

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.**

**Before the Honorable Monica Bhattacharyya
Administrative Law Judge**

In the Matter of

**CERTAIN LIGHT-BASED PHYSIOLOGICAL
MEASUREMENT DEVICES AND
COMPONENTS THEREOF**

Inv. No. 337-TA-1276

RESPONDENT APPLE INC.'S REBUTTAL *MARKMAN* BRIEF

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. U.S. PATENT NO. 10,687,745	2
III. U.S. PATENT NO. 7,761,127	4
IV. U.S. PATENT NOS. 10,912,501, 10,912,502, and 10,945,648	6
A. The Asserted Claims Are Indefinite	7
B. Complainants' Proposed Construction Is Unsupported.....	10
V. CONCLUSION.....	14

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bio-Rad Laboratories, Inc. v. International Trade Commission</i> , 998 F.3d 1320 (Fed. Cir. 2021).....	14
<i>Chef America, Inc. v. Lamb-Weston, Inc.</i> , 358 F.3d 1371 (Fed. Cir. 2004).....	14
<i>Liqwd, Inc. v. L'Oreal USA, Inc.</i> , No. CV 17-14-JFB-SRF, 2019 WL 1977367 (D. Del. May 2, 2019).....	11
<i>On Demand Machine Corp. v. Ingram Industries</i> , 442 F.3d 1331 (Fed. Cir. 2006).....	9
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005) (en banc).....	3, 4, 6

I. INTRODUCTION

In all instances, Complainants proposed constructions clash with the intrinsic evidence. For U.S. Patent No. 10,687,745 (“745 patent”), Complainants now agree that a mere difference in size is neither necessary nor sufficient to change a first shape into the claimed “second shape.” But Complainants have declined to abandon the erroneous implication that any *other* difference, besides a mere difference in size, automatically changes the first shape into the “second shape.” That implication should be rejected because it is unsupported, contrary to the plain and ordinary meaning of “second shape,” and contradicted by the intrinsic evidence.

For U.S. Patent No. 7,761,127 (“127 patent”), Complainants offer no reason to depart from Apple’s plain and ordinary construction of “plurality of operating wavelengths” and the separate limitation in claim 7 that already requires “the operating wavelengths dependent on the bulk temperature.” Notably, Complainants argue and cite evidence that the operating wavelengths vary as a function of “the bulk temperature,” which only confirms that it is confusing to add Complainants’ proposed language requiring a single “operating wavelength that varies with temperature.”

For asserted U.S. Patent Nos. 10,912,501 (“501 Patent”), U.S. Patent No. 10,912,502 (“502 Patent”) and U.S. Patent No. 10,945,648 (“648 Patent”) (collectively, the “Asserted Poeze Patents”), the patent’s description of a “bulk measurement” is fatally inconsistent with the use of this term in the claims. Complainants attempt to save the claims by redefining a “bulk measurement” as a “baseline measurement,” but have failed to set forth any intrinsic or other support for this construction. Rather, the patents’ use of “bulk measurement” in the asserted claims remains irreconcilably inconsistent with the specification, rendering the term indefinite.

II. U.S. PATENT NO. 10,687,745

Claim Term	Proposed Constructions
“second shape” (’745 patent, cls. 1, 20)	<u>Complainants’ Construction</u> : “A shape that is different from the first shape beyond a change in size of the first shape”
	<u>Apple’s Construction</u> : Plain and ordinary meaning (i.e., a shape different than the first shape)

Complainants and Apple agree that intrinsic evidence from the prosecution of the parent U.S. Patent Application No. 16/532,065 (“’065 application”) confirms that the “second shape” limitation is not met when the “material . . . positioned between the plurality of light-emitting diodes and tissue on a wrist of a user” merely changes the size of the first shape. *See* Complainants Br. at 24 (applicants’ interview summary “unambiguously exclude[s] a mere change in size from the first shape”); Apple Br. at 9-10 n.2 (noting that the applicants’ interview summary “memorializes the applicant’s disclaimer that a change in size is *not sufficient* to produce a change in shape” (original emphasis)). Complainants also concede that any construction of “second shape” should not “imply that there must be *at least* a change in size for the second shape to be different from the first shape; in other words, if there is no change in area or size, Complainants’ language implies there is no difference between the first shape and second shape.” Apple Br. at 9.¹ On February 3, 2022, Complainants offered to amend their proposed construction to eliminate that erroneous implication:

Specifically, there appears to be some confusion regarding the word “beyond” in Masimo’s proposed construction. Apple criticized Masimo’s construction as implying that: “if there is no change in area or size, Complainants’ language implies there is no difference between the first shape and second shape.” (Page 9.) *To remove any such implication*, Masimo proposes that the parties agree to a

¹ All emphasis added unless otherwise stated.

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