

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of

**CERTAIN MEMS DEVICES AND
PRODUCTS CONTAINING SAME**

Investigation No. 337-TA-700

**NOTICE OF COMMISSION DECISION TO REVIEW-IN-PART A FINAL INITIAL
DETERMINATION FINDING A VIOLATION OF SECTION 337; REQUEST FOR
WRITTEN SUBMISSIONS REGARDING REMEDY, BONDING, AND THE PUBLIC
INTEREST**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review-in-part a final initial determination (“ID”) of the presiding administrative law judge (“ALJ”) finding a violation of section 337 in the above-captioned investigation, and is requesting written submissions regarding remedy, bonding, and the public interest.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2310. 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 at <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 December 31, 2009, based on a complaint filed on December 1, 2009, by Analog Devices, Inc. (“Analog Devices”) of Norwood, Massachusetts. *75 Fed. Reg.* 449-50 (Jan. 5, 2010). The complaint, as supplemented, alleged 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, and the sale within the United States after importation of certain microelectromechanical systems (“MEMS”) devices and products containing the same by reason of infringement of certain claims of U.S. Patent Nos. 7,220,614 (“the `614 patent”) and 7,364,942 (“the `942 patent”). The

complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337. The complaint named as respondents Knowles Electronics LLC of Itasca, Illinois and Mouser Electronics, Inc. of Mansfield, Texas.

On December 23, 2010, the ALJ issued his final ID finding a violation of section 337 by respondents with respect to the `942 patent, and which also included his recommendation on remedy and bonding during the period of Presidential review. The ALJ found no section 337 violation with respect to the `614 patent due to non-infringement of the asserted claims. On January 21, 2011, the Commission issued notice of its determination to extend the deadline to March 7, 2011, for determining whether to review the final ID. On January 18, 2011, Analog Devices, respondents, and the Commission investigative attorney (“IA”) filed petitions for review of the final ID, and each party filed responses to the other parties’ petitions on January 26, 2011. On February 4, 2011, Analog Devices and respondents each filed submissions on the public interest.

Upon considering the parties’ filings, the Commission has determined to review-in-part the ID. Specifically, the Commission has determined to review: (1) the ALJ’s construction of the claim term “oven” relating to both the `614 and `942 patents; (2) the ALJ’s construction of the claim term “sawing” relating to both the `614 and `942 patents; (3) the ALJ’s determination that the accused process does not infringe, either literally or under the doctrine of equivalents, claims 12, 15, 31-32, 34-35, and 38-39 of the `614 patent or claim 1 of the `942 patent; (4) the ALJ’s finding that U.S. Patent No. 5,597,767 (“the `767 patent”) does not incorporate by reference U.S. Patent Nos. 5,331,454 and 5,512,374 (“the `374 patent”); (5) the ALJ’s finding that claims 2-6 and 8 are infringed by the accused process; (6) the ALJ’s findings that claims 34-35 and 38-39 of the `614 patent, and claims 2-6 and 8 of the `942 patent, are not anticipated, under 35 U.S.C. § 102(a), by the `767 patent or the `374 patent; (7) the ALJ’s findings that claims 34-35 and 38-39 of the `614 patent are not obvious, under 35 U.S.C. § 103, in view of the `767 patent and the Sakata et al. prior art reference; and (8) the ALJ’s finding that the technical prong of the domestic industry requirement has been satisfied as to both the `614 and `942 patents. The Commission has determined not to review the remainder of the ID.

On review, with respect to violation, the parties are requested to submit briefing limited to the following issues:

- (1) In arguing that the term “oven” should be construed as “a system that includes a heated chamber,” is it the contention of Complainant and the IA that the system includes elements such as a reservoir, heaters on the reservoir, a delivery line that connects the reservoir and the deposition chamber, a vacuum line, a nitrogen line, and a device (such as a computer) for programming the temperature, gas pressure, etc. of the oven? *See* Complainant Analog’s Contingent Petition at 25 and the IA’s Contingent Petition at 6.
- (2) If the term “oven” as it appears in claim 1 of the `942 was construed broadly to encompass the entire system, would the claim cover a method

in which the wafer is inserted into, and the anti-stiction compound is heated within, any portion of the system, including the elements listed in the question above, such as a heater, delivery line, or a device for programming? In your response, please address whether the Commission should construe the disputed term in light of the context supplied by the claim, which indicates, for example, that the anti-stiction compound is *heated* within said oven.

- (3) If the term “oven” is construed broadly, then is the claim invalid based on a failure to satisfy the written description and enablement requirements? For example, does the specification disclose that the anti-stiction compound can be heated within a vacuum line or a device for programming?
- (4) The ALJ determined that the ‘374 patent did not disclose the limitation “exposing said wafer, substantially at room temperature, to the vapor of a compound having anti-stiction properties” of claim 34 of the ‘614 patent, finding that a table found at column 5 of the ‘374 does not disclose a “process whereby the anti-stiction compound is deposited on a wafer ‘substantially at room temperature.’” ID at 108-09. Can the required disclosure be found in the ‘374 at cols. 4:59-5:62?

In addressing these issues, the parties are requested to make specific reference to the evidentiary record and to cite relevant authority.

In connection with the final disposition of this investigation, the Commission may issue an order that results in the exclusion of the subject articles from entry into the United States. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

When the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation, particularly in the context of the ALJ’s recommendations on remedy.

When the Commission orders some form of remedy, the U.S. Trade Representative, as

delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* section 337(j), 19 U.S.C. § 1337(j) and the Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues under review in response to the above-referenced questions. The submissions should be concise and thoroughly referenced to the record in this investigation. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding, and such submissions should address the recommended determination by the ALJ on remedy and bonding. The complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the dates that the patents at issue expire and the HTSUS numbers under which the accused articles are imported. The written submissions and proposed remedial orders must be filed no later than close of business on March 18, 2011. Reply submissions must be filed no later than the close of business on March 25, 2011. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. §210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

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 210.42-46 of the Commission's Rules of Practice and Procedure, 19 C.F.R. §§ 210.42-46.

By order of the Commission.

/s/
James R. Holbein
Acting Secretary to the Commission

Issued: March 7, 2011