

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN BIO-LAYER
INTERFEROMETERS AND
COMPONENTS THEREOF**

Investigation No. 337-TA-1344

**NOTICE OF COMMISSION DECISION TO REVIEW AND, ON REVIEW,
TO REVERSE AN INITIAL DETERMINATION GRANTING SUMMARY
DETERMINATION OF INVALIDITY FOR INDEFINITENESS AND
REMAND FOR FURTHER PROCEEDINGS**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review an initial determination (“ID”) (Order No. 27) of the presiding Administrative Law Judge (“ALJ”) granting summary determination of invalidity based on indefiniteness with respect to the remaining asserted claims of U.S. Patent No. 7,445,887 (“the ’887 patent”). On review, the Commission has determined to reverse the ID and to remand for further proceedings consistent with the Commission’s determination.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708-4716. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.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: On November 29, 2022, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), based on a complaint filed by Sartorius Bioanalytical Instruments, Inc. of Bohemia, New York (“Complainant”). *See* 87 FR 73329-30 (Nov. 29, 2022). The complaint, as supplemented, alleges a violation of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain bio-layer interferometers and components thereof by reason of the infringement of certain claims of the ’887 patent as well as U.S. Patents Nos. 7,394,547 (“the ’547 patent”); 7,728,982 (“the ’982 patent”); and 8,305,585 (“the ’585 patent”). *See id.* The notice of investigation names Gator Bio, Inc. (“Respondent”) of Palo Alto, California as a respondent in the

investigation. *See id.* The Office of Unfair Import Investigations (“OUII”) is also a party to the investigation. *See id.*

On June 9, 2023, the Commission terminated the investigation as to claims 20 and 29-31 of the ’982 patent, claims 1-5, 7, 9-14, and 17 of the ’887 patent, and claims 5, 6, and 15 of the ’547 patent based on withdrawal of the complaint as to those claims. *See* Order No. 14 (May 15, 2023), *unreviewed by* Comm’n Notice (June 9, 2023). The ’547, ’982, and ’585 patents were subsequently terminated in their entirety from the investigation based on the withdrawal of the complaint as to those patents. *See* Order No. 26 (June 29, 2023), *unreviewed by* Comm’n Notice (July 20, 2023). Claims 8, 16, and 18 of the ’887 patent remain pending in this investigation.

On May 31, 2023, the ALJ issued a claim construction order (Order No. 16) construing certain terms of the ’887 patent but holding the issue of indefiniteness in abeyance pending supplemental briefing by the parties. On June 26, 2023, the ALJ issued a supplemental claim construction order (Order No. 22) finding the asserted claims of the ’887 patent invalid as indefinite under 35 USC 112.

On June 28, 2023, Complainant filed a motion for summary determination that the remaining claims 8, 16, and 18 of the ’887 patent are invalid for indefiniteness. The motion states that it is unopposed so that “Complainant may promptly seek Commission review.” *See* ID at 1.

On June 30, 2023, the ALJ issued the subject ID (Order No. 27) granting, pursuant to Commission Rule 210.18 (19 CFR 210.18), Complainant’s unopposed motion for summary determination of invalidity and terminating the investigation.

On July 10, 2023, Complainant filed a petition for Commission review of the subject ID and its underlying claim construction orders. On July 12, 2023, Respondent filed a contingent petition for Commission review. On July 17, 2023, OUII filed a combined response to the private parties’ petitions. On July 17 and 19, 2023, respectively, Respondent and Complainant filed responses to each other’s petitions.

Having examined the record of this investigation, including the ID, the underlying claim construction orders, and the parties’ submissions, the Commission has determined to review the subject ID (Order No. 27). On review, as explained in the Commission Opinion issued concurrently herewith, the Commission has determined to reverse the ID’s finding of invalidity based on indefiniteness and to remand for further proceedings consistent with the Commission’s determination. Chairman Johanson dissents from the majority’s decision to review and reverse the subject ID.

The Commission vote for this determination took place on August 16, 2023.

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: August 16, 2023