

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

RECEIVED
OFC OF THE SECRETARY
US INTL TRADE COMM
2009 NOV 16 PM 4: 55

In the Matter of)	
)	
CERTAIN ADJUSTABLE KEYBOARD)	Investigation No. 337-TA-670
SUPPORT SYSTEMS AND)	
COMPONENTS THEREOF)	

Order No. 27: Granting Complainant Humanscale Corporation’s Motion for Summary Determination on Economic Prong of the Domestic Industry Requirement

On October 2, 2009, complainant Humanscale Corporation (Humanscale) moved for summary determination that it satisfied the economic prong of the domestic industry requirement under 35 U.S.C. § 1337(a)(3). (Motion Docket No. 670-18.)

In a filing dated October 14, 2009, respondents CompX International Inc. and Waterloo Furniture Components Limited d/b/a CompX Waterloo (CompX) opposed said Motion No. 670-18. It was argued that complainant’s “alleged factual basis for this Motion consists of mischaracterizations and misrepresentations, and fails to provide any nexus between the alleged investments and the patented invention.” (Opposition at 1.) In support, it was argued that most of the{

}citing CompX Statement
of Additional Material Facts Precluding Summary Determination at ¶ 70. (Id. at 2.)

The staff, in a submission dated October 14, 2009, opposed said Motion No. 670-18. In

support, it was argued that “the lack of undisputed evidence specifically apportioned to the practicing products regarding domestic investments by Humanscale in plant and equipment, employment of labor and capital, engineering, and research and development regarding Humanscale’s adjustable keyboard support systems requires that the motion be denied.” (Staff Initial Response at 5 (emphasis in original).) The staff, however, represented that it:

... would not oppose a motion by Humanscale for leave to supplement its motion with a brief declaration by a competent witness setting forth what portion of its total investment in “keyboard support systems” is attributable to those products Humanscale asserts are covered by the ‘097 patent.

(Staff Initial Response at 5, n. 4.)

Humanscale, on October 20, 2009, filed a motion for leave to file an attached reply memorandum in further support of its Motion No. 670-18, “in order to provide additional facts requested by the Commission Investigative Staff in their Response and to correct misstatements of law and fact made by Respondents ... in their Opposition to Humanscale’s Motion.” (Motion Docket No. 670-26.) In an order that issued on October 21, 2009, said Motion No. 670-26 was granted and each of respondents and the staff were ordered to respond, no later than October 26, 2009, to the reply filed with said motion. (Order No. 22.)

On October 22, 2009, the staff, in a response at 3-4 pursuant to Order No. 22, argued that there is sufficient basis for finding that the economic prong of the domestic industry has been satisfied, and that Motion No. 670-18 should be granted.

On October 26, 2009, respondents, in a response pursuant to Order No. 22, argued, inter alia, that there are “several misstatements and mischaracterizations of fact and law in Humanscale’s Reply” and therefore Motion No. 670-18 should be denied. (Respondents’

Response to Order No. 22 at 1-2.)

Commission rule 210.18(b) states that a party is entitled to summary determination only if there are no genuine issues of material fact and the party is entitled to such determination as a matter of law. Under said rule, summary determination may be rendered only “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 summary determination as a matter of law.” Summary determination is appropriate only when the relevant, material facts are so clear and beyond dispute that a hearing on the matter at issue would serve no useful purpose and the movant is entitled to judgment as a matter of law. See Certain Recombinant Erythropoietin, No. 337-TA-281, 1989 WL 608775 (U.S.I.T.C.), at *82, Initial Determination (Jan. 10, 1989).

When deciding a motion for summary determination, “the administrative law judge must accept all evidence presented by the non-movant as true, must view all of the evidence in the light most favorable to the non-movant and must draw all justifiable inferences in favor of the non-movant.” Certain Lens-Fitted Film Packages, Inv. No. 337-TA-406, Order No. 7 at 3 (July 10, 1998). Any doubt as to the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. Certain Coated Optical Waveguide Fibers and Products Containing Same, Inv. No. 337-TA-410 (Coated Optical Waveguide Fibers), Order No. 6 at 3 (July 28, 1998).

Summary determination is improper where the record contains facts that, if explored and developed, might lead the Commission to accept the position of the non-moving party. Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners

for Automobiles, Inv. No. 337-TA-334, Views of the Comm'n at 3, 4 (Nov. 25, 1992); Coated Optical Waveguide Fibers at 3; Certain Set-Top Boxes and Components Thereof, Inv. No. 337-TA-454, Order No. 8 at 7-8 (May 31, 2001); see also, e.g., Certain Tool Handles, Tool Holders, Tool Sets, and Components Therefor, Inv. No. 337-TA-483, Order No. 14, at 2 (June 20, 2003) (unreviewed initial determination); and Certain Optical Disk Controller Chips and Chipsets and Products Containing Same, Including DVD Players and PC Optical Storage Devices II, Inv. No. 337-TA-523, Order No. 75 at 9 (August 19, 2005).

With respect to the “economic prong” of the domestic industry requirement, section 337(a)(3) sets forth the following criteria for a patent-based case:

[A]n industry in the United States shall be considered to exist if there is in the United States, with respect to articles protected by the patent . . . concerned –

- (A) significant investment in plant and equipment;
- (B) significant employment of labor or capital; or
- (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3). The satisfaction of any one of these criteria will satisfy the economic prong. See, e.g., Certain Agricultural Vehicles and Components Thereof, Inv. No. 337-TA-487, Initial Determination at 76, USITC Pub. 3735 (Dec. 2004) (unreviewed). The domestic industry determination should not be made according to any rigid formula, but by “an examination of the facts in each investigation, the articles of commerce, and the realities of the marketplace.” Certain Double-Sided Floppy Disk Drives and Components Thereof (Temporary Relief), Inv. No. 337-TA-215, 227 USITC Pub. 1860 (May 1986), Comm'n Op. at 17. A liberal and flexible

standard is applied by the Commission in determining the existence of an economic domestic industry. See, e.g., Certain Video Graphics Display Controllers and Products Containing Same, Inv. No. 337-TA-412, Initial Determination, 1999 ITC LEXIS 503 at *12 (July 19, 1999).

For the most part, as indicated, infra, in lieu of challenging the facts on which Humanscale depends to prove the economic prong of the domestic industry requirement, respondents' objections are legal arguments as to how said facts should be interpreted generally. The administrative law judge addresses these general objections before analyzing the evidence and arguments pertinent to each of the criteria in section 337(a)(3)(A)-(C).

In an affidavit filed with Humanscale's reply memorandum, Humanscale's Vice President of Finance Michele Gerards (Gerards) attested to the fact that during the period of time from January 2008 to November 2008, Humanscale's revenue for all products was{ } and that during that period, approximately{ } of that total was attributable to adjustable keyboard support system sales of the products on which Humanscale is relying to prove domestic industry. Respondents do not directly challenge these facts, but rather argued that said numbers are inflated because the{ } (Respondents' Response to Order No. 22 at 2-4.)

Respondents argued that most of the components included in Humanscale's Keyboard Support Systems, { } see supra. However, the Commission in Inv. No. 337-TA-140 concurred with the administrative law judge that there is an industry in the United States within the meaning of Section 337 even though the patented and copyrighted elements were manufactured overseas, because the essential components of the personal computer were

assembled in the United States, and the article of commerce was found to be the complete personal computer, thus requiring that the domestic industry be defined in terms of such computers. See USITC Publication 1504 at 41 (March 1984); see also USITC Publication 2902 at 140 (June 1995).

The Commission in Inv. No. 337-TA-546 found as follows:

The unfinished condoms imported from China are not saleable to the consumer as imported. Final ID at 126. Exposure to light and air would cause the latex to oxidize and become brittle. Tr. at 936. It is not until the prophylactics are sealed in foil and tested according to FDA standards that they are merchantable in the United States, an important fact that the ALJ improperly declined to accord any weight. Final ID at 120-22. Prior investigations instruct that if the product is not saleable without the domestic activities, this factor supports finding a domestic industry. For example, in Certain Diltiazem Hydrochloride and Diltiazem Preparations, the economic prong was held to be satisfied even though the entire patented process for the drug in question was practiced overseas by one co-complainant. Inv. No. 337-TA-349, USITC Pub. 2902 (June 1995), Initial Determination at 133-45 (unreviewed in relevant part). The determination was based in part on the fact that the drug as imported in bulk form was not usable until it was converted into dosage form at domestic facilities (owned by the second co-complainant). Id. At 141-45.

See Certain Male Prophylactic Devices, Inv. No. 337-TA-546, Commission Opinion at 42 (August 1, 2007) (emphasis added). In Inv. No. 337-TA-560, the respondent argued that the complainant is a producer and supplier of products that use NAND flash memory chips and is not in the business of selling NAND flash chips themselves, which allegedly use the patent in issue, and further argued that said patent in issue is directed toward the technology embodied in a NAND flash chip, rather than technology in products that incorporate flash memory chips and therefore that the complainant's expenditures only related to products that use NAND flash

memory chips, not the chips themselves, thereby failing to link the investments to the patent in issue. The complainant in Inv. No. 337-TA-560 argued that expert witnesses opined that the NAND chips cannot perform all of the steps of the method claims of the asserted patent by themselves and that in order to perform all the steps of the method claims of the patent in issue, the NAND chips must be used in a NAND flash memory product including a controller or equivalent device, and therefore it is appropriate to include research and development activities that relate to NAND flash memory products as well as NAND chips. The administrative law judge found the complainant's arguments persuasive. (See Order No. 37 (November 17, 2006) (non-reviewed December 8, 2006).)

The Commission has also held that a domestic industry can be established by reference to a complete article of commerce rather than just the patented component of that article. Certain Double-Sided Floppy Disk Drives and Components Thereof, Inv. No. 337-TA-215, Comm'n Op., 227 U.S.P.Q. 982, 989 (Oct. 15, 1985) (Floppy Disk Drives); Certain Personal Computers and Components Thereof, Inv. No. 337-TA-140, USITC Pub. 1504, Comm'n Op., (1984) (Personal Computers); Certain Variable Speed Wind Turbines and Components Thereof, Inv. No. 337-TA-376, U.S.I.T.C. Pub. No. 3003 (Nov. 1996), Initial Determination at 70-71, 1996 WL 1056330 (U.S.I.T.C., May 30, 1996) (unreviewed by Commission in relevant part) (wind turbines, sold as integrated units, define domestic industry rather than only subcomponents that were actually patented). More specifically, the Commission has found that a domestic industry may be established based on key domestic steps in the assembly of an article that contains an essential, patent-protected component manufactured abroad. Floppy Disk Drives; Personal Computers.

Based on Commission precedent, including the precedent cited, supra, the administrative law judge rejects respondents' argument to the effect that complainant's activities in the United States should be ignored.

Humanscale claims to manufacture domestically a{
 } (Statement of Undisputed Material Facts in Support of Complainant's Motion for Summary Determination of Domestic Industry ¶ 12.) The staff does not dispute this statement. (Staff's Response to Complainant's Statement of Undisputed Facts in Support of Its Motion for Summary Determination of Domestic Industry ¶ 12.) Respondents' only objections are that the {
 } and that complainant draws improper allegations from this statement. (Respondents' Response to Complainant's Statement of Undisputed Facts in Support of Its Motion for Summary Determination of Domestic Industry ¶ 12.) The administrative law judge finds that manufacturing{ } is a significant part of manufacturing adjustable keyboard support systems as finished products. The administrative law judge also finds that manufacturing{ } can contribute significantly to the finished products of adjustable keyboard support systems. Therefore, the administrative law judge finds that domestically manufacturing{ } as components of adjustable keyboard support systems can serve to fulfill the domestic industry requirement, even where{ }

Respondents also note that Humanscale offers the{
 } and that other vendors also sell similar mechanisms. (Respondents' Response to Complainant's Reply in Support of Its

Motion for Summary Determination on the Economic Prong of Domestic Industry at 3.)

However, as noted in Floppy Disk Drives, supra, a market for a patent-protected mechanism manufactured abroad does not preclude a finding of domestic industry for an article in which said mechanism is an essential component.

With regard to the criteria of section 337(a)(3)(A)-(C), supra, it is undisputed that Humanscale has a facility located at 220 Circle Drive North, Piscataway, NJ 08854 (Piscataway facility) and a facility located at 3728 S. Willow, Suite 106, Fresno, CA 93725 (Fresno facility). (Complainant's Statement of Material Facts, ¶¶5-6.)

Specifically with respect to a significant investment in plant and equipment (337(a)(3)(A)), complainant contends that it has { } square feet of plant space in its Piscataway facility and { } square feet of plant space in its Fresno facility devoted to keyboard support systems; that it expends { } per month in rent for its Piscataway facility and { } per month in rent for its Fresno facility; that it has invested over { } in equipment devoted to adjustable keyboard support systems that exploit the '097 patent in issue in the United States; that it manufactures a {

} (Statement of Undisputed

Material Facts in Support of Complainant's Motion for Summary Determination of Domestic Industry ¶¶ 5-20.) Respondents' objections essentially are that the Piscataway and Fresno

facilities only use{ } square feet, respectively, for adjustable keyboard support systems;{

} which are not relevant to the

domestic industry requirement; that complainant actually{

} and that the{

} (Respondents' Response to Complainant's Statement of

Undisputed Facts in Support of Its Motion for Summary Determination of Domestic Industry ¶¶

5-20.) Regarding the discrepancy in square footage used in the facilities between the Complaint and the current Motion, complainant credibly updated the information in the complaint.

Respondents' other objections to complainant's Statement of Undisputed Facts are treated, supra.

With respect to a significant employment of labor or capital (337(a)(3)(B)), Humanscale expends { } per month in rent for its Piscataway facility and{ } per month in rent for its Fresno facility. (Ex. 3, Hoeffner Dep. 149:7-14, July 29, 2009; Ex. 4, Conf. Ex. 12 to Humanscale's Compl.) Respondents do not dispute these figures, but argued that these figures

{ }

{ } With

the exception of respondents' argument regarding whether or not complainant may use adjustable keyboard support systems to satisfy a domestic industry, treated supra, it is undisputed that from 1997 to 2008, Humanscale has invested over{ } in equipment devoted to the manufacture, assembly, quality control testing, packaging, and shipping of its adjustable keyboard support

systems that exploit the '097 patent in the United States (Ex. 2, Washkevich Dep. 48:7-13; Ex. 6, Gerards Dep. 33:14-36:10, Aug. 12,2009; Ex. 7, Washkevich Decl. ¶ 3; Ex. 8, Invoice for Expenditures of Equipment 1997-2006 at HMN00347725 and HMN00347726-HMN00347728; Ex. 4, Conf. Ex. 12 to Humanscale's Compl.); that after the manufacture of the{

} Humanscale's employees {

} in the Piscataway and Fresno facilities (Ex. 3, Hoeffner Dep. 149:24-150:13; Ex. 9, 4G90011RG22 Keyboard Assembly); that Humanscale employees also{

} (Ex. 5, Weber Dep. 110:24-111 :7; Ex. 12, Excerpts of User Instruction Manuals); that Humanscale employs{ } people that work in the following departments: Executive, Administrative, Global Operations, Accounting, Human Resources/Recruiting, IT, Ergonomic Consulting, Design, Manufacturing, Installation, Sales, and Customer Service (Ex. 13, Gerards Decl. ¶ 3) and that of these { } employees in Manufacturing are exclusively dedicated to the production, assembly, testing, packaging, and shipping of adjustable keyboard support systems that exploit the '097 patent (Ex. 13, Gerards Decl. ¶ 4; Ex. 14, Humanscale's Organizational Chart at HMN00348038); that Humanscale has { } employees dedicated to the manufacturing, assembly, quality control testing, packaging, shipping, sales, design, production, customer service of its adjustable keyboard support systems (Ex. 13, Gerards Decl. ¶ 8; Ex. 15, Humanscale's Profit and Loss Statement; Ex. 14, Humanscale's Organizational Chart); that between January 2008 and November 2008, Humanscale's sale revenue for its adjustable keyboard support systems was { } (Ex. 13, Gerards Decl. ¶ 6); that Humanscale allocated { } of its sale revenue to employees

that work on the manufacturing, sales, production, design, customer service, installation, and other job responsibilities in relation to adjustable keyboard support systems (Ex. 13, Gerards Decl. ¶¶ 6-8); that Humanscale's { } employees are in the following categories: Executive, Administrative, Global Operations, Accounting, Human Resources/Recruiting, IT, Ergonomic Consulting, Design, Manufacturing, Installation, Sales, and Customer Service (Ex. 13, Gerards Decl. ¶ 8); that in 2008, the total compensation for these full-time equivalent dedicated employees was approximately { } (Ex. 13, Gerards Decl. ¶ 11); that Humanscale has { } types of engineers dedicated to the manufacture, design, assembly, testing, including quality control testing, process and product improvements, customization of products, and servicing activities of its adjustable keyboard support systems, including { } (Ex. 7, Washkevich Decl. ¶ 6); that Humanscale employs approximately { } full-time equivalent engineers dedicated to quality control testing, process and product improvements, customization of products, and servicing activities for the adjustable keyboard support systems (Ex. 7, Washkevich Decl. ¶ 6; Ex. 14, Humanscale's Organizational Chart; Ex. 15, Humanscale's Profit and Loss Statement); and that Humanscale based its full-time equivalent figure on the percentage of sales revenue attributable to adjustable keyboard support systems, which was { } between January 2008 and November 2008 (Ex. 7, Washkevich Decl. ¶¶ 4-5); that Humanscale had expended { } in 2008 (through November) on compensation for these full-time equivalent engineers in relation to their work on adjustable keyboard support systems (Ex. 7, Washkevich Decl. ¶ 7).

With respect to substantial investment in exploitation of the '097 patent in issue,

including engineering or research and development (337 (a)(3)(C)), the Commission has found that domestic research and development expenditures directed to products that incorporate the patented technologies at issue are sufficient to satisfy the economic prong of the domestic industry requirement under 337(a)(3)(C). See Certain NOR and NAND Flash Memory Devices and Products Containings Same, Inv. No. 337-TA-560, Order No. 37 at 6 (Nov. 17, 2006) (Flash Memory Devices) Commission Decision Not to Review (Dec. 8, 2006); Certain GPS Chips, Associated Software and Systems, and Products Containg Same, Inv. No. 337-TA-596, Order No. 37 at 4-5 (Feb. 27, 2008); Certain Mobile Telephone Headsets, Wireless Communications Devices, and Components Thereof, Inv. No. 337-TA-578, Order No. 33 at 10-11 (Feb. 16, 2007). Therefore, the administrative law judge rejects respondents' argument that complainant's research and development investments should be limited to those projects that are directed to the exact tecinology of the '097 patent in issue and finds further that, based on the evidence cited supra, respondents' argument does not create a genuine issue of material fact regarding whether complainant has satisfied the economic prong of the domestic industry requirement. Further, with respect to investment in engineering in the United States as to articles covered by the '097 patent in issue, it is undisputed, with the exception of objections as to interpretation of facts treated, supra, that complainant employs the equivalent of approximately { } full-time engineers dedicated to quality control testing, process and product improvements, customization of products, and servicing activities for the adjustable keyboard support systems (Ex. 7, Washkevich Decl. ¶ 6; Ex. 14, Humanscale's Organizational Chart; Ex. 15, Humanscale's Profit and Loss Statement); that Humanscale had expended { } in 2008 (through November 2008) on compensation for these full-time equivalent engineers in relation to their work on

adjustable keyboard support systems (Ex. 7, Washkevich Decl. ¶ 7); that included within this figure, are the salaries of{ } full-time manufacturing engineers, {

} who have significant responsibility in the design, manufacture, quality control testing, process and product improvements, customization of products, and servicing activities for the adjustable keyboard support systems in Humanscale's Piscataway facility (Ex. 5, Weber Dep. 10:15-13:3, 14:13-16, 18:13-19:18; Ex. 11, Barry Dep. 8:22-16:17; Ex. 14, Humanscale's Organizational Chart at HMN00348018); that the combined salaries for{

} (Ex. 16, W2 for S. Barry and W2 for M. Weber); that on new models, the Humanscale's manufacturing engineers will{ } (Ex. 11, Barry Dep.

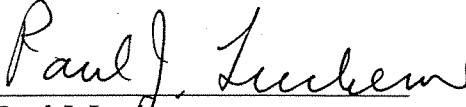
10:16-11:5); and that Humanscale's manufacturing engineers{ } (Ex. 11, Barry Dep. 9:6-12).

Even viewing all evidence in the light most favorable to the non-movant and drawing all justifiable inferences in favor of the non-movant, it is clear that complainant has made a significant investment in plant and equipment, has significant employment of labor or capital, and has made a substantial investment in exploitation of the patent at issue, including engineering, research and development, in the United States. Based on the foregoing, Motion No. 670-18 is granted.

This initial determination, pursuant to Commission rule 210.42(c), is hereby CERTIFIED to the Commission. Pursuant to Commission rule 210.42(h)(3), this initial determination shall become the determination of the Commission within thirty (30) days after the date of service hereof unless the Commission grants a petition for review of this initial determination pursuant

to Commission rule 210.43, or orders on its own motion a review of the initial determination or certain issues therein pursuant to Commission rule 210.44.


This order will be made public unless a bracketed confidential version is received by November 13, 2009.


Paul J. Luckern
Paul J. Luckern
Chief Administrative Law Judge

Issued: November 4, 2009

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **Public Version Order** has been served by hand upon the Commission Investigative Attorney, Heidi E. Strain, Esq., and the following parties as indicated, on November 17, 2009.


Marilyn R. Abbott, Secretary JNG
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

Counsel for Complainant:

V. James Adduci, II, Esq.
Adduci Mastriani & Schaumberg LLP
1200 Seventeenth Street NW - Fifth floor
Washington, DC 20036
P-202-467-6300

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: _____

Counsel for Respondents CompX International, Inc. & Waterloo Furniture Components Ltd.:

Frederic M. Meeker, Esq.
Banner & Witcoff, Ltd.
1100 13th Street, NW
Suite 1200
Washington, DC 20005-4051
P-202-824-4051
F-202-824-3001

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: _____

PUBLIC MAILING LIST

Heather Hall
LEXIS-NEXIS
9443 Springboro Pike
Miamisburg, OH 45342

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: _____

Kenneth Clair
Thomson West
1100 Thirteen Street, NW, Suite 200
Washington, DC 20005

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: _____

(PARTIES NEED NOT SERVE COPIES ON LEXIS OR WEST PUBLISHING)