

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of

**CERTAIN SILICON MICROPHONE
PACKAGES AND PRODUCTS
CONTAINING THE SAME**

Investigation No. 337-TA-629

**NOTICE OF COMMISSION DETERMINATION TO REVIEW A FINAL INITIAL
DETERMINATION IN PART AND SET A SCHEDULE FOR FILING WRITTEN
SUBMISSIONS ON THE ISSUES UNDER REVIEW AND ON REMEDY, THE PUBLIC
INTEREST, AND BONDING; EXTENSION OF TARGET DATE**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) on January 12, 2009, in the above-captioned investigation. The Commission has also determined to extend the target date by 30 days.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW, Washington, D.C. 20436, telephone (202) 205-3116. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW, Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission’s electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on January 14, 2008, based on the complaint of Knowles Electronics, LLC of Itasca, Illinois (“Knowles”). 73 *Fed. Reg.* 2277 (Jan. 14, 2008). The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain silicon

microphone packages or products containing same by reason of infringement of one or more of claims 1 and 2 of U.S. Patent No. 6,781,231 (“the ‘231 patent”), and claims 1, 2, 9, 10, 15, 17, 20, 28, and 29 of U.S. Patent No. 7,242,089 (“the ‘089 patent”). The respondent is MEMS Technology Berhad of Malaysia (“MemsTech”).

The evidentiary hearing in this investigation was held on September 22-25, 2008. On January 12, 2009, the ALJ issued an Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond, finding a violation of section 337. All parties to this investigation, including the Commission investigative attorney, filed timely petitions for review of various portions of the final ID, as well as timely responses to the petitions.

Having examined the record in this investigation, including the ALJ’s final ID, the petitions for review, and the responses thereto, the Commission has determined to review:

- (1) With respect to the ‘231 patent:
 - (a) the ALJ’s determination that MemsTech’s accused products infringe the ‘231 patent;
 - (b) the ALJ’s determination that U.S. Patent No. 4,533,795 to Baumhauer, Jr. et al. (“Baumhauer”) does not anticipate claims 1 and 2 of the ‘231 patent;
 - (c) the ALJ’s determination that claims 1 and 2 of the ‘231 patent are not rendered obvious in view of U.S. Patent No. 5,459,368 to Onishi et al. (“Onishi”);
 - (d) the ALJ’s determination that U.S. Patent No. 6,522,762 to Mullenborn et al. (“Mullenborn”) taken in combination with Baumhauer does not render claim 1 obvious;
 - (e) the ALJ’s determination that the master’s thesis by David Patrick Arnold entitled “A MEMS-Based Directional Acoustic Array for Aeroacoustic Measurements” (“Arnold”) taken in combination with Baumhauer does not render claims 1 and 2 obvious.

- (2) With respect to the ‘089 patent:
 - (a) the ALJ’s construction of the limitation “electrically coupled” in the asserted claims of the ‘089 patent;
 - (b) the ALJ’s construction of the limitation “volume” in the asserted claims of the ‘089 patent;
 - (c) the ALJ’s determination that the MemsTech’s accused products infringe the ‘089 patent;
 - (d) the ALJ’s determination that Knowles SiSonic products practice claim 1 of the ‘089 patent;
 - (e) the ALJ’s determination that Mullenborn does not anticipate claims 1, 2, 9, 15, 17, 20, 28, and 29 of the ‘089 patent;
 - (f) the ALJ’s determination that claims 1, 2, 9, 15, 17, 20, 28, and 29 of the ‘089 patent are not invalid as obvious in view of: (i) Baumhauer alone; (ii) Baumhauer in combination with an article by Kress et al. entitled “Integrated

Silicon Pressure Sensor for Automotive Applications with Electronic Trimming,” SAE Document 950533 (1995) (“Kress”); (iii) Baumhauer in combination with U.S. Patent No. 4,277,814 to Giachino et al. (“Giachino”); (iv) Onishi; (g) the ALJ’s determination that evidence shows that the commercial success of the SiSonic products is attributable to the ‘089 patent.

The Commission has determined not to review the remainder of the final ID. The Commission also has determined to extend the target date for completion of the subject investigation by thirty (30) days from Tuesday, April 14, 2009, to Thursday, May 14, 2009.

On review, the Commission requests briefing on the above-listed issues based on the evidentiary record. The Commission is particularly interested in responses to the following questions:

(1) With respect to the ‘231 patent:

(a) Did the ALJ rely on any exhibits that were not admitted into evidence in reaching his determination that the accused Memstech products infringe the ‘231 patent? Please provide the citations in the ALJ’s final ID. Is there evidence in the record that sufficiently supports the ALJ’s infringement determination without taking into account exhibits that were not admitted into evidence and relied on by the ALJ?

(b) Provided the ALJ’s finding that “[t]he substrate in Baumhauer is not exclusive to the transducer, and it extends beyond cover,” ID at 65, cannot be used to support his conclusion that “Baumhauer does not disclose a ‘microelectromechanical system package,’” *see id.*, is there record evidence to support the ALJ’s above conclusion that is consistent with (i) the ALJ’s findings (and the infringement analysis that lead to such findings) that the accused Memstech’s products are microelectromechanical system packages and that they literally infringe claims 1 and 2 of the ‘231 patent, *see ID at 178, 183-84*; and (ii) the ALJ’s construction of claims 1 and 2 (and specifically, the preambles of claims 1 and 2), *see ID at 13-16*.

(c) Does the record evidence, particularly including RX-363; RX-045; RX-046; RX-33, show, clearly and convincingly, that it would have been obvious to one skilled in the art to modify the teachings of Onishi to arrive at the inventions claimed in claims 1 and 2 of the ‘231 patent? Does the record evidence show that Onishi teaches away from the ‘231 patent?

(d) Does the record evidence show, clearly and convincingly, that it would have been obvious to one skilled in the art to modify Mullenborn in view of Baumhauer to arrive at the invention claimed in claim 1 of the ‘231 patent?

(e) Does the record evidence show, clearly and convincingly, that it would have been obvious to one skilled in the art to modify Arnold in view of Baumhauer to arrive at the inventions claimed in claims 1 and 2 of the ‘231 patent?

(2) With respect to the '089 patent:

(a) (i) What record evidence, particularly including the prosecution history, supports a finding that the term “electrically coupled” in claim 1 of the '089 patent does not include an indirect electrical connection?

(ii) In distinguishing Cote during prosecution, the inventor made the following assertions: “Cote does not teach or suggest that the transducer is mounted to a surface. As such, Cote cannot teach the further claimed electrical connection between the transducer and the at least one patterned conductive layer formed on the surface to which it is attached. In fact, Cote fails to teach or suggest the formation of a patterned conductive layer associated with any part of the described electret microphone.” (RX-255 at 206-207)

Based on record evidence, how should the following sentence quoted above be interpreted: “As such, Cote cannot teach the further claimed electrical connection between the transducer and the at least one patterned conductive layer formed on the surface to which it is attached”? Does it (I) indicate that there is no *electrical connection* because the transducer is not mounted on the surface, (II) simply restate that the transducer is not *mounted* to a surface as mentioned in the previous sentence, or (III) refer to the fact that there is no patterned conductive *layer* as mentioned in the subsequent sentence? What are the implications of each interpretation to the question of whether the inventor distinguished his invention based on the absence of a direct electrical connection in Cote?

(iii) In answering the previous questions, what is the significance of the USPTO’s statement that “the prior art of record does not teach or suggest the combination of the surface being formed with at least one patterned conductive layer, the patterned conductive layer being electrically coupled to the transducer”? RX-255 at 366.

(b) Is the ALJ’s construction of the term “volume” supported by the Federal Circuit precedent, including the Federal Circuit decision in *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 864 (Fed. Cir. 2004)?

(c) (i) Does the record evidence support the ALJ’s finding that Mullenborn discloses “what can arguably be described as a package,” ID at 78?

(ii) Does the record evidence support the ALJ’s finding that Mullenborn does not meet the limitation “chamber being defined by the first member and the second member,” ID at 79?

(d) Provided the ALJ’s finding that “[Baumhauer] does not disclose first or second level connections and it fails to disclose a package substrate,” ID at 132, cannot be used to support his conclusion that “Baumhauer fails to teach or suggest a package,” *see id.*, is there record evidence to support the ALJ’s above conclusion that is consistent with (i) the ALJ’s finding (and the infringement analysis that lead to such a finding) that the accused MemTech’s products are surface mountable packages and that they literally infringe claim 1 of the '089 patent, *see* ID at 197-98, and (ii) the ALJ’s construction of claim 1 (and specifically, the preamble of claim 1), *see* ID at 27-29.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or are likely to do so. For background, see *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (Dec. 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues under review. The submissions should be concise and thoroughly referenced to the record in this investigation. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to provide the expiration dates of the asserted patents at issue in this investigation and state the HTSUS number under which the accused articles are imported. The written submissions and proposed remedial orders must be filed no later than the close of business on March 27, 2009. Reply submissions must be filed no later than the close of business on April 3, 2009. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.42-.46 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42-.46).

By order of the Commission.

/s/
Marilyn R. Abbott
Secretary to the Commission

Issued: March 13, 2009