

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.**

In the Matter of

**CERTAIN DATA STORAGE PRODUCTS
AND COMPONENTS THEREOF**

Investigation No. 337-TA - _____

**VERIFIED COMPLAINT UNDER SECTION 337 OF THE
TARIFF ACT OF 1930, AS AMENDED**

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I. INTRODUCTION

1. Complainant Data Network Storage, LLC (“DNS”) requests that the United States International Trade Commission (“Commission”) institute an investigation into violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“Section 337”). These violations involve certain data storage products that are adapted for transferring and storing data.

2. This Complaint is based on, and the Commission’s jurisdiction is invoked upon, the unlawful and unauthorized importation into the United States, sale for importation, and/or the sale within the United States after importation of data storage products and components thereof by Respondents (a) NetApp, Inc. (“NetApp”), (b) Dell, Inc. (“Dell”), (c) International Business Machines, Inc. (“IBM”), (d) Dot Hill Systems Corp. (“Dot Hill”), (e) Xyratex, Ltd., and its subsidiaries and/or affiliates including Xyratex International Inc. and Xyratex (Malaysia) Sdn Bhd, (collectively referred to as “Xyratex and its affiliates”), (f) QNAP Systems, Inc. (“QNAP”), and (g) Cisco Systems, Inc. (“Cisco”) (collectively referred to as “Respondents”).

3. Respondents’ data storage products (collectively referred to as the “Accused Products”) and their components infringe independent claim 1 and dependent claims 2 through 8 of U.S. Patent No. 6,098,128 (the “128 Patent”).

4. Pursuant to Section 337(d), DNS seeks as relief from the Commission an exclusion order barring and excluding from entry into the United States (a) Accused Products of Respondents NetApp, Dot Hill, Dell, IBM, QNAP, and Cisco, (b) components of Respondents Xyratex and its affiliates, which are assembled into NetApp’s and Dell’s Accused Products, and (c) components of Respondent Dot Hill, which are assembled into NetApp’s Accused Products.

5. Pursuant to Section 337(f), DNS also seeks as relief from the Commission the issuance of a cease and desist order prohibiting all Respondents and/or their affiliates,

subsidiaries, successors, and assigns, from importing, selling for importation, marketing, demonstrating, distributing, offering for sale, selling after importation, or transferring (including the movement or shipment of inventory in the United States), of Accused Products and all components thereof that infringe the '128 Patent.

6. A domestic industry exists as required by Section 337(a)(2) and (a)(3), based upon the substantial investment in the exploitation of the inventions claimed in the '128 Patent, through at least the licensing activities of DNS in the United States.

II. THE PARTIES

A. The Complainant

7. DNS is a limited liability company organized and existing under the laws of the State of Delaware with its headquarters located in San Diego, California.

8. DNS's business model includes acquiring, licensing and developing patent portfolios. DNS generates licensing revenues from users of its patented technologies. DNS also protects its patented inventions from unauthorized use and, if necessary, enforces rights against infringers of its proprietary, claimed technologies.

9. DNS's success in licensing intellectual property depends, in large part, on its ability to license its intellectual property through enforcement of the '128 Patent. In order to do so, DNS monitors third party activities and products that include the technology claimed by the '128 Patent.

10. DNS is the exclusive licensee of the '128 Patent and has the exclusive right to enforce the '128 Patent pursuant to an Exclusive License Agreement, dated October 3, 2006, with Storage Computer Corporation ("SCC"), the owner of the '128 Patent. See **Exhibit 3** and

Confidential Exhibits 92 and 93. SCC acquired the ‘128 Patent through a series of transactions described in **Exhibits 2, 4, 5 and 6.**

B. The Respondents

11. The following Respondents are involved in the unlawful importation and sale in the United States of Accused Products that infringe the ‘128 Patent.

1. NetApp, Inc.

12. On information and belief, Respondent NetApp, Inc. (“NetApp”) is a corporation duly organized under the laws of the State of Delaware, with its principal place of business located at 495 East Java Drive, Sunnyvale, California 94089.

13. On information and belief, NetApp has imported on its behalf, distributes, and sells in the United States data storage products (“NetApp Accused Products”) or components used to make the NetApp Accused Products.

14. On information and belief, components used to make the NetApp Accused Products are imported from China into the United States on behalf of NetApp, by Dot Hill, and assembled into NetApp Accused Products by Dot Hill. *See* ¶¶ 58-60, *infra* and **Exhibits 32, 33 and 34.**

15. On information and belief, components used to make the NetApp Accused Products are also imported from Malaysia into the United States on behalf of NetApp, by Xyratex and its affiliates, and assembled into NetApp Accused Products by Xyratex and its affiliates. *See* ¶¶ 63-66, *infra* and **Exhibits 35, 36, and 37.** On information and belief, after assembly, NetApp sells the NetApp Accused Products in the United States. *See* ¶ 41, *infra* and attached **7, 8, 9, 10 and 11.**

2. Dot Hill Systems Corp.

16. On information and belief, Respondent Dot Hill Systems Corp. (“Dot Hill”) is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 1351 S. Sunset Street, Longmont, Colorado 80501.

17. On information and belief, Dot Hill supplies NetApp with components imported from China into the United States by Dot Hill, which are subsequently assembled in the United States into NetApp Accused Products. *See* ¶¶ 58-60, *infra* and **Exhibits 32, 33 and 34**.

18. On information and belief, the NetApp Accused Products are sold by NetApp within the United States. *See* ¶ 41, *infra* and **Exhibits 7, 8, 9, 10 and 11**.

19. On information and belief, Dot Hill also imports components from China and assembles them in the United States into data storage products (the “Dot Hill Accused Products”), which are then sold and distributed in the United States. *See* ¶¶ 61-62 and 46, *infra* and **Exhibits 30, 31 and 33**.

3. Dell, Inc.

20. On information and belief, Respondent Dell, Inc. (“Dell”) is a corporation duly organized under the laws of the State of Delaware, with its principal place of business located at One Dell Way, Round Rock, Texas 78682.

21. On information and belief, Dell has imported on its behalf, distributes, and sells in the United States data storage products (“Dell Accused Products”).

22. On information and belief, components of Dell Accused Products are imported from Malaysia into the United States on behalf of Dell by Xyratex and its affiliates, and assembled by Xyratex and its affiliates into the Dell Accused Products. On information and

belief, after assembly, Dell sells the Dell Accused Products in the United States. *See* ¶¶ 66-67 and 42, *infra* and **Exhibits 12, 13-23, 35, 36 and 37.**

4. Xyratex Ltd, Xyratex International Inc., and Xyratex (Malaysia) Sdn

23. On information and belief, Respondent Xyratex, Ltd. (“Xyratex”) is a limited liability company organized and existing under the laws of Bermuda with its principal place of business located in Havant, United Kingdom and offices in Fremont, California.

24. On information and belief, Respondent Xyratex International, Inc. (“Xyratex International”) is a corporation organized and existing under the laws of the State of California with places of business located in West Sacramento and Fremont, California.

25. On information and belief, Respondent Xyratex (Malaysia) Sdn Bhd (“Xyratex Malaysia”) is a corporation organized and existing under the laws of Malaysia with a place of business located in Penang, Malaysia.

26. On information and belief, Xyratex International and Xyratex Malaysia are subsidiaries and/or affiliates of Xyratex, and Xyratex operates in concert with them. *See Exhibit 35.* Xyratex, Xyratex International, and Xyratex Malaysia are collectively referred to as “Xyratex and its affiliates.”

27. On information and belief, Xyratex and its affiliates supply NetApp with components imported from Malaysia into the United States by Xyratex and its affiliates on behalf of NetApp. Those components are then assembled by Xyratex and its affiliates in the United States into NetApp Accused Products. *See* ¶¶ 63-65, *infra* and **Exhibits 35, 36 and 37.**

28. On information and belief, Xyratex and its affiliates supply Dell with components imported from Malaysia into the United States by Xyratex and its affiliates on behalf of Dell,

that are then assembled by Xyratex and its affiliates into Dell Accused Products. *See* ¶¶ 66-67, *infra* and **Exhibits 35, 36 and 37**.

5. International Business Machines Corporation

29. On information and belief, Respondent International Business Machines Corporation (“IBM”) is a corporation duly organized under the laws of the State of New York, with its principal place of business located at One New Orchard Road, Armonk, New York 10504.

30. On information and belief, IBM imports, distributes, and sells in the United States after importation data storage products (“IBM Accused Products”). *See* ¶ 43, *infra* and **Exhibits 24, 25, 99, 100, 101, 102, and 103**.

31. IBM’s operations include the manufacture, importation, distribution, and sale after importation into the United States, of IBM Accused Products. *See* ¶¶ 68-69, *infra* and **Exhibit 38**. In addition, certain IBM Accused Products are re-branded NetApp Accused Products which are manufactured abroad and/or imported on behalf of NetApp. *See* ¶¶ 68-69, *infra* and **Exhibit 103**.

6. QNAP Systems, Inc.

32. On information and belief, Respondent QNAP Systems, Inc. (“QNAP”) is a corporation duly organized under the laws of Taiwan, Republic of China, with its principal place of business located in Taiwan, and a sales and distribution center located in Pomona, California.

33. On information and belief, QNAP imports data storage products (“QNAP Accused Products”) from Taiwan and subsequently distributes and sells in the United States QNAP Accused Products. *See* ¶¶ 70-72 and 44-45, *infra* and **Exhibits 26, 27 and 39**.

34. On information and belief, QNAP is also an overseas OEM supplier of data storage products for Cisco Systems, Inc. ("Cisco"), as described below. See ¶¶ 70-72 and 45, *infra* and **Exhibits 28, 29, 39 and 40**.

35. On information and belief, QNAP manufactures Cisco Accused Products in Taiwan and imports them into the United States on behalf of Cisco, which Cisco then sells in the United States. *Id.*

7. Cisco Systems, Inc.

36. On information and belief, Respondent Cisco is a corporation duly organized under the laws of the State of California, with its principal place of business located at 170 West Tasman Drive, San Jose, California 95134.

37. On information and belief, Cisco has imported on its behalf, distributes and sells in the United States data storage products ("Cisco Accused Products"). *Id.*

38. On information and belief, Cisco Accused Products are manufactured in Taiwan by QNAP, imported into the United States by QNAP at the behest of Cisco, and thereafter sold by Cisco in the United States. *Id.*

III. THE TECHNOLOGY AND ACCUSED PRODUCTS

A. The Technology

39. The inventions claimed in the '128 Patent generally relate to novel aspects of a system that is configured to receive and store data, and allow for the conversion of storage commands to and from a common format.

40. In order to implement this data storage technology, the '128 Patent claims, *inter alia*, a file management system configured to convert storage commands to and from a common

format; a processor configured to execute commands in a common format; and a file device driver configured to redirect commands to the file management system.

B. The Accused Products

41. On information and belief, the NetApp Accused Products are offered for sale in the United States through at least Respondent NetApp's website, sales representatives and/or other distribution channels. *See, e.g., Exhibit 7.* The NetApp Accused Products include, but are not limited to, the following:

- (a) NetApp FAS2000 Series (*see Exhibit 8*);
- (b) NetApp FAS3000 Series, renamed as FAS3100 (*see Exhibit 9*);
- (c) NetApp FAS6000 Series (*see Exhibit 10*); and
- (d) NetApp V-Series, V3100 and V6000 (*see Exhibit 11*).

42. On information and belief, the Dell Accused Products are offered for sale in the United States through at least Respondent Dell's website, sales representatives and/or other distribution channels. *See, e.g., Exhibit 12.* The Dell Accused Products include, but are not limited to, the following:

- (a) Dell EqualLogic PS5000 and PS5500 Series (*see Exhibit 13*);
- (b) Dell PowerVault NX 1950 (*see Exhibit 14*);
- (c) Dell PowerVault MD3000i (*see Exhibit 15*);
- (d) Dell EqualLogic PS4000 Series (*see Exhibit 16*);
- (e) Dell EqualLogic PS6000E/6010E Series (*see Exhibit 17*);
- (f) Dell EqualLogic PS6000S/6010S Series (*see Exhibit 18*);
- (g) Dell EqualLogic PS6000X/6010X Series (*see Exhibit 19*);
- (h) Dell EqualLogic PS6000XV/6010XV Series (*see Exhibit 20*);

- (i) Dell EqualLogic PS6000XVS/6010XVS Series (*see Exhibit 21*);
- (j) Dell EqualLogic PS6500E/6510E Series (*see Exhibit 22*); and
- (k) Dell EqualLogic PS6500X/6510X Series (*see Exhibit 23*).

43. On information and belief, the IBM Accused Products are offered for sale in the United States through at least Respondent IBM's website, sales representatives, dealers and/or other distribution channels. *See, e.g., Exhibits 24 and 99.* The IBM Accused Products include, but are not limited to, the following:

- (a) IBM XIV Storage System (*see Exhibit 25*);
- (b) N3000 Series (3300, 3400, 3600, 3700) (*see Exhibit 100*);
- (c) N6000 Series (6040, 6060, 6070) (*see Exhibit 101*); and
- (d) N7000 Series (*see Exhibit 102*).

According to IBM, the N3000, N6000, and N7000 Series of IBM Accused Products comprise private label NetApp Accused Products re-branded under the IBM brand and product name. *See Exhibit 103.* Accordingly, as more fully described below, all infringement and importation allegations against the NetApp Accused Products apply equally to the N3000, N6000, and N7000 Series of IBM Accused Products.

44. On information and belief, the QNAP Accused Products are offered for sale in the United States through at least Respondent QNAP's website, sales representatives, dealers and/or other distribution channels. *See, e.g., Exhibit 26.* The QNAP Accused Products include, but are not limited to, the following:

- (a) QNAP TS-809 (U-RP and Pro);
- (b) QNAP TS-859 (U-RP and Pro);
- (c) QNAP TS-659 (Pro and Pro+);

- (d) QNAP TS-559 (Pro and Pro+);
- (e) QNAP TS-459 (Pro, Pro+, U-RP, U-SP);
- (f) QNAP TS-259 (Pro and Pro+);
- (g) QNAP TS-439 (Pro II);
- (h) QNAP TS-239 (Pro II);
- (i) QNAP SS-839 (Pro);
- (j) QNAP SS-439 (Pro);
- (k) QNAP TS-419U;
- (l) QNAP TS-410U;
- (m) QNAP TS-419P;
- (n) QNAP TS-410;
- (o) QNAP TS-219P;
- (p) QNAP TS-119;
- (q) QNAP TS-210; and
- (r) QNAP TS-110.

See Exhibit 27 (which also contains representative information about one of these products, the “QNAP TS-459 Pro”).

45. On information and belief, the Cisco Accused Products are offered for sale in the United States through at least Respondent Cisco’s website, sales representatives, dealers and/or other distribution channels. *See Exhibit 28*. The Cisco Accused Products include, but are not limited to, Cisco NSS 300 Series Smart Storage (including NSS 322, NSS 324, NSS 326). *See Exhibit 29*. On information and belief, the Cisco Accused Products comprise certain private label QNAP Accused Products re-branded under the Cisco brand and product name.

46. On information and belief, the Dot Hill Accused Products are offered for sale in the United States through at least Respondent Dot Hill's website, sales representatives, dealers and/or other distribution channels. *See, e.g., Exhibit 30.* The Dot Hill Accused Products include, but are not limited to, Dot Hill's 2000 "Mercury" Series (including OEM 2322 and OEM 2332) and 3000 "Titanium" Series (including OEM 3420, OEM 3430, OEM 3920 and OEM 3930) of data storage products. *See Exhibit 31.*

47. DNS is informed and believes that Xyratex and its affiliates, in addition to supplying components or fully assembled products that are incorporated into and branded as the NetApp and Dell Accused Products, imports, sells for importation, or offers for sale in the United States other data storage products or components thereof. DNS reserves the right to accuse those products at the appropriate time after discovery is taken in the investigation.

IV. THE ASSERTED PATENT AND NON-TECHNICAL DESCRIPTION

A. Overview and Ownership of the '128 Patent

48. The '128 Patent issued from United States application Serial No. 08/714,846, filed on September 17, 1996, on a continued prosecution application, and claims priority to United States provisional patent application Serial No. 60/003,920, filed September 18, 1995. The '128 Patent¹ expires on September 17, 2016. A certified copy of the '128 Patent is attached hereto as **Exhibit 1**.

49. Pursuant to Commission Rule 210.12(c), a certified copy of the File History of the '128 Patent is included as **Appendix A**. Copies of the references cited in the certified file history of the '128 Patent are included as **Appendix B**.

¹ A reissue application is pending in the U.S. Patent and Trademark Office (USPTO).

50. DNS has the exclusive right to enforce the '128 Patent pursuant to its Exclusive License Agreement with SCC. *See Exhibits 2, 3, and 4-6 and Confidential Exhibits 92 and 93.*

B. Non-Technical Description and the Asserted Claims of the '128 Patent

51. The '128 Patent generally discloses and claims innovative aspects of a system that is adapted for transferring and storing data.

52. The '128 Patent has 32 claims. Claims 1-8 ("the Asserted Claims") are directly and/or indirectly infringed by the Respondents' manufacture, importation, use, offer to sell, or sale of the Accused Products in the United States.

53. Claim 1, which is the only independent claim, recites:

A device for providing an interface between at least one client computer and at least one storage device, the client computer having a first microprocessor for running a software application and a first operating system which produce I/O commands, the storage device containing at least one file, comprising:

(i) a file management system operative to convert the I/O commands from the software application and said first operating system in the client computer to high level commands to a selected format, said file management system further operative to receive said high level commands and convert said high level commands to compatible I/O commands;

(ii) a second microprocessor operative to execute said high level commands received from said file management system and access the storage device to copy data in said intermediate common format from the client computer to at least one storage device wherein said second microprocessor employs a second operating system distinct from said first operating system; and

(iii) a file device driver interfacing said first operating system and the file management system by functioning to receive data and commands from the client computer and redirect the received data and commands to said file management system.

C. Foreign Counterparts

54. The '128 Patent has no foreign counterparts, no corresponding pending foreign patent applications, and no foreign applications that have been withdrawn, abandoned or rejected.

D. Licenses to the '128 Patent

55. DNS has entered into eleven (11) license agreements that directly relate to the '128 Patent. A confidential list of licensees that are parties to these license agreements, together with their royalty payments, is attached hereto as **Confidential Exhibit 94 (Public Version Exhibit 98)**. DNS has not entered into any other license agreements that relate to the '128 Patent.

56. On information and belief, SCC also entered into at least five (5) non-exclusive license agreements that relate to the '128 Patent that pre-date the Exclusive License Agreement between SCC and DNS. SCC's non-exclusive license agreements do not affect DNS's standing to bring this Complaint before the Commission. A confidential list of licensees that are parties to these license agreements is attached hereto as **Confidential Exhibit 95**.

V. RESPONDENTS' UNLAWFUL AND UNFAIR ACTS

A. Importation

57. The information currently available to DNS regarding importation was obtained from publicly-available sources. The Accused Products typically involve high-end enterprise storage systems that require special licenses, installation, and/or ongoing services and maintenance provided by Respondents and/or their authorized resellers. Due to the high cost associated with purchasing the Accused Products (e.g., priced at tens of thousands of dollars and up), and the requirement to execute various licenses and agreements when acquiring them, it was

not practical to purchase the Accused Products for physical examination prior to filing this Complaint.

1. Dot Hill's Importation of Components and Assembly of NetApp Accused Products

58. On information and belief, Dot Hill supplies NetApp with components imported from China that are then assembled in the United States into NetApp Accused Products. Dot Hill's importation of components for NetApp is supported by U.S. Customs records available through www.importgenius.com and Dot Hill's 10-K filing with the Securities and Exchange Commission ("SEC") where it is reported that:

- (a) Dot Hill entered into a Development and OEM Supply Agreement with NetApp to supply NetApp Accused Products;
- (b) Respondent NetApp accounted for approximately 25% of Dot Hill's 2009 revenues; and
- (c) Dot Hill entered into a manufacturing agreement with MiTAC International Corporation ("MiTAC") based in Taiwan.

See Exhibit 32.

59. U.S. Customs records excerpts obtained from www.importgenius.com on or about September 23, 2010, exemplify Dot Hill's importation from MiTAC in China of components described as "computer parts" and "chassis modules" that are imported for assembly into the "Mercury" and "Titanium" series of Dot Hill Accused Products.

See Exhibit 33.

60. Dot Hill is in the business of selling Original Equipment Manufacturer ("OEM") data storage products for private labeling by others such as NetApp. *See Exhibit 34.* Accordingly, Dot Hill imports, and will continue to import, into the United States components

which are assembled in the United States as NetApp Accused Products and thereafter sold in the United States by NetApp.

2. Dot Hill's Importation of Components and Assembly of Dot Hill Accused Products

61. On information and belief, Dot Hill imports components from MiTAC in China into the United States that are then assembled in the United States into Dot Hill Accused Products. U.S. Customs records show examples of Dot Hill's importation from MiTAC in China of components described as "computer parts" and "chassis modules" for the "Mercury" and "Titanium" series of Dot Hill's Accused Products. *See Exhibit 33.*

62. Accordingly, Dot Hill imports and will continue to import into the United States components which are assembled in the United States as Dot Hill Accused Products and thereafter sold in the United States by Dot Hill.

3. Xyratex's Importation of Components and Assembly of NetApp and Dell Accused Products

63. On information and belief, Xyratex and its affiliates supply NetApp with components imported from Malaysia into the United States by Xyratex and its affiliates on behalf of NetApp. These components are then assembled by Xyratex and its affiliates in the United States into NetApp Accused Products. Xyratex and its affiliates' importation of components for NetApp is supported by U.S. Customs records obtained from www.importgenius.com and Xyratex's Form 20-F and 6-K filings with the SEC where Xyratex reports that:

- (a) Xyratex Malaysia operates a manufacturing facility in Seremban, Malaysia; and
- (b) NetApp accounted for approximately 48% of Xyratex's 2009 revenues.

See Exhibit 35.

64. U.S. Customs records excerpts obtained from www.importgenius.com on or about May 24, 2010, exemplify the importation of components identified as “data storage subsystem (NSS), disk drive storage unit” shipped from Xyratex Malaysia’s facility in Seremban, Malaysia to Xyratex International’s facilities based in West Sacramento, California through the Port of Oakland, California as recently as April 2010. *See Exhibit 36.*

65. Accordingly, on information and belief, Respondents Xyratex Malaysia and Xyratex International, on behalf of themselves and their parent, Respondent Xyratex, Ltd., import, and will continue to import, into the United States data storage components, which are assembled in the United States as NetApp Accused Products and thereafter sold in the United States by NetApp. *See also Exhibit 37.*²

66. On information and belief, Xyratex and its affiliates supply Dell with data storage components imported from Malaysia into the United States by Xyratex and its affiliates on behalf of Dell that are then assembled by Xyratex and its affiliates in the United States into Dell Accused Products. This importation for Dell is evidenced by:

- (a) Xyratex Malaysia’s manufacturing facility in Seremban, Malaysia,
- (b) the above-described www.importgenius.com U.S. Customs records excerpts, and
- (c) Dell’s accounting for approximately 15% of Xyratex’s 2009 revenues.

See Exhibits 35 and 36.

² **Exhibit 37** comprises photographs of a data storage product assembled by Xyratex and its affiliates for one of DNS’s licensees of the ‘128 Patent, Compellent Technologies. The data storage product is marked by Xyratex with a Xyratex part number and as “Assembled in the U.S.A.” The implication is that these products are assembled in the U.S. from mainly foreign components.

67. Accordingly, on information and belief, Respondents Xyratex Malaysia and Xyratex International, on behalf of themselves and their parent, Respondent Xyratex, Ltd, import, and will continue to import, into the United States data storage components, which are assembled in the United States as Dell Accused Products and thereafter sold in the United States by Dell. *See Exhibit 37.*

4. IBM's Importation of IBM Accused Products

68. On information and belief, Respondent IBM manufactures IBM Accused Products, specifically the IBM XIV Storage System, in Guadalajara, Mexico and imports them into the United States. *See Exhibit 38.* In addition, according to IBM, the N3000, N6000, and N7000 Series of IBM Accused Products comprise private label NetApp Accused Products re-branded under the IBM brand and product name. *See Exhibit 103.* Thus, the manufacturing and importation activities associated with the NetApp Accused Products, namely those activities of Respondents Dot Hill and Xyratex, apply equally to the N3000, N6000, and N7000 Series of IBM Accused Products. *See supra*, ¶¶ 58-60 (Dot Hill importation activities and related Exhibits) and ¶¶ 63-65 (Xyratex importation activities and related Exhibits).

69. Accordingly, IBM imports, and will continue to import, into the United States IBM Accused Products that are thereafter sold in the United States by IBM.

5. QNAP's Importation of QNAP and Cisco Accused Products

70. On information and belief, Respondent QNAP, which is headquartered in Taiwan, manufactures QNAP and Cisco Accused Products in Taiwan and imports them into the United States.

71. Excerpts of U.S. Customs records obtained from www.importgenius.com on or about August 17, 2010, show numerous entries from January through July 2010 of QNAP

importing “Network Attached Storage”³ from Taiwan into the United States. *See Exhibit 39.* On information and belief, many of these entries constitute examples of QNAP’s importation of QNAP Accused Products and components thereof.

72. On information and belief, QNAP is an OEM supplier of Cisco Accused Products. *See Exhibit 40.* In addition, one of the “Network Attached Storage” entries referred to in the preceding paragraph shows that 222 cartons of “Network Attached Storage” products were shipped by QNAP from Taiwan to Hon Hai Precision Industry Co. Ltd. in Houston, Texas via the Port of Los Angeles, California, with an arrival date of May 31, 2010. This shipment contained the following marks and numbers: “CISCO USA PO 6800000839 PLT NO. 1-10 MADE IN TAIWAN.” This demonstrates one example of QNAP’s importation of private-labeled Cisco Accused Products. *See Exhibit 39.*

B. Sale

73. As set forth in Section III.B of this Complaint, *supra*, the NetApp, Dot Hill, Dell, IBM, QNAP, and Cisco Accused Products are offered for sale in the United States through Respondents’ respective websites, sales representatives and/or other United States distribution channels. *See Exhibits 7, 12, 24, 26, 28 and 30.*

C. Direct Infringement

74. On information and belief, the Accused Products and their components are manufactured outside of the United States, imported, and then sold within the United States by, or on behalf of, Respondents.

³ Network Attached Storage (“NAS”) and Storage Area Network (“SAN”) are terms commonly used by the computer storage industry to describe computer storage devices, such as the Accused Devices, purchased by business enterprises for use in their computer networks. *See, e.g., Exhibits 45, 65, 72 and 73.*

1. Dell

75. Dell has infringed and continues to infringe claims 1 through 8 of the '128 Patent under 35 U.S.C. § 271(a) by at least the sale after importation of Dell Accused Products in the United States without authority from DNS. Independent claim 1 of the '128 Patent reads on the Dell Accused Products, as shown in the claim chart attached hereto as **Exhibit 41**.

2. IBM

76. IBM has infringed and continues to infringe claims 1 through 8 of the '128 Patent under 35 U.S.C. § 271(a) by its manufacture, importation, sale for importation, or sale in the United States after importation of IBM's Accused Products (or the importation of components thereof) without authority from DNS. Independent claim 1 of the '128 Patent reads on the IBM Accused Products, as shown in the claim charts attached hereto as **Exhibit 50** (IBM XIV Series) and **Exhibit 60** (IBM N3000, N6000, N7000 Series, comprising private label NetApp Accused Products).

3. NetApp

77. Respondent NetApp has infringed and continues to infringe claims 1 through 8 of the '128 Patent under 35 U.S.C. § 271(a) by at least its sale of NetApp Accused Products after importation in the United States without authority from DNS. Independent claim 1 of the '128 Patent reads on the NetApp Accused Products, as shown in the claim chart attached hereto as **Exhibit 60**.

4. Xyratex and its Affiliates

78. Xyratex and its affiliates supply components of, or fully assembled products that are then branded and sold in the United States as, the NetApp and Dell Accused Products. The infringement of claim 1 of the '128 Patent by NetApp's and Dell's Accused Products applies equally to Xyratex and its affiliates. *See Exhibits 41 and 60.*

5. QNAP / Cisco

79. QNAP has infringed and continues to infringe claims 1 through 8 of the '128 Patent under 35 U.S.C. § 271(a) by its manufacture, importation of QNAP and Cisco Accused Products or components thereof, and sale in the United States after importation of QNAP and Cisco Accused Products without authority from DNS. Independent claim 1 of the '128 Patent reads on the QNAP Accused Products as shown in the claim chart attached hereto as **Exhibit 71**.

80. Cisco has infringed and continues to infringe claims 1 through 8 of the '128 Patent under 35 U.S.C. § 271(a) by its importation of Cisco Accused Products or components thereof and sale in the United States after importation of Cisco Accused Products without authority from DNS. On information and belief, the Cisco Accused Products comprise certain private label QNAP Accused Products re-branded under the Cisco brand and product name. Independent claim 1 of the '128 Patent reads on the Cisco Accused Products as shown in the claim chart attached hereto as **Exhibit 79**.

6. Dot Hill

81. In addition to supplying components or fully assembled products that are incorporated into and/or branded as the NetApp Accused Products, Dot Hill also imports and offers for sale in the United States components of or fully assembled Dot Hill Accused Products.

82. Dot Hill has infringed and continues to infringe claims 1 through 8 of the '128 Patent under 35 U.S.C. § 271(a) by its importation and sale for importation of Dot Hill Accused Products or components thereof, and sale in the United States after importation of Dot Hill Accused Products without authority from DNS. Independent claim 1 of the '128 Patent reads on the Dot Hill Accused Products as shown in the claim chart attached hereto as **Exhibit 85**.

D. Indirect Infringement

1. NetApp, Dot Hill, Dell, IBM, QNAP and Cisco

83. On information and belief, Respondents NetApp, Dot Hill, Dell, IBM, QNAP and Cisco induce others to infringe claims 1-8 of the '128 Patent under 35 U.S.C. § 271(b) by encouraging and facilitating others to perform actions known by them to infringe and with the intent that performance of the actions will infringe. Respondents knew or should have known that their actions would induce actual infringement because they are named as defendants in patent infringement litigation involving the '128 Patent. *See* ¶¶ 105-107, *infra*. NetApp, Dot Hill, Dell, IBM, QNAP and Cisco actively encourage, promote, distribute, provide instruction for, and support the use of these products in connection with a client or server computer in such a manner as to directly infringe claims 1-8 of the '128 Patent.

84. On information and belief, Respondents NetApp, Dot Hill, Dell, IBM, QNAP and Cisco each contribute to the infringement of claims 1-8 of the '128 Patent under 35 U.S.C. § 271(c) as described below.

85. Respondents NetApp, Dot Hill, Dell, IBM, QNAP and Cisco knew that the combination for which their respective accused components were especially made was both patented and infringing because they are named as defendants in patent infringement litigation involving the '128 Patent. *See* ¶¶ 105-107, *infra*.

86. On information and belief, the storage and communication hardware or software components in the NetApp, Dot Hill, Dell, IBM, QNAP, and Cisco Accused Products are specially adapted for connection to a client or server computer so as to infringe one or more of claims 1-8 of the '128 Patent. The storage and communication hardware or software components in each of these products embody a material part of the inventions claimed in the

‘128 Patent. These components are not staple articles of commerce suitable for substantial non-infringing use.

87. On information and belief, Respondents NetApp, Dot Hill, Dell, IBM, QNAP and Cisco import, and/or sell after importation in the United States, the NetApp, Dot Hill, Dell, IBM, QNAP and Cisco Accused Products or the components of those products.

88. On information and belief, consumers use the claimed inventions by connecting the NetApp, Dot Hill, Dell, IBM, QNAP, and Cisco Accused Products with a client or server computer, thereby directly infringing claims 1-8 of the ‘128 Patent.

2. Xyratex and its Affiliates

89. On information and belief, Xyratex and its affiliates induce others, such as NetApp and Dell, to infringe claims 1-8 of the ‘128 Patent under 35 U.S.C. § 271(b) by encouraging and facilitating others to perform actions known to infringe and with the intent that performance of the actions will infringe. Xyratex and its affiliates knew or should have known that their actions would induce actual infringement because they are named as defendants in patent infringement litigation involving the ‘128 Patent. *See* ¶107, *infra*. Xyratex and its affiliates actively encourage, promote, distribute, provide instruction for, and support the use of Xyratex and its affiliates’ components assembled into the NetApp, Dell or IBM Accused Products, which directly infringe the ‘128 Patent, knowing that consumers use the claimed inventions by connecting NetApp, Dell or IBM Accused Products to a client or server computer in such a manner as to directly infringe claims 1-8 of the ‘128 Patent.

90. Xyratex and its affiliates contribute to the infringement of claims 1-8 of the ‘128 Patent under 35 U.S.C. § 271(c) by their manufacture, importation, sale for importation, and/or sale in the United States after importation of one or more components of the NetApp, Dell or

IBM Accused Products. Respondents Xyratex and its affiliates knew that the combination for which their respective accused components were especially made was both patented and infringing because they are named as defendants in patent infringement litigation involving the '128 Patent. *See* ¶107, *infra*. The components imported by Xyratex and its affiliates for use in the NetApp, Dell or IBM Accused Products embody a material part of the inventions claimed in the '128 Patent. These components are not staple articles of commerce suitable for substantial non-infringing use.

91. On information and belief, the NetApp, Dell or IBM Accused Products that contain said components imported by Xyratex and its affiliates directly infringe claims 1-8 of the '128 Patent.

92. On information and belief, consumers use the claimed inventions by connecting NetApp, Dell or IBM Accused Products, which include components supplied by Xyratex and its affiliates, with a client or server computer, thereby directly infringing claims 1-8 of the '128 Patent.

VI. HARMONIZED TARIFF SCHEDULE

93. Respondents' Accused Products are believed to fall within at least the following headings and subheadings of the Harmonized Tariff Schedules of the United States ("HTS"): 8471 *et. seq.*, including but not limited to 8471.70 *et seq.* (storage units), 8471.70.10, 8471.70.20, 8471.70.30, 8471.70.50, *et. seq.* These HTS numbers are illustrative only, and not intended to limit the scope of the investigation. The exact 10-digit HTS Codes (headings/subheadings and suffixes) are dependent, and vary, based upon the specific capabilities and features of the Accused Products.

VII. THE DOMESTIC INDUSTRY

94. With respect to the '128 Patent, a domestic industry in the United States exists, through DNS's substantial investments in the exploitation of the '128 Patent.

A. DNS Business Activities

95. DNS is in the business of acquiring and licensing patents in the field of computer data storage. See **Confidential Exhibit 96** (Declaration of Marc Frechette) at ¶ 2. In 2007, DNS acquired the rights to a portfolio of seven United States patents relating to computer data storage. *Id.* The '128 Patent was an important acquisition in this portfolio and is a key asset in DNS's licensing program. *Id.*

96. DNS operates its licensing business from its headquarters in San Diego, California, and office space shared with other affiliates in Newport Beach, California.⁴ *Id.* at ¶ 7.

97. As part of its business, DNS makes substantial investments in the research and evaluation of its computer data storage patent portfolio to identify licensing opportunities for, *inter alia*, the '128 patent in the computer data storage industry. *Id.* at ¶ 3. This due diligence process includes market research and analysis of publicly available information of data storage products. *Id.* The due diligence has resulted in significant capital expenditures by DNS. *Id.*

98. DNS's business activities also include prosecuting and developing patent portfolios, protecting patented inventions from unauthorized use, generating licensing revenue from users of patented technologies and, if necessary, enforcing patent rights against unauthorized users of its patented technologies. *Id.* at ¶ 4. DNS has incurred significant costs for these activities. *Id.*

⁴ The facilities located in Newport Beach comprise in excess of 18,000 square feet of shared office space.

B. DNS Licensing Activities

99. DNS's licensing operations include: (a) promotion of computer data storage patented technology controlled by DNS, (b) negotiation and drafting of license agreements, (c) ensuring compliance with licensing agreements, (d) conducting market analysis, (e) providing licensing and patent strategy, and (f) licensing the '128 Patent through litigation. *Id.* at ¶ 5.

100. In addition to these activities, from 2008 through present, Marc Frechette and another individual have been directly responsible for DNS's business, research and legal activities, including licensing activities related to the '128 Patent. *Id.* at ¶ 6. Several other personnel provide administrative, accounting, accounts payable, engineering, and business development support for DNS's licensing activities related to the '128 Patent. During 2008 and 2009, DNS has invested significant sums in compensation to these personnel. *Id.* This investment continues. *Id.*

101. DNS's licensing program for the '128 patent has resulted in the execution of eleven (11) license agreements that specifically include rights to the '128 patent. *Id.* at ¶ 8 and **Confidential Exhibit 94**. Every one of these eleven (11) DNS license agreements was negotiated, and executed, through enforcement of the '128 patent in the litigation described below.⁵ See ¶¶ 105-106, *infra*, and **Confidential Exhibit 96** at ¶ 8. These license agreements have generated a substantial amount in royalty revenue. *Id.* and **Confidential Exhibit 94 (Public Version Exhibit 98)**.

102. DNS has invested a substantial amount in its efforts to license the '128 Patent during the period 2008 through the end of its most recent fiscal year, 2009. **Confidential Exhibit 96** at ¶ 9. This investment includes significant litigation costs associated with licensing

⁵ DNS also has actively sought, and continues to seek, to license the '128 Patent to other prospective licensees. *Id.* at ¶ 8.

the '128 patent through the litigation described below. *Id.* The activities performed in association with these litigation costs include, *inter alia*, filing complaints and conducting the litigations, conducting settlement negotiations, and negotiating, drafting, and executing license agreements. *Id.*

C. Storage Computer Corporation's Licensing Activities

103. In addition, SCC, the owner of the '128 Patent who acquired the assets of Cyberstorage Computer Corp. ("CSC") (the prior owner of the '128 Patent) and DNS's licensor, has licensed the '128 Patent to third parties. *See Confidential Exhibit 97* (Decl. of Theodore Goodlander) at ¶ 4.

104. At the time of SCC's acquisition of CSC, the '128 Patent was valued at a substantial amount. *Id.* at ¶ 3. SCC's licensing of the '128 Patent has generated the aggregate royalty revenue disclosed in the attached Confidential Declaration of Theodore Goodlander. *See Confidential Exhibit 97* at ¶ 4.

VIII. RELATED LITIGATION⁶

105. The action entitled *Data Network Storage Corporation v. Hewlett-Packard Company, et. al* is presently pending before the United States District Court for the Northern District of Texas, Dallas Division, Case No: 3-08-cv-0294-K ("Dallas Action"). Respondents NetApp and Dell are the remaining defendants in that action. The case is stayed pending a ruling on a motion for summary judgment filed by NetApp and Dell that is based upon a typographical error in DNS's preliminary infringement contentions. At the time of the stay, the parties were

⁶ In light of the history of related litigation involving the '128 Patent between Respondents and Complainant, resulting in familiarity with the legal and factual issues to be decided by the Commission, Complainant respectfully requests an expedited target date.

exchanging discovery related to Claim Construction. The court has neither construed the claims of the '128 Patent nor conducted a *Markman* hearing.

106. The action entitled *Data Network Storage, LLC v. Aberdeen, LLC et. al* is presently pending before the United States District Court for the Southern District of California, Case No: 3:09-cv-00658-MMA (AJB) ("San Diego Action"). All of the named defendants, except for Respondent IBM, have entered into license agreements with DNS or have been dismissed. The case is stayed as to IBM because at the time of filing the San Diego Action, DNS only had knowledge of accused infringing products sold by IBM that were supplied by NetApp. Accordingly, the court stayed the case pending the outcome of the Dallas Action involving the same products.

107. The action entitled *Data Network Storage, LLC v. Cisco Systems, Inc., et al.*, was filed on October 4, 2010, in the United States District Court for the Southern District of California, Case No: 10cv2060 LAB (BGS) ("Cisco Action"). That action is currently active, and DNS is awaiting a responsive pleading from Defendants Cisco, Dot Hill, QNAP and Xyratex.

108. In March 2002, SCC commenced an action in the United States District Court for the Northern District of Texas entitled *Storage Computer Corporation v. Veritas*, No. 3:01-CV-2078. In that case, the Court construed claim 1 of the '128 Patent following a *Markman* hearing. Summary judgment of non-infringement was granted in favor of Defendant Veritas and, during the ensuing appeal, DNS and Veritas (a software company) settled the case.

109. There has been no foreign court or agency litigation involving the '128 Patent or any of its counterparts.

IX. RELIEF REQUESTED

WHEREFORE, by reason of the foregoing, Complainant DNS requests that the United States International Trade Commission:

1. Institute an immediate investigation pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, with respect to Respondents' violations of that section based on the unlawful importation into the United States, sale for importation into the United States, and/or the sale within the United States after importation of Accused Products, and all components thereof, that infringe claims 1 through 8 of United States Patent No. 6,098,128;
2. Determine that there has been a violation of Section 337 by all Respondents;
3. Schedule and conduct a hearing on permanent relief pursuant to 19 U.S.C. §§ 1337(d) and (f) of the Tariff Act of 1930, as amended;
4. Issue a permanent exclusion order pursuant to 19 U.S.C. § 1337(d) barring and excluding from entry into the United States (a) Accused Products of Respondents NetApp, Dot Hill, Dell, IBM, QNAP, and Cisco that infringe the '128 Patent, (b) components of Respondents Xyratex and affiliates, which are assembled into or used in NetApp's and Dell's Accused Products that infringe the '128 Patent, and (c) components of Respondent Dot Hill, which are assembled into or used in NetApp's Accused Products that infringe the '128 Patent;
5. Issue permanent cease and desist orders pursuant to 19 U.S.C. § 1337(f) prohibiting any and all Respondents and/or their affiliates, subsidiaries, successors, or assigns, from engaging in the importation, sale for importation, marketing, demonstrating, distributing, offering for sale, sale after importation, or transferring, including the movement or shipment of inventory in the United States, of (a) Accused Products of Respondents NetApp, Dot Hill, Dell, IBM, QNAP, and Cisco that infringe the '128 Patent, (b) components of Respondents Xyratex

and affiliates, which are assembled into or used in NetApp's and Dell's Accused Products that infringe the '128 Patent, and (c) components of Respondent Dot Hill, which are assembled into or used as in NetApp's Accused Products that infringe '128 Patent; and

6. Issue such other and further relief as the Commission deems just and proper based upon the facts determined by the investigation and the authority of the Commission.

October 20, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. J. Dain', is written over a horizontal line.

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VERIFICATION OF COMPLAINT

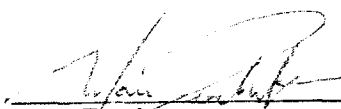
I, Marc Frechette, Vice-President of Complainant Data Network Storage, LLC ("DNS"), for and on behalf of DNS, in accordance with the provisions of Rule 210.4 and 210.12(a), declare that:

1. I am duly authorized to execute this verification.
2. I have read the complaint and am familiar with the allegations and statements contained therein, and that to the best of my knowledge, information and belief founded after reasonable inquiry, the allegations and statements made in the complaint are well grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

This document is not being filed for any improper purpose.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2010



Marc Frechette
Vice President
Data Network Storage, LLC