EXHIBIT D

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CONTAINS CONFIDENTIAL BUSINESS INFORMATION SUBJECT TO PROTECTIVE ORDER

UNITED STATES INTERNATIONAL TRADE COMMISSION WASHINGTON, D.C.

Before the Honorable Paul J. Luckern Chief Administrative Law Judge

In the Matter of

CERTAIN ELECTRONIC DEVICES WITH MULTI-TOUCH ENABLED TOUCHPADS AND TOUCHSCREENS Inv. No. 337-TA-714

RESPONDENT APPLE INC.'S POSTHEARING BRIEF

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Putting aside the strained nature of Mr. Dezmelyk's infringement theory, in order to meet the burden of proof on infringement, it was nonetheless incumbent upon Mr. Dezmelyk to present meaningful evidence confirming that the Apple products actually produce the narrow data assumptions that he alleges are required to infringe. Yet, at the hearing, Mr. Dezmelyk did the opposite, confirming time and again that, on an issue where Elan has the burden of proof, he *did not* base his opinion on any actual measured data to confirm infringement. Rather, Mr. Dezmelyk relied almost exclusively upon hypothetical data that he created deliberately to suggest infringement.⁸ *See, e.g.*, Dezmelyk, Tr. at 668:3-7 ("Q. My only question is whether you did it deliberately, Mr. Dezmelyk. Was it accidental or was it deliberate? A. All data in the hypothetical has been deliberately placed."); *id.* at 512:21-25 ("And I will point out the only thing that is important to note, since it is hypothetical data, I don't know the actual magnitude that would be seen from the actual sensor."); *id.* at 665:22-666:5 ("Q.

."); *id.* at 666:25-667:3 ("Q. And, again, the data that you have depicted on this illustrative exhibit were hypothetical data, not actual data. True? A. That's correct.").

Ultimately, Mr. Dezmelyk relied upon only a single exhibit that showed real data. *See* **RX-631C** [USPTO Presentation] at RX-631C.019. And, Mr. Dezmelyk conceded on cross-examination that this one real data set did not even show infringement under his theory. *See*

⁸ While it is true that Apple's expert Dr. Balakrishnan also pointed to hypothetical data sets, he did so to illustrate the function of Apple's code and the flaws in Mr. Dezmelyk's analysis. Because Apple does not carry the burden of proof on this issue, Dr. Balakrishnan's approach of using such data sets to illustrate his testimony is entirely appropriate. Elan's attempt to substitute hypothetical data sets for proof of infringement is not. *See* Section X.A.2.a(3).

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Instead of presenting any evidence of specific instances where all of the conditions necessary for infringement under its theory have actually been met in practice, Elan has merely argued that its required data conditions are likely to have been met in practice in at least some of the accused Apple products. In support, Elan relies upon its expert Mr. Dezmelyk's opinion as to what is and is not likely to occur in the operation of the accused products. But neither Elan nor its expert Mr. Dezmelyk has actually measured any data of capacitive coupling for actual fingers on actual accused products to determine whether the conditions necessary for infringement under Elan's theory have actually ever been met in practice. Dezmelyk, Tr. at 652:7-12, 660:3-11, 668:17-25, 669:8-12.

Rather, Mr. Dezmelyk's opinions are based on hypothetical data sets. Dezmelyk, Tr. at 652:13-653:1, 666:25-667:3. To be sure, hypothetical data sets can be useful to understand how Apple's algorithms would function in certain conditions (as Dr. Balakrishnan used them to illustrate the operation of Apple's code). But hypothetical data sets cannot be used as a substitute for evidence to satisfy a burden of proof on whether those certain conditions actually occur in practice. The testimony on Mr. Dezmelyk's hypothetical data sets reveals exactly why this is so. Mr. Dezmelyk testified that the data depicted on his demonstrative slides including CDX-172.232, are hypothetical data, not actual data. Dezmelyk, Tr. at 652:13-653:1, 666:25-667:3; CDX-172C.232. "All data in the hypothetical has been deliberately placed" by Mr. Dezmelyk, presumably to support Elan's infringement case. Dezmelyk, Tr. at 667:10-668:7.

the hypothetical would be

non-infringing even under his own theory. Dezmelyk, Tr. at 668:8-12.