebody be
25 ordered and obey to pay royalties, ongoing future royalties

1 and be enjoined at the same time is absolutely inconsistent
2 and makes no sense.

3 They have said --

4 THE COURT: Let's suppose I agree with you.
5 Okay?

6 MR. ZEINEDDIN: Yes.

7 THE COURT: What's the legal right that you're
8 asserting under the second theory to preclude Philips from
9 pursuing its -- its, what it believes are its rights in the
10 ITC? What's the legal right, the theory?

11 MR. ZEINEDDIN: Actually, they would be abusing
12 their patents in a way, right, because what they are doing,
13 they're going to be collecting the money they are owed back
14 with prejudgment, post-judgment interest.

15 THE COURT: Well, what's the legal theory?

16 MR. ZEINEDDIN: They are not entitled to it.
17 Why would they be entitled? It's an absolute defense
18 actually, right, once somebody is licensed.

19 So the only difference here is the delay between
20 when Your Honor, until this Court finds actual terms and we
21 actually execute the license. Now, any money they're going
22 to get is their money and if there is a delay in it between
23 now until the judgment and the past, they'll get prejudgment
24 interest and post-judgment interest and they'll be made
25 whole. And they will get what they are entitled to, the

1 maximum that they are entitled to, right, because these are
2 standard essential patents, these are patents -- practicing
3 these patents is not even an act of infringement.

4 THE COURT: So far everything you said it
5 strikes me boils down to either you're resorting back to
6 the first theory, which is that they are contractually
7 precluded from pursuing the ITC proceeding, or just a policy
8 that you think they shouldn't be allowed to pursue these two
9 tracks.

10 I thought you might say the second theory was
11 going to be that it's not a legal right you have, it's that
12 because the case is before me, I should be able to act to
13 protect this Court's jurisdiction and so -- and this is why
14 I attribute on your colleagues' invocation of the
15 divestiture of jurisdiction.

16 The second theory as I kind of see it is the
17 anti-suit injunction theory, and as I understand the
18 position of the movant, it's that -- I don't think it's
19 explicitly stated in the briefs this way, but I think it's
20 where you're getting at, what you are getting at, is that I
21 should view this the way courts have viewed foreign
22 proceedings in the anti-suit injunction context and I should
23 view the ongoing ITC proceeding as essentially undermining
24 the jurisdiction of this Court in divesting me of my powers
25 to decide this case, and that public equity suggests that I

1 have authority under my anti-suit injunction power.

2 MR. ZEINEDDIN: Absolutely without -- there's
3 not a single word that you said that we disagree with.

4 THE COURT: All right. So is that your second
5 theory?

6 MR. ZEINEDDIN: Yes. And also because you have
7 to exercise that discretion, the equitable consideration,
8 the fact that we will have a license, they'll be made whole
9 in all of the other equitable considerations, including the
10 ITC would divest --

11 THE COURT: When you go back to you will be made
12 whole, see, that's where I lose you. Okay?

13 So I get you have a legal right to be made whole
14 through your contract, so you can assert that legal right.
15 What's the other legal right that you are asserting to say I
16 ought to consider that you'll be made whole?

17 MR. ZEINEDDIN: Right.

18 THE COURT: How does it differ from the first
19 theory?

20 MR. ZEINEDDIN: So it does go back to exactly
21 what you were saying, Your Honor, which you eloquently
22 stated. Ultimately, for you while you're deciding these
23 licensing terms, for us to be enjoined and be taken off the
24 market and effectively like the other cases, that's why --
25 that's why those courts enjoined the injunction. That's

1 what we're asking for here, for you to stop us to be
2 excluded from the market. It frustrates your ability to
3 actually adjudicate the claims that are brought before you.

4 THE COURT: Okay. I get that second theory.
5 All right. So then when you start talking about make
6 yourself whole, you'll agree at the end of the day what that
7 boils down to is your contractual right as a third-party
8 beneficiary to the ETSI contract?

9 MR. ZEINEDDIN: That first one, yes.

10 THE COURT: All right. I think I understand
11 your theory now.

12 MR. ZEINEDDIN: Thank you, Your Honor.

13 THE COURT: I want to make sure Telit --

14 MR. LOWENSTEIN: We' Telit. He's Thales.

15 THE COURT: I'm sorry. You're?

16 MR. LOWENSTEIN: Telit. Telit. Telit and he's
17 Thales.

18 THE COURT: Oh, okay. So the "H" is silent?

19 MR. LOWENSTEIN: Yes.

20 THE COURT: Not silent, but --

21 MR. LOWENSTEIN: That's the way I pronounced it.

22 THE COURT: Okay. Sorry. So Telit and Thales.
23 You're going to make this confusing.

24 MR. LOWENSTEIN: They're a French company. I
25 think the "H" is silent.

1 THE COURT: Okay.

2 MR. LOWENSTEIN: You originally asked about
3 success on the merits. In listening to this discussion,
4 you see that these factors sort of get merged together. I
5 mean --

6 THE COURT: No, I don't think they get merged
7 together actually.

8 MR. LOWENSTEIN: All right.

9 THE COURT: So I want to hear what you think.

10 MR. LOWENSTEIN: We raised two issues for
11 success on the merits, and it depends what you call --

12 THE COURT: So what are your two issues?

13 MR. LOWENSTEIN: If the merits are should you
14 decide --

15 THE COURT: No. What do you think the merits
16 are?

17 MR. LOWENSTEIN: You should decide. The merits
18 are should you decide the FRAND license. They say you
19 should and we say you should, so to the extent that's the
20 merits of this dispute, we're in agreement, that this is an
21 issue for you to decide.

22 THE COURT: All right. And so the first prong
23 is the likelihood of success on the merits.

24 MR. LOWENSTEIN: Correct.

25 THE COURT: And the question I have is: The

1 merits of what? All right?

2 MR. LOWENSTEIN: Okay.

3 THE COURT: So what's your answer to that?

4 MR. LOWENSTEIN: So the answer is we have a
5 breach of contract claim, too. We have not answered yet,
6 but we submitted a declaration from Professor Stoffle-Munck,
7 who said under French law you can't do what they have done.

8 THE COURT: All right. So your first theory,
9 and I get -- this makes sense to me.

10 MR. LOWENSTEIN: Okay.

11 THE COURT: Your first theory is to win prong
12 one of the preliminary injunction test, you have to
13 establish a likelihood of success of proving that Philips
14 breached the ETSI contract?

15 MR. LOWENSTEIN: Correct.

16 THE COURT: All right. Is there a second
17 theory?

18 MR. LOWENSTEIN: Well, I was trying to
19 articulate it. Maybe I didn't do a good job.

20 Maybe you don't agree with it, but I think -- it
21 depends what you talk about as the merits. If the breach of
22 contract is the merits, we discussed that, but there's also
23 sort of an underlying issue about whether or not this Court
24 should decide the FRAND rate, and if that's the merits of
25 this dispute, preliminary injunction or not, we are all in

1 agreement, everyone in this court thinks you should decide
2 the FRAND rate. So that's it. You know, I think those are
3 two prongs on the success on the merits.

4 So unless you have any other questions --

5 THE COURT: Do you have any theory besides
6 breach of contract?

7 MR. LOWENSTEIN: Well, we --

8 THE COURT: Hold on.

9 MR. LOWENSTEIN: Sorry.

10 THE COURT: Let me just finish the question.

11 MR. LOWENSTEIN: Sure.

12 THE COURT: Do you have any theory other than a
13 breach of contract theory that you want to put forward to
14 establish a right, a legal right that you have, your client
15 had, to preclude Philips from litigating in the ITC?

16 MR. LOWENSTEIN: We have not answered yet, but
17 when we answer --

18 THE COURT: No. For the purpose of this motion?

19 MR. LOWENSTEIN: Right now, no, we have not.

20 THE COURT: So the only legal right that you are
21 asserting to preclude Philips from litigating in the ITC is
22 based on the ETSI contract. Is that correct?

23 MR. LOWENSTEIN: I think that is correct.

24 THE COURT: All right.

25 MR. LOWENSTEIN: But I would like to draw a

1 distinction between a legal right and equitable right. We
2 think, again, this is bound together with the Court's
3 equitable power to enjoin, and so I don't know, you know,
4 where we cut -- draw the line on that.

5 THE COURT: So I think what I'm going to do is,
6 I mean, and I think I'm actually somewhat on the same page.
7 I'm in the same chapter you are.

8 MR. LOWENSTEIN: Okay.

9 THE COURT: But I don't like the way you
10 articulate it.

11 MR. LOWENSTEIN: Okay.

12 THE COURT: And here's how I'm going to
13 articulate it. I think that you've conflated anti-suit
14 injunction with preliminary injunction and I think you've
15 conflated it I think because frankly under the law, it is
16 sketchy.

17 MR. LOWENSTEIN: It's confusing.

18 THE COURT: So the way I look at it is there are
19 really two issues before me. So the first issue is whether
20 I ought to grant a preliminary injunction and that theory
21 boils down to a determination in the first instance of
22 whether or not Philips is precluded under its ETSI
23 contractual obligations from proceeding in the ITC, and so
24 that, to determine whether a preliminary injunction should
25 issue or not, the first question I have to ask is whether or

1 not it's precluded by the ETSI contract before moving
2 forward in the ITC.

3 MR. LOWENSTEIN: Could I put a finer point on
4 it?

5 THE COURT: You can.

6 MR. LOWENSTEIN: I'm afraid that you're sort
7 of going in their direction, which is that there's a
8 per se rule about injunctions from the ETSI contract and
9 we're not saying that there's a per se rule. We are not
10 saying that the ETSI contract, if you read it, says no
11 injunction ever. We're saying under our facts here, where
12 in the Telit case, we were negotiating up until two weeks
13 before they sued us.

14 THE COURT: But here's the thing. I don't even
15 get there. That's my point. All of that, you still have to
16 have a legal right.

17 MR. LOWENSTEIN: I agree.

18 THE COURT: You can't come in and say, Judge, in
19 any context, you can't say, you know what, we don't like the
20 way that party is treating us. They are just not being very
21 nice to us. We think they should. Now we're in front of
22 the Court and we want to preclude a party from going to an
23 agency of the United States government to petition its --
24 you know, you've got to have a legal right.

25 Now, if you don't have a legal right, then

1 you've got to have, there's another -- and if you want to
2 call it equitable basis, that's fine. And I think it's a
3 stretch probably, but we'll discuss it today, that courts
4 have decided that they'll issue an anti-suit injunction if
5 it protects some important public policy, and so far the
6 only public policy I've seen where a Court is willing to do
7 it in that context, is in order to be sure that the Court
8 isn't divested effectively of some jurisdiction. All right?

9 So now if you want to articulate something else,
10 I will hear you, but when you get to that, well, the
11 particular facts of our case, you know, they were
12 negotiating this contract and then they, you know -- all of
13 that, unless it goes from my powers or unless it goes to a
14 legal right that you have, you're going to have to tell me
15 authority that exists to show that.

16 MR. LOWENSTEIN: I mean, I'm going to fall back
17 on the fairness argument. They've asked you for an
18 anti-suit injunction against us and we're just saying we're
19 entitled to one as well and here's why. Here are the
20 factors that we've outlined.

21 THE COURT: Under what legal theory?

22 MR. LOWENSTEIN: Under the Court's equitable
23 powers to --

24 THE COURT: Do you know of any case where a
25 Court held that because the plaintiff asked for an anti-suit

1 injunction, that meant that the defendant was entitled to an
2 anti-suit injunction?

3 MR. LOWENSTEIN: No, but what I do know is they
4 can't say that they are asking you to cross some
5 constitutional threshold because --

6 THE COURT: Well, why is that relevant? I mean,
7 don't you have to have a legal right to win?

8 MR. LOWENSTEIN: Sure.

9 THE COURT: What is it?

10 MR. LOWENSTEIN: I think we've articulated it,
11 that there's a breach of the agreement.

12 THE COURT: I'm with you on that.

13 MR. LOWENSTEIN: Okay.

14 THE COURT: Okay.

15 MR. LOWENSTEIN: All right.

16 THE COURT: So we're back to breach of contract.

17 MR. LOWENSTEIN: So then maybe I should just
18 stop talking.

19 THE COURT: Okay. We'd better figure out
20 whether there has been a breach of contract.

21 MR. LOWENSTEIN: All right.

22 THE COURT: All right. So again then I'm going
23 to finish where I started because you wanted to put a finer
24 point on it. I'm not sure what the finer point is.

25 What I am sure about right now is that I've got

1 a preliminary injunction in front of me and for the
2 preliminary injunction purposes, for the movants to prevail,
3 they've got to establish a likelihood of success that they
4 would succeed. I'm going to strike all of that. It was
5 just a mess.

6 For the purpose of the preliminary injunction,
7 step one, the movants have to establish a likelihood of
8 success in establishing that Philips breached it's ETSI
9 obligations by filing the ITC proceeding. All right.

10 Then we get -- there is still a second argument
11 being made as far as I can tell and I'm willing to entertain
12 it today, which is that I should consider imposing an
13 anti-suit injunction, because allowing the ITC proceeding to
14 proceed effectively divests this Court of jurisdiction to
15 determine the FRAND dispute that was put in front of me both
16 by the claims that were filed by the plaintiff and by the
17 defenses and the counterclaims asserted by the defendants.

18 All right. So that's how I'm going to address
19 the argument.

20 MR. LOWENSTEIN: Sure.

21 THE COURT: And I don't think anybody on the
22 movant's side has established another basis that would
23 justify in any way an injunction, and so to the extent there
24 is any more, I'm just -- I've given you, I think, both a
25 full opportunity to articulate what the theory would be.

1 You have not done it to my satisfaction. I'm not the
2 brightest candle. I'm sure you might be able to persuade
3 some other appellate judge that you have. I have not seen
4 it and I'm going to deny any request for an injunction based
5 on any theory under other than the two theories I've
6 articulated.

7 All right. So now let's turn first to the
8 breach of contract claim. All right?

9 Is it disputed -- let me hear briefly from the
10 plaintiff. Do you dispute that the movants are third-party
11 beneficiaries to the ETSI contract?

12 MR. THOMPSON: No.

13 THE COURT: Okay. So then would you agree that
14 they are entitled to allege here that Philips has breached
15 the ETSI contract?

16 MR. THOMPSON: As long as we're talking about
17 the same contract, because I think they have a vastly
18 different view.

19 THE COURT: We'll get to all of that. The ETSI
20 contract?

21 MR. THOMPSON: Right.

22 THE COURT: Okay. All right. Do you agree that
23 French law governs the ETSI contract?

24 MR. THOMPSON: Yes.

25 THE COURT: All right. So let me go back now to

1 movants. Who is going to speak to the breach of contract
2 claim? You are?

3 MR. ZEINEDDIN: Yes, Your Honor.

4 THE COURT: All right. What law governs?

5 MR. ZEINEDDIN: So the fact that there is a
6 contract is under French law, that the ETSI commitment is
7 played in France. ETSI is in France and it's subject to
8 French law.

9 THE COURT: Okay.

10 MR. ZEINEDDIN: And French law says the
11 contract, they call it contract for the benefit of -- it's a
12 promise for a third party.

13 THE COURT: I don't know that you have a dispute
14 about that. You agree French law governs, so whether it's a
15 contracts, it's governed by French law as well?

16 MR. ZEINEDDIN: Yes.

17 THE COURT: Okay. We're good there.

18 MR. ZEINEDDIN: Yes.

19 THE COURT: How under French law, can you
20 explain to me how you're going to establish a breach of
21 contract?

22 MR. ZEINEDDIN: So I think there's also no
23 dispute that French law says that this contract should be --
24 should be governed by good-faith negotiation.

25 THE COURT: Okay. Let's hear from them. Do you

1 believe -- do you agree that there's an implied covenant of
2 good faith in every contract that is entered under French
3 law?

4 MR. THOMPSON: Yes, in an application where the
5 contract says that you will be willing to be prepared to
6 offer a FRAND license.

7 THE COURT: We'll get to the merits.

8 MR. THOMPSON: I just --

9 THE COURT: I want to talk about the legal
10 principles first. You agree then French law and I think
11 it's a civil statute. Right?

12 MR. THOMPSON: Right.

13 THE COURT: Provides that just like Delaware
14 law, there's an implied covenant and good faith inherent in
15 every contract?

16 MR. THOMPSON: To be a willing licensor, yes.

17 THE COURT: I mean, I don't think the civil
18 statute says anything about licensor, does it?

19 MR. THOMPSON: Well, no. I mean in the context
20 of this particular situation.

21 THE COURT: Yes. We'll get to context. Let's
22 establish what we can agree on.

23 MR. THOMPSON: Okay.

24 THE COURT: Then we'll get to the application.

25 MR. THOMPSON: Yes, Your Honor.

1 THE COURT: Do you have any French cases? There
2 was very little discussion. I mean, boy, you gave me long
3 affidavits, both of you did, but in the briefing, maybe
4 there's a page-and-a-half long of discussion of French law.
5 So, but that's what I ought to apply. Right?

6 MR. ZEINEDDIN: Well, so, Your Honor, what we
7 believe and what we've said also is French law says this is
8 a contract and it should be governed by good faith, covenant
9 of good faith and fair dealing in carrying it out.

10 THE COURT: Do you have a French case? Do you
11 have a holding of a French Court that says that ETSI is a
12 contract?

13 MR. ZEINEDDIN: What I do have are American
14 cases saying this is it and looking at good faith under U.S.
15 law and French law is the same, citing a lot of French
16 experts, too. And the people did not disagree on that.
17 There is not -- there is no French case that I know of that
18 does that.

19 THE COURT: See, here's the problem that I feel
20 like. You asked me to decide a question of French law.
21 Your expert cites what I think is undisputed is apparently a
22 lower court or some inferior court. Right? Tribunal. Is
23 that right?

24 MR. ZEINEDDIN: So, Your Honor, we're asking for
25 Thales. We did not put in --

1 THE COURT: You didn't have a French case cited.

2 MR. ZEINEDDIN: So basically what we said is

3 U.S. courts looking at the ETSI --

4 THE COURT: We'll go back to that. Did you cite
5 any French case law?

6 MR. ZEINEDDIN: No.

7 THE COURT: All right. I'm confusing you
8 with -- and I mixed it up. Telit or Thales?

9 MR. ZEINEDDIN: Thales, spelled --

10 THE COURT: All right. And you're the "A" and
11 you're the "E." Okay.

12 So you are the one who cited the French Court.
13 Why don't just finish with --

14 MR. ZEINEDDIN: Yes, Your Honor.

15 THE COURT: I'm sorry. What's your name, sir?

16 MR. ZEINEDDIN: Paul Zeineddin.

17 THE COURT: Zeineddin?

18 MR. ZEINEDDIN: Yes, Your Honor.

19 THE COURT: Mr. Zeineddin, so do you cite -- I
20 just need to be clear then. You don't even cite a French
21 case for me to determine whether French law applies?

22 MR. ZEINEDDIN: We cite U.S. cases saying we're
23 applying the ETSI commitment, which is governed by French
24 law. We're looking at good faith, the faith, the same as in
25 France.

1 THE COURT: All right. Show me what those cases
2 say.

3 MR. ZEINEDDIN: We cited a number of cases. So,
4 Your Honor, on page 9 of our opening brief --

5 THE COURT: I'm looking at it.

6 MR. ZEINEDDIN: ETSI, that's E-T-S-I, that's
7 the very same body we're talking about, the same kind of
8 patents, which is governed by French law, and we have the
9 TCL case versus Ericsson.

10 The Federal Circuit, by the way, Your Honor,
11 heard that case and the only reversal they had is the issue
12 that should have been decided by the jury as opposed to the
13 judge himself. But they had no issue in looking at the fact
14 that when we're looking at good faith, it was interpreted
15 based on what Americans understood to be good faith to be,
16 men American judges understood good faith to be.

17 The same thing was in HTC versus Ericsson and
18 that's in Texas. The same thing in Apple versus Motorola,
19 and that was in Wisconsin. That's also a case that Philips
20 relies on.

21 And so, Your Honor, courts have heard -- I mean,
22 we've heard of the smartphone wars. The smartphone wars are
23 the same kind of patents. So we've seen those wars all
24 over. We've seen them between Apple and Samsung in the ITC
25 where the ITC actually granted an exclusion order in 2013

1 and then the U.S. trade representative came back and said we
2 should not do that. That was based on French law, this very
3 ETSI commitment, and it was basically adjudicated on what we
4 Americans understand good faith to be, because all experts
5 have always agreed that what French believed good faith is
6 pretty much the same here. That was also the same issue on
7 the cases that came up here. Specifically, the InterDigital
8 cases, the series of them that Judge Andrews had heard
9 between ZTE and Huawei.

10 All of those cases were based off standard
11 essential patents from ETSI. Everything had to do with the
12 ETSI commitment, and all the experts agreed, French law
13 governs, and French law says good faith should apply, and
14 that good faith is the same.

15 Your Honor does not need to go to French
16 decisions to figure out what good faith in France is for
17 these facts.

18 THE COURT: Wait. I think that's where I may
19 part ways with you. Okay. So I don't debate that any of
20 the cases, or at least some of the cases you cited on page 9
21 of your brief say that ETSI is a contract or has a contract
22 and it's interpreted under French law and that certain
23 principles of interpreting contract under French law apply.
24 I don't think Philips disputes that. Do you?

25 MR. THOMPSON: No, Your Honor.

1 THE COURT: Right. Now, do any of those cases
2 say that under French law, a member of ETSI cannot seek an
3 injunction?

4 MR. ZEINEDDIN: So in these particular cases, in
5 the TCL Ericsson case, Your Honor --

6 THE COURT: Okay. I've got it.

7 MR. ZEINEDDIN: TCL -- Ericsson had sued TCL in
8 a multitude of jurisdictions, all foreign. Right?

9 THE COURT: Right.

10 MR. ZEINEDDIN: And in that particular case,
11 TCL moved to preclude Ericsson, and that Judge Selna, from
12 pursuing those cases in the foreign jurisdictions where each
13 single one of those cases, there were injunctions that were
14 being sought by Ericsson to exclude TCL the from market, and
15 in one place, I believe, I don't have it off the top of my
16 head, they did get a preliminary injunction doing so, and
17 then ultimately, the judge basically said that those cases
18 cannot go forward and that the FRAND determination in
19 California will proceed.

20 The other case, Your Honor, that --

21 THE COURT: I've got TCL in front of me.
22 Can you show me anywhere in TCL where the Court ruled that
23 the ETSI contract precluded a member from seeking an
24 injunction?

25 MR. ZEINEDDIN: So, Your Honor, that was a

1 predicate. It was not disputed. Nobody had disputed --

2 THE COURT: Well, then that's part of the
3 problem. Assuming, even assuming you're right, and that is
4 an assumption, I'm not sure it is, but how is that helpful
5 here then? I mean, if parties agreed to what you're trying
6 to achieve here in another case, I don't think it's very
7 helpful to me. I mean, you cited these cases to establish,
8 as I understand it, that French law dictates the result you
9 want here.

10 Can you show me? I've got the case in front of
11 me. Can you show me where Judge Selna opined that French
12 law, that under French law, ETSI's contract precludes a
13 member from seeking an injunction?

14 MR. ZEINEDDIN: So, Your Honor, that was not
15 disputed and I cannot show you that.

16 THE COURT: Okay.

17 MR. ZEINEDDIN: And the same was, by the way,
18 between Samsung and Ericsson. Nobody had disputed that.

19 THE COURT: Here's what I need you to do then.
20 I just want to make sure the record is clear.

21 You are not able to show me either a French case
22 or a United States Court decision interpreting French law
23 that states that a member of ETSI is precluded from seeking
24 an injunction. Is that right?

25 MR. ZEINEDDIN: May I inquire one thing, Your

1 Honor?

2 THE COURT: Yes. Your colleague just gave you a
3 note.

4 MR. ZEINEDDIN: Yes. Is the issue, Your Honor,
5 that you're having is that you want a French decision saying
6 under the French law interpretation of good faith, they have
7 heard a case relating to somebody who was seeking an
8 injunction and they are saying French law prohibits that for
9 ETSI? Is that what you are looking for?

10 THE COURT: I wouldn't say it's limited to the
11 implied covenant of good faith. What I'm looking for, and I
12 think it's your burden is whether a French Court has ruled
13 that a member of ETSI situated the way Philips is is barred
14 from seeking an injunction akin to what it's seeking in the
15 ITC.

16 MR. ZEINEDDIN: What we do have is not that.
17 What we do have is saying that French law requires good
18 faith and so does the U.S. law and they both apply in the
19 same way.

20 THE COURT: So that's what you have?

21 MR. ZEINEDDIN: That's what we have.

22 THE COURT: All right. So then under your
23 theory what you have to show is that there's a breach of the
24 implied covenant of good faith here under basically U.S.
25 law. Is that right?

1 MR. ZEINEDDIN: Which would be the same,
2 correct.

3 THE COURT: Well --

4 MR. ZEINEDDIN: May I say --

5 THE COURT: So hold on a second. So, for
6 instance, I know enough about Delaware contract law that if
7 the issue that is in dispute is not addressed expressly in a
8 contract, it would be the burden of the movant to show that
9 had both parties negotiated the issue, the disputed issue,
10 they would have agreed to what your interpretation of the
11 contract is. That's pretty clear under Delaware law.

12 So that means you're going to have to show me if
13 you are right that Philips would have agreed when it
14 negotiated, or when it signed onto the ETSI that it would be
15 precluded from seeking an injunction. So do you agree
16 that's what you have to prove?

17 MR. ZEINEDDIN: And, yes, absolutely.

18 THE COURT: You do believe it?

19 MR. ZEINEDDIN: Yes. That's the point.

20 THE COURT: Okay. So what's your evidence that
21 Philips agreed or would have agreed that it was barred from
22 seeking an injunction in the ITC?

23 MR. ZEINEDDIN: I think Philips even today will
24 say they will not and should not pursue an injunction in the
25 ITC or anywhere against --

1 THE COURT: They filed an injunction --

2 MR. ZEINEDDIN: Against a willing licensee.

3 THE COURT: I'm sorry. What?

4 MR. ZEINEDDIN: Against a willing licensee, a
5 licensee who is willing to take --

6 THE COURT: Okay.

7 MR. ZEINEDDIN: -- a license on the entirety of
8 their portfolio.

9 THE COURT: Right. Well, first of all, do you
10 agree with that?

11 MR. THOMPSON: It's hard to even address it
12 because Philips made a FRAND offer and they rejected it.

13 THE COURT: Right. It really boils down to you
14 don't think they're willing, they think you're not willing.
15 Right? It's a factual issue in a way.

16 MR. THOMPSON: Right.

17 THE COURT: It's like they have different
18 opinions.

19 MR. THOMPSON: Was there a breach? Did Philips
20 not perform and make a FRAND offer available, and that's why
21 we cited the Court the case that says that it was a FRAND
22 offer.

23 THE COURT: Which is why maybe at the end of the
24 day -- I mean, the way you guys are positioned right now in
25 this room in the last 30 seconds, it sounds to me that for

1 the movant to win, I have to what? Discount, not believe
2 Philips' assertion that you're not a willing licensee? Is
3 that really what it boils down to?

4 MR. ZEINEDDIN: So this is why I mentioned on
5 the breach part. There is another breach that we're not
6 basing this motion on and that is the breach that you have
7 been talking about and that's the breach that they've talked
8 about all along.

9 There are two different types of breach of
10 contracts, French contract that we brought. One goes to the
11 issue that you're talking about and one would require
12 looking at their offer and looking at our offer and looking
13 at evidence and figuring out were we objectively,
14 subjectively justified in doing that -- you know, all of
15 this. That would actually be part and parcel of the FRAND
16 rate setting. And, as a matter of fact, you know, of
17 course, you're almost there, you're almost there at setting
18 the rate when you figure out if somebody breached because
19 you've got to figure out what's FRAND and what's not FRAND
20 to see if those offers are back and forth.

21 But there is a completely different question
22 where courts all over, including in the U.K., Your Honor,
23 there have not been cases brought, I don't know why, in
24 France to talk about this. You would think they would all
25 go there.

1 Well, everybody has said that when somebody is
2 going to take a license, you don't enjoin them. It happened
3 in the Ninth Circuit. It happened in the U.K.

4 THE COURT: When you say everybody had said --

5 MR. ZEINEDDIN: But here's the question. The
6 one question here, it is not a fixed point in time where
7 everything stops once they filed their ITC complaint. They
8 filed their ITC complaint after a year-and-a-half of saying
9 nothing to us, and then as soon as they filed it, they filed
10 on December 17th, Your Honor.

11 On December 28th, a European company in France,
12 we were able to get back to them on December 28th, a letter
13 from Thales on Thales letterhead saying, we want to do this,
14 let's go.

15 THE COURT: So --

16 MR. ZEINEDDIN: But here's the question. Then
17 we became -- regardless of what happened before, Your Honor,
18 we take issue that we've ever been unwilling. We've always
19 been willing and we will prove that. And we did not come to
20 you saying, let's look at all of these, take our side of the
21 story and do this. We're saying we're going to do that.

22 THE COURT: Right.

23 MR. ZEINEDDIN: But aside from that --

24 THE COURT: But you are saying that you are
25 going to do it like when you get to it and they are saying

1 we need to move this along, so they're going to the ITC.

2 MR. ZEINEDDIN: And we're saying let's move it
3 along.

4 THE COURT: Well, they are saying you've taken
5 forever.

6 MR. ZEINEDDIN: No.

7 THE COURT: They are saying they offered you a
8 FRAND deal and you rejected it. So now we're in the merits
9 of the whole case.

10 MR. ZEINEDDIN: No. There's one more thing. As
11 soon as we said we were going to do it, we became willing
12 and they could not do that again. They could not pursue the
13 ITC, and who said that? Many, many places have said that.
14 Microsoft/Motorola --

15 THE COURT: Wait. So many, many. Let's go
16 through the cases that have said that. Actually, no, I
17 don't want to do that.

18 MR. ZEINEDDIN: Okay.

19 THE COURT: You've got to actually persuade me
20 of cases that have said that under French law, that's what
21 would happen.

22 MR. ZEINEDDIN: Okay.

23 THE COURT: All right.

24 MR. ZEINEDDIN: So, Your Honor, I will take you
25 to a case. This is the Motorola/Apple European Commission.

1 How about that?

2 THE COURT: Is it French law?

3 MR. ZEINEDDIN: Well, it's European law.

4 THE COURT: Okay. But is it French law?

5 MR. ZEINEDDIN: It's looking -- yes, it did look
6 at French law, because the French commitment, that's
7 regarding --

8 THE COURT: Didn't it look at German law, too?

9 MR. ZEINEDDIN: No, Your Honor.

10 THE COURT: No?

11 MR. ZEINEDDIN: The contract is the same, the
12 ETSI contract. That's the bedrock.

13 THE COURT: Show me in this decision where they
14 talk about French law.

15 MR. ZEINEDDIN: Well, about French law?

16 THE COURT: Yes.

17 MR. ZEINEDDIN: I don't think they will
18 dispute --

19 THE COURT: You go look for French law.

20 MR. ZEINEDDIN: But I don't think they will
21 dispute that the commitment in the Apple/Motorola case,
22 those are cellular patents, is the ETSI commitment. It's
23 Motorola's ETSI commitment.

24 THE COURT: But I'm only interested whether
25 under French law they are precluded from going to the ITC.

1 That's all I care about. That's the issue before me.

2 MR. ZEINEDDIN: Okay. So I'm trying to at least
3 say on the record that basically, what's going on is that
4 you had the European Commission looking at the ETSI
5 commitment, which is subject to French law on the contract,
6 and looked at good faith, the back and forth, what happened
7 between Apple and Motorola.

8 And there's one more case that I have for you,
9 which is --

10 THE COURT: So let me ask you this: That case,
11 Apple/Motorola, was taking place, it was a European
12 Commission. So where was the dispute filed, where was it
13 adjudicated?

14 MR. ZEINEDDIN: Where was the dispute filed
15 between Apple and Motorola?

16 THE COURT: Yes.

17 MR. ZEINEDDIN: All over the place.

18 THE COURT: Well, but the one that the
19 Commission ruled upon.

20 MR. ZEINEDDIN: That was a Commission
21 investigation, like the DOJ.

22 THE COURT: I'm sorry. What?

23 MR. ZEINEDDIN: Like the Department of Justice.
24 It was the European Commission. And they found that Apple,
25 they found with Apple --

1 THE COURT: All right. So let me ask you this:
2 Did they express an opinion on whether -- well, had either
3 party -- I don't know which party was the plaintiff in that
4 case in that dispute. Who was the patentholder in that
5 dispute?

6 MR. ZEINEDDIN: Motorola.

7 THE COURT: Okay. Had Motorola filed a
8 proceeding in the ITC at that point?

9 MR. ZEINEDDIN: You know, I believe they may
10 have.

11 THE COURT: And did the European Commission --

12 MR. ZEINEDDIN: Please, because I don't remember
13 off the top of my head.

14 But, so, Your Honor, in that case, and I
15 misplaced where I have it, but in that particular case, what
16 was examined was Apple's multiple stances. And this is
17 something Philips keeps saying that once you become a
18 willing licensee -- if you have been an unwilling licensee,
19 which we take issue with, we never were, that's it, you
20 forfeited, and now you ought to be punished.

21 And in that particular case, in that ITC -- in
22 that European Commission, which is looking under French law,
23 treated in Europe, they looked at the first Apple offer and
24 said, no, you're unwilling. Second time? No, you're
25 unwilling. Third time, no, you're unwilling. And then

1 finally, Apple became willing. They said to Motorola, you
2 can't do it anymore, you can't enjoin it. Once you've done
3 that, you can't enjoin them.

4 So we have here a continuum of actions.
5 Assuming arguendo that they could have filed that ITC case,
6 the day we told them we're done, we'll do whatever needs to
7 be done and you'll get everything you're entitled to, they
8 could not maintain it. That in itself is a breach. That in
9 itself is a breach that does not require Your Honor to start
10 looking at the back and forth offers because, as you said --
11 and if I may, because this is very crucial here.

12 We are dealing -- the reason we had these big
13 smart wars, smartphone wars, is because this ETSI
14 commitment, you have a lot of patent holders and you have a
15 lot of bilateral secret licenses.

16 So when you have an implementer -- this is the
17 plug, Your Honor. Everybody has to use it to put into that
18 outlet. These are things that are designed to be processed
19 by everybody, not to wait for people, for everybody to take
20 the license. And there is no place that you can go, one or
21 two places that you can go to take a license to everybody,
22 and there are hundreds, if not over a thousand patent
23 holders. Each one of them have their own opinion of how big
24 their slice of the pie is.

25 So what happens here, the standard was put into

1 place and the FRAND policy was put into place -- and I'm
2 sorry if I'm speaking too fast, forgive me.

3 What happened is, there is a balance. We want
4 the widespread use of this standard, but we also want people
5 to innovate and contribute their technology, which was
6 chosen over other technology to get their fair, reasonable,
7 nondiscriminatory royalty, and the non-discriminatory
8 reasonable and the fair and reasonable is not only for them
9 to get their money, it's for everybody to be on an equal
10 level playing field because, Your Honor, this is a cost
11 component for every implementer, and everybody should be on
12 an equal playing field because those people that have the
13 technology, they shouldn't just get in the backroom, design
14 what the technology is going to be and then pull the strings
15 dictating who is going --

16 THE COURT: Much of what you say sounds very
17 reasonable, but when you say equal playing field, is there
18 anything in ETSI that says that they have to be equal?

19 MR. ZEINEDDIN: Level playing field. So I did
20 not mean equal as in hundred percent equal. The idea is
21 non-discriminatory. Right?

22 THE COURT: Nondiscriminatory.

23 MR. ZEINEDDIN: That's what the language says.

24 THE COURT: All right.

25 MR. ZEINEDDIN: So what we have here is the idea

1 that whenever -- and we have said that in the United States
2 and Europe has said that, that you don't get to exclude
3 people.

4 What you're entitled to is this fair,
5 reasonable, nondiscriminatory --

6 THE COURT: What does a member do, a patentee do
7 when it has got a manufacturer that says even in a
8 declaration that it's willing, but it rejects every
9 reasonable offer of a license made by the member?

10 MR. ZEINEDDIN: Well, and the key here is the
11 reasonable offer. Right?

12 THE COURT: Right.

13 MR. ZEINEDDIN: Right, Your Honor. That's what
14 the case, for example, the cases that they -- they keep
15 citing the Apple/Motorola here in the U.S. It talks about,
16 you know, the fact that somebody can keep rejecting a super
17 FRAND offer, a non-reasonable --

18 THE COURT: Right.

19 MR. ZEINEDDIN: Offer.

20 So, but the key here is, is that --

21 THE COURT: And so and precisely because of
22 that, why shouldn't a member who is facing that type of --
23 and I'm not suggesting it's your client, but let's suppose
24 you had a really, really dishonest manufacturer that kept
25 on, you know, teasing the member with promises of eagerness

1 to get involved in negotiations and the whole time was
2 really stonewalling, was actually being very disingenuous,
3 had no intention of entering a license.

4 MR. ZEINEDDIN: Right.

5 THE COURT: And years pass and they continue to
6 infringe and profit from the intellectual property that the
7 member has. So doesn't the member have a right at that
8 point to seek an injunction?

9 MR. ZEINEDDIN: So under those circumstances, it
10 has been said, yes, absolutely.

11 THE COURT: Okay. So how am I to determine who
12 is really willing here? Right? I've got to dive into the
13 facts and that could take a lot of time, and that's an
14 example of why, you know, protracted litigation can really
15 prevent the member from ever benefit benefiting from its
16 intellectual property unless it has a right to an
17 injunction.

18 MR. ZEINEDDIN: So, Your Honor, great question,
19 and that's exactly what happened in Realtek, for example.
20 They waited until they had discovery and summary judgment to
21 turn down.

22 But in that case they have what we have, and,
23 again, the real answer to that lies in what I've just told
24 you about the Microsoft/Motorola and the Commission. And
25 I'm going to tell you one more thing that's even better, and

1 that is the Supreme Court of Europe, the European court of
2 justice, specifically heard the interest between two
3 companies called Huawei and ZTE.

4 Your Honor, none of this is here because we're
5 basically relying on U.S. law, but if you want to talk about
6 it, we're happy to talk about it.

7 It governs everything in Europe. It's the
8 Supreme Court of Europe that basically said -- and this is
9 here where the key is. Those are the issues of delay.
10 You're exactly touching on the same issues, which really
11 tells you it's all the same question, you can look at U.S.
12 or there.

13 The key --

14 THE COURT: Sorry to interrupt, but I'm looking
15 at it as this is a really important policy decision to be
16 made by somebody. Right? Maybe Congress. And one thing I
17 know for sure is that Congress understood that there would
18 be parallel ITC and district court proceedings. Right? And
19 you agree with that, don't you?

20 MR. ZEINEDDIN: That's part of the statute,
21 correct.

22 THE COURT: I mean, so if I want to know what
23 Congress is thinking, I know that for sure, and I know
24 that because, what is it, 1659, right, of Title 28, that
25 Congress has provided explicitly for a mechanism for a stay

1 to be issued if it is sought within a certain amount of time
2 of the filing of either the ITC or the district court.

3 Right?

4 So if Congress actually contemplates parallel
5 proceedings and in one proceeding you can only get an
6 injunction and you can't get a FRAND license.

7 MR. ZEINEDDIN: That's right.

8 THE COURT: Why should I be preventing somebody
9 from affording themselves of that congressionally provided
10 right?

11 MR. ZEINEDDIN: Your Honor, you're asking very
12 good questions. On page 17 of Philips' reply they listed
13 all of these ITC cases talking about this. What they don't
14 talk about is this. This is -- which, by the way, this is
15 not something extra.

16 If you take a look at the first case they cite,
17 which is the Samsung/Apple case in the ITC, where they say
18 the ITC says it's okay to give exclusion orders on standard
19 essential patents. Well, that wasn't the end of the story,
20 the U.S.C.R.

21 The U.S.C.R. -- and this is, by the way, anybody
22 who is looking for it on Westlaw --

23 THE COURT: You've got some paper in your hands.

24 MR. ZEINEDDIN: Yes. If I may approach.

25 This is the U.S.C.R. letter to the ITC, and I

1 have it both in the letter format that it was sent as well
2 as -- well, it's also on Westlaw. If I may?

3 THE COURT: Yes, please. Do you have two copies
4 by any chance so I can give one to my clerk?

5 MR. ZEINEDDIN: Of course. Forgive me. And --

6 THE COURT: Wait. Are these the same thing?

7 MR. ZEINEDDIN: Yes. And I just want to show
8 you this is not --

9 THE COURT: You gave me two copies.

10 MR. ZEINEDDIN: One is a Westlaw. When you look
11 at that case, it just says subsequent history, that's what
12 happens. This basically says to the ITC, you can't enforce,
13 you can't issue the whole commission. You can't issue an
14 exclusion order against a willing licensee.

15 Now, you know, I would have dropped a footnote
16 on page 17. And then every case after that --

17 THE COURT: Hold on.

18 MR. ZEINEDDIN: Yes, Your Honor.

19 THE COURT: This is not in the brief, but this
20 is responding to their footnote on page 17. Is that your
21 point?

22 MR. ZEINEDDIN: Well, so, if you take a look at
23 Philips' opposition on page 17.

24 THE COURT: All right. Hold up. All right.
25 I'm looking at the briefing in which case?

1 MR. ZEINEDDIN: Yes, Your Honor.

2 THE COURT: What is the number of the case?

3 MR. ZEINEDDIN: It's on page 17.

4 THE COURT: No, no. You can tell, right, you've
5 given me two feet of paper. I need a little bit more
6 precision. What number are we dealing with?

7 MR. KEELEY: 1713, Your Honor.

8 THE COURT: 1713. Which brief?

9 MR. ZEINEDDIN: So this is Philips' opposition.

10 THE COURT: Okay. All right. On page 17.

11 Thank you.

12 MR. ZEINEDDIN: On page 17.

13 THE COURT: All right.

14 MR. ZEINEDDIN: So this is where they start
15 talking about that and what you basically were referring to,
16 the ITC has repeatedly recognized that exclusion orders can
17 be granted for except.

18 THE COURT: Correct.

19 MR. ZEINEDDIN: Your Honor, we do have the
20 statute which talks about patents in general, and up until
21 that point, in the first case, the Apple, Apple/Samsung
22 case, right?

23 THE COURT: Right.

24 MR. ZEINEDDIN: The exclusion order issued. And
25 then you have U.S.C.R. coming back and saying, no, not

1 against the willing licensee.

2 THE COURT: Was this in your reply brief? I
3 don't remember it. Was this letter in your reply brief?

4 MR. ZEINEDDIN: This letter, Your Honor, is not
5 in our reply brief. That's why I also -- I also gave the
6 Westlaw. This is the subsequent history of the case they
7 cited.

8 THE COURT: Okay. Which case is it the
9 subsequent history of?

10 MR. ZEINEDDIN: It's the first one which, you
11 know, and ITC --

12 THE COURT: It says in the manner of certain
13 electronic devices.

14 MR. ZEINEDDIN: 337.

15 THE COURT: That helps me out. Thank you.

16 MR. LOWENSTEIN: Your Honor, that letter is part
17 of our compendium in the reply brief and I think it's
18 Exhibit B. It's a U.S. Trade Representative letter,
19 August 3, 2013.

20 THE COURT: Okay. So it's in your brief?

21 MR. LOWENSTEIN: It's our compendium, correct.

22 THE COURT: Did you discuss it in the reply
23 brief?

24 MR. LOWENSTEIN: I believe we discussed it in
25 part --

1 THE COURT: So you did. I'm trying to digest
2 all of these papers in a preliminary injunction. Help me
3 out. It's in there. I will look for it.

4 MR. LOWENSTEIN: Yes.

5 THE COURT: Thank you. All right. Give me a
6 second here.

7 THE COURT: This is a case where is the Obama
8 administration came in and reversed the ITC.

9 MR. ZEINEDDIN: That's correct, Your Honor.

10 THE COURT: All right.

11 MR. ZEINEDDIN: And then also established a
12 procedure from then on that you don't grant exclusion orders
13 against willing licensees.

14 THE COURT: Yes. Okay.

15 MR. ZEINEDDIN: And that they have to take
16 evidence and then decide at the very end.

17 THE COURT: Right. Okay. So this is the
18 opinion of an executive branch office, but it doesn't create
19 a legal right and that is where I go back to. I mean, I
20 appreciate you bringing up this, but we got a little bit on
21 a tangent, because my point was just that you make very,
22 very compelling policy arguments, but I'm a Court, and the
23 issue before me is whether you have an entitlement, a legal
24 entitlement to preclude Philips from seeking a remedy that
25 Congress has expressly provided and that Congress has

1 impliedly but necessarily said by virtue of, I know this
2 from 1659, that we can have parallel proceedings.

3 So you're asking me to, you know, enjoin them.
4 So I go back to the right. I might fully agree with you as
5 a policy matter, and if I were writing the law, I might say
6 we shouldn't allow this to happen, but that's not what the
7 standard is before me.

8 Now, when we get to the anti-suit injunction, a
9 different issue. We'll talk about that. Are you
10 effectively divesting me from my powers if I do that? I'm
11 only on the preliminary injunction and whether you have a
12 likelihood of success on the merits. I mean, all this
13 letter tells me is if somebody went before the ITC again and
14 they got an injunction order, depending on who is president,
15 the executive branch might get involved and say, we're going
16 to trump that. And, incidentally, under the law, right, the
17 president is allowed to do that. Right? I mean, the
18 statute explicitly provides, does it not, for the president
19 to be able to come in and reverse the ITC? Isn't that
20 right?

21 MR. ZEINEDDIN: That's right.

22 THE COURT: So that could happen here. Right?
23 You could go to the president and if I ruled against you and
24 you lose in the ITC, you can go to the president and say,
25 hey, overturn the ITC, so you have that remedy available to

1 you.

2 MR. ZEINEDDIN: Except that the ITC then went
3 and made the rules, their rules and modified it and it said
4 every single time.

5 THE COURT: Well, then you're going to win in
6 the ITC. All the more reason I shouldn't get involved.

7 MR. ZEINEDDIN: Now we're going to prong two,
8 the irreparable harm until then, and that's what
9 specifically we complain of, the irreparable harm until
10 then, and these are the affidavits that we filed.

11 We talk about the irreparable harm, not what's
12 going to happen at the ITC at the end, which is on its face
13 everybody knows what it is, but what happens, the
14 uncertainty and that cloud hanging over our head from now
15 until then.

16 And, Your Honor, really, this all kind of comes
17 back at the end of the day to the very point that you
18 yourself made at the very beginning. They came here.

19 THE COURT: They came here and went to the ITC.
20 We'll get to that.

21 MR. ZEINEDDIN: And we came here, too.

22 THE COURT: Right. I wondered, you know, first
23 of all, there's no way to get a stay in the ITC.

24 MR. ZEINEDDIN: No.

25 THE COURT: Right? There's no statute?

1 MR. ZEINEDDIN: They have their mandate, they
2 have their timeline.

3 THE COURT: Right. So the answer is no. You
4 know the law way better than I do, so help me out.
5 Sometimes I ask you, they're very silly, but they are short
6 questions that I think are yes or no. Is there a way, a
7 mechanism to get a stay within the ITC?

8 MR. ZEINEDDIN: Not based on my understanding,
9 Your Honor.

10 THE COURT: All right. Now, there is a statute
11 that specifically provides that you can seek a stay of the
12 ITC -- of what? What's 1659 under your interpretation? To
13 seek a stay of these proceedings. Right?

14 MR. ZEINEDDIN: The defendant can come here and
15 say we don't want to move both in the district court and
16 ITC. They are going to stay the district court.

17 THE COURT: My point is it only applies, 1659
18 only allows you to stay this Court's proceedings?

19 MR. ZEINEDDIN: Right. That case is going very
20 fast.

21 THE COURT: Right.

22 MR. ZEINEDDIN: And they can only --

23 THE COURT: Incidentally, one of the cases the
24 defendant did seek, it did get a stay?

25 MR. THOMPSON: That's right, Your Honor. The

1 Quantel case, that set of cases is stayed, and actually, one
2 of the defendants, I believe it's in the Thales case, also
3 stayed, so part of this case is stayed anyway.

4 THE COURT: Right.

5 MR. THOMPSON: They did exercise that right.

6 THE COURT: Yes.

7 MR. ZEINEDDIN: So, Your Honor, not only is it
8 going there full force, target date of final determination
9 next spring.

10 THE COURT: Let me ask you this: Why didn't you
11 seek expedited resolution of this case?

12 MR. ZEINEDDIN: Within ten days, with Christmas
13 break and weekends intervening, we told them, let's stop.
14 And they said, no, no, you really don't mean -- you really
15 don't mean --

16 THE COURT: No. What I'm getting at is why
17 isn't the solution to this problem, because it is a problem.
18 Right? It's a problem in every case where we have a FRAND
19 issue. Isn't it always a problem or virtually always a
20 problem?

21 MR. ZEINEDDIN: The licensor always wants to get
22 their money as soon as possible.

23 THE COURT: Yes. The potential licensee might
24 delay --

25 MR. ZEINEDDIN: Your Honor, we're happy to go as

1 fast as possible and resolve that issue first for the whole
2 portfolio.

3 THE COURT: Well, all right. I have reserved --
4 did they tell you how much time I reserved for this?

5 MR. ZEINEDDIN: No, Your Honor.

6 THE COURT: No, but I did reserve a lot of time.
7 I think this is a very important case.

8 MR. ZEINEDDIN: Thank you, Your Honor.

9 THE COURT: And what bothers me about it,
10 precisely because of that, I'm very reluctant to get engaged
11 in what I think is a very, very interesting and significant
12 policy issue and I go back to I think you've got to
13 establish a legal right again on the first test.

14 MR. ZEINEDDIN: May I inquire, Your Honor?

15 THE COURT: Yes. You go ahead.

16 MR. ZEINEDDIN: When you say legal rights, you
17 encompass in that the equitable right or the equitable at
18 least --

19 THE COURT: No. That's part of the problem. I
20 mean, do you know of anywhere other than an anti-suit
21 injunction, and we'll even talk about whether -- just keep
22 that aside.

23 Do you know of any circumstances where a Court
24 has imposed an injunction based on a -- just let me start
25 over. An injunction is an equitable right.

1 MR. ZEINEDDIN: Exactly.

2 THE COURT: That's what it is.

3 MR. ZEINEDDIN: Exactly.

4 THE COURT: Okay. But it's founded on enforcing
5 a legal right. When you are getting a mandatory injunction,
6 it's because you have a legal entitlement to preclude them
7 from doing something.

8 MR. ZEINEDDIN: Right.

9 THE COURT: Right? It's not out of fairness.
10 Lots of things in the world are unfair. You can't come and
11 get an injunction because of it. Okay?

12 My wife likes to eat dinner later than I do. I
13 can't run to court and get an injunction and say, hey, you
14 no know what, we've got to eat dinner by 6:30. It doesn't
15 work that way. Do you agree with that?

16 MR. ZEINEDDIN: I agree with that.

17 THE COURT: So we go back to the legal right.
18 And on that you agree, there's no express provision in the
19 ETSI contract that would prevent Philips from seeking an
20 injunction. Correct?

21 MR. ZEINEDDIN: We believe that the ETSI
22 commitment inherently precludes that.

23 THE COURT: We go back to this though. You
24 agree, there's no express provision in the ETSI contract
25 that precludes Philips from seeking an injunction?

1 MR. ZEINEDDIN: Against an unwilling licensee.
2 That's what we said.

3 THE COURT: All right. Do you want to show
4 me express language in the contract that precludes the
5 member from seeking an injunction if there's an unwilling
6 licensee?

7 MR. ZEINEDDIN: They are prepared to grant a
8 license. By definition, that means --

9 THE COURT: Where does it say expressly in
10 the ETSI agreement you are prevented from seeking an
11 injunction?

12 MR. ZEINEDDIN: It doesn't say those words.

13 THE COURT: Okay. You've been very credible,
14 but, you know, my question was: Don't you agree there's no
15 express provision in the ETSI contract that precludes them
16 from seeking an injunction? I think the answer is that's
17 true.

18 MR. ZEINEDDIN: That is true.

19 THE COURT: Okay. So it all boils down to the
20 implied covenant of good faith. That's true. Right?

21 MR. ZEINEDDIN: That is true.

22 THE COURT: Okay. Go ahead.

23 MR. ZEINEDDIN: May I?

24 THE COURT: Yes.

25 MR. ZEINEDDIN: It also -- the license itself

1 and an injunction are absolutely diametrically opposed.

2 They are not consistent. They cannot cohabit.

3 You cannot tell me that I'm renting and I pay
4 you rent and I sit there and then kick me out. You cannot
5 get a judgment against me to pay past rent and future rent
6 and kick me out.

7 THE COURT: Right.

8 MR. ZEINEDDIN: So that's what I meant by that,
9 Your Honor.

10 THE COURT: Well, I get that, but then we get
11 back to willing. You know, willing doesn't lend itself to
12 irrefutable proof, you know, the way, the fact that you paid
13 rent is. You either have a check that was cashed or it
14 wasn't.

15 MR. ZEINEDDIN: That's right.

16 THE COURT: So we get back to this debate and
17 that's why we have this big policy problem, because it's
18 willing, willingness.

19 MR. ZEINEDDIN: Right.

20 THE COURT: By definition --

21 MR. ZEINEDDIN: And we both agree.

22 THE COURT: Yes.

23 MR. ZEINEDDIN: Philips and Thales agree.

24 THE COURT: All right.

25 MR. ZEINEDDIN: Correct.

1 THE COURT: So there's nothing express. Then we
2 go back to the implied covenant of good faith.

3 And then I've asked you, well, what does French
4 law say about implied covenant and good faith? And what you
5 say is, and you point me to some Court decisions that
6 suggest that certain principles of contract law under French
7 law are the same as U.S. decisions. You don't point me to
8 anything that says how I ought to interpret the implied
9 covenant of good faith under French law, do you?

10 MR. ZEINEDDIN: No. What we said, Your Honor,
11 and I think what everybody has said so far that I know of,
12 is that French law requires good faith.

13 THE COURT: Right.

14 MR. ZEINEDDIN: And then that's it. So at the
15 end of the day -- I mean, these are contracts, this
16 contract. This is to grant a worldwide license between
17 somebody in China and somebody in Korea.

18 THE COURT: See, but, wait. Hold on. I want to
19 make sure I get what you are saying. I mean, when you say
20 it requires good faith, that's it, which is what you said.
21 It seems to me what you're saying in effect then is that as
22 long as there is a statement from the potential licensee
23 that that licensee is willing to engage in FRAND
24 negotiations or be subject to a FRAND license, that by
25 itself precludes the member from seeking an injunction.

1 Right? Is that what your position boils down to?

2 MR. ZEINEDDIN: No. The position is actually
3 there's a spectrum of behavior. There's a spectrum of
4 behavior, and depending on, you know, and part of it is a
5 lot of it is the trier of fact. Right?

6 But the spectrum of behavior. What we do submit
7 that where we are, we're all the way over here, smack in the
8 middle of the safe harbor, willing, because we have
9 surrendered to the Court to determine what's fair and
10 reasonable, nondiscriminatory, because we couldn't have done
11 it ourselves, because we couldn't look at the under like
12 secret bilateral agreement.

13 And here, this Court --

14 THE COURT: Hold on, hold on. I want to think
15 about something. I want to flesh this out a little bit
16 because what I hear you saying is that the current record
17 that you've put in, which is like the back and forth that
18 you all have engaged in, shows a likelihood of succeeding
19 on your breach of contract claim. All right? If I accept
20 that as true, the problem is I still circle back to, so
21 what's your right to preclude them from going forward in
22 the ITC? Like, even if you were right, right, what's your
23 entitlement at that point to preclude them from seeking an
24 injunction?

25 MR. ZEINEDDIN: Because they had given that up.

1 They gave up -- we both agree, Your Honor, I don't think
2 Philips can stand up.

3 THE COURT: But then I'm back now to square one,
4 which is, where did they give that right up? Didn't it just
5 go back to the contract?

6 MR. ZEINEDDIN: So, Your Honor, we have -- the
7 Ninth Circuit has said that. We had even the Federal
8 Circuit say you're not entitled to an injunction. Now we
9 start talking about the per se. They say injunctions are
10 not per se prohibited.

11 And then even in the Apple/Motorola, that
12 Federal Circuit case, and we can go to it and you can read
13 this paragraph, and it says --

14 THE COURT: Wait. The Apple/Motorola, you're
15 back in the ITC case?

16 MR. ZEINEDDIN: We're back in the Federal
17 Circuit.

18 THE COURT: Okay.

19 MR. ZEINEDDIN: Right? And the Federal Circuit
20 basically says, you know, there is no per se rule
21 prohibiting injunctions.

22 THE COURT: Right.

23 MR. ZEINEDDIN: In FRAND cases.

24 THE COURT: They say that.

25 MR. ZEINEDDIN: That doesn't mean that it's

1 always allowed.

2 THE COURT: Okay.

3 MR. ZEINEDDIN: Okay.

4 THE COURT: But where do they say that you have
5 a legal right to preclude somebody from seeking an
6 injunction in that case?

7 MR. ZEINEDDIN: I beg your indulgence.

8 THE COURT: Okay.

9 MR. ZEINEDDIN: I'm going to read it because
10 that's the best way to do it. So it's Apple/Motorola.

11 THE COURT: What's the cite?

12 MR. ZEINEDDIN: So this is --

13 THE COURT: This is the Wisconsin case? Which
14 case is this? This is the Federal Circuit case?

15 MR. ZEINEDDIN: Yes, Your Honor. This is the
16 Federal Circuit coming out of Judge Posner's decision.
17 There are many cases between Apple and Motorola. And the
18 cite is 757 F3d., 1286.

19 THE COURT: Okay.

20 MR. ZEINEDDIN: And the page is --

21 THE COURT: And we're printing a copy. Do you
22 have a copy for me? If not, we're printing one.

23 MR. ZEINEDDIN: I do not, Your Honor.

24 THE COURT: That's okay.

25 MR. ZEINEDDIN: I apologize. So the cite is

1 1332.

2 THE COURT: Okay.

3 MR. ZEINEDDIN: A patentee subject to FRAND
4 commitment may have difficulty establishing irreparable
5 harm. On the other hand, an injunction may be justified
6 where an infringer unilaterally refuses a FRAND royalty or
7 unreasonably delays negotiations to the same effect. And
8 they have cited that.

9 THE COURT: Yes.

10 MR. ZEINEDDIN: It doesn't stop there.

11 THE COURT: I can see why they cited that.

12 Exactly.

13 MR. ZEINEDDIN: It doesn't stop there.

14 THE COURT: Okay.

15 MR. ZEINEDDIN: To be clear, this does not mean
16 that an alleged infringer's refusal to accept any license
17 offer necessarily justifies issuing an injunction. For
18 example, the license offered may not be on FRAND terms. In
19 addition, the public has an interest in encouraging
20 participation in standard setting organizations, but also in
21 ensuring that SEPs are not overvalued.

22 While these are important concerns --

23 THE COURT: Hold on a second. Now I think I do
24 remember this case. In this case the plaintiff sought the
25 injunction, not the patentee sought the injunction. Is that

1 right?

2 MR. ZEINEDDIN: In Microsoft/Motorola?

3 THE COURT: In the case you're reading.

4 MR. ZEINEDDIN: In Apple/Motorola? So

5 Motorola's request for injunction.

6 THE COURT: Is it the patentee?

7 MR. ZEINEDDIN: The patent owner, yes.

8 THE COURT: Yes.

9 MR. ZEINEDDIN: The patent owner, that they went
10 to get an injunction to exclude them from the market.

11 THE COURT: Right. You argue that in front of
12 the ITC. I am talking about in front of me. Why does that
13 help you in front of me?

14 MR. ZEINEDDIN: So this is the issue. The issue
15 is you had asked why is it that a patent owner is not
16 allowed to get an injunction or should not get an injunction
17 on a standard essential patent as part of the ETSI and this
18 here is talking about that. It's saying, that while a
19 regular patent, you may get it.

20 THE COURT: But nothing you've read so far says
21 that a patentee is precluded from getting an injunction in a
22 standard setting context, does it? I didn't hear anything
23 you said that says that and I actually did read the case now
24 that I think about it, but why I got mixed up was because
25 it's the opposite. That case is when the patentee is

1 seeking the injunction.

2 MR. ZEINEDDIN: They're the patentee here. They
3 are seeking an injunction in the ITC.

4 THE COURT: You're seeking the injunction to
5 prevent them from going to the ITC.

6 MR. ZEINEDDIN: I'm asking Your Honor to stop
7 them from excluding us from the market. It's the same
8 injunction here and there.

9 THE COURT: That you can argue in front of the
10 ITC.

11 MR. ZEINEDDIN: So now -- so the reason I went
12 into this, Your Honor, because I understood the parameters
13 that you had set first, which is we're not going to talk
14 about the anti-suit injunction, we're talking about the
15 actual injunction. But on both sides, Your Honor.

16 The reason we're here before you is because by
17 the time we get to the ITC, by the time we get to the ITC,
18 we have irreparable harm, and that's why we came to you,
19 because we both -- both parties came to you --

20 THE COURT: I'm not talking about irreparable
21 harm. I'm talking about likelihood of success on the
22 merits. That's the problem. That's where we are.

23 MR. ZEINEDDIN: Right. We came to you, Your
24 Honor, to say they're going to get everything. We both
25 requested the same thing. We both asked Your Honor to

1 set the FRAND rate and terms and conditions, and once you
2 agree to do that, that's at this time. We're happy.
3 We're done.

4 We succeed, A, and --

5 THE COURT: So I go back to -- you know, you're
6 back on the policy? Right? I mean, look, if you want my
7 view on how this unfolds, right, the fairest way for this to
8 unfold is Philips brought its lawsuit. You said, Judge, we
9 need to have an expeditious schedule. We have to have this
10 decided right away because if we don't, we're going to go to
11 the ITC. But nobody did that.

12 What you did was you said -- you waited and then
13 you said, hey, I want you to prevent them from going to the
14 ITC. So that's a different story and that's the issue
15 that's before me. Right?

16 And you've got to have a right to get there.
17 That's what we'll keep talking about. So the contract
18 doesn't expressly provide for it. We're back to it implies
19 it in your view, and it implies it because you say it's
20 inconsistent to allow a member to seek an injunction if you
21 read the ETSI contract in its totality and so you've got to
22 flesh that out. You've got to prove that, that you are
23 going to prevail as a matter of law.

24 And you say -- as I understand it, you can
25 correct me if I'm wrong, you say you don't have any French

1 cases that tell me how the French interpret the covenant,
2 but it's the same way that states interpret implied
3 covenant.

4 I don't know how every state interprets implied
5 covenant. I know how Delaware interprets it. Delaware
6 interprets the implied covenant this way. If you don't have
7 a provision that expressly addresses the issue, then you
8 need to step back and say what would the parties have agreed
9 to during the negotiations of the contract had the issue
10 been raised? And so under that test, you're going to have
11 to persuade me that Philips would have agreed when it
12 negotiated or, you know, entered the ETSI, that it would
13 never seek an injunction.

14 That's a hard climb for you to make. We'll hear
15 Philips, but I'm pretty sure Philips will say we never
16 agreed to that because we're going to be subject to a
17 licensee who just isn't going to move until they get some
18 really reduced license rate.

19 MR. ZEINEDDIN: To be clear, Your Honor, we're
20 not making any such absolute statements.

21 THE COURT: I know you want to get there.

22 MR. ZEINEDDIN: No, no. We're talking about our
23 situation where we have surrendered ourselves to the Court.

24 THE COURT: Okay.

25 MR. ZEINEDDIN: And there have been many courts,

1 including a bunch that we have cited, where they basically
2 have said, those that have agreed to take the FRAND, the
3 rates that are set by the Court are willing licensees. So I
4 mean, it happened --

5 THE COURT: So it's only because you had a
6 declaration before this Court that said you're going to do
7 whatever I want to do?

8 MR. ZEINEDDIN: That's right.

9 THE COURT: Whatever I decide.

10 MR. ZEINEDDIN: That alone is enough.
11 Absolutely.

12 THE COURT: Okay.

13 MR. ZEINEDDIN: That is absolutely right.

14 THE COURT: All right.

15 MR. ZEINEDDIN: Because --

16 THE COURT: I look at that more on the anti-suit
17 injunction part of it, but, okay.

18 MR. ZEINEDDIN: But to us, because, Your Honor,
19 on every level you look at it, that is our success. That's
20 what we claimed and that's what we want.

21 THE COURT: All right. Let's talk about the
22 definitiveness of that. So I need to give you a chance to
23 be heard as well. You'll get your day, your hour.

24 MR. ZEINEDDIN: Yes, Your Honor.

25 THE COURT: So your record to establish that

1 Thales, the record for that is what?

2 MR. ZEINEDDIN: So we have our exhibit to the
3 complaint, which is our declaration saying that we'll abide
4 by this Court's decision. And, Your Honor, it's -- I don't
5 think that is before you in the papers.

6 THE COURT: Well, it's attached. It's an
7 exhibit to the complaint.

8 MR. ZEINEDDIN: That is right.

9 THE COURT: Right.

10 MR. ZEINEDDIN: But, in any event, Your Honor,
11 so what we have is the first declaration of Robert
12 Antonitsch.

13 THE COURT: Right.

14 MR. ZEINEDDIN: And in that declaration he says,
15 I'm authorized to declare and commit for the benefit of
16 Thales and its parent and sister corporations that Thales
17 will execute and abide by a worldwide license to Philips'
18 SEPs -- that's short for standard essential patents -- to
19 make and sell the Thales modules whether sold separately or
20 incorporated into the products of Thales customers on such
21 final FRAND terms and conditions as determined by this
22 Court, unequivocally.

23 Now --

24 THE COURT: All right. Now, Philips. Are you
25 concerned about wiggle room there?

1 MR. THOMPSON: Definitely, Your Honor.

2 THE COURT: Yes.

3 MR. THOMPSON: I'm happy to go through it.

4 THE COURT: Sure. Let's talk a little bit about
5 the wiggle room in that and then we'll move on.

6 MR. THOMPSON: Okay.

7 THE COURT: I only want to address that issue.
8 Then we're going to come back here. Yes. Let's talk about
9 the wiggle room in that.

10 MR. THOMPSON: I can do it from here since he's
11 all set up.

12 THE COURT: Oh, okay.

13 MR. THOMPSON: If you would like.

14 THE COURT: That's fine.

15 MR. THOMPSON: I can take the podium if you
16 would like.

17 THE COURT: Actually, how much stuff do you
18 have? Incidentally, does anybody need a break? Do you all
19 want a break? I think we will set a break.

20 And then on the movant's side, look, what I want
21 you to think about is, because the manner in which the
22 argument is conducted is actually helpful to me and that's
23 really what matters in the end. Right? But I don't want to
24 prejudice Telit, and you should feel free to stand up, and
25 you have, but you should continue to do that, and if you

1 also want to talk on the defense side between yourselves
2 about how to divvy up, you can.

3 I'm going to let Philips have its time to
4 respond to any arguments that have been made. You know,
5 I've allocated the full day -- not the full day, but
6 certainly until mid to late afternoon and I think it's a
7 very important case, so that's why I dedicated the time I
8 did.

9 Let's take a -- I will give you a ten-minute
10 break and we'll come back at about five of.

11 MR. ZEINEDDIN: Thank you, Your Honor.

12 MR. THOMPSON: Thank you, Your Honor.

13 (Short recess taken.)

14 - - -

15 (Proceedings resumed after the short recess.)

16 THE COURT: Actually, before you come up here,
17 let me just finish with your friend. I forgot to ask you.
18 You said you agreed to expedite.

19 MR. ZEINEDDIN: Yes, Your Honor.

20 THE COURT: Just trying to think about the
21 schedule here. Now, presumably, if you want to expedite,
22 you agree not to challenge the patents on the validity. I
23 set the license rate first and then what? Then you could
24 thereafter decide to challenge validity.

25 MR. ZEINEDDIN: That's a very good question,

1 Your Honor. So here's the thing. The patents can stay, can
2 wait, and we can move on rate setting, and once Your Honor
3 tells us the rate and the injunction, that's the third
4 injunction, forcing us to enter into it, all of us, we're
5 licensed, we're done.

6 So --

7 THE COURT: So I set the rate. I just want to
8 make sure you're good with I set the rate first, no
9 consideration whatsoever. The patents are valid. You set
10 the rate. You're on the hook. Right?

11 MR. ZEINEDDIN: So I would love to address that
12 specifically.

13 THE COURT: I asked you if you would get to it.

14 MR. ZEINEDDIN: Yes, exactly. And this is how
15 these things have worked in court, and actually, that's how
16 they work also in negotiations, because ultimately, what
17 we're talking about here, just like in a damages case on
18 infringement goes on one patent, we're talking about what an
19 arm's length transaction --

20 THE COURT: Right. So how about -- I told you
21 what I shouldn't have because then you know I'm going to
22 give you the day, so this is a really quick answer.

23 You would are willing, I just want to hear it,
24 you would be willing for me to, we would set the rate first.
25 We wouldn't do anything else. We would just --

1 MR. ZEINEDDIN: Terms and conditions. Rate
2 terms and conditions, meaning the scope. You know,
3 worldwide.

4 THE COURT: Right.

5 MR. ZEINEDDIN: Right.

6 THE COURT: Something like that. And no
7 contesting validity and you would agree to be bound by that
8 rate?

9 MR. ZEINEDDIN: On the contesting validity, for
10 a second here.

11 So, Your Honor, I want to present to you and to
12 the trier of fact, if it's the bench, which is fine, or if
13 they want a jury for the past part, the Federal Circuit said
14 the past part could be the jury.

15 I want to present evidence to tell you this. We
16 believe these patents -- we believe this is what they're
17 entitled to because these patents, A, that's their share of
18 the patents. B, a lot of these patents are declared and
19 they turn out not to be essential or not valid, but a lot of
20 them are.

21 So here's the thing. I don't want you to rule
22 on it. That's not what I'm asking. What I'm not doing, and
23 we're not -- what we don't want to do, we don't want to go
24 through the ringer patent by patent, prove validity,
25 infringement. No. I want to present -- because what you

1 are assessing as the trier of fact in this court would be
2 assessing the value of this --

3 THE COURT: The short answer is -- hold on. The
4 short answer is you're not willing to forego arguing that
5 the license should be low because the patents are, some of
6 the patents at least are invalid?

7 MR. ZEINEDDIN: We want to present that.
8 They'll present their view.

9 THE COURT: In other words, when you say you are
10 willing to license the patents, it's only, one, if you get
11 to prove to the fact-finder that some of the patents are
12 invalid. But what you are saying you're willing to do is
13 forego a definitive ruling about the validity of the
14 patents, that the only consideration of validity that would
15 be given is in setting the FRAND rate?

16 MR. ZEINEDDIN: Assessing the value.
17 Absolutely.

18 THE COURT: Right.

19 MR. ZEINEDDIN: That's exactly it, Your Honor.
20 And the --

21 THE COURT: In terms of that, jurisdiction or
22 not. You want me to basically try the case twice. If I set
23 the FRAND rate, I'm going to have to necessarily address the
24 validity of the patents and then --

25 MR. ZEINEDDIN: No.

1 THE COURT: -- we deal with that?

2 MR. ZEINEDDIN: No.

3 THE COURT: No?

4 MR. ZEINEDDIN: What we want is the trier of
5 fact, if that happens to be the bench, that's great, too, is
6 take that into account, because Your Honor may be convinced
7 by them that all of their stuff really is invalid and
8 infringed and you just hear us. The problem is if I concede
9 it, you can't hear me anymore because I've already agreed
10 everything is valid and infringed.

11 THE COURT: All right. Let me ask you one other
12 step.

13 MR. ZEINEDDIN: You tell us what the value is.

14 THE COURT: One other question. Is there
15 anything in the ETSI contract that says anything about
16 challenging or not challenging validity of patents?

17 MR. ZEINEDDIN: In the ETSI contract, no. The
18 European Court of Justice in the Huawei/ZTE case, in
19 addressing what a willing licensee had, said, at no point
20 they should be precluded, the implementer, from challenging
21 the essentiality.

22 But to be clear here, Your Honor, what we're not
23 saying, and I want to be very clear about this and also I'm
24 hoping that's going to be clear for Philips, that as part of
25 what the ruling or setting the rate on FRAND terms and

1 conditions, you have to actually render judgment on validity
2 or essentiality or infringement.

3 We just want you to take it into account,
4 because we're going to say, we believe some of this stuff is
5 good, some of is not as good, because part of what we're
6 looking at, Your Honor, are licenses that are granted to
7 others, because this is a pie and they have a slice of that
8 pie. Right? And the pie is worth X. And the question is,
9 how much is theirs.

10 THE COURT: I get it, that the validity --

11 MR. ZEINEDDIN: Once you do that, we take a
12 license, we're done.

13 THE COURT: Okay.

14 MR. ZEINEDDIN: We're done.

15 THE COURT: All right. Thank you very much.

16 MR. ZEINEDDIN: And I'm grateful for the
17 opportunity to make that clear because people can read it
18 and misconstrue our intent. Our intent is to get there and
19 for the trier of fact to take those things into account as
20 they come up with a magic formula for the number and then
21 we're done. Then we are not in the business of taking them
22 through the ringer once we're done.

23 We want to keep going. We want to sell products
24 that were licensed and we want to know that's fair,
25 reasonable, nondiscriminatory royalties taking all the

1 evidence that you heard. Half it is ours, half of it is
2 theirs, and then we're done.

3 THE COURT: All right.

4 MR. ZEINEDDIN: Thank you, Your Honor.

5 THE COURT: So do you want to address wiggle
6 room?

7 MR. THOMPSON: I'm happy to, Your Honor, and as
8 well I can talk about the first prong we spent this morning
9 talking about too.

10 THE COURT: What's your name, sir?

11 MR. LOWENSTEIN: David Lowenstein, Your Honor.

12 THE COURT: Lowenstein?

13 MR. LOWENSTEIN: Yes.

14 THE COURT: I want to give Mr. Lowenstein his
15 opportunity to argue that first prong. Then I will hear
16 you.

17 MR. THOMPSON: Okay.

18 THE COURT: If he wants that. Maybe he doesn't.

19 MR. LOWENSTEIN: I would like to address the
20 French law issue because we did submit a declaration.

21 THE COURT: I read it and you're happy to
22 summarize it for me. I forget how many pages. I can
23 benefit from a summary. All right. Go ahead.

24 MR. THOMPSON: Your Honor, on the question of
25 wiggle room, we actually had some slides and there's a

1 summary slide. If I can hand up --

2 THE COURT: First of all, anybody is free to use
3 any PowerPoints. If you prepared them, put them up.

4 MR. THOMPSON: I was going to suggest this
5 particular part of the discussion is well suited to that and
6 I have a printout.

7 THE COURT: That's fine.

8 MR. THOMPSON: I would be happy to hand it up to
9 the bench.

10 THE COURT: That's fine.

11 MR. THOMPSON: Okay.

12 THE COURT: Thank you.

13 MR. THOMPSON: Thank you.

14 So, Your Honor, relative to wiggle room and
15 positions that have been taken, the first observation I
16 would make is that they say that they'll throw themselves to
17 the Court. Right? But then they reserve every argument.
18 Right? That's not quite the same thing. Right?

19 I'm going to make every argument and resist in
20 every way I possibly can, but at the end of the day, the
21 Court can make its finding. And I think that in particular,
22 the courts have seen this before, these sorts of contention
23 offers contingent on being able to raise every defense I,
24 you know, come up with.

25 But at the end of the day, if I lose, well,

1 yeah, I want the license. I certainly don't want to, you
2 know -- I guess it's more or less saying if I'm an adjudged
3 infringer, I will pay, you know. And that's not at all I
4 would submit what ETSI had in mind and the contract and I
5 won't divert to that, but I can give you specific citations
6 where that contract is in our record.

7 So I would refer -- I guess we're talking about
8 Thales first. I think it's fair to talk about them because
9 they were the one who was presenting. Slide 35 has a
10 summary, which I'm going to talk about.

11 The first thing I think that is really important
12 is that the obligation under the contract only exists for
13 patents that are essential. If they're not essential,
14 you're outside, you're outside the ETSI agreement. And,
15 indeed, they've taken the position that the patents in this
16 case, in the case that overlays exactly is that they are not
17 essential. It's a defense that they raised in the context
18 of noninfringement in the ITC.

19 If they succeed on that, those patents are no
20 longer part of the ETSI agreement by definition. So right
21 there is a situation where you wouldn't even have a
22 connection between the DJs that they have presented and the
23 breach of contract and the patents because they would no
24 longer be essentially subject to the contract, wouldn't be
25 subject to the DJ. It wouldn't be part of it. It would

1 just be a straight infringement case.

2 So I think that's the last point, by the way, on
3 this chart, the essential point.

4 The other thing is that they have said -- and
5 this is part of we reserve our rights and how difficult it
6 is to get these parties to actually be clear about what it
7 is they're saying, because it moves around all the time.

8 And I will make one observation Your Honor may
9 find useful. Judge Crabb, Barbara Crabb, a famous patent
10 judge out of the Western District of Wisconsin had the Apple
11 v. Motorola case. In that case there was a similar simple
12 sort of dynamic going on.

13 On the Friday before a Monday trial, Apple said
14 that's not what I meant when I said before that we would
15 agree to it. What I meant was that we would take into
16 account your rate. She had to end the trial and then ended
17 up dismissing the case, and it's because there is
18 uncertainty in all of these, I'm willing. Well, what does
19 that mean? Right?

20 So here's one. They say they're willing, but
21 then embedded at the top is that they will not -- they
22 didn't agree to pay for the patent and it's in their brief.

23 I'm sure every point I make, by the way, every
24 point I make they're going to come up and say we'll agree
25 to that, and that's because they are going to try to make

1 it seem like they're not -- these are not wiggle points.
2 But this is what was in their brief. So this citation is
3 given there. It's not only in the declaration, but it's in
4 their opening brief, that they'll enter into a forward
5 looking.

6 They are not entering into paying for the past
7 on a portfolio that covers actions and uses not only in the
8 U.S., but Australia, Asia, Europe. There are -- there are a
9 number of subsidiary companies that are using this
10 technology, but not paying for it, and, of course, using
11 that over the last five years to their advantage, right,
12 because the FRAND license that we attached that was offered
13 to them they could accept today. By the way, we could stop
14 this hearing right now if they would just accept that
15 license, but they won't. Right? And that has been pending
16 with them for five years. So that's one, not willing to pay
17 for the past.

18 Now, again, I hate to say it twice, but it's
19 really important to me to know that with respect to things
20 like this, you have to tease it out of them. They don't
21 just come and tell you what they have up their sleeve like
22 happened before Judge Crabb. Right?

23 Another one is they say that they'll pay on the
24 portfolio. Well, the portfolio, if you look at the license
25 that was offered, it's for the portfolio, which includes a

1 GSM, UMTS, 2G, 3G and 4G.

2 Well, they are not willing to pay on 2G. Oh,
3 yeah, I will do it, but only a slice of what is your
4 portfolio. Right?

5 And then --

6 THE COURT: Just so you know, I do think the
7 come back -- how do you pronounce your name?

8 MR. ZEINEDDIN: Zeineddin, Your Honor.

9 THE COURT: Zeineddin.

10 MR. ZEINEDDIN: Thank you.

11 THE COURT: Thank you. Sorry.

12 MR. ZEINEDDIN: Not at all.

13 THE COURT: Mr. Zeineddin, here's what I predict
14 the response is, right, they'll agree if I find it at this
15 time.

16 MR. THOMPSON: And they'll argue the whole way
17 through. Right.

18 THE COURT: I agree. Mr. Zeineddin, that's
19 correct. Right? In other words, do you have a picture of
20 this slide, 35, in front of you?

21 MR. ZEINEDDIN: Yes, Your Honor.

22 THE COURT: All right. I'm going to guess,
23 you're going to say what to all of these things? You'll
24 agree to them if I find against you. Right?

25 MR. ZEINEDDIN: So the thing is we will have a

1 license. Just like in the TCL, the past relates to cover
2 the prior. Then there will be forward. So they're going to
3 get everything.

4 THE COURT: All right.

5 MR. ZEINEDDIN: Based on what you said.

6 THE COURT: But it's based on what I said.

7 Right.

8 MR. ZEINEDDIN: It's based on the rates and the
9 terms.

10 THE COURT: Right. But you're going to argue
11 it. It's just you are going to argue against some of these
12 things and then I will decide.

13 The point is when you say you're willing, what
14 you are saying is, you're willing to be bound by whatever
15 decision I make?

16 MR. ZEINEDDIN: Absolutely.

17 THE COURT: Right.

18 MR. ZEINEDDIN: And what we are going to say is,
19 they want us to already say every single one of their
20 patents deserves a hundred percent.

21 THE COURT: Of course.

22 MR. ZEINEDDIN: Right? And they're the best
23 patents ever.

24 THE COURT: Right.

25 MR. ZEINEDDIN: And we say, you can say that and

1 you can put your expert on. We're going to say, we think
2 30 percent or 40.

3 THE COURT: Yes.

4 MR. ZEINEDDIN: And we're going to present that.
5 And then, Your Honor, or if they insist on a jury for the
6 past, like the Federal Circuit said in TCL, they will hear
7 it. And then whatever happens, happens, but what we know at
8 the end of the day, you've seen everything. You've seen the
9 secret stuff and you've seen everything and you've heard
10 what we have to say as to the whole -- the whole box of
11 apples, not just the top part that we're looking at. And
12 then we know we're getting a fair, reasonable,
13 non-discriminatory deal, which is going to put us on a level
14 playing field in the industry and it's going to be a
15 guidepost for this industry, this industry of the IOT
16 devices. Unlike the cellphone, it has been around for a
17 long time. Now there are going to be a lot of those all
18 over the place.

19 THE COURT: All right.

20 MR. ZEINEDDIN: That's what we want.

21 THE COURT: Okay. Go ahead.

22 MR. THOMPSON: So another one.

23 THE COURT: And I think this is a helpful chart,
24 but I don't want to spend tons of time on this because I
25 hear your point loud and clear.

1 MR. THOMPSON: Okay.

2 THE COURT: And this is why I used the word
3 wiggle room. I mean, really, by the end of the day it boils
4 down what is willing, who gets to decide, who is willing and
5 who is not willing. I mean, really, that is where the
6 rubber hits the road.

7 MR. THOMPSON: And I think that there's an
8 element to that, right, because the obligation is to be
9 willing to offer the license. Right? So that's why we
10 attached the license and a decision that said that it was
11 FRAND. So that's pending today to both of them.

12 And so there has been no breach and this whole
13 thing about, well, we want this, you know, we say we're
14 willing to have a decision made which would be advisory,
15 then -- and every defense they want to raise in the
16 meantime, it's just -- it's no reason to take a Court that
17 has jurisdiction under Title 35 as granted by Congress.
18 That's this Court. And then another Court in the U.S. that
19 Congress gave jurisdiction, exclusive jurisdiction under
20 Title 19 and say this Court, to go into that other Court and
21 say, stop your proceedings.

22 THE COURT: Right. Okay. This has been good.
23 Let me hear from Mr. Lowenstein on irreparable harm -- not
24 the irreparable harm. On the likelihood of success.
25 Forgive me.

1 MR. LOWENSTEIN: So this is a few issues ago and
2 I actually made some notes about some of your questions.
3 But we did submit a declaration from a French law professor,
4 and to the extent there were cases, he would have cited
5 them.

6 THE COURT: There's only one case. Right?

7 MR. LOWENSTEIN: But he cited a slew of civil
8 statutes, civil lawsuits.

9 THE COURT: I will get there. I will give you
10 this opportunity. You know, besides the one French case,
11 what can you tell me about that Court? And actually, what
12 can you tell me -- I don't know anything about the French
13 Court. Is there a Supreme Court in France?

14 MR. LOWENSTEIN: Yes. The Court of Cassation.

15 THE COURT: Do you speak French? It sounds like
16 you do.

17 MR. LOWENSTEIN: Not enough to --

18 THE COURT: All right. I don't speak it.

19 So this is the Supreme Court of France. Is the
20 Supreme Court of France, or whatever the name of it is --

21 MR. LOWENSTEIN: Court of Cassation. It's a
22 Supreme Court.

23 THE COURT: Does it function like our Supreme
24 Court? They take the law of the land for all courts?

25 MR. LOWENSTEIN: I may be getting ahead of

1 myself. The way I understand it, and it would be obviously
2 better if you got it from somebody who actually knew what
3 they were talking about, but they have a Supreme Court like
4 we do who sets something like precedent.

5 The lower courts are not obligated to accept it,
6 but they are supposed to, and if they don't, they'll get
7 reversed. And the way he explained it was that the Court of
8 Cassion can change its mind, which I think Courts in this
9 country do periodically, too. So I'm not entirely sure what
10 the difference is. But they don't have a strict star
11 decisis view and they rely on civil statutes and I think you
12 saw Mr. Borghetti do that, too.

13 So I don't think you can say from the absence of
14 any cases that, you know, we're wrong. First of all, they
15 just may not exist.

16 THE COURT: And you know what, just so you know,
17 I didn't say you were wrong. You're the movant. You have
18 the burden. You have to persuade me that under French law,
19 that contract precludes Philips from going to the ITC.

20 MR. LOWENSTEIN: That's another point I want to
21 make. That contract doesn't say you can or you cannot. It
22 doesn't deal -- but I think that the trap that we're falling
23 into here is this per se argument.

24 We're not seeking a per se rule. We're not
25 saying a FRAND, an SEP owner can never get an injunction.

1 There are circumstances where they can. This doesn't happen
2 to be one of them. Right?

3 We had a negotiation with them. They say we're
4 acting in bad faith. We disagree. You are not going to
5 break that tie.

6 THE COURT: Actually, hold up. I need to think
7 about what you just said.

8 MR. ZEINEDDIN: Okay.

9 THE COURT: Hold on. You just said, as I
10 understand it, that you are not taking the position that
11 the contract precludes them from seeking an injunction
12 per se.

13 MR. LOWENSTEIN: Per se, correct.

14 THE COURT: But that a contract precludes them
15 from seeking an injunction under the facts of this case.

16 Now, it cannot be -- and, again, I don't have
17 your French skills or anybody's Latin skills, but it can't
18 be that they make a sui generis, whatever, decision here.
19 You've got to be able to establish that there is some legal
20 right that precludes them from seeking an injunction and I
21 think that is a starting point.

22 MR. LOWENSTEIN: I agree, and I think the
23 starting point, and we hope the ending point was a
24 declaration from a French law professor who analyzed the
25 various contractual obligations, the various guides that

1 interpreted those obligations, the French civil statute, a
2 few cases like the European Commission decision, it
3 presented it and discussed that are not binding precedent on
4 French courts but are influential in their decision.

5 So if the European Commission publishes an
6 opinion that says it's an abuse of an SEP's owner right to
7 seek an injunction, well, then, a French Court would
8 consider that, and I think that was what Professor
9 Stoffel-Munck said here.

10 So I can't embellish on French law. All I can
11 say that is in his opinion, and he's a professor at the
12 Sorbonne. He says under our facts, you can't come to a U.S.
13 Court, you, and say, please enter a FRAND rate and then seek
14 an injunction trying to throw us out of business all at the
15 same time.

16 And so you may be entitled to an injunction if
17 the proposed licensee is really recalcitrant. So if you
18 call him up and say we'd like to discuss license and hang
19 up the phone on you and you call them again and they hang
20 up the phone on you again, well, that's an unwilling party.

21 So in our case we provided them two weeks
22 before they sued you a lengthy explanation of how it is we
23 came up with our rate. It's not that we were unwilling. We
24 just didn't agree to the number. That doesn't make a party
25 unwilling, that just makes a party not agree to a number,

1 and presumably, if there's enough time for negotiation, they
2 would agree. But we're, you know, fairly far apart. I will
3 agree with that.

4 THE COURT: Again, under your definition of
5 willingness, as long as you just say you don't agree to the
6 number, you're not unwilling.

7 MR. LOWENSTEIN: Well --

8 THE COURT: We get back to they don't think
9 you're willing, you think you are willing.

10 MR. LOWENSTEIN: Right. And I know you can't
11 break the tie and I understand that. But the question is
12 what do you in that circumstance where the parties are
13 apart? Do you go ahead and try to throw them out of
14 business or do they come to you, which is what they did,
15 and say please set a rate, which we're agreeable to. Right?

16 Just because we can't agree to a number doesn't
17 say, well, I'm going to get out a sledgehammer and I'm
18 going to beat you into submission and then you're going to
19 agree. That's precisely what an injunction is not for and
20 that's what they are doing here.

21 They're going to the ITC which doesn't consider
22 irreparable harm, and keeping in mind they don't have a
23 competitive product on the market. Their market shares
24 aren't going to increase. Their profits aren't going to
25 increase if we get an injunction.

1 THE COURT: Actually, does it matter that the
2 ITC doesn't seek, doesn't consider irreparable harm?

3 MR. LOWENSTEIN: Does it matter?

4 THE COURT: Yes.

5 MR. LOWENSTEIN: I think it matters a whole lot.

6 THE COURT: Does it matter to the determination
7 of likelihood of success on the merits?

8 MR. LOWENSTEIN: In the preliminary injunction
9 motion, I understand your point, I think, and the answer is
10 probably it doesn't.

11 THE COURT: So, in other words, as a French
12 professor, does it matter if the ITC doesn't --

13 MR. LOWENSTEIN: Under French law? I don't
14 think so, no.

15 THE COURT: All right.

16 MR. LOWENSTEIN: But what he said after, you
17 know, fairly extensive analysis of ETSI agreements and the
18 French civil code was that under these circumstances you are
19 in breach if you ask a U.S. Court to set a license and at
20 the same time try to throw the implementers out of business.
21 Those two things are incompatible. You can't do them both
22 at the same time.

23 That's why we're here. If all they did was come
24 to you and say we want a license and an injunction,
25 obviously, we wouldn't be here.

1 Right? We don't think that they have a right to
2 an injunction in your court either, but that's not an issue
3 for today. We just think you cannot do both things at the
4 same time. You can't have your cake and eat it, too.

5 THE COURT: Well, you get your cake and eat it,
6 too. You get to challenge validity. You get to slow them
7 down and challenge these patents in protracted litigation
8 and raise every validity defense you can think of.

9 Why do you get to have your cake and eat it,
10 too?

11 MR. LOWENSTEIN: I don't see that we're getting
12 our cake. They brought a suit here and we would just
13 litigate here as any other litigant would.

14 THE COURT: The fact that you get to challenge
15 the validity of the patent.

16 MR. LOWENSTEIN: I mean, that's our right. I
17 don't understand why that would be a problem.

18 THE COURT: Where do you have that right?

19 MR. LOWENSTEIN: I mean it's just the right of
20 patent defendants.

21 THE COURT: Is it in the ETSI?

22 MR. LOWENSTEIN: No.

23 THE COURT: The ETSI is silent on it. Right?

24 MR. LOWENSTEIN: Correct.

25 THE COURT: All right. So is the ETSI silent on

1 injunction?

2 MR. LOWENSTEIN: Yes.

3 THE COURT: Okay. So they have that right.

4 MR. LOWENSTEIN: Again, we're talking about,
5 what, the per se rule that they have a right to an
6 injunction.

7 The answer is ETSI does not specifically say
8 that you do or you do not have a right to an injunction.
9 But, again, on our facts here, the question is can they do
10 it? And to address your point that, you know, we would drag
11 it out indefinitely, I don't think you would allow that to
12 happen.

13 But to the extent there's a FRAND decision at
14 some point whatever, two years down the road, there are
15 mechanisms to account for the time value of money. They get
16 prejudgment interest, they'll get post-judgment interest and
17 they would be made whole.

18 THE COURT: Well --

19 MR. LOWENSTEIN: They don't make any --

20 THE COURT: How about for the same reason you
21 argue you're a small company that would suffer irreparable
22 harm, they say, yes, they're a small company that is not
23 going to be able to fit the bill if you have a judgment
24 three years from now?

25 MR. LOWENSTEIN: Well, we could put money in

1 escrow if that's the issue. It's not something as far as I
2 know that we've raised, but we can put some money in escrow.

3 But I think this is sort of the thrust of our
4 argument and I understand that, you know, you may disagree,
5 but, you know, if you win --

6 THE COURT: Incidentally, I think this might be
7 the seventh time you suggest you know how I'm going to rule
8 and I have not said anything.

9 MR. LOWENSTEIN: All right.

10 THE COURT: For what it's worth. I mean, you
11 said it a number of times.

12 MR. LOWENSTEIN: All right. I apologize.

13 THE COURT: No, you don't have to apologize.
14 You might just want to focus on the power of your argument.

15 MR. LOWENSTEIN: I don't think it's fair for
16 them to try to get a remedy that has enormous repercussions
17 not just from Telit, but on our customers downstream, people
18 that are using these IOT devices. We've mentioned some in
19 our brief. And you weigh that against money damages.

20 They'll be made whole in this court with a FRAND
21 license and we will suffer irreparable harm if the ITC
22 enters an exclusion order that we can't recover from very
23 well. Once their customers are gone, they may not come
24 back. We may be out of the U.S. market altogether.

25 THE COURT: So what your argument now boils down

1 to is you have a legal right under the facts of this case to
2 preclude them from getting an injunction.

3 MR. LOWENSTEIN: We say that we have a legal
4 right under French law because that is the opinion of
5 Professor Stoffel-Munck.

6 THE COURT: Then his discussion -- I don't know
7 how you say it's not per se. You think his affidavit is
8 limited to the facts of this case?

9 MR. LOWENSTEIN: That's what he said, yes.

10 THE COURT: Okay. The peculiar negotiations in
11 this case. He's not giving an opinion beyond that?

12 MR. LOWENSTEIN: Correct. He's not saying that
13 an SEP owner can never get an injunction. He's saying on
14 the facts of this case where there was ongoing negotiations
15 up to two weeks before the suit, they sued here, asked for a
16 license. Three days later they said let's continue the
17 license negotiations.

18 Why would you ask to continue a negotiation with
19 an unwilling licensee? They obviously know we weren't
20 unwilling or the existence of the injunction threat from the
21 ITC switched us from being unwilling to being willing.

22 So either way --

23 THE COURT: I mean, what bothers me about that
24 position, because I realize he discussed the facts of the
25 case and I realize he did express an opinion as applied, but

1 I have to say I didn't interpret it that narrowly. I also
2 inferred from his affidavit that he was saying, he was
3 expressing an opinion of law and, in fact, that's why I
4 thought his affidavit is permissible under the rules of
5 evidence as an expert, because he's giving an opinion of
6 law. And what's the rule? 412 or something? It's not 412.
7 What is the rule? It's a civil rule. It's not the rules of
8 evidence.

9 MR. LOWENSTEIN: 44.1.

10 THE COURT: Don't ask me why I was thinking of
11 41.2.

12 MR. LOWENSTEIN: Are you thinking of 44.1, the
13 notice on foreign law?

14 THE COURT: Hold on a second. Okay. So, yes.
15 So there was Rule 44.1, determining foreign law. And it
16 says, a party that raises an issue about a foreign country's
17 motion must give notice by pleading or writing.

18 MR. LOWENSTEIN: We both did that.

19 THE COURT: You both did. Right?
20 The reason why I bring this up is because I remember when I
21 first got this, it was new to me. I saw the declarations
22 and I thought to myself, how are you able to submit an
23 opinion of law? I mean, that's clearly generally precluded
24 by the rules of evidence. And so I learned for the first
25 time there was this other rule and it does provide that you

1 can submit expert testimony whether or not submitted or
2 admissible under the rules of evidence to determine foreign
3 law. Right?

4 And then it says, and this is the important
5 point. "The Court's determination must be treated as a
6 ruling on a question of law." In other words, it's not law
7 as applied to facts. It's a question of law. And therefore
8 when I read the affidavit, even though it is definitely a
9 lot of discussion or, you know, of the specifics of the
10 case, the facts, ultimately, I think for it to be
11 admissible, I'm supposed to treat it as a question of law,
12 which is like, incidentally -- and this is why you used
13 the words per se, but that's what law is.

14 I mean, law really is -- I mean, to a certain
15 extent, right, it's per se in that we don't have a law that
16 applies only to the sui generis situation, the case, the
17 facts of this case and only this case. That's not law.
18 That's law applied to the circumstances of the case.

19 And so that's why I want to go back and get
20 clarity here. I mean, I think that the way you just
21 described the opinion of Borghetti. What's the name?

22 MR. LOWENSTEIN: Their guy is Borghetti. Ours
23 is Stoffel-Munck.

24 THE COURT: I won't do justice to the
25 pronunciation to your expert. I can only consider that as a

1 question of law, and if it is limited, as you seem to
2 suggest, to the application of general principles of French
3 law to the particular facts of this case, then I can't even
4 consider it.

5 MR. LOWENSTEIN: I guess I'm not following
6 why --

7 THE COURT: In other words, you keep saying,
8 Judge, we are not saying it's the per se rule here. We're
9 not saying the ETSI contract per se precludes Philips from
10 going to the ITC. We are not saying that. We're saying
11 under the particular facts of this case, given the way the
12 negotiations went, the back and forth between the parties,
13 the particular things said to the parties, we're saying that
14 that is prohibited by French law or creates a prohibition of
15 French law from Philips pursuing the ITC proceeding. That's
16 applying general laws to the facts of this case and that's
17 all it is.

18 And I don't think you're -- if that's what -- if
19 that's the confines of what your expert says, then I don't
20 know how it's admissible under Rule 44.1 or, more
21 importantly, and I guess this is the dispositive thing, I'm
22 only permitted to consider the material or source that you
23 submit pursuant to 44.1 to make a determination as a ruling
24 on a question of law. That's it.

25 MR. LOWENSTEIN: And --

1 THE COURT: It sounds to me like he's not ruling
2 on a question of law, he is applying law to facts.

3 MR. LOWENSTEIN: He's telling you what the law
4 in France is according to the facts of this case. I think
5 that's the same thing Mr. Borghetti is doing.

6 THE COURT: Well, I mean, I don't think there's
7 a need for Mr. Borghetti to respond to your situation. I
8 mean, you've got the burden. I've got to consider what you
9 say.

10 MR. LOWENSTEIN: Well, I mean --

11 THE COURT: You've got to prove it.

12 MR. LOWENSTEIN: I'm not sure what the
13 distinction is. If you ask a French law professor to tell
14 you what the law is under these certain facts, I mean, why
15 is that --

16 THE COURT: No. That's what I'm getting at.
17 You asked a French law professor. You are supposed to say,
18 tell me. Does this contract -- interpretation of contract
19 is a question of law.

20 MR. LOWENSTEIN: Right.

21 THE COURT: Does it preclude the party from
22 doing X? That is a question of law. That I can entertain
23 and make a determination on.

24 What you are essentially doing as I think about
25 it is you're having your expert act as a judge. He's

1 interpreting the law as he sees fit and he's applying it to
2 the facts of this case and coming out with essentially a
3 judge opinion. He did it without the benefit of a hearing,
4 without the benefit of cross-examination. He made basically
5 a decision on the merits.

6 I didn't think coming into the hearing that's
7 the way you were presenting him. I did think he was saying
8 that the ETSI contract precludes them from seeking an
9 injunction when you have a willing party and, you know, and
10 then he offered an opinion as well. You have a willing
11 party here. But --

12 MR. LOWENSTEIN: Well, that's the thing. If you
13 start getting into willing, unwilling, the issue comes back
14 to what you said earlier. You know, how do you break that
15 tie here? It's a fact question.

16 So the answer was, I think based on the
17 undisputed facts, we had a discussion up until two weeks
18 before they sued us. Then they sued you us. Then three
19 days later they wanted to continue the discussion. All at
20 the same time they are trying to shut us down in the ITC,
21 and as a matter of French law, interpreting the ETSI
22 contract, he says that that is improper.

23 It's a breach of contract. You've asked us what
24 the support was for the French law, the breach of contract
25 claim, and so I thought this was the support. I mean, you

1 can't -- well, I don't think in the abstract you can
2 determine that somebody has breached a contract or not. I
3 mean, isn't it always some factual specific background? You
4 can't just say as a matter of law these guys have breached a
5 contract without knowing the factual basis.

6 I mean, I don't think on a clean slate you can
7 say breach or no breach. You have to say, what happened
8 here? What are the facts? What do the two parties do?
9 And in that circumstance, is it a breach or is it not a
10 breach?

11 I understand your point, but I don't think you
12 can --

13 THE COURT: I'm just thinking if I carried your
14 position to its logical extreme, any time anybody wanted to
15 seek an injunction in Federal Court based on a purported
16 violation of a foreign law, they would win and they would be
17 allowed to just submit as evidence of it a law professor
18 from another country who offered an opinion that the
19 contract in question violated the foreign law. I'm just
20 thinking that can't be the case.

21 MR. LOWENSTEIN: I don't think it is and that
22 addresses the first issue. Right? That addresses success
23 on the merits.

24 So let's suppose he says that and you accept
25 what he says. That's one of, whatever, four issues. Then

1 you have to weigh the other issues, too.

2 So I don't think it's carte blanche that, you
3 know --

4 THE COURT: I don't think it's carte blanche as
5 a matter of law that he establishes the first. It gets rid
6 of what the role of the Court is supposed to play. He's
7 supposed to give an opinion about what French law is. But
8 anyway, I will have to think about it.

9 MR. LOWENSTEIN: All right. You also asked
10 about what Congress contemplated. It's true they set up the
11 ITC, but that doesn't mean every dispute belongs in the ITC.
12 And, again, we submit in this case it doesn't for the
13 reasons I've just stated.

14 In the --

15 THE COURT: But can you point to anything where
16 Congress indicated its view by a statute or a legislative
17 history that this case shouldn't be in front of the ITC?

18 MR. LOWENSTEIN: No. It just hasn't come up.
19 I suppose when that statute was written, FRAND really
20 wasn't an issue. Maybe some day they will address it.
21 But, you know, again, we're playing with the cards we have
22 here and those are there's a FRAND license. They've agreed
23 to license it to us. There's no dispute about that.
24 They say they're prepared to grant a license. They have
25 agreed.

1 THE COURT: They said they're agreed to grant
2 a license on a FRAND term and they have given you an example
3 of a rate that was approved. Right? Was it adjudicated?

4 MR. THOMPSON: It was adjudicated in the Arcos
5 case.

6 THE COURT: Right.

7 MR. THOMPSON: And we submitted the case.

8 MR. LOWENSTEIN: I'm happy to address it if you
9 want.

10 THE COURT: You can address it.

11 MR. LOWENSTEIN: Yes. As I understand it, and
12 we have not taken any discovery in really the ITC either,
13 but Arcos, and I have slide which I've taken out, sells
14 cellphones and laptop or tablet computers that cost, you
15 know, 500 or a thousand dollars, whatever they cost.

16 We sell these little wireless modules that on
17 average are 20, 25 bucks. So for a 75 cent royalty to be
18 adequate or a FRAND reasonable for somebody that sells a
19 \$500,000 product, that may be true, but that doesn't apply
20 to us. We can't sell these things profitably.

21 The background issue is it's not just Philips
22 that has these SEPs. Right? There are others. If we give
23 each one of them 75 cents, we're out of business. We can't
24 turn a profit.

25 THE COURT: I get it. Like I said, I'm not the

1 policy maker that may review it. Do you know how I think I
2 may benefit? Maybe you should all do your presentations
3 because I think you came in prepared to do that
4 understandably, and I don't want to shortchange you or short
5 shrift you, whatever the right word is. So you should feel
6 free, because you mentioned your slides. You should feel
7 free to put your slides up either now or I will give you a
8 chance to do a formal presentation.

9 MR. LOWENSTEIN: The only thing that I really
10 wanted to point out was the complaint and they made repeated
11 statements. I mean, I can put it up if you would like that
12 this Court has jurisdiction and that there's an immediate
13 issue.

14 THE COURT: They are not disputing I have
15 jurisdiction.

16 MR. LOWENSTEIN: But what they are saying,
17 they're saying not only can we not go somewhere else because
18 they want an anti-suit injunction, but they can. They can
19 go somewhere else. They can go to the ITC.

20 They say you've got the jurisdiction, you should
21 resolve the FRAND rate. There's an immediate issue to
22 establish declaratory judgment jurisdiction, but then they
23 say you should stay the case and let's forget about it.
24 Let's just go ahead and litigate in the ITC.

25 THE COURT: Wait, wait. Actually, they should

1 stay the case?

2 MR. LOWENSTEIN: In their papers they said that
3 we're not suffering irreparable harm because we could have
4 stayed the case.

5 THE COURT: Oh, but they didn't seek a stay in
6 the case?

7 MR. LOWENSTEIN: No.

8 THE COURT: I just want to make sure I didn't
9 miss anything.

10 MR. LOWENSTEIN: No. We have not sought a stay
11 either. The reason is because we think you should decide
12 the FRAND rate. We've all said it.

13 If you decide the FRAND rate, the ITC case goes
14 away, there's no injunctive relief, there's money damages
15 that's sufficient and everybody goes on their way.

16 So I mean I'm not quite sure what -- you know,
17 back to the success on the merits, what more we could have
18 said other than to, you know, try to get a declaration from
19 a French law expert to say this is the -- this is my
20 opinion. This is the conclusion a French Court would reach.
21 It doesn't mean that the other issues are, the other
22 preliminary injunction or anti-suit injunction factors are
23 off the table. You still need to consider them. But this
24 one thing is we believe we have a likelihood of success.
25 They disagree. But --

1 THE COURT: I will tell you where I am. I read
2 the two affidavits. I don't know what a French Court would
3 conclude. That's where I am. So where does that leave you?

4 MR. LOWENSTEIN: Well, I mean, I can address
5 what Mr. Borghetti said. Among other things, he said the
6 only thing the ETSI requirement established was an
7 obligation to negotiate in good faith, but both experts say,
8 well, that has been part of French law for 200 years. It's
9 a Napoleonic code. If that's true, why would ETSI establish
10 a rule that's already existing in French law? In fact, Mr.
11 Borghetti said, it doesn't make sense to have a contractual
12 provision that simply echoes existing law. It's redundant
13 and it would not be correct. So we get into a fight about
14 whose intentions should govern and frankly I'm not sure it
15 matters. Right?

16 Stoffel-Munck, our expert, says, well, you can't
17 really figure out ETSI's intention. What you need to do is
18 look at it from the perspective of a reasonable person.

19 And their expert says, no, no, no. You can
20 figure out ETSI's intention and he goes through a litany of
21 argument about why it is you can discern their intention.
22 And if you think --

23 THE COURT: You understand, right, your
24 co-defendant says that I should apply the principle that we
25 use in the United States to determine whether the implied

1 covenant of good faith applies and what the scope of it is.
2 You don't dispute that?

3 MR. LOWENSTEIN: I don't dispute it.

4 THE COURT: How do you respond to that, that
5 Delaware law, which governs a lot of contracts in this
6 country. Right? And Delaware law says if the contracts are
7 silent, then the Court is supposed to put itself in the seat
8 or seats of the parties during this contract negotiation and
9 figure out what the parties would have agreed to. Right?
10 And if I do that, I don't think Philips would have agreed to
11 preclude itself from seeking an injunction generally or
12 under the circumstances of this case.

13 So what do I do with that? If that's where I
14 am, it sounds like I almost have to rule in their favor.

15 MR. LOWENSTEIN: Well, I don't think ETSI would
16 have allowed them to sue for a license at the same time they
17 would sue for an injunction. I mean, we can speculate on
18 what ETSI would have done and what Philips would have done.

19 If you come back to a reasonable person
20 standard, why would somebody agree to allow you to sue for a
21 license and sue and throw the other person out of business
22 all at the same time?

23 THE COURT: Well, when you phrase it like that,
24 I think a reasonable question would be, well, why would you
25 agree to let a manufacturer continue to use a product even

1 though it was telling the other side it was actually in good
2 faith, never actually consider the license in good faith and
3 fully negotiate and dillydally and get to use the property
4 that's otherwise protected by the patent. Right?

5 MR. LOWENSTEIN: There's --

6 THE COURT: It's how you view it, isn't it?

7 MR. LOWENSTEIN: Well, I agree, but there's a
8 remedy for that, and the remedy is come to you and say set a
9 FRAND rate. We have no problem with that.

10 THE COURT: No, you do, though. That's the
11 point. You do, because you want to challenge the patent
12 validity and you want to argue, you want to make every
13 possible argument you can to exert leverage on Philips to
14 lower its demand for a license.

15 MR. LOWENSTEIN: I suppose the opposite is true,
16 too.

17 THE COURT: It is. That's the point. I fully
18 agree with that. Put that on the record. Mark that line.
19 That's exactly the point. The opposite is true. It depends
20 on your perspective.

21 MR. LOWENSTEIN: I don't think we want to
22 dillydally. I don't think you would allow us to dillydally,
23 but we do want a fair rate and 75 cents for the reasons I
24 said is not a fair rate for us. And they may have licenses
25 that they're going to talk about and this goes into the

1 confidentiality issue and I don't know how you want to deal
2 with that.

3 But for Telit, it's not a fair rate. It doesn't
4 seem to be a fair rate for Thales. It doesn't same to be a
5 fair rate to reflect Telit or three of the customers. So
6 the idea that we're all being unreasonable and we're all
7 dilly-dallying and we're all acting improperly and the only
8 party in this lawsuit is Philips -- I mean, it's possible,
9 but it seems unlikely.

10 So, you know, can I make one suggestion here?
11 Is this the kind of thing you would consider sending to a
12 special master to figure out what the proper rate is,
13 because it is fact-intensive and we have no interest in
14 litigating the validity or infringement of a thousand
15 patents. I don't think they do either. But we do need to
16 explain to somebody that 75 cents is improper and one of the
17 reasons that, one of the ways we do that is to say, you
18 know, some sample of these patents are invalid, some sample
19 is not.

20 THE COURT: Well, I don't think you have to do
21 a special master. I can do something like that. I mean,
22 that's not the issue.

23 MR. LOWENSTEIN: Okay. But, you know, we need a
24 mechanism to show you that the licenses that they have
25 granted are not in our view fair or reasonable.

1 THE COURT: Right. I get that.

2 MR. LOWENSTEIN: And the easiest way for me to
3 point out is this Arcos license. And then the case --

4 THE COURT: Right.

5 MR. LOWENSTEIN: -- the case that does not
6 actually stand for what the -- that that is a proper
7 license. Apparently, there's a fair of proof. Arcos was
8 not able to prove that 75 cent was unreasonable and I
9 suppose they settled after that. But, you know --

10 THE COURT: All right. What's your name, sir?

11 MR. THOMPSON: Eley Thompson.

12 THE COURT: Thompson. Mr. Thompson, let me hear
13 from you for a couple of minutes.

14 Thank you, Mr. Lowenstein.

15 MR. LOWENSTEIN: Thank you.

16 THE COURT: Mr. Thompson, let me tell you what
17 bothers me and it bothers me a lot. It bothers me that
18 Philips sued in our court, brought this lawsuit the same day
19 it brought the ITC proceeding.

20 If you had brought the ITC proceeding first, you
21 know, I could understand that, but for you to bring the case
22 here at the same time you're bringing the ITC case troubles
23 me that our case is -- that you're really not asking us to
24 exercise our powers or you're undermining the Court's
25 ability to fully and properly adjudicate the very claims

1 you've brought before us.

2 How do you address that?

3 MR. THOMPSON: Well, Your Honor, first off, I
4 would say that it's very common practice. Let me just
5 start, which is a bigger picture.

6 THE COURT: Really? It's common practice?

7 MR. THOMPSON: Yes, indeed, to file an ITC case
8 at the same time as a district court case, and there are
9 different statutes, of course, Title 35 and Title 19. And
10 the ITC -- the statute relative to the ITC includes a number
11 of provisions that indicate that it is the preferred
12 proceeding to go forward.

13 THE COURT: Right. Why didn't you go there
14 first?

15 MR. THOMPSON: I thought I answered that. It's
16 because the common practice to file it --

17 THE COURT: Was it a FRAND case?

18 MR. THOMPSON: I'm sorry?

19 THE COURT: Is it a common practice in a FRAND
20 case?

21 MR. THOMPSON: In all cases to my knowledge,
22 yes.

23 THE COURT: Wait. I've got to make sure. Do
24 you practice patents?

25 MR. THOMPSON: Yes. That's all I've done for

1 the last 30 years, is practice IP law.

2 THE COURT: I have over 300 patent cases.

3 MR. THOMPSON: Well, not every patent case has
4 an ITC case.

5 THE COURT: I'm just trying to think about how
6 many have an ITC case. That's what I'm getting at.

7 MR. THOMPSON: You have a domestic industry to
8 appear before the ITC, which means you've shown a domestic
9 industry in the U.S. that needs to be protected, and so if
10 you can make that showing, only then can you go to the ITC
11 because that's the nature of the statute.

12 THE COURT: Okay.

13 MR. THOMPSON: But not everybody can do it.
14 Right? If you don't have --

15 THE COURT: I do know people do it. The idea of
16 common practice the same day you file a lawsuit in Delaware,
17 you're filing an ITC proceeding? Well, that's news to me.

18 MR. THOMPSON: I mean that in the context of
19 when you can file. When are filing an ITC case -- maybe I
20 should switch this around a little bit.

21 When you are filing an ITC case, it's common
22 practice to file a district court case as well at the same
23 time and then, of course, the statute, as you pointed out
24 earlier, says that the defendant stays the district court
25 case.

1 The other thing is that the primary statute
2 under Title 19 is 1337, and it provides that the
3 proceedings, of course, as you mentioned before are to be
4 resolved at the earliest practical time. That's 337(b)(1).

5 It also says, you know, as you mentioned, the
6 1659 about the stay. Right? This is the congressional
7 mandate for how the system is supposed to work, how this
8 Court gets jurisdiction under Title 35 and how the ITC has
9 jurisdiction under Title 19. It says, and this is, I think,
10 important, because we hear a lot about irreparable harm and,
11 you know, the ITC doesn't do this.

12 1337(c) says, all legal and equitable defenses
13 may be presented in all cases. Okay. All legal, all
14 equitable defenses, full due process, and only then a
15 ruling. A ruling by a Court that gives you full due process
16 is not irreparable harm, and I would lay on top of that that
17 if you had any issue with that --

18 THE COURT: Well, wait. I thought they even
19 cited authority for that, that irreparable harm is not
20 considered in the ITC. No?

21 MR. THOMPSON: No. They are trying to say that
22 the eBay factors that's used for irreparable harm for
23 injunction in a district court case is different than what
24 is ITC does. And the ITC, of course, has its own statute,
25 including domestic industry, a requirement of slowing

1 domestic industry and all of its procedures and burdens of
2 proof that a plaintiff like Philips has to show. So they
3 are not the same proceeding.

4 I think that --

5 THE COURT: Is it your position that the ITC
6 proceeding will give due regard to the harm that they will
7 suffer? That's your position?

8 MR. THOMPSON: Absolutely, absolutely. Every
9 legal and equitable defense they can raise. As a matter of
10 fact, I think they cited to you some letter that was a
11 policy letter that showed an instance where the defense was
12 raised and it was successful in that case. It's not
13 successful in every case. Right?

14 That was a policy under -- President Obama
15 decided that the Court's judgment should not be enforced.
16 That's a policy of the administration that changes whatever
17 the administration changes and, of course, we're in the
18 midst of a whole change now in the administration.

19 So it's unclear what any policy will be. It's
20 not law though. And I wanted to make that point because I
21 do think that ultimately, that is a really helpful thing to
22 bear in mind, is that when it comes to deciding what is a
23 breach or not in these cases, there has been so much
24 argument about policy and with the suggestion that that
25 should be law.

1 I wanted to give Your Honor just a citation.
2 That has actually come up before in the Federal Circuit.
3 They made this statement in the Unwired Planet v. Google
4 case which is cited on page 5 of our slide. They say
5 general policy statements are not legally binding, and then
6 the case goes into what it takes to make a policy of whoever
7 it may be -- the DOJ, the antitrust division, whoever it may
8 be in an administration says something, and there's lots of
9 papers in all of these submissions because we had to answer
10 what they were saying. And also Europe, the EC, or
11 whatever, implying competitive law. None of that is law
12 like you were saying. It's not a legal right.

13 And so when we look at the, going back to the
14 ITC, I was referring to the differences. One case that we
15 cited is In re Carpenter, which is a Third Circuit case,
16 which goes into all of the various differences that are
17 between the ITC and district courts. In that case, by the
18 way, the question was whether a district court in this
19 circuit should enjoin the ITC and they declined, right, and
20 it goes through all the reasons why.

21 Now, some of the defenses, just to remind you,
22 Exhibit 8 in DI 17. We submitted one of their public
23 interest statements where they said, they raised this
24 defense. I will just repeat it. Complainants's license
25 demand in Delaware is antithetical to the relief sought

1 here, that's in the IT, namely, injunctive remedies. They
2 pursued that. Telit has a fifth defense.

3 THE COURT: Your quote is from what they told
4 the ITC?

5 MR. THOMPSON: Right. I'm saying they are
6 raising the defense of due process.

7 THE COURT: Right.

8 MR. THOMPSON: The fifth, the fifth defense in
9 their answer in the ITC is that they, that plaintiffs are
10 barred from obtaining any relief in this investigation on
11 the basis of an implied or express license.

12 Then there's another one. Breach of contract
13 defense, which is exactly what you've heard. I won't bother
14 repeating that.

15 Thales has the same sort of thing, and in DI 37,
16 Exhibit N, we submitted their, one of their submissions that
17 raises the exact same points I just made a second ago.

18 So there's another thing that I don't know has
19 been highlighted so far, which is that there is sort of an
20 illustration in the statute itself for the ITC. It's
21 1337(c), which contemplates that counterclaims can be
22 brought in the ITC and what happens procedurally in those
23 instances is that the counterclaim gets referred to a
24 district court.

25 Right? So you file a counterclaim in the ITC.

1 Whatever it may be, equitable remedy or whatever, it goes to
2 the district court. And then the statute, Congress' mandate
3 says this, and I will quote it: "Action on such
4 counterclaims shall not delay or affect the proceeding
5 under this section." That's a pretty clear mandate about
6 what Congress thought was the relationship between the
7 district -- of course, that's just one on top of the 1659
8 about how the district court case should be stayed. Right?

9 So those are some of the differences between --

10 THE COURT: But why do you file a district court
11 case?

12 MR. THOMPSON: Because at one point in time
13 there may be a determination of damages.

14 THE COURT: Why don't you wait and file it? Why
15 do you file it at the same time you file the ITC?

16 MR. THOMPSON: You know, I think that aside from
17 practice, I think it's plaintiff's choice of venue would be
18 one reason. You know, finding the proper Court that you
19 will want -- like, I mean, for example, we filed the case,
20 Philips filed a case, all of the cases here in Delaware.
21 There's obviously an economy for that.

22 If we would not have -- we might have seen cases
23 coming up all over the place, right, and then we would be
24 into multidistrict litigation. We'd have all of that
25 complication to try to deal with it.

1 THE COURT: Okay.

2 MR. THOMPSON: I mean, that's one particular
3 reason why it makes sense in this instance.

4 THE COURT: Why don't you move to stay these
5 cases?

6 MR. THOMPSON: Well, because it's not our -- I
7 mean, we could move under the discretion of the Court.

8 THE COURT: Doesn't 1659 apply to your party?

9 MR. THOMPSON: Oh, no, no. It applies to
10 defendant.

11 THE COURT: All right.

12 MR. THOMPSON: Right. So I wanted to speak for
13 a moment, if I could, about which I think is -- when I was
14 working through this to come and present, I was thinking I
15 think a lot along the lines you're saying. What's the
16 right? You know, how do we resolve this? How do we write
17 an opinion on this?

18 And so in the beginning slides, for example,
19 slide 3 --

20 THE COURT: Why don't you put them up.

21 MR. THOMPSON: Sure. Oh, sorry. Okay. Excuse
22 me. I've been told that I misstated the case. It's not In
23 re Carpenter. That was the way I remembered it.

24 THE COURT: Okay.

25 MR. THOMPSON: It's In re Convertible Rowing.

1 THE COURT: Convertible Rowing?

2 MR. THOMPSON: Yes. It's cited in our papers.

3 It's --

4 THE COURT: Give me the cite.

5 MR. THOMPSON: Yes. It's 616 F. Supplement,

6 1134.

7 THE COURT: Wait. It's not a Third Circuit

8 case?

9 MR. THOMPSON: No. Delaware.

10 THE COURT: That's not a Third Circuit case.

11 MR. THOMPSON: I mean a court in the circuit.

12 I'm sorry.

13 THE COURT: No, no. I'm not faulting you, but

14 just so you'll know, when you say Third Circuit, I'm

15 thinking the Third Circuit. That's precedent. When you

16 say any court in the Third Circuit, district courts, that's

17 not precedent. But I'm not saying I wouldn't want to see

18 it.

19 MR. THOMPSON: I apologize for not being precise

20 the way I said it.

21 THE COURT: That's all right.

22 MR. THOMPSON: I just meant that it was from

23 this Circuit. It's from this Court, by the way, the

24 District of Delaware.

25 THE COURT: Was it Judge Farnan's? Whose was

1 it?

2 MR. THOMPSON: It was the Chief Judge before
3 Schwartz, I believe.

4 THE COURT: Okay.

5 MR. THOMPSON: Okay. So anyway, I'm happy to
6 clarify that.

7 So in looking at what is the right that we're
8 talking about? Well, one thing is I think you've got to
9 look at the actual declaration. Right. So we've cited that
10 there.

11 It's Exhibit H to their papers and I note this
12 just so it makes it easy for the Court to actually refer to
13 this, the document, the document that has it. It says, of
14 course, which we've talked about that Philips, there's a
15 phrase, and I won't bother repeating it here, but more or
16 less with caveats, because there are specific things like
17 it has to be essential and things like that, that they would
18 be willing to offer a FRAND license under ETSI.

19 Now, one of the questions is: What does that
20 mean? Right? What does being willing mean?

21 Well, one thing it means is that when you look
22 at FRAND and what a rate or a term or an amount is in FRAND,
23 it's oftentimes thought of as a range. Right?

24 So you can be -- the negotiation goes on. I
25 think a lot of the cases, and you may see it as you review

1 them, talked about a range of FRAND where parties may
2 negotiate and end up with it in this range, and I think
3 both parties talk about that and mentioned it in their
4 brief.

5 As far as what the obligation of the plaintiff
6 is or the patent owner is, the obligation is to be willing
7 to make an offer in the FRAND range, and that is exactly
8 what Philips has done, and we outlined -- and also, by the
9 way, more than that, been willing to go beyond that and work
10 for years to try --

11 THE COURT: But do you think I should get
12 involved in all of this?

13 MR. THOMPSON: No, because I don't think they've
14 proven it. I just raised it because I kind of felt like the
15 Court deserved to hear a little bit more about what was
16 going on rather than them coming in because their papers are
17 really a per se. I mean, they say it's not, but in reality
18 it's a per se argument that if -- that you can't get an
19 injunction. I would say, of course --

20 THE COURT: I agree. I read their papers and
21 it's policy.

22 MR. THOMPSON: Right.

23 THE COURT: You can't allow somebody to do this.

24 MR. THOMPSON: Right.

25 THE COURT: That if somebody said they're

1 willing to license, at that point the member can't seek an
2 injunction. They've got to negotiate, and even maybe
3 especially if you are already in front of a Court, but
4 that's really the gist that I took from their briefs.

5 I took from the arguments this morning, they are
6 much narrower. We've got these very particular facts, and
7 if you look at these very particular facts and the
8 representations we make either to the Court, and you hear
9 this French law professor applies his understanding of
10 French law to the particular facts of this case, then they
11 should just be on the merits.

12 MR. THOMPSON: I submit they have not even come
13 close to carrying their burden on that. I will say what I
14 found particularly helpful was the 1994 policy at -- we call
15 it ETSI.

16 Their 1994 policy is, of course, what's
17 reflected in the declaration that is the actual contract.
18 In 1993 there was a major debate which basically some
19 parties were arguing exactly what they are arguing now.

20 THE COURT: Right.

21 MR. THOMPSON: That if an implementer were to
22 say --

23 THE COURT: Actually, I read this and it was
24 rejected.

25 MR. THOMPSON: It was rejected.

1 THE COURT: I remembered it. Right. Then I
2 started thinking there was a problem with the way the
3 briefing is.

4 All right. Do French courts consider
5 legislative history? Do French courts go and consider what
6 a commission, let alone Congress or the equivalent or
7 whatever the French body would be over there in Congress,
8 but do they consider this legislative -- this commission
9 equivalent of legislative history? I don't know. Right?
10 And nobody tells me what the French law says about what
11 French courts do then. You don't tell me that.

12 MR. THOMPSON: Right. But I can tell you what
13 U.S. courts say about it, which is actually on slide 4.
14 There are two citations where this very issue had come up.

15 Now, they're ITC cases, but they went through
16 the back and forth and a couple quotes that you may look at
17 later, but it's that the agreement doesn't intend to, it
18 does not bar any remedy beyond the reach of -- there's no
19 remedy beyond the reach of the parties.

20 And it talks about down in the second one that
21 there were several attempts made to introduce the language.
22 We gave you the direct evidence of it and that they have all
23 been rejected. We gave you the direct evidence of that.
24 This is a court that made a ruling on that and said, look,
25 it's not --

1 THE COURT: You say it's a court.

2 MR. THOMPSON: Well, it's a court in the sense
3 that's the Commission's opinion from the ITC. That's a
4 court. I mean, it's an administrative court. It's not an
5 Article III.

6 THE COURT: It's the ITC --

7 MR. THOMPSON: It's not an Article III Court. I
8 will say the same thing is reflected in the other decisions
9 that we talked about, like with the Apple decision where it
10 said no per se and that sort of stuff, that the same sort of
11 notion has been reflected in Article III Courts as well.
12 Right?

13 And the bottom line is though, however you
14 look at this, the point about let's say that we go back to
15 what -- would the party Philips have agreed to it? It's
16 pretty clear, no. It was raised and rejected and we have
17 that record. Right?

18 And, in addition, I will say that I believe
19 Borghetti talked about under French law when you're doing
20 this sort of thing like you were saying in following
21 Delaware law, that they have followed the same sort of
22 thing. If it's not -- if it's something like this and it's
23 not in there, they won't put it in, French law won't put it
24 in.

25 And I'm afraid I don't have the citation for

1 that paragraph, but I do know that it's in Borghetti's
2 declaration.

3 So if you take that, right. So if we think
4 about that, and --

5 THE COURT: They're moving to strike Borghetti's
6 declaration. Right?

7 MR. THOMPSON: No. We moved to strike --

8 THE COURT: Oh, my goodness. Wait a second.
9 I've got them mixed up again. Borghetti is your guy.

10 MR. THOMPSON: It was the reply.

11 THE COURT: No, wait. No. If they didn't move
12 to strike -- I thought they did in their papers. Hold on a
13 second.

14 MR. LOWENSTEIN: Your Honor, you may be mixing
15 up our request. We said that there are a number of
16 paragraphs in Borghetti.

17 THE COURT: Right. You said he's not a French
18 law expert?

19 MR. LOWENSTEIN: No, no, not Borghetti. He is
20 definitely a French law expert, but Huber is not.

21 THE COURT: That's what it is. I am mixing it
22 up with Huber. I apologize.

23 MR. THOMPSON: All right.

24 THE COURT: I just remember you had a bunch of
25 paragraphs together.

1 MR. LOWENSTEIN: Yes.

2 MR. THOMPSON: I was referring to Borghetti when
3 it came to that.

4 THE COURT: Sorry.

5 MR. THOMPSON: I will say, one thing I would
6 like to offer on page -- slide 5, is just an observation
7 that might be useful to the Court from the Apple v. Motorola
8 case before Judge Crabb.

9 You know, the thing about these arguments that
10 guilty made by the implementers, right, is that they tend to
11 argue a lot of policy because the contract simply doesn't
12 provide the relief they want. They need to change it. And
13 so it has come up in the context. Here's another instance
14 where the judge has said, look, that's not what the
15 declaration says.

16 And so, you know, so one thing -- and so if we
17 talk about the likelihood of success, right, so can they
18 show a likelihood of success?

19 In addition to that Apple v. Motorola case, the
20 Microsoft v. Motorola case that's in the Ninth Circuit as
21 well says that the right of an injunction is permitted under
22 the ETSI contract. Right? So it's not just a breach.

23 And then, of course, we had the, okay, well,
24 it's not a breach at least under a per se rule. We want a
25 new rule for the facts of this case. And that's where we

1 withdrew and showed that they can't fail to show that
2 Philips was not offering a FRAND license. They need to show
3 that. They have to prove it. Right?

4 To show a likelihood of success, they have to
5 show that Philips didn't offer a FRAND license, which we
6 have. We submitted the license. They didn't. We did.
7 And, two, so they failed to prove. Right? If it comes from
8 anywhere, it comes from us.

9 They've never really tried to address the
10 negotiations. Only really we have, and when we did, in
11 their reply brief, they responded.

12 THE COURT: Hold on a minute. So let's assume
13 for argument's sake I agree with them, you didn't offer them
14 a FRAND license.

15 MR. THOMPSON: Okay.

16 THE COURT: Do you lose on the likelihood of
17 success on the merits?

18 MR. THOMPSON: If you were to conclude that not
19 only was the license attached, not FRAND, but so were all of
20 the other offers --

21 THE COURT: Yes, but let's suppose they say --
22 let's suppose they persuaded me that you -- let's suppose
23 they just say you've reached the ETSI obligations.

24 MR. THOMPSON: Yes.

25 THE COURT: Are you saying they're the same

1 thing?

2 MR. THOMPSON: No, because there are other
3 factors, too. You have to go to the irreparable harm.

4 THE COURT: Are you saying they win --

5 MR. THOMPSON: On the likelihood of success on a
6 breach of contract, if you find someone has breached this
7 contract, then, yes.

8 THE COURT: Okay. Wait. So then you agree with
9 them, that the test is not whether you have a contractual
10 obligation to not go to the ITC. You're saying they've got
11 to prove that you just breached a contract, period?

12 MR. THOMPSON: Right. They had -- there are two
13 levels to that. One, their argument, because they never
14 addressed the argument because they can't show a breach. So
15 they have to stick with that you can't go to the ITC. If I
16 make a declaration, I can't go to the ITC, and that has been
17 rejected under the contract like I was showing you before.

18 THE COURT: That part I get. Now you're adding
19 this other thing. But if they show you breached any
20 provision of the ETSI, then they've got likelihood of
21 success on the merits to win an injunction to preclude you
22 from going to the ITC?

23 MR. THOMPSON: They have to show the other
24 elements, but they have not shown that is what I'm saying
25 and that's the only other way that you could do it. It's

1 Philips that has presented that to show that it has acted in
2 good faith. It had five different offers to one of the
3 parties and four different offers to the other one and it
4 worked over the years to try to get them over the last six
5 years to try to get them to license and then meanwhile this
6 is supported in the evidence.

7 They declined the offers and still do today,
8 right now. Right as we stand here, they're declining the
9 FRAND offer that Philips made. Right? And they have also
10 delayed over, over all of these many years and we provided
11 the evidence for that.

12 THE COURT: All right. Give me a second. I'm
13 confused.

14 MR. THOMPSON: Yes, Your Honor.

15 THE COURT: All right. So I understood the
16 likelihood of success on the merits for this injunction
17 that's pending before me, this request for an injunction to
18 be basically a likelihood of establishing that under the
19 ETSI contract, Philips was precluded from going to the ITC.
20 So the contractual breach that's at issue, as I understood
21 it in this particular proceeding, is a breach of an
22 obligation under ETSI not to go to the ITC.

23 MR. THOMPSON: I think that's correct.

24 THE COURT: And they had to establish, A, that
25 ETSI has a requirement that precludes you from going to the

1 ITC, and clearly, once they establish that parameter, it's
2 undisputed you did go to the ITC, so that would be the
3 breach.

4 MR. THOMPSON: Right.

5 THE COURT: Now, there are obviously under ETSI
6 other contractual obligations that are not in dispute.
7 Right? I guess one of them is at some point you have to
8 offer them a FRAND. Under certain conditions, you have to
9 offer them a FRAND.

10 MR. THOMPSON: I would suggest that that is
11 actually the only contractual obligation. It's one that
12 they are drumming up that doesn't existed in the agreement.

13 THE COURT: I get that, and that is why I think
14 there may be a disconnect between us, because what I thought
15 you said was that they showed that you breached your
16 obligation to offer a FRAND, that they won, they won on the
17 likelihood of success on the merits.

18 Now, I get where they win at the conclusion of
19 this case. I mean, in other words, the claim before us is
20 did you violate your obligations under ETSI.

21 MR. THOMPSON: Right.

22 THE COURT: And I'm oversimplifying, but I think
23 one of those obligations is under, you know, certain
24 circumstances to offer a FRAND.

25 MR. THOMPSON: Okay.

1 THE COURT: And whoever -- and you're going to
2 say we did offer a FRAND and they didn't, and that's the
3 contract dispute that ultimately that I have to resolve on
4 the merits in this case.

5 MR. THOMPSON: Yes, true.

6 THE COURT: But that's not what I have to
7 resolve today is the way I understood it, because what I
8 understand they are saying is, by the way, you have this
9 other contractual obligation, you, Philips, and you can't go
10 seek an injunction in the ITC. And in my mind coming in
11 until about 20 minutes ago, that's what I thought I had to
12 resolve today or in connection with the pending motion, is
13 have they demonstrated a likelihood of establishing that, A,
14 there is an obligation to preclude you from going to the ITC
15 and, B, you did, you breached the obligation. But --

16 MR. THOMPSON: That's right. I think that
17 that -- I don't mean to confuse the issue by pointing out
18 what I pointed out. I just -- I agree with you, that they
19 say that the obligation is you can't seek an injunction and
20 that is all they've said, and our position is that there is
21 no such requirement in the ETSI declaration contract, and as
22 a result, there's just no way that they can carry that
23 burden.

24 THE COURT: Okay.

25 MR. THOMPSON: It's as simple as that.

1 THE COURT: All right. Sorry, but I guess I
2 just misinterpreted what the last ten minutes have been.

3 MR. THOMPSON: Well, and I apologize.

4 THE COURT: You don't need to apologize. I'm
5 sure I'm wrong on this or I will figure it out. You don't
6 need to apologize by any stretch. I'm just trying to figure
7 it out. I feel like I'm missing something, and that's --

8 MR. THOMPSON: And I think that may be the
9 reason that I said that, is because maybe that I thought
10 that they had mis-portrayed what the obligation is, so I
11 felt like I needed to talk about what I felt the actual
12 obligation was.

13 But they are not trying to establish any
14 likelihood of success under the actual obligation. It's
15 only this one that they've created that's not in there. So
16 maybe that's why I brought it up. I didn't think that they
17 had asserted it because they haven't.

18 We addressed it because it actually kind of goes
19 to what the actual agreement talks about. They've asserted
20 an obligation in the agreement that simply does not exist.
21 And so I won't bother going through.

22 In our slides we did talk about all the
23 different offers that were made. I will say on that, they
24 never really offered any evidence in that regard, just like
25 we're saying now. And I think that in that respect, I would

1 then turn to irreparable harm, if I may.

2 THE COURT: Not yet.

3 MR. THOMPSON: Okay.

4 THE COURT: Let me hear the other side. First
5 of all, do you have anything else you want to say in terms
6 of likelihood of success on the merits?

7 MR. THOMPSON: I will say --

8 THE COURT: Likelihood --

9 MR. THOMPSON: I will skip over irreparable
10 harm and just finish up on likelihood of success, if that's
11 okay.

12 THE COURT: Yes.

13 MR. THOMPSON: I will say there is a case that I
14 think might be useful for the Court, which is the Apple v.
15 Motorola. It's DI 17, Exhibit 5, at pages 105 to 106 after
16 Judge Crabb heard the argument from the parties on a
17 preliminary injunction like this. Maybe we can put that up.
18 Slide 23.

19 She's denying the motion for preliminary
20 injunction. She can't see any likelihood of success and it
21 would be inappropriate in her view for a district court to
22 interfere with an ITC proceeding, and it makes no sense that
23 that could be what Congress had in mind.

24 And then I would say another thing she pointed
25 out is the status quo. Usually, with a preliminary

1 injunction, you try and maintain the status quo. Here, we
2 have a trial, a hearing -- hearing and trial is set in the
3 ITC for four months from now.

4 THE COURT: September?

5 MR. THOMPSON: It won't change. They hardly
6 ever change. It could possibly, but it's not like the
7 district court, where schedules, there are conflicts and
8 stuff. The ITC pretty much sticks to the schedule they've
9 got.

10 And so in four months time -- she said three
11 months time, it's four months. It's very similar. So
12 that's a ruling I thought might be helpful for Your Honor.

13 So with that, I will -- if you have any
14 questions? Otherwise I will turn the podium over.

15 THE COURT: All right. Thank you.

16 MR. THOMPSON: Thank you, Your Honor.

17 THE COURT: Yes?

18 MR. ZEINEDDIN: May I, Your Honor?

19 THE COURT: I'm definitely -- yes. So we could
20 take a lunch break now, come back. What do you want to do?

21 MR. ZEINEDDIN: Whatever you'd like to do, Your
22 Honor.

23 THE COURT: No. I mean, how long was your
24 thought?

25 MR. THOMPSON: No. I was just standing because I

1 thought we were going to have a conversation.

2 MR. ZEINEDDIN: I have a few quick points to
3 make about some of the points that were made, but I can make
4 them, whatever you want.

5 THE COURT: Why don't you finish up likelihood
6 of success. We'll take a break for lunch. Then we'll do
7 irreparable harm after lunch.

8 Mr. Lowenstein --

9 MR. LOWENSTEIN: I withdraw my head shake. I
10 just wanted to make two points.

11 THE COURT: I will make sure you get a chance to
12 do that. All right.

13 MR. ZEINEDDIN: Thank you, Your Honor. Just --
14 thank you for your indulgence. I want to start with that
15 last point on the Apple/Motorola before Judge Crabb. I was
16 actually in that courtroom.

17 In that very specific exhibit, Exhibit 7 that
18 was just cited, Your Honor, it's telling -- if you take a
19 look at page 84 and you'll see Motorola's counsel on the
20 bottom saying, and this is, he's referring to --

21 THE COURT: Page what?

22 MR. ZEINEDDIN: This is Motorola's counsel.

23 THE COURT: Right. On 47?

24 MR. ZEINEDDIN: Page 84.

25 THE COURT: Oh, 84. Sorry.

1 MR. ZEINEDDIN: I misspoke.

2 THE COURT: Okay.

3 MR. ZEINEDDIN: So he's talking about what's
4 going on there. There are portions of the record that are
5 sealed, but this will show you what's going on. This, and
6 then after that, what the judge will say.

7 To say -- this is at the bottom, around line 23.
8 To say we are not going to adjudicate FRAND and deal with
9 FRAND in court and we're going to splinter off existing
10 proceedings where those issues can be addressed in due
11 course, stop, throw a wrench into an ongoing ITC proceeding
12 in violation of clear statutory mandate demands that those
13 proceedings not be delayed.

14 So what Motorola is complaining of is Apple
15 saying you've got to stop the ITC, but guess what? We're
16 not going to discuss FRAND rates. We're not going to
17 discuss the FRAND meaning in court.

18 Page 86 right across, it says, the Court on line
19 11: Right. My sense is that if the Court could do
20 anything, it would only be in the situation where the party
21 that had absolutely refused and the party with essential
22 benefits just said we're not going to -- we're going to
23 engage in any kind of negotiations. We don't want a license
24 and we don't have a license.

25 So, Your Honor, that kind of gives you an idea

1 of what was going on in that case. Two extremes. They're
2 discussing the case where Apple at that point, who was the
3 implementer, did not want to discuss FRAND, did not abide,
4 did not indicate that it would abide by the Court's FRAND
5 decision on any rate that the Court would render.

6 This is not what we are talking about here.
7 We did not come here, nor did we ever say in our briefing
8 we did not advance any dogmatic approaches. We're not
9 talking about what's never available and what's always
10 available.

11 THE COURT: Are you saying the Court, that
12 the --

13 MR. ZEINEDDIN: And --

14 THE COURT: The accused infringer in the
15 Wisconsin case --

16 MR. ZEINEDDIN: So --

17 THE COURT: -- said it wouldn't be bound by the
18 Court?

19 MR. ZEINEDDIN: So basically, you had Apple
20 saying on one hand that you should -- that unless if they
21 absolutely refuse to negotiate, that's when the injunction
22 would be, would be granted. That is how extreme their
23 position was. We're nowhere here.

24 In that case Apple never said they would abide
25 by the Court's determination of FRAND rate. In that Court,

1 Apple never said they wanted to kind of start evaluating,
2 you know, this back-and-forth kind of negotiation. As far
3 as they're concerned, as long as there's any kind of
4 back-and-forth negotiation, what you would end up with is no
5 injunction.

6 We're in a very different situation here. We
7 came here, Your Honor, where they came, and mind you, we
8 were confused. They came here to set the rate and we said,
9 fine. And on the point on that slide, the first slide that
10 you saw, we never said we don't want to pay back damages or
11 back release, whatever it is that they're entitled to. We
12 followed the roadmap that they set and we have just told you
13 here and we're here on the record. The license would be for
14 the forward and then the past release and they get every
15 penny they're entitled to as set by the Court for
16 everything, past and forward.

17 Your Honor --

18 THE COURT: You know, I am kind of in a way back
19 where I started this morning. What gets me is although I am
20 troubled by, in a sense, the duplication of resources,
21 bringing a case here, bringing a case in the ITC, it really
22 doesn't matter that they brought a case here. What matters,
23 because you're seeking an injunction of their bringing an
24 ITC.

25 Suppose they went to the ITC and they didn't

1 file a lawsuit here and came here and said, give me an
2 injunction to prevent them from going to the ITC. I would
3 be back at, well, Congress gave them a right to go to the
4 ITC and how can I prevent them?

5 MR. ZEINEDDIN: So, again, the question that
6 you -- the points that you were noting just a few minutes
7 ago about the question of law. The question of law under
8 French law, which we included actually is an exhibit is that
9 contracts must be negotiated in good faith. That's simple
10 code.

11 And as you noted, Your Honor, all of these
12 experts are saying, the French experts, well, we think if
13 this was adjudicated by the trier of fact in France, it
14 would be here. And here, what we're saying is that under
15 the circumstances, good faith dictates that when we say we
16 will abide by what you said, which is what they requested.
17 Then that's the end of the story, because the relief that
18 you would be rendering is a hundred percent inconsistent
19 with the relief they are seeking in the ITC.

20 THE COURT: Right. And the thing that I like
21 about your position is at least I think I know the roadmap.
22 The roadmap for, as I understand it, your position is, okay.
23 They have breached a contract. You're a third-party
24 beneficiary of the contract. You get to come here and make
25 them comply with the terms of the contract. The contract is

1 the ETSI contract.

2 The ETSI contract is governed by French law.
3 French law has an implied covenant of good faith. You don't
4 have any decision from the French courts telling you what it
5 is, but you've got United States district courts saying that
6 general common law principles of contract interpretation
7 that we use are also used by French courts. Therefore, you
8 ought to apply them. Therefore, I can apply United States
9 common law, principles about the implied covenant, good
10 faith to the ETSI contract, and I can apply it to the facts
11 of this case and make my decision. That's your roadmap.
12 Right?

13 MR. ZEINEDDIN: Moreover, they came to a U.S.
14 Court.

15 THE COURT: Okay.

16 MR. ZEINEDDIN: They came to a U.S. Court to do
17 exactly that.

18 THE COURT: I got you.

19 MR. ZEINEDDIN: Okay.

20 THE COURT: I actually can follow that decision
21 tree.

22 MR. ZEINEDDIN: And that's exactly what we're
23 saying.

24 THE COURT: Okay.

25 MR. ZEINEDDIN: And now there's one --

1 THE COURT: Now, your decision tree is a little
2 bit different than Mr. Lowenstein's. I understand your
3 decision tree.

4 MR. ZEINEDDIN: Right.

5 THE COURT: Okay.

6 MR. ZEINEDDIN: And there's one more thing. So
7 not every case that gets filed in the ITC on SEP, somebody
8 comes to the district court and seeks a rate setting for the
9 entire portfolio and then the other side, the implementer
10 comes in and says, we're going to do it, the whole
11 portfolio.

12 Your Honor, you would be setting the rate, you
13 will be setting the money for the past and the future for
14 French families, Chinese families. We want to present to
15 you the evidence as to the likelihood of how good these are,
16 what their incremental value is, and they'll do the same.

17 And, by the way, Your Honor, the U.K. Court that
18 they keep citing, Unwired Planet, did just that, allowed the
19 parties to present evidence. Well, how many of them do you
20 think are essential? How good are they? Both parties said
21 what they had to say and they came out with a rate.

22 And then, then the U.K. Court said, if you don't
23 take that rate, I will enjoin you, and that went up to the
24 Supreme Court in England.

25 THE COURT: Supreme Court of what?

1 MR. ZEINEDDIN: England.

2 THE COURT: England?

3 MR. ZEINEDDIN: And back then it was part of the
4 EU. But the bottom line, Your Honor, was, you don't pay the
5 rate, you've had your say, I've looked at everything. You
6 came here and we're done. Now you're enjoined.

7 THE COURT: Okay.

8 MR. ZEINEDDIN: As Professor Contrares pointed
9 out in here, and we don't need to go there, but there has
10 been a tradition in this country since 1950. On those
11 standard patents where parties cannot agree, the Court sets
12 a rate.

13 Your Honor, you asked a very important question
14 and you ask asked a question about antitrust. The impetus
15 of the commitment is the entire idea of level playing field
16 and allowing certain companies to select technology to the
17 exclusion of others and fix this market. It's the
18 networking effect. There is no way --

19 THE COURT: I hear you on the policy.

20 MR. ZEINEDDIN: But you asked a very important
21 question, Your Honor, and you did not hear the answer to
22 that question, which is when did they give up the right to
23 an injunction, because it's the patent. It's part of a
24 bundle of rights in an injunction. It's because when they
25 said select my technology, and when you do that, according

1 to ETSI, you have to declare at the time, you have to
2 declare any patents that you are well aware of that may
3 become essential, so everybody can see. And then you have
4 to say, I'm willing to grant it on fair, reasonable,
5 nondiscriminatory. You also can say I am not, at which time
6 everybody who is participating may say, do I want that
7 technology really or not? So there is a process and all of
8 these are part of the ETSI procedures back from the 1990s
9 until now.

10 So this is -- this is why these are not your
11 typical patents. And in this particular standard, Your
12 Honor, I keep coming back to this, because there are other
13 standards where it's not the issue. Another standard where,
14 like, which compression algorithm you use on your computer?
15 If you don't like this one, use that one. You've got to use
16 this one to make the phone call. You've got to use this one
17 to collect to the network.

18 If I want to include Thales' module in these
19 devices that's going to go for medical assistance for people
20 to communicate, you've got to use this. You can't go, well,
21 you know, just asking too much, go somewhere else.

22 And it was excluding that testimony. It's that
23 outlet in that wall. They got that shape in there. They
24 convinced people, and people said, oh, I trust you're going
25 to collect X and then we could have had a different shape,

1 just as good. But, no, we went this way.

2 And they cannot be the final one on FRAND.

3 There's one more thing. I'm not going to keep you too long.

4 One more thing. You keep asking why not go to the IT, why
5 here? Well, there's one thing. Regardless of what we think
6 of the ITC and the fact of an administrative agency and a
7 counterclaim and all of this, the practice of ETSI, there
8 has never been a counterclaim here.

9 But here's the thing. The ITC cannot set a
10 rate. The ITC cannot force Philips to get into that rate.
11 What the ITC can do is hand a sword, and once that sword is
12 handed to Philips, we go in the backroom and the price that
13 we pay is our access to the market, which is a hundred
14 percent standing in every single way against anything that
15 any Court in this country, including the Federal Circuit and
16 the Supreme Court said about the value of patents and their
17 incremental value.

18 The Federal Circuit has said, and we're
19 reserving this for later on where we're going to talk about
20 the rate. It's not the value of the standard. You don't
21 get to charge the value of the access to the market. You
22 get to charge the incremental value of your patents.

23 And the problem here, Your Honor, is they say
24 they got FRAND. They refer to this Arcos case. All this
25 Arcos case said in the hay against a very French company is

1 that that French company failed to meet its burden to -- I
2 don't know if it's basically the declaratory judgment
3 upfront, like a summary judgment. At the time, based on the
4 evidence that they've presented, that Philips was not FRAND.
5 That's what they said.

6 It also said that .07 cents, which is what
7 they offered, what Arcos offered, a small French company,
8 was not FRAND. That we know, that whatever that company
9 offered for their device, which, by the way, uses all the
10 technology.

11 These are things you're going to be hearing
12 about if you do this, Your Honor. They can't just come in
13 and give you a cellphone case. The cellphone uses every
14 part of that standard.

15 THE COURT: All right. Just watch your time.

16 MR. ZEINEDDIN: You know, and I'm going to stop
17 right now because I know everybody is tired. But I thank
18 Your Honor for the opportunity.

19 THE COURT: All right. Mr. Lowenstein?

20 MR. LOWENSTEIN: I just wanted to make two quick
21 points. The case that Mr. Thompson was talking about from
22 Delaware from 1985, 35 years ago, and I can confirm this at
23 a lunch break with an associate. But from what I could tell
24 last night, the patent statute in '85 didn't include
25 importation. It does now.

1 And the Judge, Judge Schwartz I think said the
2 ITC has certain jurisdiction. That's to prevent
3 importation. I as a district court do not. And I think
4 that's part of what influenced that decision.

5 The other ITC cases -- and, again, I will
6 confirm this. I tried to do it last night. I don't think
7 any of them exclude issues in an exclusion order.

8 So some of the cases of patents were held
9 invalid or not infringed. There was no exclusion order. I
10 think one, there was an exclusion order and then the
11 Commission reversed.

12 We know in the Apple/Samsung case, the U.S.
13 trade representative reversed. So to the extent those cases
14 are up there for the proposition that they can issue
15 exclusion orders, it's different. We are not saying that
16 they can't, but those cases don't necessarily support that.
17 But I --

18 THE COURT: What are the powers of the ITC other
19 than exclusion?

20 MR. LOWENSTEIN: Well, they have an exclusion
21 order. There's something called a cease and desist order,
22 so I think the stuff that's in the U.S. can't be resold.

23 THE COURT: I guess that's why I'm at a loss
24 then. I thought that was the only power they had. They can
25 declare a patent invalid?

1 MR. LOWENSTEIN: Yes. In fact, you can litigate
2 validity and infringement.

3 THE COURT: Well, in the context of ultimately,
4 though, you can't go there to get a declaratory judgment on
5 invalidity. Right? You can only go there to get an
6 exclusion order of some sort. Is that right?

7 MR. THOMPSON: That's right.

8 THE COURT: Right. So I'm missing a point that
9 you have made. You said those orders that were put on the
10 screen?

11 MR. LÖWENSTEIN: The cases they cited ultimately
12 did not result in an exclusion order.

13 THE COURT: Oh, they didn't result in one?

14 MR. LOWENSTEIN: Correct.

15 THE COURT: And help me out why that's
16 probative.

17 MR. LOWENSTEIN: As far as I can tell, they
18 recited to a proposition that the ITC could issue exclusion
19 orders for FRAND patents and I don't think those cases
20 necessarily stand for that proposition, which is they didn't
21 necessarily issue the exclusion order.

22 THE COURT: All right. How long do you need for
23 lunch?

24 All right. So here's a thought. This is what
25 I'm struggling with. It goes to this divestiture of

1 jurisdiction. The practical reality is that by using the
2 ITC, you've got incredible leverage, especially under the
3 circumstances, and you'll forgive me, but -- well actually,
4 both parties, both companies.

5 So there's an argument that you undercut this
6 Court's ability or authority to adjudicate a FRAND. Now, I
7 understand, right, the same argument can be made. I don't
8 know that it's the same, I mean, but I kind of suggested in
9 questions I've asked, which is that -- well, they get to
10 challenge validity here. They are not just going to accept
11 the FRAND you offered. They get to challenge that. And I
12 know your argument is just as that was contemplated by ETSI,
13 there was the threat after an injunction contemplated by
14 ETSI. And, in fact, and I do think it's compelling, when
15 there was a proposal to codify a prohibition on injunction,
16 it was rejected by you. That's pretty powerful.

17 But I think just after lunch you ought to be
18 prepared to address in the context of the anti-suit
19 injunction case, you know, how this concern I've just raised
20 should be addressed.

21 All right. So do you want to break until 1:30?
22 Does that sound good?

23 MR. LOWENSTEIN: Yes.

24 THE COURT: Okay. Thank you.

25 (Luncheon recess taken.)

1 - - -

2 Afternoon Session, 1:31 p.m.

3 THE COURT: I didn't realize Mr. Thompson wasn't
4 back yet, so we'll just wait.

5 (Pause.)

6 MR. THOMPSON: Your Honor, my apologies. We got
7 hung up in security.

8 THE COURT: That's fine. All right.

9 Mr. Zeineddin, can I ask a question?

10 MR. ZEINEDDIN: Yes, Your Honor.

11 THE COURT: Just in your offer, you said, I
12 think, let me make -- I will set the FRAND date and you're
13 going to live by whatever that is, are you giving up your
14 right to appeal?

15 MR. ZEINEDDIN: The right to appeal?

16 THE COURT: Whatever I decide to the Federal
17 Circuit.

18 MR. ZEINEDDIN: I mean, if there is, like, error
19 of law based on the --

20 THE COURT: I am just wondering if you are
21 talking about, you've got this broad thing. I'm just
22 wondering if you are giving up your right to appeal.

23 MR. ZEINEDDIN: We would not waive that.

24 THE COURT: I just wondered.

25 MR. ZEINEDDIN: I mean, it's a decision by the

1 Court. So --

2 THE COURT: So you're not. That's fine.

3 MR. ZEINEDDIN: Right.

4 THE COURT: Okay. Just curious. All right.

5 All right. Is there anything else anybody wants
6 to address on likelihood of success on the merits either
7 under the contract theory, I will call it, or under the
8 anti-exclusion injunction?

9 MR. ZEINEDDIN: Your Honor, on that last point,
10 it's not so much the right to appeal on the waiver, but, for
11 example, in the TCL case with Ericsson --

12 THE COURT: Wait. Don't go off on that. I'm
13 not interested.

14 MR. ZEINEDDIN: Okay.

15 THE COURT: I've got to watch the time.

16 MR. ZEINEDDIN: Absolutely. Thank you.

17 THE COURT: I'm curious. I didn't think you
18 were. I just wanted to make sure I understood. Okay.

19 Now, does anybody want to say anything else on
20 the likelihood of success on the merits and what I'm also
21 calling the anti-suit injunction. No? Okay.

22 Then I'm going to hear very, very brief argument
23 on irreparable harm. Mr. Lowenstein, do you want to go
24 first?

25 MR. LOWENSTEIN: I'm sorry.

1 THE COURT: Sorry? Irreparable harm, do you
2 want to address that?

3 MR. LOWENSTEIN: I was going to talk about --
4 actually, I thought you wanted to discuss the effect on your
5 jurisdiction, but I can talk about irreparable harm.

6 THE COURT: No. When I say anti-suit, if you
7 want to talk about that, go ahead, sure.

8 MR. LOWENSTEIN: I don't have a whole lot to
9 say. I was going to just walk you through the complaint.
10 I've got some slides that I can put up.

11 Is that all right if I put some slides up to the
12 complaint?

13 THE COURT: Sure.

14 MR. LOWENSTEIN: So these are confidential. I'm
15 not planning to discuss confidential information, but
16 there's some in there.

17 MR. THOMPSON: So my suggestion simply if this
18 is marked confidential, we'll handle it with the typical
19 seal of the Court.

20 THE COURT: Do you see anybody in the room who
21 poses a risk of --

22 MR. THOMPSON: I don't know everybody in the
23 room I'm afraid to say.

24 THE COURT: You don't? All right. I guess
25 we'll keep it off the screen. Go ahead and make your

1 argument.

2 MR. THOMPSON: Your Honor, I would suggest, as
3 far as I'm concerned, if he wants to show a slide he said
4 represents, knows is not confidential, then that's fine with
5 me.

6 THE COURT: Okay.

7 MR. THOMPSON: So counsel, I'm sure, will let me
8 know.

9 MR. LOWENSTEIN: I'm planning to skip over the
10 confidential.

11 THE COURT: That's fine. That's good then. All
12 right.

13 MR. LOWENSTEIN: So this is all a bit above me.
14 It worked before when we were practicing.

15 THE COURT: There you go.

16 MR. LOWENSTEIN: So I just wanted to skip to the
17 complaint and just walk through what they've told you here.

18 As I said, they're asking for anti-suit
19 injunction that Telit should not be permitted to ask the
20 Court, this Court or any other Court worldwide to determine
21 a FRAND rate.

22 THE COURT: Wait, wait. I think you just said
23 they're not -- they're saying you guys shouldn't be
24 permitted to ask me a FRAND rate.

25 MR. LOWENSTEIN: Should not be able to ask this

1 Court or any other Court worldwide to determine a FRAND
2 rate. I'm not sure what that means. They are saying that
3 we can't really discuss with you what the FRAND rate should
4 be.

5 THE COURT: No. I thought they are saying they
6 should not be permitted to circumvent.

7 MR. LOWENSTEIN: They say that, too.

8 THE COURT: Okay.

9 MR. LOWENSTEIN: Telit and CalAmp should not be
10 permitted to circumvent the Court's jurisdiction by asking a
11 foreign Court or any other Court to set a FRAND rate and
12 should the Court enter a judgment that Telit/CalAmp may not
13 raise any claims seeking a determination of the FRAND rate
14 in terms or raise any other FRAND rate or claims in this
15 Court or any other Court.

16 Now, I don't really understand what this Court
17 means. If you read it literally, it means I can't make an
18 argument about FRAND. I don't suppose that's what they
19 mean, but that's what it says.

20 And it carries on. It says that we're precluded
21 from making any collateral --

22 THE COURT: Can we just clear that up? Is that
23 a typo?

24 MR. THOMPSON: Your Honor, you have to read it
25 in context. It's because I had deemed courts in the

1 District of Delaware as cited there have found that these
2 sorts of claims are advisory unless the parties have a
3 meeting of the minds, and I think that that -- and that's
4 when you talk about wiggle room. That's where the meaning
5 of the minds doesn't happen.

6 THE COURT: Okay. All right.

7 MR. LOWENSTEIN: So they then say there's a case
8 or controversy of sufficient immediacy, reality and
9 ripeness. So immediacy to me means now. It doesn't mean
10 six, eight, ten months after the ITC comes to some decision.

11 Then they talk about this sworn affidavit and
12 they say that Philips is entitled to declaratory judgment
13 determining the appropriate worldwide FRAND rate, and the
14 prayer for relief basically repeats what they just said,
15 that we're not entitled to raise a claim -- well, let's just
16 skip over the this Court and any other Court, and we're not
17 permitted to make any collateral attack on this Court's
18 proper jurisdiction.

19 So it seems to me pretty obvious they're
20 invoking the Court's jurisdiction. I don't know that you
21 can do it in a big way, but that's really what they are
22 doing. They are saying it's in this court and no place
23 else. We cannot go anywhere else, but they can. And if we
24 commit to accepting a FRAND rate, paragraph B, well, then,
25 the Court should decide what the FRAND rate ought to be.

1 And so I think I've already covered these
2 points, but Philips --

3 THE COURT: Wait, wait. Sorry. Can you go
4 back? What was the last point you made?

5 If you commit --

6 MR. LOWENSTEIN: If we commit -- my laser
7 pointer doesn't work on the screen.

8 THE COURT: Right.

9 MR. LOWENSTEIN: -- commit to accepting the
10 FRAND rate, then this Court should decide what that FRAND
11 rate should be and no other Court, no other foreign Court.

12 THE COURT: Okay.

13 MR. LOWENSTEIN: So they're invoking the Court's
14 jurisdiction. And in order for the Court, and I think we
15 touched on this earlier --

16 THE COURT: And that's what you want. I mean,
17 this last sentence is what you want?

18 MR. LOWENSTEIN: Sure. We're happy to have the
19 Court decide it.

20 THE COURT: Right.

21 MR. LOWENSTEIN: But that's what they wanted,
22 too, and my understanding is you want us to talk about
23 whether or not that had to -- the ITC action has some
24 implication on the Court's jurisdiction.

25 THE COURT: Right.

1 MR. LOWENSTEIN: Which is invoked.

2 THE COURT: Right. When you say I want you to,
3 I want to offer you the opportunity to.

4 MR. LOWENSTEIN: Okay.

5 THE COURT: You don't have to, but the way I see
6 the world is you've either got a contractual right to
7 preclude them or you've got to win on anti-suit injunction
8 grounds, and to do that, as far as I understand the Third
9 Circuit law, which uses the restrictive approach, it's not
10 embraced by the Ninth Circuit, you've got to basically
11 establish that there's some effect, divestiture of
12 jurisdiction to this Court or some very big public policy
13 that is served. I mean, there's some ambiguity in the case
14 law. That's how I read it and, you know, I've thrown out
15 there the jurisdiction. You don't have to do it, but go
16 ahead.

17 MR. LOWENSTEIN: Let me skip to the Third
18 Circuit test. There are three factors. Comity is not an
19 issue. Right? So that doesn't apply. Protecting the
20 Court's jurisdiction.

21 THE COURT: Well, I'm not so sure about that.

22 MR. LOWENSTEIN: Okay.

23 THE COURT: I mean, the Third Circuit never
24 applied the anti-suit injunction doctrine, to the ITC. Is
25 that correct?

1 MR. LOWENSTEIN: I believe that's true.

2 THE COURT: Okay. Has it applied it to anybody
3 other than a foreign Court?

4 MR. LOWENSTEIN: I don't know the answer to
5 that. We looked at the cases we cited, the cases I guess
6 Judge Andrews cited and his decisions were all --

7 THE COURT: I think the answer is no and I think
8 the reason why is because there's a Federal Circuit that
9 precludes a federal court from enjoining a state court,
10 which would be the only other probably context it would come
11 up. And that basically I recall the statute has -- there
12 are exceptions, and one of them is if it would affect the
13 jurisdiction of our Court, which is kind of the same test I
14 think that the Third Circuit was looking at when it applied
15 it to foreign courts in the context of this theory.

16 I think this anti-suit injunction is very rarely
17 invoked. I looked on Westlaw. I think there are only three
18 Supreme Court cases that have even looked at it. I mean,
19 this is a very unusual argument you are making. Right?

20 MR. LOWENSTEIN: I don't think so in the context
21 of FRAND, ITC and parallel lawsuits. I mean, we've all
22 cited a dozen cases that touch on that issue. Some of them
23 admittedly were Ninth Circuit. If you are talking about the
24 Third Circuit, there are a half dozen or so cases that we've
25 all found.

1 THE COURT: All right.

2 MR. LOWENSTEIN: So, well, I'm not -- I mean,
3 I don't think comity applies because it's not a foreign
4 Court.

5 THE COURT: Right. But, see, that's why I kind
6 of segued. I'm sorry. Let me address that.

7 So I'm not so sure about this, and this goes
8 back to Congress created parallel tracks here. I mean,
9 that's part of being what gave me concern, it gave the judge
10 in Stonington concern. I'm supposed to give some comity I
11 think to the ITC. No?

12 MR. LOWENSTEIN: Going back to what you said
13 about your wife liking dinner late, I mean, you have the
14 right to complain about it, but still. So the fact that
15 they have the right to go to the ITC doesn't mean that this
16 case is one that should be in the ITC. The factors are
17 inverse of my family, but, you know, I can't complain about
18 it either. It the way it is. So I mean not every right
19 that you have is one that you exercise.

20 So I will focus on these other two and I will go
21 back to the previous slide.

22 It's a matter of common sense. With this
23 FRAND, potential ITC injunction hanging over our heads,
24 we can't get a FRAND rate. I mean, it's already, excuse
25 the -- whatever equilibrium there may or may not have been.

1 Right?

2 I have not seen that Philips has disputed this,
3 that they said, well, the ITC action really doesn't change
4 the value of a patent. It happens. If you have a threat of
5 an injunction over your head, just as a matter of common
6 sense, it's going to change things. The Microsoft case, it
7 recognizes that it fundamentally places a party at a
8 disadvantage. So you have a choice of going out of business
9 or paying the exorbitant rate. It's, you know, it's a
10 Hobson's choice.

11 So that's kind of where we are. And to protect
12 an important public policy, I mean I think, you know, we
13 mentioned that, avoiding inconsistent judgments. If the ITC
14 deems fit under its rules to grant an exclusion order
15 without considering irreparable harm and then we come back
16 here I suppose and you reconsider whether or not there
17 should or shouldn't be an injunction applying all the eBay
18 factors, you can say no. I mean --

19 THE COURT: On inconsistent judgments, let's
20 talk about judgments. You could win a ruling in the ITC if
21 the patents are invalid. Right?

22 MR. LOWENSTEIN: Conceivably, we could, yes.

23 THE COURT: And contrary to the way I
24 interpreted -- well, you actually could raise in the ITC as
25 a defense harm to you where an exclusion would be entered,

1 couldn't you?

2 MR. LOWENSTEIN: We can.

3 THE COURT: Irreparable harm that you can't
4 raise in the ITC, they can't raise irreparable harm. They
5 don't need to prove irreparable harm.

6 MR. LOWENSTEIN: Correct. Just while we're
7 talking about that, to touch on a point that Mr. Thompson
8 made. You know, this issue about domestic industry. It's a
9 pretty thin read in this case. They've identified the sleep
10 apnea products that don't compete with our products at all.
11 Right? We sell these little modules that go into these
12 products, but we're not competitors. So their domestic
13 industry isn't going to be affected.

14 THE COURT: Don't you get to argue that in the
15 ITC?

16 MR. LOWENSTEIN: That it's not a domestic
17 industry? As far as I know, no. Their argument is that,
18 you know, at least one OF THE claims covers one of their
19 products and that's sufficient to be a domestic industry
20 product.

21 THE COURT: And you don't get to argue against
22 that in the ITC?

23 MR. LOWENSTEIN: I'm not an ITC expert. There's
24 a technical prong of the domestic industry and if they can
25 prove up that one of the patent claims, there are four

1 patents, 21 claims, something like that, if one of those
2 claims covers one of their sleep apnea products, that,
3 according to them, is going to be sufficient.

4 THE COURT: Right.

5 MR. LOWENSTEIN: I mean, we could argue that the
6 patents don't cover it, but the answer to your question is,
7 yes, we could.

8 THE COURT: Okay. You get to argue it. All
9 right.

10 MR. LOWENSTEIN: And we also, you know,
11 discussed the serious disruption if they were able to
12 succeed on an exclusionary order. I don't think they could
13 convince you here that they are suffering irreparable harm
14 because they don't have a competitive product.

15 THE COURT: They don't have to have one, do
16 they?

17 MR. LOWENSTEIN: Well, if they were going to get
18 an injunction from you.

19 THE COURT: But we're not going to deal with
20 that unless --

21 MR. LOWENSTEIN: Not today.

22 THE COURT: Unless there's an infringement
23 finding and we get to the very end of the case.

24 MR. LOWENSTEIN: Right. But my point is that
25 there's discrepancy between the two standards, that the ITC

1 would apply an injunction and that a district court would
2 apply, and the primary distinction is irreparable harm and
3 that's an important distinction.

4 You can go back to Judge Briar's comment in the
5 eBay case, that they're non-manufacturing entities that
6 could use injunctions or the threat of injunction as
7 leverage and bargaining, like bargaining negotiations.
8 That's kind of where we're at here.

9 THE COURT: All right.

10 MR. LOWENSTEIN: That was the point. And then
11 skipping back a couple of slides, it's not -- you know,
12 it's not just my observation, but a couple of courts have
13 said the same thing, that if the ITC were to enter an
14 injunction, it would interfere with the equitable
15 considerations and frustrate this Court's ability to
16 adjudicate the issues properly before it, and I think that
17 is kind of where we are.

18 In the complaint you see, they have invoked the
19 Court's jurisdiction exclusively. We can't go anywhere
20 else. Right? So they've said it's this Court or no place
21 else. And in order for the Court to invoke its
22 jurisdiction, like they've asked us to resolve this FRAND
23 issue, you can't have us out of business or having a threat
24 of us out of business. It will skew the result. You can't
25 have a proper FRAND determination while there's a threat or

1 actual injunction in play.

2 THE COURT: Well, I think this is your best
3 argument, the quote from the California case, which isn't
4 binding on me, and we talked about frustrating the Court's
5 ability to adjudicate properly before it and I've made some
6 comments today to Mr. Thompson that expressed some
7 frustration. But really my frustration is the unnecessary
8 requirement or duplication of the resources of the Court.
9 That's really more what it's directed to.

10 I don't think, and I'm making a finding on this,
11 I don't think that the ITC proceeding divests me of
12 jurisdiction in any way. I don't think it usurps this Court
13 in any way of jurisdiction and that's also what the Third
14 Circuit has looked to in applying the anti-suit injunction
15 test. And as I say, I have expressed frustration that I
16 would have to expend resources that are being expended in
17 the ITC, and given our caseload, that is frustrating. But I
18 also understand why Philips would bring lawsuits here the
19 way it did, because it has got multiple defendants subject
20 to jurisdiction in Delaware, and rather than wait to bring
21 district court actions, which Congress has expressly
22 provided an ability to do so, it decided to bring all of
23 these suits in one place here.

24 And then the other thing that under Third
25 Circuit law that application of anti-suit injunction

1 doctrine requires consideration of, is there some big broad
2 policy that's being served, and I think you've made
3 compelling policy arguments today as has Mr. Zeineddin. But
4 I think it's clear that FRAND policy is actually subject to
5 significant debate. It's a hard issue.

6 One of the reasons I was so interested in this
7 case is because it's a very, very difficult issue and there
8 are experts on both sides, and we've had changes in the
9 views, for instance, of the Department of Justice over the
10 last decade on the positions and how to balance the right of
11 an injunction that comes with a patent against the fair and
12 reasonable licensing terms these standards organizations set
13 and the benefits economically that come from both the
14 standards setting body and the monopoly rights of a patent.

15 I mean, there's a lot of debate about that
16 policy. It's not clear what the right answer is. So I
17 don't think that given the lack of clarity on the policy
18 issue we can say that there's a broad policy, a very
19 important policy served by applying the anti-suit
20 injunction to this case, so I'm not going to do that.

21 Now, we still have to adjudicate and make a
22 final ruling on whether there's a likelihood of success
23 based on contractual rights that you might have to preclude
24 them from filing in the ITC, but as far as application of
25 the anti-suit injunction act or doctrine, I don't think it

1 applies. And I just want to make clear, even the Third
2 Circuit has made clear, it did not choose to adopt the
3 liberal approach that has been adopted by the Ninth Circuit.
4 It has expressly held that it has a restrictive approach and
5 that's the approach that I used.

6 MR. LOWENSTEIN: Okay. I just want to point out
7 the restrictive approach that I read is the comity issue. I
8 understand your position about the ITC.

9 One last point. You I think asked Mr. Thompson,
10 you know, why did they sue in the ITC and here at the same
11 time and it seems to me the question should be, you know,
12 why did they sue in the ITC? They can get the same remedies
13 here. In fact, they can get more remedies.

14 THE COURT: They can get more leverage in the
15 ITC.

16 MR. LOWENSTEIN: Well, that's the point that we
17 made in our opening papers.

18 THE COURT: I go back to you made a great point.
19 It's a great argument. I get it. If you get leverage -- if
20 they get leverage by going to the ITC, but you get leverage
21 by saying, we'll take a -- you know, we'll enter into some
22 negotiations and we're willing to accept a FRAND rate, but
23 we're not willing to accept the rate you offered us. You
24 have leverage like that.

25 So that's the way the system is set up. I mean,

1 there's very compelling policy arguments on both sides.

2 It's a fascinating issue.

3 I look forward to clarity coming from the issue
4 either from a Court or Congress, but I don't think in the
5 first instance I'm the one who should just decide what the
6 policy ought to be and I don't think you've established or
7 failed to establish reasons that were justified under Third
8 Circuit law using the anti-suit injunction to preclude
9 Philips from going forward in the ITC. It's a doctrine that
10 was not designed in the first instance to apply domestically
11 at all in my mind. If at all, you could apply it to state
12 proceedings, and again we have a statute that specifically
13 addresses that, you know, full faith and credits clause and
14 whatnot that addresses that issue, and I don't think it
15 applies to the ITC, especially when at the end of the day
16 Congress authorized patentees to pursue on parallel tracks
17 proceedings before the ITC in the district courts.

18 MR. LOWENSTEIN: I will just comment on that
19 briefly. I mean, as I understand what Congress has
20 authorized, it would be a parallel patent lawsuit and a
21 parallel patent lawsuit in the ITC. That's not exactly what
22 we have here. Right? We have a patent lawsuit coupled with
23 declaratory judgment action seeking a FRAND rate coupled
24 with an ITC action. So, yes, there is a statute that says
25 that, but I don't think it's contemplated for this

1 situation.

2 THE COURT: Well, you can make that argument to
3 another Court. I appreciate it and I've enjoyed the
4 argument on that.

5 MR. LOWENSTEIN: Thank you.

6 THE COURT: Anything else anybody wants to add
7 on the irreparable harm? Sorry. On the likelihood of
8 success? Okay. Then let's touch briefly on irreparable
9 harm.

10 MR. ZEINEDDIN: Your Honor, I'm happy to address
11 that on behalf of Thales. And thank you, Your Honor.

12 On the irreparable harm, the question is not
13 what will happen at the ITC eventually, and as we submitted
14 two declarations on that, but what will happen in the
15 meantime.

16 THE COURT: Right. So in a nutshell, give me
17 your -- do you have slides or not?

18 MR. ZEINEDDIN: I do not, no.

19 THE COURT: Give me your bullet point. What's
20 your irreparable harm?

21 MR. ZEINEDDIN: So, Your Honor, this is an
22 industry that is a native industry. It's ten years away
23 from saturation. So competitors are capturing market share.

24 We have submitted declarations on this and I'm
25 going to refer to the declaration is by Mr. Christopher

1 Morehead on behalf of Thales.

2 THE COURT: Okay. Hold on a second. Can you
3 give me the DI number? I want to have it in front of me
4 when you speak.

5 MR. ZEINEDDIN: So it is 691 is our brief and it
6 is attached as Exhibit 2, I believe. I'm sorry. DI 21,
7 Your Honor. Forgive me.

8 THE COURT: DI-26. I've got it. Thank you.

9 MR. ZEINEDDIN: Hopefully, that's the right one.

10 THE COURT: Thank you very much.

11 MR. ZEINEDDIN: Thank you, Your Honor.

12 So the bullet point is that this is the market
13 that's ten years from saturation, the IoT, the internet of
14 things market. And right now to win what we call a design
15 win when Thales or other companies like that want to take
16 their modules and incorporate it into a potential customer,
17 it takes about 18 months, and that's in the declaration.
18 And then you pretty much are set for about four years. This
19 is the life cycle of those products.

20 Now, we also have a declaration from one of the
21 customers, Xirgo, who is actually a co-defendant, and this
22 is by Mr. Kenneth Boschwitz.

23 THE COURT: All right.

24 MR. ZEINEDDIN: And in there -- and this is one
25 of Thales' customers, he states in paragraph 7, dependency

1 of the ITC investigation casts significant doubt and
2 uncertainty on Xirgo's business, which depends on reliable
3 access to Thales' models.

4 So we have that from this customer. We also
5 have now going back to Mr. Morehead's declaration, and which
6 was filed under seal. You will see, Your Honor, at the end
7 of paragraph 10, which is at the top of page 3 as well as
8 paragraph 11, a number of companies that are customers who
9 have expressed grave concerns with Thales' ability to supply
10 to them.

11 So here what we have are customers that can buy
12 from anybody, and this is a supply chain threat as far as
13 they're concerned and the pendency of this action alone
14 threatens our ability to supply to them in this country.
15 And if we lose that, whatever we lose from now until the
16 ITC rules -- and the ITC has scheduled a target date in May
17 next year -- we are under the cloud of that and we're losing
18 the ability to do design win with our competitors who are
19 not --

20 THE COURT: Can I just ask you this?

21 MR. ZEINEDDIN: And lose market share.

22 THE COURT: There's a potential injunction that
23 could issue in this case. Right? I could issue an
24 injunction.

25 MR. ZEINEDDIN: Against Thales from --

1 THE COURT: Is it possible that an injunction
2 could issue from this Court?

3 MR. ZEINEDDIN: By injunction as in excluding
4 Thales from the market? No, because we have said we would
5 take a license, pay for the patent in the future.

6 THE COURT: Well, there's relief requested in
7 the form of an injunction, is there not?

8 MR. THOMPSON: Yes, Your Honor.

9 THE COURT: So how do you know the relief here
10 sought in the form of an injunction, how do you know the
11 Court wouldn't issue an injunction?

12 MR. ZEINEDDIN: Because Your Honor would not
13 issue an injunction and at the same time make us pay forward
14 looking license. They've asked for that.

15 To be very clear, they have come here and they
16 said they want forward looking license. That's prayer
17 relief G and B.

18 And all they wanted was for us to sign an
19 affidavit committing a hundred percent that we'll abide by
20 the --

21 THE COURT: I mean, suppose I decided that the
22 FRAND -- did you offer the FRAND license to both?

23 MR. THOMPSON: Yes, Your Honor.

24 THE COURT: You did?

25 MR. THOMPSON: Yes.

1 THE COURT: Suppose I said that's the FRAND and
2 I'm going to require you to pay it right away, and I don't
3 know. You say, do you want to appeal it? I said, then I'm
4 going to issue an injunction. I guess my point is that
5 they've requested an injunction. There's some possibility I
6 could enter an injunction.

7 MR. ZEINEDDIN: That's a great point, Your
8 Honor. I was going to mention that before and this is a
9 great time to talk about it. You will hear a hearing,
10 you'll hear all the evidence. You say this is the FRAND.
11 Right? We'll enter into a license and they'll start getting
12 paid.

13 Now, if there's an appeal like what happened in
14 TCL, they appeal, they lose, the license keeps going. If
15 they don't, maybe there's an action to kind of figure out
16 how this is going to rehash back and adjust. But they get
17 their relief. So what we're not talking about here is
18 waiting forever for them to get this license to be executed.

19 And this comports with the due process and why
20 should anybody waive their right to contest something they
21 believe is wrong? Meanwhile that doesn't mean, too, that
22 they don't get paid? And if they got overpaid, then that's
23 something the Court can address on remand if it sees fit and
24 if it serves justice according to law and according to the
25 procedure and the due process of both parties.

1 So what we're not talking about here is a
2 gotcha, and when Your Honor -- you're absolutely right.
3 Yes, at the end of the day, there are two separate roads,
4 one in the ITC and one here. This is the one that dispenses
5 justice to both parties, period.

6 THE COURT: All right.

7 MR. ZEINEDDIN: And it's your discretion.

8 THE COURT: I didn't mean to cut you off.
9 Is there anything else you want to say for irreparable
10 harm?

11 MR. ZEINEDDIN: No, Your Honor. Everything is
12 in both of those declarations and nobody has contradicted
13 any of the facts asserted.

14 THE COURT: Right. But I want to make sure, the
15 summary of those declarations is somewhat loss of
16 reputation, but the real gist of it, what you are getting at
17 is that folks are worried that you won't be able to be on
18 the market and therefore do business they want to do.

19 MR. ZEINEDDIN: Lose market share and not be
20 able to capture the market share that you would have
21 captured in the space of market where others have taken it.
22 And once you lose it, you've got at least four years to come
23 back.

24 THE COURT: As far as market share, point me to
25 explicitly what you've put in the record to demonstrate

1 that.

2 MR. ZEINEDDIN: Yes, Your Honor.

3 THE COURT: Because there's a lot of conclusory
4 assertions, but the burden to demonstrate irreparable harm
5 you have to show by a preponderance of the evidence. Right?

6 MR. ZEINEDDIN: Yes, Your Honor.

7 THE COURT: Okay. So can you show me what you
8 put on the record to establish that?

9 MR. ZEINEDDIN: So, again, we're going back to
10 Mr. Morehead's declaration. It's a short declaration.

11 So starting -- so after paragraph 11, which we
12 have referred to the customer.

13 THE COURT: Right.

14 MR. ZEINEDDIN: As well as paragraph 12, still
15 addressing that last customer.

16 Starting with page 13 -- I'm sorry, with
17 paragraph 13, we're talking about how long it would take to
18 win the design and also how long is the life cycle of the
19 product? Four years.

20 But toward the top of page four, and he mentions
21 that basically, if you don't win that, you're waiting four
22 years. And then on page 14, it talks about Thales has a
23 percentage market share that's stated at paragraph 14 in
24 North America and it states the number of year plan that
25 they have. And they talk about the IoT space being ten

1 years away from the market saturation.

2 And these are the factor that have not been
3 covered. All they say is we have not lost yet, but this is
4 very key here. Those customers, if they had started already
5 working, planning to buy from somebody else, which is not
6 unreasonable when you think of the market reality, they're
7 still not there yet, but the point is we would be gone by
8 now -- by next May when we have the final determination from
9 the ITC. And we may very well win in the ITC, but by then,
10 what's done is done.

11 THE COURT: Okay.

12 MR. ZEINEDDIN: So that's what we stand to lose.
13 And all they stand to lose, Your Honor, is the interest,
14 which the Court would award anyway, prejudgment and
15 post-judgment interest.

16 THE COURT: Okay. Thank you.

17 MR. ZEINEDDIN: Thank you, Your Honor.

18 THE COURT: Mr. Lowenstein?

19 MR. LOWENSTEIN: I'm not sure I have too much to
20 add. I think I've already said this, so I think in our
21 papers, we've cited the Protek case for the propositions
22 litigating in two fora simultaneously is evidence of
23 irreparable harm.

24 THE COURT: So I don't buy that. I am going to
25 make a ruling on that. I'm going to make a ruling that I do

1 not believe being forced to litigate on parallel tracks in
2 the ITC and the United States District Court can constitute
3 irreparable harm. I think Congress has explicitly provided
4 for that and I do not believe that would justify irreparable
5 harm.

6 MR. LOWENSTEIN: We also said that there's
7 inevitable loss of market share, right, if the ITC were to
8 issue an injunction, and we've explained that in our
9 supporting declaration.

10 THE COURT: Well, I want you to explain that.
11 There's no question there are conclusory assertions about
12 lost profit and lost market share, but what do you have on
13 the record? Show me, please.

14 MR. LOWENSTEIN: I don't have anything other
15 than the common sense argument that if there's an injunction
16 entered against us, we stop selling and somebody else is
17 presumably, their argument, there are numerous companies
18 out there going to fill the void. So that's in our papers,
19 too.

20 THE COURT: Well, I want you to make sure.
21 Okay. I don't want you to be able to repeat if I rule
22 against you on appeal what you have not said here. I want
23 you to point it out to me.

24 Again, this is a preliminary injunction. We're
25 a really, really busy Court. I have gone through the

1 papers, but we're so busy, this is your opportunity. I've
2 dedicated the day to listening to you.

3 Tell me what it is you've got that constitutes
4 irreparable harm. What numbers? Do you have any financial
5 documents? What do you have other than a conclusory
6 assertion that, well, we would lose market share if there's
7 an injunction. I mean, I think that if that is all it took,
8 you would never have to make a showing if you were faced
9 with an injunction. So what do you have?

10 MR. LOWENSTEIN: If I can point to Dennis
11 Kelly's declaration.

12 THE COURT: All right. So what document?

13 MR. LOWENSTEIN: I don't have it in front of me.
14 He said if there's an injunction issued that would exclude
15 Telit from selling, Telit U.S. would lose two-thirds of its
16 sales in the U.S. if there's an exclusion order issued.

17 THE COURT: Okay.

18 MR. LOWENSTEIN: And the company --

19 THE COURT: And so what are we talking
20 dollars-wise, that is? How does it affect your overall
21 revenue stream? What is the evidence that backs up that
22 kind of raw data?

23 MR. LOWENSTEIN: I didn't put in revenue
24 numbers. Two-thirds of the sales I think is a pretty
25 significant amount of sales. I can't, you know, pinpoint a

1 number and I can't necessarily give you the unit sales that
2 would be excluded, but, you know, it comports with common
3 sense. I mean, if you are out of business, you're going to
4 lose sales.

5 THE COURT: When you are saying you're out of
6 business, so is that the implication of what he said? It's
7 not expressed. That will put us out of business?

8 MR. LOWENSTEIN: I think he goes on --

9 THE COURT: Let's pull up the declaration. What
10 DI number are you talking about?

11 MR. LOWENSTEIN: I will pull it out of my
12 notebook. From memory, it is two-thirds if there's an
13 exclusion order issued, and if the customers then switch to
14 a different manufacturer, he believes that Telit, Inc. would
15 have a hard time surviving in the U.S.

16 THE COURT: Right.

17 MR. LOWENSTEIN: So it's DI -- it looks like
18 DI 11 in the 1708 case.

19 THE COURT: Okay.

20 MR. LOWENSTEIN: And paragraph 6 says what I
21 just said.

22 THE COURT: What exhibit?

23 MR. LOWENSTEIN: Sorry?

24 THE COURT: Is it an exhibit?

25 MR. LOWENSTEIN: I think it's just a separate

1 document, docket entry. It's docket entry 11 in the 1708,
2 the declaration of Dennis Kelly.

3 THE COURT: All right. I've got it now.

4 MR. LOWENSTEIN: So paragraph 6. If Philips
5 were successful in stopping Telit products from entering the
6 U.S., it would reduce Telit sales by at least two-thirds,
7 probably causing Telit to go out of business in the U.S.

8 And the next one says, assuming Telit were in
9 business following an order preventing Telit from importing
10 the accused modules causing customers to switch to new
11 suppliers, it's highly unlikely they would switch back to
12 Telit, and in this scenario it's highly likely that Telit
13 would go out of business.

14 So that's the evidence that we've presented.

15 THE COURT: Okay.

16 MR. LOWENSTEIN: I mean, I understand your
17 question that you want something, you know, with numbers on
18 it that's more solid than that, but it's a sales projection,
19 and by definition, those are projections. Right? I mean,
20 you can't pinpoint exactly what's going to happen six,
21 eight, twelve months from now, but that seems to me a fairly
22 plausible explanation.

23 THE COURT: I guess my concern with it is it's
24 very conclusory and it has the word even probably if Philips
25 were successful in stopping. And, again, we don't even know

1 what the scope of the injunction would be.

2 MR. LOWENSTEIN: Well --

3 THE COURT: And we don't know the timing of it.

4 Right? I guess we heard maybe May, so between now and May.

5 What's going to happen in this case between now and May?

6 So, a lot.

7 And then you've got no documents to support
8 there is a very broad assertion of a loss of sales of
9 two-thirds "probably causing Telit," and it's only to go out
10 of business in the U.S. So It has resources there, and who
11 is to say that they can't get back in the market again? Who
12 knows what's going to happen between now and May? So it's
13 very general, maybe you can't do any better, but it does
14 strike me as very general.

15 MR. LOWENSTEIN: Okay.

16 THE COURT: Anything else?

17 MR. LOWENSTEIN: There's the flip side, the
18 inequitable conduct -- I'm sorry, irreparable injury
19 argument and we've touched on it today. I will just say it
20 one more time, I guess. If you've agreed to license your
21 patents, you've agreed to a remedy of law, financial
22 compensation for the use of your patents. So the cases that
23 we cited on page 17, and I think it was the Motorola case,
24 I making sure at this point, say that it's unlikely that you
25 can show irreparable harm if you have made this brand

1 commitment. So it's the flip side of the irreparable harm
2 argument that addressed that.

3 THE COURT: All right. Thank you.

4 MR. LOWENSTEIN: Thank you.

5 THE COURT: Mr. Thompson?

6 MR. THOMPSON: Thank you, Your Honor. I will
7 just say a few brief comments on this and I will just
8 reference to slide 19 just so that the Court knows where to
9 find some of these references, the citations.

10 I think that probably the one thing that is
11 important is that the defendants, and they're both the same,
12 they chose a path of infringement over licensing and the
13 record shows all the licenses that were offered and the one
14 that exists today that they could take.

15 I think on that part, they could take a license
16 right now. I think that as a matter of fact just switches
17 it over to a numerical number of damages rather than all of
18 the claims of irreparable -- I'm sorry, of --

19 THE COURT: Irreparable harm.

20 MR. THOMPSON: Irreparable harm. Sorry.

21 THE COURT: That's all right. I've been calling
22 likelihood of success irreparable harm.

23 MR. THOMPSON: Yes. So the claims that they
24 make really just aren't there because they could always take
25 the license and then claim damages.

1 The other thing that they say is that they would
2 be irreparably harmed if there was an exclusion order from
3 the ITC. Well, that's after due process. That's actually
4 called justice. Right? That's not called irreparable harm.

5 Everybody who is found guilty of infringement,
6 patents and injunction issues, believes they're irreparably
7 harmed. Right? So that's another part that's just really
8 not irreparable harm.

9 And so the other thing is I think I guess I
10 would just mention, then I will sit down, that, you know,
11 they're asking to change the status quo. So the trial --
12 and they keep talking about a later time, but the trial is
13 actually set in September as you mentioned earlier and so
14 that's four months from now, very similar to the case with
15 Judge Crabb that he was referring to that we cited.

16 THE COURT: Thank you.

17 MR. THOMPSON: Thank you.

18 THE COURT: Can I just ask the defendants, was
19 there any record evidence of if you had taken, if you take
20 the license that was offered, the financial, the relative
21 financial effects on your company?

22 MR. ZEINEDDIN: Thales, Your Honor?

23 THE COURT: Yes. Can you show me where?

24 MR. ZEINEDDIN: I'm sorry. Could you repeat
25 your question?

1 THE COURT: Is there record evidence of the
2 actual financial result and its effect on Thales' current
3 financial state were it to take the license that was offered
4 to it that it rejected?

5 MR. ZEINEDDIN: No, Your Honor, we don't have
6 that in the record. I mean, what you see from the brief is
7 what they're asking for.

8 THE COURT: I know that. I just want to make
9 sure.

10 MR. ZEINEDDIN: Yes.

11 THE COURT: Because, you know, I can't be sure I
12 captured everything I read.

13 MR. ZEINEDDIN: Yes.

14 THE COURT: Or remember it. So --

15 MR. ZEINEDDIN: But --

16 THE COURT: I recall seeing that. I just want
17 to make sure that is correct.

18 MR. ZEINEDDIN: Yes. Your Honor, that's the
19 thing. If you take this license, right, and admit it's
20 FRAND just because they said so, what it makes no sense to
21 us. I mean, we've --

22 THE COURT: First of all, you can take the
23 license and continue in the lawsuit.

24 MR. ZEINEDDIN: Well, not really. They want us
25 to admit to everything. Your Honor, even if we talked about

1 if you take a look in the record and the exhibits that will
2 get attached, they talked about arbitration, but they want
3 us to limit the evidence to one license only.

4 THE COURT: Well, I shouldn't say -- I don't
5 know if you could. You could at least ask if you could take
6 the license subject to --

7 MR. ZEINEDDIN: They want us to admit to
8 infringement, invalidity of everything and acquiesce.
9 Whatever that is, Your Honor, that's going to serve as a
10 foundation, as a comparable for all other licensors. So
11 question here --

12 THE COURT: Hold on. Mr. Thompson, that's
13 right. When I think about it is, you only offered the
14 license with basically a complete surrender associated with
15 it. Right?

16 MR. THOMPSON: No, that's not true. In Lear v.
17 Atkins by the Supreme Court, it won't permit any licensor to
18 do that anyway. Right? So patents can always be challenged
19 for validity at any given time.

20 THE COURT: I don't know in a FRAND context, is
21 that even --

22 MR. THOMPSON: It's not in the terms. You could
23 review it yourself. There's no term in there that says they
24 won't challenge validity. The case can go forward on those
25 grounds.

1 THE COURT: Do you dispute that?

2 MR. ZEINEDDIN: Yes, Your Honor. Even here they
3 said they wouldn't even want to do the rate setting without
4 us first acquiescing to infringement and validity.
5 According to them, we can't do that until we capitulate.
6 They could get a default judgment tomorrow because we've
7 admitted liability.

8 And then they talked to us about arbitration and
9 they want to limit it only to the arbitrator's point of view
10 at the beginning of one license, just one license, which, by
11 the way, Your Honor, that's one of the big reasons why we
12 couldn't even begin to truly figure out how to negotiate
13 with them because they tell us there's a license. They
14 won't show it to us. And they want us to take somebody
15 else's word for it and it's a comparable to my house that I
16 want to sell you, but I won't let you know whether it has a
17 basement, the same bathroom. I won't let you know, maybe
18 that price that was paid, you get two Porsches in the
19 garage. You're not going to know any of that.

20 Is there a side deal? You're not going to know
21 any of that. And before we walk into the arbitration, then,
22 on top of it, before we do that, acquiesce that every single
23 one of their patents are invalid and infringed, they're
24 designing the rules and according to rules of FRAND
25 calculation that they dictate.

1 So this is -- we're talking about bad faith and
2 negotiations, Your Honor. So you can imagine even what
3 happened during the negotiation and you've seen some of this
4 stuff in there and especially in our reply brief. They go
5 back and forth.

6 We're not going to show you this, but we have
7 this and they cite the U.K. decision about comparable
8 decisions, but the U.K. decision itself says not every
9 license is comparable and enumerates three or four of them.
10 Right?

11 We talked to them about what we call the topdown
12 analysis. If we pay you this and you have such a sliver --
13 Philips is a great company, Your Honor. Not in this
14 industry. We're not talking about Ericsson, Qualcomm.
15 Those huge portfolios. Right?

16 And if they get this much -- they want to get --
17 I mean, you've heard the number 75 cents. We didn't say it.
18 On a \$20 ASP, average selling price, for somebody that has
19 what, one, two, three percent of the patents, will the
20 market bear more than doubling the ASP just to pay it just
21 because they said so?

22 This is the kind of evidence, Your Honor, you'd
23 hear. Your Honor, you've said a lot of things today that
24 make a great deal of sense, but the point is the FRAND
25 commitment does not entitle them to be the final arbiter.

1 THE COURT: All right.

2 MR. ZEINEDDIN: So thank you, Your Honor.

3 THE COURT: Thank you. Mr. Lowenstein?

4 MR. LOWENSTEIN: To just address your question,
5 we have not provided financial information what 75 cents
6 would do for us.

7 I touched on this earlier and I think it bears
8 repeating. This issue of Philips, royalty stacking is a
9 severe problem. If we pay Philips 75 cents, I don't want to
10 name the companies, but there are a number of other
11 companies who are or will bang on their door and say, you
12 pay paid Philips 75 cents, we want it, too. All of a sudden
13 it becomes 3 or \$4, and as Mr. Zeineddin has said, you know,
14 on a \$25 product, it's not a sustainable model.

15 THE COURT: All right. Okay.

16 MR. LOWENSTEIN: One last point. I apologize.
17 I think Philips knows that 75 cents is not a realistic
18 amount of money and that's what motivated them to file the
19 lawsuit in the ITC, to put some extra pressure on us to sign
20 up. It's not a number that Telit, it sounds like Thales or
21 any of the customers can live with, and the fact that we're
22 here I think is evidence of that.

23 THE COURT: All right. Mr. Lowenstein, a couple
24 of other points with you. I want to go back to likelihood
25 of success. I think in some of my questions to you when I

1 was forming them and maybe in some comments I made I
2 conflated or gave, and in particular the length of
3 Borghetti's declaration was the declaration that your client
4 submitted, the French law professor, who I'm going to put
5 his name in. I will look at it when I recite it this time
6 so I don't are butcher it, which is Stoffel-Munck.

7 MR. LOWENSTEIN: Correct.

8 THE COURT: And I made that comment because, in
9 fact, Stoffel-Munck's declaration is quite short and I went
10 back and reread it at the lunch break because, as I said, in
11 my mind and just we have again so many cases, so many
12 papers, I kind of conflate things. And I had forgotten how
13 conclusory his analysis was.

14 I want to give you a chance to respond to some
15 of these things because you made the point and we had a back
16 and forth. You can come up. We had a back and forth.
17 Sure. Go ahead.

18 MR. LOWENSTEIN: Sorry. Go ahead. I'm just
19 going to have it in front of me if you are going to ask me
20 questions about it.

21 THE COURT: Well, that's a good idea. I told
22 you my recollection of it was that it was not the situation
23 of really discussing in any detail the facts. I mean, it
24 was I drew the inference that there was a, what you were
25 calling a per se violation under the ETSI contracts to seek

1 an injunction. When I went back and looked at it, I thought
2 that was kind of the case.

3 I want to give you a chance to respond and make
4 sure I'm not misinterpreting it. I mean, your are correct
5 in about paragraph 40 he talks about what a reasonable
6 person would understand from the contract. I don't think
7 that would be a debated point in terms of what standard I
8 ought to apply to the contract.

9 MR. LOWENSTEIN: Well, it actually is.

10 THE COURT: Okay.

11 MR. LOWENSTEIN: Because they say you need to
12 look at the intent of the organization and Professor
13 Stoffel-Munck says it's difficult to do, so I'm going to
14 look at what a reasonable person --

15 THE COURT: On that, what I was referring to, I
16 meant when it changed through application of the implied
17 covenant of good faith.

18 MR. LOWENSTEIN: Okay.

19 THE COURT: That's what I was referring to. I
20 don't think that's disputed, but maybe I'd better ask, that
21 I ought to look at. An implied covenant, good-faith
22 analysis would look at like what a reasonable person in the
23 shoes of a party would have negotiated?

24 MR. THOMPSON: Yes. There's another caveat to
25 that that says Dr. Borghetti's declaration, which is the

1 hesitance to inject terms that would be very material to the
2 agreement.

3 THE COURT: Under French law?

4 MR. THOMPSON: Under French law, yes.

5 THE COURT: Okay.

6 MR. THOMPSON: So that's in there as well.

7 THE COURT: But anyway, we get back to the rest
8 of the declaration, and I mean, you know, in paragraph 56,
9 Mr. Stoffel-Munck says, talks about his conclusion "that a
10 party irreparably declaring that it is prepared to grant an
11 irrevocable license cannot at the same time it is seeking
12 the Court to determine a FRAND rate and ask the other party
13 to negotiate also seek an injunction against a prospective
14 licensee." That's the first per se rule. Isn't it?

15 MR. LOWENSTEIN: No, I don't think so.

16 THE COURT: No?

17 MR. LOWENSTEIN: That seems to me the opposite
18 of the per se rule. He's not saying that the ETSI contract
19 is a prohibition from seeking an injunction. He's saying at
20 the same time, have the Court determine a FRAND rate to look
21 at what's going on here and ask the other party to continue
22 negotiations, which is what's going on here, and also seek
23 an injunction.

24 So this actually, 56 and then the conclusory
25 paragraph, show that we're not in per se land. That's not

1 my term. That's Philips' term, what they used in their
2 opposition papers.

3 I was addressing their argument, and I think 56
4 is a good example of him saying under these facts, you can't
5 get an injunction. And I think he repeats that at the end,
6 70-something or other. Given the circumstances, 70, it
7 would not consistent with a mandatory requirement and he
8 carries on and 71.

9 THE COURT: Well, 71, again, basically, it's a
10 breach if you seek an injunction while FRAND license
11 negotiations are ongoing.

12 MR. LOWENSTEIN: The next one, under French law
13 seeking an injunction, parties are conducting ongoing
14 negotiations while Philips has asked to continue the
15 negotiations where the patentee has asked the Court to
16 either prevent Telit from litigating the issue or determine
17 the FRAND rate.

18 That's his last paragraph in his conclusion and
19 I think that's consistent with the one that you pointed out,
20 56.

21 THE COURT: Well, this might be semantics or
22 maybe just frankly a miscommunication or misunderstanding or
23 different understanding of words, but when you say the
24 particular circumstances of the parties, that to me means I
25 have to look at e-mails, I have to look at the precise words

1 the parties use as opposed to a rule of law.

2 Now, and I would agree that this would be a rule
3 of law for an expert to say, as I actually think he has
4 said, that a party that has irrevocably declared that it's
5 prepared to grant an irrevocable license cannot at the same
6 time it is seeking to have a Court determine a FRAND rate
7 and ask the other party to negotiate also seek injunction
8 against a prospective licensee.

9 That's a statement of law. I'm willing to
10 accept the declaration. I don't think he has established it
11 and I don't think it's -- anyway, that's a statement of law,
12 it seems to me, that I can look at under Rule 44.1. I do
13 look at it. I'm not persuaded that it's right and I'm not
14 persuaded by it's right because the analysis is cursory.

15 I think the Borghetti declaration has set forth
16 significant analysis. I find it very compelling that there
17 was an attempt at ETSI to add to the contract or revise the
18 contract to address the issue before it and it was rejected.
19 The contract does not expressly preclude or even address the
20 propriety of seeking an injunction.

21 And all you've given me is essentially a
22 relatively cursory analysis by a French professor. He cites
23 one decision. I have no idea how that Court's authority
24 lets me understand how French law would apply.

25 And then from Thales, I do get a decision tree,

1 which I will employ, which says basically that French law
2 recognizes an implied covenant of good faith and plus the
3 standard that French law would look to are the same
4 standards that United States Courts employ and no one has
5 objected to me looking at Delaware, which is the state I'm
6 most familiar with, and its common law teaches that when you
7 apply -- when you apply the implied covenant of good faith,
8 you, A, only do so with respect to terms that are not
9 expressly taught by the contract. Then when you apply it,
10 you try to determine what the parties would have negotiated
11 with respect to the challenged issue.

12 And in this case I don't think there has been
13 any evidence and I'm not persuaded that Philips would ever
14 have agreed or that ETSI would ever have adopted a contract
15 that would have precluded a member from seeking a parallel
16 injunction. And actually, we have pretty good proof of
17 opposite because we actually have -- we know it's undisputed
18 that ETSI did consider revising the contract to address the
19 issue that is left unaddressed and it didn't adopt that
20 revision.

21 So for that reason I don't think that the
22 movants have established a likelihood of success on the
23 merits, and as I previously ruled, I don't think that the
24 movant established that under Third Circuit law, which I
25 believe governs, that the anti-suit injunction doctrine

1 would preclude Philips from pursuing the ITC injunction.
2 And I will say I'm just going to repeat so it's really
3 clear, at the end of the day, I would add, I just am very
4 troubled by the prospect of a district court effectively
5 enjoining an ITC proceeding by barring a party from pursuing
6 such proceeding when Congress passed a law that clearly
7 contemplated parallel proceedings.

8 So that's my ruling. I have not gone into a
9 recitation of cases for the applicable legal standard. I am
10 more than happy to do so. I think it's implicit in
11 everything I've discussed today. For instance, I do believe
12 that the Third Circuit and the Federal Circuit, although
13 they articulate the four prongs of the preliminary
14 injunction analysis differently, at the end of the day, they
15 both treat the first two factors the same and they are
16 gateway factors -- the irreparable harm factor, which is
17 number two and then the likelihood of success. I think the
18 courts are different how they articulated the third prong
19 and they're the same about the fourth prong, which is they
20 basically balance the equities.

21 If anybody thinks that that is an issue, please
22 let me know, because I will make it a point in case somebody
23 wants to take an appeal to articulate those, and I don't
24 want to be faulted in front of the Federal Circuit.

25 Similarly, I did not identify the Third Circuit

1 cases that articulate a position that I think is very clear
2 from Third Circuit law that the Third Circuit uses a
3 restrictive approach. The Third Circuit has expressly held
4 that it would not adopt a Ninth Circuit liberal approach. I
5 don't remember the case off the top of my head. I have the
6 cases on my bench here in front of me.

7 If anybody thinks and is going to fault me for
8 that on appeal, let me know, because I will lay the
9 necessary record. And if there's any other question
10 somebody has in that regard, for instance, the citation to a
11 record or lack of citation to a record or case, you need to
12 let me know now, because I would willingly address that.

13 I'm ruling from the bench because we have
14 600 cases each here in this district. I want to afford the
15 movant an opportunity to litigate this matter in the Federal
16 Circuit, which doesn't have 600 cases a judge, and I want to
17 move expeditiously so that you all have a right to
18 adjudicate this in a timely fashion in the Federal Circuit.
19 So now is the time. Please let me know. I've got some time
20 left in the day and I will address anything.

21 MR. KEELEY: Your Honor, if I may, I'm Michael
22 Keeley from Axinn, Veltrop & Harkrider, also for Teles with
23 my partner.

24 Regarding appeal, we'll need to discuss with our
25 client whether that is in the cards. I am satisfied that we

1 all are looking at the same papers and thinking about the
2 same cases from the different circuits and courts so that I
3 don't think there will be confusion on appeal about the
4 cases you were relying on, Your Honor, but I did want to be
5 forthright with you that we may appeal and I don't want to
6 be in the position of you feeling like we sandbagged you by
7 not making clear that that was a possibility in the event
8 that you wanted to recite more cases either on the record
9 verbally or in a writing.

10 THE COURT: No. Thank you very much for that
11 comment. I will tell you, part of me was tempted not to
12 rule on irreparable harm so that you could tee this first I
13 issue up to the Federal Circuit, which is almost -- I think
14 it's largely a legal issue, a policy issue that agencies and
15 courts above my level could help weigh in on, but I also
16 felt it would be unfair to Philips not to address
17 irreparable harm, and I didn't think irreparable harm had
18 been established because, as I mentioned, I just think the
19 record is too conclusory. I think you need to do more. And
20 I absolutely believe, this is the one thing I'm confident
21 about probably, is that it's not irreparable harm to have to
22 litigate on two fronts when Congress has expressly allowed
23 for that. That just doesn't constitute irreparable harm in
24 my mind.

25 But those are the only two factors I've ruled

1 upon. Because I've ruled against the movants on both of
2 them, I don't think it's necessary to address the two
3 remaining factors. A very interest issue. It will make for
4 interesting appeal.

5 Anything else, plaintiff?

6 MR. THOMPSON: No, Your Honor. Thank you.

7 THE COURT: Anything else?

8 MR. LOWENSTEIN: No, Your Honor. Thank you.

9 THE COURT: Anything else?

10 MR. ZEINEDDIN: No, your Honor. Thank you.

11 THE COURT: All right. Everybody have a good
12 day. Thanks very much.

13 MR. LOWENSTEIN: Thank you.

14 (Hearing concluded at 2:39 p.m.)

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FORM 30. Certificate of Service

Form 30
July 2020**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT****CERTIFICATE OF SERVICE****Case Number** 2021-2106**Short Case Caption** Koninklijke Philips N.V. v. Thales DIS AIS USA LLC

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Form 19
July 2020

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2021-2106

Short Case Caption: Koninklijke Philips N.V. v. Thales DIS AIS USA LLC

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Form 31
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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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Short Case Caption: Koninklijke Philips N.V. v. Thales DIS AIS USA LLC

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