

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN BULK WELDING WIRE
CONTAINERS AND COMPONENTS
THEREOF AND WELDING WIRE**

Inv. No. 337-TA-686

**ORDER NO. 41: DENYING COMPLAINANTS' MOTION FOR SUMMARY
DETERMINATION THAT THE ECONOMIC PRONG OF THE
DOMESTIC INDUSTRY REQUIREMENT IS SATISFIED**

(March 3, 2010)

On February 4, 2010, complainants The Lincoln Electric Company and Lincoln Global, Inc. (collectively "Lincoln") moved for summary determination that they have satisfied the economic prong of the domestic industry requirement. (Motion Docket No. 686-050.) On February 16, 2010, respondent Sidergas SpA and respondent The ESAB Group, Inc. (collectively "Respondents") filed a response opposing the motion. On February 16, 2010, the Commission Investigative Staff ("Staff") filed a response opposing the motion.

Lincoln claims that it has satisfied the economic prong of the domestic industry requirement by virtue of its significant investments in the U.S. relating to the manufacture and packaging of bulk welding wire that practices the asserted patent, U.S. Patent No. 6,708,864 ("the '864 patent"). Lincoln relies on the declaration of George Blankenship, President of Lincoln North America and President/CEO of Lincoln Global, Inc., to support its motion. Lincoln claims that the Blankenship declaration details Lincoln's domestic investments in the manufacture, inspection, testing, and packaging of bulk wire products. Lincoln additionally relies on documents it produced during discovery to demonstrate that its activities satisfy the

economic prong of the domestic industry requirement. Lincoln asserts that Respondents have never challenged Lincoln's evidence of its domestic investments.

Respondents oppose the motion. Respondents claim that the activities and investments relied upon by a complainant to establish the economic prong must relate to the "articles" used to establish the technical prong. Respondents argue that Lincoln failed to meet its burden because Lincoln relies on the sum of its investments generally, and fails to tie any of the investments to the products it claims practice the '864 patent.

Respondents assert that Lincoln is only relying on its Exact-Trak product for purposes of establishing a domestic industry. According to Respondents, Lincoln's motion fails to discuss any investments made by Lincoln specifically related to the Exact-Trak product; rather, the only products mentioned are the Accu-Trak and Accu-Pak products. Respondents state that Lincoln's failure to allocate the identified investments to the Exact-Trak product creates a genuine dispute of material fact that warrants a denial of Lincoln's motion.

Staff opposes the motion. Staff notes that while the articles that Lincoln relies upon for the economic prong analysis are the Accu-Trak and Accu-Pak products, the evidence offered by Lincoln relates to Lincoln's investment in bulk welding wire in general. Thus, Staff is of the view that Lincoln has not satisfied its burden to demonstrate that its economic activities with respect to the Accu-Trak and Accu-Pak products are "significant" or "substantial," as required under the 19 U.S.C. § 1337.

I. Applicable Law

A. Summary Determination

Commission Rule 210.18 governs summary determination, and states, *inter alia*, that:

The determination sought by the moving party shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.

19 CFR § 210.18(b).

The evidence “must be viewed in the light most favorable to the party opposing the motion...with doubt resolved in favor of the nonmovant.” *Crown Operations Int’l, Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002); *see also Xerox Corp. v. 3Com Corp.*, 267 F.3d 1361, 1364 (Fed. Cir. 2001) (“When ruling on a motion for summary judgment, all of the nonmovant’s evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant’s favor.”). “Issues of fact are genuine only if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party.” *Id.* at 1375 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The trier of fact should “assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial.” *EMI Group North America, Inc. v. Intel Corp.*, 157 F.3d 887, 891 (Fed. Cir. 1998). “Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate.” *Sandt Technology, Ltd. v. Resco Metal and Plastics Corp.*, 264 F.3d 1344, 1357 (Fed. Cir. 2001) (Dyk, C.J., concurring). “In other words, ‘[s]ummary judgment is authorized when it is quite clear what the truth is,’ [citations omitted], and the law requires judgment in favor of the movant based upon facts not in genuine dispute.” *Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993).

B. The Domestic Industry Requirement

In patent-based proceedings under section 337, a complainant must establish that an

industry “relating to the articles protected by the patent...exists or is in the process of being established” in the United States. 19 U.S.C. § 1337(a)(2) (2008). Under Commission precedent, the domestic industry requirement of Section 337 consists of an “economic prong” and a “technical prong.” *Certain Data Storage Systems and Components Thereof*, Inv. No. 337-TA-471, Initial Determination Granting EMC’s Motion No. 471-8 Relating to the Domestic Industry Requirement’s Economic Prong (unreviewed) at 3 (Public Version, October 25, 2002).

The “economic prong” of the domestic industry requirement is satisfied when it is determined that the economic activities set forth in subsections (A), (B), or (C) of subsection 337(a)(3) have taken place or are taking place. *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, USITC Pub. No. 3003, 1996 ITC LEXIS 556, Comm’n Op. at 21 (Nov. 1996). With respect to the “economic prong,” 19 U.S.C. § 1337(a)(2) and (3) provide, in full:

(2) Subparagraphs (B), (C), (D), and (E) of paragraph (1) apply only if an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design 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.

Given that these criteria are listed in the disjunctive, satisfaction of any one of them will be sufficient to meet the domestic industry requirement. *Certain Integrated Circuit Chipsets and Products Containing Same*, Inv. No. 337-TA-428, Order No 10, Initial Determination

(Unreviewed) (May 4, 2000), citing *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, Commission Op. at 15, USITC Pub. 3003 (Nov. 1996).

To meet the technical prong, the complainant must establish that it practices at least one claim of the asserted patent. *Certain Point of Sale Terminals and Components Thereof*, Inv. No. 337-TA-524, Order No. 40 (April 11, 2005). “The test for satisfying the ‘technical prong’ of the industry requirement is essentially same as that for infringement, i.e., a comparison of domestic products to the asserted claims.” *Alloc v. Int’l Trade Comm’n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). The technical prong of the domestic industry can be satisfied either literally or under the doctrine of equivalents. *Certain Excimer Laser Systems for Vision Correction Surgery and Components Thereof and Methods for Performing Such Surgery*, Inv. No. 337-TA-419, Order No. 43 (July 30, 1999).

II. Analysis

The economic prong of the domestic industry requirement examines the domestic investment made by the patentee, or a licensee, “relating to the articles protected by the patent[.]” 19 U.S.C. § 1337(a)(2)-(3). Thus, to satisfy the economic prong, it is necessary for the complainant to establish, *inter alia*, that the asserted investment relates to the articles protected by the patent.

Here, Lincoln has failed to make that showing. Lincoln primarily relies on the declaration of George D. Blankenship to support its position. While the Blankenship Declaration provides details regarding Lincoln’s investments and expenditures, the statements do provide the level of detail necessary to satisfy the economic prong. Specifically, the statements in the declaration describe investments and expenditures related to Lincoln’s bulk welding wire and bulk welding wire containers in general, but do not address investments and expenditures related

to any specific products that are asserted to practice the patents. (*See* Ex. 1 to Lincoln Mot.) The only mention of any specific Lincoln products are the Accu-Trak drum-shaped containers and the Accu-Pack box-shaped containers, and Mr. Blankenship only notes that these containers are made in the U.S. by third parties for Lincoln. (*Id.* at ¶ 6.)

Lincoln next relies on a number of documents that it produced during discovery. The first document is Lincoln's December 31, 2009 Form 10-K Report that Lincoln filed with the U.S. Securities and Exchange Commission. (Ex. 2 to Lincoln Mot.) Lincoln cites to generalized statements in the report explaining that Lincoln is a large manufacturer of bulk welding wire and that Lincoln invests in research and development related to bulk welding wire. (Lincoln Mem. at 6.) The statements are not directly tied to any articles alleged to practice the '864 patent.

Lincoln next points to three marketing documents. {

} The other two documents relate to a new and improved Accu-Pak box. (*Id.*) None of these documents demonstrate the necessary investments related to the articles alleged to practice the '864 patent.¹

Finally, Lincoln points to a large spreadsheet document. Lincoln states that this document is its stock keeping unit ("SKU") report relating to Lincoln's inventory of products on or about August 2008. (Ex. 4 to Lincoln Mot.) Again, this large spreadsheet, which apparently depicts Lincoln's inventory as of August 2008, does not demonstrate the investment related to the articles covered by the '864 patent that is necessary to satisfy 19 U.S.C. § 1337(a)(2)-(3).

After an examination of all of the evidence relied upon by Lincoln in its motion, I concur with Staff and Respondents that Lincoln has failed to meet its burden at this time. None of the evidence submitted by Lincoln discusses Lincoln's domestic investment with respect to the

¹ The claims of '864 patent are related to weld wire, and not packaging for weld wire.

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articles that Lincoln claims are covered by the '864 patent. Instead, Lincoln's evidence is general in nature, and only addresses Lincoln's investments with respect to bulk welding wire as a whole. In addition, I find that there is a genuine dispute of material fact regarding whether or not Lincoln's investment related to the Exact-Trak, Accu-Pak, or Accu-Trak products satisfies 19 U.S.C. § 1337(a)(2)-(3). Therefore, summary determination is not appropriate. *Certain Digital Televisions & Certain Products Containing Same & Methods of Using Same*, Inv. No. 337-TA-617, Order No. 54 (July 1, 2008) (finding that "the lack of information concerning the allocation of expenditures and activities prevents the granting of summary determination.")

ORDER

Motion No. 686-050 is hereby DENIED.

Within seven (7) days of the date of this Order, each party shall submit to the Office of the Administrative Law Judges a statement regarding whether or not it seeks to have any portion of this document deleted from the public version. The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date.

Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.




Robert K. Rogers, Jr.
Administrative Law Judge

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CONTAINERS AND COMPONENTS
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PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** was served upon **Benjamin Levi, Esq.**, Commission Investigative Attorneys, and the following parties via first class mail and air mail where necessary on **APR 30 2010**


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