

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

In the Matter of

**CERTAIN DIGITAL CAMERAS,
SOFTWARE, AND COMPONENTS
THEREOF**

Investigation No. 337-TA-1059

**NOTICE OF COMMISSION DETERMINATION TO REVIEW-IN-PART A
FINAL INITIAL DETERMINATION FINDING A VIOLATION OF
SECTION 337; REQUEST FOR WRITTEN SUBMISSIONS;
EXTENSION OF TARGET DATE FOR COMPLETION OF THE
INVESTIGATION**

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 the presiding administrative law judge's ("ALJ") final initial determination ("Final ID") issued on August 17, 2018, finding a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337") in the above-captioned investigation. The Commission has also determined to extend the target date for completion of the above-captioned investigation to February 1, 2019.

FOR FURTHER INFORMATION CONTACT: Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, D.C. 20436, telephone (202) 708-2301. 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, SW., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<https://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://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 June 2, 2017, based on a complaint filed by Carl Zeiss AG of Oberkochen, Germany, and ASML Netherlands B.V. of Veldhoven, Netherlands. 82 FR 25627-28. The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 ("section 337), in the importation into the United States, the sale for

importation, and the sale within the United States after importation of certain digital cameras, software, and components thereof that infringe U.S. Patent Nos. 6,301,440 (“the ’440 patent”); 6,463,163 (“the ’163 patent”); 6,714,241 (“the ’241 patent”); 6,731,335 (“the ’335 patent”); 6,834,128 (“the ’128 patent”); 7,297,916 (“the ’916 patent”); and 7,933,454 (“the ’454 patent”). *Id.* The complaint further alleges that a domestic industry exists in the United States. The Commission’s Notice of Investigation named as respondents Nikon Corporation of Tokyo, Japan; Sendai Nikon Corporation of Natori, Japan; Nikon Inc. of Melville, New York; Nikon (Thailand) Co., Ltd. of Ayutthaya, Thailand; Nikon Imaging (China) Co., Ltd. of Wuxi, China; and PT Nikon Indonesia of Jakarta, Indonesia. *Id.* at 25627. The Office of Unfair Import Investigations is not participating in this investigation. *Id.* The Commission later terminated respondent PT Nikon from the investigation. Order No. 36 (Dec. 27, 2017) (unreviewed Notice (Jan. 19, 2018)). The Commission also subsequently terminated from the investigation all claims of the ’163 and ’335 patents and certain claims of the ’440, ’241, ’128, ’916, and ’454 patents. Order No. 23 (Oct. 3, 2017) (unreviewed Notice (Oct. 17, 2017)); Order No. 32 (Nov. 22, 2017) (unreviewed Notice (Dec. 19, 2017)); Order No. 45 (Feb. 5, 2018) (unreviewed Notice (Mar. 6, 2018)); Order No. 65 (Mar. 27, 2018) (unreviewed Notice (Apr. 25, 2018)); Order No. 67 (Apr. 13, 2018) (unreviewed Notice (May 4, 2018)).

On August 17, 2018, the ALJ issued her Final ID, finding a violation of section 337 with respect to asserted claims 1 and 8 of the ’916, asserted claims 6, 35, and 39 of the ’440 patent, and asserted claim 22 of the ’454 patent. The final ID finds no violation as to asserted claims 1, 12, and 16 of the ’128 patent, asserted claim 10 of the ’241 patent, and asserted claims 37, 46, and 50 of the ’440 patent.

In particular, the Final ID finds that asserted claims 1 and 8 of the ’916 patent read on the accused products under the DOE. The Final ID also finds that asserted claims 1 and 8 are not invalid for obviousness under 35 U.S.C. § 103. The Final ID further finds that Zeiss has satisfied the technical prong of the domestic industry (“DI”) requirement with respect to the ’916 patent.

The Final ID finds that asserted claims 6, 35, 37, 39, 46, and 50 of the ’440 patent read on the accused products. The Final ID also finds that asserted claim 37 is invalid as anticipated under 35 U.S.C. § 102, but that asserted claims 6, 35, 39, 46, and 50 are not invalid as anticipated under 35 U.S.C. § 102 or for obviousness under 35 U.S.C. § 103. The Final ID further finds that Zeiss has satisfied the technical prong of the DI requirement with respect to the ’440 patent.

The Final ID finds that asserted claim 22 of the ’454 patent reads on the accused products. The Final ID also finds that asserted claim 22 is not invalid as anticipated under 35 U.S.C. § 102 or for obviousness under 35 U.S.C. § 103. The Final ID further finds that Zeiss has satisfied the technical prong of the DI requirement with respect to the ’454 patent.

The Final ID finds that asserted claims 1, 12, and 16 of the '128 patent do not read on the accused products. The Final ID also finds that asserted claims 1, 12, and 16 are invalid for obviousness under 35 U.S.C. § 103 or as indefinite under 35 U.S.C. § 112. The Final ID further finds that Zeiss has not satisfied the technical prong of the DI requirement with respect to the '128 patent.

The Final ID finds that asserted claim 10 of the '241 patent reads on one of the accused products – the D610 camera. The Final ID also finds that asserted claim 10 is not invalid for obviousness under 35 U.S.C. § 103. The Final ID finds that Zeiss has not satisfied the technical prong of the DI requirement with respect to the '241 patent.

In addition, the Final ID finds that Zeiss proved direct infringement by Nikon of only the asserted apparatus and system claims and failed to prove third-party direct infringement or indirect infringement with respect to asserted method claims 46 and 50 of the '440 patent and asserted method claims 12 and 16 of the '128 patent.

The Final ID finds that Zeiss has shown, with respect to the '916, 440, and '454 patent, that it has a domestic industry in the process of being established pursuant to section 337(a)(2) and has satisfied the economic prong of the DI requirement pursuant to section 337(a)(3)(B) (significant employment of labor or capital) and/or (C) (substantial investment in exploitation of the asserted patents).

The Final ID also contains the ALJ's recommended determination on remedy and bonding. The ALJ recommended that the appropriate remedy is a limited exclusion order, including a certification provision, and cease and desist orders against each of the Nikon respondents. The ALJ recommended the imposition of a bond of 0% (no bond) during the period of Presidential review.

On September 4, 2018, the parties each filed petitions for review of numerous aspects of the Final ID. On September 12, 2018, the parties filed responses to the respective petitions for review.

On September 19, 2018, Zeiss filed a post-RD statement on the public interest pursuant to Commission Rule 210.50(a)(4). Nikon did not submit a public interest statement. No public interest submissions were filed by the public in response to the post-RD Commission Notice issued on August 20, 2018. *See* Notice of Request for Statements on the Public Interest (Aug. 20, 2018); 83 FR 42938-39 (Aug. 24, 2018).

Having examined the record of this investigation, including the Final ID, the petitions for review, and the responses thereto, the Commission has determined to review the Final ID in part.

With respect to the '916 patent, the Commission has determined to review the Final ID's construction of the limitation "wherein a thickness of the second set of layers is larger than a thickness of the first set of layers to reduce size of the sensor die." Accordingly, the Commission has determined to review the Final ID's findings regarding whether asserted claims 1 and 8 read on the accused products, as well as the Final ID's findings concerning validity and the technical prong of the DI requirement with respect to

those claims.

With respect to the '440 patent, the Commission has determined to review the Final ID's finding that the limitation "photographic expert unit which adjusts image capture parameters" recited in unasserted independent claim 1 is not a means-plus-function claim under 35 U.S.C. § 112 ¶ 6. Accordingly, the Commission has determined to review the Final ID's findings regarding whether asserted claims 6, 35, 37, and 39 read on the accused products, as well as the Final ID's findings concerning validity and the technical prong of the DI requirement with respect to those claims.

With respect to the '454 patent, the Commission has determined to review the Final ID's findings regarding whether asserted claim 22 reads on the accused products, as well as the Final ID's findings concerning validity and the technical prong of the DI requirement with respect to that claim.

With respect to the '128 patent, the Commission has determined to review the Final ID's construction of the limitations "coarse motion vector" and "refined mosaic" recited in asserted claim 1. The Commission has also determined to review the Final ID's finding that claim 1, in particular the limitation "means for generating a refined mosaic," is invalid as indefinite under 35 U.S.C. § 112. The Commission has further determined to review the Final ID's findings regarding whether asserted claim 1 reads on the accused products as well as the Final ID's findings concerning obviousness and the technical prong of the DI requirement with respect to that claim.

The Commission has determined to review the Final ID's finding that Zeiss has satisfied the economic prong of the DI requirement under section 337(a)(3)(B) and (C) with respect to the '440 patent.

The Commission has determined not to review the remaining issues decided in the Final ID. In particular, the Commission has determined not to review the ID's findings that Zeiss failed to show use in the United States of the steps of the asserted claimed methods – *i.e.*, claims 46 and 50 of the '440 patent and claims 12 and 16 of the '128 patent. *See* Final ID at 282, 285. Zeiss has abandoned these method claims by failing to seek Commission review of these findings. Under Commission Rule 210.43(b) "[a]ny issue not raised in a petition for review will be deemed to have been abandoned by the petitioning party and may be disregarded by the Commission...." 19 C.F.R. § 210.43(b). The Commission's determination not to review the ALJ's findings that Zeiss failed to show use of the steps of the asserted claimed methods in the United States results in a determination of no violation based on those claims. The Commission also reviews and strikes the sentence that traverses pages 276-277 in the Final ID, which is the last sentence just prior to heading XII.A.

The parties are requested to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in responses to the following questions:

1. If the Commission were to construe the limitation “photographic expert unit which adjusts image capture parameters” recited in claim 1 of the ’440 patent as a means-plus-function claim under 35 U.S.C. § 112 ¶ 6, please explain whether the patent specification discloses sufficient structure to preclude a finding of indefiniteness under 35 U.S.C. § 112.
2. Please address whether, under Zeiss’s proposed construction, the limitation “refined mosaic” recited in claim 1 of the ’128 patent is invalid under 35 U.S.C. § 112 for indefiniteness.

The parties have been invited to brief only these discrete issues, as enumerated above, with reference to the applicable law and evidentiary record. The parties are not to brief other issues on review, which are adequately presented in the parties’ existing filings.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. 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 *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If 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.

If 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 Presidential Memorandum of July 21, 2005, 70 FR 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 and prescribed by the Secretary of the Treasury. 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 identified in this notice. 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. Such submissions should address the recommended determination by the ALJ on remedy and bonding. Complainant is also requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to state the dates that the patents expire, the HTSUS numbers under which the accused products are imported, and any known importers of the accused products. The written submissions and proposed remedial orders must be filed no later than close of business on **November 26, 2018**. Initial submissions are limited to **30** pages, not including any attachments or exhibits related to discussion of the public interest. Reply submissions must be filed no later than the close of business on **December 3, 2018**. Reply submissions are limited to **15** pages, not including any attachments or exhibits related to discussion of remedy, the public interest, and bonding. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-1059") in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, https://www.usitc.gov/secretary/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel^[1], solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The Commission has also determined to extend the target date for completion of the above-captioned investigation to February 1, 2019.

^[1] All contract personnel will sign appropriate nondisclosure agreements.

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', written in a cursive style.

Lisa R. Barton
Secretary to the Commission

Issued: November 15, 2018