



## INTERNATIONAL TRADE COMMISSION

### Investigation No. 337-TA-963

#### Certain Activity Tracking Devices, Systems, and Components Thereof

#### Commission Determination Not to Review a Final Initial 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 not to review the final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) on August 23, 2016, finding no violation of section 337 of the Tariff Act of 1930, as amended, in connection with alleged misappropriation of certain trade secrets.

**FOR FURTHER INFORMATION:** Panyin A. Hughes, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-3042. 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 (<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 Inv. No. 337-TA-963 on August 21, 2015, based on a complaint filed by AliphCom d/b/a Jawbone of San Francisco, California and BodyMedia, Inc. of Pittsburgh, Pennsylvania (collectively, “Jawbone”). 80 *Fed. Reg.* 50870-71 (Aug. 21, 2015). The complaint 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 activity tracking devices, systems, and components thereof by reason of infringement of certain claims of U.S. Patent No. 8,529,811 (“the ’811 patent”); U.S. Patent No. 8,398,546 (“the ’546 patent”); U.S. Patent No. 8,793,522 (“the ’522 patent”); U.S. Patent No. 8,446,275 (“the ’275 patent”); U.S. Patent No. 8,961,413 (“the ’413 patent”); and U.S. Patent No. 8,073,707 (“the ’707 patent”). The complaint further alleges misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States. The notice of investigation named the following respondents: Fitbit, Inc. of San Francisco, California (“Fitbit”); Flextronics International Ltd. of San Jose, California; and Flextronics Sales & Marketing (A–P) Ltd. of Port Louis, Mauritius (collectively, “Flextronics”); Fitbit and Flextronics are collectively referred to as “Respondents.” The Office of Unfair Import Investigations (“OUII”) is a party to the investigation.

On February 22, 2016, the ALJ granted Jawbone’s unopposed motion to terminate the investigation as to the ’522 patent; claims 8-10, 13, 14, and 18 of the ’275 patent; claim 6 of the ’811 patent; and claims 5 and 8 of the ’413 patent. *See* Order No. 32. The Commission determined not to review the ID. *See* Comm’n Notice of Non-review (Mar. 21, 2016).

On March 3, 2016, the ALJ granted Fitbit’s motion for summary determination that the asserted claims of the ’546 and ’275 patents are directed to ineligible subject matter under 35

U.S.C. § 101. *See* Order No. 40. The Commission determined to review the ID, and on review to affirm the ID with certain modifications. *See* Comm'n Notice affirming the ID with modification (Apr. 4, 2016).

On March 11, 2016, the ALJ granted Jawbone's unopposed motion to terminate the investigation as to the remaining claims of the '811 patent. *See* Order No. 42. The Commission determined not to review the ID. *See* Comm'n Notice of Non-review (Apr. 4, 2016).

On April 27, 2016, the ALJ granted Fitbit's motion for summary determination that the asserted claims of the '413 and '707 patents (the two patents remaining in the investigation), are directed to ineligible subject matter under 35 U.S.C. 101. *See* Order No. 54. The Commission determined not to review the ID. *See* Comm'n Notice of Non-review (Jun. 2, 2016). Thus, all the patent infringement allegations were terminated from the investigation. Only the allegations of trade secret misappropriation remain at issue in the investigation.

The ALJ held an evidentiary hearing from May 9, 2016 through May 17, 2016, and thereafter received post-hearing briefing from the parties. During discovery, Jawbone identified 154 trade secrets allegedly misappropriated by Respondents (Trade Secret Nos. 1-144, including Nos. 1.A-1.G, 92-A, 139-A, and 141-A.). ID at 3. Yet at the hearing, Jawbone presented evidence and argument on only 38 of the alleged trade secrets (Trade Secret Nos. 1, 1A-G, 2-4, 12-14, 17, 18, 33, 52, 53, 55, 58, 91, 92, 92-A, 93-102, 128, 129, 141, 141-A). Jawbone's post-hearing briefs addressed only five of the alleged trade secrets (Trade Secret Nos. 92, 92-A, 98, 128, and 129). Specifically, Jawbone argued that Fitbit misappropriated alleged Trade Secret Nos. 98 and 128, and Flextronics misappropriated alleged Trade Secret Nos. 92, 92-A, and 129. ID at 3-4.

On June 15, 2016, Jawbone moved to terminate the investigation as to all of the trade secrets except for the five alleged trade secrets addressed in its post-hearing briefing. ID at 4 (citing Mot. Docket No. 963-072). Respondents opposed the motion, arguing that they are “entitled to a determination that Jawbone failed to present sufficient evidence showing *actual* misappropriation as to all of the trade secrets that Jawbone now seeks to abandon...” *See id.* at 23 (quoting Mot. 072 Rsp. at 8)(emphasis in original). The ALJ denied Jawbone’s motion as outside the scope of Commission Rule 210.21(a). She also denied Fitbit’s request for a determination on whether the withdrawn trade secrets were misappropriated. *Id.* at 20, 23-24. The ALJ stated that “[p]arties are free to waive arguments” and that Fitbit failed to provide “any support for the proposition that arguments that have been waived and abandoned should be considered on their merits.” *Id.* The ALJ also granted Jawbone’s June 30, 2016 motion to strike Section V.A. of Fitbit’s post-hearing reply brief for improperly raising a new argument based on news articles that are not in the record of the investigation. *Id.* at 25. No party petitioned for review of the ALJ’s determinations as to these motions.

On August 23, 2016, the ALJ issued her final ID finding no violation of section 337 by Respondents in connection with the alleged trade secrets misappropriation. Specifically, the ALJ found that the Commission has subject matter jurisdiction, *in rem* jurisdiction over the accused products, and *in personam* jurisdiction over Respondents. ID at 15-16. The ALJ further found that Jawbone satisfied the importation requirement of section 337, noting that Respondents have stipulated that the accused products have been imported into the United States. *Id.* at 16. The ALJ, however, found that Jawbone failed to show that the alleged trade secrets constitute actual trade secrets, and that Respondents did not misappropriate any of Jawbone’s alleged trade secrets. ID at 28, 38, 45-46. Finally, the ALJ found that Jawbone failed to prove a threat of

substantial injury to a domestic industry as required by 19 U.S.C. 1337(a)(1)(A)(i). *See ID* at 79-80. In that regard, the ALJ referenced her finding of no misappropriation of trade secrets and added that “even if Jawbone had proven misappropriation of the five asserted trade secrets, there is no way to decide on this record what specific injury is attributable to these trade secrets, and whether the injury is substantial.” *Id.* at 80.

On September 6, 2016, Jawbone filed a petition for review of the ID, challenging only the ALJ’s findings as to alleged Trade Secret Nos. 92, 92-A, and 98. On September 14, 2016, Respondents and the Commission investigative attorney filed responses to the petition for review. Having examined the record of this investigation, including the ALJ’s final ID, the petition for review, and the responses thereto, the Commission has determined not to review the final ID. This investigation is therefore 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.

Lisa R. Barton

Secretary to the Commission

Issued: October 20, 2016

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