PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN COAXIAL CABLE CONNECTORS AND COMPONENTS THEREOF AND PRODUCTS CONTAINING SAME

Inv. No. 337-TA-650

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ORDER NO. 18: INITIAL DETERMINATION GRANTING IN PART COMPLAINANT'S MOTION FOR SUMMARY DETERMINATION OF VIOLATIONS OF SECTION 337 AND REMEDY WITH RESPECT TO THE '257 PATENT INFRINGED BY RESPONDENTS FU CHING TECHNICAL INDUSTRY CO. LTD., GEM ELECTRONICS, AND DEFAULTING RESPONDENTS

(April 6, 2009)

On March 2, 2009, Complainant John Mezzalingua Associates, Inc. d/b/a PPC, Inc. ("PPC") moved for summary determination with respect to its assertions that Respondents Fu Ching Technical Industry Co. Ltd. ("Fu Ching"), Gem Electronics, Inc. ("Gem"), Hanjiang Fei Yu Electronics Equipment Factory ("Fei Yu"), Zhongguang Electronics ("ZE"), Yangzhou Zhongguang Electronics Co. ("Yangzhou ZE"), and Yangzhou Zhongguang Foreign Trade Co. Ltd. ("Yangzhou FTC")[1] have violated certain claims of U.S. Patent No. 5,470,257 (the "'257 patent"). (Motion Docket No. 650-016.) PPC argues that the undisputed facts show that (i) respondents' products were sold for importation into the United States, imported or sold within the United

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1 Respondents Fei Yu, ZE, Yangzhou ZE and Yangzhou FTC were found in default ("Defaulting Respondents"). (Order No. 8.)

States after importation; (ii) respondents' products "infringe one or more of claims 1, 2, 3, 4, 5, and 10 of [the '257 patent], which is valid and enforceable"; (iii) there is a domestic industry "relating to the articles protected by this patent"; and (iv) a general exclusion order is necessary "to prevent circumvention of an exclusion order limited to products of the named respondents, and also because there is a pattern of violation of Section 337 and it is difficult to identify the source of infringing products." (Mot. at 1-2.)

On March 12, 2009, Respondents Fu Ching Technical Industry Co. Ltd. and Gem Electronics, Inc. (collectively, "Respondents") filed an opposition to PPC's motion. Respondents dispute whether the asserted claims of the '257 patent are valid, arguing, *inter alia*, that (i) the "engagement means" element of the asserted '257 patent claims is governed by the means-plus-function requirement under 35 U.S.C. § 112 ¶6, (ii) the specification and prosecution history fail to disclose adequate structure to correspond to the claimed function of the engagement means, and (iii) therefore, the claims are indefinite under 35 U.S.C. § 112 ¶2. (Opp. at 2-9.) Alternatively, Respondents dispute whether a radially protruding circular shoulder is present on the accused products at a first position, which Respondents assert is a required structure corresponding to the claimed function of the engagement means. (*Id.* at 18.) In addition, Respondents dispute whether the locking member of the accused products is separable from the connector body. (*Id.* at 19.) While Respondents raise a number of theories regarding invalidity and non-infringement of the '257 patent, they do not dispute PPC's assertions relating to economic domestic industry and importation of the accused products.

On March 12, 2009, the Commission Investigative Staff ("Staff") filed a response partially supporting PPC's motion. Staff argues that only summary determination with respect to importation by respondents and the economic prong of the domestic industry requirement should be granted. (Staff Resp. at 1.) According to Staff, there are genuine issues of material fact which preclude summary determination on the issues of infringement by Fu Ching and Gem and the technical prong of the domestic industry requirement. (*Id.* at 1-2.) In addition, Staff argues that PPC has failed to set forth sufficient information and legal analysis to justify summary determination for infringement by Defaulting Respondents or for the technical prong of the domestic industry requirement. (*Id.* at 6, 7.) Because summary determination with respect to infringement and technical domestic industry would be inappropriate, Staff submits that a recommended determination as to remedy would be premature. (*Id.* at 2.)

Based upon the motion papers and responses thereto, the Administrative Law Judge finds as follows.

The Commission Rules permit a party to "move with any necessary supporting affidavits for a summary determination in his favor upon all or any part of the issues to be determined in the investigation." 19 C.F.R. § 210.18(a). Summary determination "shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law." 19 C.F.R. § 210.18(b). Summary determination under Commission Rule 210.18 is analogous to summary judgment under Federal Rule of Civil Procedure 56. *See Certain Asian-Style Kamaboko Fish Cakes*, Inv. No. 337-TA-378, Order No.

15 at 3 (U.S.I.T.C., May 21, 1996) (unreviewed initial determination); *Certain Vehicle Security Systems and Components Thereof*, Inv. No. 337-TA-355, Order No. 18, 1994 WL 931905 at 3 (U.S.I.T.C., April 19, 1994) (unreviewed initial determination); *Certain Modular Structural Systems*, Inv. No. 337-TA-164, Comm'n Determination, 1984 WL 273799 at n.20 (U.S.I.T.C., June 1984).

The moving party bears the initial burden of establishing that there is an absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When such an initial showing is established, the burden shifts to the opposing party, who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). To avoid summary judgment, the non-moving party must produce evidence of sufficient caliber to support judgment in its favor. *See Anderson*, 477 U.S. at 252. Such evidence must be real and substantial, not merely colorable. *Id.* at 249-50; *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("[The non-moving party] must do more than simply show that there is some metaphysical doubt as to the material facts."). If the responding party fails to make such a showing, the moving party is then entitled to judgment as a matter of law. *See Celotex*, 477 U.S. at 325.

When ruling on a motion for summary judgment, courts must examine all the evidence in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255. All "justifiable inferences" are to be drawn in the non-moving party's favor. *Id.*

I. Importation

Section 337(a)(1)(B) declares unlawful 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 (i) infringe a valid and enforceable patent. . . ." The fact that Respondents' accused products were sold for importation into the United States, and imported and sold in the United States is undisputed. (SOF III.2-6, III.9, III.14-15, III.17-23 (undisputed).) Likewise, it is undisputed that Defaulting Respondents' accused products were sold for importation and imported into the United States. (Complaint, Ex. 13. *See also* 19 C.F.R. § 210.16(c) (with respect to defaulting respondents, facts alleged in the complaint presumed true).)

Based on the foregoing, the Administrative Law Judge finds that PPC has established that the sale for importation into the United States, and importation and sale in the United States of the accused products by Respondents and Defaulting Respondents satisfies the importation standard of Section 337.

II. Infringement/Validity

With respect to issues of infringement and validity as they relate to Respondents, the Administrative Law Judge finds that summary determination is not appropriate. The Administrative Law Judge finds that genuine material issues of fact remain relating to at least (i) whether the locking member of Respondents' accused products is separable from the connector body and (ii) whether a radially protruding circular shoulder is present on Respondents' accused products at a first position, and that good cause does not exist to grant this portion of the motion in lieu of a trial of all issues on the merits.

III. Domestic Industry

PPC must establish that "an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work or design concerned, exists or is in the process of being established." 19 U.S.C. § 1337(a)(2); *Certain Ammonium Octamolybdate Isomers*, Inv. No. 337-TA-477, Comm'n Op. at 55 (U.S.I.T.C., Jan. 2004) ("*Certain Isomers*"). The domestic industry requirement consists of both an economic prong (*i.e.*, the activities of, or investment in, a domestic industry) and a technical prong (*i.e.*, whether complainant practices its own patents). *Certain Isomers*, at 55.

A. Economic Prong.

To satisfy the economic prong, the domestic industry must involve "with respect to the articles protected by the patent . . . concerned[:] (A) significant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in its exploitation, including engineering, research and development, or licensing." 19 U.S.C. § 1337(a)(3) (internal formatting removed). It is undisputed that PPC has made significant investment in at least domestic manufacturing and equipment, labor, and research and development. (SOF IV.B.2., IV.B.5., IV.B.7-22., IV.B.25-39. (undisputed).)

Based on the foregoing, the Administrative Law Judge finds that PPC has satisfied the economic prong of the domestic industry requirement of Section 337.

B. Technical Prong.

"In order to satisfy the technical prong of the domestic industry requirement, it is sufficient to show that the domestic industry practices any claim of that patent, not necessarily an asserted claim of that patent." *Certain Isomers*, *supra*, at 55.

The Administrative Law Judge agrees with Staff that PPC has failed to set forth sufficient information in its one-page analysis to support summary determination with respect to the technical domestic industry requirement. (*See* Mot. Mem. at 46.) In addition, the Administrative Law Judge finds that genuine material issues of fact remain relating to whether the PPC CMP connector has a locking member that is inseparably coupled to the connector body.

IV. Remedy

Because genuine material issues of fact remain with respect to infringement and technical domestic industry, the Administrative Law Judge declines at this time to evaluate remedy as it relates to the '257 patent in this Investigation.

Accordingly it is the Initial Determination of the Administrative Law Judge that PPC's motion (Motion Docket No. 650-016) should be GRANTED IN PART with respect to importation and economic domestic industry, as outlined above. All other portions of PPC's motion are DENIED.

This Initial Determination is hereby certified to the Commission. Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or

the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the Initial Determination or certain issues herein.

Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date.

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.

E. James Gildea
Administrative Law Judge

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CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached has been served upon, **Kevin Baer, Esq.**, Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on APR 17 _____, **2009.**

Marilyn R. Abbott

Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, S.W., Room 112A
Washington, DC 20436

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