

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN RADIOTHERAPY SYSTEMS
AND TREATMENT PLANNING
SOFTWARE, AND COMPONENTS
THEREOF

Investigation No. 337-TA-968

**NOTICE OF COMMISSION DETERMINATION TO REVIEW A FINAL INITIAL
DETERMINATION IN PART AND, ON REVIEW, TO AFFIRM IN PART, VACATE IN
PART AND REMAND SOME ISSUES TO THE ADMINISTRATIVE LAW JUDGE,
AND MAINTAIN CERTAIN ISSUES UNDER REVIEW**

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 (the “Final ID”) issued by the presiding administrative law judge (“ALJ”) on October 27, 2016. As to one issue under review, the Commission has determined to affirm. As to other issues, the Commission has determined to vacate and remand the investigation to the ALJ for additional findings. Other issues remain under review.

FOR FURTHER INFORMATION CONTACT: Ron Traud, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-3427. 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 (EDIS) at <https://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 October 30, 2015, based on a complaint filed by Varian Medical Systems, Inc. of Palo Alto, California; and Varian Medical Systems International AG of ZG, Switzerland (collectively, “Varian”). 80 FR 66934 (Oct. 30, 2015). The complaint 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 radiotherapy systems and treatment planning software, and components thereof by reason of infringement of

certain claims of U.S. Patent Nos. 7,945,021 (“the ‘021 patent”); 8,116,430 (“the ‘430 patent”); 8,867,703 (“the ‘703 patent”); 7,880,154 (“the ‘154 patent”); 7,906,770 (“the ‘770 patent”); and 8,696,538 (“the ‘538 patent”). *Id.* The notice of investigation named as respondents Elekta AB of Stockholm, Sweden; Elekta Ltd. of Crawley, United Kingdom; Elekta GmbH of Hamburg, Germany; Elekta Inc. of Atlanta, Georgia; IMPAC Medical Systems, Inc. of Sunnyvale, California; Elekta Instrument (Shanghai) Limited of Shanghai, China; and Elekta Beijing Medical Systems Co. Ltd. of Beijing, China (collectively, “Elekta”). The Office of Unfair Import Investigations (“OUII”) also was named as a party to the investigation. *Id.*

Prior to the evidentiary hearing, Varian withdrew its allegations as to certain patent claims and also added additional claims. *See* Notice of Commission Determination Not to Review an Initial Determination Granting a Motion to Amend the Complaint and Notice of Investigation (Apr. 4, 2016). Varian proceeded at the evidentiary hearing on the following patents and claims: claims 1, 4, 9, and 15 of the ‘021 patent; claims 6 and 18 of the ‘430 patent; claim 1 of the ‘703 patent; claims 23 and 26 of the ‘154 patent; claims 61, 67, and 68 of the ‘770 patent; and claims 26 and 41 of the ‘538 patent.

On October 27, 2016, the ALJ issued his Final ID, which finds a violation of section 337 by Elekta as to claims 23 and 26 of the ‘154 patent; claims 26 and 41 of the ‘538 patent; and claim 67 of the ‘770 patent. The Final ID found no violation of section 337 in connection with claim 61 of the ‘770 patent; claims 1, 4, 9, and 15 of the ‘021 patent; claims 6 and 18 of the ‘430 patent; and claim 1 of the ‘703 patent. The ALJ recommended that the Commission issue a limited exclusion orders directed to Elekta’s accused products that infringe the claims for which a violation was found. The ALJ further recommended that cease and desist orders issue.

Having examined the record in this investigation, including the Final ID, the petitions for review, and the responses thereto, the Commission has determined to review the Final ID in part and, on review, to take certain actions. In particular, the Commission has determined as follows:

- (1) To review the Final ID’s conclusions that the claims asserted for infringement and/or domestic industry of the ‘154 patent, the ‘770 patent, and the ‘538 patent are not invalid as obvious due to Elekta’s witness’s failure to analyze Varian’s evidence of secondary considerations of nonobviousness. On review, the Commission has determined to vacate this determination and to remand the investigation to the ALJ with respect to this issue. The ALJ shall analyze Varian’s evidence of secondary considerations and (1) make findings as to that evidence, including whether Varian has demonstrated that there is a nexus between the claims and the evidence of secondary considerations, and any other finding necessary to determine the effect of that evidence on whether those claims are obvious; (2) make findings as to whether and to what extent that evidence of secondary considerations supports Varian’s arguments that Elekta has not shown that the asserted claims are obvious; and (3) reconsider the ultimate conclusion of whether the claims are obvious in light of the foregoing.

(2) To review the Final ID's determination regarding the obviousness of the asserted claims of the '021 patent, the '430 patent, and the '703 patent. This issue remains under review.

(3) To review the claim construction in the Final ID of the claim term "communications network," as found in the asserted claims of the '021 and '430 patents. *See, e.g.*, Final ID at 46-54. This issue remains under review.

(4) To review the Final ID's conclusions regarding the anticipation of claim 18 of the '430 patent by the Jaffray MICCAI 2001 reference, and on review, the Commission affirms that this claim is not anticipated and clarifies that the indication otherwise on page 152 of the Final ID is a typographical error.

(5) To review the Final ID's discussion, interpretation, and application of *Certain Electronic Devices with Image Processing Systems, Components Thereof, and Associated Software*, 337-TA-724, Comm'n Op. (Nov. 21, 2011), in analyzing the infringement of claim 18 of the '430 patent and the asserted claims of the '154, '538, and '770 patents, and to review the Final ID's conclusions regarding infringement of the aforementioned claims. *See, e.g.*, Final ID at 133-39, 253-57, 327, 394. This issue remains under review.

The Commission has determined to not review the remainder of the Final ID. The Commission does not seek further briefing at this time.

In light of the remand, the ALJ shall set a new target date within thirty days of the date of this notice consistent with the Remand Order. The current target date for this investigation is March 16, 2017.

Any briefing on reviewed and remanded issues, and on remedy, bonding, and the public interest will follow Commission consideration of the remand ID.

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.



Lisa R. Barton
Secretary to the Commission

Issued: January 13, 2017

**CERTAIN RADIOTHERAPY SYSTEMS AND
TREATMENT PLANNING SOFTWARE, AND
COMPONENTS THEREOF**

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PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Lisa M. Kattan, Esq., and the following parties as indicated, on **January 13, 2017**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
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