

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. 23: DENYING RESPONDENT APPLE'S MOTIONS *IN LIMINE* NOS. 1
AND 2**

(March 23, 2022)

Respondent Apple, Inc. ("Apple") filed motions *in limine* nos. 1 ("MIL 1" (Mot. 1266-022)) and 2 ("MIL 2" (Mot. 1266-023)) on March 7, 2022. Complainant AliveCor, Inc. ("AliveCor") 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.").

The two motions present similar issues. MIL 1 seeks to exclude evidence and argument regarding allegedly "anticompetitive" conduct by Apple, in particular that "Apple acted to eliminate AliveCor as a competitor." MIL 1 at 1. MIL 2 seeks to exclude "evidence and argument regarding AliveCor's meetings with Apple." MIL 2 at 1. The Staff opposes both motions. *See* Staff Resp. at 7-9.

As presented by AliveCor, the evidence and argument at issue include: AliveCor developed an app called Kardia, which relied on heart rate data collected from a sensor on the Apple Watch (MIL 1 Oppo. at 2); Apple tried to develop a product to compete with Kardia as early as 2013 (MIL 2 Oppo. at 5); Apple held meetings with AliveCor personnel in 2016, at which the KardiaBand System was demonstrated (MIL 2 Oppo. at 3); Apple eventually released the Apple

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Watch 4, which (in addition to infringing) communicated heart rate data to Kardia differently than before, such that the app was no longer as accurate (MIL 1 Oppo. at 2; *see also* AliveCor’s Prehearing Brief (“CPB”) at 178); and as a result AliveCor discontinued sales of one domestic industry product, which had enjoyed commercial success and industry praise, and started developing new domestic industry products (MIL 1 Oppo. at 2; CPB at 177-79). AliveCor and the Staff correctly observe that such evidence is relevant to secondary considerations of non-obviousness, specifically copying, and the economic prong of domestic industry. *See* MIL 1 Oppo. at 3; MIL 2 Oppo. at 2; Staff Resp. at 7-8.

Apple essentially concedes that the contested evidence is relevant to economic prong: AliveCor’s allegations of Apple’s anticompetitive conduct are “an implicit admission that AliveCor cannot show it has an established domestic industry.” MIL 1 at 5. And whether AliveCor’s evidence of copying is “[u]nsubstantiated,” as Apple contends, will be determined after the hearing; certainly it cannot be determined before actually hearing all the evidence. MIL 2 at 3. Nor is this case similar to *Certain Multi-Stage Fuel Vapor Canister Systems and Activated Carbon Components Thereof*, Inv. No. 337-TA-1140, Order No. 35 at 2 (Nov. 15, 2019), where an expert’s opinion regarding the Complainant’s state of mind was stricken as “unduly speculative.” *See* MIL 1 at 4. The evidence here consists of fact witness testimony and documentary evidence, as well as some expert evidence, concerning Apple’s conduct and AliveCor’s response, rather than Apple’s state of mind. *See* MIL 1 Oppo. at 2, 4; MIL 2 Oppo. at 2-3; CPB at 96. Lastly, the challenged evidence may prejudice Apple (or it may not), but Apple provides no basis to conclude that any prejudice substantially outweighs the evidence’s probative value, that is, that the prejudice is undue. *See* MIL 2 at 1. As the Staff puts it, “[w]hile evidence of copying is [certainly] not favorable to Apple, it is not unfairly prejudicial.” Staff Resp. at 9.

[REDACTED]

Therefore, MIL 1 (Mot. 1266-022) and MIL 2 (Mot. 1266-023) are 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.



Cameron Elliot
Administrative Law Judge