

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN ACTIVE COMFORT
FOOTWEAR**

Inv. No. 337-TA-660

**ORDER NO. 8: DENYING RESPONDENT RYN KOREA CO. LTD.'S MOTION
FOR SUMMARY DETERMINATION OF NON-INFRINGEMENT
OF U.S. PATENT NO. 6,341,432**

(June 1, 2009)

On April 20, 2009, Respondent RYN Korea Co. Ltd. ("RYN") filed a motion for summary determination that the RYN Troy sneaker, RYN Casual shoe, RYN Sandal, and RYN Sargon shoe ("Accused Shoes") do not literally infringe asserted U.S. Patent No. 6,341,432 (the "432 patent") because they "do not have the claimed structure for 'recess (13)' and 'material element (25) . . .'" (Motion Docket No. 660-005.) RYN relies primarily on the declaration of its expert, Ian Whatley. (Mot. Ex. C.) RYN further argues that Complainants Masai Marketing & Trading AG and Masai USA Corp. (collectively, "Masai") are estopped from asserting that the Accused Shoes infringe under the doctrine of equivalents because of claim amendments Masai made during prosecution of the '432 patent. (Mot. Mem. at 1.)

On April 30, 2009, Masai filed an opposition to RYN's motion. Masai counters that RYN fails to submit sufficient proof to support its motion. (Masai Opp. at 1-2.) For example, Masai argues that the pending motion does not provide adequate factual evidence of the level of skill in the relevant art. (*Id.* at 2.) Masai further argues that a summary determination of noninfringement is not possible because there are genuine issues of material fact relating to whether the RYN shoes have (i) a "material element" and (ii) a "recess 'between' the sole body

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and sole covering[,] as called for in the '432 patent.” (*Id.* at 2-3.) According to Masai, RYN’s own admissions, as well as the findings of Masai’s expert, contradict the declaration of Mr. Whatley. (*Id.* at 4; Frederick Decl.; CR SOF 7, 17-49.) Finally, Masai argues that RYN incorrectly asserts that the Complaint alleges infringement under the doctrine of equivalents. (Mot. Mem. at 3-4.)

On April 30, 2009, Commission Investigative Staff (“Staff”) filed a response in opposition to RYN’s motion. Staff argues that Masai does not assert infringement under the doctrine of equivalents, and therefore this portion of RYN’s motion is moot. (Staff Opp. at 4-5.) Staff further notes that RYN’s noninfringement arguments with respect to literal infringement are based on conclusory expert statements, not “engineering drawings or other specifications or to deposition testimony of the RYN witnesses.” (*Id.* at 6.) In addition, Staff argues that there is a genuine issue of material fact as to the structure of the sole and location of the ‘tunnel’ or ‘recess’ in the Accused Shoes. (*Id.* at 6-7.)

On May 15, 2009, RYN filed for leave, which is hereby DENIED, to file a reply in support of its motion. (Motion Docket No. 660-006.)

On May 27, 2009, Masai filed for leave, which is hereby DENIED, to file a surreply in support of its opposition. (Motion Docket No. 660-008.)

After reviewing the motion papers and responses thereto, as well as the Complaint and physical samples submitted by Masai, 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

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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). See also *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001); *Wenger Mfg., Inc. v. Coating Machinery Systems, Inc.*, 239 F.3d 1225, 1231 (Fed. Cir. 2001). 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 v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). All “justifiable inferences” are to be drawn in the non-moving party’s favor. *Id.* “The trier of fact should “assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial.” *EMI Group North America, Inc. v. Intel Corp.*, 157 F.3d 887, 891 (Fed. Cir. 1998).

Literal Noninfringement

With respect to literal noninfringement, the Administrative Law Judge finds that summary determination is not appropriate. The Administrative Law Judge finds that genuine issues of material fact remain relating to at least (i) whether the Accused Shoes have a ‘recess’ and the location of same, and (ii) whether the Accused Shoes have at least one ‘material element.’ Therefore, good cause does not exist to grant this portion of the motion in lieu of a trial of all issues on the merits.

Doctrine of Equivalents.

The Administrative Law Judge finds that RYN’s estoppel arguments are premature, as Masai has not made allegations that the Accused Shoes infringe under the doctrine of equivalents. The Administrative Law Judge declines to rule upon a matter that is not in issue.


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Accordingly, RYN's summary determination motion (Motion Docket No. 660-005) is DENIED in full.

Within seven (7) 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.

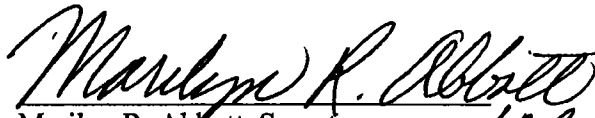
SO ORDERED.



E. James Gildea
Administrative Law Judge

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER 8** has been served by hand upon the Commission Investigative Attorney, **Aarti J. Shah, Esq.**, and the following parties as indicated, on June 10, _____ **2009.**



Marilyn R. Abbott, Secretary *MSB*
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