

**PUBLIC VERSION**

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C. 20436**

**In the Matter of**

**CERTAIN MULTIPLE MODE OUTDOOR  
GRILLS AND PARTS THEREOF**

**Inv. No. 337-TA-895**

**RECOMMENDED DETERMINATION  
Administrative Law Judge David P. Shaw**

**I. Background and Recommendation**

This is the recommended determination of the administrative law judge on remedy and bonding in *Certain Multiple Mode Outdoor Grills and Parts Thereof*, United States International Trade Commission Investigation No. 337-TA-895. As indicated in the final initial determination (“ID”) on violation, issued on September 26, 2014, the administrative law judge has found that a violation of section 337 (19 U.S.C. § 1337) has occurred with respect to some but not all respondents because certain accused products infringe at least one asserted claim of U.S. Patent No. 8,381,712, while certain accused products do not infringe any asserted claim.

The administrative law judge must issue a recommended determination concerning the appropriate remedy in the event that the Commission finds a violation. *See* 19 C.F.R. § 210.42(a)(1)(ii). That recommendation is contained herein below. Nevertheless, the Commission did not authorize the administrative law judge to take public interest evidence or to provide findings and recommendations concerning the public interest. Thus, in accordance with the usual Commission practice and the applicable Commission Rule, only the Commission can

determine the role that public interest factors may play in this investigation. *See* 19 C.F.R. § 210.50(b)(1).

## **II. General Exclusion Order**

A general exclusion order (“GEO”) is warranted when “a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons,” 19 U.S.C. § 1337(d)(2)(A), or “there is a pattern of violation of this section and it is difficult to identify the source of infringing products,” 19 U.S.C. § 1337(d)(2)(B). Satisfying either of these statutory criteria is sufficient. *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Comm’n Op. at 24 (Oct. 1, 2009). While the factors set forth in *Certain Airless Paint Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, Comm’n Op. at 18-19, USITC Pub. No. 1119 (Nov. 1981) guided the GEO analysis for some time, the Commission “now focus[es] principally on the statutory language itself.” *Certain Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 25 (Mar. 27, 2009).

Complainants argue that “a general exclusion order is necessary to prevent circumvention of an exclusion order limited to products of named respondents,” that “there is also a widespread pattern of violation of Section 337, as demonstrated by the significant volume of imports of Respondents’ accused multiple mode grills,” and that “it is difficult to identify the source [ ] of infringing products.” Compls. Br. at 129, 137, 138, *see id.* at 126-40. Respondents argue that “a GEO should not be issued.” Resps. Br. at 136. The Staff argues that “a GEO is not an appropriate remedy in this investigation.” Staff Br. at 44.

### **Circumvention**

Complainants argue that a general exclusion order (“GEO”) is necessary to prevent

circumvention of an exclusion order limited to products of named respondents. Compls. Br. at 129-37. In support of their argument, complainants argue:

- “there is an established and growing demand for multiple mode grills in the United States, as shown by sales volumes, and evidence of profitability of grills” (Compls. Br. at 129);
- “there are well-established marketing and distribution networks” (*Id.* at 130);
- “there are a large number of non-respondent foreign manufacturers” (*Id.* at 131); and
- “there are no significant barriers to the expansion of foreign production of accused multiple mode grills” (*Id.* at 134).

Complainants argue that “an LEO would create a commercial vacuum that would attract manufacturers, exporters, importers, and retailers seeking to take advantage of a new commercial opportunity in the large U.S. grill market.” Compls. Br. at 136.

Respondents argue that the evidence fails to show that a GEO is necessary to prevent circumvention of an LEO. Resps. Br. at 137-40. Respondents criticize Dr. Button, and his analysis, for relying on census data to show that there are a large number of potential retail outlets without confirming whether or not any of those outlets sell multiple mode outdoor grills. *Id.* at 137-38. Respondents argue that remedial orders would preclude importation and sale through respondents in this investigation. *Id.* at 138.

It is argued that the Commission should not issue a GEO because A&J failed to name all known distributors of multiple mode outdoor grills as respondents. *Id.* at 139-40. Indeed, complainants discovered that Blue Rhino multiple mode outdoor grills were being sold by Walmart. *Id.* Yet, complainants did not seek to name Blue Rhino or Walmart as respondents in this investigation. *Id.* According to respondents, A&J should not be able to ignore possible infringement by the largest retail outlet in the United States, and then seek a GEO against all multiple mode outdoor grills. *Id.* at 140.

The evidence does not establish that a GEO is necessary to prevent circumvention of any remedial orders in this investigation. There is no evidence that that any respondent would be likely to circumvent any remedial order in this investigation. *See* Button Tr. 507-508. Indeed, the Commission has determined that certain design-around products do not infringe. Notice of the Commission's Determination to Affirm-in-Part and Vacate-in-Part an Initial Determination Granting-in-Part a Motion for Summary Determination of Non-Infringement (June 24, 2014) at 2. Further, Mr. Simms testified that A&J would have the capacity to meet any excess demand resulting from remedial orders in this investigation. Simms Tr. 99. Thus, the evidence shows that it is more likely that manufacturers would design around the asserted patent, instead of circumventing any remedial order.

Accordingly, the evidence does not show that a GEO is appropriate under section 337(d)(2)(A).

**Pattern of Violation and Difficulty Identifying the Source**

Complainants argue that a GEO is necessary because there is a widespread pattern of violation, and there is difficulty in identifying the source of infringing products. Compls. Br. at 137-40. Complainants argue that respondents' importations evidence a widespread pattern of violation. *Id.* It is argued that it is difficult to identify the sources of infringing products because: (1) grills are not typically branded with the manufacturer's name; (2) business-to-business websites are ambiguous as to whether a company manufactures listed grills; and (3) it is common practice to request confidential treatment of importation documents filed with U.S. Customs and Border Protection. *Id.* However, the evidence shows that complainants were able to identify the manufacturers for each of the accused grills in this investigation.

Moreover, complainants failed to present evidence of any infringing products where it

could not determine its source. For example, as noted above, complainants discovered that Blue Rhino was selling a potentially infringing grill through Walmart and, in fact, downloaded the owner's manual and photographed the grill. CX-0888C (Hermes WS) at Q/A 47; Simms Tr. 97-98. Complainants, however, did not contact either Blue Rhino or Walmart to determine the manufacturer of the grill (Hermes Tr. 172), and took no action to amend the complaint to include either Blue Rhino or Walmart as a respondent. If complainants had done so, they would likely have been able to ascertain the manufacturer of that grill. A&J has not met its heightened evidentiary burden of showing that there has been a widespread pattern of violation and difficulty identifying the source of accused products.

The evidence does not show that a GEO is appropriate under section 337(d)(2)(B).

Accordingly, the administrative law judge does not recommend a GEO in this investigation.

### **III. Limited Exclusion Orders**

The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a section 337 proceeding. *Viscofan, S.A. v. United States Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986). A limited exclusion order directed to respondents' infringing products is among the remedies that the Commission may impose. *See* 19 U.S.C. § 1337(d).

Complainants argue: "Should the Commission find that a GEO is not warranted in this Investigation, the appropriate remedy is a limited exclusion order prohibiting the importation of Brinkmann, Outdoor Leisure, Kingsun, Keesung, Char-Broil, Fudeer, Academy, and Huige's multiple mode outdoor grills and parts thereof that infringe the Asserted Patent." Compls. Br. at 140. It is argued that "any limited exclusion order issued should follow the Commission's standard protocol." *Id.* at 141.

Respondents argue that “[s]hould a violation [ ] be found with respect to the Accused Products, any LEO should be limited and subject to a certification provision. In particular, if a violation is found and an LEO must be issued, it should except from its scope all activities related to and component parts utilized in the servicing or repair of previously sold Accused Products.” Resps. Br. at 135. Respondents argue that “any remedial order should except from its scope any merchandise delivered pursuant to preexisting contracts. Finally, any LEO imposed should include a certification provision such that Respondents can certify to U.S. Customs that their products do not infringe the asserted claims of the Asserted Patents.” *Id.* at 136.

In the event of a violation, the Staff “recommends that a limited exclusion order issue.” Staff Br. at 45.

As noted, respondents request that any remedial order be limited so as to permit service and repair of previously sold accused products. In addition, respondents request that any remedial order be limited so as to permit delivery under preexisting contracts. Respondents, however, do not explain how their customers or others would be harmed absent those limitations, or how the facts in this investigation may be analogous to those in the cited investigations. *See* Resps. Br. at 135-36. The evidence does not support deviating from the Commission’s standard practice with respect to these issues.

Notwithstanding the public interest factors before the Commission, respondents argue, for the first time, that the public has an “interest in assuring the safe operation of barbeque grills,” but do not explain how this interest is served by placing limitations on an LEO. *Id.* at 136. Inasmuch as respondents did not raise this argument in their prehearing brief, respondents have waived this argument. *See* G.R. 7(c). Moreover, the products at issue in this

investigation are distinguishable from those in the cited investigation because replacement of a consumer product, such as a grill, is unlike replacing an essential component of an expensive machine, such as a truck transmission. *See Certain Automated Mechanical Transmission Systems for Medium-Duty and Heavy-Duty Trucks, and Components Thereof*, Inv. No. 337-TA-503, Comm'n Op. at 6-7 (May 9, 2005).

Accordingly, should a violation be found, it is recommended that limited exclusion orders issue with respect to respondents Brinkmann, OLP, Kingsun, Academy, and Huige. The administrative law judge recommends that the LEOs contain a certification provision.

#### **IV. Cease and Desist Orders**

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for a violation of section 337. 19 U.S.C. § 1337(f)(1). The Commission “generally issues a cease and desist order only when a respondent maintains a commercially significant inventory of infringing products in the United States.” *Certain Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, Comm'n Op. at 24 (Mar. 26, 2009); *Certain Video Game Systems, Accessories, and Components Thereof*, Inv. No. 337-TA-473, Comm'n Op. at 2 (Dec. 24, 2002).

Complainants request the issuance of cease and desist orders as to Brinkmann, OLP, Academy, and Char-Broil. Compls. Br. at 141-44. Respondents argue that their inventories are not commercially significant. *See* Resps. Br. at 145-46. The Staff argues that “the evidence shows that Brinkmann, OLP, Academy, and Char-Broil maintain commercially significant inventories in the United States.” Staff Br. at 47.

The evidence shows the following:

- Brinkmann maintains inventory of over [ ] units of the accused grills at its Olive Branch, Mississippi, warehouse to support regular commercial operations (CX-

0171C.0029);

- OLP maintains an inventory of over [ ] units of the accused grills in its Neosho, Missouri, warehouse (CX-0434; CX-0709C);
- Academy maintains inventories of over [ ] units of the accused grills at its retail locations in the United States, and at its distribution centers in Texas and Georgia (JX-0017C (Levien Dep. Tr.) 109; CX-0163C at 0029-30); and
- Char-Broil<sup>1</sup> maintains an inventory of over [ ] units of the accused grills in its Columbus, Georgia, and Fontana, California, facilities to support commercial sales operations (JX-0022C (Gafford Dep. Tr.) 97-99; CX-0637C; CX-0638C; CX-889C (Button WS) at Q/A 562).

As noted, respondents dispute that their inventories are commercially significant. *See* Resps. Br. at 145-46. With respect to Academy, Brinkmann, and Char-Broil, respondents argue that their inventory to sale ratios are too low to warrant cease and desist orders. *Id.* Respondents downplay the significance of their inventories by comparing them to sales over extended periods of time, going as far back as January 1, 2011. *See id.* Respondents' argument is rejected. The appropriate inquiry is not the ratio of inventory levels to prior sales. Rather, the appropriate inquiry is whether these respondents maintain commercially significant inventories in the United States. As Dr. Button testified, these respondents maintain sufficient inventory levels to support commercial operations in the United States. CX-0889C (Button WS) at Q/A 536-45, 551-63. The evidence shows that Brinkmann, OLP, Academy, and Char-Broil maintain commercially significant inventories in the United States.

Should a cease and desist order issue, respondents request that it be limited so as to exclude "replacement inventory of customers who purchased their grills prior to the date of an

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<sup>1</sup> It is noted that in the underlying final initial determination on violation, the administrative law judge determined that "the Char-Broil grills at issue do not infringe any asserted claim of the '712 patent." *Certain Multiple Mode Outdoor Grills and Parts Thereof*, Inv. No. 337-TA-895, Initial Determination at 57 (Sept. 26, 2014). In the event the Commission finds otherwise, Char-Broil's inventory is discussed herein.



exclusion order.” Resps. Br. at 145. In support, respondents cite to two prior investigations. *Id.* However, those investigations do not support similarly limited cease and desist orders in this investigation.

In *Printing and Imaging Devices*, the administrative law judge recommended limiting remedial orders to permit Oki Data to continue servicing existing customers. *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Initial Determination at 451 (Sept. 23, 2010) (“The purpose of this exception is [to] prevent harm to Oki Data’s customers in the U.S. who already own Oki Data printing and imaging devices and will need replacement parts, such as additional toner cartridges, to continue to use the devices.”). Nonetheless, the Commission did not find a violation in that investigation, and thus did not adopt the administrative law judge’s recommendation. *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm’n Op. at 34-35 (Feb. 17, 2011).

In *Systems for Detecting & Removing Viruses or Worms*, the respondent’s customers relied upon software maintenance releases to update a virus signature database needed for continued effective operation of the products at issue. *Certain Systems for Detecting & Removing Viruses or Worms, Components Thereof, & Prods. Containing Same*, Inv. No. 337-TA-510, Comm’n Op. (Aug. 23, 2005) (“if [respondent’s] customers are denied receiving software maintenance releases, updates, services or replacement parts, the antivirus capabilities of the [accused] products already held by customers may [] quickly become ineffective.”).

In those prior investigations, customers required continued service and support in order to use the products they had purchased. Respondents, however, have not shown that an analogous situation exists with respect to their accused grills. Indeed, respondents do not explain how and to what extent customers would be harmed absent such a limitation. *See* Resps. Br. at 145. The

evidence does not support limiting any cease and desist order in the manner requested by respondents.

In sum, the evidence shows that Brinkmann, OLP, Academy, and Char-Broil maintain commercially significant inventories in the United States. Accordingly, should a violation be found, the administrative law judge recommends that cease and desist orders issue as to those respondents.

## **V. Bond**

Pursuant to section 337(j)(3), the administrative law judge and the Commission must determine the amount of bond to be required of a respondent, during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. The purpose of the bond is to protect the complainant from any injury. 19 U.S.C. § 1337(j)(3); 19 C.F.R. §§ 210.42(a)(1)(ii), 210.50(a)(3).

When reliable price information is available, the Commission has often set bond by eliminating the differential between the domestic product and the imported, infringing product. *Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 24 (1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41 (1995). A 100 percent bond has been required when no effective alternative existed. *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (a 100% bond imposed when price comparison was not practical because the parties sold products at different levels of commerce,

and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record).

As an initial matter, all parties agree that price differential, and royalty rate, are not appropriate means for determining bond in this investigation. *See* Compls. Reply Br. at 50 (“Respondents and the Staff agree with Complainants that price differential and royalty rate are not appropriate means for determining bond in this Investigation.”); Resps. Br. at 147-148; Staff Br. at 49-50.

As an alternative method for setting bond, complainants argue that “an appropriate bond rate can be set on the basis of lost profits.” Compls. Br. at 146.

Respondents argue: “Complainants alternatively seek to use a ‘lost profits’ calculation to support its request for a bond. But Complainants should not be permitted to shield from outside counsel the royalty rates in the agreements it has executed with certain respondents and then claim entitlement to a higher bond rate based on the lack of evidence of reasonable royalty rates.” Resps. Br. at 148.

The Staff argues that it “does not take a position at this time as to whether lost profits are an acceptable basis for determining the appropriate bond during the Presidential review period.” Staff Br. at 49. The Staff argues that “no bond should be imposed during the Presidential review period.” *Id.* at 50.

It is A&J’s burden to establish support for its requested bonding amount. *See e.g. Certain Liquid Crystal Display Devices*, Inv. No. 337-TA-631, Comm’n Op. at 28 (July 10, 2009). Should A&J fail to meet its burden, the Commission may determine that no bond should be imposed during the Presidential review period. *Id.*

As the parties agreed, the evidence does not show that a bond rate can be set based on

price differential between imported products and complainants' domestic industry products.

Further, the evidence does not show that a bond rate can be based on an established royalty rate.<sup>2</sup>

A&J argues that the appropriate bond rate should be set at [ ] per grill based on A&J's lost profits. Compls. Br. a 146-147. The Commission, however, has previously declined to use lost profits as a basis for establishing the appropriate bond rate. *See Certain Hardware Logic Emulation Systems & Components Thereof*, Inv. No. 337-TA-383, Comm'n Op. at 41 (Apr. 1, 1998). Furthermore, as argued by the Staff, even if lost profits would be appropriate in this situation, A&J's analysis is insufficient.

A&J assumes that each sale made by respondents during the Presidential review period is a lost sale for A&J. Although some sales may be considered lost sales, this analysis does not take into account non-infringing alternatives, including respondents' multiple mode outdoor grills that have already been found not to infringe in this investigation (*i.e.*, (1) Chant/Tractor Supply's New Model 1046761; (2) Rankam's Member's Mark Grill, Model No. GR2071001-MM (Ver. 2); and (3) Rankam's Smoke Canyon Grill, Model No. GR2034205-SC (Ver. 2)). Notice of the Commission's Determination to Affirm-in-Part and Vacate-in-Part an Initial Determination Granting-in-Part a Motion for Summary Determination of Non-Infringement (June 24, 2014) at 2. Furthermore, A&J does not address whether it would have the manufacturing and marketing capability to exploit excess demand in the absence of excluded products. *See* Compls. Br. at 146-47. Thus, even if the evidence shows that A&J's profit is approximately \$42/unit, this would be higher than what is necessary to protect A&J from injury during the Presidential review period.

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<sup>2</sup> As noted, respondents argue that A&J should not be allowed to shield them from confidential settlement terms that may bear on the issue of a bond based on a reasonable royalty, while requesting a higher bond rate based on a lost profit analysis. The Staff agrees. *See* Staff Reply Br. at 22.

Although it did not do so in its prehearing brief, A&J now argues that bond should be set at 100% of the entered value of respondents' products on the basis that a bond rate cannot be set based on pricing differentials or a reasonable royalty. *See* Compls. P.H. Br. at 158-61; Compls. Br. at 145. Inasmuch as A&J's prehearing brief only requested a bond amount of [ ] per grill, the A&J's new argument is rejected in view of Ground Rule 7.c. Even if considered, however, the administrative law judge recommends that A&J's request for a 100% bond be denied because A&J did not offer evidence regarding a reasonable royalty. A&J specifically withheld the financial terms of licensing agreements that may have a bearing on this issue.

Accordingly, it is the recommendation of the administrative law judge that no bond should be imposed during the Presidential review period.

## **VI. Conclusion and Order**

The administrative law judge has found that a violation of section 337 (19 U.S.C. § 1337) has occurred with respect to some but not all respondents. Certain accused products infringe at least one asserted claim of U.S. Patent No. 8,381,712, while certain accused products do not infringe any asserted claim. The Commission did not authorize the administrative law judge to take public interest evidence or to provide findings and recommendations concerning the public interest. Thus, in accordance with the usual Commission practice and the applicable Commission Rule, only the Commission can determine the role that public interest factors may play in this investigation. *See* 19 C.F.R. § 210.50(b)(1). If the Commission determines that a violation of section 337 has occurred, a limited exclusion order directed to respondents Brinkmann, OLP, Kingsun, Academy, and Huige should issue with respect to the '712 patent. In addition, cease and desist orders as to Brinkmann, OLP, Academy, and Char-Broil should issue, if violations are found. No bond should be imposed during the 60-day Presidential review period.

To expedite service of the public version, each party is hereby ordered to file with the Commission Secretary no later than October 16, 2014, a copy of this recommended determination with brackets to show any portion considered by the party (or its suppliers of information) to be confidential, accompanied by a list indicating each page on which such a bracket is to be found. At least one copy of such a filing shall be served upon the office of the undersigned, and the brackets shall be marked in red. If a party (and its suppliers of information) considers nothing in the recommended determination to be confidential, and thus makes no request that any portion be redacted from the public version, then a statement to that effect shall be filed.<sup>3</sup>



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David P. Shaw  
Administrative Law Judge

Issued: October 9, 2014

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<sup>3</sup> Confidential business information ("CBI") is defined in accordance with 19 C.F.R. § 201.6(a) and § 210.5(a). When redacting CBI or bracketing portions of documents to indicate CBI, a high level of care must be exercised in order to ensure that non-CBI portions are not redacted or indicated. Other than in extremely rare circumstances, block-redaction and block-bracketing are prohibited. In most cases, redaction or bracketing of only discrete CBI words and phrases will be permitted.

**CERTAIN MULTIPLE MODE OUTDOOR  
GRILLS AND PARTS THEREOF**

Inv. No. 337-TA-895

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **Recommended Determination** has been served by hand upon the Commission Investigative Attorney, **R. Whitney Winston, Esq.**, and the following parties as indicated, on OCT 29 2014.



Lisa R. Barton, Secretary  
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**CERTAIN MULTIPLE MODE OUTDOOR  
GRILLS AND PARTS THEREOF**

**Inv. No. 337-TA-895**

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