

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington D.C.

In the Matter of

**CERTAIN HYBRID ELECTRIC VEHICLES
AND COMPONENTS THEREOF**

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) **Inv. No. 337-TA-688**
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**NOTICE OF COMMISSION DETERMINATION
TO REVIEW AN INITIAL DETERMINATION
AND ON REVIEW TO AFFIRM**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review the final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) on May 21, 2010, granting, on the basis of issue preclusion, complainant’s motion for summary determination regarding validity of the patent in suit. On review, the Commission has determined to review the ID, and on review to affirm.

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2532. 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, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://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 5, 2009, based on a complaint filed by Paice LLC (“Paice”) of Bonita Springs, Florida. 74 *Fed. Reg.* 52258-59 (Oct. 9, 2009). The complaint named as respondents Toyota Motor Corporation of Japan and two U.S. subsidiaries (collectively “Toyota”). The complaint alleges infringement by certain Toyota hybrid vehicles of claims of U.S. Patent No. 5,343,970 (“the ’970 patent”).

In late 2005, the Eastern District of Texas found that certain Toyota hybrid vehicles infringed claims of the '970 patent. Paice and Toyota have contended throughout this investigation that the Texas action must be afforded preclusive effect, though they have disagreed as to the operation and effect of the preclusion. On November 25, 2009, Paice moved – on the basis of claim preclusion and/or issue preclusion – for summary determination that the accused products infringe the '970 patent and that the '970 patent is valid and enforceable. On December 22, 2009, Toyota opposed Paice's motion and cross-moved for summary determination terminating the entirety of the investigation on the basis of claim preclusion. Paice opposed Toyota's cross-motion.

On March 3, 2010, the ALJ issued Order No. 6, which granted Paice's motion (as an ID) and denied Toyota's cross-motion (as a non-ID order). With regard to the ID portion of Order No. 6, the ALJ concluded that all of the factors necessary for claim preclusion had been met with regard to validity, enforceability and infringement. Toyota petitioned for review of the ID, which Paice and the IA opposed.

On April 2, 2010, the Commission determined to review Order No. 6. The Commission reversed the ALJ's finding that claim preclusion prevented relitigation only of Toyota's defenses, while taking no position on other applications of claim preclusion. The Commission also took no position on the question of issue preclusion, and remanded the matter to the ALJ. Comm'n Op. 15 (Apr. 2, 2010).

On remand, the ALJ allowed a new round of briefing on the application of issue preclusion to this investigation. On April 12, 2010, Paice moved for summary determination that issue preclusion prevents relitigation of invalidity. On April 19, 2010, Toyota opposed Paice's motion only as to whether it should be permitted to relitigate questions of obviousness under 35 U.S.C. § 103. That same day, the Commission investigative attorney filed a response in support of Paice.

Having examined the record of this investigation, the Commission has determined to review the ID.

On review, the Commission affirms the ID. In addition to the reasoning set forth in Order No. 11, which the Commission adopts, the Commission finds that if – contrary to the view of the ALJ and the Commission – *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) can constitute a change in the law for purposes of providing an exception to issue preclusion, *see* Restatement (Second) of Judgments § 28(3) (1982), then Toyota has not satisfied its burden to support an exception to issue preclusion in this case. This supplemental basis for affirming the ID will be set forth in a separate Commission Opinion.

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 sections 210.42-.45 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42-.45).

By order of the Commission.

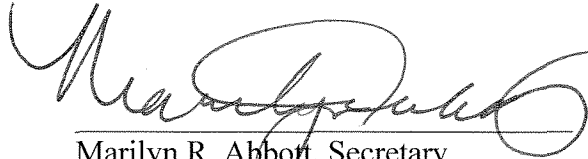
A handwritten signature in black ink, appearing to read 'Marilyn R. Abbott', with a long, sweeping horizontal line extending to the right.

Marilyn R. Abbott
Secretary to the Commission

Issued: June 22, 2010

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DETERMINATION TO REVIEW AN INITIAL DETERMINATION AND ON REVIEW TO AFFIRM** has been served by hand upon the Commission Investigative Attorney, Erin D. E. Joffre, Esq., and the following parties as indicated, on
June 23, 2010



Marilyn R. Abbott, Secretary
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**On behalf of Respondents Toyota Motor Corporation;
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