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

In the Matter of

**CERTAIN CIGARETTES AND
PACKAGING THEREOF**

Inv. No. 337-TA-643

COMMISSION OPINION

On February 3, 2009, the presiding administrative law judge (“ALJ”) issued a summary initial determination (“ID”) finding respondent Alcesia SRL (“Alcesia”) in violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, sale for importation into the United States, or sale after importation into the United States of gray market cigarettes bearing the Marlboro®, Virginia Slims®, and Parliament® trademarks (“the trademarks at issue”). The Commission has determined to affirm the ALJ’s findings and conclusions that (1) the Commission has jurisdiction because Alcesia is involved in the sale for importation of gray market cigarettes; (2) there is a material difference between the gray market and U.S. market cigarettes because the gray market cigarettes do not have English-language Surgeon General warnings; and (3) substantially all of the authorized U.S. market cigarettes are materially different from the gray market cigarettes. The Commission, however, declines to adopt certain findings in the ID concerning material differences between U.S. and gray market cigarettes, as detailed below in part III.B of this opinion.

The Commission has determined that Alcesia has violated section 337 and issues herewith a general exclusion order directed to gray market cigarettes bearing the trademarks at issue.

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I. BACKGROUND

A. Procedural History

The Commission instituted this investigation on April 4, 2008, based on a complaint filed by Philip Morris USA, Inc. (“PM USA”), naming Alcesia along with twelve other entities as respondents. *73 Fed. Reg.* 18561 (April 4, 2008). PM USA alleged violations of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation into the United States, or the sale after importation into the United States of certain cigarettes and packaging thereof that infringe fourteen registered trademarks owned by PM USA.

On August 27, 2008, the ALJ granted, in Order No. 9, PM USA’s motion to strike Alcesia’s affirmative defenses based on PM USA’s duty-free and for-export cigarette sales. On September 4, 2008, the ALJ granted, in Order No. 10, PM USA’s motion to strike Alcesia’s affirmative defense of unclean hands.

On November 25, 2008, PM USA moved for an ID finding twelve respondents (all except for Alcesia) in default, and on January 9, 2009, the ALJ issued an initial determination, Order No. 17, granting PM USA’s motion. The Commission determined not to review Order No. 17. Alcesia is the only respondent remaining in this investigation.

Also on November 25, 2008, PM USA filed a motion for summary determination that Alcesia has violated section 337 by selling for importation gray market cigarettes bearing the trademarks at issue and requested issuance of a general exclusion order. Alcesia filed an opposition to this motion on December 15, 2008. On December 18, 2008, the Commission Investigative Attorney (“IA”) filed a response in support of PM USA’s motion for summary determination, and supported the issuance of a general exclusion order.

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On February 3, 2009, the ALJ issued the subject ID (Order No. 19) granting PM USA's motion for summary determination that Alcesia has violated section 337 of the Tariff Act with respect to the Marlboro®, Parliament®, and Virginia Slims® trademarks. On February 17, 2009, Alcesia filed a petition for review of the ID. PM USA and the IA filed their responses opposing Alcesia's petition for review on February 24 and 25, 2009, respectively.

Also on February 3, 2009, the ALJ issued Order No. 20, in which he denied PM USA's request for a recommended determination on remedy and bonding because PM USA's motion for summary determination addressed only the Marlboro®, Parliament®, and Virginia Slims® trademarks out of the fourteen total asserted trademarks. On February 9, 2009, PM USA filed a motion withdrawing the eleven asserted trademarks remaining. On February 23, 2009, the ALJ issued Order No. 21 in which he granted PM USA's motion for a recommended determination and ended the violation phase of this investigation before him. On March 18, 2009, the ALJ issued his Recommended Determination as to Remedy and Bonding ("RD") (Order No. 23), in which he recommended issuance of a general exclusion order with the bond set at 100% of the entered value of the articles.

On April 9, 2009, the Commission determined to review the subject summary ID in its entirety and asked for briefing on particular questions as well as on the issues of remedy, the public interest, and bonding. 71 *Fed. Reg.* 17512 (April 15, 2009). On May 8, 2009, PM USA, Alcesia, and the IA filed written submissions responding to the Commission's notice to review the ALJ's ID as well as on the issues of remedy, the public interest, and bonding. On May 29, 2009, the parties filed response submissions. Additionally, several members of the public submitted correspondences addressing issues of remedy and public interest.

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B. Trademarks at Issue

The Commission instituted this investigation to determine whether there is a violation of subsection (a)(1)(C) of section 337 by reason of infringement of various U.S. trademark registrations, including U.S. Registration Nos. 68,502 (Marlboro®); 378,340 (Parliament®); 894,450 (Virginia Slims®); and whether an industry in the United States exists as required by subsection (a)(2) of section 337. *73 Fed. Reg.* 18561 (April 4, 2008). It is undisputed that PM USA is the owner of these U.S. trademark registrations. ID at 5.

C. Products at Issue

The imported products at issue in this investigation are certain cigarettes and packaging bearing the Marlboro®, Virginia Slims®, and Parliament® trademarks. These products are manufactured abroad by Philip Morris International (“PMI”) and are distributed in Europe. These cigarettes are then purchased on the Internet for shipment to customers in the United States. Hereinafter, these cigarettes will be referred to as the “gray market cigarettes” or the “accused cigarettes.”

II. APPLICABLE LEGAL PRINCIPLES

A. Summary Determination

Under 19 C.F.R. § 210.18(a), “[a]ny party may 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.”

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19 C.F.R. § 210.18(b). Commission Rule 210.18 is analogous to Federal Rule of Civil Procedure 56. *See e.g., Certain Asian-Style Kamaboko Fish Cakes*, Inv. No. 337-TA-378, Order No. 15, at 3, 1996 WL 1056341 (U.S.I.T.C., September 1996) (unreviewed ID).

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 id.* at 252. Such evidence must be real and substantial, not merely colorable. *Id.* at 249-50.

B. Section 337: Gray Market Trademark Infringement

Section 337(a)(1)(C) forbids “the importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, or consignee, of articles that infringe a valid and enforceable United States trademark registered under the Trademark Act of 1946” (Lanham Act). 19 U.S.C. § 1337(a)(1)(C). The Lanham Act provides, in pertinent part, that trademark infringement occurs when a person makes unauthorized use in commerce of a registered trademark in connection with selling, offering to sell, distributing or advertising any goods, where such use is “likely to cause confusion, mistake, or to deceive.” 15 U.S.C. § 1114(1).

In the context of “gray market” cases, the Commission has stated that:

... [T]rademark infringement (and thus a violation of section 337) is established by proof there are ‘material differences’ between the accused

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imported products and the products authorized for sale in the United States. The existence of material differences creates a presumption that consumers are likely to be confused as to the source of the gray market product, resulting in damage to the markholder's goodwill. [footnote omitted]

Certain Agricultural Tractors Under 50 Power Take-off Horsepower, Inv. 337-TA-380, USITC Pub. 3026, Comm'n. Op. at 4-5 (Mar. 1997) ("*Tractors*"), *aff'd.*, *Gamut Trading Co. v. U.S. Int'l Trade Comm'n*, 200 F.3d 775 (Fed. Cir. 1999). The purpose of the material differences inquiry in gray market cases is to assess whether consumer confusion is likely to occur. *See Gamut Trading*, 200 F.3d at 779. This reflects the central concern of trademark law, in which the operative legal standard is "likelihood of confusion." *Id.* at 783. As courts have explained, "[a] 'trademark' is not that which is infringed. What is infringed is the right of the public to be free of confusion and the synonymous right of a trademark owner to control his product's reputation." *James Burrough Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 274 (7th Cir. 1976). The use of a trademark in connection with the sale or importation of a good constitutes infringement if it is likely to cause consumer confusion as to the source of those goods or as to the sponsorship or approval of such goods. In gray market cases, if there are material differences between the accused imports and the authorized U.S. products, this type of confusion is presumed. *Tractors*, at 4-5.

If the trademark owner, however, introduces goods into the United States market that are not materially different from the gray market product, this undercuts their request for relief because "[t]o permit recovery by a trademark owner when less than 'substantially' all of its goods bear the material difference from the gray [market] goods thus would allow the owner itself to contribute to the confusion by consumers that it accuses the gray market importers of

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creating.” *SKF USA Inc. v. Int’l Trade Comm’n*, 423 F.3d 1307, 1315 (Fed. Cir. 2005). A trademark owner may contribute to consumer confusion in the gray market if it directly imports or sells the same gray market goods of which it complains, or if it authorizes importation and sale of these gray market goods. *Certain Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487, Comm’n Remand Op. at 16 (Sept. 18, 2008) (“*Agricultural Vehicles Remand*”).

The Commission has borrowed from principles of agency law in conducting the “authorization” inquiry when considering whether sales are *actually* authorized or *apparently* authorized for purposes of the “substantially all” analysis. *Id.* at 16-17. Apparent authority is created when:

[T]he principal, either intentionally or by lack of ordinary care, induces third persons to believe that an individual is his agent even though no actual authority, express or implied, has been granted to such individual.

Id. at 16.

III. SUMMARY DETERMINATION OF VIOLATION OF SECTION 337

The ID found gray market trademark infringement on summary determination. The Commission granted Alcesia’s petition for review to examine the ID’s findings that (1) Alcesia’s activities are subject to Commission jurisdiction, (2) there are material differences between the gray market and U.S. market cigarettes, (3) Alcesia’s sales are not authorized by PM USA, and (4) PM USA is entitled to gray market relief.

A. Commission Jurisdiction Over Alcesia’s Sale of Gray Market Cigarettes

Whether the Commission has jurisdiction over certain activities is a question of law, and the Commission has broadly interpreted its jurisdiction under section 337. *See Certain Digital Satellite System (DSS) Receivers and Components Thereof*, Inv. No. 337-TA-392, USITC Pub.

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No. 3418, Notice of Comm'n. Decision to Terminate the Investigation and to Vacate Portions of Initial Determination at 14 (U.S.I.T.C. April 2001) (“*DSS Receivers*”). The Commission has held in the section 337 context that it has jurisdiction to act if there is some nexus between a respondent’s activities and the importation of the products accused of infringement. *Id.*

The ALJ found that Alcesia was involved in the importation of cigarettes to the United States and was therefore subject to the Commission’s jurisdiction under section 337. ID at 10. In particular, he found that “Alcesia engaged in a multifaceted transaction to sell cigarettes online, including in the United States” that involves “parceling out portions of the transaction to partners or service providers.” ID at 9. The ALJ found that it was not necessary for Alcesia to be the importer of record or to deliver cigarettes to customers in the United States itself in order for it to be sufficiently involved in the importation. ID at 7. The ALJ concluded that Alcesia’s activities – including taking payment from U.S. customers, and having [] ship the gray market cigarettes to customers in the United States – provide a “sufficient nexus” to importation so as to establish that there was a “sale for importation” under section 337. ID at 7, 10.

We determine that the ALJ correctly found sufficient involvement by Alcesia in the importation into the United States of the gray market cigarettes to invoke the Commission’s jurisdiction under section 337. The undisputed evidence shows that Alcesia manages an elaborate arrangement to sell and import gray market cigarettes into the United States. In particular, Alcesia owns and operates “web shops,” such as www.cigoutlet.biz, from which U.S. customers purchase European Marlboro®, Parliament®, and Virginia Slims® cigarettes. ID at 9-10. Although Alcesia contracts out portions of the transaction such as collecting payment,

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hosting its website, fulfilling orders, and customer service to third parties, customers purchase cigarettes via these websites without being informed that any other company is involved in the transaction.¹ Alcesia advertises gray market cigarettes on its websites, takes purchase orders from customers in the United States for gray market cigarettes, and then arranges for shipment of the gray market cigarettes to the United States. ID at 10. As the ALJ found, the online orders taken by Alcesia through its websites “were integral to the importation” of gray market cigarettes. *Id.* For all intents and purposes Alcesia “brokers” the sale and importation of gray market cigarettes to customers in the United States even though it never owns or possesses the cigarettes. Therefore, we find that the Commission has jurisdiction over the activities of Alcesia.

Furthermore, we agree with the statutory interpretation advanced by the IA and PM USA that a foreign entity—such as Alcesia—need not be an “owner, importer, or consignee” of an article in order to be found in violation of section 337 for the unfair acts of “importation into the United States” or “sale for importation” of the infringing article.

Section 337(a)(1)(C) defines as 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 infringe a valid and enforceable United States trademark registered under the Trademark Act of 1946 [15 U.S.C. § 1051 et seq.].

19 U.S.C. § 1337(a)(1)(C). Application of the doctrine of the last antecedent² suggests that Congress did not intend the “owner, importer, or consignee” phrase to apply to importations and

¹ ID at 9; *See* Declaration of Candida Harty In Support Of Complainant Philip Morris USA Inc.’s Motion for Summary Determination (“Harty Decl.”), Exh. 28.

² The doctrine of last antecedents provides that any modifying words or phrases refer to the language immediately preceding the modifier, unless it is clear that the modifier was intended to apply to something more distant or less obvious.

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sales for importation, for if it did so, it would have placed a comma after the phrase “sale within the United States after importation.” See *Certain Erasable Programmable Read Only Memories*, Inv. No. 337-TA-276, Enforcement Proceeding at n.54, 1990 WL 710442 (U.S.I.T.C. June 22, 1990); see also *Bingham, Ltd. v. United States*, 724 F.2d 921, 926 (11th Cir. 1984) (“Where the modifier is set off from two or more antecedents by a comma, the supplementary ‘rule of punctuation’ states that the comma indicates the drafter’s intent that the modifier relate to more than the last antecedent.”).

Our interpretation of section 337(a)(1)(C) is consistent with the history of section 337. Until the 1988 amendments to section 337 in the Omnibus Trade and Competitiveness Act, the statute applied to “[u]nfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either.” S. Rep. 100-71, 100th Cong., 1st Sess., at 244. Like the current version of section 337, the “owner, importer, or consignee” language in the pre-1988 version of the statute applied only to sales within the United States after importation. See e.g., *Certain Auto Visors*, Inv. No. 337-TA-117, Order No. 14, 1982 WL 212985 (U.S.I.T.C. Apr. 30, 1982) (“The first part of this section covers unfair acts in connection with the importation of things. The second part of this section deals with the sale of imported articles by certain persons.”) (emphasis in original); see also *Certain Molded-In Sandwich Panel Inserts and Methods for Their Installation*, Inv. No. 337-TA-99, Comm’n. Op. at 4-5 (April 9, 1982) (rejecting the notion that a respondent could not be held in violation if it was not an owner, importer, or consignee of the accused product). Because the 1988 amendments were not intended to change the current law relating to importation or sale, *DSS Receivers* at 6-7 (quoting H.R. Rep. No. 100-576 at 633 (April 20, 1988)), we conclude that

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the 1988 amendments do not undermine earlier Commission decisions holding that the “owner, importer, or consignee” language applied only to sales within the United States after importation.

For the reasons set forth above, we find Alcesia need not be an “owner, importer, or consignee” in order to violate section 337. Accordingly, we affirm the ALJ’s finding that Alcesia’s activities constitute a “sale for importation” under section 337.

B. Material Differences Between the Gray Market and U.S. Market Cigarettes

Under the gray market theory of trademark infringement, likelihood of consumer confusion is presumed if there are material differences between the gray market good and the U.S. market good. *Tractors*, at 4-5. If there are material differences, consumers’ expectations, which are based on the U.S. market good, may not be met by the gray market good. In this case, we define the consumer to be a habitual smoker who buys Marlboro®, Parliament®, or Virginia Slims® cigarettes by the carton.

The ALJ found material differences between the gray market cigarettes and the U.S. market cigarettes, including (1) the absence of the English-language Surgeon General’s health warning on the packaging of the gray market cigarettes, (2) the gray market cigarettes are subject to seizure for violation of the Imported Cigarette Compliance Act (“ICCA”), and (3) PM USA does not exercise quality control over procedures for distribution, storage, and transportation of the gray market cigarettes. ID at 14-32.

We agree with the ALJ that the lack of the English-language Surgeon General warning constitutes a material difference for the reasons set forth in the ID. ID at 14-19. This finding is consistent with a long line of Commission and Federal Circuit cases that indicate that the absence of English-language warning labels constitutes a material difference. *See Certain*

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Cigarettes and Packaging Thereof, ITC Inv. No. 337-TA-424, Comm'n Determination, 2000 WL 1726827 (Oct. 16, 2000) (finding that the absence of the Surgeon General's warning on cigarettes was a material difference) ("*Cigarettes I*"); *Gamut Trading*, 200 F.3d 775, 779 (affirming the Commission's finding in *Tractors* that absence of English-language warning and instructional labels constitutes a material difference). Importantly, these warning labels are required by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), and are therefore deemed significant under Federal law. *See* 15 U.S.C. § 1333; *see also* ID at 17-19.

None of the gray market cigarettes have the English-language warning from the U.S. Surgeon General that consumers of cigarettes in the United States are accustomed to seeing on every pack of cigarettes sold legally in the United States for at least the past 40 years. ID at 16-17; *see also* Harty Decl. at ¶¶ 38, 41-43; Exs. 37, 40-42. In fact, the gray market cigarettes sold by Alcesia have warnings that are written in a foreign language. *Id.* We find that consumers of cigarettes are likely to consider the lack of English language warnings to be significant when purchasing the product, thus making this difference "material." Although consumers may not be aware of this material difference when making an initial purchase of gray market cigarettes through the Internet, confusion is likely to result when consumers receive the purchased cigarette packages bearing a foreign language where consumers are used to seeing the English-language Surgeon General warning. For this reason, we find consumer expectations are likely to be adversely affected, and consumers are likely to question whether the gray market cigarettes are the same product as the U.S. market cigarettes and whether they originate from the same source as the U.S. market cigarettes. Moreover, PM USA is a well-known American tobacco company; and it is likely that consumers would believe that the gray market cigarettes, because of their

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foreign language labels, are of a different quality than the U.S. market cigarettes. We find these questions about origin and quality raised by the difference in labeling would be significant concerns to consumers.³ Thus, we find that the lack of English-language Surgeon General warnings is a material difference under gray market law, and we affirm the ID on this point.

However, we decline to adopt the ID's finding that the gray market cigarettes are also materially different because they are susceptible to seizure under the ICCA. Even assuming the gray market cigarettes violate the ICCA, this difference between the U.S. and gray market cigarettes is not apparent to consumers and therefore cannot cause the type of confusion with which trademark law is concerned. Although gray market law is concerned with material differences, the focus remains on consumer confusion as to the source, sponsorship, or approval of the products. *Gamut Trading*, 200 F.3d at 779. While it may be true (as PM USA argues) that consumers consider the seizure of illegally imported cigarettes by law enforcement to be significant to their purchasing decisions, a consumer having failed to receive shipment of the gray market cigarettes he ordered would not associate this failure with the manufacturer of the cigarettes—*i.e.*, the source of the goods. Instead, this disappointed consumer would fault the online retailer and/or the shipping company responsible for transporting the cigarettes. In other words, although susceptibility to seizure may be significant in selecting *where* to purchase cigarettes, it would be insignificant in deciding to purchase Marlboro®, Parliament®, or Virginia Slims® trademarked cigarettes, as opposed to other brands.

³ Contrary to Alcesia's argument, PM USA is not required to provide evidence of consumer complaints about the lack of English-language Surgeon General warnings. See *Hyundai Constr. Equip. U.S.A., Inc. v. Chris Johnson Equip., Inc.*, 2008 U.S. Dist. LEXIS 84687 (N.D. Ill. Sept. 10, 2008); *Societe Des Produits Nestle, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 640 (1st Cir. P.R. 1992).

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We take no position on whether PM USA's lack of quality control over gray market cigarette distribution, storage, and transportation constitutes a material difference for gray market infringement analysis.

C. Whether Substantially All of the Authorized U.S. Market Cigarettes Are Materially Different From the Gray Market Cigarettes.

1. Alcesia's Sales

The ALJ found that substantially all of the gray market cigarettes are materially different from the authorized U.S. market cigarettes. ID at 40. In reaching this conclusion, the ALJ found that the undisputed evidence shows that PM USA has never taken action to authorize any third party to import or sell in the United States cigarettes bearing the Marlboro®, Virginia Slims®, or Parliament® trademarks.⁴ The ALJ further found that the undisputed evidence shows that PM USA does not have any affiliates, subsidiaries, or distributors outside the United States.⁵ Thus, the ALJ found Alcesia's sale and importation of gray market cigarettes to be unauthorized. ID at 37. The ALJ also found that PM USA's authorization of sales in foreign embassies through 2006 and duty-free sales of gray market cigarettes should not be included in the "substantially all" authorization analysis. ID at 38-39.

Alcesia contends, among other things, that PM USA and PMI had a *de facto* affiliation because (1) PM USA produced cigarettes under contract for Philip Morris Products SA

⁴ ID at 35; Declaration of Beth Kelly In Support of Complainant Philip Morris USA's Motion For Summary Determination ("Kelly Decl.") at ¶ 12; Complainant Philip Morris USA Inc.'s Statement of Material Facts As to Which There is No Genuine Issue In Support of Its Motion For Summary Determination ("Statement of Material Facts") at ¶ 74.

⁵ ID at 36; Declaration of Gary R. Schmidt In Support of Complainant Philip Morris USA Inc.'s Motion For Summary Determination ("Schmidt Decl.") at ¶ 4.

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(“PMPSA”)—a subsidiary of PMI and (2) PM USA and PMI divided world markets between themselves and cooperated in numerous other agreements and arrangements.^{6, 7} Because PM USA and PMI have this *de facto* affiliation (as Alcesia argues), the ALJ erred in not including all United States sales of PM USA and PMI cigarettes bearing the trademarks at issue in his “substantially all” analysis, citing *Agricultural Vehicles Remand* at 11-12.

Contrary to Alcesia’s argument, importation of gray market cigarettes made by PMI was neither actually nor apparently authorized. As the ALJ found, the undisputed evidence shows that PM USA has “never taken any action to authorize any third party to import and sell in this country cigarettes bearing” its trademarks. ID at 35. The undisputed evidence shows that PM USA does not have any affiliates, subsidiaries, or distributors outside the United States. ID at 36. Furthermore, until the end of 2008, PM USA manufactured cigarettes bearing the trademarks at issue for PMI and PMPSA pursuant to a contract in which the parties explicitly agreed that these cigarettes were “intended for final sale outside the United States” and that PMI/PMPSA would “take no direct or indirect action to promote or facilitate the resale by any of PMPSA’s direct customers or subsequent purchasers into markets within the USA.”⁸ PM USA sent Alcesia numerous cease-and-desist letters advising Alcesia that it was not authorized to sell cigarettes

⁶ Alcesia’s Petition For Review (“Alcesia Pet.”) 10-11.

⁷ PMI and PM USA were owned by the same parent company, Altria Group, Inc., until 2008 when it spun-off PMI, shortly before the complaint was filed by PM USA.

⁸ Supplemental Declaration of Candida Harty in Support of Complainant Philip Morris USA, Inc.’s Reply in Support of Motion for Summary Determination (“Supplemental Harty Decl.”), Exh. 1 at 19-20; PM USA Resp. at 10.

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bearing the trademarks at issue for importation into the United States.⁹ In fact, as noted by the ALJ, Alcesia’s Sales Manager, Ms. Hriplivaia, admitted that Alcesia was aware of no consent by PM USA to import cigarettes bearing the trademarks at issue. ID at 36; Hriplivaia Depo. at 28:1-8. Thus, we adopt the ALJ’s finding that the undisputed evidence shows that PM USA did not actually authorize gray market sales.

Moreover, we find that PM USA also did not provide apparent authorization for Alcesia’s sale and importation of gray market cigarettes. *See Agricultural Vehicles Remand* at 16-17. To determine whether PM USA provided apparent authorization, we examine PM USA’s conduct and how it would be perceived by a third party—such as Alcesia—in the context of whether PM USA had authorized Alcesia’s gray market sales. We find it significant that PM USA sent seven cease-and-desist letters to Alcesia, because this evidence directly contradicts Alcesia’s claim that PM USA apparently authorized its sales into the United States.¹⁰ Furthermore, PM USA imposes certain trade policies on its wholesalers and retailers that forbid involvement with gray market cigarettes and imposes penalties for violations. Statement of Material Facts at ¶ 89-96. PM USA actively investigates and monitors vendors of gray market cigarettes and has sent hundreds of cease-and-desist letters to those engaged in gray market cigarette sales since 2002. *Id.* at ¶ 78; Kelly Decl. at ¶ 13-20. Additionally, since 2002 PM USA has filed and publicized more than twenty lawsuits against those who import cigarettes bearing its trademarks. Statement

⁹ *Id.*; Declaration of Beth Kelly In Support of Complainant Philip Morris USA’s Motion For Summary Determination (“Kelly Decl.”) at ¶ 18, Exs. 1-7.

¹⁰ PM USA also sent [redacted], Alcesia’s supplier, several cease and desist letters demanding that it immediately cease use of the trademarks at issue in the United States, in the sale and importation of gray market cigarettes. Supplemental Harty Decl., Exh 2. Thus, [redacted] was also aware that the importation of PMI-manufactured cigarettes bearing the trademarks at issue was not authorized by PM USA.

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of Material Facts at ¶ 87. In light of this evidence, we find that PM USA did not take or omit any action that could have reasonably induced Alcesia to believe that it was authorized to sell PMI-manufactured cigarettes bearing the trademarks at issue for importation into the United States.

We reject Alcesia’s claim that it could assume authorization to sell trademarked cigarettes in the United States by PM USA simply because its supplier, [], obtained the gray market cigarettes from a dealer authorized by PMI, *i.e.*, []. PMI (through PMPSA) can authorize use of its trademarks only abroad, not in the United States, because trademark rights are territorial in nature. PM USA owns the trademarks at issue in the United States, therefore only PM USA can authorize their use in the United States. Thus, the actions or omissions of PMI, its dealers, and distributors cannot be imputed to PM USA and are therefore irrelevant to the authorization inquiry.

We further reject Alcesia’s argument that a *de facto* relationship existed between PM USA and PMI after the spin-off from the parent company—Altria Group.¹¹ According to Alcesia, authorization for gray market imports by PM USA should be presumed because “[k]ey arrangements between the two companies . . . likely survived the spin-off.” *Id.* We find Alcesia’s apparent authority arguments meritless. To the extent that Alcesia was under the mistaken impression that PMI cigarettes were authorized for sale in the United States because of a prior relationship between PMI and PM USA, this mistaken impression would have been corrected by the actions taken by PM USA, *e.g.*, the cease-and-desist letters, to put Alcesia on

¹¹ Alcesia’s Brief With Respect to the Questions Raised By the Commission in Its Notice of Determination to Review the Presiding Judge’s Initial Determination of Violation (“Alcesia Br.”) at 17-19.

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notice that its gray market sales were not authorized. A reasonably prudent business person would have at least investigated the legality of importing gray market cigarettes into the United States after receiving a single cease-and-desist letter, let alone seven.

PM USA has met its burden of showing that Alcesia's sales into the United States of PMI-manufactured cigarettes are not authorized under the proper standard, which was set forth in *Agricultural Vehicles Remand*. Unlike the Commission's determination in *Certain Hydraulic Excavators and Components Thereof*, Inv. No. 337-TA-582, Comm'n. Op. (Jan. 21, 2009) ("*Hydraulic Excavators*"), in which the Commission found that Caterpillar was presumed to have apparently authorized its "official" dealers who were its subsidiaries, there is no such affiliation between PM USA and either PMI, [], or Alcesia. Therefore, the apparent authorization situation present in *Hydraulic Excavators* is distinct from the present set of facts. Moreover, [] is a dealer of PMI, not PM USA, thus we agree with the ALJ (ID at 36-37) that the agreements between [] and [] do not support Alcesia's arguments that the actions or omissions of PM USA created apparent authorization. *See Racicky v. Farmland Indus., Inc.*, 328 F.3d 389, 393 (8th Cir. Neb. 2003) ("apparent authority or agency for which a principal may be liable must be traceable to the principal . . ."); *Wilson v. Muckala*, 303 F.3d 1207, 1221 (10th Cir. Okla. 2002) ("A third party asserting apparent authority to bind an alleged principal to a contract must also demonstrate its reliance on the principal's manifestation . . ."). Therefore, we conclude that Alcesia's sales were properly excluded from the determination of whether "substantially all" of the cigarettes authorized for sale in the U.S. are materially different from the gray market cigarettes.

2. Duty Free and Embassy Sales

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The ALJ noted that the only possible evidence of PM USA authorizing gray market sales into the United States was PM USA's practice of selling cigarettes to Philip Morris Duty Free, which then sold the cigarettes to foreign embassies in the United States. ID at 39. This practice ended in December of 2006. *Id.* The ALJ concluded that because these sales stopped in 2006 they are not relevant and, even if they were, the amount sold to embassies was *de minimis*, constituting only 0.02 percent of Marlboro cigarettes sold in the United States during that year (2006). *Id.*¹²

The ID also found that duty-free sales of gray market cigarettes bearing the trademarks at issue in the United States to travelers outbound from the United States are irrelevant because they require immediate export and are deemed to occur outside the United States. ID at 38-39; Order No. 9 at 6-7.

We affirm the ALJ's conclusion that duty-free sales of gray market cigarettes through Philip Morris Duty Free should not factor into the "substantially all" analysis. Federal regulations require that duty-free items be sold for immediate exportation only. *See e.g.*, 19 C.F.R. § 19.35(d); *see also United States v. Commodities Export Co.*, 755 F. Supp. 418, 420 (C.I.T. 1991); *Cigarettes I*, Inv. No. 337-TA-424 (August 3, 2000). Thus, duty-free sales have little or no impact on United States commerce. Because section 337 focuses on the impact of

¹² Because we adopt the ALJ's finding (ID at 39) that the sales of Marlboro® cigarettes to foreign embassies that ceased in 2006 are irrelevant, we need not and do not determine whether we agree with the ALJ's characterization of these sales as *de minimis*.

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unfair acts within the United States, duty-free sales are irrelevant, as the ALJ found. Thus, we also adopt the findings set forth in Order No. 9 and the ID.¹³

D. Whether Gray Market Theory of Trademark Infringement Requires the U.S. Trademark Holder to Authorize Use of the Same Mark Abroad.

Alcesia argued in its petition for review that, given the ALJ's finding that there is no evidence that PM USA ever authorized production of cigarettes bearing the trademarks at issue outside of the United States, there is no basis for a gray market complaint here, since the ALJ also found that PM USA and PMI were not affiliated. Alcesia Pet. at 5-6 (citing *Gamut Trading*, which stated that "[t]he term "gray market goods refers to genuine goods . . . bearing a legally affixed foreign trademark that is the same mark as is registered in the United States." 200 F.3d at 779). In particular, Alcesia argues that there is no evidence that PM USA (1) manufactures cigarettes bearing the trademarks at issue outside of the United States; (2) has registrations for the trademarks at issue outside of the United States; or (3) has authorized any independent foreign manufacturer to use its marks. *Id.* at 6. In effect, Alcesia argues that PM USA has failed to allege the necessary elements to prove a gray market trademark violation because it has not shown a relationship with PMI by which PM USA authorizes PMI's use of the trademarks at issue outside the United States. *Id.* at 10. The Commission granted review to examine whether

¹³ The ALJ's citation to Order No. 9 (J. Luckern, striking certain affirmative defenses) implies that *Bourdeau Bros.* ruled on whether duty-free sales should be included in the "substantially all" analysis. Actually, Order No. 9 compares duty-free sales to the unauthorized sales of agricultural vehicles at issue in *Bourdeau Bros.* This mistaken interpretation of Order No. 9, however, does not affect the correctness of the ALJ's analysis of the duty-free issue and his conclusions. Thus, we adopt the ALJ's findings and conclusions on this point to the extent they do not rely on the mistaken interpretation.

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PM USA's failure to allege or show that PMI's use of its trademarks outside of the United States was authorized is fatal to its claim.

It is undisputed that PMI is not authorized or licensed by PM USA to use the trademarks at issue in the manufacture or sale of cigarettes abroad. This follows from the fact that trademarks by their nature are territorial, and PM USA's United States trademarks do not give it rights to license overseas. *See e.g., Gamut Trading*, 200 F.3d at 778; *Bourdeau Bros.*, 444 F.3d 1317 (recognizing "territorial boundaries of trademarks"). In fact, PMI (through its subsidiary PMPSA)—not PM USA—owns the Marlboro®, Parliament®, and Virginia Slims® trademarks in countries other than the United States. Schmidt Decl. ¶ 5; Kelly Depo. 69:25-70:3; Alcesia Pet. at 10. Thus, PM USA cannot authorize the use of the trademarks at issue overseas, although the cigarettes manufactured by PMI overseas are presumably authorized by PMPSA, PMI's subsidiary.

The fact that PM USA did not authorize PMI's use of its trademarks abroad does not mean this is not a gray market case. We agree with the IA that this factual scenario bears a striking resemblance to *A. Bourjois & Co. v. Katzel*, 260 U.S. 689 (1923), a case in which the United States Supreme Court granted relief to a U.S. trademark holder against an unaffiliated foreign entity that owned the rights to the same mark outside the United States. Indeed, the Commission has come to the same conclusion. As the Federal Circuit explained in *Bourdeau Bros.*:

[G]ray market law is not concerned with . . . whether the trademark . . . owner authorized the use of the trademark on that product in another country. Instead, gray market law is concerned with whether the trademark owner has authorized use of the trademark on that particular product in the United States and

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thus whether the trademark owner has control over specific characteristics associated with the trademark in the United States.

444 F.3d at 1323 (emphasis added). Therefore, the extent to which PMI was or was not authorized to use the trademarks at issue overseas does not impact the overall question of whether trademark infringement has occurred in the United States. Alcesia has not cited any cases in which courts have held that trademark infringement under gray market theory requires that the U.S. trademark holder prove that it authorized use of the same mark abroad. We reject Alcesia's view of gray market theory as overly restrictive and not supported by legal precedent. We conclude that proving trademark infringement under a theory of gray market does not require a showing that the U.S. trademark holder authorized use of the same mark abroad.

Gray market trademark infringement, like traditional trademark infringement, requires proof of a likelihood of confusion. *SKF*, 423 F.3d at 1313. The rationale underlying gray market cases is that if material differences exist between the genuine and gray goods, consumers will likely be confused even if the goods emanate from the same source. *Id.* In this case, the genuine and gray goods emanate from different, unaffiliated sources—PM USA and PMI, respectively. It nonetheless remains a fundamental concern that consumers in the United States will be confused by material differences between goods bearing the same mark, as discussed in part III.B *supra*.

We also conclude that even without regard to the material differences discussed, a likelihood of confusion as to the source of the accused cigarettes exists, based on (1) the fact that the marks on both the PM USA cigarettes and the PMI-manufactured cigarettes sold by Alcesia are identical for use on the exact same types of goods, (2) the strength, length of exclusivity, and

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fame of the PM USA trademarks at issue, and (3) the record evidence of at least one instance of actual confusion as to the source of the PMI-manufactured cigarettes (Statement of Material Facts at ¶ 70). See *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357 (C.C.P.A. 1973). Therefore, the undisputed facts support a finding that consumer confusion is likely to occur as a result of Alcesia's activities.

In light of the above, we affirm the ALJ's finding that Alcesia's activities are a violation of section 337. Additionally, we adopt the ALJ's findings regarding validity and enforceability of the trademarks at issue,¹⁴ domestic industry, and his conclusions that certain affirmative defenses are not supported by the law.¹⁵ Alcesia has not shown there to be *material* facts in dispute for any one of the above issues and we agree with the ALJ that summary determination is appropriate.

IV. REMEDY

Section 337 provides that, “[i]f the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States” 19 U.S.C. § 1337(d)(1). This statutorily mandated exclusion is achieved, as appropriate, through either a “limited exclusion order” or a “general exclusion order.” See *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1356 (Fed.

¹⁴ The facts on which Alcesia relies (Alcesia Pet. at 42-43) as to enforceability of the trademarks at issue do not create a genuine issue of material fact. The facts cited by Alcesia are not relevant to the use and enforceability of the trademarks at issue in the United States.

¹⁵ Specifically, the ALJ found, in Order No. 9, that Alcesia's affirmative defense that PM USA's sales of cigarettes into the duty free market for export to overseas markets are relevant to the “substantially all” authorization analysis is not supported by the law. In Order No. 10, the ALJ found Alcesia's affirmative defense of unclean hands not supported by the law.

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Cir. 2008). Generally, a limited exclusion order is appropriate unless either of the statutory criteria in section 337(d)(2) for issuance of a general exclusion order are met, that is, unless “(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing goods.” 19 U.S.C. § 1337(d)(2). Because of its considerable impact on international trade, potentially extending beyond the parties and articles involved in the investigation, the Commission exercises caution in issuing general exclusion orders. *Tractors*, at 21.

The ALJ, in his RD, recommended that the Commission issue a general exclusion order directed to the trademarked gray market cigarettes. RD at 8. The ALJ found that the record indicates that there is a widespread pattern of unauthorized use. RD at 8-11. The ALJ further found that certain business conditions exist that support the issuance of a general exclusion order, including (1) an established demand for trademarked gray market cigarettes, (2) the existence of extremely low barriers to entry to the market because foreign entities can easily obtain gray market cigarettes to sell on the Internet with minimal capital investment, and (3) high profit margins in online sale of gray market cigarettes. RD at 11-13. The ALJ concluded that a general exclusion order is also necessary to prevent circumvention of a limited exclusion order because the widespread pattern of unauthorized use and the business conditions discussed above indicate that new foreign sellers may attempt to enter the U.S. market with infringing cigarettes, and Alcesia and the defaulting respondents could easily circumvent a limited exclusion order by quickly creating new entities and shifting their operations to new websites. RD at 15.

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We find a general exclusion order directed to gray market cigarettes bearing the Marlboro®, Parliament®, and Virginia Slims® trademarks to be the appropriate remedy in this case. Section 337(d)(2) states:

The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that—

(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2). There is sufficient evidence in the record to meet either prong of 337(d)(2). As the ALJ found, PM USA’s Brand Integrity Program has identified hundreds of websites, mostly located and operated outside the United States, that sell unauthorized trademarked cigarettes to customers in the United States. RD at 8.¹⁶ PM USA has sent hundreds of cease-and-desist letters, filed dozens of lawsuits, and made thousands of investigative purchases trying to stop gray market cigarettes sales. *Id.* Additionally, PM USA joined thirteen respondents in this investigation and, at the time the complaint was filed, was aware of 177 additional websites engaged in the sale of gray market cigarettes bearing the trademarks-in-suit. Statement of Material Facts at ¶ 110. According to PM USA, as of November 20, 2008, it had become aware of 35 previously unidentified websites engaged in gray market cigarette sales. *Id.* at ¶ 111. We find that these facts support the ALJ’s finding that widespread unauthorized use,

¹⁶ See Declaration of David A. Young In Support of Complainant Philip Morris USA, Inc.’s Renewed Motion for a Recommended Determination As to Remedy (“Young Decl.”), Exs. 3-4, 6, 9-11, 14, 18-20, 25-27, 30-31, 34, 35, 41, 42, 46-47, 103; see also Kelly Decl. at ¶¶ 15-16.

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i.e., a pattern of violation, exists. This pattern of violation is explained by the business conditions found to exist by the ALJ, namely, established demand for the trademarked gray market cigarettes in the United States, the ready supply of gray market cigarettes abroad, the low barrier to entry and low capital investment required for starting an online retail website for gray market cigarettes, and the high profit margins for this type of business. RD at 11-13.

Furthermore, the substantial volume of websites selling gray market cigarettes to the United States and the ease with which websites and corporate identities are created and changed makes the source of the infringing products difficult to identify. Here, we note that respondents have apparently taken actions to make it more difficult to identify the contents of their shipments—such as labeling the gray market shipments as “gifts” instead of “cigarettes.” *See* Statement of Material Facts ¶¶ 98, 152-53. In light of the above, we find that “there is a pattern of violation of this section and it is difficult to identify the source of infringing products” under section 337(d)(2)(B). 19 U.S.C. § 1337(d)(2)(B).

We find further that section 337(d)(2)(A) is met because “a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons.” 19 U.S.C. § 1337(d)(2)(A). We agree with the ALJ that the evidence shows that “it would be simple for Alcesia and the defaulting respondents to quickly create new entities and shift their operations to new websites, enabling them to bypass a limited exclusion order.” RD at 15. Moreover, the evidence of respondents’ efforts to make it difficult to identify the gray market cigarettes coupled with evidence that they advise their customers not to pay taxes on the cigarettes indicates a general willingness to avoid the legal consequences of their actions. *See* Statement of Material Facts at ¶¶ 147-54. Gray market cigarette sales are made by foreign

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entities not subject to personal jurisdiction, therefore they, at most, stand to lose shipments of gray market cigarettes. This is a small risk when compared to the high profit margins of selling gray market cigarettes online. Because changing websites and/or corporate identities to avoid lawful enforcement of a limited exclusion order is a small step away from concealing contents of shipments to avoid seizure by CBP and advising customers not to pay taxes due on these shipments, we conclude that a limited exclusion order directed to the named respondents would almost certainly be circumvented. Thus, a general exclusion is necessary to prevent circumvention under section 337(d)(2)(A).

V. THE PUBLIC INTEREST

When determining whether to issue remedial orders when there is a violation of section 337, the Commission weighs the effect of the orders on four public interest factors: (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) the production of like or directly competitive articles in the U.S., and (4) U.S. consumers. 19 U.S.C. § 1337(d).

PM USA and the IA agree that the issuance of a general exclusion order is not contrary to the public interest.¹⁷ Alcesia generally argues that a general exclusion order is contrary to the public interest. Alcesia Br. at 48-51. In addition to the submissions by the parties, a number of correspondences were received from various entities and jurisdictions indicating that a general exclusion order would aid in prevention of cigarette sales to minors, avoid loss of tax revenue associated with sales of gray market cigarettes, and protect intellectual property rights. *See e.g.*,

¹⁷ Complainant Philip Morris USA Inc.'s Response to the Commission's Determination to Review the Summary Determination of Violation and Request for Comments Regarding Remedy ("PM USA Br.") at 40; Brief of OUII's Response to Notice of Commission Determination to Review the Presiding Administrative Law Judge's Initial Summary Determination of Violation ("OUII Br.") at 13-14.

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Letter from Michael Cardozo, Law Department, City of New York (May 4, 2009); Letter from Robin Conrad and Amar Sarwal, Chamber of Commerce of the United States (May 8, 2009); Letter from Martha Coakley and Robert McKenna, National Association of Attorneys General (May 4, 2009); Letter from Congressman Lamar Smith, U.S. House of Representatives (May 6, 2009); Letter from Congressman Robert Scott, U.S. House of Representatives (May 8, 2009). Only one correspondence was received from an individual member of the public urging the Commission not to issue a general exclusion order for a variety of reasons not relevant to the statutory public interest factors of 19 U.S.C. § 1337(d). *See* Letter from A. O. Kime (May 11, 2009).

Having considered the submissions of the parties in light of the statutory public interest factors set forth in 19 U.S.C. § 1337(d), we find that these factors do not preclude issuance of a general exclusion order. Because section 337(d) mandates that the Commission “shall direct that the articles concerned . . . be excluded from entry” upon a finding of a violation “unless, after considering the effect of such exclusion upon” the public interest “it finds that such articles should not be excluded,” we need only decide that the public interest does not preclude our remedy. 19 U.S.C. § 1337(d)(1) (emphasis added). We need not decide that the public interest favors our remedy. Nevertheless it bears noting that the public interest strongly favors the issuance of a general exclusion order. A general exclusion order will be beneficial to (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) the production of like or directly competitive articles in the U.S., and (4) U.S. consumers. As to the public health and welfare, a general exclusion order will help curb sales of cigarettes to minors in the United States and combat tax evasion and other illegal activities that occur in online sale of cigarettes.

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A general exclusion order will also ensure that U.S. consumers receive the health warnings that are required by law because our exclusion order bars entry of gray market cigarettes that lack English-language Surgeon General warnings. Additionally, PM USA manufactures cigarettes in the United States; therefore, a general exclusion order against gray market cigarettes bearing the trademarks at issue will protect the production of like or directly competitive articles in the United States. We find Alcesia's concerns that U.S. consumers, in the absence of cheaper gray market cigarettes, will be forced to buy "off-brand" cigarettes to be outweighed by (1) PM USA's right to prevent unauthorized use of its trademarks and (2) the benefits to public health and welfare set forth above. Accordingly, we find the public interest factors do not preclude issuance of a general exclusion order.

VI. BOND

When the Commission issues an exclusion order, infringing products are nonetheless entitled to entry under bond during the period of Presidential Review. 19 U.S.C. § 1337(j). The Commission must set the amount of the bond at a level sufficient to protect complainants from any injury. *Id.* When reliable price information is available, the Commission has often set the bond amount as that which would eliminate the differential between the domestic product and the imported, infringing product. *Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. 2949, Comm'n Op., 1996 ITC LEXIS 280, at *44 (1996) ("*Microsphere Adhesives*"). When a pricing comparison is impossible, it is entirely appropriate to set the bond based on a reasonable royalty. *Certain Audio Digital-to-Analog Converters and Products Containing Same*, Inv. No. 337-TA-499, Comm'n Op. at 28 (March 3, 2005). In circumstances

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where pricing information is unclear, or where variations in pricing make price comparisons complicated and difficult, the Commission has set a 100 percent bond. *Microsphere Adhesives* at 24-25.

Here, the ALJ recommended that a bond of 100 percent of entered value be set for the period of Presidential Review. RD at 17. In making his recommendation, the ALJ found that “the pricing data for respondents is so varied” and “there are no clear differentials between PM USA’s products and the infringing imports” because different respondents sell the trademarked gray market cigarettes at different prices. *Id.* PM USA supports the ALJ’s recommendation of 100 percent bond for each brand of cigarettes. PM USA Br. at 47. The IA argues that the bond should be set based on representative price differentials in the following amounts: 86 percent for Marlboro® cigarettes, 44 percent for Parliament® cigarettes, and 81 percent for Virginia Slims® cigarettes. OUII Br. at 14. Alcesia submits that a 100 percent bond is not necessary to protect PM USA from injury and that the bond should be set to “no more than 1-5 percent.” Alcesia Br. at 44.

We have determined to set the bond amount at 100 percent of the entered value of gray market cigarettes. We agree with the ALJ that a reliable price differential cannot be obtained. In particular, there are a vast number of websites selling gray market cigarettes at different prices. If the IA’s approach is adopted, there are instances in which the infringing cigarettes would continue to enjoy a price advantage over the authorized U.S. market cigarettes. For example, if an 86 percent bond amount is set for Marlboro gray market cigarettes as proposed by the IA, then \$11.09 would be required as bond for a \$12.90 carton of Marlboro cigarettes purchased from www.all-cigarette-brands.com. *See* ID at 17; Young Decl., Ex 38. Even after the suggested

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bond amount is added to the price of the gray market cigarettes (\$23.99), the gray market cigarettes would still enjoy a price advantage over the \$27.64 price at which PM USA sells its Marlboro® cigarettes to its *direct* buyers in the United States. See Statement of Material Facts at ¶¶ 159-160. Thus, the IA's proposed bond amount does not sufficiently protect complainant against injury as required by section 337(j). 19 U.S.C. § 1337(j). Accordingly, we find that 100 percent is the appropriate bond amount for the period of Presidential review.

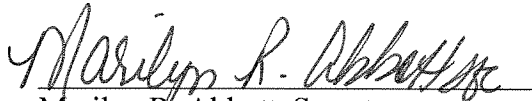
VII. CONCLUSION

For the reasons set forth above, we concur with the ALJ's finding of violation of section 337, and we adopt the ID's findings of fact and legal conclusions that are not inconsistent with this opinion. We find the appropriate remedy is a general exclusion order and this remedy is not precluded by consideration of the statutory public interest factors. Finally, we determine to set a bond amount of 100 percent of the entered value of cigarettes covered by this order during the period of Presidential review.

Issued: October 1, 2009

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney Rett V. Snotherly, Esq., and the following parties as indicated, on October 1, 2009.



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