

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN WEARABLE ELECTRONIC  
DEVICES WITH ECG FUNCTIONALITY  
AND COMPONENTS THEREOF

Inv. No. 337-TA-1266

**ORDER NO. 22: DENYING COMPLAINANT ALIVECOR'S MOTIONS *IN LIMINE*  
NOS. 1 AND 2**

(March 22, 2022)

Complainant AliveCor, Inc. ("AliveCor") filed motions *in limine* nos. 1 ("MIL 1" (Mot. 1266-017)) and 2 ("MIL 2" (Mot. 1266-020)) on March 7, 2022. Respondent Apple, Inc. ("Apple") timely filed oppositions ("MIL 1 Oppo." and "MIL 2 Oppo.," respectively), and the Commission's Office of Unfair Import Investigations ("Staff") filed an omnibus response ("Staff Resp.").

**A. MIL 1**

MIL 1 seeks to preclude Apple from presenting certain claim construction arguments. By way of background, the claims in suit include claim 1 of U.S. Patent No. 10,595,731 ("731 patent") and claim 12 of U.S. Patent No. 10,638,941 ("941 patent"), both of which require an indication of cardiac arrhythmia, and an electrocardiogram ("ECG") to "confirm the presence of the arrhythmia." During the claim construction process the parties disputed the meaning of this clause, and the dispute focused on whether a comparison was needed between the arrhythmia indication and the ECG. *See generally* Order No. 12 at 20-26 ("*Markman* Order"). The claims were construed to not require such a comparison, and were otherwise accorded their plain and ordinary meaning. *See id.* at 22, 26.

[REDACTED]

It is often the situation that claims are not fully construed during the *Markman* process, and this case is no exception. AliveCor’s expert, Dr. Roozbeh Jafari, seemingly opined in his expert report that the plain and ordinary meaning of “confirm the presence of the arrhythmia” requires an ECG reading “taken in relative [temporal] proximity to” the indication. MIL 1 Oppo., Ex. 4 at 210:16-211:19. Apple’s expert, Dr. Rosalind Picard, opined in her expert report that the plain and ordinary meaning requires “significant overlap in the recording of [indication data] and ECG to ensure the system was analyzing the same relevant event,” and that “confirm” specifically means “verify the correctness or accuracy.” MIL 1, Ex. B at ¶¶ 304, 311. Both “relative temporal proximity” and “significant overlap in the recording” present an interpretive issue focusing not on data comparison, an issue that has already been addressed, but on closeness in time, an issue that has not already been addressed. So there is no conflict with the *Markman* Order as AliveCor suggests. MIL 1 at 5-7. And contrary to Apple’s argument, how the claim term is construed is relevant to evaluating infringement and the technical prong of domestic industry, so the experts’ disagreement on the term’s plain and ordinary meaning presents a claim construction dispute. *See* MIL 1 Oppo. at 8.

AliveCor also argues that both the “significant overlap” interpretation and the “verify the correctness or accuracy” interpretation should be precluded for untimely disclosure; the Staff opposes the motion. *See* MIL 1 at 7-8; Staff Resp. at 1-2. As to the first interpretive issue, the experts’ differing constructions were both presented in their expert reports, and AliveCor deposed Dr. Picard at length on her understanding of the claim term. *See, e.g.,* MIL 1 Oppo., Ex. 5 at 224:8-231:11. More to the point, “parties should reasonably expect expert reports to contain opinions that are more detailed than a party’s contention interrogatory responses,” and so long as those opinions are not “wholly outside the scope” of the contentions, they are permissible. *See Certain*

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*Touch-Controlled Mobile Devices, Computers, and Components Thereof*, Inv. No. 337-TA-1162, Order No. 23 at 3-4 (Jan. 23, 2020) (citation omitted). Apple’s contentions state that the ECG readings by the accused articles do not infringe because they are “independent and separate” from the indication readings. *E.g.*, MIL 1, Ex. A at 42. Dr. Picard’s opinion expressly states that the various functions of the accused articles “are entirely independent features,” and then elaborates on that by emphasizing the features’ relative timing. MIL 1, Ex. B at ¶ 304. Such an opinion is not wholly outside the scope of Apple’s contentions.

As to the second interpretive issue, Apple does not explicitly dispute that “verify the correctness or accuracy” is a newly proposed construction not fairly within the scope of its contentions. *See generally* MIL 1 Oppo. Nonetheless, it is not clear that it really is a newly proposed construction. As previously observed, the specification of the 731 patent (but not of the 941 patent) seemingly uses the term “confirm” interchangeably with the terms “identify” and “verify.” *See Markman* Order at 21, 25. Nor does any party cite any evidence that Dr. Jafari disagrees with Dr. Picard’s interpretation. So the dispute over “verify the correctness or accuracy” may not present a claim construction dispute at all; certainly it would be premature to strike Dr. Picard’s opinion on this point.

Therefore, MIL 1 (Mot. 1266-017) is denied.

**B. MIL 2**

AliveCor seeks to preclude Apple’s assertion of three obviousness arguments pertaining to the 941 and 731 patents. *See* MIL 2 at 1. The basis of the motion is alleged discrepancies between Apple’s contention interrogatory responses, including its claim charts served in November 2021, and the report of its expert, Dr. Collin Stultz. *See generally id.* The Staff opposes the motion. Staff Resp. at 2-3.

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The relevant documents – Apple’s claim charts, expert report, and Prehearing Brief – do not substantiate the alleged discrepancies. First, AliveCor seeks to preclude the theory that what Dr. Stultz labels element 12[f] of the 941 patent, “based on the presence of the discordance, indicate to the user a possibility of an arrhythmia being present,” would have been obvious over the combination of two references, Tran and Libbus. *See* MIL 2 at 5. Apple’s claim chart asserts that Tran alone or the combination of “Tran with . . . Libbus” renders all claims of the 941 patent obvious (MIL 2, Ex. 5 at 1-2), and more specifically that Tran teaches element 12[f] or renders it obvious (*id.* at 100-02), and Apple’s Prehearing Brief (“RPB”) argues that Tran discloses this element or renders it obvious, and further asserts that “a POSITA would have also looked to the teachings of Libbus” (RPB at 85). By contrast, Dr. Stultz opines that Tran discloses this element or renders it obvious, but does not mention Libbus. *See* MIL 2, Ex. 4 at ¶ 821.

Second, AliveCor seeks to preclude the theory that claim 13 of the 941 patent, which depends from claim 12 and adds the requirement that “the heart rate parameter comprises an indication of a heart rate variability, and wherein the arrhythmia is atrial fibrillation,” would have been obvious over the combination of two references, AMON and Almen. *See* MIL 2 at 5. Apple’s claim chart asserts that AMON alone or the combination of AMON and Almen renders all claims of the 941 patent obvious (MIL 2, Ex. 6 at 1-2), and more specifically that AMON teaches or renders obvious the element added in claim 13 (*id.* at 155-56), and Apple’s Prehearing Brief argues that AMON invalidates claim 13 alone and alternatively in combination with Almen (RPB at 78). Dr. Stultz merely opines that AMON discloses the additional element of claim 13, or renders it obvious, and does not expressly mention Almen. *See* MIL 2, Ex. 4 at ¶ 722.

Third, AliveCor seeks to preclude the theory that what Dr. Stultz labels element 1[h] of the 731 patent, “confirm the presence of the arrhythmia based on the ECG data,” would have been

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obvious over the combination of Tran and another reference, Thomsen. *See* MIL 2 at 5. Apple’s claim chart asserts that Tran alone or the combination of “Tran with Thomsen and/or Libbus” renders all claims of the 731 patent obvious (MIL 2, Ex. 7 at 1-2), and more specifically that Tran teaches element 1[h] or renders it obvious (*id.* at 36-39), Dr. Stultz opines that Tran discloses this element or renders it obvious, and additionally that the combination of Tran and Thomsen renders it obvious (MIL 2, Ex. 4 at ¶¶ 530-36), and Apple’s Prehearing Brief essentially reiterates Dr. Stultz’ opinion (RPB at 127).

In short, Apple’s contentions are consistent with its Prehearing Brief, Dr. Stultz’ opinions regarding the 941 patent claims at issue are narrower than Apple’s contentions or Prehearing Brief, and all three documents are consistent regarding claim element 1[h] of the 731 patent. MIL 2 (Mot. 1266-020) is accordingly denied.

Within seven days of the date of this document, the parties shall submit to the Office of the Administrative Law Judges a joint statement as to whether or not they seek to have any portion of this document deleted from the public version. If the parties do seek to have portions of this document deleted from the public version, they must submit to this office a copy of this document with red brackets indicating the portion or portions asserted to contain confidential business information. The submission may be made by email and/or hard copy by the aforementioned date and need not be filed with the Commission Secretary.

**SO ORDERED.**



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Cameron Elliot  
Administrative Law Judge