

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

**Before The Honorable Carl C. Charneski
Administrative Law Judge**

In the Matter of

**CERTAIN MACHINE VISION SOFTWARE,
MACHINE VISION SYSTEMS, AND
PRODUCTS CONTAINING THE SAME**

Inv. No. 337-TA-680

**COMMISSION INVESTIGATIVE STAFF'S RESPONSE
TO JOINT MOTION TO TERMINATE THE INVESTIGATION
AS TO RESPONDENTS MULTITEST ELEKTRONISCHE SYSTEME GMBH
AND MULTITEST ELECTRONIC SYSTEMS, INC.
BASED UPON SETTLEMENT AGREEMENT AND CONSENT ORDER**

The Commission Investigative Staff ("Staff") supports the Joint Motion to Terminate the Investigation as to Respondents Multitest Elektronische Systeme GmbH and Multitest Electronic Systems, Inc. Based Upon Settlement Agreement and Consent Order. (Motion Dkt. No. 680-05). The motion was filed jointly by Complainants Cognex Corporation and Cognex Technology & Investment Corporation and the moving Respondents. The patent license agreement (*e.g.*, a settlement agreement), proposed consent order, and consent order stipulation provide an acceptable basis upon which to terminate the investigation as to each of the moving Respondents, with the exception of one modification to the proposed order that is discussed below.¹

¹ The parties filed a public version and a confidential version.

I. DISCUSSION

A. The Consent Order Stipulation

The Consent Order Stipulation (Joint Motion Ex. 1) appears to comply with the procedural requirements of Commission Rule 210.21, 19 C.F.R. § 210.21.

In compliance with Commission Rules, the Stipulation contains statements that the Commission has *in rem* jurisdiction over the accused products and that the Commission has *in personam* jurisdiction over Respondents Multitest Elektronische Systeme GmbH and Multitest Electronic Systems, Inc. (collectively “Multitest Respondents”) for the purposes of the consent order. Stipulation ¶ 2; *see* 19 C.F.R. § 210.21(c)(3)(i)(A)(1). The Stipulation also provides that the Multitest Respondents waive all right to seek judicial review or otherwise challenge the validity of the consent order. Stipulation ¶ 2; *see* 19 C.F.R. § 210.21(c)(3)(i)(A)(2). The signatories to the Stipulation agree that they will cooperate with and will not seek to impede by litigation or other means the Commission’s efforts to gather information under subpart I of Part 210. Stipulation ¶ 4; *see* 19 C.F.R. § 210.21(c)(3)(i)(A)(3). The Stipulation also contains a provision that the enforcement, modification and revocation of the consent order will be carried out pursuant to subpart I of Part 210, Title 19 Code of Federal Regulations. Stipulation ¶ 5; *see* 19 C.F.R. §210.21(c)(3)(i)(A)(4). The Stipulation further states that the consent order shall not apply to an intellectual property right that has expired or been found or adjudicated invalid or unenforceable by the Commission or a court or agency of competent jurisdiction, provided that such finding or judgment has become final and non-reviewable. Stipulation ¶ 6; *see* 19 C.F.R. § 210.21(c)(3)(i)(B)(1). The Multitest Respondents stipulate that they will not challenge the validity of the patents-at-issue in any administrative or judicial proceeding to enforce the consent

order. Stipulation ¶ 7; *see* 19 C.F.R. § 210.21(c)(3)(i)(B)(2). Finally, a Proposed Consent Order is attached to the joint motion. Joint Motion Ex. 2.

B. The Proposed Consent Order

The Proposed Consent Order closely parallels the Stipulation. The Proposed Order would terminate the investigation as to both Multitest Respondents. Proposed Order ¶ 7. Further, the Proposed Order states that the Multitest Respondents will not, except as allowed by consent or license,² encourage, participate in, or induce the sale for importation, importation in the United States, or sale in the United States after importation of machine vision software, machine vision systems, and products containing the same that infringe the patent claims identified in the Notice of Investigation. Proposed Order ¶ 1. *See Certain Gel-Filled Wrist Rests*, Inv. No. 337-TA-456, Order No. 6, (Unreviewed) Initial Determination Terminating the Investigation (October 22, 2001) (“proposed consent order construed to cover only asserted patent claims”). The Proposed Order also states that in determining whether the Multitest Respondents are in violation of the Order, the Commission may infer facts adverse to them if they fail to provide adequate or timely information, and that the Commission may impose on any person violating the Order the penalties available in 19 U.S.C. § 1337(f)(2). Proposed Order ¶ 7; *see* 19 U.S.C. § 1337(f)(2).

In the Staff’s view, the last sentence of the proposed consent order should be struck by the Commission and not included in any consent order issued by the Commission because it

² A separate patent license agreement (Joint Motion, Ex. 3) provides that Complainants grant the Multitest Respondents a license under certain terms. Patent License Agreement ¶ 2.2. On September 3, 2009, the parties further submitted a letter agreement that further defines agreement reached between Complainants and the Multitest Respondents.

proposes non-standard language and such language is contrary to the Commission's ordinary practice. The non-standard language states: "The Commission's assessment of any such penalty shall have the force of a judgment and liability for payment of such penalty shall accrue upon administrative assessment by the Commission." Section 337(f)(2) of the Tariff Act of 1930 provides the mechanism for the Commission to recover penalties that the Commission may impose. *See also* 19 CFR § 210.75(c) (judicial enforcement via civil action). Whatever its intended meaning, the extra sentence in the proposed consent order appears not to be in conformity with the Commission's statutory grant, its governing regulations, and its ordinary practice, and thus the sentence should not be adopted.

C. Patent License Agreement

The parties also filed a patent license agreement, which settles this investigation and an additional letter agreement that further defines the agreement.³ Joint Motion, Ex. 3 (Patent License Agreement). The license agreement contains, *inter alia*, Complainants' release of the Multitest Respondents. *Id.* ¶ 2.2. Pursuant to the agreement, the Multitest Respondents also agree to pay to Complainants a sum of money for the license.⁴ *Id.* ¶ 2.1. In the Staff's view, the license agreement and the additional letter agreement provide an acceptable basis for settling the dispute between the parties and neither document appears to present issues harming the public.

³ A public and a confidential version of the settlement agreement were filed as required. *See* 19 C.F.R. § 210.21(b)(1). The Joint Motion states that there are no other agreements between the parties. *See id.*

⁴ The dollar amount of the agreed-to payment has been redacted from the public version of the settlement agreement and from the confidential version served upon the other Respondents.

II. CONCLUSION

For all of the foregoing reasons, the joint motion to terminate the investigation based on a consent order and patent license agreement should be granted.

Respectfully submitted,

s/Kevin Baer
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September 16, 2009

CERTIFICATE OF SERVICE

The undersigned certifies that on September 16, 2009, he caused the foregoing Commission Investigative Staff's Response To Joint Motion To Terminate the Investigation as to Respondents Multitest Elektronische Systeme GmbH and Multitest Electronic Systems, Inc. Based Upon Settlement Agreement and Consent Order to be served by hand upon Administrative Law Judge Carl C. Charneski (2 copies), and served upon the parties in the manner indicated below:

<p>For Complainants Cognex Corp. and Cognex Technology & Investment Corp.:</p>	<p>For Respondents MVTec Software GmbH, MVTec LLC, IDS Imaging Development Systems GmbH, IDS Imaging Development Systems, Inc., E. Zoller GmbH, Zoller Inc., Delta Design, Inc., Rosco GmbH, Visics Corp., Subtechnique, Inc., Resolution Technology, Inc., Daiichi Jitsugyo Viswill Co., Ltd., Daiichi Jitsugyo (America), Inc., Techno Soft Systemnics, Inc.</p>
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