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October 7, 2022

VIA EDIS

The Honorable Cameron R. Elliot
Administrative Law Judge
c/o Michael Turner
United States International Trade Commission
500 E. Street, S.W., Room 317
Washington, D.C. 20436

Re: ***In the Matter of Certain Mobile Phones and Tablet Computers, All with Switchable Connectivity; Inv. No. 337-TA-1301***

Dear Judge Elliot:

Pursuant to Ground Rule 3.1, attached is a non-confidential copy of Ericsson's Opposition to Apple's Motion to Strike the Expert Opinions of Ronald A. Cass (Motion Dkt. No. 1301-0027) filed September 29.

Please let us know if you have any questions or comments.

Respectfully submitted,

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cc: Service List

CERTIFICATE OF SERVICE

I, Liberty M. Quan, hereby certify that copies of the foregoing **PUBLIC VERSION OF ERICSSON'S OPPOSITION TO APPLE'S MOTION TO STRIKE THE EXPERT OPINIONS OF RONALD A. CASS (MOTION DKT. 1301-0027)** were filed and served on **October 7, 2022** on the persons as indicated below.

The Honorable Katherine M. Hiner Acting Secretary U.S. International Trade Commission 500 E Street, S.W., Room 112 Washington, DC 20436	☐ Via First Class Mail ☐ Via Express Delivery ☐ Via Hand Delivery ☒ Via EDIS
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PUBLIC VERSION

[redacted]

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC

BEFORE THE HONORABLE CAMERON R. ELLIOT
ADMINISTRATIVE LAW JUDGE

In the Matter of **CERTAIN MOBILE PHONES AND TABLET COMPUTERS, ALL WITH SWITCHABLE CONNECTIVITY**	**Investigation No. 337-TA-1301**

ERICSSON'S OPPOSITION TO APPLE'S MOTION TO STRIKE
THE EXPERT OPINIONS OF RONALD A. CASS (MOTION DKT. NO. 1301-0027)

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Apple's (Respondent's) motion to exclude the testimony of Ronald Cass regarding the effect of an exclusion order on the public interest factors should be denied. There has been no challenge raised to Mr. Cass's expertise in this subject area, nor could there be. Among many of his impressive credentials, Mr. Cass has been a Commissioner and Vice-Chairman of the International Trade Commission, has been Dean of the Boston University School of Law for 14 years, and been a Professor of Law at the University of Virginia and Boston University for over three decades. Apple Motion Ex. 4. He has taught, written about, and consulted about international trade and international trade law for more than 25 years. *Id*.

Indeed, Mr. Cass has provided his opinions on this same subject matter in three prior ITC investigations, each time after a challenge to his opinions was substantially denied. *See Certain Wireless Communications Base Stations and Components Thereof*, No. 337-TA-871, Order No. 30 (Nov. 22, 2013) (EDIS Doc. ID 885960); *Certain Non-Volatile Memory Devices and Products Containing the Same*, No. 337-TA-909, Order No. 19 (Oct. 20, 2014) (EDIS Doc. ID 544805); and *Certain Elec. Devices, Including Wireless Communication Devices, Computers, Tablet Computers, Digital Media Players, and Cameras*, Inv. No. 337-TA-952, Order No. 43 (Nov. 19, 2015) (EDIS Doc. ID 569488).

I. BACKGROUND

When it instituted this Investigation, the Commission directed the ALJ "to take evidence or other information and hear arguments" on how an exclusion order may affect the public interest and to provide the Commission with findings of fact and a recommended determination. *See* Feb. 17, 2022, Notice of Institution of Investigation (EDIS Doc. ID 763475), at p. 2. To support its argument that an exclusion order would adversely affect the public interest, Apple has offered opinions from Michael Davies, David McAdams, Christian Dippon, and Paul Meyer.

In rebuttal to Apple's experts' opinions, Complainants have submitted testimony from Mr. Cass, a former Commissioner and expert on international trade and the public interest. Mr. Cass has provided opinions regarding the public interest from the perspective of an international trade and public interest expert with decades of experience and training. Apple disagrees with the merits of Mr. Cass's opinions, and rather than cross-examine him at the hearing in this Investigation, Apple has moved to strike portions of Mr. Cass's reports and bar him from rebutting the opinions of Davies, Dippon, McAdams, and Meyer.

II. LEGAL STANDARD

The admission of expert testimony is governed by Rule 702 of the Federal Rules of Evidence and the framework set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589–95 (1993). The inquiry asks whether the proposed testimony meets the minimum threshold standards of relevance and reliability. *Daubert*, 509 U.S. at 594–95. Expert testimony is relevant when "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Moreover, "[u]nlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert*, 509 U.S. at 592 (internal citations omitted).

In general, concerns about the sufficiency of an expert's facts or data, or concerns about the reliability of an expert's methodology or principles, go to the "weight of the evidence, not its admissibility." *See Certain Elec. Devices, Including Mobile Phones and Tablet Computers, & Components Thereof*, Inv. No. 337-TA-847, Order No. 18 at 4 (May 28, 2013) (EDIS Doc. ID 509969); *see Certain Multiple Mode Outdoor Grills & Parts Thereof*, Inv. No. 337-TA-895, Order

No. 48 at 1–2 (July 11, 2014) (EDIS Doc. ID 537964); *Certain Light Emitting Diodes & Prods. Containing the Same*, 337-TA-785, Order No. 35 (July 5, 2012) (EDIS Doc. ID 486490).

For this reason, courts regularly deny motions to exclude expert testimony when such concerns can be explored during cross-examination. *See Certain Electronic Devices*, Inv. No. 337-TA-847, Order No. 18 at 4; *see also Certain Multiple Mode Outdoor Grills*, Order No. 48 at 1–2; *Certain Windshield Wiper Devices and Components Thereof*, Inv. No. 337-TA-881, Order No. 26 (Jan. 22, 2014) (EDIS Doc. ID 534247) (denying motion *in limine* to exclude expert testimony on the basis that the expert relied on insufficient facts or data and based his testimony on unreliable principles or methods).

Where a judge is sitting as the trier of fact in place of a jury, moreover, courts have relaxed the application of *Daubert* and shown greater reluctance to exclude expert testimony. *See In re Tex. Grand Prairie Hotel Realty, LLC*, 710 F.3d 324, 329 (5th Cir. 2013) ("[M]ost of the safeguards provided for in *Daubert* are not essential in a case . . . where a district judge sits as the trier of fact in place of a jury") (internal quotations and citation omitted); *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005) ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself").

The exclusion of an expert's testimony is generally reserved for experts who provide no basis for conclusory analysis. *See Certain Static Random Access Memories and Prods. Containing Same*, Inv. No. 337-TA-792, Comm'n Op. at 11–13 (June 28, 2013) (excluding expert testimony when the expert made conclusions without any explanation of his particular methodology); *see Certain Light Emitting Diodes and Prods. Containing the Same*, 337-TA-785, Order No. 35 (Jul. 5, 2012) (excluding expert testimony when expert provided no authority for his expertise and where his testimony was not otherwise probative to the issues at bar).

[redacted]

III. ARGUMENT

A. Public Interest Issues Involve Policy Issues And Are Treated Differently Than Violation Issues

Public interest proceedings are different from violation proceedings. A first difference arises from the statute itself, which states that the Commission *shall* issue an exclusion order or cease and desist order, "*unless, after considering* the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry [or a cease and desist order should not be issues]." 19 U.S.C. 1337(d)(1) and (f)(1). When the Commission balances the interests of enforcing intellectual property policy, trade policy, against the enumerated public interest issues, that balancing of policy issues is entitled to *Chevron* deference.[1]

A second difference in public interest proceedings is that the Commission retains unto itself the compilation of an evidentiary record, briefing, and determinations regarding public interest issues, except when it affirmatively delegates those issues to the ALJ. Rule 210.50(b)(1). However, when the Commission delegates to the ALJ authority to consider public interest issues, that consideration is made in the form of a recommended determination.[2] Limiting that delegation to a recommended determination means that a majority vote of the Commission is required to either adopt the recommendation or to not issue a remedy when a violation is found. In contrast, an ALJ initial determination on violation issues becomes the determination of the Commission unless there is a majority vote of the Commission to either change or not adopt a violation finding.

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[1] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 865 (1984)([An a]dministrator's interpretation [that] represents a reasonable accommodation of manifestly competing interests … is entitled to deference."

[2] *Certain Mobile Phones and Tablet Computers, All with Switchable Connectivity*, Inv. 1301, Notice of Institution of Investigation, 87 Fed. Reg. 1038 (Feb. 24, 2022).

This procedural difference between recommended determinations and initial determinations is consistent with the exercise of public interest policy judgement that is reserved to the Commission.

B. The ITC Considers Public Interest Testimony of Former Commissioners

In past 337 investigations, the Commission and ALJs have considered public interest testimony of former Commissioners. For example, former ITC Chairwoman Paula Stern has testified before the Commission regarding the "sound and overriding public policy reasons—reinforced by Congress—that form the basis for the Commission's strict enforcement of its mandate in penalizing unfair imports, especially when those unfair imports violate US. patent rights" and "the preeminent public interest is in the protection of intellectual property."[3] And as detailed below, former Vice Chairman Cass has previously testified on public interest issues in three prior section 337 investigations. Commissioners have real-world experience in exercising the policy discretion inherent in balancing the international trade, intellectual property, and public interest policy policies. When public interest proceedings are delegated to the ALJ, there is an opportunity for testimony (and cross examination) of public interest experts that can be considered by the ALJ and Commission and potentially obviate the need for that testimony during a hearing before the Commission on public interest issues.

C. Mr. Cass Has Offered Opinions Regarding How Facts in This Investigation Relate to the Statutory Public Interest Framework, Not Legal Conclusions

Apple's objection to paragraphs 18–40, 42, 44, 46, 48, 52–53, 55, 59–67, and 69–81 of Mr. Cass's opening report and paragraphs 15–19 and 24–91 of Mr. Cass's rebuttal report as legal conclusions should be denied because these opinions are offered by an expert qualified to provide them, are not legal conclusions, and are helpful to the fact finder.

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[3] *Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, Including Cellular Telephone Handsets*, Inv. 543, Statement of Dr. Paula Stern on Behalf of Complainant Broadcom Corporation (Mar. 19, 2007).

The Commission has authorized the ALJ to address the public interest factors in this Investigation. Feb. 17, 2022, Notice of Institution of Investigation (EDIS Doc. ID 763475):

> [T]he presiding administrative law judge shall take evidence or other information and hear arguments from the parties and other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors.

Mr. Cass has rendered expert opinions "regarding the effect on the public interest of an exclusion order in this Investigation," and "whether public interest considerations counsel against issuance of an exclusion order against two classes of products, the Apple iPhone and/or the Apple iPad, that infringe one or more of Ericsson's Asserted Patents." Apple Motion Ex. 1 at ¶2; *see also* ¶¶32–66 (opinions regarding "public health and welfare"), ¶67 (opinions regarding "competitive conditions in the U.S. economy"), ¶68 (opinions regarding "production of like or directly competitive products"), and ¶¶69–80 (opinions regarding "U.S. consumers").

These opinions are admissible. As noted above, while Apple argues that Mr. Cass is not an economist or technical expert, Apple does not challenge to Mr. Cass's expertise in trade and public interest considerations. Thus, there is no dispute that Mr. Cass is qualified to opine on this subject matter. Importantly, the subject matter of Mr. Cass's opinions exactly matches the statutory public interest factors. *See* 19 U.S.C. § 1337(d)(1), (e)(1), and (f)(1). Thus, these opinions regarding the public interest factors will help the ALJ—operating as the trier of fact—to address the public interest. Therefore, such testimony is admissible under Fed. R. Evid. 702, unless his opinions are legal conclusions.

Mr. Cass's opinions are not legal conclusions. The opinions objected to as "legal conclusions" are opinions regarding the applicability of the available facts and data to the statutorily defined public interest factors and what effect those public interest factors should have

upon the exclusion order issued in this investigation. Such opinions correlate directly with the Commission's directions for the ALJ to find facts regarding the public interest and provide a recommended determination on this issue. For example, Mr. Cass's report offers his opinion that "any public interest considerations that may be implicated by an exclusion order in this Investigation would not rise to the level the Commission has previously deemed necessary to deny an exclusion order upon finding a violation." Apple Motion Ex. 1 at ¶27. This opinion was based upon Mr. Cass's "review and analysis of public interest considerations raised by Respondent's answers to interrogatories and of other relevant evidence in the context of Section 337." *Id.* Any references to "policy" in the objected paragraphs are descriptions of how Mr. Cass's background experience in international trade policy help to inform his understanding of what facts do and what facts do not "rise to the level the Commission has previously deemed necessary to deny an exclusion order upon finding a violation." *Id.* They are not attempts to provide an opinion on the application of law; they are attempts to analyze the available facts with respect to the effects of an exclusion order upon the public interest factors, which is, by statutory definition, a part of U.S. trade policy.

While it is true that a few of Mr. Cass's opinions were excluded from evidence in two prior investigations, what has been glossed over in the present motion to strike is that the fact that Mr. Cass has opined on public interest factors in three prior ITC investigations and, in all cases, Mr. Cass was allowed to testify.

In *Certain Wireless Communications Base Stations and Components Thereof*, No. 337-TA-871, the complainants sought to exclude Mr. Cass's testimony regarding the public interest, alleging that Mr. Cass provided improper legal opinions and unqualified expert testimony. *Certain Wireless Communications Base Stations and Components Thereof*, Inv. No. 337-TA-871, Order

No. 30 ("*Wireless Communication Base Stations*"). The ALJ denied the motion and was unconcerned about references to legal factors in Mr. Cass's opinions, noting that "while there are references to legal factors in some of the answers given by Mr. Cass, these references are not expressions of legal opinions or advice, but, rather, are acknowledgements that certain laws are factors that may come into play, when weighing public interest factors in general." *Id.* at 9. Similarly, here, Mr. Cass's opinions are not "expressions of legal opinions or advice"; rather, his opinions on public interest factors are supported by the specific facts of the case.

In *Certain Non-Volatile Memory Devices and Products Containing the Same*, No. 337-TA-909, the respondents sought to exclude substantially all of Mr. Cass's testimony regarding the public interest. Only a handful of questions and answers in his witness statement were excluded as being deemed legal opinion, unlike the opinions regarding public interest factors at issue in this case. *Id.*, Order No. 19 at 4 (EDIS Doc. ID. 544651).

In *Certain Elec. Devices, Including Wireless Communication Devices, Computers, Tablet Computers, Digital Media Players, and Cameras*, Inv. No. 337-TA-952, the ALJ excluded certain questions and answers from Mr. Cass's *witness statement* as not permissible subject matter. However, the ALJ noted that "some discussion of law or policy may be inevitable in order to understand the framework of a witness's analysis and testimony (*especially at the level of an expert report*, as opposed to actual testimony)." *Id.*, Order 43 at 2 (EDIS Doc. ID 569488) (emphasis added) ("*Certain Elec. Devices*").

Here, Mr. Cass's references to law and policy are permissible discussions to understand the framework of his analysis and opinions. That Apple may disagree with Mr. Cass's understanding of that framework is no basis to strike his opinions. And, certainly, offers no basis to strike the underlying factual analysis within that framework. The opinions offered by Mr. Cass

in this investigation are on the same subject matter as the admissible opinions provided in those other three investigations. And, thus, the present motion to strike Mr. Cass's opinions in this Investigation should be denied.

Apple specifically set out bullet points of certain paragraphs as containing impermissible legal opinion. Apple Motion at 7–8. Ericsson addresses each of these in turn:

- Apple challenges Mr. Cass's opinions regarding the "burden of proof" (Apple Ex. 1 at ¶¶19, 20, 24, 30, 31, 33, and 55; Apple Ex. 2 at ¶¶5, 17).

First, Apple complains that Mr. Cass states that Complainants do not have the burden of proof with respect to showing whether the public interest factors weigh against any remedy. Apple Ex. 1 at ¶19; Ex. 2 at ¶16. Such a statement is a "permissible acknowledgement of the factors that may come into play, when weighing public interest factors in general." *Wireless Communication Base Stations*. This is no different from a technical expert explaining that he understands that respondent bears the burden on proving invalidity. Further, Mr. Cass is correct. Neither Complainant nor Respondents bear the burden on this issue. *See Certain Subsea Telecommunications Sys. & Components Thereof*, Inv.-TA-1098, ID on Violation of Section 337 & Recommended Determination on Remedy & Bond (Apr. 26, 2019) ("As an initial matter, Respondents repeated criticism of Xtera for failing to present evidence that it could replace Nokia and NEC's products in the marketplace erroneously places an evidentiary burden on Xtera to show that the public interest will not be harmed if an exclusion order issues. No such burden exists, and placing one on Xtera would be contrary to the Commission's general approach of favoring the protection of intellectual property rights by excluding infringing products.")

Second, Apple complains that, in the remaining "burden of proof" paragraphs, Mr. Cass quantifies that burden, for example calling it "especially high." Again, this is appropriate "discussion of law or policy … to understand the framework of a witness's analysis and

testimony." *Certain Elec. Devices*. Mr. Cass is applying the facts of this investigation to his understanding of the appropriate framework for analysis. This is no different than an expert opinion that, in his opinion, the evidence presented is not sufficient to show anticipation or obviousness.

- Apple claims Mr. Cass performs a legal analysis of prior investigations (Apple Ex. 1 at ¶¶21–22, 27–29, 35–40, 64–66, 69, 77, and 79).

A review of those paragraphs demonstrates that Mr. Cass does not provide any legal opinion regarding those prior cases. Rather, Mr. Cass analyzes the facts of this case within his understanding of the framework necessary to show his analysis. This is a typical process when setting forth opinions in an expert report. *See Wireless Communication Base Stations* and *Certain Elec. Devices*.

- Apple challenges Mr. Cass's discussion of the Presidential Review process (Apple Ex. 1 at ¶23).

In this paragraph, Mr. Cass simply notes that the standards applied during Presidential Review are different from those applied by the Commission in assessing public interest factors. This understanding is a necessary part of the framework under which Mr. Cass presents his subsequent analysis.

- Apple challenges Mr. Cass's opinions regarding profitability, job loss, consumer preference, and the cost of switching devices (Apple Ex. 1 at ¶¶31, 59–66, 70–72, 73–76, and 78).

There is no legal analysis in these paragraphs. Rather, Mr. Cass's points rebut Apple's claims of being an American success story by pointing out that Apple's profitability and employment are not statutory elements considered in the public interest analysis. Apple Ex. 1 at ¶¶31, 59–66. Mr. Cass also properly rebuts Apple's claims regarding alleged strong consumer preference for Apple products and cost of switching from those products by not only identifying

contravening facts, but also by noting that such considerations are not within the statutory public interest framework. *Id.* at 70–72, 73–76, and 78. All of these paragraphs set forth the proper analysis of the facts of this investigation within the necessary framework of public interest analysis. *See Wireless Communication Base Stations* and *Certain Elec. Devices.*

- Apple challenges Mr. Cass's opinions regarding public interest and intellectual property rights (Apple Ex. 1 at ¶¶25–26 and 67).

In these paragraphs, Mr. Cass is properly setting forth his understanding of the framework under which he presents his analysis and testimony. Mr. Cass also presents the facts of this investigation within that framework. As noted above, that Apple may disagree with the framework Mr. Cass utilizes is not basis to strike his opinions regarding that framework or his opinions on the underlying facts analyzed within that framework.

- Apple challenges Mr. Cass's opinion on public health and welfare (Apple Ex. 1 at ¶¶32 and 34).

In these paragraphs, Mr. Cass does nothing more that set forth the framework under which his subsequent analysis of the facts is presented. This is proper under *Wireless Communication Base Stations* and *Certain Elec. Devices* and that Apple may disagree with that framework is no basis to strike his opinions.

- Apple challenges Mr. Cass's opinions on education, government and first responders, healthcare, and accessibility (Apple Ex. 1 at ¶¶42, 44, 46, and 48).

In each of these paragraphs, Mr. Cass rebuts Apple's claims by pointing out *the facts* that Apple's products' claimed features relating to education, government and first responders, healthcare, and accessibility are available in competing alternative products. Apple Ex. 1 at 42, 44, 46, and 48. Mr. Cass also appropriately analyzes those facts within his understanding of the appropriate public interest framework. *Id.*

- Apple challenges Mr. Cass's opinions regarding the adverse effects on public interest (Apple Ex. 1 at 80–81).

Paragraphs 80 and 81 are merely Mr. Cass's final conclusions that summarize the application of the facts of this case to his understanding of the framework under which he presents his factual analysis. As noted above, this is appropriate expert opinion. *Wireless Communication Base Stations* and *Certain Elec. Devices.*

- Apple challenges Mr. Cass's opinions regarding the licensing dispute between the parties (Apple Ex. 5 at ¶¶18–19, 24).

Mr. Cass's opinions in these paragraphs are a direct rebuttal to Apple's experts' Meyer and McAdams opinions that the Commission must consider the parties' licensing dispute when analyzing the public interest factors. Indeed, both of Apple's experts Meyer and McAdams opine that the Commission should reject any remedy in this Investigation because Ericsson and Apple are involved in a license dispute over patents *not at issue in this Investigation*. It is rich that Apple seeks to strike Mr. Cass's opinions on this issue while advancing its experts' opinions on the very same issue. In any event, paragraphs 18–19 and 24 of Mr. Cass's rebuttal report set forth both the public interest framework under which he rebuts Meyer's and McAdams's opinions and the facts analyzed within that framework. That Apple dislikes that framework and those facts is no basis to strike Mr. Cass's opinions.

- Apple challenges Mr. Cass's opinions regarding the parties' SEP licensing dispute (Apple Ex. 5 at ¶¶24–91).

As in the bullet point above, Apple seeks to strike Mr. Cass's rebuttal testimony on the very same issue that Apple itself claims testimony is appropriate. Both Meyer and McAdams specifically opine that the Commission should reject any remedy because there is an SEP licensing dispute between the parties. Though neither Meyer nor McAdams has any expertise in analysis of public interest factors, both opinions are necessarily a statement that a licensing dispute regarding

SEP patents not asserted in this Investigation is within the scope of this investigation. Mr. Cass rebuts that presentation of the framework of public interest issues. Indeed, Mr. Cass's analysis is devoted to Meyer's and McAdams's failure to link any issues regarding that SEP licensing dispute to actual public interest factors that must be analyzed with respect to this Investigation. Mr. Cass further identifies contravening facts and analysis that rebut the Meyers and McAdams opinions.

That Apple disagrees with Mr. Cass's rebuttal of the framework of analysis that Meyers and McAdams have presented, and that Mr. Cass has identified contravening facts and analysis to rebut Meyers and McAdams, is no basis to strike opinions on the proper framework for analysis nor opinions regarding the underlying facts used in that analysis. *See Wireless Communication Base Stations* and *Certain Elec. Devices.*

Apple's motion should also be denied because it confuses the weight to be accorded expert testimony with the issue of whether it is admissible. But "*Daubert* and Rule 702 are safeguards against unreliable or irrelevant opinions, not guarantees of correctness." *See i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 854 (Fed. Cir. 2010). This is shown by Apple's arguments quibbling with the correctness of some Mr. Cass's opinions. Even though those arguments are wrong on the facts because Mr. Cass's opinions are accurate, whether an expert's opinions are accurate provides no grounds for exclusion and would only be relevant to the weight accorded to expert testimony—which is an issue that may be addressed on cross-examination. *See Daubert*, 509 U.S. at 596; *i4i*, 598 F.3d at 852 (disputes concerning the accuracy of expert opinions "go to the testimony's weight, but not its admissibility"); *S.E.C. v. Das*, 723 F.3d 943, 951 (8th Cir. 2013) ("[M]ere disagreement with the assumptions and methodology used does not warrant exclusion of expert testimony.") (internal quotations and citation omitted). Thus, Apple's issues with Mr.

Cass's testimony go to weight and not admissibility and, therefore, Apple's motion should be denied.

For these reasons, Mr. Cass's opinions are admissible because they are offered by an expert qualified to provide them, are not legal conclusions, and are helpful to the fact finder, and Apple's motion to strike paragraphs 18–40, 42, 44, 46, 48, 52–53, 55, 59–67, and 69–81 of Mr. Cass's opening report and paragraphs 15–19 and 24–91 of Mr. Cass's rebuttal should be denied.

D. Mr. Cass Does Not Offer Opinions on Economic and Technical Matters Outside His Realm of Expertise

Apple's objection to paragraphs 29, 36, 41, 43, 45, 47, 49, 50, 52–54, 68, 73, and 77–78 of Mr. Cass's report as unreliable or unduly repetitive should be denied because these opinions are reliable and are not unduly repetitive.

"An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." Fed. R. Evid. 703. Mr. Cass has examined the available facts and data and provided his opinions on whether and how those facts and data relate to the statutory public interest effects factors, his area of expertise. This analysis of the facts and data in this case includes his review of, and reliance on, the opinions and factual analysis of Ericsson's other experts in this investigation, Dastmalchi, Sikka, and Akemann. This is entirely proper under Fed. R. Evid. 703. *See Certain Foodservice Equipment and Components Thereof*, Inv No. 337-TA-1166, Order No. 34 (Apr. 20, 2020) ("As an expert, he may be permitted to rely on testimony that would otherwise be inadmissible . . . As to the bases for his opinions, Respondents had the opportunity to depose Mr. Ashton, who disclosed in his expert report that he was relying on interviews with various individuals, and there is no suggestion that Respondents' examination of the underlying bases of Mr. Ashton's opinions was curtailed in any way."); *United States Gypsum v. LaFarge North American, Inc.*, 670 F. Supp. 2d 748, 758 (N.D. Ill. 2009) ("It is common in technical fields

for an expert to base an opinion in part on what a different expert believes on the basis of expert knowledge not possessed by the expert.").

Apple complains that, in the paragraphs it seeks to strike, Mr. Cass "is simply repeating the opinions of other experts and repeating the contents of various documents" and therefore these paragraphs are "unduly duplicative." Apple Motion at 12. Apple proceeds to set forth bullet points of alleged examples. *Id.* Ericsson need not address each of these bullet points individually because Mr. Cass has done more than merely repeat experts or documents. And the application of the facts presented by other experts and available documents to the public interest analysis is entirely appropriate.

Rather than being unduly repetitive, Mr. Cass's opinions acknowledge the fact that these other experts have different areas of expertise. Mr. Cass is an expert on the public interest effects inquiry, while Dastmalchi is an expert on supply chain, Sikka is a healthcare expert, and Akemann is an economic expert. Mr. Cass may not be qualified to offer opinions on supply chain, capacity, healthcare, substitutability, etc., but he is qualified to offer opinions on whether and how those issues relate to the public interest effects inquiry. And that is what Mr. Cass has done in this investigation.

Nor are the opinions in these paragraphs places where Mr. Cass simply "repeats the contents of various documents." Rather, in each instance, Mr. Cass identifies relevant facts, whether provided by Ericsson's other experts or Apple's interrogatory responses, and applies those facts to the public interest analysis. A component of this exercise is marshaling citations to the evidence; this exercise is necessary for Mr. Cass to show that Apple's claims are contradicted by the available facts. What it is *not* is Mr. Cass "simply repeat[ing] what he finds in various documents," as alleged in Apple's motion.

[redacted]

In any event, that Mr. Cass found and reports facts from various expert opinions and documents is not a reason to strike his opinions, because reporting available facts and synthesizing them into opinions is the role of expert witnesses. This is explicitly recognized in Fed. R. Evid. 703, which allows that "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." To the extent Mr. Cass's report repeats facts found in expert reports or documents in this case, it is because that is also required by Ground Rule 7, which requires that an expert "report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions[.]"

Indeed, in *Certain Elec. Devices*, the ALJ rejected the notion that Mr. Cass's opinions should be struck because he relies on the opinions of other experts and is himself not an expert in those other issues. Rather, the ALJ acknowledged that his application of those marshalled facts to the public interest analysis were admissible. "Questions raised as to other portions of the Cass report go largely to weight, which will be determined after the hearing. Ericsson has demonstrated that Mr. Cass has expertise in many areas relevant to the public interest factors to be addressed during the hearing in this investigation." *Certain Elec. Devices* at 2.

Finally, Apple argues that certain of Mr. Cass's opinions in ¶¶43, 68, and 73 lack foundation and therefore are unreliable. Apple Motion at 14. First, Apple quibbles with only one sentence in of each of those paragraphs and not the entirety of those paragraphs. Thus, to the extent any portion is stricken, it should be limited to the quoted statements in Apple's Motion at 14. Nevertheless, the identified statements in ¶¶43, 68, and 73 have a foundation. Throughout ¶43, Mr. Cass cites ERIC_APPLE_ITC_01978205 and ERIC_APPLE_ITC_01978356 to support his statements. While Mr. Cass inadvertently did not cite those documents for the one statement Apple

quotes in its Motion, the foundation is laid in those identified documents. Further, foundation is laid for the statements in each of ¶¶43, 68, and 73 through Mr. Cass's expertise. As recognized in *Certain Elec. Devices*, "Ericsson has demonstrated that Mr. Cass has expertise in many areas relevant to the public interest factors to be addressed during the hearing in this investigation." *Id.* at 2. To the extent Apple wants to challenge that expertise, and whether it provides foundation, it can do so at the hearing, where the ALJ can properly assess what weight to give the testimony. *Id.*

For these reasons, Mr. Cass's opinions are neither unreliable nor unduly repetitive and Apple's motion to strike paragraphs 29, 36, 41, 43, 45, 47, 49, 50, 52–54, 68, 73, and 77–78 of Mr. Cass's opening report should be denied.

IV. CONCLUSION

For the foregoing reasons, Ericsson respectfully requests that the ALJ deny Apple's motion.

Date: September 29, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Liberty M. Quan, hereby certify that copies of the foregoing **ERICSSON'S OPPOSITION TO APPLE'S MOTION TO STRIKE THE EXPERT OPINIONS OF RONALD A. CASS (MOTION DKT. 1301-0027)** were filed and served on **September 29, 2022** on the persons as indicated below.

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