

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN RADIOTHERAPY SYSTEMS AND
TREATMENT PLANNING SOFTWARE, AND
COMPONENTS THEREOF

Inv. No. 337-TA-968

Order No. 12: Initial Determination

On February 17, 2016, complainants Varian Medical Systems, Inc., and Varian Medical Systems International AG (collectively, “Varian”) filed a motion for leave to file an amended complaint in this investigation and further seek a corresponding amendment to the notice of investigation. Motion Docket No. 968-6.

On February 29, 2016, respondents Elekta AB; Elekta Ltd.; Elekta GmbH; Elekta Inc.; IMPAC Medical Systems, Inc.; Elekta Instrument (Shanghai) Limited; and Elekta Beijing Medical Systems Co. Ltd. filed a response in opposition. On the same date, the Commission Investigative Staff (“Staff”) filed a response supporting the pending motion.¹

Complainants argue that they “now move to amend because recent discovery uncovered non-public information confirming infringement of seven additional claims. In addition, the proceedings are still in the early stages so the parties will suffer little or no prejudice from the amendment.” Mot at 1. Complainants argue that “reducing the number of asserted claims from the Shapiro patents [U.S. Patent Nos. 7,945,021; 8,116,430; and 8,867,703] in half, from 54 claims to 27 claims.” *Id.* at 2. It is argued that “in view of this recent discovery, the modest

¹ On March 8, 2016, complainants filed a motion for leave to file a reply in support of the underlying motion. Motion Docket No. 968-9. Motion No. 968-9 is denied.

nature of the proposed amendment, the efficiencies that can be achieved by permitting the amendment, and the lack of prejudice to the parties, good cause exists to grant this motion.” *Id.*

Respondents argue:

Varian’s Motion—filed just 30 days before the close of fact discovery in this case—seeks to add seven new “Shapiro” patent[] claims with only the vaguest allegations that discovery is “early” and that it learned “recently” of three new features of Elekta’s products. A closer examination of the actual facts behind Varian’s generalizations and broad statements reveals that Varian has no good cause to add these claims. Most of the claims were identified by Varian months ago, but then dropped. Adding these claims now, given the progress of the case and with less than a month before the end of fact discovery, is unjustified and—despite Varian’s assertions to the contrary—would cause great prejudice to Elekta.

Opp’n at 1.

The Staff argues that complainants have shown good cause, and neither the public interest nor the rights of the parties will be prejudiced. *See* Staff at 2-5.

Commission Rule 210.14(b) governs amending the complaint and NOI after an investigation has been instituted. It states, *inter alia*:

After an investigation has been instituted, the complaint or notice of investigation may be amended only by leave of the Commission for good cause shown and upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation.

19 C.F.R § 210.14(b)(1).

Complainants have shown good cause to amend the complaint. Complainants argue that the new allegations of infringement are based on non-public information that they obtained from respondents during the course of discovery. *See* Mem. at 1 and 4. “When a complainant seeks to amend the complaint and notice of investigation by adding patent claims, the ‘good cause’ requirement of Commission rule 210.14(b) requires that the party demonstrate why it was unable to bring those allegations at an earlier point.” *Certain Crawler Cranes and Components Thereof*, Inv. 337-TA-887, Order No. 10 (Initial Determination) at 2 (Dec. 16, 2013), (unreviewed) (Jan.

22, 2014).

This requirement is generally satisfied where, as here, complainants obtain new information regarding the additional claims through discovery. *See Certain Standard Cell Libraries, Products Containing the Same, Integrated Circuits Made Using the Same, and Products Containing Such Integrated Circuits*, Inv. 337-TA-906, Order No. 10 (Initial Determination) at 2 (Mar. 13, 2014), (unreviewed) (Apr. 4, 2014). Complainants' motion explains the design and operational information concerning accused products that was found in non-public discovery documents, which support each new claim. *See Mem.* at 4-8.

Complainants have shown that no undue prejudice will be caused by the amendments they seek, to either the public interest or the rights of the other parties. Indeed, adjudication of all relevant claims in a single investigation serves the public interest and promotes judicial economy by conserving resources of the Commission and the parties. By allowing complainants to add the new claims, all relevant claims will be heard in a single investigation. *See Mem.* at 2.

Furthermore, prejudice to the parties is limited in circumstances where the investigation is in its early stages. *See Certain Crawler Cranes*, Order No. 10 at 2 (finding no prejudice to the parties from the granting of complainant's motion for leave to amend complaint, which was filed, as was the pending motion, more than one month prior to the end of fact discovery and four months prior to the evidentiary hearing). In addition, the additional claims at issue here neither add products, nor require changes to the remedy requested, and are part of patents that have already been asserted. *See Mem.* at 3 (Varian "does not propose adding additional patents or products").

This investigation is still in its early stages. Fact discovery has not yet concluded, initial expert reports are due in four weeks, fact depositions have not yet been taken, and the

evidentiary hearing will not be held until late June. *See* Mem. at 8-9; Order No. 8 (Procedural Schedule). Moreover, the additional claims belong to patents already asserted in this investigation and share limitations with claims that are already asserted. *See* Mem. at 4. Complainants' amendments do not require adding any new products, and complainants do not seek to change the requested remedy. *See* Mem. at 9.²

As requested by the Staff, in order to minimize any prejudice that may occur from the addition of the new patent claims: (1) respondents and the Staff may submit supplemental notices of prior art to address the new claims; (2) respondents may submit any contention interrogatory responses with respect to the new claims after March 7, 2016, the current deadline for contention interrogatory responses; and (3) all parties are to exchange and meet and confer regarding the construction of any claim terms that appear in the newly asserted claims well in advance of initial expert reports (*i.e.*, prior to April 7, 2016). *See* Staff at 5.

Accordingly, it is the initial determination of the undersigned that Motion No. 968-6 is granted. The complaint and the notice of investigation shall be amended as proposed by complainants.

* * *

² For the reasons explained by the Staff, although complainants seek to withdraw 34 claims and add seven, the reduction in the scope of the investigation, in terms of the technology to be evaluated, will be more modest than complainants allege. *See* Staff at 4 n.4. It is noted that the scope of this investigation remains large and complex, and complainants should make genuine effort to reduce further the number of patents and claims in the near future.

Pursuant to 19 C.F.R. § 210.42(h), this initial determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the initial determination or certain issues contained herein.



David P. Shaw
Administrative Law Judge

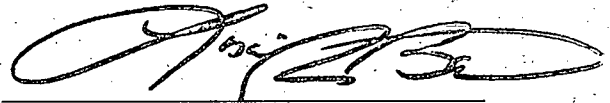
Issued: March 9, 2016

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PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **Order No. 12 (Initial Determination)** has been served by hand upon the Commission Investigative Attorney, **Lisa Kattan, Esq.**, and the following parties as indicated, on MAR -9 2016.



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