

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN COLOR INTRAORAL SCANNERS
AND RELATED HARDWARE AND
SOFTWARE**

Investigation No. 337-TA-1091

**NOTICE OF A COMMISSION DETERMINATION FINDING NO VIOLATION OF
SECTION 337; TERMINATION 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 affirm, with modified reasoning, the final initial determination's ("ID") finding of no violation of section 337 has occurred.

FOR FURTHER INFORMATION CONTACT: Amanda Pitcher Fisherow, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW, Washington, D.C. 20436, telephone (202) 205-2737. 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 at <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 the underlying investigation on December 20, 2017, based on a complaint filed on behalf of Align Technology, Inc. of San Jose, California ("Align"). 82 FR (Dec. 20, 2017). The complaint alleged violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain color intraoral scanners and related hardware and software by reason of infringement of certain claims of U.S. Patent Nos. 8,363,228 ("the '228 patent"); 8,451,456 ("the '456 patent"); 8,675,207 ("the '207 patent"); 9,101,433 ("the '433 patent"); 9,48,931 ("the '931 patent"); and 6,685,470 ("the '470 patent"). *See id.* The

complaint named 3Shape A/S and 3Shape Inc. as the respondents. On March 15, 2018, the ALJ granted Align's unopposed motion to amend the complaint and notice of investigation to add as an additional respondent in this investigation 3Shape Trios A/S of Copenhagen, Denmark (respondents are collectively referred to as "3Shape"). *See* 83 FR 13781-82 (March 30, 2018), *unreviewed*, Notice (March 27, 2018). The Office of Unfair Import Investigations did not participate in the investigation.

On March 1, 2019, the ALJ issued his final ID finding that no violation of section 337 has occurred. On March 18, 2019, Align filed a petition for review and 3Shape filed a contingent petition for review of the ID. On March 26, 2019, all of the parties filed responses to the respective petitions for review.

On July 18, 2019, the Commission determined to review the final ID in part. Specifically, the Commission determined to review the ID's findings on the following issues: (1) importation; (2) the construction of "processor"; (3) the construction of "confocal imaging techniques"; (4) all findings concerning infringement; (5) all findings concerning invalidity; (6) all findings concerning whether Align's products practice one or more claims of the asserted patents; and (7) all findings concerning whether Align's financial investments and activities relating to Align's products meet the domestic industry requirement. The Commission requested briefing on some of the issues under review, and requested submissions from the parties, government agencies and the public on remedy, bonding, and the public interest. 84 FR 35688 (July 25, 2019). On July 30, 2019, Align and 3Shape filed their written responses to the Commission's request for briefing. On August 6, 2019, Align and 3Shape filed their reply submissions.

The Commission has examined the record of this investigation, including the ALJ's final ID, the petitions for review, and the responses thereto, and filings in response to the Commission's request for briefing. The Commission affirms in part, with modified reasoning as discussed in the accompanying opinion, the ID's finding of no violation of section 337. Specifically, the Commission determines: (1) claim 1 of each of the '228, '456, and '207 patents is infringed; (2) claim 26 of the '228 patent is infringed; (4) claim 15 of the '456 patent is not infringed; (5) claim 12 of the '433 is not infringed; (6) the asserted claims of the '228 and '456 patents are invalid for failing to meet the written description requirement; (7) the '228, '456, and '433 patents are not invalid as anticipated or obvious; (8) the asserted claim of the '207 patent is invalid as obvious; (9) Align's products do not practice the '228, '456, and '207 patents; (10) Align's products practice claim 12 of the '433 patent; (11) the importation requirement is met for 3Shape Trios A/S; (12) to take no position on whether 3Shape A/S and 3Shape Inc. have met the importation requirement; (13) to take no position on whether claim 4 of the '228 patent is infringed; (14) to take no position on secondary considerations for the '228, '456, and '433 patents; and (15) to take no position on whether Align's investments and activities relating to Align's products meet the domestic industry requirement. The Commission also affirms, without modification, the ID's finding of no violation for the '931 and '470 patents. The investigation is terminated.

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 22, 2019