UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN WEARABLE ELECTRONIC DEVICES WITH ECG FUNCTIONALITY AND COMPONENTS THEREOF**	**Investigation No. 337-TA-1266**

COMMISSION OPINION

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I. INTRODUCTION

On September 22, 2022, the Commission determined to review in part the final initial determination ("ID") issued by the presiding administrative law judge ("ALJ") on June 27, 2022. 87 Fed. Reg. 58819-21 (Sept. 28, 2022). On review, the Commission has determined to affirm, with modifications, the ID's finding that there has been a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. Having found a violation of section 337, the Commission has determined to issue a limited exclusion order and a cease and desist order as set forth below. The Commission finds that the public interest does not preclude the issuance of remedial orders. The Commission has determined that a bond in the amount of $2 per imported article is required for infringing products imported during the period of Presidential review.[1] The Commission, however, has determined to suspend enforcement of the orders, including the bond provision, pending final resolution of the U.S. Patent and Trademark Office, Patent Trial and Appeal Board's ("PTAB") Final Written Decisions finding all asserted patent claims unpatentable. *See Apple, Inc. v. AliveCor, Inc.*, IPR2021-00970, Patent 9,572,499, Final Written Decision Determining All Challenged Claims Unpatentable (Dec. 6, 2022); *Apple, Inc. v. AliveCor, Inc.*, IPR2021-00971, Patent 10,595,731, Final Written Decision Determining All Challenged Claims Unpatentable (Dec. 6, 2022); *Apple, Inc. v. AliveCor, Inc.*, IPR2021-00972, Patent 10,638,941, Final Written Decision Determining All Challenged Claims Unpatentable (Dec. 6, 2022) (collectively, "Final Written Decisions" or "FWDs").

This opinion sets forth the Commission's reasoning in support of that determination. The Commission adopts the remainder of the ID that is not inconsistent with this opinion.

[1] Commissioners Schmidtlein and Stayin disagree with the Commission's determination regarding the amount of the bond required for infringing products imported during the period of Presidential review as provided in section (V)(D) of the Commission's Opinion concerning bond. *See infra* note 41.

II. BACKGROUND

A. Procedural History

On May 26, 2021, the Commission instituted this investigation based on a complaint filed by AliveCor, Inc. of Mountain View, California ("AliveCor" or "ALC"). 86 Fed. Reg. 28382 (May 26, 2021). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain wearable electronic devices with ECG[2] functionality and components thereof by reason of infringement of one or more of claims 1-30 of U.S. Patent No. 10,595,731 ("the '731 patent"); claims 1-23 of U.S. Patent No. 10,638,941 ("the '941 patent"); and claims 1-4, 6-14, 16-20 of U.S. Patent No. 9,572,499 ("the '499 patent"). *Id.* The Commission's notice of investigation named Apple Inc. of Cupertino, California ("Apple") as the sole respondent. The Office of Unfair Import Investigations ("OUII") is named as a party in this investigation. *Id.*

On February 23, 2022, the ALJ issued an initial determination granting AliveCor's motion to terminate the investigation as to (1) claims 1-4, 6-14, and 18-20 of the '499 patent; (2) claims 2, 4, 6, 7, 11, 13, 14, and 17-30 of the '731 patent; and (3) claims 1-11, 14, 15, 17, and 18 of the '941 patent based upon withdrawal of allegations from the complaint as to those claims. Order No. 16 (Feb. 23, 2022), *unreviewed by* Notice (Mar. 18, 2022).

The ALJ held an evidentiary hearing from March 28-April 1, 2022, and received post-hearing briefs thereafter.

[2] ECG stands for electrocardiogram.

On June 27, 2022, the ALJ issued the final initial determination ("ID"), finding a violation of section 337 as to the '941 and '731 patents, and no violation as to the '499 patent.[3] The ID found that the parties do not contest personal jurisdiction, and that the Commission has *in rem* jurisdiction over the accused products. ID at 18. The ID further found that the importation requirement under 19 U.S.C. § 1337(a)(1)(B) is satisfied. *Id.* (citing CX-0904C (Apple stipulating that it imports the accused products into the United States)). Regarding the '941 patent, the ID found that AliveCor has proven infringement of the asserted claims, claims 12, 13, 19, and 20-23, and that Apple failed to show that any of the asserted claims are invalid. *Id.* at 30-45, 60-98, 187-88. For the '731 patent, the ID found that AliveCor has proven infringement of the asserted claims, claims 1, 3, 5, 8-10, 12, 15, and 16, but that Apple has proven that claims 1, 8, 12, and 16 are invalid for obviousness. *Id.* at 105-108, 113-127, 188. For the '499 patent, the ID found that AliveCor failed to prove infringement of the asserted claims, claims 16 and 17, and that claim 17 is invalid for lack of patentable subject matter under 35 U.S.C. § 101. *Id.* at 129-138, 140-152, 188. Finally, the ID found that AliveCor has proven the existence of a domestic industry that practices the asserted patents as required by 19 U.S.C. § 1337(a)(2). *Id.* at 152-180, 188. The ID included the ALJ's recommended determination on remedy and bonding ("RD"). The RD recommended that, should the Commission find a violation, issuance of a limited exclusion order and a cease and desist order would be appropriate. ID/RD at 190-193. The RD also recommended imposing no bond for covered products imported during the period of Presidential review. *Id.* at 194-95.

On July 11, 2022, Apple filed a petition for review of the final ID and AliveCor filed a

[3] The ALJ issued a corrected final ID on July 26, 2022, correcting the table of contents.

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