

IN THE UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DISTRICT OF COLUMBIA

In The Matter of:

CERTAIN SILICON MICROPHONE PACKAGES,
PRODUCTS CONTAINING THE SAME

Investigation No. 337-TA-2694

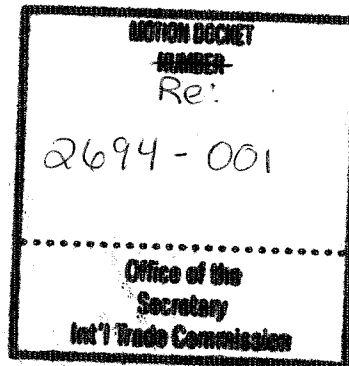
COMPLAINANT'S MOTION FOR TEMPORARY RELIEF

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I. INTRODUCTION AND SUMMARY

Knowles seeks that the Commission grant its request for temporary relief in the form of a temporary exclusion order and temporary cease and desist order against Respondent Analog Devices Inc. (“ADI”) barring ADI from importing Accused Products into the United States and promoting, selling, and otherwise committing acts of infringement with respect to products already imported. The basis for this request is the unfair acts of competition undertaken by the Respondent owing to its infringement of Knowles’s U.S. patents, nos. 6,781,231 and 7,242,089 (“the Knowles Patents”). These patents disclose and claim ways of packaging silicon microphones in manner that significantly reduces the cost and increases the ease of assembly of devices such as cell phones, media recorders and computers, that include the microphones. Respondent ADI makes silicon microphones packages that infringe the Knowles Patents and has been promoting and importing those microphones including the patented packages into the United States. ADI’s silicon microphones, and any other products incorporating ADI’s microphones, comprise the Accused Products in this investigation.

Respondent ADI has neither sought nor received authorization from Knowles to use the proprietary technology disclosed and claimed in Knowles’s Patents. Nevertheless, it has continued to do so. If importation of the Accused Products is not promptly barred by the Commission, especially in view of the importation, testing and use of the infringing microphones in devices being planned and designed for the 2010 holiday sales season, Knowles will suffer irreparable harm including lost sales and growth opportunities, lost goodwill and price erosion. There also exists a high likelihood of success on the merits of the asserted claims of unfair competition and patent infringement. The Commission, in recent litigation against another Respondent, has already ruled on claim construction supporting infringement of the ADI

products, found the Knowles Patents not invalid, and found the existence of a domestic industry, all on claims that mirror the present circumstances.

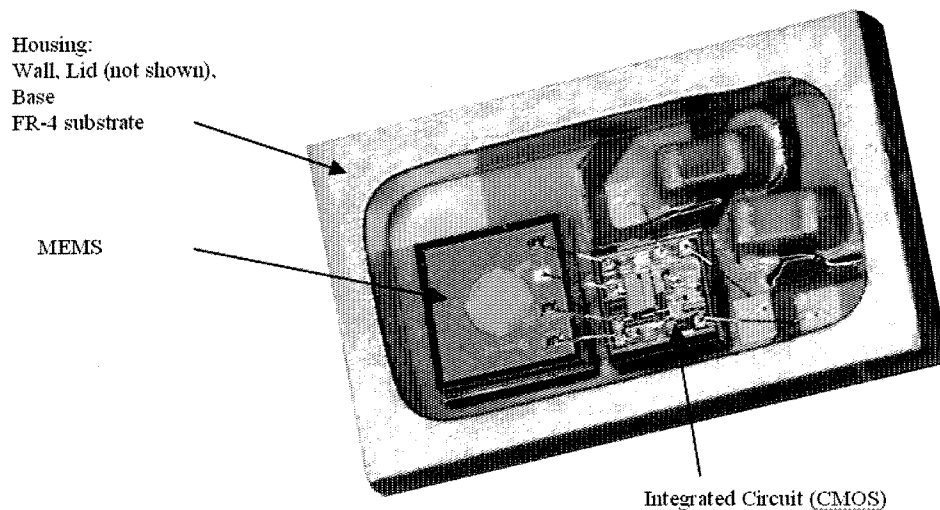
II. FACTUAL BACKGROUND

A. Complainant Knowles Electronics LLC

Knowles is a pioneer in the field of silicon microphones, also known as microelectromechanical system microphones (“MEMS”). Silicon microphones are a unique type of microphone made using processes like silicon etching that are normally used to create microchips. Such microphones can be incredibly small, some measuring less than a single millimeter tall. Exhibit 1. Their small size makes silicon microphones ideal for integration into devices like mobile phones, video cameras, and other electronic devices where small size is a necessity. Silicon microphones also have an advantage over other types of microphones in their ability to resist heat without damage, allowing devices built using silicon microphones to be assembled more quickly and cheaply than other technologies where the microphone cannot be installed until after other steps requiring heat treatment. *Id.* A silicon microphone can be assembled on the final device into which it will be integrated, or—alternatively, the microphone can be built into a self-contained package with accompanying electronics so that the package as a whole can be installed onto a variety of devices.

Knowles began to research and develop its MEMS Silicon Microphone Technology in or around 1990 and, to date, has invested millions of dollars leading to its SiSonic Microphone Package. The Knowles silicon microphone package, which is sold under the trade name “SiSonic,” was the first commercialized MEMS microphone package. *Id.* One of the challenges Knowles faced in creating a commercially viable product was to create a MEMS microphone that matched the performance, reliability and pricing of traditional Electret Condenser Microphones (ECMs)—an alternative microphone technology. Knowles met and surpassed this

challenge and developed a surface mountable package that was less expensive to use than existing solutions like ECMs. To do so, Knowles developed a unique, low-cost packaging for surrounding the microphone components. *Id.* This package is the subject of the '231 and '089 patents. The packaging simultaneously provides protection from electromagnetic radiation, and allows certain components access to the surrounding environment. Knowles's innovative packaging includes a base, a wall and a lid - all of which are made of a material which is conductive to shield against electromagnetic radiation - laminated together. Below is a SiSonic Microphone Package shown in cutaway form.



In this view, the MEMS is the silicon microphone itself. It translates sound signals into electrical signals which are passed to a substrate layer by way of an integrated circuit. Protecting these inner electronics is a package formed of a substrate and additional conductive layers. This construction gives the SiSonic Microphone Package the ability can be picked up and placed by special assembly machines called—fittingly—“pick and place” machines without damaging the microphone’s functions. This assembly can occur at any point in the assembly process of the underlying device, regardless of any subsequent heat treatments—an advantage over prior technologies such as electret condenser microphones. Therefore, Knowles’s MEMS Silicon

Microphone Technology significantly improves manufacturability, environmental stability and reliability and significantly reduces the size of a microphone package.

In August, 2009, Knowles reached a major milestone in the history of MEMS technology with the shipment of its 1 Billionth SiSonic surface mount MEMS microphone. Exhibit 2. Today SiSonic is recognized as the preferred acoustic component in mobile phones, laptops, gaming systems, and headsets.

B. Respondents Analog Devices Inc.

Analog Devices Inc. (“ADI”) describes itself as world leader in data conversion and signal conditioning technology in virtually all types of electronic equipment. Knowles became aware that ADI was planning to move into the U.S. Silicon Microphone market and has now seen ADI microphones in Apple iPod Nano products introduced in September 2009. ADI’s website reflects its entry into the U.S. market, where two models of silicon microphone are offered for “prerelease.” Exhibit 4. The ADI website further reflects that samples of the microphone products are available for order and delivery. *Id.* Data sheets for these microphones are also posted on ADI’s website. Ex. 5 and 6. Knowles has become aware that ADI has sought and continues to seek consumer electronics manufacturers to use its Silicon Microphones in their products.

ADI’s website reflects that the majority of its regional headquarters facilities are located outside the United States. Exhibit 7. ADI’s website also states that it completes test and assembly at “a test facility in the Philippines, and also at test and assembly subcontractors in the Far East.” Exhibit 8. Accordingly, ADI products sent to U.S. based manufacturers for evaluation and testing are necessarily imported.

C. Market Conditions

Complainant Knowles and Respondent ADI are participants in the consumer electronics market. This market is a fast-paced, innovation driven field marked by constant product improvements and competition. Exhibit 9, ¶13. To that end, it is critical for market participants to cultivate and maintain a reputation as a source for new and inventive products. *Id.*

Knowles and ADI participate in this market by making, importing and selling components like microphones that are used in such devices to supply features such as ability to record sound. *See, e.g.*, Exhibits 9, ¶5,1, 4.

Many component parts vendors, such as ADI, have manufacturing facilities overseas. Exhibit 9, ¶6; Exhibit 8. Much of the assembly and manufacturing for final consumer electronic devices also occurs at overseas facilities. Exhibit 9, ¶6. *Id.* For U.S.-based firms, however, much of the design and testing for new consumer electronics products occurs in the U.S. *Id.* at ¶¶2, 10, 11. For example, Apple, Inc., makes its iPod products in China, but designs them in California. *Id.* at ¶2. Thus, component parts vendors, such as ADI, must often import samples of its parts for use in qualifying and testing for, and selling to, the consumer electronic device manufacturers.

The consumer electronics market sees a significant increase in sales in preparation for and around the time of the year-end holidays. *Id.* at ¶10. Much of the planning for order and delivery of products and parts between suppliers of parts, manufacturers, and retailers occurs with an eye to this timeframe. *Id.* Thus, manufacturers will make decisions for parts like microphones toward the beginning of the calendar year for that year's holidays. *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

III. THE KNOWLES PATENTS

A. Knowles's U.S. Patent No. 6,781,231.

From its research and development on MEMS microphones, including its MEMS Silicon Microphone Technology, Knowles obtained, on August 24, 2004, the duly, properly and legally issued U.S. Patent No. 6,781,231, entitled "Microelectromechanical System Package with Environmental and Interference Shield." Knowles obtained the Knowles '231 Patent as assignee of Inventor and Knowles employee, Anthony D. Minervini.

Generally speaking, the Knowles '231 Patent is directed to a package in acoustic systems for enclosing a surface mountable MEMS microphone. The package generally includes a substrate having a surface for supporting a MEMS microphone and a cover, within which the MEMS microphone – and related equipment – are disposed, an acoustic port for allowing the acoustic signal to reach the microphone, and protection from an interference signal. Exhibit 10.

Anthony D. Minervini, the Inventor of the Knowles '231 Patent, as part of his employment with Knowles, assigned all rights, title, and interest in the Knowles '231 Patent to Knowles.

B. Knowles's U.S. Patent No. 7,242,089.

Further from its research and development on MEMS microphones, including its MEMS Silicon Microphone Technology, Knowles obtained, on July 10, 2007, U.S. Patent No. 7,242,089 entitled "Miniature Silicon Condenser Microphone." Again, Knowles obtained the '089 Patent as assignee of Inventor and Knowles employee, Anthony D. Minervini.

Generally speaking, the Knowles '089 Patent is directed to a surface mountable microphone package. The microphone package generally includes a chamber, a surface mountable transducer unit mounted on one of the members forming the chamber, a volume defined by the transducer and one of the members, an aperture for allowing an acoustic signal to

reach the transducer, and terminal pads coupled to a patterned conductive layer coupled to the transducer. Exhibit 11.

C. Prior Adjudication of Knowles's Patents

In January 2008, the Commission commenced investigation 337-TA-629 against respondent Mems Technology Berhad ("MemsTech") for importation of silicon microphone packages that were alleged to infringe the '231 and '089 patents. MemsTech responded by asserting that the Knowles patents were invalid and asserted over 600 individual references which they contended proved as much. In September, 2008, the Commission held a hearing in that investigation, ALJ Robert K. Rogers, Jr., presiding. After the hearing and extensive post-hearing briefing, the ALJ determined that Knowles's patents—save claim 10 of the '089 patent, which is not asserted in this investigation—were valid and infringed by MemsTech. Initial Determination, 337-TA-629 January 12, 2009. Exhibit 12. ALJ Rogers also determined that Knowles had established both the technical and economic prongs of the domestic industry requirement with respect to both patents. *Id.*; Order on Summary Determination, September 24, 2008. Exhibit 13. After review, the Commission upheld ALJ Rogers's determinations of validity, infringement and domestic industry and issued a final determination on June 12, 2009, as amended August 18, 2009. Exhibit 14.

IV. STANDARDS FOR A TEMPORARY EXCLUSION ORDER

In determining motions for temporary relief, the Commission applies the same standards as those used in the U.S. Court of Appeals for the Federal Circuit in reviewing district court decisions granting or denying a preliminary injunction. Commission Rule 210.52(a). The Federal Circuit employs the traditional four-factor test in determining whether to enter a preliminary injunction: "(1) reasonable likelihood of success on the merits; (2) irreparable harm; (3) balance of hardships tipping in [the patentee's] favor; and (4) the impact of the injunction on

the public interest.” *Illinois Tool Works, Inc. v. Grip-Pak, Inc.* 906 F.2d 679, 681 (Fed. Cir. 1990). No one factor is dispositive, rather “[i]f a preliminary injunction is granted by the trial court, the weakness of the showing regarding one factor may be overborne by the strength of others.” *Chrysler Motors Corp. v. Auto Body Panels of Ohio, Inc.* 908 F.2d 951 (Fed. Cir. 1990).

“The essential attribute of a patent grant is that it provides a right to exclude competitors from infringing the patent.” *Acumed LLC v. Stryker Corp.*, 551 F. 3d 1323, 1328 (Fed. Cir. 2008). Irreparable harm warranting injunctive relief may be based on the potential for lost market share to the patent owner. *Acumed LLC v. Stryker Corp.*, 551 F. 3d 1323, 1327 (Fed. Cir. 2008). Other factors warranting such relief include loss of revenue and goodwill, a need to reduce research and development activities, and harm to reputation. *Bio-Technology General Corp. v. Genentech, Ltd.* 80 F3d 1553, 1566 (Fed. Cir. 1996). In cases where a supplier of a part must win approval of a design with a customer, such a situation “favors a finding that monetary damages are inadequate.” *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 703 (Fed. Cir. 2008). Indeed, the Federal Circuit has repeatedly and explicitly held that the existence of licensees does not preclude a finding of irreparable harm. *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 703 (Fed. Cir. 2008); *Acumed LLC v. Stryker Corp.*, 551 F. 3d 1323, 1328 (Fed. Cir. 2008).

V. ARGUMENT

As laid out more particularly below, Knowles is entitled to the extraordinary relief of a temporary exclusion order excluding the Accused Products from importation into the United States during the pendency of this proceeding.

A. Knowles Has Shown A High Likelihood of Success on the Merits of its Claims

The factor weighing most strongly in favor of a finding of a likelihood of success on the merits is the fact that Knowles has litigated the exact issues raised by Respondents' Accused Products before this Commission through a hearing on the merits and has previously prevailed.

1. Knowles is Likely to Prevail on its Claim that the Accused Products Infringe the Knowles Patents

Infringement analysis is a two step process: First, the meaning and scope of the asserted claims is determined. Second, the construed claims are compared to the device accused of infringing. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996). The first step of claim construction is a question of law, whereas the second step of comparing the article to the claims is a factual determination. *Id.* While the issue of infringement necessarily includes analysis of the accused product, the issues of infringement raised in this action are substantially the same as those raised previously in investigation 337-TA-629. Furthermore, the construction of the Accused Product packaging, in comparison to the claims of the '231 and '089 patents, is straightforward. As shown in the attached claim charts, the Accused Products meet each and every limitation of the claims that were previously adjudicated and found to be valid.

The infringement analysis here is straightforward. "Claim terms are entitled to a 'heavy presumption' that they carry their ordinary and customary meaning to those skilled in the art in light of the claim term's usage in the patent specification." *Elbex Video, Ltd. v. Sensormatic Electronics Corp.*, 508 F.3d 1366, 1371 (Fed. Cir. 2007). As noted in ALJ Rogers's Initial Determination in 337-TA-629, the terms of the claims of the Knowles patents are uncomplicated and do not have artificial limitations other than what they say. ALJ Roger's construction of the individual terms is set forth in detail in the Initial Determination which was adopted by the Commission, attached hereto as exhibit 7. Because the issues of infringement litigated in that

investigation were the same as those raised by the present Accused Products, the likelihood that Knowles will again prevail is self-evident. Exhibit 15 is a claim chart showing infringement of Knowles's patents by ADI, including claims 1 and 2 of the '231 patent and claims 1, 2, 9, 15, 17, 20, 28 and 29 of the '089 patent, which were found to be valid by ALJ Rogers in 337-TA-629. Exhibit 16 shows the near-identity of the components of the ADI Accused silicon microphone to the components of the accused silicon microphone of 337-TA-629 respondent Memstechnology Berhad which was found to be infringing. Similarly, comparison to exhibit 18 shows the near-identity of the components of the ADI Accused silicon microphone to the components of the Knowles SiSonic microphones which were found in 337-TA-629 to practice the claims of the '231 and '089 patent. Given these similarities, there can be little doubt that these identical issues of infringement should be and are likely to be resolved in the same way.

2. Knowles is Likely to Defeat any Potential Claims of Invalidity of the Knowles Patents

Pursuant to the Patent Act, the '231 and '089 patents are presumed valid, a presumption that may only be overcome by clear and convincing evidence. 35 U.S.C. § 282. As mentioned previously, in the course of investigation 337-TA-629, the respondent in that investigation asserted that the '231 and '089 patents were invalid for lack of novelty or for obviousness in light of no less than 600 distinct references. None of those references, however, were found to support invalidity of the Knowles patents. The Initial Determination, in particular, adopted by the Commission, found claims 1 and 2 of the '231 patent and claims 1, 2, 9, 15, 17, 20, 28 and 29 of the '089 patent valid. Therefore, not only are the Knowles patents presumed valid; but this presumption has withstood prior attacks and trial at the ITC.

Prior adjudication of, and the affirmance of, the validity of a patent has long been held to be evidence of likelihood of success on the merits of validity. *Atlas Powder Co. v. Ireco*

Chemicals, 773 F.2d 1230 (Fed. Cir. 1985); *Fireball Gas Tank & Illuminating Co. v. Commercial Acetylene Co.*, 198 F. 650, 653 (8th Cir. 1912), *aff'd*, 239 U.S. 156 (1915) (“It is an incontrovertible rule of equity jurisprudence that where there has been a prior adjudication sustaining a patent and an infringement thereof in the same or another circuit, where the validity of the patent has been contested on full proofs, the Circuit Court should, upon a motion for a preliminary injunction, sustain the patent and leave the question of its validity to be determined upon the final hearing.”).

Respondent ADI, in response to a lawsuit filed by Knowles in the U.S. District Court for the Northern District of Illinois alleging infringement of the ‘231 and ‘089 patents, has requested the reexamination of those patents. Those requests, however, do not present substantial questions of validity. ADI’s request presumably puts forth its best arguments and prior art, yet all of the art cited has already been asserted to no avail in the prior ITC proceeding which held the patents valid, or is cumulative of that art.

More specifically, the ADI reexamination request of the ‘231 patent recycles the same arguments presented in 337-TA-629; that various “chip on board” devices—where there is no second level connection constituting a “package”—render the ‘231 patent invalid. This argument was rejected by ALJ Rogers in 337-TA-629 and that rejection was affirmed by the Commission: the “package” requirement of claims 1 and 2 of the ‘231 patent requires a first and second level connection to a user substrate. Exhibits 12; 14. Likewise, with regards to the ‘089 patent, ADI’s request relies heavily on references cited during prosecution of the patent or nearly-identical to such references. ADI’s request attempts somewhat to avoid wholesale recycling of previously-defeated arguments by relying on different art with the same disclosures as those used in 337-TA-629, but as described above, the underlying fatal flaw in its logic is the

same. ADI's failure to present any new invalidity arguments in its request to the Patent Office is another clear sign that it will be, like the respondent in 337-TA-629, unable to do so before the Commission.¹

3. Knowles is Likely to Show the Existence of a Domestic Industry

A Domestic Industry, under Subparts (A), (B) and (C) of Section 337(a)(3), exists by virtue of Knowles's activities within the United States, including Knowles's manufacture, research and development, repair and service of its MEMS Silicon Microphone Technology and its SiSonic Microphone Package. The existence of the economic and technical prongs of the domestic industry requirement was adjudicated and affirmed in investigation 337-TA-629 with respect to both of the '231 and '089 patents. The determination in that investigation was based on Knowles's domestic activities which include its significant investment in plant and equipment, significant investment in labor and capital and substantial investment in the exploitation of its intellectual property portfolio, all as are presented in the present proceeding..

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A substantial portion of the Knowles Domestic Industry is specifically dedicated to its SiSonic Microphone Package. Knowles has justified its substantial domestic investment through the anticipated commercial profits of the exploitation and/or sale of its SiSonic Microphone Package. *Id.*

¹ Non-respondent Wolfson Microelectronics, as noted in the complaint filed herewith, has also requested reexamination of the '231 and '089 patents. Likewise, those requests simply recycle previously defeated art, or cumulative references, and arguments from the prior investigation before the Commission and does not present a question of validity.

As shown in the attached claim charts at Exhibit 18, Knowles domestically practices at least one claim of the Knowles '231 Patent and the Knowles '089 Patent. A determination of the technical prong aspect of the domestic industry requirement depends on the Complainant's products. Knowles has previously established that its products meet the claims of its own patents, and the packaging aspects of those products remain substantially unchanged. Exhibit 9 ¶4. Knowles is highly likely to succeed on the identical issue before the Commission here. Likewise, the economic activity which led to the Commission's determination in 337-TA-629 continues to this day. Exhibit 17 [REDACTED]

[REDACTED] In light of this investment in the SiSonic line, there is little doubt that the domestic investment by Knowles in its SiSonic products continues to satisfy the economic prong of the Commission's domestic industry requirement.

It is highly likely that the Commission will reach the same determination given the same underlying facts—a domestic industry exists for Knowles's products patented by the '231 and '089 patents.

4. Knowles Will Suffer Irreparable Harm if Importation of Accused Products Continues

Knowles's strong likelihood of success on the merits of its infringement claims raises the presumption that it will be irreparably harmed. *Pfizer, Inc. v. Teva Pharmaceuticals, USA, Inc.*, 429 F.3d 1364, 1381 (Fed. Cir. 2005). Further, "when the presumption of irreparable harm attaches, the burden is on the likely infringer to produce evidence sufficient to establish that the patent owner would not be irreparably harmed by an erroneous denial of a preliminary injunction." *Id.* In *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) the Supreme Court

held that broad categorical classifications such as automatic denial of an injunction where the patentee licensed its products “cannot be squared with principles of equity adopted by Congress.” *Id.* at 393. Likewise, the entry of an injunction upon a finding of infringement is also not automatic. *Id.* However, in light of holding in *eBay* that “the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity” it remains within the discretion of the Judge or ALJ to utilize traditional notions of the patent system in finding irreparable harm. In *Abbott Labs v. Andrx Pharms., Inc.*, 452 F.3d 1331, 1347 (Fed. Cir. 2006) the Federal Circuit stated “as noted above, we conclude that Abbott has not established a likelihood of success on the merits. As a result, Abbott is no longer entitled to a presumption of irreparable harm.” This comment reinforces the conclusion that, after *eBay*, there continues to be a rebuttable presumption of irreparable harm upon the showing of a strong likelihood of success on the merits in cases of patent infringement.

Even if irreparable harm were not presumed, it exists in this case. Unless the Respondents’ products are excluded from further importation, Knowles will suffer irreparable harm in the form of loss of goodwill with Knowles’s customers, harm to Knowles’s reputation, and loss of market share. Exhibit 9 ¶¶12-18. To that end, a strong showing of likelihood of success on the merits, in particular coupled with other forms of irreparable harm, can suffice to demonstrate irreparable harm. *Sanofi-Synthelabo v. Apotex, Inc.* 470 F.3d 1368, 1381 (Fed. Cir. 2006) (decided after *eBay*). In that case, the Federal Circuit affirmed the district court’s application of a presumption of irreparable harm in light of a likelihood of success on the merits. *Id.* The Federal Circuit also noted that the patent owner would suffer irreparable harm in the form of “irreversible price erosion, loss of good will, [and] potential lay-offs.” *Id.*

The most pressing need for temporary relief, and a compelling illustration of why the harm to Knowles will be irreparable if its request is denied, is the fast-approaching holiday shopping season and the accompanying timeframe for orders for the 2010 holidays. Exhibit 9 ¶¶9-12.

ADI's Accused Products have already displaced Knowles's products from consumer electronics devices for the 2009 holiday season. *Id.* ¶9. Particularly, they have been found to have been incorporated in the Apple Inc.'s wildly successful iPod Nano line of products. Exhibit 19. As discussed above, manufacturers of consumer electronics devices, even those assembled overseas, design and plan their products at facilities in the United States. To plan products using ADI Accused Products like its accused silicon microphone package, such manufacturers must obtain ADI Accused Products for testing and qualification in the United States. Thus, continued importation of even small quantities of Accused ADI microphones for testing and design will irreparably harm Knowles by planting the seeds for later lost sales, goodwill and market and design win opportunities for Knowles. *See* Exhibit 9, ¶¶ 8, 12, 14, 16, 17.

The irreparable harm to Knowles is also due to the threat of actual lost holiday sales and opportunities. Absent temporary relief, these orders will again be siphoned off by ADI's Accused Products; even if the Commission sets a target date of 12 months, the opportunity for Knowles to reap the full benefit of its inventions will have passed by. These lost opportunities will represent irreparable harm to Knowles's growth and market position. In *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 702-703 (Fed. Cir. 2008) the Federal Circuit recognized that in cases where business compete not for individual consumers but for "design wins" monetary damages will be inadequate. Exclusion of the ADI Accused Products will prevent the harm of manufacturers planning to introduce products which incorporate ADI's accused microphones

instead of Knowles or licensed microphones by preventing design and testing with such Accused Products. Further, exclusion will prevent the harm of loss of sales to any domestic product manufacturers who order ADI Accused Products for direct shipment into the U.S. for domestic assembly.

Further, Knowles loses the present and future goodwill of its customers when unauthorized products such as ADI's accused microphones infiltrate the market. As discussed above, the consumer electronics business is a fast-paced, innovation driven field. To that end, it is critical that competitors in it, like Knowles, earn and maintain a reputation as a source of new and inventive products. Exhibit 9, ¶13. While Knowles has long enjoyed a reputation as a pioneer in the silicon microphone market, unauthorized infringement of those inventions dilutes Knowles's reputation as the source of such innovation. *Id.* Knowles, not ADI, is the innovator behind the unique packaging that enables the functions of the SiSonic and ADI microphones, and the loss of recognition as such irreparably harms Knowles reputation. [REDACTED]

[REDACTED]

[REDACTED]

Knowles also suffers irreparable harm from ADI's infringement by lost future sales growth. As a result of lost sales opportunities, Knowles will lose opportunities to further grow its silicon microphone production capacity and thus [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, the addition of ADI's microphone package products as a competitor to Knowles's represents the entry of an unauthorized market participant in what rightfully should be a monopoly held by Knowles. [REDACTED]

[REDACTED]

[REDACTED] Thus, Knowles will be prevented from receiving unquantifiable sales and royalties that it would have otherwise been entitled. The loss of market position caused by sale of infringing products will obviously be severely detrimental to Knowles's ability to exploit opportunities for growth going forward.

B. The Balance of Harms Favors Grant of Temporary Relief

In the balancing the hardships, "[t]he magnitude of the threatened injury to the patent owner is weighed, in light of the strength of the showing of the likelihood of success on the merits, against the injury to the accused infringer if the preliminary decision is in error." *H.H. Robertson, Co. v. United Steel Deck, Inc.*, 820 F. 2d 384, 390 (Fed. Cir. 1987). The balance of harms in this case tips decidedly in Knowles's favor. The SiSonic microphone is Knowles's

flagship product which it has promoted and protected. In comparison to the irreparable harm that will be felt by Knowles, described above, the Respondent will not be harmed by the entry of a temporary exclusion order. ADI will not be irreparably harm since, while ADI is importing quantities of accused infringing microphones for testing, its website reveals that its ADMP401 and ADMP421 products are “prerelease.” Exhibit 4. Thus, since ADI has not yet begun general sales, it is clear that the balance of hardships favors the relief requested by Knowles. Moreover, what comparatively minor harm may be felt by ADI if the motion for temporary relief is granted was self-imposed and does not militate against temporary relief. “One who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected.” *Ortho Pharmaceutical Corp. v. Smith*, 15 U.S.P.Q.2d (BNA) 1856, 1863, 1990 WL 18681 (E.D. Pa. 1990).

C. The Public Interest Favors Temporary Relief

Section 337 (e)(1) provides that the Commission may issue a temporary exclusion order “unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the united States, and United States consumers, it finds that such articles should not be excluded from entry.” 19 U.S.C. §1337(e)(1). Thus “typically, in a patent infringement case, the focus of the Commission’s public interest analysis should be whether there exists some critical public interest that would be injured by the grant of temporary relief.” *Certain Hardware Emulation Systems*, 1996 ITC LEXIS 317 at *175, citing *Hybritech Inc. v. Abbott Laboratories*, 849 F.2d 1446, 1458 (Fed. Cir. 1988).

There is no critical public interest at stake here. The loss of ADI’s infringing products will not harm the domestic market, which can be supplied by Knowles, its licensees and non-infringing substitutes. Indeed, the public interest weighs strongly in favor of the entry of a

temporary exclusion order, which would serve the public's interest in encouraging innovation by preventing infringement. Coupled with Knowles's strong showing of likely success on the merits, this principle weighs even more in favor of temporary exclusion. In *Certain Hardware Emulation Systems*, Judge Luckern observed that "a firm owning patents should have the capacity to expand output in response to increases in market demand, and thereby improve its financial position and engaged in future product development . . . [P]ublic policy also favors the granting of temporary relief because complainant has established a reasonably likelihood of success in both infringement and validity of the patents at issue." *Certain Hardware Emulation Systems*, 1996 ITC LEXIS 317 at *178. Thus, consideration of public interests only strengthens the justification for entry of a temporary exclusion order.

D. Entry of at Temporary Exclusion Order and a Temporary Cease and Desist Order is Justified

Section 337 permits the Commission to grant temporary relief through both an exclusion order and a cease and desist order. 19 U.S.C. §1337(e)(1) and (f)(1). The present case is such a circumstance where both forms of relief are justified. As shown through ADI's website, ADI engages not only in importation of the Accused Devices, but extensively markets and promotes imported products domestically as well. Exhibit 4. Thus, unless enjoined, Respondent will continue to engage in infringing activity under 37 U.S.C. §271(a). Therefore, the Commission should exercise its authority to issue both a temporary exclusion order and a temporary cease and desist order barring further acts of infringement including sales and offers for sale of Accused Products.

VI. BOND REQUIREMENTS

A. Knowles Should Not Be Required to Post a Bond

Section 337 makes clear that requirement of a bond for the requestor of temporary relief is within the Commission's discretion, and the Commission need not impose any bond amount at all. 19 U.S.C. §1337(e)(2). The demonstrably high likelihood of success shown by Knowles weighs against imposition of a bond in this case. The legislative history to Section 337 indicates that a primary purpose of the complainant's bond is to "prevent the use of TEOs as a form of harassment of respondents or for other unjustified purposes." H.R. Rep. No. 576, 100th Cong., 2d Sess. 635-36 (1988). A strong showing on the merits supports a finding that the party seeking temporary relief has not misused the remedy, and therefore can justify dispensing with the bond requirement. *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972) (allowing waiver of bond owing to high likelihood of success); *see also Specialty Chems. & Servs., Inc. v. Chandler*, 9 U.S.P.Q.2d 1793, 1798 (N.D. Ga. 1988). If the Commission does determine to require a bond, the amount of such a bond should be minimal.

B. No Bond Amount is Sufficient to Compensate Knowles for the Irreparable Harm Caused by Continuing Importation

If the Commission finds that a temporary exclusion order is warranted, the Act Provides that the Secretary shall refuse entry of the infringing articles. 19 U.S.C. § 1337(e)(1). The Act further provides that the articles will be entitled to entry if the respondent pays a bond that is "sufficient to protect the complainant from any injury." *Id.* As such, a bond must be sufficiently high to account of the Complainant's lost profits and lost market share caused by the unfair trade practices of the Respondent as well as any other potential damages such as price erosion and lost goodwill. As detailed above, no monetary amount will be sufficient to cure the irreparable harm that would result from the continuation of Respondent's conduct. Accordingly, a temporary exclusion order and temporary cease and desist order are the only adequate remedies and cannot be replaced by a bond. If the Commission does determine to allow a bond in lieu of temporary

relief, such a bond should be at least equal to the full value of the imports of the Respondent's goods during the relevant period. *Certain Integrated Repeaters, Switches, Transceivers and Products Containing Same*, 2002 ITC LEXIS 615, at *3, *16, Inv. No. 337-TA-435 (2002) (respondents' bond set at 100% of value of imported goods).

VII. CONCLUSION

For the reasons stated above, Knowles's Motion For Temporary Relief should be granted in its entirety. The Commission should issue a temporary exclusion order barring Respondent ADI, its agents and affiliates, successors and assigns from importation of Accused Products into the United States, and further should issue a cease and desist order barring Respondent ADI, its agents and affiliates, successors and assigns from further acts of unfair competition within the United States.

Dated: November 12, 2009

Respectfully submitted,

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