



7020-02

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1073]

Certain Thermoplastic-Encapsulated Electric Motors, Components Thereof, and Products and Vehicles Containing Same II; Notice of Commission Determination to Review a Final Initial Determination in Its Entirety; Schedule for Filing Written Submissions on the Issues Under Review and on Remedy, the Public Interest, and Bonding; Extension of the Target Date

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 its entirety the presiding administrative law judge's final initial determination, finding no violation of section 337 of the Tariff Act of 1930, as amended, with respect to U.S. Patent Nos. 7,683,509 and 7,928,348. The Commission has also determined to extend the target date for completion of the above-captioned investigation until April 29, 2019. The Commission requests certain briefing from the parties on certain issues under review, as indicated in this notice. The Commission also requests briefing from the parties and interested persons on the issues of remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Lucy Grace D. Noyola, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW, Washington, DC 20436, telephone 202-205-3438. 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, DC 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 under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on October 11, 2017, based on a complaint filed on September 5, 2017, by Intellectual Ventures II LLC of Bellevue, Washington ("IV"). 82 FR 47250 (Oct. 11, 2017). The complaint alleges a violation of section 337 by reason of infringement of certain claims of U.S. Patent Nos. 7,683,509 ("the '509 patent"); 7,928,348 ("the '348 patent"); 7,154,200 ("the '200 patent"); 7,067,944 ("the '944 patent"); and 7,067,952 ("the '952 patent"). The notice of investigation names as respondents Aisin Seiki Co., Ltd. of Aichi, Japan, Aisin Holdings of America, Inc. of Seymour, Indiana, Aisin Technical Center of America, Inc. of Northville, Michigan, and Aisin World Corporation of America of Northville, Michigan (collectively, "Aisin" or "Aisin Seiki"); Bayerische Motoren Werke AG of Munich, Germany, BMW of North America, LLC of Woodcliff Lake, New Jersey, and BMW Manufacturing Co., LLC of Greer, South Carolina (collectively, "BMW"); Denso Corporation of Aichi, Japan and Denso International America, Inc. of Southfield, Michigan ("collectively, DENSO"); Honda Motor Co., Ltd. of Tokyo, Japan, Honda North America, Inc., of Torrance, California, American Honda Motor Co., Inc. of Torrance, California, Honda of America Mfg., Inc. of Marysville, Ohio, Honda Manufacturing of Alabama, LLC of Lincoln, Alabama, and Honda R&D Americas, Inc. of Torrance, California (collectively, "Honda"); Mitsuba Corporation of Gunma, Japan and American Mitsuba Corporation of Mount Pleasant,

Michigan (collectively, “Mitsuba”); Nidec Corporation of Kyoto, Japan and Nidec Automotive Motor Americas, LLC of Auburn Hills, Michigan (collectively, “Nidec”); and Toyota Motor Corporation of Aichi Prefecture, Japan, Toyota Motor North America, Inc. of New York, New York, Toyota Motor Sales, U.S.A., Inc. of Torrance, California, Toyota Motor Engineering & Manufacturing North America, Inc. of Erlanger, Kentucky, Toyota Motor Manufacturing, Indiana, Inc. of Princeton, Indiana, and Toyota Motor Manufacturing, Kentucky, Inc. of Georgetown, Kentucky (collectively, “Toyota”). The Office of Unfair Import Investigations (“OUII”) was also named a party in this investigation.

The Commission previously terminated the investigation in part with respect to respondents BMW, DENSO, Mitsuba, and Nidec, as well as the ’200, ’944, and ’952 patents. Notice (Apr. 18, 2018) (determining not to review Order No. 22 (Mar. 16, 2018)); Notice (May 4, 2018) (determining not to review Order No. 29 (Apr. 10, 2018)); Notice (May 4, 2018) (determining not to review Order No. 31 (Apr. 16, 2018)); Notice (May 11, 2018) (determining not to review Order No. 33 (Apr. 23, 2018)); Notice (June 19, 2018) (determining not to review Order No. 39 (May 21, 2018)); Notice (Aug. 15, 2018) (determining not to review Order No. 46 (July 19, 2018)); Notice (Aug. 15, 2018) (determining not to review Order No. 47 (July 24, 2018)); Notice (Aug. 27, 2018) (determining not to review Order No. 48 (Aug. 13, 2018)). Thus, the remaining respondents in this investigation are Aisen, Honda, and Toyota (collectively, “Respondents”), and the remaining asserted patents are the ’509 and ’348 patents (collectively, the “asserted patents”).

On November 13, 2018, the presiding administrative law judge (“ALJ”) issued a final initial determination (“ID”), finding no violation of section 337 with respect to the ’509 and ’348 patents. Specifically, the ID found that the accused products infringe claims 14 and 15 of the

'509 patent and do not infringe claims 24-27 of the '348 patent. With respect to both patents, the ID found that IV has not satisfied the technical and economic prongs of the domestic industry requirement nor have Respondents established that any asserted claim is invalid for obviousness. On November 27, 2018, the ALJ issued a Recommended Determination ("RD") on remedy, the public interest, and bonding, recommending, should the Commission find a violation: (1) the issuance of a limited exclusion order directed to certain infringing thermoplastic-encapsulated electric motors, components thereof, and products and vehicles containing same; (2) the issuance of cease and desist orders against Aisin and Toyota; and (3) imposition of a bond of zero percent for infringing products that are imported during the period of Presidential review.

Also, on November 27, 2018, IV filed a petition for review, and Respondents filed a contingent petition for review, each challenging various findings in the final ID. On December 6, 2018, IV, Respondents, and OUII filed responses to the petitions for review.

On December 14, 2018, Respondents filed a notice that, on December 12, 2018, the Patent Trial and Appeal Board of the U.S. Patent and Trademark Office issued four final written decisions finding that every claim asserted against Respondents in this investigation is unpatentable on invalidity grounds.

On January 30, 2019, the Commission received comments from the public in response to the Commission notice issued on December 4, 2018. 83 FR 62603 (Dec. 4, 2018). On February 1, 2019, the Commission received post-RD public interest comments from IV and Respondents pursuant to Commission Rule 210.50(a)(4).

Having examined the record of this investigation, including the final ID and the parties' submissions, the Commission has determined to review the final ID in its entirety.

The Commission has also determined to extend the target date for completion of the

investigation until April 29, 2019.

In connection with its review, the Commission requests responses to the following questions.

The parties are requested to brief their positions with reference to the applicable law and the existing evidentiary record.

1. With respect to the “non-linear heat transfer fluid pathway” limitation required by the asserted claims of the ’509 patent, discuss whether the specification of the ’509 patent defines the term “non-linear” and whether the term should be construed accordingly. If so, explain the record evidence cited by the parties in briefing to the Commission regarding the process by which the accused element is formed and discuss whether the accused element satisfies the “non-linear” term.
2. With respect to the “monolithic body of injection molded thermoplastic material substantially encapsulating the at least one conductor” limitation required by the asserted claims of the ’348 patent, describe the process by which the accused element encapsulates the conductor and discuss whether that process results in the accused element substantially encapsulating the at least one conductor.
3. With respect to the alleged “significant and unusual” circumstances, discuss whether the record indicates that the KickStart pump is finalized, whether the record supports Encap’s projected “explosive growth,” and whether there are any other “significant and unusual” circumstances in the record.
4. In the event the Commission determines to issue a form of remedy, discuss an appropriate exemption period for the repair and replacement of infringing products that are imported before the issuance of a remedial order.

5. In the event the Commission determines to issue a form of remedy, discuss an appropriate transition period for the continued importation of infringing products after the issuance date of a remedial order to allow Respondents to implement and introduce non-infringing alternatives.

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 a cease and desist order that could result in the respondent 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 (Dec. 1994), Comm'n 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 order 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 all of 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 also requested to state the date that the asserted patents expire and the HTSUS numbers under which the accused products are imported, and provide identification information for all known importers of the subject articles. Initial written submissions and proposed remedial orders must be filed no later than close of business on **March 1, 2019**. Reply submissions must be filed no later than the close of business on **March 8, 2019**. 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 CFR 210.4(f)). Submissions should refer to the investigation number (Inv. No. 337-TA-1073) 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 at (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 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.

Issued: February 19, 2019.

Katherine Hiner,
Supervisory Attorney.

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

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