

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of

CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME

Inv. No. 337-TA-644

COMMISSION OPINION

BACKGROUND

On March 24, 2008, complainants Magotteaux International S/A and Magotteaux, Inc. (collectively, "Magotteaux") filed a complaint alleging, *inter alia*, that Respondents AIAE Engineering Limited and Vega Industries (collectively, "the AIAE Respondents") and respondent Fonderie Acciaierie Roiale S.p.A. ("FAR") violated section 337 by reason of the importation and sale of certain composite wear components and products containing same that infringe one or more of claims 1-22 of U.S. Patent No. RE 39,998 ("the '998 patent"). The investigation was instituted on April 25, 2008, by publication of a notice of investigation in the *Federal Register*. See 73 *Fed. Reg.* 22431 (April 25, 2008). On February 13, 2009, FAR was terminated from this investigation based on a settlement agreement.

On March 27, 2009, the Commission Investigative Attorney ("IA") moved for a finding that the AIAE Respondents were in default pursuant to Commission Rule 210.16(a)(2) and in violation of section 337 based on adverse inferences drawn from their failure to make or cooperate in discovery and failure to file a pre-hearing brief pursuant to Commission Rule 210.17. 19 C.F.R. §§ 210.16(a)(2) and 210.17. On April 13, 2009, Magotteaux also moved for a finding of default and for adverse inferences. The AIAE Respondents did not oppose a finding

RECEIVED
OFC OF THE SECRETARY
US INTL TRADE COMMISSION
2009 NOV 24 PM 3:05

Public

of default under Commission Rule 210.16(a)(2), but opposed a finding of violation and the entry of adverse inferences under Commission Rule 210.17.

On May 8, 2009, the ALJ granted the outstanding motions, made certain adverse inferences, and found the AIAE Respondents in default and in violation of Section 337 pursuant to Commission Rules 210.16(a)(2) and 210.17. *See* Order No. 26. On May 19, 2009, the AIAE Respondents petitioned for review of Order No. 26. Magotteaux and the IA opposed this petition. On July 7, 2009, the Commission determined not to review Order No. 26, thus adopting the ALJ's findings that AIAE Respondents are in default, that they are in violation of section 337, that they import or sell for importation articles covered by the asserted claims of the '998 patent, and that a domestic industry exists with respect to the articles protected by the '998 patent. Order 26; 74 *Fed. Reg.* 33472 (July 13, 2009). However, due to the procedural posture of the investigation, and the uncertainty regarding whether the initial determination ("ID") was a final ID, the ALJ did not issue a recommended determination on remedy and bonding ("RD"). The Commission determined to waive Commission Rule 210.42(a)(ii), which, unless the Commission orders otherwise, requires that the ALJ issue an RD in conjunction with any final ID concerning violation of section 337. *Id.* The Commission solicited briefs on remedy, the public interest, and bonding. *Id.*

On July 22, 2009, Magotteaux and the IA filed initial briefs and proposed remedial orders. The IA filed a reply brief on July 30, 2009. This investigation is now before the Commission for its determinations on remedy, the public interest, and bonding.

Public
DISCUSSION

I. REMEDY

A. Exclusion Order

1. Statutory Background and Criteria for Exclusion Orders

Section 337 provides that, “[i]f the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States” 19 U.S.C. § 1337(d)(1). This statutorily mandated exclusion is achieved, as appropriate, through either a limited exclusion order or a general exclusion order. *See Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1356 (Fed. Cir. 2008). A general exclusion order is not, however, at issue in this investigation as neither Magotteaux nor the IA have requested that the Commission consider issuing a general exclusion order.

We note that section 337(d)(1), rather than the default provision (section (g)(1)), governs the issuance of a limited exclusion order in this investigation. Section 337(g)(1) applies to instances when the respondent “fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice.” The AIAE Respondents answered the complaint and subsequently were found in default pursuant to Commission Rule 210.16(a)(2) for failure to cooperate in discovery. Order No. 26 at 12. *See Certain Sildenafil or any Pharmaceutically Acceptable Salt Thereof, such as Sildenafil Citrate, and Products Containing Same*, Inv. 337-TA-489, Comm. Op. at 4 (Feb. 2004) (issuance of exclusion order governed by section 337(d)

Public

rather than section 337(g) because one respondent answered the complaint and contested allegations in the investigation).

2. Parties' Submissions

Complainant Magotteaux and the IA agree that a limited exclusion order is appropriate in this investigation given the Commission's determination that the AIAE Respondents have violated section 337. Magotteaux Brief on Remedy, the Public Interest and Bonding ("Magotteaux Br.") at 3; IA Brief on Remedy, the Public Interest and Bonding ("IA Br.") at 4-5.

3. Commission Determination

We determine that it is appropriate to issue a limited exclusion order covering claims 12-13 and 16-21 of the '998 patent. The limited exclusion order is directed against the products of the two defaulting AIAE Respondents.

B. Cease and Desist Orders

1. Statutory Background and Criteria for Issuance of Cease and Desist Orders

The Commission may, in lieu of or in addition to an exclusion order, issue a cease and desist order directing persons found to have violated section 337 "to cease and desist from engaging in the unfair methods or acts involved." 19 U.S.C. § 1337(f). Cease and desist orders are warranted with respect to domestic respondents that maintain commercially significant U.S. inventories of the infringing product. *See, e.g., Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, USITC Pub. 2391 at 37- 42 (June 1991). Domestic respondents who have defaulted are presumed to maintain significant inventories of infringing products in the United States and are thus subject to cease and desist orders. *Certain Video Game Systems*, Inv. No.

Public

337-TA-473, Comm'n Op. at 2 (December 2, 2002); *Certain Agricultural Tractors*, Inv. No. 337-TA-380, USITC Pub. 3026 at 32, n.124 (March 1997).

2. Parties' Arguments

Magotteaux seeks imposition of cease and desist orders against both the domestic respondent Vega Industries and its foreign parent AIA Engineering, Ltd. of India. Magotteaux Br. at 4-5. Magotteaux asserts that it has been unable to obtain the discovery necessary to demonstrate that Vega Industries and AIA Engineering have commercially significant inventories in the United States. *Id.* at 5. Given that the AIAE Respondents have defaulted, Magotteaux maintains that the Commission should presume that the AIAE Respondents have commercially significant inventories in the United States. *Id.* at 6.

Magotteaux also argues that it is appropriate to issue a cease and desist order to the foreign parent respondent AIA Engineering, Ltd. because it has been found in violation and its subsidiary Vega Industries imports and sells the infringing articles on consignment. *Id.* at 5-6. Magotteaux notes that, in *Certain Abrasive Products Made Using a Process for Powder Preforms, and Products Containing Same*, 337-TA-449 (2002) ("*Certain Abrasive Products*"), the Commission issued a cease and desist order to a foreign respondent. Magotteaux maintains that, absent a cease and desist order directed to it, AIA Engineering, Ltd., may be able to impermissibly sell inventory currently held by Vega Industries. *Id.* at 6 n.3.

The IA argues that a cease and desist order directed only to the domestic respondent Vega Industries is appropriate. He maintains that the Commission generally does not issue cease and desist orders to foreign respondents due to the difficulty in enforcing such orders against foreign

Public

companies. IA Reply on Remedy at 4. He also maintains that the cease and desist order directed to Vega Industries will prevent it from transferring the infringing articles for potential sale through another distributor in the United States. *Id.* at 5. Thus, according to the IA, Magotteaux's concern is unwarranted. *Id.*

3. Commission Determination

We determine to issue a cease and desist order to the defaulting domestic respondent, Vega Industries. Magotteaux has alleged that Vega Industries maintains commercially significant inventories of infringing articles in the United States, and the AIAE Respondents may not contest that allegation due to their default. It is therefore appropriate for the Commission to find that Vega Industries maintains commercially significant inventories and issue a cease and desist order directed to it. Such a finding is consistent with Commission practice as domestic respondents who have defaulted are presumed to maintain significant inventories of infringing products in the United States and are therefore subject to cease and desist orders. *Certain Video Game Systems*, Comm'n Op. at 2; *Certain Agricultural Tractors*, Inv. No. 337-TA-380, USITC Pub. 3026 at 32, n.124 (March 1997).

We decline, however, to issue a cease and desist order to the foreign respondent, AIA Engineering, Ltd. The Commission's practice is to decline to issue cease and desist orders to foreign respondents. See *Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. No. 2949, Comm'n Op. at 22-23 (1996) ("A cease and desist order is typically an *in personam* order directed to a party in the United States and enforced by the Commission in U.S.

Public

district courts. Thus, unless a party in the United States can be compelled to do some act or to refrain from doing some act by a U.S. Court a cease and desist order is inappropriate.”¹

As the IA notes, the cease and desist order to domestic respondent Vega Industries will prohibit it from “aid[ing] or abet[ting] other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.” This language addresses Magotteaux’s concern that Vega Industries may transfer the covered products to another company that would sell the covered products on AIA Engineering’s behalf. We therefore issue a cease and desist order directed to only the defaulting domestic respondent, Vega Industries.

II. THE PUBLIC INTEREST

A. Statutory and Regulatory Standards

The Commission’s authority to issue any exclusion order is conditioned on consideration of the public interest. 19 U.S.C. §§ 1337(d). Specifically, the statute indicates that the Commission shall issue an exclusion order unless:

after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. § 1337(d).

¹ As Magotteaux notes, the Commission has issued a cease and desist order to a foreign respondent when it had jurisdiction over the respondent and the respondent had a non-respondent agent in the United States holding significant inventory. *Certain Abrasive Products*, Comm. Op. at 6. Because the agent was not a respondent, the Commission could not issue a cease and desist order to the company holding the inventory and was only able to grant relief to complainant by directing the order to the foreign respondent and its agents.

Public

Similarly, the Commission may not issue a cease and desist order if it finds that such an order would be contrary to the public interest. 19 U.S.C. § 1337(f). The public interest analysis does not concern whether there is a public interest in issuing a remedial order, but whether issuance of such an order will adversely affect the public interest.

Certain Agricultural Vehicles, Inv. No. 337-TA-487, Comm. Op. at 17.

B. Parties' Arguments

Magotteaux asserts that in virtually all investigations, the issuance of remedial orders has been found consistent with the public interest. *Magotteaux Br.* at 6-7. It argues that the products and technology at issue, which concern metal and ceramic composite wear materials used in products designed to crush and grind rocks, present no public interest concerns because these products are not related to the preservation of the public health and welfare. *Id.* at 7. Magotteaux also contends that it has sufficient production capacity to meet demand for products refused entry and notes that because the exclusion order is limited to the AIAE Respondents, other competitive articles will not be excluded. *Id.* at 7.

The IA argues that there is no evidence that U.S. demand for composite wear products cannot be met by other entities, including Magotteaux. Moreover, he maintains that there are many other types of wear products on the market, and composite wear products are not the types of articles that raise particular public interest concerns. *IA Br.* at 9.

C. Commission Determination

Public

There is no evidence in the record to indicate that the issuance of a limited exclusion order and cease and desist order in this investigation would be contrary to the public interest, nor is the Commission aware of any such issues. We therefore determine to issue the remedial orders.

III. BOND DURING PERIOD OF PRESIDENTIAL REVIEW

A. Bonding During the Presidential Review Period

During the 60-day period of Presidential review, imported articles otherwise subject to a remedial order are entitled to conditional entry under bond, pursuant to section 337(j)(3). 19 U.S.C. § 1337(j)(3). The amount of the bond is specified by the Commission and must be an amount sufficient to protect the complainant from any injury. *Id.*, 19 C.F.R. § 210.50(a)(3). The Commission typically attempts to set the bond during the period of Presidential review based on the price differential between the domestic and imported products, or based on a reasonable royalty. *See, e.g., Certain Power Supply Controllers and Products Containing Same*, Inv. No. 337-TA-541, Comm. Op. at 11 (Aug. 29, 2006).

B. Parties' Arguments

Magotteaux asserts it was unable to obtain pricing information due to the AIAE Respondents' failure to cooperate in discovery, and therefore bond in the amount of 100 percent of entered value is appropriate. Magotteaux Br. at 8. The IA agrees, arguing that it is appropriate in the case of default when evidence is lacking to set bond in the amount of 100 percent of entered value. IA Reply on Remedy at 6 (citing *Certain Video Game*

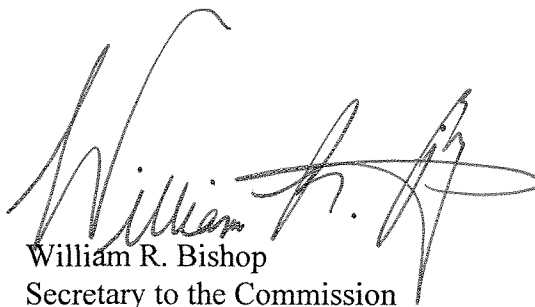
Public

Systems, Comm. Op. at 5 (2002)). Hence, Magotteaux and the IA are of the view that, in the absence of evidence concerning price differentials between Magotteaux's products and the infringing imports due to the AIAE Respondents' refusal to cooperate in discovery, a bond of 100 percent of entered value should be entered. *See Magotteaux Br.* at 8; IA Reply on Remedy at 6.

C. Commission Determination

In this particular investigation, the AIAE Respondents failed to cooperate in discovery and were found in default pursuant to Commission Rule 210.16(a)(2) based on this lack of cooperation. Thus, Magotteaux was precluded from obtaining the relevant pricing information from AIAE Respondents through discovery, and the record contains no information concerning the price differences between the domestic products and the infringing products. When the pricing information is absent, as is often the case when respondents have defaulted, the Commission has set the amount of the bond at 100 percent of entered value. *See Neodymium Magnets*, Inv. No. 337-TA-372, USITC Pub. 2694 (May 1996), Comm. Op. at 15; *Certain Video Game Systems*, Comm. Op. at 5. We therefore determine to set the bond at 100 percent of the entered value of infringing products to prevent any harm to Magotteaux during the 60-day period of Presidential review.

By order of the Commission.


William R. Bishop
Secretary to the Commission

Issued: November 24, 2009

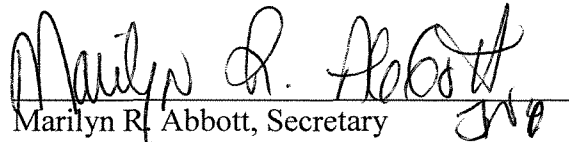
CERTAIN COMPOSITE WEAR COMPONENTS AND PRODUCTS CONTAINING THE SAME

337-TA-644

CERTIFICATE OF SERVICE

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

November 24, 2009



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

On Behalf of Complainants Magotteaux International S/A And Magotteaux, Inc.:

John J. Gresens, Esq.
VEDDER PRICE P.C.
222 North La Salle Street
Suite 2600
Chicago, IL 60601-1003

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

On Behalf of Respondents Vega Industries and AIA Engineering Ltd.:

Lizabeth R. Levinson, Esq.
GARVEY, SCHUBERT and BARER
1000 Potomac Street, NW, 5th Floor
Washington, DC 20005

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

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

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

Kenneth Clair
THOMAS WEST
1100 Thirteen Street NW –Suite 200
Washington, DC 20005

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