

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

**In the Matter of**

**CERTAIN ELECTRONIC DEVICES WITH  
MULTI-TOUCH ENABLED TOUCHPADS  
AND TOUCHSCREENS**

**Investigation No. 337-TA-714**

**NOTICE OF COMMISSION DECISION  
TO REVIEW AN INITIAL DETERMINATION;  
COMMISSION DETERMINATION THAT ORDER NO. 16  
IS AN ORDER RATHER THAN AN INITIAL DETERMINATION**

**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 initial determination (“ID”) (Order No. 16) of the presiding administrative law judge (“ALJ”) granting respondent’s motion to foreclose, on the basis of issue preclusion or judicial estoppel, certain claim construction arguments regarding claims 1 and 18 of U.S. Patent No. 5,825,352 (“the ’352 patent”). Upon review, the Commission has determined that Order No. 16 is properly issued in the form of an order rather than as an initial determination.

**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 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 April 29, 2010, based on a complaint filed by Elan Microelectronics Corporation of Taiwan (“Elan”), alleging, *inter alia*, a violation of section 337 in the importation, sale for importation, and sale within the United States after importation of certain electronic devices with multi-touch enabled touchpads and touchscreens by reason of infringement of certain claims U.S. Patent No. 5,825,352 (“the ’352 patent”). 75 *Fed. Reg.* 22625. The complaint named Apple, Inc. of Cupertino, California (“Apple”) as the only respondent.

Prior to the ALJ's *Markman* hearing, Apple moved for summary determination that Elan was barred from advocating a claim construction for certain claim terms in claims 1 and 18 of the '352 patent different from the claim construction advocated by Elan and adopted by the District Court in *Elantech Devices Corp. v. Synaptics, Inc.*, No. C 06-01839 CRB (N.D. Cal. filed Mar. 10, 2006). Apple's motion was based on the doctrine of issue preclusion, or in the alternative, on the doctrine of judicial estoppel. Mem. in Support of Apple Inc.'s Mot. for Summ. Determination of Claim Construction 10-23 (July 14, 2010). Following briefing (both before and after the *Markman* hearing) and attorney argument at the *Markman* hearing, the ALJ granted Apple's motion as an ID (Order No. 16).

On October 6, 2010, Elan petitioned for review of the ID, and on October 14, 2010, Apple opposed the petition, substantially for the reasons set forth in its motion. On October 14, 2010, the Commission investigative attorney opposed the petition on the basis that the decision is not properly an ID and that Commission review is not ripe.

The Commission has determined to review the subject ID in its entirety, and upon review to find that Order No. 16 is an order and not an initial determination. On October 20, 2010, the Commission found that claim constructions standing alone (*i.e.*, without a finding of invalidity, infringement, or the like) are not properly the subject of initial determinations under Commission rules 210.18 and 210.42, 19 C.F.R. §§ 210.18, 210.42. Notice of Commission Determination that June 22, 2010, Initial Determination Is an Order Rather than an Initial Determination, Inv. No. 337-TA-703 (Oct. 20, 2010); *see also* Notice, 75 *Fed. Reg.* 44282 (July 28, 2010). It follows, *a fortiori*, that Order No. 16 in the instant investigation, which merely precluded the presentation of certain evidence or attorney argument in connection with claim construction proceedings, is similarly not an initial determination under Commission rules.

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 210.18 and 210.42–.46 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.18, 210.42–.46).

By order of the Commission.

/s/  
Marilyn R. Abbott  
Secretary to the Commission

Issued: October 28, 2010