

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

In the Matter of

**CERTAIN MOBILE DEVICES WITH
MULTIFUNCTION EMULATORS**

Investigation No. 337-TA-1170

**NOTICE OF A COMMISSION DETERMINATION TO REVIEW IN PART A
FINAL INITIAL DETERMINATION FINDING NO VIOLATION OF SECTION 337;
REQUEST FOR WRITTEN SUBMISSIONS ON THE ISSUES UNDER REVIEW AND
ON REMEDY, THE PUBLIC INTEREST, AND BONDING**

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 Administrative Law Judge’s (“ALJ”) final initial determination (“ID”) issued on March 16, 2021, finding no violation of section 337 in the above-referenced investigation. The Commission requests briefing from the parties on certain issues under review, as indicated in this notice, and submissions from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding, under the schedule set forth below.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, D.C. 20436, telephone (202) 205-3042. 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 August 16, the Commission instituted this investigation based on a complaint filed by Dynamics Inc. (“Dynamics”) of Cheswick, Pennsylvania. 84 FR 42009-10 (Aug. 16, 2019). The complaint, as supplemented, alleges 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 mobile devices with multifunction emulators by reason of infringement of one or more of claims 1 and 5-8 of U.S. Patent No. 8,827,153 (“the ’153 patent”); claims 1-20 of U.S. Patent No. 10,032,100 (“the ’100 patent”); claims 1-7, 9-13, 19, 21, and 22 of U.S. Patent No. 10,223,631 (“the ’631 patent”); and claims 1-16 of U.S. Patent No. 10,255,545 (“the ’545 patent”). *Id.* at 42010. The Commission’s notice of investigation named as respondents Samsung Electronics Co., Ltd of Gyeonggi, Republic of Korea and Samsung Electronics America, Inc. of Ridgefield Park, New Jersey (collectively, “Samsung”). *Id.* The Office of Unfair Import Investigations is not participating in this investigation.

On September 3, 2019, the ALJ set a sixteen-month target date of December 16, 2020 for completion of the investigation. Order No. 3 (Sept. 3, 2019). The Order set an evidentiary hearing for May 11-15, 2020.

On November 26, 2019, the ALJ held a *Markman* hearing, and on January 31, 2020, issued Order No. 7, construing certain claim terms of the asserted patents.

On May 20, 2020, the ALJ issued an initial determination granting Dynamics’ unopposed motion for partial termination of the investigation as to claims 5, 6, and 8 of the ’153 patent, claims 2, 3, 5, 7, 9-11, 13-17, 19, and 20 of the ’100 patent, claims 2, 3, 5, 7, 9-13, 19, and 21 of the ’631 patent, and claims 2, 4, and 6-16 of the ’545 patent. Order No. 15 (May 20, 2020), *unreviewed*, Notice (June 15, 2020).

Due to the ongoing COVID-19 pandemic, the ALJ amended the procedural schedule several times. On March 12, 2020, the Commission postponed all in-person hearings under section 337 scheduled within the next sixty days. *See* 85 FR 15498 (Mar. 18, 2020). Thus, the ALJ issued Order No. 10, rescheduling the evidentiary hearing for June 22-26, 2020.

On April 6, 2020, the ALJ issued Order No. 12, resetting the target date to February 23, 2021 due to the COVID-19 pandemic. Order No. 12 (Apr. 6, 2020), *unreviewed*, Notice (Apr. 24, 2020).

On May 14, 2020, the Commission extended the postponement of all section 337 hearings. *See* 85 FR 30734-5 (May 20, 2020). On June 22, 2020 the Commission further extended the postponement of all in-person section 337 hearings “until such time as the agency enters Phase Three of the Commission’s three-phase plan to re-establish on-site business operations.” 85 FR 38388-9 (June 26, 2020). This order is currently in effect.

On August 11, 2020, the ALJ scheduled a virtual hearing using the Commission’s newly established videoconference software for November 16-20, 2020 and reset the target date for July 16, 2021. Order No. 24 (Aug. 11, 2020), *unreviewed*, Notice (Sept. 8, 2020).

On March 16, 2021, the ALJ issued the final ID, finding no violation of section 337. The ID found that the importation requirement under 19 U.S.C. 1337(a)(1)(B) is satisfied. ID at 28. Specifically, the ID found that “[t]he parties stipulated to facts establishing the importation

requirement is met for both respondents” and that “Samsung does not dispute the Commission’s jurisdiction over this investigation or that the requisite importation or sale in connection with importation has taken place for each Accused Product.” *Id.* Accordingly, the ID found that the Commission has jurisdiction over this investigation and that the importation requirement has been satisfied. *Id.*

With respect to the domestic industry requirement, the ID found that Dynamics had satisfied the domestic industry requirement for the ’100 patent, but not the ’153, ’631, and ’545 patents. ID at 183-84. For the domestic industry requirement’s technical prong, the ID found that Dynamics failed to show it practiced any claim of the ’153 and ’631 patents. *Id.* at 60-64, 127-31. For the ’545 patent, however, the ID found that Dynamics had shown it was “in the process” of practicing claim 1 of the ’545 patent. *Id.* at 148-52. With respect to the domestic industry requirement’s economic prong, for the ’153 and ’631 patents, the ID found that Dynamics had shown it had made significant investments in satisfaction of section 337(a)(3)(A) and (B), 19 U.S.C. 1337(a)(3)(A)-(B). *Id.* at 158-79. For the ’545 patent, the ID found that Dynamics had not shown that it was “in the process” of establishing a U.S. industry. *Id.* at 180-83.

With respect to infringement and validity, the ID found that Samsung infringes claims 1 and 7 of the ’153 patent and that Samsung failed to establish that those claims are invalid. ID at 45-58, 64-69. The ID also found that Samsung infringes claims 1, 4, 6, 12, and 18 of the ’100 patent (except for claim 6 as to certain modified products), but that the asserted claims, except for claim 4 are invalid as anticipated or obvious by prior art. *Id.* at 83-88, 96-115. The ID further found that Samsung directly infringes claims 1, 4, 6, and 22 of the ’631 patent, but that those claims are invalid as anticipated or obvious by prior art. *Id.* at 121-127, 131-140. The ID also found that Samsung directly infringes claims 1, 3, and 5 of the ’545 patent, but that those claims are invalid for anticipation. Finally, the ID found that Samsung failed to carry its burden with respect to various additional affirmative defenses under 35 U.S.C. 102(f), 116 (inventorship), or 112 (written description and enablement).

The ID included the ALJ’s recommended determination on remedy and bonding (“RD”). The RD recommended that the Commission should issue a limited exclusion order and cease and desist orders if it finds a violation. ID/RD at 186-91. The ID, however, recommended imposing no bond on covered products that may be imported during the period of Presidential review. *Id.* at 193.

On March 29, 2021, Dynamics filed a petition for review of the ID, and Samsung filed a contingent petition for review. On April 8, 2021, Dynamics and Samsung submitted responses to each other’s petition.

Having examined the record of this investigation, including the ID, the petitions for review, and the responses thereto, the Commission has determined to review the ID with respect to the following: (1) for the ’153 patent, claim construction of the term “analog waveform” as well as the related infringement and technical prong analysis, (2) for the ’153 patent, the ID’s

finding that the combination of Shoemaker and Gutman fails to render the asserted claims obvious; (3) for the '100 patent, whether Doughty in combination with VivoTech renders obvious claim 4 and whether such issue was waived, whether claims 4 and 6 are infringed, and whether the domestic industry requirement is satisfied; and (4) for the '545 patent, the ID's domestic industry findings. The Commission has determined not to review the remainder of the ID.

The parties are requested to brief their positions on only the following issues:

1. If the Commission construes "analog waveform" to mean "a wave shape whose amplitude changes in a continuous fashion" that includes so-called real-world square waves, please cite record evidence and explain whether the accused products and DI products meet the relevant claim limitations.
2. Given Gutman's disclosure that "communication of data by the card of the current invention is independent of movement of the card or placement of the card within the magnetic card reader" (Gutman at col.17 ll.10-13), please explain why or why not one of ordinary skill would be motivated to combine Shoemaker with Gutman.
3. While Gutman states that "no 'swiping' movement is necessary," the disclosure "allows users to perform the familiar 'swiping' movement while using the card 200 of the present invention for users that have become accustomed to the 'swiping' movement of the card 106." Gutman at col.16 l.66 - col.17 l.4. Please discuss the legal significance of this disclosure to an obviousness inquiry in light of Samsung's proposal to combine Gutman with Shoemaker to solve the so-called directionality problem associated with "swiping."

The parties are requested to brief their positions with reference to the applicable law and the existing evidentiary record. The parties are not to brief other issues on review, which are adequately presented in the parties' existing 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 (Dec. 1994).

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 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 and on the issues of remedy, the public interest, and bonding. Complainant is requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the date that the patents expire and the HTSUS subheadings under which the accused products are imported. Complainant is further requested to supply the names of known importers of Respondents' products at issue in this investigation.

The parties' written submissions and proposed remedial orders must be filed no later than the close of business on Wednesday, June 2. Reply submissions must be filed no later than the close of business on Wednesday, June 9. Opening submissions are limited to 50 pages. Reply submissions are limited to 30 pages. Such submissions should address the ALJ's recommended determination on remedy and bonding. Interested government agencies and any other interested parties are also encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Third-party submissions should be filed no later than the close of business on Wednesday, June 9. 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 deadlines stated above. The Commission's paper filing requirements in 19 C.F.R. 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number ("Inv. No. 337-TA-1170") in a prominent place on the cover page and/or the first page. (See Handbook on Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary at (202) 205-2000.

Any person desiring to submit a document 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* 19 CFR 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. 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 personnel¹, solely for cybersecurity purposes. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The Commission's vote on this determination took place on May 17, 2021.

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 210).

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: May 17, 2021

¹ All contract personnel will sign appropriate nondisclosure agreements.