

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

**In the Matter of**

**CERTAIN COMPOSITE WEAR  
COMPONENTS AND PRODUCTS  
CONTAINING SAME**

**Investigation No. 337-TA-644**

**COMMISSION OPINION**

On May 22, 2009, complainants Magotteaux International S/A and Magotteaux Inc. (collectively, “Magotteaux”) moved for attorney’s fees and sanctions against defaulting respondents AIA Engineering Ltd. and Vega Industries (collectively, “AIAE”). *See* Motion Docket No. 644-039. On July 17, 2009, the presiding administrative law judge (“ALJ”) (Judge Essex) issued a recommended determination (“RD”) (Order No. 27) recommending that the Commission grant Magotteaux’s motion in part. The Commission has determined to adopt the ALJ’s recommendation to award Magotteaux attorney’s fees, but has determined to reduce the amount requested by Magotteaux. This opinion sets forth the reasons for the Commission’s determination.

**I. BACKGROUND**

The Commission instituted this investigation on April 25, 2008, based on a complaint filed by Magotteaux. *73 Fed. Reg.* 22431 (Apr. 25, 2008). The complaint, as supplemented, 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, or the sale within the United States after importation of certain composite wear components and welding products containing the same that infringe

several claims of U.S. Patent No. RE39,998. The complaint named Fonderie Acciaiere Rioale S.P.A. (“FAR”) and AIAE as respondents. FAR was terminated from the investigation on the basis of a settlement agreement, leaving AIAE as the remaining respondents.

Although AIAE filed a response to the complaint on November 26, 2009, AIAE reduced their participation in discovery by February of 2009. *See* RD at 5. As a result, between February 9, 2009 and February 24, 2009, Magotteaux and the Commission investigative attorney (“IA”) filed a series of motions to compel discovery from AIAE. *See* Motion Docket Nos. 644-027 (“Complainants’ Motion to Compel the Appearance of Respondents AIA Engineering Limited and Vega Industries Ltd.’s Witnesses for Deposition”); 644-031 (“Complainants Magotteaux International S/A and Magotteaux, Inc.’s Motion to Compel Production”); and 644-032 (“Commission Investigative Staff’s Motion to Compel Responses to Contention Interrogatories”).

On March 19, 2009, the ALJ issued Order No. 23 granting these motions to compel and ordering AIAE to respond to written discovery and to produce fact and expert witnesses for deposition. AIAE failed to comply with the order and continued to refuse to participate in discovery. On March 23, 2009, AIAE filed a notice informing the ALJ that they would not participate any further in the investigation. *See* Respondents AIA Engineering Limited’s and Vega Industries Ltd.’s Notice of Filing of District Court Action and Statement of Position with Respect to ITC Investigation No. 337-TA-644.

On March 27, 2009, the IA filed a motion requesting an initial determination (“ID”) finding AIAE in default. Magotteaux filed a response supporting the IA’s motion. Motion Docket No. 644-037. On April 13, 2009, Magotteaux filed its own motion for default in which Magotteaux sought adverse inferences against AIAE on importation, infringement, and domestic industry.

Motion Docket No. 644-038. The IA supported Magotteaux's motion. AIAE opposed both motions. On May 8, 2009, the ALJ issued an ID (Order No. 26) finding AIAE in default pursuant to Commission Rules 210.16(a)(2) and 210.17 (19 C.F.R. §§ 210.16(a)(2) and 210.17). The Commission determined not to review the ID and indicated that, in addition to the ALJ's finding of violation pursuant to Commission Rule 210.17, the Commission presumes the facts alleged in the complaint to be true with respect to AIAE. In response to the Commission's notice, Magotteaux, AIAE, and the IA each filed submissions and response submissions concerning remedy, the public interest, and bonding on July 22, 2009 and July 30, 2009, respectively. After examining the record in this investigation, the Commission issued a limited exclusion order and a cease and desist order against AIAE and terminated the investigation.

On May 27, 2009, Magotteaux moved for attorney's fees and sanctions against AIAE. Motion Docket No. 744-039. On June 1, 2009, AIAE filed its opposition to Magotteaux's motion. On June 5, 2009, the IA filed a Response to Complainants' Motion for Attorney's Fees and Sanctions ("IA Response") which supported Magotteaux's motion in part. In the IA's Response, he indicated that Magotteaux should submit detailed billing records to support its motion for attorney's fees and sanctions. IA Response at 13, n.5. As a result, Magotteaux filed a Supplemental Submission to its motion for attorney's fees and sanctions ("First Supplemental Submission") on June 15, 2009. On July 17, 2009, the ALJ issued the subject RD (Order No. 27) granting Magotteaux's motion in part. On October 2, 2009, Magotteaux filed a Second Supplemental Submission to its motion ("Second Supplemental Submission") providing additional information identified by the ALJ.

## II. ANALYSIS

Magotteaux requested sanctions in the form of attorney's fees totaling because according to Magotteaux, AIAE's conduct throughout this investigation caused damage to Magotteaux. Complainants' Motion for Attorney's Fees and Sanctions, Memo at 10 and 19. The ALJ stated that monetary sanctions are permitted against AIAE under Commission Rule 210.33(c) because AIAE failed to obey Order No. 23, which directed AIAE to respond to written discovery and to produce fact and expert witnesses for deposition. RD at 8. The ALJ concluded, however, that under Rule 210.33(c), Magotteaux is only entitled to receive attorney's fees associated with activities caused by AIAE's failure to comply with Order No. 23. *Id.* at 9. The ALJ found that as a result of AIAE's failure to comply with Order No. 23, Magotteaux filed a motion for default (Motion Docket No. 644-038) in which Magotteaux sought adverse inferences against AIAE on importation, infringement, and domestic industry; the IA also filed a motion for default (Motion Docket No. 644-037) RD at 9; *see* Motion Docket Nos. 644-037 and 644-038. Accordingly, the ALJ recommended that Magotteaux be compensated for the attorney's fees it incurred for preparing and filing its default motion and its response to the IA's default motion. RD at 9. As for Magotteaux's remaining request for attorney's fees, the ALJ concluded that Magotteaux did not show that these costs were caused by AIAE's failure to comply with Order No. 23. *Id.* at 10.

The ALJ did not identify a particular dollar amount that Magotteaux should receive and indicated that the supporting billing entries were not fully allocated, stating:

The fees incurred may very well be for the requested amount of \$58,398.50 as represented by Magotteaux in its motion. However, given that the billing records [included in Magotteaux's First Supplemental Submission] list costs incurred that are not related to the motions for default combined with those that are, the ALJ believes that Magotteaux is in the best position to point to the specific billing

entries to support its requested fees should the Commission determine that such support is necessary.

Order No. 27 at 13, n. 8. In response, on October 2, 2009, Magotteaux filed its Second Supplemental Submission containing a more detailed billing record and an affidavit from counsel for Magotteaux explaining how it allocated the costs.

We agree with the ALJ that AIAE's conduct during the investigation warrants sanctions.

Commission Rule 210.25 provides generally for sanctions as follows:

Any party may file a motion for sanctions for abuse of process under § 210.4(d)(1), abuse of discovery under § 210.27(d)(3), failure to make or cooperate in discovery under § 210.33 (b) or (c), or violation of a protective order under § 210.34(c).

19 C.F.R. § 210.25. There is some question about which basis Magotteaux relied on for sanctions because Magotteaux argued broadly that AIAE has “(1) taken impermissible liberties with the rules of this Court, (2) implemented a defense based on delay tactics, (3) made false representations of their intent to participate, and (4) otherwise done everything possible to extend, complicate and make this Investigation unnecessarily protracted.” Complainants' Motion for Attorney's Fees and Sanctions at 1. The only rules explicitly identified by Magotteaux in support of its motion, however, are Commission Rules 210.25 and 210.33. *See* Complainants' Motion for Attorney's Fees and Sanctions, Memo at 1 (“Complainants . . . for their Memorandum of Points and Authorities in Support of Magotteaux's Motion for Sanctions and Attorneys' Fees pursuant to §§ 210.25 and § 210.33 . . .”). Accordingly, we agree with the ALJ that Magotteaux is seeking sanctions only for “failure to make or cooperate in discovery under § 210.33(b) or (c).” 19 C.F.R. § 210.25; RD at 8.

Magotteaux requested monetary sanctions arising from AIAE's failure to cooperate

throughout the underlying investigation. Complainants' Motion for Attorney's Fees and Sanctions at 10 and 19. Commission Rule 210.33(c) governs monetary sanctions and states:

If a party . . . fails to obey an order to provide or permit discovery . . . the administrative law judge . . . upon motion . . . may require the party failing to obey the order or the attorney advising that party or both to pay reasonable expenses, including attorneys' fees, caused by the failure . . . .

19 C.F.R. § 210.33(c).

Therefore, under Commission rule 210.33(c), Magotteaux may only recover those attorney's fees incurred as a result of AIAE's failure to comply with an order to provide or permit discovery. The ALJ issued only one order regarding discovery, Order No. 23. The only actions Magotteaux took in response to AIAE's failure to comply with Order No. 23 were to file its April 13, 2009 motion for default and to respond to the IA's March 27, 2009 motion for default. Thus, Magotteaux is entitled to its fees associated with those filings.

According to Magotteaux, the fees associated with the default motions total \$58,398.50. Complainants' Motion for Attorney's Fees and Sanctions at 18. Magotteaux presented copies of bills relating to these motions to support its request for sanctions, but several of the billing entries cover charges related to the default motions as well as charges related to other tasks in a single "mixed" entry. In response to the ALJ's statement that Magotteaux is in the best position to point to billing entries that support its requested fees, Magotteaux submitted its Second Supplemental Submission explaining how Magotteaux allocated the cost. Specifically, counsel for Magotteaux identified 33 billing entries that are solely related to filing a response to the IA's motion for default and to filing Magotteaux's own motion for default ("default entries"). These 33 entries, according to counsel for Magotteaux's affidavit, alone total \$58,771.50. Counsel for Magotteaux also

identified 18 billing entries that cover fees for the response and/or the motion for default as well as for other work (“mixed entries”). Of these 18 entries, according to the affidavit, \$16,733.17 was allocated to work related solely to the response and/or motion for default. To arrive at this figure, counsel for Magotteaux applied an allocation formula that takes the total number of tasks associated with the response and/or the motion for default as the numerator and the total number of tasks for each entry as a denominator, and multiplies the fees associated with each entry by this fraction. Thus, the total amount of attorney’s fees for filing a response to the IA’s motion for default and for filing its own motion for default, as asserted by Magotteaux, is \$75,504.67.

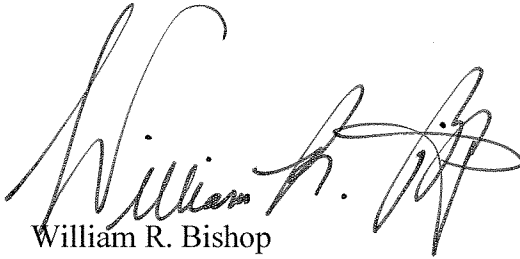
After a detailed examination of Magotteaux’s Second Supplemental Submission, we find that with respect to the mixed entries, Magotteaux did not meet its burden to show what portion of the mixed entry is associated with the default motions. There is no evidence to support the assertion that each task listed in a single mixed billing entry took the same amount of time. Indeed, Magotteaux’s apportionment formula appears to give greater weight to work related to the default motions than seems appropriate. Because we cannot rely on this apportionment methodology and it is not clear how these mixed entries should be apportioned, we cannot award Magotteaux attorney’s fees for the mixed entries. With respect to the default entries, we find that three entries in this category, entries 26, 27, and 29, are mixed entries that do not relate solely to the default motions and thus cannot be relied upon. In addition, we find that three other entries in this category, entries 3, 5, and 6, occurred before Order No. 23 issued and therefore also cannot be relied upon. Accordingly, the Commission finds that Magotteaux is entitled to attorney’s fees in the amount of

the remaining default entries, totaling \$43,366.<sup>1</sup>

### III. CONCLUSION

For the reasons discussed herein, the Commission has determined to grant Magotteaux's motion in part and award Magotteaux attorney's fees in the amount of \$43,366.

By order of the Commission.



William R. Bishop  
Acting Secretary to the Commission

Issued: June 7, 2010

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<sup>1</sup> Commissioner Lane respectfully dissents from the award calculated by the majority. Commissioner Lane agrees with the ALJ's determination, and the majority's decision, to award sanctions in the form of attorney's fees for costs incurred by Magotteaux that are directly related to the activities caused by AIAE's failure to comply with the Administrative Law Judge's Order No. 23. These costs include the attorney fees Magotteaux incurred by preparing and filing a response to the IA's motion for default and for Magotteaux's preparing and filing its own motion for default. Commissioner Lane, however, does not agree with the monetary level of the award granted by the majority.

The motion and response filed in this case appear to be fairly routine for experienced practitioners. Thus, reasonable fees for this motion and response should be based upon a value-based services billing model or flat-fee model rather than the hourly rate model involving numerous lawyers and hours of time.

Commissioner Lane determines that a value-based or flat-fee billing for the motion and response at issue would justify an amount much lower than the requested amount and certainly not more than \$20,000.

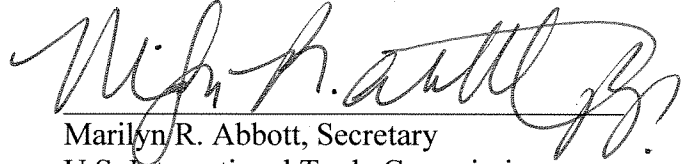
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**337-TA-644**

**CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, David O. Lloyd, Esq., and the following parties as indicated, on

June 7, 2010



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