

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN BIO-LAYER INTERFEROMETERS AND
COMPONENTS THEREOF**

INV. NO. 337-TA-1344

**ORDER NO. 27: INITIAL DETERMINATION GRANTING COMPLAINANT'S
UNOPPOSED MOTION FOR SUMMARY DETERMINATION**

(June 30, 2023)

On June 28, 2023, complainant Sartorius BioAnalytical Instruments, Inc. moved for issuance of “an initial determination granting summary determination that claims 8, 16, and 18 of [U.S. Patent No. 7,445,887] are invalid for indefiniteness so that Complainant may promptly seek Commission review.” EDIS Doc. ID 799510, Motion No. 1344-021 at 1. The motion indicates that respondent Gator Bio, Inc. and the Commission Investigative Staff do not oppose. *Id.*

I. BACKGROUND

The Commission instituted this investigation to determine whether certain bio-layer interferometers and components thereof infringe various claims of U.S. Patent Nos. 7,394,547; 7,728,982; 8,305,585; and 7,445,887. 87 Fed. Reg. 73329 (Nov. 29, 2022).

The private parties and the Commission Investigative Staff filed a joint chart on agreed and disputed claim terms and claim construction briefs, after which a claim construction hearing was held. EDIS Doc. ID 792996 (Joint Chart); EDIS Doc. ID 793859 (Sartorius Opening); EDIS Doc. ID 793844 (Gator Bio Opening); EDIS Doc. ID 794233 (Staff Brief); EDIS Doc. ID 794598 (Sartorius Reply); and EDIS Doc. ID 794602 (Gator Bio Reply). Following the hearing, EDIS

Doc. ID 795542 (Transcript (Confidential)), EDIS Doc. ID 795543 (Transcript (Limited)), the parties submitted a supplemental joint chart. EDIS Doc. ID 796151.

I then issued a Claim Construction Order. *See* Order No. 16 (EDIS Doc ID 797546). In the Order, I discussed the parties' dispute regarding the meaning of the claim term "the layer of enzyme binding molecules" in independent claim 8 of the '887 patent and whether that term contains an error that can be corrected. *See id.* at 20–21. I held the issue in abeyance because "[t]he parties did not address whether the Commission has the authority to correct obvious clerical errors in claim language." *Id.* at 21.

After issuing Order No. 16, I conducted a case management conference, during which the parties proposed additional briefing. *See* EDIS Doc. ID 797894, Tr. at 10:13–14:10. In Order No. 18, I provided a schedule for additional briefing. Sartorius and Gator Bio each filed opening and responsive briefs, (1) Sartorius Opening (EDIS Doc. ID 797964), (2) Gator Bio Opening (EDIS Doc. ID 797963), (3) Sartorius Response (EDIS Doc. ID 798062), and (4) Gator Bio Response (EDIS Doc. ID 798069). The Staff briefed the issue as well, Staff Brief (EDIS Doc. ID 798143).

I issued a Supplemental Claim Construction Order, directed to the parties' dispute regarding the term "the enzyme binding layer" in claim 8 of the '887 patent. *See* Order No. 22 (EDIS Doc ID 799288). For the reasons discussed in Order No. 22, I concluded that claim 8 of the '887 patent is indefinite.

Sartorius then moved to withdraw all asserted claims of the '982 patent, all asserted claims of the '585 patent, and all asserted claims of the '547 patent. Motion No. 1344-020. I granted that motion in an initial determination. *See* Order No. 26 (initial determination). After the withdrawal of those claims, Sartorius now only asserts claims 8, 16, and 18 of the '887 patent.

II. LEGAL STANDARD

Summary determination under Commission Rule 210.18, like summary judgment under Federal Rule of Civil Procedure 56, may be granted only where the evidence shows “there is no genuine issue as to any material fact and that the moving party is entitled to summary determination as a matter of law.” 19 C.F.R. § 210.18(b). The movant bears the initial burden of establishing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the movant satisfies its initial burden, the burden shifts to the non-movant to demonstrate specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The evidence must be viewed in a light most favorable to the non-movant and all justifiable inferences are drawn in its favor. *Id.*; see also *Certain Power Semiconductors, and Mobile Devices and Computers Containing Same*, 337-TA-1308, Order No. 35 at 3 (Jan. 26, 2023) (EDIS Doc. ID 791101).

III. ANALYSIS

In Order No. 22, I concluded that the term “the enzyme binding layer” in claim 8 of the ’887 patent lacks antecedent basis, rendering the claim indefinite. A finding of indefiniteness renders a claim invalid. See *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014). I therefore conclude, for the reasons set out in Order No. 22 that claim 8 of the ’887 patent is invalid. See also Order No. 16.

Claims 16 and 18 both depend from claim 8. Accordingly, because claim 8, the only asserted independent claim, is invalid for indefiniteness, so too are dependent claims 16 and 18. See *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1356 (Fed. Cir. 2005), *abrogated on other grounds by Nautilus*, 572 U.S. at 901.

I find that there is no genuine issue of material fact, and that Sartorius is entitled to summary determination as a matter of law that claims 8, 16, and 18 of the '887 patent are invalid as indefinite.

Accordingly, it is my initial determination that claims 8, 16, and 18 of the '887 patent are invalid for indefiniteness. Motion No. 1344-021 is GRANTED. Because the asserted claims of the '887 patent are the last remaining claims in this investigation, this investigation is terminated in its entirety. The procedural schedule in this investigation is hereby suspended, and the evidentiary hearing scheduled to begin on July 10 is canceled. *See* Order No. 7. In addition, all pending motions (Motion Nos. 1344-012, 1344-013, 1344-014, 1344-015, 1344-016, and 1344-017) are hereby DENIED as moot.

This initial determination, along with supporting documentation, is hereby certified to the Commission. Under 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 this initial determination or certain issues herein.

SO ORDERED.



Doris Johnson Hines
Administrative Law Judge