

PUBLIC VERSION

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

In the Matter of

**CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME**

Inv. No. 337-TA-644

**ORDER NO. 26: INITIAL DETERMINATION FINDING RESPONDENTS AIAE
ENGINEERING LIMITED AND VEGA INDUSTRIES IN
DEFAULT AND FINDING A VIOLATION OF SECTION 337**

(June 8, 2009)

On March 27, 2009, the Commission Investigative Staff ("Staff") filed a motion for issuance of an initial determination finding respondents AIAE Engineering Limited and Vega Industries (collectively "AIAE") in default, attached hereto as Attachment A. (Motion Docket No. 644-037.) On April 8, 2009, complainant Magotteaux International S/A and Magotteaux, Inc. (collectively "Magotteaux") filed a response in support of the motion and further stated that it would be filing its own motion seeking adverse inferences on importation, infringement and domestic industry. On that same day, AIAE filed a response arguing that it should only be found in default pursuant to 19 C.F.R. § 210.16 for "failure to make or cooperate in discovery" and that it opposed a finding of default under 19 C.F.R. § 210.17 based on adverse inferences.

On April 13, 2009, Magotteaux filed a motion for issuance of an initial determination finding respondents in default and request for adverse inferences on importation, infringement and domestic industry, attached hereto as Attachment B. (Motion Docket No. 644-038.) Magotteaux seeks adverse inferences in addition to Staff's proposed adverse inferences, namely that AIAE has imported, sold for importation or sold after importation the accused products; that the accused products infringe the asserted claims of U.S. Patent No. RE 39,998 ("the '998

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Patent”); that a domestic industry exists; and that the ‘998 Patent is not subject to the arbitration clause in the Settlement Deed. Magotteaux further outlined detailed, specific findings of fact on infringement of the ‘998 Patent and on the technical prong of the domestic industry requirement. (See Memorandum of Points and Authorities ISO Motion for Issuance of an Initial Determination Finding Respondents in Default and Request for Adverse Inferences on Importation, Infringement and Domestic Industry (“Magotteaux’s Memo”) at 13-15, 17-18.)

On April 12, 2009, Staff filed a response in support of the motion to the extent it seeks an initial determination finding AIAE in default and seeking an adverse inference of violation pursuant to Rule 210.16(a)(2) and 210.17(e). Staff further stated that it did not oppose Magotteaux’s request for adverse inferences as to importation, infringement and domestic industry, although the inferences need not be as specific as set forth by Magotteaux.

On that same day, AIAE filed a response opposing the motion.¹ AIAE argues that its request for reconsideration or interlocutory appeal of the ALJ’s decision to deny their motion to terminate based on arbitration clause should be granted and that such a ruling would render Magotteaux’s motion moot. AIAE further argues that any finding of default should be based on Rule 210.16(a)(2) and that adverse inferences are a “wasteful attempt” to “circumvent” any independent factual finding by a District Court and an improper attempt at asking the ALJ to make “sweeping and unjustified” findings of fact and conclusions of law.

PROCEDURAL HISTORY

On March 24, 2008, Magotteaux filed a complaint alleging, *inter alia*, that AIAE violated Section 337 by reason of the importation and sale of certain composite wear components and products containing same that infringe one or more of claims 1-22 of the ‘998 Patent. (See

¹ The certificate of service originally filed with AIAE’s response was dated April 8, 2009. On April 27, AIAE filed a corrected certificate of service reflecting the date upon which its response was actually served, *i.e.*, April 23, 2009.

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Complaint ¶¶ 29-43.) The investigation was instituted on April 21, 2008, and the Notice of Investigation was published in the Federal Register on April 25, 2008. (*See* 73 Fed. Reg. 22431 (April 25, 2008).)

On May 15, 2008, respondent Vega Industries moved for an extension of time to respond to the Complaint and Notice of Investigation, which the ALJ granted. (*See* Order No. 3)². On May 22, 2008, instead of filing a response to the Complaint and Notice of Investigation, AIAE filed a motion to stay this investigation based on pending injunction suit that they had obtained as part of the court case between the parties in High Court of New Delhi in India (“the Indian Court Action”). (*See* Motion Docket No. 644-004). Thereafter, AIAE essentially refused to participate in discovery and in this investigation.³

² Respondent AIAE Engineering did not join in the motion.

³ As explained in Order No. 12, respondent AIA Engineering and Magotteaux are involved in a lawsuit in India involving Magotteaux’s Indian patent that is the counterpart of the patent at issue in this Investigation. AIA sought a permanent injunction against Magotteaux in the High Court of Delhi to prevent Magotteaux from proceeding with this Investigation and was granted interim injunctive relief from the Indian court on May 13, 2008. (*See* AIA Engineering Ltd.’s Motion to Stay These Proceedings Pending a Determination by the Indian Court of Whether to Issue a Permanent Injunction Against Magotteaux at 1-2.) During this time, the High Court of Delhi also ordered Magotteaux to file a motion to stay the instant investigation. (*See* Magotteaux’s Memo ISO its Motion to Extend Certain Dates in the Procedural Schedule at 3.) Magotteaux appealed this injunction, which the Indian Appellate Court overturned. (*See* Magotteaux’s Memo ISO of its Opposition to AIAE’s Motion for Termination of the Investigation Pursuant to 19 U.S.C. § 1337 (c) and 19 C.F.R. §210.21 at 7.) Magotteaux ultimately withdrew its complaint in the High Court of Delhi. (*Id.* at 7.)

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On October 3, 2008, the ALJ denied the motions for stay and extended the target date. (See Order Nos. 12, 13) (October 3, 2008). The ALJ ordered the parties to submit a new procedural schedule in light of the extended target date, including “deadlines for AIA Engineering and Vega Industries for events whose deadlines have already passed.” (Order No. 12, at 3 n.3.)⁴ On October 14, 2008, Magotteaux, respondent Fonderie Acciaierie Roiale S.p.A. (“FAR”), and Staff submitted a new joint procedural schedule, which the ALJ granted. (See Order No. 14) (October 16, 2008). AIAE did not respond or participate in setting the new procedural schedule. (*Id.*; see also Joint Proposed Procedural Schedule (October 14, 2008).)⁵

On November 14, 2008, Magotteaux filed a motion for a default against AIAE based on their failure to answer the Complaint and Notice of Investigation. (Motion Docket No. 644-015). AIAE filed a response opposing the motion for default, specifically stating that they “must participate and defend themselves here, and they fully intend to do so.” (See AIAE Response to Motion for a Default, at 2). On November 26, 2009, AIAE filed responses to the Complaint and Notice of Investigation and began to participate in discovery to a certain degree. (See AIAE Engineering Limited’s Response to Amended Complaint and Notice of Investigation and Vega Industries’ Response to Amended Complaint and Notice of Investigation.) On February 3, 2009, the ALJ denied Magotteaux’s motion for a default because AIAE had responded to the Complaint and Notice of Investigation and had begun to actively participate in the investigation and in discovery. (See Order No. 18).

⁴ While AIAE refused to participate, discovery continued with FAR, Magotteaux and Staff.

⁵ On February 13, 2009, FAR was terminated from this investigation based on settlement agreement. (See Order No. 19.)

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However, immediately following the ALJ's denial of default motion, AIAE drastically reduced its participation in discovery. AIAE refused to produce both fact and expert witnesses for deposition, refused to respond substantively to Magotteaux's and Staff's written discovery, and refused to respond substantively to the Staff's contention interrogatories. (See Motion Docket Nos. 644-027 ("Complainants Motion to Compel the Appearance of Respondents AIA Engineering Limited and Vega Industries Ltd.'s Witnesses for Deposition"); 644-031 ("Complainants Magotteaux International S/A and Magotteaux, Inc.'s Motion to Compel Production"); 644-032 ("Commission Investigative Staff's Motion to Compel Responses to Contention Interrogatories"); and 644-033 ("Commission Investigative Staff's Motion to Preclude Expert Testimony or to Compel Deposition of Expert").)

On February 12, 2009, AIAE filed its motion to terminate this investigation in whole based on an arbitration agreement contained in a Settlement Deed dated February 16, 2000 (the "Settlement Deed") between AIAE and Magotteaux. (Motion Docket No. 644-028.) On February 25, 2009, Magotteaux and Staff filed responses in opposition to AIAE's motion to terminate.

On February 12, 2009, Magotteaux filed a motion for summary determination of a violation by AIAE. (Motion Docket No. 644-029.) On February 25, 2009, AIAE filed a response opposing the motion in its entirety and, on February 27, 2009, Staff filed a response supporting in part and opposing in part the motion for summary determination.⁶ Based on the ALJ's ruling herein, Motion No. 644-029 is MOOT.

⁶ On February 18, 2009, the parties filed a joint stipulated motion seeking extensions of time for their responses to the motion for summary determination, which the ALJ granted via e-mail on February 19, 2009.

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On March 5, 2009, the ALJ issued an order denying AIAE's motion to terminate, and the ALJ also struck AIAE's expert witness because AIAE named their expert witness out of time and, further, refused to produce their expert witness for deposition. (*See* Order Nos. 20 and 21.)⁷ Pursuant to the procedural schedule, Magotteaux and Staff filed their pre-hearing statements on March 17 and March 25, respectively. AIAE, however, failed to file a pre-hearing statement and failed to submit or serve any exhibits or witness statements. Rather, on March 13, 2009, AIAE filed a motion for reconsideration or interlocutory appeal. (Motion Docket No. 644-035.) On March 23, 2009, Magotteaux filed a response opposing the motion for reconsideration and interlocutory appeal and, on March 25, 2009, Staff also filed a response opposing the motion.

On March 16, 2009, AIAE filed a declaratory judgment action against Magotteaux in the U.S. District Court for the Middle District of Tennessee ("the District Court Action").

On March 19, 2009, the ALJ granted the outstanding motions to compel (Motion Nos. 644-027, 644-031, and 644-032) ordering AIAE to respond to written discovery by March 23, 2009, and to produce its fact and expert witnesses for deposition. The ALJ further warned AIAE that "[t]he ALJ will not hesitate, either *sua sponte* or in response to a motion, to make adverse inferences against AIAE should they refuse to cooperate and participate in discovery nor will the ALJ refrain from making the appropriate findings based on the adverse inferences, which includes a finding of default." (Order No. 23, at 4-5).

Ignoring the ALJ's specific order to comply and participate in discovery, AIAE

⁷ In Order No. 21, the ALJ warned AIAE that "[c]ooperation in discovery, compliance with the Rules of the Commission, and compliance with the ALJ's Ground Rules and orders, including procedural schedules, are essential for the smooth and quick resolution of Section 337 investigations. AIAE respondents have failed to cite to any case or rule that supports the unilateral actions such as AIAE has imposed on the Staff and Magotteaux, nor is the ALJ aware of any... AIAE respondents should not be permitted to unilaterally disrupt discovery and dictate such matters in callous disregard of the time schedules imposed by the Commission and this ALJ. AIAE respondents' delay in naming its expert, their continued failure to cooperate and participate in discovery, and their unilateral decisions to cancel fact witness depositions and its expert witness deposition is without justification and has hampered both Magotteaux and Staff's ability to prepare for the evidentiary hearing. This failure to comply with the rules and orders of this ALJ and the Commission appears both willful and without justification." Order No. 21 at 3.

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continued to refuse to participate in discovery, failed to serve responses to the written discovery and failed to produce their witnesses for deposition. Rather, on March 23, 2009, AIAE filed a document entitled “Respondents AIA Engineering Limited’s and Vega Industries Ltd.’s Notice of Filing of District Court Action and Statement of Position with Respect to ITC Investigation No. 337-TA-644” (“Statement of Position”), wherein AIAE informed the ALJ of the District Court Action and argued that it “will be in a position to seek relief from Magotteaux’s allegations in a forum in which they can fully and fairly develop and present their substantial defenses”; “reserved” its right to appeal any decisions by the ALJ or the Commission; and gave notice that it “will not participate any further in this investigation.” (Statement of Position at 1-2).

As set forth *supra*, on March 27, 2009, Staff filed Motion No. 644-037 for issuance of an initial determination finding AIAE in default and request for shortened response time. Staff argued that AIAE should be found in default pursuant to 19 C.F.R. §§ 210.16 and 210.17 for failure to file a pre-hearing brief, exhibits or witness statements; failure to participate in discovery, including complying with Order No. 23; and based on their statement of intention to no longer participate in this investigation. In addition, Staff argued that given AIAE’s conduct in this investigation, an adverse inference that AIAE has violated Section 337 was warranted.

Both Magotteaux and AIAE filed a response to the Staff’s motion, despite AIAE’s statements to the contrary in its Statement of Position. Magotteaux supported Staff’s motion and AIAE opposed it to the extent the finding of default was based on adverse inferences. AIAE argued that a finding of default under Rule 210.17 is “unnecessary”, “inappropriate” and “wasteful” because (1) this dispute is governed by the Settlement Deed⁸; (2) the basis for finding

⁸ AIAE maintains its position that the dispute in this investigation is governed by a Settlement Deed entered into by Magotteaux and Mr. Bhadresh Shah, the principal shareholder of the company that would become AIA Engineering.

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AIAE in default will not affect the result for Magotteaux, namely that AIAE is in default; and (3) any adverse inference is contrary to the evidence before the ALJ. AIAE also argued that its request for reconsideration or interlocutory appeal of the ALJ's decision to deny their motion to terminate based on arbitration clause should be granted and that such a ruling would render Staff's motion moot.⁹

Based on the foregoing, the ALJ determined good cause existed to stay the evidentiary hearing scheduled to begin on April 13. (*See* Order No. 24) (March 31, 2009). Specifically, the ALJ cited AIAE's statements that they will no longer participate in this investigation, which presumably included attending and participating in the evidentiary hearing, and failure to file a pre-hearing brief; the dispositive nature of Staff and Magotteaux's motions for issuance of an initial determination finding AIAE in default; and the stated positions of Magotteaux and Staff in their pre-hearing briefs that a violation of Section 337 has occurred.

On April 13, Magotteaux filed Motion No. 644-038 seeking the additional adverse inferences set forth *supra* and Staff filed a response in support of the motion. AIAE again filed a response despite its representations in its Statement of Position and in response to the Staff's motion that it would no longer participate in this investigation. AIAE again opposed a finding of default based on adverse inferences.

APPLICABLE LAW

Commission Rule 210.16(a)(2) states that "[a] party may be found in default as a sanction for abuse of process under § 210.4(c), or failure to make or cooperate in discovery, under § 210.33 (b)."¹⁰ 19 C.F.R. § 210.16(a)(1). The Commission has found non-cooperative

⁹ The ALJ has contemporaneously denied AIAE's motion for reconsideration. *See* Order No. 25 (May 8, 2009).

¹⁰ Commission Rule 210.33(b) limits sanctions to cases in which the party has failed to comply with an order compelling discovery, including "an order for the taking of a deposition or the production of documents, an order to answer interrogatories, [or] an order issued pursuant to a request for admissions." 19 C.F.R. § 210.33(b). In such

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respondents in default for failure to participate in discovery in previous investigations. *See, e.g., Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-565, Order No. 51, at 2 (Jan. 13, 2009) (“*Ink Cartridges*”) (unreviewed initial determination finding a respondent in default pursuant to Rule 210.16(a)(2)); *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Order No. 17, at 4-5 (Jan. 9, 2008) (“*Cigarettes*”) (unreviewed initial determination finding a respondent in default pursuant to Rules 210.16(a)(2) and 210.17); *Certain Ink Markers and Packaging Thereof*, Inv. No. 337-TA-522, Order No. 28 (June 1, 2005) (unreviewed initial determination making adverse inferences based on failure to cooperate in discovery); *Certain Automotive Measuring Devices, Products Containing Same, and Bezels for Such Devices*, Inv. No. 337-TA-494, Order No. 18 (April 7, 2004) (unreviewed initial determination finding a respondent in default pursuant to Rule 210.16(a)(2)); *Certain Bearings and Packaging Thereof*, Inv. No. 337-TA-469, Order No. 104 (Jan. 14, 2003) (same).

Commission Rule 210.17 states, in relevant part, that “[f]ailures to act other than the defaults listed in § 210.16 may provide a basis for the presiding administrative law judge or the Commission to draw adverse inferences and to issue findings of fact, conclusions of law, determinations (including a determination on violation of section 337 of the Tariff Act of 1930)...[s]uch failures include, but are not limited to

....

(e) Failure to file a brief or other written submission requested by the administrative law judge or the Commission during an investigation or related proceeding;

....

(g) Failure to file a brief or other written submission requested by the administrative law judge or the Commission;

....

cases, a party may move for a default, or the Judge may enter a default *sua sponte*. 19 C.F.R. § 210.16(b)(2).

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The presiding administrative law judge or the Commission may take action under this rule sua sponte or in response to the motion of a party.”

19 C.F.R. § 210.17. The Commission has also found respondents in default under Rule 210.17 and has made adverse inferences based on their failure to act. *See Certain Electrical Connectors and Products Containing Same*, Inv. No. 337-TA-374, Order No. 38 (Feb. 9, 1996) (unreviewed initial determination finding respondent in default under 19 C.F.R. § 210.17 for failure to respond to a motion for summary determination and making an adverse inference of a violation); *see also, e.g., Cigarettes*, Order No. 17, at 4-6 (unreviewed initial determination finding a respondent in default pursuant to Rules 210.16(a)(2) and 210.17); *Certain Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487, Order No. 45, at 4 (Oct. 1, 2003) (unreviewed initial determination finding respondents in default pursuant to 19 C.F.R. §§ 210.16 and 210.17).

Commission Rule 210.16(a)(2)

AIAE’s conduct in this investigation clearly warrants a finding of default based on Rule 210.16(a)(2). Upon resolution of the Indian Court Action, AIAE began to cooperate and participate in this investigation, including filing a response to the Complaint and Notice of Investigation and participating in discovery. Based on AIAE’s conduct, the ALJ denied Magotteaux’s motion for an order to show cause and for a finding of default. However, once AIAE filed its motion to terminate based on arbitration clause in the Settlement Deed, it unilaterally decided that it would no longer participate in discovery and argued that the ALJ and Commission lacked authority to compel or demand discovery. (*See Respondents’ Memorandum in Opposition to Commission Investigative Staff’s Motion to Preclude Expert Testimony or to Compel Deposition of Expert* at 3 (“[T]he ALJ lacks authority to demand or compel discovery where the Settlement Deed between the parties expressly requires arbitration of the disputes in a forum other than the ITC.”); *see also Id.* at 1, 2 (“Respondents’ decision not to present their

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expert for deposition is and remains justified because the issues raised in this investigation arise out of and touch upon the Settlement Deed between the parties that contains a license to Respondent AIA to manufacture and export from India product containing the technology at issue and that provides that issues touching this license must be resolved in an arbitral forum other than the ITC.”; “Pending the ALJ and Commission rulings on this Motion, Respondents maintain their position that discovery of any kind, including the deposition of their expert, is without authority and is unduly burdensome and oppressive.”); Respondents’ Memorandum in Opposition to Complainants’ Motion to Compel the Appearance of Respondents’ Witnesses for Deposition at 1-2 (“Because this investigation must be terminated in whole as a result of the provisions of written Settlement Deed, there is no authority to demand or compel depositions of Respondents’ employees or any other discovery, and the depositions are unduly burdensome and oppressive.”).)

Rather, AIAE unilaterally cancelled scheduled depositions, refused to substantively respond to Staff’s contention interrogatories, refused to respond to Magotteaux’s requests for admission, and refused to produce documents in response to Magotteaux’s requests for the production of documents and things. (*See* Order No. 23. at 1-2; *See also* Complainants’ Motion to Compel the Appearance of Respondents AIAE Engineering Limited and Vega Industries Ltd.’s Witness for Deposition, Exhibit C; and Commission Investigative Staff’s Motion to Compel Responses to Contention Interrogatories, Exhibit G.) As a result, Staff and Magotteaux each filed separate motions to compel AIAE to respond to its discovery requests. In response, AIAE again argued that its decision to no longer participate in discovery was justified since it had filed a motion to terminate based on an arbitration clause. (*See supra.*) However, as the ALJ explained in his order compelling AIAE to produce discovery:

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AIAE's continued reliance on its motion to terminate as a basis for refusing to cooperate and participate in discovery is in error. Ground Rule 3.8 specifically states that "[n]o motion stops discovery except a timely motion to quash a subpoena." The basis for this rule is to ensure that discovery continues, especially given the fast pace of Section 337 investigations, regardless of any pending motions. [. . .] The ALJ's Ground Rule 3.8 is unambiguous and clear: discovery is to continue, regardless of any motion filed, except for a motion to quash a subpoena. There is no exception for a motion to terminate and, further, AIAE has failed to cite to any authority that supports their position that they may unilaterally refuse to participate in discovery once a motion to terminate has been filed. Indeed, Commission precedence has indicated that the appropriate action would be to file a motion to stay the procedural schedule pending the motion to terminate. The filing of a motion to terminate in and of itself does not provide a valid basis to refuse to cooperate in discovery. AIAE has not filed any motion to stay the procedural schedule pending a ruling on the motion to terminate and, instead, has chosen to blatantly disregard the ALJ's and the Commission's rules and authority in favor of its own unilateral decision as to how and where this investigation should proceed.

(*Id.* at 3-4) (internal citations omitted). In response to Order No. 23, AIAE filed its Statement of Position where it specifically stated its intention to continue to refuse to participate in this investigation, including ignoring Order No. 23. AIAE filed no other response to Order No. 23 nor did it take any affirmative steps in an attempt to resolve the matter. The ALJ finds that such conduct is sufficient to find AIAE in default for "failure to make or cooperate in discovery" under Rule 210.16(a)(2).

AIAE in effect concedes that its conduct in this investigation warrants a finding of default based on Rule 210.16(a)(2). Indeed, in both responses to Staff's and Magotteaux's motions for default and violation, AIAE states that "if any order against Respondents is to be entered, then Respondents submit that 19 C.F.R. § 210.16(a)(2) controls." (Respondents' Memo in Response to Commission Investigative Staff's Motion for Issuance of an Initial Determination Finding Respondents in Default and Request for Shortened Response Time at 2; Respondents' Memo in Response to Complainants' Motion for Issuance of an Initial Determination Finding Respondents

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in Default and Request for Adverse Inferences on Importation, Infringement and Domestic Industry at 2.)

Based on the foregoing, the ALJ finds that respondents AIA Engineering Limited and Vega Industries are in default pursuant to Rule 210.16(a)(2).

Commission Rule 210.17

While AIAE effectively concedes that it should be found in default pursuant to Rule 210.16(a)(2), it argues that adverse inferences are not warranted. However, based on AIAE's conduct thus far in this investigation, the ALJ finds that adverse inferences are justified. First, AIAE has failed to file a pre-hearing brief per Order Nos. 6 and 14, which itself is sufficient for a finding of default and adverse inferences under the enumerated instances set forth in Rule 210.17. Notwithstanding the former basis, AIAE's conduct throughout this investigation has been so inconsistent, egregious and disruptive that it provides an independent basis for a finding of default and adverse inferences.

AIAE asserts that this dispute should more appropriately be settled in arbitration rather than through litigation and that the ALJ and the Commission lack the authority to govern the dispute based on the arbitration clause. However, as noted in the ALJ's Order No. 20 where he denied the motion to terminate, AIAE's actions are inconsistent with their stated intention to seek resolution through arbitration. Indeed, less than one week after the ALJ denied AIAE's motion to terminate, AIAE filed a declaratory judgment action in the Middle District of Tennessee. This recently filed complaint combined with AIAE's litigious actions in the Indian Court Action (where AIAE did not assert its right to seek arbitration despite the fact that the Settlement Deed was raised in that action) contradicts AIAE's representations that the "correct" and/or "appropriate" forum for resolving this dispute "lies solely with the arbitrators in London."

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Indeed, there is no indication or evidence that AIAE has even contacted or notified Magotteaux of its intention to exercise this “right.” Rather, AIAE has determined, yet again, that the “correct” forum is not with the arbitrators in London but through litigation in the District Court in Tennessee. Furthermore, when AIAE was notified of the instant investigation in April 2008, it did not immediately seek termination of the investigation based on arbitration nor did it seek termination once it did begin to actively participate in this investigation in November despite knowing of the Settlement Deed and the arbitration clause contained therein from the Indian Court Action. Rather, AIAE waited nearly 4 months from the time it began to actively participate in this investigation to assert the arbitration clause in the Settlement Deed.¹¹

AIAE’s basis for filing in the District Court of Tennessee appears to be little more than forum shopping. Indeed, in its Statement of Position, AIAE stated that “it had been limited as a practical matter in their ability to conduct discovery and otherwise prepare their defense for the hearing in this investigation” and that in the District Court Action “Respondents will be in a position to seek relief from Magotteaux’s allegations in a forum in which they can fully and fairly develop and present their substantial defenses which, as more fully explained below, they are not in a position to do here.” In explaining their position, AIAE argues that (1) the Indian Court matter prevented it from participating in the instant investigation, which gave Magotteaux an advantage in discovery; (2) that FAR’s settlement out of the investigation just days before the start of expert discovery severely injured AIAE; and (3) that all of this may have been avoided had the ALJ granted AIAE’s motion to terminate. If AIAE was truly concerned about “fully and fairly meet[ing] all of the allegations of Magotteaux’s complaint, or to prepare and present its substantial defense of, *inter alia*, non-infringement and invalidity,” then the proper recourse should

¹¹ The period extends to nearly 11 months if one were to take into consideration the date on which AIAE became aware of this investigation, April 2008.

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have and could have been to notify the ALJ of their concern and supposed disadvantage. The ALJ could have worked with the parties to amend the procedural schedule such that AIAE would have the opportunity to fully develop their arguments and conduct discovery. (See Order No. 23.) However, AIAE had never notified the ALJ of its purported disadvantage. Instead, AIAE repeatedly cited its pending motion to terminate as a basis for its lack of participation. The first mention of its purported disadvantage came only after it had filed its District Court Action. Rather than properly seek appropriate remedial action from the ALJ and Commission, AIAE chose to simply stop “participating” in this investigation and file a declaratory judgment action in the District Court in Tennessee where AIAE, no doubt, begins with an advantage having collected discovery from Magotteaux without having to produce any itself.

Moreover, despite AIAE’s representations that it would no longer participate in this investigation, it has continued to intermittently “participate” by filing responses and oppositions to motions. Again, AIAE’s actions are inconsistent with their statements to this ALJ and to the Commission that it would no longer participate in this investigation. Rather, AIAE has, again, unilaterally and arbitrarily decided when, where and how it will participate in this investigation. In fact, its decision to no longer participate had certain “exceptions,” which AIAE unilaterally decided were appropriate.¹² Such conduct is disruptive, unfair and disrespectful to Magotteaux,

¹² In their Statement of Position, AIAE set several “conditions” on their decision to no longer participate, *i.e.*, AIAE reserved the right to participate and respond to certain things:

Respondents submit this Notice and Statement without prejudice to the position taken in their Motion for Termination of the Investigation Pursuant to 19 U.S. C. § 1337 (C) and 19 C.F.R. § 210.21 (A)(2) (“Respondents’ Termination Motion”), their Motion for Reconsideration or Interlocutory Appeal of Decision Denying Motion for Termination of the Investigation (“Motion for Reconsideration or Appeal”), their opposition to and denial of Complainants Magotteaux International S/A and Magotteaux, Inc.’s (collectively, “Magotteaux”) Motion for Summary Determination, their opposition to and denial of Magotteaux’s allegations in this investigation, and to any appeals from any rulings by the Administrative Law Judge (“ALJ”) and/or any final determinations of the Commission (including without limitation challenges to the timing or substance of any exclusion order with Magotteaux may seek). They also submit this Notice and Statement without prejudice to any proceedings that AIA and/or Vega may choose to pursue (or continue to pursue) in the Indian court(s). The latter includes (but may not be limited to) an action

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Staff, the ALJ and the Commission. Whether AIAE shall participate and when it shall participate should not be a guessing game nor should such participation lie solely within AIAE's discretion. (See Fed. Rules Civ. Proc R 37; see also *Adriana Int'l Corp. v Thoeren*, 913 F2d 1406 (9th Cir. 1990); *Adolph Coors Co. v. Movement against Racism & Klan*, 777 F.2d 1538 (11th Cir. 1985; *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602 (2nd Cir 1964); *United States v. 49,000 Currency*, 330 F.3d 371 (5th Cir. 2003); see also 19 C.F.R. §§ 210.11, 210.12, 210.13, 210.14.). Therefore, the ALJ finds that based on AIAE's conduct in this investigation, adverse inferences are justified.

In its motion, Magotteaux seeks specific, detailed findings against AIAE relating to importation, infringement and domestic industry and lists nearly 130 findings of fact. (See Motion No. 644-038 at 9-24 and Attachment 2.) The ALJ finds that while the request for adverse inferences is warranted and justified, it need not be as detailed or as specific as set forth by Magotteaux.

Therefore, pursuant to Rule 210.17, the ALJ finds that AIA Engineering Limited and Vega Industries are in violation of Section 337 in that (1) the Accused Products infringe the asserted claims of the '998 Patent; (2) AIA Engineering Limited and Vega Industries import or sell for importation composite wear components and products containing same that infringe the asserted claims of the '998 Patent; and (3) a domestic industry exists with respect to the articles protected by the '998 Patent.

that AIA expects to initiate in India regarding the consequences of Magotteaux's unconditional withdrawal of Magotteaux's patent infringement suit against AIA in India.

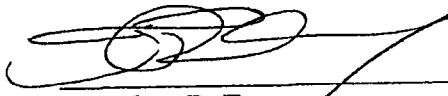
Subject to all of the forgoing, Respondents hereby give notice that AIA and Vega will not participate any further in this investigation, except in connection with appeals or other challenges to the denial by the ALJ of Respondents' Termination Motion or other challenges to the ALJ's rulings on appeals to the Commission or elsewhere, or to any actions taken by the Commission (all including without limitation challenges to the timing or substance of any exclusion order Magotteaux may seek).

Statement of Position at 1-2.

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Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.

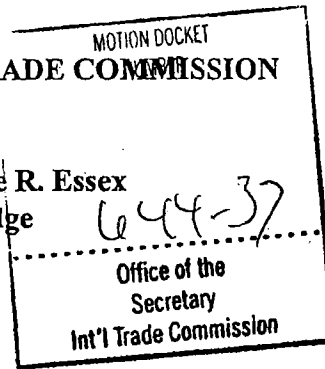


Theodore R. Essex
Administrative Law Judge

ATTACHMENT A

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

Before the Honorable Theodore R. Essex
Administrative Law Judge



In the Matter of

**CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME**

Inv. No. 337-TA-644

**COMMISSION INVESTIGATIVE STAFF'S MOTION FOR ISSUANCE OF AN
INITIAL DETERMINATION FINDING RESPONDENTS AIA ENGINEERING
LIMITED AND VEGA INDUSTRIES IN DEFAULT AND REQUEST FOR
SHORTENED RESPONSE TIME**

The Commission Investigative Staff ("Staff") respectfully moves pursuant to Commission Rules 210.16 and 210.17 for an order finding Respondents AIA Engineering Limited and Vega Industries (collectively "Respondents" or "the AIAE Respondents") in default. As discussed in the accompanying memorandum of law, a default is appropriate under 19 C.F.R. §§ 210.16(a)(2), (b)(2), for failure to make and cooperate in discovery. In this respect, the AIAE Respondents have failed to comply with Order No. 23, which directed them to respond to written discovery and produce witnesses for deposition, and have stated that they will not participate further in this investigation. A default is also appropriate under 19 C.F.R. § 210.17(e) for failure to file a brief or other written submission requested by the Administrative Law Judge. In this respect, the AIAE Respondents have failed to file a pre-hearing statement and have thus waived their right to contest any issues in the investigation. (*See* Ground Rule 8(f)). Under the circumstances, the Staff submits that the Judge should issue an initial determination finding the AIAE Respondents in default and making an adverse inference that they have violated Section 337.

In addition, because the hearing in this matter is scheduled to begin on April 13, 2009, the Staff requests that the Judge shorten the time to respond to this motion such that any responses are due in one week, *i.e.*, on April 3, 2009. This will allow for the briefing to be completed and for the Judge to rule on the motion before the beginning of the evidentiary hearing, if the Judge determines that this would be appropriate.

Pursuant to Ground Rule 3.2, the Staff has contacted the other parties concerning this motion. Complainants have indicated that they will "join this Motion and/but ask for an opportunity to separately brief the Motion and further move the Court for adverse inferences on the outstanding issues in the Investigation." Respondents have indicated that they will oppose the motion.

Respectfully submitted,



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Anne Goalwin, Supervisory Attorney
David O. Lloyd, Investigative Attorney

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March 27, 2009

CERTIFICATE OF SERVICE

The undersigned certifies that on March 27, 2009, he caused the foregoing **COMMISSION INVESTIGATIVE STAFF'S MOTION FOR ISSUANCE OF AN INITIAL DETERMINATION FINDING RESPONDENTS AIA ENGINEERING LIMITED AND VEGA INDUSTRIES IN DEFAULT AND REQUEST FOR SHORTENED RESPONSE TIME** to be filed with the Secretary (original and six copies), served by hand upon Administrative Law Judge Theodore R. Essex (2 copies), and served upon the parties (1 copy each) in the manner indicated below:

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

**Before the Honorable Theodore R. Essex
Administrative Law Judge**

In the Matter of

**CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME**

Inv. No. 337-TA-644

**COMMISSION INVESTIGATIVE STAFF'S MEMORANDUM IN SUPPORT
OF MOTION FOR ISSUANCE OF AN INITIAL DETERMINATION
FINDING RESPONDENTS AIA ENGINEERING LIMITED AND VEGA
INDUSTRIES IN DEFAULT AND REQUEST FOR SHORTENED RESPONSE TIME**

I. INTRODUCTION

The Commission Investigative Staff ("Staff") respectfully submits this memorandum in support of its motion for issuance of an initial determination finding Respondents AIA Engineering Limited and Vega Industries in default. As discussed further below, Respondents have failed file a pre-hearing brief, exhibits, or witness statements, have failed to meet their discovery obligations, have failed to comply with an order compelling discovery, and have announced that they will not participate any further in this investigation.¹ Respondents should therefore be found in default pursuant to Commission Rules 210.16 and 210.17, 19 C.F.R. §§ 210.16, 210.17. In addition, because the hearing in this matter is scheduled to begin on April 13, 2009, the Staff respectfully requests that the response time for this motion be shortened to April

¹ The Staff notes that despite this statement of non-participation and the fact that there can be no dispute that Respondents have failed to comply with Order No. 23 and have failed to file a pre-hearing brief, Respondents have nonetheless indicated that they will oppose this motion.

3, 2009 (*i.e.*, the parties would have one week to respond to the motion), so that the issue of a default can be resolved before the hearing, if possible.²

II. BACKGROUND

In the Complaint, filed on March 24, 2008, Complainants Magotteaux International S/A and Magotteaux, Inc. (collectively "Magotteaux") allege, *inter alia*, that Respondents AIA Engineering Limited and Vega Industries (collectively "Respondents" or "the AIAE Respondents") have violated Section 337 by reason of the importation and sale of certain composite wear components and products containing same that infringe one or more of claims 1-22 of U.S. Patent No. Re. 39,998 ("the '998 patent").³ The Commission voted to institute an investigation on April 21, 2008, and the Notice of Investigation was published in the Federal Register on April 25, 2008. *See* 73 *Fed. Reg.* 22431 (April 25, 2008).

On May 15, 2008, Respondent Vega Industries moved for an extension of time to respond to the Complaint and Notice of Investigation. (*See* Order No. 3). On May 22, 2008, however, rather than file responses to the Complaint and Notice of Investigation, the AIAE Respondents moved to stay this investigation based on an antisuit injunction that they had obtained as part of the court case between the parties in India. (*See* Motion Docket No. 644-4). After filing the motion for a stay, the AIAE Respondents essentially refused to participate in the investigation.

² AIA Engineering Limited and Vega Industries are the only remaining Respondents in the investigation. Moreover, Complainants are requesting only a limited exclusion order, not a general exclusion order. (*See, e.g.*, SX-2C, at 10 (responses to contention interrogatories)). Thus, if a default is found, no evidentiary hearing will be necessary.

³ The investigation has been terminated as to a third Respondent based on a settlement agreement. (Order No. 19; Commission Decision Not to Review, March 11, 2009).

On October 3, 2008, the Judge denied the motion for stay, but did extend the target date. (Order Nos. 12, 13). The Judge requested that the parties submit a new procedural schedule, including "deadlines for AIA Engineering and Vega Industries for events whose deadlines have already passed." (Order No. 12, at 3 n.3). A new procedural schedule was subsequently entered. (Order No. 14). The AIAE Respondents nonetheless did not participate in the investigation.

On November 14, 2008, Complainants moved for a default against the AIAE Respondents based on their failure to answer the Complaint and Notice of Investigation. (Motion Docket No. 644-15). The AIAE Respondents opposed the motion for default, specifically representing to the Judge that they "must participate and defend themselves here, and they fully intend to do so." (AIAE Response to Motion for a Default, at 2).⁴ The AIAE Respondents subsequently responded to the Complaint and Notice of Investigation and began to participate in discovery, at least to some degree. On February 3, 2009, the Judge denied the motion for a default. (Order No. 18).

Immediately following the denial of the motion for a default, the AIAE Respondents ceased participating in discovery. They refused to produce their fact and expert witnesses for deposition, refused to respond substantively to Complainants' written discovery, and refused to respond substantively to the Staff's contention interrogatories. (Motion Docket Nos. 644-27, 644-31, 644-32, 644-33). Respondents also did not file a pre-hearing statement and did not serve any exhibits or witness statements.

⁴ Based on the representation that the AIAE Respondents would participate in the investigation, the Staff also opposed the entry of a default.

On March 5, 2009, the Judge struck Respondents' untimely identification of their expert witness. (Order No. 21). On March 19, 2009, the Judge granted the outstanding motions to compel, ordering responses by March 23, 2009, and specifically warned the AIAE Respondents that "[t]he ALJ will not hesitate, either *sua sponte* or in response to a motion, to make adverse inferences against AIAE should they refuse to cooperate and participate in discovery nor will the ALJ refrain from making the appropriate findings based on the adverse inferences, which includes a finding of default." (Order No. 23, at 4-5).

The AIAE Respondents nevertheless did not serve responses to the interrogatories and requests for admission, did not produce their witnesses for deposition, and thus did not comply with Order No. 23. Instead, Respondents filed a document entitled "Respondents AIA Engineering Limited's and Vega Industries Ltd.'s Notice of Filing of District Court Action and Statement of Position with Respect to ITC Investigation No. 337-TA-644" ("Statement of Position") This document, while purporting to reserve the AIAE Respondents' rights to appeal any decisions by the Judge or the Commission, states that "Respondents will not participate any further in this investigation." (Statement of Position at 2, 5).

III. DISCUSSION

A. Respondents Should Be Found In Default Pursuant to Commission Rules 210.16(a)(2) and 210.16(b)(2)

First, the Staff respectfully moves pursuant for an order finding Respondents in default for failure to make and cooperate in discovery. See 19 C.F.R. §§ 210.16(a)(2), (b)(2).⁵ The

⁵ Under these Rules, it is not necessary to issue an order to show cause before entering a default. See 19 C.F.R. § 210.16(b)(2); see also *Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-565, Order No. 51, at 2 (Jan. 13, 2009) ("*Ink Cartridges*").

Commission Rules provide that “[a] party may be found in default as a sanction for abuse of process, under § 210.4(c), or failure to make or cooperate in discovery, under § 210.33(b).” 19 C.F.R. § 210.16(a)(2) (emphasis added). Rule 210.33(b), in turn, limits sanctions to cases in which the party has failed to comply with an order compelling discovery, including “an order for the taking of a deposition or the production of documents, an order to answer interrogatories, [or] an order issued pursuant to a request for admissions.” 19 C.F.R. § 210.33(b). In such cases, a party may move for a default, or the Judge may enter a default *sua sponte*. 19 C.F.R. § 210.16(b)(2). The Staff submits that although a default for a failure to make or cooperate in discovery should be a last resort, the facts of this investigation more than justify this result.

Here, Respondents have failed to make and cooperate in discovery and have failed to comply with an order compelling discovery. Respondents have been given multiple opportunities to participate in this investigation and defend their interests. (*See supra* at § II). However, they have not done so. Instead, as soon as Complainants’ original motion for a default was denied, Respondents ceased participating in discovery at all. (*Id.*). In Order No. 23, the Judge directed Respondents to comply with the outstanding discovery requests, including producing witnesses for deposition, responding to interrogatories, and answering requests for admissions. (*See* Order No. 23, at 5-6). Indeed, Respondents were specifically warned that failure to comply with the Order could result in the imposition of sanctions, including a default. (Order No. 23, at 4-6). Respondents nonetheless did not comply with Order No. 23 and did not provide the requested discovery. Instead, they served a “Statement of Position,” announcing that they had filed a declaratory judgment action in U.S. District Court and that they “will not participate any further in this investigation.” (Statement of Position at 2, 5). The Staff therefore

submits that Respondents have not merely failed to cooperate in discovery, but have willfully disobeyed the Judge's Order in this respect. Moreover, given the late date (the hearing is approximately two weeks away), it is effectively impossible to remedy Respondents' failure to comply with their discovery obligations.

Under Commission precedent, this course of behavior warrants a finding of a default. *See, e.g., Ink Cartridges*, Order No. 51 (unreviewed initial determination finding a respondent in default pursuant to Rule 210.16(a)(2)); *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Order No. 17, at 4-5 (Jan. 9, 2008) ("*Cigarettes*") (unreviewed initial determination finding a respondent in default pursuant to Rules 210.16(a)(2) and 210.17); *Certain Ink Markers and Packaging Thereof*, Inv. No. 337-TA-522, Order No. 28 (June 1, 2005) (unreviewed initial determination making adverse inferences based on failure to cooperate in discovery); *Certain Automotive Measuring Devices, Products Containing Same, and Bezels for Such Devices*, Inv. No. 337-TA-494, Order No. 18 (April 7, 2004) (unreviewed initial determination finding a respondent in default pursuant to Rule 210.16(a)(2)); *Certain Bearings and Packaging Thereof*, Inv. No. 337-TA-469, Order No. 104 (Jan. 14, 2003) (same). The Staff therefore requests that its motion be granted, that the Judge issue an initial determination finding Respondents in default under 19 C.F.R. §§ 210.16(a)(2), (b)(2), and that this matter be sent to the Commission for immediate entry of relief.

B. Respondents Are In Default Pursuant to Commission Rule 210.17(e)

Second, the Staff respectfully moves pursuant to Commission Rule 210.17 for an order finding Respondents in default for failure to file a pre-hearing brief. *See* 19 C.F.R. § 210.17. The Commission Rules state that "[f]ailures to act other than the defaults listed in § 210.16 may

provide a basis for the presiding administrative law judge or the Commission to draw adverse inferences and to issue findings of fact, conclusions of law, determinations (including a determination on violation of section 337 of the Tariff Act of 1930), and orders that are adverse to the party that fails to act.” *Id.* These failures to act include “[f]ailure to file a brief or other written submission requested by the administrative law judge or the Commission during an investigation or a related proceeding.” 19 C.F.R. § 210.17(e). The Judge may take action under this Rule either *sua sponte* or in response to a motion by a party. 19 C.F.R. § 210.17. The Staff submits that the circumstances of this investigation warrant making an adverse inference that Respondents have violated Section 337 and thereby holding Respondents in default.

Specifically, Respondents have not only failed to comply with their discovery obligations, but they have also failed to submit a pre-hearing brief, as well as exhibits and witness statements, and have determined not to participate any further in this investigation. (*See supra* at § II). By failing to file a pre-hearing brief, Respondents have waived any arguments that they may have had concerning the issues of the investigation. (*See* Ground Rules 8(e), (f)). Under the circumstances, a default and an adverse inference of violation are fully appropriate. *See Certain Electrical Connectors and Products Containing Same*, Inv. No. 337-TA-374, Order No. 38 (Feb. 9, 1996) (unreviewed initial determination finding respondent in default under 19 C.F.R. § 210.17 for failure to respond to a motion for summary determination and making an adverse inference of a violation); *see also, e.g., Cigarettes*, Order No. 17, at 4-6 (unreviewed initial determination finding a respondent in default pursuant to Rules 210.16(a)(2) and 210.17); *Certain Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487, Order No. 45, at 4 (Oct. 1, 2003) (unreviewed initial determination finding respondents in default pursuant to 19

C.F.R. §§ 210.16 and 210.17). The Staff therefore requests that its motion be granted, that the Judge issue an initial determination containing an adverse inference that Respondents have violated Section 337 and finding Respondents in default under 19 C.F.R. § 210.17(e), and that this matter be sent to the Commission for immediate entry of relief.

IV. CONCLUSION

For all of the above reasons, the Judge should issue an initial determination finding Respondents AIA Engineering Limited and Vega Industries in default.

Respectfully submitted,



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David O. Lloyd, Investigative Attorney

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March 27, 2009

Certain Composite Wear Components
and Products Containing the Same

Investigation No. 337-TA-644

CERTIFICATE OF SERVICE

The undersigned certifies that on March 27, 2009, he caused the foregoing **COMMISSION INVESTIGATIVE STAFF'S MEMORANDUM IN SUPPORT OF MOTION FOR ISSUANCE OF AN INITIAL DETERMINATION FINDING RESPONDENTS AIA ENGINEERING LIMITED AND VEGA INDUSTRIES IN DEFAULT AND REQUEST FOR SHORTENED RESPONSE TIME** to be filed with the Secretary (original and six copies), served by hand upon Administrative Law Judge Theodore R. Essex (2 copies), and served upon the parties (1 copy each) in the manner indicated below:

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and Magotteaux, Inc.:**

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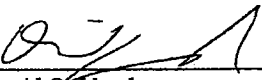
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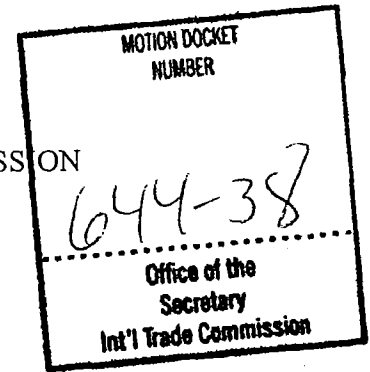
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ATTACHMENT B

(PUBLIC)

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC

Before the Honorable Theodore R. Essex
Administrative Law Judge



In the Matter of

CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME

Investigation No. 337-TA-644

**COMPLAINANTS MAGOTTEAUX INTERNATIONAL S/A AND MAGOTTEAUX
INC.'S MOTION FOR ISSUANCE OF AN INITIAL DETERMINATION FINDING
RESPONDENTS IN DEFAULT AND REQUEST FOR ADVERSE INFERENCES ON
IMPORTATION, INFRINGEMENT AND DOMESTIC INDUSTRY**

Complainants Magotteaux International S/A and Magotteaux, Inc., (collectively "Magotteaux") by and through their counsel, Vedder Price P.C., respectfully submit their Motion for Issuance of an Initial Determination Finding Respondents in Default and Request for Adverse Inferences on Importation, Infringement and Domestic Industry. This Motion is in addition to and supplements the ITC Staff's similarly titled motion for an Initial Determination by requesting adverse inferences and specific findings of fact as permitted under § 210.16 and § 210.17 of the Commission Rules. The basis for the adverse inferences and the specific findings of fact are fully supported by the record and are demonstrated in the accompanying Memorandum of Points and Authorities.

Respectfully submitted,

MAGOTTEAUX S/A and MAGOTTEAUX,
INC.

By: 

One of Its Attorneys

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Dated: April 13, 2009

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

**Before the Honorable Theodore R. Essex
Administrative Law Judge**

In the Matter of

CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING THE SAME

Inv. No. 337-TA-644

**COMPLAINANTS' MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT
OF ITS MOTION FOR ISSUANCE OF AN INITIAL DETERMINATION FINDING
RESPONDENTS IN DEFAULT AND REQUEST FOR ADVERSE INFERENCES ON
IMPORTATION, INFRINGEMENT AND DOMESTIC INDUSTRY**

I. INTRODUCTION

Complainants Magotteaux International S/A and Magotteaux, Inc. ("Complainants") have joined the Commission Investigative Staff's ("Staff") Motion for Issuance of an Initial Determination Finding Respondents in Default. Complainants are in substantial agreement with the Staff's Brief on this matter wherein the Staff has requested an adverse inference that AIA Engineering Limited and Vega Industries (collectively "Respondents" or "AIAE") have violated Section 337.

In addition to joining the Staff's Motion, Complainants have now moved for added adverse inferences given the record in this matter.

Specifically, Complainants request an adverse inference that Respondents have imported, sold for import, or sold after importation based on admissions made by AIA Engineering and Vega Industries in their respective Answers to the Amended Complaint and united responses to the Staff's discovery.

[REDACTED]

Complainants further request an adverse inference that the products imported and sold by AIA Engineering and Vega Industries infringe at least claims 12-13, 16-18 and 20-21 of U.S. Reissue Patent No. 39,998 given the Faber Witness Statement and CTL/McCrone laboratory analysis of AIA Engineering products.

Complainants request an inference adverse to Respondents that a Domestic Industry exists based on the activities of Magotteaux Inc. as reflected in the Taylor Witness Statement and various hearing exhibits cited and relied upon therein.

Finally Complainants request an adverse inference and finding of fact that U.S. Patent No. RE 39,998 is not subject to the arbitration clause included in the Settlement Deed.

The context in which the present Motion is brought presents this Investigative Body with a full and complete record. Beyond findings which support an adverse inference of a violation under § 337, there is evidence of importation, infringement and Domestic Industry. There is also a failure to provide sufficient information regarding an alleged license to the asserted '998 Patent. The record as presented, supports findings and, in turn, adverse inferences on these four issues.¹

At the same time, Respondents will oppose this Motion as they did the Motion put forth by Staff. As the ALJ knows, Respondents unilaterally "cut off" discovery in this Investigation and have placed at least three pleadings in the record stating that they would no longer participate in this Investigation. Respondents took this action only after answering the Complaint. At that time Respondents told the ALJ they would investigate and respond to certain Staff discovery. Respondents' moved to terminate this Investigation, claiming a prior settlement deed between the partners granted them rights to the technology claimed in the '998 patent and

¹ Complainants' proposed Findings of Fact are included with this Memorandum as attachment 2.

[REDACTED]

that the action belonged in arbitration or was more properly heard back in India. Respondents' Motion to Terminate was denied. Respondents moved for reconsideration of the Motion to Terminate, and simply repeated the same unpersuasive argument. The Motion for Reconsideration remains pending (see below).

Somewhere in the midst of all this, Respondents sued Magotteaux in Tennessee Federal Court, alleging noninfringement and invalidity of the patent-in-suit that is the subject of this Investigation. At the same time, Respondents were ordered to produce discovery in the form of witnesses for deposition, documents and answers to interrogatories. They have not.

Respondents' behavior presents a compelling record for action by the ALJ. Spurning the province of the ALJ, the Respondents have tactically withdrawn from the ITC claiming the dispute should be the subject of arbitration or otherwise decided in India while at the same time re-filing in the Federal Courts. Having been ordered to act, the Respondents have made a tactical decision not to do so, thereby handicapping the Staff's and Magotteaux's ability to complete the Investigation. All the while, Respondents have maintained their opposition to Motions for Default while placing all participants on notice of their intent to appeal.²

Respondents are literally holding Staff and Complainants hostage in this Investigation while moving on to Tennessee in an effort to extend the delay and expense to Magotteaux in enforcing its patent rights.

II. THE PENDING MOTIONS

Order No. 24 noted the motions now pending before this Court.³ At this time,

² Complainants placed Respondents on notice of its intent to seek attorneys' fees.

³ In Order No 24, the ALJ references among other things the pendency of Complainants Motion for Summary Judgment. Complainants believe that the Summary Judgment motion is moot. Respondents' unilateral declaration on February 5, 2009 that they would no longer participate in
(cont'd)

[REDACTED]

Complainants have responded to the Motion for Reconsideration or Interlocutory Appeal of decision denying Motion for Termination of Investigation. Respondents' renewed motion presents neither new facts or law. In its Motion for Reconsideration, Respondents have done nothing more than reargue the same issues previously presented, rely on inapplicable and misplaced Indian law while feigning to take the controversy back to New Delhi. Yet, Respondents have filed a District Court action in Tennessee on the very issues they claim are the subject of an arbitration provision.

Respondents' Motion for Reconsideration should be denied.

III. BACKGROUND

Complainants are in substantial agreement with the Background provided by Staff in its Memorandum in Support of the instant Motion. Complainants add the following information.

Complainants have now placed before the Commission as hearing direct exhibits CX-1 through CX-42 and hearing physical exhibits CPX-1 through CPX-3. These exhibits support Complainants requested findings of fact and stand un rebutted as Respondents failed to file a hearing brief or submit exhibits either direct or rebuttal as part of the pre-hearing procedure and as noted by the Staff in its brief, are precluded from participating in the hearing.

(cont'd)

discovery including refusing to answer interrogatories, requests to admit, failing to make their expert available for deposition, and failing to file Pre-Hearing Exhibits and Statement, as well as their later position paper essentially confirming their refusal to participate except with respect to selected issues that they deem necessary provides more than enough basis for disposal of this Investigation pursuant to Commission Rules 210.16 and 210.17 through default and adverse inferences.

[REDACTED]

Certain of these Exhibits are subject to objection by Staff. The list of hearing exhibits is found herein as Attachment I. Also found herein as Attachment II are Proposed Findings of Fact and Conclusions of Law.

Complainants join the Staff in moving for default against the Respondents and requesting an adverse inference of violation under Section 337. Further, Complainants request an adverse inferences on each of the issues of domestic industry, importation, infringement and the lack of a license against Respondents. Exhibits and Proposed Findings of Fact support the requested adverse inferences.

The pattern of conduct pursued by Respondents is clear. Respondents have done everything possible to delay action in this Investigation. When that was no longer possible, Respondents engaged to avert default in November of 2008. As soon as it was apparent that the Investigation was not moving forward as Respondents' desired, they unilaterally "cut off" discovery and moved to terminate the Investigation.

Even still, while feigning removal of the controversy to India and refusing to comply with the ALJ's Order compelling production, the Respondents filed a second action in Tennessee.

Now the Respondents have come forth stating that they would accept a default of these proceedings but arguing against further adverse inferences.

Despite numerous violations of the Court ordered schedule, an immediate and intentional decision to disregard Court ordered discovery, failure to file any pre-hearing submissions, including exhibits and a statement, among other notable deficiencies, Respondents still contend that adverse inferences are inappropriate.

All this argument flies in the face of Commission Rule 210.17.

[REDACTED]

Is the ALJ left to disregard the Commission's own rules?

How much longer must Complainants and Staff be held hostage to Respondents' absolute and utter disregard for the Rules of Practice of this Investigative Body?

Respondents have intentionally pursued a pattern of conduct which is exemplified by delay and selective compliance with Commission Rules when it suits Respondents' position.

Inferences, adverse to Respondents are well based on the full and complete record now before the ALJ.

IV. DISCUSSION

A. Respondents Should Be Found In Default

The Complainants join the Staff's Motion for Default. The Commission Rules provide that "[a] party may be found in default as a sanction for abuse of process, under § 210A(c), *or failure to make or cooperate in discovery, under § 210.33(b).*" 19 C.F.R. § 21.0.16(a)(2) (emphasis added). Rule 210.33(b), in turn, limits sanctions to cases in which the party has failed to comply with an order compelling discovery, including "an order for the taking of a deposition or the production of documents, an order to answer interrogatories, [or] an order issued pursuant to a request for admissions." 19 C.F.R. § 210.33(b). In such cases, a party may move for a default, or the Judge may enter a default *sua sponte*. 19 C.F.R. § 210.16(b)(2). Although a default for a failure to make or cooperate in discovery should be a last resort, the facts of this investigation more than justify that very result.

Here, Respondents have failed to make and cooperate in discovery and have failed to comply with an order compelling discovery. Respondents have been given multiple opportunities to participate in this investigation and defend their interests. (See Staff's Memorandum In Support of Motion, pp. 2-4). However, they have not done so. Instead, as soon

[REDACTED]

as Complainants' original motion for a default was denied, Respondents ceased participating in discovery at all. (*Id.*).

Order No. 23 directed Respondents to comply with the outstanding discovery requests, including producing witnesses for deposition, responding to interrogatories, and answering requests for admissions. (*See* Order No. 23, at 5-6). Respondents were specifically warned that failure to comply with the Order could result in the imposition of sanctions, including a default. (Order No. 23, at 4-6).

Respondents nonetheless did not comply with Order No. 23 and did not provide the requested discovery. Instead, they served a "Statement of Position," announcing that they had filed a declaratory judgment action in U.S. District Court (Middle District of Tennessee) and that they "will not participate any further in this investigation." (Statement of Position at 2, 5).

Respondents have failed to cooperate in discovery and have willfully disobeyed the Judge's Order in this respect.

Under Commission precedent, this course of behavior warrants a finding of a default. *See, e.g., Ink Cartridges*, Order No. 51 (unreviewed initial determination finding a respondent in default pursuant to Rule 210.16(a)(2)); *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Order No. 17, at 4-5 (Jan. 9, 2008) ("*Cigarettes*") (unreviewed initial determination finding a respondent in default pursuant to Rules 210.16(a)(2) and 210.17); *Certain Ink Markers and Packaging Thereof*, Inv. No. 337-TA-522, Order No. 28 (June 1, 2005) (unreviewed initial determination making adverse inferences based on failure to cooperate in discovery); *Certain Automotive Measuring Devices, Products Containing Same, and Bezels for Such Devices*, Inv. No. 337-TA-494, Order No. 18 (April 7, 2004) (unreviewed initial determination finding a

[REDACTED]

respondent in default pursuant to Rule 210.16(a)(2)); *Certain Bearings and Packaging Thereof*, Inv. No. 337-TA-469, Order No. 104 (Jan. 14, 2003) (same).

Complainants therefore request that this motion be granted, that the Judge issue an initial determination finding Respondents in default under 19 C.F.R. §§ 210.16(a)(2), (b)(2), and that this matter be sent to the Commission for immediate entry of relief.

B. Adverse Inferences Are Appropriate As Respondents Are In Default Pursuant to Commission Rule 210.17(e)

Complainants have joined the Staff's Motion pursuant to Commission Rule 210.17 for an order finding Respondents in default for failure to file a pre-hearing brief. See 19 C.F.R. § 210.17. The Commission Rules state that "[f]ailures to act other than the defaults listed in § 210.16 may provide a basis for the presiding administrative law judge or the Commission to draw adverse inferences and to issue findings of fact, conclusions of law, determinations (including a determination on violation of section 337 of the Tariff Act of 1930), and orders that are adverse to the party that fails to act." *Id.* These failures to act include "[f]ailure to file a brief or other written submission requested by the administrative law judge or the Commission during an investigation or a related proceeding." 19 C.F.R. § 210.17(e). The Judge may take action under this Rule either *sua sponte* or in response to a motion by a party. 19 C.F.R. § 210.17.

Complainants agree with the Staff in that the circumstances of this investigation warrant making an adverse inference that Respondents have violated Section 337 and thereby holding Respondents in default.

Specifically, Respondents have not only failed to comply with their discovery obligations, but they have also failed to submit a pre-hearing brief, as well as exhibits and witness statements, and have determined not to participate any further in this investigation. (See Staff's Memorandum in Support of this Motion). By failing to file a pre-hearing brief,

[REDACTED]

Respondents have waived any arguments that they may have had concerning the issues of the investigation. (See Ground Rules 8(e), (f)).

Under the circumstances, a default and an adverse inference of violation are fully appropriate. *See Certain Electrical Connectors and Products Containing Same*, Inv. No. 337-TA-374, Order No. 38 (Feb. 9, 1996) (unreviewed initial determination finding respondent in default under 19 C.F.R. § 210.17 for failure to respond to a motion for summary determination and making an adverse inference of a violation); *see also, e.g., Cigarettes*, Order No. 11, at 4-6 (unreviewed initial determination finding a respondent in default pursuant to Rules 210.16(a)(2) and 210.17); *Certain Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487, Order No. 45, at 4 (Oct. 1, 2003) (unreviewed initial determination finding respondents in default pursuant to 19 C.F.R. §§ 210.16 and 210.17).

Complainants therefore join the Staff in requesting the Judge issue an initial determination containing an adverse inference that Respondents have violated Section 337 and finding Respondents in default under 19 C.F.R. § 210.17(c), and that this matter be sent to the Commission for immediate entry of relief.

C. Adverse Inferences On Infringement, Importation, and Domestic Industry Against Respondents Are Also Appropriate

Complainants additionally move for default under Commission Rule 210.17(e) and request adverse inferences and specific findings of fact on the issues of importation, infringement and domestic industry against Respondents.

The evidence supporting these findings are established and uncontroverted.

1. The Facts Establish Importation Under Section 337

A violation under Section 337 of the Tariff Act of 1930, as amended, requires, among other things, “the importation into the United States, the sale for importation, or the sale within

[REDACTED]

the United States after importation by the owner, importer or consignee, of articles that ... infringe a valid and enforceable United States patent. 19 U.S.C. § 1337(a)(1)(B) (emphasis added).

Respondents have admitted that AIA Engineering and Vega have collaboratively, imported into the United States Sintercast line products, alleged in the Amended Complaint⁴ to be at issue. CX-14C. CX-15C. SX-5C. SX-6C. AIA Engineering answered Magotteaux's Amended Complaint by unequivocally stating that it "has exported to Vega in the United States Sintercast line products" and that it "has the capacity in India to produce and has such produced such products in India." CX-14C. Similarly, Vega answered Magotteaux's Amended Complaint acknowledging that it "has purchased from AIA[E] in India and imported into the United States Sintercast line products⁵, alleged in the Amended Complaint to be at issue."⁶ CX-15C.

Respondents freely admit that Sintercast line products ("Accused Products") have generated sales in the United States in the range of approximately \$5,000 in 2005, \$121,000 in 2007 and \$179,000 in 2008. SX-5C. SX-6C. More specifically, Respondents admit selling \$327,322 of Accused Products in the United States between January 1, 2005 and March 31, 2008. SX-5C. SX-6C.

Interrogatories answered by Respondents demonstrate the following: (i) AIAE has been and remains involved in the business of exporting into the United States Accused Products; (ii)

⁴ The Amended Complaint alleges, among other things, that Respondents manufacture, have manufactured on their behalf, import into, have imported on their behalf, and/or sell composite wear components and/or products containing the same under the Sintercast trademark. CX-12C.

⁵ Product literature regarding the Sintercast product line was produced during the course of this Investigation and is attached hereto for reference as Attachment 2 to Magotteaux's Statement of Facts.

⁶ According to Respondents, the Sintercast line products are imported under Harmonizing Tariff Schedule item number 8474.90.0020. (*Id.*).

[REDACTED]

AIAE has been and remains involved in the business of selling Accused Products to a related company called Vega Middle East for importation into the United States; (iii) Vega has been and remains involved in the business of purchasing Accused Products for importation into the United States from Vega Middle East; and (iv) Vega has been and remains involved in the business of importing these Accused Product into the United States and selling the same within the United States. SX-5C. SX-6C.

Documents produced by Respondents corroborate these undisputed facts. These documents include at least thirteen different commercial offers for sale, quotations, or proposals for the sale of Accused Products by Vega to customers and potential customers located in the United States and range in value from \$23,980 to \$197,800 inclusive of freight and pattern development charges. CX-18C – CX-21C. Cumulatively, these commercial offers for sale, quotations or proposals represent Respondents' attempt to generate \$1,430,587.50, with freight and pattern development charges, in gross sales of Accused Products within the United States. (*Id.*)

Further document production from Respondents evidences four discrete sales of Accused Products via purchase orders from customers in the United States. CX-18C – CX-21C. The four purchase orders total \$277,719 in gross sales of Accused Products to customers in the United States. (*Id.*) Similarly, other documents evidence the following undisputed facts: (i) AIA Engineering shipped Vega \$5,152 worth of Accused Products from a foreign port to its final destination in Charleston, South Carolina (CX-18C – CX-21C); and (ii) Accused Products were sold and installed by Vega in customer's facilities in Tennessee in November 2007 and in November 2008. CX-18C – CX-21C.

[REDACTED]

Based on the above uncontroverted evidence introduced into the record by Respondents, AIA Engineering and Vega meet the importation requirement of Section 337 of the Tariff Act of 1930. Not only do AIA Engineering and Vega collaboratively import into the United States and sell for importation in the United States Accused Products, but Vega has admitted to substantial sales of Accused Products in the United States over the past three years. Accordingly, an inference adverse to Respondents on importation is appropriate.

2. The Facts Establish Respondents Imported Products Infringe the '998 Patent

A violation under Section 337 of the Tariff Act of 1930, as amended, requires, among other things, "the importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer or consignee, of articles that ... infringe a valid and enforceable United States patent. 19 U.S.C. § 1337(a)(1)(B) (emphasis added).

In previous briefing, Complainants have shown that each and every limitation of the asserted claims 12-13, 16-18 and 20-21 reads on Respondents' Accused Products. (See Complainants Pre-Hearing Brief, pp. 30-52).

Respondents produced three samples of the Accused Products in accordance with its responses to Complainants' discovery requests. Faber Witness Statement at Q.21-Q.23. CX-26C. One such sample (the "AIAE Sample") was inspected by Complainants' expert, Dr. Katherine T. Faber, Ph.D. The results of this inspection are set forth in the written Witness Statement of Complainants' Expert, Katherine T. Faber, Ph.D. (the "Faber Witness Statement"). The Faber Witness Statement includes expert findings of fact based on: (i) Dr. Faber's inspection of the AIA Engineering Sample; (ii) laboratory testing of the AIA Engineering Sample for metallographic examination and particle size analysis, as performed by the CTL

Group of Skokie, Illinois; (iii) and laboratory testing of the AIAE Sample for chemical analysis, as performed by McCrone Associates, Inc. of Westmont, Illinois. Faber Witness Statement at Q.24 and Q.36. CX-26C. Based on these findings of fact, the Faber Witness Statement demonstrates that each of claims 12-13, 16-18 and 20-21 are infringed by the AIAE Sample. Faber Witness Statement at Q.24. CX-26C.

Respondents engaged the services of Dr. Richard Sailors, Ph.D. to examine three samples of the Accused Products (the “Sailors Samples”) and prepare an expert report based on his examination. CX-27C. The Court struck Respondents’ identification of Dr. Sailors as untimely (Order No. 21). Moreover, Respondents refused to produce Dr. Sailors for deposition initially and even after the ALJ granted the Staff’s motion to compel. Based on these actions, including respondents’ failure to submit rebuttal expert reports, we understand Dr. Sailors’ report to be stricken.

Notwithstanding the striking of Respondents expert Dr. Sailors, including his report, and out of an abundance of caution, Dr. Faber analyzed the data compiled and listed in the Sailors' Report on the chemical elements found in the ceramic portion of the three Sailors Samples. CX-28C. Based on this analysis, the Second Faber Report used the Sailors Report data to determine the average weights by percent of Al_2O_3 and ZrO_2 in the ceramic composite portion of the three Sailors Samples. CX-28C. The results of this determination, demonstrated that the AIAE sample provided to Dr. Sailors infringed at least each of claims 12, 16-18 and 20-21 of the '998 Patent. CX-28C.

a. The Facts Regarding Claim 12

The following undisputed facts relevant to the application of claim 12 to the Accused Products are found in the Faber and Sailors Expert Opinions (CX-25C through CX-28C):

[REDACTED]

- the AIAE Sample is a composite wear component since it is made of more than one material; the materials are visible in Figures 1 and 2 of the Sailors Report;

- the AIAE Sample and the Sailors Samples are composite wear components made of metal and ceramic;

- the AIAE composite wear components of the AIAE Sample and of the Sailors Samples are made using [REDACTED]

- the AIAE composite wear components of the AIAE Sample and of the Sailors Samples comprise and include a metal matrix found to be [REDACTED];

- the AIAE metal matrices of the AIAE Sample and of the Sailor Samples include a working face having ceramic inserts;

- the AIAE ceramic inserts of the AIAE Sample and of the Sailor Samples are [REDACTED]

- the AIAE porous ceramic pads of the AIAE Sample are [REDACTED]

- the AIAE porous ceramic pads of the AIAE Sample and of the Sailor Samples have been [REDACTED]

[REDACTED]

- a calculation using data compiled and listed in the Sailors Report regarding the chemical elements found in the ceramic portion of the Sailors Samples illustrates that, with respect to the Sailors Samples: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- a legitimate method of assessing homogeneity of a composition is to assess the average composition and its variability; the standard deviation associated with [REDACTED]

[REDACTED] a person having ordinary skill in the art would therefore consider the ceramic composites in the Sailors Samples homogeneous.

The Faber Witness Statement readily indicates that each and every claim limitation is found in the AIAE Accused Products and that a finding of infringement for claim 12 is appropriate. The Faber Witness Statement also readily demonstrates that each of the remaining claims 13, 16-18 and 20-21 are infringed by the AIAE accused products and will not be repeated

[REDACTED]

in this Memorandum. An inference of infringement of these claims adverse to Respondents is dictated by the record before the ALJ.

3. A Domestic Industry Exists Under Section 337

A violation under Section 337 of the Tariff Act of 1930, as amended, requires, among other things, "an industry in the United States, relating to the articles protected by the patent ... concerned, exists or is in the process of being established." 19 U.S.C. § 1337(2). Because Magotteaux makes and sells products protected by at least claims 12-13 and 16-19 of the '998 Patent and because Magotteaux has significant investment in plant and equipment and in the employment of labor or capital to manufacture and sell products protected by the '998 Patent, and no contrary evidence has been submitted by Respondents, a finding that Magotteaux has established a domestic industry is appropriate.

a. Magotteaux Practices Claims 12-13 and 16-19 of the Claimed Invention

Magotteaux provided Dr. Faber a sample product produced under the Xwin® mark (the "Magotteaux Sample") for inspection. Faber Witness Statement at Q.20. CX-26C. The results of this inspection are set forth in the Faber Witness Statement. (*Id.*). The Faber Witness Statement includes expert findings of fact based on: (i) Dr Faber's inspection of the Magotteaux Sample; (ii) laboratory testing of the Magotteaux Sample for metallographic examination and particle size analysis, as performed by the CTL Group of Skokie, Illinois; and (iii) laboratory testing of the Magotteaux Sample for chemical analysis, as performed by McCrone Associates, Inc. of Westmont, Illinois. Faber Witness Statement at Q.24 and Q.36. CX-26C. Based on these findings of fact, the Faber Witness Statement concluded that each of claims 12-13 and 16-18 read on the Magotteaux Sample. Faber Witness Statement at Q.15. CX-26C. Because each

[REDACTED]

of these claims reads on the Magotteaux Sample, the technology prong test of the domestic industry inquiry is satisfied.

b. The Facts Regarding Claim 12

The following undisputed facts relevant to the application of claim 12 to the Magotteaux Sample are found in the First Faber Report or are otherwise part of the record.

- the Magotteaux Sample is a composite wear component since it is made of more than one material (Faber Witness Statement at Q.17. CX-26C.);
- the Magotteaux Sample is a composite wear component made of metal and ceramic (Faber Witness Statement at Q.17, Q.32-Q.34. CX-26C.);
- the Magotteaux composite wear component of the Magotteaux Sample is made using a classical casting method where molten metal is poured into a mold of the desired shape (Faber Witness Statement at Q.34. CX-26C.);
- the Magotteaux composite wear component of the Magotteaux Sample comprises and includes a metal matrix identified as a composition close to [REDACTED] (Faber Witness Statement at Q.32-Q.34. CX-26C.);
- the Magotteaux metal matrix of the Magotteaux Sample includes a working face having ceramic inserts;
- the ceramic inserts of the Magotteaux Sample are porous ceramic pad which has been infiltrated with metal (Faber Witness Statement at Q.32-Q.34. CX-26C.);
- the average weight percentage of Al_2O_3 in the Magotteaux Sample is [REDACTED] and the average weight percentage of ZrO_2 in the Magotteaux Sample is [REDACTED] (Faber Witness Statement at Q.48. CX-26C.);
- the porous ceramic pad of the Magotteaux Sample is a homogeneous ceramic composite of 20 to 80% Al_2O_3 and 80 to 20% ZrO_2 because the ceramic grains were identified as, on average [REDACTED] Al_2O_3 and [REDACTED] ZrO_2 by weight (Faber Witness Statement at Q.48. CX-26C.);
- products incorporating the Xwin® technology, i.e., the technology in products practicing the claimed invention of the '998

[REDACTED]

Patent and sold under the mark Xwin®, generally have a porous ceramic pad comprising a homogeneous ceramic composite of 20 to 80% of Al₂O₃ and 80 to 20% ZrO₂, the percentages being expressed by weights of the constituents (Faber Witness Statement at Q.48. CX-26C.);and

- the porous ceramic pad of the Magotteaux Sample has been infiltrated with liquid metal during casting. Faber Witness Statement at Q.32-Q.34. CX-26C.

The Faber Witness Statement readily indicates that each and every claim limitation is found in the Magotteaux Sample and that a finding of domestic industry for claim 12 is appropriate. The Faber Witness Statement also readily demonstrates that each of the remaining claims 13, and 16-18 are covered by the Magotteaux Xwin™ products and will not be repeated in this Memorandum. The findings in the Faber Witness Statement stand unrebutted and no contrary evidence or analysis of the Magotteaux Xwin® product has been provided in this Investigation.

c. Magotteaux Has Satisfied the Economic Prong of the Domestic Industry Inquiry

"The scope of the domestic industry in patent-based investigations has been determined on a case-by-case basis in light of the realities of the marketplace and encompasses not only the manufacturing operations but may include, in addition, distribution, research and development and sales." *In the Matter of Certain Optical Disk Controller Chips and Chipset and Products Containing the Same*, 2005 WL 2040764 at *6, 7, USITC Inv. No. 337-TA-523, Order No. 75 (U.S.I.T.C. 2005).

In the United States, Magotteaux maintains a corporate facility in Franklin, Tennessee and a plant facility in Pulaski, Tennessee. Taylor Witness Statement at Q.10. CX-33C. CX-34C. The Pulaski plant facility opened in 1972. Taylor Witness Statement at Q.10_. CX-33C. CX-34C. As technology evolved over the past three and a half decades, so did Magotteaux's

[REDACTED]

investments in plant and equipment in the United States. Taylor Witness Statement at Q.10. CX-33C. CX-34C. Today, the Pulaski plant is one site in Magotteaux's operations where Xwin® technology has been manufactured and continues to be manufactured on an ongoing basis. Taylor Witness Statement at Q.10. CX-33C. CX-34C.

Nearly every aspect of the Pulaski plant is used, in some capacity, in the manufacture of products containing Xwin® technology. Taylor Witness Statement at Q.37-Q.40. CX-33C. CX-34C. [REDACTED]

[REDACTED]

In 2006, Magotteaux, Inc. valued its property, plant and equipment including land and improvements at approximately [REDACTED] its building and improvements at approximately [REDACTED] its factory and office machinery and equipment at approximately [REDACTED] and its automotive equipment at approximately [REDACTED] for a total of approximately [REDACTED] in undepreciated assets. Taylor Witness Statement at Q.10. CX-33C. CX-34C. The depreciated value of these assets is approximately [REDACTED] Taylor Witness Statement at Q.10. CX-33C. CX-34C.

[REDACTED]

[REDACTED]

[REDACTED] Taylor Witness Statement at Q.9. CX-

[REDACTED]

33C. CX-34C. [REDACTED]

[REDACTED] Taylor Witness Statement at Q.9. CX-33C. CX-34C. [REDACTED]

[REDACTED]

Magotteaux has undertaken significant employment of labor and capital in connection with the substantial investment in the exploitation of its intellectual property. Taylor Witness Statement at Q.10. CX-33C. CX-34C. As of March 3, 2008, the Franklin facility supports [REDACTED] and the Pulaski plant supports [REDACTED] Taylor Witness Statement at Q.10. CX-33C. CX-34C. [REDACTED]

[REDACTED]

[REDACTED] (*Id.*). The total employment for Magotteaux Inc. during 2006 was [REDACTED] with an overall annual salary base of approximately [REDACTED] (*Id.*)

[REDACTED]

[REDACTED] (*Id.*).

A large percentage of Magotteaux employees at the Pulaski plant work, in some capacity, on products incorporating the Xwin® technology. Taylor Witness Statement at Q.37-Q.39. CX-33C. CX-34C. Similarly, a large percentage of Magotteaux employees at the Franklin facility work, in some capacity, supporting products incorporating the Xwin® technology. (*Id.*). In fact, almost every person employed by Magotteaux at the Magotteaux Franklin facility work who work in its sales department, product support department or in the technical center work in some capacity, supporting Xwin® products. (*Id.*).

Xwin® products made with this technology are sold to (i) the cement industry as, for example, hammers, vertical roller mill castings; (ii) the utility industry as, for example, rolls and

[REDACTED]

tables, (iii) the aggregate industry as, for example, blow bars with wear castings for horizontal shaft machines, as anvils and impellers and as vertical shaft machines; (iv) the waste industry as, for example, hammers and (v) the fluid business as, for example, pump casing housings. Taylor Witness Statement at Q.12. CX-33C. CX-34C.

In 2006, approximately [REDACTED] are directed to products made with, using or embodying Xwin® technology. Taylor Witness Statement at Q.10. CX-33C. CX-34C. During that year, Magotteaux sold [REDACTED] of Xwin® products manufactured [REDACTED] Taylor Witness Statement at Q.11. CX-33C. CX-34C. The gross sales from this volume of product amounted to approximately [REDACTED] [REDACTED] with net sales amounting to approximately [REDACTED] and resulting in an overall profit margin, based on these sales, was of [REDACTED] (Id.).

The 2007 Consolidated Report indicates that gross sales increased in 2007 from approximately [REDACTED] to approximately [REDACTED] Taylor Witness Statement at Q.31-Q.36. CX-33C. CX-34C. Of the approximately [REDACTED] in gross sales during 2007, approximately [REDACTED] is attributable to the sale of Xwin® products. (Id.).

[REDACTED]

Magotteaux attributes this success, in part, to its extensive marketing plan that advertises its Xwin® products using: (i) brochures; (ii) proposals; (iii) quotations; (iv) annual trade shows

[REDACTED]

for various industries; (v) conferences; (vi) papers; (vii) presentations (e.g., PowerPoint presentations); (viii) industry wide gatherings; (ix) paid advertising in high circulation magazine articles; (x) direct-to-customer outreach using field representatives; and (xi) field testing with customers and potential customers. Taylor Witness Statement at Q.15-Q.29. CX-33C. CX-34C.

Because Magotteaux (1) has made significant investments in its plant and facilities in the United States since 1972, and continues to operate facilities, plants, land and property valued at [REDACTED]

are attributable to the sale of Xwin® products; (2) employs more than [REDACTED] in the United States who support the manufacture and sale of Xwin® products [REDACTED]

[REDACTED] (3) sold approximately [REDACTED] of Xwin® products manufactured at the [REDACTED] the gross sales from this volume of product amounted to approximately [REDACTED] with net sales amounting to approximately [REDACTED] and resulting in an overall profit margin, based on these sales, was of [REDACTED] and (4) is recognized as an industry leader in the domestic cement and mining industries, the economic prong test is also satisfied. The information and evidence on the issue of domestic industry stands unrebutted by Respondents.

D. An Adverse Inference That The '998 Patent Is Not Subject To An Arbitration Clause Is Appropriate

During the Investigation, Respondents moved to terminate the Investigation in whole, based on an arbitration agreement contained in a Settlement Deed dated February 16, 2000 (the "Settlement Deed") between AIAE and Magotteaux International S/A. Respondents argued that the issues in this Investigation relate to the Settlement Deed because the prosecution history of the '998 Patent indicates conception of the invention claimed in the '998 Patent likely occurred before the parties executed the Settlement Deed. AIA Engineering therefore contends the subject

[REDACTED]

matter of the '998 Patent may be covered by the license provision of the Settlement Deed.

Magotteaux opposed the termination on the basis that AIA Engineering waived any right it may have had to arbitration because it had numerous opportunities to raise the issue of arbitration in both the prior Indian litigation and the present Investigation but failed to do so. Magotteaux also argued that the technology associated with the '998 Patent was unrelated to the Settlement Deed and was never transferred to AIAE under the Settlement Deed or any other agreement between the parties.

After briefing on the issue by both parties, the ALJ denied the Motion to Terminate and specifically found that (1) AIAE waived its right to arbitration; and (2) AIAE has failed to demonstrate that the '998 Patent is subject to the arbitration clause of the Settlement Deed.

Thus, Magotteaux believes that adverse inferences and findings of fact and conclusion of law that (1) AIAE waived its right to arbitration; (2) the '998 Patent is not subject to the arbitration clause of the Settlement Deed; and (3) AIAE has failed to demonstrate that the technology of the '998 Patent has been licensed to AIAE be entered. These findings are fully supported by the record before the Commission.

Complainants recognize that Respondents have moved for reconsideration of the denial of the Motion to Terminate. That motion is currently pending and Complainants have filed an opposition to the motion. As more fully set forth in its opposition, Respondents Motion for Reconsideration should be denied for the same reasons the ALJ found compelling in denying the Motion to Terminate initially. Respondents have cited to no new facts that would alter the ALJ's previous findings. Moreover, Respondents simply re-argue their position regarding waiver, and that the arbitration clause applies and then immediately turns around and files suit in the U.S. District Court for the Middle District of Tennessee for declaratory judgment that the '998 Patent,

[REDACTED]

currently the subject of the present Investigation, is invalid, not infringed and unenforceable.

Consequently, the Motion for Reconsideration should be denied and the adverse inference and findings of fact previously made by the ALJ with respect to Respondents' Motion to Terminate should be included in the Initial Determination.

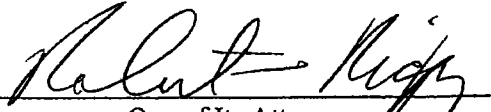
V. CONCLUSION

For the foregoing reasons, Complainants Magotteaux International, S/A and Magotteaux, Inc. respectfully request that the Commission Investigative Staff's Motion for Issuance of an Initial Determination Finding Respondents in Default and that an Adverse Inferences that Respondents have violated Section 337 be granted. Complainants further respectfully request that additional adverse inferences and finding of facts that (1) Respondents import and sell the accused products in the U.S., (2) that Respondents' accused products offered for sale and sold into the United States infringes at least claims 12-13, 16-18 and 20-21 of the '998 Patent, (3) that a domestic industry exists all in accordance with Section 337; (4) AIAE waived its right to arbitration; (5) the '998 Patent is not subject to the arbitration clause of the Settlement Deed; and (6) AIAE has failed to demonstrate that the '998 Patent technology has been licensed to AIAE.

(Signature page to follow)

Respectfully submitted,

MAGOTTEAUX S/A and MAGOTTEAUX,
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Dated: April 13, 2009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Complainants' Motion for Issuance of an Initial Determination Finding Respondents in Default and Request for Adverse Inferences on Importation, Infringement and Domestic Industry and accompanying Memorandum of Points and Authorities in Support** was served April 13, 2009, upon the following interested parties as indicated:

The Honorable Marilyn R. Abbott
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U.S. International Trade Commission
500 E. Street, S.W., Room 112A
Washington, D.C. 20436
(Original + 6 copies)

- ☒ Via Hand Delivery
- ☐ Via Overnight Mail
- ☐ Via Electronic Filing
- ☐ Via Facsimile
- ☐ Via Electronic Docket Filing

The Honorable Theodore R. Essex
Administrative Law Judge
U.S. International Trade Commission
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Anthony Hackley

Attachment 1

MAGOTTEAUX PRELIMINARY EXHIBIT LIST

DIRECT EXHIBITS

EXHIBIT No.	<u>DESCRIPTION</u>	<u>PURPOSE</u>	<u>SPONSORING WITNESS</u>	<u>ACCEPTANCE INTO EVIDENCE</u>
CX-1	Ribbon copy of U.S. Reissue Patent No. 39,998			
CX-2	Certified copy of Certificate of Correction of U.S. Reissue Patent No. 39,998			
CX-3	Certified copy of file history of U.S. Reissue Patent No. 39,998			
CX-4	Certified copy of U.S. Patent No. 6,399,176			
CX-5	Certified copy of file history of U.S. Patent No. 6,399,176			
CX-6	Certified copy of Assignment of U.S. Reissue Patent No. 39,998			
CX-7	Certified copy of Assignment of U.S. Patent No. 6,399,176			
CX-8	Tutorial Power Point Presentation on Technology at issue and claimed in the Patent-in-Suit in this Investigation. (Mag. Doc No. 2103, Bates # M072580- M072640)			
CX-9	Curriculum Vitae of Katherine Theresa Faber			
CX-10C	CTL Group Report (Confidential)			
CX-11C	McCrone Associates, Inc. Report for MA47664 (Confidential)			
CX-12C	Amended Complaint, filed November 14, 2008, without exhibits (Confidential)			
CX-13C	Respondents' documents bearing Bates Nos. AIA000924 – AIA001002, representative of Respondents' literature describing products imported into and sold in the United States under the Sintercast trademark (Confidential)			
CX-14C	AIAE's Answer to the Amended Complaint dated 11/20/2008 (Confidential)			
CX-15C	Vega's Answer to the Amended Complaint dated 11/20/2008 (Confidential)			
CX-16	Commission Investigative Staff's First Set of Interrogatories to Respondents, dated July 25, 2008 ("ITC Interrogatories")			

EXHIBIT No.	DESCRIPTION	PURPOSE	SPONSORING WITNESS	ACCEPTANCE INTO EVIDENCE
CX-17	Commission Investigative Staff's Request for Production of Documents & Things to Respondents, dated July 25, 2008 ("TTC Request for Production")			
CX-18C	Respondents' documents bearing Bates Nos. AIA000845 – AIA000850, AIA000867 – AIA000869, AIA000887 – AIA000914, and AIA000920 – AIA000923, representative of thirteen (13) different commercial offers for sale, quotations or proposals of Sintercast products from Vega to customers and/or potential customers in the United States (Confidential)			
CX-19C	Respondents' documents bearing Bates numbers AIA000841 – AIA000844, AIA000871, AIA000874 – AIA000876, AIA000877, representative of four (4) different purchase orders from Vega customers in the United States for the sale of Sintercast products (Confidential)			
CX-20C	Respondents' document bearing Bates numbers AIA000870, representative of an invoice dated July 2, 2005 from AIAE to Vega for the sale and importation into the United States of \$5,152 of Sintercast products (Confidential)			
CX-21C	Respondents' documents bearing Bates numbers AIA000858 – AIA000860, and AIA000864 – AIA000865, representative of two (2) different visit reports by Vega to Vega customers in the United States, said customers having purchased Sintercast products from Vega (Confidential)			
CX-22C	Complainants' First Set of Requests for Production of Documents and Things (No. 1) to Respondent AIAE, dated June 26, 2008 (Confidential)			
CX-23C	Complainants' First Set of Requests for Production of Documents and Things (No. 1) to Respondent Vega, dated June 26, 2008 (Confidential)			
CX-24C	AIAE's Objections and Responses to Magotteaux's Document Request to AIAE, dated December 29, 2008 (Confidential)			
CX-25C	Complainants' Expert Infringement Report of Katherine Theresa Faber, Ph.D., dated January 30, 2009 (Confidential)			

<u>EXHIBIT No.</u>	<u>DESCRIPTION</u>	<u>PURPOSE</u>	<u>SPONSORING WITNESS</u>	<u>ACCEPTANCE INTO EVIDENCE</u>
CX-26C	Appendices to Complainants' Expert Infringement Report dated January 30, 2009 (Confidential)			
CX-27C	Respondents' Expert Report of Richard Sailors, Ph.D., dated January 30, 2009 (Confidential)			
CX-28C	Complainants' Rebuttal Expert Infringement Report of Katherine Theresa Faber, Ph.D., dated February 6, 2009 (Confidential)			
CX-29C	Appendices to Complainants' Rebuttal Expert Infringement Report dated February 6, 2009 (Confidential)			
CX-30C	Transcript of the Confidential Videotaped Deposition of Christopher Taylor Taken on Behalf of the Respondents F.A.R., S.p.A., AIAE and Vega dated January 7, 2009 ("Taylor Deposition") (Confidential)			
CX-31C	Declaration of John Christopher Taylor dated March 20, 2008 (without exhibits), attached to the Amended Complaint as Confidential Exhibit A ("Taylor Declaration") (Confidential)			
CX-32C	Xwin® product literature and photograph of a Magotteaux products incorporating the same, attached to the Amended Complaint as Exhibit J and Confidential Exhibit C, respectively, each referenced in the Taylor Declaration (Confidential)			
CX-33C	Magotteaux, Inc. and Subsidiaries Consolidated Financial Statements, dated December 31, 2006, attached to the Amended Complaint as Confidential [Exhibit E], referenced in the Taylor Declaration, referenced in the Taylor Deposition as Exhibit 19 (Confidential)			
CX-34C	Magotteaux, Inc. and Subsidiaries Consolidated Financial Statements dated December 31, 2007, referenced in the Taylor Deposition as Exhibit 27 (Confidential)			
CX-35C	Pivot table showing sales of Xwin® products in U.S. Dollars since approximately 1998-1999 by year, tons, month and dollars, referenced in Taylor Deposition as Exhibit 22 (Bates Nos. M002560-M002615) (Confidential)			

EXHIBIT No.	<u>DESCRIPTION</u>	<u>PURPOSE</u>	<u>SPONSORING WITNESS</u>	<u>ACCEPTANCE INTO EVIDENCE</u>
CX-36C	Document prepared by Magotteaux comparing certain strengths, weakness, opportunities and threats of AIAE to Magotteaux, dated April 5, 2003, referenced in Taylor Deposition as Exhibit 32 (Bates Nos. M307356-M307359) (Confidential)			
CX-37	Copy of EP0838288A1			
CX-38	Certified translation of EP0838288A1			
CX-39	Copy of EP0930948B1			
CX-40	Verified/certified translation of EP0930948			
CX-41	Product Information on Ceramics from St. Gobain			
CX-42C	McCrone Associates, Inc. Report for MA47363 (Confidential)			

PHYSICAL EXHIBITS

EXHIBIT No.	<u>DESCRIPTION</u>	<u>PURPOSE</u>	<u>SPONSORING WITNESS</u>	<u>ACCEPTANCE INTO EVIDENCE</u>
CPX-1	Samples of Ceramic Grains- Physical Exhibits to be produced at trial			
CPX-2	Sample of AIAE Product analyzed and reported in Dr. Faber's Report- Physical Exhibits to be produced at trial			
CPX-3	Sample of Magotteaux Product analyzed and reported in Dr. Faber's Report- Physical Exhibits to be produced at trial			

Attachment 2

[REDACTED]

COMPLAINANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

CFF1. Parties to the Investigation.

- CFF1.1. The Commission instituted this Investigation, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, by publication of the Notice of Investigation in the *Federal Register* on April 25, 2008, (Vol. 73, No. 81, 22431).
- CFF1.2. The Commission named Magotteaux International S/A of Liege, Belgium and Magotteaux Inc. of Franklin, Tennessee as the Complainants. (Fed. Reg. Vol. 73, No., 81, 22431.)
- CFF1.3. The Commission named AIAE of India and Vega Industries of Brentwood, Tennessee as Respondents. (Fed. Reg. Vol. 73, No., 81, 22431.)
- CFF1.4. AIAE was, at the time this Investigation was instituted, a Corporation organized under the laws of India having its principal place of business at Plot No. 115, Gujarat Vyapari, Maha Mandel, Industrial Estate, Odhav Road, Ahmedabad 38240.
- CFF1.5. Vega Industries is a subsidiary of AIAE, having a principal place of business at 330 Franklin Rd., Suites 135-180, Brentwood, Tennessee 37027.

CFF2. The Investigation and Importation.

- CFF2.1. The Investigation was instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain composite wear components by reason of infringement of the claims of U.S. Reissue Patent No. 39,998 and whether a domestic industry in the United States exists as required by subsection (a)(2) of section 337. (Fed. Reg. Vol. 73, No., 81, 22431.)

- [REDACTED]
- CFF2.2. AIAE and Vega Industries have admitted importing into the United States or selling within the United States after importation, certain composite wear components under the Trademark Sintercast®. SX-5C. SX-6C. CX-15C.
- CFF2.3. AIAE admits that AIAE has exported to Vega in the United States Sintercast® products, alleged in the Amended Complaint to be at issue. Those products are believed to have resulted in sales in the United States in the range of approximately \$5,000 in 2005, \$121,000 in 2007, and \$179,000 in 2008. SX-5C. SX-6C. CX-14C.
- CFF2.4. AIAE has the capacity in India to produce and has produced composite wear components in India. As relates to the United States, the Sintercast® product line forms, on average, a portion of AIAE's exports to the United States. CX-14C. SX-5C. SX-6C.
- CFF2.5. Vega admits that it has purchased composite wear components from AIAE in India and imported into the United States these products, alleged in the Amended Complaint to be at issue. CX-15C. SX-5C. SX-6C.
- CFF2.6. Vega's sales of such products in the United States have been in the range of approximately \$5,000 in 2005, \$121,000 in 2007, and \$179,000 in 2008. SX-5C. SX-6C.
- CFF2.7. The Harmonizing Tariff Schedule item numbers for these products is 8474.90.0020. SX-5C. SX-6C.
- CFF2.8. Vega purchases all composite wear component products from AIAE and does not have the capacity to produce the accused devices. SX-5C. SX-6C.
- CFF2.9. AIAE and Vega admit that AIAE has been and remains involved in the business of exporting into the United States composite wear components and products containing the same that are covered by one or more of the patent claims at issue. SX-5C. SX-6C.
- CFF2.10. Vega has been and remains involved in the business of importing composite wear components into the United States. SX-5C. SX-6C.

[REDACTED]

CFF2.11. Vega sells the composite wear components in the United States. SX-5C.
SX-6C.

CFF2.12. The Accused Products imported into the United States by Vega are purchased from an affiliated company of Vega's called Vega Middle East, which purchases the composite wear components from AIAE. SX-5C.
SX-6C.

CFF2.13. Vega admitted selling [REDACTED]
[REDACTED] SX-5C. SX-6C.

CFF2.14. Vega admitted selling [REDACTED]
[REDACTED] SX-5C. SX-6C.

CFF2.15. Vega admitted selling [REDACTED]
[REDACTED] SX-5C. SX-6C.

CFF2.16. Vega admitted selling [REDACTED]
[REDACTED] SX-5C. SX-6C.

CFF3. Sales and Offers For Sale.

CFF3.1. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
[REDACTED] CX-18C.

CFF3.2. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
[REDACTED] CX-18C.

CFF3.3. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
[REDACTED] CX-18C.

[REDACTED]

CFF3.4. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
CX-18C.

CFF3.5. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
CX-18C.

CFF3.6. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
CX-18C.

CFF3.7. A commercial offer for sale, quotation or proposal dated [REDACTED] was
[REDACTED]
CX-18C.

CFF3.8. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
CX-18C.

CFF3.9. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
CX-18C.

CFF3.10. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
CX-18C.

[REDACTED]

CFF3.11. A commercial offer for sale, quotation or proposal dated [REDACTED]

[REDACTED]

[REDACTED] CX-18C.

CFF3.12. A commercial offer for sale, quotation or proposal dated [REDACTED]

[REDACTED]

[REDACTED] CX-18C.

CFF3.13. A commercial offer for sale, quotation or proposal dated [REDACTED]

[REDACTED]

CX-18C.

CFF3.14. A purchase order was received from [REDACTED]

[REDACTED]

[REDACTED] CX-19C.

CFF3.15. A purchase order was received from [REDACTED]

[REDACTED]

[REDACTED] CX-19C.

CFF3.16. A purchase order was received from [REDACTED]

[REDACTED]

[REDACTED] CX-19C.

CFF3.17. A purchase order was received from [REDACTED]

[REDACTED]

[REDACTED] CX-19C.

[REDACTED]

CFF3.18. An invoice dated [REDACTED]

[REDACTED] CX-
20C.

CFF3.19. Vega personnel visited [REDACTED]

[REDACTED] CX-21C.

CFF3.20. Vega personnel visited [REDACTED]

[REDACTED] CX-21C.

CFF4. The Patent at Issue.

CFF4.1. The patent at issue in this Investigation is U.S. Reissue Patent No. 39,998 ("the '998 Patent"), and its Certificate of Correction. CX-1. CX-2.

CFF4.2. The '998 Patent issued on January 7, 2008 having 22 claims and was Reissued from U.S. Patent No. 6,339,176. CX-1. CX-4.

CFF4.3. The '998 Patent names Hubert Francois as inventor. (CX-1.)

CFF4.4. Complainant has asserted Claims 12, 13, 16, 17, 18, 20 and 21 of the '998 Patent against Respondents. (Prehearing Statement of Complainant.)

CFF4.5. As found in the '998 Patent and its attendant Certificate of Correction, Claim 12 of the '998 Patent reads:

Composite wear component produced by classical or centrifugal casting, said composite wear component comprising[:]

a metal matrix having a working face or faces including inserts which have wear resistance, the inserts include a porous

[REDACTED]

ceramic pad, wherein the porous ceramic pad comprises a homogeneous ceramic composite [of] 20 to 80% of Al_2O_3 and 80 to 20% of ZrO_2 , the percentages being expressed by weights of the constituents, and the porous ceramic pad being integrated into the metal matrix by impregnation of a liquid metal in the porous ceramic pad during the casting. CX-1. CX-2.

- CFF4.6. As found in the '998 Patent and its attendant Certificate of Correction, Claim 13 of the '998 Patent reads:

Composite wear component according to claim 12, wherein the ceramic material includes from 55 to 60% of by weight of Al_2O_3 and from 38 to 42% by weight of ZrO_2 . CX-1. CX-2.

- CFF4.7. As found in the '998 Patent and its attendant Certificate of Correction, Claim 16 of the '998 Patent reads:

Composite wear component according to claim 12, wherein the inserts include an aggregate of composite ceramic grains which have a particle size within the range F6 to F22 of the FEPA standard. CX-1. CX-2.

- CFF4.8. As found in the '998 Patent and its attendant Certificate of Correction, Claim 17 of the '998 Patent reads:

Composite wear component according to claim 16, wherein the ceramic grains are manufactured by one of electrofusion, sintering and flame spraying. CX-1. CX-2.

- CFF4.9. As found in the '998 Patent and its attendant Certificate of Correction, Claim 18 of the '998 Patent reads:

Composite wear component according to claim 16, wherein the ceramic grains are jointed integrally with the aid of an inorganic or organic liquid adhesive prior to the casting with the liquid metal. CX-1. CX-2.

- CFF4.10. As found in the '998 Patent and its attendant Certificate of Correction, Claim 20 of the '998 Patent reads:

Composite wear component produced by classical or centrifugal casting according to claim 12 and made up of a metal matrix including a wear-resistant ceramic pad, wherein the ceramic pad is in the form of a honeycomb structure in which the various cells are of polygonal or circular shape within the ceramic phase. CX-1.

[REDACTED]

CX-2.

CFF4.11. Claim 21 of the '998 Patent reads:

Composite wear component according to claim 20, wherein a thickness of walls of the various cells constituting the ceramic phase varies from 5 to 25 mm. CX-1. CX-2.

CFF4.12. The phrase "solid solution" is not a claim term in the '998 Patent. CX-1.
CX-2.

CFF4.13. The phrase "solid solution" is used only once in the '998 Patent, at column 2, lines 56-66 of the written description portion of the specification of the '998 Patent and is reprinted below:

To meet the first objective the invention proposes a composite wear component produced by conventional or centrifugal casting. It consists of a metal matrix whose wear surface comprises inserts which have good abrasion resistance properties, these inserts being made of a ceramic material, itself composite, consisting of a solid solution or homogenous phase of 20 to 80% of Al_2O_3 and 80 to 20% of ZrO_2 , the percentages being expressed by weights of constituents. CX-1.

CFF5. Infringement.

CFF5.1. AIAE waived its right to arbitration (Order No. 20).

CFF5.2. AIAE has failed to demonstrate that the '998 Patent is subject to the arbitration clause of the Settlement Deed. (Order No. 20).

CFF5.3. There is no evidence of a license between Magotteaux International S/A or any of its subsidiaries and AIAE and any of its subsidiaries or related companies relating to the technology of the '998 Patent (Order No. 20).

CFF5.4. Three AIAE samples were produced to Magotteaux by AIAE. One such sample (the "AIAE Sample") was inspected by Dr. Faber in forming the opinions set forth in the First Faber Report. CPX-2. CX-26C. Faber Witness Statement, Q.20-Q.30.

CFF5.5. The AIAE Sample was subject to laboratory testing by the CTL Group of

[REDACTED]

Skokie, Illinois for metallographic examination and particle size analysis and subject to laboratory testing by McCrone Associates, Inc. of Westmont, Illinois for chemical analysis. CX-26C. Faber Witness Statement, Q.20-Q.30.

CFF5.6. The CTL Report observes that the AIAE Sample had an [REDACTED]

[REDACTED]

CX-26C. Faber Witness Statement, Q.20-Q.30.

CFF5.7. The McCrone Report observes the following facts with respect to the AIAE Sample: [REDACTED]

[REDACTED] Q.39-Q.53.

CFF5.8. Dr. Faber observed that Components from the AIAE Sample have obvious areas of ceramic grain in a metal matrix along one face; and the AIAE Sample has a 'honeycomb' configuration in which the ceramic pad formed the honeycomb with metal-filled holes. CX-26C. Faber Witness Statement, Q.39-Q.53.

CFF5.9. Dr. Faber has observed that (i) the AIAE Sample is a composite wear component since it is made of more than one material; (ii) the AIAE Sample is a composite wear component made of metal and ceramic; (iii) the AIAE composite wear component is made using [REDACTED]

[REDACTED] (iv) the AIAE composite wear component comprises and includes a metal matrix found to be [REDACTED] (v) the AIAE metal matrix includes a working face having ceramic inserts; (vi) the AIAE ceramic inserts are a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CX-26C. Faber Witness Statement, Q.20-Q.30,
Q.39-Q.53.

CFF5.10. Dr. Faber has observed that the AIAE porous ceramic pad is a [REDACTED]
[REDACTED]
[REDACTED] Q.39-Q.53.

CFF5.11. Dr. Faber has observed that the ceramic grains of the AIAE Sample have a
range in the average length of [REDACTED]
[REDACTED]
[REDACTED] CX-26C.
Faber Witness Statement, Q.20-Q.30.

CFF5.12. Dr. Faber has observed that as ceramic composite grains of [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] CX-26. Faber Witness Statement, Q.49-Q.51.

CFF5.13. Dr. Faber has observed that ceramic grains must be joined integrally with
the aid of [REDACTED]
[REDACTED]
[REDACTED] CX-26C. Faber Witness Statement, Q.51

CFF5.14. Dr. Faber has observed that AIAE Sample is made of a metal matrix
including a wear resistant ceramic pad which is in the form of a honeycomb

[REDACTED]

structure. Various cells within the honeycomb are of polygonal or circular shape within the ceramic phase of [REDACTED] CX-26. Faber Witness Statement, Q.52

CFF5.15. Dr. Faber has observed that average thickness of the cell walls of the ceramic phase of [REDACTED]
[REDACTED] CX-26C. Faber Witness Statement, Q.53

CFF5.16. Dr. Faber has concluded that after analysis and evaluation, the AIAE Sample meets the limitations of claims 12-13, 16-18 and 20-21 of the '998 Patent since the AIAE Sample includes each of the terms and limitations expressed in these claims. CX-26C. Faber Witness Statement, Q.14

CFF6. Domestic Industry.

CFF6.1. Magotteaux International S/A is a corporation organized under the laws of Belgium, having its principal place of business at Rue A. Dumont, B-4051 Vaux-sous-Chèvremont, Belgium. Magotteaux, Inc. is a Tennessee corporation, with its principal place of business at 725 Cool Springs Boulevard, Suite 200, Franklin, Tennessee, 37067. Magotteaux, Inc. is a subsidiary of Magotteaux International S/A which is the assignee of the '998 Patent. CX-12C.

CFF6.2. Magotteaux's product line using the technology of the '998 Patent is Magotteaux's Xwin® product line. CX-32C. Taylor Witness Statement, Q.14-Q.29.

CFF6.3. Products incorporating the Xwin® technology are currently being manufactured and sold in the United States and are generally characterized as having a porous ceramic pad comprising a homogeneous ceramic composite of 20 to 80% of Al_2O_3 and 80 to 20% ZrO_2 , the percentages being expressed by weights of the constituents. CX-26C, CX-32C. Taylor Witness Statement, Q.7-Q.9.

- [REDACTED]
- CFF6.4. The ceramic grains in products using the Xwin® technology may have concentrations of Al_2O_3 and ZrO_2 that vary slightly and that, for example, one formulation of the Xwin® technology uses approximately [REDACTED] Al_2O_3 and [REDACTED] ZrO_2 . Another exemplary formulation of the Xwin® technology uses approximately [REDACTED] Al_2O_3 and [REDACTED] ZrO_2 . CX-26C. Taylor Witness Statement, Q.48.
- CFF6.5. The ceramic grains used in products incorporating the Xwin® technology [REDACTED]
[REDACTED]
[REDACTED] CX-41. Taylor Witness Statement, Q.7-Q.9. Francois Witness Statement, Q.8.
- CFF6.6. Dr. Faber inspected, analyzed and reported certain expert opinions on a sample product provided by Magotteaux (the "Magotteaux Sample") for the purpose of comparing the Magotteaux Sample to the claims. CX-26C. Faber Witness Statement, Q.31-Q.38.
- CFF6.7. The Magotteaux Sample was subject to laboratory testing by the CTL Group of Skokie, Illinois for metallographic examination and particle size analysis and subject to laboratory testing by McCrone Associates, Inc. of Westmont, Illinois for chemical analysis. CX-26C. Faber Witness Statement, Q.31-Q.38.
- CFF6.8. The results of the metallographic examination and particle size analysis performed by the CTL Group and the results of the chemical analysis performed by the McCrone Associates, Inc. formed the basis of Dr. Faber's Opinion on Infringement. CX-26C. Faber Witness Statement, Q.31.
- CFF6.9. The Magotteaux Sample has an average length along the long dimension of the ceramic grains of [REDACTED] and the average length of the short dimension of the ceramic grains is [REDACTED] Faber Witness Statement. CX-26C.

- [REDACTED]
- CFF6.10. The Magotteaux Sample has an average weight percentage of Al_2O_3 of [REDACTED] and the average weight percentage of ZrO_2 is [REDACTED] CX-26C. Faber Witness Statement, Q.48.
- CFF6.11. The Magotteaux Sample is a composite wear component since it is made of more than one material and the Magotteaux Sample is a composite wear component made of metal and ceramic. CX-26C. Faber Witness Statement, Q.17, Q.31, and Q.32.
- CFF6.12. The Magotteaux composite wear component is made using a classical casting method where molten metal is poured into a mold of the desired shape. CX-26C. Faber Witness Statement, Q.33.
- CFF6.13. The Magotteaux composite wear component comprises and includes a metal matrix identified as a composition close to [REDACTED] CX-26C. Faber Witness Statement, Q.17, Q.31 and Q.32.
- CFF6.14. The Magotteaux metal matrix includes a working face having ceramic inserts. CX-26C.
- CFF6.15. The ceramic inserts are a porous ceramic pad which has been infiltrated with metal. CX-26C. Faber Witness Statement, Q.32, Q.33.
- CFF6.16. The porous ceramic pad is a homogenous ceramic composite of 20 to 80% Al_2O_3 and 80 to 20% ZrO_2 because the ceramic grains were identified as, on average [REDACTED] Al_2O_3 and [REDACTED] ZrO_2 by weight. CX-26C. Faber Witness Statement, Q.48.
- CFF6.17. The porous ceramic pad has been infiltrated with liquid metal during casting. CX-26C. Faber Witness Statement, Q.32, Q.33.
- CFF6.18. The Magotteaux porous ceramic pad is a homogenous ceramic composite of [REDACTED] Al_2O_3 and [REDACTED] ZrO_2 because the ceramic grains were identified as, on average [REDACTED] Al_2O_3 and [REDACTED] ZrO_2 by weight. CX-26C. Faber Witness Statement, Q.48.
- CFF6.19. The ceramic grains of the Magotteaux Sample have a range in the average

[REDACTED]

length of [REDACTED] depending upon whether the short or long dimension of the grain are being measured. These size ranges clearly fit within the range of F22 to F6 FEPA standard. CX-26C. Faber Witness Statement, Q.31.

CFF6.20. Ceramic composite grains of Al_2O_3 and ZrO_2 are not naturally occurring. Composite grains are produced by processes which fuse Al_2O_3 and ZrO_2 at high temperature. Angular composite grains fused Al_2O_3 and ZrO_2 associated with the Magotteaux Sample are normally manufactured by electrofusion, sintering or flame spraying. CX-26C. Faber Witness Statement, Q.50.

CFF6.21.

[REDACTED]
[REDACTED]
[REDACTED] CX-26C. Faber Witness Statement, Q.51.

CFF6.22. The Magotteaux Sample, after analysis and evaluation embodies at a minimum at least claims 12-13, 16-18 for the Magotteaux Sample, since it includes each of the terms and limitations expressed in these claims of U.S. Reissue Patent No. 39,998. CX-26C. Faber Witness Statement, Q.15.

CFF6.23. Magotteaux has made a significant investment in plant and equipment in the United States and has undertaken significant employment of labor and capital in connection with the substantial investment in the exploitation of its intellectual property. CX-33C. CX-34C. Taylor Witness Statement, Q.10.

CFF6.24. Magotteaux opened a plant facility in Pulaski, Tennessee in 1972. As the technology evolved, this plant has become one site in Magotteaux's operations where Xwin® technology has been manufactured on an ongoing basis. CX-33C. CX-34C. Taylor Witness Statement, Q.10.

CFF6.25. Xwin® technology and products made with this technology are sold to (i) the cement industry as, for example, hammers, vertical roller mill

[REDACTED]

castings; (ii) the utility industry as, for example, rolls and tables, (iii) the aggregate industry as, for example, blow bars with wear castings for horizontal shaft machines, as anvils and impellers and as vertical shaft machines; (iv) the waste industry as, for example, hammers and (v) the fluid business as, for example, pump casing housings. CX-33C. CX-34C. Taylor Witness Statement, Q.12.

CFF6.26. Sales attributable to Xwin® technology have risen approximately [REDACTED] from 2006 to 2007; [REDACTED] CX-32C. CX-33C. Taylor Witness Statement, Q.30-Q.36.

CFF6.27. In the United States, Magotteaux maintains a corporate facility in Franklin, Tennessee and a plant facility in Pulaski, Tennessee. CX-32C. CX-33C. Taylor Witness Statement, Q.10 and Q.14.

CFF6.28. As of March 3, 2008, the Franklin facility supports [REDACTED] employees and the Pulaski plant supports [REDACTED] employees. CX-32C. CX-33C. Taylor Witness Statement, Q.10.

CFF6.29. Of the [REDACTED] employees at the Franklin facility as of March 3, 2008, [REDACTED]
[REDACTED]
CX-32C. CX-33C. Taylor Witness Statement, Q.10.

CFF6.30. The total employment for Magotteaux Inc. during 2006 was [REDACTED] with an overall annual salary base of approximately [REDACTED] CX-32C. CX-33C. Taylor Witness Statement, Q.10.

CFF6.31. As of March 3, 2008, approximately [REDACTED] of the Pulaski plant's gross sales (in dollar value) are directed to products made with, using or embodying Xwin® technology. CX-32C. CX-33C. Taylor Witness Statement, Q.10, Q.13.

CFF6.32. A large percentage of Magotteaux employees at the Pulaski plant work, in some capacity, on products incorporating the Xwin® technology. CX-32C.

[REDACTED]

CX-33C. Taylor Witness Statement, Q.8, Q.13, Q.37-Q.40.

CFF6.33. A large percentage of Magotteaux employees at the Franklin facility work, in some capacity, supporting products incorporating the Xwin® technology. CX-32C. CX-33C. Taylor Witness Statement, Q.8, Q.10, Q.13, Q.37-Q.40.

CFF6.34. Almost every person related to sales or product support or the technical center employed by Magotteaux at its Franklin facility works, in some capacity, supporting products incorporating the Xwin® technology. CX-32C. CX-33C. Taylor Witness Statement, Q.37-Q.40.

CFF6.35. Many portions of the Pulaski plant are used, in some capacity, for making products including the Xwin® technology. CX-32C. CX-33C. Taylor Witness Statement, Q.37-Q.40.

CFF6.36. Ceramic grains used in Xwin® products [REDACTED]
[REDACTED] CX-32C. CX-33C. Taylor Witness Statement, Q.9.

CFF6.37. [REDACTED]
[REDACTED] CX-32C. CX-33C. Taylor Witness Statement, Q.8.

CFF6.38. [REDACTED]
[REDACTED]
[REDACTED] CX-32C. CX-33C. Taylor Witness Statement, Q.8, Q.10, Q.37-Q.40.

CFF6.39. Magotteaux markets its Xwin® products using: (i) brochures; (ii) proposals; (iii) quotations; (iv) annual trade shows for various industries; (v) conferences; (vi) papers; (vii) presentations (e.g., PowerPoint presentations); (viii) industry wide gatherings; (ix) paid advertising in high circulation magazine articles; (x) direct-to-customer outreach using field representatives; and (xi) field testing with customers and potential customers. CX-32C. CX-33C. Taylor Witness Statement, Q.15-Q.29.

[REDACTED]

CFF6.40. In 2006, Magotteaux, Inc. valued its property, plant and equipment including land and improvements at approximately [REDACTED] its building and improvements at approximately [REDACTED] its factory and office machinery and equipment at approximately [REDACTED] and its automotive equipment at approximately [REDACTED] for a total of approximately [REDACTED] Million in undepreciated assets. The depreciated value of these assets is approximately [REDACTED]. These numbers are found in the 2006 Consolidated Report. CX-32C. CX-33C. Taylor Witness Statement, Q.10.

CFF6.41. In 2006, Magotteaux sold [REDACTED] of product which was manufactured in the [REDACTED] using the Xwin® technology. CX-32C. CX-33C. Taylor Witness Statement, Q.11.

CFF6.42. The gross sales from this volume of product amounted to approximately [REDACTED] with net sales amounting to approximately [REDACTED] providing an overall profit margin of [REDACTED]. CX-32C. CX-33C. Taylor Witness Statement, Q.11.

CFF6.43. The environments of use into which the [REDACTED] was sold into during 2007 included aggregates, cement, and utilities. CX-32C. CX-33C. Taylor Witness Statement, Q.11.

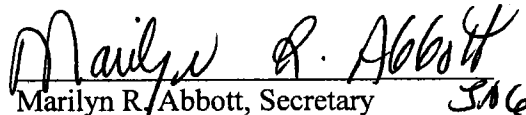
CFF6.44. The 2007 Consolidated Report indicates that gross sales increased in 2007

**IN THE MATTER OF CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS CONTAINING THE SAME**

Inv. No. 337-TA-644

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER 26** has been served by hand upon, the Commission Investigative Attorney, **David O. Lloyd, Esq.**, and the following parties as indicated June 8, 2009.


Marilyn R. Abbott, Secretary
U.S. International Trade Commission
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**IN THE MATTER OF CERTAIN COMPOSITE WEAR
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Inv. No. 337-TA-644

CERTIFICATE OF SERVICE - PAGE 2

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