

**UNITED STATES INTERNATIONAL TRADE COMMISSION**  
**Washington, D.C. 20436**

**In the Matter of**

**CERTAIN FLASH MEMORY AND  
PRODUCTS CONTAINING SAME**

**Inv. No. 337-TA-685**

**NOTICE OF COMMISSION DECISION TO REVIEW IN PART A FINAL  
DETERMINATION FINDING A VIOLATION OF SECTION 337;  
REQUEST FOR WRITTEN SUBMISSIONS**

**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 part the presiding administrative law judge's ("ALJ") final initial determination ("ID") issued on February 28, 2011, finding a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 in the above-captioned investigation.

**FOR FURTHER INFORMATION CONTACT:** Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 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, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <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 Inv. No. 337-TA-685 on September 9, 2009, based on a complaint filed by Samsung Electronics Co. ("Samsung") of Suwon City, South Korea on August 21, 2009. 74 *Fed. Reg.* 45469 (Sept. 2, 2009). The complaint, as amended, alleged violations of Section 337 of the Tariff Act of 1930 (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 flash memory and products containing same by reason of infringement of certain claims of U.S. Patent Nos. 6,930,050 ("the '050 patent") and 5,740,065 ("the '065 patent"). The Commission's notice of investigation named numerous respondents, including Spansion, Inc. and Spansion, LLC of Sunnyvale, California (collectively, "Spansion") and D-Link Corporation of Taipei City, Taiwan and D-Link Systems, Inc. of Fountain View, California (collectively "D-Link"). Respondents Spansion and D-Link are herein referred to collectively as "Respondents."

On February 28, 2011, the ALJ issued his final ID, finding a violation of Section 337. The ID included the ALJ's recommended determination ("RD") on remedy and bonding. In his ID, the ALJ found that asserted claims 8 and 12 of the '065 patent are infringed. The ALJ also found that claims 1, 8, and 12 of the '065 patent are not invalid under 35 U.S.C. § 102 for anticipation. The ALJ also found that the asserted claims of the '065 patent are not invalid for failing to satisfy the written description requirement of 35 U.S.C. § 112 ¶ 1. The ALJ further found that the asserted claims of the '065 patent are not invalid as indefinite under 35 U.S.C. § 112 ¶ 2. The ALJ also found that there is a domestic industry with respect to claim 1 of the '065 patent as required by 19 U.S.C. § 1337(a)(2) and (3). In his RD, the ALJ recommended that the appropriate remedy is a limited exclusion order barring entry of infringing flash memory devices or products containing same and that it would also be appropriate to issue cease and desist orders against both Spansion and D-Link. The ALJ also recommended that Respondents be required to post a bond equal to 2.4 percent of the entered value of any accused product that they seek to import during the period of Presidential review.

On March 14, 2011, Respondents filed a petition seeking review of the ALJ's determination concerning the ALJ's findings on claim construction, infringement, invalidity, and domestic industry. Also on March 14, 2011, the Commission investigative attorney ("IA") filed a petition seeking review of the ALJ's determination concerning the ALJ's findings on claim construction, infringement, validity, and the domestic industry. On March 22, 2011, Samsung filed an opposition to Respondents' and the IA's petitions for review. Also on March 22, 2011, the IA filed a response to Respondents' petition for review on the issue of invalidity under 35 U.S.C. § 102 for anticipation. On March 25, 2011, the IA filed an unopposed motion for leave to file a public version of its petition for review out of time. The Commission hereby determines to grant the motion.

Having examined the record of this investigation, including the ALJ's final ID, the petitions for review, and the responses thereto, the Commission has determined to review the final ID in part. Specifically, the Commission has determined to review the ID's construction of the limitation "extracting an optimal working condition by accumulatively averaging working conditions of lots previously processed" of claim 8 of the '065 patent. In particular, the Commission has determined to review the ID's construction of "extracting an optimal working condition by accumulatively averaging" as not being limited to Equation (1) of the '065 patent. The Commission has also determined to review the ID's construction of the "extracting" limitation of claim 8 as including the phrase "suitable lots." The Commission has further determined to review the ID's construction of the claim limitation "accumulatively averaging working conditions of lots previously processed" of claim 8 of the '065 patent. In particular, the Commission has determined to review the ID's construction of the claim limitations "accumulatively averaging" and "working conditions."

The Commission has also determined to review the ID's finding that Spansion's accused run-to-run alignment and exposure controllers infringe claims 8 and 12 of the '065 patent. The Commission has further determined to review the ID's finding that Japanese Unexamined Patent Application Publication H5-47893, entitled "Adjustment Method for Semiconductor

Manufacturing Apparatus” does not anticipate claim 8 of the ‘065 patent. The Commission has also determined to review the ID’s finding that claim 8 is not invalid for failing to satisfy the written description requirement. The Commission has further determined to review the ID’s finding that claims 1, 8, and 12 are not invalid as indefinite. The Commission has also determined to review the ID’s finding that Samsung’s Exposure Parameter Optimization System practices claim 1 of the ‘065 patent. The Commission has determined not to review the remaining issues decided in the ID.

The parties are requested to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in responses to the following questions:

1. Please address whether it is appropriate to apply a plain, ordinary meaning analysis in construing the claim term “accumulatively averaging” even though this term is admittedly a “coined term.” In discussing this issue, please address the following questions:
  - a. If an ordinary meaning analysis of “accumulatively averaging” is appropriate, does the experts’ testimony concerning the understanding of one of ordinary skill in the art in any way conflict with the meaning of the claim language as informed by the intrinsic evidence?
  - b. If an ordinary meaning analysis is appropriate, what is the definition of the word “accumulatively” and how does the meaning of the word “accumulatively” affect the correct construction of “accumulatively averaging?”
  - c. If an ordinary meaning analysis is appropriate, how does the definition of “accumulatively” fit into the context of the purpose of the ‘065 invention in terms of effective automatic process control.
  - d. If “accumulatively averaging” should be construed according to its ordinary meaning, how would such an analysis affect the validity of claim 1?
2. Please address Samsung’s expert, Dr. Watts’, admission that, under Samsung’s broad interpretation of “accumulatively averaging” as encompassing all types of averaging, the limitation could read on averaging operations that are not useful for the process control procedure disclosed in the ‘065 patent. *See Watts, Tr. 861:16 – 862:3.*
3. With respect to the claim construction of the “working conditions” limitation, please address the following questions:
  - a. Should the “process parameter values” recited in claim 11 be read into claim 8?
  - b. How does the meaning of the phrase “according to” in col. 5, ln. 46 of the ‘065 specification inform the interpretation of the phrase “based on” recited in claim 8?

- c. Are there any specific examples available from the evidence of record that may shed light on when a process parameter variable that is not specifically a machine setting may be used in a semiconductor manufacturing process as disclosed in the '065 patent? In considering this question, please also address how such a parameter might then be converted to the proper units or axis for a particular piece of processing equipment.
4. Please address in depth whether the particular type of averaging used in Spansion's accused process satisfies the "accumulatively averaging" limitation under the doctrine of equivalents.
5. Please address whether claim 8 satisfies the written description requirement if the claim limitation "extracting an optimal working condition by accumulatively averaging" is limited to Equation (1) disclosed in the '065 patent, where Equation (1) may represent to one of ordinary skill in the art a moving average or a weighted or unweighted average.
6. Please address whether claims 1, 8, and 12 of the '065 patent are indefinite if the "accumulatively averaging" limitation is construed to include a moving average or a weighted or unweighted average.

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 one or more cease and desist orders that could result in the respondent(s) 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 *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission 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 orders 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 *Fed. Reg.* 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 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.

Complainants and the IA are also requested to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the dates that the patents expire and the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on Monday, May 16, 2011. Reply submissions must be filed no later than the close of business on Monday, May 23, 2011. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. § 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

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 sections 210.42-46 and 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.42-46 and 210.50).

By order of the Commission.

/s/  
William R. Bishop  
Acting Secretary to the Commission

Issued: April 29, 2011