

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN PERCUSSIVE MASSAGE
DEVICES**

Inv. No. 337-TA-1206

**ORDER NO. 40: INITIAL DETERMINATION GRANTING COMPLAINANT
HYPERICE, INC.'S MOTION FOR SUMMARY
DETERMINATION THAT THE DEFAULTING RESPONDENTS
HAVE VIOLATED SECTION 337, AND RECOMMENDED
DETERMINATION ON REMEDY AND BONDING**

(August 20, 2021)

I. INTRODUCTION, SUMMARY AND BRIEF PROCEDURAL HISTORY

A. Overview

On May 7, 2021, pursuant to Commission Rule 210.18 (19 C.F.R. §210.18), Hyperice, Inc. (“Hyperice” or “Complainant”) filed a Motion for Summary Determination (“Motion”),¹ together with a supporting Memorandum of Points and Authorities (“Memorandum” or “Mem.”)² and a Statement of Material Facts (“SMF”)³ in which Hyperice seeks a finding that certain Defaulting Respondents⁴ have sold for importation, imported, or sold after importation

¹ Complainant Hyperice’s Motion for Summary Determination That the Defaulting Respondents Have Violated Section 337 and for a Recommended Determination on Remedy and Bonding, Doc. ID No. 1633955 (Motion Docket No. 1206-021.).

² Complainant Hyperice’s Memorandum of Points and Authorities in Support of Motion for Summary Determination That the Defaulting Respondents Have Violated Section 337 and for a Recommended Determination on Remedy and Bonding, Doc. ID No. 1633958.

³ Doc. ID No. 1633957.

⁴ The “Defaulting Respondents:” are Kinghood International Logistics, Inc. (“Kinghood”), Manybo Ecommerce Ltd. (“Manybo”), Shenzhen Infein Technology Co., Ltd. (“Shenzhen Infein”); Hong Yongxu Capital Management Co., Ltd. (“Hong Yongxu”) , and Kula eCommerce Co., Ltd. (“Kula”). There is not

certain percussive massage devices (“the Accused Products”) that infringe asserted claims of Hyperice’s asserted patents in violation of Section 337 of the Tariff Act of 1930, as amended. 19 U.S.C. § 1337. (Motion Docket No. 1206-021, Motion at 1; Mem. at 1.). Hyperice requests a general exclusion order (“GEO”) pursuant to Section 337 (d)(2) together with the entry of a 100% bond during the Presidential Review Period. (Motion at 1; Mem. at 4, 42.).⁵

In its Complaint and in its Motion, Hyperice has accused some 19 respondents of infringing its three (3) asserted patents, i.e. one utility patent, U.S. Patent No. 10,561,574 (“the ’574 patent” or “the Utility Patent”), and two (2) design patents, U.S. Patent No. D855,822 (“the ’822 patent”) and U.S. Patent No. D866,317 (“the ’317 patent,” and together with the ’822 patent “the Design Patents,” and collectively “the Asserted Patents”). (Compl. at pp. 1-2, 30-32, 33: *see also* Exs. 1-3 of the Compl. (Certified Patents); Mem. at 1, 2, 29.).

On May 14, 2021, Hyperice filed an unopposed motion to supplement its Motion with supporting declarations that attest to evidence that supports Hyperice’s claims of infringement by the Defaulting Respondents’ Accused Products.⁶ As indicated in n.6, below, the supplemental

enough evidence to support a motion for summary determination of infringement against Kula. (*See infra.*)

⁵ Hyperice also requested Cease and Desist Orders (“CDOs”). (Mem. at 41-42.). However, there is no evidence that any of the Defaulting Respondents maintain inventory in the United States or have significant operations in the United States. (*See Resp.* at 48.). Yet, as also noted in Section XI, the Commission may use its discretion and infer inventory in the United States when a Defaulting Respondent has operations in the United States.

⁶ (*See* Complainant Hyperice, Inc.’s Unopposed Motion to Supplement its Motion for Summary Determination That the Defaulting Respondents Have Violated Section 337 and for a Recommended Determination on Remedy and Bonding with Declarations in Further Support Thereof (“Supplemental MSD”), Motion Docket No. 1206-023 (May 14, 2021). There are three (3) exhibits that support the Supplemental MSD: Ex. 1, the Declaration of Brian Arnold (“Arnold Decl.”), which authenticates the photographs of the Accused Products at pages 13-15 of Hyperice’s Mem. and confirms the purchase and receipt of the Accused Products; Ex. 2, the first Declaration of Alan Ball (“First Ball Decl.”), which confirms his analysis, inspection and either his inspection of photographs or the pictures he took in support of his infringement conclusions with respect to the Accused Products as set forth in the Ball

declarations support Hyperice's claims of importation of certain Accused Products, as well as financial information that supports Hyperice's fulfillment of the Economic Prong of the Domestic Industry requirement. (Motion Docket No. 1206-023; *see also* Exs. 7, 8 and 9 to Compl. (*See* Domestic Industry Charts for Hypervolt domestic industry product.).

As part of its supplementation to its Motion and Memorandum, Hyperice also filed "Claim Charts" on infringement that were created by and authenticated by Hyperice's expert on infringement, Mr. Alan Ball. (*See* Ex. 1 to Mem, "Opening Report of Alan Ball" (Dec. 11, 2020)("Ball Expert Report"); *see also* Doc. ID No. 749309 ("Authentication of Claim Charts," in response to Order No. 37);⁷ Ex. 27 to Mem., "Rebuttal Expert Report of Alan Ball on the Validity of U.S. Patent No. 10,561,574" (Dec. 23, 2020) ("Ball Rebuttal Report;" *see also* Ex. E ("Claim Charts"), Motion Docket No. 1206-025, Doc. ID No. 743064 (May 20, 2021), and Authentication of Claim Charts, Doc. ID No. 749309.).

Mr. Ball's Claim Charts, with his Declarations, should be read in conjunction with Mr. Ball's Opening Expert Report and with his Rebuttal Report. Together, the referenced documents not only support Hyperice's claims of infringement against four (4) of the five (5) Defaulting Respondents, but they also contain evidence that support Hyperice's assertions that its domestic industry products practice the '574 patent. (*See* Mem. at 2-27; *see also* Exs. 1-27 to Motion and

Expert Report; and Ex. 3, the Declaration of Maggie Sakioka ("Sakioka Decl."), which contains factual financial information on Hyperice's investments from 2017-2020 in its domestic industry products ("DI Products"), the Hypervolt and Hypervolt Plus, and which supports Hyperice's economic prong contentions. The Sakioka Decl. uses a sales-based allocation method to explain and support Hyperice's economic prong investments, which Commission precedent supports. *Certain Mobile Device Holders & Components Thereof*, Inv. No. 337-TA-1028, Comm'n Op. at 17-19 (March 22, 2018).).

⁷ *See* Complainant Hyperice, Inc.'s Response to Order No. 37 to Authenticate the Claim Charts Supporting Its Motion to Supplement [1206-025] its Summary Determination That the Defaulting Respondents Have Violated Section 337 and for a Recommended Determination on Remedy and Bonding with Relied Upon Claim Charts [206-021].

Mem.).

Additionally, exhibits 48-77 and 97-104 to the Complaint contain claim charts, largely comprised of photographs, that compare the Respondents' accused products against the Design Patents or the Utility Patent respectively. (*See also* Exs. 1, 2, 26 and 27 to Mot. and Mem.).

On May 19, 2021, the Office of Unfair Import Investigations ("Staff" and with Hyperice, "the Parties") filed a response in partial support of Hyperice's Motion ("Response"). (Doc. ID No. 742938; Resp. at 2.). Staff supports Hyperice's Motion that four (4) of the (5) Defaulting Respondents' Accused Products either were imported or sold after importation, that they infringe one of three (3) of Hyperice's asserted patents (i.e. Hyperice's Utility Patent), and that four (4) of the five (5) Defaulting Respondents have violated Section 337 with respect to Hyperice's Utility Patent. (Resp. at 2.). However, Staff contends that there is insufficient specific evidence where the Defaulting Respondent eCommerce Co., Ltd. ("Kula")'s accused product is manufactured. There is no direct evidence of who manufactured Kula's accused product, or that it was imported into the United States. (Resp. at 22, 24, 35.).

However, as explained in more detail below, Staff does not support Hyperice's Motion for summary determination that two (2) of the three (3) Asserted Patents, or Hyperice's Design Patents, are entitled to a summary determination of violation of Section 337.⁸

⁸ Staff does not dispute the facts contained in Hyperice's SMF. (Resp. at 2, n.2.). However, Staff had problems at the time of its filing of its Response with the completeness or thoroughness of Hyperice's evidence with respect to the elements and issues required to show a violation of Section 337 and infringement of Hyperice's Utility Patent. (*Id.*). For example, Staff noted that Hyperice had not filed "Claim Charts" that support the analysis of infringement of the Utility Patent by the Accused Products, which was Exhibit E to Mr. Ball's Expert Report. (*See* n.6, above.). Hyperice since corrected its evidence in its Supplemental MSD by filing Mr. Ball's "Claim Charts" as part of Motion Docket No. 1206-025, and by filing other declarations that provide necessary support on importation with the Defaulting Respondents' Accused Products, except for Kula's. (*See* n.6, above; *see also* Doc. ID No. 749309.). Hyperice is trying to rely upon hearsay from one of the Respondents with whom Hyperice has entered into a Stipulation of Non-Infringement. That is not sufficient. Hyperice's supplemental filings

Nonetheless, Staff supports Hyperice's request for a GEO because Hyperice has provided substantial and persuasive evidence that there has been widespread copying of Hyperice's Utility Patent, and that there is a likelihood of circumvention of a Limited Exclusion Order ("LEO"). (Resp. at 25-26; *see also* Compl. Exs. 78-96 (Orders and Shipment documents for certain accused products)).⁹ To that end, Hyperice has documented the difficulty of identifying all of the sources of the infringing products. (*See* Mem. at 36-40; Resp. at 1, 3, 44.). Additionally, Staff supports Hyperice's request for a bond of 100% of the entered value of the infringing goods during the Presidential Review Period. (*Id.*).

There was no public interest factual development pursuant to 337(d)(1) and (f)(1). *See* 19 U.S.C. 1337(d)(1), (f)(1). However, Hyperice suggest that the public interest would neither be implicated nor adversely affected by the Commission's issuance of exclusion orders or other remedies. (Statement of Public Interest at 2.). Hyperice estimates that it has 50% of the United States market for percussive massage devices. (*Id.* at 3.). Hyperice says that together with two (2) of its competitors who have another 30% of the market in the United States for the type of devices Hyperice sells, they could cover the entire United States market for any necessary replacement of the excluded products. (*Id.*).

Staff does not support Hyperice's Motion that the Accused Products infringe Hyperice's two (2) asserted Design Patents because Staff contends that Hyperice did not have sufficient

apparently resolved Staff's reservation with respect to the insufficiency of the evidence on importation and infringement. Staff's Response was a conditional support for a finding of violation of the Utility Patent assuming Hyperice filed the Claim Charts, which it did. (*See* Staff Resp. at 2, 3.).

⁹ At the time Staff filed its Response, Mr. Ball's Claim Charts were not in evidence as they had not been filed with the excerpts of Mr. Ball's Expert Report that was filed with Hyperice's Motion and Memorandum. Again, Hyperice corrected its omission with the filing of the Claim Charts. (*See* Ex. E, Hyperice's Supplemental MSD, Motion Docket 1206-025, Supplemental MSD and also Doc. ID No. 749309.).

rights in the Design Patents at the time the Commission instituted the Investigation. (Resp. at 2.). One of the three (3) inventors had not assigned his rights to Hyperice at that time. (*Id.*). Because of Hyperice’s standing problem with respect to the Design Patents, on May 6, 2021, Staff filed a motion to terminate the Design Patents from the Investigation (“Motion to Terminate”). (Motion Docket No. 1206-020.).¹⁰ Hyperice opposed Staff’s Motion to Terminate the Design Patents.¹¹

Order No. 39, which grants Staff’s Motion to Terminate (i.e. the two (2) Design Patents), contains the reasoning and evidentiary and legal support for that decision was issued and filed on August 17, 2021. (*See* Order No. 39, Doc. ID No. 749816.). Order No. 39 should be read with Order No. 38, also filed on August 17, 2021, that denies Hyperice’s Cross-Motion to amend the Complaint and NOI, which contains the reasoning and evidentiary and legal support for that decision. (*See* Order No. 38, Doc. ID No. 749779.).

B. Summary of Findings

Accordingly, this Recommended Initial Determination (“RID”) addresses four (4) of the Defaulting Respondents’ infringement of Hyperice’s Utility Patent and *grants* Hyperice’s Motion for summary determination of infringement and violation of Section 337 against those

¹⁰ Commission Investigative Staff’s Motion to Terminate the Asserted Design Patents for Lack of Standing (“Motion to Terminate”), Motion Docket 1206-020 (May 6, 2021.).

¹¹ Hyperice filed Complainant Hyperice’s Opposition (“Opp’n to Termination”) to Commission Investigative Staff’s Motion to Terminate the Asserted Design Patents for Lack of Standing [Motion No. 1206-020]; Cross Motion (“Cross Motion”) to Amend Complaint to Reflect Proper Inventorship, Doc. ID No. 742700 (May 17, 2021). Hyperice’s Cross Motion was denied in part because of Hyperice’s severe delay in seeking Certificates of Correction of Inventorship from the U.S. Patent and Trademark Office (“PTO”) for an inventor of the Asserted Patents, and then because of Hyperice’s additionally delay in filing the Certificates of Correction on EDIS. Additionally, Hyperice’s Cross Motion was denied in part because had it been granted, that would have required re-service of the Complaint and NOI on all named Respondents long after discovery was complete the Settling Respondents had settled with Hyperice, and the Defaulting Respondents had defaulted. For those reasons, Staff’s Motion to Terminate was granted and Hyperice’s Cross Motion was denied. (*See* Order Nos. 39 and 38, respectively.).

four (4) Defaulting Respondents with respect to the Utility Patent.¹² This RID also addresses Hyperice’s satisfaction of the technical and economic prong of the domestic industry requirements.

This RID finds that four (4) of the five (5) Defaulting Respondents have infringed the ‘574 patent in violation of Section 337. 19 U.S.C. § 1337. Additionally, this RID finds that Hyperice has established a domestic industry that meets both the economic prong and technical prong of the domestic industry requirement under 19 U.S.C. §§ 1337(a)(2) and 1337(a)(3).

Finally, this RID recommends a GEO against all Defaulting Respondents and a CDO against Defaulting Respondent Kinghood. This RID also recommends the entry of a 100% bond of the entered value during the Presidential Review Period. (*See also* Section XII below.).

C. Abbreviated Procedural History

On June 17, 2020, Hyperice filed its Complaint (“Compl.”) pursuant to Section 337 of the Tariff Act of 1930. (Doc. ID No. 712833). On June 29, 2020, Hyperice filed a supplement to its Complaint. (*See* Supplement to the Complaint and Exhibits, Doc. ID No. 713551 (June 29, 2020).).

On July 16, 2020, the Commission voted to institute the Investigation and then issued the Notice of Investigation (“NOI”). 85 Fed. Reg. 44323 (July 22, 2020).

The Complaint, as supplemented, and the NOI name 19 respondents: Addaday LLC (“Addaday”); Performance Health Systems, LLC (“Performance Health”); WODFitters (“WODFitters”); Massimo Motor Sports, LLC (“Massimo”); Kinghood International Logistics Inc. (“Kinghood”); Manybo Ecommerce Ltd. (“Manybo”); Shenzhen Let Us Win-Win Technology Co., Ltd.; Shenzhen Infein Technology Co., Ltd. (“Shenzhen Infein”); Hong Kong

¹² Hyperice is not barred from refileing a Complaint against the Defaulting Respondents with respect to Hyperice’s Design Patents.

Yongxu Capital Management Co., Ltd. (“Hong Kong Yongxu”); Laiwushiyu Xinuan Trading Company; Shenzhen QingYueTang E-commerce Co., Ltd.; Shenzhen Shiluo Trading Co., Ltd.; Kula eCommerce Co., Ltd. (“Kula”); Fu Si (“Shenzhen Fusi Technology”); Shenzhen Qifeng Technology Co., Ltd.; Rechar, Inc. (“Rechar”); Ning Chen; Opove, Ltd. (“Opove”); and Shenzhen Shufang E-Commerce Co., Ltd. (“Shufang E-Commerce”). *Id.* The Office of Unfair Import Investigations was named as a party to this Investigation. *Id.*

On September 16, 2020, Respondent Addaday was terminated from this Investigation through a settlement. (*See* Order No. 10 (Sept. 16, 2020), unreviewed (Oct. 15, 2020).).

On September 25, 2020, two (2) third parties, Shenzhen Xinde Technology Co., Ltd. (“Xinde”) and Yongkang Aijiu Industrial & Trade Co., Ltd. (“Aijiu”), were permitted to intervene in this Investigation as Respondents, pursuant to Commission Rule 210.19 (for a total of 21 Respondents), in order to protect their interests in their own percussive massage devices which they acknowledge importing into the United States, and for which they presented evidence of possible infringement of Hyperice’s Asserted Patents. (*See* Order No. 11, (Oct. 16, 2020)(unreviewed); *see also* Motion Docket Nos. 1206-005 and 006 (Sept. 17, 2020).). They later entered a Stipulations of Non-infringement with Hyperice (see below).

On October 22, 2020, Hyperice gave notice that it was unable to serve the Complaint on the following five (5) named respondents: Laiwushiyu Xinuan Trading Company; Shenshen Let Us Win-Win Technology; Shenzhen Qifeng Technology Co., Ltd.; Shenzhen QingYueTang E-commerce Co., Ltd. and Shenzhen Shiluo Trading Co., Ltd. (“Unserved Respondents”). (Doc. ID No. 722854.).

On November 4, 2020, two (2) additional Respondents, WODFitters and Massimo, were terminated from this Investigation on the basis of settlement. (*See* Order No. 12, (Nov. 12,

2020), unreviewed (Nov. 20, 2020).)

On December 2, 2020, Order No. 15, a Notice to Show Cause issued ordering the five (5) Defaulting Respondents to answer and explain why they should not be held in default for failing to respond to the Complaint and NOI. On December 17, 2020, the Defaulting Respondents were found to be in default in this Investigation for their failure to file appearances and to respond pursuant to 19 C.F.R. § 210.16. (See Order No. 17, unreviewed (Jan. 15, 2021)).

On January 8, 2021, Order No. 18, a *Markman* order (“*Markman* Order”), issued that adopted the eight (8) claim terms upon which the Parties agreed and construed the sole, disputed claim term of the ’574 patent. (See Appendix A Charts A and B, respectively, Construing Certain Claims of U.S. Patent No. 10,561,574 (*Markman* Claim Construction)(Order No. 18 (Jan. 8, 2021)).

On April 8, 2021, eight (8) additional Respondents, i.e. Opove, Shufang E-Commerce Co., Shenzhen Fusi Technology, Rechar, Ning Chen, Performance Health, Aijiu, and Xinde were terminated from this Investigation based on settlement (with Addaday and WODFitters and Massimo, “the Settling Respondents”). (See Order No. 30; (unreviewed (Apr. 22, 2021)).

On August 3, 2021, the Unserved Respondents were terminated from this Investigation as a result of Hyperice’s motion to withdraw the Complaint against them. (Order No. 36, Initial Determination Granting Complainant Hyperice’s Unopposed Motion to Terminate the Investigation as to Respondents That Hyperice Was Unable to Serve (August 3, 2021)).

II. THE PARTIES

A. Hyperice

1. Hyperice, Inc.

Hyperice is incorporated under the laws of California, with its principal place of business in Irvine, California. (Complaint (“*Compl.*”) at ¶ 4.). Hyperice has been in business since 2010

when it first introduced an ice compression massage product line. (Compl. at ¶ 5.). Hyperice describes itself as “a recovery and movement enhancement technology company specializing in ice compression, thermal, vibration, and percussion technology.” (Mem. at 4.). Hyperice also describes that it has researched, designed, developed, marketed, and sold various therapy and massage devices throughout the United States and in 50 countries. (*Id.*). Those sales generally include Hyperice’s domestic industry products, the Hypervolt percussive massage devices (“Hypervolt” and “Hypervolt Plus”). (*Id.*; Compl. at ¶ 5, *see also* Exs. 3-5, 8-10 to Motion and Mem.; Exs. 8-9 to Compl.). Hyperice’s products are generally used by athletes (and others) for deep tissue massage and for myofascial release. (Compl at ¶ 5.).

B. Defaulting Respondents

1. Kinghood

Respondent Kinghood International Logistics Inc. is a domestic corporation with its principal place of business in La Mirada, California. (Compl. at ¶ 20; Mem. at 4.). Kinghood’s accused products include the Theradrill. (Compl. at ¶ 19.).

2. Manybo

Respondent Manybo Ecommerce Ltd. is known to have a place of business in Hong Kong. (*Id.* at ¶ 22.). Manybo’s accused products include the FBF Pulse Gun. (*Id.* at ¶ 21.).

3. Shenzhen Infein

Respondent Shenzhen Infein Technology Co., Ltd. is a Chinese corporation with its principal place of business in Shenzhen, Guangdong, China. (*Id.* at ¶ 27.). Shenzhen Infein’s accused products include the ALI2 Massage Gun. (*Id.* at ¶ 26.).

4. Hong Kong Yongxu

Respondent Hong Kong Yongxu Captial Management Co., Ltd. is a Chinese corporation with its principal place of business in Hong Kong. (*Id.* at ¶ 30.). Hong Kong Yongxu’s accused

products include the AM1 Massage Gun. (*Id.* at ¶ 29.).

5. Kula

Respondent Kula eCommerce, Ltd. is a Chinese corporation with its principal place of business in Huizhou City, Guangdong, China. (*Id.* at ¶ 38.). Kula’s accused products include the AM5 Massage Gun. (*Id.* at ¶ 37.).

III. THE UTILITY PATENT AND ASSERTED CLAIMS

A. U.S. Patent No. 10,561,574

The ’574 patent, the Utility Patent, is entitled “Battery-Powered Percussive Massage Device,” was filed on October 17, 2019, as U.S. Patent Application No. 16/656,348 (“the ’348 application”). (Compl. Ex. 1.). The ’348 application issued as the ’574 patent on February 18, 2020, and names Robert Marton and Anthony Katz as inventors. (*Id.*). From the filing of the Complaint, Hyper Ice, Inc. has owned, by assignment, all right, title, and interest in and to the ’574 patent. (Compl. at Ex. 4; *id.* at ¶ 8.).

The ’574 patent is directed generally toward battery-powered motorized percussive massage devices. (Compl. Ex. 1 at Abstract.). Percussive massage, also referred to as “tapotement,” is the “rapid, percussive tapping, slapping and cupping of an area of the human body.” (*Id.* at 1:21-23; *see also* Compl. at ¶ 63.).

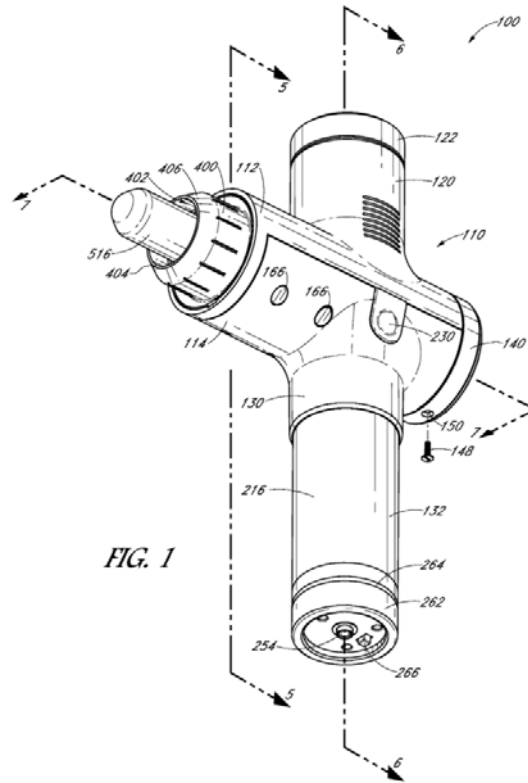
According to Hyperice, its DI Products, Hyperice’s Hypervolt and Hypervolt Plus, which practice the ’574 patent, improved upon previous percussive massage devices by their design, their durability, portability and ergonomic features. (Compl. at ¶ 51.). Additionally, Hyperice notes that its Hypervolt DI Products are generally lighter and untethered to an electrical power source unlike many other percussive massage products. (*Id.* at ¶ 54.).

The percussive massage device of the ’574 patent includes a main enclosure, a motor with a rotatable shaft, a reciprocation assembly in the main enclosure including a piston, a

massage head removably attached to the piston, a battery assembly extending from the main enclosure, a battery assembly receiving tray within the longitudinal cavity of the main enclosure, and a battery assembly with an outer gripping surface. (*See id.* at cls. 1, 14.).

Figure 1 of the '574 patent, which is shown below as Figure No. 1, depicts one embodiment of the claimed percussive massage device:

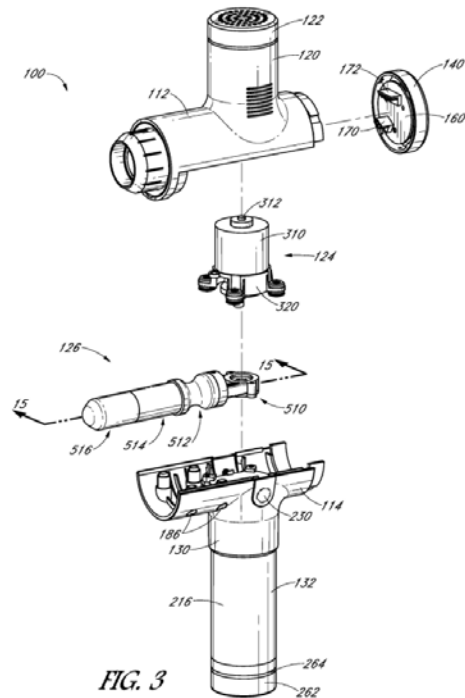
Figure No. 1: Figure 1 of the '574 Patent



(*Id.* at Fig. 1.).

Figure 3 of the '574 patent, shown below as Figure No. 2, provides an “exploded perspective view” of the percussive massage device of Figure 1, including a depiction of the horizontal enclosure (112 + 114), the battery assembly receiving enclosure (130) and the motor enclosure (120).

Figure No. 2: Figure 3 of the '574 Patent



(*Id.* at Fig. 3; Compl. Ex. 1 at 3:34-36.).

Hyperice has asserted claims 1–9, 14, and 15 of the '574 patent (“Asserted Claims”) in this Investigation. (*See* Compl. at Ex. 1; *see id.* Mem. at 9-11.). Independent claims 1 and 14, and the dependent claims, 2-9 and 15 are reproduced below.

1. A battery-powered percussive massage device comprising:

a main enclosure extending along a longitudinal axis, the main enclosure having a proximal end and a distal end, the main enclosure including a longitudinal cavity;
a motor having a rotatable shaft;

a reciprocation assembly coupled to the rotatable shaft, the reciprocation assembly including a piston, the reciprocation assembly configured to reciprocate the piston along a reciprocation axis in response to rotation of the rotatable shaft, the reciprocation assembly positioned within the longitudinal cavity of the main enclosure;

an applicator head having a proximal end removably attachable to the piston, and having a distal end that extends from the distal end of the main enclosure when the proximal end of the applicator is attached to the piston;

a battery assembly receiving enclosure extending from the main enclosure;

a battery assembly receiving tray within the longitudinal cavity of the main enclosure, the battery assembly receiving tray aligned with the battery receiving enclosure, the battery assembly receiving tray having an inner perimeter, the battery assembly receiving tray having at least a first electrical contact and a second electrical contact positioned within the inner perimeter; and

a battery assembly having a free end and a contact end, the contact end of the battery assembly having an outer perimeter, the contact end of the battery assembly having at least a first electrical contact and a second electrical contact positioned on the outer perimeter to engage the first electrical contact and the second electrical contact respectively of the battery assembly receiving tray, the battery assembly having an outer gripping surface positioned between the contact end and the free end.

2. The battery-powered percussive massage device of claim 1, wherein the battery assembly extends from the battery assembly receiving enclosure when the battery assembly is engaged with the battery assembly receiving tray.

3. The battery-powered percussive massage device of claim 2, wherein the battery assembly extends in a direction perpendicular to the reciprocation axis.

4. The battery-powered percussive massage device of claim 1, wherein the outer gripping surface of the battery assembly is cylindrical.

5. The battery-powered percussive massage device of claim 1, wherein the free end of the battery assembly includes a power switch, the power switch operable to selectively connect and to selectively disconnect electrical power from the battery assembly to the main enclosure.

6. The battery-powered percussive massage device of claim 1, wherein proximal end of the main enclosure includes a control switch, the control switch operable to select between at least a first rotational speed and a second rotational speed of the motor.

7. The battery-powered percussive massage device of claim 1, wherein proximal end of the main enclosure includes at least a first display and a second display, the first display displaying an indication of a rotational speed of the motor, the second display displaying an indication of a charging state of the battery assembly.

8. The battery-powered percussive massage device of claim 7, wherein the first display comprises a first plurality of light-emitting diodes (LEDs) and the second display comprises a second plurality of LEDs.

9. The battery-powered percussive massage device of claim 1, wherein the battery assembly includes a charging indicator between the outer gripping surface and the

free end, the charging indicator having at least a first display state to indicate a first charge condition of the battery assembly and a second display state to indicate a second charge state of the battery assembly.

14. A battery-powered percussive massage device comprising:

a main housing that encloses a motor, the main housing extending between a proximal end and a distal end, the main housing including a longitudinal cavity, the main housing enclosing a piston that reciprocates along a reciprocation axis within the longitudinal cavity in response to operation of the motor;

an applicator head positioned at the distal end of the main housing and removably coupled to the piston, at least a portion of the applicator head exposed outside the distal end of the main housing;

a battery assembly receiving enclosure extending from the main housing at an angle with respect to the reciprocation axis;

a battery assembly receiving tray positioned within the longitudinal cavity of the main housing in alignment with the battery assembly receiving enclosure, the battery assembly receiving tray having at least a first electrical contact and a second electrical contact; and

a battery assembly having a contact end and a free end, the contact end positionable through the battery assembly receiving enclosure to engage the battery assembly receiving tray, the contact end supporting at least a respective first electrical contact to engage the first electrical contact of the battery assembly receiving tray and a respective second electrical contact to engage the second electrical contact of the battery assembly receiving tray, the battery assembly including an outer gripping surface positioned between the contact end and the free end, the outer gripping surface configured to be gripped by one hand.

15. The battery-powered percussive massage device of claim 14, wherein the battery assembly extends from the battery assembly receiving enclosure when the battery assembly is engaged with the battery assembly receiving tray within the main housing.

(*See Mem. at 9-11; see also Compl. at Ex. 1.*)

IV. PRODUCTS AT ISSUE

A. Hyperice's Domestic Industry Products

Hyperice contends, and supports with uncontroverted evidence, that its Hypervolt and Hypervolt Plus, Hyperice's DI Products, practice the Asserted Claims of the '574 patent. (Mem.

at 21, 24-27; *see also* Exs. 1, 2, 3, 8-10 to Mot. and Mem.; SMF Nos. 23 and 24.). Staff does not dispute Hyperice's argument that its DI Products practice the '574 patent. (Resp. at 34.).



Generally, Hyperice has relied upon Mr. Ball's Declaration, the Ball Expert Report, and Mr. Ball's Claim Charts in support of its argument for infringement of the '574 patent and violation of Section 337. (Mem. at 20; Ball Decl. at ¶ 6, Ex. 1 to Mem.; *see also* Ex. 7 to the Complaint.). Mr. Ball's Expert Report and his Claim Charts are somewhat abbreviated on their narrative analysis of Hyperice's DI Products but cover both the Hypervolt and the Hypervolt Plus. (Mem. at 21 (citing Claim Chart, Ex. 7 to Compl.)). As Staff notes, there is a specific statement in Mr. Ball's Declaration that references Exhibit 7 to the Complaint and an explicit demonstration of how the Utility Patent's claim language applies to both of Hyperice's DI Products. (*See* Resp. at 35 (citing Ball Decl. at ¶ 6.)).

B. The Defaulting Respondents' Accused Products

Pictures of samples of the Defaulting Respondents' accused products that Hyperice purchased are reflected in the summary chart, Table No. 1, below. The Accused Products include Kinghood's Theradrill, Manybo's FBF Pulse Gun, Shenzhen Infein's ALI2 Massage Gun, Hong Kong Yongxu's AM1 Massage Gun, and Kula's AM5 Massage Gun ("Accused Products"). (*See* Mem. at 12; *see also* Compl. at ¶¶ 85-102; Compl. at ¶¶ 19, 21, 26, 29, 37; *see id.* Exs. 18, 20, 25, 28, 36 to Compl.). While Hyperice apparently bought representative samples of each of the Defaulting Respondents' Accused Products on various websites in the United States, Hyperice provided pictorial or declaratory evidence that each such sample Hyperice purchased was made in China or was imported into the United States from China or Hong Kong (except for Kula). (*See* Mem. at 12 for Table, and at 12-14 (citing Compl. at Exs. 18, 36, 82, 83, 85, 86, 90); *see also* Resp. at 33-34 for pictures of the Accused Products in comparison with the Asserted Patents.).

Additionally, the Ball Expert Report provides an extensive analysis and explanation of his examination of the Accused Products, particularly with respect to the Design Patents. However, Mr. Ball’s Design Patent analysis is equally applicable to the Utility Patent, including a comparison of the working features of the Accused Products. (See Mem. at 24-27; Resp. at 28-34; see also Ball Expert Report at Ex. 1 to Motion at ¶¶ 118-119, 165-169, 210, 286, 298, 306.). Moreover, as noted below, Mr. Ball’s analysis of Hyperice’s DI Products is similar to his infringement analysis of the Accused Products. (*Id.*).

Table No. 1: Pictures of Defaulting Respondents’ Accused Products

Respondent	Name of Accused Product	The Accused Product
Kinghood	Theradrill	
Manybo	FBF Pulse Gun	

<p>Shenzhen Infein</p>	<p>Shenzhen Infein Massage Gun (ALI2)</p>	
<p>Hong Kong Yongxu</p>	<p>Hong Kong Yongxu Massage Gun (AM1)</p>	
<p>Kula</p>	<p>Kula eCommerce Massage Gun (AM5)</p>	

(Mem. at 10-11; Resp. at 13-14; Compl. at ¶¶ 19, 21, 26, 29, 37; Exs. 18, 20, 25, 28, 36 to Compl.).

V. LEGAL STANDARDS

A. Summary Determination

Summary determination under Commission Rule 210.18 is analogous to summary judgement under Federal Rule of Civil Procedure 56 and may be granted only where the evidence shows “that there is no genuine issue as to any material fact and that the moving party is entitled to summary determination as a matter of law.” *See* 19 C.F.R. § 210.18(b). “Any party may move with any necessary supporting affidavits for a summary determination in [its] favor upon all or any part of the issues to be determined in the investigation.” 19 C.F.R. § 210.18(a); *see also Certain Digital Processors and Digital Processing Sys., Components Thereof, and Prods. Containing Same*, Inv. No. 337-TA-559, 2006 ITC LEXIS 522, at *6, Order No. 13 (Sept. 6, 2006) (collecting cases). The party moving for summary determination 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, 255 (1986). When evaluating a motion for summary determination, the evidence must be examined in a 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 (1986). The non-moving party “must set forth specific facts showing there is a genuine issue of fact.” *Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*, Inv. No. 337-TA-380, Order No. 40 at 3, (August 8, 1996) (citing *Anderson*, 477 U.S. at 248). 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, U.S.I.T.C. Pub. No. 2186, Initial Determination at 70 (Jan. 10, 1989).

B. Default

Commission Rule 210.16(b)(4) states: “A party found in default shall be deemed to have waived its right to appear, to be served with documents, and to contest the allegations at issue in the investigation.” 19 C.F.R. § 210.16(b)(4). Commission Rule 210.16(c) further provides that “[t]he facts alleged in the complaint will be presumed to be true with respect to the defaulting respondent.” 19 C.F.R. § 210.16(c).

C. Literal Infringement

“Determination of infringement is a two-step process which consists of determining the scope of the asserted claim (claim construction) and then comparing the accused product . . . to the claim as construed.” *Certain Sucralose, Sweeteners Containing Sucralose, and Related Intermediate Compounds Thereof*, Inv. No. 337-TA-604, Comm’n Opinion at 36 (U.S.I.T.C., April 28, 2009) (citing *Litton Sys., Inc. v. Honeywell, Inc.*, 140 F.3d 1449, 1454 (Fed. Cir. 1998)).

An accused device literally infringes a patent claim if it contains each limitation recited in the claim exactly. *Litton*, 140 F.3d at 1454. Each patent claim element or limitation is considered material and essential. *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991). In a Section 337 investigation, the Hyperice bears the burden of proving infringement of the asserted patent claims by a preponderance of the evidence. *Enercon GmbH v. Int’l Trade Comm’n*, 151 F.3d 1376, 1384 (Fed. Cir. 1998). This standard “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). If any claim limitation is absent, there is no literal infringement of that claim as a matter of law. *Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d 1241, 1247 (Fed. Cir. 2000).

D. Domestic Industry

The Commission may only find a violation of Section 337 “if an industry in the United States relating to the articles protected by the patent . . . exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2) (emphases added). Typically, a Complainant must show that a domestic industry existed at the time the complaint was filed. *See Motiva LLC v. Int’l Trade Comm’n*, 716 F.3d 596, 601 n.6 (Fed. Cir. 2013). The domestic industry requirement consists of a “technical prong” and an “economic prong.” *See, e.g., Certain Elec. Devices, Including Wireless Commc’n Devices, Portable Music & Data Processing Devices, & Tablet Computs.*, Inv. No. 337-TA-794, Order No. 88, 2012 WL 2484219, at *3 (June 6, 2012); *Certain Unified Commc’ns Sys., Prods. Used with Such Sys., and Components Thereof*, Inv. No. 337-TA-598, Order No. 9 at 2 (Sept. 5, 2007) (“*Communications Systems*”).

1. Technical Prong

A Complainant satisfies the “technical prong” of the domestic industry requirement when it proves that its activities relate to an article “protected by the patent” or that it is practicing/exploiting the patent(s) at issue. *See Communications Systems*, Order No. 9 at 2. “In order to satisfy the technical prong of the domestic industry requirement, it is sufficient to show that the domestic industry practices any claim of that patent, not necessarily an asserted claim of that patent.” *Certain Ammonium Octamolybdate Isomers*, Inv. No. 337-TA-477, Comm’n Op. at 55 (U.S.I.T.C. Jan. 5, 2004)(“*Certain Isomers*”).

The test for claim coverage for the purposes of the technical prong of the domestic industry requirement is the same as that for infringement. *Certain Doxorubicin and Preparations Containing Same*, Inv. No. 337-TA-300, Initial Determination at 109, 1990 WL 710463 (U.S.I.T.C. May 21, 1990), *aff’d*, Views of the Commission at 22 (October 31, 1990) (“*Doxorubicin*”). “First, the claims of the patent are construed. Second, the Complainant’s

article or process is examined to determine whether it falls within the scope of the claims.” *Id.* The technical prong of the domestic industry can be satisfied either literally or under the doctrine of equivalents. *Certain Dynamic Sequential Gradient Devices and Component Parts Thereof*, Inv. No. 337-TA-335, Initial Determination at 44, Pub. No. 2575 (U.S.I.T.C. Nov. 1992).

2. Economic Prong

A Complainant satisfies the “economic prong” of the domestic industry requirement when it demonstrates that the economic activities set forth in subsections (A), (B), and/or (C) of Section 337(a)(3) have taken place or are taking place with respect to the protected articles. *See id.*

Subsection 337(a)(3) states that:

(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.

19 U.S.C. § 1337(a)(3).

Because the criteria are listed in the disjunctive, satisfaction of any one of them will be sufficient to meet the economic prong of the domestic industry requirement. *Certain Integrated Circuits, Chipsets and Prods. Containing Same*, Inv. No. 337-TA-428, Order No. 10, Initial Determination (May 4, 2000) (“*Integrated Circuits*”) (unreviewed). Establishment of the “economic prong” is not dependent on any “minimum monetary expenditure” and there is no need for a Hyperice “to define the industry itself in absolute mathematical terms.” *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 25-26 (May 16, 2008) (“*Stringed Instruments*”). However, a Hyperice must substantiate the

nature and the significance of its activities with respect to the articles protected by the patent at issue. *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm'n Op. at 30 (Feb. 17, 2011) ("*Imaging Devices*").

The Commission has interpreted Sections 337(a)(3)(A) and (B) to concern "investments in plant and equipment and labor and capital with respect to the *articles* protected by the patent." *Certain Ground Fault Circuit Interrupters and Prods. Containing Same*, Inv. No. 337-TA-739, 2012 WL 2394435, at *50, Comm'n Op. at 78 (June 8, 2012) ("*Circuit Interrupters*") (emphasis in original) (quoting 19 U.S.C. §§ 1337(a)(3)(A), (B)).

There is no mathematical threshold test or a "rigid formula" for determining whether a domestic industry exists. *Certain Male Prophylactic Devices, Inc.*, Inv. No. 337-TA-292, Comm'n Op. at 39, USITC Pub. 2390 (June 1991) ("*Male Prophylactic Devices*"). However, to determine whether investments are "significant" or "substantial," the actual amounts of a Hyperice's investments or a quantitative analysis must be performed. *Lelo Inc. v. Int'l Trade Comm'n*, 786 F.3d 879, 883-84 (Fed. Cir. 2015). Even after *Lelo*, which requires some quantification of a Complainant's investments, there is still no bright line as to a threshold amount that might satisfy an economic industry requirement.

It is the Complainant's burden to show by a preponderance of evidence that each prong of the domestic industry requirement is satisfied. *Certain Prods. Containing Interactive Program Guide and Parental Control Tech.*, Inv. No. 337-TA-845, Final Initial Determination, 2013 WL 3463385, at *14 (June 7, 2013.). Moreover, the Commission makes its determination by "an examination of the facts in each investigation, the article of commerce, and the realities of the marketplace." *Male Prophylactic Devices*, Comm'n Op. at 39 (quoting *Certain Double Sided-Floppy Disk Drives and Components Thereof*, Inv. No. 337-TA-215, Comm'n Op. at 17,

USITC Pub. 1859 (May 1986)).

VI. IMPORTATION

Section 337(a)(1)(B) prohibits, *inter alia*, “[t]he importation into the United States, the sale for importation, or the sale within the United States after importation” of articles that infringe a valid and enforceable United States patent.” 19 U.S.C. § 1337(a)(1)(B). A single instance of importation is sufficient to satisfy the importation requirement of Section 337.

Certain Optical Disc Drives, Components Thereof, and Prods. Containing the Same, Inv. No. 337-TA-897, Order No. 101 at 3 (Sept. 22, 2014) (citations omitted) (Doc. ID No. 543438).

Based upon the cumulative evidence it has submitted, Hyperice has established the importation of or sale after importation of representative Accused Products of four (4) of the five (5) Defaulting Respondents: Manybo, Shenzhen Infein, Hong Kong Yongxu and Kinghood. Staff agrees. (Resp. at 22-23.). The lone exception is with respect to Kula.

In support of its satisfaction of the importation or sale after importation of the Accused Products, Hyperice states generally that:

[Hyperice] has obtained in the United States representative samples of the [Accused Products]. As detailed below, all the products are made in China and imported into the United States, as shown on the labels on the products themselves, the instruction manuals included with the products, the online product listings for the products, and/or the shipping details for the products.

(Mem. at 12; *see id.* at 12-15.).

In support thereof, Hyperice has relied upon exhibits to its Complaint and Motion and Memorandum, together with Declarations provided with its Supplemental MSD, for proof of and attestation of purchase and/or the importation of samples of the Defaulting Respondents’ Accused Products. (*See* Mem. at 12-15; Compl. at Exs. 82, 83, 85, 86, 90; *see also* Exs. 1-3 to Supplemental MSD; n.6, above.). For example, Mr. Arnold certifies and authenticates certain importation information that is based upon his personal knowledge. This includes evidence of

his purchase and receipt of samples of the Accused Products, with certain labels, tracking information, and his own photographs taken of certain Accused Products. (*See* Arnold Decl. at ¶ 4, Ex. 1 to Supplemental MSD.).¹³

With respect to Respondent Manybo's accused product, Hyperice provided evidence that it placed an order for Manybo's FBF Pulse Gun on April 15, 2020; that it was shipped from Hong Kong and was delivered in the United States on April 30, 2021. (Compl. at ¶¶ 21, 91; Ex. 83 to Compl. (shipping receipt and packaging.)). Hyperice also provided a photograph that purportedly shows the label "Made in China" on the Manybo accused product. (Mem. at 13-14.).

With respect to Respondent Shenzhen Infein's accused product, Hyperice stated that it ordered Shenzhen Infein's ALI1 Massage Gun on May 22, 2020, which was shipped from Hong Kong and then delivered in the United States on June 9, 2020. (Compl. at ¶ 93; Ex. 85 to Compl. (shipping and tracking labels)).

With Respect to Respondent Kong Yongxu's accused product, Hyperice states that it ordered an AM1 Massage Gun on March 6, 2020, and that the product was delivered in the United States on March 7, 2020. (Compl. at ¶ 94; Ex. 86 to Compl.). Additionally, Hyperice provide a photograph of a label "Assembled in China" that was on the AM1 Massage Gun. (Mem. at 15; Compl. at ¶ 94.).

With respect to Respondent Kinghood,'s accused product, the Theradrill, Hyperice has cited to various photographs of Kinghood's Theradrill product, evidence of Hyperice's purchase of a Theradrill; and evidence of importation. (Mem. at 13; Compl. at ¶ 90; Ex. 82 to Compl.). Additionally , Hyperice provided a photograph that Theradrill was "Assembled in China,"

¹³ Order No. 33 granted Hyperice's request to supplement its Motion with three (3) supporting declarations, including that of the Arnold Declaration, Ex.1. (*See* Order No. 33 (May. 17, 2021)).

although it was shipped within the United States from an Address in the United States. (*See* Mem. at 12-13; Arnold Decl. at ¶ 4; Compl. at ¶¶ 19, 90, Ex. 82 to Compl.).

With respect to Defaulting Respondent Hong Kong Yongxu’s accused product, Hyperice has cited to evidence that it ordered the AM1 Massage Gun that it was delivered to Hyperice in the United States after sale, although from an unknown address or location. (Compl. at ¶ 94; Ex 86 to Compl.). However, Hyperice also submitted a photograph of the label of Hong Kong Yongxu’s AM1 Massage Gun that states “assembled in China.” (*Id.*).

With respect to Kula, Hyperice has only provided evidence that Kula’s AM5 Massage Gun was ordered and shipped to the United States from an unknown location. (*See* Compl. at ¶¶ 37, 98; Ex. 90 to Compl.). This is an example of a problem with the source of an infringing product: a lack of an address of the company that manufactures and sells an accused product. Hyperice was unable to cite to specific evidence in its Complaint or in its Memorandum that the AM5 Massage Gun is manufactured overseas or was imported into the United States. (*See* Mem. at 15.). Instead, Hyperice has relied upon the Arnold Declaration to prove that Hyperice ordered the Kula AM5 Massage Gun. To that end, the Arnold Declaration, in pertinent part, attests to the following:

Regarding the Kula eCommerce Co., Ltd. Massage Gun AM5, I placed an order for this product via Amazon.com on March 7, 2020. Kula is a Chinese company, and the Kula AM5 Massage Gun is nearly identical to several other massage guns at issue in this Investigation that settling Respondent Aijiu admitted were manufactured in China. I received the product in the United States on March 9, 2020.

(Ex. 1 to Supplemental MSD, Arnold Decl. at ¶ 8.).

The Arnold Declaration relies upon a hearsay submission by a Settling Respondent, Aijiu, that the Kula AM5 Massage Gun is manufactured in China. (*See* Arnold Decl., Ex. 1 to

Supplemental MSD.).¹⁴ However, the hearsay in the Arnold Declaration does not provide sufficient proof of either who manufactures the Kula AM5 Massage Gun, or where it is manufactured. At best, the Arnold Declaration provides proof that there is copying and sale of Hyperice's DI products on the Amazon website.

VII. JURISDICTION

To have the authority to decide a case, a court or agency must have both subject matter jurisdiction and jurisdiction over either the parties or the property involved. *See Certain Steel Rod Treating Apparatus and Components Thereof*, Inv. No. 337-TA-97, Comm'n Opinion, 215 U.S.P.Q. 229, 231 (U.S.I.T.C. 1981). For the reasons discussed below, the facts support a finding that the Commission has jurisdiction over four (4) of the five (5) Defaulting Respondents in this Investigation except for Kula.

A. Subject Matter Jurisdiction

The Commission has subject matter jurisdiction over this Investigation because Hyperice alleged that the Defaulting Respondents violated 19 U.S.C. §1337(a)(1)(B). (*See* Compl. at ¶¶ 85-102; *see also Amgen v. U. S. Int'l Trade Comm'n*, 902 F.2d 1532, 1536 (Fed. Cir. 1990)). Moreover, there is uncontroverted evidence of the importation and/or sale after importation of the four (4) of the five (5) Defaulting Respondents' Accused Products. (*See* Mem. at 11 (citing Compl. at ¶¶ 85-102); *see also* Section III, above.)).

B. Personal Jurisdiction

Personal jurisdiction is not required so long as the products are being imported. *See Sealed Air Corp. v. US. Int'l Trade Comm'n*, 645 F.2d 976, 985-89 (C.C.P.A. 1981). As described above, there is a finding, above, that the Accused Products of Defaulting Respondents

¹⁴ Respondent Yongkang Aijiu Industrial & Trade Co., Ltd. was terminated from this Investigation pursuant to a settlement agreement. (*See* Order No. 30 (Apr. 8, 2021).)

Kinghood, Manybo, Shenzhen Infein, and Hong Kong Yongxu have been imported into the United States or sold in the United States after importation. (*See* Section IV, above.).

Furthermore, the Defaulting Respondents Kinghood, Manybo, Shenzhen Infein, and Hong Kong Yongxu have waived their right to contest that *in personam* jurisdiction exists. *See Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, Initial Determination at 46 (June 29, 2012).

C. In Rem Jurisdiction

The Commission has *in rem* jurisdiction over the accused products of Defaulting Respondents Kinghood, Manybo, Shenzhen Infein, and Hong Kong Yongxu because evidence supports a finding that the accused percussive massage devices, or Accused products, have been imported into the United States. *See Sealed Air Corp. v. U. S. Int’l Trade Comm’n*, 645 F.2d 976, 985 (C.C.P.A. 1981); *see* Section III, above.).

VIII. VALIDITY

A patent is presumed to be valid. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 95, 101-103 (2011)(“*Microsoft*”). A party asserting invalidity has the burden of establishing invalidity by clear and convincing evidence. (*See* *Microsoft* at 101-103.). There is no party, including the Settling Respondents, that has challenged the validity, or met their burden to establish the invalidity of, the Asserted Patents, especially given the Ball Rebuttal Report. (Mem. at 22-23; (Ball Rebuttal Report), Ex. 27 to the Motion and Mem.; Resp. at 24.). The Settling Respondents did not contest Mr. Ball’s Rebuttal Report. (Mem. at 22.). The Asserted Patents are presumed to be valid and there is no reason at this point to undermine that conclusion. Staff agrees. (Resp. at 24.).

IX. U.S. PATENT NO. 10,561,574: INFRINGEMENT**A. Claim Construction**

As reflected in Table No. 2, below, the *Markman* Order in Appendix A, Chart B, construed the sole, disputed claim term of the '574 patent, "longitudinal cavity." The *Markman* Order, Appendix A, Chart A, also adopted the agreed upon the Parties definitions of the remaining, undisputed eight (8) claim terms of the '574 patent. (Order No. 18, App'x A at Chart A.).

Table No. 2: Claim Construction of the '574 Patent

Claim Term	Construction	Claim Number
"longitudinal cavity"	Plain and ordinary meaning: a longitudinal cavity as understood by one of skill in the art	Claims 1 and 14
"battery assembly receiving tray"	"tray with an edge or edges for receiving the battery (<i>e.g.</i> , a cap-like structure)"	Claims 1, 2, and 11
"within the longitudinal cavity"	"inside or not beyond the inside of the longitudinal cavity"	Claims 1 and 14
"an inner perimeter"	"the inside of the perimeter"	Claim 1
"within the inner perimeter"	"within the inside of the perimeter"	Claim 1
"an outer perimeter"	"the outside of the surface area"	Claim 1
"on the outer perimeter"	"on the outside of the surface area"	Claim 1
"charging state"	"level of charge"	Claim 7
"configured to be gripped by one hand"	"enabling gripping by one hand"	Claim 14

(See Order No. 18, *Markman* Order at App'x A, Charts A and B.).

Staff supported the construction of the one disputed claim. Staff also agreed with the

joint, agreed upon claim constructions. (*See Markman* Order at 3; *see also* Staff’s Initial *Markman* Brief (“SMBr.”), (Doc. ID No. 723708 (Oct. 30, 2020)).

The *Markman* Order also defines a person of ordinary skill in the art at the time the application leading to the ’574 patent was filed, consistent with an analysis of the factors for making such a determination. (*See, e.g. In re GPAC*, 57 F.3d 1573, 1579, 35 USPQ2d 1116, 1121 (Fed. Cir. 1995); *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 421, 420 (2007)(“A person of ordinary skill in the art is also a person of ordinary creativity, not an automaton... [I]n many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle.”).). To that end, the *Markman* Order defines a person of ordinary skill in the art as one who would possess: “a level of knowledge roughly equivalent to at least a Bachelor of Arts degree in mechanical engineering and/or an equivalent degree, and/or at least two years of experience in the field of medical devices.” (*See Markman* Order at 11.).

Because no other party proposed a definition of a person of ordinary skill in the art, Staff’s proposed the definition of a person of ordinary skill in the art has been adopted. (Staff *Markman* Br. at 3). It is a finding that Hyperice’s expert, Mr. Ball, by virtue of the information contained in his Curriculum Vitae, meets the definition of a person of ordinary skill at the time the application leading to the ’574 patent was filed, with respect to infringement, technical domestic industry, and validity. (*See* Hyperice’s Identification of Expert Witnesses, Ex. 2 (Doc. ID. No. 1575346 (Oct. 13, 2020)).).

B. Infringement

Hyperice provided undisputed evidence that each of the Accused Products infringe claims 1-7, 14 and 15 of the ’574 patent. (Mem. at 22 (citing Compl. at 33-34; Exs. 51, 52, 54, 55 and 59 to Compl.; Expert Report of Alan Ball at 33-34, Ex. 1 to Motion; *see also* Claim Charts, Ex. 1 to Supplemental MSD and Doc. ID No. 749309.).). Additionally, Hyperice provided

supporting evidence that Kinghood’s Theradrill, Manybo’s FBF Pulse Gun, and Shenzhen Infein’s ALI2 Massage Gun, each infringe claim 9 of the ’574 patent. (*Id.*). This RID so finds.

Hyperice provided the original version of the table, reproduced below as Table No. 3, below, that describes each of the Asserted Claims of the ’574 patent that each of the Accused Products infringes.

Table No. 3: Accused Product Infringement of the Asserted Claims of the ’574 Patent

Product:	’574 Patent Claims:	1	2	3	4	5	6	7	8	9	14	15
Kinghood International Logistics (Theradrill)		X	X	X	X	X	X	X		X	X	X
Manybo Massage Gun		X	X	X	X	X	X	X		X	X	X
Shenzhen Infein Massage Gun (ALI2)		X	X	X	X	X	X	X		X	X	X
Hong Kong Yongxu Massage Gun (AM1)		X	X	X	X	X	X	X			X	X
Kula eCommerce Massage Gun (AM5)		X	X	X	X	X	X	X		X	X	X

(*See Mem. at 22.*).¹⁵

In support of its allegations that each of the identified Accused Products infringes the ’574 patent, Hyperice relies on Mr. Ball’s Expert Report which provides an extensive analysis of each of the claimed products in comparison with the ’574 patent. (*Mem. at 21-22; Motion Ex. 1, Ball Expert Report at ¶¶ 81-82.*).¹⁶ The Ball Expert Report was supplemented with Claim

¹⁵ Staff agrees that if the Commission finds that Hyperice has standing with respect to the Design Patents, then the Accused Products of the Defaulting Respondents Kinghood and Manybo infringe the ’822 patent while the Accused Products of Defaulting Respondents Kinghood, Manybo, Shenzhen Infein, and Hong Kong Yongxu infringe the ’317 patent. (*Staff Resp. at 28-34.*). There is little difference in the Ball Expert Report and in his Claim Charts in the analysis of the Design Patents and of the Utility Patent.

¹⁶ Mr. Alan Ball is the founder and president of A.B.I.D. Inc. (Alan Ball Industrial Design). Mr. Ball has more than thirty (30) years of experience as an Industrial Designer. (*Ball Expert Report at ¶ 7, Ex. 1 to Motion and Mem.; Ex. A. to Complainant’s Pre-Hearing Statement, Doc. ID No. 1613185 (March 1,*

Charts, filed on EDIS on May 20, 2021, and authenticated on August 11, 2021, that demonstrate element by element, and claim by claim how each Accused Product satisfies each limitation of Asserted Claims 1-7 and 14 and 15 of the '574 patent. (See Ball Expert Report at ¶¶ 81-82; Compl. Ex. Nos. 51, 52, 54, 55 and 59; Ball Expert Report Ex. E (Doc. ID No. 743064 (May 20, 2021))).¹⁷ The Ball Expert Report also describes how Mr. Ball's Claim Charts also demonstrate and prove how certain of the Accused Products meets the limitation of Asserted Claim 9. In other words, the Asserted Claims 1-7, 14 and 15 are all satisfied by Kinghood's Theradrill, Manybo's FBF Pulse Gun, Shenzhen Infein's ALI2 Massage Gun, and Hong Kong Yongxu's AM1 Massage Gun. (See Ball Report at ¶¶ 81-82; Compl. Ex. Nos. 51, 52, 54, 55 and 59; Ball Report Ex. E, Ex. 1 to Supplemental MSD.). Claim 9 is satisfied by Kinghood's Theradrill, Manybo's FBF Pulse Gun and Shenzhen Infein's ALI2 Massage Gun. Mr. Ball submitted a supplemental declaration which states stating that his infringement analysis and conclusions, including in his Claim Charts, described above, apply the claim constructions of the *Markman* Order. (Ball Decl. at ¶¶ 5-6 (Doc. ID No. 742521 (May 14, 2021))).¹⁸

Staff does not dispute that each of the Accused Products infringes claims 1-7, 14 and 15 of the '574 patent, or that that Kinghood's Theradrill, Manybo's FBF Pulse Gun, and Shenzhen Infein's ALI2 Massage Gun each infringe claim 9 of the '574 patent. (Resp. at 24-25.).

2021)). It is a finding that Mr. Ball meets the definition of a "Person of Ordinary Skill In the Art," and that he is qualified as an expert on the subject matter in dispute. To that end, Mr. Ball submitted a Curriculum Vitae ("CV") that includes a description of his experience. (See Ex. A to Complainant's Pre-Hearing Statement.).

¹⁷ Order No. 34 granted Hyperice's request to supplement its Summary Determination Motion with the Claim Charts that should have been attached as Exhibit E to the Ball Expert Report but were not. (See Order No. 34 (Jul. 27, 2021)). This was a major correction to Hyperice's Motion and Mem. that left no doubt based upon the uncontroverted evidence that Hyperice is entitled to a finding that at least four (4) of the five (5) Defaulting Respondents' Accused Products infringe the '574 patent.

¹⁸ Order No. 33 granted Hyperice's request to supplement its Summary Determination Motion with three (3) supporting declarations, including a supplemental Ball Declaration (See Order No. 33 (May. 17, 2021); see also n.6, above.).

Therefore, the undisputed evidence demonstrates that the Defaulting Respondents' Accused Products infringe claims 1-7, 14 and 15 of the '574 patent, and that Kinghood's, Manybo's, and Shenzhen Infein's Accused Products also each infringe claim 9 of the '574 patent.

C. Technical Prong

Hyperice's evidence supports a finding that its Hypervolt and Hypervolt Plus DI Products practice the Asserted Claims of the '574 patent. (Mem. at 21.). Hyperice relies on a Claim Chart submitted with its Complaint that demonstrates how the Hypervolt Product satisfies each claim limitation of the Asserted Claims. (*Id.*; Ex. 7 to Compl.). Hyperice's expert, Mr. Ball, also submitted a declaration with his Expert Report, together with Claim Charts, that describe how the Hypervolt Product, and therefore the Hypervolt Plus, satisfy each claim limitation of the Asserted Claims, as construed in the *Markman* Order. (*See* Exs. 51, 52, 54, 55 and 59 to Compl.; Expert Report of Alan Ball at 33-34, Mot. Ex. 1 at ¶ 6, Doc. ID No. 742521; *see also* Claim Charts, Ex. 1 to Supplemental MSD and Doc. ID No. 749309.).

Hyperice states: “[t]he Hypervolt Plus product is identical in all patent-relevant respects” and submits an additional chart mapping the limitations of the Asserted Claims to the Hypervolt Plus. (*See* Motion Ex. 26.). Staff also agrees that “the Hypervolt Plus uses a more powerful motor and is a different color than the Hypervolt, and accordingly, would likewise practice the claims” of the '574 patent. (Resp at 35 n.16.). Staff does not dispute that the Hypervolt and Hypervolt Plus products practice the Asserted Claims of the '574 patent. (*Id.* at 35-36.). There is no contrary evidence that Hyperice's DI Products practice the Asserted Claims of the '574 patent.

Thus, the undisputed evidence supports a finding that Hyperice's DI Products practice the Asserted Claims of the '574 patent.

X. DOMESTIC INDUSTRY – ECONOMIC PRONG ¹⁹

Hyperice has provided supporting evidence that it has satisfied the economic prong of the domestic industry requirement under 19 U.S.C. § 1337(a)(3)(B). (Mem. at 29-35.). Hyperice states that it “designed and developed the incredibly successful Hypervolt products in the United States beginning in 2016, selling the first Hypervolt product in February 2018.” (*Id.* at 29.). Hyperice contends the Hypervolt products have “enjoyed tremendous market success, demonstrating the significance and value added as a result of Hyperice’s innovations relating to the Hypervolt product.” (*Id.*). In Staff’s view, “the evidence regarding (i) investments in domestic research and design in the HyperVolt product, and (ii) the fact that the product and the business it initiated domestically support finding the existence of a domestic industry in the HyperVolt products.” (Resp. at 26.).

A. Hyperice’s Domestic Labor and Capital Expenditures

To prove satisfaction of the economic prong of the domestic industry requirement under prong (B), Hyperice relies on allocated investments in labor and capital from 2017 to 2020. (Mem. at 32-33.). Hyperice has used a sales allocation method, with which Staff agrees, at least through 2019. (Resp. at 39.). Since 2017, Hyperice has expanded its number of employees from [REDACTED] employees in 2017 to approximately [REDACTED] in 2019 and to [REDACTED] in 2020. (Motion Ex. 10 (Maggie Sakioka Dep. Tr. at 124:2-129:19 (Dec. 2, 2020))).²⁰ From 2017

¹⁹ It should be noted that some of the evidence that supports the findings on Hyperice’s satisfaction of the economic prong can be found as supporting exhibits to Complainant Hyperice, Inc.’s Response to Respondents Motion for Summary Determination of Failure to Satisfy the Economic Prong of Domestic Industry Requirement, Doc. ID 733696 (Feb. 10, 2021) (Motion Docket No. 1206-012). Hyperice supplemented the information upon which it relied. (*See* n.6, above.).

²⁰ As of May 14, 2021, Ms. Sakioka was the Senior Director of Accounting and Operations at Hyperice. (*See* Sakioka Decl. at ¶ 6 (Doc. ID No. 742521 (May 14, 2021))). She has sufficient information to establish factual information with respect to Hyperice’s financial investments in its domestic industry.

through 2019, all of Hyperice’s employees were located in the United States. (Ex. 10 to Motion and Mem. (Depo. of Maggie Sakioka (“Sakioka Dep.”) 125:12-14 (Dec. 2, 2020)).). According to Hyperice, its employees facilitate the product development, product engineering, client management, sales, and/or support of the DI Products. (Mem. at 32; Ex. 5 to Motion and Mem.). In 2020, Hyperice acquired a facility in Boston that does not support or relate to Hyperice’s DI Products. (Sakioka Decl. at ¶ 6 (Doc. ID No. 742521 (May 14, 2021))).²¹ Those investments have been excluded from analysis here, or from a conclusion with respect to the significance of Hyperice’s investments. Staff agrees. (Resp. at 39.).

1. Allocation of Labor and Capital Expenditures

Hyperice submits that “a sales-based allocation” of its total expenditures in labor and capital can be used to estimate the share of expenditures attributable to the DI Products. (Mem. 30, 32.). Again, Staff agrees. Hyperice represents that it “does not track all investments or employee time on a per-product basis,” and that a sales-based allocation is appropriate under such circumstances. (*Id.* at 30 (citing *Certain Indus. Automation Systems and Components Thereof Including Control Systems, Controllers, Visualization Hardware, Motion Control Systems, Networking Equip., Safety Devices, and Power Supplies*, Inv. No. 337-TA-1074, Order No. 39 Initial Determination at 7-9, 13 (July 12, 2018) (unreviewed) (Aug. 14, 2018)).). However, Hyperice also provides a revenue-based comparison of its sales of the DI Products against all Hyperice’s sales internationally from 2017 through Q3 2002. The percentages of the sales of Hyperice’s DI Products in comparison with sales of all of Hyperice’s products are summarized below in Table No. 4.

Table No. 4: Hyperice’s Sales Allocation of the DI Products

²¹ Order No. 33 granted Hyperice’s request to supplement its Summary Determination Motion with three supporting declarations, including the Sakioka Declaration, Ex. 3; *see also* n.6, above.



(Mem. at 31; *see also* Ex. 4 to Motion and Mem. (Itemized List of Investments)).

In Staff’s view, Hyperice’s sales-based allocation is reasonable for the 2018-2019 time period. (Resp. at 39.). However, Staff contends that Hyperice’s allocation for 2020 is compromised by Hyperice’s Boston facility acquisition in 2020 that does not relate to the DI Products. (*Id.*; *see also* Sakioka Decl. at ¶ 6.). According to Staff, “the investments in 2018-2019, as allocated based on the sales of the domestic industry products, should be considered in finding the existence of a domestic industry.” (Resp. at 39.).

Hyperice has provided a table, replicated below as Table No. 5, that provides Hyperice’s monetary expenditures for labor and capital, the percentage of total sales attributable to the DI Products, and Hyperice’s allocated labor and capital expenditures attributable to the each of the DI Products, from the 2017 to Q3 2020 period:

Table No. 5: Hyperice’s Allocated Labor and Capital Expenditures

A large rectangular grey box redacting the content of Table No. 5.

(Mem. at 32 (citing Ex. 3 to Motion and Mem. (Itemized Sales Data of Hypervolt Products)); *see also* Ex. 4 to Motion and Mem. (Itemized List of Investments)).

Hyperice’s sales-based allocation for the 2018-2019 period is reasonable and appropriate,

as Staff agrees and Commission precedent allows. The Commission has explained that the “use of a sales-based allocation is one acceptable way to determine the numerical value of domestic industry investments for each Asserted Patent.” *See Certain Earpiece Devices & Components Thereof*, Inv. No. 337-TA-1121, Comm’n Op. at 19 (Nov. 8, 2019) (“*Certain Earpiece Devices*”) (citing *Certain Carburetors and Products Containing Such Carburetors*, Inv. No. 337-TA-1123, Comm’n Op. at 17, 19 (Oct. 28, 2019) (“*Certain Carburetors*”). Furthermore, Staff’s concerns about the reliability of Hyperice’s 2020 domestic industry investments because the Boston facility does not clearly support Hyperice’s DI Products appears to be validated by Ms. Sakioka’s statement that its “overall investments, and the allocation thereof, include investments and labor performed in Hyperice’s Boston facility, which Hyperice acquired in 2020.” (Sakioka Decl. at ¶ 5.). Ms. Sakioka’s explanation and statement are at best vague. Under those circumstances, the 2018-2019 time period provides the best evidentiary support of Hyperice’s domestic industry expenditures.

The evidence is that Hyperice has made approximately investments of approximately [REDACTED] in labor and capital expenditures that are attributable to the DI Products in 2018 and 2019. While the expenditures might be considered relatively small from a strict monetary standpoint, Hyperice was building the sales of its DI Products. Accordingly, Hyperice has established that its approximately [REDACTED] expenses should be considered in the domestic industry analysis under prong (B).

2. Significance

Hyperice’s domestic industry expenditures are both quantitatively and qualitatively significant. The quantitative significance of these expenditures is best represented by Hyperice’s

growth from a five-employee company in 2017 to a fifty (50) employee company by 2020.²² *See Certain Table Saws Incorporating Active Injury Mitigation Technology and Components Thereof*, Inv. No. 337-TA-965, Order No. 10 at 18 (March 22, 2016) (unreviewed) (citing to Hyperice’s significant commitment to domestic investments in relation to the domestic industry products).

Hyperice’s domestic expenditures reflect that the DI Products accounted for approximately [REDACTED] of Hyperice’s sales from 2017 to 2020. From 2018 to 2019, Hyperice steadily expanded its workforce and domestic industry investments as the DI Products were launched and sales grew. The expansion of Hyperice’s workforce during a period where roughly [REDACTED] of its sales were attributable to the DI Products strongly suggests the quantitative significance of Hyperice’s domestic industry investments. *See e.g. Certain Printing & Imaging Devices & Components Thereof*, Inv. No. 337-TA-690, Comm’n Op. at 27 (Feb. 17, 2011) (finding that “whether a Hyperice has established that its investment and/or employment activities are significant with respect to the articles protected by the intellectual property right concerned is not evaluated according to any rigid mathematical formula,” but instead depends on “the facts in each investigation, the article of commerce, and the realities of the marketplace”). Furthermore, Hyperice’s increase in domestic industry expenditures, from [REDACTED] in 2018 to [REDACTED] in 2019 is itself significant. *See Lelo Inc. v. Int’l Trade Comm’n*, 786 F.3d 879, 883 (Fed. Cir. 2015) (“the terms ‘significant’ and ‘substantial’ refer to an increase in quantity, or to a

²² Hyperice argues that its profit margins on the DI Products is evidence of the significance of its domestic industry investments. (*See* Mem. at 34.). However, this approach provides little context for analyzing the significance of Hyperice’s domestic industry investments. *See, e.g., Certain Carburetors*, Comm’n Op. at 18 (the Commission has “sought to place the value of domestic investments in the context of the relevant marketplace, such as by comparing a Hyperice’s domestic expenditures to its foreign expenditures or considering the value added to the product from a complainant’s activities in the United States”).

benchmark in numbers”).

Considering qualitative significance, Hyperice designed and developed the DI Products in the United States. (Compl. at ¶¶ 5, 106-107; Ex. 5 to Motion and Mem. (Employee Salary Data 2016-2019) (including salary data for inventors of the ’574 patent, Robert Marton and Anthony Katz).). Even before considering Hyperice’s foreign expenditures, Hyperice’s evidence demonstrates that its DI Products simply would not exist without Hyperice’s domestic operations and spending. (*See e.g. Certain Movable Barrier Operator Systems and Components Thereof*, Inv. No. 337-TA-1118, Comm’n Op., January 12, 2021, at 33 (“*Certain Movable Barrier Systems*”)(“Qualitative factors may include, for example, whether the Hyperice’s domestic activities or its purchases of components in the United States are crucial to its domestic industry products.”)).

In addition to product design, Hyperice’s domestic workforce is engaged in, *inter alia*, “engineering, supply chain and operation management, sales, marketing, warranty, customer service, executive, intellectual property protection, and other business operations” in support of the DI Products. (*See* Compl. at ¶¶ 5, 106-107.).

As Hyperice reports with evidence, its sales of the DI Products, both in terms of revenue and units sold, substantially increased from 2018 to 2019. (*See* Sakioka Decl. at ¶ 3; Motion Ex. 3.). Given the simultaneous growth in Hyperice’s number of employees and in Hyperice’s increase in sales of the DI Products, it can be inferred reasonably that Hyperice’s labor and capital expenditures contributed to the growth of the DI Product market. Taken together, Hyperice’s domestic industry expenditures were necessary to establish the market for the DI Products, and also appear to support the sales growth of the DI Products. This is indicative of qualitative significance.

Finally, Exhibit 3 to Hyperice's Motion and Memorandum places in context Hypervolt's domestic sales in comparison with its international sales of all of its products from 2018-2020. (*See Certain Movable Barrier Systems*, Comm'n Op. at 23 (citing *Certain Optoelectronic Devices for Fiber Optic Communications*, Inv. No. 337-TA-860, Comm'n Op. at 18-19 (May 9, 2014)). In 2018, Hyperice had [REDACTED] in total gross worldwide sales of which [REDACTED] were domestic sales, while [REDACTED] were foreign sales. (Mot. Ex. 3). In 2019, Hypervolt had total gross sales of [REDACTED] of which [REDACTED] were domestic sales while [REDACTED] were foreign sales. (*Id.*). Clearly, [REDACTED]. As of the accounting of the 2020 actual gross sales, Hyperice had total gross sales of [REDACTED] of which [REDACTED] were domestic sales while [REDACTED] constituted foreign sales. (*See Ex. 3 to Motion and Mem.*; *see also Ex. 4 to Motion and Mem.*). Even in comparison with its international sales, and in context, Hyperice's gross domestic sales were typically [REDACTED] than its foreign sales.

What might be taken into consideration as part of the context of Hyperice's domestic investments and industry is that Hyperice claims it has 50% of the United States Market while its two (2) main competitors dominate another approximate 30% of the United States market for the type of percussive device that Hyperice sells. (*See infra.*). Surely, this contextual analysis, abbreviated as it may be, together with the analysis of Hyperice's investments in labor-related activities suggests that Hyperice investments in its domestic industry is significant, consistent with Commission precedent and comparative analyses. (*See Certain Movable Barrier Systems*, Comm'n Op. at 23-25.).

For all reasons explained. Hyperice has established that its domestic industry

expenditures in labor and capital are quantitatively and qualitatively significant under Section 337(a)(3)(B).²³

XI. REMEDY AND BOND

Pursuant to Commission Rule 210.42, an administrative law judge must issue a recommended determination on: (1) an appropriate remedy if the Commission finds a violation of Section 337; and (2) an amount, if any, of the bond to be posted. 19 C.F.R. § 210.42(a)(1)(ii). When a Section 337 violation has been found, as here, “the Commission has the authority to enter an exclusion order, a cease-and-desist order, or both.” *Certain Flash Memory Circuits and Prods. Containing the Same*, Inv. No. 337-TA-382, Comm’n Opinion on the Issues under Review and on Remedy, the Public Interest and Bonding, at 26 (June 9, 1997). 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). Hyperice seeks a General Exclusion Order (“GEO”) pursuant to 19 U.S.C. § 1337(d)(2), or in the alternative, a Limited Exclusion Order (“LEO”) against the Defaulting Respondents pursuant to 19 U.S.C. § 1337(d)(1), and permanent cease-and-desist orders (“CDO”) pursuant to 19 U.S.C. § 1337(f) directing the Defaulting Respondents “to cease and desist from the importation, sale, offer for sale, advertising, packaging or solicitation of any sale by the Respondents of products that infringe” the Asserted Patent. (Mem. at 35-41.). Hyperice requests the entry of a bond of 100% of the value of all infringing products. (*Id.* at 42.).

²³ Having determined that Hyperice satisfies the economic prong under Section 337(a)(3)(B), there is no need to decide whether Hyperice satisfied the economic prong under Section 337(a)(3)(A). A domestic industry may be supported under Section 337(a)(3)(A) although Hyperice did not make a point of breaking out plant and equipment expenditures as part of its Motion and Memorandum sufficient to support satisfaction of Section (a)(3)(A).

Staff supports Hyperice’s request for a GEO pursuant to 19 U.S.C. § 1337(d)(2). (Resp. at 47-48.). Staff argues that issuance of CDOs would be inappropriate because there is no evidence that any of the Defaulting Respondents maintain inventory in the United States. (Resp. at 48-49.). However, there is case authority for the Commission to issue a CDO when there is a Respondent who has operations in the United States even if there is no evidence of the amount of the inventory that Respondent maintains. *See Certain Electric Skin Care Devices, Brushes and Chargers Therefore, and Kits Containing the Same*, 337-TA-959, Comm’n Op. at 26 (Feb. 13, 2017) (“*Certain Electric Skin Care Devices*”). As noted below, in this case, a CDO is warranted against Respondent Kinghood.

Staff also recommends that pursuant to 19 U.S.C. § 1337(j), a bond in the amount of 100% of the entered value of imported articles that are subject to exclusion orders is appropriate. (Resp. at 49.).

A. General Exclusion Order

1. Legal Standard

Section 337(d)(2) provides that a GEO may issue in cases where: (a) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named respondents; or (b) 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). The Commission may issue a GEO when either Section 337(d)(2)(A) or 337(d)(2)(B) is met. *Certain Cigarettes & Packaging Thereof* (“*Cigarette Wrappers*”), Inv. No. 337-TA-643 (Comm’n Op. (Oct. 1, 2009)). “In determining whether either criterion is satisfied, the Commission may look not only to the infringing activities of active respondents, and respondents who have defaulted or been terminated from an investigation, but also to those of non-respondents.” *Certain Earpiece Devices & Components Thereof*, Inv. No. 337-TA-1121, Comm’n Op. at 33-34 (Nov. 8, 2019)

(“*Certain Earpiece Devices*”). Under Subsection 337 (d)(2), the Commission has the authority to exclude infringing articles regardless of their source when specific conditions are met.

Section 337(d)(1) requires that an order excluding the entry of articles into the United States must be limited to persons that the Commission determines violates Section 337, unless an exclusion order is “necessary to prevent circumvention” by the named persons, or “there is a pattern of violation...and it is difficult to identify the source of infringing products. 19 U.S.C. § 1337(d)(2); 19 C.F.R. § 210.50(c).

In other words, if relief is granted under Section 337(d)(2), it must be anchored in “substantial, reliable, and probative evidence.” See *Certain Digital Multimeters, and Prods. with Multimeter Functionality*, Inv. No. 337-TA-588, Comm’n Op. at 4 (June 3, 2008)).

2. Hyperice Has Demonstrated That A GEO Is Necessary Because of Widespread Copying, and to Prevent Circumvention

Hyperice has provided substantial, reliable, and probative evidence that a GEO is warranted, and it should extend to all products that would be imported into the United States that are likely to infringe Hyperice’s Utility Patent. Hyperice has amply demonstrated with evidence that it is difficult to identify the sources of some of the products that are being sold in the United States. (Mem. at 35-40 (citing Exs. 51, 52, 54, 55, 59, 63, 65, 69, 70, 72, 73 and 76.)). To that end, Hyperice argues that it meets the following four factors recently discussed by the Commission in *Certain Earpiece Devices*:

First, the respondents conduct their business through the anonymity of the internet.
[...]

Second, multiple respondents have provided incorrect addresses, and many companies selling infringing products are capable of changing names, facilities, or corporate structure to avoid detection.
[...]

Third, numerous companies rebrand essentially the same infringing product for use with different sales channels or sell the same product to multiple distributors who consequently import the product under various names.
[...]

Fourth, it is common practice to use generic packaging and ambiguous labeling practices not revealing the manufacturer.

(Mem. at 37 (quoting *Certain Earpiece Devices*, Comm'n Op. at 35-36).).

Hyperice first argues that “numerous parties sell infringing devices online through the anonymity of the internet.” (Mem. at 37.). Hyperice observes that sellers of like, infringing products can easily change names or online platforms and continue to sell infringing devices. (*Id.* at 37-38.). To that end, Hyperice has provided evidence that a substantial number of percussive massage devices are available from multiple retailers across multiple internet platforms, including Amazon.com, Wish.com, Walmart.com, and Alibaba.com. (*See* Ex. 11 to Motion and Mem. (Website Listings for Various Percussive Massage Devices: Ex. 12 to Motion and Mem. (Wish.com “Hypervolt” Search Results (Dec. 30, 2019)); Ex. 13 to Motion and Mem. (Wish.com “Hypervolt” Search Results (Aug. 19, 2020)); Ex. 14 to Motion and Mem. (Walmart.com “Hypervolt” Search Results (Aug. 19, 2020)); Ex. 15 to Motion and Mem. (Alibaba.com “Hypervolt” Search Results (Aug. 19, 2020).).

Hyperice has provided supporting evidence that multiple respondents have provided incorrect addresses online. Hyperice notes that even when physical addresses can be located for infringing sellers, those addresses are often defective. Hyperice cites to its previous inability to serve certain Respondents at physical addresses listed “on Amazon’s Mexico website or Alibaba.” (Mem. at 38 (citing Notice of Delivery Failures in Service of Complaint (Doc. ID No. 722854 (Oct. 22, 2020)); Exs. 24, 30, 33, 35 and 41 to Compl.).).

Hyperice also notes that “numerous companies rebrand essentially the same infringing products.” (Mem. at 38.). Hyperice argues that its statement is supported by “the identical, or

nearly identical, nature of various groups of infringing products.” (*Id.*).²⁴ For example, Hyperice identifies Respondent Aijiu’s practice of manufacturing five (5) different infringing products that are sold under different brand names. (*Id.* (citing Ex. 19 to Motion and Mem. (Chart of Infringing Products)).). Hyperice also provided evidence that many percussive massage devices use similar components such as battery assemblies and battery assembly receiving trays and include nearly identical instruction manuals. (*See, e.g.*, Exs. 51, 52, 54, 55, 59, 63, 65, 69, 70, 72, 73 and 76 to Compl.).

Hyperice provided extensive evidence to support its argument that infringing products commonly fail to identify the manufacturer. (Mem. at 39; *see also* evidence that the Accused Products are not labeled with the manufacturer’s name, which appears consistent with other infringing products, Exs. 51, 52, 54, 55, 59 to Compl.; *see also* Compl. at ¶¶ 13-46 (including photos of Respondents’ products that do not identify the manufacturer)).

Finally, Hyperice argues that its experiences with Amazon and Alibaba reflect an additional justification for a GEO. With respect to Alibaba, Hyperice provided uncontroverted evidence that Alibaba offers large quantities of infringing products at reduced prices, which can be resold by third parties on other online platforms. (*See, e.g.*, Exs. 23 and 25 to Compl. (Alibaba Sales Offer for >1000 Infringing Products; *see also* Exs. 16-18 to Motion and Memorandum.)).

With respect to the Amazon website, Hyperice states that it “has utilized Amazon’s Neutral Utility Patent Evaluation Program (“NPEP”) to target certain sellers, including some with unknown addresses.” Yet, according to Hyperice, this approach has not been effective

²⁴ On this point, Hyperice cites to paragraphs of the Ball Expert Report that are not included in Exhibit 1, to the Motion and Memorandum which is an excerpted version of the Ball Expert Report.

always at eliminating all infringing sellers. (Mem. at 39; *see also* Exs. 20-25 to Motion and Mem.). Hyperice also provides evidence that it prevailed in at least one NPEP dispute over model number ASIN B082Y2Y7FW, only for the seller to fraudulently spoof Hyperice's email to send a retraction notice to Amazon. (*Id.* (citing Exs. 20-22 to Motion and Mem.)). In another instance, Hyperice initiated an NPEP complaint against model number ASIN B082KC94F1, only for the seller to send a spoofed email to Amazon that resulted in the product's relisting. (Mem. at 39 (citing Ex. 23 to Motion and Mem.)). Hyperice also provided evidence that its report of a separate infringing product to Amazon has not led to removal of that product's listing from Amazon's website, and that copycat product listings have continued to appear. (Mem. at 40 (citing Exs. 24-25 to Motion and Mem.)).

Staff has concluded that Hyperice has presented sufficient evidence to demonstrate that a GEO is necessary to prevent the circumvention of a limited exclusion order. (Resp. at 47-48.).

The evidence outlined above demonstrates that many parties sell products that are substantially similar to the Accused Products through the relative anonymity of the internet. Hyperice's submitted evidence also demonstrates that large numbers of allegedly infringing products may be purchased online via platforms like Alibaba. They are then resold on different online platforms under different seller accounts making their detection difficult. *See Certain Cases for Portable Electronic Devices*, Inv. No. 337-TA-867/861, Comm'n Op. at 9 (July 10, 2014) ("[T]he respondents can easily circumvent a LEO by selling infringing goods online ... and foreign manufacturing operations can change their names and distribution patterns to avoid detection.").

Hyperice has provided probative evidence that there is a large number of allegedly infringing products that are sold with generic markings that do not reveal the named

manufacturer. Hyperice also has provided supportive, probative evidence that its attempts to restrict sales of allegedly infringing devices on Amazon have been challenging, subverted by fraud, and often unsuccessful. When Hyperice's evidence is considered in its totality, a conclusion can be drawn that Hyperice has proven that there are a significant number of companies on the internet selling infringing products in the United States and that it is difficult or impossible to identify the manufacturers of these infringing products. Under similar circumstances, the Commission has found that subparagraph 337(d)(2)(A) is satisfied. *See, e.g., Certain Personal Transporters, Components Thereof and Manuals Therefor*, Inv. No. 337-TA-935, Comm'n Op. at 7-9 (Apr. 20, 2016) (finding that a GEO is warranted because the record evidence showed there are many companies on the internet that are selling the respondent's product in the U.S. and it is unknown which company actually manufactures the infringing products, and foreign entities could continue to import infringing products under a different corporate name or product name).

Hyperice has proven that a GEO may be necessary to prevent circumvention of a LEO.

3. Hyperice Has Demonstrated a Widespread Pattern of Unauthorized Use of and Difficulty in Identifying the Sources of the Infringing Products

Hyperice also argues, with evidence, that infringement of the '574 patent is widespread and cites to sales of the Accused Products. (Mem. at 40 (citing Exs. 51, 52, 54, 55, 59 to Compl.); *see also* Ball Expert Report Ex. 1 to Motion and Mem., and Ex. E, Claim Charts.). Hyperice cites to evidence of "dozens, if not hundreds, of other infringing products sold online in the United States." (Mem. at 40.). Hyperice has supplied evidence that the Defaulting Respondents and numerous other entities appear when a search for "Hypervolt" is conducted on multiple online retail platforms. (*See* Exs. 22, 27, 34, 42 and 43 to Compl.; Exs. 11-15 to Motion and Mem.). The same evidence of the searches that Hyperice conducted also reveal a large

number of products that appear substantially similar to the Accused Products. (*See* Exs. 22, 27, 34, 42 and 43 to Compl.; Exs. 11-15 to Motion and Mem.).

In reflecting upon the difficulty of identifying the source of infringing products, Hyperice states:

[N]umerous parties sell infringing devices online through the anonymity of the internet. [...] Hyperice did not name the many other infringers as Proposed Respondents because Hyperice was unable to locate physical addresses for the sellers. The ease with which sellers can anonymously list products online – on either their own websites or platforms ranging from Alibaba.com to wish.com to Amazon.com to Walmart.com to eBay.com – and the ease with which the same sellers can change their seller names and postings, supports Hyperice’s request for a general exclusion order.

(Mem. at 37-38 (citing Exs. 11-15 to Motion and Mem.; Exs 23 and 25 to Compl.).).

Staff makes similar arguments and concludes that Hyperice has demonstrated and proven that there is a widespread pattern of violation of Hyperice’s Utility Patent, and that the sources of the infringing products are difficult to identify. (Resp. at 46-47.).

In *Certain Earpiece Devices*, the Commission was faced with similar circumstances as Hyperice has identified and proven here. *Certain Earpiece Devices*, Comm’n Op. at 37. Faced with similar facts, the Commission found a pattern of violation, noting that “the presence of numerous online sales of infringing goods can constitute a pattern of violation of section 337.” *Id.* (quoting *Certain Loom Kits For Creating Linked Articles* (“Loom Kits”), Inv. No. 337-TA-923, Comm’n Op. at 14 (June 26, 2015)).

Hyperice has presented evidence of a widespread pattern of violation and that it is difficult, if not impossible, to identify the source of infringing products. The evidence here is strongly similar to the circumstances of *Certain Earpiece Devices*. In particular, Hyperice’s evidence demonstrates that, in addition to the Defaulting Respondents, numerous other sources of infringing percussive massage devices are available for purchase online. (*See* Exs. 22, 27, 34,

42 and 43 to Compl.; Exs. 11-15 to Motion and Mem.). Hyperice has provided evidence that a large number products of infringing products are sold with generic markings that do not reveal the named manufacturer. (*See, e.g.*, Exs. 51, 52, 54, 55, 59 to Compl.; *see also* Compl. at ¶¶ 13-46 (including photos of Respondents' products that do not identify the manufacturer).).

Furthermore, the prevalence of internet sales over online platforms like Amazon, and the relative anonymity available to internet sellers and resellers, presents challenges to the identification of the source of infringing products. (*See, e.g.*, Exs. 11-15 to Motion and Mem.).

Thus, Hyperice's evidence supports a finding of a pattern of violation of the Utility Patent.

For the foregoing reasons, this Initial Determination recommends that, in the event the Commission finds a violation of section 337, the appropriate remedy is a GEO that encompasses the infringing Accused Products and that it extends to all other similar products that are imported into the United States, regardless of source.

B. In the Event the Commission Rejects A GEO, A LEO Is Warranted

Hyperice requests a LEO against the Defaulting Respondents if the Commission declines to issue a GEO. (Mem. at 41.). Section 337 permits the Commission to issue either a LEO, which is directed against infringing products manufactured or imported by or on behalf of persons found in violation, or a general exclusion order, directed against all infringing products. *See* 19 U.S.C. § 1337(d). If the Commission declines to issue a GEO, it is the recommendation of this Initial Determination that a LEO issue that would bar the entry into the United States of the Accused Products of Defaulting Respondents Kinghood, Manybo, Shenzhen Infein, and Hong Kong Yongxu. Issuance of a LEO (as an alternative) is not recommended with respect to the Kula accused product. That is not recommended because Hyperice has not established a specific instance of importation of Kula's AM5 Massage Gun.

C. A Cease-and-Desist Order May Be Warranted Against Defaulting Respondent Kinghood’s Accused Products

Section 337(f) authorizes the Commission to issue a cease-and-desist order (“CDO”), in lieu of or in addition to an exclusion order, which instructs those who are found to be in violation of Section 337 “to cease and desist from engaging in the unfair methods or acts involved.” 19 U.S.C. § 1337(f). The Commission has stated that a cease-and-desist order is warranted when a respondent maintains a commercially significant inventory of the infringing products in the United States or has significant domestic operations that could undercut the remedy provided by the exclusion order that could be sold to undercut the remedy provided by an exclusion order. *Certain Electric Skin Care Devices*, Comm’n Op. at 26.

Hyperice seeks CDOs against the Defaulting Respondents. Hyperice argues that this remedy is “warranted as a deterrent to further violations, and to provide recourse to Hyperice and the Commission if those Defaulting Respondents continue to import and sell infringing devices.” (Mem. at 41-42.). However, Staff disagrees because Hyperice “does not argue nor show that any of the Defaulting Respondents have significant domestic operations or inventory.” (Resp. at 48.).

Except for Kinghood, none of the Defaulting Respondents is located in the United States. (*See* Section II.2.). With respect to Maynbo, Shenzhen Infein, Hong Kong Yongxu, and Kula, Staff is correct that Hyperice has neither argued nor provided evidence that circumstances to warrant a CDO are present. Hyperice has not established that any of the Defaulting Respondents have either a commercially significant inventory of Accused Products, or significant domestic operations that would support the issuance of a CDO. In the absence of evidence or specific allegations in the complaint, supported with evidence, the Commission does not “presume the presence of domestic inventories or other business operations in the United States that would

support the issuance of a cease-and-desist order” for defaulting foreign respondents. *Certain Earpiece Devices*, Comm’n Op. at 42. Thus, Hyperice has not shown that a CDO is appropriate for Defaulting Respondents Maynbo, Shenzhen Infein, Hong Kong Yongxu, or Kula.

However, a different principle applies to Kinghood. The Commission “has consistently inferred the presence of commercially significant inventories in the United States” for defaulting respondents located in the United States. *See Certain Electric Skin Care Devices* at 28-29. “Due to the domestic presence and lack of participation, the Commission has historically granted a complainant’s request for relief in the form of a cease-and-desist order regarding U.S. based activities for domestic respondents found in default.” *Id.* at 29. Given that the Complaint alleges that Kinghood is a domestic corporation (*see* Compl. at ¶ 20) who Hyperice was able to serve with the Complaint and NOI, a CDO issued to Kinghood would be appropriate.

Accordingly, this decision recommends that a CDO should be issued only to Defaulting Respondent Kinghood.

D. A Bond in the Amount of 100% of the Entered Value of Infringing Goods Is Appropriate

During the Presidential Review Period, imported articles otherwise subject to a remedial order are entitled to conditional entry under bond. *See Certain Beverage Dispensing Sys. & Components Thereof*, Comm'n Opinion, Inv. No. 337-TA-1130 at 26 (Mar. 26, 2020) (citing 19 U.S.C. § 1337(j)(3)). The amount of bond is determined by the Commission and must be enough to protect a complainant such as Hyperice from any injury. *See id.* “The Commission typically sets the bond based on the price differential between the imported infringing product and the domestic industry article or based on a reasonable royalty. However, where the available pricing or royalty information is inadequate, the bond may be set at one hundred (100) percent of the entered value of the infringing product.” *Certain Loom Kits for Creating Linked Articles*, Inv.

No. 337-TA-923, Comm'n Op., 2015 WL 5000874, *11 (citations omitted). Hyperice bears the burden of establishing the need for a bond, including the amount of bond.

Hyperice states that the Accused Products “undercut Hyperice’s prices by an average of at least 50%; i.e., on average, they sell for about half the price.” (Mem. at 42 (citing Exs. 38, 93, and 95 to Compl.); *see also* Ex. 14 to Motion and Mem. (Walmart.com “Hypervolt” Search Results’ (Aug. 19, 2020))). However, there is no consistent, reliable evidence on the average price of each of the Accused Products. Given that there is little evidence of the exact pricing or volume of sales of the Accused Products, a bond of 100% of the entered value of percussive massage devices is appropriate. (*See, e.g., Video Game Sys. & Wireless Controllers & Components Thereof*, Inv. No. 337-TA-770, Comm’n Op. at 5 (Oct. 28, 2013)). This amount should be enough to prevent any harm to Hyperice during the Presidential Review Period.

XII. SUMMARY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Hyperice has satisfied jurisdiction and standing requirements with respect to Defaulting Respondents Kinghood, Manybo, Shenzhen Infein, and Hong Kong Yongxu (“Infringing Defaulting Respondents”) with respect to the ’574 patent.
2. Hyperice has established importation of accused, infringing products from Defaulting Respondents Kinghood, Manybo, Shenzhen Infein, and Hong Kong Yongxu.
3. Hyperice has not established importation for Defaulting Respondent Kula’s accused product, and therefore, Hyperice has not established a violation of Section 337 by Kula.
4. The Accused Products of the Infringing Defaulting Respondents infringe claims 1-7, 14 and 15 of the ’574 patent.
5. Infringing Defaulting Respondents Kinghood’s Theradrill, Manybo’s FBF Pulse Gun, and Shenzhen Infein’s ALI2 Massage Gun, i.e. their accused products each infringe claim 9 of the ’574 patent.
6. At least one of Hyperice’s DI Products practices one or more claims of the ’574 patent.
7. Hyperice has proven that a domestic industry exists within the United States

related to articles protected by the '574 patent.

8. The Infringing Defaulting Respondents Kinghood, Manybo, Shenzhen Infein, and Hong Kong Yongxu have each violated Section 337 of the Tariff Act of 1930, as amended, by importing into the United States, selling for importation, or selling within the United States after importation certain percussive massage devices that infringe the '574 patent.
9. A General Exclusion Order against all Infringing Defaulting Respondents is recommended.
10. A Cease-and-Desist Order against Defaulting Respondent Kinghood is recommended.
11. A bond in the amount of 100% of the entered value of the infringing, imported products is recommended during the Presidential Review Period.

XIII. INITIAL DETERMINATION

This Initial Determination on Violation of Section 337 of the Tariff Act of 1930 is certified to the Commission. All orders and documents, filed with the Secretary, including the exhibit lists enumerating the exhibits received into evidence in this Investigation, that are part of the record, as defined in 19 C.F.R. § 210.38(a), are not certified, since they are already in the Commission's possession in accordance with Commission Rules. *See* 19 C.F.R. § 210.38(a). In accordance with 19 C.F.R. § 210.39(c), all material found to be confidential under 19 C.F.R. § 210.5 is to be given *in camera* treatment.

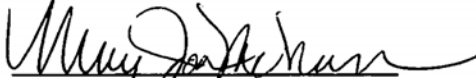
Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review pursuant to 19 C.F.R. § 210.43(a) or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the Initial Determination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

Within fourteen (14) business days of the date of this document, each party shall submit to the Office of the Administrative Law Judges through McNamara337@usitc.gov a statement whether it seeks to have any confidential portion of this document. That is the courtesy copy

Public Version

pursuant to Ground Rule 1.3.2. Any party seeking redactions to the public version must submit to this office through McNamara337@usitc.gov a copy of a proposed public version of this document pursuant to Ground Rule 1.10 with yellow highlighting clearly indicating any portion asserted to contain confidential business information.

SO ORDERED.



MaryJoan McNamara
Administrative Law Judge