PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	
CERTAIN LIGHT-BASED PHYSIOLOGICAL MEASUREMENT DEVICES AND COMPONENTS THEREOF	**Investigation No. 337-TA-1276**

COMMISSION OPINION DENYING RESPONDENT'S MOTION TO STAY THE REMEDIAL ORDERS

Table of Contents

I. INTRODUCTION

On October 26, 2023, the Commission issued its final determination in this investigation, finding Apple Inc. of Cupertino, California ("Apple"), the sole respondent, in violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, as to certain claims of U.S. Patent No. 10,912,502 ("the '502 patent") and U.S. Patent No. 10,945,648 ("the '648 patent"). 88 Fed. Reg. 75032, 75032–33 (Nov. 1, 2023). The Commission issued: (1) a limited exclusion order ("LEO") prohibiting the importation of light-based physiological measurement devices and components thereof that infringe one or more of those claims; and (2) a cease and desist order ("CDO") directed to Apple. *Id.* Thereafter, Apple filed a motion to stay the LEO and CDO pending appeal and/or in light of a potential government shutdown. Masimo Corporation ("Masimo") and Cercacor Laboratories, Inc. (collectively, "Complainants") filed an opposition to this motion. For the reasons discussed herein, Apple's motion is denied.

II. BACKGROUND

The Commission instituted this investigation on August 18, 2021, based on a complaint filed by Complainants on June 30, 2021, with an amended complaint filed on July 12, 2021, and supplemented on July 19, 2021. 86 Fed. Reg. 46275 (Aug. 18, 2021). The amended complaint alleged violations 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 light-based physiological measurement devices and components thereof by reason of infringement of certain claims of the '502 and '648 patents as well as U.S. Patent No. 10,912,501 ("the '501 patent"); U.S. Patent No. 10,687,745 ("the '745 patent"), and U.S. Patent No. 7,761,127 ("the '127 patent"). *Id.* The notice of investigation named Apple as the sole respondent. *Id.* at 46276. The Office of Unfair Import Investigations did not participate in this investigation. *Id.*

Before the presiding administrative law judge ("ALJ") issued the final initial determination ("Final ID"), Complainants withdrew certain asserted patent claims from the investigation. *See* Order No. 25 (Mar. 23, 2022), *unreviewed* by Comm'n Notice (Apr. 12, 2022); Order No. 33 (May 20, 2022), *unreviewed* by Comm'n Notice (June 10, 2022). At the time of the Final ID, only claim 12 of the '501 patent; claims 22 and 28 of the '502 patent; claims 12, 24, and 30 of the '648 patent; claims 9, 18, and 27 of the '745 patent; and claim 9 of the '127 patent remained in the investigation.

On October 26, 2023, the Commission found that Apple violated section 337 as to claims 22 and 28 of the '502 patent and claims 12, 24, and 30 of the '648 patent and issued an LEO and CDO. 88 Fed. Reg. 75032, 75032–33 (Nov. 1, 2023). The Commission determined that the public interest factors did not preclude issuance of the remedial orders. *See id.*; 19 U.S.C. § 1337(j)(3).

On October 30, 2023, Apple filed the pending motion to stay the remedial orders pending appeal and/or in light of a potential government shutdown. *See* Respondent Apple Inc.'s Motion to Stay Exclusion and Cease and Desist Orders Pending Appeal and/or in Light of the Potential Government Shutdown, EDIS Doc. ID 807326 (Oct. 30, 2023) ("Motion" or "Mtn."). On November 9, 2023, Complainants filed an opposition to Apple's motion. *See* Complainants' Opposition to Respondent Apple Inc.'s Motion to Stay Exclusion and Cease and Desist Orders Pending Appeal and/or in Light of the Potential Government Shutdown, EDIS Doc. ID 808262 (Nov. 9, 2023) ("Oppn.").[1]

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[1] On November 20, 2023, Complainants filed Complainants' Request for Judicial Notice of Recent Regulatory Developments for Masimo W1 Watch. EDIS Doc. ID 808970 (Nov. 20, 2023). Complainants asked the Commission to consider, in making its determination on Apple's Motion, a decision of the United States Food and Drug Administration related to Masimo's W1

III. LEGAL STANDARD

The Administrative Procedure Act provides an agency with the authority to "postpone the effective date of action taken by it, pending judicial review" if the "agency finds that justice so requires." 5 U.S.C. § 705. The Federal Circuit has set forth the following four-part test to assess whether to stay a lower court's remedy pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Standard Havens Prods., Inc. v. Gencor Indus., Inc., 897 F.2d 511, 512 (Fed. Cir. 1990) (quotation omitted). The factors are subject to weighing, and each factor need not be given equal weight. *See id.* at 512–13.

The Commission evaluates motions for stay pending appeal under the *Standard Havens* test, with one exception. The Commission has recognized the futility of establishing a likelihood-of-success for a movant given that it is difficult to ask an agency to find its own decision is likely to be overturned on appeal. *See Certain Agric. Tractors Under 50 Power Take-Off Horsepower*, Inv. No. 337-TA-380, Comm'n Op. Denying Respondents' Petition for Reconsideration and Motion for Relief Pending Appeal at 10 (Apr. 24, 1997) ("*Agric. Tractors*") (denying respondents' motion to stay a general exclusion order and cease and desist orders and discussing *Wash. Metro. Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 844–45 (D.C. Cir. 1977)). Thus, in lieu of the *Standard Havens* "likely to succeed on the merits" factor,

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Watch product and documents associated with that decision. *See id.* at 1–2. However, putting aside the applicability of judicial notice for the documents in question, the Commission does not rely on these documents and consideration of them would not alter the Commission's determination.

the Commission considers whether it has "ruled on an admittedly difficult legal question." *See Certain Tobacco Heating Articles & Components Thereof*, Inv. No. 337-TA-1199, Comm'n Op. Denying Respondents' Motion to Stay Limited Exclusion Order and Cease and Desist Orders Pending Appeal at 4 (Jan. 20, 2022) ("*Tobacco Heating Articles*"); *see also Holiday Tours*, 559 F.2d at 844–45 ("What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained."). As the Commission stated in *Tobacco Heating Articles*, it has "repeatedly recited and applied this 'admittedly difficult question' test in previous investigations in which stays of its remedial orders were sought pending appeal." Comm'n Op. at 4 (footnote collecting investigations omitted).

IV. APPLE'S MOTION AND ANALYSIS THEREOF

A. The *Standard Havens* Factors

1. Admittedly Difficult Legal Questions

Apple presents three separately-alleged "admittedly difficult legal questions," discussed below, *see* Motion at 6–18; the Commission finds that none of these is admittedly difficult.

a. Domestic Industry—Whether a Patent-Practicing Article Must Exist at the Time the Complaint is Filed

According to Apple, "[b]y affirming the ALJ's conclusion that Complainants 'have shown the existence of a domestic industry,' Comm'n Op. at 67, the Commission necessarily held that Section 337's requirement that an industry 'relating to the articles protected by the patent . . . exists' . . . is satisfied even if the only article described in the complaint is a drawing of an imaginary product." Mtn. at 6–7 (footnote omitted). Apple asserts that "this ruling is wrong in light of the Federal Circuit's ruling in *Microsoft Corp. v. ITC* that 'a company seeking section 337 protection must . . . provide evidence' that 'relates to an *actual article* that practices

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