

**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

REMAND ORDER

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 initial determination (“the 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 ALJ 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. Varian and Elekta filed timely petitions for review of various portions of the Final ID, and Varian, Elekta, and OUII timely filed responses to the petitions.

On January 13, 2017, the Commission determined to review the Final ID in part. On review, the Commission determined to vacate the Final ID in part and to remand the investigation to the ALJ on the issues detailed below. We conclude that it is appropriate for the ALJ to make factual findings as to Varian’s evidence of secondary considerations. *See Apple, Inc. v. Int’l Trade Comm’n*, 725 F.3d 1356, 1365 (Fed. Cir. 2013). As part of its review of the Final ID, the Commission has also determined to affirm the conclusion of the Final ID that claim 18 of the '430 patent is not invalid as anticipated by the Jaffray MICCAI 2001 reference; other issues remain under review.

Accordingly, upon consideration of this matter, the Commission hereby **ORDERS** that:

1. The issue of the obviousness of the claims of the '154 patent, the '538 patent, and the '770 patent that are asserted for infringement and/or domestic industry is remanded to the presiding ALJ. 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. The ALJ shall issue an initial determination within 30 days of this Order extending the target date as he deems necessary to accommodate the remand. A remand initial determination ("RID") shall issue four months before the extended target date.

3. The administrative law judge may reopen the record to receive further briefing on which to base his RID, but is not to reopen discovery.

4. The RID will be processed in accordance with Commission rules 210.42, 210.43-.46, and 210.50. Any petitions for review will be due 12 days after service of the RID, and shall be limited to the issues remanded. Responses to any petition for review will be due 8 days after service of petition. The RID will become the Commission's final determination 60 days after issuance, unless the Commission orders review.

5. Notice of this Order shall be served on the parties to this investigation.

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". The signature is stylized and cursive.

Lisa R. Barton
Secretary to the Commission

Issued: January 13, 2017

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Inv. No. 337-TA-968

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** 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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