

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN CASES FOR PORTABLE
ELECTRONIC DEVICES

Inv. No. 337-TA-861
Inv. No. 337-TA-867
(Consolidated)

ORDER NO. 28: INITIAL DETERMINATION GRANTING COMPLAINANT
SPECK'S MOTION FOR SUMMARY DETERMINATION THAT
THE DEFAULTING RESPONDENTS VIOLATED SECTION 337
AND FOR ENTRY OF A GENERAL EXCLUSION ORDER

(February 21, 2014)

Table of Contents

INITIAL DETERMINATION

I.	BACKGROUND	3
II.	STANDARDS OF LAW	5
A.	Summary Determination.....	5
B.	Violation of Section 337(a)(1)(B) and (a)(2)	7
1.	Importation of Goods Into the United States	7
2.	Infringement	8
3.	Domestic Industry.....	9
III.	DISCUSSION REGARDING VIOLATION - U.S. PATENT NO. 8,204,561.....	10
A.	Introduction	10
B.	Asserted Claims	10
C.	Level of Ordinary Skill in the Art	12
D.	Claim Construction.....	12
1.	Construction of Agreed-Upon Claim Terms.....	12
2.	Construction of Disputed Claim Terms.....	13
E.	Importation and Infringement	13
1.	Defaulted Respondents Wexun, Rocon, and SW-Box	14

Public Version

2.	Defaulted Respondent Trait.....	19
3.	Defaulted Respondent Anbess	24
4.	Defaulted Respondent Global Digital	28
IV.	DOMESTIC INDUSTRY	33
V.	CONCLUSION	34
VI.	CONCLUSIONS OF LAW	34
VII.	INITIAL DETERMINATION	35
RECOMMENDATION ON REMEDY AND BONDING		
I.	REMEDY AND BONDING	36
A.	Remedy	36
1.	Legal Standard	36
2.	The Parties' Positions.....	37
3.	Discussion.....	38
B.	Bond	40
1.	Legal Standard	40
2.	The Parties' Positions.....	41
3.	Discussion.....	41

INITIAL DETERMINATION

On November 15, 2013, complainant Speculative Product Design, LLC's ("Speck" or "Complainant") filed a Motion for Summary Determination of Violation and For Entry of a General Exclusion Order. (Motion Docket No. 867-028.) On November 26, 2013, the Commission Investigative Staff ("Staff") filed a response in support of Speck's motion. On February 18, 2014, Speck filed a supplemental declaration from its expert, Dr. Osswald, in further support of its motion for summary determination of violation. No other responses were received.

I. BACKGROUND

This investigation is a consolidation of investigations 337-TA-861 and 337-TA-867.

On September 26, 2012, Complainant Speck filed its original Complaint. On November 16, 2012, by publication in the Federal Register, the Commission issued a Notice of Investigation (“NOI”) instituting investigation 337-TA-861. In particular, the Commission ordered that:

Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain cases for portable electronic devices that infringe one or more of claims 1-16 of the '561 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337

77 Fed. Reg. 68828. The NOI named the following Respondents: Anbess Electronics Co., Ltd. (“Anbess”), BodyGlove International, LLC (“BodyGlove”), Fellowes, Inc. (“Fellowes”), ROCON Digital Technology Corp. (“Rocon”), SW-Box.com, a/k/a Cellphonezone Limited (“SW-Box”), Trait Technology (Shenzhen) Co., Limited (“Trait”), and Hongkong Wexun Ltd. (“Wexun”). *Id.*

On December 26, 2012, Speck filed a second Complaint. On January 25, 2013, by publication in the Federal Register, the Commission issued a NOI instituting investigation 337-TA-867 and ordering investigations 337-TA-861 and 337-TA-867 consolidated. 78 Fed. Reg. 6834. In particular, the Commission ordered that:

Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain cases for portable electronic devices by reason of infringement of one or more of claims 1-16 of the '561 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337

Public Version

Id. The NOI named the following Respondents: En Jinn Industrial Co., Ltd. (“En Jinn”), Shengda Huanqiu Shijie (“Shengda”), Global Digital Star Industry, Ltd. (“Global Digital”), JWIN Electronics Corp., d/b/a iLuv (“JWIN”), Project Horizon, Inc. (“Horizon”), Superior Communications, Inc. (“Superior”), and Jie Sheng Technology (“Jie Sheng”). *Id.*

During the course of the investigation, a number of respondents either have been terminated or have defaulted. The current status of each of the original Respondents is as follows:

Respondent	Status	Docket Entry
Hongkong Wexun Ltd. (337-TA-861)	In default	Order No. 8 (April 2, 2013)
ROCON Digital Technology Corp. (337-TA-861)	In default	Order No. 8 (April 2, 2013)
SW-Box.com (337-TA-861)	In default	Order No. 27 (February 21, 2014)
Trait Technology Co. (337-TA-861)	In default	Order No. 8 (April 2, 2013)
Anbess Electronics Co., Ltd. (337-TA-861)	In default	Order No. 8 (April 2, 2013)
Global Digital Star Industry, Ltd. (337-TA-867)	In default	Order No. 27 (February 21, 2014)
JWIN Electronics Corp. (337-TA-867)	Terminated on the basis of a settlement agreement	Order No. 10 (April 30, 2013)
Project Horizon, Inc. (337-TA-867)	Terminated on the basis of a stipulation and consent order	Order No. 6 (March 1, 2013)
En Jinn Industrial Co., Ltd. (337-TA-867)	Terminated on the basis of a stipulation and consent order	Order No. 22 (February 5, 2014)
Jie Sheng Technology (337-TA-867)	Terminated by amendment to the Complaint and NOI	Order No. 9 (April 30, 2013)

Public Version

Shengda Huanqiu Shijie (337-TA-867)	Terminated due to withdrawal of the Complaint	Order No. 21 (November 26, 2013)
Body Glove International, LLC (337-TA-861)	Terminated from the investigation on summary determination	Order No. 16 (September 17, 2013)
Superior Communications, Inc. (337-TA-867)	Terminated due to withdrawal of the Complaint	Order No. 19 (October 29, 2013)
Fellowes, Inc. (337-TA-861)	Terminated on the basis of a settlement agreement	Order No. 23 (February 6, 2014)

On September 30, 2013, I issued Order No. 17 as an Initial Determination granting Speck's motion to partially terminate the investigation as to claims 1-3, 6-8, 10, and 12-16 of the '561 patent. Thus, only claim 4, 5, 9, and 11 of the '561 patent remain at issue.

On November 4, 2013, Speck moved to terminate the last participating Respondent, Fellowes Inc., based on a settlement agreement.¹ (Motion Dkt. 867- 027.) In compliance with 19 C.F.R. § 210.16(c)(2), Speck included in the motion a declaration that it would seek a general exclusion order ("GEO"). On February 10, 2014, I issued Order No. 25 granting Speck's request to suspend the procedural schedule in this investigation *nunc pro tunc* to November 4, 2013. Order No. 25 also granted Speck leave to file its present motion for summary determination of violation out of time.

II. STANDARDS OF LAW

A. Summary Determination

Pursuant to Commission Rule 210.18(b), summary determination "shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

¹ Fellowes has since been terminated based on settlement agreement. (See Order No. 23.)

Public Version

moving party is entitled to a summary determination as a matter of law.” 19 C.F.R. § 210.18(b). Summary determination should therefore be granted when 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*, Inv. No. 337-TA-281, USITC Pub. 2186, ID at 70 (Jan. 19, 1989).

The moving party bears the initial burden of establishing that there is an absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant satisfies its initial burden, the burden then shifts to the non-movant to demonstrate specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). When evaluating a motion for summary determination, the evidence is to be examined in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255; *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, Order No. 6 at 3 (July 28, 1998) (denying a motion for summary determination of non-infringement). Summary determination is improper where “the record contains facts which, if explored and developed, might lead the Commission to accept the position of the non-moving party.” *Id.* However, “[a] party may not overcome a grant of summary judgment by merely offering conclusory statements.” *TechSearch L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1371 (Fed. Cir. 2002).

After a respondent has been found in default by the Commission, the facts alleged in the complaint will be presumed true with respect to that respondent. *See* 19 C.F.R. § 210.16(c); *see also Certain Toner Cartridges & Components Thereof*, Inv. No. 337-TA-740, Order No. 26,

ID/RD at 11-12 (June 1, 2011). A finding of default can lead to a substantive finding of a violation of Section 337 and issuance of a general exclusion order. *See Certain Tadalafil or Any Salt or Solvate Thereof & Prods. Containing Same*, Inv. No. 337-TA-539, USITC Pub. 3992, Notice of Comm'n Issuance of Gen. Exclusion Order (June 13, 2006) (issuing a general exclusion order against nine respondents who defaulted for failure to respond to the Complaint and the Notice of Investigation).

B. Violation of Section 337(a)(1)(B) and (a)(2)

To establish violation of Section 337(a)(1)(B) and (a)(2), a complainant must prove three elements: (1) the importation of goods into the United States, the sale for importation, or the sale within the United States after importation; (2) infringement by those goods of a valid and enforceable United States patent; and (3) a domestic industry in the United States. 19 U.S.C. §§ 1337(a)(1)(B), 1337(a)(2); *Alloc, Inc. v Int'l Trade Comm'n*, 342 F.3d 1361, 1365 (Fed. Cir. 2003).

1. Importation of Goods Into the United States

A complainant "need only prove importation of a single accused product to satisfy the importation element." *Certain Purple Protective Gloves*, Inv. No. 337-TA-500, Order No. 17, at 5 (Sept. 23, 2004); *Certain Trolley Wheel Assemblies*, Inv. No. 337-TA-161, USITC Pub. 1605, Comm'n Action & Order at 7-8 (Nov. 1984) (finding importation requirement satisfied by the importation of single trolley wheel assembly of no commercial value). The importation requirement can be established through a summary-determination motion. *See Certain Mobile Commc'ns & Computer Devices & Components Thereof*, Inv. No. 337-TA-704, Order No. 48, ID at 3 (Oct. 5, 2010) (granting summary determination as to importation requirement).

2. Infringement

Section 337(a)(1)(B)(i) prohibits “the importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that – (i) infringe a valid and enforceable United States patent.” 19 U.S.C. §1337(a)(1)(B)(i). The Commission has held that the word “infringe” in Section 337(a)(1)(B)(i) “derives its legal meaning from 35 U.S.C. § 271, the section of the Patent Act that defines patent infringement.” *Certain Electronic Devices with Image Processing Systems, Components Thereof, and Associated Software (“Electronic Devices”)*, Inv. No. 337- TA-724, Comm’n Op. at 13-14 (December 21, 2011)). Under 35 U.S.C. § 271(a), direct infringement of a patent consists of making, using, offering to sell, or selling the patented invention without consent of the patent owner.

Determination of patent infringement requires a two-step analysis: first, the claims must be properly construed, and second, the properly construed claims must be compared to the infringing device. *See Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995). The first step—claim construction—is a matter of law, but the second step—comparison of the properly construed claims to the accused product—is a question of fact. *Zelinski v. Brunswick Corp.*, 185 F.3d 1311, 1315 (Fed. Cir. 1999) (citations omitted). “A claim for patent infringement must be proven by a preponderance of the evidence, which simply requires proving that infringement was more likely than not to have occurred.” *Warner-Lambert Co. v. Teva Pharm. USA, Inc.*, 418 F.3d 1326, 1341 n.15 (Fed. Cir. 2005) (internal citations omitted). To prove direct infringement, “the patentee must show that the accused device meets each claim limitation, either literally, or under the doctrine of equivalents.” *Catalina Mktg. Int’l, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 812 (Fed. Cir. 2002) (citations omitted).

3. Domestic Industry

In an investigation based on a claim of patent infringement, Section 337 requires that an industry in the United States, relating to the articles protected by the patent, exist or be in the process of being established. 19 U.S.C. § 1337(a)(2). Under Commission precedent, the domestic industry requirement has been divided into (i) an “economic prong” (which requires certain activities with respect to the protected articles) and (ii) a “technical prong” (which requires that the activities relate to the asserted patent). *Certain Video Game Systems and Controllers (“Video Games”)*, Inv. No. 337-TA-743, Comm’n Op. at 6-7 (April 14, 2011).

a. “Economic Prong”

The “economic prong” of the domestic industry requirement is satisfied when there exists in the United States in connection with products practicing at least one claim of the patent at issue: (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, and licensing. 19 U.S.C. §1337(a)(3). Establishment of the “economic prong” is not dependent on any “minimum monetary expenditure” and there is no need for complainant “to define the industry itself in absolute mathematical terms.” *Certain Stringed Musical Instruments and Components Thereof (“Stringed Instruments”)*, Inv. No. 337-TA-586, Comm’n Op. at 25-26 (May 16, 2008). However, a complainant must substantiate the significance of its activities with respect to the articles protected by the patent. *Certain Printing and Imaging Devices and Components Thereof (“Imaging Devices”)*, Inv. No. 337-TA-694, Comm’n Op. at 30 (February 17, 2011). Further, a complainant can show that its activities are significant by showing how those activities are important to the articles protected by the patent in the context of the company’s operations, the marketplace, or the industry in question. *Id.* at 27-28.

b. “Technical Prong”

The “technical prong” of the domestic industry requirement is satisfied when it is determined that the complainant practices at least one claim of each of the patents at issue. *Certain Microlithographic Machines and Components Thereof* (“*Microlithographic Machines*”), Inv. No. 337-TA-468, Initial Determination at 63 (April 1, 2003). The test for determining whether a complainant is practicing a claim of a patent at issue is essentially the same as that for infringement, *i.e.*, it requires that a complainant’s domestic product practice at least one claim of the asserted patent. *Alloc, Inc. v. Int’l Trade Comm’n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003).

III. DISCUSSION REGARDING VIOLATION - U.S. PATENT NO. 8,204,561

A. Introduction

U.S. Patent No. 8,204,561 (“the ‘561 Patent”) is titled “One Piece Co-Formed Exterior Hard Shell Case With An Elastomeric Liner For Mobile Electronic Devices.” (JX-001, cover page.) The ‘561 Patent issued on June 19, 2012, based on a patent application filed on October 26, 2011. (*Id.*) The ‘561 Patent lists Ryan H. Mongan, David J. Law, Jarret Weis, Bryan L. Hyncek, and Stephen R. Myers as inventors and Speculative Product Design, LLC as the assignee. (*Id.*)

The ‘561 Patent is generally directed to a one-piece, dual-layered case for portable electronic devices comprised of a flexible inner layer co-molded with a hard protective exterior shell. (JX-1 at 1:59-2:37.) The ‘561 Patent has one independent claim and 15 dependent claims. Speck is asserting dependent claims 4, 5, 9, and 11 (“Asserted Claims”).

B. Asserted Claims

Speck argues that defaulted respondents Hongkong Wexun Ltd., ROCON Digital Technology Corp., SW-Box.com, Trait Technology Co., Anbess Electronics Co., Ltd., and

Public Version

Global Digital Star Industry, Ltd., infringe at least one of claims 4, 5, 9, and 11 of the '561

Patent. The asserted claims read as follows:

1. A one-piece case for enclosing a personal electronic device comprising:

a flexible inner layer co-molded with an exterior hard layer and permanently affixed together to form a co-molded one-piece assembly;

wherein the co-molded one-piece assembly is sufficiently flexible to accept insertion of the personal electronic device and sufficiently rigid to securely retain the inserted personal electronic device, wherein:

the flexible inner layer includes a bottom surface, side surfaces joined to the bottom surface and extending upward therefrom, and a fitted cavity configured to accept and retain the inserted personal electronic device such that the bottom surface covers at least a portion of a bottom surface of the inserted personal electronic device and the side surfaces cover at least a portion of a side surface of the inserted personal electronic device;

the exterior hard layer includes a bottom surface and side surfaces sized and shaped to substantially cover an exterior of the bottom and side surfaces of the flexible inner layer and a cut away portion that is permanently filled with a portion of the co-molded flexible inner layer.

...

4. The one-piece case of claim 1, wherein the side surfaces of the exterior hard layer form a corner joint and the co-molded flexible inner layer fills in the cutaway portion located at the corner joint contributing to the overall flexibility of the one-piece case.
5. The one-piece case of claim 1, wherein the flexible inner layer that fills in the cut-away portion creates a stretch-zone that is sufficiently flexible to enable the co-molded one-piece assembly to deform and thereby accept insertion of the personal electronic device.

...

Public Version

9. The case of claim 8, wherein an overhang extending from a top portion of one or more of the side surfaces and extends completely around the perimeter of the opening.

...

11. The one-piece case of claim 1, wherein the side surfaces of at least one of the flexible inner layer and the exterior hard layer extend above a top surface of the inserted personal electronic device.

C. Level of Ordinary Skill in the Art

In Order No. 13 a person of ordinary skill in the art at the time of the '561 Patent was found to include someone with an undergraduate degree (such as a Bachelor of Science) in industrial design, mechanical engineering or the equivalent with either course work in plastics or molding or 1-2 years of experience in the manufacturing or design of molded plastic products, preferably consumer products such as accessories for portable electronic devices, or a person of similar education and experience. (Order No. 13 at 7-8.) Alternatively, a person of ordinary skill in the art was found to include someone without an undergraduate degree, but with 2-4 years of experience in the manufacture or design of molded plastic products, preferably consumer products such as accessories for portable electronic devices or a person of similar education and experience. (*Id.*)

D. Claim Construction

On July 8, 2013, Order No. 13 issued construing certain terms of the '561 Patent.

1. Construction of Agreed-Upon Claim Terms

The parties' constructions of the agreed-upon claim terms of the '561 Patent were adopted as follows:

Claim Term	Claim(s)	Agreed Construction
Permanently affixed together	4, 5, 9, 11	Plain and ordinary meaning.
Sufficiently flexible	4, 5, 9, 11	Plain and ordinary meaning.
Sufficiently rigid	4, 5, 9, 11	Plain and ordinary meaning.

Public Version

Substantially cover	4, 5, 9, 11	Plain and ordinary meaning.
Cut away portion	4, 5, 9, 11	Plain and ordinary meaning.
Contributes to	4	Plain and ordinary meaning.
Overall flexibility	4	Plain and ordinary meaning.
Creates	5	Plain and ordinary meaning.
Corner joint	4	Plain and ordinary meaning.

(See Order No. 13).

2. Construction of Disputed Claim Terms

The disputed claim terms of the '561 Patent were construed as follows:

Claim Term	Claim(s)	Construction
Co-molded	4, 5, 9, 11	Plain and ordinary meaning.
Flexible inner layer	4, 5, 9, 11	Plain and ordinary meaning.
Exterior hard layer	4, 5, 9, 11	Plain and ordinary meaning.
One-piece case	4, 5, 9, 11	Plain and ordinary meaning.
One-piece assembly	4, 5, 9, 11	Plain and ordinary meaning.
Fitted cavity	4, 5, 9, 11	Plain and ordinary meaning.
Permanently filled	4, 5, 9, 11	Plain and ordinary meaning.
Fills in	4, 5	Plain and ordinary meaning.

(See Order No. 13).

E. Importation and Infringement

Speck alleges that each of the defaulted Respondents has violated Section 337 by importing, selling for importation, and/or selling after importation certain cell-phone cases that infringe the '561 Patent. (Mem. at 1.) The defaulted Respondents Speck accuses of violating Section 337 are: Hongkong Wexun Ltd. ("Wexum"), ROCON Digital Technology Corp. ("Rocon"), SW-Box.com ("SW-Box"), Trait Technology Co. ("Trait"), Anbess Electronics Co., Ltd. ("Anbess"), and Global Digital Star Industry, Ltd. ("Global"). (*Id.* at 12-16.)

As discussed in more detail below, I find that there are no genuine issues of material fact that each of the defaulted Respondents has imported, sold for importation, and sold after importation in the United States products that infringe the asserted claims of the '561 Patent.

1. Defaulted Respondents Wexun, Rocon, and SW-Box

a. Importation

Defaulted Respondents Wexun, Rocon, and SW-Box are all involved in the manufacture, importation, and sale of Rocon branded cases. (861 Complaint at ¶¶ 48, 49, 51, Exh. 32.) Wexun currently operates a website at www.wexun-e.com. (Mem. at Exh. E (“Gosselin Dec.”) at ¶ 3.) Rocon still operates a website at www.sinorocon.com. (Gosselin Dec. at ¶2.) SW-Box is still in business and operates a website as SW-Box.com. (Gosselin Dec. at ¶4.) Rocon is a brand launched by Wexun, and is a registered trademark of Wexun. (Mem., Exh. B (“Riley Dec.”) at ¶ 7.) A Wexun product catalog indicates that “ROCON is a brand launched by Hongkong Wexun Ltd. to meet the demands of electronics products accessories.” (*Id.* at ¶ 7, Exh. 6.)

The evidence shows Rocon Cases are manufactured in China. (861 Complaint at ¶ 27; Riley Dec. at ¶ 2.) The evidence shows that Wexun makes in China, has others make in China, exports from China to the U.S., and/or imports into the U.S. for sale certain cases for handheld mobile electronics, for example the “Rocon CandyShell Case for iPhone 4 and 4S” in assorted colors. (861 Complaint at ¶ 26.) The evidence shows that Rocon also makes in China, has others make in China, exports from China to the U.S., and/or imports into the U.S. certain cases for portable electronic devices, for example the Rocon DTC Cases for the iPhone 4/4S. (*Id.* at ¶ 21, Exh. 15.) The evidence further shows that at the time of the complaint, SW-Box imported into the United States, sold for importation and/or sold within the United States after importation, certain cases for handheld mobile electronic devices, including Rocon brand cases, via its website, www.sw-box.com. (861 Complaint at ¶ 24, Exh. 25.)

The evidence shows Rocon Cases have been available for purchase in the U.S. online at, for example, (1) <http://www.mart-shopping.com>; and (2) <http://www.sw-box.com>; and (3)


Public Version

www.casefanatic.com. (861 Complaint at ¶¶ 24, 27; Riley Dec. at ¶¶ 2-6.) The evidence shows Speck purchased several Rocon Cases, including the Rocon CandyShell Case for iPhone 4/4S and Rocon DTC Case for iPhone 4/4S, online in the United States. (861 Complaint at ¶ 27; Riley Dec. at ¶¶ 2-6.) Moreover, the evidence shows the Rocon Cases purchased by Speck were imported from China to the United States. (Riley Dec. at ¶ 6).

Accordingly, I find there to be no factual dispute that Rocon, Wexun, and SW-Box accused products were imported into the United States, sold for importation and/or sold within the United States after importation.


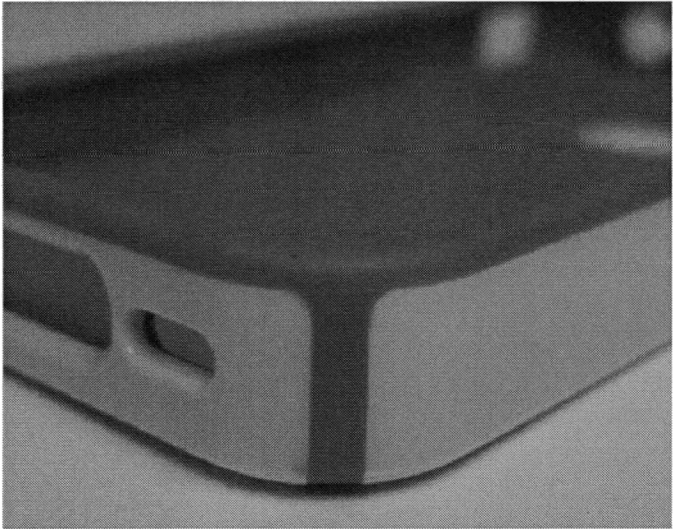
b. Infringement


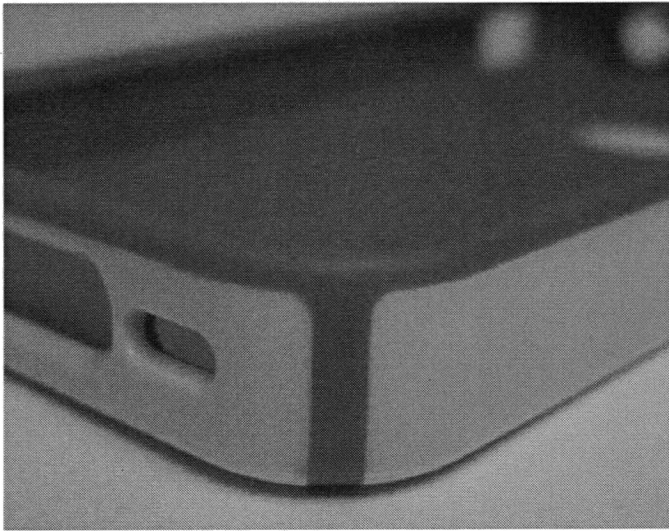
Speck relies primarily on the testimony of its expert, Dr. Osswald, in support of its argument that the Recon brand cases infringe the asserted claims of the '561 Patent. The following claim chart from the declaration of Dr. Osswald addresses how a representative Rocon case for the iPhone 4/S maps to each limitation of the asserted '561 Patent claims:

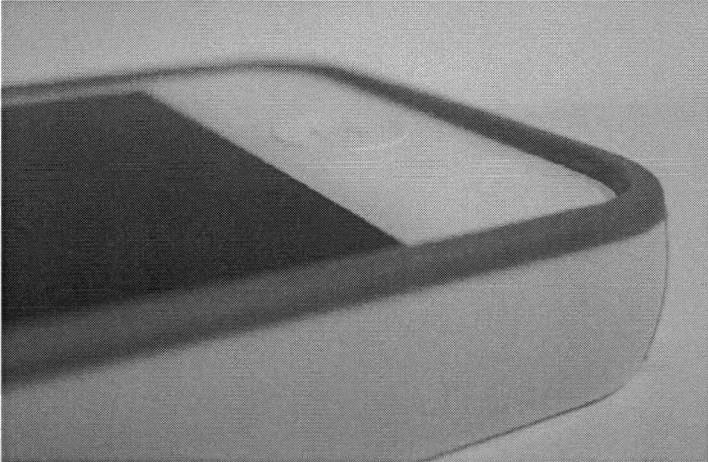
<u>Claim Term</u>	<u>Rocon's iPhone Cases</u>
1. A one-piece case for enclosing a personal electronic device comprising: a flexible inner layer co-molded with an exterior hard layer and permanently affixed together to form a co-molded one-piece assembly;	 <p>The Rocon cases are one-piece. The flexible inner layer (blue) is co-molded with an exterior hard layer (white) and the two layers are permanently affixed together.</p>

Public Version

<u>Claim Term</u>	<u>Rocon's iPhone Cases</u>
<p>wherein the co-molded one-piece assembly is sufficiently flexible to accept insertion of the personal electronic device and sufficiently rigid to securely retain the inserted personal electronic device,</p>	<div data-bbox="649 281 1347 577" data-label="Image"> </div> <p>The Rocon cases are sufficiently flexible to insert the phone into the case and sufficiently rigid to securely retain the phone.</p>
<p>wherein: the flexible inner layer includes a bottom surface, side surfaces joined to the bottom surface and extending upward therefrom, and</p>	<div data-bbox="675 735 1385 1283" data-label="Image"> </div> <p>EXHIBIT 16 SW-Box.com Rocon Case Sample</p> <p>The Rocon cases have the claimed geometry.</p>
<p>a fitted cavity configured to accept and retain the inserted personal electronic device such that the bottom surface covers at least a portion of a bottom surface of the inserted personal electronic device and the side surfaces cover at least a portion of a side surface of the inserted personal electronic device;</p>	

<u>Claim Term</u>	<u>Rocon's iPhone Cases</u>
the exterior hard layer includes a bottom surface and side surfaces sized and shaped to substantially cover an exterior of the bottom and side surfaces of the flexible inner layer and	 <p>The exterior hard layer (white) substantially, if not entirely, covers an exterior of the bottom and side surfaces of the flexible inner layer (blue)</p>
a cut away portion that is permanently filled with a portion of the co-molded flexible inner layer.	 <p>The corners of the Rocon cases have cut away portions permanently filled with a portion of the co-molded flexible inner layer.</p>

<u>Claim Term</u>	<u>Rocon's iPhone Cases</u>
<p>4. The one-piece case of claim 1, wherein the side surfaces of the exterior hard layer form a corner joint and the co-molded flexible inner layer fills in the cut-away portion located at the corner joint contributing to the overall flexibility of the one-piece case.</p>	 <p>The side surfaces of the Rocon cases form a corner joint filled with the co-molded flexible inner layer which contributes to the overall flexibility of the case and which creates a stretch-zone that allows the case to deform to accept insertion of the phone.</p>
<p>5. The one-piece case of claim 1, wherein the flexible inner layer that fills in the cut-away portion creates a stretch-zone that is sufficiently flexible to enable the co-molded one-piece assembly to deform and thereby accept insertion of the personal electronic device.</p>	
<p>8. The one-piece case of claim 1, further comprising: an opening parallel to the bottom surface of the flexible inner layer positioned such that a portion of the inserted personal electronic device is not enclosed by the co-molded one-piece assembly.</p>	 <p>The Rocon cases have a 360° overhang that extends from the top of the side surfaces and extends completely around the perimeter of the opening</p>
<p>9. The case of claim 8, wherein an overhang extending from a top portion of one or more of the side surfaces and extends completely around the perimeter of the opening.</p>	

<u>Claim Term</u>	<u>Rocon's iPhone Cases</u>
11. The one-piece case of claim 1, wherein the side surfaces of at least one of the flexible inner layer and the exterior hard layer extend above a top surface of the inserted personal electronic device.	 <p>The side surfaces of the Rocon cases extend above a top surface of the phone.</p>

(Osswald Dec. at ¶¶ 6-9.) I find the declaration of Dr. Osswald, a polymer engineering expert, persuasive. Dr. Osswald's declaration demonstrates infringement of the claimed features by Rocon branded cases for the iPhone 4/4S.

Accordingly, I find there to be no factual dispute that the accused Rocon branded cases imported into the United States, sold for importation and/or sold within the United States after importation infringe the asserted claims of the '561 patent.

2. Defaulted Respondent Trait

a. Importation

The evidence shows that Trait makes in China, has others make in China, exports from China to the U.S., and/or imports into the U.S. for sale certain cases for handheld mobile electronics including, without limitation, the "Dexter Speck, Candy Phone Protective Case" for iPhone 4/4S, the CandyShell Grip for iPhone, the Candyshell Flip for iPhone, and Cases for Samsung Galaxy (collectively "the Trait Cases"). (861 Complaint at ¶ 25, Riley Dec. at ¶ 8.) Trait currently operates the website www.trait-tech.com. (Gosselin Dec. ¶ 5.) The evidence


Public Version



shows that as of the filing of the Complaint the Trait Cases were available for purchase in the United States online at Trait's website www.trait-tech.com. (861 Complaint ¶ 25; Riley Dec. at ¶¶ 8-9.) The evidence further shows that Speck purchased at least one Trait Case in the United States and that the case was shipped to the United States from China. (*Id.*)

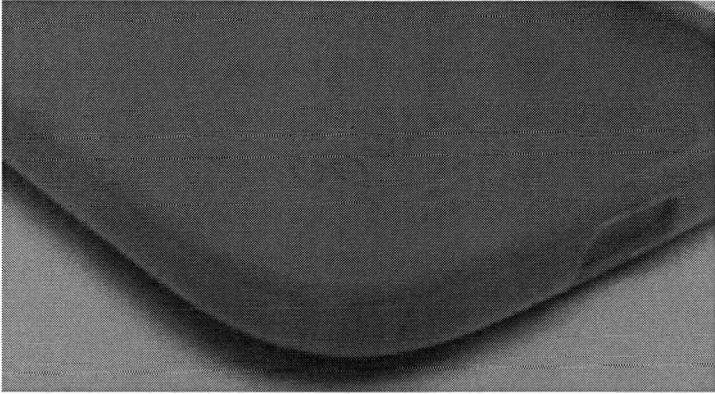
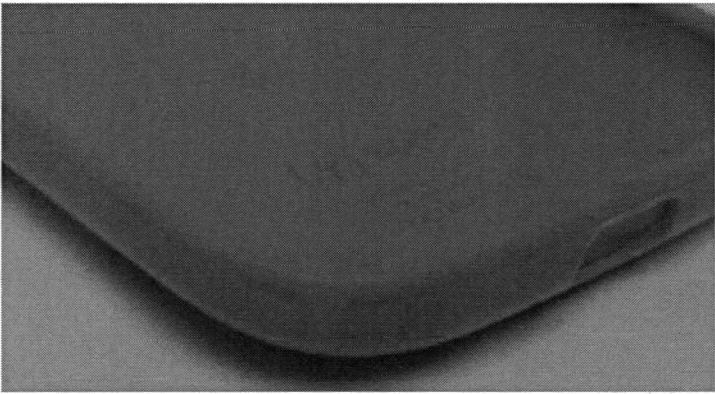
Accordingly, I find there to be no factual dispute that Trait's accused products were imported into the United States, sold for importation and/or sold within the United States after importation.


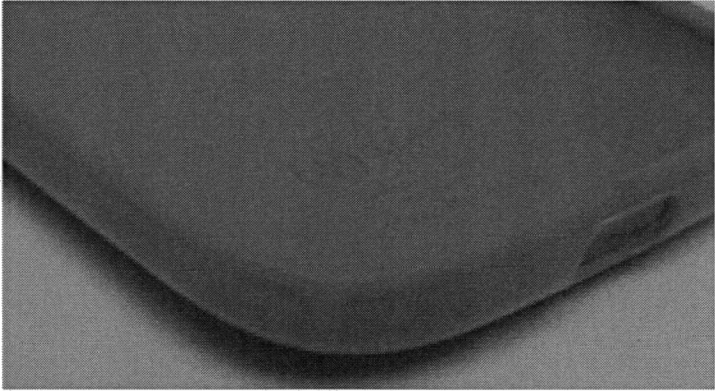
b. Infringement

Speck relies primarily on the testimony of its expert, Dr. Osswald, in support of its argument that the Recon brand cases infringe the asserted claims of the '561 Patent. The following claim chart from the declaration of Dr. Osswald addresses how a representative Trait case for the Galaxy S III maps to each limitation of the asserted '561 patent claims:

<u>Claim Term</u>	<u>Trait's Dexter Speck Cases</u>
1. A one-piece case for enclosing a personal electronic device comprising: a flexible inner layer co-molded with an exterior hard layer and permanently affixed together to form a co-molded one-piece assembly;	 <p>Trait's cases are one-piece. The flexible inner layer (blue) is co-molded with an exterior hard layer (white) and the two layers are permanently affixed together.</p>

<u>Claim Term</u>	<u>Trait's Dexter Speck Cases</u>
wherein the co-molded one-piece assembly is sufficiently flexible to accept insertion of the personal electronic device and sufficiently rigid to securely retain the inserted personal electronic device,	Trait's cases are designed to be sufficiently flexible to insert the phone into the case and sufficiently rigid to securely retain the phone.
wherein: the flexible inner layer includes a bottom surface, side surfaces joined to the bottom surface and extending upward therefrom, and	 <p data-bbox="646 1035 1174 1066">Trait's cases have the claimed geometry.</p>
a fitted cavity configured to accept and retain the inserted personal electronic device such that the bottom surface covers at least a portion of a bottom surface of the inserted personal electronic device and the side surfaces cover at least a portion of a side surface of the inserted personal electronic device;	
the exterior hard layer includes a bottom surface and side surfaces sized and shaped to substantially cover an exterior of the bottom and side surfaces of the flexible inner layer and	 <p data-bbox="646 1604 1398 1711">The exterior hard layer (blue) substantially, if not entirely, covers the exterior of the bottom and side surfaces of the flexible inner layer (red)</p>

<u>Claim Term</u>	<u>Trait's Dexter Speck Cases</u>
<p>a cut away portion that is permanently filled with a portion of the co-molded flexible inner layer.</p>	 <p>The corners of Trait's cases have cut away portions permanently filled with a portion of the co-molded flexible inner layer.</p>
<p>4. The one-piece case of claim 1, wherein the side surfaces of the exterior hard layer form a corner joint and the co-molded flexible inner layer fills in the cut-away portion located at the corner joint contributing to the overall flexibility of the one-piece case.</p> <p>5. The one-piece case of claim 1, wherein the flexible inner layer that fills in the cut-away portion creates a stretch-zone that is sufficiently flexible to enable the co-molded one-piece assembly to deform and thereby accept insertion of the personal electronic device.</p>	 <p>The side surfaces of Trait's cases form a corner joint filled with the co-molded flexible inner layer which contributes to the overall flexibility of the case and which creates a stretch-zone that allows the case to deform to accept insertion of the phone.</p>

<u>Claim Term</u>	<u>Trait's Dexter Speck Cases</u>
<p>8. The one-piece case of claim 1, further comprising: an opening parallel to the bottom surface of the flexible inner layer positioned such that a portion of the inserted personal electronic device is not enclosed by the co-molded one-piece assembly.</p>	
<p>9. The case of claim 8, wherein an overhang extending from a top portion of one or more of the side surfaces and extends completely around the perimeter of the opening.</p>	<p>Trait's cases have a 360° overhang that extends from the top of the side surfaces and extends completely around the perimeter of the opening</p>
<p>11. The one-piece case of claim 1, wherein the side surfaces of at least one of the flexible inner layer and the exterior hard layer extend above a top surface of the inserted personal electronic device.</p>	 <p>The side surfaces of Trait's cases extend above a top surface of the phone.</p>

(Osswald Dec. at ¶¶ 10-14.) I find Dr. Osswald's declaration that the accused Trait cases infringe and "look[] very much like Speck's CandyShell product, and even bear the Speck logo" persuasive. I find Dr. Osswald's declaration demonstrates infringement of the asserted claims by the accused Trait cases. I note that the evidence shows that the Trait Cases are not authorized by or manufactured for Speck. (Riley Dec. at ¶ 10; Gibbins Dec. at ¶ 46).

Public Version

Accordingly, I find there to be no factual dispute that the accused Trait cases imported into the United States, sold for importation and/or sold within the United States after importation infringe the asserted claims of the '561 patent.

3. Defaulted Respondent Anbess

a. Importation

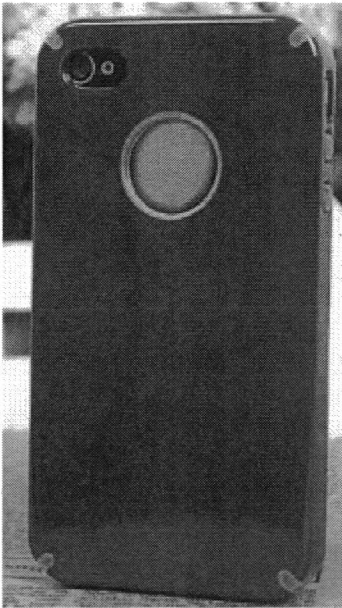
The evidence shows that Anbess makes in China, has others make in China, exports from China to the U.S., and/or imports into the U.S. for sale certain cases for handheld mobile electronics including, without limitation, the "Speck Spek Candy Shell Cases for iPhone 4s and 4G" in assorted colors (collectively "Anbess Cases"). (861 Complaint at ¶¶ 11, 39.) The evidence shows that Anbess Cases were, at the time of the Complaint, available for purchase in the United States online at www.anbess.com. (861 Complaint at ¶ 11, Exh. 3.) However, since the institution of this Investigation, the evidence shows Anbess has disabled its website. (Memo., Statement of Material Facts Not in Dispute at 36.) Although Anbess has since disabled its website, Anbess continues to sell cell-phone cases on other websites, for example on the website www.dhgate.com. (Gosselin Dec. ¶ 7.)

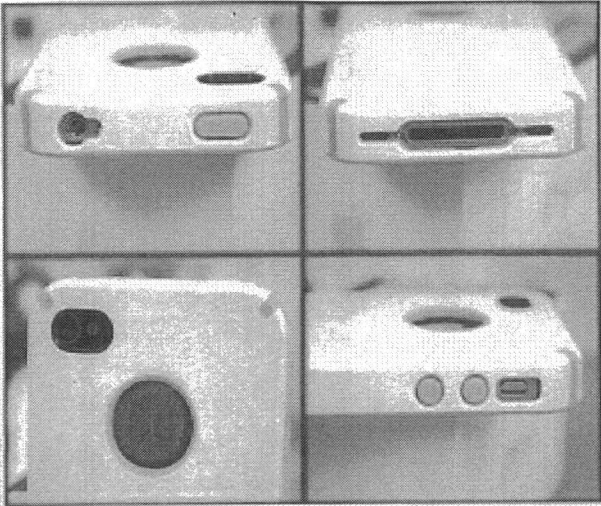
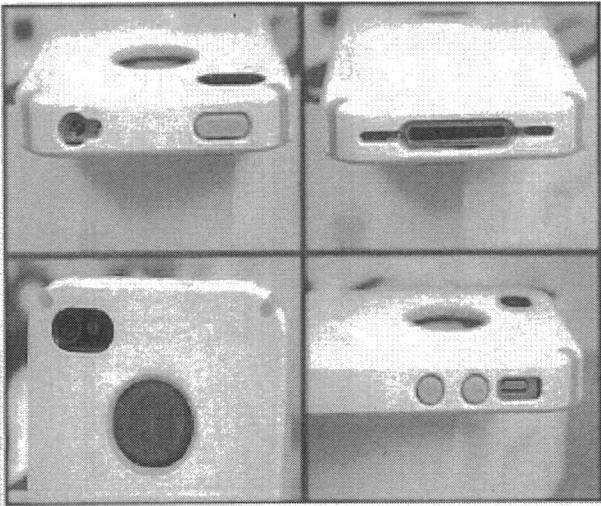
Accordingly, I find there to be no factual dispute that Anbess' accused products were imported into the United States, sold for importation and/or sold within the United States after importation.

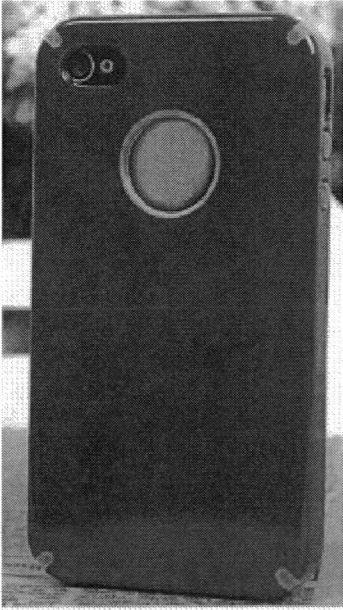
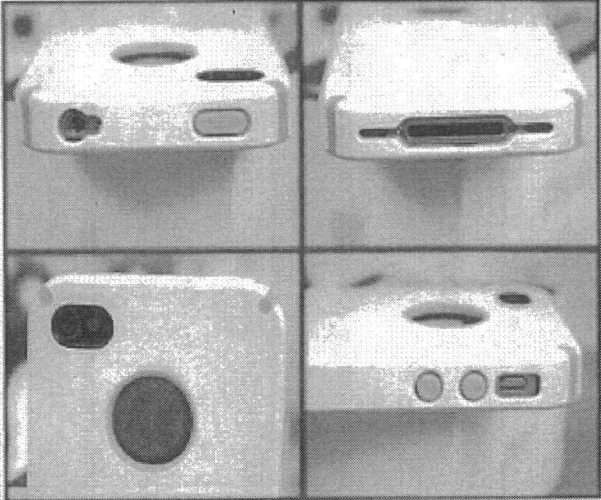
b. Infringement

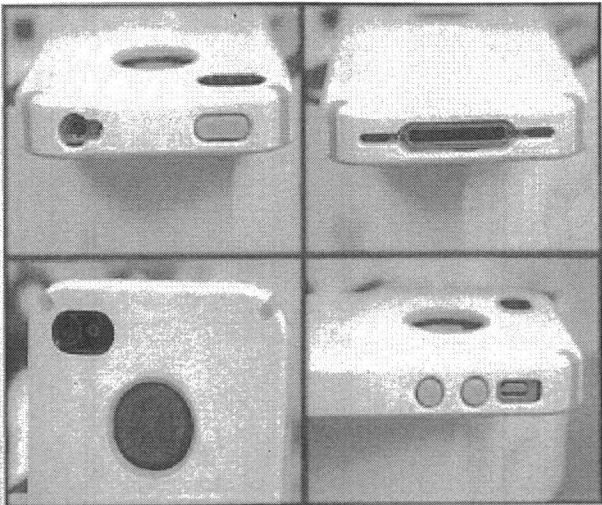
Speck relies primarily on the testimony of its expert, Dr. Osswald, in support of its argument that the Anbess Speck Spek Candy Shell Cases for iPhone infringe the asserted claims of the '561 Patent. The following claim chart from the declaration of Dr. Osswald addresses how a representative Anbess case maps to each limitation of the asserted '561 patent claims:

Public Version

<u>Claim Term</u>	<u>Cases from Anbess</u>
1. A one-piece case for enclosing a personal electronic device comprising:	 <p>The cases from Anbess are one-piece. The flexible inner layer (blue) is co-molded with an exterior hard layer (purple) and the two layers are permanently affixed together.</p>
a flexible inner layer co-molded with an exterior hard layer and permanently affixed together to form a co-molded one-piece assembly;	The cases from Anbess are designed to be sufficiently flexible to insert the phone into the case and sufficiently rigid to securely retain the phone.

<u>Claim Term</u>	<u>Cases from Anbess</u>
<p>wherein the co-molded one-piece assembly is sufficiently flexible to accept insertion of the personal electronic device and sufficiently rigid to securely retain the inserted personal electronic device,</p>	 <p>The cases from Anbessare designed to be sufficiently flexible to insert the phone into the case and sufficiently rigid to securely retain the phone.</p>
<p>wherein: the flexible inner layer includes a bottom surface, side surfaces joined to the bottom surface and extending upward therefrom, and</p> <p>a fitted cavity configured to accept and retain the inserted personal electronic device such that the bottom surface covers at least a portion of a bottom surface of the inserted personal electronic device and the side surfaces cover at least a portion of a side surface of the inserted personal electronic device;</p>	 <p>The cases from Anbess have the claimed geometry.</p>

<u>Claim Term</u>	<u>Cases from Anbess</u>
<p>the exterior hard layer includes a bottom surface and side surfaces sized and shaped to substantially cover an exterior of the bottom and side surfaces of the flexible inner layer and</p>	 <p>The exterior hard layer (purple) substantially, if not entirely, covers the exterior of the bottom and side surfaces of the flexible inner layer (blue).</p>
<p>a cut away portion that is permanently filled with a portion of the co-molded flexible inner layer.</p>	 <p>The corners have cut away portions permanently filled with a portion of the co-molded flexible inner layer.</p>

<u>Claim Term</u>	<u>Cases from Anbess</u>
<p>4. The one-piece case of claim 1, wherein the side surfaces of the exterior hard layer form a corner joint and the co-molded flexible inner layer fills in the cut-away portion located at the corner joint contributing to the overall flexibility of the one-piece case.</p>	
<p>5. The one-piece case of claim 1, wherein the flexible inner layer that fills in the cut-away portion creates a stretch-zone that is sufficiently flexible to enable the co-molded one-piece assembly to deform and thereby accept insertion of the personal electronic device.</p>	<p>The side surfaces form a corner joint filled with the co-molded flexible inner layer which contributes to the overall flexibility of the case and which creates a stretch-zone that allows the case to deform to accept insertion of the phone.</p>

(Osswald Supp. Dec. at ¶¶ 4-6.) I find Dr. Osswald’s declaration persuasive. I find

Dr. Osswald’s declaration demonstrates infringement of asserted claims 4 and 5 by the accused Anbess cases.

Accordingly, I find there to be no factual dispute that the accused Anbess cases imported into the United States, sold for importation and/or sold within the United States after importation infringe asserted claims 4 and 5 of the ‘561 patent.

4. Defaulted Respondent Global Digital

a. Importation

The evidence shows that Global Digital makes in Taiwan or China, has others make in Taiwan or China, exports from Taiwan or China to the U.S., and/or imports into the U.S. for sale certain cases for handheld mobile electronics (“Global Digital Cases”). (867 Complaint at ¶ 13, Exh. 14.) Moreover, the evidence shows that Speck purchased at least one Global Digital Case

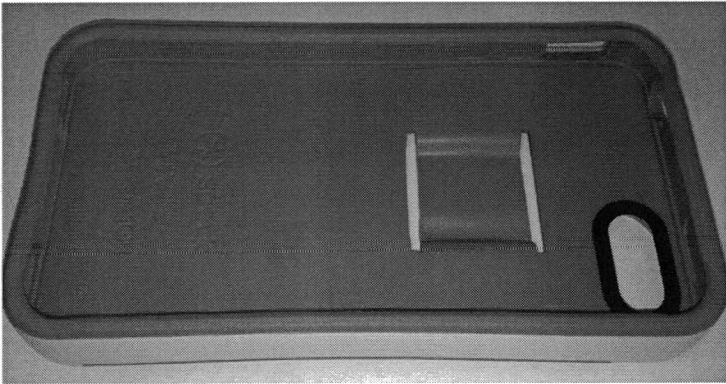
Public Version

in the United States, and that the case was shipped to the United States from China. (867 Complaint at ¶ 13; Riley Dec. ¶¶ 11-13.)

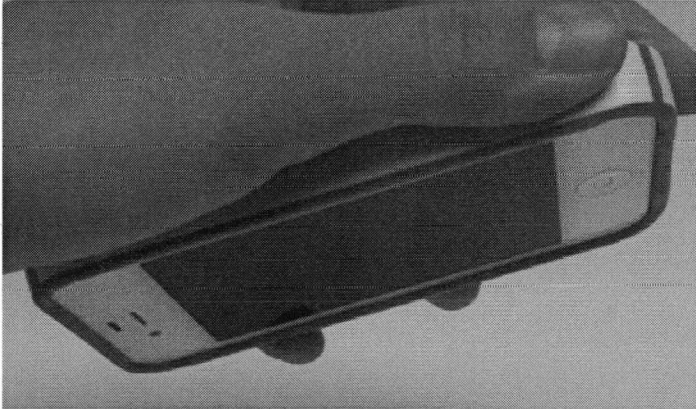

Accordingly, I find there to be no factual dispute that Global's accused products were imported into the United States, sold for importation and/or sold within the United States after importation.


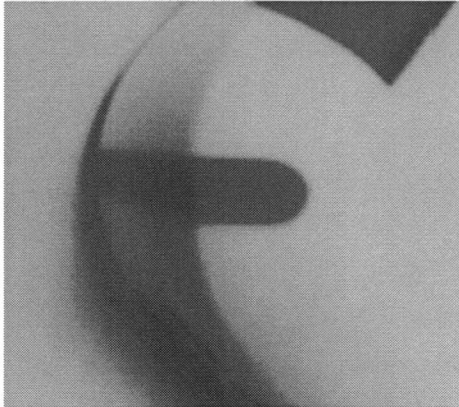
b. Infringement

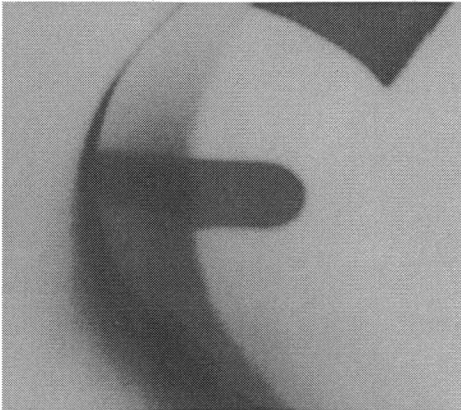

Speck relies primarily on the testimony of its expert, Dr. Osswald, in support of its argument that the Global Digital Cases infringe the asserted claims of the '561 Patent. The following claim chart from the declaration of Dr. Osswald addresses how a representative Global Digital Case maps to each limitation of the asserted '561 patent claims:


<u>Claim Term</u>	<u>Global Digital's CandyShell Cases</u>
1. A one-piece case for enclosing a personal electronic device comprising: a flexible inner layer co-molded with an exterior hard layer and permanently affixed together to form a co-molded one-piece assembly;	 <p>Global's cases are one-piece. The flexible inner layer (blue) is co-molded with an exterior hard layer (white) and the two layers are permanently affixed together.</p>

Public Version

<u>Claim Term</u>	<u>Global Digital's CandyShell Cases</u>
wherein the co-molded one-piece assembly is sufficiently flexible to accept insertion of the personal electronic device and sufficiently rigid to securely retain the inserted personal electronic device,	 <p>Global's cases are designed to be sufficiently flexible to insert the phone into the case and sufficiently rigid to securely retain the phone.</p>
wherein: the flexible inner layer includes a bottom surface, side surfaces joined to the bottom surface and extending upward therefrom, and	
a fitted cavity configured to accept and retain the inserted personal electronic device such that the bottom surface covers at least a portion of a bottom surface of the inserted personal electronic device and the side surfaces cover at least a portion of a side surface of the inserted personal electronic device;	

<u>Claim Term</u>	<u>Global Digital's CandyShell Cases</u>
the exterior hard layer includes a bottom surface and side surfaces sized and shaped to substantially cover an exterior of the bottom and side surfaces of the flexible inner layer and	 <p>The exterior hard layer (white) substantially, if not entirely, covers the exterior of the bottom and side surfaces of the flexible inner layer (blue)</p>
a cut away portion that is permanently filled with a portion of the co-molded flexible inner layer.	 <p>The corners of Global's cases have cut away portions permanently filled with a portion of the co-molded flexible inner layer.</p>

<u>Claim Term</u>	<u>Global Digital's CandyShell Cases</u>
<p>4. The one-piece case of claim 1, wherein the side surfaces of the exterior hard layer form a corner joint and the co-molded flexible inner layer fills in the cut-away portion located at the corner joint contributing to the overall flexibility of the one-piece case.</p>	 <p>The side surfaces of Global's cases form a corner joint filled with the co-molded flexible inner layer which contributes to the overall flexibility of the case and which creates a stretch-zone that allows the case to deform to accept insertion of the phone.</p>
<p>5. The one-piece case of claim 1, wherein the flexible inner layer that fills in the cut-away portion creates a stretch-zone that is sufficiently flexible to enable the co-molded one-piece assembly to deform and thereby accept insertion of the personal electronic device.</p>	
<p>8. The one-piece case of claim 1, further comprising: an opening parallel to the bottom surface of the flexible inner layer positioned such that a portion of the inserted personal electronic device is not enclosed by the co-molded one-piece assembly.</p>	 <p>Global's cases have a 360° overhang that extends from the top of the side surfaces and extends completely around the perimeter of the opening</p>
<p>9. The case of claim 8, wherein an overhang extending from a top portion of one or more of the side surfaces and extends completely around the perimeter of the opening.</p>	

<u>Claim Term</u>	<u>Global Digital's CandyShell Cases</u>
11. The one-piece case of claim 1, wherein the side surfaces of at least one of the flexible inner layer and the exterior hard layer extend above a top surface of the inserted personal electronic device.	 <p>The side surfaces of Global's cases extend above a top surface of the phone.</p>

(Osswald Dec. at ¶¶ 15-19; Osswald Supp. Dec. at ¶¶ 2-3.) I find Dr. Osswald's declaration persuasive. I find Dr. Osswald's declaration demonstrates infringement of the asserted claims by the accused Global Digital Cases. I note that the evidence shows that the Global Digital Cases are not authorized by or manufactured for Speck. (Gibbins Dec. at ¶ 47).

Accordingly, I find there to be no factual dispute that the accused Global Digital Cases imported into the United States, sold for importation and/or sold within the United States after importation infringe the asserted claims of the '561 patent.

IV. DOMESTIC INDUSTRY

On September 10, 2013, I issued Order No. 15 granting-in-part Speck's motion for partial summary determination of the domestic industry requirement, finding both the economic prong and technical prong satisfied. (See Order No. 15 at 29-30.) I determined that "Speck has provided convincing and uncontroverted proof that its CandyShell line of products practice the '561 Patent." (*Id.* at 29). I also found that Speck's CandyShell line of products practices each

and every element of representative claims 1, 4, 5, 8, 9, 14, and 15. (*Id.*) I further found that “Speck satisfied the economic prong requirement of 19 U.S.C. 1337(a)(3)(C).” (*Id.*)

On October 24, 2013, the Commission issued a Notice that it had determined not to review the ID finding that Speck had satisfied the domestic industry requirement of Section 337.

V. CONCLUSION

I find that there are no issues of material fact or law as to whether the defaulted respondents have violated section 337. Accordingly, for the reasons above, I find that Speck is entitled to summary determination that the defaulted respondents Hongkong Wexun Ltd., ROCON Digital Technology Corp., SW-Box.com, Trait Technology Co., Anbess Electronics Co., Ltd., and Global Digital Star Industry, Ltd. are in violation of Section 337 though the importation, sale for importation, or sale in the United States after importation of certain cases for electronic devices that infringe at least one asserted claim of U.S. Patent No. 8,204,561.

VI. CONCLUSIONS OF LAW

1. The Commission has subject-matter jurisdiction over the accused products.
2. The importation or sale requirement of Section 337 is satisfied with regard to the accused Recon brand cases.
3. The accused Recon brand cases infringe U.S. Patent No. 8,204,561.
4. The importation or sale requirement of Section 337 is satisfied with regard to the accused Trait cases.
5. The accused Trait cases infringe U.S. Patent No. 8,204,561.
6. The importation or sale requirement of Section 337 is satisfied with regard to the accused Anbess cases.
7. The accused Anbess cases infringe U.S. Patent No. 8,204,561.
8. The importation or sale requirement of Section 337 is satisfied with regard to the accused Global Digital cases.
9. The accused Global Digital cases infringe U.S. Patent No. 8,204,561.

Public Version

10. The domestic industry requirement is satisfied with respect to U.S. Patent No. 8,204,561.
11. There has been a violation of Section 337 with respect to U.S. Patent No. 8,204,561 by defaulted Respondents Hongkong Wexun Ltd., ROCON Digital Technology Corp., SW-Box.com, Trait Technology Co., Anbess Electronics Co., Ltd., and Global Digital Star Industry, Ltd.

VII. INITIAL DETERMINATION

Based on the foregoing, it is my Initial Determination that a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, has been found in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain cases for electronic devices that infringe at least one of claims 4, 5, 9, and 11 of U.S. Patent No. 8,204,561.

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the Initial Determination or certain issues contained herein.

RECOMMENDED DETERMINATION ON REMEDY AND BONDING

Pursuant to Commission Rules 210.36(a) and 210.42(a)(1)(ii), the Administrative Law Judge is to consider evidence and argument on the issues of remedy and bonding and issue a recommended determination thereon.

I. REMEDY AND BONDING

A. Remedy

Speck seeks a general exclusion order (“GEO”) that would prevent the importation into the United States of “all cases for Portable Electronic Devices that infringe Claims 1-16 of the ‘561 patent.” (867 Complaint ¶ XI.C, p. 16; Mem. at 39-40.) Alternatively, Speck seeks a limited exclusion order “forbidding entry into the United States of all Cases for Portable Electronic Devices imported, sold for importation, or sold following importation by the Respondents that infringe Claims 1-16 of the ‘561 patent.” (867 Complaint ¶ XI.C, p. 16; Mem. at 52)

1. Legal Standard

The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a Section 337 proceeding. *Viscofan, S.A. v. U.S. Int’l Trade Comm’n*, 787 F.2d 544, 548 (Fed. Cir. 1986). The Commission may issue a GEO that applies to all infringing products, regardless of manufacturer, instead of a limited exclusion order (“LEO”) directed to persons determined to be in violation of Section 337, when:

- (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or
- (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2). The Commission has also historically considered the existence of a “widespread pattern of unauthorized use” and “certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles.” *Certain Airless Paint Spray Pumps*, Inv. No. 337-TA-90, USITC Pub. 1199, Comm’n Op. at 18 (Nov. 1981).

2. The Parties’ Positions

Speck argues that a GEO is warranted because a limited exclusion order against the defaulting respondents would not adequately address the infringement of Speck’s patents. (Mem. at 39.) First, Speck argues that industry for protective cases for portable electronic devices is particularly susceptible to repeated violations of Section 337 because of the anonymous nature of internet sales, the number of retailers, and the difficulty in locating manufacturers and sellers. (*Id.* at 42.) Speck argues the industry for protective cases is also susceptible to repeated violations of Section 337 because of the low barriers to entry and the high profit margins associated with product sales. (*Id.* at 49.) Second, Speck argues that the widespread infringement of the ‘561 patent by a large numbers of infringers prevents Speck from being able to enforce their IP rights. (*Id.* at 43.) Third, Speck argues that due to the increasing popularity of e-commerce, large numbers of unregulated foreign manufacturers can manufacture and sell infringing goods with minimal effort. (*Id.* at 44-45.) Fourth, Speck argues that it is difficult to identify the source of infringing products due to the nature of the manufacturers, as well as the lack of identifying packaging on the products themselves. (*Id.* at 45-50.) Finally, Speck argues that unauthorized infringing activity is rising despite its enforcement efforts, and the fact that five out of fourteen original respondents opted not to raise a defense or appear in the investigation is probative of a pattern of violation, and supports issuance of a GEO. (*Id.* at 50-52.)

Public Version

The Staff agrees with Speck, and recommends the Commission enter a GEO in this investigation. (Staff at 16.)

3. Discussion

I find Speck's arguments regarding the nature of the industry for protective cases for portable electronic devices and the inadequacy of a limited exclusion order persuasive. GEOs may issue in cases where the exclusion from entry of articles is necessary to prevent circumvention of an exclusion order that would otherwise be limited to the products of named respondents. 19 U.S.C. § 1337(d)(2)(A). An evidentiary record that reveals that respondents have, or are capable of, changing names, facilities, or corporate structure to avoid detection is relevant to an inquiry under Section 337(d)(2)(A). *Certain Protective Cases and Components Thereof* ("Protective Cases"), Inv. No. 337-TA-780, Comm'n Op. at 25-26 (November 19, 2012). Here, I agree with Speck and the Staff that market conditions for cell-phone cases invite counterfeiting and infringement. I find the low barriers to entry in the protective case manufacturing market and the ease with which foreign manufacturing operations can change their names and distribution patterns to avoid detection are particularly relevant. In light of the ease in which counterfeit products can be manufactured and distributed, even if a limited exclusion order were to be awarded, Speck would be unreasonably burdened by enforcement actions. Indeed, the evidence presented by Speck of the frequency of unauthorized infringing activity demonstrates just such a trend.

Specifically, the evidence shows that unnamed parties frequently counterfeit Speck's CandyShell products that are protected by the '561 patent. (Gibbins Dec. at ¶¶ 22-23). Mr. Christian Gibbins, Speck's Director of Global Brand Protection, explained that Speck loses millions of dollars each year due to the sale of counterfeit CandyShell cases. (*Id.* at ¶ 9). The evidence also shows that in July of 2013 there were 4,500 internet auctions of counterfeit Speck

Public Version

products, most of which were covered by the patent at issue. (*Id.* at ¶¶ 16-17; Exhs. 2, 3). The evidence shows that Speck has filed multiple lawsuits and sent numerous cease-and-desist letters, but the counterfeiting problem has grown. (*Id.* at ¶¶ 13, 37). Additionally, the evidence shows that most of these counterfeiters originate in southern China through companies operating under fake names and fake addresses, while using professional quality molds. (*Id.* at ¶¶ 8, 21, 30, 49). The evidence further shows that Respondents may easily circumvent a limited exclusion order by selling counterfeit goods online. (*Id.* at ¶¶ 8-13, 52; Riley Dec. at ¶ 4; Gosselin Dec. at ¶¶ 2-6).

Accordingly, I find a GEO would be well justified under 19 U.S.C. § 1337(d)(2)(A).

I also find Speck's argument that a GEO should be awarded based on a pattern of violation and difficulty in identifying the source also persuasive. A GEO may issue if there is a widespread pattern of violation of Section 337 and it is difficult to identify the source of infringing products. 19 U.S.C. § 1337(d)(2)(B). *See, e.g. Certain Cigarettes and Packaging Thereof*, 337-TA-643, Order No. 23 at p. 8 (March 18, 2009) (finding that the fact that the complainant has "engaged in twenty-three lawsuits since 2002, not including this investigation, against 85 defendants" supported a GEO). The Commission has recognized that the anonymity over the Internet increases the difficulty in identifying the sources of infringing products. *See, e.g., Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-740, Comm'n Op. at 6 (Nov. 19, 2012). Here, the evidence shows that foreign counterfeiters frequently copy Speck's designs, and despite Speck's efforts to stop the counterfeiting, the number of counterfeiters has grown. (Gibbins Dec. at ¶¶ 13, 24, 31, 33, 37, 40, 43, 51.) The evidence shows that Speck has compiled a list of over 150 counterfeit CandyShell products and identified 90 companies in Hong Kong and China that allegedly produce counterfeit Speck products. (*Id.* at ¶¶ 24, 40.) The

evidence shows the manufacturers sell the counterfeit products online, under false names, to avoid detection. (*Id.* at ¶¶ 11, 52.) Of the 90 companies identified by Speck, 44% were found to list addresses that were not real locations. (*Id.* at ¶ 24.) In this investigation alone, Speck named fourteen Respondents, many of whom defaulted. Thus, I find the evidence demonstrates a widespread pattern of violation of Section 337 by manufacturers which would be difficult to identify.

Accordingly, I find a GEO would be well justified under 19 U.S.C. § 1337(d)(2)(B).

B. Bond

1. Legal Standard

If the Commission enters an exclusion order in this investigation, affected articles shall still be entitled to entry and sale under bond during the 60-day Presidential review period. The amount of such bond must “be sufficient to protect the complainant from any injury.” 19 U.S.C. § 1337(j)(3); see also 19 C.F.R. § 210.50(a)(3). The Commission typically sets the Presidential review period bond based on the price differential between the imported or infringing product, or based on a reasonable royalty. *See, e.g., Certain Microsphere Adhesives, Process For Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm’n Op. at 24, (December 15, 1995) (setting bond based on price differentials); *Certain Plastic Encapsulated Integrated Circuits*, Inv. No. 337-TA-315, Comm’n Op. on Issues Under Review and on Remedy, the Public Interest, and Bonding at 45, USITC Pub. 2574 (Nov. 1992) (setting the bond based on a reasonable royalty). However, where the available pricing or royalty information is inadequate, the bond may be set at 100% of the entered value of the accused product. *See, e.g., Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Products Containing Same*, Inv. No. 337-TA-372, Comm’n Op. on Remedy, the Public Interest and Bonding at 15, USITC Pub. 2964 (May 1996).

2. The Parties' Positions

Speck argues that reliable price information is not available, and price comparisons are not practicable because many of the accused products are offered for sale on the internet at different prices based on the website visited, the age of the product, and the quantity purchased. (Mem. at 53.) Accordingly, Speck argues that bond should be set at 100%.

The Staff agrees with Speck, and argues that the evidence shows that many sales are made online at various price points, calculating an average price will be unnecessarily difficult. (Staff at 16-17.) Therefore, the Staff believes bond should be set at 100%. (*Id.*)

3. Discussion

I agree with Speck and the Staff that a bonding rate of 100% is appropriate. The variety of pricing, coupled with the number of accused products, makes it difficult to reliably compare the price of Speck's domestic industry products to the infringing products. In these situations, a bond value of 100% is appropriate. *See, e.g., Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Products Containing Same*, Inv. No. 337-TA-372, Comm'n Op. on Remedy, the Public Interest and Bonding at 15, USITC Pub. 2964 (May 1996).

Accordingly, I find that Respondents are required to post a bond of 100% of entered value during the 60-day Presidential Review Period.

To expedite service of the public version, the parties are hereby ORDERED to jointly submit no later than seven (7) days from the date of this Order: (1) a proposed public version of this EID with any proposed redactions bracketed in red; and (2) a written justification for any proposed redactions specifically explaining why the piece of information sought to be redacted is confidential and why disclosure of the information would be likely to cause substantial harm or

Public Version

likely to have the effect of impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions.^{2 3}

SO ORDERED.



Thomas B. Pender
Administrative Law Judge

² Under Commission Rules 210.5 and 201.6(a), confidential business information includes: information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information.

See 19 C.F.R. § 201.6(a). Thus, to constitute confidential business information the disclosure of the information sought to be designated confidential must ***likely have the effect of*** either: (1) impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions; or (2) ***causing substantial harm*** to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained.

³ While the parties are required to jointly submit the proposed redactions, there is no requirement that the parties must agree on all the redactions. However, the parties' written justification for any proposed redactions should distinguish between those redactions that are agreed upon and those proposed by the individual parties.

**IN THE MATTER OF CERTAIN CASES FOR PORTABLE
ELECTRONIC DEVICES**

**337-TA-861
337-TA-867
(Consolidated)**

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 28 INITIAL DETERMINATION** has been served upon, **John Shin, Esq.**, Commission Investigative Attorney, and the following parties on

MAR - 5 2014



Lisa R. Barton, Acting Secretary
U.S. International Trade Commission
500 E Street, S.W., Room 112A
Washington, DC 20436

FOR COMPLAINANT SPECULATIVE PRODUCT DESIGN, LLC.:

Christian Samay, Esq.
FROMMER LAWRENCE & HAUG LLP
745 Fifth Avenue, 10th Floor
New York, NY 10151

() Via Hand Delivery
☒ Via Express Delivery
() Via First Class Mail
() Other: _____

FOR RESPONDENTS:

BODYGLOVE INTERNATIONAL, LLC. & FELLOWES, INC.

William P. Atkins, Esq.
PILLSBURY WINTHROP SHAW PITTMAN LLP
1650 Tysons Boulevard, 14th Floor
McLean, VA 22102

() Via Hand Delivery
☒ Via Express Delivery
() Via First Class Mail
() Other: _____

RESPONDENT EN JINN INDUSTRIAL CO. LTD

No. 5 Wu Chan 3rd Road
Wu Ku Industrial Zone
New Taipei City, Taiwan

() Via Hand Delivery
☒ Via Express Delivery
() Via First Class Mail
() Other: _____

IN THE MATTER OF CERTAIN CASES FOR PORTABLE

337-TA-861
337-TA-867
(Consolidated)

GLOBAL DIGITAL STAR INDUSTRY, LTD.

22F Hong Ling Building
Hong Line South Road
Futian District
Shenzhen City 518112, China

☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other

SW-Box.com (a/k/a Cellphonezone Ltd.)

c/o Sino Wholesale Ltd.
Rm 19C Lockhart Ctr.
301-307 Lockhart Rd.
Wanchai, Hong Kong

☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____