

Exhibit H

UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of:) Investigation No.
CERTAIN 3G WIDEBAND CODE) 337-TA-601
DIVISION MULTIPLE ACCESS)
WCDMA) MOBILE HANDSETS)
AND COMPONENTS THEREOF)

OPEN SESSION

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*** Index appears at end of transcript ***

P R O C E E D I N G S

(8:30 a.m.)

JUDGE LUCKERN: This is day four in the evidentiary hearing in the matter of Certain 3G Wideband Code Division Multiple Access (WCDMA) Mobile Handsets and Components Thereof, Investigation Number 337-TA-601.

Before we start the cross-examination of Mr. Merritt, who wants to report on the times for yesterday?

MR. POWERS: I will, Your Honor. The agreed times are for Complainants, they have consumed 14 hours and 49 minutes. And Respondents have consumed 11 hours and 41 minutes.

JUDGE LUCKERN: And that's the total, correct?

MR. POWERS: That is cumulative.

JUDGE LUCKERN: Obviously it is the total. It could not be anything but the total. Okay. All right. Come on there, Mr. Powers.

MR. POWERS: As long as yesterday felt and was, it wasn't that long.

JUDGE LUCKERN: Let's hope this is going to be a short cross. No. You take all

1 JUDGE LUCKERN: Well, so you are ready
2 to call the next witness?

3 MR. POWERS: We are.

4 JUDGE LUCKERN: Who is it going to be?
5 I have got your appendix 9 here to your
6 prehearing statement. So what is going to --

7 MR. POWERS: Mr. Kowalski. Ms. Mehta
8 will conduct the examination.

9 JUDGE LUCKERN: All right. Mr. John
10 Kowalski. He is the first. Who is going to be
11 the second? And with him, how much time do you
12 think you are going to be with him? I guess it
13 must be someplace in your prehearing statement.
14 How much time do you think you are going to be
15 with him?

16 MR. POWERS: It will be quite short,
17 about 15 minutes or less.

18 JUDGE LUCKERN: Maybe we can get him
19 out. Who is the next one?

20 MR. POWERS: Who is the next one?

21 JUDGE LUCKERN: You don't know?

22 MR. POWERS: Mr. Boucobza. He is the
23 French law expert who will be testifying with a
24 translator.

25 JUDGE LUCKERN: This is

1 B-o-l-o-u-r-c-h-i?

2 MR. POWERS: It is B-o-u-c-o-b-z-a.

3 JUDGE LUCKERN: I'm sorry. I have the
4 wrong name here. Where is he on appendix 9,
5 Mr. Powers or somebody on your team?

6 MR. POWERS: I will find it.

7 JUDGE LUCKERN: Can you tell me what
8 page it is?

9 MR. POWERS: We don't have it here.

10 JUDGE LUCKERN: I have it. Professor
11 Xavier Boucobza. And his area of expertise is
12 French law, on page 9.

13 MR. POWERS: That's it, Your Honor.

14 JUDGE LUCKERN: What do you estimate
15 for him, how long?

16 MR. POWERS: Probably a half hour.

17 JUDGE LUCKERN: We don't know about --
18 let's at least get rid of one of them if we can
19 before lunch. So, all right, we're doing
20 great. I compliment you people.

21 Respondents, who is going to do any
22 cross-examination of Mr. Kowalski?

23 MR. LAVENUE: Lionel Lavenue, Your
24 Honor.

25 JUDGE LUCKERN: All right. Do

1 AFTERNOON SESSION

2 (12:53 p.m.)

3 JUDGE LUCKERN: Mr. Powers, do you
4 want to call your next witness, please?

5 MR. POWERS: Yes, Your Honor.

6 MR. HICKERSON: David Hickerson from
7 Weil, Gotshal & Manges for the Samsung
8 Respondents. We call Professor Xavier
9 Boucobza.

10 JUDGE LUCKERN: Okay, Professor, do
11 you want to take the witness stand? And we
12 have a translator and check translator?

13 MR. HICKERSON: Your Honor, we have a
14 translator, Lily Olm.

15 JUDGE LUCKERN: Do you have a card?
16 Could I have it, please? Did I hear something
17 about a check translator? Do we have one? We
18 do not?

19 MS. NIEMEYER: No.

20 JUDGE LUCKERN: We're on the public
21 record. What I usually do is put the witness
22 under oath and I don't put a translator under
23 oath, I just ask the translator if she will
24 make an accurate translation. And I don't know
25 what Lily will say, but we will see. That's

1 all I do. And it is on the record and we leave
2 it like that.

3 So who -- we have Ms. Niemeyer. Okay.
4 So, Professor, do you want to raise your right
5 arm, please.
6 Whereupon--

7 XAVIER BOUCOBZA,
8 having been first duly sworn, was examined and
9 testified through the interpreter as follows:

10 THE INTERPRETER: Yes, I swear to God.

11 JUDGE LUCKERN: We do have a
12 translator. Her name is Lily Olm. She is
13 consecutive/simultaneous interpretation,
14 French, German, Dutch. She has a place at 7718
15 Lafayette Forest Drive, apartment 14 -- I hope
16 you don't mind me putting this in the record,
17 do you? Lily?

18 THE INTERPRETER: No problem.

19 JUDGE LUCKERN: Annandale, Virginia,
20 22003. And she has something about voice,
21 703-862-2456. Lily, you will make an accurate
22 translation, won't you?

23 THE INTERPRETER: I will do that.

24 JUDGE LUCKERN: All right. That's
25 wonderful.

1 (Discussion off the record.)

2 JUDGE LUCKERN: I believe I heard
3 Complainant's counsel say something. What did
4 you say, Ms. Niemeyer?

5 MS. NIEMEYER: I had just asked that
6 the interpreter speak into the microphone when
7 she does her translation.

8 JUDGE LUCKERN: You understand that,
9 Lily, don't you?

10 THE INTERPRETER: Yes, I do.

11 JUDGE LUCKERN: And I have Lily's
12 card. I read it into the record. Off the
13 record.

14 (Discussion off the record.)

15 JUDGE LUCKERN: Back on the public
16 record. I have given the card to Karen. She
17 may need it for the transcript, et cetera, et
18 cetera. So that's where we stand. All right.
19 Let's ask your first question, counselor.

20 MR. HICKERSON: Thank you, Your Honor.

21 DIRECT EXAMINATION

22 BY MR. HICKERSON:

23 Q. Professor, could you state your full
24 name for the record, please.

25 A. Yes. My name is Xavier Boucobza.

1 Q. And where are you currently employed?

2 A. I work as a law professor at the
3 University, Paris, 11.

4 Q. And how long have you been employed as
5 a professor of law?

6 A. I am a law professor since 1997.

7 Q. Could I ask you to look at
8 Exhibit RX-2791.

9 A. Yes.

10 Q. Do you recognize that document?

11 A. Yes, absolutely. That is my witness
12 statement.

13 Q. And did you prepare this witness
14 statement?

15 A. Yes, I prepared it myself.

16 MR. HICKERSON: Your Honor, in order
17 to speed things up, I would propose that I ask
18 that the professor be qualified as an expert in
19 French law on the basis of his witness
20 statement and the contents thereof. I could go
21 through all of his qualifications if you would
22 prefer.

23 JUDGE LUCKERN: All right. Let me --
24 first of all, let me just take a quick look at
25 the exhibit which you had identified as

1 RX-2791. Is it in this book?

2 MR. HICKERSON: Yes, Your Honor, it is
3 in your binder.

4 JUDGE LUCKERN: I have volume 1 of 1.
5 Is there another -- I should have how many
6 binders up here?

7 MR. HICKERSON: One binder, Your
8 Honor.

9 JUDGE LUCKERN: I have it here, all
10 right. Yes. I have before me the witness
11 statement of Professor Xavier Boucobza that
12 speaks for itself. It indicates his high
13 school, Ph.D. in law, et cetera, et cetera.
14 And his professional positions, as I am looking
15 at question number 4, et cetera.

16 And Mr. Hickerson wants me to qualify
17 this witness as an expert in French law on the
18 basis of this exhibit, again, which is RX-2791.
19 What is the position of Complainant's counsel
20 on that proffer?

21 MS. NIEMEYER: InterDigital does not
22 object, Your Honor.

23 JUDGE LUCKERN: What about the staff?

24 MR. LEVI: Staff has no objection,
25 Your Honor.

1 JUDGE LUCKERN: All right. Based on
2 my review of RX-2791, I don't have any problem
3 qualifying the good professor as an expert in
4 French law. Go ahead, counselor.

5 BY MR. HICKERSON:

6 Q. Professor, have you been asked to
7 render any expert opinions in this case?

8 A. Yes, I was asked by Samsung to render
9 my expert opinion in this case.

10 Q. Can you state what the questions that
11 you were asked to render opinions on were?

12 A. Two questions were asked of me. The
13 first one with regards to the legal nature of
14 the relation between the members of ETSI, and
15 the second one with regards to the legal extent
16 of article 6.1 of the ETSI rules.

17 Q. Nate, could you just pull up RDX-21,
18 please.

19 And are these the two questions that
20 you addressed in your initial expert report?

21 MS. NIEMEYER: Objection, Your Honor.

22 THE WITNESS: Yes, absolutely.

23 JUDGE LUCKERN: All right. Go ahead,
24 Ms. Niemeyer. What is the basis for your
25 objection?

1 MS. NIEMEYER: We don't object to the
2 first sort of block that's up that identifies
3 the questions put to the expert that he just
4 testified as to, but the portion at page 5
5 which is basically an excerpt from his expert
6 report, which has not been admitted into
7 evidence, and this is a way to lead the expert
8 and get around that.

9 JUDGE LUCKERN: Mr. Hickerson, how do
10 you want to respond?

11 MR. HICKERSON: We're not seeking to
12 have his expert reports admitted into evidence.
13 We're simply, you know, putting as a
14 demonstrative exhibit for aiding the Court, you
15 know, the questions he was asked and the answer
16 that was given to one of the questions.

17 That is his opinion. I can certainly
18 have him testify to it.

19 MS. NIEMEYER: We don't object if that
20 second square on the RDX is redacted.

21 JUDGE LUCKERN: Well, let me just read
22 the transcript, please. This portion of page
23 5, that is page 5 of the RX-2791? You said
24 page 5.

25 MS. NIEMEYER: It is an excerpt from

1 his expert report.

2 JUDGE LUCKERN: Oh, oh, all right.
3 Well, Mr. Hickerson, why don't you have him
4 testify to it, Mr. Hickerson.

5 MR. HICKERSON: Very well, Your Honor.

6 BY MR. HICKERSON:

7 Q. Professor, you referred to an entity
8 named ETSI. Can you tell me what ETSI is?

9 A. Yes. ETSI is an association which is
10 governed by French law. It has been created by
11 initiative of the European Union. And it
12 regroups the operators that deal with
13 telecommunications.

14 Q. Could you --

15 MS. NIEMEYER: Objection, Your Honor,
16 move to strike as outside -- objection, Your
17 Honor, I move to strike that response as
18 outside the scope of his expert report. He did
19 not provide that detail on what ETSI is in his
20 report.

21 JUDGE LUCKERN: How do you want to
22 respond, Mr. Hickerson?

23 MR. HICKERSON: Your Honor, I am
24 simply establishing the foundation for the
25 witness's testimony. He certainly provided

1 expert reports on the ETSI organization, the
2 documents governing the organization, the
3 obligations of the party to the organization
4 and I think it is certainly fair game to ask
5 the witness if he knows what the organization
6 is.

7 I do not think that every single word
8 that comes out of the witness's mouth here
9 today must be mimicked in an expert report that
10 I am not even allowed to put into evidence.

11 JUDGE LUCKERN: Mr. Levi, what is your
12 position with respect to the motion to strike?

13 MR. LEVI: Your Honor, the information
14 elicited by Mr. Hickerson -- I'm sorry, Your
15 Honor, my mic was off.

16 Your Honor, the information that
17 Mr. Hickerson elicited or sought to elicit by
18 his question would seem to be more factual in
19 nature as opposed to opinion testimony, so it
20 seems to be a fair question for Mr. Hickerson
21 to ask as background for this witness's
22 testimony.

23 JUDGE LUCKERN: All right. I am going
24 to deny the motion to strike. And you
25 certainly, Ms. Niemeyer, have the opportunity

1 to any cross to go into that matter, but the
2 motion to strike is denied. Go ahead,
3 Mr. Hickerson.

4 MS. NIEMEYER: Could we also have the
5 slide taken down, as long as page 5 is up
6 there? It appears to be just leading the
7 expert.

8 JUDGE LUCKERN: All right. Could we
9 do that?

10 MR. HICKERSON: Absolutely. Please
11 take the slide down.

12 JUDGE LUCKERN: All right. Thank you.
13 It is taken down. Go ahead, Mr. Hickerson.

14 BY MR. HICKERSON:

15 Q. Professor, I would like you to look
16 at -- first, let me ask you, have you looked at
17 the documents that govern ETSI?

18 A. Yes. In order to prepare my report, I
19 had to look over the documents that govern
20 ETSI.

21 Q. Could you take a look at
22 Exhibit RX-2083, please.

23 A. Yes.

24 Q. Can you tell me what that document is?

25 A. Those are the ETSI rules.

1 Q. Okay. And is this a document, the
2 ETSI IPR policy?

3 A. Yes, that's correct.

4 Q. And does the ETSI IPR policy say
5 anything about the obligations of ETSI members
6 who own IPR that is essential to the ETSI
7 standard?

8 A. Yes. The first one of the obligations
9 is the burden of the holder of one of the
10 essential patents, he needs to declare that
11 patent before ETSI, so that this would comport
12 with article 4.1.

13 Q. Nate, could you pull up article 4.1
14 there, please. And can you also pull up
15 article 6.1.

16 Professor, after making a disclosure
17 pursuant to article 4.1, does the ETSI IPR
18 policy oblige the declarant to do anything
19 else?

20 A. According to article 6.1, the holder
21 of essential patent needs to grant licenses, is
22 obliged to grant licenses to the ETSI members
23 which request it.

24 Q. And does article 6.1 say anything
25 about the terms of such licenses?

1 A. Yes, according to article 6.1, those
2 licenses should be granted fairly, reasonable,
3 and nondiscriminatory.

4 Q. Now, earlier you said that one of the
5 questions you were asked to give an opinion on
6 was the nature of the relationship between the
7 ETSI members?

8 A. That's correct.

9 Q. And so under French law, can you tell
10 us what the nature of the relationship is
11 between ETSI members?

12 A. Under French law, the relationship
13 which exists between the members of an
14 association is always of contractual nature.

15 Q. And is there any particular type of
16 contract under French law that is applicable
17 here?

18 A. Yes. Here we have to do -- we are in
19 the context of what is called, under French
20 law, framework agreement.

21 Q. And what is, under French law, a
22 framework agreement?

23 A. A framework agreement is before
24 anything else a contract, a real contract.
25 That means that it has a binding force, which

1 binds the parties. Then it is a contract which
2 frames the relationship between the parties.

3 And in this context, it necessitates
4 the existence of the creation of implementing
5 contracts.

6 Q. What is an implementing contract?

7 A. An implementing contract is a contract
8 which implements the framework agreement in
9 order to accomplish the objective set forth in
10 the framework agreement.

11 Q. And in the context of ETSI, what are
12 the implementing contracts?

13 A. On the implementing contract are the
14 licenses which are granted the way it is
15 foreseen, set forth by article 6.1 of the ETSI
16 rules.

17 Q. Now, under French law, does the
18 framework agreement have to set forth all of
19 the terms of the implementing contracts?

20 A. No, not at all. The framework
21 agreement only needs to foresee, set forth the
22 principle of the application -- the
23 implementing contract.

24 Q. Well, what about the price term? What
25 if the price term is missing, is there still a

1 valid contract?

2 A. Yes. The framework agreement is still
3 valid and with regards to that point, French
4 case law pronounced itself very clearly. Four
5 decisions were rendered by the Supreme Court in
6 its most Solinow formation. This Supreme Court
7 on the 1st of December, '95 decided upon
8 validity of such a framework agreement.

9 Q. Professor, could you turn to
10 Exhibit RX-508, please.

11 MR. HICKERSON: Your Honor, this is a
12 case that's in French, we have attached a
13 certified translation in English as part of the
14 exhibit. Nate, could you turn to page 4 of the
15 exhibit, please.

16 JUDGE LUCKERN: You have it there,
17 don't you, Ms. Niemeyer?

18 MS. NIEMEYER: Yes, Your Honor.

19 JUDGE LUCKERN: And Mr. Levi, you have
20 it, don't you?

21 MR. LEVI: Yes.

22 JUDGE LUCKERN: He says yes. Go
23 ahead, Mr. Hickerson.

24 BY MR. HICKERSON:

25 Q. Professor, is this one of the Supreme

1 Court cases that you just mentioned?

2 A. Yes, absolutely. This is one of the
3 decisions I just mentioned.

4 Q. And could you tell us what the holding
5 of this case is?

6 A. Yes, in this case, there was a
7 framework agreement which necessitated
8 implementing contracts. And the price for the
9 implementing contracts was not mentioned. The
10 Supreme Court declared the framework agreement
11 to be valid. And so for that reason, the
12 implementing contracts had to be executed.

13 Q. Professor, are you aware that
14 InterDigital has made declarations pursuant to
15 section 4. -- sorry, section 6.1 with respect
16 to certain of its patents?

17 A. Yes, absolutely. Certain declarations
18 were given to me before I started authoring my
19 expert report.

20 Q. Now, once InterDigital made these
21 declarations, was it obliged to offer a license
22 to ETSI members to the patents that it included
23 in its declaration?

24 MS. NIEMEYER: Objection, Your Honor.
25 The professor did not opine on the specific

1 obligations by InterDigital in his expert
2 report.

3 MR. HICKERSON: Your Honor, the expert
4 report opined on the obligations of ETSI
5 members, including InterDigital and Samsung,
6 who are both ETSI members.

7 JUDGE LUCKERN: Mr. Levi, what is your
8 position with respect to the objection to the
9 question?

10 MR. LEVI: Your Honor, if
11 Mr. Hickerson is correct that the professor
12 opined on the obligations of ETSI members at
13 large, and if it is true that InterDigital is a
14 member of ETSI, then I think it logically
15 follows that the professor's opinion --
16 opinions would apply to InterDigital. So the
17 staff opposes the objection.

18 JUDGE LUCKERN: I am going to overrule
19 the objection. You will have the opportunity,
20 if you want to, to get into it on cross,
21 Ms. Niemeyer. Objection is overruled. Go
22 ahead.

23 Sir, you may answer the question. The
24 question -- off the record.

25 THE INTERPRETER: I have it.

1 JUDGE LUCKERN: Go ahead. Back on the
2 public record. The translator has the
3 question. Go ahead, please.

4 THE WITNESS: Yes. Every ETSI member
5 that makes a declaration that has to do with
6 the essential patent is bound because of the
7 binding force of the contract to grant licenses
8 to the other ETSI members that request such a
9 license.

10 BY MR. HICKERSON:

11 Q. Now, assuming the parties don't agree
12 on the price for the license, under French law,
13 how is the price determined?

14 A. The solution is clear with regards to
15 French law. It is the patent holder who needs
16 to unilaterally determine the price.

17 Q. Now, can the patent holder here,
18 InterDigital, set any price it wants?

19 A. No. They are restricted, there is a
20 twofold restriction. First, they are
21 restricted by the contract itself, the terms of
22 the contract. And then, second, they are
23 restricted by the rules of French law.

24 BY MR. HICKERSON:

25 Q. Nate, can you pull up RDX-19.

1 Professor, you said there was limitations
2 imposed by the contract. Can you tell us what
3 limitations those are?

4 MS. NIEMEYER: Objection.

5 JUDGE LUCKERN: Go ahead, the basis
6 for your objection, Ms. Niemeyer?

7 MS. NIEMEYER: Objection, there is no
8 foundation for this exhibit, and it appears to
9 be just leading the witness.

10 MR. HICKERSON: Your Honor, it is a
11 demonstrative exhibit. It is supported by the
12 testimony he just gave and the testimony he
13 will give. And it is, I think, completely in
14 line with the ground rules in this case
15 concerning proper demonstrative exhibits.

16 MS. NIEMEYER: It does not follow the
17 testimony he has already given. It appears to
18 lead him to the question that Mr. Hickerson
19 wants him to give.

20 MR. HICKERSON: He testified that
21 there were limitations under the contract and
22 under French law. The exhibit goes precisely
23 to those two points.

24 JUDGE LUCKERN: Mr. Levi, what is your
25 position with respect to the objection?

1 MR. LEVI: Well, Your Honor, the
2 way -- I think the way we have been proceeding
3 this week, in numerous instances that I can
4 recall the examining attorney has put up slides
5 in advance of the witness's testimony. I don't
6 particularly see the problem, unless the
7 objection is foundation, in which case I think
8 Mr. Hickerson could ask the witness if he is
9 familiar with the slide. But as the objection
10 currently stands, I am not inclined to support
11 it, Your Honor.

12 JUDGE LUCKERN: You said you are not
13 inclined to what?

14 MR. LEVI: I am not supporting the
15 objection, Your Honor.

16 JUDGE LUCKERN: All right.
17 Ms. Niemeyer, do you want to say anything
18 further?

19 MS. NIEMEYER: If Mr. Hickerson would
20 like to lay some foundation for the exhibit, I
21 might withdraw my objection.

22 JUDGE LUCKERN: How do you want to
23 proceed, Mr. Hickerson?

24 MR. HICKERSON: Your Honor, I have
25 already asked him about limitations. He has

1 given answers about contract and French law. I
2 am going to follow up and ask him now specifics
3 about those contract and French law
4 limitations, which are on the slide.

5 At this point, I am merely using a
6 demonstrative. I believe that's exactly what
7 the ground rules provide that a demonstrative
8 needs to do, either it is in the record or it
9 is going to be followed up and put in the
10 record. And this is what this is. So I would
11 ask the Court to overrule the objection.

12 JUDGE LUCKERN: First of all, I don't
13 make a big distinction between demonstratives
14 and documentary. Demonstratives are not in
15 yet. In any event, no, I am going to overrule
16 the objection. And you will have the
17 opportunity for cross, Ms. Niemeyer. I am
18 overruling the objection. He can answer the
19 question.

20 Maybe in the long run, maybe the
21 demonstrative will never get in. Usually if
22 there is testimony about some portion of it, it
23 will get in, maybe a portion of the
24 demonstrative. In any event, it is overruled.
25 Can you find that question? Do you want me to

1 read it?

2 MR. HICKERSON: Your Honor, I would
3 restate the question at this point. I am not
4 sure there was a question pending.

5 JUDGE LUCKERN: Don't put another
6 little phrase in it or something. That's the
7 only reason many times I want to read it
8 because I find attorneys, not purposely -- but
9 go ahead.

10 BY MR. HICKERSON:

11 Q. Professor, you said that there were
12 limitations on setting the price imposed by
13 contract. Can you tell me what in this case
14 those limitations are?

15 A. The limitations are a direct result
16 from article 6.1. Because of what is said in
17 this article, the price needs to be fair,
18 reasonable and nondiscriminatory.

19 Q. And does the licensor, that would here
20 be InterDigital, have to take into account the
21 purposes and policies of ETSI in setting the
22 price?

23 A. Absolutely. This is a contractual
24 obligation that links the ETSI members. It is
25 a firm obligation.

1 Q. And you also said there were
2 limitations under French law that applied here.
3 Can you tell us what those are?

4 A. Yes. There are two restrictions.
5 First of all, the holder of an essential patent
6 needs to fix this price in good faith. The
7 notion of good faith results directly from the
8 code, from the civil code.

9 And then the price which is determined
10 cannot be an abusive price. And the
11 jurisdictions will surveil and eventually
12 sanction an abusive price.

13 Q. Now, can you turn to Exhibit RX-545,
14 please.

15 A. Yes.

16 MR. HICKERSON: Again, Your Honor,
17 this is a document in French. It does have
18 attached to it a certified English translation.

19 BY MR. HICKERSON:

20 Q. Professor, do you recognize this
21 document? Can you tell us what it is?

22 A. Yes, of course. This is a comment
23 given by a professor, it has a very
24 long-standing reputation in France. It is
25 Professor Jacques Gestau, and he gave a comment

1 here with regards to the four decisions which
2 were pronounced by the Supreme Court.

3 Q. And is this a source that you have
4 cited in your expert opinions and relied on in
5 forming your opinions?

6 A. Yes. This is, indeed, a comment which
7 is cited several times in my expert opinions.

8 Q. Professor, under French law, if the
9 licensee disagrees with the price set by the
10 licensor, what happens?

11 A. The licensee may then go against that
12 price, dispute that price. So the licensee may
13 sue before the jurisdictions in order to either
14 request a lower price or in order to be paid
15 damages.

16 Q. Okay. I would like you to turn,
17 again, to Exhibit RX-2083, please. That's the
18 ETSI IPR policy. Can you just pull that up,
19 please.

20 And if you could just focus on article
21 6.1. In particular, the last sentence of
22 section 6.1. And I will just read it into the
23 record. It says, "The above undertaking may be
24 made subject to the condition that those who
25 seek licenses agree to reciprocate."

1 Have you looked at that section of
2 6.1?

3 A. Yes, absolutely. I even established
4 an additional report with regards to that
5 point.

6 Q. And what is your understanding of that
7 sentence of section 6.1?

8 A. This is a reciprocity clause. It
9 means that every licensee who is the holder of
10 an essential patent which falls within the
11 realm, the domain, the operation of ETSI, has
12 the obligation to give out licenses, to grant
13 licenses with regards to this essential patent.

14 Q. Now, would tying an offer to license
15 its essential patents with other business
16 proposals that have nothing to do with either
17 party's essential IPR comport with ETSI
18 obligations?

19 MS. NIEMEYER: Objection, leading.

20 JUDGE LUCKERN: Sustained.

21 BY MR. HICKERSON:

22 Q. Professor, what is your opinion with
23 respect to an offer to license essential IPR
24 with requirements that are not connected with
25 either party's essential IPR?

1 A. That would be a violation of article
2 6.1. It said that only essential patents are
3 subject of that article and the obligation to
4 grant licenses has only to do with the
5 essential patents.

6 Q. Nate, could you pull up RDX-20,
7 please. So, Professor, if InterDigital's
8 offers to license its essential patents is
9 conditioned on a requirement that Samsung also
10 take a license to InterDigital's nonessential
11 patents, would that comport with InterDigital's
12 ETSI obligations?

13 MS. NIEMEYER: Objection, lack of
14 foundation, leading by this demonstrative.

15 JUDGE LUCKERN: Do you want a ruling?
16 Do you want to lay some foundation? Do you
17 want to rephrase or do you want to argue?

18 MR. HICKERSON: Your Honor, he has
19 just testified and he has given an expert
20 opinion in this case.

21 JUDGE LUCKERN: So you want -- go
22 ahead. Finish arguing. That's it, huh?

23 MR. HICKERSON: He has given an expert
24 opinion on this case that tying an offer for
25 essential patents with other business proposals

1 does not comport with ETSI obligations. I am
2 simply asking him with respect to an offer from
3 InterDigital, the condition, a license to its
4 essential patents with a requirement that a
5 license to nonessential IPR also be taken,
6 would that comport with section 6.1?

7 He has issued extensive reports in
8 this case about the obligations of the parties
9 under section 6.1. He has issued an opinion in
10 this case with respect to tying offers for
11 licenses to essential IPR with other business
12 proposals and other requirements that don't
13 have anything to do with the parties' essential
14 IPR. I can't see what possible objection there
15 is to the question that I have asked. So I
16 would like a ruling, yes.

17 JUDGE LUCKERN: All right.
18 Ms. Niemeyer, do you have anything new you want
19 to say before I hear the position of Mr. Levi?

20 MS. NIEMEYER: Yes. There is no
21 foundation that Professor Boucobza has any idea
22 what InterDigital has or has not done. And
23 this slide seems to suggest that either he did
24 or it leads him to draw conclusions about
25 offers that have or have not been made.

1 JUDGE LUCKERN: All right. Mr. Levi,
2 what is your position with respect to the
3 objection?

4 MS. NIEMEYER: One other thing, Your
5 Honor.

6 JUDGE LUCKERN: Go ahead.

7 MS. NIEMEYER: Also in his report, he
8 gave no conclusion on the ultimate issue of
9 whether or not particular acts by InterDigital
10 comported, since he had no knowledge of those.
11 That's all.

12 JUDGE LUCKERN: All right. Mr. Levi,
13 what is your position with respect to the
14 objection?

15 MR. LEVI: Well, Your Honor, I would
16 like to make two points. First, as I noted a
17 few moments ago, the way we have been
18 proceeding this week, the examining attorney
19 has on several instances placed demonstrative
20 exhibits on the screen prior to questioning the
21 witness regarding subject matter of that
22 demonstrative.

23 So the staff would have no objection
24 to the witness's responding to Mr. Hickerson's
25 question. With regard to the demonstrative

1 exhibit itself, Mr. Hickerson has yet to move
2 that exhibit, this exhibit into evidence. So I
3 think any objection Ms. Niemeyer has to this
4 particular exhibit is premature.

5 JUDGE LUCKERN: Fine. Let me just
6 make one comment. Over the years, I try not to
7 do it, but I take each situation that comes up
8 by itself. And the fact that there is
9 similarity with what I have done earlier
10 doesn't mean that I have to do the same thing
11 here because there may be a little bit of
12 difference here.

13 So whatever is done earlier, unless a
14 party wants to point out on such and such a
15 date, you did this and this and this and this,
16 exactly the same, I usually don't give any --
17 much weight to prior rulings. That doesn't
18 mean I don't stand by my prior rulings, but
19 there are various facets that come in here.

20 And the demonstrative is not in yet.
21 And he has been qualified as an expert and,
22 Ms. Niemeyer certainly would have the
23 opportunity to cross-examine him. So I am
24 going to overrule the objection on this
25 particular question, you will have an answer

1 and we will see where we are going to go. Only
2 on this. Keep up the work, Ms. Niemeyer. You
3 are protecting your client's interests. If you
4 don't want to do it, fine with me.

5 Go ahead. You may answer that
6 question.

7 MR. HICKERSON: Shall I restate the
8 question, Your Honor?

9 JUDGE LUCKERN: Well, so long as you
10 don't put in a little nuance on there which is
11 different and I am going to hear from
12 Ms. Niemeyer again. Do you understand?

13 MR. HICKERSON: I will do my best to
14 repeat it exactly.

15 JUDGE LUCKERN: That's why I do it
16 most of the time because I have found in the
17 past, lawyers will throw in another little
18 thing here. Go ahead.

19 BY MR. HICKERSON:

20 Q. Professor, if InterDigital's offer to
21 license its essential patent is conditioned on
22 a requirement that Samsung also take a license
23 to InterDigital's nonessential patents, would
24 that comport with InterDigital's ETSI
25 obligations?

1 A. No. According to article 6.1, the
2 price needs to be fixed for the license of
3 essential patent and only of an essential
4 patent.

5 Q. Well, what if InterDigital's offers
6 require Samsung to cross-license Samsung's
7 nonessential IPR to InterDigital in order to
8 obtain the license on the essential IPR, would
9 that comport with InterDigital's ETSI
10 obligations?

11 A. That, again, would be a violation of
12 article 6.1. It would also be a bad
13 interpretation of the reciprocity clause. Only
14 the essential patents are the ones that fall in
15 the context of article 6.1.

16 We also have to mention that there is
17 no obligation whatsoever to grant licenses to
18 nonessential IPRs.

19 Q. Professor, what if InterDigital's
20 offers required Samsung to enter into a joint
21 venture or other business arrangement with
22 InterDigital that was unrelated to
23 InterDigital's essential patents, would that
24 comport with InterDigital's ETSI obligations?

25 A. For the same reasons, this would be a

1 violation of article 6.1 of the ETSI rules.

2 MR. HICKERSON: I have no further
3 questions on direct, Your Honor.

4 JUDGE LUCKERN: All right. Who goes
5 next? Ms. Niemeyer, you are going next?

6 MS. NIEMEYER: Yes, please, Your
7 Honor.

8 JUDGE LUCKERN: Are you ready to
9 proceed with your cross-examination?
10 How is the professor doing?

11 THE WITNESS: Everything is fine.

12 JUDGE LUCKERN: Is this his first time
13 testifying in court?

14 THE WITNESS: I was the witness before
15 a court in Great Britain in the past.

16 JUDGE LUCKERN: But this is the first
17 in the United States?

18 THE WITNESS: Yes.

19 JUDGE LUCKERN: This is not a District
20 Court. This is an administrative proceeding
21 here. It is a little different than in the
22 District Courts, Professor. You have a lovely
23 city. You live in Paris? Beautiful city.
24 Beautiful city.

25 (Discussion off the record.)

1 JUDGE LUCKERN: Ms. Niemeyer, are you
2 ready?

3 MS. NIEMEYER: Yes, Your Honor.

4 JUDGE LUCKERN: Back on the public
5 record.

6 CROSS-EXAMINATION

7 BY MS. NIEMEYER:

8 Q. Good morning, or good afternoon,
9 Professor Boucobza.

10 A. Good afternoon.

11 Q. Could you please turn to
12 Exhibit RX-2083, which is the ETSI rules and
13 procedures, please.

14 A. Yes, okay.

15 Q. You testified that 6.1 requires that a
16 party is -- or a member is obliged to grant to
17 ETSI licenses, correct? And the only
18 particular phrase I am referring to is the
19 quote, obliged to grant.

20 A. Yes, that's correct. He has a
21 contractual obligation to grant licenses for
22 the essential patents.

23 Q. Okay. And what 6.1 actually says is
24 the entity is prepared to grant irrevocable
25 licenses on fair, reasonable and

1 nondiscriminatory terms, correct, the actual
2 language in the rule is prepared to grant,
3 correct?

4 A. Yes. That is correct. And the
5 wording here means that every ETSI member who
6 wishes to obtain a license can have it.

7 Q. Okay.

8 A. And that is why it is said that the
9 holder of the patent is prepared, he is ready
10 to grant the licenses.

11 Q. There isn't anywhere in 6.1 that says
12 is prepared to grant licenses to ETSI members,
13 there is no limitation, including that it is
14 only to ETSI members, correct?

15 A. The limitation speaks for itself, if I
16 can say. Because the article is in a contract
17 which binds only ETSI members.

18 Q. Okay, under your theory, except there
19 is nothing in 6.1 that says it is only
20 applicable to ETSI members, correct?

21 A. In every contract, when there are --
22 when there are dispositions, when there are
23 terms set, they are not repeated. It is not
24 repeated that these are only for the advantage
25 of the members of the -- I mean, of the parties

1 concerned.

2 Q. So you agree that it is not in 6.1?

3 MR. HICKERSON: Your Honor, before the
4 answer, I would object that that
5 mischaracterizes his testimony. She has asked
6 this question several times now, he has given
7 the answer.

8 JUDGE LUCKERN: How do you respond?

9 MS. NIEMEYER: That's fine. I think
10 the language speaks for itself. I will
11 withdraw the question.

12 JUDGE LUCKERN: Thank you. Move on.

13 BY MS. NIEMEYER:

14 Q. Earlier you testified in response to
15 Mr. Hickerson's questions regarding what
16 happens if the parties don't agree on the
17 price.

18 A. Yes, that's correct.

19 Q. And what happens is the patentee
20 unilaterally sets a price, correct?

21 A. That's correct.

22 Q. There are no negotiations between the
23 parties, correct?

24 A. Well, practically speaking, there may,
25 of course, be negotiations which take place if

1 the parties wish to do that. But if the
2 parties do not agree, it is upon the shoulders
3 of the holder of the patent to unilaterally
4 determine the price.

5 Q. Could you please turn to, in your
6 witness binder, the yellow cover, under the
7 first tab that says deposition, Min-U-Script,
8 on page 63 of your deposition testimony, then I
9 will read from line 4 to page 66, line 1.

10 "Question: Okay --"

11 JUDGE LUCKERN: Mr. Hickerson, you
12 have it there?

13 MR. HICKERSON: I do have it, Your
14 Honor.

15 JUDGE LUCKERN: And the witness has it
16 there? Make sure the witness has it in front
17 of him and he can follow it. If he wants to
18 read it ahead of time, he can read it, et
19 cetera. Lily, you make sure the witness --

20 MR. HICKERSON: Your Honor, he does
21 have it in front of him but, of course, it is
22 going to have to be translated, so I guess I
23 would ask Ms. Niemeyer which portion of this
24 she plans to read and what the purpose is.

25 If she is reading it for impeachment,

1 I don't see how this relates to the answer he
2 just gave.

3 JUDGE LUCKERN: All right. I
4 understand that. But we have had this argument
5 many times and you know my position on that. I
6 do want the English in the record, so somebody,
7 Ms. Niemeier, read it in and then have it
8 translated and then ask your question.

9 BY MS. NIEMEIER:

10 Q. So at page 63, line 4 to 22.

11 "Question: Okay. Going back to if an
12 offer is made, and it is rejected because the
13 parties don't agree that the terms meet the
14 contractual obligations, and they can't agree
15 by discussing the issue, is the only opinion
16 then litigation?"

17 Mr. Healey objected to the form of the
18 question, vague and ambiguous.

19 "The Witness: Can you repeat the
20 question, please? Just you -- translation.

21 "Answer: Several remarks regarding
22 your question. First, that the determination
23 of a price is not an offer, it's an obligation,
24 which is incumbent upon the patent owner, who
25 fixes the price or determines the price,

1 unilaterally in that regard or in that -- in
2 that regard, it is not, strictly speaking, an
3 offer."

4 Then the purpose which does impeach
5 his testimony.

6 "A second point as was stated earlier,
7 the parties can always discuss in reality --"

8 JUDGE LUCKERN: A little slower. Go
9 ahead.

10 MS. NIEMEYER: "Answer: Or have
11 discussions in reality, but the price cannot
12 result from these discussions."

13 JUDGE LUCKERN: Have you finished?

14 MS. NIEMEYER: Yes.

15 JUDGE LUCKERN: Can you translate
16 that? That's what Ms. Niemeyer said he
17 testified to in the deposition. Can you
18 transit first, and then we will have the
19 question.

20 THE WITNESS: I don't need a
21 translation. I know it.

22 BY MS. NIEMEYER:

23 Q. So every time --

24 JUDGE LUCKERN: Wait a minute. Is
25 this the witness?

1 THE INTERPRETER: The witness
2 speaking.

3 JUDGE LUCKERN: You understand the
4 question?

5 THE WITNESS: (In English) Yes, I
6 understand it. Thank you.

7 JUDGE LUCKERN: So now ask your
8 question. I don't think there is a question,
9 Ms. Niemeyer.

10 MS. NIEMEYER: There is not.

11 JUDGE LUCKERN: Please proceed.

12 BY MS. NIEMEYER:

13 Q. So every time there is a dispute
14 between the parties to -- regarding the price,
15 what they have to do to find out what the right
16 price is, they have to go to court, correct?

17 A. More exactly, it is upon the licensee
18 to dispute the price before the owner of the
19 patent and this before the court.

20 Q. Okay. And it is true in your view
21 that the declaration submitted to ETSI, there
22 must be one for each patent, correct?

23 A. That's correct, article 6.1 applies to
24 every essential patent.

25 Q. And a party would have to license on a

1 per patent basis, correct?

2 A. Yes. In order to be -- to comport
3 with article 6.1, it definitely needs to
4 license patent by patent on a per patent basis.

5 Q. So if an entity wanted to license five
6 patents, it would have to get five licenses and
7 a different rate or whatever the appropriate
8 rate is for each patent, correct?

9 A. Yes, with regards to article 6.1,
10 that's correct. Of course, it may be the case
11 that the parties agree among themselves to take
12 then that price for several licenses.

13 Q. Okay. You aren't actually personally
14 familiar with how -- what ETSI members do to
15 reach their licenses, are you?

16 A. May you specify that question?

17 Q. You haven't personally studied the
18 license agreements made by ETSI members
19 pursuant to their membership, correct?

20 A. Well, my expert report does not deal
21 at all with licenses which were granted, but
22 with the legal extent of article 6.1.

23 Q. And could you please turn to CX-816,
24 which is in your binder with the yellow cover
25 on it. And they are organized numerically.

1 JUDGE LUCKERN: Let me know, sir, when
2 you get it. It is towards the end. I have it
3 here in front of me. Do you have it there?

4 THE WITNESS: I do have the page.

5 JUDGE LUCKERN: Go ahead,
6 Ms. Niemeyer.

7 BY MS. NIEMEYER:

8 Q. If you look at question 7 and its
9 answer, if you turn to the third page, I
10 basically have just taken the exhibit and just
11 made it larger so that it can be read by
12 someone without a microscope.

13 Just for the record, this is a
14 printout from the ETSI web site and ETSI's IPR
15 policy FAQs. The question, question 7 reads,
16 "does the firm concerned have to pay some
17 consideration to ETSI for utilizing the said
18 patents or while buying the technology from
19 another company?"

20 Answer, in the second paragraph,
21 indicates "to this end, the concerned firm has
22 to enter into negotiations with the companies
23 holding patents in order to obtain licenses for
24 the use of the patented technology included in,
25 and essential for the implementation of an ETSI

1 standard."

2 THE INTERPRETER: I am going to
3 translate that.

4 Just one second. I am referring to
5 this because I think of something.

6 MR. HICKERSON: Your Honor.

7 JUDGE LUCKERN: Mr. Hickerson?

8 MR. HICKERSON: Your Honor, I object
9 to this. Ms. Niemeyer has taken a document
10 that is in English with no translation for the
11 witness, called out a small portion of that
12 document. The witness doesn't know what the
13 document is, what the context is, what the rest
14 of the document is. He has no way to know, per
15 the rule of completeness, the full context of
16 the document, and I object to this question.

17 JUDGE LUCKERN: Ms. Niemeyer, how do
18 you respond? Do you want a ruling? Do you
19 want to rephrase? Do you want to argue the
20 objection?

21 MS. NIEMEYER: Well, I will respond.

22 JUDGE LUCKERN: Go ahead.

23 MS. NIEMEYER: There is no requirement
24 that parties submit documents in a foreign
25 language. My object is not to confuse or

1 mislead the witness. And I haven't even asked
2 a question yet.

3 JUDGE LUCKERN: That's what I was
4 trying to find out, what was at issue. And
5 that's why I was looking at the realtime. Let
6 me just read the realtime. We don't have a
7 question yet.

8 THE INTERPRETER: May I translate the
9 question again for him?

10 JUDGE LUCKERN: Is there a question,
11 Mr. Hickerson?

12 MS. NIEMEYER: I don't think there is
13 a question pending.

14 JUDGE LUCKERN: I am looking at the
15 realtime, Mr. Hickerson. I don't see a
16 question. She has read something from this
17 document, but I don't know where the question
18 is. So can we at least hear the question?

19 MR. HICKERSON: We can. But I also
20 object to the use of the document in this
21 fashion.

22 JUDGE LUCKERN: Well, let's get a
23 question so I know what I can do right now. So
24 get your question up and then, Mr. Hickerson,
25 you can say I rely on what I just said and

1 anything else. Do you understand what I am
2 saying, Ms. Niemeier?

3 MS. NIEMEIER: Yes.

4 JUDGE LUCKERN: Go ahead. Right now,
5 actually, there doesn't have to be a
6 translation. Why don't you finish your
7 question. Then we will see what Mr. Hickerson
8 said, without translating it. Because if I
9 sustain the objection, we can move on. So go
10 ahead with whatever your question is going to
11 be.

12 BY MS. NIEMEIER:

13 Q. Do you agree, then, that according to
14 ETSI publicly available information, they
15 direct parties to negotiate to determine to
16 reach a license agreement?

17 JUDGE LUCKERN: Did you finish your
18 question?

19 MS. NIEMEIER: Yes.

20 JUDGE LUCKERN: Mr. Hickerson, do you
21 stand by what you said?

22 MR. HICKERSON: I do, Your Honor. And
23 I just want to point out, you know, why my
24 objection should be sustained here. This
25 document is talking about that the members

1 don't pay money to ETSI for the licenses, that
2 they pay money to the license owner. And the
3 witness has no way of knowing what this
4 document is to know the context of what I know,
5 because I can read it in English.

6 If she is going to ask this question,
7 the witness needs to have the entire document
8 translated so that he understands what this
9 document says.

10 MS. NIEMEYER: Your Honor, during
11 Professor Boucobza's deposition, he was asked
12 do you speak English?

13 "Answer: I have a very average level
14 of English." I don't know that he needs to
15 have the whole document translated -- why he
16 would need to have the whole document
17 translated. I am asking a very simple question
18 about one portion of a document that's on a
19 publicly available web site of ETSI.

20 JUDGE LUCKERN: Does he have available
21 the whole document in English?

22 MS. NIEMEYER: He has the whole
23 document available in front of him. If he
24 wants to review it to answer the question
25 asked, he is welcome to do so. I think it

1 would be a waste of the Court's time because it
2 doesn't bear on the specific question asked.

3 JUDGE LUCKERN: Mr. Hickerson, I don't
4 have any problem, I can ask the witness, you
5 know, whether he, by himself, looking at the
6 document, reading it and then do it. I don't
7 know how much English he knows or not,
8 Mr. Hickerson.

9 Do you have any comment you want to
10 make on what I am saying from the bench?

11 MR. HICKERSON: I have nothing further
12 to add to my objection, Your Honor.

13 JUDGE LUCKERN: All right. Well, let
14 me ask the witness. I don't know how much
15 English, and I want this witness comfortable.
16 And is the witness able to read this document
17 to himself and understand it? It is all in
18 English. It is not translated.

19 And I just don't know.

20 THE WITNESS: (In English) I think
21 that I understand the question.

22 MR. HICKERSON: Could I at least ask
23 and make sure that the question at the top is
24 read and translated to the professor? I
25 couldn't even see it on the exhibit to begin

1 with.

2 JUDGE LUCKERN: You mean question 7
3 you want read?

4 MR. HICKERSON: Yes.

5 JUDGE LUCKERN: So you want him to
6 understand the question? And you have no
7 problem answering it? That's what the witness
8 says, Mr. Hickerson. And I will be glad to --
9 does he know what this question 7 itself says?
10 It is sort of gray here. It is a little hard
11 for me to read.

12 THE WITNESS: Yes, I have it here on
13 my document and I can read it.

14 JUDGE LUCKERN: All right. Then I am
15 going to overrule the objection. Go ahead and
16 answer any way you want to. Go ahead.

17 THE WITNESS: Well, as far as I
18 understand it, this question 7 has nothing to
19 do with granting of the licenses. It has to do
20 with who is the entity to which I have to pay
21 the royalties. Moreover, with regards to the
22 statement which is highlighted, they don't tell
23 us here whether they are talking about ETSI
24 members or third parties.

25 If it has to do with third parties,

1 meaning any company, of course they have to
2 negotiate with the patent holder because there
3 is no contract which binds it to the patent
4 holder.

5 The existence of the obligation to
6 grant a license is only valid for the ETSI
7 members, which has nothing to do with this
8 question.

9 THE INTERPRETER: Question on the
10 screen, he meant.

11 BY MS. NIEMEYER:

12 Q. Okay. Do you see anything in question
13 7 or in this document that says it is limited
14 to, that the question and answer is limited to
15 non-ETSI members?

16 MR. HICKERSON: Before you answer, I
17 have an objection.

18 JUDGE LUCKERN: I'm sorry.

19 MR. HICKERSON: I object to the
20 question as asked. Ms. Niemeyer is now asking
21 whether there is anything in this document --

22 JUDGE LUCKERN: It is a double
23 question. It is a compound question in a way.

24 MR. HICKERSON: Yes. So I object to
25 extent that the question goes beyond this

1 question 7, which she has focused the witness
2 on. If she does want the witness to read the
3 entire document before answering it, I would
4 ask that the witness be allowed to do that and
5 that the time be charged to InterDigital.

6 JUDGE LUCKERN: I certainly don't have
7 a problem with this witness reading the whole
8 document if he wants this question the way it
9 is.

10 MS. NIEMEYER: I will withdraw the
11 question, Your Honor. The document speaks for
12 itself.

13 JUDGE LUCKERN: Move on.

14 BY MS. NIEMEYER:

15 Q. Could you also take a look at question
16 6, which is immediately above it, which is,
17 "does one have to take permission from ETSI for
18 using the patents as listed by ETSI in the
19 standard?

20 "Answer: It is necessary to obtain
21 permission to use patents declared as essential
22 to ETSI standards. To this end, each standard
23 user should seek directly a license from a
24 patent holder. In order to obtain the contact
25 details of a patent holder, please make your

1 request to the ETSI legal service."

2 Do you see that?

3 A. Yes.

4 Q. So according to that question and
5 answer, this ETSI FAQ, frequently asked
6 question, is directing anyone who uses a
7 standard to contact the patent holder who has
8 declared it as essential to ETSI, correct?

9 JUDGE LUCKERN: I am not sure,
10 Mr. Hickerson, whether you have an objection or
11 what.

12 MR. HICKERSON: I thought we would
13 have the translation, and then I would state my
14 objection.

15 JUDGE LUCKERN: All right. Okay.
16 Translate it and then I don't want to hear from
17 the witness, we will hear what the lawyer has
18 to say. Go ahead, translate it.

19 Mr. Hickerson.

20 MR. HICKERSON: Yes, Your Honor. My
21 objection is that Ms. Niemeyer has now put the
22 text of this document on the screen, she has
23 read it to the witness and she has
24 recharacterized in her own words what the
25 document says. And then asked the witness

1 whether he agrees with it.

2 I think that's improper. I think that
3 if she wants to ask the witness what his
4 understanding of the text of this document is,
5 that's one thing, but I do not think that it is
6 proper for her to be asking, putting the words
7 into this witness's mouth, through a
8 translator, and asking him whether or not he
9 agrees with her tortured interpretation of the
10 document.

11 JUDGE LUCKERN: How do you respond?

12 MS. NIEMEYER: I am cross-examining
13 the witness, Your Honor. He is free to agree
14 or not agree with my question. He is an expert
15 and I think he can answer the question.

16 JUDGE LUCKERN: I am going to overrule
17 the objection. He has been qualified as an
18 expert. It has been translated into French.

19 So let's hear what he has to say. You
20 will have your opportunity for redirect. So do
21 we have to translate it again or does he
22 remember what the question is?

23 THE WITNESS: I remember the question.

24 JUDGE LUCKERN: Thank you very much.

25 Go ahead.

1 THE WITNESS: Well, first, this
2 question and this answer, they are not ETSI
3 rules. And they do not have a binding force.
4 My second comment, the general nature of this
5 question, and this also was with -- regarding
6 to the preceding question, the general nature
7 of these questions, makes us think that we have
8 to do with questions that concern third parties
9 to ETSI.

10 And then the answer, which is given
11 here, which simply states that you have to have
12 the permission of the patent holder, that is
13 totally acceptable. In fact, if you make a
14 declaration to ETSI of your essential patent, I
15 mean, the patent holder of the essential patent
16 accepts that the other ETSI members might
17 benefit from a license. So it is with his
18 agreement that the license was granted.

19 BY MS. NIEMEYER:

20 Q. I just have a couple more questions on
21 the Samsung confidential record.

22 JUDGE LUCKERN: All right. We're on
23 the confidential record. Whose information is
24 it?

25 MS. NIEMEYER: Samsung's.

1 JUDGE LUCKERN: Okay. Anybody not
2 associated with Samsung, not subscribed to the
3 protective order has to leave the hearing room.

4 (Whereupon, the trial proceeded in
5 confidential session.)

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BY MS. NIEMEYER:

Q. Professor Boucobza, you have never seen any of InterDigital's offers to Samsung to license, have you?

A. No, never.

Q. And you have never seen any of Samsung's offers to InterDigital to license, correct?

A. No, no, that wasn't necessary for me to establish my report.

MS. NIEMEYER: I have no more questions, Your Honor. Thank you, Professor Boucobza.

JUDGE LUCKERN: Mr. Levi, do you have anything?

MR. LEVI: I do, Your Honor, very briefly.

JUDGE LUCKERN: Fine, fine, no problem.

EXAMINATION BY COUNSEL FOR ITC STAFF

BY MR. LEVI:

Q. Good afternoon, Professor.

A. Good afternoon.

Q. I would like to return to

1 Ms. Niemeyer's questioning of you and, in
2 particular, I would like to return to her -- do
3 you recall when she showed you a portion of
4 your deposition transcript?

5 A. Yes.

6 Q. And then do you recall when she asked
7 you a question about going to court? Do you
8 recall generally that question?

9 A. Yes.

10 Q. And your response to Ms. Niemeyer's
11 question was it was up to the party seeking a
12 license to dispute the price before the owner
13 of the patent, and to do this before going to
14 court. Do you recall giving that response?

15 A. It is, indeed, the burden of the
16 licensee to dispute the price that is fixed by
17 the patent holder, and he has to bring this
18 dispute before the Court, if there was no
19 agreement between the parties.

20 Q. And the "he" you referred to in your
21 response, under ETSI rules, does the "he" refer
22 to the patentee or the party seeking the
23 license?

24 A. I'm going to clarify. It is the one
25 seeking the license. The license is concluded

1 before there has been an agreement on the
2 price. If there is no agreement with regards
3 to the price, the price is then unilaterally
4 defined by the patent holder.

5 And this price fixing is done while
6 the license is executed. It is the contract --
7 the license which is the contract to execute.
8 And so the licensee, the beneficiary of the
9 license, if the beneficiary of the license does
10 not accept the price, which is fixed, has the
11 burden to show in court that this price is
12 abusive.

13 Q. Okay. I appreciate that -- that
14 response, Professor.

15 And I think you did -- you did state,
16 at least I understood you to state that the
17 burden to go to court lies on the party seeking
18 the license as opposed to the patentee. Is
19 that correct?

20 A. That's correct.

21 Q. Thank you. Now --

22 A. And under French law, this is looked
23 upon as an advantage to the patent holder.

24 Q. Okay. Now, when the -- assuming the
25 situation where the party who is seeking a

1 license goes to court, what question would that
2 party ask the court to answer?

3 A. This party would have to prove that
4 the price is abusive. Meaning that the price
5 is too high. And case law shows with certain
6 examples of cases how one can judge if a price
7 is abusive.

8 Q. Do ETSI rules contemplate that in
9 place of the party seeking the license going to
10 court to seek an answer to the question you
11 just described, do ETSI rules contemplate an
12 action by the patentee in court asserting
13 infringement of their patent?

14 MS. NIEMEYER: Objection, Your Honor,
15 this is outside the scope of Professor
16 Boucobza's expert report.

17 JUDGE LUCKERN: Mr. Levi, how do you
18 want to respond?

19 MR. LEVI: It is certainly within the
20 scope of Ms. Niemeyer's cross-examination.

21 MS. NIEMEYER: I disagree.

22 JUDGE LUCKERN: Did I hear you say
23 something?

24 MS. NIEMEYER: I disagree.

25 MR. LEVI: I think it is squarely

1 within the scope, Your Honor.

2 JUDGE LUCKERN: Mr. Hickerson, what is
3 your position on the objection?

4 MR. HICKERSON: We do not support the
5 objection, Your Honor.

6 MS. NIEMEYER: It is also leading,
7 Your Honor.

8 JUDGE LUCKERN: Where do we stand on
9 the leading with respect to Mr. Levi and this
10 witness. Is he a hostile witness to you and
11 Mr. Levi? I would have to go back to your
12 prehearing statement and see.

13 MR. LEVI: Your Honor, if the rule
14 we're following is on an issue by issue basis,
15 then I believe I'm aligned with Samsung on the
16 issue related to this particular witness's
17 testimony.

18 JUDGE LUCKERN: It would be rule by
19 rule, I mean, issue by issue, yes. Let me just
20 -- you indicated, Mr. Levi, that it is
21 certainly within the scope -- well, wait a
22 minute.

23 I am going to then sustain the
24 objection on the leading nature of it. Go
25 ahead.

1 MR. LEVI: I will be happy to
2 rephrase, Your Honor.

3 BY MR. LEVI:

4 Q. Do ETSI rules -- strike that.

5 Professor, you described an action
6 that a potential licensee can bring under ETSI
7 rules. My question is, do ETSI rules
8 contemplate a patentee bringing an action for
9 patent infringement?

10 MS. NIEMEYER: Objection, Your Honor,
11 that's the same question.

12 MR. LEVI: I don't believe that
13 question is leading. So if it is the same
14 question, then I don't think the first question
15 was leading.

16 JUDGE LUCKERN: And the basis for your
17 objection?

18 MS. NIEMEYER: I think -- still think
19 it is leading, and I also dispute that it is
20 within the scope of Professor Boucobza's expert
21 report or cross-examination.

22 MR. LEVI: I am asking him if ETSI
23 rules provide for a certain scenario. It is
24 either yes or no. They do or they don't.

25 JUDGE LUCKERN: Okay. Let me just go

1 to the other area that Ms. Niemeyer raised.

2 MR. LEVI: It was the same basis that
3 Your Honor did not find merit to, within the
4 scope.

5 JUDGE LUCKERN: I am going to overrule
6 the objection. You can answer that.

7 THE WITNESS: The answer is no. There
8 is no objection for infringement of the
9 license. But the response, according to French
10 law, is, in reality, quite simple.

11 When there was a contract between
12 parties, then you are immediately not in the
13 framework, in the context anymore of
14 infringement. Then you are in a context of a
15 case which can result by contract. For
16 example, it can result in a lawsuit with
17 regards to the price.

18 And then measures are taken, are
19 executed in order to obtain -- to change that
20 price. But this has only to do with contract
21 law, the domain of contract law. This has
22 nothing to do with infringement.

23 MR. LEVI: Thank you, Professor.
24 Nothing further.

25 JUDGE LUCKERN: You are finished?

1 Redirect, Mr. Hickerson?

2 MR. HICKERSON: Yes, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. HICKERSON:

5 Q. Professor, with respect to the last
6 answer you just gave, when the interpreter
7 interpreted, she said infringement of the
8 license. I think you said infringement of the
9 patent, didn't you?

10 A. (In English) Of the patent.

11 Q. Okay, thank you.

12 Professor, Ms. Niemeyer asked you some
13 questions about an ETSI frequently asked
14 questions document. It was CX-816. Do you
15 remember those questions? Question 6 and
16 question 7.

17 Now --

18 MR. HICKERSON: Please interpret.

19 THE WITNESS: Yes, absolutely.

20 BY MR. HICKERSON:

21 Q. Okay. Now, to the extent that there
22 is anything inconsistent with those frequently
23 asked questions with the ETSI IPR policy, which
24 would control?

25 A. There is no possible dispute. Those

1 questions and answers have absolutely no legal
2 value. So only the ETSI IPR policy is valid
3 and would control any question.

4 Q. Okay. And one last area I want to
5 talk to you about is Ms. Niemeyer asked you
6 whether the licenses under section 6.1 had to
7 be done on a patent by patent basis. Do you
8 remember those questions?

9 A. Yes, absolutely.

10 Q. Now, if an ETSI member made a
11 declaration of essential patents under section
12 4.1 that included more than one patent, a
13 number of patents, that would be okay, wouldn't
14 it?

15 MS. NIEMEYER: Objection, leading,
16 Your Honor.

17 BY MR. HICKERSON:

18 Q. Would that be okay?

19 JUDGE LUCKERN: Wait a minute now.

20 MR. HICKERSON: I am just trying to
21 hurry things along, Your Honor. I am trying to
22 focus the question on Ms. Niemeyer's questions.

23 MS. NIEMEYER: I have no objection to
24 hurrying things along in accordance with --

25 JUDGE LUCKERN: Right now we had a

1 question and you said objection, leading. And
2 then the question was, would that be okay? And
3 I am just not sure.

4 MR. HICKERSON: I was making the
5 question open-ended, Your Honor, with that
6 phrase.

7 JUDGE LUCKERN: Why can't you rephrase
8 it in some way?

9 BY MR. HICKERSON:

10 Q. Would it be okay, Professor -- I will
11 rephrase. Would it be okay, Professor, if a
12 party that held multiple patents that it
13 thought were essential, to make a declaration
14 under section 4.1 that included all of those
15 patents in a single declaration?

16 MS. NIEMEYER: Objection, leading.

17 JUDGE LUCKERN: I am not sure that
18 suggests an answer. I am going to overrule the
19 objection. You can answer that. We have an
20 expert here.

21 THE WITNESS: Well, on section 4.1 of
22 the rules is pointing towards one essential
23 patent and not a whole regrouping of patents.

24 MR. HICKERSON: Thank you.

25 JUDGE LUCKERN: You are finished,

1 Mr. Hickerson?

2 MR. HICKERSON: Yes, I am.

3 JUDGE LUCKERN: What about exhibits?
4 Everybody happy or should we go off the record?
5 I don't want to have argument going back and
6 forth.

7 MS. NIEMEYER: May I briefly respond
8 to Mr. Levi's examination?

9 JUDGE LUCKERN: Yes, you may. But you
10 mean with further questions of this witness,
11 Ms. Niemeyer? Is that what you want to do?

12 MS. NIEMEYER: I want to, I guess,
13 either redirect or cross in response to Mr.
14 Levi.

15 JUDGE LUCKERN: You want to ask this
16 witness more questions?

17 MS. NIEMEYER: Yes, in response to Mr.
18 Levi's questions.

19 JUDGE LUCKERN: We will go around
20 again then. You are not going to have the last
21 say, that's for sure. But then we will have
22 the staff and Mr. Hickerson. Mr. Hickerson is
23 going to end up. So I will let you do it.
24 Mr. Hickerson, you have another crack, based on
25 what you hear now.

1 MR. HICKERSON: Thank you, Your Honor.

2 RE-CROSS-EXAMINATION

3 BY MS. NIEMEYER:

4 Q. Professor Boucobza, in response to Mr.
5 Levi's question, you indicated that the license
6 is concluded before the price is agreed upon.
7 Do you recall that?

8 A. Yes, absolutely.

9 Q. I just want to refer you to your
10 deposition transcript, page 40, line 17,
11 through 41, line 5 which reads:

12 "Question: So basically until the
13 implementing contract is signed, or the
14 license, an ETSI member does not have a license
15 to practice patents that have been declared to
16 ETSI; is that correct?

17 "Answer: Yes, that is correct, that
18 means that it does not have a license in order
19 to be able to use the patent. On the other
20 hand, as of the moment the declaration exists,
21 there is an obligation for the patent owner or
22 holder to grant a license under contract --
23 under the contractual conditions."

24 JUDGE LUCKERN: Are you finished?

25 MS. NIEMEYER: With that question,

1 yes.

2 JUDGE LUCKERN: Do you want to
3 translate that, Lily? The witness understands
4 it?

5 THE INTERPRETER: No, I am going to
6 translate it. I'm sorry, I am going to
7 translate it. He needs the translation. It
8 started at line 17, Ms. Niemeyer?

9 MS. NIEMEYER: Yes.

10 JUDGE LUCKERN: So it is translated.
11 What is your question?

12 MS. NIEMEYER: I don't have a
13 question. Basically, he just gave
14 contradictory testimony in his deposition from
15 today.

16 MR. HICKERSON: Your Honor --

17 JUDGE LUCKERN: Wait a minute. We
18 read it in and I don't have a question -- well
19 --

20 MS. NIEMEYER: He had stated -- sorry.

21 JUDGE LUCKERN: You say it is
22 contradictory. But let's have a question. Do
23 you agree with this today or something?

24 BY MS. NIEMEYER:

25 Q. So you stated to Mr. Levi that you can

1 conclude the license before the price is agreed
2 upon, whereas in your deposition, you must have
3 a price to have a license?

4 A. No, as you can see from the response I
5 gave to your question, I never said that the
6 price was necessary to conclude the license. I
7 only state that there needs to be a license
8 contract. And on this point, case law is very
9 clear.

10 The license contract -- I mean, the
11 contract is concluded independently of the
12 fixing of the price. And this, according to
13 the decisions of the Supreme Court of the 1st
14 of December, 1995, which were earlier
15 mentioned.

16 In other words, the price is not a
17 necessity in order to conclude a valid contract
18 license. The license already exists, was
19 concluded before the price is determined. I do
20 not believe having said anything else.

21 Q. But that is your -- the testimony that
22 I just read was the testimony you gave at your
23 deposition, correct?

24 A. Yes, that's correct, and, again, I
25 approve completely with what I said in my

1 answer.

2 Q. Okay. And you also indicated in
3 response to Mr. Levi's question that a patentee
4 may not sue for patent infringement on a patent
5 that's been declared essential to ETSI. Do you
6 recall that?

7 A. Yes, that's correct, but with regards
8 to ETSI members, not with regards to third
9 parties.

10 Q. Okay. So, for example, if Samsung
11 sued Ericsson for infringement of patents that
12 it had declared essential to Sony or to ETSI,
13 that would be a violation of French law,
14 correct?

15 JUDGE LUCKERN: Mr. Hickerson?

16 MR. HICKERSON: I object, Your Honor.
17 This is an incomplete hypothetical. There
18 could be, you know, many other factors involved
19 and I don't think that the question is
20 appropriate.

21 JUDGE LUCKERN: Ms. Niemeyer, how do
22 you respond?

23 MS. NIEMEYER: I think he is an expert
24 and he testified what an ETSI member can do,
25 having declared its patents essential to ETSI.

1 It is just changing the names of the parties.

2 JUDGE LUCKERN: I am going to overrule
3 the objection. He has been qualified as an
4 expert. He seems to be doing a great job, as
5 all witnesses do. You may answer that. Do you
6 want to translate it again?

7 THE WITNESS: (In English) No. (In
8 French) The question is very vague.

9 JUDGE LUCKERN: Well, wait a minute.
10 The question is very vague. Well, if you don't
11 understand it or it is ambiguous or something,
12 sir, you can just tell me that. And I will --
13 however you want to do it. But if you feel you
14 can answer it, but you want to qualify it in
15 some way, you can do that. You have been
16 qualified as an expert. However you want to --
17 you are the king right there in that box. What
18 do you want to do?

19 THE WITNESS: I am going to specify
20 the hypothesis.

21 JUDGE LUCKERN: All right, fine.

22 MS. NIEMEYER: I don't know what he is
23 going to say.

24 JUDGE LUCKERN: Wait a minute now.
25 Well, I know you don't know what to say. I'm

1 sure he didn't go up to you and tell you what
2 he is going to say. I am going to let the
3 witness -- go ahead. Ms. Niemeyer opened it,
4 you go ahead and say whatever you want to and
5 we will see what Ms. Niemeyer does. Go ahead.

6 THE WITNESS: If the patent is used so
7 that Samsung or Ericsson, I don't remember the
8 name of the party in your hypothesis, expressed
9 a will to exploit the license, then according
10 to the application of 6.1, article 6.1, there
11 it is not possible that there is infringement.

12 On the other hand, if the patent is
13 used without having requested the benefit of a
14 license, then the situation is totally
15 different because the one who exploits then the
16 license is not in the place of the licensee.
17 And then you could talk about infringement.
18 But only in that context, in that situation.

19 MS. NIEMEYER: Okay, thank you.

20 JUDGE LUCKERN: Are you finished?

21 MS. NIEMEYER: Yes, thank you, Your
22 Honor.

23 JUDGE LUCKERN: Mr. Levi, do you have
24 anything you want to do?

25 MR. LEVI: Thank you, Your Honor,

1 nothing further.

2 JUDGE LUCKERN: Mr. Hickerson? You
3 have the last say.

4 MR. HICKERSON: Nothing further, Your
5 Honor.

6 JUDGE LUCKERN: All right. I am going
7 to release this witness. If nobody has any
8 problems with that? If you do or not, I am
9 going to. Thank you very much.

10 THE WITNESS: Thank you, Your Honor.

11 JUDGE LUCKERN: Have a pleasant trip
12 back to Paris. I wish I could go with you, not
13 just leave, go to Paris. That would be
14 fantastic. Where do we go? Stay here if you
15 want to.

16 MS. NIEMEYER: Your Honor --

17 JUDGE LUCKERN: Wait a minute. We
18 have exhibits. You better wait a bit. Sorry,
19 sorry. Why don't you -- is there agreement on
20 these exhibits or what?

21 MR. HICKERSON: We're about to find
22 out, Your Honor.

23 JUDGE LUCKERN: Off the record.

24 (Discussion off the record.)

25 JUDGE LUCKERN: Back on the public