PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436

In the Matter of	
CERTAIN KINESIOTHERAPY DEVICES AND COMPONENTS THEREOF	Investigation No. 337-TA-823

RECOMMENDED DETERMINATION ON REMEDY AND BOND

Administrative Law Judge Thomas B. Pender

(January 22, 2013)

List of Abbreviations

CDX	Complainant's Demonstrative Exhibit
CIB	Complainant's Initial Post-Hearing Brief
CRB	Complainant's Reply Post-Hearing Brief
CPHB	Complainant's Pre-Hearing Brief
CX	Complainant's Exhibit
Depo.	Deposition
JX	Joint Exhibit
RDX	Respondent's Demonstrative Exhibit
RIB	Respondent's Initial Post-Hearing Brief
RRB	Respondent's Reply Post-Hearing Brief
RX	Respondent's Exhibit
Tr.	Hearing Transcript
DWS	Direct Witness Statement (Including Revised Direct Witness Statements)
RWS	Rebuttal Witness Statement
SIB	Staff's Initial Post-Hearing Brief
SRB	Staff's Reply Post-Hearing Brief

The Commission's Rules provide that subsequent to an initial determination on the question of violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, the administrative law judge shall issue a recommended determination containing findings of fact and recommendations concerning: (1) the appropriate remedy in the event that the Commission finds a violation of Section 337, and (2) the amount of bond to be posted by respondents during Presidential review of Commission action under section 337(j). *See* 19 C.F.R. § 210.42(a)(1)(ii).

I. EXCLUSION ORDER

Under Section 337(d), the Commission may issue either a limited or a general exclusion order. A limited exclusion order instructs the U.S. Customs and Border Protection ("CBP") to exclude from entry all articles that are covered by the patent at issue and that originate from a named respondent in the investigation. A general exclusion order instructs the CBP to exclude from entry all articles that are covered by the patent at issue, without regard to source.

A general exclusion order may issue in cases where (a) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named respondents; or (b) there is a widespread pattern of violation of Section 337 and it is difficult to identify the source of infringing products. 19 U.S.C. § 1337(d)(2). The statute essentially codifies Commission practice under *Certain Airless Paint Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, Commission Opinion at 18-19, USITC Pub. 119 (Nov. 1981) (*"Spray Pumps"*). *See Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing the Same*, Inv. No. 337-TA-372 (*"Magnets"*), Commission Opinion on Remedy, the Public Interest and Bonding at 5 (USITC Pub. 2964 (1996)) (statutory standards "do not differ significantly" from the standards set forth in *Spray Pumps*). In *Magnets*, the Commission confirmed that there are two requirements for a general exclusion order: a "widespread pattern of unauthorized use;" and "certain business conditions from which one might reasonably infer that

foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles." The focus now is primarily on the statutory language itself and not an analysis of the *Spray Pump* factors. *Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, Comm'n Op. at 25 (March 9, 2009); *Hydraulic Excavators and Components Thereof*, Inv. No. 337-TA-582, Comm'n Op. at 16-17 (January 21, 2009).

A. General Exclusion Order

1. Prevention of Circumvention (Section 337(d)(2)(a))

A general exclusion order is appropriate when necessary to prevent circumvention of a limited exclusion order. 19 U.S.C. § 1332(d)(2)(A). The evidence does not show that a general exclusion order is necessary to prevent circumvention of a limited exclusion order. To make such a showing, a complainant must present evidence of intent to circumvent an order by showing for example, a history of dishonest or evasive acts for the purpose of avoiding detection or actual circumvention of a limited exclusion order. *See, e.g., Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Order No. 23 at 4-5; (March 25, 2009); *Certain Sildenafil or Any Pharmaceutically Acceptable Salt Thereof, Such as Sildenafil Citrate, and Products Containing Same,* Inv. No. 337-TA-489, Comm'n Op. at 7 (July 26, 2004). Further, an evidentiary record that reveals that respondents have, or are capable of, changing names, facilities, or corporate structure to avoid detection would, as another example, be relevant to an inquiry under Section 337(d)(2)(A).

Here, the evidence has not shown a general exclusion order is necessary to prevent circumvention of a limited exclusion order. Specifically, Standard Innovation contends that the conditions are ripe for circumvention of a LEO because there are low barriers to entry and the allegedly infringing products would not be excluded from entry under a LEO because the entities

manufacturing and selling the infringing product are not named parties to the investigation (or subject to the Respondents' control). (CIB at 71-72.) In support of these assertions, Standard Innovation relies on the testimony from its expert, Ms. Webster, and Ms. Finlayson, its Chief Financial Officer and VP of Operations which it contends supports the fact that it would take minimal time and effort to make an infringing product. (CX-278C at Q/A 267-273; CX-280C at Q/A 293-297.) This testimony, however, does not clearly show what the costs are associated with making the infringing product in China, where Standard Innovation contends most of the infringing We-Vibe products are made. (CX-280C at Q/A 292.) Rather, Mr. Finlayson vaguely testifies that the costs would range between 10-40K, depending on whether it was a new or already existing manufacturer. (CX-280C at Q/A 293-297.) This, however, does not demonstrate that it would take minimal time, effort, or money to make the product in China. *Certain Lighting Control Devices Including Dimmer Switches and Parts Thereof (IV)*, 337-TA-776, ID at *19 (June 2012) ("The record contains no evidence of what the cost would actually be in China (or even estimated to be) and, thus, how expensive or inexpensive it would be to enter the market.").

Moreover, Standard Innovation's further contention that it was unable to name the actual manufacturers of infringing products in this investigation due to confidentiality issues; cannot, in this instance, support the issuance of a general exclusion order. While the evidence does show that such information is confidential, the Respondents disclosed the names of the manufacturers of its products during discovery. Standard Innovation, however, failed to timely move to add these potential respondents to the investigation. (*See* Order No. 21.) Thus, I will not allow Standard Innovation to cure its lack of diligence and obtain a GEO under sub-prong 337(d)(2)(A).

2. Pattern of Violation and Difficulty of Identifying the Source (Section 337(d)(2)(B))

The second statutory factor of Section 337(d)(2)(B), focuses on whether there is a (1) pattern of violation and (2) a difficulty in identifying the source of the infringing import. 19 U.S.C. § 1337(d)(2)(B).

First, I find Standard Innovation has presented sufficient evidence to show a widespread pattern of violation. Specifically, the evidence shows the following:

- Evidence of counterfeiting of the We-Vibe by entities. (CX-278C at Q/A 271; CX-0072. Standard Innovation first became aware of these counterfeits in late 2011 and has been unable to track down the source. (CX-282C, Q. 89-91; CXX-001C-007C.) The evidence shows that 5-10% of We-Vibe II volumes are counterfeit. (CX-282C at Q/A 92.) Standard Innovation has identified over 1,000 URLs that sell counterfeit We-Vibe products. (CX-282C at Q/A 95.)

- In the present investigation, thirteen respondent retailers and distributers have been terminated based on consent orders or are the subject of a pending motion to terminate based on consent orders.

- There are at least five unauthorized retailers who sell the We-Vibe product on-line. (CX-282C at Q/A 83-84.)

- Standard Innovation has identified four other potentially infringing products that have not yet been imported into the United States. (Tr. 136:17-137:4.)

These facts, especially Standard Innovation's counterfeit evidence indicates that there is a widespread pattern of violation. *See, e.g. Certain Cigarettes and Packaging Thereof*, 337-TA-643, Order No. 23 at p. 8 (March 18, 2009) (finding that the fact that the complainant has "engaged in twenty-three lawsuits since 2002, not including this investigation, against 85 defendants" supported a GEO).

The market conditions also suggest that foreign exporters and domestic importers other than the former and current respondents might attempt to enter the U.S. market with infringing articles. *Cigarettes* at pp. 6-7. For example, foreign entities wishing to enter the kinesiotherapy

industry have ready access to established distribution networks, using internet sites like Amazon. (CX-282C at Q/A 93-94). Online purchases of kinesiotherapy devices are common in the industry. (CX-288C at Q/A 68; CX-1971C at Q/A 327-328; CX-746; CX-723.) In addition, the profit margins for these products are extremely high, often in excess of 400%. (CX-0218; CX-252.) Similarly, the demand for these products is also high. The evidence shows that the kinesiotherapy device industry in China is over twelve billion dollars annually. (CX-280C at Q/A 287-288, 292.) Further, in the U.S., consumers purchase over one billion dollars of kinesiotherapy devices imported from overseas each year. (*Id.*) Thus, given at least the above, the evidence shows a widespread pattern of violation and the necessary business conditions that satisfy the first sub-prong of Section 337(d)(2)(B).

Standard Innovation contends that it has had difficulty in identifying the source of the products. The Staff agrees with Standard Innovation. The evidence shows that the actual identities of many online retailers are hidden and many entities have numerous online storefronts or web addresses, making identification impossible. (CX-278C Q/A 269, 277-279; CX-1089; CX-304C; CX-280C Q/A 298-299; CX-282 at Q/A 83-87.) In this regard, the CEO of Standard Innovation testified that:

> Q. And why have you not been successful [in tracking down who is manufacturing counterfeit products]?
>
> A. Because it's a frustratingly very complex and difficult process to track down the manufacturers. They are hiding somewhere deep into China, and they have marketing arms throughout that contact all the people in the industry and say I have We-Vibe product. But our channel partners, they don't get to see where the product is manufactured. China is a huge country. We're working very hard. We hired the best legal firm [ ] and we still have not been successful. I hope if we are successful, we get an opportunity to shut it down. My fear is we'll shut it down and they'll be up and running in another three to six months, which is an estimate of how long it takes. So that's the big concern. This is

> a never-ending cycle for a product like ours. In a consumer product industry when the consumer concerned about the reputation of our company that we work very hard to maintain.

(Tr. 143:6-144:3.) Thus, the evidence shows that identifying the source of the entities copying the We-Vibe products is a difficult, if not, impossible task.

While Standard Innovation's evidence supporting a GEO is not as detailed as in many cases where such a remedy was deemed appropriate, the evidence nevertheless shows collectively a widespread pattern of unauthorized use of the We-Vibe invention. Specifically, the record shows evidence of extensive counterfeiting of the We-Vibe products as well as evidence of copying of the We-Vibe product by the respondents, *i.e.* the Tiani, Mahana, Screaming O Gee, Bendable You Too, and the Le Duet. Further, Standard Innovation has supported its allegation of the difficulty of identifying sources of infringing products by providing evidence of its failure to identify the source of the counterfeiting products and the respondents' products. Moreover, the way in which the accused products (and counterfeit products) are distributed through various retail channels also makes it difficult to identify the original source of the product. Thus, I find that Standard Innovation has satisfied the second statutory factor of Section 337(d)(2).

Although I found no violation of section 337, should the Commission nonetheless find a violation, I recommend that the Commission issue a general exclusion order prohibiting the importation of kinesiotherapy devices found to infringe the '605 patent.

B. Limited Exclusion Order

Under Section 337(d), the Commission may issue either a limited or a general exclusion order. A limited exclusion order directed to respondents' infringing products is among the remedies that the commission may impose, as is a general exclusion order that would apply to all infringing products, regardless of their manufacturer. *See* § 1337(d)(2)(B).

Standard Innovation argues that at a minimum, a limited exclusion order should issue prohibiting at least the entry for consumption of any Kinesiotherapy devices covered by one or more of the Asserted Claims of the '605 patent, including but not limited to the specific infringing products identified above, which are manufactured by or on behlf of, or imported by or on behalf of, the Respondents or any of their affiliated companies, parents, subsidiaries, successors, assigns, or other related business entities. Respondents argue that the appropriate remedy should be a limited exclusion order as opposed to a general exclusion order. The Staff states in the event the ALJ determines a general exclusion order is not warranted, the Staff is of the view that, if a violation is found, a limited exclusion order directed at the named Respondents is appropriate. Should the Commission find a violation and determine that a general exclusion order is not warranted, I concur with staff that a limited exclusion order directed at the named Respondents is appropriate.

II. Cease and Desist Order

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for violation of Section 337. *See* 19 U.S.C. § 1337(f)(l). The Commission generally issues a cease and desist order directed to a domestic respondent when there is a "commercially significant" amount of infringing, imported product in the United States that could be sold, thereby undercutting the remedy provided by an exclusion order. *See Certain Crystalline Cefadroxil Monohydrate,* Inv. No. 337-TA-293, USITC Pub. 2391, Comm'n Op. on Remedy, the Public Interest and Bonding at 37-42 (June 1991); *Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles,* Inv. No. 337-TA-334, Comm'n Op. at 26-28 (Aug. 27, 1997).

Standard Innovation asserts that the U.S. Respondents have stipulated that they have maintained inventories of at least [ ] units, and as high as [ ] units of the Accused Products

in the U.S. (JX-0012.) Standard Innovation argues that these inventories are commercially significant and a cease and desist order is appropriate. The Staff concurs with Standard Innovation. (SIB at 83-84.)

However, as noted by Respondents, the importation stipulation does not break down inventories by Accused Product and that the inventories identified include products that are no longer at issue in this Investigation. (RRB at 37-38.) Accordingly, I find Standard Innovation has not established that Respondents maintain a commercially significant inventory of imported infringing accused products in the United States. Thus, if the Commission determines a violation of Section 337 has occurred, I recommend that no cease and desist order issue in this Investigation.

III. BOND DURING PRESIDENTIAL REVIEW PERIOD

Section 337(j)(3) provides that if an exclusion order is issued respondents may, upon payment of a bond, continue to import products subject to exclusion until the expiration of the 60-day Presidential review period. 19 C.F.R. §1337(j)(3). I am charged with recommending whether a bond shall issue and if so, the amount of said bond. The purpose of the bond is to protect the complainant from any injury and thus any bond set should be in an amount sufficient to ensure such protection. 19 C.F.R. § 210.42(a)(l)(ii); 19 C.F.R. § 210.50(a)(3).

When reliable price information is available, the Commission has often set the bond by eliminating the differential between the domestic product and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes,* Inv. No. 337-TA-366, Comm'n Op. a 24 (1995) (The Commission "typically has considered the differential in sales price between the patented product made by the domestic industry and the lower price of the infringing imported product, and has set a bond amount sufficient to eliminate that difference."). In other cases, the

Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See, e.g., Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus,* Inv. No.337-TA-337, Comm'n Op. at 41 (1995). A 100 percent bond has been required when no effective alternative existed. *See, e.g., Certain Flash Memory Circuits and Products Containing Same,* Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (a 100% bond imposed when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record).

Standard Innovation argues the appropriate bond is at least 9.4% per imported unit, based on the difference between $109.65, the average of the prices for the Tiani, Mahana, and NOA, and $119.99, the average of the prices for the We-Vibe II and We-Vibe 3. (CIB at 75.) The Staff asserts the bond should be set at 9% based on the average price of the products, but notes that a weighted average would be the most appropriate way to determine the bond amount if sufficient information were available. (SIB at 84.) Respondents argue that the Tiani does not undersell the We-Vibe and the Pico Bong Manhana does not directly compete with the We-Vib because its is not intended to be worn by a woman during intercourse.

As an initial matter, I find Standard Innovation's methodology flawed as the NOA was included in Standard Innnoation's bond calculation. A more appropriate method would remove the NAO from this analysis. Accordingly, I recommend the bond amount be set based on the difference between the average prices for the Tiani, Tiani2, and Mahanam and the average prices for the We-Vibe 2 and 3.

In accordance with the discussion of the issues contained hereinabove, should the Commission find a violation of Section 337, it should issue a general exclusion order directed at respondents' products found to infringe U.S. Patent No. 7,931,605 patent. It is also my recommendation that the Commission not issue a cease and desist. Further, it is my recommendation that Respondents recalculate the bond amount be required back out the NOA and post a bond of the of the entered value for the Accused Products, found to infringe

Within seven days of the date of this document, each party shall submit to the office of the Administrative Law Judge a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' s submissions must be made by hard copy by the aforementioned date. 3Any party seeking to have any portion of this document deleted from the public version must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information to be deleted from the public version. The parties' submissions concerning the public version of this document need not be filed with the Commission.

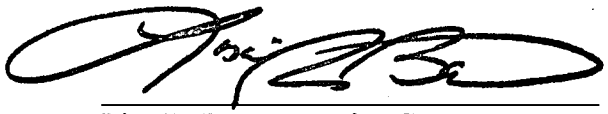
SO ORDERED.

Thomas B. Pender
Administrative Law Judge

IN THE MATTER OF CERTAIN KINESIOTHERAPY DEVICES AND COMPONENTS THEREOF **337-TA-823**

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC RECOMMENDED DETERMINATION** has been served by hand upon the Commission Investigative Attorney, **Monisha Deka, Esq.**, and the following parties as indicated, on **February 1, 2013**.



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