

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

In the Matter of

**CERTAIN BEVERAGE BREWING
CAPSULES, COMPONENTS THEREOF,
AND PRODUCTS CONTAINING THE
SAME**

**Investigation No. 337-TA-929
(Enforcement and Rescission Proceeding)**

COMMISSION OPINION

This opinion sets forth the Commission's final determination in the consolidated enforcement and rescission proceeding. As explained more fully below, the Commission has determined to: (1) reverse the finding in the enforcement initial determination ("EID") that the remedial orders cannot be enforced due to a lack of domestic industry; (2) find that the complainants failed to show that the respondents possessed the intent necessary to violate the remedial orders; (3) decline to rescind the remedial orders; and (4) terminate the consolidated enforcement and rescission proceeding.

I. BACKGROUND

A. Violation Investigation

The Commission instituted the underlying violation investigation on September 9, 2014, based on an amended complaint ("Violation Complaint") filed by Adrian Rivera and Adrian Rivera Maynez Enterprises, Inc. (collectively, "ARM"). 79 Fed. Reg. 53445-46 (Sept. 9, 2014). The scope of the investigation covered certain beverage brewing capsules, components thereof, and products containing the same that were alleged to infringe one or more of claims 5-8 and 18-20 of U.S. Patent No. 8,720,320 ("the '320 patent") and were imported and sold in the United States in violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337

(“section 337”). *Id.* The named respondents included Eko Brands, LLC (“Eko”), Evermuch Technology Co., Ltd. and Ever Much Company Ltd. (together, “Evermuch”), Solofill, Inc. (“Solofill”), and DongGuan Hai Rui Precision Mould Co. (“DongGuan”). *Id.* The amended complaint alleges, *inter alia*, that Eko induced and contributed to the infringement of claims 5, 6, 8, and 18-20 through its sale of its EkoBrew Elite and EkoBrew (China) products, and that ARM satisfies the domestic industry requirement with respect to claims 1, 5, 10, and 18. Amended Complaint (Aug. 14, 2014) at ¶¶ 4, 52-57, 94-98, and Exs. 7, 30, 31.

On September 25, 2014, Eko informed ARM that it had no intention of responding to the amended complaint or participating further in the investigation.¹ On October 10, 2014, ARM moved for the presiding administrative law judge (“ALJ”) to order Eko and Evermuch to show cause why they should not be found in default for failing to respond to the amended complaint, the notice of investigation, and discovery requests.² The ALJ issued the show cause order on October 28, 2014. Order No. 9. No response was filed. On March 24, 2015, ARM moved for the ALJ to find Eko and Evermuch in default.³ The ALJ found Eko and Evermuch in default on April 22, 2015. Order No. 19, *not reviewed*, Notice (May 18, 2015).

Meanwhile, the investigation continued with respect to Solofill and DongGuan.⁴ On March 13, 2015, ARM withdrew its allegations that Solofill and DongGuan infringed claims 8 and 19 of the ’320 patent, but maintained its allegations that Eko and Evermuch infringed those claims. *See* Notice (Apr. 21, 2015). On September 4, 2015, the ALJ issued his final initial

¹ ARM’s Motion for an Order Directing Eko and Evermuch to Show Cause Why They Should Not Be Held In Default (Oct. 10, 2014).

² *Id.*

³ ARM’s Motion for Entry of an Initial Determination of Default Against Eko and Evermuch (Mar. 24, 2015).

⁴ The investigation originally included additional respondents, but those respondents were terminated by consent order or settlement agreement.

determination, finding that Solofill and DongGuan did not violate section 337 because they did not indirectly infringe claims 5-7, 18, and 20 of the '320 patent due to a lack of pre-suit knowledge of the patent. Final Initial Determination of No Violation (Sept. 4, 2015). On March 17, 2016, the Commission reversed the ALJ's lack of pre-suit knowledge finding, but determined that Solofill and DongGuan did not violate section 337 because claims 5-7, 18, and 20 are invalid under 35 U.S.C. § 112 for a lack of an adequate written description. 81 Fed. Reg. 15742-43 (Mar. 17, 2016). On May 23, 2017, the Federal Circuit affirmed the Commission's invalidity determination in *Rivera v. ITC*, No. 16-1841, 2017 WL 2233501 (Fed. Cir. May 23, 2017).

The Commission also determined that ARM had established the requirements of section 337(g)(1) against Eko and Evermuch with respect to claims 8 and 19; thus, the Commission presumed as true the facts alleged against Eko and Evermuch in the amended complaint. 81 Fed. Reg. at 15743; *Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same*, USITC Inv. No. 337-TA-929, Comm'n Op. at 83 (Mar. 17, 2016). Consequently, the Commission issued a limited exclusion order ("LEO") prohibiting Eko and Evermuch from importing beverage brewing capsules, components thereof, and products containing same that infringed claims 8 or 19 of the '320 patent, and also issued cease and desist orders ("CDOs") against Eko and Evermuch prohibiting, *inter alia*, the importation and sale within the United States of articles that infringe claims 8 or 19. *Id.*

B. District Court Proceedings

On April 2, 2015, Eko filed a complaint in the U.S. District Court for the Western District of Washington ("district court") that sought, *inter alia*, a declaration that claims 5, 6, 8, 10, and 18-20 of the '320 patent are invalid, in a case styled *Eko Brands v. Adrian Rivera Maynez Enterprises Inc. et al.*, Case No. 2:15-cv-00522-RSL (W.D. Wash.). Adrian Rivera counterclaimed that Eko infringed the '320 patent through its Eko Brew 1.0, Eko Brew 2.0, Eko

Brew Elite, and Brew and Save products. Defendant Adrian Rivera's Answer, Counterclaims (Jun. 30, 2015).

On February 24, 2016, the district court issued an order construing claim terms in the '320 patent. Order Construing Claims (Feb. 24, 2016). On August 17, 2016, based on one of its claim constructions, the district court issued a summary judgment that Eko's accused products do not infringe the '320 patent. Order Granting in Part Plaintiff's Motion for Summary Judgment (Aug. 17, 2016). The district court explained that, given its construction of "passageway," Eko's noninfringement was "patently obvious." *Id.* at 3. On November 3, 2016, the court ruled that ARM's pursuit of its infringement claim after the issuance of the claim construction order was frivolous and unreasonable, and, accordingly, awarded Eko attorney's fees. Order Awarding Plaintiff Attorney's Fees (Nov. 3, 2016)

C. Enforcement and Rescission Proceedings

Meanwhile, on June 1, 2016, ARM filed a complaint requesting that the Commission institute a formal enforcement proceeding under Commission Rule 210.75(b) to investigate alleged violations of the LEO and CDO (together, "the remedial orders") by Eko and Espresso Supply, Inc., the entity that subsequently purchased Eko (together, "Eko"). Complaint for Enforcement Proceeding Pursuant to Commission Rule 210.75 (Jun. 1, 2016) ("Enforcement Complaint") at ¶ 4 and Ex. 5. The enforcement complaint alleged, *inter alia*, that Eko violated the remedial orders by selling its Brew & Save, Ekobrew Elite, Ekobrew, and Ekobrew paper filter products. *Id.* at ¶¶ 7, 36-70. The Commission instituted a formal enforcement proceeding on July 1, 2016. 81 Fed. Reg. 43242-43 (Jul. 1, 2016).

On September 12, 2016, Eko petitioned the Commission to rescind the remedial orders based on, *inter alia*, the district court summary judgment that Eko's products do not infringe

the '320 patent.⁵ On November 25, 2016, the Commission instituted a rescission proceeding, delegated the proceeding to the presiding administrative law judge (“ALJ”), and consolidated the rescission proceeding with the enforcement proceeding. 81 Fed. Reg. 85264-65 (Nov. 25, 2016).

On January 31, 2017, Eko filed a second petition requesting that the Commission rescind the remedial orders based on a lack of a domestic industry. The Commission denied the petition on June 8, 2017, because Eko failed to show changed circumstances with respect to the domestic industry. Notice of Commission Determination to Deny a Petition Requesting the Rescission of Remedial Orders (June 8, 2017).

On March 27, 2017, the ALJ issued the EID in the consolidated enforcement and rescission proceeding, finding that the remedial orders cannot be enforced due to a lack of a domestic industry, and a recommended determination (“RD”) recommending that the Commission rescind the remedial orders based on the district court’s summary judgment of noninfringement.⁶ The Office of Unfair Import Investigations (“OUII”) petitioned for review of the EID on April 6, 2017,⁷ and ARM petitioned for review of the EID on April 7, 2017.⁸ On April 13, 2017, ARM⁹ and Eko¹⁰ responded to OUII’s petition, and OUII responded to ARM’s

⁵ Eko’s Petition to Rescind the Commission’s March 17, 2016 LEO and CDOs and to Terminate the Enforcement Proceeding.

⁶ Initial Determination on Enforcement of Limited Exclusion and Cease and Desist Orders, and Recommended Determination on Rescission (Mar. 27, 2017) (“EID/RD”).

⁷ Office of Unfair Import Investigation’s Petition for Review of the Enforcement Initial Determination and Recommendation on Rescission (Apr. 6, 2017) (“OUII Pet.”).

⁸ Complainants Adrian Rivera and Adrian Rivera Maynez Enterprises, Inc.’s Petition for Review of the Enforcement Initial Determination (Apr. 7, 2017) (“ARM Pet.”).

⁹ Complainants Adrian Rivera and Adrian Rivera Maynez Enterprises, Inc.’s Response to the Staff’s Petition for Review (Apr. 13, 2017) (“ARM Resp.”)

¹⁰ Respondents Eko Brands LLC’s and Espresso Supply, Inc.’s Response to the Staff’s Petition for Review of the Enforcement Initial Determination (Apr. 13, 2017) (“Eko Resp. to OUII Pet.”).

petition.¹¹ Eko responded to ARM's petition on April 14, 2017.¹² On May 11, 2017, the Commission determined to review the EID. Notice (May 11, 2017). The Commission herein explains its determination on review of the EID and its determination on rescission.

II. DISCUSSION

A. Domestic Industry

The EID found that the remedial orders could not be enforced because ARM failed to show that it satisfied the technical prong of the domestic industry requirement that is necessary to establish a violation of section 337 in an original investigation. EID at 12-14. Although no party had argued that the remedial orders could not be enforced due to a lack of a domestic industry,¹³ the ALJ reasoned that his final initial determination on violation found that ARM had satisfied the technical prong of the domestic industry requirement with respect to claim 5 only, and therefore the Commission's final determination that claim 5 is invalid left ARM without a domestic industry. *Id.* at 13-14.

ARM argues that the EID erred by failing to take notice that the Commission had deemed the facts alleged in the Violation Complaint against Eko to be true. ARM Pet. at 9-10. Section 337(g)(1) requires that the Commission presume as true the facts alleged against a defaulted respondent. Accordingly, the Commission found in the underlying investigation that ARM

¹¹ Office of Unfair Import Investigation's Reply to Adrian Rivera and Adrian Rivera Maynez Enterprises, Inc.'s Petition for Review of the Enforcement Initial Determination of Limited Exclusion and Cease and Desist Orders, and Recommended Determination on Rescission (Apr. 13, 2017) ("OUII Resp.").

¹² Respondents Eko Brands LLC's and Espresso Supply, Inc.'s ("Eko's") Response to ARM's Petition for Review of the Enforcement Initial Determination (Apr. 14, 2017) ("Eko Resp. to ARM Pet.").

¹³ Although Eko had raised the domestic industry issue in its January 31, 2017 petition to rescind the remedial orders, that petition was not delegated to the ALJ. Rather, as noted above, the Commission retained consideration of the petition and ultimately denied it.

satisfied the domestic industry requirement with respect to claims 1 and 10 of the '320 patent.

Id. Eko contends to the contrary that the EID correctly found that the remedial orders could not be enforced due to a lack of a domestic industry. Eko Resp. to ARM Pet. at 3-7. OUII argues that ARM's petition for review should not be granted, but urges the Commission to find that the remedial orders were not violated on different grounds. OUII Resp. at 3-5.

The Commission has determined to reverse the EID's finding that ARM lacks a domestic industry. Section 337(g)(1) provides that, if a complainant can establish the factors of section 337(g)(1)(A) through (E), "the Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both, limited to that person" 19 U.S.C. § 1337(g)(1). Here, the Commission found that ARM established the factors in section 337(g)(1)(A)-(E) with respect to Eko.¹⁴ While the Commission found that claims 5 and 18 are invalid in the underlying investigation, the Commission presumed that ARM's remaining allegations in its Violation Complaint were true,¹⁵ including its allegation that it satisfied the domestic industry with respect to claims 1 and 10 of the '320 patent.¹⁶ The Commission also previously determined that Eko had not shown any changed circumstances in the domestic industry that affected the remedial orders. *See* Notice of Commission Determination to Deny a Petition Requesting the Rescission of Remedial Orders (June 8, 2017). Accordingly, ARM's enforcement allegations do not fail because of a lack of a domestic industry.

¹⁴ Order No. 19 (Apr. 22, 2016), *not reviewed*, Notice (May 18, 2016); *see also* Notice (Mar. 17, 2016) (stating that the Commission had previously found that the statutory requirements for default had been met).

¹⁵ ARM alleged that it satisfied the domestic industry requirement with respect to claims 1, 5, 10, and 18 of the '320 patent. Violation Complaint at ¶ 96 (incorporating Public Exhibits Ex. 30 and Ex. 31).

¹⁶ Commission Opinion (Mar. 17, 2017) at 24-34, 81-83.

Eko's and OUII's arguments to the contrary are not persuasive. Both Eko and OUII argue that the presumption of truth under section 337(g)(1) should not apply to domestic industry allegations because the relevant information is in the possession of the complainant. Eko Resp. to ARM Pet. at 5; OUII Resp. at 3. Neither party, however, cites any authority for this proposition, which is contrary to the statute's mandate that "the Commission shall presume the facts alleged in the complaint to be true" 19 U.S.C. § 1337(g)(1). Nothing in the statute suggests that domestic industry allegations should be treated differently from other types of allegations pertaining to the elements of a section 337 violation.

Eko also contends that the Commission cannot issue relief under section 337(g)(1) against a defaulted respondent when another respondent participates in the investigation, because section 337(g)(1) requires that the relief sought be "limited to that [defaulted] person." Eko Resp. to ARM Pet. at 5-6. That language, however, simply provides that the relief granted under section 337(g)(1) (*i.e.*, an LEO and/or CDO) must be limited to the defaulted party, as opposed to the relief granted under section 337(g)(2) (*i.e.*, "a general exclusion from entry"), which requires additional evidence and affects nonparties. Here, ARM properly sought relief limited to each of the three defaulted parties, which was independent of ARM's pursuit of relief against Solofill and DongGuan under section 337(d) and (f).

Finally, Eko argues that the Commission must make "more fulsome factual findings" in order to issue relief against a defaulted respondent when other respondents participate in the investigation. Eko Resp. to ARM Pet. at 5-7. Nothing in section 337(g)(1), however, requires any factual findings predicated on a fully developed record on the merits of the complainant's allegations against a defaulted respondent, and Eko cites no authority to the contrary. Eko cites *Certain Ground Fault Circuit Interrupters*, but there the Commission merely declined to issue

orders against defaulted respondents with respect to two patents because the complainant's domestic industry allegations relied upon claims that the Commission found invalid. *Certain Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-739, Comm'n Op., 2012 WL 2394435 at *46-48 (Jun. 8, 2012). Thus, while the Commission does not issue relief against defaulted respondents when the allegations of the complaint would be inconsistent with its findings regarding the participating respondents, as in *Ground Fault Circuit Interrupters*, the statute does not require that the Commission make additional findings with respect to a defaulted respondent merely because other respondents have chosen to participate. Here, it was not necessary for the Commission to make factual findings regarding the domestic industry requirement with respect to claims 1 and 10 when it made the findings on whether Solofill and DongGuan violated section 337. Rather, the Commission relied upon the domestic industry allegations against Eko in the Violation Complaint regarding the claims that were not found invalid, as required by section 337(g)(1). Thus, the Commission's determination in *Ground Fault Circuit Interrupters* is not inconsistent with the Commission's presumption in the underlying investigation that the domestic industry requirement is satisfied with respect to claims 1 and 10 based on Eko's default.

B. Indirect Infringement

ARM alleges that Eko violated the March 17, 2016 remedial orders based on induced and contributory infringement. OUII urges the Commission to find that Eko did not violate the remedial orders because ARM failed to show that Eko had the knowledge of infringement required to indirectly infringe claims 8 and 19 of the '320 patent. OUII Pet. at 9-11. According to OUII, the evidence shows that Eko reasonably determined that it did not infringe based on the district court's February 24, 2016 claim construction order, which eventually led to the district court's August 17, 2016 summary of judgment of noninfringement. *Id.* at 11. Eko agrees with

OUII. Eko Resp. to OUII Pet. at 6-9.

ARM argues that OUII's position is contrary to the record and the law. ARM Resp. at 4-15. ARM, however, does not argue that the facts show that Eko had the intent to infringe, but instead argues that Eko intended to infringe as a matter of law. *Id.* at 8-9. Specifically, ARM argues that Eko must have had the intent to infringe because it continued to import and sell products that are structurally identical to the products that ARM had alleged were infringing in the underlying investigation. *Id.* ARM further argues that the district court claim construction is unreasonable and that Eko's attempts to comply with the remedial orders show that Eko knew that its products infringed. ARM Resp. at 9-12.

The Commission finds that ARM has not shown that Eko violated the remedial orders. After the Commission found Eko in default in the underlying investigation, the Commission issued an LEO and a CDO that prohibit, *inter alia*, the importation and sale after importation of certain products that infringe claims 8 and 19 of the '320 patent by Eko. ARM does not allege that Eko violates the remedial orders by directly infringing claims 8 and 19, but instead contends that Eko induces and contributes to infringement by others by instructing end users to combine Eko products with a single serve brewer, such as the Keurig brewer. Enforcement Complaint at ¶¶ 40-41, 51-52, 70-71. Because both induced and contributory infringement require "knowledge of the patent in suit and knowledge of patent infringement," *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S.Ct. 1920, 1926 (2015), ARM must show that Eko knew that it was infringing claims 8 and 19 of the '320 patent to establish a violation of the remedial orders. As ARM acknowledges, a determination on whether there is an intent to infringe is a question of fact. ARM Resp. at 9 (citing *Smith & Nephew Inc. v. Arthrex, Inc.*, 603 Fed. Appx 981, 989-90 (Fed. Cir. 2015)).

OUII argues that Eko's lack of intent to infringe is supported by the district court's claim construction order and two Eko witness statements testifying that they did not believe that Eko infringed based on the district court's claim construction order and summary judgment of noninfringement. OUII Resp. at 11 (citing RX-28 (claim construction order), RX-52C at Q/A29 and 40, and RX-56C at Q/A32). The district court judgment covered the same products at issue in the enforcement investigation,¹⁷ and there is no credible dispute that Eko does not infringe claims 8 and 19 of the '320 patent under the district court's claim construction. See ARM Resp. (presenting no such argument); see also Order Granting in Part Plaintiff's Motion for Summary Judgment (Aug. 17, 2016) (finding that Eko's noninfringement was "patently obvious"). ARM, on the other hand, presented no evidence that Eko intended to infringe,¹⁸ and instead argues that Eko's default in the underlying violation investigation establishes its knowledge of infringement for the enforcement investigation. ARM Resp. at 8.

ARM argues that the district court rulings cannot affect the Commission's claim constructions and infringement determinations in the violation investigation, and therefore are irrelevant here. ARM Resp. at 8. Although the Commission presumed that Eko infringed in the underlying investigation based on its default, the present enforcement proceeding is a separate investigation to determine whether Eko subsequently infringed claims 8 and 19 of the '320 patent in violation of the Commission's remedial orders. See *VastFame Camera, Ltd. v. Int'l Trade Comm'n*, 386 F.3d 1108, 1113 (Fed. Cir. 2004) (holding that Commission enforcement proceedings are investigations under section 337(b)). Because ARM alleges induced and

¹⁷ Both the district court action and the enforcement proceeding involved the Eko Brew, Eko Brew Elite, and Brew & Save products. Compare Defendant Adrian Rivera's Answer, Counterclaims (Jun. 30, 2015) to Enforcement Complaint at ¶¶ 7, 36-70.

¹⁸ ARM presented evidence that Eko knew that it was purchasing screens and o-rings, but not that Eko knew that it was infringing. See ARM Resp. at 8-9 (citing evidence of screen and o-ring purchases).

contributory infringement, ARM must show Eko's intent to infringe after the issuance of the remedial orders. *See Commil* 135 S.Ct. at 1926. The district court rulings and witness statements are relevant to Eko's intent. And while ARM argues that Eko's infringement is law of the case, that doctrine does not apply to default rulings. *See Charles Alan Wright et al., FEDERAL PRACTICE & PROCEDURE* § 4478 (2017) ("Actual decision of an issue is required to establish the law of the case.").¹⁹

ARM further argues that Eko cannot rely upon the district court rulings because the district court's claim construction of "passageway" is unreasonable. ARM Resp. at 9-10. The ALJ construed "passageway" to mean "path, channel, or source by which something passes" in the underlying investigation,²⁰ whereas the district court construed "passageway" to mean "a narrow space of some depth or length connecting one place to another."²¹ ARM argues that the district court construction is unreasonable solely because it differs from the ALJ's construction. ARM Resp. at 10. Different tribunals may reach different constructions of the same term,²² and ARM failed to demonstrate that the district court's construction is unreasonable. ARM additionally argues that Eko should have been required to produce an opinion of counsel in order to establish its reasonable belief that it did not infringe claim 8 and 19 of the '320 patent. ARM

¹⁹ To the extent that ARM is arguing that the Commission's default finding on violation establishes Eko's intent to infringe by issue preclusion, case law establishes that default judgments do not create issue preclusion. *See Charles Alan Wright et al., FEDERAL PRACTICE & PROCEDURE* § 4442 (2016) ("many federal cases have ruled in various circumstances that default judgments do not support issue preclusion"); *Sharp Kabushiki Kaisha v. ThinkSharp, Inc.*, 448 F.3d 1368, 1370 (Fed. Cir. 2006) (holding that a default cannot create issue preclusion because no issue was "litigated and decided").

²⁰ Final Initial Determination of No Violation at 27, *not reviewed* Notice (November 9, 2015).

²¹ Order Construing Claims at 12.

²² *See Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S.Ct. 831, 839 (2015) (holding that different tribunals may have divergent claim constructions).

Resp. at 10-11. There is no affirmative requirement to obtain an opinion of counsel to establish a lack of intent to infringe. *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 699 (Fed. Cir. 2008).

Finally, ARM argues that Eko's attempts to comply with the remedial orders by moving portions of its manufacturing to the United States is evidence that Eko did not have a good-faith belief that it did not infringe. ARM Resp. at 11-12. We do not view Eko's additional efforts to comply with the remedial orders as evidence that it knew that it infringed. Eko's changes in manufacturing practice are in no way inconsistent with its belief that it did not infringe.

Accordingly, for the reasons stated above, we find that ARM has not shown that Eko violated the remedial orders based on its failure to show that Eko intended to induce or contribute to the infringement of claims 8 or 19 of the '320 patent.

C. Rescission

The ALJ recommends that the remedial orders be rescinded because the district court's summary judgment of noninfringement changed the circumstances under which the remedial orders were issued. EID/RD at 20. ARM argues that the remedial orders should not be rescinded because the summary judgment has no bearing on the conditions that led to the remedial orders and is based on a flawed claim construction. ARM Pet. at 10-16. Eko and OUII argue that the ALJ properly found that summary judgment warranted rescission. Eko Resp. to ARM Pet. at 12-19; OUII Resp. at 5-8.

The Commission has determined not to rescind the remedial orders. Commission remedial orders "shall continue in effect until the Commission finds . . . that the conditions which led to such exclusion from entry or order no longer exist." 19 U.S.C. § 1337(k)(1). There is no basis under the statute for rescission. First, the condition that led to the remedial orders is Eko's failure, in the underlying violation investigation, to respond to the amended complaint and

notice of investigation regarding allegations that Eko infringed a valid patent. Eko has not shown that the conditions relating to its default no longer exist.

Second, while the parties and the ALJ cite instances in which the Commission has rescinded remedial orders based on another tribunal's ruling that a subject patent is invalid,²³ they fail to cite any instance in which the Commission has rescinded remedial orders based on a district court ruling that certain articles do not infringe a subject patent.²⁴ See EID/RD at 20 (acknowledging that the cited authority does not involve a finding of noninfringement). A district court patent invalidity ruling is substantially different from a noninfringement ruling. An invalidity ruling precludes other tribunals from finding that the patent is infringed. *Soverain Software LLC v. Victoria's Secret Direct Brand Management, LLC*, 778 F.3d 1311, 1315 (Fed. Cir. 2015) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 349-50 (1971) ("a defense of issue preclusion applies where a party is 'facing a charge of infringement of a patent that has once been declared invalid'")). A noninfringement ruling with respect to certain products, however, does not preclude a later ruling that other products do infringe. See

²³ See *Certain Composite Wear Components and Products Containing Same*, Inv. No. 337-TA-644, Comm'n Op. at 9 (Feb. 10, 2011) (public version) (rescinding remedial orders based on a district court's ruling that the orders' subject patent is invalid); *SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n*, 718 F.2d 365, 370 (Fed. Cir. 1983) (holding that the Commission acted properly in partially rescinding a remedial order based on district court's finding that two of the order's subject patents are invalid); *Certain Miniature Plug-In Blade Fuses*, Inv. No. 337-TA-114, Notice (Mar. 20, 2002) (modifying a remedial order based on a district court ruling that the order's subject trade dress is invalid);

²⁴ None of the cases cited by the parties involve terminating remedial orders based on a district court ruling of noninfringement. See *Certain Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487, Notice (Jun. 20, 2006) (rescinding remedial orders with respect to certain products based on a direct appeal to the Federal Circuit that held that those products do not infringe the relevant trademarks); *Certain Wire Electrical Discharge Machining Apparatus and Components Thereof*, 337-TA-290, Notice, 55 Fed. Reg. 51356 (Dec. 13, 1990) (terminating an enforcement proceeding based on a district court ruling of noninfringement); *Certain Universal Transmitters for Garage Door Openers*, Inv. No. 337-TA-497, Order (Mar. 10, 2004) (barring a Digital Millennium Copyright Act (DMCA) claim based on a previous district court ruling that rejected the DMCA claim).

Yingbin-Nature (Guangdong) Wood Indus. Co., Ltd. v. Int'l Trade Comm'n, 535 F.3d 1322, 1333 (Fed. Cir. 2008) (holding that collateral estoppel only applies to noninfringement where there is a “close identity” of “relevant features”). Thus, the district court’s summary judgment of noninfringement by the products before it does not warrant rescinding the remedial orders.

Eko also contends that the district court’s summary judgment of noninfringement warrants relief from the remedial orders under Federal Rule of Civil Procedure 60. Eko Resp. to ARM Pet. at 16. The Commission may rescind remedial orders if the party subject to those orders shows “grounds which would permit relief from a judgment or order under the Federal Rules of Civil Procedure.” 19 U.S.C. § 1337(k)(2). Eko, however, again relies upon cases in which a court provided relief from a judgment based on a finding that a patent is invalid or unenforceable,²⁵ and fails to cite any case where relief was granted based on a noninfringement finding. Moreover, Eko intentionally defaulted as a matter of strategy,²⁶ and suffers the consequence of that choice.²⁷ The Commission therefore declines to rescind the remedial orders.

²⁵ See *Life Techs., Inc. v. Promega Corp.*, 189 FRD 334, 337 (D.Md. 1999) (modifying a consent judgment order based on a finding that the underlying patent is unenforceable due to inequitable conduct); *ePlus, Inc. v. Lawson Software, Inc.*, 789 F.3d 1349, 1351 (Fed. Cir. 2015) (vacating contempt sanctions for violating an injunction after a finding that the underlying patent is invalid); *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330, 1331 (Fed. Cir. 2013) (vacating a district court judgment of infringement after a finding that the underlying patent is invalid).

²⁶ As noted above, Eko notified ARM that it had no intention of responding to the amended complaint or participating further in the violation investigation. See ARM’s Motion for an Order Directing Eko and Evermuch to Show Cause Why They Should Not Be Held In Default (Oct. 10, 2014).

²⁷ See *Wells v. Rockefeller*, 728 F.2d 209, 214 (3d Cir. 1984) (affirming a district court’s refusal to set aside a default judgment because the defendant intentionally defaulted “as a matter of strategy; that being so, he must now live with the consequences”); *Paul Revere Variable Annuity Ins. Co. v. Zang*, 248 F.3d 1, 6 (1st Cir. 2001) (“the discretionary power granted by Rule 60(b)(6) is not for the purpose of relieving a party from such ‘free, calculated, and deliberate’ choices made as a party of a strategy of litigation”); *Ackermann v. U.S.*, 340 U.S. 193, 198 (1950) (“free, calculated, deliberate choices are not to be relieved from”).

III. CONCLUSION

For the reasons set forth above, the Commission has determined that ARM has not shown that Eko violated the remedial orders, and has determined not to rescind the remedial orders.

The consolidated enforcement and rescission proceeding is hereby terminated.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: August 15, 2017

**CERTAIN BEVERAGE BREWING CAPSULES,
COMPONENTS THEREOF, AND PRODUCTS
CONTAINING THE SAME**

**Inv. No. 337-TA-929
(Enforcement Proceeding)**

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, Monisha Deka, Esq., and the following parties as indicated, on **August 15, 2017**.



Lisa R. Barton, Secretary
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