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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. 24: DENYING RESPONDENT APPLE'S MOTION *IN LIMINE* NO. 3

(March 23, 2022)

Respondent Apple, Inc. ("Apple") filed motion *in limine* no. 3 ("MIL 3" (Mot. 1266-024)) on March 7, 2022. Complainant AliveCor, Inc. ("AliveCor") timely filed an opposition ("MIL 3 Oppo."), and the Commission's Office of Unfair Import Investigations ("Staff") filed an omnibus response ("Staff Resp.").

In MIL 3 Apple requests that AliveCor be precluded from advancing an allegedly "newly disclosed construction" of a particular claim term. MIL 3 at 1. Claim 12 of U.S. Patent No. 10,638,941 ("941 patent") recites a smartwatch comprising a processor programmed to "determine if a discordance is present between the activity level value of the [smartwatch] user and [a sensed] heart rate parameter of the user." The accused articles include various models of the Apple Watch, and AliveCor asserted in its infringement claim charts that the determination is made by thresholding rather than by direct comparison: "if the condition is sedentary and heart rate is above the 120 bpm threshold, it turns on a flag [and] determin[es] that a discordance is present." RX-0796C at 30; *see id.* at 31-33, 95-97. To be sure, this contention was presented in the context of claim 1 of the 941 patent, but that claim's language is very similar and the discussion of claim 1 was cross-referenced in the discussion of claim 12. *See id*. at 96 ("*See* limitations 1.2, 1.3, 1.4, and 1.5, above."). AliveCor also asserted doctrine of equivalents infringement, involving a

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particular Apple Watch feature called HHRN, under the theory that "once the high heart rate feature is triggered, the PPG sensors record heart rate parameters, which are compared to the measured activity level to determine if there is a discordance." *Id*. at 97.

In its Prehearing Brief ("CPB") AliveCor again relies on thresholding, asserting that if activity level is below a threshold for a period of time and heart rate is above a threshold for a period of time, then the system "flags" or notifies the user. *See* CPB at 30-35. AliveCor apparently no longer asserts that this element is met under the doctrine of equivalents. *See id*.

Apple asserts that "AliveCor never contended that 'determin[ing] if a discordance is present' merely requires the system to (1) measure activity level, and (2) separately measure a heart rate parameter, without any comparison of those two values." MIL 3 at 4. This is incorrect; as explained above, and as the Staff observes, AliveCor has "consistently maintained its position since the filing of the Complaint." Staff Resp. at 10. Moreover, AliveCor's position does not present a claim construction issue, because it simply argues that the Apple Watch satisfies the claim element, not that the claim element has a particular meaning.

This finding resolves the dispute as presented by Apple. There is, however, a fair amount of discussion in the moving papers that is seemingly beside the point, and that has not been addressed. For instance, Apple argues that a comparison of activity level and heart rate parameter is required by the claim language, a point not squarely addressed by AliveCor. *See* MIL 3 at 1-2; *see generally* MIL 3 Oppo. As another example, AliveCor argues that "determin[ing]" a discordance does not require that activity level and heart rate parameter be captured or compared "at the same moment in time." *See* MIL 3 Oppo. at 6 (emphasis omitted). The relevance of this argument is unclear, because it does not appear that Apple contends otherwise. *See* MIL 3 Oppo., Ex. L at ¶ 146; Apple Prehearing Brief ("RPB") at 48-51. Nor does it appear to be disputed that

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the IRN feature of the Apple Watch only functions when the user is still. *Compare* Staff Resp. at 9 *with* RPB at 49 ("if the IRN feature starts to measure, and . . . the user starts to move, then the IRN determination stops"). To the extent any of these collateral issues present claim construction questions, they have not been fulsomely briefed and must wait to be answered until after the hearing.

Therefore, MIL 3 (Mot. 1266-024) is 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