



7020-02

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1053]

Certain Two-Way Radio Equipment and Systems, Related Software and Components Thereof; Commission Decision to Affirm-In-Part, Modify-In-Part, Reverse-In-Part, and Strike Certain Portions of a Final Initial Determination Finding a Violation of Section 337; Issuance of Limited Exclusion Order and Cease and Desist Orders; and 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-in-part, modify-in-part, reverse-in-part, and strike certain portions of a final initial determination (“ID”) of the presiding administrative law judge (“ALJ”). Accordingly, the Commission has determined that a violation of section 337 has occurred in the above-captioned investigation, and has issued a limited exclusion order directed against infringing two-way radio products and cease and desist orders directed against two domestic respondents found in violation. The Commission has terminated the investigation.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, D.C. 20436, telephone (202) 708-2310. 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 this investigation on May 3, 2017, based on a complaint filed on behalf of Motorola Solutions, Inc. ("Motorola") of Chicago, Illinois. 82 *Fed. Reg.* 20635-36. The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, by reason of infringement of certain claims of U.S. Patent Nos.: 8,116,284 ("the '284 patent"); 7,369,869 ("the '869 patent"); 7,729,701 ("the '701 patent"); 8,279,991 ("the '991 patent"); 9,099,972 ("the '972 patent"); 8,032,169 ("the '169 patent"); and 6,591,111 ("the '111 patent"). The Commission's Notice of Investigation named as respondents Hytera Communications Corp. Ltd. of Shenzhen, China; Hytera America, Inc. ("Hytera America") of Miramar, Florida; and Hytera Communications America (West), Inc. ("Hytera Communications America") of Irvine, California (collectively, "Hytera"). The Office of Unfair Import Investigations is not participating in the investigation. *Id.*

On September 18, 2017, the Commission issued notice of its determination not to review an ID (Order No. 10) terminating the investigation as to: (1) claims 2, 5, 10, and 16 of the '284 patent; (2) claims 2-3, 8, 12, 14-15, 20, 22-24, and 30 of the '169 patent; (3) claims 5, 8, 11-14, 18, and 22 of the '869 patent; (4) claims 3, 5, 8-10, 15, and 17-18 of the '701 patent; (5) claim 3 of the '972 patent; and (6) claims 3-5, 8-10, and 14 of the '111 patent. On October 17, 2017, the Commission issued notice of its determination not to review an ID (Order No. 16) terminating the investigation as to claim 10 of the '869 patent. On November 14, 2017, the Commission issued notice of its determination not to review an ID (Order No. 19) terminating the investigation as to: (1) claims 1, 4, 12, and 18 of the '284 patent; (2) claims 4, 13, 16, and 25 of the '169 patent; (3)

claims 3-4, 9, 19-20, and 23-24 of the '869 patent; (4) claims 2, 4, and 14 of the '701 patent; (5) claims 4 and 8 of the '972 patent; (6) claims 6 and 12 of the '111 patent; and (7) claim 19 of the '991 patent for the purposes of satisfying the technical prong of the domestic industry requirement.

On December 4, 2017, the Commission issued notice of its determination not to review an ID (Order No. 21) terminating the investigation as to claims 5 and 18 of the '169 patent. On January 3, 2018, the Commission issued notice of its determination not to review an ID (Order No. 23) terminating the investigation as to: (1) the '111 and '169 patents; (2) claims 2 and 7 of the '869 patent; and (3) claims 7-8 and 19 of the '284 patent. On the same date, the Commission issued notice of its determination not to review an ID (Order No. 24) terminating the investigation as to claim 1 of the '701 patent. On February 6, 2018, the Commission issued notice of its determination not to review an ID (Order No. 31) terminating the investigation as to the following patent claims: (1) claim 13 of the '701 patent; (2) claim 6 of the '284 patent; and (3) claim 1 of the '972 patent. On February 26, 2018, the Commission issued notice of its determination not to review an ID (Order No. 40) terminating the investigation as to the '972 patent.

On January 26, 2018, the ALJ issued Order No. 38 which granted Motorola's motion *in limine* to preclude Hytera's licensing defense. On May 18, 2018, the ALJ issued Order No. 47, which granted-in-part Motorola's motion to strike certain portions of Hytera's expert testimony at the evidentiary hearing. On July 3, 2018, the ALJ issued her final ID and recommended determination ("RD") on remedy and bonding in one document. The ID finds that Hytera's accused products infringe claims 1, 6, 17, and 21 of the '869 patent; claims 1 and 11 of the '701 patent; and claims 7-8 of the '991 patent. The ID also finds that Hytera's accused legacy products literally infringe claims 9 and 13-15 of the '284 patent and that Hytera's accused redesigned

products infringe these claims under the doctrine of equivalents. The ID also finds that Hytera induced infringement of and contributorily infringed all of the claims of the asserted patents. As part of the ID's finding of indirect infringement, the ID applied an adverse inference against Hytera for certain of its witnesses' invocation of their Fifth Amendment right against self-incrimination. The ID also finds that Motorola satisfies the domestic industry requirement with respect to the '869, '701, and '991 patents, but that its domestic products do not satisfy the technical prong of the domestic industry requirement with respect to the '284 patent. Accordingly, the ID finds a violation of section 337 with respect to the '869, '701, and '991 patents. The RD recommended the issuance of limited exclusion orders directed against Hytera's infringing products and cease and desist orders directed against two domestic Hytera respondents.

On July 17, 2018, Motorola and Hytera petitioned for review of the final ID. Hytera's petition for review included a petition for review of Order Nos. 38 and 47. On July 25, 2018, Motorola and Hytera each filed a response in opposition to the other party's petition for review. On August 6 and 7, 2018, respectively, Hytera and Motorola filed statements on the public interest. On August 10, 2018, the Commission received statements on the public interest from interested non-parties.

On September 4, 2018, the Commission issued notice of its determination to review the following: (1) Order No. 38's finding that Hytera's licensing defense is precluded; (2) Order No. 47's finding that certain expert testimony from Hytera at the evidentiary hearing is stricken; (3) the ID's finding that Hytera's accused redesigned products infringe claims 9 and 13-15 of the '284 patent under the doctrine of equivalents; (4) the ID's application of an adverse inference against

Hytera as part of the finding of indirect infringement; and (5) the ID's finding that insufficient record evidence exists to make a conclusive determination as to whether any redesigned products infringe the '701 patent and ID's lack of an express finding on this issue with respect to the '869 or '991 patent. The Commission determined not to review the remainder of the final ID. The determinations made in the final ID that were not reviewed became final determinations of the Commission by operation of rule. *See* 19 C.F.R. § 210.43(h)(2). The Commission also (1) requested the parties to respond to certain questions concerning the issues under review; and (2) requested written submissions on the issues of remedy, the public interest, and bonding from the parties, interested government agencies, and interested non-parties, including requesting the parties to respond to certain questions concerning the public interest. 83 *Fed. Reg.* 45679-81 (Sept. 10, 2018).

On September 18 and 25, 2018, respectively, complainant and respondents each filed a brief and a reply brief on all issues for which the Commission requested written submissions. The Commission also received written submissions on the public interest from interested non-parties on September 18, 2018.

Having reviewed the record in this investigation, including the final ID and the parties' written submissions, the Commission has determined to affirm-in-part, reverse-in-part, modify-in-part, and strike certain portions of the final ID's findings under review. Specifically, the Commission has: (1) reversed the ID's finding that Hytera's accused redesigned products infringe claims 9 and 13-15 of the '284 patent under the doctrine of equivalents; (2) struck the first and second sentences of the fourth paragraph on page 8 in Order No. 38, and struck the third sentence of this paragraph "There is no analysis" and substituted "There is no analysis in Dr. Akl's

Report,” and struck the second sentence of the first full paragraph on page 9 of Order No. 38; (3) affirmed Order No. 47 and supplemented and clarified its reasoning; (4) took no position on the ID’s drawing of an adverse inference against Hytera as part of its finding of indirect infringement; and (5) found that Hytera’s redesigned products do not infringe the ’701, ’869, or ’991 patents. Accordingly, the Commission has found that there is a violation of section 337 with respect to the ’991, ’869, and ’701 patents.

Having found a violation of section 337 as to these patents, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that the appropriate form of relief is (1) a limited exclusion order prohibiting the unlicensed entry of two-way radio equipment and systems, related software and components thereof that infringe one or more of claims 1, 6, 17, and 21 of the ’869 patent; claims 1 and 11 of the ’701 patent; and claims 7-8 of the ’991 patent, which are manufactured abroad by or on behalf of, or are imported by or on behalf of, Hytera, or any of its affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns; and (2) cease and desist orders prohibiting Hytera America or Hytera Communications America from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for two-way radio equipment and systems, related software and components thereof that infringe one or more of claims 1, 6, 17, and 21 of the ’869 patent; claims 1 and 11 of the ’701 patent; and claims 7-8 of the ’991 patent.

The Commission further determined that the public interest factors enumerated in section 337(d)(1) and (f)(1) (19 U.S.C. §§ 1337(d)(1), (f)(1)) do not preclude issuance of the limited

exclusion order or cease and desist orders. Finally, the Commission determined that a bond of 44 percent of the entered value of the covered products is required to permit temporary importation during the period of Presidential review (19 U.S.C. § 1337(j)). The Commission has also issued an opinion explaining the basis for the Commission's action. The Commission's order and opinion were delivered to the President and to the United States Trade Representative on the day of their issuance. 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.

Issued: November 16, 2018.

Lisa Barton,
Secretary to the Commission.

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