

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN MOVABLE BARRIER
OPERATOR SYSTEMS AND
COMPONENTS THEREOF**

Investigation No. 337-TA-1118

**NOTICE OF A COMMISSION DETERMINATION TO REVIEW A FINAL INITIAL
DETERMINATION IN PART FINDING NO VIOLATION OF SECTION 337 AND ORDER NO.
38 GRANTING SUMMARY DETERMINATION THAT THE ECONOMIC PRONG HAS BEEN
SATISFIED; REQUEST FOR WRITTEN SUBMISSIONS ON THE ISSUES UNDER REVIEW
AND ON REMEDY, PUBLIC INTEREST, AND BONDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (the “Commission”) has determined to review in part the final Initial Determination (“ID”) issued in this case as well as Order No. 38 granting summary determination that the economic prong of the domestic industry requirement has been satisfied. The Commission requests briefing from the parties on the issues under review. The Commission also requests written submissions from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Carl P. Bretscher, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-2382. 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, DC 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<https://www.usitc.gov>). The public record for this investigation may be viewed on the Commission’s Electronic Docket Information System (“EDIS”) (<https://edis.usitc.gov>). Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal, telephone (202) 205-1810.

SUPPLEMENTARY INFORMATION: On June 11, 2018, the Commission instituted the present investigation based on a complaint and supplement thereto filed by The Chamberlain Group, Inc. (“Chamberlain”) of Oak Brook, Illinois. 83 FR 27020-21 (June 11, 2018). The complaint, as supplemented, alleges a violation of 19 U.S.C. 1337, as amended (“Section 337”), in the importation, sale for importation, or sale in the United States after importation of certain movable barrier operator systems that purportedly infringe one or more of the asserted claims of Chamberlain’s U.S. Patent Nos. 8,587,404 (“the ’404 patent”); 7,755,223 (“the ’223 patent”); and 6,741,052 (“the ’052 patent”). *Id.* The Commission has partially terminated the investigation with respect to certain patent claims withdrawn by Chamberlain. *See* Order No. 16 (Feb. 5, 2019), *not rev’d*, Comm’n Notice (March 6, 2019); Order No. 27 (June 7, 2019), *not rev’d*, Comm’n Notice (June 27, 2019); Order No. 31 (July 30, 2019), *not rev’d*, Comm’n Notice (Aug. 19, 2019); Order No. 32 (Sept. 27, 2019), *not rev’d*, Comm’n Notice (Oct. 17, 2019). The only asserted claims still at issue are claim 11 of the ’404 patent, claims 1 and 21 of the ’223 patent, and claim 1 of the ’052 patent.

The Commission's notice of investigation named Nortek Security & Control, LLC of Carlsbad, CA; Nortek, Inc. of Providence, RI; and GTO Access Systems, LLC of Tallahassee, FL (collectively, "Nortek") as respondents. 83 FR at 270721. The Office of Unfair Import Investigations was not named as a party to this investigation. *See id.*

The parties filed their *Markman* briefs on November 13, 2018, and a revised claim construction chart on February 8, 2019. On June 5, 2019, the presiding administrative law judge ("ALJ") issued a *Markman* order (Order No. 25) construing the claim terms in dispute.

On December 12, 2018, Chamberlain filed a motion for summary determination, pursuant to 19 CFR 210.18(a), that it has satisfied the economic prong of the domestic industry requirement. Nortek filed a response opposing the motion on February 11, 2019. The ALJ held a teleconference with the parties on May 31, 2019. On June 6, 2019, the ALJ issued a notice advising the parties that the motion would be granted and a formal written order would be issued later. Order No. 26 (June 6, 2019).

The ALJ held a prehearing conference and evidentiary hearing on the issues in dispute on June 10-14, 2019. The parties filed their initial post-hearing briefs on July 11, 2019, and their reply briefs on August 16, 2019. On October 11, 2019, the ALJ issued Order No. 35, which extended the target date for completion of this investigation by 27 business days to March 25, 2020, and the due date for issuance of the final ID to November 25, 2019. Order No. 35 (Oct. 1, 2019), *not rev'd*, Comm'n Notice (Nov. 5, 2019).

On November 25, 2019, the ALJ issued two IDs. The first (Order No. 38) grants a motion for summary determination that the economic prong of the domestic industry requirement has been satisfied, pursuant to 19 CFR 210.42(c). The second is the final Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond. The final ID finds no violation of Section 337 because the asserted claims of the Chamberlain patents are either invalid or not infringed, and, in the case of the '223 patent, the technical prong of the domestic industry requirement has not been met. ID at 1, 286-87. Should the Commission reverse these findings and determine there is a violation of Section 337, the RD recommends issuing a limited exclusion order and cease and desist orders and imposing a bond in the amount of 100 percent during the period of Presidential review. RD at 277-86.

On December 4, 2019, Nortek filed a petition for review and Chamberlain filed a contingent petition for review of Order No. 38 granting summary determination that the economic prong has been satisfied. On December 9, 2019, Chamberlain filed a petition for review of the final ID, while Nortek filed a contingent petition for review of the final ID. On December 16, 2019, the Commission issued a notice of its determination to extend the deadline for determining whether to review Order No. 38 to January 24, 2019, to coincide with the deadline for determining whether to review the final ID. Comm'n Notice (Dec. 16, 2019).

On December 18, 2019, the Commission issued a notice soliciting comments on the public interest from the public. 84 Fed. Reg. 70998-99 (Dec. 26, 2019). No responses were received. Similarly, no party filed a submission, pursuant to 19 CFR 210.50(a)(4).

On January 23, 2020, the Commission extended the deadline for determining whether to review the final ID and Order No. 38 to February 14, 2020. Comm'n Notice (Jan. 23, 2020). The Commission also extended the target date to April 20, 2020. *Id.* On February 14, 2020, the Commission extended the deadline for determining whether to review the final ID and Order No. 38 to February 19, 2020. Comm'n Notice (Feb. 14, 2020). The Commission left the April 20, 2020, target date unchanged. *Id.*

Having reviewed the record in this investigation, including the final ID, Order No. 38, Order No. 25 (*Markman* order), and the parties' petitions and responses thereto, the Commission has determined to review Order No. 38 and the final ID in part, as follows.

With regard to the '404 patent, the Commission has determined to review the ID's claim constructions and application of those constructions, infringement and technical prong findings, and patent-eligibility findings.

With regard to the '223 patent, the Commission has determined to review the ID's finding of no infringement, particularly with respect to the application of the term "operates" in this context. The Commission has similarly determined to review the ID's finding that the asserted domestic industry products do not practice the '223 patent claims.

With regard to the '052 patent, the Commission has determined to review the ID's findings with respect to direct infringement, indirect infringement, technical prong, and obviousness.

The Commission has further determined to review Order No. 38 granting summary determination that the economic prong has been satisfied in this investigation.

The Commission has determined not to review the remaining findings in the ID.

The parties are asked to provide additional briefing on the following issues regarding the '223 and '052 patents. For each argument presented, the parties' submissions should include whether and how that argument was presented and preserved in the proceedings before the ALJ, in conformity with the ALJ's Ground Rules (Order No. 2), with citations to the record:

- A. With regard to the '404 patent, please discuss whether the ID correctly found that claim 11 is not directed to an abstract idea and that it lacks an inventive concept. Does the claimed system use off-the-shelf technology or a specific implementation of a communication scheme? Please also discuss *SIPCO, LLC v. Emerson Elec. Co.*, 939 F.3d 1301, 1312 (Fed. Cir. 2019) and *Certain Road Construction Machines and Components Thereof*, Inv. No. 337-TA-1088, Comm'n Op. (June 27, 2019).
- B. With regard to claims 1 and 21 of the '223 patent, please explain how a person skilled in the art would apply the plain and ordinary meaning of the term "operates" in the context of this patent and products at issue, and whether in this context "the obstacle detector operates using a second energy usage . . ." if the detector can be awoken to perform a function in the higher energy "first mode of energy usage."
- C. With regard to indirect infringement, please explain whether there is a preponderance of the evidence that Nortek induces indirect infringement of the '052 patent, with particular attention to evidence showing the relevant products or components that Nortek imports into the United States (*e.g.*, gate operators, garage door operators, or controllers); whether or to what extent those imported products or components are assembled into final accused products; where final assembly of the accused products occurs (inside or outside the United States); which party or parties (*e.g.*, Nortek, its customers, etc.) perform such final assembly; and any other matters the parties deem relevant to review of indirect infringement.
- D. With regard to the '052 patent, please explain whether the evidence supports finding a motivation to use a potentiometer or other means to manually adjust force thresholds that

were previously automatically determined, or whether the prior art teaches away from such a combination, paying particular attention to the Hormann reference (U.S. Patent No. 4,625,291), the Schindler reference (U.S. Patent No. 4,638,433), technology and background of potentiometers, and any other relevant evidence that was timely raised in this investigation.

- E. With regard to Order No. 38, explain whether there is a preponderance of evidence that Chamberlain has satisfied the economic prong requirement for the '404 patent, '223 patent or '052 patent – each patent standing alone – as a matter of law. In answering this question be sure to address the contextual analysis required by Commission precedent. *See, e.g., Certain Carburetors and Products Containing Such Carburetors*, Inv. No. 337-TA-1123, Comm'n Op. at 17-19 (Oct. 28, 2019).

The parties are requested to brief only the discrete issues identified above, with reference to the applicable law and evidentiary record. The parties are not to brief any other issues on review, which have already been adequately presented in the parties' previous filings.

In connection with the final disposition of this investigation, the Commission may issue: (1) an exclusion order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) a cease-and-desist order 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 likely to do so. For background, *see Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 7-10 (December 1994). In addition, if a party seeks issuance of any cease and desist orders, the written submissions should address that request in the context of recent Commission opinions, including those in *Certain Arrowheads with Deploying Blades and Components Thereof and Packaging Therefor*, Inv. No. 337-TA-977, Comm'n Op. (Apr. 28, 2017) and *Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits Containing the Same*, Inv. No. 337-TA-959, Comm'n Op. (Feb. 13, 2017). Specifically, if Complainant seeks a cease and desist order against a respondent, the written submissions should respond to the following requests:

1. Please identify with citations to the record any information regarding commercially significant inventory in the United States as to each respondent against whom a cease and desist order is sought. If Complainant also relies on other significant domestic operations that could undercut the remedy provided by an exclusion order, please identify with citations to the record such information as to each respondent against whom a cease and desist order is sought.
2. In relation to the infringing products, please identify any information in the record, including allegations in the pleadings, that addresses the existence of any domestic inventory, any domestic operations, or any sales-related activity directed at the United States for each respondent against whom a cease and desist order is sought.
3. Please discuss any other basis upon which the Commission could enter a cease and desist order.

The statute requires the Commission to consider the effects of any remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion

order and/or cease-and-desist order 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 U.S. Trade Representative, as delegated by the President, has 60 days to approve, disapprove, or take no action on the Commission's determination. *See* Presidential Memorandum of July 21, 2005. 70 FR 43251 (July 26, 2005). 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 if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to this investigation are requested to file written submissions on the issues identified in this Notice. In addition, 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 initial submissions should include views on the recommended determination by the ALJ on the issues of remedy and bonding. Complainant is requested to identify the form of remedy sought and to submit proposed remedial orders for the Commission's consideration in its initial written submission. Complainant is also requested to state the date that the patents expire and the HTSUS numbers under which the accused products are imported. Complainant is further requested to supply the names of known importers of the Respondents' products at issue in this investigation. Complainant is additionally requested to identify and explain, from the record, articles that are "components of" the subject products, and thus covered by the proposed remedial orders, if imported separately from the subject products

The parties' written submissions and proposed remedial orders must be filed no later than the close of business on **March 4, 2020**. Reply submissions must be filed no later than the close of business on **March 11, 2020**. Opening submissions are limited to 40 pages. Reply submissions are limited to 30 pages. Third-party submissions should be filed no later than the close of business on **March 4, 2020**, and may not exceed 10 pages, not including any attachments. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadline stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-1118") in a prominent place on the cover page and/or first page. (*See Handbook for Electronic Filing Procedures*, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract

personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

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 part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

A handwritten signature in black ink, appearing to read "Lisa R. Barton", written in a cursive style.

Lisa R. Barton
Secretary to the Commission

Issued: February 19, 2020