[redacted]

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. 25: DENYING RESPONDENT APPLE'S MOTION *IN LIMINE* NO. 4

(March 23, 2022)

Respondent Apple, Inc. ("Apple") filed motion *in limine* no. 4 ("MIL 4" (Mot. 1266-025)) on March 7, 2022. Complainant AliveCor, Inc. ("AliveCor") timely filed an opposition ("MIL 4 Oppo."), and the Commission's Office of Unfair Import Investigations ("Staff") filed an omnibus response ("Staff Resp.").

In MIL 4 Apple seeks to preclude AliveCor's economic expert, Dr. Michael Akemann, from relying on any evidence other than that related to AliveCor's investments in customer support to show activities for an alleged domestic industry product, the KardiaBand System, after 2018. *See* MIL 4 at 1. In particular, Apple seeks to preclude evidence of "alleged R&D . . . after 2018." MIL 4 at 4. One principal basis for the motion is Dr. Akemann's deposition testimony, where he stated that the "[redacted]" *See* MIL 4 at 2-3 (quoting MIL 4, Ex. B at 256:7-16). Another is a statement in his report that, "[redacted]." *See* MIL 4 at 3, 4 (citing MIL 4, Ex. C at ¶ 167).

[redacted]

The Staff opposes the motion, and with respect to the deposition testimony, helpfully points to Dr. Akemann's complete question and answer:

Q: [redacted]

A: [redacted]

MIL 4, Ex. B at 256:7-16. Apple's selective and incomplete quotation of Dr. Akemann's deposition testimony ignores both the time period (mid-2019 instead of 2018) and the expressly mentioned "[redacted]"

Admittedly, Dr. Akemann's expert report, in the discussion of subsection (C), does appear to limit efforts attributable to the KardiaBand, that is, R&D and regulatory work prior to 2018, and only customer support from 2018 to 2021. MIL 4, Ex. C at ¶ 167. AliveCor's subsection (C) theory, however, does not appear to distinguish between the various DI Product models. *See* CPB at 180-181, 192; RX-0331C at ¶ 143 (referencing Akemann Exhibit 10a); RX-0348C (Akemann Exhibit 10a, referencing Akemann Exhibit 10b); RX-0349C (Akemann Exhibit 10b, setting forth engineer time attributed to "DI Products"). Thus, it is not clear that shifting R&D investments from the KardiaBand to a later product, such as [redacted], makes a difference. *See Certain Integrated Circuit Chips and Products Containing the Same*, Inv. No. 337-TA-859, Comm'n Op. at 39 (Aug. 22, 2014) (holding that ultimate emphasis for subsection (C) is a nexus between the investment and asserted patent). Moreover, to the extent there is a difference, Apple has identified a collection of fact witness testimony that seemingly contradicts any opinion that R&D or regulatory work continued for KardiaBand beyond 2018. *See* MIL 4 at 3 (citing JX-0223C (Albert); JX-0225C (Raghavan)); *but see* MIL 4 Oppo. at 5-8

[redacted]

(discussing same). The record will benefit more from the resolution of these conflicts than from preemptive exclusion. There is otherwise a considerable amount of discussion in the moving papers, particularly that of the private parties, that is either beside the point or is of marginal relevance, and the analysis above suffices to resolve the motion.

Therefore, MIL 4 (Mot. 1266-025) 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