UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	**Investigation No. 337-TA-1112**
CERTAIN RADIO FREQUENCY MICRO-NEEDLE DERMATOLOGICAL TREATMENT DEVICES AND COMPONENTS THEREOF	

NOTICE OF COMMISSION DETERMINATION TO REVIEW AND REMAND AN INITIAL DETERMINATION GRANTING A MOTION FOR A SUMMARY DETERMINATION THAT CERTAIN CLAIMS ARE INVALID

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review and remand an initial determination ("ID") (Order No. 21) issued by the presiding administrative law judge ("ALJ"). The ID granted a motion for a summary determination that certain claims are invalid as indefinite pursuant to 35 U.S.C. 112 ¶ 2 and ¶ 6.

FOR FURTHER INFORMATION CONTACT: Robert Needham, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, D.C. 20436, telephone (202) 708-5468. 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 (*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 May 15, 2018, based on a complaint filed by Syneron Medical Ltd. of Yokneam Illit, Israel; Candela Corporation of Wayland, Massachusetts; and General Hospital Corporation d/b/a Massachusetts General Hospital of Boston, Massachusetts (together, "Complainants"). 83 FR 22515-16. The complaint, as supplemented, alleges 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 radio frequency micro-needle dermatological treatment devices and components thereof that infringe one or more of claims 1, 2, 4, 9-11, 15, 20, and 21 of U.S. Patent No. 9,510,899 ("the '899 patent") and claims 1, 2, 4, 9-12, 17, and 18 of U.S. Patent No. 9,095,357. *Id.* at 22515. The Commission's notice of investigation named numerous respondents, including EndyMed Medical Inc. of New York, New York, and EndyMed Medical Ltd. of Caesarea, Israel (collectively, "EndyMed"). *Id.* at 22516. The Office of Unfair Import Investigations is not participating in this investigation. *Id.*

On September 11, 2018, EndyMed filed a motion for a summary determination that claims 1, 2, 4, 9-11, 15, 20, and 21 of the '899 patent are invalid as indefinite pursuant to 35 U.S.C. 112 ¶ 2 and ¶ 6. Complainants filed a response in opposition to the motion on September 28, 2018, and EndyMed filed a reply in support of the motion on October 15, 2018. Complainants filed a motion for leave to file a sur-reply on November 1, 2018, and filed a motion to supplement its opposition on March 7, 2019. The ALJ granted Complainants' motions for leave to file a sur-reply and leave to supplement their opposition. ID at 1-2.

The Commission subsequently terminated the investigation with respect to claims 2, 9, 20, and 21 of the '899 patent based on Complainants' withdrawal of those allegations. Order No. 13 (Feb. 5, 2019), *not reviewed* Comm'n Notice (Feb. 21, 2019).

On March 26, 2019, the ALJ issued the subject ID, granting EndyMed's motion for summary determination that claims 1, 2, 4, 9-11, 15, 20, and 21 of the '899 patent are invalid pursuant to 35 U.S.C. 112 ¶ 2 and ¶ 6. The ID found that "[e]ven if a person of ordinary skill in the art would have understood 'control module' to refer to a 'sufficiently definite structure,' that structure necessarily would be a prior art 'control module'" that "would not be sufficient structure capable of performing all of the functions claimed in the '899 patent." ID at 10.

On April 3, 2019, Complainants filed a petition for review of the ID. On April 10, 2019, EndyMed filed a response in opposition to the petition.

The Commission has determined to review the subject ID in its entirety. On review, the Commission has determined to vacate the ID's finding of invalidity with respect to claims 2, 9, 20, and 21 because those claims were previously terminated from the investigation. *See* Comm'n Notice (Feb. 21, 2019).

Additionally, the Commission has determined to remand to the ALJ the issue of whether the term "control module" in claims 1, 4, 10, 11, and 15 of the '899 patent is a means-plus-function limitation. A summary determination shall be issued only if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law," 19 CFR 210.18(c), and "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be

drawn in his favor," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Although the ID dismisses Complainants' expert testimony as "conclusory and unsupported," ID at 13, the Commission finds that the expert testimony (including both Complainants' and respondents' expert's testimony) raises a genuine issue of material fact when the facts are viewed in the light most favorable to Complainants. Furthermore, the Commission finds that *Pressure Prods. Med. Supplies, Inc. v. Greatbatch Ltd.*, 599 F.3d 1308, 1317 (Fed. Cir. 2010) does not provide a basis for rejecting Complainants' argument that "control module" connotes structure to persons skilled in the art at the time of filing of the '899 patent application based on the use of the term in prior art references. *See* ID at 14. The ID also considered the claimed functions for all nine claims simultaneously, ID at 15, but the claim construction analysis under 35 U.S.C. 112 ¶ 6 and any invalidity analysis arising therefrom requires that each claim be assessed individually, 35 U.S.C. 282(a). Finally, to the extent that the ID reads *Williamson* to require a prior art "control module" capable of performing all of the claimed functions (*see* ID at 10), the Commission notes that *Williamson* requires only that "the words of the claim are understood by persons of ordinary skill in the art as the name for structure." *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1349 (Fed. Cir. 2015) (*en banc*). Accordingly, the Commission remands to the ALJ the issue of whether the "control module" in claims 1, 4, 10, 11, and 15 of the '899 patent is a means-plus-function limitation for relevant factual findings on the extrinsic evidence and the consideration of each claim individually under the controlling *Williamson* standard.

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.

Lisa R. Barton
Secretary to the Commission

Issued: April 25, 2019