UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of **CERTAIN LAPTOPS, DESKTOPS, SERVERS, MOBILE PHONES, TABLETS, AND COMPONENTS THEREOF**	**Inv. No. 337-TA-1280**

ORDER NO. 23: DENYING AMAZON.COM, INC.'S MOTION FOR SUMMARY DETERMINATION OF NO IMPORTATION

(March 24, 2022)

On February 22, 2022, respondent Amazon.com, Inc. ("Amazon") moved (1280-017) for summary determination of no importation—that is, "Amazon does not engage in 'the importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or assignee, of articles that infringe' the asserted patents." On March 4, 2022, the Commission Investigative Staff filed a response in which it opposed the motion ("Staff Resp."). On March 8, 2022, pursuant to Order No. 20, complainant Sonrai Memory Ltd. ("Sonrai") filed an opposition ("Opp'n"). The motion represents that the remaining, non-moving, respondents to the investigation "take no position on the motion." Mot. at 1.

Amazon first explains that it has been accused of violating section 337 "based solely on its domestic resale of Samsung, ASUS, Acer, and VAIO products." Mot. Mem. at 1; *see id.* at 2 (citing EDIS Doc. ID 758675 (Joint Stipulation Regarding Accused Products)). Amazon continues, "[i]t is undisputed that Amazon purchases and resells these products domestically without any involvement in their importation" and thus the resale "bears *no* nexus to importation

of those products by their manufacturers." *Id.* (emphasis in original). In its opposition, Sonrai confirms that it "is not alleging that Amazon itself sells the accused products for importation or physically imports the accused products as the importer of record." Opp'n at 3.

As for "the sale within the United States after importation by the owner, importer, or consignee," Amazon argues it is undisputed that it "contracts with vendors who supply the [accused products] domestically." Mot. Mem. at 4; *id.* at 3 (citing Mot., Ex. 2 (Fincham) at 33:11-15). Amazon points to its vendor agreements, wherein "[n]one allow Amazon to influence the design of the product or provide that products will be imported on Amazon's behalf." *Id.* (citing Mot., Exs. 4-12, 14). Amazon does not allege, however, that any of its accused products are not imported into the United States. *See id.* at 4, 5.

In light of these facts, Amazon contends:

> Location of manufacture is not the same thing as importation. The mere fact that a product was manufactured by others outside the United States is insufficient to subject the domestic resellers of that product with no involvement in importation to jurisdiction under Section 337. [*Certain Carbon and Alloy Steel Products*, Inv. No. 337-TA-1002, Order No. 103 at 33 (Oct. 2, 2017) ("*Steel Products*")]. Any other reading of Section 337 would lead to absurd results permitting jurisdiction when *any* individual or entity resells *any* product that originated outside the United States, reading the importation requirement out of the statute entirely.

Mot. Mem. at 5; *see id.* at 1 ("Nor is Amazon 'liable merely because it does business with other entities that import accused products.'"). Amazon views the Federal Circuit's holding in *Comcast Corp. v. Int'l Trade Comm'n* as "teach[ing] that only entities sufficiently involved in importation can be liable under Section 337. One must do more than domestically resell the once-imported product of others." Mot. Mem. at 6 (citing 951 F.3d 1301 (Fed. Cir. 2020) (no pincite)).

More specifically, Amazon contends that to violate the "sale within the United States after importation" clause, "the sale must be made by 'the owner, importer, or consignee' of the articles upon importation." Mot. Mem. at 8 (citing 19 U.S.C. § 1337(a)(1)(B); *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Comm'n Op. at 9-10 (Oct. 1, 2009); *Certain Cases for Portable Elec. Devices*, Inv. No. 337-TA-861/867 (Consolidated), Initial Determination at 4-5 (Sept. 17, 2013) ("*Cases for Portable Devices*")); *see id.* at 9. According to Amazon, "[t]he statute is not satisfied when *anyone* makes a subsequent 'sale within the United States after importation'" as the sale "must have a nexus to importation." *Id.* at 8. It reasons, "[a]ny other reading eliminates the importation requirement entirely, as it would result in Section 337 covering all domestic sales of once-imported products." *Id.*; *see id.* at 8-9 (collecting cases).

In opposition, Sonrai argues that "Amazon misrepresents Section 337 by adding 'upon importation,' which does not appear in Section 337(a)(1)(B)(i) at all . . .. In other words, Amazon's Motion rests on the premise that Sonrai has failed to allege or prove a fact that neither the statute nor any precedent require." Opp'n at 3; *see id.* at 2-3 (citing *Certain Intraoral Scanners and Related Hardware and Software*, Inv. No. 337-TA-1090, Order No. 17 (May 31, 2018)), 5 (citing same).

Staff also opposes the motion because Amazon "satisfies the 'sale within the United States after importation by the owner' language of section 337(a)(1)(B)(i), or at the least because there is a material fact in dispute about whether it satisfies this prong." Staff Resp. at 4. Staff disputes that the seller must also have been the "owner" at the time of importation or "upon importation." *Id.* at 4-5. Staff considers Amazon's position to be inconsistent with the original language and intent of the Tariff Act of 1930, which recited "sale by the owner, importer,

consignee or agent of either.'" *Id.* at 5 (citing Smoot-Hawley Tariff Act, 46 Stat. 590, 703 (Mar. 13, 1930); *Cigarettes*, Inv. No. 337-TA-643, Comm'n Op. (Oct. 1, 2009)). "Instead," according to Staff, "any 'owner, importer, or consignee' of the imported 'articles that . . . infringe' who then resells them domestically falls under the 'sale . . . after importation' language." *Id.* (citing *Cases for Portable Devices*, Inv. No. 337-TA-861/867 (Consolidated), Order No. 16). In other words, Staff argues the evaluation of "owner" is at the time of sale. *Id.* at 6; see id. at 6-7 (citing *Certain Artificial Eyelash Extension Systems, Products, and Components Thereof*, Inv. No. 337-TA-1226, Initial Determination, at 7, 141, 149 (October 28, 2021), *not reviewed in relevant part*, Comm'n Notice (Jan. 26, 2022) ("*Eyelash Systems*"); *Certain Wearable Monitoring Devices, Systems, and Components Thereof*, Inv. No. 337-TA-1190, Initial Determination, at 10 (Feb. 4, 2021), *not reviewed in relevant part*, Comm'n Notice at 2-3 (April 12, 2021)) ("*Wearable Devices*").

Staff also finds no support in the cases cited by Amazon for a "nexus" to importation or ownership at the time of importation. *See generally* Staff Resp. at 7-10 (discussing collected cases). Under the proper interpretation, then, Staff finds there to be no dispute that Amazon is the "owner" at the time of "after importation" sales in satisfaction of the statute. *Id.* at 7. Staff adds that if a "nexus" is required, "Sonrai has shown evidence that Amazon knew or should have known that the Accused Products are imported" (*id.* at 8 (citing Complaint, Exs. 49, 50)) and a case and desist order would be particularly effective if a violation was found (*id.* at 9-10 (citing EDIS Doc. ID 762925 (Joint Stipulation Between Sonrai and Amazon Relating to Volume of Inventory))).

Amazon's motion is denied for two reasons. First, it rests on an unsupported legal principle—that "sale within the United States after importation by the owner, importer, or consignee" within the statute only means owners, importers, or consignees upon importation. Mot. Mem. at 4-5, 8. As Amazon admits, "there are no recent Commission or Federal Circuit decisions squarely on point." *Id.* at 5. But recent decisions suggest Amazon's is not the proper interpretation. In *Wearable Devices*, the ALJ considered argument from a respondent that had "stipulated that it sold Fitbit products after importation under a distribution agreement" but "that it no longer sold any Fitbit products at the time the complaint was filed in this investigation." Inv. No. 337-TA-1090, Initial Determination at 10. The ALJ ruled the Respondent's "past sales of Fitbit products" met the statutory requirement. *Id.* The respondent did not petition for review of this finding (EDIS Doc. ID 735326), and it was not reviewed by the Commission (EDIS Doc. ID 739554).

Similarly, in *Eyelash Systems*, the ALJ described respondents Walmart, Inc. and CVS Pharmacy, Inc., among others, as "resellers" of certain accused products. Inv. No. 337-TA-1226, Initial Determination at 3. These entities are in a similar position to Amazon in the chain of commerce and they offered no dispute that acting as domestic "resellers" satisfied the importation requirement (*see id.*); nor did they petition for review of this finding (EDIS Doc. ID 757540). The Commission likewise did not review the issue. EDIS Doc. ID 761044. While neither *Wearable Devices* nor *Eyelash Systems* constitute explicit statements on the scope of after-importation jurisdiction, the Commission's determinations likely could not stand if sales after importation did not include domestic resellers.

Second, even if Amazon's interpretation of the law is correct, there remains a genuine issue over whether Amazon is an "importer" under the statute. *See Comcast*, 951 F.3d at 1308-1311 (holding "importer" covered respondent who did not sell prior to importation nor after, and did not actually conduct the importation, but was the purchasing entity for whom the importation occurred). For example, Amazon states as fact, "Amazon sources all of the Amazon Accused Products from domestic vendor warehouses and resells the products domestically" and cites its exhibits 4-11 and 14. Mot. Mem. at 4. Exhibits 4-11 are general sales or vendor agreement contracts, however, and not purchase orders of specific quantities of goods which contain at least some shipping information. *See, e.g.*, Mot., Ex. 7 at 6

Mot., Ex. 2 at 23:21-24 ("Q. What document would show where Amazon received any particular consumer electronic product? A. Purchase – a purchase order would show where the order was sent to.").

The agreements contain no terms that establish or even suggest that every single one of Amazon's accused products "[is] already within the United States and entered the United States regardless of any action taken by Amazon." Mot, Ex. 3 at 30 (contention interrogatory response); *see* Mot., Ex. 4 at 3-4 (Section 7. Shipping (General Amazon Vendor Agreement)); Mot., Ex. 5 at 2 (Section 7. Shipping (Amazon's Vendor Agreement for Acer)); Mot., Ex. 6 at 3 (Section 7. Shipping (Amazon's Vendor Agreement for Acer ASUS); Mot., Ex. 7 at 8 (Section VII. Deliver and Risk of Loss; Remedies (Samsung's Vendor Agreement for Amazon)). Moreover, Amazon provides no pin cites within these agreements or explains them in any way,

despite claiming they are "irrefutable" evidence that it is not involved in importation. *See generally* Mot. Mem.; *id.* at 7.

Amazon also refers to the testimony of its representative (Mot., Ex. 2) and accompanying purchase order record spreadsheet (Mot., Ex. 14). These are not persuasive either. For example, with respect to the spreadsheet, Amazon's witness was sure it represented only "U.S. sales" meaning no "international purchase orders" (Mot., Ex. 2 at 28:5-6, 20-22), but admitted there was no part of the document "that would indicate that these sales relate to U.S. sales [to Amazon]" (*id.* at 28:7-9). As for the actual shipping of orders, the witness explained columns U through W contained information on "where the products were shipped from." *Id.* at 32:11-22. Yet the vast majority of these fields are blank. Mot., Ex. 14. The witness testified such empty fields meant the supplier prepaid for shipping and that Amazon took possession only upon arrival at its warehouse. Mot., Ex. 2 at 32:23-33:2. Viewed in a light most favorable to the non-movant, however, this evidence would show Amazon does not know, or does not care to know, from where its purchased products come when shipping is arranged by the supplier. *Id.* at 33:7-10 ("Q. For the prepaid products, does this document contain any information on where the prepaid products were shipped from? A. This document specifically, no."). Obviously, this is critical information for the inquiry at hand.

Moreover, the spreadsheet, assuming it covers *all* Amazon accused products, also indicates some purchase orders were sent to "distributors" outside of Samsung, Acer, ASUS, or VAIO (*see* Mot., Ex. 2 at 31:5-32:1 (discussing supplier code "0")). Amazon's motion offers no explanation or contention of how these unnamed "distributors" also constitute purely domestic sourcing.

Mot., Ex. 2 at 31:24-32:1.

Id. at 54:7-9.

But viewing the witness' testimony in a light most favorable to Sonrai, this creates an additional genuine issue as to who the supplier(s) for the VAIO products are, and where those products were shipped from to arrive at Amazon's warehouses.

It is also striking that the witness knew with confidence that but the laptops and desktops at issue in this investigation were definitely not. When asked *how* he knew this, his testimony was vague:

> Q. Do you see the third sentence – actually the fourth sentence in this clause stating "if Amazon is the importer of record of any products"?
> A. Yes, I see it.
> Q.
>
> . . . .
>
> A.
> Q.
> A.
> Q. Was Amazon the importer of record for any PC desktop or laptop products?
> A. No.
> Q. Does this document state whether Amazon was the importer of record for any particular products?
>
> . . . .
>
> A. I don't believe so. I'm not a contracts expert, though.
> Q. What document would show which products Amazon was the importer of record on?
>
> . . . .
>
> A. I – I don't know the answer to that question.
> Q. How do you know Amazon was not the importer of record for laptop and desktop products from Acer?
> A. As mentioned, we sourced and received them from domestic warehouses.

Mot., Ex. 2 at 22:19-23:20; *see id.* at 26:4-14 19:23-20:8 (similar claim for products from Samsung), 33:11-20 (similar claim for all entries of

Mot., Ex. 14), 48:17-22 (similar claim for all "affected products in this case"). It bears repeating that this witness testified actual purchase orders include shipping information. Mot., Ex. 2 at 23:21-24:2. But none were provided with Amazon's motion.

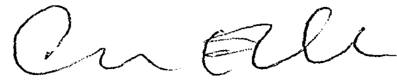
In sum, there is a genuine issue of material fact over Amazon's contention that every single one of its hundreds of accused product models (*see* Mot., Ex. 3 at Exhibits A, B, C, D) was already in the United States prior to its purchase and subsequent resale. (Mot., Ex. 4 at 3-4 is enough at this stage to suggest Amazon is in a similar position to the purchasing respondents in *Comcast*, *Wearable Devices*, and *Eyelash Systems*. Viewing the totality of the evidence in the light most favorable to Sonrai, the record would benefit from further development pertaining to, among other things: (1) the details of shipments, particularly where they originated; (2) the identity and location of the distributors receiving Amazon's purchase orders; and (3) why were sourced differently from every single consumer electronic product at issue.

Accordingly, the motion (1280-017) is denied.

Within seven days of the date of this document, the parties shall submit to the Office of the Administrative Law Judges a joint statement as to whether or not they seek to have any portion of this document deleted from the public version. If the parties do seek to have portions of this document deleted from the public version, they must submit to this office a copy of this document with red brackets indicating the portion or portions asserted to contain confidential

business information. The submission may be made by email and/or hard copy by the aforementioned date and need not be filed with the Commission Secretary.

SO ORDERED.



Cameron Elliot
Administrative Law Judge