UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	
CERTAIN SLEEP-DISORDERED BREATHING TREATMENT SYSTEMS AND COMPONENTS THEREOF	**Inv. No. 337-TA-879**

ORDER NO. 11: INITIAL DETERMINATION GRANTING AMENDED MOTION TO TERMINATE THE REMAINING RESPONDENTS BASED ON A CONSENT ORDER AND TO STAY THE PROCEEDINGS

(July 17, 2013)

On July 2, 2013, Respondents Apex Medical Corp. and Apex Medical USA Corp. (collectively, "Apex") filed a motion to terminate based on a consent order (Motion Docket No. 879-008) and a separate motion to stay the Investigation pending their motion to terminate (Motion Docket No. 879-009). On July 5, 2013, in response to certain concerns raised by the Commission Investigative Staff ("Staff"), Apex filed an amended motion to terminate the Investigation based on a consent order stipulation ("Stipulation") and proposed consent order and to stay the proceedings ("Amended Motion").[1] (Motion Docket No. 879-011.) Apex asserts that the Stipulation attached to the Amended Motion contains the admissions, waivers, statements, and other requirements set forth in Commission Rule 210.21(c). (Amended Motion at 2.) Apex also asserts that termination as to Apex is in the public interest and that there are no agreements, written or oral, express or implied, between the parties concerning the subject matter of this Investigation. (*Id.*)

[1] In light of Apex's Amended Motion, the Administrative Law Judge finds that Motion Docket Nos. 879-008 and 879-009 should be DENIED as moot.

On July 16, 2013, Complainants ResMed Corp, ResMed Inc., and ResMed Ltd (collectively "ResMed") opposed the motion. ResMed argues that it is unclear in the proposed consent order what products Apex will not import such that the proposed consent order does not provide ResMed with all the relief it would otherwise be entitled. (Opp. at 2-3.) Specifically, ResMed takes issue with the following language in the proposed consent order attached to the Amended Motion:

> Upon entry of the Consent Order, Apex will cease the importation, distribution, sale, or other transfers (other than exportation) of any sleep-disordered breathing treatment systems and components thereof that infringe the Asserted Patent Claims (collectively, "Subject Articles") in the United States, except under consent or license from ResMed, its successors, or assignees.

(Amended Motion, Ex. A at ¶ 4.)

According to ResMed, Apex previously agreed to refer to "any sleep-disordered breathing treatment systems or components thereof as identified in the Complaint and illustrated in Exhibits 65 to 75 to the Complaint or that infringes the Asserted Patent Claims (collectively, "Subject Articles")" in this paragraph. (Opp. at 4.) ResMed states that Apex reneged on this agreement and Apex subsequently referred to only the products named in the Complaint in this paragraph in the original motion, before including the language quoted above in the Amended Motion. (*Id.* (citing Motion Docket No. 879-008, Ex. A at ¶ 4).) ResMed asserts that Apex has refused to confirm that the language in the Amended Motion was intended to cover the accused products in this case. (*Id.* at 6.) ResMed argues that the Commission Rules require that a consent order must cover the articles named in the Complaint and that it is ultimately unclear what Apex is consenting to do. (*Id.* at 6-7.) Further, ResMed argues that Apex's proposed consent order is inconsistent with the proposed consent order attached to the Administrative Law Judge's initial determination terminating Respondent Medical Depot, Inc. d/b/a Drive Medical

Design & Manufacturing ("Drive Medical") because Drive Medical's proposed consent order specifically includes the products named in the Complaint. (*Id.* at 8-9 (citing Order No. 8).)

On July 16, 2013, Staff supported the motion. Staff asserts that the Stipulation and proposed consent order meet all the requirements of the Commission Rules. (Staff Resp. at 2-5.) Staff does not raise any concerns regarding the allegedly ambiguous language cited by ResMed, and Staff indicates that the language complies with the Commission Rules. (*Id.* at 2-3.) Staff also asserts that the public interest would be served by granting Apex's Amended Motion. (*Id.* at 5.)

No other responses to the motion were received.

Based on a review of the motion papers and responses thereto, the Administrative Law Judge finds as follows.

The Commission's Rules permit a motion to terminate an investigation as to any or all respondents based upon an agreement to present the matter for consent order. 19 C.F.R. § 210.21(a)(2). Parties making such a motion must include a stipulation that incorporates a proposed consent order. 19 C.F.R. § 210.21(c)(1)(ii). Commission Rule 210.21(c)(3) sets forth certain requirements for stipulations made in intellectual property-based investigations:

> (1) An admission of all jurisdictional facts;
>
> (2) An express waiver of all rights to seek judicial review or otherwise challenge or contest the validity of the consent order;
>
> (3) A statement that the signatories to the consent order stipulation 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 this part; and
>
> (4) A statement that the enforcement, modification, and revocation of the consent order will be carried out pursuant to subpart I of this part, incorporating by reference the Commission's Rules of Practice and Procedure.
>
> * * *
>
> [(5)] A statement that the consent order shall not apply with respect to any claim of any 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 nonreviewable; and
>
> [(6)] A statement that each signatory to the stipulation who was a respondent in the investigation will not seek to challenge the validity of the intellectual property right(s), in any administrative or judicial proceeding to enforce the consent order.

19 C.F.R. § 210.21(c)(3)(i). The agreement of all parties is not a requirement. *See e.g., Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Order No. 6: Initial Determination Granting Respondent Aska's Motion for Termination Based on Consent Order (U.S.I.T.C., August 27, 2008) (unreviewed).

On May 20, 2013, certain amendments to the Commission Rules went into effect, including amendments to Commission Rule 210.21(c) regarding motions for termination by consent order. 78 Fed. Reg. 23474-487 (April 19, 2013). On June 4, 2013, the Commission issued a notice clarifying that the amended rules are not applicable to investigations instituted before May 20, 2013. (*See* Notice Clarifying Commission Rules, Docket No. MISC-040.) The Commission also encouraged, but did not require, parties to investigations instituted before May 20, 2013 to submit proposed consent orders consistent with Commission Rule 210.21(c), as amended. (*Id.*)

Apex attached to its motion the Stipulation with a proposed consent order (both attached hereto as Appendix A), providing for termination of the Investigation as to Apex. Specifically, Apex agrees that it "will cease the importation, distribution, sale, or other transfers (other than exportation) into the United States of any sleep-disordered breathing treatment system and components thereof that infringe the Asserted Patents (collectively, "Subject Articles") in the United States, except under consent or license from ResMed, its successors, or assignees." (Stipulation at ¶ 4.)

In accordance with Commission Rule 210.21(c), as worded prior to the amendments referenced above, the Stipulation also includes: an admission of all jurisdictional facts; an express waiver by Apex of all rights to seek judicial review or otherwise challenge or contest the validity of the consent order; a statement that Apex 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 the Commission's Rules; a statement that the enforcement, modification and revocation of the Consent Order will be carried out pursuant to Subpart I of the Commission's Rules, and the statement incorporates by reference the Commission's Rules of Practice and Procedure; a statement that the consent order shall not apply with respect to any claim of any 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 nonreviewable; and a statement that Apex will not seek to challenge the validity or enforceability of the asserted patents in any administrative or judicial proceeding to enforce the consent order. (Stipulation at ¶¶ 3, 5-7, 9-11.)

The effect of this proposed consent order would be to terminate the Investigation as to Apex. Apex and Staff both argue that termination would not be contrary to the public interest.[2] (Mot. at 1; Staff Resp. at 5.) Furthermore, termination of litigation under these circumstances as an alternative method of dispute resolution is generally in the public interest.

Based on the foregoing, the Administrative Law Judge finds that Apex's motion and Stipulation comply with the requirements of Commission Rule 210.21(c) in effect for this Investigation.

As indicated, Apex was not required to include a proposed consent order consistent with the amended version of Commission Rule 210.21(c). (*See* Notice Clarifying Commission

[2] ResMed does not address the public interest in its response.

Rules.) Nonetheless, the Administrative Law Judge finds that Apex's motion, Stipulation, and proposed consent order meet all requirements of the amended rule. Specifically, Apex represents that there are no agreements, written or oral, express or implied, between the parties concerning the subject matter of this Investigation, and the Stipulation and proposed Consent Order include the contents required under amended Commission Rule 210.21(c)(3)-(4). Regarding the alleged ambiguity identified by ResMed, the Administrative Law Judge finds that the language in the Stipulation and proposed consent order is unambiguous and covers all products within the scope of this Investigation, which is defined by the Notice of Investigation. The Commission Rules do not require a consent order stipulation or proposed consent order to specifically list the products accused in a complaint. *See* Commission Rule 210.21(c)(3)-(4).

Based on the foregoing, it is the Initial Determination of the Administrative Law Judge that Motion Docket No. 879-011 should be GRANTED and the Investigation terminated with respect to Respondents Apex Medical Corp. and Apex Medical USA Corp. This would effectively terminate the Investigation. The Administrative Law Judge further orders that the procedural schedule is stayed pending final outcome of Motion Docket No. 879-011.[3]

[3] In light of this order, the Administrative Law Judge finds that Apex's pending motion to amend the procedural schedule (Motion Docket No. 879-012) should be DENIED as moot.

This Initial Determination, along with copies of the Stipulation and proposed consent order, is hereby certified to the Commission. 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 herein.

SO ORDERED.

E. James Gildea

E. James Gildea
Administrative Law Judge

APPENDIX A

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC

Before The Honorable E. James Gildea
Administrative Law Judge

In the Matter of Certain Sleep-Disordered Breathing Treatment Systems and Components Thereof	Investigation No. 337-TA-879

CONSENT ORDER STIPULATION

Concurrent with their motion to terminate, Respondents Apex Medical Corp. and Apex Medical USA Corp. (collectively, "Apex") hereby respectfully submit this Consent Order Stipulation (Stipulation).

On March 28, 2013, pursuant to Section 337 of the Tariff Act of 1930, as Amended, 19 U.S.C. § 1337, Complainants ResMed Corp., ResMed Inc., and ResMed Ltd. (collectively, "ResMed") filed a Complaint with the United States International Trade Commission (Commission) against Apex and Medical Depot Inc., d/b/a Drive Medical Design & Manufacturing. The Complaint alleged violations of Section 337 based upon the importation into the United States, the sale for importation, or the sale within the United States after importation by Respondents of certain sleep-disordered breathing treatment systems and components thereof that infringe one or more of asserted claims 1, 5, 6, 11, 12, 18, 19, 20, 35 and 36 of the United States Patent No. 7,487,772 (the '772 patent); claims 17, 21, 22, 23, 24, 29, 32, 33, 34, 35, 36, and 37 of United States Patent No. 7,997,267 (the '267 patent); claim 15 of United States Patent No. 7,159,587 (the '587 patent); claims 59, 60, 63, 72, 73, 74, and 75 of the United States Patent No. 7,743,767 (the '767 patent); claims l, 2, 4, 5, 17 and 28 of United States

Patent No. 6,216,691 (the '691 patent); claims 1 and 20 of the United States Patent No. 6,935,337 (the '337 patent); and claims l, 2, 3, 4, 5, 6 and 7 of United States Patent No. 7,614,398 (the '398 patent) (collectively, "the Asserted Patent Claims").[1] The Commission instituted this Investigation on May 1, 2013.

Pursuant to 19 C.F.R. § 210.21(c)(1) & 210.21(c)(3), it is hereby stipulated by Apex that:

1. Apex Medical Corp. is a company organized and existing under the laws of Taiwan, with its principal place of business at No. 9, Min Sheng St., Tu-Cheng, New Taipei City, 23679, Taiwan. Apex Medical USA Corp. is a company organized and existing under the laws of the state of California, with its principal place of business at 615 North Berry St., Suite D, Brea, CA 92821, USA.

2. Apex stipulates to the entry of a Consent Order as outlined below and as expressed in the accompanying Proposed Consent Order.

3. Apex admits and acknowledges that the Commission has *in rem* jurisdiction over the products that are the subject of the Complaint and Notice of Investigation. Apex admits and acknowledges that the Commission has *in personam* jurisdiction over it for the purposes of this Stipulation and the Consent Order. Apex admits and acknowledges that the Commission has subject matter jurisdiction in this Investigation.

4. Upon entry of the Consent Order, Apex will cease the importation, distribution, sale, or other transfers (other than exportation) of any sleep-disordered breathing treatment systems and components thereof that infringe the Asserted Patent Claims (collectively, "Subject

[1] Apex notes that ResMed submitted a letter to the Administrative Law Judge on June 28, 2013, indicating that it will withdraw its pending motion to amend the Complaint and Notice of Investigation upon the granting of Apex's motion to terminate the investigation on the basis of consent order.

Articles") in the United States, except under consent or license from ResMed, its successors, or assignees.

5. Apex expressly waives all rights to seek judicial review or otherwise challenge or contest the validity of the Consent Order.

6. Apex 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, Title 19 Code of Federal Regulations.

7. 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, and the Commission's Rules of Practice and Procedure, which are hereby incorporated by reference.

8. Apex's signing of this Stipulation is for settlement purposes only and does not constitute admission by Apex that an unfair act has been committed.

9. The Consent Order shall have the same force and effect and may be enforced, modified, or revoked in the same manner as is provided in section 337 of the Tariff Act of 1930 and Part 210, Title 19 Code of Federal Regulations, and the Commission's Rules of Practice and Procedure, which are hereby incorporated by reference, and the Commission may require periodic compliance reports pursuant to subpart I of Part 210, Title 19 Code of Federal Regulations, to be submitted by Apex.

10. The Consent Order shall not apply with respect to any claim of any 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 nonreviewable.

11. Apex will not seek to challenge the validity of the Asserted Patent Claims of the '772 patent, the '267 patent, the '587 patent, the '767 patent, the '691 patent, the '337 patent, and the '398 patent in any administrative or judicial proceeding to enforce the Consent Order.

12. Entry of the Consent Order will terminate Investigation No. 337-TA-879 as to Apex.

13. Attached herewith as Attachment B is a Consent Order pursuant to 19 C.F.R. § 210.21(c), as proposed by Apex.

Apex Medical Corp.
Apex Medical USA Corp.

By: Chang, Ming-Cheng

Chang, Ming-Cheng
Vice President, Apex Medical Corp.

Date: Jul. 2. 2013.

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC

Before The Honorable E. James Gildea
Administrative Law Judge

In the Matter of Certain Sleep-Disordered Breathing Treatment Systems and Components Thereof	Investigation No. 337-TA-879

[PROPOSED] CONSENT ORDER

The United States International Trade Commission (Commission) has instituted an investigation of Respondents Apex Medical Corp. and Apex Medical USA Corp. (collectively, "Apex") and Medical Depot Inc., d/b/a Drive Medical Design & Manufacturing (Drive) pursuant to 19 U.S.C. § 1337 on a Complaint Under Section 337 of the Tariff Act of 1930, as amended filed with the Commission by Complainants ResMed Corp., ResMed Inc., and ResMed Ltd (collectively, "ResMed"). Filed on March 28, 2013, the Complaint alleged violations of Section 337 based upon the importation into the United States, the sale for importation, or the sale within the United States after importation by Apex of certain sleep-disordered breathing treatment systems and components thereof that infringe one or more of claims 1, 5, 6, 11, 12, 18, 19, 20, 35 and 36 of the United States Patent No. 7,487,772 (the '772 patent); claims 17, 21, 22, 23, 24, 29, 32, 33, 34, 35, 36, and 37 of United States Patent No. 7,997,267 (the '267 patent); claim 15 of United States Patent No. 7,159,587 (the '587 patent); claims 59, 60, 63, 72, 73, 74, and 75 of the United States Patent No. 7,743,767 (the '767 patent); claims l, 2, 4, 5, 17 and 28 of United States Patent No. 6,216,691 (the '691 patent); claims 1 and 20 of the United States Patent No.

6,935,337 (the '337 patent); and claims 1, 2, 3, 4, 5, 6 and 7 of United States Patent No. 7,614,398 (the '398 patent) (collectively, "the Asserted Patent Claims").

Apex has executed a consent order stipulation and moved for an initial determination terminating this investigation as to Apex by entry of a consent order. Pursuant to 19 C.F.R. §210.21(c), the motion is hereby GRANTED and the following SO ORDERED:

A. Effective immediately upon the entry of this Consent Order, Apex shall not sell for importation, import, or sell after importation any sleep-disordered breathing treatment systems and components thereof that infringe the Asserted Patent Claims (collectively, "Subject Articles"), directly or indirectly, and shall not aid, abet, encourage, participate in, or induce the sale for importation, the importation, or the sale after importation except under consent or license from ResMed.

B. Effective immediately upon the entry of this Consent Order, Apex Medical USA Corp. shall cease and desist from importing and distributing Subject Articles covered by the Asserted Patent Claims.

C. Apex shall be precluded from seeking judicial review or otherwise challenging or contesting the validity of this Consent Order.

D. Apex shall cooperate with and shall not seek to impede by litigation or other means the Commission's efforts to gather information under subpart I of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

E. Apex and its officers, directors, employees, agents, and any entity or individual acting on its behalf and with its authority shall not seek to challenge the validity or enforceability of the Asserted Patent Claims of the '772 patent, the '267 patent,

the '587 patent, the '767 patent, the '691 patent, the '337 patent, and the '398 patent in any administrative or judicial proceeding to enforce the Consent Order.

F. Upon expiration of the term of the '772 patent, the '267 patent, the '587 patent, the '767 patent, the '691 patent, the '337 patent, and the '398 patent, the Consent Order shall become null and void as to such patent.

G. If any Asserted Patent Claims is held invalid or unenforceable by a court or agency of competent jurisdiction or as to any Subject Articles that has been found or adjudicated not to infringe the asserted right in a final decision, no longer subject to appeal, this Consent Order shall become null and void as to such invalid or unenforceable claim.

H. This Investigation is hereby terminated with respect to Apex Medical Corp. and Apex Medical USA Corp., provided, however, that enforcement, modification, or revocation of the Consent Order shall be carried out pursuant to Subpart I of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

BY ORDER OF THE COMMISSION:

Date: _____

_____
Lisa Barton, Acting Secretary
U.S. International Trade Commission

CERTAIN SLEEP-DISORDERED BREATHING TREATMENT SYSTEMS AND COMPONENTS THEREOF

337-TA-879

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, Lisa Kattan, Esq., and the following parties as indicated on

JUL 17 2013

Lisa R. Barton
Acting Secretary to the Commission
U.S. International Trade Commission
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ON BEHALF OF COMPLAINANTS RESMED CORPORATION, RESMED INCORPORATED, AND RESMED LIMITED:

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CERTAIN SLEEP-DISORDERED BREATHING TREATMENT SYSTEMS AND COMPONENTS THEREOF

337-TA-879

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