



7020-02

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-945]

**Certain Network Devices, Related Software and Components Thereof (II) (Modification 2);
Grant of Joint Motion to Terminate the Modification Proceeding Based on a
Settlement Agreement; Termination of the Modification Proceeding in its Entirety**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined grant a joint motion of complainant Cisco Systems, Inc. of San Jose, California (“Cisco”) and respondent Arista Networks, Inc. of Santa Clara, California (“Arista”) to terminate the above-captioned modification proceeding concerning a limited exclusion order and a cease and desist order issued against Arista in Inv. No. 337-TA-945. The modification proceeding is terminated in its entirety.

FOR FURTHER INFORMATION CONTACT: Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, DC 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, S.W., Washington, DC 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 this investigation on January 27, 2015, based on a Complaint filed by Cisco. 80 FR 4313-14 (Jan. 27, 2015). The Complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), by reason of infringement of certain claims of U.S. Patent Nos. 7,023,853 (“the ’853 patent”); 6,377,577 (“the ’577 patent”); 7,460,492 (“the ’492 patent”); 7,061,875 (“the ’875 patent”); 7,224,668 (“the ’668 patent”); and 8,051,211 (“the ’211 patent”). The Complaint further alleges the existence of a domestic industry. The Commission’s Notice of Investigation named Arista as the respondent. The Office of Unfair Import Investigations (“OUII”) was also named as a party to the investigation. The Commission terminated the investigation in part as to certain claims of the asserted patents. Notice (Nov. 18, 2015) (see Order No. 38 (Oct. 27, 2015)); Notice (Dec. 1, 2015) (see Order No. 47 (Nov. 9, 2015)).

On June 11, 2016, the Patent Trial and Appeal Board (“PTAB”) of the U.S. Patent and Trademark Office instituted separate *inter partes* review (“IPR”) proceedings concerning the ’577 and ’668 patents. *Arista Networks, Inc. v. Cisco Systems, Inc.*, Case IPR2016-00303 (regarding the ’577 patent); *Arista Networks, Inc. v. Cisco Systems, Inc.*, Case IPR2016-00309 (regarding the ’668 patent).

On May 4, 2017, the Commission found a violation of section 337 with respect to certain of the asserted claims of the ’577 and ’668 patents. Notice (May 4, 2017); 82 FR 21827-29 (May 10, 2017); *see also* Notice of Correction (May 30, 2017); 82 FR 25811 (June 5, 2017). The Commission issued a limited exclusion order (“LEO”) and a cease and desist order (“CDO”) against Arista. *Id.* The Commission did not find a violation with respect to the ’853, ’875, ’492, and ’211 patents. *Id.*

On May 25, 2017, the PTAB issued its final written decision finding certain claims of

the '577 patent unpatentable based on prior art not presented in the Commission investigation. On June 1, 2017, the PTAB issued its final written decision finding certain claims of the '668 patent unpatentable based on certain combinations of prior art not presented in the Commission investigation. Both decisions affected the claims upon which the Commission found a violation of section 337.

On June 30, 2017, Cisco filed a notice of appeal with the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), seeking review of the Commission's finding of no violation as to the '853, '875, '492, and '211 patents. *Cisco Sys., Inc. v. Int'l Trade Comm'n*, Appeal No. 17-2289. On July 21, 2017, Arista filed a notice of appeal with the Federal Circuit, seeking review of the Commission's finding of violation as to the '577 and '668 patents. *Arista Networks, Inc. v. Int'l Trade Comm'n*, Appeal No. 17-2336. On August 3, 2017, the Federal Circuit consolidated the Arista and Cisco appeals. *Cisco Sys., Inc. v. Int'l Trade Comm'n*, Appeal No. 17-2289, Dkt. No. 20.

On August 25, 2017, Arista filed a motion with the Federal Circuit seeking to stay the Commission's remedial orders pending resolution of the appeal on the merits. On September 22, 2017, the Federal Circuit denied this request "subject to the condition that the product redesign on which Cisco relies to deny irreparable harm must be permitted to enter the country, without being blocked by the Commission order under review in this case, unless and until Commission proceedings are initiated and completed to produce an enforceable determination that such a redesign is barred by the order here under review or by a new or amended order." *Cisco Sys, Inc. v. ITC; Arista Networks, Inc. v. ITC*, Appeal Nos. 2017-2289, -2351, Order at 3 (Fed. Cir. Sept. 22, 2017).

On September 27, 2017, Cisco petitioned for a modification proceeding to determine

whether Arista's redesigned switches infringe the patent claims that are the subject of the LEO and CDO issued in this investigation and for modification of the remedial orders to specify the status of these redesigned products.

On November 1, 2017, the Commission instituted the modification proceeding. 82 FR 50678 (Nov. 1, 2017). On November 7, 2018, the Commission issued a notice clarifying that OUII is not named as a party in the modification proceeding. 82 FR 52318 (Nov. 13, 2017).

On February 14, 2018, the Federal Circuit summarily affirmed the PTAB's decision finding the claims of the '668 patent unpatentable. *Cisco Systems, Inc. v. Arista Networks, Inc.*, Appeal No. 17-2384, Order (Feb. 14, 2018). The Court issued the mandate on March 23, 2018. *Id.*, Dkt. No. 54.

On March 23, 2018, the ALJ issued a recommended determination in the modification proceeding ("MRD"), finding that Arista's redesigned products infringe the relevant claims of the '668 patent but do not infringe the relevant claims of the '577 patent. MRD (Mar. 23, 2018). Also on March 23, 2018, the ALJ issued an order denying Arista's motion to stay the modification proceedings or to stay the remedial orders with respect to the '668 patent. Order No. 20 (Mar. 23, 2018).

On April 5, 2018, the Commission determined to modify the remedial orders to suspend enforcement of those orders with respect to the '668 patent. Notice (Apr. 5, 2018); Comm'n Order (Apr. 5, 2018).

On June 26, 2018, the Commission accepted the ALJ's recommended determination finding no infringement with respect to the '577 patent and determined to modify the remedial orders to exempt Arista's redesigned products that were the subject of the modification proceeding. The Commission also determined to suspend the modification proceeding as to

the '668 patent. The '577 patent expired on June 30, 2018.

On August 27, 2018, the Federal Circuit granted a motion of the parties to voluntarily dismiss the consolidated appeal from the Commission's final determination on violation. *Cisco Sys., Inc.*, Appeal No. 17-2289, Dkt. No. 121 (Aug. 27, 2018).

On August 27, 2018, Cisco and Arista filed a joint motion to terminate the modification proceeding in its entirety pursuant to Commission Rule 210.21(b)(1) (19 CFR 210.21(b)(1)) based on a settlement agreement between the parties. The motion indicates that the Agreement fully resolves the disputed issues in the modification proceeding, that there are no other agreements, written or oral, express or implied, between them concerning the subject matter of this proceeding, and that the motion includes a public version of this Motion along with an accompanying public version of the Agreement. The motion also contends that termination of the modification proceeding will not adversely affect the public interest.

The Commission has determined to grant the joint motion and terminate the modification proceeding in its entirety. We note that only the '668 patent remains in the modification proceeding.

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: September 14, 2018.

Lisa Barton,

Secretary to the Commission.

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